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JURISDICTIONALITY AND *BOWLES V. RUSSELL*

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On June 14, 2007, the Supreme Court decided *Bowles v. Russell*,[1] a case watched primarily by procedure geeks but one which may have enormous impact for courts and litigators. It addressed a ubiquitous but confusing question of jurisdictional characterization: when is a limitation "jurisdictional," and when is it not? Litigators encounter these questions all the time in statutory coverage issues, in time limitations, and in a host of other preconditions. Whether a particular limitation is jurisdictional or not can be an important question, for jurisdictional limitations are not subject to waiver or equitable exceptions, may be raised at any time, and obligate courts to monitor and raise them *sua sponte*. In *Bowles*, the Court held that the statutory time limitation for filing a notice of appeal is jurisdictional.

I. A BRIEF SUMMARY OF *BOWLES*

Keith Bowles was convicted of murder in Ohio and unsuccessfully appealed through the state court system. He filed a federal habeas corpus petition, which was denied by the district court on September 9, 2003. He did not appeal within the required 30 day period, but in December timely moved to reopen the period during which he could file his notice of appeal. His motion was granted by the district court on February 10, 2004.[2]

In its order, the district court gave Bowles seventeed days—until February 27—to file his notice of appeal. Bowles filed on February 26.[3] The problem is that while 28 U.S.C. § 2107(c) authorizes a district court to reopen and extend the time to appeal, it limits that extension period to fourteen days. Thus, Bowles's notice of appeal was timely under the district court's order but untimely under § 2107(c).

The Sixth Circuit dismissed the appeal for lack of jurisdiction.[4] The Supreme Court, in a brief 5-4 majority opinion by Justice Thomas, affirmed.

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[1] 127 S. Ct. 2360 (2007) (link).

[2] *Id.* at 2362.

[3] *Id.*

[4] Bowles v. Russell, 432 F.3d 668 (6th Cir. 2005).

Justice Thomas began by asserting: "This Court has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'"[5] That has been so particularly for statutory time limits because Congress has the constitutional authority to regulate the courts' jurisdiction. In § 2107, Congress "specifically limited the amount of time by which district courts can extend the notice-of-appeal period."[6] Accordingly, for Justice Thomas, that meant that the time period of § 2107(c) is jurisdictional and not susceptible to the equitable exception sought by Bowles.

Justice Thomas also reasoned that a jurisdictional characterization "makes good sense." He wrote: "If rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits."

In dissent, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, decried the unfair result of precluding Bowles's appeal when he filed within the time allowed by the district judge: "It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch."[7] In addition, Justice Souter noted that recent opinions of the Court have stepped back from strict adherence to jurisdictional characterizations and have called into question the precedent that Justice Thomas relied upon. Under that trend, he argued, the limitation in § 2107(c) should not be viewed as jurisdictional. Accordingly, he would find an equitable exception available to Bowles.

II. WHERE *BOWLES* GOES WRONG

At a first glance of Justice Thomas's opinion for the Court, the issues seem relatively straightforward and the result reasonable. But, as Justice Souter points out in dissent, there is far more at stake than just the jurisdictionality of § 2107(c). By eliding the complexity and far reach of jurisdictional characterization issues, *Bowles* creates tension with precedent and increases the risk of wasted litigant and judicial resources.

A. *Doctrinal Inconsistency and Uncertainty*

Justice Souter was correct to note that prior to *Bowles*, recent decisions had identified rampant misuse of the term "jurisdictional," and that the Court had tried to curtail that misuse by providing clearer guidelines as to when a limit was jurisdictional or not.[8]

[5] *Id.* at 2363.

[6] *Id.* at 2366.

[7] *Id.* at 2367 (Souter, J., dissenting).

[8] *See., e.g.*, Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 127 S. Ct. 1184 (2007) (link) (admitting that phrases from precedent using the term "jurisdiction" were "less than 'felicitously' crafted"); Arbaugh v. Y&H Corp., 126 S. Ct. 1235, 1242 (2006) (link) (confessing that the Court had "sometimes been profligate in its use of the term [jurisdictional]"); Eberhart v. U.S., 126 S. Ct. 403, 407 (2005) (link) (per curiam) (noting that the lower court's improper characterization of a federal rule as jurisdic-

The first guideline concerned whether the limit was phrased in jurisdictional terms. If so, the presumption was that the limit was jurisdictional. If not, then the presumption was that the limit was not.[9]

The next guideline entailed looking at the limit and classifying it either as a "claim-processing rule," which generally was not jurisdictional, or a line that separates "classes of cases," which generally was.[10] For example, the Court had characterized as nonjurisdictional "claim-processing rules" both Bankruptcy Rule 4004, which gives a Chapter 7 creditor sixty days after the first date set for the meeting of creditors to file a complaint objecting to the debtor's discharge,[11] and Federal Rule of Criminal Procedure 33(b)(2), which sets a time deadline to file a motion for a new trial.[12] The Court contrasted these nonjurisdictional limits with "prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority."[13]

Bowles sweeps these decisions aside as distinguishable and dismisses the framework that they erected as mere dicta. But Justice Thomas does not explain why the framework would not be valuable for § 2107. Instead, Justice Thomas distinguishes those cases on the ground that they dealt with federal rules as opposed to statutes. He is right that they are distinguishable, but he is wrong to use that distinction as a reason to discard the helpful guidance provided by those cases. Those cases developed the guidance to apply broadly and to signal a willingness to revisit, in a principled way, prior decisions' loose use of the term "jurisdictional" to describe certain limits.[14] Instead of explaining why the guidance was not appropriate in this case, however, Justice Thomas simply refused to apply it and relied instead on the very same prior decisions that had used the term "jurisdictional" loosely. Justice Souter is right: "By its refusal to come to grips with our considered statements of law the majority leaves the Court incoherent."[15]

At the same time, Justice Thomas failed to adopt any substitute guidance other than the fact that the limit was expressed in a statute. I agree that rules adopted under the Rules Enabling Act are different than statutes in

tional "is an error shared among the circuits, and that is was caused in large part by imprecision in our prior cases"); Kontrick v. Ryan, 540 U.S. 443, 454 (2004) (link) ("Courts, including this Court, it is true, have been less than meticulous . . . ; they have more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court.").

[9] *Arbaugh*, 126 S. Ct. at 1245.

[10] *Eberhart*, 126 S. Ct. at 405–06; *Kontrick*, 540 U.S. at 455.

[11] *See Kontrick*, 540 U.S. 443.

[12] *See Eberhart*, 126 S. Ct. 403. In another case, the Court had characterized the Equal Access to Justice Act's time limit for an applicant to seek attorney's fees against the U.S. government as a nonjurisdictional restriction on a "mode of relief." Scarborough v. Principi, 541 U.S. 401, 405 (2004) (link).

[13] *Kontrick*, 540 U.S. at 455.

[14] *See supra* note 8 and accompanying text.

[15] Bowles v. Russell, 127 S. Ct. 2360, 2370 (2007) (Souter, J., dissenting).

"jurisdictionally significant"[16] ways because Congress can restrict judicial jurisdiction by statute.[17] But just because Congress *can* does not mean that it does so in all cases. Not all statutory limits are jurisdictional limits.[18] Justice Thomas does not say what it is about § 2107 that makes it jurisdictional and what it is about, say, Title VII's time limit for filing a complaint that makes it nonjurisdictional.[19] After *Bowles*, lower courts will be left to wonder how to determine the jurisdictionality of other statutory limits.

The removal statute, for example, may be a limit with which the courts soon wrestle. Every single circuit court to rule on the characterization of the § 1446 requirement—that a notice of removal be filed within 30 days after service—has held it to be nonjurisdictional.[20] Likewise, every circuit to publish an opinion on the characterization of the § 1446 requirement that a notice of removal based on diversity be filed within one year has held it to be nonjurisdictional.[21] After *Bowles*, courts adopting a nonjurisdictional characterization of § 1446 will have to reconsider that characterization (though, as I suggest elsewhere,[22] *Bowles* need not be considered a controlling case if put in its proper place within a broader framework). Removal is just one area that is certain to become more confused after *Bowles*. [23]

B. Increased Risk of Wasted Resources

Bowles reverses a presumption of nonjurisdictionality imposed in prior cases, to the detriment of litigants and the courts. Previously, only Congress's explicit designation of a statutory limit as jurisdictional raised a presumption of jurisdictionality,[24] and for good reason: as a matter of separation of powers, the courts must defer to Congress's delineations of jurisdiction, for Congress wields the constitutional power to monitor jurisdiction.

The converse presumption also makes sense. If Congress has not designed a statutory limit as jurisdictional, then it should be presumed to be

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[16] *Id.* at 2364.

[17] *See* Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. (forthcoming 2008) (manuscript on file with *Colloquy*).

[18] *See* Posting of Scott Dodson to Civil Procedure Prof Blog, *http://lawprofessors.typepad.com/civpro/2007/07/a-sleeper-case-.html* (July 9, 2007) (link).

[19] *See* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982) (link).

[20] *See, e.g.*, Barnes v. Westinghouse Elec. Corp., 962 F.2d 513, 516 (5th Cir. 1992) (link); Wilson v. GM Corp., 888 F.2d 779, 781 (11th Cir. 1989).

[21] *See* 16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 107.41 (3d ed. 2006); *cf.* Caterpillar, Inc. v. Lewis, 519 U.S. 61 n.13 (1996) (referring to the one-year limit in dictum as "a nonjurisdictional argument").

[22] *See* Dodson, *supra* note 17.

[23] Another is federal statutes of limitations, which the Court will address this coming Term when it hears *John R. Sand & Gravel Co. v. United States*. 127 S. Ct. 2877 (2007) (link) (granting certiorari to consider whether the six-year statute of limitations in the Tucker Act is a jurisdictional limit).

[24] *See* Arbaugh v. Y&H Corp., 126 S. Ct. 1235, 1245 (2006).

nonjurisdictional because a jurisdictional rule often entails heavy costs on the litigants and legal system.[25] Jurisdiction can be raised at any time and obligates courts to monitor it *sua sponte*. Thus, a jurisdictional defect discovered well into trial causes disruption, unfairness, and tremendous waste of time and resources. Withholding a jurisdictional characterization without a specific designation of jurisdiction by Congress ensures that Congress has duly considered these costs and deemed them outweighed by the need for the benefits of a jurisdictional bar.[26]

Bowles dispenses with these presumptions and reverses them: statutory time limits are presumed jurisdictional unless Congress says otherwise. That is just bad business, for at least two reasons.

First, litigants conserve their own (and judicial) resources by contesting only those issues that at least one litigant deems important enough to warrant litigation. By making a host of statutory limitations jurisdictional, *Bowles* obligates the courts to investigate all of these issues *sua sponte* even if none of the litigants wish to expend effort and money on their adjudication. And if such a limit is found to have been breached, the court must dismiss the case, even if the defect is found after years of costly discovery and trial preparation.

Second, the rule allows a single party that recognizes a potential jurisdictional defect to have two bites at the apple: if she fails on the merits, she can raise the jurisdictional defect. This is a real concern. In *Arbaugh v. Y&H Corp.*, for example, the defendant lost at trial and only on appeal raised the "jurisdictional" argument that it was never covered by the statute in the first place.[27] And if the statutory precondition is jurisdictional, the party *who failed to satisfy it* is just as able to raise it on appeal to vacate an unfavorable result. In other words, the plaintiff in *Arbaugh* could have raised the "jurisdictional" issue as well if she had been dissatisfied with her verdict and wanted another shot. *Bowles*, by crafting a presumption that favors a jurisdictional characterization, is likely to result in a great waste of litigant and court resources and to encourage losing parties to raise "jurisdictional" issues for the first time on appeal.

III. A BETTER WAY: MANDATORY BUT NONJURISDICTIONAL

To avoid this tension with precedent, waste of litigant and judicial resources, and unfairness, the Court should have considered characterizing the time limit of § 2107(c) as mandatory but nonjurisdictional. That characterization would have enabled the Court to reach the same result without doing violence to the nature of jurisdiction or to precedent.

A mandatory rule restricts the discretion of the court to deviate from

[25] *See id.*
[26] *Id.*
[27] *Id.* at 1238.

the rule when one party timely objects, but that does not mean that it is jurisdictional. As the Court long ago recognized, nonjurisdictional but mandatory legal rules have a functional role to play:

> The provision is not directory only, but mandatory to the government; and its purpose is to inform the defendant of the testimony which he will have to meet, and to enable him to prepare his defense. Being enacted for his benefit, he may doubtless waive it, if he pleases; but he has a right to insist upon it, and if he seasonably does so, the trial cannot lawfully proceed until the requirement has been complied with.[28]

Thus, a mandatory limit places control of its enforcement in the hands of the litigant whom it would benefit. If he wishes to enforce it, he need only speak up in a timely manner, and the court is obligated to enforce the limit even if it is inequitable to do so. Mandatory limits conserve litigant and judicial resources, while at the same time eliminating judicial discretion in determining when a limit is excusable or not. In contrast, jurisdictional rules constrain the litigants as well and therefore result in greater inefficiencies.

In *Bowles*, the Court could have construed the limit in § 2107(c) as merely mandatory. That characterization would have precluded Mr. Bowles' equitable "unique circumstances" excuse for his failure to meet the statutory time limit. Even if inequitable, a court has no discretion to deviate from a properly invoked mandatory rule.

Characterizing time limits for appeals as mandatory but nonjurisdictional is in accord with the nature of jurisdiction. Jurisdiction generally is founded on structural values such as federalism, separation of powers, and limited national government, not the litigant and systematic values of efficiency, cost-effectiveness, autonomy, predictability, and fairness. The nature of jurisdiction speaks to the power of the court, not to the rights and obligations of parties.[29]

Unlike jurisdictional rules, appeal periods involve primarily the interests of the litigants, not structural values. They exist to promote efficiency in the same way that other procedural rules do. Indeed, they are closer to statutes of limitation than to rules of subject-matter jurisdiction such as diversity jurisdiction.

Describing appellate time limits as mandatory but nonjurisdictional has the added benefit of being consistent with precedent. True, a host of Supreme Court cases beginning in 1960 had described those time limits as "mandatory and jurisdictional,"[30] though the precedent was not entirely

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[28] Logan v. U.S., 144 U.S. 263, 304 (1892) (link).

[29] For more on how the formal nature and functional effects of jurisdiction should influence the framework for determining whether a limitation is jurisdictional or not, see Dodson, *supra* note 17.

[30] *See., e.g.*, Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982) (per curiam) (link); Browder v. Dep't of Corr., 434 U.S. 257, 264, 271–72 (1978) (link); U.S. v. Robinson, 361 U.S. 220, 224 (1960) (link).

consistent.[31] But, as others have explained, the outcome and reasoning in each case using the standard doublet "mandatory and jurisdictional" could have been obtained by characterizing the limit as mandatory and *non*jurisdictional, for the only issue was whether the court had authority to relax the requirements after the defect had been properly and timely raised by the party who would benefit from the limit.[32] Thus, those cases could be best read as holding only that the limits were mandatory, and their additional language of "jurisdictional" seen as rhetorical emphasis on the mandatory and inflexible nature of the rule.[33] A mandatory but nonjurisdictional characterization also would be consistent with more recent precedent, which trended toward nonjurisdictional characterizations.[34]

IV. CONCLUSION

Bowles v. Russell is a sleeper case. Although it seems relatively straightforward on the surface, it undermines precedent and lacks principled reasoning for its result. As a consequence, *Bowles* likely will cause great confusion among the lower courts and litigants whenever a statutory limitation issue arises. That, in turn, will mean more litigation, more circuit splits, and more confusion about what limits are jurisdictional and what are not.

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[31] *Cf., e.g.*, Becker v. Montgomery, 532 U.S. 757, 767 (2001) (link) ("[I]mperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court."); Foman v. Davis, 371 U.S. 178, 180–81 (1962) (link) (holding that a Court of Appeals could not dismiss an appeal *sua sponte* for a violation of the rules governing notices of appeal when the parties fully briefed the appeal and neither party was prejudiced by the violation).

[32] Mark A. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 GA. L. REV. 399, 410 (1986).

[33] *Cf.* Eberhart v. U.S., 126 S. Ct. 403, 406–07 (2005) (discouraging reliance on the mantra "mandatory and jurisdictional" as obscuring the distinction between "mandatory" and "jurisdictional"); Kontrick v. Ryan, 540 U.S. 443, 454 (2004) (noting that precedent used the term "jurisdictional" to mean merely "emphatic").

[34] I note that Justice Souter, in dissent, appears to misunderstand the difference between "mandatory" and "jurisdictional" when he writes: "While a mandatory but nonjurisdictional limit is enforceable at the insistence of a party claiming its benefit or by a judge concerned with moving the docket, it may be waived *or mitigated in exercising reasonable equitable discretion*." Bowles v. Russell, 127 S. Ct. 2360, 2368 (Souter, J., dissenting) (emphasis added). The better view is that a mandatory but nonjurisdictional limit is not susceptible to equitable mitigation if the party claiming its benefit timely invokes it.