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APPELLATE REVIEW OF §1404(a) ORDERS —
MISUSE OF AN EXTRAORDINARY WRIT

The most controversial aspect of the statutory motion to transfer, pursuant to 28 U.S.C. §1404(a), has been the use of the extraordinary writ of mandamus as the method of appeal from an adverse ruling on the motion.

Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

At the time of its enactment, in 1948, section 1404(a) was generally considered to be a mere codification of the common law doctrine of *forum non conveniens*.¹ However, the Supreme Court in *Norwood v. Kirkpatrick*² observed that section 1404(a) was something more than a simple codification of the common law doctrine.³ The Court pointed out that under the *forum non conveniens* doctrine a finding that the forum was improper resulted in the dismissal of the action, which often deprived plaintiff of proper redress. Under section 1404(a) however, the action may be transferred rather than dismissed, thus eliminating the harshest aspect of the older doctrine. The Court further added that this statutory change should further expand the wide area of discretion already ceded to the district judge.⁴ Once this broad discretion has been exercised, the question arises as to how a disappointed litigant may appeal from the decision of the district court granting or denying the motion.

Since an order granting or denying a section 1404(a) motion is not a final order it cannot be appealed at this stage.⁵ Federal courts have always adhered to a strict policy which prohibits piecemeal appeals and permits appeal from less than final judgments only when specifically authorized by statute.⁶ The only

¹ See *Ex parte Collett*, 337 U.S. 55, 58 (1949).

² 349 U.S. 29 (1955).

³ *Id.* at 32. See also *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010, 1011 (3rd Cir. 1952); *Jiffy Lubricator Co. v. Stewart Warner Corp.*, 177 F.2d 360, 362 (4th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950).

⁴ *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955).

⁵ See, e.g., *Clinton Foods, Inc. v. United States*, 188 F.2d 289, 290-91 (4th Cir. 1951), *cert. denied*, 342 U.S. 825 (1951); *Paramount Pictures Inc. v. Rodney*, 186 F.2d 111, 116 (3rd Cir. 1950), *cert. denied*, 340 U.S. 953 (1951); *Shapiro v. Bonanza Hotel Co.*, 185 F.2d 777 (9th Cir. 1950); *Magnetic Engineering Co. v. Dings Mfg. Co.*, 178 F.2d 866, 868-69 (2d Cir. 1950); *Jiffy Lubricator Co. v. Stewart Warner Corp.*, 177 F.2d 360 (4th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950).

⁶ See *Cobbledick v. United States*, 309 U.S. 323 (1940). See also *Catlin v. United States*, 324 U.S. 229 (1945); *Reeves v. Beardall*, 316 U.S. 283 (1942); *United States v. Florian*, 312 U.S. 656 (1940); *Arnold v. United States*, 263 U.S. 427 (1923); *Collins v. Miller*, 252 U.S. 364 (1920); *Hohorst v. Hamburg-American-Packet Co.*, 148 U.S. 262 (1893).

other exception is the interlocutory appeal authorized by 28 U.S.C. §1292(b). This section provides for an appeal at the discretion of the court of appeals before final judgment where the district judge makes an order and is of the opinion that the order "involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. . . ." Interlocutory appeal is generally considered unavailable to review a section 1404(a) order because seldom, if ever, is a controlling question presented.⁷

Appeal after final judgment from a section 1404(a) order is less than satisfactory because it is improbable that any error made in ruling on the motion can be corrected on appeal for the reason that parties and witnesses have already been inconvenienced, and it would only be more of an inconvenience to retry the case at the appropriate forum.⁸ Furthermore, it can readily be appreciated that a court of appeals would be hesitant to reverse an order at this stage thus requiring a new trial after the cause had already been tried to judgment once.

The courts of appeal in the various circuits have attempted to draw a balance between the inequities caused by postponing review and the rigid prohibitions against premature appeals. However, because it is so difficult to draw such a balance, the decisions of the courts of appeal, even within the same circuits, are replete with controversies and inconsistencies.⁹ Despite the conflicts between and within the circuits, the Supreme Court has persistently refused review of the question. As a result of this conflict and thus the apparent lack of an adequate means to review section 1404(a) orders, litigants have been compelled to petition for a writ of mandamus as the method of appeal.

In considering the use of the writ of mandamus as an appropriate means to review a 1404(a) order, a distinction should first be made between the power of the court of appeals to issue the writ and the propriety or advisability of exercising that power.

The power of the court of appeals to issue an extraordinary

⁷ See, e.g., *A. Olinick & Sons v. Dempster Brothers, Inc.*, 365 F.2d 439 (2d Cir. 1966); *Standard v. Stoll Packing Corp.*, 315 F.2d 626 (3rd Cir. 1963); *Bufalino v. Kennedy*, 273 F.2d 71 (6th Cir. 1959). *But see* *Humble Oil & Refining Co. v. Bell Marine Service, Inc.*, 321 F.2d 53 (5th Cir. 1963); *Houston Fearless Corp. v. Teter*, 318 F.2d 822 (10th Cir. 1963); *In re Humble Oil & Refining Co.*, 306 F.2d 567 (5th Cir. 1962).

⁸ See *Ford Motor Co. v. Ryan*, 182 F.2d 329, 330 (2d Cir. 1950), *cert. denied*, 340 U.S. 851 (1950) wherein Judge Frank observed that the reason that such an order is not likely to be correctable on appeal is that it would be difficult for petitioner to show that a different result would have obtained had the motion been decided the other way. Likewise, if judgment was ultimately rendered in favor of the party alleging error in the transfer order, he would have a difficult task in trying to collect damages for any additional expense due to such an erroneous order.

⁹ See appendix *infra*.

writ, such as mandamus, is auxiliary in nature, not conferring independent appellate jurisdiction,¹⁰ and is limited entirely to situations where it is "necessary or appropriate in aid of their respective jurisdictions." The source of this power is found at 28 U.S.C. §1651(a):

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

It is well settled that courts of appeal have the power, under this section, to issue writs in aid of their prospective or potential appellate jurisdiction as well as where such jurisdiction has already attached.¹¹ Since a court of appeals has potential appellate jurisdiction over all cases presently pending in the district courts of that circuit, the court will have the power to issue the extraordinary writ where "the action of the District Court tends to frustrate or impede the ultimate exercise by the Court of Appeals of its appellate jurisdiction granted in some other provision of the law."¹² Thus, where a district judge grants a motion transferring a cause to another circuit, the court of appeals of the transferor district has the "power" to issue the writ since its potential appellate jurisdiction has been removed by the order.¹³

Where an order pursuant to section 1404(a) transfers the cause to another district court within the same circuit, there has been less justification for the issuance of the writ because if an appeal is taken after final judgment the same court of appeals would hear the appeal and would not in any way be deprived of its potential jurisdiction. This has been the position taken by the Eighth Circuit Court of Appeals in one case.¹⁴

The same distinction has been made when a district court denies a motion to transfer and thus retains the cause. The court of appeals of that circuit is in no way deprived of its potential jurisdiction and, therefore, has no power to issue the writ in aid of its jurisdiction.¹⁵

Despite the few decisions that have challenged the courts'

¹⁰ See *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943); *In re Josephson*, 218 F.2d 174, 180 (1st Cir. 1954).

¹¹ *McClellan v. Carland*, 217 U.S. 268, 280 (1910).

¹² *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 264 (1957) (Justice Brennan dissenting).

¹³ *Id.* at 264. See also *In re Josephson*, 218 F.2d 174, 181 (1st Cir. 1954).

¹⁴ See *Carr v. Donohoe*, 201 F.2d 426, 628-29 (8th Cir. 1958). *But see*, e.g., *Shapiro v. Bonanza Hotel Co.*, 185 F.2d 777 (9th Cir. 1950) where, although issuance of the writ was ultimately denied by the court of appeals, the court did assume the power to issue the writ under section 1651(a) even though the transferee district was in the same circuit as the transferor district.

¹⁵ *In re Josephson*, 218 F.2d 174, 181 (1st Cir. 1954). See also *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 264 (1957) (Justice Brennan dissenting). *But see* *General Tire and Rubber Co. v. Watkins*, 373 F.2d 361, 369-70 (4th Cir. 1967), *cert. denied*, 386 U.S. 960 (1967).

power to issue the writ, the majority of the courts have assumed the power to review such orders by mandamus, both where the order grants and where it denies transfer. The main question, once the power to issue is assumed, is then whether the issuance of the extraordinary writ under the facts of a particular case is appropriate.¹⁶

The major argument against the use of mandamus is, of course, that the effect of such a writ, issued to review an order that is not otherwise reviewable by appeal, is to substitute the writ for an appeal and thus circumvent the policy prohibiting piecemeal appeals. A strong expression by the Supreme Court supporting this viewpoint is found in *Roche v. Evaporated Milk Association*.¹⁷

Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals. . . .¹⁸

Disregarding the prohibition against piecemeal appeals delays the ultimate termination of the litigation by permitting lengthy litigation over issues which are not determinative of the merits, such as place of trial. Conceptually, the same cause may come before the court of appeals many times even before final judgment. This result defeats the objective of section 1404 (a), and as stated by Judge Goodrich in *All States Freight, Inc. v. Modarelli*.¹⁹

Instead of making the business of the courts easier, quicker, and less expensive, we now have the merits of the litigation postponed while appellate courts review the question where a case may be tried.²⁰

This point was dramatically illustrated in the leading case of *Minnesota Mining and Manufacturing Co. v. Platt*.²¹ In this criminal action, District Judge Platt denied the defendant's motion to transfer under 18 U.S.C. §21 (b).²² Defendant then petitioned the court of appeals for a writ of mandamus ordering Judge Platt to vacate the order. A divided Seventh Circuit Court of Appeals, after reviewing Judge Platt's decision on the motion, ordered the case transferred.²³ The Supreme Court granted certiorari and then unanimously reversed and remanded the case back to the court of appeals with instructions to remand to the

¹⁶ That the question is not one of power but of appropriateness was recognized in, e.g., *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382-83 (1953); *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 201-02 (1945); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25-26 (1953).

¹⁷ 319 U.S. 21 (1943).

¹⁸ *Id.* at 30.

¹⁹ 196 F.2d 1010 (3rd Cir. 1952).

²⁰ *Id.* at 1011.

²¹ 345 F.2d 681 (7th Cir. 1965).

²² See note 42 *infra*.

²³ *Minnesota Mining & Mfg. Co. v. Platt*, 314 F.2d 369 (7th Cir. 1963).

district court.²⁴ Judge Platt, on remand, again denied the petition to transfer, and defendant once again petitioned the court of appeals for a writ of mandamus directing transfer. Again, a divided court ordered Judge Platt to transfer the case.²⁵

Dissenting Chief Judge Hastings pointed out that litigation as to the place of trial had already taken nearly three years, and the case had not as yet come to trial²⁶ — an ironic result under a statute enacted to expedite litigation. The chief judge commented:

Finally, I think the majority erred in entertaining this petition for an extraordinary writ and issuing a Rule to Show Cause. It appears to me that a second interlocutory review of a discretionary order in this case is unwise and unsound judicial administration. In light of the experience of this court in recent months, I adhere to the view that repetitive invocations of mandamus are improperly becoming a way of appellate life.²⁷

A further consideration with respect to the appropriateness of the writ is that where the order under review by mandamus is a section 1404(a) order, the respondent is the district judge. Although mandamus may issue against a judge, traditionally courts have been hesitant to do so, particularly where the decision in question was a discretionary one. As the Supreme Court has emphasized:

Mandamus, prohibition, and injunction against judges are drastic and extraordinary remedies. . . . [T]hey have the unfortunate consequence of making the judge a litigant, obligated to obtain personal counsel or to leave his defense to one of the litigants before him. . . . As extraordinary remedies, they are reserved for really extraordinary causes.²⁸

To be balanced against these considerations is the hardship of awaiting the normal mode of appeal. Although the inadequacy and hardship of awaiting final judgment is a regrettable result, it does not necessarily justify review by the extraordinary writ. In striking the balance, the Supreme Court appears to adopt the viewpoint that the hardship does not justify use of the extraordinary writ in place of appeal. In *United States Alkali Export Association v. United States*,²⁹ the Court discussed the use of extraordinary writs by courts of appeal under the statutory predecessor to section 1651(a):³⁰

²⁴ *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964).

²⁵ See case cited note 21 *supra*. This order was later vacated by the Supreme Court in *Platt v. Minnesota Mining & Mfg. Co.*, 382 U.S. 456 (1966) because the mandamus issue was moot.

²⁶ *Minnesota Mining & Mfg. Co. v. Platt*, 345 F.2d 681, 688 (7th Cir. 1965).

²⁷ *Id.*

²⁸ *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947).

²⁹ 325 U.S. 196 (1945).

³⁰ This provision, being similar to §1651(a), provided that courts " . . . shall have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

In such cases appellate courts are reluctant to interfere with decisions of lower courts, even on jurisdictional questions, which they are competent to decide and which are reviewable in the regular course of appeal.³¹

It also must be presumed, according to the court in *Roche*, that Congress contemplated such hardship when it provided that only final judgments be appealable.³²

Indeed, the history of the *Platt* case strongly suggests that the risk of injury which may result from an erroneous granting or denial of the transfer motion would be less burdensome than the certainty of added delay and expense if the order was subject to review by mandamus at an interlocutory stage.³³

Despite the limitations and caveats expressed by the Supreme Court with respect to the issuance of extraordinary writs under section 1651(a) and its predecessors, a majority of the courts of appeal persist in considering mandamus petitions to review section 1404(a) orders, where, in their opinion, the circumstances so merit.³⁴ The difference of opinion among the courts is explained by the fact that although most courts apparently agree that the writ may issue where extraordinary circumstances exist,³⁵ there is disagreement as to what circumstances are really extraordinary.

At one extreme are the courts which consider the fact that appeal after final judgment will be inadequate to correct an erroneous transfer order to be sufficiently extraordinary to issue the writ.³⁶ Such courts, reviewing the order by mandamus, feel free to reconsider, weigh and balance the various factors that had originally been considered by the district judge in exercising his discretion. If the court, after its review of the record, came to the conclusion that in weighing and balancing the considerations prescribed by the statute the district judge erred, it would

³¹ *United States Alkali Export Association v. United States*, 325 U.S. 196, 202 (1945). See also *Panhandle Eastern Pipe Line Co. v. Thornton*, 267 F.2d 459, 461 (6th Cir. 1959), cert. denied, 361 U.S. 820 (1959), wherein the court commented on the fact that although the question of venue is different from the question of jurisdiction, where a district judge's ruling is sought to be reviewed by mandamus the issues involved are similar.

³² 319 U.S. at 30.

³³ *Accord*, *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010, 1012 (3rd Cir. 1952).

³⁴ See appendix *infra*.

³⁵ The Supreme Court has recognized that the writ will issue where extraordinary circumstances exist in, e.g., *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964); *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953); *DeBeers Consolidated Mines Ltd. v. United States*, 325 U.S. 212 (1945). In each of these cases extraordinary circumstances consisted of usurpation of power by the district judge and not mere error. See also the recent decision of *Will v. United States*, 88 S. Ct. 269 (1967).

³⁶ See, e.g., *Minnesota Mining & Mfg. Co. v. Platt*, 345 F.2d 681 (7th Cir. 1965).

not hesitate to issue the writ.³⁷ At the other extreme are those courts which would not review the district court's discretionary decision as long as the trial judge had based his decision on a consideration of the factors prescribed by the statute, and had acted within the proper confines of the power vested in the district court.³⁸

Most of the other decisions in this area seem to fall somewhere between these two extremes, calling situations extraordinary where there is a "clear abuse of discretion"³⁹ or "clear-cut error."⁴⁰ An unfortunate consequence is that many courts which do review the order, weighing and balancing the factors originally considered by the district judge, will then deny the writ concluding that extraordinary circumstances, justifying issuance, were not present. Yet delay, the very evil sought to be avoided, is still the result of such action.

Although the Supreme Court has not offered guidelines or passed upon the precise question of the extent, if any, to which a section 1404(a) order may be reviewed by a writ of mandamus,⁴¹ the Court has considered the closely analogous motion to transfer under 18 U.S.C. §21(b).⁴² When *Platt* was before the Supreme Court, it held that a court of appeals could not resort to the writ of mandamus to make a *de novo* review of the record, and could not, by a reweighing and balancing of the various factors prescribed by the statute, exercise the "function which the rule commits to the trial judge."⁴³ Such action, according to Judge Harlan, concurring in the *Platt* decision, would be contradictory to accepted principles of appellate procedure.⁴⁴

³⁷ *Id.*

³⁸ *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010 (3rd Cir. 1952). See also *In re Josephson*, 218 F.2d 174 (1st Cir. 1954) and *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439 (2d Cir. 1966) (Circuit Judge Friendly concurring).

³⁹ See appendix *infra*.

⁴⁰ See appendix *infra*.

⁴¹ The question of the propriety of mandamus to review section 1404(a) orders was before the Court in *VanDusen v. Barrack*, 376 U.S. 612 (1964); *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 244 (1964); and *Norwood v. Kirkpatrick*, 349 U.S. 29, 33 (1955). In each instance the Court left the question open for future resolution.

⁴² Section 21(b) provides that where it appears that an offense was committed in more than one district or division, and the court "is satisfied that in the interest of justice the proceeding should be transferred" to another such district or division than the one wherein it is filed, the court shall upon motion transfer the case.

⁴³ 376 U.S. at 244. See also *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1943), and the recent case of *Will v. United States*, 88 S. Ct. 269 (1967).

⁴⁴ 376 U.S. at 246. See also *Parr v. United States*, 351 U.S. 513, 520-21 (1956).

When the petition for mandamus in *Platt* came before the court of appeals for the second time, the court again made a *de novo* determination of the motion. This action by the majority, according to dissenting Chief Judge Hastings, was in conflict with the principles laid down when the case was before the Supreme Court, because in his opinion District Judge Platt had reconsidered the motion in the light of the proper criteria and had not abused his discretion.⁴⁵ As such, the action of the majority of the court of appeals in effect substituted their discretion for that of the district judge.

Judge Friendly, concurring in *A. Olinick & Sons v. Dempster Brothers, Inc.*,⁴⁶ interpreting the Supreme Court's decision in *Platt*, observed that when *Platt* was read in the light of the Court's earlier limitations on the scope of mandamus, the courts had no choice but to refuse to "listen to discussions whether a district judge made an error, clear-cut or otherwise, in deciding whether or not to transfer, but will entertain applications for mandamus as to transfer orders only when there is an issue of transferability or a substantial claim that the judge has refused to exercise or has usurped judicial power. . . ."⁴⁷ Likewise, the view taken by the Supreme Court in *DeBeers Consolidated Mines, Ltd. v. United States*⁴⁸ supports the above position that the power granted under section 1651(a) cannot be used to correct mere error.

It is submitted that once a district judge rules on a motion to transfer under section 1404(a), a court of appeals may not use the extraordinary writ of mandamus to review that order as long as the district judge, in granting or denying the motion, has considered all the criteria as set forth in the statute, and only that criteria. To implement this policy, courts of appeal, when petitioned for such a writ, should refuse to entertain such a petition or refuse to issue a rule to show cause directing the district judge to answer, unless the petition clearly alleges, with supporting affidavits, that the district judge has considered an improper factor, has refused to consider a proper factor or has refused to rule on the motion itself.

It is not difficult to understand the rationale of those courts of appeal which wish to retain the availability of the writ to correct an order that the court might feel should, in the interest of justice, be corrected immediately. This is evidenced by the

⁴⁵ *Minnesota Mining & Mfg. Co. v. Platt*, 345 F.2d 681, 688 (7th Cir. 1965).

⁴⁶ 365 F.2d 439, 445 (2d Cir. 1966).

⁴⁷ *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 447 (2d Cir. 1966). See also cases cited note 38 *supra*.

⁴⁸ 325 U.S. 212, 217 (1945).

many courts that will review an order by the writ and then deny its issuance. Yet if such review itself is not limited, any interlocutory order, alleged to be erroneous, might come to be reviewed in this manner; and, if a district judge is to wisely exercise the discretion with which he is vested, he must not be burdened by the fear that mandamus will be available to control the decisions in his courtroom every time one who loses on the motion believes the judge has erred. In other words, the use of the writ should not be improperly expanded to enable courts of appeal to accomplish a function that is not truly theirs.

It is interesting to note that even though the courts of appeal have been relatively free in granting review by the writ, in the majority of these cases the decision of the courts has been that the writ should not issue. The ultimate result is delay, while the probability that the writ will actually issue remains small. As stated by Judge Friendly:

When we turn from the conceptual to the practical, experience shows that entertaining applications for mandamus to review discretionary orders for transfer produces much harm and almost no good. In the fifteen years since this court first announced willingness to consider such applications, . . . we have never granted one. But even so dismal a record naturally does not prevent counsel from accepting our invitation, whether because in the heat of battle they have persuaded themselves of the merits of their cause, or because however slight their chance of success, they welcome the delay a mandamus petition will cause. Whatever the motivation, delay is the result . . .⁴⁹

The recent decision of *Will v. United States*,⁵⁰ wherein the Supreme Court harshly criticized the Court of Appeals of the Seventh Circuit for their improper use of the writ of mandamus, may have some deterrent effect upon the courts of appeal generally. Notwithstanding the Supreme Court's rebuke, no sudden reversal of trend should be anticipated. As was stated by Judge Friendly, concurring in *Olinick*, "[a]ppellate courts die hard in relinquishing powers stoutly asserted but never truly possessed; like generals, they prefer to fade away."⁵¹

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⁴⁹ *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 446 (2d Cir. 1966) (Judge Friendly concurring).

⁵⁰ 88 S. Ct. 269, 278 (1967), where the court stated, *inter alia*: Thus the most that can be claimed on this record is that petitioner may have erred in ruling on *matters within his jurisdiction*. . . . But 'the extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals.' . . . Mandamus, it must be remembered, does not 'run the gauntlet of reversible errors.' . . . Its office is not to 'control the decision of the trial court,' but rather *merely to confine the lower court to the sphere of its discretionary power*. [emphasis added] . . . Thus the record before us simply fails to demonstrate the necessity for the drastic remedy employed by the Court of Appeals.

⁵¹ 365 F.2d at 445.

APPENDIX

The cases cited below represent a sample of the various views among and within the circuits.

1st Circuit: In re Josephson, 218 F.2d 174 (1st Cir. 1954) (where the court would deny leave to file petition of mandamus except in "really extraordinary situations" which the court did not define).

2nd Circuit: Grossman v. Pearlman, 353 F.2d 284, 286 (2d Cir. 1965), *cert. denied*, 384 U.S. 987 (1966) (mandamus available to review such an order but it is necessary to show some extraordinary circumstances); *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439 (2d Cir. 1966) (review by mandamus available where there is a "clear cut abuse of discretion" but not to correct mere error); *Ford Motor Co. v. Ryan*, 182 F.2d 329 (2d Cir. 1950), *cert. denied*, 340 U.S. 851 (1950) (where on review by mandamus the court must accept "the district judge's guess unless it is too wild.")

3rd Circuit: All States Freight, Inc. v. Modarelli, 196 F.2d 1010 (3rd Cir. 1952) (see text); *Paramount Pictures, Inc. v. Rodney*, 186 F.2d 111 (3rd Cir. 1950), *cert. denied*, 340 U.S. 953 (1951) (mandamus appropriate to compel district judge to exercise discretion.)

4th Circuit: General Tire & Rubber Co. v. Watkins, 373 F.2d 361 (4th Cir. 1967), *cert. denied*, 386 U.S. 960 (1967) (writ issued where district court was shown to have abused its discretion); *Clayton v. Warlick*, 232 F.2d 699 (4th Cir. 1956) (mandamus available only where there is usurpation of power).

5th Circuit: Ex parte Chas. Pfizer & Co., 225 F.2d 720 (5th Cir. 1955) (where the court would not entertain petitions for mandamus unless the district court had failed to correctly construe and apply the statute, failed to consider relevant factors or unless it would be necessary to correct a clear abuse of discretion); *Atlantic Coast Line R.R. v. Davis*, 185 F.2d 766 (5th Cir. 1955) (where such review was granted without limitation on such review being determined by the court.)

6th Circuit: Goranson v. Kloeb, 308 F.2d 655 (6th Cir. 1962) (per curiam) (mandamus available to correct clear abuse of discretion); *Panhandle Eastern Pipe Line Co. v. Thornton*, 267 F.2d 459 (6th Cir. 1959), *cert. denied*, 361 U.S. 820 (1959) (mandamus available only where there is clear abuse of discretion or usurpation of power as to present the "really extraordinary cause"); *Lemon v. Druffel*, 253 F.2d 680, 685 (6th Cir. 1958), *cert. denied*, 358 U.S. 821 (1958) (mandamus only available where there is clear abuse of discretion or usurpation of power); *Nicol v. Koscinski*, 188 F.2d 537, 538 (6th Cir. 1951) (where the district judge's decision would not be set aside unless there was apparent an abuse of discretion).

7th Circuit: Chicago, R.I. & P. R.R. v. Igoe, 220 F.2d 299, 305 (7th Cir. 1955), *cert. denied*, 350 U.S. 822 (1955) (mandamus granted to compel transfer where denial was "so clearly erroneous that it amounted to an abuse of discretion"); *General Portland Cement Co. v. Perry*, 204 F.2d 316, 319 (7th Cir. 1953) (where the court would grant petition if the district judge's denial of the motion was so clearly erroneous as to amount to an abuse of discretion).

8th Circuit: McGraw Edison Co. v. Van Pelt, 350 F.2d 361 (8th Cir. 1965) (review available, with traditional restraint, where the district court's denial was arbitrary).

9th Circuit: Gulf Research & Development Co. v. Harrison, 185 F.2d 457, 459 (9th Cir. 1950), *aff'd* by an equally divided Court, 344 U.S. 861 (1952) (review available in extraordinary circumstances); *Shapiro v. Bonanza Hotel*, 185 F.2d 777, 779 (9th Cir. 1950) (mandamus available "... if it clearly appears that the district court was in error").

10th Circuit: Cessna v. Brown, 348 F.2d 689, 691 (10th Cir. 1965) (mandamus appropriate to test the validity of transfer).

D.C. Circuit: Wiren v. Laws, 194 F.2d 873, 874 (D.C. Cir. 1951), *cert. denied*, 346 U.S. 938 (1954) (mandamus available where "... the grounds for transferring the cause are insufficient to support the order and to bring it within the terms of the statute").