SUPREME COURT OF UNITED STATES

Stephen S. Chandler, United States District Judge for the Western District of Oklahoma,

Vs.

Judicial Council of the Tenth Circuit of the United States.

No. 2, Misc.

Argued Dec. 10, 1969.

Decided June 1, 1970.

Rehearing Denied June 29, 1970.

See 399 U.S. 937, 90 S.Ct. 2248.

Thomas J. Kenan, Oklahoma City, Okl., for petitioner.

Carl L. Shipley, Washington, D.C., amicus curiae.

Charles Alan Wright, Austin, Tex., for respondent.

Solicitor Gen., Erwin N. Griswold, for the United States, amicus curiae, by special leave of Court.

Mr. Chief Justice BURGER delivered the opinion of the Court.

Petitioner, a United States District Judge, filed a motion for leave to file a petition for a writ of mandamus or alternatively a writ of prohibition addressed to the Judicial Council of the Tenth Circuit. His petition seeks resolution of questions of first impression concerning, inter alia, the scope and constitutionality of the powers of the Judicial Councils under 28 U.S.C. §§ 137 and 332.1 The Judicial Council of each federal circuit is, under the present statute, composed of the active circuit judges of the circuit. Petitioner has asked this Court to issue an order under the All Writs Act2 telling the Council to 'cease acting (in) violation of its powers and in violation of Judge Chandler's rights as a federal judge and an American citizen.' The background facts are of some importance.

* On December 13, 1965, the Judicial Council of the Tenth Circuit convened in special session,3 and adopted an order which reflected a long history of controversy between petitioner and the Council concerning the conduct of the work of the District Court assigned to petitioner. The Order of December 13 purported to issue under the authority of 28 U.S.C. § 332, supra, n. 1, and recited that during

'the past four years the Judicial Council at many meetings has discussed and considered the business of the United States District Court for the Western District of Oklahoma and has done so with particular regard to the effect thereon of the attitude and conduct of Judge Chandler who, as the Chief Judge of that District, is primarily responsible for the administration of such business. * * *'

The Order noted that during that period petitioner had been a party defendant in both civil and criminal litigation, as well as the subject of two applications to disqualify him in litigation in which on challenge petitioner had refused to disqualify himself.4 The Order continued with a finding that

'Judge Chandler is presently unable, or unwilling, to discharge efficiently the duties of his office; that a change must be made in the division of business and the assignment of cases in the Western District of Oklahoma; and that the effective and expeditious administration of the business of the United States District Court for the Western District of Oklahoma requires the orders herein made.'

Expressly invoking the powers of the Judicial Council under 28 U.S.C. § 332, supra, n. 1, the Order directed that

'until the further order of the Judicial Council, the Honorable Stephen S. Chandler shall take no action whatsoever in any case or proceeding now or hereafter pending in the United States District Court for the Western District of Oklahoma; that all cases and proceedings now assigned to or pending before him shall be reassigned to and among the other judges of said court; and that until the further order of the Judicial Council no cases or proceedings filed or instituted in the United States District Court for the Western District of Oklahoma shall be asigned to him for any action whatsoever.

'It is further ORDERED that in the event the active judges of the United States District Court for the Western District of Oklahoma, including Judge Chandler, cannot agree among themselves upon the division of business and assignment of cases made necessary by this order, the Judicial Council, upon such disagreement being brought to its attention, will act under 28 U.S.C. § 137 and make such division and assignment as it deems proper.' Copies of the above Order were filed in the Court of Appeals for the Tenth Circuit and in the United States District Court for the Western District of Oklahoma on December 27 and 28, respectively. Another copy was served on Judge Chandler by a

U. S. Marshal.

On January 6, 1966, as previously noted, Judge Chandler filed with this Court his motion for leave to file a petition for a writ of prohibition and/or mandamus directed to the Judicial Council. He also sought a stay of its Order. The Solicitor General, appearing on behalf of the Judicial Council, asked this Court to deny the stay application on the Council's representation that the Order of December 13 was only temporary pending prompt further inquiry into Judge Chandler's administration of the business of his court. The stay was denied on January 21, 1966, on the ground that the Order was 'entirely interlocutory in character pending prompt further proceedings * * * and that at such proceedings Judge Chandler will be permitted to appear before the Council, with counsel * * *.' [1966] USSC 17; 382 U.S. 1003, 86 S.Ct. 610, 15 L.Ed.2d 494.

On January 24, 1966, Judge Chandler addressed a letter to his fellow district judges indicating that he objected to the removal and reassignment of cases previously assigned and pending before him on December 28, 1965, but that he was not in disagreement with them as to the assignment of all new cases to judges other than himself. Judge Chandler asserted continuing judicial authority, however, over the cases pending before him as of December 28. The following day the judges of the Western District of Oklahoma advised the Judicial Council that all judges of that Disrict had agreed on the division of new business filed in that court, but that they could not agree on the assignment to other judges of cases then pending before Judge Chandler.

On January 27, 1966, the Judicial Council again convened in special session and ordered a hearing on February 10, 1966, in Oklahoma City at which Judge Chandler was invited to appear, with counsel if he desired. However, by February 4, when the Council met again, it had been advised that no judge of the Western District, including Judge Chandler, desired to be heard pursuant to the order for hearing. Accordingly, no hearing took place.

At this same meeting on February 4, 1966, the Council concluded that there was a disagreement among the District Judges of the Western District as to the division of business; it reached this conclusion on the basis of the disagreement between Judge Chandler and the other District Judges as to the reassignment of cases previously assigned to Judge Chandler as of December 28, 1965. The Council accordingly, acting under 28 U.S.C. §§ 137 and 332, entered an order authorizing Judge Chandler to continue to sit on cases filed and asssigned to him prior to December 28, 1965; the Order assigned to the other judges of the Western District cases filed after that date. This Order of February 4 recited further that

'4. The division of business and assignment of cases made herein may be amended or modified by written order signed by all active judges of the Western District of Oklahoma, provided that nothing contained herein shall be construed as preventing Judge Chandler from surrendering any pending cases for re-assignment to another active judge or to prevent transfer between judges to whom new

business is assigned pursuant to this order.

'5. This order supersedes the orders of the Council entered on December 13, 1965, and on January 27, 1966, entitled 'In the Matter of the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma' and shall remain in effect until the further order of the Council.' On February 9, 1966, the Solicitor General filed a memorandum on behalf of the Council suggesting that in light of the above developments, namely the confirmation of Judge Chandler's authority to dispose of the case load then before him and the assignment of new business in accordance with an order previously agreed to by Judge Chandler, the case had become moot since there was nothing more to argue about. To this memorandum Judge Chandler filed a reply on February 25, 1966, contesting the suggestion that he had acquiesced in the Council's actions. Judge Chandler argued that his acquiescence in the division of new business settled upon by his fellow district judges was given deliberately for reasons of 'strategy' in order to prevent any possibility that the Council could find that 'the district judges * * * are unable to agree upon the adoption of rules or orders' for the distribution of business and assignment of cases under 28 U.S.C. § 137.

A supplemental memorandum filed by the Solicitor General on behalf of the Council expressed the latter's position that Judge Chandler should dispose of his pending docket of pre-December 28, 1965, cases before seeking assignment of new cases. In view of Judge Chandler's expressed disagreement with the February 4 Order the Solicitor General withdrew the suggestion of mootness. Later in March 1966 Judge Chandler submitted a reply to that supplemental memorandum asserting that the Council was continuing to act beyond its authority by purporting to require that he certify to it his subsequent willingness and ability to undertake new business. He contended that the supplemental memorandum setting forth the condition that he must apply for assignment was in effect a new order fixing still another condition on the exercise of his judicial office.

On July 12, 1967, the Judicial Council convened and, in light of a report from the District Judges of the Western District showing that Judge Chandler had only 12 cases then pending, concluded that a modification of the Order of February 4, 1966, might be in order. The Council transmitted a copy of the minutes of the meeting to the District Judges and asked them to consider anew and agree upon a division of business within the Western District. On August 28, 1967, Judge Chandler wrote his district judge colleagues claiming that the Council's action of July 12 was but another 'illegal effort' to create a situation in which the Council could assert its powers under 28 U.S.C. § 137 to assign and apportion cases.

On September 1, 1967, the Western District Judges, including Judge Chandler, advised the Judicial Council that 'the current order for the division of business in this district is agreeable under the circumstances.' (Emphasis added.) When the Council convened two weeks later, it noted the latter expressing agreement and concluded that there need be no new order in the case; accordingly the Order of February 4 was left in effect. All of these developments were reported to the Clerk of this Court and are part of the record.

In essence petitioner challenges all orders of the Judicial Council relating to assignment of cases in the Western District of Oklahoma as fixing conditions on the exercise of his constitutional powers as a judge. Specifically, petitioner urges that the Council has usurped the impeachment power, committed by the Constitution to the Congress exclusively. While conceding that the statute here invoked confers some powers on the Judicial Council, petitioner contends that the legitimate administrative purposes to which it may be turned do not include stripping a judge of his judicial functions as he claims was done here.

The Judicial Council contends that petitioner seeks to invoke the original jurisdiction of this Court in a case to which such jurisdiction does not extend. The Council argues that the purely administrative action taken in this case has never been reviewed by any court and cannot now be reviewed in an original proceeding under the guise of a claim under the All Writs Act.

The judicial Council also contends that the order of December 13, 1965, has been altogether superseded by the Order of February 4, 1966. The latter, in accordance with petitioner's desire, gave back those cases that had been temporarily withdrawn from Judge Chandler. It also continued in force the assignment and division of judicial business agreed upon by the District Judges including Judge Chandler. Alternatively, the Council contends that even absent petitioner's agreement on the division of cases, nonetheless the Council's action is authorized by 28 U.S.C. §§ 137 and 332.

The Solicitor General, who has filed a brief as amicus curiae, contends that this Court has jurisdiction to entertain the petition for a writ of mandamus or prohibition when a Judicial Council order is directed to a district judge because it acted as a judicial, not an administrative, tribunal for purposes of meeting the requirement that the case fall within this Court's appellate jurisdiction. The Solicitor General suggests that the Council is nothing more nor less than the Court of Appeals sitting en banc, and that the proceedings in the present case may be analogized to a disbarment.5 From this the Solicitor General concludes that the case falls within the extraordinary relief available through the All Writs Act. That conclusion in turn rests on the further assumption that this Court's supervisory authority over lower courts under § 13 and 14 of the First Judiciary Act, 1 Stat. 80, 81, was not withdrawn when the letter two sections were repealed in favor of the All Writs Act by the revision of the Judicial Code in 1948. The Solicitor General concludes, however, that even though there is appellate jurisdiction in this Court, nonetheless it ought not to be exercised since the Order of December 13 has been superseded for four years by the Order of February 4, the terms of which have been expressly approved by petitioner. The respondent Council also urges this point.

Whether the action taken by the Council with respect to the division of business in Judge Chandler's district falls to one side or the other of the line defining the maximum permissible intervention consistent with the constitutional requirement of judicial independence is the ultimate question on

which review is sought in the petition now before us. The dissenting view of this case seems to be that the action of the Judicial Council relating to assignment of cases is an impingement on judicial independence. There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business. The question is whether Congress can vest in the Judicial Council power to enforce reasonable standards as to when and where court shall be held, how long a case may be delayed in decision, whether a given case is to be tried, and many other routine matters. As to these things—and indeed an almost infinite variety of others of an administrative nature—can each judge be an absolute monarch and yet have a complex judicial system function efficiently?

The legislative history of 28 U.S.C. § 332 and related statutes is clear that some management power was both needed and granted.6 That is precisely what a group of distinguished chief judges and others seem to have had in mind when, in 1939, Congress was urged by Chief Justice Hughes, Chief Judge Groner, Judges Parker, Stephens and Biggs, and others to give judges a statutory framework and power whereby they might 'put their own house in order.'

Many courts—including federal courts—have informal, unpublished rules which, for example, provide that when a judge has a given number of case under submission, he will not be assigned more cases until opinions and orders issue on his 'backlog.' These are reasonable, proper, and necessary rules, and the need for enforcement cannot reasonably be doubted. These internal rules do not come to public notice simply because reasonable judges acknowledge their necessity and abide by their intent. But if one judge in any system refuses to abide by such reasonable procedures, it can hardly be that the extraordinary machinery of impeachment is the only recourse.

These questions have long been discussed and debated; they are not easy questions and the risks suggested by the dissents are not to be lightly cast aside. But for the reasons that follow we do not find it necessary to answer them because the threshold question in this case is whether we have jurisdiction to entertain the petition for extraordinary relief.

The authority of this Court to issue a writ of prohibition or mandamus 'can be constitutionally exercised only insofar as such writs are in aid of its appellate jurisdiction. Marbury v. Madison, [1803] USSC 16; 1 Cranch 137, 173—180[1803] USSC 16; , 2 L.Ed. 60.' Ex parte Republic of Peru, [1943] USSC 69; 318 U.S. 578, 582[1943] USSC 69; , 63 S.Ct. 793, 796[1943] USSC 69; , 87 L.Ed. 1014 (1943). If the challenged action of the Judicial Council was a judicial act or decision by a judicial tribunal,7 then perhaps it could be reviewed by this Court without doing violence to the constitutional requirement that such review be appellate. As the concurring and dissenting opinions amply demonstrate, finding the prerequisites to support a conclusion that we do have appellate jurisdiction in this case would be no mean feat. It is an exercise we decline to perform since we conclude that in the present posture of the case other avenues of relief on the merits may yet be open

to Judge Chandler. See Rescue Army v. Municipal Court, [1947] USSC 91; 331 U.S. 549, 568—575[1947] USSC 91; , 67 S.Ct. 1409, 1410, 1419—[1947] USSC 91; 1423, 91 L.Ed. 1666 (1947).

Judge Chandler contends that his acquiescence in the division of business agreed upon by his fellow judges was given under some kind of duress flowing from the Council's Order of December 13, and that it was also given as a matter of 'strategy,' specifically in order to avoid the appearance of an absence of agreement among the District Judges as to a division of work. By so doing he sought to avoid creating a situation in which the Council would undoubtedly have had jurisdiction under § 137. The Council, however, noting that the judges had been unable to reach agreement as to those cases previously assigned to Judge Chandler, found nonetheless that a disagreement existed. Despite his apparent acquiescence, Judge Chandler contends that his actions since then belie his words; specifically that his subsequent attack in this Court established his disagreement.

Whatever the merits of this apparent attempt to have it both ways, one thing is clear: except for the effort to seek the aid of this Court, Judge Chandler has never once since giving his written acquiescence in the division of business sought any relief from either the Council or some other tribunal.8 Were he to disagree with the present division of business, the Judicial Council would thereupon be obliged to 'make the necessary orders.' 28 U.S.C. § 137. He chose to avoid that course. As Mr. Justice HARLAN'S concurring opinion points out, Judge Chandler apparently desires to have the status quo ante restored without the bother of either disagreeing with the present order of the Council or persuading his fellow district judges to enter another. To say the least this is a remarkable litigation posture for a lawyer to assert in his own behalf.

Instead, Judge Chandler brought an immediate challenge in this Court to the Order of December 13. As noted above, supra, at 79, we denied any relief on the ground that that Order was 'entirely interlocutory in character pending prompt further proceedings * * * and that at such proceedings Judge Chandler will be permitted to appear before the Council, with counsel. * * *' He expressly refused to attend the hearing called by the Council for February 10, 1966, in response to this Court's order; in his brief he gives as a reason that he was unwilling to 'attend a hearing conducted by a body whose jurisdiction he challenged * * *.'9 As a result of that refusal we have no record, no petition for relief addressed to any agency, court or tribunal of any kind other than this Court, and a very knotty jurisdictional problem as well.10 Parenthetically it might be noted that Chandler could have appeared, in person or by counsel, and challenged the jurisdiction of the Council without impairing his claim that it had no power in the matter.

As noted above, and as conceded by the dissents, the Order of December 13, 1965, was terminated by the Order of February 4, 1966. Judge Chandler has twice expressed agreement with the disposition of judicial business effected by that latter Order. Nothing in this record suggests that, were he to express disagreement, relief would not be forthcoming. On the contrary, on July 12, 1967, the Council expressly invited the judges of Chandler's district to agree among themselves

upon a new rule or order for the division of business, and all the judges wrote back advising the Council that 'the current order for the division of business in this district is agreeable under the circumstances.'

Whether the Council's action was administrative action not reviewable in this Court, or whether it is reviewable here, plainly petitioner has not made a case for the extraordinary relief of mandamus or prohibition. The motion for leave to file the petition is therefore

Denied.

Mr. Justice MARSHALL took no part in the consideration of decision of this case.

Mr. Justice HARLAN, concurring in the denial of an extraordinary writ.

This opinion sets forth my reasons for concluding (1) that the subsisting Order of the Judicial Council of February 4, 1966, raises issues that are adequately presented to this Court and should be faced by it; (2) that this Court does have jurisdiction to pass upon them; and (3) that promulgation and effectuation of the Order of February 4, 1966, are within the Council's authority, and hence this petition for an extraordinary writ should be denied. The novelty and unusual character of these questions require, regrettably, an opinion of some length.

* I am perplexed by the Court's explanation for its failure to reach the issues presented by Judge Chandler's petition. As the Court states, the issues are whether this Court has jurisdiction to review the orders of the Judicial Council, and, if so, whether those orders are invalid because beyond the statutory and constitutional bounds of the Council's authority. The Court says, correctly I believe, that 'the threshold question in this case is whether we have jurisdiction to entertain the petition for extraordinary relief.' Ante, at 86. However, that question is never decided, and the Court's opinion closes with the statement that whether or not we have jurisdiction, 'plainly petitioner has not made a case for the extraordinary relief of mandamus or prohibition.' The predicate for this conclusion appears to be that Judge Chandler has an adequate remedy available before the Council, which he must invoke before seeking relief here. As authority for this unusual disposition, the Court cites only Rescue Army v. Municipal Court, [1947] USSC 91; 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947), a decision that I do not consider lends itself to the gloss the Court today places upon it.

It is clear that, although the Council's Order of December 13, 1965, has been revoked, the subsequent Order of February 4, 1966, is still outstanding and is attacked by Judge Chandler as

beyond the authority constitutional exercisable by the Council under either § 137 or § 332 of the Judicial Code. Judge Chandler has twice certified to the Council his acquiescence in the allocation of business mandated by the February 4 Order; indeed, his first certification was relied upon by the then Solicitor General, appearing for the Council in February 1966, as a basis for suggesting that the case was moot. Judge Chandler immediately responded that he did not in any way concede the Council's power to enter the February 4 Order, and that his indication of acquiescence made to the Council did not constitute such a concession. In light of this continued challenge to the order, the Solicitor General in March 1966 agreed 'that the case can no longer be deemed moot.'

The case thus reached the posture in which it now stands: Judge Chandler unequivocally asserts that the February 4 Order is beyond the Council's authority. If his contention were sound, the only validly outstanding directives for the allocation of business in the District Court would be those 'rules and orders' of that court, issued under § 137, that were in effect prior to December 13, 1965. Though the terms of those rules and orders are not before us, it is evident that they provided for assignment to Judge Chandler of a portion of the cases continually filed in his court. In challenging the validity of the Council's attempts to modify the previous allocation of business, and in requesting restoration of the status quo ante, Judge Chandler seeks to achieve a marked departure from the manner in which business is currently allocated.

Judge Chandler claims a right to accomplish this result without the necessity of mobilizing all the judges of his district to change the assignment of business by unanimous action, as the February 4 Order allows them to do. Further, since he denies the Council's authority to deprive him of all new business, he of course denies that he should be required to request the Council to renege as a condition of obtaining review of its outstanding order. He claims that it is illegal for the Council to deprive him of new cases, and equally so for the Council to condition his access to new cases upon his making a request to it that is tantamount to a form of a certification of disagreement under § 137.

Although the Court states that it does not decide the merits of this claim, see ante, at 87, I can read its opinion only as a determination that the claim is insubstantial. The Court states that it is a 'remarkable litigation posture' for Judge Chandler to argue that the Council has no authority to force him to choose between remaining without new business, seeking further action by the Council, or seeking unanimous action by the District Judges. The Court denies relief because '(n)othing in this record suggests that, were he to express disagreement, relief would not be forthcoming,' a decision that can only be premised on a holding that he is denied no rights by being relegated to that course of action. Ante, at 87, 88—89. But this is the contrary of what Judge Chandler contends, and a conclusion with which two members of this Court sharply differ. As explained in Part III, infra, I too believe that Judge Chandler now lacks meritorious ground for complaint. However, I do not believe that the Court can properly make that holding without first determining its jurisdiction to consider the question.

Rescue Army, supra, provides no authority for such a procedure. That decision represents one branch of the longsettled doctrine that this Court will not determine constitutional questions unnecessarily or in a case that does not present them with sufficient clarity to make possible the circumspect consideration they require. See generally id., at 568—585, 67 S.Ct. at 1419—1428; Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346, 56 S.Ct. 466, 483[1936] USSC 36; , 80 L.Ed. 688 (1936) (Brandeis, J., concurring). Because the constitutional issues in Rescue Army were presented in a highly abstract and speculative form, and were clouded by factors not present in this case,1 the Court dismissed the appeal, declining to adjudicate them. It concluded that an appellant there, faced with state criminal charges, would have to undergo a trial on the charges before obtaining review in this Court of his constitutional claims. As in this case, the Court's action had the effect of rejecting the appellant's claim of a right to obtain relief without further proceedings in a lower tribunal, see 331 U.S., at 584, 67 S.Ct., at 1427. However, the Court made that disposition only after carefully determining that it had jurisdiction in the case. See id., at 565—568, 67 S.Ct., at 1417 1419.

The Court does suggest, by footnote, an alternative basis for its refusal to consider Judge Chandler's petition. Ante, at 87 n. 8. If an adequate means of review of Council orders were available in the Federal District Court under 28 U.S.C. § 1361, that might justify this Court's staying its hand until such review had been sought. However, as pointed out by the United States as amicus curiae, it seems wholly unrealistic to suggest that an appropriate remedy could be obtained from a District Court. The District Court mandamus statute, § 1361, extends to 'officers,' 'employees,' and 'agencies' of the United States; there is no indication that it empowers the District Courts to issue mandamus to other judicial tribunals. Thus, as the Judicial Council seems to concede, the availability of a remedy under that statute hinges on a determination, which the Court avoids making, whether the Council's actions under review were judicial or not. Brief for Respondent 19. Beyond that, direct review by a district judge of the actions of circuit judges would present serious incongruities and practical problems certainly not contemplated when § 1361 was enacted. It is unrealistic for the Court to imply that § 1361 presents an appropriate avenue of relief justifying this Court's refusal to exercise its jurisdiction.

I do not disagree with the Court that the issues presented by Judge Chandler's petition are troublesome ones that we might wish to avoid deciding. However, I can perceive no reasoned justification for the Court's refusal to decide them. Chief Justice Marshall long ago enunciated the principle that should govern us here:

'It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. * * * With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usrup that which is not given.' Cohens v. Virginia, [1821] USSC 18; 6 Wheat. 264, 404[1821] USSC 18; , 5 L.Ed. 257 (1821).

That principle has not been abrogated by the Rescue Army decision, which merely undertook to define the limits of our ability to adjudicate constitutional issues in cases that adequately present them. I find no license in that decision for the action taken by the Court today.

II

Before Judge Chandler's attack on the orders of the Judicial Council can be considered, it must be determined whether the Court possesses jurisdiction to entertain his petition for a writ of mandamus or prohibition. While I agree with my Brothers Black and Douglas that the Court does have jurisdiction, I think the question warrants fuller treatment than they have given it.

A. Constitutional Jurisdiction

Any discussion of the scope of this Court's authority under the Constitution must take as its point of departure Marbury v. Madison, [1803] USSC 16; 1 Cranch 137, 2 L. Ed. 60 (1803), where the Court held that except in those instances specifically enumerated in Article III of the Constitution,2 this Court may exercise only appellate not original—jurisdiction. Because this suit is not cognizable as an original cause, the question initially to be faced is whether it is within our appellate jurisdiction.

The Court was asked in Marbury to issue a writ of mandamus to compel the Secretary of State to deliver to an appointed justice of the peace his previously signed commission. After nothing that the suit did not fall within any of the enumerated heads of original jurisdiction, the Court, through Chief Justice Marshall, concluded: 'To enable this court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable (the Court) to exercise appellate jurisdiction.' Id., at 175. The Court held that issuance of mandamus to a nonjudicial federal officer would not be an exercise of appellate, but of original, jurisdiction. Thus the statute that purported to authorize such action by the Supreme Court was ineffective. See 2 J. Story, Commentaries on the Constitution of the United States § 1761 (5th ed. 1891).

The Chief Justice stated, as the 'essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.' I Cranch, at 175. Beyond cavil, the issuance of a writ of mandamus to an inferior court is an exercise of appellate jurisdiction. In re Winn[1909] USSC 116; , 213 U.S. 458, 465—466[1909] USSC 116; , 29 S.Ct. 515, 516 517[1909] USSC 116; , 53 L.Ed. 873 (1909). If the challenged orders of the Judicial Council in this instance were 'an exercise of judicial power.' this Court is constitutionally vested with jurisdiction to review them, absent any statute curtailing such review. Williams v. United States, [1933] USSC 123; 289 U.S. 553, 566[1933] USSC 123; , 53 S.Ct. 751, 755[1933] USSC 123; , 77 L.Ed. 1372 (1933); Old Colony Trust Co. v. Commissioner of Internal Revenue, [1929] USSC 113; 279 U.S. 716, 723[1929] USSC 113; , 49 S.Ct. 499, 501[1929] USSC 113; , 73 L.Ed. 918 (1929); In re Sanborn[1893] USSC 85; , 148 U.S. 222, 224[1893] USSC 85; , 13 S.Ct.

577, 578[1893] USSC 85; , 37 L.Ed. 429 (1893). On the other hand, if they were not, Marbury alone is sufficient authority to support a conclusion that this suit is beyond this Court's power under Article III. An analysis of the nature of the Council's orders must begin with consideration of the statute by which the Council was created.

The Judicial Councils of the circuits were brought into being by the Act of August 7, 1939, which was termed 'An act to provide for the administration of the United States courts, and for other purposes.' 53 Stat. 1223. The major purposes of the Act were to free the federal courts from their previous reliance on the Justice Department in budgetary matters, and 'to furnish to the Federal courts the administrative machinery for self-improvement, through which those courts will be able to scrutinize their own work and develop efficiency and promptness in their administration of justice.' H.R.Rep. No. 702, 76th Cong., 1st Sess., 2 (1939). To this end the Act established the Administrative Office of the United States Courts, headed by a Director, to compile statistical data on the operation of the courts and to provide support services of a logistical nature.3 The Act further established two new entities in each of the judicial circuits: the Judicial Council, composed of all the active circuit judges, and the Judicial Conference, composed of circuit and district judges along with participating members of the bar. The Council, in regular meetings, was to consider the reports of the Director and take 'such action * * * thereon' as might be necessary;4 the Conference was to meet annually 'for the purpose of considering the state of the business of the courts and advising ways and means of improving the administration of justice within the circuit.'

As these statutory provisions indicate, Congress envisioned quite different functions for the three new bodies. The role of the Administrative Office, and its Director, was to be 'administrative' in the narrowest sense of that term. The Director was entrusted with no authority over the performance of judicial business—his role with respect to such business was, and is, merely to collect information for use by the courts themselves. Chief Justice Groner of the Court of Appeals for the District of Columbia, who was chairman of the committee of circuit judges that participated in drafting the bill, stressed to the Senate Committee on the Judiciary that the bill would give the Director no 'supervision or control over the exercise of purely judicial duties,' because to grant such power to an administrative officer 'would be to destroy the very fundamentals of our theory of government. The administrative officer (the Director) proposed in this bill is purely an administrative officer.' Hearings on S. 188 before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 1st Sess., 12 (1939) (response to question by Senator Hatch). See also id., at 36 (statement of A. Holtzoff).

The Judicial Conference for each circuit was given a complementary role, again divorced from direct involvement in the disposition by the courts of their judicial business. Patterned in large part after the voluntary conferences that had been held for years in the Fourth Circuit, the Conference was intended to provide an opportunity for friendly interchange among judges and between bench and bar, out of which might grow increased understanding of problems of judicial administration and enhanced cooperation toward their solution. Its function, as indicated by the statutory language quoted above, was to be 'purely advisory.' See Hearings on H.R. 5999 before the House Committee on the Judiciary, 76th Cong., 1st Sess., 11—12, 17, 23—24 (1939).

The Judicial Council, on the other hand, was designed as an actual participant in the management of the judicial work of the circuit. The Act provided that, '(t)o the end that the work of the district courts shall be effectively and expeditiously transacted,' the circuit judges of each circuit were to meet as a council at least twice a year. After consideration of the statistical reports submitted by the Administrative Office, 'such action shall be taken thereon by the council as may be necessary. It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts.'6 This provision exists today as § 332 without relevant change, except that the 1948 revision of the Judicial Code added a declaration that '(e)ach judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit,' and correspondingly directed the district judges to carry out all such 'orders.' The reviser's note explained this amendment as merely a change in 'phraseology,' embodying in new words the original understanding of the powers of the councils. H.R.Rep. No. 308, 80th Cong., 1st Sess., A46 (1947).

The most helpful guide in determining the role envisaged for the Judicial Councils is the testimony of Chief Justice Groner, who shouldered most of the task of explaining the purposes of the bill to the committees of both Houses of Congress. He explained that under existing law the circuit judges had 'no authority to require a district judge to speed up his work or to admonish him that he is not bearing the full and fair burden that he is expected to bear, or to take action as to any other matter which is the subject of criticism, * * * for which he may be responsible.' Hearings on S. 188, supra, at 11. In contrast, under the proposed bill the Administrative Office would 'observe and see that whatever is wrong in the administration of justice, from whatever sources it may arise, is brought to the attention of the judicial council that it may be corrected, by the courts themselves.' Id., at 12 13.

As examples of the kinds of action a Judicial Council might be expected to take under the proposed bill, Chief Justice Groner suggested that if the statistics showed a particular district court to be falling behind in its work, the Council would 'see to it, either that the particular judge who is behind in his work catches up with his work, or that assistance is given to him whereby the work may be made current.' Id., at 11. If it appeared that a particular judge 'had been sick for 4 or 5 months and had been unable to hold any court, or had been unable, by reason of one thing or another, to transact any business, * * * immediate action could be taken to correct that situation.' Hearings on H.R. 5999, supra, at 11. Asked by Representative Walter Chandler 'what power is given there to require a judge to decide a case that he has had under advisement for months and years,' he responded that the Council, after considering the matter, could issue directions that would be 'final.' Id., at 13. Any 'lazy judge's work would be reported to the council, (which) would take the correct action.' Id., at 27.7

Judge Parker stated his view that

'what we have done is this, up to this point: We have given to the Circuit Court of Appeals supervisory power over the decisions of the district judges, but we have given them no power

whatever over administration by the district judges.

'If Judge Jones decides a case contrary to the views of the majority of the Circuit Court of Appeals, we can tell him so and reverse him. But if he holds a case under advisement for 2 years, instead of deciding it promptly, there is nothing that we are authorized by the law to do about it in the absence of an application for mandamus. Now, this (bill) authorizes us to do something about it; and I agree with you that something ought to be done about it.' Id., at 21.

In place of the inadequate extraordinary remedy of mandamus, which could correct only the extreme abuse in a particular case, the circuit judges, sitting as the Judicial Council, were given the authority for continuous supervision of the flow of work through the district courts.

In short, the proposed Judicial Council was intended to fill the hiatus of authority that existed under the then-current arrangements, whereby the Attorney General collected data about the operation of the courts but had no power to take corrective action, 'except, perhaps, as a result of the moral suasion of his office.' The proposed bill would allow compilation of more complete information, and would 'provide a method, a legitimate, valid, legal method, by which if necessary, and when necessary, the courts may clean their own house'; it would 'give a body, in which the authority is firmly lodged, the power to do that and to do it expeditiously.' Id., at 8. See generally Report on the Powers and Responsibilities of the Judicial Councils, H.R.Doc. No. 201, 87th Cong., 1st Sess. (1961); Fish, The Circuit Councils: Rusty Hinges of Federal Judicial Administration, 37 U.Chi.L.Rev. 203 (1970).

This legislative history lends support to a conclusion that, at least in the issuance of orders to district judges to regulate the exercise of their official duties, the Judicial Council acts as a judicial tribunal for purposes of this Court's appellate jurisdiction under Article III. It seems clear that the sponsors of the bill considered the power to give such orders something that could not be entrusted to any purely 'administrative' agency not even to the Administrative Office, which was to be an arm of the judicial branch of government and under the direct control of the Supreme Court and the Judicial Conference of the United States. Chief Justice Groner, in the passage quoted above, stated that to give such power to an administrative agency 'would be to destroy the very fundamentals of our theory of government.' Instead, any problems unearthed by the Director's studies were to be 'corrected, by the courts themselves.' Hearings on S. 188, supra, at 12—13. See also Hearings on H.R. 5999, supra, at 8.

There were further references throughout the hearings and committee reports to the fact that the corrective power would be exercised by the courts themselves. E.g., Hearings on S. 188, supra, at 16 (statement of A. Vanderbilt); id., at 31—32 (statement of Hon. Harold M. Stephens); id., at 36 (statement of A. Holtzoff); H.R.Rep. No. 702, 76th Cong., 1st Sess., 4 (1939). The House report quoted with approval an endorsement of the bill by the American Judicature Society, stating that

'there is no way to fortify judicial independence equal to that of enabling the judges to perform their work under judicial supervision.' Ibid. These statements indicate that the power to direct trial judges in the execution of their decision-making duties was regarded as a judicial power, one to be entrusted only to a judicial body.

In this regard it is important to note that an earlier draft of the 1939 Act would have given responsibility for supervising the lower courts to the Supreme Court and the Chief Justice of the United States. The idea of devolving the authority to councils at the circuit level was suggested by Chief Justice Hughes, who believed that the supervision could be made most effective by 'concentration of responsibility in the various circuits * * * with power and authority to make the supervision all that is necessary to induce competence in the work of all of the judges of the various districts within the circuit.' H.R.Doc. No. 201, supra, at 3. It is equally notable that, while the draftsmen did consider giving district judges some representation on the Councils, see id., at 4—5, there was apparently no thought given to including nonjudicial officers. These indications leave no doubt that the Councils' architects regarded the authority granted the Councils as closely bound up with the process of judging itself.8

Because the legislative history shows Congress intended the Councils to act as judicial bodies in supervising the district judges, there is no need to decide whether placement of this authority in a nonjudicial body would violate the constitutional separation of powers, as Chief Justice Groner seems to have believed. It is sufficient to conclude from reason and analogy that this responsibility is of such a nature that it may be placed in the hands of Article III judges to be exercised as a judicial function.

An order by the Council to a district judge, directing his handling of one or many cases in his court, is an integral step in the progress of those cases from initial filing to final adjudication. Like the district judge's own orders setting a time for discovery or trial, or transferring a case to another district pursuant to 28 U.S.C. § 1404(a), such an order, even though concerned with a matter of 'judicial administration,' is part of the official conduct of judicial business. Unlike the more common orders of the district court, the Council's orders involve supervision of a subordinate judicial officer. But in this regard they are not unlike the extraordinary writ of mandamus, which Judge Parker thought the Council's orders would supplement, or the orders entered by courts in proceedings for disbarment of an attorney. In short, the function of the Council in ordering the district judges to take certain measures related to the cases before them is, as the legislative history indicates Congress understood, judicial in nature.

To support a contrary conclusion, respondent points to the language of Justice Holmes in Prentis v.

Atlantic Coast Line Co., [1908] USSC 160; 211 U.S. 210, 226, 29 S.Ct. 67, 69[1908] USSC 160; , 53 L.Ed. 150 (1908), defining a 'judicial inquiry' as one that 'investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist,' as contrasted to legislation, which 'looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.' The Court in Prentis held that a ratemaking proceeding in the Virginia State Corporation Commission was legislative in character, despite the fact that the Commission was assumed to function as a court in performing other duties. Similarly, in United States v. Ferreira, [1851] USSC 79; 13 How. 40, 14 L.Ed. 42 (1852), this Court concluded that the act of a district judge in passing on claims under a treaty, subject to approval by the Secretary of the Treasury, was not a judicial one; the Court held that Congress, in giving this authority to judges, referred to them by their office 'merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends.' Id., at 47. See also Gordon v. United States, [1864] USSC 29; 2 Wall. 561, 17 L.Ed. 921 (1865); In re Metzger[1847] USSC 12; , 5 How. 176, 12 L.Ed. 104 (1847); Hayburn's Case, 2 Dall. 409, 1 L.Ed. 436 (1792).

Respondent argues that the functions of the Judicial Council under § 332 are, under Justice Holmes' definitions, legislative, or administrative, rather than judicial; and that the statutory provision making the membership of the Council coextensive with that of the Court of Appeals for each circuit10 is merely a means of designating the individual members by reference to their office. Certainly respondent is correct in urging that Congress' designation of circuit judges as the members of the Council does not in itself make the Council's function judicial. I think, however, that the Council's orders directing the official business of the district courts are judicial within the general definition of that term in Prentis. In urging that the Council's function merely 'looks to the future and changes existing conditions by making a new rule,' respondent disregards the fact that each of the Council's orders, such as those challenged here, is rooted in the factual circumstances of the business of a particular judge or judges and the status of a particular case or cases in the district court; and each order, if properly entered, extends only as far as the circumstances that make it 'necessary * * * for the effective and expeditious administration of the business of the courts.' 28 U.S.C. § 332. As noted above, the Council's orders for the handling of cases in the district court serve as one step in the progress of those cases toward judgment. Those orders can be expected to apply commonly accepted notions of proper judicial administration to the special factual situations of particular cases or particular judges.

As respondent points out, the power entrusted to the Councils by § 332, like those added by later enactments see infra, at 109 110, necessarily involves a large amount of discretion; accordingly, review of the Councils' actions will usually be narrow in scope. But this does not mean that the Councils are 'left at large as planning agencies.' United States v. First City National Bank, [1967] USSC 80; 386 U.S. 361, 369, 87 S.Ct. 1088, 1094[1967] USSC 80; , 18 L.Ed.2d 151 (1967). In First City National Bank, we were faced with a federal statute directing the courts to determine whether the anticompetitive effect of a proposed bank merger was outweighed by considerations of

community convenience and need. We ruled that the courts could accept this as a 'judicial task' because, like the 'rule of reason,' long prevalent in the antitrust field, the effect-on-competition standard was a familiar one within 'the area of judicial competence.' See also United Steel-workers of America v. United States, [1959] USSC 169; 361 U.S. 39, 80 S.Ct. 1, 4 L.Ed.2d 12 (1959). Judicial administration is a matter in which the courts even more clearly should have special competence. Within the framework of the statutes establishing the inferior federal courts and defining their jurisdiction, the Judicial Councils are charged with the duty to take such actions as are necessary for the expedition of the business of the courts in each circuit. Their discretion in this matter, while broad, does not seem to be of a different order from that possessed by district judges with respect to many matters of trial administration. In both instances, review can correct legal error or abuse of discretion where it occurs; that the scope of review will often be very narrow does not in itself establish that the exercise of such discretion is a nonjudicial act.

Respondent makes a further argument to avert a conclusion that the actions here drawn in question were judicial actions. It points out that Congress since 1939 has given the Judicial Councils many specific powers—powers that respondent considers so clearly nonjudicial as to negate any inference that the Council serves as a 'judicial' body within the purview of Article III. Those powers include the power to order a district judge, where circumstances require, to reside in a particular part of the district for which he is appointed, 28 U.S.C. § 134(c); to make any necessary orders if the district judges in any district are unable to agree upon the division of business among them, 28 U.S.C. § 137; to consent to the pretermission of any regular session of a District Court for insufficient business or other good cause, 28 U.S.C. § 140(a); to approve as necessary the provision of judicial accommodations for the courts by the General Services Administration, 28 U.S.C. § 142; to consent to the designation and assignment of circuit or district judges to sit on courts other than those for which they are appointed, 28 U.S.C. § 295; to certify to the President that a circuit or district judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability, thus authorizing the President to appoint an additional judge, 28 U.S.C. § 372(b); to direct where the records of the courts of appeals and district courts shall be kept, 28 U.S.C. § 457; to approve plans for furnishing representation for defendants under the Criminal Justice Act, 18 U.S.C. § 3006A(a); and to take various actions in regard to referees in bankruptcy, including removal of a referee for cause, 11 U.S.C. §§ 62(b), 65(a), (b), 68(a), (b), (c), 71(b), (c).

While many of these powers are trivial in comparison with the courts' basic responsibility for final adjudication of lawsuits, I am not persuaded that their possession is inconsistent with a conclusion that the Council, when performing its central responsibilities under 28 U.S.C. § 332, exercises judicial power granted under Article III. Cf. Glidden Co. v. Zdanok, [1962] USSC 121; 370 U.S. 530, 580—582[1962] USSC 121; , 82 S.Ct. 1459, 1488—[1962] USSC 121; 1490, 8 L.Ed.2d 671 (1962) (opinion of Harlan, J.). In the first place, the respondent concedes that at least one of these enumerated powers—the power to remove referees for cause—'can properly be regarded as judicial,' and it is not at all clear that any of them is beyond the range of the permissible activities of an Article III court. In Textile Mills Securities Corp. v. Commissioner of Internal Revenue, [1941] USSC 152; 314 U.S. 326, 332[1941] USSC 152; , 62 S.Ct. 272, 276[1941] USSC 152; , 86 L.Ed. 249 (1941), the Court noted the range of relatively minor responsibilities, other than the hearing of appeals, placed by statute in the courts of appeals. These included prescribing the form of writs and other process and the form and style of the courts' seals; making rules and regulations; appointing a clerk and approving the appointment and removal of deputy clerks; and fixing the times when court should be held. Each of these functions was to be performed by the 'court.' While it is possible that

the performance of some of them might never produce a case or controversy reviewable in this Court, they are reasonably ancillary to the primary, dispute-deciding function of the courts of appeals. Just as the Court in Textile Mills did not question the authority of Congress to grant such incidental powers to the courts of appeals, I see little reason to believe that any of the various supervisory tasks entrusted to the Judicial Council is beyond the capacities of a judicial body under Article III.

In the second place, my conclusion about the nature of the Council's primary function under § 332 would stand even if it were determined that one or more of the Council's assorted incidental powers were incapable of being exercised by an Article III court. If I am correct in concluding that Congress' purpose in 1939 in creating the Judicial Councils was to vest in them, as an arm of the Article III judiciary, supervisory powers over the disposition of business in the district courts, that purpose is not undone by a subsequent congressional attempt to give them a minor nonjudicial task; it would be 'perverse to make the status of (the Councils) turn upon so minuscule a portion of their purported functions.' Glidden Co. v. Zdanok, 370 U.S., at 583, 82 S.Ct., at 1490.

B. Statutory Jurisdiction

This Court does not, of course, necessarily possess all of the appellate jurisdiction permitted to it by Article III. That article provides that our appellate jurisdiction is to be exercised 'with such Exceptions, and under such Regulations as the Congress shall make,' and this language has been held to give Congress the power, within limits, to prescribe the instances in which it may be exercised. E.g., Ex parte McCardle, [1868] USSC 31; 7 Wall. 506, 512—513[1868] USSC 31; , 19 L.Ed. 264 (1869). I turn, therefore, to the Judicial Code to determine our statutory authority to consider Judge Chandler's petition.

Congress in the Code has not spoken, one way or the other, regarding review of the orders of Judicial Councils. Petitioner asserts that the Court has power to issue mandamus or prohibition to the Councils under the All Writs Act, 28 U.S.C. § 1651(a), which provides that

'(t)he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.'

This statute has been construed to empower this Court to issue an extraordinary writ to a lower federal court in a case falling within our statutory appellate jurisdiction, where the issuance of the writ will further the exercise of that jurisdiction. See e.g., De Beers Consolidated Mines, Ltd. v. United States, [1945] USSC 93; 325 U.S. 212, 217[1945] USSC 93; , 65 S.Ct. 1130, 1133[1945] USSC 93; , 89 L.Ed. 1566 (1945); United States Alkali Export Assn. v. United States, [1945] USSC 97; 325 U.S. 196, 201—204[1945] USSC 97; , 65 S.Ct. 1120, 1124—1126[1945] USSC 97; , 89 L.Ed. 1554 (1945). It is now settled that the case need not be already pending in this Court before

an extraordinary writ may be issued under § 1651(a); rather, the Court may issue the writ when the lower court's action might defeat or frustrate this Court's eventual jurisdiction, even where that jurisdiciton could be invoked on the merits only after proceedings in an intermediate court. See, e.g., De Beers Consolidated Mines, Ltd. v. United States, 325 U.S., at 217, 65 S.Ct., at 1133; Ex parte Republic of Peru, [1943] USSC 69; 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014 (1943); Ex parte United States, [1932] USSC 155; 287 U.S. 241, 248—249[1932] USSC 155; , 53 S.Ct. 129, 130—131[1932] USSC 155; , 77 L.Ed. 283 (1932); McClellan v. Carland, [1910] USSC 110; 217 U.S. 268, 30 S.Ct. 501, 54 L.Ed. 762 (1910); cf. FTC v. Dean Foods Co., [1966] USSC 116; 384 U.S. 597, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966); Roche v. Evaporated Milk Assn., [1943] USSC 94; 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185 (1943). But cf. In re Glaser[1905] USSC 116; , 198 U.S. 171, 173[1905] USSC 116; , 25 S.Ct. 653, 654[1905] USSC 116; , 49 L.Ed. 1000 (1905); In re Massachusetts[1905] USSC 91; , 197 U.S. 482, 488[1905] USSC 91; , 25 S.Ct. 512, 514[1905] USSC 91; , 49 L.Ed. 845 (1905).

Each of the prior cases in which this Court has invoked § 1651(a) to issue a writ 'in aid of (its jurisdiction)' has involved a particular lawsuit over which the Court would have statutory review jurisdiction at a later stage. By contrast, petitioner's reliance on this statute is bottomed on the fact that the action of the Judicial Council 'touches, through Judge Chandler's fate, hundreds of cases over which this Court has appellate or review jurisdiction.' Petition for Writ of Prohibition and/or Mandamus 13. He argues that the Council's orders, allocating to other judges in his district cases that would otherwise be decided by him, constitute a usurpation of power that cannot adequately be remedied on final review of those cases by certiorari or appeal in this Court. The United States as amicus curiae agrees that this claim properly invokes the Court's power to consider whether mandamus or prohibition should be granted.12 Although this expansive use of § 1651(a) has no direct precedent in this Court, it seems to me wholly in line with the history of that statute and consistent with the manner in which it has been interpreted both here and in the lower courts.

Chief Justice Stone, writing for the Court in Ex parte Republic of Peru, 318 U.S., at 583, 63 S.Ct., at 796, characterized the 'historic use of writs of prohibition and mandamus directed by an appellate to an inferior court' as that of 'confining the inferior court to a lawful exercise of its prescribed jurisdiciton, or of compelling it to exercise its authority when it is its duty to do so.' The bounds of this Court's discretionary power to issue such writs were further stated in Parr v. United States, [1956] USSC 80; 351 U.S. 513, 520—521[1956] USSC 80; , 76 S.Ct. 912, 917[1956] USSC 80; , 100 L.Ed. 1377 (1956):

'The power to issue them is discretionary and it is sparingly exercised. * * * This is not a case where a court has exceeded or refused to exercise its jurisdiction, see Roche v. Evaporated Milk Assn., [1943] USSC 94; 319 U.S. 21, 26[1943] USSC 94; , 63 S.Ct. 938, 941[1943] USSC 94; , 87 L.Ed. 1185, nor one where appellate review will be defeated if a writ does not issue, cf. Maryland v.

Soper, [1926] USSC 26; 270 U.S. 9, 29—30, 46 S.Ct. 185, 189[1926] USSC 26; , 70 L.Ed. 449. Here the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction. The extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals. Roche v. Evaporated Milk Assn., supra, 319 U.S. at page 30, 63 S.Ct. at page 943.'

In Parr, the petitioner's claim was simply that a district court had erred in dismissing an indictment at the Government's request after the Government had obtained a new indictment for the same offenses in another district. In contrast, the present case involves a claim that the Council's orders were entered in a matter entirely beyond its jurisdiction. Judge Chandler claims that the order of December 13, 1965, depriving him of both pending and future cases, was tantamount to his removal from office, and that such an act far exceeded the limited jurisdiction over 'administrative' matters conferred on the Council by § 332. He further asserts, as noted in Part I, supra, that the order of February 4, 1966, exceeded the Council's jurisdiction under either § 332 or § 137. Such grave charges clearly go beyond a mere claim that the Council has 'erred in ruling on matters within (its) jurisdiction.' Cf. Will v. United States, [1967] USSC 237; 389 U.S. 90, 95—96, 98 and n. 6[1967] USSC 237; , 88 S.Ct. 269, 273—274, 275[1967] USSC 237; , 19 L.Ed.2d 305 (1967); Schlagenhauf v. Holder, [1964] USSC 219; 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964).

Further, there seems to be no means by which Judge Chandler's challenge to the orders could be aired adequately on review of the cases to which they pertain. While the losing party in a case assigned to another district judge might conceivably argue on appeal that he is entitled to reversal because his case should have been heard by Judge Chandler, such an argument would encounter formidable obstacles. A reviewing court would have no way of determining whether a particular case filed in the District Court after the February 4 Order would, but for that order, have been assigned to Judge Chandler; nor is it clear that the error, if detectable, would in itself entitle the losing party to invalidate proceedings had before another judge. More basically, Judge Chandler is asserting an injury to himself, apart from any injuries to the parties in those cases; the parties cannot be relied upon to seek vindication of that injury. Cf. Ex parte Fahey, [1947] USSC 111; 332 U.S. 258, 260[1947] USSC 111; , 67 S.Ct. 1558, 1559, 91 L.Ed. 2041 (1947); Ex parte Harding, [1911] USSC 30; 219 U.S. 363, 372—380[1911] USSC 30; , 31 S.Ct. 324, 326 330[1911] USSC 30; , 55 L.Ed. 252 (1911).

It is difficult to see how the very multiplicity of the cases affected by the Council's orders could derogate from this Court's authority under § 1651(a) to issue an extraordinary writ in aid of its appellate jurisdiction over them. A somewhat analogous multiplicity was found to militate in favor of the issuance of mandamus in McCullough v. Cosgrave, 309 U.S. 634, 60 S.Ct. 703, 84 L.Ed. 992 (1940), and in Los Angeles Brush Mfg. Corp. v. James, [1926] USSC 180; 272 U.S. 701, 47 § .Ct. 286[1926] USSC 180; , 71 L.Ed. 481 (1927). As later explained by Mr. Justice Brennan, dissenting in La Buy v. Howes Leather Co., [1957] USSC 4; 352 U.S. 249, 266[1957] USSC 4; , 77 S.Ct. 309, 318[1957] USSC 4; , 1 L.Ed.2d 290 (1952),

'Los Angeles Brush Mfg. Corp. was a case where a reference (to a master) was made, not because a district judge decided that the particular circumstances of the particular case required a reference but pursuant to an agreement among all the judges of that District Court always to appoint masters to hear patent cases regardless of the circumstances of particular cases.'

Mandamus was therefore issued in Los Angeles Brush Mfg. Corp., and in McCullough, which involved a similar situation in the same District Court, in order to remedy a pervasive disregard of the Rules of Civil Procedure affecting numerous cases.

Similarly, in La Buy the Court upheld the authority of the Court of Appeals under § 1651(a) to issue writs of mandamus compelling a district judge to rescind his referral of two antitrust cases to a master for trial. The Court found that the referral 'was a clear abuse of discretion,' and further noted 'that the Court of Appeals has for years admonished the trial judges of the Seventh Circuit that the practice of making references 'does not commend itself' * * * (and that it was) 'all too common in the Northern District ofIllinois," 352 U.S., at 257, 258, 77 S.Ct., at 314. This factor was primary among the 'exceptional circumstances' found to warrant the Court of Appeals' issuance of the writs.

In the reported case most nearly analogous to this one, the Court of Appeals for the Third Circuit issued a writ of mandamus at the behest of the United States to compel a district judge to return to the judicial office from which he had been unlawfully removed. United States v. Malmin, 272 F. 785 (C.A.3d Cir. 1921). Judge Malmin, of the District Court of the Virgin Islands, had returned to the United States after the territorial governor had purported to remove him and appoint another to his seat. Relying on § 262 of the Judicial Code of 1911, a predecessor of the All Writs Act, the court ruled that it had authority to issue the writ 'in aid of' its jurisdiction, id., at 791; it observed that the absence of a lawfully appointed judge of the District Court affected the rights of litigants in cases reviewable in the Court of Appeals, and that 'the right of the public to a properly constituted trial court from which appeals can validly lie could not be asserted or brought about in proceedings on appeal or by writ of error.' In those circumstances, the court deemed it 'essential to the appellate jurisdiction of this court that orderly proceedings in the District Court of the Virgin Islands be restored.' Id., at 792.

A dissenter in Malmin disagreed with the majority's conclusion that the defect could not be rectified on appeal, and urged that mandamus should not issue because it could not bind the succeeding appointee, who was not a party. In the case before us, as noted above, the ordinary appeals are not adequate to protect Judge Chandler's interest; and there is no problem of missing parties, since it is the judge himself who is complaining of illegal interference with the exercise of his office, and that complaint can be remedied fully by the issuance of a writ against respondent Judicial Council.

For these reasons I would conclude that the actions challenged by Judge Chandler sufficiently affect matters within this Court's appellate jurisdiction to bring his application for an extraordinary writ within our authority under § 1651(a), and that his charges, if sustained, would present an appropriate occasion for the issuance of such a writ.15

III

In the present posture of this case Judge Chandler, in my opinion, is not entitled to the relief he seeks. The Order of December 13, 1965, which prompted his recourse to this Court, has been superseded by the Order of February 4, 1966, which I am satisfied is entirely within the authority of the Council. I am wholly unable to regard the latter order either as a 'removal' of Judge Chandler from judicial office, or as anything other than an effort to move along judicial traffic in the District Court. In this state of affairs, I can find no room for the constitutional argument so vigorously made by my Brothers BLACK and DOUGLAS.

Petitioner strenuously attacks the substance of the December 13 Order, which he claims effectively re-A145

(1947). Because the language of § 1651(a) more closely resembles that of § 262, it has been speculated that Congress by enacting the revision may have withdrawn from this Court its special appellate power under § 234 to supervise proceedings in the lower federal courts without regard to whether any other statute gives the Court jurisdiction to review those proceedings. See La Buy v. Howes Leather Co., [1957] USSC 4; 352 U.S. 249, 260[1957] USSC 4; , 77 S.Ct. 309, 315[1957] USSC 4; , 1 L.Ed.2d 290 (1957) (Brennan, J., dissenting); In re Josephson, supra

The United States as amicus urges the Court to rule that no such change was effected by the 1948 revision, arguing correctly that § 234 would clearly encompass the type of review Judge Chandler seeks. The United States points out, in support of such a ruling, that the Reviser's Note stated that § 1651(a) 'consolidates' the earlier provisions, 'with necessary changes in phraseology'; this gave no indication that a significant change in the law was intended, and one should not lightly be inferred. I note that the Court in Ex parte Republic of Peru, referring to both § 234 and § 262, stated that '(u)nder the statutory provisions, the jurisdiction of this Court to issue common-law writs in aid of its appellate jurisdiction has been consistently sustained.' 318 U.S., at 582—583, 63 S.Ct., at 796. Its use of the expression 'in aid of its appellate jurisdiction' to characterize both statues suggests that the similar phrase in § 1651(a) may also encompass the powers exercised by this Court under § 234. However, there is no need to decide this question here in light of the fact that the reviewability in this Court of the many cases whose allocation is determined by the Judicial Council's orders brings Judge Chandler's petition within the Court's powers as they existed under § 262. moved him from office, as well as the procedures under which the order was issued. His substantive argument is that § 332, on which the Council relied, does not authorize the placing of restrictions upon the functioning of a district judge, even temporarily, and that if it does the statute is unconstitutional because the constitutional provisions16 vesting in Congress authority to impeach federal officers,

including judges, establish the exclusive means of inquiry into the fitness of a federal judge to perform his duties. In response the United States as amicus argues that the impeachment provisions should not be read as precluding legislation that would authorize supervision of federal judges by 'judicial trial of the fulfillment of the condition of federal judicial tenure under Article III—that the judge maintain his 'good behavior." This question has been the subject of scholarly debate, and is presently before the Senate as it considers the proposed Judicial Reform Act. See Hearings on S. 1506—S. 1516 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. (1969). Petitioner's procedural objections to the December 13 Order relate to its issuance ex parte, without notice or hearing circumstances that raise serious questions under the Due Process Clause of the Fifth Amendment.