JURISDICTIONAL PRESCRIPTIONS, NONJURISDICTIONAL PROCESSING RULES, AND FEDERAL APPELLATE PRACTICE: THE IMPLICATIONS OF *KONTRICK*, *EBERHART* & *BOWLES*

*Philip A. Pucillo**

I. INTRODUCTION

In the recent cases of *Kontrick v. Ryan*,[1] *Eberhart v. United States*,[2] and *Bowles v. Russell*,[3] the Supreme Court accentuated a critical distinction between two kinds of mandatory timing prescriptions: one that directly governs a federal court's subject-matter jurisdiction, and one that merely governs a federal court's administration of a proceeding over which its subject-matter jurisdiction is not in doubt. While noncompliance with the former will deprive the court of jurisdiction to adjudicate the proceeding, noncompliance with the latter, which the Court has colloquially described as an "inflexible claim-processing rule,"[4] will result in a litigant's forfeiture of the opportunity to raise a timeliness challenge once the court has adjudicated the proceeding on the merits.

The purpose of this Article is to assess the implications of these cases for at least two categories of timing prescriptions routinely confronted by federal appellate litigants. The first concerns the initiation of an appeal as of right. Although the Court's traditional understanding had been that the relevant timing restrictions were jurisdictional prerequisites regardless of the nature of the underlying proceeding or the status of the appellant, the Court has since confirmed that this understanding no longer pertains to appeals initiated by criminal defendants because the restrictions are not

* Associate Professor of Law, Ave Maria School of Law, Ann Arbor, Michigan. A.B., Lafayette College; J.D., Tulane Law School. The author extends his gratitude to Edward Cooper, Scott Dodson, Joan Steinman, and Catherine Struve for extremely helpful insights and suggestions, and to Judy Gallagher and Cimarron Gilson for their refinement of prior drafts.

1. 540 U.S. 443 (2004).
2. 546 U.S. 12 (2005) (per curiam).
3. 127 S. Ct. 2360 (2007).
4. *Kontrick*, 540 U.S. at 456.

prescribed by statute. Accordingly, the government's failure to object to a criminal defendant's appeal on timeliness grounds prior to an adjudication on the merits will result in a forfeiture of that objection.

The second timing prescription concerns the filing in civil cases of certain postjudgment motions that routinely precede an appeal from the judgment. The requirements for the timely filing of such a motion, like the requirements for the timely filing of appeal as of right, had long been regarded as jurisdictional prerequisites. But because those restrictions are not prescribed by statute, they are now properly understood as mere processing rules that are subject to forfeiture by a litigant who fails to object to the timeliness of such a motion before the district court adjudicates it on the merits.

Part II of the Article provides an overview of the timing requirements for the filing of an appeal as of right from a decision of a federal district court, emphasizing the development of the Supreme Court's jurisdictional conception of these requirements. Part III examines the important distinction between rules governing subject-matter jurisdiction and mere claim-processing rules, as initially developed in *Kontrick* and affirmed shortly thereafter in *Eberhart*. Part IV then assesses the implications of these cases for the timing requirements discussed in Part II, including a discussion of the Court's recent holding in *Bowles* that the requirements for the timely filing of an appeal as of right in a civil proceeding govern the subject-matter jurisdiction of the courts of appeals in light of 28 U.S.C. § 2107.[5] Lastly, Part V assesses how, in light of *Kontrick* and *Eberhart*, the timing requirements applicable to certain postjudgment motions in civil proceedings are now properly viewed as processing rules rather than jurisdictional prerequisites because they do not derive from a statute.

II. THE SUPREME COURT'S JURISDICTIONAL CONCEPTION OF THE TIMING REQUIREMENTS OF AN APPEAL AS OF RIGHT[6]

The appropriate method of commencing a proceeding in a federal court of appeals depends upon both the nature of the decision to be challenged and the tribunal that rendered it. This Article focuses upon the manner in which a litigant must initiate an appeal from a decision of a federal district court[7] that is appealable as of right,[8] namely, the filing of a timely notice of appeal with the district court.

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5. 28 U.S.C. § 2107(a) (2006).

6. This Part draws from a similar discussion in a prior publication. *See* Philip A. Pucillo, *Rescuing Rule 3(c) from the 800-Pound Gorilla: The Case for a No-Nonsense Approach to Defective Notices of Appeal*, 59 OKLA. L. REV. 271, 273–77 (2006).

7. In addition to decisions of district courts, the federal courts of appeals entertain challenges to decisions of the United States Tax Court and federal administrative agencies. *See* FED. R. APP. P. 13.

A. *The Timing Requirements of Rule 4*

Pursuant to Rule 3 of the Federal Rules of Appellate Procedure, the commencement of an appeal as of right from a decision of a federal district court may be effected "only by filing a notice of appeal with the district clerk *within the time allowed by Rule 4*."[9] The amount of time that Rule 4 allows for the filing of a notice of appeal is determined primarily by the nature of the underlying action. A litigant in a civil proceeding generally has thirty days from the district court's entry of the judgment or order[10] in which to file a notice of appeal.[11] If, on the other hand, the underlying action is criminal in nature, the time to file a notice of appeal differs depending upon the status of the litigant who will initiate the appeal: the United States ordinarily has thirty days from entry of the

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8. *See, e.g.*, 28 U.S.C. § 1291 (granting appellate jurisdiction over "appeals from all final decisions of the district courts of the United States"). When a decision may be appealed only with the permission of the court of appeals, *see, e.g.*, FED. R. CIV. P. 23(f) ("A court of appeals may *in its discretion* permit an appeal from an order of a district court granting or denying class action certification . . . .") (emphasis added), the appellant must file with that court a petition for permission to appeal, *see* FED. R. APP. P. 5(a)(1) ("To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal.").

9. FED. R. APP. P. 3(a)(1) (emphasis added).

10. Under Rule 4(a)(7) of the Federal Rules of Appellate Procedure, "[a] judgment or order is entered" within the meaning of Rule 4(a):

> (i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or
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> (ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:
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> - the judgment or order is set forth on a separate document, or
> - 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

Id. 4(a)(7).

11. *Id.* 4(a)(1)(A) ("In a civil case . . . the notice of appeal . . . must be filed with the district clerk within 30 days after the judgment or order appealed from is entered."). *See also* 28 U.S.C. § 2107(a) (providing in relevant part that "no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree").

A party to a civil proceeding has an additional thirty days (for a total of sixty) in which to file a notice of appeal when the federal government (or an officer or entity thereof) is a party to that proceeding. *See* FED. R. APP. P. 4(a)(1)(B) ("When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered."); 28 U.S.C. § 2107(b) ("In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.").

judgment or order[12] to file a notice of appeal,[13] while the defendant usually has just ten days to do so.[14]

B. Robinson *and Appeals in Criminal Cases*

For decades, the Supreme Court consistently reinforced the notion that the preceding timing requirements for the filing of a notice of appeal were *jurisdictional* in nature.[15] An oft-cited source for this jurisdictional conception was *United States v. Robinson*,[16] which involved two criminal defendants who sought to challenge the district court's judgment of conviction by way of notices of appeal filed in excess of the ten-day limit set forth in then-Rule 37(a)(2) of the Federal Rules of Criminal Procedure.[17] Because the notices were filed out of time, the government moved that the Court of Appeals for the District of Columbia Circuit dismiss the appeals for lack of jurisdiction.[18] In denying the motion, the D.C. Circuit held that its jurisdiction over the appeals was secured by the district court's

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12. Under Rule 4(b)(6) of the Federal Rules of Appellate Procedure, a judgment or order is "entered . . . when it is entered on the criminal docket." FED. R. APP. P. 4(b)(6).

13. *Id.* 4(b)(1)(B) ("When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of: (i) the entry of the judgment or order being appealed; or (ii) the filing of a notice of appeal by any defendant."). *See also* 18 U.S.C. § 3731.

14. FED. R. APP. P. 4(b)(1)(A) ("In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of: (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government's notice of appeal.").

15. The Supreme Court expressed a jurisdictional conception of the requirements for the initiation of a timely appeal as far back as 1846. *See* E. King Poor, *Jurisdictional Deadlines in the Wake of* Kontrick *and* Eberhart, 40 CREIGHTON L. REV. 181, 187-88 (2007) (discussing the Court's dismissal of an appeal for want of jurisdiction in United States v. Curry, 47 U.S. 106 (1848)).

16. 361 U.S. 220 (1960). *See* Poor, supra note 15, at 194 (observing that, "[o]f the myriad decisions holding various criminal, appellate, and bankruptcy decisions to be jurisdictional, a great many trace their origin to" *Robinson*).

17. *See Robinson*, 361 U.S. at 220–21. *See generally* FED. R. CRIM. P. 37(a)(2), 361 U.S. 220 (1960) (repealed 1968) (providing the rule in effect at the time of the case: "An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from . . . .").

Rule 4 of the Federal Rules of Appellate Procedure subsequently absorbed the timing requirements of Rule 37(a)(2) of the Federal Rules of Criminal Procedure, along with those of its counterpart in the Federal Rules of Civil Procedure. FED. R. APP. P. 4(a) advisory committee's note (1967) ("This subdivision is derived from FRCP 73(a) . . . without any change of substance."); FED. R. APP. P. 4(b) advisory committee's note (1967) ("This subdivision is derived from FRCrP 37(a)(2) . . . without change of substance.").

18. *Robinson*, 361 U.S. at 221.

determination that the defendants' untimely filing resulted from "excusable neglect."[19]

The Supreme Court rejected the D.C. Circuit's approach, concluding that a district court's finding of excusable neglect carried no significance in regard to a notice of appeal filed after expiration of Rule 37(a)(2)'s ten-day time limit.[20] The Court relied primarily upon Rule 45(b) of the Federal Rules of Criminal Procedure, which at that time provided, in pertinent part, that "the [district] court may not enlarge the period . . . for taking an appeal."[21] Finding this provision to be "quite plain and clear," the Court reasoned that "to recognize a late notice of appeal is actually to 'enlarge' the period for taking [any action]" within the meaning of Rule 45(b).[22] The Court found that the D.C. Circuit's contrary understanding of Rule 45(b) could not be reconciled with its text and history, nor with prior judicial interpretations of the Rule and its predecessor.[23]

While the analysis of the operation of Rule 45(b) was significant, the most substantial repercussions of *Robinson* arose from the Court's observation that "[t]he courts have uniformly held that the taking of an appeal within the prescribed time is *mandatory and jurisdictional.*"[24] Notably, the *Robinson* Court did not explicitly embrace that proposition at any point in its opinion. In short order, however, the courts of appeals construed *Robinson* as holding that the requirements for the filing of a timely notice of appeal were "mandatory and jurisdictional."[25]

C. Browder *and Appeals in Civil Cases*

The Supreme Court verified that interpretation of *Robinson* almost twenty years later in *Browder v. Director, Department of*

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19. *Id.* at 221–22.

20. *Id.* at 222–30.

21. *Id.* at 223.

22. *Id.* at 224.

23. *Id.* at 227–29.

24. *Id.* at 229 (emphasis added). *See also id.* at 224 (observing that, with the exception of the D.C. Circuit, every court of appeals had determined that "the filing of a notice of appeal within the 10-day period prescribed by Rule 37(a)(2) is *mandatory and jurisdictional*") (emphasis added).

25. *See, e.g.*, Wilkinson v. United States, 278 F.2d 604, 605 (10th Cir. 1960). The advisory committee on the Federal Rules of Appellate Procedure shared this same understanding of *Robinson*. *See* FED. R. APP. P. 3 advisory committee's note (1967):

> Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is 'mandatory and jurisdictional,' *United States v. Robinson*, compliance with the provisions of those rules is of the utmost importance.

Corrections.[26] Unlike *Robinson*, *Browder* involved an appeal from a judgment in a civil proceeding.[27] In order to emphasize that the pertinent thirty-day limit for the filing of a notice of appeal[28] was a jurisdictional prescription, the Court could have relied upon 28 U.S.C § 2107(a), which provides that "no appeal shall bring any judgment, order or decree in *an action, suit or proceeding of a civil nature* before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."[29] Rather than seize upon the fact that the applicable timing requirements were congressionally mandated, however, the Court fell back upon *Robinson* in stating without further elaboration that "[t]his 30-day time limit is 'mandatory and jurisdictional.'"[30] The Court thus confirmed its jurisdictional conception of the ten-day restriction at issue in *Robinson*, while making plain that this conception applied with equal force to the thirty-day restriction at issue in the civil proceeding then before it. The upshot of *Browder*, therefore, was to firmly establish the proposition that the requirements for the filing of a timely notice of appeal were jurisdictional in nature, regardless of whether the underlying proceeding was civil or criminal.

III. *KONTRICK*, *EBERHART*, AND THE DISTINCTION BETWEEN JURISDICTIONAL PRESCRIPTIONS AND NONJURISDICTIONAL CLAIM-PROCESSING RULES

Against the backdrop of *Robinson* and *Browder*, the Supreme Court repeatedly expressed its understanding of the requirements for the filing of a timely notice of appeal as jurisdictional prerequisites.[31] In the recent cases of *Kontrick v. Ryan*[32] and *Eberhart v. United States*,[33] however, the Court called this jurisdictional conception into doubt by suggesting that those requirements are simply nonjurisdictional processing rules that are subject to forfeiture when

26. 434 U.S. 257 (1978).

27. The underlying proceeding was a petition for a writ of habeas corpus. *Id.* at 260.

28. *See supra* note 11.

29. 28 U.S.C. § 2107(a) (2006) (emphasis added).

30. *Browder*, 434 U.S. at 264 (quoting United States v. Robinson, 361 U.S. 220, 229 (1960)).

31. *See, e.g.*, Hohn v. United States, 524 U.S. 236, 247 (1998); Budinich v. Becton Dickinson & Co., 486 U.S. 196, 203 (1988); Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 61 (1982) (per curiam); Needham v. White Labs., Inc., 454 U.S. 927, 929–30 (1981) (Rehnquist, J., dissenting from denial of certiorari).

32. 540 U.S. 443 (2004).

33. 546 U.S. 12 (2005) (per curiam).

an appellee fails to raise them in a timely fashion.[34] These cases are examined in detail below.[35]

A. Kontrick v. Ryan

Kontrick arose from Robert Ryan's effort to contest the discharge of a debt owed to him by Andrew Kontrick, who had sought protection under chapter seven of the Bankruptcy Code.[36] Ryan instituted in the bankruptcy court a timely complaint objecting "to the discharge of any of Kontrick's debts."[37] Ryan then filed an amended complaint almost four months later, in order to assert an additional objection (referred to as "the 'family-account' claim"); namely, that Kontrick had fraudulently transferred money to his wife by removing his name from their formerly joint checking account, while continuing to deposit his salary checks into that account.[38] Ryan's amended complaint, however, was untimely under Rule 4004(a) of the Federal Rules of Bankruptcy Procedure, which mandates that such a pleading "be filed no later than [sixty] days after the first date set for the meeting of creditors."[39] Although Rule 4004(b) authorizes a bankruptcy court to extend the sixty-day filing period "for cause,"[40] Ryan did not bring the requisite motion seeking such an extension.[41] Moreover, Ryan had no additional means of securing an extension in light of Bankruptcy Rule 9006(b)(3), under which a bankruptcy court "may enlarge the time for taking action under [Rule 4004(a)] only to the extent and under the conditions stated in [that rule]."[42]

Notwithstanding that Ryan's amended complaint was indisputably filed out of time, Kontrick raised no timeliness objection in his answer or otherwise to the amended complaint's family-account objection.[43] As it turned out, the bankruptcy court relied entirely upon that single objection in ruling that "Kontrick was not

34. *See* Alva v. Teen Help, 469 F.3d 946, 951 (10th Cir. 2006) (observing that *Kontrick* and *Eberhart* "appear (at least at first blush) to call into doubt" the line of precedent establishing that the timely filing of a notice of appeal in both civil and criminal cases is mandatory and jurisdictional).

35. For another intensive discussion of *Kontrick* and *Eberhart*, see Poor, *supra* note 15, at 205-15.

36. 540 U.S. at 448–49.

37. *Id.* at 449; Poor, *supra* note 15, at 187-88.

38. *Kontrick*, 540 U.S. at 449-50.

39. FED. R. BANKR. P. 4004(a).

40. *Id.* 4004(b).

41. *Kontrick*, 540 U.S. at 449.

42. FED. R. BANKR. P. 9006(b)(3).

43. *See Kontrick*, 540 U.S. at 449–50.

entitled to a discharge of his debts" and entered judgment for Ryan accordingly.[44]

Kontrick thereafter sought reconsideration of the bankruptcy court's ruling on the ground that Ryan's amended complaint was untimely, and thus the court had no authority to consider the family-account objection in rendering its decision.[45] The court denied the motion, however, concluding that the applicable timing requirements were not, as Kontrick characterized them, "'jurisdictional,' *i.e.*, dispositive whenever raised in the proceedings."[46] Instead, the court held that Kontrick forfeited his "right to assert the untimeliness of the amended complaint" by waiting to do so until after the adjudication of Ryan's objection on the merits.[47]

The case eventually reached the Supreme Court, which agreed with the bankruptcy court's understanding of the timing requirements in question. At the outset of its discussion, the Court emphasized that Congress alone possesses the authority to determine the subject-matter jurisdiction of the lower federal courts.[48] The Court then contrasted the operation of a rule governing a federal court's subject-matter jurisdiction with that of what it characterized as a "claim-processing rule."[49] The latter, in the Court's view, is unlike a rule governing subject-matter jurisdiction to the extent that it is subject to forfeiture when a litigant who wishes to object to a proceeding on timeliness grounds "waits too long to raise the point."[50] Specifically, a litigant may not base a timeliness challenge upon a claim-processing rule after having litigated and lost on the merits of the proceeding.[51] A litigant who timely invokes a claim-processing rule, on the other hand, will ordinarily prevail, assuming that the prescription is amply emphatic to preclude application of equitable tolling or another equity-based exception.[52]

The Court then turned to the timing requirements applicable to the proceeding at issue—namely, a complaint objecting to a discharge of debts.[53] The Court observed that those requirements, rather than being imposed by Congress in the statutory provision conferring jurisdiction over such a proceeding to the bankruptcy courts, are prescribed by the Court itself in the form of Bankruptcy Rules 4004

44. *Id.* at 450–51.
45. *Id.* at 451.
46. *Id.* at 447.
47. *See id.* at 451.
48. *See id.* at 452-53.
49. *Id.* at 456.
50. *Id.*
51. *Id.* at 460.
52. *Id.* at 457–58.
53. *Id.* at 452-53.

and 9006(b)(3).[54] The Court was satisfied, therefore, that the applicable filing deadlines "are claim-processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate."[55] Accordingly, a debtor such as Kontrick will forfeit the right to raise a timeliness challenge under those rules by waiting until after the bankruptcy court decides the merits of the creditor's complaint.[56]

B. The Validity of Robinson *after* Kontrick

The Court's analysis in *Kontrick* necessarily cast doubt upon its longstanding notion that the timing requirements for the filing of a notice of appeal are jurisdictional in nature. After all, this jurisdictional understanding was supported by the *Robinson* Court's observation that "[t]he courts have uniformly held that the taking of an appeal within the prescribed time is *mandatory and jurisdictional.*"[57] And yet, the timing requirements at issue in *Robinson*, like those in *Kontrick*, were imposed by a procedural rule promulgated by the Court itself, as opposed to a statute of Congress.[58]

Notably, the *Kontrick* Court made explicit reference to *Robinson*'s use of the phrase "mandatory and jurisdictional" in describing the restrictions that Rule 45(b) of the Federal Rules of Criminal Procedure then imposed upon a district court's authority to extend the time to initiate an appeal from a judgment in a criminal proceeding.[59] The Court was rather forgiving with itself in this respect, depicting as "less than meticulous"[60] its repeated invocation of the phrase "mandatory and jurisdictional" to describe what were all along *nonjurisdictional* timing prescriptions. Nevertheless, the Court appropriately instructed that lower courts and litigants should reserve the term "'jurisdictional' . . . for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority" as opposed to claim-processing rules.[61]

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54. *Id.* at 454.

55. *Id.*

56. *Id.* at 447.

57. United States v. Robinson, 361 U.S. 220, 229 (1960) (emphasis added); *see also supra* notes 24–30 and accompanying text.

58. *See supra* notes 16–23 and accompanying text.

59. *Kontrick*, 540 U.S. at 454 (citing *Robinson*, 361 U.S. at 228–29); *see also supra* notes 21–22 and accompanying text.

60. *Kontrick*, 540 U.S. at 454. "Mistaken" and/or "incorrect" would have been more suitable descriptions for the Court's action.

61. *Id.* at 455.

C. Eberhart*'s Affirmation of* Kontrick *(and* Robinson*)*

Eberhart, which reached the Court within two years of its decision in *Kontrick*, provided a valuable opportunity to address the post-*Kontrick* viability of *Robinson*. *Eberhart* arose from Ivan Eberhart's effort to obtain a new trial after having been convicted of conspiring to distribute cocaine.[62] Eberhart initially supported his motion for a new trial with just a single ground for relief.[63] Almost six months later, however, Eberhart filed a supplemental submission that offered two additional grounds in support of his motion.[64]

The problem that Eberhart faced in regard to his supplemental submission was that it was untimely under Rule 33(b)(2) of the Federal Rules of Criminal Procedure, which provides that "'a[ny] motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty, or within such further time as the court sets during the 7-day period.'"[65] Moreover, Eberhart had no additional means of pursuing an extension of time to submit additional grounds in support of his motion in light of Criminal Rule 45(b), the same provision at issue in *Robinson*, under which a district court "'may not extend the time to take any action under [Rule 33], except as stated' in [that rule]."[66]

Notwithstanding that Eberhart presented his supplemental submission well beyond the seven-day deadline imposed by Rule 33 for the filing of a motion for a new trial, the government did not argue that the untimeliness of the submission barred the district court's consideration of the two grounds that it presented.[67] Instead, the government responded to the submission simply by contending that those grounds lacked merit.[68] In the end, the district court granted Eberhart's motion and ordered a new trial accordingly.[69] Importantly, the court emphasized that its ruling rested upon all three of the grounds asserted by Eberhart, and that any of the grounds standing alone or in pairing would not have sufficed.[70]

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62. Eberhart v. United States, 546 U.S. 12, 12 (2005) (per curiam).

63. *Id.* Eberhart alleged that there was a flaw in the transcript that was published to the jury. *Id.* at 12-13.

64. *Id.* at 13. Eberhart challenged (1) the district court's admission of hearsay testimony into evidence; and (2) the district court's failure to give to the jury a particular instruction. *Id.*

65. *Id.* at 12 (quoting FED. R. CRIM. P. 33(b)(2)).

66. *Id.* (quoting FED. R. CRIM. P. 45(b)(2)).

67. *Id.* at 13.

68. *Id.*

69. *Id.*

70. *Id.*

In support of its appeal from this ruling to the Court of Appeals for the Seventh Circuit, the government argued that the district court abused its discretion in considering the two grounds presented by Eberhart after the expiration of Rule 33's seven-day limit.[71] The Seventh Circuit agreed with the government and reversed the grant of a new trial, but did so with some reluctance in light of *Kontrick*.[72] The court suspected that Rule 33's timing prescriptions might be understood, after *Kontrick*, as claim-processing rules that the government had forfeited by failing to raise an appropriate timeliness objection before the adjudication of Eberhart's motion on the merits.[73] Contrary to this understanding, however, the Seventh Circuit had previously held that Rule 33's timing prescriptions were jurisdictional in nature, relying upon the Supreme Court's decisions in *Robinson* and *United States v. Smith*.[74] Considering itself bound to follow those earlier precedents until the Supreme Court expressly overruled them, the Seventh Circuit concluded that the district court was without jurisdiction to consider the two grounds for a new trial that Eberhart did not present until the filing of his untimely supplemental submission.[75]

Although the Supreme Court reversed the Seventh Circuit's judgment, the Court confirmed the Seventh Circuit's surmise that the timing prescriptions contained in Criminal Rules 33 and 45(b), like those at issue in *Kontrick*, constituted claim-processing rules that were subject to forfeiture, as opposed to rules governing the district court's subject-matter jurisdiction.[76] Comparing Criminal Rule 33 to Bankruptcy Rule 4004, the Court pointed out that each establishes a set period of time in which a litigant must initiate the appropriate proceeding with the court.[77] The Court noted that, although Rule 4004 permits a bankruptcy court to extend the time ordinarily allowed "for cause,"[78] an extension is otherwise prohibited in light of Bankruptcy Rule 9006(b)(3), under which the court "may enlarge the time for taking action under [Rule 4004(a)], only to the extent and under the conditions stated in [that rule]."[79] The Court then made the key observation that the prohibition contained in Bankruptcy Rule 9006(b)(3) is practically identical to that contained in Criminal Rule 45(b)(2), under which a district court "may not

71. *Id.*
72. *Id.* at 13-14.
73. *Id.* at 14.
74. 331 U.S. 469 (1947).
75. *Eberhart*, 546 U.S. at 13-14.
76. *Id.* at 14-16.
77. *Id.* at 14-15.
78. *Id.* at 15; FED. R. BANKR. P. 4004(b).
79. *Eberhart*, 546 U.S. at 15 (quoting FED. R. BANKR. P. 9006(b)(3)).

extend the time to take any action under [Rule 33] except as stated in [that rule]."[80] Given these similarities, the Court found it "implausible that the Rules considered in *Kontrick* can be nonjurisdictional claim-processing rules, while virtually identical provisions of the Rules of Criminal Procedure can deprive federal courts of subject-matter jurisdiction."[81]

Significantly, the *Eberhart* Court was satisfied that its characterization of the timing prescriptions contained in Criminal Rules 33 and 45(b) as claim-processing rules was reconcilable with its approach forty-five years earlier in *Robinson*.[82] The Court acknowledged that its observation in *Robinson* that "courts have uniformly held that the taking of an appeal within the prescribed time is *mandatory and jurisdictional*"[83] had resulted in confusion.[84] However, the Court demonstrated that its ultimate judgment in *Robinson*—that the D.C. Circuit was required to dismiss the untimely appeals at issue in that matter[85]—was perfectly consistent with the conception of the pertinent timing prescriptions as claim-processing rules.[86] The Court reasoned that the government in *Robinson* responded to the defendants' initiation of the appeals by immediately raising a timeliness objection rather than simply contesting the appeals on their merits.[87] Accordingly, the Court stated that the D.C. Circuit had to dismiss those appeals "not because the District Court lacked *subject-matter jurisdiction*, but because district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked."[88] To the Court's credit, this understanding of the D.C. Circuit's responsibility in *Robinson*[89] accords with the Court's suggestion in *Kontrick* that the bankruptcy court would have been obliged to dismiss Ryan's amended complaint if Kontrick had presented a timeliness challenge prior to adjudication on the merits.[90]

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80. *Id.* at 15 (quoting FED. R. CRIM. P. 45(b)(2)).

81. *Id.* at 15.

82. *Id.* at 15-16.

83. United States v. Robinson, 361 U.S. 221, 229 (1960) (emphasis added); *see also supra* note 24 and accompanying text.

84. *Eberhart*, 546 U.S. at 15.

85. The Court specifically stated that "the central point of the *Robinson* case [was] that when the Government objected to a filing untimely under Rule 37, the court's duty to dismiss the appeal was mandatory." *Id.* at 17.

86. *Id.*

87. *Id.*

88. *Id.* at 16-17.

89. *See* United States v. Robinson, 361 U.S. 221, 229 (1960).

90. *See* Kontrick v. Ryan, 540 U.S. 443, 458 (2004).

IV. THE IMPLICATIONS OF *KONTRICK* AND *EBERHART* FOR THE TIMING REQUIREMENTS OF AN APPEAL AS OF RIGHT

The Supreme Court concluded that the timing prescriptions at issue in *Kontrick* and *Eberhart* were processing rules, as opposed to rules governing the subject-matter jurisdiction of the respective courts.[91] Although the proceedings at issue in those cases were a complaint objecting to a discharge of debts and a motion for a new trial, respectively, the relevant principles had undeniable implications for the timing requirements for the filing of a notice of appeal.

As observed in Part II,[92] Rule 3 of the Federal Rules of Appellate Procedure provides that the exclusive method for initiating an appeal as of right from a decision of a federal district court is the filing of a notice of appeal within the timing requirements set forth in Appellate Rule 4.[93] Rule 4, in turn, provides for one set of timing requirements that governs when the appeal is taken in a civil proceeding,[94] and a second set of timing requirements that governs when the appeal is taken in a criminal proceeding.[95] The nature of each set of requirements in light of *Kontrick* and *Eberhart* will be addressed in turn below.

A. Appeals in Civil Proceedings

1. The Timing Requirements of Rule 4(a)

The timing requirements for the initiation of an appeal from a judgment or order entered by a district court in a civil proceeding are contained in Appellate Rule 4(a). Under Rule 4(a)(1), a litigant ordinarily has thirty days from the district court's entry of a judgment or order in which to file a notice of appeal.[96] However, Rule 4(a)(1)(B) affords a litigant sixty days in which to file the notice if the United States, or an officer or agency of the United States, is a party to the underlying action.[97]

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91. *See supra* text accompanying notes 55, 76.

92. *See supra* note 9 and accompanying text.

93. FED. R. APP. P. 3(a)(1).

94. *Id.* 4(a).

95. *Id.* 4(b).

96. *Id.* 4(a)(1)(A) ("In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.").

97. *Id.* 4(a)(1)(B) ("When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.").

Importantly, a federal court of appeals has no authority to extend the time in which a party to a civil proceeding must file a notice of appeal.[98] The relevant provision is Rule 26(b)(1) of the Federal Rules of Appellate Procedure, which states that "the court may not extend the time to file . . . a notice of appeal (*except as authorized in Rule 4*)."[99] As it turns out, Rule 4(a) authorizes the district court alone to extend the time to file a notice of appeal, and only under limited circumstances. First, under Rule 4(a)(5),[100] a district court may extend the time to file a notice of appeal so long as the litigant seeking the extension "moves no later than 30 days after the time prescribed by . . . Rule 4(a) expires"[101] and demonstrates "excusable neglect" or "good cause" for the extension.[102] If granted, the extension may not exceed "30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later."[103]

Second, under Rule 4(a)(6),[104] a district court may reopen the time to file a notice of appeal when a litigant seeks to appeal from a

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98. *Id.* 26(b)(1).

99. *Id.* (emphasis added).

100. Rule 4(a)(5) provides in full:

> (A) The district court may extend the time to file a notice of appeal if:
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> (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
>
> (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.
>
> (B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.
>
> (C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

Id. 4(a)(5).

101. *Id.* 4(a)(5)(A)(i).

102. *Id.* 4(a)(5)(A)(ii). For an interesting discussion of the "excusable neglect" standard, see *Graphic Commc'ns. Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1 (1st Cir. 2001).

103. *See* FED. R. APP. P. 4(a)(5)(C).

104. Rule 4(a)(6) provides in full:

> The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> (A) The court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
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> (B) The motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice . . . of the entry, whichever is earlier; and

judgment or order of which it did not receive timely notice under Rule 77(d) of the Federal Rules of Civil Procedure.[105] To qualify for such relief, the litigant in question must file the appropriate motion within 180 days after entry of the judgment or order to be appealed, or within seven days after receiving notice of the judgment or order under Rule 77(d), whichever is earlier.[106] The litigant then must demonstrate that it did not receive notice of the judgment or order under Rule 77(d) within twenty-one days of entry by the district court.[107] Finally, the district court must find that a reopening of the appeal period would not prejudice any of the parties.[108] Upon granting the motion, "[t]he district court may reopen the time to file [a notice of] appeal for a period of 14 days after the date when its order to reopen is entered. . . ."[109]

Applying the Supreme Court's analysis of the rules at issue in *Kontrick* and *Eberhart*, Rule 4(a)'s timing prescriptions appear at first glance to fall into the category of nonjurisdictional processing rules, as opposed to rules that govern the subject-matter jurisdiction of the federal courts of appeals. Significantly, the structure of Rule 4(a) reflects that of both Bankruptcy Rule 4004 and Criminal Rule 33. In particular, Rule 4(a) establishes a set period of time in which a litigant must file its notice of appeal,[110] and authorizes an extension of that time by the district court only under specified conditions.[111] An extension is not otherwise obtainable in light of Appellate Rule 26(b)(1), which, in the manner of Bankruptcy Rule 9006(b)(3) and Criminal Rule 45(b)(2), forbids an extension except as provided in the rule.[112] Rule 4(a), therefore, shares the fundamental characteristics of the rules featured in *Kontrick* and *Eberhart*.

(C) The court finds that no party would be prejudiced.

Id. 4(a)(6).

105. Rule 77(d) provides in pertinent part: "Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry in the manner provided for in Rule 5(b) upon each party who is not in default for failure to appear, and shall make a note in the docket of the service." FED. R. CIV. P. 77(d).

106. FED. R. APP. P. 4(a)(6)(B).

107. *Id.* 4(a)(6)(A).

108. *Id.* 4(a)(6)(C).

109. *Id.* 4(a)(6).

110. *See* Eberhart v. United States, 546 U.S. 12, 14-15 (2005) (per curiam) (noting that Rule 33 of the Federal Rules of Criminal Procedure and Rule 4004 of the Federal Rules of Bankruptcy Procedure allow a "set period of time to file with the court").

111. *See id.* at 15 (noting that extensions of time are not allowed under Criminal Rule 33 and Bankruptcy Rule 4004 except as provided for in those rules).

112. *Id.*

2. The Timing Restrictions of § 2107

The foregoing analysis is complicated, however, by the presence of timing restrictions imposed by statute. Congress has vested the courts of appeals with jurisdiction to review a number of decisions in civil proceedings that a litigant may appeal as a matter of right. Such decisions include not only "final decisions" within the meaning of § 1291,[113] but also certain types of "interlocutory decisions" specified in 28 U.S.C. § 1292(a).[114]

Although the provisions conferring jurisdiction over these categories of appeals do not restrict the time in which they must be initiated, a detailed set of restrictions that are generally applicable to appeals in civil proceedings is contained in 28 U.S.C. § 2107.[115]

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113. *See supra* note 8 and accompanying text. Notably, the Court of Appeals for the Federal Circuit has exclusive jurisdiction to review certain categories of "final decisions" of the district courts. *See, e.g.*, 28 U.S.C. § 1295(a)(1) (2006) (providing the Federal Circuit with exclusive appellate jurisdiction over "an appeal from a final decision of a district court of the United States . . . if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title"); *id.* § 1295(a)(2) (providing the Federal Circuit with exclusive appellate jurisdiction over "an appeal from a final decision of a district court of the United States . . . if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title. . . .").

114. *See, e.g.*, 28 U.S.C. § 1292(a)(1) (granting appellate jurisdiction over appeals from "[i]nterlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions"); *id.* § 1292(a)(2) (granting appellate jurisdiction over appeals from "[i]nterlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property"); *id.* § 1292(a)(3) (granting appellate jurisdiction over appeals from "[i]nterlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed").

115. Section 2107 provides in relevant part:

> (a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> (b) In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.
>
> (c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—
>
> > (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
> >
> > (2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier,

Indeed, the thirty-day time limit imposed by Rule 4(a)(1)(A) is an exact reflection of § 2107(a), which provides, in relevant part, that "no appeal shall bring any judgment, order or decree *in an action, suit or proceeding of a civil nature* before a court of appeals for review unless notice of appeal is filed, *within thirty days* after the entry of such judgment, order or decree."[116] Moreover, Rule 4(a)(1)(B)'s allowance for sixty days, when the United States is a party to the underlying proceeding, simply mirrors the same allowance contained in § 2107(b).[117]

Section 2107 even sets forth detailed standards applicable to a litigant's effort to obtain an extension or a reopening of the time to appeal. Specifically, § 2107(c) provides that "[t]he district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause."[118] That same section also authorizes a district court to reopen the time to appeal for a fourteen-day period "upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier," so long as the court determines "(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and (2) that no party would be prejudiced."[119] Accordingly, the requirements for an extension or a reopening of the time to appeal set forth in Rule 4(a)(5) and Rule 4(a)(6), respectively,[120] are in effect prescribed by a statute of Congress.[121]

3. *Bowles* and the Confirmation of a Jurisdictional Conception after *Kontrick* and *Eberhart*

Following the Court's decisions in *Kontrick* and *Eberhart*, a significant question that arose was whether the timing restrictions

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reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

28 U.S.C. § 2107(a)-(c).

116. *Id.* § 2107(a) (emphasis added).

117. *Id.* § 2107(b) ("In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.").

118. *Id.* § 2107(c).

119. *Id.* § 2107(c)(1).

120. *See supra* notes 100-109 and accompanying text.

121. This is not to suggest that the Supreme Court has provided no gloss on the congressional standards contained in § 2107. For example, Rule 4(a)(6)(A) makes clear that the notice "of the entry of a judgment or order" referred to in § 2107(c)(1) is the notice required by Rule 77(d) of the Federal Rules of Civil Procedure. *See* FED. R. APP. P. 4(a)(6)(A). Section 2107, however, makes no reference whatsoever to Rule 77(d). *See* 28 U.S.C. § 2107.

applicable to the filing of an appeal as of right in a civil proceeding constitute rules that govern the subject-matter jurisdiction of the courts of appeals.[122] The Supreme Court eventually resolved that question in *Bowles v. Russell*.[123]

Bowles involved an appellant who successfully moved to reopen the time to appeal after having failed to receive notice of the judgment.[124] In granting the motion, however, the district court reopened the appeal period for seventeen days,[125] even though Appellate Rule 4(a)(6)—and its statutory counterpart in 28 U.S.C. § 2107(c)—allow for a reopening of no more than fourteen days.[126] Bowles then filed his notice of appeal within the time afforded by the district court, but beyond the fourteen-day period permitted by these provisions.[127] The Sixth Circuit subsequently dismissed the appeal for lack of jurisdiction.[128]

In affirming the Sixth Circuit's jurisdiction-based disposition, the Supreme Court emphasized its "longstanding treatment of statutory time limits for taking an appeal as jurisdictional."[129]

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122. Section 2107 fails to explicitly resolve this question by using jurisdictional terms or otherwise referring to the jurisdiction of the courts of appeals. *See* 28 U.S.C. § 2107. Nor does the legislative history of § 2107 suggest that its timing prescriptions were intended to govern the subject-matter jurisdiction of the courts of appeals. See H.R. REP. NO. 102-322, at 10 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1303, 1309-10 (history of Judicial Improvements, Pub. L. 102-198, § 12, 105 Stat. 1627 (1991)); S. REP. NO. 95-989, at 3, 15-19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5789, 5801-05 (history of Bankruptcy Reform of Act of 1978, Pub. L. 95-598, tit. II, § 248, 92 Stat. 2672 (1978)); H.R. REP. NO. 95-595, at 449 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6405 (same).

123. 127 S. Ct. 2360 (2007). Prior to the Supreme Court's ruling in *Bowles*, the two courts of appeals that had squarely addressed the question (in the wake of *Kontrick* and *Eberhart*) determined that, in light of § 2107, the pertinent timing requirements are jurisdictional prerequisites as opposed to claim-processing rules. *See* Alva v. Teen Help, 469 F.3d 946, 948 (10th Cir. 2006); Bowles v. Russell, 432 F.3d 668, 672 n.1 (6th Cir. 2005). For critical assessments of the Supreme Court's rationale in *Bowles*, see Scott Dodson, *Jurisdictionality and* Bowles v. Russell, 102 NW. U. L. REV. COLLOQUY 42 (2007), http://www.law.northwestern.edu/lawreview/Colloquy/2007/21/LRColl2007n21Dodson.pdf; Elizabeth Chamblee Burch, *Nonjurisdictionality or Inequity*, 102 NW. U. L. REV. COLLOQUY 64 (2007), http://www.law.northwestern.edu/lawreview/Colloquy/2007/24/LRColl2007n24Burch.pdf; E. King Poor, *The Jurisdictional Time Limit for an Appeal: The Worst Kind of Deadline—Except for All Others*, 102 NW. U. L. REV. COLLOQUY 151 (2008), http://www.law.northwestern.edu/lawreview/colloquy/2008/1/LRColl2008n1Poor.pdf.

124. *Bowles*, 127 S. Ct. at 2362.

125. *Id.*

126. *See supra* text accompanying notes 104, 115.

127. *Bowles*, 127 S. Ct. at 2362.

128. *Id.* at 2363.

129. *Id.* at 2364. *See id.* at 2363-64 n.2 ("[I]t is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century.").

Against this backdrop, the Court observed that the timing restrictions relating to the reopening of an appeal, like the initial thirty-day period for the filing of a notice of appeal in a civil proceeding, are set forth in 28 U.S.C. § 2107.[130] The Court then reasoned that "because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."[131] Noting its prior observation that subject-matter jurisdiction extends to "classes of cases" falling within a court's adjudicatory authority,[132] the Court declared that "it is no less 'jurisdictional' when Congress forbids federal courts from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final judgment."[133] Accordingly, a litigant's failure to file a notice of appeal within a time limit set forth in § 2107 deprives the court of appeals of jurisdiction over the ensuing appeal.[134]

In reaching its determination, the *Bowles* Court relied upon the statutory nature of the pertinent timing prescriptions in distinguishing them from those at issue in *Kontrick* and *Eberhart*. The Court pointed out that *Kontrick* and *Eberhart* had recognized "the jurisdictional significance of the fact that a time limitation is set forth in a statute,"[135] emphasizing *Kontrick*'s explicit reference to § 2107 as an example of a provision containing "the type of statutory time constraints that would limit a court's jurisdiction."[136] The Court concluded, therefore, that Congress's specific limitation of time by which a district court may reopen the appeal period under § 2107(c) "is more than a simple claim-processing rule."[137]

The effect of the *Bowles* Court's holding that § 2107's timing prescriptions constrain the subject-matter jurisdiction of the courts of appeals is that, even after an untimely appeal is adjudicated on the merits, an appellee in a civil proceeding will retain a timeliness objection that would have been forfeited were the timing prescriptions in question nothing more than processing rules.[138]

130. *Id.* at 2366.

131. *Id.* at 2365.

132. *See supra* text accompanying note 61.

133. *Bowles*, 127 S. Ct. at 2366.

134. *See id.*

135. *Id.* at 2364.

136. *Id.* at 2365. *See* Kontrick v. Ryan, 540 U.S. 443, 453 n.8 (2004).

137. *Bowles*, 127 S. Ct. at 2366 (internal quotation marks omitted).

138. This principle would not apply to the fourteen-day rule applicable to *cross*-appeals in civil cases, to the extent that it derives from Rule 4(a)(3) of the Federal Rules of Appellate Procedure, as opposed to § 2107. *See* FED. R. APP. P. 4(a)(3) ("If one party timely files a notice of appeal, any other party may file a notice of appeal within

Moreover, should the appellee fail to raise a timeliness objection, a court of appeals would be authorized to do so sua sponte, even after its adjudication of the appeal on the merits.[139]

B. Appeals in Criminal Proceedings

1. The Timing Restrictions of Rule 4(b)

Appellate Rule 4(b) contains the timing prescriptions applicable to the initiation of an appeal from a judgment or order entered in a criminal proceeding. The period of time in which a notice of appeal must be filed depends upon both the status of the party taking the appeal and whether the opposing party has already initiated an appeal. Under Rule 4(b)(1)(A), the notice of appeal of a *defendant* must be filed "within 10 days after the later of: (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government's notice of appeal."[140] "When the government is entitled to appeal, [Rule 4(b)(1)(B) requires that] its notice of appeal . . . be filed . . . within 30 days after the later of: (i) the entry of the judgment or order being appealed; or (ii) the filing of a notice of appeal by any defendant."[141]

As with appeals in civil proceedings, Rule 26(b)(1) forbids a federal court of appeals from granting an extension of the time to file a notice of appeal in a criminal proceeding. Again, Rule 26(b)(1) provides that "the court may not extend the time to file . . . a notice of appeal (*except as authorized under Rule 4*) . . . ."[142] Similarly, Rule 4(b), like Rule 4(a), vests the authority to extend the time to appeal in a criminal matter solely with the district court, and only under limited circumstances.[143] Specifically, Rule 4(b)(4)[144] authorizes an extension for a period not to exceed thirty days from the expiration of

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14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.").

139. *See* Poor, *supra* note 15, at 183-84 (noting that "courts have raised [jurisdictional] deadlines *sua sponte* at any time, even after a hearing on the merits").

140. Fed. R. App. P. 4(b)(1)(A).

141. *Id.* 4(b)(1)(B).

142. *Id.* 26(b)(1) (emphasis added).

143. *Id.* 4(b)(4).

144. Rule 4(b)(4) provides in full:

> Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

Id.

the time otherwise prescribed by Rule 4(b), and only upon a finding of "excusable neglect" or "good cause."[145]

Similar to those contained in Rule 4(a), Rule 4(b)'s timing prescriptions appear at first glance to fall into the category of claim-processing rules along with Bankruptcy Rule 4004 and Criminal Rule 33. In particular, Rule 4(b) provides for a set amount of time in which a litigant must file a notice of appeal, and permits additional time only under specified circumstances.[146] A litigant has no other means of obtaining an extension of that time in light of Appellate Rule 26(b)(1), which, in the manner of Bankruptcy Rule 9006(b)(6) and Criminal Rule 45(b)(2), forbids an extension except as stated in the rule.[147] Under *Kontrick* and *Eberhart*, therefore, Rule 4(b) has the features of a nonjurisdictional claim-processing rule rather than a rule governing the subject-matter jurisdiction of the courts of appeals.

As in the civil context, however, the foregoing analysis is complicated by the presence of a timing restriction contained in a statute. Specifically, the thirty-day limit that Rule 4(b)(1)(B) prescribes for the filing of a notice of appeal by the government[148] in a criminal proceeding reflects the thirty-day limit established by Congress in 18 U.S.C. § 3731.[149] Through this provision, Congress

145. *Id.* The district court may grant the extension "before or after the time has expired" and "with or without motion and notice." *Id.*

146. *See* Eberhart v. United States, 546 U.S. 12, 18 (2005) (per curiam).

147. Fed. R. App. P. 26(b)(1); *see also Eberhart*, 546 U.S. at 18.

148. *See supra* text accompanying note 141.

149. In its entirety, this provision states:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

has vested the federal courts of appeals with jurisdiction to entertain a variety of appeals initiated by the government in criminal proceedings, including an appeal from a dismissal of an indictment or information, an appeal from the grant of a new trial after verdict or judgment, and an appeal from a decision "suppressing or excluding evidence."[150] The provision goes on to state that "[t]he appeal in all such cases shall be taken *within thirty days* after the decision, judgment or order has been rendered . . . ."[151] Consequently, the thirty-day time limit set forth in Rule 4(b)(1)(B) is, in essence, mandated by a statute of Congress.

2. The Implications of *Bowles* for Appeals by the Government in Criminal Proceedings

A significant question with which the courts of appeals will likely wrestle in the near future is whether the thirty-day prescription set forth in § 3731 is properly understood as a jurisdictional prerequisite rather than a claim-processing rule.[152] The resolution of that question follows naturally from the reasoning employed by the Supreme Court in *Bowles*.

As discussed earlier,[153] the *Bowles* Court's determination as to the jurisdictional nature of § 2107's timing prescriptions rested primarily upon the "longstanding treatment of statutory time limits for taking an appeal as jurisdictional."[154] Significant to the Court in

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> *The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered* and shall be diligently prosecuted.
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

18 U.S.C. § 3731 (2006) (emphasis added).

150. *Id.* Other decisions of district courts that Congress has authorized the government to appeal as of right are the imposition of a "final sentence" under certain circumstances, *see id.* § 3742(b) (outlining list of exceptions), along with certain decisions related to the release of classified information, *see id.* § 2339B(f)(5) (outlining guidelines for interlocutory appeal).

151. *Id.* § 3731 (emphasis added).

152. As with 28 U.S.C. § 2107, Congress has provided no explicit resolution of this question in the statute itself, which does not speak in jurisdictional terms, or in any way refer to the jurisdiction of the courts of appeals. *See supra* note 122 and accompanying text. In addition, nothing in the legislative history suggests that the rule was meant to be jurisdictional in nature. *See* H.R. REP. NO. 107-685, at 188 (2002) (Conf. Rep.), *reprinted in* 2002 U.S.C.C.A.N. 1120, 1140-41 (history of 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107-273, div. b, tit. III, § 3004, 116 Stat. 1758 (2002)); H.R. REP. NO. 99-797, at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6138, 6149 (history of Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. 99-646, § 32, 100 Stat. 3592 (1986)).

153. *See supra* Part IV.A.3.

154. Bowles v. Russell, 127 S. Ct. 2360, 2364 (2007).

this regard was the notion that "[b]ecause Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."[155] Accordingly, should Congress choose to prohibit a federal court of appeals from "adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final judgment," the prescription in question would constrain the court's subject-matter jurisdiction.[156]

Nothing in the *Bowles* Court's analysis suggested that these principles were confined to appeals taken in civil proceedings.[157] It follows, therefore, that a jurisdictional prerequisite would result if Congress statutorily restricted the time in which a party to a criminal proceeding may initiate an appeal. This is precisely what Congress has done in imposing a thirty-day limit upon an appeal by the government from any of the categories of decisions enumerated in § 3731. The restriction at issue is thus no different in nature than the various timing restrictions that Congress has imposed upon the initiation of appeals in civil proceedings under § 2107. Consequently, the government's failure to initiate an appeal within thirty days, like a civil litigant's failure to initiate an appeal within thirty days,[158] would deprive the court of appeals of jurisdiction over the ensuing appeal.

Because the pertinent thirty-day restriction is a jurisdictional prerequisite rather than a mere processing rule, a criminal defendant who fails to assert a timeliness challenge to an appeal by the government would nonetheless retain the right to do so after the court of appeals has adjudicated it on the merits. Of course, even if the defendant fails to challenge the appeal as untimely, the court of appeals may do so sua sponte.[159]

3. The Nonjurisdictional Nature of the Timing Requirements for a Criminal Defendant's Notice of Appeal

Unlike the thirty-day limit discussed above, the ten-day limit applicable to an appeal initiated by a defendant in a criminal proceeding under Rule 4(b)(1)(A) does not govern the subject-matter jurisdiction of the courts of appeals. A criminal defendant may

155. *Id.* at 2365.

156. *Id.* at 2366.

157. *See id.* at 2363-67.

158. As noted earlier, a sixty-day period would apply in a civil proceeding to which the United States, or any agency or entity thereof, was a party. *See supra* note 11 and accompanying text.

159. *See* Poor, *supra* note 15, at 183-84 (noting that "courts have raised [jurisdictional] deadlines *sua sponte* at any time, even after a hearing on the merits").

pursue an appeal as of right[160] from a "final decision" within the meaning of 28 U.S.C. § 1291,[161] or from a "final sentence" under the conditions set forth in 18 U.S.C. § 3742(a).[162] Neither of these provisions contains a timing restriction, however.[163] And no separate statutory provision imposes such a restriction upon a criminal defendant.[164] Because Rule 4(b)(1)(A)'s ten-day limitation is thus entirely a creation of the Supreme Court as opposed to Congress, it has the status of a processing rule that the government would forfeit by raising a timeliness objection to a criminal defendant's appeal only after the court of appeals has adjudicated it on the merits.[165]

Notably, an understanding of the relevant ten-day prescription as a claim-processing rule is perfectly consistent with the *Eberhart* Court's affirmation of *Robinson*.[166] As discussed earlier, the *Eberhart* Court determined that the D.C. Circuit rightfully dismissed the appeal of the criminal defendants in *Robinson* "not because the District Court lacked *subject-matter jurisdiction*, but because district

160. An appeal as of right is not the only mechanism available to a criminal defendant who wishes to bring an immediate challenge to an adverse decision of a district court. For example, a criminal defendant may petition a court of appeals for a writ of mandamus. *See* Nichols v. Alley, 71 F.3d 347, 352 (10th Cir. 1995) (issuing a writ of mandamus directing the recusal of the district court judge with respect to the defendant's trial).

161. Section 1291 provides in pertinent part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291 (2006); *see also* Abney v. United States, 431 U.S. 651, 656 (1977).

162. Section 3742(a) provides:

> A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—(1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; or (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

18 U.S.C. § 3742(a).

163. *See* 28 U.S.C. § 1291; 18 U.S.C. § 3742.

164. *See* Barnhart v. Peabody Coal Co., 537 U.S. 149, 159-60 n.6 (2003) (stating that "some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants").

165. *Cf.* Kontrick v. Ryan, 540 U.S. 443, 459-60 (2004). The *Eberhart* Court appropriately highlighted that, since the government will seldom miss a timeliness defect in a defendant's submission, it behooves a criminal defendant to comply with applicable timing restrictions. Eberhart v. United States, 546 U.S. 12, 18 (2005) (per curiam).

166. *See supra* Part III.C.

courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked."[167] The clear thrust of the Court's statement was that the ten-day prescription, although mandatory under the circumstances, did not govern the D.C. Circuit's jurisdiction to consider the defendants' appeal.

V. THE IMPLICATIONS OF *KONTRICK* AND *EBERHART* FOR THE TIMING REQUIREMENTS OF POSTJUDGMENT MOTIONS

A litigant's act of moving for particular forms of postjudgment relief in a civil proceeding might substantially prolong the time to file a notice of appeal. Under Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure,[168] the effect of the timely filing of certain designated postjudgment motions under the Federal Rules of Civil Procedure—including a motion for judgment under Rule 50(b),[169] a motion to amend or make additional factual findings under Rule 52(b),[170] a motion to alter or amend the judgment under Rule 59,[171] or a motion for a new trial under Rule 59[172]—will be that the time to appeal from the underlying judgment "runs for all parties from the entry of the order disposing of the last such remaining motion."[173] As a result, a party who initially had just thirty days to file a notice of appeal from the judgment[174] might nevertheless file a timely notice from that judgment several years after its entry if the district court takes that long to decide the pertinent motion (or motions).

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167. *See Eberhart*, 546 U.S. at 16-17.

168. Rule 4(a)(4)(A) provides:

> If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
>
> (i) for judgment under Rule 50(b);
> (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;
> (iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;
> (iv) to alter or amend the judgment under Rule 59;
> (v) for a new trial under Rule 59; or
> (vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

FED. R. APP. P. 4(a)(4)(A).

169. *Id.* 4(a)(4)(A)(i).

170. *Id.* 4(a)(4)(A)(ii).

171. *Id.* 4(a)(4)(A)(iv).

172. *Id.* 4(a)(4)(A)(v).

173. *Id.* 4(a)(4)(A).

174. This assumes, of course, that the United States (or an officer or agency of the United States) is not a party to the action. *See supra* note 97.

Prior to *Kontrick* and *Eberhart*, the ten-day timing prescription applicable to each of the above-referenced motions[175] was understood as jurisdictional in nature. This understanding, which persists even after *Kontrick* and *Ryan*,[176] was based upon the suggestion of the *Robinson* Court that the requirements for the filing of a timely motion under Civil Rule 59 were jurisdictional in nature.[177] The Court offered this suggestion in the context of its discussion of the history of Criminal Rule 45(b), where it noted that the prototype for that provision was Civil Rule 6.[178] The Court pointed out that, when the Federal Rules of Criminal Procedure were originally formulated, the limiting clause of then-Civil Rule 6(b) provided that the district court "may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law."[179] Citing various decisions of the federal courts of appeals,[180] the Court then observed that "[i]t had consistently been held that Civil Rule 6(b) was *mandatory and jurisdictional* and could not be extended regardless of excuse."[181]

Notably, Rule 6(b)'s restriction on extensions of time presently encompasses not only Rule 59 motions, but also motions for judgment under Rule 50(b), and motions to alter or amend findings of fact under Rule 52(b).[182] In light of *Robinson*, therefore, a district court would have no jurisdiction to entertain any such motion that was filed out of time.

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175. *See, e.g.*, FED. R. CIV. P. 50(b) ("The movant may renew its request for judgment as a matter of law by filing a motion *no later than 10 days* after the entry of judgment or—if the motion addresses a jury issue not decided by a verdict—*no later than 10 days* after the jury was discharged.") (emphasis added); *id.* 52(b) ("On a party's motion filed *no later than 10 days* after entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly.") (emphasis added); *id.* 59(b) ("Any motion for a new trial shall be filed *no later than 10 days* after entry of the judgment.") (emphasis added); *id.* 59(e) ("Any motion to alter or amend a judgment shall be filed *no later than 10 days* after entry of the judgment.") (emphasis added).

176. *See, e.g.*, Dresdner Bank AG v. M/V Olympia Voyager, 465 F.3d 1267, 1271 (11th Cir. 2006) (stating that "the ten day period for filing a Rule 59 motion is *jurisdictional*") (emphasis added).

177. This suggestion was, of course, in addition to the Court's suggestion that the requirements for the filing of a timely notice of appeal were jurisdictional in nature. *See supra* note 24 and accompanying text.

178. United States v. Robinson, 361 U.S. 220, 228 (1960).

179. *Id.* at 228-29.

180. *Id.* at 229 n.13.

181. *Id.* at 229 (emphasis added).

182. *See* FED. R. CIV. P. 6(b) (providing that the district court "may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them").

After *Kontrick* and *Eberhart*, however, the timing restrictions applicable to these motions can no longer be viewed as jurisdictional prerequisites. First, the timing restrictions "do not delineate [the classes of] cases [that a district court is] competent to adjudicate."[183] They instead relate solely "to postjudgment proceedings auxiliary to cases already within that court's adjudicatory authority."[184]

Second, rather than being prescribed in a congressional statute, the timing restrictions in question are established by the Supreme Court through the Federal Rules of Civil Procedure.[185] And those Rules, like Bankruptcy Rule 4004 and Criminal Rule 33, establish a set period of time in which the motion must be filed,[186] and forbid an extension of time for any reason not provided for in the rule.[187] The pertinent timing restrictions thus have the characteristics of processing rules that a nonmoving party may forfeit by failing to present a timeliness objection before the motion is adjudicated on the merits.[188]

VI. CONCLUSION

In *Kontrick* and *Eberhart*, the Supreme Court emphasized a crucial distinction between those timing prescriptions that directly govern a federal court's subject-matter jurisdiction over a proceeding, and those timing prescriptions that are mere processing rules subject

183. *See* Kontrick v. Ryan, 540 U.S. 443, 454 (2004).

184. Scarborough v. Principi, 541 U.S. 401, 414 (2004).

185. *See Kontrick*, 540 U.S. at 453–54.

186. Eberhart v. United States, 546 U.S. 12, 18 (2005) (per curiam).

187. *See supra* note 80 and accompanying text.

188. *See Eberhart*, 546 U.S. at 18. This renewed understanding of the timing restrictions at issue is obviously beneficial to a litigant who seeks to challenge a judgment by way of an untimely postjudgment motion. Instead of having no alternative but to dismiss the motion for lack of jurisdiction, a district court may now choose to proceed to the merits of the motion in the absence of a timeliness objection from the nonmoving party. *See id.* at 19.

At the same time, a district court's decision to entertain an untimely postjudgment motion on the merits might cause an unwary litigant to lose the opportunity to appeal from the underlying judgment. Such a result would occur if, given the possibility that the district court's ruling on the motion would lead to a material alteration of the judgment, a litigant postponed the filing of a notice of appeal until after disposition of the motion. The flaw in this approach is that, under Rule 4(a)(4)(A), an untimely motion does not suspend the time to appeal from the underlying judgment. *See* FED. R. APP. P. 4(a)(4)(A) ("If a party *timely* files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion . . . .") (emphasis added). Consequently, by the time that the district court decides the motion, the time in which to appeal from the underlying judgment will likely have expired. In that regard, a litigant seeking to challenge the judgment would have been better off if the district court had summarily dismissed his motion for lack of jurisdiction while time still remained to file a notice of appeal from the judgment.

to forfeiture by a litigant who waits too long to present a timeliness objection. Although the proceedings at issue in *Kontrick* and *Eberhart* were not appellate in nature, the Court's discussion in those cases called into question its longstanding *jurisdictional* conception of various timing prescriptions regularly confronted by federal appellate litigants.

Kontrick and *Eberhart* ultimately had no effect upon the Court's traditional understanding that the requirements for the filing of a timely notice of appeal in a civil case are jurisdictional prerequisites. As confirmed by the *Bowles* Court, the pertinent requirements are set forth by Congress in 28 U.S.C. § 2107, and thus are not simply processing rules. A civil appellee, therefore, may still challenge the timeliness of the appeal even after a decision on the merits has been rendered. If the appellee fails to raise such a challenge, the court of appeals might nonetheless do so sua sponte and vacate its decision on the basis that it lacked jurisdiction to render it.

In a criminal proceeding, on the other hand, the nature of the timing requirements for the filing of a notice of appeal now depends upon the status of the appellant. The Court's reasoning in *Bowles* compels the conclusion that the thirty-day requirement for the filing of an appeal by the government is a jurisdictional prerequisite because of its basis in 18 U.S.C. § 3731. But the ten-day rule for the filing of an appeal by a criminal defendant, which derives entirely from a rule promulgated by the Court itself, rather than a statute of Congress, is properly understood as a nonjurisdictional processing rule. Accordingly, while the government would forfeit an opportunity to challenge a defendant's appeal as untimely by withholding that challenge until after the court of appeals has decided the appeal on the merits, a criminal defendant would retain a timeliness challenge to an appeal by the government. Should the defendant not bring such a challenge, the court would be authorized to do so sua sponte.

Furthermore, *Kontrick* and *Eberhart* have substantial implications for the timing prescriptions imposed upon the filing of certain postjudgment motions in civil proceedings. Because those prescriptions are now properly understood as claim-processing rules, a district court may reach the merits of an untimely motion in the absence of a timeliness objection by the nonmoving party. Indeed, any such objection would be forfeited once the court adjudicates the motion on the merits.