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SECTION 1404(a) OF THE JUDICIAL CODE: IN THE INTEREST OF JUSTICE OR INJUSTICE?

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Section 1404(a) of the Judicial Code authorizes a district court in which venue is proper to transfer a civil action to any other district where "the action might have been brought" "for the convenience of parties and witnesses" and "in the interest of justice."¹ A 1945 conception of James William Moore, patron oracle of the Judicial Code,² the section has received nearly unanimous praise from the commentators and the courts in light of its unexceptionable objectives of convenience and justice.³ In purpose and function the section is to be distinguished from section 1406(a)⁴ which provides for transfer when venue is improper and which is designed to save a plaintiff from what might otherwise be the catastrophic effect of a wrong choice of forums.⁵ The objective of section

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1. 28 U.S.C. § 1404(a) (1958): "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The statute is universally read as saying: "For the convenience of parties and witnesses, [and] in the interest of justice. . . ." That reading will be adopted here.

2. See MOORE, COMMENTARY ON THE JUDICIAL CODE 200-11 (1949). The reviser's notes to § 1404(a) state that it "was drafted in accordance with the doctrine of forum non conveniens." That doctrine was extended to problems of intra-federal inconvenience by *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

3. *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964); *Sullivan v. Behimer*, 363 U.S. 335, 351 (1960) (dissent of Frankfurter, J.) ("Section 1404(a) was devised to avoid needless hardship and even miscarriage of justice by empowering district judges to recognize special circumstances calling for special relief."); *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010 (3d Cir. 1952); BARRON & HOLTZOLF, FEDERAL PRACTICE AND PROCEDURE § 86.8, at 441, ("an exciting experiment in judicial administration"); 1 MOORE, FEDERAL PRACTICE ¶ 0.145[3-1] (1964); Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947). *But see Hoffman v. Blaski*, 363 U.S. 335 (1960); Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 494 n.36 (1956): "As a delaying tactic it has few equals; as a control of jury trial its significance is unfathomable." Nevertheless Green refers to § 1404(a) as "the recently improved doctrine of forum non conveniens." *Ibid.*

4. 28 U.S.C. § 1406(a) (1958).

5. Other important federal transfer provisions are: 28 U.S.C. § 1406(c) (Supp. IV, 1963) (providing for transfer to the Court of Claims when an action has been improperly filed in a district court); FED. ADM. R. 54 (transfer of limitation of liability proceedings); FED. R. CRIM. P. 21(b) (permits transfer "if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division

1404(a) is to make it possible for a district court where the action has been properly brought to transfer the action to the most desirable district for trial. In the words of the then District Judge Kaufman, section 1404(a) is "a basically simple procedural device having a simple but important objective . . . that litigation, which is always an unpleasant matter, should be rendered as convenient, expeditious, and inexpensive as possible."⁶

In practice, however, the administration of the statute has not been a simple matter. From the beginning, the meaning of the phrase "might have been brought" has been the subject of considerable litigation. To a chorus of criticism the Supreme Court in *Hoffman v. Blaski* gave the phrase a restrictive reading by holding that it imposed a requirement that the transferee district must be one in which the plaintiff would have had a right to sue, independently of the wishes of the defendant, at the time the action was originally commenced.⁷ The grant or denial of a transfer motion may have a substantial practical impact on the position of the litigants not only because of its financial importance but also because of its effect on the composition of the jury and attitude of the court which will ultimately try the case. This practical importance of 1404(a) rulings has led losing parties to seek relief in the appellate courts by means of petitions for the writ of mandamus. The courts of appeals, mindful of the practical significance of the rulings and of the need for authoritative construction of the broad language of the statute have with some prodding from the Supreme Court responded to these petitions for relief with increasing frequency. The courts of appeals have been fearful, however,

in which the commission of the offense is charged"). The central focus of this article is on § 1404(a). The reasoning herein, however, is equally applicable to 28 U.S.C. § 1402 (1958); FED. ADM. R. 54; FED. R. CRIM. P. 21(b). It is not applicable to 28 U.S.C. § 1406 (1958).

6. Kaufman, *Further Observations on Transfers Under Section 1404(a)*, 56 COLUM. L. REV. 1, 18 (1956).

7. 363 U.S. 335 (1960). Mr. Justice Frankfurter dissented from the Court's construction of the statute in a companion case. *Sullivan v. Behimer*, 363 U.S. 335, 351 (1960). Eleven out of the fourteen notes published on the *Hoffman* decision were critical of the decision. "But whatever the lamentations that may be expressed, one thing is clear: the *Paramount* [Paramount Pictures v. Rodney, 186 F.2d 111 (3d Cir. 1950)] rule is no longer law." 46 CORNELL L.Q. 318, 321 (1961). "The *Blaski* case curtails much of the expected effectiveness of 1404(a) by severely restricting its scope." 36 IND. L.J. 344, 359 (1961). "The majority's position is questionable on the basis of history, legislative intent, and logic, and appears to be a serious restriction on the use of the statute for the furtherance of justice." 14 VAND. L. REV. 646, 652 (1961). 10 DE PAUL L. REV. 204 (1960); 6 N.Y.L.F. 478 (1960); and 12 W. RES. L. REV. 418 (1961) were favorable to the decision. 72 HARV. L. REV. 1375 (1959) and 1959 U. ILL. L.F. 652 criticized the court of appeals decision which was affirmed by the Supreme Court. 57 MICH. L. REV. 772 (1959) was favorable.

Two weeks after *Hoffman*, in *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960), the Court itself shifted course and limited the broad language of *Hoffman*.

of the impact these petitions might have not only on their own calendars but on the expeditious resolution of the litigation in the district courts. To control, if not to stem, the tide of petitions they have turned to nineteenth century principles governing the availability of mandamus which were not formulated to deal with the problem of appellate review of transfer orders. The result has been a number of different approaches by the courts of appeals and a confused and unsatisfactory body of law. This erratic appellate intervention has added to the complexity and burden of section 1404(a) rulings as parties have attempted to avail themselves of any possible appellate remedy in quest of what is from their own point of view the most desirable place of trial. Meanwhile the district courts, caught up in the enthusiasm for the statute and apparently considering transfer a less drastic remedy than the dismissal or stay required by the predecessor doctrine of *forum non conveniens*, have granted transfer on a steadily decreasing showing of inconvenience. Section 1404(a) rulings have become one of the battery of motions by which a defendant can introduce matters peripheral to the merits and postpone the day of trial.

The suitability of the transfer remedy as a solution to the problem of the inconvenient federal forum needs to be re-examined in light of the now more than fifteen years of accumulated experience under the statute. It is the judgment of the present writer that the cure is itself a serious disease.

The case of *Van Dusen v. Barrack*, decided last term by the Supreme Court, is a dramatic recent example of the problems involved in the administration of section 1404(a).⁸ On October 4, 1960, an Electra airplane operated by Eastern Airlines and destined for Philadelphia crashed in Boston harbor approximately one minute after take-off. During the following year fifty-two cases for wrongful death and three cases for injuries sustained in the crash were filed against Eastern Airlines, Lockheed Aircraft Corporation, General Motors Corporation, and the United States of America in the United States District Court for the Eastern District of Pennsylvania. The legal drama opened when the defendants moved for transfer of all the actions to the United States District Court for the District of Massachusetts under section 1404(a). On April 6, 1962, District Judge Van Dusen granted the motion.⁹ He found that the transfer was for the convenience of witnesses because most of the eyewitnesses to events before, during, and after the crash were residents

8. 376 U.S. 612 (1964), *reversing* 309 F.2d 953 (3d Cir. 1962).

9. *Popkin v. Eastern Airlines, Inc.*, 204 F. Supp. 426 (E.D. Pa. 1962).

of the Boston area.¹⁰ He found that the transfer was in the interest of justice because it would permit consolidation of the Pennsylvania actions with other actions arising out of the same crash pending in the District of Massachusetts and because it would make possible uniform disposition of all the cases.¹¹ And he rejected the contention of the plaintiff-administrators in the wrongful death actions that their cases could not be transferred to the District of Massachusetts because that district was not one where the action "might have been brought."¹² They argued that since they had not obtained ancillary letters of administration in Massachusetts, the District of Massachusetts was not one where the action "might have been brought" because of the requirement of Rule 17(b) of the Federal Rules of Civil Procedure¹³ that the capacity to sue of a representative be determined by the law of the state in which the district court sits.

The plaintiffs began the second act by filing a petition for a writ of mandamus to prevent the transfers in the Third Circuit Court of Appeals. On October 2, 1962, the court of appeals granted the writ, finding it appropriate because the transfer was beyond the "jurisdiction" of District Judge Van Dusen.¹⁴ The "holding in *Hoffman v. Blaski*," said the court, "compels the conclusion that respondent was without power to transfer these actions. The import of that decision is that unless the plaintiff *had an unqualified right to bring suit* in the transferee forum at the time he filed his original complaint, transfer to that district is not authorized by § 1404(a)."¹⁵

The defendants were undaunted. They began the third act by filing a petition for a writ of certiorari. The Supreme Court granted the writ and on March 30, 1964, reversed the court of appeals,¹⁶ holding that the phrase "might have been brought" in section 1404(a) must "be construed with reference to the federal laws delimiting the districts in which an action 'may be brought' and not with reference to the laws of the transferee State concerning the capacity of fiduciaries to bring suit."¹⁷

The Court, in a footnote, observed that it was unnecessary for it to pass on the contention of the government, a defendant in the wrongful death action in the district court, that the court of appeals had no juris-

10. *Id.* at 429-30.

11. *Id.* at 431-33.

12. *Id.* at 437.

13. FED. R. CIV. P. 17(b): "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. . . . In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held. . . ."

14. *Barrack v. Van Dusen*, 309 F.2d 953 (3d Cir. 1962).

15. *Id.* at 957.

16. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

17. 376 U.S. 624.

diction to issue a writ of mandamus to prevent the transfer.¹⁸ The Court found that it was unnecessary to pass on this contention because "in our opinion the courts below erred in interpreting the legal limitations upon and criteria for a § 1404(a) transfer."¹⁹ Apparently, the Court meant by this that since it considered that the writ of mandamus was improper in any case, it was not necessary to consider whether the court of appeals had jurisdiction to issue it.

The Court's disposition of the case, however, was not quite so simple. After having decided that the district court had the power under section 1404(a) to transfer the wrongful death actions to the District of Massachusetts, it went on to consider an issue not considered by the court of appeals: was it in the "interest of justice" for the district court to order the transfer? The Court was led to a consideration of this issue by the plaintiffs. Correctly sensing that an affirmance of the court of appeals' interpretation of "might have been brought" was not highly probable, they made a second argument in their brief. The transfer was not in the "interest of justice," argued the plaintiffs, because the Massachusetts wrongful death statute limiting damages to 20,000 dollars and utilizing as a basis for recovery the degree of culpability of the tort-feasor would apply in the transferee forum but might not apply in the transferor forum.²⁰ The Solicitor General, in his brief, had argued the admittedly difficult position—on the precedents—that mandamus was not available to correct an incorrect district court determination of whether the transferee district was one in which the action "might have been brought."²¹ But the Solicitor General concentrated his fire on this aspect of the case—driving for a reversal of the Third Circuit's decision—and did not stop to argue, as well he might have, that the court of appeals clearly did not have jurisdiction to correct by mandamus an erroneous district court determination of the convenience of the parties and witnesses and the interest of justice. Thus when the Court went on to consider the respondent's "interest of justice" argument, it moved into an area where the jurisdictional underpinnings had not been argued by opposing counsel.

The Court had no difficulty in disposing of the plaintiffs' interest of justice argument by holding, in accord with the court of appeals precedents and legal commentary, that the law of the transferor forum, not the

18. 376 U.S. 615 n.3.

19. *Ibid.*

20. Brief for Respondents, pp. 33-47, *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

21. Brief of the Solicitor General for Petitioners, pp. 27-37, *Van Dusen v. Barrack*, 376 U.S. 612 (1964). The Court had implicitly sanctioned the use of the writ for this purpose in *Hoffman v. Blaski*, 363 U.S. 335 (1960).

transferee forum, would control after transfer.²² Since the transfer would not result in a change of law, the plaintiffs' argument necessarily failed. But this holding, the Court felt, introduced a new factor into the situation. Although the district judge in ruling on the transfer had refused to decide what law would control in the transferee forum on the grounds that such a decision would be premature, his citations indicated that he thought the law of the transferor forum would control.²³ Nevertheless, the Supreme Court felt that he had not given sufficient weight to the inconvenience which would be caused the transferee district by applying the law of the transferor state.

We have concluded . . . that the District Court ignored certain considerations which might well have been more clearly appraised and might have been considered controlling had not that court assumed that even after transfer to Massachusetts the transferee District Court would be free to decide that the law of its State might apply. It is appropriate, therefore, to reverse the judgment of the Court of Appeals and to remand to the District Court to reconsider the motion to transfer.

Accordingly, the judgment of the Court of Appeals for the Third Circuit is reversed and the case remanded to the District Court for further proceedings in conformity with this opinion.²⁴

22. *H. L. Green Co. v. MacMahon*, 312 F.2d 650 (2d Cir. 1962), *cert. denied* 372 U.S. 928 (1963); *Headrick v. Atchison, T. & S. F. Ry.*, 182 F.2d 305 (10th Cir. 1950); 1 MOORE, *FEDERAL PRACTICE* ¶ 0.145[4.d-5], at 1774 (1964); Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341 (1960). The problem is one of statutory interpretation. It could be argued that in a case where transfer is appropriate Congress intended to deprive the plaintiff of all the advantages of the transferor forum including its choice of law rules. But Congress was apparently concerned with problems of trial convenience, not forum shopping for favorable law. If a transfer were to result in a change in the applicable law, then courts in ruling on transfer motions would be faced with the problem of whether any given change is in the "interest of justice." Such an inquiry would add to the complexity of § 1404(a) transfers.

A holding that the transferee forum is to apply the law of the transferor forum is in tension with the "substantial effect on outcome" test of Mr. Justice Frankfurter's opinion in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). Indeed, the Court recognized in *Barrack* that "a superficial reading of these formulations might suggest that a transferee federal court should apply the law of the State in which it sits rather than the law of the transferor State." 376 U.S. 637-38. However, theorists of the *Erie* doctrine now see the crucial question not as one of substantial similarity between state and federal diversity courts but as the validity of the reason for substantial differences. See Friendly, *In Praise of Erie—and of the New Federal Common Law*, 19 RECORD OF N.Y.C.B.A. 64 (1964); *cf.* *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525 (1958).

23. *Popkin v. Eastern Airlines, Inc.*, 204 F. Supp. 426, 433 (E.D. Pa. 1962), citing *Headrick v. Atchison, T. & S.F. Ry.*, 182 F.2d 305 (10th Cir. 1950).

24. 376 U.S. at 646. Mr. Justice Black concurred in the reversal, but "under the circumstances shown in the opinion" he would "now hold that it was error to order these actions transferred to the District of Massachusetts." *Ibid.* The Supreme Court "remanded" another mandamus action earlier in the same term. *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, *reversing* 314 F.2d 369 (7th Cir. 1963). The Court got the

The technical difficulty with this disposition is that the Court overlooked the fact that there was no case to remand to the district court. The case before the Supreme Court, *Van Dusen v. Barrack*, was an action for mandamus, begun in the court of appeals with District Judge Van Dusen as a party. The underlying actions remained in the district court throughout the mandamus proceeding.

Despite the technical inadequacy of the scene-changing machinery, the fourth act opened in Judge Van Dusen's district court. The plaintiffs had advanced their cause to the extent that the original transfer order had been vacated. But Judge Van Dusen would rule again on the transfer, and his position had been made clear in his original opinion. So the plaintiffs moved that he disqualify himself from further consideration of the motion. Judge Van Dusen declined, whereupon the plaintiffs began the fifth act by filing another petition for mandamus in the Third Circuit Court of Appeals. On December 16, 1964, the court sitting en banc granted the writ.²⁵ In the court of appeals the plaintiffs argued that by giving advice to his own counsel in the first mandamus proceeding when the same counsel also represented the defendants, Judge Van Dusen had made his further participation in the pending action improper. It is of course customary practice, sanctioned by the Supreme Court decisions, for counsel for the prevailing party below to represent the district judge in the mandamus proceeding.²⁶ The defendants re-

idea that it should remand the *Platt* case from the Solicitor General's brief. "Here the error laid bare was the consideration of an improper factor; the method for correcting it was a remand to the district court to re-exercise its discretion without considering that factor." Brief for Petitioner, p. 26, *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964). As an example of the proper procedure to be followed the Solicitor General cited the decision of the Court of Appeals for the Seventh Circuit in Chicago, R. I. & Pac. R.R. Co. v. *Igoe*, 212 F.2d 378 (7th Cir. 1954). In *Igoe* the district court had held § 1404(a) inapplicable because the case had been removed from a state court. On a petition for a writ of mandamus the Seventh Circuit Court of Appeals held that this was an improper interpretation of § 1404(a) and "remanded" the case so that the district court could consider the transfer motion on its merits. 212 F.2d 382. The court relied on its own case of *Dairy Indus. Supply Ass'n v. La Buy*, 207 F.2d 554 (7th Cir. 1953), as authority for this procedure. But in that case, the court did not consider the problem of mandamus jurisdiction. The court of appeals apparently thought it was on appeal, for the court affirmed the judgment in part and reversed and remanded in part. Thus the "remand" procedure adopted by the Supreme Court is the lineal descendant of a decision of the Seventh Circuit Court of Appeals which the deciding court thought was an appeal, but was in fact a mandamus case. Cf. *United States v. Choate*, 276 F.2d 724 (5th Cir. 1960). Although the court there denied the petition for the writ, it concluded that "the principles announced in this opinion will, we hope, be a sufficient guide for the authority of the [district] court to consider any further motion under Rule 21(b) which may hereafter be filed." *Id.* at 729.

25. *Rapp v. Van Dusen*, Civil No. 14927, 3d Cir., Dec. 16, 1964 (en banc).

26. *Ex parte Fahey*, 332 U.S. 258, 260 (1947): "[Extraordinary remedies] 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."

sponded to the plaintiffs' argument by arguing that the plaintiffs could not be heard to complain since it was they who forced Judge Van Dusen to defend the mandamus action by filing it.

The court found it "unnecessary to decide the merits of these contentions."²⁷ Rather, the court noted that "throughout . . . [the] long development of the scope of mandamus, no procedural distinction was made between those cases where judicial review of interlocutory orders is sought, and those rare instances where the claim is directed against the judge himself."²⁸ The court felt that the time had come to recognize such a distinction and proceeded to formulate a new procedure to deal with it.

It follows, therefore, that where the purpose of mandamus is to secure interlocutory review of alleged judicial error, the application for the writ should not be cast in the form appropriate for complaint against improper judicial conduct. The substance rather than the form of the application should determine the procedure. Proper practice requires that in cases such as review of an order of transfer the petitioners should apply for a rule directed to the prevailing parties to show cause why the order entered in their favor should not be vacated and set aside. The judge below should not be named as a respondent. He has no personal interest in the litigation and his function is completed on the rendition of his decision. It is appropriate, however, that a copy of the petition should be served on the judge so that he may file a memorandum of the reasons for his order if no opinion already appears of record.²⁹

Having proposed the new solution, the court proceeded to apply it retroactively. With no little pride in its own handiwork the court concluded that "although the procedure is now prescribed for the future

27. *Rapp v. Van Dusen*, Civil No. 14927, 3d Cir., Dec. 16, 1964, p. 6.

28. *Id.* at 8.

29. *Id.* at 9-10. 6 MOORE, FEDERAL PRACTICE ¶ 54.10[2] at 73 (1953) suggests that a "rule of court could provide that all parties, other than petitioner, should be named respondents, along with the judge of the lower court; and that the judge need make no return. The 'extraordinary' remedies would then become in form, as well as in fact, what they now are—'supplementary' remedies." This suggestion is adopted in SUP. CT. R. 31 and in PROPOSED FED. R. APPELLATE P. 20(b): "All parties below other than the petitioner shall also be deemed respondents for all purposes. Respondents may answer jointly. If the judge or judges named respondents do not desire to contest the petition, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted." The Third Circuit goes farther and eliminates the judge below as a respondent. Moore's procedure is designed to answer the Court's objection to the use of the writs expressed in *Ex parte Fahey*, 332 U.S. 258, 260 (1947), quoted *supra* note 26.

there is no reason why its beneficial purpose should not extend to pending cases."³⁰ In the words of a dissenter, "We penalize the fine judge concerned for conscientiously obeying our order [to show cause in the first mandamus action], make him the whipping boy for our blunder."³¹ When and how this already over tedious drama will end, it is impossible to say. But as this article goes to press, the Third Circuit has set the *Rapp* case down for rehearing on May 26, 1965. More than three years after the actions were filed the place of trial has not yet been determined.

The *Van Dusen* sequence raises two basic problems surrounding the administration of section 1404(a). First, was the extended and complex intervention of the appellate courts in the matter desirable? And second, was the transfer itself in furtherance of any significant objective?

Although the cases would themselves appear to be forceful illustrations of the detrimental impact of appellate court participation in transfer rulings, both *Barrack* and *Rapp*, in harmony with the central thrust of the Supreme Court decisions of the last twenty years,³² seek to broaden the utility of the writ as a means of interlocutory review. Ironically, *Barrack* is a case which quite explicitly denies the availability of mandamus. Instead the Court chose to "remand," adapting from appeal a procedure quite similar to mandamus, a procedure by which the appellate court instructs the trial judge on how he is to perform his duties. But this new device increases the utility of the writ. Even if the writ is denied, the appellate court can instruct the district judge how to decide the matter before him. *Rapp* attempts to broaden the utility of mandamus by eliminating one of the obstacles to its routine employment—the fact that it puts the district judge in the role of a litigant. But it is probable that these procedural innovations will not go unchallenged

30. *Rapp v. Van Dusen*, Civil No. 14927, 3d Cir., Dec. 16, 1964, pp. 10-11.

31. *Id.* at 12 (McLaughlin, J.).

32. The landmark Supreme Court case is *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943). This expansion of mandamus as a means of interlocutory review has been at least in part a response to the felt inadequacy of the final judgment rule. *E.g.*, 6 MOORE, FEDERAL PRACTICE ¶ 54.10[1] at 58-59 (1953): "Conceding that the final judgment rule embodies the present basic policy toward federal appellate review, it must be recognized that inexorably applied it will at times work injustice. Machine-like rigidity cannot be the final goal of judicial administration. There is some need for flexibility so that, in exceptional situations, appellate review may be had of an order that is non-appealable under either the statutes governing interlocutory appeals or those governing appeals from final judgments. We believe that Congress so provided in the All Writs Statute." Note, *The Writ of Mandamus: A Possible Answer to the Final Judgment Rule*, 50 COLUM. L. REV. 1102 (1950); Note, *Appealability of 1404(a) Orders: Mandamus Misapplied*, 67 YALE L.J. 122 (1957) (arguing for extension of collateral order doctrine to 1404(a) rulings in order to make them appealable); Note, *Federal Court Review by Extraordinary Writ: A Clogged Safety Valve in the Final Judgment Rule*, 63 YALE L.J. 105 (1953). *Cf.* Comment, *Use of Prohibition to Avoid the Final Judgment Limitation on Appeal*, 41 CALIF. L. REV. 124 (1953) (California practice); Note, *Appellate Review by Extraordinary Writ in Indiana*, 33 IND. L.J. 431 (1958).

in the future. The "remand" procedure of *Barrack* appears to be a complete innovation adopted with little thought and carries with it all the pitfalls and problems of the advisory opinion. The elimination of the judge as a party in *Rapp* undermines the theoretical basis for distinguishing between the power of an appellate court in a mandamus action and on appeal. The theory of the power of an appellate court in a mandamus action is that the power is directed against the judge.³³ If the judge's order is improper and mandamus is the appropriate remedy, the appellate court orders him to revise it. The trial judge, not the appellate court, revises the order. On the other hand, on an appeal, the appellate court has the original action itself before it. But if the mandamus is to issue only against the prevailing party then what power does the appellate court have to change the contested ruling? It certainly cannot order the judge to revise it, and the prevailing party does not have power to revise it. By bringing the parties before it the appellate court is apparently taking for itself the power to dispose of the original action at least for purposes of the contested ruling. If this is so then the proceeding is in substance an interlocutory appeal. And if, to quote the Third Circuit, "the substance rather than the form of the application should determine the procedure," why doesn't the Interlocutory Appeals Act³⁴ control the availability of review of section 1404(a) transfer orders? But the Interlocutory Appeals Act would make such review unavailable in most cases.³⁵ Thus, not only do *Barrack* and *Rapp* apparently foreshadow further appellate court participation in the administration of section 1404(a) with the attendant complexity, delay, and expense; but the very procedural innovations they employ to achieve this end may themselves become the source of further complexity and dispute.

In spite of the fact that Judge Van Dusen's transfer ruling has now been the subject of three appellate court opinions, the desirability of the transfer order supposedly at issue has not been the subject of appellate court scrutiny. Judge Van Dusen wrote a careful opinion upholding his decision to transfer.³⁶ First, he found that most of the potential witnesses

33. It has always been recognized that although the action is directed against the judge personally, the real purpose of the petition for mandamus is to obtain review of the decision below. Thus in *Ex parte First Nat'l Bank*, 207 U.S. 61 (1907), the Court declined to dismiss an appeal from a court of appeals decision to issue the writ on the grounds that the district judge did not contest the ruling and had entered a decree conforming to the mandate of the court of appeals. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), recognized that a writ original in form might be appellate for constitutional purposes. But there is a considerable difference between recognizing that the district judge is not the only party in interest and eliminating him as a party altogether.

34. 28 U.S.C. § 1292 (1958).

35. See text accompanying notes 136-46 *infra*.

36. *Popkin v. Eastern Airlines, Inc.*, 204 F. Supp. 426 (E.D. Pa. 1962).

with knowledge of the events surrounding the crash lived in the Boston area. For instance, four of the ten survivors, four employees of the Logan Airport who prepared the plane for flight, and seven operators of the control tower lived in the Boston area.³⁷ But would it really be necessary to have all ten survivors, all four service employees, and all seven control tower operators testify? Wouldn't it be probable that only depositions would be taken from most of these witnesses, and couldn't those depositions be taken in Boston? Even at the early stages of the litigation the basic facts of the accident were largely undisputed. The airplane had encountered a large number of birds shortly after take-off; some of them had been ingested into its turbine engines and had interfered with their operation. If the facts of the accident were not in dispute, would any eyewitnesses at all be needed to testify at the trial? If not, was transfer necessary for their convenience?

The other important reasons given by District Judge Van Dusen for transfer were consolidation and uniformity.³⁸ It is of course in the interest of judicial economy to consolidate a total of 169 cases. All the cases in the District of Pennsylvania and all of the cases in the District of Massachusetts, however, could have been consolidated without transfer, so the transfer would result in the saving of only one trial for the judicial system. Admittedly the trial avoided by the transfer would have been a procedurally complicated one because of the large number of parties involved, but the law of diminishing returns would operate to minimize the gain of the transfer. Consolidation would further uniformity, certainly a commendable objective. Consolidation in Massachusetts, however, does not insure that all the cases will be resolved justly, but only that all the cases will be decided the same way. Is the cause of uniformity of sufficient significance to require a transfer?

These questions are not asked in order to show that Judge Van Dusen's order was incorrect. Indeed, in the best of all possible worlds, it would seem desirable that the cases be tried in Massachusetts. But is it so desirable that a transfer is justified? How desirable does transfer have to be before it is proper under the statute? In short, by what standard is Judge Van Dusen's decision to be evaluated?

The two basic issues in the administration of section 1404(a) are: (1) the role of the appellate courts and (2) the standards which govern the "convenience of parties and witnesses" and "the interest of justice." The problems involved in these two issues themselves raise the ultimate question: Is section 1404(a) a satisfactory procedural reform?

37. *Id.* at 429.

38. *Id.* at 431-33, 436.

THE LAW OF REVIEW

The availability of appellate review of transfer orders has been an area of great confusion ever since section 1404(a) was enacted into law. Although it has consistently been held that transfer orders are non-appealable interlocutory orders, the courts of appeals and the Supreme Court have not been able to decide when and on what conditions a remedy is available by way of mandamus to correct an erroneous district court ruling on a transfer motion.

The Supreme Court has been so eager to write opinions on the merits of transfer orders that it has never really faced up to the jurisdictional problems. In *Ex parte Collett*³⁹ and *Norwood v. Kirkpatrick*⁴⁰ the Court denied mandamus on the merits and found it unnecessary to base the decisions on jurisdictional grounds. In *Hoffman v. Blaski*⁴¹ the Supreme Court affirmed a court of appeals decision to issue the writ. Mr. Justice Whittaker stopped only to observe that "propriety of the remedy of mandamus is not assailed."⁴² There are, however, two contradictory Supreme Court decisions which bear on the issue.

In *Bankers Life & Cas. Co. v. Holland*,⁴³ District Judge Holland had ordered a treble damage action under the Sherman and Clayton acts transferred to the Northern District of Georgia under section 1406(a)⁴⁴ on the ground that venue was improperly laid in his court, the Southern District of Florida. In a per curiam opinion the Fifth Circuit denied mandamus.⁴⁵ The Supreme Court affirmed. Mr. Justice Clark wrote the opinion of the Court.

[The district court's] decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power . . . and is reviewable upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly cir-

39. 337 U.S. 55 (1949).

40. 349 U.S. 29 (1955).

41. 363 U.S. 335 (1960).

42. *Id.* at 340.

43. 346 U.S. 379 (1953).

44. 28 U.S.C. §.1406(a) (1958): "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

45. *In re Bankers Life & Cas. Co.*, 199 F.2d 593 (5th Cir. 1952).

cumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous.⁴⁶

In *La Buy v. Howes Leather Co.*,⁴⁷ District Judge La Buy had referred two complex antitrust actions to a master for trial under the authority of Rule 53(b) of the Federal Rules of Civil Procedure.⁴⁸ The parties filed a petition in the Seventh Circuit Court of Appeals for a writ of mandamus to compel Judge La Buy to try the case himself. In answer to an order to show cause why the writ should not issue Judge La Buy gave as his reason for the references that "the cases were very complicated and complex, that they would take considerable time to try," and that his "calendar was congested."⁴⁹ The court of appeals found that these circumstances were not sufficiently exceptional to justify the reference under Rule 53(b) and issued the writ.⁵⁰ The Supreme Court affirmed, characterizing Judge La Buy's order as "little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."⁵¹ Mr. Justice Clark, writing for the Court, distinguished his opinion in *Bankers Life & Cas. Co. v. Holland* on the ground that that "case did not concern rules promulgated by this Court but, rather, an Act of Congress, the venue statute."⁵² If one is to make anything of this distinction, it apparently means that it is more important for the district courts to adhere to the exact requirements of the Federal Rules of Civil Procedure than to the requirements of federal statutes. Perhaps it would be better to interpret

46. 346 U.S. 382-83. The Court cited *Gulf Research & Dev. Co. v. Leahy*, 193 F.2d 302 (3d Cir. 1951), for the proposition that the transfer order was reviewable on appeal after final judgment. In that case the Third Circuit said: "Assuming that the order of the Southern California District Court [in the Ninth Circuit] was erroneous in sustaining the defendant's objection to the venue and that its order transferring the action to the District of Delaware [in the Third Circuit] was accordingly invalid, the error is one which this court will have power to correct upon appeal from the judgment ultimately entered in the action by the Delaware District Court. For if the order of transfer was erroneous all subsequent proceedings in the Delaware District Court are subject to that initial infirmity." 193 F.2d 304. But if all subsequent proceedings are invalid, and the case is still, in effect, in the transferor district court, how would the Third Circuit Court of Appeals have power, either on appeal or by mandamus, to correct an erroneous order of a district judge outside its circuit?

47. 352 U.S. 249 (1957), *affirming* 226 F.2d 703 (7th Cir. 1955).

48. FED. R. CIV. P. 53(b): "A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."

49. 352 U.S. 254 (1957).

50. 226 F.2d 703 (7th Cir. 1955).

51. 352 U.S. 256 (1957).

52. *Id.* at 257.

this "distinction" as an admission that there was no distinction at all. In any case, Mr. Justice Clark no longer spoke of the congressional policy against piecemeal appeal. Instead, he spoke enigmatically and broadly of the "supervisory control of the District Courts by the Courts of Appeals" which is "necessary to proper judicial administration in the federal system."⁵³ The proper interpretation of that talismanic text has become the center of debate about the contemporary scope of mandamus in the courts of appeals. *Barrack* and *Rapp*, of course, constitute its fulfillment. Mandamus is available to a court of appeals whenever that court, in the exercise of its discretion, feels that mandamus should be available. The mandamus power is simply a problem of administration, not a highly specialized remedy available in only a limited number of situations. It was not so long ago that the Court observed that "mandamus, prohibition and injunction against judges are drastic and extraordinary remedies."⁵⁴

But it was a good many centuries ago that mandamus was exactly what it has again become, a problem of administration. For, saith the Preacher, "That which hath been is now; and that which is to be hath already been."⁵⁵ The writ owes its origins to the prerogative powers of the English king. It was Lord Coke who claimed this power for the Court of King's Bench and with it formed one of the procedural foundations of modern administrative law.⁵⁶ From the seventeenth to the nineteenth century the writ of mandamus was a flexible tool by which the Court of King's Bench forged its place in the English constitutional scheme as a central check on local officials.⁵⁷ Although the writ was

53. *Id.* at 259-60.

54. *Ex parte Fahey*, 332 U.S. 258, 259 (1947).

55. *Ecclesiastes* 3:15.

56. *James Bagg's Case*, 11 Co. 93b, 77 Eng. Rep. 1271 (1614). In his report Coke states that "in this case, first, it was resolved, that to this court of King's Bench belongs authority not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or to any manner of mis-government; so that no wrong or injury, either public or private, can be done, but that it shall be reformed or punished by due course of law." *Id.* at 98a, 77 Eng. Rep. at 1277-78. See generally, HENDERSON, *FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW: CERTIORARI AND MANDAMUS IN THE SEVENTEENTH CENTURY* 46-82 (1963).

57. Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus*, 9 N.Y.L.F. 478, 493 (1963):

"[J]udicial leadership came about quite naturally through the collapse of the Stuarts, the impetus to judicial independence gained from the Act of Settlement of 1700, and the absence from the onset of the struggle with the Stuarts, of a central, supervisory authority over local activities. The revitalized role of the writ of mandamus, and also of certiorari, is therefore the offspring of accidents of English constitutional history. . . . During the troubled Stuart-Parliament struggle and through the periods of Commonwealth, Restoration, Revolution and New Royalty, the common law courts rose to meet a pressing need in this particular area. The courts filled a vital gap in the law of the seventeenth century by exercising a sparing veto power, in the default of the executive branch, to

available against the officials of "inferior" courts (not inferior in the sense that a trial court is inferior to an appellate court, but inferior in the sense that a court is subject to the prerogative powers of the King's Bench), it was used in matters relating to judicial administration rather than as part of a system of appellate review.⁵⁸ The question of its availability was not so much one of law as of political wisdom. Even at the end of the writ's two formative centuries, Lord Mansfield set its limits by cannily observing that "it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."⁵⁹ But so discretionary a tool was alien to the spirit of substantive formalism of the last half of the nineteenth century.⁶⁰ The courts and the treatise writers soon established more stringent limitations on its availability.⁶¹

superintend the actions of local bodies and officials. The judges utilized and re-moulded the techniques of mandamus, certiorari, criminal presentment and civil actions to this end."

58. Holdsworth, in his discussion of the Court of King's Bench, lists motions for a new trial, a writ of error on the record, or a bill of exceptions as the available methods of questioning a decision of the court. 1 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 226 (7th ed. 1956). He lists the prerogative writs of habeas corpus, certiorari, prohibition, mandamus, and quo warranto as writs for carrying on the power of "superintendence over the due observance of the law by officials and others." *Ibid.* 3 BLACKSTONE, *COMMENTARIES** 110-11: "[A]t present we are more particularly to remark, that it issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the court of king's bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers, with which the crown or legislature have invested them: and this not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice."

59. *Rex v. Barber*, 3 Burr. 1265, 1267, 97 Eng. Rep. 823, 824-25 (1762).

60. LLEWELLYN, *JURISPRUDENCE* 182-88 (1962); PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 350 (1956); cf. Hazard & Moskovitz, *An Historical and Critical Analysis of Interpleader*, 52 CALIF. L. REV. 706 at 708 (1964): "[T]he four supposed 'essential elements' for maintaining interpleader propounded by Pomeroy in his treatise, *Equity Jurisprudence*, are the product of uncritical reading and uncritical thinking. This process of compression appears in retrospect to be the consequence of the legal point of view, widely encountered in the nineteenth century, that combined a reverence for precedent with an insensitivity to the realities of history; all cases were read as though they were decided aright, and at about the same time." The first major treatise on the law of mandamus in England was published in 1853. TAPPING, *THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS* (1853). In his preface the author observed that "The necessity of a Work upon the Law and Practice of the High Prerogative Writ of Mandamus, was made known to . . . [him] during his pupilage in the Chambers of a Special Pleader, when having such a writ to prepare, he was informed that the only source from whence the student or Practitioner could obtain any information upon this most important branch of legal learning, were the cases scattered through the Books of Reports, excepting, however, the brief accounts of the writ which were to be found in *Compendious Crown Practices*, and in a small treatise on the subject by Impey, published in 1826. . . ." *Id.* at v. A treatise on American practice written in 1866 was published in 1874. MOSES, *THE LAW OF MANDAMUS* (1874).

61. By 1893 a treatise writer was able to assure his readers that "the right to the writ and the jurisdiction to issue it have ceased to depend upon the exercise of sovereign will, and it has come to be regarded as an ordinary civil process issued as of ordinary

Under the English common law the writ of mandamus was not part of a system of appellate review. But in a transplanted American federal context use of the writ for this purpose soon acquired a history and a flavor all its own. The jurisdiction of the federal appellate courts was not a common law jurisdiction, but a statutory one. Under the scheme of the Judiciary Act of 1789 the Supreme Court was the only court whose most important jurisdiction was appellate.⁶² Nevertheless, the statutes left important areas outside its appellate jurisdiction, most notably criminal prosecutions.⁶³ The Court did have the power, however, to grant mandamus.⁶⁴ Pressure was thus created to adapt the writ to the context of appellate review in order to provide a remedy for errors of the lower courts which would otherwise go uncorrected.⁶⁵ Expansion, however, was limited by the nineteenth century rules limiting the availability of mandamus.

The writ of mandamus so used, called in modern judicial parlance the writ of mandamus or prohibition,⁶⁶ was brought into federal juris-

right in cases when it is applicable." 2 SPELLING, INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES § 1362, at 1167 (1st ed. 1893). HIGH, EXTRAORDINARY LEGAL REMEDIES (2d ed. 1884), contains the fantastic statement that "It is believed that few branches of the law have been shaped into more symmetrical development, and few legal remedies are administered upon more clearly defined principles, than those which govern the courts in administering relief by the extraordinary aid of mandamus." *Id.* § 5, at 10.

62. The Judiciary Act established two courts in addition to the Supreme Court. The jurisdiction of the district courts was entirely original and concentrated largely in admiralty and maritime matters. § 9, 1 Stat. 76-77 (1789). The circuit courts had appellate jurisdiction over final decrees of the district court in causes of admiralty and maritime jurisdiction where the amount in dispute exceeded the sum of three hundred dollars, § 21, 1 Stat. 83-84 (1789), and over final decrees and judgments of the district courts by writ of error in civil actions where the amount in dispute exceeded the sum of fifty dollars. § 22, 1 Stat. 84 (1789). But the circuit courts also had exclusive jurisdiction of all federal criminal offenses (except for minor offenses where the district courts had concurrent jurisdiction) and were the only federal courts to have original jurisdiction based on diversity of citizenship. § 11, 1 Stat. 78-79 (1789).

63. The Supreme Court had no appellate jurisdiction in criminal prosecutions and had appellate jurisdiction over civil actions only where the amount in dispute exceeded \$2,000. § 22, 1 Stat. 84 (1789).

64. § 13, 1 Stat. 81 (1789).

65. In *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809), mandamus was used as substitute for a certified question. The district judge, desiring a ruling by the Supreme Court because of intense local opposition to his decree, refused to issue execution on the judgment until mandamus issued from the Supreme Court compelling him to do so. See *Parker v. Judges of the Circuit Court of Maryland*, 25 U.S. (12 Wheat.) 561 (1827) (refusal to issue execution on judgment upheld); *Bank of Columbia v. Sweeny*, 26 U.S. (1 Pet.) 567 (1828) (unsuccessful effort to obtain review of interlocutory order by mandamus); *Ex parte Crane*, 30 U.S. (5 Pet.) 189 (1831) (refusal to approve bill of exceptions upheld). Pressures also existed to use habeas corpus as a means of reviewing criminal cases. See *United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). See generally Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153.

66. The two writs are now treated as interchangeable. See, e.g., *Rapp v. Van Dusen*, 3rd Cir., Dec. 16, 1964. "In some of the petitions the writ sought is described simply as mandamus, in others as mandamus or prohibition, and in some as mandamus

prudence by sections 13 and 14 of the Judiciary Act of 1789. Section 13 was apparently designed to confer on the Supreme Court the prerogative powers which had belonged to the Court of the King's Bench. It provided that the Supreme Court "shall have power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."⁶⁷ Section 14 gave all courts of the United States power to issue "all other writs not specially provided for" (which included the writ of mandamus), with one important limitation—that they "be necessary for the exercise of their respective jurisdictions."⁶⁸ Section 13 never operated as was apparently intended, for it was soon emasculated by Chief Justice Marshall in the decision of *Marbury v. Madison*.⁶⁹ By a process of constitutional interpretation beyond the scope of the present discussion Marshall imposed on the Supreme Court's jurisdiction to issue the writ a limitation, similar to that found in section 14, that the use of the writ be an exercise either of the Court's appellate jurisdiction⁷⁰ or of the court's constitutionally specified original jurisdiction.

By the end of the nineteenth century the Court and the commentators had formulated a set of rules governing the conditions under which the appellate writ would issue. First, the writ would not issue when there was a remedy by way of appeal.⁷¹ Second, the writ would issue only to compel the performance of a ministerial act or to command an inferior court to act in a case in which that court had jurisdiction,⁷² but in this latter situation the writ would not prescribe what the decision of the inferior court should be.⁷³ Third, under the statutes and the rule

or prohibition, or both. We shall refer to mandamus as including prohibition wherever appropriate." *Id.* at 3 n.4.

67. 1 Stat. 81 (1789).

68. *Id.* at 81-82.

69. 5 U.S. (1 Cranch) 137 (1803).

70. *Id.* at 175: "It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a *mandamus* should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original."

71. *Ex parte Newman*, 81 U.S. (14 Wall.) 152, 165 (1872): "[N]or will the writ be issued in any case if the party aggrieved may have a remedy by writ of error or appeal. . . ." Spelling, *op. cit. supra* note 61, § 1389, at 1202: "At any rate, that the existence of an adequate remedy by appeal is a bar to relief by mandamus is firmly established, both in England and in this country, by numerous authorities."

72. *Ex parte Newman*, 81 U.S. (14 Wall.) 152, 169 (1872): "Superior tribunals may by mandamus command an inferior court to perform a legal duty where there is no other remedy, and the rule applies to judicial as well as to ministerial acts, but it does not apply at all to a judicial act to correct an error, as where the act has been erroneously performed." See also HIGH, *op. cit. supra* note 61, § 147; 2 SPELLING, *op. cit. supra* note 61, § 1388, at 1200.

73. *Ex parte Newman*, 81 U.S. (14 Wall.) 152, 169 (1872): "If the duty is unperformed and it be judicial in its character the mandate will be to the judge directing him to exercise his judicial discretion or judgment, without any direction as to manner

of *Marbury v. Madison* the writ would issue only in aid of a present or potential appellate jurisdiction.⁷⁴

The difficulty with these hornbook formulations is that more often than not they were only that. When confronted with a situation in which the Court thought the need for intervention sufficiently pressing, these rules were manipulated, and mandamus would issue.⁷⁵ It was this line of cases which developed into the "extraordinary" remedies rule,⁷⁶ a rule so inherently impossible of consistent application that it was almost inevitable that it would spill over into the general supervisory power of the *La Bay* case. The implications of this shift for the courts of appeals were first explicitly underlined by the Court itself in the landmark case of *Roche v. Evaporated Milk Ass'n.*⁷⁷ Although the Court there reversed a

in which it shall be done, or if it be ministerial, the mandamus will direct the specific act to be performed." See also, HIGB, *op. cit. supra* note 61 § 149; 2 SPELLING, *op. cit. supra* note 61, § 1389, at 1200-01.

74. These rules and the firm, confident tone of Mr. Justice Clifford's discussion of mandamus in *Ex parte Newman*, 81 U.S. (14 Wall.) 152, 165-67 (1872), can be usefully contrasted to the carefully considered observations of Mr. Chief Justice Marshall on mandamus in *Marbury v. Madison*, 5 U.S. (5 Cranch) 137 (1803), and *Ex parte Crane*, 30 U.S. (5 Pet.) 189 (1831). Although Marshall directs his attention to the same considerations, his conclusions are undogmatic. For example, "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus, is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation. But where he is directed by law to do a certain act affecting the absolute rights of individuals . . . it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment . . ." *Marbury v. Madison*, *supra* at 170-71 (emphasis added). Or, "We cannot perceive a reason why the single case of a refusal by an inferior Court to sign a bill of exceptions, and thus to place the law of the case on the record, should be withdrawn from that general power to issue writs of mandamus to inferior Courts . . ." *Ex parte Crane*, *supra* at 193 (emphasis added).

75. See, e.g., *Ex parte Bradley*, 74 U.S. (7 Wall.) 364 (1869); *Virginia v. Rives*, 100 U.S. (10 Otto) 313 (1880); *United States v. Mayer*, 235 U.S. 55 (1914); *Ex parte Simons*, 247 U.S. 231 (1918); *Delaware L. & W. R.R. v. Rellstab*, 276 U.S. 1 (1928); *Ex parte United States*, 287 U.S. 241 (1932); *Ex parte Peru*, 318 U.S. 578 (1943). Compare *Ex parte Bradley*, 74 U.S. (7 Wall.) 364 (1869), with *Ex parte Burr*, 22 U.S. (9 Wheat.) 529 (1824). In both cases the petitioner asks for mandamus to restore him to the bar of the court below. The opinion of the Court in *Burr*, written by Marshall, is tentative in tone. "If there be a revising tribunal, which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case." 22 U.S. (9 Wheat.) 530. Mindful of the need for "some controlling power, some discretion" in the court below, the court declined to issue the writ. *Ibid.* In *Bradley*, the Court issued the writ, dogmatically concluding that "the court below had no jurisdiction to disbar the relator for a contempt committed before another court." 74 U.S. (7 Wall.) 377. This absurd conclusion was made necessary by the Court's rigid conception of its mandamus power.

76. Mandamus has long been described as an "extraordinary remedy." But the appellation reached its high point as a rule of availability in *Ex parte Fahey*, 332 U.S. 258, 260 (1947): "As extraordinary remedies, they are reserved for really extraordinary cases."

77. 319 U.S. 21 (1943).

decision of the Ninth Circuit Court of Appeals to issue the writ, it took pains to emphasize that the issue was one of discretion, not power.

[T]he question presented . . . is not whether the court below had power to grant the writ but whether in the light of all the circumstances the case was an appropriate one for the exercise of that power. 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.⁷⁸

Contrary to the general thrust of the Supreme Court decisions, the circuit courts of appeals have directed their efforts towards circumscribing the availability of the writ of mandamus to review trial court rulings on transfer motions. Apparently fearful of their own calendar pressures⁷⁹ and delay tactics of litigants, some of the circuits at least partially embraced the nineteenth century doctrines limiting mandamus in order to stem the flow of mandamus petitions. As a result their precedents have necessarily co-existed uneasily with contemporary Supreme Court doctrine.

The nineteenth century doctrine limiting mandamus does not fit easily into the situation of a party seeking review of a transfer ruling. Under this doctrine, the litigant seeking mandamus must first establish that no remedy by appeal is available to him. Certainly it can be argued that a transfer ruling, like any interlocutory order, is reviewable on appeal after final judgment. This argument might be met, however, by pointing out that the requirements of the harmless error statute⁸⁰ would make it unlikely that any appellate court would reverse because of an erroneous transfer order. To do so it would be necessary for that court to find that the transferee court had reached a different result from that which the transferor court would have reached. Such a conclusion, implying that justice is not uniformly administered throughout the federal

78. *Id.* at 25-26. See also *Ex parte Peru*, 318 U.S. 578 (1943), which in more ambiguous language changes the issue from power to discretion where an "original" writ in the Supreme Court is involved.

79. This is not mentioned in the opinions. But see *Ex parte Peru*, 318 U.S. 578, 603 (1943) (dissent of Frankfurter, J.): "It is therefore imperative that the docket of the Court be kept down, that no case be taken which does not rise to the significance of inescapability for the responsibility entrusted to this Court. Every case that is allowed to come here which, judged by these standards may well be left either to the state courts or to the circuit courts of appeals, makes inroads upon thought and energy which properly belongs to the limited number of cases which only this Court can adjudicate. . . . One case is not just one case more, and does not stop with being just one more case. Chief Justice Taft was not the last judge who, as he said of himself, 'having a kind heart, I am inclined to grant probably more [discretionary reviews] than is wise.'"

80. 28 U.S.C. § 2111 (1958).

judicial system, would be impermissible.⁸¹ Therefore, goes the argument, the remedy on appeal is inadequate. But this argument can in turn be refuted. The essence of the argument is that because Congress has made relief unavailable on appeal, courts should supply it by means of mandamus.⁸² This appears to fall afoul of the statutory limitation on the mandamus power—that the writ should issue in aid of present or potential appellate jurisdiction.

At first look the nineteenth century doctrines appear to foreclose review by mandamus. However, if a reviewing court were willing to hold that a transfer order had been made in such circumstances that it was ineffective to transfer the case, then mandamus would be proper to order the district court to hear the case. In such a situation, it could be reasoned that the district court's transfer order was in fact an improper refusal to hear a case still on its docket.⁸³ If the reviewing court is willing to hold that the transfer order was ineffective to transfer the case, the objection that there is a remedy on appeal is also met. If the transfer is ineffective and any judgment entered by the transferee district court is void, it is hard to see how the court of appeals of the transferee district would have jurisdiction on appeal to consider the merits of the transfer order since the case, by hypothesis, is still in the transferor district court.⁸⁴

Thus under the traditional doctrines review of transfer orders would be available only when the trial court granted a transfer motion in a situation where it was beyond the power of the trial court to effect the transfer. As a practical matter this would foreclose all review of transfer rulings since most courts have assumed that a transfer is completed when the papers are forwarded to the transferee court whether or not the trans-

81. *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964); *Cunningham v. Chesapeake & O. R.R.*, 228 F. Supp. 492 (N.D. Ill. 1964).

82. *Gulf Research & Dev. Co. v. Harrison*, 185 F.2d 457, 460 (9th Cir. 1950): "The remedy of appeal from a final judgment is 'inadequate' so as to justify the use of mandamus only when it is totally unavailable, or when, because of the particular circumstances it could not correct extraordinary hardship."

83. *But see United States v. Choate*, 276 F.2d 724 (5th Cir. 1960), which denied a petition for the writ to prevent a transfer under Fed. R. Crim. P. 21 (b), apparently on the ground that since the court in its opinion had decided that the transfer was ineffective the judge could be expected to proceed to trial without coercion.

84. The courts have generally been unwilling to push the logic this far. In *Hoffman v. Blaski*, 363 U.S. 335 (1960), Mr. Justice Whittaker observed that "The transferee courts could have acquired jurisdiction over these actions only if properly brought in those courts, or if validly transferred thereto under § 1404(a)." *Id.* at 343. He went on to hold that the actions had in fact been improperly transferred under § 1404(a) without stopping to explain how the Supreme Court obtained jurisdiction over the matter in an action for mandamus brought against the transferee judge who, Mr. Justice Whittaker held, did not have jurisdiction over the underlying actions.

feror court properly ordered the transfer.⁸⁵ This practical position has been dictated by the fact that it is difficult for a court to proceed with a "case" if the record which embodies it is located in another court. Some courts, however, have suggested that where the district court has ordered the transfer to a district which is not one where the action "might have been brought" the transfer is ineffective because it exceeds the statutory transfer power.⁸⁶ In that one situation, then, the traditional mandamus doctrines would appear to make review available.

The pressures to obtain authoritative appellate rulings on section 1404(a)—particularly on the construction of the "might have been brought" clause—have been sufficiently great so that no circuit completely adopted the position outlined above. The Second Circuit has followed it in its holdings but gone beyond it in dicta.

85. *In re Southwestern Mobile Homes, Inc.*, 317 F.2d 65 (5th Cir. 1963); *Drabik v. Murphy*, 246 F.2d 408 (2d Cir. 1957). This rule has occasioned some amusingly uncomfortable moments as transferor courts of appeals have faced the possibility that district judges could deprive them of control over transfer orders by having the clerk mail the papers off as soon as the order is issued. In *Swindell-Dressler Corp. v. Dumbauld*, 508 F.2d 267 (3d Cir. 1962), the district judge had sent the papers to the transferee court before the petition for the writ of mandamus was filed. The clerk of the transferee court then returned the papers to the transferor district on conditions imposed by the transferee judge. "Judge Paul is willing that the papers be returned to your office for inspection by the attorneys for the parties with the understanding that no original paper would be sent to the Circuit Court of Appeals, and that no paper would be added or removed from the file. Will you please return the file to Wheeling as soon as possible." *Id.* at 270-71 n.4. The result of this arrangement seemed to be that the case was in suspended animation—neither in the transferor nor the transferee court. The Third Circuit muddled through in a mandamus action brought against the transferor judge, observing only that "we cannot perceive how the court below could regain jurisdiction of [civil action number] 257 simply by having the papers returned to it by the transferee court in escrow or even by having them returned without any limited custodianship." *Id.* at 273. The court concluded that the original transfer order violated due process of law and was void but, nevertheless, issued a writ of mandamus ordering the transferor judge to vacate his supposedly invalid transfer order without ever explaining where the underlying case was actually located. In frustration the court suggested, "A local rule or standing order of court which would automatically stay a transfer under Section 1404(a) for a stated number of days would be of value in a situation such as is presented by the instant case. . . . Such a procedure would permit the transfer with 'all deliberate speed' and yet allow a reasonable time for applications to the Court of Appeals for mandamus and a stay." *Id.* at 274 n.11. The allusion to *Brown v. Board of Education*, 349 U.S. 294 (1955), is appropriate. See *Griffin v. County School Board*, 377 U.S. 218 (1964).

In *A. C. Nielson Co. v. Hoffman*, 270 F.2d 693 (7th Cir. 1959), the petition for mandamus was filed after the papers were sent but apparently before they were received by the transferor court, the Southern District of New York. The court of appeals took a gruff approach. "Courts do not look with favor upon the efforts of parties to a lawsuit or their counsel to prevent an opposing party having its day in court." *Id.* at 695. The Seventh Circuit did not stop to explain why the District Court for the Southern District of New York did not qualify as a "day in court."

86. *Foster-Milburn Co. v. Knight*, 181 F.2d 949, 951 (2d Cir. 1950); *cf. United States v. Choate*, 276 F.2d 724, 729 (1960); *Gulf Research & Dev. Co. v. Leahy*, 193 F.2d 302, 304 (3rd Cir. 1951), *aff'd mem. by an equally divided court*, 344 U.S. 861 (1952).

In *Magnetic Eng'r & Mfg. Co. v. Dings Mfg. Co.*,⁸⁷ the Second Circuit Court of Appeals accepted the argument that the remedy by appeal might well be inadequate because of the harmless error rule but denied mandamus to prevent the transfer on the grounds that the Seventh Circuit, the court of appeals for the transferee district, would be in a better position to pass on "the extent to which any review of the transfer will be open upon appeal from a final judgment against the plaintiff."⁸⁸ Judge Frank dissented, arguing that if an appeal would not lie from a transfer order, then mandamus should lie.

I think . . . that a sense of justice should prompt us to grant relief, if possible, by way of mandamus. For if, on the facts here, the transfer order was improper, plaintiff may be seriously hurt, should he be obliged to wait, for a vacation or reversal of that order, until the completion of a trial in Wisconsin. Indeed, paradoxically, if he must thus wait, and then wins at the end of the trial, the hurt to him, caused by the transfer, will be wholly irremediable.⁸⁹

In the next case to come before the court, *Foster-Milburn Co. v. Knight*,⁹⁰ the petitioners did not claim, as had the petitioners in the *Magnetic Mfg.* case, that the district judge had improperly weighed the factors of convenience and justice. Rather, the petitioners claimed that the district to which the court below had ordered the case transferred was a district where the action could not have been brought. The court of appeals found that if the district court was wrong in its construction of the statute, "the transfer will be a nullity . . . for the . . . [transferee district] will have no jurisdiction over the defendants, and any judgment it may enter will be void."⁹¹ Under the traditional doctrines already outlined, the court found that the writ would issue.⁹² In the next case, *Ford Motor Co. v. Ryan*,⁹³ Judge Frank, now writing for the court, managed to suggest that the *Foster-Milburn* situation was not the only one in which the writ would issue. Although the court denied a writ to compel

87. 178 F.2d 866 (2d Cir. 1950).

88. *Id.* at 869.

89. *Id.* at 870.

90. 181 F.2d 949 (2d Cir. 1950).

91. *Id.* at 951.

92. The court, however, seemed to think that the fact that the judgment would be void in the transferee court meant that there was a remedy by appeal. "If we are right in supposing that, should § 1404(a) not authorize the transfer, any judgment in the California court will be a nullity, there can be no doubt that the order will be reviewable on appeal from a judgment for the plaintiff, and there is no reason why we should not decide the point *in limine*." *Id.* at 951. Logic would seem to require the opposite result. See note 46 *supra* and text accompanying note 84 *supra*.

93. 182 F.2d 329 (2d Cir.), *cert. denied* 340 U.S. 851 (1950).

transfer Judge Frank echoed his dissent in *Magnetic Mfg.* when he wrote that

This [is] the kind of interlocutory order with which this court can properly deal by way of such a writ, since should petitioners—the defendants—finally lose on the merits below, any error in the interlocutory order would probably be incorrigible on appeal, for petitioners could hardly show that a different result would have been reached had the suit been transferred. Nor, should petitioners win on the merits below, could they collect as costs the additional expenses to them, if any, due to the court's failure to order the transfer. We recognize that the dividing line is by no means entirely clear between the power of this court and its lack of power to issue the writ. But we think this is a sufficiently "extraordinary cause" to empower us to do so, if the district judge erred.⁹⁴

Although the Second Circuit has never actually issued the writ under Judge Frank's extraordinary circumstances test, the test has become an established part of the circuit's case dicta.⁹⁵

The First Circuit has practically foreclosed review of transfer orders by mandamus. In *In re Josephson*,⁹⁶ Judge Magruder served notice "that in the future, except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop . . . mandamus proceedings [to review transfer orders] at the very threshold, by denying leave to file the petition for writ of mandamus."⁹⁷ Only where the transfer was to a district outside the first circuit did Judge Magruder even find that, "we have power under 28 U.S.C. 1651(a),⁹⁸ in aid and protection of our potential appellate jurisdiction, to review the order of transfer . . ."⁹⁹ Although this approach has the virtue of restricting the number of cases in which mandamus will lie, it seems to rest on the rather unfortunate premise that the courts of appeals of the United States are in competition, one with another, for the right to review cases coming from the district courts. Such a view was expressly rejected by the

94. 182 F.2d at 330. One imaginative district judge solved the problem of the additional expenses which may be incurred by a plaintiff when a transfer is ordered by conditioning the transfer order upon payment by the defendant of the plaintiff's additional costs. *Allied Petro-Prods., Inc. v. Maryland Cas. Co.*, 201 F. Supp. 694 (E.D. Pa. 1961)

95. *Ackert v. Pelt Bryan*, 299 F.2d 65 (2d Cir. 1961); *Lykes Bros. S. S. Co. v. Sugarman*, 272 F.2d 679 (2d Cir. 1959).

96. 218 F.2d 174 (1st Cir. 1954).

97. *Id.* at 183.

98. 28 U.S.C. § 1651(a) (1958), successor to the Judiciary Act of 1789 §§ 13, 14, 1 Stat. 80-82 (1789).

99. 218 F.2d 181.

Second Circuit in *Magnetic Mfg.*¹⁰⁰ and takes an unduly parochial view of the concept of "protecting" appellate jurisdiction. The Eighth Circuit, however, had proposed a similar limitation in the case of *Carr v. Donohoe*¹⁰¹ and warmly embraced the restrictive approach of the *Josephson* case in *Great Northern R.R. v. Hyde*.¹⁰² In *Carr* the court declined to review the district court's determination that the transferee district, a district within the Eighth Circuit, was one "where the action might have been brought." In *Hyde* it was conceded that the transferee district, a district outside the Eighth Circuit, was one where the action "might have been brought." The petitioners contested the district court's exercise of discretion. Although the court of appeals agreed that "there was no adequate factual or legal basis for the transfer,"¹⁰³ it refused to review the ruling. Even after the Supreme Court's decision in *La Buy v. Howes Leather Co.*,¹⁰⁴ recognizing a supervisory mandamus power in the courts of appeals, the Eighth Circuit refused, on rehearing, to review the district court transfer in the *Hyde* case. Somewhat lamely, the court said:

It may be that we are unduly reluctant to undertake the review of discretionary orders of transfer under § 1404(a), involving, as they usually do, controversial fact questions as to where cases can most conveniently and appropriately be tried. If so, we shall hope to be corrected.¹⁰⁵

Correction has not yet been administered.

The Third Circuit has arrived at a reformulation of the traditional doctrine that mandamus will not be used to compel a decision one way or the other on a matter within the discretion or "jurisdiction" of the official against whom the writ is to be issued. The resulting rule was summed up in the case of *All States Freight, Inc. v. Modarelli*.¹⁰⁶ "We do not propose to grant review [by mandamus] where the judge in the district court has considered the interests stipulated in the statute and decided thereon."¹⁰⁷ The court had previously granted the writ in *Paramount Pictures, Inc. v. Rodney*¹⁰⁸ because it felt the district judge had incorrectly construed the "might have been brought" clause of section 1404(a). The district judge had refused transfer on the grounds that venue did not lie in

100. *Magnetic Eng'r & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866 (2d Cir. 1950).

101. 201 F.2d 426 (8th Cir. 1953).

102. 238 F.2d 852 (8th Cir. 1956).

103. *Id.* at 855.

104. 352 U.S. 249 (1957).

105. 245 F.2d 537, 538 (8th Cir) *cert. denied* 355 U.S. 872 (1957).

106. 196 F.2d 1010 (3d Cir. 1952).

107. *Id.* at 1012.

108. 186 F.2d 111 (3d Cir. 1950), *cert. denied* 340 U.S. 953 (1951).

the transferee district. The court of appeals held that venue need not lie in the transferee district to satisfy the "might have been brought" requirement and issued mandamus to compel the district judge to consider the issues of "convenience" and "interest of justice."¹⁰⁹ In *Modarelli*, the *Paramount* case was explained as one in which the writ was issued "not to review the exercise of a judge's discretion, but to indicate that the discretion should be exercised."¹¹⁰ Apparently the court felt that mandamus was appropriate for this end because of the rule that where a matter is within the discretion or "jurisdiction" of an inferior court, mandamus may be used to compel the court to decide the issue but not to tell it how to decide that issue. But in *Paramount Pictures* the district judge had, in fact, passed on the transfer motion. The court of appeals was not telling the district judge that he must exercise this power but that he had exercised it incorrectly. The Third Circuit's emphasis on the means rather than the ends of decision was carried to an extreme in *Swindell-Dressler Corp. v. Dumbauld*.¹¹¹ There the court held that a hearing was required on a transfer motion by due process of law and that mandamus would issue to enforce this requirement.

The general approach of the Third Circuit has been followed in the Fifth¹¹² and District of Columbia Circuits.¹¹³ The Fourth Circuit has not articulated a clear position, but its approach has been restrictive.¹¹⁴ The Sixth Circuit has simply followed an "exceptional circumstances test" in determining the availability of mandamus.¹¹⁵ It has issued the writ

109. The district judge was right. *Hoffman v. Blaski*, 363 U.S. 335 (1960).

110. 196 F.2d 1012 n.3.

111. 308 F.2d 267 (3d Cir. 1962).

112. The leading case is *Ex parte Chas. Pfizer & Co.*, 225 F.2d 720 (5th Cir. 1955). "It is our opinion that, in the absence of a failure of the District Court to correctly construe and apply the statute, or to consider the relevant factors incident to ruling upon a motion to transfer, or unless it is necessary to correct a clear abuse of discretion, a Court of Appeals should not entertain motions for Writs of Mandamus to direct District Courts to enter or vacate orders of transfer under § 1404(a)." *Id.* at 723.

113. *Wiren v. Laws*, 194 F.2d 873 (D.C. Cir. 1951), held that transfer orders were reviewable by way of mandamus "in light of the criteria customarily associated with mandamus and similar remedies." *Id.* at 874. This was amplified in *Loew's Inc. v. McGuire*, 205 F.2d 719 (D.C. Cir. 1953): "The present petition asks that the respondent be directed to consider the convenience of the parties and witnesses in the interest of justice. He says he has done so. We take this to be conclusive." *Id.* at 719-20.

114. The leading case is *Clayton v. Warlick*, 232 F.2d 699 (4th Cir. 1956). "The correct rule to be applied, we think, is the same as that applied in the use of other interlocutory orders, i.e., where the judge has exercised a power conferred upon him by law, mandamus may not be availed of to review the exercise of the power in the face of the restriction placed by Congress on the review of interlocutory orders." *Id.* at 706. The court decided it would issue the writ in *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F.2d 514 (4th Cir. 1955), to compel the district judge to proceed with two suits in admiralty transferred from the Southern District of New York. He refused to accept the suits on the ground that the Southern District did not have power to transfer them.

115. The leading case is *Lemon v. Druffel*, 253 F.2d 680 (6th Cir. 1958), *cert. de-*

to review a transfer ruling only once, in a case where the transfer was to a district where the action could not have been brought.¹¹⁶ The Ninth Circuit has never issued the writ to review a transfer order and has said that it would do so only in "extraordinary circumstances."¹¹⁷ The Tenth Circuit has never been faced with the issue.¹¹⁸

The Seventh Circuit, meanwhile, was making its unique way through these difficulties. After expressing some early doubts about the availability of mandamus to review transfer rulings,¹¹⁹ it "remanded" in *Dairy Indus. Supply Ass'n v. La Buy*¹²⁰ because the district judge had improperly considered the factors involved in weighing the convenience of the parties and witnesses and the interest of justice under section 1404(a). This it did without discussion, apparently thinking the case was on appeal, and thereby established the precedent which was to take full root in *Barrack*. The court again remanded because of an improper consideration of factors in *Chicago, R.I. & Pac. R.R. v. Igoe*.¹²¹ In that case the district judge had considered the fact that the case had been removed from the state courts as foreclosing transfer. After the remand, the district judge, although considering the proper factors, again refused to transfer the case. The defendants again filed a petition for the writ, and the court granted it, ordering the transfer and holding that the district court's failure to transfer was an abuse of discretion.¹²² The Supreme Court was to later hold this procedure an improper use of the writ on the grounds that the writ is not to be used "to actually control the decision of the trial court" on a matter committed to the discretion of the trial judge.¹²³ The court again issued the writ, ordering a retransfer, in *Blaski v. Hoffman*¹²⁴ and *Behimer v. Sullivan*.¹²⁵ The Supreme Court, as has been noted, affirmed without discussion of the jurisdictional is-

nied, 358 U.S. 821 (1958). *Accord*, *Pennsylvania R.R. v. Connell*, 295 F.2d 32 (6th Cir. 1961).

116. *Johnson & Johnson v. Picard*, 282 F.2d 386 (6th Cir. 1960).

117. *Gulf Research & Dev. Co. v. Harrison*, 185 F.2d 457, 459 (9th Cir. 1950).

118. The Tenth Circuit has, however, commented on the merits of a § 1404(a) transfer ruling after final judgment in a case which was reversed on the merits. *Chicago, R.I. & Pac. R.R. v. Hugh Breeding Inc.*, 232 F.2d 584 (10th Cir. 1956), 247 F.2d 217 (10th Cir. 1957). It has also ruled on the merits of a transfer order in a case certified as to other issues under the Interlocutory Appeals Act. *Huston Fearless Corp. v. Teter*, 318 F.2d 822 (10th Cir. 1963).

119. *General Portland Cement Co. v. Perry*, 204 F.2d 316 (7th Cir. 1953); *B. Heller & Co. v. Perry*, 201 F.2d 525 (7th Cir. 1953).

120. 207 F.2d 554 (7th Cir. 1953).

121. 212 F.2d 378 (7th Cir. 1954).

122. *Chicago, R.I. & Pac. R.R. v. Igoe*, 220 F.2d 299 (7th Cir.), cert. denied 350 U.S. 822 (1952).

123. *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245 (1964).

124. 260 F.2d 317 (7th Cir. 1958).

125. 261 F.2d 467 (7th Cir. 1958).

sues.¹²⁶ The court soon found, however, that its readiness to issue mandamus led to unfortunate side effects for in *Sypert v. Miner*¹²⁷ the court solemnly observed:

We note an increased number of petitions for mandamus where contested motions for transfer under 1404(a) are involved. Apparently a number of attorneys are filing petitions for mandamus under circumstances where an appeal might be taken in an ordinary case . . . Members of the Bar should not file petitions for mandamus in transfer cases unless they can make out a strong case of abuse of discretion.¹²⁸

This new position has controlled subsequent cases. In the next three cases the court did not issue the writ¹²⁹ and issued it in *Minnesota Mining & Mfg. Co. v. Platt* only after finding that the district judge's refusal to transfer undermined a constitutional policy.¹³⁰

Thus in spite of *Roche* and *La Buy* the courts of appeals have for the most part resisted efforts to obtain review of transfer rulings by means of the writ of mandamus. The unanswered question at the present time is whether *Roche* and *La Buy* are to be read as permissive or compulsive. Do these cases simply stand for the proposition that the courts of appeals have the power to utilize mandamus for purposes of interlocutory review when they choose to do so but that they may decline to do so if they wish? If so, can the courts of appeals formulate general rules to govern the writ? Or must their power be exercised in each particular case in light of its own particular facts?¹³¹ If the courts of appeals are denied the power to formulate rules governing the availability of mandamus, parties

126. *Hoffman v. Blaski*, 363 U.S. 335 (1960).

127. 266 F.2d 196 (7th Cir.), *cert. denied* 361 U.S. 832 (1959).

128. *Id.* at 199.

129. *Butterick Co. v. Will*, 316 F.2d 111 (7th Cir. 1963); *Chemetron Corp. v. Perry*, 295 F.2d 703 (7th Cir. 1961); *A. C. Nielsen Co. v. Hoffman*, 270 F.2d 693 (7th Cir. 1959).

130. *Minnesota Mining & Mfg. Co. v. Platt*, 314 F.2d 369 (7th Cir. 1963), *rev'd* 376 U.S. 240 (1964).

131. In Wolfson, *Extraordinary Writs in the Supreme Court Since Ex Parte Peru*, 51 COLUM. L. REV. 977 (1951), the courts of appeals were chastised for their failure to exercise this discretionary power. "[F]or some reason the courts of appeals have not understood this shift from power to discretion. One need only page through the recent cases in the Federal Reporter to find instances where those courts have denied the existence of power to grant the extraordinary writs. The old attitudes relating to power still hold sway, and it will perhaps be necessary for the Supreme Court again to emphasize the wholly discretionary nature of these writs." *Id.* at 992. However, if the courts of appeals can formulate general rules to guide their discretion then the "shift" is not a significant one. For the same rules that once regulated "power" can now be used to regulate "discretion." The fundamental issue remains not one of power or discretion but of the wisdom of the rules. By "wholly discretionary," however, Wolfson apparently means "to be exercised without reference to general rules."

will be tempted to file petitions with little chance of success since the outcome in any particular case will be difficult to predict.¹³² Even though a court of appeals were in fact to grant few petitions, every time a petition was filed it would be faced with the burden of considering all the factors involved. If *Roche* and *La Buy* are merely permissive, the body of courts of appeals doctrine just set forth is not inconsistent with them. But *Rapp* and some recent cases in other circuits suggest that in the face of the Supreme Court's firm declaration that the courts of appeals have a broad power of interlocutory review by mandamus, these courts of appeals precedents may be abandoned.¹³³ Now that the power has been found to exist, it would probably be surprising if the courts of appeals did not succumb to the temptation to use it. But the Seventh Circuit's experience suggests that this is a temptation which can be overcome with exposure.¹³⁴ It seems reasonable to predict that during the next decade the courts of appeals will follow increasingly variant paths as they attempt to exercise in practice the discretionary mandamus and "remand" powers which are now theirs. Hopefully, they will eventually arrive at a position not too dissimilar from their present one. Interlocutory review by mandamus of section 1404(a) rulings will only be used to review a district court's determination of the scope of the power conferred by the statute, never to review a district court's determination of the "convenience of parties and witnesses" and "the interest of justice."¹³⁵

But the path to that end is not yet a clear one. At least for the present the Supreme Court is apparently determined to encourage a good deal of experimentation by the courts of appeals in order to find the appropriate judicial policy for handling interlocutory review. This is

132. There is a rough correlation between the number of original proceedings commenced in each circuit and the past attitude of that circuit toward the writ. In fiscal year 1962, 107 out of a total of 4,823 cases commenced in the courts of appeals were original proceedings (2.2%). The corresponding figures for each circuit were: D. C., 7/653 (1.1%); 1st, 2/165 (1.2%); 2d, 26/582 (4.6%); 3d, 10/437 (2.3%); 4th, 5/300 (1.7%); 5th, 9/715 (1.4%); 6th, 5/412 (1.2%); 7th, 19/394 (4.8%); 8th, 1/297 (0.3%); 9th, 12/580 (2.1%); 10th, 11/288 (3.8%). 1963 ANN. REP. DIRECTOR ADM. OFFICE U.S. COURTS 188-91 (1964). Although the absolute numbers are small, only a few cases can make the difference between a court with time enough for its responsibilities and one rushed to keep up with its case load. See the dissent of Mr. Justice Frankfurter in *Ex parte Peru*, 318 U.S. 578 (1943), quoted note 79 *supra*.

133. *United States v. Cobb*, 328 F.2d 115 (9th Cir. 1964); *Lummas Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80 (2d Cir. 1961), cert. denied 368 U.S. 986 (1962); *Padovani v. Bruchhausen*, 293 F.2d 546 (2d Cir. 1961); *In re Union Leader Corp.* 292 F.2d 381 (1st Cir.), cert. denied 368 U.S. 927 (1961); *Holub Indus., Inc. v. Wyche*, 290 F.2d 852 (4th Cir. 1961).

134. *Sypert v. Miner*, 266 F.2d 196 (7th Cir.), cert. denied 361 U.S. 832 (1959). Compare *Holub Indus., Inc. v. Wyche*, 290 F.2d 852 (4th Cir. 1961) (mandamus to compel dismissal on jurisdictional grounds), with *General Tire & Rubber Co. v. Watkins*, 326 F.2d 926 (4th Cir.), cert. denied 377 U.S. 909 (1964) (mandamus denied for same purpose).

135. See text accompanying notes 154-55 *infra*.

particularly surprising in view of the fact that the problem is one which Congress has given careful consideration and with which the jurisdictional statutes specifically deal. In 1958 Congress amended the Interlocutory Appeals Act with the problem of review of transfer orders, among others, specifically in mind.¹³⁶ New section 1292(b) of the Judicial Code now provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order 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, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order if application is made to it within ten days after the entry of the order¹³⁷

The crucial finding required is that an "immediate appeal from the order may materially advance the ultimate termination of the litigation." Ironically, when one comes to consider the availability of review of transfer rulings under the act this requirement leads right back to the same issue which the nineteenth century mandamus doctrines make crucial: Is the claimed error in the transfer order one that would void the transfer? If an appellate court will not reverse the final judgment of the transferee court because of the harmless error statute, then it will not advance the termination of the litigation to permit an immediate appeal. Only if the claimed error in the order would invalidate the transfer, making any final judgment in the transferee district void, will immediate appeal have this effect. The precedents, of course, would justify a finding that error in the order invalidates the transfer only where the transferee district was not one in which the action "might have been brought."¹³⁸

136. 72 Stat. 1770 (1958). The legislative history makes it clear that the act was intended to apply to at least some transfer orders. H. R. REP. No. 1667, 85th Cong., 2d Sess. 1-2 (1958); *Hearings on H.R. 6238 before Sub-committee No. 3 of the House Committee on the Judiciary*, 85th Cong., 2d Sess. 8-9 (1958) (Testimony of Judge Parker). Judge Parker, who had shepherded the bill for a number of years in the Judicial Conference, told the house that the bill would be useful in "cases of transfer of causes when it is claimed that the transfer is not authorized by law. Congress has recently authorized the transfer of cases from one district to another district, or from one circuit to another circuit, where the circuit to which the case is transferred or the district to which the case is transferred would have had jurisdiction and they frequently claim that the court to which they would have no jurisdiction [sic]." *Id.* at 9.

137. 28 U.S.C. § 1292(b) (1958).

138. See cases cited note 86 *supra*. Section 1292(b) has been used in this situation. *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960), *affirming* 268 F.2d 240 (5th Cir. 1959); *Lewis v. Hogwood*, 300 F.2d 697 (D.C. Cir. 1962).

The Fifth Circuit is the only circuit which has used section 1292(b) to review a district court's evaluation of the "convenience of parties and witnesses" and the "interest of justice."¹³⁹ In *Ex parte Deepwater Exploration Co.*¹⁴⁰ the court denied leave to apply for a writ of mandamus to review a transfer order until the district judge had had an opportunity to consider the applicability of the Interlocutory Appeals Act. District Judge Wright, in an opinion following the reasoning above, held that the Interlocutory Appeals Act was unavailable to review the exercise of a judge's discretion under section 1404(a).¹⁴¹ The Fifth Circuit then directed that leave to file a petition for the writ be granted.¹⁴² When the court again took this approach in *In re Humble Oil & Ref. Co.*,¹⁴³ the district judge granted the appeal certificate. The court of appeals then proceeded to review the district judge's exercise of his discretion under Admiralty Rule 54¹⁴⁴ and affirmed,¹⁴⁵ although it disclaimed passing on the jurisdictional issue.¹⁴⁶ This as yet fragmentary experience suggests that in spite of its simplicity section 1292(b) will in practice provide no panacea for the problem of appellate review of transfer orders.

Nevertheless, the section should be recognized as a congressional delineation of the situations in which appellate review of transfer orders is to be available. Although history would support the contention that traditional mandamus is outside the scope of the statute, it is difficult to justify an expansion of the mandamus power in the face of an explicit recent declaration of congressional policy. At the very least, the reconstituted mandamus procedure of *Rapp*—eliminating the distinctive basis of the mandamus power—should be controlled by the section. Only the retention of the label "mandamus" makes it possible to perpetuate the fiction that the proceeding envisaged in *Rapp* is not an appeal.

The remand procedure used in *Barrack*, however, cannot be classified as an appeal. Rather, it is similar to the Third Circuit's pre-*Rapp*

139. *Koehring Co. v. Hyde Constr. Co.*, 324 F.2d 295 (5th Cir. 1963); *Humble Oil & Ref. Co. v. Bell Marine Serv., Inc.*, 321 F.2d 53 (5th Cir. 1963).

140. 260 F.2d 546 (5th Cir. 1958).

141. *Deepwater Exploration Co. v. Andrew Weir Ins. Co.*, 167 F. Supp. 185 (E.D. La. 1958); followed in *Texas San Juan Oil Co. v. An-Son Offshore Drilling Co.*, 198 F. Supp. 284 (S.D.N.Y. 1961).

142. 260 F.2d 547 (5th Cir. 1958).

143. 306 F.2d 567 (5th Cir. 1962). It would not be a far step from the Fifth Circuit's use of mandamus as a tactic to obtain district judge certifications under § 1292(b) to the use of mandamus to order the certification. If that step were taken, then all interlocutory orders would be reviewable.

144. Rule 54 applies to proceedings to limit liability and provides in part: "The District Court may, in its discretion, transfer the proceedings to any district for the convenience of the parties." FED. ADM. R. 54.

145. *Humble Oil & Ref. Co. v. Bell Marine Serv., Inc.*, 321 F.2d 53 (5th Cir. 1963).

146. *Id.* at 55 n.5.

approach to mandamus. The court below is told how to exercise its discretion, but it is not told which way it must decide. The difference, however, is that the Third Circuit has considered it sufficient that the district judge properly interpret the "might have been brought" clause, and make a finding on the "convenience" and "interest of justice" issues. The Supreme Court, on the other hand, has seen fit, by means of its mandamus "remand" procedure, to advise the district judge on the most minute elements entering into his exercise of discretion. The closest analogy to the "remand" procedure appears to be that of an unsolicited advisory opinion for the edification of the district judge.¹⁴⁷ It is entirely unclear what steps an appellate court would be justified in taking if the district judge chose to ignore the "remand." Perhaps contempt would be appropriate on the theory that disregard of the "remand" is disregard of an order to the district judge himself similar to traditional mandamus. Or perhaps the appellate court would have to wait for appeal after final judgment when it could reverse for failure to consider the proper factors. But here the harmless error statute would again rear its head. In fact the chief weakness of the *Barrack-Minnesota Mining* remand procedure is that it does not even incorporate this fundamental principle of judicial economy—the district judge is advised how he should consider the factors even if the new considerations will not change the outcome of his decision.

But is there some particular factor in the nature of the problems encountered in the administration of section 1404(a) which justifies the Court's apparent decision to subject transfer rulings to extensive appellate scrutiny? Certainly it is true that if there is to be meaningful appellate supervision of section 1404(a) and its brothers¹⁴⁸ it must be by means of interlocutory, not final review. After a party has already been subjected to the inconvenience of a trial in an inconvenient forum, his position can hardly be improved by subjecting him to the inconvenience of a second trial in a convenient forum.

It is necessary to interpose one major aside. The retransfer problem would require special treatment under any system of appellate review. As section 1404(a) is presently administered there appears to be no barrier to putting a case in orbit.¹⁴⁹ Because of the failure of the majority

147. Which is exactly what Circuit Judge Lumbard provided in a concurring opinion in *Arvida Corp. v. Sugarman*, 259 F.2d 428 (2d Cir. 1958). "In light of the supervisory function of the courts of appeals over the administration of justice in the district courts [citing *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957)]," he proceeded "to add a word with respect to applications for temporary orders." *Id.* at 429.

148. 28 U.S.C. § 1402 (1958); FED. ADM. R. 54; FED. R. CRIM. P. 21.

149. *But see* *United States v. United States District Court*, 209 F.2d 575 (6th Cir. 1954), where the court of appeals used its mandamus power to prevent that from hap-

of the Court to discuss the problem in *Hoffman v. Blaski*,¹⁵⁰ no doctrine of the law of the case has developed under section 1404(a).¹⁵¹ The possibility that a case might endlessly shuttle between two or three district courts is real enough to require some form of appellate supervision to put a stop to it. It would be reasonable to hold that once a judge has passed on a section 1404(a) transfer motion his decision is conclusive unless there is a significant change of circumstances. Appellate intervention would be necessary to make such a rule meaningful. A different treatment would also be required in situations where the courts hold that the transferee court has no jurisdiction over the case—as they apparently might do where the transferee court is not one where the action “might have been brought.”¹⁵² As has already been noted, it would be proper to review such a transfer order by means of mandamus or an interlocutory appeal in the transferor circuit court of appeals. But it makes no sense to review such an order in the transferee circuit court of appeals since it does not have jurisdiction over the case to begin with. It would be necessary, however, after the transferor circuit court had ruled that the transfer order was so defective, to permit the transferee circuit to intervene to compel the transferee district court to send the record back to the transferor district so that the court could proceed with the case.¹⁵³ But these are special problems, and they need not be considered further.

An important reason for appellate review in a judicial system is to insure a reasonable degree of uniformity in the administration of justice.

pening in a dispute between two districts based on transfer under FED. R. CRIM. P. 21(b). *But cf.* *United States v. United States District Court*, 226 F.2d 238 (8th Cir. 1955); *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F.2d 514 (4th Cir. 1955).

150. 363 U.S. 335 (1960), *affirming* 260 F.2d 317 (7th Cir. 1958). The Seventh Circuit Court of Appeals had ordered the case retr transferred contrary to a holding of the Fifth Circuit Court of Appeals in the same case. *Ex parte Blaski*, 245 F.2d 737 (5th Cir. 1957). Mr. Justice Frankfurter dissented on this issue. 363 U.S. 345 (1960).

151. *E.g.*, *United States Lines Co. v. MacMahon*, 285 F.2d 212 (2d Cir. 1960); *Sypert v. Miner*, 266 F.2d 196 (7th Cir. 1959); *cf.* *Gulf Research & Dev. Co. v. Leahy*, 193 F.2d 302 (3d Cir. 1951), *aff'd mem. by an equally divided court*, 344 U.S. 861 (1952). *But see*, *Atlantic Coast Line R.R. v. Davis*, 185 F.2d 766, 769-70 (5th Cir. 1950): “[I]t could be reasonably argued that the statute envisions and authorizes, after the plaintiff has made the permissible choice of venue, only one determination thereafter of the venue for trial which will best serve ‘the convenience of parties and witnesses, in the interest of justice’ and that this determination settles the matter. This application of the statute would remove any possibility of shuttling of the cause or of conflict between the several district courts, each of coordinate jurisdiction, which would arise from plural transfers.” 1 MOORE, FEDERAL PRACTICE ¶ 0.145[4.-4] at 1769 (1964) firmly asserts that “When a federal district court decides a motion for transfer it establishes the law of the case as to this issue which is binding on the litigants, and which the court will normally apply to this issue in subsequent proceedings before it. . . .” Authority for that proposition is sparse.

152. See cases cited note 86 *supra*.

153. *Cf.* *Swindell-Dressler Corp. v. Dumbauld*, 308 F.2d 267 (3d Cir. 1962), discussed note 85 *supra*.

Can meaningful uniformity be obtained in the administration of section 1404(a) by means of appellate review?

To answer this question it is necessary to distinguish between two classes of problems which arise under section 1404(a). In the first class are those problems relating to the scope of the power given to the district courts by the section.¹⁵⁴ In the second class are those problems raised by the district court's evaluation of "interest of justice" and the "convenience of parties and witnesses." It was the pressure to obtain authoritative judicial interpretation of the "might have been brought" clause—a power issue—which brought section 1404(a) rulings into the appellate courts in the first place. It is interesting to note that it was this issue which originally brought *Barrack v. Van Dusen* into the Third Circuit. This pressure for conclusive appellate rulings was understandable since there was a reasonable fear that a transfer to a district which was not one where the action "might have been brought" would be null and void and render all subsequent proceedings meaningless. A similar possibility exists whenever it is argued that the transfer is beyond the power of the transferor district court. It can be argued that appellate intervention is also necessary where a district judge has denied a transfer motion because he erroneously believes that the proposed transfer is outside the scope of the statute. Because of the misconstruction, it could be pointed out, the moving party loses his statutory right to have the transfer considered on the merits. But at least issues relating to the scope of the statute can be conclusively resolved by the appellate courts. As a body of appellate precedent is developed the need for appellate review will decline.

OPERATIVE FACTORS IN TRANSFER RULINGS

The issues of the "convenience of parties and witnesses" and the "interest of justice" are of an entirely different type. District court opinions on these issues are published in great number,¹⁵⁵ suggesting that the dis-

154. This class of cases can be broken down into two questions. First, in what situations does a district court have power to consider a transfer under the section? This question was largely answered by *Ex parte Collet*, 337 U.S. 55 (1949), which construed the phrase "any civil action" broadly. The important issue unresolved by the Supreme Court is whether the section is available when venue is proper but service of process cannot be obtained in the district. It has been held that it is. *United States v. Berkowitz*, 328 F.2d 358 (3d Cir.), *cert. denied*, 379 U.S. 821 (1964); *Koehring Co. v. Hyde Constr. Co.*, 324 F.2d 295 (5th Cir. 1963); *cf. Internatio-Rotterdam, Inc. v. Thomsen*, 218 F.2d 514 (4th Cir. 1955); see generally, Comment, *Change of Venue in Absence of Personal Jurisdiction Under 28 U.S.C. 1404(a) and 1406(a)*, 30 U. CHI. L. REV. 735 (1963). The second question is: to what districts can a transfer be made? This is the "might have been brought" problem, and appears to have been largely laid to rest by *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

155. Thirty-four opinions based on transfer motions decided by the district courts in 1962 and 1963 and dealing at least in part with the "convenience of the parties and witnesses" and the "interest of justice" have been published in Federal Supplement.

trict judges find them difficult to deal with. Their numbers, unfortunately, do not add to their clarity. Although it has been hoped that experience under the statute would lead to clear standards,¹⁵⁶ that hope has not yet been fulfilled.¹⁵⁷ Most district judges do not have the mechanical approach of the judge who found that "it is not amiss to point out the somewhat significant number of cases that have refused transfer of a seaman's action from Philadelphia or New York to southern port cities."¹⁵⁸ Typical is the enumeration of factors in the case of *United Artists Associated v. NWL Corp.*

The principal factors are: (1) relative ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling witnesses; (3) the cost of obtaining willing witnesses; (4) the possibility of a view of the premises, if that would be appropriate; (5) all other practical problems that would make the trial of a case easy, expeditious and inexpensive; (6) the various public interests involved.¹⁵⁹

This listing, repeated in more or less the same form in district court opinion after district court opinion, is based on Mr. Justice Jackson's discussion in *Gulf Oil Corp. v. Gilbert*.¹⁶⁰ Apparently the district courts have followed the lead of *Moore's Federal Practice*, which lists the factors discussed in *Gulf Oil* as controlling "Grounds for Transfer under § 1404(a)."¹⁶¹

From the mass of cases it is possible to extract some of the more interesting factors which the district courts do and do not consider relevant.

1. *The comparative docket situation.* This is perhaps the most frequently discussed factor in the cases. The district courts make use of the *Annual Report of the Director of the Administrative Office of the United*

156. BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 86.8 at 441 (1960): "This problem [the absence of meaningful standards], however, is diminishing as a substantial body of authority construing the statute is developed."

157. *Mills v. Colgate-Palmolive Co.*, 232 F. Supp. 577, 579 (S.D.N.Y. 1964): "Apart from applicable general principles, however, the numerous cases are not particularly helpful." Brown, *Factors to be Considered in Determining a Motion to Transfer Under 28 U.S.C. 1404(a)*, 26 INS. COUNSEL J. 117, 128 (1959): "When the factors favoring transfer substantially predominate over those weighing against transfer, transfer will be granted. A more specific conclusion cannot be reached since the factors present change from case to case and the precise weight to be given each factor, as well as the exact extent to which the factors favorable to transfer must predominate over those unfavorable, must vary with the individuality of the various courts."

158. *Clendenin v. United Fruit Co.*, 214 F. Supp. 137, 141 (E.D. Pa. 1963).

159. 198 F. Supp. 953, 957 (S.D.N.Y. 1961).

160. 330 U.S. 501 (1947).

161. 1 MOORE, FEDERAL PRACTICE ¶ 0.145[5] (1964).

States Courts to ascertain the docket situations of the transferor and transferee courts. If the case can be expected to be up for trial sooner in the transferee district, this is considered a factor weighing in favor of transfer.¹⁰²

2. *Neutral witnesses subject to compulsory process.* If there are neutral witnesses who probably will not appear voluntarily but would be subject to process in the transferee district, this is a factor which favors transfer.¹⁰³

3. *The convenience of attorneys.* This factor is repeatedly rejected.¹⁰⁴ Not untypical is the observation of the court in *Wilson v. Ohio River Co.*:

Although plaintiff avers that she chose this forum because of "her confidence in her proctors practicing herein," neither the statute nor any decision brought to our attention has made the choice or engagement of proctors a factor to be considered in weighing the convenience of a litigant.¹⁰⁵

Although this factor is not considered significant, it is suggestive of the economic impact which a transfer order may have on individual members of the bar.

4. *The court's familiarity with the law to be applied.* In *Gulf Oil* the Supreme Court suggested that one of the factors justifying a forum non conveniens dismissal in the Southern District of New York was that the law to be applied was that of Virginia. "There is an appropriateness," observed the court, "in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."¹⁰⁶ This factor was again considered by the Court in *Van Dusen v. Barrack*.¹⁰⁷ It is seldom raised in the district courts. The significance of this factor is questionable. Certainly judges do not make rulings on matters of substantive law from memory. In the absence of some particularly complex or unsettled issue it is difficult to see how either the transferee or transferor court would not be able to apply the controlling law. In *Gulf Oil*, of course, this factor was seen as pointing towards transfer. In *Barrack*, because of the holding that the

102. *Fannin v. Jones*, 229 F.2d 368 (6th Cir.), cert. denied 351 U.S. 938 (1956). See cases collected 1 A.L.R.2d. Later Case Service 1030-31 (1965). [Hereinafter cited 1 A.L.R.2d L.C.S.]

103. See cases cited 1 MOORE, FEDERAL PRACTICE ¶ 0.145[5] at 1780 n.12 (1964).

104. See cases collected 1 A.L.R.2d L.C.S. 1029-30.

105. 211 F. Supp. 666, 667 (W.D. Pa. 1962).

106. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

107. 376 U.S. 612, 644-45 (1964).

law of the transferor forum controls after transfer, it was seen as militating against transfer. After *Barrack*, every transferee court will have to apply the conflicts laws of the transferor before it can arrive at the conclusion that the substantive law of its own state controls. And in all those matters which are governed by the law of the transferor state as a result of the operation of that state's conflicts law and are outcome determinative, the law of the transferor state will have to be applied by the transferee district court.¹⁶⁸ This means, for instance, that some of the rules of evidence of the transferor state may be controlling in the transferee district even though the substantive law of the transferee state is otherwise applicable. As a result, after *Barrack*, this factor simultaneously militates against and weighs for transfer in any case where the transferor state would apply the substantive law of the transferee state. Ironically, the factor now neutralizes itself. This state of affairs led one slightly overwhelmed district judge to suggest that a case which he was ordering transferred back to the transferor district might be retransferred to his district if the transferor court found after applying the conflicts law of its own state that the substantive law of the transferee state was controlling.¹⁶⁹

5. *Delay in making the transfer motion.* The district courts have been unanimous in considering delay in making the motion as a factor weighing against transfer.¹⁷⁰ In part they have reached this conclusion by application of rather sterile estoppel or consent notions, but more often they have based their decision on practical considerations. The usual assumption is that if the case is transferred, it will be necessary to bring new counsel into the case who would be unfamiliar with the proceedings which have already been held.

The trial of the case would not be expedited. On the contrary, it would further delay the trial. Moreover, it may be quite inconvenient for defendants now to arrange for their Harrisburg counsel, who have already done considerable work on the case, to conduct the trial in Pittsburgh; it would especially be so if they were also required to engage Pittsburgh counsel.¹⁷¹

It is perfectly clear that it is easier to transfer a case in its earlier stages. The rule that the motion must be made early in the litigation, however, is in conflict with the next factor to be discussed, the conveni-

168. *Van Dusen v. Barrack*, 376 U.S. 612, 639 n.40 (1964).

169. *Chenoweth v. Atchison, T. & S.F. Ry.*, 229 F. Supp. 540, 543 (D. Colo. 1964).

170. See cases collected 1 A.L.R.2d L.C.S. 1022 (1965).

171. *Standard v. Stoll Packing Corp.*, 210 F. Supp. 749, 750 (M.D.Pa. 1962).
Accord, *Roberts Bros. v. Kurtz Bros.*, 231 F. Supp. 163, 167-68 (D.N.J. 1964).

ence of the parties and witnesses, because the attorneys may not know exactly what witnesses will be called until discovery has been completed. This latter factor has led the Seventh Circuit to observe:

We think it unwise for a District Judge to enter an order of transfer in the early stages of a case before it can be determined just what the issues in that case are going to be. In the case in which the transfer order was issued, at the time respondent ordered the transfer, there was a possibility that 65 claims of 4 patents might be in issue. However, the probability was that after pre-trial discovery had been completed, plaintiff would decide to try the case relying on a far less number. We cannot ascertain any compelling reason why the order should have been entered at such an early stage of the proceeding.¹⁷²

6. *The convenience of the parties and witnesses.* The previous five factors could be loosely classified as all related to the "interest of justice." Until the courts silently rewrote the statute, the convenience of the parties and witnesses was the only factor to be considered. It remains the central factor, but it is difficult to extract any meaningful rule from the opinions. Generally, if the plaintiff is a resident of the forum or if some of his important witnesses reside there, his choice of venue will not be disturbed.¹⁷³ The courts are unable to state any rule beyond this, and as a result the emphasis has been shifted from one of substantive standards to one of procedure. The burden, the opinions repeatedly intone, is on the moving party.¹⁷⁴ The problem the opinions have tried to deal with is how the moving party can carry this burden.

The courts from almost the very beginning have insisted that the parties name the witnesses who will be inconvenienced or inconvenienced by one of the two alternative forums.¹⁷⁵ This procedure, as has already been noted, is in conflict with the rule that the transfer motion be made early in the case. The result is what can charitably be called a name matching game. One has the definite feeling that much of what is discussed is totally unrelated to what will finally happen at trial. Taking a hint from the opinion in *Gulf Oil*, attorneys in personal injury cases have

172. *A.C. Nielson Co. v. Hoffman*, 270 F.2d 693, 696 (7th Cir. 1959).

173. *Compare* *Rodgers v. Northwest Airlines*, 202 F. Supp. 309 (S.D.N.Y. 1962) (transfer granted, plaintiffs residents of Michigan, Iowa, and Florida), *with* *Schindelheim v. Branniff Airways, Inc.*, 202 F. Supp. 313 (S.D.N.Y. 1962) (transfer denied, plaintiffs residents of New York area). See also *Newfield v. Nicholson File Co.*, 210 F. Supp. 796 (E.D. Pa. 1962).

174. See cases collected 1 A.L.R.2d L.C.S. 1013-14.

175. See *United States Lines Co. v. MacMahon*, 285 F.2d 212 (2d Cir. 1960); *General Portland Cement Co. v. Perry*, 204 F.2d 316 (7th Cir. 1953).

argued that a transfer is necessary so that the court will be able to view the scene of the accident when in fact such a procedure is very unlikely.¹⁷⁶ The Third Circuit has attempted to make rulings on 1404(a) motions more meaningful by holding that a hearing is required by due process of law.¹⁷⁷ The very emptiness of the concept generates a pressure to make a complete inquiry into the situation in order to find a basis for decision. It would be a natural extension of this approach to require a complete trial on the issue of where the trial should be held before a trial is held on the merits. The absurdity of such a procedure needs no comment.

An appellate court could provide some uniformity in supervising the administration of the first five factors. The district courts, however, seem to have been able to handle them without appellate court assistance. But there is no underlying concept in the last factor to be clarified and made uniform. The plaintiff has a venue "privilege," and he gets to exercise this venue "privilege" until the defendant has overcome his burden of showing that the plaintiff doesn't have a venue "privilege." The amorphous nature of the issue is sharply etched when venue is laid under one of the broad, remedial venue statutes such as section six of the Federal Employers' Liability Act.¹⁷⁸ In such a case, the plaintiff's venue privilege has resulted from a specific congressional determination that the plaintiff should be able to bring the defendant into an inconvenient forum to vindicate his statutory rights. Just how inconvenient must that forum be before the plaintiff's privilege must yield to a section 1404(a) transfer? An appellate court could do little to insure uniformity in the administration of this crucial factor.

But is this a sufficient objection to appellate review of transfer rulings? The appellate courts do not exist simply to further uniformity of

176. See, *e.g.*, *Wyandotte Trans. Co. v. Great Lakes Towing Co.*, 196 F. Supp. 494 (E.D. Wis. 1961); *Aircraft Marine Prods., Inc. v. Burndy Eng'r. Co.*, 96 F. Supp. 588 (S.D. Calf. 1951).

177. *Swindell-Dressler Corp. v. Dumbauld*, 308 F.2d 267 (3d Cir. 1962).

178. 36 Stat. 291 (1910), 45 U.S.C. § 56 (1958). Other important statutes providing special venue for civil actions between private parties are: Clayton Anti-Trust Act §§ 4 (general), 12 (corporations), 16 (injunctive relief), 38 Stat. 731, 736, 736 (1914), 15 U.S.C. §§ 15, 22, 26 (1958); Securities Act of 1933 § 22(a), 48 Stat. 86 (1933), 15 U.S.C. § 77v(a) (1958); Securities Exchange Act of 1934 § 27, 48 Stat. 902 (1934), 15 U.S.C. § 78aa (1958); Investment Company Act of 1940, 54 Stat. 844 (1940), 15 U.S.C. § 80a-43 (1958); 28 U.S.C. § 1397 (1958) (interpleader); 28 U.S.C. § 1400 (1958) (patents and copyrights). "In the absence of a pre-empting statute, venue of admiralty libels in personam is in any district where the respondent is found and service of process is made on him, or in any district where the respondent's property or credits are attached. This rule is applicable to parties without regard to their place of residence and allows an action against a corporation in any district where valid service of process may be made." 1 MOORE, FEDERAL PRACTICE ¶ 0.144[13.-1] at 1645 (1964). The most important preempting statute is the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958), which is itself a significant source of § 1404(a) motions.

approach and concept among the trial courts. They perform an equally important function by acting as a check, insuring minimum competence in the decision of cases. As long as the district courts are charged with the responsibility of ruling on section 1404(a) motions, do not the appellate courts have a responsibility to supervise their rulings? Indeed, is this responsibility not increased by the lack of clear standards to guide the district courts in their exercise of discretion? The answer to this line of reasoning is that the burden of appellate supervision appears to exceed any possible gain. But the difficulty with this answer is that if appellate review of section 1404(a) rulings is too much of a burden on the parties and the courts, then what about the burden of section 1404(a) itself? This is a burden which becomes particularly significant in light of the Third Circuit decision that a hearing is required on section 1404(a) motions. Can it not be argued that a system of procedure which imposes on the parties the burden of litigating the question of the most desirable place of trial is at least *prima facie* unsound? It may be that it is desirable to equalize the dockets of the district courts. But that problem could be better solved by assigning additional judges to districts with heavy backlogs than by transferring cases. And it may be that it is good to have a trial in a district in which witnesses can be subjected to compulsory process. However, if that is the problem, perhaps the reach of process ought to be extended in at least some situations.

CONCLUSION

The real problem with which section 1404(a) attempts to deal is the fact that the federal venue statutes represent the result of years of *ad hoc* legislative accretion. Federal acts with their own special, liberal venue provisions designed to make the plaintiff's remedy an easier one are one of the most frequent sources of section 1404(a) motions.¹⁷⁹ In these cases the congressional policy of the venue provision to favor the plaintiff is in irreconcilable conflict with the congressional policy incorporated in the transfer section to protect the defendant against an inconvenient forum. Ironically, the existence of the transfer section, which alleviates the hardship cases, has eliminated the pressure for legislative accommodation of these competing policies.¹⁸⁰ In diversity cases, section 1404(a)

179. In about 40 per cent of the reported cases relating to § 1404(a) motion, the original venue appears to be based on one of the statutes cited note 178 *supra*. Almost all of the remaining cases are based on the diversity venue provisions, 28 U.S.C. § 1391(a) (1958).

180. Pending before the same Congress which passed § 1404(a) as part of the revision of the Judicial Code was a proposal to limit venue under the Federal Employers' Liability Act. H.R. 1639, 80th Cong., 1st Sess. (1947). The House passed the bill, but it died in the Senate Judiciary Committee. See legislative history in *Pope v. Atlantic*

motions arise in two situations. The first is where the plaintiff has sued the defendant in the plaintiff's home district under the provision that venue shall lie in the district where all the plaintiffs reside.¹⁸¹ The second situation is that of the defendant, usually a corporation subject to suit in many districts because of its wide-ranging business activities, which finds that it has been sued both far from the scene of the accident or transaction on which the cause of action is based and far from its principal office under the provision that venue shall lie in the district where all the defendants reside.¹⁸² Section 1404(a) places these hardship cases, caused by the failure of Congress to consider its venue policies in a reasoned and sustained manner, in the hands of the courts for resolution on a case-by-case basis. The proposed amendments to the Judicial Code now in the process of preparation by the American Law Institute would solve both problems posed by the present venue statutes in diversity actions. Under the proposed amendments a plaintiff would be unable to sue in the federal courts of the district where he resides.¹⁸³ Moreover venue would lie against a corporation only in the district in which its principal office is located,¹⁸⁴ in a district in its state of incorporation,¹⁸⁵ or in the district in which the transaction on which the cause of action is based occurred.¹⁸⁶ The only problem situation left would be when the plaintiff sued the defendant in the plaintiff's state courts, and the defendant removed. But it is arguable that a transfer section should not be provided to deal with cases on removal.¹⁸⁷ If the purpose of removal jurisdiction is to protect a defendant against the possible prejudices of a foreign state court, that function is performed by removal alone. It would seem to be an anomaly that the availability of the removal procedure should also make it possible for the defendant to obtain a different place of trial assuming, of course, that the state courts would not have dismissed the action under the doctrine of *forum non conveniens*.

Coast Line R.R., 345 U.S. 379, 386-87 (1953). Since the passage of § 1404(a) no serious efforts have been made to restrict venue under the Federal Employers' Liability Act.

181. 28 U.S.C. § 1391(a) (1958).

182. *Ibid.*

183. ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1302(a) (Tent. Draft No. 2, 1964) [hereinafter cited as ALI].

184. ALI §§ 1304(a) (2), (b).

185. *Ibid.*

186. ALI § 1304(a) (1).

187. It has been held that § 1404(a) applies to removed actions. *Chicago, R.I. & Pac. R.R. v. Igoe*, 212 F.2d 378, 382 (7th Cir. 1954). This conclusion was reached on the basis of the broad reach of the phrase "any civil action." But so applied the removal and transfer sections together can operate to undermine the constitutionally permissible state policy to provide a local forum for the adjudication of the controversy. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

In spite of the fact that the proposed code's venue provisions eliminate the bulk of the problems which generate section 1404(a) transfer motions, transfer sections for both plaintiffs¹⁸⁸ and defendants¹⁸⁹ are included in the proposals. It is conceded that occasional cases will remain in which the general venue provisions of the proposed code will result in an inconvenient place of trial. No general provisions can cover all individual cases with complete fairness. It might even be argued that as the number of problem situations declines, the less burdensome the existence of a transfer section becomes. But the burdens must be weighed against the benefits. Even if the number of actual transfers is small, the number of transfer motions might well remain large. The proposed elimination of the "might have been brought" requirement would certainly increase the number of transfer possibilities. The motion can always be made for purposes of delay, and even though chances of success are slim, the hope of obtaining a jury which is thought likely to be more favorable may spur a flood of objectively superfluous motions. At least under the present arrangement the inadequacies of the venue code are a reason for the burden of the section. With the reason gone, how can the section continue to be justified?

An air of unreality hangs over section 1404(a) motions. The suspicion always remains that behind the talk of inconveniences and the interests of justice lies a concern not about plane fares but about juries.¹⁹⁰

188. ALI § 1307. Although the language of § 1404(a) is broad enough to encompass plaintiff motions for transfer, it would seem reasonable to deny them on the ground that one chance to choose a convenient forum is enough. On the whole, however, the courts have given such motions a sympathetic hearing. See cases collected 1 A.L.R.2d L.C.S. 1004-05 (1965). The problem of plaintiff motions is part of the larger problem of the failure of the courts to apply a "once is enough" philosophy to transfer motions. See discussion of the law of the case, text accompanying notes 149-53 *supra*. At the same time *Hoffman v. Blaski*, 363 U.S. 335 (1960), destroyed law of the case doctrine as applied to transfer motions by silence, it approved plaintiff motions for transfer by implication. *Id.* at 344.

189. ALI § 1306. The "might have been brought" requirement is eliminated.

190. This concern is mentioned explicitly in some of the cases. See, *e.g.*, *Chicago, R.I. & Pac. R.R. v. Igoe*, 212 F.2d 378 (7th Cir. 1954): "Respondent earnestly contends . . . that the order should stand inasmuch as one forum to which transfer is sought is a noted insurance center, and a trial there would be prejudicial to plaintiff." *Mills v. Colgate-Palmolive Co.*, 232 F. Supp. 577, 579 (S.D.N.Y. 1964): "[D]efendant contends that the action . . . was brought in this district by the plaintiff for the purpose of securing an enhanced award of damages from a metropolitan jury." *Cunningham v. Chesapeake & O. Ry.*, 228 F. Supp. 492 (N.D. Ill. 1964): "What remains of plaintiff's argument, then, is a claim that, being of the Negro race, he will not receive a fair and unbiased trial and verdict at the hands of a jury in the Eastern District of Kentucky." Of the thirty-six opinions published in Federal Supplement dealing with 1404(a) motions decided in 1962 and 1963, twenty-three were written by judges sitting in the Southern District of New York, or the Eastern or Western Districts of Pennsylvania. Although this figure is susceptible to many interpretations, it suggests that transfer motions are motivated in part by a desire to avoid urban juries.

Will the jury be an urban jury or a rural jury? From the defendant's home ground or the plaintiff's? All the arts of the trial lawyer are brought to bear to obtain the most favorable forum. Although the courts talk of witnesses and dockets, in many cases the important issue that is being decided is the kind of jury that will try the case. If that is the real underlying issue that concerns the parties, then is it rational to determine it on the basis of where the witnesses happen to live? To ask the question in another fashion, should a resident of Chicago be able to avoid a Chicago jury because he is defendant in an action based on an accident at Madison, Wisconsin, which was witnessed by people from Madison while another Chicago resident cannot avoid a Chicago jury because he is defendant in an action based on an accident also at Madison but which happened to be witnessed by people from Chicago? Or to put the question even more sharply, should a defendant who is a Chicago resident be able to avoid a Chicago jury because his accident happened in Des Moines (after all it is inconvenient to bring witnesses from Des Moines) while another Chicago resident cannot avoid a Chicago jury because his accident happened in Madison (and it is more convenient to bring witnesses from Madison)?

Assuming that the size of a verdict is affected by the place of trial, should the place of trial be determined by the residence of the witnesses or the parties? As an objection to the conclusion that the residence of the parties should control, it can be asked whether the size of the plaintiff's recovery should be affected by whether he was hit by a driver from Des Moines or a driver from Chicago. It is arguable that it should not. On the other hand one is not too terribly offended by the thought that the size of the plaintiff's recovery should turn on the policy limits of the driver who hit him. It is difficult to speak of expectations when one is discussing the problem of venue. But to the extent there are such expectations, are they not more reasonably based on the geographic affinities of the parties than on the geographic distribution of the witnesses?

It is fashionable to ridicule pre-code procedure because of its emphasis on matters of form to the exclusion of substance. Our objective, we are admonished, should be "to simplify the structure of the judicial system and the procedure followed in the courts so that the decisions of cases on technicalities or by surprise may be avoided and so that procedure may become a means of achieving justice rather than an end in itself."¹⁹¹ Section 1404(a), designed "for the convenience of parties and witnesses [and] in the interest of justice," carries out the mandate with heavy handed literalness. In a similar spirit the Supreme Court has broadened

191. VANDERBUILT, *THE CHALLENGE OF LAW REFORM* 134 (1955).

the mandamus power of the courts of appeals, changing the issue from one of power to one of discretion with firm confidence that that discretion (whatever that means)¹⁹² will be exercised in the interest of justice. The irony is that the very flexibility of these procedural innovations becomes a parody of the procedural ideals they were designed to institute, for any system of procedure must use matters of form to concentrate judicial resources on matters of substance. When form is carried to the point where it is dominating, it is carried too far; but it cannot be abandoned in any system of procedure. The balance is difficult to strike, but it is clear that the issue of the place of trials is one that should be settled by simple, formal tests. An occasional hardship must be endured in the interest of the expedient operation of the system as a whole. Similarly, it is clear that it imposes a heavy burden on the courts of appeals to insist that they must determine the availability of interlocutory review in every case on an *ad hoc* basis. If there are no general standards by which the availability of interlocutory review can be determined, then an inordinate amount of energy must be directed to the question of whether any given ruling should be reviewed. When the energy of litigants and courts is directed to matters of procedure, it is diverted from what should be the central focus of litigation—the merits of the plaintiff's claim.

Section 1404(a) suffers from an irremediable defect. The justification for the section is that it operates as a safety valve, giving the courts the power to deal with hardship cases which will inevitably arise from inflexible rules governing the place of trial. Unless the section is reserved for "hardship" cases, however, most transfers serve no significant purpose and the courts become burdened with consideration of 1404(a) motions. But it is difficult for a district judge ruling on a transfer motion in the context of a particular case to have the perspective necessary to determine what is a hardship case. Quite naturally, the question in each case becomes: Where is the most desirable district for trial? Only the appellate courts can reasonably be expected to have sufficient perspective to determine what is a hardship case. In order for the appellate courts to enforce this perspective, they must supervise transfer rulings. But ap-

192. Different authorities provide different explanations. "[T]he fundamental question is one of propriety, rather than of power. . . . The adequacy of a postponed review and related factors should be weighed against the general policy of finality so that the grant or denial of a writ will truly rest on a wisely exercised discretion." 6 MOORE, FEDERAL PRACTICE ¶ 54.10[6] at 108. "[T]he courts should consider whether the use of extraordinary review, which may or may not terminate in actual issuance of the writ, will aid in attaining the goal of both the doctrine of finality and the All Writs Act—insuring efficient functioning of the judicial system so that the parties may obtain a timely decision and terminate the litigation." Comment, *Mandamus Proceedings in the Federal Courts of Appeals: A Compromise With Finality*, 52 CALIF. L. REV. 1036 at 1047-48 (1964).

pellate intervention in the transfer process in turn entails such a substantial burden of delay that it outweighs the advantages of the section. In the face of this dilemma it is better to bear with the small number of true hardship situations that would arise under a well drawn venue code than with the burdens which will inevitably result from a transfer provision like section 1404(a).