REPORT OF THE COMMITTEE ON JUDICIAL REVIEW IN SUPPORT OF RECOMMENDATION NO. 7

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An anomaly in the law relating to federal-court jurisdiction deprives a United States district court, otherwise competent, to entertain certain cases involving "nonstatutory" review of federal administrative action in the absence of the jurisdictional-amount requirement of 28 U.S.C. § 1331 (1964) (the general "federal question" provision). These cases "arise under" the federal Constitution or federal statutes and—unless barred by the doctrine of sovereign immunity and subject to the various limiting rules of standing, exhaustion of remedies, finality, ripeness, and so on—they are appropriate matters for the exercise of federal judicial power. The purpose of this recommendation, as it plainly states, is to correct this anomaly by conferring original jurisdiction on district courts of "any action in which the plaintiff alleges that he has been injured or threatened with injury by an officer or employee of the United States or any agency thereof, acting under color of federal law."

Nonstatutory review of federal administrative action has recently been summarized by Professor Byse:

> The litigant who seeks judicial review of a federal administrative determination must, of course, bring his action in a court which Congress has authorized to hear the controversy. If the petitioner can show that he is "aggrieved" or "adversely affected" by an "order" of one of the major regulatory agencies, the jurisdictional hurdle will easily be surmounted, for most regulatory statutes specifically authorize such persons to secure judical review in a named court or courts. If the statute from which the agency derives its powers does not contain a specific review provision, the necessary congressional authorization may appear in another statute, such as the Review Act of 1950 [5 U.S.C. § 1031–42 (1964)], or, possibly, section 10 of the Administrative Procedure Act [5 U.S.C. §§ 701–06 (Supp. II, 1967)]. Whether an action for review is brought pursuant to a specific or general statutory review provision, the theory is the same: Congress has directed the judiciary to review the ad-

> ministrative determination; so long as the statute does not transgress constitutional limitation, it is the court's duty to comply with the congressional directive.
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> If the litigant is unable to ground his action on either a specific or a general statutory review provision, judicial relief is not necessarily foreclosed, for he may still be able to institute a "nonstatutory" review action. . . .
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> The litigant who seeks review under this theory will institute an action in a federal district court against the individual whose action or inaction as a government official allegedly invades his legal rights. The remedy usually sought is an injunction, often accompanied by a request for relief under the Declaratory Judgment Act [28 U.S.C. §§ 2201–02 (1964)]. More often, the nonstatutory review action is based upon a jurisdictional provision enacted as part of a substantive statute, such as section 279 of the Immigration and Nationality Act of 1952, which states that district courts shall have jurisdiction of "all cases, civil and criminal, arising under any provision of this title." [8 U.S.C. § 1329 (1964)]. More often, the nonstatutory review action is based upon a jurisdictional section of title 28 of the United States Code, such as section 1331, the general "federal question" jurisdictional grant (which is subject to the requirement of the $10,000 jurisdictional amount) or sections 1337 and 1339, which confer "original jurisdiction" without regard to jurisdictional amount on the district courts of any civil action "arising under" any act of Congress "regulating commerce" or "relating to the postal service."

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, 321–23 (1967) [footnotes omitted].

Under present law there are a significant number of situations involving "nonstatutory" review in which a plaintiff must ground his action on the "general federal question" section of the Judicial Code, 28 U.S.C. § 1331, and must be prepared to establish not only that the action arises under the Constitution, laws or treaties of the United States but also that "the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs." In some of these cases the jurisdictional-amount requirement cannot be met because it is impossible to place a monetary value on the right asserted by the plaintiff. How is one to value an individual's claim that he is entitled to remain free from military service, to travel abroad, or to remain free from continuous police surveillance? In other cases the plaintiff's claim that he is entitled to a federal grant or benefit (*e.g.*, federal employment, use of public lands) may be assigned a monetary value, but the amount in controversy may be $10,000 or less. Judicial review of these and similar claims may be unavailable or limited in scope for other reasons, but judicial consideration of the plain-

tiff's claim should not be foreclosed solely because of lack of jurisdictional amount.

The problem is illustrated by the recent case of *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D.N.J., 1968), in which four Selective Service registrants challenged the constitutionality of college-student deferments provided by the Military Selective Service Act of 1967, 50 U.S.C. § 456(h)(1) (Supp. 1967), on the ground that student deferments arbitrarily discriminate against persons who are economically unable to attend college. The three-judge district court, in an opinion by Judge Hays, granted the government's motion to dismiss for lack of jurisdictional amount:

> . . . The injury claimed is an increased likelihood of induction, because, so the plaintiffs allege, registrants who are deferred as students thereby ordinarily postpone their induction for several years and in many cases escape service entirely by acquiring other deferments. . . .
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> . . . Jurisdiction of this suit is claimed under 28 U.S.C. § 1331, the general federal question statute, which requires that "the matter in controversy" exceed "the sum or value of $10,000." Plaintiffs' counsel concedes that he cannot prove that any of the plaintiffs will suffer a monetary loss of more than $10,000 by reason of the injury alleged.
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> It is firmly settled law that cases involving rights not capable of valuation in money may not be heard in federal courts where the applicable jurisdictional statute requires that the matter in controversy exceed a certain number of dollars. The rule was laid down in *Barry* v. *Mercein*, 46 U.S. (5 How.) 103 (1847), a child custody case. The "right to the custody, care, and society" of a child, the court noted, "is evidently utterly incapable of being reduced to any pecuniary standard of value, at it rises superior to money considerations." 46 U.S. at 120. Since the statute permitted appeals only in those cases where the "matter in dispute exceeds the sum or value of two thousand dollars," the court concluded that it was without jurisdiction: "The words of the act of Congress are plain and unambiguous. . . . There are no words in the law, which by any just interpretation can be held to . . . authorize us to take cognizance of cases to which no test of money value can be applied." 46 U.S. at 120. Subsequent decisions have followed this reasoning. See *Kurtz* v. *Moffitt*, 115 U.S. 487, 498 (1885); *Youngstown Bank* v. *Hughes*, 106 U.S. 523 (1882); *Giancana* v. *Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965); *Carroll* v. *Somervell*, 116 F.2d 918 (2d Cir. 1941); *United States ex rel. Curtiss* v. *Haviland*, 297 Fed. 431 (2d Cir. 1924); 1 Moore, Federal Practice § 0.92[5] (2d ed. 1964).

Judge Edelstein dissented, arguing that the plaintiffs' allegation that the matter in controversy exceeded $10,000 should not be scrutinized, at least where the defendant did not move to dismiss on that ground, or, alternatively, that the court should "assume that freedom from an unconstitutional discrimination exceeds the sum or value of $10,000." He suggested that the jurisdictional-amount requirement was an unconstitutional one in situations,

such as this, in which the action, because it is against federal officers, could not be brought in a state court.

The reasons for objecting to the absence of federal jurisdiction in a case like *Boyd* v. *Clark* are readily apparent. The factors relevant to the question of whether or not a federal court should be available to a litigant seeking protection of a federal right have little, if any, correlation with minimum jurisdictional amount. Instead they involve such considerations as whether there is a need for a specialized federal tribunal and whether there are defects in the state judicial system that might substantially impair consideraton of the plaintiff's claim. These factors have special force in the type of cases with which this recommendation is concerned—where specific relief is sought against a federal officer —because state courts generally are powerless to restrain or mandamus the action of a federal officer taken under color of federal law. See Arnold, *The Power of State Courts To Enjoin Federal Officers,* 73 Yale L.J. 1385 (1964). Unlike other federal-question cases subject to the jurisdictional-amount requirement, such as cases attacking state statutes on federal constitutional grounds, denial of a federal forum for lack of jurisdictional amount may be a denial of any remedy whatsoever. As Judge Edelstein pointed out in his dissent in *Boyd* v. *Clark,* jurisdictional provisions which deny a litigant any opportunity to present federal constitutional claims may themselves present constitutional difficulties.

The lack of a state forum in actions against federal officers serves to distinguish this recommendation from other and more general proposals to eliminate the jurisdictional-amount requirement in federal-question cases. The American Law Institute, for example, has tentatively recommended that the jurisdictional amount requirement be abandoned in federal question cases. ALI, *Study of the Division of Jurisdiction Between State and Federal Courts* § 1311 and commentary at 172–76 (1969). Whether or not these broader proposals are accepted, the narrower problem with which this recommendation is concerned needs correction.

It is unclear why Congress, when it increased the jurisdictional amount in diversity-of-citizenship cases in 1958 from $3,000 to $10,000, also raised the minimum jurisdictional amount in federal question cases arising under 28 U.S.C. § 1331. The legislative history merely asserts that the effect of the change is insignificant because the only cases affected are those involving the constitutionality of state statutes and those arising under the Jones Act. Virtually all other cases were said to fall within one of the special federal question statutes which require no minimum jurisdictional

amount. See, *e.g.*, 104 Cong. Rec. 11508 (June 30, 1958). If this were the case it is difficult to see why the provision was enacted, since the only purpose of increasing the jurisdictional amount was to reduce the workload of the federal courts, a purpose which would not be advanced if federal-question cases were unaffected. See Friedenthal, *New Limitations on Federal Jurisdiction,* 11 Stan. L. Rev. 213, 216–18 (1959).

The assertion, however, that the significant cases which arise under section 1331 are limited to the two categories mentioned is misleading and erroneous. There is an important third category, with which this recommendation is concerned, in which persons aggrieved by federal administrative action are seeking nonstatutory review in an action brought against the officer. In these cases the plaintiff must follow one of the following courses: (1) satisfy the minimum jurisdictional amount required by 28 U.S.C. § 1331; (2) bring his action in the District of Columbia; (3) cast his action in the form of a mandamus proceeding, thus qualifying under the provisions of the Mandamus and Venue Act of 1962, 28 U.S.C. §§ 1361, 1391(e) (1964); or (4) persuade the court that section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701–04 (Supp. II, 1967), provides an independent jurisdictional basis for judicial review of federal administrative action, a proposition that is much in doubt. Brief consideration will be given to the unsatisfactory nature of each of these alternatives.

1. *Satisfying the minimum jurisdictional amount.* The principles for determining whether the amount in controversy satisfies statutory requirements are well-established. The plaintiff has the burden of alleging and proving jurisdictional facts. The plaintiff's ad damnum is ordinarily taken at face value unless it appears not to have been made in good faith or the court believes as a matter of legal certainty that the value of the right in controversy is less than the minimum amount. *St. Paul Mercury Indem. Co.* v. *Red Cab Co.,* 303 U.S. 283, 288–89 (1938). There is no guarantee, however, that the court will not examine in detail the value of the plaintiff's claim. In *Carroll* v. *Somervell,* 116 F.2d 918 (2d Cir. 1941), for example, where a federal employee sought to enjoin his dismissal for failure to sign a non-Communist affidavit, the employee alleged loss of standing in the community in excess of $3,000. Nevertheless, the case was dismissed for lack of jurisdictional amount on the ground that the value of the claim was measured by the maximum compensa-

tion—less than $3,000—that the employee would be entitled to receive during the ensuing year.

As the *Carroll* case indicates, the methods of valuation in injunction suits are conservative. In *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178 (1936), it was held that in an attack on a regulatory statute the amount in controversy is not the value of the business or other activity regulated but the difference between its value regulated and unregulated. See also *Healy* v. *Ratta*, 292 U.S. 263 (1934) (the amount in controversy in tax litigation is measured by the amount of the tax rather than of the penalty). Although some cases ignore these principles by treating the plaintiff's ad damnum as conclusive, *e.g.*, *Flast* v. *Cohen*, 392 U.S. 83 (1968) (federal taxpayer's attack on federal grants to religious schools); *Townsend* v. *Zimmerman*, 237 F.2d 376 (6th Cir. 1956) (attack on selective service classification), a plaintiff seeking judicial review of federal administrative action cannot rely on this approach being taken.

Although many nonstatutory review actions can be based upon special jurisdictional provisions such as 28 U.S.C. § 1337 (arising under acts "regulating commerce"), there is a significant residue in which jurisdiction must be predicated upon § 1331, the general federal question provision which requires a jurisdictional amount in excess of $10,000. Cases against federal officers in which the jurisdictional-amount requirement was in issue are listed below.

Reputational or intangible interests that cannot be expressed in money terms: Oesterreich v. *Selective Service System Local Board No. 11*, 280 F.Supp. 78 (D. Wyo. 1968), aff'd, 390 F.2d 100 (10th Cir. 1968), cert. granted, 391 U.S. 912 (freedom from induction resulting from selective service reclassification); *Giancana* v. *Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. den.*, 379 U.S. 1001 ("Courts may not treat as a mere technicality the jurisdictional amount essential to the 'federal question' jurisdiction, even in this case where there is an allegedly unwarranted invasion of plaintiff's privacy [by continuous FBI surveillance]"); *Jackson* v. *Kuhn*, 254 F.2d 555 (8th Cir. 1958) (constitutionality of military presence at Little Rock High School; jurisdictional-amount requirement held not satisfied); *Vorachek* v. *United States*, 337 F.2d 797 (8th Cir. 1964) (disclosure of confidential information concerning plaintiff by federal officers).

Employment interests: Neustein v. *Mitchell*, 130 F.2d 197 (2d Cir. 1942) (loss of state office because of federal enforcement of Hatch Act prohibitions on political activity); *Carroll* v. *Somervell*, 116 F.2d 918 (2d Cir. 1941) (value of federal employment measured by lost wages); *Fischler* v. *McCarthy*, 117 F.Supp. 643 (S.D.N.Y. 1954), *aff'd on other grounds*, 218 F.2d 164 (2d Cir. 1954) (bare allegation that value of federal employment exceeded $3,000 not accepted). Cf. *Friedman* v. *Interna-*

tional Ass'n of Machinists, 220 F.2d 808 (D.C.Cir. 1955) (value of member's explusion from union measured by loss of wages). One line of cases that formerly were troubled by the jurisdictional-amount requirement involved the preferential employment rights of veterans. See *Christner* v. *Poudre Valley Co-op. Ass'n*, 134 F.Supp. 115 (D.Colo. 1955), *aff'd*, 235 F.2d 946 (10th Cir. 1956). This particular problem has now been cured by a statute specifically providing for federal jurisdiction in such cases without regard to jurisdictional amount.

Freedom from regulatory interference: Quinault Tribe of Indians v. *Gallagher*, 368 F.2d 648 (9th Cir. 1966) (freedom of Indian reservation from state civil and criminal authority); *Gavica* v. *Donaugh*, 93 F.2d 173 (9th Cir. 1937) (enforcement of regulations governing grazing on public lands); *Dewar* v. *Brooks*, 16 F.Supp. 636 (D.Nev. 1963) (same); *Wyoming* v. *Franke*, 58 F.Supp. 890 (D.Wyo. 1945) (creation of national monument). Cf. *Empresa Hondurena de Vapores, S.A.* v. *McLeod*, 300 F.2d 222, (2d Cir. 1962) (employer's suit to enjoin NLRB regional director from conducting a representation election).

Property rights: Cameron v. *United States*, 146 U.S. 533 (1892) ("It is not, however, the value of the property in dispute in this case which is involved, but the value of the color of title to this property, which is hardly capable of pecuniary estimation, and if it were, there is no evidence of such value in this case"); *Helvy* v. *Webb*, 36 F.Supp. 243 (S.D. Calif. 1941) (value of grazing lands).

Military status: Jones, Jurisdiction of the Federal Courts to Review the Character of Military Administrative Discharges, 57 Colum. L. Rev. 917, 937–41 (1957): ". . . the jurisdictional amount may prove an insurmountable obstacle since the plaintiff-veteran [in military discharge situations] probably would not be able to establish that the requisite $3,000 is involved in the controversy over the character of his discharge, a matter as to which he has the burden of proof." See also Meador, Judicial Determinations of Military Status, 72 Yale L. J. 1293, 1298 n. 27 (1963).

2. *Litigating in the District of Columbia.* The district court for the District of Columbia has long been viewed as inheriting the inherent and common-law powers of the Maryland courts. Prior to 1962 this meant that, alone of federal courts, those in the District of Columbia possessed the power to issue original writs of mandamus as a general matter. The mandamus problem was taken care of by the Mandamus and Venue Act of 1962, 28 U.S.C §§ 1361, 1391(e), which conferred power on district courts everywhere to entertain "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." In addition to its mandamus power, however, the district court for the District of Columbia also "has a general equity jurisdiction," *Stark* v. *Wickard*, 321 U.S. 288, 290 (1944), which it may exercise without regard to the amount in controversy. D.C. Code Ann. §§ 11–521, 11–961, 11–962 (Supp. IV, 1965).

The resulting situation is hardly a logical or defensible one. Congress, disturbed by the inability of litigants to obtain mandamus relief in local courts distributed around the country, conferred such jurisdiction on all district courts, without regard to amount in controversy, in 1962. The more traditional exercise of injunctive or declaratory authority, however, remained subject to the requirement of minimum jurisdictional amount whenever no special federal question statute was available—except in the District of Columbia! The same arguments that supported the Mandamus and Venue Act of 1962—the expense and inconvenience of forcing litigants from all over the country to bring their claims to a District of Columbia court—support the elimination of the remaining anachronism with respect to jurisdictional amount in injunction suits against federal officers.

3. *Relief "in the nature of mandamus."* As has already been indicated, the Mandamus and Venue Act of 1962, 28 U.S.C. §§ 1361, 1391(e), was intended to provide litigants with a convenient local forum in actions to require a federal officer to perform a duty owed to the plaintiff. No jurisdictional amount is required in actions coming within 28 U.S.C. § 1361. In situations where the federal officer does not "owe a duty" to the plaintiff but has unlawfully interfered with the plaintiff's rights—the traditional situation giving rise to injunctive relief—§ 1361 cannot provide the basis for federal jurisdiction. Moreover, since an action under § 1361 is "in the nature of mandamus," there is a risk that the court will hold that a negative decree cannot be issued or that the ministerial-discretionary distinction and other technicalities of mandamus law will significantly narrow the scope of review. These problems are ably discussed by 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 (1967), who conclude that the present existence of the mandamus remedy does not take care of all of the troublesome limitations on the availability of nonstatutory review.

4. *Section 10 of the Administrative Procedure Act as an independent source of federal jurisdiction.* Section 10 of the Administrative Procedure Act provides, subject to some qualifications, that "a person suffering legal wrong because of agency action . . . is entitled to judicial review thereof" and that "final agency action for which there is no other adequate remedy in a court is subject to judicial review." 5 U.S.C. §§ 701–03 (Supp. II, 1967). It also provides that "[t]he form of proceeding for

judicial review" may be brought "in a court of competent jurisdiction." Although the section does not in terms confer jurisdiction on federal courts and was generally viewed as restating the existing law of judicial review, some courts in more recent years have concluded that section 10 is an independent grant of jurisdiction to review "final agency action." *Brennan* v. *Udall*, 379 F.2d 803 (10 Cir. 1967) (Interior determination which adversely affected landowner's title); *Coleman* v. *United States*, 363 F.2d 190 (9th Cir. 1966), *adhered to on rehearing*, 379 F.2d 555 (1967) (Interior determination concerning the validity of a mining claim); *Cappadora* v. *Celebrezze*, 356 F.2d 1 (2d Cir. 1966) (refusal of Social Security Administrative to reopen claim for survivors' benefits) (alternative holding); *Estrada* v. *Ahrens*, 296 F.2d 690 (5th Cir. 1961) (Immigration and Naturalization Service action excluding an alien from entry). It is not clear that the jurisdiction of the district court needed to be rested on section 10 of the Administrative Procedure Act in any of these cases: special federal-question provisions existed in *Cappadora* and *Estrada;* and it is probable that the minimum jurisdictional amount under §§ 1331 could have been satisfied in *Brennan* and *Coleman*. None of the cases contains an extensive or reasoned discussion of the question whether section 10 is in fact an independent ground of subject-matter jurisdiction in federal courts.

A number of cases have reached the conclusion that the Administrative Procedure Act is not a source of jurisdiction: *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967) (attack on manner of holding tribal election); *Chournos* v. *United States*, 335 F.2d 918 (10th Cir. 1964) (Interior determination concerning the validity of placer mining claim); *Local 542, Operating Engineers* v. *NLRB*, 328 F. 2d 850 (3d Cir. 1964) (NLRB refusal to hold representation election); *Ove Gustavsson Contracting Co.* v. *Floete*, 278 F. 2d 912 (2d Cir. 1960) (termination of government contract); *Kansas City Power & Light Co.* v. *McKay*, 225 F.2d 924 (D.C. Cir. 1955) (federally-supported power program). These decisions are no more satisfactory than those going the other way. The *Chippewa* case merely states a conclusion that section 10 "does not confer jurisdiction upon federal courts. Its purpose is to define the procedures and manner of judicial review of agency action rather than confer jurisdiction." *Chournos* really involves the separate problem of whether section 10 waives sovereign immunity, while the *Kansas City Power* case involves standing and not subject-matter jurisdiction. The other two cases appear to be

correctly decided on other grounds: nonstatutory review of NLRB matters under the doctrine of *Leedom* v. *Kyne*, 358 U.S. 184 (1958), takes place in district courts rather than, as was urged in the *Local 542* case, in a court of appeals; and district court jurisdiction of claims arising out of government contracts, the matter at issue in *Ove Gustavsson*, is precluded because of the existence of an adequate statutory remedy.

The Supreme Court has not yet spoken on the question, despite the conflict of circuits, although in *Rusk* v. *Cort*, 369 U.S. 367, 371–72 (1962) (passport issuance), the Court appears to have assumed that section 10 is a grant of jurisdiction. Thus the question remains an open one.

If the Supreme Court were to hold that section 10 of the Administrative Procedure Act is an independent ground of federal jurisdiction, that holding would go far to ameliorate the problems with which this recommendation is concerned. Cases seeking judicial review of federal administrative action would be entertained by federal courts without regard to jurisdictional amount, except in those situations exempt from the Administrative Procedure Act or included within the qualifying phrase of section 10: "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law. . . ."

The Committee on Judicial Review, believing that it is not its function to interpret federal statutes, takes no position on whether section 10 now provides for federal jurisdiction in cases involving final action of federal officers or agencies. The Committee merely states a conclusion of policy—there should be no jurisdictional-amount limitation on suits against federal officers seeking injunctive and declaratory relief. Since it is at least doubtful whether this objective can be reached by interpretation of existing legislation, the Committee urges enactment of specific legislation to handle the problem.

It should be noted again that the grant of subject-matter jurisdiction without regard to jurisdictional amount would not impair the doctrine of sovereign immunity or affect any of the other rules and doctrines that limit the availability and scope of judicial review of official action: (1) the plaintiff's lack of standing; (2) the absence of a matured controversy; (3) the availability of an alternative remedy in another court; (4) the express or implied preclusion of judicial review; (5) the commission of the matter by law to the defendant's discretion; (6) the privileged nature of the defendant's conduct; (7) the plaintiff's

failure to exhaust his administrative remedies; and (8) the discretionary authority of a court to refuse relief on equitable grounds.