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

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

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Introduction, Background, and Overview

§ 1.01 Purpose of This Primer

A primer is a brief introductory reading on a subject, and that is what this monograph is meant to be: a brief introduction to the complexity and nuance in the subject-matter jurisdiction of the U.S. courts of appeals. The organization is topical in seven chapters, followed by an annotated bibliography. Chapter 1 provides 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 meant to be a primer and not a treatise should not be lost on the reader. A complete, thorough, and self-contained work on this subject necessarily would be several times longer. 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 footnote references. The annotated bibliography surveys the literature.

Finally, the reader should bear in mind that this primer is meant as a supplement, not as a substitute, for the jurisdictional outlines and guides that the various circuits have prepared for the benefit of their new judges.

§ 1.02 Scope of This Primer

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

First, there are a number of "second-look" procedures available in the district court. The most common may simply be listed: motion for judgment notwithstanding the verdict;[1] motion to amend or make additional findings;[2] motion for a new trial;[3] motion to alter or amend a judgment;[4] motion for relief from clerical mistake;[5] motion for relief from mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, void judgment, enforcement inequity, or some "other reason";[6] and motion for stay of proceeding.[7]

Second, the appellate jurisdiction of the Supreme Court is beyond the scope of this primer.[8] Effective Sept. 25, 1988, Congress eliminated substantially all of the Supreme Court's so-called mandatory or obligatory appeal statutory jurisdiction, which previously had provided a direct appeal from the district court, bypassing review in the court of appeals.[9] Still, a very few of the arcane provisions for convening a three-judge district court with direct appeal to the Supreme Court survive today.[10]

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1. Fed. R. Civ. P. 50(b).
2. Fed. R. Civ. P. 52(b).
3. Fed. R. Civ. P. 59(a).
4. Fed. R. Civ. P. 59(e).
5. Fed. R. Civ. P. 60(a).
6. Fed. R. Civ. P. 60(b).
7. Fed. R. Civ. P. 62.
8. *See generally* R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice (6th ed. 1986).
9. Pub. L. No. 100-352, 102 Stat. 662 (1988). *See generally* Boskey & Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 109 S. Ct. LXXXI (Nov. 1, 1988).
10. 28 U.S.C. § 1253 (1982). *See generally* 17 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure: Jurisdiction 2d § 4040 (2d ed. 1984) (hereinafter Federal Practice & Procedure); 7B J. Moore,

Third, standards of review are not detailed here. The various phrases for defining the relevant scope of appellate review of a given issue prescribe: the degree of deference owed to the court being reviewed, the affirmative power of the reviewing court, the relevant materials appropriate for consideration, the level of scrutiny on review, and the framework of analysis for questions of fact and law. A thoughtful elaboration of these functions would require a separate primer; indeed, it would require a separate treatise.[11] A standard of review establishes the analytical process for deciding an issue on an appeal for which the appellate court has concluded it has jurisdiction. Although the two concepts are related, this primer is limited to the process of reaching this second conclusion.

Fourth, this primer cannot summarize all the complexities of federal appellate procedure. Full-length books have been given over to the art of appellate advocacy.[12] The Federal Rules of Appellate Procedure create a national framework for appellate procedure that has been embellished for each court of appeals by local rules and internal operating procedures. Only those appellate procedures that determine directly the power to decide an appeal are deemed relevant here.

Fifth and finally, this primer focuses only on the decision-making responsibility of the courts of appeals to review cases. Matters of judicial administration, although quite important, are left to the judicial council in each circuit and to the Judicial Conference of the United States.[13] Thus such matters as the pro-

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Moore's Federal Practice § 1253 (2d ed. 1987) (hereinafter Moore's Federal Practice).

11. *See generally* S. Childress & M. Davis, Standards of Review: vol. 1, Federal Civil Cases and Review Process & vol. 2, Federal Criminal Cases and Administrative Appeals (1986).

12. *E.g.*, R. Martineau, Modern Appellate Practice—Federal and State Civil Appeals (1983); M. Tigar, Federal Appeals—Jurisdiction and Practice (1987); F. Wiener, Briefing and Arguing Federal Appeals (2d ed. 1961).

13. *See generally* 16 Federal Practice & Procedure § 3939.

mulgation of the rules of procedure[14] and the procedures for judicial disability or misconduct[15] are beyond this treatment.

§ 1.03 History of the Courts of Appeals

Any study of the federal courts or their jurisdiction must be informed by some sense of history.[16] More particularly, the major historical stages of the federal court system have been reflected in the creation and the reforms of the middle tier.[17] 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."[18] The original statute, the Judiciary Act of 1789,[19] provided for two tiers of courts below the Supreme Court. The district courts were exclusively trial courts of limited jurisdiction. The circuit courts were the principal trial courts, with original jurisdiction over more serious criminal offenses, diversity suits above a set figure, 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.[20]

The famous, though short-lived, "Midnight Judges" Act in 1801 would have created circuit judgeships and would have consti-

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14. Fed. R. App. P. 47; 28 U.S.C. § 2071 (1982).

15. 28 U.S.C. § 372 (1982).

16. *See generally* E. Surrency, History of the Federal Courts (1987).

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

18. U.S. Const. art. III, § 1.

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

20. Act of Mar. 2, 1793, ch. 22, 1 Stat. 333.

tuted the circuit courts in three-judge panels for each of the newly numbered six circuits.[21] Charging court-packing by the Federalists, the successor Jeffersonian Congress repealed the 1801 Act and returned the circuit court to the status quo ante, except that their quorum was further reduced to require one district judge sitting alone.[22]

For a time, congressional alteration of the the court system was driven only by geography. The duty of riding circuit continued for the justices, which obliged Congress to add to the membership of the Supreme Court to accommodate western expansion and the creation of new circuits. A seventh circuit and a seventh justice were added in 1807.[23] 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.[24] A tenth circuit was added, not too long after, to include the west coast states, and a tenth justice was added to the Supreme Court.[25] 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.[26]

In the period from 1870 to 1891, federal court litigation increased dramatically, as a result of geographical expansion, popu-

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21. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89.

22. Act of Apr. 29, 1802, ch. 31, 2 Stat. 156, *as amended by* Act of Mar. 3, 1803, ch. 40, 2 Stat. 244.

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

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

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

26. 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, 16 Stat. 44.

lation growth, commercial development, and congressional extensions of jurisdiction. When House and Senate reformers could not agree on what to do, nothing was done, and the courts were hard-pressed to keep up with their work. The country had become too large for circuit riding to be a feasible duty for the justices. A complement of fewer than a dozen circuit judges could not alone supervise the growing number of district courts, which by then had reached 65. 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; appeals from the circuit court to the Supreme Court were by statute almost eliminated, as well.

With the Circuit Court of Appeals Act of 1891, commonly known as the Evarts Act, Congress made a long overdue structural change, which marks the modern organization.[27] The 1891 Act created a circuit court of appeals for each circuit, composed of two circuit judges (the Act created a second judgeship in each circuit) and either one circuit justice or one district judge. The circuit court continued as a trial court, but its appellate jurisdiction was transferred to the circuit court of appeals. A second appeal as of right to the Supreme Court from the circuit court of appeals was limited by subject matter and by an amount-in-controversy requirement. In the remaining cases, the decision of the circuit court of appeals was final, subject only to discretionary review by the Supreme Court by a writ of certiorari or by certification. The structure was streamlined further in 1911, when the anachronistic circuit courts were abolished and their trial jurisdiction was transferred to the district courts.[28] In 1925, Congress dramatically expanded the Supreme Court's discretion over its docket.[29] Thus the 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.

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27. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.
28. Act of Mar. 11, 1911, Pub. L. No. 61-475, 36 Stat. 1087.
29. Act of Feb. 13, 1925, Pub. L. No. 68-415, 43 Stat. 936.

The federal court system has not evolved much beyond the 1911 structure, except to redraw geographical lines. In the 1948 Judicial Code, Congress formally added the District of Columbia Circuit and the circuit courts of appeals were renamed the courts of appeals for the various circuits.[30] Congress added a tenth circuit in 1929[31] and an eleventh circuit in 1981,[32] and created the Federal Circuit in 1982.[33] Of course, one of the most controverted issues today is whether the nearly 100-year-old structure is serving the nation's needs or whether some new national court should be created.[34]

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

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30. Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869.

31. Act of Feb. 28, 1929, Pub. L. No. 70-840, 45 Stat. 1346.

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

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

34. *Compare, e.g.*, Baker & McFarland, *The Need for a New National Court*, 100 Harv. L. Rev. 1400 (1987) (favoring a new national court of appeals) *with* Ginsburg & Huber, *The Intercircuit Committee*, 100 Harv. L. Rev. 1417 (1987) (against).

jurisdiction—the judicial power—cannot be understood in the abstract or without some appreciation for role or function.[35]

§ 1.04 Limited Jurisdiction

At the outset, the following merits reiteration: "It is a principle of first importance that the federal courts are courts of limited jurisdiction."[36] Thus, in effect, every federal court decision is a kind of precedent in federal jurisdiction, for a federal court must conclude, explicitly or implicitly, that it has the power to decide before it may decide. From the time of the framers, the federal jurisdiction inquiry has been twofold: first, to determine whether the case comes within the judicial power of Article III and, second, to determine whether the case comes within some particular enabling act of Congress.[37] The opposite of the presumption of subject-matter jurisdiction in the state court system applies in the federal court: the federal court, as a court of limited jurisdiction of a limited sovereign, is presumed to lack jurisdiction unless the invoking party demonstrates the court's constitutional and statutory power to decide the case. The Supreme Court has made this self-executing duty of the court of appeals quite clear: "An appellate federal court must satisfy itself

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

36. C. Wright, The Law of Federal Courts § 7, at 22 (4th ed. 1983). *See generally* 13 Federal Practice & Procedure § 3522; 1 Moore's Federal Practice, ¶ 60[1], [3]–[4].

37. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 442, 12 L. Ed. 1147, 1148 (1850); Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304, 3 L. Ed. 108 (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, 2 L. Ed. 554, 560 (1807) (Marshall, C.J.).

not only of its own jurisdiction, but also of that of the lower courts in a cause under review."[38]

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 merely be an error of discretion for the court to decide an appeal, it would be a violation of the Constitution. Such an action of excess, by any federal court, offends the constitutional principle of limited federal sovereignty. 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.

That the Constitution limits appellate jurisdiction does not imply that there is a constitutional right to an appeal. Neither in civil matters nor even in criminal matters does the Constitution itself guarantee an appeal as of right, according to Supreme Court dicta (never directly tested) and the hornbook wisdom (often skeptically expressed).[39] For the most part, any effort to understand the jurisdiction of the courts of appeals is an effort in statutory interpretation, and therefore that will be the emphasis in this primer.

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38. Mitchell v. Maurer, 293 U.S. 237, 244, 55 S. Ct. 162, 165, 79 L. Ed. 338, 343 (1934). *See also* Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. —, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379, 101 S. Ct. 669, 676, 66 L. Ed. 2d 571, 581 (1981).

39. *E.g.*, W. La Fave & J. Israel, Criminal Procedure § 26.1, at 954 (1985); J. Nowak, R. Rotunda & J. Young, Constitutional Law § 13.10, at 516–20 (3d ed. 1986).

§ 1.05 Rules of Precedent

The individual courts of appeals have developed something of an artificial autonomy in their stare decisis. 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. When 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. The first administrative mechanism designed to turn back the threat of disuniformity was the en banc rehearing before all the judges of the circuit. As the years passed and circuit caseloads exploded, en banc rehearings proved inefficient and ineffective, for they added delay and expense and consumed premium judicial resources. The so-called "rule of interpanel accord" was developed as a variant of stare decisis to preserve uniformity and majority control and to avoid too frequent empanelling of the en banc court. 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. Decisions of sister courts of appeals, however, are deemed merely persuasive. Thus, each court of appeals has developed a parallel but independent stare decisis.[40]

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 juris-

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40. *See generally* McFeeley, *En Banc Proceedings in the United States Courts of Appeals*, 24 Idaho L. Rev. 255 (1988); Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Parts I & II)*, 40 N.Y.U. L. Rev. 563, 726 (1965); Annot., *In Banc Proceedings in Federal Courts of Appeals*, 37 A.L.R. Fed. 274 (1978).

dictional statutes, of course, bind each court of appeals. Jurisdictional decisions by a particular court of appeals, however, directly bind that court only. Although precedents on the jurisdiction of the court of appeals from sister circuits are often used interchangeably, not all the nuance of one circuit's precedent may translate to a second circuit, and research needs to 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 and 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 court of appeals schema do not apply to Supreme Court review of state court decisions.[41] Decisions under the two statutes most frequently are cited interchangeably, implying a common meaning.[42] 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.[43] It is sufficient for present purposes, however, to note the general rule and to sound a caution against wholly indiscriminate cross-reference.[44]

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41. *Compare* 28 U.S.C. § 1257 *with* § 1291.

42. *E.g.*, National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 44, 97 S. Ct. 2205, 2206, 53 L. Ed. 2d 96, 98 (1977); Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152–54, 85 S. Ct. 308, 310–12, 13 L. Ed. 2d 199, 202–04 (1964).

43. Flanagan v. U.S., 465 U.S. 259, 265 n.3, 104 S. Ct. 1051, 1055 n.3, 79 L. Ed. 2d 288, 294 n.3 (1984).

44. *Cf.* Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916, 922–24 , 103 L. Ed. 2d 34, 41-43 (1989). *See generally* 15 Federal Practice & Procedure § 3908; 7B Moore's Federal Practice §§ 1257, 1291.

§ 1.06 Clarity, Capacity, and Closure

The two most important concerns behind the principles of appellate jurisdiction are clarity and capacity.

Clarity in these principles minimizes the undesirable, though 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 complex. In those few remaining appeals in which jurisdiction is uncertain, the lack of clarity about jurisdiction may be attributed to a purposeful pragmatism that has characterized the courts in their administration of the jurisdictional rules—an effort, in short, to avoid automatic or extreme approaches.

As for capacity, the concern is to define appellate jurisdiction so as to keep appellate caseloads manageable. Statutory and decisional policies relating to appellate jurisdiction have not contributed appreciably to the current docket crisis in the courts of appeals, but that is a small comfort. Congress has not kept judicial capacity in line with caseload demands. Since 1960, circuit judgeships have more than doubled, yet the annual number of appeals filed has increased nearly by a factor of 10, causing the courts to devise new procedures to try to cope with the work.[45]

Viewed most broadly and cumulatively, the various statutes and case decisions on appealability structure a relationship between the reviewing court and the court being reviewed. In this relationship, everything is reviewable, in its own way and at its own time. Every order that a district court enters or fails to enter may be reviewed. This may be described as the concept of "closure" in federal appellate jurisdiction. The different bases for appellate review are best considered aggregatively and alter-

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45. *See generally* Baker, *A Compendium of Proposals to Reform the United States Courts of Appeals*, 37 U. Fla. L. Rev. 225 (1985).

natively; the sections of this primer are cumulative. The appropriate method is to go down the table of contents like a checklist to determine if there is one or more bases for appellate review now or later.[46]

Ultimately, solving the jurisdictional puzzle requires knowing when and how, and 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: "No verbal formula yet devised can explain prior [appellate jurisdiction] . . . decisions with unerring accuracy or provide an utterly reliable guide for the future."[47]

46. *E.g.*, Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 374–79, 107 S. Ct. 1177, 1181–84, 94 L. Ed. 2d 389, 397–400 (1987).

47. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170, 94 S. Ct. 2140, 2149, 40 L. Ed. 2d 732, 744 (1974).

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Procedures Related to the Exercise of Subject-Matter Jurisdiction

§ 2.01 Derivative Jurisdiction

Section 1.04 noted that the "federalness" of the courts of appeals means they are courts of limited jurisdiction. While a lack of personal jurisdiction may be a defect cured by acquiescence (actual, assumed, or imposed), subject-matter jurisdiction is different.[48] Subject-matter jurisdiction in the court of appeals derives chiefly from the subject-matter jurisdiction of the district court or other tribunal whose decision is being reviewed. For the court of appeals to have jurisdiction over the appeal, at the proper time and in the proper manner, the district court must have had subject jurisdiction over the original matter under one of the various statutory heads of original subject-matter jurisdiction, such as diversity,[49] general federal question,[50] and special federal question.[51] These provisions are complicated by the accumulated judicial gloss of such doctrines 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, all of the

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

49. 28 U.S.C. § 1332 (1982).

50. 28 U.S.C. § 1331 (1982).

51. *E.g.*, 28 U.S.C. §§ 1333 (admiralty), 1337 (commerce), 1338 (patents), 1339 (postal), 1352 (bonds) (1982).

concepts concerning original subject-matter jurisdiction are relevant on appeal.

There is a related distinction: a lack of jurisdiction differs from a lack of merit. On appeal, as on original jurisdiction, the power to decide depends on the subject matter of the action and the status of the parties. It is axiomatic that there is jurisdiction to decide a case on appeal even though there is no merit to the appeal and even if there was no merit to the original complaint.[52]

The jurisdictional requirement added by the appeal is the notion of finality or some reason to excuse finality for interlocutory review. This notion is best understood as the structure of the relationship between the reviewing court and the court being reviewed. The reviewing court should first consider its own jurisdiction as a necessary condition precedent to any further action on appeal. That, of course, is the subject of the remainder of this primer.

§ 2.02 Scope of Review

Once jurisdiction attaches, the appellate power is plenary. By statute, 28 U.S.C. § 2106, the court of appeals is vested with the power to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause, or require such further proceedings to be had as may be just under the circumstances."[53] Thus it has been suggested, somewhat facetiously, that a circuit judge with a concurring second vote can "do justice" within constitutional and statutory constructs. A few limits, beyond institu-

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52. Bell v. Hood, 327 U.S. 678, 682, 66 S. Ct. 773, 776, 90 L. Ed. 939, 943 (1946). *See generally* 13 Federal Practice & Procedure § 3522; 1 Moore's Federal Practice ¶ 60[3].

53. 28 U.S.C. § 2106 (1982). *See, e.g.*, U.S. v. White, 855 F.2d 201 (5th Cir. 1988) (exercise of supervisory power over all district courts in the circuit). *See generally* 15 Federal Practice & Procedure § 3901; 1 Moore's Federal Practice ¶ 0.2[2].

tional limits of precedent and judicial hierarchy, may be briefly mentioned, however.

Generally, 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."[54] This concept of harmless error varies with the character of the issue being raised; different analyses may obtain whether the error was preserved by an objection, whether the matter is civil or criminal, and whether the issue is of constitutional proportion.[55]

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."[56] This provision reaches non-jurisdictional 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.[57]

Title 28 has a few particular limits on the jurisdiction of the courts of appeals.[58] An order of a district court remanding a case previously removed to it from a state court "is not reviewable on appeal or otherwise."[59] Likewise, there is a prohibition on appeals from final orders in proceedings in the nature of habeas

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54. 28 U.S.C. § 2111 (1982). *See generally* McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553, 104 S. Ct. 845, 848, 78 L. Ed. 2d 663, 669 (1984). *See also* Fed. R. Civ. P. 61; Fed. R. Evid. 103(a).

55. *See generally* S. Childress & M. Davis, *supra* note 11, at 12 n.37, at § 6.5; 11 Federal Practice & Procedure §§ 2881–2883; 7 Moore's Federal Practice ¶ 61.11.

56. 28 U.S.C. § 2105 (1982).

57. *See generally* 15 Federal Practice & Procedure § 3903, at 412–14; 7 Moore's Federal Practice ¶ 61.11.

58. *See generally* 13 Federal Practice & Procedure § 3903; 12 Moore's Federal Practice ¶¶ 400.06[8.–2]–[8.–7].

59. 28 U.S.C. § 1447(d) (1982). *See also infra* § 5.03. There is an exception to this limitation for civil rights cases removed under 28 U.S.C. § 1443 (1982).

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.[60]

Although the court of appeals is a court of limited jurisdiction and subject to these and various other statutory limitations, the plenary power to decide a proper appeal has a dimension of inherent authority. There is a vague notion of pendent or ancillary appellate jurisdiction exhibited when the reviewing court contemplates the scope of its own reviewing authority to go beyond the questions presented on appeal. Underlying traditional pendent or ancillary jurisdiction 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 whole of the case or controversy, including aspects over which there is no independent jurisdictional basis. This is a rather curious notion when juxtaposed with the notion of a limited federal jurisdiction, but is understandable as an inherent power of the federal court qua court. While the exercise of pendent or ancillary jurisdiction is more commonplace at the district court, it is also part of the federal appellate jurisdiction.[61] Some applications involve the court of appeals' determination of the proper scope of appeal from a final judgment. More frequently, the concepts are applied 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 happened, this makes good sense. These exercises of the power of "pendent review" still are developing, however, and the jurisdictional questions raised are not yet of certain answer.[62]

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60. 28 U.S.C. § 2253 (1982).

61. 16 Federal Practice & Procedure § 3937.

62. *See, e.g.*, San Filippo v. U.S. Trust Co., 737 F.2d 246, 255 (2d Cir.), *cert. denied*, 470 U.S. 1035, 105 S. Ct. 1408, 84 L. Ed. 2d 797 (1984) (White, J., dissenting) (applying principle); Armstrong v. McAlpin, 699 F.2d 79, 94 (2d Cir. 1983) (rejecting principle).

§ 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.[63] Generally, a plaintiff who does not have standing to sue does not have standing to bring an appeal, although the rules and decisions on the former status are much more detailed than those on the latter. A simple rule of thumb is whether the judgment being challenged has an adverse impact on the individual appellant or, in the case of a cross appeal, the issues raised might have an adverse effect upon a reversal on the main appeal. Deciding whether an impact is adverse may, at times, become somewhat metaphysical. In a recent 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.[64]

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63. *See generally* 15 Federal Practice & Procedure § 3902; 7 Moore's Federal Practice pt. 2, ¶ 65.17.

64. Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 333–34, 100 S. Ct. 1166, 1171, 63 L. Ed. 2d 427, 436–37 (1980). *See also* Karcher v. May, 484 U.S. 72, —, 108 S. Ct. 388, 392–95, 98 L. Ed. 2d 327, 334–36 (1987); Bender v. Williamsport Area School Dist., 475 U.S. 534, 546–49, 106 S. Ct. 1326, 1334–35, 89 L. Ed. 2d 501, 514–16 (1986).

Each of these principles, of course, has a certain iceberg quality.

The rule for a cross appeal is related.[65] An appellee usually may argue for an affirmance on a ground not decided by the district court without filing a cross appeal. Generally, the appellee may not rely on the original appeal to obtain a modification of the judgment, but must bring a cross appeal. Although there are contrary authorities, this rule is best considered not to be a matter of jurisdiction and may be ignored for good reason.

§ 2.04 Sources of Appeals

The most significant source of appeals to the courts of appeals is the district courts. In civil and criminal matters,[66] these appeals include final judgments,[67] orders in the nature of final judgments,[68] interlocutory orders entitled[69] or permitted[70] to be appealed, and review by way of extraordinary writ.[71] About 10% of the appellate docket (more for the District of Columbia Circuit) involves judicial review of final decisions and certain interim or interlocutory orders of dozens of federal agencies, boards, and offices.[72] 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."[73] As

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65. 15 Federal Practice & Procedure § 3904; 9 Moore's Federal Practice ¶ 204.11.

66. *See infra* §§ 6.01–6.03.

67. *See infra* § 3.02.

68. *See infra* §§ 3.03–3.05.

69. *See infra* § 4.02.

70. *See infra* § 4.03.

71. *See infra* § 5.03.

72. 16 Federal Practice & Procedure § 3940 n.3. *See infra* §§ 7.01 & 7.02.

73. 26 U.S.C. § 7482(a) (court of appeals venue provision) (1982). *See generally* M. Garbis & A. Schwait, Tax Court Practice (1974); M. Garbis & S. Struntz, Tax Procedure and Tax Fraud (1981). *See also* 17

amended in 1984, the bankruptcy statute creates a three-tiered review: bankruptcy judge, district court or bankruptcy panel, court of appeals. Besides orders that otherwise fit the general appellate criteria under 28 U.S.C. § 1291, the bankruptcy statute grants the courts of appeals jurisdiction to review all final decisions, judgments, and decrees entered by either a district court on appeal to such court from a bankruptcy judge or by a bankruptcy appellate panel established by order of a judicial council of the circuit to review bankruptcy judge orders.[74] The Federal Magistrate Act of 1979 created two additional sources of jurisdiction for the courts of appeals: specified direct appeals from a magistrate and discretionary review after direct review in the district court.[75] Although they seldom do, individual judges of the courts of appeals are authorized to issue writs of habeas corpus and prisoners may so challenge their custody under state or federal judgments of confinement.[76] Finally, the U.S. Court of Appeals for the Federal Circuit was created in 1982 with national jurisdiction over a variety of subject matters and over cases by origin from the U.S. Claims Court, the Board of Patent Appeals, district courts in patent matters, the U.S. Court of International Trade, and other miscellaneous agencies and executive officers.[77]

Federal Practice & Procedure § 4102 nn.37 & 42; 9 Moore's Federal Practice ¶ 213.03[1.–2.].

74. 28 U.S.C. § 158 (Supp. 1985). The peculiar nature of the exclusive federal original jurisdiction skews the analysis of the appellate jurisdiction. *See generally* 16 Federal Practice & Procedure § 3926; 9 Moore's Federal Practice ¶¶ 110.23, 110.24.

75. Pub. L. No. 96–82, Oct. 10, 1979 (codified as 28 U.S.C. § 636 (1982)). *See generally* 15 Federal Practice & Procedure § 3901 (Supp. 1987); 7B Moore's Federal Practice § 636, at 284.6.

76. Fed. R. App. P. 22(a); 28 U.S.C. § 2241 (1982). *See infra* § 5.02.

77. 28 U.S.C. § 1295 (1982). *See generally* 15 Federal Practice & Procedure § 3903 n.3.5 at 76-78 (Supp. 1988).

§ 2.05 The Locus of Appeals

In most cases, the proper locus of 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.[78] There may be optional appellate venues in certain matters, such as in reviews of agency matters.[79] Furthermore, appellate venue may be manipulated by the strategic choice among optional trial venues, for example, in tax cases,[80] or by a motion for a general change of venue in civil matters.[81] The provisions governing the Federal Circuit are too complex to cover in this primer.[82]

§ 2.06 The Notice of Appeal

The requirements for the form of the notice of appeal are simple and straightforward.[83] Fed. R. App. P. 3 requires a notice to be filed with the clerk of the court that rendered the judgment, which "shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is

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78. 28 U.S.C. § 1294 (1982). *See also* 28 U.S.C. § 1407(b) (1982) (multidistrict cases).

79. 28 U.S.C. § 2112 (1982). As of this writing, rules have been proposed for multicircuit petitions for review. *Proposed Rules, Judicial Panel on Multidistrict Litigation*, 840 F.2d No. 2, at ci–cxvii (Mar. 31, 1988). *See infra* § 7.01.

80. *See generally* 17 Federal Practice & Procedure § 4102; 9 Moore's Federal Practice ¶¶ 213.01–.03[5].

81. 28 U.S.C. §§ 1404, 1406 (1982). *See generally* Annot., *Mandamus, Prohibition or Interlocutory Appeal as a Proper Remedy to Seek Review of District Court's Disposition of Motion for Change of Venue Under § 1404(a) or § 1406(a) of Judicial Code*, 2 A.L.R. Fed. 573 (1969).

82. *See supra* text at note 77.

83. *See generally* 16 Federal Practice & Procedure § 3949; 9 Moore's Federal Practice ¶¶ 203.03–.05.

taken."[84] 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.[85] The requirements for timeliness of the notice of appeal, by contrast, are of another magnitude of complexity and trigger draconian effects upon their breach.

Timeliness of the notice of appeal is jurisdictional. Determining the timeliness of a notice of appeal can be as obscure as determining appellate jurisdiction. Separate rules apply for permissive interlocutory appeals,[86] agency review,[87] bankruptcy and appeals,[88] Tax Court review,[89] and habeas corpus cases.[90] Fed. R. App. P. 4 generally governs appeals as of right in civil and criminal matters.[91]

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.[92] In criminal cases, the notice is due within ten days of entry of the judgment or order and within thirty days for government appeals.[93] Both periods

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84. Fed. R. App. P. 3(c). *See also* Fed. R. App. P. 12(a) (docketing the appeal). *See generally* M. Tigar, *supra* note 12, § 6.02.

85. *But cf.* Torres v. Oakland Scavenger Co., 487 U.S. —, 108 S. Ct. 2405, 101 L. Ed. 2d 285 (1988) (suggesting more rigorous approach).

86. 16 Federal Practice & Procedure § 3951; 7B Moore's Federal Practice § 1292, at 432, ¶¶ 205.01–.07.

87. 16 Federal Practice & Procedure §§ 3961–3966; 9 Moore's Federal Practice ¶¶ 215.01–220.02.

88. 16 Federal Practice & Procedure § 3952; 9 Moore's Federal Practice ¶¶ 206.01–.07.

89. 16 Federal Practice & Procedure §§ 3959–3960; 9 Moore's Federal Practice ¶¶ 213.03–.03[5], 214.02.

90. 16 Federal Practice & Procedure §§ 3968–3970; 9 Moore's Federal Practice ¶¶ 222.01–224.04.

91. 16 Federal Practice & Procedure § 3950; 9 Moore's Federal Practice ¶¶ 204.01–.20.

92. Fed. R. App. P. 4(a)(1). *See also* Fed. R. App. P. 26 (computation and extension of time).

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

may be extended thirty days on the ground of "excusable neglect." Cross appeals must be filed within fourteen days of the filing of the first notice.[94] 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 suspend the finality of the judgment, and the time for filing the notice of appeal begins to run from the decision on the motion. The motions with this effect include Motion for Judgment Notwithstanding the Verdict;[95] Motion for New Trial;[96] Motion to Amend the Findings;[97] Motion to Alter or Amend the Judgment;[98] Motion for New (criminal) Trial;[99] Motion for Arrest of (criminal) Judgment.[100] Thus, a premature notice of appeal, filed before the disposition of any of these motions, in the words of Fed. R. App. P. 4, "shall have no effect." Since the notice must be timely, a premature filing without a timely refiling will leave the court of appeals without jurisdiction.[101]

§ 2.07 Transferring Appeals

If an appeal in a civil action or a petition for agency review is filed in the wrong court of appeals so that there is a want of jurisdiction, the matter may be transferred to the court of ap-

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94. Fed. R. App. P. 4(a)(3).
95. Fed. R. Civ. P. 50(b).
96. Fed. R. Civ. P. 59.
97. Fed. R. Civ. P. 52(b).
98. Fed. R. Civ. P. 59(e).
99. Fed. R. Crim. P. 33.
100. Fed. R. Crim. P. 34.
101. Osterneck v. Ernst & Whinney, 489 U.S. —, —, 109 S. Ct. 987, 991–93, 103 L. Ed. 2d 146, 154–56 (1989); Budinich v. Becton Dickinson & Co., 486 U.S. 196, —, 108 S. Ct. 1717, 1721–22, 100 L. Ed. 2d 178, 185–86 (1988); Buchanan v. Stanships, Inc., 485 U.S. 265, 108 S. Ct. 1130, 99 L. Ed. 2d 289 (1988); Acosta v. Louisiana Dep't of Health & Human Resources, 478 U.S. 251, 253, 106 S. Ct. 2876, 2877, 92 L. Ed. 2d 192, 197 (1986); Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61, 103 S. Ct. 400, 403, 74 L. Ed. 2d 225, 229 (1982).

peals 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." This often overlooked provision is invoked most frequently between the regional courts of appeals and the court of appeals for the Federal Circuit, although it is not limited to that usage.[102]

§ 2.08 Miscellaneous Procedures

Every circuit judge participates in numerous appellate procedural decisions and can appreciate firsthand how procedure informs substance—how resolution of procedural questions can shape the consideration of an appeal and determine its outcome. This represents an important dimension of the jurisdiction of the courts of appeals: the power to determine how to go about exercising the power to decide appeals.[103] Most relevant here are motion practice and procedures of mandate.

Motion practice is not monolithic—according to the Federal Rules of Appellate Procedure and local rules in each circuit, specified motions are decided by the clerk's office, by a single circuit judge, by a multi-judge administrative panel, or by a hearing panel. Internal procedures vary from circuit to circuit.[104] Lesser matters, such as perfunctory filing extensions, are best left to the clerk's office. While the appellate rule specifically prohibits a single judge from dismissing an appeal,[105] the Committee Commentary to Fed. R. App. 27 lists dozens of

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102. *See* Christianson v. Colt Indus. Operating Corp., 486 U.S. —, —, 108 S. Ct. 2166, 2178, 100 L. Ed. 2d 811, 831 (1988); U.S. v. Hohri, 482 U.S. 64, 76, 107 S. Ct. 2246, 2253, 96 L. Ed. 2d 51, 62 (1987) (remand with instruction to transfer); Olveira v. U.S., 734 F.2d 760, 762 (11th Cir. 1984); 18 Federal Practice & Procedure § 4478 (Supp. 1987); 1 Moore's Federal Practice ¶ 0.146[9]. *See also infra* § 7.01.

103. *See generally* 16 Federal Practice & Procedure §§ 3971–3994; 9 Moore's Federal Practice ¶¶ 225.01–247.02.

104. *See* Fed. R. App. P. 27.

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

matters placed within the jurisdiction of a single circuit judge, by rule and statute, such as entering a stay, issuing a certificate of probable cause, permitting intervention, or appointing counsel.

Other motions are expressly placed beyond the jurisdiction of a single judge, such as requests for permission to appeal,[106] requests for extraordinary relief,[107] and petitions for rehearing.[108] The most common appellate motions include motion to voluntarily withdraw and dismiss the appeal;[109] motion for stay or injunction pending review;[110] motion to expedite the appeal;[111] and a motion for leave to file an amicus curiae brief.[112]

The mandate simply is the order issued by the court of appeals after decision of the appeal, directing some action be taken or some disposition be made of the matter in the court being reviewed. A mandate is composed of a certified copy of the judgment or order of the court of appeals, along with the written opinion, if any, and any court order regarding appellate costs.[113] Until the mandate issues, all jurisdiction is retained by the appellate court and, once issued, the mandate binds the reviewed court or agency. The issuance of the mandate is stayed by filing a petition for rehearing[114] or a petition for a writ of certiorari in the Supreme Court.[115] A timely petition for rehearing to the panel automatically stays the issuance of the mandate,[116] while a suggestion for en banc rehearing, if granted, typically has the effect of vacating the panel opinion and judgment and staying the man-

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106. Fed. R. App. P. 5, 5.1, 6.
107. Fed. R. App. P. 21.
108. Fed. R. App. P. 40.
109. Fed. R. App. P. 42(b).
110. Fed. R. App. P. 8, 18.
111. *See* Fed. R. App. P. 31(a).
112. Fed. R. App. P. 29.
113. Fed. R. App. P. 41.
114. Fed. R. App. 35(c), 40.
115. Sup. Ct. R. 44.3.
116. Fed. R. App. P. 41(a).

date.[117] In addition, there is a kind of inherent power in a court of appeals to recall a mandate, on rare and undefined occasions, to prevent some manifest injustice.[118]

117. *E.g.*, Fifth Cir. R. 41.3.

118. 16 Federal Practice & Procedure § 3938, at 478; 9 Moore's Federal Practice ¶ 241.02[4].

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Appeals from Final Decisions—Civil

§ 3.01 Generally

The principal grant of jurisdiction to the courts of appeals confers power to review "all final decisions of the district courts."[119] Unless an appeal fits into one of the relatively narrow statutes authorizing interlocutory appeals,[120] therefore, the power to review a judgment or order depends on the characteristic of "finality."

The history of the finality requirement is long, if not illuminating. Finality has been a statutory requirement as long as there have been federal courts.[121] Courts have consistently deemed the requirement of a final decision to be jurisdictional.[122] Functionally, the requirement structures the relationship between appellate court and trial court; within this relationship, each court performs its complementary role.[123]

Continuing past a ruling that is reversible error, in order to complete the trial and then to require an appeal and retrial, expends scarce judicial resources, arguably unnecessarily. The post-

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119. 28 U.S.C. § 1291 (1982). *See also* 28 U.S.C. § 1295 (1982) (jurisdiction of the Court of Appeals for the Federal Circuit).

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

121. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, §§ 21, 22, 25. *See generally* 15 Federal Practice & Procedure § 3906; 6 Moore's Federal Practice ¶ 54.04[2].

122. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379, 101 S. Ct. 669, 676, 66 L. Ed. 2d 571, 581 (1981). *See supra* § 1.04.

123. 15 Federal Practice & Procedure § 3907; 9 Moore's Federal Practice ¶ 110.07.

ponement of review imposed by the final-decision rule 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 was 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. The value of self-correction also is preserved, by postponement of review at least until the trial judge has had an opportunity to rule finally and fully on the matter. Frequently, interlocutory trial court rulings are reconsidered. The critical concern is for efficiency. Postponing review of a ruling may de-emphasize the issue, for example, if the parties settle, or the trial outcome turns out not to depend on the ruling, or if there is simply no 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—four out of five—are affirmed, and presumably so would be most interlocutory appeals.

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 statute, by rule, and by judicial decision.[124] Some rulings, a preliminary injunction for example, may work an independent and irreparable harm during trial and may so profoundly affect the trial that the appeal–reversal–retrial routine is too little too late.[125] 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 in a way that would manifest the evils of piecemeal

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124. *See infra* § 4.02.
125. *See infra* § 3.05.

review.[126] Finality is, after all, in the eyes of the beholder, and appellate judges should and do have an eye for justice.[127]

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 formless. 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 the competing values sometimes favoring awaiting a final judgment and sometimes favoring an interlocutory appeal.

§ 3.02 The Final-Decision Requirement

Section 1291 of 28 U.S.C. grants appellate jurisdiction to review "all final decisions," but that phrase is nowhere defined in the Code. Judicial interpretation provides a study in contrast. At one 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 extreme, the phrase might be read to emphasize "final" and thus to require that the litigation in the district court be literally and wholly complete. Courts have rejected both extremes.[128] The first extreme would allow too many appeals and would totally 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 holdings are purposeful and pragmatic.

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126. *See infra* §§ 3.03, 3.04.

127. *See supra* § 2.02.

128. *See generally* 15 Federal Practice & Procedure § 3909; 9 Moore's Federal Practice ¶¶ 110.08–.08[3]. *See also* Fed. R. Civ. P. 58 (requirement of entry of judgment on a separate document).

Lawyers, and lawyers who become judges, are prone to look for "good language" in opinions to use. Here are six examples of some of the best language on the final-decision statute.

> 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. U.S.[129] (Held 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 is much cited but 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. U.S.[130] (Held 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 is much cited in denying review.

> 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.

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129. 324 U.S. 229, 233, 65 S. Ct. 631, 633, 89 L. Ed. 911, 916 (1945).

130. 309 U.S. 323, 324–25, 60 S. Ct. 540, 540–41, 84 L. Ed. 783, 784–85 (1940).

Radio Station WOW, Inc. v. Johnson[131] (Held 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 is much cited in allowing review.

> [T]he requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages . . . . On the other hand, if nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate, the decree is 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[132] (Five to four holding that order giving company three choices—to stop withdrawing gas, or 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 demonstrates the difficulty in close cases.

> [The] struggle of the courts [requires] . . . 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.

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131. 326 U.S. 120, 124–26, 65 S. Ct. 1475, 1478–79, 89 L. Ed. 2092, 2097–98 (1945).

132. 334 U.S. 62, 68, 68 S. Ct. 972, 976, 92 L. Ed. 1212, 1219 (1948).

Dickinson v. Petroleum Conversion Corp.[133] (Held earlier decree disposing of party's claims but requiring further proceedings to divide judgment funds among other parties had been final and reviewable; appeal taken from later, clearly final decree was too late to raise issues about earlier decree). This identifies the essential considerations, the inevitable categorical balancing.

> 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. U.S.[134] (Raised at oral argument, the finality issue was resolved 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). The ultimate emphasis is on the pragmatic.

The Court's rejection of extremes inevitably results in a certain disharmony in the precedents. Thus some holdings and opinions support a generous attitude toward finality, while others urge a stricter approach. Nonetheless, this series of exemplars is not meant to suggest that finality determinations are merely ad hoc. There are clear holdings of appealability and nonappealability categorizing almost every ruling a district court conceivably can make.[135] The Supreme Court explicitly has warned us against a case-by-case approach.[136] Therefore, care is required to find precedent from the high Court and circuit precedent to

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133. 338 U.S. 507, 511, 70 S. Ct. 322, 324, 94 L. Ed. 299 (1950).

134. 370 U.S. 294, 306, 82 S. Ct. 1502, 1513, 8 L. Ed. 2d 510, 524–25 (1962).

135. *See generally* 15 Federal Practice & Procedure §§ 3910–3918; 9 Moore's Federal Practice ¶¶ 110.08–.16.

136. Richardson–Merrell, Inc. v. Koller, 472 U.S. 424, 439, 105 S. Ct. 2757, 2765, 86 L. Ed. 2d 340, 351–52 (1985).

determine the finality of each particular ruling. On those rare occasions when a holding does not bind—and only then—do the finality policies and "good language" serve as a guide.

All of this once caused Jerome Frank to observe, "There is, still, too little finality about 'finality.'"[137]

§ 3.03 The 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."[138]

Under this expansive interpretation, orders are labeled final and appealable even though the ruling does not terminate the entire action or even any significant part of it. The apparent finality is that the order is a final determination of the 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 Industries Corp.*[139] In a stockholders' suit, the defendant corporation moved under state law to require the plaintiff to post a bond for defendant's costs and attorney's 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

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137. U.S. v. 243.22 Acres of Land in Town of Babylon, 129 F.2d 678, 680 (2d Cir.), *cert. denied*, 317 U.S. 698, 63 S. Ct. 441, 87 L. Ed. 558 (1942).

138. *See generally* 15 Federal Practice & Procedure § 3911; 9 Moore's Federal Practice ¶¶ 110.10, 110.13[9].

139. 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).

> 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.[140]

The collateral order doctrine remains viable today. More recent decisions seem to suggest a more restrictive attitude and some reluctance to find appealability, although some particular orders have been held to satisfy the *Cohen* test. Consider a few more recent examples each way. The Court has held for appealability in challenges to a pretrial order that imposed on the defendants 90% of the costs of notifying the members of the plaintiff class,[141] an order denying a claim of immunity raised by a defendant in a motion for summary judgment,[142] and an order granting a motion to stay federal litigation to abstain pending similar state litigation.[143] The Court has held nonappealable the determination that an action may not go forward as a class action,[144] an order refusing to disqualify opposing counsel in a civil case,[145] an order denying a motion to stay federal litigation to

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140. 337 U.S. at 546–47, 69 S. Ct. at 1225–26, 93 L. Ed. at 1536–37.

141. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172, 94 S. Ct. 2140, 2150, 40 L. Ed. 2d 732, 745 (1974).

142. Mitchell v. Forsyth, 472 U.S. 511, 524–30, 105 S. Ct. 2806, 2814–17, 86 L. Ed. 2d 411, 423–27 (1985) (qualified immunity); Nixon v. Fitzgerald, 457 U.S. 731, 741–43, 102 S. Ct. 2690, 2696–97, 73 L. Ed. 2d 349, 358–59 (1983) (absolute immunity).

143. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 8–13, 103 S. Ct. 927, 932–35, 74 L. Ed. 2d 765, 775–78 (1983).

144. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468–69, 98 S. Ct. 2454, 2457–58, 57 L. Ed. 2d 351, 357–58 (1978).

145. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373–78, 101 S. Ct. 669, 673–75, 66 L. Ed. 2d 571, 577–81 (1981). *See* Flanagan v. U.S., 465 U.S. 259, 263–70, 104 S. Ct. 1051, 1053–55, 79 L. Ed. 2d 288, 293–98 (1984) (same for order disqualifying criminal defense attorney).

abstain pending similar state litigation,[146] and an order denying a motion to dismiss made on the ground that an extradited person was immune from civil process.[147]

The Court has refused to expand the collateral order doctrine into a purely pragmatic approach to finality. Consistent with the formalism that generally characterizes finality analysis, the Court has adhered to the 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.[148]

§ 3.04 The Twilight Zone Doctrine

The twilight zone doctrine, sometimes less pejoratively called "pragmatic finality" or the "*Gillespie* doctrine," is another discrete, though tangential, line of analysis under § 1291.[149] The namesake and original decision is *Gillespie v. United States Steel Corp.*[150] In a Jones Act 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

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146. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 108 S. Ct. 1133, 99 L. Ed. 2d 296 (1988).

147. Van Cauwenberghe v. Biard, 486 U.S. —, —, 108 S. Ct. 1945, 1952–54, 100 L. Ed. 2d 517, 528–30 (1988).

148. Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 374–79, 107 S. Ct. 1177, 1181–84, 94 L. Ed. 2d 389, 397–400 (1987).

149. *See generally* 15 Federal Practice & Procedure § 3913; 9 Moore's Federal Practice ¶ 110.12.

150. 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964).

the merits and affirmed. The Supreme Court reached the merits following what might be characterized as a "Rod Serling script":

> [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 compelling considerations are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."[151]

Distinguish language from holdings. Opinion language in this line of decisions would end the finality requirement, if taken literally and if applied frequently. Actual holdings that invoke this doctrine to allow an appeal are rather rare. This line of precedent may be described as essentially moribund but susceptible to some future revitalization.

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

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151. 379 U.S. at 152–53, 85 S. Ct. at 311, 13 L. Ed. 2d 203.

courts of appeals should be and are understood to be less interchangeable than usual.[152]

The experience in the courts of appeals is difficult to chronicle. As one might expect from such an enigmatic opinion, *Gillespie* has been interpreted in different ways by different courts of appeals.[153] Some few panels simply have balanced the policies for and against immediate appeal in the particular case. Other panels have used the balancing approach to allow appeal from orders that could have been placed within more traditional finality precedent or could have used the balancing approach to dismiss the appeal under the doctrine. The great potential for expansion of appellate jurisdiction feared in this approach has not been realized. Perhaps because the twilight zone appears so boundless, the courts of appeals have been tentative in their applications, usually preferring to use the doctrine to buttress holdings of appealability based primarily on other grounds. The *Gillespie* holding, in retrospect, may be best understood as an efficient and appropriate rationalization only (as was true in the *Gillespie* case itself) when it is invoked as a justification after the court of appeals has reached the merits and has fully decided the appeal based on a mistaken belief of finality.[154]

§ 3.05 Partial Final Judgments

The Fed. R. Civ. P. 54(b) certification is another application of § 1291. 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.[155] 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

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152. *See supra* § 1.05.

153. *See generally* 15 Federal Practice & Procedure § 3913.

154. 15 Federal Practice & Procedure § 3913, at 534; 9 Moore's Federal Practice ¶ 110.12.

155. *See generally* 10 Federal Practice & Procedure §§ 2656–2661; 6 Moore's Federal Practice ¶¶ 54.23[1]–[2], 54.28[2].

of all the parties."[156] Modern federal procedure allows for such liberal joinder of claims and parties that contemporary civil actions often become very complex. By allowing for a partial final judgment and an immediate appeal, the rule is a response to the legitimate concern that delay of any appeal until the entire complex action is complete could result in injustice. The successful party thus is relieved of any delay and from the need to participate in the extended trial proceeding. The rule allows a prompt appeal and provides some certainty for the appellate procedure in today's complex suits. 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, as it must be satisfied for the partial judgment.[157]

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

Each of these requirements can be a catch-point. In the absence of the express determination and direction in a Rule 54(b) certificate, any order adjudicating fewer than all claims against all parties normally is subject to any 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. 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

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

157. Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 431–38, 76 S. Ct. 895, 897–901, 100 L. Ed. 1297, 1304–08 (1956).

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 the discretion to issue the certificate.

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.*[158] Plaintiff sued on various claims for breach of multiple contracts, including a demand for a liquidated balance that admittedly remained unpaid. 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 the Rule 54(b) certificate had been properly issued by the district court. The Court opined that Rule 54(b) treatment should not be reserved for only the extreme cases, but also should not issue merely upon the request of the parties. The "no just reason for delay" element is to be emphasized. This element has two components: the interest of judicial administration and the equities of the parties. The former component requires the thoughtful scrutiny of the court of appeals within contemplation of the general finality principle; the latter component, by contrast, is peculiarly within the district court's informed discretion, to be exercised on a fact-bound basis.

The chief purpose of the rule is to accommodate the final-decision requirement to complex litigation with multiple parties or multiple claims. This functional approach to Rule 54(b) assures flexibility to accomplish immediate enforcement or to allow immediate appellate review.

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158. 446 U.S. 1, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980).

4

Appeals from Interlocutory Orders—Civil

§ 4.01 Generally

This chapter chronicles the widening statutory exceptions to the requirement of finality.[159] Both the general policy and the statute equate appealability with finality. At one time, interlocutory orders were just that—interlocutory. Not until 1891—the year the circuit courts of appeal were created—was there a provision for an interlocutory appeal, and that covered only orders granting or continuing injunctions.[160] Statutory exceptions to the general rule of finality, however, have grown in number and significance ever since.[161]

As is true of the federal appellate power to review final decisions, jurisdiction over interlocutory appeals is completely a creature of statute. Inexorably, Congress has widened the appellate power. The Supreme Court has explained the process: "[Exceptions] seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequences. When the pressure rises to a point that influences Congress, legislative remedies are

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159. *See generally* 16 Federal Practice & Procedure § 3920; 9 Moore's Federal Practice ¶ 110.16.

160. Act of Mar. 3, 1891, 26 Stat. 828, § 7. *See supra* § 1.03.

161. *See* Carson v. American Brands, Inc., 450 U.S. 79, 83 n.8, 101 S. Ct. 993, 996 n.8, 67 L. Ed. 2d 59, 64 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, 84 S. Ct. 800, 11 L. Ed. 2d 767 (1963).

enacted."[162] The various statutory exceptions demonstrate a congressional recognition that a too rigid adherence to the finality requirement can work a severe hardship within the litigation and beyond. Furthermore, a categorical approach to appealability can frustrate the very policies sought to be served by finality.

Because these provisions create exceptions to the general history and tradition 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. Once jurisdiction obtains, however, the interlocutory appeal brings before the court of appeals all aspects of the case illuminated by the order on review.[163]

Tautologically, interlocutory orders may be divided into reviewable orders and nonreviewable orders. (Here the terms *reviewable* and *nonreviewable* are preferred to the terms *appealable* and *nonappealable* because the former pair distinguishes orders based on the power of the court of appeals and the latter pair may be misunderstood to be in the complete control of the litigants. An appeal from an order might be taken improperly to require the court of appeals to dismiss for want of jurisdiction. Such an appeal may broadly and imprecisely be thought of as appealable but could not be mistaken as reviewable.) Nonreviewable here has something of a temporal connotation. An interlocutory order that is not immediately reviewable under the statutes considered in this chapter might serve as the basis for an immediate application for an extraordinary writ[164] and, certainly, would be cognizable on any eventual appeal from a final judgment under

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162. Baltimore Contractors v. Bodinger, 348 U.S. 176, 181, 75 S. Ct. 249, 252, 99 L. Ed. 233, 238 (1955), *overruled in part*, Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 108 S. Ct. 1133, 1138–43, 99 L. Ed. 2d 296, 306-12 (1988).

163. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 755–57, 106 S. Ct. 2169, 2175–77, 90 L. Ed. 2d 779, 789–92 (1986).

164. *See infra* § 5.03.

the principle of closure.[165] Interlocutory appeals of reviewable orders may be subdivided into entitled interlocutory appeals and permissive interlocutory appeals. The former are brought in 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 the possibility of an immediate appeal, the issue still may be raised on appeal from the eventual final judgment.

§ 4.02 Entitled Interlocutory Appeals

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

Subsection (1) of § 1292(a) defines an entitled interlocutory appeal of an order "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions."[166] A prolific source of appeals, this subsection accounts for the largest number of interlocutory appeals, entitled or permissive. Once obtained, appellate review extends to all matters necessary to determine the propriety of the order, going so far as to review the merits to order a dismissal. A working definition of an *injunction* for purposes of § 1292(a)(1) is an order addressed to a party, enforceable by contempt and designed to accord or protect some or all of the substantive relief sought in the action.[167] Based on the duration of the order and whether there was notice and a hearing, and on the nature of the showing made,

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165. *See infra* § 1.06.

166. 28 U.S.C. § 1292(a)(1) (1982). *See generally* 16 Federal Practice & Procedure §§ 3921–3924; 9 Moore's Federal Practice ¶¶ 110.20–.20[5].

167. 16 Federal Practice & Procedure § 3922, at 29.

the courts of appeals distinguish between preliminary injunctions (which are appealable) and temporary restraining orders (which are not appealable).[168]

Denial of an injunction may be implicit. If the order has the practical effect of refusing injunctive relief, there is an entitlement to an interlocutory appeal so long as there are immediate and serious consequences.[169] In a recent 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 finally stopped distinguishing the appealability of various stays based on irrelevant remnants of the distinctions between equity and law.[170]

In characterizing orders for 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 does not control, circuit precedent elaborates on the definition of an interlocutory order "granting, continuing, modifying, refusing or dissolving . . . or refusing to

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168. *E.g.*, Sampson v. Murray, 415 U.S. 61, 86 n.58, 94 S. Ct. 937, 951 n.58, 39 L. Ed. 2d 166, 185 n.58 (1974).

169. *Compare* Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480–82, 98 S. Ct. 2451, 2453-54, 57 L. Ed. 2d 364, 367-68 (1978) (denial of class action status not appealable) *with* Carson v. American Brands, Inc., 450 U.S. 79, 86–90, 101 S. Ct. 993, 997–99, 67 L. Ed. 2d 59, 65–68 (1981) (refusal to approve consent decree that would have barred racial discrimination in hiring is appealable).

170. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, — - —, 108 S. Ct. 1133, 1138–43, 99 L. Ed. 2d 296, 306–12 (1988), *overruling in part* Baltimore Contractors Inc. v. Bodinger, 348 U.S. 176, 75 S. Ct. 249, 99 L. Ed. 2d 233 (1955) *and* Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188, 63 S. Ct. 163, 87 L. Ed. 176 (1942) *and* Enelow v. New York Life Ins. Co., 293 U.S. 379, 55 S. Ct. 310, 79 L. Ed. 440 (1935). *See generally* 16 Federal Practice & Procedure § 3923 at 65; 9 Moore's Federal Practice ¶ 110.20[3] at 245.

dissolve or modify" an injunction.[171] The growing understanding is that this subsection is to be saved for orders of serious, perhaps irreparable, consequence so as not to compromise unduly the basic policy against piecemeal appeals.[172]

Subsection (2) of § 1292(a) defines a second entitled interlocutory appeal of "orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property."[173] A practice of strict construction has limited this subsection to its literal meaning.[174] A receiver, a character of equity, is appointed by the court that has managerial powers over the property.[175] Much of the litigation under this subsection considers whether an order does 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 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 entitled interlocutory appeal from decrees "determining the rights and liabilities of the parties to admiralty cases in which appeals from final de-

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171. *See generally* 16 Federal Practice & Procedure § 3924; 9 Moore's Federal Practice ¶ 110.20[1]–[2].

172. *See generally* Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 374–79, 107 S. Ct. 1177, 1183–84, 94 L. Ed. 2d 389, 399–400 (1987); Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480, 98 S. Ct. 2451, 57 L. Ed. 2d 364 (1978).

173. 28 U.S.C. § 1292(a)(2) (1982).

174. *See generally* 16 Federal Practice & Procedure § 3925; 7 Moore's Federal Practice pt. 2, ¶ 66.04[3].

175. *See* Fed. R. Civ. P. 66. *See generally* 12 Federal Practice & Procedure § 2983; 7 Moore's Federal Practice pt. 2, ¶ 66.04[1].

crees are allowed."[176] 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.[177] There is no readily apparent reason why admiralty cases deserve a significantly more liberal practice of interlocutory appeals. No matter, for a few accepted rules will suffice for the present consideration.[178]

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 head of federal jurisdiction as well as the federal admiralty jurisdiction and is denominated as an admiralty case. The typical interlocutory appeal under subsection (3) is from an admiralty order finally determining that one party is liable to another in the first part of a bifurcated trial to the district court.[179]

§ 4.03 Permissive Interlocutory Appeals

Section 1292(b) of Title 28, United States Code, provides:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion,

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176. 28 U.S.C. § 1292(a)(3) (1982).

177. *Compare* Heller & Co. v. O/S Sonny V, 595 F.2d 968, 971 (5th Cir. 1979) (broadly) *with* Hollywood Marine, Inc. v. M/V Artie James, 755 F.2d 414, 416 (5th Cir. 1985) (narrowly). *See supra* § 1.05.

178. *See generally* 16 Federal Practice & Procedure § 3927; 9 Moore's Federal Practice ¶ 110.19[4].

> 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.[180]

First adopted in 1958, this provision is the latest statutory qualification of the general requirement for finality.[181] It is best understood as a 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. Given the docket explosion experienced since 1958 by the courts of appeals, it is not likely that this particular debate will be rejoined anytime soon. Indeed, current suggestions in favor of discretionary jurisdiction for the courts of appeals would move in the other direction, to make even appeals from final judgments a matter of grace, in order to cope with burgeoning appellate dockets.[182] Furthermore, the experience under § 1292(b) does not demonstrate any pent-up pressure for further legislative relaxation of the finality policy.

Obviously, § 1292(b) is the most explicit departure from the general policy in favor of finality and against interlocutory appeals. While the available statistics do not disclose the frequency with which this provision is invoked and denied in the district courts, only an estimated 100 appeals are brought under § 1292(b) each year. The provision goes largely unused then, considering that more than 35,000 federal appeals are filed each year. Perhaps

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179. *See* Schoenamsgruber v. Hamburg American Line, 294 U.S. 454, 458, 55 S. Ct. 475, 479, 79 L. Ed. 989, 992 (1935).

180. 28 U.S.C. § 1292(b) (1986).

181. *See generally* 16 Federal Practice & Procedure § 3929; Moore's Federal Practice ¶ 110.22–.22[5].

182. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 Sw. L.J. 1151 (1981).

appellate attitudes influence this disuse; approximately one-half of the appeals that are attempted under this section are refused.

While the legislative history and the case law support the 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. The certification by the district court and the permission to appeal by the court of appeals, evaluations independent of each other, for the most part follow the straightforward procedure and criteria of the statute.[183]

The criteria in the statute are rather straightforward in summary, although their application is subtle and highly eclectic.[184] 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 is in the discretion of the district court, and it may be entered sua sponte or on motion; there is no set form. The order must be "not otherwise appealable." Matters "otherwise appealable" include outright final decisions and the equivalents to final decisions;[185] a Rule 54(b) certificate may be optional with a § 1292(b) certificate;[186] a § 1292(b) certificate is preferred over an extraordinary writ.[187] The "controlling question of law" criterion means that factual questions do not qualify and that appeals from the exercise of district court discretion are not ordinarily permitted. The legal question must be central and important to the litigation. There must be a "substantial ground for difference of opinion." An example of an appropriate occasion might be an issue of first impression in a circuit on which there is a conflict between other courts of appeals. There should be some doubt on the issue. The

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183. *See also* Fed. R. App. P. 5. *See generally* 16 Federal Practice & Procedure § 3930; 9 Moore's Federal Practice ¶ 110.22[2]–.22[5].

184. 16 Federal Practice & Procedure § 3931; 9 Moore's Federal Practice ¶ 110.22[2].

185. *See supra* §§ 3.02, 3.03 & 3.04.

186. *See supra* § 3.05.

187. *See infra* § 5.03.

possibility of avoiding trial proceedings or, at least, significantly simplifying pretrial or trial proceedings, is enough to satisfy the next 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 criterion obliges the reviewing court to evaluate the prudence of the district court in issuing the certificate, an evaluation somewhat analogous to the exercise of discretion on the part of the court of appeals to grant an extraordinary writ.[188] But more than this, the court of appeals is to exercise an independent discretion by taking into account factors beyond the proper contemplation of the district court, such as the state of the appellate docket. This appellate discretion seems wide open.

All of the criteria are to be figured into the calculi of the district court and of the court of appeals, in turn, against the background purposes of § 1292(b). Once granted, the scope of review is closely limited to the order appealed from and the issue justifying the certification.[189]

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188. *See infra* § 5.03.

189. *See* U.S. v. Stanley, 483 U.S. 669, 676-78, 107 S. Ct. 3054, 3059–60, 97 L. Ed. 2d 550, 562–63 (1987); Marrese v. American Academy of Orthopædic Surgeons, 470 U.S. 373, 387, 105 S. Ct. 1327, 1335, 84 L. Ed. 2d 274, 285 (1985).

5

Review by Writ

§ 5.01 Generally

Proceedings considered in this chapter are formally commenced by an original application in the court of appeals. This original jurisdiction may be considered a remnant of the early history of the circuit courts, with their hybrid appellate and original jurisdiction.[190] Broadly considered, however, the power to issue writs should be characterized as an appellate power. More metaphysical issues of the inherent power of the courts of appeals are preempted, for the most part, by specific statutory authorizations to issue the writ of habeas corpus, to grant all writs necessary or appropriate in aid of their jurisdiction, and to impose appropriate sanctions.[191]

§ 5.02 Relief in the Nature of Habeas Corpus

History informs an understanding of this jurisdiction.[192] 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.[193] The 1911 legislation ended the trial jurisdiction of the circuit courts and ended their habeas jurisdiction as well. The "new" 1911 courts of appeals were not given the power to issue the writ of habeas corpus, apart from

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190. *See supra* § 1.03.
191. *See supra* § 1.04.
192. *See* L. Yackle, Post Conviction Remedies § 18 (1981).
193. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826 (1891).

the all writs statute. Nor have the courts of appeals qua courts ever been given power to issue the writ. One historical anomaly persists to the present day, however: The courts of appeals lack power to grant the writ but individual circuit judges do possess that authority. Section 2241(a) of 28 U.S.C. authorizes "the Supreme Court, any justice thereof, the district courts and any circuit judge" to issue the writ of habeas corpus.[194] The federal remedy for state prisoners repeats that empowerment;[195] the federal remedy for federal prisoners authorizes application in the sentencing court with an appeal to the court of appeals "as from a final judgment."[196] But the jurisdiction over habeas corpus vested in the individual circuit judge has small practical significance. The statute authorizes a transfer of the application to "the district court having jurisdiction to entertain it."[197] Circuit judges thus follow the practice of Supreme Court justices and decline to entertain original petitions in most cases.[198] Nonetheless, the power to issue the writ of habeas corpus is part of the jurisdiction of the circuit judge.[199]

§ 5.03 "All Writs Necessary and Appropriate"

Writ lore is a somewhat murky tradition in federal appellate procedure.[200] Section 1651(a) of 28 U.S.C. provides, in part: "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and

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194. 28 U.S.C. § 2241(a) (1982).

195. 28 U.S.C. § 2254 (1982). *See also* 28 U.S.C. § 2253 (1982) (requirement of a certificate of probable cause to appeal); Fed. R. App. P. 22(b).

196. 28 U.S.C. § 2255 (1982).

197. 28 U.S.C. § 2241(b) (1982).

198. *See* Fed. R. App. P. 22(a) ("the application will ordinarily be transferred to the appropriate district court").

199. *See generally* 16 Federal Practice & Procedure § 3968; 9 Moore's Federal Practice ¶¶ 222.01–.04.

200. *See generally* 16 Federal Practice & Procedure §§ 3932–3934; 9 Moore's Federal Practice ¶¶ 110.26, .28.

agreeable to the usages and principles of law."[201] This original jurisdiction allows for interlocutory review of district court orders through issuance of extraordinary writs by the court of appeals. 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 contrast to the restraint that characterizes the jurisdictional determination, the courts of appeals generally exhibit a rather relaxed attitude toward the form of the writ and its actual issuance. The statute authorizes the courts of appeals to issue writs in aid of their jurisdiction. At minimum, then, the matter must fall within the potential jurisdiction of the court of appeals. Writs are deemed extraordinary and, by axiom, will not be used as a mere substitute for review, although in doubtful circumstances a single appellate filing will sometimes seek an extraordinary writ and appellate review in the alternative.[202] The writ must be necessary to assert appellate supervision that cannot be later asserted effectively after 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. While 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.[203]

The extraordinary nature of the writs is underscored by the discretion surrounding their issuance.[204] The discretion of the court of appeals to exercise the power defines the proper circumstances in which to grant a writ. But that discretion defines

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201. 28 U.S.C. § 1651(a) (1982).

202. *E.g.*, Will v. U.S., 389 U.S. 90, 104–07, 88 S. Ct. 269, 278–80, 19 L. Ed. 2d 305, 315–17 (1967); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 30–31, 63 S. Ct. 938, 943–44, 87 L. Ed. 1185, 1192–93 (1943).

203. *E.g.*, La Buy v. Howes Leather Co., 352 U.S. 249, 255, 77 S. Ct. 309, 313, 1 L. Ed. 2d 290, 296 (1957).

204. 16 Federal Practice & Procedure § 3933; 9 Moore's Federal Practice ¶ 110.26.

particular circumstances even more clearly in which to deny a writ. Writs are not entitled appeals, as are review of final decisions and § 1292(a) interlocutory appeals. The characteristic of restraint of discretion, of a power properly withheld, comes from the common-law history of the writs and is reinforced, of course, by the notion of limited federal jurisdiction.[205] Although the phrase "clear and indisputable" is used to describe the rights protected by extraordinary writs, that does not establish a threshold of certainty.[206] The issue on review may be doubtful and difficult and still justify a writ. A writ will not issue to determine the merits of the ruling that has been withheld, however, but will issue to compel a district court to rule on a matter that has been improperly deferred. The writ does not direct the district court to rule one way or the other, but only to cease withholding a ruling.

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.[207] The courts of appeals advise the district courts on difficult and novel issues that cannot or should not await final appeal, and they supervise the district courts by remedying unusual categories of error. 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 litigant as the respondent.[208] Furthermore, while there may be a case-by-case preference for a

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205. *See supra* § 1.04.

206. Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36, 101 S. Ct. 188, 191, 66 L. Ed. 2d 193, 197 (1980). *See also* 16 Federal Practice & Procedure § 3933, at 174 (Supp. 1987); 9 Moore's Federal Practice ¶ 110.28, at 200 (Supp. 1987–88).

207. 16 Federal Practice & Procedure § 3934; 9 Moore's Federal Practice ¶ 110.28.

208. *See* Fed. R. App. P. 21(b) (respondent judge may opt not to appear).

§ 1292(b) certificate for permissive appeal, the writs are best understood as a supplement to the interlocutory appeal routes.[209]

Although writ practice is a good bit arcane,[210] a few situations regularly recur in which the writ will issue: when a jury trial has been denied improperly;[211] when an allegation of district court misconduct raises a general procedural matter of first impression;[212] and when a district court has acted improperly to remand a case previously removed from state court.[213] The "last word" on the writs from the Supreme Court, however, reemphasizes their extraordinary nature and portends an era of self-restrained caution.[214]

§ 5.04 Appellate Sanctions

By statute and rule, reinforced by their inherent power, the courts of appeals have jurisdiction to impose appropriate sanctions on those who abuse the appellate process.[215] The law of

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209. *See supra* § 4.03.

210. *See generally* 16 Federal Practice & Procedure § 3935; 9 Moore's Federal Practice ¶ 110.28, at 309.

211. *E.g.*, Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479–80, 82 S. Ct. 894, 900–01, 8 L. Ed. 2d 44, 51–52 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511, 79 S. Ct. 948, 957, 3 L. Ed. 2d 988, 998 (1959).

212. *E.g.*, Schlagenhauf v. Holder, 379 U.S. 104, 109–12, 85 S. Ct. 234, 237–39, 13 L. Ed. 2d 152, 158–60 (1964).

213. *E.g.*, Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 352–53, 96 S. Ct. 584, 593–94, 46 L. Ed. 2d 542, 554–55 (1976).

214. *E.g.*, Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35, 101 S. Ct. 188, 190, 66 L. Ed. 2d 193, 196 (1980) (per curiam); Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661–62, 98 S. Ct. 2552, 2556–57, 57 L. Ed. 2d 504, 510–11 (1978).

215. *See generally* 16 Federal Practice & Procedure § 3984; 9 Moore's Federal Practice ¶¶ 238.01–.02.

sanctions is developing rapidly and may best be described as uncertain.[216]

Section 1927 of 28 U.S.C. provides that any attorney who "multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct."[217] Section 1927 went largely ignored until the recent fad for sanctions, engendered in part by amendments to Fed. R. Civ. P. 11 and a siege response to the federal docket crisis. The statute is limited to attorneys but covers all cases and all proceedings in federal court, including appeals.[218] The circuits are split over whether "unreasonably and vexatiously" requires subjective bad faith[219] or only objective misconduct.[220]

Two other provisions are even broader. Fed. R. App. P. 38, an echo of 28 U.S.C. § 1912, authorizes "just damages," including attorneys' fees, and single or double costs upon a determination that an "appeal is frivolous."[221] This determination 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 wholly without merit. The test is an objective standard, and persons sanctionable include anyone who was responsible for prosecuting the frivolous appeal: the parties, including pro se litigants and criminal

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216. *See, e.g.*, G. Joseph, Sanctions: The Law of Litigation Abuse (1988); W. Freedman, Frivolous Lawsuits and Frivolous Defenses: Unjustifiable Litigation (1987).

217. 28 U.S.C. § 1927 (1982).

218. *See In re* Ginther, 791 F.2d 1151, 1155–56 (5th Cir. 1986).

219. *E.g.*, Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d Cir. 1986), *cert. denied*, 480 U.S. 918, 107 S. Ct. 1373, 94 L. Ed. 2d 689 (1987); Ford v. Temple Hosp., 790 F.2d 342, 347–49 (3d Cir. 1986).

220. *E.g.*, Coleman v. Commissioner, 791 F.2d 68, 71–72 (7th Cir. 1986).

221. Fed. R. App. P. 38; 28 U.S.C. § 1912 (1982) (minor differences in wording). *See also* Fed. R. App. 46(b), (c) (power to suspend, disbar, and discipline attorneys); 16 Federal Practice & Procedure § 3992.

defendants; and their attorneys. Sanctions can be imposed sua sponte or on motion. Once deemed highly unusual and quite rare, appellate sanctions seem to be becoming more common in the pages of the *Federal Reporter, 2d Series.*[222]

Beyond rule and statute, there are somewhat questionable claims of a residual inherent power to impose sanctions, such an inherent power being part of the courts' power to control and manage their jurisdiction.[223] As with the 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 or limitations otherwise expressly provided. These sanctions might conceivably include attorneys' fees awards; disbarment, suspension, disqualification, or reprimand of counsel; and dismissal of an appeal or even withdrawal of a mandate obtained by a fraud on the court. There are not many decisions based on this inherent power, since the rule and statute generally have proved to be sufficient.

There seems to be a trend toward a greater willingness to experiment with appellate sanctions.[224] Multiple policy considerations converge here. Access to appellate courts, while not ultimately of constitutional dimension, is at least a statutory entitlement. But appeals brought to harass or to delay do impose se-

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222. *See, e.g.*, Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987) (en banc); Natasha, Inc. v. Evita Marine Charters, Inc., 763 F.2d 468, 471–73 (1st Cir. 1985). *See generally* Joseph, *Rule 11 Is Only the Beginning*, 74 A.B.A. J. 62 (May 1, 1988).

223. *E.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 764, 100 S. Ct. 2455, 2463, 65 L. Ed. 2d 488, 500 (1980); Link v. Wabash R.R., 370 U.S. 626, 633, 182 S. Ct. 1386, 1390, 8 L. Ed. 2d 734, 739 (1962). *See generally* Note, *The Inherent Power: An Obscure Doctrine Confronts Due Process*, 65 Wash. U.L.Q. 429 (1987).

224. *E.g.*, *In re* McDonald, 490 U.S. —, 109 S. Ct. 993, 103 L. Ed. 2d 158 (1989) (pro se petitioner prohibited prospectively from filing in forma pauperis requests for extraordinary writs in the Supreme Court); Urban v. United Nations, 768 F.2d 1497, 1500 (D.C. Cir. 1985) (pro se litigant enjoined from filing any civil action in any federal court without first obtaining leave of the forum court).

vere economic costs on litigants and lawyers. Viewed systemically, frivolous appeals also siphon scarce judicial resources and serve to debase the appellate currency. Guaranteeing and policing appropriate methods and procedures for prosecuting appeals are necessary aspects of the judicial administration of the courts of appeals. Consumers of judicial services—litigants and attorneys—are entitled to know what standards will be applied, and courts are entitled to expect compliance. What should be forthcoming from the judiciary, however, are more, and more clear, guidelines.

6

Appeals in Criminal Matters

§ 6.01 Generally

Appeals in federal criminal matters bear a different emphasis than appeals in civil matters do and require separate treatment. When brought by a criminal defendant, an appeal 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. When a criminal appeal is brought by the government, additional special statutes must be satisfied, and there is a constitutional overlay of double jeopardy restrictions. The differences summarized here are subdivided by the identity of the appellant, either defendant or government.

§ 6.02 Criminal Defendant Appeals

The especial importance of adhering to the final-decision requirement in criminal cases has always been emphasized:[225]

> 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

225. *See generally* 15 Federal Practice & Procedure § 3918; 9 Moore's Federal Practice ¶¶ 110.04–.05.

> prosecution must await his conviction before its reconsideration by an appellate tribunal.[226]

With few statutory exceptions, the term *final decision* from § 1291 means imposition of the sentence in criminal matters.[227] However, it is enough if the defendant is put on probation, after sentence has been imposed and suspended or 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.

In detail too elaborate to repeat here, the courts of appeals have made fine distinctions between and within categories of criminal trial orders.[228] Orders related to grand jury proceedings sometimes are and sometimes are not deemed final. 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 are ordinarily 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. If deemed sufficiently separable, an order restraining a defendant's property pending trial may be deemed appealable. Denial of a motion for a speedy trial ordinarily is not final. These and sundry other orders at criminal trials disposing of pretrial, trial, and post-trial motions "may present puzzling questions"[229] and therefore require

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226. Cobbledick v. U.S., 309 U.S. 323, 325, 60 S. Ct. 540, 541, 84 L. Ed. 783, 785 (1940). *See also* Midland Asphalt Corp. v. U.S., 489 U.S. —, 109 S. Ct. 1494, 103 L. Ed. 2d 879 (1989). *But see* Houston v. Lack, 487 U.S. —, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988) (§ 2.06 issue).

227. *See* 18 U.S.C. § 3742(a) (Supp. IV 1986) (broadened review of sentences). *See also* Mistretta v. U.S., 488 U.S. —, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) (upholding scheme of sentencing guidelines).

228. *See generally* 15 Federal Practice & Procedure § 3918; 9 Moore's Federal Practice ¶¶ 110.05, .13[3], .13[11].

229. 15 Federal Practice & Procedure § 3918, at 429 (Supp. 1988).

independent assessment against precedent and the policy of finality.

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. Section 1292(a), entitled interlocutory appeals,[230] and § 1292(b), permissive interlocutory appeals,[231] are expressly limited to civil actions. The jurisdiction to issue extraordinary writs applies in criminal and civil matters, although the restrictive attitude toward the writs is exaggerated further by the heightened importance afforded the final-decision requirement in criminal matters.[232]

Aside from the previously mentioned collateral orders sometimes judicially treated as final, other matters are permitted interlocutory appeal by specific statute. The Bail Reform Act of 1984[233] creates the most significant statutory exception to this regime of finality.[234] Appeals from a release or detention order, or from an order denying revocation or amendment of such an order, must satisfy 28 U.S.C. § 1291 finality if brought by an accused, or the restrictions on government appeals if brought by the prosecution.[235] The new scheme permits a defendant to appeal only after the order to detain pending trial, or the condi-

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230. *See supra* § 4.02.

231. *See supra* § 4.03.

232. *E.g.*, Will v. U.S., 389 U.S. 90, 96, 88 S. Ct. 269, 274, 19 L. Ed. 2d 305, 311 (1967).

233. 18 U.S.C. §§ 3141–3145 (1982). *See also* Stack v. Boyle, 342 U.S. 1, 6–7, 72 S. Ct. 1, 4–5, 96 L. Ed. 3, 7–8 (1951).

234. *See also* 18 U.S.C. § 4208(b) (1982); Corey v. U.S., 375 U.S. 169, 173–74, 84 S. Ct. 298, 301–02, 11 L. Ed. 2d 229, 232–33 (1963) (alternate appeals allowed upon indeterminate commitment to develop information for sentence).

235. 18 U.S.C. § 3145(c) (Supp. IV 1986). *See infra* § 6.03. *See also* Fed. R. App. P. 9(b) (court of appeals or circuit judge may authorize bail pending appeal, although application should first be made in district court).

tions imposed on an order to release, have been passed on by the district court.[236]

Last mentioned is the constitutional possibility for interlocutory appeal under the former jeopardy provision. Unlike other motions with constitutional overtones, such as motions to suppress[237] or motions for a speedy trial,[238] the denial of a motion to dismiss an indictment for former jeopardy is subject to interlocutory appeal.[239] As with other interlocutory appeals, the district court must fully decide the question; the matter itself must be separable from the issue on the merits, and former jeopardy is separate from guilt or innocence. The substantive right here informs the procedure; because the right is not to be subjected to a second trial, only an interlocutory appeal can protect it.[240] This notion of a constitutionally based interlocutory appeal has not been extended to other rights.[241]

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236. *See also* 18 U.S.C. § 3731 (Supp. IV 1986) (authorizes government appeal from any order denying a motion to modify the conditions of release).

237. DiBella v. U.S., 369 U.S. 121, 131–32, 82 S. Ct. 654, 660–61, 7 L. Ed. 2d 614, 621–22 (1962).

238. U.S. v. MacDonald, 435 U.S. 850, 853–56, 98 S. Ct. 1547, 1548–50, 56 L. Ed. 2d 18, 22–24 (1978).

239. Abney v. U.S., 431 U.S. 651, 656–62, 97 S. Ct. 2034, 2038–42, 52 L. Ed. 2d 651, 657–61 (1977). *See also* Richardson v. U.S., 468 U.S. 317, 326 n.6, 104 S. Ct. 3081, 3086 n.6, 82 L. Ed. 2d 242, 251 n.6 (1984) (extension to improper mistrials); *cf.* Helstoski v. Meanor, 442 U.S. 500, 505–08, 99 S. Ct. 2445, 2447–49, 61 L. Ed. 2d 30, 35–37 (1979) (denial of motion to dismiss based on speech or debate clause held appealable).

240. *But see* U.S. v. Dunbar, 611 F.2d 985, 988 (5th Cir.) (en banc), *cert. denied*, 447 U.S. 926, 100 S. Ct. 3022, 65 L. Ed. 2d 1120 (1980) (procedural consequences).

241. *See also* Tibbs v. Florida, 457 U.S. 31, 40–42, 102 S. Ct. 2211, 2217–18, 72 L. Ed. 652, 660–61 (1982) (possibility of appellate acquittal); Burks v. U.S., 437 U.S. 1, 14–18, 98 S. Ct. 2141, 2148–51, 57 L. Ed. 2d 1, 11–14 (1978) (same).

§ 6.03 Government Appeals

The government has no right to appeal in federal criminal cases unless the appeal is expressly authorized by statute.[242] Furthermore, statutory authorization must comport with the Fifth Amendment's former jeopardy protection. And any interlocutory government appeal must not unduly postpone the proceeding sufficiently 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 § 1291.[243] Section 3731 of 18 U.S.C. is the basic authorizing statute.[244] Appeals are authorized from three separate 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.

The first category, with its incorporation by reference, is essentially shorthand for the former jeopardy protection in the Fifth Amendment. Although 28 U.S.C. § 1291 is not the jurisdictional basis, that finality test is the first criterion for these

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242. *See generally* 16 Federal Practice & Procedure § 3919; 9 Moore's Federal Practice ¶ 110.04, .19[7].

243. Carroll v. U.S., 354 U.S. 394, 400, 77 S. Ct. 1332, 1336, 1 L. Ed. 2d 1442, 1446 (1957). *But see supra* § 5.02; Arizona v. Manypenny, 451 U.S. 232, 241–50, 101 S. Ct. 1657, 1664–69, 68 L. Ed. 2d 58, 68–74 (1981) (removal from state court); 28 U.S.C. §§ 2253, 2255 (1982) (§ 1291 applies in proceedings to vacate sentence). *See generally* 15 Federal Practice & Procedure § 3919.

244. 18 U.S.C. § 3731 (Supp. IV 1986). *See also supra* § 5.03 (government may petition for extraordinary relief.).

appeals under 18 U.S.C. § 3731, with a few specifically identified statutory exceptions. Double jeopardy principles[245] prohibit the government from taking an appeal from a not guilty verdict 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 an appeal. There is no right of government appeal if the jury's verdict acquits the defendant, but an appeal may be taken if the jury convicts and the judge thereafter absolves the defendant. The statutory intent is understood to mean to permit all government appeals within the judicial interpretation of the constitutional limit. An appeal by the government does not allow the defendant, by cross appeal, to raise issues not related to a judgment of dismissal.[246] Beyond these basics, the decisional law on double jeopardy and government appeals is in a state of flux.[247]

The second category in § 3731, appeals from orders suppressing or excluding evidence or requiring the return of property, permits a government appeal of an order that as a practical matter eliminates the prosecution's case. Otherwise, an acquittal could result from an improvident suppression. Appeals under this provision are liberally allowed, in contrast with the general rule

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245. *See generally* W. LaFave & J. Israel, *supra* note 39, at §§ 24.1–24.5.

246. *See supra* § 2.03.

247. *See, e.g.,* Sanabria v. U.S., 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978); Finch v. U.S., 433 U.S. 676, 97 S. Ct. 2909, 53 L. Ed. 2d 1048 (1977); Lee v. U.S., 432 U.S. 23, 97 S. Ct. 2141, 53 L. Ed. 2d 80 (1977); U.S. v. Martin Linen Supply Co., 430 U.S. 564, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977); Serfass v. U.S., 420 U.S. 377, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975); U.S. v. Jenkins, 420 U.S. 358, 95 S. Ct. 1006, 43 L. Ed. 2d 250 (1975); U.S. v. Wilson, 420 U.S. 332, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975), *overruled in part,* U.S. v. Scott, 437 U.S. 82, 95–101, 98 S. Ct. 2187, 2196–99, 57 L. Ed. 2d 65, 76–81 (1978).

that denials of a defendant's motion to suppress are not appealable.[248] Upon filing the required certificate of good faith and importance, the government may appeal suppression based on the exclusionary rule or any other reason.[249]

The third category in § 3731, the bail appeal provision, must be read together with the Bail Reform Act of 1984, 18 U.S.C. § 3742.[250] These statutes together 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.

Finally, beyond § 3731, the government's right to appellate review of sentences was broadened in 1984, along with the defendant's, by statute.[251] Section 3742(b) of 18 U.S.C. 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 violated the terms of a plea agreement.[252]

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248. *See supra* § 6.02.

249. *See also* 18 U.S.C. § 2518(10)(b) (1982) (interlocutory appeal of suppression orders in wiretaps); 18 U.S.C.A. app. IV § 7 (1985) (interlocutory appeal under Classified Information Procedures Act).

250. *See also* 18 U.S.C. §§ 3141–3148 (1982).

251. *See supra* § 6.02.

252. 18 U.S.C. § 3742(b) (Supp. IV 1986). *See also supra* note 227.

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Appeals in Administrative Matters

§ 7.01 Generally

The courts of appeals have jurisdiction to review administrative actions of dozens of federal agencies, boards, and even individual government officials. These reviews account for upwards of 10% of the federal appellate docket. The substantive law and procedural rules are adjectival to the subject of administrative law, and this discussion must defer to treatises on that larger subject.[253]

Judicial review of administrative agency action may take the form of "nonstatutory" review by suit against the officer or agency in the district court under some general head of subject-matter jurisdiction with an appeal to the court of appeals.[254] With the growth of the modern administrative state, Congress has experimented with two other review models. Some statutes authorized a priority suit to enjoin an agency order before a three-judge district court, with 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 somewhat anachronistic, although there still are a few statutes adhering to this procedure.[255] Beginning with the

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253. *See generally* K. Davis, 4 Administrative Law Treatise §§ 23.1–23.22 (2d ed. 1983); L. Jaffe, Judicial Control of Administration Action (1965).

254. 5 U.S.C. §§ 702, 703 (1982). *See generally* 14 Federal Practice & Procedure § 3655; 3A Moore's Federal Practice ¶ .65[2.-1].

255. *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) (1982) (district court re-

Federal Trade Commission Act of 1914,[256] Congress authorized an exclusive jurisdiction in the (then-circuit) courts of appeals to affirm, enforce, modify, or set aside orders of the agency, with a subsequent discretionary review in the Supreme Court.[257] Since 1950, this review model has been preferred and has become dominant.

In the prevailing review model, the agency performs as a trial court through an administrative law judge who hears evidence, develops a record, and makes the initial decision on issues of law and fact. Most commonly, there is an intra-agency appeal before some agency review panel. Judicial review in the court of appeals thereafter deals, for the most part, with questions of law or reviews the record for substantiality of the evidence.

Numerous statutes provide for review in the courts of appeals, sometimes exclusively in the Court of Appeals for the District of Columbia, and the disclaimer from a well-known treatise applies even more strongly to this primer: "Complete enumeration of the statutes would be too lengthy to serve any useful purpose, even if it were possible to be confident that a complete list could be prepared."[258] Issues on appeal might range from a claim for individual compensation under a government entitlements program to an environmental issue with national impact. Statutes either expressly require that rules be adopted by an order made reviewable or simply provide for judicial review of all orders. Courts seem to vacillate between polar approaches, one approach preoccupied with procedural and jurisdictional matters and the other approach characterized by a zeal to reach and to resolve the merits.[259] For example, the answer varies from statute to statute and from circuit to circuit whether a statutory authorization to

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view of orders to pay) *with* §§ 2321–2323, 2342(5) (1982) (court of appeals review of all other orders). *See supra* § 1.02.

256. Act of Sept. 26, 1914, c. 311, § 5, 38 Stat. 717, 720.

257. *See* 28 U.S.C. §§ 2341–2351 (1982).

258. 16 Federal Practice & Procedure § 3941, at 304.

259. *See* K. Davis, *supra* note 253, § 23.2.

review administrative "orders" does include judicial review of agency rules and regulations.

The notion of limited jurisdiction is important in understanding judicial review of administrative agencies.[260] As interpreted, the judicial review provisions of the Administrative Procedure Act do not confer jurisdiction,[261] but only prescribe procedures when a court of appeals is granted review power by some other statute.[262]

The procedure for transferring an administrative appeal from one court of appeals to another depends on 28 U.S.C. § 2112(a)[263] and on a seldom invoked but recognized additional, inherent power.[264] Typically, a need for the transfer mechanism arises when multiple petitions for review of a single administrative order are filed in different circuits.[265] Multiple filings are made possible by alternative grants of jurisdiction to review in more than one circuit. For example, a 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 so-called race to the courthouse is on. Under the old first-to-file rule of jurisdiction, differences of minutes often controlled. Congress recently responded to the waste of judicial resources and the delays inevitable in multiple filings by creating simple

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260. *See supra* § 1.04.

261. 5 U.S.C. §§ 701–706 (1982).

262. *See, e.g.*, 28 U.S.C. §§ 2341–2351 (1982) (orders of specified agencies subject to review in the courts of appeals).

263. 28 U.S.C. § 2112(a) (1982).

264. *See supra* § 5.04 (inherent power to sanction). *But see infra* nn.267 & 268. *See also supra* § 2.07 (transfers for want of jurisdiction, under 28 U.S.C. § 1631).

265. *See generally* 16 Federal Practice & Procedure § 3944; 9 Moore's Federal Practice ¶ 0.146[10].

and clear "rules of the road."[266] Under the new statute, if two or more petitions for review are filed in two or more courts of appeals within ten days of the administrative order, then the matter is referred to the judicial panel on multidistrict litigation, which will assign the petitions randomly to one of the courts in which a petition was filed.[267] The panel on multidistrict litigation has proposed rules of procedure, not adopted as of this writing, to handle multiple filings.[268]

§ 7.02 Finality and Exclusivity

Some of the myriad statutes providing for court of appeals review explicitly require a "final order,"[269] while others have been interpreted to impliedly require finality.[270] As the final-decision requirement serves to order the relationship of the appellate court to the trial court, the final-administrative order requirement does the same for appellate court and agency.[271]

On the administrative side, finality is related to the doctrine that requires the exhaustion of administrative remedies.[272] The party seeking judicial review must generally pursue administrative remedies provided by statute or agency rule. And most agency review statutes preclude consideration of matters not first raised before the agency, although the failure may be excused on a

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266. Selection of Court for Multiple Appeals, Pub. L. No. 100-236, §§ 1, 3, Act Approved Jan. 8, 1988, 101 Stat. 1731, 1732.

267. 28 U.S.C. § 2112(a) (1982) (further elaboration).

268. *Proposed Rules for Multicircuit Petitions for Review Under 28 U.S.C. § 2112(a)(3)*, 840 F.2d No. 2, at ci–cxvii (Mar. 31, 1988). *See supra* § 2.05.

269. *E.g.*, 28 U.S.C. § 2344 (1982).

270. *E.g.*, Federal Power Comm'n v. Metropolitan Edison Co., 304 U.S. 375, 58 S. Ct. 963, 82 L. Ed. 1408 (1938).

271. *See generally* 16 Federal Practice & Procedure § 3942.

272. *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S. Ct. 459, 82 L. Ed. 638 (1938).

proper showing.[273] Nevertheless, finality is something of an empty vessel to be given content by the courts. In administrative matters, 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."[274] The finality requirement is to be applied "pragmatically . . . focusing on whether judicial review at the time will disrupt the administrative process."[275] The requirement is treated as jurisdictional, and these purposes are reflected in applications.[276] The interplay of the need for present judicial review and the finality concept is manifested again in a small but growing number of decisions allowing interlocutory review of agency action through extraordinary writs.[277] These decisions build on the unremarkable use of mandamus against an agency ignoring the mandate of a court of appeals after review.

The principle of exclusivity is distinct from that of finality.[278] 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 jurisdiction may be precluded by implication.[279] Of

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273. *Compare* EEOC v. FLRA, 476 U.S. 19, 22–23, 106 S. Ct. 1678, 1680, 90 L. Ed. 2d 19, 23–24 (1986) (claim barred) *with* McKart v. U.S., 395 U.S. 185, 193, 89 S. Ct. 1657, 1662, 23 L. Ed. 2d 194, 202 (1969) (failure excused).

274. Mathews v. Eldridge, 424 U.S. 319, 331 n.11, 96 S. Ct. 893, 901 n.11, 47 L. Ed. 2d 18, 31 n.11 (1976).

275. Bell v. New Jersey, 461 U.S. 773, 779, 103 S. Ct. 2187, 2191, 76 L. Ed. 2d 312, 319 (1983).

276. 16 Federal Practice & Procedure § 3942. *E.g.*, FTC v. Standard Oil Co., 449 U.S. 232, 101 S. Ct. 488, 66 L. Ed. 2d 416 (1980).

277. *See supra* § 5.03.

278. *See generally* 16 Federal Practice & Procedure § 3943; 3B Moore's Federal Practice ¶ 24.06[3.-3].

279. *E.g.*, 15 U.S.C. § 45(d) (1982) (explicit); Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411, 85 S. Ct. 551, 13 L. Ed. 2d 386 (1965) (implicit).

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.[280] Additionally, exclusivity may be excused to allow the district court to review immediately a matter that the court of appeals would eventually review, if a showing is made akin to that required for injunctive relief: if the right being asserted is clear and important, especially if it is a constitutional right, and the harm will be irreparable if review is postponed until a later appeal in the court of appeals. This possibility is a rare but noteworthy exception to the general exclusivity principle.

280. *Cf.* FCC v. ITT World Communications, Inc., 466 U.S. 463, 104 S. Ct. 1936, 80 L. Ed. 2d 480 (1984) (interpreting scope of exclusive jurisdiction).

Annotated Bibliography

The materials in this bibliography are arranged by treatises, textbooks, manuals, symposia, and articles and annotations. The articles and annotations section is subdivided to correspond to the chapter headings in this primer. Works are listed alphabetically by author; student works are listed alphabetically by article title. Especially important sources for appellate jurisdiction are noted with a star.

Treatises

K. Davis, Administrative Law Treatise (K. C. Davis Publishing Co. 1978–1983): 5 vols.; once considered the preeminent treatise; primarily devoted to administrative law, but also covers procedure.

★ J. Moore, B. Ward & J. Lucas, Moore's Federal Practice (Matthew Bender, 2d ed. 1948): vol. 9 2d supplement to 1987; once considered the preeminent treatise on federal jurisdiction and procedure; volume 9 covers appeals to the courts of appeals, but the treatise is better for issues on district court jurisdiction; organization and presentation of material are not up to earlier editions; still comprehensive; a good place to begin research.

R. Rotunda, J. Nowak & J. Young, Treatise on Constitutional Law—Substance and Procedure (West Publishing Co. 1986): 4 vols.; an up-to-date analysis and synthesis of constitutional law; a superior resource on the constitutional aspects of federal jurisdiction; the one-volume handbook is keyed to this treatise.

★ C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure (West Publishing Co., vol. 15 2d ed. 1986, vol. 16 1977): the best and most usable multivolume treatise on federal courts; updated continuously with supplements; volumes 15 and 16 cover the courts of appeals; each section amounts to a knowledgeable and enlightening lecture on the topic; the fourth edition of Wright's handbook is a

masterful highlight of this set; this primer relies extensively on this treatise, as should be apparent from the footnotes.

Cyclopedia of Federal Procedure (Callaghan & Co. 3d ed. 1983–1986): a supplement to 1988; written by editorial staff members; volumes 13, 13A, 14, 14A, and 15 deal with appeals and reviews; lack of emphasis and unclear organization explain why this treatise is a distant third that is not nearly as sophisticated as Moore's or Wright's treatises; summary of cases with extensive citations.

Textbooks

★ P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, Hart and Wechsler's The Federal Courts and The Federal System (Foundation Press, 3d ed. 1988): more than a casebook, a standard reference full of history and theory; thorough and exhaustive in a new 1,898-page edition.

L. Brilmayer, An Introduction to Jurisdiction in the American Federal System (Michie Co. 1986): emphasizes broader principles of jurisdiction; designed as a student guide to the more sophisticated questions.

R. Casad, Jurisdiction in Civil Actions (Warren, Gorham & Lamont 1983 & 1986 Supp.): a comprehensive treatment of all aspects of invoking district court jurisdiction in civil actions, including constitutional limits and rules of procedure; very thorough on the original jurisdiction of the district court.

D. Currie, Federal Courts—Cases and Materials (West Publishing Co., 3d ed. 1982): 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.

K. Davis, Administrative Law Text (West Publishing Co., 3d ed. 1972): a student handbook that is an abbreviated version of, with citations to, the multivolume treatise; a ready introduction to administrative procedures.

H. Fink & M. Tushnet, Federal Jurisdiction: Policy and Practice (Michie Co., 2d ed. 1987): a blend of history and constitu-

tional law with practice and procedure; emphasizes federalism and separation of powers; poses problems; provides good context and transitions.

R. Forrester & J. Moye, Federal Jurisdiction and Procedure—Cases and Materials (West Publishing Co., 3d ed. 1977): a traditional approach; meant for classroom use; quite dated, though 1985 Supplement is available.

H. Hart & H. Wechsler, The Judicial Code and Rules of Procedure with Excerpts from the Criminal Code (Foundation Press, students' ed. 1984): a handy desk reference of rules and statutes.

P. Low & J. Jeffries, Federal Courts and the Law of Federal-State Relations (Foundation Press 1987): a modern treatment that de-emphasizes procedure and emphasizes themes of federalism; provides extended notes; includes a thorough bibliography of secondary authorities.

W. McCormack, Federal Courts (Matthew Bender 1984): emphasizes procedures in the district court; presented in problem–commentary format; lists additional readings.

C. McCormick, J. Chadbourn & C. Wright, Federal Courts—Cases and Materials (Foundation Press, 8th ed. 1988): traditional casebook that emphasizes jurisdiction and procedure; notes are sparse; mostly opinions; the junior-surviving author's hornbook is a superior research tool.

J. Moore, Moore's Federal Practice Rules Pamphlet Part I (Matthew Bender 1988): a handy desk reference of rules and statutes.

J. Nowak, R. Rotunda & J. Young, Constitutional Law (West Publishing Co., 3d ed. 1986): a handbook keyed to a multivolume treatise; helpful on the constitutional aspects of federal court jurisdiction.

M. Redish, Federal Courts—Cases, Comments and Questions (West Publishing Co. 1983): designed for use solely in a classroom setting; presents open-ended questions that explore policy; somewhat eccentric arrangement; not helpful for research.

M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power (Michie Co. 1980): a collection of essays on federal–state issues; a much cited and thoughtful treatment; Supreme Court decisions since publication have begun to overtake this work's originality.

L. Tribe, American Constitutional Law (Foundation Press Co., 2d ed. 1988): an original synthesis from the author's orientation; a good resource for constitutional limits on federal court jurisdiction.

★ C. Wright, The Law of Federal Courts (West Publishing Co., 4th ed. 1983): modestly intended for law student use but one of the most frequently-cited texts in judicial opinions; becoming somewhat dated in a few areas, but author would say that encourages reference to multivolume treatise he coauthors; if a library could buy only one federal courts volume, this would be it.

Manuals

P. Carre, A. Ntephe & H. Trainor, eds., Appellate Advocacy (ABA Professional Education Publication 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.

★ S. Childress & M. Davis, Standards of Review (Wiley Law Publications 1986): 2 vols.; the most thorough, comprehensive, and up-to-date treatment of standards of review; gives separate treatment for civil, criminal, and administrative matters.

R. Givens, Manual of Federal Practice (Shephard's/McGraw-Hill, 3d ed. 1987): provides two good chapters on appellate practice and procedure; guides attorney through the steps of an appeal.

H. Levy, How to Handle an Appeal (Practicing Law Institute 1968): a good practitioner's guide to appellate jurisdiction and practice; additional emphasis on advocacy skills; somewhat dated.

F. 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.

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

R. Martineau, Modern Appellate Practice—Federal and State Civil Appeals (Lawyers Co-operative Publishing Co. 1983 & Supps. to 1987): "modern" connotes last twenty-five years; covers both state and federal civil appeals; scholarly and practical; well researched, with extensive citations and cross-references.

P. O'Brien, Manual of Federal Appellate Procedure (Filmer Bros. Electrotype Co. 1929): a compilation of rules and statute with brief commentary; out of date.

R. 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.

T. Powell, The Law of Appellate Proceedings (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.

G. Rahdert & L. Roth, Appeals to the Fifth Circuit Manual (Butterworth Legal Publisher 1977 & Supps. to 1988): 2 vols.; very complete guidelines to appellate practice and procedure; detailed reference and synthesis to U.S. Code, Federal Rules of Appellate Procedure, local rules, internal operating procedures, etc.; cited here as representative of other circuit-by-circuit manuals written for practitioners which would provide a valuable and quick reference.

R. Stern, Appellate Practice in the United States (Bureau of National Affairs 1981): a comprehensive handbook on the appellate process, with emphasis on brief writing and oral argument.

★ R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice (Bureau of National Affairs, 6th ed. 1986): 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 writs.

★ M. Tigar, Federal Appeals—Jurisdiction and Practice (Shepard's/McGraw-Hill 1987): current and thorough; the jurisdiction portion elaborates the important topics; presents well-chosen and helpful citations; relied on in the writing of this primer.

N. 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.

M. Volz, et al., West's Federal Practice Manual (West Publishing Co., vol. 7, 2d ed. 1979 & Supps. to 1987): § § 9601-9700 cover jurisdiction of the U.S. courts of appeals and § § 9701-9800 cover procedure; extensive citations to illustrative decisions in each circuit.

F. Wiener, Briefing and Arguing Federal Appeals (Bureau of National Affairs, 2d ed. 1961): emphasizes appellate advocacy; the best treatment of its kind; regrettably becoming dated; this is how a first-rate lawyer views the appellate process.

L. Yackle, Postconviction Remedies (Lawyers Co-operative Publishing Co. 1981 & Cumulative Supp. to 1988): the writ of habeas corpus is pure procedure, and this is the best single volume on the great writ.

E. 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

★ Carrington (ed.), *Civil Appellate Jurisdiction Parts I & II*, 47 Law & Contemp. Probs. 1–248 & 1–179 (1984): written in the form of a restatement of the law; Part I is a valuable re-

search tool and able synthesis; Part II adds a comparative perspective to include Canada, France, and Germany.

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

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

Eighth Circuit Survey, Creighton L. Rev.: an annual symposium.

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

Fifth Circuit Symposium, Loy. L. Rev.: an annual symposium.

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

Fourth Circuit Review, Wash. & Lee L. Rev.: an annual symposium.

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

Second Circuit Review, Brooklyn L. Rev.: an annual symposium.

Seventh Circuit Review, Chicago-Kent L. Rev.: an annual symposium.

*The Supreme Court 19** Term*, Harv. L. Rev.: an annual symposium; each November issue is devoted to selected decisions from the preceding term.

Survey of Sixth Circuit Law, Det. Coll. of L. Rev.: an annual symposium.

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

Articles and Annotations

Chapter 1: Introduction, Background, and Overview

Carrington, *The Function of the Civil Appeal: A Late Century View*, 38 S.C.L. Rev. 411 (1987): traces the history and function of civil appeals.

Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 Ga. L. Rev. 507 (1969): a general exploration of the relationship of federal trial court and appellate court.

Herrmann, *Thermtron Revisited: When and How Federal Trial Court Remand Orders Are Reviewable*, 19 Ariz. St. L.J. 395 (1987): a good discussion of removal-remand appealability.

Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question and Procedural Discretion*, 64 N.C.L. Rev. 993 (1986): a general and theoretical treatment of the relationship between trial court and appellate court.

Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 Vand. L. Rev. 1023 (1987): a thoughtful and very complete consideration of this critical issue for scope of review.

Martineau, *The Appellate Process in Civil Cases: A Proposed Model*, 63 Marq. L. Rev. 163 (1979): a broad overview of the appellate process and components of that process; provides good general citations.

Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 Wash. U.L.Q. 409 (1981): an evaluation of this rule from the perspective of a federal district judge.

Report of the ABA Standing Committee on Federal Judicial Improvements, *The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth* (March 1989): proposes subject matter specialization and other reforms.

Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173 (1979): a general treatment of scope of review of discretion.

Note, *Appealability in the Federal Courts*, 75 Harv. L. Rev. 351 (1961): examines various bases of review.

Annot., *Construction and Application of Rule 60(b)(5) of Federal Rules of Civil Procedure Authorizing Relief from Final Judgment Where Its Prospective Application Is Inequitable*, 14 A.L.R. Fed. 309 (1973).

Annot., *Construction and Application of Rule 60(b)(6) of Federal Rules of Civil Procedure Authorizing Relief from Final Judgment or Order for "Any Other Reason,"* 15 A.L.R. Fed. 193 (1973).

Annot., *In Banc Proceedings in Federal Courts of Appeals*, 37 A.L.R. Fed. 274 (1978).

Annot., *What Standards Govern Appellate Review of Trial Court's Conditional Ruling, Pursuant to Rule 50(c)(1) of Federal Rules of Civil Procedure on Party's Motion for New Trial*, 52 A.L.R. Fed. 494 (1981).

Chapter 2: Procedures Related to the Exercise of Subject-matter Jurisdiction

Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 Ga. L. Rev. 399 (1986): discusses limitations on the time to appeal; critical of current approach to treat timeliness as jurisdictional.

Note, *The Appellate Jurisdiction of the Temporary Emergency Court of Appeals*, 64 Minn. L. Rev. 1247 (1980): an overview of this specialized court's jurisdiction.

Note, *Appellate Review of Stay Orders in the Federal Courts*, 72 Colum. L. Rev. 518 (1972): sketches the origins of the stay order—§ 1292(a) & (b); concludes that federal trial court discretion in granting or denying stays has been diminished.

Annot., *Appellate Review of Order Denying Extension of Time for Filing Notice of Appeal Under Rule 4(A) of Federal Rules of Appellate Procedure*, 39 A.L.R. Fed. 829 (1978).

Annot., *Composition of Record on Appeal from District Court Under Rule 10(a) of Federal Rules of Appellate Procedure*, 33 A.L.R. Fed. 588 (1977).

Annot., *Construction of Provision in Rule 4(a) of Federal Rules of Appellate Procedure (Formerly Civil Procedure Rule 73(a), Making an Exception as to Time for Filing Notice of Appeal from District Court to Court of Appeals in Civil Case "If the United States or an Officer or Agency Thereof is a Party,"* 9 A.L.R. Fed. 611 (1971).

Annot., *Effect of Filing of Notice of Appeal on Motion to Vacate Judgment Under Rule 60(b) of Federal Rules of Civil Procedure*, 62 A.L.R. Fed. 165 (1983).

Annot., *Effect of Party's Failure to File Timely Objections, Under 28 USCS § 636(b)(1), to Magistrate's Findings or Recommendations on Right of Review in Appellate Court*, 80 A.L.R. Fed. 921 (1986).

Annot., *Plaintiff's Right to Appeal Adverse Judgment on One Cause of Action as Affected by Acceptance of Remittitur on Another Cause of Action*, 41 A.L.R. Fed. 856 (1979).

Annot., *Right to Class Member, in Class Action Under Rule 23 of Federal Rules of Civil Procedure, to Appeal from Order Approving Settlement with Class*, 30 A.L.R. Fed. 946 (1976).

Annot., *Standing of Attorney to Appeal Federal Court Order Denying, or Limiting Amount of, Attorney's Fees to Client*, 72 A.L.R. Fed. 417 (1985).

Annot., *Sufficiency of "Designation," Under Federal Appellate Procedure Rule 3(c) or Former Federal Civil Procedure Rule 73(b), of Judgment or Order Appealed from in Civil Case by Notice of Appeal Not Specifically Designating Such Judgment or Order*, 2 A.L.R. Fed. 545 (1969).

Annot., *Tolling of Time for Filing Notice of Appeal in Civil Action in Federal Court Under Rule 4(a)(4) of Federal Rules of Appellate Procedure*, 74 A.L.R. Fed. 516 (1985).

Annot., *When Will Premature Notice of Appeal Be Retroactively Validated in Federal Civil Case*, 76 A.L.R. Fed. 199 (1986).

Chapter 3: Appeals from Final Decisions—Civil

Crick, *The Final Judgment As a Basis for Appeal*, 41 Yale L.J. 539 (1932): explores common-law origins of the finality requirement.

Frank, *Requiem for the Final Judgment Rule*, 45 Tex. L. Rev. 292 (1966): decries laxity brought on by statutory changes and changed judicial attitudes.

Comment, *Appellate Procedure—Orders Disqualifying Counsel Are Not Immediately Appealable Under the Collateral Order Exception to 28 U.S.C. § 1291*, 8 U. Ark. Little Rock L.J. 531 (1986): a good treatment of recent developments.

Comment, *Tightening the Collateral Order Doctrine*, 50 U. Mo. K.C. L. Rev. 99 (1981): an analysis of the Supreme Court holding that a district court order denying a motion to disqualify opposing counsel does not create a right of immediate appeal, thus restricting the collateral order doctrine.

Annot., *Appealability of Discovery Order as "Final Decision" Under 28 USCS § 1291*, 36 A.L.R. Fed. 763 (1978).

Annot., *Appealability of Federal Court Order Denying Motion for Appointment of Counsel for Indigent Party*, 67 A.L.R. Fed. 925 (1984).

Annot., *Appealability of Orders in Government Civil Antitrust Actions*, 10 A.L.R. Fed. 607 (1972).

Annot., *Appealability Under "Collateral Order" Doctrine of Order Staying or Dismissing, or Refusing to Stay or Dismiss, Proceedings in United States District Court Pending Federal or State Administrative Determination*, 40 A.L.R. Fed. 740 (1978).

Annot., *Appealability, Under 28 USCS § 1291, of Order Awarding or Denying Attorney's Fees*, 73 A.L.R. Fed. 271 (1985).

Annot., *Necessity of Statement of Reasons Underlying District Court's Decision to Grant Certification Under Rule 54(b) of Federal Rules of Civil Procedure*, 32 A.L.R. Fed. 772 (1977).

Annot., *Order on Motion to Disqualify Counsel As Separately Appealable Under 28 USCS § 1291*, 44 A.L.R. Fed. 709 (1979).

Chapter 4: Appeals from Interlocutory Orders—Civil

Holtzoff, *Interlocutory Appeals in the Federal Courts*, 47 Geo. L.J. 474 (1959): presents initial reactions to permissive interlocutory appeals and provides analysis of legislative history.

Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, 35 Hastings L.J. 829 (1984): a sophisticated treatment of topic, with models.

Porter, *Appeals from Interlocutory and Final Decrees in the United States Circuit Court of Appeal*, 19 B.U.L. Rev. 377 (1939): an extensive article on interlocutory and final decrees; a good historical perspective.

Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 Colum. L. Rev. 89 (1975): deals with aspects of § 1292(b), etc.; concludes that pragmatic approach to appealability has suffered from fundamental confusion as to its basic purposes.

Note, *Appealability of Orders Denying Attorney Disqualification—A Look Beyond Firestone*, 1982 U. Ill. L. Rev. 975: a good treatment of topic.

Note, *Civil Procedure—Interlocutory Appeals: Orders Denying Disqualification of Counsel Are Not Appealable Pursuant to the Collateral Order Exception*, 56 Tul. L. Rev. 1035 (1982): a fairly comprehensive review of the topic.

Note, *The Collateral Order Doctrine After* Firestone Tire & Rubber Co. v. Risjord: *The Appealability of Orders Denying Motions for Appointment of Counsel*, 62 B.U.L. Rev. 845 (1982): a good treatment of the topic.

Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607 (1975): an extensive examination of § 1292(b).

Note, *The Perlman Exception: Limitations Required by the Final Decision Rule*, 49 U. Chi. L. Rev. 798 (1982): an examination of subpoenaed party intervenor's right to immediate appeal.

Note, *Section 1292(b): Eight Years of Undefined Discretion*, 54 Geo. L.J. 940 (1966): concludes that double discretion governs action on appeal; complains that no legal precedent was established as a guide.

Note, *Time Is of the Essence: The Case for Amending 28 U.S.C. § 1292(b) to Permit Interlocutory Appeals in Crimi-*

nal Cases, 1986 Ariz. St. L.J. 727: a good discussion of the policy and practice of permissive interlocutory appeals.

Comment, *The Limits of Section 1292(a)(1) Redefined?: Appealability of the Class Determination as an Order "Refusing an Injunction,"* 9 U. Tol. L. Rev. 488 (1978): a restrictive reading of § 1292(a)(1) to restrict proliferation of piecemeal review.

Annot., *Appealability of Determination Adverse to Confirmation of Action As Class Action Under Rule 23 of Federal Rules of Civil Procedure*, 17 A.L.R. Fed. 933 (1973).

Annot., *Appealability of Federal Court Order Granting or Denying Consolidation, Severance or Separate Trials*, 30 A.L.R. Fed. 393 (1976).

Annot., *Appealability of Federal Court Order Granting or Denying Stay of Arbitration*, 31 A.L.R. Fed. 234 (1977).

Annot., *Appealability of Order Allowing Action to Proceed As Class Action under Rule 23 of Federal Rules of Civil Procedure*, 32 A.L.R. Fed. 674 (1977).

Annot., *Appealability of Order Staying, or Refusing to Stay, Proceedings in Federal District Court Pending Arbitration Proceedings*, 11 A.L.R. Fed. 640 (1972).

Annot., *Appealability, Under 28 USCS § 1292(a)(1), of Order Approving or Refusing to Approve, Proposed Settlement*, 48 A.L.R. Fed. 663 (1980).

Annot., *Review of Federal Judge's Grant or Denial of Motion to Recuse*, 64 A.L.R. Fed. 433 (1983).

Chapter 5: Review by Writ

Bell, *The Federal Appellate Courts and the All Writs Act*, 23 Sw. L.J. 858 (1969): a good overview, written by a-then circuit judge, later Attorney General.

Feigenbaum, *Interlocutory Appellate Review Via Extraordinary Writ*, 36 Wash. L. Rev. 1 (1961): an extensive analysis of interlocutory appellate review with specific applications.

Note, *Mandamus As a Means of Federal Interlocutory Review*, 38 Ohio St. L.J. 301 (1977): a general outline of mandamus.

Note, *Mandamus Proceedings in the Federal Courts of Appeals: A Compromise with Finality*, 52 Calif. L. Rev. 1036 (1964): a general overview.

Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 Harv. L. Rev. 595 (1973): distinguishes jurisdiction from standard of review.

Note, *The Use of Extraordinary Writs for Interlocutory Appeals*, 44 Tenn. L. Rev. 137 (1976): notes trend of increasing flexibility in issuance of extraordinary writ.

Comment, *Federal Courts—Use of Mandamus to Compel Adjudication of a Claim Within Exclusive Federal Jurisdiction*, 24 Vill. L. Rev. 815 (1978): a brief comment on mandamus holding of Supreme Court.

Annot., *Award of Costs in Appellate Proceedings in Federal Court Under Rule 39 of Federal Rules of Appellate Procedure*, 68 A.L.R. Fed. 494 (1984).

Annot., *Dismissal of Appeals Under Rule 42(b) of Federal Rules of Appellate Procedure*, 42 A.L.R. Fed. 758 (1979).

Annot., *Finality for Appeal of Federal Habeas Corpus Orders*, 82 A.L.R. Fed. 937 (1987).

Annot., *Mandamus, Prohibition, or Interlocutory Appeal As Proper Remedy to Seek Review of District Court's Disposition of Motion for Change of Venue Under § 1404(a) or § 1406(a) of Judicial Code*, 2 A.L.R. Fed. 573 (1969).

Annot., *Sanctions, in Federal Circuit Courts of Appeals, for Failure to Comply with Rules Relating to Contents of Briefs and Appendixes*, 55 A.L.R. Fed. 521 (1981).

Chapter 6: Appeals in Criminal Matters

Powell, *Federal Jurisdiction in Criminal Appeals—Appealable Orders in the Fifth Circuit*, 19 Tex. Tech L. Rev. 1003 (1988): a good general discussion of Supreme Court and Fifth Circuit precedents.

Note, *Immediate Appeal of Pretrial Commitment Orders: "It's Now or Never,"* 55 Fordham L. Rev. 785 (1987): discusses

the issue of incompetency in criminal context and the application of the collateral order doctrine.

Note, *A Test for Appealability: The Final Judgment Rule and Closure Orders*, 65 Minn. L. Rev. 1110 (1981): a well-researched consideration of the overlap between finality and criminal trial closure orders.

Annot., *Direct Review by United States Court of Appeals of Duration of Sentence Imposed by District Court in Federal Criminal Prosecution, Where Duration Does Not Exceed Statutorily Authorized Maximum*, 21 A.L.R. Fed. 655 (1974).

Annot., *Dismissal of Indictment or Information As Reviewable on Appeal by United States Under 18 USCS § 3731, As Amended by Omnibus Crime Control Act of 1970*, 30 A.L.R. Fed. 655 (1976).

Annot., *Failure to Appeal Denial of Double Jeopardy Claim Within Time Limits of Rule 4, Federal Rules of Appellate Procedure, As Precluding Review of Claim on Appeal of Conviction at Retrial*, 51 A.L.R. Fed. 770 (1981).

Annot., *Review on Appeal by United States Under 18 USCS § 3731 of Orders Suppressing or Excluding Evidence, or for Return of Seized Property*, 34 A.L.R. Fed. 617 (1977).

Chapter 7: Appeals in Administrative Matters

Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986): concludes that existing law regarding judicial review of administrative agencies is unstable.

Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1 (1975): explores the considerations that determine which federal administrative actions are best reviewed by district courts or courts of appeals; argues against a specialized administrative appeals court.

Hubbard, *Patterns of Judicial Review of Administrative Decisions*, 12 U. Tol. L. Rev. 37 (1980): a philosophical approach to the developing general theory of administrative law and judicial review.

Jones, *A Component Approach to Minimal Rationality Review of Agency Rulemaking*, 39 Admin. L. Rev. 275 (1987): an extensive consideration of administrative procedure; advocates component approach.

Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 Iowa L. Rev. 1297 (1986): examines administrative review and judicial review together.

Mikva, *How Should the Courts Treat Administrative Agencies*, 36 Am. U.L. Rev. 1 (1986): a speech dealing with deference for an agency's interpretations of its organic statutes.

Wald, *Judicial Review of Complex Agency Decisions*, 462 Annals 72 (1982): a good overview of the complexity and difficulty of judicial review of administrative agencies.

Weis, *Agency Non-Acquiescence—Respectful Lawlessness or Legitimate Disagreement?*, 48 U. Pitt. L. Rev. 845 (1987): predicts that courts will increasingly find themselves called on to resolve disputes between agencies and citizens; discusses Separation of Powers tension.

Note, *Extending the Limits of Judicial Review of Regulatory Orders: Committee of Consumer Services v. Public Service Commission*, 1980 B.Y.U. L. Rev. 921: discusses cases that extended limits of judicial review of regulatory orders.

Comment, *Administrative Inaction and Judicial Review: The Rebuttable Presumption of Unreviewability*, 51 Mo. L. Rev. 1039 (1986): a case comment on the Supreme Court holding that an agency's decision not to use its enforcement powers was presumptively unreviewable.

Annot., *Composition of Record on Review of Agency Action Under 28 USCS § 2112(b) and Rule 16(a) of Federal Rules of Appellate Procedure*, 32 A.L.R. Fed. 648 (1977).

Annot., *Direct Review by Federal Courts of Appeals of Action by Administrator of Environmental Protection Agency Not Specifically Enumerated in § 509(b)(1) of the Federal Water Pollution Control Act (33 U.S.C.S. § 1369(b)(1)), Which*

Authorizes Direct Review of Specified Actions Taken by the Administrator, 56 A.L.R. Fed. 918 (1982).

Annot., *Jurisdiction of United States Courts of Appeals to Review Agency Action Under § 9 of Bank Holding Company Act (12 USCS § 1848)*, 40 A.L.R. Fed. 593 (1978).

Annot., *Recall of Appellate Mandate Affirming Order of Federal Agency*, 31 A.L.R. Fed. 795 (1977).

Annot., *When Petition for Review of Administrative Order Under 28 U.S.C. § 2344 Is Timely Commenced*, 84 A.L.R. Fed. 369 (1987): discusses petitions for review of federal administrative agencies.

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