APPEALING TEMPORARY RESTRAINING ORDERS

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Abstract

Temporary restraining orders (TROs) are a powerful injunctive tool for district courts to maintain control over a case by directly controlling the parties' out-of-court conduct, especially when both the facts on the ground and the litigation are moving at breakneck speed. In response to the wave of TROs against the Trump Administration, appellate courts have struggled with the power of these orders and the long-standing rule that parties cannot appeal from TROs. But that rule is not found anywhere in the relevant statute, which authorizes interlocutory appeals from any order concerning an injunction. To the contrary, an examination of the history of TROs and interlocutory appeals reveals that TROs were not appealable solely because of a now-repealed statutory requirement that the appealed-from interlocutory order be issued "upon a hearing." Even if that requirement applies today, most modern TROs (especially against government defendants) are now issued after a hearing and so should be appealable. Although many of these appeals would quickly become moot as the TRO expires or merges into a preliminary injunction, appellate courts should nevertheless have the option to expedite the appeal or grant emergency relief.

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INTRODUCTION

Not to be lost in the impressive rash of executive actions taken by President Donald Trump's Administration in its early days is the federal courts' equally expansive response to these actions.[1] In suit after suit by challengers to executive action, courts have grappled with difficult legal issues at lightning speed. The result has been an array of orders—administrative stays,[2] pauses,[3] temporary restraining orders (TROs),[4] preliminary injunctions,[5] administrative appellate stays,[6] and stays pending appeal[7]—and perhaps a comparable number of denials of such orders.[8] Amid this full-court press of judicial

1. For a collection of legal challenges to President Trump's actions to date, see *Trump Administration Litigation Tracker*, LAWFARE, https://www.lawfaremedia.org/projects-series/trumps-first-100-days/tracking-trump-administration-litigation [https://perma.cc/V62Z-LDQN].

2. *E.g.*, Dellinger v. Bessent, No. 25-cv-00385, 2025 WL 450488, at *1 (D.D.C. Feb. 10, 2025). For a forceful argument that these stays are really TROs, see Christopher D. Moore, *So-Called "Administrative Stays" in Trump 2.0*, 104 TEX. L. REV. ONLINE (forthcoming 2025).

3. *See* Bessent v. Dellinger, 145 S. Ct. 515, 515 (2025) (denying the application as moot after holding it in abeyance, 2025 WL 716621 (U.S. Mar. 6, 2025) (No. 24A790) (mem.)).

4. *E.g.*, Nat'l Council of Nonprofits v. OMB, No. 25-cv-00239, 2025 WL 368852, at *14 (D.D.C. Feb. 3, 2025).

5. *E.g.*, Washington v. Trump, No. 25-cv-00127, 2025 WL 415165, at *7 (W.D. Wash. Feb. 6, 2025).

6. *E.g.*, Dep't of State v. Aids Vaccine Advoc. Coal., No. 24A831, 2025 WL 618071, at *1 (U.S. Feb. 26, 2025) (Roberts, C.J., in chambers) (mem.).

7. *E.g.*, Dellinger v. Bessent, No. 25-5052, 2025 WL 717383, at *1 (D.C. Cir. Mar. 5, 2025) (per curiam); Dep't of Educ. v. California, 145 S. Ct. 966, 969 (2025) (per curiam).

8. *E.g.*, Nat'l Treasury Emps. Union v. Trump, No. 25-cv-00420, 2025 WL 561080, at *8 (D.D.C. Feb. 20, 2025); U.S. Conf. of Cath. Bishops v. Dep't of State,

decisions, several procedural issues—often decisive—have arisen, among which is the appealability of TROs.[9] Indeed, four Supreme Court Justices recently expressed that clarifying the standard for the appealability of TROs is a question worthy of granting certiorari.[10]

The "established" (and, as far as we can tell, so far unquestioned)[11] wisdom is that TROs "are ordinarily not appealable,"[12] despite the general rule that all interlocutory orders concerning injunctions are immediately appealable.[13] Interlocutory appeals are generally disfavored[14] and were traditionally disallowed.[15] Rather, a litigant's right to an interlocutory appeal is statutory. Section 1292(a)(1) grants a right of immediate appeal to circuit courts of appeals from all "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions."[16] Modern precedent suggests that interlocutory orders concerning TROs do not fall within this category, but it is unclear why not.

Most courts rejecting appeals from TROs focus on the practical reasons why such an appeal might be undesirable or even impractical. A TRO is short-lived, and it is unlikely that an appeal can be completed before it expires.[17] TROs are often granted on a very limited record and are designed to maintain

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No. 25-cv-00465, 2025 WL 763738, at *8 (D.D.C. Mar. 11, 2025); Washington v. Trump, No. 25-807, 2025 WL 553485, at *1 (9th Cir. Feb. 19, 2025); J.G.G. v. Trump, No. 25-cv-00766, 2025 WL 890401, at *17 (D.D.C. Mar. 24, 2025); J.G.G. v. Trump, No. 25-5067, 2025 WL 914682, at *1 (D.C. Cir. Mar. 26, 2025) (per curiam) (mem.).

9. The appealability of TROs also rose in prominence during the COVID-19 pandemic, which presented similar timing concerns. *See* Bernadette Bollas Genetin, *Appealable TROs: Restoring Irreparable Harm as the Touchstone for Instant Interlocutory Appeal of Temporary Restraining Orders*, 75 BAYLOR L. REV. 372, 374 & n.1 (2023).

10. Dep't of State v. AIDS Vaccine Advoc. Coal., 145 S. Ct. 753, 755 n.1 (2025) (Alito, J., dissenting); *see also* Samuel L. Bray, Preliminary Injunctions on a Blank Slate 12–13 (Mar. 5, 2025) (unpublished manuscript) (proposing consolidating the forms of interlocutory injunctive relief but noting the "major practical hurdle" of how to determine appealability).

11. One recent article on the issue called the principles "[a]mong the most venerable precepts governing federal appellate practice." *See* Genetin, *supra* note 9, at 375.

12. OPM v. Am. Fed. of Gov't Emps., AFL-CIO, 473 U.S. 1301, 1303–04 (1985).

13. 28 U.S.C. § 1292(a)(1).

14. *See* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981).

15. Richmond v. Atwood, 52 F. 10, 20 (4th Cir. 1892).

16. 28 U.S.C. § 1292(a)(1).

17. Satanic Temple, Inc. v. Tex. Health and Human Serv. Comm'n, 79 F.4th 512, 514 n.7 (5th Cir. 2023).

the status quo until a hearing and ruling on a preliminary injunction may be had, so they are not the best vehicle for appellate review.[18] To be sure, these valid concerns suggest that appeals might not be frequent or that courts should review them deferentially, something we discuss in Part III. But it is unclear how any of these pragmatic reasons speak to whether TROs are "orders . . . granting . . . injunctions."[19] In fact, TROs almost certainly fall within the historical and modern definitions of "injunction," so the exclusion of TROs is unlikely to be a mere application of textualist reasoning.

To answer that question, we examine the statutory history of both TROs and interlocutory injunctions under section 1292. Congress created the modern TRO in 1872,[20] and at the time, this TRO was statutorily designed to be issued solely on an ex parte basis, without a hearing, pending the preliminary-injunction hearing.[21] In 1912, the Supreme Court promulgated an Equity Rule imposing time limits on these TROs.[22] Congress later codified these time limits,[23] and that statute became the precursor to the modern Federal Rule of Civil Procedure 65 that governs TROs today.[24] The interlocutory-appeal statute, in turn, was first enacted in 1891 and applied when, "upon a hearing in equity," a district court issued an order concerning an injunction.[25] Although some early courts appeared to consider appeals from TROs authorized by the statute,[26] the consensus became that TROs were a species of injunction but were not appealable under the statute because they were issued ex parte and without a hearing.[27]

There the law sat, generally undisturbed,[28] until 1948. That year, Congress codified the title of the United States Code

18. *See* 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, WRIGHT & MILLER'S FEDERAL PRACTICE AND PROCEDURE § 3922.1, Westlaw (database updated Apr. 2025).

19. 28 U.S.C. § 1292(a)(1).

20. *See* Act of June 1, 1872, ch. 255, § 7, 17 Stat. 196, 197–98.

21. *Id.*

22. Equity Rule 73, 226 U.S. 670 (1912); *see also* THE NEW FEDERAL EQUITY RULES 194–95 (James Love Hopkins ed., 1913) (reproducing Equity Rule 73).

23. *See* Act of Oct. 15, 1914, ch. 323, § 17, 383 Stat. 730, 737.

24. FED. R. CIV. P. 65(b)(2) advisory committee notes to 1938 version of FRCP 65.

25. *See* Act of Mar. 3, 1891, ch. 517, § 7, 26 Stat. 826, 828.

26. *See infra* notes 53–68 and accompanying text.

27. *See infra* notes 69–70 and accompanying text.

28. The interlocutory-appeal statute was amended several times, as we discuss in Part I below, but the basic structure remained unchanged.

dealing with judicial proceedings.[29] The new interlocutory-appeal statute dropped the requirement that the appealed-from order be issued "upon a hearing." But no one appears to have noticed the change, much less its potential implications for the appealability of TROs. So perhaps the hearing requirement is binding despite the lack of a current textual hook.

Where does that leave us, assuming we are working from first principles? First, even under a narrow reading of the statute, TROs issued after notice and hearing should be immediately appealable. This would sweep in the vast majority of, if not all, TROs,[30] especially those issued against the federal government and state–government defendants. Second, on some interpretive theories, TROs might be categorically appealable after the removal of the hearing requirement.

True enough, TROs are short-lived, and appeals from them will often become moot before any meaningful review. But, at a minimum, recognizing the appealability of at least some TROs would offer appellate courts the opportunity to expedite appeals, grant relief pending appeal of the TRO, or both. In that way, a more formalist approach to section 1292(a)(1) could still accommodate many functionalist considerations—but through a discretionary decision whether to expedite the appeal rather than through a more pragmatic or purposivist interpretive approach. Perhaps that result is normatively unattractive for the appellate system. Or maybe that interpretation is blocked by stare decisis. In any event, courts should be aware that the lines they are currently drawing are not justified by the statute.

I. FIRST PRINCIPLES

In this Part, we examine the question as a matter of first principles. We first detail the nature of TROs in federal courts in the late 1800s. Then we look at the enactment of the interlocutory-appeal statute in 1891 and early judicial interpretations of it. Finally, we consider statutory amendments and changes in judicial practice around the turn of the century and until 1974 (when the Supreme Court first stated that TROs were generally not appealable).

29. *See infra* notes 84–85 and accompanying text.

30. *See* Genetin, *supra* note 9, at 399–400, 399 n.122 ("[E]x parte TROs are a rarity.").

A. *Early Temporary Restraining Orders*

In 1872, Congress provided district courts with guidance regarding what it termed temporary restraining orders.[31] Although TROs as such were not unheard of,[32] and preliminary orders necessary to the court's resolution of the ultimate issue were used,[33] this statute was the first to set out authorization for—and limits on—TROs in federal courts. The provision kicked in when "notice [was] given of a motion for an

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31. Act of June 1, 1872, ch. 255, § 7, 17 Stat. 196, 197. For example, even the 1878 edition of Bouvier's Law Dictionary contained no entries for "temporary restraining order" or "restraining order," nor did it mention any variation of such terms in other entries.

32. A Westlaw search for the term "temporary" in the same paragraph as "restraining order!" limited to dates before June 1, 1872, returned only five decisions, all from state supreme courts and all within the seven years leading up to Congress's enactment. *See Ex parte* Hays, 26 Ark. 510, 511–12 (1871); City of Columbus v. Hydraulic Woolen Mills Co., 33 Ind. 435, 436–37 (1870); *In re* Mitchell, 1 Kan. Dass. Ed. 643, 645 (1870) (Kingman, C.J., at chambers); Andrews v. Powell, 27 Ind. 303, 304, 306 (1866); Patterson v. Stair, 26 Ind. 137, 138 (1866). Another sixteen decisions—all but one from state courts and reaching back to 1835—resulted from a search for "restraining order!" *See* Keel v. Ogden, 33 Ky. (3 Dana) 103, 104–09 (1835); Mastin v. Cullom, 28 Ala. 670, 673–74 (1856); Heyman & Co. v. Landers, 12 Cal. 107, 110–11 (1859); Cincinnati & C.R. Co. v. Huncheon, 16 Ind. 436, 437–38 (1861); Prader v. Purkett, 13 Cal. 588, 588–90 (1859) (in syllabus and description of arguments of counsel); Cincinnati Coll. v. Nesmith, 13 Ohio Dec. Reprint 746, 747 (Superior Ct. 1870); Taffts v. Manlove, 14 Cal. 47, 49, 51–53 (1859); Hicks v. Michael, 15 Cal. 107, 109–12 (1860); Jenkins v. Parkhill, 25 Ind. 473, 474, 477–78 (1865); Sutherland v. Lagro & M. Plank-Road Co., 19 Ind. 192, 193 (1862); Cincinnati Coll. v. City of Cincinnati, 13 Ohio Dec. Reprint 535, 535 (Superior Ct. 1871) (in reporter's notes); Wood v. Laycock, 60 Ky. (3 Met.) 192, 193–95 (1860); Nailor's Children v. Nailor, 34 Ky. (4 Dana) 339, 340, 346 (1836); Prader v. Grim, 13 Cal. 585, 587 (1859); Wallace v. McVey, 6 Ind. 300, 303 (1855). One decision used the term "preliminary restraining order." *See Huncheon*, 16 Ind. at 437–38. Some of the early state court decisions reference long-standing rules or even statutes apparently covering these orders, implying that such orders may have been more common than it might appear from reported decisions. *See Heyman Co.*, 12 Cal. at 110; *Mastin*, 28 Ala. at 673; *Nesmith*, 13 Ohio Dec. Reprint at 347 (citing Roberts v. Easton, 19 Ohio 78, 79 (1869)). Further, some decisions equated these restraining orders with temporary or preliminary injunctions, which lasted up to the length of the case—a period longer than that of a TRO. *See* Prader v. Purkett, 13 Cal. at 590; *In re Mitchell*, 1 Kan. Dass. Ed. at 645. *But see Wallace*, 6 Ind. at 303 (explaining that restraining orders last until the defendant can be notified, and temporary injunctions are granted in between court terms and last until the court is back in session). The lone federal decision arose under the enforcement of a restraining order under the Bankruptcy Act of 1867. Creditors v. Cozzens, 6 F. Cas. 793, 793 (E.D. Mo. 1869) (No. 3,378).

33. *See, e.g.*, Prader v. Purkett, 13 Cal. at 591 ("[W]e think that as the Chancellor had taken jurisdiction of the general subject, he had power to make this order as any other order in the progress of the case, for the furtherance of the objects of the litigation, and the protection of the subject matter of it.").

injunction."[34] At that point, courts could sua sponte (or upon request) examine the motion and issue a TRO "restraining the act sought to be enjoined until the decision upon the motion" if, and only if, "there appear[ed] to be danger of irreparable injury from delay[ing]" the order.[35]

The structure imposed by Congress meant that, as a practical matter, nearly all TROs were issued ex parte, without notice or a hearing. The statute affirmatively authorizes TROs, distinguishable from other kinds of interlocutory injunctions, upon the filing of a motion.[36] And because the notice of the motion came through the court—which then determined the appropriateness of a TRO—before being served on the defending party, the order was issued before the motion was served. In fact, the order was itself served on the defendant simultaneously with the notice for the hearing on the interim injunction.[37] Preliminary or temporary injunctions, by contrast, were issued upon a hearing and could last any length but at most until the final decision was issued.

Importantly, almost all sources agreed that these TROs were themselves injunctions. For example, the First Edition of *Black's Law Dictionary* in 1891 described "restraining order" as "[a]n order in the nature of an injunction."[38] Less than two decades later, the Supreme Court explained that the "statutory restraining order [set forth in the 1872 Act] is a species of temporary injunction."[39] Other contemporaneous dictionaries[40]

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34. Act of June 1, 1872, § 7, 17 Stat. at 197.

35. *Id.*

36. *See id.*

37. *See* N.A. Land & Timber Co. v. Watkins, 109 F. 101, 106 (5th Cir. 1901) (explaining that TROs are useful to prevent irreparable injury because courts can grant TROs "when an injunction is asked for," notice of "which may be served at the same time that the notice [of the preliminary-injunction hearing] is served").

38. *Restraining Order*, BLACK'S LAW DICTIONARY (1st ed. 1891). A later dictionary described any order issued in the pursuance of a preliminary injunction, which would presumably include TROs, as itself a "preliminary injunction." *See Preliminary Injunction*, JAMES A. BALLENTINE, BALLENTINE'S LAW DICTIONARY WITH PRONUNCIATIONS 1001 (1930).

39. Houghton v. Cortelyou, 208 U.S. 149, 156 (1908).

40. *See, e.g.*, *Restraining Order*, 2 BENJAMIN VAUGHN ABBOTT, DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE 425–26 (1879); *Restraining Order*, WILLIAM C. COCHRAN, THE STUDENT'S LAW LEXICON: A DICTIONARY OF LEGAL WORDS AND PHRASES 237 (1888); *Restrain*, WILLIAM C. ANDERSON, A DICTIONARY OF LAW 896 (1889); *Restraining Order*, J. KENDRICK KINNEY, A LAW DICTIONARY AND GLOSSARY 595 (1893).

and treatises[41] echoed the same sentiment.

And those sources that distinguished between interlocutory injunctions and TROs did not say that TROs were not injunctions. Rather, the sources specified that "temporary restraining order" was the correct term to use for orders that applied "only . . . until the propriety of granting an injunction . . . c[ould] be determined."[42] In other words, TROs were injunctions,[43] but they were a special kind of injunction—distinguishable from ordinary interlocutory injunctions in their notice, length, and purpose.[44]

In 1912,[45] the Supreme Court issued an Equity Rule clarifying how courts were to handle TROs. That rule, which "embodie[d] the principles long established and enforced by the federal courts,"[46] applied more stringent requirements for TROs. When a TRO was issued without notice, the hearing on the temporary or preliminary injunction was to be held no later than ten days after issuance of the TRO.[47] And the restrained party could, on just two days' notice to the party benefitting from the TRO, obtain a hearing seeking dissolution of the

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41. *See, e.g.*, 1 WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 224 (William A. Herrick ed., 1871) (describing an "interim restraining order" as an order "in the nature of an injunction").

42. *Restraining Order*, BLACK'S LAW DICTIONARY (3d ed. 1933); *see also Houghton*, 208 U.S. at 156 (reasoning that the statutory TRO "does not deal with temporary injunctions, . . . but is intended to give power to preserve the *status quo* when there is danger of irreparable injury from delay"); *accord Temporary Injunction*, JAMES A. BALLENTINE, BALLENTINE'S LAW DICTIONARY WITH PRONUNCIATIONS 1268 (1930); *Restraining*, 3 BOUVIER'S LAW DICTIONARY 2924 (3d rev. ed. 1914); 1 CHARLES FISK BEACH, JR., COMMENTARIES ON THE LAW OF INJUNCTIONS § 111, at 126–27, 127 n.1 (1895); 2 JAMES L. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS § 1708, at 1075 (2d ed. 1880).

43. As additional evidence, TROs fit within basically every contemporaneous definition of injunction. *See, e.g.*, *Injunction*, BLACK'S LAW DICTIONARY (1st ed. 1891) ("A prohibitive writ . . . directed to a party defendant in the action . . . forbidding [him] to do some act, . . . which he is threatening or attempting to commit, or restraining him in the continuance thereof . . . ."); *Injunction*, COCHRAN, *supra* note 40, at 146 (similar).

44. This history of TROs might call into question the modern rule that courts must find that the plaintiff is likely to succeed on the merits before issuing a TRO. *See* New Mexico v. Musk, No. 25-cv-00429, 2025 WL 520583, at *2 (D.D.C. Feb. 18, 2025); *see also* Bray, *supra* note 10, at 12–13 (reconceptualizing merits evaluations through an irreparable-harm analysis). However, such an argument is far removed from the scope of this Essay.

45. *See* Order Adopting Equity Rules, 226 U.S. 629 (1912).

46. Cathey v. Norfolk & W. Ry. Co., 228 F. 26, 29 (4th Cir. 1915).

47. Equity Rule 73, 226 U.S. 670 (1912); *see also* THE NEW FEDERAL EQUITY RULES, *supra* note 22 (reproducing Equity Rule 73).

TRO.[48] The wording of the rule also implied that TROs could be issued with notice to the defending party.[49] That is, by simply imposing limits on TROs issued without such notice, the rule left open the possibilities that TROs could be issued with notice.[50] This rule is one of the first recognitions we have found that courts may issue TROs (actual TROs, not temporary or preliminary injunctions that are improperly called TROs) after a hearing. In fact, there is evidence that the name "temporary restraining order" became a placeholder for any injunction, with or without a hearing, that was not a temporary or preliminary injunction.[51] In 1914, Congress enacted a new TRO statutory provision that adopted the same tact, providing that "[n]o [TRO] shall be granted" unless certain prerequisites were met.[52]

B. *Appealable Interlocutory Orders*

There the TRO sat until Congress passed a statute departing from the general presumption that interlocutory orders were not appealable.[53] In recognition that temporally limited injunctions issued during litigation often imposed unreviewable hardships, Congress provided for a limited right of interlocutory appeal in 1891. "[W]here, upon a hearing in equity in a district court," the district court "granted or continued" an "injunction" by "interlocutory order or decree," an

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48. Equity Rule 73, 226 U.S. 670 (1912).

49. *See id.* ("Nor shall any [TRO] be granted without notice to the opposite party, unless" the irreparable harm standard is met.).

50. *See id.* ("In case a [TRO] shall be granted without notice, . . . the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character.").

51. *See* Cunard S.S. Co. v. Mellon, 284 F. 890, 897–98 (S.D.N.Y. 1922) (Hand, J.) (describing an injunction pending appeal of an order dismissing the underlying bill of injunction as a TRO (and interchangeably as an injunction)).

52. Act of Oct. 15, 1914, ch. 323, § 17, 38 Stat. 730, 737. This act was meant to limit the issuance of injunctions in antitrust cases, *see id.* § 1, 38 Stat. at 730, but the provision concerning preliminary injunctions and TROs was by its terms broadly applicable, *see id.* § 17, 38 Stat. at 737; *see also* 28 U.S.C. § 381 (1940). This statute was then implemented word-for-word in Federal Rule of Civil Procedure 65(a)–(b). *See* FED. R. CIV. P. 65 (1938), *reprinted in* 28 U.S.C. app. at 2648 (1940).

53. *See* Lawrence J. Dolan, Note, *Federal Civil Procedure -- The Appealability of Interlocutory Orders: 28 United States Code § 1292*, 31 NOTRE DAME L. REV. 265, 266–67 (1956) (explaining that the Judiciary Act of 1789 allowed appeals only from final orders and that Congress did not depart from that model until 1891).

immediate appeal could be taken to a circuit court of appeals.[54] Appeals had to be taken within thirty days, and the lower-court "proceedings . . . [were] not stayed" unless the district court issued a stay pending appeal.[55]

From the time of the statute's initial enactment in 1891 until its codification in its current place in the United States Code, Congress amended the statute many times, but none of those amendments altered the basic structure. In 1895, for example, Congress extended the right of appeal to include interlocutory orders for any case in which a district court, after hearing, "granted, continued, refused, or dissolved" an injunction "by an interlocutory order or decree or [where] an application to dissolve an injunction [was] refused."[56] In 1900, in response to questions whether the interlocutory appointment of a receiver was appealable absent a specific injunction to comply, Congress again amended the statute to cover "injunction[s] . . . granted or continued" and "receiver[s] appointed" on the same terms.[57] Apparently by accident, however, this amendment repealed the 1895 expansion.[58] In 1911, Congress enacted the Judicial Code and combined the 1895 and 1900 provisions.[59] And then in 1925, Congress removed the textual requirement that the hearing be one in equity,[60] but the Supreme Court held that such a change had no practical effect[61] because there was no other type of hearing in which interlocutory injunctions could generally be issued.[62] More importantly, the 1925 Act also

54. Act of Mar. 3, 1891, ch. 517, § 7, 26 Stat. 826, 828. The statute limited such an appeal to cases in which the circuit courts of appeals would otherwise have had jurisdiction over an appeal from a final judgment. *Id.* In 1906, Congress removed the requirement that the circuit courts of appeals have jurisdiction over an appeal from the final order. *See* Act of Apr. 14, 1906, ch. 1627, 34 Stat. 116, 116.

55. Act of Mar. 3, 1891, ch. 517, § 7, 26 Stat. 826, 828

56. Act of Feb. 18, 1895, ch. 96, 28 Stat. 666, 666–67. Congress also granted district courts discretion to require appellants to post a bond to appeal the interlocutory order and gave appellate courts the power to grant a stay pending appeal. *See id.* at 667.

57. Act of June 6, 1900, ch. 803, 31 Stat. 660, 600.

58. *See* Dolan, *supra* note 53, at 267.

59. *See* Judicial Code of 1911, ch. 231, § 129, 36 Stat. 1087, 1134.

60. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936, 937.

61. Schoenamsgruber v. Hamburg Am. Line, 294 U.S. 454, 457 (1935).

62. *See id.* (reaching this conclusion by looking to legislative history and the fact that courts sitting in admiralty do not generally issue injunctions).

expanded appellate jurisdiction to include orders modifying injunctions.[63]

Early on, some courts in the 1890s concluded that the interlocutory-appeal statute applied to all TROs. For example, the Eighth Circuit addressed the question in the context of a dissolved TRO.[64] The Court explained that the order fell within the new statute authorizing appeal from orders "dissolving . . . an injunction," but held that it was not retroactive to cover that appeal.[65] Two years later, the Supreme Court also held that a TRO was appealable to the circuit court of appeals.[66] There, the lower court had issued a "preliminary restraining order" pending hearing on the motion to appoint a receiver, but the Supreme Court denied leave to file a petition for certiorari because there was adequate remedy by appeal to the circuit court of appeals.[67] Other decisions similarly appear to have concluded that TROs, and even interlocutory injunctions granted ex parte, were appealable.[68]

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63. Act of Feb. 13, 1925, ch. 229, 43 Stat. at 937. The same act also expanded the scope of interlocutory appeals from receivership. *See id.*; *see also* Dolan, *supra* note 53, at 267.

64. Denver R.G.R. Co. v. Walker, 68 F. 23, 23 (8th Cir. 1895). The TRO was dissolved after a hearing. *Id.* But that fact played no part in the court's (granted, brief) analysis. *See id.* at 23–24. To the extent the hearing was the deciding factor, *Denver R.G.R. Co.* then fits comfortably within the general rule that TROs were not appealable because they were not issued upon a hearing. *See infra* notes 71–75 and accompanying text.

65. *Denver R.G.R.*, 68 F. at 23–24 (quoting Act of Feb. 18, 1895).

66. *See In re* Tampa Suburban R. Co., 168 U.S. 583, 587–88 (1897). The syllabus accompanying the decision stated that it was unclear whether the order was issued ex parte or with notice and consent of the defendant's agent. *See id.* at 584. Again, the Court made no mention that the distinction might have been important.

67. *Id.* at 587–88 ("An appeal to the Circuit Court of Appeals might, therefore, have been taken from these orders [including the preliminary restraining order] or from an order refusing to set them aside and dissolve the injunction.").

68. *See* Stover Mfg. Co. v. Mast, Foos & Co., 89 F. 333, 337 (7th Cir. 1898) (stating that "temporary restraining order[s] should be considered on [their] merits"); Rubens v. Wheatfield, 93 F. 677, 681–82 (7th Cir. 1899) (characterizing *Stover Manufacturing Co.* as an "appeal . . . from an interlocutory order of injunction granted upon ex parte affidavits" and applying the *Stover Manufacturing Co.* rule to a similar case). Another subset of cases appeared to have assumed that TROs were appealable without specifically addressing the issue. *See Cathey*, 212 F. at 144–45 (concluding that a TRO was properly issued); Dempsey v. Guaranty Tr. of New York, 131 F.2d 103, 105 (7th Cir. 1942) (dismissing the appeal on other grounds); Bennell Realty Co. v. E.G. Shinner & Co., 74 F.2d 491, 494 (1935) ("We think that this statute contemplates an injunction or restraining order which actually infringes some right . . . ."); *see also* Higginson v. Chicago, B. & Q.R. Co., 102 F. 197, 198–99 (7th Cir. 1900) (reviewing a TRO, but one that was likely a preliminary injunction in substance); City of Terre Haute v. Farmers' Loan & Tr. Co., 99 F. 838, 839 (7th Cir. 1900)

Admittedly, however, the majority of courts reached the opposite conclusion: that TROs were not generally appealable.[69] Many of these courts reasoned that TROs were different from preliminary injunctions. For example, one leading decision stated that "the reason [for the distinction in appealability] is obvious," but the court then merely went on to describe the differences between the procedure, formality, and length of a TRO (without explaining how those differences speak to whether a TRO is an injunction within the meaning of the statute).[70]

However, when courts closely examined the issue, many focused on the statutory hearing requirement as the reason for excluding TROs from appealable interlocutory orders. The most cogent and extensive of these decisions was the Fifth Circuit's decision in *Joseph Dry Goods Co. v. Hecht*,[71] which was cited by several other decisions.[72] There, the court explained that when the interlocutory-appeal statute was enacted in 1891, the 1872 TRO statute and the then-current Equity Rules required a hearing for preliminary injunctions but not TROs.[73] The hearing requirement for an interlocutory appeal, then, "distinguish[ed] the temporary restraining order from the injunction [ultimately] granted at the hearing after notice."[74]

(reviewing refusal to dissolve an order it described as both a TRO and an "interlocutory order of injunction").

69. *See, e.g.*, W. Union Telegraph Co. v. U.S. & Mexican Tr. Co., 221 F. 545, 553 (8th Cir. 1915); Davis v. Hayden, 238 F. 734, 736–37 (4th Cir. 1916); Harvey v. Harvey, 290 F. 653, 657–58 (7th Cir. 1923); Marion Mortg. Co. v. Edmunds, 64 F.2d 248, 250 (5th Cir. 1933); Bank of Am. Nat'l Tr. & Sav. Ass'n v. Cuccia, 93 F.2d 754, 758 (9th Cir. 1937); *In re* Nat'l Fin. & Mortg. Corp., 96 F.2d 74, 76 (9th Cir. 1938); *see also* 1 BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, A TREATISE ON APPELLATE PROCEDURE AND TRIAL PRACTICE INCIDENT TO APPEALS § 106, at 85–86 (1892) ("[A]n appeal will not lie from an order granting a temporary restraining order.").

70. Pack v. Carter, 223 F. 638, 640–41 (9th Cir. 1915) (reaching this conclusion despite quoting the Supreme Court's statement that "the statutory restraining order is a species of temporary injunction" (quoting Houghton v. Meyer, 208 U.S. 149, 156 (1908)).

71. 120 F. 760 (5th Cir. 1903).

72. *See, e.g.*, Schainmann v. Brainard, 8 F.2d 11, 12 (9th Cir. 1925); Haight & Freese Co. v. Weiss, 156 F. 328, 334 (1st Cir. 1907).

73. *Joseph Dry Goods*, 120 F. at 762.

74. *Id.* at 763; *see also id.* at 763–64 ("The words when first used related to the granting or continuing of the writ of injunction, and in that connection they distinguished the ex parte restraining order from the injunction which followed, which was granted after notice and on an adversary hearing.").

Other decisions also concluded that the hearing requirement was the feature that made TROs not appealable.[75]

One practical effect of the hearing requirement was to channel litigants to the district court first, giving that court an opportunity to hear the parties' arguments.[76] In fact, traditional practice required arguments to have been raised before the lower court.[77] So perhaps an appeal from an ex parte TRO would have been barred precisely because the appealing party would not have presented the argument to the district court. In any event, the hearing requirement facilitated district-court involvement before appealing, a requirement that was easier to meet after parties were given the opportunity to request a hearing on two days' notice.[78]

To be sure, notwithstanding the general rule, courts sometimes looked at other factors in determining whether TROs should be appealable. These considerations were often used to determine the true substance of the order—whether the order was a TRO or a preliminary injunction. Nonetheless, one driving divide (and the only divide with a textual hook) was that

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75. *See, e.g.*, Dreutzer v. Frankfurt Land Co., 65 F. 642, 646 (7th Cir. 1895) (stating, in dicta, that "the appeal is allowed from an order granting an injunction 'upon a hearing in equity,' which would hardly describe an order made on an ex parte application"); Taylor v. Breese, 163 F. 678, 686 (4th Cir. 1908) (concluding that a TRO was appealable because it "forbade them to do the acts which the complainant sought to restrain," "was continuing," and "was granted upon a hearing in equity"); W. Union Telegraph Co. v. U.S. & Mexican Tr. Co., 221 F. 545, 553 (8th Cir. 1915) ("[A] restraining order which is granted, or sustained, or denied after a hearing of the parties, [and looks like a temporary injunction] falls within the evident meaning of the statute . . . ."); Pressed Steel Car Co. v. Chi. & A.R. Co., 192 F. 517, 519–20 (7th Cir. 1911) (dismissing an appeal because the order was not granted upon a hearing, which is a requirement that "must be strictly observed"); *Schainmann*, 8 F.2d at 12 ("The correct view is that a [TRO] is granted without hearing, and is incidental to an order to show cause why preliminary injunction should not be granted. The hearing is upon the application for the injunction."). Although we have not comprehensively surveyed state court precedent on the question, at least one state supreme court similarly held that statutorily authorized, ex parte TROs were not appealable under a statute that allowed appeals from injunctions issued after a hearing. *See* Hollingshead v. Lincolnton, 84 Ga. 590, 590 (1890) (citing GA. CODE § 3211–12 (1882)); *see also* GEORGE N. LESTER, CHIRSTOPHER ROWELL, & WALTER B. HILL, THE CODE OF THE STATE OF GEORGIA §§ 3211–12, at 804 (George N. Lester et al., eds., 4th ed., 1882).

76. One state supreme court held that injunctions issued ex parte were not appealable under a statute with "general language" because the matter had not been brought before the lower court. *See* State ex rel. Norris v. Dist. Cts. Eleventh and First Jud. Dists., 52 Minn. 283, 291–92 (1893).

77. THOMAS WATKINS POWELL, THE LAW OF APPELLATE PROCEEDINGS, ch. IV, § 26, at 132 n.3 (1872).

78. *See supra* note 48 and accompanying text.

TROs were issued without hearings. Indeed, some decisions found TROs appealable at least in part because there had been such a hearing.[79]

Eventually, however, pragmatic non-hearing distinctions started to predominate. Courts focused on whether the order looked to the merits, how long it lasted, whether it was to be dissolved automatically or upon further hearing, and whether it seriously risked the irreparable harm that interlocutory injunctions are meant to avoid.[80] Courts still sometimes considered whether there had been a "full presentation by the parties,"[81] but the original basis for the TRO–interlocutory injunction divide was largely lost.

C. *Post-Entrenchment Developments*

After this settlement of precedent, there were two legal developments that further undermined the general rule against appealing TROs. As discussed above, amendments to the statutory provision authorizing TROs and later court rules conforming to the amendments implied that TROs could be issued after notice and a hearing.[82] But in 1966, amendments to the Federal Rules of Civil Procedure took the preference for hearings even further. Rule 65 now required "the applicant's attorney [to] certif[y] . . . the efforts, if any, which have been made to give the notice and the reasons supporting his claim

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79. *See Taylor*, 163 F. at 686. Some decisions much later also pointed to the fact of a hearing. *See* Alloyed General Corp. v. Building Leasing Corp., 361 F.2d 359, 362 (1st Cir. 1966); Dilworth v. Riner, 343 F.2d 226, 229 (5th Cir. 1965) ("[W]here the opposing party has notice of the application for a [TRO], '[. . .] such order does not differ functionally from a preliminary injunction, [. . .]'" (quoting 3 WILLIAM W. BARRON & ALEXANDER HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE WITH FORMS § 1432, at 487 (Wright ed., 1958))).

80. *E.g.*, Siebert v. Great N. Dev't Co., 494 F.2d 510, 511 (5th Cir. 1974) (per curiam) (rejecting an appeal because the denied injunction "did not pertain to the merits"); Sims v. Greene, 160 F.2d 512, 517 (3d Cir. 1947) (looking to "the substantial effect of the order made"); Pack v. Carter, 223 F. 638, 640–41 (9th Cir. 1915) (resting primarily on when the order is set to expire); Davis v. Hayden, 238 F. 734, 736–37 (4th Cir. 1916) (considering an order appealable because there was no need to further consider the preliminary injunction motion and because of the order's "practical effect"); McGonigle v. Foutch, 51 F.2d 455, 459–60 (8th Cir. 1931) (looking to a hearing and whether the order continued indefinitely); *see also* Pac. Nw. Packing Co. v. Allen, 109 F. 515, 516 (9th Cir. 1901) (holding that the hearing requirement could be relaxed in the context of a receivership to avoid "defeat[ing] the purpose" of interlocutory appeals).

81. Spencer Co. v. Armonk Indus., 489 F.2d 704, 706 (1st Cir. 1973).

82. *See supra* notes 36–37, 45–52 and accompanying text.

that notice should not be required."[83] Thus, the Rules now expressly prefer that TROs be issued upon notice and hearing, even if it is not a full evidentiary hearing. So, to the extent that a hearing is a prerequisite to appealing a TRO, the current Rules make it such that many more TROs would be appealable.

The other development happened in Congress's process of recodifying the Judicial Code into the United States Code in 1948. To make the provisions for interlocutory appeals more manageable, Congress separated the different bases for such appeals.[84] The new version now read, "The courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions."[85] As one might notice, this amendment removed the hearing requirement for appealing interlocutory orders concerning injunctions.

It is unclear what to make of this amendment. On one view, this alteration might shift the focus back to whether TROs are injunctions, which they are,[86] and away from whether the order was issued upon a hearing. The current text encompasses all interlocutory orders concerning injunctions, and because TROs are both interlocutory orders and injunctions, they are freely appealable. And although courts are generally hesitant to read too much into Congress's "simpl[e] . . . recodification"[87] in 1948 absent "clearly expressed" intent to the contrary,[88] Congress did change the text here. And that textual change is notable because in an analogous provision governing interlocutory

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83. FED. R. CIV. P. 65(b) (1966), *reprinted in* 28 U.S.C. app. at 7830 (1970). The advisory committee expressed concern that courts were not attempting with sufficient urgency to give notice, even informal notice, to the opposing party. *See* 28 U.S.C. app. at 7831.

84. *See* Act of June 25, 1948, ch. 646, 62 Stat. 869, 929.

85. 28 U.S.C. § 1292–(1) (1952). The modern version has adjusted only the existing district courts from which an appeal might be taken and recognized that the Court of Appeals for the Federal Circuit has exclusive jurisdiction over some appeals. *See* 28 U.S.C. § 1292(a)(1), (c)–(d).

86. For evidence that TROs are injunctions from around the turn of the twentieth century, see *supra* notes 38–44 and accompanying text. For evidence that they are properly considered injunctions today, see *infra* notes 93–127 and accompanying text.

87. *Cf.* Oklahoma v. Castro-Huerta, 597 U.S. 629, 645 (2022) (citing Muniz v. Hoffman, 422 U.S. 454, 474) (1975)).

88. Tidewater Oil Co. v. United States, 409 U.S. 151, 162 (1972) (quoting Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 227 (1957)).

appeals from three-judge district courts directly to the Supreme Court, Congress maintained the hearing requirement.[89]

Alternatively, reliance on such a minor change during recodification might be overly technical. Outside of the omission, there is little evidence that Congress intended to alter the basic functioning of the interlocutory-appeal statute by recodifying and reformatting the provision as part of a large-scale change to the judicial code.[90] And despite that change in the language, the hearing requirement was fairly well entrenched and so, somewhat like the requirement that the hearing be in equity,[91] might not have needed to be directly in the statute anymore. Perhaps most troubling, though, is that no court or commentator (including the U.S. Code Revisers) appears to have recognized the change—much less spotted that the hearing requirement might no longer apply.[92] And one might reasonably hesitate to rest too heavily on an obscure change from nearly eighty years ago. In any event, even if there is still a hearing requirement, it will almost always be more efficient for parties against whom a TRO is issued ex parte to seek a hearing in the district court than to file an appeal.

* * *

As an original matter, TROs were injunctions. If an order regarding a TRO was issued upon a hearing and otherwise met the statutory requirements, the statute authorized an interlocutory appeal. One might argue further that, post-1948, all orders concerning TROs are appealable, but the basis for that conclusion is perhaps overly technical. That no one appears to have noticed the potential change might indicate that, setting aside questions of stare decisis, the better view is that the hearing requirement continues today.

II. MODERN PRECEDENT

The pragmatic considerations that motivated lower courts long after the hearing requirement's role was forgotten reached

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89. *Compare* Act of Mar. 3, 1911, ch. 231, § 266, 36 Stat. 1087, 1162–63, *with* Act of June 25, 1948, ch. 646, 62 Stat. at 928.

90. *Cf.* Micah S. Quigley, *What Is Habeas?*, 173 U. PA. L. REV. 453, 526–33 (2025) (exploring the argument that the fact of widescale recodification might counsel against finding a change in statutory meaning).

91. Schoenamsgruber v. Hamburg Am. Line, 294 U.S. 454, 457 (1935).

92. *Cf. Fourco Glass*, 353 U.S. at 227–28 (finding relevant that the Revisers' Notes to the 1948 recodification did "not express any substantive change" and concluding that the provision at issue had undergone "no substantive change").

the Supreme Court in 1974. In *Sampson v. Murray*,[93] the Court first gestured at the practical effect doctrine, under which appeals from TROs are allowed when (notwithstanding the nominal title) they have the effect of a preliminary injunction. The Court expressed hesitance to allow district courts unfettered discretion in delineating the lines between appealable and non-appealable orders.[94] In that case, the district court's TRO had persisted past the time allowed by Rule 65, suggesting it was actually a preliminary injunction.[95] Interestingly, the Court focused on the fact that the district court had held "an adversary hearing": When such a hearing "has been held, . . . classification of the potentially unlimited order as a [TRO] seems particularly unjustified."[96] A preliminary injunction and a TRO are separated only by a hearing because (at least in theory) a preliminary injunction can also be short-lived if the district court so orders. The Court further hinted that the exception was not a technical or formal delineation but, rather, was meant to honor the "meaning and intent" of section 1292 by shielding against "drastic consequences which c[ould] not later be corrected."[97]

Seven years later, the Court clarified the substantial-effects test set out in *Sampson*. In *Carson v. American Brands, Inc.*,[98] the Court addressed a non-TRO interlocutory order and emphasized that the test is whether delaying an appeal would cause irreparable harm, as opposed to using the irreparable-harm concern to look beyond the order's nominal title to its substance (as in *Sampson*).[99] In addition to having the "practical effect" of an injunction, an order must threaten serious harm and not be effectively challengeable by a later appeal to fall within section 1292.[100] This focus was justified, according to *Carson*, on a purposivist account of section 1292.[101]

93. 415 U.S. 61 (1974).
94. *Id.* at 86.
95. *Id.*
96. *Id.* at 87.
97. *Id.* at 86 n.58.
98. 450 U.S. 79 (1981).
99. *See id.* at 89.
100. *Id.* at 84.
101. *Id.* The same two-part test applies to denials of TROs, but such denials are less likely to satisfy the test because a denial of a TRO is likely followed by a decision on a preliminary injunction. *See* OPM v. Am. Fed. of Gov't Emps., AFL-CIO, 473 U.S. 1301, 1304–05 (1985) (extending the test to denials of TROs and finding that the denial did not impose "grave" consequences because the district court had already made plans to promptly hold a preliminary-injunction hearing).

So, for TROs, the order's length is relevant,[102] but *Carson* did not consider directly whether there was a pre-order hearing, driving the hearing requirement further from relevance.

The Court recently reaffirmed this test and extended it to another statute. There, the Court considered whether it had jurisdiction over a direct appeal of an interlocutory order from a three-judge district court.[103] That statute is narrower than section 1292(a)(1) because it requires "notice and hearing" but applies broadly to "an interlocutory or permanent injunction."[104] The Court held that "where an order has the 'practical effect' of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction," notwithstanding "the label attached to the order."[105] The Court again looked to the purpose of the statute, which was to avoid "harm" caused by interlocutory orders "before the final decision in the district court."[106] Delaying review where such harm is present would frustrate the interlocutory-appeal scheme.

Then, just this year, the Court found jurisdiction to review a TRO in two emergency applications.[107] In both decisions, the Court reached that conclusion without analysis, briefly stating the TROs were appealable under the exemption in *Sampson*.[108] Dissents from both decisions argued that the TROs did not meet the requirements for the exception.[109] Whether these decisions are merely disputed applications of the ordinary test or whether they represent a move toward looser application of the test to allow more TROs to be reviewed remains unclear. Regardless, these recent disputes reveal the odd and contested nature of the jurisdictional inquiry required by current precedent.

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102. The longer the TRO lasts, the more likely it is to threaten irreparable harm and thus be resistant to challenge on appeal.

103. Abbott v. Perez, 585 U.S. 579, 602–03 (2018).

104. 28 U.S.C. § 1253.

105. *Id.* at 594.

106. *Id.* at 595.

107. Dep't of Educ. v. California, 145 S. Ct. 966, 968 (2025) (per curiam); Trump v. J.G.G., 145 S. Ct. 1003, 1005 (2025) (per curiam). Both decisions were issued after an early draft of this essay was posted to SSRN.

108. *Dep't of Educ.*, 145 S. Ct. at 968 (stating that the TRO "carrie[d] many of the hallmarks of a preliminary injunction" (first citing Sampson v. Murry, 415 U.S. 61, 87 (1974) and then citing Abbott v. Perez, 585 U.S. 579, 594 (2018)) and then stating that the government "strongly challenged" the basis for the TRO (quoting *Sampson*, 415 U.S. at 87)); *J.G.G.*, 145 S. Ct. at 1005 (stating only, "We construe these TROs as appealable injunctions." (citing Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981)).

109. *Dep't of Educ.*, 145 S. Ct. at 972–73 (Jackson, J., dissenting); *J.G.G.*, 145 S. Ct. at 1012 (Sotomayor, J., dissenting).

Thus, the exception to the text for TROs is justified on pragmatic grounds from the practical difficulties of appealing from TROs, and the purposivist carve-out to that exception is designed to avoid the bad consequences of the pragmatic exception.[110] As we explain in Part III, the pragmatic reasons for excluding TROs from immediate review might not be so compelling. And the need for a purposivist carve-out suggests that the pragmatic exception is not justified by the statute itself. Indeed, the purposivist carve-out introduces its own oddities. For example, it makes the irreparable-harm analysis a jurisdictional inquiry, whereas irreparable harm is ordinarily a factual and legal question at the merits stage. And where an appeal is from a denial of a TRO and an appellate court must assess whether the plaintiff will suffer irreparable harm without the TRO, that jurisdictional irreparable-harm analysis is bound up with the merits.

The modern precedent is not only unpersuasive and lacking justification in light of the statutory authorization but also contradicted by other strands of Supreme Court precedent. Consider, for example, the Supreme Court's most extensive opinion discussing the definition of an injunction. In *Nken v. Holder*,[111] the Court addressed whether a stay of an immigration removal order was an "injunction" for purposes of a statute that limited courts' power to enjoin immigration actions.[112] The Court acknowledged that one sense of "injunction" would include "every order of a court which commands or forbids."[113] Nonetheless, the Court reasoned that the proper "legal sense" was more narrow, defining an injunction as a "judicial process or mandate operating *in personam*," or in other words an "[order] direct[ing] the conduct

110. Although courts have summarily stated that a TRO "is not an injunction," *e.g.*, CFTC v. Walsh, 618 F.3d 218, 225 n.7 (2d Cir. 2010), we have not found any prolonged treatment of the interpretive question in the courts of appeals outside of expressing pragmatic reasons why allowing appeals from TROs would be undesirable. *See also* J.G.G. v. Trump, No. 25-5067, 2025 WL 914682, at *3 (D.C. Cir. Mar. 26, 2025) (Henderson, J., concurring) (stating without analysis that "no [interlocutory appeal] exists for TROs"). For an impressive and thorough survey of lower-court treatment of the *Carson* factors, see Genetin, *supra* note 9. Professor Genetin offers evidence that the lower courts are far from uniform in determining whether TROs are appealable, but courts consistently look to whether an appeal would serve the supposed purposes of section 1292. *See id.*

111. 556 U.S. 418 (2009).

112. *Id.* at 425–26.

113. *Id.* at 428 (quoting *Injunction*, BLACK'S LAW DICTIONARY (8th ed. 2004)).

of a party."[114] A TRO falls squarely within even this narrow definition because restraining orders by definition restrain the extrajudicial conduct of the party.[115]

Nken did hold that, at least under that statutory scheme, a "stay" was not an "injunction,"[116] but that distinction does not apply to the vast majority of TROs. As relevant here, a stay simply "temporarily divest[s] an order of enforceability," operating on the "judicial proceeding itself."[117] For the Court, a stay "'suspend[s] judicial alteration of the status quo,' while injunctive relief 'grants judicial intervention that has been withheld by lower courts.'"[118] The Court extended that definition to include stays that "suspend *administrative* alteration of the status quo."[119]

Even setting that distinction aside, perhaps TROs that effectively do no more than suspend the effectiveness of an administrative order are not appealable, even though such an order would indirectly prevent executive action. However, that fails to describe basically any recent TRO, even those addressing measures taken in conjunction with executive action that might be termed an administrative order. For example, the first TRO against the Trump Administration's efforts to restrict birthright citizenship "fully enjoined" the government defendants from "[e]nforcing or implementing" several sections of the executive order.[120] Indeed, a TRO merely staying the executive order likely would have failed to prevent the plaintiffs' harm because the executive order did not create a legal basis for the policy, which could have been implemented

114. *Id.* (first quoting BLACK'S LAW DICTIONARY, *supra* note 113)).

115. *Cf.* Alloyd Gen. Corp. v. Bldg. Leasing Corp., 361 F.2d 359, 362 n.10 (1st Cir. 1966) ("There is no question that a [TRO] is included within the meaning of 'injunction' as used in [section 1292(a)(1)]."). The Congressional Research Service similarly considers TROs to be injunctions. *See* JOANNA R. LAMPE, CONG. RSCH. SERV. LSB11271, ENFORCEMENT OF COURT ORDERS AGAINST THE EXECUTIVE BRANCH 2 (2025), https://www.congress.gov/crs-product/LSB11271 [https://perma.cc/Z5V6-F7S8]. And in 1988, Congress itself thought that TROs were injunctions. *See* 17 U.S.C. § 1322(a) (authorizing courts to "grant injunctions . . . including . . . temporary restraining orders"); *see also* Moore, *supra* note 2, (manuscript at 6–7).

116. *See Nken*, 556 U.S. at 428 ("An injunction and a stay have typically been understood to serve different purposes.").

117. *Id.*

118. *Id.* at 429 (quoting Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)) (alteration in original).

119. *Id.* at 429 n.1.

120. Washington v. Trump, No. 25-cv-00127, 2025 WL 272198, at *2 (W.D. Wash. Jan. 23, 2025). Interestingly, even the district judge referred to his own order as an "injunction." *Id.*

even without the executive order. Other recent TROs are similar.[121] Indeed, a TRO that merely suspended the effect of an order—judicial or administrative—would be a stay mislabeled as a TRO because it does not "restrain" anything.[122]

In any event, *Nken*'s decision to adopt the narrower of two senses of "injunction" was supported by two features of that particular immigration statute, neither of which are present here. First, the Court pointed to other immigration provisions that used the word "stay" to drive home the distinction between injunctions and stays.[123] Here, there is no similar distinction to draw in the interlocutory-appeal statute: It does not separate TROs and preliminary injunctions. Second, the Court invoked the presumption that Congress would not obliquely undermine courts' traditional powers, which include the power to issue stays.[124] That concern cuts the other way here. Section 1292 was originally enacted to remedy a defect in the law—interlocutory injunctions could often be damaging to the parties with no ability to seek review.[125] As multiple contemporaneous courts explained, such a remedial statute was to be given a liberal construction such that "jurisdiction should not be taken away unless the statute require[s] it."[126] Thus, if there is doubt, the statute should be read to include TROs.[127]

Finally, a word on the stare decisis problem. A full resolution of this question is beyond the scope of this Essay, but two points are worth noting. First, even if stare decisis forecloses abandoning the presumption against appealing TROs, recovering the original scope of interlocutory appeals might counsel against a robust application of that presumption. Second, the statutory stare decisis test requires an additional

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121. *See, e.g.*, Perkins Coie LLP v. DOJ, No. 25-cv-00716, 2025 WL 782889, at *1 (D.D.C. Mar. 12, 2025) (directly enjoining government defendants and issuing mandatory injunctions to prevent the executive branch from carrying out the same policy reflected in the challenged executive order independently); *see also* Moore, *supra* note 2, (manuscript at 8–10) (reaching the same conclusion about recent administrative stays).

122. We thank Chris Moore for raising this point.

123. *Nken*, 556 U.S. at 430–31.

124. *Id.* at 431–32.

125. Root v. Mills, 168 F. 688, 689 (7th Cir. 1909).

126. Berliner Gramophone Co. v. Seaman, 108 F. 714, 716 (4th Cir. 1901); *see also* Richmond v. Atwood, 52 F. 10, 20 (1st Cir. 1892); Pac. Nw. Packing Co. v. Allen, 109 F. 515, 516 (9th Cir. 1901).

127. Nearly a century after the statute's enactment, the Court purported to justify a narrow construction in light of the presumption against interlocutory appeals. *Carson*, 450 U.S. at 84. At best, that concern is offset by the remedial-statute canon.

justification—such as the precedent becoming unworkable or having been undermined by subsequent legal developments.[128] There is a plausible argument that courts have failed to find a workable distinction between TROs that cause irreparable harm and those that do not,[129] as well as an argument that decisions like *Nken* undermine any textual basis for concluding that TROs are not injunctions.

III. THE TRO ON APPEAL

One might wonder at this point, even if our thesis is correct, what difference it would make. True, many TROs are issued after notice and a hearing, especially those issued against states or the federal government. But most orders, notice or no notice, are short-lived, so an ordinary appeal from a TRO would become moot even before briefing is due.[130] Moreover, once a district court reaches a decision on the underlying motion for preliminary injunction, the TRO "merge[s] in the injunction" or denial thereof.[131] And for TROs that last longer or present sufficient irreparable harm, the current test makes many of those orders appealable.[132]

Yet the mootness limitation of appealing TROs functions much differently from the current test. If TROs are generally appealable (perhaps with a hearing requirement), then most (if not all) TROs appealable under the current test will still be appealable. Some aspects of the current test ask whether the TRO is in essence a preliminary injunction. The proposition that some nominal TROs are preliminary injunctions seems correct to us. But that distinction is irrelevant for purposes of the interlocutory-appeal statute. Rather, the correct question is whether, if the appealed-from TRO is short-lived, the court should exercise its discretion to expedite consideration of the appeal.

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128. *See* Tyler B. Lindley, *Reconstructing Section 1983*, 101 NOTRE DAME L. REV. (forthcoming 2026) (manuscript at 45–49), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5238400 [https://perma.cc/8H7C-TRG5].

129. For a case dividing appellate judges, see Dellinger v. Bessent, No. 25-5028, 2025 WL 559669 (D.C. Cir. Feb. 15, 2025) (per curiam).

130. *Cf. In re* Lieb, 925 F.2d 180, 183 (5th Cir. 1990) ("The rule prohibiting appeals from the grant or denial of a temporary restraining order likely has its basis in concerns about mootness.").

131. Toledo, P. & W.R.R. v. Brotherhood of R. Trainmen, 132 F.2d 265, 268 (7th Cir. 1942) (citing City of Reno v. Sierra Pac. Power Co., 44 F.2d 281, 283 (9th Cir. 1930)).

132. *See supra* notes 93–102 and accompanying text.

As a circuit court judge explained in another mootness context, "cases *can* be litigated very swiftly when the need arises."[133] "For example, in the *Pentagon Papers Case*, the Supreme Court received briefing, heard oral argument, and issued an opinion a mere fifteen days from the day the district court issued the first injunction that gave rise to the appeal."[134] If courts wished to do so (and had the capacity[135]), they could expedite an appeal from a TRO and reach a decision in many, even if not all, cases.

To be sure, whether to move quickly to prevent an appeal from becoming moot is a discretionary decision. And there are costs to moving the wheels of the judicial decision too quickly.[136] But that discretionary decision is guided by completely different considerations from those that the current test allows. A court of appeals could screen appeals from TROs for clear legal errors, inordinate costs relative to the benefit to the plaintiff and the public, or broadly consequential litigation—each of which might offer normative benefits.

Screening for clear errors at the TRO stage might save judicial resources for both district and appellate courts. In the litigation concerning President Trump's firing of the head of the Office of Special Counsel, the district court issued a TRO on what was arguably a mischaracterization of Supreme Court precedent.[137] There, the district court reasoned that the President had constitutional authority to fire executive officials only when they exercised "significant executive power," quoting a 2020 Supreme Court decision.[138] But in 2021, the Supreme Court had clarified that "the nature and breadth of an agency's authority is not dispositive"; rather, the relevant question was

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133. Suntharalinkam v. Keisler, 506 F.3d 822, 830 (9th Cir. 2007) (Kozinski, J., dissenting).

134. Tyler B. Lindley, *The Constitutional Model of Mootness*, 48 BYU L. REV. 2151, 2177 (2023).

135. *Cf. Judiciary Seeks 71 Judgeships to Meet Growing Caseloads*, U.S. COURTS (Mar. 11, 2025), http://uscourts.gov/data-news/judiciary-news/2025/03/11/judiciary-seeks-71-judgeships-meet-growing-caseloads [https://perma.cc/UG8W-MVNB].

136. For a sampling of analyses arising in the context of the Court's emergency docket, see STEPHEN VLADECK, THE SHADOW DOCKET (2023); Pablo Das, Lee Epstein, & Mitu Gulati, *Deep in the Shadows?: The Facts About the Emergency Docket*, 109 VA. L. REV. ONLINE 73 (2023); Taraleigh Davis & Sara C. Benesh, *Procedural Justice and the Shadow Docket*, 73 EMORY L.J. 443 (2023).

137. *See* Dellinger v. Bessent, No. 25-cv-00385, 2025 WL 471022, at *7 (D.D.C. Feb. 12, 2025).

138. *Id.* at *7 (quoting Seila Law LLC v. Consumer Fin. Protection Bureau, 591 U.S. 197, 220 (2020)).

whether "an agency does important work."[139] The D.C. Circuit refused emergency relief on the ground that the TRO was not appealable,[140] and the Supreme Court declined to address the emergency request one way or the other.[141] When the district court issued an appealable preliminary injunction, the D.C. Circuit almost immediately stayed the order.[142] The bipartisan panel held, with no noted dissent, that the district court's order was inconsistent with Supreme Court precedent,[143] and the plaintiff announced he was dropping his suit the day after the stay was issued.[144] Addressing this straightforward legal question (under current precedent) at the TRO stage would have saved resources at three levels of the federal judicial system.

Further, there might be instances in which the defendant's costs are exorbitant, even if not technically irreparable. In another recent case, an order enforcing a TRO ordered the government to pay past-due money on certain completed contracts.[145] Except in rare circumstances, the loss of money is not considered irreparable harm,[146] but the government

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139. Collins v. Yellen, 594 U.S. 220, 251–52 (2021). The district court feigned at distinguishing *Collins*, merely repeating the Supreme Court's statement that it was not weighing in on the constitutionality of removal protections at other agencies. *Dellinger*, 2025 WL 471022, at *8.

140. Dellinger v. Bessent, No. 25-5028, 2025 WL 559669, at *1 (D.C. Cir. Feb. 15, 2025) (per curiam). The D.C. Circuit had previously rejected an appeal from the district court's "administrative stay" on the same grounds. Dellinger v. Bessent, No. 25-5025, 2025 WL 561425, at *1 (D.C. Cir. Feb. 12, 2025) (per curiam).

141. Bessent v. Dellinger, 145 S. Ct. 515, 515 (2025).

142. Dellinger v. Bessent, No. 25-5052, 2025 WL 717383, at *1 (D.C. Cir. Mar. 5, 2025) (per curiam).

143. Dellinger v. Bessent, No. 25-5052, 2025 WL 887518, at *4 (D.C. Cir. Mar. 10, 2025) (per curiam).

144. Katelyn Polantz, *Federal Watchdog Removed by Trump Drops His Case, Citing Long Odds of Winning at Supreme Court*, CNN (Mar. 6, 2025, 12:32 PM), https://www.cnn.com/2025/03/06/politics/fired-federal-watchdog-trump-case-dropped/index.html [https://perma.cc/H27C-KUXE]. Dellinger did not even wait until the D.C. Circuit issued its opinion explaining the stay on March 10, 2025. *See id.*

145. *See* Application to Vacate the Order Issued by the United States District Court for the District of Columbia and Request for an Immediate Administrative Stay at 1–2, Dep't of State v. AIDS Vaccine Advocacy Coal., 145 S. Ct. 753 (2025) (mem.) (No. 24A831), 2025 WL 653297, at *1–2 [hereinafter Application to Vacate Order] (describing the district court's minute order).

146. *See* Brown v. HHS, 4 F.4th 1220, 1226–28, *vacated as moot*, 20 F.4th 1385 (11th Cir. 2021). *But see* Dep't of Educ. v. California, 145 S. Ct. 966, 968–69 (2025) (per curiam) (stating that the failure of the entities seeking payment to "promise[ ] to return [the] funds should" they ultimately lose their case was relevant to the non-merits "stay factors," but not expressly stating that such a scenario would produce irreparable harm).

asserted that it would struggle to reclaim any of the money if it prevailed in the litigation.[147] The Supreme Court stayed the TRO until after the deadline to make payments, denied the application for emergency relief, and instructed the district court to make its order clearer.[148] Putting aside the complicated merits of the case, it might have made sense for the Supreme Court to consider whether the balance of the equities supported the TRO before the money was paid. Indeed, when the Court was presented with a similar emergency application concerning judicially ordered distribution of funds, the Court found jurisdiction and concluded that the district court likely did not have jurisdiction.[149]

Moreover, some TROs are themselves universal injunctions.[150] Even if universal injunctions are sometimes permissible (a proposition we are skeptical of), courts should be cautious in exercising that power. Even short-lived TROs can have dramatic effects on government programs if they universally prohibit the program. Courts, in exercising their discretion to expedite appeals from TROs, might wish to address the scope of the TRO. Recognizing the general appealability of TROs would provide appellate courts with that option.

Even if courts have neither the will nor the capacity to expedite consideration of the entire appeal, appealable TROs might provide a basis for an appellate court to issue emergency relief. As a practical matter, appellate courts would have the opportunity to set the status quo while the preliminary injunction is pending—analogous to how appellate courts now set the status quo pending final judgment through appeals from preliminary injunctions. We set aside questions about whether courts should issue emergency relief pending appeal if they know the underlying appeal will become moot.[151] Even if there

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147. Application to Vacate Order, *supra* note 145, at 4, 2025 WL 653297, at *4 ("[T]he government has no sure mechanism to recover wrongfully disbursed funds delivered to entities that claim to be near insolvency.").

148. *AIDS Vaccine Advocacy Coal.*, 145 S. Ct. at 753.

149. *Dep't of Educ.*, 145 S. Ct. at 968–69.

150. *Cf.* Ann E. Marimow & David Nakamura, *Trump Asks Supreme Court to Allow Birthright Citizenship Ban in Some States*, WASH. POST (Mar. 13, 2024, 5:32 PM), https://www.washingtonpost.com/politics/2025/03/13/supreme-court-birthright-citizenship-trump/ [https://perma.cc/9GTR-QHUY] (reporting on the Trump Administration's request to narrow three universal injunctions).

151. Professor Bray has recently argued that interlocutory judicial interventions should be targeted toward preserving the court's remedial options. *See* Samuel L. Bray, *The Purpose of the Preliminary Injunction*, 78 VAND. L. REV. (forthcoming 2025)

is no such general barrier, however, appellate courts should still place the burden of persuasion on the movant, which would limit the circumstances in which emergency relief is appropriate.

CONCLUSION

The beginning of the second Trump Administration was not the first time TROs were issued, and it will not be the last. TROs and their appealability present lasting questions made more difficult by a pragmatic test that finds little support in the text of the interlocutory-appeal statute. These pragmatic concerns might explain why TROs are rarely appealed, or even why Congress's policy choice was ill-advised. But none of these concerns speak to whether a TRO is an injunction. As an equitable judicial order that operates directly on the parties' out-of-court conduct, a TRO is an injunction and was so considered when Congress enacted the interlocutory-appeal statute. As appellate courts address appeals from TROs during the next four years and beyond, they should be aware that the "general rule" they are applying evolved from a now-repealed hearing requirement that protected most historical TROs from appeal.

(manuscript at 57), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4922379 [https://perma.cc/3HFM-UEST] But that concern might not apply when the court has no intention of issuing an ultimate remedy.