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## The Renaissance of Permissive Interlocutory Appeals and the Demise of the Collateral Order Doctrine

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**THE RENAISSANCE OF PERMISSIVE INTERLOCUTORY  
APPEALS AND THE DEMISE OF THE COLLATERAL  
ORDER DOCTRINE**

*Michael E. Solimine\**

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I. INTRODUCTION

A long-standing pillar of federal court litigation is the final judgment rule, currently codified in § 1291 of the Judicial Code.<sup>1</sup> It provides for one appeal as of right from rulings of district courts, but states that only “final orders” at the trial level may be appealed.<sup>2</sup> This means that interlocutory,

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1. 28 U.S.C. § 1291 (2018).

2. Like most courts and commentators, I use “final order” and “final judgment” interchangeably. Interpreting § 1291, the Supreme Court has stated that a “final order” is a decision

non-final decisions cannot be immediately appealed. Those decisions can be appealed by the losing party as part of an appeal from a final judgment.

The reasons for the rule are well-settled. Permitting unhappy litigants to immediately appeal any and all interlocutory decisions would cause havoc with the orderly administration of trial litigation and potentially flood appellate courts with cases. Such a regime would show little deference to decisions of trial courts and could lead to wasteful litigation and decisions at the appellate level, since interlocutory decisions may be mooted out in favor of the unhappy party (i.e., that party may win, or lose, the case anyway on other grounds). Similarly settled is the necessity for some exceptions to the final judgment rule. Consider that an interlocutory decision may be mooted by subsequent events (e.g., the denial of a motion for an injunction), cause unnecessary litigation until reversed on appeal (e.g., the erroneous denial of a motion to dismiss for lack of jurisdiction), or improperly prevent a case from being litigated at all (e.g., the erroneous denial of class action certification that is the “death knell” of the litigation).

To ameliorate the harshness of the final judgment rule, Congress and the courts have developed exceptions, a full accounting of which is beyond the scope of this Article.<sup>3</sup> Instead, I will focus on two of the exceptions: permissive interlocutory appeals, codified in § 1292(b) of the Judicial Code;<sup>4</sup> and the collateral order doctrine. As discussed in Part II of this Article, § 1292(b) permits immediate appeals in civil cases under certain criteria, and as I have argued before, for a number of reasons is a relatively well-crafted exception, not least of which in that it requires the permission of both the district court *and* the appellate court.<sup>5</sup> In my view this is no less true today, 30 years later. Moreover, § 1292(b) could and should have been used in at least two recent, high-profile cases to immediately review controversial interlocutory district court decisions.

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which “terminate[s] the] action,” or “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 586 (2020) (quoting *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 409 (2015)).

3. Other exceptions include immediate appeals of the grant or denials of motions for an injunction (28 U.S.C. § 1292(a) (2018)); of orders only affecting one issue out of many, or one party in a multiple party case (FED. R. CIV. P. 54(b)); of class certification decisions (FED. R. CIV. P. 23(f)); and writs of mandamus. For useful summaries and discussion of these and other exceptions, see Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423 (2013); Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 729–48 (1993).

4. 28 U.S.C. § 1292(b) (2018).

5. Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1175–83 (1990) (advocating greater use of interlocutory appeals in some contexts, particularly those involving § 1292(b)).

Part III of the Article addresses the collateral order doctrine. This exception has been controversial almost from its inception, both for its dubious provenance (ostensibly an interpretation of the final judgment statute) and, more importantly, the difficulties in applying the doctrine in a principled and coherent fashion. Those issues have been extensively addressed before,<sup>6</sup> but what is worthy of further attention is the linkage of the doctrine to § 1292(b) appeals. The institutional standing of the doctrine is on uncertain grounds given the very existence of § 1292(b), enacted in 1958, and statutes passed in 1990 and 1992 which permit rulemaking by the courts to create exceptions to the final judgment rule. True, the Supreme Court has ameliorated the problems of the doctrine by (mostly) narrowly construing it, but at the same time the Court has frequently pointed to § 1292(b) appeals as a more appropriate exception. Courts should take that advice seriously by applying § 1292(b), when appropriate, more often and, likewise, continue to narrowly interpret the collateral order doctrine or, better yet, do away with it entirely.

## II. APPLYING (AND REVIVING) PERMISSIVE INTERLOCUTORY APPEALS

This Part of the Article discusses the passage of, and controversies associated with the application of interlocutory appeals under, 28 U.S.C. § 1292(b); the application of this provision in recent, controversial appellate litigation; and how courts should apply § 1292(b) going forward.

### A. *Background and Application of § 1292(b)*

Some version of the final judgment rule has statutorily existed since the beginning of the federal court system.<sup>7</sup> The Supreme Court has frequently extolled the virtues of the rule. In one recent formulation, it said that while a “party is entitled to a single appeal, to be deferred until final judgment has been entered, . . . [p]ermitting piecemeal, prejudgment appeals . . . undermines ‘efficient judicial administration’ and encroaches upon the prerogatives of district court judges, who play a ‘special role’ in managing ongoing litigation.”<sup>8</sup> The “justification for immediate appeal,” the Court continued, “must therefore be sufficiently strong to overcome the usual benefits of deferring appeal until litigation conclude[d].”<sup>9</sup>

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6. See *infra* Part III(B).

7. Martineau, *supra* note 3, at 726–29.

8. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (internal citation omitted).

9. *Id.* at 107.

Consequently, it is not surprising that since the birth of the final judgment rule, Congress and federal courts have established mechanisms for exceptions to the rule. One of those exceptions is the Interlocutory Appeals Act, passed in 1958<sup>10</sup> and codified in § 1292(b) of the Judicial Code.<sup>11</sup> As contemporaneously observed by Charles Alan Wright, the provision “represents a middle view between those who opposed any broadening of interlocutory review and those who favored giving the appellate courts discretion to entertain any interlocutory appeal they wished regardless of certification by the trial judge.”<sup>12</sup>

The middle ground is expressed in several ways, most notably with the requirement of dual certification of an immediate appeal by both the district judge and the court of appeals. And not simply any issue can be certified; both levels of courts must find that several criteria must be satisfied: there must be a “controlling issue of law,” upon which there is a “substantial ground for difference of opinion,” such that an immediate appeal “may materially advance the termination of the litigation.”<sup>13</sup> The drafters intended to open a narrow exception to the final judgment rule, to be used in only “exceptional cases where a decision of the appeal may avoid protracted and expensive litigation . . . where a question which would be dispositive of the litigation is raised and there is serious doubt as to how it should be decided. . . .”<sup>14</sup>

In the six decades since its passage, courts have continued to debate the contours of these criteria. A full description of that debate is unnecessary here. Suffice it to say that lower courts continue to tangle over the precise meaning of the elements of § 1292(b). Thus, it is not clear how “controlling” an issue of law must be, that is, whether a reversal of the district court decision would necessarily lead to a final judgment for

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10. Pub. L. No. 85-919, 72 Stat. 17770 (1958).

11. “When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such an order involves a controlling issue of law as to which there is a substantial grounds for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after entry of the order: *Provided, however*, That an application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.” 28 U.S.C. § 1292(b) (2018) (emphasis in original).

12. Charles Allan Wright, *The Interlocutory Appeals Act of 1958*, 23 F.R.D. 199, 202 (1959) (footnote omitted). For further discussions of the legislative history, see Solimine, *supra* note 5, at 1171–72; Note, *Interlocutory Appeals In the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 610–12 (1975).

13. See 28 U.S.C. § 1292(b) (2018).

14. Wright, *supra* note 12, at 204 (quoting the legislative history).

the appealing party.<sup>15</sup> Some authorities suggest that a reversal can be considered to have met this language, even if it would not inexorably lead to a reversal of a final judgment against the appealing party, “if interlocutory reversal might save time for the district court, and time and expense for the litigants.”<sup>16</sup> Similarly, some courts have been unclear about how to interpret a question of *law* in this context, as presumably opposed to one of *fact*, or an issue typically left to district court discretion.<sup>17</sup>

Nor has it been clear how to determine if there is a “substantial ground for a difference of opinion,” or if an immediate appeal will “materially advance the termination of the litigation.” Many courts, not surprisingly or inappropriately, appear to assume that the statutory criteria should be applied in an interrelated fashion, so that if there is a controlling issue of law, an immediate appeal will likely advance the termination of the litigation.<sup>18</sup>

The most contentious issue regarding the interpretation of § 1292(b) has been the assertion that its use should be restricted to “exceptional” or “big” cases. Such a restriction has some basis in the legislative history, as already noted,<sup>19</sup> as well as the common sense notion that if § 1292(b) is interpreted too broadly, it could generate too many appeals. But the restriction finds no basis in the legislative text, and properly understood the legislative history is simply referring to cases that, all things being equal, are more likely to satisfy the statutory criteria.<sup>20</sup>

Nonetheless, these differing interpretations have persisted, in part, because the Supreme Court has frequently and favorably cited § 1292(b) as an option for litigants seeking interlocutory review, albeit in dicta and with relatively little discussion of the proper interpretation or application

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15. Solimine, *supra* note 5, at 1172.

16. CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3930, at 426 (2d ed. 1996) (footnote omitted).

17. *Id.* at 427–29.

18. *Id.* at 432–38; Solimine, *supra* note 5, at 1173 n.50.

19. See *supra* note 14 and accompanying text.

20. WRIGHT, *supra* note 16, § 3929 at 365–70 (arguing against “exceptional” case requirement on textual grounds and noting that many courts do not follow it); Solimine, *supra* note 5, at 1173, 1193–95 (summarizing the dispute and arguing against a strict “big case” requirement). In referencing the legislative history of § 1292(b) and other laws in this Article, I am aware of contemporary norms of legislative interpretation that give the primary if not exclusive role to the text of the statute. I have previously argued that my views of the proper interpretation of § 1292(b) do not depend on what interpretative role, if any, one gives to legislative history in addition to the text. Solimine, *supra* note 5, at 1193–94 n.152. I stand by this conclusion and extend it to the 1990 and 1992 laws discussed later in this Article.

of the criteria.<sup>21</sup> (I shall have more to say below about the jurisprudential significance of these references for the scope of the collateral order doctrine.) Despite this lack of guidance, by and large the lower courts appear to be interpreting and applying § 1292(b) in a measured and useful way. The late Charles Alan Wright and his co-authors have persuasively argued that while § 1292(b) is designed “for the purpose of minimizing the total burdens of litigation on parties and the judicial system by accelerating or at least simplifying trial court proceedings,” it “might serve the additional purposes of avoiding that hardship does not result from the length of the proceedings alone, or of providing a vehicle for appellate review of issues that characteristically evade review on appeal from a final judgment.”<sup>22</sup> They continue: “[T]he flexible procedures of § 1292(b) would offer many advantages over the often contorted finality doctrines that courts have found useful or even necessary[,]” and that “[l]iberalistic interpretation of the [statutory criteria] should not stand in the way.”<sup>23</sup>

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21. See, e.g., *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 416 (2015); *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 110–11 (2009); *Swint v. Chambers Cty. Comm’n*, 514 U.S. 35, 46–47 (1995); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 883 (1994); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 288 (1988); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529–30 (1988); *Richardson-Merrell Inc. v. Kollar*, 472 U.S. 424, 435 (1985); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 n.13 (1981); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474–75 (1978). See also *Cunningham v. Hamilton Cty.*, 527 U.S. 198, 210 (1999) (referring to interlocutory appeal options found in 28 U.S.C. § 1292(a)–(c)). But see *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996) (asserting that “[r]outine resort to § 1292(b) requests would hardly comport with Congress’ design to reserve interlocutory review for ‘exceptional’ cases while generally retaining for the federal courts a firm final judgment rule.”) (quoting *Coppers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) (quoting *Fisons, Ltd. v. United States*, 458 F.2d 1241, 1248 (7th Cir. 1972), cert. denied, 405 U.S. 1041 (Apr. 3, 1972)).

22. WRIGHT, *supra* note 16, at 439 (footnotes omitted).

23. *Id.* at 441. This pragmatic approach is arguably illustrated by two influential decisions by Judge Richard Posner. In *Ahrenholz v. Bd. of Trustees*, 219 F.3d 674 (7th Cir. 2000), a district judge had denied a defendant’s motion for summary judgment in an employment discrimination case on the ground that the plaintiff had established a prima facie case of retaliation. But without explanation, the district judge certified a § 1292(b) appeal. *Id.* at 676. Judge Posner found that the statutory criteria had not been satisfied. Conceding that those criteria “unfortunately, are not as crystalline as they might be,” the statute, he held, “was not intended to make denials of summary judgment routinely appealable,” in part because “to decide whether summary judgment was properly granted requires hunting through the record” assembled in support of and opposing the motion. *Id.* at 676–77. That would be at variance with the statute’s limit to issues of law. Contrast *Ahrenholz* with *In re Text Messaging Antitrust Litigation*, 630 F.3d 622 (7th Cir. 2010). There the appellate court, again by Posner, held that a denial of a Rule 12(b)(6) motion to dismiss in an antitrust case did satisfy the § 1292(b) criteria. The appeal did not seek the review or overturning of findings of fact, but rather presented a controlling issue of law (even though a reversal was not certain to end the case, *id.* at 624), namely the sufficiency of pleadings in light of the Supreme Court’s then-relatively recent decision of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *Ahrenholz* was distinguished on the

Almost 30 years ago I advanced similar views, arguing that a broader reading of the statute was compatible with the statutory text and legislative history. It would also be appropriate in light of the dual certification requirement (which means two levels of courts have presumably considered but rejected the usual disruptive effects of interlocutory appeals), could lead to more settlements (by making the law clearer in a particular case) and expose the courts of appeals to a richer diet of issues (including those often subsumed in a final judgment), which could systematically inure to the benefit of district and appellate judges, and litigants.<sup>24</sup> Even when the appellate court affirms the decision, that does not show that an immediate appeal was unnecessary, because it will likely clarify a legal issue for that case, and other similar cases.<sup>25</sup> A broader use of § 1292(b) is also supported by a recognition of fewer cases going to trial in the federal system (and fewer appeals from trials), with the concomitant rise in the importance of pretrial rulings, especially (though not only) those potentially dispositive of the case.<sup>26</sup>

Taken as a whole, both district courts and courts of appeals appear to be applying § 1292(b) in a measured fashion, and it has neither fallen into disuse nor carved out a significant exception to the final judgment rule. The Administrative Office (AO) of the U.S. Courts collects some data on the use of § 1292(b), but has not publicly reported that data for several

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basis that the case did not involve “hunting through a record,” and this case did present the then-unsettled issue of how to apply *Twombly*, especially in antitrust cases. *Id.* at 626.

24. See Solimine, *supra* note 5, at 1179–83. As Professor Wright notes, WRIGHT, *supra* note 16, at 439 n.49, a narrower view of the statute, than that favored by Wright or myself, is advanced in Note, *supra* note 12, at 609, which would limit the its application “to vindicate only . . . the avoidance of unnecessary trial proceedings.” *Id.* This focus would exclude the additional goals of “providing an opportunity to review orders of the trial court before they irreparably modify the rights of the litigants,” or to supervise “the development of the law by providing a mechanism for resolving conflicts among trial courts on issues not normally open on final appeal.” *Id.* (footnotes omitted). The Note argues, among other things, that the examples given in the legislature history are more supportive of a narrower application of the statute. *Id.* at 611–12. In a recent decision acknowledging the existence and relevance of § 1292(b), albeit without directly discussing its application, the Supreme Court somewhat incongruously added a “see generally” cite to *both* my article, Solimine, *supra* note 5, and the Note, *supra* note 12. *Gelboim*, 574 U.S. 405, 416. Professor Wright and his treatise co-authors are not cited, though they argue for a flexible approach to interpreting the statute, see WRIGHT, *supra* note 16, § 3939 at 370. It would be inappropriate to glean any strong view about the differing approaches to § 1292(b) from these spare citations.

25. See Solimine, *supra* note 5, at 1198.

26. See Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1240–41 (2007). See also Pauline Kim, et al., *How Should We Study District Judge Decision-Making?*, 29 WASH. U. J.L. & POL’Y 83, 92 (2009) (pointing out that “a substantial portion of the district judge’s work” are various pretrial rulings that “are usually not final decisions and therefore are only rarely reviewed by courts of appeals.”) (footnote omitted); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012) (stating that in recent years only about 1% of cases go to trial in the federal courts).



decades.<sup>27</sup> Three decades ago I accessed data from the AO, and it showed an average of about 280 certifications from the district courts during a five-year period. And of those, about 100 or 36% were accepted on average each year by the courts of appeals.<sup>28</sup>

To determine if the use of § 1292(b) had changed over two decades later, I again accessed data from the AO for the years 2015 to 2019 regarding the number and disposition of § 1292(b) appeals accepted by the circuit courts.<sup>29</sup> The relevant data is collected in the Appendix to this Article. As the Appendix indicates, the data for recent years is remarkably similar to the previous period.<sup>30</sup> For each year, the number of terminations on the merits of cases that come up via § 1292(b) for all of the circuits ranged from 106 to 80, with a yearly average of 93.2. Indeed, the number of such appeals resulting in decisions on the merits in the circuit courts was slightly below the analogous figures some thirty years ago.

Complimentary data has recently been reported by researchers at the Federal Judicial Center.<sup>31</sup> They accessed data from the AO from October 1, 2013, through June 30, 2019, and found that 636 applications under §

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27. WRIGHT, *supra* note 16, § 3929 at 363.

28. Solimine, *supra* note 5, at 1176 (reporting data by circuit from 1985 to 1989). Certification by the courts of appeals was over 50% in the 1960s, *id.* at 1174, and the lower rate years later might be attributable to concerns over higher caseloads.

29. I am grateful to Gary Yakimov, Chief Data Officer, Judiciary Data & Analysis Office, Administrative Office of the United States Courts, and his colleagues for supplying me with this data, since it is not reported in this detail in the AO's Annual Report. See e-mail from Gary Yakimov, Chief Data Officer, Judiciary Data & Analysis Office, Administrative Office of the United States Courts to author (August 26, 2019, 4:35 PM) (on file with author). Mr. Yakimov and his colleagues do not necessarily share any of my analysis of the data. The AO's Annual Report reports data on the termination of *all* interlocutory appeals in the circuits (i.e., under § 1292(b), FED. R. CIV. P. 23(f), and various other proceedings), see ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. 2.7 (2018), but does not further provide the detail on § 1292(b) reported in the Appendix.

30. The data reflects the terminations on the merits of accepted § 1292(b) appeals on a yearly basis, as of June 30 on the five years in question, for all circuits except the Federal Circuit. Unfortunately, the recent data does not include information on how many applications for certification from district courts were filed in the circuit courts during the years in question, and per the dual certification requirement accepted by the appellate court. As of 2010, these applications were treated and counted in as appeals and were not separately accounted for. See e-mail from Tiffanie Snyder, Appellate, BAP and Judges Program Manager, Department of Program Services, Administrative Office of the U.S. Courts, to Michael E. Solimine (Aug. 28, 2019, 3:24 PM) (citing Memorandum on New Statistical Reporting Requirements for Courts of Appeals and Bankruptcy Appellate Panels from Steven R. Schlesinger, Chief Statistics Division, Administrative Office of the United States Courts to Clerks, United States Courts of Appeals and Bankruptcy Appellate Panels (Sept. 20, 2011)) (e-mail and memorandum on file with author).

31. EMERY G. LEE III, JASON A. CATONE & KRISTIN A. GARRI, FEDERAL JUDICIAL CENTER, PERMISSIVE INTERLOCUTORY APPEALS, 2013-2019 (2020).

1292(b) were terminated in the Courts of Appeals during that period.<sup>32</sup> Of those, 101 were terminated on procedural grounds, and of the remainder, 52% were granted.<sup>33</sup> The number of appellate decisions on the merits generated by § 1292(b) is very similar to that reported in the Appendix, while the rate of granting applications is higher than that found thirty years ago.

With regard to certification by district courts, it is sometimes suggested that district judges are especially reluctant to voluntarily certify § 1292(b) appeals given the potentially disruptive effect of such appeals on normal case management.<sup>34</sup> Whether these assumptions are well-grounded is not clear.<sup>35</sup> So to gauge recent judicial behavior, I conducted a study of judicial rulings on motions to certify § 1292(b) appeals in 2018. There were 248 such rulings, and 39 (15.7%) were granted.<sup>36</sup>

These are obviously small numbers given the large civil dockets of both courts. If anything, it suggests both district courts and the court of appeals are reluctant to certify such appeals. This is especially true given that there is no indication that § 1292(b) certification requests are overwhelming either the district or circuit courts, and that the Supreme Court itself has frequently touted the use of § 1292(b) as a Congressionally-sanctioned avenue for interlocutory appeals.

32. *Id.* at 1–2.

33. *Id.* The FJC reports variation among the circuits, with among other things the Second, Fifth, Sixth and Ninth Circuits having relatively higher rates of granting applications, and higher numbers of appeals decided on the merits, as compared to other circuits. *Id.* at 2. This is similar to the data reported in the Appendix.

34. *E.g.*, Daniel Klerman, *Posner and Class Actions*, 86 U. CHI. L. REV. 1097, 1103 (2019); Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 108–09 (1975).

35. As far as I know, there is no official compilation of data on how often § 1292(b) motions are made and of the rate on which they are granted or denied. In my prior study, I conducted a review of officially published decisions by district judges on motions to certify § 1292(b) appeals, and for the three years of 1987 through 1989, found that there were 102 such decisions, with 61 of those being granted. *See Solimine, supra* note 5, at 1197–98.

36. The search on Lexis for the decisions used “1292(b)” as a search term. See e-mail from Alisher Kassym to Michael E. Solimine (Oct. 3, 2019, 1:25 PM) (on file with author). A list of the decisions and their dispositions are on file with the author. The much greater number of decisions from one year, as opposed the smaller number over three years I previously found (see *supra* note 35) is likely due in large part to the prior study being restricted to officially published decisions, while the one from 2018 included both those and officially unpublished decisions only reported on Lexis. That said, data from one year from a database that likely does not capture all such motions should be viewed with some caution. Anecdotally, it seems that some district judges and U.S. Magistrate Judges are lukewarm at best to granting § 1292(b) motions, still insisting that the issues be “exceptional.” *See, e.g.*, *Bailey v. Verso Corp.*, No. 3:17-cv-332, 2019 WL 665354, at \*1 (S.D. Ohio Feb. 15, 2019) (denying motion); *Pinkston v. Univ. of S. Fla. Bd. of Regents*, No. 8:18-cv-2651-T-33SPF, 2019 WL 1877340, at \*2 (M.D. Fla. Apr. 26, 2019) (same, and referring to § “1292(b)’s high burden”).

B. *The Juliana and Trump Litigations*

Despite its value to federal judges and lawyers, it must be admitted that § 1292(b) has a relatively low profile outside the legal community (and maybe inside that community too). There have been two high-profile exceptions to this generalization in the past two years.

One is the *Juliana v. United States* climate change case. That was a case brought in 2015 by a group of children in federal court in Oregon, who argued that actions, or inaction, by the federal government to ameliorate the deleterious effects of climate change in general and the rise of greenhouse gases in particular was violating their constitutional rights. The case raises a host of complex procedural and substantive issues, including standing, the political question doctrine, substantive due process and other constitutional law doctrines, and the propriety of the wide-ranging injunctive sought by the plaintiffs against the federal government.<sup>37</sup>

Both the Obama and Trump administrations defended the case by filing motions to dismiss on the grounds mentioned above. The district judge denied the motions,<sup>38</sup> and further denied a motion to certify a § 1292(b) appeal.<sup>39</sup> Seeking to avoid discovery and a trial on the merits, the government then attempted interlocutory review by writs of mandamus, which were denied by the Ninth Circuit. Undeterred, the government sought mandamus relief in the Supreme Court. In two orders in 2018, the Supreme Court denied the writs without prejudice but remanded for further consideration of the government's defenses. In unusually blunt language, the Court in the first order observed that the "breadth" of plaintiffs' "claims [were] striking," and added that "the justiciability of those claims presents substantial ground for difference of opinion," a seeming reference to the language of § 1292(b), though the statute was not cited.<sup>40</sup> In the second order, denying a stay until a writ of mandamus could be ruled upon, the Court noted that the district court had failed to certify a § 1292(b) appeal, and further quoted its earlier order paraphrasing the language of the statute.<sup>41</sup> The Court denied the stay in

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37. For a useful discussion of all of these issues, see Bradford Mank, *Does the Evolving Concept of Due Process in Obergefell Justify Judicial Regulation of Greenhouse Gases and Climate Change?*: *Juliana v. United States*, 52 U.C. DAVIS L. REV. 855 (2018).

38. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Ore. 2016).

39. *Juliana v. United States*, No. 6:15-cv-01517-TC, 2017 WL 2483705, at \*2 (D. Ore. June 8, 2017). The district judge adopted a report and recommendation of the U.S. Magistrate Judge assigned to the case to deny the certification. *Id.*

40. *United States v. U.S. District Court*, 139 S. Ct. 1, 1 (2018).

41. *In re United States*, 139 S. Ct. 452, 453 (2018).

part because the government had not first requested mandamus relief from the Ninth Circuit, but in doing so the Court seem to be strongly suggesting that the courts below use § 1292(b) as a vehicle to obtain immediate appellate review of the defenses.<sup>42</sup>

If only reluctantly, the lower courts followed that advice. Not long after, the district judge revisited the § 1292(b) motion by reviewing the protracted litigation to date, noting at some length the values of the final judgment rule and what she considered to be the narrow interpretation of that statute.<sup>43</sup> “Trial courts across the country[,]” she added, “address complex cases involving similar jurisdictional, evidentiary, and legal questions as those presented here without resorting to certifying for interlocutory appeal.”<sup>44</sup> While “stand[ing]” by her “prior rulings on jurisdictional and merits issues,” the court acknowledged that she took “particular note of the recent orders” by the Supreme Court, and “upon reconsideration” and without further explanation certified the § 1292(b) appeal.<sup>45</sup>

Shortly thereafter, a panel on the Ninth Circuit accepted the appeal, with the court explanation that the “district court properly concluded that the issues presented in this case satisfied the standard set forth in § 1292(b) and properly exercised its discretion in certifying the case for interlocutory appeal.”<sup>46</sup> One judge on the panel issued a four-page dissent. The dissenting judge stated that despite the holding by the district judge, that decision, when “read as a whole,” indicated that the district judge did *not* think that the § 1292(b) criteria had been satisfied.<sup>47</sup> The dissent added disapprovingly that the district judge seems to have “felt compelled” to certify “even though—as the rest of its order suggests—the court did not believe it to be true.”<sup>48</sup> Given the language of § 1292(b) and the district court’s “superior vantage point,” the dissent concluded that the lower court’s *de facto* failure to certify deprived the appellate court of jurisdiction.<sup>49</sup>

There is much to process in *Juliana* from a § 1292(b) perspective. And then, about seven months later, we were presented with yet another

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42. *See id.*

43. *Juliana v. United States*, No. 6:15-cv-01517-AA, 2018 WL 6303774, at \*1–2 (D. Or. Nov. 21, 2018).

44. *Id.* at \*3.

45. *Id.*

46. Order at 2, *Juliana v. United States*, 949 F.3d 1125 (9th Cir. 2018).

47. *Id.* at 1127 (Friedland, J., dissenting).

48. *Id.*

49. *Id.* at 1128 (Friedland, J., dissenting). The Ninth Circuit ultimately reversed the district court’s decision on the merits. *See Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020).

high profile decision on § 1292(b), the Fourth Circuit’s decision in *In re Donald J. Trump*.<sup>50</sup> That case was a highly publicized suit by the District of Columbia and the State of Maryland in Maryland federal court, against the President, on the basis that his continued business interests resulted in his receiving money and benefits from foreign governments and persons which, it was argued, violated the Foreign and Domestic Emoluments Clauses.<sup>51</sup> Not unlike the *Juliana* case, the district court heard, and denied, a series of motions to dismiss on the basis of, among other things, lack of standing, and for failure to state a claim.<sup>52</sup> The district judge also refused to certify a § 1292(b), on the basis that the statutory criteria had not been met.<sup>53</sup> The President then sought a writ of mandamus in the court of appeals, seeking an order that the district judge to certify the appeal.

The Fourth Circuit granted the writ of mandamus. While acknowledging the discretion granted district judges under § 1292(b), the court held that the district court abused its discretion by not concluding that there was substantial ground for a difference of opinion.<sup>54</sup> The court noted that the district court issued the first decision ever holding that a party could pursue relief for alleged violation of the Emoluments Clauses for alleged competitive injury, and that the holding was contrary to a recent prior decision in the Southern District of New York: in a virtually identical case brought by different plaintiffs.<sup>55</sup> The court also concluded that the other criteria of § 1292(b) had been met.<sup>56</sup> Still, the court went out of its way to emphasize that granting a writ of mandamus in these circumstances “should be rare and occur *only* when a clear abuse of discretion is demonstrated,” and also mentioned, albeit with little elaboration, the “unique circumstances of this case.”<sup>57</sup> The court proceeded to immediately reach the merits of the case, rather than “pointlessly go[ing] through the motions of certifying.”<sup>58</sup>

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50. *In re Trump*, 928 F.3d 360 (4th Cir. 2019).

51. *Id.* at 362.

52. *Id.* at 362–64.

53. District of Columbia v. Trump, 344 F. Supp. 3d 828, 841 (D. Md. 2018).

54. *See In re Trump*, 928 F.3d at 369–70.

55. *Id.* at 370–71.

56. *Id.* at 371–72.

57. *Id.* at 372 (emphasis in original).

58. *Id.* In a very similar case with similar litigation history, brought in the District of Columbia, the D.C. Circuit, relying in part on the Fourth Circuit’s decision in *In re Trump*, denied a writ of mandamus without prejudice, and remanded to the district court “for immediate reconsideration of the motion to certify” under § 1292(b). *In re Trump*, 781 Fed. Appx. 1, 2 (D.C. Cir. 2019) (per curiam). *See also* Blumenthal v. Trump, No. 17-1154 (EGS), 2019 WL 3948478 (D.D.C. Aug. 21, 2019) (certifying § 1292(b) appeal after remand), *appeal accepted*, *In re Trump*, No. 19-8005, 2019 WL 4200443 (D.C. Cir. Sept. 4, 2019), *rev’d*, 949 F.3d 14 (D.C. Cir. 2020) (per curiam).

The panel decision was reversed by the Fourth Circuit sitting en banc.<sup>59</sup> An eight-judge majority held that mandamus relief was inappropriate because the district judge's decision not to certify a § 1292(b) appeal was essentially unreviewable. The majority argued that the text and legislative history of § 1292(b) clearly indicated that both the district and appellate court was vested with discretion whether or not to allow an appeal under that provision.<sup>60</sup> It follows, the court continued, that for mandamus purposes there was no "clear and indisputable" right to have an appeal certified, and to allow it would be "particularly problematic when doing so circumvents the specific process Congress has prescribed for seeking interlocutory review."<sup>61</sup> The majority did not rule out the possibility of issuing a writ of mandamus in an "appropriate case" in this context, but it must be one where the district court "ignored a request for certification, denied such a request based on nothing more than caprice, or made its decision in manifest bad faith."<sup>62</sup> But those circumstances were not present here, the court concluded, because the "district court promptly recognized and ruled on the request for certification in a detailed written opinion that applied the correct legal standards."<sup>63</sup>

Six judges dissented on the § 1292(b) issue. The principal dissent on that point<sup>64</sup> argued, similar to the original panel, that the "district court's orders are paradigmatic orders for certification under § 1292(b), and that the district court clearly abused its discretion and usurped appellate jurisdiction in refusing to certify them."<sup>65</sup> The dissent allowed that while § 1292(b) "indisputably confers broad discretion upon district courts . . . the statute does not provide that a district court's exercise of that discretion is unfettered and unreviewable."<sup>66</sup> "A holistic review of the district court's decisions," the dissent continued, "reveals both a clear abuse of discretion . . . and a judicial usurpation of power in this most unusual case against the President," making mandamus relief appropriate.<sup>67</sup>

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59. *In re Trump*, 958 F.3d 274 (4th Cir.2020) (en banc).

60. *Id.* at 282–83.

61. *Id.* at 283.

62. *Id.* at 285.

63. *Id.*

64. *Id.* at 309 (Niemeyer, J., dissenting). Judge Wilkinson separately dissented on other issue, but noted that he agreed with Judge Niemeyer's dissent regarding § 1292(b). *Id.* at 291 n.1 (Wilkinson, J., dissenting).

65. *Id.* at 315 (Niemeyer, J., dissenting).

66. *Id.*

67. *Id.*

C. *Section 1292(b) Litigation, Circa 2020*

The *Juliana* and *Trump* cases were unusual in many ways, but they can still provide insights on more conventional litigation involving § 1292(b). For one thing, both cases seem classic examples of the appropriate use of the statute, and the district judges can be fairly criticized for not granting motions to certify at least some of the issues in the cases. The standing and substantive due process claims in *Juliana*, and the state standing and Emoluments Clauses claims in *Trump*, stand out as issues that seem to readily satisfy the statutory criteria. That is, all of those claims were not routine ones (either fact-intensive or resolvable by settled law), and their resolution would likely “materially advance” the litigation: potentially ending them in favor of one of the parties. For another thing, both cases easily satisfy any requirement of “exceptional” litigation or a “big case” (however those terms might be defined) given the parties and the high-profile political stakes involved.<sup>68</sup>

In addition to not certifying the cases, the district judge decisions were also characterized by their limited or unsatisfactory explanations. I have earlier observed that an appreciable number of district and circuit decisions certifying, or not certifying, under § 1292(b) do not discuss the statutory requirements in detail, and instead simply recite the language with little elaboration.<sup>69</sup> That was true in *Juliana*. The district judge there issued a decision that could be (and was, by one circuit judge) interpreted as holding that the criteria were not met, yet then proceeded to certify the

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68. On this point, it is worth noting President Trump contributed to § 1292(b) jurisprudence in another case. In *In re Trump*, 874 F.3d 948 (6th Cir. 2017), the court of appeals accepted a certification. The case grew out of a campaign rally by then-presidential candidate Trump, where he responded to protesters by saying, among other things, “Get ‘em out of here.” Allegedly in response, three protesters were assaulted by others at the rally, and they subsequently sued Trump in federal court in Kentucky for “incitement to riot,” which is prohibited by Kentucky statutes. The district court denied a Rule 12(b)(6) motion, but certified a § 1292(b) appeal. Both the district and appellate courts held that there was a “controlling issue of law,” since it involved the interpretation of statutes, and there was a legal question of whether the statutes violated the First Amendment. Also, there was a “substantial ground for difference of opinion,” since (the Sixth Circuit said) “fair-minded jurists might reach” different conclusions on the First Amendment defense, and an “immediate appeal may materially advance the termination of the litigation,” since “litigation would end” if the defense were accepted. The court added that to fall under § 1292(b), a case must be “exceptional,” and however one might define that term, this case satisfied it, since it was “exceptional in many ways. FalseThe practical and political consequences of [this] case are readily apparent.” *Id.* at 951–52. Subsequently, after briefing on the merits, the court reversed the denial of the motion to dismiss, holding that Trump’s speech enjoyed First Amendment protection because it did not specifically advocate imminent lawless action. *Nwanguma v. Trump*, 903 F.3d 604, 613 (6th Cir. 2018).

69. Solimine, *supra* note 5, at 1200.

appeal.<sup>70</sup> Likewise, while the initial Fourth Circuit panel decision in *Trump* had considered it a “paradigmatic case for certification,”<sup>71</sup> in part because there was a substantial ground for a difference of opinion on the standing issue, given the conflicting district court ruling in another circuit.<sup>72</sup> Earlier in its opinion, the court of appeals described the district judge’s decision refusing certification as one that “reiterated [the] reasoning of its earlier rulings [on the merits].”<sup>73</sup>

In my view, the initial panel decision correctly characterized the district judge’s decision. To its credit, the district court issued a full opinion on the § 1292(b) certification motion, but as I read it, much of the decision consists of summaries of the respective positions of the parties on certification.<sup>74</sup> Beyond that, the district judge felt that the President was mostly expressing disagreement with the prior rulings denying his motions to dismiss, and likewise distinguished (and disagreed with) the district court decision from the Second Circuit.<sup>75</sup> I’m not faulting the district judge for disagreeing with the other court, or for being confident in his earlier rulings, but that confidence does not prevent the satisfaction of the § 1292(b) criteria.

Both *Juliana* and *Trump* also present the issue of whether an appellate court should use the writ of mandamus to review a district judge’s decision not to certify a § 1292(b) appeal. The issuance of such a

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70. See *supra* notes 43–49 and accompanying text. The district court was not a model of clarity in deciding a motion to certify in its two encounters with the issue. In its first decision on a motion to certify, the district judge referred the recertification issue to a U.S. Magistrate Judge, who then issued a Report and Recommendation. Cf. WRIGHT, *supra* note 16, § 3929 at 373 (stating that the “certification power cannot be delegated to a magistrate judge in a case tried by a district judge,” but citing a case where the Magistrate Judge had decided the issue without issuing a report and without further review by the district judge). *Id.* at 373 n.29 (citing *Vitols v. Citizens Banking Co.*, 984 F.2d 168 (6th Cir. 1993) (per curiam)). However, the Magistrate Judge’s decision, *Juliana v. United States*, No. 6:15-cv-1517-TC, 2017 WL 9249531 (D. Ore. May 1, 2017) (Coffin, M.J.), for the most part simply reiterates the merits discussion in a previous report which recommended that motions to dismiss be denied. The court cited the statutory language, but on my reading, did not explicitly discuss why the criteria had not been met, with the exception of the “question of law” requirement. On that front, the court observed that “numerous factual questions” on climate change would need to be addressed at trial. *Id.* at \*8. That’s true, but there were several antecedent defenses raised (e.g., standing; the political question and public trust doctrines) that presented relatively pure questions of law. With virtually no discussion, the district court accepted the Magistrate Judge’s decision. See *supra* note 39 and accompanying text.

71. *In re Trump*, 928 F.3d at 371.

72. *Id.* at 371–72.

73. *Id.* at 368.

74. *District of Columbia v. Trump*, 344 F. Supp. 3d 828, 833–36 (D. Md. 2018).

75. *Id.* at 834, 836–39. The decision from the S.D.N.Y. was subsequently reversed (by a noninterlocutory appeal) in a 2-1 decision. See *CREW v. Trump*, 939 F.3d 131 (2d Cir. 2019). That decision does not undermine the point made in the text, since there was conflicting authority at the time the district judge in the Fourth Circuit declined to certify the appeal.



writ would permit the circuit court to certify an appeal and proceed to hear it on the merits. The straightforward argument against that option is that it flouts the dual certification requirement of the statute. That requirement was put in place to limit the number of interlocutory appeals. If the court of appeals is permitted to review and potentially reverse a failure of a district judge to certify, that results in unilateral certification. Once the district judge refuses to certify, the § 1292(b) option comes to an end.<sup>76</sup> Most decisions recognize this point,<sup>77</sup> while adding that a litigant is not totally without recourse, since it can instead seek a mandamus review “directed to the underlying order.”<sup>78</sup>

Yet there is a circuit split on this issue.<sup>79</sup> The contrary argument against unreviewable district court discretion points out that § 1292(b) states that a district judge “shall” certify if the criteria are met, and argues that the statutory text and the legislative history does not *explicitly* forbid review (by mandamus, at least) by the appellate court.<sup>80</sup> Also supporting review, it is argued is that even those courts in the no-review camp sometimes strongly suggest that the district court *should* after remand certify the appeal, given the appeals court conclusion that the criteria had been satisfied.<sup>81</sup> This seems tantamount to review of the certification order by the appellate court, despite earlier disclaimers that no such review is possible. If the no-review position is so correct, it might be argued, then appellate courts should not gratuitously (or perhaps not so gratuitously after all) advise the district judge to certify an appeal.

Aspects of this debate were played out in the *Juliana* and *Trump* litigation. Recall that in *Juliana*, the district judge once refused to certify, but later did so after the Supreme Court, not once but twice, strongly

76. WRIGHT, *supra* note 16, § 3929 at 371–73.

77. *E.g.*, *In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2002); *In re Powerhouse Licensing, LLC*, 441 F.3d 467, 471 n.1 (6th Cir. 2006); *Arthur Young & Co. v. U.S. Dist. Court*, 549 F.2d 686, 698 (9th Cir. 1977); *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 755 n.1 (3d Cir. 1973).

78. *Ford Motor*, 344 F.3d at 654.

79. As it is described in *In re Trump*, 781 Fed. Appx. 1, 2 (D.C. Cir. 2019) (per curiam).

80. Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 779–85 (2006); Mackenzie M. Horton, Comment, *Mandamus, Stop in the Name of Discretion: The Judicial “Myth” of the District Court’s Absolute and Unreviewable Discretion in Section 1292(B) Certification*, 64 BAYLOR L. REV. 976, 985–86, 991–96 (2012).

81. Horton, *supra* note 80, at 989–91 (discussing, inter alia, *Fernandez-Roque v. Smith*, 671 F.2d 426, 431–32 (11th Cir. 1982)); *DeMasi v. Weiss*, 669 F.2d 114, 123 (3d Cir. 1982); *In re McClelland Eng’rs, Inc.*, 742 F.2d 837, 837–38 (5th Cir. 1984)). See also *In re Gee*, 941 F.3d 153, 172–73 (5th Cir. 2019) (per curiam) (not directly addressing whether mandamus can be used to review district court’s denial of § 1292(b) motion, but denying mandamus petition without prejudice, and strongly suggesting that district judge on remand certify a § 1292(b) appeal on whether plaintiffs have standing).

encouraged the judge to so certify. And so the district judge did, as did the Ninth Circuit.<sup>82</sup> The initial panel decision of the Fourth Circuit in *Trump* argued at length that the district judge's refusal to certify was "a clear abuse of discretion."<sup>83</sup> It then held that "there is no mechanism for prompt appellate review . . . and because the district court erred so clearly . . . we conclude that granting the President's petition for mandamus is appropriate."<sup>84</sup> It supported this holding by referencing a few cases from other circuits that had held that mandamus review was appropriate,<sup>85</sup> though it also stated that such review should be "rare" and only when there was a "clear abuse of discretion."<sup>86</sup>

The arguments advanced in favor of some type of review of district judge denials of certification, at least in some cases, are not without force. For a variety of reasons, at least some of the legal issues in both *Juliana* and *Trump* seem appropriate for § 1292(b) certification, and one is tempted to agree that at least in such cases, rare in number, mandamus review of the district court's decision not to certify should be allowed. I nevertheless agree with Professor Wright and his co-authors that "the temptation should be resisted."<sup>87</sup> Even if the statute, literally read, does not forbid this result, the structure of § 1292(b) as a whole vests power in the district judge to certify, and the court of appeals only acts after such certification is lodged with it. It undermines this process to permit mandamus to review the district judge, even if for some undefined rare or exceptional cases. Perhaps some review mechanism *should* be put in place, but that is not how the statute is currently written.<sup>88</sup> As the courts in the no-review camp have suggested, the better solution is to permit mandamus on the underlying district court decision directly, rather than "subvert the structure" of § 1292(b).<sup>89</sup> Granted, this is no panacea. *Any*

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82. See *supra* notes 38–49 and accompanying text. It is also worth noting that in the Emoluments Clause litigation in the D.C. Circuit, see *supra* note 79, the district court, after declining to certify a § 1292(b) appeal, was admonished by the appellate court, and subsequently did certify the appeal, *Blumenthal v. Trump*, No. 17-1154 (EGS), 2019 WL 3948478 (D.D.C. Aug. 8, 2019), which was promptly accepted by the D.C. Circuit, *In re Trump*, No. 19-8005, 2019 WL 4200443 (D.C. Cir. Sept. 4, 2019).

83. *In re Trump*, 928 F.3d 360, 371 (4th Cir. 2019).

84. *Id.* at 371–72.

85. See *supra* note 77 and accompanying text (noting the cases cited did not mention the circuit split on the issue, or the cases that held that mandamus review was inappropriate).

86. *Trump*, 928 F.3d at 372.

87. WRIGHT, *supra* note 16, at 374 (footnote omitted).

88. *Id.* at 374–75, 511. The Supreme Court's rule-making authority under the 1990 and 1992 statutes might be another way to authorize review of no-certification decisions. See *infra* Part III(B).

89. *Id.* at 511. Thus, I agree with the holding and analysis on this issue by the en banc majority in *In re Trump*. To the extent district courts are reluctant to certify § 1292(b) appeals in the first instance, see *supra* note 34, a robust embrace of mandamus review would inevitably lead to more

review by mandamus is meant to be narrow,<sup>90</sup> and in contrast, review of a decision with dual certification under § 1292(b) is plenary.<sup>91</sup> Still, mandamus review would be available to deal with the truly exceptional and unusual case, despite a questionable lack of certification by a district judge. On that score, a good case for review by mandamus can be made for at least some of the issues raised in *Juliana* and *Trump*, as compared to the more conventional litigation that characterizes the vast majority of cases in federal court.

While *Juliana* and *Trump* are, to be sure, unusual cases, they can illustrate the appropriate use of § 1292(b) in ordinary civil litigation as well. Not every motion to certify an interlocutory decision by an unhappy litigant is going to satisfy the criteria of § 1292(b). But in my view, both district and court of appeals judges should not approach such motions with an effective presumption against (or in favor of) granting such motions. Instead, such certification requests should be viewed as another aspect of pretrial management, to be used when, after dispassionate consideration, the courts deem the statutory criteria to be satisfied.

My embrace of § 1292(b) will not go down well with its critics, who argue that the statute's myriad requirements—dual certification; the sometimes hard-to-apply criteria; the sometimes-applied “exceptional, big-case” factor—all make it an awkward and relatively little-used option for interlocutory appeal.<sup>92</sup> Instead, they argue that developing precise criteria to *ex ante* designate certain types of orders as worthy of immediate review is an impossible task, and typically argue that the court of appeals should instead be vested with discretion to decide whether to hear an interlocutory appeal on a case-by-case basis, balancing the pros and cons of allowing an interlocutory appeal for that particular case.<sup>93</sup> I am not oblivious to this critique but do not find it convincing. The proposed alternatives are not without their own weaknesses, such as potentially

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such certifications being sought in the trial courts, and more efforts to seek appellate review of denials of such motions. These are not necessarily bad things, but they could be the unintended consequence of ignoring the present statutory scheme. Also, although I am no fan of the collateral order doctrine, in part because it has been undermined by the use of § 1292(b), see *infra* Part III, *infra*, nonetheless perhaps that doctrine might be another basis to secure appellate review of district court decisions in some instances.

90. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004). For further discussion of the sometimes unclear elements appellate courts apply in deciding whether to grant or deny mandamus, see Steinman, *supra* note 26, at 1257–70.

91. WRIGHT, *supra* note 16, § 3929.1 at 414.

92. *E.g.*, Martineau, *supra* note 3, at 767–70; Redish, *supra* note 34, at 108–09.

93. Martineau, *supra* note 3, at 786–87; Redish, *supra* note 34, at 92–96. *See also* John C. Nagle, Note, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L.J. 200, 214–22 (2004) (agreeing with Martineau proposal).

creating a new stream of satellite litigation in the appellate courts. This potential would surely follow after the institution of a policy to entertain and decide all, or nearly all, motions to certify interlocutory appeals on a case-by-case basis. More importantly, § 1292(b), for all of its complications, in my view, tolerably accommodates the pros and cons of permitting some interlocutory appeals, and in practice has been used more often than realized to send a wide variety of district court orders for immediate appellate review.<sup>94</sup>

### III. THE TWILIGHT OF THE COLLATERAL ORDER DOCTRINE

The collateral order doctrine is another exception to the final judgment rule. As typically articulated by courts, it has no direct connection to permissive interlocutory appeals under § 1292(b). But there are indirect connections, and as I will argue, the continued viability and use of the latter should have negative jurisprudential consequences for the former. In this section, I outline the collateral order doctrine, the considerable criticisms it has long endured, and suggest how the existence of § 1292(b), and the Supreme Court's rule-making authority on interlocutory appeals established by statutes in 1990 and 1992, should limit the further development of the doctrine, and perhaps even herald its demise.

#### A. *The Collateral Order Doctrine and Its Discontents*

The genesis of the collateral order doctrine is the Supreme Court's decision in 1949 in *Cohen v. Beneficial Industrial Loan Corp.*<sup>95</sup> In an opinion by Justice Robert Jackson, the Court construed the final judgment rule to permit an immediate appeal of a trial court decision in a diversity,

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94. WRIGHT, *supra* note 16, § 3931 (giving numerous examples of orders certified under § 1292(b)); Solimine, *supra* note 5, at 1204–05 (same through 1990, including numerous cases that have reached the Supreme Court). For a sampling of more recent Supreme Court cases decided on the merits, that reached the Court via § 1292(b), see *Mach Mining, LLC v. EEOC*, 575 U.S. 480 (2015); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Breur v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003); *Bartnicki v. Vooper*, 532 U.S. 514 (2001); *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000). One might argue that greater use of § 1292(b) appeals, as suggested in Part II of this Article, will lead to a torrent of motions for such appeals at the district court level. There is always such a possibility, but it can be policed by careful application of the statutory criteria, as well as district judge's ability to sanction frivolous motions. See FED. R. CIV. P. 11. See also Bryan Lammon, *Three Ideas for Discretionary Appeals*, 53 AKRON L. REV. 639 (2020) (proposing amendments to § 1292(b)).

95. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

shareholder derivative action, following a state law requiring the plaintiff to post security for payment of expenses if plaintiff were to lose the suit.<sup>96</sup> The Court acknowledged that the district court's interlocutory decision would not ordinarily be appealable under the final judgment rule,<sup>97</sup> but held that it was in this instance. The Court reasoned that the order was not related to the merits, and it would be "too late [to] effectively review" the decision on appeal from a final judgment.<sup>98</sup> An order, then, could be immediately appealable if it was "separable from, and collateral to, rights asserted in the action," was "too important to be denied review," and was "too independent of the cause itself" to require the case to proceed to a final judgment.<sup>99</sup> The Court added its analysis was supported by the fact that it had "long given [§ 1291(a)] practical rather than a technical construction."<sup>100</sup>

A review of the many collateral order decisions from the Supreme Court, addressing other types of district court orders, is unnecessary here.<sup>101</sup> Suffice it to say that the Court at first seemed to expansively apply the doctrine for almost three decades, then started to hold fewer examples of the *Cohen* criteria being met. A significant turning point, as some see it,<sup>102</sup> was in 1978 when the Court unanimously held in *Coopers & Lybrand v. Livesay*<sup>103</sup> that denials of motions by plaintiffs to certify a class action were interlocutory decisions that did not qualify as a collateral order. As the doctrine comes down to us today, the Court has recently stated that it covers "[t]hat small category includ[ing] only decisions that are conclusive, that involve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action."<sup>104</sup>

As Bryan Lammon has recently observed, "[r]arely is the collateral-order doctrine mentioned without accompanying criticism."<sup>105</sup> This criticism might at first blush seem surprising. The invocation of pragmatism of *Cohen* is a mark of 20th century jurisprudence, and as

96. *Id.* at 545–46.

97. *Id.*

98. *Id.* at 546.

99. *Id.*

100. *Id.*

101. For an overview of those decisions, see Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1838–42 (2018); Steinman, *supra* note 26, at 1248–51.

102. Martineau, *supra* note 3, at 740–41.

103. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

104. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 42 (1995)).

105. Lammon, *supra* note 101, at 1842 (footnote omitted).

Stephen Yeazell has suggested: “the need for [interlocutory appeals] must have seemed more pressing with the adoption of procedural rules [i.e., the Federal Rules of Civil Procedure in 1938] that lengthened the pretrial process and made it less likely that cases would ever come to trial.”<sup>106</sup> And it is not hard to suggest that the doctrine might never had been announced in 1949 had § 1292(b) existed at the time. Consequently, *Cohen* might be viewed as a necessary precursor till § 1292(b) was enacted.

But praise for *Cohen*, despite these factors and its distinguished author, was not meant to be. Among the subsequent criticisms is the basis for the doctrine: it is difficult to glean the multi-part test from the spare language, or the legislative purpose, of § 1291, so much so that it is *de rigueur* for commentators to instead label it as judicially created.<sup>107</sup> To be sure, the *Cohen* decision claimed it was merely engaging in a “practical” rather than a “technical” interpretation of that statute which, it claimed, it had “long” done.<sup>108</sup> The claim is unconvincing,<sup>109</sup> but in a later case the Court went out of its way to emphasize that *Cohen* was engaging in statutory interpretation, not creating an exception to the statute.<sup>110</sup>

More important than its provenance is the substantive critique that the Court (and lower courts) have been unable to apply the doctrine’s criteria in a consistent and principled fashion. In short, the Court has not been clear or consistent about how to determine if an order is an “important” one “separate from the merits,” or when an order is “effectively unreviewable on appeal from a final judgment.”<sup>111</sup>

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106. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 662 (1994).

107. *E.g.*, Martineau, *supra* note 3, at 739 (“created by judicial decision”); Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353, 360 (2010) (“judicially-crafted exception”); Redish, *supra* note 34, at 111 (“judicially created”); Steinman, *supra* note 26, at 1247 (“judicial invention”).

108. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

109. WRIGHT, *supra* note 16, § 3911 at 332 (2d ed. 1992) (the “three cases relied upon to establish the ‘practical’ construction of the finality requirement provide only remote support for this result.”) (footnote omitted); Steinman, *supra* note 26, at 1249 & n.90 (pointing out that no case prior to *Cohen* had recognized an exception from the final judgment rule not grounded in a statute, and that none of the three cases the Court cited for its “long . . . practical” construction of § 1291 squarely supports such a construction).

110. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994).

111. For useful overviews of the cases and the difficulties the Court has shown in applying the criteria in a coherent and consistent fashion, see RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* 1098–1106 (7th ed. 2018); Lloyd C. Anderson, *The Collateral Order Doctrine: A New “Serbian Bog” and Four Proposals for Reform*, 46 DRAKE L. REV. 539, 551–85 (1998); Lammon, *supra* note 101, at 1838–42; Petty, *supra* note 107, at 377–86; Steinman, *supra* note 26, at 1250–57. It is no small irony that commentators have persuasively argued that in light of how the *Cohen* criteria have been applied in later cases, it’s doubtful that *Cohen* was rightly decided. *See*

Apparently not oblivious to these criticisms, the Court has emphasized the “importance” of the issue from which immediate appeal is sought, a word found in all formulations of the doctrine going back to *Cohen*. The Court has suggested that the source of the right will inform its importance, so that a right “originating in the Constitution or statutes” should be regarded as more important than a “privately conferred right” created by a contract.<sup>112</sup> But even that formulation still leaves open considerable uncertainties, such that it seems a “process of ad hoc balancing that focuses on the Court’s perception of the importance of the interest in avoiding trial.”<sup>113</sup>

As examples of these criticisms, consider two well-known Court decisions, one holding the *Cohen* criteria to be met, the other not. In the aforementioned *Coppers & Lybrand* decision, the Court held that the criteria were not satisfied. In the space of one paragraph, the Court reasoned that a denial of class certification was not conclusive, since it could be revised by the district court; was not separate from the merits, since it “involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action;” and was not effectively unreviewable after a final judgment, since the named plaintiff or intervening class members could then appeal the order.<sup>114</sup> In the immediately following part of its opinion, the Court also rejected an analytically separate argument that an interlocutory appeal should be allowed if the denial of class certification would be the “death knell” of plaintiff’s case, since given the small amount of individual damages involved, the case could only be economically brought as a class action.<sup>115</sup>

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Martineau, *supra* note 3, at 742 (arguing that the harm of applying the state statute was only “financial, not legal” since the trial court order “would not prevent continuance of the suit, but at worst would only require the posting of security.”); Redish, *supra* note 34, at 112–13 (arguing that the *Cohen* decision “did not explain why refusing to allow immediate appeal in that case would result in irreparable loss.”).

112. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994).

113. *MARCUS*, *supra* note 111, at 1103. *See also* *WRIGHT*, *supra* note 16, § 3911.5 at 430 (the importance requirement as had a “checkered career”). Yet another complication of the collateral order doctrine is that in practice, lawyers will frequently brief both whether the doctrine applies to permit an interlocutory appeal (if the cases are unclear with respect to that particular order), and the merits of the case. If the court decides that the doctrine is not satisfied, then the briefing on the merits has been wasted. *Steinman*, *supra* note 26, at 1271–72. In contrast, this can be avoided in § 1292(b) appeals, if the parties first brief, and a motions panel on the court of appeals first decides, whether to accept the appeal. That said, it is apparently not unusual for both the § 1292(b) issue and the merits to be briefed, and sometimes the same panel will decide both. *See, e.g., In re Text Messaging Antitrust Litigation*, 630 F.3d 622, 627 (7th Cir. 2010).

114. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

115. *Id.* at 477. *See also* *WRIGHT*, *supra* note 16, § 3912 at 439–59 (discussing whether and to what extent the death knell doctrine fits with the collateral order doctrine).

On that point, the Court expressed concerns with the uncertainty of defining a “death knell”; with courts of appeals becoming bogged down in heavily factual, time-consuming disputes in applying that term in individual appeals; and with reconciling the proposed death-knell exception with the purposes of the final judgment rule, and the existence of § 1292(b) as an already-existing safety valve to potentially hear such appeals.<sup>116</sup>

On just the collateral order doctrine, the Court’s analysis, comprised of “three terse sentences,”<sup>117</sup> is not a model of robust analysis. The Court’s reasoning was formalistically correct but arguably paid short shrift to the practicalities of class action litigation. Yes, an order denying class certification could be revisited by the district court, but that’s true of virtually any interlocutory decision. Yes, to various degrees the determination of whether the criteria of Rule 23 has been satisfied overlaps with the evidence to be presented on the merits of the case, but the degree can vary if it occurs at all.<sup>118</sup> Finally, yes, a plaintiff can appeal, after final judgment, an order denying class certification, but that seems oblivious to the point that the plaintiff won’t pursue the suit at all if the denial is truly the “death-knell” of the case.<sup>119</sup>

In another important decision, the Supreme Court held in 1985 in *Mitchell v. Forsyth*<sup>120</sup> that in civil rights actions, denials of motions to dismiss or for summary judgment based on the qualified immunity defense satisfied the *Cohen* criteria and were immediately appealable. Properly understood, the Court held the qualified immunity defense was “an entitlement not to stand trial or face the other burdens of litigation,”

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116. *Id.* at 471–76.

117. Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1555 (2000). *See also* WRIGHT, *supra* note 16, § 3912 at 459 (the collateral order doctrine was “easily put aside.”).

118. Subsequently, the Supreme Court held in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), involving whether the Rule 23(a)(2) & (b) had been satisfied, that the inquiry “entail[ed] some overlap with the merits of plaintiff’s underlying claims.” *Id.* at 351 (citing, *inter alia*, *Coopers & Lybrand*, 437 U.S. at 469).

119. I am not necessarily arguing that the case was wrongly decided, only that it presented a more difficult issue under the *Cohen* criteria than the Court let on in one paragraph. As the Court itself observed, there was a circuit split on the issue. *Coopers & Lybrand*, 437 U.S. at 465, n.2. That said, the Court spent considerable time analyzing the “death knell” doctrine, and the possible use of § 1292(b) as an alternative to the collateral order doctrine. On the latter point, the Court seemed particularly influenced by a then-recent opinion by noted Judge Henry Friendly, extolling the benefits of § 1292(b) as an alternative to the doctrine to review class action certification decisions. *Id.* at 475 n.27 (citing and quoting *Parkinson v. April Indus., Inc.*, 520 F.2d 650, 660 (2d Cir. 1975) (Friendly, J., concurring)).

120. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).



and thus, was an “immunity from suit rather than a mere defense to liability.”<sup>121</sup> Thus, a denial of the defense made it “effectively unreviewable on appeal from a final judgment.”<sup>122</sup> Moreover, the Court explained that the immunity was an issue of law—an inquiry as to whether the “legal norms” the defendants allegedly violated were “clearly established” at the time, and thus, was “conceptually distinct from the merits of the plaintiff’s claim that his rights had been violated.”<sup>123</sup>

Unlike the unanimous decision in *Coopers & Lybrand*, *Mitchell* was a 4-3 decision on the issue of appealability. In his partial dissent, Justice William Brennan argued that the qualified immunity defense “is not identical to the ultimate question on the merits, but the two are quite closely related.”<sup>124</sup> He also argued that the defense was not conceptually different from other immunities, or other defenses like lack of jurisdiction or the statute of limitations, all of which are effectively lost if a trial court denial is not immediately reviewed.<sup>125</sup>

I have recently argued that the dissent in *Mitchell* got the better of the argument.<sup>126</sup> On the separate from the merits prong, I suggested that the qualified immunity defense, with its inquiry into clearly established law at the time of the events giving rise to suit, “overlaps in most cases with the facts and merits of the case.”<sup>127</sup> On the effectively unreviewable prong, I argued that the defense is much like lack of jurisdiction and many other “procedural” defenses that are completely lost if a motion to dismiss raising those issues is denied.<sup>128</sup> I also observed that *Mitchell* (or *Coopers & Lybrand*, for that matter) had little explicit discussion of the “importance” of the defense raised. Recall that was a factor briefly mentioned in *Cohen*, and then resurrected in some decisions after *Coopers & Lybrand* and *Mitchell* were decided.<sup>129</sup> On that front, the dispute in the former case was between private parties, governed by a Federal Rule of Civil Procedure applicable to all litigation. It is difficult to label that as “important” in the sense of being drawn on the Constitution or federal statutes. On the other hand, for the latter case, the qualified immunity defense is a frequently litigated issue in civil rights actions

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121. *Id.* at 526 (emphasis in original).

122. *Id.* at 526–27.

123. *Id.* at 527–28.

124. *Id.* at 545 (Brennan, J., concurring in part and dissenting in part).

125. *Id.* at 551–53.

126. Michael E. Solimine, *Are Interlocutory Qualified Immunity Appeals Lawful?*, 94 NOTRE DAME L. REV. ONLINE 169 (2019).

127. *Id.* at 176.

128. *Id.* at 177.

129. *See supra* notes 99, 112 and accompanying text.

involving public officials, and is drawn (at least in part) from federal statutes like 42 U.S.C. § 1983, so a better case can be made there for meeting the “importance” criterion.<sup>130</sup>

*B. Section 1292(b), Rulemaking, and the Collateral Order Doctrine*

Putting aside its ragged application, there are at least two reasons to suggest that the collateral order doctrine rests on shakable jurisprudential foundations, so much so that the doctrine might be narrowed even more than it is, or perhaps even abandoned entirely. One reason is the passage of § 1292(b) nine years after the *Cohen* decision. As I’ve pointed out,<sup>131</sup> the Court has frequently cited § 1292(b) in the course of decisions holding that a particular trial court order does not fall under the collateral order doctrine. The Court does this to emphasize that there is a safety valve available for litigants to possibly ameliorate, on a case-by-case basis, the sometimes-harsh effects of the final judgment rule. Permissive interlocutory appeals in this regard are particularly attractive, the Court has emphasized, since application of the collateral order doctrine requires the “blunt, categorical instrument” that an entire class of orders be subject to immediate appeal.<sup>132</sup> In short, the Court seems to cite this safety valve as an additional justification to apply the doctrine in a (mostly) narrow fashion. Interestingly, the Court has sometimes *not* cited § 1292(b) on the few occasions it has held that the doctrine *does* apply to an order.<sup>133</sup> The upshot is that the mere possibility of the use of the § 1292(b) option suggests a significant brake on, or perhaps even the total demise, of the collateral order doctrine.<sup>134</sup>

In other words, perhaps § 1292(b) can be regarded as preemptive of any interpretations of (much less “judge-made” exceptions to) § 1291,

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130. Solimine, *supra* note 126, at 177–78. The exact provenance and scope of the qualified immunity defense is currently a hotly contested one in the case law and the academic literature. *Id.* at 170.

131. See *supra* note 21 and accompanying text.

132. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 110–12 (2009).

133. *E.g.*, *P. R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) (denial of sovereign immunity defense under the Eleventh Amendment satisfied the collateral order doctrine). The majority opinion in *Mitchell* makes no mention of § 1292(b), even though a certification was denied in the district court, and its relevance was briefed in the Supreme Court. Solimine, *supra* note 126, at 181 n.94. The dissent did mention the possibility of its use in qualified immunity cases. *Mitchell v. Forsyth*, 472 U.S. 511, 554 (1985) (Brennan, J., concurring in part and dissenting in part).

134. The Court suggested as much, albeit without extended discussion, in a case finding the doctrine not applicable to immediately review an order denying a stay of proceedings due to parallel litigation in another court: *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 288 n.21 (1988) (citing with approval a case that made that argument, *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 738 (7th Cir. 1986) (Posner, J.)).

prior to 1958, that resulted in exceptions to the final judgment rule. One problem with this argument is that the text of § 1292(b) has no language of preemption. Nor does the legislative history, which, perhaps surprisingly, appears to make no reference to the collateral order doctrine. Only a year after the passage of § 1292(b), no less an authority than Professor Wright concluded that the new statute was only an addition to, and did not replace, the collateral order doctrine.<sup>135</sup> He reasoned, even at this early stage, that the doctrine is best regarded as statutorily based, in that it recognizes an order “sufficiently separable from the main action to be regarded as final decisions and appealable as of right under” § 1291.<sup>136</sup> Thus, § 1292(b) simply adds another exception. Professor Wright’s conclusions are sound, even given that the doctrine appeared to enjoy a relatively robust life in the courts of appeals in the decade after *Cohen*.<sup>137</sup>

The other, stronger reason to question the continued viability of the collateral order doctrine is Congressional action in the early 1990s. Those actions followed upon the convening of, and the resultant report of, the Federal Courts Study Committee.<sup>138</sup> Concerned with a variety of issues including court congestion, delays, and expense in the federal court system, the Report also remarked on the complicated and confusing regime of interlocutory appeals, and recommended that Congress take action to authorize the Supreme Court by rulemaking to authorize such appeals.<sup>139</sup> Congress took the advice by passing two statutes. The Rules Enabling Act was amended in 1990 to give the Court rulemaking power to “define when a ruling of a district court is final for the purposes of appeal under section 1291.”<sup>140</sup> In 1992, § 1292 (already the statutory repository of several exceptions to the final judgment rule) was amended to permit the Court by rule “to provide for an appeal of an interlocutory decision to the courts of appeal that is not otherwise provided for” in

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135. Wright, *supra* note 12, at 202–03.

136. *Id.* at 203. He also referred to other exceptions, *e.g.*, FED. R. CIV. P. 54(b), as not being preempted either, since “it is now too well settled by a substantial body of case law that they are to be regarded as final decisions to treat them as interlocutory at this late date.” *Id.* On the other hand, he argued that the new statute should limit the use of writs of mandamus, in the sense of being a signal to the appellate court not to grant such a writ, if the district judge denies certification. *Id.* at 203–04. *See also* WRIGHT, *supra* note 16, § 3911 at 369–70.

137. Martineau, *supra* note 3, at 740.

138. For a useful overview of the convening of the Committee, its report, and its implementation by Congress, see Martineau, *supra* note 3, at 718–26.

139. FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 95–96 (April 2, 1990) [hereinafter FCSC REPORT].

140. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 315, 104 Stat. 5089 (1990), (codified at 28 U.S.C. § 2072(c) (2018)).

§ 1292.<sup>141</sup> To date, only one such rule had been promulgated. Rule 23(f) was added to the Federal Rules of Civil Procedure in 1998, and it provides that the courts of appeals in their discretion can hear an immediate appeal from a class certification decision.

The confluence of the focal points of this Article—§ 1292(b), the collateral order doctrine, and the 1990 and 1992 Acts—was addressed by the Supreme Court in 2009 in *Mohawk Industries, Inc. v. Carpenter*.<sup>142</sup> There the Court, in an opinion by Justice Sonia Sotomayor, held that a district court ruling overruling a defendant’s objection to discovery, based on the attorney-client privilege, was not immediately appealable under the collateral order doctrine.<sup>143</sup> In the part of the opinion discussing the “effectively unreviewable” prong of the doctrine, the Court drew on what it considered the significance of § 1292(b) and the recent Congressional legislation. Regarding the former, the Court argued that a reason for not creating another exception under the doctrine was the existence of several existing “appellate options,”<sup>144</sup> including § 1292(b), writs of mandamus, and an appeal by a party held in contempt for defying a discovery order.<sup>145</sup> Briefly commenting on the § 1292(b), it suggested that the criteria “are most likely to be satisfied when a privilege ruling involves a new legal question or is of special consequence, and district courts should not hesitate to certify an interlocutory appeal in such cases.”<sup>146</sup> The possibility of at least “some” discovery rulings involving the attorney-client privilege being immediately appealable under § 1292(b), and the other exceptions, the Court added, ameliorate hardships to affected parties and suggests that the “institutional costs” of making *all* such orders immediately appeal are not justified.<sup>147</sup>

The Court also referenced the 1990 and 1992 statutes. Its frequent statements in collateral order doctrine cases that the doctrine should be construed narrowly “has acquired special force in recent years,” the Court stated, “with the enactment of legislation designating rulemaking, ‘not expansion by court decision,’ as the preferred means for determining whether and when prejudgment orders should be immediately appealable.”<sup>148</sup> The Court concluded that “[w]e expect that the

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141. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 45006 (1992) (codified at 28 U.S.C. § 1292(e) (2018)).

142. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009).

143. *Id.* at 103.

144. *Id.* at 110.

145. *Id.* at 110–13.

146. *Id.* at 111.

147. *Id.* at 112.

148. *Id.* at 113 (quoting *Swint v. Chambers Cty. Comm’n*, 514 U.S. 35, 48 (1995)).

combination of standard post judgment appeals [and] § 1292(b) . . . will continue to provide adequate protection to litigants ordered to disclose materials . . . . Any further avenue for immediate appeal of such rulings should be furnished, it at all, through rulemaking, with the opportunity for full airing it provides.”<sup>149</sup>

Justice Clarence Thomas reiterated some of these points in his concurring opinion. He was highly critical of the *Cohen* line of cases, observing that the Court has long narrowed the scope of the doctrine, “principally by raising the bar on what types of interests are ‘important enough’ to justify collateral order appeals.”<sup>150</sup> But, he added, these “attempts to contain the *Cohen* doctrine have not all been successful or persuasive.”<sup>151</sup> A better approach, he argued, to the “case-by-case adjudication” required by the doctrine is to leave the “value judgments” about the “likely” costs and benefits of allowing an exception to the final judgment rule in an entire ‘class of cases’” to the rulemaking process.<sup>152</sup> “And in so doing,” he would “take this opportunity to limit . . . the doctrine that, with a sweep of the Court’s pen, subordinated what the appellate jurisdiction statute says to what the Court thinks is a good idea.”<sup>153</sup>

### C. *The Collateral Order Doctrine, Circa 2020*

To what extent can the existence of § 1292(b), and other exceptions, bolstered by the 1990 and 1992 statutes, can be said to spell the demise of the collateral order doctrine? Earlier collateral order doctrine cases, in holding that the doctrine was not satisfied, had mentioned the apparent influence of the recent legislation,<sup>154</sup> but it first received extended discussion in *Mohawk*.<sup>155</sup> Nonetheless, much like § 1292(b) has not been (and should not be) interpreted as spelling the end of the doctrine, the two recent statutes should not be interpreted as, by themselves, overruling that line of cases. Neither the Court nor Justice Thomas in *Mohawk* explicitly

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149. *Id.* at 114.

150. *Id.* at 117 (Thomas, J., concurring).

151. *Id.* He agreed with the Court’s comments about alternative avenues of appeal, but wondered, “why such avenues were not also adequate to address the orders whose unusual importance or particularly injurious nature we have held *justified* immediate appeal under *Cohen*.” *Id.* at 118 (emphasis in original).

152. *Id.* at 118.

153. *Id.* at 119.

154. *Cunningham v. Hamilton County*, 527 U.S. 198, 210 (1999) (Thomas, J.); *Swint v. Chambers Cty. Comm’n*, 514 U.S. 35, 48 (1995).

155. For post-*Mohawk* endorsement of rulemaking in light of the 1990 and 1992 legislation, see *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1714 (2017).

so stated. At most, those opinions can be read as suggesting that the Court should no longer hold, under the *Cohen* criteria, that there can be further exceptions to the final judgment rule. Or, to put it less strongly, that such holdings are not forbidden but that there should be an even stronger presumption than there already is against such holdings.<sup>156</sup>

These more modest readings are consistent with the legislative history of the laws. Granted, the Federal Courts Study Committee Report appears to make only the briefest mention of the collateral order doctrine,<sup>157</sup> and apart from that the legislative history of the Congressional legislation is rather thin.<sup>158</sup> That said, the legislative history is best read as permitting the Court, via the rulemaking process, to *expand* the number of exceptions to the final judgement rule.<sup>159</sup> This reading is also consistent with the promulgation of Rule 23(f), which is widely recognized as responding to and to a degree limiting the effect of *Coopers & Lybrand*, since the rule permits discretionary appeal of class action certification decisions where the decision permitted none.<sup>160</sup> Were the Court, under the purported authority of the 1990 and 1992 Acts, to simply overrule *Cohen* and its progeny creating exceptions, it would not be expanding them.<sup>161</sup>

Even if the Court disclaims a new mandate to explicitly overrule the collateral order doctrine, for decades it has openly and unapologetically applied the doctrine in narrow manner. In light of *Mohawk* and other cases, that tendency does not appear to be in danger of ending.<sup>162</sup>

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156. Yet another way to manage the doctrine would be to leave intact the decisions finding the doctrine satisfied prior to the passage of the 1990 and 1992 Acts, while explicitly or implicitly not finding any more exceptions after the passage of those two laws. In effect that is what the Court seems to be doing. A variation on that point (suggested to me by Bryan Lammon) would be to not overrule or limit decisions until and if there has been rulemaking on point. It is also worth reiterating that § 1292(b) by its terms only applies to civil cases, so it should have less gravitational effect on the use of the collateral order doctrine in criminal cases.

157. FCSC REPORT, *supra* note 139, at 95.

158. Martineau, *supra* note 3, at 726.

159. FCSC REPORT, *supra* note 139, at 96; Martineau, *supra* note 3, at 772; Michael E. Harriss, Note, *Rebutting the Roberts Court: Reinventing the Collateral Order Doctrine Through Judicial-Decision Making*, 91 WASH. U. L. REV. 721, 735–37 (2014).

160. *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1709 (2017); Solimine & Hines, *supra* note 117, at 1568.

161. Even under this reading, though, there could be disputes whether a particular rule “expands” or “contracts” an existing exception. Thus, I have suggested that *Mitchell v. Forsyth* could be replaced by rulemaking that, among other things, vests discretion in the court of appeals to hear immediate appeals of denials of the qualified immunity defense. Solimine, *supra* note 126, at 183. *Mitchell*, as currently applied, automatically permits all such appeals, at least those that don’t raise disputed issues of fact. *Id.* at 174. This would arguably “contract” the *Mitchell* exception in a literal sense, but leave it intact in a more nuanced way.

162. Recently the Court had two opportunities to revisit the collateral order doctrine, and possibly revisit some of the issues posed in the text. *Salt River Project Agric. Imp. & Power Dist. v.*

Continued application by the Court, and by the lower courts, of § 1292(b) where appropriate will likely only reinforce that trend.

Two other factors are likely to continue the withering of the collateral order doctrine. The Court has frequently cited the possibility of § 1292(b) appeals when holding the doctrine does not apply to a particular order. The point can be extended to those decisions holding that a particular order *does* fall under the collateral order doctrine. For example, at least some appeals of denials of the qualified immunity defense could and should be certified under § 1292(b).<sup>163</sup> The qualified immunity defense also is an example of how the doctrine might be further narrowed without complete overruling. I have earlier suggested that the Court could plausibly limit collateral order appeals to those involving high-ranking federal officers, which was the case in *Mitchell v. Forsyth* itself.<sup>164</sup> The vast majority of such appeals, involving lower level state officials, could be replaced by the potential availability of the § 1292(b) and writ of mandamus safety valves.

A second factor portending continued desuetude for the doctrine is the venerable concern with federal court caseloads. It is interesting to observe that in the year after *Cohen* was decided, circuit judges were deciding on average about 73 appeals each year, but that number had risen to 329 by 2014.<sup>165</sup> This steep increase occurred despite the increase in the

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Tesla Energy Operations, Inc., 138 S. Ct. 1323 (2018), involved whether the doctrine covered a denial of the state-action defense in an antitrust suit. The Court granted certiorari to resolve a circuit split on the issue, but certiorari was then dismissed after the parties settled the case. *Id.* In *Whole Woman's Health v. Texas Catholic Conference of Bishops*, 139 S. Ct. 1170 (2019), the Court was asked to consider a Fifth Circuit decision, *Whole Woman's Health v. Smith*, 896 F.3d 362 (5th Cir. 2018), which 2-1 held that the doctrine was satisfied when a third-party subject of discovery raised objections under the Religion Clauses of the First Amendment, which had been denied by the district court. The Supreme Court, without recorded dissent, denied certiorari and thus passed on an opportunity to further restrict the doctrine. *Whole Women's Health*, 139 S. Ct. at 1170. The refusal to grant the appeal was arguably surprising, since the lower court decision, while purporting to distinguish *Mohawk*, like that case concerned discovery orders and potentially created a robust source of interlocutory appeals. I was a signatory in both cases to amicus curiae briefs of law professors which argued that an exception under the collateral order doctrine should not be found. See Brief of Federal Courts Scholars as *Amici Curiae* in Support of Respondent, *Salt River*, 138 S. Ct. at 1323 (2018) (No. 17-368); Brief of Law Professors as *Amici Curiae* in Support of Petitioners, *Whole Woman's Health*, 139 S. Ct. at 1170 (2019) (No. 18-622) [hereinafter *Whole Woman's Health Amicus Brief*]. My comments in this footnote and in the rest of this Article are my own and do not necessarily reflect any views of other signatories to these briefs.

163. Solimine, *supra* note 126, at 180–81. Indeed, *Mitchell v. Forsyth* should have been a good candidate for use of § 1292(b), given the uncertainties at the time of the personal liabilities of the U.S. Attorney General. *Id.* at 181 n.94.

164. *Id.* at 177.

165. *Whole Woman's Health Amicus Brief*, *supra* note 162, at 20 (citing Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386, 2388 (2014) (book review)). For further discussion of the long-term concerns with and responses to increasing caseloads in the federal appellate courts,

number of appellate judges for each circuit. Surely it has had, and will continue to have, an implicit impact on appeals to the Supreme Court which call on it to increase the work of the circuit courts, and indirectly its own.

#### IV. CONCLUSION

This Article has both a descriptive and normative component. On the former, it has addressed with data the use of § 1292(b) appeals at both the district and appellate circuit levels; how § 1292(b) jurisprudentially interacts with, and how it has led (along with other factors) to the narrowing, of the collateral order doctrine. On the latter, it has argued that § 1292(b) should be broadly interpreted, and that, on the whole, it has been interpreted in a broader fashion by both high-profile, and more conventional, recent decisions. Conversely, the collateral order doctrine is subject to several infirmities, not least of which is that it is a “blunt instrument,” subjecting entire categories of trial court orders to automatic interlocutory appeals. Instead, the more nuanced appeals under § 1292(b), or perhaps under new rule-making by the Supreme Court, are more appropriate vehicles for allowing interlocutory appeals, since unlike the collateral order doctrine, they permit more surgical precision in weighing the pros (avoiding hardship) and cons (disrupting the ordinary litigation process at the trial level) of interlocutory appeals in individual cases. In this way, I suggest, the federal courts can avoid the venerable “Serbonian bogs”<sup>166</sup> or the “crazy quilt”<sup>167</sup> that has long characterized by many observers the present regime of interlocutory appeals in the federal courts.

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see WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* (2013). See generally Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity “Crisis”*: *Charting a Path for Federal Judiciary Reform*, 108 CAL. L. REV. (forthcoming 2020) (on file with author).

166. See Anderson, *supra* note 111.

167. See Nagle, *supra* note 93. See also Steinman, *supra* note 26, at 1238–39 (canvassing pejorative descriptions for interlocutory appeal doctrine).



**APPENDIX***Section 1292(b) Appeals Decided on the Merits, by Circuit, 2015–2019*

<b>CIRCUIT</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>
DC	1	1	1	2	2
1	1	3	1	2	4
2	5	6	8	27	10
3	14	12	7	10	8
4	8	9	7	7	5
5	12	10	4	14	5
6	9	13	6	11	11
7	11	3	13	5	9
8	4	5	7	0	3
9	22	18	22	14	12
10	6	6	1	7	4
11	12	5	7	7	7
<b>TOTAL</b>	<b>105</b>	<b>91</b>	<b>84</b>	<b>106</b>	<b>80</b>

Source: Administrative Office of the United States Courts, *see supra* notes 29–30.