Alan B. Morrison addresses the recent use of mandamus petitions in the emoluments suits and the alternative of discretionary interlocutory appeals.

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The following guest post is by Alan B. Morrison. Mr. Morrison is the Lerner Family Associate Dean for Public Interest & Public Service Law at George Washington University Law School, where he teaches civil procedure. He is also the co-author, with Howard Eisenberg, of an article dealing with similar appeal issues: Discretionary Appellate Review of Non-Final Orders: It’s Time To Change the Rules, 1 Journal of Appellate Practice & Process 285 (1999) (PDF, 1.3 MB).

On July 10, 2019, the Fourth Circuit unanimously ruled that the State of Maryland and the District of Columbia lack standing to challenge President Donald J. Trump’s alleged failure to comply with the Foreign Emoluments Clause of Article I, section 9, clause 8 of the Constitution, which forbids any officer of the United States from accepting any “present, Emolument, Office or Title . . . from any King, Prince, or foreign State.” I shall not debate the merits of the standing question, which is currently pending in other similar, but different contexts in the Second and D.C. Circuits, nor the meaning of the Emoluments Clause, which is at least within the realm of Congress, should it embark on impeachment or seek to legislate in that area. Instead, being a civil procedure nerd, I want to focus on the Fourth Circuit’s use of mandamus to
reach the standing issue and what that spells for the future of appellate jurisdiction in the federal courts.

In response to the complaint filed by Maryland and the District, the President moved to dismiss on standing and failure to state a claim grounds, among other reasons. The district court rejected each of those defenses and set a schedule for discovery. At that point, the President asked the district court to certify his orders refusing to dismiss the complaint for an interlocutory appeal under 28 U.S.C. § 1292(b). That provision applies when an otherwise unappealable 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.” However, the appeal is not as of right, but can be taken only if the district judge “shall be of the opinion” that his order meets that standard, and “he shall so state in writing.” In addition, the court of appeals “may thereupon, in its discretion, permit an appeal to be taken from such order,” which means that two courts must exercise their discretion to allow the appeal from a non-final order. The problem for the President was that the district judge refused to certify the question, and section 1292(b) appears to give district judges an absolute gatekeeper role that can prevent the use of that section no matter how “controlling” the question of law is, how “substantial” the basis for disagreement may be, or how much its resolution may advance the “ultimate termination of the litigation.” But appearances (and precedent) are often deceiving, and, as the saying goes, where there is a will there is a way, even when the matter relates to appellate jurisdiction.

The way here was found through the writ of mandamus. Yes, district judges have discretion, but, according to the Fourth Circuit, there are limits, and while the situations in which a district judge will have been found to abuse his discretion are “extraordinary,” they do occur, and this is one of those cases. The Court bent over backwards to emphasize the unique nature of this case, and in all likelihood, it will be readily distinguished in almost all future efforts to do an end run on section 1292(b). In addition, those opposing certification will point to In re Ford Motor Co., which the Fourth Circuit did not mention, where the court ruled that it had no power to direct the district court to certify orders under section 1292(b).
Moreover, despite all the cautionary language, the Fourth Circuit's opinion cannot prevent defendants from turning to mandamus when the district judge denies 1292(b) certification, making the same kind of arguments that proved persuasive here. All the incentives push defendants toward doing just that: the costs of seeking mandamus are modest (especially when compared to the costs of discovery); the effort is surely not frivolous after this decision; seeking appellate review will add to the delay, which is almost always good for defendants; and there is a chance of winning big—if the court of appeals agrees to hear the case, it will almost certainly reverse, as it did here. The result may be that only a very few cases will actually be decided on the merits using mandamus to overcome a refusal to certify, but there is very likely to be a large influx of cases in which the courts of appeals have to write opinions explaining why the case is not governed by In re Trump. In theory, the Supreme Court or the Fourth Circuit en banc could overturn this jurisdictional ruling, but it is hard to imagine either agreeing to hear that claim, especially given the facts in this case.

In fact, the D. C. Circuit was faced with a similar request in a similar but not identical emoluments case, In re Trump. It considered what the Fourth Circuit had done, and then did something close to it, but not quite the same. Instead of using mandamus to order certification, the court expressed its strong views in a two-page order that 1292(b) certification was appropriate, denied the mandamus petition without prejudice, and remanded the matter to the district court “for immediate reconsideration of the motion to certify and the motion to stay further proceedings.” Perhaps the D.C. Circuit should be applauded for tact or gentleness, but that “order” looks a lot like an advisory opinion, even though Article III requires courts to decide cases or controversies. Of course, in the real world, the district court will have little choice but to certify the questions, or else the next time the D.C. Circuit seems quite likely to do what the Fourth Circuit did, although it is possible that it might agree with the Seventh Circuit opinion in Ford Motor, which it cited, if forced to choose.

What should be done? This is not the first time that the courts have been faced with situations in which an interlocutory appeal seems the sensible way to proceed, but similar hurdles stood in the way. The Supreme Court found a way out in Cohen v. Beneficial Indus. Loan Corp., creating the “collateral order” doctrine under 28 U.S.C. § 1291, which in turn spawned years of litigation over
eventually gave the Court the authority under 28 U.S.C. § 2072(c) to define by rule when an order is final under section 1291, which took much of the pressure off the collateral order doctrine, but as In re Trump shows, there is still plenty of room for litigation.

The solution is not complicated or unknown to the federal courts. Since 1998, Rule 23(f) has allowed discretionary appeals of orders granting or denying class certification, under which the district court does not have a gatekeeper role, but its opinion on the motion is likely to influence the court of appeals in deciding whether to hear the appeal, for many of the same reasons as apply under section 1292(b). As a lawyer who is most often on the side of the plaintiffs, I recognize that interlocutory appeals more often favor defendants, but as In re Trump demonstrates, if a court of appeals wants to hear a case, it can find a way to do so. To counterbalance that tendency, I would have Congress abolish the collateral order doctrine and make discretionary review the exclusive basis for interlocutory appeals, other than what is provided by specific statutes. With that safeguard in place, I would also end the use of mandamus to do an end run on both the final judgment rule and any limits on discretionary interlocutory appeals.

In the end, the real question is whether litigants and courts should continue to spend countless hours debating the application of mandamus, or instead should recognize the discretionary nature of these questions regarding interlocutory appeals and make discretion the standard for these exceptions to the final judgment rule.

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