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Robert S. Berger

University at Buffalo School of Law

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THE MANDAMUS POWER OF THE UNITED STATES COURTS OF APPEALS: A COMPLEX AND CONFUSED MEANS OF APPELLATE CONTROL

ROBERT S. BERGER*

INTRODUCTION

According to the United States Court of Appeals for the Ninth Circuit “[o]ne of the most significant challenges presently facing the federal appellate courts centers on the use of their power to issue extraordinary writs under the venerable All Writs Statute, 28 U.S.C. § 1651.”¹ The primary extraordinary writ employed today is the writ of mandamus.² It functions as an interlocutory appellate device, but one that is said to be “extraordinary.”³ This Article will explore the the manner in which the federal courts of appeals use this appellate power as a part of the current system of appellate review in the federal courts.

The general rule of appealability in the federal courts, embodied in 28 U.S.C. § 1291,⁴ is that appellate review is only available after a final judgment in the district court. Immediate appellate review of interlocutory orders is normally not permitted. There are

* Associate Professor of Law, Faculty of Law and Jurisprudence, State University of New York at Buffalo; A.B. Kenyon College 1970; J.D., University of Chicago 1973. Research for this project was supported in part by a grant from the U.B. Foundation. I would like to thank Lee Albert, George Priest, and Jack Schlegel for their helpful comments on earlier drafts. I also wish to acknowledge the fine research assistance of Dennis Patterson and Matthew Modica.

1. *Bauman v. United States Dist. Court*, 557 F.2d 650, 653 (9th Cir. 1977).

2. The other writ occasionally employed is the writ of prohibition. Despite historical differences, the precise writ sought or granted is of no importance today. See *Ex Parte Simons*, 247 U.S. 231, 239-40 (1918); 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *FEDERAL PRACTICE AND PROCEDURE* § 3932 (1977) [hereinafter cited as 16 WRIGHT & MILLER]; Bell, *The Federal Courts and The All Writs Act*, 23 Sw. L.J. 858, 859 (1969).

3. *Ex Parte Fahey*, 332 U.S. 258, 260 (1947).

4. 28 U.S.C. § 1291 (1976) provides:

Final decisions of district courts. The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

various statutory and judicially created exceptions to this general principle, but most have limited application. Currently, the most viable judicially created exception is the collateral order doctrine. That doctrine, however, has been given a quite restrictive interpretation by the Supreme Court.⁵ 28 U.S.C. § 1292(a) also contains various specific exceptions.⁶

The statutory exception which is broadest in scope is 28 U.S.C. § 1292(b)⁷ which, like mandamus, provides a means for discretionary interlocutory appellate review. It allows an interlocutory appeal in a civil case if the district judge certifies that the order at issue "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. . .,"⁸ and the court of appeals, "in its discretion," permits the appeal. This provision for discretionary appeals is actually quite limited. It applies only to civil cases, not criminal ones. Its use is restricted to a small number of issues. More importantly, it requires the agreement of the district judge whom the party wishes to have reversed.⁹ "By providing trial courts with a veto over appeals, the certificate requirement has vastly reduced section 1292(b)'s potential effectiveness as a safety valve from the rigors of the final judgment rule."¹⁰

The mandamus power, on the other hand, is potentially a far broader means of obtaining interlocutory appellate review.¹¹ It ap-

5. The Court recently stated that for an order to fall within this exception it "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). In some respects, of course, the collateral order doctrine is similar to mandamus and an appeal pursuant to that doctrine may be sought instead of or in addition to a petition for mandamus. See 16 WRIGHT & MILLER, *supra* note 2.

6. The most important of these allows review only of "interlocutory orders. . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . ." 28 U.S.C. § 1292(a)(1) (1976).

7. 28 U.S.C. § 1292(b)(1976).

8. *Id.*

9. The district judge has virtually absolute authority to deny a § 1292(b) certificate. Mandamus to require the judge to certify an order under § 1292(b) is inappropriate. The *Plum Tree v. Stockment & Newcomer*, 488 F.2d 754, 755 n.1 (3d Cir. 1973).

10. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 108-09 (1975).

11. The basis of the power of the federal appellate courts to use the writ is the All Writs Act, 28 U.S.C. § 1651(a)(1976), which provides:

plies to both civil and criminal cases and does not require the acquiescence of the district judge. Rather, mandamus has traditionally been viewed as a proceeding directly against the judge, for it is the descendant of the common law prerogative writ developed in England in the seventeenth century. In its broadest sense it was an order that required "a public body or official . . . to perform a public duty."¹² It developed within the province of the Court of King's Bench and initially was used against local government officials. Numerous restrictions and requirements regarding the writ of mandamus grew out of its place in the complicated political and judicial structures of seventeenth century England.¹³ Unfortunately, some of these historical requirements are still attached to the current use of mandamus.¹⁴

The historical origin of the mandamus power of the federal courts of appeals is the same as that of the power of the federal courts embodied in 28 U.S.C. § 1361 to mandamus an executive officer to perform his duty. But in usage today the two perform quite different functions. Section 1361 is a means of reviewing administrative action and calls into play considerations surrounding the involvement of the judicial branch in the activities of the executive branch.¹⁵ Section 1651, on the other hand, encompasses only involvement of appellate judges with the actions of district judges.¹⁶ This Article addresses only the use of mandamus as an internal judicial control device.¹⁷

(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.

This Article will not dwell on the technical question of the power of the courts of appeals to use mandamus under this statute, for the existence of a broad power has been accepted by the Supreme Court. *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 24-25 (1943).

12. Jenks, *The Prerogative Writs in English Law*, 32 YALE L. J. 523, 530 (1923).

13. *See* E. HENDERSON, *FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW* 46-82 (1963).

14. *See infra* text accompanying notes 18-29.

15. *See* L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 178-79 (1965).

16. Mandamus is sometimes sought regarding action taken by judges in their administrative capacity. *See Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970), *reh'g denied*, 399 U.S. 74 (1970); *In re Berkan*, 648 F.2d 1386 (1st Cir. 1981); *Catoggia v. Mishler*, No. 77-3011 (2d Cir. May 12, 1977), *mandamus denied* by oral opinion, 559 F.2d 1202 (2d Cir. 1977) (denying petition of magistrate seeking to order district judges to let him complete his 8 year term of office).

17. This Article does not consider the full use of the mandamus power within the judicial system, as the use of mandamus to enforce a previously issued decision of the appellate court is not discussed. *See, e.g., Citibank v. Fullam*, 580 F.2d 82 (3d Cir. 1978).

As such a device, the writ of mandamus presents the conceptually complex problem of determining when it should be used. The writ exists for special instances in which the final judgment rule should not be followed. Formulating standards to delineate these special instances has proven to be a difficult task for courts. As the discussion in Part I will demonstrate, the extant Supreme Court cases utilize standards that have little independent meaning for determining whether the district court's order will be or should be reviewed before final judgment and ordered changed. Many of these standards were originally developed in contexts far different from the current use of mandamus as an internal judicial control device.

Much can be learned, however, from examining the way in which the federal courts of appeals are actually using their mandamus power. Part II contains such an examination drawing upon a review of the published mandamus opinions for approximately the last ten years from all the courts of appeals and the case files of all mandamus petitions filed in the U.S. Court of Appeals for the Second Circuit during a three-year period. Various types of issues that have been considered appropriate for mandamus review can be identified in the published opinions. Focusing solely on which petitions are granted in published opinions, however, gives a false picture of the full scope of the mandamus power as currently used. In the first place, the vast majority of petitions are summarily considered and decided without the issuance of a published opinion.¹⁸ The appellate control function is exercised in many of these cases even though the writ is rarely formally granted. Moreover, mandamus actually serves numerous functions in the appellate process that generally have not been differentiated or recognized. The failure to recognize the various roles played by mandamus is a major flaw in one circuit's attempt to formulate a comprehensive approach to the use of its mandamus power.

In Part III, this understanding of the full scope of the use of mandamus forms the basis for some suggestions regarding the appropriate use of the mandamus power. Recognizing the relevant as-

18. The published mandamus opinions appear to represent only about 5% of the total petitions filed. For the fiscal years 1971-80, 4,555 original petitions were begun, presumably almost all of these being mandamus petitions. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORTS OF THE DIRECTOR 1971 THROUGH 1980 (1980). During this time approximately 225-250 mandamus opinions were published.

pects of the appellate process as a whole and their relationship to the use of mandamus, an analytical framework for courts approaching mandamus cases is offered.

I. THE SUPREME COURT OPINIONS

The current sources of the "standards" for using mandamus petitions, and the basis for much of the confusion in this area, are the oft-quoted phrases from various Supreme Court opinions. The analysis of most courts usually begins, and sometimes ends, with a recitation of these quotations. These phrases have developed a life of their own independent of the facts of the cases that spawned them. The present use of the mandamus power cannot be understood without an appreciation of the origin of these general phrases, their present uses, and the results of this usage. We begin then with a discussion of the relevant Supreme Court cases. The analysis of these cases will generally emphasize the development of the rather meaningless "tests" that are thrown about by the Court. The discussion is divided into three sections. The first presents the tests that traditionally have been associated with mandamus. Next, some cases that are often viewed as authorizing a more expansive approach are considered. Finally, a few recent cases worthy of note are discussed.

A. "Traditional" Tests: The Quotable Language From Above

One of the primary sources for the "traditional" tests is *Roche v. Evaporated Milk Ass'n*.¹⁹ The question to be decided in *Roche* was "not whether the court below had power to grant the writ but whether in light of all the circumstances the case was an appropriate one for the exercise of that power."²⁰ The issue of appropriateness arose because of the established principle that "[t]he common

19. 319 U.S. 21 (1943). *Roche* came before the Supreme Court from the Ninth Circuit's issuance of a writ of mandamus requiring the district judge to reinstate pleas in abatement in a criminal antitrust case and to have the factual issues raised by the pleas tried by a jury. The basis of the pleas in abatement were that the grand jury which returned the indictment had not begun its investigation within the statutory time limits for its term. The issue addressed by the Court was whether the Ninth Circuit properly exercised its power to issue the writ.

20. *Id.* at 25-26. The Court's opinion noted the general agreement that the Ninth Circuit had the power to issue this writ pursuant to the All Writs Act, then 28 U.S.C. § 377 (1940). *Id.* at 24-25.

law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court."²¹ This statement that the issuance of the writ is in the discretion of the court of appeals is one of the oft-repeated phrases.²² The Court in *Roche* attempted to establish some parameters for the exercise of this discretion.

In determining what is appropriate we look to those principles which should guide judicial discretion in the use of an extraordinary remedy rather than to formal rules rigorously controlling judicial action. Considerations of importance to our answer here are that the trial court, in striking the pleas in abatement, acted within its jurisdiction as a district court; that no action or omission on its part has thwarted or tends to thwart appellate review of the ruling; and that while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute.²³

The first of these "considerations of importance," the concept of jurisdiction, is one of the most often repeated "tests" for the issuance of mandamus.

The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.²⁴

It is simply accepted, apparently as a matter of historical limitation, that the scope of the mandamus power is tied to the issue of whether the contested action of the district court can be deemed to be outside of its jurisdiction. Whether this is or should be true today is an issue that needs to be examined, even though the Supreme Court has not done so in recent times. This is particularly so because the term "jurisdiction" as used in mandamus cases often bears little resemblance to traditional notions of either territorial or subject matter jurisdiction. As the Court has said more recently, "the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction'."²⁵ Certainly it is true that not every decision of a district court relating to its jurisdiction will automatically be appropriate for review by use of a

21. *Id.* at 25.

22. This concept of discretion in the court of appeals should not be confused with the fact that many of the decisions of the district court that are the subject of mandamus petitions are viewed as resting within the discretion of the district judge.

23. 319 U.S. at 26.

24. *Id.*

25. *Will v. United States*, 389 U.S. 90, 95 (1967).

writ of mandamus. As the Court in *Roche* stated, "appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal."²⁶ Thus, whatever reason may justify using mandamus when the district court has exceeded its jurisdiction does not require its use.

Roche itself contains a good example of the looseness of the term jurisdiction as employed in the mandamus context. In discussing cases cited by petitioner which held that mandamus was available to ensure a party's right to trial by jury, the Court distinguished some of these cases by stating that they were based on ordering a district court "to relinquish a jurisdiction it could not lawfully exercise."²⁷ The oldest of these cases discussed by the Court, *Ex Parte Simons*, did state that the order of the district court "may be regarded as having repudiated jurisdiction of the first count" so that mandamus was appropriate.²⁸ What actually had occurred in *Simons*, however, was that the district court had ordered that the first cause of action in plaintiff's complaint, brought as an action at law, be transferred and docketed as an equity cause, thereby removing the right to a trial by jury on that claim. The Supreme Court, to whom the petition was directly addressed, determined that there was a proper cause of action at common law and stated:

If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake.²⁹

Thus, the Court in *Simons* actually determined that the final judgment rule should not apply in the case of deprivation of a jury trial and proceeded to justify its decision in terms of the "jurisdiction" analysis.

Interestingly, more recent jury trial mandamus cases now treat this issue as simply a "special circumstance"³⁰ for which manda-

26. 319 U.S. at 26.

27. *Id.* at 32.

28. 247 U.S. 231, 240 (1917).

29. *Id.* at 239.

30. This concept of "special circumstances" justifying the use of mandamus is explicitly recognized in Supreme Court opinions. In *Roche*, for example, the Court noted that the case

mus is appropriate. Thus, in *Beacon Theatres, Inc. v. Westover*, the Court stated only that "we think the right to grant mandamus to require jury trial where it has been improperly denied is settled,"³¹ citing in a footnote various cases including *Ex Parte Simons*. The Court did not even discuss the concept of "jurisdiction."³² The district court simply was found to have made an error that was correctable by mandamus. Still, why mandamus should be available to correct this type of error remains a question.

Even though the Court has obliterated the currently accepted meaning of "jurisdiction" as used in the mandamus context, this "test" is still widely used. But the Court has also provided other terms to use in determining when the district court has acted in a manner justifying the invocation of the writ of mandamus. One of these phrases, "abuse of judicial power," was presented in *Roche*. "Its decision, even if erroneous—a question on which we do not pass—involved no abuse of judicial power"³³ What constitutes an "abuse of judicial power" is now one of the questions for courts to consider. We know that a lower court can err without abusing its power, but at what point does its error constitute an abuse? More importantly, why should this question be asked? Nor is this the only additional "test" that is used. In *DeBeers Mines v. United States*,³⁴ rather than referring to an "abuse of judicial power," the Court contrasts mere error with "usurpation of power." The phrase "usurpation of power" has become one of the most repeated tests invoked by courts faced with mandamus petitions. It is illuminating to discuss the context in which it was created, because it illustrates the difficulties connected with the phrase.

DeBeers was actually a petition for certiorari directly to the

did not involve the "special circumstances which would justify the issuance of the writ" that had been present in certain other cases. 319 U.S. at 31. The Court mentioned the persistent disregard of the Rules of Civil Procedure, the refusal to perform a plain ministerial duty, and considerations of comity between state and federal courts as "special circumstances."

31. 359 U.S. 500, 511 (1959).

32. *Beacon Theatres* concerned only a determination by the district judge to try the equitable claims of the complaint to the court before a jury determination of the charges of antitrust violations set forth in the counterclaim and cross-claim. While this determination may well have frustrated the right to a jury trial on all issues because of collateral estoppel effects from the non-jury trial, in no meaningful sense had the district court failed to exercise its jurisdiction or exceeded its jurisdiction.

33. 319 U.S. at 27.

34. 325 U.S. 212, 217 (1945).

Supreme Court, under the All Writs Act, challenging the issuance of a preliminary injunction on behalf of the United States.³⁵ The petition was addressed to the Supreme Court directly because the Expediting Act of February 11, 1903³⁶ then provided that appeals from equity suits under the Anti-Trust Act in which the United States was the complainant should be taken directly to the Supreme Court. But, as pointed out by the dissent, this section had been interpreted to prevent an appeal to any court from an interlocutory decree.³⁷ The Court had to address the question of how it could entertain this petition without violating Congress' ban on interlocutory review in these cases. Its answer was that, although mere error could not be corrected on interlocutory review, the All Writs Act could be invoked "when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power."³⁸

The Court proceeded to hold that the district court's preliminary injunction was not authorized by statute and did not fall within traditional equity powers, thereby constituting a usurpation of power. The Court did not say that the district court was without jurisdiction to enter this order. Instead it said that the lower court was without power or authority to do so. But what is meant by the terms power or authority when they are not associated with either the concepts of error or jurisdiction? This basic point was raised by Justice Douglas in his dissent in *DeBeers*, "In other words, we look to the merits and take the case under § 262 [the All Writs Act] if it appears that the District Court exceeded its authority. But it always exceeds its authority when it abuses its discretion."³⁹ The question has still not received a satisfactory discussion although the "usurpation of power" language continues to be employed.⁴⁰

35. The underlying actions were suits by the United States for equitable relief based on alleged antitrust violations. The government contended that, because the defendants were foreign corporations, any decree ultimately entered by the court could only be enforced by sequestration of property and therefore the defendants must be restrained from selling or disposing of their property in the United States.

36. 15 U.S.C. § 29 (1976).

37. 325 U.S. at 223-24.

38. *Id.* at 217.

39. *Id.* at 225.

40. In regard to *De Beers* itself, we can identify other reasons why the Court thought interlocutory review appropriate. As the Court indicated, because this preliminary relief would have occurred "no decision of the suit on the merits can redress any injury done by

Additional tests connected with the "traditional" view of the mandamus power were contributed by *Bankers Life & Casualty Co. v. Holland*.⁴¹ In reviewing the Fifth Circuit's denial of mandamus regarding a severance and transfer of venue order under 28 U.S.C. § 1406(a), the Court used the "usurpation of judicial power" language, but added as an alternative the phrase "clear abuse of discretion." This phrase lives on today.⁴² One might imagine that a "clear abuse of discretion" should be an easier standard to meet than "abuse of judicial power" or "usurpation of power," but all three appear to be used interchangeably, or more commonly in pairs or as a triumvirate, to convey the same message. As one might guess at this juncture, little illumination exists as to what makes an ordinary abuse of discretion a "clear" one. Is it that it is clear to any casual observer, *i.e.*, immediately obvious, that the action was an abuse of discretion? Or is it that upon study the action is seen to be so wrong that there is virtually no doubt that it is an abuse of discretion?

Bankers Life contains an additional traditional standard, one which has attained particular importance recently.⁴³ Interestingly, it is phrased in terms of the burden placed upon the petitioner: "We note additionally that the petitioner has not met the burden of showing that its right to issuance of the writ is 'clear and indisputable'."⁴⁴ Whether there is any independent content to this concept of a burden of persuasion in a situation in which the substantive standard requires a determination that the abuse of discretion be "clear" is dubious. How one establishes a clear and indisputable right to relief that is said to be discretionary with the appellate court is also open to serious question. There is the further issue of whether one ever can meet this standard if the underlying ruling is viewed as being within the discretion of the district court. This issue has recently been considered by the Supreme Court and will

the order." *Id.* at 217. This is true of interlocutory injunctive relief in general and forms the policy basis for the general exception to interlocutory relief contained in 28 U.S.C. § 1292(a)(1). What lives on, however, are not these implicit policy considerations, but the usurpation of power language. *See, e.g.*, *United States v. West*, 672 F.2d 796, 799 (10th Cir. 1982); *In re Sessions*, 672 F.2d 564, 566 (5th Cir. 1982).

41. 346 U.S. 379, 383 (1953).

42. *See* cases cited *supra* note 40.

43. *See Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978), and *Allied Chemicals Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980), discussed *infra* at text accompanying notes 93-111.

44. 346 U.S. at 384.

receive attention later herein.⁴⁵

It is important to note at this point that the origin of the "clear and indisputable right" language belies its current use. *Bankers Life* cites *United States v. Duell*,⁴⁶ as the authority for the proposition. Indeed, *Duell* does contain the phrase "clear and indisputable," but the context is quite different. In *Duell* the Supreme Court was reviewing the refusal of the lower courts to issue a writ of mandamus against an administrative officer, the Commissioner of the Patent Office. Thus, the actual language of the Court is, "the writ of mandamus will not ordinarily be granted . . . unless the duty sought to be enforced is clear and indisputable . . ."⁴⁷ The reference was to the duty of the administrative official. Yet, the Court in *Bankers Life* simply transfers this test to the context of mandamus within the judicial system without even discussing the differences between mandamus as an internal judicial control and mandamus as employed by the judicial branch against an officer of the administrative branch. The mere fact that the historical origins of both types of mandamus are the same hardly seems sufficient to justify incorporating this standard without consideration of the current role each plays.

Despite their amorphous nature, these traditional "tests" do communicate a sense that the mandamus power is to be used sparingly and only in special circumstances. Little guidance is given by the Court on the crucial question of when these special circumstances can be said to exist. But the extraordinary nature of the procedure is well established and accepted.

The policy bases for so treating the mandamus power have been addressed by the Court. In *Roche*, the remaining "considerations of importance" discussed by the Court, whether appellate review would be thwarted and whether mandamus would simply be used as a substitute for the statutory procedure for appeals, recognize these underlying policies as embodied in the final judgment rule. Thus, *Roche* supported the view that mandamus was not available to review a merely erroneous decision of the district court by noting that "any error which it may have committed is reviewable by the circuit court of appeals upon appeal appropriately

45. See *infra* text accompanying notes 93-111.

46. 172 U.S. 576, 582 (1899).

47. *Id.* at 582.

taken from a final judgment"⁴⁸ The petitioners argued that without review by mandamus they would have had to undergo the cost and inconvenience of a trial of possibly several months duration which ultimately might have been unnecessary. The Court's answer, not surprisingly, was that Congress had dictated that review could be had only from final judgments and the Court could not evade that requirement. If the inconvenience had resulted from an abuse of judicial power or a failure to exercise it, however, then mandamus would be appropriate. Why the final judgment rule would not be improperly violated in such instances is not explained.

The other policy basis normally cited for the reluctance to employ the mandamus power also stems from a difference between mandamus and an ordinary appeal. It is grounded not on the interlocutory nature of the writ, but on the particular procedure traditionally employed wherein the district judge is technically the named respondent. Thus, as stated in *Ex Parte Fahey*,⁴⁹ mandamus petitions are drastic remedies that should not be used as a substitute for appeal because "they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him." As will be discussed later,⁵⁰ the continued validity of this policy rationale must be questioned, despite its repetition, in view of the reality of the use of the device, the provisions of the Federal Rules of Appellate Procedure and numerous circuits' attempts to address this problem in their circuit rules.

B. *Supervisory and Advisory Mandamus: A More Expansive Attitude*

Two cases have been viewed as greatly expanding the scope of mandamus by allowing its use for supervisory and advisory purposes.⁵¹ In the first of these cases, *LaBuy v. Howes Leather Co.*,⁵² the district judge had issued orders referring antitrust cases pending before him to a master for trial. The Seventh Circuit granted the requested writs of mandamus and ordered the district judge to

48. 319 U.S. at 27.

49. 332 U.S. 258, 260 (1947).

50. See *infra* text accompanying notes 228-33.

51. See 16 WRIGHT & MILLER, *supra* note 2, at § 3934.

52. 352 U.S. 249 (1957).

vacate these orders. The Seventh Circuit had indicated in a number of previous opinions that the district courts were interpreting too loosely the provisions of Federal Rules of Civil Procedure (FRCP) Rule 53(b) allowing reference to a master although there apparently had never been a formal reversal on this ground. Relying heavily on the fact that the Seventh Circuit had given numerous warnings to the district court that had been ignored, the Supreme Court upheld the use of the mandamus power, stating: "We believe that *supervisory control* of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here."⁵³

The use of the phrase "supervisory control" is said to have created a supervisory mandamus power that greatly expanded the scope of mandamus.⁵⁴ Certainly the term was, and still is, employed by the courts of appeals.⁵⁵ But what is encompassed within the concept of "supervisory?" To some degree all review by an appellate court amounts to an exercise of its supervisory power. *LaBuy* cannot and has not been read that broadly. Still it can be seen as supporting the positions that the mandamus power need not be used as sparingly as the "traditional" tests seem to indicate and that there is a broader spectrum of special circumstances for which it may be employed.⁵⁶

But is *LaBuy* as great a departure from the earlier "traditional" cases as has been suggested? The Court in *LaBuy* did find

53. *Id.* at 259-60 (emphasis added).

54. See, e.g., Note, *Mandamus as a Means of Federal Interlocutory Review*, 38 OHIO ST. L. J. 301, 312 (1977); Redish, *supra* note 10, at 114.

55. See, e.g., *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C. Cir. 1975).

56. *LaBuy* itself provides an exceptional circumstance, according to the Court, because the district court abused the Federal Rules of Civil Procedure. The supervisory test is often linked to the particular circumstances in *LaBuy* and the involvement of the Federal Rules. See *Will v. United States*, 389 U.S. 90, 104 n.14 (1967). The argument regarding the Federal Rules as extraordinary circumstances reasons that they are promulgated by the Supreme Court, so their proper administration is peculiarly within the realm of the courts. It is not immediately obvious why the means to ensure correct application of the Rules should be writs of mandamus whereas other substantive or even procedural requirements (the Court specifically distinguishes the venue statute, 352 U.S. at 257) can be adequately enforced by appeal after final judgment. Also, the existence of any special power in the courts of appeals to enforce rules promulgated by the Supreme Court is dubious.

that the district court's order "was a clear abuse of discretion."⁵⁷ Moreover, the district court's action could have been categorized as improperly refusing to exercise its jurisdiction. And, as previously indicated,⁵⁸ "special circumstances" cases already existed and special circumstances had been found to exist here.⁵⁹ Thus the case does not seem to have required a substantial departure from many of the "tests" the Court had previously used.

Still, the case does represent a less restrictive attitude toward the use of the mandamus power. Mandamus was allowed even though an appeal after final judgment was available.⁶⁰ The Supreme Court implicitly recognized the severe limitations of an ordinary appeal in providing an effective check on judicial action in these circumstances. The Seventh Circuit had never actually reversed a case for improper reference to a master despite its admonitions, and it is doubtful that it could have reversed this case after the trial before the master on the basis that the improper reference prejudiced the losing party.⁶¹ Thus, this case represents a situation, explained in more detail later,⁶² in which the interplay of the final judgment rule and the harmless error doctrine created a circumstance in which the only effective review that could be had would be at an interlocutory stage.

The other major case associated with this claimed period of expansion of the mandamus power is *Schlagenhauf v. Holder*.⁶³ Although often linked with *LaBuy*, *Schlagenhauf* presented a quite different procedural context from that which precipitated the "supervisory" mandamus in *LaBuy*. Whereas *LaBuy* concerned an issue upon which the district courts had been given much guidance which they had ignored, *Schlagenhauf* involved an issue of first impression.

Schlagenhauf presented the issue of the propriety of ordering a physical and mental examination of a defendant pursuant to

57. 352 U.S. at 257.

58. See *supra* note 30.

59. See *supra* note 56.

60. The dissenters indicated that appellate review would be possible, 352 U.S. at 261-62, and the majority did not speak of the futility of appeal, as was done in *DeBeers*.

61. Professor Carrington suggests that neither party could establish prejudice. Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507, 512 (1969).

62. See *infra* text accompanying notes 250-55.

63. 379 U.S. 104 (1964).

FRCP Rule 35 as one of first impression,⁶⁴ and thus the petition presented "a substantial allegation of usurpation of power in ordering any examination of a defendant."⁶⁵ The Supreme Court held that mandamus was available to review the order, including the issue of whether the "good cause" requirement of the rule had been met, in order "to avoid piecemeal litigation and to settle new and important problems."⁶⁶ The Court was careful to note that its consideration of the issue of whether "good cause" existed for ordering an examination was premised on the fact that this was an issue of first impression and therefore its opinion should not be construed to mean that all decisions by district courts on Rule 35 motions can be reviewed by mandamus.⁶⁷ Here the power was being used to set guidelines for a previously unaddressed issue. This aspect has been seized upon to suggest that the Court had created an "advisory" mandamus power to complement its authorization of a "supervisory power."⁶⁸

One fairly influential student Note has suggested that there is an advisory mandamus power, but its source should be seen as *LaBuy*.⁶⁹ This Note contends that supervisory or advisory mandamus would be used when "there is a likelihood of recurring error which will be forestalled by immediately confronting the challenged order."⁷⁰ This could occur either in the *LaBuy* context or

64. In *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), the Court had recognized the propriety of Rule 35 as applied to the physical examination of a plaintiff.

65. 379 U.S. at 111.

66. *Id.*

67. A party could obtain appellate review by refusing to comply with the order and suffering the entry of an adverse final judgment, from which an appeal could be taken. See *infra* text accompanying notes 266-67. It is interesting to note, however, that the Court specifically mentions that mandamus would be an appropriate remedy even when the sole issue is the district court's determination of the "good cause" requirement, if the determination were "a clear abuse of discretion." 379 U.S. at 111. One might speculate on the possible relationship between "a clear abuse of discretion" and a matter being one of first impression. Is it likely that a decision may constitute a clear abuse if there is no prior appellate guidance on the issue? Or is it more likely that an abuse is a clear one only if the district court has acted contrary to a previous appellate court interpretation? Indeed, is there any relationship at all between the "first impression" and "clear abuse" concepts? See *Bauman v. United States Dist. Court*, 557 F.2d 650, 660 (9th Cir. 1977).

68. See, e.g., *Nat'l Right to Work Legal Defense & Educ. Found. v. Richey*, 510 F.2d 1239, 1243 (D.C. Cir. 1975), *cert. denied*, 422 U.S. 1008 (1975).

69. Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973). This Note is frequently cited by courts. See, e.g., *Gasch*, 509 F.2d at 524 n.20; *United States Bd. of Parole v. Merhige*, 487 F.2d 25, 30 n.3 (4th Cir. 1973).

70. See Note, *supra* note 69, at 611.

where there were "novel and important questions" which "like the recurrence of a past error, may be viewed as a factor upon which a court of appeals may decide that there exists a likelihood a significant error will be recurrently made in the future unless it reviews a question by petition for mandamus."⁷¹ The emphasis is on the uniformity function of an appellate court. Mandamus would be used to decide issues that are new and important (in the sense of having broad effect) in order to speed up this important appellate function and thus prevent the errors that would occur if the normal appellate process were employed. The degree of error of the district court would be irrelevant.⁷² Moreover, this view does not appear to be dependent on a finding that an appeal after final judgment would be inadequate. It may be so, but need not be, unless inadequacy is defined to include the occurrence of similar errors during the additional time it takes to decide the question on appeal. It is this additional time and its effect on "the functioning of the judicial system" that supports this use of mandamus as an additional exception to the final judgment rule, despite the existence of the statutory procedure for interlocutory appeal of a "controlling question of law as to which there is substantial ground for difference of opinion."⁷³ But should this factor be sufficient by itself? Would the costs of multiple appeals in a case and frequent appellate determination of the novelty and importance of questions be outweighed solely by the benefits of fewer errors by other district courts during the time between a decision on a mandamus petition and a decision on appeal after final judgment? Certainly many courts have seized upon this factor as an important one.⁷⁴ Yet, the significance of the existence of a new and important question needs further refinement.⁷⁵

One more important Supreme Court opinion, *Will v. United States*,⁷⁶ should be included at this point, because it has been viewed as restricting the role of supervisory or advisory mandamus,⁷⁷ even though it is not much newer than *Schlagenhauf*. In

71. *Id.* at 611-12 (footnotes omitted).

72. *Id.* at 611.

73. *See id.* at 618 n.96, and 28 U.S.C. § 1292(b) (1976).

74. *See, e.g., Gasch*, 509 F.2d at 524; *United States v. United States Dist. Court*, 444 F.2d 651, 656 (6th Cir. 1971).

75. *See infra* text accompanying notes 282-85.

76. 389 U.S. 90 (1967).

77. "*Will v. United States* thus appears to rechart the area of the availability of man-

Will, a petition was filed by the government challenging the district court's order requiring it to answer a bill of particulars seeking the names of individuals who heard certain oral statements of the defendant in a criminal case. The Seventh Circuit granted the writ. The government attempted to present the petition as simply an application of *LaBuy*, albeit in the context of a criminal case. Its contention was that Judge Will had adopted a uniform rule regarding discovery in all criminal cases that was inconsistent with Federal Rules of Criminal Procedure Rule 7. The Supreme Court refused to accept this argument, but mainly on the ground that no record of a consistent disregard of the Rules had been established as was done in *LaBuy*. In a footnote the Court claimed to "have no quarrel with *LaBuy*, which is simply inapposite where there is no showing of a persistent disregard of the federal rules."⁷⁸ That same footnote stated that although *Schlagenhauf* had noted the presence of "new and substantial" questions, "it rested the existence of mandamus jurisdiction squarely on the fact that there was real doubt whether the District Court had any power at all to order a defendant to submit to a physical examination."⁷⁹ This does seem to be a warning against assuming the existence of a broad supervisory or advisory mandamus power. Whether or not it constitutes a restriction on *LaBuy* itself, *Will* certainly constitutes a refusal to extend *LaBuy*.

More important to the influence of the *Will* opinion as a whole is that it refused to extend *LaBuy* into the area of criminal cases. The opinion is quite significant for its discussion of the "additional considerations which flow from the fact that the underlying proceeding is a criminal prosecution."⁸⁰ The Court noted that the "policy against piecemeal appeals takes on added weight in criminal cases, where the defendant is entitled to a speedy resolution of the charges against him."⁸¹ The Court then discussed the heart of the mandamus issue in criminal cases, the extremely limited right of the government to appeal. This factor can, of course, cut both ways. In many situations in criminal cases no appellate review will

damus along quite restrictive lines." 9 J. MOORE & B. WARD, MOORE'S FEDERAL PRACTICE § 110.28 (2d ed. 1980).

78. 389 U.S. at 104, n.14.

79. *Id.* at 105 n.14.

80. *Id.* at 96.

81. *Id.*

occur for the prosecution's allegations of error except by means of mandamus. The Court in *Will* rejected this argument as supporting mandamus in the context of that case. Instead, it focused on the fact that allowing mandamus can undermine the policies against government appeals, which in turn are grounded, at least in part, on the concerns supporting the double jeopardy prohibition.⁸²

One more aspect of *Will* needs to be discussed. Although not explicitly seized upon by the courts of appeals or commentators,⁸³ it is perhaps the most crucial aspect in terms of understanding the use of the mandamus power by the courts of appeals. The Court stated that both parties had presented substantial arguments on the propriety of the district court's order, yet claimed that it need not address those arguments because it found the case inappropriate for issuance of the writ.⁸⁴ It is the manner by which the Court determined the appropriateness of using mandamus which is crucial. Admittedly, it did look to the "tests" and mentioned the special concerns of a criminal case as discussed above. In order to apply these general principles, however, including those of *LaBuy*, the Court did indeed address the substantive merits of the order. For several pages the Court considered, but did not finally resolve, the issue of the propriety of the order. It considered it in terms of deciding whether there was a "willful disobedience of the rules."⁸⁵ It might as well have been considering whether there was a "usurpation of power." Thus, in order to determine the issue of whether mandamus was appropriate, the Court undertook an extensive analysis of the propriety of the underlying order. The only reason it could say that it did not "reach the question," is because it decided that the most that might be said is that the district court erred. The Court, though, utilized partial review of the merits as the approach for deciding whether the use of mandamus is proper.

C. *Recent Cases: Some New Twists*

Although not formally creating new "tests," a few recent cases

82. A full discussion of these concerns is beyond the scope of this Article. See *Arizona v. Manypenny*, 451 U.S. 232 (1981); *United States v. DiFrancesco*, 449 U.S. 117 (1980).

83. *But see* 16 WRIGHT & MILLER, *supra* note 2, at § 3934.

84. 389 U.S. at 95.

85. *Id.* at 100.

are significant and should be mentioned. *Kerr v. United States*⁸⁶ continued and perhaps expanded the mode of analysis dependent on reviewing the merits of the order at issue just discussed in regard to *Will*. In *Kerr* the Ninth Circuit had refused to issue writs of mandamus to order the district court to vacate two discovery orders requiring the defendant California Adult Authority to produce the personnel files of its members and employees, and the correctional files of a sample of prisoners in custody. A protective order limiting the number of people who could view the documents had also been issued. The petitions for writs of mandamus were grounded on the claim that these files were irrelevant and privileged. The Ninth Circuit denied the petitions, finding that relevancy is quite broad on discovery and that petitioners were only entitled to a qualified governmental privilege that they had not properly claimed.

The Supreme Court began its analysis, in a unanimous opinion, by repeating the language that mandamus is a drastic remedy to be used in extraordinary circumstances amounting to a judicial usurpation of power.⁸⁷ The Court viewed the "traditional tests" as means of determining the appropriate extraordinary circumstances,⁸⁸ but did not discuss whether this type of privilege claim was an appropriate "extraordinary circumstance" justifying interlocutory appellate consideration by mandamus. Instead, the Court's analysis at this point was addressed to the claimed privilege and the procedure to be followed in the district court. The Supreme Court interpreted the Ninth Circuit's opinion as allowing the petitioners to assert the privilege in the district court and seek *in camera* review, thus providing the petitioners with effective relief even though the writ of mandamus had been denied. More than simply a discussion of alternative means of review was involved; the Court explicitly approached this problem of what review of the merits had taken place. The question upon which the petitioner wanted appellate review was whether a privilege could be claimed. The existence of this privilege was confirmed, although it was deemed only to apply pursuant to certain procedures which had not yet been invoked. The need for some sort of qualified priv-

86. 426 U.S. 394 (1976).

87. *Id.* at 402.

88. *Id.* at 403.

ilege was explicitly discussed by the Court.⁸⁹ The Court affirmed the refusal to *issue* the writs because the opinions (the Ninth Circuit's and its own) already told the district court what to do. Thus, the Court left the formal issuance of the writ as extraordinary, but not review of the order by way of mandamus. "Kerr v. United States District Court . . . illustrates how the effect of appellate review by extraordinary writ can be virtually achieved even when the writ is denied."⁹⁰

Despite the recognition of the use of mandamus for *de facto* review of an order indicated by the preceding quote, this same source suggests that *Kerr* has had a chilling effect on the use of extraordinary writs.⁹¹ Admittedly *Kerr* quoted the usual restrictive language and affirmed a denial of the writ. But it is not certain that the Court would have reversed had the Ninth Circuit exercised its discretion (the existence of which was specifically noted by the Court)⁹² and granted the writ. More importantly, the Court said nothing about the impropriety of *addressing* this issue on the basis of a mandamus petition. The opinion might be read to limit the actual use of the writ as a remedy, but it also can be read to expand the scope of review by way of mandamus, and that is really the far more important variable in practical terms for most cases.

A more recent case might represent a serious limitation on the use of the mandamus power. In *Will v. Calvert Fire Insurance Co.*,⁹³ the Supreme Court again was reviewing a Seventh Circuit decision on mandamus. The Seventh Circuit had granted a petition requiring the district court "to proceed immediately with Calvert's claim for damages and equitable relief under the Securities Exchange Act of 1934."⁹⁴ The trial court had stayed the federal proceedings pending the outcome of a proceeding in the Illinois state courts between the parties.

In a plurality opinion,⁹⁵ Justice Rehnquist addressed the ques-

89. *Id.* at 405.

90. D. LOUISELL & G. HAZARD, PLEADING AND PROCEDURE 1082 (4th ed. 1979).

91. *Id.* at 1083.

92. 426 U.S. at 403.

93. 437 U.S. 655 (1978).

94. *Id.* at 660.

95. Justices Stewart, White, and Stevens joined this opinion. Justice Blackmun concurred on the separate ground that issuance of the writ was premature because the matter should have been remanded to the district judge by the court of appeals for reconsideration in light of an intervening Supreme Court opinion. *Id.* at 667-68.

tion of the propriety of using mandamus in this instance. Justice Rehnquist began by noting that "a simple showing of error" sufficient for reversal on direct appeal was not sufficient for issuance of a writ of mandamus.⁹⁶ The opinion then quoted *Roche's* statement that the traditional use of mandamus is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."⁹⁷ In this case it was argued that the district court had refused to so exercise its jurisdiction. The opinion addressed this argument from the perspective (now termed "essential") of whether the petitioner had met its "burden of showing that its right to issuance of the writ is 'clear and indisputable'."⁹⁸

It is Justice Rehnquist's discussion of the "clear and indisputable" standard that gives this opinion its significance for limiting the use of the mandamus power. The opinion noted that the decision of the district court on whether to stay the proceedings was deemed to be "largely committed to the discretion of the district court."⁹⁹ Then followed the crucial statement: "Where a matter is committed to the discretion of a district court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable'."¹⁰⁰ Thus, no matter deemed to be within the district court's discretion could ever be the basis for issuance of a writ of mandamus.¹⁰¹ The opinion confirmed this view by adding a footnote which stated that although the Court did once approve of the issuance of the writ "upon a mere showing of abuse of discretion, *LaBuy v. Howes Leather Co.*, we warned soon thereafter [in *Will v. United States*] against the dangers of such a practice."¹⁰²

In the same footnote, the opinion distinguished *Beacon Theatres* and the agreement by all the Justices in that case that manda-

96. *Id.* at 661.

97. *Id.*

98. *Id.* at 662 (quoting *Banker's Life*, 346 U.S. at 384, quoting *Duell*, 172 U.S. at 582).

99. *Id.* at 664. Use of the phrase "largely committed" possibly allows for finding some stay orders not to be an exercise of discretion. See *infra* text accompanying notes 109-11.

100. *Id.* at 665-66.

101. *But see* *First Jersey Securities, Inc. v. Beyen*, 605 F.2d. 690 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1979). In *Beyen*, the Court of Appeals for the Third Circuit found that the right to mandamus can be "clear and indisputable" where the district judge only has discretion which is "closely restricted by well-defined legal principles," as in the case of deciding whether administrative remedies have been exhausted. *Id.* at 701.

102. 437 U.S. at 665 n.7 (citations omitted). Justice Rehnquist failed to indicate that the word "clear" had modified "abuse of discretion" in *LaBuy*.

mus should issue to protect the right to a jury trial. The distinction was that in *Beacon Theatres* it was "not permissible" to postpone the jury trial whereas here it was "permissible for a district court to defer to the concurrent jurisdiction of a state court."¹⁰³ That apparently means that in *Beacon Theatres* the district court's action was "not permissible" because the district court did not have any discretion on the matter, whereas in *Calvert* the district court did have discretion so that no matter how badly it abused that discretion its action was still "permissible." But the district court's decision can be termed "permissible" only in the sense that it is unreviewable and therefore will not be reversed.¹⁰⁴ For certainly there are cases in which the trial court can decide that there is no right to a jury trial. *Beacon Theatres* was not such a case. Similarly there are situations in which a trial court "cannot" stay proceedings pending the outcome of state court litigation, despite the leeway it is given. These are situations in which there has been an abuse of discretion. The existence of this discretion does not remove the ability of one to criticize its exercise as an abuse even if there is no means of challenging it.¹⁰⁵ Permissibility as used in *Calvert* actually encompasses nothing more than finality.¹⁰⁶ But the finality results from the lack of effective appellate review by means of mandamus. So it is simply circular reasoning to say that mandamus was not available because the decision was permissible. The decision was necessarily permissible only because mandamus was not available.

The faulty reasoning in *Calvert* was adopted there only by a plurality of the Court and thus is of questionable significance as authority, as at least one court of appeals has noted.¹⁰⁷ But the crucial statement regarding the unavailability of mandamus for discretionary actions has recently been used by a majority of the

103. *Id.* at 666 n.7.

104. The plurality opinion, in effect, is using the term "discretion" in this context in what Dworkin has termed the second weak sense of that word, i.e., "final authority" that "cannot be reviewed and reversed by any other official." See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 32 (1977).

105. *See id.* at 33.

106. Justice Jackson commented about the Supreme Court: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1952) (Jackson, J., concurring).

107. *In re Attorney Gen. of the United States*, 596 F.2d 58, 63 (2d Cir. 1979).

Court in *Allied Chemicals Corp. v. Daiflon, Inc.*,¹⁰⁸ a *per curiam* opinion that, without the benefit of oral argument, summarily reversed an issuance of mandamus.

In *Allied Chemicals* the Tenth Circuit had issued a writ of mandamus preventing the district court from proceeding with the liability portion of the new trial that it had granted. The Supreme Court repeated the *Calvert* statement regarding the inability to meet the "clear and indisputable" right burden when the action complained about was committed to the district court's discretion. The Court did not say, however, that the granting of a new trial was completely committed to the discretion of the district court, but rather stated that it was "confided *almost entirely* to the [trial court's] exercise of discretion."¹⁰⁹ This seems to indicate that there are some instances in which a trial court does not have unreviewable discretion to award a new trial. Presumably those instances are ones which might be so extraordinary that mandamus could be invoked. The theoretical possibility of using mandamus to review an order for a new trial was recognized, for the Court stated that "rarely, if ever" will such an order "justify the issuance of a writ of mandamus."¹¹⁰

Thus, even though this opinion quoted the restrictive statement of *Calvert*, it again left some leeway for the use of mandamus in situations in which the district court's action ordinarily can be characterized as discretionary. It makes little difference whether an action so wrong that it may be corrected by mandamus is termed a "clear abuse of discretion" or is instead termed "not within the discretionary authority of the district court."¹¹¹ In either instance the possibility of using mandamus in certain special circumstances exists. *Allied Chemical* seems to leave open this possibility by suggesting that there are some aspects of a new trial order that are not discretionary, so the prohibition it endorses on

108. 449 U.S. 33 (1980).

109. *Id.* at 36 (emphasis added).

110. *Id.* See also *United Sewerage Agency of Washington County, Oregon v. Selco, Inc.*, 646 F.2d 1339, 1344 n.3 (9th Cir. 1981).

111. This general line of argument has been used to distinguish *Calvert*. In *In re Int'l Business Machines Corp.*, 618 F.2d 923 (2d Cir. 1980) the Court of Appeals for the Second Circuit stated that the *Calvert* analysis did not apply to a mandamus petition challenging the failure of the district judge to recuse himself because "[t]he question here is not whether the trial judge had abused his discretion but whether he could exercise any discretion because of a personal extrajudicial bias which precludes dispassionate judgment." *Id.* at 926.

reviewing discretionary decisions would not apply to these. This again is just a means of allowing mandamus by giving the district court's action a different semantic label. The important questions of what circumstances justify the use of mandamus and why, once again remain unanswered by the Court.

II. THE MANDAMUS POWER AS USED BY THE COURTS OF APPEALS

As the above discussion indicates, the Supreme Court opinions provide relatively little insight into the specific instances in which the mandamus power will be employed by the courts of appeals. A review of a large number of decisions rendered by the federal intermediate appellate courts should prove more enlightening by disclosing how these courts are in fact using mandamus. Are there some recognizable and predictable patterns? What, if anything, explains the reason that the courts of appeals have so acted? This Article will approach this line of inquiry by examining the published mandamus opinions of all the United States Courts of Appeals for approximately the last ten years and the mandamus case files of the Second Circuit filed during a three-year period. The primary purpose is to discern the manner in which these appellate courts are exercising the discretion that the Supreme Court has both explicitly and implicitly, by use of these extremely broad linguistic "tests," given them.

The numerous approaches taken in regard to the mandamus power and the different roles played by mandamus make it difficult to discuss its use by the courts of appeals. The matter will be viewed from various perspectives. First, the generally recognized classification of the substantive issues entertained in the published mandamus opinions will be presented. A discussion of the generally unrecognized use of the mandamus power in connection with the many petitions that are filed and resolved without published opinions will follow. Third, a more analytical examination of the various roles the mandamus device actually performs will be offered. Finally, one circuit's attempt to structure a comprehensive approach to the use of its mandamus power will be considered.

A. *The Substantive Classification of Mandamus Opinions*

One accepted approach to a discussion of the way in which the

mandamus power is employed is to organize the opinions into categories according to the types of substantive questions presented by the petitions.¹¹² This is a useful means of communicating some sense of the way in which the mandamus power is being used.

The first class of cases to be identified is that best termed "established categories." These are instances in which the type of order for which review is sought is simply accepted as one that is potentially appropriate for the issuance of mandamus. The prime example is a claim that the order of the district judge denies the right to trial by jury. As already indicated,¹¹³ the Supreme Court has designated this an appropriate issue for review by mandamus and the courts of appeals have followed suit.¹¹⁴ Mandamus is deemed proper as soon as it is determined that the issue is right to trial by jury. Numerically this is not a large category of mandamus cases, but it is the most firmly established.

The category that probably is the largest in terms of numbers of published mandamus opinions encompasses orders for transfer of venue, primarily under 28 U.S.C. § 1404(a).¹¹⁵ This is also the class of cases which, except for the jury trial issue, has gained the widest acceptance of at least some type of review by mandamus.¹¹⁶ The scope of this review, however, is much more uncertain and varies greatly among the circuits.¹¹⁷ Some courts appear to have justified the use of mandamus in section 1404(a) cases on the technical theory that once a case is transferred out of the circuit, the court of appeals would never have jurisdiction to review the transfer order and therefore must use mandamus to protect its appel-

112. See, 16 WRIGHT & MILLER, *supra* note 2, at §§ 3935, 3936.

113. See *supra* text accompanying notes 27-32.

114. See, e.g., *Myers v. United States Dist. Court for the Dist. of Montana*, 620 F.2d 741, 744 (9th Cir. 1980); *Goldman, Sachs & Co. v. Edelstein*, 494 F.2d 76, 78 (2nd Cir. 1974).

115. 28 U.S.C. § 1404(a) (1976) provides: "For the convenience of the 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."

116. Some courts do not even bother to discuss the propriety of using mandamus to review a section 1404(a) transfer. See, e.g., *In re Fireman's Fund Ins. Co.*, 588 F.2d 93 (5th Cir. 1979). Others simply state that mandamus review lies in these cases. See, e.g., *Commercial Lighting Products, Inc. v. United States Dist. Court*, 537 F.2d 1078, 1079 (9th Cir. 1976).

117. An extensive circuit-by-circuit analysis is contained in 15 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3855 (1976)[hereinafter cited as 15 WRIGHT & MILLER].

late jurisdiction.¹¹⁸ As other courts have noted, it is strange that a particular court of appeals should be concerned with its ability to review a transfer order when another court of appeals will be available.¹¹⁹ Of course, the more serious concern, recognized by some courts, is whether any court of appeals could effectively review this order after final judgment because of the formidable difficulty of establishing error prejudicial to the decision resulting from the transfer.¹²⁰ Still, that fact exists with respect to many pre-trial matters and the question remains why mandamus should be available in this instance.¹²¹

Another category of cases generally deemed appropriate for mandamus review is comprised of decisions denying motions for recusal.¹²² Some circuits do not automatically find mandamus available in these circumstances,¹²³ but most do.¹²⁴ The rationale, though not always stated, appears to be that:

A claim of personal bias and prejudice strikes at the integrity of the judicial process, and it would be intolerable to hold that the disclaimer of prejudice by the very jurist who is accused of harboring it should itself terminate the inquiry until an ultimate appeal on the merits.¹²⁵

Cases which involve an order granting a stay of proceedings may also be viewed as an "established category" in which courts

118. See *In re Josephson*, 218 F.2d 174, 181 (1st Cir. 1954). See also *Carr v. Donohoe*, 201 F.2d 426, 428-29 (8th Cir. 1953).

119. See *Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866, 869 (2d Cir. 1950).

120. See, e.g., *id.* at 866, 869-70.

121. See *Josephson*, 218 F.2d at 180-81.

122. "There is no question but that a mandamus petition may be used to force the disqualification of a district court judge." *Bell v. Chandler*, 569 F.2d 556, 559 (10th Cir. 1978).

123. The Sixth Circuit does not allow mandamus to be used to require a judge to recuse himself. *City of Cleveland v. Krupansky*, 619 F.2d 576 (6th Cir. 1980); *Albert v. United States Dist. Court for the W. Dist. of Michigan*, 283 F.2d 61 (6th Cir. 1960). Interestingly, at least part of the rationale for this position is that "the judge performs a judicial and not a ministerial act." *Krupansky*, 619 F.2d at 588. This appears to be an adherence to the historical limitations and a failure to fully appreciate the difference between mandamus used as an appellate review device and mandamus used against an administrative official. See *supra* text accompanying notes 12-15.

124. 16 *WRIGHT & MILLER*, *supra* note 2, at § 3935. The Seventh Circuit has recently changed its position and decided that mandamus is appropriate for the denial of a recusal motion, finding that the existence of a new statute governing recusal justifies the change. See *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977).

125. *In re Int'l Business Machines Corp.*, 618 F.2d 923, 926-27 (2d Cir. 1980).

simply assume the propriety of using mandamus.¹²⁶ *Will v. Calvert Fire Insurance* casts some doubt on whether such cases should continue to be so viewed.¹²⁷ But the courts of appeals have used mandamus for this issue fairly liberally, often apparently on the traditional, but unpersuasive, justification that such stays could constitute a refusal to exercise jurisdiction.¹²⁸

Other cases with overtones of an "established category" concern privilege questions. By no means is this an area in which all courts of appeals accept mandamus as proper.¹²⁹ But many courts will not pause for long on the issue of the propriety of using mandamus in this context, having previously determined that an order rejecting a claim of privilege is one that can be entertained on a mandamus petition.¹³⁰ Others will not treat this as an established category and will consider the particulars of the order.¹³¹

Some cases can better be classified as instances of "special circumstances" rather than "established categories." These "special circumstances" are ones that are recognized as making mandamus review appropriate without being reduced to just one issue. The two prominent "special circumstances" are 1) orders that might interfere with the functioning of other branches of government or other governments, and 2) orders that allegedly infringe on First Amendment rights. Although they do not ensure review by mandamus as automatically as do the "established categories,"¹³² these are independent factors often considered sufficient to justify review by mandamus. They are not limited to one category of orders and appear in various contexts as justifications for allowing the use of the mandamus power. Thus, this first "special circumstance" exists in mandamus cases reviewing a claim of governmental privilege as-

126. See, e.g., *Lecor, Inc. v. United States Dist. Court for the Cent. Dist. of California*, 502 F.2d 104 (9th Cir. 1974). See also *Applegate v. Devitt*, 509 F.2d 106 (8th Cir. 1975).

127. See *supra* text accompanying notes 93-106.

128. See *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820, 823-24 (9th Cir. 1963); 16 WRIGHT & MILLER, *supra* note 2, at § 3935.

129. See, e.g., *Xerox Corp. v. SCM Corp.*, 534 F.2d 1031 (2d Cir. 1976). See also *City of Los Angeles v. Williams*, 438 F.2d 522 (9th Cir. 1971) (grand jury context).

130. See, e.g., *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977); *Heathman v. United States Dist. Court for the Cent. Dist. of California*, 503 F.2d 1032 (9th Cir. 1974).

131. See, e.g., *In re Attorney Gen. of the United States*, 596 F.2d 58 (2d Cir. 1979).

132. See *Nat'l Super Spuds, Inc. v. New York Mercantile Exch.*, 591 F.2d 174 (2d Cir. 1979); *Grinnell Corp. v. Hackett*, 519 F.2d 595, 598-99 (1st Cir. 1975); *Nat'l Right to Work Legal Defense & Educ. Found. v. Richey*, 510 F.2d 1239, 1243 (D.C. Cir. 1975).

serted by an official of the executive branch,¹³³ a refusal to dismiss a suit against an agency that regulates securities,¹³⁴ and a decision that did not immediately release a vessel owned by a foreign government granted foreign sovereign immunity.¹³⁵ The second "special circumstance," an order allegedly infringing on First Amendment rights, can be found in mandamus decisions reviewing gag orders¹³⁶ and in an order requiring a FRCP Rule 35 physical and mental examination of a Christian Scientist.¹³⁷

In addition to recognizing these "established categories" and "special circumstances," it is possible to divide some of the other opinions into classes. Many of the cases involve orders entered in criminal actions, which will receive further attention later.¹³⁸ Also, two other large classifications composed of discovery matters and class action issues can be identified. But there is much less significance to doing so than with the "established categories" or "special circumstances" classifications, because classifying a mandamus case as a discovery order or a class action issue does not help much in determining whether a court will find mandamus an appropriate means of review for that case. Admittedly, there is some indication that particular class action orders are beginning to be treated by some courts as an "established category"¹³⁹ and discovery orders as a class are sometimes declared particularly inappropriate for mandamus review.¹⁴⁰ And it is important in and of itself to realize that these are areas in which significant numbers of petitions for mandamus have been treated seriously by courts. Still, the very problem with this type of analysis based on categorizations of issues is that while it provides much vital information, it provides limited insight into generalizations about the mandamus device itself.¹⁴¹

133. See *In re Attorney Gen. of the United States*, 596 F.2d 58 (2d Cir. 1979). See also *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (en banc).

134. *First Jersey Sec. Inc. v. Bergen*, 605 F.2d 690, 701-02 (3rd Cir. 1979).

135. See *Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974). See also *Ex parte Peru*, 318 U.S. 578 (1943).

136. See *In re Halkin*, 598 F.2d 176, 198-99 (D.C. Cir. 1979); *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1006 (3d Cir. 1976).

137. *Winters v. Travia*, 495 F.2d 839, 840-41 (2d Cir. 1974).

138. See *infra* text accompanying notes 195-200.

139. See *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1338-39 (9th Cir. 1976).

140. See *Krupansky*, 619 F.2d at 575 (6th Cir. 1980); *UAW v. Nat'l Caucus of Labor Committees*, 525 F.2d 323, 326 (2d Cir. 1975).

141. Of course, one is able to comment on the use of the "supervisory" mandamus power. Discovery cases provide examples of courts justifying review by mandamus by claim-

B. *The Second Circuit Unpublished Mandamus Cases*

Looking at over 200 files of mandamus cases resolved by the Second Circuit within a three-year time span¹⁴² should provide an excellent idea of when that court will use its mandamus power. Although new insights are gained, much uncertainty remains. Of course, one discovers that in general the odds are greatly in favor of a formal denial of a petition, especially one decided without a published opinion. That is neither surprising nor greatly enlightening.¹⁴³ The question still remains which are the few petitions that will be granted.

Indeed, this question itself is misleading. There are various stages of entertaining a mandamus petition between a flat denial without requiring an answer and the actual granting of a mandamus petition. On the procedural level, the first is requiring an answer, the filing of which is not an automatic occurrence but must be requested by the court.¹⁴⁴ The next stage, usually, is the court of appeals' determination to hear oral argument on the petition. Both of these indicate, to varying degrees, that the court is giving serious consideration to granting the petition. Presumably, this fact is also recognized by the district judge whose decision is the subject of the petition.

There are also varying means by which mandamus can provide relief, even though the writ is formally denied. Overall, this is even more crucial to understanding the use of mandamus in these cases than in the cases decided with a published opinion.¹⁴⁵ The petition can be denied on the assumption that the district judge will do a particular act, or denied without prejudice to its being refiled at a

ing to adopt a more expansive view of the nature of supervisory mandamus. See, e.g., *Gasch*, 509 F.2d at 524-25; *Merhige*, 487 F.2d at 29-30. Given the amorphous nature of the term "supervisory," however, these comments amount to no more than generalizations about the courts' attitude toward the use of the writ rather than generalizations about the actual use of mandamus.

142. The case files were those of petitions filed during the calendar years 1977, 1978, and 1979.

143. Thirty years ago an examination of the Second Circuit Docket Book encompassing the forty-seven petitions for writs filed between December 30, 1947 and December 30, 1952 had revealed that all 32 of those petitions decided without opinion had been denied. Note, *Federal Court Review by Extraordinary Writ: A Clogged Safety Valve in the Final Judgment Rule*, 63 YALE L. J. 105, 106 n.11 (1953).

144. FED. R. APP. P. 21(b).

145. See *infra* text accompanying notes 220-33.

later date.¹⁴⁶ The order, while formally denying the petition, can indicate that the view of the panel on the matter is contrary to that of the district court.¹⁴⁷ Unlike such "gratuitous" comments in an opinion formally affirming a decision on appeal after a final judgment, in the case of a mandamus petition it is possible for the district judge to change his decision to that suggested by the appellate panel even if not ordered to do so.

An important use of the mandamus power that is not generally recognized falls within both the procedural and remedial stages. This is the court's attempt "to settle" the disputes raised by certain mandamus petitions. Usually these are petitions challenging delay on the part of the district judge. Such petitions are a significant percentage of the mandamus caseload. The procedural aspect arises from direct contact between Second Circuit personnel and the district judge or his law clerks regarding the issue raised by the petition. The existence of this "informal" contact is difficult to fully document. One case file did contain an express reference to such contact. A phone call to the district judge's chambers by a Second Circuit *pro se* law clerk resulted in action that mooted the petition within a week.¹⁴⁸

This is only one example. But there is little doubt that it is not an isolated example.¹⁴⁹ Indeed, such contact presumably also occurs at the level of a direct conversation between a court of appeals judge and the district court judge. At times the initiation of this contact might come from the chambers of the district judge. A

146. See cases cited *infra* notes 156-57.

147. See, e.g., *In re Little*, No. 77-3051 (2d Cir. Dec. 1, 1977). In the order the "Court suggests, however, that the District Court reconsider whether the stay granted in 77-CV-220 is not too broad and whether it would not be sufficient if"

148. *In re Leone*, No. 78-3008 (2d Cir. Feb. 21, 1978). A petition was filed *pro se* on February 5, 1978, seeking to order Judge Bartels to rule on a 28 U.S.C. § 2255 petition filed in the district court in May 1977. In the file on this petition is a memorandum from a Second Circuit *pro se* law clerk dated February 8, 1978, indicating that a phone call had been made to Judge Bartels' chambers which revealed that the § 2255 petition had been referred to a magistrate and that they were awaiting the magistrate's report. A February 9, 1978 postscript to the memo indicates that a subsequent call from Judge Bartels' law clerk disclosed that Judge Bartels was taking the case back from the magistrate to handle himself. On February 14, 1978, the § 2255 petition was ruled upon and the mandamus petition in the Second Circuit was then denied as moot.

149. My own experience elsewhere and conversations with Second Circuit personnel confirm this. Apparently, a similar procedure is also followed in at least some of the Missouri state courts. See Tuchler, *Discretionary Interlocutory Review in Missouri: Judicial Abuse of the Writ?*, 40 Mo. L. Rev. 577, 593 n.77 (1975).

mandamus petition is still perceived as more of a personal attack than an appeal and the district judge is therefore more anxious to have it dismissed.¹⁵⁰ The direct ramifications of this perception and the uniqueness of mandamus in this respect are particularly evident in these cases.

The purpose of this Article is not to criticize this practice. From an extremely technical viewpoint one might argue that this type of contact is improper because the district judge is a respondent and therefore the court of appeals is accepting *ex parte* communications. Such an argument ignores the reality of these petitions.¹⁵¹ "Settlement" in this context is as beneficial as it is in most others. Still, it is important to recognize this type of informal control as a part of the full remedial context of the mandamus power. A petitioner seeks relief by filing a mandamus petition, and whether it comes by way of a published opinion granting the petition or a phone call that results in the district judge taking the requested action, the ultimate result is the same.

Although one cannot accurately gauge the extent of these informal contacts, one can quantify the degree to which the attempts to invoke the mandamus power result in cases being mooted because of the action of the district court. Overall, there is a relatively large number of such cases, and they demonstrate that merely focusing on the petitions that are granted gives a false picture of the degree to which relief results from the filing of a mandamus petition. For instance, all seven mandamus petitions challenging the failure of the district judges to rule promptly, in which the petitioners were represented by counsel, were either withdrawn or denied as moot because the court had ruled.¹⁵² Usually the ruling came soon after the filing of the petition, although one mandamus petition was held three months, a very long time, presumably to allow the district judge to rule.¹⁵³ One can assume that these results are not explainable as coincidental judicial action at the

150. See *infra* notes 232-33 and accompanying text.

151. See *infra* notes 228-31 and accompanying text.

152. *In re* Banco Nacional De Cuba, No. 79-3075 (2d Cir. Jan. 17, 1980); *In re* Kapsin & Dallis Realty Corp., No. 79-3084 (2d Cir. Dec. 11, 1979); *In re* Krygier, No. 79-3031 (2d Cir. May 30, 1979); *In re* Carges, No. 78-3038 (2d Cir. Dec. 19, 1978); *In re* Massaut, No. 78-3020 (2d Cir. June 29, 1978); *In re* Marcera, No. 77-3039 (2d Cir. June 24, 1977); Hornblower & Weeks-Hemphill Noyes Inc. v. Stewart, No. 77-3007 (2d Cir. Mar. 3, 1977).

153. *In re* Carges, No. 78-3038 (2d Cir. Dec. 19, 1978). (Mandamus petition filed on September 19, 1978 and stipulated dismissal of petition filed on December 19, 1978.)

very time the judge would have ruled anyway. As common sense would dictate, and as the petitions themselves demonstrate, an attorney normally tries all avenues of getting the court to rule before resort to what is viewed as the drastic measure of a mandamus petition. Yet, despite the previous inability to get a decision from the district court, the filing of the mandamus petition achieved this result in each of these cases. Whether this was due to inquiries from the appellate court or simply the desire of the district judge not to be embarrassed by this petition, the fact remains that the petitions were successful even if they were not actually granted. Currently, mandamus does provide a fairly effective remedy for egregious delay, although it is used sparingly for this purpose by attorneys who view it as a drastic step.

One group that is not hesitant to file mandamus petitions, on grounds of delay or otherwise, is *pro se* litigants. *Pro se* petitions represented about one-half of all of those that were filed during these three years. There are probably various reasons to explain this. Such litigants undoubtedly have less stake in maintaining a favorable long-term relationship with a judge than does an attorney, so perhaps they have less inhibition about using a procedure that might offend the district judge. Secondly, such litigants are generally considered extremely litigious and willing to file numerous legal papers.¹⁵⁴ Moreover, they are probably less familiar with normal modes of procedure and consequently would not view an interlocutory petition to the appellate court as particularly extraordinary. Finally, most of these *pro se* petitions are filed by prisoners who have initiated habeas corpus or 28 U.S.C. § 2255 petitions, or civil rights actions under 42 U.S.C. § 1983. Often, these end up being filed in great numbers in a few districts, thereby causing delay and leading to mandamus petitions. This delay is undoubtedly exacerbated by some degree of dislike for this barrage on the part of the judges in those districts.

In any event, the most important point is not the precise reason for this large number of *pro se* petitions, but the fact that it exists. Removing these *pro se* petitions gives a better picture of the number of mandamus petitions filed by attorneys. The attorney-

154. The Eighth Circuit ordered that the mandamus petitions of one *pro se* litigant, who had filed 66 petitions in one year, no longer be filed. *In re Green*, 598 F.2d 1126 (8th Cir. 1979).

filed petitions are the primary concern of this Article since their numbers, more than the *pro se* petitions, are likely to be influenced by the standards for entertaining mandamus petitions established by the courts.

This does not mean, however, that *pro se* petitions should be ignored entirely. A significant percentage of them can best be described as incomprehensible or frivolous. But of those I examined, forty petitions were complaining of the district court's failure to act. Of these, fifty percent (twenty) were denied as moot, the court having taken the action or being about to do so.¹⁵⁵ Another twenty-five percent (ten) of this group, received some implicit promise of relief: one was denied on the condition that the district court act by a certain date,¹⁵⁶ and the other nine were denied without prejudice to their renewal within a certain period of time (thirty, sixty, or ninety days).¹⁵⁷ Presumably the message to the district court was fairly clear. The remaining twenty-five percent (ten) were simply denied.¹⁵⁸ Once again it is established that the filing of a mandamus petition is an effective avenue of relief for claims of delay, and in this instance, in a very large number of cases. The mandamus power viewed in its total breadth provides an institu-

155. *In re Mahler*, No. 79-3094 (2d Cir. Dec. 17, 1979); *In re Banks*, No. 79-3092 (2d Cir. Dec. 13, 1979); *In re Smith*, No. 79-3067 (2d Cir. Sept. 11, 1979); *In re Wilson*, No. 79-3066 (2d Cir. Sept. 11, 1979); *In re Winkle*, No. 79-3024 (2d Cir. Mar. 29, 1979); *In re Kessler*, No. 79-3010 (2d Cir. Feb. 20, 1979); *In re Ross*, No. 79-3015 (2d Cir. Feb. 6, 1979); *In re Mahler*, No. 79-3009 (2d Cir. Jan. 24, 1979); *In re Du Bray*, No. 79-3006 (2d Cir. Jan. 18, 1979); *In re Ross*, No. 79-3005 (2d Cir. Jan. 16, 1979); *In re Negron*, No. 79-3004 (2d Cir. Jan. 9, 1979); *In re Ayers*, No. 78-3051 (2d Cir. Oct. 24, 1978); *In re Housand*, No. 78-3034 (2d Cir. Sept. 18, 1978); *In re Crusco*, No. 78-3033 (2d Cir. Sept. 18, 1978); *In re Carlton*, No. 78-3024 (2d Cir. Aug. 14, 1978); *In re Gossom*, No. 78-3002 (2d Cir. Mar. 28, 1978); *In re Leone*, No. 78-3008 (2d Cir. Feb. 21, 1978); *In re DiGiovanni*, No. 78-3006 (2d Cir. Feb. 16, 1978); *In re Quionones*, No. 77-3071 (2d Cir. Oct. 3, 1977) (presumably issue was delay, but the petition was not on file); *In re Dailey*, No. 77-3067 (2d Cir. Sept. 29, 1977).

156. *In re Boothe*, No. 77-3080 (2d Cir. Nov. 29, 1977).

157. *In re Sewell*, No. 79-3090 (2d Cir. Dec. 13, 1979); *In re Payton*, No. 79-3069 (2d Cir. Sept. 12, 1979); *In re Winkle*, No. 79-3061 (2d Cir. Aug. 14, 1979); *In re Ferrante*, No. 79-3059 (2d Cir. Aug. 13, 1979); *In re La Van*, No. 79-3048 (2d Cir. June 20, 1979); *In re Sanchez*, No. 79-3049 (2d Cir. June 20, 1979); *In re Ferrante*, No. 79-3022 (2d Cir. Mar. 21, 1979); *In re Heitzer*, No. 79-3025 (2d Cir. Mar. 29, 1979).

158. *In re Thomas*, No. 79-3087 (2d Cir. Nov. 27, 1979); *In re Day*, No. 78-3044 (2d Cir. Nov. 15, 1978); *In re Setter*, No. 78-3042 (2d Cir. Sept. 28, 1978); *In re Martino*, No. 78-3037 (2d Cir. Sept. 19, 1978); *In re Saunders*, No. 78-3036 (2d Cir. Sept. 19, 1978); *In re Cruz*, No. 78-3039 (2d Cir. Sept. 14, 1978); *In re Alim*, No. 77-3013 (2d Cir. Mar. 21, 1978); *In re Millette*, No. 77-3079 (2d Cir. Nov. 29, 1977); *In re Kincade*, No. 77-3049 (2d Cir. Aug. 24, 1977); *In re Wilson*, No. 77-3033 (2d Cir. May 20, 1977).

tional control on district judges' failure to act within reasonable time periods. This is especially true for prisoner petitioners, an area in which such control is particularly necessary.

Thus far in this section only the mandamus power in its remedial function directed to the specific problem of delay has been discussed. As indicated, a discernable pattern can be identified in terms of this "informal" aspect of the mandamus power. It has not been possible, however, to identify any other general patterns of the Second Circuit's use of its mandamus power that are much more illuminating than the previous discussion of the published opinions. Even consideration of occasions when an answer has been requested and/or argument heard for petitions ultimately denied adds little. Yet, these case files do offer some further insights into the almost equally important question of the matters on which litigants are seeking mandamus relief.

Obviously these case files are not representative of the types or frequency of issues that would be the subject of mandamus petitions if there were no restrictions on the types of matters that would be entertained. There are some standards for mandamus petitions, however ambiguous they may be. More importantly, as previously discussed, certain matters have become accepted as appropriate for review by mandamus. Thus, as expected, one finds some petitions raising the issue of the right to trial by jury, as well as a significant number of cases involving transfer of venue.

Nevertheless, the frequency with which certain issues arise is informative on the question of what issues litigants find important enough to seek mandamus relief, especially since there are the risks of antagonizing the district judge. This information is relevant to the question of when the mandamus power should be available. At the least it indicates the degree to which the person directly affected feels strongly enough about the harm done by the district judge that he is willing to risk filing a mandamus petition.

The numerous petitions filed challenging delay, especially by *pro se* litigants, have already been discussed. Interestingly, one also finds a comparatively large number of petitions addressed to the "flip side" of the delay issue, the refusal to grant a continuance. Seven petitions were filed seeking an order directing the district judge to postpone a trial date or grant a continuance of a trial.¹⁵⁹

159. *In re Felt*, No. 79-3046 (2d Cir. June 26, 1979); *In re Monsanto Enviro-Chem Sys-*

This is particularly intriguing in light of the Second Circuit's opinion in *Stans v. Gagliardi*,¹⁶⁰ which expressed the court's view that a continuance should have been granted, but held that mandamus was not available to set aside a trial date. Despite *Stans*, or more likely because of it,¹⁶¹ seven petitioners sought to have their civil or criminal trials delayed on grounds ranging from illness, to insufficient time for preparation, to inability to have counsel of choice participate. The number of these petitions can also be explained partially on the grounds that in some of the cases the attorneys involved could not participate if the trial went ahead, so the risk of incurring the wrath of the judge might have seemed slight, at least to these attorneys, compared to not being present at the trial.

The startling fact is that three of these petitions were given serious consideration and the remedial power exercised to some degree, including the actual granting of one petition. In *Kalfas v. MacMahon*¹⁶² a petition seeking a three week postponement of a criminal trial for purposes of preparation was denied, but one judge dissented. In *re Ford*¹⁶³ involved a petition to have a trial date set aside so that counsel of choice could complete a state court trial and participate in this federal criminal trial on behalf of the defendant. Oral argument was heard on the petition which was eventually denied in a five page order on the grounds that the panel was bound by *Stans v. Gagliardi*. But the opinion did "express the hope" that the trial judge would reconsider and went on to explain that the Speedy Trial Act would not bar this four week continuance. Finally, in *In re Felt*,¹⁶⁴ a writ of prohibition¹⁶⁵ was granted, apparently without even requiring an answer. The petition, filed on June 13, 1979, had sought to stop a visiting judge to the Northern District of New York from requiring plaintiffs in a wrongful death case to proceed to trial in Auburn, New York,

tems, Inc., No. 78-3031 (2d Cir. Sept. 14, 1978); *In re Mahler*, No. 77-3074 (2d Cir. June 26, 1978); *In re Ford*, No. 78-3011 (2d Cir. Mar. 30, 1978); *In re Slotkin*, No. 77-3064 (2d Cir. Sept. 14, 1977); *In re Cooper*, No. 77-3029 (2d Cir. May 5, 1977); *Kalfas v. MacMahon*, No. 77-3001 (2d Cir. Jan. 7, 1977).

160. 485 F.2d 1290 (2d Cir. 1973). See also *infra* text accompanying note 223.

161. The true value of the opinion in *Stans* appears to have been recognized. See *infra* note 225.

162. No. 77-3001 (2d Cir. Jan. 7, 1977).

163. No. 78-3011 (2d Cir. Mar. 30, 1978).

164. No. 79-3046 (2d Cir. June 26, 1979).

165. The fact that it was a writ of prohibition rather than mandamus has no significance. See *supra* note 2.

rather than wait for the November term of court in Albany, New York.¹⁶⁶ The Second Circuit panel ordered that the case be put on the later Albany trial calendar.

Any surprise over the Second Circuit's treatment of these three petitions is diminished significantly when one notes that all three cases involved the same district court judge, the Honorable Lloyd F. MacMahon. These three cases demonstrate an important aspect of an appellate court's exercise of its mandamus power, the knowledge or opinions of the judges of the court of appeals regarding the district judges in their circuit. Surely, this is also a factor influencing an appellate court's consideration of a conventional appeal, even if it is difficult to document. Though equally difficult to prove conclusively in the mandamus context, this factor is undoubtedly even more important. The mandamus power, as will be explained in more detail later,¹⁶⁷ often plays a special role in the appellate process as a type of judicial control device. One of the factors the appellate judges would consider in deciding whether the district judge needs to be "controlled" is whether that judge has tendencies toward an excess in a particular direction. If so, it is more likely that the judge will be deemed to have erred and, arguably, more necessary to correct the error by use of the mandamus power.¹⁶⁸ Presumably this is the situation in regard to Judge MacMahon.¹⁶⁹ His reputation with the appellate judges is apparently one of a district judge who is too strict in controlling his calendar and too unresponsive to the difficulties caused to litigants and their attorneys.¹⁷⁰ The reliance on such "judicial character" factors

166. The petitioners claimed that their expert would not be available, that their witnesses were all in Albany and some could not go to Auburn, and, finally, that the plaintiffs, a mother and her children, would have to stay in a hotel in Auburn. The case had been on a calendar of jury trials cases that were three years old.

167. See *infra* text accompanying notes 286-90.

168. See *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957). See also *supra* text accompanying notes 52-63 (for a discussion of *Labuy*).

169. See *Gavino v. MacMahon*, 499 F.2d 1191 (2d Cir. 1974). In *Gavino*, a writ of mandamus issued against Judge MacMahon at least partly on the basis that "his refusal to grant a reasonable adjournment of trial represented a gross abuse of discretion." *Id.* at 1196.

170. In *Napolitano v. Compania Sud Americana De Vapores*, 421 F.2d 382, 384-85 (2d Cir. 1970), the Second Circuit noted disapprovingly the "recurrent occurrences" of Judge MacMahon's refusals to grant a trial recess. See also *supra* note 170. At least one publication suggests that this is Judge MacMahon's general reputation. "Time—not truth, not fairness—is the most precious commodity in MacMahon's court. With a kind of temporal obsession, he moves cases along and avoids delay at any cost." 2 *THE AM. LAW.* July 1980, at 22.

is more necessary in ruling on mandamus petitions regarding these kinds of matters than with most appeals because it is so difficult for the appellate court to determine the appropriate relationship between the district judge, his calendar, and the parties, especially in the short time available.¹⁷¹ In this respect it may be fair to claim that in some instances a mandamus petition is directed more specifically toward the district judge than an appeal would be, not because the judge technically may be a respondent, but because the particular "judicial character" of the judge may be more of a crucial factor.

Another large category of mandamus petitions is explicitly directed at the trial judge. These are petitions seeking a different judge in the district court. Ten petitions were filed challenging district judges' denials of recusal motions.¹⁷² Three other petitions also presented challenges to the presently assigned district judge.¹⁷³ None of these petitions were granted, though in two cases an answer was received,¹⁷⁴ another had a stipulated withdrawal,¹⁷⁵ and a fourth was denied as moot.¹⁷⁶ The interesting point is not that the Second Circuit entertained some of these petitions seriously, since, as discussed above,¹⁷⁷ it is generally accepted that the denial of a recusal motion is appropriate for review by mandamus. But this large a number of such petitions is not what one would

171. This same factor might well explain the report of the Seventh Circuit's grant of a writ of mandamus against the Honorable Julius J. Hoffman, who had presided over the infamous Chicago Seven trial, for refusing to suspend a trial, as he had promised, in order to allow one of the lawyers to marry. 83 NEWSWEEK, March 11, 1974, at 62.

172. *In re Solomon*, No. 79-3081 (2d Cir. Nov. 8, 1979); *In re Jones*, No. 78-3021 (2d Cir. July 20, 1978); *In re Rodriguez*, No. 78-3023 (2d Cir. July 11, 1978); *In re Persico*, No. 78-3018 (2d Cir. May 30, 1978); *In re Sassower*, No. 78-3015 (2d Cir. Apr. 7, 1978); *In re Grossman*, No. 78-3059 (2d Cir. Jan. 4, 1978); *In re King*, No. 77-3021 (2d Cir. Apr. 18, 1977); *In re Rappaport*, No. 77-3061 (2d Cir. Sept. 28, 1977); *In re Malizia*, No. 77-3025 (2d Cir. Apr. 26, 1977); *In re Kaplan*, No. 77-3014 (2d Cir. Mar. 28, 1977).

173. One petition requested that a judge outside of New York be ordered brought in to hear the case. *In re Gerzoff*, No. 77-3066 (2d Cir. Sept. 29, 1977). Another petitioner sought to have her criminal case assigned to a randomly selected judge rather than the judge it had been assigned to on the basis of the local court rule on "related cases." *In re Davis*, No. 78-3001 (2d Cir. Jan. 27, 1978). The third petition concerned a criminal contempt proceeding and sought, *inter alia*, that the charges be heard by a different judge. *In re Brewer*, No. 78-3007 (2d Cir. Feb. 22, 1978).

174. *In re Persico*, No. 78-3018 (2d Cir. May 30, 1978); *In re Malizia*, No. 77-3025 (2d Cir. Apr. 26, 1977).

175. *In re Rappaport*, No. 77-3061 (2d Cir. Sept. 28, 1977).

176. *In re Kaplan*, No. 77-3014 (2d Cir. Mar. 28, 1977).

177. See *supra* text accompanying notes 122-25.

expect from a review of the published mandamus petitions. Obviously the fact that this is an established area for relief by mandamus somewhat accounts for the large number. Moreover, there is little additional to be lost in terms of offending a district judge whom you already have challenged as being biased. A further explanation is offered in Section III below.¹⁷⁸

The final category of cases in which a large number of petitions were filed concerns discovery matters. Actually the number of such petitions might be considered surprisingly low in light of the large number of rulings on discovery matters. Thirteen petitions¹⁷⁹ were filed and ruled upon, and an additional one¹⁸⁰ was filed but dismissed on stipulation. This is roughly the same number as those concerning recusal matters, even though there are far more rulings on discovery matters than on recusal motions. Of course, the Second Circuit has indicated a reluctance to entertain petitions regarding discovery matters,¹⁸¹ and this may explain why the number of such petitions is not larger.

The court's treatment of these petitions adds little to our knowledge. One petition, involving interference with the executive branch, was granted in a published opinion.¹⁸² All twelve of the other decided petitions were denied, although in three cases answers were filed.¹⁸³ Whether the court was seriously considering issuing the writ in these three cases, one cannot be sure. Why the judges might have thought that these three particular discovery

178. See *infra* text accompanying notes 275-79.

179. *In re* Thetford, No. 79-3065 (2d Cir. Oct. 30, 1979); *In re* Williams & Glyn's Bank Ltd., No. 79-3076 (2d Cir. Dec. 4, 1979); *In re* Gordon Jewelry Corp., No. 79-3063 (2d Cir. Sept. 25, 1979); *In re* New Times Publishing Co., No. 79-3052 (2d Cir. July 19, 1979); *In re* Cheng, No. 79-3040 (2d Cir. May 25, 1979); *In re* Wall, No. 79-3012 (2d Cir. Mar. 7, 1979); *In re* Newsday, Inc., No. 78-3059 (2d Cir. Feb. 22, 1979); *In re* Xerox, No. 77-3058 (2d Cir. Dec. 13, 1977); *In re* Shaheen, No. 779-3062 (2d Cir. Sept. 15, 1977); See also *In re* Attorney Gen. of the United States, 596 F.2d 58 (2d Cir. 1979). *In re* Buddy L. Corp., No. 77-3027 (2d Cir. June 13, 1977); *In re* Hsieh, No. 77-3032 (2d Cir. May 18, 1977).

180. *In re* Katz, No. 79-3091 (2d Cir. Mar. 7, 1980).

181. See *UAW v. Nat'l Caucus of Labor Comm.*, 525 F.2d 323, 326 (2d Cir. 1975).

182. *In re* Attorney Gen. of the United States, 596 F.2d 58 (2d Cir. 1979).

183. These cases disclose no discernable pattern. One, *In re* Williams & Glyn's Bank Ltd., No. 79-3076 (2d Cir. Dec. 4, 1979), involved a work-product claim. Since such a claim is only a qualified privilege, it is thus less likely to be viewed as part of an "established category" than is a true evidentiary privilege. See *FED. R. CIV. P. 26(b)(3)*. Another challenged a protective order denying access to data by house counsel. *In re* Xerox, No. 77-3058 (2d Cir. Dec. 13, 1977). The third related to an order restricting the sequence in which discovery devices could be used. *In re* Buddy L. Corp., No. 77-3027 (2d Cir. June 13, 1977).

cases were possibly appropriate for mandamus review is not evident. Little aid in understanding the court's view of mandamus petitions on discovery matters or predicting its action regarding them is gained from reviewing these unpublished orders.

This same complaint of lack of new insight applies to the remaining petitions that raised a myriad of matters. Trial matters, grand jury questions, criminal pre-trial issues, denials of summary judgment motions, and the grants of new trials, along with various uncategorizable matters, were all the subjects of mandamus petitions, and were generally denied. Strange instances arise—such as one in which a petition challenging the denial of summary judgment reaches the stage of an answer and oral argument before it is denied.¹⁸⁴ Admittedly it was an unusual case.¹⁸⁵ The problem is, once again, that most of these cases are “unusual,” at least in terms of one's ability to predict whether they will be or should be considered for review by use of the mandamus power. It is not clear whether these petitions were denied as being inappropriate matters for mandamus review based on some factors “independent” of the merits, or denied “on the merits” because the district judge's action was not error under the applicable standard of review. Nor does one even know if the court separately addressed these issues.

C. *The Three Functions of Mandamus*

It is valuable to discuss the question of how the mandamus power is being used by the courts of appeals from another perspective as well, one that explores the differing aspects of the power that generally have not been recognized. These are differences in approach and use that exist within individual courts of appeals as well as among them. Mandamus can be viewed as serving at least three different functions in the appellate process depending on the issue that is presented and the approach of the court of appeals to which it is addressed. It can be a jurisdictional provision, a standard of review, or a remedy.

1. *Jurisdictional device.* One might assume that a writ of

184. *In re United States*, No. 79-3055 (2d Cir. Aug. 15, 1979).

185. The district judge had refused to grant the government's motion for summary judgment, even though he had said that it was appropriate, because he wanted to keep the government in the case for settlement purposes.

mandamus is merely another appellate jurisdictional device and should be so treated. Thus sections 1291, 1292(b), and 1651¹⁸⁶ are all spoken of as provisions authorizing review by the courts of appeals. And certainly there are court references to mandamus jurisdiction.¹⁸⁷ But what is meant by this? Jurisdiction in the sense of the power to entertain the appeal is almost never the question in a mandamus proceeding.¹⁸⁸

More relevant is a somewhat different concept of appellate jurisdiction, that of an appellate screening device. By this I mean an opportunity for the court to make an initial determination, independent of the merits of the order, of whether this case has satisfied certain prerequisites for review. Most courts discuss the propriety of using mandamus. But often they are not considering mandamus as a jurisdictional device in the way it is defined here.

Such "jurisdictional" uses of mandamus do exist, however. Determining whether a case falls within an "established category" or presents a "special circumstance" is a jurisdictional inquiry. Once the preliminary inquiry¹⁸⁹ concludes that the case fits within such an "established category" or contains a sufficient "special circumstance" the propriety of review by mandamus has been settled. No further consideration of the issue is necessary to justify review by mandamus.

Other factors considered by courts, such as the existence of a new and undecided question, or the inadequacies of an appeal after final judgment, could be used as jurisdictional inquiries. If the existence of a new and undecided question were sufficient in and of itself to support mandamus review, it would be fair to char-

186. 28 U.S.C. §§ 1291, 1292(b), 1651 (1976).

187. See, e.g., *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 535 (8th Cir. 1975).

188. In contrast with its view that an appeal under § 1291 requires a determination of the existence of a final judgment in order for the court of appeals to express any view on the merits, the Supreme Court has affirmed the denial of a petition for mandamus on the merits without deciding whether mandamus review was appropriate. Compare *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378-80, with *Norwood v. Kirkpatrick*, 349 U.S. 29, 33 (1955). In a different context, however, at least one court of appeals has viewed mandamus as not authorizing a decision on non-constitutional grounds to avoid reaching constitutional issues when the basis for invoking mandamus was an alleged violation of the First Amendment. *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1006, 1006 n.12 (3d Cir. 1976).

189. This determination, however, is not always made at the beginning of the opinion prior to the discussion of the merits. See, e.g., *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977).

acterize its use as a jurisdictional one.¹⁹⁰ Often, however, these factors are not treated as independent and sufficient ones, but are coupled with the traditional standards necessitating a review of the merits of the order to determine if mandamus review is appropriate.¹⁹¹

It is difficult at present to take a true jurisdictional approach to mandamus because of the standards the Supreme Court has developed. With a standard such as "usurpation of power" or "clear abuse of discretion" the appellate court must address the merits of the claim in order to determine whether any review by mandamus should be allowed. There is, for many cases, no separate way of first addressing whether this is a proper case for the court of appeals even to consider. The "jurisdictional" standards noted above are only useful for preliminarily determining that mandamus review is appropriate. They do not constitute a means of dismissing a mandamus petition on the basis that an essential jurisdictional requirement has not been met. The only "test" that is used in this way is the very narrow one of whether an alternative means of immediate review by appeal is available.¹⁹²

This aspect of mandamus review may be contrasted with the approach taken with review by appeal. For section 1291 review the court can determine whether it should consider a case by asking whether the judgment is a final one. If the answer is no, an appeal does not lie. This involves little serious review of the merits of the issues on appeal.¹⁹³ Even for a section 1292(b) discretionary appeal the court has the certification of the district judge and can determine whether the statutory requirements have been met with minimal consideration of the proper resolution of the certified question. Indeed, there are two separate procedural stages at the appellate level, the decision to accept the appeal and the appeal itself. But with mandamus the two determinations often merge. Thus, almost every mandamus case proceeds to some consideration

190. See *Colonial Times, Inc. v. Gasch*, 509 F.2d 517 (D.C. Cir. 1975).

191. See, e.g., *Bauman v. United States Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977); *Am. Express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F.2d 277, 283 (2d Cir. 1967).

192. See *Askew v. United States Dist. Court for the Cent. Dist. of Cal.*, 527 F.2d 469 (9th Cir. 1975); *In re Maritime Serv. Corp.*, 515 F.2d 91 (1st Cir. 1975).

193. This is usually true even when the question of finality is being decided under the collateral order doctrine. See *Nat'l Life Ins. Co. v. Hartford Accident & Indem. Co.*, 615 F.2d 595, 597 (3d Cir. 1980).

of the merits unless it has been determined that the alternative of review by appeal is currently available.

This might suggest that there is no significance to having a case fall within an "established category" or "special circumstance," because in all cases there is some review of the merits. But qualifying for one of these special areas often ensures a fuller review of the merits. If it is determined as a preliminary matter that mandamus review is appropriate, many courts will discuss the merits of the petition in the same manner as if the issue had arisen on direct appeal and no reference will be made to the mandamus "tests."¹⁹⁴ The issue is not whether the district court's order can be declared a clear abuse of discretion or a usurpation of power, but whether the district court erred viewed by whatever standard of review would normally apply.

2. *Standard of review.* What the above discussion points out is that in many other cases mandamus is used, in effect, as a standard of review. In one sense this is obvious. It is the standard of review for deciding whether or not to formally issue the writ. But it is also the standard used to determine the degree of deference given the district court. This is an important point because it demonstrates that cases are being reviewed, *i.e.*, considered on mandamus, at least to the extent of determining whether there is this heightened level of error (either "usurpation of power," "clear abuse of discretion," or "clear and indisputable right"). This means that there is review by the appellate court and the standard of review is that of the device being used as the means of review. Neither section 1291 nor section 1292(b) provides a *standard* of review. They provide a *means* for review by an appellate court applying various standards of review. But mandamus is often a standard as well as a means, because there is this review. The review occurs because of the merger of the standard for mandamus review and consideration of the merits of the district court's order. Admittedly, the review might be done in the context of determining the propriety of mandamus, but that is review nonetheless. And the standard applied is one or all of the mandamus standards previ-

194. See, *e.g.*, *United States Dep't of Energy v. Crocker*, 629 F.2d 1341 (Temp. Emer. Ct. App. 1980) (privilege); *Bell v. Chandler*, 569 F.2d 556 (10th Cir. 1978) (recusal); *Winters v. Travia*, 495 F.2d 839 (2d Cir. 1974) (First Amendment considerations). Some courts, though, will at least mention the mandamus standards even after a review by the normal standard. See, *e.g.*, *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979).

ously identified in Part I above.

These standards are obviously different from those that might be applied to an order that is challenged on appeal.¹⁹⁵ This is a simple yet crucial observation: courts are reviewing the merits of decisions, but by a different standard from that which they normally apply. Why should this be so? It might be that interlocutory review is frowned upon, but once the court of appeals invests the time to give the issues some review, why should it be by a different standard than is normally employed?

Of course, for many issues the standard of review applied in mandamus cases is in fact the only standard of review used. This is true for those decisions that cannot otherwise be reviewed. Some of the mandamus cases involve matters that generally are not considered appropriate for any appellate review. Most in this category are criminal cases in which the prosecution seeks review. Generally, no review after final judgment is available if the defendant is acquitted. If many of the district court's actions adverse to the prosecution are to be subject to any appellate review it must be by means of mandamus. Thus there are cases entertaining mandamus review of judges' orders denying discovery that the government wishes,¹⁹⁶ precluding the government from introducing evidence at trial for failure to produce statements,¹⁹⁷ and excluding a government agent from the courtroom.¹⁹⁸ Numerous challenges to sentences that allegedly violated specific statutory limits also have been deemed appropriate for mandamus,¹⁹⁹ although recent Supreme Court cases²⁰⁰ seem to suggest that an appeal might now be appropriate in these instances.

195. Courts will sometimes explicitly state that this is so. In *In re Grand Jury Subpoena*, May, 1978 at Baltimore, 596 F.2d 630 (4th Cir. 1979), the Court of Appeals for the Fourth Circuit stated, "[w]e need not decide how we would strike the balance if this came to us on appeal." *Id.* at 632. See *Sperry Rand v. Larson*, 554 F.2d 868, 876 (8th Cir. 1977) (suggesting a different substantive standard would have applied if the case had been before the court on a § 1292(b) appeal). See also *In re Traffic Executive Ass'n-E. R.R.s.*, 627 F.2d 631, 634-35 (2d Cir. 1980).

196. *United States v. Carter*, 493 F.2d 704 (2d Cir. 1974).

197. *United States v. McMillen*, 489 F.2d 229 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973).

198. *In re United States*, 584 F.2d 666 (5th Cir. 1978).

199. See, e.g., *United States v. Denson*, 603 F.2d 1143 (5th Cir. 1979) (en banc); *United States v. Jackson*, 550 F.2d 830 (2d Cir. 1977).

200. See *Arizona v. Manypenny*, 451 U.S. 232 (1981); *United States v. DiFrancesco*, 449 U.S. 117 (1980).

The civil counterpart to the criminal case in which no appellate review other than by mandamus is allowed at any time is the order remanding to state court cases that have been "removed improvidently and without jurisdiction."²⁰¹ A section of the removal statutes provides that such a remand order is "not reviewable on appeal or otherwise."²⁰² But in *Thermtron Products v. Hermansdorfer*,²⁰³ the Supreme Court said that mandamus is available if the remand were for reasons other than those allowed under the statute. Various court of appeals cases allow mandamus review for this issue.²⁰⁴

It is important to recognize the limited role mandamus is supposed to play in these cases. The general rule is no appellate review. The final authority on certain matters is to rest with the district court. How this authority is exercised is not the business of the appellate court. Mandamus is to be employed only when the district judge is viewed as acting outside of the specific limits of this authority.²⁰⁵ However vague terms such as "usurpation of power" are, they surely are meant to invoke some type of standard stricter than that implied by the traditional abuse of discretion standard.

What mandamus does in these cases is enforce the parameters set on the district judge's final authority. Often these are parameters set by legislative action. The degree to which the district court actually has this authority is dependent on whether there is appellate review and the extent of any such review. Mandamus is the means of appellate review provided, but, in theory, it is a review only of whether the district court exceeded the bounds of the discretion it was given.

Unfortunately, there is no easy way to distinguish this type of review from review of the manner in which discretion is exercised, the review mandated by the normal abuse of discretion standard. How does one differentiate between misuse of discretion and going beyond the bounds of discretion? In some cases one might agree

201. 28 U.S.C. § 1447(c) (1976).

202. 28 U.S.C. § 1447(d) (1976).

203. 423 U.S. 336 (1976). *But see* *Gavitt v. S.W. Bell Tel. Co.*, 430 U.S. 723 (1977) (Mandamus not available when remand complies with 28 U.S.C. § 1447(c) (1976)).

204. *See, e.g., In re Shell Oil Co.*, 631 F.2d 1156 (5th Cir. 1980); *In re Greyhound Lines Inc.*, 598 F.2d 883 (5th Cir. 1979).

205. *See In re United States*, 598 F.2d 233, 236-38 (D.C. Cir. 1979). *But see In re United States*, 565 F.2d 173, 178 (1st Cir. 1977).

that the trial court was trying to exercise discretion beyond what it was given, such as failure to adhere to specific numerical limitations.²⁰⁶ Thus, writs of mandamus have issued where a district judge ordered a determinate sentence for a period not authorized by the Federal Youth Corrections Act²⁰⁷ and where a judge had reduced a sentence after the 120 day limit of Federal Rules of Criminal Procedure Rule 35 had run.²⁰⁸ But when the question is whether the reasons that the district judge gave for ordering a new trial in a criminal case²⁰⁹ or remanding a civil case to state court²¹⁰ are proper grounds for taking such action under the appropriate rule or statute, it is far more difficult to see a line between reviewing the actual exercise of the discretion as opposed to reviewing only whether the boundaries of the discretion have been exceeded.

In fact, the mandamus standard of review as employed by many courts has come full circle. The court of appeals looks to see if the district court has erroneously interpreted a statute or rule and thus is actually applying the most stringent standard of appellate review: whether the district court has erred. Courts will feel compelled to state that they are using the mandamus standard, but will then automatically find error rising to that level whenever an error as to statutory authority is declared. This is well illustrated by some mandamus cases involving class action issues.²¹¹ The "extraordinary" writ has been justified when a court of appeals has been able to determine that the district court's action was based on an incorrect interpretation of some part of Rule 23, the argument being that an incorrect interpretation of the statute meant the action was taken without authorization and thus amounted to a clear abuse of discretion.²¹²

206. *But see* United States v. Mehamanesh, 652 F.2d 766, 770 (9th Cir. 1980).

207. United States v. Jackson, 550 F.2d 830 (2d Cir. 1977).

208. United States v. Regan, 503 F.2d 234 (8th Cir. 1974).

209. *In re* United States, 565 F.2d 173 (1st Cir. 1977).

210. *See In re* Greyhound Lines, Inc., 598 F.2d 883 (5th Cir. 1979). The Fifth Circuit has attempted to draw the distinction based on whether "the district judge affirmatively states a non-1447(c) ground for remand." *In re* Merrimack Mut. Fire Ins. Co., 587 F.2d 642, 647 (5th Cir. 1978).

211. Review of these issues after final judgment is, of course, available.

212. *McDonnell Douglas Corp. v. United States Dist. Court for the Cent. Dist. of Cal.*, 523 F.2d 1083, 1086-87 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). *See also* Uery v. Ritter, 547 F.2d 528 (10th Cir. 1977), where the Court of Appeals for the Tenth Circuit automatically found that the district court "usurped its power in rejecting the claim of privilege." *Id.* at 532.

The fact that this "mandamus standard of review" can be and has been turned on its head at times does not mean that we should ignore the reality of this separate standard of review. Despite its conceptual and practical difficulties in application, this standard of review is the only one ever used to review certain "unreviewable" action of the trial judge. It is important to recognize the unique aspect of this use of mandamus. In this context mandamus is the only means of appellate control that is available. The mandamus "tests" are employed to establish the standard of review that governs the extent of this appellate control. This demonstrates the close connection between the standard of review applied by the appellate court and appellate jurisdiction, *i.e.*, the instances in which an appellate court will entertain an appeal. In the situation where there is no appellate review other than by mandamus and the propriety of mandamus review is determined by the degree of error, the existence of appellate review and the standard of review have merged into one. Indeed, one discovers a similar development in the section 1404(a) transfer cases because useful review after final judgment is virtually nonexistent.²¹³

From the viewpoint of proper judicial administration, used in its broader sense, there is nothing wrong with this merger of mandamus jurisdiction and the standard of review in cases in which review only can be by mandamus, because this is the only standard that ever will be applied. Thus, these standards are the attempt to express the degree of overall appellate control desired concerning these issues. A separate question exists for each particular use of mandamus as to whether any review should be allowed, but there is no overall objection to having this special standard of review.

That is not the case for the use of mandamus as a means of interlocutory review of decisions for which normal appellate review after final judgment is available. Unfortunately, the distinction between these two fundamentally different types of mandamus power is normally not recognized. More importantly, there are serious difficulties with using this separate standard of review in this larger category of mandamus cases.

It is not that there will be a difficulty in determining which

213. This occurs either when courts develop a special standard of review for § 1404(a) cases similar to those used for mandamus, *see, e.g.*, *Toro Co. v. Alsop*, 565 F.2d 998, 1000 (8th Cir. 1977) ("manifest judicial arbitrariness"), or actually use the mandamus standards, *e.g.*, *Application of Amarnick*, 558 F.2d 110, 112-13 (2d Cir. 1977).

standard to use. But there is a conceptual difficulty, and ultimately a practical one, in having two standards. If the court of appeals is going to allow some review of a class action²¹⁴ or privilege issue,²¹⁵ it should not be done by a standard other than that normally applicable. The fact that the court of appeals is being asked to review the issue on mandamus should not affect the question of how much authority on this issue should be given to the district court. Whether the district court slightly erred or erred substantially should not affect the question of allowing interlocutory review.

There is an inherent inefficiency in allowing a review of the merits by this standard and a second review of the merits by a less deferential standard at a later time. Admittedly, this might not actually happen in many instances. Still, it will sometimes occur and is often encouraged by courts of appeals which claim to be expressing no opinion on the result of the issue were it to come up by appeal rather than mandamus.²¹⁶ How allowing two separate reviews of the merits preserves the integrity of the final judgment rule is hard to understand.

Moreover, it is not sensible to allow a separate standard of review for orders that are subject to review by appeal as well as mandamus. Having two standards of review leads, in effect, to courts entertaining petitions on the grounds that the district court's order is reversible under this higher standard of review. But if the order should not be reviewable at this time for other reasons, the degree of error should not automatically authorize such review.²¹⁷ And if review is appropriate at this time, it should be a full review by the normal standard that would be used if the issue had arisen by means of a section 1291 or section 1292(b) appeal. Often there is now only a partial review.

Yet, not all courts that make reference to the mandamus "tests" are engaging in only a partial review. The ability to manip-

214. See, e.g., *J. H. Cohn & Co. v. Am. Appraisal Assocs., Inc.*, 628 F.2d 994, 997-98 (7th Cir. 1980).

215. See, e.g., *Nat'l. Super Spuds, Inc. v. New York Mercantile Exch.*, 591 F.2d 174, 181 (2d Cir. 1979).

216. See, e.g., *United States Fidelity & Guar. Co. v. Lord*, 585 F.2d 860, 866 (8th Cir. 1978), cert. denied, 440 U.S. 913 (1979); *In re Sugar Antitrust Litig.*, 559 F.2d 481, 483 (9th Cir. 1977).

217. Courts can say that a district court's order denying discovery is "in excess of its powers" thus warranting mandamus without facing the issue of whether any review at this time is appropriate. *Western Elec. Co., Inc. v. Stern*, 544 F.2d 1196, 1198-99 (3d Cir. 1976).

ulate these standards to justify review of almost any error is evident. A decision can be deemed a "clear abuse of discretion" if the court wishes to reverse the order at this time, or the petitioner can be found not to have shown "clear and indisputable" error if the court does not think reversal is appropriate at that time.²¹⁸ Surely, some courts are exercising a type of discretion through this rubric. Since the standards are so amorphous, it is possible to place almost any order that is reversible under the normal standard in the category of error correctable by mandamus.²¹⁹ Similarly, the same error easily could be deemed as not rising to this level. The problem with this is not simply that the courts of appeals have such broad discretion. It is that it allows them to approach the question and answer it without addressing the real issues as to interlocutory review or giving any guidance to the bar as to what is appropriate for mandamus review.

For the courts of appeals often are not directly asking and answering the question of whether this order should be considered by interlocutory appellate review at this time. It may be true that there is some connection between the type of error alleged and the propriety of mandamus review in some cases. But often this is neither discussed nor made explicit. The standards are presented as rationales for immediate review in and of themselves without regard to the more relevant considerations, those upon which the final judgment rule and the allocation of responsibility between trial and appellate judges are premised. Thus, there is no sense to saying that a certain order of the district court concerning a class action issue is not authorized by Rule 23 and therefore a usurpation of power or an excess of jurisdiction and hence must be corrected by mandamus. That does not address the considerations relevant to whether this order should be subject to immediate appellate review. As suggested earlier, once traditional notions of subject matter jurisdiction or explicit numerical limitations are exceeded, almost any order that is reversible error might be deemed

218. Compare *McDonnell Douglas Corp. v. United States Dist. Court for the Cent. Dist. of Cal.*, 523 F.2d 1083, 1087 (9th Cir. 1975) with *In re Sugar Antitrust Litig.*, 559 F.2d 481, 483 (9th Cir. 1977).

219. "The rather tenuous distinction between 'mere' error and 'abuse of discretion' provides the appellate courts with the opportunity to exercise their extraordinary power whenever they consider immediate review appropriate." Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 377 (1961). See also Note, *Mandamus as a Means of Federal Interlocutory Review*, 38 OHIO ST. L. J. 301, 317 (1977).

a usurpation of power or excess of jurisdiction. These categorizations bear no relationship to whether interlocutory appellate review should be entertained.

3. *Remedy.* There is a likely response to the above contention. It would focus on the third function of mandamus, that of a remedy. The response to the foregoing argument would be that the courts look to the type or degree of error in order to decide whether it is necessary to actually use the remedy of formal issuance of the writ. The type or degree of error would be relevant to deciding whether this powerful weapon in the appellate arsenal should be employed.

This view raises serious questions. Why should the appellate court not issue the writ if it has decided that the court has erred?²²⁰ Is it because of the policy of the final judgment rule? How is that policy being served if the court of appeals has already considered the merits, but not found error sufficient to authorize mandamus relief? Is there some assumption that this is necessary in order to deter others from filing petitions for mandamus by sending them the message that they are unlikely to be awarded relief?²²¹ This seems strange on several grounds. First, it still does not answer the question of why a more blatantly erroneous order, as opposed to an erroneous order with more serious consequences, ever should be the test for actually issuing the writ. Second, the deterrent effect is not well designed because of the difficulty of determining whether an order is merely erroneous or actually a usurpation. Those who are to be deterred might not easily be able to recognize it.

Moreover, the deterrence argument suffers because some relief often can be obtained from the consideration of a mandamus petition even when the petition is denied. This is an important aspect of the remedial function of the mandamus power. A classic and explicit example of this is the previously discussed Supreme Court decision in *Kerr*.²²² The unpublished Second Circuit cases provided further examples. In many of the published opinions the courts of

220. In an interesting opinion, the Fifth Circuit sitting *en banc* rejected the notion that a court of appeals has the discretion to choose not to use mandamus to correct an illegal sentence on the grounds that there was no "compelling need." *United States v. Denson*, 603 F.2d 1143, 1145-48 (5th Cir. 1979) (*en banc*).

221. See Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 378 (1961).

222. See *supra* text accompanying notes 86-92.

appeals will express some disapproval of the district court's order even while they are declaring it not sufficiently erroneous for mandamus relief.²²³ Or the court's opinion might indicate that the order would be proper under the standard of review applicable on appeal.²²⁴ Such statements by a court of appeals can be quite useful to a petitioner.²²⁵ As noted above, mandamus opinions occur at a time when the district court can still change its order based on the views expressed by the appellate court.²²⁶ Indeed, the appellate court often so hopes²²⁷ and petitioner's counsel desires expression of such hope by the appellate court. Even if the district court remains firm, which it is empowered to do if the writ is not issued, the petitioner might be better able to evaluate his ultimate chances for success. This could be true even when the court of appeals has hinted that the district court order is proper; such information might be eagerly sought to help decide whether to settle or how much time and money to invest in the litigation.

The refusal to issue the writ because a sufficient level of error has not been found cannot be justified on the basis of the policy behind the final judgment rule. The whole general procedure of considering the merits on this limited review flies in the face of that policy. Regardless of whether the writ actually issues, the time and cost of some appellate review of the merits of the order has occurred. Worse, this time and effort can go for naught if the review does not dispose of the issue, but leaves open the possibility of a reversal on appeal. It is an extremely inappropriate use of judicial resources.

Hence, this remedial aspect of mandamus petitions is premised more on the other policy basis underlying the reluctance to employ mandamus, the fact that the district judge is a litigant. This policy basis, however, needs further refinement. It is not the

223. *In re United States*, 565 F.2d 19, 23-24 (2d Cir. 1977), *cert. denied*, 436 U.S. 962 (1978); *Stans v. Gagliardi*, 485 F.2d 1290, 1291-92, (2d Cir. 1973).

224. *See J. R. Cohn & Co. v. Am. Appraisal Assocs., Inc.*, 628 F.2d 994, 997-99 (7th Cir. 1980).

225. Practitioners are well aware of the usefulness of such comments. *See Bonner & Appler, Interlocutory Appeals and Mandamus*, LITIGATION, Winter 1978, at 29-30 [hereinafter cited as *Bonner & Appler*].

226. District courts will, in fact, do so, as was apparently the reaction to the court of appeals' comments in *Stans v. Gagliardi*, 485 F.2d at 1292. *See Bonner & Appler, supra* note 225, at 25.

227. *See cases cited supra* note 2.

fact that the district judge is the named respondent that is crucial. This once might have had some importance, but currently the Federal Rules of Appellate Procedure allow the district judge the choice not to appear²²⁸ and automatically make the opposing party in the underlying suit a respondent. The district judge is merely a nominal party.²²⁹ Indeed, some circuits²³⁰ have provided by local rule that the petitions are to be entitled "In re Petitioner" rather than "Petitioner v. District Judge," thus further undercutting this narrow rationale.²³¹ Moreover, if the concern were based on the district judge being a party to the appeal who, therefore, has to provide some defense to the petition, that burden would already have occurred by the time that the decision is made whether or not to issue the writ in a case which has received consideration by the appellate court.

There is some sense to the general policy, however, if it is expanded. The writ has been said to be extraordinary and is viewed that way by federal judges. Whereas no reversal is desired or well received by a district judge, to be "mandamused" is a particularly strong rebuke that often will be taken more personally. The very standards developed for mandamus express this thought. It was a sensitivity to these feelings that prompted the District of Columbia Circuit to develop a general policy not to issue the writ, relying on the assumption that the district judge will comply with the views of the appellate court,²³² and caused the Third Circuit, in at least one case,²³³ to allow the petitioner to apply for issuance of the writ if the district court's order was not vacated within twenty days. There is no doubt that these courts reversed the district court's

228. FED. R. APP. P. 21(b).

229. Thus, even though a judge technically is "represented" by counsel for the party opposing the petition for mandamus, this "representation" by an attorney for one of the parties does not disqualify the judge from continuing to preside over the case. *Century Casualty Co. v. Sec. Mut. Casualty Co.*, 606 F.2d 301 (10th Cir. 1979); *United States v. Halde-man*, 559 F.2d 31 (D.C. Cir. 1976).

230. 1ST CIR. R. 18; 2D. CIR. R. 21; 4TH CIR. R. 14; 5TH CIR. R. 12; 8TH CIR. R. 25; 11TH CIR. INTERIM R. 19; D.C. CIR. R. 6(h).

231. The Third Circuit, in an *en banc* opinion, has noted the reduced nature of this concern resulting from the change of procedure making the district judge a nominal party which is not required to file an answer. See *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 702-03 (3d Cir. 1979)(*en banc*), *cert. denied*, 444 U.S. 1074 (1980).

232. See *In re Halkin*, 598 F.2d 176, 200 (D.C. Cir. 1979); *In re Zweibon*, 565 F.2d 742, 748 (D.C. Cir. 1977).

233. *The Plum Tree, Inc. v. Stockment & Newcomer*, 488 F.2d 754 (3d Cir. 1973).

order, but they preferred not to use the strong means of formally issuing a writ of mandamus.

What is actually the basis for the view that being "mandamused" is much worse than being reversed on appeal? Is it not the fact that the judge has been found to have erred so badly that even applying the deferential mandamus standards of review the court of appeals has found reversible error? It is not the device of mandamus *per se*, but the special standard of review often used that justifies this special fear of having the writ of mandamus issue against one. For in a case involving a "special category" such as a jury trial issue in which an ordinary standard of review is used, issuance of a writ of mandamus should not be seen as any more drastic than a reversal on appeal. Thus, the special nature of using mandamus should be recognized and maintained, but only for those instances in which the mandamus standard of review properly should be employed. Again, the differing types of mandamus are not being fully understood.

The discussion in this section indicates that the courts of appeals are entertaining mandamus petitions in numerous different respects, without much recognition of the differences. Nor has there been much effort to formulate an overall approach to mandamus cases other than to pick and choose among Supreme Court cases or quotations. One court of appeals, however, has tried to create an analytical framework.

D. *The Ninth Circuit Approach*

In *Bauman v. United States District Court*, the Ninth Circuit recognized the need "to formulate objective principles to guide the exercise of their Section 1651 power."²³⁴ The case involved the issue of allowing mandamus review of an order requiring a particular notice to class members in a FRCP Rule 23(b)(2) class action. Without attempting to differentiate among the different uses of the mandamus power,²³⁵ the court "identified five specific guidelines" to be used as a framework for the boundaries of its section

234. 557 F.2d 650, 653 (9th Cir. 1977).

235. See *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978) (applying the same *Bauman* factors in a case in which mandamus was being sought by a newspaper that could not appeal an order to stay away from jurors because the paper was not a party to the action). See also *Rees v. United States Dist. Court for the Cent. Dist. of Cal.*, 572 F.2d 700 (9th Cir. 1978)(applying the *Bauman* guidelines).

1651 power.

The first of these is that the petitioner have no other adequate means of attaining the relief desired, such as by direct appeal, and the second is that “[t]he petitioner will be damaged or prejudiced in a way not correctable on appeal.”²³⁶ These can be considered together for the court itself notes that they are “closely related.” Certainly, if an immediate appeal is available there is no need for mandamus and no real issue as to its appropriate use. Courts have traditionally used this as a preliminary or jurisdictional factor. The crucial issue is whether an appeal at a later time will be “adequate” or sufficient. The Ninth Circuit’s first two guidelines recognize this as a factor, but do not indicate how it is to be evaluated. The court itself notes this.²³⁷ There is almost always some harm that cannot be corrected on appeal. The question is what type of harm and what degree of harm should be sufficient to authorize an immediate review by mandamus. Moreover, it is important to note that none of these guidelines are considered determinative in and of themselves. Thus, even if a later appeal should be termed adequate, the other factors still must be explored.

This is an important point in view of the third guideline: “The district court’s order is clearly erroneous as a matter of law.”²³⁸ Presumably, this is again a requirement of reviewing the merits in all cases. The extent of the review is not evident from the guideline. The “matter of law” part might mean that the order on its face violates a specific statutory provision, such as a time limit. Instead, it is more likely a way of indicating that the court of appeals will consider the merits but not undertake an extensive analysis of any factual dispute.²³⁹ Interestingly, despite the time spent on the merits in *Bauman*, the court determined that there was a split of authority on one issue, with no Ninth Circuit or Supreme Court authority, and stated that therefore the district court’s order was not “clearly erroneous as a matter of law as that term is used in mandamus analysis.”²⁴⁰ It did not resolve that issue, but it did

236. *Bauman*, 557 F.2d at 654.

237. *Id.* at 655.

238. *Id.* at 654-55.

239. The court does examine the class notice order issued by the district court and the documentation regarding the provisions necessary for class certification as well as the requirements of FED. R. Civ. P. 23. See 557 F.2d at 658-60.

240. *Id.* at 660.

address the merits on another issue to state that "[t]his portion of the order is facially unassailable."²⁴¹ It also specifically construed the order in a certain fashion and stated that "[i]f the district court has other intentions than these, our analysis might be different and may lead to a finding of clear error."²⁴² The court did not question whether by these comments alone it had already exercised part of its mandamus power.

The final two factors are basically those of *LaBuy*, "an oft-repeated error, or . . . a persistent disregard of the federal rules" and *Schlagenhauf*, "new and important problems, or issues of law of first impression."²⁴³ The oft-repeated error contention was rejected because the Ninth Circuit viewed it as applicable only when there is a prior decision by an appellate court condemning the practice. In that sense it seems to be closely tied to the question whether the decision is "clearly erroneous as a matter of law." Nor was the factor of an "issue of first impression" found to favor the issuance of the writ here.²⁴⁴

In *Bauman*, the Ninth Circuit was able to determine that all the guidelines pointed to denial of the writ. But using these guidelines also resulted in at least a partial review of the merits of the district court's order. The Ninth Circuit's formulation of guidelines does indicate a more developed concern about the problem than that of the other circuits. But the guidelines were simply drawn from cases without any evaluation of their propriety or the practical effects of using them. They fail to adequately address the heart of the issue.

This entire examination of the use of the mandamus power by all the courts of appeals does not disclose much specific analytical guidance concerning the proper scope of the mandamus power. It does, however, provide an understanding of the differing ways in which mandamus is used which implicitly suggests much about its appropriate role and is the major part of the foundation needed to prepare an analytical framework for the use of this appellate

241. *Id.*

242. *Id.*

243. *Id.* at 655.

244. This despite the fact that the issue had never been addressed by the Ninth Circuit. The reason given is that the district judge had not actually ordered this action, but simply indicated an intention to do so. *Id.* at 661. Thus, any review would be premature in the court's opinion. *Id.* This itself is an interesting statement about the extent to which mandamus should be used for "supervisory" or "advisory" purposes.

power.

III. SUGGESTIONS FOR THE APPROPRIATE USE OF THE MANDAMUS POWER

The task of suggesting guidelines for the appropriate use of the mandamus power is a difficult one. The previous discussions of the cases provide some guidance through the recognition of the different functions of mandamus and the various situations in which the courts are employing the power. Also needed, however, is some understanding of the appellate process as a whole in order to determine the appropriate role mandamus should play.

A. Appellate Review

Appellate review is, in many respects, a check on the behavior of lower court judges.²⁴⁵ Initially, the decision-making power of the judicial system resides with the trial court, in the federal system, the district court judge. We prefer, however, not to allow the entire decision-making authority to vest in one man or woman, but to require a check on that power.²⁴⁶ The check we provide is review by other judges, who are chosen specifically for that purpose.²⁴⁷ The final authority must rest somewhere, however, and the major task of creating a system of appellate review is to decide where this authority is to lie.

This is an extremely complex issue. It involves matters beyond the questions of whether there should be an intermediate appellate court or how many judges should hear an appeal, questions important in their own right.²⁴⁸ The heart of the issue is the determination of who should be given what degree of final authority over which matters. At one extreme is the possibility of no appellate review whatever.²⁴⁹ At the other extreme is "de novo" appellate

245. Generally two functions of appellate review are recognized, an "institutional" or law development function and an error correction function. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 2-4 (1976)[hereinafter cited as *JUSTICE ON APPEAL*]; Martineau, *The Appellate Process in Civil Cases: A Proposed Model*, 63 MARQ. L. REV. 163, 166-67 (1979).

246. See *id.* at 166. Redish, *supra* note 10, at 97.

247. *Id.* at 106 n.94.

248. See *JUSTICE ON APPEAL*, *supra* note 245, at 138-84.

249. It has been argued that appeals in most civil cases should be abolished. Wilner, *Civil Appeals: Are They Useful in the Administration of Justice?*, 56 GEO. L. J. 417 (1968).

review in which no consideration or deference is given to the decision or findings of the lower court.

The degree of control provided results from various aspects of the procedural system.²⁵⁰ Perhaps the most obvious is the standard of review used by the appellate court.²⁵¹ For substantive matters deemed questions of law the appellate court exercises the final authority by substituting its judgment for that of the trial court through use of a standard of whether the trial court has erred. Other decisions are reviewed on the basis of an "abuse of discretion" standard. Factual findings are subject to review by the "clearly erroneous" standard.²⁵² These standards constitute a splitting of the final authority. The trial judge has the final authority if he remains within certain parameters. The limits of these parameters, however, are set by the appellate court, so that court has the final authority on whether the district judge has exceeded these bounds.

But standards of review are only part of the picture. They will determine the allocation of authority when the issue is actually being decided by the appellate court. Yet, in many instances, the issue will never be resolved by the appellate court so as to provide relief to the complaining party. Thus the allocation of this final authority also occurs by use of the harmless error doctrine.²⁵³ Theoretically the district judge does not have final authority on a particular matter simply because the harmless error rule might lead the appellate court to affirm the judgment even though it found that the trial court had erred. A "review" of the decision might be had, but no relief from the ruling of the trial court would be granted, so in effect the judge's final authority would not have been disturbed. The reason for this is that no relief is needed since by definition the complaining party was not ultimately harmed by the ruling.²⁵⁴

Harm in this context refers to effect on the ultimate disposi-

250. See Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 731 (1957).

251. See JUSTICE ON APPEAL, *supra* note 245, at 129-32.

252. FED. R. CIV. P. 52(a).

253. See R. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 3-51 (1970), (for a general discussion of the doctrine of harmless error).

254. Federal appellate courts should disregard "errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (1976). See also FED. R. CIV. P. 61; FED. R. CRIM. P. 52(a).

tion of the suit itself. Some "harm" may have occurred as a result of the ruling itself. For instance, a party may have been forced to answer intimate questions that were irrelevant to the case. He was harmed by the fact that he had to reveal embarrassing facts unnecessarily. But the irrelevant material may have played no part in the trier's decision on the actual issue in dispute. Therefore, when this issue reaches the appellate court after the final judgment the appellate court provides no relief. The embarrassment has already occurred and ordering an unnecessary reversal of the judgment will not change that.

This leads to the recognition of the other crucial and related factor in this equation: the timing of the appellate review. The decision of the district court in the above example takes on *de facto* finality only because it is not reviewed until after the witness has answered and the trial is completed. It is conceivable that an immediate appeal could be available. As a practical matter, it would be very difficult to complete a trial if every evidentiary ruling were appealable. The costs would be enormous. At the heart of the final judgment rule is the determination that we will not allow this type of interlocutory appeal. The efficiency inherent in deciding all of these issues at once, coupled with the fact that it might be unnecessary to decide this question (the complaining party might prevail in the lawsuit or the ruling might have no effect on the ultimate outcome), are the major justifications for the rule.²⁵⁵ The party might suffer embarrassment unnecessarily, but that alone is not deemed a sufficient reason to allow interlocutory appellate review.

The rationale underlying the final judgment rule requires further consideration.²⁵⁶ The efficiency argument is premised on the assumption that the district judge is in as good a vantage point as the appellate judges to make the decision (in some instances perhaps a better vantage point)²⁵⁷ and that more often than not the district judge's decision will be correct.²⁵⁸ Thus, we assume that

255. See Note, *supra* note 221, at 351-52; 15 WRIGHT & MILLER, *supra* note 117, at § 3907.

256. Although currently viable policy justifications exist for the continued use of the final judgment rule, its origin appears to have been the result of historical peculiarities. See Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L. J. 539, 541-44 (1932).

257. See Wright, *supra* note 250, at 781-82. But see Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507, 513 (1969) (appellate courts protect litigants from an abuse of discretion by the trial judge).

258. At least trial court decisions are affirmed more often than not. 15 WRIGHT &

there will not be a large number of instances in which proceedings in the district court will be either ultimately unnecessary or repeated. At least the amount of resources allocated to these unnecessary or repetitious proceedings will be less than the amount of appellate resources that would be required in the absence of the final judgment rule.

Another rationale offered in support of the rule is that it avoids the problems of delay caused by "a succession of separate appeals."²⁵⁹ The ability to appeal immediately every ruling of the trial court could allow a party to continually delay the final outcome of the litigation.²⁶⁰ There is also the potential for harassment of a poorer litigant by a wealthier one given the expense entailed in an appeal.²⁶¹

An additional justification for the final judgment rule that has been suggested centers on the need for the district judge to have the ultimate authority on most matters for at least some significant amount of time. The argument is that in order to carry out his duties the district judge's authority must be respected by the parties, and frequent interruption of the proceedings at the trial level and review of the trial judge's orders can undermine that respect.²⁶² Although there surely is need for fostering respect for the trial judge, the degree to which all interlocutory appellate review undesirably affects the legitimate respect we wish to promote is questionable.²⁶³ Indeed, in many instances, this proposed rationale runs directly counter to one of the main purposes of mandamus review.²⁶⁴

Finally,²⁶⁵ it must be recognized that the final judgment rule presupposes that most harm to parties which is judicially recognized as important can be effectively remedied on appeal after final judgment. The assumption is that harm is judicially recog-

MILLER, *supra* note 117, at § 3907. *But see* Redish, *supra* note 10, at 107 (district court decisions left intact because courts of appeals prefer to leave resolution of certain issues to the district judge).

259. *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

260. *See* Note, *supra* note 221, at 351; 15 WRIGHT & MILLER, *supra* note 117, at § 3907.

261. *Id.*

262. *See* Wright, *supra* note 250, at 781.

263. *See* Carrington, *supra* note 61, at 513; Redish, *supra* note 10, at 106.

264. *See infra* text accompanying notes 286-90.

265. There are other minor justifications for the rule that have been presented. *See* Note, *supra* note 221, at 351-52; 15 WRIGHT & MILLER, *supra* note 117, at § 3907.

nized as important if it has an effect on the outcome of the litigation itself. For, as discussed above, other harm will normally not be remedied on appeal after final judgment under the harmless error doctrine.

Yet, the effect of the final judgment rule in allocating authority for decisions causing such harm is more complex than this. Unlike a situation in which a matter is never reviewable on appeal, the interplay of the final judgment rule and the harmless error doctrine does not mean that an entire category of decisions always will escape any review by the appellate court. Some appellate guidance or supervision on the general issue itself might occur through an appeal after final judgment, either through the expression by the appellate court of a "gratuitous" opinion on the correctness of trial court action, deemed irrelevant to the outcome of the case, or through the ability of at least one litigant to establish prejudicial error resulting from such a ruling. Admittedly, for certain types of decisions of the trial judge it might be almost impossible for any party to show that the error was not legally "harmless." But, for most types, the possibility of that rare instance in which a litigant will be able to demonstrate error exists, and with it the means to provide some minimal overall appellate control on this type of decision, even if it is not available for correction of the harm in each particular case.

More importantly, the availability of review after final judgment does give litigants, in many instances, some effective opportunity for review of harm that they themselves consider especially serious, even if it is unlikely to be deemed prejudicial on review after final judgment. Often a party can refuse to comply with a particular order and have the trial court enter judgment against him or find him in criminal contempt.²⁶⁶ An appeal from such action can then be taken immediately and the underlying issue reviewed.²⁶⁷ Still, the serious consequences of the dismissal or contempt citation will remain if the appellate court affirms. Obviously, this is a drastic measure that will not be undertaken lightly. Nevertheless, some litigants will be willing to use it and our allocation of final authority must reflect this possibility of providing some

266. See Bonner & Appler, *supra* note 225, at 30.

267. Whether a party is entitled to an immediate appeal if the contempt is determined to be civil rather than criminal is uncertain. See *Grinnell Corp. v. Hackett*, 519 F.2d 595, 598 (1st Cir. 1975); *cert. denied*, 423 U.S. 1033 (1975). See also *Redish*, *supra* note 10, at 123.

limitation on the trial judge's authority.

B. *The Role of Mandamus in the Appellate Review Process*

Recognizing these general principles, the main question of the appropriate use of the mandamus power still remains. How should mandamus fit into this overall scheme and when should it be employed? It is impossible to present a concrete "test" that will result in a clear and easy answer for each particular case. It is possible, however, to develop an analytical framework for the appropriate use of these writs that is cognizant of the various roles they play within the appellate process and is more consistent with the twin goals of efficient use of judicial resources and achievement of an optimum degree of appellate control.

This analytical framework would provide a means of initially addressing each mandamus petition with a jurisdictional inquiry. Thus, these suggestions mainly relate to the use of mandamus as a jurisdictional device. The special mandamus standards of review must also be considered to complete the picture and will receive some attention at the end of this section.

The remedial uses of the mandamus power, however, generally are not necessary ingredients of this framework. Approaching mandamus petitions raising certain issues, such as allegations of delay, by means designed to "settle" the dispute does not conflict with the suggestions offered. But other currently identifiable instances of the remedial aspect of the mandamus power would not be appropriate. There would be no reason to consider the merits of an issue and express the court's opinion on it, but refuse to issue the writ on the ground that correction by mandamus would be improper. The propriety of mandamus would be determined prior to any serious consideration of the merits. The appellate court judges still might suggest that they would have acted differently than the district judge, even though they do not find that the decision exceeded the leeway allowed by the applicable standard of review.²⁶⁸ But the basis for not ordering the decision changed would be that it was not erroneous under the applicable standard of review, not that the device of mandamus could not be used to remedy the

268. This standard of review would be the same regardless of the appellate device used for review. See *infra* text accompanying note 293.

situation.²⁶⁹

This framework for a jurisdictional approach to mandamus is premised on the simple fact that the mandamus power is an exception to the final judgment rule. As such, the circumstances justifying its use should be those in which one or more of the underlying persuasive bases for the final judgment rule are not applicable. One general comment about the mandamus device itself is appropriate in this regard. As noted, two of the concerns connected with allowing interlocutory appeals are delay and expense. The mandamus procedure is well suited to keeping both to a minimum. An improper petition can be dismissed or denied quickly without even requiring the filing of an answer by the other side. Of course, for those petitions which are given full consideration, including possibly oral argument, some delay and expense will result. The goal is to develop a means of identifying instances in which we are willing to accept the delay and expense of this interlocutory review.

One possibility might be to identify a category of cases for which the validity of the efficiency argument supporting the final judgment rule is more doubtful than it is in general. This might include cases that could be identified as much more likely to be reversed than most. Since one major premise underlying the final judgment rule is the prevention of unnecessary appeals, if it were economically possible to determine which orders are likely to be found to be erroneous we would be more inclined to allow them to be reviewed immediately.²⁷⁰ The difficulty, of course, is being able to identify such decisions without full appellate review. One possible category of such decisions might be those that are clearly wrong. Arguably, this is an unarticulated premise supporting the tests that require a finding of a clear abuse of discretion or a clear and indisputable right to issuance of the writ. The theory is that

269. The possibility that such comments from the appellate court could influence the district judge at a time when he could change his decision would still exist. One vital difference from the current use of mandamus, however, would be that the district judge could be certain that any final decision would not be reversed on this ground, because the same standard of review would be used. Even so, the district judge might be swayed by the appellate judges' comments and it would be possible for the court of appeals to continue to exercise some influence in certain cases by choosing to express its views in an unpublished order or a published opinion.

270. It would still be true, however, that part of the rationale for the final judgment rule would support no immediate review. Such erroneous orders might never have to be reviewed because the case might settle, the complaining party might win, or the error might be deemed harmless.

there are some decisions that are so erroneous that they can be easily spotted as such. Thus, one of the criteria for whether to allow mandamus review might be whether the decision is so wrong that even a preliminary glance would so indicate. This is a superficially inviting concept and one which to some extent appears to be used at present. Indeed, the mandamus procedure is well suited to preliminary determinations because of the discretion to order an answer or to hear argument.

The contention of this Article, however, is that attempting to determine whether a decision is obviously erroneous is not appropriate. Surely there might be some cases in which a preliminary determination could establish this. But it is questionable whether this is a useful criterion. These are not instances in which after considering the full arguments of both sides and the appropriate authorities it is easy to decide that the judge erred. Instead, the question is whether a jurisdictional inquiry based on a limited consideration of one side's arguments can be used effectively to determine that a case is likely to be reversed. Such an attempt leads inexorably toward an inefficient use of mandamus. Our system is premised on the assumption that a district judge will normally decide correctly. In any event, it will be the relatively rare case in which the district judge will err so greatly that the error easily can be spotted by appellate judges who have given the matter little consideration. Because there is no convenient stopping point, no threshold determination of error can be used without leading to a full consideration of the merits. Allowing this consideration to be a general basis for authorizing mandamus results in the inappropriate "partial" review of the merits that, as discussed above, currently often occurs.

Instead, it seems more fruitful to focus the inquiry for guidelines on the implicit assumption underlying the final judgment rule that all harm that should be judicially recognized as important can be cured after final judgment. If effective review can be had after final judgment, the final judgment rule dictates that immediate review is inappropriate. This leaves the difficult question of determining when an appeal after final judgment should be declared insufficient.

There are two different, though at times overlapping, factors to be considered in deciding whether an appeal after final judgment should be viewed as so insufficient that interlocutory review

should be allowed. An appeal at that later point might be insufficient on either of these two grounds. The first is that certain inherently irreparable harm will occur between the time the particular decision is rendered and the time when it will be reviewed on appeal.²⁷¹ The second is that the order most likely will be unreviewable on appeal after final judgment because any error would be "harmless." Sometimes an order might qualify on both counts. Each of these categories can present a proper basis for the use of the mandamus power, but each is quite broad and needs further limitation.

Presumably some decisions can await final judgment without the occurrence of any irreparable harm to anyone. In most situations, however, there will be some harm that will occur that, by its very nature, cannot be remedied. If nothing else, this will usually be the harm that results from having to bear the time and expense (monetary and psychic) of further proceedings in the district court that may either ultimately prove to be unnecessary or now need to be repeated to correct the error. Yet, this type of harm by itself generally cannot justify immediate review.²⁷² The sensible fundamental premise of the final judgment rule is that even though this type of harm will occur, less waste of time and resources will result in the long run, over all cases, if not every decision can be immediately reviewed. This does not mean that this type of harm can never be sufficient to allow immediate review, but it will be so only in the truly exceptional case.²⁷³

Thus, the crucial factor must be the type of harm rather than simply the fact that it is irremediable. Various matters have been recognized as being both irremediable and too important to be effectively allowed to remain in the final authority of the district judge. Our legal system places great emphasis on ensuring that the fundamental prerequisites of the right to a fair hearing are always preserved. This is an important part of our procedural system and one we strongly desire to maintain. It is also the primary policy

271. See *Pan Am. World Airways, Inc. v. United States Dist. Court for the Cent. Dist. of Cal.*, 523 F.2d 1073, 1076 (9th Cir. 1975).

272. It has been argued that immediate interlocutory review should be allowed in some cases just on the basis of this type of harm. Redish, *supra* note 10, at 98-101.

273. An example of such an exceptional case might be a situation involving a trial of unprecedented complexity and length such as that in the IBM antitrust case. This appears to be the best explanation for the Second Circuit's use of mandamus in *Int'l. Business Machines Corp. v. Edelstein*, 526 F.2d 37 (2d Cir. 1975).

explanation for the rule authorizing mandamus review in cases in which it is alleged that the right to a jury trial has been improperly denied. Trial by jury is an essential aspect of our procedural system. Its importance is exemplified by its inclusion in the Constitution.²⁷⁴ Admittedly, any decision resulting from this error can be corrected by ordering a new trial, but the harm resulting from the failure to have provided the party this basic right in the first instance cannot be. The litigant has not simply been required to go forth when he thought his case should have been dismissed or to proceed without the availability of certain discovery he thought proper, but must present his entire case to what he considers to be the wrong fact-finder.

Likewise, mandamus has been and should be available to review the denial of a recusal motion in order to protect the right to proceed before an unbiased judge. As noted earlier,²⁷⁵ litigants themselves seem to desire strongly the immediate resolution of this essential question. Litigants and their attorneys simply do not wish to proceed in the district court before a judge whom they claim cannot fairly and impartially rule on the case. As recognized in the opinions authorizing mandamus review of recusal motions, the presence of an unbiased judge is the fundamental prerequisite to a fair determination.²⁷⁶ Similar reasoning would apply to reviewing the denial of a *pro hac vice* motion which prevents the party from being represented by counsel of his first choice.²⁷⁷

Moreover, these are decisions that if wrong almost never will be deemed harmless.²⁷⁸ As Justice Traynor has phrased it, these "are errors that carry a high risk of prejudice to the judicial process itself."²⁷⁹ Thus, allowing immediate review of these orders is also supported by the fact that one need not await final judgment to know that these errors will not be declared harmless if the complaining party loses the suit. Moreover, these matters involve decisions that are fairly difficult to "disobey" in order to gain an immediate review by means of an appeal from a finding of contempt.

274. U.S. CONST. amends. VI & VII.

275. See *supra* text accompanying notes 172-78.

276. See *supra* text accompanying note 125.

277. See *In re Evans*, 524 F.2d 1004 (5th Cir. 1975). Failure to grant a continuance to allow counsel of choice to participate in the trial might also present these same concerns.

278. See R. TRAYNOR, *supra* note 253, at 64-65.

279. *Id.* at 64.

Additional types of injury that have been considered sufficiently serious to justify the use of mandamus are interference with the functioning of other branches of government or other governments, and infringement on First Amendment rights.²⁸⁰ For the former, review by mandamus ensures that these other entities are respected by the judicial system by preventing improper interference with them, even for a limited time. For the latter, such review helps protect against any chilling effect on First Amendment rights. These are matters too important to leave to the district judge alone.

Other particular orders can result in harm sufficient to authorize mandamus review. Privilege questions present one of the most difficult areas in terms of the sufficiency of the harm. Certainly disclosing a confidential communication or the name of an informant causes irreparable and important harm.²⁸¹ But is enough control provided by the availability of an immediate appeal from an adjudication of contempt following a refusal to disclose? Is the possibility of being held in contempt too great a disincentive to review compared to the degree of seriousness attached to the forced disclosure? Perhaps the answers to these questions should depend on the particular privilege and the involvement of other factors such as interference with other branches of government or the concern over First Amendment rights. In any event, the issue in each case should be squarely met by analyzing whether forcing the party to make use of this more restrictive procedure adequately protects the underlying value.

The question of whether an issue is one of first impression should be tied in with this analysis. This is a relevant inquiry in determining whether to allow mandamus or to leave the party only the option of accepting a contempt citation to secure immediate review. The contempt option presumably provides some degree of control over decisions of the district court that are quite out of line with prior appellate decisions. The party can be confident enough of winning to take the risk of contempt. If the issue is one of first impression, however, it is much harder for a party to gauge his chance for success, and presumably he will be less willing to follow

280. See *supra* text accompanying notes 132-37.

281. It may well be, however, that the party is still entitled to raise the issue on appeal as a ground for reversal even after the privilege has been breached. See C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* §73 (E. Cleary 2d ed. 1972).

the contempt route.²⁸² Thus, the existence of an issue of first impression is a factor to be considered in the analysis of whether the underlying value is adequately preserved by the availability of appeal from a dismissal or a contempt finding.

The "advisory" function should have a broader application than privilege issues alone. As argued above,²⁸³ mandamus should not be available in all instances where an order presents an unresolved issue. Still, it is an appropriate factor to consider. The focus should be on the following questions: (1) is this an issue on which there has been any appellate guidance? (2) how much, if at all, do we desire some appellate guidance on this matter? and (3) how likely is it that this issue ever will reach the appellate court unless a mandamus petition is allowed? It might be that for matters which would almost always be harmless error we would still want some appellate guidance. For instance, the question of a refusal to allow a party to take a tape recorded deposition is an issue that will be unlikely ever to arise on appeal.²⁸⁴ Allowing review of one mandamus petition raising this issue in order to afford the appellate court an opportunity to express its views on the matter might be justified.²⁸⁵ But after that one case, mandamus should not be available to review each case in which a judge does not allow a tape recorded deposition.

There are, however, other types of orders that result in harm likely to be seen as legally harmless for which mandamus review should be allowed in every case. These are instances in which the district judge should be seen as too "interested" to be allowed final authority. This does not refer to a personal interest that would subject the judge to disqualification, but rather to a type of institutional interest in which there is some concern for the ability of the district judge to decide a question in a disinterested fashion. These are mainly matters directly affecting the workload of the judge, most of them related to the time demands presently placed on federal district judges. These judges are forced to move their

282. It may be argued, however, that a party may be more willing to endure a contempt citation if the issue is one of first impression and the litigant is particularly anxious to raise the matter as a "test" case.

283. See *supra* text accompanying notes 69-75.

284. A party refused the right to take a tape-recorded deposition will often take the deposition by stenographic means. Moreover, the inability to take a deposition is extremely unlikely to constitute reversible error after final judgment.

285. See *Colonial Times, Inc. v. Gasch*, 509 F.2d 517 (D.C. Cir. 1975).

caseloads and do so quickly.²⁸⁶ It is in their "interest" in this sense to be able to lessen their docket. This can be done by granting motions to transfer to other districts, referring cases to magistrates, staying cases pending the outcome of other cases, or remanding cases to state court.²⁸⁷ It might also be argued that this can be done in some situations by denying class certification thus avoiding the additional responsibilities that the existence of a class entails. Finally, the district judge can be seen as having this same special interest in the speed in which a case moves, whether it be to hasten the case by refusing a continuance or to delay it and the judge's corresponding work requirements by failing to rule for a long time.²⁸⁸

This "interest" factor provides not only a means of identifying decisions for which there is special reason to question the judgment of the district court, but also provides the only means of creating a check or control on behavior of district judges that should be prohibited, but cannot be corrected on appeal because it is not outcome related, nor checked by special judicial control devices (impeachment or disciplinary mechanisms) because it does not rise to that level of seriousness.²⁸⁹ The peculiarities of mandamus and the general perception of its "special nature" make it appropriate for this purpose. The "interest" factor identifies instances in which there is a special need to provide a detached appellate perspective.

286. See comments of one federal district judge in *Graver v. Secretary of Health, Educ. & Welfare*, 405 F. Supp. 631, 636-37 (E.D. Pa. 1975).

287. Conceivably it might also be in the judge's "interest" to grant a motion for recusal and, therefore, perhaps this should be an appropriate order for review by mandamus, at least by some standard of review. The Seventh Circuit has refused mandamus for such an order. *Hampton v. City of Chicago*, 643 F.2d 478 (7th Cir. 1981).

288. Related to this institutional "interest" factor are other issues such as the one raised in the use of mandamus to prevent a trial judge from proceeding with further off-the-record proceedings. *Nat'l Farmers' Org., Inc. v. Oliver*, 530 F.2d 815 (8th Cir. 1976).

289. Thus, contrary to the position of the Seventh Circuit, in some instances a litigant should have standing to invoke mandamus for "control" purposes even if he is raising a "public" right. See *Hampton*, 643 F.2d at 479-81. *Hampton* suggested that the circuit council could take appropriate action for widespread abuses in granting recusal motions. *Id.* at 479. This possibility should be recognized, but it is not sufficiently used at present to be a basis upon which to deny the availability of the additional control of mandamus for particular actions. See *Ward, Can the Federal Courts Keep Order in Their Own House? Appellate Supervision Through Mandamus and Orders of Judicial Councils*, 1980 B. Y. U. L. Rev. 233, 247-50 (1980). How the new Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980), might change this cannot be determined, although it appears not to apply to any matter "directly related to the merits of a decision or procedural ruling." 28 U.S.C. § 372(c)(3)(A) (Supp. IV 1980).

The views of the district judge will be given great deference, but the parties will have some opportunity for redress. Whether or not such review might affect respect for the trial judge, it will certainly enhance respect for the process as a whole.²⁹⁰ This suggested factor is related to some of the ideas underlying the supervisory mandamus power, but focuses that power on the control of particular individual judicial behavior. Such individual control is possible without opening the proverbial floodgates of disaster if the correct standard of review is utilized.

Before discussing the final aspect of this framework, the standard of review, one other possible argument ought to be considered. This would be an attack on the premise underlying this Article that more clearly defined guidelines for the use of mandamus are desirable. The argument is that the amorphous nature of the current standards is beneficial because it ensures that any egregious decision of a district judge might be immediately corrected. Thus, it would be contended that the above argument for the need for some control over decisions in which the judge is "interested" actually supports the current standards which are so unstructured that a district judge always must consider the possibility of being "mandamused." Under this view, the current mandamus practice ensures that a litigant is not completely at the mercy of the district judge.²⁹¹

Admittedly, there may be instances in which a district judge will make a terribly wrong decision that will not fit within the guidelines for mandamus suggested above.²⁹² Perhaps it is even possible that in a few instances the district judge will do this only because the judge knows that the complaining party has no recourse by means of mandamus. To some limited extent adoption of these guidelines might change the "balance of power" in the district court. Most such changes, however, are to the benefit of par-

290. See Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 551 (1969).

291. Arguably, the theoretical availability of some appellate recourse for all rulings of the district judge also raises the level of public confidence in the judiciary. See Redish, *supra* note 10, at 107.

292. Surely, there are instances in which the district judge will become so involved in a particular case that he will have an even less detached perspective in regard to all orders in that case than do most judges in regard to orders for which they are institutionally "interested." See Carrington, *supra* note 290, at 550-51. These, however, are not instances of certain types of decisions that can be identified by a general principle.

ties who would know better when mandamus is available. Presently, filing a petition for a writ of mandamus is a risky course to follow, and there is limited opportunity to accurately evaluate that risk. This Article has tried to suggest guidelines that will take into account any extremely important harm caused by a district judge's decision and allow review when there is reason for special concern about leaving final authority with the district judge. The current "tests" for mandamus are not only inefficient but lead more to confusion than serious deterrence of improper judicial behavior. Discretion in the court of appeals will obviously still exist under these suggested guidelines for mandamus, but it will be more structured and recognizable, thereby resulting in a fairer and more useful appellate control device.

One more aspect of the suggested use of mandamus must be added. As previously indicated,²⁹³ it is contended in this Article that a separate standard of review should not be used simply because a matter is being reviewed by means of mandamus. This does not mean, however, that many matters that effectively can be reviewed only by mandamus, using this very deferential standard of review, must be subjected to a more exacting standard.

The special mandamus standard, in fact, may be proper for many issues arising by way of a petition for a writ of mandamus, not because they are being considered through this procedural device, but because the appropriate split of final authority between the appellate and trial courts necessitates this standard, which gives even more leeway than abuse of discretion. It may be that the refusal to grant a continuance of a trial date is appropriate for consideration by mandamus, but the standard of review should be the very deferential one of clear abuse of discretion, which is presumably a shorthand recognition of even broader discretion in the district court than that conveyed through an abuse of discretion standard. Thus, the appropriate limitations on having every denial of a continuance considered by the court of appeals are not only the question of whether the mandamus jurisdiction guidelines are met (they may be), but also the use of a standard of review that requires the petitioner to show an extraordinary deviance from what the appellate court would consider the appropriate disposition. Note that this same deferential standard is the one that would be

293. See *supra* text accompanying notes 214-27.

used in those rare instances in which a party could show some possible harm justifying reversal on appeal after final judgment.

Thus, many cases deemed appropriate for mandamus under these guidelines would be reviewed by this deferential standard and resolved in quick fashion *on the merits*. An answer would not even be needed for those that the appellate court felt did not even come close to showing the sufficient degree of error. Possibly this is already the current practice in many instances. It should be explicitly recognized by clarifying the ground upon which a mandamus petition is denied. Perhaps there should be a provision for "dismissal" of a petition, which would distinguish a petition not appropriate for mandamus review from one denied on the merits. Such a clarification would aid both the bench and bar in a better understanding of the mandamus process and might even result in the filing of fewer petitions which raise issues that are inappropriate for review by mandamus.

CONCLUSION

The mandamus power of the United States Courts of Appeals is a complex procedural device. Many of its purely historical origins have been retained, at least in some of the "tests" that are cited by courts. Other amorphous phrases have been created and maintain vitality in their repetition. Yet, these "tests" do little to focus the court of appeals' attention on the inquiries that should be relevant to the use of mandamus.

Indeed, the complexity of the power is often not recognized. Mandamus serves many different purposes. It is the only means of appellate review of some orders. It may be the only effective means of review of others. It has developed a standard of review of its own. And it has a remedial breadth that far exceeds those published opinions in which the petition for a writ is granted.

Failure to recognize the different contexts in which mandamus is employed has hindered the development of a more realistic and comprehensible approach to its use. Understanding the various roles it plays in the system of appellate control is the key to developing an analytical framework for courts to consider in choosing how to exercise this power. This Article has tried to suggest such a framework that is cognizant of these various roles, especially the unique purpose mandamus can serve as a control on certain behavior of district judges.