

tion and the necessity to protect scarce natural resources, further extension of equitable retroactive sanctions can be expected.¹²⁷

VI. JUDICIAL REVIEW—FEDERAL COURT JURISDICTION

A. THE APA AS A STATUTORY GRANT OF JURISDICTION

The federal courts are courts of limited jurisdiction and can hear cases only under a specific jurisdictional grant from Congress.¹ Jurisdiction to hear claims involving federal agencies is most often con-

127. Since the Natural Gas Act was patterned after the regulatory scheme of its sister statute, the Federal Power Act, *Hearings on H.R. 11662 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, 74th Cong., 2d Sess. 10, 46 (1936)*; Flittie & Armour, *supra* note 17, at 448, 453, it might be expected that the developments discussed herein would also be applicable to activities regulated under the Federal Power Act. However, no such analogous developments are evident. Furthermore, immediate extension of *Callery, Sunray, Plaquemines*, and *Mesa Petroleum* to such activities is doubtful because the use of a certificate-conditioning refund order has been predicated on the FPC's simultaneous licensing and rate-regulating jurisdiction under the Natural Gas Act. The problem under the Federal Power Act is that the FPC has no certification powers under Part II of the Act, 16 U.S.C. §§ 824-28c (1970), which grants its primary rate-regulatory power through jurisdiction over interstate electric utilities. See note 4 *supra*. The FPC does have license-conditioning authority under Part I of the Act, 16 U.S.C. §§ 799, 803 (1970), but its jurisdiction to regulate rates under that part, 16 U.S.C. §§ 812-13 (1970), is extremely limited and seldom exercised. See R. BAUM, *THE FEDERAL POWER COMMISSION AND STATE UTILITY REGULATION* 176-77, 180 (1942); note 4 *supra*.

A jurisdictional overlap, on the other hand, could theoretically be construed by attempting to bridge the separate parts of the Act. When a hydro-electric utility sells or transmits electricity in interstate commerce, the FPC has jurisdiction under both parts of the Federal Power Act. In this situation it has been held that provisions of Part I are repealed by implication by inconsistent or conflicting provisions of the later enacted Part II, *Safe Harbor Water Power Co. v. FPC*, 179 F.2d 179, 185 n.10 (3d Cir.), *cert. denied*, 339 U.S. 957 (1949); *Safe Harbor Water Power Corp. v. FPC*, 124 F.2d 800, 804 (3d Cir.), *cert. denied*, 316 U.S. 663 (1942), and provisions not conflicting or inconsistent can be read together, *see* 179 F.2d at 186-88. If the license-conditioning powers of Part I, therefore, can be construed together with the rate-regulating powers of Part II, refund powers could presumably be implied from the two. The problem with the above analysis, however, is that the legislative history indicates that a certification provision was placed in the original draft of Part II of the Federal Power Act and eliminated upon redrafting, *see* note 45 *supra*. Where Congress has thus intended that there be no licensing powers under Part II of the Federal Power Act, it would be inconsistent to create implied refunds by interposing the licensing powers of Part I into the rate-regulating provisions of Part II. See note 29 *supra* and accompanying text.

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ferred either by the general jurisdictional grants in title 28² or by special statutes dealing with individual agencies.³ These grants of jurisdiction, however, are not comprehensive and leave critical gaps.⁴ The argument is often made that section 10 of the Administrative Procedure Act⁵ fills these jurisdictional gaps by conferring statutory jurisdiction on the federal courts.⁶

2. *E.g.*, 28 U.S.C. §§ 1331 (federal question), 1332 (diversity), 1333 (admiralty and maritime claims), 1337 (interstate commerce), 1361 (mandamus) (1970).

3. *E.g.*, Federal Alcohol Administration Act, 27 U.S.C. § 207 (1970); Communications Act of 1934, 47 U.S.C. § 402 (1970); and Federal Aviation Act, 49 U.S.C. § 1486 (1970). See generally BARRON & HOLTZOFF §§ 21, 28.

4. See Cramton 436-49. This deficiency is particularly true with respect to actions brought against a federal administrative agency because most agency legislation does not specifically provide for jurisdiction and it is often difficult to satisfy *all* the requisites for the general jurisdictional statutes in an action against an agency. For example, section 1331 would be unavailable without an amount in controversy exceeding \$10,000, and section 1361 would be unavailable where there is no duty owed by the federal officer or agency to the plaintiff. *Id.*

If statutory jurisdiction is otherwise unavailable, a litigant can bring an action under the general equity jurisdiction of the District Court of the District of Columbia or the Court of General Sessions of the District of Columbia. D.C. CODE ENCYCL. ANN. §§ 11-521, -961 to -962 (1966); *Stark v. Wickard*, 321 U.S. 288, 290-91 (1944). It might be argued that this source eliminates any critical jurisdictional gaps. However, such discretionary jurisdiction is inadequate because it forces a litigant to bring the action in the District of Columbia and to rely on the discretion of the court.

5. Administrative Procedure Act § 10, 5 U.S.C. § 701, *et seq.* (1970), amending 5 U.S.C. § 1009 (1964). See generally Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965); Dickinson.

6. The argument can also be made that the Constitution is a source of federal court jurisdiction. See Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953). There is a constitutional right to judicial review of claims based on a constitutional right, and ". . . a court must always be available to pass on claims of constitutional right to judicial process, and to provide such process if the claim is sustained." *Id.* The present discussion is limited to statutory grants of jurisdiction and does not consider this constitutional source.

The argument can also be made that the APA confers jurisdiction on *courts of appeals* to review agency determinations. This contention has not been accepted however since section 10's provisions for review deal "not with appellate court review but with review by an *original* action in a court of competent jurisdiction. The court of appeals is not such a court unless specially authorized by statutory grant of power." *City of Dallas v. Rentzel*, 172 F.2d 122, 123 (5th Cir. 1949). See also *Arizona State Dep't of Pub. Welfare v. HEW*, 449 F.2d 456 (9th Cir. 1971); *Wisconsin v. FPC*, 292 F.2d 753, 755 (D.C. Cir. 1961); *Schwab v. Quesada*, 284 F.2d 140, 143 (3d Cir. 1960); *Magnolia Petroleum Co. v. FPC*, 236 F.2d 785, 793 (5th Cir. 1956). But see *Rettinger v. FTC*, 392 F.2d 454, 457 (D.C. Cir. 1968). Examples of special statutes authorizing a court of appeals to exercise original review are 47 U.S.C. § 402 (1970) (FCC) and 15 U.S.C. § 45 (1970) (FPC). See generally BARRON & HOLTZOFF § 58. As a policy matter it would seem unnecessary to have the APA confer jurisdiction on a court of appeals, since it has automatic jurisdiction to review any final district court order. 28 U.S.C. § 1291 (1970).

Section 10 of the APA expressly deals with four elements essential to obtaining jurisdiction to review agency action,⁷ but it fails to specify the initial and most important element—a statutory grant of jurisdiction. The question of whether section 10 is an implied grant of jurisdiction was the subject of at least one decision during 1971⁸ and was mentioned in several opinions as a possible alternative source of jurisdiction.⁹ The issue has been widely debated and it “remains an open [question], clouded by uncertainty.”¹⁰ No reference to the jurisdictional question is made in the APA legislative history.¹¹ The courts which have considered the question have reached conflicting conclusions,¹² and those which found section 10 to be an independent source

7. 5 U.S.C. § 701(a) (1970) (absence of statutory preclusion of judicial review); *id.* § 702 (standing); *id.* § 703 (form and venue).

8. Northwest Residents Ass'n v. HUD, 325 F. Supp. 65 (E.D. Wis. 1971).

9. *E.g.*, Aquavella v. Richardson, 437 F.2d 397, 401-02 n.10 (2d Cir. 1971); Templeton v. Dixie Color Printing Co., ___ F. Supp. ___, ___ n.3 (N.D. Ala. 1971); Delaware v. Pennsylvania N.Y. Cent. Transp. Co., 323 F. Supp. 487, 493-95 (D. Del. 1971); General Motors Corp. v. Volpe, 321 F. Supp. 1112, 1119-20 (D. Del. 1970).

10. Cramton 445. *See also* Charlton v. United States, 412 F.2d 390, 394-95 (3d Cir. 1969); Toilet Goods Ass'n v. Gardner, 360 F.2d 677, 679 n.1 (2d Cir.), *aff'd*, 387 U.S. 158 (1966); Byse & Fiocca 328. *But see* DAVIS (Supp. 1970) 790.

11. *See* note 17 *infra* and accompanying text.

12. Finding jurisdiction: Brennan v. Udall, 379 F.2d 803 (10th Cir.), *cert. denied*, 389 U.S. 975 (1966); Coleman v. United States, 363 F.2d 190 (9th Cir. 1966), *aff'd on rehearing*, 379 F.2d 555 (1967), *rev'd on other grounds*, 390 U.S. 599 (1968); Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961); Northwest Residents Ass'n v. HUD, 325 F. Supp. 65 (E.D. Wis. 1971); Templeton v. Dixie Color Printing, ___ F. Supp. ___ (N.D. Ala. 1971); Powelton Civic Home Owners' Ass'n v. HUD, 284 F. Supp. 809 (E.D. Pa. 1968).

Denying jurisdiction: Zimmerman v. United States, 422 F.2d 326 (3d Cir.), *cert. denied*, 399 U.S. 911 (1970); Pan Am. World Airways v. CAB, 392 F.2d 483 (D.C. Cir. 1968); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967); Chournos v. United States, 335 F.2d 918 (10th Cir. 1964); Local 542, Operating Eng'rs v. NLRB, 328 F.2d 850 (3d Cir.), *cert. denied*, 379 U.S. 826 (1964); Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir. 1955); McEachern v. United States, 212 F. Supp. 706 (W.D.S.C. 1963); Barnes v. United States, 205 F. Supp. 97 (D. Mont. 1962); Olin Indus. v. NLRB, 72 F. Supp. 225 (D. Mass. 1947).

The Court of Appeals for the Second Circuit has reached opposing results without expressly overruling earlier decisions. *Compare* Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970) and Cappadora v. Celebrezze, 356 F.2d 1 (2d Cir. 1966) (finding jurisdiction) with Ove Gustavsson Contracting Co. v. Floete, 278 F.2d 912, 914 (2d Cir. 1960) (denying jurisdiction). *See also* Empresa Hondurena de Vapores, S.A. v. McLeod, 300 F.2d 222, 227 n.5 (2d Cir. 1962), *vacated on other grounds sub nom.* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) (noting the possibility of jurisdiction); Toilet Goods Ass'n v. Gardner, 360 F.2d 677, 679 n.1 (2d Cir.), *aff'd*, 387 U.S. 158 (1967) (recognizing the conflicting decisions).

have often had alternative sources available.¹³ There has never been a Supreme Court decision dealing with the issue.¹⁴

The better reasoned view, followed by most of the circuit courts which have considered the problem,¹⁵ is that section 10 does *not* confer jurisdiction. It increases access to judicial review by widening the definition of reviewable actions, but does so only for already jurisdictionally empowered courts:

[the APA does not extend] the jurisdiction of federal courts to cases not otherwise within their competence. The purpose of section 10 is to define the procedures and manner of judicial review of agency action rather than to confer jurisdiction over the courts.¹⁶

This view is supported by the absence of any reference to statutory jurisdiction in the legislative history of the APA¹⁷ and, as a matter of statutory construction, by the express language of the APA.¹⁸

The alternative view, advanced by some commentators¹⁹ and a number of recent decisions,²⁰ contends that the APA is an *implied*

13. *Brennan v. Udall*, 379 F.2d 803 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967); *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966), *aff'd on rehearing*, 379 F.2d 555 (1967), *rev'd on other grounds*, 390 U.S. 599 (1968); *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir. 1961). *See generally* Cramton 444.

14. *See* Byse & Fiocca 328-29. *But see* note 29 *infra* and accompanying text.

15. *See* note 12 *supra*.

16. *Ove Gustavsson Contracting Co. v. Floete*, 278 F.2d 912, 914 (2d Cir.), *cert. denied*, 364 U.S. 894 (1960). *See also* Dickinson 576.

17. Although the *scope* of judicial review was discussed extensively, the expansion of statutory jurisdiction was never explicitly considered in the drafting and enacting of the Administrative Procedure Act. *See Hearings on Federal Administrative Procedure Before House Comm. on the Judiciary*, 79th Cong., 1st Sess. 19 (1945); S. REP. NO. 752, 79th Cong., 1st Sess. (1945); H.R. REP. NO. 353, 79th Cong., 2d Sess. (1946); H.R. REP. NO. 1980, 79th Cong., 2d Sess. (1946). *See also* 92 CONG. REC. 2148-60, 5788-90 (1946) (remarks of Senator McCarran). *See generally* Byse & Fiocca 327-28.

The absence of any discussion of statutory jurisdiction has been explained as an assumption by the drafters of the APA that at least one of the many federal jurisdictional statutes would always provide a judicial forum. *Id.* 328.

18. Section 10(b) of the APA reads: "any applicable form of legal action, . . . in a court of competent jurisdiction . . ." 5 U.S.C. § 703 (1970) (emphasis added). Construing the words "competent jurisdiction" would ordinarily require both subject matter jurisdiction and personal jurisdiction. Byse & Fiocca 327. In contrast, the Freedom of Information Act has a specific jurisdictional provision. 5 U.S.C. § 552(a)(3) (1970). *See Note, The Information Act: Judicial Enforcement of the Records Provision*, 54 VA. L. REV. 466, 473-77 (1968). *See generally* Dickinson 561-78 for a discussion of the legislative history and the conclusion that the APA merely codifies a presumption of reviewability and is not a grant of jurisdiction.

19. DAVIS (Supp. 1970) § 23.02; JAFFE 164.

20. *See* note 12 *supra*.

source of jurisdiction.²¹ Although this position has gained gradual recognition, “[n]one of the authorities . . . [has given] a reasoned analysis of the problem.”²² Most courts which have held section 10 to be a source of statutory jurisdiction have done so by relying on the familiar presumption in favor of judicial review under the APA.²³ However, a presumption in favor of *judicial review* cannot necessarily be equated with a presumption in favor of *jurisdiction*. Empowering a court to exercise review involves many collateral issues and underlying policy questions, implicit in such an expansion of jurisdiction, which could not be adequately considered or disposed of through the judicial process. For example, is there any justification for a jurisdictional amount when actions are brought against an administrative agency? The answer depends upon a congressional determination as to who are the proper parties to bring an action and whether or not an agency or a federal court will be subjected to a burdensome amount of litigation. Another important policy consideration is the proper venue for actions involving federal agencies.²⁴ The problems these issues would cause have not been considered or explored by those courts holding the APA to be a grant of jurisdiction. “[T]he

21. The courts have not been clear in determining the basis for the implication. See, for example, *Northwest Residents Ass'n v. HUD*, 325 F. Supp. 65 (E.D. Wis. 1971). Jurisdiction is generally implied from the text of section 10(a) and (b). *Byse & Fiocca* 326-27. However, the basis might also be the general purpose of section 10, which is to increase access to judicial review. For a discussion of the implications upon waiver of sovereign immunity when the APA is held jurisdictional, see pages 244-47 *infra* and accompanying text.

22. *Byse & Fiocca* 329.

23. See, for example, *Cappadora v. Celebrezze*, 356 F.2d 1 (2d Cir. 1966) and *Powelton Civic Home Owners' Ass'n v. HUD*, 284 F. Supp. 809 (E.D. Pa. 1968). For a discussion of the presumption in favor of reviewability, see *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967); *Dickinson* 577; Comment, *Judicial Control of Administrative Action: EDF v. Ruckelshaus*, 57 VA. L. REV. 676, 692-93 (1971).

A number of courts have converted this presumption in favor of judicial review into one in favor of jurisdiction. One court has stated: “the Supreme Court has implemented what appears to be a presumption in favor of a finding of *jurisdiction* under the Administrative Procedure Act,” *Citizens Comm. for the Hudson Valley v. Volpe*, 302 F. Supp. 1083, 1091 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir. 1970) (emphasis added). For other courts confusing the two concepts, see, e.g., *Northwest Residents Ass'n v. HUD*, 325 F. Supp. 65 (E.D. Wis. 1971); *School Board of Oskaloosa Co. v. Richardson*, 332 F. Supp. 1263 (N.D. Fla. 1971). For a discussion of the presumption in favor of judicial review liberalizing standing requirements, see *1969 Duke Project* 198.

24. The Mandamus Act, 28 U.S.C. § 1361 (1970), which involved analogous policy determinations, represents a Congressional determination that decentralized review, allowing a local federal court to hear the action, is both necessary and practical. See generally *Byse & Fiocca* 330-31.

important goal of subjecting final agency action to judicial scrutiny"²⁵ has been the dominant consideration to these courts.

An intermediate and more justified solution would be to hold that section 10 confers jurisdiction only when no other statute provides an alternative grant of statutory jurisdiction to review the agency action in question.²⁶ None of the courts have imposed such a limitation in declaring the APA to be an independent source of jurisdiction, and a number of them have even held the APA to confer jurisdiction without considering the availability of other jurisdictional sources.²⁷ This subordination of express power in jurisdictional statutes to an implied power in the APA has been neither explained nor justified.

Professor Davis advocates another intermediate solution: since the APA confers a *right*²⁸ to judicial review, at least one court must be jurisdictionally empowered to exercise such review.²⁹ Davis would avoid some of the collateral issues suggested above³⁰ by requiring that the APA be read in conjunction with the most applicable express jurisdictional statute.³¹ There is little authority in support of Professor Davis' approach which does not fully avoid the collateral issues such as, what criteria should be used to determine the "most applicable express jurisdictional statute,"³² and to what extent should section 10

25. *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97, 102 (2d Cir. 1970), *aff'd* 302 F. Supp. 1083 (S.D.N.Y. 1969), *cert. denied*, 400 U.S. 949 (1970).

26. See *Byse & Fiocca* 330.

27. "We find sufficient grounds to accept jurisdiction under the provisions of the . . . [APA] and thus it is not necessary to determine whether additional jurisdictional basis exists." *Brennan v. Udall*, 251 F. Supp. 12, 14 (D. Colo. 1966), *aff'd*, 379 F.2d 803, *cert. denied*, 389 U.S. 975 (1967). See also cases cited note 13 *supra*.

28. Davis is referring to a statutory right to judicial review and not a constitutional right of judicial review. See note 6 *supra*.

29. DAVIS (Supp. 1970) 789-92. Davis finds support for his views in *Rusk v. Cort*, 369 U.S. 367 (1962): "[t]he Supreme Court has quite properly assumed that one who is entitled to review under the Administrative Procedure Act cannot be denied review on the ground that a district court lacks jurisdiction. . . ." DAVIS (Supp. 1970) 789. See also JAFFEE 164-65.

30. See notes 22-24 *supra* and accompanying text.

31. For example, under Professor Davis' solution, if an action brought against an agency under section 1331 was barred by the \$10,000 jurisdictional amount, the court could look to the APA for a grant of jurisdiction. Section 1331 would continue to govern the case for all matters except the jurisdictional amount, and the jurisdictional amount would still be required as against any non-agency parties. DAVIS (Supp. 1970) 790-92.

32. Davis discusses the APA as a jurisdictional source with respect to a 1331 action but, because his approach is applicable to *any* jurisdictional statute relied upon by a litigant when he would otherwise be unable to obtain an empowered court, guidelines are necessary to determine if that particular jurisdictional statute is to be expanded by the APA.

remedy deficiencies in “the most applicable express jurisdictional statute.”

To the extent that jurisdiction is available, judicial review of improper agency action is increased.³³ Some commentators feel that the ameliorative effects of such review warrant judicial construction of the APA as a source of jurisdiction.³⁴ However, because a jurisdictional expansion needs to be integrated with other statutory sources of jurisdiction and involves many collateral issues which are not adequately handled through the judiciary’s piecemeal approach, decisive legislation is most often³⁵ and more appropriately advocated as the proper solution:

[W]e are dealing with a problem that merits statutory clarification . . . as to the jurisdictional basis for review If the cases make anything clear, it is the desirability of Congressional action in this murky and troublesome area.³⁶

B. SOVEREIGN IMMUNITY

In 1971 four diverse developments in the doctrine of sovereign immunity¹ furthered a movement to limit or abrogate² the doctrine’s

33. See generally Berger, *supra* note 5, at 86, 93-95; McCarran, *Improving “Administrative Justice”*; *Hearings and Evidence; Scope of Judicial Review*, 32 A.B.A.J. 827, 893-94 (1946).

34. See DAVIS (Supp. 1970) 789-92; JAFFEE 164-65; Byse & Fiocca 329-30.

35. See, e.g., Cramton 445, 468-70. Discussions of this solution, however, are usually directed at eliminating only jurisdictional gaps caused by the minimum jurisdictional amount under 28 U.S.C. § 1331 (1970). See S. 3568, 91st Cong., 1st Sess. (1970) and S. 598, 92d Cong., 1st Sess. (1971). For a discussion of a proposal to amend the APA, see *Pending Proposals To Amend the Administrative Procedure Act: An Analysis of S. 518*, 20 AD. L. REV. 185, 200-06 (1968).

36. *Charlton v. United States*, 412 F.2d 390, 400 (3d Cir. 1969) (concurring opinion).

1. The doctrine, simply stated, means that the United States may not be sued without its consent. Historically, a variety of bases have been advanced in support of sovereign immunity, but none can withstand a critical analysis. Justice Holmes suggested that a legal right cannot exist against the authority that makes the law on which the right depends. *Kawanakoa v. Polyblank*, 205 U.S. 349, 353 (1907). However, this is not persuasive since the federal government has long obeyed the judgments of courts in cases involving legal rights asserted against it. DAVIS (Supp. 1970) § 27.00-4, at 906-08. Hamilton argued that a suit against the government lies outside a federal court’s jurisdiction as defined by article III of the Constitution. THE FEDERALIST No. 81, 567-68 (Dawson ed. 1867). See also *Williams v. United States*, 289 U.S. 553 (1933). See generally WRIGHT §§ 11, 22. The federal courts, in continually reviewing suits to which the United States has consented, have never accepted Hamilton’s argument. *Id.* § 22. A third early argument for sovereign immunity was that it was a method by which the courts could avoid bankrupting “a young and relatively impoverished federal . . . body politic.” Sherry, *The Myth that the King Can Do No Wrong: A Comparative Study of the Sovereign*