

DEFINING FINALITY AND APPEALABILITY BY COURT
RULE: A COMMENT ON MARTINEAU'S "RIGHT PROBLEM,
WRONG SOLUTION"

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By his extensive scholarship and law reform work, Professor Robert Martineau has earned the compliment that he has probably forgotten more about appellate practice and procedure than most lawyers will ever know. His article in this journal faults a proposal of the Federal Courts Study Committee (FCSC),¹ now enacted into law,² to delegate considerable authority over federal definitions of finality and appealable interlocutory orders to the federal rules process. Professor Martineau's main point is that the FCSC and Congress should have used the ABA-Wisconsin discretionary approach for review of non-final trial court judgments and orders³ instead of giving the rulemakers somewhat of a blank check. He also foresees other problems with what the rulemakers might do in exercising their new authority.

I am in the happy position of registering disagreement that amounts to reassurance. This comment will briefly argue that the new rulemaking authority largely allows the Supreme Court to adopt the ABA-Wisconsin model if the rulemakers find the arguments in favor of this approach persuasive. Further, the new authority is unlikely to produce the problems that Professor Martineau fears. In short, don't worry, Bob; you should make the case for the approach you favor to the federal Advisory Committee on Appellate Rules, in which effort I wish you well.

The FCSC recommendation was concise:

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1. See *infra* text accompanying note 4.

2. See *infra* text accompanying notes 7-9.

3. See Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 776-87 (1993) (describing proposal of AMERICAN BAR ASSOCIATION, COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS § 3.12 (1977), and its implementation in Wisconsin); see also text accompanying note 10 *infra* (text of Wisconsin statute).

To deal with difficulties arising from definitions of an appealable order, Congress should consider delegating to the Supreme Court the authority under the Rules Enabling Act to define what constitutes a final decision for purposes of 28 U.S.C. § 1291, and to define circumstances in which orders and actions of district courts not otherwise subject to appeal under acts of Congress may be appealed to the courts of appeals.⁴

Congress has now accepted that recommendation in full. In an act implementing several FCSC proposals in 1990,⁵ Congress added a new subsection (c) to the Rules Enabling Act, whose subsection (a) authorizes the Supreme Court "to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals"⁶:

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of [title 28 of the United States Code].⁷

Just recently, Congress passed more implementing legislation⁸ that included a new subsection for 28 U.S.C. § 1292 on appealable interlocutory decisions:

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).⁹

The ABA-Wisconsin approach that Professor Martineau favors, as it exists in statutory form in Wisconsin, provides:

(1) APPEALS AS OF RIGHT. A final judgment or a final order of a circuit [trial] court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment or order . . . which disposes of the entire matter in litigation as to one or more of the parties

(2) APPEALS BY PERMISSION. A judgment or order not appealable as a matter of right under sub. (1) may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will:

4. FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMM. 95 (1990).

5. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 315, 104 Stat. 5115 (1990).

6. 28 U.S.C. § 2072(a) (1988).

7. 28 U.S.C. § 2072(c) (Supp. II 1991).

8. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506 (1992).

9. 28 U.S.C.A. § 1292(e) (West Supp. 1993).

- (a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;
- (b) Protect the petitioner from substantial or irreparable injury; or
- (c) Clarify an issue of general importance in the administration of justice.¹⁰

The present federal appealability statutes include in section 1291 substantially the same final decision requirement that appears in subsection (1) of the Wisconsin law.¹¹ Thus, the main difference between the federal and ABA-Wisconsin approaches lies with federal section 1292, which lists several categories of appealable interlocutory decisions,¹² and Wisconsin's subsection (2), which grants discretion to the court of appeals to allow an interlocutory appeal when the court determines that the appeal would serve any of three broad functional goals.

Especially after the 1992 amendment authorizing the creation of additional categories of appealable interlocutory decisions by rule, it is clear that the United States Supreme Court could promulgate Wisconsin's subsection (2) in whole or in part if it saw fit. Some overlap with existing statutory provisions for interlocutory review could result. For instance, if the Supreme Court adopted Wisconsin's subsection (2) by rule, a court of appeals might hear an interlocutory appeal of a particular order either pursuant to the new rule or under section 1292(b) upon certification by the trial judge.¹³ To keep such overlaps from getting too messy, federal rulemakers persuaded of the general wisdom of the ABA-Wisconsin approach might be well advised to fine tune new categories of interlocutory appeals. They might also do well to use their power to define finality under section 1291 to move some present categories of "final" decisions such as collateral orders¹⁴ from section 1291 to new rule categories of appealable interlocutory orders.

The Supreme Court, then, can now do by rule most or all of what Professor Martineau would have Congress do by statute. It is understandable that he might have preferred the legislative energy that went

10. WIS. STAT. ANN. § 808.03 (West Supp. 1992).

11. Compare 28 U.S.C. § 1291 (1988) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .") with WIS. STAT. ANN. § 808.03(1) (West Supp. 1992) ("A final judgment or a final order of a circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law.").

12. See 28 U.S.C. § 1292(a)-(d) (1988) (defining categories of permitted interlocutory appeals, including appeals from many interlocutory orders concerning injunctions, receiverships, etc., and discretionary appeals in limited circumstances).

13. See quoted passage *infra* note 18.

14. See Martineau, *supra* note 3, at 739-43 (discussing collateral order doctrine).

into conferring the new rulemaking authority on the Court to have gone instead into adopting his solution. Mustering enough support for his single approach out of the many that reformers have advocated,¹⁵ however, would likely have been far more difficult and uncertain of success than getting through the new delegation of rulemaking authority. The bodies involved in the rules process, busy groups but less distracted than Congress, can focus on choosing the best system. Professor Martineau's chances, if anything, are likely to be better in the rules process than in the halls of Congress.

The Supreme Court's ability to implement the approach advocated by Professor Martineau obviates his major objection to the FCSC recommendation and Congress' recent actions. Nothing in the new authority, particularly with the 1992 expansion concerning interlocutory appeals, limits it solely to defining or creating "appeals of right," having either to "confer mandatory jurisdiction or [to] deny jurisdiction in the appellate court."¹⁶ The Supreme Court may by rule "provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for . . ."¹⁷ New interlocutory appeal rules could readily include discretionary conditions like those found in existing section 1292(b),¹⁸ rather than only conferring or denying mandatory appellate jurisdiction.

Professor Martineau continues with several other objections to the FCSC proposal and the new authority. They will not, he says, "accomplish the goals stated by the FCS Committee in its report—to reduce litigation on issues of finality and appealability, to avoid dismissal of appeals as premature, and in particular, to avoid instances in which an appeal of an order not truly final but immediately appealable is held to

15. *See id.* at 749-60 (discussing several proposals for changes in existing statutory provisions on finality rule and its exceptions).

16. *Id.* at 772.

17. 28 U.S.C.A. § 1292(e) (West Supp. 1993).

18. 28 U.S.C. § 1292(b) (1988):

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

See also id. § 1292(d)(1)-(2) (parallel provisions for discretionary appeals by certification from Court of International Trade and United States Claims Court to United States Court of Appeals for the Federal Circuit).

be untimely because the appeal was not taken until after the final judgment was entered."¹⁹ He sees the authority to define finality by rule as usable only to "expand the definition of 'final' to include rulings that are not truly final but become final only because the rule says so."²⁰ He further fears the creation of an "ever expanding list"²¹ of categories of appealable orders, as may have happened in England.²² He also questions whether the rules process, with its recent increase in publicity and politicization, is still "more responsive to the needs of the courts and those who use them than Congress and the legislative process."²³

These concerns raise fair questions, but Professor Martineau seems too pessimistic in his view of the nature and likely use of the new authority. To begin with, the ABA-Wisconsin approach he favors includes a finality requirement for most appeals, as does federal law before and after the recent amendments.²⁴ Under either approach, therefore, litigation over finality would continue. If federal rulemakers believe they can reduce difficulties by adopting definitional rules, such litigation should decline because of increased clarity in the definitions. Similarly, a clearer definition of finality should reduce losses of appeal rights through failure to take timely appeals from "final" decisions. If the Advisory Committee concludes that efforts to define finality by rule might worsen the situation by triggering too much litigation over the new definitions, it presumably will follow the familiar doctor's maxim that it should first do no harm.

Much of Professor Martineau's concern seems to flow from his view that the authority to define "final" for purposes of appeal can be used only to expand the category. He states that the Supreme Court has interpreted "final" to include, first, judgments that effectively dispose of the litigation, and second, orders affecting rights that will be lost without an immediate appeal.²⁵ Professor Martineau then suggests that a new definition of "final" probably would not exclude either type of ruling.²⁶ His reading of the new rulemaking authority, I believe, is too grudging. The second type of ruling to which he refers involves obvious, if defensible, fudging that yields qualifications of the finality

19. Martineau, *supra* note 3, at 772 (footnote omitted).

20. *Id.*

21. *Id.* at 774.

22. *See id.*

23. *Id.* at 775.

24. *See supra* note 11 and accompanying text.

25. Martineau, *supra* note 3, at 772.

26. *Id.*

requirement, such as the much litigated collateral order rule. The congressionally delegated authority to "define when a ruling of a district court is final"²⁷ gives the rulemakers some authority that Congress itself might have exercised, which must include authority to adopt rules pruning back the growths that have sprung up in the borderland of finality.²⁸ The rulemakers might plausibly exercise the two aspects of their new authority in tandem, for example, to eliminate the collateral order doctrine but to treat the area as subject to discretionary interlocutory appeal as under the ABA-Wisconsin approach.

Another concern of Professor Martineau's, that the new authority will do nothing to avoid loss of appeal rights for failure to take a timely appeal from a ruling later held final, appears related to his belief that the definitional power can only expand the category of final decisions. If I am correct that the authority allows pruning as well as planting new shoots, eliminating categories in the gray area at the fringe of "finality" will reduce the already small number of situations in which parties face the threat of losing a right to appeal. If necessary, the rulemakers could explicitly indicate that interlocutory appeals pursuant to rule were optional with no loss of later appeal rights, and could perhaps include such a statement in definitions of retained borderline categories of "final" orders.²⁹ Further, if an effort at definition succeeds in

27. 28 U.S.C. § 2072(c) (Supp. II 1990).

28. The Federal Courts Study Committee was fully explicit on this point: "The rulemaking authority under this proposal would include authority . . . to change (by broadening, *narrowing*, or systematizing) decisional results under the finality rule of 28 U.S.C. § 1291 . . ." REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 4, at 96 (emphasis added). As for the limited legislative history in Congress, it is far from definitive; but it gives no support to Professor Martineau's view that the new authority permits only expansion of the category of "final" decisions. The 1990 House Report on the bill conferring this rulemaking authority refers to "uncertainty . . . as to the scope of a final decision . . . that could be reduced, if not eliminated, by the promulgation of clarifying rules." H.R. REP. NO. 734, 101st Cong., 2d Sess. 18 (1990). If the problem is "uncertainty" about "scope" that can be reduced by "clarifying rules," it is hard to see why narrowing and expansion are not equally legitimate. The Report goes on to quote the standard limit on Supreme Court rulemaking authority, that the rules prescribed "shall not abridge, enlarge or modify any substantive right," *id.* (quoting 28 U.S.C. § 2072(a) (1988)), but it should be difficult for reasonable redefinitions affecting only the *time* for appeal to run afoul of that constraint.

29. Sensible judicial construction has already reached this result, refusing to require immediate appeal from collateral orders. "A 'final' final order must be appealed forthwith; a 'collateral' final order need not be appealed but merges with the final judgment and may be appealed at the end of the case." *In re Kilgus*, 811 F.2d 1112, 1116 (7th Cir. 1987). Similarly,

[O]nly final judgments need be appealed. Until a judgment is rendered "final" by entry of a separate document under Fed. R. Civ. P. 58, no one need appeal. An appeal from an interlocutory order is not one from a final judgment, even if by virtue of *Cohen v. Benefi-*

improving clarity, parties will have better notice of when they do and do not need to take an immediate appeal, which should also help reduce the number of appeals dismissed as premature.

As for the proliferation of long lists of categories of orders defined as final or interlocutory but appealable, Professor Martineau's fears might be warranted. At least as likely, though, expressions of concern like his could persuade the rulemakers that such a course would be a mistake.³⁰ In any event, the danger of possible misuses of the authority hardly seems great enough to halt efforts at seeing if it can be used well. If the rulemakers give this potentially good idea a bad name by implementing it poorly, Congress can always take back what it has recently given.

Professor Martineau is, finally, skeptical about whether "the rule-making process is more responsive to the needs of the courts and those who use them than Congress and the legislative process."³¹ He cites recent criticism of the rules process and suggests that it has "become more public and thus more political and more time consuming."³² It is true that the regular rules process necessarily takes years with drafting, comment, approval from tiers of bodies up to the Supreme Court, and months on the table after submission to Congress before a new rule or amendment can take effect; and it is sometimes—but far from always—possible to get judiciary legislation through Congress quickly. Politicization and delay in the rules process, however, have tended to come in connection with legal hot buttons like Rule 11 and discovery reform,³³ while rafts of more technical, lawyers'-law changes have gone through with useful comment and refinement but no great flutter. Fi-

cial Industrial Loan Corp., 337 U.S. 541 (1949),] it is from a final decision. Interlocutory orders therefore may be stored up and raised at the end of the case. Other interlocutory decisions, even those producing interlocutory "judgments" (such as the denial of a preliminary injunction) receive the same treatment.

Kurowski v. Krajewski, 848 F.2d 767, 772 (7th Cir.) (citations omitted), *cert. denied*, 488 U.S. 926 (1988).

30. An advantage of the federal scheme for interlocutory appeals created by the recent amendments is that it *combines* having a *few* definite statutory categories, those of section 1292, with the new power to authorize interlocutory appeals in additional cases. Some definiteness, as for appealability of interlocutory trial court actions on injunctions under § 1292(a)(1), can be preferable to *always* having to argue appealability under general functional criteria like those of the ABA-Wisconsin approach. The functional criteria can then allow interlocutory appeals in some other cases without creating an "ever expanding list" of categories.

31. Martineau, *supra* note 3, at 775.

32. *Id.*

33. See, e.g., Henry J. Reske, *Tinkering with Procedure*, A.B.A. J., Sept. 1992, at 14.

nality definitions and appealability expansions seem unlikely to become lightning rods.

The possibility that the rules process *would* respond well to the needs of courts and litigants links to a key virtue of the new authority: It gives much of the job of defining finality and appealability to bodies with considerable specialized expertise and commitment to the workings of the appellate process. Before the FCSC proposal and the recent grants of rulemaking authority, definitions of finality and appealable interlocutory actions took place on two levels: in legislation, and in adjudication interpreting the appellate jurisdiction statutes. Congress has tinkered from time to time with those statutes but has left their most important features largely intact for many years, despite the difficulties that have led to numerous calls for reform such as Professor Martineau's. The courts when deciding cases necessarily labor under an obligation to interpret what Congress has laid down. Judges' ideas of what would constitute a desirable regime must take second place to divining legislative intent, or can enter only via the fudging that has complicated much of the federal law on appealability.

The federal rules process, by contrast, is in a useful intermediate position, neither bound as are the federal courts just to interpret what Congress has done nor subject to the multifarious distractions pressing upon a generalist Congress. The rulemakers, in particular the Advisory Committee on Appellate Rules, can think about policy and what may be the best ways to define finality and the circumstances in which interlocutory appeals shall be allowed, and then draft rules to achieve those ends. They may decide that Professor Martineau is right about the kind of rules they should propose, or they might get a better idea. They could even conclude that they are unlikely to be able to improve upon the present situation within the confines of their new authority, in which case nothing obligates them to use it.

What the Federal Courts Study Committee recommended and Congress enacted may not be ideal. It nonetheless creates an opportunity to gauge the success of defining finality and interlocutory appeal categories by rule. Professor Martineau has made his criticisms of the FCSC proposal and the new authority, but the authority is on the books. I hope he will now turn to helping the rulemakers make the best of this new opportunity, rather than letting his idea of the best become the enemy of the good. The rulemaking power that Congress has recently conferred could itself be a halfway house on the way to full delegation of power over definitions of appealability to the rules process.

That further step would clearly enable the rulemakers to adopt Professor Martineau's proposal without the encumbrance of present statutory language.

The "happy warrior" sees opportunities where others see problems. The new authority creates opportunities both to use it well as it stands, and to show by wise use that it should be broadened further. Professor Martineau is among those best qualified to help the rulemakers seize and make the most of these opportunities; I trust they can count on his help.

