Cornell Law Review

Volume 64
Issue 4 *April 1979*

Article 5

Recall of Appellate Mandates in Federal Civil Litigation

David G. Seykora

RECALL OF APPELLATE MANDATES IN FEDERAL CIVIL LITIGATION

Upon entry of a final judgment in federal court, a disappointed litigant may attack the decision in several ways. If a higher court has jurisdiction to hear the case, he may launch a direct attack through appeal. Alternatively, he might launch a collateral attack on the judgment when his opponent brings an enforcement action. Or he might bring his own action, attempting to squeeze the case into the exceptions to res judicata.[1] But even if appeal is unavailable and if the judgment is both valid and inescapable, one other option remains open: the litigant may return to the court that rendered the judgment and petition the court to reconsider. If the court agrees, it will recall its prior mandate and decide the case anew.[2]

Relief from district court judgments may be had through the Federal Rules of Civil Procedure. Rule 60 carefully delineates the circumstances in which a district court may correct its own errors.[3] An appellate court, however, has no such guidance and

---

[1] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 61.2 (Tent. Draft No. 1 1973) and RESTATEMENT (SECOND) OF JUDGMENTS § 68.1 (Tent. Draft No. 4 1977). *See* notes 125-26 *infra*.

[2] *See* 24 VILL. L. REV. 157 (1978).

[3] FED. R. CIV. P. 60 provides:

> (a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.
>
> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of the judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding,

must chart its own course when asked to reconsider one of its final judgments. The Federal Rules of Civil Procedure do not apply to appellate proceedings,[4] and the Federal Rules of Appellate Procedure, which allow petitions for rehearing[5] and for the issue and stay of mandates,[6] make no provisions for "recalls" of

---

or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of bills of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

[4] *See* American Iron & Steel Inst. v. EPA, 560 F.2d 589, 593 n.17 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); Hines v. Royal Indem. Co., 253 F.2d 111, 113 (6th Cir. 1958); Pierce v. Cook & Co., 518 F.2d 720, 726 (10th Cir. 1975) (dissenting opinion), *cert. denied*, 423 U.S. 1079 (1976); 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1012, at 73 (1969).

[5] FED. R. APP. P. 40(a) provides:

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make final disposition of the cause without reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

[6] FED. R. APP. P. 41 provides:

(a) Date of Issuance. The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(b) Stay of Mandate Pending Application for Certiorari. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for certiorari the mandate shall issue immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

mandates.[7] In the absence of an applicable Federal Rule of Appellate Procedure, the individual circuits are free to make their own rules, so long as they are not inconsistent with the Federal Rules.[8] Most circuits recognize, either by rule or through judicial interpretation, that mandates can be recalled[9] to "prevent injustice"[10] or upon a showing of "good cause."[11]

Obviously, the phrases "good cause" and "to prevent injustice" are not self-defining. Appellate courts need standards and guidelines for dealing with petitions for recall of mandates. Articulating such standards should minimize needless confusion and result in more uniform decisions. Through an analysis of the underlying policies and the historical development of procedures used to grant relief from judgments, this Note will identify situations where recall of an appellate mandate is proper.

I

CONFLICTING POLICY INTERESTS: FINALITY VERSUS CORRECTNESS

A motion to recall runs squarely against the policy that judicial decisions, once made, are final. Solid reasons undergird this policy of finality. First, the judicial system exists to resolve disputes, to bring them to an end so that the litigants can return to their normal affairs. In addition to this immediate effect, finality gives litigants a continuing measure of certainty by allowing them to rely upon the court's decision. For instance, a party who has won a quiet title action should be free to develop the land without fear that this judgment is open to attack.[12] Allowing repeated challenges to the decisions of a court erodes faith in the judicial system. As Justice Harlan once wrote, "I can think of nothing more unsettling to lawyers and litigants, and more disturbing to their confidence in the evenhandedness of the Court's processes,

---

[7] *See* 9 MOORE'S FEDERAL PRACTICE ¶ 241.02[4] (2d ed 1975).

[8] FED. R. APP. P. 47. *See also* Hines v. Royal Indem. Co., 253 F.2d 111, 113 (6th Cir. 1958).

[9] Two circuits have rules dealing with recalls. *See* 5TH CIR. R. 15; 8TH CIR. R. 18. Many other circuits have found authority to recall without the aid of court rules. *See, e.g.*, American Iron & Steel Inst. v. EPA, 560 F.2d 589, 592-94 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 276-77 (D.C. Cir. 1970), *cert. denied*, 406 U.S. 950 (1972). *See generally* 16 C. WRIGHT & A. MILLER, *supra* note 4, § 3938.

[10] *See* note 74 *infra*.

[11] *See* note 72 *infra*.

[12] *See* United States v. Throckmorton, 98 U.S. 61 (1878).

than to be left in . . . uncertainty . . . as to when their cases may be considered finally closed in this Court."[13] Finally, allowing repeated hearings of the same dispute wastes judicial resources.

A motion to recall finds its support in the desire to reach a just result. "The recall of an appellate mandate to avoid injustice is a continuation, in the appellate sphere, of a deeply rooted equity jurisprudence."[14] To say that courts exist to resolve disputes tells only half the story, for courts exist to resolve disputes correctly. Denying relief to meritorious litigants is unfair, especially when the denial stems from a court-made policy of finality rather than from substantive law. Allowing manifestly unjust results to stand uncorrected also erodes public faith in the judicial process.

II

HISTORICAL ANTECEDENTS OF RECALL DOCTRINE

A. *The Term Rule*

Prior to the enactment of the Federal Rules of Civil Procedure, federal courts achieved finality of judgments through a device called the "term rule."[15] The classic formulation of the term rule is found in *Bronson v. Schulten*:[16]

> It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court.
>
> But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them . . . .[17]

This rule had two exceptions. A court could modify a judgment at a later term if it expressly reserved control over the judgment

---

[13] United States v. Ohio Power Co., 353 U.S. 98, 111 (1957) (dissenting opinion).

[14] Greater Boston Television Corp. v. FCC, 463 F.2d 268, 279 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

[15] 1 A. FREEMAN, LAW OF JUDGMENTS § 69 (4th ed. 1892); *see generally* Moore & Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 627 (1946).

[16] 104 U.S. 410 (1881).

[17] *Id.* at 415.

during the term in which it was rendered.[18] A court could also correct mere clerical errors or matters of form in a later term.[19] Thus the term rule and its exceptions established a clumsy and arbitrary balance between the policies of finality and correctness. It caught the most glaring errors (those that became apparent to the parties before the expiration of the term) and the mere technical mistakes (those that did not go to the merits of the judgment). In the interests of finality, however, this framework consigned the vast middle range of errors to stand uncorrected.

B. *Procedures for Avoiding the Term Rule*

To provide relief in special instances where the term rule produced unduly harsh results, the common law and equity courts developed ancillary remedies that allowed a court to look into its own final judgments.[20] Each remedy was developed to cover a distinct situation deemed inequitable enough to warrant further proceedings.[21]

---

[18] *See, e.g.*, Bernards v. Johnson, 314 U.S. 19, 29-30 (1941); United States v. Swift & Co., 286 U.S. 106, 114 (1931). *See* 2 MOORE'S FEDERAL PRACTICE ¶ 6.09[2], at 1500.110-.111 (2d ed. 1978); Moore & Rogers, *supra* note 15, at 627.

[19] *See, e.g.*, Fairmont Creamery Co. v. Minnesota, 275 U.S. 70, 72 (1927); Bank of the United States v. Moss, 47 U.S. (6 How.) 31, 38 (1847); Bank of Ky. v. Wistar, 28 U.S. (3 Pet.) 431, 432 (1830); The Palmyra, 25 U.S. (12 Wheat.) 1, 4 (1827); Hart v. Wiltsee, 25 F.2d 863, 863 (1st Cir. 1928) (per curiam), *cert. denied*, 275 U.S. 559 (1927). *See* 1 A. FREEMAN, *supra* note 15, at § 71.

[20] Other commentators have discussed these ancillary remedies. *See* 7 MOORE'S FEDERAL PRACTICE ¶ 60.13-.16 (2d ed. 1978); 11 C. WRIGHT & A. MILLER, *supra* note 4, § 2867 (1973); Moore & Rogers, *supra* note 15, at 659-82.

[21] The ancillary remedies were invoked by petitioning the same court that had entered the judgment and were considered to be an extension of the earlier proceeding rather than a new action. *See* 2 T. STREET, FEDERAL EQUITY PRACTICE § 2185 (1909). This use of ancillary jurisdiction avoided the complications of finding an independent jurisdictional basis for the action. A decision to grant relief under an ancillary remedy involved matters of policy rather than jurisdiction.

> Historically, the term rule can be adequately explained as a rule of repose (somewhat analogous to a statute of limitations), which the common law and equity courts invoked to give finality to their judgments. Thus, when these courts evolved the ancillary remedies, such as *coram nobis, coram vobis, audita querela,* bill of review, and bill in the nature of a bill of review, and the independent action in equity, which gave relief long after term time, they were not enlarging their jurisdiction, but were merely recognizing that under certain circumstances their self-imposed rule of repose should be relaxed.

2 MOORE'S FEDERAL PRACTICE ¶ 6.09[2], at 1500.114-.115 (2d ed. 1978) (footnotes omitted). The ancillary remedies were spawned through the union of a court's supervisory power to protect its judgments and the policy of achieving a correct, just result. Born of this union and living within the bounds of the judgments they modified, the ancillary remedies ex-

The common law courts used two basic writs to remedy these situations. The writ of error *coram nobis* (or its variant, *coram vobis*)[22] was used to raise some material fact that existed at the time of the trial but had gone unnoticed by the court.[23] *Coram nobis* was unavailable if the error was apparent from the face of the record or if the proponent negligently withheld the information until after the entry of judgment.[24] The writ of *audita querela* was used to relieve a party from the wrongful acts of his adversary.[25] This writ was used to correct a matter arising after

---

pired only through laches. *See* 7 MOORE'S FEDERAL PRACTICE ¶¶ 60.13-.15, at 38, 53, 62 (2d ed. 1978).

The authority to recall an appellate mandate derives from the ancillary remedies because the recall doctrine developed in part from them. Hence when courts refer to their "inherent power" to recall mandates they apparently are referring to the union of their supervisory power over judgments and the policy of achieving just results. *See, e.g.,* Reserve Mining Co. v. Lord, 529 F.2d, 181, 188 (8th Cir. 1976); Perkins v. Standard Oil Co., 487 F.2d 672, 674 (9th Cir. 1973); Dickerson v. Continental Oil Co., 476 F.2d 635, 636 (5th Cir. 1973). Although it may be correct simply to state that a court has inherent powers to recall mandates, it is misleading to think in terms of jurisidiction and power rather than in terms of conflicting policies. *See* notes 12-14 and accompanying text *supra.* In addition, it is unnecessary to search, as one court has done, for a statute that grants jurisdiction to hear recall petitions. *See* Greater Boston Television Corp. v. FCC, 463 F.2d 268, 277 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 950 (1972) (finding statutory authority to recall in language of 28 U.S.C. § 2106: "court[s] of appellate jurisdiction may . . . require such further proceedings to be had as may be just under the circumstances.").

[22] The difference between *coram nobis* and *coram vobis* is of historical significance only. The distinction originated from the court in which the writ was brought—it was called *coram nobis* if brought in the King's Bench and *coram vobis* if brought in the Court of Common Pleas. *See* Moore & Rogers, *supra* note 15, at 669; Orfield, *The Writ of Error Coram Nobis in Civil Practice,* 20 VA. L. REV. 423, 425 (1934). *See also* BLACK'S LAW DICTIONARY 1785-86 (rev. 4th ed. 1968).

[23] Freeman described *coram nobis* as follows:

> If . . . the proceedings are based upon facts presumed by the court to exist, as when one of the parties is insane, or is an infant or a *feme covert,* or has died before verdict, and the court, supposing such party to be alive and competent to appear as a litigant, renders judgment, it may be set aside by a writ of *coram nobis.* But this writ does not lie to correct any error in the judgment of the court, nor to contradict or put in issue any fact directly passed upon and affirmed by the judgment itself. . . . The writ of error *coram nobis* is not intended to authorize any court to review and revise its opinions; but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have prevented the rendition of the judgment, and which, without any fault or negligence of the party, was not presented to the court.

1 A. FREEMAN, *supra* note 15, § 94, at 129 (footnote omitted).

[24] *See* Orfield, *supra* note 22, at 424. *See generally* Moore & Rogers, *supra* note 15, at 669-74.

[25] *See* 1 A. FREEMAN, *supra* note 15, § 95, at 130. Blackstone described it as "a writ of a most remedial nature, and seems to have been invented, lest in any case there should be an oppressive defect of justice, where a party has a good defence, but by the ordinary forms of law had no opportunity to make it." 3 W. BLACKSTONE, COMMENTARIES *405.

the judgment, as when a defendant neglected to record his satisfaction of a judgment and the plaintiff then demanded payment a second time.[26] Because of *audita querela*'s remedial nature, it was also used to reopen judgments obtained through one party's perpetration of a fraud on his opponent or on the court.[27]

In their independent attempts to remedy obvious injustices, the two writs began to cover much the same ground. *Coram nobis* eventually expanded to remedy cases of fraud.[28] Therefore the distinct writs no longer covered distinct situations. Not only did the courts stretch the substance of the writs, but they also began to depart from the technical formalities. Courts allowed the writs to be raised on motion,[29] a procedure much "more simple, more expeditious, and less fruitful of difficulty and expense."[30] Thus parties could request relief through a motion alleging error or injustice. And whether applying the writs or motions, courts drew no distinction on whether they were addressed to an appellate or a trial court.[31]

---

[26] 3 W. BLACKSTONE, COMMENTARIES *404.

[27] *See* 1 A. FREEMAN, *supra* note 15, § 95, at 130.

[28] This extension seems to have developed from cases involving both a fraud and missing material facts. For example, the writ could be used when one party actively concealed jurisdictional facts from the court and the other party later discovered the fraud. Although the writ of *coram nobis* was technically being used to bring the true facts before tbe court, it appeared as if it were being used to remedy the fraud. *See* Orfield, *supra* note 22, at 432-33. When used to examine a fraud that occurred prior to the rendition of judgment, *audita querela* became almost indistinguishable from *coram nobis*. *See* Moore & Rogers, *supra* note 15, at 660-61, 670; 1 A. FREEMAN, *supra* note 15, § 95, at 130; 7 MOORE'S FEDERAL PRACTICE ¶¶ 60.13, 60.14 at 34, 47 (2d ed. 1978).

[29] Harris v. Hardeman, 55 U.S. (14 How.) 334, 346 (1852). *See* Pickett's Heirs v. Legerwood, 32 U.S. (7 Pet.) 107, 110 (1833). Blackstone noted that an "indulgence now shewn by the courts in granting a summary relief upon motion, in cases of such evident oppression, has almost rendered useless the writ of *audita querela*, and driven it quite out of practice." 3 W. BLACKSTONE, COMMENTARIES *405.

[30] Harris v. Hardeman, 55 U.S. (14 How.) 334, 346 (1852).

[31] *See* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 256 (1943) (dissenting opinion, Roberts, J.). Relief was requested, and sometimes granted, in both trial and appellate courts. In Bronson v. Schulten, 104 U.S. 410 (1881), most famous for its formulation of the term rule, the plaintiff brought an action to amend the trial court's judgment 17 years after it was entered and was granted relief by the court which had entered the judgment. The defendant appealed and the Supreme Court reversed, holding that *coram vobis* did not apply in this situation and that the trial court had no power to change the judgment once the term ended. In Pickett's Heirs v. Legerwood, 32 U.S. (7 Pet.) 107 (1833), the trial court sustained the plaintiff's writ of error *coram vobis*, and the defendant appealed. The Supreme Court held that since a *coram vobis* action enabled the court below to correct an error in a prior judgment, the granting of the *coram vobis* motion was not a final judgment and therefore was not appealable. *See also* Cameron v. M'Roberts, 16 U.S (3 Wheat.) 303 (1818) (application to set aside decree of district court denied). With the preceding cases, compare the following cases where a litigant requested that an appellate court

The ancillary remedy used by courts of equity to reexamine decrees was a bill of review (or its variant, a bill in the nature of a bill of review).[32] Courts could use it to correct errors of law appearing on the face of the decree and to bring forth newly discovered evidence,[33] but not to impeach a decree for fraud.[34] Nor could an appellate court use it to review an appellate decree. Appellate courts could, however, grant leave for a lower court to entertain a bill of review for newly discovered evidence.[35]

In addition to the ancillary remedies, another method of obtaining relief from a judgment has existed for centuries—an independent action in equity.[36] The traditional requirements for an independent action included an inequitable or unconscionable judgment, a good claim or defense to the cause of action on which the judgment was founded, a fraud, accident, or mistake that prevented use of the claim or defense, lack of fault or negligence on the part of the aggrieved party, and lack of an adequate remedy at law.[37] Hence the independent action in equity provided slightly broader grounds for relief than did the various ancillary remedies. In addition, since the independent action was a new law suit rather than a continuation of the old action, the plaintiff was not necessarily restricted to the judgment-rendering court.[38] The catch, however, was that he had to establish independent jurisdictional grounds for the new action. In federal court this could mean that the litigant had to show a basis for assertion of federal jurisdiction, that the suit involved the requisite amount in controversy, and that all parties were served with pro-

---

reopen its judgment: Fairmont Creamery Co. v. Minnesota, 275 U.S. 270 (1927) (errors in clauses on interest and costs not clerical error and therefore not within exception to term rule justifying recall); Peck v. Sanderson, 59 U.S. (18 How.) 42 (1855) (attorney missing oral argument due to illness insufficient error to open judgment in next term); *Ex parte* Crenshaw, 40 U.S. (15 Pet.) 119 (1841) (omission in record of marshal's failure to serve party with notification of appeal held sufficient to open judgment during next term).

[32] Courts properly used bills of review to scrutinize decrees that had been enrolled and bills in the nature of a bill of review to examine decrees that had not been enrolled. *See* J. STORY, EQUITY PLEADINGS § 403 (10th ed. 1892). *See also* Moore & Rogers, *supra* note 15, at 675.

[33] *See* 2 T. STREET, FEDERAL EQUITY PRACTICE § 2119 (1909); J. STORY, *supra* note 32, §§ 404-12. *See generally* Moore & Rogers, *supra* note 15, at 675-82.

[34] *See* 2 T. STREET, *supra* note 33, at §§ 2121, 2185.

[35] *See id.* at §§ 2178-79.

[36] *See generally* 7 MOORE'S FEDERAL PRACTICE ¶¶ 60.36-60.39 (2d ed. 1978); 11 C. WRIGHT & A. MILLER, *supra* note 4, § 2868 (1973).

[37] National Sur. Co. v. State Bank, 120 F. 593, 599 (8th Cir. 1903).

[38] *See* 7 MOORE'S FEDERAL PRACTICE ¶ 60.36, at 602 (2d ed. 1978). *See also* note 21 *supra.*

cess. Fortunately for the plaintiff, modern courts have relaxed the jurisdictional requirements in some cases. An independent action brought in the judgment-rendering court is considered to be an exercise of the court's ancillary jurisdiction.[39] Thus with the possibility of invoking either the rendering court's ancillary jurisdiction or the jurisdiction of other courts, plus its slightly broader grounds for relief, the independent action was a somewhat more expansive remedy than any of the ancillary remedies.

In sum, prior to the advent of the Federal Rules of Civil Procedure in 1938, the procedures for obtaining relief from a judgment were varied, complex, and confusing. In both appellate and district courts, the term rule generally held sway, subject to the exceptions for reserved power in the rendering court and clerical errors. But a litigant could obtain relief through the ancillary remedies (or motions based on them) developed by common law and equity courts. In addition, he could bring an independent action in equity to restrain the effects of a judgment against him.

C. *Replacement of the Term Rule*

The enactment of the Federal Rules of Civil Procedure in 1938 gave federal district courts new guidelines for reexamining their own judgments. Rule 6(c) eliminated the significance of terms of court when it provided that: "The expiration of a term of court in no way affects the power of a court to do any act . . . ."[40] To fill the resulting void, rule 60 permitted relief

---

[39] Professors Wright and Miller explain:

> If an independent action for relief from a judgment is brought in the court that gave judgment, there is ancillary jurisdiction over the action despite the absence of a federal question or of diversity of citizenship or of the requisite amount of controversy. But, in theory at least, the action may be brought in any court of competent jurisdiction. If it is brought in a court other than the one that gave judgment, it seems that independent grounds of jurisdiction are needed.

11 C. WRIGHT & A. MILLER, *supra* note 4, at 242-43 (footnotes omitted). *Accord,* 7 MOORE'S FEDERAL PRACTICE ¶ 60.38, at 642-47 (2d ed. 1978).

[40] In its original form, rule 6(c) read:

> (c) Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

Fed. R. Civ. P. 6(c) (1938). The Advisory Committee's Notes on the original rule 6(c) stated: "This eliminates the difficulties caused by the expiration of terms of court." The Advisory Committee made clear its intent to abolish the term rule in its Notes on the Preliminary Draft of Proposed Amendments (May 1944): "The general rule that a court

from final judgments for clerical errors and for a judgment based on mistake or excusable neglect.[41] Rule 60 clearly governed *after* the expiration of the term, but some courts persisted in retaining plenary power over their judgments during the term.[42] Rule 6(c) was amended in 1946 to end this practice.[43] At the same time,

---

loses jurisdiction to disturb its judgments, upon the expiration of the term at which they were entered, had long been the classic device which ... gave finality to judgments.... Rule 6(c) abrogates that limit on judicial power." FED. R. CIV. P. 6(b) note (1946 Advisory Comm. Note).

[41] Rule 60(a) governed clerical errors, and rule 60(b) dealt with mistake or excusable neglect. In its entirety rule 60 originally read:

> (a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.
>
> (b) Mistake; Inadvertence; Surprise; Excusable Neglect. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U.S.C. Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

Fed. R. Civ. P. 60 (1938). Rule 60(b) applies in circumstances similar to the basis for a writ of error *coram nobis.*

[42] Boaz v. Mutual Life Ins. Co., 146 F.2d 321, 322 (8th Cir. 1944); *see* Hill v. Hawes, 320 U.S. 520, 524 (1944); Bucy v. Nevada Constr. Co., 125 F.2d 213, 216-17 (9th Cir. 1942). The Advisory Committee Notes on the May 1944 preliminary draft of proposed amendments discussed this confusion when they stated:

> A question has arisen whether the equitable remedy of an ancillary bill of review is available under these rules as they stand. Some members of the Advisory Committee have had the impression the writ of error *coram nobis*, at common law, and the bill of review in equity, were abolished by these rules, and that the only procedures for correcting or obtaining relief from judgments are those prescribed by these rules, including 60(b), except that an independent action to set aside a judgment for such a cause as "extrinsic" fraud is preserved by 60(b). It is probable that the rules leave this question of procedure in some doubt and, if so, the doubt should be cleared up.

FED. R. CIV. P. 60(b) (Prelim. Draft 1944) note (Advisory Comm. Note).

[43] As amended, rule 6(c) read:

> (c) Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the *continued existence or* expiration of a term of court. The *continued existence or* expiration of a term of court in no way affects the power of a court to do any act to take any proceeding in any civil action which has been pending before it.

Fed. R. Civ. P. 6(c) (1946) (emphasis indicates amendments).

This amendment also can help to clarify another area of confusion surrounding the recall of appellate mandates. Rule 6(c) indicates that a court's power to deal with its judgments derives from its power over "cases and controversies." *See generally* U.S. CONST. art.

rule 60 was completely revamped.[44] It now includes more grounds for relief from judgments and specifically states that the old ancillary remedies used to obtain relief from judgments are "abolished." Independent actions in equity, however, are expressly preserved as a means of obtaining relief from a judgment.[45] The Advisory Committee Notes on rules 6 and 60 make it clear that the Federal Rules delineate the only procedures under which a district court can review its own judgments.[46]

III, § 2. The Federal Rules of Civil Procedure limit a district court's power to reconsider cases by regulating the circumstances under which a district court can reopen its own cases. *Cf.* FED. R. CIV. P. 60(b). *See* note 21 *supra*.

[44] *See* FED. R. CIV. P. 60, *quoted in* note 3 *supra*.

[45] Professor Moore describes the difference between a rule 60(b) motion and an independent action in equity as follows:

> [F]rom the ... principles of ancillary jurisdiction and service of process applicable to an independent action brought in the federal court which rendered the federal judgment from which relief is sought, it can be seen that the so-called independent action is not, as a practical matter, very dissimilar in its procedural aspects from the old ancillary common law and equitable remedies of audita querela, coram nobis and bill of review, which ... were, along with others, incorporated into grounds for relief by motion under amended 60(b).
>
> ....
>
> There are, undoubtedly, some procedural differences between the 60(b) motion and the independent action. But the essential difference does not lie in pure procedure. It is this. The independent action affords relief where the 60(b) motion does not afford a plain, adequate and complete remedy; and, what is perhaps more important, it affords relief, when warranted by established equitable principles, although relief by motion under 60(b) is not obtainable because the time for making a motion has run.

7 MOORE'S FEDERAL PRACTICE ¶ 60.38[3], at 650-52 (2d ed. 1978) (footnotes omitted).

[46] The Advisory Committee Notes on the 1946 Amendments to FED. R. CIV. P. 6(b) stated:

> The further argument is that Rule 6(c) abolished the long standing device to produce finality in judgments through expiration of the term, and since that limitation on the jurisdiction of courts to set aside their own judgments has been removed by Rule 6(c), some other limitation must be substituted or judgments never can be said to be final.
>
> ... The Committee believes that the abolition by Rule 6(c) of the old rule that a court's power over its judgments ends with the term, requires a substitute limitation, and that unless Rule 6(b) is amended to prevent enlargement of the times specified in Rules 50(b), 52(b), and 60(b), and the limitation as to Rule 59(b) and (d) is retained, no one can say when a judgment is final.

FED. R. CIV. P. 6(b) note (1946 Advisory Comm. Note).

Similarly, the Advisory Committee Notes on the 1946 Amendments to FED. R. CIV. P. 60(b) stated:

> If these various amendments, including principally those to Rule 60(b), accomplish the purpose for which they are intended, the federal rules will deal with the practice in every sort of case in which relief from final judgments is asked, and prescribe the practice.
>
> ....
>
> It should be noted that Rule 60(b) does not assume to define the substan-

Because they apply only to district courts,[47] the Federal Rules of Civil Procedure do not govern the procedures for reexamining appellate mandates. In 1939 the Second Circuit decided to continue using the term rule rather than to follow the lead of rule 6(c) and judicially abrogate the term rule.[48] Similarly, the Supreme Court in 1941 relied on a technical exception to the term rule to allow the recall of an appellate mandate,[49] and the following year two more circuits reaffirmed the term rule.[50] Thus the term rule remained well-entrenched in appellate courts.

In 1944, however, the Supreme Court signalled the demise of the term rule. In *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*,[51] Hartford-Empire had obtained a decree holding its patent valid. But the same decree also held that Hazel-Atlas had not infringed the patent.[52] On appeal, the Third Circuit reversed, finding that Hazel-Atlas had infringed the patent.[53] Nine years later Hazel-Atlas filed a petition in the court of appeals conclusively showing that a trade journal article relied upon by that court, purportedly written by a disinterested third party, had in fact been written by an attorney for Hartford-Empire. The Third Circuit denied relief from the judgment, holding that it had not relied heavily on

---

tive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief.

FED. R. CIV. P. 60(b) note (1946 Advisory Comm. Note).

[47] *See* note 4 *supra*. *But cf.* 2 MOORE'S FEDERAL PRACTICE ¶ 6.09[2], at 1500.115-.116 (2d ed. 1978) (although original rule 6(c) did not apply to appellate courts, 1948 amendments could be taken to state "a principle for all courts").

[48] Nachod v. Engineering & Research Corp., 108 F.2d 594 (2d Cir. 1939) (per curiam).

[49] In Bernards v. Johnson, 314 U.S. 19 (1941), the Court held that a court of appeals could recall its mandate when a motion to recall was made during the same term at which the mandate was technically rendered. The court stated:

> [B]y staying the issue of the mandate and retaining the cause until after the subsequent term had opened, the court, in effect, did extend the term as respects the instant case and . . . it had power to take further steps in the cause during the term in which the stay expired and the mandate issued.

Id. at 30. This case applied the traditional exception to the term rule of reserving control over the judgment, thereby fictionally "extending" the term for a particular case. *See* note 18 *supra*.

[50] Sun Oil Co. v. Burford, 130 F.2d 10 (5th Cir.) (mandate recalled during term in reliance on continued power over mandates during term even though time for rehearing expired), *rev'd on other grounds*, 319 U.S. 315 (1942); Stewart Die Casting Corp. v. NLRB, 129 F.2d 481 (7th Cir. 1942) (term rule observed after citing rule 6(c) and Nachod v. Engineering & Research Corp., 108 F.2d 594 (2d Cir. 1939)).

[51] 322 U.S. 238 (1944), *overruled on other grounds*, Standard Oil Co. v. United States, 429 U.S. 17 (1976) (per curiam).

[52] Hartford-Empire Co. v. Hazel-Atlas Glass Co., 39 F.2d 111 (W.D. Pa. 1930).

[53] Hartford-Empire Co. v. Hazel-Atlas Glass Co., 59 F.2d 399 (3d Cir. 1932).

the article, and that in any event, the court could not recall a mandate once the term had expired.[54]

In a 5-4 decision, the Supreme Court reversed. The Court's assault on the term rule began with the statement that "[f]rom the beginning there has existed alongside the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry."[55] In holding that this case warranted such relief, the *Hazel-Atlas* Court broke down many of the old procedural rigidities that surrounded the term rule. The Court drew upon various aspects of both independent actions in equity and bills of review, while also rejecting other aspects. After stating that it was granting relief on a bill of review, the Court endorsed the practice of hearing bills of review in appellate courts rather than sending such cases to district courts.[56] But at the same time, the Court dealt with the case as if it were an independent action in equity; it cited cases involving independent actions[57] and granted relief on the basis of fraud, an appropriate ground for an independent action but not for a bill of review.[58] In addition, the Court abrogated the time constraint of laches—which had applied to both independent actions and bills of review[59]—when invoking equity power to preserve "the integrity

---

[54] Hartford-Empire Co. v. Hazel-Atlas Glass Co., 137 F.2d 764, 768-69 (3d Cir. 1943) (citing Nachod v. Engineering & Research Corp., 108 F.2d 594 (2d Cir. 1939)).

[55] 322 U.S. at 244.

[56] The movant in *Hazel-Atlas* had originally brought a motion in the Third Circuit for leave to file a bill of review in the district court. The Third Circuit granted Hazel-Atlas leave to amend to seek the same relief directly in the appellate court, a procedure generally unavailable in a bill of review. *See* text at note 35 *supra*. But, for fear of violating the term rule, the court of appeals balked at granting relief. Hartford-Empire Co. v. Hazel-Atlas Glass Co., 137 F.2d 764, 769 (3d Cir. 1943). On appeal, the Supreme Court reversed, rejecting the notion that a bill of review could not be granted by the appellate court after the term ended. 322 U.S. at 248-49.

[57] The Court relied in part upon Pickford v. Talbott, 225 U.S. 651 (1912), Marshall v. Holmes, 141 U.S. 589 (1891), United States v. Throckmorton, 98 U.S. 61 (1878) and Marine Ins. Co. v. Hodgson, 11 U.S. (7 Cranch) 557 (1813), each of which involved an independent action for relief rather than a bill of review.

[58] *Compare* text at note 37 *supra, with* text at note 34 *supra. But see* Moore & Rogers, *supra* note 15, at 677, 679-81; Fraser v. Doing, 130 F.2d 617, 620 & n.12 (D.C. Cir. 1942) (dicta that bill of review may be used to correct fraud, citing other dicta to that effect).

[59] *See* 11 C. WRIGHT & A. MILLER, *supra* note 4, § 2868, at 241 ("There is no time limit on when an independent action may be brought, but the doctrine of laches is applicable and undue delay may bar relief."); 7 MOORE'S FEDERAL PRACTICE ¶ 60.15, at 62 (2d ed. 1978) (bill of review may be time-barred by laches).

of the judicial process."[60] The Supreme Court thus abrogated the old procedural technicalities and fashioned a new category of post-judgment relief—that of fraud on the court.[61]

The *Hazel-Atlas* Court's analysis advanced the evolution of the recall doctrine by articulating a balancing test that many courts would follow. The Court ignored the individual requirements of the ancillary remedies and the independent action, and looked instead to the purposes and policies common to them all. The Court stated:

> Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations.[62]

The common law and equity courts corrected "particular injustices" with particular devices—the ancillary remedies. In contrast to the clumsy and indirect approach to granting relief, the *Hazel-Atlas* analysis is simple—a balancing between two court-made doctrines. The term rule holds sway except in extreme cases where adherence to the rule would result in "particular injustices." Equitable principles then allow the court to avoid the harshest results of the rule.

The term rule, with all its bag and baggage, abruptly disappeared in 1948 when Congress revised the Judicial Code. Section

---

[60] 322 U.S. at 246. The Court stated: "But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. . . . Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants." *Id.* This statement also rejects the equitable doctrine of "clean hands" in the context of a fraud on a court.

[61] This hybrid remedy has since outgrown its historical antecedents to become a pillar of the recall doctrine. Litigants no longer need to bring bills of review or independent action to obtain relief when there has been a fraud on an appellate court. Courts will grant relief when a litigant brings a motion to recall the mandate. *See* Cord v. Smith, 370 F.2d 418, 423 (9th Cir. 1966) (dicta); Root Ref. Co. v. Universal Oil Prods. Co., 169 F.2d 514, 521-22 (3d Cir. 1948), *cert. denied,* 335 U.S. 912 (1949). *See also* Greater Boston Television Corp. v. FCC, 463 F.2d 268, 278 (D.C. Cir. 1971) (dicta), *cert. denied,* 406 U.S. 950 (1972); 16 C. WRIGHT & A. MILLER, *supra* note 4, § 3938, at 288-89.

[62] 322 U.S. at 248.

452 of the Code tracks the language of Federal Rule of Civil Procedure 6(c)[63] and provides: "The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding."[64] Section 452 applies to all courts, including appellate courts.[65] Although the Judicial Code abolished the term rule, it did not substitute any procedures for attaining finality of judgments.[66]

D. *Development of Recall Doctrine in Appellate Courts*

Section 452 provided the last ingredient needed to complete the evolution of the recall doctrine. After an initial period of varied reactions,[67] the courts of appeals developed a more consistent approach to recalls. An alternative holding by the Sixth Circuit in *Hines v. Royal Indemnity Co.*,[68] an intellectual offspring of *Hazel-Atlas*, crystallized the current doctrine of recall of mandates. In *Hines*, the petitioner filed a rule 60(b) motion in the court of appeals requesting a reversal of the earlier judgment. The court first held that since the appellant alleged only that the court had made an error of law, the motion amounted to no more than "a petition for rehearing under a different name."[69] Being untimely under Court Rule 22, the motion was denied.

As an alternative ground, the *Hines* court also looked to Court Rule 24(a)—"A mandate once issued will not be recalled

---

[63] *See* note 43 and accompanying text *supra*.

[64] 28 U.S.C. § 452 (1976).

[65] The Code provides in relevant part:

> As used in this title:
>
> The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title . . . .

Id. at § 451.

[66] *See* United States v. Ohio Power Co., 353 U.S. 98, 103 (1957) (dissenting opinion, Harlan, J.) ("The effect of § 452 was to leave the federal courts untrammeled in establishing their own rules of finality. But the history of § 452 indicates that the courts were to have no power to re-examine their judgments otherwise than in accordance with their established rules or statutes.").

[67] The Second Circuit interpreted abolition of the term rule to mean that they now held enough control over their mandate to "change it as we think the situation demands." National Comics Publs., Inc. v. Fawcett Publs., Inc., 198 F.2d 927, 927 (2d Cir. 1952). At the other extreme, the Sixth Circuit at first missed the importance of § 452 and clung to the term rule. *See* Watson v. Gallagher, 202 F.2d 641 (6th Cir. 1953), *overruled by* Hines v. Royal Indem. Co., 253 F.2d 111, 113 (6th Cir. 1958). *See also* 14 CYCLOPEDIA OF FEDERAL PROCEDURE §§ 69.12-15 (3d ed. 1952) (1952 compilation of cases fails to mention § 452).

[68] 253 F.2d 111 (6th Cir. 1958).

[69] *Id.* at 113-14.

except by order of the court for good cause shown."[70] To constitute "good cause" the petitioner had to show "exceptional circumstances . . . sufficient to override the strong public policy that there should be an end to a case in litigation."[71] Petitioner failed to make such a showing.

This alternative holding in *Hines* contains the heart of the current doctrine of recall of mandates. Whether speaking in terms of "good cause,"[72] "special circumstances,"[73] or "prevent[ing] injustice,"[74] courts analyze whether the petitioner has demonstrated some reason special enough to override the policy of finality. Because of the respect accorded to finality, most courts exercise their power to recall sparingly.[75]

In contrast to the stringent substantive requirements of the recall doctrine, its procedural aspects are simple. The Federal Rules of Appellate Procedure make no mention of recalls,[76] and only two circuits have their own rules allowing recalls.[77] Because no specific provision controls the procedural aspects of recalling mandates, relief must be sought by motion under the general requirements of Federal Rule of Appellate Procedure 27.[78] Rule 27(a) allows "any party" to file a "response in opposition" to the motion.[79] The rules of two circuits allow a single judge to con-

---

[70] *Id.* at 114.

[71] *Id.*

[72] Aerojet-General Corp. v. American Arb. Ass'n, 478 F.2d 248, 254 (9th Cir. 1973); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 277 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 950 (1972).

[73] Alphin v. Henson, 552 F.2d 1033 (4th Cir.), *cert. denied,* 434 U.S. 823 (1977); Powers v. Bethlehem Steel Corp., 483 F.2d 963, 964 (1st Cir. 1973); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 277 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 950 (1972); Collins v. City of Wichita, 254 F.2d 837, 839 (10th Cir. 1958).

[74] 5TH CIR. R. 15; 8TH CIR. R. 18. *See* Alphin v. Henson, 552 F.2d 1033, 1035 (4th Cir.), *cert. denied,* 434 U.S. 823 (1977); Aerojet-General Corp. v. American Arb. Ass'n, 478 F.2d 248, 254 (9th Cir. 1973); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 277 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 950 (1972); *cf.* Riha v. IT&T Corp., 533 F.2d 1053, 1055 (8th Cir. 1976) (time set by district court for interest to start running not sufficiently unjust to lead to a recall).

[75] *See* Powers v. Bethlehem Steel Corp., 483 F.2d 963, 964 (1st Cir. 1973); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 277 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 950 (1972); Estate of Iverson v. Commissioner, 257 F.2d 408, 409 (8th Cir.), *cert. denied,* 358 U.S. 893 (1958).

[76] *See* note 7 and accompanying text *supra.*

[77] *See* note 9 and accompanying text *supra.*

[78] 9 MOORE'S FEDERAL PRACTICE ¶ 241.02[4] (2d ed. 1975).

[79] FED. R. APP. P. 27(a).

sider the motion;[80] in another circuit the judges who heard the appeal consider the motion.[81] Although rule 27 contains no time limitation on motions, many courts attach great weight to the timeliness of the motion.[82]

The courts' treatment of recalls involves a case-by-case balancing of the desirability of a just result against the policy of finality.[83] Through direct consideration of the conflicting policies, the courts achieve substantially the same results that were once achieved indirectly through—or in spite of[84]—the rigid term rule and its exceptions.[85] Although emphasizing the proper policies, such analysis consists of little more than the recitation of amorphous catchwords. Since a court can recall its mandate whenever it believes that a petitioner has demonstrated sufficient "good cause" or injustice, the limits on the doctrine lie solely in the court's discretion. Such a vague test gives a court great freedom to correct injustices, but it also results in uncertainty and unevenness of application.[86] In an effort to promote uniformity, simplicity, and theoretical soundness of application, this Note suggests some reforms of the current doctrine of recalls.

---

[80] *See* 6TH CIR. R. 8(b); 8TH CIR. R. 2(c).

[81] *See* 2D CIR. R. 27(c).

[82] *See, e.g.*, Greater Boston Television Corp. v. FCC, 463 F.2d 268, 276 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (timeliness of motion may affect court's decision) (dicta); Cord v. Smith, 370 F.2d 418, 423 (9th Cir. 1966) (party requesting recall knew of fraud before judgment rendered); Lee v. Terminal Transp. Co., 301 F.2d 234, 236 (7th Cir. 1962) (motion to recall 29 months after mandate issued too late); Yanow v. Weyerhaeuser S.S. Co., 274 F.2d 274, 284 (9th Cir. 1959), *cert. denied*, 362 U.S. 919 (1960) (motion to recall for lack of jurisdiction 11 months after mandate issued too late; by deciding case court implicitly decided it had jurisdiction). *See generally* 16 C. WRIGHT & A. MILLER, *supra* note 4, § 3938, at 289-90; 24 VILL. L. REV. 157, 162-63 (1978). The requirement of timeliness as applied by the courts bears a striking similarity to the doctrine of laches as it applied to the ancillary remedies and independent actions. *See* notes 21 & 59 *supra*.

[83] *See* text accompanying note 62 *supra*.

[84] *See* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 245 (1944). The Court stated: "[W]hatever form the relief has taken in particular cases, the net result in every case has been the same: where the situation has required, the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away."

[85] *See* notes 17-19 and accompanying text *supra*.

[86] One court has found a mandate that is arguably unclear causes sufficient injustice to require a recall. Aerojet-General Corp. v. American Arb. Ass'n, 478 F.2d 248, 254 (9th Cir. 1973). Another court has held that a change in the law causing opposite results in two suits arising from the same accident "is not such an extraordinary circumstance which justifies such relief." Collins v. City of Wichita, 254 F.2d 837, 839 (10th Cir. 1958).

III

PROPOSED TREATMENT OF SPECIFIC RECALL PROBLEMS

Over the past forty years, the reasons for requesting recalls have generally fallen within four broad categories. Each conflicts with a different facet of the finality policy, so each will be analyzed separately.

A. *Clerical Errors*

Motions styled as requests for recalls of appellate mandates arise with great frequency over matters that do not go to the merits of the lawsuit. The most common examples are clerical mistakes,[87] questions of costs of appeal,[88] and questions concerning interest on judgments.[89] Although these errors are administrative in nature and collateral to the main issues, they loom large in the eyes of the litigants and may involve huge sums of money. Whenever a litigant demonstrates that a clerical or administrative error of oversight or omission arising during the appellate proceedings has caused him harm, the appellate court should promptly correct the error.

Courts should grant recalls of mandates flawed by clerical errors without balancing the conflicting policies embodied in the general doctrine of recalls. The desire for correctness will always be strong in this situation because the harm arises not from any fault of the party, but from the type of error inherent in any

---

[87] *See, e.g.*, Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 296 F.2d 215 (5th Cir.), *cert. denied*, 368 U.S. 890 (1961) (modifying district court judgment that had mistakenly used the word "affirmed" when intent had been to say "modified").

[88] *See, e.g.*, United States v. Certain Land, 420 F.2d 370 (2d Cir. 1969) (costs improperly taxed against United States government); Technical Tape Corp. v. Minnesota Mining & Mfg. Co., 249 F.2d 1 (2d Cir. 1957) (mandate recalled to reduce printing costs awarded appellee); Samson Tire & Rubber Corp. v. Rogan, 140 F.2d 457 (9th Cir. 1943) (mandate recalled to tax costs).

[89] *See, e.g.*, Riha v. IT&T Corp., 533 F.2d 1053 (8th Cir. 1976) (recall refused and district court allowed to set proper amount of interest); Perkins v. Standard Oil Co., 487 F.2d 672 (9th Cir. 1973) (recall granted to include instruction on interest provision); Dickerson v. Continental Oil Co., 476 F.2d 635 (5th Cir. 1973) (recall granted and interest awarded on assumption that district court was without power to award interest); Lee v. Terminal Transp. Co., 301 F.2d 234 (7th Cir. 1962) (recall denied on request for interest made 29 months after mandate issued); Bankers Life & Cas. Co. v. Bellanca Corp., 308 F.2d 757 (7th Cir. 1962) (untimely petition to recall to modify interest provision denied); Chemical Bank & Trust Co. v. Prudence-Bonds Corp., 213 F.2d 443 (2d Cir. 1954) (recall denied and district court held to have determined incorrectly date from which interest computed).

humanly-operated system. In contrast, the justification for finality will be weak in these circumstances.[90] A dispute is not fully resolved when the system malfunctions and creates an additional conflict between the parties. Second, little justifiable reliance can attach to any part of a judgment based on a clerical error because reliance stems from the reasoning of the court, not from the form of its pronouncements. Third, certainty in knowing that a simple, needless error will stand uncorrected is more unsettling than uncertainty over whether the lawsuit has ended. Finally, clerical errors can be corrected in summary proceedings that consume virtually no judicial resources. In this situation, then, a balancing of the policies is unnecessary because the policy considerations in favor of recall should always prevail. To undertake an unnecessary balancing of policies might blur important distinctions and result in erratic decision making.[91]

The term rule had a special exception for correction of clerical errors;[92] likewise, the Federal Rules of Civil Procedure has a special rule for clerical errors.[93] The Federal Rules of Appellate Procedure should also have a special rule. A provision similar to Federal Rule of Civil Procedure 60(a) would allow an appellate court to grant relief to a litigant aggrieved because of an administrative error without requiring the parties and the court to make a needless analysis of policies.[94]

B. *Clarification of a Mandate*

Parties commonly ask appellate courts to recall mandates in order to clarify ambiguous language in the judgment.[95] This

---

[90] *See* text accompanying notes 12-14 *supra.*

[91] The confusion of the courts currently runs deep. *Compare* Riha v. IT&T Corp., 533 F.2d 1053, 1055 (8th Cir. 1976) (appellate court ordered remittitur but did not specify when interest to begin to run; "[n]o injustice exists sufficient to lead us to recall and alter [our] mandate.") *and* Bankers Life & Cas. Co. v. Bellanca Corp., 308 F.2d 757 (7th Cir. 1962) (petition to recall mandate to include post-judgment interest denied as untimely) *and* Lee v. Terminal Transp. Co., 301 F.2d 234 (7th Cir. 1962) (plaintiff's motion in district court to grant interest that appellate court failed to mention denied for lack of authority to deviate from mandate; plaintiff's motion in appellate court to seek same relief denied as untimely) *with* Perkins v. Standard Oil Co., 487 F.2d 672, 674 (9th Cir. 1973) (court granted recall to include forgotten interest instructions in exercise of its power to "protect the integrity of its own processes").

[92] *See* text at note 19 *supra.*

[93] *See* FED. R. CIV. P. 60(a), *quoted in* note 3 *supra.*

[94] For a suggested incorporation of this proposal into the Federal Rules of Appellate Procedure, see Appendix.

[95] *See, e.g.,* Reserve Mining Co. v. Lord, 529 F.2d 181, 183 (8th Cir. 1976); Reserve

problem is easily corrected, but a recall of a mandate is not a proper initial solution. In some limited situations a recall will be appropriate; in most cases, less drastic measures will suffice.

When parties disagree over the meaning of a mandate, the proper general procedure is to petition for rehearing.[96] During the time when a rehearing is available, petitions to recall and clarify a mandate are superfluous. But because of the nature of ambiguous language, parties are often blind to interpretational problems until they attempt to act on the mandate. By then, the time for rehearing has usually passed.

When an ambiguity surfaces during further proceedings on remand, a recall to clarify is inappropriate. The district court is in a position to determine what the appellate court meant. Misinterpretation by the district court can be corrected on appeal.[97] Should the district court blatantly misconstrue the mandate, the aggrieved litigant can petition the appellate court for a writ of mandamus to compel the district judge to properly carry out the mandate.[98] In any event, litigants should not be allowed to re-

---

Life Ins. Co. v. Pitfield MacKay & Co., 528 F.2d 120 (8th Cir. 1976); Aerojet-General Corp. v. American Arb. Ass'n, 478 F.2d 248 (9th Cir. 1973); Meredith v. Fair, 306 F.2d 374 (5th Cir.), *cert. denied,* 371 U.S. 828 (1962); Penton v. United States, 264 F.2d 477 (6th Cir. 1959); National Comics Publs., Inc. v. Fawcett Publs., Inc., 198 F.2d 927 (2d Cir. 1952).

[96] *See* note 5 *supra.*

[97] The appellant could argue that the district court wrongly deviated from the higher authority's mandate and thus violated the law of the case. *See* Briggs v. Pennsylvania R.R., 334 U.S. 304 (1948); *In re* Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895); *Ex parte* Sibbald v. United States, 37 U.S. (12 Pet.) 488, 491 (1838); S.S. Kresge Co. v. Winget Kickernick Co., 102 F.2d 740, 742 (8th Cir.), *cert. denied,* 308 U.S. 557 (1939).

[98] *See* United States v. United States Dist. Court, 334 U.S. 258, 264 (1947) (court of appeals empowered to issue mandamus to compel lower court to carry out appellate mandate). *Cf.* Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976) (when district judge willfully misconstrued mandate, appellate court recalled mandate and recused district judge rather than issuing mandamus only).

The Supreme Court settled this area of law long ago in *In re* Sanford Fork & Tool Co., 160 U.S. 247 (1895), when it stated:

> When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. . . . If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal . . . or by a writ of mandamus to execute the mandate of this court . . . . The opinion delivered by this court . . . may be consulted to ascertain what was intended by its mandate;

turn to the appellate court for a clarification while a district court is dealing with the case on remand.[99] Piecemeal review ought not to be allowed under the guise of a "motion to recall."[100]

Recalls for clarification are appropriate only where the ambiguity in a mandate does not surface until after the completion of remand proceedings or where there is no remand.[101] In such cases, interpretation of the mandate is the only remaining issue. Since a district judge's reading would often be appealed anyway, direct recourse to the appellate court seems more expeditious. Like clerical errors, ambiguities arise by oversight and can usually be corrected quickly.[102] There is of course a danger that parties will use "clarification" recalls to seek a substantive change in the mandate or to delay its execution, but such frivolous petitions could be penalized by awarding damages and costs.[103]

---

and, either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly.

Id. at 255-56.

[99] *See* Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425 (1978) (per curiam) (motion to clarify judgment denied since judgment only a routine order directing that the decision of Court be carried into effect, but option to file petition for mandamus left open).

[100] *See generally* 28 U.S.C. §§ 1291, 1292 (1976) (courts of appeals have jurisdiction to hear appeals from final and specified interlocutory decisions of district courts).

[101] Such a situation may arise when an appellate court, without remanding for further proceedings, modifies the relief granted to a plaintiff and, as modified, affirms.

[102] For a suggested incorporation of this proposal into the Federal Rules of Appellate Procedure, see Appendix. As with clerical errors, the definition of "clarification" will determine whether this proposal is workable. The term "clarification" can be stretched to include requests for relief that do not really deal with ambiguous language. For instance, in Penton v. United States, 264 F.2d 477 (6th Cir. 1959), a district court judge receiving a case on remand sent a memorandum to the court of appeals asking for a clarification because he was unable to reconcile the law as stated by the latter court with the facts stipulated by the parties. The clear implication was that he believed that the court of appeals made a mistake of law that should be corrected. The Sixth Circuit recognized that the confusion lay with district court judge rather than their mandate and denied the petition. Courts should guard against such attempts to use clarification as a ploy to obtain reconsideration of a decision that is substantively wrong rather than merely the bearer of ambiguous language or some other technical mistake. When a technical error other than an ambiguity is characterized as a clarification problem, however, the problem is obviated because both can be summarily corrected upon a proper motion. *See, e.g.*, Gurley v. Lindsley, 466 F.2d 498 (5th Cir. 1972) (granting motion to clarify mandate which failed to indicate when 10% interest was to begin to accrue); Lauro v. United States, 163 F.2d 642 (2d Cir. 1947) (granting motion to "interpret" whether mandate called for interest on judgment).

[103] 28 U.S.C. § 1927 (1976). Compare also FED. R. APP. P. 38 which provides: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Although rule 38 does not mention motions, the purpose of the rule would be served by applying it in this situation. *Cf.* NLRB v. Smith & Wesson Co., 424 F.2d 1072 (1st Cir. 1970) (on petition to enforce board order, damages awarded for frivolous argument in opposition to petition). *See generally* 9 MOORE'S FEDERAL PRACTICE ¶ 201.08 (2d ed. 1975) (rules should be liberally construed).

C. *Fraud on an Appellate Court*

A fraud on the judicial processes raises delicate problems of vindicating the integrity of the court within the confines of an adversary process. Here it is necessary to distinguish "fraud on the court" from "fraud between the parties."[104] According to Professor Moore's widely accepted definition, "fraud on the court" is

> that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjuding [sic] cases that are presented for adjudication. Fraud *inter partes*, without more, should not be a fraud upon the court . . . .[105]

Fraud between the parties or a fraud on a district court should be handled by the district courts under rule 60(b).[106] A fraud perpetrated solely on an appellate court (for example by corruption of an appellate judge[107] or by an attorney's improper conduct on appeal[108]) should be handled through recall of the appellate mandate.

Hazel-Atlas Glass Co. v. Hartford-Empire Co.[109] set forth the principle that allegations of a fraud on an appellate court must be

---

[104] For district courts, such a distinction must be drawn to make sense out of the structure of rule 60(b). The rule authorizes district courts to handle fraudulent judgments in three ways: the court that rendered a judgment may set it aside within one year because of the fraud, misrepresentation, or misconduct of an adverse party; any court may, subject to a time limitation of laches, entertain an independent action in equity to set aside a fraudulently obtained judgment; and a court may at any time "set aside a judgment for fraud on the court." FED. R. CIV. P. 60(b), *quoted in* note 3 *supra*. *See generally* Lockwood v. Bowles, 46 F.R.D. 625, 628-32 (D.D.C. 1969); 7 MOORE'S FEDERAL PRACTICE ¶ 60.33, at 504-06 (2d ed. 1978); 11 C. WRIGHT & A. MILLER, *supra* note 4, § 2870, at 253.

The repetition and overlap of antifraud procedures in rule 60(b) is symptomatic of the problems that a fraud on the court entails. A stain on the judicial system cannot be condoned. Yet just how to define a "fraud on the court" is unclear (*see, e.g.*, Moore & Rogers, *supra* note 15, at 692 n.266), as is how, when, and by whom the stain should be removed.

[105] 7 MOORE'S FEDERAL PRACTICE ¶ 60.33, at 515 (2d ed. 1978). *See* 11 C. WRIGHT & A. MILLER, *supra* note 4, § 2870, at 252.

[106] *See* note 104 *supra*.

[107] *See, e.g.*, Root Ref. Co. v. Universal Oil Prods. Co., 169 F.2d 514 (3d Cir. 1948), *cert. denied*, 335 U.S. 912 (1949) (attorney improperly influenced judge in attempt to secure favorable judicial action).

[108] *See, e.g.*, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), *discussed in* notes 51-62 and accompanying text *supra*. The appellate court in *Hazel-Atlas* relied on a fraudulent trade journal article written by Hartford-Empire's attorney, an insignificant part of the record in the trial court.

[109] 322 U.S. 238 (1944), *discussed in* notes 51-62 and accompanying text *supra*.

ruled upon by the defrauded court.[110] This principle presents thorny practical problems. Appellate courts are ill-equipped to hear issues of fact, even "undisputed" facts.[111] That it was the victim of a fraud does not give the appellate tribunal any special information that cannot be obtained by another tribunal. Indeed, the court should decline to decide the factual matters because it now has an interest in the dispute[112] —it runs the danger of stepping into a prosecutorial role.[113]

These problems are not insoluble, however. When faced with a petition to recall a mandate for fraud upon an appellate court, that court could refer the case to a district court for all factual determinations.[114] Upon receipt of the district court's findings of

---

[110] 322 U.S. at 247-50. In *Hazel-Atlas* itself, the Court declined to decide whether or not the Third Circuit should have remanded had the factual allegations in the affidavits been disputed. 322 U.S. at 249-50 n.5. Two years later the Supreme Court stated: "The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation." Universal Oil Co. v. Root Ref. Co., 328 U.S. 575, 580 (1946). On remand the court of appeals followed this language to the hilt by holding a ten day trial before a three-judge panel in the appellate courthouse without the aid of a master. Root Ref. Co. v. Universal Oil Prods. Co., 169 F.2d 514, 519-21 (3d Cir. 1948), *cert. denied,* 335 U.S. 912 (1949). This procedure has been cited with approval by Professor Moore (7 MOORE'S FEDERAL PRACTICE ¶ 60.33, at 507-08 (2d ed. 1978)), and Professors Wright and Miller (11 C. WRIGHT & A. MILLER, *supra* note 4, § 2870, at 251-52).

[111] The *Hazel-Atlas* Court glossed over underlying factual issues by labelling the facts "undisputed." 322 U.S. at 247. The dissenters, however, raised significant doubts about the propriety of the movant's conduct and would have remanded for trial (322 U.S. at 262-71), and the Third Circuit had held that the fraudulent article was not the basis of their prior decision and therefore the allegations of fraud were without merit (Hartford-Empire Co. v. Hazel-Atlas Glass Co., 137 F.2d 764, 769 (3d Cir. 1943)).

[112] The court has an interest both in vindicating itself when its integrity has been sullied through unscrupulous acts by members of the bench and bar and in protecting against groundless allegations of such acts. The protection of this interest will involve powerful emotions that may affect the decisionmaking process in even the fairest of minds. Such a conflict should be avoided if possible.

[113] That a fraud on a district court places the trial judge hearing a rule 60(b) motion in the same uncomfortable position does not argue against avoidance of factfinding by appellate courts in fraud cases. A resouceful district court judge could find a way to avert the conflict such as by utilizing a master.

[114] *See, e.g.*, Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 403 F.2d 437 (5th Cir. 1968) (en banc). Kinnear urged that the trial judge be disqualified because of his substantial financial ties to Humble Oil and further alleged that Humble's failure to disclose those financial ties to the petitioner and to the Fifth Circuit on appeal constituted a fraud on the latter court. *See* Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 441 F.2d 631, 633, 636 (5th Cir. 1971). Although both parties desired to stand upon the record and have the court of appeals decide the issue (403 F.2d at 444 (dissenting opinion, Dyer, J.)), the Fifth Circuit felt that public policy required a complete airing of the issue. It stated:

> [T]he interests of justice require that there be a judicial factual hearing and determination of the charges .... Obviously this Court is not equipped for this sort of determination, either acting en banc, by a panel, or by one Judge acting

fact, the appellate court could then grant any appropriate relief.[115]

D. *Change in Law After Appellate Decision*

Perhaps the most troublesome recall problems arise when the substantive law changes shortly after an appellate court has reached its decision. The losing litigant desires to have the new principle of law applied to his case, but the general rule of finality prevents reformation of mandates. Only under special circumstances can a mandate be reformed to make it consistent with a subsequent change in law. Litigants often use a motion for recall as a vehicle for seeking such relief.[116] In most cases, however, a recall would be improper because other means of obtaining relief are usually available and should be used rather than the extraordinary remedy of recall. In this context, recalls should be used only in unique instances that cannot be remedied by less drastic measures.

> as an independent Special Master. This is the task for which a District Court is ideally suited. Consequently, we treat this extraordinary petition as one requesting leave of this Court to proceed with a motion under F.R. Civ. P. 60(b) or, as permitted in Rule 60(b), an "independent action." ... The issues may encompass the charges showing fraud upon this Court. And to the extent that Petitioner undertakes to prove such facts as distinguished from fraud on the District Court ... the District Court shall hear and determine and make findings of fact and conclusions of law on that feature of the case. After which, by appropriate steps, we can determine whether and to what extent these are to be treated as the action of (i) a District Court serving as a Special Master, requiring our approval prior to their effectiveness, or (ii) simply as a District Court in which event such findings and conclusions would be reviewed as a part of any appeal.

403 F.2d at 442. The district court found that no fraud had been perpetrated on either court, (Kinnear-Weed Corp. v. Humble Oil & Ref. Co. 324 F. Supp. 1371 (S.D. Tex. 1969)), and the Fifth Circuit affirmed on appeal (Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 441 F.2d 631 (5th Cir. 1971)).

When no factual issues are presented, such a factual determination is, of course, unnecessary. But in matters involving such intricate and delicate considerations, it seems better to err on the side of too much rather than too little thoroughness.

[115] This procedure does not conflict with Standard Oil Co. v. United States, 429 U.S. 17 (1976) (per curiam). In that case the Court held that litigants desiring to open a judgment that had been affirmed on appeal need not apply for leave of the appellate court to file a rule 60(b) motion in district court. The case involved an allegation of a fraud on the court (misconduct by an attorney), but the defrauded court was the district court, not the appellate court. A fraud on the district court is cognizable under rule 60(b); a fraud on the appellate court is not. Therefore a litigant victimized by a fraud on an appellate court must return to that court not for leave to file a motion in the district court, but for his remedy.

[116] *See, e.g.*, Verilli v. City of Concord, 557 F.2d 664 (9th Cir. 1977); *In re* Union Nacional de Trabajadores, 527 F.2d 602 (1st Cir. 1975); Mississippi Valley Barge Line Co. v. T.L. James & Co., 256 F.2d 344 (5th Cir. 1958).

One primary factor which determines whether a subsequent change in law will override an appellate decision is the procedural posture of the case.

1. *Cases sub Judice*

So long as the case remains *sub judice,* the court currently considering the case should apply the most recent controlling decision. For instance, imagine a case now in the district court on remand following an appellate decision clearly stating the rule of law. If, before the district court completes its disposition of the case, the Supreme Court hands down a contrary rule of law, the district court should apply the new controlling authority;[117] under a traditional exception to the law of the case doctrine, it is not bound to follow the prior appellate mandate.[118] Because the appellate court must also follow the new controlling authority, leave from the appellate court to deviate from the mandate is unnecessary.[119] Thus a motion to recall would be unnecessary.[120]

---

[117] *See* Banco Nacional de Cuba v. Farr, 383 F.2d 166, 178 (2d Cir. 1967), *cert. denied,* 390 U.S. 956 (1968); Page v. St. Louis Sw. Ry., 349 F.2d 820, 821 (5th Cir. 1965). *See also* 1B MOORE'S FEDERAL PRACTICE ¶ 0.404[10], at 575-76 (2d ed. 1974 & Supp. 1978-79); Vestal, *Law of the Case: Single-Suit Preclusion,* 1967 UTAH L. REV. 1, 6-10.

[118] 1B MOORE'S FEDERAL PRACTICE ¶ 0.404 [10], at 575-76 (2d ed. 1974).

[119] Luminous Unit Co. v. Freeman-Sweet Co., 3 F.2d 577, 580 (7th Cir. 1924); Bailey v. Ryan Stevedoring Co., 443 F. Supp. 899, 901 (M.D. La. 1978). *Cf.* Standard Oil Co. v. United States, 429 U.S. 17 (1976) (per curiam) (abolishing appellate leave requirements in cases involving rule 60(b) motions), *discussed in* note 115 *supra* and text accompanying notes 131-36 *infra. But cf.* 16 C. WRIGHT & A. MILLER, *supra* note 4, § 3938, at 279-81 (viewing motion to recall as useful in avoiding "error that would vitiate the proceedings" because viability of prior mandate is questioned).

Should the district court refuse to deviate from the appellate mandate, the litigant should appeal that decision and ask the appellate court to align itself with the new controlling authority. For instance, in Verilli v. City of Concord, 557 F.2d 664 (9th Cir. 1977), a statute awarding attorneys' fees became law after the oral arguments in the appellate court, but before filing of the opinion. A subsequent decision held that the statute applied to all cases pending on the date the statute became law. The district court refused to grant the attorneys' fees because to do so would change the appellate mandate. On appeal, the Ninth Circuit overruled its earlier mandate, holding that the statute should be applied to *Verilli.* The court spoke in terms of recalling its prior mandate and used the balancing approach of the type suggested in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), *discussed in* text at note 62 *supra,* but that discussion appears unnecessary since it merely reversed its earlier ruling on appeal.

[120] Using recall doctrine and terminology merely confuses the true issues. An example of such needless confusion is American Iron & Steel Inst. v. EPA, 560 F.2d 589 (3d Cir. 1977), *cert. denied,* 435 U.S. 914 (1978). In that case, the American Iron & Steel Institute obtained review of the Environmental Protection Agency's water pollution regulations. The Third Circuit had held, *inter alia,* that a federal statute required the EPA to promulgate "ranges" of permissible effluent discharge as guidelines for the industry. American Iron &

2. *After Final Disposition*

The principles of res judicata normally prevent a party from attacking a valid and final judgment.[121] "Alleged erroneous rulings of law are generally not held to be sufficiently unconscionable to justify reopening a judgment not void when issued."[122] Nor, in the usual case, will a subsequent change in the applicable law vitiate a judgment.[123] But in some instances substantial injustice results when a mandate based on an outmoded law binds a party. Many litigants have requested recall of a mandate as a means to avoid the binding effect of an inequitable judgment.[124] Where other modes of relief can correct these injustices parties need not resort to recalls.

Relitigation of the dispute provides the primary means for avoiding the binding effect of a judgment. Under section 70 of the Restatement of Judgments, a determination of a question of

---

Steel Inst. v. EPA, 526 F.2d 1027 (3d Cir. 1975). In deciding a similar case from another circuit, the Supreme Court approved single-number guidelines, leaving the law in the Third Circuit out of step with that of the rest of the country. The EPA, meanwhile, had not yet completed its efforts on remand from the Third Circuit to promulgate the range guidelines. It then filed a petition asking the Third Circuit to recall and modify the mandate to prevent deviation from the Supreme Court's order and the occurrence of inconsistent EPA operating guidelines among the various circuits. *Id.* at 598. The Third Circuit recalled and modified its mandate after a long and intricate opinion.

These arduous recall proceedings were unnecessary. The EPA itself could have simply fallen into line with the Supreme Court without all this bother. The Third Circuit recognized that the case remained *sub judice*. They stated that their earlier mandate, "at least prior to completion by the agency of the tasks ordered by this panel, cannot be said to have constituted a final adjudication of the dispute concerning the validity of the challenged regulations." *Id.* at 599. Thus the EPA could have foregone the recall petition and taken advantage of the exception to law of the case doctrine just as any lower court could ignore a court of appeals decision in favor of an intervening Supreme Court decision.

The obvious factor complicating this case is the difference in the relationship between a trial court and appellate court and the relationship between agency and reviewing court. *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 8.10, at 209 (3d ed. 1972). The relations in this context, however, seem sufficiently analogous that the same basic principles should apply.

[121] *See* Commissioner v. Sunnen, 333 U.S. 591, 597 (1948). *See generally* 1B MOORE'S FEDERAL PRACTICE ¶ 0.405[1] (2d ed. 1974).

[122] Powers v. Bethlehem Steel Corp., 483 F.2d 963, 964 (1st Cir. 1973). *See* Estate of Iverson v. Commissioner, 257 F.2d 408 (8th Cir. 1958); Hines v. Royal Indem. Co., 253 F.2d 111, 113-14 (6th Cir. 1958). *See generally* Note, *Federal Rule 60(b): Finality of Civil Judgments v. Self-Correction by District Court of Judicial Error of Law*, 43 NOTRE DAME LAW. 98 (1967).

[123] *See* RESTATEMENT OF JUDGMENTS § 70 (1942); 1B MOORE'S FEDERAL PRACTICE ¶ 0.448, at 4233-35 (2d ed. 1974). *But see* United States v. Komisar, 420 F.2d 377 (6th Cir. 1966) (mem.).

[124] *See, e.g.*, Powers v. Bethlehem Steel Corp., 483 F.2d 963 (1st Cir. 1973); Estate of Iverson v. Commissioner, 257 F.2d 408 (8th Cir. 1958).

law binds the parties only "where both causes of action arose out of the same subject matter or transaction; and in any event it is not conclusive if injustice would result."[125] The recently proposed revision of the Restatement of Judgments substantially amplifies this theme. Proposed sections 61.2 and 68.1 allow relitigation of a claim or an issue settled in a prior action where claim or issue preclusion would result in unjust or inequitable administration of the law.[126] This framework permits adequate relief from an outmoded or erroneous ruling of law in most, but not all, situations. The statute of limitations may have run on some litigants. Others may simply be unable to afford the time and expense of a new trial.

Another way to avoid the binding effect of judgments obviates most of these problems. Courts of equity historically re-

---

[125] RESTATEMENT OF JUDGMENTS § 70 (1942). The type of injustice alluded to in § 70 occurs when a person engaged in a continuing course of conduct obtains a judgment regarding his conduct. For instance, an importer may litigate whether certain goods fall within a duty-free classification. Should subsequent litigation between the regulatory body and other importers result in an opposite rule of law, the first importer would possess either a substantial advantage or disadvantage vis-a-vis his competitors if he and the agency are bound by the prior judgment. To prevent such unequal and unfair results, the parties should be able to relitigate the issue after the change in law. *See* United States v. Stone & Downer Co., 274 U.S. 225 (1927).

[126] RESTATEMENT (SECOND) OF JUDGMENTS § 61.2 (Tent. Draft No. 1 1973) provides in relevant part:

> (1) When any of the following circumstances exists, the general rule of § 61 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
>
> ....
>
> (d) The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim; or
>
> ....
>
> (f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.

Similarly, RESTATEMENT (SECOND) OF JUDGMENTS § 68.1 (Tent Draft No. 4 1977) states in pertinent part:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: ... (b) The issue is one of law and ... (ii) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administrations of the laws.

tained power to modify decrees when changed circumstances of law or fact rendered injunctive relief inequitable.[127] Codified in Federal Rule of Civil Procedure 60(b)(5), this relief is available upon motion.[128] It thus requires no independent claim or jurisdictional basis.

Rule 60(b)(5), however, is not a cure-all. It applies only to judgments with "prospective effect as contrasted with those that offer a present remedy for a past wrong."[129] Further, it applies only to district court judgments and not to appellate mandates. If an appellate court has ruled upon the case, the district court is bound by that ruling as the law of the case. Once the decision has become final, no exception to law of the case doctrine allows a district court to reassert jurisdiction to modify the decision. But in this context, a modified form of recall developed to allow litigants to take advantage of the relief available under rule 60(b) without flouting the mandate of the appellate court. The litigant first petitioned the appellate court for leave to file a rule 60(b) motion in the lower court. If the appellate court found some merit in the petition, it recalled its mandate pending the outcome in the district court.[130]

In *Standard Oil Co. v. United States*,[131] the Supreme Court called the appellate leave requirement an "unnecessary and undesirable clog on the proceedings,"[132] and abolished it.[133] The

---

[127] *See* System Fed'n v. Wright, 364 U.S. 642, 646-48 (1960); United States v. Swift & Co., 286 U.S. 106, 114 (1931); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 431-32 (1855).

[128] FED. R. CIV. P. 60(b), *quoted in* note 3 *supra*. *See* 7 MOORE'S FEDERAL PRACTICE ¶ 60.26[4], at 327-30 (2d ed. 1978); 11 C. WRIGHT & A. MILLER, *supra* note 4, § 2863, at 204.

[129] 11 C. WRIGHT & A. MILLER, *supra* note 4, § 2863, at 205 (footnote omitted). *See* Ryan v. United States Lines Co., 303 F.2d 430, 434 (2d Cir. 1962); 7 MOORE'S FEDERAL PRACTICE ¶ 60.26[4], at 327, 333 (2d ed. 1975), *See generally* Note, *Federal Rule of Civil Procedure 60(b): Standards for Relief from Judgments Due to Changes in Law*, 43 U. CHI. L. REV. 646, 652-56 (1976).

[130] *See, e.g.*, Tribble v. Bruin, 279 F.2d 424 (4th Cir. 1960), *overruled*, Standard Oil Co. v. United States, 429 U.S. 17, 18 (1976) (per curiam). For pre-rule practice, see *In re* Potts, 166 U.S. 263 (1897).

[131] 429 U.S. 17 (1976) (per curiam).

[132] *Id.* at 19 (quoting Wilkin v. Sunbeam Corp., 405 F.2d 165, 166 (10th Cir. 1968)).

[133] An earlier attempt to eliminate the appellate leave requirement failed. In October 1955 the Advisory Committee on Rules for Civil Procedure proposed to amend rule 60(b) by inserting the following after tbe third sentence: "Leave to make the motion need not be obtained from any appellate court except during such time as an appeal from the judgment is actually pending before sucb court." ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 61 (1955). The Committee Note stated:

Court reasoned that the district court does not flout the appellate mandate by hearing the motion because the mandate relates only to the record and not to possible later events. Finality is impaired no more here than in any rule 60(b) proceeding. Finally, it found district courts to be just as qualified as appellate courts to distinguish meritorious from frivolous rule 60(b) motions.[134] Thus, rule 60(b) relief[135] from a district court judgment indirectly provides all necessary relief from an appellate decision mandating an outmoded rule of law. In this situation, the various forms of relief available under rule 60(b)[136] render appellate recalls obsolete.

CONCLUSION

Courts have long been plagued by the question of when to grant post-judgment relief. The common law and equity courts developed the term rule which strongly favored finality of judgments. It permitted correction of errors that were either glaring or incidental;[137] the vast middle range of errors were left untouched. Dissatisfied with its workings in particular cases, courts developed various ancillary remedies to avoid the term rule.[138]

> The amendment ... deals with the requirement of leave from an appellate court to reopen a judgment which had been settled on appeal. Some courts have laid down such a requirement, though the carefully detailed procedure of this rule included none .... Such a requirement of leave from the appellate court is a useless and delaying formalism. An appellate court cannot know whether the requirements for reopening a case under the rule are actually met without a full record which must obviously be made in the district court. The amendment expressly negatives any such barren requirement.

Id. at 62. In a separate statement, Professor Moore argued against adoption of the proposal, saying:

> Proposed revision of Rule ... 60(b) is, in my opinion, unsound in principal because the proposed amendment
>
> ....
>
> unnecessarily undermines the finality of judgments by rejecting the rule stated in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, that leave of an appellate court is necessary before the trial court may proceed with a motion for relief from a judgment entered in accordance with the appellate court's mandate.

Id. at 8. Professor Moore's view prevailed and the amendment was never adopted. For an amplification of Professor Moore's view, see 7 MOORE'S FEDERAL PRACTICE § 60.30[2], at 425-29 & n.27 (2d ed. 1975).

[134] 429 U.S. at 18-19.

[135] The court did not limit their holding to the specific clause of rule 60(b) under consideration. They spoke of all of the various types of rule 60(b) motions.

[136] Clause (6) of rule 60(b) opens wide the door for relief because it allows the equivalent of a recall by the district court for "any other reason [not already listed in the rule] justifying relief from the operation of a judgment." FED. R. CIV. P. 60(b).

[137] *See* notes 15-19 and accompanying text *supra*.

[138] *See* notes 20-39 and accompanying text *supra*.

The Federal Rules of Civil Procedure collected this bewildering array of devices and molded them into one eminently workable rule for the district courts.[139] Rule 60 simplified post-judgment proceedings at the district court level, but set appellate courts adrift by offering them no guidance. Following the Supreme Court's lead in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, the courts of appeals ignored the procedural maze of the past and developed a new, flexible doctrine: appellate mandates would not be altered except "for good cause."[140] Under this recall doctrine, appellate courts weigh the interests of finality and correctness in determining whether to grant relief in each individual case.[141]

Although this appellate procedure focuses on the proper considerations, it is time-consuming, confusing and unpredictable. The procedures for obtaining post-judgment relief in appellate courts should be simplified and unified. To this end, district and appellate courts should work together and use the same procedures to grant any appropriate post-judgment relief. Circuit courts are free to establish their own recall procedures and could adopt these suggested reforms as either common law doctrine or local court rule. Alternatively, such an integration of procedures can easily be accomplished by adding three provisions to Federal Rule of Appellate Procedure 41, which deals with issuance and stay of mandates.[142] The Appendix sets forth a proposal for drafting such provisions. The first provision authorizes appellate courts to grant summary corrections of minor errors such as clerical errors and ambiguous language[143] in the same way that rule 60(a) authorizes such relief by district courts. The second provision authorizes appellate courts to take appropriate steps to rectify the most major defects in its mandates—those that touch upon the integrity of the courts' own processes.[144] The third provision covers all other cases. It establishes rule 60(b) as the basic procedure for obtaining relief from any judgment, even a judgment upon which an appellate court has ruled. The first five categories of rule 60(b), though not specifically designed for appellate courts, cover nearly every situation in which a need for a recall

---

[139] *See* notes 40-46 and accompanying text *supra*.
[140] *See* notes 67-75 and accompanying text *supra*.
[141] *See* notes 51-82 and accompanying text *supra*.
[142] *See* FED. R. APP. P. 41, *quoted in* note 6 *supra*.
[143] *See* notes 87-103 and accompanying text *supra*.
[144] *See* notes 104-15 and accompanying text *supra*.

may arise. Rule 60(b)(6) can expand to include the rare cases that do not fit into the first five categories.[145] This procedure can bridge the gap between the district and appellate courts and provide clear guidance to litigants and judges in all motions for post-judgment relief.

David G. Seykora

---

[145] The interplay between district and appellate courts under this proposal can be demonstrated by working an actual case through the procedure. In Pierce v. Cook & Co., 518 F.2d 720 (10th Cir. 1975), *cert. denied*, 423 U.S. 1079 (1976), three lawsuits arising from the same accident were removed from state court to federal court on the basis of diversity of citizenship. One plaintiff succeeded in defeating removal by lack of complete diversity, thus sending his case back to the state court. The federal court, applying the current state law, granted summary judgment for the defendant solely on the basis of stare decisis. The court of appeals affirmed. Three years later, the plaintiff who remained in the state court persuaded the Oklahoma Supreme Court to overrule the prior decision that the federal courts had relied upon. The two federal plaintiffs brought a rule 60(b) motion in the court of appeals. Although recognizing the technical impropriety of an appellate court hearing a rule 60(b) motion, the court decided to consider the motion because "the trial court could well believe that it is without power to determine a legal question contrary to the decision of the court of appeals." *Id.* at 722. The court granted relief under rule 60(b)(6) by recalling its judgment and remanding to the district court for further proceedings.

The proposal would have eliminated the confusion on the part of both the litigants and the courts in *Pierce* over which court should hear the motion. The district court need not have feared that it lacked power to hear the motion because the appellate court had ruled upon the matter. Further, the district court would be empowered to hear the motion even though the motion involved a change in law rather than a changed factual matter of the type covered under the first five categories of rule 60(b).

APPENDIX

PROPOSED AMENDMENTS TO FEDERAL RULE OF APPELLATE PROCEDURE 41

(c) Correction of Minor Errors. Clerical mistakes in opinions, judgments, or mandates, or errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on motion of any party and after such notice, if any, as the court orders. On motion, the court may clarify any ambiguities of the language used in its mandate unless another court has jurisdiction over and is conducting further proceedings in the same action, in which case the latter court may clarify the ambiguous language.

(d) Fraud on an Appellate Court. On motion or of its own initiative, an appellate court shall reexamine any judgment that may have been obtained through a fraud on that court. After resolution of any factual issues by an appropriate factfinder, the court may recall its mandate and grant any and all relief it deems appropriate.

(e) Recall of Mandate. Except as provided in (d), no mandate may be recalled unless (i) the mandate works a substantial injustice upon a party, and (ii) the injustice cannot otherwise be remedied, as, for instance, under Federal Rule of Civil Procedure 60(b) or by relitigation under an exception to res judicata doctrine.[146]

---

[146] Although mandates have also been recalled in criminal cases, this proposal deals only with recalls in civil cases. This Note makes no attempt to discuss whether different policies obtain in criminal cases and expresses no opinion on the efficacy of recalls in such cases. As written, the proposal leaves open the possibility of recalls in criminal cases upon a showing of substantial injustice.