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# JUDICIAL REVIEW OF FEDERAL EMPLOYEE DISMISSALS AND OTHER ADVERSE ACTIONS

*Richard C. Johnson† and Richard G. Stoll, Jr.††*

The federal government is the United States' largest employer. Even excluding the armed forces, approximately 2.8 million persons are currently employed in the federal civil service.<sup>1</sup> Unlike most private employers who can fire, suspend, demote, and discipline their employees for any reason or for no reason, the federal government as an employer is subject to legal restraints.<sup>2</sup> For example, statutory and regulatory law forbid the government from taking "adverse actions,"<sup>3</sup> such as removal, suspension, or demotion, against most civil service employees except "for such cause as will promote the efficiency of the service."<sup>4</sup> Those employees covered by the Veterans' Preference Act<sup>5</sup> are protected from the imposition of adverse employer actions without minimal procedural safeguards.<sup>6</sup> In addition, procedural safeguards relating to adverse actions have recently been granted to almost all other federal employees in the competitive service through executive order<sup>7</sup> or regulations of the Civil Service Commission.<sup>8</sup> Hence most federal employees today are at least minimally protected both substantively and procedurally against improper or capricious adverse actions.

If a dismissal or other adverse action is upheld after exhaustion of the procedures available in the employing agency and in the Civil Ser-

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<sup>1</sup> BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971, at 388 (1971).

<sup>2</sup> Strenuous efforts have been made to equate federal or state governments with private employers for purposes of defining the employer-employee relationship. *See, e.g., McAuliffe v. Mayor & Bd. of Aldermen*, 155 Mass. 216, 29 N.E. 517 (1892). Such efforts have by and large failed. *See, e.g., Murray v. Vaughn*, 300 F. Supp. 688, 703-04 (D.R.I. 1969).

<sup>3</sup> An "adverse action," as generally defined in the Civil Service regulations, means removal, suspension for more than 30 days, furlough without pay, or reduction in grade or pay. 5 C.F.R. § 752.201(b) (1971).

<sup>4</sup> 5 U.S.C. §§ 7501(a), 7512(a) (1970); 5 C.F.R. § 752.104(a) (1971).

<sup>5</sup> 5 U.S.C. §§ 2108, 7511-12, 7701 (1970).

<sup>6</sup> Such safeguards include 30 days advance written notice of a proposed adverse action, opportunity to reply personally in writing and to furnish supporting affidavits, and a right of appeal to the Civil Service Commission. *See* 5 U.S.C. §§ 7512, 7701 (1970).

<sup>7</sup> Exec. Order No. 10,988, 3 C.F.R. 521, 527 (1959-63 Comp.), issued under authority granted by 5 U.S.C. § 7301 (1970).

<sup>8</sup> *See* 5 C.F.R. § 752 (1971) (adverse actions by agencies); *id.* § 771 (appeals within agencies); *id.* § 772 (appeals to the Civil Service Commission).

vice Commission, a government employee may turn to the federal courts to secure reinstatement and to recover back pay for the period of his alleged wrongful dismissal, demotion, or suspension. However, unlike many other areas of government action in which a person adversely affected can seek judicial review through relatively clear statutory procedures,<sup>9</sup> judicial review of agency adverse actions has not been regulated by a single statute specifically addressed to the problem.

As in other areas of administrative law, the most important check upon capricious or illegal government action is an independent system of judicial review.<sup>10</sup> For a review procedure actually to provide such a beneficial check, especially when the person adversely affected is generally a low- to moderate-income individual, it should offer a reasonably simple, economical, expeditious, and efficient means of obtaining review. Unfortunately, there exists today a somewhat complex, frequently costly, often tediously slow, and certainly inefficient system of judicial review of federal employee adverse actions. The purpose of this article is to point out the exasperating confusion and inefficient duplication of effort that currently exist in the system, and to suggest a simple statutory solution to the problem.

## I

### JUDICIAL REVIEW OF ADVERSE ACTIONS

#### A. *Jurisdiction of the Federal District Courts*

An unusual pattern of judicial review emerges at the very outset when the disgruntled employee discovers, after exhausting his administrative remedies within the employing agency and the Civil Service Commission, that one of his paths of review is to the federal district court, rather than to a court of appeals. The reason is simply that there is no statute conferring jurisdiction on the courts of appeals to hear these cases directly.

The district courts, however, have concluded on several statutory bases that they have jurisdiction to review adverse action decisions of

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<sup>9</sup> *E.g.*, 15 U.S.C. § 45(c) (1970) (appeals of final orders of the FTC must go to a United States Court of Appeals). See note 87 and accompanying text *infra*.

<sup>10</sup> It is a basic proposition that absent a clear mandate of Congress to the contrary, a person whose interests are directly and adversely affected by action on the part of the federal government should have the opportunity to seek judicial review once the pertinent administrative remedies have been exhausted. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967); 5 U.S.C. §§ 701-02, 704 (1970) (judicial review provisions of the Administrative Procedure Act); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 336-53 (1965).

the Civil Service Commission. District courts have variously cited as the bases for jurisdiction the basic federal question and diversity statutes,<sup>11</sup> the Federal Declaratory Judgments Act,<sup>12</sup> the judicial review provisions of the Administrative Procedure Act (APA),<sup>13</sup> and the statutory provisions relating to mandamus and venue for mandamus.<sup>14</sup> Many cases, on the other hand, have failed to discuss the jurisdictional issue at all. For example, an opinion may merely term the litigation "an action for reinstatement"<sup>15</sup> or a "government employee discharge case."<sup>16</sup> In spite of this diversity of opinion, however, federal district courts have uniformly concluded that they do have jurisdiction to review employee adverse actions, and they will direct reinstatement of an employee if they conclude that a dismissal was wrongful.<sup>17</sup>

When the courts do cite authority for their jurisdiction in reviewing employee adverse actions, the mandamus statute<sup>18</sup> and the judicial review provisions of the APA<sup>19</sup> are by far the most common. The mandamus statute currently in effect provides:

The 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.<sup>20</sup>

<sup>11</sup> 28 U.S.C. §§ 1331-32 (1970); *see, e.g.*, *Benson v. United States*, 421 F.2d 515 (9th Cir.), *cert. denied*, 398 U.S. 943 (1970).

<sup>12</sup> 28 U.S.C. §§ 2201-02 (1970); *see, e.g.*, *Camero v. McNamara*, 222 F. Supp. 742 (E.D. Pa. 1963); *see also* *Benson v. United States*, 421 F.2d 515 (9th Cir.), *cert. denied*, 398 U.S. 943 (1970); *Mendez v. Macy*, 292 F. Supp. 802 (S.D.N.Y. 1968); *Murphy v. Kelley*, 259 F. Supp. 914 (D. Mass.), *aff'd mem.*, 368 F.2d 232 (1st Cir. 1966); *cf. DeLong v. Hampton*, 422 F.2d 21 (3d Cir. 1970).

<sup>13</sup> 5 U.S.C. §§ 701-06 (1970); *see, e.g.*, *Charlton v. United States*, 412 F.2d 390 (3d Cir. 1969); *Fagan v. Schroeder*, 284 F.2d 666 (7th Cir. 1960); *Hargett v. Summerfield*, 243 F.2d 29 (D.C. Cir.), *cert. denied*, 353 U.S. 970 (1957); *Mindel v. Civil Serv. Comm'n*, 312 F. Supp. 485 (N.D. Cal. 1970); *Jenkins v. Macy*, 237 F. Supp. 60 (E.D. Mo. 1964), *aff'd*, 357 F.2d 62 (8th Cir. 1966); *May v. Civil Serv. Comm'n*, 230 F. Supp. 659 (W.D. La. 1963); *but see Capolino v. Kelly*, 236 F. Supp. 955 (S.D.N.Y.), *aff'd per curiam*, 339 F.2d 1023 (2d Cir. 1964), *cert. denied*, 382 U.S. 858 (1965).

<sup>14</sup> 28 U.S.C. §§ 1361, 1391(e) (1970); *see, e.g.*, *Taylor v. Civil Serv. Comm'n*, 374 F.2d 466 (9th Cir. 1967); *Capolino v. Kelly*, 236 F. Supp. 955 (S.D.N.Y.), *aff'd per curiam*, 339 F.2d 1023 (2d Cir. 1964), *cert. denied*, 382 U.S. 858 (1965); *Seebach v. Cullen*, 224 F. Supp. 15 (N.D. Cal. 1963), *aff'd*, 338 F.2d 663 (9th Cir. 1964), *cert. denied*, 380 U.S. 972 (1965); *Camero v. McNamara*, 222 F. Supp. 742 (E.D. Pa. 1963); *cf. Fagan v. Schroeder*, 284 F.2d 666 (7th Cir. 1960).

<sup>15</sup> *E.g.*, *Steck v. Connally*, 199 F. Supp. 104, 105 (D.D.C. 1961).

<sup>16</sup> *E.g.*, *Pelicone v. Hodges*, 320 F.2d 754, 755 (D.C. Cir. 1963).

<sup>17</sup> *Mindel v. Civil Serv. Comm'n*, 312 F. Supp. 485 (N.D. Cal. 1970).

<sup>18</sup> 28 U.S.C. § 1361 (1970).

<sup>19</sup> 5 *id.* §§ 701-06.

<sup>20</sup> 28 *id.* § 1361. This section is almost always cited together with a section of the venue statute:

It should be noted that the statute speaks not of a "writ of mandamus," but rather of an "action in the nature of mandamus." It is clear from the cases that courts do not treat the action with the old, restrictive ministerial-discretionary dichotomy in mind, but rather view the scope of review more broadly.<sup>21</sup>

The other statute most frequently cited by district courts as the jurisdictional basis for reinstatement is the Administrative Procedure Act.<sup>22</sup> The broad judicial review provisions of the Act provide that, except where judicial review is precluded by statute or where action is committed by law to agency discretion,<sup>23</sup> "[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."<sup>24</sup> Judicial application of this statute to adverse actions has been inconsistent and confusing. Although many courts have apparently assumed that they have jurisdiction to review adverse actions under the APA, there is still considerable debate in academic circles and in courts as to whether the APA is jurisdictional in and of itself.<sup>25</sup> One court has even squarely held that the APA precludes by its very terms judicial review of employee adverse actions.<sup>26</sup>

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A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

*Id.* § 1391(e).

Both sections were added in 1962. Act of Oct. 5, 1962, Pub. L. No. 87-748, 76 Stat. 744. Together, they allow a plaintiff to seek reinstatement to federal employment in the district in which he resides. This right of action had previously been severely restricted, in that only the District of Columbia District Court had jurisdiction to hear such actions "in the nature of mandamus." Compare *Fagan v. Schroeder*, 284 F.2d 666 (7th Cir. 1960), with *Camero v. McNamara*, 222 F. Supp. 742 (E.D. Pa. 1963), and *Seebach v. Cullen*, 224 F. Supp. 15 (N.D. Cal. 1963), *aff'd*, 338 F.2d 663 (4th Cir. 1964), *cert. denied*, 380 U.S. 972 (1965).

<sup>21</sup> For an excellent treatment of the 1962 "action in the nature of mandamus" legislation in general and its application to judicial review of employee adverse action cases in particular, see *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, 342-44 (1967).

<sup>22</sup> 5 U.S.C. §§ 701-06 (1970).

<sup>23</sup> *Id.* § 701(a).

<sup>24</sup> *Id.* § 702.

<sup>25</sup> See, e.g., *Zimmerman v. United States*, 422 F.2d 326, 330-31 (3d Cir.), *cert. denied*, 399 U.S. 911 (1970); *L. JAFFE, supra* note 10, at 164-65; *Byse & Fiocca, supra* note 20, at 326-31.

<sup>26</sup> *Capolino v. Kelly*, 236 F. Supp. 955 (S.D.N.Y.), *aff'd per curiam*, 339 F.2d 1023 (2d Cir. 1964), *cert. denied*, 382 U.S. 858 (1965). See *Democratic State Cent. Comm. v. Andolsek*, 249 F. Supp. 1009, 1017 (D. Md. 1966).

Another statute frequently invoked by courts in this type of action is the Federal Declaratory Judgments Act.<sup>27</sup> At least one court has correctly pointed out, however, that that statute does not create jurisdiction for federal courts, but only provides a type of remedy once federal jurisdiction is found to exist.<sup>28</sup>

### B. *Scope of Review in the Federal District Courts*

There has been a fair amount of disagreement concerning the scope of district court review. However, although the outer limits of judicial review are as yet only vaguely defined,<sup>29</sup> there is a well estab-

<sup>27</sup> 28 U.S.C. §§ 2201-02 (1970).

<sup>28</sup> *Fagan v. Schroeder*, 284 F.2d 666, 668 (7th Cir. 1960).

The Back Pay Act of 1966 (5 U.S.C. § 5596 (1970)) is similar to the Federal Declaratory Judgments Act in that it is remedial rather than jurisdictional. The Back Pay Act provides in relevant part:

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period . . . .

*Id.* § 5596(b)(1).

Prior to 1964, the federal district courts were prohibited from granting any "fees, salary, or compensation for official services" to employees of the United States in any civil action or claim. (Act of June 25, 1948, ch. 646, § 1346(d)(2), 62 Stat. 933). By the 1964 amendment to the Federal Judicial Code, district courts are prohibited only from hearing claims for "pensions," and hence are empowered to entertain requests for the remedy granted by the Back Pay Act. 28 U.S.C. § 1346(d) (1970).

<sup>29</sup> The Civil Service regulations do not provide an adequate guide as to when employee dismissals will promote the efficiency of the service. Some examples and exclusions are given, but several raise more difficulties than they solve. Some listed grounds for dismissal are (1) criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct; (2) intentional false statement, deception, or fraud in examination or appointment; (3) habitual and excessive use of intoxicating beverages; and (4) reasonable doubt as to loyalty to the United States Government. In addition there is a "catchall" category of "[a]ny legal or other disqualification which makes the individual unfit for the service." 5 C.F.R. §§ 731.201 (b)-(g) (1971). The regulations specifically exclude such grounds as marital status, or political activities (except when required by statute) (*Cf.* 5 U.S.C. § 7324 (1970) (the Hatch Act)); race, sex or national origin; and physical handicap if the duties required may be efficiently performed with such a handicap. 5 C.F.R. § 752.104 (1971). For a general survey and discussion of causes for dismissal that have been relied on by agencies, see Chaturvedi, *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 *Nw. U.L. Rev.* 287, 290-307 (1968).

Until recently, courts would refuse to second guess the Civil Service Commission as to what constitutes "such cause as will promote the efficiency of the service." For example, the District of Columbia Circuit stated in 1949 that "the courts have uniformly held that

lished basis for at least three possible interpretations of the proper scope of review of employee actions: (1) the court may reverse if it finds that the required procedures were not followed by the agency in effecting the dismissal;<sup>30</sup> (2) the court may reverse if it finds either that proper procedures were not followed or that the decision was "arbitrary or capricious";<sup>31</sup> or (3) the court may reverse if it finds

the administrative determination by the employing agency of what constitutes cause for discharge will not be judicially reviewed." *Carter v. Forrestal*, 175 F.2d 364, 365 (D.C. Cir.), *cert. denied*, 338 U.S. 832 (1949) (employee dismissed for continually avoiding payment of lawful debts). This rule was stated with approval as recently as 1966: "[I]t has been established that an administrative determination by the employing agency of what constitutes 'such cause as will promote the efficiency of such service' in cases of removal will not be reviewed judicially." *Murphy v. Kelley*, 259 F. Supp. 914, 917 n.1 (D. Mass.), *aff'd mem.*, 368 F.2d 232 (1st Cir. 1966) (employee dismissed for unauthorized use of government automobile).

However, the District of Columbia Circuit recently reversed a dismissal even though it was effected through proper procedures and was based upon substantial evidence. In *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969), the court ruled that dismissal for an employee's off-duty homosexual conduct would not promote the efficiency of the service, and was therefore "an arbitrary ground for dismissal." *Id.* at 1167. The majority opinion, written by Chief Judge Bazelon, met with a strong dissent by Judge Tamm:

The majority once again violates the judicial cloister erected by the Administrative Procedure Act and rushes out, robes flying, into the forbidden area of administrative discretion to give kind assistance to the subject of what it feels to be highwayman tactics at the hands of the Civil Service Commission. . . .

. . . I have felt constrained to follow this view time and again, [that where procedures are properly complied with a dismissal is not reviewable as to its wisdom or good judgment] . . . although in so doing I remain a *vox clamantis in deserto*.

*Id.* at 1168-69. A recent case has followed the Norton majority and held that a dismissal in which procedures were properly followed and which was based upon substantial evidence should be reversed because there was no basis offered for the dismissal that would in the court's view promote the efficiency of the service. The case involved a postal clerk living out of wedlock with a woman. *Mindel v. Civil Serv. Comm'n*, 312 F. Supp. 485 (N.D. Cal. 1970). Besides holding that the dismissal was arbitrary and capricious (*id.* at 487), *Mindel* held that the dismissal of this employee because of his private sex life violated his ninth amendment right to privacy. *Id.* at 488. *But see Schlegel v. United States*, 416 F.2d 1372 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1039 (1970).

<sup>30</sup> *Benson v. United States*, 421 F.2d 515, 517-18 (9th Cir.), *cert. denied*, 398 U.S. 943 (1970); *Seebach v. Cullen*, 338 F.2d 663, 664 (9th Cir. 1964), *cert. denied*, 380 U.S. 972 (1965); *Fagan v. Schroeder*, 284 F.2d 666, 668 (7th Cir. 1960); *Whiting v. Campbell*, 275 F.2d 905, 906 (5th Cir. 1960); *Chiriaco v. United States*, 235 F. Supp. 850, 852 (N.D. Ala. 1963), *aff'd*, 339 F.2d 588, 590 (5th Cir. 1964). "Judicial review of dismissal from federal employment, a matter of executive agency discretion, is limited to a determination of whether the required procedural steps have been substantially complied with." *Seebach v. Cullen*, *supra* at 664.

<sup>31</sup> *See, Pauley v. United States*, 419 F.2d 1061, 1065 (7th Cir. 1969); *Charlton v. United States*, 412 F.2d 390, 398 (3d Cir. 1969) (concurring opinion); *McTiernan v. Gronouski*, 337 F.2d 31, 34 (2d Cir. 1964); *Murphy v. Kelley*, 259 F. Supp. 914, 917 (D. Mass.), *aff'd mem.*, 368 F.2d 232 (1st Cir. 1966); *Taylor v. Macy*, 252 F. Supp. 1021, 1023 (S.D. Cal. 1966), *aff'd sub nom. Taylor v. Civil Serv. Comm'n*, 374 F.2d 466 (9th Cir. 1967).

The overwhelming weight of authority holds that judicial review of employee

that proper procedures were not followed, that the decision was arbitrary and capricious, or that the decision was not supported by substantial evidence on the record.<sup>32</sup>

Conflicting opinions as to the proper scope of review cannot be explained by the confusion over the basis of jurisdiction.<sup>33</sup> Courts that have assumed jurisdiction on the basis of the Administrative Procedure Act, for example, have not agreed on the proper scope of review.<sup>34</sup> In this regard, it is interesting to compare the majority and the concurring opinions in the recent case of *Charlton v. United States*.<sup>35</sup> There the lower court, in an unreported decision, dismissed an employee's appeal because "there [had] been substantial compliance with all the applicable procedural and statutory requirements."<sup>36</sup> The court concluded, therefore, that "[w]e cannot inquire further into the matter."<sup>37</sup> The Third Circuit reversed, holding that the scope of judicial review section of the APA<sup>38</sup> required that the lower court also determine whether the dismissal was supported by substantial evidence before it could affirm the dismissal.<sup>39</sup> The persuasive concurring opinion of Judge Stahl, on the other hand, noted "the distressing absence of uniformity in the scope of judicial review on employee discharge appeals,"<sup>40</sup>

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disciplinary actions is limited to insuring that required procedures have been substantially complied with and that the action taken was not arbitrary or capricious.

Pauley v. United States, *supra* at 1065.

<sup>32</sup> Toohey v. Nitze, 429 F.2d 1332, 1334 (9th Cir. 1970), *cert. denied*, 400 U.S. 1022 (1971); Charlton v. United States, 412 F.2d 390, 395 (3d Cir. 1969); Vigil v. Post Office Dep't, 406 F.2d 921, 924 (10th Cir. 1969); Dabney v. Freeman, 358 F.2d 533, 535 (D.C. Cir. 1965); Mendez v. Macy, 292 F. Supp. 802, 804 (S.D.N.Y. 1968); Jenkins v. Macy, 237 F. Supp. 60, 62 (E.D. Mo. 1964), *aff'd*, 357 F.2d 62 (8th Cir. 1966) (adequate evidence).

In summary, we are of the opinion that the scope of judicial review of a federal agency's action with respect to the dismissal or discipline of a civil service employee extends to the determination whether procedural requirements have been satisfied in the administrative proceedings, and whether the administrative record establishes that substantial evidence supports the agency's action and that it was not arbitrary, capricious or an abuse of discretion.

Charlton v. United States, *supra* at 395 (footnote omitted).

<sup>33</sup> See notes 11-14 and accompanying text *supra*.

<sup>34</sup> Compare Fagan v. Schroeder, 284 F.2d 666, 668 (7th Cir. 1960) (judicial review of employee adverse actions under the APA is limited to whether there has been compliance with applicable procedures), with Mendez v. Macy, 292 F. Supp. 802, 804 (S.D.N.Y. 1968) (substantial evidence rule must be applied in reviewing employee adverse actions under the APA).

<sup>35</sup> 412 F.2d 390 (3d Cir. 1969) (dismissal of IRS employee for failure to report attempted bribery and failure to care properly for official documents).

<sup>36</sup> *Id.* at 391.

<sup>37</sup> *Id.*

<sup>38</sup> 5 U.S.C. § 706 (1970).

<sup>39</sup> 412 F.2d at 395.

<sup>40</sup> *Id.* at 400 n.8.



and indicated that an "arbitrary and capricious" rather than a "substantial evidence" standard should be considered.<sup>41</sup>

There is one matter upon which all the district and circuit courts apparently agree. It is not the function of the reviewing district court to hold a de novo hearing on the matter. Rather, no matter which of the three interpretations is followed, the court must review the case and affirm or reverse solely on the basis of the administrative record. The type of review that the district courts are thus required to exercise is identical to that of the courts of appeals in the federal system.

### C. *Jurisdiction and Scope of Review of the Court of Claims*

The aggrieved federal employee, with the Civil Service Commission's adverse decision in hand, does not have to go to the federal district court, but may proceed instead to the Court of Claims. With this two-track approach a primary goal of a workable system of judicial review—simplicity—has been lost.

The statute that authorizes the Court of Claims to hear suits by dissatisfied federal employees<sup>42</sup> states in pertinent part:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract

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<sup>41</sup> Judge Stahl's conclusion seems correct if one accepts the APA as the basis of jurisdiction, for 5 U.S.C. § 706(2)(E) (1970) limits the application of the substantial evidence standard to cases covered by sections 556-57 of the Act, which specifically exclude matters involving the "selection and tenure" of employees. *Id.* §§ 554(a)(2), 556-57. Section 706 provides in relevant part:

The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and  
(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute . . . .

It is clear that the substantial evidence test applies only in two situations: (1) in cases subject to *id.* §§ 556-57; and (2) when agency hearings are otherwise required by statute. By virtue of *id.* § 554(a)(2), employee adverse action cases are not subject to sections 556 and 557, so the first criterion cannot be met; and, although employees are entitled to a hearing by virtue of Civil Service Commission regulations (5 C.F.R. § 771.208(a) (1971)), no statute requires a hearing, so the second criterion cannot be met either. See 5 U.S.C. §§ 7501, 7512 (1970).

<sup>42</sup> 28 U.S.C. § 1491 (1970), as amended, Act of July 23, 1970, Pub. L. No. 91-350, § 1(b), 84 Stat. 449.

with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.<sup>43</sup>

This statute and its predecessors have been held applicable to claims arising out of federal employment since the 1871 case of *Patton v. United States*,<sup>44</sup> where the Court of Claims stated:

All questions of salary are questions of contract. . . . [T]he Government contracts to pay the officer his salary, and, failing to do so, is liable to be sued therefor . . . .

We hold, therefore, that this court has jurisdiction of this case.<sup>45</sup>

Relief provided by the Court of Claims is limited to money judgments.<sup>46</sup> Nevertheless, its jurisdiction to hear cases of this nature and either to award compensation for services performed or to award back pay to persons wrongfully discharged,<sup>47</sup> necessarily carries with it the power to determine whether an "adverse action" was wrongful or not. Thus the court has recently affirmed that it can "correct" what it finds to be a wrongful adverse action even though it does not have authority to direct reinstatement of an employee.<sup>48</sup> And as a practical matter, a money judgment in favor of an employee often has the effect of accomplishing reinstatement, for the government is not likely to continue paying one who is not working.<sup>49</sup> Except in the matter of remedies, then, the jurisdiction of the Court of Claims to review Civil Service Commission adverse actions is presently coextensive with that of the district courts.

As with both district court and court of appeals decisions, Court

<sup>43</sup> *Id.*

<sup>44</sup> 7 Ct. Cl. 362 (1871).

<sup>45</sup> *Id.* at 371. See *United States v. Harmon*, 43 F. 560, 563-65 (C.C. Me. 1890), *aff'd*, 147 U.S. 268, 272-76 (1893).

<sup>46</sup> *Gaines v. United States*, 131 F. Supp. 925, 930 (Ct. Cl. 1955).

<sup>47</sup> 5 U.S.C. § 5596 (1970); see note 27 *supra*.

<sup>48</sup> *Ainsworth v. United States*, 399 F.2d 176 (Ct. Cl. 1968).

The Court of Claims in *Ainsworth*, quoting a dissenting opinion from an earlier Court of Claims case, stated:

It is true that it is not within the power of this court to order the Secretary of the Treasury to reinstate the plaintiff. However, the practical effect of our judgment is to put the plaintiff back on the payroll of the United States . . . . He gets a judgment now for the pay he would have earned to date, and the next year he can bring another suit for his pay for that year, and so on until he is formally reinstated and discharged according to law.

We find, therefore, that this court is a "proper authority" . . . which corrects an unjustified personnel action by deciding that a separation was ineffective and awarding the injured employee back pay.

*Id.* at 181, quoting *McGuire v. United States*, 145 Ct. Cl. 17, 24-25 (1959) (dissenting opinion).

<sup>49</sup> See 399 F.2d at 181.

of Claims decisions on the scope of review of adverse actions have been inconsistent.<sup>50</sup> The different standards of review applied by the court fall generally within the three interpretations set forth earlier<sup>51</sup> and do not require separate discussion and analysis. Also, as the other federal courts, the Court of Claims has been consistent in treating its scope of review as limited, and will not hold an adverse action to have been wrongful merely because the court would have drawn different conclusions from the facts on the record.<sup>52</sup>

One anomalous practice followed by the court, however, is disturbing in its implications for the healthy development of the administrative process in this field. If it feels that the record before it was not adequately developed by the employing agency or the Civil Service Commission, the court will often remand the matter to one of its own trial commissioners and direct him to hold a limited fact-finding hearing.<sup>53</sup> For example, in *Camero v. United States*,<sup>54</sup> the court noted that although there were valid grounds and substantial evidence to support a dismissal, there was a serious question as to whether the government had violated its own regulations in securing the dismissal, thereby possibly rendering it procedurally defective. Because the court felt that the administrative record and the pleadings had not adequately explored this issue, the matter was remanded to a trial commissioner for a hearing on the facts. Under similar circumstances a district court or court of appeals would properly have sent the case back to the Civil Service Commission.<sup>55</sup>

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<sup>50</sup> Compare *Jacobowitz v. United States*, 424 F.2d 555, 561 (Ct. Cl. 1970); *Haynes v. United States*, 418 F.2d 1380, 1381 (Ct. Cl. 1969); *Camero v. United States*, 345 F.2d 798, (Ct. Cl. 1965) (all applying the substantial evidence test), with *Armstrong v. United States*, 405 F.2d 1275, (Ct. Cl.), cert. denied, 395 U.S. 934 (1969); *Liotta v. United States*, 174 Ct. Cl. 91, 95 (1966); *Sakran v. United States*, 176 Ct. Cl. 831, 838 (1966) (all applying the arbitrary and capricious test), and *Culligan v. United States*, 107 Ct. Cl. 222, 223 (1946), cert. denied, 330 U.S. 848 (1947) (applying the proper procedures test).

As noted by Judge Stahl of the Third Circuit Court of Appeals, two decisions handed down the same day by the Court of Claims applied different standards of review. *Charlton v. United States*, 412 F.2d 390, 399-400 n.8 (3d Cir. 1969) (concurring opinion).

<sup>51</sup> See notes 30-32 and accompanying text *supra*.

<sup>52</sup> *Haynes v. United States*, 418 F.2d 1380, 1384-85 (Ct. Cl. 1969).

<sup>53</sup> E.g., *Camero v. United States*, 345 F.2d 798, 806 (Ct. Cl. 1965); *Menick v. United States*, 184 Ct. Cl. 756, 758 (1968); *Harrington v. United States*, 174 Ct. Cl. 1110, 1116-18 (1966).

<sup>54</sup> 345 F.2d 798, 806 (Ct. Cl. 1965).

<sup>55</sup> *Goodman v. United States*, 424 F.2d 914, 915 (D.C. Cir. 1970); *Dabney v. Freeman*, 358 F.2d 533 (D.C. Cir. 1965). In *Dabney*, the employee argued that she should have been granted a trial on the factual issues in the district court. The court of appeals stated, however:

There can, we think, be little doubt that Congress intended personnel grievances of this kind to be heard and determined in the first instance by the Commission

The Court of Claims approach places the Civil Service Commission on an unequal footing with the other major federal administrative agencies. Under review statutes for such major agencies as the Federal Trade Commission, the Securities and Exchange Commission, and the Civil Aeronautics Board, the federal courts of appeals are required to remand factual questions to the agencies themselves rather than to the district courts.<sup>56</sup> Application of a different rule by the Court of Claims seriously detracts from the stature of the Civil Service Commission in the federal administrative scheme.

## II

### MODIFICATION OF THE EXISTING FRAMEWORK FOR JUDICIAL REVIEW

It is time that serious attention be directed towards the persistent criticism<sup>57</sup> of district court and Court of Claims involvement in employee discharge cases. Two-step review is a needless expenditure of

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and not by the District Court. The latter has enough to do without displacing the Civil Service Commission in this area, at least without a clearer mandate from Congress than it now has.

358 F.2d at 535.

<sup>56</sup> E.g., 15 U.S.C. § 45(c) (1970) (FTC).

<sup>57</sup> This criticism has been most frequently and cogently voiced by Judge McGowan of the District of Columbia Circuit Court of Appeals. In *Connelly v. Nitze*, 401 F.2d 416 (D.C. Cir. 1968), he stated:

We have pointed out before that these employee discharge cases, although in form original actions in the District Court, are in reality agency review proceedings and are normally treated as such by all parties. . . . This creates difficulties, as here, in our ability to give, effectively and expeditiously, the most appropriate kind of relief.

*Id.* at 417 n.1.

In *Scott v. Macy*, 402 F.2d 644 (D.C. Cir. 1968), he noted:

Why there should be a double review of this character—once in the District Court and once here—is a highly pertinent question, particularly in these days of over-crowded dockets in all courts. To the extent the Commission aspires to the status of an independent agency comparable to those whose decisions are reviewed directly by the federal courts of appeals, it would seem in the interest of both it and the federal judicial system to bring this matter to the attention of the Congress.

*Id.* at 647 n.6.

In 1969, two more cases stimulated similar remarks by Judge McGowan addressed squarely to Congress and the Commission: "There appears to be no reason why two courts should be required to review, by reference solely to the administrative record, the Commission's determinations." *Goldwasser v. Brown*, 417 F.2d 1169, 1171 n.1 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

This would appear to be another of those cases where the interposition of the District Court in the judicial review process serves no visible purpose . . . .

We start at the same point as we do in the cases where Congress has made provision for direct review by the Courts of Appeals of federal agency action. . . .

*Adams v. Laird*, 420 F.2d 230, 234 n.2 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

time and money for all concerned. It is particularly needless since the district court merely acts in a reviewing capacity and is not required, or even permitted,<sup>58</sup> to utilize its fact-finding capability. Instead, the Civil Service Commission's decisions on adverse actions should be treated as final orders of other major administrative agencies are treated, and should be appealable directly to a federal court of appeals.

#### A. *Administrative Fact-Finding Procedures*

A system by which agency decisions are appealable directly to a court of appeals presupposes that the agency's procedures afford adverse parties an opportunity to create an adequate administrative record, so that the court may decide on the basis of such a record whether the agency's decision was effected through improper procedures, was arbitrary and capricious, or was not based upon substantial evidence. In fact, adverse action procedures are compatible with a system of direct appellate court review. Federal courts have consistently, if implicitly, indicated that the administrative procedures currently available to employees in adverse action cases either are or can be made adequate to create a usable record for judicial review. They have repeatedly held that district courts may not hold *de novo* fact-finding proceedings, but instead must either perform their review on the administrative record before them<sup>59</sup> or remand the proceeding for the development of additional facts at the administrative level.

Occasionally, courts of appeals have directed that an administrative remedy be created so that the facts can be developed. For example, in *Holden v. Finch*,<sup>60</sup> the District of Columbia Circuit Court of Appeals instructed the Civil Service Commission to provide an administrative process, including an evidentiary hearing if necessary, in spite of the Commission's abnegation of its own jurisdiction. In *Holden*, an HEW employee was discharged during her probationary period and hence was not covered by the adverse action regulations. Alleging that her dismissal was motivated by political considerations and the agency's desire to suppress her first amendment rights, the employee sought and was denied review by the Civil Service Commission. She brought an action against the agency and the Commission, which was dismissed by the district court.<sup>61</sup> The Court of Appeals reversed, stating:

Surely it is one of the central purposes of the Civil Service Commis-

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<sup>58</sup> See text accompanying note 41 *supra*; note 59 and accompanying text *infra*.

<sup>59</sup> See, e.g., *United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953).

<sup>60</sup> 446 F.2d 1311 (D.C. Cir. 1971).

<sup>61</sup> The unreported dismissal of the action by the district court was noted by the court of appeals. *Id.* at 1312.

sion to inquire, by evidentiary hearing if necessary, into this tangle of assertion and counter-assertion, and to make a fair and rational judgment on the question of whether, as the Government insists, appellant subordinated her public duties to her personal prepossessions, or whether, as appellant alleges, her performance of the one was unimpaired by her indulgence of the other.<sup>62</sup>

In the majority of adverse action cases, however, administrative procedures are already available, and an adequate record for purposes of judicial review can be developed. These administrative procedures consist of a combination of steps taken first by the employing agency and later by the Civil Service Commission. The involvement of the employing agency in the adjudication of its rights and responsibilities vis-à-vis its own employees awakens an initial distrust. Substantial safeguards exist, however, a number of which were only recently promulgated by the Civil Service Commission.<sup>63</sup> While it cannot be said that an employee faced with an adverse action has all the procedural rights of a defendant in a criminal trial, the procedures afforded are generally adequate to assure that no employee will be subject to an adverse action without full development of the facts involved.

The regulations provide that an agency proposing to take an adverse action must afford the employee a hearing before a neutral examiner whose qualifications are approved by the Commission.<sup>64</sup> This hearing may take place at the agency's discretion, either before the adverse action is taken or afterwards, as part of the employee's appeal within the agency.<sup>65</sup> Whether the hearing is held at the initial adverse action stage, or as part of the agency's own appeal process, before taking action the agency must give the employee at least thirty days written notice, setting forth in detail the reasons for the proposed action.<sup>66</sup> Moreover, the agency must assemble and make available to the employee all material upon which it relies to support the reasons in the notice, including statements of witnesses, documents, and other reports.<sup>67</sup>

In cases where the agency chooses not to hold a hearing before the initial adverse action, the employee is allowed to answer the charges either orally or in writing.<sup>68</sup> The agency then makes its initial decision. It must notify the employee of the adverse decision at the earliest

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<sup>62</sup> 446 F.2d at 1316.

<sup>63</sup> These regulations became effective April 1, 1971. 5 C.F.R. §§ 752.101-772.308 (1971).

<sup>64</sup> *Id.* § 771.208(a).

<sup>65</sup> *Id.* § 771.209.

<sup>66</sup> *Id.* § 752.202(a)(1).

<sup>67</sup> *Id.* § 752.202(a)(2).

<sup>68</sup> *Id.* § 752.202(b).

practicable date, stating specifically which of the reasons in the initial notice were sustained and fully informing him of his right to appeal.<sup>69</sup>

An employee who has been subject to an adverse action has the right to appeal either through his agency's appellate procedure, or to the Civil Service Commission, or both.<sup>70</sup> An "appeal file" must be kept by the agency, containing all matters relevant to the adverse action, including a verbatim transcript of the hearing. Within the employing agency, if there was a hearing prior to the initial adverse action, the reviewing official is required to make the appellate decision on the basis of that file, including the verbatim transcript of the hearing.<sup>71</sup> The reviewing official must be at a higher administrative level than the person who took the original adverse action, with one exception that is somewhat jarring: when the head of the agency makes the original decision, he also decides the appeal.<sup>72</sup>

At whatever stage the agency chooses to hold a hearing, the employee is entitled to be represented by a person of his choice.<sup>73</sup> The hearing is conducted by an examiner meeting standards prescribed by the Commission and not occupying a position under the jurisdiction of the official who proposed the adverse action or who will make the decision based upon the examiner's recommendations, unless the official is the head of the agency.<sup>74</sup>

At the hearing, the rules of evidence need not be strictly applied, but the examiner must give the parties an opportunity to cross-examine witnesses.<sup>75</sup> Both parties are entitled to produce witnesses. After considering a request by either of the parties the examiner may require the agency to make its employees available for examination.<sup>76</sup> The hearing must be transcribed verbatim.<sup>77</sup> The examiner must make a written report of his findings and recommendations, and specify which of the charges reviewed have been sustained and which have not. In this report he must also draw conclusions from his findings.<sup>78</sup>

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<sup>69</sup> *Id.* § 752.202(f).

<sup>70</sup> However, if his agency has more than one appellate level and he appeals to at least the second level, he forfeits his right to appeal to the Commission. If he appeals first to the Commission after the adverse decision, he loses his right to appeal within the agency. He may appeal to his agency's first appellate level, and then the Commission. *See id.* § 771.222(b) (1971).

<sup>71</sup> *Id.* §§ 771.204, .219(a).

<sup>72</sup> *Id.* § 771.218(a).

<sup>73</sup> *Id.* § 771.208(a).

<sup>74</sup> *Id.* §§ 771.209(a), (b).

<sup>75</sup> *Id.* §§ 771.210(c), (f).

<sup>76</sup> *Id.* §§ 771.211(a), (b).

<sup>77</sup> *Id.* § 771.212(a).

<sup>78</sup> *Id.* § 771.213(a).

When the hearing follows the original adverse action and takes place as part of the appeal, the reviewing official making the appellate decision must accept the examiner's recommendations, except: (1) when the head of the agency makes the decision, the reviewing official need only "consider" the recommendations; (2) when the reviewing official chooses to impose a less severe action than the examiner recommended, he is free to do so; or (3) when the reviewing official determines that the recommendations are unacceptable, he may state specifically the basis for such a determination and transmit the appeal file to a higher agency authority for decision.<sup>79</sup>

If the agency has a second appellate level, the employee may appeal again within the agency, but if he does so he loses his right to appeal to the Civil Service Commission.<sup>80</sup> Conversely, he may appeal to the Commission either immediately after the original adverse action is taken, or after he has received an adverse decision from his agency's first appellate level.<sup>81</sup>

There is a right to another hearing before the Appeals Examining Office of the Civil Service Commission, which exercises initial jurisdiction over the appeal. The rules regarding this hearing are essentially the same as those for the hearing granted within the agency, except that testimony may be summarized rather than recorded verbatim. Either party may submit written exceptions to the summary, which becomes part of the appeal file. The Appeals Examining Office must make a written decision in which it must list all of its findings and recommendations, and state the reasons for the conclusions reached.<sup>82</sup> The employee has a further right of appeal on the record, without an evidentiary hearing, to the Commission's Board of Appeals and Review.<sup>83</sup> Finally, the members of the Commission may at their discretion reopen and reconsider the otherwise final decision of the Board.<sup>84</sup>

Although these agency and Civil Service Commission procedures afford an employee many safeguards, there is some room for improvement. For example, nowhere do the regulations explicitly state who has the burden of proof or the burden of coming forward with evidence at any of the proceedings, although the cases discussing "substantial evi-

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<sup>79</sup> *Id.* § 771.219.

<sup>80</sup> See note 70 *supra*. Foreclosing Commission review on this basis is of doubtful legality. 5 U.S.C. § 7701 (1970) affords "preference eligible employee[s]" the right to appeal to the Commission from an adverse action, without qualification of any kind. There is no decisional authority on this point.

<sup>81</sup> 5 C.F.R. §§ 752.203, .204, 771.222 (1971).

<sup>82</sup> *Id.* §§ 772.305, .306.

<sup>83</sup> *Id.* §§ 772.307(a), (b).

<sup>84</sup> *Id.* § 772.308.



dence" make it clear that the burden of proving grounds for adverse action rests on the government.<sup>85</sup>

Nevertheless, before an employee has exhausted his administrative remedies, he will have had the right to at least one and possibly two hearings conducted by a neutral examiner of an agency of the government, at which he will have been able to offer proof and cross-examine adverse witnesses. And before the adverse action can be initially taken or upheld against the employee, the allegations and findings must be specifically articulated and the reasons for any conclusions must be explained. At least this much can be said about the procedures: by the time decision is ready for judicial review, there is fair assurance that there will be a full record of specific allegations, employee responses, findings of fact, procedures followed, hearing transcripts, recommended action, and action taken. There is thus little cause to believe that a reviewing court will not be able adequately to determine whether a decision was based upon substantial evidence, whether it was arbitrary or capricious, or whether required procedures were followed in effecting the adverse action.

#### B. *Direct Court of Appeals Review*

A statute providing for direct appeal of adverse action decisions to the courts of appeals would save the time and expense of litigants, and could also provide the ancillary benefit of settling the confusion that exists over the basis of court jurisdiction in this area and of articulating the permissible scope of judicial review.<sup>86</sup> A further ancillary but decidedly beneficial effect would be the enhancement of the status of the Civil Service Commission in the federal administrative scheme, for nearly all major agencies' decisions are now directly reviewable in a court of appeals.<sup>87</sup> The only major agency exception is the Interstate Commerce Commission, whose orders are reviewable in a district court.<sup>88</sup> Some decisions of the smaller agencies, such as the Social Security Administration, are also required by statute to be reviewed in a district court.<sup>89</sup>

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<sup>85</sup> See, e.g., *Meehan v. Macy*, 392 F.2d 822, 829, 837 (D.C. Cir.), *modified and vacated*, 425 F.2d 469 (D.C. Cir. 1968); *Finfer v. Caplin*, 344 F.2d 38, 41 (2d Cir.), *cert. denied*, 382 U.S. 883 (1965); *Pelicone v. Hodges*, 320 F.2d 754, 756 (D.C. Cir. 1963).

<sup>86</sup> See notes 11-32 and accompanying text *supra*.

<sup>87</sup> See 15 U.S.C. § 45(c) (1970) (FTC); *id.* §§ 77i, 78y(a) (SEC); 16 *id.* § 8251(b) (FPC); 28 *id.* § 2342 (FCC orders other than licensing decisions, Federal Maritime Comm'n (FMC), AEC, Sec'y of Agriculture); 29 *id.* § 160(f) (NLRB); 47 *id.* § 402(b) (FCC licensing orders); 49 *id.* § 1486(a) (CAB & FAA).

<sup>88</sup> 28 *id.* §§ 1336, 1398, 2321-25.

<sup>89</sup> See 33 *id.* § 921(b) (compensation cases under Longshoremen's and Harbor

Several common elements can be discerned in the statutes providing for direct agency review by a court of appeals. Most provide that a person adversely affected or aggrieved by final agency action may appeal to the court of appeals located either where a certain transaction occurred, where the person affected resides or does business, or in the District of Columbia. Several statutes provide explicitly that once jurisdiction is obtained, it shall be exclusive.<sup>90</sup> Moreover, most provide that the court shall apply the substantial evidence test as part of the scope of review.<sup>91</sup> Finally, nearly every statute provides that when the court finds the record deficient, it must remand the matter to the agency for further proceedings.<sup>92</sup>

Such statutes could be easily adapted to apply to adverse action appeals. As a first step, the statutory right of appeal of adverse agency actions to the Civil Service Commission should be expanded to include all federal nonmilitary, competitive service employees who have completed a probationary period.<sup>93</sup> This should evoke little or no

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Worker's Act); 42 *id.* § 405(g) (decisions under the Social Security Act). Commenting on this situation, Professor Jaffe has stated "The obvious theory of a district court venue is that the typical plaintiff is a person of modest means." L. JAFFE, *supra* note 10, at 158. However, this justification seems misplaced. It is, indeed, rather clear from the adverse action cases that many district court decisions eventually end up in the courts of appeals. *See* notes 11-14 and accompanying text *supra*. Certainly, this is more expensive than seeking review directly and solely in a court of appeals, and is particularly regrettable when what is at issue is nothing less than a biweekly paycheck. In addition, seeking direct court of appeals review should cost no more than seeking initial review by the district court, and should be no more time-consuming.

Another statute providing for judicial review in a district court is 5 U.S.C. §§ 1501-08 (1970). The substantive provisions of this statute prohibit certain political activity by state and local government employees whose employment is connected with federally-funded activities. The Civil Service Commission has the duty to investigate alleged violations and to determine by a hearing whether the employee should be removed from his office. The federal funding may be stopped if the employee is not removed after an affirmative finding. Judicial review is entrusted to the district court by section 1508.

<sup>90</sup> *E.g.*, 15 U.S.C. § 45(d) (1970) (FTC); *id.* § 77i, 78y(a) (SEC); 16 *id.* § 825l(b) (FPC); 28 *id.* § 2342 (FCC orders other than licensing decisions, FMC, AEC, Sec'y of Agriculture).

<sup>91</sup> *E.g.*, 15 *id.* § 78y(a) (SEC); 16 *id.* § 825l(b) (FPC); 29 *id.* § 160(f) (NLRB); 49 *id.* § 1486(e) (CAB and FAA).

<sup>92</sup> 15 *id.* § 45(c) (FTC); *id.* § 77i, 78y(a) (SEC); 16 *id.* § 825l(b) (FPC); 49 *id.* § 1486(d) (CAB and FAA).

One review statute providing a slight variation is the Judicial Review Act of 1950, as amended, 28 *id.* §§ 2341-51, which establishes court of appeals review for certain decisions of the FCC, AEC, FMC, and the Secretary of Agriculture. Section 2347 provides that when the agency has not held a hearing and the court determines that although a hearing was not required by law there is a material issue of fact, it must transfer the proceedings to a district court for a factual hearing. *Id.* § 2347(b)(3). This provision has been severely criticized. *See* Comment, *Review of Administrative Rulings: The Anomaly of District Court Fact-Finding*, 19 CATH. U.L. REV. 215 (1969).

<sup>93</sup> 5 U.S.C. § 7701 (1970).

opposition, since as a result of executive order<sup>94</sup> nonveteran employees have already been given all the rights of veterans in the adverse action area, including the right to appeal to the Commission.

With federal employees, veteran and nonveteran alike, afforded the statutory right to appeal adverse actions to the Commission, a judicial review statute could be formulated. The provisions of such a statute might include the following language:

Any employee aggrieved by a final decision of the Commission pursuant to section 7701 of Title 5 may obtain review of such decision exclusively in the Court of Appeals of the United States within any circuit wherein such person resides, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after entry of such decision, a written petition praying that the decision of the Commission be reversed or modified in whole or in part. Upon the filing of such petition such court shall have exclusive jurisdiction to affirm, modify, or reverse such decision, in whole or in part. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.<sup>95</sup> If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The judgment and decree of the court, affirming, modifying, enforcing, or setting aside, in whole or in part, any such decision of the Commission, shall be final, subject to review by the Supreme Court of the United

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<sup>94</sup> Exec. Order No. 10,988, 3 C.F.R. 521, 527 (1959-63 Comp.).

<sup>95</sup> The proposed statute would make clear that the "substantial evidence" test constitutes part of the courts' scope of review of the Commission's findings of fact. The other two tests discussed earlier (notes 30-31 and accompanying text *supra*), which cover matters other than review of the findings of fact would also appear applicable on the basis of the APA's scope of review section (5 U.S.C. § 706 (1970)). See note 41 *supra*. Even if section 706 were determined not to be applicable to adverse action appeals, however, courts could still reverse the Commission if they found its action to be arbitrary and capricious or procedurally defective. Not only is there a well established, existing body of decisional law for each of these review standards in adverse action appeals (notes 30-31 *supra*), but additional standards were applied in analogous areas of administrative law prior to the 1946 enactment of the APA, although the judicial review statutes involved referred only to "substantial evidence." See, e.g., *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 380 (1945) (purpose of judicial review is to guard against "arbitrary action" by the Board); *Shawmut Ass'n v. SEC*, 146 F.2d 791, 796 (1st Cir. 1945) (SEC economic opinion not "capricious to reasonable men"); *Pennsylvania Power & Light Co. v. FPC*, 139 F.2d 445, 451 (3d Cir. 1943), *cert. denied*, 321 U.S. 798 (1944) ("arbitrary and capricious" test applied); *Berkshire Knitting Mills v. NLRB*, 139 F.2d 134, 136-38 (3d Cir. 1943), *cert. denied*, 322 U.S. 747 (1944) (inquiry into procedural adequacy of the Board hearing).

States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

No further statutory revisions would be necessary to make the jurisdiction exclusive. As provided in the judicial review section of the Administrative Procedure Act,<sup>96</sup> the proper form of review "is the special statutory review proceeding relevant to the subject matter in a court specified by statute . . ."<sup>97</sup> It is only "in the absence or inadequacy" of such a jurisdictional statute that the form of review should then be "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."<sup>98</sup> Presumably, such an "applicable form of legal action" includes the mandamus provision,<sup>99</sup> which has frequently been called upon in the past to serve as a basis for district court jurisdiction in employee adverse action reviews.<sup>100</sup> Therefore, with the enactment of such a statute, the mandamus action would no longer be a permissible method of seeking judicial review in employee adverse actions.

### C. *The Role of the Court of Claims and the District Courts*

One beneficial effect of vesting exclusive power of judicial review in courts of appeals would be to diminish substantially the role of the Court of Claims and the district courts in adverse action cases. It should be noted, however, that while the suggested statute would vest in the courts of appeals exclusive jurisdiction to decide the legality of adverse actions, litigable issues would often remain for the Court of Claims or a district court. Several issues could arise when, for example, after an employee is reinstated pursuant to a court of appeals decision, he and the government disagree as to the amount of back pay the employee is owed. Normally an employee recovers only an amount equal to what he would have received during the period in question if the adverse action had not occurred.<sup>101</sup> Accordingly, a crucial issue often arises as to whether the employee was ready, willing, and able to work during the period in question.<sup>102</sup> Also, there must be deducted from the amount

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<sup>96</sup> 5 U.S.C. §§ 701-06 (1970).

<sup>97</sup> *Id.* § 703.

<sup>98</sup> *Id.*

<sup>99</sup> 28 *id.* § 1361.

<sup>100</sup> See notes 17-20 and accompanying text *supra*.

<sup>101</sup> 5 U.S.C. § 5596(b)(1) (1970).

<sup>102</sup> See, e.g., *Graves v. United States*, 176 Ct. Cl. 68, 77 (1966) (recovery denied where showing that claimant was receiving disability compensation during period for which he claimed back pay precluded finding that he was able to return to work during that period); *Armand v. United States*, 136 Ct. Cl. 339, 343 (1956) (to the same effect where employee

recoverable any amount actually earned by the employee through other employment during the period in question,<sup>103</sup> a requirement which may call for judicial findings. In addition, disputes may arise as to the proper computation of back pay with regard to within-grade and statutory pay increases occurring during the period of the employee's absence. Since the regulations governing adverse actions do not provide for adjudication of these issues, they are proper for Court of Claims or district court determination under the Back Pay Act.<sup>104</sup>

The proposed legislation would not foreclose the Court of Claims or the federal district courts from hearing and deciding *de novo* any claims for money judgments by employees who are neither afforded the full procedural protection of the Civil Service Commission regulations nor given the statutory right to appeal an adverse action of the Civil Service Commission. Legislative or judicial branch employees not occupying a position in the competitive service, temporary employees, employees whose appointment must be confirmed by the Senate, and employees serving in a probationary capacity, among others, would thus be free to bring original actions in the Court of Claims or in district courts.

#### CONCLUSION

The present scheme of judicial review for federal employees aggrieved by an adverse action decision is unnecessarily costly and inefficient. Delays can be inordinate.<sup>105</sup> The more sensible arrangement suggested by this article would provide direct and exclusive judicial review in the courts of appeals, would enhance the stature of the Civil Service Commission, and would remove the confusion over the bases of jurisdiction and scope of review in this area.

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had been committed to a mental hospital, then released and placed on a disability pension during the period in question).

<sup>103</sup> 5 U.S.C. § 5596(b)(1) (1970).

<sup>104</sup> See note 48 *supra*.

<sup>105</sup> In *Holden v. Finch*, 446 F.2d 1311 (D.C. Cir. 1971), the Civil Service Commission denied jurisdiction in August 1966. The decision in the court of appeals was rendered in May 1971. Even assuming as much as a one-year delay in filing suit in the district court, the employee waited almost four years for a decision.