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# THE FEDERAL APPELLATE COURTS AND THE ALL WRITS ACT

by

Griffin B. Bell\*

*The peremptory common-law writs are among the most potent weapons in the judicial arsenal.<sup>1</sup>*

THE ADMINISTRATION of the All Writs Act<sup>2</sup> by the appellate courts is a subject of increasing importance. The obverse to sound decisional doctrines for use in granting or denying relief under the Act may be a proliferation of split appeals with ensuing trial delays. This would be contrary to "the notion that appellate review should be postponed, except in certain narrowly defined circumstances, until after final judgment has been rendered by the trial court."<sup>3</sup> In any event, the deployment of the power vested in the courts under the Act is an integral and developing part of the appellate process.

Some commentators have been critical of the erosion of trial court power through the processes of the appellate courts.<sup>4</sup> This erosion is perhaps nowhere more evident than in the evolution of the concept of supervisory powers of federal appellate courts over the trial courts. These supervisory powers, in large measure, flow from the expanding utilization of the All Writs Act and, in the main, are manifested in piecemeal appeals under the guise of mandamus.<sup>5</sup> The issue is no longer one of power, but

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<sup>1</sup> Mr. Chief Justice Warren in *Will v. United States*, 389 U.S. 90, 107 (1967).

<sup>2</sup> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 1651 (1964).

<sup>3</sup> 389 U.S. at 96.

<sup>4</sup> L. GREEN, JUDGE AND JURY 380 (1930); Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482 (1956); Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

<sup>5</sup> The other important use of the All Writs Act is in the granting of injunctions pending appeal. Since sound rules have been developed for granting such relief, no problems are apparent in the administration of this power by the appellate courts. The rule used in the Fifth Circuit was announced in *Greene v. Fair*, 314 F.2d 200 (5th Cir. 1963). "Unless an appellant can demonstrate to the court on such an emergency motion as this [for injunction pending appeal] that there is great likelihood, approaching near certainty, that he will prevail when his case finally comes to be heard on the merits, he does not meet the standard which all courts recognize must be reached to warrant the entering of an emergency order of this kind." *Id.* at 202. See also *United States v. Lynd*, 301 F.2d 818 (5th Cir. 1962). A similar rule appears to have been enforced by the Sixth Circuit in *Dunn v. Retail Clerks Int'l Ass'n*, 299 F.2d 873 (6th Cir. 1962). That court stated that it would not enjoin the union from picketing pending appeal where there was doubt whether the employer would ultimately prevail.

The attitude in several other circuits is that injunctions are to be issued pending appeal only in order to preserve jurisdiction. See *Reiter v. Universal Marion Corp.*, 273 F.2d 820 (D.C. Cir. 1960); *Ring v. Spina*, 148 F.2d 647 (2d Cir. 1945); cf. *UAW v. J.I. Case Co.*, 281 F.2d 773 (7th Cir. 1960).

The power to stay the enforcement of a judgment pending the outcome of an appeal also had its origin in the All Writs Act. See *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 10 n.4 (1942). See also FED. R. APP. P. 8 (a) on injunctions and stays. The District of Columbia Circuit has listed four factors to be considered in determining whether to issue a stay: first, whether the party seeking the stay made a strong showing that it was likely to prevail on the merits of its appeal; second, whether irreparable injury will result if the stay is not granted; third, whether issuance of a stay

rather one of propriety.<sup>6</sup> The decisions reflect the need for a philosophy of restraint and a policy of comity in the approach of the courts of appeals toward the district courts.

## I. HISTORY

While the basis for general judicial supervision over inferior courts through extraordinary or peremptory writs can be found in early common law, the All Writs Act is a direct descendant of the Judiciary Act of 1789.<sup>7</sup> Section 14 of that Act granted federal courts the power to issue extraordinary writs in aid of their respective jurisdiction. And while it is clear that the All Writs Act authorizes the issuance of the traditional common law writs of mandamus and prohibition,<sup>8</sup> the phrase "all writs" also encompasses common law certiorari,<sup>9</sup> injunctions,<sup>10</sup> subpoenas,<sup>11</sup> writs of *ne exeat*,<sup>12</sup> writs of habeas corpus,<sup>13</sup> and all other writs "necessary or appropriate" in aid of jurisdiction.<sup>14</sup>

Traditionally the writs of mandamus and prohibition, by keeping a case in reviewable posture, have served to prevent an inferior court from wrongfully assuming jurisdiction,<sup>15</sup> or to compel it to exercise jurisdiction where indicated.<sup>16</sup> Although Congress, through the habeas corpus statutes, has not conferred original jurisdiction upon courts of appeals to issue original writs of habeas corpus, these courts under the All Writs Act have power to grant an auxiliary writ of habeas corpus in aid of their appellate jurisdiction.<sup>17</sup>

Choosing the correct writ to obtain the desired relief is no longer necessary in the federal courts.<sup>18</sup> Different writs may be sought alternatively or cumulatively;<sup>19</sup> the choice is now unimportant.<sup>20</sup> The subtle distinctions among the various writs have no effect on their relative usefulness as vehicles for interlocutory review.<sup>21</sup>

would substantially harm other parties; and fourth, whether the public interest is involved. *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958).

<sup>6</sup> See *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957).

<sup>7</sup> 1 Stat. 73, 81 (1789); see *In re Josephson*, 218 F.2d 174, 177 (1st Cir. 1954).

<sup>8</sup> See *United States Alkali Export Ass'n v. United States*, 325 U.S. 196 (1945). See also 6 J. MOORE, FEDERAL PRACTICE ¶ 54.10[2] (2d ed. 1953) [hereinafter cited as MOORE].

<sup>9</sup> See, e.g., *United States v. Beatty*, 232 U.S. 463 (1914). See also 6 MOORE ¶ 54.10[2].

<sup>10</sup> See, e.g., *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942); *United States v. Lynd*, 301 F.2d 818 (5th Cir. 1962).

<sup>11</sup> See e.g., *Bethlehem Ship Building Corp. v. NLRB*, 120 F.2d 126 (1st Cir. 1941).

<sup>12</sup> See, e.g., *Judson v. Judson*, 8 F.R.D. 336 (D.D.C. 1943).

<sup>13</sup> See, e.g., *Price v. Johnston*, 334 U.S. 266 (1948).

<sup>14</sup> See, e.g., *United States v. Hayman*, 342 U.S. 205 (1952) (writ to produce prisoner for hearing). See also 6 MOORE ¶ 54.10[2] n.8.

<sup>15</sup> See *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

<sup>16</sup> See *Ex parte Chicago, R.I. & Pac. Ry.*, 255 U.S. 273, 275 (1921).

<sup>17</sup> *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1943). See generally 6 MOORE ¶ 54.10[4]; R. SOKOL, FEDERAL HABEAS CORPUS § 8.5 (2d ed. 1969); cf. FED. R. APP. P. 22.

<sup>18</sup> See, e.g., *American Airlines, Inc. v. Forman*, 204 F.2d 230 (3d Cir.), cert. denied, 346 U.S. 806 (1953).

<sup>19</sup> See, e.g., *In re Rice*, 155 U.S. 396 (1894). See generally 6 MOORE ¶ 54.10[2].

<sup>20</sup> See *Ex parte Simons*, 247 U.S. 231, 239-40 (1918).

<sup>21</sup> See generally Sunderland, *The Problem of Appellate Review*, 5 TEXAS L. REV. 126 (1926).

## II. JURISDICTION

The jurisdictional prerequisite for application of the All Writs Act is simply that the writ be necessary or appropriate in aid of the jurisdiction of the issuing court.<sup>22</sup> The Supreme Court in *LaBuy v. Howes Leather Co.*<sup>23</sup> explained the power of the courts of appeals under the Act: "The question of naked power has long been settled by this Court. . . . Since the Court of Appeals could at some stage of the . . . proceedings entertain appeals in these cases, it has power in proper circumstances . . . to issue writs of mandamus reaching them."<sup>24</sup> This is an expression of prospective or concurrent appellate jurisdiction. The power of the courts of appeals to issue writs is not limited to cases where an appeal has already been filed. Rather, this power of review extends to all proceedings where the actions of the trial judge at some future stage of the litigation might be reviewable.

The Supreme Court's pronouncement in *LaBuy* put aside the narrow construction of the All Writs Act previously advanced in several circuits that writs properly could issue only when appellate review otherwise would be defeated.<sup>25</sup> After *LaBuy*, the availability or non-availability of alternative means of appellate review would appear to be irrelevant to a finding of jurisdiction or power in the court of appeals. Indeed, the Supreme Court in *Will v. United States*,<sup>26</sup> a criminal prosecution for tax evasion, found that since the Government lacked a method of securing appellate review, the court of appeals was precluded from exercising authority under the All Writs Act. The Court noted that Congress has limited appeal by the Government in criminal cases to narrow categories of orders terminating the prosecution. The opinion continued: "This Court cannot and will not grant the Government a right of review which Congress has chosen to withhold."<sup>27</sup> Simply stated, in that case the court of appeals had neither actual nor potential jurisdiction.<sup>28</sup>

In sum, under the expansive interpretation of the All Writs Act by the Supreme Court in *LaBuy*, the overriding question left to the courts of appeals upon petition for an extraordinary writ is no longer one of power, but rather the propriety of exercising the power conferred by the Act.

## III. PROPRIETY CONSIDERATIONS

### A. *An Extraordinary Remedy for Extraordinary Circumstances*

Review under the All Writs Act is reserved for narrowly defined cir-

<sup>22</sup> See note 2 *supra*.

<sup>23</sup> 352 U.S. 249 (1957).

<sup>24</sup> *Id.* at 255.

<sup>25</sup> See *General Tire & Rubber Co. v. Watkins*, 373 F.2d 361 (4th Cir. 1966); *CMAx, Inc. v. Hall*, 290 F.2d 736 (9th Cir. 1961); *In re Josephson*, 218 F.2d 174 (1st Cir. 1954).

<sup>26</sup> 389 U.S. 90 (1967).

<sup>27</sup> *Id.* at 97 n.5 (citing *Carroll v. United States*, 354 U.S. 394, 407-08 (1957)).

<sup>28</sup> The Second Circuit reached the same result using the same reasoning in *United States v. Bondy*, 171 F.2d 642 (2d Cir. 1948). However, the First Circuit in *In re United States*, 348 F.2d 624 (1st Cir. 1965), issued mandamus in a similar situation, reasoning that a pretrial order in a criminal case could be challenged by a contempt proceeding or by dismissal of the indictment. The court there stated: "We see no reason why the government should not be able to do directly what it could effectuate indirectly." *Id.* at 625.

cumstances.<sup>29</sup> The Supreme Court, in the often-cited case of *Roche v. Evaporated Milk Ass'n*,<sup>30</sup> emphasized this point, saying: "[W]hile a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute."<sup>31</sup> When considering a petition for a peremptory common-law writ, the courts of appeals traditionally begin by echoing the directive given by Mr. Justice Jackson in *Ex parte Fabey*:<sup>32</sup> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. . . . These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As *extraordinary remedies, they are reserved for really extraordinary causes.*"<sup>33</sup>

To say, however, that the All Writs Act is reserved for extraordinary situations merely begs the question, for the factors which lead an appellate court to exercise its discretion are the same factors which the court will describe as extraordinary circumstances. A more meaningful analysis of the exercise of discretion by the appellate courts under the Act can be accomplished by putting aside the rhetoric of "extraordinary circumstances" and delving instead into the actual factors which have influenced the issuance of a writ.

The procedure to be followed in seeking and obtaining relief under the Act is governed by Rule 21 of the Federal Rules of Appellate Procedure.<sup>34</sup> This procedure has two stages: first, the court may summarily deny the petition; second, if not so denied, an answer to the petition will be required. Only thereafter does the decisional process ensue. There are two basic factors which influence the court toward denial of relief: a desire to avoid an affront to the district judge, and the need to prevent piecemeal appeals (*i.e.*, final judgment rule).

Under the All Writs Act the petitioner initially must overcome a basic reluctance on the part of the appellate courts to interfere with the trial court. The Supreme Court has emphasized the problem which arises in the use of the extraordinary writs, commenting that "they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him."<sup>35</sup> On occasion, this view that the issuance of a writ is a personal affront to the trial judge, to be avoided if possible, has led courts of appeals to deny the writ after stating its confidence that the trial judge will comply with the opinion without the compulsion of a writ.<sup>36</sup>

The Fifth Circuit has noted the difference in degree of confrontation with the trial judge under a petition for mandamus on the one hand, and

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<sup>29</sup> See *Will v. United States*, 389 U.S. 90 (1967).

<sup>30</sup> 319 U.S. 21 (1943).

<sup>31</sup> *Id.* at 26.

<sup>32</sup> 332 U.S. 258 (1947).

<sup>33</sup> *Id.* at 260 (emphasis added).

<sup>34</sup> FED. R. APP. P. 21.

<sup>35</sup> 332 U.S. at 260.

<sup>36</sup> See, *e.g.*, *United States v. Kirkpatrick*, 186 F.2d 393 (3d Cir. 1951); *Tennessee v. Taylor*, 169 F.2d 626 (6th Cir. 1948).

a hearing on interlocutory review<sup>37</sup> on the other.<sup>38</sup> Professor Moore has suggested that in most cases arising under the All Writs Act, the trial judge, while literally the defendant, is in fact only a formal party who has no more interest in the result reached by the circuit court than he does in any appealable question.<sup>39</sup> While there may be merit in this observation, confrontation is still cited as the principal reason for denial of mandamus.

The second consideration militating against exercise of authority under the Act is the so-called final judgment rule. Although stemming from early common law,<sup>40</sup> the requirement of a final judgment for review, like the All Writs Act, has its statutory basis in the Judiciary Act of 1789.<sup>41</sup> The purpose of the rule was to promote judicial economy and avoid needless delay and expense generated by split appeals and case fragmentation. Additional justification for the rule is found in the experience that most issues presented for interlocutory review either will be resolved or rendered moot if the trial courts are permitted to proceed uninterrupted to judgment. Although the Supreme Court has relaxed the rigors of the rule through an expansive definition of a "final" judgment,<sup>42</sup> and Congress by statute has provided interlocutory review for certain specified orders,<sup>43</sup> the final judgment rule remains undaunted as a firm administrative doctrine in the appellate courts.

#### B. Standards Invoked in the Decisional Process Under the All Writs Act

The appellate courts have fashioned a variety of criteria for use in determining the propriety of granting a requested writ under the Act. Some of these fall under the label "abuse of discretion." Others, such as the absence of an alternative means of review or the alleviation of expense and inconvenience, fall into a separate category.

*Abuse of Discretion.* Traditionally writs under the Act have issued only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."<sup>44</sup> In *Howes Leather Co. v. LaBuy*<sup>45</sup> the Supreme Court established criteria for evaluating the district court's action to determine the appropriateness of an extraordinary writ. In approving the circuit court's issuance of mandamus the Supreme Court spoke in terms of the district court's "abuse of power" and "clear abuse of discretion." In *Will v. United States*<sup>46</sup> the Court refined these phrases, stating: "it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the

<sup>37</sup> 28 U.S.C. § 1292(b) (1964).

<sup>38</sup> Compare *In re Humble Oil & Ref. Co.*, 306 F.2d 567 (5th Cir. 1962) (per curiam), with *Humble Oil & Ref. Co. v. Bell Marine Serv., Inc.*, 321 F.2d 53 (5th Cir. 1963).

<sup>39</sup> 6 MOORE ¶ 539, at 72; see *Rapp v. Van Dusen*, 350 F.2d 806 (3d Cir. 1965).

<sup>40</sup> See generally Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292 (1966); Note, *Mandamus Proceedings in the Federal Courts of Appeal: A Compromise with Finality*, 52 CALIF. L. REV. 1036 (1964).

<sup>41</sup> § 22, 1 Stat. 73, 84 (1789).

<sup>42</sup> See generally Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 353-54 (1961).

<sup>43</sup> 28 U.S.C. § 1292 (1964).

<sup>44</sup> *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

<sup>45</sup> 352 U.S. 249 (1957).

<sup>46</sup> 389 U.S. 90 (1967).

invocation of this extraordinary remedy."<sup>47</sup> It is only through application by the courts to concrete situations that these vague phrases take on real meaning.

The criteria of "abuse of power" and "abuse of discretion" were cast into an area already fraught with vague platitudes and few concrete guidelines. The new terminology was coined in a case arising out of a situation where Judge LaBuy of the Northern District of Illinois was faced with two complex and time-consuming antitrust cases. After numerous hearings, Judge LaBuy, on his own motion, ordered the case to a master under Rule 53(b) of the Federal Rules of Civil Procedure.<sup>48</sup> The attorneys had estimated the trial would take six weeks. Recognizing that "a reference should be made only upon a showing that some exceptional conditions require it,"<sup>49</sup> Judge LaBuy concluded that these circumstances constituted an "exceptional condition" justifying reference under Rule 53(b). The reference to a master was not a final judgment. Although the district judge's determination was seemingly authorized by Rule 53(b), the circuit court disagreed with that determination, electing to superimpose its judgment that such an "exceptional condition" did not exist,<sup>50</sup> and the Supreme Court affirmed.<sup>51</sup>

It would be difficult to describe a mistaken application of a rule as a "clear abuse of discretion." There should be more, and the Supreme Court in its opinion attempted to find more in the existence of an established practice in Judge LaBuy's district of making references to masters. The Court termed the practice "little less than an abdication of the judicial function."<sup>52</sup> Apparently this was an attempt by the Court to cast the decision in the traditional category of jurisdictional error which has long been within the ambit of mandamus. But the result gave the All Writs Act a new dimension. A broad reading of *LaBuy* provides authority for courts of appeals to control the district courts in their discretionary actions; indeed the power to supervise if not direct the litigation process.<sup>53</sup>

Nevertheless, the existence of power does not dictate its exercise. Again the talisman is propriety and the cases must be examined to determine how the term "abuse of discretion" has been applied.

Appellate courts traditionally have found an abuse of discretion in two general situations: first, when the action of the district court deprives the petitioner of a substantial right, and second, when the trial court's action exceeds that court's "power" or "jurisdiction." For example, a wrongful denial of trial by jury constitutes sufficient deprivation of a substantial

<sup>47</sup> *Id.* at 95. Actually the term "usurpation of power" was first used by the Court to describe the action of a district judge to justify the issuance of mandamus in *Schlagenhauf v. Holder*, 379 U.S. 104, 159 (1964).

<sup>48</sup> FED. R. CIV. P. 53(b).

<sup>49</sup> *Id.*

<sup>50</sup> 226 F.2d 703 (7th Cir. 1955).

<sup>51</sup> *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957).

<sup>52</sup> *Id.* at 256.

<sup>53</sup> In *In re Watkins*, 271 F.2d 771 (5th Cir. 1959), the court, after stating the adage that a "mere error" in a ruling by the district court on a matter within its jurisdiction would not justify the use of the All Writs Act, found "clear abuse of discretion" in the district court's reference of a matter to a master. Although the court of appeals purported to rely on *LaBuy*, there was no indication of a general practice of making such reference.

right to justify mandamus.<sup>54</sup> Yet the Court of Appeals for the Ninth Circuit on petition for an extraordinary writ in *Institutional Drug Distributors, Inc. v. Yankwich*<sup>55</sup> refused to determine whether the petitioner was entitled to jury trial, reasoning that the question should be reserved for appeal after final judgment. Challenges to the impartiality of the district judge have also been heard through petitions brought under the Act on grounds that a substantial right had been denied.<sup>56</sup>

The greater number of writs have issued when the trial court's action has been said to amount to "jurisdictional error." In this connection, mandamus has issued to compel an exercise of jurisdiction directed by statute and, similarly, to prevent a district judge from asserting jurisdiction where prohibited by statute.<sup>57</sup> Although appellate courts generally refuse to hear petitions for mandamus when the challenged assertion of jurisdiction depends on a fact determination,<sup>58</sup> two circuits have issued the writ to prevent a district court from hearing a case after erroneously finding jurisdiction over the subject matter or the parties.<sup>59</sup>

In the main, however, the circuit courts use the term "jurisdiction" in All Writs cases to refer to a district court's "power" to take particular action under the federal statutes or rules once jurisdiction over the parties and the subject matter has been established. Illustrative of the "power" approach is the Fifth Circuit opinion in *Securities & Exchange Comm'n v. Krentzman*,<sup>60</sup> where the court of appeals by writ of mandamus ordered the district judge to direct the referee in a bankruptcy reorganization proceeding to allow the SEC full participation in the hearing. After the SEC had intervened in the proceeding pursuant to section 208 of the Bankruptcy Act,<sup>61</sup> the district court affirmed the refusal of the referee to permit the SEC to cross-examine witnesses at the hearing. The court of appeals, however, explained that the district judge had "exercised what he thought to be a discretionary power which he did not possess under section 208, which in our opinion makes mandamus appropriate."<sup>62</sup> Appellate courts have also found district judges to be without "power" to relitigate previously litigated matters,<sup>63</sup> to restrain a party's use of evidence,<sup>64</sup> and to transfer a case without a hearing.<sup>65</sup>

The "power" evaluation plays a leading role in the use of mandamus

<sup>54</sup> *Dairy Queen v. Wood*, 369 U.S. 469 (1962); *Burgess v. Williams*, 302 F.2d 91 (4th Cir. 1962); *In re Watkins*, 271 F.2d 771 (5th Cir. 1959).

<sup>55</sup> 249 F.2d 566 (9th Cir. 1957). The *LaBuy* case also involved a denial of the substantial right to trial before a court.

<sup>56</sup> *Occidental Petroleum Corp. v. Chandler*, 303 F.2d 55 (10th Cir. 1962) (per curiam), cert. denied, 372 U.S. 915 (1963); *In re Union Leader Corp.*, 292 F.2d 381 (1st Cir.), cert. denied, 368 U.S. 927 (1961).

<sup>57</sup> *Ex parte Kawato*, 317 U.S. 69 (1942); *Ex parte Skinner & Eddy Corp.*, 265 U.S. 86 (1924).

<sup>58</sup> See *Allstate Ins. Co. v. United States Dist. Ct.*, 264 F.2d 38 (6th Cir. 1959) (per curiam); *Smith's Transfer Corp. v. Barksdale*, 259 F.2d 498 (4th Cir. 1958); *Electrical & Musical Indus. Ltd. v. Walsh*, 249 F.2d 308 (2d Cir. 1957) (per curiam).

<sup>59</sup> *Holbut Indus., Inc. v. Wyche*, 290 F.2d 852 (4th Cir. 1961); *Blaw-Knox Co. v. Lederle*, 151 F.2d 973 (6th Cir. 1945).

<sup>60</sup> 397 F.2d 55 (5th Cir. 1968).

<sup>61</sup> 11 U.S.C. § 608 (1964).

<sup>62</sup> 397 F.2d at 59.

<sup>63</sup> *Lummas Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80 (2d Cir. 1961).

<sup>64</sup> *International Prod. Corp. v. Koons*, 325 F.2d 403 (2d Cir. 1963).

<sup>65</sup> *Swindell-Dressler Corp. v. Dumbauld*, 308 F.2d 267 (3d Cir. 1962).



to review district court orders granting or denying transfers of cases.<sup>66</sup> The Third Circuit has held that a district court acted beyond its power in transferring a case to a district where the action could not have been brought originally,<sup>67</sup> and in another case that the district court was without power to order a transfer without a hearing.<sup>68</sup> In both cases the circuit court corrected the errors through writ of mandamus. The circuits differ as to what constitutes an abuse of discretion in transfer cases, and in one instance there are conflicting opinions within the same circuit. The Seventh Circuit in 1955 granted mandamus to order a transfer apparently because the circuit court simply disagreed with the district judge as to which forum was more convenient.<sup>69</sup> However, in 1961 the Seventh Circuit stated that a court of appeals is not privileged to substitute its judgment for that of the district court upon the propriety of the transfer of a case.<sup>70</sup> The Eighth Circuit has announced that it will not even hear applications for mandamus to review transfer orders.<sup>71</sup> The First Circuit has limited mandamus to cases where the ordered transfer to a district outside the circuit would preclude review by that court of appeals.<sup>72</sup> Two other circuits have rejected this reasoning, stating that they will issue mandamus only when the district court action could not be reviewed through an appeal from a final judgment in *any* appellate court.<sup>73</sup>

Since the transfer of a case is expressly discretionary, the argument against reviewing such transfer orders through proceedings under the All Writs Act is substantial. As articulately stated by the Third Circuit in *All States Freight, Inc. v. Modarelli*,<sup>74</sup> "the risk of a party being injured either by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and additional expense if these orders are to be subjected to interlocutory review by mandamus . . . ."<sup>75</sup> In fact, the Third Circuit has simply restated the basis for the final judgment rule.<sup>76</sup>

It is apparent that the All Writs Act is becoming a basis for an interlocutory appeals system.<sup>77</sup> This can be seen in the increasing review of discovery orders by means of mandamus petitions. In *Hartley Pen Co. v. United States*<sup>78</sup> mandamus issued to direct a district court to vacate its

<sup>66</sup> 28 U.S.C. § 1404(a) (1964).

<sup>67</sup> *Barrack v. Van Dusen*, 309 F.2d 953 (3d Cir. 1962). The Supreme Court reversed, 376 U.S. 612 (1964), finding that the action could have been brought originally in the transferee district. However, the Supreme Court did not question the Third Circuit's use of mandamus in this situation.

<sup>68</sup> *Swindell-Dressler Corp. v. Dumbauld*, 308 F.2d 267 (3d Cir. 1962).

<sup>69</sup> *Chicago, R.I. & Pac. R.R. v. Igoe*, 220 F.2d 299 (7th Cir.), *cert. denied*, 350 U.S. 822 (1955).

<sup>70</sup> *Chematron Corp. v. Perry*, 295 F.2d 703 (7th Cir. 1961).

<sup>71</sup> *Great N. Ry. v. Hyde*, 238 F.2d 852, 857 (8th Cir. 1956).

<sup>72</sup> *In re Josephson*, 218 F.2d 174 (1st Cir. 1954). This arises when the transferee district is outside the circuit.

<sup>73</sup> See *Paramount Pictures v. Rodney*, 186 F.2d 111 (3d Cir.), *cert. denied*, 340 U.S. 953 (1951); *Ford Motor Co. v. Ryan*, 182 F.2d 329 (2d Cir.), *cert. denied*, 340 U.S. 851 (1950).

<sup>74</sup> 196 F.2d 1010 (3d Cir. 1952).

<sup>75</sup> *Id.* at 1011-12.

<sup>76</sup> On the other hand, in 1966 the Supreme Court not only upheld the Fifth Circuit's review through a petition for mandamus of a district judge's denial of a section 1404 transfer motion, but in so doing also found that the court of appeals was empowered to transfer the case by direct order. *Koehring v. Hyde Constr. Co.*, 382 U.S. 362 (1966).

<sup>77</sup> See *American Flyers Airline Corp. v. Farrell*, 385 F.2d 936 (2d Cir. 1967).

<sup>78</sup> 287 F.2d 324 (9th Cir. 1961).

order authorizing discovery of trade secrets held by petitioner. The Court of Appeals for the Ninth Circuit reasoned that the trial judge had committed gross abuse of discretion which would result in irreparable harm to the petitioner. The Fifth Circuit in *Digital Data Systems, Inc. v. Carpenter*<sup>79</sup> expressly stated that from the record it could not find such an abuse of discretion in the trial court's discovery order as would justify issuance of a writ of mandamus. Yet the circuit court ordered the district court to reconsider its order after a full hearing on the existence *vel non* of trade secrets in the matter to be discovered. This quasi or half-a-loaf reversal is noteworthy. It is a middle ground designed perhaps as a remedy where a finding of abuse of discretion could not be sustained.

These discovery decisions must be measured by the observation of Professor Wright:

The central feature of modern procedural reform is that trial courts are given discretion to decide details of procedure which in the past have been governed by rigid statutes. . . . It is terrifying to think of the consequences, to the discovery process, to the appellate courts, and to the cause of efficient judicial administration, if litigation is to be suspended by an application for writ of mandamus every time one side or the other believes that the trial judge has made a mistake in applying the discovery rules.<sup>80</sup>

*Alternative Means of Review.* There are other considerations which sometimes motivate appellate courts to grant review through the All Writs Act. One is the non-availability of an alternative method of review, such as an appeal from final judgment.<sup>81</sup> While this consideration does not go to the appellate court's power under the Act, as discussed above, it may influence the resolution of whether the power should be exercised.

Such is the case when a district judge effectively denies a requested injunction simply by declining to rule on a plaintiff's motion. There is no order to review and the only remedy available is to petition the circuit court for an extraordinary writ, such as an injunction pending appeal.<sup>82</sup> A similar situation is presented when a district court stays proceedings in a suit for an injunction pending resolution of the same claim in a state court. The practical result of the stay is denial of the preliminary injunction with no available means of appeal except through the Act.

Such is also the case when a defendant in a state criminal prosecution successfully removes the case to the federal district court. There is no provision for the state to appeal the denial of a motion to remand to the state court. It can challenge the federal court's ruling only by means of a petition for an extraordinary writ. The interest of the state in conducting the trial in its own courts and the unavailability of appeal have been held to justify relief in the appellate courts under the All Writs Act.<sup>83</sup>

Conversely, the Fifth and Sixth Circuits have found the statutory cer-

<sup>79</sup> 387 F.2d 529 (5th Cir. 1967).

<sup>80</sup> Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 775-76 (1957).

<sup>81</sup> See, e.g., *Bartsch v. Clarke*, 293 F.2d 283 (4th Cir. 1961).

<sup>82</sup> See generally Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 369 (1961).

<sup>83</sup> See, e.g., *Maryland v. Soper*, 270 U.S. 9 (1926); *Virginia v. Rives*, 100 U.S. 313 (1879). However, 28 U.S.C. § 1447(d) (1964) does provide that an order remanding a case to the state

tification procedure<sup>84</sup> to be a potentially effective alternative method of review and have denied motions for relief under the Act where the complaining party has not first sought certification from the district court.<sup>85</sup> However, the Second Circuit in *Japan Line, Ltd. v. Sabre Shipping Corp.*<sup>86</sup> held that the mere denial by a district judge of a motion for certification did not preclude the appellate court from considering a petition under the Act. The crux of the Second Circuit decision was that the certification procedure was not intended to supplant the All Writs Act. While the actual holding in *Japan Line* does not conflict with the earlier decisions of the Fifth and Sixth Circuits, some of the language in the opinion raises considerable doubt as to whether the Second Circuit would have taken the exhaustion of remedies approach outlined in the earlier cases even if the aggrieved party had not moved for certification below.<sup>87</sup>

*Expense and Inconvenience.* Just as there is doubt about the necessity of a motion for certification in order subsequently to obtain an extraordinary writ, there is also uncertainty regarding the premise that the expense and inconvenience of waiting for appeal from final judgment is a basis for relief under the All Writs Act. This uncertainty is attributable to the Supreme Court statement in *Roche* that the inconvenience of a potentially useless trial "is one which we must take it Congress contemplated in providing that only final judgments should be reviewable."<sup>88</sup> However, the Seventh Circuit in *Howes Leather Co. v. LaBuy*<sup>89</sup> found a basis for mandamus in "the necessity and great expense of protracted trials which conceivably may eventually lead nowhere but to a complete retrial of the causes before a competent tribunal."<sup>90</sup> Similarly, the Fifth Circuit in *United States v. Hughes*<sup>91</sup> paid lip service to the *Roche* policy that the Act is not to be used "to alleviate the hardship resulting from an unnecessary trial in a particular case."<sup>92</sup> However, in the next paragraph of the opinion, the court cited the inconvenience of continuing the trial to final judgment as justification for granting the petition, commenting that "the trial of the present case and similar cases would be lengthy and expensive, causing a heavy burden on the litigants and a drain on judicial manpower."<sup>93</sup>

### C. Supervisory Function

The decisions indicate a trend toward more interim supervision by the appellate courts over the litigation process. In *United States v. Hughes*, for court from which it was removed pursuant to 28 U.S.C. § 1443 (1964) is reviewable by appeal and otherwise.

<sup>84</sup> 28 U.S.C. § 1292(b) (1964).

<sup>85</sup> *In re Humble Oil & Ref. Co.*, 306 F.2d 567 (5th Cir. 1962) (per curiam); *Allstate Ins. Co. v. United States Dist. Ct.*, 264 F.2d 38 (6th Cir. 1959). Compare the procedure outlined in 28 U.S.C. § 1292(b) (1964) with that provided for in FED. R. CIV. P. 54(b).

<sup>86</sup> 407 F.2d 173 (2d Cir. 1969).

<sup>87</sup> *Id.* at 175.

<sup>88</sup> 319 U.S. at 30.

<sup>89</sup> 226 F.2d 703 (7th Cir. 1955), *aff'd on other grounds*, 352 U.S. 249 (1957). See note 23 *supra*, and accompanying text.

<sup>90</sup> 226 F.2d at 712.

<sup>91</sup> 413 F.2d 1244 (5th Cir. 1969).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

instance, the Fifth Circuit held mandamus to be an appropriate vehicle for review of a district judge's construction of a recently promulgated discovery provision of the Federal Rules of Criminal Procedure. In this criminal antitrust prosecution, defendants had filed pre-trial motions for discovery under Rule 16,<sup>94</sup> including motions to discover grand jury testimony. By these motions the defendant sought production of grand jury testimony of all present and former officers and employees of the corporate defendants. The district court responded with an order allowing the corporate defendants to discover only the testimony of corporate officers. Both the Government and the defendants petitioned the court of appeals for writs of mandamus against the order as an improper construction of Rule 16, the Government contending it was too broad and the defendants arguing it was not broad enough. The court of appeals, asserting reliance upon the Supreme Court decisions in *LaBuy* and *Schlagenbauf v. Holder*,<sup>95</sup> held mandamus to be an appropriate remedy. The result was full blown appellate review of an issue at the discovery stage, albeit an issue of first impression in the court.

The Fifth Circuit was armed in its decision with the Supreme Court's reaffirmation in *LaBuy* that proper judicial administration requires supervisory control of the district courts by the courts of appeals and that in proper circumstances such supervisory authority might be exercised through extraordinary means. In *Hughes* the court noted that the issues presented to the district court had not yet been considered by the court of appeals and that the district courts within the circuit were in conflict over this question. The court then simply stated "the exercise of our 'expository and supervisory functions' will limit further disparity."<sup>96</sup>

The Fourth Circuit through mandamus has directed the transfer of an antitrust case relying on the supervisory authority that it understood *LaBuy* to confer, noting:

We are not concerned here only with rights of private litigants which we feel in any event will not be impaired in the least by transfer. Nor are we concerned only with the problem of whether or not we shall ultimately lose our jurisdiction to review to another appellate court. *Rather, our interest is with the effective administration and supervision of the courts of our circuit.*<sup>97</sup>

The Supreme Court, however, abandoned the language of "supervisory control" in *Schlagenbauf* and emphasized instead "the substantial allegation of usurpation of power." Yet the facts of *Schlagenbauf* actually show no intention on the part of the Court to retreat from *LaBuy*. District Judge Holder ordered a physical and mental examination of a defendant under Federal Rule 35.<sup>98</sup> The defendant petitioned the Seventh Circuit for writ of mandamus directing the district judge to vacate the order on the ground that petitioner's mental and physical condition was not "in con-

<sup>94</sup> FED. R. CRIM. P. 16.

<sup>95</sup> 379 U.S. 104 (1964).

<sup>96</sup> 413 F.2d 1244 (5th Cir. 1969).

<sup>97</sup> *General Tire & Rubber Co. v. Watkins*, 373 F.2d 361, 370 (4th Cir. 1966) (emphasis added).

<sup>98</sup> FED. R. CIV. P. 35.

troversy" and alleging that "good cause" for the order had not been shown, both being expressly required by Rule 35. The Seventh Circuit issued the writ. The Supreme Court affirmed, placing heavy reliance on the fact that the district court's order was the first of its kind and that, therefore, the question was undecided. Thus the situation in *Schlagenbauf* was analogous to that faced by the Fifth Circuit in *Hughes* and the motivation for issuing the requested writ was quite similar.

The *Hughes* decision may or may not be in conflict with the most recent Supreme Court case involving the All Writs Act and the *LaBuy* and *Schlagenbauf* opinions. In a footnote to the opinion in *Will v. United States*,<sup>99</sup> Mr. Chief Justice Warren stated that *LaBuy* "is simply inapposite where there is no showing of a persistent disregard of the federal rules."<sup>100</sup> He then went on to interpret *Schlagenbauf*, saying that although the Court in that opinion did note that the questions concerning the construction of Rule 35 were new and substantial, the Court "rested the existence of mandamus jurisdiction squarely on the fact that there was real doubt whether the District Court had any power at all to order a defendant to submit to a physical examination."<sup>101</sup>

But "usurpation of power" is just another phrase to be applied by the courts of appeals. Indeed, vague phrases are apt to turn into dangerous tools unless due restraint is exercised by the appellate courts. As the Supreme Court warned in *Will*: "Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous."<sup>102</sup>

#### IV. CONCLUSION

There is scarcely a procedural area in the appellate courts where the need for judicial restraint is greater than in the administration of the All Writs Act. There is frequently great weakness in an excess of power. The resources of the appellate courts are already heavily taxed with appeals from final judgments. Since these courts are hardly equal to the task of directing the trial process through interlocutory appeals, relief under the All Writs Act must be sparingly granted. Such a philosophy may be a sounder approach than efforts to follow catch phrases such as "usurpation of power," "abuse of discretion," and the like. The philosophy of the comity doctrine as it exists in the federal-state courts relationship may be adapted to administration of the federal peremptory writs power. The intrusion into the trial process by the appellate courts is one to be avoided except in the most compelling circumstances.

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<sup>99</sup> 389 U.S. 90 (1967).

<sup>100</sup> *Id.* at 104 n.14.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 98.

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