The Frontiers of the Federal Mandamus Statute

Bruce Comly French
THE FRONTIERS OF THE FEDERAL MANDAMUS STATUTE

Bruce Comly French†

I. Introduction

IN LIGHT OF THE MODERN DAY ADVENT of the federal administrative state, access to the federal courts for review of federal administrative action is of crucial importance to a panoply of potential individual plaintiffs. Unfortunately, there are gaps in the present law of federal jurisdiction, and obtaining review of the actions of federal officials can be very difficult, if not impossible, in a shockingly wide range of circumstances.

In many instances, a plaintiff will seek to compel a federal officer to perform a particular act within his or her official capacity, contending that the federal officer is legally obligated to so perform. Initially, for a federal court to entertain such a suit, it must have the requisite power. Since federal courts are special courts of limited jurisdiction, this power is derived solely from congressional grants of jurisdiction. Accordingly, there are several potential avenues by which jurisdiction may be obtained in these instances: 1) “statutory” review; 2) the general federal question provisions of section 1331(a).


4. See notes 9–12 and accompanying text infra.
of title 28 of the United States Code (section 1331); 5 3) section 10 of the Administrative Procedure Act (APA); 6 and 4) the Federal Mandamus and Venue Act of 1962 (section 1361). 7 Where statutory judicial review is not available, plaintiffs have shown a general tendency to assert the latter three bases of jurisdiction and, as will be shown, any one or a combination of these sources of "nonstatutory" 8 review may be applicable in a given case. This article focuses upon section 1361 and explains how an expansive reading of this provision makes it a superior vehicle for entry into federal court in a suit to compel performance by a federal officer. Initially, however, a brief introductory glimpse of the remaining potential bases for jurisdiction, and their infirmities, is appropriate.

The first, and least complicated, jurisdictional basis for judicial review of federal administrative action is statutory review, wherein the regulatory statute establishing the particular federal agency or unit authorizes the federal courts to review administrative determinations, decisions, and orders which "adversely affect" or "aggrieve" a person. 9 Where this review is available, the jurisdictional hurdles which a plaintiff faces are relatively minimal: generally, the action of the administrative agency must constitute an "order" or be "final," 10 the plaintiff must be a "person aggrieved" due to the administrative action, 11 and the plaintiff must have exhausted all of the available administrative remedies. 12

Where statutory judicial review is not available, a plaintiff may resort to several forms of nonstatutory judicial review. Section 1331 confers upon the federal courts jurisdiction over cases which "arise under the Constitution, laws or treaties of the United States." 13 If this were the only requirement, a suit to compel a federal officer

5. 28 U.S.C. § 1331(a) (1970); see notes 222-26 and accompanying text infra.
6. 5 U.S.C. §§ 701 et seq. (1970); see notes 185-99 and accompanying text infra.
8. The term "nonstatutory" has been said to include those proceedings which, without the assistance of a specific or general statutory review provision, are brought against government officers to review their action or inaction on the ground that the legal rights of the plaintiff have allegedly been violated.


Where the statute creating a federal agency and governing its operation does not provide specific procedures for review of that agency's determinations, nonstatutory review may still be available. Ortego v. Weinberger, 516 F.2d 1005 (5th Cir. 1975).

11. Id.
to perform a function allegedly mandated by a federal statute or the Constitution would present no jurisdictional obstacles. However, section 1331 also requires that an amount greater than $10,000 be alleged and, if challenged by the defendant, established as the "amount in controversy." In this context, plaintiff's task is framed as one of placing a monetary value on the performance of a particular function by a federal officer. In many instances this performance is allegedly required by constitutional principles and would therefore require a federal court's assessment of the value of a constitutional right. Even where the asserted right is statutory, the necessity of evaluation obviously presents formidable difficulties, as is reflected by the confused state of the federal case law on this issue.

A textual reading of the judicial review provisions of the APA suggests that Congress did not intend the APA to serve as an independent source of federal jurisdiction, but rather as a regulatory scheme of judicial review of administrative action where there is a preexisting basis of jurisdiction. The circuit courts have disagreed on this issue, however, a slight majority of the circuits holding that the APA is a jurisdiction-conferring provision. This split among the circuits has apparently resulted from conflicting policies since the resolution of the question must be based upon policy considerations. The policies in conflict are the general hesitancy of the federal courts to expand their jurisdiction by interpretation versus the general presumption of the reviewability of administrative action. Consequently, under this form of nonstatutory review, plaintiff's greatest obstacle is obtaining venue in a circuit amenable to an assertion of jurisdiction under the APA. The courts in these circuits would be almost certain to find jurisdiction over suits to compel performance by a federal officer, provided the official's action can be attributed to an agency. However, even though jurisdiction may be established,

16. See id.
18. See notes 191 & 192 and accompanying text infra.
19. See, e.g., Byse & Fiocca, supra note 1, at 326-31; Project, supra note 2, at 231.
20. Project, supra note 2, at 231.
22. See, e.g., Cappadora v. Celebrezze, 356 F.2d 1 (2d Cir. 1966); McEachern v. United States, 321 F.2d 31 (4th Cir. 1963).
the question remains, as with section 1331, whether mandatory injunctive relief can be afforded as under section 1361.

It is clear that section 1361 is an independent jurisdictional grant, and since it is one of the "special" federal question provisions, a suit based upon this section requires no allegation of the amount in controversy. 23 Since it is also clear that section 1361 was designed specifically to confer district court jurisdiction over suits to compel conduct by federal officers, 24 it is important to delineate its nature and scope. Because the section refers to suits "in the nature of mandamus," federal courts, in attempting to establish the parameters of section 1361, have tended to adhere to the common law of mandamus and to the mandamus tradition as established by the federal courts of the District of Columbia prior to 1962. 25 Frequently, this reliance upon arguably outdated mandamus principles has led to the dismissal of suits against federal officers for lack of subject matter jurisdiction. 26

Thus, in many instances, a plaintiff seeking to compel performance by a federal officer may be precluded from access to the federal courts despite the assertion of three bases of federal jurisdiction. The fundamental contention of this article is that Congress, through section 1361, intended to open the doors of the federal courts to suits against federal officers: section 1361 was designed to fulfill the need for a widely available jurisdictional basis to obtain affirmative relief against federal officials, and to close interstices in federal jurisdiction. Only its creative interpretation by the federal courts will transform section 1361 into an effective device to assure minimal compliance by federal officers with statutory mandates and constitutional requirements.

To understand the present and potential nature and scope of section 1361, a brief sketch of the development of the common law writ of mandamus, particularly in the District of Columbia federal courts, is necessary.

II. HISTORY OF THE WRIT OF MANDAMUS

The writ of mandamus was developed by the English law courts as a broad remedial measure by which parties could be compelled to perform in a certain manner. The English judiciary used the writ creatively in situations where no other remedy was available. By

24. See note 55 and accompanying text infra.
25. See notes 56-58 and accompanying text infra.
1762, on the eve of the American Revolution, its use was widespread\(^\text{27}\) and a court could state with authority:

Where there is a right to execute an office, perform a service, or exercise a franchise; (more especially, if it be in a matter of public concern, or attended with profit;) and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy; this Court ought to assist by a mandamus; upon reasons of justice . . . and upon reasons of public policy, to preserve peace, order, and good government.\(^\text{28}\)

State courts in America adopted the English common law view of mandamus, but in the federal courts the issuance of a writ became intertwined with basic questions of separation of powers and federal court jurisdiction.\(^\text{29}\) In 1803, in *Marbury v. Madison*,\(^\text{30}\) the historic confrontation between the branches of the United States Government, the Supreme Court held that it lacked original jurisdiction to grant a writ of mandamus.\(^\text{31}\) Although Congress, through the Judiciary Act of 1789,\(^\text{32}\) had attempted to grant such jurisdiction, the Supreme Court concluded that its original jurisdiction was defined by the Constitution and could not be expanded by legislative action.\(^\text{33}\) Ten years later, the Court held that lower federal courts, similarly limited by the Constitution, also lacked original jurisdiction to issue writs of mandamus.\(^\text{34}\) In 1838, however, unlike other federal courts, the

---

28. Rex v. Barker, 97 Eng. Rep. 823, 824 (K.B. 1762). The court in *Barker*, after investigating the possibility of other remedial action, ordered that a Presbyterian minister be restored to his former post after he had been wrongfully ousted as leader of a congregation. *Id.* at 826. For other early English cases involving requests for writs of mandamus, see *The Case of Cardiffe Bridge*, 91 Eng. Rep. 135 (K.B. 1700); *James Bagg's Case*, 77 Eng. Rep. 1271 (K.B. 1615).
30. *Id.* In *Marbury*, the plaintiff sought a writ of mandamus from the Supreme Court to compel the newly inaugurated President Jefferson and his Secretary of State, James Madison, to deliver a commission as justice of the peace, conferred upon the plaintiff by President Adams in the last hours of Adams' presidency. *Id.*
31. *Id.* at 175–76.
33. 5 U.S. at 175–76. Mandamus was available, however, to bolster already existing appellate jurisdiction. *Id.* at 175. *See also* Chandler v. Judicial Council, 398 U.S. 74, 80 n.8 (1970); *In re Massachusetts*, 197 U.S. 482 (1905); *Ex parte Warmouth*, 84 U.S. (17 Wall.) 64 (1872) (the Supreme Court has no power to issue a writ of prohibition to a circuit court of the United States until that court issues an opinion); *H. Hart & H. Wechsler, The Federal Courts and the Federal System* 290–300 (2d ed. 1973) [hereinafter cited as *Hart & Wechsler*].
34. M'Intire v. Wood, 11 U.S. (7 Cranch.) 504 (1813). In *M'Intire*, the circuit court in Ohio had been asked to issue a writ of mandamus to the "register" of the federal land office in Ohio directing him to deliver to plaintiff a certificate for the purchase of land. The Supreme Court held that the power of the circuit courts to
Court of Appeals for the District of Columbia Circuit was determined to be a court of general, not limited, jurisdiction with the authority to issue original writs of mandamus. The development of federal mandamus law was thus confined to cases originating in the District of Columbia courts until the passage of the Mandamus and Venue Act more than a century later.

Two early Supreme Court cases defined the parameters of federal mandamus law. Mandamus could issue "to enforce the performance of a mere ministerial act" by an official, but it could not be used to "guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties." Issue the writ of mandamus was "confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction." Id. at 506.

In a later action, M'Intire sought the writ from a state court in Ohio. The Supreme Court of the United States again held that mandamus was not available in a state court against a federal officer. McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821). See also Ex parte Shockley, 17 F.2d 133 (N.D. Ohio 1926); Fischer v. Davidsital, 9 F. 145 (E.D. Pa. 1881); Hinkle v. Town of Franklin, 118 W. Va. 585, 191 S.E. 291 (1937); Arnold, The Power of State Courts to Enjoin Federal Officers, 73 Yale L.J. 1385 (1964).


In Kendall, the plaintiff and his business partner had received a contract to deliver goods for the Postal Department. Subsequently, a new Postmaster General found the contract disagreeable and refused to honor it, even after a special act had been passed by Congress to resolve the dispute (Act of July 2, 1836, 6 Stat. 665). Upon the plaintiff's filing of a petition for a writ of mandamus, the Circuit Court for the District of Columbia held that mandamus should issue since no other remedy was available to satisfy the obligation owed to the plaintiff. United States ex rel. Stokes v. Kendall, 26 F. Cas. 702 (No. 15,517) (D.C. Cir. 1837), aff'd, 37 U.S. (12 Pet.) 524 (1838). The Supreme Court affirmed the issuance of the writ, holding that the District of Columbia court had been created on land dedicated by the state of Maryland for that purpose, and thus inherited that state's common law jurisdiction, which included original mandamus jurisdiction. Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 614, 626 (1838).

36. See notes 51–53 and accompanying text infra.


38. Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515 (1840). In Decatur, the Supreme Court affirmed the refusal of the lower court to issue a writ of mandamus compelling the Secretary of the Navy to award the plaintiff both a general widow's pension fund and money allegedly due her under a congressional resolution. Id. at 517. The Secretary's decision rested upon policy matters — the condition of pension funds and the proper apportionment of available funds among the claimants — and was clearly an exercise of discretion. Id. In resolving the merits against the petitioner, the Court noted:

The first question . . . is whether the duty imposed . . . was a mere ministerial act.

The duty required . . . was to be performed by [the Secretary] as the head of one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties . . . are not mere ministerial duties. The head of an executive department of the government . . . is continually required to exercise judgment and discretion.

[The Court cannot,] by mandamus, act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties. Id. at 514–15.
This rigid distinction between ministerial duties, which could be compelled by mandamus, and discretionary actions, which could not be compelled, controlled the issuance of writs of mandamus until the 20th century. Although the ministerial-discretionary distinction has yet to be abandoned completely by the courts, the rapid growth of the federal bureaucracy encouraged the judiciary to broaden its conception of the proper scope for mandamus actions. In Roberts v. United States, the Supreme Court ruled that the mere fact that an official needed to construe a statute in determining his duty "[did] not necessarily and in all cases make the duty . . . anything other than a purely ministerial one." Indeed, even a discretionary act could be compelled, according to dicta in two subsequent Supreme Court cases, if the official had transgressed existing statutory limits on his discretion or had refused entirely to act, in which case mandamus could be used "to compel action . . . but not to direct the exercise of judgment or discretion in a particular way . . . ."

In some cases brought against federal officials in the District of Columbia courts during the decade preceding the enactment of section 1361, the courts appear to have found authority under the umbrella of mandamus for both close scrutiny of any statute under which a defendant-official operated and the fashioning of appropriate, if novel, affirmative relief to aid the plaintiff. In McKay v. Wahlenmaier, an action brought against the Secretary of Interior, the court,

39. It has been said that
[t]he Kendall and Decatur cases fixed a doctrinal pattern, congenial to the intellectual climate of the time, under which judicial control of executive action was confined within close limits during the bulk of the nineteenth century, until the expansion of executive and administrative powers began to force the development of new techniques of control and the reexamination of older attitudes. Hart & Wechsler, supra note 33, at 1381. See also Lee, The Origins of Judicial Control of Federal Executive Action, 36 Geo. L.J. 287 (1948). For an early discussion of the confusion surrounding the ministerial-discretionary distinction, see Patterson, Ministerial and Discretionary Official Acts, 20 Mich. L. Rev. 848 (1922).
40. See notes 70-73 and accompanying text infra.
41. 176 U.S. 221 (1900). In Roberts, the Supreme Court, affirming the lower court's issuance of a writ to the Secretary of the Treasury, found mandamus appropriate to compel the Secretary to pay interest on certificates that had been unlawfully detained by a federal agent. Id. at 222, 230-31.
42. Id. at 231.
43. Work v. Rives, 267 U.S. 175, 177 (1924). However, the Court stated that mandamus was not available if this statutory discretion included the final interpretation of a particular statute. Id.
45. E.g., Elmo Div. of Drive-X Co. v. Dixon, 348 F.2d 342 (D.C. Cir. 1965); see Byse & Fiocca, supra note 1, at 318. In that article, the authors state that the District of Columbia courts, in cases brought against federal officials in which affirmative relief is requested, have focused upon the substantive issues involved and "have for the most part avoided reliance on the much criticized ministerial-discretionary distinction." Id.
46. 226 F.2d 35 (D.C. Cir. 1955).
although speaking in terms of the traditional ministerial-discretionary distinction, refused to defer to the Secretary's interpretation of a statute under which he had power to issue oil and gas leases on public lands. Rather, the court examined the statute and its accompanying regulations in detail and concluded that the Secretary had wronged the plaintiff by awarding the lease to an unqualified applicant. Moreover, the court, in an action described by the dissenting judge as "entirely unprecedented," ordered the Secretary not only to cancel the existing lease but also to award the lease to the plaintiff.

Thus, even at the time section 1361 was enacted, authority could be found in existing federal cases to support the use of mandamus to compel an official to perform a ministerial duty, to initiate discretionary acts which he was obligated to perform, to remain within statutory limits imposed upon his discretion, and to correct a wrong suffered by a plaintiff as a result of his improper action.

III. Evolution of Mandamus Under Section 1361

Although prior to 1962 the common law writ of mandamus had been available solely in the federal courts of the District of Columbia, enactment of the Mandamus and Venue Act of 1962 (section 1361) made the writ a readily available device for challenging official conduct of federal officers and employees in all federal courts. Section 1361 provides:

The district courts shall have 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.

While the enactment of section 1361 made judicial review of federal administrative action more accessible to those seeking relief

---

47. *Id.* at 48 (Washington, J., dissenting).
48. *Id.* at 47. See also Chambers v. Robertson, 183 F.2d 144 (D.C. Cir. 1950), rev'd, 341 U.S. 37 (1951), in which the court, in finding mandamus available, refused to accept an official's determination of his statutory duty. *Id.* at 48. Although the Supreme Court reversed this decision upon appeal because the Court disagreed with the circuit court's construction of the statute, it did not criticize the lower court's refusal to accept the official's view of a statute which was clearly open to differing interpretations. Robertson v. Chambers, 341 U.S. 37 (1951).
49. See notes 43 & 44 and accompanying text *supra.*
50. See notes 45–48 and accompanying text *supra.*
52. Section 1391(e) provides several choices of venue in such actions against federal officials. The action may be brought within any judicial district in which (1) a defendant resides; (2) the cause of action arose; (3) any real property involved in the action is situated; (4) the plaintiff resides if no real property is involved in the action. 28 U.S.C. § 1391(e) (1970).
outside of the District, it was not clear whether mandamus jurisdiction under section 1361 was broader in scope than the common law writ of mandamus. Decisional law since the enactment of section 1361 has suggested at least a partial solution to this question. In this section, the author traces the development of this statutory successor to the common law writ of mandamus and assesses its potential applicability as a tool for judicial review and control of administrative action, concluding that: 1) the availability of an action "in the nature of mandamus" under section 1361 need no longer be determined solely by strict adherence to the common law ministerial-discretionary distinction, being based instead upon a broader inquiry into the authority granted to the defendant-official; 2) infringement of a plaintiff's constitutional rights by a defendant-official is sufficient to invoke mandamus jurisdiction such that the plaintiff may be afforded affirmative relief to rectify the constitutional deprivation.

A. Legislative History of Section 1361

The primary reason behind the enactment of section 1361 was decentralization of judicial review for those litigants seeking affirmative relief against federal officials. However, the exact nature of the relief authorized by that statute remains a matter of dispute. In an attempt to delineate the scope of mandamus jurisdiction under section 1361, courts and commentators have analyzed its rather complex legislative history, and have generally concluded that "relief in the nature of mandamus" was intended to encompass mandamus principles developed in the District of Columbia federal courts and created no new remedies. A brief sketch of the legislative history of section 1361 will reveal the reasons for this conclusion.

54. Id.
56. The Fourth Circuit noted that it was not clear "whether the purview of the common law writ of mandamus was broadened by the inclusion of the words 'in the nature of' before the word 'mandamus' . . . or whether Congress meant only to make the writ available at common law." Burnett v. Tolson, 474 F.2d 877, 880 & n.5 (4th Cir. 1973).
57. Byse & Fiocca, supra note 1, at 313-18; Jurisdictional Basis, supra note 1, at 123, 125.
58. Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364, 367 (10th Cir.), cert. denied, 385 U.S. 831 (1966); White v. Administrator of General Serv. Admin., 443 F.2d 444, 446 (9th Cir. 1965); JURISDICTION AND VENUE REPORT, supra note 55, at 2; Byse & Fiocca, supra note 1, at 319; Jurisdictional Basis, supra note 1, at 123.
As initially introduced, section 1361 contained no reference to mandamus actions; it merely provided that "[t]he district courts shall have original jurisdiction of any action to compel an officer or employee of the United States or any agency thereof to perform his duty."\(^{59}\) However, the Justice Department cautioned that the provisions of the bill were "dangerously broad"\(^{60}\) and suggested that the section "refer to the 'mandamus' power and specifically limit its exercise to ministerial duties owed to the plaintiff."\(^{61}\) Ultimately the Senate approved the Senate Judiciary Committee's version of the bill\(^{62}\) without including the language suggested by the Justice Department.\(^{63}\) When the House of Representatives acted upon the Senate's amendments, the Justice Department renewed one of its original objections, insisting that the legislation contain at least a reference to mandamus.\(^{64}\) The wording of the section referring to actions "in the nature of mandamus" represents the compromise necessitated by the Justice Department's intervention.

The Senate Report clearly indicates that the legislators intended the mandamus principles developed in the federal courts of the District of Columbia to govern the scope of the remedy provided in section 1361.\(^{65}\) It should be noted, however, that the statutory grant of section 1361 does not qualify the type of duty which must be found before mandamus jurisdiction is established. Indeed, Congress rejected those amendments which proposed to include a "ministerial" and "discretionary" distinction, since that distinction had proven so

---

60. For a letter from Byron S. White, Deputy Attorney General, to the Chairman of the Senate Judiciary Committee on Feb. 28, 1962, see Jurisdiction and Venue Report, supra note 55, at 5–7.
61. Id. at 6. The Justice Department submitted a proposal which provided:
   The district courts shall have jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or of any agency thereof to perform a ministerial duty owed to the plaintiff under a law of the United States.
Id. at 7 (emphasis added).
63. Jurisdiction and Venue Report, supra note 55, at 5–7. The Senate Judiciary Committee's version provided:
   The district courts shall have original jurisdiction of any action to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff or to make a decision in any matter involving the exercise of discretion.
Id. (emphasis added).
64. For the letter from Nicholas D. Katzenbach, Deputy Attorney General, to John A. Carroll, Chairman of the Senate Judiciary Comm., on Sept. 18, 1962, see 108 Cong. Rec. 20079 (1962).
65. Jurisdiction and Venue Report, supra note 55, at 2. See also 108 Cong. Rec. 18783 (1962), where the Justice Department's suggestion to include the phrase "[jurisdiction] concurrent with that of the District Court for the District of Columbia" was rejected by the House as "unnecessary and cumbersome." Id.
bothersome in the past. Likewise, the District of Columbia courts, recognizing that the distinction possessed little utility, had occasionally relaxed the ministerial requirement as a prerequisite for finding mandamus jurisdiction prior to the enactment of section 1361. Surely the insertion of the language “in the nature of mandamus” was not intended to resurrect that dichotomy.

B. Decisional Law Under Section 1361

1. Broadening the Scope of the Inquiry

While many courts still frame the issue of mandamus jurisdiction in terms of “ministerial” or “discretionary” acts, other courts, cognizant of the rapid growth of the federal bureaucracy, have developed a more liberal concept of mandamus jurisdiction. For example, although language in the leading case of Decatur v. Paulding indicated that a writ of mandamus should not issue where administrators are discharging the ordinary duties of their offices, this concept has been refined. Most statutes which create an administrative or executive office require some interpretation by the public officer of the duties which are part of the office. The fact that a statute may

---

66. Jurisdiction and Venue Report, supra note 55, at 4. Professor Davis has stated that the ministerial-discretionary distinction is “undesirable, unworkable, and without practical justification.” 3 Davis, supra note 55, § 23.11, at 356 (1958).

67. See notes 41–44 and accompanying text supra.

68. The initial concern expressed by some was that the courts would adopt the narrower mandamus tradition relating to ministerial obligations under section 1361 instead of relying upon the more liberal equitable injunction tradition to control discretion developed later by the District of Columbia courts. See Byse & Fiocca, supra note 1, at 318.

69. E.g., Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir.), cert. denied, 385 U.S. 831 (1966), where the court stated:

Before such a writ may issue, it must appear that the claim is clear and certain and the duty of the officer involved must be ministerial, plainly described, and peremptory.


In Ashe, the court never discussed the ministerial-discretionary dichotomy and simply stated that the new section 1361 allowed the bringing of the suit, whereas it might have been difficult to do so previously. 355 F.2d at 279. In Martin, the court held mandamus available to those seeking performance by defendants who had a clear duty to so perform, in circumstances where no other relief was available. 371 F. Supp. at 640, citing Burnett v. Tolson, 474 F.2d 877 (1973). See generally Hart & Wechsler, supra note 33, at 1381; Lee, The Origins of Judicial Control of Federal Executive Action, 36 Geo. L.J. 287 (1948).

71. 39 U.S. (14 Pet.) 497, 515 (1840); see note 38 supra.
require administrative (or judicial) construction to clarify the created duties does not mean that the duty is not ministerial, nor that mandamus is not proper in such a case to compel an officer to perform the duty once it is determined. Thus, while a federal administrative officer may invoke statutory language in characterizing the exercise of the duties of an office as discretionary, it was determined even prior to the enactment of section 1361 that such manipulation would not be permitted to circumvent access to the courts:

Executive officers cannot . . . create an area of doubt and dispute which will be outside the established power of the judiciary to compel obedience to a clear mandate of the Congress. They cannot by bootstraps manufactured by them lift themselves out of the [mandamus] jurisdiction of the courts.

Limited interpretations of language will not defeat a writ of mandamus even when the ministerial-discretionary dichotomy is employed as a test of mandamus jurisdiction. As will be illustrated by the cases outlined in following sections, the courts now carefully scrutinize the minimal duty that a federal administrator is obliged to perform and decide on that basis if a writ of mandamus will issue to require fulfillment of the duties in accordance with statutory and/or constitutional requirements.

In addition to evaluating the minimal duty required by statute, the actions of federal administrators are closely scrutinized whenever a mandamus action is instituted for a second reason. In deciding whether the court possesses jurisdiction under section 1361, a court must first consider the merits of the case to determine if a duty exists on the part of the defendant sought to be compelled to perform some act. The court assumes jurisdiction preliminarily, to determine whether mandamus jurisdiction is appropriate. This process was explained by the Court of Appeals for the First Circuit as follows:

In mandamus actions, the usually separate questions of jurisdiction and failure-to-state-a-claim merge. There can be no

---

73. Clackamas County, Ore. v. McKay, 219 F.2d 479, 495 (D.C. Cir. 1954), vacated as moot, 349 U.S. 909 (1955). This general principle had been recognized by the Supreme Court as early as 1900, as is evidenced by the Court's opinion in Roberts v. United States, 176 U.S. 221 (1900). There the Court stated:

Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one.

Id. at 231. For a discussion of Roberts, see notes 41 & 42 and accompanying text supra.
74. See notes 92-95 & 133-37 and accompanying text infra.
mandamus jurisdiction if no “duty” exists on the part of the defendants. On the other hand, if a duty does exist, then not only is there jurisdiction under § 1361 but plaintiff has also adequately stated a claim in asking that such duty be fulfilled.75

Thus, in a mandamus action, the court undertakes a closer examination of the facts and circumstances of a case than would normally be undertaken in deciding a jurisdictional issue. Therefore, a study of the mandamus action requires a detailed discussion of the factual situations with which the courts have been presented.

2. Mandamus to Correct An Abuse of Discretion

Under the current law of mandamus, the writ is available to control abuses of discretion as well as to compel performance of purely ministerial duties.76 One of the earliest cases to recognize this aspect of the federal mandamus tradition was Work v. United States ex rel. Rives.77 In that case, the Supreme Court denied relief, stating that mandamus would not issue to compel the discharge of a duty which was wholly within the official’s discretion. Nonetheless, the Court noted in dicta that “the duty may be discretionary within limits,”78 and that federal officials can be controlled by mandamus if those limits are transgressed.79 This concept was not fully utilized, however, until after the enactment of section 1361, when the lower federal courts began to grant relief based upon the principle of curtailing the scope of administrative discretion.

For example, a number of courts have granted relief under the federal mandamus statute where an abuse of discretion was discovered in an agency’s promulgation of regulations which did not conform to the congressional purpose in enacting the relevant legislation.80 In

75. Davis Associates, Inc. v. Secretary, Dep’t of HUD, 498 F.2d 385, 388 (1st Cir. 1974).
77. 267 U.S. 175 (1925).
78. Id. at 177 (emphasis added).
79. Id.
80. Brown v. Lynn, 385 F. Supp. 986 (N.D. Ill. 1974); Bailey v. Romney, 359 F. Supp. 596 (D.D.C. 1972). In Bailey, the plaintiffs successfully used section 1361 as a basis for challenging regulations governing reimbursements to be made to home owners for repair of defects in homes insured by the Federal Housing Administration (FHA). Id. at 599. Jurisdiction was also found to exist under the APA and section 1331(a). Id. at 598-99; see text accompanying notes 98-101 infra.
Brown v. Lynn, the plaintiff mortgagors attacked, inter alia, guidelines promulgated by the Department of Housing and Urban Development (HUD) pursuant to the mortgage assistance and mortgage insurance programs of the National Housing Act, contending that such guidelines failed to protect sufficiently the interest of the mortgagors. The district court found that HUD's failure to formulate adequate guidelines and to make them obligatory upon the administrators was an abuse of discretion. The court reasoned that in leaving the wronged mortgagor without means of redress, the HUD policies had "forced foreclosures rather than taking action to prevent them," contrary to the congressional purpose in enacting the Housing Program.

The full scope of a court's power under section 1361 to review administrative acts deemed to be abuses of discretion was perhaps best demonstrated by Bennett v. Butz. In Bennett, the outreach program administered by the Department of Agriculture to inform low income persons of the Food Stamp Program was found to be inadequate. The court closely scrutinized the program, which had been instituted by the Department of Agriculture, to ascertain whether it complied with the requirements of the statute and the intent of Congress. Although the court acknowledged that the Secretary had broad discretion in the implementation of the program, the Secretary was found to have abused this discretion by implementing a program which the court deemed inadequate to fulfill the duties imposed upon him by statute. Indeed, Bennett is a graphic illustration of the expansion of judicial control over administrative and executive actions through intense examination of the officials' actions. Significantly, this scrutiny often involves, as in Bennett, the making of rather subjective value judgments by the courts.

Another series of cases has dealt with the issue of whether the Federal Housing Authority (FHA) had a duty to the purchasers of federally insured homes to warrant the condition of those homes

---

83. 385 F. Supp. at 989.
84. Id. at 989-99.
85. Id. at 1000.
86. 386 F. Supp. 1059 (D. Minn. 1974). Jurisdiction was found under both sections 1337 and 1361. Id. at 1063.
87. 386 F. Supp. at 1066.
88. Id. at 1067. See also Berends v. Butz, 357 F. Supp. 143 (D. Minn. 1973), where the Secretary of Agriculture unilaterally terminated an emergency farm loan program 6 months prior to the previously announced termination date without giving notice to potential applicants. To the extent that the Secretary had authority to terminate the program, the court held that doing so without notice was an abuse of discretion. Id. at 157.
before approving a loan guarantee under the provisions of the National Housing Act.\(^{89}\) Mandamus was used primarily to challenge certain regulations promulgated by the Secretary of HUD on the theory that the Secretary had acted outside the scope of his statutory mandate in issuing such rules.\(^{90}\) A second potential use of the federal mandamus statute, suggested in \textit{Jackson v. Romney},\(^{91}\) is to compel the FHA to inspect homes prior to the approval of sale, thereby assuring compliance with the relevant local housing codes. Both the Court of Appeals for the Third Circuit in \textit{Davis v. Romney}\(^{92}\) and the District Court for the District of Columbia in \textit{Bailey v. Romney}\(^{93}\) found in certain provisions of the National Housing Act\(^{94}\) an affirmative duty owed by the FHA to the purchasers of federally insured homes to ensure such compliance.\(^{95}\) Yet the jurisdictional section employed in each of the two cases varied. In \textit{Davis}, the Third Circuit found jurisdiction existing under section 1337 of title 28 of the United States Code,\(^{96}\) a statutory grant encompassing actions arising under any act which regulates commerce.\(^{97}\) In \textit{Bailey}, however, jurisdiction was found under the APA,\(^{98}\) section 1361,\(^{99}\) and section 1331(a),\(^{100}\) jurisdiction under section 1337 was not alleged in \textit{Bailey}. The district court based the section 1361 mandamus jurisdiction on the Secretary of HUD's duty to promulgate regulations consistent with the statutory mandate.\(^{101}\)

A line of cases involving United States military officials further illustrates the utilization of section 1361 to curb abuses of discretion.


\(^{91}\) 355 F. Supp. 737, 741-42. The court found that no claim was stated upon which relief could be granted and did not elaborate upon the sources of potential jurisdiction. \textit{Id.} at 742.

Shortly after this decision, HUD changed its procedure to require compliance with housing codes as a prerequisite to the issuance of mortgage insurance, thus rendering the issue moot. Jackson v. Lynn, 506 F.2d 233, 238 (D.C. Cir. 1974).

\(^{92}\) 490 F.2d 1360 (3d Cir. 1974).


\(^{95}\) 490 F.2d at 1368; 359 F. Supp. at 599-600.


\(^{97}\) 490 F.2d at 1365.


\(^{99}\) 359 F. Supp. at 599.

\(^{100}\) \textit{Id.}

\(^{101}\) \textit{Id.}
As the American military involvement in Southeast Asia escalated in the mid-1960's, mandamus became an important tool for those seeking relief from directives of military personnel, military courts-martial, and decisions of the ancillary branches of the military — the Veterans' Administration and the Selective Service System. Expansion of the use of mandamus in these areas occurred primarily due to the existence of statutory preclusions\(^{102}\) to civilian court intervention into decisions of the military\(^{103}\) and the Veterans' Administration.\(^{104}\)

Even where no express statutory preclusion of review existed, civilian courts have traditionally been reluctant to impose their judgment of proper action upon military officials, especially in areas involving discretionary determinations.\(^{105}\) Yet some courts have recognized that mandamus may issue upon a sufficient showing that the military conduct challenged constituted an abuse of discretion.\(^{106}\) What constitutes a sufficient demonstration of abuse is far from clear, however. In United States ex rel. Schonbrun v. Commanding Officer,\(^{107}\) the Court of Appeals for the Second Circuit commented that "official conduct may have gone so far beyond any rational exercise of discretion as to call for mandamus even when the action is within the letter of the authority granted."\(^{108}\) Despite this language, the court declined to review the defendant's allegedly arbitrary refusal to exempt the plaintiff from active duty on the ground that it would excessively delay the activation of reservists by the military.\(^{109}\) Two years after Schonbrun, a New York district court, in issuing a writ of mandamus to a military official, stated that "[i]t is . . . well established that mandamus may be used to correct an abuse of discretion by a federal officer, particularly if the abuse constitutes a violation of constitutional rights."\(^{110}\) Yet the Second Circuit afforded much

---

102. See note 214 and accompanying text infra.
105. In Jarrett v. Resor, 426 F.2d 213 (9th Cir. 1970), the court denied jurisdiction under section 1361 to challenge an allegedly arbitrary denial by the military of the plaintiff's petition for a discharge from the Army, since the plaintiff had alleged at most an abuse of discretion. Id. at 216-17.
106. See notes 107-11 and accompanying text infra.
108. Id. at 374. The Second Circuit reaffirmed the Schonbrun standard as the applicable legal standard in Casarino v. United States, 431 F.2d 775, 777 (2d Cir. 1970), but found the facts of that case did not warrant its application.
109. 403 F.2d at 374-75.
deference to the military in reversing the decision. In 1974, a Colorado district court dismissed a complaint containing allegations that the plaintiff had been transferred for exercising his first amendment rights because there was "no adequate showing of such an abuse of discretion as to warrant interference with persons [commands of military officers] by a civilian court." This leads to the conclusion that, while mandamus jurisdiction over the military can theoretically be invoked to correct an abuse of discretion, proving abuse to the satisfaction of a court may pose an almost insurmountable barrier to obtaining relief under section 1361.

Courts have consistently found jurisdiction under section 1361 to compel the military to follow their own regulations and to compel corrective action when regulations have been violated. This conclusion has been justified, inter alia, on the basis that a failure to follow prescribed regulations deprives the plaintiff of due process, violates a duty owed to the plaintiff, or constitutes an abuse of discretion.

In addition to the utilization of mandamus to attack an administrator's abuse of discretion, the issuance of the writ is occasionally based upon a second rationale — that the officer has acted completely outside the scope of authority granted by the statute or regulation. As the following cases illustrate, it is often difficult to distinguish this basis for issuance of a writ of mandamus from the situation in which discretion is in fact granted but is wrongly exercised; yet the two are separate grounds for decision.

The case of North City Area-Wide Council v. Romney involved the requirement of the Demonstration Cities and Metropolitan Development Act that the Model Cities programs include widespread citizen participation in order to qualify for federal funding. North City Area-Wide Council (AWC) brought suit against HUD,

---

111. Moore v. Schlesinger, 384 F. Supp. 163, 166 (D. Colo. 1974). The plaintiff alleged that he had written letters to various members of Congress and, as a result, had been removed mid-year from a teaching assignment at the Air Force Academy and reassigned elsewhere. Id. at 164.
113. See Kom v. Laird, 460 F.2d 1318, 1319 (7th Cir. 1972); Smith v. Resor, 406 F.2d 141, 146 (2d Cir. 1969).
116. Similarly, courts have compelled draft boards to comply with their own regulations, e.g., Grosfeld v. Morris, 448 F.2d 1064, 1010-12 (4th Cir. 1971), and with statutory requirements. See Carey v. Local Bd. No. 2, 297 F. Supp. 252 (D. Conn.), aff'd per curiam, 412 F.2d 71 (2d Cir. 1969); Armendariz v. Hershey, 295 F. Supp. 1351 (W.D. Tex. 1969).
117. 428 F.2d 754 (3d Cir. 1970).
119. 428 F.2d at 755.
alleging that HUD had violated the requirements of the Act by approving the operation of the Philadelphia Model Cities Program, even though the AWC had been removed from its position as the citizen board. The Philadelphia Director of the Model Cities program was held to have acted outside the scope of her authority in unilaterally removing AWC from representation. Jurisdiction was based upon sections 1331, 1361, and the APA.\textsuperscript{119}

Similarly, in \textit{State Highway Commission v. Volpe},\textsuperscript{121} the Court of Appeals for the Eighth Circuit reviewed a decision of the district court in which a writ of mandamus was issued under section 1361 compelling the release of funds impounded by the Department of Transportation.\textsuperscript{122} While the court ruled that the action for mandamus was moot since the funds had been released, the court noted in dictum that mandamus would otherwise have been proper since the Secretary had not been delegated the power to withhold funds for anti-inflationary purposes.\textsuperscript{123} In other words, the impoundment was wholly outside the scope of the Secretary’s authority.

3. \textbf{Mandamus to Compel an Exercise of Discretion}

While actions in the nature of mandamus under section 1361 may not be brought to \textit{influence} an official’s exercise of discretion,\textsuperscript{124} mandamus may be used to compel an \textit{exercise} of discretion when an official is required by statute to render a decision as part of the duties of the office.\textsuperscript{125} In \textit{Rothgeb v. Statts},\textsuperscript{126} federal employees brought an action for overtime pay, alleging jurisdiction under section 1361.\textsuperscript{127} The court stated that mandamus could not be used to compel payment of sums out of the public treasury, but declared that mandamus would lie to compel the Government to \textit{rule} on whether or not the plaintiffs were entitled to the overtime pay.\textsuperscript{128}

\textsuperscript{119} Id. at 758. The same factual situation was appealed two years later as North City Area-Wide Council v. Romney, 456 F.2d 811 (3d Cir.), \textit{cert. denied}, 406 U.S. 963 (1972). The Third Circuit held that the AWC must be consulted by the city concerning any changes which were made in the program. \textit{Id.} at 818.

\textsuperscript{120} Id. at 757.

\textsuperscript{121} 479 F.2d 1099 (8th Cir. 1973).

\textsuperscript{122} Id. at 1104.

\textsuperscript{123} Id. at 1104 & n.5.

\textsuperscript{124} McQuary v. Laird, 449 F.2d 608, 611 (10th Cir. 1971).


\textsuperscript{126} 56 F.R.D. 559 (S.D. Ohio 1972).

\textsuperscript{127} Id. at 561. Plaintiffs were employees of the Internal Revenue Service assigned to the Sky Marshall Project to protect crews and passengers on international flights. \textit{Id.} at 560.

\textsuperscript{128} Id. at 561-62.
Jurisdiction under section 1361 has also been found where the plaintiff demonstrated that an agency or other organization has failed to adhere to its own prescribed regulations. Thus in Feliciano v. Laird the Second Circuit held that where the United States Army deviated from its own regulations in considering an enlisted man’s application for a hardship discharge and arbitrarily disapproved the application, mandamus would issue to require Army officials to reconsider the application properly in a de novo proceeding. The line of cases employing this rationale may provide a model for the creative use of mandamus to obtain compliance with minimal due process requirements in other governmental agencies and organizations.

4. Protection Against Infringement of Constitutional Rights

Several decisions rendered since the enactment of section 1361 indicate that a writ of mandamus will issue even where a federal officer is clearly vested with discretion in the performance of the particular official duties, if it can be shown that the official has violated the constitutional rights of a person subject to agency action. Hence, in Murray v. Vaughn, the United States District Court for the District of Rhode Island held that jurisdiction existed under section 1361 to challenge a concededly discretionary government action when the action had violated the plaintiff’s first amendment rights. Plaintiff Murray had been expelled from the Peace Corps for publishing a letter in a Chilean newspaper criticizing United States policy in Vietnam and the policy of the Peace Corps against such criticism. He filed suit seeking, inter alia, mandamus commanding the Director of the Peace Corps to reinstate him in the Peace Corps and to remove all reference to his expulsion from his employment records. The

129. See cases cited at notes 113–15 supra.
130. 426 F.2d 424 (2d Cir. 1970).
131. Id. at 427–29. The relevant regulation provides that if the application for hardship discharge does not contain conclusive evidence upon which a decision may be based, the application and supporting evidence must be forwarded to the Director of Selective Service of the state in which the individual’s local draft board is situated. Noting that the Army is bound by its own regulations, the court found that a duty existed by virtue of the regulation to forward the application unless it presented a clear case for rejection. The duty imposed by regulation was deemed sufficient to support mandamus jurisdiction. Id. at 429.
132. See Berends v. Butz, 357 F. Supp. 143 (D. Minn. 1973). The court ordered the Secretary of Agriculture to review applications for emergency loans even though the Secretary could not be required to grant loans to everyone who applied. Id. at 151. The loan program had been terminated without notice in violation of agency regulation and due process of law. Id.
134. Id. at 692.
135. Id. at 693–94.
court conceded that the President had discretionary authority, which he delegated to the Director of the Peace Corps, enabling the Director to terminate the employment of any Peace Corps member. Yet the court denied defendants’ motion to dismiss the case, stating that “if these defendants, in exercising that discretion, violated the constitutional rights of the plaintiff, they cannot avoid § 1361 jurisdiction.”

The Murray court explained its holding as follows:

Unquestionably, mandamus will not compel an officer to do a “discretionary” act. Yet, the pivotal inquiry must be directed at the permissible scope of the officer’s discretion, for that discretion is circumscribed by constitutional, statutory, and regulatory strictures.

... Just as federal officers are not immune from suit where they exceed their powers and violate the Constitution, so also are they susceptible of suit under § 1361 when they exceed their powers and violate the Constitution.

Thus it is evident that the finding of a clear duty to act on the part of a defendant officer no longer need be grounded upon a statutory prescription. Rather, a duty sufficient to invoke mandamus jurisdiction may be based upon the Constitution, without regard to the statute creating an office.

Several additional cases have recognized that jurisdiction may exist under section 1361 to provide relief for plaintiffs whose constitu-

136. Id. at 697. In a subsequent hearing, the court held that the Peace Corps Director had violated the plaintiff’s first amendment rights and failed to follow the Peace Corps’ own policy directive regarding termination of members. The court, therefore, ordered the Director to remove from plaintiff’s employment record any document relating to his expulsion and to recompute the reassignment allowance given plaintiff. Murray v. Blatchford, 307 F. Supp. 1038, 1059 (D.R.I. 1969).

After his expulsion from the Peace Corps, Murray had been reclassified I-A by his local draft board. In addition to seeking relief from the Director of the Peace Corps, the plaintiff also requested that mandamus issue to compel his reclassification back to the II-A status which he had been classified while a member of the Peace Corps. Under the Military Selective Service Act of 1967, 50 U.S.C. § 460(b)(3) (Supp. V, 1975), selective service classification may not usually be challenged except in a defense to a criminal prosecution for refusing induction. The court rejected the plaintiff’s argument that a plausible claim of a constitutional violation could allow the court to assume jurisdiction to review the draft board’s action. 300 F. Supp. at 700.

137. 300 F. Supp. at 696–97 (citations omitted) (emphasis added). For other cases involving the use of mandamus to correct an abuse of discretion amounting to a violation of constitutional rights see CCCO-Western Region v. Fellows, 359 F. Supp. 644, 647–48 (N.D. Cal. 1972) (dicta); Cortright v. Resor, 325 F. Supp. 797, 812 (E.D.N.Y.), rev’d, 447 F.2d 245 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972). But see Fifth Ave. Peace Parade Comm. v. Hoover, 327 F. Supp. 238 (S.D.N.Y. 1971), where the court stated that there are occasions of deprivations of constitutional rights where satisfaction of mandamus requirements might be viewed liberally. Even with the most liberal interpretation, however, the court must have the benefit of some specific statutes or regulations against which to measure duties said to have been specifically ignored by the defendant. Id. at 242–43.
tional rights have been violated by military personnel. Significantly, such jurisdiction has been recognized even where civilian court review of the military’s action was apparently precluded by statute or case law.138

In 1965, the Court of Appeals for the First Circuit in *Ashe v. McNamara*139 determined that the district court had jurisdiction under section 1361 to review the refusal of the Secretary of Defense to change the administrative record of plaintiff’s military discharge from dishonorable to honorable.140 The plaintiff’s dishonorable discharge had resulted from his conviction at a court-martial during which the plaintiff had manifestly been denied the effective assistance of counsel — a deprivation which violated petitioner’s rights under the sixth amendment.141 Initially, the plaintiff attempted to have his military records corrected through the military justice appeals system, but upon failing to obtain the desired correction, he sought an order compelling the correction through a section 1361 action. The district court granted summary judgment for the defendant on the ground that it lacked jurisdiction over the subject matter of the claim.142 On appeal, however, since the military authorities had consistently refused without justification to rectify the effect of the deprivation of Ashe’s constitutional rights, the First Circuit remanded the case to the district court instructing that an order be issued requiring the change of plaintiff’s discharge to an honorable one.143

In 1971, the Second Circuit in *Cortright v. Resor*144 affirmed the district court’s finding of jurisdiction under section 1361 to hear a challenge to the transfer of Army personnel allegedly resulting from the plaintiff’s exercise of his first amendment rights. In a show of deference to the military, however, the court reexamined the facts and

---

138. *See* notes 216–19 and accompanying text infra.
139. 355 F.2d 277 (1st Cir. 1965).
140. *Id.* at 279. In 10 U.S.C. § 1552(a) (1970), the Secretary’s powers are described:

The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense . . . may correct any military record of that department when he considers it necessary to correct an error or remove an injustice.

*Id.*

The court noted that, under section 1552, the records of a discharge may be changed even if the discharge were ordered at a court-martial, 355 F.2d at 280, despite the following provision in the Uniform Code of Military Justice:

The appellate review of records of trial . . . the proceedings, findings, and sentences of courts-martial . . . and all dismissals and discharges carried into execution under sentences by courts-martial . . . are final and conclusive.

141. 355 F.2d at 279–80.
143. 355 F.2d at 282.
144. 447 F.2d 245 (2d Cir. 1971).
rejected the district court’s finding that the plaintiff had in fact been transferred for signing and circulating a petition against the Vietnam war.\textsuperscript{145} Consequently, the Second Circuit reversed the district court’s order that plaintiff be reinstated in his former position.\textsuperscript{146} In so deciding, however, the court cautioned that it was not holding that a civilian court could never interfere with a military transfer order or prescribe relief to prevent abridgement of first amendment rights, noting that “the Army has a large scope in striking a proper balance between servicemen’s assertions of the right of protest and the maintenance of the effectiveness of military units . . . .”\textsuperscript{147}

In \textit{Burnett v. Tolson},\textsuperscript{148} the Fourth Circuit recognized that an alleged denial of first amendment rights by the commanding general of Fort Bragg could form the basis for jurisdiction under section 1361. The commanding general had prohibited the distribution of antiwar leaflets in the public areas of the military base.\textsuperscript{149} Rejecting the contention that such a decision lay within the commanding general’s discretion, the Fourth Circuit found instead that he had a ministerial duty to allow the orderly expression of ideas in these areas.\textsuperscript{150} Since jurisdiction under section 1331 was doubtful, the court concluded that section 1361 provided the only available adequate remedy,\textsuperscript{151} thereby reversing the district court’s dismissal for lack of jurisdiction.\textsuperscript{152}

Jurisdiction has also been found to exist under section 1361 to challenge Navy grooming regulations, allowing wigs for bald members of the Navy Reserves but arbitrarily prohibiting short hair wigs on long-haired reservists in violation of fifth amendment due process rights.\textsuperscript{153} Long-haired reservists brought suit in \textit{Etheridge v. Schlesinger}\textsuperscript{154} to prevent their being activated to regular military

\begin{footnotesize}
\begin{enumerate}
\item[145.] \textit{Id.} at 247–49, 254–55.
\item[146.] \textit{Id.} at 255.
\item[147.] \textit{Id.} at 254–55. Even though the limitation on the military implied in this quote is very slight, it appears to offer more possibility for civilian review of the military under section 1361 than existed prior to the enactment of that statute. In 1953, in Orloff v. Willoughby, the United States Supreme Court stated:

\begin{quote}
While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.
\end{quote}

345 U.S. 83, 94 (1953).
\item[148.] 474 F.2d 877 (4th Cir. 1973).
\item[149.] \textit{Id.} at 879.
\item[150.] \textit{Id.} at 882.
\item[151.] \textit{Id.} at 879–80.
\item[152.] \textit{Id.} at 883.
\item[154.] \textit{Id.} at 198.
\end{enumerate}
\end{footnotesize}
duty as a result of alleged violations of the wig regulations.\textsuperscript{155} The United States District Court for the Eastern District of Virginia found that "those who seek performance of constitutional duties owed them by defendants who have a clear duty to perform said duties and where no other relief is available are within the scope of 28 U.S.C. § 1361."\textsuperscript{156} The court, therefore, enjoined the defendant from ordering one plaintiff to active status and "mandatorily" instructed the defendant to void another plaintiff's activation to regular duty.\textsuperscript{157}

Plaintiffs have used mandamus in actions to compel federal officials to provide notice and an opportunity to be heard to tenants of federally subsidized housing projects prior to increases in rent. In Bloodworth v. Oxford Village Townhouses, Inc.,\textsuperscript{158} an action was brought to force HUD officials to exercise more extensive control over cooperative housing projects and to preclude the private organizers thereof from increasing rental payments until project residents received notice and a hearing which comported with due process.\textsuperscript{159} The Bloodworth court found that mandamus jurisdiction existed as to the federal defendants, and that pendent jurisdiction existed as to the private defendants who were joined to the action as indispensable parties.\textsuperscript{160}

\footnotesize
\begin{itemize}
\item \textsuperscript{155} \textit{Id.} at 199.
\item \textsuperscript{156} \textit{Id.} at 201.
\item \textsuperscript{157} \textit{Id.} at 204.
\item While several cases have relied upon the federal mandamus statute in permitting review of the determinations of the Social Security Administration, in at least one case, jurisdiction was found under the authorizing act itself. Arizona State Dept of Pub. Welfare v. HEW, 449 F.2d 456 (9th Cir. 1971), cert. denied, 405 U.S. 919 (1972). The court relied upon provisions for review contained in 42 U.S.C. § 1316(a) (1970).
\item It should be noted that one district court opinion viewed the challenged regulations as properly reviewable within the state court system, and denied federal court relief. On appeal, the Supreme Court affirmed the trial court's dismissal. Ramirez v. Weinberger, 363 F. Supp. 105 (N.D. Ill. 1973), aff'd, 415 U.S. 970 (1974).
\item \textsuperscript{159} 377 F. Supp. 709 (N.D. Ga. 1974).
\item \textsuperscript{160} \textit{Id.} at 713. The extensive involvement of HUD in the development and construction of cooperative housing projects was deemed sufficient federal action to invoke the protection of the fifth amendment. \textit{Id.} at 716.
\item For cases in which similar relief has been afforded under different jurisdictional statutes, see Geneva Towers Tenants Org. v. Federated Mortgages Inv., 504 F.2d 483 (9th Cir. 1974); Marshall v. Lynn, 497 F.2d 643 (D.C. Cir. 1973), cert. denied, 419 U.S. 970 (1974). For cases in which such relief was denied on the merits, see Paulson v. Coachlight Apts. Co., 507 F.2d 401 (6th Cir. 1974); People's Rights Org. v. Bethlehem Associates, 487 F.2d 1395 (3d Cir. 1973), affg 356 F. Supp. 407
\end{itemize}
Several cases have held that mandamus is available to attempt to prevent the federal Social Security Administration from seeking recoupment for overpayment of benefits from persons receiving public assistance without affording the recipients a prior hearing.\footnote{161} The landmark decision of \textit{Goldberg v. Kelly}\footnote{162} has had a significant impact upon all current litigation involving the termination and recoupment of federal welfare and social security benefits, and was relied upon in several of the cases which found jurisdiction under section 1361.\footnote{163} In \textit{Goldberg}, the Supreme Court determined that welfare recipients were entitled to a due process hearing prior to the termination of welfare benefits.\footnote{164}

Similarly, in \textit{Elliott v. Weinberger},\footnote{165} the District Court for the District of Hawaii held that Social Security Administration procedures for recoupment of overpayments of old age and disability benefits violated the fifth amendment’s due process clause.\footnote{166} Recipients received inadequate notice both of the reason for recoupment and the right to a reconsideration by the agency, and were not accorded a hearing prior to reduction or suspension of benefits.\footnote{167} In \textit{Elliott}, jurisdiction was alleged under the APA, general federal question jurisdiction of section 1331(a), and section 1361.\footnote{168} While some support existed for a finding of jurisdiction under the APA and section 1331(a), the court declined to rule as to those jurisdictional issues.\footnote{169} Instead, the court concluded that mandamus jurisdiction under section 1361 was most appropriate.

\footnote{165} 397 U.S. at 264.
\footnote{166} Id. at 972-73. The holding of \textit{Elliott} concerning the right to a hearing prior to recoupment of overpayments in disability benefits must be reconsidered in light of the recent Supreme Court decision of Mathews v. Eldridge, 424 U.S. 319 (1976).
\footnote{167} There the Court held that present Social Security Administration procedures comply with due process and that an evidentiary hearing is not required prior to the termination of disability benefits, 424 U.S. at 349. The \textit{Mathews} case does not affect the jurisdictional holding regarding the proper use of mandamus under section 1361 in cases where a constitutional duty does exist.
\footnote{168} 371 F. Supp. at 973.
\footnote{169} Id. at 967.
\footnote{169} 371 F. Supp. at 967-68 n.21. The court noted that there was some dispute concerning whether the APA is a jurisdictional grant independent of other statutes and that the amount-in-controversy requirement might preclude section 1331(a) jurisdiction. \textit{Id.}
An understanding of the court’s rationale in reaching this conclusion is crucial, for the same reasoning has reappeared in several recent cases granting relief from allegedly unconstitutional administrative action. First, the court observed that although section 1361 was aimed at extending the availability of mandamus jurisdiction beyond the rigid common law concepts, the facts of the case supported jurisdiction even under the traditional restrictive rules. Among the elements required in common law mandamus actions was a showing of "a clear duty on the part of the defendant to do the act in question." For the Elliott court, the finding of a duty to act did not present the dilemma faced by the judiciary in the past, for this modern day court found that a duty existed whenever constitutional rights were infringed by the action of the defendant-officer. The court observed that the duty arises whenever "the application of a Supreme Court ruling to the instant case clearly shows the existence of plaintiff's constitutional right and its denial by the defendant." In Mattern v. Weinberger, the district court noted that, for the purposes of jurisdiction under section 1361, there was no distinction between a statutory duty and a constitutional duty. Thus despite the fact that "neither the provisions of the [Social Security] Act . . . nor the regulations promulgated thereunder compel the Secretary to conduct a hearing prior to recoupment of an overpayment," mandamus was available to compel a due process hearing. Mattern and Elliott are particularly significant in view of the fact that many courts have in the past refused exercise of mandamus jurisdiction because of the lack of a duty imposed on the defendant by statute.

The matrix below outlines the bases upon which federal court jurisdiction has been afforded in several welfare recoupment cases. In

---

170. See cases cited in note 163 supra.
171. 371 F. Supp. at 967.
172. Id. at 967-68 (footnote omitted) (emphasis added).
175. Id. at 968 (footnote omitted). There is similar language in Thomas v. Weinberger, 384 F. Supp. 540, 542 (S.D.N.Y. 1974). That court stated that "[i]f the Social Security Administration is under a clear constitutional duty . . . to provide an evidentiary hearing prior to the recoupment of overpayments, then that duty may be enforced by mandamus." Id.
177. Id. at 914.
178. Id.
179. Id.
the sampling of cases presented, all grants of relief have been afforded under the mandamus statute or the authorizing statute itself. Deference to the state trial court resulted in a denial of jurisdiction in one action.\textsuperscript{181} The matrix outlines graphically the conclusion developed in this section: when federal officials interfere with constitutionally protected rights — such as a pretermination due process hearing or the free speech issue presented in the Murray case — the federal courts will intervene and, through mandamus jurisdiction, direct the federal officials to follow constitutional mandates.

<table>
<thead>
<tr>
<th>JURISDICTION</th>
<th>APA § 1361</th>
<th>§ 1331(a)</th>
<th>§ 1343(3)</th>
</tr>
</thead>
</table>

KEY:
X—Jurisdiction found under this statute.
Y—Jurisdiction alleged under this statute; issue not determined by the court.

IV. Modern Jurisdictional Bases for Review of Federal Official Action

A petitioner seeking mandatory relief against an officer or employee of the United States may explore several potential jurisdictional approaches. If the defendant’s actions are attributable to an agency, a provision in the statute creating the particular agency may expressly grant jurisdiction to either federal district courts or to the courts of appeal to review determinations of the named agency.\textsuperscript{182} As indi-

\textsuperscript{182} See notes 9–12 and accompanying text supra.
cated earlier, this statutory review approach will in most cases assure
review of the action or lack thereof on the part of the defendant. Where statutory review is not available, however, review may be
sought under the more general review provisions of the Administra-
tive Procedure Act,183 or under section 1331 of title 28 of the United
States Code,184 provided a federal question is involved. As will be
demonstrated, however, mandatory relief against federal administrative
officials is sometimes unavailable under either of the foregoing jur-
dictional bases. In such a case, section 1361 may become a litigant's
sole means of redress.

A. Review Under the Administrative Procedure Act

Review of federal agency decisions standardized somewhat as a
result of the Administrative Procedure Act.185 Section 10(a) of the
Act provides in pertinent part:

A person suffering legal wrong because of agency action, or
adversely affected or aggrieved by agency action within the
meaning of a relevant statute, is entitled to judicial review
thereof.186

Under the APA, a federal court may force an agency to take action
which has been unlawfully refused or unreasonably delayed,187 and
may invalidate arbitrary agency action, action in excess of statutory
jurisdiction, action violating a constitutional right, or action constituting
an abuse of discretion.188

185. For a brief discussion of the legislative history of the APA, see Jurisdic-
tional Basis, supra note 1, at 108-15.
187. Id. § 706. Presumably this section would allow a court to compel mandatory
relief by requiring that action be taken to correct a wrongful delay, thus providing
relief similar to that afforded under section 1361.
188. 5 U.S.C. § 706 (1970). Section 10(e) provides that the court shall:
(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions
found to be—
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in
accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or
short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to section
556 and 557 of this title or otherwise reviewed on the record of an
agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to
trial de novo by the reviewing court.

Id.
The APA, however, cannot be considered a panacea for those seeking review of agency action for several reasons. First, the plaintiff must obtain venue in a jurisdiction in which the APA has been held to be an independent grant of jurisdiction, or in the alternative must establish jurisdiction under some other statute. It is in those jurisdictions in which the APA is not regarded as an independent grant of jurisdiction that section 1361 may become crucial to the plaintiff seeking review of federal administrative action.

The lower federal courts are hopelessly divided on the question of the meaning of the APA "jurisdictional" grant, and the Supreme Court has consistently refused to rule on the question in the past. Nor do the commentators agree in their assessments of the proper resolution of the question. Certainly, the Mandamus and Venue Act presently provides an alternate source of relief for petitioners, and the future development of the writ of mandamus may affect the final resolution of the issue of whether the APA is a jurisdictional grant independent of any other statutory grant. Indeed, the strongest argument in favor of a finding that section 10 is jurisdictional is that a person suffering legal wrong may not otherwise be able to secure judicial review of that action. If section 1361 is liberally construed and creatively applied, the necessity of finding section 10 to be jurisdictional would be lessened.

In many instances, a particular factual situation will give rise to jurisdiction under both the APA and section 1361. Several such

---

189. See note 191 infra.

190. E.g., 28 U.S.C. § 1331(a) (1970); 28 U.S.C. § 1337 (1970). Section 1337 provides that “district courts shall have original jurisdiction of any civil action or proceedings arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.” Id. There is no amount-in-controversy requirement for section 1337; thus it might provide a jurisdictional basis where section 1331 would not. See note 96 and accompanying text supra for a case in which section 1337 was the jurisdictional grant relied upon in awarding affirmative relief.

191. Among the many cases from the six circuits which have held that the APA is an independent jurisdictional grant are the following: Elton Orchards, Inc. v. Brennan, 506 F.2d 493 (1st Cir. 1974); Young v. United States, 498 F.2d 1211 (5th Cir. 1974); Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971). The remaining four circuits have held that section 10 does not independently confer jurisdiction. E.g., Grant v. Hogan, 505 F.2d 1220 (3d Cir. 1974); Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973), cert. denied, 414 U.S. 1146 (1974); Zimmerman v. United States, 422 F.2d 326 (3d Cir.), cert. denied, 399 U.S. 911 (1970).

192. The Court has been presented with ample opportunity to rule on this question, but in each case has denied certiorari. See, e.g., Local 542 Operating Eng’rs v. NLRB, 328 F.2d 850 (3d Cir.), cert. denied, 379 U.S. 826 (1964).


cases have arisen under the Model Cities program's requirement that there be widespread citizen participation in the program in order for applicants to be eligible for federal assistance. In another area, the relationship between the APA and the Mandamus and Venue Act is exemplified by Berends v. Butz. In Berends, mandatory relief was sought against the Secretary of Agriculture when he arbitrarily terminated an emergency farm loan program in Minnesota in violation of the Department's own regulations and pronouncements. The district court ordered a reinstatement of the program and a consideration of all the program and the loan applications properly before the Department. In resolving the case, the court assumed subject matter jurisdiction under section 1361 and, significantly, adopted the scope of review of section 706 of the APA. The case thus illustrates an instance in which section 1361 would be most helpful to a plaintiff seeking affirmative relief in a jurisdiction which holds that the APA is not an independent jurisdictional grant.

Even if the petitioner is fortunate enough to have instituted his action in a jurisdiction in which the APA is viewed as an independent jurisdictional grant, persons "aggrieved" within the meaning of section 10 may still be unable to obtain relief under the APA. The remedy provided therein is not available whenever "agency action is committed to agency discretion by law" or when "statutes preclude judicial review." In these instances, section 1361 again may emerge as a viable means for redress otherwise unobtainable.

1. Agency Action Committed by Law to Agency Discretion

The mere fact that an agency and its officials are granted rather broad discretionary powers does not automatically bring it within the discretion exception to the review provisions of the APA. There is a strong presumption that agency action is in fact reviewable and the legislature's intent to vest an administrative official with absolute

198. Id. at 153.
199. Id. at 149.
202. See id.
discretion must be clearly demonstrated.204 Such demonstration must be especially clear where it is alleged that agency action has deprived the plaintiff of constitutional rights,205 the agency has violated clear statutory duties, or the agency has exceeded its statutory jurisdiction.206 Upon a determination that review is unavailable under the APA, however, it is quite likely that review would be granted under section 1361, to avoid depriving the petitioner of all modes of redress.207

2. Statutory Preclusion of Review

Some statutes specifically provide that agency determinations shall be final, thereby eliminating all recourse to judicial review. An example of such a statute is the Veterans Benefits Act which provides in pertinent part:

[T]he decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision. . . .

Despite the presumption in favor of judicial review, provisions such as the above have been held to prohibit absolutely review of agency action under the aegis of the APA.208 Where no jurisdiction exists under section 10(a), the inquiry becomes whether section 1361 will provide a basis for control of agency action. At least one case has answered this question in the affirmative. In Atewoofatekewa v. Udall,210 the district court held that while there was some question concerning the existence of jurisdiction to review decisions of the Secretary of the Interior under the APA, there could be no doubt that section 1361 provided a basis for jurisdiction "in order to effectu-

208. 38 U.S.C. § 211 (a) (1970) (emphasis added). The courts have consistently held that this section precludes judicial review under the APA. Barefield v. Byrd, 320 F.2d 455 (5th Cir. 1963), cert. denied, 376 U.S. 928 (1964); Ford v. United States, 230 F.2d 533 (5th Cir. 1956); Acker v. United States, 226 F.2d 575 (5th Cir. 1955), cert. denied, 350 U.S. 1008 (1956).
ate the purposes of the [APA] by providing the review function which
the act contemplates."211 On appeal, the Supreme Court determined
that jurisdiction over the dispute could be premised exclusively upon
general federal question jurisdiction,212 and found it unnecessary
to examine the validity of the district court's determination.213
The APA is unavailable as a jurisdictional base in many instances
where plaintiffs seek judicial review of actions by the military. Court-
martial and military commissions are explicitly excluded from the
review provisions of the APA,214 and section 10(a) has been held to
be inapplicable to several aspects of military affairs through judicial
interpretation.215 In Moore v. Schlesinger,216 for instance, the court
held that the APA was inapplicable to any proceeding under Article
138 of the Uniform Code of Military Justice217 which provides for
internal review of actions by commanding officers upon the complaint
of a member of the armed forces.218 The court suggested that jurisdic-
tion would have been available under section 1361, however, if the
plaintiff had been able to demonstrate "an abuse of the broad discre-
 tion granted to military officers in their command."219 Conversely,
in Colson v. Bradley,220 the Eighth Circuit directed the district court
to order the plaintiff's commanding officer to correctly review and
investigate an Article 138 complaint that had previously been sub-
mitted by the plaintiff.221 That case, however, contained no discussion
of the jurisdictional issue.

B. Review Under Section 1331

General federal question jurisdiction, codified in section 1331 of
title 28 of the United States Code, provides another nonstatutory
basis for review of federal administrative action. Section 1331 reads:

The district courts shall have original jurisdiction of all civil
actions wherein the matter in controversy exceeds the sum or

211. Id. at 465 n.1.
213. 397 U.S. at 604 n.11; see Ortego v. Weinberger, 516 F.2d 1005, 1014 (5th
Cir. 1975).
216. Id.
218. 384 F. Supp. at 166.
219. Id. at 165-66 (dictum).
220. 477 F.2d 639 (8th Cir. 1973).
221. Id. at 642. For cases defining the availability of review for selective service
classification, see Breen v. Selective Serv. Local Bd. No. 16, 396 U.S. 460 (1970);
Clark v. Gabriel, 393 U.S. 256 (1968); Oestereich v. Selective Serv. Sys., 393
value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. 222

In suits to compel federal officers to perform their "duties" under statute or the Constitution, the requirement of a "federal question" is met without difficulty. However, a plaintiff seeking such relief may find that the amount-in-controversy requirement prevents the court's assumption of jurisdiction under section 1331. 223 The problem is particularly acute when the petitioner seeks affirmative relief or when the "duty" sought to be enforced consists of a constitutional right owed to the plaintiff by the defendant-officer.

Generally, the amount-in-controversy requirement is met by a good faith allegation that the damages exceed the requisite amount. 224 A more stringent burden must be met to establish jurisdiction where the plaintiff is demanding equitable relief against a federal officer. The standard employed varies; however, commentators who have analyzed the case law in this area have concluded that "the plaintiff must satisfy the court as to the objective facts" that support the allegation of jurisdictional amount. 225 Where the plaintiff is seeking to enforce a duty arising out of constitutionally guaranteed rights, meeting this burden of proof poses substantial problems unless venue is obtained in a jurisdiction where constitutional rights are automatically deemed to be worth more than $10,000. 226 Hence, the lack of an amount-in-controversy requirement in section 1361 and the willingness of the courts to utilize section 1361 to enforce constitutional rights may distinguish the Mandamus and Venue Act as the sole means of obtaining relief.

V. The Future of the Federal Mandamus and Venue Act

It is well established that Congress has the power to withhold from the judiciary authority to review federal administrative determinations. 227 Nonetheless, the Supreme Court of the United States


223. It is clear that it is necessary to satisfy the amount-in-controversy requirement for federal jurisdiction in section 1331 suits against federal officers. Lynch v. Household Fin. Corp., 405 U.S. 538, 547 (1972).


225. Hart & Wechsler, supra note 33, at 1155.

226. Many cases have held that constitutional rights are by definition worth more than $10,000. See Cortright v. Resor, 325 F. Supp. 797, 810 (E.D.N.Y.), rev'd on other grounds, 447 F.2d 245 (2d Cir. 1971).

227. See notes 133-81 and accompanying text supra.

has stated that legislative intent to preclude judicial review of administrative action adjudicating private rights is not to be lightly inferred. Indeed, there is a continuing struggle to delineate the constitutional limits within which agency determinations may be enforced against individuals prior to judicial review. This debate will persist as long as individuals wronged by agency officials' actions are unable to obtain relief because no jurisdictional basis exists for bringing an action against such federal officials. The purpose of the enactment of the Mandamus and Venue Act was to provide such jurisdiction and to make the mandamus remedy readily available to all persons wronged by agency action. Courts and commentators alike have recognized that section 1361 should be liberally construed in accordance with its avowed purpose.

Referring to their "rational law of mandamus," Professors Byse and Fiocca have argued that the writ of mandamus should not be constrained by the "ministerial-discretionary" dichotomy, but instead should be infused with the equitable principles traditionally applied in providing injunctive relief and review through declaratory judgment actions. Likewise, Professor Davis has observed that

[The fundamental choice is between mandamus tradition and equity tradition. The law of mandamus is both positively harmful and needlessly complex. Its doctrine rests upon technicalities growing out of needs of former generations; the technicalities have failed to adapt to the needs of a modern system of judicial review . . . .

Equity tradition is simple and satisfactory . . . . [C]ourts and counsel typically focus immediately upon merits of cases, without interruption from procedural discord . . . . The mandatory injunction . . . does not make availability or scope of review dependent upon an undesirable and unworkable distinction between ministerial and discretionary action.

Arguably, a writ of mandamus could afford relief against federal officials to the same extent permitted in actions for injunctions, declaratory relief, and other equitable remedies. Since the issuance of mandatory injunctions and writs of mandamus are "governed by like con-

231. See note 55 and accompanying text supra.
233. Byse & Fiocca, supra note 1, at 331-36; Jurisdictional Basis, supra note 1, at 131-41.
234. Byse & Fiocca, supra note 1, at 331-36.
235. 3 Davis, supra note 55, § 23.12, at 361 (1958).
siderations," the following discussion of Cole v. Lynn, a recent mandatory injunction action, suggests a potential use for the writ of mandamus in controlling the actions of federal officials. In the Cole case, a preliminary injunction issued requiring affirmative action by the Secretary of the Department of Housing and Urban Development to restore eight apartment buildings which had been ordered demolished, to aid those tenants desiring to return to the apartments, and to provide security services to prevent further vandalism to the buildings. While the Secretary of HUD was vested with the discretion to determine whether to demolish such housing projects, plaintiffs made a prima facie showing that the Secretary had acted arbitrarily and irrationally in exercising this discretion. The case was characterized by Judge Gesell as "one of those distinctive cases . . . in which 'the status quo is a condition not of rest, but of action.'" Mandatory rather than prohibitory relief was deemed necessary to prevent continuing irreparable injury to the former tenants.

The case law further demonstrates that the courts are evolving the "rational law of mandamus" propounded by Professors Byse and Fiocca. In Martin v. Schlesinger, the plaintiffs were a group of Marine Corps reservists seeking, inter alia, to enjoin Marine Corps authorities from harassing and giving unsatisfactory grades to reservists for wearing short hair wigs. Finding jurisdiction over the action under section 1361, the court observed:

Traditionally, relief based upon federal mandamus procedure was confined to ministerial duties. However this Court adopts the recent expansion of the scope of relief available pursuant to mandamus . . . . "Mandamus jurisdiction under 28 U.S.C. § 1361 permits flexibility in remedy," such that the injunctive and declaratory relief sought in the present case is not inconsistent with this jurisdictional basis.

236. Miguel v. McCari, 291 U.S. 442, 452 (1934). In Miguel, the Supreme Court affirmed a directive from a lower court which ordered the Government to pay a pension to a member of the Philippines Scouts under several congressional enactments. The suit was characterized as an action "to enjoin interference" with the payments process, but it was in fact in the nature of mandamus. The Court noted that:

The mandatory injunction here prayed for is in effect equivalent to a writ of mandamus, and governed by like considerations.

Id. at 452. See also Warner Valley Stock Co. v. Smith, 165 U.S. 28 (1897); Note, Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts, 38 Colum. L. Rev. 903 (1938).


240. Id. at 639–40, quoting Burnett v. Tolson, 474 F.2d 877, 883 n.10 (1973) (footnotes omitted).
A series of cases dealing with the impoundment of appropriated funds by the executive branch of the government typifies a situation in which mandamus relief was most appropriate but seldom utilized to its full potential. This litigation was initiated as a result of the impoundment of federal funds appropriated to the states by the Secretary of the Department of Transportation under the Federal-Aid Highway Act of 1956,241 purportedly to assist in the control of inflation. In each of the cases reaching the courts of appeals, the actions of the Secretary of the Department of Transportation were deemed invalid,242 granting relief usually on the ground that the Secretary had exceeded the discretion granted to him under the Highway Act. Although the courts conceded that the Secretary had discretion to withhold funds for certain limited purposes, impoundment for general economic welfare was not considered to be within the scope of that discretion.243 While most courts dealing with this question have relied upon general federal question jurisdiction,244 the Eighth Circuit, in State Highway Commission v. Volpe,245 commented on the propriety of using the federal mandamus statute as a basis for jurisdiction.246 The district court in that case issued a writ of mandamus under section 1361 compelling the release of funds for fiscal year 1973, but the Department of Transportation had actually released funds for that year prior to the date judgment was entered. The action for mandamus was, therefore, rendered moot. Nonetheless, the court observed:

[I]f the Secretary was not delegated any discretionary power to withhold funds for anti-inflationary purposes, the Secretary would be acting outside the scope of his power and it would appear that mandamus was intended to provide a basis for such relief.247

243. See, e.g., State Highway Comm'n v. Volpe, 479 F.2d 1099, 1114 (8th Cir. 1975).
244. See, e.g., Iowa ex rel. State Highway Comm'n v. Brinegar, 512 F.2d 722 (8th Cir. 1975); State Highway Comm'n v. Volpe, 479 F.2d 1099 (8th Cir. 1973); Louisiana ex rel. Guste v. Brinegar, 388 F. Supp. 1319 (D.D.C. 1975). In Brinegar the court also used the federal mandamus statute as a basis for jurisdiction.
245. 479 F.2d 1099 (8th Cir. 1973).
246. Id. at 1104 n.6.
247. Id.
VI. Summary and Conclusions

This study has traced the development of common law mandamus and its statutory successor in the federal courts from its creation in the English courts until the present. The narrow use to which mandamus has been put in the modern era by American courts sharply varies from its initial purpose and use in the English common law courts. The American development of mandamus has largely been the product of the courts of the District of Columbia, due to a unique twist of history whereby the federal courts lacked statutory mandamus jurisdiction, while the District of Columbia courts retained such jurisdiction from its adoption of the Maryland common law.

Congressional action in 1962 authorizing a federal writ of mandamus has been thoroughly explored in many studies. The writ's development has been a modest one, based largely upon the District of Columbia's case law and strict construction of ministerial and discretionary acts by federal courts.

The frontiers of judicial creativity under the federal mandamus statute were first seen when the courts were called upon to police flagrant abuses of due process procedures by military authorities in the 1960's. First amendment free speech rights were early protected by the federal courts through mandamus, despite a strong statutory and case law tradition of noninvolvement in the daily affairs of the armed services. Then the courts called upon the military to honor their own regulations and to afford fair hearing and due process rights under the fifth amendment. These fifth amendment rights developed into the mainstay of mandamus actions, when review of administrative decisions was unobtainable under the Administrative Procedure Act or insufficient dollar claims precluded jurisdiction under other statutes.

Actions involving procedural irregularities in federal housing programs have been corrected by writs of mandamus. In several cases involving the housing and Model Cities acts, the courts have granted requested relief upon a broad reading of the basic enabling statute authorizing the programs. This approach is quite similar to that of early mandamus in England and is one way in which "reasonable" discretion can be reviewed, such review being statutorily precluded by the APA review provisions.

While mandamus has not yet developed a heritage of its own and cannot be identified as "the" appropriate jurisdictional basis for action, it is viewed as a catch-all basis for federal court jurisdiction. Mandamus should not be tied to the narrow review provisions of the
APA and the rigid ministerial-discretionary dichotomy as articulated by the Supreme Court. It should be available as a vehicle to challenge an administrator's decisions and to force them to be reviewed under the light of public scrutiny.

The broadening of the availability of the mandamus action, as contemplated by the courts of the District of Columbia, might return mandamus to its earliest history. Coupled with the expansion to allow access to more plaintiffs should be the availability of a writ of mandamus to compel the exercise of administrative discretion, in much the same manner that a federal appellate court can so direct a federal trial judge. These twin thrusts of mandamus development, combined with the ability and willingness of the federal court to review federal administrative actions in light of the basic purpose of the enabling statutes, will afford a salutory development in the law of mandamus, and return this ancient and arcane writ to its proper and historic function.