CHAPTER 2

SUBJECT-MATTER AND PERSONAL JURISDICTION, REMOVAL, AND OTHER PREFILING CONSIDERATIONS

2.1 STRATEGIC QUESTIONS—DO YOU WANT TO BE IN FEDERAL COURT?

2.101 Some Potential Advantages

A. Speed of resolution.

B. Uniformity.

C. Familiarity with federal law (if the case involves a federal claim that could be brought in state or federal court).[1]

D. Summary judgment is possible because of the ability to rely on depositions and affidavits, whereas Virginia state procedure prohibits the use of depositions or affidavits to support motions for summary judgment (and Virginia's general bias against summary disposition).[2]

E. In discovery-intensive cases, the parties can get quicker rulings in federal court.

F. Written opinions more frequent than in state court.

G. Federal subpoena power for discovery in other states.

H. Settlement conference and no-cost mediation.

I. Greater "body of law" relating to expert witnesses and other evidentiary issues.

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[1] *See* Appendix 2-1 (Federal Issues Checklist).

[2] Until recently, an automatic right of appeal was a significant potential advantage to federal court litigation. Effective January 1, 2022, Virginia now gives an automatic right of appeal to its intermediate Court of Appeals from a final order of a circuit court in all civil cases. *See* Va. Code § 17.1-405.

2.102 Some Potential Disadvantages.

A. Fast track may be overwhelming.

B. Unfamiliarity with changing federal rules and procedures can be challenging.

C. Less ability to predict a jury's composition.

D. If a case is "cutting edge," Fed. R. Civ. P. 11 sanctions may be levied more readily than in state court under Va. Code § 8.01-271.1.

E. Federal court cases generally require relatively higher fees and costs in a shorter period than in state court, though in the long run fees and costs may even out.

F. Voir dire is more limited in federal court than in state court.

G. When local law firms agree to act as local counsel, it is their responsibility to know the Local Civil Rules and the particular procedures employed in the Eastern and Western Districts of Virginia. The judges of both the Eastern and Western Districts of Virginia take local counsel responsibilities very seriously.[3]

H. Pretrial scheduling orders and inflexibility of same (depending upon the judge assigned).

2.2 CONSTITUTIONAL AND STATUTORY FOUNDATIONS

2.201 Grant of Jurisdiction Under Article III. The jurisdiction of federal courts is derived from article III of the United States Constitution. Section 1 of article III provides that "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the

[3] For a good example of a notable failure on the part of lead and local counsel to follow the Local Civil Rules, see *Certusview Technologies, LLC v. S&N Locating Services, LLC*, No. 2:13-cv-346, 2015 U.S. Dist. LEXIS 103982, at *13-16 (E.D. Va. Aug. 7, 2015), noting that the plaintiff had blatantly violated the requirements of the local rules relating to summary judgment, and, as a consequence, the motion for summary judgment was denied.

Congress may from time to time ordain and establish."[4] Section 2 of article III provides a listing of "Cases" and "Controversies" over which "[t]he judicial power shall extend. . . ."[5]

A. General Principle. Federal courts are courts of limited jurisdiction, possessing only those powers conferred by the Constitution or by statute, and this power "is not to be expanded by judicial decree."[6]

B. Obligation to Investigate Jurisdiction. Federal courts, therefore, have an "independent obligation" to investigate the limits of their subject matter jurisdiction, even when either or both parties have elected not to raise or press the issue.[7]

C. "Arising Under." Within the jurisdiction granted to the federal courts by article III, section 2, are the "Cases" and "Controversies" that arise under the Constitution, laws of the United States, and federal treaties.[8]

D. Justiciable "Cases" or "Controversies." "Article III of the Constitution limits federal court jurisdiction to "Cases" and "Controversies." Those two words confine the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[9] The term "justiciability" refers to those cases that are truly adversarial and capable of resolution through the judicial process without intruding upon functions that the Constitution has committed to other branches of government.[10] The doctrines of standing, mootness, ripeness, and political question "all originate in Article III's 'case' or 'controversy' language . . . ."[11]

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[4] U.S. Const. art. III, § 1.

[5] U.S. Const. art. III, § 2.

[6] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 401 (4th Cir. 2011).

[7] *Geithner*, 671 F.3d at 401; *see Hamilton v. Pallozzi,* 848 F.3d 614, 619 (4th Cir. 2017) (addressing question of justiciability even though it was not appealed, because courts have independent obligation to evaluate their subject matter jurisdiction), *cert. denied*, 138 S. Ct. 500 (2017).

[8] U.S. Const. art. III, § 2; s*ee also* 28 U.S.C. § 1331.

[9] *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007).

[10] *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968).

[11] *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *see, e.g., Lansdowne on the Potomac Homeowners Ass'n v. OpenBand at Lansdowne, LLC*, 713 F.3d 187, 198 (4th Cir. 2013) (finding challenge by homeowners association to contractual agreements with video services provider was justiciable because group had standing and its claims were ripe); *Shenandoah Valley Network v. Capka*, 669 F.3d 194, 196 (4th Cir. 2012) (holding that a challenge to a "tiered review process" for planned improvements to I-81, on the ground that

2.202 Congressional Power over Creation and Jurisdiction of Courts. Congress was not required to create inferior article III courts to hear or decide cases; nor was it required to invest them with all of the jurisdiction that it was authorized to bestow under article III.[12] Consequently, although the parameters of judicial power with which federal courts may be invested, and the exercise of that power, is limited by article III, the creation of district courts, including the very nature of their jurisdiction, is determined by Congress.

While Congress can preclude federal courts from hearing cases that they are authorized to hear, Congress cannot empower federal courts to hear cases that they are not authorized to hear under article III.[13]

2.203 Judicial Power of Federal Courts. As stated above, federal courts are courts of limited jurisdiction. This means that, with certain limited exceptions, these courts can exercise only the judicial power that has been expressly conferred upon them by the Constitution or by acts of Congress.[14]

> A judge without jurisdiction is no more than a man in the street. What his views may be with respect to a given issue presented to him are but of passing moment. Jurisdiction either exists or it does not. This issue of jurisdiction can be raised at any time, even, as has been said, on a petition for a rehearing after a unanimous decision by the Supreme Court.[15]

A. Judicial Interpretation. Federal courts have not only been entrusted with the responsibility to decide matters "arising under" the Constitution, but they are also the final arbiter of: (i) the constitutionality of acts of Congress;[16] (ii) the constitutionality of state laws;[17] and (iii) the constitutionality of state court decisions.[18]

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this process supposedly foreclosed consideration of more environmentally friendly alternatives, failed to state any actionable claims).

[12] *Palmore v. United States*, 411 U.S. 389, 400-01 (1973).

[13] *United Transp. Union v. ICC*, 891 F.2d 908, 915 (D.C. Cir. 1989).

[14] *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978); *Bowman v. White*, 388 F.2d 756, 760 (4th Cir. 1968).

[15] *Outdoor World Corp. v. Calvert*, 618 F. Supp. 446, 448 (E.D. Va. 1985) (citing *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69 (1941)).

[16] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[17] *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

[18] *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat). 304 (1816).

B. Nonfederal Claims. When a federal court has subject matter jurisdiction over a federal claim, there are certain instances in which that court may also resolve related nonfederal claims. This is allowed primarily due to reasons of judicial economy and is discussed in this chapter in paragraph 2.8 below concerning supplemental jurisdiction.

2.204 Standing.

A. In General. "Standing is a threshold jurisdictional question which ensures that a suit is a case or controversy appropriate for the exercise of the courts' judicial powers under the Constitution of the United States."[19]

Standing continues to be a regular subject of review in the United States Supreme Court.[20] The Court has emphasized that "[s]tanding to sue is a doctrine rooted in the traditional understanding of a case or controversy."[21] The Court also noted that the law of article III standing "serves to prevent the judicial process from being used to usurp the powers of the political branches."[22] This doctrine also serves to confine the federal courts to their proper role in a democratic society.[23]

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[19] *AtlantiGas Corp. v. Columbia Gas Transmission Corp.*, 210 Fed. Appx. 244, 247 (4th Cir. 2006).

[20] *See, e.g., TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210-13 (2021) (in class action by individuals whose credit reports contained a false notice that the individual was considered a potential threat to national security, only the group whose reports were disseminated to third parties had suffered a concrete injury and thus had standing); *Thole v. U.S. Bank N.A.,* 140 S. Ct. 1615, 1619 (2020) (finding that retirees and vested participants in defined benefit pension plan lacked standing to bring claims alleging mismanagement of plan because they had no concrete stake in suit; they had thus far received all of their monthly benefit payments and the outcome of the suit would not affect their future benefit payments); *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019) (finding at least some states had standing to challenge citizenship question on 2020 census); *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019) (finding single chamber of bicameral legislature lacked standing to appeal the invalidation of redistricting plan separately from the state of which it is a part); *Gill v. Whitford*, 138 S. Ct. 1916, 1933-34 (2018) (vacating injunction and remanding partisan gerrymandering claims by Wisconsin voters because they failed to prove individualized harms); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016) (reversing and remanding Fair Credit Reporting Act case because the Court of Appeals had erroneously failed to consider a central element of the "injury-in-fact" requirement that, to maintain a case, the plaintiff must allege an injury that is both "concrete and particularized," and, while the Ninth Circuit has analyzed the particularity requirement, it failed to consider, indeed "overlooked," the concreteness requirement); *Wittman v. Personhuballah*, 578 U.S. 539, 545-46 (2016) (dismissing appeal of ten Republican members of Congress who had challenged the striking down by a three-judge panel of Virginia's redistricting plan); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) (observing that the party invoking federal jurisdiction has the burden of proving it, and that the petitioner did not have to wait to be arrested for violating a political advertisement statute in order to challenge its enforceability).

[21] *Spokeo*, 578 U.S. 330 at 338.

[22] *Id.* (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013)).

[23] *Gill,* 138 S. Ct. at 1929 (citing *Allen v. Wright*, 468 U.S. 737, 750 (1984)); *accord Spokeo*, 578 U.S. at 338.

B. Establishing Standing. To have article III standing, a plaintiff must adequately establish:

1. an injury in fact (namely, an invasion of a "legally protected interest" that is "concrete," "particularized" to the plaintiff, and "actual or imminent").[24] Concreteness and particularization are two "distinct requirements" that are "quite different" from one another.[25] An injury is particularized if it affects the plaintiff "in a personal and individual way"; an injury is concrete if it is "de facto," i.e., it actually exists.[26] While it must actually exist to be concrete, the injury may nevertheless be intangible.[27]

2. causation (namely, a "fairly traceable" connection between the alleged injury in fact and the alleged conduct of the defendant);[28] and

3. redressability (namely, it is "likely" and not "merely speculative"[29] that the plaintiff's injury will be remedied by the relief that the plaintiff seeks in bringing suit).[30]

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[24] *Spokeo*, 578 U.S. at 339-43 (examining both the "particularity" and the "concreteness" components of the "injury in fact" requirement).

[25] *Id.* at 339, 340.

[26] *Id.* at 339.

[27] *See, e.g., Federal Election Comm'n v. Akins*, 524 U.S. 11 (1998) (informational injury); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 562-63 (1992) (aesthetic injury); *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (stigmatic injury).

[28] *Spokeo*, 578 U.S. at 338.

[29] *Beck v. McDonald*, 848 F.3d 262, 271-77 (4th Cir. 2017) (affirming dismissals of class-action complaints alleging Privacy Act violations based on theft of laptop and boxes at Veterans Affairs medical center containing plaintiffs' personal information because threat of future injury, from potential future misuse of information or identity theft, was too speculative), *cert denied sub nom. Beck v. Shulkin*, 137 S. Ct. 2307 (2017); *cf. Hutton v. Nat'l Bd. of Examiners in Optometry, Inc.*, 892 F.3d 613, 623-24 (4th Cir. June 12, 2018) (reversing dismissal of claims arising from suspected breach of personal information in defendant's database because plaintiffs alleged that they had already suffered identity and credit card theft and their allegations plausibly pinpointed defendant as the source of their misused personal information).

[30] *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 268 (4th Cir. 2011) (dismissing complaint for lack of standing because Virginia had no right to challenge the individual Patient Protection and Affordable Care Act (PPACA) mandate, which applies only to persons and not states, and because the PPACA imposed no obligations on Virginia); *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (observing that article III's standing requirements are designed to prevent the judicial process from being used to usurp the powers of the political branches).