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## FEDERAL APPELLATE PROCEDURE—RECALL OF MANDATE — REVIEW OF JUDGMENTS AFTER REHEARING AND APPEAL PERIODS EXPIRE

### I. INTRODUCTION

A well known legal maxim is that public policy demands finality of judgment—that there be an end to litigation at some point.<sup>1</sup> Another important policy which must be weighed against the interest in finality is the policy favoring fair and correct results in litigation.<sup>2</sup> It is these interests which courts must balance when a party dissatisfied with a judgment seeks to have it vacated or amended. Rule 60(b) of the Federal Rules of Civil Procedure enumerates the various grounds upon which relief from judgments may be granted at the district court level,<sup>3</sup> and also limits the time period in which the motions must be made.<sup>4</sup> No statute, however, has been enacted to aid courts of appeals in balancing these interests when they are requested to recall their mandates,<sup>5</sup> which are their binding instructions to the trial court as the law of the case.<sup>6</sup>

1. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944); *United States v. Throckmorton*, 98 U.S. 61, 65 (1878); *Marine Ins. Co. of Alexandria v. Hodgson*, 11 U.S. (7 Cranch) 332, 336 (1813). In *Throckmorton*, the Court stated:

There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy; namely, *interest rei publicae, ut sit finis litium* [it concerns the state that there be an end to lawsuits], and *nemo debet bis vexari pro una et eadem causa* [no one should be vexed twice with the same cause].

*United States v. Throckmorton*, 98 U.S. at 65 (translations supplied).

2. See *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970); *Lincoln Nat'l Life Ins. Co. v. Roosth*, 306 F.2d 110, 113 (5th Cir. 1962), *cert. denied*, 372 U.S. 912 (1963). See also *United States v. Ohio Power Co.*, 363 U.S. 98, 109 (1957) (Harlan, J., dissenting); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-45 (1944).

3. FED. R. CIV. P. 60(b). This rule provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

*Id.*

4. *Id.* All motions must be made within a reasonable time. *Id.* Motions based upon mistake, newly discovered evidence, or fraud must be made within one year of the entry of the judgment. *Id.* Moreover, this one year limit may not be varied in the trial court's discretion. FED. R. CIV. P. 6(b).

5. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944); *Greater Boston Television Corp. v. FCC*, 463 F.2d 263, 277-78 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *Hines v. Royal Indem. Co.*, 253 F.2d 111, 114 (6th Cir. 1958).

6. *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895); *United States ex rel. Greenhalgh v. F.D. Rich Co.*, 520 F.2d 886, 889 (9th Cir. 1975); *United States v. Fernandez*,

While there has been no concise and well developed discussion of the principles which guide appellate courts in ruling on motions to recall a mandate, the Third Circuit substantially contributed to the development of this area of law in *American Iron and Steel Institute v. Environmental Protection Agency* (AISI II).<sup>7</sup> This note will consider the concept of recall of mandates by focusing upon the federal civil court system, in light of the conflicting policies of finality of judgment and reopening litigation where justice so requires.

## II. BACKGROUND

Principles of finality play a dominant role throughout the law, underlying the doctrines of res judicata and collateral estoppel,<sup>8</sup> stare decisis,<sup>9</sup> and law of the case.<sup>10</sup> This heavy emphasis on finality of judgment exists so that parties can rely on a judgment in ordering their future activities.<sup>11</sup> Moreover, courts must be able to clear their dockets in order to make room for other controversies.<sup>12</sup> This interest in finality of judgment has resulted

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506 F.2d 1200 (2d Cir. 1974). This doctrine was stated by the Supreme Court in *Sanford Fork & Tool* as follows:

When a case has once been decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and is disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided upon appeal; or intermeddle with it, further than to settle so much as has been remanded.

*In re Sanford Fork & Tool Co.*, 160 U.S. at 255 (citations omitted).

7. 560 F.2d 589 (3d Cir. 1977).

8. Res judicata and collateral estoppel are principles of former adjudication which have the common objective of finality of judgment. 1B MOORE'S FEDERAL PRACTICE ¶ 0.405, at 634 (2d ed. 1974) [hereinafter cited as MOORE]. While res judicata prevents relitigation of the same cause of action between the same parties, collateral estoppel precludes the relitigation of an issue that was already litigated and necessarily determined involving the same parties but different causes of action. *Tait v. Western Maryland Ry. Co.*, 289 U.S. 620, 623 (1933). See 1B MOORE, *supra*, ¶ 0.405, at 621-22.

9. 1B MOORE, *supra* note 8, ¶ 0.402, at 54. The doctrine of stare decisis and its policy justifications have been summarized as follows:

Along with the common law's attention to the concrete, the specific case before the court, developed the doctrine of *stare decisis et non quieta movere*: to abide by the precedents and not to disturb settled points. It was a development of necessity, which has been traced in detail by many able writers on the subject. The goal of the doctrine is a reasonable certainty in the application of known principles for achieving stability and predictability in the law, for convenience, and for uniform treatment of litigants.

*Id.* (footnotes omitted).

10. For a discussion of the law of the case doctrine, see note 6 *supra*.

11. *American Iron & Steel Inst. v. EPA*, 560 F.2d 589, 592 (3d Cir. 1977). See also *United States v. Ohio Power Co.*, 353 U.S. 98, 111 (1957) (Harlan, J., dissenting). The seriousness of the problem may be illustrated by a passage from Justice Harlan's dissent to an order to recall a mandate:

I can think of nothing more unsettling to lawyers and litigants, and more disturbing to their confidence in the evenhandedness of the Court's processes, than to be left in the kind of uncertainty which today's action engenders, as to when their cases may be considered finally closed in this Court.

*Id.*

12. See *American Iron & Steel Inst. v. EPA*, 560 F.2d 589, 592 (3d Cir. 1977).

in strong disfavor of recalling mandates after rehearing periods have expired.<sup>13</sup>

The mandate is the command of the appellate court to the court below to execute the appellate judgment.<sup>14</sup> The Federal Rules of Appellate Procedure provide that appellate court mandates automatically issue twenty-one days after the entry of judgment in the circuit court.<sup>15</sup> A petition for rehearing may be presented to the court of appeals within fourteen days after the entry of judgment,<sup>16</sup> or in the case of the Supreme Court, within twenty-five days after the entry of its judgment.<sup>17</sup> A petition for rehearing will usually stay the issuance of the mandate until its disposition.<sup>18</sup> Neither the Federal Rules of Appellate Procedure nor the Judicial Code<sup>19</sup> provides for any reexamination or alteration of an issued mandate, which becomes the law of the case.<sup>20</sup> A litigant who believes that the court of appeals has misapplied or overlooked an issue of law may move for that court to recall its mandate or seek review by the United States Supreme Court.<sup>21</sup>

13. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944); *United States v. Throckmorton*, 98 U.S. 61, 65 (1878); *Marine Ins. Co. of Alexandria v. Hodgson*, 11 U.S. (7 Cranch) 332, 336 (1813); *American Iron & Steel Inst. v. EPA*, 560 F.2d 589, 592 (3d Cir. 1977).

14. *West v. Brashear*, 39 U.S. (14 Pet.) 51 (1840). Under the Federal Rules of Appellate Procedure, "[a] certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to the costs shall constitute the mandate, unless the court directs that a formal mandate shall issue." FED. R. APP. P. 41(a). The United States Supreme Court Rules provide formal mandates "shall not issue unless specifically directed" in cases coming from federal courts. SUP. CT. R. 59(3). In such cases, the mandate consists of a copy of the opinion and of the judgment, as well as provisions for the recovery of costs. *Id.*

15. FED. R. APP. P. 41(a). The Supreme Court's mandates issue 25 days after the entry of judgment in the Supreme Court. SUP. CT. R. 59(2). In both courts of appeals and the Supreme Court, the time may be shortened or enlarged if required under the circumstances of the case. *Id.*; FED. R. APP. P. 41(a). For example, in the "Nixon Tapes" case, the Supreme Court mandate affirming an order of the district court that the President produce certain tapes in response to a federal subpoena was issued immediately, since time was of the essence in the district court criminal proceeding. *United States v. Nixon*, 418 U.S. 683, 716 (1974).

16. FED. R. APP. P. 40(a). This rule further provides: "The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present." *Id.*

17. SUP. CT. R. 58(1).

18. *Id.* 59(2); FED. R. APP. P. 41(a).

19. 28 U.S.C. §§ 1-2906 (1970).

20. *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). For a definition and illustration of the law of the case doctrine, see note 6 *supra*. Under this doctrine, the mandate remains binding on a second appeal to the appellate court. *Lincoln Nat'l Life Ins. Co. v. Roosth*, 306 F.2d 110, 113 (5th Cir. 1962), cert. denied, 372 U.S. 912 (1963); *Moyer v. Aetna Life Ins. Co.*, 126 F.2d 141, 143 (3d Cir. 1941). *Moyer*, for example, held that where a prior appeal in the same case had determined that there was sufficient evidence to support a jury's determination of liability, the issue of liability could not be reargued on a second appeal. *Id.* The *Lincoln* court noted that the law of the case rule is designed to aid the effective administration of justice, in that it fosters "a sort of permanence and sureness in decision apart from the make-up or composition of the particular tribunal so far as the person of the Judges is concerned." *Lincoln Nat'l Life Ins. Co. v. Roosth*, 306 F.2d at 113. The Fifth Circuit noted that the panel members hearing the second appeal would probably be different from the members of the panel hearing the first, and concluded that were it not for the law of the case rule, this might lead to "differences in emphasis, approach, or views" on close issues. *Id.* at 114.

21. 28 U.S.C. § 1254 (1970). A party may appeal to the Supreme Court as a matter of right if the court of appeals holds a state statute unconstitutional. *Id.* § 1254(2). The Supreme Court

Despite the absence of explicit statutory authority, federal appellate courts have long recognized that they possess the power to recall issued mandates under certain circumstances.<sup>22</sup> The courts have identified two possible sources of this power. One court has relied upon the language of section 2106 of the Judicial Code,<sup>23</sup> which provides that federal appeals courts may, *inter alia*, "require such further proceedings to be had as may be just under the circumstances."<sup>24</sup> The District of Columbia Circuit held that this section inferentially grants it the power to review its own judgments, if to do so would be "just under the circumstances."<sup>25</sup>

The second source drawn upon by some courts for their recall power lies in the inherent power of a court to exercise supervisory control over its judgments and to protect the integrity of an earlier mandate.<sup>26</sup> It is submitted that this second source of power is the more acceptable of the two, since it does not require a broad reading of a statute that was drafted long after courts began recalling their mandates.<sup>27</sup>

The ultimate question is under what circumstances this power will be invoked. The Fifth Circuit has sought to answer this question through its

may review any other decision of a court of appeals in its discretion by writ of certiorari. *Id.* § 1254(1). See *Bronson v. Schulten*, 104 U.S. 410, 417 (1881).

22. See *United States v. Ohio Power Co.*, 353 U.S. 98 (1957); *Bronson v. Schulten*, 104 U.S. 410 (1881); *Marine Ins. Co. of Alexandria v. Hodgson*, 11 U.S. (7 Cranch) 332 (1813); *Perkins v. Standard Oil Co. of Calif.*, 487 F.2d 672 (9th Cir. 1973). The *Marine Ins. Co.* Court noted that the appellate mandate could be recalled and amended only upon a clear showing of fraud or unconscionable result. 11 U.S. (7 Cranch) at 337. In *Bronson*, the Court held that courts have total control over their mandates, but conditioned its broad view with the statement that this power to recall a mandate survived only so long as the term in which the case was decided, after which the appellate court loses control over the mandate. 104 U.S. at 415-17. This condition has been effectively removed by the Judicial Code, which provides: "The continued existence or expiration of a session of court in no way affects the power of the court to do any act or take any proceeding." 28 U.S.C. § 452 (1970). See *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 276-77 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). For a discussion of *Greater Boston*, see notes 32-51 and accompanying text *infra*.

23. *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 277 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). See 28 U.S.C. § 2106 (1970).

24. 28 U.S.C. § 2106 (1970).

25. *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 277 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

26. See *Reserve Mining Co. v. Lord*, 529 F.2d 184, 188 (8th Cir. 1976); *Perkins v. Standard Oil Co. of Calif.*, 487 F.2d 672, 674 (9th Cir. 1973); *Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248, 254 (9th Cir. 1973). The Supreme Court has described this source for the recall power as a "judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944).

27. The Supreme Court noted that it had the power to recall its mandates as early as 1813. See *Marine Ins. Co. of Alexandria v. Hodgson*, 11 U.S. (7 Cranch) 332 (1813). Section 2106 of the Judicial Code, 28 U.S.C. § 2106 (1970), was enacted in 1948. Act of June 25, 1948, Pub. L. No. 80-773, ch. 646, § 2106, 62 Stat. 963. For a discussion of a decision relying on § 2106, see notes 23-25 and accompanying text *supra*.

Additionally, the Supreme Court has noted that the rule that mandates will not be recalled was a "court made rule." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944). Since this obstacle was not imposed by statute, it is suggested that the reach of the rule could be refined by the court to relieve hardships.

rulemaking power,<sup>28</sup> providing that “[a] mandate once issued will not be recalled except by the court and to prevent injustice.”<sup>29</sup> The Ninth Circuit has attempted to follow Federal Rule of Civil Procedure 60(b)(6), which states that a judgment entered in district court may be vacated by that court for any reason “justifying relief from the operation of the judgment.”<sup>31</sup> It is submitted, however, that neither of these grounds provides an adequate explanation of the conditions that will warrant the extraordinary recall of mandate.

The state of the law in this area was summarized by the United States Court of Appeals for the District of Columbia in *Greater Boston Television Corp. v. Federal Communications Commission*.<sup>32</sup> In *Greater Boston*, the FCC petitioned the court to recall its mandate<sup>33</sup> which had affirmed the FCC’s order awarding a construction permit to a broadcasting company.<sup>34</sup> The FCC sought a recall in order to reopen its proceedings and receive new evidence concerning allegations that a key principal of the broadcasting company had violated securities laws.<sup>35</sup>

In denying the FCC’s motion,<sup>36</sup> the *Greater Boston* court summarized the scant precedent on the recall of mandates.<sup>37</sup> Initially, the D.C. Circuit noted that courts had only rarely invoked this power.<sup>38</sup> The court stated that an appellate judgment had been most commonly recalled where the mandate had included a clerical mistake,<sup>39</sup> where the mandate was inconsis-

28. 28 U.S.C. § 2071 (1970); FED. R. APP. P. 47. For a discussion of this rulemaking authority, see note 31 *infra*.

29. 5TH CIR. R. 15. See Gradsky v. United States, 376 F.2d 993, 995 (5th Cir.), vacated on other grounds *sub nom.* Roberts v. United States, 389 U.S. 18 (1967). *Gradsky* was decided under a rule essentially similar to the present rule in force in the Fifth Circuit. 376 F.2d at 995.

30. Yanow v. Weyerhaeuser Steamship Co., 274 F.2d 274 (9th Cir. 1959), *cert. denied*, 362 U.S. 919 (1960). See FED. R. CIV. P. 60(b)(6).

31. FED. R. CIV. P. 60(b)(6). The Ninth Circuit has stated that rule 60(b) of the Federal Rules of Civil Procedure provides authority for it to recall its mandate. Yanow v. Weyerhaeuser Steamship Co., 274 F.2d 274, 284 (9th Cir. 1959), *cert. denied*, 362 U.S. 919 (1960). For the text of rule 60(b), see note 3 *supra*. Courts of appeals may prescribe their own rules consistent with acts of Congress and rules of procedure established by the Supreme Court. 28 U.S.C. § 2071 (1970); FED. R. APP. P. 47. The Ninth Circuit had incorporated the Federal Rules of Civil Procedure into its own rules. 274 F.2d at 278, citing 9TH CIR. R. 8(1).

32. 463 F.2d 268 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

33. 463 F.2d at 274.

34. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 862 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

35. 463 F.2d at 274. The FCC contended that the principal’s participation in the enterprise figured favorably in the FCC order. *Id.*

36. *Id.* at 291.

37. *Id.* at 275-80.

38. *Id.* at 277-78. The court stated that the “power to recall mandates should be exercised sparingly.” *Id.* at 277, quoting *Estate of Iverson v. Comm’r*, 257 F.2d 408, 409 (8th Cir. 1958).

39. 463 F.2d at 278. The court noted that this power is expressly provided for district courts in the Federal Rules of Civil Procedure. *Id.* at 278 n.13, citing FED. R. CIV. P. 60. This rule reads in pertinent part: “Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on motion of any party. . . .” FED. R. CIV. P. 60(a) (emphasis added). See *Fluoro Elec. Corp. v. Branford Assoc.*, 489 F.2d 320 (2d Cir. 1973).

tent with the full opinion,<sup>40</sup> or where it had been fraudulently procured.<sup>41</sup> The court further noted that mandates had been traditionally recalled if their enforcement as issued would have produced an unintended<sup>42</sup> or unconscionable result.<sup>43</sup>

In addition to summarizing the development of the law on recall of mandate, the *Greater Boston* court contributed two new factors which it deemed sufficiently compelling to cause a federal appellate court to recall its mandate. First, recall would be justified where significant evidence has been discovered after the appellate mandate has issued.<sup>44</sup> The court limited the applicability of this factor, however, to instances where the district court would have been permitted to reopen the cases had there been no appeal.<sup>45</sup> Second, the *Greater Boston* court noted that recall of mandates may be warranted where there is an interest in intracircuit uniformity among cases pending at the same time.<sup>46</sup>

The *Greater Boston* court also stated that the timeliness of the recall motion had been considered a significant factor by courts in determining whether a recall motion should be granted.<sup>47</sup> One ground often offered by

40. 463 F.2d at 278, citing *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 296 F.2d 215 (5th Cir. 1961), cert. denied, 380 U.S. 916 (1965). In *Kinnear-Weed*, the Fifth Circuit recalled and amended its earlier mandate on the grounds that it was inconsistent with the full opinion. 296 F.2d at 215-16.

41. 463 F.2d at 278. In fact, the D.C. Circuit noted that a court's power to recall any mandate obtained through fraud "overrode the 'term' rule even when that was in force." *Id.*, citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944). For a discussion of the "term rule," see note 22 *supra*.

The Federal Rules of Civil Procedure provide that relief from a judgment may be granted upon a showing of fraud. FED. R. CIV. P. 60(b)(3). For the text of rule 60(b), see note 3 *supra*.

42. 463 F.2d at 279. Since the district court is prohibited under the doctrine of "law of the case" from departing from the remand instructions, see note 6 *supra*, the mandate must be changed by the issuing court to reflect the intended instruction and result. 463 F.2d at 279. See *Meredith v. Fair*, 306 F.2d 374 (5th Cir. 1962) (*sua sponte* recall).

Any motion to amend the mandate must be addressed to the issuing court. 463 F.2d at 279. See *Simons v. Grier Bros. Co.*, 258 U.S. 82 (1922). The *Simons* Court emphasized that district court decrees entered pursuant to appellate mandates could be amended only upon motion to the appellate tribunal. *Id.* at 91. The Court termed this "proper deference to [the appellate court's] authority." *Id.*

43. 463 F.2d at 279. The court set forth this exception as follows:

If a case involves the kind of injustice that would support an independent suit in the trial court [pursuant to FED. R. CIV. P. 60(b)], but presents an instance where action is needed from an appellate court, . . . [because the district court must comply with the mandate as the law of the case], the remedy of recall of mandate may well be appropriate.

463 F.2d at 279.

44. 463 F.2d at 279-80.

45. *Id.* The court stated that the societal interest in finality is violated only where the appellate court recalls the mandate to reconsider newly discovered evidence beyond the time which the district court could reconsider evidence on its own had the case not been appealed. *Id.* A district court may grant relief from its judgment on the basis of newly discovered evidence not more than one year after judgment has been entered. FED. R. CIV. P. 60(b).

46. 463 F.2d at 278-79. The *Greater Boston* court stated that the interest in avoiding differences in result in cases pending at the same time within a circuit has been considered sufficient cause to override the strong policy interests in favor of finality of judgments. *Id.*

47. *Id.* at 276. The court noted that the fundamental question of timing is one of due diligence, similar to the equitable defense of laches. *Id.* See *Lee v. Terminal Transp. Co.*, 301

movants is that the case had been incorrectly decided on appeal.<sup>48</sup> However, a simple showing that the court has made an error of law where the movant had failed to seek rehearing has been consistently held insufficient to invoke the court's recall discretion.<sup>49</sup> It is suggested that this conclusion is supportable because the correction of such errors is considered the primary purpose of petitions for rehearing or Supreme Court review.<sup>50</sup> In fact, the *Greater Boston* court itself noted that the recall measure will not be employed where it would only serve in effect to extend the period allowed for a rehearing.<sup>51</sup>

Moreover, a denial of petitions for rehearing and certiorari has been considered a crucial reason to deny motions to recall a mandate which were grounded upon alleged errors of law,<sup>52</sup> since the accepted means of reviewing judgments of federal appellate courts on such grounds is by petition for rehearing or by seeking review by the Supreme Court.<sup>53</sup> Subsequent changes in substantive law within the circuit have likewise been deemed insufficient to warrant recall.<sup>54</sup>

In *Legate v. Maloney*,<sup>55</sup> the First Circuit suggested one additional ground upon which a motion to recall might be based.<sup>56</sup> The court stated in dicta that if a subsequent Supreme Court opinion were to show that the original opinion was "demonstrably wrong," a motion to recall that mandate "might be entertained."<sup>57</sup> It is submitted, however, that the *Legate* court failed to support this possible exception with precedent. Indeed, the more typical response to such a motion can be demonstrated by the Tenth Circuit's disposition of a recall motion in *Collins v. City of Wichita*.<sup>58</sup> In *Col-*

F.2d 234, 236 (7th Cir. 1962) (motion to recall and amend mandate made 29 months after original mandate issued was denied); *Yanow v. Weyerhaeuser Steamship Co.*, 274 F.2d 274, 284 (9th Cir. 1959), *cert. denied*, 362 U.S. 919 (1960) (motion made 11 months after original mandate issued was denied, since movant failed to exercise due diligence); *Hines v. Royal Indem. Co.*, 253 F.2d 111, 114 (6th Cir. 1958) (motion filed 8 months after mandate issued was denied, since the motion was "obviously" an untimely petition for rehearing).

48. *Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir. 1965); *Collins v. City of Wichita*, 254 F.2d 837, 838 (10th Cir. 1958).

49. *See Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir. 1965); *Collins v. City of Wichita*, 254 F.2d 837, 838 (10th Cir. 1958).

50. For a discussion of this appellate function, *see* P. CARRINGTON, D. MEADER, & M. ROSENBERG, *JUSTICE ON APPEAL* (1976); Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507, 517-18 (1969).

51. 463 F.2d at 277.

52. *See Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir. 1965); *Hines v. Royal Indem. Co.*, 253 F.2d 111, 114 (6th Cir. 1958). *But see* *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957) (mandate recalled nearly 18 months after Supreme Court had denied petition for rehearing). For a discussion of *Legate*, *see* notes 55-57 *supra* and accompanying text *infra*.

53. *See* notes 17-21 and accompanying text *supra*.

54. *See Powers v. Bethlehem Steel Corp.*, 483 F.2d 963, 964 (1st Cir. 1973); *Collins v. City of Wichita*, 254 F.2d 837, 839 (10th Cir. 1958).

55. 348 F.2d 164 (1st Cir. 1965).

56. *Id.* at 166.

57. *Id.* The First Circuit, however, denied the motion to recall the mandate that was based on an alleged error of law made by the original panel. *Id.* The court stated that even if an error of law had been made, "we believe it would be far greater error to permit reconsideration now after denial of petitions for rehearing and certiorari. There must be an end to dispute." *Id.*

58. 254 F.2d 837 (10th Cir. 1958).



lins, the movant contended that its motion should have been granted because the statute upon which the mandate had been based had been subsequently declared unconstitutional by the Supreme Court.<sup>59</sup> In denying the motion, the Tenth Circuit stated that "a judicial change in the court's view of the law" would not provide grounds to recall a mandate.<sup>60</sup>

In summary, although federal appeals courts have long recognized the power to recall their mandates,<sup>61</sup> there has been little discussion by courts and commentators as to the circumstances under which this power will be exercised. *Greater Boston*, the single case which has attempted to comprehensively discuss this area of the law, has provided little more than an inventory of circumstances which might provide adequate grounds for recalling mandates.<sup>62</sup> As a result, the Third Circuit panel had little precedent upon which to rely when confronted with the EPA's motion in *AISI II*.

### III. THE AISI II SETTING

In *American Iron and Steel Institute v. Environmental Protection Agency (AISI I)*,<sup>63</sup> the American Iron and Steel Institute (AISI) and several iron and steel companies petitioned the Third Circuit for review of regulations promulgated by the EPA.<sup>64</sup> The EPA had established "single-number" effluent limitations for existing point sources for the iron and steel industry<sup>65</sup> pursuant to the Federal Water Pollution Control Act Amendments of 1972 (Act).<sup>66</sup> The petitioners contended that the EPA was not empowered by the Act to issue any limiting regulations for existing point sources,<sup>67</sup> and that if the EPA were so empowered, the limitations must be

59. *Id.* at 839.

60. *Id.* See also *Powers v. Bethlehem Steel Corp.*, 483 F.2d 963, 964 (1st Cir. 1973) (motion to recall mandate denied where state supreme court had changed substantive tort law after the issuance of the mandate).

61. See notes 22-27 and accompanying text *supra*.

62. See notes 32-51 and accompanying text *supra*.

63. 526 F.2d 1027 (3d Cir. 1975).

64. *Id.* at 1035. Review in the Third Circuit was proper under 33 U.S.C. § 1369(b)(1)(E) (Supp. V 1975). 526 F.2d at 1035 n.7.

65. 526 F.2d at 1035. See 40 C.F.R. § 420 (1977). A point source is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (Supp. V 1975). The regulations define an effluent limitation as "any restriction established by the Administrator on quantities, rates, and concentrations of chemical, physical, biological and other constituents which are discharged from point sources, other than new sources, into navigable waters, the waters of the contiguous zone or the ocean." 40 C.F.R. § 401.11(i) (1977). For example, the regulations provide that no more than .2736 kg/kg ammonia may be discharged per day into water from an existing point source. *Id.* § 420.12(a).

66. 33 U.S.C. §§ 1251-1376 (Supp. V 1975).

67. 526 F.2d at 1035. The AISI contended that no section of the Act specifically authorized the EPA to establish effluent limitations for existing point sources, while it specifically authorized the EPA, *inter alia*, to set standards for new point sources and for toxic discharges. *Id.* at 1036, citing 33 U.S.C. §§ 1316(b)(1)(B) & 1317(a)(2) (Supp. V 1975). The AISI supported its contention by relying on the language in the Act which authorized the EPA to promulgate guidelines. 526 F.2d at 1036, citing 33 U.S.C. § 1314(b) (Supp. V. 1975). The AISI maintained that the Act literally authorized the EPA to draw guidelines pertaining only to existing point

expressed in "ranges" rather than in "single-numbers."<sup>68</sup> The court noted that single-number limitations set maximum nationwide pollutant discharge levels, while range limitations would establish spectrums of maximum discharge levels, which would vary on a plant-by-plant basis.<sup>69</sup>

The Third Circuit held that the Act empowered the EPA to promulgate effluent limitations for existing point sources,<sup>70</sup> but that the Act required the limitations to be expressed in ranges rather than in single-numbers.<sup>71</sup> The *AISI I* court therefore remanded the case to the EPA, mandating the agency to promulgate range limitations.<sup>72</sup>

The same basic substantive issues were subsequently examined in at least four other circuits and, in contrast to the *AISI I* decision, each circuit sustained the EPA's single-number effluent limitations.<sup>73</sup> In addition, in *E.I. duPont de Nemours & Co. v. Train*,<sup>74</sup> the United States Supreme Court considered single-number effluent limitations, similar to those at issue in

sources, and therefore the EPA did not have the power under the Act to promulgate regulations for existing point source effluent limitations. 526 F.2d at 1036.

68. 526 F.2d at 1044.

69. *Id.* at 1043.

70. *Id.* at 1041-42.

71. *Id.* at 1043-44. The *AISI I* court based this conclusion upon its reading of § 304(b)(1)(B) of the Act, which states that the Administrator of the EPA shall "specify factors to be taken into account in determining the control measures and practices to be applicable to point sources." *Id.* at 1042, citing 33 U.S.C. § 1314(b)(1)(B) (Supp. V. 1975) (emphasis supplied by the court). The court further concluded that the Act required that the EPA establish "base" and "ceiling" discharge levels. 526 F.2d at 1044-45. The permit granting authorities (primarily states) were therefore, to set effluent limitations on a plant-by-plant basis within the "range" of limitation set by the EPA. *Id.* at 1043. The factor guidelines were intended to aid these authorities in that process. *Id.*

In reaching its conclusion, the *AISI I* court rejected the EPA's contention that by subcategorizing each industry by the type of process employed, the EPA had established effective ranges as perhaps contemplated by the Act. *Id.* at 1046. For example, as of 1975, the iron and steel industry regulations promulgated by the EPA for subcategory processes encompassed by-product coke, bee hive coke, sintering, blast furnace, basic oxygen furnace (wet and semi-wet air), open hearth furnace, electric arc furnace (wet and semi-wet air), vacuum degassing and continuous casting processes. See 40 C.F.R. §§ 420.10 -.126 (1975). More subcategories have been added to the regulations since 1975. See 40 C.F.R. §§ 420.10 -.262 (1977).

72. 526 F.2d at 1046-47.

73. *American Petroleum Inst. v. EPA*, 540 F.2d 1023 (10th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977); *American Paper Inst. v. Train*, 543 F.2d 328 (D.C. Cir.), *cert. dismissed*, 429 U.S. 967 (1976); *American Frozen Food Inst. v. Train*, 539 F.2d 107 (D.C. Cir. 1976); *Hooker Chems. & Plastics Corp. v. Train*, 541 F.2d 620 (2d Cir. 1976); *E.I. duPont de Nemours & Co. v. Train*, 541 F.2d 1018 (4th Cir. 1976), *modified on other grounds*, 430 U.S. 112 (1977).

In *Hooker Chems. & Plastics Corp.*, the Second Circuit sustained single-number effluent limitations for existing point sources set by the EPA for the phosphate manufacturing industry. 541 F.2d at 630. The court reasoned that "whenever Congress spoke of 'ranges' in the debates over the Act, it meant only the spectrum comprised of varying discharge levels on a subcategorical, rather than individual basis. . . . Congress intended that the regulations establish a single discharge level for a given subcategory." *Id.* In *American Frozen Food Inst.*, the District of Columbia Circuit reasoned that

if there were such a requirement [of ranges], it would be met by the fact that the permit issuing authority under § 402 (state or federal) will clearly be able to employ any limitation it finds appropriate for a specific plant which falls between a 'range' of zero pollutant discharge and the nationally set effluent limitations.

539 F.2d at 140.

74. 430 U.S. 112 (1977).

*AISI I*, which the EPA had promulgated for the inorganic chemicals industry.<sup>75</sup> The *duPont* Court held that the EPA was empowered under the Act to issue effluent limitations in the form of regulations for existing point sources.<sup>76</sup> Although the *duPont* Court did not specifically discuss the range and single-number issue, it did allow the single-number effluent limitations to remain intact on remand.<sup>77</sup> While the *duPont* case cannot be said to have expressly overruled *AISI I*, it would seem to have cast doubt upon the correctness of the *AISI I* holding that the Act required range rather than single-number effluent limitations for existing point sources.<sup>78</sup>

Approximately four months after the *duPont* decision,<sup>79</sup> the EPA moved for the Third Circuit to recall the *AISI I* mandate which had issued almost two years previously, and to amend it so as to conform to the *duPont* decision.<sup>80</sup> The Third Circuit was thus confronted in *AISI II* with the issue of whether the policy interests favoring putting an end to litigation were so outweighed by the circumstances of the case as to warrant an extraordinary recall of mandate, even though the EPA had failed to seek a rehearing in the court of appeals or further review by the Supreme Court following the *AISI I* decision.<sup>81</sup>

#### IV. THE *AISI II* RESULT

In support of its motion to recall the *AISI I* mandate, the EPA relied primarily upon the *duPont* decision of the Supreme Court.<sup>82</sup> The EPA contended that *duPont* and *AISI I* were inconsistent, and that the case fit within the *Legate* "demonstrably wrong" exception to the recall prohibition.<sup>83</sup> The *AISI II* court rejected this argument, finding it impossible to conclude that *AISI I* was demonstrably wrong in light of *duPont* since the latter case did not directly deal with the range and single-number issue.<sup>84</sup> The *AISI II*

75. *Id.* at 115. These regulations are codified at 40 C.F.R. § 415 (1977). *Id.*

76. 430 U.S. at 136. The Court based this conclusion on a literal reading of the statute. *Id.* at 128-29. Moreover, the Court supported this interpretation of the Act with an analysis of its legislative history. *Id.* at 130.

77. *Id.* at 139. The Court reversed a portion of the judgment of the Court of Appeals for the Second Circuit which required the EPA to provide a variance procedure. *Id.*

78. While the Third Circuit reached a different conclusion in *AISI I*, see note 73 *supra*, the Second Circuit's decision in *Hooker Chems. & Plastics Corp. v. Train*, 541 F.2d 620 (2d Cir. 1976), was in accord with the *duPont* Court's conclusion on this issue. See note 77 *supra*.

79. *duPont* was decided February 23, 1977. 430 U.S. at 112. *AISI II* was argued June 9, 1977. 560 F.2d at 589.

80. 560 F.2d at 592.

81. *Id.* at 591. The *AISI II* dissent stated that it would have denied the recall motion on this ground. *Id.* at 600 (Hunter, J., dissenting). For a discussion of the significance of the failure to petition for rehearing or seek Supreme Court review, see notes 49-51 and accompanying text *supra*. For the significance of the denial for petitions for rehearing or certiorari, see notes 52-53 and accompanying text *supra*.

82. 560 F.2d at 595. See notes 74-78 and accompanying text *supra*.

83. 560 F.2d at 595. For a discussion of the *Legate* exception, see notes 55-57 and accompanying text *supra*. The EPA contended that the *duPont* decision involved regulations which were roughly identical to those at issue in *AISI I*. 560 F.2d at 595. The *duPont* regulations are listed at 40 C.F.R. § 415 (1977). 430 U.S. at 115.

84. 560 F.2d at 595. See text accompanying notes 74-78 *supra*.

court also noted that the holding of *AISI I*, empowering the EPA under the Act to issue regulations for existing point sources, had been cited favorably by the *duPont* Court.<sup>85</sup>

Nonetheless, the *AISI II* court stated that the Supreme Court, in allowing the single-number limitations in *duPont* to stand on remand,<sup>86</sup> had cast a taint upon the overall correctness of the *AISI I* decision.<sup>87</sup> The *AISI II* court therefore held that recall of the *AISI I* mandate would be granted and the judgment amended.<sup>88</sup> The court reasoned that the integrity of the *AISI I* mandate, which remained basically viable after *duPont*,<sup>89</sup> would be jeopardized if the tainted portion of the *AISI I* mandate were not corrected.<sup>90</sup>

The *AISI II* court stressed that it was basing its decision to recall the *AISI I* mandate on several other factors as well, without the presence of which recall would have been more problematic.<sup>91</sup> Initially, the *AISI II* court stated that the interest in intracircuit uniformity, proposed by the *Greater Boston* court as an exceptional circumstance warranting recall,<sup>92</sup> could be applied by analogy to *AISI II*.<sup>93</sup> The *AISI II* panel reasoned that since the Act envisioned a national program of water pollution control,<sup>94</sup> and since the other circuits had disagreed with the Third Circuit's interpretation of the Act,<sup>95</sup> the need for intercircuit harmony in such a crucial national program dictated that the Third Circuit conform its decisions with the rest of the nation.<sup>96</sup>

Moreover, the *AISI II* court noted that modifying its judgment in *AISI I* would serve the public interest, since a refusal to recall its mandate would impose substantial administrative hardship upon the EPA by requiring it to

85. 560 F.2d at 595. The *AISI II* court stated that the *duPont* Court gave *AISI I* favorable treatment, having cited it at least five times while agreeing with the Third Circuit on the "central issue" of the EPA's authority to promulgate effluent limitations in the form of regulations for existing point sources. *Id.* The *AISI II* court therefore concluded that *AISI I* retained its "fundamental vitality" after *duPont*. *Id.*

86. *Id.* at 595-96. The *AISI II* court noted that the Supreme Court did not specifically remand the single-number effluent limitations for further refinement or reformulation. *Id.* at 595. See note 77 and accompanying text *supra*.

87. 560 F.2d at 597.

88. *Id.* The *AISI I* court mandate was amended to permit the single-number limitations as had been first promulgated by the EPA. *Id.* at 600.

89. *Id.* at 596. The court reached this conclusion while dismissing the EPA's contention that the case fit within the "Legate" exception. *Id.* See notes 80-82 and accompanying text *supra*.

90. 560 F.2d at 596.

91. *Id.* at 597.

92. *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 278-79 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). For a discussion of this exception, see note 46 and accompanying text *supra*.

93. 560 F.2d at 597.

94. *Id.* at 598. Section 101 of the Act declares the goals and policy of Congress: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (Supp. V. 1975).

95. 560 F.2d at 597. See note 73 and accompanying text *supra*.

96. 560 F.2d at 597-98.

develop and enforce two different sets of effluent limitations regulations.<sup>97</sup> The court observed that such administrative hardship would hamper the national program of water pollution control, which the Act states should be fully achieved by 1985.<sup>98</sup>

The *AISI II* court also observed that the *AISI I* mandate had imposed a continuing duty upon the EPA to reformulate its regulations, and that if *AISI I* had resulted in an inherently final judgment, such as a money judgment, recall would have probably been inappropriate.<sup>99</sup> The court concluded that the modification sought by the EPA to the *AISI I* holding would be modest,<sup>100</sup> since the EPA's power to set effluent limitations for existing point sources would not be affected by the requested amendment.<sup>101</sup> The "confluence of several unusual factors" convinced the court that policy of finality of judgments had been outweighed by other considerations of justice.<sup>102</sup>

## V. CONCLUSION

It is submitted that the *AISI II* court adopted a sound approach to the problem of whether a motion to recall should be granted. The *Greater Boston* decision, although it made a substantial contribution to the law in this area, demonstrates a less sound method of dealing with this issue. While the *Greater Boston* court catalogued the traditional exceptions to the recall prohibition,<sup>103</sup> the D.C. Circuit did not provide any guidance to courts or litigants as to whether the presence of one or several factors was necessary to warrant recall.

The Third Circuit in *AISI II* refused to search for a single factor in reaching its decision. Rather, the court analyzed the issue by balancing the

97. *Id.* at 598. The court observed that because of the requirements imposed by *AISI I*, there were presently no effluent limitations regulations applicable to point sources within the Third Circuit. *Id.* Noting that the iron and steel industry is a major source of water pollution in the United States, the *AISI II* court concluded that recall of the *AISI I* mandate best served the congressional goal of achieving "integrity of the Nation's waters." *Id.*, quoting 33 U.S.C. § 1251(a) (Supp. V. 1975).

98. 560 F.2d at 598, citing 33 U.S.C. § 1251(a)(1) (Supp. V. 1975).

99. 560 F.2d at 599. The court stated:

Had *AISI I*, for example, awarded a money judgment, we would have been far more reluctant to amend the original mandate. And litigants generally should stand as forewarned that the extraordinary remedy granted here may well be confined to instances where litigants are under a continuing duty to satisfy an order of the Court.

*Id.*

Traditionally, courts have been more reluctant to recall mandates where property has been exchanged in reliance on the judgment. See *Collins v. City of Wichita*, 254 F.2d 837 (10th Cir. 1958) (condemnation award); *Hines v. Royal Indem. Co.*, 253 F.2d 111 (6th Cir. 1958) (money judgment). In *Collins*, a motion was made for the recall of a condemnation award on the ground that the statute involved in the judgment had been subsequently declared unconstitutional by the United States Supreme Court. *Collins v. City of Wichita*, 254 F.2d at 838. In denying the motion, the *Collins* court stressed that stability was essential where real estate titles were concerned. *Id.* at 839.

100. 560 F.2d at 599.

101. *Id.* See text accompanying note 70 *supra*.

102. 560 F.2d at 600 (emphasis supplied by the court).

103. See notes 32-51 and accompanying text *supra*.

interests of justice against the strong policy of finality of judgment. It is suggested that the presence of any single factor cannot itself determine the answer to this question.

In granting the EPA's motion to recall its mandate, the *AISI II* court stressed that it was considering the motion in light of the totality of circumstances, including the need for uniformity in a national program of water pollution control. Moreover, the *AISI II* court noted that *AISI I* had imposed a continuing duty upon the EPA, and had not resulted in the awarding of a money judgment. The public interest in finality was thus not significantly offended, since no party had relied on the judgment to his detriment in the ordering of his affairs.

It is submitted that appellate courts confronted with a motion to recall a mandate should adopt the balancing approach advanced by the Third Circuit in *AISI II*. With respect to fairness to the litigants, certain factors should be weighed by the court in utilizing this method. The diligence of the litigant in moving for a rehearing or for Supreme Court review should be considered, and the litigant's diligence in moving for the recall should also enter into the balancing process. Furthermore, the court should examine the extent to which a party who has relied on the judgment would be injured by its recall,<sup>104</sup> as well as the extent to which any abuse of the judicial process had entered into the procurement of the judgment. Finally, the interest of society in finality of judgment and in the outcome of a particular suit, as well as the degree its expectations would be upset by recall of a mandate, must be considered. It is suggested that the Third Circuit appropriately weighed these factors and has established an approach to be followed by other courts confronted with this problem.

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104. See *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957) (Harlan, J., dissenting); *Collins v. City of Wichita*, 254 F.2d 837 (10th Cir. 1958). The *AISI II* court recognized this as the essential purpose of the finality doctrine. 560 F.2d at 592.