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Federal Jurisdiction Over Federal Welfare Claims

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FEDERAL JURISDICTION OVER FEDERAL WELFARE CLAIMS

At the present time the most significant efforts toward welfare reform are proceeding in two federal forums, the federal courts and the Congress. Since 1968 the greatest strides in the assertion of both constitutional and statutory welfare rights have been taken in the federal courts.[1] Congressional efforts toward reform have been directed at federalization of the assistance programs.[2] On January 1, 1974, all the adult welfare categories were combined into the single federal Supplemental Security Income (SSI) program;[3] a national minimum benefit level was established;[4] and the troublesome grant-in-aid structure was for the most part eliminated.[5]

There is, however, an unforeseen and unfortunate by-product of this federalizing reform. As welfare programs become more federalized, there is less jurisdictional ground for promptly challenging illegal agency policies in federal courts. In the past, most welfare litigation[6] was brought in the context of section 1983 civil rights claims.[7] The jurisdictional counterpart to section 1983, sec-

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[1] *See, e.g.,* United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (congressional definition of food-stamp household as including related persons only violates due process); Townsend v. Swank, 404 U.S. 282 (1971) (Illinois's attempt to exclude otherwise eligible dependent college students from AFDC eligibility violates Social Security Act); Goldberg v. Kelly, 397 U.S. 254 (1970) (due process mandates notice and prior hearing before welfare benefits are terminated); King v. Smith, 392 U.S. 309 (1968) (Alabama regulation denying AFDC to families with substitute father violates Social Security Act).

[2] *See, e.g.,* Note, *1974 Developments in Welfare Law—The Supplemental Security Income Program,* 60 CORNELL L. REV. 825, 827-28 (1975); H.R. 16311, 91st Cong., 2d Sess. (1970) (Family Assistance Plan). Although never enacted, FAP is discussed at length in R. LEVY, T. LEWIS & P. MARTIN, SOCIAL WELFARE AND THE INDIVIDUAL 753-61 (1971).

[3] 42 U.S.C. §§ 1381-83 (Supp. III, 1973). *See generally, 1974 Developments in Welfare Law—The Supplemental Security Income Program,* 60 CORNELL L. REV. 825 (1975); *Developments in Welfare Law—1973,* 59 CORNELL L. REV. 859, 880-92 (1974); Note, *Welfare Law—1972 Social Security Amendments—Supplemental Security Income for the Aged, Blind, and Disabled,* 58 CORNELL L. REV. 803 (1973).

[4] 42 U.S.C. § 1382(b) (Supp. III, 1973).

[5] For a discussion of the grant-in-aid system, see generally, R. LEVY, T. LEWIS & P. MARTIN, *supra* note 2, at 75-100. The funding problems created by such a system are discussed at *id.* 96-100.

[6] *See, e.g.,* note 1 *supra.*

[7] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970).

tion 1343(3),[8] gives the federal courts jurisdiction over all cases involving state deprivations of constitutional rights. There is no jurisdictional-amount requirement in section 1343(3). As a result, whenever welfare programs are state administered, challenges to illegal agency practices are justiciable in the federal courts as long as a colorable constitutional claim is present. But this is not so when programs are federally administered. The Social Security Act provides for ultimate judicial review of agency determinations for both Old Age Survivors and Disability Insurance (OASDI) and SSI.[9] However, this statutory judicial review is so slow that welfare litigants are often seriously harmed by the delay.[10] In addition, some cases may be rendered non-justiciable by the intervening administrative review; by the time the courts could hear the case, it would necessarily be moot.[11] Sections 1983 and 1343(3) are inapplicable where state deprivation of constitutional rights is not

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[8] The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

28 U.S.C. § 1343 (1970).

The mechanics of § 1343(3) and the problems associated with invoking federal jurisdiction under that section are discussed in Note, *Federal Jurisdiction Over Challenges to State Welfare Programs,* 72 COLUM. L. REV. 1404 (1972). In 1974 the Supreme Court defined the proper scope and use of § 1343(3). Hagans v. Lavine, 415 U.S. 528 (1974). *See* Note, *The Outlook for Welfare Litigation In The Federal Courts: Hagans v. Lavine & Edelman v. Jordon,* 60 CORNELL L. REV. 897, 898-903 (1975).

An interesting reverse twist to federal jurisdiction under § 1343(3) was discovered by the district court in Lyons v. Weinberger, 376 F. Supp. 248 (S.D.N.Y. 1974). That case was a Goldberg-type challenge to the SSI procedure of terminations without a prior hearing. The court found sufficient state action to warrant § 1343(3) jurisdiction primarily on the basis of state funding of supplementary benefits and state agency interaction with the Social Security Administration. In New York the supplementary benefits are federally administered; payments are made through the Social Security Administration. *Id.* at 254. Clearly, payments made directly by a state agency would be sufficient state action to warrant § 1343(3) jurisdiction. Thus, under the *Lyons* approach, all SSI litigation in a state making supplementary payments would fit within the § 1343(3) ground rules. For an analysis of the substantive aspects of the *Lyons* decision, see Note, *1974 Developments in Welfare Law—The Supplemental Security Income Program,* 60 CORNELL L. REV. 825, 835-36 (1975).

[9] 42 U.S.C. § 405(g) (1970) (OASDI); 42 U.S.C. § 1383(c)(3) (Supp. III, 1973) (SSI).

[10] *See* notes 27-29 and accompanying text *infra.*

[11] A good example of this dilemma is the due process litigation discussed at notes 17-19 and accompanying text *infra.* Where social security recipients assert their rights to notice and prior hearings before their benefits are reduced or terminated, they obviously need immediate judicial review. If the courts require administrative hearings before they consent to rule on the constitutional questions, these constitutional questions become moot and non-justiciable. *See* Mills v. Richardson, 464 F.2d 995, 1000 (2d Cir. 1972).

involved. Furthermore, there is no analogous statute granting federal jurisdiction over claims of *federal* deprivations of constitutional rights.[12] This anomoly leaves federal welfare recipients without timely federal redress for the unconstitutional and illegal actions of federal officers.

Federal adjudication of both constitutional and statutory federal welfare claims is necessary for two reasons:[13] (*1*) there is a need for uniformity in the developing federal law;[14] and (*2*) the Social Security Act and accompanying federal regulations are so complex that proper adjudication of welfare claims can only occur in courts which have developed a degree of expertise in the field. There is the additional federal interest in seeing that large federal welfare expenditures are properly administered. Moreover, there is no important state interest served by allowing state courts to resolve these matters; federal questions predominate in all federal welfare litigation. Although federal court dockets are exceedingly crowded,[15] foreclosure of federal adjudication of the rights of indigent persons is not the proper solution to this problem. The Supreme Court has explicitly stated that it is "peculiarly . . . the duty" of the Court to resolve this type of dispute.[16]

The present state of the law concerning federal jurisdiction to hear federal welfare claims is chaotic. After *Goldberg v. Kelly*,[17] several cases challenging Social Security procedures for benefit termination and reduction without a prior hearing arose in the federal courts.[18] In most of these cases, there was no discussion of

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[12] Although all constitutional and statutory challenges to illegal federal welfare practices obviously turn on the resolution of federal law, federal-question jurisdiction historically has been barred by the jurisdictional-amount requirement, now $10,000. 28 U.S.C. § 1331(a) (1970). Without this $10,000 hurdle, welfare litigants would have no problem in redressing their grievances in federal court. Various methods for overcoming this $10,000 hurdle are discussed in notes 54-99 and accompanying text *infra*.

[13] *See also* Herzer, *Federal Jurisdiction over Statutorily-Based Welfare Claims*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 9-12 (1970); Redlich, *The Art of Welfare Advocacy: Available Procedures and Forums*, 36 ALBANY L. REV. 57, 85-86 (1971); Note, COLUM. L. REV., *supra* note 8, at 1404-05.

[14] *See* Note, COLUM. L. REV., *supra* note 8, at 1405.

[15] *See* Cramton, *Federal Appellate Justice in 1973*, 59 CORNELL L. REV. 571, 578-81 (1974); Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974).

[16] [W]e find not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field. . . . It is . . . peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use.

Rosado v. Wyman, 397 U.S. 397, 422-23 (1970).

[17] 397 U.S. 254 (1970).

[18] *See, e.g.*, Wright v. Finch, 321 F. Supp. 383 (D.D.C. 1971). *Wright* was representative of

federal jurisdiction and it is inferable that the Department of Health, Education and Welfare (HEW) conceded the jurisdictional issue. In cases relitigating the issue within the past two years, however, the jurisdictional questions have surfaced with no consistent pattern of resolution.[19]

In 1973 the Supreme Court held that an attempt by Congress to define an eligible food-stamp household as comprised only of related persons violated the equal protection guarantees of the fifth amendment's due process clause.[20] In this instance, the Court did not discuss the question of federal jurisdiction, apparently reflecting satisfaction with the approach taken by the three-judge panel below. That court had found jurisdiction premised on section 1337.[21] Since then, a 1974 Supreme Court decision has openly acknowledged the indefinite nature of the jurisdictional law applicable to this area. In holding that the Veterans' Readjustment Benefits Act of 1966[22] could not preclude judicial review of alleged constitutional violations, the Court noted that jurisdiction was invoked below pursuant to sections 1331, 1337, 1343, and 1361.[23] The Court did not state whether this "shotgun" approach to jurisdiction implied alternative or cumulative statutory grounds.

The result of this confusion is that the federal welfare litigant

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several cases decided or pending in the lower federal courts that were cited by the Supreme Court in Richardson v. Wright, 405 U.S. 208, 212-13 n.1 (1972). While the decision of the three-judge district court in *Wright v. Finch,* holding the Social Security procedure violative of due process, was being appealed, the Social Security Administration changed its hearing regulations. Consequently, the Supreme Court vacated the judgment below, hoping that the administrative action would solve the problem and free the Court from deciding the constitutional issue. *Id.* at 209.

[19] The Supreme Court's hopes in *Richardson* have not materialized. A second generation of Goldberg-type challenges to the Social Security procedures has arisen in the lower federal courts. Some district courts have dismissed all plaintiffs' alleged jurisdictional grounds. *See, e.g.,* Finnerty v. Weinberger, 1A UNEMPL. INS. REP. ¶ 17,670 (N.D.N.Y. Jan. 9, 1974); Knuckles v. Weinberger, 371 F. Supp. 565 (N.D. Cal. 1973). Other district courts have found jurisdiction under one or more of the following alleged grounds: 28 U.S.C. § 1331 (1970); 28 U.S.C. § 1361 (1970); and 5 U.S.C. § 701-06 (1970). *See, e.g.,* Frost v. Weinberger, 375 F. Supp. 1312 (E.D.N.Y. 1974).

[20] United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

[21] 28 U.S.C. § 1337 (1970). "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." *Id.* In order to find jurisdiction under § 1337, the three-judge court emphasized the beneficial impact of the food stamp program on the national agriculture industry. Moreno v. United States Dep't of Agriculture, 345 F. Supp. 310, 312-13 (D.D.C. 1972).

[22] Act of March 3, 1966, Pub. L. No. 89-358, 80 Stat. 12 (codified in scattered sections of 38 U.S.C.).

[23] 28 U.S.C. §§ 1331, 1337, 1343, 1361 (1970). Johnson v. Robison, 415 U.S. 361, 366 n.7 (1974). *See* notes 30-35 and accompanying text *infra.*

is understandably insecure about his ability to get into federal court. At present, it is impossible to predict whether the courts will willingly invoke jurisdiction or whether strict construction of past doctrine will be used to foreclose jurisdiction.

Although seven jurisdictional grounds have been asserted in recently litigated cases,[24] this Note will focus on the two grounds with the most promise for federal welfare litigants, section 1331(a) (federal question), and section 1361 (mandamus). However, it is first necessary to discuss two threshold problems: (*1*) the general availability of judicial review, and (*2*) the timing of such review and the related doctrine of exhaustion of administrative remedies.

I

Availability and Timing of Judicial Review

Two preliminary questions in any challenge to welfare agency practices are whether judicial review of the agency action is available, and if so, at what point such review is proper. Both the OASDI and SSI programs provide for judicial review in the district courts

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[24] 5 U.S.C. §§ 701-06 (1970); 28 U.S.C. §§ 1331(a), 1337, 1343(3), 1343(4), 1346(2), 1361 (1970). Many welfare litigants include jurisdictional allegations based on the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-06 (1970). Although the APA will not be discussed in detail in this Note, it deserves some mention.

The broad language of § 702 of the APA seems to provide an independent basis for federal jurisdiction. "A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof." *Id.* § 702. However, since HEW provides for eventual judicial review of its decisions (*see, e.g.*, 42 U.S.C. § 405(g) (1970) (OASDI)), it is not clear whether the APA is thereby satisfied, or whether it independently assures welfare litigants of judicial review. There is a further complication. Only final federal agency action is reviewable, not preliminary or intermediate rulings. *Id.* § 704. Thus, it is again unclear whether the litigant must wait for the complex hierarchy of administrative review provided by HEW before there is a final and judicially reviewable decision.

According to the Supreme Court, the APA instituted no changes in the common law of reviewability. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967). Thus, it would seem that the APA does not constitute a new and independent ground for federal jurisdiction. The Second Circuit has stated that neither it nor the Supreme Court has expressly acknowledged an independent grant of jurisdiction under the APA. Mills v. Richardson, 464 F.2d 995, 1001 n.9 (2d Cir. 1972).

Nevertheless, not all courts are convinced. One district court has indicated that a number of decisions involving the standing of litigants to raise claims under the APA strongly suggest that the APA was intended to provide an independent jurisdictional ground. Lyons v. Weinberger, 376 F. Supp. 248, 255-57 (S.D.N.Y. 1974). A recent case in the District of Columbia Circuit has expressly held that the APA provides such an independent jurisdictional basis. Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1109-10 (D.C. Cir. 1974). *Contra,* Zimmerman v. United States Gov't, 422 F.2d 326, 330 (3d Cir. 1970); Jamieson v. Weinberger, 379 F. Supp. 291 (E.D. Pa. 1974).

of final agency determinations made by HEW.[25] The statutes do not define, however, what constitutes a final decision by the Secretary. These statutory provisions clearly contemplate review of individual determinations where questions of fact predominate. In such cases, for example Social Security disability claims, postponing judicial review is logical.[26] Problems arise, however, when HEW asserts that these statutory provisions are the exclusive avenues for judicial review in all cases, including constitutional or statutory challenges to the welfare system itself.

Although the Social Security Act presently provides for ultimate judicial review, it is not inconceivable that Congress may at some time attempt to preclude judicial review of welfare cases.[27] Other benefit distribution programs have such preclusive provisions today.[28] For welfare recipients, however, the statutory review scheme in effect functions to preclude judicial review. Regulations promulgated by HEW provide for a four-tiered system of administrative review before the recipient gets into court.[29] As welfare recipients are by definition indigent, any delay in the receipt of benefits has potentially drastic consequences; a reduction in assistance often results in a deprivation of food or shelter. Obviously, indigent recipients have no savings to rely on while they await HEW's complex administrative review and need prompt judicial review of HEW decisions. However, to the extent that the OASDI and SSI judicial review provisions are considered exclusive, thereby

[25] 42 U.S.C. § 405(g) (1970) (OASDI); 42 U.S.C. § 1383(c) (Supp. III, 1973) (SSI). There is no jurisdictional-amount requirement in either of these sections.

[26] Disability determinations turn upon complex fact issues, often involving detailed medical testimony. Such determinations can properly be made by a specialized administrative hearing system which has acquired a degree of expertise in that particular field. Moreover, the lengthy hearings on such complex fact questions would furtber clog the federal courts. In sucb cases it seems more efficient to restrict judicial review to questions of law.

[27] OASDI hearing fact-findings are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g) (1970). The more recent SSI statute is somewhat more restrictive in permitting judicial review of administrative hearings. SSI adopts the OASDI framework for review of hearing decisions; however, all fact-findings of the Secretary are conclusive and are not subject to judicial review. 42 U.S.C. § 1383(c)(3) (Supp. III, 1973).

[28] Decisions of the Veterans' Administration as to any claim for veterans' benefits are final and subject to no review by any other official or court. 38 U.S.C. § 211(a) (Supp. III, 1973). *But see* notes 30-35 and accompanying text *infra*.

[29] OASDI provides for the following hierarchy of administrative decisions: initial determination, reconsideration, hearing, and review by the Appeals Council. Only after proceeding through this administrative maze may the recipient obtain court review of an agency decision. 20 C.F.R. §§ 404.901-.990 (1974). SSI provides for a similar system of administrative review. Proposed HEW Reg. §§ 416.1501-.1595, 38 Fed. Reg. 34,469-73 (1973), 39 Fed. Reg. 1053-55, 1860-61, 5778-83, 34,060-62 (1974).

necessitating exhaustion of administrative remedies, it is apparent that such promptness may not be achieved.

A. *Availability of Judicial Review*

The Supreme Court, in *Johnson v. Robison,*[30] has recently suggested that no statute may preclude judicial review of constitutional questions. Plaintiff, a conscientious objector, sued the Veterans Administration for GI benefits that had been denied him because he was not a veteran who had served on active duty. Plaintiff alleged that such statutory discrimination against conscientious objectors was a violation of his first and fifth amendment rights. As a threshold defense, the defendant Veterans Administration relied on a section of the Veterans Administration statute which precluded court review of any final decision made by the Administration.[31] The Supreme Court held that this statutory bar could not operate against constitutional claims. First, the statute did not expressly preclude constitutional claims, but barred only review of agency decisions made pursuant to the statute itself. Second, the agency could not be expected to adjudicate constitutional claims, since they were inherently beyond the scope of administrative review.[32] Implicit in the Court's argument was the need for judicial review in order to assess the constitutionality of the statute itself, including the section in question.[33] But the Court invalidated the section precluding judicial review with respect to constitutional claims only and implied that the bar against reviewing statutory claims was valid.[34]

Although it seems clear that a statutory preclusion of judicial review of administrative fact-finding is valid,[35] it is not clear how far such statutory preclusion could be carried. The rationale of *Robison* would forbid any preclusion where the litigant's challenge was to the validity of a statutory provision. Thus, whenever the underlying administrative review procedure is established pursuant to an overall statutory scheme, the administrative body logically

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[30] 415 U.S. 361 (1974).

[31] 38 U.S.C. § 211(a) (Supp. III, 1973).

[32] "Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." 415 U.S. at 368, *quoting* Ostereich v. Selective Serv. Bd., 393 U.S. 233, 242 (1968) (Harlan, J., concurring).

[33] The Court distinguished between review of a question of law or fact which arises under the statute and review of a congressional decision embodied in the statute which arises under the Constitution. *Id.* at 367.

[34] *See id.* at 368-74, where the Court discusses the rationale behind a 1970 amendment of § 211(a).

[35] *See* 42 U.S.C. § 1383(c)(3) (Supp. III, 1973) (SSI).

lacks jurisdiction to examine the validity of the statute in question. At present, however, the real problem for the welfare litigant is not the ultimate availability of judicial review, but the timing of such review.

B. *Timing of Judicial Review*

In a recent case challenging the Social Security Act's alleged discrimination against illegitimate children on equal protection grounds,[36] HEW argued that the suit was premature under section 405(g) of the Social Security Act.[37] The basis for this argument was the Agency's position that section 405(g), which provides for judicial review only of final agency decisions, was the exclusive means for obtaining federal jurisdiction.[38] Accordingly, there could be no judicial review until the individual claimant had exhausted all of the administrative remedies provided by the Social Security Administration.[39] But the court held that since the injunctive and declaratory relief necessary to remedy this alleged constitutional violation was beyond the scope of administrative review under the statute, the court did not have to wait for the plaintiff to pursue her administrative remedies.[40] This issue is presently one of the most important threshold questions for welfare litigants.

The Supreme Court has repeatedly held that a plaintiff who brings a constitutional claim under the Civil Rights Act, section 1983,[41] need not exhaust administrative remedies.[42] However, the significance of these cases is unclear because challenges of illegal welfare practices under section 1983 arise only in the context of state deprivations of constitutional rights. The Supreme Court has emphasized that the Civil Rights Act was intended to provide a remedy supplementary to any provided by the states.[43] Thus, these holdings may be limited to situations where exhaustion would be effected through state channels, and the rationale may be inapplicable to federal cases. A more reasonable reading, however, would emphasize the inherent inability of administrative agencies to ques-

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[36] Griffin v. Richardson, 346 F. Supp. 1226 (D. Md. 1972), *aff'd*, 409 U.S. 1069 (1973) (scheme for reduction of children's benefits that eliminated all benefits for illegitimate children before reducing those of legitimate children violated equal protection).

[37] 42 U.S.C. § 405(g) (1970). This section provides for judicial review in the district courts of any final decision of HEW. *See* 20 C.F.R. §§ 404.901-90 (1974).

[38] Griffin v. Richardson, 346 F. Supp. 1226, 1230 (D. Md. 1972).

[39] *See* note 29 *supra*.

[40] 346 F. Supp. at 1230.

[41] 42 U.S.C. § 1983 (1970).

[42] King v. Smith, 392 U.S. 309, 312 n.4 (1968); Damico v. California, 389 U.S. 416 (1967).

[43] 389 U.S. at 417, *citing* McNeese v. Board of Educ., 373 U.S. 668, 671 (1963).

tion the constitutionality of their own statutory schemes. Any constitutional challege should make exhaustion unnecessary, and the rationale of *Johnson v. Robison*[44] supports such an approach. If an administrative body is without jurisdiction to question the validity of its enabling statute, it would be useless to require the administrative body to consider the question before permitting a court to exercise the required judicial review. This simple test, constitutional question or fact question, has been accepted by at least two district courts.[45]

However, when a plaintiff challenges illegal welfare practices on statutory grounds, the doctrine of exbaustion is not susceptible to any simple test. Some courts have distinguished between constitutional challenges to the validity of the statute, which do not require exhaustion, and statutory challenges to the administration of the plan, which do require exhaustion.[46] But the Supreme Court has rejected this simplistic approach. In *Rosado v. Wyman,*[47] plaintiffs successfully challenged the New York State Department of Social Services's method of computing AFDC benefits as violative of section 402(a)(23)[48] of the Social Security Act. The Court noted that plaintiffs did not seek to review an administrative order.[49] The majority opinon, however, did emphasize the plaintiffs' inability to initiate conformity hearings, implying that the only way for plaintiffs to challenge this kind of agency decision was through judicial channels.

Today, most courts approach the exhaustion question by considering several factors. First, exhaustion is not required if the administrative remedy is wholly inadequate and the federal ques-

[44] 415 U.S. 361 (1974). *See* notes 30-35 and accompanying text *supra.*

[45] Where a plaintiff attacks the constitutionality of the statute under which an administrative agency acts, the attack does not turn upon a factual determination requiring administrative expertise, and the doctrine of exhaustion of adminstrative remedies, therefore, does not apply. Mattern v. Weinberger, 377 F. Supp. 906, 912 (E.D. Pa. 1974). *See also* Salfi v. Weinberger, 373 F. Supp. 961 (N.D. Cal. 1974).

[46] *See* Roane v. Weinberger, 1A UNEMPL. INS. REP. ¶ 17,663 (N.D. Cal. March 27, 1974) (action to enjoin OASDI deductions from salaries); Metcalf v. Swank, 305 F. Supp. 785 (N.D. Ill. 1969) (action to enjoin enforcement of shelter allowance maximum).

[47] 397 U.S. 397, 406-07 (1970).

[48] 42 U.S.C. § 602(a)(23) (1970).

[49] In *Rosado* the plaintiffs challenged the New York State Department of Social Services's decision to fix maximum AFDC allowances for each family and to eliminate all special grants. This decision resulted in decreased benefit levels for many New York recipients. 397 U.S. at 415-19. Contrast this agency policy decision with the individual disability decisions discussed in note 26 *supra.* Although exhaustion seems proper in the latter case, it is futile in the former. The decisions of the hearing officer are governed by the agency interpretations of the statute, which are embodied in the regulations, and it is these very regulations that litigants often seek to cballenge.

tion is plainly presented to the court.[50] Second, exhaustion is not required where it would cause irreparable harm to the litigant.[51] Against these factors the court should balance specialized administrative expertise. Where such expertise would be helpful to the court in reviewing the question, exhaustion may be required to allow the agency to present its views.[52]

Application of this test in the welfare context will almost always obviate exhaustion. Whether the challenge is to the statute itself, or to the agency's own interpretation of the statute, the administrative remedy is clearly inadequate.[53] Furthermore, since the potential for irreparable injury is present in all welfare litigation, judicial review at the earliest possible time is always a necessity. Under this analysis, exhaustion should never be required for welfare litigants, except in cases of factual determinations on an individual basis.

II

SECTION 1331—FEDERAL QUESTION JURISDICTION

The federal welfare litigant's most direct avenue to federal court seems to be by way of federal question jurisdiction.[54] There is little doubt that federal welfare claims, whether constitutional or statutory, arise under the constitution or laws of the United States. As welfare becomes progressively federalized and state involve-

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[50] Martinez v. Richardson, 472 F.2d 1121, 1125 (10th Cir. 1973); Frost v. Weinberger, 375 F. Supp. 1312, 1320 (E.D.N.Y. 1974); Elliott v. Weinberger, 371 F. Supp. 960, 965 n.9 (D. Hawaii 1974).

[51] "Nor will exhaustion of administrative remedies be required where it would result in irreparable harm. This is especially true where time is crucial to tbe protection of substantive rights and administrative remedies would involve delay." Martinez v. Richardson, 472 F.2d 1121, 1125 n.10 (10th Cir. 1973). *See also* Frost v. Weinberger, 375 F. Supp. 1312, 1320 (E.D.N.Y. 1974); Elliott v. Weinberger, 371 F. Supp. 960, 965 n.9 (D. Hawaii 1974).

[52] *See* Rosado v. Wyman, 397 U.S. 397, 406-07 (1970). Professor Davis emphasizes these three factors in suggesting a proposed guide to problems of exhaustion. K. DAVIS, ADMINISTRATIVE LAW TEXT § 20.03, at 387-88 (3d ed. 1972).

[53] The agency's interpretation of the statute is embodied in the regulations that it promulgates. The agency's hearing officers are bound by such regulations and by general agency policy decisions made pursuant to such regulations. It is useless to ask hearing officers to consider the invalidity of their agency's own regulations. Furthermore, it is arguably beyond the jurisdiction of such officers to challenge agency policy and regulations.

[54] "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a) (1970).

The use of federal-question jurisdiction in welfare challenges to illegal state agency practices is discussed in Note, COLUM. L. REV., *supra* note 8, at 1428-35.

ment decreases, the system becomes governed almost exclusively by the Social Security Act and the regulations promulgated thereunder.[55] While such federal welfare claims clearly comport with the language of section 1331 they must also overcome the $10,000 jurisdictional-amount requirement of that section. The harshness of this requirement in the welfare context is obvious; $10,000 is approximately six times the annual minimum benefit level for an SSI recipient.[56] It is almost impossible for any recipient to amass a claim for over $10,000 in welfare benefits.

The traditional rationale behind the jurisdictional amount was reaffirmed by the Supreme Court in 1974: "The jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies."[57] While the present jurisdictional amount may achieve a proper balance between these two extremes in cases involving traditional monetary disputes, the same cannot be said in the welfare context—a simple dollar measurement of the amount in controversy fails to reflect the seriousness of a welfare dispute. For a subsistence recipient a reduction of assistance benefits carries the specter of inadequate food, clothing, shelter, and health care. Furthermore, because welfare programs distribute billions of dollars annually, there is a clear federal interest in seeing that such large distributions are properly administered.[58]

Nevertheless, the traditional approach to the jurisdictional-amount requirement has effectively foreclosed section 1331 litigation for welfare claimants. It has therefore become necessary to bypass traditional doctrine, primarily through the use of two devices: (*1*) alternative measurement of the amount in controversy, and (*2*) aggregation of claims in class actions. However, both of these devices are at best unsatisfactory ad hoc solutions; there is a need for statutory overhaul.

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[55] Although SSI federalized all adult welfare categories, the mandatory state supplementation has been held to be a significant factor in finding sufficient state involvement for jurisdiction under 28 U.S.C. § 1343(3) (1970). Lyons v. Weinberger, 376 F. Supp. 248, 254-55 (S.D.N.Y. 1974). *See* note 8 *supra.*

[56] The annual federal SSI benefit for an individual without an eligible spouse was $1,752 for 1974. 42 U.S.C. § 1382(b) (Supp. III, 1973).

[57] Zahn v. International Paper Co., 414 U.S. 291, 293 n.1 (1973), *citing* S. REP. No. 1830, 85th Cong., 2d Sess. 3-4 (1958).

[58] In fiscal 1974 the federal government was to distribute over $126 billion through 51 different welfare programs. STAFF OF SUBCOMM. ON FISCAL POLICY, JOINT ECONOMIC COMM., 93D CONG., 1ST SESS., HOW PUBLIC WELFARE BENEFITS ARE DISTRIBUTED IN LOW-INCOME AREAS 13-15 (Comm. Print 1974).

A. *Measurement of the Amount in Controversy*

The prevailing rule is that the amount in controversy should be determined from the viewpoint of potential benefit to the plaintiff.[59] Furthermore, "the collateral effect of the judgment in other matters not directly involved in the pending suit cannot be taken into consideration."[60] An important caveat to this rule, however, is that the plaintiff need not prove the jurisdictional amount. Dismissal for lack of jurisdictional amount is justified only when it appears to a legal certainty that the claim is for less than the jurisdictional amount.[61] The interaction of these principles has allowed the courts somewhat more flexibility than the strict plaintiff-viewpoint rule would seem to justify.

Despite the contrary prevailing rule, some courts have openly measured the amount in controversy by the monetary result to either party.[62] For example, in a recent case challenging the military surveillance of civilian political activity, the District of Columbia Circuit stated that, in claims for injunctive relief, the amount in controversy may be measured by the value of the relief sought by plaintiff or the cost to defendant.[63] This approach achieves the desired result of keeping trivial cases out of the federal courts.[64]

Rather than openly disregard the plaintiff-viewpoint rule, many courts faced with the dilemma of measuring the extent of constitutional deprivation in pecuniary terms have placed a per se dollar value on the constitutional right itself, instead of concentrating on the fiscal harm suffered as a result of the constitutional

[59] *See* 1 J. MOORE, FEDERAL PRACTICE ¶ 0.91[1] (1974); C. WRIGHT, LAW OF FEDERAL COURTS § 34 (1970).

[60] 1 J. MOORE, *supra* note 59, ¶ 0.91[2], at 828-29. According to Moore, although a suit may work as an estoppel, or affect other actions or persons not parties to the instant suit, such collateral effects do not increase the jurisdictional amount. *Id.* at 828-31.

[61] St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938).

[62] The most frequently cited authority for this principle is Ronzio v. Denver & R.G.W. Ry., 116 F.2d 604 (10th Cir. 1940).

[63] Tatum v. Laird, 444 F.2d 947, 951 (D.C. Cir. 1971), *rev'd on other grounds,* 408 U.S. 1 (1972) (dictum). The court found jurisdiction based on the unique nature of the District of Columbia courts. It has been held that the District of Columbia courts have general equity jurisdiction where either party resides in the district. *Id.* at 950.

Tatum has been followed in a recent challenge to the new federal recoupment regulations. 45 C.F.R. § 233.20(a)(12) (1974). Since the court was satisfied that the amount in controversy was over $10,000 for either plaintiff or defendant, federal question jurisdiction was satisfied. NWRO v. Weinberger, 377 F. Supp. 861 (D.D.C. 1974). However, this approach was recently rejected by the Northern District of California. Roane v. Weinberger, 1A UNEMPL. INS. REP. ¶ 17,663 n.2 (N.D. Cal. Mar. 27, 1974).

[64] *See* C. WRIGHT, *supra* note 59, § 34, at 118-19.

deprivation. For example, when an army enlisted man sought to enjoin his transfer, which allegedly had resulted from his expression of dissent over the Vietnam war, the Eastern District of New York, in *Cortright v. Resor*,[65] found federal question jurisdiction through an evaluation of the right infringed. Plaintiff's allegations of first amendment violations seemed to be beyond monetary measurement. But the court found that "free speech is almost by definition, worth more than $10,000, so that the allegation of jurisdiction based upon 1331 ought not to be subject to denial."[66] The Third Circuit has applied the *Cortright* rationale to a case involving a plaintiff's right to campaign for political office on an army base.[67] A candid statement of this emerging principle of federal jurisdiction appeared in a suit to recognize plaintiffs as the governing body of an Indian tribe: "In that narrow spectrum of civil rights suits against federal authorities which may not be judicially cognizable except under 28 U.S.C. § 1331, the value of the civil right itself should be considered in determining the jurisdictional amount."[68]

The Second Circuit has recently stated that, when the right in question is not susceptible to dollar valuation, the court is without federal-question jurisdiction to hear the case.[69] The court traced this doctrine back to an 1847 Supreme Court holding.[70] That case was a custody suit, however, and the federal courts have always declined to hear such cases, even when diversity jurisdiction has

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[65] 325 F. Supp. 797 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

[66] *Id.* at 810. However, as mandamus was found to be an alternative basis for jurisdiction, this language may only be dictum. *Cortright* was reversed on other grounds by the Second Circuit, but the jurisdictional question was avoided because the government conceded mandamus jurisdiction. 447 F.2d 245 (2d Cir. 1971).

[67] Spock v. David, 469 F.2d 1047 (3d Cir. 1972), *stay denied*, 409 U.S. 971 (1972). *Spock* was an action by political campaigners, who had been barred from entering Fort Dix, for an injunction against further interference with their first amendment rights by the United States Army. The court ordered that the time and place of such campaigning could be regulated by the Army, but that plaintiffs could not be barred entirely from the military base.

The first *Spock* opinion was an appeal from a denial of a preliminary injunction. *Id.* On appeal after the final hearing on the injunction, the Third Circuit expressly reaffirmed the jurisdictional point. Although the first amendment rights in question were intangible, they were susceptible to dollar valuation. Their value exceeded the $10,000 jurisdictional amount. Spock v. David, 502 F.2d 953 (3d Cir. 1974).

[68] McCurdy v. Steele, 353 F. Supp. 629, 638 (D. Utah 1973).

[69] Rosado v. Wyman, 414 F.2d 170 (2d Cir. 1969), *rev'd*, 397 U.S. 397 (1970). *See also* Goldsmith v. Sutherland, 426 F.2d 1395 (6th Cir.), *cert. denied*, 400 U.S. 960 (1970). The court in *Goldsmith* refused to place a specific value on the right to distribute political literature on an army base, and dismissed the case for lack of federal-question jurisdiction. *Id.*

[70] Barry v. Mercein, 46 U.S. (5 How.) 103 (1847).

been present.[71] Moreover, the Second Circuit's approach makes little sense if the rationale behind jurisdictional amount is to keep trivial cases out of the federal courts. Constitutional violations are substantial enough to merit federal adjudication whenever they occur.[72]

Even so, the utility of this principle in welfare litigation is unclear. Although all constitutional claims are amenable to the same per se rule which applies to first amendment violations, statutory claims are not necessarily of equal importance. It can be argued, though, that benefit deprivations for welfare recipients affect fundamental, if not constitutionally recognized, "rights." A reduction or termination of a subsistence assistance grant clearly affects the recipient's right to adequate food, clothing, shelter, and health care. Measured in this manner, plaintiff's right should meet the jurisdictional amount.

Another attempt to circumvent a rigid approach to the amount in controversy focuses on indirect damages. Although dismissal is only proper if it appears to a legal certainty that the requisite amount is not present,[73] the plaintiff must tread a narrow line between permissible allegations and impermissible allegations of collateral effects.[74] For example, only the assistance benefits sought by plaintiff, and not those of other recipients, are taken into account. Also, courts have refused to permit plaintiffs to multiply annual welfare benefits by future years of welfare eligibility to meet the jurisdictional amount.[75] Future welfare eligibility is regarded as too speculative. But because welfare recipients live at the subsistence level or below, some courts have listened favorably to allegations of indirect damages resulting from benefit deprivations. The

[71] *See* C. WRIGHT, *supra* note 59, § 25, at 84.

[72] This rationale is implicit in 28 U.S.C. § 1343(3) (1970), which authorizes federal jurisdiction over all cases involving *state* deprivations of constitutional rights. *See* note 8 *supra*. Section 1343(3) contains no jurisdictional amount. When the defendant is a federal officer, however, the aggrieved party has no jurisdictional-basis analogue to § 1343(3). He is relegated to general federal-question jurisdiction and must meet the jurisdictional amount. Note, however, that when the defendant is a federal officer or agency, there should he a greater federal interest in federal adjudication of the suit. For a compelling statement of the need for federal adjudication of the federal deprivation of constitutional rights, see Fein v. Selective Service System Local Bd. No. 7, 430 F.2d 376, 385 (2d Cir. 1970) (Lumbard, C. J., dissenting).

[73] *See* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938).

[74] *See* note 60 and accompanying text *supra*. By analogy, in tax cases the amount in controversy is only the amount of the tax in question and not the effect on future taxes nor possible adverse effects on plaintiff's property. *See* 1 J. MOORE, *supra* note 59, ¶ 0.91[2], at 828-31.

[75] Roane v. Weinberger, 1A UNEMPL. INS. REP. ¶ 17,663 n.2 (N.D. Cal. March 27, 1974); Rosado v. Wyman, 304 F. Supp. 1356, 1363 (E.D.N.Y. 1969), *rev'd*, 414 F.2d 170 (2d Cir. 1969), *rev'd*, 397 U.S. 397 (1970).

district court in *Rosado*[76] accepted a good faith claim by plaintiffs who alleged health complications caused by their marginal nutritional status and mental health problems resulting from constant material deprivations.[77] Similarly, in a school lunch case, where thirty-five cent lunches were denied to plaintiffs, a federal court, after noting that the right to good health was involved, found jurisdiction under section 1331 and decided that possible damages resulting from the deprivation of these lunches were not too speculative.[78] Although allegations such as these, which focus on the adverse consequences of welfare cutbacks, seem to have the most potential for creative welfare litigants, they do not assure the litigant a firm jurisdictional ground.

B. *Aggregation of Claims in Class Actions*

Enforcement considerations often lead welfare litigants to bring class actions seeking to enjoin illegal agency practices. A favorable decision benefits all members of the class and all recipients in a given jurisdiction. But the rules governing aggregation of claims to meet the jurisdictional amount have prevented most welfare litigants from surmounting this fiscal barrier.[79]

In 1968, the Supreme Court was faced with the question of when aggregation would be permissible under the new Rule 23.[80] In *Snyder v. Harris*,[81] the Court held that Rule 23 had not enlarged the scope of federal jurisdiction, and that aggregation was still permissible only when the several plaintiffs asserted a "common and undivided interest" in the claim.[82] In the great majority of cases, where plaintiffs' claims are separate and distinct, no aggregation is allowed. The *Snyder* Court found that the separate-and-distinct test was not inherently unworkable because the lower courts had developed viable standards for distinguishing separate and distinct claims from common and undivided claims.[83] Fur-

[76] 304 F. Supp. 1356, 1363 (E.D.N.Y.), *rev'd*, 414 F.2d 170 (2d Cir. 1969), *rev'd*, 397 U.S. 397 (1970).

[77] Although *Rosado* was reversed by the Second Circuit, the Supreme Court eventually found jurisdiction based upon 28 U.S.C. § 1343(3) (1970). 397 U.S. at 403.

[78] Marquez v. Hardin, 339 F. Supp. 1364 (N.D. Cal. 1969).

[79] For purposes of this discussion, unless otherwise noted, aggregation will be used to mean only aggregation of several plaintiffs' claims against a common defendant.

[80] Federal class action procedure is outlined in FED. R. CIV. P. 23.

[81] 394 U.S. 332 (1969).

[82] Some examples of a common and undivided interest are: distributees of an estate suing a converter of the estate; a wrongful death action brought by more than one beneficiary; and creditors suing for insurance payable to their common debtor. These examples and others are collected in C. WRIGHT, *supra* note 59, § 36, at 122 n.8. It should be noted that aggregation is also permissible when one plaintiff asserts several claims against one defendant. *Id.* at 121.

[83] Snyder v. Harris, 394 U.S. 332, 341 (1969). The Supreme Court's opinion that these two

thermore, the Court felt that a different result would undermine the basic jurisdictional amount rationale. This rationale sought to keep two classes of cases out of the federal courts: trivial actions, and aggregations of small state claims brought in diversity. These cases, primarily involving questions of state law, properly belong in the state courts and should not be permitted to congest the federal system.

Justice Fortas, writing in dissent, noted the impact that this holding would have on federal question cases.[84] Although the majority focused its analysis on diversity policy, the impact of *Snyder* on section 1331 cases would be to keep essentially federal cases out of the federal courts.[85] In *Zahn v. International Paper Co.*,[86] the Court acknowledged this adverse impact on such cases and held that each plaintiff with a separate and distinct claim in a class action, and not only the named party plaintiff, must individually satisfy the jurisdictional amount. Again, this was a diversity case, and the Court limited its analysis of the rule to the diversity context. However, the Court explicitly stated that the result would have been the same with a federal question case.[87] Neither the majority nor the dissent answered Justice Fortas's concerns.

By applying the separate-and-distinct test, most courts have managed to deny aggregation in the welfare context. For example, in an action seeking assistance benefits for strikers, aggregation of claims to reach the jurisdictional amount was summarily denied by the Second Circuit.[88] Likewise, the district court in *Rosado* forbade aggregation of welfare claims with nothing more than a recital of the *Snyder* test.[89]

In the past few years, some courts have begun to permit aggregation, first in medicaid cases and later in welfare cases, by holding that class action plaintiffs met the common-and-

tests provide workable standards for the courts is not universally shared. "[T]he distinction between a common undivided interest and several and distinct claims is something less than clear." C. WRIGHT, *supra* note 59, § 36, at 122. More generally, Professor Wright finds that the present law governing aggregation is plainly unsatisfactory and that the rules have evolved haphazardly with little functional utility and even less basis in logic. He considers the distinction between the two *Snyder* tests to be mystifying. *Id.* at 121-24.

[84] 394 U.S. at 342 (Fortas, J., dissenting).

[85] *Id.* at 342 n.2.

[86] 414 U.S. 291 (1973).

[87] *Id.* at 302 n.11. "Because a class action invoking general federal-question jurisdiction under 28 U.S.C. § 1331 would be subject to the same jurisdictional-amount rules with respect to plaintiffs having separate and distinct claims, the result here would be the same even if a cause of action under federal law could be stated, or if substantive federal law were held to control this case." *Id.* (citation omitted).

[88] Russo v. Kirby, 453 F.2d 548 (2d Cir. 1971).

[89] 304 F. Supp. at 1362.

undivided-interest test. In the first such case, *Bass v. Rockefeller,*[90] plaintiffs brought a class action to enjoin a tightening of medicaid eligibility standards. The court interpreted the traditional *Snyder* test to permit aggregation when either of two tests was satisfied: (*1*) "when the adversary of the class has no interest in how the claim is to be distributed among the class members";[91] or (*2*) "when none of the class members could bring suit without directly affecting the rights of his co-parties."[92] It was held that in the medicaid context either test was satisfied. The court then analogized the suit to trust cases where several beneficiaries would be allowed to aggregate their claims when asserting a common interest in the proper administration of a single trust fund.[93] In the medicaid program the state was perceived as the trustee for all of the medically needy. Consequently, the amount in controversy was not any sum specifically sought by the plaintiffs, but was rather the proposed amount of state reduction in medicaid benefits.[94] Also, because this action was not representative of either of the two classes of cases which *Snyder* sought to exclude from the federal courts, trivial lawsuits and minor state claims, the court was not compelled to reach the result which was achieved in *Snyder.*

Recently, the Southern District of New York reaffirmed the *Bass*[95] approach and proposed a less mechanistic application of the *Snyder* test. Focusing more on the rationale behind *Snyder,* the court interpreted it to forbid aggregation only in trivial actions or in actions that are primarily diversity cases.[96] The *Bass* approach has subsequently been used to permit aggregation in both welfare[97] and social security cases.[98]

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[90] 331 F. Supp. 945 (S.D.N.Y. 1971).

[91] *Id.* at 950.

[92] *Id.*

[93] *Id.* at 952.

[94] "The sole concern of New York for purposes of this action is whether it must make the fund available to the medically needy, and not how much of the fund each member of the plaintiff class will ultimately receive." *Id.* at 951.

[95] Bass v. Richardson, 338 F. Supp. 478 (S.D.N.Y. 1971). Bass v. Rockefeller, 331 F. Supp. 945 (S.D.N.Y. 1971), was vacated as moot by the Second Circuit in Bass v. Rockefeller, 464 F.2d 1300 (2d Cir. 1971), but came up again on a new claim iu *Richardson.*

[96] 338 F. Supp. at 482. The court then expressed a result-oriented view of federal jurisdiction: "If any case is proper for adjudication of important federal rights and issues of federal law by a federal court, it is this case." *Id.*

[97] National Welfare Rights Organization v. Weinberger, 377 F. Supp. 861 (D.D.C. 1974) (HEW recoupment regulations held invalid).

[98] Mattern v. Weinberger, 377 F. Supp. 906 (E.D. Pa. 1974) (suit to require *Goldberg* procedures for OASDI terminations or reductions). *Contra,* Roane v. Weinberger, 1A UNEMPL. INS. REP. ¶ 17,663 (N.D. Cal. Mar. 27, 1974) (suit to enjoin OASDI deductions from teachers' salaries).

Although the policy rationale of *Bass* is sound, the court's analogy to trust cases, upon which the common-and-undivided approach is in part based, is obviously weak. Neither medicaid beneficiaries nor welfare recipients have any vested interest in the fund. Each much satisfy complex eligibility requirements, and the size of the fund rests ultimately upon legislative whim under the Social Security Act. *Bass* appears to be another expression of court dissatisfaction with restrictive federal jurisdictional policy. If so, the *Bass* approach provides the most promise for welfare litigants. Unlike methods which circumvent restrictive federal jurisdiction,[99] this approach accords with the established doctrine of the Supreme Court as expressed in *Snyder*.

III

MANDAMUS JURISDICTION

In the absence of state action to establish jurisdiction under section 1343, and without the requisite $10,000 amount in controversy under section 1331, the federal welfare or social security litigant will want to establish jurisdiction under the mandamus provisions of section 1361.[100] Known as the Mandamus and Venue Act of 1962,[101] section 1361 extends two important powers to federal district courts. First, it gives all district courts the power to issue mandamus relief—to order federal officials to act consistently with their duties imposed by federal law.[102] Second, it establishes an independent basis of federal jurisdiction[103] without regard to the amount in controversy.[104]

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[99] *See* notes 59-78 and accompanying text *supra*.

[100] 28 U.S.C. § 1361 (1970). "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." *Id.*

[101] For a legislative history of § 1361, see S. REP. No. 1992, 87th Cong., 2d Sess. (1962).

[102] Mandamus jurisdiction in the federal courts has a curious history. In 1813 the Supreme Court, on the theory that a mandamus action was not a suit "of a civil nature at common law or in equity," ruled that the Judiciary Act of 1789 did not give the federal courts jurisdiction to issue writs of mandamus. M'Intire v. Wood, 11 U.S. (7 Cranch) 504 (1813). In 1838, however, the Court took up the question again and decided that the Circuit Court of the District of Columbia, as the inheritor of the common law power of the courts of Maryland, had the power to issue a writ of mandamus to federal officers. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524 (1838). *See generally* Byse & Fiocca, *Section 1361 of The Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967).

[103] National Welfare Rights Organization v. Weinberger, 377 F. Supp. 861, 867 (D.D.C. 1974); Peoples v. United States Dep't of Agriculture, 427 F.2d 561 (D.C. Cir. 1970).

[104] Martinez v. Richardson, 472 F.2d 1121, 1125-26 (10th Cir. 1973).

Mandamus jurisdiction will lie whenever facts are alleged upon which mandamus relief, in its traditional sense, should be granted.[105] The rationale of mandamus jurisdiction is that any federal official should be held accountable in a federal court for injuries caused by a failure to act according to the responsibilities imposed by federal law and his federal office.

The writ of mandamus is an extraordinary form of relief[106] which is granted as a matter of judicial discretion only in appropriate circumstances.[107] To be judicially cognizable, a mandamus cause of action must allege facts which show the following elements: (*1*) a federal officer has a clear duty to perform the act in question,[108] (*2*) the claimant has a right to the relief sought, and (*3*) there is no alternative remedy.[109] Whether the official has a clear duty to perform the act in question is said to rest on its ministerial rather than discretionary nature.[110] In contrast to a discretionary function, a ministerial act is the product of a simple and definite duty, imposed by law, without regard to individual judgment as to the propriety of the act being done.[111] To be ministerial, a duty must be equivalent to a positive command.[112] It must be specific, mandatory, plainly ascertainable, and free from doubt.[113]

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[105] Even though § 1361 refers to "any action in the *nature* of mandamus" (emphasis added), it is generally assumed that the Act was not intended to enlarge the scope of mandamus jurisdiction. Thus, § 1361 jurisdiction requires the allegation of a mandamus claim good at common law. Jarrett v. Resor, 426 F.2d 213, 216 (10th Cir. 1973). Some uncertainty has nevertheless been expressed on this point. *See* Burnett v. Tolson, 474 F.2d 877, 880 (4th Cir. 1973); Elliott v. Weinberger, 371 F. Supp. 960, 967 (D. Hawaii 1974). *See also* Byse & Fiocca, *supra* note 100.

[106] Carter v. Seamans, 411 F.2d 767, 773 (5th Cir. 1969), *cert. denied,* 397 U.S. 941 (1970).

[107] *Id.* at 773.

[108] In addition to ordering the performance of a positive act, mandamus may be brought to compel inaction, to require the exercise of a choice among alternatives, or to direct the exercise of discretion, but not to determine the manner in which discretion is exercised. United States *ex rel.* McLennah v. Wilbur, 283 U.S. 414, 420 (1931); Work v. United States *ex rel.* Rives, 267 U.S. 174, 177 (1925); Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 514-17 (1840); Casarino v. United States, 431 F.2d 774 (2d Cir. 1970); Clackamus County v. McKay, 219 F.2d 479 (D.C. Cir. 1954), *vacated as moot,* 349 U.S. 909 (1944); Guffanti v. Hershey, 296 F. Supp. 553 (S.D.N.Y. 1969). Mandamus is also appropriate to correct an abuse of discretion. United States *ex rel.* Schonbrun v. Commanding Officer, 403 F.2d 371, 374 (2d Cir. 1968), *cert. denied,* 394 U.S. 929 (1960); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 181-82 (1965).

[109] Carter v. Seamans, 411 F.2d 767, 773 (5th Cir. 1969), *cert. denied,* 397 U.S. 941 (1970).

[110] ICC v. New York, N.H. & H.R.R., 287 U.S. 178, 204 (1932); Wilbur v. United States *ex rel.* Kadrie, 281 U.S. 206, 218 (1930); Burnett v. Tolson, 474 F.2d 877, 881 n.8 (4th Cir. 1973); Richardson v. United States, 465 F.2d 844, 849 (3d Cir. 1972); United States v. Walker, 409 F.2d 477, 481 (9th Cir. 1969).

[111] Roberts v. United States, 176 U.S. 221, 231 (1900).

[112] Switzerland Co. v. Udall, 225 F. Supp. 812 (W.D.N.C.), *aff'd,* 337 F.2d 56 (4th Cir. 1964), *cert. denied,* 380 U.S. 914 (1965).

[113] Richardson v. United States, 465 F.2d 844, 849 (3d Cir. 1972), *cert. denied,* 410 U.S. 955 (1973); National Welfare Rights Organization v. Weinberger, 377 F. Supp. 861 (D.D.C. 1974).

Despite these guidelines, the ministerial-discretionary distinction is an imprecise method for determining whether mandamus relief is appropriate. Moreover, the history of the mandamus concept,[114] and the technical rules that govern it, have generated considerable confusion as to the basis for establishing jurisdiction under section 1361. Currently, three problems common to section 1361 jurisdictional questions must be resolved before a more consistent analytical approach towards mandamus cases can be developed.

A. *Mandamus Jurisdiction and Mandamus Relief*

Questions of law, as well as issues of fact, must be decided after a court has assumed jurisdiction over a controversy.[115] To avoid the temptation of deciding substantive issues by dismissing claims for want of jurisdiction, it has long been federal practice to accept at face value the allegations in the complaint, and to give them their natural jurisdictional consequences "unless they are so transparently insubstantial or frivolous as to afford no possible basis for jurisdiction."[116] Thus, each of the three elements of mandamus action must be alleged in a nonfrivolous manner to establish jurisdiction under section 1361.[117] Yet recent federal court decisions, involving constitutional questions under the first, fifth, and fourteenth amendments, indicate that a different standard, one similar to the more exacting rule applied to a motion for summary judgment, is being applied where jurisdiction rests principally on section 1361.

In the past two years, six federal district courts have considered whether a social security recipient has a right to a hearing

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[114] *See* Byse & Fiocca, *supra* note 102.

[115] Bell v. Hood, 327 U.S. 678 (1946).

[116] Carter v. Seamans, 411 F.2d 767, 770 (5th Cir. 1969).

[117] The Supreme Court in Hagans v. Lavine, 415 U.S. 528 (1974), reaffirmed the substantiality doctrine as a statement of jurisdictional principle. *Hagans* involved statutory and constitutional challenges to a New York Social Services Regulation concerning recoupment of public assistance. *See* Note, *The Outlook For Welfare Litigation In The Federal Courts: Hagans v. Lavine & Edelman v. Jordon*, 60 CORNELL L. REV. 897, 900-03 (1975). Although the jurisdictional argument in *Hagans* involved the sufficiency of an equal protection claim under § 1343(3), the reasoning is equally applicable to the sufficiency of jurisdiction under § 1361 for mandamus relief. In each instance, the substantiality of the claim must be established before the court invokes jurisdiction. The *Hagans* court stated that the petitioners' constitutional claim was not so attenuated and insubstantial as to be devoid of merit. 415 U.S. at 539. However, the constitutional claims were very questionable. *See id.* at 554 (Rehnquist, J., dissenting); Hagans v. Wyman, 471 F.2d 347, 349 (1973). In *Hagans* the Supreme Court established a very minimal standard of substantiality when there was no other jurisdictional basis that would permit a federal court to hear the pendent federal question. Thus, the traditional elements of a mandamus claim, although they must be alleged and must not be "wholly insubstantial" or "obviously frivolous," should be measured by a flexible standard when considering jurisdiction. 415 U.S. at 537.

before his benefits are reduced or terminated.[118] On four occasions the courts ruled that the claimants had a fifth amendment right to a Goldberg-type hearing prior to agency action;[119] in each instance, jurisdiction was found under section 1361.[120] However, in *Jamieson v. Weinberger*[121] and *Knuckles v. Weinberger*,[122] contrary decisions were rendered as the courts rejected both the propriety of maintaining the action under section 1361 and the existence of a substantive right to a prereduction hearing. The nearly perfect correlation between the substantive and jurisdictional findings in these decisions and other mandamus cases[123] suggests a departure from the traditional two-tiered approach, and suggests that a litigant's right to be in a federal forum may rest on a court's predilection towards accepting the substantive constitutional and statutory arguments that the plaintiff is asserting. In *Knuckles* and *Jamieson*, there may have been some basis for distinguishing a reduction of social security benefits from a reduction of welfare benefits. Such a distinction might trigger *Goldberg* due process protections only in the welfare context, and not in the Social Security context since the latter is not need-based.[124] However,

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[118] Jamieson v. Weinberger, 379 F. Supp. 28 (E.D. Pa. 1974); Mattern v. Weinberger, 377 F. Supp. 906 (E.D. Pa. 1974); Lyons v. Weinberger, 376 F. Supp. 248 (S.D.N.Y. 1974); Frost v. Weinberger, 375 F. Supp. 1312 (E.D.N.Y. 1974); Elliott v. Weinberger, 371 F. Supp. 960 (D. Hawaii 1974); Knuckles v. Weinberger, 371 F. Supp. 565 (N.D. Cal. 1973). *Lyons* involved the right of a recipient in the newly established SSI program to a hearing before reduction of benefits, while the five other cases involved Social Security recipients. All six cases were brought without exhausting administrative remedies, and as a result statutory judicial review was not available. *See* note 25 *supra*.

[119] Mattern v. Weinberger, 377 F. Supp. 906 (E.D. Pa. 1974); Lyons v. Weinberger, 376 F. Supp. 248 (S.D.N.Y. 1974); Frost v. Weinberger, 375 F. Supp. 1312 (E.D.N.Y. 1974); Elliott v. Weinberger, 371 F. Supp. 960 (D. Hawaii 1974).

[120] *Elliott* and *Mattern* found jurisdiction under § 1361 only, with *Mattern* explicity rejecting the "shotgun" approach. *See* note 23 and accompanying text *supra*. *Frost* and *Lyons* found jurisdiction under the Administrative Procedure Act. *See* note 24 *supra*. *Frost* also found jurisdiction under § 1331, while *Lyons* considered § 1343 to provide an additional basis for jurisdiction.

[121] 379 F. Supp. 28 (E.D. Pa. 1974).

[122] 371 F. Supp. 565 (N.D. Cal. 1973).

[123] *See* notes 8-10 *supra*.

[124] Goldberg v. Kelly, 397 U.S. 254 (1970), was a welfare case. The plaintiffs in that action were New York recipients of AFDC and Home Relief. In holding that plaintiffs were entitled to due process protections (notice and a prior hearing) before their benefits were terminated, the Court focused on the "brutal need" of the recipients. *Id.* at 261, 264-66. As Social Security is not need-based, however, it could be argued that Goldberg-type due process protections are not necessary under the Social Security Act. A more realistic approach would not draw a distinction of constitutional dimension, however, because for those recipients who have no income other than their Social Security benefits, there is no less need present. Even if full *Goldberg* procedures do not attach, HEW should at least provide a prereduction hearing to decide if the recipient is needy and, therefore, if *Goldberg* restrictions are required in the particular case.

factual distinctions do not explain the court's failure to find jurisdiction under section 1361. In both cases it was uncontroverted that the Social Security Administration did not provide prereduction hearings,[125] nor could it be questioned that the agency had a duty to respect its recipients' fifth amendment rights. Under *Hagans v. Lavine*,[126] the only remaining jurisdictional question is whether the fifth amendment right to a *Goldberg* hearing is so wholly inapplicable to the fact pattern presented as to render the claim frivolous and insubstantial.[127] On this basis, it would seem that neither *Knuckles* nor *Jamieson* presented insubstantial claims, and accordingly jurisdiction under section 1361 should have been recognized in each instance.[128] Instead, the jurisdictional and substantive issues were somehow blurred, and access to the federal courts was denied.

B. *The Ministerial-Discretionary Distinction*

To conform with the requirements of the mandamus tradition, welfare litigants uniformly attempt to characterize the duty of a federal official as mandatory rather than discretionary.[129] Since most statutory and constitutional duties have both mandatory and discretionary aspects,[130] dismissals for want of a ministerial duty can be avoided only by phrasing the obligation of the federal

[125] Jamieson v. Weinberger, 379 F. Supp. 28, 33 (E.D. Pa. 1974); Knuckles v. Weinberger, 371 F. Supp. 565, 566 (N.D. Cal. 1973).

[126] 415 U.S. 528 (1974).

[127] *See* note 117 *supra*.

[128] A first amendment case, representative of the same fuzzy analysis as *Jamieson* and *Knuckles*, is Yahr v. Resor, 339 F. Supp. 964 (E.D.N.C. 1972). In *Yahr* it was decided that the court lacked jurisdiction to compel plaintiff's commanding officer to cease interfering with the plaintiff's first amendment right of association (specifically, his right to attend public meetings). The court's analysis vacillated between the merits and the jurisdictional issue throughout. Even if the court were hesitant to concede that a serviceman has a full right of association, it should have decided the issue as a matter of substantive law. Unless the court intended to say that the commanding officer had no duty to respect the rights of a serviceman under his command, the action should not have been dismissed for lack of jurisdiction.

[129] *See* notes 108-14 and accompanying text *supra*.

[130] Work v. United States *ex rel.* Rives, 267 U.S. 175 (1925).

> Mandamus issues to compel an officer to perform a purely ministerial duty. It can not be used to compel or control a duty in the discharge of which by law he is given discretion. The duty may be discretionary within limits. He cannot transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them. The power of the Court to intervene, if at all, thus depends upon what statutory discretion he has. Under some statutes, the discretion extends to a final construction by the officer of the statute he is executing. No court in such a case can control by mandamus his interpretation, even if it may think it erroneous. The cases range, therefore, from such wide discretion as that just described to cases where the duty is purely ministerial, where the officer can do only one thing, which on refusal he may be compelled to do.

Id. at 177.

official in the most unequivocal, nondiscretionary manner. Where constitutional rights are involved, it is sufficient to assert that the defendant has a ministerial duty not to violate the plaintiff's constitutional rights.[131] In *Langevin v. Chenango Court Inc.*,[132] for example, the assertion that a Federal Housing Administration rent increase, without a prior hearing, violated the fifth amendment due process clause was a sufficient allegation of jurisdiction under section 1361.[133] In a statutory context, it has been held that the failure of the Secretary of HEW to promulgate regulations consistent with the Social Security Act is a violation of a ministerial duty, and therefore a sufficient allegation of section 1361 jurisdiction.[134]

C. *The "Clear Duty" Requirement*

The cases which have denied jurisdiction under the mandamus provisions have implicitly suggested that the complexity of the ultimate issues is a relevant factor in determining whether the court has subject matter jurisdiction. Inevitably, these decisions have given rise to the inference that mandamus is proper only in what may be characterized as the "easy" cases.[135] If this is the actual basis underlying the clear duty element of a mandamus claim, it will severely limit the usefulness of section 1361 whenever the duty is "unclear" because the extent or nature of a constitutional right is in issue. Despite this interpretation, it has been established that mandamus questions should be liberally construed in cases charging violations of constitu-

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[131] Burnett v. Tolson, 474 F.2d 877, 880 (4th Cir. 1973); Mead v. Parker, 464 F.2d 1108 (9th Cir. 1972); Elliott v. Weinberger, 371 F. Supp. 960 (D. Hawaii 1974). The court in *Elliott* found mandamus to require: (*1*) a clear duty on the part of the defendant to do the act, and (*2*) a lack of another adequate remedy. "Moreover, the first and second requirements are met when the application of a Supreme Court ruling to the instant case clearly shows the existence of plaintiff's constitutional right and its denial by the defendant." *Id.* at 968.

[132] 447 F.2d 296 (2d Cir. 1971).

[133] *See also* Walker v. Blackwell, 360 F.2d 66 (5th Cir. 1966) (prison warden's interference with prisoner's freedom of religion adequate jurisdictional allegation under § 1361).

[134] National Welfare Rights Organization v. Weinberger, 377 F. Supp. 861, 867 (D.D.C. 1974).

[135] Jamieson v. Weinberger, 379 F. Supp. 28 (E.D. Pa. 1974); Knuckles v. Weinberger, 371 F. Supp. 565 (N.D. Cal. 1973); Yahr v. Resor, 339 F. Supp. 964 (E.D.N.C. 1972). As the court in *Jamieson* stated:

> I do not believe that the performance that the plaintiff seeks here is the kind of duty that can be said to be a clear, plain, ministerial command that is envisioned in the concept of mandamus. . . . [I]n the case before us, the duty of the Administration is not plainly prescribed by the Constitution. . . . [T]he case turns on whether there is a constitutional duty upon the Administration to make available to plaintiff the opportunity for a preadjustment oral hearing. The question is not free from doubt.

379 F. Supp. at 34.

tional rights.[136] The constitutional duty asserted must only be sufficiently apparent to survive a dismissal as insubstantial.[137] Such a judgment cannot be made in a vacuum;[138] therefore, all relevant legislative and regulatory materials must be considered to determine the extent of the right asserted and the scope of the discretion which has been delegated to the federal official.[139] Mandamus jurisdiction will lie where the duty becomes "clear" after construction, analysis, and interpretation of the relevant case law, constitutional provisions, and statutory language.[140] It is not necessary that there be a Supreme Court decision directly in point to establish a clear constitutional duty for section 1361 purposes.[141] Furthermore, jurisdiction is not defeated simply because another district court viewed the constitutional duty alleged as unclear.[142] Ultimately a judge must exercise his own discretion, and if he sees the duty as clear, jurisdiction is appropriate despite the existence of reasonable viewpoints to the contrary.[143]

CONCLUSION

From the perspective of the social security or federal welfare litigant, the law of federal jurisdiction is chaotic. Despite compelling reasons for federal adjudication of federal welfare claims, there is no jurisdictional provision which guarantees that these cases will be given access to the federal courts. A fundamental unfairness has resulted from this situation. The right of a poor person to have federal statutory and constitutional claims heard in federal court rests largely on the discretion of a district court judge. Although some loopholes have been developed to permit section 1331 jurisdiction, they are not imbedded firmly enough in the law of federal jurisdiction to offer solace to this class of litigants. When there is no loophole, there is a strong possibility of a preliminary determination of the merits before the jurisdictional question is addressed. Theoretically, jurisdiction is present in a given case as a matter of right or not at all. It

[136] United States v. Richardson, 365 F.2d 844, 851 (3d Cir. 1972); Fifth Avenue Peace Parade Comm. v. Hoover, 327 F. Supp. 238, 243 (S.D.N.Y. 1971). "[T]here are occasions of deprivations of constitutional rights where satisfaction of the mandamus requirements might be viewed liberally . . . ." 327 F. Supp. at 243.

[137] *See* note 117 *supra.*

[138] Mattern v. Weinberger, 377 F. Supp. 906 (E.D. Pa. 1974).

[139] Chaudoin v. Atkinson, 494 F.2d 1323 (3d Cir. 1974).

[140] Carey v. Local Bd. No. 2, 297 F. Supp. 252 (D. Conn.), *aff'd*, 412 F.2d 71 (2d Cir. 1969).

[141] Burnett v. Tolson, 474 F.2d 877 (4th Cir. 1973); Mead v. Parker, 464 F.2d 1108 (9th Cir. 1973); Elliott v. Weinberger, 371 F. Supp. 960, 968 n.24 (D. Hawaii 1974).

[142] 371 F. Supp. at 968.

[143] L. JAFFE, *supra* note 108, at 184.

is disturbing when the merits of a claim are submerged in the issue of the claimant's right to be in a federal forum. This problem is especially acute where jurisdiction is based upon section 1361 because the court must evaluate the substantive right involved when it determines the extent of the duty owed to the plaintiff. To date, many courts have confused the jurisdictional and underlying substantive issues.

Absent a legislative reform of Title 28,[144] the welfare litigant suing a federal officer must live with a patchwork approach to federal jurisdiction and the realization that the right to a federal forum is a matter of judicial discretion. Until jurisdictional reform is achieved, society's poor will remain vulnerable to illegal and unconstitutional actions of the federal government which are beyond the reach of the federal courts.

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[144] The American Law Institute's proposal for reform of federal-question jurisdiction would obviate much of the foregoing discussion. AMERICAN LAW INSTITUTE STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 172 (1969).