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ADMINISTRATIVE LAW

INTRODUCTION

During this past term, the Ninth Circuit considered cases involving the procedural aspects of administrative law,[1] the scope of review of agency decisions,[2] and the interpretation and application of several state and federal statutes.[3] A significant decision in the area of administrative procedure was *Wiren v. Eide*,[4] in which a panel of the circuit held that the Administrative Procedure Act was a source of independent subject matter jurisdiction for the review of administrative actions. In addition to *Wiren*, the circuit examined, in *Lynn v. Biderman*,[5] the enforcement of administrative subpoenas and, in *Midwest Growers Cooperative Corp. v. Kirkemo*,[6] administrative search warrants. These three decisions are discussed more extensively below.

I. OVERVIEW

A. Enforcement of Administrative Subpoenas

During the survey period, the Ninth Circuit considered two cases which dealt with the investigative power of administrative

1. *See* Wiren v. Eide, 542 F.2d 757 (9th Cir. June, 1976) (per Koelsch, J); Lynn v. Biderman, 536 F.2d 820 (9th Cir. May, 1976) (per Thompson, D.J.), *cert. denied*, 97 S. Ct. 316 (1976); Midwest Growers Cooperative Corp. v. Kirkemo, 533 F.2d 455 (9th Cir. Mar., 1976) (per Jameson, D.J.); United States v. Vixie, 532 F.2d 1277 (9th Cir. Mar., 1976) (per curiam).

2. *See* Kitchens v. Department of Treasury, 535 F.2d 1197 (9th Cir. May, 1976) (per curiam); FTC v. Simeon Management Corp., 532 F.2d 708 (9th Cir. Mar., 1976) (per Kennedy, J.); Proietti v. Levi, 530 F.2d 836 (9th Cir. Feb., 1976) (per Wollenberg, D.J.); Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. Nov., 1975) (per Koelsch, J.).

3. *See* United States v. Tulare Lake Canal Co., 535 F.2d 1093 (9th Cir. Apr., 1976) (per Browning, J.), *cert. denied*, 45 U.S.L.W. 3560 (U.S. Feb. 22, 1977) (action to enjoin delivery of water under excess land requirements of the Omnibus Adjustment Act of 1926, 46 U.S.C. section 423e); General Mills, Inc. v. Jones, 530 F.2d 1317 (9th Cir. Oct., 1975) (per Rich, J.), *cert. granted*, 96 S. Ct. 1663 (1976) (federal preemption and the Fair Package and Labeling Act); Rath Packing Co. v. Becker, 530 F.2d 1295 (9th Cir. Oct., 1976) (per Rich, J.), *cert. granted sub nom.* Jones v. Rath Packing Co., 96 S. Ct. 1663 (1976) (federal preemption and the Wholesome Meat Act); Driscoll v. United States, 525 F.2d 136 (9th Cir. Oct., 1975) (per Sneed, J.) (liability and immunity under the Federal Tort Claims Act); Greenway v. Information Dynamics, Ltd., 524 F.2d 1145 (9th Cir. Oct., 1975) (per curiam), *cert. dismissed*, 96 S. Ct. 1153 (1976) (consumer reporting under the Fair Credit Reporting Act); American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. Sept., 1975) (per Sneed, J.) (standing, access channels and CATV regulations), *noted in* 1975 Utah L. Rev. 994.

4. 542 F.2d 757 (9th Cir. June, 1976) (per Koelsch, J.).

5. 536 F.2d 820 (9th Cir. May, 1976) (per Thompson, D.J.), *cert. denied*, 97 S. Ct. 316 (1976).

6. 533 F.2d 455 (9th Cir. Mar., 1976) (per Jameson, D.J.).

agencies. In *Lynn v. Biderman*,[7] the Office of Interstate Land Sales Registration (OILSR) issued administrative subpoenas requiring the defendants to appear to testify and to produce documents pertaining to their land sales activities. The subpoenas were part of an investigation initiated by OILSR as a result of purchaser complaints about the defendants' sales activities. The defendants complied only partially with the subpoenas, refusing to provide OILSR with certain information concerning specific transactions. OILSR then filed an action in district court seeking enforcement of the subpoenas. The defendants counterclaimed seeking injunctive and declaratory relief. As a defense to enforcement of the subpoenas, the defendants alleged that OILSR was seeking the material for illegitimate purposes. The district court issued orders enforcing the subpoenas and dismissing the defendants' counterclaim. The court's orders were based solely on an examination of the pleadings and supporting affidavits submitted by both sides.

On appeal, the Ninth Circuit held: (1) that OILSR's inquiry was being conducted pursuant to legitimate purposes and that the information sought was relevant to those purposes; and (2) the defendants were not entitled to either preenforcement discovery or an evidentiary hearing with respect to the legitimacy of the purpose of the subpoenas.[8] In holding that OILSR was entitled to judicial enforcement of its subpoenas, the *Lynn* court applied the test enunciated by the Supreme Court in *United States v. Powell*[9] and found that there were three legitimate purposes for OILSR's investigation, and that the information sought was relevant to each.[10]

In the district court, the defendants had attacked the motive of OILSR in issuing the subpoenas. On appeal, they contended

7. 536 F.2d 820 (9th Cir. May, 1976) (per Thompson, D.J.), *cert. denied*, 45 U.S.L.W. 3326 (U.S. Nov. 1, 1976). For a discussion of the current status and ultimate legitimacy of the administrative process see Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041 (1975).

8. 536 F.2d at 823, 825-26.

9. 379 U.S. 48 (1964). The Court stated that in order to obtain judicial enforcement of an administrative subpoena, the agency need not demonstrate the existence of probable cause to investigate. Rather, the agency must show that: (1) the investigation will be conducted pursuant to a legitimate purpose; (2) the inquiry may be relevant to that purpose; (3) the information sought is not already in the possession of the agency; and (4) the administrative steps required by congressional guidelines have been followed. *Id.* at 57-58.

10. 536 F.2d at 825. The *Lynn* court found that OILSR needed the information subpoenaed to determine the nature of the defendants' sales practices and to discover whether the claims of the defendants' customers were barred by the statute of limita-

that this attack had entitled them to preenforcement discovery and a limited evidentiary hearing. In support of this contention, they cited the Ninth Circuit case of *United States v. Church of Scientology*.[11] The court recognized the applicability of *Church of Scientology* to an investigation conducted by other administrative agencies, but refused to hold that a defendant in an action to enforce an administrative subpoena is entitled to an evidentiary hearing in every case where the agency's motives are impugned.[12] The court stated that the granting of such a hearing was dependent upon two considerations. First, the substantiality of the defendant's allegations had to be evaluated. In this regard, the *Lynn* court noted that the agency investigation involved in *Church of Scientology* was initiated by the agency, whereas the investigation of OILSR was spurred by complaints lodged by the defendants' customers. The court found that the latter situation presented an arguably smaller chance of agency oppression and therefore there was less need for the safeguards provided by a hearing.

The second factor identified by the Ninth Circuit in *Lynn* was the likelihood that an evidentiary hearing would have aided the court in making its determination of an agency's motives. Here the court noted that the district court had been presented with the affidavits of the parties on both sides. The *Lynn* court found no indication that anything more would have been achieved by a hearing and hence concluded that the district court did not abuse its discretion by deciding the case summarily. Thus, with its decision in *Lynn*, the Ninth Circuit set the stage for a case-by-case determination of whether an evidentiary hearing is required in suits for enforcement of administrative subpoenas. The court also clearly enunciated the factors to be taken into account by district courts in making this determination.

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tions, as the defendants had asserted. The court also found that OILSR could properly seek the information in order to aid the Secretary of Commerce in formulating proposed legislation. *Id.*

The court further noted that it was not proper for OILSR to subpoena the customers names in order to advise them of their right of action against defendants. However, the court held this fact did not bar enforcement of the subpoenas in light of the lawful purposes also served. *Id.* at 826.

11. 520 F.2d 818 (9th Cir. 1975). The defendant Church of Scientology had alleged that an Internal Revenue Service (IRS) investigation was being conducted for the purpose of harassing the church. The Ninth Circuit held that the district court had erred in denying the church a limited evidentiary hearing for the purposes of inquiring into the purpose of the IRS investigation. *Id.* at 825.

12. 536 F.2d at 825-26. In response to the defendants' request for preenforcement discovery, the court noted that *Church of Scientology* held it was not error to deny such discovery. *Id.* at 825.

B. ADMINISTRATIVE SEARCH WARRANTS

Midwest Growers Cooperative Corp. v. Kirkemo[13] presented the Ninth Circuit with another question of administrative investigation. An agent of the Interstate Commerce Commission (ICC) attempted several times to inspect Midwest's books and records, pursuant to 49 U.S.C. section 320(g).[14] Each time, Midwest refused to allow the agent to carry out the inspection. After a final formal demand, the ICC applied for an inspection warrant.[15] The warrant was signed by a United States magistrate in an ex parte hearing, although the defendant had not received prior notice of the hearing. The warrant was executed the same day, and Midwest's suit for injunctive relief and damages ensued.

The district court dismissed all of Midwest's causes of action for damages on the grounds that they were barred by the doctrine of sovereign immunity. However, the court found that the search by the ICC had violated Midwest's fourth amendment rights and entered a permanent injunction against any further use by the agents of the materials obtained during the search.[16] Both sides appealed, and the Ninth Circuit upheld the district court's dismissal of Midwest's damage claims. The court further held that the ICC could not enforce its right of inspection by means of a search warrant, but found that the injunction issued by the district court was an improper remedy for the ICC's violation of Midwest's fourth amendment rights.[17]

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13. 533 F.2d 455 (9th Cir. Mar., 1976) (per Jameson, D.J.).

14. 49 U.S.C. § 320(g) (1970) provides:

> The commission or its duly authorized special agents, accountants or examiners shall, during normal business hours, have access to and authority, under its order, to inspect, examine, and copy any and all documents pertaining to motor vehicle transportation of a cooperative association or federation or cooperative associations which is required to give notice to the Commission pursuant to the provision of section 303(b)(5) of this title: *Provided, however*, That the Commission shall have no authority to prescribe the form of any accounts, records, or memorandums to be maintained by a cooperative association or federation of cooperative associations.

15. At the time the warrant was applied for, a United States district court had held that the ICC's right of inspection could not be enforced by way of an injunction. ICC v. Big Valley Growers Co-op, Civ. No. 72-2163 (C.D. Cal., Oct. 22, 1975). The Ninth Circuit subsequently reversed the district court's decision in ICC v. Big Valley Growers Co-op, 493 F.2d 888 (9th Cir. 1974).

16. The district court declined to extend the injunction to the ICC itself on the basis of sovereign immunity. 533 F.2d at 465.

17. *Id.* at 463-65.

In its discussion of the validity of the search warrant obtained by the ICC, the Ninth Circuit noted that unlike some other administrative agencies, the ICC has not been given the power to issue subpoenas, but instead has a statutory right to inspect which may be enforced by injunction.[18] The court found that the question whether the right to inspect may also be effectuated by means of administrative search warrants was one of first impression.[19] It examined several cases where the Supreme Court had upheld the use of such warrants,[20] but stated that these cases did not create the right to an ex parte warrant whenever a right to inspect exists. The court distinguished these Supreme Court cases on the ground that the statutes involved, unlike section 320(g), authorized entry for purposes of inspection without the consent of the party occupying the premises to be inspected. These decisions, the *Kirkemo* court stated, made the procurement of a warrant a prerequisite to judicial enforcement of the statutory right of entry. Since the court could find no such right in section 320(g), it held that the ICC was not entitled to a search warrant.[21]

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18. *See* note 15 *supra*.

19. 533 F.2d at 462.

20. *See* Colonnade Catering Corp. v. United States, 397 U.S. 72 (1969) (forcible, nonconsensual searches by the Alcohol and Tax Division of the Internal Revenue Service could not be accomplished without a search warrant); Camara v. Municipal Court, 387 U.S. 523 (1967) (fourth amendment protections applicable to health, safety and fire inspections of personal residences by administrative agencies); See v. City of Seattle, 387 U.S. 541 (1967) (fourth amendment protections applicable to administrative inspections of commercial property). For discussions of the fourth amendment issues raised by administrative searches see Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CALIF. L. REV. 1011 (1973); LaFave, *Administrative Searches and the Fourth Amendment*, in 1967 SUP. CT. REV. 1 (Kurland ed.); Myers, *Administrative Inspection of Health Facilities as Unreasonable Searches*, 22 FOOD DRUG COSM. L.J. 456 (1967); Note, *Administrative Searches and the Implied Consent Doctrine: Beyond the Fourth Amendment*, 43 BROOKLYN L. REV. 91 (1976); Comment, *Constitutional Law–Administrative Searches and the Fourth Amendment: The Definition of "Probable Cause" in Camara v. Municipal Court of the City and County of San Francisco*, 36 U.M.K.C.L. REV. 111 (1968).

21. 533 F.2d at 463. The court nonetheless dissolved the district court's injunction against the agents of the ICC. The injunction had prohibited the use of the material which had been obtained as evidence in any civil or criminal proceeding by the ICC against Midwest. The court found that Midwest had not shown it was entitled to equitable relief. Midwest's proper remedy against use of the information was a motion to suppress in any action in which the ICC attempted to introduce the information. The *Kirkemo* court stated that this was the proper remedy, since the exclusion of the material from evidence would depend on the proper application of the exclusionary rule in light of the circumstances of the particular proceeding involved. *Id.* at 465-66.

II. SUBJECT MATTER JURISDICTION UNDER THE ADMINISTRATIVE PROCEDURE ACT

A. INTRODUCTION

The Administrative Procedure Act[1] (APA) was enacted by Congress in 1946 in response to widespread concern about the public's ability to deal with a burgeoning federal bureaucracy. The drafters of the Act recognized the need to create a sense of fairness and accountability in citizens' dealings with governmental agencies.[2] To accomplish this purpose, section 10 of the Act establishes a right to judicial review for those persons aggrieved by agency action.[3] In creating this right, Congress did not make it clear whether it also intended to enlarge the subject matter jurisdiction of the federal district courts, thus enabling those seeking judicial review of agency action to do so without meeting the then existing federal jurisdictional requirements.

In *Wiren v. Eide*,[4] decided during this survey period, the Ninth Circuit aligned itself with a majority of the circuits in holding that the APA constitutes an independent grant of subject

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1. 5 U.S.C. §§ 551-559, 701-706 (1970).

2. *See* H.R. REP. No. 1980, 79th Cong., 2d Sess. 16-17 (1946), *reprinted in* ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, 79th CONGRESS, 1944-46, at 250-51 (1946); S. REP. No. 752, 79th Cong., 1st Sess. 31 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, 79th CONGRESS, 1944-46, at 212 (1946).

3. *See* H.R. REP. No. 1980, 79th Cong., 2d SESS. 42 (1946), *reprinted in* ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, 79th CONGRESS, 1944-46, at 276; S. REP. No. 752, 79th Cong., 1st SESS. 26 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, 79th CONGRESS, 1944-46, at 212 (1946). The Administrative Procedure Act, § 10(a), 5 U.S.C. § 702 (1970), provides:

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

The Administrative Procedure Act, § 10(b), 5 U.S.C. § 703 (1970) provides:

> 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. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

4. 542 F.2d 757 (9th Cir. June, 1976) (per Koelsch, J.).

matter jurisdiction.[5] Four circuits had taken the contrary view.[6] The question of whether Congress intended to enlarge the jurisdiction of the federal district courts by creating a right of judicial review had been a source of controversy for over twenty years.[7] The conflict had been exacerbated by the continuing failure of the Supreme Court to rule on the question.[8] It was not until October of 1976 that Congress responded to the calls of both courts and commentators to resolve the issue, by enacting Public Law 94-574 (P.L. 94-574).[9] This law amended section 1331 of Title 28 to ex-

5. In addition to the Ninth Circuit, the following circuits had held that the APA alone conferred subject matter jurisdiction upon the district courts; Sanders v. Weinberger, 552 F.2d 1167 (7th Cir. 1975), *rev'd sub nom.* Califano v. Sanders, 97 S. Ct. 980 (Feb. 1977); Ortego v. Weinberger, 516 F.2d 1005 (5th Cir. 1975); Elton Orchards, Inc. v. Brennan, 508 F.2d 493 (1st Cir. 1974); Bard v. Seamans, 507 F.2d 765 (10th Cir. 1974); Pickus v. United States Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974); McEachern v. United States, 321 F.2d 31 (4th Cir. 1963). *Contra*, Bott v. Holiday Universal, Inc., [1976] 5 TRADE REG. REP. (CCH) (1976 Trade Cas.) ¶ 60,973 (D.D.C. July 14, 1976).

6. The following circuits had held that the APA did not provide an independent basis of subject matter jurisdiction: West Penn Power Co. v. Train, 522 F.2d 302 (3d Cir. 1975); Bramblett v. Desobry, 490 F.2d 405 (6th Cir.), *cert. denied*, 419 U.S. 872 (1974); Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967). *But see* Hunt v. Weinberger, 527 F.2d 544 (6th Cir. 1975); Mills v. Richardson, 464 F.2d 995 (2d Cir. 1972).

7. The first case to consider the issue was Almour v. Pace, 193 F.2d 699 (D.C. Cir. 1951), where the court held that the APA did not constitute an independent grant of subject matter jurisdiction. The first case to hold that the APA was an independent grant of subject matter jurisdiction was McEachern v. United States, 321 F.2d 31 (4th Cir. 1963). For discussions of the general problems involved in judicial review of administrative actions see McAllister, *Statutory Roads to Review of Federal Administrative Orders*, 28 CALIF. L. REV. 129 (1940); Verkuill, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974); Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443 (1971); Note, *Reviewability of Administrative Action: The Elusive Search for a Pragmatic Standard*, 1974 DUKE L.J. 382; Note, *Interim Relief and Exhaustion of Administrative Remedies: A Study in Judicial Confusion*, 1973 DUKE L.J. 275; Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 HARV. L. REV. 980 (1975).

8. As this Note went to press, the Supreme Court did in fact hold that the APA was not jurisdictional. *See* Califano v. Sanders, 97 S. Ct. 980 (1977), discussed at note 33 *infra*. The impact of this ruling was mitigated by the congressional action discussed in the text accompanying notes 23-34 *infra*.

9. Pub. L. No. 94-574, 90 Stat. 2721 (Oct. 21, 1976) (amending 5 U.S.C. §§ 702, 703 (1970); 28 U.S.C. §§ 1331(a), 1391(e) (1970)), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6121.

In addition to the changes discussed in the text accompanying note 10 *infra*, P.L. 94-574 enacted several other procedural reforms. Section 1 amends section 10 (5 U.S.C. § 701 (1970)) of the APA to remove the defense of sovereign immunity as a bar to judicial review of federal administrative action. Section 1 also amends section 10(a) of the APA (*id.* § 702) to eliminate the problems that litigants have faced in ascertaining the proper party defendant in such suits.

plicitly provide for federal question jurisdiction in all suits against the United States, its agencies or officers, irrespective of the amount in controversy or lack thereof.[10]

Prior to the enactment of P.L. 94-574, there existed a class of potential litigants who were denied a forum even though they had meritorious claims which were cognizable under the judicial review provisions of section 10. Such a denial would occur because of the claimant's inability to meet federal jurisdictional requirements.[11] *Wiren* presented a typical situation: but for a finding of jurisdiction under the APA, the plaintiff would have possibly been denied a federal forum in which to present a substantial constitutional claim.[12] Plaintiff Wiren sought judicial review of Bureau of Customs procedures with respect to the seizure and

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Section 3 amends 28 U.S.C. § 1391(e) (1970), which provides for a broader choice of venue in actions against federal officers and agencies. The previous section 1391(e) had been interpreted to prevent a plaintiff from joining nonfederal third parties as defendants in such actions. Section 3 removes this bar. However, to avoid hardship to private defendants, the amendment provides that where they are joined, the plaintiff must obtain venue as if the government were not a party.

10. The impact of this amendment to 28 U.S.C. section 1331 extends far beyond suits brought under the APA. While a full discussion of its import exceeds the scope of this Note, the most significant area of cases affected will be those in which the plaintiff's claim involves a constitutional right which is incapable of monetary evaluation. *See, e.g.*, 13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3561 (1975); Earnest, *The Jurisdictional Amount in Controversy in Suits to Enforce Federal Rights*, 54 TEX. L. REV. 545 (1976); Fraser, *Proposed Revision of the Jurisdiction of the Federal District Courts*, 8 VAL. U.L. REV. 189, 205-07 (1974); Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 198-202 (1969); Comment, *A Dollars & Sense Approach to the Amount-in-Controversy Requirement*, 57 IOWA L. REV. 530 (1971); Comment, *A Federal Question: Does Priceless Mean Worthless*, 14 ST. LOUIS L.J. 268 (1969).

11. This inability most frequently resulted from the fact that the right infringed was either not susceptible of monetary evaluation, or involved an amount less than ten thousand dollars. The inability to meet the amount in controversy requirement of 28 U.S.C. § 1331 (1970) was not, of course, an insurmountable barrier to suits seeking review of agency action pursuant to the APA. Many litigants could invoke one of the other accepted bases of the district court's subject matter jurisdiction, *e.g.*, *id.* § 1337 (jurisdiction over civil actions arising under commerce or antitrust legislation), and thus would not have to satisfy any amount in controversy requirement.

12. In dictum, the *Wiren* panel asserted that if jurisdiction were otherwise absent, Wiren's claim could be brought under the federal mandamus statute, 28 U.S.C. § 1361 (1970). 542 F.2d at 761 n.5. For a discussion of the utility of this statute in actions seeking review of administrative acts, see K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 23.09-.10 (Supp. 1970); Byse & Fiocca, *Section 1361 of the Mandamus & Venue Act of 1962 and "Nonstatutory" Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967); Comment, *The Jurisdictional Bases of Nonstatutory Review in Suits Against Federal Officers—Jurisdictional Amount, The Administrative Procedure Act and Mandamus*, 51 WASH. L. REV. 97, 122-40 (1976) [hereinafter cited as *Nonstatutory Review*].

forfeiture of certain property.[13] His claim was based on a fifth amendment challenge to the constitutionality of the procedures. He sought equitable relief and damages in an amount less than ten thousand dollars. The district court dismissed Wiren's complaint for want of jurisdiction, and the Ninth Circuit reversed. The *Wiren* panel found several bases for jurisdiction in the district court and, in particular, held that section 10 of the APA conferred jurisdiction to determine the propriety of the Bureau of Customs seizure and forfeiture procedures.[14] In reaching its determination, the Ninth Circuit did not attempt to explicate the reasons for its interpretation of the APA, but rather cited a substantial number of Ninth Circuit cases in support of its view.[15] However, a closer reading of these cases indicates that none held the APA to be a grant of subject matter jurisdiction without regard to the amount in controversy, and only one decision can be possibly construed as stating so in dictum.[16] In other words, there was no precedential support within the Ninth Circuit for the *Wiren* court's conclusion.

13. Wiren's car was seized by United States Customs agents after a body search of one of his passengers revealed a small quantity of hashish. Such a seizure is authorized by the Customs Simplification Act of 1954, § 596, 19 U.S.C. § 1595a (1970). *Id.* §§ 1606-1610 establish a statutory scheme for the forfeiture, condemnation and sale of property seized. These sections also provide for notice of the intended forfeiture and a procedure for asserting an interest in the property to be forfeited. Section 1608 requires, however, that when the property in question is valued at less than $2,500, a penal bond of $250 must be filed by anyone seeking to challenge its forfeiture. Wiren alleged that he was indigent and unable to post the bond, and that therefore the scheme established by the Act worked a seizure of his property without due process of law and in denial of his right to equal protection under the law. He sought the return of his car and damages.

14. 542 F.2d at 760. In an earlier opinion, issued in September, 1975, the *Wiren* court had held that the district court did not have jurisdiction to hear Wiren's claims, and therefore did not reach the merits of Wiren's claim. The court subsequently changed its position in a corrected opinion which is the subject of this Note.

In addition to holding, in its corrected opinion, that the APA furnished jurisdiction for the constitutional claims advanced by Wiren, the court found that jurisdiction for Wiren's damage claims was furnished by the Tucker Act, 28 U.S.C. § 1346(a)(2) (1970). The Act gives federal district courts jurisdiction over civil suits against the government for nontort damages where the claim involved does not exceed ten thousand dollars.

15. The cases cited by the court were Proietti v. Levi, 530 F.2d 836 (9th Cir. 1976); Rothman v. Hospital Serv. of S. Cal., 510 F.2d 956 (9th Cir. 1975); Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970); Washington v. Udall, 417 F.2d 1310 (9th Cir. 1969); Coleman v. United States, 363 F.2d 190 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 599 (1968); Adams v. Witmer, 271 F.2d 29 (9th Cir. 1959).

16. In applying the cases it cited in support of its conclusion, the *Wiren* panel confused two separate issues: (1) The reviewability of agency action under the APA; and (2) the APA as a grant of subject matter jurisdiction. The former is ultimately a question

The Ninth Circuit was not alone in this regard. The judicial dispute over the status of section 10 as a source of jurisdiction was a debate in which both sides had routinely taken positions without offering a satisfactory rationale.[17] The lack of agreement

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of justiciability and goes to the nature of the agency action in question. It involves a determination of whether judicial review is barred by the separation of powers doctrine. If the doctrine bars review, the district court does not have subject matter jurisdiction in the sense that it does not have the right to review the challenged agency action. The guidelines by which this determination is to be made were enunciated by the Supreme Court in Abbot Laboratories v. Gardner, 387 U.S. 136, 139-41 (1967). The cases relied on by the *Wiren* court dealt only with the APA's effect on this aspect of subject matter jurisdiction.

However, even if a plaintiff's claim is justiciable, the court's subject matter jurisdiction to entertain the action must still be invoked. The district courts are forums of limited jurisdiction and, as such, have power only over those actions which Congress has authorized them to decide. *See* U.S. CONST. art. I, § 8, cl. 9; art. III, § 1. The question confronting the *Wiren* court was whether the APA is a grant of jurisdiction in the strictest sense. That is, did the APA authorize the district courts to entertain actions not otherwise within their competence, or would subject matter jurisdiction have to be found in some other federal statute?

17. As one commentator observed:

> [N]one of the cases contains an extensive or reasoned discussion of the question whether section 10 is an independent ground of subject matter jurisdiction in the federal courts. A number of cases . . . have reached the conclusion that the APA is not a source of jurisdiction. But these decisions are no more satisfactory in reasoning than those going the other way.

Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 444 (1970) (footnotes omitted). This trend continued. Some courts which had determined that the APA is not a source of jurisdiction merely asserted that their conclusion was clear from an examination of the statute itself, an unpersuasive argument in light of the controversy which surrounded the issue. *See, e.g.*, Local 542, Int'l Union of Operating Eng'rs v. NLRB, 328 F.2d 850 (3d Cir.), *cert. denied*, 379 U.S. 826 (1964). Other courts simply stated their position and cited to their equally persuasive counterparts. *See, e.g.*, Bramblett v. Desobry, 490 F.2d 405 (6th Cir. 1974); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967); Ove Gustavsson Contracting Co. v. Floete, 278 F.2d 912 (2d Cir. 1960).

The case law in favor of the proposition that the APA is an independent source of subject matter jurisdiction is more voluminous but equally unconvincing. Many of the opinions relied on Supreme Court decisions which provide little support for the inference. *See, e.g.*, Pickus v. United States Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974); Bard v. Seamans, 507 F.2d 765 (10th Cir. 1974); Bradley v. Weinberger, 483 F.2d 410 (1st Cir. 1973). Other courts, like the *Wiren* panel, have relied on a distorted reading of earlier precedent within their circuit. *See, e.g.*, Bard v. Seamans, 507 F.2d 765 (10th Cir. 1974); Pickus v. United States Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974). The *Pickus* panel, like the *Wiren* panel, relied on precedent that dealt only with reviewability. In addition, it totally ignored two earlier District of Columbia cases in which the court had expressly stated that the APA was not an independent basis of subject matter jurisdiction. Kansas City Power & Light v. McKay, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955); Almour v. Pace, 193 F.2d 699 (D.C. Cir. 1951). These cases were

stemmed in part from the total dearth of legislative history on the subject,[18] and in part from the use of statutory language which was open to several interpretations.[19] Commentators employed a

viewed as the law in the circuit as late as 1973. *See* Select Senate Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973).

An exception to the trend was the Fifth Circuit's decision in Ortego v. Weinberger, 516 F.2d 1005 (5th Cir. 1975), which based its conclusion that the APA was a jurisdictional statute on its understanding of the legislative purpose of the original APA, viewed in light of certain public policy considerations. The court noted the manifest intent of Congress in passing the original APA was to expand the availability and flexibility of review of administrative action. *Ortego* reasoned that if jurisdiction could not be predicated on the APA alone, many plaintiffs would be required to litigate their cases in state courts, which would be less familiar with federal administrative matters than would federal courts. Further, the problems of venue and in personam jurisdiction could pose insurmountable barriers to obtaining relief in such cases. The difficulty with this line of reasoning, as the *Ortego* court recognized, is that the legislative history of the original APA suggests no intention on the part of Congress to create a new basis of federal subject matter jurisdiction. *See* note 18 *infra*.

18. It is generally agreed that the drafters of the APA did not consider the issue. *See, e.g.*, Byse & Fiocca, *supra* note 12, at 327-28; *Federal Administrative Law Developments—1971*, 1972 DUKE L.J. 115, 229; *Nonstatutory Review*, *supra* note 12, at 114. *See also* Nathanson, *Some Comments on the Administrative Procedure Act*, 41 ILL. L. REV. 368, 413-16 (1946).

Only H.R. 117, 79th Cong., 1st Sess. § 9(b) (1945) (Smith-Craven bill), made any specific mention of the courts in which suits to review administrative actions may be brought. The text of this bill may be found in *Hearings on Federal Administrative Procedure Before the House Comm. on the Judiciary*, 79th Cong., 1st Sess. 101, 107-08, *reprinted in* ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, 79th CONGRESS, 1944-46, at 147, 153-54 (1946). There is no evidence in the legislative history of any intent to incorporate any of the provisions of the Smith-Craven bill into the Act as enacted in 1946. *See generally* 92 CONG. REC. 2148, 2150-51 (1946) (remarks of Sen. McCarran), *reprinted in* ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, 79th CONGRESS, 1944-46, at 295, 300-04 (1946).

19. Section 10(b) of the APA provides that where no other statutory review procedure is specified or the procedure is inadequate, review of administrative action may be had in "a court of competent jurisdiction." 5 U.S.C. § 703 (1970). Courts which viewed section 10 as a jurisdictional statute read this language to require proper venue in the reviewing court. Courts holding the contrary view maintained that this language required jurisdiction in the fullest sense of the word. *See* discussion at note 16 *supra*.

There is little case law on the meaning of the term. The Supreme Court has had occasion to consider the question only once, and concluded that a court of "competent jurisdiction" is one which independently has jurisdiction in all respects. Blackburn v. Portland Gold Mining Co., 175 U.S. 571 (1900). Nevertheless, the lower federal courts have not hesitated to construe such statutory language as an affirmative grant of jurisdiction. *See, e.g.*, Hales v. Winn-Dixie Stores, Inc., 500 F.2d 836 (4th Cir. 1974); Houghton v. McDonnell Douglas Corp., 413 F. Supp. 1230 (E.D. Mo. 1976); Wells v. Delta Air Lines, Inc., 398 F. Supp. 384 (E.D. Pa. 1975) (dictum); Stringfellow v. Monsanto Co., 320 F. Supp. 1175 (W.D. Ark. 1970) (Age Discrimination in Employment Act § 7(c), 29 U.S.C. § 626(c) (1970)); Moyer v. Kirkpatrick, 265 F. Supp. 348 (E.D. Pa. 1967), *aff'd mem.*, 387 F.2d 955 (3d Cir. 1968) (by implication); Sander v. Birthright, 172 F. Supp. 895 (S.D. Ind. 1959) (by implication) (Pub. L. No. 85-836, 72 Stat. 1002 (1958) (repealed 1974) (current version in the Pension Reform Act of 1974, 29 U.S.C. § 1132 (1974))).

variety of approaches in an attempt to resolve the dispute, generally arguing in favor of a jurisdictional construction.[20] In light of the Supreme Court's apparent unwillingness to resolve the question, congressional action was called for.

Two courses of action were proposed, both of which would result in the abolition of the amount in controversy requirement in suits for judicial review brought pursuant to the APA. One suggestion was to amend section 10 of the APA to include an explicit grant of jurisdiction to entertain cases brought thereunder.[21] A more general proposal advocated the amendment of the Judicial Code to eliminate the amount in controversy requirement in all suits against the United States, its agencies or officers.[22] In P.L. 94-574, Congress adopted the latter course.

An examination of the legislative history of P.L. 94-574 reveals several points. The first is that the Ninth Circuit was incorrect in concluding that the APA was an independent basis of

20. Professor Davis, in his treatise, argued that the Supreme Court had consistently assumed that Section 510 constituted an independent source of jurisdiction, or alternatively, that the Court construed section 10 as waiving the jurisdictional amount requirement of 28 U.S.C. § 1331 (1970) in cases involving review of agency action. K. DAVIS, *supra* note 12, § 23.02, at 790. The former interpretation was employed by many of the courts which took this position. *See, e.g.*, Bard v. Seamans, 507 F.2d 765 (10th Cir. 1974); Pickus v. United States Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974). But it is generally agreed that the Court had never explicitly held the APA to be either a jurisdictional statute or a waiver of jurisdictional requirements, and, as Judge Friendly observed: "It is impossible to believe that the court would have disposed of so important a question *sub silentio*." Aguayo v. Richardson, 473 F.2d 1090, 1102 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

Professor Byse argued that section 10 should be construed as a grant of jurisdiction in light of the congressional intent, manifested in the Mandamus & Venue Act of 1962, 28 U.S.C. § 1361 (1970), to decentralize nonstatutory judicial review. Hence, a jurisdictional interpretation of section 10 would be justified to further the purposes of the 1962 Act. Byse & Fiocca, *supra* note 12, at 330-31. It is true that Congress eventually agreed that removal of the jurisdictional amount requirement would indeed be consistent with the purposes of the 1962 Act. *See* H.R. REP. No. 94-1656, 94th Cong., 2d Sess. 15-17, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6553, 6568-69. But in doing so, it also noted with disfavor the "very lax" interpretation of the amount in controversy requirement which courts had been adopting. H.R. REP. No. 94-1656, 94th Cong., 2d Sess., 16-17, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6568-69. Professor Byse's reasoning was a valid argument for legislative action, but inappropriate as a call for a statutory interpretation which encouraged courts to ignore the constitutional limitations on their exercise of jurisdiction.

21. *See Pending Proposals to Amend the Federal Administrative Procedure Act: An Analysis of S. 518*, 20 AD. L. REV. 185 (1968).

22. *See* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1969 ANNUAL REPORT 39-40. *See also* Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 225-26 (1948).

subject matter jurisdiction. While Congress made it clear that the jurisdictional amount in controversy requirement was an unwarranted restriction on suits against federal officers and agencies,[23] it also emphasized that it in fact did exist until the amendment of section 1331.[24] Further, if such an interpretation of section 10 were warranted, or even advisable, it seems that the drafters of the 1976 amendments to the APA would have amended section 10 to justify this reading of the section, as opposed to amending section 1331 of Title 28, as they chose to do.

The long delay between the first calls for the elimination of the amount in controversy requirement and the eventual enactment of the change was apparently due more to legislative inertia than to any dispute over the propriety of such a change. The proposal to eliminate the requirement was part of a large group of suggested amendments to the APA[25] and was among the least controversial. The Senate subcommittee solicited comment on all of the proposed amendments, and none of those agencies and individuals responding objected to the elimination of the requirement, insofar as suits against the United States, its agencies or officers were concerned.[26]

23. H.R. REP. No. 94-1656, 94th Cong., 2d Sess. 16-17 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6569; S. REP. No. 94-996, 94th Cong., 2d Sess. 12-15 (1976).

24. H.R. REP. No. 94-1656, 94th Cong., 2d Sess. 16-17 (1976), *reprinted in* [1976] U.S. CONG. CODE & AD NEWS 6569; S. REP. No. 94-996, 94th Cong., 2d Sess. 12-15 (1976).

The Supreme Court adopted the same reasoning after its examination of the 1976 amendment to section 1331 and the accompanying legislative history. "[T]he legislative history suggests that Congress believed that the APA does not confer jurisdiction over administrative action, and, therefore, deletion of the jurisdictional amount from § 1331 was warranted." Califano v. Sanders, 97 S. Ct. 980, 985 n.7 (1977).

25. *See Administrative Procedure Act Amendments of 1976: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary on S. 796, S. 797, S. 798, S. 799, S. 800, S. 1210, S. 1289, S. 2407, S. 2408, S. 2715, S. 2792, S. 3123, S. 3296 and S. 3297*, 94th Cong., 2d Sess. (1976) [hereinafter cited as *1976 Hearings*]. S. 800 was the bill enacted as P.L. 94-574. The other bills included proposed changes in areas such as notice and comment exemptions, de novo judicial review, standing and legislative veto of agency rulemaking. *Id.* at 3-4.

26. *Id.* at 259-732. S. 800, as originally proposed, would have eliminated the amount in controversy requirement in all suits involving federal questions. However, the Department of Justice objected to eliminating the requirement in suits other than those involving review of federal agency action. The Department argued that to completely eliminate the requirement would have an undetermined impact on the caseload of the federal courts, unlike a more limited removal of the requirement in suits for review of agency action. The latter had received much study, as by the Administrative Conference of the United States. *Id.* at 104, 106-07. (Statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel). *See also id.* at 413, 427-28 (Letter from Calvin J. Collier, Chairman, Federal Trade Commission). For a discussion of the impact of the amendment to section 1331 as enacted see text accompanying notes 27-34 *infra*.

B. Impact of the Amendments

Caseload

It is generally agreed that the elimination of the amount in controversy requirement in suits against federal agencies and officers will not result in a significantly greater burden on the lower federal courts.[27] There are several reasons for this fact. First, litigants who could not meet the requirement could, in the past, circumvent it in two ways. A plaintiff could bring his or her claim under the general equity jurisdiction of the United States District Court for the District of Columbia, or possibly cast his or her action in the form of a mandamus proceeding and obtain jurisdiction under section 1361 of Title 28.[28] This anomalous situation has been characterized as "hardly. . . logical or defensible . . . ."[29] Therefore, the potenital increase in litigants is small and would largely stem from a clearly deserving group of those with meritorious claims, but unable to surmount technical or geographical barriers.

Further, as one commentator has noted,[30] a majority of the circuits have been entertaining such claims already, predicating jurisdiction on section 10 of the APA.[31] In these circuits, there is no reason for the amendment to result in a heavier caseload. In all circuits, the amendment to section 1331 should result in a decreased workload in the courts of appeals, as the jurisdictional nature of the APA need no longer be litigated.

Relation to Other Restrictions on Judicial Review of Administrative Action

Section 10 originally provided that all federal agency action was subject to judicial review, with two exceptions. Administrative action is not reviewable if there is evidence of congressional intent to preclude such relief with respect to the agency action in

27. H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 15-16 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 6568-69; S. Rep. No. 94-996, 94th Cong., 2d Sess. 15-16 (1976).

28. H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 15-16 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 6568-69; S. Rep. No. 94-996, 94th Cong. 2d Sess. 15-16 (1976).

29. H.R. Rep. No. 94-1656, 94 Cong., 2d Sess. 16 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 6568; S. Rep. No. 94-996, 94th Cong., 2d Sess. 15 (1976).

30. *1976 Hearings, supra* note 25, at 649 (Letter from Roger Cramton).

31. *See* note 5 *supra*.

question, or if the action is committed by law to the discretion of the agency.[32] The legislative history of the amendment of section 1331 explicitly states that neither this nor any other restriction on the availability of judicial review will be affected by the amendment.[33]

C. Conclusion

The inability of certain individuals to challenge agency action in federal court because of a jurisdictional technicality was "an unfortunate gap in the statutory jurisdiction of the federal courts,"[34] and inconsistent with the spirit of the Constitution and the APA. Both the Constitution and the APA were designed in part to protect the rights of the individual vis-à-vis the government. Such rights are by definition significant and valuable. As Professor Wright has aptly stated: "We do nothing to encourage confidence in our judicial system or in the ability of persons with substantial grievances to obtain redress through lawful processes when we close the courthouse door to those who cannot produce $10,000 as a ticket of admission."[35] With the amendment of section 1331, some such confidence may be generated or restored.

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32. 5 U.S.C. § 701 (1970). *See* Abbot Laboratories v. Gardner, 387 U.S. 136, 139-41 (1967).

33. Other pertinent restrictions on judicial review include lack of standing, ripeness and exhaustion of administrative remedies. H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 15 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 6567; S. Rep. No. 94-996, 94th Cong., 2d Sess. 14 (1976).

The Supreme Court in Califano v. Sanders, 97 S. Ct. 980 (1977) declined to attempt to circumvent Congress' intent. The Court granted certiorari to hear the case prior to Congress' amendment of 28 U.S.C. § 1331 (1976), and was apparently prepared to rule on the jurisdictional nature of section 10 of the APA. The Court of Appeals for the Seventh Circuit has held that section 10 gave the district court jurisdiction to review the denial by the Secretary of Health, Education and Welfare of social security benefits. Sanders v. Weinberger, 522 F.2d 1167 (7th Cir. 1975). The Court stated that the statutory review procedure established by Congress in section 205 of the Social Security Act, 42 U.S.C. § 405 (1970), was intended as the exclusive means of review, and precluded the exercise of the district court's jurisdiction under section 1331. The Court stated that to permit the district court to take jurisdiction under section 10 of the APA would be to overrule Congress' decision to limit the means of review in certain areas of administrative decisionmaking. 97 S. Ct. at 985.

34. Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817, 826 (2d Cir. 1967).

35. *"Sovereign Immunity": Hearings Before the Subcomm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary,* 91st Cong., 2d Sess. 254 (1970).