

COMMENT

A Blueprint for Applying the Rules Enabling Act's Supersession Clause

When Congress passed the Rules Enabling Act (REA),¹ it deferred to the Supreme Court's institutional expertise to enact guidelines for judicial procedure. In the REA, Congress included a provision—now known as the supersession clause—that declared existing statutes in conflict with new rules to “be of no further force or effect.”² This Comment examines a divergence between 18 U.S.C. § 3731 and Federal Rule of Appellate Procedure 4(b)(1)(B) that implicates the supersession clause. Three circuits have adjudicated this conflict and reached different conclusions. The substance of the conflict concerns the timeliness of government appeals of district court decisions and orders in criminal cases. At present, Rule 4(b) permits a longer appellate time limit than § 3731, but a 2007 Supreme Court case, *Bowles v. Russell*,³ may invalidate any limit longer than that in § 3731. This Comment asserts that irrespective of *Bowles*, applying the supersession clause favors the primacy of Rule 4(b). Employing the supersession clause provides a blueprint for future rule-statute disputes concerning timeliness. In making these determinations, this Comment argues that courts should evaluate the rule versus the statute according to three metrics: the relative recency of enactment, the institutional competence of the respective authors to decide the issue, and the degree to which the rule affects substantive rights.

1. 28 U.S.C. §§ 2071-2077 (2000).

2. *Id.* § 2072(b).

3. 127 S. Ct. 2360 (2007).

I. THE SPECTRUM OF RULE-STATUTE PRIMACY

Rule 4(b) and § 3731 diverge with respect to the moment at which the government's thirty-day appellate time limit begins. Section 3731 states that the "appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered."⁴ By contrast, Rule 4(b) states that "[w]hen the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of: (i) the entry of the judgment or order being appealed; or (ii) the filing of a notice of appeal by any defendant."⁵ The statute begins the thirty-day clock when the decision is *rendered*, but the rule begins the countdown once the judgment or order has been *entered* on the criminal docket.⁶ Any delay between the issuance of the order and its entry on the docket creates a disparity between the deadline authorized by the statute and the later deadline provided for in the rule. In factually similar cases, the Fifth, Ninth, and Tenth Circuits resolved this disparity by relying on different legal authorities, resulting in three divergent outcomes.

The Fifth Circuit in *United States v. Wilson* held that only Rule 4(b) applies because "where a conflict exists between a rule and a statute, the [more] recent of the two prevails."⁷ In *Wilson*, the government filed its appeal thirty-two days after an order suppressing evidence was issued, but only twenty-nine days after the order had been entered into the docket. In an earlier Fifth Circuit case, *Jackson v. Stinnett*, the court had adopted the last-in-time analysis for rule-statute conflicts.⁸ The *Wilson* court ultimately concluded that while "repeals by implication are not favored," . . . "the later act to the extent of the conflict constitutes an implied repeal of the earlier one."⁹ The Fifth Circuit also cited

4. 18 U.S.C. § 3731 (2000).

5. FED. R. APP. P. 4(b)(1)(B).

6. See, e.g., *United States v. Cantero*, 995 F.2d 1407, 1408 n.1 (7th Cir. 1993) (defining entry of judgment as "entry on the docket").

7. 306 F.3d 231, 236-37 (5th Cir. 2002).

8. 102 F.3d 132, 134-36 (5th Cir. 1996) (stating that the supersession clause trumps "statutes passed before the effective date of the rule"); see also *id.* at 135 ("[A] statute passed after the effective date of a federal rule repeals the rule to the extent that it actually conflicts.").

9. *Wilson*, 306 F.3d at 236 (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987); *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)); cf. *Penfield Co. v. Sec. & Exch. Comm'n*, 330 U.S. 585, 590 n.5 (1947) ("Where a Rule of Civil Procedure conflicts with a prior statute, the Rule prevails.").

§ 3731's final line that the statute shall be "liberally construed to effectuate its purposes."¹⁰

The Ninth Circuit has similarly addressed this conflict. Although it initially concluded that "[t]he Rule trumps the statute,"¹¹ the court ultimately held on rehearing that the statute has the same effect as the rule.¹² In *United States v. Kim*, the government appealed an order dismissing an indictment sixty-two days after the decision but only twenty-nine days after docketing. The Ninth Circuit panel wrote unambiguously that "[n]o conflict exists because [the Rules Enabling Act] has abolished [§ 3731]."¹³ Upon rehearing, however, the same Ninth Circuit panel amended that opinion, citing a 1992 case from the Tenth Circuit, *United States v. Sasser*, which held that the rules could not extend the court's statutory jurisdiction.¹⁴ Noting its reluctance "to read the Rules . . . to have made an illegal expansion of our jurisdiction," the court clarified that "a judgment is rendered when there is entry of the judgment on the docket."¹⁵ Thus, in *Kim II*, the Ninth Circuit backtracked from its original holding in *Kim I* and crafted a definition of "rendering judgment" from § 3731 that almost exactly matches the language of the timeliness provision from Rule 4(b). The Ninth Circuit's position does not necessarily favor the rule over the statute; it merely holds that they compel the same outcome.

Resolving a dispute stemming from the government's appeal of a dismissed indictment, the Tenth Circuit in *Sasser* held that "in case of a conflict between a jurisdictional statute and the Rules of Appellate Procedure, the statute controls."¹⁶ The government's appeal was filed within thirty days of the defendant's appeal but thirty-four days after the original order. The Tenth Circuit ruled for the defendants, citing Rule 1(b), which states that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law."¹⁷ The court also remarked normatively that "the government generally is not as disadvantaged as the defendant by . . . time

10. *Wilson*, 306 F.3d at 237.

11. *United States v. Kim (Kim I)*, 298 F.3d 746, 749 (9th Cir. 2002).

12. *United States v. Kim (Kim II)*, 317 F.3d 917 (9th Cir. 2002).

13. *Kim I*, 298 F.3d at 749.

14. *Kim II*, 317 F.3d at 917 ("[W]e . . . now agree with the Tenth Circuit [in *Sasser*] that the statute is jurisdictional . . ."); see *United States v. Sasser*, 971 F.2d 470, 473 (10th Cir. 1992).

15. *Kim II*, 317 F.3d at 918.

16. *Sasser*, 971 F.2d at 473.

17. *Id.*

limitation[s].”¹⁸ At no point in the decision did the majority discuss the supersession clause.

These three circuits reached two diametric conclusions and a potential compromise position. The Fifth Circuit held that the rule unequivocally trumped the statute, whereas the Tenth Circuit held the reverse. By harmoniously construing both the statute and the rule, the Ninth Circuit may have established a middle ground. While the Ninth Circuit’s conclusion avoids an undesirable implied repeal, it may not satisfy the jurisdictional concerns presented in *Sasser*.

II. THE SUPREME COURT’S LATEST PRONOUNCEMENT ON RULE-BASED AND STATUTORY TIME LIMITS

The Supreme Court in *Bowles v. Russell* ruled that statutory time limits for civil appeals are mandatory and jurisdictional.¹⁹ *Bowles* will influence how lower courts resolve disputes between rules and statutes that govern the timeliness of both civil and criminal appeals. The case affirmed a Sixth Circuit decision, dismissing a habeas appeal for lack of jurisdiction.²⁰ The appellant’s notice of appeal was not filed within the time period established by statute, even though it fell within the range provided by the district court’s order. The majority noted that in a civil case 28 U.S.C. § 2107 establishes appellate time limits for appeals to the circuits, and Federal Rule of Appellate Procedure 4(a) carries them into practice.²¹

The Court noted that a difference exists between time limits derived from statutes and those stemming from “court-promulgated rules.”²² Writing for the Court, Justice Thomas contrasted § 2101(c)’s guidelines for Supreme Court review of civil cases with the certiorari rules that govern criminal appeals to the Supreme Court. The Supreme Court has “treated the rule-based time limit for criminal cases differently, stating that it may be waived because ‘[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional.’”²³ Unlike criminal appeals to the Supreme

18. *Id.* at 474.

19. 127 S. Ct. 2360, 2366 (2007); see *The Supreme Court 2006 Term: Leading Cases*, 121 HARV. L. REV. 185, 315 (2007).

20. *Bowles*, 127 S. Ct. at 2365.

21. See *id.* at 2363.

22. *Id.* at 2365.

23. *Id.* (quoting *Schacht v. United States*, 398 U.S. 58, 64 (1970)). The certiorari rules that govern civil and criminal appeals to the Supreme Court are not all grounded in statute like the rules governing civil and criminal appeals to the circuits. Compare 18 U.S.C. § 2101(b)

Court, however, a statute establishes time limits for criminal appeals to the circuit courts: § 3731. Litigants in the circuit courts may now apply *Bowles* and argue that § 3731 sets a mandatory, jurisdictional boundary for criminal appeals. The *Bowles* majority noted neither the existence of § 3731 nor the implications of the REA's supersession clause for conflicts between rules and statutes.

Although the U.S. government would benefit from applying Rule 4(b) instead of § 3731, the government's brief in *Bowles* made a compelling case for statutory primacy. The government vigorously distinguished *Bowles* from the recent decisions in *Kontrick v. Ryan*²⁴ and *Eberhart v. United States*,²⁵ in which the Court waived time limits because "[b]oth *Kontrick* and *Eberhart* involved nonstatutory rules."²⁶ In addition, the government argued that the § 2107 time limit from *Bowles* is jurisdictional because it involved the transfer of proceedings from one court to another.²⁷ The parallel between the role of § 3731 in government criminal appeals and the role of § 2107 in civil appeals accords cleanly with this argument and appears to disadvantage the government, which probably will contest § 3731's primacy when litigated.²⁸

III. A FRAMEWORK FOR ASSESSING RULE-STATUTE CONFLICTS

Three factors should influence courts' adjudication of rule-statute disputes: (1) the recency of the statute's and the rule's enactments; (2) the institutional competencies of the respective authors on the topic; and (3) the degree to which the rule affects substantive rights. The conflict between Rule 4(b) and § 3731 exemplifies the type of dispute that courts should resolve by privileging the rule over the conflicting statute.

(2000), with 18 U.S.C. § 2102(d) (2000). See generally SUP. CT. R. 13.1 (establishing certiorari time limits).

24. 540 U.S. 443 (2004) (addressing FED. R. BANKR. P. 4004(a)).

25. 546 U.S. 12 (2005) (addressing FED. R. CRIM. P. 33(a)).

26. Brief for the United States as Amicus Curiae Supporting Respondent at 13, *Bowles v. Russell*, 127 S. Ct. 2360 (No. 06-5306).

27. As the government notes in its amicus brief, Judge Posner has recently written that "[t]he emergent distinction, so far as classification of deadlines as jurisdictional . . . is concerned, is between those deadlines that govern the transition from one court (or other tribunal) to another . . . and other deadlines, which are not." *Joshi v. Ashcroft*, 389 F.3d 732, 734 (7th Cir. 2004).

28. The only plausible explanation for the government taking this position in light of the present conflict is the government's failure to anticipate that a rule of statutory primacy would compromise its ability to file criminal appeals.

A. Recency of Enactment

More recently enacted rules should supplant older, conflicting statutes because they are more current reflections of collective wisdom on judicial proceedings.²⁹ In this case, Rule 4(b) has been subject to more recent consideration than § 3731. Rule 4(b)'s "entry" language finds its origins in the 1934 Criminal Appeals Rules,³⁰ which the Supreme Court partially incorporated into the Federal Rules of Criminal Procedure in 1947.³¹ The Court reaffirmed the entry language in the Federal Rules of Appellate Procedure in 1967.³² The Supreme Court last amended Rule 4(b) on April 25, 2005.³³ Because Congress did not amend the Court's version, the current wording of Rule 4(b) became effective on December 1, 2005.³⁴ In contrast, § 3731's "rendered" term first appeared in the 1902 Criminal Appeals Act,³⁵ and its most recent amendment passed in 2002.³⁶ In this case, the rule's original 1946 wording and its 2005 amendment are both more recent than the statute's 1902 original wording and 2002 amendment.³⁷ The "entry" language survived a

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29. See Bernadette Bollas Genetin, *The Powers That Be: A Reexamination of the Federal Courts' Rulemaking and Adjudicatory Powers in the Context of a Clash of a Congressional Statute and a Supreme Court Rule*, 57 BAYLOR L. REV. 587, 600 n.43 (2005) (citing cases for the proposition that more recently enacted rules supplant conflicting statutes).
 30. CRIM. APP. R. 3, 292 U.S. 662 (1934) (superseded 1947). Prior to the Rules Enabling Act, the Supreme Court promulgated the Criminal Appeals Rules under specific congressional delegation to draft rules relating to criminal procedure, including "the times for and manner of taking appeals." Act of Mar. 8, 1934, ch. 49, 48 Stat. 399, *repealed by* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 404(a)(1), 102 Stat. 4642, 4651 (1988).
 31. See George H. Dession, *The New Federal Rules of Criminal Procedure* (pt. 2), 56 YALE L.J. 197, 237-38 (1947).
 32. FED. R. APP. P. 4(b); 43 F.R.D. 70 (1967); *see also* FED. R. APP. P. 4(b), advisory committee's note (1967) ("This subdivision is derived from FRCrP 37(a)(2) without change of substance.").
 33. FED. R. APP. P. 4(b), 544 U.S. 1151 (2005); *see also* 151 CONG. REC. H3060 (daily ed. May 9, 2005).
 34. See 28 U.S.C. § 2074(a) (2000) ("The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.").
 35. Criminal Appeals Act, ch. 2564, 34 Stat. 1248 (1907) (codified as amended at 18 U.S.C. § 3731 (2000)).
 36. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).
 37. One may reasonably suggest that little difference exists between a 2005 amendment and a 2002 amendment. Although this factor alone may not be dispositive for courts, they should

deliberative process subsequent to Congress's most recent examination of § 3731's "rendered" language.

B. Institutional Competence

Judges should also evaluate these conflicts from the perspective of institutional competence. When Congress passed the REA, it delegated some of its powers to the Supreme Court in recognition of the judiciary's superior competence in establishing rules of procedure. In its early deliberations on the REA,³⁸ Congress explored the issue of comparative institutional competence in great depth.³⁹ In its 1926 report, the Senate acknowledged that "[a] legislative body immersed in questions of broad public policy only remotely related to the details of court procedure is ill adapted to the framing of court rules."⁴⁰ The drafters of the REA believed that "Congress would tell the Supreme Court what . . . courts may and shall do, but will leave it to the experience of that great tribunal to provide how they shall do it."⁴¹ The House Judiciary Committee similarly noted the Supreme Court's expertise, stating that "[t]he bill . . . [leaves] all detail to the Supreme Court, which is its featural merit."⁴²

In a strictly comparative sense, the Supreme Court is more competent than Congress at establishing procedures for moving cases from district courts to circuit courts.⁴³ Judges experience procedural challenges daily and are uniquely positioned to draft rules that effectuate the efficient administration of justice. Congress, an institution representative of the general population, does not have as much training, experience, or perspective to craft guidelines superior to those thought optimal by the courts. Congress's sole comparative advantage

consider recency in combination with institutional competence and the rule's effect on substantive rights.

38. As of the REA's passage in 1934, Congress had produced only perfunctory reports, totaling less than three pages. This reticence may have resulted from the REA's rushed enactment after the nearly twenty-year battle that Congress and the American Bar Association had waged over the REA. For the most comprehensive account of this campaign, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1050-98 (1982).
39. See S. REP. NO. 69-1174, at 6-8 (1926). The reports cited in this paragraph refer to the original legislation that is nearly identical to the version passed in 1934.
40. *Id.* at 7.
41. Burbank, *supra* note 38, at 1052 (citing *Hearings on ABA Bills Before the H. Comm. on the Judiciary*, 63d Cong. 22-23 (1914)).
42. H.R. REP. NO. 63-462, at 1 (1914).
43. See *Bus. Guides, Inc. v. Chromatic Commc'ns Enters.*, 498 U.S. 533, 565 (1990) (Kennedy, J., dissenting) (describing the regulation of judicial procedure as "an area where [the Supreme Court has] expertise and some degree of inherent authority").

stems from its greater democratic legitimacy.⁴⁴ Possibly to allay countermajoritarian concerns related to the supersession of statutes by rules, Congress included the six-month waiting period for all rules, permitting Congress to veto or alter rules within that window.⁴⁵ This provision demonstrates an institutional acknowledgement that the Supreme Court should have broad authority to craft the procedures that govern judicial operations.

C. *Effect on Litigants' Substantive Rights*

Apart from these institutional considerations, courts should also consider how the rule affects litigants. The Supreme Court has endorsed the language of the REA, reiterating that “the Rules ‘shall not abridge, enlarge or modify any substantive right.’”⁴⁶ It has also affirmed, though, that “[i]n enacting [the REA], however, Congress expressly provided that [inconsistent laws] . . . would automatically be repealed upon the enactment of new rules in order to create a uniform system of rules for Article III courts.”⁴⁷ Courts therefore must remain sensitive to a rule’s potential impact on substantive rights, despite the REA’s directive mandating automatic repeal of any statute that conflicts with the rule.

The Supreme Court has not precisely defined what would constitute an abridgment, enlargement, or modification of substantive rights, but the Court’s clearest statement on this topic appears in *Burlington Northern Railroad*

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44. See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 907 (1999) (“[C]oncerns about legitimacy . . . lie at the heart of modern discontent with court rulemaking.”). But see *id.* at 890 (“[T]he legitimacy of the court rulemaking process does not derive from public participation or political accountability, but instead from a model of principled deliberation akin to common law reasoning.”).
45. “[These rules] shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.” Act of June 19, 1934, Pub. L. No. 73-415, § 1, 48 Stat. 1064, 1064 (codified as amended at 28 U.S.C. §§ 2071-2077 (2000)). At present, proposed rules are subject to a six-month period of public comment and hearings, followed by a seven-month period, during which Congress may amend or reject the rule. See Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323, 328-31 (1991).
46. *Semtek Int’l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001) (quoting 28 U.S.C. § 2072(b) (2000)).
47. *Clinton v. City of New York*, 524 U.S. 417, 446 n.40 (1998); see also *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996) (“It is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law.”).

Co. v. Woods.⁴⁸ In *Burlington Northern*, the Court wrote, “Rules which incidentally affect litigants’ substantive rights do not violate [the REA] if reasonably necessary to maintain the integrity of that system of rules.”⁴⁹ In contrast, though, at least one member of the Court has described the REA’s reach as a “limited mandate.”⁵⁰ To give a more specific and recent example, the Court in *Henderson v. United States* held that time limits on service of process were “distinct from . . . substantive matters.”⁵¹ Dissenting in *Henderson*, Justice Thomas presciently noted that even though a rule may conflict with a statute, it should not supersede the legislation if the rule affects substantive rights.⁵² If Justice Thomas’s reasoning applies, the substantive right consideration trumps the recency and institutional competence arguments. The Court should consider these three factors in totality, however, and not permit one element to trump the other two.

Examining the present conflict, judges should follow the holding in *Henderson* and conclude that the longer timeframe authorized by Rule 4(b) is similarly distinct from substantive rights. Justice Souter, dissenting in *Bowles*, analyzed the issue precisely: “A filing deadline is the paradigm of a claim-processing rule, not [a jurisdictional rule].”⁵³ The Supreme Court has noted that even “a jurisdiction-conferring or jurisdiction-stripping statute usually ‘takes away no substantive right.’”⁵⁴ If, under *Bowles*, rules do not have the power to alter jurisdiction, and jurisdictional changes do not typically rise to the level of affecting substantive rights, it appears unlikely that Rule 4(b)’s potentially longer time limit could affect a substantive right according to this high standard.⁵⁵ Moreover, while the jurisdictional issue may remain ambiguous, the Supreme Court commented in 1986 that the “legislative history of 18 U.S.C. § 3731 ‘makes it clear that Congress intended to remove all

48. 480 U.S. 1 (1987).

49. *Id.* at 5.

50. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 410 (1990) (Stevens, J., concurring).

51. 517 U.S. 654, 671-72 (1996).

52. *Id.* at 676 (Thomas, J., dissenting). The *Henderson* majority did not issue a holding on this precise point.

53. *Bowles v. Russell*, 127 S. Ct. 2360, 2369 (2007) (Souter, J., dissenting).

54. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2765 (2006) (citing *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)).

55. *But see* Robert P. Wasson, Jr., *Resolving Separation of Powers and Federalism Problems Raised by Erie, the Rules of Decision Act, and the Rules Enabling Act: A Proposed Solution*, 32 CAP. U. L. REV. 519, 530 (2004) (“[A] Rule viewed as ‘procedural’ in the abstract may be shown to have unintended ‘substantive’ effects when actually applied in a specific case.”).

statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit.”⁵⁶

D. Employing Canons of Statutory Construction

Even if the circuits do not wish to give primacy to Rule 4(b), another possible resolution of this dispute lies in employing the canon disfavoring implied repeals.⁵⁷ Courts historically have been reluctant to repeal statutes under the supersession clause,⁵⁸ resorting to implied repeal only in instances of irreconcilable conflict.⁵⁹ On other occasions, however, courts have sought to construe rules and statutes in a manner that avoids the conflict altogether.⁶⁰ In the case of Rule 4(b), this tactic—similar to the methodology of the Ninth Circuit in *Kim II*—would lead the Court to conclude that Rule 4(b)’s language controls because a judgment is not “rendered” until it has been “entered.” This reasoning enables circuit courts to value the greater competence of Rule 4(b)’s drafter and its more recent enactment, while avoiding the countermajoritarian concerns associated with repealing a statute.

CONCLUSION

The dispute over the relative primacy of Rule 4(b) and 18 U.S.C. § 3731 can serve as a roadmap for future cases in which rules and statutes conflict. This Comment’s suggested three-part evaluation effectuates the intentions of the REA’s drafters and should guide judges in determining which time limit prevails. Likewise, trying to construe the two rules without conflict may be a productive strategy for judges disfavoring repeals by implication. This strategy remains faithful to the REA’s purpose, promotes the efficient administration of the federal courts, and protects litigants’ substantive rights.

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56. *United States v. Loud Hawk*, 474 U.S. 302, 313 (1986) (quoting *United States v. Wilson*, 420 U.S. 322, 337 (1975)).

57. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987).

58. *See Bernadette Bollas Genetin, Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677, 701-04 (2002) (citing cases demonstrating reluctance to employ the supersession clause).

59. *See id.*

60. *E.g., United States v. Microsoft Corp.*, 165 F.3d 952, 958 (D.C. Cir. 1999).