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Adam N. Steinman

University of Alabama - School of Law, [asteinman@law.ua.edu](mailto:asteinman@law.ua.edu)

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#### Recommended Citation

Adam N. Steinman, *Appellate Jurisdiction and the Emoluments Litigation*, 53 Akron L. Rev. 659 (2019).

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**APPELLATE JURISDICTION AND THE  
EMOLUMENTS LITIGATION**

*Adam N. Steinman\**

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\* University Research Professor of Law, University of Alabama. Sincere thanks to the *Akron Law Review* for the invitation to participate in this symposium and to its editors for their excellent work on this article. Although the COVID-19 pandemic prevented us from gathering for an in-person symposium as originally scheduled, I am deeply gratified to be able to share space in this issue with such a wonderful group of appellate procedure scholars.

## I. INTRODUCTION

A symposium on federal appellate procedure may seem an unlikely venue for hot-button, ripped-from-the-headlines subjects. On the Venn diagram of our current moment, however, important questions of appellate jurisdiction have intersected with the myriad ethical questions surrounding the presidency of Donald J. Trump.<sup>1</sup> This Article examines the jurisdictional issues that have arisen in cases challenging Trump's conduct under the U.S. Constitution's Emoluments Clauses—issues that are currently headed for the U.S. Supreme Court.<sup>2</sup>

Part II of this Article summarizes two lawsuits—one in Maryland federal court and one in D.C. federal court—alleging that Trump's continued receipt of income from his various business enterprises violates the Emoluments Clauses. Part III describes early rulings by district court judges rejecting Trump's arguments that these cases should be dismissed at the pleading stage. Part IV turns to Trump's efforts to obtain immediate appellate review of those rulings, highlighting the different paths to appellate review that each case followed: one to the Fourth Circuit and the other to the D.C. Circuit. Part V critically examines both of these paths, arguing that they reflect a mistaken view of the relationship between appellate mandamus and the certification process set forth in 28 U.S.C. § 1292(b).

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1. See, e.g., Sharon LaFraniere, *Federal Appeals Court Rules for Trump in Emoluments Case*, N.Y. TIMES (July 10, 2019), <https://www.nytimes.com/2019/07/10/us/politics/trump-hotel-emoluments-constitution.html> [<https://perma.cc/N6MB-BZ7E>] (“In a legal victory for President Trump, a federal appeals court panel on Wednesday ordered the dismissal of a lawsuit claiming that he had violated the Constitution by collecting profits from government guests at his hotel in the nation’s capital. . . . The lawsuit, which alleges violations of the Constitution’s anti-corruption, or ‘emoluments,’ clauses, was about to enter the evidence-gathering phase.”); Ann E. Marimow & Jonathan O’Connell, *Trump Business Dealings Argued at Federal Appeals Court in Emoluments Case*, WASH. POST (Dec. 9, 2019), [https://www.washingtonpost.com/local/legal-issues/trump-business-dealings-argued-at-federal-appeals-court-in-emoluments-case/2019/12/09/84ee5286-1792-11ea-a659-7d69641c6ff7\\_story.html](https://www.washingtonpost.com/local/legal-issues/trump-business-dealings-argued-at-federal-appeals-court-in-emoluments-case/2019/12/09/84ee5286-1792-11ea-a659-7d69641c6ff7_story.html) [<https://perma.cc/39E5-EFGM>] (“Even as the judges seemed troubled that Congress may have no other viable way to enforce the Constitution’s anti-corruption emoluments provision, they did not seem prepared to allow the lawsuit from more than 200 Democratic lawmakers to move forward.”); Bobby Allyn, *Trump Still Faces 3 Lawsuits Over His Business Empire*, NPR (Dec. 12, 2019), <https://www.npr.org/2019/12/12/787167408/trump-still-faces-3-lawsuits-over-his-business-empire> [<https://perma.cc/9SSZ-QE8K>] (describing the emoluments litigation as seeking “a court order declaring that Trump is in violation of the Constitution’s Emoluments Clause, an anti-corruption provision that prohibits federal officials from receiving gifts or money from state and foreign governments”).

2. See *infra* notes 70–71 and accompanying text.

## II. SUING TRUMP TO ENFORCE THE EMOLUMENTS CLAUSE(S)

The Constitution contains two clauses relating to emoluments. One addresses *foreign* emoluments, and another addresses *domestic* emoluments. The Foreign Emoluments Clause appears in the eighth clause of Article I, section 9. It provides that “no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”<sup>3</sup> The Domestic Emoluments Clause appears in the seventh clause of Article II, section 1. It provides: “The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.”<sup>4</sup>

In the early years of the Trump administration, several lawsuits were filed in federal district courts alleging violations of the Emoluments Clauses. This article focuses on two of these lawsuits. One case, captioned *District of Columbia v. Trump*, was filed in U.S. District Court for the District of Maryland. The plaintiffs in this case are the State of Maryland and the District of Columbia. Another case, captioned *Blumenthal v. Trump*, was filed in U.S. District Court for the District of Columbia by 201 members of the House and Senate.<sup>5</sup>

There are some differences in the particular activities alleged in each case, but the basic theory is that Trump, through his financial interests in various businesses, has received payments and other benefits from foreign governments and state governments. Judge Sullivan’s opinion in *Blumenthal v. Trump* summarized the plaintiffs’ allegations this way: Trump “has a financial interest in vast business holdings around the world that engage in dealings with foreign governments and receive benefits from those governments.”<sup>6</sup> Trump “owns ‘more than 500 separate entities—hotels, golf courses, media properties, books, management companies, residential and commercial buildings airplanes and a

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3. U.S. CONST. art. I, § 9.

4. U.S. CONST. art. II, § 1.

5. These are not the only emoluments lawsuits against Trump. Another one was filed in a Manhattan federal court. See *CREW v. Trump*, 276 F. Supp. 3d 174, 174 (S.D.N.Y. 2017), *vacated and remanded*, 939 F.3d 131 (2d Cir. 2019), *amended*, 953 F.3d 178 (2d Cir. 2020). That case, however, has not raised the same issues regarding appellate jurisdiction, as explained *infra* note 35.

6. *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 51 (D.D.C. 2018) [hereinafter *Blumenthal I*] (quoting plaintiffs’ amended complaint).

profusion of shell companies set up to capitalize on licensing deals.”<sup>7</sup> These businesses “receive funds and make a profit from payments by foreign governments” and “they will continue to do so while he is President.”<sup>8</sup> Through these financial interests, Trump “has accepted, and will accept in the future, emoluments from foreign states.”<sup>9</sup>

Judge Messitte’s opinion in *District of Columbia v. Trump* focuses on activities at Trump’s hotel in Washington, D.C. According to the plaintiffs’ allegations, “a number of foreign governments have patronized or expressed a definite intention to patronize the Hotel, some of which have indicated that they are doing so precisely because of the President’s association with it.”<sup>10</sup> These include Saudi Arabia, which “spent thousands of dollars at the Hotel between October 1, 2016, and March 31, 2017.”<sup>11</sup> In addition, “at least some foreign governments have withdrawn their business from other hotels in the area not affiliated with the President and have transferred it to the Hotel,” including Kuwait, which “held its National Day celebration at the Hotel . . . despite having made a prior ‘save the date reservation with the Four Seasons hotel.’”<sup>12</sup>

Similar allegations addressed the Domestic Emoluments Clause. For example, “at least one State—the State of Maine—patronized the Hotel when its Governor, Paul LePage, visited Washington to discuss official business with the Federal Government, including discussions with the President.”<sup>13</sup> This included a trip where “the President and Governor LePage appeared together at a news conference at which the President signed an executive order to review orders of the prior administration that established national monuments within the National Park Service”—an order that “could apply to a park and national monument in Maine, which President Obama had established over LePage’s objections in 2016.”<sup>14</sup>

In both of these cases, Trump asked the courts to dismiss the claims at the earliest possible stage, making a range of arguments. In both cases, however, the district courts rejected Trump’s efforts. The next Part summarizes these early district court rulings.

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7. *Id.*

8. *Id.*

9. *Id.*

10. *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 734 (D. Md. 2018) (quoting plaintiffs’ amendment complaint).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* (citations omitted).

## III. EARLY DISTRICT COURT RULINGS IN THE EMOLUMENTS LITIGATION

## A. District of Columbia v. Trump

In the action filed by the District of Columbia and the State of Maryland in the Maryland district court, Trump made several arguments for dismissing the case. First, he argued that the plaintiffs lacked both Article III standing and prudential standing. In terms of Article III standing, the district court agreed with Trump that Maryland had “suffered no injury to its *sovereign* interests.”<sup>15</sup> However, it found that: “Plaintiffs have alleged injuries-in-fact to their quasi-sovereign, proprietary, and *parens patriae* interests that are concrete and particularized, actual and imminent. Those injuries are fairly traceable to the President’s purported conduct and are likely to be redressed by the Court through appropriate injunctive and declaratory relief if Plaintiffs succeed on the merits.”<sup>16</sup> As to these particular plaintiffs, however, Article III was only satisfied with respect to Trump’s hotel in Washington, D.C.<sup>17</sup>

The district court reached a similar conclusion on prudential standing. It first found that the District of Columbia and the State of Maryland fell within the “zone of interests” of the Emoluments Clauses, finding that “the Emoluments Clauses clearly were and are meant to protect all Americans” and “[t]hat being so, there is no reason why Plaintiffs, a subset of Americans who have demonstrated present injury or the immediate likelihood of injury by reason of the President’s purported violations of the Emoluments Clauses, should be prevented from challenging what might be the President’s serious disregard of the Constitution.”<sup>18</sup> The court then rejected Trump’s argument that the suit was barred by the political question doctrine. On this issue, the district

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15. *Id.* at 738 (emphasis added).

16. *Id.* at 752–53.

17. *Id.* at 753 (“[T]he Court finds that these particular Plaintiffs lack standing to challenge the operations of the Trump Organization or the benefits the President may receive from its operations outside the District of Columbia. But to be perfectly clear: The Court reaches this conclusion only with respect to these Plaintiffs and the particular facts of the present case. This is in no way meant to say that other States or other businesses or individuals immediately affected by the same sort of violations alleged in the case at bar, e.g., a major hotel competitor in Palm Beach (near Mar-a-Lago) or indeed a hotel competitor anywhere in the State of Florida, might not have standing to pursue litigation similar to that which is in process here.”).

18. *Id.* at 755. The district court recognized, but did not resolve, the plaintiffs’ argument that the Supreme Court’s decision in *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), had abandoned the zone of interest test. *See* District of Columbia v. Trump, 291 F. Supp. 3d 725, 755 (D. Md. 2018) (“The Court need not engage the issue of whether the zone of interests test has been abandoned. Assuming it has not been, the Court finds that Plaintiffs fall within the zone of interests of the Emoluments Clauses.”).

court concluded that there was no “textually demonstrable constitutional commitment” of a President’s compliance with the Emoluments Clauses “to a coordinate political department,”<sup>19</sup> nor was there a “lack of judicially discoverable and manageable standards for resolving’ this issue.”<sup>20</sup>

Turning to other arguments seeking to dismiss the complaint for failure to state a claim, the district court rejected Trump’s view that the Emoluments Clauses covered only “payment made in connection with a particular employment over and above one’s salary” and therefore did not apply to “payments to a federal official for any independent services rendered, such as for the rental of hotel rooms or event spaces privately owned by the officeholder, or payments for meals at his restaurants.”<sup>21</sup> Instead, the district court found that the Emoluments Clauses cover “any profit, gain, or advantage, of more than *de minimis* value, received by him, directly or indirectly, from foreign, the federal, or domestic governments,” including “profits from private transactions, even those involving services given at fair market value.”<sup>22</sup> The district court also rejected the argument put forward by *amici curiae* that the President himself is not subject to the Foreign Emoluments Clause at all.<sup>23</sup> The district court did not, however, rule on Trump’s argument that he had absolute immunity from suit for claims brought against him in his *individual* capacity.<sup>24</sup>

#### B. Blumenthal v. Trump

In the action filed by members of Congress in D.C. District Court, Trump sought dismissal on a number of grounds. The first was that the court lacked subject matter jurisdiction because of a lack of standing. The district court found that the plaintiffs did have Article III standing, recognizing that Trump was depriving them of the opportunity to give or withhold their consent to his acceptance of foreign emoluments, in

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19. *Id.* at 756 (quoting *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012)).

20. *Id.* at 757 (quoting *Zivotofsky*, 566 U.S. at 195).

21. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 880 (D. Md. 2018).

22. *Id.* at 904.

23. *Id.* at 882–86 (“The Court concludes that the President holds an ‘Office of Profit or Trust under [the United States]’ and, accordingly, is subject to the restrictions contained in the Foreign Emoluments Clause.” (brackets in original)).

24. *See* *District of Columbia v. Trump*, 930 F.3d 209, 212 (4th Cir. 2019), *appeal dismissed*, 959 F.3d 126 (4th Cir. 2020) (en banc). That argument, of course, would not have stopped the litigation entirely, because the claims against Trump in his official capacity for injunctive and declaratory relief would have survived. Indeed, as explained *infra* notes 46–47 and accompanying text, the plaintiffs voluntarily dismissed their claims against Trump in his individual capacity.

violation of the Foreign Emoluments Clause.<sup>25</sup> This was a constitutionally cognizable injury in fact, which was fairly traceable to Trump’s failure to seek consent from Congress. That injury could be redressed by the court’s grant of the declaratory and injunctive relief sought by the plaintiffs, which would include an order “enjoining the President from accepting ‘any present, Emolument, Office, or Title, of any kind whatever’ from a foreign state without obtaining ‘the Consent of Congress.’”<sup>26</sup>

In addition to asserting a lack of standing, Trump sought to dismiss this suit for failure to state a claim, arguing that profits Trump received through his business interests did not qualify as emoluments subject to the Emoluments Clause.<sup>27</sup> The district court rejected this argument, defining the term Emolument “broadly” to include “any profit, gain, or advantage.”<sup>28</sup> The district court also rejected Trump’s argument that there was no implied cause of action to seek injunctive relief under the Emoluments Clause. It found that the plaintiffs’ allegations—if proven—revealed that “the President is accepting prohibited foreign emoluments without seeking congressional consent, thereby defeating the purpose of the Clause to guard against even the possibility of ‘corruption and foreign influence.’”<sup>29</sup> The court therefore had “equitable discretion to enjoin allegedly unconstitutional action by the President.”<sup>30</sup> Likewise, the district court rejected Trump’s argument that an injunction against him would unconstitutionally “impose a condition on his ability to serve as President and to perform the duties he is duly elected to perform.”<sup>31</sup> The district court reasoned that “seeking congressional consent prior to accepting prohibited foreign emoluments is a ministerial duty,” and that a President “has no discretion as to whether or not to comply with it in the first instance.”<sup>32</sup>

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25. *Blumenthal I*, 335 F. Supp. 3d 45, 52–72 (D.D.C. 2018).

26. *Id.* at 72 (quoting Complaint ¶¶ 84–92).

27. *Blumenthal v. Trump*, 373 F. Supp. 3d 191, 194 (D.D.C. 2019).

28. *Id.* at 207 (“‘Emolument’ is broadly defined as any profit, gain, or advantage.” (citing *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 905 (D. Md. 2018))).

29. *Id.* at 209 (quoting 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 327 (Max Farrand ed., 1966)).

30. *Id.* (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015), for the proposition that “we have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law”).

31. *Id.* at 211 (quoting Motion to Dismiss).

32. *Id.* at 212.



## IV. MULTIPLE PATHS TO APPELLATE REVIEW

The general rule is that the federal courts of appeals have jurisdiction to review “*final* decisions of the district courts of the United States.”<sup>33</sup> None of the district court rulings described above constituted such “final decisions” in the traditional sense, because they simply *rejected* President Trump’s efforts to obtain an early dismissal of the action. They surely did not “end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment.”<sup>34</sup> Rather, the rulings meant that those cases would proceed in the district courts, in order to adjudicate the merits of the plaintiffs’ claims. Accordingly, Trump’s attempts to contest the district court’s rulings on appeal raised interesting questions of appellate jurisdiction.<sup>35</sup>

Trump’s first move was to ask the district courts in both *District of Columbia v. Trump* and *Blumenthal v. Trump* to certify their rulings for an immediate interlocutory appeal under 28 U.S.C. § 1292(b). Section 1292(b) provides a statutory exception to the final judgment rule, by which the district court may state in writing that a non-final 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.”<sup>36</sup> Such a certification then gives the court of appeals “discretion” to “permit an appeal to be taken from such order.”<sup>37</sup> In both *Blumenthal* and *District of Columbia*, however, the district courts initially refused to certify their rulings for immediate appeals under § 1292(b).<sup>38</sup> But Trump did not take no for an answer. The following Sections describe Trump’s attempts to obtain appellate review in the Fourth Circuit and D.C. Circuit.

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33. 28 U.S.C. § 1291 (2018) (emphasis added).

34. *Catlin v. United States*, 324 U.S. 229, 233 (1945).

35. Appellate jurisdiction has not been a concern in the case that was filed in Manhattan federal court. *See supra* note 5. There, the district court agreed with Trump’s arguments and dismissed the plaintiffs’ claims, *see* *CREW v. Trump*, 276 F. Supp. 3d 174, 195 (S.D.N.Y. 2017), leading to a final judgment in Trump’s favor that the plaintiffs appealed to the Second Circuit. *See* *CREW v. Trump*, 939 F.3d 131, 160 (2d Cir. 2019) (vacating and remanding the district court’s dismissal).

36. 28 U.S.C. § 1292(b) (2018).

37. *Id.*

38. *See* *District of Columbia v. Trump*, 344 F. Supp. 3d 828, 832 (D. Md. 2018) (denying § 1292(b) certification); *Blumenthal v. Trump*, 382 F. Supp. 3d 77, 79 (D.D.C. 2019) (denying § 1292(b) certification).

### A. *The Fourth Circuit*

Following the Maryland district court's rulings, Trump pursued two separate cases in the Fourth Circuit: First, he filed a petition for a writ of mandamus.<sup>39</sup> Second, he filed a notice of appeal, although that particular appeal challenged solely the district court's refusal to rule on his argument that he was absolutely immune from suit in his individual capacity.<sup>40</sup>

In a case captioned *In re Trump*, a three-judge panel issued a writ of mandamus directing the district court to certify its rulings for interlocutory appeal under § 1292(b). Citing the Supreme Court's decision in *Cheney v. United States District Court*, the opinion by Judge Niemeyer found that "there is no other mechanism for prompt appellate review of the threshold legal issues raised by the District and Maryland's complaint, which asserts unprecedented claims directly against a sitting President,"<sup>41</sup> and that the district court's refusal to certify its ruling under § 1292(b) "amounted to a clear abuse of discretion."<sup>42</sup> However, "rather than remand the case to the district court simply to have it pointlessly go through the motions of certifying," the Fourth Circuit panel explained that it would "take the district court's orders as certified and grant our permission to the President to appeal those orders, thus taking jurisdiction under § 1292(b)."<sup>43</sup> The panel then addressed the merits of the Article III standing issue, concluding that neither the District of Columbia nor the state of Maryland had Article III standing to pursue their claims against Trump for violating the Emoluments Clauses.<sup>44</sup>

In a second opinion issued that same day, captioned *District of Columbia v. Trump*, the same panel considered Trump's appeal regarding the individual-capacity claims.<sup>45</sup> Shortly after Trump filed his notice of appeal on this issue, the plaintiffs filed a notice of voluntarily dismissal (without prejudice) of their individual-capacity claims in the district court.<sup>46</sup> They accordingly sought dismissal of this appeal for lack of

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39. *See In re Trump*, 928 F.3d 360, 360 (4th Cir. 2019).

40. *See District of Columbia v. Trump*, 930 F.3d 209, 209 (4th Cir. 2019).

41. *In re Trump*, 928 F.3d at 371 (quoting *Cheney v. United States District Court*, 542 U.S. 367, 382 (2004)).

42. *Id.*

43. *Id.* at 372.

44. *See id.* at 375–79.

45. *Trump*, 930 F.3d at 211 ("[H]ere, we address the President's motion filed *in his individual capacity*, which raises the additional issue of whether the President has absolute immunity and which is presented to us by appeal." (emphasis in original)).

46. *See id.* at 212 ("[O]n December 19, the District and Maryland filed a notice of voluntary dismissal 'without prejudice' of their individual-capacity claims pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i).").

appellate jurisdiction.<sup>47</sup> Judge Niemeyer’s opinion for the panel rejected the plaintiffs’ jurisdictional argument, reasoning that the plaintiffs’ “lost the ability to act on the [individual-capacity] claims in the district court” after Trump had filed his notice of appeal.<sup>48</sup> Then, using an interpretation of the collateral order doctrine that allows denials of governmental immunity to be immediately reviewed, Judge Niemeyer ruled that the district court had effectively denied Trump’s invocation of absolute immunity by ordering the parties to begin discovery.<sup>49</sup> Finally, invoking its ruling on the mandamus petition, the panel concluded that the District of Columbia and Maryland lacked Article III standing to pursue their individual-capacity claims against Trump.<sup>50</sup>

On October 15, 2019, the full Fourth Circuit granted the plaintiffs’ petitions for en banc rehearing in both cases.<sup>51</sup> And on May 14, 2020, the en banc Fourth Circuit voted 9-to-6 to overturn the panel decisions in both *In re Trump* and *District of Columbia v. Trump*—thereby reinstating the district court’s decisions and allowing the litigation to proceed.<sup>52</sup> In both cases, Judge Motz authored the majority opinion, joined by Chief Judge Gregory and Judges King, Keenan, Wynn, Diaz, Floyd, Thacker, and Harris.<sup>53</sup> Judges Wilkinson, Niemeyer, Agee, Richardson, Quattlebaum, and Rushing dissented, stating that they would have reversed the district court and ordered the litigation be dismissed.<sup>54</sup>

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47. *See id.*

48. *Id.* at 214.

49. *Id.* at 213 (“After it deferred ruling on the President’s invocation of immunity, it ordered the parties to begin with discovery, thereby effectively denying the President the important aspect of immunity that he be spared the burdens of pretrial proceedings, including discovery.”).

50. *Id.* at 215 (“Because the claims that the District and Maryland assert against the President in his individual capacity are identical to the claims they assert against him in his official capacity and are premised on the same factual allegations, our decision in appeal No. 18-2486, also decided today and addressing the same standing issue, governs the outcome here. . . . [T]he District and Maryland do not have standing under Article III to pursue their claims against the President in any capacity, including his individual capacity.”).

51. *See In re Trump*, 780 F. App’x 36, 37 (4th Cir. 2019); *District of Columbia v. Trump*, 780 F. App’x 38, 38 (4th Cir. 2019).

52. *See In re Trump*, 958 F.3d 274 (4th Cir. 2020) (en banc); *District of Columbia v. Trump*, 959 F.3d 126 (4th Cir. 2020) (en banc).

53. *See Trump*, 958 F.3d at 278; *District of Columbia*, 959 F.3d at 128. In the mandamus action, Judge Wynn also wrote a concurring opinion that was joined by Judges Keenan, Floyd, and Thacker. *See Trump*, 958 F.3d at 289 (Wynn, J., concurring).

54. In the mandamus action, Judge Wilkinson authored a dissenting opinion that was joined by Judges Niemeyer, Agee, Richardson, Quattlebaum, and Rushing, *see Trump*, 958 F.3d at 290 (Wilkinson, J., dissenting), and Judge Niemeyer authored a dissenting opinion that was joined by Judges Wilkinson, Agee, Quattlebaum, and Rushing, *see id.* at 309 (Niemeyer, J., dissenting). In *District of Columbia v. Trump*, Judge Niemeyer authored a dissenting opinion that was joined by Judges Wilkinson, Agee, Quattlebaum, and Rushing, *see* 959 F.3d at 132 (Niemeyer, J., dissenting), and Judge Richardson authored a dissenting opinion, *see id.* at 142 (Richardson, J., dissenting).

Judge Motz’s majority opinion in *In re Trump* denied Trump’s petition for a writ of mandamus. Noting that “[t]he procedural posture in which this case comes to us—a petition for a writ of mandamus—is not window dressing,” she concluded that “[a] petitioner must establish a clear and indisputable right to the relief sought for a writ of mandamus to issue, and the President has not done so.”<sup>55</sup> Judge Motz first rejected Trump’s argument for a writ of mandamus compelling the district court to certify an interlocutory appeal under § 1292(b).<sup>56</sup> She did not completely “foreclose the possibility that in an appropriate case a writ of mandamus may issue to order a district court to certify an interlocutory appeal under § 1292(b).”<sup>57</sup> For example, “[i]f the district court ignored a request for certification, denied such a request based on nothing more than caprice, or made its decision in manifest bad faith, issuing the writ might well be appropriate.”<sup>58</sup> In the emoluments case, however, the district court’s § 1292(b) ruling “was not arbitrary or based on passion or prejudice; to the contrary, it ‘was in its nature a judicial act.’”<sup>59</sup> Mandamus was not appropriate vis-à-vis the district court’s refusal to certify the case under § 1292(b) because “the district court promptly recognized and ruled on the request for certification in a detailed written opinion that applied the correct legal standards.”<sup>60</sup>

Next, Judge Motz rejected Trump’s argument that—regardless of § 1292(b) certification—the Fourth Circuit should issue a writ of mandamus directing the district court to dismiss the lawsuit. She noted that such relief would require Trump to “establish that it is not merely *likely*, but ‘clear and indisputable,’ that the *entire action* cannot lie.”<sup>61</sup> Although the plaintiffs’ legal claims were “novel,” Judge Motz found that “reasonable jurists can disagree in good faith on the merits of these claims”—as well as on whether the plaintiffs suffered a “cognizable injury.”<sup>62</sup> Judge Motz also rejected Trump’s argument that a writ of mandamus was justified because of separation of powers, either because the suit would “subject[] the Executive Branch to intrusive discovery,”<sup>63</sup>

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55. *Trump*, 958 F.3d at 289.

56. *See id.* at 282–85.

57. *Id.* at 285.

58. *Id.*

59. *Id.* (quoting *Ex parte Secombe*, 60 U.S. (19 How.) 9, 15 (1856)).

60. *Id.*

61. *Id.* (emphasis in original)

62. *Id.* at 286.

63. *Id.* at 287 (discussing *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004) (internal quotation marks omitted)).

or because the judicial branch lacked the power to interfere regarding the President's performance of a "discretionary duty."<sup>64</sup>

Finally, the en banc Fourth Circuit's decision in *District of Columbia v. Trump* found a lack of appellate jurisdiction regarding Trump's argument that he was entitled to absolute immunity from the claims brought against him in his individual capacity.<sup>65</sup> Judge Motz's majority opinion recognized that "[a] district court's actual refusal to rule on immunity is treated as a denial of immunity and is immediately appealable,"<sup>66</sup> and that "[a]n implicit refusal to rule on an immunity question can also provide a basis for appellate jurisdiction."<sup>67</sup> But this route to an immediate appeal is not available when "it is clear that the district court *does* intend to rule on a motion asserting an immunity defense and has not unreasonably delayed in doing so."<sup>68</sup> Judge Motz concluded that the district court's seven-month delay in ruling on Trump's motion invoking absolute immunity did not "evinced[] an unreasonable delay or a desire to needlessly prolong this litigation," noting the district court's "express statements that it would rule on the President's motion to dismiss and its diligence in attending to other important matters in the case."<sup>69</sup>

It appears that the next stop for the Maryland emoluments litigation is the U.S. Supreme Court. In June 2020, Trump asked the Fourth Circuit to extend its previously entered stay on further district court proceedings, indicating that he plans to file a petition for certiorari in the Supreme Court.<sup>70</sup> The timing could be quite interesting, because the November 2020 election may affect whether a live controversy will still exist regarding Trump's conduct and the Emoluments Clauses.<sup>71</sup>

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64. *Id.* at 288.

65. 959 F.3d at 129.

66. *Id.* at 130.

67. *Id.*

68. *Id.* at 131 (emphasis in original).

69. *Id.* at 132.

70. See Motion to Extend the Stay of District Court Proceedings Pending the Resolution of a Forthcoming Petition for a Writ of Certiorari and any Further Proceedings in the Supreme Court, *In re Trump* (June 12, 2020) (No. 18-2486), 2020 WL 3183539; see also Motion to Stay the Mandate, *District of Columbia v. Trump* (June 12, 2020) (No. 18-2488), 2020 WL 3183540 (asking the Fourth Circuit to "stay the mandate to preserve the status quo pending a petition for a writ of certiorari in the Supreme Court").

71. Whether the result of the 2020 election could make the emoluments litigation moot as a formal matter is a question beyond the scope of this Article. Even if a live controversy remains, the election could affect the Supreme Court's interest in granting certiorari.

*B. The D.C. Circuit*

With respect to the D.C. district court’s ruling in *Blumenthal*, Trump filed a petition for a writ of mandamus in the D.C. Circuit. The three-judge panel (Judges Millett, Pillard, and Wilkins) denied the writ without prejudice in a per curiam opinion.<sup>72</sup> As for the substantive issues addressed in the district court’s rulings, the D.C. Circuit stated simply: “Although Petitioner has identified substantial questions concerning standing and the cause of action, he has not shown a clear and indisputable right to dismissal of the complaint in this case on either of those grounds.”<sup>73</sup>

The D.C. Circuit then turned to Trump’s request for an order directing the district court to certify the orders for interlocutory appeal under § 1292(b). The panel observed that “it appears to this court that the district court abused its discretion by concluding that an immediate appeal would not advance the ultimate termination of the litigation.”<sup>74</sup> It also stated that the plaintiffs’ claims against Trump presented “important and open threshold questions of pure law,” and that such questions “are best resolved conclusively through an expedited interlocutory appeal with focused briefing and oral argument, rather than tentatively through the demanding lens of the mandamus requirement of clear and indisputable error.”<sup>75</sup>

That said, the D.C. Circuit also recognized a divide within the federal circuits regarding “whether a court of appeals has jurisdiction to issue a writ of mandamus to order a district court to certify an issue for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).”<sup>76</sup> It declined, however, “to wade into that dispute at this time.”<sup>77</sup> Instead, the panel “exercised [its] discretion to deny the writ, without prejudice, and remand the matter to the district court for *immediate reconsideration* of the motion to certify.”<sup>78</sup> It then stated that it would retain jurisdiction over “the decision whether to grant any petition for permission to appeal, should the district court grant certification pursuant to 28 U.S.C. § 1292(b) upon remand.”<sup>79</sup> More pointedly, the panel declared that it would also retain

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72. *In re Trump*, 781 F. App’x 1, 1 (D.C. Cir. 2019).

73. *Id.*

74. *Id.* at 2.

75. *Id.*

76. *Id.* (citing *In re Trump*, 928 F.3d 360, 370–73 (4th Cir. 2019), and *In re Ford Motor Co.*, 344 F.3d 648, 653–55 (7th Cir. 2003)).

77. *Id.*

78. *Id.* (emphasis added).

79. *Id.*

jurisdiction over “any subsequent petition for writ of mandamus, should the district court deny certification upon remand.”<sup>80</sup>

Sure enough, the D.C. Circuit’s suggestion to the district court was successful, and on remand the district court certified the orders under § 1292(b).<sup>81</sup> Indeed, the district court viewed the D.C. Circuit’s order as quite forceful. Consider the district court’s response to a plan proposed by the plaintiffs that would have proceeded to expedited summary judgment motions without subjecting Trump to any direct discovery.<sup>82</sup> The district court did not make an independent assessment of whether § 1292(b) certification was warranted in light of this proposal. Rather, it felt compelled to certify its earlier orders because the plaintiffs’ plan was “inconsistent with the remand order from the D.C. Circuit,”<sup>83</sup> emphasizing the D.C. Circuit’s “view” that the district court’s orders “squarely meet the criteria for certification under Section 1292(b).”<sup>84</sup>

Once the district court issued its § 1292(b) certification on remand, Trump petitioned the D.C. Circuit for permission to appeal under Appellate Rule 5.<sup>85</sup> The D.C. Circuit granted the petition and a three-judge panel heard oral argument on December 9, 2019.<sup>86</sup> On February 7, 2020, the panel issued its decision—unanimously concluding that the members of Congress lacked Article III standing and instructing the district court to dismiss their complaint.<sup>87</sup> The opinion did not address any issues relating to appellate jurisdiction, except to recognize that the district court ultimately certified its order under § 1292(b).<sup>88</sup>

#### V. THE RELATIONSHIP BETWEEN MANDAMUS AND § 1292(B)

The decisions by the Fourth Circuit and D.C. Circuit panels reveal two distinct approaches. The initial Fourth Circuit panel embraced the

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80. *Id.*

81. *Blumenthal v. Trump*, No. 17-1154 (EGS), 2019 WL 3948478, at \*3 (D.C. Cir. Aug. 21, 2019).

82. *See id.* at \*2.

83. *Id.*

84. *Id.* at \*3 (quoting *In re Trump*, 781 F. App’x 1, 2 (D.C. Cir. 2019)).

85. *See* FED. R. APP. P. 5(a) (governing petitions for permission to appeal).

86. The panel that heard oral argument was different than the one that ruled on the mandamus petition. *See supra* note 72 and accompanying text. The oral argument panel was Judges Henderson, Tatel, and Griffith.

87. *Blumenthal v. Trump*, 949 F.3d 14, 16 (D.C. Cir. 2020) (“Because we conclude that the Members lack standing, we reverse the district court and remand with instructions to dismiss their complaint.”).

88. *Id.* at 18 (“On reconsideration, the district court certified both dismissal denials for interlocutory appeal and stayed its proceedings. We then granted the interlocutory appeal. . . . We have jurisdiction under 28 U.S.C. § 1292(b).” (citations omitted)).

view that the court of appeals can use a writ of mandamus not only to compel a district court to certify an interlocutory order under § 1292(b), but to “take the district court’s orders as certified” and thereby to address the merits of those orders without a remand to the district court.<sup>89</sup> Although the en banc Fourth Circuit has overturned that decision, Trump is likely to push this approach as the litigation moves to the Supreme Court.<sup>90</sup> The D.C. Circuit panel claimed that it was refraining from deciding whether a court of appeals can compel § 1292(b) certification through a writ of mandamus,<sup>91</sup> but it nonetheless expressed its view that the district court had “abused its discretion” in failing to find that the requirements of § 1292(b) had been met;<sup>92</sup> the D.C. Circuit panel then remanded the case to the district court “for immediate reconsideration of the motion to certify.”<sup>93</sup>

Although the D.C. Circuit’s approach may seem more modest, both approaches are problematic. This Part addresses each approach in turn.<sup>94</sup>

A. *A Court of Appeals Cannot Use Mandamus to Compel § 1292(b) Certification By the District Court*

The approach of the initial Fourth Circuit panel—which permits an appellate court to compel the district court to certify an order under § 1292(b)—would contravene the will of Congress and upend the structure of the § 1292(b) certification procedure. Section 1292(b) opens the door to immediate appellate review of an interlocutory order only “[w]hen a *district judge . . . 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.”<sup>95</sup>

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89. *In re Trump*, 928 F.3d 360, 372 (4th Cir. 2019).

90. *See supra* note 70 and accompanying text (noting Trump’s intention to file a petition for a writ of certiorari with the Supreme Court).

91. *In re Trump*, 781 F. App’x 1, 2 (D.C. Cir. 2019) (“We need not wade into that dispute at this time.”).

92. *Id.*

93. *Id.*

94. In criticizing the panels’ approaches to the relationship between writs of mandamus and § 1292(b), I do not dispute the possibility that orders like those issued by the district courts might be *directly* reviewed via a writ of mandamus. As current Chief Judge of the Seventh Circuit Diane Wood explained: “[T]he way to secure appellate consideration in such a situation is not by seeking a writ of mandamus to require the district court to certify something under § 1292(b). It is simply to file a petition for a writ of mandamus directed to the underlying problem.” *In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2003). *See infra* notes 98–101 and accompanying text (discussing the *Ford* decision).

95. 28 U.S.C. § 1292(b) (2018).



Chief Judge Henry Friendly, writing for the Second Circuit, made the point well five decades ago in *Leasco Data Processing Equipment Corp. v. Maxwell*.<sup>96</sup> As he put it: “Congress plainly intended that an appeal under § 1292(b) should lie *only* when the district court and the court of appeals *agreed* on its propriety. It would wholly frustrate this scheme if the court of appeals could coerce decision by the district judge.”<sup>97</sup>

A more recent opinion from the Seventh Circuit, authored by current Chief Judge Diane Wood, reached the same conclusion. Her opinion in *In re Ford Motor Co.* noted that “[m]ost courts have held that mandamus is not appropriate to compel a district court to certify under § 1292(b),”<sup>98</sup> and explained that “[t]his wealth of authority exists for a very good reason.”<sup>99</sup> That is, “[t]he whole point of § 1292(b) is to create a *dual gatekeeper system* for interlocutory appeals: *both* the district court and the court of appeals must *agree* that the case is a proper candidate for immediate review before the normal rule requiring a final judgment will be overridden.”<sup>100</sup> Allowing an appellate court to manufacture district court certification via mandamus would flout this system—“[i]f someone disappointed in the district court’s refusal to certify a case under § 1292(b) has only to go to the court of appeals for a writ of mandamus requiring such a certification, there will be only *one* gatekeeper, and the statutory system will not operate as designed.”<sup>101</sup>

Leading treatises agree. The Wright & Miller *Federal Practice & Procedure* treatise explains that “[t]he district judge is given authority by the statute to defeat any opportunity for appeal by certification, in deference to familiarity with the case and the needs of case management.”<sup>102</sup> Accordingly, “[a]lthough a court of appeals may be tempted to assert mandamus power to compel certification, the temptation should be resisted.”<sup>103</sup> Moore’s *Federal Practice* recognizes that an appellate court might use mandamus to review a particular interlocutory

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96. *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1326 (2d Cir. 1972).

97. *Id.* at 1344 (emphasis added).

98. *In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2003) (citing *In re Phillips Petroleum Co.*, 943 F.2d 63, 67 (Temp. Emer. Ct. App. 1991); *Arthur Young & Co. v. U.S. Dist. Court*, 549 F.2d 686, 698 (9th Cir. 1977); *In re Cessna Aircraft Distributorship Antitrust Litig.*, 518 F.2d 213, 216–17 (8th Cir. 1975); *In re Maritime Serv. Corp.*, 515 F.2d 91, 92 (1st Cir. 1975) (per curiam); *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 755 n.1 (3d Cir. 1973); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1344 (2d Cir. 1972)).

99. *Id.*

100. *Id.* (emphasis added).

101. *Id.* (emphasis added).

102. 16 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 3929 (3d ed. 1998).

103. *Id.*

order, but it should not use mandamus to “compel” the certification of such an order for immediate appeal under § 1292(b) when the district court has refused to do so.<sup>104</sup>

The impropriety of using mandamus to compel § 1292(b) certification is confirmed by the statute’s legislative history, which makes abundantly clear that Congress anticipated a “two keys”<sup>105</sup> system that required certification by the district judge.<sup>106</sup> According to the House Report, § 1292(b) appeals are available only when they have “been approved by *trial judges* and by courts of appeals.”<sup>107</sup> It emphasized the bill’s “built-in safeguards” to “prevent numerous and groundless appeals.”<sup>108</sup> “To begin with, before an appeal can be had, *the district court must certify* in writing that the order involves a controlling question of law and that an immediate appeal may materially advance the ultimate determination of the case.”<sup>109</sup> Only if the court of appeals is “of the same opinion” as the district court may an appeal proceed.<sup>110</sup>

The Senate Report is equally clear. Section 1292(b) made it “possible for a *district judge* in a civil action to *make* an order . . . subject to appeal *by stating in writing* in his order that the 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.”<sup>111</sup> Only *after* “the issuance of such a written statement” may a litigant apply to the court of appeals.<sup>112</sup> The Senate Report emphasized that § 1292(b) appeals are “*discretionary in the first instance with the district judge* for he *must state in writing*” that the requirements are met.<sup>113</sup> Supporting letters—which

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104. 19 MOORE’S FEDERAL PRACTICE – CIVIL § 203.33 (3d ed. 2019) (“If certification under § 1292(b) is sought and denied, mandamus may lie, not to compel issuance of the necessary statement, but to review the order for which the certificate was sought.”).

105. Cf. SEINFELD: THE STRONGBOX (NBC television broadcast Feb. 5, 1998) (“George, both parties don’t have to consent to a breakup. It’s not like you’re launching missiles from a submarine and you both have to turn your keys.”).

106. See *Trump*, 958 F.3d at 282 (en banc) (“The legislative history of § 1292(b) confirms Congress’s clear intent to require both the district court and the court of appeals to agree to allow an interlocutory appeal and to provide both courts with discretion in deciding whether to do so.”).

107. H.R. REP. NO. 85-1667, at 1 (1958) (emphasis added) (“The bill permits the granting of appeals from interlocutory or nonfinal court orders where the entertaining of such appeals has been approved by trial judges and by courts of appeals.”).

108. *Id.* at 2.

109. *Id.*

110. *Id.* (“In addition, the court of appeals must also *be of the same opinion* before the appeal can be had.” (emphasis added)).

111. S. REP. NO. 85-2434, at 2 (1958) (emphasis added).

112. *Id.*

113. *Id.* at 3 (emphasis added).

were attached to both the House and Senate reports—emphasized “the requirement of the certificate of the trial judge,”<sup>114</sup> and explained that “the certificate of the trial judge is essential.”<sup>115</sup>

Finally, oral testimony before the House Judiciary Committee repeatedly stressed the absolute necessity of the district court judge certifying the issue for an immediate appeal.<sup>116</sup> Chief Judge John Parker of the Fourth Circuit noted that the Judicial Conference of the United States had voted against a recommendation to “give the court of appeals the right to entertain the appeal in its discretion,” embracing instead a “satisfactory compromise measure,” under which the district judge must “certif[y] that in his opinion the appeal should be allowed.”<sup>117</sup> As Judge Parker put it: “You must get from the district judge—he knows all about what you are up to, and you must get from him a statement that he thinks that it will probably expedite the termination of the litigation and that the question is one as to which there is doubt.”<sup>118</sup>

Judge Niemeyer’s panel opinion for the Fourth Circuit—which was ultimately overturned by the en banc court<sup>119</sup>—overlooked some crucial problems with permitting an appellate court to compel a district court to certify an order under § 1292(b). Although Judge Niemeyer did unearth two decisions in which the appellate court had used mandamus to direct the district court to issue a § 1292(b) certification,<sup>120</sup> neither decision considered the extent to which it would undermine the structure and

114. *Id.* at 6 (Letter from the Judicial Conference of the United States) (“The right of appeal given by the amendatory statute is limited . . . by the requirement of the certificate of the trial judge, who is familiar with the litigation and will not be disposed to countenance dilatory tactics.”).

115. *Id.* at 9 (Letter to the Tenth Circuit Judicial Conference) (“We believe that the certificate of the trial judge is essential both to recognition of the appropriate case and to rejection of applications calculated merely to delay the day of judgment.”).

116. *See Appeals from Interlocutory Orders and Confinement in Jail-Type Institutions: Hearings Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 85th Cong. (1958).

117. *Id.* at 9.

118. *Id.* at 11; *see also id.* at 22 (“You have got to have the certificate of the district court judge.”); *id.* at 19 (testimony of Representative Edwin Willis) (“The *lower court judge must express an opinion* that the order involves a controlling question of law as to which there is substantial grounds for difference of opinion, and then he must go further and state that in his opinion an immediate appeal from the order may materially advance the ultimate termination of the litigation. *That is putting the judge pretty well on the spot.* He has got to come out and *express his opinion on those two.*” (emphasis added)); *id.* at 20 (testimony of Third Circuit Judge Albert Maris) (“As you point out, this says that *the district judge has got to render his opinion and sign a statement* that although he has decided it one way there is substantial ground for difference of opinion.” (emphasis added)).

119. *See supra* notes 52–64 and accompanying text.

120. *In re Trump*, 928 F.3d 360, 372 (4th Cir. 2019) (citing *Fernandez-Roque v. Smith*, 671 F.2d 426, 431–32 (11th Cir. 1982), and *In re McClelland Eng’rs, Inc.*, 742 F.2d 837, 837, 839 (5th Cir. 1984)).

purpose of § 1292(b).<sup>121</sup> In terms of quality, those decisions stand in stark contrast to the careful reasoning of Judges Friendly and Wood;<sup>122</sup> and in terms of quantity, they are significantly outweighed by the “wealth of authority” against this use of mandamus.<sup>123</sup>

Judge Niemeyer’s textual analysis is also misguided. He placed great weight on the use of the word “shall” in § 1292(b), describing the statute as providing:

that a district court “shall” certify its order for interlocutory appeal when the court determines that its 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.”<sup>124</sup>

Yet this analysis omitted § 1292(b)’s phrase “be of the opinion.”<sup>125</sup> The requirement that the district court “*shall* so state in writing” applies only when “the district judge shall *be of the opinion*” that the elements of § 1292(b) are satisfied.<sup>126</sup> The importance of that language is bolstered by § 1292(b)’s legislative history and its dual certification system.<sup>127</sup>

These problems go directly to whether an appellate court may use a writ of mandamus to require a district court to certify an issue for immediate appeal under § 1292(b). Although there is some inconsistency regarding the conditions that must be satisfied to justify appellate mandamus,<sup>128</sup> Judge Niemeyer himself invoked three requirements that the Supreme Court identified in its 2004 *Cheney* decision: “A party seeking a writ of mandamus must demonstrate (1) that it has a ‘clear and indisputable’ right; (2) that there are ‘no other adequate means’ to vindicate that right; and (3) that the writ is ‘appropriate under the

121. See *Fernandez-Roque*, 671 F.2d at 431–32 (granting mandamus to require the district court to “resolve the question of its jurisdiction” and to “specify the exact nature of the claim or claims as to which jurisdiction is now alleged to reside in the district court,” and then ordering that “[t]he question of subject matter jurisdiction shall then be certified to this Court, pursuant to 28 U.S.C. § 1292(b), upon request by any party”); *McClelland*, 742 F.2d at 839 (failing to cite or quote § 1292(b), but “request[ing] that the district court certify its interlocutory order for appeal”).

122. See *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1326 (2d Cir. 1972); *supra* notes 96–101 and accompanying text.

123. *In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2003).

124. *Trump*, 928 F.3d 360, 369 (4th Cir. 2019) (selectively quoting 28 U.S.C. § 1292(b)).

125. 28 U.S.C. § 1292(b) (2018).

126. *Id.* (emphasis added).

127. See *supra* notes 105–118 and accompanying text.

128. See Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1263–65 (2007).

circumstances.”<sup>129</sup> Section 1292(b)’s structure and purpose make this use of mandamus *inappropriate* under the circumstances. A categorical rule against appellate courts compelling district courts to certify an order under § 1292(b) is the best understanding of both § 1292(b) and the mandamus authority of appellate courts.

To be clear, this argument goes beyond the usual rhetoric of reluctance regarding writs of mandamus. Although it is often said that mandamus is a “drastic and extraordinary remedy” that is *not* to be “used as a substitute for the regular appeals process,”<sup>130</sup> in practice mandamus has been deployed to reverse a broad range of district court decisions without waiting for the final judgment required by § 1291.<sup>131</sup> Whether such examples reflect the most faithful understanding of appellate mandamus or improper appellate court opportunism, the requirements of appellate mandamus are open-ended enough to give courts a fair amount of leeway. What is unique about § 1292(b) is that the certification structure itself confirms that a district court’s refusal to certify an issue for an immediate interlocutory appeal should *never* satisfy the requirements of appellate mandamus.<sup>132</sup>

Independent of whether an appellate court can use mandamus to override a district court’s refusal to certify under § 1292(b), it is worth interrogating Judge Niemeyer’s assumption that the requirements of § 1292(b) were, in fact, met in the emoluments litigation. His analysis focused exclusively on whether there was a “substantial ground for difference of opinion” regarding the district court’s denial of Trump’s dispositive motions.<sup>133</sup> Even if that requirement is met, however, § 1292(b) certification is allowed only if “an immediate appeal from the order may materially advance the ultimate termination of the litigation.”<sup>134</sup> Given the course of the emoluments litigation, it is far from clear that immediate appellate review of the various district court rulings actually does so. The Maryland district court had ruled on Trump’s

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129. *Trump*, 928 F.3d at 368 (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380–81 (2004)).

130. *E.g.*, *Cheney*, 542 U.S. at 380–81.

131. See Maurice Rosenberg, *Solving the Federal Finality–Appealability Problem*, 47 *LAW & CONTEMP. PROBS.* 171, 174 (1984) (noting that mandamus “has become an ordinary rather than an extraordinary route of appeal”); Steinman, *supra* note 128, at 1273–76.

132. See also *Trump*, 928 F.3d at 283 (en banc) (“It is always difficult to establish a ‘clear and indisputable’ right to a decision that lies within a court’s discretion, but it is particularly problematic when doing so circumvents the specific process Congress has prescribed for seeking interlocutory review.”).

133. *Trump*, 928 F.3d at 369–71.

134. 28 U.S.C. § 1292(b) (2018).

motions to dismiss by July 2018.<sup>135</sup> But for the *sturm und drang* surrounding Trump's desperate attempt to obtain immediate appellate review, the district court could have supervised a brief discovery phase, followed by summary judgment motions or a bench trial.<sup>136</sup> That final judgment could have been promptly appealed, on the merits, informed by actual facts and evidence,<sup>137</sup> without a dispute over appellate jurisdiction that remains unresolved two years later.

Judge Motz's majority opinion for the en banc Fourth Circuit suggested a narrower role for writs of mandamus in the § 1292(b) context. She wrote that issuing a writ of mandamus might be justified if "the district court ignored a request for certification, denied such a request based on nothing more than caprice, or made its decision in manifest bad faith."<sup>138</sup> Even if one accepts this possibility, it is far from clear that the proper mandamus remedy is to compel *certification* by the district court—much less to "take the district court's orders *as certified*"<sup>139</sup> (as Judge Niemeyer would have done).<sup>140</sup> In any event, the inquiry suggested by Judge Motz would not open the door to an appellate court overriding a district judge's own assessment of whether the requirements of § 1292(b) were met.

*B. The Court of Appeals Cannot Use the Threat of Mandamus to "Nudge" the District Court to Certify under § 1292(b)*

On one hand, the D.C. Circuit's handling of the § 1292(b) issue in the emoluments litigation may seem more modest than the Fourth Circuit's. It did not use mandamus to compel the district court to certify the order under § 1292(b). And it certainly did not cut the district court entirely out of the process by "tak[ing] the district court's orders as certified."<sup>141</sup> Rather, the D.C. Circuit panel made the following moves:

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135. See *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 875 (D. Md. 2018); *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 725 (D. Md. 2018).

136. Such expedited district court proceedings were proposed in the *Blumenthal* case. See *Blumenthal v. Trump*, No. 17-1154 (EGS), 2019 WL 3948478, at \*2 (D.D.C. Aug. 21, 2019).

137. See, e.g., Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 288 (2013) ("[T]he distinguished proceduralists who drafted the Federal Rules believed in citizen access to the courts and in the resolution of disputes on their merits, not by tricks or traps or obfuscation.").

138. *Trump*, 958 F.3d at 285.

139. See *supra* note 43 and accompanying text.

140. For example, the court of appeals might direct the district court to address the § 1292(b) criteria via a true "judicial act"—rather than in a way that was "arbitrary or based on passion or prejudice." *Trump*, 958 F.3d at 285 (quoting *Ex parte Secombe*, 60 U.S. (19 How.) 9, 15 (1856)).

141. *Trump*, 928 F.3d at 372.

(1) the panel observed that it “appears to this court that the district court abused its discretion” by failing to certify the order under § 1292(b); (2) the panel denied the mandamus petition “without prejudice”; (3) the panel remanded the case to the district court “for immediate reconsideration of the motion to certify”; and (4) the panel made clear that it will “retain jurisdiction” over “any subsequent petition for writ of mandamus, should the district court deny certification upon remand.”<sup>142</sup>

This technique—one might think of it as a mandamus *nudge*<sup>143</sup> (if not a more aggressive term)—has been deployed by a number of federal courts of appeals, particularly in controversial cases. This Section first summarizes other recent high-profile cases where appellate courts have used this tactic. It then argues that this approach, although seemingly less intrusive than the Fourth Circuit’s direct use of mandamus, is also unjustifiable.

### 1. A Growing Trend

The D.C. Circuit’s initial handling of *Blumenthal v. Trump* was not an isolated incident in the federal appellate world. Another example is a recent lawsuit filed by several individuals and an association of young environmental activists against the federal government and certain federal officials and agencies.<sup>144</sup> The plaintiffs in *Juliana v. United States* alleged that the federal government’s actions relating to fossil fuels and their effect on the climate violated their constitutional rights under the Due Process Clause.<sup>145</sup> The district court denied the defendants’ various dispositive motions, which sought to end the case on grounds ranging

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142. *In re Trump*, 781 F. App’x 1, 2 (D.C. Cir. 2019).

143. Cf. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008); Cass R. Sunstein, *Nudges vs. Shoves*, 127 HARV. L. REV. F. 210 (2014).

144. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016) (“Plaintiffs in this civil rights action are a group of young people between the ages of eight and nineteen . . . ; Earth Guardians, an association of young environmental activists; and Dr. James Hansen, acting as guardian for future generations. Plaintiffs filed this action against defendants the United States, President Barack Obama, and numerous executive agencies.”), *rev’d and remanded*, 947 F.3d 1159 (9th Cir. 2020).

145. *Id.* (“Plaintiffs allege defendants have known for more than fifty years that the carbon dioxide (‘CO2’) produced by burning fossil fuels was destabilizing the climate system in a way that would significantly endanger plaintiffs, with the damage persisting for millennia. . . . Although many different entities contribute to greenhouse gas emissions, plaintiffs aver defendants bear a higher degree of responsibility than any other individual, entity, or country for exposing plaintiffs to the dangers of climate change. Plaintiffs argue defendants’ actions violate their substantive due process rights to life, liberty, and property, and that defendants have violated their obligation to hold certain natural resources in trust for the people and for future generations.” (citations and internal quotation marks omitted)).

from standing to political question doctrine to others.<sup>146</sup> The district judge then rejected the defendants' request to certify the issues for interlocutory appeal under § 1292(b).<sup>147</sup>

The defendants filed multiple petitions for a writ of mandamus in the Ninth Circuit, but they were initially unsuccessful.<sup>148</sup> The defendants then sought a stay from the Supreme Court pending the disposition of their Supreme Court petition for a writ of mandamus.<sup>149</sup> The Supreme Court denied the stay without prejudice, noting that "adequate relief may be available in the United States Court of Appeals for the Ninth Circuit."<sup>150</sup> Even though the Ninth Circuit had denied the defendants' prior mandamus requests, the Supreme Court observed that the Ninth Circuit "did so without prejudice," and that some of the Ninth Circuit's reasons for denial "are, to a large extent, no longer pertinent."<sup>151</sup> The Supreme Court also observed that "the striking breadth" of the plaintiffs' claims "presents substantial grounds for difference of opinion."<sup>152</sup>

Following the Supreme Court's decision, the Ninth Circuit executed the § 1292(b) mandamus nudge. In an unpublished order, the Ninth

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146. *Id.* at 1235–61 (rejecting defendants' and intervenors' arguments in support of their motions to dismiss); *Juliana v. United States*, 339 F. Supp. 3d 1062, 1076–1104 (D. Or. 2018) (denying in part and granting in part defendants' motion for judgment on the pleadings and motion for summary judgment).

147. *Juliana*, 339 F. Supp. 3d at 1105 (D. Or. 2018) ("[T]he requests to certify for interlocutory appeal made both in the motion for judgment on the pleadings and motion for summary judgment are denied."); *Juliana v. United States*, No. 6:15-CV-01517-TC, 2017 WL 2483705, at \*2 (D. Or. June 8, 2017) ("[C]ertification for interlocutory appeal is not warranted in this case.").

148. *See In re United States*, 884 F.3d 830, 838 (9th Cir. 2018) ("[W]e decline to exercise our discretion to grant mandamus relief at this stage of the litigation."); *In re United States*, 895 F.3d 1101, 1104 (9th Cir. 2018) ("In this petition for a writ of mandamus, the government asks us for the second time to direct the district court to dismiss a case seeking various environmental remedies, or, in the alternative, to stay all discovery and trial. We denied the government's first mandamus petition, concluding that it had not met the high bar for relief at that stage of the litigation. No new circumstances justify this second petition, and we again decline to grant mandamus relief." (citations omitted)).

149. *See In re United States*, 139 S. Ct. 452, 452 (2018).

150. *Id.* at 453.

151. *Id.*

152. *Id.* This portion of the Supreme Court's opinion cited its earlier ruling on the *Juliana* defendants' request to stay district court proceedings pending disposition by the Ninth Circuit of one of its petitions for a writ of mandamus. *Id.* (citing "this Court's order of July 30, 2018, No. 18A65"). The Supreme Court denied that earlier application "without prejudice," noting at that time that the defendant's "request for relief is premature." *United States v. U.S. Dist. Court for Dist. of Or.*, 139 S. Ct. 1, 1 (2018). The Court wrote, however, that "[t]he breadth of [the plaintiffs'] claims is striking" and that "the justiciability of those claims presents substantial grounds for difference of opinion," and it urged the district court to "take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions." *Id.*



Circuit panel declined to rule at that time on the defendants' mandamus petition,<sup>153</sup> but it ordered that the district court is "requested to promptly resolve petitioners' motion to reconsider the denial of the request to certify orders for interlocutory review."<sup>154</sup> It provided no further explanation, although it cited the Supreme Court's earlier ruling as "noting that the justiciability of plaintiffs' claims 'presents substantial grounds for difference of opinion.'"<sup>155</sup>

Sure enough, the district court reconsidered. Calling the Ninth Circuit's nudge an "extraordinary order," the district court wrote that "[a]t this time, the Court finds sufficient cause to revisit the question of interlocutory appeal as to its previous orders, and upon reconsideration, the Court finds that each of the factors outlined in § 1292(b) have been met."<sup>156</sup> The Ninth Circuit then promptly—although not without controversy<sup>157</sup>—granted the defendants' permission to appeal.<sup>158</sup> There was therefore no need to rule on the mandamus petition, which it denied as moot.<sup>159</sup> Having overcome the obstacles to appellate jurisdiction, a Ninth Circuit panel ultimately reversed the district court in a 2-1 decision and ordered that the *Juliana* case be dismissed for lack of Article III standing.<sup>160</sup>

Another high-profile example is ongoing litigation challenging various abortion regulations in Louisiana. In *June Medical Services, LLC v. Gee*, the district court denied several dispositive motions seeking to dismiss the cases.<sup>161</sup> Although the district court initially certified its order

153. Order at 2, *In re United States*, (9th Cir. Nov. 8, 2018) (No. 18-73014) (ordering additional briefing regarding the mandamus petition).

154. *Id.*

155. *Id.*

156. *Juliana v. United States*, No. 6:15-CV-01517-AA, 2018 WL 6303774, at \*3 (D. Or. Nov. 21, 2018); see also *Juliana v. United States*, 947 F.3d 1159, 1166 (9th Cir. 2020) (describing the district court as having "reluctantly certified the orders denying the motions for interlocutory appeal under 28 U.S.C. § 1292(b)" (emphasis added)).

157. As discussed *infra* notes 176–184 and accompanying text, Judge Friedland dissented from the Ninth Circuit's grant of permission to appeal following the district court's reluctant § 1292(b) certification.

158. *Juliana v. United States*, No. 18-80176, 2018 WL 10426470, at \*1 (9th Cir. Dec. 26, 2018) ("The district court properly concluded that the issues presented by this case satisfied the standard set forth in § 1292(b) and properly exercised its discretion in certifying this case for interlocutory appeal. The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted.")

159. Order, *In re United States*, (9th Cir. Dec. 26, 2018) (No. 18-73014) ("The petition for a writ of mandamus is DENIED as moot.")

160. *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020). Although the panel found that the plaintiffs satisfied the injury and causation requirements of Article III standing, the majority concluded that they had not shown that their "claimed injuries are redressable by an Article III court." *Id.* at 1168–69.

161. *June Med. Servs., LLC v. Gee*, 306 F. Supp. 3d 886, 889 (M.D. La. 2018).

under § 1292(b),<sup>162</sup> it later vacated the certification in order to allow the plaintiffs to amend their complaint.<sup>163</sup> It then denied the defendants' motion to partially dismiss the amended complaint and denied their request to certify that order under § 1292(b).<sup>164</sup>

The defendants filed a petition for a writ of mandamus in the Fifth Circuit.<sup>165</sup> Although the Fifth Circuit panel opined that there were a number of factors that “support issuance of the writ,” it declined to do so.<sup>166</sup> This denial, however, came with a § 1292(b) nudge. The panel was “confident” that a writ of mandamus was “unnecessary,”<sup>167</sup> because “[i]f the district court chooses to certify its decision for interlocutory appeal, some or all of the State’s arguments could be resolved without the need for mandamus.”<sup>168</sup> Citing the D.C. Circuit’s nudge in the emoluments litigation, the Fifth Circuit wrote:

This panel will retain jurisdiction over the decision whether to grant any application for permission to appeal, should the district court grant certification pursuant to 28 U.S.C. § 1292(b), or any subsequent petition for writ of mandamus, should the district court deny certification or fail to resolve the State’s jurisdictional challenges.<sup>169</sup>

Whether this nudge will work—as it did in *Blumenthal* and *Juliana*—remains to be seen. In October 2019, the Supreme Court granted certiorari regarding certain other issues in the litigation.<sup>170</sup> This prompted

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162. *June Med. Servs., LLC v. Gee*, No. CV 17-00404-BAJ-RLB, 2018 WL 2224064, at \*1 (M.D. La. May 15, 2018).

163. *June Med. Servs., LLC v. Gee*, No. CV 17-00404-BAJ-RLB, 2018 WL 2656552, at \*1 (M.D. La. June 4, 2018).

164. Order at 1, *June Med. Servs., LLC v. Gee*, (M.D. La. March 29, 2019) (No. CV 17-00404-BAJ-RLB).

165. *In re Gee*, 941 F.3d 153, 153 (5th Cir. 2019).

166. *Id.* at 170 (“The district court’s failure to consider the State’s jurisdictional challenges and the inadequacy of a later appeal support issuance of the writ. We nonetheless exercise our discretion not to issue it at this time.”); *see also id.* at 173 (“[W]e think it prudent not to issue the writ at this time.”).

167. *Id.* at 156 (“[W]e exercise our discretion not to grant Defendants’ mandamus petition at this time because we are confident it is unnecessary.”).

168. *Id.* at 173.

169. *Id.* (citing *In re Trump*, No. 19-5196, 781 F. App’x 1, 2019 WL 3285234, at \*1–2 (D.C. Cir. July 19, 2019) (per curiam)).

170. *See Gee v. June Med. Servs. L.L.C.*, 140 S. Ct. 35, 35 (2019); *June Med. Servs. L.L.C. v. Gee*, 140 S. Ct. 35, 35–36 (2019). Prior to the March 2020 oral argument, Rebekah Gee resigned as Secretary of the Louisiana Department of Health and Hospitals and was replaced by Interim Secretary Stephen Russo. These cases are now captioned *Russo v. June Medical Services L.L.C.* and *June Medical Services L.L.C. v. Russo*.

a joint motion to stay proceedings in the district court,<sup>171</sup> which the district judge granted “pending a final judgment by the United States Supreme Court.”<sup>172</sup>

## 2. What’s Wrong with the D.C. Circuit’s Handling of § 1292(b)

Although this approach may seem less intrusive, it suffers from the same fundamental problem as the initial Fourth Circuit panel’s more aggressive use of mandamus. Without mandamus authority to compel § 1292(b) certification, it is hard to justify why an appellate court would have the authority to pick nits regarding the district court’s § 1292(b) reasoning.

At the very least, it is concerning for an appellate court to leverage the uncertainty surrounding its ultimate authority to compel § 1292(b) certification to nudge the district court to provide that certification following remand. That is exactly what the initial D.C. Circuit panel did. It acknowledged the conflict between the Fourth Circuit’s panel decision in *In re Trump* and decisions like the Seventh Circuit’s *Ford* decision but stated that “[w]e need not wade into that dispute at this time.”<sup>173</sup> The D.C. Circuit absolutely did need to “wade into that dispute”; without the authority to review the district court’s § 1292(b) certification decision, it had no basis to call that decision into question and remand for “immediate reconsideration of the motion to certify.”<sup>174</sup> For all the reasons laid out in the preceding Section,<sup>175</sup> appellate courts lack that authority.

Moreover, it is not clear that a district judge who certifies an order under § 1292(b) only after a threat by the appellate court truly *is* “of the opinion” that the requirements of § 1292(b) are satisfied. Judge Friedland made this point in her dissent from the Ninth Circuit’s grant of permission to appeal after the district judge in *Juliana* was nudged into granting certification.<sup>176</sup> As she explained: “Although the district court’s statement that the § 1292(b) factors were met would ordinarily support certification, here it appears that the court felt compelled to make that declaration even

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171. Joint Motion to Stay Proceedings, at 1, June Med. Servs., LLC v. Gee, (M.D. La. Nov. 26, 2019) (No. CV 17-00404-BAJ-RLB).

172. Order at 1, June Med. Servs., LLC v. Gee, (M.D. La. Dec. 9, 2019) (No. CV 17-00404-BAJ-RLB).

173. *In re Trump*, 781 F. App’x 1, 1 (D.C. Cir. 2019).

174. *Id.*

175. See *supra* notes 95–118 and accompanying text.

176. *Juliana v. United States*, No. 18-80176, 2018 WL 10426470, at \*1 (9th Cir. Dec. 26, 2018) (Friedland, J., dissenting) [hereinafter *Juliana*, Dec. 2018 Order].

though—as the rest of its order suggests—the court did not believe that to be true.”<sup>177</sup>

This was “very concerning,”<sup>178</sup> according to Judge Friedland, for essentially the same reasons that underlie § 1292(b)’s dual-certification structure.<sup>179</sup> She noted that “§ 1292(b) reserves for the *district court* the threshold determination whether its two factors are met.”<sup>180</sup> Respect for the district court’s *true* “opinion” regarding § 1292(b)’s requirements is especially important as to whether “an immediate appeal from the order may materially advance the ultimate termination of the litigation”<sup>181</sup> because the district court has “direct experience with the parties, knowledge of the status of discovery, and the ability to sequence issues for trial.”<sup>182</sup> The district judge is, therefore, “far better positioned to assess how to resolve the litigation most efficiently.”<sup>183</sup> Put simply, “[s]ection 1292(b) respects the district court’s superior vantage point and its particular, critical role in the judicial process by allowing an interlocutory appeal only when the district court is ‘of the opinion’ that both of the section’s requirements are met.”<sup>184</sup>

Indeed, the logistics of nudging the district judge to change her “opinion” undermines the efficiency rationale behind § 1292(b). The goal of “materially advanc[ing] the ultimate termination of the litigation” does not seem to be well-served by cases going up and down multiple times between the district court and the court of appeals. Perversely, a district judge who *does* wish to move the case forward expeditiously to a final judgment (as could have been done in the emoluments litigation) might feel compelled to grant the § 1292(b) petition rather than force the parties into more litigation in the appellate court about the propriety of mandamus. It is a strange result, particularly when the time spent jockeying over the availability of an immediate appeal could be better spent pursuing the relevant facts and evidence and obtaining a final judgment on the merits.<sup>185</sup> And of course the inefficiencies could compound. Not every district judge will be as receptive to a nudge from the court of appeals. Given the discretion vested in district judges by

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177. *Id.* at \*2.

178. *Id.*

179. *See supra* notes 95–118 and accompanying text.

180. *Juliana*, Dec. 2018 Order, 2018 WL 10426470, at \*2 (Friedland, J., dissenting) (emphasis added).

181. 28 U.S.C. § 1292(b) (2018).

182. *Juliana*, Dec. 2018 Order, 2018 WL 10426470, at \*2 (Friedland, J., dissenting).

183. *Id.*

184. *Id.* at \*3.

185. *See supra* notes 134–137 and accompanying text.