A Survey of the Literature on Federal Appellate Practice and Procedure

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The late Justice Byron R. White marked the point of departure for this Survey of the Literature on Federal Appellate Practice and Procedure:

The Supreme Court of the United States reviews only a small percentage of all judgments issued by the . . . courts of appeals. Each of the courts of appeals, therefore, is for all practical purposes the final expositor of the federal law within its geographical jurisdiction. This crucial fact makes each of those courts a tremendously important influence in the development of the federal law, both constitutional and statutory. Hence, it is an obviously useful and significant service to keep close track of and to publicize, particularly for the benefit of lawyers and judges, the work of the circuits.¹

Thus, the Courts of Appeals are the engines for error correction and declaration of the law in the courts of the Third Article. The goal of this Survey is to identify and memorialize the available publications related to

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appellate practice and procedure before the United States Courts of Appeals for the benefit of lawyers and judges and scholars.

Sources are listed in encyclopedic fashion for the user’s further study and research. The materials are arranged by treatises, textbooks, studies and books, manuals, and symposia. Works are listed alphabetically by author. Especially useful sources for studying and understanding appellate jurisdiction are starred with an asterisk (“*”). These “**” marked sources are exceptionally comprehensive or unusually thorough and also are current and up to date. The coverage of this Survey is reliable through January 2023.

I. TREATISES

*James Wm. Moore et al., Moore’s Federal Practice (Matthew Bender 3d ed. 2022): 31 vols.; once considered the preeminent treatise on federal jurisdiction and procedure; volumes 19 through 21 cover appeals to the courts of appeals; more comprehensive on district court jurisdiction; comprehensive; a good place to begin research; citations to this treatise are routinely found in the footnotes to this Primer; available online in Lexis Advance Research.

Richard J. Pierce, Jr. & Kristin E. Hickman, Administrative Law Treatise (Wolters Kluwer 6th ed. 2020): 3 vols.; the successor to the preeminent treatise edited by Kenneth Culp Davis; primarily devoted to administrative law, but also covers administrative procedure.

Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law — Substance and Procedure (Thomson Reuters 5th ed. 2012): 6 vols.; an up-to-date analysis and synthesis of constitutional law; a superior resource on the constitutional aspects of federal jurisdiction; the popular one-volume student hornbook is keyed to this treatise.

*Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure (Thomson Reuters 2022): 33 vols.; the best and most usable multivolume treatise on federal courts; updated continuously with supplements; volumes 15A, 15B, 16, 16A, and 16AA cover the courts of appeals; each section amounts to a knowledgeable and thorough lecture on the topic with comprehensive and exhaustive citations; the eighth edition of Wright & Kane’s student hornbook (2017) is a masterful highlight of this set; this Primer relies extensively on this treatise, as should be apparent from the footnotes.

II. TEXTBOOKS

overview of federal appellate procedures; a useful student guide; a concise reference for attorneys.


Lea Brilmayer & Jacob Corre, An Introduction to Jurisdiction in the American Federal System (Michie Co. 1986): designed as a student guide to some of the more esoteric questions of jurisdiction.


Erwin Chemerinsky, Federal Jurisdiction (Wolters Kluwer 8th ed. 2020): a discussion of the law and policy involved with current jurisdictional issues; focus is more on the district court level and federal-state issues; a comprehensive and thorough student guide written by a masterful teacher and prolific academic.


David P. Currie, Federal Courts — Cases and Materials (West Publishing Co. 4th ed. 1990): an effort at modern organization to emphasize major contemporary themes such as civil rights jurisdiction; note materials seek to deepen analysis; includes a statutory appendix.


of history and constitutional law with practice and procedure; a casebook that describes the current state of the federal courts and considers their future.


Peter W. Low, John C. Jeffries, Jr., Curtis A. Bradley & Tara L. Grove, Federal Courts and the Law of Federal-State Relations (Foundation Press 10th ed. 2022): a modern treatment that de-emphasizes procedure and emphasizes themes of federalism; provides extended notes; includes a valuable bibliography of secondary authorities.


James E. Pfander, Principles of Federal Jurisdiction (West Publishing Co. 4th ed. 2021): a law student hornbook; provides up-to-date explanations of the leading principles of federal jurisdiction.

Richard J. Pierce, Sidney A. Shapiro & Paul R. Verkuil, Administrative Law and Process (Foundation Press 6th ed. 2013): a law student hornbook that is an abbreviated version of, with citations to, the multivolume treatise; a quick and ready introduction to administrative procedures.

state issues; a much cited and thoughtful treatment by a leading scholar of the federal courts.

Martin H. Redish, Suzanna Sherry, James E. Pfänder, Steven S. Gensler & Adam Steinman, Federal Courts: Cases, Comments and Questions (West Publishing Co. 9th ed. 2022): a comprehensive casebook that includes the latest court decisions and excerpts from the scholarly literature.


Laurence H. Tribe, American Constitutional Law (Foundation Press Co. 3d ed. 2000): an original synthesis from the author’s orientation to the subject; a reliable resource for constitutional limits on federal court jurisdiction; the author has since abandoned his plan for a second volume.


*Charles Alan Wright & Mary Kay Kane, Law of Federal Courts (West Publishing Co. 8th ed. 2017): modestly intended as a hornbook for law student use, but one of the most frequently-cited texts in federal judicial opinions; includes references to the multi-volume treatise that is one of Charles Alan Wright’s great testaments as a scholar; if a library could buy only one federal courts volume, this would be it.

Charles Alan Wright, John B. Oakley & Debra L. Bassett, Federal Courts Cases and Materials (Foundation Press 14th ed. 2018): traditional casebook that emphasizes jurisdiction and procedure; notes are sparse; mostly opinions; deftly teaches the subject of federal courts for lawyers.


III. BOOKS AND STUDIES

*Administrative Office of the U.S. Courts, Annual Reports of the Director of the Administrative Office of U.S. Courts: detailed statistics; available over time for comparisons and trend analyses; the motherlode of stats; enough data to satisfy any federal court wonk.

efficient and less judge-labor intensive; relied on the belief that appellate judges could do more work, if only they worked more efficiently.


American Bar Foundation, Accommodating the Workload of the United States Courts of Appeals (1968): expressed concerns for the growing appellate caseload; recommended various intramural procedural reforms to increase efficiency; contemplated splitting circuits and adding judgeships as the primary approaches to coping with future caseload growth.

American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts (1969): one of the earliest studies of the modern federal court system; recommended the logical straightforward proposition that narrowing the subject-matter jurisdiction at the district court level would result in a decrease in the case load demand at the appellate level.


*Thomas E. Baker, Rationing Justice on Appeal — the Problems of the U.S. Courts of Appeals (West Publishing Co. 1994): a comprehensive study by the author of this Primer; surveys the literature on the courts of appeals; chronicles studies and proposal for reform; one of the most-cited books on the subject.


Gordon Bermant, Edward Sussman, William W. Schwarzer & Russell R. Wheeler, Imposing a Moratorium on the Number of Federal Judges: Analysis of Arguments and Implications (Federal Judicial Center 1993): tracks the debate over capping the size of the federal judiciary by limiting the number of authorized judgeships.

*Benjamin N. Cardozo, The Nature of the Judicial Process (Yale Univ. Press 1921): a classic account of how an appellate judge reaches a decision; written by an historic Justice of the Supreme Court who previously had sat with great distinction on a state high court.

*Paul D. Carrington, Daniel J. Meador & Maurice Rosenberg, Justice on Appeal (West Publishing 1976): a classic account of appellate courts, their history and development; published after a national conference in 1975.

Joe S. Cecil, Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project (Federal Judicial Center 1985): describes
the series of procedural innovations adopted by the Ninth Circuit from 1980 to 1982.


*Frank M. Coffin, On Appeal: Courts, Lawyering, and Judging (W.W. Norton 1994): an insightful account of how appellate courts function; written by one of the leading appellate jurists of his generation.


Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change (1975), as reprinted in 67 F.R.D. 195: the “Hruska Commission” report, part II; recommended the creation of a new national court of appeals to decide appeals referred from the Supreme Court and appeals transferred from the courts of appeals; the division of the Fifth Circuit and the creation of the Eleventh Circuit, in 1981, can be traced to this report.

*Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report (1998): popularly known as the White Commission after its chair, Justice Byron White; congressionally created; reported on proposals to divide the U.S. Court of Appeals for the Ninth Circuit; analyzed proposals for revising the appellate structure of all the courts of appeals.

Frank B. Cross, Decision Making in the U.S. Courts of Appeals (Stanford 2007): comprehensive study of judicial decisionmaking; includes bibliographical references.


William Domnarski, In the Opinion of the Court (Univ. Ill. 1996): an exploration of the reporting and writing of judicial opinions.

Federal Courts Study Committee, Judicial Conference of the United States, Report of the Federal Courts Study Committee (April 2, 1990): this committee was appointed by Chief Justice Rehnquist at Congress’s request in response to increasing delays in processing cases due to quickly increasing caseloads; the report sets out the committee’s description of problems, and its proposed structural and managerial reforms to the federal court system; summarizes relevant figures underlying their proposals; a separate volume (Part III of the report) has more detailed analysis and background memoranda written by staff and consultants.

Federal Judicial Center, Appellate Court Caseweights Project (Federal Judicial Center 1977): an attempt to develop estimates of relative workload in the courts of appeals without detailed timekeeping by judges; the experiment had judges estimate the relative workload associated with various appeal types, and their estimates were used to calculate case weights; concluded that the weighted caseloads produced by this method were not useful measures of appellate workload; cautioned that the method could not be adequately assessed given the inconsistencies in the appellate court statistical reporting.


Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court (Federal Judicial Center 1972), as reprinted in 57 F.R.D. 573: the “Freund Committee” report; championed the creation of a new national court of appeals that would screen petitions for certiorari to the Supreme Court and decide conflicts among the circuits; the proposal was controversial and nothing came of it legislatively.

process: notification, documentation, argumentation, decision, publication, and mandate; also describes procedures related to judicial conferences, councils, committees, and circuit executives; bar admission and regulation; court support personnel, staff attorneys, and libraries.

*Bryan A. Garner, Carlos Bea, Rebecca White Berch, Neil M. Gorsuch, Harris L Hartz, Nathan L. Hecht, Brett M. Kavanaugh, Alex Kozinski, Sandra L. Lynch, William H. Pryor, Jr., Thomas M. Reavley, Jeffrey S. Sutton & Dian P. Wood, The Law of Judicial Precedent (Thomson Reuters 2016): the first hornbook-style treatise on the doctrine of precedent in more than a century; the above list of coauthors that includes two Supreme Court Justices demonstrates the intellectual firepower of this volume; in his foreword Justice Stephen Breyer writes that he is “confident that many others will find something to learn in its comprehensive explications.”

Jerry Goldman, Measuring a Rate of Appeal (Federal Judicial Center 1973): preliminary study; out of date for current purposes.


Virginia A. Hettinger, Stefanie A. Lindquist & Wendy L. Martinek, Judging on a Collegial Court: Influences on Federal Appellate Decision Making (Univ. Va. 2006): investigates the circumstances when a judge is likely to write a separate concurring or dissenting opinion.


David E. Klein, Making Law in the United States Courts of Appeals (Cambridge Univ. 2002): explores the legal and behavioral facets of how the courts of appeals are situated as an intermediate court of error correction.

Carol Krafka, Joe S. Cecil & Patricia Lombard, Stalking the Increase in the Rate of Federal Appeals (Federal Judicial Center 1995): a study of the increase in the number of appeals and the increase in the rate of appeals.

Ashlyn K. Kuersten & Donald Songer, Decisions on the U.S. Courts of Appeals (Routledge 2001): outlines the structures and procedures of the courts of appeals; provides longitudinal data on litigants; utilizes statistical programs and databases; includes tables and charts.


Karl N. Llewellyn, How Appellate Courts Decide Cases (Brandeis Lawyers’ Society 1951): a classic; included here for its history and timelessness as well as out of a sense of nostalgia.


*Judith A. McKenna, Structural and Other Alternatives for the Federal Courts of Appeals: Report to the United States Congress and the Judicial Conference of the United States (Federal Judicial Center 1993): commissioned by Congress; hypothesizes various futures for the federal courts and contemplates the various proposals to reform them.

Laural L. Hooper, Dean P. Miletich & Angelia Levy, Case Management Procedures in the Federal Courts of Appeals (Federal Judicial Center 2d ed. 2011): detailed consideration of intramural procedures of appellate case management, such as screening, the nonargument calendar, and decisions without published opinions.


*Richard A. Posner, How Judges Think (Harv. Univ. 2008): one of the most prominent jurists of his generation not to have served on the Supreme Court focuses his considerable intellect on the craft of judging; this is an intellectual tour de force along the lines of Benjamin Cardozo’s classic, The Nature of the Judicial Process; a philosophical description of how judges go about deciding cases.

was “Crisis and Reform”; examines the workload and work ways of the federal courts, with an emphasis on the courts of appeals; provides equal parts history and statistics to help the reader to understand the challenges facing the federal appellate judiciary and to evaluate the proposals for its reform.


Christopher E. Smith, Judicial Self-Interest: Federal Judges and Court Administration (Praeger 1995): examines how judges develop judicial policies and how they go about reforming the courts.

Donald R. Songer, Reginald S. Sheehan & Susan B. Haire, Continuity and Change on the United States Courts of Appeals (Univ. Mich. 2000): uses the National Science Foundation database of courts of appeals decisions; a comprehensive examination of the trends in appointments, changes in workload, increased levels of conflict, and regional differences among the courts of appeals.

Standing Committee on Federal Judicial Improvements, American Bar Association, The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth (1989): expressed the concern that the seemingly inexorable trend towards more appeals of greater complexity would overwhelm the courts of appeals; urged continued study; encouraged consideration of various proposals addressing intercircuit conflicts, limited en bancs, subject matter panels and appellate case management techniques.


Donna Stienstra & Joe S. Cecil, The Role of Staff Attorneys and Face-to-Face Conferencing in Non-Argument Decisionmaking: a View From the Tenth Circuit (Federal Judicial Center 1989): these appellate ADR programs have been implemented in most, if not all, of the remaining circuits since this study.


Larry W. Yackle, Reclaiming the Federal Courts (Harv. Univ. 1994): a leading federal courts scholar’s manifesto; a critique of how the courts have closed the door to the federal courthouse by invoking case or controversy doctrines such as standing.

**IV. MANUALS**


*Steven Alan Childress & Martha S. Davis, Federal Standards of Review (Lexis Nexis 4th ed. 2010): 3 vols.; the most thorough, comprehensive, and up-to-date treatment of standards of review; separate treatment for civil, criminal, and administrative matters.


*Council of Appellate Lawyers, Appellate Practice Compendium (Dana Livingston, ed. ABA Publishing 2012): a compilation of “insider’s guides” to the Supreme Court of the United States, all the U.S. courts of appeals, and the 50 state appellate court systems; the guides are written by a “who’s who” lineup of appellate lawyers.


*Harry T. Edwards & Linda A. Elliot, Federal Courts Standards of Review — Appellate Court Review of District Court Decisions & Agency Actions (Thomson West 3d ed. 2018): describes the doctrinal frameworks informing the various standards of review; examines the relevant statutes and applicable rules of procedure; focuses on leading Supreme Court decisions.


*Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett & Dan Himmelfarb, Supreme Court Practice (Bloomberg BNA 10th ed. 2013): the Bible of Supreme Court practice; provides a detailed treatment of review of courts of appeals; many topics are analogous to jurisdiction of the courts of appeals, such as finality and extraordinary writs.

Lissa Griffin, Federal Criminal Appeals Manual (Thomson Reuters 2019): covers all the issues presented on appeal from a federal criminal conviction, including jurisdiction, appealability, and standards of review.


Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure (Lexis Nexis Publishing 5th ed. 2005): 2 vols.; designed to guide the practitioner through the post-AEDPA world of habeas procedure (Anti-Terrorism and Effective Death Penalty Act); chapters 34-38 detail the appellate stages up to and including certiorari.

*David F. Herr & Eric J. Magnuson, Federal Appeals: Jurisdiction & Practice (Thomson Reuters 2022): a lawyer’s guide to the federal appellate courts, their jurisdiction and procedures; up to date treatment of the case law; available online on Westlaw Edge.

*David G. Knibb, Federal Court of Appeals Manual (Thomson Reuters 7th ed. 2022): created as a practical guide for attorneys who will be bringing cases to the U.S. courts of appeals; sections written in a Q&A format but with thorough answers; primarily covers procedural matters, but does devote some space to more substantive issues such as standards of review; frequently relied on in the writing of this Primer; available online on Westlaw Edge.


Brian R. Means, Federal Habeas Manual (Thomson West 2018): addresses various aspects of federal habeas corpus litigation with emphasis on the Antiterrorism and Effective Death Penalty Act of 1996 and Supreme Court and Circuit Court decisions.


Herbert Monte Levy, How to Handle an Appeal (Practicing Law Inst. 4th ed. 1999): a good practitioner’s guide to appellate jurisdiction and practice; additional emphasis on advocacy skills; chapter 11 is specifically devoted to the courts of appeals.


Roy B. Marker, Federal Appellate Jurisdiction and Procedure (Callaghan & Co. 1935 & Supps. to 1938): too far out of date to rely on, except for historical research.

Robert J. Martineau, Modern Appellate Practice — Federal and State Civil Appeals (Bancroft-Whitney 1983 & Supps. to 1994): “modern” connotes the previous twenty-five years; covered both state and federal civil appeals; scholarly and practical; well researched, with extensive citations and cross-references; not being updated, however.


Roscoe Pound, Appellate Procedure in Civil Cases (Little, Brown & Co. 1941): provides an extensive history and comparative material; only one chapter devoted to the “present century”; presents proposals for reform; useful for perspective and history.

Thomas W. Powell, The Law of Appellate Proceedings: in Relation to Review, Error, Appeal, and Other Reliefs Upon Final Judgments (T. & J.W. Johnson & Co. 1872): noteworthy as the earliest attempt at a separate treatise on appeals; too far out of date to rely on, except for historical research.

Practitioner’s Guide to the United States Court of Appeals for the Fifth Circuit (2021): distributed by the Clerk’s Office to assist lawyers and pro se litigants.

*George K. Rahdert & Larry M. Roth, Appeals to the Fifth Circuit Manual (Butterworth Legal Publ’r 1977 & Supps. to 2005): 2 vols.; very
complete guidelines to appellate practice and procedure; detailed references and synthesis of U.S. Code, Federal Rules of Appellate Procedure, local rules, internal operating procedures, etc.; cited here as being representative of other circuit-specific manuals written for practitioners which would provide a valuable and quick reference.

*Antonin Scalia & Bryan A. Garner, Making Your Case — The Art of Persuading Judges (2008): a new masterpiece on appellate advocacy; one of the best stylists to have sat on the Supreme Court, and the leading guru on legal usage and grammar collaborate to create an instant classic.

Standing Committee on Continuing Education of the Bar, American Bar Association, Appellate Advocacy (Peter J. Carre, Azike A. Ntephe & Helen C. Trainor eds., ABA Prof’l Educ. Publ’n 1981): a collection of essays and speeches by lawyers and judges on appellate practice; a good compilation on the nature of the appellate process; little on jurisdiction.

Robert L. Stern, Appellate Practice in the United States (Bureau of Nat’l Affairs 2d ed. 1989): a comprehensive handbook on the appellate process, with emphasis on brief writing and oral argument.

*Michael E. Tigar & Jane B. Tigar, Federal Appeals — Jurisdiction and Practice (West Group 3d ed. 1999): current and thorough; the jurisdiction portion elaborates the important topics; presents well-chosen and helpful citations; coauthored by one of the premier appellate lawyers of this generation; frequently relied on in the writing of this Primer.


Paul G. Ulrich, et al., Federal Appellate Practice 9th Circuit (Thomson Reuters 2018-19 ed.): 2 vols.; another good example of the many comprehensive reference books commercially available to attorneys taking appeals to the various courts of appeals.

Frederick Wiener, Briefing and Arguing Federal Appeals - with an appendix of late authorities including references to the Supreme Court’s 1967 rules (Bureau of Nat’l Affairs 1967): emphasizes appellate advocacy; the best treatment of its kind; regrettably dated; this is how a first-rate appellate lawyer viewed the appellate process when in his prime.

*Larry W. Yackle, Postconviction Remedies (West Group 1981 & Cumulative Supp. to 2007): the writ of habeas corpus is pure procedure, and this is the best single volume on the great writ written by one of the leading scholars on the subject.

Elijah N. Zoline, Federal Appellate Jurisdiction and Procedure (Clark Boardman Co. 2d ed. 1924): too far out of date to rely on, except for historical research.
V. SYMPOSIA

*American Academy of Appellate Lawyers, Bibliography of Appellate Practice — Books, Manuals, and Articles (https://www.appellateacademy.org/publications/bibliography.pdf): comprehensive listing of online materials — with links — as well as print materials related to appellate practice, the Supreme Court, the U.S. Courts of Appeals, and the state appellate courts.

*2005 National Conference on Appellate Justice, 8 J. App. Prac. & Process 65 (2006): co-sponsored by the American Academy of Appellate Lawyers, Federal Judicial Center, and the National Center for State Courts; includes comprehensive statistical tables; selected presentations and addresses; this national conference brought together jurists, lawyers, and academics to consider the state of appellate courts both state and federal.


*Civil Appellate Jurisdiction: Part I, 47 Law & Contemp. Probs., Issue 2 Spring 1984, at 1, 1–248; Civil Appellate Jurisdiction: Part II, 47 Law & Contemp. Probs., Issue 3 Summer 1984, at 1, 1–179: written in the form of a restatement of the law; Part I is a valuable research tool and able synthesis; Part II adds a comparative perspective to include Canada, France, and Germany.

Eighth Circuit Survey, Creighton L. Rev.: a regular feature.

Eleventh Circuit Survey, Mercer L. Rev.: an annual symposium.

Federal Courts Law Review: an electronic law review published online; editorial board consists of U.S. magistrate judges and law school professors.

Fifth Circuit Symposium, Loy. L. Rev.: a regular feature.


Ninth Circuit Conference, 48 Ariz. L. Rev. 221, 221–367 (2006): a symposium organized to discuss issues affecting the Ninth Circuit in particular, such as “limited” en banc rehearings, caseload, and reversals by the Supreme Court.
A Survey of the Literature

Restructuring Federal Courts, 78 Tex. L. Rev. 1399, 1399–1866 (2000): A symposium discussing the effects recent legislation such as the Anti-Terrorism and Effective Death Penalty Act (AEDPA) have had on judicial review of immigration and criminal appeals.
Seventh Circuit Review, Chi.-Kent L. Rev.: semi-annual online journal analyzing recent decisions of the Seventh Circuit.
*The Supreme Court [Year] Term, Harv. L. Rev.: an annual symposium; each November issue is devoted to selected decisions from the preceding term.
Third Circuit Review, Vill. L. Rev.: an annual symposium.