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The Not-So-Extraordinary Case of Aikens v. Ingram: Rule 60(b)(6) Relief from Final Judgments in the Fourth Circuit

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THE NOT-SO-EXTRAORDINARY CASE OF *AIKENS V. INGRAM*: RULE 60(b)(6) RELIEF FROM FINAL JUDGMENTS IN THE FOURTH CIRCUIT*

INTRODUCTION

Professor John Oakley of the University of California, Davis, once quipped about an "Exam Question from Hell masquerading as a federal lawsuit."[1] This may be a good way to describe the recent Fourth Circuit case of *Aikens v. Ingram*,[2] where, after a series of twists and turns, a high-stakes lawsuit failed on procedural grounds. In *Aikens*, a high ranking military official allegedly retaliated against a deployed subordinate officer by hacking into his personal e-mails.[3] The federal district court dismissed the action, directing the plaintiff to exhaust his remedies before an Army administrative body that ultimately lacked subject matter jurisdiction.[4] Upon returning to federal court, the plaintiff requested that the district court reopen his claim under Federal Rule of Civil Procedure 60(b)(6),[5] which allows a court to reopen final judgments in "extraordinary" situations.[6] The district court declined to do so.[7] Ultimately, the Fourth Circuit, sitting en banc, concluded that the circumstances were not sufficiently extraordinary to mandate Rule 60(b)(6) relief.[8] A review of the procedural quagmire in *Aikens* raises the question: if this was not an extraordinary circumstance, what is?

Rule 60(b) lists five circumstances where the federal courts may reopen a final judgment.[9] It also has a sixth "catch-all" provision,[10]

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1. *See* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 110 n.3 (6th ed. 2002).

2. 652 F.3d 496 (4th Cir. 2011) (en banc).

3i *Id.* at 498.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8i *Id.*; *see* Ackermann v. United States, 340 U.S. 193, 202 (1950) (finding no extraordinary circumstances warranting Rule 60(b)(6) relief).

9. Rule 60(b) reads in full:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

Rule 60(b)(6), which allows a federal court to reopen judgments for "any other reason that justifies relief."[11] Shortly after the addition of the catch-all provision to the federal rules in 1948, the Supreme Court, in *Ackermann v. United States*,[12] construed this language to require relief only in truly extraordinary circumstances.[13] The *Ackermann* Court held that a "free, calculated, [and] deliberate choice[]," [14] such as the failure to appeal an adverse verdict, is not an extraordinary circumstance, and therefore the party raising it should not be entitled to relief from a final judgment under Rule 60(b)(6).[15]

In *Aikens*, the Fourth Circuit relied upon the sixty-year-old rule first announced by the Supreme Court in *Ackermann*.[16] The Fourth Circuit could have clearly and justly distinguished *Aikens* from *Ackermann* on at least two grounds. First, in *Aikens*, the procedural defect was an anomaly of the law that served only as a procedural formality; the strategic choice pursued by Aikens's attorneys benefited the court at the expense of no one. Second, the court in

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(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

FED. R. CIV. P. 60(b). The federal rules are binding upon the Court and authorized by statute under the Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2006).

10. Note, *Federal Rule 60(b): Relief from Civil Judgments*, 61 YALE L.J. 76, 81 (1952) ("60(b)(6) . . . is a catch-all clause to permit correction 'for any other reason [not specified in 60(b)(1)–(5)] justifying relief from the operation of [a final] judgment.' " (quoting FED. R. CIV. P. 60(b) (1948)).

11. FED. R. CIV. P. 60(b)(6).

12. 340 U.S. 193, 198 (1950).

13. *See Ackermann*, 340 U.S. at 199–200, 202 ("Neither the circumstances of petitioner nor his excuse for not appealing is so extraordinary as to bring him within . . . Rule 60(b)(6)."); *see also infra* Part II (discussing judicial interpretation of Rule 60(b)(6)).

14. *Ackermann*, 340 U.S. at 198.

15. *Id.*

16. Aikens v. Ingram, 652 F.3d 496, 503 (4th Cir. 2011) (en banc).

Aikens could have followed a line of cases which generally suggest, despite *Ackermann*, that Rule 60(b)(6) can be an appropriate remedy for correcting a procedural error brought about, in part, by actions of the court, which result in a substantial injustice.[17]

The Fourth Circuit declined to draw either of these distinctions in *Aikens*.[18] Instead, the Fourth Circuit validated what this Recent Development will refer to as the "categorical approach" to Rule 60(b)(6) relief.[19] Under the categorical approach, *any* freely made choice by the petitioning party that is fatal to the original claim is an absolute bar to reopening a verdict under Rule 60(b)(6).[20] The application of the categorical approach to the facts of *Aikens* undermines the very purpose of Rule 60(b)(6), which is to provide litigants, as well as courts, with some measure of flexibility when procedural anomalies cause unjust final judgments.[21]

This Recent Development argues that the time has come to relax the assumption that erroneous final judgments caused in part by the petitioner's own tactical choices categorically bar Rule 60(b)(6) relief. In doing so, it identifies trends that depart from the categorical approach. Some of these trends reflect the sound policy supporting Rule 60(b)(6) relief, while others run counter to the policy of such relief. This Recent Development also notes that there are growing inconsistencies with the analysis of Rule 60(b)(6) motions and urges that the federal judiciary make an effort to bring doctrinal clarity to the extraordinary circumstances requirement created by *Ackermann*. Finally, this Recent Development discusses two frameworks through which Rule 60(b)(6) relief can be analyzed.

Analysis proceeds in three parts. Part I briefly discusses the facts of *Aikens* and addresses the strategic mistakes made during the course of the litigation. Part II analyzes the extraordinary

17. *See* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863–64 (1988) (using Rule 60(b)(6) to vacate an adverse judgment when the district court judge incorrectly failed to recuse himself); Thompson v. Bell, 580 F.3d 423, 444 (6th Cir. 2009) (using Rule 60(b)(6) to correct an erroneous dismissal based on lack of exhaustion); Whitmore v. Avery, 179 F.R.D. 252, 259 (D. Neb. 1998) (using Rule 60(b)(6) to correct an erroneous denial of a stay pending administrative exhaustion). Judge Diaz's concurring opinion in *Aikens* distinguishes *Thompson* and *Whitmore* on grounds that *Whitmore* was a *pro se* representation and *Thompson* involved a challenge to a state execution. *See Aikens*, 652 F.3d at 505 (Diaz, J., concurring).

18. *See Aikens*, 652 F.3d at 505.

19. This language arises from a discussion in *Ungar v. Palestine Liberation Organization*, 599 F.3d 79, 81, 84 (1st Cir. 2010). The "categorical" language was also used in *Liljeberg*, 486 U.S. at 864.

20. *See Aikens*, 652 F.3d at 502.

21. Note, *supra* note 10, at 76–77.

circumstances requirement. This includes a discussion of two early Supreme Court decisions, the use of Rule 60(b)(6) to remedy court errors, and the recent explicit rejection of the categorical approach by the First Circuit. Part III discusses problems created by the Fourth Circuit's Rule 60(b)(6) analysis and proposes a framework to analyze Rule 60(b)(6) relief. In so doing, it examines practical problems and credibility issues that are created by the holding of *Aikens*. The analysis concludes by synthesizing a possible rule for future federal courts to use in determining whether Rule 60(b)(6) relief from a final judgment is required.

I. *AIKENS v. INGRAM*

A. *Facts of* Aikens

Frederick Aikens was promoted to the rank of colonel in the North Carolina National Guard in 2001, leaving his prior position as lieutenant colonel temporarily vacant.[22] Adjutant General William Ingram selected Peter von Jess as Aikens's replacement.[23] In so doing, the General allegedly overlooked another candidate who was slated to get the position, which caused friction between von Jess and Aikens.[24]

According to Aikens, he received multiple complaints regarding von Jess's performance and behavior as lieutenant colonel, including complaints from "nearly every field grade officer in Plaintiff's unit."[25] As a result, Aikens filed two negative officer evaluation reports concerning von Jess's performance as lieutenant colonel.[26] General Ingram overrode and invalidated both reports, prompting Aikens "to

22. *See Aikens*, 652 F.3d at 498. Colonel is the fifth highest pay grade in the United States Army. *See US Army Military Ranks, Lowest to Highest*, MILITARYFACTORY.COM, http://www.militaryfactory.com/ranks/army_ranks.asp (locate "Colonel" listing and follow "Pay Scale" hyperlink) (last visited Apr. 11, 2012).

23. *Aikens*, 652 F.3d at 498.

24. *See* Aikens v. Ingram, 71 Fed. R. Serv. 3d (West) 1544, 1545 (E.D.N.C. 2008), *aff'd*, 612 F.3d 285 (4th Cir. 2010), *aff'd en banc*, 652 F.3d 496 (4th Cir. 2011). According to the district court, Colonel Aikens was originally informed that he would be able to choose his own lieutenant. *See id.*

25. Amended Complaint ¶ 13, Aikens v. Ingram, 513 F. Supp. 2d 586 (E.D.N.C. 2007) (No. 5:06-CV-00185).

26. *See Aikens*, 652 F.3d at 498. According to Aikens's 2006 complaint, von Jess was involved in an altercation with a major in the National Guard, which prompted the initial negative evaluation. *See* Amended Complaint, *supra* note 25, ¶ 14.

file a complaint for undue command influence with the Department of the Army Inspector General."[27]

After the complaint for undue command influence was substantiated,[28] Aikens alleged that he became the victim of repeated unjustified Army investigations at the behest of General Ingram.[29] Between 2003 and 2005, General Ingram ordered at least three special investigations of Colonel Aikens.[30] The first two investigations did not indicate that Aikens engaged in any improper conduct.[31] Then, according to Aikens, two of his fellow officers monitored the computer he used while he was deployed in Kuwait.[32] Specifically, von Jess allegedly used the equipment to screen Aikens's personal e-mails from North Carolina.[33] Based on these e-mails, the Army concluded that Aikens maintained a "hostile command climate and inappropriate relations with women."[34] As a result, Aikens resigned from the Guard under pressure in June 2005.[35]

In 2006, Aikens initiated an action against von Jess, Ingram, and two other officers who allegedly aided in intercepting Aikens's e-mails,[36] both in their capacity as North Carolina National Guard employees and as individuals, for violations of his privacy and Fourth Amendment rights.[37] He filed his claim in the U.S. District Court for the Eastern District of North Carolina.[38] Aikens contended that the interception of his personal e-mails violated his Fourth Amendment protections against unreasonable searches and seizures and that his

27. *Aikens*, 652 F.3d at 498.

28. "Inspectors general will use the conclusion of 'substantiated' when a preponderance of credible evidence, as viewed by a reasonable person, exists to prove the allegation." U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES § 7-2(1) (Nov. 29, 2010).

29. *See* Amended Complaint, *supra* note 25, ¶¶ 22–38.

30. *See Aikens*, 652 F.3d at 498–99.

31. *Id.* at 498.

32. Amended Complaint, *supra* note 25, ¶¶ 27–28.

33. *See id.* ¶¶ 28–29.

34. *Aikens*, 652 F.3d at 499.

35. *See id.*

36. *See* Amended Complaint, *supra* note 25, ¶ 27.

37. He filed actions for violations of his privacy and for violations of his Fourth Amendment rights both under 42 U.S.C. § 1983 (2006) and under the implied cause of action created by *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). Amended Complaint, *supra* note 25, ¶¶ 46–62.

38. *See* Aikens v. Ingram, 513 F. Supp. 2d 586, 586 (E.D.N.C. 2007), *relief denied*, 71 Fed. R. Serv. 3d (West) 1544 (E.D.N.C. 2008), *aff'd*, 612 F.3d 285 (4th Cir. 2010), *aff'd en banc*, 652 F.3d 496 (4th Cir. 2011).

2005 resignation "amounted to constructive discharge."[39] He sought to amend his status to active duty and to recoup back pay.[40]

Aikens's claim presents an interesting constitutional question in its own right.[41] However, the factual basis for Aikens's claim and the underlying constitutional issue in *Aikens* were never addressed during the four years of litigation. In 2007, the district court concluded that Aikens had failed to exhaust his administrative remedies.[42] It dismissed Aikens's action without prejudice and directed Aikens to bring his case before the Army Board for Correction of Military Records ("ABCMR").[43] The district court noted that if it was incorrect in its determination that ABCMR had jurisdiction, then Aikens could "return to federal court."[44] At the time the claim was dismissed by the federal district court, the statute of limitations had already run,[45] unless equitable tolling applied.[46] Aikens attempted to comply with, rather than appeal, the district court's decision by

39. *See Aikens*, 652 F.3d at 499. In North Carolina, a claim of constructive discharge requires a showing of "two elements: deliberateness of the employer's action, and intolerability of the working conditions." Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985). These claims are uncommon but not unheard of in a military context. *See, e.g.*, Madock v. McHugh, No. ELH-10-02706, 2011 WL 3654460, at *23–24 (D. Md. Aug. 18, 2011), *aff'd*, 2012 WL 886889 (4th Cir. Mar. 16, 2012) (finding that reassignment of plaintiff after she was diagnosed with multiple sclerosis did not constitute constructive discharge).

40. *Aikens*, 652 F.3d at 499.

41. The question of whether the Army may constitutionally intercept the personal e-mail communications of a deployed soldier without a warrant seemingly has never been addressed. The inquiry would likely focus on the reasonable expectations of privacy of a deployed soldier. *Cf.* United States v. Warshak, 631 F.3d 266, 288 (6th Cir. 2010) ("[B]ecause they did not obtain a warrant, the government agents violated the Fourth Amendment when they obtained the contents of [a civilian]'s emails."). Army Regulation 380-19 requires a banner-screen display on any computer set up by the Department of Defense notifying the user that their e-mails may be intercepted for "all lawful purposes." U.S. DEP'T OF ARMY, REG. 380–19, INFORMATION SYSTEMS SECURITY § 4-1(1) (Feb. 27, 1998). Aikens alleged that the Army violated Army Regulation 380-19, but he did not allege that the Army failed to display the required notification. *See* Amended Complaint, *supra* note 25, ¶¶ 43–44. For an interesting discussion of the constitutional rights of military service men and women, see generally Major Alison Martin, *How Far Can They Go: Should Commanders Be Able To Treat Hotel Rooms Like an Extension of the Barracks for Search and Seizure Purposes?*, ARMY LAW., June 2004, at 1 (discussing Fourth Amendment protections against unreasonable searches and seizures in military barracks and other temporary housing facilities).

42. *See Aikens*, 513 F. Supp. 2d at 588.

43. *See id.* at 594.

44. *Id.* at 592.

45. *See Aikens*, 652 F.3d at 509 (King, J., dissenting).

46. Equitable tolling is "[t]he doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired." BLACK'S LAW DICTIONARY 618 (9th ed. 2009).

submitting his claim to ABCMR.[47] However, the district court was incorrect, and ABCMR ultimately concluded that it lacked jurisdiction to hear the constitutional claims.[48]

Upon returning to federal district court, Aikens filed a motion to reopen his claim under Rule 60(b)(6).[49] He attempted to reopen, rather than file a new claim, because of the high likelihood that the three-year statute of limitations[50] had run on his claim.[51] However, the district court denied Aikens's motion.[52]

On July 6, 2010, the Court of Appeals for the Fourth Circuit reviewed the district court's decision for abuse of discretion.[53] It reasoned that the district court could have properly concluded that the facts of *Aikens* did not constitute an extraordinary circumstance requiring Rule 60(b)(6) relief.[54] On Aikens's petition,[55] the issue was reheard by the Fourth Circuit sitting en banc.[56] On July 13, 2011, the

47. *See Aikens*, 652 F.3d. at 498 (majority opinion).

48. *See id.* at 499.

49. Three of the four opinions from the *Aikens* en banc rehearing provided commentary on the operation of the statute of limitations under North Carolina law. *See id.* at 502–03; *id.* at 506 (Diaz, J., concurring); *id.* at 517–18 (King, J., dissenting). The most thorough discussion came in Judge King's dissent, which included almost instructive commentary on how equitable tolling could operate in North Carolina. *See id.* at 517–18. While noting the lack of North Carolina case law on point, Judge King indicated that "misleading acts" by the defendant have been a ground for tolling in the past. *See id.* at 517. Judge King further stressed that it is the harm done to the plaintiff, and not the bad faith of the defendant, that necessitates equitable tolling. *See id.* at 517–18.

50. Because 42 U.S.C. § 1983 does not specify a statute of limitations, the Supreme Court has specified that each state's personal injury statute of limitations should be controlling. Wilson v. Garcia, 471 U.S. 261, 280 (1985). In North Carolina, this means that § 1983 disputes are subject to a three-year statute of limitation. *See* N.C. GEN. STAT. § 1-52 (2011).

51. It is likely that uncovering the application of the statute of limitations in *Aikens* would have involved novel questions of North Carolina law. *See Aikens*, 652 F.3d at 516 (King, J., dissenting). Further, any tolling would have been equitable in nature, which raises interesting questions about the doctrine of unclean hands, the "principle that a party cannot seek equitable relief or assert an equitable defense if that party has violated an equitable principle, such as good faith." BLACK'S LAW DICTIONARY 286 (9th ed. 2009). In North Carolina, "[w]hen equitable relief is sought, courts claim the power to grant, deny, limit, or shape that relief as a matter of discretion. This discretion is normally invoked by considering an equitable defense, such as unclean hands or laches . . . ." Roberts v. Madison Cnty. Realtors Ass'n, Inc., 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996).

52. *See* Aikens v. Ingram, 71 Fed. R. Serv. 3d (West) 1544, 1545 (E.D.N.C. 2008), *aff'd*, 612 F.3d 285 (4th Cir. 2010), *aff'd en banc*, 652 F.3d 496 (4th Cir. 2011).

53. *See* Aikens v. Ingram, 612 F.3d 285, 290 (4th Cir. 2010) *aff'd en banc*, 652 F.3d 496 (4th Cir. 2011).

54. *See id.* at 291.

55. Opening Brief of the Appellant on Petition for Rehearing *En Banc* at 2, *Aikens*, 652 F.3d 496 (2011) (No. 08-2278), 2010 WL 5313789, at *2.

56. *See Aikens*, 652 F.3d at 496.

Fourth Circuit, in a six-to-five decision,[57] affirmed the district court's decision not to reopen Aikens's claims.[58] After four years of litigation, Aikens's complaint failed on procedural grounds.

Key to the court of appeals' reasoning was the standard of review. The Fourth Circuit reviewed the district court's actions for abuse of discretion.[59] Application of this standard, which may have support from the Supreme Court,[60] has the obvious problem that "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment [before the court] for review."[61] At least one other circuit applies the standard of review differently, reviewing the facts on a Rule 60(b)(6) motion for abuse of discretion, but reviewing the underlying legal issues *de novo*.[62] This standard is preferable because it would allow the court of appeals to define the contours of the extraordinary circumstances doctrine without being confined to the district court's interpretation.

B. Tactical Decisions

There is a simple mechanism available that could have alleviated the "hellish"[63] procedural circumstances that arose in *Aikens*. Aikens's counsel could have requested a stay, pending administrative exhaustion.[64] If granted,[65] there would have been no need to request

57. Judge Niemeyer wrote the majority opinion in both the 2010 and 2011 decisions. *See id.* at 498; *Aikens*, 612 F.3d at 286. Judge Diaz concurred in the 2011 decision. *See Aikens*, 652 F.3d at 504 (Diaz, J., concurring). Judge King wrote a dissenting opinion for both decisions. *See Aikens*, 652 F.3d at 507 (King, J., dissenting); *Aikens*, 612 F.3d at 291 (King, J., dissenting). Judge Davis dissented upon rehearing en banc. *See Aikens*, 652 F.3d at 520 (Davis, J., dissenting).

58. *See Aikens*, 652 F.3d at 498.

59. *Id.* at 501.

60. Browder v. Dir., Dep't of Corrs., 434 U.S. 257, 263 n.7 (1978).

61. *Aikens*, 652 F.3d at 501 (quoting *Browder*, 434 U.S. at 263 n.7) (internal quotation marks omitted).

62. *See* Ungar v. Palestine Liberation Org., 599 F.3d 79, 83 (1st Cir. 2010). One scholar, commenting on *Aikens*, contended that the abuse of discretion standard was inappropriate, and that a de novo standard should have been used because the court based its decision on reasoning different than the district court. Scott Dodson, *Rethinking Extraordinary Circumstances*, 106 NW. U. L. REV. COLLOQUY 111, 116 (2011), http://www.law.northwestern.edu/lawreview/colloquy/2011/23/LRColl2011n23Dodson.pdf.

63. *See supra* note 1 and accompanying text (referring to the "Exam Question from Hell").

64. *Aikens*, 652 F.3d at 502–03.

65. The fact that the district court indicated that Aikens could "return to federal court" if ABCMR lacked jurisdiction may inform how the district court would have ruled. Aikens v. Ingram, 513 F. Supp. 2d 586, 592 (E.D.N.C. 2007), *relief denied*, 71 Fed. R. Serv. 3d (West) 1544 (E.D.N.C. 2008), *aff'd*, 612 F.3d 285 (4th Cir. 2010), *aff'd en banc*, 652 F.3d 496 (4th Cir. 2011).

the court to reopen its prior judgment. An argument can be made, using existing case law,[66] that the district court should have made a motion for a stay sua sponte.[67] But accountability for this failure still lies with Aikens's attorneys, as it is reasonable to expect an attorney to anticipate statute of limitations problems.[68] The question examined by this Recent Development is not whether failure to request a stay is a mistake. Rather, this Recent Development questions whether that mistake should categorically bar relief.

Notwithstanding the attorneys' failure to request a stay, this Recent Development maintains that Rule 60(b)(6) relief should have been available and that the Fourth Circuit could have used *Aikens* to rebuke the categorical trend. The categorical bar of Rule 60(b)(6) relief from a final judgment is simply not appropriate where, as here, a procedural defect leads to a disproportionate injustice.

There are several reasons for this. First, in a case such as *Aikens*, where there seemed to be a shared understanding among the parties that Aikens intended to litigate the matter,[69] the procedural interest in requesting a stay is low, but not absent. As demonstrated by the protracted litigation over Aikens's request for remedial measures, the consequence for failure is harsh. Because of a small technical mistake by his attorneys, Aikens's chances of recovering anything were severely hampered.

The natural progression may be to use attorney malpractice to resolve issues created by attorney error.[70] But malpractice is not an adequate substitute for real litigation on the merits of the original dispute.[71] The defendants in *Aikens* were alleged to have intentionally

66. *See* Whitmore v. Avery, 179 F.R.D. 252, 259 (D. Neb. 1998) ("This dismissal was not one on its merits so as to allow immediate appeal. Nor could the petitioner have [complied with court] instructions and exhausted his remedies because the claim was not one that could be exhausted .... [T]his is the type of case that warrants the exceptional relief contemplated by Rule 60(b)(6).").

67. Judge King made this argument in his dissenting opinion. *Aikens*, 652 F.3d at 514–15 (King, J., dissenting).

68. *See* Richard D. Bridgman, *Legal Malpractice—A Consideration of the Elements of a Strong Plaintiff's Case*, 30 S.C. L. REV. 213, 223 (1979) (noting that a high percentage of legal malpractice cases involve attorneys missing deadlines).

69. *See Aikens*, 513 F. Supp. 2d at 592.

70. *See* Christopher G. Meadows, Comment, *Rule 60(b)(6): Whether "Tapping the Grand Reservoir of Equitable Power" Is Appropriate To Right an Attorney's Wrong*, 88 MARQ. L. REV. 997, 997 (2005) ("When a litigant suffers an adverse judgment solely because of his attorney's misconduct, an issue arises with respect to how the courts should allow the litigant to proceed: by granting relief from the prior judgment pursuant to Rule 60(b)(6) or steering the litigant toward a malpractice suit against the attorney.").

71. *See id.* at 1007 (noting that policy favoring malpractice suits can "make[] the total burden on the courts greater because now an entirely new case must be fully litigated").

participated in retaliatory conduct;[72] Aikens's attorneys, however, merely failed to secure a technical, albeit important, procedural checkmark in a fairly complex litigation scheme. Thus, the levels of culpability are not comparable. Further, given the novelty of Aikens's claims, it would be hard to predict the damages suffered as a result of his attorneys' error.[73]

The majority in *Aikens* not only faulted Aikens for failing to request a stay, they also faulted Aikens for failing to appeal[74] and for failing to attempt to refile the litigation under an equitable tolling theory.[75] It is troubling that the court placed so much weight on these two decisions, as they cannot seriously be considered erroneous. First, it is relatively easy to understand from an attorney's perspective the decision not to appeal. It would be wasteful to have yet another panel of federal judges speculate about ABCMR's administrative jurisdiction when simply submitting the matter to ABCMR would almost assuredly be quicker and less expensive.[76] Similarly, the decision to request Rule 60(b) relief, rather than test the sparse North Carolina equitable tolling case law, was a reasonable course of action.

In short, Aikens was presented with an anomalous procedural situation. His attempts to comply with an impossible mandate of the court proved fatal. In situations like the one that confronted Aikens, Rule 60(b)(6) relief should be available.

II. JUDICIAL INTERPRETATION OF RULE 60(b)(6)

Rule 60(b)(6) was first adopted in 1948.[77] Its inception was largely an attempt to remedy the "haphazard" and unsatisfying common law remedial devices that the federal courts used to reopen final judgments.[78] As one early commentator noted, these common law devices suffered from two defects: first, "[c]orrection of an unjust

72. *See Aikens*, 652 F.3d at 498–99 (majority opinion).

73. *See* Formyduval v. Britt, 177 N.C. App. 654, 658, 630 S.E.2d 192, 194 (2006) ("A plaintiff alleging a legal malpractice action must prove a 'case within a case,' meaning a showing of the viability and likelihood of success of the underlying action."), *aff'd by an equally divided court*, 361 N.C. 215, 639 S.E.2d 443 (2007) (per curiam).

74. *Aikens*, 652 F.3d at 502.

75. *See id.* at 503.

76. *See id.* at 513–14 (King, J., dissenting); *cf.* Cal. Med. Ass'n v. Shalala, 207 F.3d 575, 578 (9th Cir. 2000) (finding that where an appeal would be a "meaningless formality" Rule 60(b)(5) relief should not be denied due to a defective appeal).

77. Mary C. Cavanagh, Note, *Interpreting Rule 60(b)(6) of the Federal Rules of Civil Procedure: Limitations on Relief from Judgment for "Any Other Reason,"* 7 SUFFOLK J. TRIAL & APP. ADVOC. 127, 128 (2002).

78. *See* Note, *supra* note 10, at 76 n.3.

judgment was frequently left to the chance of litigating before a court that could manipulate an elusive doctrine," and, second, "in some cases, the arsenal of remedies [available to federal judges] was simply too scant to furnish even flexible courts with a rationale for relief."[79]

Accordingly, Rule 60(b)(6)'s initial purpose was to preserve prior common law justifications for reopening judgments, as well as to allow courts flexibility to reopen judgments in novel situations, if justice so required.[80] It was designed to be a catch-all clause, providing courts the flexibility to reopen judgments in situations not contemplated by common law or by Rule 60(b)(1)–(5).[81]

Since its inception, there has been a tension between the need for finality in judgments and the desire to correct gross injustices in the civil process.[82] Despite this tension, there is surprisingly little academic analysis of Rule 60(b)(6).[83] The body of case law reflects the federal judiciary's attempt to "reconcile the need for correction of unjust judgments with the aims of finality in litigation."[84]

At its most basic level, Rule 60(b)(6) analysis should balance the competing interests of finality against the demands of justice; in applying Rule 60(b)(6) the Supreme Court has considered "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process."[85] To flesh out the inherent conflicts driving Rule 60(b)(6) analysis, several prerequisites to relief have emerged. For instance, the Supreme Court has held that Rule 60(b)(1)–(5) are mutually exclusive with Rule 60(b)(6).[86] Under the mutual exclusivity requirement, to receive Rule

79. *Id.* at 77.

80i *See* Klapprott v. United States, 335 U.S. 601, 614–15 (1949).

81. *See supra* note 9 for the full text of Rule 60(b).

82. *See* James W. Moore & Elizabeth B.A. Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 623 (1946) ("Opinion varies sharply concerning the extent to which relief should be granted from a judgment. This divergence necessarily results from a clash of the two principles that litigation must terminate within a reasonable time, but that justice must be accorded the parties.").

83. *See* Dodson, *supra* note 62, at 112 ("[T]he literature on Rule 60(b)(6) is some of the sparsest in all of civil procedure.").

84. *See* Note, *supra* note 10, at 76.

85. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 864 (1988) (holding that Rule 60(b)(6) is an available means to correct an adverse judgment where a judge incorrectly failed to recuse himself).

86. *Id.* at 863 n.11. Other requirements are that: Rule 60(b)(6) motions must be timely made; the underlying cause of action must be worthy on the merits, meaning, essentially, that the parties state a claim on which relief can be can be granted; and the judgment must not unreasonably prejudice the other parties to the action. Heyman v. M.L. Mktg. Co., 116 F.3d 91, 94 n.3 (4th Cir. 1997).

60(b)(6) relief, the petitioning party must show that he falls outside of Rule 60(b)(1)–(5) by showing that extraordinary circumstances existed that prevented the petitioner from seeking relief through traditional means.[87] The general approach has been to treat erroneous final judgments by the court not as Rule 60(b)(1) inquiries, but instead as Rule 60(b)(6) inquiries.[88] Rule 60(b)(1) allows for relief from a final judgment for "mistake, inadvertence, surprise, or excusable neglect."[89] The significance of using Rule 60(b)(6) rather than 60(b)(1) to reopen a final judgment when a court makes an erroneous judgment is twofold. First, a party petitioning under Rule 60(b)(6) has a relaxed time consideration.[90] Second, that party must make a showing of extraordinary circumstances.[91]

A. Emergence of the Extraordinary Circumstances Requirement

The extraordinary circumstances requirement is probably the greatest substantive barrier to an individual seeking Rule 60(b)(6) relief.[92] It originated in two early Supreme Court decisions: *Klapprott v. United States*[93] and *Ackermann v. United States*.[94] Comparing *Klapprott* and *Ackermann* illustrates the tension between the need for finality in litigation and the existence of an equitable remedy to correct unjust procedural flaws.

Klapprott was the first Supreme Court case to address Rule 60(b)(6) relief in any context. The petitioner, August Klapprott, was German by birth.[95] He was granted American citizenship in 1933.[96] During World War II, the United States instituted civil proceedings to strip Klapprott of his citizenship.[97] Concurrently, Klapprott was

87. *See Liljeberg*, 486 U.S. at 863 n.11; Klapprott v. United States, 335 U.S. 601, 613 (1949).

88. *See, e.g.*, White v. Investors Mgmt. Corp., 888 F.2d 1036, 1040 (4th Cir. 1989) (appearing to grant Rule 60(b)(6) relief where a district court improperly ordered judgment).

89. Fed. R. Civ. P. (60)(b)(1).

90. *See* Fed. R. Civ. P. (60)(c)(1).

91. *See* Ackermann v. United States, 340 U.S. 193, 202 (1950).

92. *See* Cavanagh, *supra* note 77, at 131 ("The two most frequently cited reasons for denying 60(b)(6) motions are the timeliness and extraordinary circumstances elements . . . .").

93. 335 U.S. 601 (1949).

94. 340 U.S. 193 (1950).

95. *Klapprott*, 335 U.S. at 602.

96. *Id.*

97. Both *Klapprott* and *Ackermann* were civil, not criminal, proceedings; the government had to prove that the petitioners had committed civil fraud when they undertook the citizenship oath. *See Ackermann*, 340 U.S. at 195; *Klapprott*, 335 U.S. at 616–17 (Rutledge, J., concurring).

arrested on a separate criminal charge of "conspiracy to violate the Selective Service Act."[98] Klapprott's attempt to answer the challenge to his citizenship and to contact the American Civil Liberties Union was allegedly thwarted by the Federal Bureau of Investigation.[99] During this time, Klapprott was shuffled between three detention centers in New York, Michigan, and Washington, D.C.[100] While he was detained, a default judgment was entered against him in the citizenship proceedings and his citizenship was revoked.[101] In 1946, a New Jersey district court heard a petition to vacate the default judgment and to allow a new trial on the merits in the citizenship proceedings.[102] This petition was denied in 1947 and appealed to the Supreme Court in 1948.[103]

Justice Black announced the Supreme Court's fractured decision, stating that Klapprott's "allegations set up an *extraordinary situation* which [could not] fairly or logically be classified as mere 'neglect' on his part."[104] Specifically, Klapprott's allegations indicated "far more than a failure to defend the denaturalization charges due to inadvertence, indifference, or careless disregard of consequences."[105] Justice Black argued that, due to the extraordinary circumstances faced by Klapprott, the judgment should be reopened "under the 'other reason' clause of 60(b)."[106] While five Justices concurred in the result, only two Justices reached their conclusion on Rule 60 grounds.[107]

Ackermann reached the Supreme Court less than two years later.[108] The *Ackermann* Court formalized the extraordinary circumstances requirement and endorsed a very narrow reading of

98. *Klapprott*, 335 U.S. at 604.
99. *Id.* at 604–05.
100. *Id.* at 608.
101. *See id.* at 605.
102. *Id.* at 607 (indicating that the action was brought by the Citizens Protective League).
103. *See id.* at 601, 608–09.
104. *Id.* at 613 (emphasis added).
105. *Id.*
106. *Id.* at 614.
107. *See id.* at 614–16. Two Justices believed that the Rules of Civil Procedure were inapplicable to denaturalization proceedings. *Id.* at 619 (Rutledge, J., concurring). The fifth "swing vote" joined "in the judgment of the Court as limited to the special facts of this case and without expressing an opinion upon any issues not now before this Court." *Id.* at 616 (majority opinion). Interestingly, on remand, the district court found the evidence offered in support of Klapprott's motion unconvincing and denied Rule 60(b)(6) relief. Klapprott v. United States, 183 F.2d 474, 475 (3d Cir. 1950).
108. Ackermann v. United States, 340 U.S. 193, 193 (1950).

Justice Black's plurality opinion in *Klapprott*.[109] The opinion was written by Justice Minton,[110] who was not a member of the *Klapprott* Court, and Justice Black offered a strongly worded dissenting opinion.[111]

The facts of *Ackermann* were very similar to those of *Klapprott*. The petitioner, Hans Ackermann, and his wife, Frieda, were both German natives who were naturalized in 1938.[112] Ackermann's brother-in-law, Max Keilbar, was also a German-born naturalized citizen.[113] Actions to cancel the citizenship of Ackermann, his wife, and Keilbar were filed in 1942, shortly after the United States entered World War II.[114] All three actions were condensed at trial, "and separate judgments were entered . . . cancelling and setting aside the orders admitting them to citizenship."[115] Ackermann was placed in an "Alien Detention Station" shortly after this judgment.[116] He and his wife were advised by a government immigration official that "they would be released at the end of the war" and that the cost of appeal would necessitate the sale of their home.[117] Based on this advice, they chose not to appeal their case.[118] However, Keilbar chose to appeal his judgment, and he was successful in overturning the cancellation of his citizenship.[119]

Ackermann then attempted to reopen his final judgment under Rule 60(b)(6) on the ground that his case was substantially identical to Keilbar's case.[120] This motion was denied.[121] In upholding the denial of Rule 60(b) relief, the Supreme Court distinguished *Klapprott* from *Ackermann*, stating that *Klapprott* "was a case of extraordinary circumstances."[122] To Justice Minton, the difference

109. *See id.* at 202.
110. *See id.* at 194.
111. *See id.* at 205 (Black, J., dissenting) ("It does no good to have liberalizing rules like 60(b) if, after they are written, their arteries are hardened by this Court's resort to ancient common-law concepts.").
112. *Id.* at 194–95.
113. *See id.* at 195.
114. *See id.*
115. *Id.*
116. *Id.* at 196.
117. *Id.*
118. *Id.*
119. *Id.* at 195.
120. *Id.* at 195–97.
121. *Id.* at 196.
122. *Id.* at 199.

between *Klapprott* and *Ackermann* was "the difference between no choice and choice."[123] He wrote:

> Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but [a] calculated and deliberate . . . choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong .... There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.[124]

Ackermann sets a very high standard indeed for Rule 60(b)(6) relief. Justice Minton did not consider the penalty that Ackermann faced at any point during his analysis in *Ackermann*. Although citizenship revocations were civil proceedings, the consequences amounted to detention and deportation—a more severe penalty than in many criminal cases.[125] *Ackermann* implicitly followed a categorical approach to Rule 60(b)(6) relief. That is to say, *any* adverse strategic choice by the petitioner disqualified him from relief from a final judgment under Rule 60(b)(6), regardless of the severity of that adverse strategic choice.[126] It is exactly this categorical mindset that is at issue in *Aikens* and should be discarded in favor of a more balanced approach.

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123. *Id.* at 202.

124. *Id.* at 198.

125. *See* Klapprott v. United States, 335 U.S. 601, 616–17 (1949) (Rutledge, J., concurring) ("[B]y the device or label of a civil suit, carried forward with none of the safeguards of criminal procedure provided by the Bill of Rights, [the rights of Citizenship] can be taken away and in its wake may follow the most cruel penalty of banishment.").

126. The Supreme Court expanded this concept, disallowing an exception to res judicata for "relitigation of an unappealed adverse judgment where . . . other plaintiffs in similar actions against common defendants successfully appealed the judgments against them." Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 395 (1981). It explained that there is "no general equitable doctrine . . . which countenances an exception to the finality of a party's failure to appeal merely because his rights are 'closely interwoven' with those of another party [who successfully appeals]." *Id.* at 400. However, the Court provided a meaningful ground, which seems to set pure procedural issues apart from the doctrine of res judicata, by noting that " '*res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours.' " *See id.* at 401 (quoting Hart Steel Co. v. R.R. Supply Co., 244 U.S. 294, 299 (1917)).

B. *The Extraordinary Circumstances Doctrine Post-*Ackermann

Since *Ackermann* and *Klapprott*, there has been relatively little doctrinal clarity on what constitutes an extraordinary circumstance and when *Ackermann* should apply. Rule 60(b)(6) was introduced in part to remedy the doctrinal inconsistencies provided by common law,[127] but the rule seems vulnerable to the same problems of haphazard and inconsistent application.

Despite this doctrinal uncertainty, Rule 60(b)(6) continues to be a valuable tool available to litigants in several situations. Further, there are a few trends in the case law that, if formalized and adopted, could help to bring clarity to the application of Rule 60(b)(6). One scenario where Rule 60(b)(6) relief is commonly requested involves an oversight made, in part, by a court. In *Liljeberg v. Health Services Acquisition Corp.*,[128] the Supreme Court confronted the problem that neither a federal statute nor Rule 60(b)(1)–(5) provided relief for an adverse judgment caused by a judge's failure to recuse himself.[129] The Court purported to accept that the judge lacked knowledge about the transaction that created the potential conflict of interest; however, it found that the mere risk of the appearance of impropriety required that the judge recuse himself.[130] Even if the judge could have discharged his duties without bias, an objective observer could reasonably question the judge's impartiality, thus calling the credibility of the court into question.[131] The Court ultimately decided that Rule 60(b)(6) was an appropriate remedy.[132] In doing so, the Court stated that relief was neither "categorically available nor categorically unavailable" for a judge's failure to recuse himself.[133]

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127. *See* Note, *supra* note 10, at 76–77.

128. 486 U.S. 847 (1988).

129. *See id.* at 862–64. In *Liljeberg*, the presiding district court judge was on Loyola University's Board of Trustees. *Id.* at 850. Meanwhile, John Liljeberg was negotiating with Loyola University over the purchase of land to construct a hospital. *Id.* "Health Services Acquisition Corp. brought an action [against Liljeberg] seeking a declaration of ownership" over a hospital corporation. *Id.* "The success and benefit to Loyola of these negotiations turned, in large part, on Liljeberg prevailing in this litigation . . . ." *Id.*

130. *See id.* at 864 ("[W]e accept the District Court's finding that while the case was actually being tried [the judge] did not have actual knowledge of [his own conflict of interest in] the dispute . . . ."). However, the Court did express skepticism concerning the judge's knowledge of the conflict of interest. *Id.* at 865. ("[I]t is remarkable that the judge, who had regularly attended the meetings of the Board of Trustees since 1977, completely forgot about the University's interest in having a hospital constructed on its property in Kenner.").

131. *See id.* at 864–65.

132. *See id.* at 863–70.

133. *Id.* at 864.

Under *Liljeberg*, the analysis for Rule 60(b)(6) relief from a judge's failure to recuse himself should consider the loss of credibility to the court, the potential effect on third parties, and the potential for injustice to the parties.[134]

When a court makes an inaccurate judgment of any kind, there is a serious threat to the credibility of the court. Further, there is a high risk of injustice to the parties. The factors articulated in *Liljeberg* should be considered when evaluating whether a Rule 60(b)(6) motion should be granted when a court made a mistake. And, in some instances, they have been considered. The Fourth Circuit, in *Compton v. Alton Steamship Co.*,[135] held that Rule 60(b) relief was proper where a district court judge made several mistaken conclusions of law in a default judgment proceeding, resulting in the defendant's liability for "two hundred times" the maximum amount under applicable law.[136] The court did not indicate whether it was acting under Rule 60(b)(1), 60(b)(4), or 60(b)(6), but its discussion reflected the court's belief that relief would have been proper on any of the three grounds.[137] The defendant company's failure to appear or defend itself at the initial trial was not controlling in the court of appeals decision.[138]

Further, in *Whitmore v. Avery*,[139] a Nebraska district court found that Rule 60(b)(6) relief was warranted where the court failed to stay proceedings pending administrative review, even though the petitioner had failed to request a stay.[140] It indicated that the procedural circumstances that arose out of the court's incorrect administrative determination were extraordinary circumstances that warranted relief from a final judgment.[141]

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134. *Id.* It should be noted that much of the language used in *Liljeberg* was seemingly constrained to the narrow situation of a judge's failure to recuse himself. *See id. passim.*

135. 608 F.2d 96 (4th Cir. 1979).

136. *Id.* at 101. In *Compton*, a seaman brought an action for wages owed while the ship was in port undergoing repairs, which were provided by his contract. *See id.* at 98. The plaintiff also requested penalty damages, as authorized by a federal statute. *Id.* at 99. However, the statute, by its plain language, did not support the award of penalty damages. *Id.* at 101. As a result, the plaintiff received an "award of a judgment of almost $60,000, based on an actual claim that would not exceed much over $300 at the most." *Id.* at 100.

137. *See id.* at 106 ("[B]eyond any claim for relief by the defendant for mistake (ground 1) and invalidity (ground 4), [Rule 60(b)(6)] would afford relief to the defendant under the unusual and extraordinary circumstances of this case . . . ."). *Compton* arose prior to the formalization of the mutual exclusivity requirement. *See supra* note 86 and accompanying text.

138. *See Compton*, 608 F.2d at 99, 107.

139. 179 F.R.D. 252 (D. Neb. 1998).

140. *See id.* at 258–59.

141. *Id.* at 259.

In *Thompson v. Bell*,[142] the Sixth Circuit held that Rule 60(b)(6) relief was available to a death row inmate in a civil habeas corpus action where the district court incorrectly concluded that the petitioner had failed to exhaust state remedies.[143] In *Thompson*, the petitioner chose not to appeal four charges of ineffective assistance of counsel to the Tennessee Supreme Court.[144] Shortly thereafter, the Tennessee Supreme Court clarified that such an appeal was not required to exhaust in-state remedies.[145] *Thompson* involved a deliberate change to Tennessee state civil procedure rules,[146] unlike many of the other cases identified in this Recent Development, in which a nonfederal judicial body heard and decided an issue of state or administrative law incorrectly.[147]However, it is analogous to the other cases discussed because it suggests that the Tennessee Supreme Court had a different conception of its own law than the federal court.

In *Compton*, *Whitmore*, and *Thompson*, the adverse judgment resulted from both an error on the part of the court and by the parties. In *Thompson* and *Whitmore*, the error resulted when the federal court was speculating as to another judicial body's jurisdiction. Further, in all three cases, the petitioners were not faultless in the occurrences of the adverse judgment and had made free, calculated decisions in the course of their claims. All of these cases indicate that Rule 60(b)(6) relief may be an appropriate ground for remedying a situation where a court error results in an unjust final verdict despite the plaintiff's fault in strategy.

It should be noted that Rule 60 may provide other grounds on which to correct a court error. Some commentators have suggested Rule 60(b)(1),[148] which allows relief from a final judgment due to "mistake, inadvertence, surprise, or excusable neglect," as a grounds for correcting a court error.[149] However, the Court in *Liljeberg* appeared to consider court actions as falling outside of Rule

142. 580 F.3d 423 (6th Cir. 2009).
143. *Id.* at 442, 444.
144. *Id.* at 433.
145. *Id.*
146. *See id.*
147. *See, e.g.*, Whitmore v. Avery, 179 F.R.D. 252, 259 (D. Neb. 1998) (allowing Rule 60(b)(6) relief where a court mistakenly dismissed for administrative exhaustion).
148. FED. R. CIV. P. 60(b)(1).
149. *See generally* Note, *Relief from Final Judgment Under Rule 60(b)(1) Due to Judicial Errors of Law*, 83 MICH. L. REV. 1571 (1985) (arguing that Rule 60(b)(1) should be a ground for correcting a court error in some situations).

60(b)(1).[150] In addition, the consequence of addressing relief for a court error under Rule 60(b)(1) is that, unlike Rule 60(b)(6), Rule 60(b)(1) is subject to a one-year time limitation.[151]

C. *Recent Trends: Departing from* Ackermann *and the Categorical Approach*

Another line of cases has more directly departed from the categorical approach to Rule 60(b)(6) relief. In a D.C. Circuit case, *Randall v. Merrill Lynch*,[152] a petitioner's "disabling illness" and financial concerns caused him to enter a second voluntary dismissal in a securities action.[153] Under the Federal Rules, a second voluntary dismissal operates as an adjudication on the merits.[154] A little more than one year later, the petitioner filed a Rule 60(b)(6) motion to vacate the judgment.[155] The D.C. Circuit upheld the lower court's decision to vacate the judgment, and distinguished *Randall* from *Ackermann*:

> *Ackermann* prohibits a court from utilizing Rule 60(b)(6) to relieve a party from a voluntary dismissal based only on financial hardship. In this case, however, the lower court found that [the petitioner] suffered a disabling illness that would have permitted his participation in the litigation only at the risk of even greater disability. We find that the district court did not abuse its discretion in determining that this combination of health *and* financial considerations was sufficient to permit relief under Rule 60(b)(6).[156]

It is not at all clear that the distinction drawn by the *Randall* court was significant. After all, the petitioner in *Ackermann* faced confinement, loss of his house, and deportation;[157] these factors could easily surpass the hardships encountered in *Randall*.

In a recent First Circuit case, *Ungar v. Palestine Liberation Organization*,[158] the court examined "whether there is a categorical rule that a party whose strategic choices lead to the entry of a default

150. *See* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863 (1988).
151. *See* FED. R. CIV. P. 60(c)(1); Note, *supra* note 149, at 1580–82.
152. 820 F.2d 1317 (D.C. Cir. 1987).
153. *Id.* at 1319–20.
154. *See* FED. R. CIV. P. 41.
155. *Randall*, 820 F.2d at 1320.
156. *Id.* at 1321.
157. *See* Ackermann v. United States, 340 U.S. 193, 196 (1950).
158. 599 F.3d 79 (1st Cir. 2010).

judgment is precluded as a matter of law from later obtaining relief from that judgment under [Rule] 60(b)(6)."[159] It concluded that "no categorical bar applie[d]."[160] In *Ungar*, the estates of two persons killed in a terrorist attack brought a claim against the Palestine Liberation Organization ("PLO") and the Palestinian Authority ("PA") under the Antiterrorism Act.[161] The plaintiffs complained that the PLO and the PA had given aid to Hamas, a Palestinian political party considered a terrorist organization by the U.S. government.[162] However, the defendants chose to attack the court's jurisdiction rather than defend the Antiterrorism Act charges on the merits.[163] The court explained:

> The defendants neither answered the complaint nor participated in discovery. Instead, at various times from 2000 to 2005 they interposed motions asserting non-merits-based defenses of sovereign immunity, lack of jurisdiction, nonjusticiability, and the like. . . . [T]he decision to stonewall in this fashion was a deliberate stratagem driven by the advice of their then-counsel and their unwillingness to recognize the authority of the federal courts.[164]

This approach was ineffective. Ultimately, in 2004, a default judgment of more than $232 million was assessed against the PLO and the PA.[165]

By 2007, "[t]he PLO and the PA [came] under new leadership."[166] This new leadership apparently desired to take a "different approach to litigation" within the United States.[167] Both defendants moved to reopen the judgment in the district court, which refused their motion.[168] It reasoned that " 'a litigant's strategic choice to default precludes a finding of exceptional circumstances under

159. *Id.* at 81.

160. *Id.*

161. *Id.* at 82. The Antiterrorism Act, Pub. L. 101-519, § 132, 104 Stat. 2250 (codified as amended at 18 U.S.C. §§ 2331–2339D (2006)), "provides a cause of action in favor of American nationals harmed by acts of international terrorism." *Ungar*, 599 F.3d at 82 (citing 18 U.S.C. § 2333).

162. *Ungar*, 599 F.3d at 82; U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2010, at 87 (2011), *available at* http://www.state.gov/documents/organization/170479.pdf.

163. *Ungar*, 599 F.3d at 82.

164. *Id.*

165. *Id.* at 82 n.2. The judgment went unsatisfied. *See id.* at 82.

166. *Id.* at 82.

167. *Id.*

168. *Id.* at 82–84; *see also* Estates of Ungar v. Palestinian Auth., 613 F. Supp. 2d 219, 228–31 (D.R.I. 2009) (holding defendants not entitled to vacatur of default judgment), *vacated*, Ungar v. Palestine Liberation Org., 599 F.3d 79 (1st Cir. 2010).

Rule 60(b)(6)' and, thus, precludes relief."[169] The district court rested its decision on the strategic choices of the defendants alone, without significant consideration of any other factors.[170]

The First Circuit concluded that the district court erred in not considering factors other than the strategic choices made by the PLO and the PA.[171] The court of appeals remanded the issue to the district court, with directions to consider the "timing of the request for relief, the extent of any prejudice to the opposing party, the existence or non-existence of meritorious claims of defense, and the presence or absence of exceptional circumstances."[172]

The First Circuit, in *Ungar*, stated that a "mechanical, multi-factor analysis" approach need not be required in every Rule 60(b)(6) case.[173] Yet, at the same time, the First Circuit urged the lower court to consider multiple factors in *Ungar*, including timing, potential prejudice, and the justification for the petitioning parties' actions.[174] It is hard to see how consistency can be reached if there are no set factors to guide the district court in every Rule 60(b)(6) case. The First Circuit's decision in *Ungar*, while motivated by an admirable policy consideration, may have gone a step too far.

Ungar and *Randall* are two cases that defy the categorical approach to Rule 60(b)(6) relief. It is doubtful that either case can be meaningfully reconciled with *Ackermann*. Instead, these cases seem to directly contradict the holding of *Ackermann*. While a more liberal approach may be appropriate in many situations, it is important to remember that there are two considerations driving Rule 60(b)(6) relief: the need for the court to accomplish justice and the need for finality in the court system.[175]

In accepting that, in rare instances, justice can only be accomplished by granting the petitioner relief from a judgment

169. *Ungar*, 599 F.3d at 84 (quoting *Estates of Ungar*, 613 F. Supp. 2d at 229).

170. *See id.* at 83.

171. *See id.* at 83–84. There is a key difference in the standard of review in the Fourth and First Circuits: the First Circuit addresses the underlying question of law *de novo*, whereas the Fourth Circuit reviews the underlying holding for abuse of discretion. *Compare* Aikens v. Ingram, 652 F.3d 496, 501 (4th Cir. 2011) ("We review the district court's ruling on a 60(b) motion for abuse of discretion . . . ."), *with Ungar*, 599 F.3d at 83 ("[Abuse of discretion] standard is not monolithic: within it, embedded findings of fact are reviewed for clear error, questions of law are reviewed *de novo*, and judgment calls subjected to classic abuse-of-discretion review.").

172. *Ungar*, 599 F.3d at 83.

173. *Id.* at 86.

174. *Id.* at 83.

175. *See* Moore & Rogers, *supra* note 82, at 623.

brought by the petitioner's own strategic choice, these cases embraced the realization that a flexible approach to Rule 60(b)(6) analysis is sometimes necessary.[176] The alternative, more rigid categorical view, like that taken by the Fourth Circuit in *Aikens*, leads to unjust results.

III. PROBLEMS WITH THE FOURTH CIRCUIT APPROACH

The result in *Aikens* is counterintuitive.[177] There are several grounds upon which to criticize *Aikens*.[178] This Recent Development limits discussion to two of the broader problems created by *Aikens*. First, *Aikens* is wasteful. It may encourage unnecessary appeals and increase strain on the court system. Second, on a more fundamental level, the Fourth Circuit's approach in *Aikens* risks undercutting the very purpose of Rule 60(b)(6), and in doing so, may diminish the credibility of the court system.

A. Unnecessary Strains on the Court

The Supreme Court created the extraordinary circumstances requirement largely in order to promote judicial efficiency.[179] A primary concern in *Aikens* was that Rule 60(b)(6) would be used to distort and circumvent the appeals process.[180] However, the question should not be merely whether the Rule allows litigants to avoid an appeal. Rather, the question should be whether allowing a Rule 60(b)(6) motion constitutes a harmful substitute to the appeals process.[181] An expansive and inflexible reading of *Ackermann*

176. *See generally* Don Zupanec, *Relief from Judgment—Willful Default—Rule 60(b)(6) Relief*, FED. LITIGATOR, May 2010, at 133, 133 (discussing *Ungar* and its impact on the Rule 60(b)(6) case law).

177. After reviewing the facts and holding of *Aikens*, one scholar concluded, simply, "[t]hat can't be right." Dodson, *supra* note 62, at 116.

178. *See id.* Dodson's discussion more completely addresses the problematic standard of review employed by the Fourth Circuit and articulates another possible criticism: namely, that the holding of *Aikens* "requires perfect foresight in choosing among reasonable litigation options." *Id.*

179. *See* Ackermann v. United States, 340 U.S. 193, 198 (1950) ("There must be an end to litigation someday . . . .").

180. *See* Aikens v. Ingram, 652 F.3d 496, 501 (4th Cir. 2011) ("To give Rule 60(b)(6) broad application would undermine numerous other rules that favor the finality of judgments . . . .").

181. *See* Note, *supra* note 149, at 1576 (arguing that, in some situations, using Rule 60(b)(1) is an appropriate means of remedying a final judgment).

completely undermines the reality that, occasionally, it will be efficient to allow a litigant to circumvent the appeals process.[182]

Aikens provides just such a case. Four years of circular litigation on procedural issues does not promote adjudication on the merits, nor does it cut down on the amount of work on the federal docket.[183] But in *Aikens*, the Fourth Circuit gave *Ackermann* an unbridled reading, even though the strategic decision was beneficial to all parties involved, except Aikens, and indeed significantly reduced the strain on the court. In doing so, the Fourth Circuit adopted a grossly inefficient approach.[184]

It is true that the ability to request a stay mitigates this inefficiency somewhat. The problem discussed above will only present itself in situations where a court denies a stay, pending administrative exhaustion. However, particularly troubling in the majority opinion is that the court seemed to base its reasoning not only on the failure to request a stay, but also on the decision not to appeal the district court's assessment of ABCMR's jurisdiction. The Fourth Circuit stated that "if Aikens was convinced that the district court erred in dismissing his action for failure to exhaust administrative remedies, as he apparently was, he should have appealed, but he did not."[185] *Aikens* suggests that a petitioner can be faulted for not appealing a court determination of jurisdiction, rather than complying, even though the alternative approach would be, in an objective sense, quicker and less expensive.[186] It would be difficult to state this point more clearly than Judge King did in his dissenting opinion in *Aikens*:

> [W]hat would Aikens have gained from an appeal? Less than seven months after the dismissal, Aikens was back before the court with an unequivocal decree that the ABCMR was an improper forum for this particular dispute, from no less an

182. *Cf. id.* (discussing how allowing litigants to use Rule 60(b)(1) to avoid an appeal can, in some situations, provide "an *efficient* alternative to appeal").

183. "In another case, the majority would be right to jealously protect the familiar, if amorphous, principle that litigation, at some point, must be suffered to end. In this case, however, the litigation has not been suffered to begin." *Aikens*, 652 F.3d at 518 (King, J., dissenting).

184. For purposes of this Recent Development, efficient actions are those that minimize the joint costs of the parties involved. *See generally* DAVID D. FRIEDMAN, LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 297–308 (2000) (discussing the theory that judicial opinions mimic economic theories on efficiency so as to minimize the joint costs of the parties involved).

185. *Aikens*, 652 F.3d at 502.

186. *See id.*

> authority than the ABCMR itself. There was virtually no chance that we would have rendered a comparable judgment so quickly, given our systemic druthers for orderly briefing, unhurried argument, and deliberate decision-making. The only advantage that Aikens would have realized from a Fourth Circuit judgment is the insurance it would have provided against a second unanticipated and unjustified refusal of the district court to entertain the merits of his claim.[187]

In short, this is precisely the type of situation where the appeals process should be discouraged. The holding of *Aikens* is that failure to appeal a dismissal without prejudice, or obtain a stay, may bar Rule 60(b)(6) relief, even if that appeal serves no function but to satisfy the letter of *Ackermann*. The guidance that *Aikens* gives to attorneys is twofold. First, it directs attorneys to seek a stay pending administrative review. This is a perfectly reasonable expectation to place on attorneys; however, a request for a stay is by no means a guarantee. The second piece of guidance from *Aikens* is to appeal rather than comply with district court decisions because an appeal will keep the claim alive.[188] Of course, in many cases, requiring an appeal does serve some function. "[I]f courts granted [Rule 60(b)(6)] relief freely, parties could potentially circumvent the appeals process," thus distorting the oversight function of courts of appeals.[189] But application of *Ackermann* to all cases is overly broad, requiring adherence to formalism in cases where justice would better be served by following the legal principles that support the use of Rule 60(b)(6). By requiring an appeal in all instances, the court will cause a new wave of unnecessary litigation. Rather than reducing litigation, *Aikens* merely moves the litigation forward in time.

B. Credibility of the Court

Although the procedural requirements created by *Aikens* are troubling, a more fundamental problem with *Aikens* exists—namely, that a potentially valid case on the merits was dismissed on a procedural technicality after more than four years of persistent

187. *Id.* at 513–14 (King, J., dissenting).

188. Judge Davis starts his dissenting opinion in *Aikens* by noting: "As best as I can discern, the majority's admonishment to counsel facing analogous circumstances in the future seems to be: 'Appeal everything, all the time, right away.' " *Id.* at 521 (Davis, J., dissenting).

189. Meadows, *supra* note 70, at 1010.

litigation. Results like the one in *Aikens* risk undermining the integrity of the federal justice system.

The federal court system is susceptible to losing public confidence whenever it allows an injustice to continue. As demonstrated by *Liljeberg*, the mere perception of injustice risks loss of public confidence.[190] The majority in *Aikens* was rightly careful to avoid discussing the merits of the case.[191] A principled application of a deferential standard of review may be a defensible ground for allowing Aikens's claims to fail. However the problematic point of *Aikens* is not captured in the language of the opinion but rather in the perception of injustice the result harbors.[192]

This is a problem, not only in *Aikens*, but in Rule 60(b)(6) cases generally. The inconsistent case law coupled with a deferential standard of review seems to give courts the ability to prematurely eject cases they perceive as unworthy on procedural grounds. Although the federal judiciary needs procedural rules in order to fairly and efficiently review the merits of an individual claim, procedural rules should not weigh directly on a claim's validity.[193] Even the perception that a rule is being used to improperly influence the outcome of a case, or to avoid deciding a highly salient issue, is dangerous.

Clear legal standards that closely approximate the procedural interest of the court will help the public fully understand the court's reasoning. Thus, such decisions will increase the court's credibility.

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190. *See* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 864–65 (1988) (using Rule 60(b)(6) to reopen a final judgment in where district judge improperly failed to recuse himself).

191. The concurring opinion does briefly examine the unsympathetic aspects of the case but is careful to indicate that this discussion is ancillary to its reasoning. *See Aikens*, 652 F.3d at 507 (Diaz, J., concurring).

192. It could be argued that *Aikens* presented less than ideal facts upon which to address a novel constitutional question. After all, the question of what constitutional rights we afford our deployed military service men would likely be a highly salient issue. *See supra* note 41. No matter how that question would have been answered, the consequences for the military and its employees would have been far reaching. Further, Aikens was alleged to have maintained a hostile command climate and to have engaged in inappropriate relations with women. *See* Amended Complaint, *supra* note 25, ¶¶ 37–38. These facts could dampen sympathy for Aikens. However, they likely would not be material to the underlying constitutional question. *See supra* note 41 (noting that the court would have likely looked to the deployed soldier's reasonable expectations of privacy). If the multiple investigations were truly unjustified and retaliatory, then it would seem that military employees were engaged in the exact type of unchecked government behavior that the Fourth Amendment seeks to regulate.

193. *See* Rules Enabling Act, 28 U.S.C. § 2072 (2006) (indicating that the *Rules of Civil Procedure* shall not "abridge, enlarge or modify any substantive right").

Conversely, inflexible, complex, or overly broad standards for purely procedural issues will diminish the credibility of the court. Rule 60 reflects the need to depart from haphazard and capricious common law doctrines available to remedy unjust final judgments. It pits the court's interest in the finality of judgments against the court's interest in effectuating justice. Thus, it should be one of the judiciary's greatest tools available to restore public confidence in the federal justice system. Instead, the Fourth Circuit pursued a course which neither promoted consistency nor reached a satisfying result.

C. *Proposed Solutions*

There are several standards that could be employed to avoid the problems created by *Aikens*. The ideal rule would promote the efficient use of Rule 60(b)(6), so as to mitigate the strain on the federal courts, while also allowing the court to better convey the appearance of justice and doctrinal clarity in Rule 60(b)(6) relief.

In a recent essay entitled *Rethinking Extraordinary Circumstances*,[194] Professor Scott Dodson proposed an interesting solution.[195] He argued that "the *Ackermann* rule ought not to apply when a litigant chooses a litigation option that is a reasonable way to continue pressing his legal claims."[196] Thus "the *Ackermann* rule [would only apply] to a litigation choice that deliberately ends the dispute, such as settling the claims or abandoning the case altogether."[197] Dodson limits his argument by stating that *Ackermann* should still apply when the movant pursued a strategy that was "patently *un*reasonable or fanciful,"[198] such as when a litigant is "pursuing a course clearly foreclosed by binding precedent."[199]

This is a succinct and compelling framework through which to evaluate Rule 60(b)(6) motions. However, it may be overly broad. Specifically, Dodson's standard seems to excuse cases where binding precedent is missing, or completely absent. But, in many cases, these are the exact instances where the appeals process should be encouraged. Thus, while Dodson's framework would help to increase the credibility of the court, it would not necessarily help promote the efficient use of Rule 60(b)(6). Dodson's framework also stops one step short of giving a comprehensive rule. As stated, Dodson places

194. Dodson, *supra* note 62.
195. *See id.* at 118.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*

the emphasis entirely on the petitioning party's actions. It does not directly consider the prejudice to the other litigants or the additional strain imposed on the court.

This Recent Development suggests altering Dodson's approach so that it blends deciding when *Ackermann* should apply with the prejudice analysis. Rule 60(b)(6) should be available to litigants who make fatal procedural errors in good faith and in pursuit of adjudication on the merits. However, availability of this type of relief should be limited where a litigant or a third party is unduly prejudiced or the strain on the court is substantial. Such a standard would promote the efficient use of Rule 60(b)(6) and also help promote doctrinal clarity.

This standard would also lead to superior results in cases such as *Ungar* and *Randall*. In both cases, the petitioners took actions that were not in pursuit of the merits, either by attempting to avoid adjudication through a failed legal strategy[200] or by filing for a second voluntary dismissal.[201] These are instances where justice does not seem to require reopening the litigation.

Applying such a rule in *Aikens* would have led to a more satisfying result. Aikens pursued a strategy that was clearly in pursuit of adjudication on the merits, and the defendants suffered no undue prejudice. One cannot be prejudiced by the vacation of a judgment that was not disputed on the merits, especially when there was no delay and the dispute was being actively litigated.[202] Although a court must be able to control its docket through procedural mechanisms, the strategic decisions of Aikens's attorneys actually lessened the strain on the judiciary. Instead of spending years pursuing an appeal which may or may not have correctly predicted ABCMR's jurisdictional limits, Aikens spent just months getting a definite statement of ABCMR's jurisdiction from ABCMR itself. And while a stay, if granted, would have avoided the Rule 60(b)(6) litigation upon returning to federal court, there was no other course of action available to the petitioner that could have achieved a quicker result.[203]

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200. *See* Ungar v. Palestine Liberation Org., 599 F.3d 79, 82 (1st Cir. 2010); *supra* notes 158–65 and accompanying text.

201. *See* Randall v. Merrill Lynch, 820 F.2d 1317, 1319–20 (D.C. Cir. 1987); *supra* notes 152–57 and accompanying text.

202. *Cf.* Compton v. Alton S.S. Co., 608 F.2d 96, 103 (1979) ("Nor can the plaintiff be said to be prejudiced by the vacation of his judgment for statutory penalty wages, to which he is not legally entitled. One cannot be prejudiced by the loss of that to which he was not entitled.").

203. *See* Aikens v. Ingram, 652 F.3d 496, 513 (4th Cir. 2011) (King, J., dissenting).

There is another ground on which extraordinary circumstances should be found, regardless of the petitioner's strategic mistakes. Rule 60(b)(6) relief should be available when a court makes an inaccurate judgment that is latent during the appeals period and that would otherwise result in substantial injustice. The latency requirement would not mean that the circumstance causing the adverse final judgment must be completely unforeseeable. Instead, latency means that there was insufficient knowledge available to foresee it. This would capture cases like *Liljeberg*, where the court error was not apparent during the appeals period. It would also cover dismissals that are based on a false premise, including cases where a judge incorrectly speculates about the rules of another judicial or quasi-judicial body.

This standard would have led to a superior result in *Aikens*. Aikens would not have been punished for the necessarily speculative decision by the federal court. Further, this standard would bar application of Rule 60(b)(6) in cases like *Ungar*, in which the district court's decision was clearly supported as a matter of existing law and the petitioner's grounds for relief were clearly appealable during the appeals process. It would also bar application of Rule 60(b)(6) in cases like *Randall*, in which the petitioners chose a course of action with full knowledge that it would bar their claims.

These standards would constitute a fairly modest modification of the existing extraordinary circumstances doctrine. Importantly, neither approach would modify the fact that the petitioner has the burden of persuading the court that extraordinary circumstances exist. Thus, these standards would act as a rebuttable presumption[204] that the facts alleged do not constitute an extraordinary circumstance. However, both standards would better allow Rule 60(b)(6) to remedy truly unjust results.

CONCLUSION

In *Aikens*, a restrictive approach to Rule 60(b)(6) relief led to an unjust result. The holding of *Aikens* runs counter to the purposes of Rule 60(b)(6) and trends in the case law. *Aikens* is wasteful in that it

204. There is obviously a difference between the legal burden and the factual burden. A Rule 60(b) motion initially resolves all facts in favor of the moving party. A hearing may then be required where the litigant must support his factual contentions. *E.g.* Klapprott v. United States, 336 U.S. 942, 942 (1949) (clarifying that, for Rule 60 (b)(6) motions, a hearing to determine the veracity of the allegations constituting extraordinary circumstances is necessary).

unnecessarily extends litigation, and its holding will undermine the integrity of the court. There are at least two standards that could be applied to Rule 60(b)(6) relief that would lead to a different result. Under one standard, a court would look to whether the petitioner acted in good faith and in pursuit of litigation on the merits, while also considering the hardships that reopening a final judgment create for other parties. The other standard would allow for Rule 60(b)(6) relief when the court made a latent error.

It is likely that the two competing interests embodied in Rule 60(b)(6) will never be completely harmonized in any single rule or statement of law. But, as relayed by the court in *Thompson*, "conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."[205] In cases like *Aikens*, where the circumstances can only be characterized as truly extraordinary, the court's interest in justice should overcome its commitment to procedural formality.

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205. Thompson v. Bell, 580 F.3d 423, 444 (6th Cir. 2009) (quoting Sanders v. United States, 373 U.S. 1, 8 (1963) (internal quotation marks omitted)).