

p. 824, n. 69.

United States v. Certain Parcels of Land in City of Philadelphia, Commonwealth of Pennsylvania, 339 F2d 414 (CA 3rd, 1964; judgment vacated and case remanded for determination pursuant to Rule 71A(j)).

§ 83.51. — Interest.

p. 825, n. 78.

See United States v. Certain Lands in Suffolk County, State of New York, 270 F Supp 823 (EDNY 1967).

§ 83.52. Disposition of charges and encumbrances binding land.

p. 826, n. 80.

District court has broad discretion under this statute, and order allowing interest on mortgage debt to date of payment was just and equitable and not abuse of discretion. United States v. Certain Land in City of Paterson, New Jersey, 322 F2d 866 (CA 3rd, 1963).

§ 83.54. Where property taken without condemnation.

p. 827, n. 83.

Increased operations and introduction of new aircraft at Naval Air Station, which caused land values to decrease sharply because of greater noise and inconvenience, constituted a further taking subject to compensation, notwithstanding that land was subjected to an avigation easement. Avery v. United States, 330 F2d 640 (Ct Cl 1964).

§ 83.55. — Action for compensation or damages.

p. 327. *In line 2 of section after "proceedings," insert: and without just compensation as required by the Fifth Amendment,*^{85.10}

^{85.10} United States v. Wald, 330 F2d 871 (CA 10th, 1964).

p. 327, n. 86.

Claim exceeding \$10,000 is within exclusive jurisdiction of Court of Claims. Myers v. United States, 323 F2d 580 (CA 9th, 1963).

p. 327. *After note 86 insert: In such a suit, consequential damages are not enough to sustain a recovery,*^{86.10} *and an actual taking must be established.*^{86.12} *The suit is in effect a condemnation action in reverse, and the interest taken by the United States must be defined with precision.*^{86.14}

^{86.10} United States v. Wald, 330 F2d 871 (CA 10th, 1964); Bellamy v. United States, 235 F Supp 139 (EDSC 1964; alleged taking in connection with operation of Air Force Base).

^{86.12} Batten v. United States, 306 F2d 530 (CA 10th, 1962), cert den 371 US 955, 9 L Ed2d 592, 83 S Ct 506; United States v. Wald, 330 F2d 871 (CA 10th, 1964); Bellamy v. United States, 235 F Supp 139 (EDSC 1964).

80.14 United States v. Cress, 243 US 316, 61 L Ed 746, 37 S Ct 330; United States v. Causby, 328 US 256, 90 L Ed 1206, 66 S Ct 1062; United States v. Wald, 330 F 2d 871 (CA 10th, 1964).

CHAPTER 84

§ 84.03. Power of court to issue writ.

p. 338, n. 27.

Power of court of appeals to entertain proceeding in prohibition under All Writs Statute (28 USC 1651). *Smoot v. Fox*, 353 F2d 830 (CA 6th, 1965).

§ 84.11. — Requirement that writ aid appellate jurisdiction.

p. 339, n. 32.

Marbury v. Madison, 1 Cranch (US) 137, 173-180, 2 L Ed 60; *Chandler v. Judicial Council of the Tenth Circuit of the United States*, 393 US 74, 26 L Ed2d 100, 90 S Ct 1648.

§ 84.14. Procedure.

p. 343, n. 58.

See § 84.65a, post, as to Rules App Proc, effective July 1, 1968.

§ 84.18. Grant or denial of writ; effect.

p. 345, n. 77.

See *I-F-E Circuit Breaker Co. v. Regan*, 348 F2d 403 (CA 8th, 1965; petition to prevent transfer of antitrust action under 28 USC 1404(a)).

§ 84.20. Power of court to issue writ.

p. 346, n. 84.

See § 84.65a, post, as to Rules App Proc, effective July 1, 1968.

§ 84.29. Generally.

p. 350, n. 3.

28 USC 1651 is not jurisdictional, authorizes issuance of appropriate writs only in actions over which court already has jurisdiction, and was of no help to petitioner who sought writ of mandamus under petition not including allegation as to basis upon which court had jurisdiction nor alleging facts from which jurisdiction could arise. *Carnage v. Sanborn*, 304 F Supp 857 (ND Ga 1969).

§ 84.30. Of Supreme Court.

p. 351, n. 8.

Authority of Supreme Court to issue writ of mandamus declared constitutionally exercisable only insofar as such writ is in aid of its appellate jurisdiction. *Marbury v. Madison*, 1 Cranch (US) 137, 173-180, 2 L Ed 60; *Ex Parte Republic of Peru*, 318 US 578, 582, 87 L Ed 1014, 63 S Ct 793; *Chandler v. Judicial Council of the Tenth Circuit of the United States*, 393 US 74, 26 L Ed2d 100, 90 S Ct 1648.

§ 84.32. Of district courts.

p. 352, n. 14.

See *Rines v. Commonwealth of Pennsylvania*, 285 F Supp 391 (ED Pa 1968), 12 FR Serv2d 81b.21, Case 1.

p. 352, n. 17.

Time Life Broadcast Co. v. Boyd, 289 F Supp 219 (SD Ind 1968); jurisdiction of action to compel Secretary of Transportation to enforce statute).

p. 352. *Add at end of section:* However, the amendments do not create any new substantive rights, but merely codify existing judicial conclusions.^{17.10}

^{17.10} *Parker v. Kennedy*, 212 F Supp 594 (SDNY 1963); *McEachern v. United States*, 212 F Supp 706 (WDSC 1963); *Dover Sand & Gravel, Inc. v. Jones*, 227 F Supp 88 (DCNH 1963).

§ 84.33. — Ancillary jurisdiction.

p. 352, n. 20.

Notwithstanding abolition of writ of mandamus as such by Rule 81(b), Rules Civ Proc, federal courts, under 28 USC 1651 (All Writs Statute), may issue all writs necessary or appropriate in aid of their respective jurisdiction, including writs in the nature of mandamus. *Haggard v. State of Tennessee*, 421 F2d 1384 (CA 6th, 1970).

§ 84.34. — Original jurisdiction.

p. 353, n. 21.

District court does not have jurisdiction under 28 USC 1361 to compel action by state official. In re *Wolenski*, 324 F2d 309 (CA 3rd, 1963).

The statute (28 USC 1361) does not create new liabilities or new causes of action against the United States government or its officials. *McEachern v. United States*, 212 F Supp 706 (WDSC 1963); *White v. Administrator of General Services Administration of United States*, 343 F2d 444 (CA 9th, 1965).

The statute confers jurisdiction of an action to compel the Secretary of Transportation and the general counsel of his department to enforce the daylight savings time provisions of the Uniform Time Act of 1966 (15 USC 260 et seq.). *Time Life Broadcast Co. v. Boyd*, 289 F Supp 219 (SD Ind 1968).

28 USC 1361 not applicable to state employee. *Carnage v. Sanborn*, 304 F Supp 857 (ND Ga 1969).

p. 353, n. 24.

Stern v. South Chester Tube Co., 252 F Supp 329 (ED Pa 1966).

See also *Stern v. South Chester Tube Co.*, 378 F2d 205 (CA 3rd, 1967).

p. 353, n. 25.

Rines v. Commonwealth of Pennsylvania, 285 F Supp 391 (ED Pa 1968; petition for writ denied), 12 FR Serv2d 81b.21, Case 1.

p. 353, n. 26.

Power of district court under All Writs Act to issue an order in the nature of a writ of mandamus against a private party in a case in which that writ is the only relief sought. *Stern v. South Chester Tube Co.*, 390 US 606, 20 L Ed2d 177, 88 S Ct 1332, 11 FR Serv2d 81b.22, Case 1.

Grant to stockholder of right to inspect and make extracts from record of stockholders as not constituting relief in nature of mandamus. *Stern v. South Chester Tube Co.*, 390 US 606, 20 L Ed2d 177, 88 S Ct 1332; *Weber v. Continental Motors Corp.*, 305 F Supp 404 (SDNY 1969).

p. 353, n. 27.

No jurisdiction unless ancillary to some other relief or basis for jurisdiction. *Stern v. South Chester Tube Co.*, 252 F Supp 329 (ED Pa 1966).

§ 84.36. — Under special statutes in particular matters.

p. 354, n. 32.

Congress has expressly authorized jurisdiction to issue writ of mandamus (15 USC 49) to enforce orders to FTC for production of documents. *United States v. Associated Merchandising Corp.*, 256 F Supp 318 (SDNY 1966).

§ 84.37. Generally.

p. 356. *After note 35 add:* Mandamus is an extraordinary remedy reserved for really extraordinary causes and exercisable 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.^{35.5} Relief in the nature of mandamus may be given in an action for a declaratory judgment.^{35.10}

Writs in the nature of mandamus, which may be issued by federal courts under 28 USC 1651 (All Writs Statute) where necessary or appropriate in aid of their respective jurisdictions, notwithstanding abolition of the writ of mandamus as such Rule 81(b), Rules of Civil Procedure,^{35.15} may only be issued in instances where, before adoption of Rule 81(b), the remedy of mandamus would have been available.^{35.20}

^{35.5} *Jones v. Gasch*, 404 F2d 1231 (App DC 1968).

See *United States v. Hughes*, 413 F2d 1244 (CA 5th, 1969).

^{35.10} *Schenley Industries, Inc. v. Fowler*, 275 F Supp 356 (DCDC 1967).

^{35.15} *Haggard v. State of Tennessee*, 421 F2d 1384 (CA 6th, 1970).

^{35.20} *Haggard v. State of Tennessee*, 421 F2d 1384 (CA 6th, 1970).

p. 356, n. 36.

See § 84.65a, post, as to Rules App Proc, effective July 1, 1968.

§ 84.38. As within discretion of court.

p. 356, n. 33.

Where mandamus to compel Secretary of Agriculture to inspect and grade tobacco would change tobacco marketing rules halfway through marketing season, while statute authorizing inspection and grading was intended to preserve orderly market (7 USC 511b-511e, 511h, 511j, 511m), writ would be denied, aside from question whether acts sought to be compelled were discretionary. *Danville Tobacco Ass'n v. Freeman*, 275 F Supp 350 (WD Va 1967).

p. 356, n. 40.

Power granted court of appeals under 28 USC 1651 is to be used only in the exceptional case where there is clear abuse of discretion or usurpation of judicial power. *Securities and Exchange Commission v. Krentzman*, 397 F2d 55 (CA 5th, 1968).

§ 84.39. Effect of other adequate remedy.

p. 357, n. 43.

Evans Elec. Const. Co. v. McMannus, 383 F2d 952 (CA 8th, 1964).

§ 84.40. Nonavailability for purpose of review.

p. 358, n. 50.

Mandamus may not be used as a substitute for an appeal from Tax Court. *Sprague Elec. Co. v. Tax Court of the United States*, 230 F Supp 779 (DC Mass 1964).

Correctness of trial court's rulings on jurisdiction was an issue to be decide in pending appeal under normal and ordinary appellate procedures. *Belcher v. Grooms*, 406 F2d 14 (CA 5th, 1968).

p. 359, n. 53.

See *National Labor Relations Board v. Nashville Bldg. and Const. Trades Council*, 383 F2d 562 (CA 6th, 1967; writ denied where attempt was made to substitute writ for statutory processes of appellate review).

p. 359, n. 54.

Petition of A & H Transportation, Inc., 319 F2d 69 (CA 4th, 1963; unappealable order treated as petition).

Mandamus does not lie to review mere error in the disposition of a motion to transfer under 28 USC 1404(a), but only to redress a clear-cut abuse of discretion. *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F2d 439 (CA 2nd, 1966).

p. 359. *After note 54 add new paragraph:*

While there is authority that neither mandamus nor prohibition is a proper remedy to review an order transferring, or denying a motion for transfer of, an action under 28 USC 1404(a),^{54.5} it has been ruled in most of the circuits that mandamus will lie to review such an order^{54.7} either granting^{54.10} or denying^{54.12} the transfer, or at least the court of appeals has the power to review the order by way of mandamus^{54.14} and to entertain a petition therefor,^{54.16} in view of the nonappealability of the order and the practicality that it may not otherwise be reviewable.^{54.18} However, there appears to be some difference of opinion as to the extent to which the power of review on mandamus should be exercised,^{54.20} and whether it should be exercised sparingly and only in extraordinary circumstances,^{54.22} or whether a more liberal attitude should be adopted with respect thereto.^{54.24} Mandamus has been held to be a proper remedy in cases turning upon a question of law as to the power or lack of power of the district court to grant the transfer,^{54.26} or to compel

the district court to exercise its discretion under the statute,^{54.28} but not to merely review the district court's exercise of discretion thereunder,^{54.30} unless the court applies an erroneous test, considers improper factors or fails to consider the requisite statutory factors in exercising its discretion.^{54.32}

^{54.5} *Gulf Research & Development Co. v. Harrison*, 185 F2d 457; *Carr v. Donohoe*, 201 F2d 426. See *Great Northern R. Co. v. Hyde*, 233 F2d 852, rehearing granted 241 F2d 707, application denied 245 F2d 537; *Lemon v. Druffel*, 253 F2d 680.

Mandamus is not appropriate remedy to review and vacate order granting transfer on ground of improper venue pursuant to 28 USC 1406(a). *Bankers Life & Casualty Co. v. Holland*, 346 US 379, 98 L Ed 106, 74 S Ct 145.

Cases, such as *Bankers Life & Casualty Co. v. Holland*, 346 US 379, 98 L Ed 106, 74 S Ct 145, relative to mandamus to review transfer order for improper venue under 28 USC 1406(a), (see § 4.45, ante), are not in point with regard to orders under 28 USC 1404(a) in view of the distinction between those two sections. *Chicago, R. I. & P. R. Co. v. Igoe*, 212 F2d 378; In the Matter of *Josephson*, 218 F2d 174.

^{54.7} *Chicago, R. I. & P. R. Co. v. Igoe*, 212 F2d 378 (stating that majority of decisions hold that mandamus will lie); *Lemon v. Druffel*, 253 F2d 680.

Mandamus, prohibition, or interlocutory appeal as proper remedy to seek review of District Court's disposition of motion for change of venue under 1404(a) or 1406(a) of Judicial Code, 2 ALR Fed 573.

^{54.10} In the Matter of *Josephson*, 218 F2d 174 (where transferred to district in another circuit); *General Cas. Co. of America v. Grubb*, 253 F2d 51; *Blaski v. Hoffman*, 260 F2d 317; *General Tire & Rubber Co. v. Watkins*, 373 F2d 361 (CA 4th, 1967; granting transfer to district in another circuit).

After completion of transfer to another circuit and transferor court has lost jurisdiction, court of appeals lacks power to compel latter to vacate its order of transfer or at least such power should be exercised only in very extreme case. In re *Southwestern Mobile Homes, Inc.*, 317 F2d 65.

Propriety of mandamus to compel district court to vacate transfer order entered under statute (28 USC 1404(a)). *I-T-E Circuit Breaker Co. v. Becker*, 343 F2d 361 (CA 8th, 1965).

^{54.12} *Ford Motor Co. v. Ryan*, 182 F2d 329; *Paramount Pictures, Inc. v. Rodney*, 186 F2d 111; *Chicago, R. I. & P. R. Co. v. Igoe*, 212 F2d 378.

An order denying transfer as distinguished from one granting transfer was intimated to be not reviewable on mandamus. In the Matter of *Josephson*, 218 F2d 174.

^{54.14} Ex parte *Chas. Pfizer & Co., Inc.*, 225 F2d 720; *Lemon v. Druffel*, 253 F2d 680.

^{54.16} Ex parte *Deepwater Exploration Co.*, 260 F2d 546 (granting leave to file petition); *A. C. Nielsen Co. v. Hoffman*, 270 F2d 693.

^{54.18} See *Chicago, R. I. & P. R. Co. v. Igoe*, 212 F2d 378; In the Matter of *Josephson*, 218 F2d 174.

^{54.20} *Clayton v. Warlick*, 232 F2d 699; *Lemon v. Druffel*, 253 F2d 680; *Lykes Bros. S.S. Co. v. Sugarman*, 272 F2d 679.

Review of order granting motion for transfer to district in another circuit is more restricted on petition for mandamus than review of order denying such motion, and is limited to consideration whether lower

court had power to make transfer or whether it committed gross abuse of discretion by causing extreme hardship on party opposing transfer. *Ackert v. Bryan*, 299 F2d 65.

^{54.22} See *Gulf Research & Development Co. v. Harrison*, 185 F2d 457; *Great Northern R. Co. v. Hyde*, 238 F2d 852; *Lykes Bros. S.S. Co. v. Sugarman*, 272 F2d 679; *American Flyers Airline Corp. v. Farrell*, 385 F2d 936 (CA 2nd, 1967); *Legal Aid Soc. of New York v. Herlands*, 399 F2d 348 (CA 2nd, 1968).

Except in extraordinary situations, Court of Appeals for First Circuit will deny leave to file petition for writ of mandamus to review transfer orders under 28 USC 1404(a). In the *Matter of Josephson*, 218 F2d 174.

^{54.24} See *Ford Motor Co. v. Ryan*, 182 F2d 329; *Chicago, R. I. & P. R. Co. v. Igoe*, 212 F2d 378; *Ex parte Chas. Pfizer & Co., Inc.*, 225 F2d 720.

^{54.26} *Blaski v. Hoffman*, 260 F2d 317, *affd* 363 US 335, 4 L Ed2d 1254, 80 S Ct 1084; *Johnson & Johnson v. Picard*, 282 F2d 386 (mandamus granted to vacate transfer order); *Philip Carey Mfg. Co. v. Taylor*, 286 F2d 782.

If district court lacked power to make order of transfer, petition for writ of mandamus will be entertained. *Anthony v. Kaufman*, 193 F2d 85.

Mandamus is appropriate, notwithstanding interlocutory remedy under 28 USC 1202(b), where question is whether district court acted without jurisdiction in granting motion to transfer. *Barrack v. Van Dusen*, 309 F2d 953.

^{54.28} *All States Freight, Inc. v. Modarelli*, 196 F2d 1010; *Chicago, R. I. & P. R. Co. v. Igoe*, 212 F2d 378; *Clayton v. Warlick*, 232 F2d 699.

^{54.30} *Teixeira v. Goodyear Tire & Rubber Co.*, 261 F2d 153; *Lykes Bros. S.S. Co. v. Sugarman*, 272 F2d 679; *United States v. Wright*, 282 F2d 428.

See *American Flyers Airline Corp. v. Farrell*, 385 F2d 936 (CA 2nd, 1967).

See also *Norwood v. Kirkpatrick*, 349 US 29, 99 L Ed 789, 75 S Ct 544. But see *Ford Motor Co. v. Ryan*, 182 F2d 329 (abuse of discretion as sufficient "extraordinary cause" to warrant mandamus).

On petition for mandamus or prohibition, court of appeals will not consider question whether district court abused its discretion in granting transfer where it had power to do so under section 1404(a), unless case is "really extraordinary." *Torres v. Walsh*, 221 F2d 319.

Power of court of appeals to review by mandamus proceedings an order of transfer under section 1404(a) should be exercised and the writ issued only in the exceptional case where there is a clear abuse of discretion or usurpation of judicial power. *Panhandle Eastern Pipe Line Co. v. Thornton*, 267 F2d 459.

In order to warrant court of appeals passing on a petition for mandamus in a transfer case under 28 USC 1404(a), something more must be shown than an erroneous decision by district court and abuse of discretion must clearly appear, so that such petitions should not be filed unless petitioner can make out a strong case of abuse of discretion. *Sypert v. Miner*, 266 F2d 196; *Chemtron Corp. v. Perry*, 295 F2d 703.

Mere error in exercise of discretion is insufficient for mandamus relief unless so clear and arbitrary as amounting to abuse of discretion. *Butterick Co., Inc. v. Will*, 316 F2d 111.

^{54.32} *Dairy Industries Supply Ass'n v. La Buy*, 207 F2d 554 (revg order denying transfer where based upon factors or tests not permissible under

statute); Chicago, R. I. & P. R. Co. v. Igoe, 212 F2d 378; General Tire & Rubber Co. v. Watkins, 373 F2d 361 (CA 4th, 1967, abuse of discretion in not granting transfer).

§ 84.42. Duties and acts that may be compelled.

p. 360, n. 59.

Simpkins v. Davidson, 302 F Supp 456 (SDNY 1969; legal right to consideration of application for loan).

Mandamus will not lie to compel government contract officer to pay sum due subcontractor out of funds retained by contract officer from prime contractor under government construction contract, where it is not alleged that officer is wrongfully withholding funds or that he has a duty to pay them to anyone. United States v. McDonald Const. Co., 295 F Supp 1363 (ED Mo 1968).

p. 361, n. 61.

Mandamus did not lie to compel local military draft board, and national and state directors of selective service system, to appoint appeal agent for local board, since 32 CFR makes it clear that any such duty lies with President upon recommendation of Governor of state, the respondents not having legal duty to appoint appeal agent. Mourgis v. Hershey, 301 F Supp 1034 (D Mass 1969).

p. 361. *After note 63 insert:* to compel an impossible act; ^{63.10}

^{63.10} Hackett v. President of City Council of City of Philadelphia, 298 F Supp 1020 (ED Pa 1969).

§ 84.43. — Ministerial acts.

p. 362, n. 69.

Mollohan v. Gray, 413 F2d 349 (CA 9th, 1969; mandamus not available).

Mandamus would not issue to compel warden of state penitentiary to allow state prisoner to mail and file civil rights punitive damage action, in violation of regulation adopted by state Department of Corrections. Kirby v. Thomas, 336 F2d 462 (CA 6th, 1964).

Court had no subject matter jurisdiction to issue writ of mandamus compelling Small Business Administration and its loan officer to grant a loan, the only statute involved (28 USC 1361) relating only to ministerial acts of employees of United States and not being usable to compel such employee to reach specific result in decision wherein Congress clearly and properly gave him discretion. Simpkins v. Davidson, 302 F Supp 456 (SDNY 1969).

§ 84.44. — Administrative discretion.

p. 363, n. 70.

Schenley Industries, Inc. v. Fowler, 275 F Supp 356 (DCDC 1967).

Mandamus lies to compel the Secretary of the Army to exercise his discretion either to issue a permit for construction of a bridge or to disapprove application. Delaware River Joint Toll Bridge Commission v. Resor, 273 F Supp 215 (ED Pa 1967).

Judicial relief is appropriate to relieve aggrieved persons from administrative action beyond the statutory grants of authority. Carl Borchsenius Co., Inc. v. Gardner, 282 F Supp 396 (ED La 1968).

p. 333, n. 71.

Parrott v. Cary, 234 F Supp 572 (DC Colo 1964); Delaware River Joint Toll Bridge Commission v. Resor, 273 F Supp 215 (ED Pa 1967); Bliss v. Shore, 279 F Supp 646 (WD Pa 1968); issuance of complaint by National Labor Relations Board).

See Drew v. Lawrimore, 380 F2d 479 (CA 4th, 1967).

p. 364, n. 73.

Leaf v. Udall, 235 F Supp 366 (ND Cal 1964; concerning approval of contract between attorneys and Indian tribe); Danville Tobacco Ass'n v. Freeman, 275 F Supp 350 (WD Va 1967; mandamus does not lie to compel inspecting and grading of tobacco by Secretary of Agriculture, since such acts are discretionary with him).

Whether the Attorney General or Director of Federal Bureau of Investigation should take action to arrest, cause to be imprisoned or to institute criminal prosecutions against state and local law enforcement officials, or any other persons, public or private, responsible for deprivation of persons' rights under the Civil Rights Act (42 USC 1987), are decisions committed to the Executive branch of the Government, not to the courts, and mandamus will not lie to compel such action. Mosses v. Kennedy, 219 F Supp 762 (DCDC 1963).

p. 364, n. 74.

National Anti-Vivisection Society v. Federal Communications Commission, 234 F Supp 696 (ND Ill 1964); Bowen v. Culotta, 294 F Supp 183 (ED Va 1968; discharge of government employee paid from nonappropriated funds).

p. 364. *After note 74 add:*

The Supreme Court has held ^{74.15} that the day-to-day operations of the armed forces are best left to the military and that the courts should not play a role in reviewing the exercise of discretionary military decisions. There are, however, certain limitations to such "hands-off" policy, and official military conduct may go so far beyond the limits of what may be considered a rational exercise of discretion as to call for mandamus. ^{74.20}

^{74.15} Orloff v. Willoughby, 345 US 83, 93-94, 97 L Ed 842, 73 S Ct 534.

^{74.20} Nixon v. Secretary of Navy, 422 F2d 934 (CA 2nd, 1970).

Determination that no enlistee who had completed Nuclear Power School would be granted discretionary cancellation of his enlistment extension was not so arbitrary as to require judicial interference. Nixon v. Secretary of Navy, 422 F2d 934 (CA 2nd, 1970).

§ 34.45. — Judicial acts and duties.

p. 364, n. 75.

Mandamus directing disqualification of attorney. Chugach Electric Ass'n v. United States District Court for District of Alaska at Anchorage, 370 F2d 441 (CA 9th, 1966).

p. 365, n. 77.

Mandamus granted to compel district court to dismiss plaintiff's action with prejudice, where district court denied such right upon plaintiff's own motion. Smoot v. Fox, 340 F2d 301 (CA 6th, 1964).

Mandamus as a remedy for the proposed dismissal of an indictment by district judge which was found to be beyond his power. *United States v. Dooling*, 406 F2d 192 (CA 2nd, 1969).

Mandamus was appropriate to compel federal district judge to vacate order insofar as it permitted plaintiffs to inspect and copy certain memoranda disclosure of which was protected by attorney-client privilege. *Harper & Row Publishers, Inc. v. Decker*, 423 F2d 487 (CA 7th, 1970), 13 FR Serv2d 34.42, Case 2.

p. 367, n. 82.

See *Thornton v. Crecran*, 407 F2d 695 (App DC 1969).

p. 367, n. 83.

Hall v. West, 335 F2d 481 (CA 5th, 1964; mandamus to compel district court to act regarding desegregation of schools).

p. 368, n. 84.

See also *Will v. United States*, 339 US 90, 19 L Ed2d 305, 83 S Ct 269.

§ 84.46. — Judicial discretion.

p. 368, n. 85.

Schiff v. Metzner, 331 F2d 963 (CA 2nd, 1964; as to modification of stay order); *Application of Cohn*, 332 F2d 976 (CA 2nd, 1964; denial of petition to compel continuance of retrial or change of venue); *Miller v. Connally*, 354 F2d 206 (CA 5th, 1965; denying petition to compel transfer of criminal proceedings); *Technitrol, Inc. v. McManus*, 405 F2d 84 (CA 8th, 1968; denying petition to compel retransfer of patent case).

See *Jones v. Gasch*, 404 F2d 1231 (App DC 1968; concerning motion for change of venue).

But see *Minnesota Min. & Mfg. Co. v. Platt*, 345 F2d 681 (CA 7th, 1965; mandamus to compel transfer of criminal action under Rule 21(b), Rules Crim Proc).

Where district judge exercised what he thought to be a discretionary power which he did not possess under Bankruptcy Act, mandamus was appropriate. *Securities and Exchange Commission v. Krentzman*, 397 F2d 55 (CA 5th, 1968).

§ 84.48. — Vacation of acts.

p. 369, n. 90.

Any litigant, private individual or public official, is entitled to a writ of mandamus to avoid an appearance to show cause why he should not be held in contempt of court, when the underlying order of the court is clearly erroneous and the refusal to comply with it has been both formal and respectful. *United States v. Hemphill*, 369 F2d 539 (CA 4th, 1966), 10 FR Serv2d 33.333, Case 4.

§ 84.54. — Joinder.

p. 373, n. 9.

See 1966 amendment of Rule 20.

p. 373. *Change text preceding note 10 to read: or persons needed for a just adjudication shall be joined, if feasible.*¹⁰

p. 373, n. 10.

See 1966 amendment of Rule 19.

p. 373. *Delete sentence preceding note 11 and footnote 11.*

§ 84.55. Pleading.

p. 374. *Change last line of section to read: whether based on legal, equitable, or maritime grounds.*^{72.1}

p. 374, n. 21.

See 1966 amendment of Rule 8(e)(2).

§ 84.65a. Writs of mandamus and prohibition directed to a judge or judges and other extraordinary writs.

The Rules of Appellate Procedure provide for writs of mandamus and prohibition directed to a judge or judges, and for other extraordinary writs.^{72.10}

^{72.10} Rule 21, Rules App Proc, effective July 1, 1968.

See also §§ 84.65b-84.65e, post.

§ 84.65b. — Mandamus or prohibition to a judge or judges; petition for writ; service and filing.

Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court.^{72.15} The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition.^{72.20} Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.^{72.25}

^{72.15} Rule 21(a), Rules App Proc, effective July 1, 1968.

^{72.20} Rule 21(a), Rules App Proc, effective July 1, 1968.

^{72.25} Rule 21(a), Rules App Proc, effective July 1, 1968.

§ 84.65c. — Denial of petition; order directing answer.

If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order.^{72.30} The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents

do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted.^{72.35} The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.^{72.40}

^{72.30} Rule 21(b), Rules App Proc, effective July 1, 1968.

Japan Line, Ltd. v. Sabre Shipping Corp., 407 F2d 173 (CA 2nd, 1969, petition for writ of certiorari denied).

^{72.35} Rule 21(b), Rules App Proc, effective July 1, 1968.

^{72.40} Rule 21(b), Rules App Proc, effective July 1, 1968.

§ 84.65d. — Other extraordinary writs.

Application for extraordinary writs other than those provided for in Rules 21(a) and 21(b) of the Rules of Appellate Procedure shall be made by petition filed with the clerk of the court of appeals with proof of service on the parties named as respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in the above cited rules.^{72.45}

^{72.45} Rule 21(c), Rules App Proc, effective July 1, 1968.

Japan Line, Ltd. v. Sabre Shipping Corp., 407 F2d 173 (CA 2nd, 1969; petition for writ of certiorari).

§ 84.65e. — Form of papers; number of copies.

All papers may be typewritten. Three copies shall be filed with the original, but the court may direct that additional copies be furnished.^{72.50}

^{72.50} Rule 21(d), Rules App Proc, effective July 1, 1968.

§ 84.78. Nature and availability of relief.

p. 392, n. 31.

See § 84.65a, ante, as to Rules App Proc, effective July 1, 1968.

CHAPTER 85

§ 85.01. Generally; jurisdiction.

p. 394, n. 7.

Wilder v. Brace, 218 F Supp 860 (D Me 1963; proceedings civil in nature under applicable state law).

§ 85.02. Use and nature of writ.

p. 394. *After note 10 add:* At common law, quo warranto was available to challenge the election of public officials and

§ 84.24. Generally; abolition of writ.

This chapter treats practice and procedure in securing relief formerly available by writs of mandamus. Rule 81(b) of the Rules of Civil Procedure provides that the writ of mandamus is abolished.⁹¹

Since the Rules of Civil Procedure are limited in their application to procedure in the United States district courts by Rule 1, Rule 81(b) does not affect mandamus practice in courts of appeals or in the Supreme Court.

§ 84.25. Relief by action or motion.

While abolishing writs of mandamus, Rule 81(b) also provides that relief heretofore available by mandamus may be obtained by appropriate action or by appropriate motion under the practice prescribed in the Rules of Civil Procedure.⁹² The effect of the Rule is to substitute for the writ a motion or complaint.⁹³

§ 84.26. Immunity of United States.

The United States, through its officers, cannot be compelled to act where consent to an action against it has not been given.⁹⁴ Accordingly, a mandamus proceeding may fail because the United States is the owner of the property involved and cannot be made a party.⁹⁵

⁹¹ *McBride v. Western Union Tel. Co.*, 171 F2d 1; *Kay Ferer, Inc. v. Hulén*, 160 F2d 146; *DeFoe v. Town of Rutherfordton*, 122 F2d 342.

⁹² *Hospoder v. United States*, 209 F2d 427; *Larsen v. Switzer*, 183 F2d 850; *Sound Investment & Realty Co. v. Harper*, 178 F2d 274.

"The remedy which, before adoption of the new Rules of Civil Procedure, was known as mandamus, is available under the new rules and is governed by the same principles as formerly governed its administration." *Hammond v. Hull*, 76 App DC 301, 131 F2d 23.

Substantive rights are governed by principles formerly applied in

Taylor, 169 F2d 626; *George Allison & Co., Inc. v. Interstate Commerce Commission*, 107 F2d 180, 181.

⁹³ *McBride v. Western Union Tel. Co.*, 171 F2d 1.

⁹⁴ *Hospoder v. United States*, 209 F2d 427; *Wilson v. Wilson*, 141 F2d 599; *International Trading Corp. v. Edison*, 109 F2d 825.

Action seeking court order controlling executive officers of government with respect to exercise of powers vested in them by statute was a suit against the government which could not be maintained because government had not consented to be sued in courts with respect thereto. *Updegraff v. Talbott*, 221 F2d 342.

§ 84.27. Immunity of state governor.

Mandamus will not in any case issue to control or review acts of a governor of a state.⁹⁶

§ 84.28. Time to sue.

Proceedings in mandamus should not be prematurely begun, that is, before a duty is matured.⁹⁷ Nor should such proceedings be delayed for an undue length of time.⁹⁸ The proceeding is generally regarded as not embraced within statutes of limitations applicable to ordinary actions, but as subject to the equitable doctrine of laches,⁹⁹ and unexcused delay in instituting the proceeding may defeat it.¹ The facts and circumstances of each case must govern the matter and determine whether the delay is such as to constitute laches.²

B. Jurisdiction

§ 84.29. Generally.

The Supreme Court and all courts established by acts of Congress may issue all writs necessary or appropriate in aid

v. Daniels, 231 US 218, 58 L Ed 191, 34 S Ct 84.

⁹⁶ *Huidekoper v. Hadley*, 177 F 1 (denied as to governor as one member of board of equalization).

Supreme Court has no power to compel governor of state by mandamus to honor requisition from governor of another state for surrender of fugitive criminal. *Kentucky v. Dennison*, 24 How (65 US) 66, 16 L Ed 717.

⁹⁷ *Robertson v. United States ex rel. Baff*, 285 F 911; *United States ex rel. Western U. Tel. Co. v. Interstate Commerce Commission*, 279 F 316.

But action for mandamus may be begun under the Interstate Commerce Act, in advance of action by Interstate Commerce Commission, under some circumstances. *United States v. Munson Steamship Line*, 33 F2d 211, *affd* 37 F2d 681.

⁹⁸ *In re Eastern Cherokees*, 220 US 83, 55 L Ed 379, 31 S Ct 373.

Duty no longer existing, see *International Trading Corp. v. Edison*, 109 F2d 825.

of duty by officer must be filed while he is in office, not after he has resigned. *United States v. Oswald*, 141 F2d 921.

⁹⁹ *United States ex rel. Arant v. Lane*, 249 US 367, 63 L Ed 650, 39 S Ct 293; *United States ex rel. Greylock Mills v. Blair*, 293 F 846.

¹ *United States ex rel. Arant v. Lane*, 249 US 367, 63 L Ed 650, 39 S Ct 293; *In re Eastern Cherokees*, 220 US 83, 55 L Ed 379, 31 S Ct 373; *Lucas v. United States ex rel. Heineman Chemical Co.*, 36 F2d 1015.

Delay in applying for mandamus requiring court to take jurisdiction of cause held not laches, see *In re Hohorst*, 150 US 653, 37 L Ed 1211, 14 S Ct 221.

² *Bunch v. United States*, 252 F 673.

Where wrong sought to be remedied by mandamus is unjust, immoral and amounts in law to fraud, mere delay without acquiescence in wrong does not constitute laches defeating right to mandamus. *Sancho v. Serralles*, 106 F2d 125, 128.

of their respective jurisdictions and agreeable to the usages and principles of law.³ Territorial courts may have jurisdiction in mandamus under statute.⁴

§ 84.30. Of Supreme Court.

The Supreme Court may issue writs of mandamus ancillary to its appellate or original jurisdiction,⁵ since it may issue all writs necessary or appropriate in aid of its jurisdiction.⁶ But it has no general original jurisdiction to issue writs of mandamus,⁷ although it may do so by way of an original

³ 28 USC 1651. See *Bankers Life & Casualty Co. v. Holland*, 346 US 379, 98 L Ed 106, 74 S Ct 145; *United States v. United States District Court of Southern District of West Virginia*, 238 F2d 713.

⁴ Canal Zone Act authorized issuance of mandamus in a proper case by the district court of the Canal Zone. An action for mandamus to compel official of United States to do his plain ministerial duty under laws was not action against United States and was within jurisdiction of federal court of Canal Zone. *Smith v. Jackson*, 241 F 747, affd 246 US 388, 62 L Ed 788, 38 S Ct 353.

Mandamus in district court of Canal Zone, see *Walker v. Chief Quarantine Officer*, 69 F Supp 980.

The case of *Smith v. Jackson*, 241 F 747, affd 246 US 388, 62 L Ed 788, 38 S Ct 353, is distinguished in *Barber v. Hetfield*, 4 F2d 245 because it "arose in the Canal Zone, and the act of Congress defining the jurisdiction of the district courts there differs widely from the Act defining the jurisdiction of district courts generally."

⁵ *Bankers Life & Casualty Co. v. Holland*, 346 US 379, 98 L Ed 106, 74 S Ct 145.

"It is undoubtedly true that, except in cases where, under the Constitution, this court has original jurisdiction, the writ [mandamus] can be issued only in the exercise or in aid of its appellate jurisdiction."

Virginia v. Rives, 100 US 313, 25 L Ed 667.

The writ of mandamus has often been granted by the Supreme Court to compel action by a court of appeals. In *re National Labor Relations Board*, 304 US 486, 82 L Ed 1482, 58 S Ct 1001.

The writ has been directed by the Supreme Court to federal district courts. Ex parte Republic of Peru, 318 US 578, 87 L Ed 1014, 63 S Ct 793; Ex parte Kawato, 317 US 69, 87 L Ed 58, 63 S Ct 115.

⁶ 28 USC 1651. See also Sup Ct Rules 30, 31; *Parr v. United States*, 351 US 513, 100 L Ed 1377, 76 S Ct 912; *Bankers Life & Casualty Co. v. Holland*, 346 US 379, 98 L Ed 106, 74 S Ct 145.

Generally as to jurisdiction of Supreme Court to issue writs, including writ of mandamus, see § 2-61, ante.

⁷ *Marbury v. Madison*, 1 Cranch 137 (5 US), 2 L Ed 60.

The statutory authority of Supreme Court to issue writs of prohibition or mandamus to district courts, with respect to suits brought in district court and not of such character as to be within original jurisdiction of Supreme Court, can be constitutionally exercised only insofar as such writs are in aid of Supreme Court's appellate jurisdiction. Ex parte Republic of Peru, 318 US 578, 87 L Ed 1014, 63 S Ct 793.

proceeding in aid of its appellate or original jurisdiction.⁸ Nor can the Supreme Court issue the writ in aid of an original or appellate jurisdiction that it does not have.⁹

The fact that jurisdiction to issue writs of mandamus is ancillary to appellate jurisdiction does not necessarily preclude the issuance of the writ where there is no present or future appellate jurisdiction to which it can relate.¹⁰ The writ may issue to prevent a lower court from obstructing enforcement of judgments of a higher court.¹¹

§ 84.31. Of courts of appeals.

Courts of appeals can issue writs of mandamus, but only where such writs are necessary or appropriate in aid of their appellate jurisdiction.¹² Such jurisdiction is impliedly provided for by the statute relating to the power of courts established by Congress to issue writs generally.¹³

⁸ Mandamus, by way of an original proceeding in the Supreme Court, is a proper remedy to correct an erroneous district court order abating an action. *Ex parte Kawato*, 317 US 69, 87 L Ed 58, 63 S Ct 115.

⁹ "In cases over which we possess neither original nor appellate jurisdiction, we cannot grant prohibition or mandamus or certiorari as ancillary thereto." *Ex parte Massachusetts*, 197 US 482, 49 L Ed 845, 25 S Ct 512.

¹⁰ *United States v. United States District Court for Southern District of New York*, 334 US 258, 92 L Ed 1351, 68 S Ct 1035.

¹¹ *United States v. United States District Court for Southern District of New York*, 334 US 258, 92 L Ed 1351, 68 S Ct 1035.

¹² *Bankers Life & Casualty Co. v. Holland*, 346 US 379, 98 L Ed 106, 74 S Ct 145; *Fink v. Igoe*, 279 F2d 544; *Black v. Boyd*, 243 F2d 156.

See also *La Buy v. Howes Leather Co., Inc.*, 352 US 249, 1 L Ed2d 290, 77 S Ct 309 (power of court of appeals to issue writs of mandamus to review interlocutory orders of district court in civil antitrust

case); *United States v. United States District Court for Southern District of New York*, 334 US 258, 92 L Ed 1351, 68 S Ct 1035 (mandamus to keep lower court from interposing unauthorized obstructions to enforcement of higher court's judgment); *State of Ohio ex rel. Plummer v. Court of Common Pleas, Jackson County, Ohio*, 205 F2d 677 (mandamus not issuable by court of appeals to secure records of state court for review of its judgment in criminal case); *Beneficial Industrial Loan Corp. v. Smith*, 170 F2d 44 (construing 28 USC 1651) *affd* 337 US 541, 93 L Ed 1528, 69 S Ct 1221 (jurisdiction of court of appeals to issue mandamus requiring official district court reporter to perform his duty); *United States v. Metzger*, 133 F2d 82.

Jurisdiction has been conferred on the federal appellate courts, such as the courts of appeals, to issue writs of mandamus, to enforce certain specific acts or duties and to protect or effectuate their own jurisdiction. *Sound Investment & Realty Co. v. Harper*, 178 F2d 274.

¹³ 28 USC 1651. See *La Buy v. Howes Leather Co., Inc.*, 352 US 249, 1 L Ed2d 290, 77 S Ct 309; *Bank*

§ 84.32. Of district courts.

District courts have jurisdiction in a proper case to grant relief formerly granted by writs of mandamus.¹⁴ But such relief cannot be granted, although otherwise proper, where it would constitute unauthorized exertion of judicial power outside of the state and district.¹⁵ Formerly, mandamus relief against federal officials was ordinarily obtainable only in the District Court for the District of Columbia,¹⁶ but such relief may now be obtainable in other judicial districts by virtue of 1962 amendments to the Judicial Code.¹⁷

§ 84.33. — Ancillary jurisdiction.

District courts have ancillary jurisdiction of proceedings in the nature of mandamus and in aid of their original jurisdiction in cases before them.¹⁸ By statute¹⁹ they are empowered to issue writs necessary or appropriate in aid of their jurisdiction and agreeable to the usages and principles of law.²⁰

ers Life & Casualty Co. v. Holland, 346 US 379, 98 L Ed 106, 74 S Ct 145.

Jurisdiction of court of appeals is exclusively appellate, and its jurisdiction to issue writ of mandamus under 28 USC 1651(a) is restricted to those cases in which the writ is in aid of that jurisdiction. *Hullom v. Ziel*, 266 F2d 546.

Authority of court of appeals under 28 USC 1651 to issue extraordinary writs, including mandamus, extends to cases within court's appellate jurisdiction even though no appeal has been perfected, although such writs should be issued only under unique and compelling circumstances. *Anderson v. McLaughlin*, 266 F2d 723.

¹⁴ Rules Civ Proc, Rule 81(b) in effect recognizes this jurisdiction. See also *Hertz v. Record Pub. Co. of Erie*, 105 F Supp 200.

District court does not have general original jurisdiction in cases of mandamus. *Marshall v. Crotty*, 185 F2d 622.

¹⁵ *People ex rel. Van Dyke v. Colorado Cent. R. Co.*, 42 F 633.

¹⁶ *United States v. White County Bridge Commission*, 275 F2d 529;

Updegraff v. Talbott, 221 F2d 342. See §§ 84.35, 84.50, post, and § 4.11, ante.

¹⁷ 28 USC 1361, 1391(c), added by Act of Oct 5, 1962, PL 87-748, 76 Stat 744.

¹⁸ *Hertz v. Record Pub. Co. of Erie*, 219 F2d 397; *Huddleston v. Dwyer*, 145 F2d 311; *Howell v. Brown*, 85 F Supp 537.

Mandamus issues out of a federal district court for purpose of protecting its jurisdiction—for assisting in carrying into execution its decree. *Johnson v. Thomas*, 16 F Supp 1013, 1017.

"Mandamus is an ancillary remedy available after the right has ripened into a demand. An action to adjudicate the existence of the right is a necessary step." *Dwyer v. Le Flore County, Okla.*, 97 F2d 823.

¹⁹ 28 USC 1651.

Statute does not authorize issuance of writ sought not in aid of appellate jurisdiction, but in unwarranted anticipation thereof. *American Airlines, Inc. v. Forman*, 204 F 2d 230.

²⁰ *Marshall v. Crotty*, 88 F Supp 30; *Money v. Wallin*, 88 F Supp

§ 84.34. — Original jurisdiction.

The federal district courts have been expressly granted original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff,²¹ and such actions are not limited to the District of Columbia.²²

Except as conferred by special federal statutes,²³ federal district courts have no general original jurisdiction in mandamus proceedings.²⁴ This is true even where the relief sought concerns an alleged right secured by the United States Constitution.²⁵ Moreover, the courts generally have refused to make any distinction in this matter between the issuance of an order in the nature of mandamus to a public officer and one to a private person or a corporation and its officers.²⁶ General original jurisdiction in mandamus is not conferred by the statutory endowment of original jurisdiction on the district courts.²⁷ Nor is such jurisdiction con-

980; *Stevens v. Brookhaven Municipal Separate School Dist.*, 5 F Supp 629.

²¹ 28 USC 1361, added by Act of Oct 5, 1962, PL 87-748, 76 Stat 744.

²² 28 USC 1391(e), added by Act of Oct 5, 1962, PL 87-748, 76 Stat 744.

²³ See § 84.36, post.

²⁴ *Covington & Cincinnati Bridge Co. v. Hager*, 203 US 109, 51 L Ed 111, 27 S Ct 24; *Biggs v. Ward*, 212 F2d 209.

See also *Longview Tugboat Co. v. Jameson*, 218 F2d 547 (no original jurisdiction to grant order requiring Collector of Customs to issue license or other document); *Ballf v. Kranz*, 82 F2d 315 (petition for mandamus dismissed for want of jurisdiction); *Grier v. Kenan*, 64 F2d 605, 608 (mandamus to United States Commissioner to obtain release of poor convict after imprisonment); *Dick v. Tevlin*, 37 F Supp 836 (dismissal of mandamus to compel Selective Service Board to correct selectee's date of birth); *United States v. Rollnick*, 33 F Supp 863 (mandamus not maintainable against Federal Board); *John-*

son v. Thomas, 16 F Supp 1013, 1017 (refusal of mandamus to compel collector of internal revenue to impress lien for taxes); *Crites v. Hill*, 9 F Supp 975 (denying mandamus to compel warden to change penitentiary records relating to petitioner's sentence).

There was absence of original jurisdiction to grant mandamus, or any relief in nature of mandamus, in any district court of United States outside the District of Columbia. *Deglau v. Franke*, 184 F Supp 225; *Green v. United States*, 283 F2d 687.

That mandamus could not issue in federal district court unless necessary for exercise of its independently conferred jurisdiction, see *Sleeth v. Dairy Products Co. of Uniontown*, 228 F2d 165.

²⁵ *Covington & Cincinnati Bridge Co. v. Hager*, 203 US 109, 51 L Ed 111, 27 S Ct 24.

²⁶ *Newark Morning Ledger Co. v. Republican Co.*, 188 F Supp 813; *Johnson v. Interstate Power Co.*, 187 F Supp 36 (order directed against public utility not within court's original jurisdiction).

²⁷ See *Sleeth v. Dairy Products*

ferred on the district courts by the Declaratory Judgment Act.²⁸

§ 84.35. — Of District Court for District of Columbia.

In a proper case, the United States District Court for the District of Columbia has authority to issue mandamus or grant relief in the nature of mandamus in cases in which the parties are by the common law entitled thereto.²⁹ In this respect the court stands on a different footing from other federal district courts, which have no such general original jurisdiction.³⁰

§ 84.36. — Under special statutes in particular matters.

The only original jurisdiction in district courts of the United States to grant mandamus relief is that conferred by special federal statutes,³¹ of which there are several.³²

Co. of Uniontown, 228 F2d 165; Chick v. Prosecuting Attorney, 142 F Supp 314.

Requested order in diversity action by minority stockholder to compel corporation to permit stockholder to examine books of account and records was one in nature of mandamus not within court's power to issue. Newark Morning Ledger Co. v. Republican Co., 188 F Supp 813.

²⁸ Longview Tugboat Co. v. Jameson, 218 F2d 547; Deglau v. Franke, 184 F Supp 225.

²⁹ United States ex rel. McBride v. Schurtz, 102 US 378, 393, 394, 26 L Ed 167; Decatur v. Paulding, 14 Pet (39 US) 497, 599, 10 L Ed 559, 609. See also United States ex rel. Humboldt Steamship Co. v. Interstate Commerce Commission, 37 App DC 266, 275, affd 244 US 474, 56 L Ed 849, 32 S Ct 556.

Venue, see § 4.11, ante, and § 84.50, post.

³⁰ Jurisdiction of other federal district courts to grant writs of mandamus must be distinguished from jurisdiction of United States District Court for District of Columbia, which is clothed with common-law powers of courts of general jurisdiction of state of Maryland. Updegraff v. Talbott, 221 F2d 342.

The District Court of the District of Columbia, unlike the other district courts, "is not one of limited jurisdiction, since it falls heir to the common law jurisdiction of the courts of Maryland," and therefore "judicial decision has placed no fetters on the power of that court to issue writs of mandamus." 38 Columbia L Rev 903, 905.

Practice in District Court in District of Columbia distinguished. Petrowski v. Nutt, 161 F2d 938.

Original jurisdiction of district courts in action in nature of mandamus against officer, employee or agency of United States, see § 84.34, ante.

³¹ Platek v. Aderhold, 73 F2d 173; Mille v. McManigal, 69 F2d 644; New York Technical Institute of Maryland v. Limburg, 87 F Supp 308; Palmer v. Walsh, 78 F Supp 64.

Unless specifically authorized by a federal statute, a right under the Constitution or laws of the United States cannot be enforced by an original action in the nature of mandamus in a federal district court. In re Higdon, 269 F 150.

An 1873 statute conferred power on circuit courts (now district courts) to hear and determine all

C. Nature and Availability of Relief

§ 84.37. Generally.

The remedy by mandamus is essentially and exclusively a legal remedy and is unknown to courts of equity.³³ How-

cases of mandamus to compel the Union Pacific Railroad Company to operate its road as required by law. 45 USC 88. See *Union Pacific R. Co. v. Hall*, 91 US 343, 23 L Ed 423.

³² Interstate Commerce Act, 49 USC 16(12), 19a(1), 20(9), 23. See *United States ex rel. Kansas City Southern Ry. Co. v. Interstate Commerce Commission*, 18 F Supp 94, affd 93 F2d 268.

If Interstate Commerce Commission has made finding of reparation and has declined to order payment, mandamus is available to compel payment, since statute makes commission's duty mandatory. *George Allison & Co. v. Interstate Commerce Commission*, 70 App DC 375, 107 F2d 180.

Mandamus is appropriate to compel carrier to transport commodity at rate prescribed by Interstate Commerce Commission. *Texas & Pac. Ry. Co. v. Sonken-Galamba Corp.*, 100 F2d 158; *Macon, D. & S. R. Co. v. General Reduction Co.*, 44 F2d 499.

Mandamus to compel carriers to furnish equal facilities for shippers, see *Rex Coal Co. v. Cleveland, C. & St. L. Ry. Co.*, 9 F Supp 179; *United States v. Missouri-Kansas-Texas R. Co.*, 21 F Supp 931, affd 93 F2d 457.

Packers' and Stockyards Act (7 USC 216) gives power to enforce order of Secretary of Agriculture by injunction "or any other proper process, mandatory or otherwise."

Communications Act, 47 USC 401(a), 406. See *McBride v. Western Union Tel. Co.*, 171 F2d 1. Power Act, 16 USC 820, 825m(b). Public Utility Holding Company Act, 15 USC 79r(g)

Railway Labor Act, 45 USC 153 (p). When appropriate, district court may by order direct the National Railroad Adjustment Board to hear a dispute between an employee and his employer, though writ of mandamus has been abolished. *Patterson v. Chicago & Eastern Illinois R. Co.*, 50 F Supp 334.

Securities Act, 15 USC 77t(c). Securities Exchange Act, 15 USC 78u(f).

Trade Commission Act, 15 USC 49. Statute did not give district court jurisdiction over orders of commission denying motions to dismiss proceedings before hearing. *Chamber of Commerce of Minneapolis v. Federal Trade Commission of United States*, 280 F 45. Petition to compel production of records for inspection, see *Federal Trade Commission v. American Tobacco Co.*, 264 US 298, 68 L Ed 696, 44 S Ct 336, 32 ALR 786.

Mandamus in district court is expressly authorized by 1940 statute relating to the alteration or removal of bridges which unreasonably obstruct free navigation of any navigable waters of the United States. 33 USC 495, 519.

Original jurisdiction of actions in nature of mandamus to compel officer, employee or agency of United States to perform a duty owing to plaintiff, see 28 USC 1361 and 1391(e), added by Act of Oct 5, 1962, PL 87-748, 76 Stat 744.

³³ *Doehler Metal Furniture Co. v. Warren*, 76 App DC 60, 129 F2d 43; *Denver-Greeley Valley Irr. Dist. v. McNeil*, 106 F2d 288, 292.

The remedy is not within equity jurisdiction. *White v. County Democratic Executive Committee of Harris County*, 60 F2d 973; *First Nat.*

ever, relief in the nature of mandamus may be granted in an action for equitable relief where necessary to final determination of all matters involved in the action.³⁴ Moreover, in a proper case an action for equitable relief may be brought in aid of an action for a mandamus.³⁵

The remedy of mandamus in the United States courts ordinarily is ancillary.³⁶

§ 84.38. As within discretion of court.

A proceeding for mandamus relief is a remedial process which is awarded, not as a matter of right, but in the exercise of sound judicial discretion³⁷ upon equitable principles³⁸ to prevent injustice.³⁹ The court should be slow in granting the relief.⁴⁰

Bank of Woodbine, Iowa v. Harrison County, Iowa, 57 F2d 56.

³⁴ Hidalgo County Road Dist. No. 1 v. Morey, 74 F2d 101, 104.

³⁵ City of Wheeling v. John F. Casey Co., 85 F2d 922, 924.

³⁶ United States ex rel. Vassel v. Durning, 152 F2d 455; Denver-Greeley Valley Irr. Dist. v. McNeil, 106 F2d 288, 292.

³⁷ Whitehouse v. Illinois Cent. R. Co., 349 US 366, 99 L Ed 1155, 75 S Ct 845; General Cas. Co. of America v. Grubb, 253 F2d 51.

In the district court for the District of Columbia allowance of mandamus is a matter of sound judicial discretion. United States ex rel. Arant v. Lane, 249 US 367, 371, 63 L Ed 650, 39 S Ct 293.

³⁸ Whitehouse v. Illinois Cent. R. Co., 349 US 366, 99 L Ed 1155, 75 S Ct 845; United States ex rel. Girard Trust Co. v. Helvering, 301 US 540, 81 L Ed 1272, 57 S Ct 855; United States ex rel. Greathouse v. Dern, 289 US 352, 359, 77 L Ed 1250, 53 S Ct 614.

³⁹ It must appear that without issuance of the writ there will be a miscarriage of justice. Hvass v. Graven, 257 F2d 1; Bankers Life & Casualty Co. v. Holland, 346 US 379, 98 L Ed 106, 74 S Ct 145.

The rule that allowance of mandamus is governed by equitable principles does not mean that all rules of equity are imported into mandamus proceedings, but merely that mandamus issues to prevent, not to promote, injustice. Drainage Dist. No. 4 of Dunklin County, Mo. v. Murphy, 119 F2d 390, 393.

⁴⁰ Borak v. Biddle, 141 F2d 278.

Issuance by Supreme Court of any writ authorized by 28 USC 1651(a), including mandamus, is not a matter of right but of sound discretion sparingly exercised. Sup Ct Rule 30; Parr v. United States, 351 US 513, 100 L Ed 1377, 76 S Ct 912.

Power of court of appeals to issue writ of mandamus under all-writs statute (28 USC 1651) is discretionary and sparingly exercised, and use of the writ against a district judge is a drastic and extraordinary remedy which should be used only in an exceptional case where there is clear abuse of discretion. Bankers Life & Casualty Co. v. Holland, 346 US 379, 98 L Ed 106, 74 S Ct 145; La Buy v. Howes Leather Co., Inc., 352 US 249, 1 L Ed2d 290, 77 S Ct 309; Prater v. Boyd, 263 F2d 788; Ackert v. Bryan, 299 F2d 65.

Mandamus may be granted or withheld in sound discretion of an

§ 84.39. Effect of other adequate remedy.

Mandamus is not ordinarily granted where the party aggrieved has another adequate remedy,⁴¹ which has not been exhausted,⁴² such as by appeal,⁴³ by habeas corpus,⁴⁴ by administrative procedure⁴⁵ or by judicial review of an ad-

appellate court, but appellate courts are reluctant to interfere with decision of a lower court on jurisdictional questions that lower court is competent to decide and that are reviewable on appeal. *Roche v. Evaporated Milk Ass'n*, 319 US 21, 87 L Ed 1185, 63 S Ct 938.

"True, this court always is reluctant to award or sustain a writ of mandamus against an executive officer, and yet cases sometimes arise when it is constrained by settled principles of law and the exigency of the particular situation to do so." *Lane v. Hoglund*, 244 US 174, 61 L Ed 1066, 37 S Ct 558.

⁴¹ *Ex parte Republic of Peru*, 218 US 578, 87 L Ed 1014, 63 S Ct 793; *United States ex rel. Girard Trust Co. v. Helvering*, 301 US 540, 81 L Ed 1272, 57 S Ct 855; *In re Mut. Life Ins. Co. of New York*, 188 F2d 424.

The existence of an equitable remedy is to be considered as an element in the discretion exercisable as to issuance of mandamus. *Armour & Co. v. Miller*, 91 F2d 521, 525.

Remedy was denied despite probability that pending suits in admiralty might fail to state cause of action within admiralty jurisdiction. *United States v. Byers*, 144 F2d 455.

⁴² Where no appeal was ever taken from a conviction, mandamus would not issue in aid of a habeas corpus proceeding to compel stenographer who took testimony to furnish at his own expense or at expense of United States a transcript of the testimony, even though applicant was a poor person entitled to appeal in forma pauperis. *Unit-*

ed States ex rel. McNeil v. Avis, 108 F2d 457.

If district judge, after decision upon a petition for mandamus which was refused because it was deemed by the court of appeals to be unnecessary, proceeded in accordance therewith, and an affidavit of personal bias and prejudice was presented which he determined to be out of time and not in good faith but nevertheless certified to the senior circuit judge, mandamus against further proceeding in the case would be denied. *In re Equitable Trust Co. of New York*, 232 F 836.

⁴³ *La Buy v. Howes Leather Co., Inc.*, 352 US 249, 1 L Ed2d 290, 77 S Ct 309; *Bankers Life & Casualty Co. v. Holland*, 346 US 379, 98 L Ed 106, 74 S Ct 145; *CMAX, Inc. v. Hall*, 290 F2d 736; *Regee v. Thornton*, 275 F2d 801.

The Interlocutory Appeals Act of 1958 (28 USC 1292(b)) may afford an adequate remedy by appeal where a controlling question of law is involved as to which there is substantial ground for difference of opinion, so as to preclude mandamus or prohibition. See *Ex parte Deepwater Exploration Co.*, 260 F 2d 546; *Ex parte Watkins*, 260 F 2d 548; *Allstate Ins. Co. v. United States Dist. Court for Eastern District of Michigan*, 264 F2d 38.

⁴⁴ *Taylor v. United States Board of Parole*, 90 App DC 199, 194 F 2d 882.

See also *McMurtrey v. Clark*, 81 App DC 294, 157 F2d 703.

⁴⁵ *Bolger v. Marshall*, 90 App DC 30, 193 F2d 37.

See also *McBride v. Western Un-*