A Jurisdictional Basis of Nonstatutory Judicial Review in Suits Against Federal Officers—Jurisdictional Amount, the Administrative Procedure Act and Mandamus

Mark William Pennak
THE JURISDICTIONAL BASIS OF NONSTATUTORY JUDICIAL REVIEW IN SUITS AGAINST FEDERAL OFFICERS—JURISDICTIONAL AMOUNT, THE ADMINISTRATIVE PROCEDURE ACT AND MANDAMUS

The jurisdiction of the federal district courts in nonstatutory review suits against federal officers has become more and more confused with the passage of time. The cause of this confusion lies in the lack of resolution among the federal courts regarding the effect of the jurisdictional amount requirement, the jurisdictional nature of the judicial review provisions of the Administrative Procedure Act (APA), the doctrine of sovereign immunity and the proper scope of review under the Mandamus and Venue Act of 1962.

This comment examines the possible sources of subject matter jurisdiction for the federal district courts in nonstatutory judicial review suits. Specifically, the comment will explore the limits of the general federal question jurisdiction provision of 28 U.S.C. § 1331 (Section

1. As noted in the leading article in the area of nonstatutory review, the distinction between “statutory” and “nonstatutory” review is whether the proceedings are specifically authorized by statute in relation to agency action or whether they are available as general remedies (either by statute, such as a code of procedure, or under the common law) and may be used, among other things, for the review of agency action... Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 321 n.51 (1967) [hereinafter cited as Byse & Fiocca], quoting Fuchs, Judicial Control of Administrative Agencies in Indiana (pt. 1), 28 Ind. L. J. 1, 11 (1952). See also Byse, Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus, 75 Harv. L. Rev. 1479, 1480–81 (1962).

The problem of “nonstatutory” judicial review of agency action arises when agency conduct is not expressly reviewable under a specific statute. For examples of express statutory judicial review provisions see note 93 infra. Nonstatutory review includes proceedings in which plaintiffs seek specific relief against a federal officer by injunction, mandamus, habeas corpus, or other common law remedies. As one commentator has put it:

The distinctive aspect of “nonstatutory review”... is the reliance on common-law remedies, with subject matter jurisdiction predicated on the general federal-question provision of 28 U.S.C. § 1331 (1964) or on a special federal-question provision such as that of 28 U.S.C. § 1337 (1964) for claims “arising under” any act of Congress "regulating commerce.


and then focus on the mounting confusion and conflict among the circuits as to the jurisdictional nature of the judicial review provisions\(^4\) of the APA. The proper scope of review under the 1962 mandamus statute, 28 U.S.C. § 1361 (Section 1361), will also be scrutinized. The comment concludes that despite the growing acceptance of the APA as an independent grant of jurisdiction, the APA should not be so construed. Rather, the proper course is for the federal courts to continue to develop a "rational law of mandamus"\(^5\) as a legitimate means of providing judicial review of federal agency action.

I. FEDERAL QUESTION JURISDICTION—THE JURISDICTIONAL AMOUNT REQUIREMENT OF SECTION 1331

The most common basis for federal court jurisdiction in nonstatutory review actions is the general federal question jurisdiction statute—Section 1331.\(^6\) If the amount-in-controversy requirement of Section 1331 is satisfied in a suit against a federal officer, then there is little problem, other than difficulties associated with sovereign immunity, in obtaining federal court jurisdiction. Such a suit is virtually certain to "arise under the Constitution, laws, or treaties of the United States."\(^7\) Thus, difficulty in meeting Section 1331's $10,000 amount-in-controversy requirement is the major obstacle in obtaining jurisdiction.

A. The General Rule—The "Legal Certainty" Test

At the outset it should be noted that the Supreme Court has made it

---

5. The term "rational law of mandamus" was coined by Byse & Fiocca. supra note 1, at 331.
6. 28 U.S.C. § 1331(a) (1970) provides:
The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.
7. Id. The "arising under" requirement of § 1331 has been most recently defined in Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 127 (1974), quoting Gully v. First Nat'l Bank, 299 U.S. 109, 112 (1936), where the Supreme Court ruled:
[F]or a claim to arise "under the Constitution, laws, or treaties of the United States.
"the right or immunity created by the Constitution or law of the United States must
be an element, and an essential one, of plaintiff's cause of action."
See also Hopkins v. Walker, 244 U.S. 486, 489 (1917). Section 1331 will also support claims arising out of federal common law. See Stream Pollution Control Bd. of Ind. v. U.S. Steel Corp., 512 F.2d 1036 (7th Cir. 1975).
clear that the amount-in-controversy requirement must be met in suits against federal officers. Ordinarily the amount-in-controversy requirement is met by the plaintiff's good faith allegation that the amount in controversy exceeds $10,000. The amount alleged by the plaintiff is controlling unless it appears to a "legal certainty" that "the claim is really for less than the jurisdictional amount." This standard clearly favors the plaintiff in most actions under Section 1331. However, where the defendant has challenged the subject matter jurisdiction, the Supreme Court has held that the plaintiff must establish the jurisdictional facts by competent proof. The Court elaborated on this requirement in *KVOS, Inc. v. Associated Press* where it held that once the plaintiff's allegation of the amount in controversy was appropriately challenged, the trial court must "inquire as to its jurisdiction before considering the merits of the prayer for

---

8. *See* Lynch v. Household Finance Corp., 405 U.S. 538, 547 (1972), where the Supreme Court admonished that "in suits against federal officers for alleged deprivations of constitutional rights, it is necessary to satisfy the amount-in-controversy requirement for federal jurisdiction." *See also* Gomez v. Wilson, 477 F.2d 411, 419 n.49 (D.C. Cir. 1973), and authorities cited therein.

9. A claim that damages are exactly $10,000 will be dismissed; the amount claimed must exceed $10,000. *See* Matherson v. Long Island State Park Comm'n., 442 F.2d 566, 568 (2d Cir. 1971).


11. *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288–89 (1938). As one court has pointed out, the good faith test and the legal certainty test are equivalents. Opelika Nursing Home, Inc. v. Richardson, 448 F.2d 658 (5th Cir. 1971).*

12. *The court in Opelika Nursing Home, Inc. v. Richardson, 448 F.2d 658, 663 (5th Cir. 1971), found this to be a "fairly rigorous standard."*

13. *McNutt v. General Motors Accept. Corp., 298 U.S. 178, 189 (1936). The Court also noted that the district court may insist upon such proof even though the jurisdictional allegation was not challenged by the opposing party.*


15. The term "appropriately challenge" generally has been construed to mean that the opposing party must specially challenge the subject matter jurisdiction of the court and introduce evidence traversing the truth of plaintiff's allegation of jurisdiction. *Opelika Nursing Home Inc. v. Richardson, 448 F.2d 658, 666 (5th Cir. 1971). But see* Davis v. Shultz, 453 F.2d 497, 501 n.15 (3d Cir. 1971), where the Court of Appeals for the Third Circuit ruled that the jurisdictional amount was placed in issue by defendant's motion to dismiss. Generally, if the opposing party merely makes an unsupported assertion of lack of jurisdiction, the trial court is not required to make an inquiry into its jurisdiction, but may, of course, make an inquiry in its discretion. *See* Gibbs v. Buck, 307 U.S. 66 (1939); Lee v. Kisen, 475 F.2d 1251 (5th Cir. 1973). *Compare* James v. Lusby, 499 F.2d 488, 492 (D.C. Cir. 1974), where the Court of Appeals for the District of Columbia ruled that when the lack of jurisdictional amount was put in issue, the district court has an "affirmative duty to inquire . . . whether or not [the issue was] raised by the parties," with *Molokai Homesteaders Cooperative Ass'n v. Morton, 506 F.2d 572, 576 (9th Cir. 1974)*, where Judge Hamley seems to imply that there is no such duty.
[relief]. And in such inquiry complainant [has] the burden of proof."\(^{16}\) However, all plaintiff must prove is that it is not a legal certainty that his claim cannot exceed $10,000.\(^{17}\)

Plaintiffs in suits against federal officers should therefore be able to obtain jurisdiction quite easily under Section 1331. Unfortunately, this is not the case where plaintiffs seek equitable relief rather than monetary relief.\(^{18}\) Thus, when a plaintiff prays for declaratory or injunctive relief, or both, the jurisdictional amount requirement may become an insurmountable obstacle in obtaining federal question jurisdiction.

### B. Equitable Relief and the "Objective Facts" Test

Where a plaintiff is seeking equitable relief, the generally accepted rule is that the good faith-legal certainty test is inapplicable. Rather "the plaintiff must satisfy the court as to the objective facts"\(^{19}\) that

---


\(^{17}\) See Spock v. David. 502 F.2d 953, 955 (3d Cir. 1974); Gomez v. Wilson. 477 F.2d 411, 420 (D.C. Cir. 1973); Davis v. Shultz, 453 F.2d 497 (3d Cir. 1971). But see Goldsmith v. Sutherland. 426 F.2d 1395, 1398 (6th Cir. 1970), where the Court of Appeals for the Sixth Circuit ruled that "[t]he District Court properly dismissed the action for lack of jurisdiction because it does not appear to a legal certainty that the amount in controversy is present." This statement is erroneous. As the Supreme Court made clear in St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938), dismissal is warranted only if it appears to be a legal certainty that the amount in controversy cannot be met—not the other way around.

\(^{18}\) Often an aggrieved plaintiff who seeks damages need not sue an officer at all. Such suits may fall under the Federal Tort Claims Act of 1946, ch. 753, tit. IV, 60 Stat. 812, 842 (codified in scattered sections of 28 U.S.C.), or the Tucker Act of 1887, ch. 359, 24 Stat. 505 (codified in scattered sections of 28 U.S.C.), which covers claims not sounding in tort (contract claims). For a discussion of the damage remedies, see Cramton, supra note 1, at 392-93. It should be noted that these actions are consent suits against the United States only for money judgments, and thus suits for equitable relief are not authorized. See, e.g., Richardson v. Morris, 409 U.S. 464 (1973) (discussing the Tucker Act); Jersey Central Power & Light Co. v. Local Unions 327 et al., IBEW, 508 F.2d 687 (3d Cir. 1974).

\(^{19}\) H. M. Hart & H. Wechsler, The Federal Courts and the Federal System 1155 (2d ed. 1973) [hereinafter cited as Hart & Wechsler]; Gomez v. Wilson. 477 F.2d 411, 420 (D.C. Cir. 1973); Tatum v. Laird. 444 F.2d 947, 951 n.6 (D.C. Cir. 1971). See also Hague v. CIO. 307 U.S. 496, 507-08 (1939), where Justice Roberts stated that in a suit to enjoin a threatened invasion of constitutional rights, the plaintiff must offer "substantial proof . . . of the facts justifying the conclusion that the suit involves the necessary sum." The Court of Appeals for the District of Columbia has stated that this "substantial proof" requirement is satisfied by a "clear-cut presentation of value." Gomez v. Wilson. supra at 420. The bottom line seems to be that while most courts will agree that something more is required of a plaintiff in an equitable action, there is little, if
Suits Against Federal Officers

support the conclusion that the jurisdictional amount requirement has been satisfied. This test is most difficult to satisfy when a plaintiff seeks declaratory or injunctive relief, or both, in order to protect a constitutional right. Generally it has been said that in equity, "the measure of jurisdiction is the value of the right sought to be protected by equitable relief."\(^\text{20}\) However, as one eminent commentator has observed, it is impossible to put a monetary value on free speech and other constitutional rights, not to mention nonconstitutional rights.\(^\text{21}\)

 Nonetheless, many courts have ruled that constitutional rights must be capable of being valued in "dollars and cents."\(^\text{22}\) These courts rely on the Supreme Court's statement in *Barry v. Mercein*\(^\text{23}\) that "the matter in dispute must be money, or some right, the value of which in money, can be calculated and ascertained."\(^\text{24}\) From *Barry* a number of courts have reached the unnecessary and unfortunate conclusion that constitutional rights, although priceless, are incapable of money valuation, and hence cannot meet the jurisdictional amount requirement of Section 1331.\(^\text{25}\)

---

\(^{20}\) Spock v. David, 469 F.2d 1047, 1052 (3d Cir. 1974); Goldsmith v. Sutherland, 426 F.2d 1395 (6th Cir. 1970). See also 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 24, at 111–13 (Wright ed. 1960). This emphasis on the value of the right seems correct since the right is the "matter in controversy" which must have a "value" in excess of $10,000 under the language of § 1331. It should be noted, however, that where the validity of regulations is challenged, a different rule prevails. In such cases it is not the value of the right sought to be protected which is measured, but rather the value of the loss which would follow the enforcement of the regulation. See McNutt v. General Motors Accept. Corp., 298 U.S. 178 (1936). Similarly, in tax or fee cases the amount in controversy is determined by the amount of the tax or fee rather than the financial effect of failure to pay the amount demanded, unless a penalty has already been assessed for such failure. See Healy v. Ratta, 292 U.S. 263 (1934); May v. Supreme Court, 508 F.2d 136 (10th Cir. 1974).


\(^{22}\) See, e.g., McGaw v. Farrow, 472 F.2d 952, 954 (4th Cir. 1973); Goldsmith v. Sutherland, 426 F.2d 1395, 1397 (6th Cir. 1970); Giancana v. Johnson, 335 F.2d 366, 368–69 (7th Cir. 1964).

\(^{23}\) 46 U.S. (5 How.) 103 (1847).

\(^{24}\) *Id.* at 120. See also Potts v. Chumasero, 92 U.S. 358, 361 (1876), where the Court reaffirmed *Barry*. Since the predecessor of § 1331 was enacted in 1875 it is hard to avoid the conclusion that the rule of *Barry* applies to § 1331. See Note, *Civil Procedure—Jurisdiction—Injunctive Suits Against Federal Officials*, 1972 Wis. L. REV. 276, 280–81.

\(^{25}\) McGaw v. Farrow, 472 F.2d 952, 954 (4th Cir. 1973); Goldsmith v. Sutherland, 426 F.2d 1395, 1397 (6th Cir. 1970); Rosado v. Wyman, 414 F.2d 170, 176–77 (2d Cir. 1969), *rev'd on other grounds*, 397 U.S. 397 (1970); Giancana v. Johnson, 335 F.2d 366, 368–69 (7th Cir. 1964); Carroll v. Somervell, 116 F.2d 918 (2d Cir. 1941); Boyd
Such a determination does not serve congressional intent. The legislative history indicates that the $10,000 amount-in-controversy requirement was designed to prevent federal courts from "fritter[ing] away their time in the trial of petty controversies."26 Clearly, a constitutional claim is not a "petty" controversy, but indeed may involve rights which are of inestimable value. Unpersuaded by such reasoning, the Court of Appeals for the Seventh Circuit asserted in Giancana v. Johnson27 that Congress "surely knew of the priceless nature of liberty and privacy when it required a showing of [$10,000]."28 Such reasoning is indefensible; not only is it unsupported by the legislative history,29 but it reflects an unjustified (and unjustifiable) abdication of the judicial responsibility to protect the constitutional rights of a plaintiff. Unless a plaintiff is able to obtain jurisdiction under some other statute, this abdication of judicial responsibility may effectively leave the plaintiff without a forum in which to assert his constitutional rights since it is doubtful that a state court could entertain actions

---

26. S. Rep. No. 1830, 85th Cong. 2d Sess. 6 (1958). The Senate report states: The recommendations of the Judicial Conference regarding the amount in controversy, which this committee approves, is based on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in all substantial controversies where other elements of Federal jurisdiction are present. The jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies.
27. 335 F.2d 366 (7th Cir. 1964). See also Goldsmith v. Sutherland, 426 F.2d 1395 (6th Cir. 1970).
29. The legislative history indicates that Congress believed that raising the amount-in-controversy requirement in federal question cases would affect only the amount required in actions involving the constitutionality of state statutes and those arising under the Jones Act. S. Rep. No. 1830, 85th Cong. 2d Sess. 6 (1958). This belief is, of course, erroneous since 28 U.S.C. § 1343 applies to actions challenging the constitutionality of state statutes and 28 U.S.C. § 1337 applies to Jones Act cases. Neither section requires an amount in controversy. See D. Currie. FEDERAL COURTS 431–32 (1968); HART & WECHSLER, supra note 19, at 1158 n.1.
against federal officers who act in their official capacity. As Judge Lumbard stated in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*:

The power to declare an action of the legislative or executive branch unconstitutional is an empty one if the judiciary lacks a remedy to stop or prevent the action. Few more unseemly sights for a democratic country operating under a system of limited governmental power can be imagined than the specter of its courts standing powerless to prevent a clear transgression by the government of a constitutional right of a person with standing to assert it.

In so abdicating their responsibility, the federal courts are ignoring their obligation to refrain from restricting jurisdiction so as to "deprive any person of life, liberty, or property without due process of law . . . ." These arguments have proved compelling to a number of courts which have ruled that in an equitable action against federal officers to protect constitutional rights the jurisdictional amount is satisfied virtually automatically. As Judge Weinstein noted in the now famous case of *Cortright v. Resor*:

To say that these priceless rights so many have fought and died to protect are worth nothing is to insult the basic principles upon which this nation was founded and which still give it its unique vitality. Free speech is almost by definition, worth more than $10,000, so that the allegation of jurisdiction based upon 1331 ought not be subject to denial.

30. See Arnold, The Power of State Courts to Enjoin Federal Officers, 73 Yale L.J. 1385 (1964); Hart & Wechsler, supra note 19, at 429-30, and authorities cited therein. At least one court has suggested that the amount-in-controversy requirement of § 1331 is unconstitutional in suits against federal officers. Cortright v. Resor, 325 F. Supp. 797 (E.D.N.Y.), rev'd on other grounds, 447 F.2d 245 (2d Cir. 1971). See also Note, The Constitutional Implications of the Jurisdictional Amount Provision in Injunction Suits Against Federal Officers, 71 Colum. L. Rev. 1474 (1971). These arguments have seemingly been rejected by the Supreme Court in Lynch v. Household Finance Corp., 405 U.S. 538, 547 (1972), see note 8 supra. Thus, the jurisdictional amount requirement remains, as one court has put it, "an unfortunate gap in the statutory jurisdiction of the federal courts." Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817, 826 (2d Cir. 1967).


33. 325 F. Supp. 797, 810 (E.D.N.Y. 1971). Other courts have adopted Judge Weinstein's approach, see, e.g., CCCO-Western Region v. Fellows, 359 F. Supp. 644, 647
Such an approach is preferable to dismissing the suit because constitutional rights are incapable of being measured in dollars and cents.

However, such a per se rejection of the jurisdictional amount requirement, while laudable for the results it achieves, is basically inconsistent with the Supreme Court's admonition in *Lynch v. Household Finance Corp.* that the jurisdictional amount requirement must be satisfied in suits against federal officers. *Lynch* would thus foreclose the argument that the "dollars and cents" test of *Barry v. Mercedes* applies only to private litigation and not to cases involving personal constitutional rights. Moreover, it remains doubtful that an aggrieved party has a constitutional right of access to a federal court to challenge the infringement of constitutional rights by a federal officer.

These considerations have perhaps led a few courts to adopt a third and more legally defensible approach to the amount-in-controversy problem. This third approach, best typified by Judge Robinson's opinion in *Gomez v. Wilson*, rejects both the not-capable-of-valua-
Suits Against Federal Officers

tion test of *Giancana v. Johnson*\(^39\) and the per se test of *Cortright*\(^40\) and favors a middle course where the plaintiff is allowed to "allege and show that the value of the rights sought to be protected exceeds the required jurisdictional amount."\(^41\) Judge Robinson evidently believed the burden on the plaintiff would not be too heavy as he observed: "[w]e find it hard to believe that demonstration of jurisdictional amount is a difficult undertaking where the right asserted is truly basic."\(^42\) Essentially, the burden is satisfied by a "clear-cut presentation"\(^43\) of the value of the right.

Unfortunately, Judge Robinson did not elaborate on what constitutes a "clear-cut presentation" of value, but merely cited *Tatum v. Laird*\(^44\) as stating the correct rule. In *Tatum*, the Court of Appeals for the District of Columbia ruled that, at least in equity, the jurisdictional amount may be satisfied from either the plaintiff's or defendant's viewpoint. While such a test may be contrary to the general rule that the amount in controversy is to be determined from the plaintiff's or defendant's viewpoint only,\(^45\) the Supreme Court has never squarely held that the amount-in-controversy requirement must be from the plaintiff's view-

---

39. 335 F.2d 366 (7th Cir. 1964); see text accompanying note 25 supra.
40. Although most courts have read *Cortright* as establishing a per se test, see note 33 supra, at least one district court has read it as affirming the duty of district courts to determine whether the value of the right exceeds $10,000. See CCCO-Western Region v. Fellows, 359 F. Supp. 644, 647 (N.D. Cal. 1972).
41. 477 F.2d 411, 421 n.56 (D.C. Cir. 1973).
42. *Id.* Judge Robinson also noted:
With the remarkable expansion of remedies in damages to enable redress of invasions of an incalculable variety of personal interests, monetary valuation of fundamental civil rights seems hardly impossible [in this case].
*Id.* *Gomez* involved a suit against the Chief of Police for the District of Columbia. The plaintiff alleged that the D.C. police had harassed him by spot check enforcement of allegedly unconstitutional vagrancy statutes.
43. *Id.* at 420.
44. 444 F. 2d 947 (D.C. Cir. 1971), rev'd on other grounds, 408 U.S. 1 (1972).
point in all circumstances.\textsuperscript{46} Indeed, a policy of flexibility would seem more in tune with the congressional purpose of preventing federal courts from frittering away their time with petty controversies\textsuperscript{47}—a purpose perhaps well served in federal question actions not involving federal constitutional rights, but surely ill-served where federal officers are accused of infringing constitutional rights. The Gomez approach\textsuperscript{48} would thus allow plaintiffs to satisfy the jurisdictional requirement by a clear-cut presentation of value to the plaintiff or cost to the defendant. In many, if not most, instances this approach will suffice to get the plaintiff into federal court, and it is a laudable attempt at reconciling the Supreme Court's ruling that the amount-in-controversy requirement must be satisfied in officer suits\textsuperscript{49} with what the court in Gomez called the "deep seated feeling that price-tagging of fundamental human rights is dangerous business . . . ."\textsuperscript{50}

A variation of this middle course has apparently been adopted by the Court of Appeals for the Third Circuit in Spock v. David.\textsuperscript{51} In Spock, the court explicitly rejected the government's argument that first amendment rights are incapable of valuation, ruling that these rights are no more incapable of valuation than other intangibles.\textsuperscript{52} Judge Gibbons reasoned that in first amendment cases where official action had blocked one method of distributing information,\textsuperscript{53} the value of the right could be measured by the cost of alternative forms of communication.

This alternative-valuation approach represents a significant departure from the general rule that valuation of the matter in controversy

\textsuperscript{46} In St. Paul Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938), the Court held that "unless the law gives a different rule, the sum claimed by the plaintiff controls . . . ." Id. at 288. However, Red Cab dealt only with the amount-in-controversy requirement in diversity cases and the Court was evidently influenced by "[t]he intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states . . . ." Id.

\textsuperscript{47} See note 26 supra.

\textsuperscript{48} For a recent application of the Gomez approach, see Committee for GI Rights v. Callaway, 518 F.2d 466, 473 (D.C. Cir. 1975).


\textsuperscript{50} 477 F.2d at 421 n.56. See also Kelley v. Metropolitan County Bd. of Educ., 372 F. Supp. 528, 537 (M.D. Tenn. 1973).

\textsuperscript{51} 502 F.2d 953 (3d Cir. 1974).

\textsuperscript{52} Id. at 956.

\textsuperscript{53} In Spock, the plaintiffs were barred from distributing political pamphlets on a military reservation. Plaintiffs presented evidence that alternative methods of reaching the same population would be less effective and would cost in excess of $10,000. Neither the district court nor the court of appeals required the plaintiffs to produce evidence of less expensive alternatives.
Suits Against Federal Officers

may not be accomplished by valuing the alternatives to which a plaintiff may be put in achieving the object of the suit. Such valuation has been held to be "indirect damage" and as such "too speculative to create jurisdiction under Section 1331." Thus the Third Circuit's commendable attempt to ease the amount-in-controversy requirement is unlikely to be accepted soon by other circuits.

Hopefully, however, this trend toward a liberal reading of the amount-in-controversy requirement of Section 1331 will continue. If so, the "unfortunate gap in the statutory jurisdiction of the federal courts" may effectively be bridged. Nonetheless, given the current prevalence of the Giancana dollars and cents rule and the conflict in the circuits, it seems unlikely that a plaintiff will be able to overcome the amount-in-controversy problem in a majority of the courts.

Such conflict among the circuits is intolerable where "priceless" constitutional rights are at stake—the Supreme Court should bring order out of this chaos as soon as the opportunity presents itself. It is hoped that the Court will explicitly reject the Giancana approach and adopt either the Cortright or Gomez approach. In addition, Congress


55. But cf. Garmon v. Warner, 358 F. Supp. 206 (W.D.N.C. 1973). In Garmon, plaintiffs brought suit for declaratory and injunctive relief to allow Marine reservists to wear wigs over their long hair while performing military duties on weekends. Military authorities had threatened to place plaintiffs on full-time duty if plaintiffs did not cut their hair in conformity with military standards. The district court acknowledged that the measurable financial losses that induction would cause were less than $10,000, but reasoned that the "emotional and psychological losses" that would be caused by induction into full-time service would satisfy the jurisdictional amount requirement. Id. at 208. See also Etheridge v. Schlesinger, 362 F. Supp. 198 (E.D. Va. 1973). Cf. Lawrence v. Oakes, 361 F. Supp. 432 (D. Vt. 1973); Chaudoin v. Atkinson, 494 F.2d 1323, 1327-28 (3d Cir. 1974).


should recognize that "jurisdictional amount has no place in actions against federal officers" and do away with the requirement.

II. THE APA AS A GRANT OF JURISDICTION AND A WAIVER OF SOVEREIGN IMMUNITY

Since the amount-in-controversy requirement associated with Section 1331 may effectively preclude federal question jurisdiction, counsel for plaintiffs in suits against federal officers typically claim that Section 10 of the Administrative Procedure Act is an independent grant of original jurisdiction to the federal district courts. To overcome the possible application of the doctrine of sovereign immunity, counsel also claim that the APA constitutes a waiver of the defense of sovereign immunity. The prospects of prevailing on these claims and their respective correctness is the subject of this section.

A. The APA As An Independent Grant of Jurisdiction

The federal courts are hopelessly in conflict on the question of whether the APA is an independent grant of jurisdiction. This discussion will first attempt to delineate the positions of the various circuits and establish where the law on the issue currently stands. It will then attempt to answer the question whether the APA should be construed as a grant of jurisdiction.

59. It is suggested that Prof. Wechsler's proposal to do away with the jurisdictional amount requirement be adopted. See Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 LAW & CONTEMP. PROB. 216 (1948). Additionally, plaintiffs might profitably note that a source of possible jurisdiction, though more limited, is 28 U.S.C. § 1337 (1970) which gives the district courts original jurisdiction "of any civil action or proceedings arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." The advantage of § 1337 lies in the fact that there is no amount-in-controversy requirement. See, e.g., Springfield Television, Inc. v. City of Springfield, 428 F.2d 1375 (8th Cir. 1970); Caulfield v. United States Dept. of Agri., 293 F.2d 217 (5th Cir. 1961); 7B J. MOORE, FEDERAL PRACTICE § 1337 (1966). Generally, it has been held that the tests of "arising under" for § 1337 "are the same as those demanded under Section 1331, except that no jurisdictional amount need be alleged." Jersey Cent. Power & Light Co. v. Local Unions 327 et al., IBEW, 508 F.2d 687, 699 n.34 (3d Cir. 1975), citing Felter v. Southern Pac. Co., 359 U.S. 326, 329 n.4 (1959).
61. It should be noted that there are sovereign immunity problems under § 1331. See also note 124 infra.
I. The state of the law—chaos

Section 10(a) of the APA provides,\footnote{5 U.S.C. § 702 (1970).} "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof." Reasoning from Section 10(a), six circuits have concluded that the APA is jurisdictional while four circuits have held that it is not jurisdictional.\footnote{The following circuits have held that the APA alone grants jurisdiction. District of Columbia: Pickus v. United States Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974). First Circuit: Elton Orchards, Inc. v. Brennan, 508 F.2d 493 (1st Cir. 1974); Bradley v. Weinberger, 483 F.2d 410 (1st Cir. 1973). Fourth Circuit: McEachern v. United States, 321 F.2d 31 (4th Cir. 1963). Cf. Littell v. Morton, 445 F.2d 1207 (4th Cir. 1971); Deering Milliken, Inc. v. Johnston, 295 F.2d 836 (4th Cir. 1961). Fifth Circuit: Young v. United States, 498 F.2d 2d 1211 (5th Cir. 1974); Thompson v. United States Fed. Prison Indus., 492 F.2d 1082 (5th Cir. 1974); Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961). Ninth Circuit: Rothman v. Hospital Serv. of S. Calif., 510 F.2d 956 (9th Cir. 1975); Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971); Brandt v. Hickel, 427 F.2d 53, 55–56 n.2 (9th Cir. 1970); Washington v. Udall, 417 F.2d 1310 (9th Cir. 1969); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). But see Nguyen da Yen v. Kissinger, No. 75-2493 (9th Cir., Nov. 5, 1975), and Wiren v. Eide, No. 74-1169 (9th Cir., Sept. 3, 1975), in which the court is vacillating on this issue. Tenth Circuit: Bard v. Seamans, 507 F.2d 765 (10th Cir. 1974). Cf. Brennan v. Udall, 379 F. 2d 803 (10th Cir. 1967). But see Chournos v. United States, 335 F.2d 918 (10th Cir. 1964). The following circuits have held that the APA is not an independent grant of jurisdiction. Second Circuit: Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973), cert. denied, 414 U.S. 1146 (1974); Ove Gustavsson Contracting Co. v. Floete, 278 F.2d 912 (2d Cir.), cert. denied, 364 U.S. 894 (1960). Compare Cappadora v. Celebrezze, 356 F.2d 1 (2d Cir. 1966). Third Circuit: Grant v. Hogan, 505 F.2d 1220 (3d Cir. 1974); Bachowski v. Brennan, 502 F.2d 79 (3d Cir. 1974), Lindy v. Lynn, 501 F.2d 1367 (3d Cir. 1974); Getty Oil Co., Inc. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972), cert. denied, 409 U.S. 1125 (1973); Zimmerman v. United States Gov't, 422 F.2d 326 (3d Cir.). cert. denied, 399 U.S. 911, rehearing denied, 400 U.S. 855 (1970); Local 542, Operating Engineers v. NLRB, 328 F.2d 850 (3d Cir.), cert. denied, 379 U.S. 826 (1964). Sixth Circuit: Bramblett v. Desobry, 490 F.2d 405 (6th Cir.), cert. denied, 419 U.S. 872 (1974). Eighth Circuit: Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 329 (8th Cir. 1967). See also State Hwy. Comm'n of Mo. v. Volpe, 479 F.2d 1099 (8th Cir. 1973). But see Ratnayake v. Mack, 499 F.2d 1207 (8th Cir. 1974).} In addition to this perplexing inter-circuit conflict, there are also conflicts within individual circuits. For instance, the Court of Appeals for the First Circuit initially held that the APA was jurisdictional,\footnote{Davis Associates, Inc. v. Secretary of Dept. of Hous. & Urban Devel., 498 F.2d 385 (1st Cir. 1974). The court stated that it had never ruled on the question, apparently overlooking its earlier decision in Bradley, supra note 64, 498 F.2d at 389 n.6.} then vacillated on the issue,\footnote{Elton Orchards, Inc. v. Brennan, 508 F.2d 493 (1st Cir. 1974).} and finally appeared to decide that the APA was, in fact, a grant of jurisdiction\footnote{Bradley v. Weinberger, 483 F.2d 410 (1st Cir. 1973).}—all within the space of a single year. The Courts of Appeals for the District of Co-
lumbia, Second, Fifth, and Eighth Circuits have also vacillated with respect to this issue.67 Of all the circuits, perhaps only the Court of Appeals for the Third Circuit has remained consistent in its position that the APA is not a grant of jurisdiction,68 yet even in the Third Circuit a district court occasionally holds that the APA is a grant of jurisdiction.69 One would be hard pressed to find a situation more deserving of definitive Supreme Court resolution, yet the Court has remained steadfast in its refusal to rule on the issue.70


The Court of Appeals for the Second Circuit held that the APA was not jurisdictional in Ove Gustavsson Contracting Co. v. Floete, 278 F.2d 912 (2d Cir.), cert. denied, 364 U.S. 894 (1960), then apparently assumed that the APA was jurisdictional in Cappadora v. Celebrezze, 356 F.2d 1 (2d Cir. 1966), then reserved the question in Mills v. Richardson, 464 F.2d 995, 1001 n.9 (2d Cir. 1972). and Aguayo v. Richardson, 473 F.2d 1090, 1101-02 (2d Cir. 1973), cert. denied, 414 U.S. 1146 (1974).

In Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961), the Court of Appeals for the Fifth Circuit ruled that jurisdiction was available under the APA, then reversed itself in Carter v. Seams, 411 F.2d 767, 776 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970), then reversed itself again in Thompson v. United States Fed. Prison Indus., 492 F.2d 1082 (5th Cir. 1974), stating that “jurisdiction here is found in the Administrative Procedure Act . . . .” 492 F.2d at 1084 n.5. The Thompson court did not mention Carter, but then the Carter court did not mention Estrada. Since Thompson however, the Court of Appeals for the Fifth Circuit has consistently held that the APA is jurisdictional. See, e.g., Ortego v. Weinberger, 516 F.2d 1005 (5th Cir. 1975); Young v. United States, 498 F.2d 1211 (5th Cir. 1974).

The Court of Appeals for the Eighth Circuit apparently has not settled on an answer to the question. Compare Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967) (the APA is not jurisdictional), with Ratnayake v. Mack, 499 F.2d 1207 (8th Cir. 1974) (the APA is jurisdictional).

68. See cases cited in note 63 supra.


70. The Supreme Court has denied certiorari in every case in which the issue was raised for decision. See, e.g., Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973), cert. denied, 414 U.S. 1146 (1974); Getty Oil Co., Inc. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972), cert. denied, 409 U.S. 1125 (1973); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).
2. *Should the APA be construed as an independent grant of jurisdiction?*

Most of the commentators who have discussed the subject urge that the APA be construed as an independent grant of jurisdiction.71 These commentators reason that such a construction is necessary to assure judicial review of agency action affecting an individual unable to bring suit under any other jurisdictional statutes, such as Sections 1331, 1337 or 1361. In order to avoid closing off access to the federal courts to such an individual, many federal courts have reasoned that Section 10(a) should be read as an implicit grant of jurisdiction.72 These courts also rely on several Supreme Court cases where the Court either held that agency actions are presumptively reviewable73 or assumed that jurisdiction was present under the APA.74

Reliance on these Supreme Court cases reflects a judicial desire to find jurisdiction so as to enable the court to reach the merits, rather than a serious attempt to analyze each case. Indeed, even a superficial analysis of these cases reveals not that the Court held the APA to be an independent grant of jurisdiction, but rather, that the Court was dealing with the issue of extent and scope of review under the two explicit exceptions to the general right to judicial review provided by

---


72. More often than not the courts of appeals simply hold that the APA is a grant of jurisdiction without any supporting reasoning. See, e.g., Bradley v. Weinberger, 483 F.2d 410 (1st Cir. 1973).

73. See, e.g., Abbott Labs. v. Gardner, 387 U.S. 136 (1967), where the Court stated, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 141. See also Citizens to Preserve Overton Park, Inc. v. Volpe, 410 U.S. 402 (1971); Dunlop v. Bachowski, 95 S.Ct. 1851, 1857–58 (1975).

74. See, e.g., Shaughnassy v. Pedreiro, 349 U.S. 48 (1955); Rusk v. Cort, 369 U.S. 367 (1962), where Justice Brennan, concurring, described both the Declaratory Judgment Act and the APA as "general grants of jurisdiction." *Id.* at 380. However, as Professor Byse has observed, "[t]he Justice may have intended another nuance of the term 'jurisdiction,' for it is well established that the Declaratory Judgment Act is not a grant of jurisdiction." Byse & Fiocca, supra note 1, at 329 n.76. In any event, the actual holding of Rusk v. Cort does not support an argument that the APA is jurisdictional. In *Rusk* the Court merely determined that Congress had not intended to preclude review of the Secretary of State's actions under the Immigration and Nationality Act of 1952. Such a holding can hardly be said to rule that the APA is an independent grant of jurisdiction.
the APA. A more careful analysis of these cases indicates that the Court was concerned with the scope of the remedial aspects of the APA, not any supposed jurisdictional character of the APA.

This reading of the cases is supported by the textual construction of the judicial review provisions of the APA. Section 702 first establishes the broad proposition that a person injured by agency action is entitled to judicial review of that action. This section fully supports the Supreme Court's holdings that agency action is presumptively reviewable, but does not necessarily support a construction that it is a grant of jurisdiction; the section merely establishes the right to judicial review, not whether a federal court has jurisdiction to enforce that right. The jurisdiction of the reviewing court would seem to be governed by Section 703 which states:

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.

Section 703 thus allows review only in a court of "competent jurisdiction." From a textual reading alone, Section 703 implies that judicial review is available only where a reviewing court already has jurisdiction under some other grant of jurisdiction since a competent court

---

75. See, e.g., Rusk v. Cort, 369 U.S. 367 (1962); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). Section 701(a) contains the two explicit exceptions that condition the right of review secured by § 702 to cases where it does not appear that:
   (1) statutes preclude judicial review; or
   (2) agency action is committed to agency discretion by law.
77. See Abbott Labs. v. Gardner, 387 U.S. 136, 140–41 (1967). See also Cramton, supra note 1, at 417–18 n.143, where Professor Cramton notes:
   To be sure, the reference in § 10(b) of the Act [5 U.S.C. § 703 (1970)] to "actions . . . in a court of competent jurisdiction" carries an implication that the Act does not vest subject matter jurisdiction in federal courts when the federal-question provision of 28 U.S.C. § 1331 (1964)—or an applicable special federal-question provision—is not satisfied.
Suits Against Federal Officers

is ordinarily a court that has both jurisdiction over the parties and jurisdiction over the subject matter.79 As one court has observed:80

Neither [§ 10(a)] nor any other clause of § 10 extends the jurisdiction of the federal courts to cases not otherwise within their competence. . . . The purpose of § 10 is to define the procedures and manner of judicial review of agency action, rather than to confer jurisdiction upon the courts.

Such a construction of Section 10 appears to be supported by the Supreme Court's decision in Blackmar v. Guerre.81

In Blackmar, the Court held that the Civil Service Commission could not be sued in a Louisiana federal district court. The Court reasoned that the APA provided for judicial review “only in a court of ‘competent jurisdiction’”82 and that “the courts of the District of Columbia are the only courts of ‘competent jurisdiction’ to reach the members of the Civil Service Commission.”83 Although the Blackmar Court held that the Louisiana district court had no jurisdiction to review the actions of the Civil Service Commission, the case could be construed as holding only that the district court lacked venue over the Commission members.84 However, even if a “court of competent jurisdiction” means a court with venue, such a construction does not mean that the APA is a grant of jurisdiction. As most commentators have concluded, the jurisdictional nature of the APA is still an open question.

82. Id. at 516.
83. Id. The Court also ruled that the APA could not be deemed “an implied waiver of all governmental immunity from suit.” Id. See text accompanying notes 112–13, infra.
84. This reading is supported by the Court's statement that the courts of the District of Columbia are the only courts of “competent jurisdiction” because only in the District of Columbia could the members of the Commission be served. Since federal officials are deemed to “reside” in the District of Columbia, 342 U.S. at 516, and since venue of the federal district courts lies only where the defendants reside (or where the action arose) in federal question cases, 28 U.S.C. § 1391(b) (1970), the Court in Blackmar may very well have meant that the Louisiana district court was not a court of “competent jurisdiction” because it lacked venue. Indeed, the Court of Appeals for the District of Columbia has observed that “the requirement that the reviewing court be one of “competent jurisdiction” can reasonably be read as a recognition of generally applicable venue requirements.” Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1110 n.5 (D.C. Cir. 1974). Contra, Lindy v. Lynn, 501 F.2d 1367 (3d Cir. 1974).
Since the legislative history of the APA is devoid of material that would be helpful in resolving the issue, the question of the jurisdictional effect of the APA should be resolved on the basis of general policy considerations. Perhaps the most important of these is that were the APA held to be a grant of jurisdiction, the amenability of federal officers to suit would be virtually assured. Since the APA contains no jurisdictional-amount requirement, such a construction would effectively do away with the difficulties plaintiffs still experience under Section 1331 when requesting equitable relief against allegedly unconstitutional actions of federal officers. No longer would plaintiffs be barred from securing judicial protection of constitutional rights by the vagaries of old Supreme Court doctrine that requires a claim to be capable of valuation in dollars and cents. This consideration alone may compel the Court to resolve the conflict among the circuits in favor of those circuits that have held the APA to be jurisdictional.

However, a potentially more compelling factor must be considered before the APA is accepted as jurisdictional. The federal courts are, fundamentally, courts of limited and specified jurisdiction and can thus hear cases only under a specific grant of jurisdiction from Congress.\textsuperscript{85} The same policy that gave rise to the rule that "jurisdictional statutes are to be strictly construed"\textsuperscript{86} also militates against finding an independent grant of federal jurisdiction absent a clear expression of congressional intent. While it is clear that Congress intended administrative agencies to be subject to the remedial aspects of the APA, it is far from clear that Congress intended to give the district courts jurisdiction to review agency action. Indeed, it has been suggested:\textsuperscript{87}

A presumption in favor of judicial review cannot necessarily be equated with a presumption of jurisdiction. Empowering a court to exercise review involves many collateral issues and underlying policy questions, implicit in such an expansion of jurisdiction, which could not be disposed of through the judicial process.

Accordingly, the federal district courts, as courts of limited and specified jurisdiction, should be presumed to lack jurisdiction absent a clear statute authorizing jurisdiction. The absence of such an explicit

\textsuperscript{85} Project. \textit{supra} note 71, at 227.
\textsuperscript{87} Project. \textit{supra} note 71, at 231.
grant of jurisdiction in Section 10 of the APA combined with the lack of any discussion of the issue in the legislative history strongly suggests that the APA should not be construed as a grant of jurisdiction.

Nonetheless, Professor Byse recommends that the APA be construed as jurisdictional. This position, although good in the sense it opens up the federal courts to aggrieved plaintiffs, is unsound because there is virtually no support in the legislative history for the position that Section 10 is a grant of jurisdiction. To find jurisdiction despite the absence of legislative support would not only violate the firm rule that the federal courts should not expand their jurisdiction by interpretation, but would also undermine Congress' plenary power to control the jurisdiction of the lower federal courts.

These considerations suggest that the Court should hold that Section 10 does not act as an independent grant of jurisdiction. This result is not as disastrous as may first appear for the federal courts have shown a propensity for broadly construing Section 1361 (mandamus) so as to afford affirmative relief to aggrieved plaintiffs.

---

89. Byse & Fiocca, supra note 1, at 330.
90. Id.
91. Id. at 328.
92. See cases cited in note 86 supra.
93. See Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850). See also Hart & Wechsler, supra note 19, at 313–22, and authorities noted therein. Congress clearly makes use of the presumption of no jurisdiction and its power to define the scope of the lower federal courts' jurisdiction wherever it provides for judicial review of agency action. For instance, the actions of the National Labor Relations Board are reviewable only under § 10 of the National Labor Relations Act, not otherwise, see AFL v. NLRB. 308 U.S. 401, 404–07 (1940). Of course, this is not to suggest that judicial review of agency action would not lie under some other grant of jurisdiction such as 28 U.S.C. § 1331 or 28 U.S.C. § 1337 where such jurisdiction has not been explicitly precluded by Congress. But jurisdiction under these "nonstatutory" sources is quite a different matter than implying jurisdiction from the APA which contains no explicit grant of jurisdiction.

94. See Part III-D-2 infra.
B. Does the APA Waive Sovereign Immunity?

A question distinct from whether the APA is a grant of jurisdiction is whether the APA waives sovereign immunity. Given the conflict as to whether or not the APA is jurisdictional and the complexity associated with the doctrine of sovereign immunity, it is not surprising that federal courts are also confused on the waiver issue. This comment will not attempt to examine all the problems caused by and associated with the doctrine of sovereign immunity, as they have been well analyzed by other commentators.95 However, since an outline of some of the problems associated with sovereign immunity would be helpful in discussing whether the APA is a waiver, a brief discussion of the doctrinal difficulties associated with sovereign immunity follows.

1. Sovereign immunity

The doctrine of sovereign immunity has evolved over the last 20 years to become one of the most complicated—and confused—legal doctrines in federal law.96 Through a series of decisions dating from the 1948 landmark case of Larson v. Domestic & Foreign Commerce Corp.,97 the Supreme Court has created a doctrine of such complexity and inconsistency that one court has remarked: "The doctrine . . . is in a considerable state of disrepair, at least in terms of intellectual respectability . . . ."98 It is thus not surprising that these cases have produced confusion and "substantial injustice"99 in the lower courts.

Despite this confusion, a few principles have been established. The doctrine has been held not only to bar suits against the United States or its agencies,100 but also, in certain instances, to bar suits against federal officers.101 To this general prohibition against officer suits, the

---

95. See, e.g., Cramton, supra note 1.
97. 337 U.S. 682 (1948).
100. Congress has, of course, consented to suit against the United States in the Tort Claims Act and the Tucker Act, see note 18 supra.
101. In officer suits, the plaintiff attempts to circumvent the bar of sovereign immunity by suing the particular official, alleging that the official has interfered with the
Court has carved out two exceptions. First, a suit may be brought against an officer if the officer has acted outside his authority (the *ultra vires* exception). Second, a suit may be brought where "the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional." Yet even where one of the two exceptions may be applicable, the Court in *Larson* ruled in the now famous footnote 11 that:

[A] suit may fail . . . if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.

In the subsequent case of *Hawaii v. Gordon*, the Court implied that the "may fail" language of *Larson*, footnote 11, would be read as "must fail" in cases where the requested relief "in fact operates against plaintiff's rights. For the frequently quoted, classic statement of the rationale of the "officer's suit," see ATTORNEY GENERAL'S COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 8, 77th Cong., 1st Sess. 80-81 (1941), quoted in Byse, Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus, 75 HARV. L. REV. 1479, 1480-81 (1962).

In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court noted that if the official's conduct was unlawful, the officer is "stripped of his official or representative character and . . . subject in his person to the consequences of his individual conduct." *Id.* at 160. This circumvention of sovereign immunity has been sharply limited, however, by *Larson*, supra note 97, and its progeny, read by the lower courts as prohibiting suits against a federal officer where:

"the decree would operate against" the sovereign or if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration" . . . or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act." *Gnotta v. United States*, 415 F.2d 1271, 1277 (8th Cir. 1969). *See also* Zimmerman v. United States Gov't, 422 F.2d 326, 329-30 (3d Cir.), cert. denied, 399 U.S. 911 (1970).

For a recent case where it was held that the doctrine of sovereign immunity did not bar a suit against federal officers brought under the constitutional tort doctrine enunciated by the Supreme Court in *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), *see* *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th Cir. 1975).

---

103. 337 U.S. at 690.
104. *Id.* at 691 n.11.
105. 373 U.S. 57 (1963). The Court, in a very short per curiam opinion, reasoned: The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter. Here the order requested would require the Director's official affirmative action, affect the public administration of government agencies and cause as well the disposition of property admittedly belonging to the United States. *Id.* at 58.

117
the sovereign" or would require "official affirmative action," and most lower federal courts have so held. However, strong criticism of this broad reading of footnote 11 has led a number of courts to rule that the "may fail" language of footnote 11 means literally *may* fail—not *must* fail. These courts reason that this language should be read in such a way that sovereign immunity would bar the suit only if the relief sought "would work an intolerable burden on governmental functions, outweighing any consideration of private harm." This reading is preferable to the "must fail" interpretation and should be adopted by the Supreme Court. However, since this interpretation has not been widely accepted, the defense of sovereign immunity remains an obstacle to a plaintiff seeking relief requiring "official affirmative action." These problems are avoided, however, if the APA is a waiver of sovereign immunity—an issue to which we now turn.

2. The APA as a waiver of sovereign immunity

Given the confusion that reigns among the lower courts as to the scope of the doctrine of sovereign immunity, it is hardly surprising that the circuits are in conflict as to whether the APA is a waiver of sovereign immunity in suits against federal officers. Most of the courts, however, hold that the APA does not waive sovereign immunity.


107. See, e.g., K. Davis, Administrative Law Treatise § 27.00-6, at 912-15 (Supp. 1970); L. Jaffe, Judicial Control of Administrative Action 229 (1965); Cramton, supra note 1, at 418-24.

108. See, e.g., Schlafly v. Volpe, 495 F.2d 273 (7th Cir. 1974); Washington v. Udall, 417 F.2d 1310 (9th Cir. 1969).


110. See note 96 and accompanying text supra.


The following circuits have held that the APA is *not* a waiver of sovereign immunity. First Circuit: Cyrus v. United States, 226 F.2d 416 (1st Cir. 1955). Third Cir-
This decided preference among the circuits for the rule that the APA is not a waiver is understandable, since the Supreme Court has ruled in *Blackmar v. Guerre*\(^\text{112}\) that "the Act [is not] to be deemed an implied waiver of all governmental immunity from suit."\(^\text{113}\) Notwithstanding *Blackmar*, three circuits have, for persuasive policy reasons, ruled that Section 702 of the APA is a "clear waiver of sovereign immunity."\(^\text{114}\) Such a rule eliminates the difficulties associated with the defense of sovereign immunity and thus eases the courts' workload. More importantly, the rule is not inconsistent with the accepted rationale for the doctrine of sovereign immunity, *i.e.*, the prevention of undue judicial interference in official actions of the government, since this policy is satisfied by Section 701(a) of the APA which precludes judicial review: (1) where statutes preclude judicial review; or (2) where agency action is committed to agency discretion by law.\(^\text{115}\) Furthermore, as at least one court has pointed out, the "doctrines of ripeness, finality and exhaustion insure that the public business entrusted to administrative agencies will not be unduly burdened."\(^\text{116}\)

Notwithstanding these persuasive policy reasons for holding that the APA is a waiver, the majority rule to the contrary is probably correct on the basis of current legal authority. For instance, in addition to *Blackmar* and its statement that the APA is not a waiver, the Supreme Court has applied the doctrine of sovereign immunity at least five times:

- Ninth Circuit: *Converse v. Udall*, 399 F.2d 616 (9th Cir. 1969).
- Tenth Circuit: *Motah v. United States*, 402 F.2d 1 (10th Cir. 1968).

But see *Adams v. Witmer*, 271 F.2d 29 (9th Cir. 1958). Tenth Circuit: *Motah v. United States*, 402 F.2d 1 (10th Cir. 1968); *Cotter Corp. v. Seaberg*, 370 F.2d 686 (10th Cir. 1966); *Chournos v. United States*, 335 F.2d 918 (10th Cir. 1964).

The Court of Appeals for the Seventh Circuit seems to have reserved the question. See *Schlafly v. Volper*, 495 F.2d 273 (7th Cir. 1974).

\(^{112}\) 342 U.S. 512 (1952).

\(^{113}\) Id. at 516. See also *Cramton*, supra note 1 at 417–18 n.143.

\(^{114}\) Estrada v. Ahrns, 296 F.2d 690, 698 (5th Cir. 1961).


\(^{116}\) Mount Sinai Hosp. of Greater Miami, Inc. v. Weinberger, 376 F. Supp. 1099, 1110 (S.D. Fla. 1974). Cf. *Montana Chapter of Ass'n of Civil. Tech., Inc. v. Young*, 514 F.2d 1165 (9th Cir. 1975), where the Court of Appeals for the Ninth Circuit held that the APA did not provide a basis for jurisdiction where the plaintiff did not exhaust available administrative remedies.
times in cases dealing with actions reviewable under the APA.\textsuperscript{117} The failure of the Court to discuss the APA in these cases indicates either that the Court did not consider the applicability of the APA as a waiver or that the Court simply assumed that the doctrine of sovereign immunity applied, independent of the judicial review provisions of the APA. Given \textit{Blackmar}, the latter possibility appears more likely. This conclusion is further strengthened by the tendency of the Court to decide APA issues without any mention of the doctrine of sovereign immunity.\textsuperscript{118}

In terms of policy, the majority rule is supported by the generally accepted rule that "[c]ourts should not lightly imply that the United States has consented to forego the normal immunity of the sovereign from suit."\textsuperscript{119} Since the defense of sovereign immunity goes to jurisdiction,\textsuperscript{120} this rule is akin to the presumption that the federal courts possess no subject matter jurisdiction other than that specifically granted by Congress.\textsuperscript{121} Just as Congress is quite capable of bestowing subject matter jurisdiction on the courts, it is equally capable, as in the Federal Tort Claims Act,\textsuperscript{122} of explicitly consenting to suits against the United States. It would thus seem that a waiver of sovereign immunity should not be presumed absent a clear intent on the part of Congress to allow the United States to be sued. Since the legis-

\textsuperscript{117} See Hawaii v. Gordon, 373 U.S. 57 (1963); Fresno v. California, 372 U.S. 627 (1963); Dugan v. Rank, 372 U.S. 609 (1963); Malone v. Bowdoin, 369 U.S. 643 (1962); Larson v. Domestic & Foreign Commerce, 337 U.S. 682 (1948). \textit{But see} Mount Sinai Hosp. of Greater Miami, Inc. v. Weinberger, 376 F. Supp. 1099 (S.D. Fla. 1974), for an argument that these sovereign immunity cases are not inconsistent with the proposition that the APA is a waiver. The Mount Sinai court reasoned that these decisions could be distinguished as instances where the APA did not apply either because the agency action was committed to agency discretion or because of a supposed congressional intent to preclude officer suits or suits against the United States where an alternative forum was available in the Court of Claims. \textit{Id.} at 1111 n.30. The court further stated that it was possible to reach the same results in each of the above-cited cases by a broad reading of § 701(a) of the APA which precludes judicial review (1) where statutes preclude judicial review; or (2) where agency action is committed to agency discretion by law. This interpretation of these cases is unpersuasive as it requires that the § 701(a) exceptions be expansively read. The Court has refused such an expansive reading and has instead indicated that the exceptions are to be narrowly construed with agency action "presumably reviewable." Abbott Labs. v. Gardner, 387 U.S. 136, 140 n.2 (1967).


\textsuperscript{119} Jackson v. Lynn, 506 F.2d 233, 237 (D.C. Cir. 1974).

\textsuperscript{120} United States v. Sherwood, 312 U.S. 584, 586–88 (1941).

\textsuperscript{121} See text accompanying notes 85–93 supra.

lative history\textsuperscript{123} of the APA contains no indication that Congress intended it to constitute a waiver of sovereign immunity, it must be concluded that the APA is not a waiver.

The case for implying a waiver-of-immunity purpose is even weaker than the case for construing the APA as a grant of jurisdiction. Even if the APA is a grant of jurisdiction, such a rule would hardly mean that it is also a waiver.\textsuperscript{124} In essence, to find that the APA is both a grant of jurisdiction and a waiver of immunity, one would have to discover first, a congressional intent to confer jurisdiction, and second, a congressional intent to waive the defense of sovereign immunity. At the very least, discovering such intent in a statute whose text and legislative history are entirely silent on both points poses a difficult, if not impossible, task. It is not surprising that presently only the Court of Appeals for the District of Columbia accepts the rule that the APA is both a grant of jurisdiction and a waiver of sovereign immunity.\textsuperscript{125} In summary, both reason and the weight of authority militate against acceptance of the argument that the APA is a waiver of sovereign immunity.


\textsuperscript{124} For example, it is clearly established that the federal question statute, 28 U.S.C. § 1331 (1970), while granting jurisdiction, does not waive sovereign immunity. Cotter Corp. v. Seaborg, 370 F.2d 686, 692 n.15 (10th Cir. 1966), citing Anderson v. United States, 229 F.2d 675 (5th Cir. 1956). This distinction between the APA as a grant of jurisdiction and as a waiver of sovereign immunity has been implicitly recognized by the courts which have held (in separate decisions) that the APA is a grant of jurisdiction but is not a waiver of sovereign immunity. In the First Circuit, compare Elton Orchards, Inc. v. Brennan, 508 F.2d 493 (1st Cir. 1974), with Cyrus v. United States, 226 F.2d 416 (1st Cir. 1955). In the Fourth Circuit, compare McEachern v. United States, 321 F.2d 31 (4th Cir. 1963), with Littell v. Morton, 445 F.2d 1207 (4th Cir. 1971). In the Ninth Circuit, compare Rothman v. Hospital Serv. of S. Cal., 510 F.2d 956 (9th Cir. 1975), with Washington v. Udall, 417 F.2d 1310 (9th Cir. 1969). In the Tenth Circuit, compare Bard v. Seamans, 507 F.2d 765 (10th Cir. 1974), with Motah v. United States, 402 F.2d 1 (10th Cir. 1968).

While it may initially seem nonsensical to first grant jurisdiction under the APA and then hold that this jurisdiction is taken away by the defense of sovereign immunity, such a distinction is logically supportable. For instance, there are undoubtedly many instances where the Larson exceptions can be applied, hence negating the defense, even though there is no basis of jurisdiction other than the APA. In such circumstances, the grant of jurisdiction under the APA would be analogous to the grant of jurisdiction under the general federal question statute, 28 U.S.C. § 1331 (1970).

\textsuperscript{125} Pickus v. United States Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974) (APA is jurisdictional); Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970) (APA is waiver of sovereign immunity). Earlier, the Court of Appeals for the Fifth Circuit also held that the APA was both a grant of jurisdiction and a waiver of sovereign immunity. Thompson v. United States Fed. Prison Indus., 492 F.2d 1082 (5th Cir. 1974) (APA is jurisdictional); Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961) (APA is waiver of sovereign immunity). However, the court has more recently retreated from its earlier position. See Colson v. Hickel. 428 F.2d 1046 (5th Cir. 1970).
III. THE MANDAMUS AND VENUE ACT OF 1962—
COMMON LAW MANDAMUS TRADITION AND THE TRENDS SINCE 1962

As demonstrated, substantial problems arise in attempting to obtain federal court jurisdiction in suits against federal officers under either the federal question statute or the APA. It thus becomes important to determine the scope of jurisdiction of the one statute that Congress has enacted which subjects all federal officers to potential district court jurisdiction, Section 1361 of the Judicial Code. Since the grant of jurisdiction in Section 1361 is limited to actions "in the nature of mandamus," an examination of the writ of mandamus, as judicially defined prior to the 1962 enactment of Section 1361, is essential to a proper understanding of the scope of the jurisdiction bestowed.

A. Background

In 1813 the Supreme Court held in *M'Intire v. Wood* that circuit (trial level) courts outside the District of Columbia did not possess jurisdiction to issue writs of mandamus under the Judiciary Act of 1789. In 1838, the Court decided in *Kendall v. United States ex rel. Stokes* that the circuit court for the District of Columbia did have jurisdiction to issue original writs of mandamus, reasoning that under the Act of February 27, 1801, the circuit courts for the District of Columbia possessed the same mandamus (and equity) powers as the courts of Maryland. However, the rule of *M'Intire* still prevailed for federal courts outside the District; thus writs of man-

---

127. 11 U.S. (7 Cranch) 504 (1813).
128. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. Section 11 of that Act gave the circuit courts "original cognizance...of all suits of a civil nature at common law or in equity...." *Id.* § 11, 1 Stat. 78.
130. Ch. 15, § 1, 2 Stat. 103. The Act "provided that the laws of the state of Maryland should continue in force in that part of the District of Columbia ceded by Maryland to the United States." Byse & Fiocca, *supra* note 1, at 311. There was "no doubt, but that in the state of Maryland a writ of mandamus might be issued to an executive officer, commanding him to perform a ministerial act required of him by law..." *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 621 (1838).
131. This restriction on the lower federal courts was repeatedly interpreted to mean not only that the lower federal courts were barred from issuing writs of mandamus, but also that they were prohibited from issuing mandatory injunctions which would have the same effect as a writ of mandamus. In essence, in situations where the
Suits Against Federal Officers

damus could be sought only in the District of Columbia until Congress enacted the Mandamus and Venue Act of 1962. 132

This Act was passed in an effort to alleviate the necessity that plaintiffs come all the way to the nation's capital to sue federal officers. 133 The Act provides that, 134 “[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.” Since 1962 the federal courts have struggled with Section 1361, trying to determine the scope and nature of the jurisdiction bestowed by it. This comment will provide an analytical framework from which the scope of an “action in the nature of mandamus” can be approached. Using this framework, the development of the law of mandamus and the extent to which the courts have, in Professor Byse's words, developed a “rational law of mandamus” 135 will be examined.

B. The Legislative History of Section 1361

The legislative history of Section 1361 is unusually complex. In its original form Section 1361 provided that, 136 “[t]he district courts shall have original jurisdiction of any action to compel an officer or employee of the United States or any agency thereof to perform his duty.” In response to the Department of Justice fears that the new Act might be read too broadly, 137 the Senate amended proposed Section 1361 by striking out the phrase “his duty” and inserting the phrase “a duty owed to the plaintiff or to make a decision in any

mandatory injunction was sought to compel affirmative official action, the principles of mandamus controlled over the court's general equity jurisdiction. See text accompanying notes 186-91 infra. See also Byse & Fiocca, supra note 1, at 312-13 n.21; Davis, Mandatory Relief From Administrative Action in the Federal Courts, 22 U. Chi. L. Rev. 585 (1955).


133. From the legislative history, it seems clear that Congress merely intended to give the mandamus jurisdiction of the District Court for the District of Columbia to all of the federal district courts, but did not intend to create new remedies. See text accompanying notes 136-46 infra. The venue requirements of the district courts were likewise modified to provide for venue where (1) a defendant resides, or (2) the cause of action arose, or (3) real property involved in the action is situated, or (4) where plaintiff resides if no real property is involved. See 28 U.S.C. § 1391(e) (1970).


135. Byse & Fiocca, supra note 1, at 331-36.


matter involving the exercise of discretion." The House subsequently amended the Senate version of Section 1361 to its present language. The legislative history indicates that the House amendment was intended to achieve greater certainty by incorporating into the statute the existing common law of mandamus. It was hoped that this incorporation of existing law would prevent an overly broad reading of Section 1361. The Senate considered and concurred in the House amendment.

138. Id. In explaining these changes, the Judiciary Committee noted that the changes would make clear that § 1361 specifies that the court can only compel the official or agency to act where there is a duty, which the committee construes as an obligation, to act or, where the official or agency has failed to make any decision in a matter involving the exercise of discretion, but only to order that a decision be made and with no control over the substance of the decision.

139. The statement of Representative Forrester, chairman of the subcommittee responsible for the bill, is most instructive as to what the House intended by its modification of the Senate's version of § 1361. In response to a request from the floor of the House for an explanation of the changes, Chairman Forrester stated:

The Committee on the Judiciary believes that the Senate amendments contribute a great deal toward achieving clarity in this legislation. However, the committee is concerned with the wording of section 1 of the bill. The Department of Justice has informed the committee that it fears that this language may produce broad and unintended results. These, the Department states, may best be avoided by making specific reference in the statute to the mandamus concept. The Department has, therefore, proposed that section 1361 should read as follows:

[reciting the present language of § 1361]

The committee agrees that by specifically making relevant a body of known principles, greater certainty can be achieved. Accordingly, the committee accepts and endorses the amendment proposed by the Department of Justice.

The committee has been assured that with this amendment, the bill will receive the endorsement and support of both the Department of Justice and the Treasury Department.

108 Cong. Rec. 20094 (1962). The House evidently accepted this explanation: it passed the bill as amended without further inquiry. Id.

140. Senator Carroll took the opportunity to insert into the Congressional Record a letter from then Deputy Attorney General Katzenbach. This is the same letter which expressed the concern of the Department of Justice to which Representative Forrester was referring in his explanatory remarks to the House of Representatives. See note 139 supra. The letter, addressed to Senator Carroll, states:

[The Department believes that the language chosen to effect this purpose is susceptible to varying interpretations which might result in the creation of a remedy quite different from mandamus. Accordingly, to remove all doubt that the legislative intent of the bill is to do nothing more than extend to all U.S. district courts jurisdiction in mandamus actions against Federal officials and employees, the Department suggests that the language of proposed section 1361 be modified to read as follows: "The district courts shall have original jurisdiction [concurrent with that of the District Court for the District of Columbia] of any action in the nature of mandamus to compel an officer or employee of the United States, or of any agency thereof, to perform a duty owed to the plaintiff." 108 Cong. Rec. 20079 (1962). The Senate deleted the bracketed phrase with the concurrence of the Department of Justice because it was thought to be "unnecessary and
Suits Against Federal Officers

Thus the legislative history demonstrates beyond dispute that Congress intended Section 1361 to simply reverse *M'Intire v. Wood*141 and allow all federal district courts to exercise mandamus jurisdiction. Congress clearly did not create any new remedies, an issue which had troubled the Department of Justice. As Professor Davis states, "the legislative history of § 1361 shows . . . clear congressional intent that the mandamus tradition should govern suits under [Section 1361]."142 Thus Professor Byse is incorrect when he states that "nothing in the statute or its legislative history indicates that the judiciary should not creatively develop review 'in the nature of mandamus' to be rational and orderly as review by injunction, declaratory judgment, or statutory petition for review."143 In short, Representative Forrester, chairman of the House subcommittee responsible for the bill, surely was not referring to the "orderly review" of the equity tradition when he stated,144 “[t]he committee agrees [with the Department of Justice] that by specifically making relevant a body of known principles, greater certainty can be achieved.” This “greater certainty” was the certainty that the courts would not create new remedies. The “body of known principles” refers not to the principles of equity, but to the principles of *mandamus*. The conclusion of Professor Byse145 and a few courts146 that the legislative history should be read to the contrary is unwarranted and must be rejected if congressional intent is to be effectuated. Since it is clear that Congress intended the pre-1962 law of mandamus to control the scope of jurisdiction bestowed upon the district courts under Section 1361, it becomes essential to precisely determine the state of the law of mandamus prior to enactment of Section 1361.

C. The Pre-1962 Law of Mandamus

The law of mandamus as developed prior to 1962, while complex, was nonetheless fairly well defined by the Supreme Court. A typical cumbersome.” *Id.* (remarks of Senator Carroll). In commenting on the letter, Senator Carroll noted that after consulting with "the Department and with the interested parties in the other body, it was agreed that the suggested language would accomplish the legislative purpose we were seeking." *Id.*

141. 11 U.S. (7 Cranch) 504 (1813). See text accompanying note 127 *supra.*


144. 108 CONG. REC. 20094 (1962). See note 139 and accompanying text *supra.*


and well-known statement of the doctrine was enunciated by the Supreme Court in *Wilbur v. United States ex rel. Kadrie,*\(^{147}\) where the Court stated:\(^{148}\)

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.

The *Kadrie* Court also noted that an official's interpretation of a statute may constitute an exercise of discretion, and thus be nonreviewable under mandamus. The Court stated:\(^{149}\)

> [W]here 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.

Thus, even though a court might deem the official's interpretation erroneous, it may not, under mandamus, intervene. Such erroneous interpretations are controlled by a writ of error, not by a writ of mandamus, and "the writ [of mandamus] never can be used as a substitute for a writ of error."\(^{150}\) In sum, *Wilbur v. United States ex rel. Kadrie* suggests that the mandamus remedy is quite limited. Under *Kadrie* a reviewing court's only role in a mandamus action is to police an official to ensure that "clear ministerial duties" are performed when such performance is refused. *Kadrie* thus suggests that the duty sought to be compelled must be so explicit that the "positive command" of the statute is apparent on its face, thus negating a need for any judicial interpretation or construction of the statute. This interpretation is

---

147. 281 U.S. 206 (1930).
148. *Id.* at 218–19.
149. *Id.* at 219.
150. *Id.* at 220.
Suits Against Federal Officers

supported by language in Work v. United States ex rel. Rives,151 where the Court intimated that a writ of mandamus could not issue even though a court's interpretation of a given statute might differ from the officer's statutory construction.152

The Supreme Court has noted, however, that there are limits on the extent to which a reviewing court must defer to an official's interpretation. In both Wilbur v. United States ex rel. Krushnic153 and Roberts v. United States ex rel. Valentine,154 the Court noted that since every statute to some extent requires construction by the performing officer, the pivotal inquiry should be whether he is so bound to perform as to make the act ministerial.155

It would thus appear that a reviewing court under mandamus may examine a statute to determine whether an official has "interpreted and applied a statute contrary to its explicit terms."156 The scope of this examination is crucial, for if a court is limited to a very superficial inquiry, then mandamus is a very restrictive remedy and nearly useless where the command of the statute is not perfectly clear on its face. Fortunately, the Supreme Court has indicated that mandamus does not have such limited scope. Instead the Court has indicated that mandamus allows for a full inquiry into—and judicial construction of—any statute which allegedly creates a duty.

151. 267 U.S. 175 (1925).
152. In Rives the Court held that the Secretary of the Interior's decision to disallow certain losses incurred by plaintiff in producing manganese under government contract was an exercise of discretion and could not be controlled by mandamus. Professor Davis has explained the limited nature of mandamus review in stating:

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.

154. 176 U.S. 221, 231 (1900).
155. In the Court's own words:

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.

Id.
In *Work v. United States ex rel. Lynn*,157 for example, the Court held that the existence of a duty may be ascertained by an examination of previous legislation, the “mischief [the statute] was intended to correct, and its legislative history.”158 The broad nature of the inquiry allowed under mandamus is also indicated by Chief Justice Taft’s statement in *Work v. United States ex rel. Rives*159 that the scope and extent of an official’s discretion is governed by “a proper interpretation of the particular statute and the congressional purpose.”160 As Professor Byse has argued, the mandamus remedy should permit more than a mere superficial examination of the statute to ascertain the existence of a duty; rather, the courts should “utilize all relevant aids to determine the scope of the delegated power.”161

Arguably, the language of *Kadrie* indicates that only a superficial examination is allowed. More likely, *Kadrie* merely stands for the proposition that the duty must be clear. It does not indicate when the court must make the determination that the duty is clear or unclear. This determination must be made only after a full judicial inquiry into the scope of the authority delegated to the official, since such an inquiry is the only way a court can adequately determine whether a statute creates a duty that is free from doubt. If such investigation clearly reveals that a duty exists, then mandamus should be available to compel its performance. Thus, a clear duty can arise only after a full investigation of the statute.

This reading of the mandamus cases is consistent with the Supreme Court’s admonition that an official’s interpretation of a statute may not be controlled by mandamus; if after such a full inquiry, the reviewing court is left with the conclusion that the official’s construction is not “plainly and palpably wrong as [a] matter of law,”162 then the court should refuse mandamus.163 Under such a rule, mandamus review would still be more restrictive than review under the APA since

---

157. 266 U.S. 161 (1924).
158. Id. at 167.
159. 267 U.S. 175 (1925).
160. Id. at 178.
the presumption of reviewability which governs review under the APA would not be applicable. Nevertheless, such a rule would allow the full utilization of the judiciary's statutory construction skills in finding a "clear" duty, the performance of which could be compelled by mandamus. To promote effective mandamus review of federal administrative action, the confusing labels of "ministerial" and "clear duty" should be discarded. Rather, all relevant aids should be examined to determine whether Congress intended the official to have discretionary power to construe and apply the statute, or intended to impose a positive duty on the officer to act or exercise his discretion.

Professor Jaffe, however, takes a more extreme position and urges that "[a] judge must judge by his own lights, and if he does see the duty as 'clear,' that is decisive even though disagreement with him is reasonable." This statement is erroneous. If the Supreme Court's holding that mandamus will not lie unless the officer's construction is "plainly and palpably wrong" is to have any meaning, then the judge's interpretation can be decisive only when the official's construction is unreasonable. The "extraordinary" nature of the mandamus remedy means that mandamus will not issue "where the matter is not beyond peradventure clear . . . ." As Justice Van Devanter noted in United States ex rel. Ness v. Fisher, if "there [is] room for difference of opinion as to the true construction of the section," then the officer's construction necessarily involves the exercise of discretion. This rule should not be interpreted to mean that in every case where the construction given by the officer is debatable mandamus is

---

164. See note 73 and accompanying text supra.
165. As Professor Jaffe has written:
   If [the "clear-duty-to-act" rule] means that a mandamus will not issue until the court decides that there is a legal duty to act, it is, of course, a perfectly obvious proposition to which nothing is added by describing the duty as "clear." It can, however, be taken to mean that if the applicable rule of law is disputable (in the opinion of the judge), then the court will not make an independent determination of the law upon which to base a command to the officer.

L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 183 (1965).
166. Id. at 184.
168. Id. at 63.
169. Id.
170. 223 U.S. 683 (1912).
171. Id. at 691.
172. See also Clackamas County v. McKay, 219 F.2d 479 (D.C. Cir. 1954).
unavailable, but rather, should be construed to mean that only if the construction is *reasonably* debatable should mandamus be refused.\textsuperscript{173}

To this summary of the law of mandamus there must be added the caveat that mandamus may be an available remedy for abuse of discretion. In *Work v. United States ex rel. Rives*\textsuperscript{174} the Court refused mandamus, but noted in dictum that "[t]here is nothing in the award by the Secretary in the case at bar which would justify characterizing it as arbitrary or capricious or fraudulent or an abuse of discretion. The Secretary's view ... must therefore prevail against mandamus."\textsuperscript{175} The Court thus implied that if, in fact, the plaintiff had been able to demonstrate that the Secretary had abused his discretion mandamus would have been available to correct it. In the subsequent *Kadrie* case the Court strengthened this implication by again implying in dictum that mandamus would lie to correct "arbitrary and capricious."\textsuperscript{176} actions, but omitted any mention of whether it would correct an abuse of discretion. This omission is of little consequence since arbitrary and capricious action is undoubtedly an abuse of discretion, and vice versa. However, it should be remembered that these cases are not *holdings* that mandamus will lie to control an abuse of discretion. Another interpretation of these cases is that the courts should withhold mandamus unless the abuse of discretion is clear. This reading is weak since the Court has never expressed any sentiment that such clarity is required.

It would seem that an abuse of discretion is at the very least a *factor* that a court will consider in deciding whether the writ will lie. The problem is, of course, how much weight this factor is to be given. It is strange reasoning which concludes that in situations in which, traditionally, the writ of mandamus would be precluded because of the discretionary nature of the act involved, the writ may nevertheless be issued when the plaintiff is able to show an abuse of discretion.

\textsuperscript{173} It is submitted that proper application of this standard would mean that only where the scales are evenly balanced or balanced in favor of the official's construction should mandamus be refused, and then only after a full judicial inquiry into the scope of the official's delegated authority.

\textsuperscript{174} 267 U.S. 175 (1925).

\textsuperscript{175} Id. at 183–84.

\textsuperscript{176} 281 U.S. 206, 220 (1930). *See also* *Work v. United States ex rel. Mosier*, 261 U.S. 352, 362 (1923), where the Court ruled that the Secretary of the Interior could not be compelled to act by mandamus if "he does not act capriciously. arbitrarily or beyond the scope of his authority."
Yet, in *Rives* the Court stated “[i]n each case it was held that as the statute intended to vest in the Secretary the discretion to construe the land laws and make such rulings, no court could reverse or control them by mandamus in the absence of anything to show that they were capricious or arbitrary.”\(^{177}\) Surely such an abuse of discretion is an action reviewable only by a writ of error which, the Court states, is not to be treated as interchangeable with a writ of mandamus.\(^{178}\) Yet the clear import of the Court’s repeated statements is that mandamus will indeed control an abuse of discretion. One is forced to conclude that mandamus will control an abuse of discretion even though such an application is inconsistent with general mandamus principles. With the principles of the writ of mandamus in mind, we can turn to an examination of Professor Byse’s “rational law of mandamus” and the post-1962 law of mandamus as developed under Section 1361.

### D. A “Rational Law of Mandamus” and the Post-1962 Law of Mandamus

#### 1. Professor Byse and the “rational law of mandamus”

In perhaps the most influential examination of the law of mandamus and the scope of jurisdiction conferred by Section 1361, Professor Byse and his co-author called for the development of a “rational law of mandamus” under the Mandamus and Venue Act of 1962.\(^{179}\) Byse divides this “rational law of mandamus” into essentially two parts. In the first, a rational law of mandamus would mean that “availability and scope of nonstatutory review should be governed by equitable, rather than mandamus, principles.”\(^{180}\) In the second, a rational law of mandamus would require a “judicial rejection or abandonment of the ministerial-discretionary distinction . . . .”\(^{181}\) In the absence of such an abandonment, Professor Byse would have the courts pour “new wine” into the “old bottles” of the ministerial-discretionary distinction\(^{182}\) by focusing on “the basic issue of the scope of the delegated

---

177. 267 U.S. 175, 183 (1925).
178. \textit{Id.}
179. Byse \\& Fiocca, \textit{supra} note 1, at 331–36.
180. \textit{Id.} at 331.
181. \textit{Id.} at 334.
182. \textit{Id.}
It is important to note that this "new wine" of expanded judicial inquiry is distinct from the question whether the mandamus or equity tradition should control once the court has inquired into the scope of the authority delegated to the official. In fact, Byse's new wine of full judicial inquiry into the scope of the officer's authority is, as demonstrated, nothing new to the traditional law of mandamus. To this extent, Byse's rational law of mandamus is simply a reaffirmation of the traditional principles of mandamus.

Professor Byse acknowledges a departure, however, from mandamus principles by urging that Section 1361 be used as a jurisdictional basis for issuing prohibitory injunctions. Such an injunction does not compel performance of an officer's duty, clear or otherwise, but rather, it is a decree requiring the officer to cease performing what he sees his duty to be. Because a prohibitory injunction is inconsistent with the pre-1962 law of mandamus, it is outside the scope of jurisdiction conferred by Section 1361. Thus, unless a court's jurisdiction can be based on some other grant of jurisdiction, a court which issues a prohibitory injunction has exceeded its jurisdiction and its judgment must fall on that ground.

Indeed, as Professor Byse acknowledges, the Supreme Court ruled in *Panama Canal Co. v. Grace Line, Inc.*, and in *Miguel v. McCar* that if the plaintiff seeks affirmative relief which could be granted under either a mandatory injunction or by a writ of mandamus, the principles of mandamus control over the principles of equity in determining whether relief can be granted. Other commentators have concluded that the breadth of judicial review is no broader over an action for a mandatory injunction than over an action for an order in the nature of mandamus. Although this result has been severely criticized as incompatible with sound principles of judicial review, it seems indisputable that prior to 1962 a district court was governed by

---

183. *Id.* at 335.
184. See text accompanying notes 157–60 supra.
185. See text accompanying notes 147–49 supra.
188. 291 U.S. 442, 452 (1934).
mandamus principles in determining whether to issue a mandatory
injunction against federal officers.  

Professor Byse is nonetheless correct that Panama Canal Co. and
Miguel represent instances where the Court refused review in affirm-
ation of the principle that precludes review where Congress has vested
an officer with discretion, and that “the crucial issue in all cases is the
scope of the delegated power.” What Professor Byse fails to give
due weight is the fact that Congress explicitly, clearly and beyond a
doubt intended that the principles of mandamus should control the
scope of jurisdiction bestowed by Section 1361. Since Congress has
plenary power over the jurisdiction of the lower federal courts, all
the excellent policy reasons for using the principles of equity are
inapposite.

Professor Byse’s desire to be rid of the principles of mandamus is
understandable as the scope of review is more limited under these
principles than under either the APA or general equitable principles.
It is submitted, however, that mandamus, while limited, is capable of
forming an adequate basis for jurisdiction in most situations requiring
affirmative relief. A mandamus inquiry can determine the scope of
discretion, which Byse says is crucial, and can compel the perform-
ance of any duty found in the course of such an inquiry. Contrary to
Byse’s implications, mandamus can control an officer’s abuse of any
discretion which may have been conferred by Congress. In short, the
principles of equity are superior to mandamus only in cases where a
plaintiff is seeking a prohibitory injunction. Certainly, a declaratory
judgment should be available under Section 1361, since it is only a
small step from compelling an officer to perform a duty to merely
telling him that such a duty exists. The single gap in mandamus relief,
\textit{i.e.}, prohibitory relief, may be partially closed by requesting a re-
viewing court to compel the officer to continue, for example, social
security benefits instead of requesting a prohibitory injunction against
the discontinuation of such benefits.

191. \textit{Id.}
192. Byse & Fiocca, \textit{supra} note 1, at 333.
193. \textit{See} Part III-B \textit{supra}.
194. \textit{See} authorities cited in note 93 \textit{supra}.
195. Professor Byse also errs in his implication that mandamus cannot control an
official’s abuse of discretion. As indicated, the Supreme Court has consistently implied that
arbitrary, capricious action or an abuse of discretion is reviewable by mandamus. \textit{See}
text accompanying notes 174–78 \textit{supra}.  

133
2. The post-1962 trend in interpreting Section 1361

The recent federal court decisions are somewhat confused in their interpretations of the scope of jurisdiction bestowed by Section 1361. Generally, most federal courts acknowledge that Section 1361 did not expand the traditional criteria for granting mandamus. But even as these courts affirm the fact that their jurisdiction is limited by mandamus principles, they exhibit a laudable tendency to use the legislative history, administrative practice and other relevant aids to determine whether a duty arises under a statute. Indeed, it is nearly universally accepted that a clear duty need not arise from a statute alone, but may also arise from the Constitution and decisions interpreting the Constitution.

The recent case of *Chaudoin v. Atkinson* is a notable instance of a court making a full judicial inquiry into the scope of discretion granted an officer by Congress. In *Chaudoin*, a civilian employee of...
Suits Against Federal Officers

the National Guard was fired for disobeying an allegedly unlawful order that he participate in a military funeral. The employee sought both reinstatement and money damages. After reciting the standard rules of mandamus, the Court of Appeals for the Third Circuit held:

[A] request for relief under § 1361 requires "the court [to] utilize all relevant legislative and other materials to determine the scope of discretion or power delegated to the officer."

The court ruled, in accord with mandamus principles, that the discharge was clearly unlawful; hence the district court had jurisdiction to compel reinstatement. Departing from mandamus principles, the court ruled that the district court also had jurisdiction under Section 1361 to award money damages. Such an award is outside the scope of mandamus and should be denied when there is no other basis of jurisdiction.

Another example of judicial willingness to utilize all relevant materials to determine whether a clear duty exists is the case of Harlem Valley Transportation Association v. Stafford. There the Court of Appeals for the Second Circuit was faced with the issue whether the Interstate Commerce Commission had to prepare an environmental impact statement prior to holding hearings regarding the abandonment of rail lines. In addressing the issue, the court simply stated that if there was such a duty to prepare a statement the district court had jurisdiction under Section 1361 to order its preparation. The court proceeded to find such a duty in the relevant statutes, case law and legislative history. It did not appear to matter to the court whether the duty was clear so long as a duty could be ascertained.

---

200. 494 F.2d at 1329.
201. Id. at 1330, quoting Leonhard v. Mitchell, 473 F.2d 709, 712–13 (2d Cir. 1973). One district court has read Chaudoin as permitting "the court to review the appropriate constitutional provisions, legislative material and judicial decisions in order to determine whether under any of these three alternatives the basis of jurisdiction is provided under the Mandamus Act." Mattern v. Weinberger, 377 F. Supp. 906, 915 n.10 (E.D. Pa. 1974). But see the subsequent case of Jamieson v. Weinberger, 379 F. Supp. 28 (E.D. Pa. 1974), where a district court in the same judicial district as Mattern explicitly rejected the Mattern reading of Chaudoin in a nearly identical fact situation. The Mattern reading is clearly not only consistent with Chaudoin but also with general mandamus principles.
202. See note 213 infra.
203. 500 F.2d 328 (2d Cir. 1974). See also Knuckles v. Weinberger, 511 F.2d 1221 (9th Cir. 1975).
These courts looked to all materials and exercised judicial skills of interpretation to find a duty. To the extent that the duty was not in fact clear or "plainly prescribed as to be free from doubt," however, these courts have departed from the principles of mandamus and exceeded their jurisdiction. As previously discussed, if a reviewing court cannot, after a full investigation, state that the officer's interpretation is unreasonable, then the court must dismiss for lack of jurisdiction. However, if the duty is clear after such an inquiry, mandamus does not require that "the precise elements of those duties have previously been prescribed." Mandamus simply requires that the duty be clear; pristine clarity of every element of the duty is not necessary.

It should also be noted that the simple presence of a controversy over the extent and scope of a duty does not necessarily mean that the duty is doubtful. As the Court of Appeals for the District of Columbia stated in *National Treasury Employees Union v. Nixon*:

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

In order to discourage such "bootstraping" the courts must adopt, as they seem to be doing, the practice of conducting a full judicial inquiry into the extent and scope of an official's duties.

Recent cases indicate an apparent judicial willingness to use mandamus to control an officer's abuse of discretion. In perhaps the leading case in point, the Court of Appeals for the Second Circuit ruled in *United States ex rel. Schonbrun v. Commanding Officer* that "[w]e recognize that . . . official conduct may have gone so far beyond any rational exercise of discretion as to call for mandamus even when the action is within the letter of the authority granted."

---

204. *See text accompanying note 148 supra.*  
205. *See text accompanying note 149 supra.*  
Thus far this statement of the scope of mandamus as a device for controlling an abuse of discretion has been accepted by five Courts of Appeals, but has been rejected by the Court of Appeals for the Ninth Circuit in *Jarrett v. Resor*.

In *Jarrett*, the court ruled that a complaint which alleged "at most" that officials, in refusing to approve plaintiff's application for a discharge from the Army, had "either abused their discretion, incorrectly found the facts, or misapplied the law," the complaint was inadequate to invoke jurisdiction under Section 1361. To the extent that the decision ruled that mandamus will not lie to correct an abuse of discretion, the decision should be regarded as erroneous.

Also erroneous is the decision of the Court of Appeals for the Eighth Circuit in *Miller v. Ackerman*, where the court ruled, per curiam, that a district court may enjoin defendants from enforcing a ban against properly trimmed wigs worn by Marine Corps reservists. Such a prohibitory injunction is completely and unquestionably outside the scope of jurisdiction conferred by Section 1361. As the Court of Appeals for the Tenth Circuit recognized in *McQueary v. Laird*, "Injunctive relief is not authorized under Section 1361. Injunction..."

---

209. These five courts are the District of Columbia Circuit, Peoples v. United States Dept. of Agri., 427 F.2d 561 (D.C. Cir. 1970); the Third Circuit, Chaudoin v. Atkinson, 494 F.2d 1323 (3d Cir. 1974); Davis v. Shultz, 453 F.2d 497 (3d Cir. 1971); the Fourth Circuit, McGaw v. Farrow, 472 F.2d 952 (4th Cir. 1973); the Seventh Circuit, Kiliskila v. Nichols, 433 F.2d 745 (7th Cir. 1970); and the Eighth Circuit, Miller v. Ackerman, 488 F.2d 920 (8th Cir. 1973); Howard v. Hodgson, 490 F.2d 1194 (8th Cir. 1974).


211. 426 F.2d at 216-17.

212. 488 F.2d 920 (8th Cir. 1973).

213. 449 F.2d 608, 611 (10th Cir. 1971). *See also* Prairie Band of the Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir. 1966). A related problem is the rule that mandamus will not lie to compel an officer to take back or reverse an action already taken. As the Seventh Circuit noted in McClendon v. Blount, 452 F.2d 381, 383 (7th Cir. 1971), *quoting* Rural Elect. Admin. v. Northern States Power Co., 373 F.2d 686, 695 n.14 (8th Cir. 1967), "[i]n so far as plaintiff seeks a direct retraction of action already taken, mandamus is not a proper remedy." This rule is supported by the Supreme Court's ruling in Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 218-20 (1930), where the Court suggested that the only appropriate device for seeking reversal of action already taken would be a writ of error. *Cf.* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 177 n.124 (1965). Under this rule it may well be argued that the result in *Chaudoin* was outside the scope of mandamus because the court ordered the federal officer to reinstate a wrongfully discharged employee. However, *Chaudoin* can be supported as a review of an abuse of discretion. *Chaudoin* thus illustrates a situation where the relief requested may be denied or granted depending on whether the court views the relief as a reversal of action already taken or review of an officer's abuse of discretion.
is a remedy to restrain the doing of an injurious act, whereas mandamus commands the performance of a particular duty."

One troublesome problem in obtaining review under Section 1361 is the general rule that not only must the plaintiff show that the official has refused to perform a clear duty, but must also have "no other adequate remedy available."214 The requirement of having no other adequate remedy probably originated from the extraordinary nature of mandamus. This requirement has been mentioned only once by the Supreme Court. In Ex parte Republic of Peru,216 the Court casually noted that "[t]he common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court . . . and are usually denied where other adequate remedy is available."217 Evidently, this requirement is only a factor to be considered by a court in deciding whether to grant a writ of mandamus. It would seem that a court is not required to dismiss a suit brought under Section 1361 because the plaintiff may have some other adequate remedy. In any event, where a plaintiff cannot obtain nonstatutory judicial review under any other source of jurisdiction, there is clearly no adequate remedy otherwise available. The better approach to this problem is to simply disregard this requirement as nonessential to mandamus and hence not incorporated into Section 1361 as a prerequisite to obtaining jurisdiction.

3. **Sovereign immunity and mandamus under Section 1361**

Since Section 1361 actions are invariably brought against federal officers, the issue of sovereign immunity occasionally arises. Defendants typically argue that Larson and its progeny218 bar suits brought to compel the performance of an affirmative duty; relief is requested which would "in fact operate against the sovereign."219 Literally, a suit in the nature of mandamus does by its very nature operate against the

---

215. Paniagua v. Moseley, 451 F.2d 228, 229 (10th Cir. 1971); Amaya v. United States Bd. of Parole, 486 F.2d 940 (5th Cir. 1973).
216. 318 U.S. 578 (1943).
217. Id. at 584.
218. See text accompanying note 97 supra.
219. See text accompanying notes 105–06 supra.
Suits Against Federal Officers

sovereign. Thus, to hold that the defense of sovereign immunity is available in Section 1361 suits would effectively mean that such suits are always barred.

Fortunately, this result has not generally occurred as the Supreme Court and the Court of Appeals for the District of Columbia have both ruled that the defense is not applicable in a mandamus action. The rationale for this rule was stated by Judge Prettyman in *Clackamas County v. McKay*:

The sovereign power over Government property was vested by the people in the Congress. . . . Congress can exercise that power itself, or it can confer on some agency or officer a measure of sovereign authority over certain property, for example, power to sell. If, on the other hand, Congress itself exercises the full of the sovereign power in respect to property, it may and usually does leave mechanical, ministerial or administrative details to an individual official. In such a case the act of Congress is the complete act needed by the sovereign; the subsequent ministerial acts do not involve sovereign power.

It thus seems clear that because Congress intended to incorporate the law of mandamus into Section 1361, the defense of sovereign immunity is not applicable. As Professor Byse noted, "a statute giving jurisdiction in mandamus contains a pro tanto waiver of immunity." Accordingly, most courts simply ignore this false issue.

It must be noted, however, that the rule establishing Section 1361 as a waiver of sovereign immunity does not render the defense inappropriate as a check where jurisdiction is based on Section 1361. The rule is quite simple: Section 1361 waives sovereign immunity only to

---

222. Id. at 493.
224. The Court of Appeals for the Eighth Circuit ruled in an aberrant case that § 1361 did not constitute a waiver of sovereign immunity where the suit was, in effect, a suit against the sovereign. Essex v. Vinal, 499 F.2d 226 (8th Cir. 1974). The court either did not realize, or found unsatisfactory, the prevailing rule that all § 1361 actions are, "in effect, suits against the sovereign." See text accompanying notes 105–06 supra. In any event, Essex should be disregarded as an erroneous statement of the law.
the extent that mandamus principles are applicable. If the relief requested is not affirmative relief or if the duty is not plainly prescribed so as to be free from doubt, the defense of sovereign immunity is fully applicable. In effect, the doctrine of sovereign immunity strikes at the jurisdictional basis of a mandamus action. A reviewing court not only loses its Section 1361 jurisdiction when it grants relief outside the traditional criteria of mandamus, but by attempting to grant such relief loses its jurisdiction by virtue of the doctrine of sovereign immunity. As Professor Byse reluctantly noted, the "enactment of section 1361 probably would affect the sovereign's immunity only to the extent that the court would classify the duty as 'ministerial.'" 225

This reasoning was apparently accepted by the Court of Appeals for the Tenth Circuit in *McQueary v. Laird* 226 where the court ruled that if the traditional requirements for mandamus have not been met, the suit must be dismissed under the doctrine of sovereign immunity. Ironically, it seems that the best way to evade the outmoded doctrine of sovereign immunity is to bring a suit under the perhaps equally outmoded principles of mandamus.

IV. CONCLUSION

Obtaining nonstatutory review of federal administrative action remains fraught with uncertainty and difficulty. Depending upon the circuit in which plaintiff finds himself, jurisdiction may be obtainable under either Section 1331 (granting federal question jurisdiction), the APA or Section 1361.

The plaintiff may be able to obtain jurisdiction under all three sources or under none of them. The situation is not only confusing, but also unjust, and it is difficult to believe that the Supreme Court has allowed it to persist for so long a time. The situation is now particularly hazardous. Prior to 1970, an aggrieved plaintiff was virtually assured of obtaining federal court jurisdiction in the District of Columbia District Court under that court's inherited equity and mandamus jurisdiction. 227 However, in 1970 Congress passed the District

---

226. 449 F.2d 608 (10th Cir. 1971).
227. See Part III-A supra.
of Columbia Court Reorganization Act of 1970 which provided for the transfer from the District of Columbia District Court to the newly organized District of Columbia Superior Court of matters other than those within the former’s jurisdiction as a United States district court.

Since the “new” district court is presumably like any other federal district court, it is now subject to the same difficulties as other district courts in obtaining jurisdiction in nonstatutory review actions. This uncertainty could be eliminated by a Supreme Court holding that the APA is both an independent grant of jurisdiction and a waiver of sovereign immunity. It seems likely, however, that the Court would be reluctant to so hold, not only because of the policy reasons previously discussed but also because such a holding would effectively make Section 1361 superfluous—any mandamus action could as easily be brought under the APA if that Act were found to be jurisdictional. In view of the evident reluctance on the part of Congress to expand the jurisdiction of the district courts beyond the traditional confines of mandamus, the Court should be reluctant to expand the jurisdiction of the federal courts by judicial fiat.

It thus seems that the best prospect for narrowing the unfortunate gap in federal court jurisdiction lies in the intelligent use of Section 1361. As demonstrated, mandamus review, while not as expansive as review under equity or the APA, is not as restrictive as some have supposed. An imaginative use of the Mandamus and Venue Act of 1962 may be the plaintiff’s only alternative in a number of circuits until either the Supreme Court rules on the APA or Congress sees fit to resolve the situation through legislation. Hopefully one of these solutions will soon be forthcoming.

Mark William Pennak*

---

229. Hart & Wechsler, supra note 19, at 1162.
230. This means, of course, that the pre-1962 law of mandamus will control in § 1361 suits brought in the District of Columbia. See Tatum v. Laird, 444 F.2d 947 (D.C. Cir. 1971); Note, Judicial Review of Military Surveillance of Civilians: Big Brother Wears Modern Army Green, 72 Colum. L. Rev. 1009, 1018–19 (1972).
231. See text accompanying notes 85–93 supra.

* Member, Washington Bar Ass’n; B.A., 1972, Washington State University; J.D., 1975, University of Washington.