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Comment

REVIEW OF SECTION 1404(a) FEDERAL VENUE PROCEEDINGS BY EXTRAORDINARY WRIT

Section 1404(a) of the Federal Judicial Code provides:¹

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.

A court's decision under this statute is classified as an interlocutory order and is not open to immediate appeal. This comment will attempt an exploration of the possibility of using an extraordinary writ to obtain interlocutory review of section 1404(a) proceedings.

Congress, except for a few specified interlocutory orders, has limited the right of appeal to final orders. This has been done in the belief that the administration of justice will best be served if piecemeal appeals are not allowed to clog the courts. Further, "it is established that the extraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay and perhaps unnecessary trial." Extraordinary writs may be used to confine an inferior court to an exercise of its jurisdiction or to require an inferior court to decide a question properly before it. Whether an extraordinary writ may issue to obtain immediate review in section 1404(a) proceedings is thus far an open question.

Comparison to Section 1406(a) Proceedings

The Supreme Court has considered the propriety of using extraordinary writs in a situation somewhat analogous to that raised by section 1404(a). In Bankers Life and Casualty Co. v. Holland a transfer had been ordered under section 1406(a), the improper venue statute, from a district court in Florida to one in Georgia, both courts being within the Fifth Circuit. Petitioner sought mandamus from the court of appeals but his petition was

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2 In re Josephson, 218 F.2d 114 (1st Cir. 1954); Ford Motor Co. v. Ryan, 182 F.2d 329 (2d Cir. 1950), cert. denied, 340 U.S. 851 (1950); All States Freight, Inc. v. Modarelli, 196 F.2d 1010 (3d Cir. 1952); Jiffy Lubricator Co. v. Stewart-Warner Corporation, 177 F.2d 360 (4th Cir. 1949), cert. denied, 338 U.S. 947 (1950); Crummer Co. v. Du Pont, 196 F.2d 468 (5th Cir. 1952); Nicol v. Kosinski, 188 F.2d 1010 (3d Cir. 1951); Chicago, R.I. & P. R. Co. v. Igoe, 212 F.2d 378 (7th Cir. 1954); Shapiro v. Bonanza Hotel Co., 185 F.2d 777 (9th Cir. 1950); Wren v. Labs, 194 F.2d 873 (D.C. Cir. 1951).

3 See note 2 supra.

4 A decision under § 1404(a) is within the ordinary discretion of the trial court. Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955).

5 Section 1292 provides for appeal of the following interlocutory orders: (1) orders concerning injunctions; (2) orders appointing receivers; (3) decrees determining the rights of parties to admiralty cases; and (4) judgments in civil actions for patent infringement which are final except for an accounting.

6 28 U.S.C. § 1291 (1948) provides, in part: "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."


10 Such use of an extraordinary writ need not work as complete a violation of the policy against piecemeal appeals as would an immediate appeal of an interlocutory order since the extraordinary writs are available only at the discretion of the court, while appeal is available as a matter of right. Roche v. Evaporated Milk Assn., 319 U.S. 21, 25-26 (1942); Clinton Foods v. United States, 188 F.2d 289, 292 (4th Cir. 1951), cert. denied, 340 U.S. 953 (1951); Notes, 66 HARV. L. REV. 343 (1950), 50 COLUM. L. REV. 537 (1950).


12 28 U.S.C. § 1406(a) (1952): "(a) 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."
denied. The Supreme Court granted certiorari "because of the importance of the question in the effective administration of federal law." The petitioner's contention was that venue was proper and, therefore, the district court was without power to order a transfer under section 1406(a). Conceding that the district court originally had jurisdiction over the subject matter and over the parties, the petitioner asserted that by its "erroneous" order transferring venue the trial court had ousted itself of jurisdiction, and that mandamus was a proper method of confining the lower court to its lawful jurisdiction.

The Supreme Court rejected this argument and affirmed the court of appeals' denial of a writ, saying that "jurisdiction need not run the gauntlet of reversible errors. The ruling . . . was made in the course of the exercise of the court's jurisdiction to decide issues properly before it . . . . Its decision against petitioner, even if erroneous . . . involved no abuse of judicial power."

In support of its argument, petitioner in the *Holland* case had cited several cases in which writs had been issued. The Supreme Court replied that "petitioner had alleged no special circumstances such as were present in the cases which it cites." The court closed its opinion with a quotation from an earlier Supreme Court decision, *Ex parte Fahey*:

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 . . . . As extraordinary remedies, they are reserved for really extraordinary causes.

Do section 1404(a) cases present "exceptional circumstances" not present in section 1406(a) cases? Unless they do, it would appear that the *Holland* decision precludes review by an extraordinary writ whenever a trial court decides in the course of the exercise of its "jurisdiction to decide issues properly brought before it."

The Seventh Circuit, while following the *Holland* case as to section 1406(a), has distinguished the problems arising under section 1404(a). Under section 1406(a), if the court fails to dismiss or transfer when it is supposed to, "any judgment entered in the cause is a nullity; an error correctible on appeal." The adequacy of a remedy for an error committed under section 1406(a) is contrasted with the difficulties presented with

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14 Id. at 382.
15 Ibid.
16 Id. at 384.
19 Reviewing § 1406(a) cases by extraordinary writs would appear less objectionable than reviewing § 1404(a) cases because the former involves primarily questions of law and simple questions of fact while the latter involves extensive questions of fact and a challenge to the court's exercise of discretion.
20 Comfort Equipment Co. v. Steckler, 212 F.2d 371 (7th Cir. 1954).
21 Chicago, R.I. & P.R. Co. v. Igoe, 212 F.2d 378, 381 (7th Cir. 1954).
... the kind of interlocutory order which this court can properly deal with by way of such a writ, since should petitioners ... finally lose on the merits below, any error in the interlocutory order would probably be incorrectible on appeal for petitioners could hardly show that a different result would have been reached had the suit been transferred.

It may well be that since section 1404(a) orders, if not reviewed immediately upon rendition, may never effectively be reviewed, cases involving section 1404(a) are sufficiently “special” or “extraordinary” as to come within the exceptions of the Holland doctrine. The difficulty of proving prejudicial error rather than the hardship of waiting to appeal the final judgment might constitute the “special circumstances,” for in the Holland case the Supreme Court rejected an argument based on hardship, stating that “delay and perhaps unnecessary trial” would not alone justify use of a writ.

While there is no affirmative evidence that the Supreme Court considers the fact that section 1404(a) decisions must be reviewed at once, if at all, sufficiently special or extraordinary to merit review by extraordinary writs, there is reason to believe that the Holland decision does not foreclose the use of writs under section 1404(a). The Supreme Court recently considered a case in which a transfer had been ordered under section 1404(a) from a court in the Third Circuit to one in the Fourth. In this case, Norwood v. Kirkpatrick, the petitioner sought mandamus against the district judge to prevent the transfer. The Court of Appeals for the Third Circuit denied the writ, and the Supreme Court granted certiorari. Petitioner claimed that the district court was bound to follow the requirements set down for a dismissal under forum non conveniens in order to direct a transfer under section 1404(a).

The Supreme Court held that the stringent requirements of forum non conveniens did not apply and that transfers might be granted on a lesser showing of inconvenience under section 1404(a) than was required under forum non conveniens. The court then concluded with the statement that

23 Chicago, R.I. & P.R. Co. v. Igoe, 212 F.2d 378, 381 (7th Cir. 1954).
24 The Court of Appeals for the First Circuit has said they feel that even though a transfer order if not reviewed immediately after issuance may never be reviewed at all, this is no reason for issuance of an extraordinary writ, because “appellate review is not of the essence of due process. In re Josephson, 218 F.2d 174, 181 (1st Cir. 1954).
"since we find that the district judge properly construed Section 1404(a),
it is unnecessary to pass upon the question of whether mandamus or pro-
hibition is a proper remedy." This may indicate that the Holland case did
not completely foreclose the use of extraordinary writs in section 1404(a)
cases. No mention was made of the Holland case in the Norwood case.

The dissenting opinion in the Norwood case, which asserted that sec-
tion 1404(a) cases were to be decided under the same standards as were
forum non conveniens cases, commented on the majority’s refusal to
decide the extraordinary writ question. It said that “the question is one of
considerable importance . . . and considering the inadequacy of appeal,
should be settled in this case if it is to be settled at all in the near future.”
The dissenters noted that “the majority of Court of Appeals decisions dealing
with Section 1404(a) find mandamus appropriate in circumstances less
compelling than these.”

Policy Considerations

Conflicting policy considerations of major importance are involved
in reaching a conclusion as to whether extraordinary writs ought to issue
to review section 1404(a) proceedings. These include the necessity of pro-
tecting against the use of a petition for review as a delaying device, the
need for some review as a means of establishing standards for trial courts,
and a recognition of the fact that if immediate review is not granted in sec-
tion 1404(a) cases it is unlikely that any will ever be obtained. The courts
of appeal are in conflict due to the absence of a clear decision by the Su-
preme Court.

Section 1404(a) has been described as an attempt to make “the busi-
ness of the courts easier, quicker and less expensive.” Decisions under
this statute are not subject to immediate appeal, but a too frequent review
through extraordinary writs would in effect make this an appealable inter-
locutory order. Would this be in the interest of justice? The Court of Ap-
peals for the Third Circuit has weighed the merits of permitting an error
of the trial court, which otherwise might be unremedied, to be corrected at
once against the inconvenience of postponing a decision on the merits in
the litigation, and it decided that

... the risk of a party being injured either by the granting or refusal of a
transfer order is ... much less than the certainty of harm through delay
and additional expense if these orders are to be subjected to interlocutory
review by mandamus.

30 Id. at 33.
31 Id. at 37.
32 Id. at 42.
33 Id. at 43.
34 All States Freight v. Modarelli, 196 F.2d 1010, 1011 (3d Cir. 1952).
35 All States Freight v. Modarelli, 196 F.2d 1010, 1012 (3d Cir. 1952).
Besides the normal delay which would be an incident of a good-faith request for an extraordinary writ, it is possible that a party might choose this method of inducing protracted delay in the hope that his opponent would grow weary or impecunious and thus be more agreeable to an out-of-court settlement. And even tenacious litigants might suffer from delay, for with the passage of time evidence and witnesses tend to disappear.

To be balanced against the obviously undesirable effects of the delay which would be coincident with review by extraordinary writs is the difficulty of establishing prejudicial error after final judgment and the possibility of obtaining a much needed set of standards upon which trial courts might base their exercise of discretion in deciding whether a transfer is merited. If no immediate review is available through extraordinary writs, since it is unlikely that review will be sought after rendition of a final judgment, trial courts will be left free of all restraint in deciding venue questions under section 1404(a). It is most unlikely that standards can be imposed legislatively because of the fine gradations in the factual situations which arise. Some uniformity might be obtained, however, on the strength of the moral persuasion of the pronouncements of courts of appeal under a system of limited review.

Regardless of the decision reached, it will be necessary to consider the relative importance of each of these policy factors.

**Alternative Solutions and the Practice of the Courts**

There are several possible solutions to the question of whether an extraordinary writ may be issued to review an order under section 1404(a).

(1) One solution would be the absolute refusal to issue a writ under any circumstance. This solution has the advantage of eliminating any danger of delay, and of providing a clear and certain answer to a question that probably should be removed, if possible, from the realm of legal controversy. Its disadvantages are that it would leave trial courts with unfettered discretion as to transfers under section 1404(a) and would preclude establishment of a uniform set of standards by which trial courts might guide themselves. Also, it might produce serious hardship in that nebulous-

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37 To exemplify the delay problem under § 1406(a), the following is quoted from All States Freight v. Modarelli, 196 F.2d 1010, 1012 n.4 (3d Cir. 1952): "The complaint was filed on March 20, 1950, in the United States District Court for the Southern District of California. The motion for dismissal or transfer under § 1406(a) was filed on April 1, 1950 and granted on January 2, 1951, by order of the District Court dated August 18, 1950. On November 20, 1950, the Ninth Circuit Court of Appeals declined to grant review by mandamus, 185 F.2d 457. The case was then entered on the docket of the Delaware Federal District Court on January 2, 1951, and promptly a motion to transfer the case back to California was filed. The district judge denied this order on May 23, 1951. Gulf Research & Development Co. v. Schlumberger Well Surveying Corp., D.C., 98 F. Supp. 198. This court declined to review the question by mandamus on December 13, 1951, and the Supreme Court granted certiorari on April 21, 1952, 72 S. Ct. 762. As yet the venue question must still be litigated in the Supreme Court and no action has been taken to get the case solved on the merits."

38 Chicago, R.I. & P.R. Co. v. Igoe, 212 F.2d 378, 381 (7th Cir. 1954).

39 For a discussion of the factors to be considered in ordering a change of venue under § 1404(a), see Comment, 41 CALIF. L. REV. 507 (1953).
ly described, and presently unforseen, "extraordinary case." The rigidity of such a solution is also contrary to the traditional common law technique of handling extraordinary writs. No court has yet taken this position.

(2) A second alternative would be an absolute refusal to consider any case where the district court had denied a transfer, and consider all cases where a transfer had been granted. Distinguishing between a grant and a denial of transfer would be treating section 1404(a) in a way analogous to the common law doctrine of forum non conveniens. Under the common law doctrine of forum non conveniens, the trial court had the alternative of dismissing the action or rejecting the claim, and a dismissal would be appealable.

Another argument in favor of limiting review to those cases where a transfer is ordered might be made on the basis of the fact that it is the plaintiff who normally is the object of the protection against undue delay, and it is the defendant who seeks a change of venue. If the plaintiff chooses to seek review of an order granting a change of venue, he has voluntarily consented to any resultant delay. This solution is also consistent with a "territorial" interpretation of the All Writs Act which has been advanced by a few courts.

The All Writs Act states that courts may "issue all writs necessary or appropriate in aid of their respective jurisdictions . . . ."40 It has been argued that the requirement that a writ be in aid of the jurisdiction of the issuing court is a territorial concept which would prevent use of a writ whenever a transfer was denied, or when the transfer was to a court within the same circuit. The Court of Appeals for the First Circuit has said that41

If the district judge had . . . denied the motion for transfer, such action would have preserved, not frustrated, any potential appellate jurisdiction which we the Court of Appeals for the First Circuit might have had; and we are at a loss to understand how we could properly review on mandamus an order denying a transfer, on the pretense that such a review would be in "aid" of our appellate jurisdiction.

In a case involving a transfer from a federal district court in Nebraska to one in Minnesota, both courts being within the Eighth Circuit, the court of appeals for that circuit (in denying a writ) stated:42

It seems obvious that the transfer . . . cannot in any way impair or defeat the jurisdiction of this court to review any appealable order or judgment which eventually may be entered in the case.

The Supreme Court has not commented upon the possibility that the "in aid of jurisdiction" requirement is territorial as to the courts of appeal. However, that Court has said that

... the traditional use of [extraordinary writs] . . . in aid of our appellate jurisdiction . . . has been to confine an inferior court to a lawful exercise of

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41 In re Josephson, 218 F.2d 174, 181 (1st Cir. 1954).
42 Carr v. Donohoe, 201 F.2d 426, 428-29 (8th Cir. 1953).
its prescribed jurisdiction or to compel it to exercise its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.\footnote{Roche v. Evaporated Milk Assn., 319 U.S. 21, 26 (1943).}

Under this view, it would appear that jurisdiction under the All Writs Act is not solely territorial.

(3) A third alternative would shift the emphasis to the nature of the error committed. This is, generally speaking, the type of analysis the courts of appeal have been applying. Those questions they wish to review are called "jurisdictional" while those they do not choose to review are evidently relegated to the category of mere errors of law reviewable only on appeal.

The most frequently controverted question concerns the disposition of assertions that the district judge has abused his discretion in deciding whether to order a transfer. The courts of appeal have taken widely divergent views as to whether an abuse of discretion constitutes a jurisdictional error, subject to immediate review through use of an extraordinary writ. The Third Circuit is clear in its refusal to review the trial court's exercise of its discretion. In All States Freight v. Modarelli,\footnote{196 F.2d 1010 (3d Cir. 1952).} the defendant sought a writ to force a transfer previously denied by the district judge. In refusing to grant the writ, the court, sitting en banc,\footnote{Id. at 1012.} stated:

[W]e do not propose to grant such review where the judge in the district court has considered the interests stipulated in the statute and decided thereon . . . . [T]he result of an attempted procedural improvement is to subject the parties to two lawsuits: first, prolonged litigation to determine the place where a case is to be tried; and, second, the merits of the alleged cause of action itself.

Agreeing with the Third Circuit's view,\footnote{In re Josephson, 218 F.2d 174, 182 (1st Cir. 1954).} the Court of Appeals for the First Circuit has announced that

. . . in the future, except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings at the very threshold, by denying leave to file the petition for a writ of mandamus.\footnote{Id. at 183.}

It is probable that the Eighth Circuit will follow the First and Third Circuit's refusal to review a court's exercise of its discretion under section 1404(a). In Carr v. Donohoe\footnote{201 F.2d 426 (8th Cir. 1953).} that court was asked to issue a writ...
to prevent a transfer between two district courts, both of which were within the Eighth Circuit. As the case would still remain within the Eighth Circuit, the court felt that issuing a writ would not aid the court's jurisdiction. The entire problem is categorized as "an ordinary contest between litigants with respect to venue" calling for no "extraordinary remedy." While a transfer to a district court outside the Eighth Circuit would fulfill the requirement that a writ be issued in aid of that court's jurisdiction, it is doubtful whether the location of the transferee court outside the Eighth Circuit would convert a venue problem into an extraordinary situation.

The position of the Second Circuit is not clear. In Ford Motor Co. v. Ryan the Court of Appeals for the Second Circuit found the question of a denied transfer to a district court in another circuit a "sufficiently extraordinary cause" to review the trial court's exercise of discretion.

But a recent decision in the Second Circuit, Torres v. Walsh, which involved two companion cases in which transfers had been ordered to district courts in other circuits, reached a contrary conclusion. The court stated that

... where the transfer has been made to a district in which the action could originally have been brought, we are not called to act [in aid of] our appellate jurisdiction, except when we find it necessary to do so in a really "extraordinary cause"...

The court concluded with the statement:

[W]e may not consider ... whether these judges abused their discretion in granting these transfer applications, unless we find that either or both of these two causes are "really extraordinary." ... But there is not the slightest basis for holding that either of these cases is "really extraordinary", or "extraordinary" in any sense. They are the ordinary run-of-the-mill type of litigation which goes through the district courts from day to day.

It does not appear that the fact that a transfer was denied, rather than granted as in Torres v. Walsh, would distinguish these two cases, and, thus, when the Second Circuit will examine the trial court's exercise of discretion is somewhat in question.

At the other end of the spectrum are those courts of appeal which have indicated that they will issue an extraordinary writ if a district judge has abused his discretion in deciding whether a transfer should be ordered.

50 Id. at 428–29.
51 Id. at 429.
52 182 F.2d 329 (2d Cir. 1950), cert. denied, 340 U.S. 851 (1950).
53 Id. at 330.
54 221 F.2d 319 (2d Cir. 1955).
55 Id. at 321.
56 Id. at 322.
57 The difference in the language in the two cases may be explainable on the basis of difference in the composition of the courts deciding the cases.
under section 1404(a). Into this category fall the Fourth,\textsuperscript{58} Fifth,\textsuperscript{59} Sixth,\textsuperscript{60} Seventh,\textsuperscript{61} and District of Columbia Circuits.\textsuperscript{62} In only two of these Circuits has a writ actually been issued because the court of appeals found that the trial court had abused its discretion. In each of the other cases it was found that the facts did not warrant such "extraordinary" action.

One of the cases in which a writ was issued, \textit{Atlantic Coast Line R. Co. v. Davis},\textsuperscript{63} involved what the Fifth Circuit found to be an "extraordinary case." Plaintiff had instituted a suit against the railway in a New York federal district court under the Federal Employees Liability Act for recovery of damages for her husband's death. When, over plaintiff's objection, the defendant railway obtained a transfer to a district court in Florida, plaintiff sought and obtained an order retransferring the case to New York. The Fifth Circuit issued a writ of prohibition, finding the "circumstances wholly insufficient to authorize the retransfer directed by the district court." The fact that there had been two mistrials and the possibility of introducing the transcripts of the witnesses' testimony rather than requiring the witnesses to travel to New York were held to be an insufficient basis for ordering the transfer.

Mandamus was issued in the case of \textit{Chicago, Rock Island and Pacific Railroad Co. v. Igoe}.\textsuperscript{64} Plaintiff sued in an Illinois state court for damages for the wrongful death of her husband who was killed when his car was hit by defendant's train in Iowa. The cause was transferred to a federal court in Illinois because of diversity of citizenship. Defendant then moved for a change of venue to a federal district court in Iowa under section 1404(a).\textsuperscript{65} On refusal of the Illinois district court to order the transfer, the court of appeals was requested to issue a writ of mandamus directing the Illinois district judge to order the transfer. The writ was issued, the court stating that

\textsuperscript{58} Jiffy Lubricator Co., Inc. v. Stewart-Warner Corp., 177 F.2d 360 (4th Cir. 1949); and see International Nickel Co. v. Martin J. Barry, Inc., 204 F.2d 583 (4th Cir. 1953), which, while it is not itself a case involving § 1404(a), does cite § 1404(a) cases in support of reviewing an abuse of discretion with mandamus.

\textsuperscript{59} Atlantic Coast Line R. Co. v. Davis, 185 F.2d 766 (5th Cir. 1950); \textit{Ex parte Chas. Pfizer & Co.,} 225 F.2d 720 (5th Cir. 1955).

\textsuperscript{60} Nicol v. Kosinski, 188 F.2d 537 (6th Cir. 1951).

\textsuperscript{61} Chicago, R.I. & P.R. Co. v. Igoe, 212 F.2d 378 (7th Cir. 1954). \textit{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).

\textsuperscript{62} Wirren v. Laws, 194 F.2d 873 (D.C. Cir. 1951).

\textsuperscript{63} 185 F.2d 766 (5th Cir. 1950).

\textsuperscript{64} 220 F.2d 299 (7th Cir. 1955).

\textsuperscript{65} At first, the district court refused to transfer, deciding on standards somewhat independent of those set forth in the statute. This refusal was challenged on petition for mandamus and the court of appeals ordered the district judge to reconsider the transfer according to the correct statutory test. \textit{Chicago, R.I. & P.R. Co. v. Igoe,} 212 F.2d 378 (7th Cir. 1954). The district court then issued a brief memorandum stating that the requested transfer "would not he for the convenience of the parties and witnesses, nor in the interest of justice" and denied the motion. \textit{Chicago, Rock Island and Pacific Railroad Co. v. Igoe,} 320 F.2d 299, 306 (7th Cir. 1955).
[the] balance of convenience of the parties is so overwhelmingly in favor of the defendant that the denial . . . of the motion to transfer this case . . . was so clearly erroneous that it amounted to an abuse of discretion.\textsuperscript{66}

A dissent filed in the above case pointed out that

[the] ultimate decision on the motion is within the province of the district court, and we cannot as petitioner would have us usurp its function and decide the question in this court.\textsuperscript{67}

It was suggested that the policy of the Third Circuit be followed whereby if the trial court "considers the interests stipulated in the statute and decides thereon" the court of appeals will not upset the result through the use of a special writ.\textsuperscript{68}

The Ninth and Tenth Circuits have not discussed the question of whether abuse of discretion is a proper ground for issuing an extraordinary writ.

Whether "abuse of discretion" constitutes the type of error appellate courts will review by extraordinary writs in the most frequently controverted question within the "scope of review" category. There are several other types of error to which courts have responded with the conclusion that issuance of a writ is proper. Included are the following situations:

1. where a district court erroneously refuses to accept a case transferred to its jurisdiction from another district court;\textsuperscript{69} 
2. where a district court refuses to consider a motion to transfer because it mistakenly believes that it lacks the power to order a transfer;\textsuperscript{70} 
3. where a district court renders a decision on a motion to transfer on the basis of standards other than those enumerated in the statute,\textsuperscript{71} and 
4. where a district court orders a transfer to a trial court which is in violation of the requirement stated in section 1404(a) that the transfer be to a district or division where the action might have been brought.\textsuperscript{72} There are no cases discussing the above claimed types of error which have indicated that review is improper in these cases.

\textsuperscript{66} Id. at 305. 
\textsuperscript{67} Id. at 306, and quoting from the first opinion of the court of appeals (see note 65 supra), Chicago, R.I. & P.R. Co. v. Igoe, 212 F.2d 378, 382 (7th Cir. 1954). 
\textsuperscript{68} All States Freight v. Modarelli, 196 F.2d 1010, 1012 (3d Cir. 1953), and see text at note 44 supra. Similar views were expressed in Ford Motor Co. v. Ryan, 182 F.2d 329 (2d Cir. 1950) (Judge Swan concurring at 332), cert. denied, 340 U.S. 851 (1950); Larsen v. Norbye, 181 F.2d 765, 766 (8th Cir. 1950); Nicol v. Kiscinski, 188 F.2d 557 (6th Cir. 1951) (Judge Hicks dissenting at 539); cf. Pennsylvania R. Co. v. Kirkpatrick, 203 F.2d 149, 150 (3d Cir. 1953). 
\textsuperscript{69} Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514 (4th Cir. 1955). 
\textsuperscript{71} Chicago, R.I. & P.R. Co. v. Igoe, 212 F.2d 378 (7th Cir. 1954); Dairy Industries Supply Ass'n v. La Buy, 207 F.2d 554 (7th Cir. 1953); the factors to be considered are (1) that the place where it might be transferred is a place where the action might have been brought, and (2) the convenience of the parties and witnesses. 
\textsuperscript{72} Foster-Milburn Co. v. Knight, 181 F.2d 949 (2d Cir. 1950); Shapiro v. Bonanza Hotel Co., 185 F.2d 777 (9th Cir. 1950). For a discussion of the requirement that a "proper place" be one in which service of process might be had, see Barrett, \textit{Venue and Service of Process in the Federal Courts—Suggestions for Reform}, 7 \textsc{Vand. L. Rev.} 608 (1954).
Conclusion

As was said by the dissenters in Norwood v. Kirkpatrick, "[T]he question is one of considerable importance in the administration of the lower federal courts . . .," and it is somewhat unfortunate that the Court did not decide whether extraordinary writs are appropriate to review decisions under section 1404(a). It is likely that the Holland case did not preclude the use of extraordinary writs altogether in section 1404(a) cases. Assuming that writs may be used in some circumstances, the question becomes when and for what purposes may they be used?

The requirement of the Third and Eighth Circuits that a transfer must have been ordered to a district court outside the circuit of the court from which the writs are requested before a writ may issue may be somewhat too stringent. In light of the fact that a transfer from one district court to another within some circuits could encompass a greater distance and more inconvenience than a transfer between some circuits, this requirement may be unduly harsh and restrictive. But it may be worthwhile to consider a part of the requirement of the Third and Eighth Circuits—namely that a transfer to some point must have been ordered before a writ will issue. Thus, it may be necessary to exclude from review by extraordinary writ those cases where a transfer has been denied, in order to protect against the dangers of undue delay and an overburdensome number of requests for a writ.

If review is available at all, it will be necessary to prescribe the scope of review. It is submitted that appellate courts should be very hesitant to overturn a trial court's ruling on a claim of "abuse of discretion," and that where this is the ground on which a writ is sought, ordinarily none ought be granted. In this respect the practice of the First and Third Circuits seems worthy of emulation. Where it is not the trial court's discretion which is attacked, i.e., when the trial court's interpretation of the witnesses' and parties' convenience is not contested, but rather the court's interpretation of the as yet unanswered questions of law which arise under section 1404(a) is raised, it would seem a particularly apt situation for the issuance of an extraordinary writ.

Peter Simmons

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