

Chapter 1

The Federal Judicial System

- § 1:1 Structure of the United States Courts
 - § 1:1.1 Constitutional and Legislative Provisions
- Figure 1A: The Thirteen Federal Judicial Circuits
 - § 1:1.2 Judicial Branch Generally
 - § 1:1.3 Judicial Circuits and Districts
 - § 1:1.4 United States District Courts
 - § 1:1.5 United States Courts of Appeals
 - § 1:1.6 “Three-Judge Courts”
 - § 1:1.7 United States Court of Federal Claims
 - § 1:1.8 Court of International Trade
 - § 1:1.9 United States Tax Court
 - § 1:1.10 Court of Appeals for the Federal Circuit
 - § 1:1.11 Bankruptcy Courts
 - § 1:1.12 Supreme Court of the United States
- § 1:2 Statutes and Rules Governing Civil Practice
 - § 1:2.1 Judicial Code of the United States
 - § 1:2.2 Federal Rules of Civil Procedure; Forms
 - § 1:2.3 Federal Rules of Evidence
 - § 1:2.4 Federal Rules of Appellate Procedure
 - § 1:2.5 Rules of the Supreme Court
 - § 1:2.6 Local Rules
- § 1:3 Claims and Remedies Recognized
 - § 1:3.1 Claims Based on Federal Law
 - § 1:3.2 Claims Between Citizens of Different States
 - § 1:3.3 Actions Involving Federal Governmental Parties
 - § 1:3.4 Minimum Dollar Value of Claim
- § 1:4 Statutes of Limitation
 - § 1:4.1 State or Federal Limitation Period
 - § 1:4.2 Discovery Versus Injury Test
 - § 1:4.3 Computation of Time
 - [A] Tolling or Extension of the Statute
 - [B] Absence
 - [C] Secrecy

- [D] Service of Process
- [E] Borrowing Statutes
- § 1:4.4 Waiver of the Statute of Limitations
- § 1:5 Remedies
 - § 1:5.1 One Form of Action for All Relief
 - § 1:5.2 Damages
 - § 1:5.3 Equitable Remedies
- § 1:6 Problems in Federal-State Relations
 - § 1:6.1 Exclusive Federal Jurisdiction
 - [A] Patents
 - [B] Trademarks
 - [C] Copyright
 - [D] Internal Revenue
 - [E] Customs
 - [F] Postal Disputes
 - [G] Admiralty
 - [H] Bankruptcy
 - [I] Diplomatic Cases
 - [J] Fine and Forfeiture Cases
 - [K] Alien Tort Statute
 - [L] Higher Education Act
 - [M] Other Claims
 - § 1:6.2 Exclusive State Court Jurisdiction
 - [A] Probate
 - [B] Domestic Relations
 - § 1:6.3 Concurrent Jurisdiction
 - § 1:6.4 Injunctions Against State Proceedings
 - § 1:6.5 Doctrine of Federal Abstention
 - § 1:6.6 State Law Applied in Federal Litigation
 - [A] The “*Erie* Problem”
- § 1:7 Judicial Officers and Agencies
 - § 1:7.1 Chief Justice
 - § 1:7.2 Chief Judges
 - § 1:7.3 Active and Senior Judges
 - § 1:7.4 United States Magistrate Judges
 - [A] Assignment of Authority
 - [B] Local Rules
 - [C] Matters Subject to Final Determination
 - [D] Matters for Recommended Disposition
 - [E] Trials by Consent and As Special Master
 - [F] Other Powers
 - § 1:7.5 Bankruptcy Judges
 - § 1:7.6 Masters
 - § 1:7.7 Clerk of Court
 - [A] District Court
 - [B] Court of Appeals
 - § 1:7.8 Judicial Conference of the United States
 - § 1:7.9 Circuit Judicial Councils

- § 1:7.10 **Circuit Executives**
- § 1:7.11 **Circuit Judicial Conferences**
- § 1:7.12 **Administrative Office of the United States Courts**
- § 1:7.13 **Federal Judicial Center**
 - [A] **Research**
 - [B] **Innovations and Systems Development**
 - [C] **Continuing Education and Training**
 - [D] **Inter-Judicial Affairs and Information Services**
- § 1:7.14 **Judicial Panel on Multidistrict Litigation**
- § 1:8 **Ancillary Agencies and Personnel**
 - § 1:8.1 **United States Attorneys**
 - § 1:8.2 **United States Marshals**
 - § 1:8.3 **Federal Bureau of Investigation**
- § 1:9 **Additional Resources**

§ 1:1 **Structure of the United States Courts**

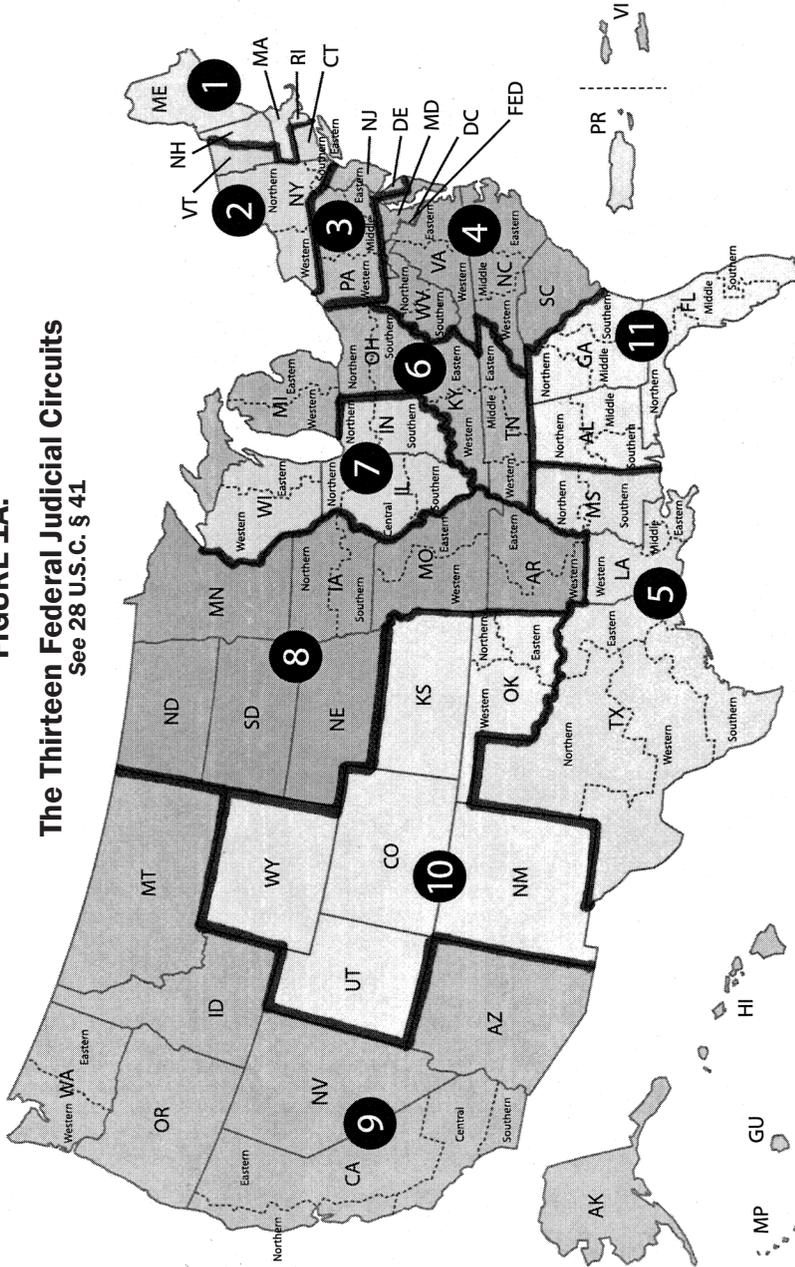
§ 1:1.1 **Constitutional and Legislative Provisions**

The U.S. Constitution, in Article III, provides for a system of courts. Section 1 of Article III provides, in part: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”¹ Congress chose to exercise this power delegated to it by the Constitution shortly after ratification with the Judiciary Act of 1789.² Since the passage of that Act, legislation has been enacted to implement and govern the system. Now codified in title 28 of the U.S. Code, the Judicial Code is a basic resource and will be analyzed in depth in various parts of this book.

Article III blocks Congress from “requir[ing] federal courts to exercise the judicial power in a manner that Article III forbids.”³ Congress, no doubt, “may not usurp a court’s power to interpret and apply the law to the [circumstances] before it,” for “[t]hose who apply [a] rule to particular cases, must of necessity expound and interpret that rule.”⁴ United States Supreme Court decisions place off limits to Congress “vest[ing] review of the decisions of Article III courts in officials of the Executive Branch.”⁵ Congress, the Supreme Court

-
1. U.S. CONST. art. III, § 1.
 2. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
 3. *Plaut v. Spendthrift Farm*, 514 U.S. 211, 218 (1995).
 4. *Marbury*, 5 U.S. 137.
 5. *Plaut*, 514 U.S. at 218; *Hayburn’s Case*, 2 U.S. 409 (1792); *Chi. & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 114 (1948).

FIGURE 1A:
The Thirteen Federal Judicial Circuits
See 28 U.S.C. § 41



has also held, may not “retroactively comman[d] the federal courts to reopen final judgments.”⁶

§ 1:1.2 Judicial Branch Generally

The “third branch” of government in the federal system has only three general levels: the district courts, the courts of appeals, and the U.S. Supreme Court. There are additional, specialized courts with jurisdiction directed to particular subject matters. All are served by the Administrative Office of the United States Courts in Washington, D.C. In addition, the Federal Judicial Center functions to train judges and improve the workings of the federal system of courts.

§ 1:1.3 Judicial Circuits and Districts

The federal courts are divided into circuits, of which there are now thirteen. They are reflected on the political map of the country in Figure 1A, on the opposite page.

There is one appellate court for each circuit. Eleven of these appellate courts are designated by number—United States Court of Appeals for the First Circuit, the Second Circuit, and so on through the Eleventh Circuit.⁷ In addition, there are the District of Columbia Circuit and the Federal Circuit, the latter of which covers all federal judicial districts.⁸

§ 1:1.4 United States District Courts

There exists at least one federal district court for each of the fifty states. There are also separate district courts for Puerto Rico, Guam, the Virgin Islands, and the District of Columbia.

The federal district courts are primarily the trial courts for the federal judicial system and have original jurisdiction over all civil cases and controversies involving bankruptcy matters;⁹ federal questions;¹⁰ diversity of citizenship cases;¹¹ admiralty or maritime matters;¹²

6. *Plaut*, 514 U.S. at 219. See Tyler, *The Story of Klein: The Scope of Congress’s Authority to Shape the Jurisdiction of the Federal Courts*, Federal Courts Stories 87 (V. Jackson & J. Resnik eds. 2010).

7. 28 U.S.C. § 41 (2012 & Supp. II 2014).

8. *Id.*

9. 28 U.S.C. § 1334.

10. 28 U.S.C. § 1331.

11. 28 U.S.C. § 1332.

12. 28 U.S.C. § 1333.

patents, copyrights, and unfair competition;¹³ postal matters;¹⁴ and internal revenue matters.¹⁵

§ 1:1.5 **United States Courts of Appeals**

The thirteen U.S. circuit courts of appeals serve primarily as the appellate court to the ninety-four federal district courts and various federal administrative agencies. Similarly, a circuit court of appeals is the intermediary court between a lower district court and the highest court—the U.S. Supreme Court. The present system of circuit courts of appeals was not created until 1891, and they were given their current title in the 1948 Judicial Code. Presently, they are correctly entitled as the United States Court of Appeals for the _____ Circuit.¹⁶

§ 1:1.6 **“Three-Judge Courts”**

The courts of appeals traditionally sit with three judges. The expression “three-judge courts,” however, refers to specifically convened *district* courts with three judges (district or circuit judges) presiding over a specific case. Cases requiring a three-judge panel have been reduced since 1976 to the point that they are now limited to the situations either “when otherwise required by Act of Congress” or “when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.”¹⁷

13. 28 U.S.C. § 1338.

14. 28 U.S.C. § 1339.

15. 28 U.S.C. § 1340.

16. CHARLES A. WRIGHT AND MARY KAY KANE, *THE LAW OF FEDERAL COURTS*, § 3 (7th ed. 2011).

17. 28 U.S.C. § 2284(a). *Shapiro v. McManus*, 136 S. Ct. 450; 193 L. Ed. 2d 279 (Dec. 8, 2015) (Since 1976, federal law has mandated that a “district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts,” 28 U.S.C. § 2284(a), and has provided that “the judge [presented with a request for a three-judge court] shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges” to serve, § 2284(b)(1). The subsequent provision of § 2284(b)(1), that the district judge shall commence the process for appointment of a three-judge panel “unless he determines that three judges are not required,” should be read not as a grant of discretion to the district judge to ignore § 2284(a), but as a compatible administrative detail requiring district judges to “determin[e]” only whether the “request for three judges” is made in a case covered by § 2284(a). This conclusion is bolstered by § 2284(b)(3)’s explicit command that “[a] single judge shall not . . . enter judgment on the merits.”).

§ 1:1.7 United States Court of Federal Claims

In 1982, Congress determined that there was a special need for nationwide uniformity in certain areas of law and it passed the Federal Courts Improvement Act. This Act abolished the Court of Claims and the Court of International Trade, Patents, and Trademarks, and formed the United States Claims Court. In 1992, the name of the court was changed to the “United States Court of Federal Claims.” The new court retains all of the trial jurisdiction previously held by the Court of Claims and exercised by its Commissioners.¹⁸

The president, with the advice and consent of the Senate, appoints sixteen judges to the Court of Federal Claims for fifteen-year terms.¹⁹

The Court of Federal Claims, located in the District of Columbia, has the authority to sit nationwide²⁰ and also has the same jurisdiction as the former Court of Claims, with a few exceptions. The Court of Federal Claims has the added power to provide the parties before it a complete and full remedy in cases within its jurisdiction.²¹ The Court of Federal Claims also has the exclusive jurisdiction to grant declaratory judgments and equitable relief in a contract claim before the contract award.²² But the Court of Federal Claims does not have the jurisdiction to review Federal Tort Claims Act decisions.²³

Since 1868, Congress has restricted the jurisdiction of the Court of Federal Claims and its predecessors when related actions are pending in any other federal court. *Keene Corp. v. United States*²⁴ held that two suits are “for or in respect to the same claim” when they are “based on substantially the same operative facts . . . at least if there [is] some overlap in the relief requested,” but it reserved the question whether the jurisdictional bar operates if suits based on the same operative facts do not seek overlapping relief. In 2011, the Supreme Court held in *United States v. Tohono O’Odham Nation*,²⁵ applying 28 U.S.C. § 1500, that two suits are barred if they are based on substantially the same operative facts, regardless of the relief each seeks.

18. C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 4101, at 51–52.

19. 28 U.S.C. §§ 171(a), 172(a) (1988).

20. 28 U.S.C. § 173.

21. 28 U.S.C. § 1491(a)(2).

22. 28 U.S.C. § 1491(a)(3).

23. 96 Stat. 41, *repealed* 28 U.S.C. § 1504.

24. *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993).

25. *United States v. Tohono O’Odham Nation*, 563 U.S. 307 (2011).

§ 1:1.8 Court of International Trade

The enactment of the Customs Court Act, 28 U.S.C. § 251, expanded the jurisdiction and powers of the former Customs Court and renamed it the United States Court of International Trade.

The offices of the Court of International Trade are located in New York City,²⁶ where most customs trials are held, although they may be held in other cities in the United States. In certain circumstances, hearing or jury trials may be conducted by an international trade court judge at any location throughout the world.²⁷

The Court of International Trade possesses exclusive jurisdiction over trade matters and is generally vested with the powers of a district court. Its major areas of judicial activity concern the value or classification of importations. These cases are brought by importers who believe they are being required to pay higher customs duties on their importations than are required by law. Importers may also attempt to overturn or to have reversed certain actions by the Secretary of the Treasury.

The court consists of nine judges who are appointed by the president and confirmed by the Senate.²⁸ The president designates one of the judges to be the chief judge. No more than five judges may belong to any one political party. All cases are assigned by the chief judge to a single judge of the court.²⁹ However, if the chief judge finds that the case involves the constitutionality of an act of Congress or a president's proclamation or otherwise has broad and significant implications, he may assign the case to a three-judge panel.³⁰

The judges serve during good behavior, and may be assigned to serve as district court judges.

§ 1:1.9 United States Tax Court

The Tax Court, although originally an executive agency, is now a special court organized under Article I of the Constitution.³¹

It has jurisdiction over controversies involving the existence of deficiencies or overpayments of income, estate, and gift taxes, and personal holding company surtaxes where deficiencies have been determined by the Commissioner of Internal Revenue.³² It also has jurisdiction to redetermine excise tax and penalties on private

26. 28 U.S.C. § 251(c).

27. 28 U.S.C. § 256.

28. 28 U.S.C. § 251(a), (b).

29. 28 U.S.C. § 253.

30. 28 U.S.C. § 252.

31. 26 U.S.C. § 7441.

32. 26 U.S.C. § 7442.

foundations.³³ Ordinarily, refund suits for taxes already paid are brought in the district court, and challenges to taxes assessed but not yet paid are brought in the Tax Court. The Tax Court has adopted its own rules, entitled Rules of Practice and Procedure.

Most of its decisions are subject to review in the court of appeals where the taxpayer resides or, by agreement, in the United States Court of Appeals for the District of Columbia Circuit.³⁴ In trials where the tax in dispute involves \$10,000 or less, simplified trial procedures are available at the option of the taxpayer.³⁵ However, in these cases the decision of the Tax Court is final and not subject to review by any other court.³⁶

The court consists of sixteen judges appointed by the president and confirmed by the Senate who serve for terms of fifteen years. The court sits at locations throughout the United States for hearings conducted by a single judge or commissioner.

§ 1:1.10 Court of Appeals for the Federal Circuit

The Federal Courts Improvement Act of 1982 replaced the courts previously known as the Court of Customs and Patent Appeals and the Court of Claims with a new Court of Appeals of the Federal Circuit.³⁷ The court's nationwide jurisdiction is defined by subject matter and not geographical location. The court has jurisdiction over almost all civil appeals where the United States is a defendant.³⁸ In addition, the court possesses exclusive jurisdiction over appeals from the Court of Federal Claims and from the various Patent Office and trademark administrative bodies.³⁹

The president has the authority to appoint those judges with confirmation by the Senate. The court sits in panels of at least three members unless a court en banc is ordered by a majority of the circuit judges.⁴⁰

§ 1:1.11 Bankruptcy Courts

In 1978, Congress passed the Bankruptcy Reform Act,⁴¹ which substantially expanded the jurisdiction of federal bankruptcy judges

33. *Id.*

34. 26 U.S.C. § 7482.

35. 26 U.S.C. § 7463.

36. *Id.*

37. Act of Apr. 2, 1982, Pub. L. No. 97-164, 1982 U.S.C.C.A.N. (96 Stat.) 27.

38. 28 U.S.C. § 1295(b).

39. 28 U.S.C. § 1295.

40. 28 U.S.C. § 46.

41. Pub. L. No. 95-598, 92 Stat. 2549.

to hear and resolve claims arising in the course of a bankruptcy proceeding.⁴² Specifically, the Act provided that the federal district courts have original and exclusive jurisdiction over all cases arising under title 11. That jurisdiction, which included the authority to try state-law claims necessary for adjudication of the bankruptcy proceeding,⁴³ was in turn to be delegated to the bankruptcy courts, with minor exceptions.⁴⁴ In each judicial district, bankruptcy judges were appointed by the president, with the Senate's consent, for fourteen-year terms and were also subject to removal for incompetency and other grounds.⁴⁵

The Supreme Court, however, held in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*⁴⁶ that the Act's broad grant of jurisdiction to the bankruptcy court was unconstitutional. The Court pointed out that the Act transferred "most, if not all, of 'the essential attributes of judicial power' from the Art. III district court, and . . . vested those attributes in a non-Art. III adjunct."⁴⁷ In *Northern Pipeline*, it was a basic premise that "the bankruptcy judges whose offices were created by the Bankruptcy Act do not enjoy the protections constitutionally afforded to Art. III judges."⁴⁸ These protections, such as life tenure and few forms of removal, help maintain the separation of powers required by the Constitution.

Following the ruling in *Northern Pipeline*, Congress slowly and ineffectively responded to the Court's decision. As a result, the bankruptcy judges became consultants or masters, and many district judges had to wade into the bankruptcy area. Finally in 1984, Congress produced legislation that transferred the appointment authority from the president and the Senate to the courts of appeals to remove the separation of powers problem.⁴⁹ Congress also curbed the bankruptcy court's jurisdiction as it gave it original, but not exclusive, jurisdiction of all civil proceedings that arise in or are related to bankruptcy cases.⁵⁰ Finally, the bankruptcy judge can determine only "core" proceedings as stipulated by section 157.⁵¹ These determinations are

42. 28 U.S.C. § 151.

43. 28 U.S.C. § 1471(b).

44. Klein, *The Bankruptcy Reform Act of 1978*, 53 AM. BANK. L.J. 1 (1979).

45. 28 U.S.C. §§ 151(a), 152, 153(a).

46. *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

47. *Id.* at 87.

48. *Id.* at 60.

49. 28 U.S.C. § 152.

50. 28 U.S.C. § 1334.

51. 28 U.S.C. § 157.

subject to review by the district court⁵² under a “clearly erroneous” standard.⁵³

§ 1:1.12 Supreme Court of the United States

The highest court of the land was directly established by Article III of the Constitution. At present the Supreme Court sits with nine Justices—one Chief Justice and eight Associate Justices appointed by the President with the advice and consent of the Senate.⁵⁴ The Supreme Court maintains original and exclusive jurisdiction in all cases involving controversies between two or more states.⁵⁵ The Court has original but not exclusive jurisdiction over all actions between the United States and a state; actions by a state against the citizens of another state or aliens; or actions to which ambassadors, public ministers, consuls, or vice consuls of foreign states are parties.⁵⁶ The Court exercises appellate jurisdiction in a variety of circumstances, which are outlined in chapter 19.

52. 28 U.S.C. § 158.

53. *See, e.g., In re HECI Exploration Co.*, 862 F.2d 513 (5th Cir. 1988); *In re Daniels-Head & Assocs.*, 819 F.2d 914 (9th Cir. 1987). *See also In re G.S.F.*, 938 F.2d 1467, 1474 (1st Cir. 1991) (observing that the Circuit Courts of Appeal that have considered the issue “have uniformly held that in appeals from the decision of a district court on appeal from the bankruptcy court, [the appellate courts] independently reviews the bankruptcy court’s decision, applying the clearly erroneous standard to findings of fact and de novo review to conclusions of law,” and that because an appellate court is “in as good a position to review the bankruptcy court’s decision as is the district court,” it is the “bankruptcy court’s findings of fact that receive clearly erroneous review [on appeal], [and] not the contrary findings of the district court”). Also regarding appeals from bankruptcy rulings to the Courts of Appeals, see *Bullard v. Blue Hills Bank*, 2015 U.S. LEXIS 2985 (May 4, 2015), where the Supreme Court recognizes the discretionary appeal procedure available under 28 U.S.C. § 158, but rejects efforts to obtain review of orders that deny confirmation of plans in a bankruptcy proceeding, explaining that in a bankruptcy proceeding it is the confirmation of a plan and dismissal of a whole case that have the kind of serious consequences that approximate the rule governing finality in the general civil context. A confirmed plan binds the parties and has preclusive effect; a dismissal lifts the automatic stay and limits its availability in later cases. Denial of confirmation, by contrast, has no similarly concrete consequences.

54. U.S. CONST. art. II, § 2, cl. 2.

55. 28 U.S.C. § 1251.

56. *Id.*

§ 1:2 Statutes and Rules Governing Civil Practice

There are several sources for rules governing federal civil litigation. Far more often than the practitioner would think, the statutes and rules directly address the particular situation being faced. A first recourse in determining how to proceed, therefore, must be to these codified governing principles. Thereafter the cases may be reviewed. The following sections give a general background to these statutes and rules and a listing of many of the topics covered by them.

§ 1:2.1 Judicial Code of the United States

The Judicial Code, found in title 28 of the U.S. Code, contains provisions covering jurisdiction of the courts, venue, specific procedures, and background rules.

Certain of the provisions of the Judicial Code are implicated in almost every piece of federal civil litigation. In order to expedite location of the appropriate section and subsection of the most commonly utilized portions of the Code, the following list of subjects covers the most commonly cited portions of the statute.

Commonly Cited Sections of the Federal Judicial Code

JURISDICTION

Section

- 1331. Federal question
- 1332. Diversity of citizenship; amount in controversy; costs
- 1333. Admiralty, maritime and prize cases
- 1334. Bankruptcy cases and proceedings
- 1335. Interpleader
- 1336. Surface Transportation Board's orders
- 1337. Commerce and antitrust regulations; amount in controversy; costs
- 1338. Patents, plant variety protection, copyrights, mask works, trademarks, and unfair competition
- 1339. Postal matters
- 1340. Internal revenue; customs duties
- 1341. Taxes by states
- 1342. Rate orders of state agencies
- 1343. Civil rights and elective franchise
- 1344. Election disputes
- 1345. United States as plaintiff

**Commonly Cited Sections of the Federal Judicial Code
(cont'd)**

- 1346. United States as defendant
- 1347. Partition action where United States is joint tenant
- 1348. Banking association as party
- 1349. Corporation organized under federal law as party
- 1350. Alien's action for tort
- 1352. Bonds executed under federal law
- 1357. Injuries under federal laws
- 1358. Eminent domain
- 1359. Parties collusively joined or made
- 1361. Action to compel an officer of the United States to perform his duty
- 1367. Supplemental [formerly pendent or ancillary] jurisdiction

VENUE

Section

- 1391. Venue generally
- 1394. Banking association's action against Comptroller of Currency
- 1395. Fine, penalty or forfeiture
- 1396. Internal revenue taxes
- 1397. Interpleader
- 1400. Patents and copyrights, mask works, and designs
- 1401. Stockholder's derivative action
- 1402. United States as defendant
- 1403. Eminent domain
- 1404. Change of venue
- 1405. Creation or alteration of district or division
- 1406. Cure or waiver of defects
- 1407. Multidistrict litigation
- 1408. Venue of cases under title 11
- 1409. Venue of proceedings arising under title 11 or arising in or related to cases under title 11
- 1410. Venue of cases ancillary to foreign proceedings
- 1411. Jury trials
- 1412. Change of venue

§ 1:2.2 Federal Rules of Civil Procedure; Forms

The Federal Rules of Civil Procedure are the most frequently used guides to the conduct of litigation. They apply in all district court proceedings and range from the procedures to be followed before the commencement of a lawsuit to its conclusion at the trial level, including enforcement of any resulting judgment. Each of the Federal Rules is discussed in this book.

Cooperative Role of Court and Counsel. In 2015, the Supreme Court of the United States amended Rule 1 of the Federal Rules of Civil Procedure, an “iconic” provision that has long stated, in the broadest possible terms, the general aspirations of the federal legal system. As amended, this “first rule” of federal practice now places responsibility *on counsel*—seemingly to the same extent as that of the court—to work toward the fair and sensible implementation of federal procedure and practice: “These rules govern the procedure in all civil actions and . . . should be construed, and administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” This added language was made in conjunction with the plenary revision of federal discovery mechanisms in 2015, discussed in chapter 9.

Advisory commentary accompanying the current version of Rule 1 notes that “[m]ost lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay.” The drafters further opine that “[e]ffective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure,” thus stressing the concept of “proportionality” that infuses the 2015 revisions to the discovery provisions in Rules 26 through 37. While there is evidently a duty to seek these fair, efficient and least-burdensome approaches to the mechanics of trial preparation, the commentary accompanying the amendment stresses that Rule 1—in and of itself—“does not create a new or independent source of sanctions.”

Example “Forms” for Pleadings and Other Illustrative or Model Papers in Federal Practice. Beginning in 1939, the Federal Rules of Civil Procedure have contained sample “forms” illustrating with stark simplicity the brevity and directness permitted in federal pleading. Most of these forms were less than one page in length. In the modern era, however, in which “plausible factual support”⁵⁷ is required for

57. See section 4:4 of this Treatise, discussing the modern U.S. Supreme Court case law discussing the implementation of Rule 8’s “short, plain statement” requirement in an era of highly burdensome litigation.

federal pleadings, these forms were increasingly viewed as a misleading or inappropriate for the level of detail and factual material needed in modern practice. In 2015, the Supreme Court of the United States accepted the recommendation of the rules drafting committees of the Judicial Conference of the United States and abolished the appendix of forms. Only the “waiver of service of process” forms were preserved, and those were moved to adjoin Rule 4, which addresses the mechanics of service in federal practice.

§ 1:2.3 Federal Rules of Evidence

The Federal Rules of Evidence are found in title 28 of the U.S. Code. These rules govern proceedings before U.S. courts and magistrate judges.⁵⁸ A detailed summary of the rules will be found in chapter 15.⁵⁹

§ 1:2.4 Federal Rules of Appellate Procedure

The Federal Rules of Appellate Procedure govern appeals to the U.S. courts of appeals. These rules have helped to create a more uniform guide than previously, when appellate procedure was regulated by the local rules of each circuit. The rules are discussed in detail in chapter 19.

§ 1:2.5 Rules of the Supreme Court

The specialized procedures applicable in presenting a case before the nation's highest court are set forth in the Rules of the Supreme Court.

§ 1:2.6 Local Rules

The local rules of the district or circuit in which the attorney will appear are an important body of rules sometimes overlooked in planning federal litigation. Before taking any action, the attorney should consult these rules, as they often specify both the format and content required for various papers and may set forth prerequisites to the maneuver being contemplated. Around the country these rules may be called “Calendar Rules,” “General Rules,” “Civil Rules,” or simply “Local Rules.”⁶⁰

58. Effective December 1, 1990, Congress changed the title of United States magistrate to United States magistrate judge. *See* Pub. L. No. 101-650, 1990 U.S.C.C.A.N. (104 Stat.) 5117.

59. *See generally* KENT SINCLAIR, *THE TRIAL HANDBOOK* (PLI current edition with Annual Updates).

60. The practitioner will find the local rules in most state rule pamphlets containing federal materials. They are also available from the courts in most

These local rules state the procedure for admission of attorneys to practice in the specific district or circuit, the term of the court, the functions of the clerk of court, the filing of motions and more specific data such as the number of copies required to be filed, the limitations on the length of memoranda, the time within which memoranda must be filed, and the limitations upon proper size and margins.

Each circuit court has local rules concerning procedures for ordering transcripts, filing and docketing the appeal, scheduling, motions, summary disposition of appeals, colors of the covers of briefs, assignments for oral argument, time limitations upon oral argument, petitions for rehearing, petitions for en banc consideration, and stay of mandate.

The district court rules will include the procedure for having cases set for trial, pretrial conferences, setting of motions for oral argument, methods of service of memoranda of law, and other details relating to trial. Local rules are often revised by an order of the court signed by all judges. There are often specialized subsets of such rules for local bankruptcy procedures. Some of the many topics often addressed in such rules are listed below.

Typical Local Rule Topics

Actions by or on Behalf of Infants or Incompetents

Address of Party or Original Owner of Claim to Be Furnished

Admission to the Bar

All Civil Jury Cases—Six-Member Jury

Allowances to Attorneys and Receivers

Appeals

Approval of Bonds or Corporate Sureties

Assignment of Cases

- (a) Civil
- (b) Criminal
- (c) Bankruptcy
- (d) Chief Judge; Senior Judge
- (e) Proceedings After Assignment
- (f) Motion for Consolidation of Cases

districts. The local rules of all circuits are printed in *United States Code Annotated* following title 28, the Judicial Code, and most are available on websites for the federal courts as well.

Typical Local Rule Topics (cont'd)

Attorneys of Record and Parties Appearing Pro Se Calendars

- (a) Order of Cases
- (b) Number of Jurors
- (c) Preferences
- (d) Motions Returnable
- (e) Impleader
- (f) Status of Cases
- (g) Preparation for Trial

Categories of Cases; Information Sheet

Certification of Record on Appeal

Clerk to Sign Certain Orders

Commission to Take Testimony

Conferences

Contempts

Counsel Fees on Taking Depositions in Certain Cases

Custody of Exhibits

Default Judgment

- (a) By the Clerk
- (b) By the Court

Deposition for Use Abroad

Description of Real Property in Notice of Sale

Discipline of Attorneys

Dismissal for Want of Prosecution

Effective Date

Entering Satisfaction of Judgments or Decrees

Entry of Order or Judgment

Exhibits

Filing Papers: Supplying Marked Pleadings for Trial

Forfeiture of Collateral in Lieu of Appearance

Form of Orders, Judgments, and Decrees

Form of Papers

Grand and Petit Jurors

Habeas Corpus and Motions Pursuant to 28 U.S.C. § 2255

Judge and Clerk

Typical Local Rule Topics (*cont'd*)

Masters

- (a) Agreement on a Master
- (b) May Sit Outside District
- (c) Report
- (d) Fees Taxable
- (e) Order of Reference
- (f) Filing of Report
- (g) Confirmation, etc., of Master's Report

Miscellaneous Part Judge

- (a) Matters and Proceedings Heard by Miscellaneous Part Judge
- (b) Disposition of Emergency Matters
- (c) Subsequent Emergency Procedures

Motion Days

Motions

Naturalization Days

Note of Issue

Notice of Changes in Rules

Notice of Claim of Unconstitutionality

Notice of Sale

- (a) Class Actions
- (b) Fees in Stockholder and Class Actions

Number of Experts in Patent Cases

Oath of Master, Commissioner, etc.

Objections and Motions Related to Discovery Procedures

Official Newspapers

Order of Taking Depositions

Orders

Payment of Fees in Advance

Petitions for Habeas Corpus in Exclusion and Deportation Cases

Photographing, Broadcasting, and Televising in Courtrooms and Environs

Powers and Duties of Full-Time and Part-Time Magistrate Judges

Preferences

Preparation and Entry of Judgments, Decrees, and Final Orders

Procedure in Absence of Rule

Proposed Findings of Fact and Conclusions of Law

Publication of Advertisements

Typical Local Rule Topics (cont'd)

Reassignment of Cases

Receivers

Reference to a Magistrate of an Information Charging a Minor Offense

Related Cases

- (a) Defined
- (b) Designation of Related Cases
- (c) Assignment of Related Cases
- (d) Cases Erroneously Assigned As Related Cases
- (e) Assignment Credit
- (f) Duty of Attorneys

Remand by an Appellate Court

Removal of Cases from State Courts

Review of Causes; Dismissal for Want of Prosecution

Sanctions

- (a) Dismissal or Default
- (b) Imposition of Costs on Attorneys

Security for Costs

Separation of Issues in Civil Suits

Service and Filing of Papers

Service of the Writ in Exclusion and Deportation Cases

Sessions Held in Parts

Sessions of Court with Jury

Settlements, Apportionments, and Allowances in Wrongful Death Actions

Stenographic Transcript

Student Practice Rule

Submission of Orders, Judgments, and Decrees

Supersedeas

Sureties

Taxable Disbursements

Terms of Court Cases Assigned to Single Judge for All Purposes

Three-Judge Court

Time of Motion to Join Third Party

Transfer of Cases to Another District

Trial Calendars and Adjournments

U.S. Magistrate Judges' Jurisdiction and Duties

Use of Law Students As Part-Time Clerks to District Judge

§ 1:3 Claims and Remedies Recognized

The federal district courts have plenary jurisdiction within the constitutional framework that controls the U.S. court system. This framework *limits* jurisdiction to specifically authorized areas. Problems of jurisdiction are discussed in detail in chapter 2. Provisional remedies are discussed in chapter 6. Judgments, post-trial proceedings, and special remedial proceedings are discussed in chapters 16, 17, and 18, respectively.

§ 1:3.1 Claims Based on Federal Law

Claims that arise under the laws of the United States may be brought in the federal district court. The federal law may be a statute (or rule promulgated thereunder) or the Constitution itself. Surprisingly, it was not until 1875 that Congress gave the federal district courts original jurisdiction over such federal-question cases.⁶¹ The issue of when a civil action arises under the “Constitution, laws or treaties of the United States”⁶² is treated in detail in chapter 2.

§ 1:3.2 Claims Between Citizens of Different States

The federal forum is open to suits between citizens of different states.⁶³ Traditionally, this jurisdiction is justified by the fear that state courts would be biased against the out-of-state party. In order to have jurisdiction based on diversity of citizenship, the amount in controversy must exceed \$75,000.⁶⁴ The nature of diversity jurisdiction is discussed in chapter 2.

§ 1:3.3 Actions Involving Federal Governmental Parties

Any lawsuit that will involve a U.S. official, agency, or other entity should be brought in the federal courts. Essentially, this grant of judicial power was provided by the Constitution. However, differences arise between cases where the United States is a defendant, and where the United States is a party plaintiff. Where the United States, or a federal officer or agent, commences a suit, federal jurisdiction is clearly granted by statute.⁶⁵ Where the United States is a defendant, however, the problem of sovereign immunity arises. If sovereign

61. C. WRIGHT & M.K. KANE, *supra* note 16, § 17 at 92.

62. 28 U.S.C. § 1331(a).

63. 28 U.S.C. § 1332.

64. *Id.*

65. 28 U.S.C. § 1345.

immunity is not a bar, the federal courts generally would have jurisdiction where the United States is a defendant.⁶⁶

§ 1:3.4 Minimum Dollar Value of Claim

For most purposes a claim of any size may be brought in the federal court. As noted above, in cases in which jurisdiction is founded solely upon diversity of citizenship of the parties, the dollar value of the claim asserted must be in excess of \$75,000, exclusive of interest and costs.⁶⁷ The purpose of the requirement has been to keep the federal courts from wasting “away their time in the trial of petty controversies.”⁶⁸ Questions as to how the calculation should be made have often been raised. A full discussion is found in chapter 2.

§ 1:4 Statutes of Limitation

An actionable wrong survives until the applicable statute of limitations decrees that it is too stale to be sued upon. Among the many reasons for barring old claims are problems of surprise and the loss of evidence necessary to litigate the claim fairly.⁶⁹ It should be noted that the statute of limitations in a particular case may or may not run against the federal government.⁷⁰ Furthermore, the protection afforded a defendant by a particular statute of limitations is not a fundamental right, but it is subject to a large degree of legislative control.⁷¹

§ 1:4.1 State or Federal Limitation Period

The limitation period bars the action as well as relief. For this reason, it has substantive implications. Thus, causes of action at law and equity that are not federally created are governed by the statute of limitations of the state in which the federal district court sits.⁷² In

66. See C. WRIGHT & M.K. KANE, *supra* note 16, § 22 at 115–19.

67. 28 U.S.C. § 1332(b).

68. S. REP. NO. 1830, 85th Cong., 2d Sess. 4 (1958).

69. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 630 (2007); *United States v. Kubrick*, 444 U.S. 111 (1979). See generally Sinclair & Szypszak, *Limitations of Action Under the FTCA: A Synthesis and Proposal*, 28 HARV. J. LEGIS. 1 (1991).

70. *United States v. Summerlin*, 310 U.S. 414 (1940). See also *Badaracco v. Comm’r*, 464 U.S. 386, 399 n.10 (1984).

71. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945).

72. *Guar. Tr. Co. v. York*, 326 U.S. 99 (1945); see *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) (commencement of a diversity action for purposes of statute of limitations determinations is defined by state law of the jurisdiction in which the court sits or whose law governs the merits).

the case of a federally created right, the court will apply any federal limitations period specified in a statute under which suit is brought.

In 1990, Congress created a fallback four-year statutory limitation to be applied in civil actions where the federal law at issue is silent as to a limitations period.⁷³ The suit must be commenced no later than four years after the cause of action accrues, unless the statute provides otherwise.⁷⁴ However, this fallback limitation is prospective in application, suitable only for federal laws enacted after December 1, 1990.⁷⁵ For statutes enacted prior to this date, which do not prescribe a time limitation, the court will continue to apply the most closely analogous state period of limitation.⁷⁶ Similarly, in any case where state law supplies the rule of decision on the merits, as in a diversity case, the state time limitation will govern.

The exception would be where a federal statute expressly prescribes a “tolling” (suspension) of applicable state limitations periods. *Artis v. District of Columbia*⁷⁷ construed 28 U.S.C. § 1367(d), which provides that the “period of limitations for” refiling in state court a state claim dismissed along with related federal claims by a federal district court exercising supplemental jurisdiction, “shall be tolled while the claim

73. Pub. L. No. 101-650, 1990 U.S.C.C.A.N. (104 Stat.) 5115.

74. *Id.*

75. In explicitly rejecting retroactive application of this four-year fallback time limitation, the House Report observes in part that

with respect to many statutes that have no explicit limitations provision, the relevant limitations period has long since been resolved by judicial decision, with the applicable period decided upon by the courts varying dramatically from statute to statute. Under these circumstances, retroactively imposing a four year statute of limitations on legislation that the courts have previously ruled is subject to a six month limitations period in one statute, and a ten year period in another, would threaten to disrupt the settled expectations of a great many parties. Given that settling the expectations of prospective parties is an essential purpose of statutes of limitation, the Committee was reluctant to apply this section retroactively without further study to ensure that the benefits of retroactive application would indeed outweigh the costs.

H. REP. NO. 734, 101st Cong., 2d Sess. 24, *reprinted in* 1990 U.S.C.C.A.N. 6802, 6870.

76. *Herget v. Cent. Nat'l Bank & Tr. Co.*, 324 U.S. 4 (1945); *Brady v. Daly*, 175 U.S. 148 (1899); *but see DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983) (where adoption of the most closely analogous state statute of limitations would be at odds with the purpose of federal law, timeliness rules will be drawn from a related federal statute or such alternatives as laches).

77. *Artis v. District of Columbia*, 138 S. Ct. 594 (2018), citing *Jinks v. Richland County*, 538 U.S. 456, 123 S. Ct. 1667, 155 L. Ed. 2d 631 (2003).

is pending [in federal court] and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.” The Court held that to “toll” a state law statute-of-limitations period means to hold it in abeyance, i.e., to stop the clock, based on the ordinary meaning of the statutory language. Where a former employee sued alleging Title VII employment discrimination along with three state law claims, fifty-nine days after a district court dismissed the federal claim and declined to exercise supplemental jurisdiction over the state law claims, the employee refiled her state law claims in state court. Dismissal of those claims as time-barred was in error, because 28 U.S.C. § 1367(d) stopped the clock on the employee’s state law claims while her federal court proceeding was pending. The Court observed that this stop-the-clock interpretation of section 1367(d) does not present a serious constitutional problem, and that it has previously rejected the argument that section 1367(d) impermissibly exceeds Congress’s authority under the Necessary and Proper Clause.

On the other hand, in a suit to enforce a federally created *equitable right*, the court will not adopt the state statute of limitations if a federal limitation does not exist. Rather, the question to be determined is whether, on the basis of equitable principles, the plaintiff has delayed inexcusably in bringing suit so as to make a judgment against the defendant unfair.⁷⁸

§ 1:4.2 Discovery Versus Injury Test

For most purposes, the limitation period runs from the date of the wrong—when the cause of action has arisen.⁷⁹ Along the same lines, it can be said that generally the commencement of the limitations period will not be postponed simply because the plaintiff has not discovered the injury.⁸⁰ The principal exception to this rule may be found where the injury is concealed from the plaintiff by the defendant. In such a case, the statute of limitations will start to run from the time when the wrong was discovered or reasonably should have been discovered.⁸¹

-
78. *Holmberg v. Ambrecht*, 327 U.S. 392 (1946). *See also, e.g., Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990) (Court is “generally . . . much less forgiving in receiving late filings where the claimant [has] failed to exercise due diligence in preserving his legal rights”); *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) (“One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence.”).
79. *United States v. Wurts*, 303 U.S. 414 (1938).
80. *Harper v. Harper*, 252 F. 39 (4th Cir. 1918); *W. Pocahontas Corp. v. E. Gas & Fuel Assocs.*, 213 F. Supp. 657 (S.D. W. Va. 1963).
81. *Traer v. Clews*, 115 U.S. 528 (1885); *Rosenthal v. Walker*, 111 U.S. 185 (1884).

§ 1:4.3 Computation of Time

Several factors are applied in calculating time for statute of limitations purposes. These include the following.

[A] Tolling or Extension of the Statute

A party may agree in writing to extend the period of exposure to suit on the claim. The agreement, usually a clause in a contract, may also shorten the period.⁸²

[B] Absence

It is usually held that absence of the defendant from the jurisdiction will not toll (halt) the running of the statute until that defendant returns, unless provided for by statute.⁸³ For most purposes, the jurisdiction is the state in which the district court sits.⁸⁴

[C] Secrecy

Hiding or concealment by a defendant, if shown to have caused a prospective plaintiff to delay bringing suit, will delay the commencement of the statutory period until discovery was reasonably to be expected.⁸⁵ This does not mean that a plaintiff who is ignorant of a right to sue, or has no knowledge of facts out of which a cause of action accrues, will have the commencement of the running of the statute of limitations postponed to the date of such discovery.⁸⁶

[D] Service of Process

In some states, a suit is begun when process has been served. Diversity cases in those states follow that rule. However, the federal rule in other instances is that a suit begins when the complaint is filed.⁸⁷

82. Order of United Commercial Travelers v. Wolfe, 331 U.S. 586 (1947); Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964); Gifford v. Travelers Protective Ass'n, 153 F.2d 209 (9th Cir. 1946).

83. See 51 AM. JUR. 2D *Limitation of Actions* § 169. This may be provided for by a separate statute or contained within the statute of limitations itself.

84. Cent. Vt. R.R. v. White, 238 U.S. 507 (1915).

85. Traer v. Clews, 115 U.S. 528 (1885).

86. Harper v. Harper, 252 F.39 (4th Cir. 1918).

87. The Supreme Court held in Walker v. Amco Steel Corp., 446 U.S. 740 (1980), that where state law governs the merits of an action, typically diversity cases, state law controls the statute of limitations issue as to whether personal service or mere filing of the complaint with the clerk of court is sufficient to end the running of the statute. It is widely assumed that in actions under federal law Rule 3, an action "is commenced by filing a complaint with the court" means that filing is sufficient to stop the statutory period; the court in *Walker* reserved judgment on the point,

[E] Borrowing Statutes

Borrowing statutes recognize the statutes of limitations of other states and foreign countries. These provisions usually provide that when a right of action accrues in another jurisdiction and is elsewhere barred, the action will be barred by the resident court as well. These statutes are designed to prevent nonresidents from coming into the state simply because that state's statute of limitations is more favorable than that of the state where the cause of action occurred.⁸⁸

§ 1:4.4 Waiver of the Statute of Limitations

The defense of the statute of limitation must be raised at the first opportunity. The defense has traditionally been seen as an affirmative one, and if not presented it will be deemed to have been waived by the defendant.⁸⁹ The effect of the waiver is that the defense is no longer available, and the plaintiff may recover even though the statute of limitations has run out.⁹⁰ It has been held that the Congress may, by legislative provision, waive a statute of limitations defense.⁹¹ Similarly, the Supreme Court has held that a waiver of a limitations statute imposed on causes of action brought against the United States is ineffective in the absence of expressed or implied authority conferred upon an officer of the federal government for such waiver.⁹² Such a waiver may be part of a contractual agreement or it may arise merely by conduct.⁹³

§ 1:5 Remedies

§ 1:5.1 One Form of Action for All Relief

The Federal Rules of Civil Procedure make it clear that all claims properly presented to the district court may be raised in one action. The subject matter and legal theories advanced may be presented in

however. *See* *Converse v. Gen. Motors Corp.*, 893 F.2d 513 (2d Cir. 1990); *Mullen v. Sears, Roebuck & Co.*, 887 F.2d 615 (5th Cir. 1989).

88. For an example of the effect of a borrowing statute, see *Cope v. Anderson*, 331 U.S. 461, 464–68 (1947). *See generally* 51 AM. JUR. 2D *Limitation of Actions* § 88.

89. *Allen v. Smith*, 129 U.S. 465 (1889); *Retzer v. Wood*, 109 U.S. 185 (1883); *see* FED. R. CIV. P. 12(h).

90. *Burnett v. Desmornes y Alvarez*, 226 U.S. 145 (1912).

91. *United States v. Cumming*, 130 U.S. 452 (1889); *Grant v. United States*, 192 F.2d 482 (4th Cir. 1951).

92. *De Arnaud v. United States*, 151 U.S. 483 (1894).

93. *See* 51 AM. JUR. 2D *Limitation of Actions* §§ 351, 354.

one action even if the alternatives are mutually exclusive. A full discussion is found in chapter 5.

§ 1:5.2 Damages

For both federal and state causes of action heard on diversity grounds, the district courts are empowered to award damages—nominal, actual, and punitive. Under certain federal statutes, such as the Copyright Act, damages are prescribed (in lieu of any proof of loss being required), which the court may, and at times must, award.

§ 1:5.3 Equitable Remedies

The powers of an equity court reside in the article III judge. That judge may order accountings, specific performance, and any other traditionally equitable form of relief. There is no arbitrary limitation on the juxtaposition of claims for dollar damages with requests for equitable decrees, either in complaints filed or judgments alternately entered by the court.

§ 1:6 Problems in Federal-State Relations

Any system that superimposes a grid of federal districts upon a map of state court sovereignty contains the seeds of friction. A variety of doctrines discussed in chapter 2 bear on this problem. These jurisdictional considerations should be viewed in the context of a few recognized rules.

§ 1:6.1 Exclusive Federal Jurisdiction

There is subject matter over which Congress has assumed superintendence to such an extent that the commerce clause powers of the Constitution have led to exclusive jurisdiction in the federal courts.⁹⁴ Disputes in the following areas, therefore, must be brought in federal courts.⁹⁵

94. Issues pertaining to exclusive jurisdictional domains of the federal courts are discussed in these Supreme Court decisions: *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996).

95. In *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), the Supreme Court noted in a case involving a tender offer that § 27 of the Exchange Act confers exclusive jurisdiction upon the federal courts in such suits. A state judgment embodying a settlement was held entitled to full faith and credit, notwithstanding the fact that it released claims within the exclusive jurisdiction of the federal courts. Thus, even when

[A] Patents

Federal jurisdiction over patent disputes is stipulated in 28 U.S.C. § 1338(a). Despite the text of 28 U.S.C. § 1338(a) providing for exclusive federal jurisdiction over any case “arising under any Act of Congress relating to patents,” the Supreme Court has held in *Gunn v. Minton*⁹⁶ that this statute does not erect exclusive federal court jurisdiction over a legal malpractice action in which the plaintiff alleged that the defendant attorney’s negligence prejudiced his patent rights. Thus, even though disposition of a malpractice claim may require interpretation and application of federal patent law jurisprudence, the claim is not based on patent law. Applying the test spelled out in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,⁹⁷ the court in *Gunn* held that, while the malpractice claim raises patent law issues, which necessarily must be included in the disposition, no matter how the state courts resolve the hypothetical “case within a case” that legal malpractice claims entail, the real-world result of the prior federal patent litigation will not change. And the Court concluded that allowing state courts to resolve these cases will not undermine the development of a uniform body of patent law.

[B] Trademarks

Registered trademarks are granted access to federal courts by the Lanham Act, 15 U.S.C. § 1115 *et seq.* The cognate tort of unfair competition may be brought in either state or federal court. Federal jurisdiction in matters concerning unfair competition is granted by 28 U.S.C. § 1338 when the action is made pendent to a validly brought trademark, copyright, or patent action, or by 15 U.S.C. § 1125(a) when false designation of origin is the gist of the action.

[C] Copyright

With respect to copyright, 17 U.S.C. § 301 preempts resolution of all rights equivalent to “the exclusive rights within the general scope of copyright as specified by section 106” and abolishes all corresponding state laws, either common law or statutory. Areas not affected by this preemption are delineated in section 301(b). State law can thus encompass:

exclusively federal claims are at stake, there is no universal right to litigate such claims in federal court. *See also, e.g.,* *Allen v. McCurry*, 449 U.S. 90, 105 (1980).

96. *Gunn v. Minton*, 133 S. Ct. 1059 (2013).

97. *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005).

1. subject matter not covered by title 17;
2. “any cause of action arising from undertaking” begun prior to January 1, 1978; and
3. activities not violating any of the exclusive rights granted to copyright owners in section 106 of title 17.

Federal jurisdiction over copyright is contained in 28 U.S.C. § 1338.

[D] Internal Revenue

Federal jurisdiction over internal revenue controversies is cited in 28 U.S.C. § 1340.

[E] Customs

Federal jurisdiction over customs matters is granted by 28 U.S.C. § 1582.

[F] Postal Disputes

Federal jurisdiction over postal matters is codified in 28 U.S.C. § 1339.

[G] Admiralty

Federal jurisdiction over admiralty and maritime matters is granted by 28 U.S.C. § 1333.

[H] Bankruptcy

Federal jurisdiction over bankruptcy matters is provided in 28 U.S.C. § 1334. Moreover, there are special bankruptcy courts designed solely for the purpose of handling bankruptcy matters.

[I] Diplomatic Cases

Federal jurisdiction over diplomatic cases is traceable to Article III of the Constitution, wherein the Supreme Court is granted original jurisdiction over matters involving ambassadors and other public ministers.

[J] Fine and Forfeiture Cases

Under 28 U.S.C. § 1355, the federal district courts have exclusive original jurisdiction over an action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture incurred under any congressional act. The same statute contains an exception for certain matters within the jurisdiction of the Court of International Trade.

[K] Alien Tort Statute

The Alien Tort Statute, 28 U.S.C. § 1350, enacted as part of the original Judiciary Act of 1789, provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The Supreme Court has held in *Kiobel v. Royal Dutch Petroleum Co.*⁹⁸ that this is a jurisdictional statute that creates no causes of action, but simply permits federal courts to “recognize private claims [for a modest number of international law violations] under federal common law.” Answering the question whether the statute provides the courts with authority to recognize a cause of action under U.S. law to enforce a norm of international law, the Court concluded there is a “presumption against extraterritoriality” that applies to claims under the Alien Tort Statute, and that nothing in the statute rebuts that presumption. Thus, claims seeking relief for violations of the law of nations occurring outside the United States is barred.

[L] Higher Education Act

The Higher Education Act of 1965, as amended, provides for exclusive federal jurisdiction over disputes between institutions of higher education and accrediting agencies or certain recognized accrediting associations “involving the denial, withdrawal, or termination of accreditation of the institution.”⁹⁹ The statute applies to accredited trade schools as well as conventional institutions of academic learning.¹⁰⁰

[M] Other Claims

Other federal statutes and programs provide for exclusive federal jurisdiction over claims and disputes arising under or out of those statutes and programs. One example is 42 U.S.C. § 4072, providing for exclusive federal jurisdiction over litigation arising out of the National Flood Insurance Program.¹⁰¹ Another is the Securities and Exchange Act of 1934, which grants federal district courts exclusive jurisdiction over “all suits in equity and actions at law brought to

98. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

99. 20 U.S.C. § 1099b(f); *Mountain State Univ. v. Higher Learning Comm’n*, 2016 U.S. Dist. LEXIS 18144 (S.D. W. Va. 2016).

100. *Chi. Sch. of Automatic Transmissions, Inc. v. Accreditation All. of Career Schs. and Colls.*, 44 F.3d 447, 449 (7th Cir. 1994).

101. *Ferraro v. Liberty Mut. Fire Ins. Co.*, 796 F.3d 529 (5th Cir. 2015) (litigation involving a “Standard Flood Insurance Policy” purchased from an insurer under the National Flood Insurance Program).

enforce any liability or duty created by [the Exchange Act] or the rules or regulations thereunder.”¹⁰²

§ 1:6.2 Exclusive State Court Jurisdiction

There are subject areas in which the federal courts traditionally have refrained from acting.¹⁰³ The two principal areas are probate and domestic relations.

[A] Probate

Although the federal district court may have jurisdiction on diversity grounds, the federal courts have refused to adjudicate disputes involving probate.¹⁰⁴

[B] Domestic Relations

In the same vein as probate matters, federal courts traditionally have refused to decide cases involving domestic relations. Generally, federal courts have no jurisdiction over domestic relations matters.¹⁰⁵ Rather, state courts have exclusive jurisdiction over these matters.¹⁰⁶

102. 15 U.S.C. § 78aa(a). The U.S. Supreme Court has held that “the jurisdictional test established by that provision is the same as the one used to decide if a case ‘arises under’ a federal law,” as prescribed in 28 U.S.C. § 1331. *Merrill Lynch, Pierce, Fenner & Smith v. Manning*, 136 S. Ct. 1562, 1566 (2016).

103. Only rights that arise independently of the domestic relations proceeding may be litigated in federal courts (for example, abuse claims by a child against a parent). *See Ankenbrandt v. Richards*, 504 U.S. 689 (1992). A few lower court decisions have probed the margins of this doctrine in contexts where civil rights claims are made, or where the issue is a fixed support obligation analogous to enforcement of other money judgments. *See, e.g., Lancaster v. Merchs. Nat’l Bank*, 961 F.2d 713, 715 (8th Cir. 1992).

Some other subject matters are committed to state court decision-making. *See, e.g., Int’l Sci. & Tech. Inst. v. Inacom Commc’ns, Inc.*, 106 F.3d 1146 (4th Cir. 1997) (telephone consumer protection actions).

104. *Markham v. Allen*, 326 U.S. 490 (1946); *Marshall v. Marshall*, 547 U.S. 293 (2006); *see generally* Winkler, *The Probate Jurisdiction of the Federal Courts*, 14 PROBATE L.J. 77 (1997).

105. *See Ankenbrandt v. Richards*, 504 U.S. 689 (1992); *Catz v. Chalker*, 142 F.3d 279, 290 (6th Cir. 1998); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 512 (2d Cir. 1973); *see generally* Vestal & Foster, *Implied Limitations on the Diversity Jurisdiction of Federal Courts*, 41 MINN. L. REV. 15 (1956).

106. *See Ankenbrandt*, 504 U.S. at 703–04; *Kelm v. Hyatt*, 44 F.3d 415, 420 (6th Cir. 1995).

The spate of federal legislation in the 1980s, principally in the support enforcement and child custody areas, necessitated a limited modification in this practice of leaving domestic cases to the state courts.¹⁰⁷ Although this domestic relations exception to federal jurisdiction does not apply to a civil action that merely has domestic relations overtones, federal courts lack jurisdiction where the action is a mere pretense and the suit is actually concerned with domestic relations issues.¹⁰⁸ Additionally, federal courts lack jurisdiction to review a case litigated and decided in state court because only the U.S. Supreme Court has jurisdiction to correct state court judgments.¹⁰⁹

§ 1:6.3 Concurrent Jurisdiction

Certain subjects give rise to claims that may be litigated, at the election of the plaintiff, in either a federal or a state forum. In fact, neither federal question¹¹⁰ nor diversity of citizenship¹¹¹ jurisdiction is exclusively reserved to federal tribunals absent an express provision

-
107. *Id.* See generally *Elk Grove Unified Sch. Dist. v. Nedou*, 542 U.S. 1, 17–18 (2004). This self-imposed limitation as regards probate matters and domestic relations does not apply to the federal district court of a U.S. territory or the District of Columbia. *Gitlin v. Gitlin*, 15 F.R.D. 458 (E.D.N.Y. 1954); see also *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir. 1982); *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 190 n.6 (1997) (claims under federal domestic violence laws are an exception to the general rule that federal courts do not hear domestic relations cases).
108. See *Drewes v. Ilnicki*, 863 F.2d 469, 471 (6th Cir. 1988).
109. See *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, n.16 (1983).
110. 28 U.S.C. § 1331. *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553 (2007), held that Fannie Mae’s sue-and-be-sued clause does not grant federal courts jurisdiction over all cases involving that entity. Generally, an entity’s congressional charter containing a “sue and be sued” provision may be read to confer federal court jurisdiction “if, but only if, it specifically mentions the federal courts.” In specifically mentioning the federal courts, Fannie Mae’s sue-and-be-sued clause resembles others the Court had held confer jurisdiction. But unlike those clauses, Fannie Mae’s clause adds the qualification “any court of competent jurisdiction,” as provided in 12 U.S.C. § 1723a(a). The Court here determined that this refers to a court with the power to adjudicate the case before it, and a court’s subject matter jurisdiction defines its power to hear cases. On this understanding, Fannie Mae’s sue-and-be-sued clause is most naturally read not to grant federal courts subject matter jurisdiction over all cases involving Fannie Mae but to permit suit in any state or federal court already endowed with subject matter jurisdiction.
111. 28 U.S.C. § 1332.

to the contrary.¹¹² As a general rule, state court jurisdiction is concurrent with that of the federal courts.

§ 1:6.4 Injunctions Against State Proceedings

While it is of somewhat less practical concern in the civil area than the criminal, it is important to note that a particularly strong set of policy considerations are raised when a federal court purports to stay a state court from proceeding with litigation pending in the state forum.

The Anti-Injunction Act, originally adopted in 1793,¹¹³ essentially prohibits federal courts from issuing a writ of injunction to stay state judicial proceedings. In the 1970 case *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*,¹¹⁴ the Supreme Court held that the Anti-Injunction Act was more than a rule of comity, amounting to “an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions.” The first exception is “as expressly authorized by Act of Congress.”¹¹⁵ The second exception permits the federal court to enjoin a state court “where necessary in aid of its jurisdiction.”¹¹⁶ The third exception is that the federal court may enjoin state proceedings “to protect or effectuate its judgments.”¹¹⁷

§ 1:6.5 Doctrine of Federal Abstention

A tradition of deference to state proceedings expresses itself in a line of cases that has come to be known as the doctrine of federal abstention. Under this doctrine, the federal court will stay its own hand in a case where the state has not had an opportunity to act or where, for a variety of reasons, policy considerations militate in favor of the discretionary refusal of the federal court to continue processing a matter that is also pending in some fashion before a state body. Apart from the anti-injunction statute and the cognate requirement

112. *E.g.*, 15 U.S.C. § 15 (antitrust laws).

113. The Anti-Injunction Act is codified in 28 U.S.C. § 2283. *See generally* *Brent v. Snyder*, 2017 U.S. App. LEXIS 26308 (6th Cir. 2017); *In re John’s Overtime Litig.*, 877 F.3d 756 (7th Cir. 2017).

114. *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281 (1970).

115. 28 U.S.C. § 2283.

116. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d 383 (4th Cir. 1974); *cf. County of Imperial v. Munoz*, 449 U.S. 54 (1980).

117. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Int’l Ass’n of Machinists & Aerospace Workers v. Nix*, 512 F.2d 125, 129–33 (5th Cir. 1975).

to avoid interference with state taxation, there are no specific statutes or rules on abstention.¹¹⁸ The Supreme Court, in *Colorado River Conservation District v. United States*,¹¹⁹ has held that a federal court may dismiss an action where a similar action between the parties is pending in a state court.

In *Colorado River*, the test to determine the appropriateness of dismissing a federal action was stated as follows:

No one fact is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required.¹²⁰

In applying this test, the Supreme Court affirmed the district court's dismissal of a federal proceeding that was commenced *prior to* the concurrent state action.¹²¹ Moreover, the jurisdiction of the district court in that action was based upon 28 U.S.C. § 1345, which specifically allows district courts to adjudicate suits brought by the United States.¹²² Even the existence of questions of federal law¹²³ did not preclude dismissal of the federal proceeding where the plaintiff became a defendant in a subsequent state action involving similar questions.

The Court delineated a narrow framework within which the traditional doctrine of abstention is applicable.

Abstention from the exercise of federal jurisdiction is the exception, not the rule. . . . “[I]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it.”¹²⁴

The Court then identified three general categories in which abstention is appropriate:

-
- 118. See generally *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584 (2013) (*Younger* abstention); *Zivotofsky v. Clinton*, 566 U.S. 189 (2012); *Grove v. Emison*, 507 U.S. 25 (1993) (*Pullman* abstention discussed); *Ankenbrandt v. Richards*, 504 U.S. 689 (1992) (domestic relations issues).
 - 119. *Colo. River Conservation Dist. v. United States*, 424 U.S. 800 (1976); see also *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).
 - 120. *Colo. River*, 424 U.S. at 818–19.
 - 121. *Id.* at 805–06.
 - 122. *Id.* at 807.
 - 123. *Id.* at 810.
 - 124. *Id.* at 813–14 (quoting *Ala. Pub. Serv. Comm'n v. S. Ry.*, 341 U.S. 341, 361 (1951)).

- (1) Cases presenting a federal constitutional issue that might become moot by a state court determination of pertinent state law;
- (2) Cases where the issues involved bear on policy problems of such public import that they transcend the result in the case then at bar; and
- (3) Cases where federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings.¹²⁵

The Court in *Colorado River* also indicated that there are “exceptional circumstances,” not subject to exact delineation, that would permit dismissal or stay of a federal suit for reasons of wise judicial administration.¹²⁶ For example, in a later case, the Court found abstention proper where the state court’s construction of an uninterpreted state statute might alter the nature of the problem in the federal court.¹²⁷ The Court in *Colorado River* also articulated a number of factors that a lower federal court may consider in determining whether to forgo jurisdiction in the event of concurrent litigation in the state and federal forums. Circumstances that might lead to a dismissal include:

- (1) The assumption of jurisdiction over a res by the state court;
- (2) The desirability of avoiding piecemeal litigation;
- (3) The inconvenience of the federal forum; and
- (4) The order in which concurrent jurisdiction was obtained by the two forums.

From the language of the Court in *Colorado River* and subsequent cases, it is clear that the factors enumerated by the Court do not constitute an exhaustive list of the considerations a federal court may utilize. And, in a later case, the Court emphasized the flexibility of the doctrine by ruling that abstention is not required simply because the federal court is asked to overturn a state policy.¹²⁸ The Court *has* noted that a carefully considered judgment weighing all relevant factors is necessary and that “only the clearest of justifications will warrant dismissal.”¹²⁹

125. *Id.* at 814–17.

126. *Id.* at 818.

127. *Bellotti v. Baird*, 428 U.S. 132, 147 (1976).

128. *Zablocki v. Redhail*, 434 U.S. 374, 380 (1978); *New Orleans Pub. Serv., Inc. v. City of New Orleans*, 491 U.S. 350 (1989); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988).

129. *Colo. River*, 424 U.S. at 818–19.

Overall, the Court's approach¹³⁰ clearly indicates that factors beyond those listed may be considered,¹³¹ and that the drastic remedy of outright dismissal is reserved for the rare case in which dismissal is necessary to effectuate the balance of policies struck by the federal court. Considerable discretion, therefore, rests with the district court in striking the balance.¹³²

§ 1:6.6 State Law Applied in Federal Litigation

In diversity actions, the court will apply the law of the state in which the federal court sits. This rule extends to the choice-of-law rules of the forum state.¹³³ Hence the district court will analyze the facts of the case in light of state conflicts of law rules in order to determine which state law the forum would apply if the issue were before the state court.

In addition to the substantive law governing the merits of the litigation, the federal court will utilize the jurisdictional principles of the forum state to determine whether a defendant is amenable to suit. This inquiry will consider state case law and statutes, including long-arm laws respecting nonresidents.

Truly procedural matters, like the following, will be governed by federal law, even in a diversity case:

1. Form and sufficiency of pleadings.
2. Time periods for answer, third-party pleadings, etc.

-
130. Lower court decisions generally identify the context of possible abstention by the most closely applicable Supreme Court decision—for example, *Colorado River* abstention (where there are parallel state and federal litigations), *Younger* abstention (barring injunctions against state proceedings), *Pullman* abstention (where difficult issues of state law must be determined before a substantial federal question can be decided), or *Burford* abstention (where the case presents complex questions of state law and matters of only minimal federal importance)—and then apply the principles to new situations. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996) (federal courts have the power to dismiss or remand cases based on abstention principles only where the relief sought is equitable or otherwise discretionary; because this was a damages action, the district court's remand order was an unwarranted application of the *Burford* doctrine).
 131. See generally Note, *Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of Colorado River*, 44 U. CHI. L. REV. 641, 666–80 (1977).
 132. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 664 (1978).
 133. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975). See also *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 134 S. Ct. 568, 582 (2013).

3. Available discovery devices.
4. Motion practice.
5. Rules of evidence, except state presumptions and privileges in diversity actions.
6. Enforcement remedies (except as may be expressly invoked by cross-reference in the federal rules).
7. Appeal procedures.

[A] The “*Erie* Problem”

The chestnut of first-year civil procedure classes in law school focuses on the difficulties the U.S. Supreme Court has had in determining when a federal court sitting in diversity must apply state substantive law under principles first articulated in *Erie Railroad Co. v. Tompkins*.¹³⁴ Surprisingly, as decades pass the difficulties in applying the various governing principles have become increasingly more murky and divisive for the Supreme Court.

For these purposes, state substantive law includes any state doctrine that is inextricably “bound up” (intertwined) with how the cause of action is created or to be enforced under state law (state statutes, constitutions, or court decisions). If an issue relates to the existence of a claim, burden of proof, relief available for such a claim, or similar matters closely tied to the very existence or nature of the state cause of action, that issue is substantive. State laws that regulate “primary behavior” (non-litigation activities) are also substantive. Even in diversity cases, federal courts apply federal procedure (for example, pleading rules, deadlines, and discovery). If issues arise because “the state does things differently,” there are two phases in the analysis.

First: Is there a Federal Rule of Procedure or statutory procedure (for example, the interpleader statute) on point? In the leading cases of *Sibbach v. Wilson & Co.*¹³⁵ and *Hanna v. Plumer*,¹³⁶ the Supreme Court held that, if so, *and* if the federal procedural rule/statute is one a reasonable person would think is “arguably procedural” (actually or “really” regulates the litigation process) and if it is apparently constitutional (no due process problems, no creation/destruction of substantive rights), it is binding. This result flows from the “Rules Enabling Act” (28 U.S.C. § 2072, the federal statute authorizing binding federal rules of procedure) and the Supremacy Clause of the

134. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). *See, e.g.*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011).

135. *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

136. *Hanna v. Plumer*, 380 U.S. 460 (1965).

Constitution (positive federal law superseding state law on point). The existence of a valid federal rule specifically on a topic preempts state rules or procedural practices on the same exact topic. In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,¹³⁷ a divided Supreme Court applied the “*Erie* doctrine” to hold that the express coverage of Rule 23 of the Federal Rules of Civil Procedure controlled the issue of whether a class action could be maintained, superseding a state statute that precluded certain forms of class relief. The Court reiterated long-standing doctrine that the Rules Enabling Act, not *Erie*, controls the validity of a Federal Rule of Procedure. Section 2072(b)'s requirement that federal procedural rules “not abridge, enlarge or modify any substantive right” means that a rule must “really regulat[e] procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”¹³⁸ Though a Rule of Procedure may incidentally affect a party's rights, it is valid so long as it regulates only the process for enforcing those rights, and not the rights themselves, the available remedies, or the rules of decision for adjudicating either. The Court held that Rule 23 satisfies that criterion, at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants. In *Shady Grove*, all members of the Supreme Court appear to acknowledge that there may be an obligation to interpret the federal procedural rule in a manner that avoids overstepping its authorizing statute and that, if the rule were susceptible of two meanings—one that would violate section 2072(b) and another that would not—such an interpretation would be undertaken. Where, however, the federal rule is “unambiguous,” its language cannot be “contorted,” even “to avert a collision with state law.” The Supreme Court was divided 4-1-4 in resolving *Shady Grove*, and Justice Stevens' partial concurrence allowing Rule 23 to override the provisions of the state law at issue contains a very informative synthesis of the conflict between the plurality opinion and the dissent concerning the canons of construction for federal procedural rules under the Rules Enabling Act, where arguable conflict with state substantive laws and rights is encountered. While Justice Stevens did not accept the prevailing plurality's distillation of the *Hanna-Sibbach* line of cases under the Rules Enabling Act as *never* permitting conflicting state law to override a Federal Rules of Civil Procedure provision that actually “regulate[s] procedure,” he found that the essential content of Rule 23 displaced conflicting New York law in the case

137. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010).

138. *Sibbach*, 312 U.S. at 14. See *Hanna*, 380 U.S. 460.

before the Court, and thus joined in the judgment on that basis. The four dissenting Justices focus upon the limit expressed in the Rules Enabling Act that rules of procedure shall not abridge substantive rights, such as those enacted in state law.

Second: If there is no Federal Rule of Procedure or procedural statute that directly controls the issue and the issue involved is simply a matter of general federal practice or case/trial management procedures a judge might wish to impose, a further analysis is required. Of course, if there is no conflict between state and federal requirements the federal court may choose to apply both. But on those matters where there is a conflict between the state procedure and an uncodified federal practice or procedure on a given topic, the issue is framed as whether the federal court is free to do what the trial judge in her discretion chooses, or is the federal court required to adhere to the state practice on the issue? As always, a state practice that is an inherent part of the creation or enforcement of substantive rights or responsibilities under state law is substantive. But if the state rule/statute/practice is not inextricably intertwined with the state's creation or enforcement of rights and obligations (so *Erie* does not require that it be followed)—and the topic is not addressed by a particular federal rule or statute (so the *Hanna* doctrine is not a simple answer requiring use of the specified federal procedure)—then factors in deciding whether the federal court is free to diverge from the state procedure would include:

- Is applying the proposed non-state approach likely to be “outcome determinative”?¹³⁹
- Is the state practice non-substantive but still closely related to the state law that creates or implements rights and obligations for this cause of action?¹⁴⁰
- Are the state “interests” in how this practice is handled identifiable and weighty—for example, is there a landmark statute or package of integrated laws, tort reform program, or other integrated legislation showing of strong interest?
- Does diverging from state practice pose problems under the “twin aims of *Erie*” as synthesized by the Supreme Court in the *Hanna* decision: (1) Would a federal procedure that differs from state practice encourage forum shopping? and (2) Would a federal procedure that differs lead to inequitable administration of the laws?

139. Guar. Tr. Co. v. York, 326 U.S. 99, 108 (1945).

140. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958).

If, finally, there are no “outcome” effects, no state policies being ignored, and no “twin aims of *Erie*” problems with overriding the state approach to the particular issue, the federal court judge is permitted to make a discretionary judgment on how to proceed and is not bound by how the state handles this issue. However, as suggested in *Byrd v. Blue Ridge Rural Electric Cooperative*¹⁴¹ and other decisions, if there are possible “outcome determination” effects, serious state policy interests in how the particular matter is handled, or possible “twin aims” problems if the federal court diverges from state practice, the federal court may nonetheless proceed with its own procedures or mechanisms if the “federal interests” in doing what the trial court is considering are substantial enough to outweigh the concerns favoring the use of the state practice (affording a jury in the federal proceeding in a proceeding for which state law would not provide a jury is but one example).

§ 1:7 Judicial Officers and Agencies

From the adoption of the Judiciary Act of 1789 until the 1870s, individual judges were the sole administrators of the federal judicial system. The Attorney General of the United States then began a program of central management. This included minimal centralized bookkeeping and reporting and the use of management auditors to observe the court’s efficiency.

Chief Justice Taft took the first steps toward judicial management over the conduct of its functions by calling together the chief judges of each circuit annually. This annual conference was formalized in 1922 by the creation of the Judicial Conference of the United States.

In 1939, at the request of the judiciary, Congress created the Administrative Office of the United States Courts, circuit judicial councils, and circuit judicial conferences to assist in the management of the courts. It assigned the primary management tasks to circuit judicial councils and delegated coordinating and housekeeping responsibilities to the Administrative Office.

The last step in the development of the present management structure was the creation in 1971 of the position of circuit executive, who exercises such administrative powers and performs such duties as may be delegated by each circuit council.

§ 1:7.1 Chief Justice

The Chief Justice of the United States is the principal administrative officer of the federal judiciary. This stems in part from the

141. *Id.*

fact that, as his title implies, he is not merely the Chief Justice of the Supreme Court, but the Chief Justice of the United States. In addition to its adjudicative responsibilities, the Supreme Court itself has the power to formulate rules applicable to the conduct of the federal courts. The Chief Justice, as a member of the Court, plays a role in these determinations.

The Chief Justice has many statutory responsibilities. Among them is the chairmanship of the Judicial Conference of the United States. The Conference has responsibility for rulemaking and for formulating board administrative policy for the federal courts. The Judicial Conference has numerous committees, all appointed by the Chief Justice for specified terms. In addition, the Chief Justice chairs the Federal Judicial Center Board. The important role of the Center is outlined later in this chapter.

The Chief Justice is also the principal spokesman for the federal judiciary, a role that includes selecting a limited number of occasions on which to speak of improving the administration of justice. The Chief Justice is regarded not only by the Congress but also by the nation, by national legal organizations, and by international groups as the official voice of the federal judiciary.

§ 1:7.2 Chief Judges

Each court of appeals, and each district court having more than one judge, has a chief judge. The chief judge of these courts is the active judge who is senior in commission and under seventy years of age. A chief judge may request to be relieved of the duties of that office and may retain status as an active judge. In that event, the active judge of the court next most senior in commission who is willing to serve is designated by the Chief Justice as the chief judge.

Chief judges of a circuit administer most of the work of the court of appeals. In addition, they preside at judicial council meetings and judicial conferences in their circuits; serve as one of their circuit's representatives to the Judicial Conferences of the United States; assign the circuit and district judges in their circuits to temporary duty on other courts within their circuit; certify to the Chief Justice the need for temporary assistance within their circuits through additional judges from another circuit; certify to the Chief Justice their consent to permit a judge within the circuit to sit in matters outside the circuit; and supervise the circuit executives in the performance of their duties.

The chief judge of a district court takes much of the responsibility for the administration of the court. Usually, this includes supervision of the clerk's office, the probation office, bankruptcy affairs, and the magistrate judges. By statute the chief judge is responsible for carrying

out the rules and orders of the court that divide the court's business among the judges,¹⁴² and for appointing magistrate judges when there is not a concurrence of a majority of the judges in the district.¹⁴³ In some district courts, the chief judge appoints committees of judges to assist in administrative matters. Some district judges have regular meetings; others consult each other only as the need arises. Chief judges have no authority over the actual decision of cases by other judges. In adjudicative matters, their authority is exactly the same as that of any other judge.

§ 1:7.3 *Active and Senior Judges*

A federal judge with ten years' active service may elect to become a senior judge upon attaining the age of seventy or later. This action is entirely at the judge's option. The judge may elect to continue as an active judge. If a judge elects senior status, a vacancy is created, which is filled in the usual manner by presidential appointment and Senate confirmation. Senior judges are considered to be retired from regular active service, but since they continue to hold office under Article III of the Constitution, they may continue to perform such judicial duties as they are willing and able to undertake. Particularly in recent years, with the increasing case loads experienced in the federal judicial system, the services rendered by senior judges have become vital to the operation of the courts.

The chief judge or judicial council of a circuit may assign a senior judge to perform judicial duties anywhere within that circuit. The Chief Justice maintains a roster of senior judges who are willing and able to serve, from which senior judges are assigned to perform needed judicial duties outside their own circuits.

A senior judge continues to receive the salary of his or her office for life. Senior judges with significant and substantial case loads are entitled to an office staff equivalent to that of active judges.

§ 1:7.4 *United States Magistrate Judges*

During the first several years of experience with the federal magistrates system, many district courts benefited materially from the assistance of U.S. magistrate judges performing a variety of judicial duties. The language used in section 636(b)¹⁴⁴ of the original Federal Magistrates Act created uncertainty as to the scope of matters that might appropriately be delegated to magistrates, and this uncertainty was reflected in the decisional law.

142. 28 U.S.C. § 137.

143. 28 U.S.C. § 756.

144. 28 U.S.C. § 636(b).

In March 1975, the Judicial Conference of the United States proposed legislation to clarify and to broaden the jurisdiction of magistrate judges.¹⁴⁵ That legislation, with some modification, was enacted into law on October 21, 1976.¹⁴⁶

This law revised in its entirety the provisions of 28 U.S.C. § 636(b), under which magistrate judges may be delegated a wide range of “additional duties” in the discretion of each district court. In explaining the purpose of the legislation, the House report on the bill stated that “it is not feasible for every judicial act, at every stage of the proceeding, to be performed by ‘a judge of the court.’”¹⁴⁷ The report concluded that the legislation would enable district judges generally to devote their time to the actual trial of cases, rather than to the various pretrial procedural steps:

If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts.¹⁴⁸

The statute and its legislative history emphasize that the magistrate judge is a federal judicial officer who serves under the general supervision of the district court, but who has authority and responsibilities derived from the statute itself. The powers and duties

145. For a general discussion of the magistrate judge system in the federal courts, see KENT SINCLAIR, *PRACTICE BEFORE FEDERAL MAGISTRATES* (Matthew Bender 1997) (a one-volume treatise with annual supplementation).

For a discussion of the consent trial jurisdiction of magistrate judges, see *Roell v. Withrow*, 538 U.S. 580 (2003), where the Supreme Court held that consent to a magistrate judge’s designation can be inferred from a party’s conduct during litigation. See *Gonzalez v. United States*, 553 U.S. 242 (2008), where the Supreme Court reviewed the reasoning and holdings in prior landmark decisions and provided the following conclusion:

Taken together, *Gomez* and *Peretz* mean that “the additional duties” the statute permits the magistrate judge to undertake include presiding at voir dire and jury selection provided there is consent but not if there is an objection.

A general appearance before the magistrate judge can be used to infer consent.

146. Pub. L. No. 94-577, § 1, 90 Stat. 2729.

147. H. REP. NO. 1609, 94th Cong., 2d Sess. 12, reprinted in 1975 U.S.C.C.A.N. 6162, 6168.

148. *Id.* at 6172.

of U.S. magistrates have continued to expand as a result of further amendments to the federal rules. In 1993, the title references in Rules 72–76 were changed to “magistrate judge” to conform with the official title established in 1990 by the Judicial Improvements Act. Rule 73 was amended in 1993 to allow a repeated form of advice to the parties about their option to consent to a trial before a magistrate under 28 U.S.C. § 636(c).

Revised notice and consent forms were promulgated in 1993 to provide notice to the parties of their right to consent to a trial before the magistrate and to embody that consent in writing. These forms are available from each district court. Other forms, for use by district judges in referring issues to a magistrate judge, were also promulgated. Other changes in 1993 included addition of attorney fee determinations to the expressly listed duties of magistrate judges, through an amendment of Rule 54 adding express provision for referral of such matters.

In 1997, the Supreme Court withdrew Rules 74–76, which had provided for an optional appeal route in civil cases tried before a magistrate judge on consent. Under the revised statute and rules, the only appeal procedure is for the parties to appeal from a final judgment to the appropriate court of appeals.¹⁴⁹

[A] Assignment of Authority

In addition to the trial of misdemeanors and the performance of U.S. commissioner-type duties, a magistrate judge may be assigned duties by a judge under four separate provisions of the statute.

Under subsection 636(b)(1)(A) and Federal Rule of Civil Procedure 72(a), a magistrate judge may hear and determine nondispositive motions and matters. Under subsection 636(b)(1)(B), the magistrate judge may hear and recommend to a judge the determination of dispositive motions and various prisoner cases. The pertinent differences between these two subsections are pointed out in detail below.

The initial sentence preceding subsections 636(b)(1)(A) and (B) states that the magistrate has jurisdiction under the statute to handle pretrial matters “notwithstanding any provision of law to the contrary.”¹⁵⁰ The congressional reports state:

This language is intended to overcome any problem which may be caused by the fact that scattered throughout the code are statutes which refer to ‘the judge’ or ‘the court.’ It is not feasible for the Congress to change each of those terms to read ‘the judge

149. See *Chandler v. Miller*, 520 U.S. 305 (1997).

150. 28 U.S.C. § 636.

or a magistrate.' It is, therefore, intended that the permissible assignment of additional duties to a magistrate shall be governed by the revised section 636(b), 'notwithstanding any provision of law' referring to 'judge' or 'court.'¹⁵¹

Third, the magistrate judge may be appointed as a master in appropriate cases. A master's responsibilities are set forth in Rule 53 of the Federal Rules of Civil Procedure.¹⁵² It was the lack of clarity in expressing this concept that led to many of the judicial decisions limiting the use of magistrates under the original statute. As noted below, trial jurisdiction under section 636(c) has also been clarified in the 1979 Federal Magistrate Act and Federal Rules of Civil Procedure 73–76.

Finally, subsection 636(b)(3) provides in a separate section for the assignment to a magistrate judge of any additional duties that are not inconsistent with the Constitution and laws. "Placing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates."¹⁵³ Accordingly, "the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of 'pretrial matters.'¹⁵⁴ Limits on this freedom have been recognized in criminal practice,¹⁵⁵ but do not impinge upon delegations of duties to magistrate judges in civil litigations.¹⁵⁶

The referral of a matter to a magistrate judge, in whole or in part, should be made on the record. The parties should be apprised of such delegation, of the magistrate judge's decisions or recommendations, and of the time within which a party may file objections to such decisions and recommendations. A general, consistent practice of the court embodied in a local rule or general order is ordinarily sufficient notice to the parties of the duties the magistrate judge is authorized to perform.

151. H. REP. NO. 1609, *supra* note 147, at 6169.

152. FED. R. CIV. P. 53; *see* 28 U.S.C. § 636(b)(2).

153. 28 U.S.C. § 636(b)(3).

154. *Id.*

155. *Gomez v. United States*, 490 U.S. 858 (1989) (jury selection in felony cases without the defendant's consent, not within the "additional duties" the trial court may assign to magistrate).

156. *See Peretz v. United States*, 501 U.S. 923 (1991) (jury selection by magistrate on consent of defendant in felony case is permitted; in part, the test is whether the duties assumed are "comparable in responsibility and importance" to those clearly authorized). *Id.* at 932–33. It would appear that consent is not required if other non-consensual duties are comparable in significance.

The statutory procedures for a magistrate judge to follow in handling pretrial matters and matters for review by a district judge vary depending upon whether the matters in issue are dispositive of the litigation. The procedures for a dispositive motion or a prisoner petition are set forth specifically at 28 U.S.C. § 636(b)(1)(C). The procedures for nondispositive matters, however, are left to local rule of court. Where a magistrate judge is appointed as a master, under authority of subsection 636(b)(2), the procedures found in Federal Rule of Civil Procedure 53 are applicable.

[B] Local Rules

Subsection 636(b)(4) of the statute¹⁵⁷ requires each district court to “establish rules pursuant to which the magistrates shall discharge their duties.” While the language of the revised law permits an individual judge to designate a magistrate judge to conduct any of the proceedings enumerated in a particular case, it is suggested that both the authority delegated to a magistrate judge and the procedures for performing these duties be set forth in local rules of court.

The congressional committee reports explain that the provision for local rules will ensure an equitable allocation of magistrate services among the various judges of the district court and will provide adequate notice to the bar as to the extent of use of magistrates by the court.¹⁵⁸

[C] Matters Subject to Final Determination

The following is a checklist of judicial functions in the exercise of which the magistrate’s determination amounts to a final order.

- General supervision of the civil calendar, including the handling of calendar calls and motions to expedite or postpone the trial of cases.
- Hearing and determining pretrial procedural and discovery motions and other motions or pretrial matters that are not specifically enumerated as an exception in 28 U.S.C. § 636(b)(1)(A).
- Issuance of subpoenas, writs of habeas corpus ad testificandum or ad prosequendum, or other orders necessary to obtain the presence of parties or witnesses or evidence needed for court proceedings.

157. 28 U.S.C. § 636(b)(4).

158. H. REP. NO. 1609, *supra* note 147, at 6173.

- ❑ Conduct of preliminary and final pretrial conferences, status calls and settlement conferences, and the preparation of a pretrial order following the conclusion of the final pretrial conference.
- ❑ General supervision of the criminal calendar, including calendar calls and motions to expedite or postpone the trial of cases.
- ❑ Hearing and deciding procedural and discovery motions.
- ❑ Hearing and deciding motions by the government to dismiss an indictment or information without prejudice to further proceedings and any other motion or pretrial matter that is not specifically enumerated as an exception in 28 U.S.C. § 636(b)(1)(A).
- ❑ Conduct of pretrial conferences, omnibus hearings, and related proceedings.
- ❑ Conduct of post-indictment arraignments, acceptance of not-guilty pleas, and the ordering of a pre-sentence report on a defendant who signifies the desire to plead guilty. A magistrate judge should not accept pleas of guilty or nolo contendere in cases outside the jurisdiction specified in 18 U.S.C. § 3401.¹⁵⁹

In all matters delegated under the authority of 28 U.S.C. § 636(b)(1)(A), the magistrate judge has the statutory power to “hear and determine.” Such decisions are final and binding, and subject only to a right of appeal to the district judge to whom the pertinent case has been assigned.

Subsection 636(b)(1)(A) does not specify the procedures to be followed by a litigant in seeking reconsideration or review of a magistrate’s order. However, Federal Rule of Civil Procedure 72(a) provides that, in nondispositive matters, a party has up to fourteen days after being served a copy of the order to file and serve any objections. Under the rule, if such objections are not timely served, that party may not thereafter assign as error a defect in the magistrate’s order.

The statute, however, does provide a specific standard of review for a judge, the traditional “clearly erroneous” appellate test.¹⁶⁰ The express congressional intent is that a matter that has been heard and determined by a magistrate judge need not in every instance be reviewed by a judge.¹⁶¹ If, however, a party specifically requests reconsideration—based on a showing that the magistrate judge’s order is

159. See *Report of Proceedings of the Judicial Conference*, 54 (1971); *Carter v. United States*, 388 F. Supp. 1334 (W.D. Pa.), *aff’d*, 517 F.2d 1397 (3d Cir. 1975).

160. 28 U.S.C. § 636(b)(1)(A).

161. H. REP. NO. 1609, *supra* note 147, at 6163.

clearly erroneous or contrary to law—the judge must reconsider the matter.¹⁶²

Of course, the judge has the inherent power to rehear or reconsider any matter *sua sponte*. Preliminary rulings during the pretrial stage of a case, moreover, are often subject to review and change in the interest of justice as the case develops. Accordingly, the judge may issue rulings at a later stage that supersede those of the magistrate judge if conditions warrant.

[D] Matters for Recommended Disposition

Numerous matters may be assigned to a magistrate judge for review. The magistrate judge should then conduct necessary hearings or arguments and submit a report with recommendations to a district judge pursuant to section 636(b)(1)(B)¹⁶³ and Federal Rule of Civil Procedure 72(b). These matters may include:

- Motions to dismiss or quash an indictment or information made by the defendant.
- Motions to suppress evidence.
- Applications to revoke probation, including the conduct of the final probation revocation hearing.
- Motions for injunctive relief, including temporary restraining orders and preliminary injunctions.
- Motions to dismiss for failure to state a claim upon which relief may be granted.
- Motions to dismiss involuntarily an action, and the review of default judgments.
- Motions to dismiss or to permit the maintenance of a class action.
- Motions for judgment on the pleadings or for summary judgment.

A magistrate judge may also be delegated to review an administrative record and the pleadings, to conduct any pretrial proceedings that may be called for, to hear any oral argument that may be necessary, to submit a report, and to recommend disposition of the case to the district judge. These duties arise in the following types of cases:

162. *Id.*

163. 28 U.S.C. § 636(b)(1)(B).

- Decisions regarding the granting of benefits to claimants under the Social Security Act, the black lung benefits laws, and related statutes.¹⁶⁴
- The administrative award or denial of licenses or similar privileges.
- Adjudications by the Civil Service Commission of adverse employee actions, retirement eligibility and benefits questions, and the rights of employees in such situations as reductions in force.

In these cases, which require judicial review of final decisions of administrative agencies, the court's role is generally to determine:

- (1) whether there are defects in the agency proceedings that rise to the level of a deprivation of due process or a violation of a statute or regulation;
- (2) whether there should be a remand to the agency for additional factual determinations to complete the record; and
- (3) whether there is substantial evidence in the administrative record to support the ultimate decision of the agency.

In a prisoner case, a magistrate may be assigned to perform the following functions by the court:

- Review of habeas corpus petitions filed by state prisoners under 28 U.S.C. § 2254; the issuance of orders to show cause and other necessary orders or writs to obtain a complete record; and the preparation of a report and recommendation as to the appropriate disposition of the petition. The issuance of any pretrial procedural orders would fall within the magistrate's authority to "hear and determine" matters under section 636(b)(1)(A).
- Review of habeas corpus petitions filed by federal prisoners for the correction or reduction of sentences under 28 U.S.C. § 2255, and the preparation of a report and recommendation to the district judge as to the disposition of the case. However, a petition of a federal prisoner under section 2255 or Federal Rule of Criminal Procedure 35 should not normally be referred to a magistrate, if resolution of the issues requires knowledge of the original trial proceedings or might result in overruling a prior determination of a district judge.

164. This duty was expressly approved in *Mathews v. Weber*, 423 U.S. 261 (1976).

- Review of prisoner suits for the deprivation of civil rights arising out of conditions of confinement under 42 U.S.C. § 1983, the hearing of motions, and the preparation of a report and recommendations to the district judge.
- Taking on-site depositions, gathering evidence, conducting pretrial conferences, or serving as a mediator at the holding facility in connection with civil rights suits filed by prisoners contesting conditions of confinement under 42 U.S.C. § 1983.
- Conduct of periodic reviews of proceedings to insure compliance with previous orders of the court regarding conditions of confinement.
- Review of prisoner correspondence.
- Conduct of an evidentiary hearing, or any other hearing, in a prisoner case in which the petitioner seeks post-trial relief or challenges conditions of confinement.

Section 636 supersedes the decision of the Supreme Court in *Wingo v. Wedding*.¹⁶⁵ The authority of the magistrate judge under subsection (b)(1)(B) is by congressional design more than the mere authority to make a preliminary review. It is the power to conduct hearings and to receive evidence relevant to the issues involved in these cases.¹⁶⁶

In appropriate cases, the magistrate could also be appointed a master in a prisoner case, in accordance with the separate provisions of subsection 636(b)(2)¹⁶⁷ and Rule 53 of the Federal Rules of Civil Procedure.

Under the provisions of subsection 636(b)(1)(C),¹⁶⁸ the magistrate judge does not have the power to determine dispositive matters. Rather, the magistrate judge must prepare proposed findings and recommendations and file them with the court. A copy is then mailed to the parties, who have fourteen days after receipt to file specific objections in writing to the magistrate judge's report. The ultimate adjudication of the matter rests with the district judge to whom the entire case has been assigned.

The judge must make a de novo determination of any matters that have been specifically objected to by the litigants. As the legislative

165. *Wingo v. Wedding*, 418 U.S. 461 (1974). See H. REP. NO. 1609, *supra* note 147, at 6165; *United States v. Raddatz*, 447 U.S. 667 (1980).

166. H. REP. NO. 1609, *supra* note 147, at 6165. See also Rules governing sections 2254 and 2255 proceedings (28 U.S.C. foll. §§ 2254, 2255), which track the language of 28 U.S.C. § 636(b).

167. 28 U.S.C. § 636(b)(2).

168. *Id.*

history makes clear, the words “de novo determination” in subsection 636(b)(1)(C) do *not* require the judge to actually conduct a new hearing on contested issues.¹⁶⁹ Normally the judge, on application, will consider the record that has been developed before the magistrate judge and consider the magistrate judge’s proposed findings of fact and conclusions of law.

The judge must give “fresh consideration to those issues to which specific objection has been made by a party.”¹⁷⁰ In doing so, the judge is not bound to adopt the findings and conclusions of the magistrate judge.

In some specific instances it may be necessary for the judge to modify or reject the findings of the magistrate judge, to take additional evidence, to recall witnesses, or to recommit the matter to the magistrate judge for further proceedings (if, for example, the judge finds that there is a problem as to the credibility of a witness or witnesses in an adversary proceeding). The judge is not required in the normal case, however, to hear any witness or conduct further evidentiary proceedings.

The approach of the Congress was taken directly from the decision of the U.S. Court of Appeals for the Ninth Circuit in *Campbell v. United States District Court*.¹⁷¹

[E] Trials by Consent and As Special Master

The third category of a magistrate judge’s additional duties is set forth in subsection 636(b)(2),¹⁷² which authorizes a magistrate judge to be appointed as a master under Rule 53 of the Federal Rules of Civil Procedure. If the parties consent to the reference, the requirement of a showing of exceptional conditions under Rule 53(a) becomes inapplicable. Under Rule 53(f)(3), moreover, the parties may stipulate that the magistrate judge’s findings of fact shall be final and that only questions of law may thereafter be considered.

A magistrate may be designated to:

- Serve as a master in accordance with the provisions of Rule 53, and (1) in jury cases, hear testimony and submit a report on complicated issues; (2) in account matters, decide on difficult

169. H. REP. NO. 1609, *supra* note 147, at 6163.

170. *Id.*

171. *Campbell v. U.S. Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974); *see* *Thomas v. Arn*, 474 U.S. 140, 150–51 n.9 (1985) (“We believe . . . that the House report used the language from *Campbell* only to support a *de novo* standard upon the filing of objections, and not for any other proposition.”), *reh’g denied*, 474 U.S. 1111 (1986).

172. 28 U.S.C. § 636(b)(2).

damages computations; and (3) in nonjury cases, offer a ruling on exceptional conditions.

- Conduct evidentiary hearings and prepare findings in employment discrimination cases as a master under title VII of the Civil Rights Act of 1964, as amended, whenever a judge has not scheduled a case for trial within 120 days after issue has been joined.¹⁷³
- Conduct hearings and resolve specific issues in patent, anti-trust, and other complex cases where there are a great many issues, claims, and documents, or in multiple disaster and class action cases where there are numerous claimants and diverse claims.
- Serve as a commissioner to determine compensation and assess damages in land condemnation cases under Federal Rule of Civil Procedure 71.1.
- Serve as a master for the assessment of damages, such as in admiralty cases.
- Preside over trials in civil cases by consent of the parties pursuant to section 636(c). District judges and magistrate judges have authority to advise civil litigants of the option to consent to trial by a magistrate judge, so long as the parties are also advised that they are free to withhold consent to magistrate jurisdiction without fear of adverse consequences.¹⁷⁴ The procedures for conducting such trials on consent of the parties are implemented in Rules 73–76 of the Federal Rules of Civil Procedure. Appeal will be to the court of appeals in each instance, unless the parties agree otherwise.¹⁷⁵ The same procedures and rules of evidence apply as in any other federal trial.

173. 42 U.S.C. § 2000e-5(f)(5).

174. Pub. L. No. 101-650, 104 Stat. 5112 (codified in 28 U.S.C. § 636(c)(2)).

175. The text of 28 U.S.C. § 636(c) is as follows:

Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is

[F] Other Powers

Under subsection 636(b)(3), the district courts may “continue innovative experimentations”¹⁷⁶ in the assignment of duties to magistrate judges that may not necessarily be included in the broad category of pretrial matters under subsection 636(b)(1). Thus, to the extent that the following duties are not covered by subsection 636(b)(1), they may be delegated to a magistrate under subsection 636(b)(3):

- Review of petitions in civil commitment proceedings under title III of the Narcotic Addict Rehabilitation Act.
- Receipt of grand jury returns in accordance with Rule 6(f), Federal Rules of Criminal Procedure.

not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties’ consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party’s right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(5) The magistrate shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

176. H. REP. NO. 1609, *supra* note 147, at 6172.

- Conduct of voir dire and jury selection for district judges.
- Conduct of preliminary hearings leading to the revocation of probation.¹⁷⁷
- Exoneration or forfeiture of bonds.
- Disposition of civil violations under the Federal Boat Safety Act.¹⁷⁸
- Supervision of proceedings on requests for letters rogatory in civil and criminal cases (a special designation is required by the district court under 28 U.S.C. § 1782(a)).
- Examination of judgment debtors.¹⁷⁹ Review of default judgments and conduct of inquests on damages in cases involving default judgments.
- Service as a member of the district's Speedy Trial Act Planning Group, including service as the reporter.¹⁸⁰
- Coordination of the court's efforts in such fields as the promulgation of local rules and procedures and the administration of the forfeiture of collateral system.

Section 636(a) of title 28 grants to the magistrate certain other authority, which is described as:

- All powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;
- The power to administer oaths and affirmations, impose conditions of release under section 3142 of title 18, and take acknowledgments, affidavits, and depositions;
- The power to conduct trials under section 3401 of title 18 in conformity with, and subject to, the limitations of that section; and
- The power to enter a sentence for a misdemeanor or infraction with the consent of the parties.

Among the proceedings that are authorized by this section, therefore, are the following: the trial and sentencing of defendants charged with "minor offenses" (upon the consent of the defendant),¹⁸¹ and the

177. See *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

178. 46 U.S.C. §§ 4311(d), 12309(c).

179. FED. R. CIV. P. 69.

180. 18 U.S.C. § 3168.

181. 18 U.S.C. § 3401.

power to invoke the federal probation laws; accepting complaints, finding probable cause, and issuing appropriate arrest warrants or summonses for the named defendants;¹⁸² issuance of search warrants upon a determination that probable cause for the warrants exists;¹⁸³ conduct of initial appearance proceedings for defendants, informing them of their rights, admitting them to bail, and imposing conditions of release;¹⁸⁴ appointment of attorneys for indigent defendants, together with the administration of the court's Criminal Justice Act plan, the maintenance of a register of eligible attorneys, and the approval of attorneys' expense vouchers in appropriate cases;¹⁸⁵ conduct of full preliminary examinations;¹⁸⁶ and conduct of removal hearings for defendants charged in other districts.

Upon special designation in a rule of court under Federal Rule of Criminal Procedure 40(b)(5), the magistrate judge may issue warrants of removal;¹⁸⁷ administer oaths and take bail, acknowledgments, affidavits, and depositions;¹⁸⁸ and set bail for material witnesses.¹⁸⁹

Upon special designation by the district court, the magistrate may conduct extradition proceedings;¹⁹⁰ discharge indigent prisoners or persons imprisoned for debt under process of execution issued by a federal court;¹⁹¹ issue an attachment or order to enforce obedience to an Internal Revenue Service summons to produce records or give testimony;¹⁹² issue administrative inspection warrants; institute proceedings against persons violating certain civil rights statutes;¹⁹³ and enforce awards of foreign consuls in differences between captains and crews of vessels of the consul's nation.¹⁹⁴

§ 1:7.5 Bankruptcy Judges

As part of the compromise made in the 1978 Bankruptcy Act,¹⁹⁵ the bankruptcy judges were no longer appointed by the district judges

-
182. FED. R. CRIM. P. 4.
 183. FED. R. CRIM. P. 41.
 184. FED. R. CRIM. P. 5.
 185. 18 U.S.C. § 3006A.
 186. FED. R. CRIM. P. 5.1; 18 U.S.C. § 3060.
 187. FED. R. CRIM. P. 40.
 188. 28 U.S.C. § 636(a)(2).
 189. 18 U.S.C. § 3149.
 190. 18 U.S.C. § 3184.
 191. 28 U.S.C. § 2007.
 192. 26 U.S.C. § 7604(b).
 193. 42 U.S.C. § 1987.
 194. 22 U.S.C. § 258a.
 195. See section 1:1.11, *supra*.

but rather by the president, with the consideration of the circuit council's recommendation and the approval of the Senate.¹⁹⁶ After the Supreme Court ruled in *Northern Pipeline* that this appointment authority was unconstitutional, since it violated principles of separation of powers,¹⁹⁷ Congress transferred the power of appointment to the courts of appeals and provided the bankruptcy judges with fourteen-year terms.¹⁹⁸

§ 1:7.6 Masters

Rule 53 of the Federal Rules of Civil Procedure authorizes any district judge before whom an action is pending to appoint a master, formerly termed a "special master." The term "master" refers to an impartial officer, who is designated to hear or consider evidence or to make an examination with respect to some issue in a pending action, and make a report to the court. A master may be appointed in either a jury or nonjury matter. Generally, referral to a master is the exception and not the rule. Litigants are entitled to a trial in court unless an "exceptional condition" is shown. A reference to a master may be expensive and time-consuming. Yet, where issues are complicated and the court believes laypersons are incapable of dealing with those complex issues unaided, the court may enlist the aid of a master to make findings on designated issues. In a jury case, these findings are admissible as "evidence of the matters found." The master may be called to testify in the case, and if so, is subject to cross-examination like any other expert.

Any person who has particular competence to consider a complex matter may be appointed. For example, a master may be a certified public accountant, an appraiser, or an economist. The compensation to be paid a special master is determined by the court and taxed as costs.

Magistrates may serve as special masters when appointed by the court pursuant to a rule of court.¹⁹⁹ Their services as special masters are particularly helpful because they are officers of the court, they have experience in fact finding and judicial procedures, and, because they are not required to be paid special compensation, their appointment does not add to the expense of litigation.

The topic of masters is discussed further in chapter 15.

196. Klein, *The Bankruptcy Reform Act of 1978*, 53 AM. BANK. L.J. 1, 4 (1979).

197. *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 83 (1982).
See also *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015);
Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2015).

198. 28 U.S.C. § 152.

199. 28 U.S.C. § 636.

§ 1:7.7 Clerk of Court**[A] District Court**

The clerk of a U.S. district court is appointed by and serves at the pleasure of the court. The clerk serves as the executive officer of the court and manages a variety of complex nonjudicial functions delegated by that court. These responsibilities include:

- Recruiting, hiring, classifying, training, and disciplining staff.
- Developing and implementing a records management system to properly maintain and safeguard the official records of the court.
- Developing and maintaining a system to assure proper collecting, accounting, and disbursing of funds and securities in the court's custody.
- Development of budgetary estimates for future staffing requirements and other substantive expense items such as supplies, equipment, furniture, services, and travel.
- Collecting and analyzing statistical data that reflects the court's performance.
- Managing the jury selection process, including responsibility for making a continuing evaluation of jury utilization.
- Maintaining liaison with all branches of the court and related government agencies.
- Preparing and disseminating reports, bulletins, and other official information concerning the work of the court.
- Coordinating the construction of court facilities and periodically inspecting such facilities.

[B] Court of Appeals

Each court of appeals has a clerk who is appointed by and serves at the pleasure of the court. Although it is not required by law, many of these clerks are lawyers. The clerk appoints necessary deputies and clerical assistants with the approval of the court. The number of employees authorized and their salary schedules are established by the Administrative Office.

The primary duties and responsibilities of a court of appeals clerk are

- To maintain the files and records of the court.
- To assure that all papers filed comply with the Federal Rules of Appellate Procedure and the rules of the court.

- To enter all orders and judgments of the court.
- To schedule cases for hearing under guidelines established by law, rules, and orders of the court.
- To distribute needed case materials to the members of the court.
- To collect, disburse, and account for required fees.
- To arrange for reproduction and distribution of the court's opinions.
- To give procedural assistance to attorneys and litigants.
- To maintain the roster of attorneys admitted to practice before the court.
- To administer oaths.
- To provide clerical staff for courtroom services.
- To provide necessary statistical case information to the court and the Administrative Office.
- To serve as secretary to the judicial council and the circuit judicial conference.

In addition, the clerks of some courts of appeals are authorized to act upon certain kinds of uncontested procedural motions and have responsibility of providing staff legal services to the court.

§ 1:7.8 *Judicial Conference of the United States*

The statutory responsibilities assigned to the Judicial Conference of the United States are to

make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary. . . . [S]ubmit suggestions and recommendations to the various courts to promote uniformity of management procedures and expeditious conduct of court business. . . .

and to

carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law.²⁰⁰

200. 28 U.S.C. § 331.

The Chief Justice of the United States presides over the Conference. Its membership consists of the chief judge of each circuit, the chief judge of the Court of Claims, the chief judge of the Court of International Trade, and one district judge from each circuit.

The Conference is required to meet annually, but traditionally meetings are held each year in the spring and fall. The Conference carries out its duties by committee and the various standing and special committees meet as needed during the year.

§ 1:7.9 Circuit Judicial Councils

The circuit judicial councils have been assigned the major portion of the managerial responsibility within the federal judiciary. That responsibility is established by 28 U.S.C. § 332(d), which provides:

(1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. (2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.

The councils are required to meet at least twice each year, but typically they meet more frequently. Each council consists of the active circuit judges within the circuit. Council meetings are presided over by the chief judge of the circuit, and if the council desires it may appoint the circuit executive to serve as secretary at council meetings.

§ 1:7.10 Circuit Executives

Each circuit judicial council is authorized to employ a circuit executive to assist the judges in carrying out their administrative and managerial responsibilities. Certification by a Board of Certification, consisting of the Director of the Administrative Office of the United States Courts, the Director of the Federal Judicial Center, and three members elected by the Judicial Conference of the United States, is a prerequisite for appointment. The standards for certification established by the Board take into account experience in administrative and executive positions, familiarity with court procedures, and special training.

Depending upon the wishes and needs of each particular council, it may delegate to its circuit executive any administrative powers and duties,²⁰¹ including:

201. 28 U.S.C. § 332(e).

- Administrative control of all nonjudicial activities of the court of appeals.
- Administering the court of appeals personnel system.
- Administering the court of appeals budget.
- Maintaining a modern accounting system.
- Property control and space management.
- Conducting studies relating to the business and administration of the courts within the circuit and preparing appropriate recommendations and reports to the chief judge, the circuit council, and the judicial conference.
- Collecting, compiling, and analyzing statistical data and presentation of reports based on such data.
- Serving as liaison with other courts and organizations.
- Arranging and attending meetings of the judges of the circuit and the council.
- Preparing an annual report to the circuit and to the Administrative Office of the United States courts for the preceding calendar year, including recommendations for more expeditious disposition of the business of the circuit.

The circuit executive is supervised by the chief judge of the circuit.

§ 1:7.11 Circuit Judicial Conferences

As part of the judicial administration statutes enacted by Congress in 1939, a judicial conference for each circuit was created.²⁰² The judicial conference is an annual meeting that each active circuit and district judge is required to attend. The statute²⁰³ also encourages participation by members of the bar of the circuit.

The chief judge of the circuit presides at the conference. Its statutory purpose is to consider the business of the courts and advise means of improving the administration of justice within the circuit.

Typically, a conference lasts two to three days. During the conference, an executive session is held, which is attended only by the district and circuit judges. Additional sessions are attended by members of the bar, either by special invitation or at open meetings. During these sessions speakers and programs of interest to the attendees are presented, and circuit problems and processes are discussed.

202. 28 U.S.C. § 333.

203. *Id.*

§ 1:7.12 Administrative Office of the United States Courts

The Administrative Office is the third of the organizations created by Congress in 1939 to assist in the management of the federal judicial system.²⁰⁴ This office provides administrative support for the courts of appeals and district courts of the United States, the Canal Zone, the Virgin Islands, and for the Court of Federal Claims and the Court of International Trade.

The Administrative Office provides staff services for the committees of the Judicial Conference of the United States and makes studies, surveys, and reports on request of such committees. Special surveys and reports are also made by the Office upon request of the judicial councils or the chief judge of a district court.

§ 1:7.13 Federal Judicial Center

The Federal Judicial Center was established by law in 1967.²⁰⁵ Its purpose, as stated in the enabling act, is “to further the development and adoption of improved judicial administration in the courts of the United States.”²⁰⁶

The principal departments of the Center are Research, Innovations and Systems Development, Continuing Education and Training, and Inter-Judicial Affairs and Information Services. The functions of these departments are summarized below.

[A] Research

This department executes the Center’s research mission, which is to identify those areas where the lack of sufficient information hampers formulation of recommendations and programs to improve operation of the federal courts and to develop required information in those areas.²⁰⁷

[B] Innovations and Systems Development

This department assists the Board in executing its statutory duty to “study and determine ways in which automatic data processing and systems procedures may be applied to the administration of the courts of the United States.”²⁰⁸ This includes development of court information systems that will aid judges and court personnel by giving

204. 28 U.S.C. § 601.

205. 28 U.S.C. §§ 620–29.

206. 28 U.S.C. § 620(a).

207. 28 U.S.C. § 620(b)(1).

208. 28 U.S.C. § 623(a)(5).

insight into the dynamics of court processes so that they may ascertain how well specific practices work and identify precisely where problems arise. Development efforts are also directed toward improved systems for general management, juror utilization, court reporting, and studies or experiments associated with the use of systems procedures in the courts.

[C] Continuing Education and Training

This department discharges the Center's function "to stimulate, create, develop, and conduct programs of continuing education and training for personnel of the judicial branch of the Government."²⁰⁹ In executing this function, the departments conduct courses and seminars for federal judges, bankruptcy judges, public defenders, clerks, courtroom deputy clerks, magistrates, probation officers, and other system employees.

[D] Inter-Judicial Affairs and Information Services

This department is primarily responsible for coordination with other organizations working toward improved judicial administration in both federal and state courts.²¹⁰ Close liaison is maintained with other organizations, such as the four conferences of the American Bar Association's Section of Judicial Administration, the National Center for State Courts, and the National College of the State Judiciary. The department also follows the work of Congress as it affects the federal courts and, in conjunction with the Administrative Office, publishes a monthly bulletin entitled *The Third Branch*, containing current news about the federal courts.

§ 1:7.14 Judicial Panel on Multidistrict Litigation

The Judicial Panel on Multidistrict Litigation was created by Act of Congress in 1968²¹¹ to review considerations for transferring civil actions involving one or more common questions of fact pending in different districts to a single district for coordinated or consolidated pretrial proceedings. The panel consists of seven district and circuit judges appointed by the Chief Justice, no two of whom may be from the same circuit. The panel usually sits en banc, and a concurrence of four members is required for any panel action. Proceedings for transfer may be initiated by motion of any party or by the panel on its own initiative. The panel maintains a clerk's office in Washington, D.C.,

209. 28 U.S.C. § 620(b)(3).

210. 28 U.S.C. § 620(b)(5).

211. 28 U.S.C. § 1407.

and holds hearings in cities throughout the United States. Detailed information regarding procedures is set forth in the Manual for Litigation. Further discussion is found in chapter 3.

§ 1:8 Ancillary Agencies and Personnel

§ 1:8.1 United States Attorneys

The authority of a U.S. attorney is set forth in 28 U.S.C. § 547.

In all cases in which the United States is a party, the attorney for the government is a representative of the Department of Justice. Criminal cases account for over 30% of the total case load of the U.S. district courts, and civil cases in which the United States is a party represent over 25% of all civil cases filed. U.S. marshals, federal penal and correctional institutions, and the Federal Bureau of Investigation are also within the Department of Justice.

Each judicial district has a U.S. attorney, who is appointed by the president with the advice and consent of the Senate. A U.S. attorney is appointed for a term of four years, but is subject to removal by the president. The salary is set by the attorney general within limits established by Congress. If a vacancy exists in the office, the district court for the district in which the vacancy exists may appoint a U.S. attorney to serve until the president fills the vacancy. Assistants to the U.S. attorney are appointed by, and may be removed by, the attorney general. The U.S. attorney represents the United States in all litigation in the specific district. This responsibility generally includes:

- Prosecuting all criminal offenses against the United States.
- Prosecuting or defending for the government all civil actions in which the United States is a party.
- Representing collectors or other officers of the revenue or customs in actions brought against them for official acts.
- Maintaining proceedings for the collection of fines, penalties, and forfeitures owed to the United States.

In connection with prosecutorial duties, the U.S. attorney may be present during sessions of a federal grand jury but may not remain while the grand jury is deliberating or voting. In some situations, such as federal tax refund suits against the United States, the U.S. attorney may be co-counsel of record together with another attorney from the Department of Justice, who may have primary responsibility for defense of the case.

§ 1:8.2 United States Marshals²¹²

The president, with the advice and consent of the Senate, appoints a U.S. marshal for each judicial district, who serves for a term of four years. The marshal appoints deputies whose employment is governed by civil service regulations. As with the U.S. attorney, the district court for the district may appoint a marshal to serve until a vacancy is filled by presidential appointment.

The duties and responsibilities of a U.S. marshal are

- To serve as marshal of the district court and of the court of appeals when sitting in that district.
- To execute all writs, process, and orders issued under the authority of the United States, including those of the courts.
- To pay the salaries and expenses of U.S. attorneys and their staffs, circuit judges, district judges, court clerks, and the marshal's own staff.

In connection with the responsibility to execute all process, the marshal has custody of federal prisoners awaiting trial, sentence, or transportation to a penal institution after conviction. Marshals and their deputies are authorized to carry firearms and may make arrests without warrant within statutory and constitutional limits.

Marshals and their deputies may exercise the same powers as sheriffs of the state in which they are located in carrying out their duties.

§ 1:8.3 Federal Bureau of Investigation²¹³

The agency charged with primary responsibility for detecting, investigating, and prosecuting crimes against the United States is the Federal Bureau of Investigation (FBI). The FBI operates as a bureau of the Department of Justice. It maintains its headquarters in Washington, D.C., but operates offices throughout the United States. It is headed by a Director appointed by the president with Senate confirmation.

Local offices are headed by an agent in charge, and staff includes special agents, secretaries, and clerical employees. Special agents of the FBI frequently are witnesses in federal criminal trials.

Agents of the FBI are authorized to carry firearms, to serve warrants and subpoenas, and to make arrests without warrants within statutory and constitutional limits.

212. 28 U.S.C. §§ 561–69.

213. 28 U.S.C. §§ 531–40C.

There are several other federal investigatory and law enforcement agencies that are assigned specialized duties, such as protecting the president of the United States, handling counterfeiting activities, controlling dangerous drug violations, and handling matters arising under the revenue, customs and immigration laws of the United States. Within their specialized areas, the relationship of these officers to the courts is similar to that of FBI agents.

§ 1:9 Additional Resources

- Lumen N. Mulligan, Glen Staszewski, *Civil Rules Interpretive Theory*, 101 MINN. L. REV. 2167–2242 (2017)
- Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697–736 (2017)
- Pamela K. Bookman, David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767–845 (2017)
- Kevin M. Clermont, *Civil Procedure’s Five Big Ideas*, 2016 MICH. ST. L. REV. 55–108 (2016)
- George Rutherglen, *What Happened to the Framers of the Federal Rules? Generational Change and the Transformation of The Rulemaking Process*, 42 J. SUP. CT. HIST. 193–201 (2017)
- David Crump, *Litigation Rules, Clausewitz, and the Strategies of War*, 9 ELON L. REV. 1–22 (2017)
- H. Allen Blair, *Promise and Peril: Doctrinally Permissible Options for Calibrating Procedure Through Contract*, 95 NEB. L. REV. 787–830 (2017)
- Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941–1011 (2017)
- Andrew S. Pollis, *Busting Up the Pretrial Industry*, 85 FORDHAM L. REV. 2097–2117 (2017)
- Dana Reda, *What Does It Mean to Say That Procedure Is Political?*, 85 FORDHAM L. REV. 2203–2225 (2017)
- Norman W. Spaulding, *Due Process Without Judicial Process?: Antiadversarialism in American Legal Culture*, 85 FORDHAM L. REV. 2249–2273 (2017)
- Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103–165 (2017)
- J. Maria Glover, *A Regulatory Theory of Legal Claims*, 70 VAND. L. REV. 221–309 (2017)

- Patrick Woolley, *The Role of State Law in Determining the Construction and Validity of Federal Rules of Civil Procedure*, 35 REV. LITIG. 207–291 (2016)
- David C. Thornton, *Evaluating Anti-Slapp Protection in the Federal Arena: An Incomplete Paradigm of Conflict*, 27 GEO. MASON U. CIV. RTS. L.J. 119–144 (2016)
- Brooke Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005–1071 (2016)
- Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RES. L. REV. 501–536 (2016)
- Eric Simpson, *Slapp-Ing Down the Right to a Jury Trial: Anti-Strategic Lawsuits Against Public Participation and the Seventh Amendment*, 48 U. TOL. L. REV. 169–187 (2016)
- Patricia Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177–1237 (2015)
- Elizabeth French, *Respecting the Linchpin: Why Absentee Consent Should Limit Magistrate Judge Jurisdiction*, 3 STAN. J. COMPLEX LITIG. 32–61 (2015)
- Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793–1838 (2014)
- Donald Doernberg, *Horton the Elephant Interprets the Federal Rules of Civil Procedure: How the Federal Courts Sometimes Do and Always Should Understand Them*, 42 HOFSTRA L. REV. 799–838 (2014)

