

AN APPEAL TO COMMON SENSE: WHY “UNAPPEALABLE” DISTRICT COURT DECISIONS SHOULD BE SUBJECT TO APPELLATE REVIEW

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ABSTRACT—28 U.S.C. § 1291 vests jurisdiction in the United States Circuit Courts of Appeal to hear “appeals from all final decisions of the district courts of the United States.” Various circuit courts have, however, determined that they may only hear appeals of final “judicial” decisions, and that they do not have jurisdiction to hear appeals from final decisions of United States district courts if those decisions are “administrative.” Circuit courts have been loath to explicitly define the dividing line between the two classes of case, and have frequently invoked the potential availability of mandamus review as a means of placating litigants who are told they cannot receive direct review of their purportedly administrative case. Yet because the distinction is ill defined, and because alternative avenues of review are in reality unavailable, “administrative” has proven broad and unforgiving. This Note critiques the tenuous distinction between administrative and judicial, examining fee reimbursement decisions under the Criminal Justice Act to pinpoint where the line is, where it should be, and how courts should explain its location. If there is to be a line separating administrative from judicial, it should be sharply drawn with an eye to the connectedness of the litigants and the dispute to the inner workings of the court. If administrative decisions remain unreviewable, judicial consistency and legitimacy demand that “administrative” be a narrow classification.

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INTRODUCTION

The Constitution does not require appellate review of federal district court decisions in United States Courts of Appeals.¹ In fact, the Constitution does not provide for either courts of appeals or federal district courts, and both are vulnerable to congressional dissolution at any time.² Yet intermediate review in federal appellate courts has been a staple of the federal judiciary since Congress created the federal district courts in 1789; the latter have never existed without the former.³ Indeed, intermediate

¹ See generally U.S. CONST. art. III (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

² See *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 442 (1850); see also Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1362–63 (1953) (outlining the most widely held theory on jurisdiction stripping, which is that Congress is allowed, but not required, to create federal courts, and thus maintains the power to limit their jurisdiction or do away with them altogether). But see Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 749–50 (1984) (arguing for a version of Justice Story’s early interpretation of the “shall be vested” clause to mandate the creation, empowerment, and perpetuity of lower federal courts).

³ The Judiciary Act of 1789 established both the federal district courts and the United States circuit courts. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77. Appellate jurisdiction was transferred to the United States Courts of Appeals in 1891 through the Circuit Courts of Appeals Act, ch. 517, § 4, 26 Stat. 826, 827 (1891), and the original circuit courts were abolished in 1911. See Act of Mar. 3, 1911, Pub. L. No. 475, 36 Stat. 1087. Thus, although the avenue for appeal has changed over time, federal district courts have never existed without intermediate courts to exercise as-of-right appellate review of their final decisions.

review has long been considered a central element of a judicial system devoted to this country's "continuing constitutional revolution."⁴

Congress vested circuit courts with the power of intermediate review to achieve some degree of consistency, predictability, and fairness in the federal judicial system.⁵ In the early republic, judicial decisions emanating from federal district courts were subject to appellate oversight in circuit courts. These courts were staffed by district judges and Supreme Court Justices riding circuit, both to provide litigants with secondary review and to expose Supreme Court Justices to the idiosyncrasies of the divergent communities scattered throughout the nation.⁶ The advent of this type of system was a clear endorsement of the notion that the legitimacy of any judicial system depends heavily on the availability of supervisory appellate review, and it made clear that the federal judiciary of the United States would be no exception.⁷

This belief that judicial decisionmaking deserves supervisory oversight continues to anchor the legitimacy of the American court system today. Judicial "decisions," however, come in a variety of shapes and sizes, not all of which warrant appellate oversight. Every day, federal judges make decisions that implicate few, if any, substantive rights of participants in the judicial process. For example, judges make decisions about the hiring of administrative staff, whether to purchase new office supplies, and what type of office decor they would like to adorn their chambers.⁸ Uncontroversially, these "administrative" decisions are not appealable, and no commentator has ever asserted that they should be. To subject the everyday, nonadjudicatory decisions of district court judges to appellate review would be to expand the already overwhelmed dockets of appellate

⁴ Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. CIN. L. REV. 1, 3 (1990). According to Justice O'Connor, the Judiciary Act of 1789 was "the last of the triad of founding documents, along with the Declaration of Independence and the Constitution itself." *Id.*

⁵ See Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 317 (2009) ("[T]he availability and processes of appellate review provide psychological cover for the adjudicative process by spreading decisional responsibility among different judges and over a relatively long period of time. More generally, an appellate court's correction of an error in any given case tends to foster an environment in which fewer errors are committed in the first instance." (footnote omitted)).

⁶ See David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1716 (2007).

⁷ See Robert Justin Lipkin, *Constitutional Revolutions: A New Look at Lower Appellate Review in American Constitutionalism*, 3 J. APP. PRAC. & PROCESS 1, 7-8 (2001); see also THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 26-27 (1994) (extolling the virtues of intermediate review in the federal judicial system).

⁸ See Martin H. Redish, *Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of Morrison and Mistretta*, 39 DEPAUL L. REV. 299, 309 (1989); see also 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3903, at 134-35 (2d ed. 1992) (enumerating categories of the nonjudicial decisions of federal judges).

courts⁹ and would make judicial administration at the district court level unworkable. Even more importantly, no party would have standing to appeal such decisions in the first place.¹⁰

It is unsurprising, then, that the administrative decisions of federal district courts have been deemed to fall outside the appellate jurisdiction of circuit courts.¹¹ At the same time, however, circuit courts have expanded the concept of administrative decisions far beyond decisions regarding office supplies and law clerks. The “administrative” label is now often applied to decisions that relate to the internal administration of the court, even where those decisions arise from the adjudication of substantive rights. Today, a person may enter a federal district courthouse, brief an issue before a federal judge, participate in a hearing, and have her rights adjudicated—but because the court’s decision is deemed *administrative* rather than *judicial*, the litigant is denied access to appellate review in a circuit court of appeals.

Recently, the Ninth Circuit demonstrated its willingness to broaden the definition of “administrative” to capture decisions only tenuously related to the inner workings of the court. In *In re Application for Exemption from Electronic Public Access Fees by Jennifer Gollan & Shane Shifflett*, two reporters conducting research on behalf of a charitable organization sought an exemption from fees imposed on public access to online federal court documents through the PACER system.¹² At the time, the PACER Fee Schedule provided for exemption for such organizations, but also required nonexemption (i.e., full payment of fees) for members of the media.¹³ The district court judge ordered the reporters to “show cause” why they should be allowed an exemption, and a hearing was convened.¹⁴ The judge denied the exemption application in a final decision, and the reporters filed a timely notice of appeal.¹⁵ Despite the fact that the reporters were conducting research outside the walls of the courthouse, and despite their being entirely disconnected from the internal administration of the court, the Ninth Circuit held that the district court’s final decision disposing

⁹ See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 63–65 (1996); Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 505 (1989) (“However large the federal district court docket has grown in the past thirty years, that growth is dwarfed by the growth rate of the appellate docket.” (footnote omitted)).

¹⁰ See Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 302–05 (1979).

¹¹ See, e.g., *United States v. Walton (In re Baker)*, 693 F.2d 925, 927 (9th Cir. 1982).

¹² See 728 F.3d 1033, 1035–36 (9th Cir. 2013).

¹³ *Id.* at 1035. The fee schedule has since been modified and no longer contains this language.

¹⁴ *Id.* at 1036.

¹⁵ *Id.*

of the fee exemption request was an “administrative” order. As such, the court explained, it fell outside the scope of the circuit court’s appellate jurisdiction.¹⁶

By finding that they have no appellate jurisdiction to evaluate these decisions, circuit courts effectively foreclose not only direct appellate review, but also application of extraordinary writs such as mandamus. Requests for writs of mandamus (orders issued by higher courts mandating that inferior judicial officers take certain action to properly fulfill their professional duties) have long been seen as a form of supervisory review because they serve as a means of securing relief against abuses of judicial power in lower courts.¹⁷ No court has directly addressed whether a losing party could secure a writ of mandamus against a district court in the wake of an administrative decision. But a study of the use and scope of the mandamus power in circuit courts reveals that even mandamus review would run afoul of the courts’ jurisdiction so long as administrative decisions are not subject to appellate review.¹⁸

The only court that might possibly retain the authority to review administrative decisions is the Supreme Court, whose ability to issue writs of mandamus, some scholars have argued, is embedded within the Constitution itself.¹⁹ But the Supreme Court would never actually engage in such review, so it is effectively unavailable as well.²⁰ Under this regime, the legitimacy of our federal judicial system is imperiled. Federal district courts—courts that were never meant to function as the only and final means of judicial review²¹—may exercise preliminary review, adjudicate the rights of persons who come before them, and then issue a final judgment on the merits not subject to any secondary oversight.

Circuit courts of appeals have thus essentially foreclosed secondary review of administrative decisions in any superior federal court. When these decisions solely implicate the internal affairs and procedures of

¹⁶ *Id.* at 1040.

¹⁷ See *infra* notes 99–102 and accompanying text.

¹⁸ See Part II, *infra*.

¹⁹ See James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1451–59 (2000) (advancing a historical argument for Supreme Court supervisory authority over all inferior tribunals); see also Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 343 (2006) (advancing a textual argument that the Constitution provides for such Supreme Court supervisory power).

²⁰ See Part II.B, *infra*.

²¹ Under the “Madisonian Compromise,” federal district courts were not established in Article III of the Constitution; instead, Article III contemplated inferior federal courts that could be created (and eliminated) by acts of Congress. See Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52–56 (1975).

courthouse administration, such foreclosure is understandable (and arguably necessary).²² But as the definition of “administrative” continues to broaden, an entire class of cases involving the substantive rights of actual people loses access to appellate oversight. This Note argues that the definition of “administrative” decisions has grown unacceptably broad: Legitimacy in the federal judicial system demands some avenue for supervisory review, and in the current landscape, no such review exists for a growing class of “administrative” decisions.

Part I points to a recent Ninth Circuit decision that suggests the administrative umbrella is beginning to expand beyond recognition. It then examines Criminal Justice Act fee reimbursement decisions to illustrate the modern jurisprudence regarding appealability of nominally administrative decisions. Part II explains how the foreclosure of appellate jurisdiction jeopardizes legitimacy because it prohibits even extraordinary mechanisms of review (specifically, mandamus). Finally, Part III discusses why the delineation of “administrative” and “judicial” decisions should depend on how directly a decision implicates the rights of actual persons coming before the courts, not on whether the issues in dispute are related to court administration in some way. Part III goes on to argue that if the line between “administrative” and “judicial” is not redefined, then courts should construe 28 U.S.C. § 1291 to make the final administrative decisions of federal district courts—when they involve actual persons seeking relief—subject to appellate review. This Part also examines whether an alternative solution lies either in revision of our current perspective on the scope of the All Writs Act and availability of writs of mandamus, or in drafting a new All Writs statute that accounts for administrative decisions. Ultimately, some revision—either by Congress or by the courts—is necessary to provide the degree of appellate oversight necessary to ensure the continued legitimacy of our federal court system.

I. UNAPPEALABLE ADMINISTRATIVE DECISIONS— CRIMINAL JUSTICE ACT REIMBURSEMENT AND THE SLIPPERY SLOPE

The final decisions of federal district courts are unequivocally subject to appellate review in the United States Courts of Appeals. Section 1291 of U.S. Code Chapter 28 provides, in relevant part: “The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals *from all final decisions of the district courts of the United States . . .* except where a direct review may be had in the

²² See *supra* note 9 and accompanying text.

Supreme Court.”²³ Though the text appears unconditionally to apply to every district court decision that is not “open, unfinished or inconclusive,”²⁴ circuit courts have consistently held otherwise, refusing to exercise appellate jurisdiction to review administrative decisions.²⁵

Some administrative decisions are easy to pick out—for example, a district court judge’s decision to hire a law clerk²⁶ or reupholster office furniture.²⁷ Others are not intuitively classified as administrative because they implicate substantive rights of participating parties;²⁸ typically, these decisions are deemed administrative when they address elements of the internal administration of the court system (such as access to the court library), even if they do have more substantive repercussions.²⁹ Recently, however, the “administrative” label has been applied outside the realm of internal administration of the courts.

A. *The Case of Jennifer Gollan & Shane Shifflett*

In March 2012, Jennifer Gollan and Shane Shifflett, two reporters with a penchant for deriding the political and judicial systems,³⁰ sought access to federal court documents through PACER, the online federal

²³ 28 U.S.C. § 1291 (2012) (emphasis added).

²⁴ *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

²⁵ *See, e.g., infra* Part I.A.

²⁶ *See* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1323–24 (2006).

²⁷ *See* *Brooks v. Laws*, 208 F.2d 18, 29 (D.C. Cir. 1953).

²⁸ *See, e.g., In re Pickett*, 842 F.2d 993, 994–95 (8th Cir. 1988). In *Pickett*, a federal district judge issued a temporary stay—which lasted over two and a half years—of proceedings arising from a female probation officer’s allegation that the court (her employer) was engaged in discriminatory hiring practices based on the fact that she had been passed over for promotion in favor of less qualified male candidates. *Id.* at 994. The Eighth Circuit held that the proceeding was administrative (and therefore, so was the order to stay the proceeding), refusing to grant mandamus relief and holding that the decision was unappealable due to lack of jurisdiction. *Id.* at 995; *see also In re Long*, 475 F.3d 880, 880–81 (7th Cir. 2007) (finding no appellate jurisdiction to review a district court’s order effectively enjoining a citizen from accessing the courthouse library because the Executive Committee of the United States District Court for the Northern District of Illinois had authority to manage the library, and the decision to exclude the citizen from the library was administrative and thus unreviewable).

²⁹ *See* Redish, *supra* note 8, at 315. This is also the basic philosophy underlying the circuit courts’ decisions to deny appellate review in Criminal Justice Act fee reimbursement decisions, though, as will be discussed in Parts II and III, *infra*, classifying these decisions as “administrative” stretches the concept to its logical limits (if not beyond).

³⁰ *See Contributors: Jennifer Gollan*, CAL. WATCH, <http://californiawatch.org/user/jennifer-gollan> [<http://perma.cc/W74J-VW7X>]. Ms. Gollan’s profile describes her as a producer of “watchdog stories.” *Id.* Some of her most recent spotlight articles include *Millions in Health Care District Deals Involve Firms with Ties to Officials* and *Retirement Systems to Send Members to Hawaii Summit*. *Id.* The recent articles she has coauthored with Mr. Shifflett include *Federal Judge’s Rulings Favored Companies in Which He Owned Stock*, and, interestingly, *PACER Federal Court Record Fees Exceed System Costs*. *Id.*

docket database. At the time, the PACER fee schedule provided that “courts [could], upon a showing of cause, exempt . . . individual researchers associated with educational institutions, courts, [or] section 501(c)(3) not-for-profit organizations”³¹ Because they intended to conduct investigative research on behalf of a charitable organization,³² Gollan and Shifflett sought an exemption from PACER fees.³³ The reporters accordingly showed cause, and the district judge initially granted the request.³⁴

Recognizing shortly thereafter that Gollan and Shifflett might be “members of the media,”³⁵ the court nonetheless ordered a hearing to determine whether such membership might render even agents of a 501(c)(3) organization ineligible for PACER fee exemption.³⁶ The district court invited Gollan and Shifflett to either appear at a hearing or file an affidavit showing cause why the initial exemption should not be revoked.³⁷

In many ways, the case proceeded like typical litigation, even in spite of the lack of an adverse party litigating against the reporters. The reporters’ counsel argued for an exemption, the court interpreted statutory language (the PACER Fee Schedule), and the judge applied his interpretation of the law to the facts at bar. In its first order (granting exemption), the court noted that the Fee Schedule required applicants to show cause for an exemption, and that the law required a granting court to find an exemption necessary “to avoid unreasonable burdens and to promote public access to information.”³⁸ The court then found (1) an unreasonable burden because the costs associated with the reporters’ in-depth research would be prohibitively expensive for their nonprofit employer, and (2) that public access to information would be promoted

³¹ U.S. JUDICIAL CONFERENCE, ELECTRONIC ACCESS PUBLIC ACCESS FEE SCHEDULE 1 (effective Apr. 1, 2012), available at https://web.archive.org/web/20120806182824/http://www.pacer.gov/documents/epa_feesched.pdf [<https://perma.cc/X8ZW-7D6L>] (accessed by searching for <http://www.pacer.gov> in the Internet Archive index).

³² See *In re Application for Exemption from Elec. Pub. Access Fees* by Jennifer Gollan & Shane Shifflett, 728 F.3d 1033, 1036 (9th Cir. 2013).

³³ See Applicant–Appellants Jennifer Gollan & Shane Shifflett’s Opening Brief on the Merits at 7, *In re Application for Exemption*, 728 F.3d 1033 [hereinafter Brief for Appellants Gollan & Shifflett].

³⁴ *Id.* at 9.

³⁵ See U.S. JUDICIAL CONFERENCE, *supra* note 31 (“Courts should not exempt local, state or federal government agencies, members of the media, attorneys or others not members of one of the groups listed above. Exemptions should be granted as the exception, not the rule.”).

³⁶ Brief for Appellants Gollan & Shifflett, *supra* note 33, at 9.

³⁷ See Notice of Hearing Regarding Revocation of Exemption from Elec. Pub. Access Fees at 1–2, *In re Application for Exemption from Elec. Pub. Access Fees* by Jennifer Gollan & Shane Shifflett, No. 3:12-mc-80113-JW (N.D. Cal. May 16, 2012).

³⁸ Brief for Appellants Gollan & Shifflett *supra* note 33, at 040 (attaching in the appendix the March 21, 2012 Order Granting Exemption from Electronic Public Access Fees).

when the resulting reports were posted online.³⁹

In the subsequent hearing, the court explained its understanding of the interplay between 501(c)(3) exemption and media nonexemption, stating that because media seek to investigate and report on the courts, the nonexemption policy is best understood as applying to all media, “501(c)(3) or otherwise.”⁴⁰ In response, counsel for the reporters urged the court to construe the Fee Schedule in favor of granting media members affiliated with a 501(c)(3) the same exemption that other 501(c)(3) applicants could receive.⁴¹ However, the court revoked the exemption, declaring that it “would not adopt Gollan and Shifflett’s interpretation in the absence of authority supporting it.”⁴² In response, Gollan and Shifflett filed a timely notice of appeal, seeking review in the Ninth Circuit.⁴³

The district court’s decision (and the proceedings leading up to it) looked and felt strikingly similar to the type of standard judicial decision that circuit courts regularly review.⁴⁴ Gollan and Shifflett had shown cause and been granted a waiver of PACER fees. When the district court expressed concern about their status as members of the media, a hearing was convened. Counsel advanced arguments. The court exercised its discretion to interpret and apply the schedule and guidelines and “say what the law is.”⁴⁵ Ultimately, the judge construed the guidelines to deny exemption to media members even when they are working for a not-for-profit, thereby setting persuasive precedent for future courts and withdrawing from Gollan and Shifflett their previously granted free access to court records.

Yet despite its adjudicatory flavor, its eligibility for precedential weight, and its effect on the litigating parties’ substantive rights, the Ninth Circuit never addressed the merits of the case. Instead, it dismissed for lack of appellate jurisdiction.⁴⁶ First, the court conceded that the finality of the

³⁹ *Id.* at 041.

⁴⁰ *Id.* at 028–29 (attaching in the appendix the Transcript of Record).

⁴¹ *See id.* at 029–30.

⁴² *In re Application for Exemption from Elec. Pub. Access Fees by Jennifer Gollan & Shane Shifflett*, 728 F.3d 1033, 1036 (9th Cir. 2013).

⁴³ *See id.*

⁴⁴ Except, of course, for the fact that there was no adverse party (a fact that this author sees as being of less import than the court apparently did). Compare Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 547–48 (2006) (arguing that a court does not act judicially when adverseness does not exist), with James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346 (2015) (arguing that a court may still act in its judicial capacity in noncontentious matters).

⁴⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁴⁶ *In re Application for Exemption*, 728 F.3d at 1041.

district court's decision was not in dispute.⁴⁷ But then, rather than reviewing the district court's parsing of the PACER Fee Schedule, the court held that the district court's decision, though final, was not a "decision" reviewable in a circuit court because of its administrative quality.⁴⁸

In coming to this conclusion, the Ninth Circuit first outlined the rationale for excluding administrative decisions from appellate review. The court noted that both the Constitution and the history of § 1291 (which, as noted above, confers appellate jurisdiction on the circuit courts) suggest that the statute's use of the word "decision" was not meant to capture decisions of a non-*judicial* nature.⁴⁹ The court cited Sixth Circuit case law⁵⁰ and legislative history to explain that the Constitution's provision of jurisdiction over "cases" and "controversies," in conjunction with early versions of § 1291 that repeatedly provided for appellate review of final decisions "in all cases," showed that appellate review under § 1291 was never meant to extend beyond decisions of a judicial nature.⁵¹ Relying on § 1291's "statutory and constitutional moorings," the court held that § 1291 "necessarily refers to final decisions of a judicial character, not to administrative actions . . . outside the scope of the litigative function."⁵²

Citing multiple cases from both the Ninth Circuit and sister circuits dealing with appointed attorneys' requests for compensation under the Criminal Justice Act (CJA),⁵³ the court explained its rationale for classifying this particular decision as an unappealable "administrative" decision.⁵⁴ First, the proceeding was nonadversarial.⁵⁵ Second, it was

⁴⁷ *Id.* at 1037.

⁴⁸ *Id.* at 1039.

⁴⁹ *Id.* at 1037 ("Decision is a term that could embrace countless acts by district courts. They make decisions pertaining to personnel, facilities, equipment, supplies, budgeting, accounting, security, rulemaking and public relations. They appoint clerks and bailiffs, order supplies, write and promulgate rules, and so on. Yet in order fairly to interpret section 1291, we must consider more than the bare meaning of the word decision." (citations and internal quotation marks omitted)).

⁵⁰ See *Rini v. Clerk, U.S. Bankr. Court (In re Rini)*, 782 F.2d 603, 606 (6th Cir. 1986).

⁵¹ *In re Application for Exemption*, 728 F.3d at 1037–39.

⁵² *Id.* at 1039 (quoting *United States v. Walton (In re Baker)*, 693 F.2d 925, 927 (9th Cir. 1982) (emphasis in original)).

⁵³ See, e.g., *In re Carlyle*, 644 F.3d 694 (8th Cir. 2011); *United States v. French*, 556 F.3d 1091 (10th Cir. 2009); *In re Baker*, 693 F.2d at 925; *United States v. Poland (In re Derickson)*, 640 F.2d 946 (9th Cir. 1981).

⁵⁴ The court noted only one other circuit court decision dealing with appellate jurisdiction over denial of PACER fee exemption: In *Zied-Campbell v. Richman*, the Third Circuit held that it had jurisdiction over an appeal of denial of a fee exemption request under collateral order review. 317 F. App'x 247, 250 (3d Cir. 2009). The Ninth Circuit distinguished *Zied-Campbell* on the seemingly irrelevant grounds that the appellant was engaged in contentious litigation with an adverse party, despite the fact that the PACER fee waiver request was neither relevant to the controversy between the parties nor disputed in any way by the adverse party. *In re Application for Exemption*, 728 F.3d at 1040.

“wholly unconnected to pending litigation.”⁵⁶ As a result, said the court, the decision was not judicially cognizable, and could not be subjected to appellate judicial review.⁵⁷

The unusual nature of the court’s holding did not escape notice. In fact, Judge O’Scannlain, the author of the court’s opinion, wrote a separate concurrence acknowledging its strangeness, which began: “I write individually to acknowledge ‘the elephant in the room’: to whom does one go for review when an application for an exemption from PACER fees has been denied?”⁵⁸ Judge O’Scannlain then offered his perspective on available avenues for review. First, he dismissed scholarly suggestion that perhaps “control may be exercised by the Judicial Council of the Circuit,”⁵⁹ explaining that outside of misconduct or bad faith allegations, the Judicial Council “would not be the place to turn.”⁶⁰ Then, Judge O’Scannlain explained that review could be attained were Congress to establish a review mechanism like the one in place for CJA fee award decisions.⁶¹

Judge O’Scannlain’s acknowledgement that finding a complete absence of supervisory review was an “elephant in the room” lends credence to the notion that supervisory review is generally understood to be a necessary component of a legitimate judiciary. But Judge O’Scannlain missed the mark by claiming that such oversight could be provided by implementing an administrative review mechanism similar to the one Congress created to evaluate CJA fee award decisions. In truth, the administrative machinery in place for review of CJA fee awards provides no opportunity for losing litigants to challenge the final decisions of lower courts.

The next Section examines the ways in which attorneys appointed as counsel for indigent defendants under the CJA pursue the fee reimbursement made available to them by statute. It shows that CJA fee decisions implicate the actual substantive rights of litigants in the federal courts, but are nonetheless characterized as “administrative” and are thus not subject to appellate review. Finally, it shows that the machinery in place to review fee decisions is not sufficiently analogous to appellate

⁵⁵ *In re Application for Exemption*, 728 F.3d at 1039 (citing *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) and *In re Carlyle*, 644 F.3d at 699).

⁵⁶ *Id.* at 1039 (citing *In re Long*, 475 F.3d 880, 880–81 (7th Cir. 2007); *Bense v. Starling*, 719 F.2d 241, 244 (7th Cir. 1983)).

⁵⁷ *See id.* at 1041.

⁵⁸ *Id.* (O’Scannlain, J., concurring specially).

⁵⁹ 15A WRIGHT ET AL., *supra* note 8, § 3903, at 134–35.

⁶⁰ *In re Application for Exemption*, 728 F.3d at 1042 (O’Scannlain, J., concurring specially).

⁶¹ *Id.*

review. The CJA provides a clear and concrete illustration of how arbitrary the line between “administrative” and “judicial” really is, and why it has been drawn in the wrong place.

B. Criminal Justice Act Fee Awards, the Administrative Process, and Denial of Appellate Review

In *Johnson v. Zerbst*, the Supreme Court held that the Sixth Amendment requires that even indigent federal defendants who cannot afford an attorney be given access to counsel.⁶² Twenty-five years later, the Court further broadened defendants’ rights in the landmark case *Gideon v. Wainwright*, holding that the Fourteenth Amendment extended the requirement of access to counsel to indigent defendants in state court proceedings as well.⁶³ The CJA of 1964⁶⁴ was a direct response to these decisions,⁶⁵ a congressional echo of Justice Black’s proclamation that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”⁶⁶

Prior to the CJA, in the absence of statutory instructions, courts fashioned a makeshift remedy for this problem by appointing attorneys without providing any compensation.⁶⁷ The CJA provided for modest fees to be paid to court-appointed attorneys. However, the fees were never intended to fully reimburse court-appointed attorneys—although some members of Congress voiced concerns that the rates were too low to provide adequate compensation,⁶⁸ most proponents of the bill celebrated its modest maximums.⁶⁹

⁶² 304 U.S. 458, 460 (1938). This was an apparent extension of the Court’s ruling in *Powell v. Alabama*, 287 U.S. 45 (1932), in which the Court held that indigent defendants in capital proceedings must have access to an attorney for the proceedings to be constitutional.

⁶³ 372 U.S. 335 (1963).

⁶⁴ Pub. L. No. 88-455, 78 Stat. 552 (codified as amended at 18 U.S.C. § 3006A (2012)).

⁶⁵ See 110 CONG. REC. 444 (1964) (statement of Rep. Rogers) (“The right of representation by counsel is fundamental in our judicial system. Many States have some form of public defender systems, and others have a system of individual assignment to indigent defendants. The Supreme Court of the United States some time ago, in 1938, in fact, set aside convictions where men were not represented in court. This has developed a problem that must be met if we are to carry out our judicial system.”).

⁶⁶ *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

⁶⁷ See 110 CONG. REC. 445 (1964) (statement of Rep. Moore) (“In an effort to complement this requirement of the Supreme Court, the Federal judiciary has regularly made it a practice to assign attorneys in private practice or employed by a legal aid society or local public defender organization to represent indigent defendants. In the absence of legislation to compensate court-appointed counsel, however, attorneys, so assigned, have been forced to work on a voluntary basis and frequently pay many expenses out of their own pocket. This clearly is neither fair to the attorney or organization, nor to the scheme of equal justice.”).

⁶⁸ See, e.g., *id.* at 451 (statement of Rep. Cahill) (“The difficulty with this bill as I see it is that it does not provide adequate compensation. Certainly \$500 is not sufficient compensation for any

Over time, the statutory maximums were adjusted upward to account for inflation and increased costs. In 1970, Congress amended the statute to raise maximum compensation amounts.⁷⁰ Another amendment additionally made possible the receipt of fees exceeding the statutory maximums, in recognition of the fact that some criminal defenses are more complicated, lengthy, and costly than others.⁷¹ In its present form, the CJA sets separate statutory maximum recovery amounts for representation before the United States Parole Commission,⁷² appellate courts,⁷³ and magistrate or district court judges.⁷⁴

Even with these higher maximums, Congress recognized that exceptions would sometimes need to be made, and thus retained the Waiving Maximum Amounts provision through every subsequent amendment to the CJA.⁷⁵ The waiver provision permits the presiding judge to grant fees in excess of statutory maximums when (1) the judge “certifies that the amount of the excess payment is necessary to provide fair compensation;” and (2) the chief judge of the circuit approves the excess payment.⁷⁶

Contrary to Judge O’Scannlain’s description of the waiver,⁷⁷ this process by which court-appointed attorneys may receive more than the statutory maximum cannot be appropriately characterized as an analog to or substitute for appellate oversight. Under the CJA, an attorney has no access to secondary review, regardless of whether she requests fees within

qualified member of the bar who appears and tries a criminal case for 3, 4, or 5 days, but at least it is a step in the right direction.”).

⁶⁹ See *id.* at 448 (statement of Rep. Celler) (“H.R. 7457 is a modest bill. Its cost to the Government is low compared to the magnitude of the problem it is designed to solve. Under the terms of the bill, the maximum which may be paid to an attorney regardless of how he is appointed or assigned cannot exceed \$500 in the case of a felony and \$300 in the case of a misdemeanor. On the assumption that nearly 10,000 persons are in need of the services to be provided by the bill, it is clear that the measure cannot cost the Government more than \$5 million annually at the outside.”).

⁷⁰ S. REP. NO. 91-790, at 7 (1970) (describing legislation to raise the maximum amounts to \$400 and \$1000 for misdemeanors and felonies, respectively).

⁷¹ *Id.*

⁷² See 18 U.S.C. § 3006A(d)(2) (2012) (setting a \$1500 per attorney maximum recovery for representation before the Parole Commission).

⁷³ See *id.* (setting a \$5000 per attorney maximum recovery for representation before circuit courts).

⁷⁴ See *id.* (setting a \$7000 per attorney maximum recovery for representation before magistrate and district judges in felony cases and a \$2000 per attorney maximum in misdemeanor cases).

⁷⁵ See *id.* § 3006A(d)(3).

⁷⁶ *Id.*

⁷⁷ See *In re Application for Exemption from Elec. Pub. Access Fees* by Jennifer Gollan & Shane Shifflett, 728 F.3d 1033, 1042 (9th Cir. 2013) (O’Scannlain, J., concurring specially) (claiming that “Congress decided to create an administrative review process separate from the traditional right of appeal” as an alternative to the right of formal appeal (quoting *In re Smith*, 586 F.3d 1169, 1173 (9th Cir. 2009)) (internal quotation marks omitted)).

the statutory limits or exceeding them. Attorneys who apply for CJA reimbursement within the statutory limits are granted or denied fees at the exclusive discretion of district court judges. Although applications requesting payment exceeding statutory maximums may come before the chief judge of the circuit, the chief judge is not vested with the authority to increase fee awards, and thus does not perform a function equivalent or similar to appellate oversight.

Courts themselves have admitted as much. In the early days of the CJA, some circuit courts showed a willingness to exercise appellate jurisdiction to review district court fee awards. In 1969, for example, the Fourth Circuit ordered, *sua sponte*, a grant of fee reimbursement without ever questioning or examining whether it had jurisdiction to do so.⁷⁸ A few years later, the Eighth Circuit applied an abuse of discretion standard of review in affirming a district court's decision to reimburse an attorney \$250 for representing a client in a half-day long trial.⁷⁹ In the Ninth Circuit's earliest decision regarding fee reimbursement under the CJA, the court took the same approach, applying an abuse of discretion standard of review to affirm a denial of reimbursement for use of an investigator.⁸⁰ In all of these cases, the courts did not appear troubled by any potential lack of appellate jurisdiction; in fact, the word "jurisdiction" does not appear in any one of these opinions.⁸¹

As early as 1972, however, some courts began to express skepticism as to whether CJA fee award decisions fell within the ambit of § 1291 appellate jurisdiction. In *United States v. Sullivan*, a criminal defendant appealed his bank robbery conviction to the Fifth Circuit.⁸² In addition to arguing that the jury verdict should be overturned due to the state's alleged presentation of prejudicial evidence at trial, defendant's counsel also argued that the trial court judge abused his discretion by denying a waiver for counsel to recover a fee higher than the CJA's statutory maximum.⁸³ The Fifth Circuit responded: "We decline to reach the merits of this position, nor will we decide whether a trial judge's decision on

⁷⁸ *United States v. Ketchum*, 420 F.2d 901 (4th Cir. 1969).

⁷⁹ *United States v. Turner*, 584 F.2d 1389, 1389 (8th Cir. 1978).

⁸⁰ *United States v. Barger*, 672 F.2d 772, 776 (9th Cir. 1982).

⁸¹ *See supra* notes 78–80. Other courts did not exercise appellate authority, but did not base their decisions on a jurisdictional bar. *See, e.g.*, *United States v. Durka*, 490 F.2d 478, 480 (7th Cir. 1973) (addressing defendant's argument that failure to provide a hearing regarding reimbursement before ordering payment violated due process by stating: "The fixing of compensation and reimbursement pursuant to 18 U.S.C. § 3006A(d) is a matter within the exclusive discretion of the district court and is not such an event that requires the procedural safeguards of an adversary hearing.").

⁸² 456 F.2d 1273, 1275 (5th Cir. 1972).

⁸³ *Id.*

compensation under this Act is appealable at all.”⁸⁴ Other courts were similarly reluctant to recognize jurisdiction over CJA fee reimbursement appeals.⁸⁵ Soon enough, courts began to routinely hold that there was no right to appeal CJA fee award decisions.

Today, attorneys who seek to recover amounts less than the statutory maximum do so by filing a CJA Form 20.⁸⁶ When those attorneys receive less money than they request, or are awarded no reimbursement at all, circuit courts have unanimously held that the discretion of the district court is absolute, and no avenue for appeal exists.⁸⁷ Troublingly, these attorneys find themselves forced to request reconsideration from the very judge who denied their request in the first place—a judge whose patience the attorney has, in many cases, already exhausted.⁸⁸

⁸⁴ *Id.* The court also expressed disapproval of the attorney’s attempt to use the appeal as a vehicle to recover fees: “Our only decision is that the correctness of such a ruling cannot be raised on the present appeal. The issues before us concern the fairness of Sullivan’s trial. This appeal does not provide a forum for his appointed attorney’s personal financial complaints.” *Id.*

⁸⁵ *See, e.g.,* United States v. D’Andrea, 612 F.2d 1386, 1387 (7th Cir. 1980) (“The [CJA] is silent on the availability of judicial review of Court decisions allowing less compensation or reimbursement than the amount requested or of the decision by the chief judge of the circuit denying approval of the full amount certified by the court in which the representation was rendered. We note that there are presently pending several appeals from allowances by a district court of amounts less than requested. We leave any question of jurisdiction of those appeals to a later date.” (footnote omitted)); United States v. Todd, 475 F.2d 757, 759 n.3 (5th Cir. 1973) (“An additional question raised which we decline to consider, is the adequacy of the fee allowed appellant’s counsel as court-appointed attorney by the trial judge as compensation under [the CJA]. This appeal is not the appropriate vehicle for consideration of appointed counsel’s financial complaints.”).

⁸⁶ *See Instructions for CJA Form 20*, U.S. COURTS, <http://www.uscourts.gov/FormsAndFees/Forms/CJAForms/InstructionsForCJAForm20.aspx> [<http://perma.cc/TH7E-RTRF>].

⁸⁷ *See, e.g.,* Shearin v. United States, 992 F.2d 1195, 1196 (Fed. Cir. 1993) (“We agree with the line of cases that holds that fee determinations and the denial of fees under the CJA are not appealable.”); *cf. Rojem v. Workman*, 655 F.3d 1199, 1201 & n.1, 1202 (10th Cir. 2011) (concluding that the magistrate judge’s decision to award less than requested, within the statutory limits of § 3599—which are not codified with the rest of the CJA, but treated as part and parcel—cannot be reviewed by an appellate court); United States v. Bloomer, 150 F.3d 146, 148 (2d Cir. 1998) (holding that orders concerning fee determinations for retroactive service are not appealable under § 1291). *But see* United States v. Davis, 953 F.2d 1482, 1497–98 & n.21 (10th Cir. 1992) (agreeing with other courts that claims concerning amount of payment are not subject to appellate court jurisdiction, but indicating a willingness to hear a request for a writ of mandamus compelling action where the district court has completely failed or refused to comply with its duty to review CJA vouchers and process payments).

⁸⁸ *See* United States v. Smith, 76 F. Supp. 2d 767, 768–69 (S.D. Tex. 1999). In *Smith*, an attorney sought \$1397.50 for travel time and expenses incurred representing an indigent defendant as a court-appointed attorney under § 3006A. *Id.* at 768. When the court awarded him only \$1283.50, the attorney requested that the court reconsider the reduction. *Id.* In response, Judge Samuel B. Kent wrote an incendiary opinion in which he scolded the attorney for attempting to waste taxpayer money:

The Court is firmly convinced that it has an inherent obligation to scrutinize these requests, make necessary adjustments, and thus safeguard these taxpayer provided funds. The Court takes this obligation seriously, for without close scrutiny, there is little to prevent the dissipation of taxpayer money on unreasonable or downright frivolous activities by court appointed defense counsel. The Court emphatically rejects the suggestion that it must simply rubber-stamp a voucher in whatever amount a defense attorney has the audacity to request.

Attorneys who apply for CJA fees in excess of the statutory maximum submit a CJA Form 26 if they seek payment for work done before a district court or magistrate judge and a CJA Form 27 if they seek payment for work done in an appellate court.⁸⁹ When those attorneys are awarded less than or equal to the statutory maximum, circuit courts have consistently held that § 1291 does not provide for appellate review.⁹⁰

When a district court judge certifies an award higher than the statutory maximum, 18 U.S.C. § 3006A(d)(3) requires that the chief judge of the circuit additionally certify the order.⁹¹ This is definitively not a form of appellate review because the attorney seeking fees has no right to challenge the amount awarded by the court.⁹² If either the district or appellate court chooses to award less than the attorney requests, but more than the statutory maximum, the chief judge has no authority to adjust the district court's award upward to the requested amount, and the circuit courts have found that they may exercise no jurisdiction to review the final certification.⁹³

Id. Interestingly, Judge Kent became the first federal judge to be impeached by the House of Representatives in nearly twenty years when, in 2009, he attempted to abscond with a taxpayer-financed life salary by way of resignation for disability when he was convicted of obstruction of justice in connection with an investigation in which he was alleged to have sexually assaulted two female employees. See Ashley Southall, *House Approves Impeachment Articles Against Judge*, N.Y. TIMES, June 20, 2009, http://www.nytimes.com/2009/06/20/us/20brfs-HOUSEAPPROVE_BRF.html [<http://perma.cc/G8JC-NCDT>].

⁸⁹ See *Forms and Fees, Court Forms by Category*, U.S. COURTS, <http://www.uscourts.gov/FormsAndFees/Forms/CourtFormsByCategory.aspx> [<http://perma.cc/3GC8-K4TP>].

⁹⁰ See *United States v. French*, 556 F.3d 1091, 1092–93 (10th Cir. 2009) (finding no jurisdiction to review when attorney requested \$7420.75 and was awarded the statutory maximum of \$1500); *United States v. Rodriguez*, 833 F.2d 1536, 1537 (11th Cir. 1987) (finding no jurisdiction to review when attorney requested \$3850 and was awarded the statutory maximum of \$2000); *United States v. Melendez-Carrion*, 811 F.2d 780, 780–81 (2d Cir. 1987) (finding no jurisdiction to deviate from chief judge oversight system when attorney sought more than statutory maximum and review by more than just the chief judge); *In re Gross*, 704 F.2d 670, 671–72 (2d Cir. 1983) (finding no jurisdiction to review when attorney sought \$712 and was awarded the statutory maximum of \$250); *United States v. Smith*, 633 F.2d 739, 739, 741 (7th Cir. 1980) (finding no jurisdiction to review when attorney requested \$3901.16 in one case and \$2263 in another and was awarded the statutory maximum of \$1000 in each case).

⁹¹ See 18 U.S.C. § 3006A(d)(3) (2012).

⁹² See *In re Smith*, 586 F.3d 1169, 1173 (9th Cir. 2009).

⁹³ See *In re Carlyle*, 644 F.3d 694, 695, 698–700 (8th Cir. 2011) (finding no jurisdiction to review when attorney sought \$58,379 and was awarded \$7000, \$3500 more than the statutory maximum); *United States v. Stone*, 53 F.3d 141, 141, 143 (6th Cir. 1995) (finding no jurisdiction to review when attorney requested \$47,077.36 and district court awarded only \$33,693.80, far above the statutory maximum); *In re Baker*, 693 F.2d 925, 925, 926 (9th Cir. 1982) (finding no jurisdiction to review when attorney submitted a voucher for \$57,468.86 and district court awarded \$35,568.86, far greater than \$1000 maximum); *United States v. D'Andrea*, 612 F.2d 1386, 1387–88 (7th Cir. 1980) (finding no jurisdiction to review when attorney requested \$6859.23 and the chief judge approved only \$2210.23, \$1000 more than the statutory maximum).

Every circuit court to address the availability of appellate review in the CJA fee context has held that CJA fee decisions are not subject to appellate review in circuit courts under 28 U.S.C. § 1291. It is easy to see why this result generates unease, even among courts themselves. Attorneys file paperwork showing cause why a court should grant them payment under a federal statute. The court reviews the attorney's request and either grants or denies the requested relief. Actual parties are litigating these issues, and the results make a real world impact on the financial wellbeing of the litigants.

Like Judge O'Scannlain in *In re Application for Exemption from Public Access Fees by Jennifer Gollan & Shane Shifflett*, many courts seem to acknowledge that actual supervisory oversight should exist; perhaps in order to avoid the appearance of impropriety or illegitimacy, some courts have set aside mandamus as a potential avenue for access to circuit court oversight.⁹⁴ Similarly, the Ninth Circuit in *In re Application for Exemption* left open the possibility of mandamus review, stating in a footnote: "We also asked the Administrative Office whether we should construe the notice of appeal as a request for a writ of mandamus. However, Gollan and Shifflett have not asked us to exercise jurisdiction on that basis. We thus express no view about that possibility."⁹⁵ But when the courts close a door, they do not necessarily open a window—in fact, they may be boarding up the whole house.

II. WHY "UNAPPEALABLE" MEANS "UNREVIEWABLE"— THE UNAVAILABILITY OF EXTRAORDINARY WRITS IN ANY HIGHER COURT

A number of courts have set aside petitioning for a writ of mandamus as a potential means of securing intermediate review of nominally "administrative" decisions.⁹⁶ But this solution is illusionary: the power of circuit courts to issue writs of mandamus is decidedly limited under both current and historical understandings of the statute that created the writ. Circuit courts are empowered to issue writs of mandamus in limited circumstances, and though a number of scholars have offered suggestions on how mandamus might be used as a creative solution to new jurisprudential problems, none of these uses justifies expansion of the

⁹⁴ See, e.g., *Landano v. Rafferty*, 859 F.2d 301, 302 (3d Cir. 1988) ("We are not called upon to decide whether, under exceptional circumstances not presented here, an order of a district judge relating to compensation of appointed counsel might be reviewable on writ of mandamus. Nor are we called upon to decide whether an appeal or a writ of mandamus would ever be an available remedy in connection with other rulings by a district judge under the [CJA].").

⁹⁵ *In re Application for Exemption from Public Access Fees by Jennifer Gollan & Shane Shifflett*, 728 F.3d 1033, 1036 n.2 (9th Cir. 2013) (citation omitted).

⁹⁶ See *supra* note 94 and accompanying text.

mandamus power into review of unappealable administrative decisions. For this reason, and because review in the Supreme Court is functionally, if not also theoretically, unavailable, the circuit courts have effectively blocked all possible avenues of secondary review of CJA fee award and other so-called administrative decisions.

A. *Seeking Writs of Mandamus in United States Courts of Appeals*

Since their establishment, federal courts have possessed the power to issue writs. The All Writs Act was born out of section 14 of the Judiciary Act, which initially created the federal court system in 1789. The Act provided that the “courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.”⁹⁷ Though section 14 did not specifically provide for mandamus power, its open-ended language was understood to grant courts the authority to issue writs of mandamus, writs of prohibition, and a number of other common law writs.⁹⁸

Although English courts used the writ power mostly for ministerial purposes,⁹⁹ the open-ended nature of section 14 (known even in the early republic as the “all writs” provision) left American courts with some degree of freedom to use writs for more powerful ends.¹⁰⁰ Some have argued that this was the result of a congressional subcommittee for the judiciary that was sharply divided between Federalists who wanted a strong and nimble federal judiciary, and Antifederalists who sought to constrain the judicial

⁹⁷ Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (footnote omitted) (codified as amended at 28 U.S.C. § 1651(a) (2012)). The All Writs Act now reads: “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a).

⁹⁸ See Griffin B. Bell, *The Federal Appellate Courts and the All Writs Act*, 23 Sw. L.J. 858, 859 (1969) (“[W]hile . . . the All Writs Act authorizes the issuance of the traditional common law writs of mandamus and prohibition, the phrase ‘all writs’ also encompasses common law certiorari, injunctions, subpoenas, writs of *ne exeat*, writs of habeas corpus, and all other writs ‘necessary or appropriate’ in aid of jurisdiction.” (footnotes omitted)).

⁹⁹ See Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 802–03 (2001). For an interesting history of prerogative writs, see J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 143–51 (4th ed. 2007), and Pfander, *supra* note 19, at 1442–44.

¹⁰⁰ See Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1507 (“Courts within the common-law tradition used such writs for administrative purposes, mostly the accomplishment of minor details, and such is the import of the limiting language, ‘exercise of their respective jurisdictions’ and ‘agreeable to the principles and usages of law.’ But the writs also could be used to deal with matters of great moment, since they were broad and relatively open-ended.”).

branch.¹⁰¹ Whatever the rationale, it is clear that the All Writs Act and its predecessor in section 14 of the Judiciary Act of 1789 served to empower the federal courts.¹⁰²

The problem with circuit courts claiming that mandamus relief might be available as a method of appellate or supervisory review over administrative decisions is that such a claim ignores one of the earliest and most deeply rooted maxims of mandamus: the writ is understood to only be available in aid of jurisdiction that a court will eventually be able to assert.¹⁰³ Without an underlying statutory grant of jurisdiction, a writ of mandamus is simply unavailable. Mandamus is an extraordinary *remedy*, not a jurisdiction-creating right; mandamus cannot create jurisdiction where there is none.¹⁰⁴

The argument for the availability of mandamus relief in CJA fee reimbursement and other administrative decisions appears to be predicated on the use of mandamus at common law to compel executives to perform in their administrative capacities.¹⁰⁵ This calls to mind the Supreme Court’s analysis in *Marbury v. Madison*. There, Chief Justice Marshall explained that section 13 of the Judiciary Act granted the Court power to issue a writ of mandamus against an executive officer, and that mandamus would be an appropriate remedy to compel an executive officer to action.¹⁰⁶ But a writ

¹⁰¹ See *id.* at 1512–13 (The Judiciary Act was “the result of the direct collision of two contrary sets of expectations about the nature of the national government and of the national judiciary. . . . A collision of expectations produced a compromise product, with typical Janus-like provisions that looked in each direction.”); Stephen I. Vladeck, *Military Courts and the All Writs Act*, 17 GREEN BAG 2D 191, 191 (2014) (“[T]he All Writs Act . . . rounds Article III’s sharp jurisdictional edges by investing courts of such limited subject-matter jurisdiction with a species of common-law authority . . .”).

¹⁰² See *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 186–87 (1977) (Stevens, J., dissenting in part) (“The Act was, and is, necessary because federal courts are courts of limited jurisdiction having only those powers expressly granted by Congress, and the statute provides these courts with the procedural tools—the various historic common-law writs—necessary for them to exercise their limited jurisdiction.” (footnote omitted)); Holt, *supra* note 100, at 1512 (“A court favoring a generous, nationalizing construction of the Constitution could have construed these two expansive provisions, sections 13 and 14, to have eaten up any or all of the apparent restrictions the Senate had argued about for months.”).

¹⁰³ See *Garcia v. Texas*, 131 S. Ct. 2866, 2870 (2011) (Breyer, J., dissenting) (“[T]his Court, under the All Writs Act, can take appropriate action to preserve its ‘potential jurisdiction.’” (quoting *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966))).

¹⁰⁴ See, e.g., *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33 (2002) (holding that “the All Writs Act does not confer jurisdiction on the federal courts”); Steven Wisotsky, *Extraordinary Writs: “Appeal” by Other Means*, 26 AM. J. TRIAL ADVOC. 577, 579 (2003) (“The ‘aid of’ jurisdiction language indicates that the power to issue writs is remedial in nature and not *ipso facto* a basis of jurisdiction.”).

¹⁰⁵ See Pushaw, *supra* note 99, at 803 n.355.

¹⁰⁶ *Marbury v. Madison* 5 U.S. (1 Cranch) 137, 148 (1803). The Court then held that section 13 of the Judiciary Act violated the Constitution by enlarging the original jurisdiction of the Supreme Court, which is limited by Article III of the Constitution. *Id.* at 178–80.

of mandamus to compel an executive officer to act has never been understood to enable intra-judicial mandamus,¹⁰⁷ and attempts to use the mandamus power to spur other Article III *judges* to take any particular administrative action have been unsuccessful.¹⁰⁸ Mandamus by appellate courts against federal district judges has been confined primarily to matters in which the district court has clearly erred in deciding whether it may assert subject matter jurisdiction,¹⁰⁹ and even then, is very rarely issued.¹¹⁰

Accordingly, courts that offer mandamus review as a possible means of securing review where appellate review is not available are either doing so without a clear understanding of the scope of the writ, or they are trying to avoid telling litigants the simple truth: Supervisory review is completely unavailable. As long as circuit courts continue to construe § 1291 to withhold jurisdiction over administrative decisions, and the All Writs Act continues to require that writs issue only in aid of jurisdiction, mandamus in circuit courts is not an option for litigants seeking supervisory review.

B. The Unobtainable Writ of Mandamus from the United States Supreme Court

If circuit court mandamus review is off the table, is mandamus review in the Supreme Court similarly unavailable? This Section briefly examines two possible approaches to answering this question. Under either approach, however, the answer is the same: the Supreme Court, like the circuit courts of appeals, is effectively unavailable for supervisory review of administrative decisions under the existing regime.

¹⁰⁷ See Robert S. Berger, *The Mandamus Power of the United States Courts of Appeals: A Complex and Confused Means of Appellate Control*, 31 BUFF. L. REV. 37, 39 (1982) (“The historical origin of the mandamus power of the federal courts of appeals is the same as that of the power of the federal courts embodied in 28 U.S.C. § 1361 to mandamus an executive officer to perform his duty. But in usage today the two perform quite different functions. Section 1361 is a means of reviewing administrative action and calls into play considerations surrounding the involvement of the judicial branch in the activities of the executive branch. Section 1651, on the other hand, encompasses only involvement of appellate judges with the actions of district judges.” (footnote omitted)).

¹⁰⁸ Examples of this are difficult to find. The best example is found in *Chandler v. Judicial Council of the Tenth Circuit*, in which the Supreme Court bizarrely held that there was no need to determine whether it had jurisdiction to consider whether mandamus could issue to compel administrative action because the merits of the claim were insubstantial and no writ would issue either way. 398 U.S. 74, 89 (1970).

¹⁰⁹ See, e.g., *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1943) (“The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.”); Berger, *supra* note 107, at 42.

¹¹⁰ See Berger, *supra* note 107, at 40, 57 (noting that writs of mandamus are “rarely formally granted” and require an almost impossible showing that right to issuance is both clear and indisputable); Wisotsky, *supra* note 104, at 577.

The most widely accepted theory on the Supreme Court's availability for supervisory review is that the Court's appellate jurisdiction is only as broad as Congress affirmatively grants by statute. A wealth of scholarship surrounds *Ex parte McCardle*,¹¹¹ the early case often cited to support the proposition that Congress may have the authority under the Exceptions Clause¹¹² to strip the Supreme Court of much of its appellate jurisdiction.¹¹³ The assumption underlying this body of scholarship is that the Supreme Court's jurisdiction is limited to those cases and controversies that Congress has not statutorily excepted from the Court's purview.¹¹⁴ This widely accepted theory on jurisdiction stripping understands the Court's appellate jurisdiction to extend only so far as Congress allows by affirmative statutory pronouncement.

When it reenacted the Judicial Code as revised in 1948, Congress eliminated the freestanding statutory grant of Supreme Court mandamus authority included in the Judiciary Act of 1789 (which had been invalidated as an expansion of original jurisdiction in *Marbury*). The revised act folded the Supreme Court's mandamus power into the all writs language of section 14.¹¹⁵ If the Court's writs power derives from the Judiciary Act and the statutory language of the All Writs Act, then the Supreme Court is no more available to issue a writ of mandamus in a CJA or other administrative case than are the circuit courts.¹¹⁶ As we have already seen, the circuit courts lack that power.

Alternatively, some scholars have argued that the Supreme Court's jurisdiction derives not from statutory grant, but rather from the Constitution or the "Plan of the Convention." Professor James Pfander, for

¹¹¹ 74 U.S. (7 Wall.) 506 (1868).

¹¹² See U.S. CONST. art. III, § 1, cl. 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

¹¹³ See, e.g., Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 898 (1984) (arguing that although it might be unwise for Congress to strip the federal courts of jurisdiction, the Constitution permits Congress expansive power to do so); William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 260 (1973) ("The power to make exceptions to Supreme Court appellate jurisdiction is a plenary power.").

¹¹⁴ See Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 145 (1982); Lawrence Gene Sager, *The Supreme Court 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 37 (1981) ("[A]rticle III permits Congress to restrict the article III jurisdiction of the Supreme Court and of the lower federal courts. . . .").

¹¹⁵ See Pfander, *supra* note 19, at 1494 nn.276–78; *supra* text accompanying note 19.

¹¹⁶ See *supra* Part II.A for an explanation of why the All Writs Act does not sufficiently provide any avenue for review in purportedly "administrative" district court decisions.

example, has suggested that the Supreme Court’s direct appellate authority might be subject to some congressional restriction, but that the Court’s supervisory power in the form of writs is embedded within the Constitution as an irrevocable right.¹¹⁷ This theory makes a historical argument that the Framers meant for the United States Supreme Court to always retain its supervisory power over all inferior tribunals within the realm.¹¹⁸ As such, it may therefore compel lower courts to act, or not act, by issuing a writ of mandamus or prohibition—even when Congress has revoked the Court’s appellate jurisdiction (or, as in the case of CJA fee reimbursement and other “administrative” decisions, when appellate jurisdiction did not exist in the first place).¹¹⁹

But even if the Supreme Court enjoys unlimited and irrevocable authority to supervise inferior courts, obtaining relief from the Court in a CJA reimbursement case or other administrative case is inconceivable. The Supreme Court fills its own docket with pressing constitutional matters, vexing legal issues that have given rise to circuit splits, and important questions of the day.¹²⁰ It is difficult to imagine a CJA fee reimbursement decision that matches any of those descriptions—no constitutional rights appear to be at issue here, the circuits appear undivided, and divisive political issues tend not to be embedded within appeals for reimbursement adjustment.

In sum, under the current regime, when a party seeks statutorily provided funds from the court and the court denies the party’s request for relief, the federal district court’s decision is unreviewable in any higher

¹¹⁷ See Pfander, *supra* note 19, at 1441. Professor Pfander points to Section One of Article III and the Framers’ decision to establish “a supreme Court” (with a lowercase “s”), explaining that the Framers envisioned the Court to have all of the same characteristics as other supreme courts in existence before or at the time of the Founding. *Id.* at 1441–42; James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613 (2011). Ultimately, he proposes:

[T]he Inferior Tribunals Clause requires that any new courts Congress may erect must ultimately answer to their judicial superior, the Supreme Court of the United States The task of superintendence include[s] both a power of appellate review, to correct and unify contradictory rules of decision, and a power of supervision through the prerogative writs.

Pfander, *supra* note 19, at 1455–56.

¹¹⁸ See James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 199–200 (2007) (relying on the superiority–inferiority construct to assert that when state courts are empowered to decide federal questions, the Supreme Court retains its supervisory authority over those cases, even when Congress attempts to limit federal jurisdiction over a class of claims).

¹¹⁹ See Pfander, *supra* note 19, at 1456; see also Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 937 (2013).

¹²⁰ See generally Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 391 (2004) (detailing the various methods and concerns of the modern Supreme Court in its approach to choosing which certiorari petitions to grant).

court. Circuit courts interpret their jurisdictional grant under § 1291 to include only “judicial” decisions, and place CJA fee award decisions outside of that category. Because circuit courts may issue extraordinary writs only in aid of their jurisdiction, mandamus is foreclosed as well. Most scholars contend that the Supreme Court would similarly lack jurisdiction to issue an extraordinary writ in this situation, but even if it had jurisdiction, the Supreme Court would still be unavailable. Attorneys seeking CJA fees are completely at the mercy of the district courts.

III. AN APPEAL TO COMMON SENSE

Part I undertook an analysis of the Ninth Circuit’s recent PACER fee exemption decision and Criminal Justice Act fee award jurisprudence to show that courts have drawn an artificial and somewhat arbitrary line between “judicial” and “administrative” decisions. Part II explains why circuit courts are wrong when they suggest that the lack of § 1291 as-of-right appellate review for administrative decisions is anything other than a complete denial of supervisory review. Part III now discusses why it is problematic to draw the line between administrative and judicial in a place that bars higher court review of decisions that directly address substantive issues litigated by actual persons, and sketches a more sensible line.

As explored above, though many of the proceedings held and decisions issued in the context of CJA reimbursement resemble judicial work, the argument for characterizing CJA fee reimbursement decisions as “administrative” rather than “judicial” is somewhat linear. *Johnson v. Zerbst* held that the Sixth Amendment requires even indigent defendants be provided access to an attorney in criminal cases.¹²¹ In 1964, Congress acted to ensure that the federal courts would satisfy this constitutional requirement, passing the CJA and creating an infrastructure for enlisting local attorneys to serve as court-appointed counsel.¹²² Reimbursement of fees was part and parcel of this infrastructure and was therefore simply a mechanism for ensuring that federal courthouses could stay open and continue to satisfy requirements of due process of law. Because the district courts have absolute authority to manage themselves, any embedded protocols are left to the discretion of those courts as well, and that includes any and all aspects of the court-appointed-attorney procedure. In that way, CJA decisions really are analogous to decisions about chambers decor, office supplies, and clerk hiring.¹²³

¹²¹ 304 U.S. 458, 462 (1938).

¹²² See *supra* notes 62–66 and accompanying text.

¹²³ See *supra* notes 26–27 and accompanying text.

But drawing the line between administrative and judicial within the gray area of what “relates to the internal administration of the court” defies logic, ignores reality, and lacks nuance. For one, countless aspects of internal court administration affect both ongoing litigation and persons affiliated with the court outside of ongoing cases and controversies. It seems extraordinary, for example, that when a district judge issues an order staying proceedings for a court employee who alleges discrimination, the circuit court (whose job it is to review the district court’s decisions) is somehow barred from asserting jurisdiction to review the matter.¹²⁴ How is it possible that a district judge whose power is granted by Article III, whose salary and tenure are constitutionally protected, but whose decisions were never intended to be the unassailable final word on issues of statutory or constitutional interpretation, might wrongly interpret statutory text with impunity?

Furthermore, focusing on whether a decision relates to the internal administration of the court makes the line between administrative and judicial exceedingly manipulable. This can be seen, for example, in the divergent treatment of CJA cases and local bar admission, denial, and disciplinary decisions. As discussed above, courts have invariably held that decisions denying reimbursement (or granting less than requested) under the CJA do not feature adverse parties¹²⁵ and are considered sufficiently related to the inner workings of the court to make them administrative and thus unappealable. But courts have variously held that district court decisions to grant or deny local bar admission or to discipline a local attorney are sometimes sufficiently adverse and removed enough from court administration to warrant appellate oversight.¹²⁶ Moreover, courts do not appear to make any principled distinction between when bar admission and discipline decisions are appealable and when they are not.

The line between administrative and judicial should thus not depend upon the degree to which a decision relates to the court’s inner workings. Instead, a more sensible line should be drawn to separate purely ministerial decisions from those that affect litigating parties. Courts act as courts when

¹²⁴ See *In re Pickett*, 842 F.2d 993, 995 (8th Cir. 1988); see also *supra* note 28 and accompanying text.

¹²⁵ It should be noted that the Constitution says nothing about adverseness. The question of whether the Constitution truly demands adverseness in order to meet the “case” or “controversy” requirement of Section Two of Article III is beyond the scope of this Note, but is certainly worth asking. See James Pfander & Daniel Birk, *supra* note 44.

¹²⁶ Compare *In re Martin*, 400 F.3d 836, 840 (10th Cir. 2005) (finding subject matter jurisdiction to hear an appeal of an attorney’s suspension or disbarment from practice in federal district courts), with *Gallo v. U.S. Dist. Court for Dist. of Ariz.*, 349 F.3d 1169, 1176 (9th Cir. 2003) (“As this Circuit and other Circuits have found, the denial of a petition for admission to a district court bar is neither a[n appealable] final order . . . nor an [appealable] interlocutory order . . .”).

they interpret statutory language, decide questions of law, and apply law to fact—all of which often occur in the context of CJA reimbursement cases and others like them. Even when the issues decided implicate the internal affairs of the court, courts should recognize decisions addressing requests, challenges, or pleas for relief as judicial in nature and open to secondary review.

A line cordoning off only purely ministerial decisions would more appropriately differentiate between rightly unappealable decisions and those that deserve the procedural protections of our judicial system. Decisions about which law clerk to hire, how to decorate chambers, and what type of desk chair to purchase would quite clearly remain outside the realm of appellate oversight, as they would still squarely be classified as “administrative” decisions. Meanwhile, those decisions arising from the efforts of a litigant to secure relief or to realize her rights (what amount should be reimbursed under the CJA *to a requesting attorney*, whether a PACER fee exemption should be granted *to requesting reporters*, whether to deny access to the court library *to a person seeking access*) would be classified as “judicial,” and would definitively fall within the scope of § 1291.

If the courts insist on construing these decisions as “administrative,” they should at least recognize that decisions like these are different in character from the ministerial decisions with which many courts associate them. Though § 1291 does not textually (or, according to the Ninth Circuit, historically)¹²⁷ grant jurisdiction to the circuit courts to review administrative decisions, it also does not foreclose the exercise of such jurisdiction.¹²⁸ The system as it exists today allows district courts to conduct a hearing, make findings of fact and determinations of law, and issue a final decision, but then characterize the decision as neither “case” nor “controversy” so as to remove it from appellate oversight.¹²⁹ Whether appellate review is available should not depend upon whether the dispute is between two discrete litigants or between a party seeking relief and the court that is authorized to grant it. If judges are going to serve in an administrative capacity in deciding issues brought by persons seeking relief

¹²⁷ See *In re Application for Exemption from Elec. Pub. Access Fees* by Jennifer Gollan & Shane Shifflett, 728 F.3d 1033, 1037 (9th Cir. 2013); see also *supra* notes 49–52 and accompanying text.

¹²⁸ See 28 U.S.C. § 1291 (2012).

¹²⁹ U.S. CONST. art. III, § 2; see Redish & Kastanek, *supra* note 44, at 565–66 (“[T]he Framers’ deliberations indicate that they were committed to the proposition that jurisdiction given to the judiciary was constructively limited to cases of a Judiciary Nature.” (brackets and internal quotation marks omitted)).

before the court, the same values that guided this country's initial decision to establish appellate review direct that it be provided in this context.

The alternatives to either approach discussed above are insufficient and unrealistic. If courts are unwilling to recharacterize cases like CJA reimbursement as "judicial" rather than "administrative," and are likewise unwilling to permit § 1291 appellate review for nonministerial administrative decisions, another possible solution would be to broaden our present understanding of the mandamus power of circuit courts. The language of the All Writs Act seems to foreclose any plausible reading of the statute that would permit the exercise of writ authority for any reason other than to protect a court's own jurisdiction. But if "jurisdiction" is understood to mean not only subject matter jurisdiction, but also the right of the court to say what is law, perhaps the circuit courts might properly exercise that authority by using mandamus to protect their position as courts superior to the inferior district courts.

Inventive though it may be, this solution fails both because it requires a tortured reading of the All Writs Act and because it neglects the current state of Supreme Court jurisprudence regarding the availability of extraordinary writs. The Court has made clear that issuing mandamus requires not only that the issuing court have jurisdiction to do so, but also a substantial showing that issuing mandamus is appropriate.¹³⁰ In fact, the standard for issuing mandamus against a lower court is almost insurmountably high, requiring the litigant seeking mandamus to show an "abuse of judicial power" in the lower court.¹³¹ Even if one were to interpret the All Writs Act to allow for issuance of mandamus where no underlying "potential jurisdiction" exists,¹³² it seems virtually guaranteed that no CJA fee reimbursement decision would be subject to any more review than it receives under the current regime.¹³³

The only other conceivable alternative would be to grant appellate courts the power to issue extraordinary writs beyond the ambit of the All Writs Act, either by writing a new All Writs provision without the language

¹³⁰ See, e.g., *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25–26 (1943).

¹³¹ *Id.* at 27 (holding that there was no need to issue mandamus because the district court's "decision, even if erroneous . . . involved no abuse of judicial power"); see also *Berger*, *supra* note 107, at 44 ("We know that a lower court can err without abusing its power, but at what point does its error constitute an abuse? More importantly, why should this question be asked?").

¹³² See *Garcia v. Texas*, 131 S. Ct. 2866, 2870 (2011) (Breyer, J., dissenting) ("[T]his Court, under the All Writs Act, can take appropriate action to preserve its 'potential jurisdiction.'" (quoting *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966))).

¹³³ See *Wisotsky*, *supra* note 104, at 580–83 (outlining the various tests used by different circuits to determine whether extraordinary writs should issue, and explaining that the equitable considerations of urgency and irreparable harm tend to limit what would otherwise be an expansive writs power).

“in aid of their respective jurisdictions,” or by granting circuit courts the power vested in district courts to mandamus executive officers.¹³⁴ If judges are indeed performing in an administrative capacity when they make decisions regarding the reimbursement of fees under the CJA or whether to grant a petitioning party exemption from PACER fees, it might be appropriate to call these judges “executive officers” and subject them to executive officer mandamus. A circuit court could then exercise its newly conferred statutory authority to review a district judge’s decision and potentially issue mandamus compelling a different outcome.

Yet again, problems with this approach abound. For one, merely exercising administrative authority does not, by its nature, convert a judicial officer into an executive officer. Additionally, and more importantly, it is simply unrealistic to suggest Congress might be willing to renounce the language of one of this country’s founding documents in order to add purportedly administrative decisions to the already overflowing dockets of the circuit courts.

* * *

Even if we accept that CJA decisions are appropriately labeled “administrative” and are unappealable, their impact on citizens’ substantive rights surely places them close to the edge of the administrative umbrella. After all, CJA reimbursement decisions are decidedly different from decisions to reupholster office furniture or hire a law clerk insofar as there is a *person* involved in every case: CJA cases feature an attorney who has a congressionally created statutory right to recover some of the costs of defending indigent defendants; decisions to order fewer Post-it Notes from a retailer do not implicate a statutorily created right or privilege.

This is precisely the reason that the Ninth Circuit’s reliance on CJA case law in *In re Application for Exemption from Electronic Access Fees by Jennifer Gollan & Shane Shifflett* is so alarming. The attorneys who apply for CJA fee reimbursement often voluntarily sign up to be called upon and enlisted as court-appointed attorneys. They are, in some ways, agents of the court, so decisions about how to assign them and what to pay them are closely tied to regular courthouse administration. Perhaps if Jennifer Gollan and Shane Shifflett had been hired by the Federal District Court for the Central District of California to conduct investigatory research, the same

¹³⁴ 28 U.S.C. § 1651(a) (2012); *see also id.* § 1361 (“The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”).

argument could be advanced to advocate administrative treatment. But Gollan and Shifflett were never employed by the court, and their research bore no relation to the court's internal affairs.

The Ninth Circuit's willingness to rely on CJA case law as a springboard to deny appellate jurisdiction in a case involving persons unaffiliated with the court signals an alarming shift in the definition of "administrative" decisions.¹³⁵ It suggests that all that is necessary for courts of as-of-right appellate review to decline to exercise jurisdiction is for a party's claim to be tied in some way to the court's administrative protocols, with no regard for whether the *party* is at all affiliated with the court's administration. If this is all that circuit courts need to do to free up their overburdened dockets, what is to stop them from sweeping even more into the administrative bucket?¹³⁶

Appellate review is central to our conception of a just, fair, and legitimate judiciary.¹³⁷ We empower appellate courts with *de novo* review of constitutional and legal questions because we trust appellate courts to know and apply the law at a more sophisticated level, and because a large federal judiciary demands consistency and predictability.¹³⁸ That even questions of fact—which are better left to the courts and juries hearing cases in the first instance¹³⁹—are subject to review (albeit in a more deferential form) is a testament to our devotion to the appellate model.¹⁴⁰ One way or another, appellate review should be available in cases that directly implicate the substantive rights of actual persons coming before the court.

¹³⁵ See *In re Application for Exemption from Elec. Pub. Access Fees* by Jennifer Gollan & Shane Shifflett, 728 F.3d 1033, 1039 (9th Cir. 2013) (citing *United States v. Walton (In re Baker)*, 693 F.2d 925, 926 (9th Cir. 1982)); see also *supra* notes 44–48 and accompanying text.

¹³⁶ See POSNER, *supra* note 9, at 63–65, in which a prominent circuit court judge laments the untenable workload of the circuit courts.

¹³⁷ See Lipkin, *supra* note 7, at 7–8 (“[T]he appellate court is part of an integrated process of discovering truth If judges had a God’s eye view of the law in a given case, there would be no need for appellate review. Appellate review, therefore, is an attempt to get us closer to the true meaning of a given law than where we would be without this additional mechanism.”); see also MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 49 (1981) (“[A]ppeal allows the loser to continue to assert his rightness in the abstract without attacking the legitimacy of the legal system or refusing to obey the trial court. . . . We often see appeal principally as a mode of ensuring against the venality, prejudice, and/or ignorance of trial court judges and of soothing the ruffled feelings of the loser.”).

¹³⁸ See Oldfather, *supra* note 5, at 333–34.

¹³⁹ See Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts’ Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1523–24 (2012) (“[A]s a society we generally believe and historically we generally have believed that trial courts—judges and juries—have advantages in making fact findings . . . [due] to our belief that judges and jurors who were firsthand witnesses to the testimonial evidence and arguments usually have a superior ability to accurately find the facts.”).

¹⁴⁰ See SHAPIRO, *supra* note 137, at 53–54.

CONCLUSION

In re Application for Exemption from Electronic Public Access Fees for Jennifer Gollan & Shane Shifflett was not wrongly decided. Rather, it was a natural outgrowth of a body of decisional law whose ill-defined bounds permit its employ as a springboard to greater institutional evils. By adhering to formalist notions of adverseness and administration, the CJA cases indicate that the degree to which the substantive right asserted, type of relief requested, and court proceedings conducted resemble a case or controversy bear little to no importance in determining whether institutional protections are called for. If we are serious about ensuring the legitimacy of the federal judiciary by means of commitment to a system of appellate review, this formalism must be discarded in favor of a more nuanced, realist, common-sense approach.

