

# TIME AND THE COURTS: WHAT DEADLINES AND THEIR TREATMENT TELL US ABOUT THE LITIGATION SYSTEM

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## INTRODUCTION

A judicial-conduct inquiry is currently underway concerning a failed attempt by attorneys for a death row inmate to make an after-hours emergency filing with the Texas Court of Criminal Appeals. According to charges filed with the Texas Commission on Judicial Conduct, the facts of the incident include the following: Michael Wayne Richard's execution was set for 6:00 PM on September 25, 2007.<sup>1</sup> On the morning of the 25th, the U.S. Supreme Court granted certiorari in *Baze v. Rees*, which presented questions concerning the constitutionality of execution by lethal injection,<sup>2</sup> the method that would be used in Richard's case.<sup>3</sup> Judges of the Texas Court of Criminal Appeals were aware of the grant of certiorari in *Baze* and an email was circulated to them discussing the possibility of a filing from Richard's lawyers.<sup>4</sup>

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1. See First Amended Notice of Formal Proceedings, Inquiry Concerning a Judge, No. 96, Before the State Commission on Judicial Conduct [hereinafter First Amended Notice], ¶ 7; The Honorable Sharon Keller's Verified Answer to the First Amended Notice of Formal Proceedings of the Texas State Commission on Judicial Conduct and Special Exception [hereinafter Answer to First Amended Notice], ¶ 4.

2. See *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2007), cert. granted, 551 U.S. 1192 (Sept. 25, 2007) (No. 07-5439).

3. See First Amended Notice, *supra* note 1, ¶ 14; The Honorable Sharon Keller's Trial Brief, Inquiry Concerning a Judge, No. 96, Before the State Commission on Judicial Conduct [hereinafter Trial Brief] at 6-7.

4. See First Amended Notice, *supra* note 1, ¶ 16; Trial Brief, *supra* note 3, at 7-8 (suggesting that the email could have been understood to refer to an expected filing in the trial court).

Richard's legal team, however, experienced computer problems and called the clerk's office shortly before 5:00 PM to request that it accept the filing after 5:00 PM.<sup>5</sup> The court's general counsel contacted Judge Sharon Keller, the Presiding Judge, to ask how to respond to the request.<sup>6</sup> Judge Keller has stated that she "understood [the general counsel's question] to refer to whether the clerk's office stayed open past 5:00 PM," a question to which she "said no in accordance with state law and . . . long standing custom."<sup>7</sup> No stay was granted in Richard's case, and he was executed later that evening.<sup>8</sup>

It is not evident that the Court of Criminal Appeals would have granted Richard a stay of execution; the court apparently denied another death row inmate's similar request.<sup>9</sup> But that inmate, Carlton Akee Turner—having obtained a ruling on the merits from the Court of Criminal Appeals—was able to seek and obtain a stay of execution from the U.S. Supreme Court.<sup>10</sup> It also remains to be determined precisely why Richard's lawyers were unable to employ Texas Rule of Appellate Procedure 9.2(a)(2), which provides that documents may be filed with "a justice or judge of that court who is willing to accept delivery."<sup>11</sup> Another judge of the Court of Criminal Appeals had been assigned to be in charge of any proceedings in connection with

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5. See First Amended Notice, *supra* note 1, ¶ 18; Answer to First Amended Notice, *supra* note 1, ¶ 14(Q); *id.* ¶ 14(T) (asserting that "[i]t is still not clear whether" Richard's lawyers were, "in fact, encountering computer problems on that day but in any event the motion to stay based on the *Baze* case was a simple document"); Trial Brief, *supra* note 3, at 8.

6. See First Amended Notice, *supra* note 1, ¶ 19.

7. Answer to First Amended Notice, *supra* note 1, ¶ 9. The state law referenced in Judge Keller's Answer is Section 658.005 of the Texas Government Code. Presumably Judge Keller meant to refer to Section 658.005(a), which provides in part that "[n]ormal office hours of a state agency are from 8 a.m. to 5 p.m. Monday through Friday. These hours are the regular working hours for a full-time state employee." Section 658.005(b) provides, "If a chief administrator of a state agency considers it necessary or advisable, offices also may be kept open during other hours and on other days, and the time worked counts toward the 40 hours a week that are required under Section 658.002."

8. Answer to First Amended Notice, *supra* note 1, ¶ 10.

9. First Amended Notice, *supra* note 1, ¶ 28.

10. See Miscellaneous Order, *Turner v. Texas*, stay granted, 551 U.S. 1193 (Sept. 27, 2007) (No. 07A272) ("Application for stay . . . granted pending the timely filing and disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically."). Ultimately, in April 2008, a fractured U.S. Supreme Court denied relief to the petitioners in *Baze*. See *Baze v. Rees*, 128 S. Ct. 1520, 1526 (2008). Soon thereafter, the Court denied Turner's petition for certiorari, thus vacating the stay of his execution. See *Turner v. Texas*, 128 S. Ct. 2052 (2008).

11. See Trial Brief, *supra* note 3, at 8 (stating that Richard's lawyers had previously used Rule 9.2(a)(2) to make an after-hours stay request in another death penalty case).

Richard's execution, and that judge stayed at court after hours on the 25th;<sup>12</sup> but Richard's attorneys did not make a filing with that judge.<sup>13</sup>

I open with this incident in part because it provides an extreme example of the importance of deadlines and their interpretation: Deadlines and their implications for access to courts can truly have life or death consequences. I do not present the *Richard* case as representative of practice in the Texas court system. Nor does that approach reflect the practice in federal courts, which typically have systems in place to receive emergency filings in capital cases after normal business hours.<sup>14</sup> Indeed, the federal courts are, by statute, "deemed always open" to receive filings, although in practice, that statute should only be invoked in the most exigent circumstances.<sup>15</sup>

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12. *See id.* at 9 (asserting that the assigned judge, the general counsel, "and several other members of the Court were at the CCA after hours" that day "and were willing to accept filings," and that the assigned judge was at the court until "shortly before" Richard's execution).

13. The amended charges filed in mid-June 2009 assert that "neither [the assigned judge] nor the other judges who remained at the Court after 5 PM were aware that Mr. Richard's lawyers had called to ask whether filings after 5 PM could be accepted." First Amended Notice, *supra* note 1, ¶ 22. However, Judge Keller's trial brief, filed in mid-August 2009, asserts that the general counsel told the assigned judge "[a]t approximately 5:00 PM . . . about the call from Mr. Richard's lawyers asking that the Clerk's office remain open after 5:00 PM" Trial Brief, *supra* note 3, at 10.

14. *See, e.g.*, 2D CIR. R. § 0.28(7)(i) ("During non-business hours, emergency stay applications must be directed to an assigned representative of the Clerk (the duty clerk), whose telephone number is left with the courthouse security officers. The duty clerk must immediately advise the members of the assigned panel of the filing of an emergency stay application."). As 2D CIR. R. 0.28(j) states,

In the event the members of the assigned panel cannot be reached by the duty clerk, the duty clerk advises the judge of the court assigned at that time to hear emergency applications of the filing of an off-hours emergency stay application. Notwithstanding the provisions of subparagraphs 7(e) and 7(g)(ii), the applications judge may stay an execution until such time as the application can be placed before the assigned panel or the Court in banc.

15. 28 U.S.C. § 452 (2006) states in part, "All courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." The national rules of procedure for the federal courts contain similar provisions. *See* FED. R. BANKR. P. 5001(a); FED. R. CIV. P. 77(a); FED. R. CRIM. P. 56(a); FED. R. APP. P. 45(a)(2). Some courts have interpreted these provisions to permit litigants to make filings after court hours by seeking out a court official and handing the filing to that official in person. *See, e.g.*, *Casaldue v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941) (citing Civil Rule 77(a) for the principle that "[a] person wishing to file a notice of appeal after closing hours on the last day may seek out the clerk or deputy clerk, or perhaps the judge . . . , and deliver the notice to him out of hours. The notice of appeal would then be filed within the statutory period."); *McIntosh v. Antonino*, 71 F.3d 29, 35 n.5 (1st Cir. 1995) (citing *Casaldue* for the proposition that "[a]fter hours, papers can validly be filed by in-hand delivery to the clerk or other proper official"; noting that "some clerks' offices reportedly have established so-called 'night depositories' to accommodate after-hours filings"; and declining to decide whether an item is filed at the time it is placed in such a depository after hours). Admittedly, § 452's history does not suggest that the statute was designed to address the accessibility of the courts for emergency filings. In nineteenth-century treatises, predecessor provisions are sometimes mentioned in the course of dis-

My broader point is that such questions illuminate not only the treatment of deadlines, but also various assumptions concerning the litigation process more generally. The principle that federal courts are always open, even if only for true emergencies, might relate to a number of facts about the modern federal courts: that they are the courts of last resort for capital petitioners; on a different note, that federal judges routinely work beyond business hours on weekdays and also on weekends;<sup>16</sup> and, on a still different note, that with the advent of electronic filing, the federal courts are in fact always open both to receive and provide documents.<sup>17</sup>

These reflections suggest the thesis of this Article: examining the treatment of court deadlines can help to reveal how participants in the litigation system view their own roles and how they view the roles of

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cussions concerning the terms of court and sometimes during discussions of jurisdiction. *See, e.g.*, HORACE ANDREWS, *MANUAL OF THE LAWS AND COURTS OF THE UNITED STATES, AND OF THE SEVERAL STATES AND TERRITORIES* 9 (1873) (in a section entitled “Terms of the Courts of the United States,” noting that “[t]he circuit courts, as courts of equity, are always open for the purpose of filing pleadings, issuing and returning process and commissions, and for interlocutory proceedings”); ROBERT DESTY, *A MANUAL OF PRACTICE IN THE COURTS OF THE UNITED STATES* 51 (5th ed. 1881) (section entitled “Courts always open for certain purposes” listed under the topic heading “Circuit Courts—Jurisdiction”); GEORGE W. FIELD, *A TREATISE ON THE CONSTITUTION AND JURISDICTION OF THE COURTS OF THE UNITED STATES* 146 (Phila., T. & J.W. Johnson & Co. 1883) (discussing the fact that “circuit courts . . . are always open” in a chapter on jurisdiction). Both contexts suggest that the purpose of courts-always-open provisions was to address the power of the courts to act. *See* JOHN M. GOULD & GEORGE F. TUCKER, *NOTES ON THE REVISED STATUTES OF THE UNITED STATES* 89 (Boston, Little, Brown & Co. 1889) (observing that “while common-law judges properly exercise their authority only when holding a court, and have no power to sit in vacation, yet courts of equity are always open, the chancellor’s authority being personal . . . and capable of exercise equally in term time and in vacation”). This was, likewise, the view taken in a House report concerning the 1948 legislation that codified the present 28 U.S.C. § 452. *See* H.R. REP. NO. 80-308, at A52 (1947). But even if § 452 was not originally designed to embody the principle of openness to emergency filings, the statute can be read to support such a principle. It is not a principle that should be overused. Judges are most unlikely to wish to receive personal visits at home from litigants seeking to make emergency filings; indeed, such a practice would raise security concerns. Provisions that designate some other court official as the point of contact seem well-advised. But apart from these practicalities, there is appeal to the general principle that courts should always be open for the purpose of addressing truly exigent circumstances.

16. *See, e.g.*, Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3, 8 (reporting the results of a survey of federal trial judges, including the fact that “most reported routinely working 10–14 hours each weekday, as well as part of each weekend”); *id.* at 39 (reporting the results of a survey of federal appellate judges and noting that “[m]ost of the judges reported they coped with caseload by working longer and harder”).

17. *See* Public Access to Court Electronic Records Overview, <http://pacer.psc.uscourts.gov/pacerdesc.html> (last visited Jan. 19, 2010). Under a pilot program, the files available electronically through PACER will include not only written documents, but also audiorecordings of some court proceedings, a feature that further increases the courts’ accessibility. *See* Press Release, Admin. Office of the U.S. Courts, Pilot Project Begins: Two Courts Offer Digital Audio Recordings Online (Aug. 6, 2007), [http://www.uscourts.gov/Press\\_Releases/digialaudio080607.html](http://www.uscourts.gov/Press_Releases/digialaudio080607.html) (last visited Jan. 19, 2010).

others. Deadlines and their proper application form a vital topic in their own right. However, in this Article, I propose to examine what litigation deadlines tell us about the way in which key actors in the litigation system relate to one another. My brief survey is meant to be impressionistic rather than comprehensive, addressing three overarching themes: how courts relate to Congress, how judges relate to parties and their lawyers, and how lawyers relate to one another.

Part II addresses legislature-court relations.<sup>18</sup> It first notes the ongoing debate—exemplified by cases such as *Bowles v. Russell*<sup>19</sup>—over the nature of statutory deadlines.<sup>20</sup> It then discusses a rare subset of such deadlines, namely, those limiting the time for the court's own action.<sup>21</sup> It suggests that although courts take such deadlines seriously and are diligent in complying with them, Congress should correlative ensure that it considers the practicalities of judging when weighing the adoption of such time limits as a means of furthering policy. Part III suggests that judges, likewise, should consider the practicalities of lawyering when they interpret and apply litigation deadlines. It first notes the systemic concerns that support the enforcement of deadlines generally, and it then discusses the factors that courts consider when deciding whether to extend a deadline in a particular case. Part IV briefly notes that the treatment of deadlines also illuminates our understanding of how lawyers relate to one another as colleagues, as litigation allies, and as opponents.

## II. COURTS AND LEGISLATURES

Among the thousands of deadlines that might come into play in federal litigation, there exist hundreds set by statute. The fact that a particular deadline is set by statute is significant. As Section A discusses, sometimes that fact is dispositive, as when a court concludes that a deadline, because it is set by statute, is non-waivable and impervious to equitable exceptions.<sup>22</sup> Although this Article will not attempt to survey completely the intricate doctrine on such questions, it will suggest that it is useful, when applying a statutory deadline, to consider statutory purpose.<sup>23</sup> The mere fact that Congress has set a deadline in statutory form should not necessarily cast that deadline as jurisdictional; a more nuanced account should take notice of the legislation's

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18. See *infra* text accompanying notes 22–132.

19. 551 U.S. 205 (2007).

20. See *infra* text accompanying notes 27–45.

21. See *infra* text accompanying notes 46–132.

22. See *infra* note 30 and accompanying text.

23. See *infra* text accompanying note 45.

goals.<sup>24</sup> Section B examines a small subset of statutory deadlines: instances in which Congress sets a deadline not for litigants' action but for action by the court.<sup>25</sup> Section B discusses a few recent examples, noting that while such provisions may serve important legislative goals, they should be carefully crafted with an eye to the realities of judges' work.<sup>26</sup>

### A. *The Nature of Deadlines in Federal Litigation*

No survey of the law of federal litigation deadlines is complete without a discussion of *Bowles v. Russell*,<sup>27</sup> so I will begin by examining what that case and some others in its line have to say about the nature of litigation deadlines in federal court. I will not discuss this question at length, both because it has been so much discussed elsewhere<sup>28</sup> and because the law in this area is still developing. However, a brief analysis is in order because *Bowles* emphasizes that appeal deadlines set by statute are for that reason jurisdictional.<sup>29</sup> And that emphasis on statutes implicates the topic I discuss in this Part, namely, the relationship between the courts and Congress.

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24. *See id.*

25. *See infra* text accompanying notes 46–132.

26. *See id.*

27. 551 U.S. 205 (2007).

28. *See, e.g.*, Scott Dodson, *Jurisdictionality and Bowles v. Russell*, 102 NW. U. L. REV. COLLOQUY 42, 47 (2007) (arguing that instead of holding the fourteen-day deadline in 28 U.S.C. § 2107 to be jurisdictional, the Supreme Court should have held it to be “mandatory but nonjurisdictional”); Elizabeth Chamblee Burch, *Nonjurisdictionality or Inequity*, 102 NW. U. L. REV. COLLOQUY 64, 65 (2007) (responding to Dodson’s proposal); Perry Dane, *Sad Time: Thoughts on Jurisdictionality, the Legal Imagination, and Bowles v. Russell*, 102 NW. U. L. REV. COLLOQUY 164, 164 (2007) (contending “that time limits can . . . be jurisdictional without being interpreted literally and peremptorily”); E. King Poor, *The Jurisdictional Time Limit for an Appeal: The Worst Kind of Deadline—Except for All Others*, 102 NW. U. L. REV. COLLOQUY 151, 151–52 (2007) (“[P]ractical experience teaches that the judicial system as a whole works far better—with greater stability and overall fairness—when the time for an appeal cannot be manipulated by the parties or overridden by the trial court and thus is treated as jurisdictional.”); Scott Dodson, *Appreciating Mandatory Rules: A Reply to Critics*, 102 NW. U. L. REV. COLLOQUY 228, 238 (2008) (responding to Dane, Poor, and Burch); Scott Dodson, *The Failure of Bowles v. Russell*, 43 TULSA L. REV. 631, 632 (2008) (arguing that *Bowles* “leaves lower courts and litigants to wonder whether statutory limits in other areas can be waived or excused for equitable reasons, or whether they could come back to unravel the entire case for the first time on appeal”); Howard Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on Dodson’s Trichotomy*, 102 NW. U. L. REV. COLLOQUY 215, 222 (2008) (considering possible implications of the Court’s discussion of *Bowles* in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008)); Christopher W. Robbins, Comment, *Jurisdiction and the Federal Rules: Why the Time Has Come to Reform Finality by Inequitable Deadlines*, 157 U. PA. L. REV. 279, 284 (2008) (arguing that “[t]he combination of a presumption that a requirement is nonjurisdictional with an extension of principles of equity into the area of post-trial motions and notices of appeal would allow for a more just procedure for challenging a judgment”).

29. *See Bowles*, 551 U.S. at 210–12.

The nature of a litigation deadline—i.e., whether the deadline is jurisdictional—is important in at least two circumstances: first, when the litigant’s opponent fails to complain about the failure to meet the deadline, and second, when the failure to meet the deadline is raised but the litigant offers as an excuse for noncompliance some extraordinary circumstance—in particular, reliance on misinformation from the court. In such instances, a nonjurisdictional deadline might not be enforced either because the opponent waived the untimeliness objection or because the litigant offers a sufficiently good excuse for noncompliance. But a jurisdictional deadline must be raised by the court *sua sponte* and cannot be softened by judicially created exceptions such as the “unique circumstances” doctrine.<sup>30</sup>

Just a few years ago, it seemed that the Supreme Court was inclined to narrow the range of litigation deadlines that it deemed “jurisdictional.” In *Kontrick v. Ryan*, the Court held that the time limit set by Federal Rule of Bankruptcy Procedure (Bankruptcy Rule) 4004 for objections by creditors was not jurisdictional.<sup>31</sup> The *Kontrick* Court suggested that “[c]larity would be facilitated if courts and litigants used the label ‘jurisdictional’ not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.”<sup>32</sup> Likewise, a year later, in *Eberhart v. United States*, the Court concluded that the seven-day time limit for certain new trial motions under Federal Rule of Criminal Procedure (Criminal Rule) 33 was nonjurisdictional.<sup>33</sup>

But the Court took a different direction in *Bowles*. That case involved a habeas petitioner who sought leave to reopen the time to appeal on the ground that he had not received notice of the entry of the judgment.<sup>34</sup> Under both Federal Rule of Appellate Procedure (Appellate Rule) 4(a)(6) and 28 U.S.C. § 2107(c), the district court had the authority to reopen the appeal time, but only for a period of fourteen days.<sup>35</sup> Unfortunately for *Bowles*, the district court’s order granting the request specified that the notice of appeal could be filed on or before February 27, 2004—a day that fell, as it turned out, seventeen rather than fourteen days after the entry of the court’s order.<sup>36</sup>

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30. See 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.1, at 203–05 (4th ed. 2008).

31. *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004).

32. *Id.* at 455.

33. *Eberhart v. United States*, 546 U.S. 12, 19 (2005).

34. *Bowles v. Russell*, 432 F.3d 668, 670 (6th Cir. 2005).

35. See 28 U.S.C. § 2107(c); FED. R. APP. P. 4(a)(6).

36. See *Bowles v. Russell*, 551 U.S. 205, 207 (2007).

The U.S. Supreme Court held that the notice of appeal, filed on February 26, was untimely and that the untimeliness constituted a jurisdictional defect.<sup>37</sup> Accordingly, the *Bowles* majority held that the lateness could not be excused by Bowles's reliance on a date that the district court miscalculated.<sup>38</sup>

The *Bowles* Court distinguished *Kontrick* and *Eberhart* by stressing that those cases did not involve deadlines set by statute. As the Court explained,

Jurisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them. Put another way, the notion of "subject-matter" jurisdiction obviously extends to "classes of cases . . . falling within a court's adjudicatory authority," but it is no less "jurisdictional" when Congress forbids federal courts from adjudicating an otherwise legitimate "class of cases" after a certain period has elapsed from final judgment.<sup>39</sup>

In the context of appeal deadlines, *Bowles* has produced a few discernible trends and one nascent circuit split. The lower courts are in consensus that statutory appeal deadlines are, under *Bowles*, jurisdictional.<sup>40</sup> And the trend in the caselaw is to treat appeal deadlines that are set only by rule and not by statute as non-jurisdictional.<sup>41</sup> Complications have arisen, however, with respect to appeal-related deadlines that are hybrids—i.e., deadlines that are set partly by rule and partly by statute. For example, the Civil Rules set deadlines for making postjudgment motions that toll the time to appeal in a civil case;<sup>42</sup> the tolling motion deadlines are purely rule-based, but the appeal deadlines tolled by such motions are statutory. Are the motion deadlines jurisdictional because they toll statutory appeal deadlines, or nonjurisdictional because they themselves are nonstatutory? To date, three circuits have answered this question, each in a different way.<sup>43</sup>

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37. *Id.* at 208.

38. *Id.* at 206–07.

39. *Id.* at 212–13 (internal citations omitted).

40. *See, e.g.*, *Marandola v. United States*, 518 F.3d 913, 914 (Fed. Cir. 2008).

41. *See, e.g.*, *United States v. Byfield*, 522 F.3d 400, 403 n.2 (D.C. Cir. 2008).

42. *See* FED. R. APP. P. 4(a)(4)(A)(i)–(vi) (listing motions that toll appeal time in civil cases).

43. *See* *United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1101 & n.37 (9th Cir. 2008) (holding that tolling-motion deadlines are jurisdictional, at least to the extent that the motions are to have a tolling effect), *reh'g en banc granted*, 545 F.3d 1106 (9th Cir. 2008) (stating that "[t]he three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit"), *opinion on reh'g en banc* 579 F.3d 989, 994 (9th Cir. 2009) (en banc) (adopting panel's reasoning on the issue of tolling-motion deadlines); *Dill v. Gen. Am. Life Ins. Co.*, 525 F.3d 612, 618–19 (8th Cir. 2008) (stating that the Civil Rule 50(b) deadline is nonjurisdictional).

Of course, although the questions raised by *Bowles* may extend beyond the field of appeal deadlines to many other litigation deadlines, it cannot be true that all statutory litigation deadlines are jurisdictional simply because they are set by statute. Statutes of limitation, for instance, are ordinarily treated as affirmative defenses; they are thus waivable, and therefore nonjurisdictional. But statutes of limitations for certain types of claims may be subject to special treatment. For instance, the U.S. Supreme Court recently held in *John R. Sand & Gravel Co. v. United States* that the Court of Federal Claims' six-year limitation period is jurisdictional.<sup>44</sup> In so doing, the Court suggested that the nature of the limitations period may be discerned by reference to the provision's purposes:

Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims. Thus, the law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver. Such statutes also typically permit courts to toll the limitations period in light of special equitable considerations.

Some statutes of limitations, however, seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency. The Court has often read the time limits of these statutes as more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period.<sup>45</sup>

The *John R. Sand* Court's emphasis on the purposes of the statutory period suggests a useful refinement of the reasoning of *Bowles*. One might question whether, in all instances, a statutory provision is meant to set a *jurisdictional* deadline that is non-waivable and impervious to equitable exceptions. Sometimes legislators may indeed intend to limit the power of courts to forgive untimeliness, but in other instances, the legislators' intent might be consistent with a contrary interpretation.

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but holding that when the other party objected to the motion's untimeliness before the court decided the motion but after the nontolled appeal time ran out, the appeal must be dismissed for lack of jurisdiction): *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 475–76 (6th Cir. 2007) (holding that the Civil Rule 59(e) deadline is nonjurisdictional).

44. 128 S. Ct. 750, 755 (2008).

45. *Id.* at 753 (internal citations omitted).

*B. Deadlines for Judicial Action*

Such interpretive questions also arise in connection with statutory litigation deadlines that set time limits on action by the court itself. The notion of tight deadlines on certain types of court action is, of course, not new. In civil cases, for example, the Civil Rules have long set a presumption that a temporary restraining order (TRO) will expire after a very short time period.<sup>46</sup> This limit, which in effect requires either the TRO's expiration or its conversion (after a hearing) into a preliminary injunction, is a necessary safeguard in light of the fact that TROs can be obtained *ex parte*.<sup>47</sup> In criminal cases, both the Constitution<sup>48</sup> and implementing statutes<sup>49</sup> guarantee a speedy trial, therefore requiring prompt judicial action.<sup>50</sup> But the implementing statutes take account of the practicalities of litigation by listing a number of time periods that are excluded from Speedy Trial Act calculations.<sup>51</sup>

During the past fifteen years, Congress has made a number of notable additions to the list of time limits on federal court action.<sup>52</sup> For example, in the mid-1990s Congress enacted both the Antiterrorism

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46. Civil Rule 65(b)(2) provides in part, "The order expires at the time after entry—not to exceed 10 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension."

47. See *French v. Duckworth*, 178 F.3d 437, 443 (7th Cir. 1999) ("Both the 10-day limit on TROs found in Rule 65(b) and the analogous limit in the Norris-LaGuardia Act respond to the particular problems of *ex parte* proceedings."), *rev'd on other grounds sub nom. Miller v. French*, 530 U.S. 327 (2000).

48. See U.S. CONST. amend. VI.

49. See 18 U.S.C. §§ 3161–3174 (2006); see also FED. R. CRIM. P. 48(b) ("The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in: (1) presenting a charge to a grand jury; (2) filing an information against a defendant; or (3) bringing a defendant to trial."); FED. R. CRIM. P. 50 ("Scheduling preference must be given to criminal proceedings as far as practicable.").

50. See generally 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 813 (3d ed.) (2004) (discussing protections for defendant's right to a speedy trial).

51. See 18 U.S.C. § 3161(h) (2006); see also *French*, 178 F.3d at 444 (noting that the Speedy Trial Act "contains a long list of exceptions").

52. In addition to the statutes discussed in the text, examples include the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (2005); the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005); the Crime Victims' Rights Act, Pub. L. 108-405, § 102(a), 118 Stat. 2260, 2261 (2004); and the Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, § 101(a)–(b), 109 Stat. 737, 744 (1995). For an example of the effects of CAFA's deadlines, see *In re U-Haul Int'l. Inc.*, No. 08-7122, 2009 WL 902414, at \*1 (D.C. Cir. Apr. 6, 2009) (Rogers, J., dissenting from denial of petition for leave to appeal) (reasoning that removal jurisdiction under CAFA depended in *U-Haul* on the unsettled question of "whether D.C. law permits a plaintiff to bring a claim on behalf of the general public as a non-class representative action," and concluding that "CAFA's time limitations on appellate review prevent this court from certifying the question" to the D.C. Court of Appeals).

and Effective Death Penalty Act of 1996 (AEDPA)<sup>53</sup> and the Prison Litigation Reform Act (PLRA).<sup>54</sup> In these statutes, the time limits on court action seem to serve a general statutory goal of reorienting the role of the federal courts: in AEDPA, by limiting federal court delay in reviewing certain capital cases, and in the PLRA, by limiting federal court delay in reassessing the appropriateness of existing injunctions concerning prison conditions. Short time limits on court action may require courts to alter their priorities, and they may limit courts' ability to thoroughly consider the merits of a given matter. Although the statutory time limits discussed here have not been invalidated on constitutional grounds, they do raise questions at a policy level.

Both AEDPA and the PLRA illustrate the use of deadlines on court action as a tool for altering the role of the federal courts. AEDPA establishes a fast-track procedure for the review of habeas petitions of state prisoners who have been sentenced to death by the courts of a qualifying state.<sup>55</sup> To qualify for the application of the fast-track procedures, the state must obtain a certification by the United States Attorney General that the state "has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners who have been sentenced to death," and that "the State provides standards of competency for the appointment of counsel" in such proceedings.<sup>56</sup> For the first decade of its existence, the fast-track qualification procedure involved a somewhat similar standard<sup>57</sup> concerning the provision of counsel on state collateral review, but it did not involve a certification by the Attorney General. During that period, it appears that no court actually applied the fast-track procedures to a state habeas petitioner.<sup>58</sup> In 2006, Congress amended the statute to make the substantive standard less stringent and to vest the certification authority in the Attorney General.<sup>59</sup>

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53. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

54. Pub. L. No. 104-134, 110 Stat. 1321 (1996).

55. See 28 U.S.C. §§ 2261–2266.

56. 28 U.S.C. § 2265(a)(1)(A), (C) (2006).

57. Under the current standard, the counsel appointed for collateral state proceedings cannot be the same counsel who represented the defendant at trial unless both the lawyer and the prisoner expressly so choose. See 28 U.S.C. § 2261(d). The pre-2006 standard went further, presumptively ruling out (as collateral-proceeding counsel) any lawyer who had represented the prisoner in the direct appeal. See Pub. L. 104-132, § 107(a), 110 Stat. 1221 (enacting original version of 28 U.S.C. § 2261(d)).

58. See John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259, 274–75 (2006).

59. See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 2265, 120 Stat. 192, 250.

The Department of Justice (DOJ) issued implementing regulations in December 2008.<sup>60</sup> However, a legal aid organization sued to challenge the sufficiency of the notice that the DOJ had provided during the rulemaking process, and in January 2009, a federal district court enjoined the DOJ from putting the rule into effect “without first providing an additional comment period of at least thirty days and publishing a response to any comments received during such period.”<sup>61</sup> Citing this injunction, in February 2009, the DOJ announced its intention “to solicit further comment on all aspects of the final rule for 60 days.”<sup>62</sup> For the present, then, it seems that no state currently qualifies for the fast-track procedures.

Nonetheless, it is instructive to contemplate how those procedures would work should they take effect in an actual case. If a state qualified for the fast-track procedures and wished to apply those procedures to a particular capital defendant, a court would ordinarily enter an order that appointed counsel for the defendant in the state collateral proceedings.<sup>63</sup> The prisoner’s execution date would then be stayed upon application to a federal habeas court.<sup>64</sup> This stay would lapse if the prisoner failed to file a timely federal habeas petition;<sup>65</sup> in contrast to other federal habeas petitioners (who face a one-year statute of limitations),<sup>66</sup> fast-track capital petitioners must comply with the statute’s 180-day statute of limitations.<sup>67</sup> And even if the petitioner filed a timely federal petition, the statute directs that the stay of execution “shall expire if . . . [the petitioner] fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.”<sup>68</sup> If such an event occurred, the statute states that “no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).”<sup>69</sup> The statute also circumscribes the

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60. See Office of the Attorney General; Certification Process for State Capital Counsel Systems, 73 Fed. Reg. 75,327, 75,327 (Dec. 11, 2008) (to be codified at 228 C.F.R. pt. 26).

61. Habeas Corpus Res. Ctr. v. U.S. Dep’t of Justice, No. C 08-2649 CW, 2009 WL 185423, at \*10 (N.D. Cal. Jan. 20, 2009).

62. Certification Process for State Capital Counsel Systems, 74 Fed. Reg. 6131, 6131 (Feb. 5, 2009) (to be codified at 28 C.F.R. pt. 26).

63. See 28 U.S.C. § 2261(c) (2006).

64. See 28 U.S.C. § 2262(a) (2006).

65. See 28 U.S.C. § 2262(b)(1).

66. See 28 U.S.C. § 2244(d)(1).

67. See 28 U.S.C. § 2263 (2006).

68. 28 U.S.C. § 2262(b)(3).

69. 28 U.S.C. § 2262(c); see also 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 3.3c, at 144 n.64 (4th ed. 2001) (suggesting that this limitation should be read narrowly in light of *Felker v. Turpin*, 518 U.S. 651 (1996)).

scope of the federal habeas review,<sup>70</sup> and it sets a tight schedule for the district court. As amended in 2006,<sup>71</sup> the statute mandates that the district court must reach final judgment “not later than 450 days after the date on which the application is filed, or 60 days after the date on which the case is submitted for decision, whichever is earlier.” The district court can extend the relevant period for an additional thirty days, but only if it issues written findings that the delay is warranted, taking into account certain statutorily specified factors.<sup>72</sup>

AEDPA’s fast-track procedures also set time limits for the court of appeals.<sup>73</sup> The court of appeals must determine the appeal no later than 120 days after the last brief is filed.<sup>74</sup> If rehearing or rehearing en banc is sought, the court of appeals must decide whether to grant rehearing within thirty days after the last relevant filing—the petition or, if one is required, the response.<sup>75</sup> And, if the court of appeals grants rehearing, it must finally determine the case on rehearing no later than 120 days after entering the order that granted rehearing.<sup>76</sup>

With respect to each set of time limits, the statute explicitly provides for both enforcement and oversight. The state can enforce the district court time limit by seeking a writ of mandamus from the court of appeals, and the court of appeals “shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.”<sup>77</sup> The state can enforce the court of appeals time limit “by applying for a writ of mandamus to the Supreme Court.”<sup>78</sup> In addition, the statute requires the Administrative Office of the United States Courts to submit annual reports to Congress on compliance with these time limits by both the district courts and the courts of appeals.<sup>79</sup>

AEDPA’s legislative history indicates that the idea of such time limits grew out of allegations concerning federal court delay in adjudicating habeas petitions by state capital prisoners. During legislative

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70. See 28 U.S.C. § 2264 (2006).

71. See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 507(e), 120 Stat. 251 (2006). Prior to the 2006 amendment, § 2266(b)(1)(A) provided, “A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application is filed.” See Pub. L. 104-132, § 107(a), 110 Stat. 1224 (enacting original version of § 2266(b)(1)(A)).

72. See 28 U.S.C. § 2266(b)(1)(C) (2006).

73. See 28 U.S.C. § 2266(c)(1).

74. See 28 U.S.C. § 2266(c)(1)(A).

75. See 28 U.S.C. § 2266(c)(1)(B)(i).

76. See 28 U.S.C. § 2266(c)(1)(B)(ii).

77. 28 U.S.C. § 2266(b)(4)(B).

78. 28 U.S.C. § 2266(c)(4)(B).

79. 28 U.S.C. § 2266(b)(5), 2266(c)(5).

hearings in the 1990s, supporters of time limits decried long delays in the execution of state prisoners<sup>80</sup> and asserted that time limits on federal habeas proceedings were an important way to address such delays. For instance, Nebraska's Attorney General testified that "[f]ederal judges already have the tools to set prompt case progression standards and hold defense counsel to them. All too frequently, this is not done. That is why statutory Federal habeas corpus reform is necessary."<sup>81</sup>

In the case of the PLRA, the time limits on court action form part of Congress's effort to circumscribe the role of the federal courts in overseeing prison conditions. In addition to setting various limits on prisoner lawsuits generally, the PLRA also narrows the availability of systemic injunctive relief. As amended by the PLRA, 18 U.S.C. § 3626(a) bars federal courts from granting preliminary or permanent injunctive relief concerning prison conditions unless the court finds that the relief is narrowly tailored to remedy actual violations of federal rights and that the relief is the "least intrusive means necessary" for that purpose.<sup>82</sup> In making those findings, the court is directed to give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief."<sup>83</sup> The statute sets additional strictures on orders that limit the size of a prison population.<sup>84</sup> Section 3626(b) provides for the termination of existing injunctions. Under § 3626(b)(2), an injunction that was entered without the type of findings required by § 3626(a) is subject to termination unless the court makes the required findings. Under § 3626(b)(1), even an injunction that was entered with the requisite findings is subject to termination after two years unless the court determines that the basis for the required findings still exists.

Section 3626(e) contains a number of avenues through which the institutions that are subject to a prison condition injunction can enforce § 3626(b)'s termination mechanism. Section 3626(e)(1) provides that "[t]he court shall promptly rule on any motion to modify or terminate" the injunction, and that "[m]andamus shall lie to remedy any

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80. See, e.g., *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing on S. 623 Before the S. Comm. on the Judiciary*, 104th Cong. 58, 60 (1995) (statement of Gale A. Norton, Att'y Gen. of Colorado).

81. *Id.* at 64 (statement of Don Stenberg, Att'y Gen. of Nebraska); see also *id.* at 34 (statement of Dan Morales, Att'y Gen. of Texas) ("While many of the Federal district courts in Texas expedite capital cases, it is not unusual for such cases to remain in the district court for five to seven years.").

82. See 18 U.S.C. § 3626(a)(1)(A), (a)(2).

83. 18 U.S.C. § 3626(a)(1)-(2) (2006) (setting limits on "prospective relief" and "preliminary injunctive relief," respectively).

84. See 18 U.S.C. § 3626(a)(3) (setting preconditions for "prisoner release order[s]").

failure to issue a prompt ruling on such a motion.”<sup>85</sup> Even apart from this, the remainder of § 3626(e) provides an automatic enforcement mechanism. A motion to terminate injunctive relief under § 3626(b)(1) or (b)(2) automatically stays the existing injunction “beginning on the 30th day after such motion is filed.”<sup>86</sup> As amended in 1997,<sup>87</sup> the statute permits the court to “postpone the effective date of” this stay “for good cause,” but only for an additional sixty days.<sup>88</sup> The statute renders any order interfering with the automatic stay (other than an order implementing the permitted sixty-day extension) immediately appealable.<sup>89</sup>

Proponents of the PLRA’s limits on injunctive relief relied on a number of contentions related to inmate litigation.<sup>90</sup> With respect to structural-reform injunctions, bill proponents asserted that federal judges were interfering with the administration of prisons,<sup>91</sup> making prisons more costly to run<sup>92</sup> and endangering the public by requiring “the release of dangerous criminals.”<sup>93</sup> Accordingly, the bill’s sponsors proposed to “curtail interference by the Federal courts . . . in the orderly administration of our prisons.”<sup>94</sup> Opponents of the limits warned that the bill would “strip Federal courts of the authority to remedy unconstitutional prison conditions” and would constitute “a

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85. The provision concerning mandamus was added in 1997. *See* Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, § 123, 111 Stat. 2440, 2470.

86. 18 U.S.C. § 3626(e)(2)(A)(i). If the motion to terminate is made under any authority other than § 3626(b)(1) or (b)(2), the automatic stay comes into effect on the 180th day after filing rather than the 30th day after filing. 18 U.S.C. § 3626(e)(2)(A)(ii).

87. *See* Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, § 123, 111 Stat. 2440, 2470.

88. 18 U.S.C. § 3626(e)(3).

89. *See* 18 U.S.C. § 3626(e)(4).

90. For assessments of the assumptions underlying the PLRA, see, for example, Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1692–93 (2003); Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1777 (2003).

91. *See, e.g.*, 141 CONG. REC. 26,449 (1995) (statement of Sen. Abraham) (alluding to “consent decrees, such as those in Michigan under which judges control the prisons literally for decades”).

92. *See, e.g., id.* at 26,448–49 (statement of Sen. Abraham).

93. *Id.* at 26,448 (statement of Sen. Abraham) (“[I]n other jurisdictions, judicial orders entered under Federal law actually result in the release of dangerous criminals from prison.”); *see also* *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 51–52 (1995) [hereinafter *July 1995 Hearing*] (reproducing a resolution by the National District Attorneys Association).

94. 141 CONG. REC. 26,449 (1995) (statement of Sen. Abraham). For the views of an academic who supported enactment of the PLRA’s curbs on prison-condition injunctions, see *July 1995 Hearing, supra* note 93, at 190 (responses to questions from Sen. Abraham to Professor John J. DiIulio, Jr.).

dangerous legislative incursion into the work of the judicial branch,"<sup>95</sup> but their opposition ultimately failed.

In this context, an automatic stay provision was presented as a way of ensuring that the federal courts ruled in a timely fashion on requests for termination of injunctive relief.<sup>96</sup> As a House committee report asserted, "[L]ocal officials are often handcuffed in their efforts to modify or terminate unnecessary and burdensome consent decrees [or] other orders by judge[s] who stonewall and simply refuse, for many months or even years, to issue a ruling on a request for modification or termination."<sup>97</sup> During a House debate on a version of the bill, Representative Melvin Watt proposed an amendment that would delete the automatic stay, arguing that the automatic stay was an unprecedented, "radical change" that would burden "overcrowded, overworked Federal courts."<sup>98</sup> Representative Charles Canady of Florida responded that the stay "is simply a mechanism to encourage the court to act swiftly, to consider these matters which are of great public importance," and he intimated that judicial delay could endanger the public: "What happens in many of these cases involving prison conditions is, the court, unfortunately, will not expeditiously consider such motions for relief by the States and local governments. In some cases, that can result in dangerous criminals actually being let out on the street."<sup>99</sup> Representative Watt's proposed amendment failed by a lopsided vote.<sup>100</sup>

Unlike AEDPA's fast-track provisions, which as of this writing have not yet been applied to any capital habeas petitioners, the PLRA's timing provisions were soon tested. The Fifth and Sixth Circuits read the PLRA to leave federal courts with equitable authority to lift the automatic stay.<sup>101</sup> The Seventh Circuit found that the PLRA foreclosed such authority and held that the automatic stay provision violated separation of powers principles.<sup>102</sup>

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95. 142 CONG. REC. 5193 (1996) (statement of Sen. Kennedy); *see also id.* at 5194 (statement of Sen. Simon) ("History is replete with examples of egregious violations of prisoners' rights.").

96. Supporters of a time limit included the National District Attorneys Association. *See Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 52 (1995).

97. H.R. REP. NO. 104-21, at 26 (1995).

98. 141 CONG. REC. 4366 (1995).

99. 141 CONG. REC. 4367 (1995).

100. *See* 141 CONG. REC. 4368-69 (1995) (recording "ayes—93," "noes—313," "not voting—28").

101. *See Ruiz v. Johnson*, 178 F.3d 385, 395 (5th Cir. 1999); *Hadix v. Johnson*, 144 F.3d 925, 930 (6th Cir. 1998).

102. *See French v. Duckworth*, 178 F.3d 437, 447 (7th Cir. 1999), *rev'd sub nom. Miller v. French*, 530 U.S. 327 (2000).

In *Miller v. French*, the Supreme Court held that both of these approaches were erroneous.<sup>103</sup> The *Miller* Court first held that the Fifth and Sixth Circuits' interpretations of the statute were insupportable: "Any construction that preserved courts' equitable discretion to enjoin the automatic stay would effectively convert the PLRA's mandatory stay into a discretionary one . . . . [T]his would be plainly contrary to Congress' intent in enacting the stay provision . . . ." <sup>104</sup> Next, the Court held that the Seventh Circuit erred in holding that the automatic stay offended separation of powers principles.<sup>105</sup> The Court reasoned that § 3626(b)'s termination provisions are permissible alterations of the propriety of prospective relief, and that § 3626(e)'s automatic stay is a permissible way to effectuate the provisions of § 3626(b).<sup>106</sup> Briefly focusing on the automatic stay's role as a deadline for court action, the Court stated that it had "no occasion to decide whether there could be a time constraint on judicial action that was so severe that it implicated . . . structural separation of powers concerns."<sup>107</sup> As for the possibility that "the time is so short that it deprives litigants of a meaningful opportunity to be heard," that question implicated due process concerns rather than separation of powers principles and was outside of the scope of the question presented.<sup>108</sup> The Court "[le]ft open, therefore, the question whether this time limit, particularly in a complex case, may implicate due process concerns."<sup>109</sup>

Justices David Souter and Ruth Bader Ginsburg concurred in the majority's statutory analysis but not in its separation of powers analysis. In their view,

[I]f determining whether a new rule applies requires time (say, for new factfinding) and if the statute provides insufficient time for a court to make that determination before the statute invalidates an extant remedial order, the application of the statute raises a serious question whether Congress has in practical terms assumed the judicial function.<sup>110</sup>

Justices Stephen Breyer and John Paul Stevens dissented, arguing that the PLRA should not be construed to remove all equitable authority

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103. See *Miller v. French*, 530 U.S. 327, 341, 346, 350 (2000).

104. *Id.* at 341.

105. See *id.* at 346.

106. See *id.* ("[Section] 3626(e)(2) merely reflects the change implemented by § 3626(b), which . . . establish[es] new standards for prospective relief.")

107. *Id.* at 350.

108. *Id.*

109. *Id.*

110. *Id.* at 352 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part).

to suspend the automatic stay.<sup>111</sup> The dissenters began by noting “the extreme circumstances that at least some prison litigation originally sought to correct, the complexity of the resulting judicial decrees, and the potential difficulties arising out of the subsequent need to review those decrees in order to make certain they follow Congress’ PLRA directives.”<sup>112</sup> While conceding that their interpretation might not be “the most natural reading of the statute’s language” and that some legislators who voted for the PLRA would reject such an interpretation,<sup>113</sup> the dissenters concluded that the PLRA,

when read in light of its language, structure, purpose, and history, is open to an interpretation that would allow a court to modify or suspend the automatic stay when a party, in accordance with traditional equitable criteria, has demonstrated a need for such an exception. That interpretation reflects this Court’s historic reluctance to read a statute as depriving courts of their traditional equitable powers. It also avoids constitutional difficulties that might arise in unusual cases.<sup>114</sup>

Time limits such as those set by AEDPA’s fast-track provisions or by the PLRA’s automatic stay mechanism may have the effect of reordering the courts’ priorities. Indeed, that is the intended effect of at least one of these statutes. AEDPA’s chapter on fast-track capital habeas procedures includes a provision that states this goal explicitly: “The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.”<sup>115</sup> And both AEDPA and the PLRA, when authorizing limited extensions of their time limits on district court action, explicitly rule out, as a reason for extension, “general congestion of the court’s calendar.”<sup>116</sup>

The *Miller* Court noted the possibility that, in some circumstances, very tight deadlines for court action may not afford enough time for

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111. *Id.* at 361 (Breyer, J., joined by Stevens, J., dissenting).

112. *Id.* at 355 (Breyer, J., joined by Stevens, J., dissenting).

113. *Id.* at 362 (Breyer, J., joined by Stevens, J., dissenting) (“I do not argue that this interpretation reflects the most natural reading of the statute’s language. Nor do I assert that each individual legislator would have endorsed that reading at the time.”).

114. *Id.* at 361 (Breyer, J., joined by Stevens, J., dissenting).

115. 28 U.S.C. § 2266(a).

116. *Compare* 28 U.S.C. § 2266(b)(1)(C)(iii) (AEDPA fast-track provision), *with* 18 U.S.C. § 3626(e)(3) (PLRA automatic stay provision). The PLRA language concerning court congestion was added in 1997. *See* Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, § 123, 111 Stat. 2440, 2470.

thorough analysis of the merits of the relevant question.<sup>117</sup> In extreme cases, as the *Miller* Court acknowledged, such enforced haste could raise due process or even separation of powers concerns.<sup>118</sup> Even short of these concerns, however, tight deadlines may have significant effects.

For example, the imposition of a tight deadline on decision making can affect the content of the law. Another of AEDPA's time limits provides an example. In habeas cases to which the fast-track procedures do not apply, 28 U.S.C. § 2244(b) sets stringent limits on the petitioner's ability to bring a second or successive petition.<sup>119</sup> Such a petition can only be brought if the claim asserted in the petition meets one of two strict statutory requirements—either that “the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,”<sup>120</sup> or that

the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and . . . the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.<sup>121</sup>

Before filing a successive petition, the petitioner must seek permission from the court of appeals.<sup>122</sup> The court of appeals can grant this permission “only if it determines that the application makes a prima facie showing that the application satisfies the requirements” set by § 2244(b),<sup>123</sup> and it must rule on the question “not later than 30 days after the filing of the motion.”<sup>124</sup>

In *Tyler v. Cain*, the Supreme Court interpreted § 2244(b)'s “new rule” provision.<sup>125</sup> The Court held that the phrase “made retroactive to cases on collateral review by the Supreme Court” means *held* retroactive.<sup>126</sup> In other words, § 2244(b)'s “new rule” provision can only apply if the Supreme Court “has held that the new rule is retroactively

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117. See *Miller*, 530 U.S. at 350 (“leav[ing] open . . . the question whether [18 U.S.C. § 3626(e)(2)'s] time limit, particularly in a complex case, may implicate due process concerns,” and not deciding “whether there could be a time constraint on judicial action that was so severe that it implicated these structural separation of powers concerns”).

118. See *id.*

119. See 28 U.S.C. § 2244(b).

120. 28 U.S.C. § 2244(b)(2)(A).

121. 28 U.S.C. § 2244(b)(2)(B).

122. See 28 U.S.C. § 2244(b)(3)(A).

123. 28 U.S.C. § 2244(b)(3)(C).

124. 28 U.S.C. § 2244(b)(3)(D).

125. *Tyler v. Cain*, 533 U.S. 656, 656 (2001).

126. See *id.* at 662 (holding “that ‘made’ means ‘held’”).

applicable to cases on collateral review.”<sup>127</sup> In addition to analyzing the statute’s wording, the *Tyler* majority relied on the timing of the § 2244(b) mechanism, holding that the Court’s chosen “interpretation is necessary for the proper implementation of the collateral review structure created by AEDPA”:<sup>128</sup>

The court of appeals must make a decision on the application within 30 days. In this limited time, the court of appeals must determine whether the application “makes a prima facie showing that [it] satisfies the [second habeas standard].” It is unlikely that a court of appeals could make such a determination in the allotted time if it had to do more than simply rely on Supreme Court holdings on retroactivity. The stringent time limit thus suggests that the courts of appeals do not have to engage in the difficult legal analysis that can be required to determine questions of retroactivity in the first instance.<sup>129</sup>

The imposition of short deadlines for court action also affects the *parties’* litigation timetable, and it can thus alter the dynamics among the litigants. For example, Margo Schlanger has argued that the PLRA’s automatic stay provision “accelerates the termination litigation in a way that sharply disadvantages plaintiffs” by requiring the plaintiff who is defending the injunction to assemble potentially complex proof of the continuing need for the injunction within a very short period of time.<sup>130</sup>

Because deadlines on court action can have significant effects on the court, the parties, and the development and application of the law, it is important that the assessment of such deadlines be informed by an accurate sense of litigation realities. A recent study of post-AEDPA habeas practice in federal district courts, for instance, finds that both noncapital and capital cases take longer post-AEDPA than pre-AEDPA. This study concludes that “[g]iven how long capital habeas cases presently take to resolve, the statutory 450-day time limit for resolving capital habeas cases from states that may qualify for expedited review under AEDPA will pose a challenge for courts.”<sup>131</sup> In the districts examined by that study, “the *average* processing time for capital cases is well over two and a half times that long,” and none of

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127. *Id.* at 662.

128. *Id.* at 664.

129. *Id.* (quoting 28 U.S.C. § 2244(b)(3)(C)).

130. Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 591–92 (2006).

131. NANCY J. KING ET AL., NAT’L CTR. FOR STATE CTS. FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 60 (2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>.

the thirteen districts studied “completed its capital habeas cases in less than 500 days on average, even excluding stayed time.”<sup>132</sup>

### III. COURTS, PARTIES, AND LAWYERS

The preceding Part noted that the creation and treatment of deadlines can reveal both how legislatures think about the courts and how judges approach statutory deadlines.<sup>133</sup> This Part examines the ways in which the interpretation and application of deadlines can illuminate judges’ views of the roles of both litigants and lawyers.<sup>134</sup> The topics are related; as noted in Part II.A, a litigant’s noncompliance with a deadline may sometimes have fatal consequences precisely because the deadline in question is set by statute and is for that reason regarded as jurisdictional.<sup>135</sup> This Part, however, will consider the broader question of deadlines in general. Section A notes the uncontroversial point that deadlines serve basic systemic needs; without deadlines, no system of litigation could function.<sup>136</sup> Here, the classic debate over rules and standards comes into play: a rational system will often have rule-like time limits, but on occasion there is a value to softening those rules through the application of a standard that permits tardiness to be forgiven. These standards for forgiveness are discussed in Section B.<sup>137</sup>

#### A. Systemic Concerns

Deadlines serve key functions before, during, and after litigation. Prior to litigation, a statute of limitations can spur the plaintiff to bring suit at a time when relevant evidence still exists, witnesses’ memories are still fresh, and the defendant has not yet relied on the absence of suit. After litigation commences, deadlines can keep the case moving by setting the timeline for initial pleadings and motions, discovery, dispositive pretrial motions, and the like. Once a case reaches judgment, values of finality are served by the relatively tight deadlines for making most postjudgment motions and for taking appeals.

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132. *Id.*

133. See *supra* text accompanying notes 22–132.

134. See *infra* text accompanying notes 138–189.

135. See *supra* text accompanying note 30.

136. See *infra* text accompanying notes 138–147.

137. See *infra* text accompanying notes 148–189.

At each stage, deadlines might be softened to account for competing concerns. Statutes of limitations might be tolled.<sup>138</sup> The court might extend the deadlines for various steps in the pretrial process.<sup>139</sup> Timely filing of certain postjudgment motions tolls the time to take an appeal.<sup>140</sup> The time to appeal can be extended for limited periods or, under certain circumstances, reopened.<sup>141</sup> Even after that time, the trial court can be asked to grant relief from the judgment.<sup>142</sup>

But all such extensions are subject to limits, and in some instances, the values served by a deadline are seen to be so important that extensions are permitted only under special provisions—as is true for appeal time<sup>143</sup>—or not at all—as is true for postjudgment motions.<sup>144</sup> It should be noted that the more rule-like a time limit is, the more important it becomes to select a realistic time frame. Postjudgment motion deadlines are illustrative. The ten-day deadline previously set by the Civil Rules—effectively fourteen days in most cases because intermediate weekends and holidays were omitted from the calculation<sup>145</sup>—was widely thought to be too short for proper briefing of a postjudgment motion in a complex case.<sup>146</sup> On at least some occasions, a sympathetic district judge, aware that extensions of the deadline were impermissible, delayed the entry of judgment so as to delay the period for postjudgment motions. If one is to have a non-extendable deadline for postjudgment motions, the better choice is to select a deadline that will be regarded as realistic. Happily, among the amendments to the Civil Rules that took effect on December 1, 2009

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138. *See, e.g.*, *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (discussing examples of equitable tolling).

139. *See, e.g.*, FED. R. CIV. P. 6(b) (authorizing courts to extend many civil litigation deadlines).

140. *See* FED. R. APP. P. 4(a)(4)(A) (providing that certain motions toll the time for taking civil appeals); FED. R. APP. P. 4(b)(3)(A) (providing that certain motions toll the time for taking criminal appeals).

141. *See* FED. R. APP. P. 4(a)(5) (providing for extension of the time to take a civil appeal); 28 U.S.C. § 2107(c) (same); FED. R. APP. P. 4(a)(6) (providing for reopening of the time to take a civil appeal); 28 U.S.C. § 2107(c) (same); FED. R. APP. P. 4(b)(4) (providing for extension of the time to take a criminal appeal).

142. *See* FED. R. CIV. P. 60(b) (providing grounds for relief from a civil judgment).

143. *See* FED. R. APP. P. 4(a)(5) (providing for extension of the time to take a civil appeal); 28 U.S.C. § 2107(c) (same); FED. R. APP. P. 4(b)(4) (providing for extension of the time to take a criminal appeal).

144. *See* FED. R. CIV. P. 6(b)(2) (“A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).”).

145. *See* FED. R. CIV. P. 6 (2009 Committee Note) (discussing the version of Civil Rule 6(a) that was in effect prior to December 1, 2009).

146. *See, e.g.*, FED. R. CIV. P. 50 (2009 Committee Note) (“Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays.”).

are amendments that changed the postjudgment motion deadlines in Civil Rules 50, 52, and 59 from ten to twenty-eight days.<sup>147</sup>

For many other deadlines, though, there is more play in the joints. As discussed in the next Section, these deadlines can often be extended upon a showing of good cause or excusable neglect.

### B. Views of Lawyering

Although the details vary depending on the specific deadline, many federal litigation deadlines can be extended if the litigant shows a good enough reason. The standard for an extension ordinarily centers on one or both of the terms “good cause” and “excusable neglect.” In applying the relevant standard, courts sometimes reveal assumptions about the role of a lawyer and how a lawyer should act.

Civil Rule 6(b),<sup>148</sup> Criminal Rule 45(b),<sup>149</sup> Bankruptcy Rule 9006(b),<sup>150</sup> and Appellate Rule 26(b)<sup>151</sup> address such extensions. These provisions have general application, but as noted above,<sup>152</sup> they exclude particular deadlines from their scope.<sup>153</sup> Among the deadlines to which Appellate Rule 26(b) does not extend are those for

147. See FED. R. CIV. P. 50(b), (d); 52(b); 59(b), (d)–(e).

148. The Civil Rules provide that

[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time: (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or (B) on motion made after the time has expired if the party failed to act because of excusable neglect.

FED. R. CIV. P. 6(b)(1).

149. The Criminal Rules provide that

[w]hen an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made: (A) before the originally prescribed or previously extended time expires; or (B) after the time expires if the party failed to act because of excusable neglect.

FED. R. CRIM. P. 45(b)(1).

150. The Bankruptcy Rules provide that

[e]xcept as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

FED. R. BANKR. P. 9006(b)(1).

151. “For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires.” FED. R. APP. P. 26(b).

152. See *supra* text accompanying notes 143–144.

153. See FED. R. CIV. P. 6(b)(2) (“A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b) . . . .”); FED. R. CRIM. P. 45(b)(2) (“The court may not extend the time to take any action under Rule 35, except as stated in that rule.”); FED. R.

taking an appeal; extensions of such deadlines are addressed separately, by Appellate Rule 4 (and sometimes by statute).<sup>154</sup>

Under all of these Rules, including the appeal-time extension provisions in Appellate Rule 4, the court's analysis is likely to follow the path marked by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*.<sup>155</sup> *Pioneer Investment* concerned a lawyer's failure to timely file a proof of claim in a bankruptcy proceeding, and it thus involved the interpretation of Bankruptcy Rule 9006(b)'s "excusable neglect" standard,<sup>156</sup> but the lower federal courts have also applied the *Pioneer Investment* approach to the extension provisions in the Civil and Appellate Rules.<sup>157</sup>

Under *Pioneer Investment*, the availability of an extension "is not limited to situations where the failure to timely file is due to circumstances beyond the control of the filer";<sup>158</sup> some "inadvertent or negligent omission[s]" can qualify as well.<sup>159</sup>

**BANKR. P. 9006(b)(2)** ("The court may not enlarge the time for taking action under Rules 1007(d), 2003(a) and (d), 7052, 9023, and 9024."). The Bankruptcy Rules provide that [t]he court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 4008(a), 8002, and 9033, only to the extent and under the conditions stated in those rules. In addition, the court may enlarge the time to file the statement required under Rule 1007(b)(7), and to file schedules and statements in a small business case under § 1116(3) of the Code, only to the extent and under the conditions stated in Rule 1007(c).

**FED. R. BANKR. P. 9006(b)(3)** (Supp. 2009). Similarly, the Appellate Rules provide that the court may not extend the time to file: (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

**FED. R. APP. P. 26(b)**.

154. Extensions of the civil appeals period are governed by Appellate Rule 4(a)(5) and 28 U.S.C. § 2107(c). These provisions permit an extension (through the later of "30 days after the prescribed time or 10 days after the date" of entry of the order granting the motion) if, inter alia,

- (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

**FED. R. APP. P. 4(a)(5)**. Extensions of appeal time in criminal cases are governed by Appellate Rule 4(b)(4). As to both civil and criminal appeals, authority to grant or deny extensions is entrusted to the district court. See **FED. R. APP. P. 4(a)(5)** (civil appeals); 28 U.S.C. § 2107(c) (same); **FED. R. APP. P. 4(b)(4)** (criminal appeals).

155. 507 U.S. 380 (1993).

156. See *id.* at 382–83.

157. See, e.g., *Pincay v. Andrews*, 389 F.3d 853, 860 (9th Cir. 2004) (applying *Pioneer Investment* to the interpretation of Appellate Rule 4(a)(5)); *Yesudian ex rel. United States v. Howard Univ.*, 270 F.3d 969, 971 (D.C. Cir. 2001) (applying *Pioneer Investment* to the interpretation of Civil Rule 6(b)).

158. *Pioneer Investment*, 507 U.S. at 391.

159. *Id.* at 394–95.

[T]he determination is at bottom an equitable one, taking account of all relevant circumstances . . . includ[ing] the danger of prejudice to the [other litigants], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.<sup>160</sup>

The *Pioneer Investment* Court stressed that its decision did not undermine the enforcement of litigation deadlines.<sup>161</sup> Even though some instances of attorney negligence might qualify for an extension, it is always necessary to convince the court that the neglect is “excusable.” “It is this requirement,” the Court stated, “that we believe will deter creditors or other parties from freely ignoring court-ordered deadlines in the hopes of winning a permissive reprieve.”<sup>162</sup> Clients, moreover, cannot avoid the effects of their lawyers’ failings simply by arguing that they themselves were blameless. Lawyers act as agents for their clients, and “clients must be held accountable for the acts and omissions of their attorneys.”<sup>163</sup>

At least under the circumstances of the *Pioneer Investment* case itself, the lawyer’s personal circumstances did not weigh heavily with the Court: the majority explicitly discounted “the fact that counsel was experiencing upheaval in his law practice at the time of the bar date.”<sup>164</sup> It is possible, however, that this conclusion rested on the Court’s evaluation of the particular circumstances of the case. The lawyer in *Pioneer Investment* had evidently been retained to represent the relevant creditors roughly a month and a half before he withdrew from his law firm,<sup>165</sup> so the Court might have reasoned that the withdrawal failed to provide a sufficiently strong excuse for the lawyer’s failure to ascertain and comply with the bar date. In cases in which a lawyer’s personal difficulties were more stark, courts have sometimes been willing to recognize excusable neglect. The sudden, dire illness of a solo practitioner, for example, has supported such a finding.<sup>166</sup>

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160. *Id.* at 395.

161. *Id.*

162. *Id.*

163. *Id.* at 396. Of course, an exception to this principle exists in the criminal context when defense counsel’s performance is so deficient as to constitute ineffective assistance. See 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.9, at 489 (4th ed. 2008) (“[A]ttorney failures that result in an untimely appeal and that meet the test for constitutionally ineffective assistance of counsel are . . . grounds for relief even when the issue is raised after the running of Rule 4(b)(4)’s permissible extension period.”).

164. *Pioneer Investment*, 507 U.S. at 398.

165. See *id.* at 384.

166. See, e.g., *Active Glass Corp. v. Architectural & Ornamental Iron Workers Local Union 580*, 899 F. Supp. 1228, 1229, 1232 (S.D.N.Y. 1995) (granting an extension of time to file a civil

In *Pioneer Investment*, one factor that appeared to sway the majority was that the bar date was announced in a way that the Court believed would cause reasonable practitioners to overlook it: “[T]he notice of the bar date provided by the Bankruptcy Court in this case was outside the ordinary course in bankruptcy cases . . . . [O]rdinarily the bar date in a bankruptcy case should be prominently announced and accompanied by an explanation of its significance.”<sup>167</sup> Similarly, in some cases, courts have been willing to excuse tardiness when the failure to meet the deadline resulted from reliance on misinformation provided by the court itself.<sup>168</sup> It should be noted that—as discussed above<sup>169</sup>—some deadlines are jurisdictional, and failure to meet a jurisdictional deadline cannot be excused on the basis of the *judicially created* “unique circumstances” doctrine (a doctrine that sometimes has excused reliance on misinformation from the court).<sup>170</sup> However, reliance on misguidance from the court can nonetheless ground a finding of “excusable neglect” under the subdivisions of Appellate Rule 4 that permit the district court to provide a limited extension of the appeal deadline, even if that appeal deadline is jurisdictional.<sup>171</sup>

Courts vary in their willingness to excuse a litigant for relying on misinformation from the court, particularly when the misinformation concerns a point of law that strikes the judge as obvious. A notable case in point concerns the deadlines for tolling motions under the Civil Rules.<sup>172</sup> Although it is well established that the district court has no power to extend those deadlines,<sup>173</sup> both litigants and judges sometimes overlook this fact. Thus, it is possible that a court might find excusable neglect when a party, relying on a district court’s purported extension of a tolling motion deadline, failed to timely file a

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appeal when a solo practitioner was hospitalized with cancer, undergoing chemotherapy, and unable to communicate by phone).

167. *Pioneer Investment*, 507 U.S. at 398.

168. See, for example, *Mennen Co. v. Gillette Co.*, 719 F.2d 568, 571 (2d Cir. 1983), stating that

[t]he record does not appear to us to support an inference of procrastination, ineptitude or dilatoriness on Mennen’s part. Rather, it reflects good faith error by a party who was deceived by a chain of unfortunate events upon which it was entitled to, and did, rely. Accordingly, we find that the trial court abused its discretion in deciding that Mennen had failed to make a showing of excusable neglect so as to extend the time to serve and file its notice of appeal.

169. See *supra* Part I.A.

170. See *supra* note 30 and accompanying text.

171. See WRIGHT ET AL., *supra* note 162, § 3950.3, at 295–96 (discussing extensions of the time to take a civil appeal).

172. See FED. R. CIV. P. 50(b), (d); 52(b); 59(b), (d)–(e).

173. See FED. R. CIV. P. 6(b)(2).

notice of appeal.<sup>174</sup> Such a result is not, however, guaranteed; the scorn with which some courts have viewed a litigant's failure to recognize the nonextendable nature of the tolling motion deadlines suggests that a refusal to grant an appeal-time extension on that basis might well be affirmed. *Prizevoits v. Indiana Bell Telephone Co.* provides an example.<sup>175</sup> In *Prizevoits*, the panel majority dismissed the appeal on the ground that the district judge abused her discretion in extending the time to appeal.<sup>176</sup> The core fact, for the majority, was how obvious it is that tolling motion deadlines are nonextendable:

Rule 6(b) makes plain . . . that the 10-day limit on filing a Rule 59(e) motion cannot be extended . . . . The federal rules are complex—a minefield for lawyers not experienced in federal practice—but *Prizevoits*' principal lawyer is a highly experienced federal litigator. He must know about Rule 6(b). An unaccountable lapse is not excusable neglect.<sup>177</sup>

As *Prizevoits* demonstrates, some courts are unwilling to excuse noncompliance with the federal rules even if the rules in question are counterintuitive. A good example is provided by the treatment of Appellate Rule 4(a)(4) during the period from 1979 to 1993, when it provided that the filing of a postjudgment motion permanently nullified any prior notice of appeal.<sup>178</sup> This feature of Rule 4(a)(4) was so counterintuitive—and so widely problematic—that the rulemakers termed it a “trap for an unsuspecting litigant” and eliminated it.<sup>179</sup> But prior to that amendment some courts refused to extend the appeal time when a litigant failed to realize that the postjudgment motion had nullified the prior notice of appeal.<sup>180</sup> On the other hand, courts occasionally excuse a failure that results from a mistake of law. It seems that this is most likely to occur if the litigant can convince the

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174. See, e.g., *Varhol v. Nat'l R.R. Passenger Corp.*, 909 F.2d 1557, 1563 (7th Cir. 1990) (en banc) (somewhat grudgingly holding the appeal timely where “[t]he trial judge found that Varhol's failure to file a timely notice of appeal resulted from his reliance on the extension of time to file the new trial motion and the consideration of that motion on the merits”).

175. *Prizevoits v. Ind. Bell Tel. Co.*, 76 F.3d 132 (7th Cir. 1996).

176. See *id.* at 135.

177. *Id.* at 133.

178. See WRIGHT ET AL., *supra* note 162, § 3950.4, at 322–24 (discussing the version of Appellate Rule 4(a)(4) that existed from 1979 to 1993).

179. FED. R. APP. P. 4(a)(4) (1993 Committee Note).

180. See *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir. 1994) (“[T]he elimination of Rule 4(a)(4)'s ‘trap’ has come too late for Weinstock, and we are satisfied that the District Court Judge did not exceed her discretion by not excusing Weinstock when he fell into the trap.”).

court that any reasonable lawyer—or the judge herself—might commit a similar error.<sup>181</sup>

In this regard, it may be interesting to observe how courts treat mistakes that occur as a result of the transition to electronic filing. Caselaw on this issue seems most likely to develop when district courts permit the notice of appeal to be filed electronically and practitioners who are unfamiliar with electronic filing encounter difficulties. The federal courts' Case Management/Electronic Case Filing (CM/ECF) system is now in use in all ninety-four federal district courts, and the courts of appeals are in the process of making the transition to CM/ECF.<sup>182</sup> Some, though not all, district courts permit litigants to file the notice of appeal electronically.<sup>183</sup>

A recent case involving electronic filing in the Court of International Trade (CIT) illustrates the types of errors that might occur when lawyers are not familiar with the electronic system. In that case, an attorney waited until the last day of the appeal period before attempting to use the CIT's electronic filing website to file a notice of appeal.<sup>184</sup> He entered the requisite information and proffered payment, but because he logged off before reaching the final confirmation, the system did not record the filing.<sup>185</sup> He realized the mistake the next day and reentered the filing, which was then duly recorded.<sup>186</sup> The Federal Circuit, remanding for the lower court to determine whether to extend the appeal time, opined that these facts constituted "a strong showing of excusable neglect."<sup>187</sup> The CIT, on remand, granted the extension.<sup>188</sup> It seems likely that the courts in this case were swayed not only by the traps that electronic filing can pose for new users, but also by the lawyer's diligence in double-checking the following day whether the initial filing had worked. For lawyers, then, cases such as this one illustrate both the perils of electronic filing and

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181. See, e.g., *Lorenzen v. Employees Ret. Plan of the Sperry & Hutchinson Co., Inc.*, 896 F.2d 228, 233 (7th Cir. 1990) (weighing, inter alia, the fact that "the error was a natural one").

182. See About CM/ECF, [http://www.uscourts.gov/cmecf/cmecf\\_about.html](http://www.uscourts.gov/cmecf/cmecf_about.html) (last visited Jan. 19, 2010).

183. Compare, e.g., U.S. Dist. Ct. Rules E.D. Cal., CM/ECF Procedures § C.17 ("A Notice of Appeal should be filed electronically."), with U.S. Dist. Ct. Rules N.D. Cal., General Order 45, pt. XI ("Until such time as the United States Courts of Appeals for the Ninth Circuit and the Federal Circuit institute rules and procedures to accommodate Electronic Case Filing, notices of appeal to those courts shall be filed, and fees paid, in the traditional manner on paper rather than electronically.").

184. See *Gilda Indus., Inc. v. United States*, 511 F.3d 1348, 1350 (Fed. Cir. 2008).

185. See *id.*

186. See *id.*

187. *Id.* at 1352.

188. See *Gilda Industries, Inc. v. United States*, 300 F. App'x 912, 914, 2008 WL 5000238, at \*1 (Fed. Cir. 2008) (unpublished opinion) (noting the CIT's finding of excusable neglect).

the need for diligence in double-checking one's compliance with key deadlines.

These examples demonstrate that a judge's perspective on extension requests may well be shaped by the judge's views concerning the capacities of lawyers. Just as legislators' imposition of deadlines on court action should be informed by realistic perspectives concerning the tasks of judging,<sup>189</sup> so too should judges' decisions concerning whether to enforce a deadline be informed by a realistic sense of what can and should be expected of lawyers.

#### IV. LAWYERS' INTERACTIONS

Finally, litigation deadlines provide a context within which to observe the way that lawyers relate to each other, both within and among firms, and both as adversaries and allies.

On the subject of the interaction among lawyers within a firm, one might for example consider the role of junior lawyers. Amendments to the national time computation rules took effect on December 1, 2009. One innovation in the amendments is a default rule that, for filings made electronically, the last day of a period ends at midnight rather than at the closing of the clerk's office.<sup>190</sup> This change may be welcomed by litigators who thereby gain a few extra hours in a given case; and the option of electronic filing can reduce cost and inconvenience. However, one predictable effect of this change is that, in many instances, the lawyers' work will extend right up to the hour of the filing deadline—and, at least in large law firms, the brunt of those late nights may fall on the more junior lawyers on the team.

On the subject of interaction among lawyers representing different parties, one obvious point is that many litigation deadlines can be and often are extended by agreement of the parties. Lawyers' willingness to agree to such extensions might provide one measure of the level of professional courtesy within a given legal market. On the other hand, mutual willingness to agree to extensions might sometimes pose systemic problems even if it benefits lawyers. This would be true, for example, if the waiver of certain deadlines led to inordinate delays.<sup>191</sup> Such systemic concerns may explain why certain deadlines—such as

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189. See *supra* text accompanying notes 131–132.

190. See, e.g., FED. R. CIV. P. 6(a)(4).

191. See, e.g., FED. R. CIV. P. 29(b) (“[A] stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.”).

those for postjudgment motions—are simply not extendable, even if all parties and the court prefer an extension.<sup>192</sup>

On the other end of the spectrum, lawyers' qualms about uncooperative opponents surface when they discuss other aspects of litigation deadlines. The "three-day rule" provides an example. Versions of this rule exist in the Civil, Criminal, Bankruptcy, and Appellate Rules.<sup>193</sup> Under the three-day rule, when a litigation deadline is measured from the service of papers on a litigant, three days are added to the end of the period if the papers are served using certain specified means, which include mail or electronic service. The three-day rule originated in a time (before electronic service) when it was thought fair to add the extra time in order to offset the time taken in the mail. Now that electronic service is becoming the norm, a number of commentators have called for the revision or elimination of the three-day rule.<sup>194</sup> But some practitioners defend the rule, particularly on the ground that if it were eliminated, lawyers could disadvantage their opponent by, for example, serving papers electronically late on the evening before a holiday weekend.<sup>195</sup>

Another example of the link between timing and lawyers' interactions can be found in Appellate Rule 29, which requires an amicus to file its brief seven days after the filing of the brief of the party the amicus supports.<sup>196</sup> The idea behind the staggered timing is that the amicus should review the party's brief so as to avoid duplicative arguments.<sup>197</sup> The provision of the seven-day time lag reflects the notion that the amicus is an unbiased participant who is distanced from the parties; in other words, the time lag rationale assumes that the amicus will not have had the opportunity to review an advance copy of the party's brief before it is filed. In practice, amici and the parties whose positions they support often share drafts of their respective briefs.

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192. See FED. R. CIV. P. 6(b)(2).

193. See FED. R. CIV. P. 6(d); FED. R. CRIM. P. 45(c); FED. R. BANKR. P. 9006(f); FED. R. APP. P. 26(c).

194. See Minutes of the Judicial Conference Committee on Rules of Practice and Procedure, June 9–10, 2008, at 5.

195. Such timing problems can occur even under the current system. Professor Schlanger, for example, has recounted her experience with motions under the PLRA's termination provision:

When I was a lawyer for the Department of Justice . . . I recall that one state filed a dozen such motions—one in each of its corrections cases—on July 3, and served them by mail. The lead lawyer on the case in which I was involved did not open the motion until after a long weekend and several days vacation, about a week later. On a thirty-day timeline, that lost week was very precious.

Schlanger, *supra* note 130, at 591 n.129.

196. See FED. R. APP. P. 29(e).

197. See *id.* (1998 Committee Note).

## V. CONCLUSION

This brief and incomplete survey has not attempted to offer a unified theory of litigation deadlines. Rather, the goal of this Article is to suggest that the treatment of deadlines is embedded in a network of assumptions—by various actors in the system—about their own and others' roles. Litigation deadlines are neither selected nor enforced in a vacuum. The choice of a particular deadline may serve various goals, such as protecting litigants, ensuring prompt case processing, or safeguarding the finality of judgments. The interpretation and application of a deadline, statutory or otherwise, should take into account its purposes. Judgments by legislators and courts concerning the timing of litigation can reveal underlying views about the nature of judging and lawyering. The more realistic those underlying views, the better for the system.