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MANDATORY RELIEF FROM ADMINISTRATIVE ACTION IN THE FEDERAL COURTS

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IN A LONG LINE of recent federal cases the intricacies of mandamus, which are fundamentally at variance with an efficient system of judicial review of administrative action, have seriously impaired the heretofore satisfactory remedies of injunction, mandatory injunction, and declaratory judgment, even though Rule 81(b) of the Federal Rules of Civil Procedure provides that the writ of mandamus is "abolished."

The case law has become so complex and so uncertain that even the simple question whether a federal district court outside the District of Columbia has original jurisdiction to grant mandatory relief is the subject of conflicting lines of cases. The law usually applied by the lower courts is directly contrary to the law usually applied by the Supreme Court which has often allowed mandatory relief in cases not arising in the District of Columbia and has never held that any district court is without jurisdiction to grant a mandatory injunction. Equity tradition calls for mandatory relief whenever the court deems it appropriate. The Administrative Procedure Act¹ specifically provides for judicial review through "writs of prohibitory or mandatory injunction," and it specifically provides that the reviewing court "shall . . . compel agency action unlawfully withheld." Yet many recent federal decisions have ignored the Supreme Court's practice, have rejected the equity tradition, have violated the APA, and have held that district courts outside the District of Columbia have no jurisdiction to grant mandatory relief. Some courts have even held that they are without jurisdiction to grant de-

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¹ 60 Stat. 237 (1946), as amended, 5 U.S.C.A. § 1001 (1951).

claratory relief if compliance with the declaration will involve affirmative action.

This line of cases does more than throw sand into our procedural machinery. It often causes serious substantive injustice.

Mandamus intricacies do their deadly deeds not only by denying jurisdiction to district courts to grant mandatory relief when mandatory relief is needed, but also by confusing the law of availability and scope of review. According to the Administrative Procedure Act, which is surely based upon considerable understanding of modern needs, availability of judicial review does not depend upon any such distinction as the supposed one between "ministerial" and "discretionary" action. But according to mandamus tradition it does. And somehow most federal courts continue to assume that mandamus tradition must be allowed to override what Congress has enacted.

Similarly, after a long period of pulling and hauling, a compromise about scope of review was reached in the Administrative Procedure Act. The compromise has proved highly satisfactory in practice, as former partisans on both sides now generally recognize. One might suppose that such an important compromise when embodied in an act of Congress would command judicial respect. But the federal courts, for no good reason, usually follow the mandamus tradition. To some uncertain and fluctuating extent, the scope of review when mandatory relief is sought is more restricted than what the APA provides.

The whole subject of mandatory relief from administrative action is in need of re-examination in the perspective of recent experience concerning judicial review of administrative action. This paper is the product of an effort to make such re-examination. The conclusion is quite conservative: a satisfactory system can be developed without breaking new ground. The only creative thinking that is needed has to do with making selections among the conflicting authorities already in existence.

I. JURISDICTION TO GRANT MANDATORY RELIEF

The law on the simple question whether federal district courts outside the District of Columbia have original jurisdiction to issue mandatory relief is amazingly complex and the courts have failed to develop a consistent body of law.

For two independent reasons, such courts lack power to issue writs of mandamus. The first reason is that in 1813 the Supreme Court held

in *McIntire v. Wood*² that the Judiciary Act did not confer such power. The case has often been followed³ and has never been overruled. In *Kendall v. United States*⁴ in 1838 the Supreme Court held that the District of Columbia courts inherited the common-law jurisdiction of Maryland and therefore had original jurisdiction to issue writs of mandamus. Ever since, the District of Columbia courts have had greater power than other federal courts to issue mandatory relief, although no reason other than historical accident can be given for holding that some district courts may issue mandamus and others may not.

The second reason for lack of power to issue writs of mandamus is Rule 81(b) of the Federal Rules of Civil Procedure: "The writs of scire facias and mandamus are hereby abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules." This rule applies to all district courts, including those of the District of Columbia, but not to appellate courts.⁵

Rule 81(b), according to its terms, abolishes the writ of mandamus but preserves "relief heretofore available by mandamus." The courts have so interpreted it. Thus, the Court of Appeals for the District of Columbia has declared: "The remedy which, before adoption of the new Rules of Civil Procedure, was known as mandamus, is available under the new rules and is governed by the same principles as formerly governed its administration."⁶ The Court of Appeals for the Seventh Circuit, after quoting Rule 81(b), has declared: "The clarity of this phraseology leaves no doubt that the relief, mandamus in character, is not abolished. The rule merely provides for the same remedy under different procedure. That is the effect of the change. . . . Although in many instances a writ of mandamus will not issue, the courts are au-

² 7 Cranch (U.S.) 504 (1813).

³ *Bath County v. Amy*, 13 Wall. (U.S.) 244 (1871); *McClung v. Silliman*, 6 Wheat. (U.S.) 598 (1821); *Rosenbaum v. Bauer*, 120 U.S. 450 (1887); *Knapp v. Lake Shore Ry.*, 197 U.S. 536 (1905); *Covington & C. Bridge Co. v. Hager*, 203 U.S. 109 (1906); *Marshall v. Crotty*, 185 F. 2d 622 (C.A. 1st, 1950).

⁴ 12 Pet. (U.S.) 524 (1838).

⁵ *Armour & Co. v. Kloebe*, 109 F. 2d 72 (C.A. 5th, 1939). The court further said that even if the Rule did apply, "there would seem to be little difficulty, if required, in interpreting petitioner's application as an appropriate motion upon which to base relief." *Ibid.*, at 74.

⁶ *Hammond v. Hull*, 131 F. 2d 23, 25 (App. D.C., 1942), cert. denied 318 U.S. 777 (1943). "Substantive rights are still governed by the principles formerly applied in mandamus cases." *Youngblood v. United States*, 141 F. 2d 912, 915 (C.A. 6th, 1944).

thorized to compel action through injunction when and if the facts warrant it."⁷

Rule 81(b) is thus clear in preserving the substance of mandamus. But the substance that is clearly preserved is far from clear.

Another mandamus complexity is the distinction between original jurisdiction and ancillary jurisdiction. Section 1651 of the Judicial Code 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."⁸ This confers what is usually called "ancillary"⁹ jurisdiction to issue mandatory relief in aid of jurisdiction otherwise conferred. For instance, because a court of appeals has statutory authority to review orders of the Federal Trade Commission, the court may issue "an order in the nature of writ of mandamus" requiring the Commission to decide on the merits a motion for modification of a cease-and-desist order which had been affirmed by the court.¹⁰ Since Rule 81(b) does not apply to courts of appeals, nothing would prevent the court from issuing "a writ of mandamus." When Section 1651 is combined with Rule 81(b), it apparently means that a district court which otherwise has jurisdiction to enter a judgment or decree may issue relief which before the adoption of Rule 81(b) was available by mandamus.¹¹

But before the adoption of Rule 81(b), no relief was "available by mandamus" in the district courts outside the District of Columbia. This was because of the line of authority originating with *McIntire v. Wood* in 1813.¹² District courts in recent years have often assumed and held that therefore they have no jurisdiction to provide mandatory relief from administrative action.¹³ The many recent cases so holding would be sound authority if mandamus or what was formerly manda-

⁷ *Delaware & Hudson R. Corp. v. Williams*, 129 F. 2d 11, 16 (C.A. 7th, 1942), vacated for other reasons 317 U.S. 600 (1942).

⁸ 62 Stat. 944 (1948), as amended, 28 U.S.C.A. § 1651 (1950).

⁹ See *Truth Seeker Co. v. Durning*, 147 F. 2d 54, 56 (C.A. 2d, 1945). In *United States ex rel. Vassel v. Durning*, 152 F. 2d 455 (C.A. 2d, 1945), the court held: "[I]t is abundantly settled . . . that district courts have no jurisdiction to grant such relief except as ancillary to the exercise of some independently conferred jurisdiction. . . ." Relief was denied for lack of jurisdiction.

¹⁰ *American Chain & Cable Co. v. F.T.C.*, 142 F. 2d 909 (C.A. 4th, 1944).

¹¹ The provision for ancillary jurisdiction is sometimes twisted into original jurisdiction. An especially good example, with cases cited, is *C. D. Mathews Estate, Inc. v. Olive Branch Drainage*, 185 F. 2d 53 (C.A. 7th, 1950).

¹² 7 Cranch (U.S.) 504 (1813).

¹³ Samples of these cases are discussed below. See notes 28, 38-41, 43, 44, 46, and 48 *infra*.

mus were the only approach to the determination of the question whether a court has power to grant mandatory relief.

But mandamus is not the only approach to mandatory relief. Another approach is through the mandatory injunction, which has its own independent origin in equity. An equity court traditionally has power to issue both prohibitory injunctions and mandatory injunctions. For instance, as early as 1836 Story summarized the established law: "A Writ of Injunction may be described to be a judicial process, whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ."¹⁴ All federal district courts have the same equity powers, whether or not the courts sit in the District of Columbia. The Supreme Court has never held that any district court lacks power to grant injunctions, either prohibitory or mandatory.

From an early time,¹⁵ under what is now Section 1331 of the Judicial Code,¹⁶ all federal district courts have had jurisdiction to review federal administrative action whenever the action is found to be reviewable and whenever no other statute has withdrawn jurisdiction. The leading case is *American School v. McAnnulty*,¹⁷ in which the Supreme Court held that the district court had jurisdiction to enjoin enforcement by a postmaster of a fraud order issued by the Postmaster General.

A court which has jurisdiction to issue an injunction is not limited to issuing an injunction which is prohibitory in form or in substance but may grant the relief it finds to be appropriate and practical in the circumstances. To say that an equity court may grant negative relief but not affirmative relief, or that an equity court may enjoin but may not command, would be artificial and technical and out of tune with equity tradition.

¹⁴ Consult 2 Story, *Equity Jurisprudence* § 861 (1st ed., 1836). To the same effect, see Jeremy, *Equity Jurisdiction* 306 (2d Amer. ed., 1840); High, *Law of Injunctions* § 1 (3d ed., 1890). See *Lane v. Newdigate*, 10 Ves. 192, 194 (1804), where Lord Eldon said: "The question is whether the Court can specifically order that to be restored. I think I can direct it in terms, that will have that effect. The Injunction, I shall order, will create the necessity of restoring the Stop-gate. . . ."

¹⁵ E.g., *Noble v. Union River Logging Co.*, 147 U.S. 165 (1893).

¹⁶ 62 Stat. 930 (1948), 28 U.S.C.A. §1331 (1949): "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States." Of course, all suits challenging federal administrative action arise under the laws of the United States.

¹⁷ 187 U.S. 94 (1902).

The *American School* case itself well illustrates the impracticability of trying to draw a line between a prohibitory and a mandatory decree. The Supreme Court said that the complainants were entitled to an injunction "to prohibit the further withholding of the mail from complainants."¹⁸ The form of language is prohibitory. But the substance is mandatory. The substance is precisely the equivalent of compelling the postmaster to deliver mail addressed to the complainants. Sound policy obviously requires that an equity court should have power to grant whatever relief is appropriate to do justice.

Quibbling about what is affirmative and what is negative is unprofitable and injurious. In a 1954 case¹⁹ a court of appeals enjoined a postmaster "from refusing to accept for mailing" a toy cap pistol manufactured by the plaintiff; was the injunction mandatory or prohibitory? In 1936 the Supreme Court in a Sherman Act case enjoined the defendants from "refraining from deviating" from announced price schedules; was the injunction mandatory?²⁰ In *United States v. Lee*,²¹ the plaintiff prevailed in an action against government officers for ejectment; was the order of ejectment mandatory or were the officers merely prohibited from continuing in possession of the land? Such questions as these are quite impractical.²² The purpose of an equity court is to do justice and to issue whatever order is fitting and practical in the circumstances, whether the order is affirmative or negative or unclassifiable.

The Supreme Court has often approved mandatory injunctions, and in doing so it has never suggested that jurisdiction should hinge on the question whether the particular case came up from the District of Columbia or from another district court. In 1897 the Supreme Court stated the law of mandatory injunction in simple and clear terms: "[A] court of equity . . . is not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action, where the circumstances of the case demand it."²³ Although

¹⁸ *Ibid.*, at 110.

¹⁹ *Stanford v. Lunde Arms Corp.*, 211 F. 2d 464 (C.A. 9th, 1954).

²⁰ *Sugar Institute, Inc. v. United States*, 297 U.S. 553, 603 (1936).

²¹ 106 U.S. 196 (1882).

²² The courts in the past have sometimes indulged in such quibbling. An outstanding example is a statement of Judge Augustus Hand: "I think there probably is a distinction . . . between an application for a mandamus requiring an official in general to take certain action and an injunction restraining his refusal upon some particular ground which he sets up as a consideration legally controlling. . . ." *Wilson v. Bowers*, 14 F. 2d 976, 977 (S.D. N.Y., 1924).

²³ *Ex parte Lennon*, 166 U.S. 548, 556 (1897).

the case came up from an Ohio district court, and not from the District of Columbia, the Court assumed that the only question about issuing a mandatory injunction was whether from the standpoint of doing justice it was proper in the circumstances.²⁴

Similarly, in *Virginian Ry. Co. v. System Federation* the Supreme Court declared in affirming a decree requiring affirmative action: "[T]he extent to which equity will go to give relief where there is no adequate remedy at law is not a matter of fixed rule. It rests rather in the sound discretion of the court. . . . It is a familiar rule that a court may exercise its equity powers, or equivalent mandamus powers . . . to compel courts, boards, or officers to act in a matter with respect to which they may have jurisdiction. . . ."²⁵ Although the case came up from a Virginia district court, and not from the District of Columbia, the Supreme Court affirmed a decree which compelled the carrier to "treat with" the union under the Railway Labor Act. The Court properly assumed that an equity court has power not only to enjoin but also to compel affirmative action.

A court of appeals has accurately summarized the basic law which the Supreme Court is likely to follow: "Injunctions are, of course, most commonly prohibitory, and such injunctions operate in futuro, but equity courts have, from early times, when equitable considerations have required the restoration of a status quo, issued mandatory injunctions or granted other affirmative relief responsive to the needs of parties invoking equity."²⁶

In *Johnson v. Yellow Cab Transit Co.*,²⁷ the Supreme Court affirmed a mandatory injunction granted by an Oklahoma federal district court. Oklahoma officers had seized liquors from a carrier, which sought not only an injunction but also a return of the liquors. Would it not have been absurd for the Supreme Court to have said that because of an 1813 case about mandamus, an equity court today cannot determine on the merits whether affirmative relief as well as negative relief should be granted? Yet that is precisely what the lower federal courts, in a long line of recent cases, have been saying and holding. Because of obsolete ideas about mandamus, the federal courts have been deny-

²⁴ The Supreme Court has recently stated one practical reason for mandatory relief: "It has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo." *Porter v. Lee*, 328 U.S. 246, 251 (1946).

²⁵ *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 551 (1937).

²⁶ *Bowles v. Skaggs*, 151 F. 2d 817, 820 (C.A. 6th, 1945).

²⁷ 321 U.S. 383 (1944).

ing not only writs of mandamus but also mandatory injunctions, injunctions, and declaratory judgments, without inquiring whether an administrative wrong has been committed or whether judicial review is needed to correct substantive injustice.

The case which has curiously become the leading case is *Palmer v. Walsh*.²⁸ The plaintiff sought reinstatement as a federal employee. The court said that the complaint could be interpreted as asking for relief in the nature of mandamus, or declaratory relief, or a mandatory injunction. The court held that mandamus must be denied for want of power of a district court outside the District of Columbia to issue writs of mandamus. The court then reasoned that declaratory relief must be denied because (1) the Declaratory Judgments Act does not "enlarge" the jurisdiction of district courts, (2) in *Doehler Metal Furniture Co. v. Warren*²⁹ the Court of Appeals for the District of Columbia held that the power to issue mandamus does not give a court jurisdiction to issue a declaratory judgment, and (3) the reasoning of the *Doehler* case applies "with added force" to a district court which, unlike a District of Columbia district court, has no original jurisdiction to issue a writ of mandamus.

The court also gave reasons for holding that it could not grant a mandatory injunction: (4) a federal court which enjoined a removal from office "conceded" that if the problem had been reinstatement the court would have been without power,³⁰ (5) the Supreme Court held in 1898 that a court of equity has no jurisdiction over appointment and removal of executive appointees,³¹ and (6) a federal court in refusing to issue a mandatory injunction against a selective service board had said that a prayer for a mandatory injunction is in effect a prayer for a writ of mandamus.³²

The six reasons add up to the virtual equivalent of nothing. (1): That the Declaratory Judgments Act does not "enlarge" the jurisdiction of district courts does not answer the question whether the district courts have jurisdiction. The Declaratory Judgments Act confers jurisdiction to grant declaratory relief, and it has no provision excepting declaratory relief which if complied with will mean an affirmative act. (2) and (3): That power to issue mandamus does not give a court

²⁸ 78 F. Supp. 64 (D. Ore., 1948).

²⁹ 129 F. 2d 43, 45 (1942), cert. denied 317 U.S. 663 (1942).

³⁰ *Butler v. White*, 83 Fed. 578, 587 (D. W.Va., 1897).

³¹ *White v. Berry*, 171 U.S. 366 (1898).

³² *Branham v. Langley*, 139 F. 2d 115 (C.A. 4th, 1943).

power to issue declaratory relief does not prove that a court having no power to issue mandamus has no power to issue declaratory relief.

(4) and (5): The 1898 holding of the Supreme Court that a court of equity has no jurisdiction over appointment and removal of executive appointees is no longer law. In 1947, in *United Public Workers of America (C.I.O.) v. Mitchell*,³³ the Supreme Court granted a declaratory judgment to a federal employee concerning the validity of a threatened discharge. Four days after the *Palmer* case, the Supreme Court announced its decision in *Hilton v. Sullivan*,³⁴ in which a federal employee in the District of Columbia sued the Secretary of the Navy and members of the Civil Service Commission for "declaratory judgment, mandamus, and other relief" in order to challenge a demotion and furlough. The Court decided the merits without wasting a single word on either reviewability or remedies.

(6): The court in *Palmer v. Walsh* equated mandatory injunction to mandamus. It should have equated mandamus to mandatory injunction. Mandamus is so burdened with intricacies having no relation to modern practical needs, and equity tradition is so thoroughly successful in judicial review of administrative action, that if the two remedies are to become equivalents, as they should, they should be equivalent to what the mandatory injunction has been in the past. The two remedies have been different. The important difference is not that mandamus is a legal remedy and mandatory injunction equitable,³⁵ but that the Supreme Court has held that district courts outside the District of Columbia have no original jurisdiction to grant mandamus,³⁶ and that the Supreme Court has often granted or affirmed mandatory injunctions in cases coming up from courts outside the District of Columbia.³⁷ The holding in *Palmer v. Walsh* that the court had no jurisdiction to grant a mandatory injunction is thus contrary to Supreme Court practice.

How strange that the federal courts should not only follow but should even acclaim such an unfortunate opinion!³⁸ A court of appeals

³³ 330 U.S. 75 (1947).

³⁴ 334 U.S. 323 (1948).

³⁵ See the 1836 statement of Story, and other authorities, in note 14 supra.

³⁶ The leading case is *McIntire v. Wood*, 7 Cranch (U.S.) 504 (1813).

³⁷ E.g., *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 551 (1937). See other authorities cited in notes 14, 23, 24, and 27 supra.

³⁸ The court in the *Palmer* case ignored the Supreme Court's decision in *Smith v. Bourbon County*, 127 U.S. 105 (1888), which probably comes closer than any other Supreme Court decision to supporting the *Palmer* holding. A stockholder sought a decree in equity against a railroad to compel assignment of a claim against the county on county bonds,

and a district court have spoken of the *Palmer* opinion as "excellent,"³⁹ and a district court has called it "a keen analysis of the problems" and "a most complete exploration of the authorities in this field."⁴⁰

The Court of Appeals for the First Circuit, in *Marshall v. Crotty*,⁴¹ denied declaratory and mandatory relief to a discharged federal employee who sought reinstatement. One ground for the decision was agreement with the *Palmer* case that "a district court lacking jurisdiction by way of mandamus, is likewise without jurisdiction to give a declaratory judgment determining the reinstatement rights of a former U.S. government employee."⁴² The court did not mention that the Supreme Court granted a declaratory judgment to a government employee in the *Hilton* case. Nor did it mention the cases in which the Supreme Court has approved mandatory injunctions whether or not the cases arose in the District of Columbia.

In many recent cases federal courts have held that they have no jurisdiction to grant mandamus or a mandatory injunction or other mandatory relief to discharged federal employees.⁴³ A typical example is *McCarthy v. Watt*,⁴⁴ where the plaintiffs sought a declaratory judgment and a mandatory injunction for reinstatement to federal positions from which they had been demoted. The court denied the mandatory injunction on the ground that a mandatory injunction is the equivalent

and against the county and commissioners to compel signing and issuance of the bonds. The Court granted mandatory relief against the railroad but denied it against the county. The Court said that "[t]he right to proceed against the county and its commissioners remains still a purely legal right, and can only be prosecuted at law, notwithstanding the equitable nature of the complainant's rights as against the railroad company." *Ibid.*, at 111. Having decided on that ground, the Court went on to indulge in a dictum that the Court had no jurisdiction to award mandamus and that "certainly that lack of jurisdiction cannot be supplied by converting the proceeding into a bill in equity." *Ibid.*, at 112.

³⁹ *Hopkins v. Wallin*, 179 F. 2d 136, 137 (C.A. 3d, 1949); *Breiner v. Kniskern*, 90 F. Supp. 9, 11 (E.D. Pa., 1950).

⁴⁰ *Smith v. United States*, 101 F. Supp. 87, 89 (D. Colo., 1951), appeal dismissed 196 F. 2d 222 (C.A. 10th, 1952).

⁴¹ 185 F. 2d 622 (C.A. 1st, 1950).

⁴² *Ibid.*, at 628. Accord: *Fredericks v. Rossell*, 95 F. Supp. 754 (S.D. N.Y., 1950).

⁴³ *Longview Tugboat Co. v. Jameson*, 218 F. 2d 547 (C.A. 9th, 1955); *Hunter v. United States*, 183 F. 2d 446 (C.A. 4th, 1950); *Petrowski v. Nutt*, 161 F. 2d 938 (C.A. 9th, 1947), cert. denied 333 U.S. 842 (1948); *Callaway County A. S. & Com. v. Missouri A. S. & Com.*, 122 F. Supp. 541 (W.D. Mo., 1954); *Alley v. Craig*, 97 F. Supp. 576 (S.D. Maine, 1951); *Kohlman v. Smith*, 71 F. Supp. 73 (W.D. Pa., 1947); *Money v. Wallin*, 88 F. Supp. 980 (E.D. Pa., 1950); *Breiner v. Kniskern*, 90 F. Supp. 9 (E.D. Pa., 1950). Declaratory relief as well as mandatory relief was denied in the *Callaway County* and the *Money* cases.

⁴⁴ 89 F. Supp. 841 (D. Mass., 1950).

of a writ of mandamus, and that since the court had no jurisdiction to issue mandamus, it had no jurisdiction to issue a mandatory injunction.⁴⁵ The court then denied a declaratory judgment on the ground of lack of jurisdiction under the authority of the *Palmer* case. The plaintiffs urged that the Supreme Court in the *Hilton* case had granted declaratory relief to a federal employee whose position was at stake, but the court distinguished the *Hilton* case on the ground that it had come up through the courts of the District of Columbia, which had the power to issue mandamus.

In *Birge v. United States*,⁴⁶ the plaintiff sought a declaratory judgment to determine whether he was entitled to have a disability income clause added to his National Service Life Insurance policy. One reason for denying relief without reaching either the question of reviewability or the merits was that "this action by nature is one calling for the exercise of mandamus authority although nominally one for a declaration of the rights of the parties. . . ."⁴⁷

In *Smith v. United States*,⁴⁸ the plaintiff, alleging that the Secretary of Agriculture had wrongfully and without hearing withdrawn grazing privileges in a national forest, sought damages and restoration of the privileges. The court interpreted the Tort Claims Act to require denial of damages, and then it denied equitable relief solely on the authority of the *Palmer* case.

In all these cases plaintiffs lost because intricacies about the writ of mandamus were allowed to interfere with the operation of the otherwise efficient remedies of injunction, mandatory injunction, or declaratory judgment. The plaintiffs were not only denied a determination of their cases on the merits but they were denied even a determination of the question whether or not the challenged administrative action was judicially reviewable. For instance, in the *Smith* case, for all that appears, the Secretary of Agriculture may have acted illegally in withdrawing the plaintiff's grazing privileges; the plaintiff contended that the Secretary denied due process of law in refusing him a hearing. To allow the law of mandamus to prevent judicial inquiry into those ques-

⁴⁵ This reasoning has been used also in denying a school injunctive and declaratory relief concerning tuition paid by the Veterans Administration, *New York Technical Institute of Maryland v. Limburg*, 87 F. Supp. 308 (D. Md., 1949), and denying mandatory injunction against a warden of a penitentiary, *Peretz v. Humphrey*, 86 F. Supp. 706 (M.D. Pa., 1949).

⁴⁶ 111 F. Supp. 685 (W.D. Okla., 1953).

⁴⁷ *Ibid.*, at 690. Accord: *Schilling v. United States*, 101 F. Supp. 525 (E.D. Mich., 1951).

⁴⁸ 101 F. Supp. 87 (D. Colo., 1951), appeal dismissed 196 F. 2d 222 (C.A. 10th, 1952).

tions even for purposes of awarding declaratory relief involves not only procedural folly but substantive injustice.⁴⁹

The many recent cases holding that federal courts are without jurisdiction to issue mandatory relief are unsound not only from the standpoint of practical needs, and not only because such holdings are contrary to equity tradition and to the Supreme Court's equity practice, but also because the Administrative Procedure Act clearly and unequivocally provides, in two separate and independent clauses, for mandatory relief from administrative action. Section 10(b) provides for judicial review of administrative action through "any applicable form of legal action (including actions for declaratory judgments or . . . mandatory injunction). . . ." Section 10(e) provides that the reviewing court "shall . . . compel agency action unlawfully withheld. . . ." In the whole line of cases represented by *Palmer v. Walsh*, the federal courts have ignored and violated these provisions.⁵⁰ In not a single case since the APA was enacted in 1946 has a federal court outside the District of Columbia cited the APA for the proposition that such a court has power to grant mandatory relief from administrative action!⁵¹

⁴⁹ Although the federal courts outside the District of Columbia have usually held in recent years that they lack jurisdiction to grant mandatory relief from administrative action, in a few cases some courts have held the opposite, without even attempting to distinguish the line of cases denying jurisdiction. In *Hospoder v. United States*, 209 F. 2d 427, 428, 429 (C.A. 3d, 1953), a veteran sought mandamus to compel the Veterans Administration to grant a rehearing. Even though the statute provided that "no . . . court . . . shall have power or jurisdiction to review any such decisions," and another applicable statute provided that "no . . . court . . . shall have jurisdiction to review by mandamus or otherwise," the court of appeals held, after referring to Rule 81(b), that "the district court did not lack power to grant the type of relief prayed for," and then went on to deny relief because of sovereign immunity and because the Administrator had not been joined. In *Siegel v. United States*, 87 F. Supp. 555, 558 (E.D. N.Y., 1949), the court held that it could "as a court of equity . . . order a rehearing by the Veterans Administration," despite the provisions withdrawing jurisdiction to review. In *Local 207 v. Landers*, 119 F. Supp. 877 (D. Conn., 1954), the court held that it had jurisdiction to grant a mandatory order against an employer. In *National Radio School v. Marlin*, 83 F. Supp. 169, 171 (N.D. Ohio, 1949), the court ordered officers of the Veterans Administration "to issue and transmit proper vouchers" for payment of a claim for money.

⁵⁰ The explicit provision for "mandatory injunction" is emphasized by the fact that the original bill provided only for "any applicable form of legal action (including actions for declaratory judgments or writs of injunction). . . ." Sen. Doc. No. 248, 79th Cong. 2d Sess. 36 (1946). The original bill was amended to make clear that an injunction could be "prohibitory or mandatory." The rest of the legislative history on the point casts no light of any kind on the use of the mandatory injunction. *Ibid.*, at 212, 276, 325-26, 369. The explicit provision that the court shall compel agency action unlawfully withheld is repeated and paraphrased in the legislative history. Nothing in the legislative history casts doubts upon its clear meaning. *Ibid.*, at 40, 214, 230, 278.

⁵¹ A flat statement that no case has said or done something is ordinarily dangerous. But in this instance, every case which has cited the statutory provisions in question, according to Shepard's Citator, has been examined, through the February 1955 supplement to

The many cases represented by the *Palmer* case are aberrations and should no longer be followed. Equity tradition, not mandamus tradition, should govern both mandatory and declaratory relief from administrative action. The lower courts should conform to the practice of the Supreme Court, which often grants or affirms mandatory relief whether or not the case originated in the District of Columbia. The lower courts should conform to the two clear and unequivocal provisions of the Administrative Procedure Act. The harm done to the heretofore satisfactory remedies of injunction, mandatory injunction, and declaratory judgment should be judicially repaired.

II. AVAILABILITY AND SCOPE OF REVIEW AS AFFECTED BY MANDATORY RELIEF

When a federal court holds that it has jurisdiction over a case in which mandatory relief is sought from administrative action, as is usually held in the courts of the District of Columbia and sometimes elsewhere, the court must then determine whether or not the challenged administrative action is reviewable and, if so, the scope of review. Should availability and scope of review be governed by the principles that usually apply when mandatory relief is not sought, or should a prayer for mandatory relief affect the availability and scope of review?

The decision on which the law seems to pivot is *Miguel v. McCarl*.⁵² Although the plaintiff sought a mandatory injunction and did not seek a writ of mandamus, the Supreme Court failed to see its opportunity to escape from the mandamus intricacies by relating the mandatory injunction to equity principles. Instead, the Court unanimously announced, without discussion of reasons: "The mandatory injunction here prayed for is in effect equivalent to a writ of mandamus, and governed by like considerations."⁵³ By that one off-hand and ill-considered remark, the Court saddled the law with mandamus technicalities, when it could easily have chosen equity practicalities.⁵⁴

Shepard's United States Citations. A district court in the District of Columbia has issued a mandatory injunction in reliance upon Section 10(b). *Snyder v. Buck*, 75 F. Supp. 902, 910 (D. D.C., 1948), reversed on other grounds 340 U.S. 15 (1950).

⁵² 291 U.S. 442 (1934).

⁵³ *Ibid.*, at 452.

⁵⁴ The Supreme Court has declared: "Although the remedy by mandamus is at law, its allowance is controlled by equitable principles." *United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 359 (1933). But this, unfortunately, has never been interpreted to mean that the court will behave like an equity court and free itself from mandamus intricacies. It means only that the court in its discretion may refuse mandamus to compel the doing

The mandamus tradition thus governs, whether the plaintiff asks for mandamus or mandatory injunction or other mandatory relief.⁵⁵ Both availability and scope of review are mixed up together in mandamus doctrine; both depend upon the distinction between so-called "ministerial" and "discretionary" action. The orthodox doctrine is often repeated; a typical example is *Wilbur v. U.S. ex rel. Kadrie*:

Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either. . . . Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.⁵⁶

Applying this doctrine, the Court demonstrated the somewhat unnatural restriction on scope of review. The Secretary of the Interior had decided three questions which the Court said were "all questions of law the solution of which requires a construction of the act of 1889 and other related acts."⁵⁷ Instead of assuming that questions of statutory interpretation may often be questions on which courts are better qualified than administrators, as would usually be assumed outside the mandamus context, the Court, after holding that the Secretary's decision of the second question was "plainly" correct, disposed of the first and third by saying: "That the construction of the acts insofar as they have a bearing on the first and third questions is sufficiently

of an idle act or to work a public injury or embarrassment. *Ibid.*, at 360. Accord: *United States ex rel. Jump v. Ickes*, 117 F. 2d 769 (App. D.C., 1940), cert. denied 313 U.S. 575 (1941). The court may refuse the writ out of consideration for a public policy that performance of administrative tasks ought not to be needlessly hampered. *Interstate Commerce Commission v. New York, N.H. & H. R. Co.*, 287 U.S. 178, 204 (1932): "Public policy forbids that the work of the Commission in the fulfillment of the stupendous task of valuation shall be hampered by writs of mandamus except where the departure from the statute is clear beyond debate."

⁵⁵ Many cases apply mandamus principles when the prayer is for mandatory relief, without the use of the terms "mandamus" or "mandatory injunction." E.g., *Higginson v. Schoeneman*, 190 F. 2d 32 (App. D.C., 1951).

⁵⁶ 281 U.S. 206, 218-19 (1930). Another especially good statement of mandamus orthodoxy appears in *Work v. United States ex rel. Rives*, 267 U.S. 175, 177-78, 184 (1925).

⁵⁷ 281 U.S. 206, 221 (1930).

uncertain to involve the exercise of judgment and discretion is rather plain."⁵⁸

In other words, the reviewing court may decide the question of statutory interpretation if the interpretation is so "plain" as not to involve judgment or discretion, but the reviewing court must keep hands off if the question is "sufficiently uncertain" to involve judgment and discretion.

The special skills which the judges have by virtue of their training and experience may be brought into play when the interpretation is so "plain" that such skills are not needed, but may not be used on the difficult problems of interpretation when the judges' skills are most needed.

Mandamus doctrine in this respect seems to be exactly the opposite of what common sense requires.⁵⁹ Why did the Supreme Court ever invent such doctrine? The doctrine goes back to *Kendall v. United States* in 1838 and *Decatur v. Paulding* in 1840.⁶⁰ In the *Kendall* case the relators claimed certain credits from the Postmaster General under contracts for transportation of the mail. Congress by statute directed the Solicitor of the Treasury to inquire into and determine the equity of the claims and to make such allowances as "may seem right, according to the principles of equity." The statute directed the Postmaster General to credit the relators with whatever sum the Solicitor should decide upon. The Solicitor made the award but the Postmaster General obeyed it only to the extent of crediting a smaller sum. The mandamus proceeding was thereupon brought in the District of Columbia court

⁵⁸ Ibid. The quoted language is not unusual but typical of the language restricting the scope of judicial inquiry into statutory interpretation when the Supreme Court denies mandamus. See *United States ex rel. Hall v. Payne*, 254 U.S. 343, 347-48 (1920): "From the act, and the Secretary's decision, it is apparent that the latter was not arbitrary or capricious, but rested on a possible construction of the act, and one that the reported decisions of the Land Department show is being applied in other cases. . . . He [the Secretary] could not administer or apply the act without construing it, and its construction involved the exercise of judgment and discretion. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. The relator, therefore, is not entitled to a writ of mandamus."

⁵⁹ Common sense requires not only that judicial skills should be used on some difficult questions of statutory interpretation, but also that the scope of judicial inquiry should be the same whether or not mandatory relief happens to be appropriate. Yet the Supreme Court has even specifically told us that if the review had been by bill in equity, "it would have been incumbent upon the courts, however doubtful the question, to decide it," but that since the remedy was by mandamus, "it must appear that the administrative tribunal was plainly and palpably wrong." *U.S. ex rel. Chicago G. W. R. Co. v. I.C.C.*, 294 U.S. 50, 61, 62 (1935).

⁶⁰ *Kendall v. United States*, 12 Pet. (U.S.) 524 (1838); *Decatur v. Paulding*, 14 Pet. (U.S.) 497 (1840).

against the Postmaster General. The Supreme Court was unanimous in the view that the statute conferred no discretion upon the Postmaster General but commanded him to perform "a mere ministerial act."⁶¹ That mandamus was an appropriate remedy was found by examining the law of Maryland, which had been incorporated into the law of the District of Columbia; the Maryland law in turn depended upon the law of England. Three justices in dissent asserted that Congress had not conferred upon the District of Columbia court the authority to issue a writ of mandamus.

The *Kendall* holding was motivated by the clarity of the congressional intent that the Postmaster General should not review the award made by the Solicitor. The Court even quoted from the report of the Senate judiciary committee to the effect that "Congress intended the award of the solicitor to be final."⁶² The decision did not rest upon mandamus intricacies but upon the Court's conception of what was needed to do substantive justice.

In the *Decatur* case of 1840, the widow of Stephen Decatur was entitled to a pension under general legislation, and Congress also passed a special statute providing that a pension be paid to her. The special enactment did not in terms answer the question whether Mrs. Decatur was entitled to both pensions. The Secretary of the Navy, on the advice of the Attorney General, ruled that she was not entitled to both. The widow sought mandamus against the Secretary. The Supreme Court said that the first question was whether the duty imposed upon the Secretary "was a mere ministerial act."⁶³ The Court then held: "The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is, from time to time, required to act."⁶⁴

The opinion makes clear, however, that the real motivation for the decision was the idea that judicial review of an exercise of administrative discretion was undesirable. The Court was actuated by something other than mandamus doctrine when it said:

The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. . . . The interference of the courts with the performance

⁶¹ 12 Pet. (U.S.) 524, 609 (1838).

⁶² *Ibid.*, at 611-12.

⁶³ 14 Pet. (U.S.) 497, 515 (1840).

⁶⁴ *Ibid.*

of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be given to them. Upon the very subject before us, the interposition of the courts might throw the pension fund, and the whole subject of pensions, into the greatest confusion and disorder.⁶⁵

In thus developing the foundations of mandamus doctrine in 1840 the Court was assuming that either the Secretary would make the final determination or the reviewing court would substitute its judgment. The choice was between *de novo* review and no review. The Court did not know what we know now—that interference by courts to the extent of interpreting statutes for the purpose of keeping administrative officers within their lawful authority is not productive of mischief but can be a cardinal feature of a highly successful system of dividing functions between administrative officers and reviewing courts. Today we know that our choice is not limited to *de novo* review or no review.

The early development of the ministerial-discretionary distinction was thus founded upon a basic assumption which later experience has proved to be false. Yet the federal courts today are still generally following the law founded upon the false assumption without making any significant effort to reformulate the law to take account of modern experience.

Indeed, during the twentieth century the Supreme Court has even expanded the area in which mandamus doctrine prevents judges from using their skills on difficult problems of statutory interpretation. The classical office of the writ of mandamus was "to direct the performance of a ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial capacity to require it or him to proceed, the manner of doing so being left to its or his discretion."⁶⁶ So said the Supreme Court in 1911. The Court firmly clinched the idea in 1918: "That [a court], in a proper case, has power to direct the Commission by mandamus to entertain and proceed to adjudicate a cause which it has erroneously declared to be not within its jurisdiction is decided in *Interstate Commerce Commission v. Humboldt Steamship Co.* . . . If the Commission did so err, on the authority of many decisions . . . the courts may correct such error on a petition for mandamus."⁶⁷ This doctrine had become well established.⁶⁸

⁶⁵ *Ibid.*, at 515-16.

⁶⁶ *I.C.C. v. Humboldt Steamship Co.*, 224 U.S. 474, 484 (1912).

⁶⁷ *United States ex rel. Louisville Cement Co. v. I.C.C.*, 246 U.S. 638, 642, 643 (1918).

⁶⁸ *E.g.*, *United States ex rel. Kansas City Southern Ry. v. I.C.C.*, 252 U.S. 178 (1920).

Then came *U.S. ex rel. Chicago Great Western R. Co. v. I.C.C.* in 1935.⁶⁹ The Commission, after a careful and painstaking review of the legislation defining its powers, held by a divided vote that it possessed no jurisdiction in the particular case. When a writ of mandamus was sought to compel the Commission to take jurisdiction, the Supreme Court, instead of deciding for itself the question whether or not the Commission had jurisdiction, decided only the question whether the Commission "was plainly and palpably wrong in refusing to take jurisdiction."⁷⁰ Even though the question was one of jurisdiction, the Court inaccurately asserted: "Where the matter is not beyond peradventure clear we have invariably refused the writ, even though the question were one of law as to the extent of the statutory power of an administrative officer or body."⁷¹

Thus was expanded an especially injurious feature of mandamus doctrine. Judicial skills on difficult questions of statutory interpretation were to be by-passed even when administrative jurisdiction depended upon the interpretation.

The law resting upon the ministerial-discretionary distinction is not only undesirable in that it prevents the use of judicial skills on the very questions of interpretation on which those skills are most needed, but it is also unworkable, as abundant experience proves. Beginning with *Roberts v. United States ex rel. Valentine* in 1900 the Court recognized that a duty may be "ministerial" even though it involves "in some degree" a construction of a statute:

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. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer.⁷²

But just when is the interpretation of a statute "plain," and when does the interpretation involve "judgment and discretion"? Intrinsically, the answer to this question is elusive. It becomes even more elusive when the Supreme Court's action, as distinguished from its language,

⁶⁹ 294 U.S. 50 (1935).

⁷⁰ *Ibid.*, at 62.

⁷¹ *Ibid.*, at 63.

⁷² *Roberts v. United States ex rel. Valentine*, 176 U.S. 221, 231 (1900).

is taken into account. Let us consider fully the Supreme Court's action in one typical case. *Wilbur v. United States ex rel. Krushnic*⁷³ involved interpretation of the Leasing Act of 1920, which amended the Mining Act of 1872. Under the Mining Act, one who located a mining claim could obtain a land patent from the government by performing labor or making improvements worth not less than one hundred dollars each year before the patent was issued, and by performing labor or making improvements in a total amount of not less than five hundred dollars. The Act provided that "upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation." The Leasing Act provided that lands were no longer to be open to location and acquisition of title, but only to lease. But the Leasing Act contained a saving clause excepting "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated." In 1919 the claimant located certain claims, on which he applied for a patent late in 1922. He had done the requisite total amount of labor, and he had done the requisite annual amount of labor during 1919, 1921, and 1922, but not during 1920. The Commissioner denied the claim on the sole ground that the requisite labor had not been done during 1920. The Secretary affirmed. The Supreme Court was confronted with the question: Was the statute "plain" that the claim was "valid" as of February 25, 1920, when the Leasing Act was enacted, or did the determination of the question whether the claim was "valid" on that date involve the exercise of "judgment and discretion"?

The reader is especially invited to decide this specific question of interpretation without exercising what the Supreme Court called "judgment or discretion." The Supreme Court accomplished this remarkable feat, according to the opinion. The Court held that mandamus should be granted: "[T]he Secretary interpreted and applied a statute in a way contrary to its explicit terms, and in so doing, departed from a plain official duty."⁷⁴ The Court assisted its holding that the question of interpretation was "ministerial" and not "discretionary" by quoting from the *Roberts* case to the effect that "[e]very statute to some extent requires construction by the public officer whose duties may be defined therein."⁷⁵

Another part of the opinion in the *Krushnic* case, however, almost gave away the fact that some discretion was involved in the interpreta-

⁷³ 280 U.S. 306 (1930).

⁷⁴ *Ibid.*, at 319.

⁷⁵ *Ibid.*, at 318.

tion. The Court remanded the case for further proceedings "in conformity with the views expressed in this opinion as to the proper interpretation. . . ."⁷⁶ Why did the Court acknowledge that it had "views" about interpretation if the interpretation did not involve judgment or discretion?

The distinction between "ministerial" and "discretionary" action has no affirmative justification. True, mandamus is historically one of the "extraordinary" remedies, and the Supreme Court has said that extraordinary remedies "are reserved for really extraordinary causes."⁷⁷ But that statement was limited to remedies "against judges."⁷⁸ When mandamus is used in an appellate court to control the action of a trial court, it is indeed an extraordinary remedy, because the ordinary and orderly process is the appeal. But whether or not such considerations may at some time in the remote past have affected the use of mandamus to control administrative action, mandamus in a federal district court as a means of reviewing administrative action has become ordinary and is in no sense extraordinary. As we have seen, the courts tend to apply the mandamus tradition whenever the plaintiff seeks mandatory relief. To consider the remedy ordinary when it happens to be prohibitory and extraordinary when it happens to be mandatory is wholly without practical justification.

Not only is the distinction between "ministerial" and "discretionary" action undesirable, unworkable, and without practical justification, but it is also contrary to the Administrative Procedure Act. Nothing in the Act either recognizes the distinction or provides that the reviewing court shall not decide questions of statutory interpretation which involve judgment or discretion. The Act provides: "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion . . . every agency action . . . for which there

⁷⁶ *Ibid.*, at 319. When the Supreme Court denies mandamus, it uses language like this: "Inasmuch as the decision of the Secretary . . . was not arbitrary or capricious, but was given after a hearing and in the exercise of a judgment and discretion confided to him by law, it cannot be reviewed, or he be compelled to retract it, by mandamus." *United States ex rel. Knight v. Lane*, 228 U.S. 6, 13 (1913).

⁷⁷ *Ex parte Fahey*, 332 U.S. 258, 260 (1947).

⁷⁸ "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. . . . These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals." *Ibid.*, at 259-60. Similarly, the Court was speaking of control of judges of lower courts when it said: "Mandamus is an extraordinary remedy, available only in rare cases." *Roberts v. United States District Court*, 339 U.S. 844, 845 (1950). Under *Marbury v. Madison*, 1 Cranch (U.S.) 137 (1803), the Supreme Court has no original jurisdiction to issue mandamus. But it does issue mandamus in aid of its appellate jurisdiction.

is no other adequate remedy in any court shall be subject to judicial review. . . . So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action."

The lower federal courts have continued to apply the ministerial-discretionary distinction, as if the APA had never been enacted.⁷⁹ Indeed, in some respects, as we have seen, they have even carried mandamus intricacies over into suits for injunctions and declaratory judgments.

The Supreme Court has never written an opinion on the question whether the APA has abolished the mandamus intricacies. But the Court in *Robertson v. Chambers*⁸⁰ has rendered a decision which is completely inconsistent with the mandamus tradition and which can best be explained on the ground that all the intricacies of mandamus are superseded by the APA—or by a mixture of the APA and common sense.

The attitude and action of the Supreme Court in the *Robertson* case are precisely what the law of mandamus has long needed. The Court drove straight to the merits of the substantive problem before it and ignored the arguments in the briefs that were directed to mandamus intricacies. The complaint was labeled "Complaint for Proceedings in the Nature of Mandamus," and the prayer was that the court issue "its mandatory order. . . ." The court of appeals had shown the usual respect for forms and verbiage, having discussed at some length the

⁷⁹ E.g., *Chapman v. El Paso Nat. Gas Co.*, 204 F. 2d 46 (App. D.C., 1953) (decision of mixed question of law and fact in mandatory injunction proceeding, with reasoning that grant of right-of-way was ministerial, though court's opinion reveals extreme complexity of problem of entitlement to right-of-way); *Chapman v. Santa Fe Pac. R. Co.*, 198 F. 2d 498 (App. D.C., 1951), cert. denied 343 U.S. 964 (1952) (mandamus and injunctive relief granted against Secretary of Interior and Director of Bureau of Land Management for issuance of patents to land, on theory that refusal was "unreasonable or plainly wrong"); *Higginson v. Schoeneman*, 190 F. 2d 32 (App. D.C., 1951) (mandatory order granted after discussion of ministerial-discretionary distinction); *Laughlin v. Reynolds*, 196 F. 2d 863 (App. D.C., 1952) (mandamus denied, partly because not ministerial, partly because "no clear right"); *Eng v. Acheson*, 108 F. Supp. 682 (S.D. N.Y., 1952) (order to Secretary of State to instruct consulate to issue certificate of identity denied because discretion involved). An exceptional case is *Snyder v. Buck*, 75 F. Supp. 902, 910 (D. D.C., 1948), reversed on other grounds 340 U.S. 15 (1950). The court said: "Under Section 10(b) of the Administrative Procedure Act, any applicable (i.e., suitable) form of relief may be granted. The statute expressly suggests a mandatory injunction as a possible form of relief. Accordingly, the judgment will take the form of a mandatory injunction directing the necessary payment." The court accordingly granted a mandatory injunction, even though it had previously said that the act required "is not purely ministerial."

⁸⁰ 341 U.S. 37 (1951).

limits imposed upon the court by the mandamus tradition. The Supreme Court was wholly indifferent to the form of the remedy. Instead of distinguishing between mandamus and mandatory injunction, it characterized the case as "this mandamus proceeding seeking a mandatory injunction."⁸¹ Then instead of assuming that mandamus tradition applied, the Court assumed that equity tradition applied.

The Court was also unconcerned about the ministerial-discretionary distinction. The substantive question was nothing less than a difficult problem of statutory interpretation of the kind that is about as far removed from the "ministerial" as any discretionary function can be. The statute provided that the determination by the Army Disability Review Board "shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer." The question was whether "service records" are limited to service prior to discharge or whether they include the officer's medical history following his retirement. The court of appeals, finding itself hemmed in by mandamus tradition, and confronted with the argument that "this action—in the nature of mandamus—is not proper here because the act to be required thereby is not purely ministerial," said that if the problem of interpretation were "doubtful," "we would hesitate to uphold this remedy."⁸² But the court of appeals decided that "the requirement of this section is clear and unequivocal."⁸³ Relying upon a case permitting use of mandamus "where the departure from the statute is clear beyond debate,"⁸⁴ the court of appeals held, unanimously, that the post-retirement medical records were not a part of the "service records" that the Board could consider.

The Supreme Court unanimously held the opposite. In view of the unanimity of the court of appeals in saying that the question of interpretation was not even "doubtful," the Supreme Court in holding the opposite could hardly assert that the question was not "doubtful." The best way out was to ignore the mandamus tradition that a court in a mandamus proceeding cannot control discretionary action. The Supreme Court chose that way out.

The weakness of the *Robertson* case as authority lies in the Court's

⁸¹ *Ibid.*, at 38.

⁸² *Chambers v. Robertson*, 183 F. 2d 144, 147-48 (App. D.C., 1950).

⁸³ *Ibid.*, at 148.

⁸⁴ *Kansas City Southern R. Co. v. I.C.C.*, 252 U.S. 178 (1920), as modified by *I.C.C. v. New York, N.H. & H. R. Co.*, 287 U.S. 178, 204 (1932).

failure to write an opinion making clear that it was deliberately throwing over the mandamus tradition. Instead, the Court ignored the mandamus doctrine—and violated it.

The Court's action clearly was not inadvertent, however. Not only had the court of appeals discussed at some length the question whether the issue of statutory interpretation could be decided in the mandamus proceeding, but both briefs had dealt with the problem of whether mandamus was the appropriate remedy.⁸⁵ The government, which was the winner in the Supreme Court, had cited in its brief six Supreme Court cases in support of "the firmly-established rule that where an administrative duty 'depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.'"⁸⁶ The government's brief had also cited four Supreme Court cases and two court of appeals cases for "the traditional rule that decisions of administrative officers involving the exercise of discretion and judgment, and in so far as they are not unreasonable or plainly wrong, will not be set aside by process in the nature of mandamus."⁸⁷ The government urged in its brief that "[s]ince the Review Board's construction of the statute is at least reasonable, its proceedings cannot be controlled by mandamus." But the Court refused to decide on that ground. Instead, it held that the Board's interpretation rather than that of the court of appeals was the correct one.

The *Robertson* case is in accord with sound equity tradition, with the Administrative Procedure Act, and with the practical needs of judicial review of administrative action. Yet it has so far been ignored; not a single court has cited it on the problem of mandatory relief. This lack of germinal significance is of course explained by the Court's silence concerning the problem of remedy. When the occasion next arises, the Supreme Court should explain that the Administrative Pro-

⁸⁵ Part IV of the Brief for the Respondent was addressed to the proposition that "Mandamus Is the Appropriate Remedy." Part III of the Brief for the Petitioner (the government) was devoted to mandamus.

⁸⁶ *Wilbur v. United States*, 281 U.S. 206, 219 (1930). See *Decatur v. Paulding*, 14 Pet. (U.S.) 497, 515 (1840); *Hall v. Payne*, 254 U.S. 343, 347-48 (1920); *Ness v. Fisher*, 223 U.S. 683, 691-92 (1912); *Work v. Rives*, 267 U.S. 175, 177-78 (1925); *United States ex rel. Chicago Great W. R. Co. v. I.C.C.*, 294 U.S. 50, 61-63 (1935).

⁸⁷ *Wilbur v. United States*, 281 U.S. 206 (1930); *Denby v. Berry*, 263 U.S. 29 (1923); *United States ex rel. Girard Trust Co. v. Helvering*, 301 U.S. 540 (1937); *Keim v. United States*, 177 U.S. 290, 292 (1900); *Hammond v. Hull*, 131 F. 2d 23 (App. D.C., 1942), cert. denied 318 U.S. 777 (1943); *United States ex rel. Roughton v. Ickes*, 101 F. 2d 248 (App. D.C., 1938).

cedure Act has abolished mandamus intricacies, that equity tradition prevails, and that in the future nothing will hinge on the unworkable and harmful distinction between ministerial and discretionary action.

III. CONCLUSIONS

The question whether the relief sought is prohibitory, mandatory, or declaratory should have no effect upon the jurisdiction of federal courts to review administrative action or upon the availability or scope of review. This conclusion is consistent with equity tradition, with Supreme Court law, and with clear and unequivocal provisions of the Administrative Procedure Act, but it is inconsistent with mandamus tradition, with certain pre-APA Supreme Court decisions, and with a curious line of recent cases in the lower federal courts—cases that seem to ignore both the Supreme Court law and the APA.

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. The greatest single deficiency of mandamus is that because of historical accident, federal courts outside the District of Columbia lack original jurisdiction to grant mandamus; the idea that any courts which review administrative action should have power to grant prohibitory but not mandatory relief is practical nonsense. The second principal deficiency of mandamus lies in the doctrine that availability and scope of review depend upon the distinction between ministerial and discretionary action. This distinction is undesirable because it requires courts to refuse to review difficult or doubtful issues of statutory interpretation—the precise issues on which the special skills of judges are most needed. Experience has proved the distinction unworkable. It serves no useful purpose. The APA provisions concerning availability and scope of review do not recognize the distinction and are inconsistent with it.

Equity tradition is simple and satisfactory. The mandatory injunction has an honorable history of more than a century. It was firmly rooted by 1836 when Story wrote: "A Writ of Injunction may be described to be a judicial process, whereby a party is required to do a particular thing, or to refrain. . . ." Equity tradition is so readily adaptable to practical needs of a modern system of judicial review that courts and counsel typically focus immediately upon merits of cases, without interruption from procedural discord. Federal courts have the

same equity powers, whether or not they sit in the District of Columbia. The mandatory injunction—unless mandamus doctrine is followed even when mandatory injunction is sought—does not make availability or scope of review dependent upon an undesirable and unworkable distinction between ministerial and discretionary action.

The recent line of federal cases denying mandatory injunction—and in some cases even declaratory relief—on the ground that the federal courts outside the District of Columbia lack jurisdiction to grant mandamus is without support in Supreme Court law, contrary to the Supreme Court's own practice of granting mandatory injunction whenever it deems that relief appropriate, directly opposed to the Administrative Procedure Act's specific provision for relief from administrative action by "mandatory injunction," and in violation of the APA's specific provision that "the reviewing court shall . . . compel agency action unlawfully withheld."

The Supreme Court's unfortunate opinion in *Miguel v. McCarl*, which equated the mandatory injunction to the writ of mandamus, should be deemed superseded by the APA. The Supreme Court may be expected to follow its recent decision in *Robertson v. Chambers*, in which the Court equates mandamus to the mandatory injunction, and in which the Court's action was a clear-cut violation of mandamus doctrine. The result of the *Robertson* case is consistent with both the APA and common sense.