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A Possible Lifeline for Jurisdictionally Untimely Federal Appeals

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What should an appellate lawyer do when he or she has missed the deadline for filing a civil appeal in federal court but with reasonable justification for the error? Most people think that there is only one answer to that question—call the malpractice insurer—because courts have held that the deadline is jurisdictional and thus not subject to any equitable exceptions.

This article proposes that appellate courts and practitioners have overlooked another potential answer: A court lacking jurisdiction to decide the merits of an appeal nevertheless has the equitable discretion to dispose of the appeal by vacating the judgment below with instructions to reenter a fresh judgment and thereby restart the clock for filing a new timely appeal. This appellate remedy of equitable vacatur is a settled practice of the Supreme Court in the narrow context of its direct-appeal jurisdiction. And there is no reason in law or logic why the practice cannot be more broadly employed by the circuit courts of appeals.

The Jurisdictional Bar on Untimely Federal Civil Appeals

The statutory time limits for filing a civil appeal in federal court are "jurisdictional" in the strict sense of the word. *Bowles v. Russell*, 551 U.S. 205, 209–13 (2007). An appellate court is barred from adjudicating the merits of an untimely civil appeal, and that bar is not subject to waiver, forfeiture, or equitable exceptions. *Id.* at 213–15. This is so even where the untimeliness was caused by judicial error: for instance, where the appellant reasonably relied on the time allowed under a district court order that was incorrectly calculated or a circuit court precedent that was later overruled. *See, e.g.*, *id.* at 207–8; *United States ex rel. Haight v. Catholic Healthcare W.*, 602 F.3d 949, 952–53 (9th Cir. 2010).

Although "sympathiz[ing]" with appellants caught in such "inequitable" predicaments, appellate courts have held that they lack the power to prevent the "harsh consequences" of missing a jurisdictional appellate deadline. *See, e.g.*, *Bowles*, 551 U.S. at 214–15; *Haight*, 602 F.3d at 953. They reason that the statute and implementing Federal Rules provide only limited opportunities for extending, reopening, or restarting the time to file an appeal (*see* 28 U.S.C. § 2107(c); Fed. R. App. P. 4(a)(5)–(6); Fed. R. Civ. P. 60(b)), that those provisions often do not cover situations involving judicial or other third-party error, and that all jurisdictionally untimely appeals that are not covered must therefore be dismissed. *See, e.g.*,*Bowles*, 551 U.S. at 208–9; *Perez v. Stephens*, 745 F.3d 174, 177–81 (5th Cir. 2014);*Haight*, 602 F.3d at 954–56.

All of the above is by now relatively well known to appellate courts and practitioners. What is less known is a potentially viable solution to this dilemma: equitable vacatur and reentry of the judgment by the appellate court in order to restart the appellate clock.

The Supreme Court's Established Remedy of Equitable Vacatur

Like all federal courts, the Supreme Court "always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002). When the exercise of that threshold jurisdiction reveals "for any reason [that] the Court may not properly proceed with a case brought to it on appeal," "[i]t is a familiar practice of th[e] Court that … it

may nevertheless, in the exercise of its supervisory appellate power, make such disposition of the case as justice requires." *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 676 (1944); *see also* 28 U.S.C. § 2106. As the Court has explained, such "matters of judicial administration and practice" are "reasonably ancillary to the [federal courts'] primary, dispute-deciding function." *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21–22 (1994) (discussing *Walling* as well as the familiarpractice of equitable vacatur when intervening mootness bars appellate review).

The need for an equitable exercise of the Supreme Court's supervisory appellate power has often arisen in the context of jurisdictionally improper direct appeals. *See Walling*, 321 U.S. at 677. Before 1976, several federal statutes imposed on the Court direct appellate jurisdiction over particular district court decisions, including, most commonly, certain rulings entered by specially convened three-judge district courts. Eugene Gressman et al., *Supreme Court Practice* § 2.7, at 89–90 (9th ed. 2007). But the statutes and precedents were notoriously unclear about the precise circumstances where an appeal should be taken to the Court rather than the usual circuit court of appeals. *See id.* § 2.9, at 99; *Gonzalez v. Automatic Emps. Credit Union*, 419 U.S. 90, 95 (1974). Thus, a recurring problem was that some appellants reasonably but "mistakenly appeal[ed] directly to [the] Court," and such appellants would have forever "lost their opportunity to have the decree below reviewed on its merits" if the Court had simply dismissed their direct appeal as jurisdictionally improper because "the time for appeal to the Circuit Court of Appeals [would have] expired." *Okla. Gas & Elec. Co. v. Okla. Packing Co.*, 292 U.S. 386, 392 (1934).

The Supreme Court avoided that inequitable result of dismissal by instead disposing of the jurisdictionally improper appeal with "an order framed to save appellants their proper remedies." *Phillips v. United States*, 312 U.S. 246, 254 (1941). In particular, despite the lack of jurisdiction to "hear the merits" of the appeal, the Court would "vacate the decree and remand the cause to the court which heard the case so that it may enter a fresh decree from which appellants may, if they wish, perfect a timely appeal to the circuit court of appeals." *Id.*

The Court has employed the practice of equitable vacatur to enable a timely circuit court appeal where its own appellate jurisdiction was ultimately held lacking for a variety of reasons, such as the following:

- A three-judge district court had been improperly convened below, *e.g.*, *id.* at 248–54.
- A three-judge district court was properly convened below, but the particular order at issue was not directly appealable, *e.g.*, *MTM, Inc. v. Baxley*, 420 U.S. 799, 802–4 (1975) (per curiam).
- A district court declined to enter its order as a three-judge court, *e.g.*, *Perez v. Ledesma*, 401 U.S. 82, 86–88 (1971).
- The narrow rationale of the decision of a single-judge district court took it outside the scope of a statutory provision authorizing the direct appeal of certain constitutional decisions, *e.g.*, *United States v. Christian Echoes Nat'l Ministry, Inc.*, 404 U.S. 561, 563–66 (1972) (per curiam).
- Congress had impliedly repealed a statutory provision conferring direct appellate jurisdiction for certain cases, *e.g.*, *United States v. Belt*, 319 U.S. 521, 521–23 (1943).

Indeed, the Court has repeatedly and consistently used this equitable vacatur practice to enable a circuit court appeal that otherwise would be jurisdictionally untimely. My research has uncovered at least 50 cases over the past 80 years in which this remedy was employed. In fact, 40 of the 46 justices who have served during that period have joined an opinion applying the practice, without a single reported objection to its validity. Notably, this includes all nine of the current justices. *Dallas Cnty. v. Tex. Democratic Party*, 132 S. Ct. 74 (2011);*see also Castro Cnty. v. Crespin*, 101 F.3d 121, 124–25 (D.C. Cir. 1996) (discussing two similar opinions issued by the Supreme Court in the 1990s).

To be sure, the Court's entry of an equitable vacatur order is not "statutorily or otherwise compelled" and is not automatically granted as a matter of course. *Norton v. Matthews*, 427 U.S. 524, 531 (1976). Rather, it is a

discretionary exercise of the Court's "supervisory appellate power" to "make such disposition of the case as justice requires." *Walling*, 321 U.S. at 676; *see also* 28 U.S.C. § 2106.

That said, the Court has exercised its discretion quite freely and forgivingly. In general, this is reflected by the fact that the Court has granted such relief in at least 50 cases. More specifically, not only have mistaken appellants received relief because they reasonably relied on prior judicial error, *e.g.*, *Gonzalez*, 419 U.S. at 94–101, but they also have received relief merely because the judiciary had not yet definitively settled the relevant question of appellate jurisdiction, *e.g.*, *Okla. Gas & Elec.*, 292 U.S. at 390–92.

In sum, the Supreme Court's equitable vacatur practice in its direct-appeal jurisprudence demonstrates that a court lacking appellate jurisdiction is not completely powerless to provide an equitable remedy. Although it does lack the power to hear the merits of the initial appeal, it nevertheless has the power to dispose of that appeal with a vacatur order that will enable a second appeal by prospectively curing the appellant's reasonable noncompliance with the jurisdictional time limits.

The Circuit Courts' Available Remedy of Equitable Vacatur

Compared to the Supreme Court, the Courts of Appeals have equal or greater power to order equitable vacatur where a putative appellant files out of time because of a reasonable mistake attributable to judicial or other third-party error. This is so for four reasons.

First, at a minimum, the courts of appeals in such cases have no less authority to grant equitable relief than the Supreme Court has had in its direct-appeal cases. In both contexts, the appellant is reasonably justified in its failure to comply with the jurisdictional time limit for taking an appeal to the circuit court that has proper appellate jurisdiction. And in both contexts, a court that lacks appellate jurisdiction to resolve the case on the merits still retains supervisory appellate power to dispose of the case justly, including by vacating and remanding for entry of a fresh judgment that will restart the time for taking an appeal.

Second, if anything, the courts of appeals have *more* authority than the Supreme Court in this regard. After all, a circuit court at least has statutory appellate jurisdiction over the case in general, *see* 28 U.S.C. § 1291, even if it cannot exercise that jurisdiction in the specific circumstance where the appellant missed the filing deadline. By contrast, in the Supreme Court's equitable vacatur cases, the Court's statutory jurisdiction did not extend to the district court's judgment at all. *See id.* §§ 1253, 1254. In other words, if the Supreme Court's*complete* lack of appellate jurisdiction does not prevent it from providing equitable vacatur relief that facilitates a timely appeal to the proper circuit court, then surely that same circuit court's *limited* lack of appellate jurisdiction does not prevent it from providing the same relief.

Third, untimely appellants who reasonably relied on judicial or other third-party error have a far better equitable claim to vacatur relief than many of the mistaken appellants in the Supreme Court's direct-appeal cases. As noted, the latter often simply made the wrong choice when confronted with an unsettled jurisdictional question, which they therefore could have mooted as a practical matter by also filing a protective appeal in the circuit court. *See, e.g.*, *Okla. Gas & Elec.*, 292 U.S. at 390–92; *Pa. Pub. Util. Comm'n v. Pa. R.R. Co.*, 382 U.S. 281, 282 (1965) (per curiam). The situation of these Supreme Court appellants is thus far less unfair than the plight of appellants to a court of appeals who had no reason when filing to doubt the propriety of their appeals because they had justifiably relied, for example, on the time allowed under a circuit court precedent that was later overruled or a district court order that was incorrectly calculated. *See Bowles*, 551 U.S. at 207–8; *Haight*, 602 F.3d at 952–53.

Fourth, the equitable vacatur practice of prospectively curing jurisdictionally defective appeals is a more established tradition than was the tradition relied on in *Bowles* for treating the civil-appeal deadline as jurisdictional in the first place. In particular, *Bowles* invoked fewer than 10 earlier cases that (arguably) had characterized that deadline as jurisdictional; moreover, those cases were in tension with the reasoning of the Court's more recent cases

circumscribing the category of jurisdictional rules and also were contrary to two additional cases that had recognized equitable exceptions to the deadline and thus had to be overruled. *See Bowles*,551 U.S. at 209–11, 213–14; *see also Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202–3, 1205 (2011). By contrast, as noted, the Court has employed the equitable vacatur practice of prospectively curing jurisdictionally defective appeals for at least 80 years, in 50 cases, by 40 justices (including the entire current Court), without a single reported objection.

All that said, there are almost no circuit court cases applying the equitable vacatur practice. But that is unsurprising. Before *Bowles*, the courts of appeals had little, if any, need to invoke the equitable vacatur practice in the context of untimely direct appeals because they could instead simply decide such cases *on the merits* under equitable exceptions to the civil-appeal deadline that had been authorized by (erroneous) prior precedent. *See Bowles*, 551 U.S. at 213–14 (overruling these cases). And after *Bowles*, the courts of appeals have reflexively concluded that no equitable relief is permitted for a jurisdictionally untimely appeal. *See, e.g.*, *Haight*, 602 F.3d at 953, 956.

Yet, *Bowles* focused only on whether appellate courts can ever equitably retain a jurisdictionally untimely appeal for adjudication on the merits, not on whether they can ever equitably dispose of the jurisdictionally untimely appeal in a manner that would enable a new timely appeal. *See Bowles*, 551 U.S. at 213–15. The Court did not consider the latter question for the simple reason that the parties failed to raise it. *See id.*

Significantly, in the one context in the courts of appeals where the need for the equitable vacatur practice did arise pre-*Bowles*, the remedy was unhesitatingly applied. The context was the converse of the Supreme Court's direct-appeal cases: The appellant had mistakenly taken a jurisdictionally improper appeal to the circuit court, causing the time for taking a direct appeal to the Supreme Court to expire absent vacatur of the district court judgment. Writing for the Second Circuit, the eminent Judge Henry Friendly concluded that there was "no basis for thinking . . . [that] the Supreme Court, with its limited direct appellate jurisdiction over the district courts, can vacate a district court judgment when an appeal was not properly before it, [but] a court of appeals, which regularly reviews judgments of the district courts, cannot." *See United States v. N.Y., New Haven & Hartford R.R. Co.*, 276 F.2d 525, 544–45 (2d Cir. 1960).

Conclusion

Appellate courts and practitioners have largely forgotten about the practice of equitable vacatur since Congress repealed most of the Supreme Court's direct-appellate jurisdiction in the 1970s and 1980s. But the need for that remedy is more timely than ever in light of the Court's decision in *Bowles* and its implementation by the courts of appeals. Thus, should you ever find yourself in the unfortunate position of having missed the civil-appeal deadline, it is definitely worth trying to grab the potential lifeline of equitable vacatur if you have a reasonable justification for your mistake. But you should certainly call your malpractice insurer as well!

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