

**NONSTATUTORY REVIEW OF FEDERAL  
ADMINISTRATIVE ACTION: THE NEED  
FOR STATUTORY REFORM OF  
SOVEREIGN IMMUNITY,  
SUBJECT MATTER JURISDICTION,  
AND PARTIES DEFENDANT**

*Roger C. Cramton*

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*I wish the State of society was so far improved, and the science of Government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens.*

—Chief Justice John Jay<sup>1</sup>

**I**T is unfortunate but true that the wishes of our first Chief Justice remain unfulfilled some 175 years later. The ability of citizens to obtain effective relief against the United States and its agencies “in the peaceable course of law” is incomplete and inadequate. Some progress has been made. The establishment by Congress in the Tucker Act<sup>2</sup> and the Federal Tort Claims Act<sup>3</sup> of twin systems of federal monetary liability, one for contract and one for tort, represented an enormous step forward. But the essential goal—“that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens”—has not yet been achieved.

*Gnotta v. United States*<sup>4</sup> provides a recent illustration of the remaining deficiencies. Gnotta, an engineer of Italian descent em-

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This Article is based in part upon reports that I have prepared as consultant to the Committee on Judicial Review of the Administrative Conference of the United States. The Conference has not evaluated or approved this Article; the responsibility for its contents is solely mine. I am indebted, however, to members of the Committee on Judicial Review for insights and comments that have shaped my thinking on the problems dealt with here. I am also indebted to Professor Clark Byse of the Harvard Law School and Professor Kenneth Culp Davis of the University of Chicago Law School, whose past contributions and generous counsel have laid the groundwork for whatever is of value in this Article.

1. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 478 (1793) (emphasis added).

2. 24 Stat. 505 (1887), as amended, 28 U.S.C. §§ 1346(a), (b), (d) (1964) (district courts); 28 U.S.C. § 1491 (1964) (Court of Claims). The Tucker Act was preceded by the Court of Claims Act, 10 Stat. 612 (1855).

3. 60 Stat. 812, 842 (1946), as amended, 28 U.S.C. §§ 1346(b), 1402(b), 1504, 2110, 2401-02, 2411-12, 2671-80 (1964).

4. 415 F.2d 1271 (8th Cir. 1969).

ployed in a field office of the Army Corps of Engineers, remained in his initial grade of appointment after a dozen years of service. He charged that his superiors had refused to provide him opportunities for advancement because of his ethnic origin. An executive order proscribes such discrimination unequivocally and provides "for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment" by the employing agency and the Civil Service Commission.<sup>5</sup> The Commission held a lengthy hearing at which testimony supporting and contradicting Gnotta's claim of discrimination was received. After an adverse determination by the Commission, Gnotta sought judicial review in a suit in a United States district court, naming as defendants the United States, the Civil Service Commission, and the employees of the Army Corps of Engineers who supervised his work. The district court dismissed the suit on the ground "that Gnotta's selected procedure and his choice of defendants raise serious questions of governmental immunity and of consequent jurisdiction"<sup>6</sup> and the dismissal was affirmed by the United States Court of Appeals for the Eighth Circuit.

Why is it that "Gnotta's appeal necessarily falls because of the identity of the defendants he had chosen to sue"?<sup>7</sup> The court listed these reasons:

(1) "One cannot sue the United States without its consent . . .";<sup>8</sup>

(2) "'Congress has not constituted the [United States Civil Service] Commission a body corporate or authorized it to be sued *eo nomine* . . .';"<sup>9</sup> and

(3) the doctrine of sovereign immunity stood in the way of suit against the individual defendants:

A suit against an officer of the United States is one against the United States itself "if the decree would operate against" the sovereign; . . . or if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration" . . . ; or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act" . . . . These principles, we feel, operate to identify the first and second counts against the named individuals with counts against the United States, for relief under the counts would compel those individuals to promote

5. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 comp.).

6. 415 F.2d at 1276. The district court decision is unreported.

7. 415 F.2d at 1276.

8. 415 F.2d at 1276, citing *United States v. Sherwood*, 312 U.S. 584, 586-88 (1941).

9. 415 F.2d at 1277, citing *Blackmar v. Guerre*, 342 U.S. 512, 514-16 (1952); *Bell v. Groak*, 371 F.2d 202, 204 (7th Cir. 1966).

the plaintiff, with the natural effect a promotion has upon the Treasury, and to exercise administrative discretion in an official personnel area.<sup>10</sup>

One's sense of justice would not be pricked if the court, reaching the merits, had decided that the administrative determination was supported by substantial evidence. Somewhat less satisfying, but tolerable, would have been a decision in which the court, after wrestling with federal civil service law and regulations, held that adverse determinations of the Civil Service Commission were subject to only limited review<sup>11</sup> or that the particular matter of personnel advancement was "committed to agency discretion by law" and hence nonreviewable.<sup>12</sup> But it is disheartening that the "State of society" is so little improved from Jay's era that dogmas of sovereign immunity and technical rules about parties defendant should foreclose judicial review of federal administrative action.

The purpose of this Article is to generate support for three legislative proposals that will rectify the problems exemplified by the *Gnotta* case and hosts of other cases: (1) The elimination of the doctrine of sovereign immunity as a barrier to judicial review of federal administrative action; (2) a modest expansion of the subject matter jurisdiction of United States district courts to accommodate such review and, in addition, to provide a remedy against the United States for the resolution of property disputes; and (3) the total elimination of the remaining technicalities concerning the identification, naming, capacity, and joinder of parties defendant in actions challenging federal administrative action.<sup>13</sup>

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10. 415 F.2d at 1277, citing and quoting from, respectively, *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963); *Land v. Dollar*, 330 U.S. 731, 738 (1947); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949); *Dugan v. Rank*, 372 U.S. 609, 620 (1963).

11. Compare *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *affd. by an equally divided Court*, 341 U.S. 918 (1951) (judicial review of the discharge of a federal employee is limited to determining whether the employee received the protection of prescribed administrative procedures), with *Charlton v. United States*, 412 F.2d 390 (3d Cir. 1969) (scope of judicial review is governed by the Administrative Procedure Act). See also Craycroft, *The Scope of Judicial Review Afforded a Civil Service Employee's Discharge*, 3 HARV. LEGAL COMMENTARY 12 (1966).

12. See, e.g., *Keim v. United States*, 177 U.S. 290 (1900); *McEachern v. United States*, 321 F.2d 31, 33 (4th Cir. 1963). The court in *Gnotta*, stating that "promotion . . . of employees . . . is a matter of supervisory discretion and not subject to judicial review," considered resting its decision on this ground, but concluded that a charge of ethnic discrimination could not be bypassed in this way. 415 F.2d at 1275-76.

13. For the proposed revisions of 5 U.S.C. §§ 702, 703 (Supp. IV, 1965-1968); 28 U.S.C. § 1331 (1964); and 28 U.S.C. § 1391(e) (Supp. IV, 1965-1968), see pp. 468-70 *infra*. These proposals are restricted to actions brought in federal courts. The reasons for not exposing the United States and its agencies to suit in state courts, except under special consent statutes, rest upon the notion that the federal courts are specially qual-

Before turning to a consideration of the problems to be solved, the pattern of existing remedies against the United States and its officers must be briefly sketched.

The law of remedies against the United States is a complicated mosaic of judge-made rules and statutory enactments. The initial premise, once the doctrine of sovereign immunity was held to have survived the American Revolution, was that the United States could not be sued by name without its consent.<sup>14</sup> Since this immunity came to be viewed as a defect affecting the subject matter jurisdiction of federal courts,<sup>15</sup> federal officers or lawyers could not confer jurisdiction by purporting to waive the sovereign's immunity; only the Congress could consent on behalf of the United States.<sup>16</sup>

In a society in which the rule of law has any meaning, it would be intolerable if private persons harmed by official conduct were without any remedy whatsoever. Therefore, our legal system has always provided some exceptions to the rigid rule of sovereign immunity, although the form of those exceptions has shifted over the years. In the nineteenth century, prior to the enactment of a profusion of statutory remedies, the action against the wrongdoing officer was the mainstay of the system. The officer who, in causing injury to a private person, exceeded his authority or violated constitutional limitations was liable for damages or, in a proper case, injunctive relief.<sup>17</sup>

Gradually, however, sentiment built up for the direct provision of damages in an action against the federal government. The inadequacies of the common-law damage action against an officer and the

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ified to decide the questions of federal law that arise in such actions. The desire of government lawyers to litigate in federal courts, when coupled with the broad removal provisions of 28 U.S.C. §§ 1441, 1442 (1964), also provides a practical argument in the same direction.

14. See, e.g., *United States v. Sherwood*, 312 U.S. 584 (1941); *Minnesota v. United States*, 305 U.S. 382 (1939).

15. The theory of the sovereign's immunity from suit without consent requires that the jurisdictional objection be considered a matter affecting the competence of the court, unlike objections with respect to personal jurisdiction, which may be waived by an attorney's general appearance or submission. See *Case v. Terrell*, 78 U.S. (11 Wall.) 199 (1871), in which the Court found it "incredible" that a federal court, in the absence of a consent statute, could render a judgment against the United States, even though the Comptroller of the Currency had appeared and had defended the action on behalf of the United States. See also note 45 *infra*.

16. See, e.g., *Case v. Terrell*, 78 U.S. (11 Wall.) 199 (1871).

17. The classic exposition of the availability of injunctive relief against the officer is in *Ex parte Young*, 209 U.S. 123 (1908), a case involving a state officer. The federal cases make no distinction between the application of sovereign immunity in actions against federal officers and its application in actions in federal courts against state officers.

desire to encourage persons to contract with the United States on favorable terms led Congress to provide a new contract remedy. In 1855 Congress made its first general provision for the recovery of damages against the Government itself; it created the Court of Claims and empowered that court to award damages against the United States in actions arising out of government contracts.<sup>18</sup> That statute, the Court of Claims Act, was followed in 1887 by the Tucker Act,<sup>19</sup> which expanded the jurisdiction of the Court of Claims and conferred concurrent jurisdiction in certain cases on the district courts.

Not until 1946 was the corresponding step taken with respect to tort liability, an advance that was long overdue when it was made because the tort action against the officer had been unsatisfactory to both the Government and the claimant. Exposing a government official to personal liability in potentially large amounts for the good faith, though mistaken, performance of his duties, might constrain his actions and delay his decisions, both of which would work to the detriment of effective government.<sup>20</sup> On the other hand, judicial efforts to ameliorate the officer's plight by immunizing him from tort liability had had the effect of depriving the injured citizen of monetary relief.<sup>21</sup> The solution of the dilemma, taken in 1946 with the Federal Tort Claims Act,<sup>22</sup> was governmental tort liability. Governmental responsibility both in contract and in tort is now well established and in broad outline totally successful.<sup>23</sup>

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18. 10 Stat. 612.

19. 24 Stat. 505.

20. See the famous statement of Judge Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949):

[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith.

21. The federal officers' immunity from tort has rapidly expanded from a protection available to those exercising judicial functions [*Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871)] to a virtually absolute immunity of all high-level officials for acts done under color of office. *Barr v. Matteo*, 360 U.S. 564 (1959); *Howard v. Lyons*, 360 U.S. 593 (1959). See generally L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* ch. 7 (1965); Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44 (1960).

22. 60 Stat. 812, 842, as amended, 28 U.S.C. §§ 1346(b), 1402(b), 1504, 2110, 2401-02, 2411-12, 2671-80 (1964), as amended, 28 U.S.C. §§ 2401(b), 2671-75, 2679(b) (Supp. IV, 1965-1968). In 1966 Congress enacted legislation designed to facilitate settlement and payment by government lawyers of tort claims against the United States. 80 Stat. 306. For a useful discussion of the Act, see Jacoby, *The 89th Congress and Government Litigation*, 67 COLUM. L. REV. 1212 (1967).

23. General satisfaction with governmental liability for money damages should not stand in the way of needed improvements. One such improvement is the reconsideration and possible narrowing of the exceptions in the Federal Tort Claims Act,

In addition to the damage remedies, however, there were non-statutory and nonmonetary remedies against official action, and it is the latter-day development of these remedies with which this Article is concerned. The common law had been a rich storehouse of such remedies, but the extraordinary remedies available in England and in most of the states before the Revolution survived America's transformation into a federal republic only in reduced numbers. Aside from habeas corpus, the federal courts were limited to injunction and mandamus, and the availability of the latter was limited to federal courts in the District of Columbia.<sup>24</sup> Thus the injunction suit, later supplemented by the declaratory judgment,<sup>25</sup> became the all-purpose method of challenging federal administrative action prior to the development in the modern era of the independent regulatory agency with its own special statutory review provisions.<sup>26</sup> The spread of such provisions in recent decades and their extension to some executive functions has channelled most judicial review of federal administrative action into the form of "statutory" review under such special statutes. But many governmental functions, especially those delegated to the older executive departments, are still reviewable only in "nonstatutory review" actions.<sup>27</sup> "Nonstatutory review" of federal administrative action refers to judicial review that is not obtained under a specific statutory review provision; it includes review

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especially the immunity of the United States for most intentional torts committed by officers. See Gellhorn & Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U. L. REV. 1325, 1341 (1954). A second improvement is correction of the omission from the Tucker Act of money damages in quasi-contract or restitution. See note 213 *infra*.

24. See the excellent discussion in Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1499-502 (1962).

25. See Federal Declaratory Judgments Act, 28 U.S.C. § 2201 (1964). Declaratory and injunctive relief are used interchangeably and in combination with one another. Both are subject to the same limitations with respect to availability. See *Developments in the Law—Declaratory Judgments—1941-1949*, 62 HARV. L. REV. 787 (1949).

26. For general discussions of the federal remedial pattern, and the special reliance on injunction, see 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* ch. 23 (1958, Supp. 1965); L. JAFFE, *supra* note 21, ch. 5.

27. Although generalization is hazardous, functions performed by the older executive departments are generally reviewable only in nonstatutory review actions. Among these are the Departments of State, Defense, Treasury, Justice, Interior, Agriculture, Commerce, and Labor. For famous examples of nonstatutory review, see *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902) (postal fraud order); *Ng Fung Ho v. White*, 259 U.S. 276 (1922) (alien deportation); *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U.S. 316 (1903) (Department of Interior land grant). For a summary of judicial review provisions as of 1962, see COMM. ON JUDICIAL REVIEW, *ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, STATUTORY PROVISIONS FOR JUDICIAL REVIEW OF FEDERAL ADMINISTRATIVE ACTION* (Sept. 1962).

proceedings that seek specific relief against a federal officer by injunction, mandamus, habeas corpus, or other common-law remedies.<sup>28</sup>

Nonstatutory review of federal administrative action rests on the premise, sometimes referred to as the presumption of a right to judicial review,<sup>29</sup> that courts can make a useful contribution to administration by testing the legality of official action which adversely affects private persons. The presumption of reviewability is reflected not only in court decisions but in a plethora of statutes in which Congress has provided a special procedure for reviewing particular administrative activity.<sup>30</sup> If there is no such special consent to suit, the plaintiff must seek judicial review by invoking the general jurisdiction of a United States district court in a nonstatutory-review action. The theory and operation of nonstatutory review are that the officer who has committed a wrong to a private individual is answerable for his conduct unless he can establish that federal law justified his action.<sup>31</sup> Injunctive relief is available on the ground that an officer has or will commit tortious acts and that the subsequent damage remedy is generally inadequate.

This brief introduction suggests but does not fully reflect the troubled relationship of the doctrine of sovereign immunity to nonstatutory review. Indeed, a series of Supreme Court decisions in the past twenty-five years has complicated the relationship even further.<sup>32</sup> Meanwhile, remedial attempts to solve technical problems of the law of parties defendant have made some headway, but, as the *Gnotta* case illustrates, room for improvement remains.

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28. The term "nonstatutory review" will be used in this Article as a shorthand reference to judicial review proceedings that take the form of injunction, declaratory judgment, mandamus, or other specific relief. It is recognized that in a sense the term is misleading, since federal courts are courts of limited jurisdiction and there must be in every case a constitutional or statutory basis of jurisdiction. The distinctive aspect of "nonstatutory review," however, is the reliance on common-law remedies, with subject matter jurisdiction predicated on the general federal-question provision of 28 U.S.C. § 1331 (1964) or on a special federal-question provision such as that of 28 U.S.C. § 1337 (1964) for claims "arising under" any act of Congress "regulating commerce." Although the latter is a "special" jurisdictional provision, it is not one limited to judicial review of administrative action.

29. See L. JAFFE, *supra* note 21, at 336-52.

30. See the review provision of the Federal Trade Commission Act, 15 U.S.C. § 45(c) (1964), which served as the prototype for other special statutory review provisions, including the Judicial Review Act of 1950, 28 U.S.C. §§ 2341-51 (Supp. IV, 1965-1968), under which the orders of a number of agencies are reviewed.

31. For a classic discussion of the theory and operation of nonstatutory review, see ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 80-82 (1941).

32. The leading decisions are *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Malone v. Bowdoin*, 369 U.S. 643 (1962); *Dugan v. Rank*, 372 U.S. 609 (1963); *Hawaii v. Gordon*, 373 U.S. 57 (1963).

## I. SOVEREIGN IMMUNITY

A. *The Sovereign Immunity Doctrine  
in the Federal Courts*

The rule that the United States cannot be sued without its consent developed slowly during the nineteenth century as a tacit assumption rather than a reasoned doctrine. Because federal courts were not given general federal-question jurisdiction until 1875,<sup>33</sup> holdings on the question occurred only infrequently. Attention centered on the related problem of the immunity of the states from suit, a subject controlled by the eleventh amendment to the United States Constitution.<sup>34</sup> It was natural to assume that the federal government was entitled by judicial implication to the same protection accorded the states by constitutional amendment.<sup>35</sup> Yet most of the early statements on federal immunity came in cases advocating a strict construction of the Court of Claims Act to preclude other contract remedies.<sup>36</sup> As late as 1882, Justice Miller—in a pioneer effort to interpret the scope of the immunity in the light of its purposes—observed that “while the exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts has . . . been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.”<sup>37</sup>

At various times it has been stated that the basis of the doctrine is, *first*, the traditional immunity of the English sovereign surviving by implication the constitutional grant of judicial power over “Con-

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33. 18 Stat. 470, *as amended*, 28 U.S.C. § 1331 (1964). The statutory evolution of federal-question jurisdiction is summarized in H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 727-33 (1953). Hart and Wechsler state that “[1875] . . . the doctrine [of sovereign immunity] was firmly established as a verbal formula without ever having been subjected to serious scrutiny for purposes of determining its appropriate scope.” *Id.* at 1152.

34. *Compare* *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (a state held liable to suit by a citizen of another state or of a foreign country), *with* *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (eleventh amendment forbids a suit against a state by a foreign sovereign).

35. *See, e.g.*, the dictum of Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821): “The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits.” *See also* *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283-84 (1855) (dictum); *Hill v. United States*, 50 U.S. (9 How.) 386 (1850); *United States v. McLemore*, 45 U.S. (4 How.) 286 (1846).

36. *See* the cases cited in Justice Gray’s dissenting opinion in *United States v. Lee*, 106 U.S. 196, 227 (1882).

37. *United States v. Lee*, 106 U.S. 196, 207 (1882). This case is discussed in note 112 *infra*.

troveries to which the United States shall be a party";<sup>38</sup> *second*, the inability of the courts to enforce a judgment against the federal executive without its aid;<sup>39</sup> and, *third*, the "logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."<sup>40</sup> These conceptual arguments for sovereign immunity are now totally discredited. The only rationale for the doctrine that is now regarded as respectable by courts<sup>41</sup> and commentators<sup>42</sup> alike is that official actions of the Government must be protected from undue judicial interference.

38. See THE FEDERALIST No. 81, at 548 (J. Cooke ed. 1961): "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*." In a recent case a federal judge stated that sovereign immunity "rests either on the theory that the United States is the institutional descendant of the Crown and enjoys its immunity or on a metaphysical doctrine that there can be no legal right as against the authority that makes the law." *Martyniuk v. Pennsylvania*, 282 F. Supp. 252, 255 (E.D. Pa. 1968). Professor Jaffe's dissection of the historical basis of sovereign immunity concludes that the rubric that the "king cannot be sued without his consent" did not mean that the subject was without remedy. L. JAFFE, *supra* note 21, at 197. Jaffe states that the petition of right, a remedy available in England against the Crown, did not survive the American Revolution, and that "a certain amount of latter-day dicta" has unfortunately encumbered "the long-established accountability of government to suit for alleged illegal activity." *Id.* at 197-98. He argues that the doctrine of sovereign immunity "has never had, and does not have today, much impact on the judicial control of administrative illegality." *Id.* at 197.

39. See Chief Justice Jay's remarks in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 478 (1793), contrasting the power of a federal court to exercise jurisdiction of a suit against a State with its lack of power over a suit against the United States: "[I]n all cases of actions against States or individual citizens, the national courts are supported in all their legal and constitutional proceedings and judgments, by the arm of the executive power of the United States; but in cases of actions against the United States, there is no power which the courts can call to their aid." The same reasoning, of course, would undermine judicial review of the constitutionality of federal legislation.

40. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (Justice Holmes). Professor Harry Street has replied: "It is difficult to give to his dicta any meaning beyond the fact that the law-making authority can exempt any group [in a state] from the operation of a particular law." GOVERNMENTAL LIABILITY 9 (1953). See also Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953). Mr. Joseph Block, somewhat more charitably, concludes that "the passage of time, with its mutations upon the theory of the role of the State in society, has sapped the strength from Mr. Justice Holmes' explanation . . ." *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1061 (1946).

41. Justice Gray defended sovereign immunity on this ground:

[I]t is essential to the common defence and general welfare that the sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts, and ships of war, necessary to guard the national existence against insurrection and invasion; of customs-houses and revenue cutters, employed in the collection of the revenue; or of light-houses and light-ships, established for the security of commerce with foreign nations and among the different parts of the country.

*United States v. Lee*, 106 U.S. 196, 226 (1882) (dissenting opinion). Chief Justice Vinson, quoting from *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 516 (1840), advanced the same rationale: "The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief . . ." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).

42. Mr. Joseph Block states that the only explanation

The soundness of this conclusion becomes apparent when the rubric that the sovereign cannot be sued in its own courts is examined against the background of the American institution of judicial review, an institution premised on the notion that the legality of official conduct—even that of the ultimate sovereign, the legislature—is subject to challenge in the courts when such conduct interferes with legally protected interests of private persons. Thus the doctrine of sovereign immunity has never had the effect of insulating official conduct from judicial scrutiny and control. Any other result would be not only inconsistent with the institution of judicial review but intolerable as a matter of social policy. Through one device or another, federal courts have always entertained suits which were directed against the sovereign in the sense that the proceeding challenged official conduct and sought to require officials either to take or not to take particular actions. Although not always perceived in this fashion, largely because of the direction in which the developing doctrine channelled thinking, sovereign immunity has always been based upon consideration of whether particular conduct should be reviewable in the courts.

The basic device for circumventing the bar of sovereign immunity was, of course, the "officer's suit."<sup>43</sup> In a suit against the officer as an individual, the plaintiff alleged that the officer's action or nonaction had interfered with the plaintiff's rights. If the officer, in an attempt to justify his behavior, sought to depend on the protective mantle of the sovereign, he was allowed to do so only if he could establish that federal law authorized him to act as he did. If the harm to the plaintiff could not be justified under federal law, the officer was "stripped of his official or representative character and . . . subjected in his person to the consequences of his individual conduct."<sup>44</sup> The plaintiff under these circumstances was entitled to the same relief that he would have received if the defendant were

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that seems worthy of consideration as a real policy basis for the doctrine of sovereign immunity today . . . is [the possibility] that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds, and property.

*Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1061 (1946). See also Byse, *Proposed Reforms in "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1484: "The practical or policy justification of the immunity is avoidance of undue judicial intervention in the affairs of government."

43. For a classic statement of the rationale of the "officer's suit," see ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 8, 77th Cong., 1st Sess. 80-81 (1941).

44. *Ex parte Young*, 209 U.S. 123, 160 (1908).

a private person who had interfered with the rights of another. By thus transforming what was in reality a controversy between a private person and the federal government into one between two private persons, the courts were able to exert a considerable degree of control over the federal bureaucracy.

Fiction has its purposes in the law as elsewhere. The device of the officer's suit, with its mystical transformation of a high government official, acting under color of his authority, into an ordinary private citizen, allowed the courts to administer a flexible and discriminating control of the burgeoning activities of government. The question of the scope of the officer's authority—and thus of his justification to act as he did—provided the leverage of judicial control. The absence of direct review of administrative action forced federal judges to rely on common-law remedies, especially injunction and mandamus, as remedial tools. The slow growth of the body of law now known as "administrative law," and much judicial uncertainty concerning the authority of the courts to participate in administration, formulate policy, or review discretion, favored the relatively cautious approach of the officer's suit. Treating the officer in the same way that a private individual was treated was less of an anachronism in an earlier and simpler age when governmental activities—largely fiscal, promotional, and proprietary in character—more closely resembled the range of private activities.

Reliance on fiction as a method of accommodating legal institutions to a new role, however, has entailed some long-run costs. The pursuit of rationality is strained by pretenses that force judges to treat things other than as they are. When the sovereign immunity doctrine itself is commonly phrased in terms of whether "the suit, in effect, is against the sovereign," a conscientious judge, unfamiliar with the vagaries of history and the fictional character of the rhetoric, is induced to make a determination as to whether the case involves important governmental interests. Nearly every case challenging official conduct may be thought to fall within this more realistic formulation, for in truth *all* such actions are suits against the Government. The officer is not acting as a private person but as a federal official. In every case the officer claims the authority to act as he did. Finally, the interests of the Government are threatened by the lawsuit, a circumstance that justifies the defense of the suit by government lawyers.

Confusing notions about the nature of the sovereign immunity doctrine add to the difficulty. Is sovereign immunity a matter affecting the subject matter jurisdiction of federal courts or a defense on

the merits or both?<sup>45</sup> Is the rule that the United States is an indispensable party in certain actions a separate rule or merely a corollary of sovereign immunity?<sup>46</sup> Is the officer's authority determined in relation to his particular action or by reference to his general competence to deal with the broad subject matter? A series of Supreme Court decisions has created so much confusion that clear answers to these questions are not possible. The resulting patchwork is an intricate, complex, and not altogether logical body of law. The basic issue—balancing the public interest in preventing undue judicial interference with ongoing governmental programs against the desire to provide judicial review to individuals claiming that the Government has harmed or threatens to harm them—is obscured rather than assisted by the doctrine of sovereign immunity in its present form.

### 1. *The Law Prior to the Larson Case*

An obvious effect of the sovereign immunity doctrine was to prevent suits against the United States *eo nomine* except as Congress had authorized such suits. A complicated body of case law, however, separated situations in which an individual could obtain relief

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45. Justice Gray, dissenting in *United States v. Lee*, 106 U.S. 196, 249 (1882), stated that sovereign immunity was an "objection to the exercise of jurisdiction over the sovereign or his property . . . which, if not suggested by the sovereign" is lost. Justice Holmes' view that sovereign immunity is derived from the absence of any underlying obligation of the sovereign (*see* text accompanying note 40 *supra*) implies that immunity is a defense on the merits, which would also be waived if not asserted. Clear holdings, however, speak in terms of subject matter jurisdiction and appear to establish the proposition that the immunity of the United States *as a defendant* cannot be waived by any law officer or other officer of the United States. *Case v. Terrell*, 78 U.S. (11 Wall.) 199 (1871), establishes the obligation of an appellate court on its own motion to raise the issue of the United States immunity, even though the immunity objection is not asserted by government lawyers. *See also Minnesota v. United States*, 305 U.S. 382, 388-89 (1939): "Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give to any court jurisdiction of a suit against the United States." On the other hand, it is well established that jurisdiction is conferred over the United States when the Attorney General brings suit on behalf of the United States; and, once the United States has brought suit against a person, the court may consider counterclaims against the United States to the extent of recoupment and set-off. *See United States v. Shaw*, 309 U.S. 495 (1940).

46. Professors Hart and Wechsler suggest that considerations controlling whether a party is indispensable, that is, whether effective relief may be fairly granted in the party's absence, are more likely to achieve good results than is Block's suggested test of undue interference with governmental operations. *See* Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1491-93 (1962). These authors apparently think that it makes a difference whether the problem is viewed as one of immunity or indispensability. On the other hand, Professor Davis asserts that "A statement that the United States is an indispensable party is the equivalent in substance of a statement that sovereign immunity bars the suit against the officer. Nothing of substance depends upon the form of the statement." 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 27.04, at 558 n.9 (1958).

against the Government by suing its officer and situations in which such relief was unavailable. Before *Larson v. Domestic and Foreign Commerce Corporation*<sup>47</sup> cast new gloom into this dark corner of the law, however, the general contours of the doctrine were reasonably clear and could be summarized in a general way.

The most clearly permissible type of action against a government official was that in which (a) the plaintiff sought to enjoin conduct or threatened conduct which, unless officially justified, would constitute a common-law tort, and (b) the relief sought could be given by simply directing the defendant to abstain from what he was doing or threatening to do.<sup>48</sup> Once the plaintiff alleged facts that would entitle him to equitable relief against a private citizen, the fact that the defendant was a government officer did not provide a complete defense but merely an opportunity for justification. The sovereign immunity doctrine failed to provide official justification in two well-recognized kinds of cases: when the officer was held to have exceeded the authority delegated to him by Congress<sup>49</sup> and when the statute that purported to authorize the officer's act was found to be unconstitutional.<sup>50</sup>

When the officer sought to justify an alleged tort by showing statutory authority, the court could not dispose of the case on the ground of sovereign immunity without also deciding the issue of statutory authority. Courts made no attempt to distinguish between an allegation of error in the performance of generally authorized duties and an allegation of the violation of a statute. Tortious conduct that involved an erroneous exercise of authority was assumed to be unauthorized, unless the action was one committed to the defendant's discretion.<sup>51</sup> For example, in *Philadelphia Company v. Stimson*<sup>52</sup> a statute authorized the Secretary of War to fix a harbor line beyond which the building of piers or other works was a misdemeanor. A property owner sued to enjoin the Secretary from

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47. 337 U.S. 682 (1949).

48. See H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1175 (1953).

49. See, e.g., *Land v. Dollar*, 330 U.S. 731 (1947) ("public officials may become tortfeasors by exceeding the limits of their authority"); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619-20 (1912); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 109 (1902).

50. See, e.g., *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 304-06 (1952): "This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State." See also *Ex parte Young*, 209 U.S. 123, 155-60 (1908); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 836-37 (1824).

51. See e.g., *Mulry v. Driver*, 366 F.2d 544 (9th Cir. 1966).

52. 223 U.S. 605 (1912).

prosecuting him for the construction of a wharf beyond the line the Secretary had fixed. The Court, in a unanimous opinion by Justice Hughes, granted relief against tortious interference with plaintiff's use of his land:

The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. . . . The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. . . . And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred.<sup>53</sup>

Nonstatutory relief was much more difficult to obtain, however, when the relief sought fell into any of three special categories: (a) enforcing of contracts against the United States; (b) directing government officers to pay over public monies; and (c) directing officials to transfer property which is in the possession of the United States and to which the United States unquestionably has legal title.<sup>54</sup> Each of these situations deserves some special comment.

The immunity of the United States from suits to enforce contracts against it developed in the context of the similar immunity of the states under the eleventh amendment. The central notion underlying the adoption of the eleventh amendment was that a court cannot without consent enforce a contract against the sovereign.<sup>55</sup> A long line of cases held that federal courts cannot give an individual specific performance of a contract with the United States.<sup>56</sup> The provision of a statutory contract remedy against the United States in the Court of Claims—or in certain instances in a district court, pursuant to the Tucker Act—was properly viewed as an exclusive remedy.

A case in which the plaintiff seeks to order a government officer to pay over public funds in his possession presents a special problem.

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53. 223 U.S. at 619-20.

54. Cf. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 29 (1963):

Our legal tradition . . . does tell us that the sensitive areas—the areas where consent to suit is likely to be required—are those involving the enforcement of contracts, treasury liability for tort, and the adjudication of interests in property which has come unsullied by tort into the bosom of the government.

55. The eleventh amendment to the Constitution was a direct response to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which had held that article III and the Judiciary Act of 1789 granted jurisdiction of a suit by South Carolina citizens to recover on bonds that Georgia had confiscated for conduct "inimical to the cause of liberty." See 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 96-100 (2d ed. 1926).

56. See, e.g., *Wells v. Roper*, 246 U.S. 335 (1918); *Goldberg v. Daniels*, 231 U.S. 218 (1913); *United States v. Jones*, 131 U.S. 1 (1889); *Louisiana v. Jumel*, 107 U.S. 711, 721, 727 (1882).

Whether the remedy sought is mandamus or injunction, the plaintiff seeks affirmative relief of a particularly delicate kind. Effective government is dependent upon an ample provision of funds, and an order requiring the public treasury to disgorge is thought to pose a substantial threat. Consequently, the circumstances under which a court may compel the payment of public monies are restricted to those in which the official lacks discretion and there is a statutory duty owed to the plaintiff.<sup>57</sup> In *Mine Safety Appliances Company v. Forrester*,<sup>58</sup> for example, a government contractor sought to "restrain" the Secretary of the Navy from withholding payments allegedly due on a contract. The Secretary had withheld payments pursuant to the Renegotiation Act on the ground that the plaintiff had made excessive profits; the plaintiff contended that the Secretary's conduct was unauthorized and unconstitutional. The Supreme Court dismissed the action as one against the United States to which it had not consented. Although the suit was framed as an action for a prohibitory injunction, the plaintiff in fact sought to compel the payment of government funds in a situation in which Congress had directed that payments not be made. In such a case, the plaintiff's contract remedy in the Court of Claims was a perfectly adequate one.

On the other hand, when a statute imposes a clear duty upon a government officer to pay a claimant, mandatory relief is available in the federal courts.<sup>59</sup> In the leading case of *Miguel v. McCarl*,<sup>60</sup>

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57. Compare *Morrison v. Work*, 266 U.S. 481, 488 (1925), in which the Court held that a suit to require officers to sell Indian reservation lands and to distribute the proceeds to various claimants was barred by sovereign immunity, and *United States ex rel. Hall v. Payne*, 254 U.S. 343 (1920), in which the Court held that the discretion of the Secretary with respect to approval of homestead applications was not subject to control by mandamus, with such cases as *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), in which the Court ordered the Postmaster General to credit relators with an amount of money.

Mandatory relief is discussed in 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 23.09-.12 (1958); *Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 861-64 (1957). Suggestions for "a rational law of mandamus" are made in 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, 331-36 (1967).

58. 326 U.S. 371 (1945).

59. See, e.g., *Roberts v. United States*, 176 U.S. 221 (1900) (mandamus directing the Treasurer to make certain payments which an Act of Congress, as construed by the Court, required him to make); *Clackamas County v. McKay*, 219 F.2d 479 (D.C. Cir. 1954), *vacated as moot*, 349 U.S. 909 (1955) (mandamus directing the Secretary of the Interior to distribute to certain counties in Oregon the monetary proceeds received by him from the sale of land which had reverted to the United States after certain grantee railroads had forfeited their rights to it; the only action required by the Secretary, according to the court's construction of the statute, was "ministerial" rather than "discretionary").

60. 291 U.S. 442 (1934).

for example, the Supreme Court affirmed a mandatory injunction against a disbursing officer requiring him to pay a retirement allowance to which the plaintiff was entitled by law. The holding that the duty was mandatory rather than discretionary was made even though the Comptroller General had ruled to the contrary on the question at issue.

Apart from cases in which the United States is named as a party defendant, the clearest class of cases which were open to the defense of sovereign immunity under the pre-*Larson* law were actions to establish an interest in, or to satisfy a claim out of, property of the United States, when the United States unquestionably had title and the property was in possession of its officers or agents.<sup>61</sup> Even in this situation, however, mandatory relief is available if a statute imposes on the officer a clear duty in favor of the claimant.<sup>62</sup>

One situation in which the law was unclear—and remained so until 1962 when *Malone v. Bowdoin*<sup>63</sup> was decided—was that in which the plaintiff claims title to specific property and the officer defends on the ground that title is in the United States. In a venerable earlier case, *United States v. Lee*,<sup>64</sup> the Supreme Court granted relief in this situation; but in other cases, the Court had refused to do so, asserting that the action was against the United States if the property was in its possession.<sup>65</sup>

## 2. *The Larson Case—Confusion Compounded*

*Larson v. Domestic and Foreign Commerce Corporation*<sup>66</sup> signaled a departure from the established contours of sovereign immunity, and the result has been confusion and a further strengthening of the immunity. In that case, the plaintiff sought to enjoin the War Assets Administrator from selling to a third party a quantity

61. See, e.g., *Maricopa County v. Valley Natl. Bank*, 318 U.S. 357, 362 (1943); *Minnesota v. United States*, 305 U.S. 382 (1939); *Oregon v. Hitchcock*, 202 U.S. 60, 69 (1906); *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868).

62. See, e.g., *Wilber v. United States ex rel. Krushnic*, 280 U.S. 306 (1930) (mandamus granted directing the Secretary of the Interior to issue a mining patent); *Payne v. Central Pac. Ry.*, 255 U.S. 228 (1921) (Secretary of the Interior enjoined from interfering with a railroad's selection of indemnity lands, since the Secretary was under a "plain official duty," without discretion "to substitute his judgment for the will of Congress"); *Lane v. Hoglund*, 244 U.S. 174 (1917).

63. 369 U.S. 643 (1962). See text accompany notes 110-17 *infra*.

64. 106 U.S. 196 (1882).

65. See, e.g., *United States ex rel. Goldberg v. Daniels*, 231 U.S. 218, 221-22 (1913) ("The United States is the owner in possession of the vessel."); *Oregon v. Hitchcock*, 202 U.S. 60, 70 (1906) ("Again, it must be noticed that legal title to all these tracts of land is still in the Government."); cf. *West Coast Exploration Co. v. McKay*, 213 F.2d 582, 596 (D.C. Cir.), cert. denied, 347 U.S. 989 (1954).

66. 337 U.S. 682 (1949).

of coal, the title to which was alleged to have passed to plaintiff under a disputed contract with the agency. The Court denied injunctive relief in a cloudy opinion by Chief Justice Vinson that attempted to restate the law of sovereign immunity applicable to suits for a prohibitory injunction against government officers. Thus it was said that a suit may be brought against an officer if the officer has acted "unconstitutionally" or "*ultra vires* his authority."<sup>67</sup> But, according to the Court, the mere allegation that the officer, "acting officially," wrongfully holds plaintiff's property, while establishing a wrong to plaintiff, "does not establish that the officer . . . is not exercising the powers delegated to him by the sovereign."<sup>68</sup> Again, the Court stated:

a suit may fail, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.<sup>69</sup>

The case itself fell squarely between two conflicting lines of authority. In one, stemming from *United States v. Lee*<sup>70</sup> and *Land v. Dollar*,<sup>71</sup> injunctive relief had been granted for the tortious withholding of property that had come into the possession of the Government; and in the other, as in *Goldberg v. Daniels*,<sup>72</sup> relief had been denied when the property claimed by the plaintiff under a contract had never left the Government's possession. The Court in *Larson* could have reached the same result that it did reach either by treating the case as an impermissible attempt to obtain specific performance of a government contract or by holding that the plaintiff's damage remedy for breach of contract in the Court of Claims was an adequate and exclusive remedy.

It is surprising that the *Larson* opinion has had so much influence. The case was decided by a divided Court in an opinion that had the support of only four Justices.<sup>73</sup> It purported to overrule or narrowly limit several well-established cases, including *Land*

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67. 337 U.S. at 689-90.

68. 337 U.S. at 693.

69. 337 U.S. at 691 n.11.

70. 106 U.S. 196 (1882).

71. 330 U.S. 731 (1947).

72. 231 U.S. 218 (1913).

73. Justice Rutledge concurred only in the result, and Justice Douglas concurred on the narrow ground that an injunction in the situation presented would interfere with the surplus property program. Three Justices dissented.

*v. Dollar*,<sup>74</sup> decided only two years before. Nevertheless, the *Larson* opinion has been taken as the modern keystone of the sovereign immunity doctrine.

The *Larson* opinion has four fundamental defects. (a) It holds that the official's conduct, even though wrongful, may not be enjoined if he is acting within the general sphere of his authority. (b) It determines the application of the sovereign immunity doctrine by the wholly irrelevant test of whether the Government, if it were a private principal, would be liable for the acts of its agent. (c) It states that the application of sovereign immunity turns on whether the suit is "in effect, a suit against the sovereign" thereby leaving the "government . . . stopped in its tracks."<sup>75</sup> (d) It implies that affirmative relief may not be granted against a federal officer.<sup>76</sup> The first three defects will be considered at this point; the last will be discussed shortly in connection with the case of *Hawaii v. Gordon*.<sup>77</sup>

a. "Error" distinguished from "authority." While the *Larson* decision allows an injunction suit against a federal officer when it is shown that the officer's action exceeded his constitutional or statutory authority, "authority" is distinguished sharply from a mistake of law or fact in exercising a statutory power: "[R]elief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient."<sup>78</sup> At a later point in the opinion the distinction between action that is erroneous or wrongful ("error") and action that is within the officer's general competence ("authority") is repeated:

It is argued that an officer given the power to make decisions is only given the power to make correct decisions. . . . There is no warrant for such a contention in cases in which the decision made by the officer does not relate to the terms of his statutory authority. Certainly the jurisdiction of a court to decide a case does not disappear if its decision on the merits is wrong. And we have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so.<sup>79</sup>

The *Larson* opinion is susceptible to the interpretation that the existence of "statutory authority" need not depend upon a careful construction of the statute in question; a case should be dismissed

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74. 330 U.S. 731 (1947).

75. See 337 U.S. at 687, 704.

76. 337 U.S. at 691 n.11.

77. See text accompanying notes 124-27 *infra*.

78. 337 U.S. at 690.

79. 337 U.S. at 695.

on sovereign immunity grounds if the officer is acting within his general sphere of authority even though the particular action would be statutorily prohibited if the statute were properly interpreted.

Congress, of course, may commit administrative action to agency discretion, thus foreclosing judicial review except for arbitrary or capricious action. "The vice of *Larson*," however, as Professor Byse has stated, is that it permits—perhaps even encourages—"courts to shirk the hard task of determining the limits of official power":<sup>80</sup>

It is perfectly possible for a court to hold that an official has authority to make erroneous as well as correct determinations. Such a holding, of course, should rest on a reasoned determination that Congress intended to confer so broad a discretion. But under *Larson* [and its progeny] the courts seem to interpret the statutes cursorily to authorize the defendant official to act in the "general" area in question; so long as the official remains within the "general" area, his erroneous acts are unreviewable whether or not the statute properly construed was intended to confer such an unreviewable discretion. This . . . is an abdication of judicial responsibility.<sup>81</sup>

Numerous decisions of lower federal courts support the proposition that *Larson's* distinction between "error" and "general authority" has been applied to deprive litigants of judicial consideration of their claim that an officer's conduct is unlawful. In *Doehla Greeting Cards, Incorporated v. Summerfield*,<sup>82</sup> for example, users of the parcel post service brought an action against the Postmaster General to enjoin him from enforcing increased parcel post zone rates, alleging that the Postmaster General had failed to comply with a statutory requirement and that the rate order was arbitrary and capricious. The court dismissed the action on the ground that the suit was "one against the United States to which no consent had been given."<sup>83</sup> The opinion, in relying on *Larson*, implies that erroneous performance of a statutory duty is the act of the sovereign and cannot be enjoined. Unlike the situation in *Larson*, however, the postal law in question sets forth standards to be observed by the Postmaster General when fixing rate changes of the sort in question in *Doehla*.<sup>84</sup> To say that the defendant may not be enjoined despite

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80. Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1490-91 (1962).

81. *Id.*

82. 227 F.2d 44 (D.C. Cir. 1955).

83. 227 F.2d at 45.

84. Act of Feb. 28, 1925, ch. 368, § 207, 43 Stat. 1067, as amended, Act of May 29, 1928, ch. 856, § 7, 45 Stat. 942, formerly codified in 39 U.S.C. § 247 (1958), provided that "if the Postmaster General shall find on experience that [the rates] . . . are such as . . . to permanently render the cost of the service greater than the receipts" he shall, with the consent of the Interstate Commerce Commission, revise the rates.

a departure from those standards is to flout their very existence.<sup>85</sup> The court's failure to construe and apply the statute had the effect of giving the Postmaster General a wholly unchecked discretion even though Congress may not have intended to confer unreviewable discretion.<sup>86</sup>

Another troublesome case along similar lines is *Kennedy v. Rabinowitz*,<sup>87</sup> in which the court refused to consider the plaintiffs' argument that, under the terms of the Foreign Agents Registration Act, the Attorney General could not require them to register. The court held that the general power of the Attorney General "to construe the individual statutes and apply them to the facts before him" was sufficient to authorize his action and to shield it behind the sovereign immunity defense.<sup>88</sup> On certiorari the Supreme Court ignored its own repeated holdings that sovereign immunity is a jurisdictional issue and proceeded to decide the case against the plaintiffs on the merits.<sup>89</sup> Other cases in which courts have failed to construe the statute to determine whether Congress *intended* the officer to exercise unchecked discretion include *Gnotta v. United States*,<sup>90</sup> *Wohl Shoe Company v. Wirtz*,<sup>91</sup> *Fay v. Miller*,<sup>92</sup> and *Interstate Reclamation Bureau v. Rogers*.<sup>93</sup>

85. For a similar discussion of the *Doehla* case, see Byse, *supra* note 80, at 1489-91; Comment, *Immunity of Government Officers: Effects of the Larson Case*, 8 STAN. L. REV. 683 (1956).

86. *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451 (D.C. Cir. 1965), *cert. denied sub nom. Manhattan-Bronx Postal Union v. O'Brien*, 382 U.S. 978 (1966), is similar, although the court there did undertake in an alternative holding to consider the merits of the claim that the Postmaster General had misconstrued an executive order dealing with collective bargaining by postal employees.

87. 318 F.2d 181 (D.C. Cir. 1963), *affd. on other grounds*, 376 U.S. 605 (1964).

88. 318 F.2d at 183 n.9. Judge Fahy, in a persuasive dissent, argued that sovereign immunity did not prevent the court from passing on the legal authority of the Attorney General to require plaintiffs to register. 318 F.2d at 185-86.

89. 376 U.S. 605 (1964).

90. 415 F.2d 1271 (8th Cir. 1969), discussed in text accompanying notes 4-10 *supra*.

91. 246 F. Supp. 821 (E.D. Mo. 1965). In this case an employer, who had been warned that he was in violation of the Fair Labor Standards Act, and who would be subject to double liability if he was not exempt, sought a declaration that he was exempt from the Act. The Court, refusing to interpret the statute, dismissed on the ground of sovereign immunity:

[A]n officer, while making an authorized determination, is still acting within his own authority when and if he makes a wrong determination as to whether or not a party is subject to a particular provision of a valid statute. . . .

. . . [The Secretary's] determinations are those of the sovereign . . . .  
246 F. Supp. at 822.

92. 183 F.2d 986 (D.C. Cir. 1950), in which the court stated that a United States Attorney has authority to request a telephone company to discontinue service to a plaintiff suspected of gambling, even though the Attorney's action might be tortious and taken without sufficient evidence.

93. 103 F. Supp. 205 (S.D. Tex. 1952), in which the court held that local officials

b. *Reliance on "normal rules of agency."* A related defect of the *Larson* opinion has also had the effect of greatly increasing the plaintiff's burden of demonstrating an official departure from statute. The Court in *Larson* insisted that a showing of illegality under general law is not sufficient, because the determinative question is whether the agent's act was that of the United States. According to the Court, when injunctive relief is sought, the answer to this question depends on whether the officer has "authority" in the sense that his actions would be regarded as those of a private principal under the normal rules of agency law.<sup>94</sup>

The injection of private agency law into questions of sovereign immunity involves a rather bizarre incongruity. As Professor Byse has commented, "The incongruous result of the *Larson* case is that to the extent the normal rules of agency impose liability on private principals, governmental officials are immunized from injunctive or declarative relief. As private liability expands, official responsibility decreases."<sup>95</sup> The policies relevant to a determination that a private principal is bound by his agent's act, namely, that the principal controls the agent and profits from his services, are not relevant to the distinct question of whether a court should pass on the legality of official conduct. The inquiry merely distracts the mind from a useful consideration of factors relevant to a rational determination of whether judicial review should be available.

Despite the incongruity of having government nonliability turn on whether a private principal would be liable, and vice versa, lower federal courts have sometimes followed the *Larson* approach. In *Hudspeth County Conservation and Reclamation District No. 1 v. Robbins*,<sup>96</sup> for example, the court cited *Larson* and then concluded:

Applying that test, it seems clear to us that if the dams . . . had been owned by a private corporation whose managers and agents had violated the rights of the plaintiffs in the manner contended in this suit, the private corporation could not escape liability for damages on the ground that its employees were acting outside the scope of their authority.<sup>97</sup>

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of the Department of Labor have "authority" to investigate and even to harass an employer in attempts to induce compliance with the Fair Labor Standards Act, even though the employer's business might eventually be found not to be within the operation of the Act.

94. 337 U.S. 682, 695 (1949).

95. Byse, *supra* note 80, at 1488.

96. 213 F.2d 425 (5th Cir.), *cert. denied*, 348 U.S. 833 (1954).

97. 213 F.2d at 432.

c. *Whether a suit is "in effect, a suit against the sovereign."* Legal fictions may occasionally serve a useful purpose in hastening a transition to sounder rules of law. In emphasizing the fictional aspects of the sovereign immunity doctrine, however, the *Larson* opinion merely obfuscates the underlying policy considerations. The Court stated that in each injunction suit

the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign . . . [because] the compulsion . . . may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred . . . because it is, in substance, a suit against the Government . . . .<sup>98</sup>

In the 1963 case of *Hawaii v. Gordon*,<sup>99</sup> the Court repeated this notion: "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter."<sup>100</sup>

The *Larson* language, restated as the "general rule" in *Hawaii v. Gordon*, purports to make the maintenance of the action—and hence the availability of judicial review—dependent upon whether "the sovereign" will be affected by the grant of relief against the officer. There is a difficulty in our system, of course, in identifying the sovereign and its interests.<sup>101</sup> The congressional will embodied in a statute, when that will is properly interpreted, may be at odds with the views of the agency. Other branches of the federal government may have different views or interests concerning the same matter.

Even apart from the difficulty of identifying the sovereign and its interests, the "general rule" stated by the Court has not been and cannot be the law.<sup>102</sup> Any suit that challenges official conduct,

98. 337 U.S. at 688.

99. 373 U.S. 57. See text accompanying notes 124-27 *infra*.

100. 373 U.S. at 58. In *Dugan v. Rank*, 372 U.S. 609, 620 (1963), discussed in text accompanying notes 128-40 *infra*, the Court said: "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" (Citations omitted.)

101. See *Land v. Dollar*, 330 U.S. 731, 738 (1947), which identifies the "dominant interest of the sovereign" not with the officer's desire to be free from judicial control, but with the citizen's interest in the recovery of property wrongfully withheld.

102. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 27.01, at 149 (Supp. 1965):

It simply is not and never has been true that federal courts are without power to enter a judgment which is really against the government. . . .

. . . Judgments of courts have often expended themselves on the public treasury

whether or not that suit is cast in the fictional form of the officer's suit, adversely affects governmental interests if relief is granted. Besides, the fact that governmental interests are affected has never been a basis for the denial of relief in such cases. Indeed, the very purpose for which these suits are brought is to affect governmental interests. Thus the holding in *Greene v. McElroy*<sup>103</sup> that the Secretary of Defense acted improperly in withdrawing the security clearance of an employee of a defense contractor, without providing an opportunity for confrontation and cross-examination, was widely and properly viewed as requiring extensive changes in the federal security program.<sup>104</sup> Similarly, when the Court held that the Secretary of the Army could not base a serviceman's other-than-honorable discharge on preinduction activities,<sup>105</sup> the military services were required to change their existing practices.<sup>106</sup> Court decisions requiring a particular affirmative action, such as the approval of an application for a merchant seaman's certificate<sup>107</sup> or the reinstatement of a federal employee,<sup>108</sup> often rest on general principles that are applicable to hundreds or thousands of other persons. In these and many other cases,<sup>109</sup> judicial review of administrative action has been cast in the form of an injunction suit against an offending officer, and relief has not been denied even though vast changes in governmental policies or practices were required.

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or domain, have often interfered with the public administration, and have often restrained the government from acting or compelled it to act, and judgments of courts will surely continue to do these things in the future.

Professor Jaffe concludes: "Away with fruitless and unhistorical attempts to determine whether a suit is 'really' against the state." L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 229 (1965).

103. 360 U.S. 474 (1959).

104. See Exec. Order No. 10,865, 3 C.F.R. 398 (1959-1963 comp.), which contained procedural requirements designed to satisfy the *Greene* case.

105. *Harmon v. Brucker*, 355 U.S. 579 (1958).

106. See Everett, *Military Administrative Discharges—The Pendulum Swings*, 1966 DUKE L.J. 41; Meador, *Judicial Determinations of Military Status*, 72 YALE L.J. 1293 (1963).

107. See *Schneider v. Smith*, 390 U.S. 17 (1968), in which the Court held that a Coast Guard Commandant was not authorized under the Magnuson Act to inquire into a mariner's political activities and affiliations in passing upon his application for validation of a mariner's certificate.

108. *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Cole v. Young*, 351 U.S. 536 (1956).

109. See, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958) (holding that the Secretary of State was not authorized to refuse a passport application for reasons of national security); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (enjoining seizure of steel mills under executive order); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (holding that a hearing is necessary before the Attorney General can place an organization on a list of subversive organizations).

### 3. *Property Disputes Between the United States and Private Persons*

Another major case in which the Supreme Court recently has strengthened the hold of the sovereign immunity doctrine is *Malone v. Bowdoin*.<sup>110</sup> In that case, sovereign immunity was held to bar an action to eject a Forest Service officer from land owned by the plaintiffs. Under *Larson*, the Court said, an officer may not be sued, even for the return of property wrongfully taken or held, unless his action was outside his statutory powers, or unless those powers, or their exercise in the particular case, were constitutionally void.<sup>111</sup> There was no allegation of either kind in *Malone*. *Larson*, the Court added, had limited *United States v. Lee*<sup>112</sup> to cases in which there is a claim that the administrative action constituted "an unconstitutional taking of property without just compensation."<sup>113</sup> Moreover, according to the *Malone* opinion, *Lee* had been decided when there was no money remedy for the Government's taking, and in the present case the Court of Claims was open.<sup>114</sup>

The Court's reasoning in *Malone*, however, was faulty. If Congress had authorized Forest Service officers to seize private property and had limited the owner's remedy to a damage action in the Court of Claims, the procedure would have been constitutional even though harsh. But Congress has not authorized Forest Service officers to seize private land without resort to condemnation procedure and the damage remedy in a distant forum is not a totally adequate remedy.<sup>115</sup> Professor Davis has criticized the *Malone* case as "patently unsound" because, even though it was assumed for purposes of appeal that the fee was in the plaintiff, the court refused to assume

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110. 369 U.S. 643 (1962).

111. 369 U.S. at 647, quoting from 337 U.S. at 702.

112. 106 U.S. 196 (1882). The *Lee* case involved a dispute over the ownership of the Arlington estate of General Robert E. Lee's wife, which had been purchased by the United States for an alleged default in taxes. Since a proffer of the taxes had been improperly rejected by the tax officials, the sale was invalid. The Supreme Court held that the owners were entitled to ejectment against the federal officers who were in possession of the property, since otherwise an unconstitutional taking would result. Legitimate governmental interests could be protected by the power of eminent domain.

113. 369 U.S. at 648, quoting from 337 U.S. at 697.

114. 369 U.S. at 647 n.8, relying on *United States v. Causby*, 328 U.S. 256, 267 (1946).

115. Justice Douglas, in a dissenting opinion, argued that

[e]jectment . . . is the classic form of action to try title. It takes place in the locality where the land is located. No judges are better qualified to try it than the local judges. . . . If [the United States] is aggrieved by the state or federal court ruling on title, . . . [e]minent domain—with the power to take possession immediately—is available.

369 U.S. 643, 650 (1962).

that government officers are not authorized to withhold land from its lawful owner.<sup>116</sup> "But instead of making these obvious assumptions, the Court made the opposite assumptions, by saying merely that the plaintiff had not asserted that the officer was exceeding his delegated powers."<sup>117</sup> More consistent with the general preference for judicial control of administrative excesses would have been the presumption that, absent an affirmative showing of authority, an officer who takes or withholds land belonging to a plaintiff does so without authority.

In a number of recent cases, *Malone* has been applied to deny district courts jurisdiction to consider land disputes between the United States and adjacent property owners.<sup>118</sup> In *Gardner v. Harris*,<sup>119</sup> the plaintiff's predecessor-in-title had sold the United States land which became part of the Natchez Trace Parkway. The conveyance had been subject to an access easement, but the federal officer in charge of the parkway erected barricades across the right-of-way. In an injunction suit seeking removal of the barricades, it was held that sovereign immunity barred the action. Chief Judge Brown reasoned that the judgment would compel the Government to act and would interfere with public administration and hence that suit could be brought only if the superintendent had exceeded his statutory powers. Since the statute authorizing the superintendent to administer and maintain the Natchez Trace Parkway did not contain any express limitation on the superintendent's powers of administration, Chief Judge Brown concluded that "[m]erely because the Superintendent may have been acting wrongfully in interfering with plaintiff's access to the highway . . . does not amount to circumstances fulfilling the exception that the officer must be acting beyond his statutory powers."<sup>120</sup>

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116. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 27.01, at 147 (Supp. 1965).

117. *Id.*

118. *See, e.g.,* *Simons v. Vinson*, 394 F.2d 732 (5th Cir.), *cert. denied*, 393 U.S. 968 (1968) (suit to try title to land formed by accretion along a river which formed the boundary between land owned by the United States and land owned by plaintiffs; action by plaintiffs held to be barred by sovereign immunity); *Switzerland Co. v. Udall*, 337 F.2d 56 (4th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965) (similar to *Gardner v. Harris*, discussed in the text); *Andrews v. White*, 121 F. Supp. 570 (E.D. Tenn. 1954), *affd. per curiam*, 221 F.2d 790 (6th Cir. 1955) (suit by a landowner to enjoin federal officers from enforcing hunting regulations in what might have been part of a national park; action held to be barred by sovereign immunity). *But see Zager v. United States*, 256 F. Supp. 396 (E.D. Wis. 1966) (quiet-title action to determine whether a mistake had been made in the original land survey; action held not barred by sovereign immunity).

119. 391 F.2d 885 (5th Cir. 1968).

120. 391 F.2d at 888.

The *Gardner* decision is the logical offspring of *Larson* and *Malone*, but the result is indefensible. When government officers mistakenly seize or hold private property, such mistakes both deprive persons of specific property and subject the United States to liability. The relevant question should be whether Congress has authorized the seizure or condemnation of private property under the circumstances that existed. In the absence of such authorization, the property owner should not be limited to a damage remedy under the Tucker Act and injunctive relief should be available.<sup>121</sup> The courts should assume that Congress intends that officers who deal with property should keep within their powers in taking and withholding property that is claimed by private persons.<sup>122</sup> Unless a vital regulatory program is involved, Congress would probably prefer a prohibitory injunction to a grant of compensation after the fact.

#### 4. Affirmative Relief

A footnote to the *Larson* opinion contained a troublesome dictum that, even though the officer who is sued has acted unconstitutionally or beyond his powers,

a suit may fail, as one against the sovereign, . . . if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.<sup>123</sup>

Although the language of the dictum makes the denial of relief permissive rather than mandatory, its failure to indicate any factors to be considered in determining whether affirmative relief is appropriate suggests that mandatory relief cannot be granted.

The recent Supreme Court decision in *Hawaii v. Gordon*<sup>124</sup> has strengthened the erroneous notion that affirmative relief may not be granted against government officers. That case involved provisions

121. This position underlies *Land v. Dollar*, 330 U.S. 731, 738 (1947):

[P]ublic officials may become tortfeasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.

122. In *Simons v. Vinson*, 394 F.2d 732 (5th Cir.), cert. denied, 393 U.S. 968 (1968), the United States wanted the land in dispute, not for a public purpose, as in *Malone* and in *Gardner v. Harris*, but merely because oil had been discovered. A dissenting judge, having in mind that the United States could not condemn land merely to collect oil royalties from it, said: "The Constitution commands that [the plaintiffs] shall have the property." 394 F.2d at 738. See text accompanying note 270 *infra*.

123. 337 U.S. 682, 691 n.11 (1949).

124. 373 U.S. 57 (1963). See text accompanying notes 99-108 *supra*.

of the Hawaii Statehood Act which provided that if the President should decide that certain federal properties were no longer needed by the United States, he must convey them to the State of Hawaii. The Director of the Bureau of the Budget, acting for the President, advised federal agencies that this authorization related only to lands that had been ceded to the United States by Hawaii. The State of Hawaii filed an original action in the Supreme Court to compel the Director to withdraw his advice, to determine whether certain property he had excluded was "needed," and, if it was not needed, to convey it to Hawaii. The Supreme Court dismissed the suit in a brief per curiam opinion, stating:

[R]elief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter. [Citing *Dugan v. Rank*, *Malone v. Bowdoin*, and *Larson*.] Here the order requested would require the Director's official affirmative action, affect the public administration of government agencies and cause as well the disposition of property admittedly belonging to the United States.<sup>125</sup>

Professor Davis argues that the "issue was not whether the lands should be conveyed—for that question was solely for the President—but whether a report should be made to the President with respect to designated lands. . . . Thus, the sole question was one of statutory interpretation."<sup>126</sup> A federal officer, of course, cannot be ordered by a court to exercise discretion in a particular way. But if a statute requires an officer to exercise discretion and the officer refuses to make the discretionary determination, a court can interpret the statute and require him to exercise discretion.<sup>127</sup> Mandatory relief has been granted against federal officers for many years under such circumstances, and *Hawaii v. Gordon* muddies the waters by suggesting that affirmative relief is always barred by sovereign immunity.

##### 5. *Undue Interference with Governmental Discretion*

Fictions aside, the application of the sovereign immunity doctrine should rest on whether the benefits of judicial review of administrative action are outweighed by the possible interference with governmental programs that may result from the grant of relief. *Dugan v. Rank*<sup>128</sup> involved this question and reached the correct

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125. 373 U.S. at 58.

126. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 27.01, at 148 (Supp. 1965).

127. See cases cited at notes 58-65 *supra*.

128. 372 U.S. 609 (1963).

result. *Dugan* was a suit to enjoin the United States and officers of its Bureau of Reclamation from impounding water behind Friant Dam, a part of the Central Valley Project in California, on the ground that this action interfered with the plaintiffs' rights to the use of the water downstream. The Supreme Court held that the United States had not consented to this kind of suit despite the McCarran Amendment,<sup>129</sup> and that the suit against the Reclamation officers must be dismissed as, in substance, one against the United States. To enjoin storage of water would require the abandonment of much of the project and "[t]he Government would, indeed, be 'stopped in its tracks'";<sup>130</sup> to order construction of subsidiary dams to meet the plaintiffs' needs would "not only 'interfere with the public administration' but also 'expend itself on the public treasury.'" <sup>131</sup> The Court stated that the only exceptions to the rule against suits producing these effects—the exceptions announced in *Larson* and *Malone*—were inapplicable, for the Government "had the power, under authorization of Congress, to seize the property of the respondents . . . , and this power of seizure was constitutionally permissible . . . ." <sup>132</sup>

Unlike other recent Supreme Court opinions discussed in this Article, the *Dugan* opinion did interpret and resolve the applicable statute, holding that Congress had authorized physical seizure of the water and had limited the relief available to affected persons to the damage remedy under the Tucker Act. Moreover, the Court's conclusion is supported by the practical consideration that interference with reclamation projects would have resulted if the contrary argument had been accepted.

The *Dugan* opinion, however, like those in *Hawaii v. Gordon*<sup>133</sup> and *Malone v. Bowdoin*,<sup>134</sup> goes beyond what was necessary, when it states that sovereign immunity is applicable whenever " 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' . . . or if the effect of

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129. 43 U.S.C. § 666 (1964). The McCarran Act provides that the United States may be joined in suits "for the adjudication of rights to the use of water of a river system or other source," and has been held to be applicable only to cases involving a general adjudication of all water rights on a given stream, not to private suits between the plaintiff and the United States. See 372 U.S. at 618.

130. 372 U.S. at 621.

131. 372 U.S. at 621.

132. 372 U.S. at 622.

133. 373 U.S. 57 (1963).

134. 369 U.S. 643 (1962).

the judgment would be 'to restrain the government from acting, or to compel it to act.'"<sup>135</sup> As Professor Davis has argued, such sweeping language is highly misleading:

This so-called general rule never has been the general rule and is not likely to become the general rule. Judgments of courts have often expended themselves on the public treasury or domain, have often interfered with the public administration, and have often restrained the government from acting or compelled it to act, and judgments of courts will surely continue to do these things in the future.<sup>136</sup>

Indeed, many of the leading decisions of the Supreme Court—that striking down the National Industrial Recovery Act,<sup>137</sup> that setting aside the President's seizure of the steel mills,<sup>138</sup> that invalidating federal loyalty and security programs<sup>139</sup>—"stop the government in its tracks" or "interfere with public administration." Yet none of these cases was held to be barred by sovereign immunity even though the effect on federal programs was much more dramatic than is the very limited interference that is entailed when a single officer is claiming a piece of land and the Government has no special program with respect to that land.<sup>140</sup>

### B. Statutory Reform of Sovereign Immunity

Today, even more than in the 1950's, it is true that "the Supreme Court in modern times has . . . tended actually to enlarge the scope of sovereign immunity, out of misapprehension of its historical foundations . . . ."<sup>141</sup> The Court now seems to regard it as settled that the general contours of the doctrine were established in *Larson v. Domestic and Foreign Commerce Corporation*.<sup>142</sup> Since there is no discernible pressure for change emanating from the Supreme Court,<sup>143</sup> the impetus for reform must come from Congress. The

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135. 372 U.S. at 620.

136. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 27.01, at 149 (Supp. 1965).

137. *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935).

138. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

139. See cases cited in notes 103-09 *supra*.

140. See, e.g., *Simons v. Vinson*, 394 F.2d 732 (5th Cir.), *cert. denied*, 393 U.S. 968 (1968), discussed in note 155 *infra*, and in text accompanying note 270 *infra*.

141. H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1151 (1953).

142. 337 U.S. 682 (1949).

143. The Supreme Court could eliminate the sovereign immunity problem in judicial review of federal administrative action by a swift stroke of the pen. All that would be required is a holding that § 10(a) of the Administrative Procedure Act (APA), as amended, 5 U.S.C. § 702 (Supp. IV, 1965-1968), means what it says: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by

failure of the courts to develop a sound jurisprudence in this area argues in favor of a legislative solution. Moreover, important questions of policy, appropriate for legislative judgment, are involved and a legislative approach to the problem is desirable.

The need for statutory reform of sovereign immunity rests fundamentally on the belief that the doctrine hinders a rational determination of basic issues of the availability, the timing, or the form of judicial review of administrative action. Sovereign immunity as a barrier to judicial review of administrative action should be eliminated, but without otherwise affecting the availability or timing of judicial review. This beneficial step can be taken without expanding the liability of the United States for money damages and without displacing congressional judgments, embodied in various statutes, that a particular remedy should be the exclusive remedy in a given situation.

### 1. *Need for Reform*

a. *Inadequacy of existing law.* The gist of the argument thus far has been that the law of sovereign immunity, as elaborated in a number of fairly recent cases, is illogical, confusing, and erratic. The available materials, already discussed at length, permit no other conclusion.

Moreover, the conclusion is not a novel one. Dissatisfaction with the present doctrine of sovereign immunity is widespread. Professors Byse and Davis have argued persuasively that the sovereign immunity doctrine constitutes a barrier to proper judicial analysis; and

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agency action within the meaning of a relevant statute, is entitled to judicial review thereof." It would not be a difficult feat of construction to interpret this language as constituting a limited consent to sue. The *Larson* case and *Dugan v. Rank*, 372 U.S. 609 (1963), could be distinguished as holdings falling within the APA exception "to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701 (Supp. IV, 1965-1968). To be sure, the reference in § 10(b) of the Act, *as amended*, 5 U.S.C. § 703 (Supp. IV, 1965-1968), to "action[s] . . . in a court of competent jurisdiction" carries an implication that the Act does not vest subject matter jurisdiction in federal district courts when the general federal-question provision of 28 U.S.C. § 1331 (1964)—or an applicable special federal-question provision—is not satisfied. Nevertheless, the reference does not foreclose the argument that Congress intended federal agencies, as defined by the APA, to be subject to suit in accordance with the provisions of the Act without regard to the doctrine of sovereign immunity. A holding of this nature, however, would require the Court to overrule *Blackmar v. Guerre*, 342 U.S. 512 (1952), which held that the APA did not authorize a suit against the Civil Service Commission by name. In that case, the Court stated that "the Act [is not] to be deemed an implied waiver of all governmental immunity from suit." 342 U.S. at 516. The *Blackmar* case has been followed by lower courts. *See, e.g.,* *Chourmos v. United States*, 335 F.2d 918 (10th Cir. 1964). *But see* *IWW v. Clark*, 385 F.2d 687, 693 n.10 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 948 (1968), holding that "[i]f consent to suit there must be, consent there here is" because of § 10 of the APA.

each has proposed a remedial statute.<sup>144</sup> Professor Jaffe has demonstrated the flimsiness of the doctrine's historical underpinnings and has agreed with Byse and Davis that legislative reform is desirable.<sup>145</sup> Milton Carrow, a prolific writer on administrative law subjects, concludes that "[t]he doctrine of sovereign immunity has long fulfilled the requirements for 'full abandonment.'"<sup>146</sup> He quotes Professor Walter Gellhorn as stating that

today the doctrine may be satisfactory to technicians but not at all to persons whose main concern is with justice. . . . The trouble with the sovereign immunity doctrine is that it interferes with consideration of practical matters, and transforms everything into a play on words.<sup>147</sup>

No scholar, so far as can be ascertained, has had a good word for sovereign immunity for many years.

This rare unanimity of legal scholarship, however, has not been echoed in court opinions except for recurrent admissions that the subject is a confusing one and that it is not "an easy matter to reconcile all of the decisions of the Court in this class of cases."<sup>148</sup> Judicial dissatisfaction with current law, however, has not led to pressures for judicial reconsideration, for lower court judges are

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144. Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479 (1962); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 27 (1958, Supp. 1965). The Byse proposal differed from the proposal advanced here in three respects: it took the form of an amendment of the Judicial Code rather than of the Administrative Procedure Act (*see* p. 430 *infra*); it required the action to be cast in the form of a suit against the officer (*see* text accompanying notes 326-31 *infra*); and it provided an exception of uncertain extent for situations in which "the relief requested would affect the title of property belonging to the United States or would compel the disbursement of funds belonging to the United States." Professor Byse has subsequently abandoned his proposal in favor of that adopted by the Administrative Conference of the United States and advanced herein. The Davis proposal differed primarily in that it sought to state considerations that should govern the availability of specific review (*see* text accompanying note 210 *infra*). Professor Davis now prefers a proposal similar in nature to that advanced here but requiring the suit to be brought against the United States (*see* text accompanying notes 329-31 *infra*).

145. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 197-98, 213-31, 229 n.123 (1965).

146. *Sovereign Immunity in Administrative Law—A New Diagnosis*, 9 J. PUB. L. 1, 22 (1960).

147. *Id.* *See also* D. CURRIE, *The Federal Courts and the American Law Institute* (pt. II), 36 U. CHI. L. REV. 268, 290 (1969): "Some day Congress should . . . make a more rational and more liberal reconciliation of individual protection and government elbow-room in suits to enjoin federal officers than that established by the benighted *Larson* decision and its sequels."

148. *Brooks v. Dewar*, 313 U.S. 354, 359 (1941), quoting from *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883). *See also* *Malone v. Bowdoin*, 369 U.S. 643, 646 (1962).

bound by Supreme Court precedents<sup>149</sup> and the high Court has not undertaken to reconsider its handiwork.

It is time for Congress to reassert the fundamental proposition stated by Justice Miller in 1882: "Courts of justice are established, not only to decide upon controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government . . . ." <sup>150</sup>

b. *Harmful consequences of present law.* Law that is confused, artificial, and erratic is likely to produce unjust results as well as wasted effort. The doctrine of sovereign immunity fulfills these unpleasant expectations by distracting attention from the real issues of whether judicial review or specific relief should be available in a particular situation and by directing attention to the sophistries, false pretenses, and unreality of present law.

If problems related to sovereign immunity arose infrequently, it would be possible to regard the defects and wastefulness of the doctrine with a degree of equanimity. The litigating practice of the Department of Justice, however, ensures that sovereign immunity arguments are presented in hundreds of cases each year. The Department asserts sovereign immunity, usually as one of a battery of grounds for dismissal of a plaintiff's complaint, in a substantial portion of the cases involving nonstatutory review of federal administrative action. Only if tradition or holdings make it absolutely clear that the suit against the officer is an appropriate form of judicial review, as in the case of Post Office fraud orders,<sup>151</sup> is the defense not asserted. This practice was recently criticized by Judge Friendly, who said: "[L]aw officers of the Government ought not to take up the time of busy judges or of opposing parties by advancing an argument so plainly foreclosed by Supreme Court decisions."<sup>152</sup>

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149. See the opinion of Judge Brown in *Gardner v. Harris*, 391 F.2d 885 (5th Cir. 1968), reluctantly following the *Malone* case in holding that sovereign immunity barred a landowner's claim that a federal officer was wrongfully denying him access to his land:

With so much done . . . to give the citizen access to a home-based Federal Court, frequently in cases that involve millions of dollars or which affect comprehensive programs, the persistence with which the Government successfully asserts immunity as to property claims . . . [is] unusual . . . . [T]hat Congress does not ameliorate these hardships appears even more unusual . . . . And not even equity—the King's conscience—can help.

391 F.2d at 886-87 & n.3.

150. *United States v. Lee*, 106 U.S. 196, 220 (1882).

151. See, e.g., *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), in which the Court allowed nonstatutory review of a Post Office fraud order. It stated that when "an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." 187 U.S. at 108.

152. *Toilet Goods Assn. v. Gardner*, 360 F.2d 677, 683 n.6 (2d Cir. 1966), *aff'd.*, 387 U.S. 158 (1967).

Despite this statement, however, the confusion in the case law provides justification for the use of a sovereign immunity argument by government lawyers, who are as eager to win their cases as are other lawyers. Busy district judges, less familiar than Judge Friendly with the intricacies of nonstatutory review, are often led to deny a hearing on the merits to some litigants who should receive one. Indeed, the Mandamus and Venue Act of 1962,<sup>153</sup> by allowing nonstatutory-review actions to be brought in the plaintiff's home district rather than solely in the District of Columbia, has had the effect of exposing all federal judges to a highly intricate specialty of federal law that had previously been mastered by only a few.

An argument occasionally made in defense of sovereign immunity is that it has been so undermined by the suit against the officer that it no longer serves as a barrier to judicial review, except in cases involving Treasury liability for damages or involving the disposition of government property—cases which are arguably deserving of special treatment. It is true that lawyers and judges who have had considerable experience with sovereign immunity usually have little difficulty in sidestepping the doctrine when governmental regulatory or enforcement activity is challenged. These lawyers read *Larson* narrowly, as essentially concerned with the forced disposition of property held by the Government, in situations in which the particular conduct of the official—though it may be tortious or wrongful toward the private claimant—is authorized by statute. So read, *Larson* does not stand in the way of a suit against an officer who is engaged in a regulatory or enforcement activity not involving government property, and who is alleged to have acted unlawfully.

This narrow reading of *Larson*, even if correct, is by no means universally accepted, and the broader *Larson* formulations have frequently led lower courts astray. The "error-authority" distinction of *Larson* encourages courts to avoid a healthy examination of official power,<sup>154</sup> and application of the doctrine to land dispute cases restricts the aggrieved landowner to an often inadequate remedy—the damage action in a distant forum.<sup>155</sup> Narrower and

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153. 28 U.S.C. §§ 1361, 1391(e) (1964), as amended, 28 U.S.C. § 1391(e) (Supp. IV, 1965-1968).

154. See cases cited in notes 82-93 *supra*.

155. See, e.g., *Simons v. Vinson*, 394 F.2d 732 (5th Cir.), cert. denied, 393 U.S. 968 (1968), involving a dispute over ownership of accreted land on which oil was being produced. Application of sovereign immunity prevented a judicial determination of title and allowed the Government to retain the land even though its condemnation power probably would not have been available. A subsequent damage action against the United States, stating a claim for trespass under the Federal Tort Claims Act, survived on appeal a motion to dismiss. *Simons v. United States*, 413 F.2d 531 (5th Cir. 1969). See also text accompanying note 270 *infra*.

more refined formulations are necessary and legislation is required for this task.

Furthermore, the application of the artificialities of *Larson* is not restricted to cases involving government property or funds. A partial sampling of recent cases reveals that sovereign immunity has been a serious issue in numerous suits challenging governmental regulatory and enforcement activities. Those suits have included challenges to agricultural regulation,<sup>156</sup> food and drug regulation,<sup>157</sup> administration of federal grant-in-aid programs,<sup>158</sup> control of subversive activities,<sup>159</sup> administration of labor legislation,<sup>160</sup> governmental employ-

156. *Garvey v. Freeman*, 263 F. Supp. 573 (D. Colo. 1967), *affd.*, 397 F.2d 600 (10th Cir. 1968) (sovereign immunity did not bar judicial review of a determination of normal wheat yields per acre); *Gregory v. Freeman*, 261 F. Supp. 362 (N.D.N.Y. 1966) (sovereign immunity barred the claim that officials had erred in determining that petitioner was not in compliance with the feed grain program); *Moon v. Freeman*, 245 F. Supp. 837 (E.D. Wash. 1965), *affd. on other grounds*, 379 F.2d 382 (9th Cir. 1967) (sovereign immunity barred suit by wheat processors to enjoin a wheat marketing export program and to recover funds already paid).

157. *Toilet Goods Assn. v. Gardner*, 360 F.2d 677, 683 (2d Cir. 1966), *affd. on other grounds*, 387 U.S. 158 (1967) (sovereign immunity does not bar a pre-enforcement challenge of Food and Drug Administration (FDA) color additive regulations by cosmetic manufacturers); *American Dietetics Co. v. Celebrezze*, 317 F.2d 658 (2d Cir.), *cert. denied*, 375 U.S. 896 (1963) (sovereign immunity barred an action to recover tapes of a concealed tape recorder used by inspectors of the FDA during an inspection); *Sugarman v. Forbragd*, 267 F. Supp. 817, 826-27 (N.D. Cal. 1967), *affd.*, 405 F.2d 1189 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969) (sovereign immunity barred the challenge of an FDA determination that coffee beans could not be imported); *Durovic v. Palmer*, CCH FDC L. REP. ¶ 40,099 (N.D. Ill.), *affd. on other grounds*, 342 F.2d 634 (7th Cir.), *cert. denied*, 382 U.S. 820 (1965) (sovereign immunity barred a suit to enjoin an FDA inspection of a facility producing Krebiozen).

158. *Dermott Special School Dist. v. Gardner*, 278 F. Supp. 687 (E.D. Ark. 1968) (sovereign immunity did not bar a school district's challenge of guidelines of the Department of Health, Education & Welfare (HEW) establishing requirements for federally aided programs); *Lee County School Dist. v. Gardner*, 263 F. Supp. 26 (D.S.C. 1967) (sovereign immunity did not bar the challenge of a deferral by HEW of payment of federal funds to school district); *cf. CORE v. Commissioner, Social Security Administration*, 270 F. Supp. 537 (D. Md. 1967) (sovereign immunity barred a suit to require an agency to establish an administrative procedure different from that already established pursuant to an executive order concerning equal opportunity in federal employment).

159. *Kennedy v. Rabinowitz*, 318 F.2d 181 (D.C. Cir. 1963), *affd. on other grounds*, 376 U.S. 605 (1964) (sovereign immunity barred an action by attorneys representing Cuba for a declaration that the Foreign Agents Registration Act did not require them to register); *IWW v. Clark*, 385 F.2d 687, 693 n.10 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 948 (1948) (sovereign immunity did not bar an organization's challenge to its listing in "Attorney General's List").

160. *Rogers v. Skinner*, 201 F.2d 521 (5th Cir. 1953) (sovereign immunity barred an action to determine whether plaintiff's employees were covered by the Fair Labor Standards Act); *Wohl Shoe Co. v. Wirtz*, 246 F. Supp. 821 (E.D. Mo. 1965) (sovereign immunity barred an action seeking a declaration that an employer, warned by officers that it was violating the Fair Labor Standards Act, was within designated exemptions); *Capital Coal Sales v. Mitchell*, 164 F. Supp. 161 (D.D.C. 1958), *affd. sub nom. George v. Mitchell*, 282 F.2d 486 (D.C. Cir. 1960) (sovereign immunity did not bar the challenge of the blacklisting of a government contractor for the alleged violation of the Walsh-

ment,<sup>161</sup> postal-rate matters,<sup>162</sup> and tax investigation.<sup>163</sup> In each of these cases the Government urged dismissal—often successfully—on sovereign immunity grounds. No claim is made that the cases were all improperly decided; in fact, alternative grounds for dismissal were mentioned or were present in many of them, and it is likely that the Government often would have prevailed even if the merits had been reached. But it cannot be asserted with confidence that *all* of the results were just; some meritorious claims may have been rejected out-of-hand by dismissals based on sovereign immunity grounds. Moreover, apart from the correctness of ultimate disposition, consideration of sovereign immunity diverted both litigants and judges from more useful inquiries and resulted in wasted time and effort.

The large role that sovereign immunity has played in suits seeking judicial review of public land determinations has been a special source of injustice, uncertainty, and wasted effort. Unlike more recently created administrative functions, the older administrative activity which is involved in regulating the use or disposition of public lands is, with rare exceptions, not subject to specific statutory review provisions. Consequently, a litigant challenging an administrative determination in the public-land area is required to seek

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Healey Act); *Interstate Reclamation Bureau v. Rogers*, 103 F. Supp. 205 (S.D. Tex. 1952) (sovereign immunity barred an action to determine whether plaintiff's employees were covered by the Fair Labor Standards Act).

161. *Leber v. Canal Zone Central Labor Union*, 383 F.2d 110 (5th Cir. 1967), *rev. Canal Zone Central Labor Union v. Fleming*, 246 F. Supp. 998 (D.C.Z. 1965), *cert. denied*, 389 U.S. 1046 (1968) (sovereign immunity barred an attack on regulations decreasing overseas differential pay); *Mulry v. Driver*, 366 F.2d 544 (9th Cir. 1966) (sovereign immunity barred a suit attacking the validity of a Veterans' Administration regulation prohibiting physicians, dentists, and nurses from engaging in outside practice—on the ground that the regulation was authorized); *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 978 (1966) (sovereign immunity barred a suit challenging the Postmaster General's refusal to recognize the plaintiff union as the exclusive bargaining representative of certain postal employees). *See also American Guaranty Corp. v. Burton*, 380 F.2d 789 (1st Cir. 1967) (sovereign immunity barred a challenge of the validity of a regulation fixing the fees for salaries and expenses of referees in bankruptcy).

162. *Summerfield v. Parcel Post Assn.*, 280 F.2d 673 (D.C. Cir. 1960) (sovereign immunity barred a challenge of the validity of increased parcel post rates); *Doehla Greeting Cards, Inc. v. Summerfield*, 227 F.2d 44 (D.C. Cir. 1955) (same).

163. *Reisman v. Caplin*, 317 F.2d 123 (D.C. Cir. 1963), *affd. on other grounds*, 375 U.S. 440 (1964) (sovereign immunity barred suit by a taxpayer's attorneys seeking injunctive and declaratory relief from a summons of the Internal Revenue Service (IRS) calling for production of allegedly privileged matter, including the work product of the attorneys); *Balistreri v. United States*, 303 F.2d 617 (7th Cir. 1962) (sovereign immunity barred a taxpayer from obtaining a declaration that he was entitled to examine documents relevant to tax liability, which the IRS had subpoenaed from an accountant); *Smith v. United States*, 250 F. Supp. 803 (D.N.J. 1966), *appeal dismissed*, 377 F.2d 739 (3d Cir. 1967) (sovereign immunity did not bar a motion by taxpayers to suppress evidence obtained from them by an IRS agent allegedly in violation of their constitutional rights).

nonstatutory review under the general law governing the federal judicial system. In order to avoid the sovereign immunity doctrine, the suit must be brought against the official rather than against the Government itself. But even that may not suffice when the judgment sought would directly provide for the disposition of government property.<sup>164</sup> A literal application of the prohibition of a decree ordering a transfer of government property would foreclose nearly all suits against public-land officials, a result that would be unjust as well as inconsistent with a long history of limited judicial review in the public-land area.<sup>165</sup> In addition, the absence of statutory review provisions has created pressure to view section 10 of the Administrative Procedure Act<sup>166</sup> as a jurisdictional provision and as a consent to suit.<sup>167</sup> The result is a great deal of confusion. A recent study prepared for the Public Land Law Review Commission by a group of scholars headed by Professor McFarland stated that

suits in the nature of review actions [against public land officials] often have been permitted. . . . When they are permitted notwithstanding, and when forbidden because of, the sovereign immunity doctrine is admittedly difficult if not impossible to determine on the basis of the court opinions. . . . [T]he precedents baffle lawyers, tempt government counsel, and feed the despair of commenators.<sup>168</sup>

The study concludes that "a simple statutory affirmation of the right to court review would seem to be a dire necessity and should pose no threat to legitimate public land administration."<sup>169</sup> The report cautions that "because court review is severely limited at best" under the general law of judicial review codified in the Administrative Procedure Act, abolition of sovereign immunity will not be "disruptive, costly, and time consuming in operation."<sup>170</sup>

164. See, e.g., *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). See text accompanying notes 61-65, 110-22 *supra*.

165. See, e.g., *Clackamas County v. McKay*, 219 F.2d 479 (D.C. Cir. 1954), *vacated as moot*, 349 U.S. 909 (1955); *West Coast Exploration Co. v. McKay*, 213 F.2d 582 (D.C. Cir.), *cert. denied*, 347 U.S. 989 (1954).

166. 60 Stat. 237 (1946), *as amended*, 5 U.S.C. §§ 701-06 (Supp. IV, 1965-1968).

167. *Adams v. Witmer*, 271 F.2d 29 (9th Cir. 1959).

168. C. MCFARLAND, ADMINISTRATIVE PROCEDURES AND THE PUBLIC LANDS—A REPORT PREPARED FOR THE PUBLIC LAND LAW REVIEW COMMISSION 187-88 (1969).

169. *Id.* at 305.

170. *Id.* at 305-06. The report expresses confidence that judicial review would produce benefits: "[I]t could operate to firm up administrative procedures, instill confidence in those who have or seek rights to develop public land resources, and afford at least a theoretical protection for the small operator who traditionally has difficulty in dealing with officialdom." *Id.*

Although the Public Land Law Review Commission will not submit its final report until mid-1970, there is every indication that the Commission will accept the recommendations of its study staff.

c. *Adequacy of the law of judicial review in protecting governmental interests.* The partial elimination of sovereign immunity as a barrier to nonstatutory judicial review of federal administrative action will not expose the Government to undue judicial interference with administration. The substantial and growing body of law that governs the availability, timing, and scope of judicial review offers a more discriminating and rational solution to that objective.

The most fundamental objection to the present sovereign immunity doctrine is that it obfuscates the real issues, which are whether particular governmental activity should be subject to judicial review, and, if so, what form of relief is appropriate. Examination of cases in which sovereign immunity is invoked demonstrates that consideration of these central issues is hindered rather than advanced by the sovereign immunity doctrine. The more discriminating rules and doctrines of judicial review, although flexible by nature and requiring judgment in their application, have the great virtue of directing the mind to considerations that are relevant to the questions of whether judicial review should be available and whether a particular form of relief is appropriate.

Many of the cases decided on sovereign immunity grounds in fact involve the question whether a particular activity is unreviewable because "committed to agency discretion by law."<sup>171</sup> Others are situations in which it is arguable that "statutes preclude judicial review" in whole or in part.<sup>172</sup> Still others involve problems of the timing of suit—prematurity, ripeness, or failure to exhaust administrative remedies<sup>173</sup>—or of the plaintiff's lack of standing.<sup>174</sup> All of the cases could be decided with greater ease and better results if attention were directed to these questions and not to the confusing metaphysics of sovereign immunity.

It must be borne in mind that the sovereign immunity doctrine became established about one hundred years ago, long before the modern law of judicial review had developed. The courts at that time assumed that they must choose between performing executive

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171. See, e.g., *Sergeant v. Fudge*, 238 F.2d 916 (6th Cir. 1956), *cert. denied*, 353 U.S. 937 (1957) (discontinuance of post office by Postmaster General). See generally Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

172. See, e.g., *Toilet Goods Assn. v. Gardner*, 360 F.2d 677, 683 (2d Cir. 1966), *affd.*, 387 U.S. 158 (1967) (specific review provisions applicable to other FDA actions did not impliedly prevent the pre-enforcement review of color additive regulations). See generally L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 353-75 (1965).

173. See, e.g., *Rogers v. Skinner*, 201 F.2d 521 (5th Cir. 1953) (action to determine whether plaintiff's employees were covered by Fair Labor Standards Act).

174. Compare *Rural Electrification Administration v. Central La. Elec. Co.*, 354 F.2d 859 (5th Cir. 1966) (no standing), with *Public Serv. Co. v. Hamil*, 416 F.2d 648 (7th Cir. 1969) (standing).

tasks and refusing review; it was understandable that they took the latter course.<sup>175</sup> With the development in the twentieth century of a sophisticated body of law governing the availability, scope, and limits of judicial review, this choice is no longer presented. American experience amply demonstrates that a *limited* judicial review of governmental actions produces fairer administrative procedures, sounder substantive results, and better government.<sup>176</sup>

The essential and sound policy underlying sovereign immunity—that courts should not engage in indiscriminate interference with governmental programs—is not abandoned merely because an artificial and outmoded doctrine is abolished. The same basic policy is inherent in the body of law that governs the availability and scope of judicial review. Thus, the doctrine of sovereign immunity is unnecessary to prevent courts from entering fields which the Constitution or Congress has delegated to the executive, and from displacing executive or administrative judgment. In *Luftig v. McNamara*,<sup>177</sup> for example, a serviceman sought to enjoin the Secretary of Defense from ordering him to Vietnam, claiming that American military action there was unconstitutional and illegal. In dismissing the action the United States Court of Appeals for the District of Columbia Circuit stated:

It is difficult to think of an area less suited for judicial action than that into which Appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.<sup>178</sup>

The sovereign immunity doctrine, which was briefly mentioned as an alternative ground, was superfluous; the result would have been the same in its absence. Similarly, courts have held that the closing of a military facility,<sup>179</sup> the shift in location of a customs office,<sup>180</sup> and the discontinuance of a post office,<sup>181</sup> are unreviewable because these

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175. Compare *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840), with *Harmon v. Brucker*, 355 U.S. 579 (1958). For a discussion of the development of "the presumption of a right to judicial review," see L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 336-53 (1965).

176. See L. JAFFE, *supra* note 175, ch. 9.

177. 373 F.2d 664 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967).

178. 373 F.2d at 665-66.

179. *Armstrong v. United States*, 354 F.2d 648 (9th Cir. 1965), *cert. denied*, 389 U.S. 934 (1966).

180. *Los Angeles Customs & Freight Brokers Assn. v. Johnson*, 277 F. Supp. 525 (C.D. Calif. 1967).

181. *Sergeant v. Fudge*, 238 F.2d 916 (6th Cir. 1956), *cert. denied*, 353 U.S. 937 (1957).

functions are committed to agency discretion or otherwise inappropriate for judicial determination.

Moreover, the partial abolition of sovereign immunity would not expose governmental programs to indiscriminate judicial interference by injunction. The result in *Dugan v. Rank*,<sup>182</sup> for example, would not have changed if the immunity doctrine had not been available. The Court in *Dugan* interpreted the statutes under which the reclamation project was proceeding as authorizing the seizure of private water rights and as limiting the plaintiff to his claim for monetary relief under the Tucker Act.

Some government lawyers, defending the sovereign immunity doctrine, assert that it prevents a flood of litigation from overwhelming the federal courts and the Government's legal staffs. They point to the large number of "crackpot" suits which are filed against the United States and its agencies, and they emphasize the value of sovereign immunity as a device for getting rid of these cases at the threshold, without the inconvenience and expense of a defense on the merits.<sup>183</sup> "Crackpot" suits, however, have deficiencies other than that they are directed against the United States or its officers. In nearly every such case there are other grounds for dismissal on the pleadings (most often because the plaintiff lacks standing, because the issue is inappropriate for judicial determination, because the action is committed to agency discretion or precluded from review, or because the complaint fails to state a claim for relief). Furthermore, in almost all cases government lawyers assert a battery of defenses and objections of which sovereign immunity is only one. One suspects that if no other defense or objection exists, the suit is not properly classified as a "crank" suit and consideration of the merits is desirable.

The "floodgates" argument is always a difficult one to rebut in advance, but fears of this kind tend to be exaggerated. The experience of those agencies that are now fully subject to judicial review under statutory review provisions suggests that the level of litigation is not crippling or burdensome, and that judicial review has many advantages, even from the agency's point of view. The heavy expense of litigation also serves as a pragmatic limit on the volume of suits

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182. 372 U.S. 609 (1963), discussed in text accompanying notes 128-32 *supra*.

183. For an example of a "crackpot" suit, see *McShane v. United States*, 366 F.2d 286 (9th Cir. 1966), in which the plaintiff sought damages and injunctive relief to remedy "piracy" and kidnapping which various federal, state, and foreign officials were alleged to have committed by failing to identify and care for the foreign-born illegitimate children of American servicemen.

that could be brought. Other limiting doctrines, already discussed, would allow a threshold disposition of unmeritorious cases.<sup>184</sup>

In the final analysis, however, if some additional cases do reach the merits because of the curtailment of sovereign immunity, the additional burden on government lawyers can be justified on the same basis as is judicial review in general—the desirability of a judicial determination of the legality of official action. The ideal of a government under law can be realized only if persons are provided with an adequate set of judicial remedies against that government, its officials, and its agencies. Remedies against the United States are impeded by the unsatisfactory case law relating to the doctrine of sovereign immunity. There is need for a limited statutory reform that will

rid the law of sovereign immunity of the artificialities and rationalizations, particularly those expressed in the *Larson* case, that have produced an irreconcilable body of case law and have permitted—indeed perhaps encouraged—courts to avoid the difficult task of determining whether, in light of all the relevant considerations, the purposes of the applicable substantive statute would better be served by granting or by denying judicial review.<sup>185</sup>

## 2. *A Reform Proposal*

The doctrine of sovereign immunity has been part of Anglo-American law for centuries. Legislative provision of remedies against the United States has taken place against a background in which sovereign immunity was an important feature. The major problem in drafting a reform statute is to achieve the objective of facilitating nonstatutory judicial review of federal administrative action without affecting the existing pattern of statutory remedies, without exposing the United States to new liability for money damages, and without upsetting congressional judgments that a particular remedy in a given situation should be the exclusive remedy.

These objectives may be accomplished by adding the following language to section 702 of title 5 of the United States Code:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or

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184. See text accompanying notes 171-82 *supra*.

185. Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1525 (1962).

that the United States is an indispensable party. . . .<sup>186</sup> Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.<sup>187</sup>

A recommendation embodying this language was recently adopted by the Administrative Conference of the United States<sup>188</sup> and will become the basis for congressional consideration of the problem in the near future.

a. *Application of the proposal.* The first sentence of the proposal eliminates the doctrine of sovereign immunity as a barrier to judicial review of federal administrative action.<sup>189</sup> If it is implemented, claims challenging official action or nonaction, and seeking relief other than money damages, will not be barred by sovereign immunity. The consent to suit, however, is a limited one. The explicit exclusion of monetary relief makes it clear that sovereign immunity is abolished only in actions for specific relief.<sup>190</sup> Thus existing limitations on the recovery of money damages—limitations such as the exclusion from the Federal Tort Claims Act of most intentional torts and of activities involving “a discretionary function”<sup>191</sup>—are unaffected.

The consent to suit is also limited to claims in federal courts; hence the United States would remain immune from suit in state courts. In addition, the waiver of immunity extends only to actions challenging the legality of federal action or nonaction and would not extend to proceedings in which federal officers or agencies are not acting in their “official capacity or under color of legal authority.”<sup>192</sup> Thus the long-standing immunity of the United States

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186. The deleted sentence, authorizing the plaintiff in such an action to name the United States as a party defendant, is discussed in the text at 461-63 *infra*.

187. The proposed revision of § 702 is set forth in the conclusion of this Article, p. 468 *infra*.

188. Recommendation 9 of the Administrative Conference of the United States, adopted Oct. 21, 1969. See 38 U.S.L.W. 2242 (1969).

189. The similar barrier phrased in terms of the United States as an indispensable party is also removed. For a discussion of the effect on the United States of a judgment in a suit against an officer, see text accompanying notes 343-48 *infra*.

190. “Specific relief,” as used herein, refers broadly to remedies other than money damages: injunction, declaratory judgment, mandamus, ejectment, quiet title, and habeas corpus.

191. See 28 U.S.C. § 2680 (1964).

192. The quoted language is taken from 28 U.S.C. § 1391(e) (1964), which would govern venue and service of process in actions falling within the purview of the proposal. See text accompanying notes 288-98 *infra*.

from garnishment process<sup>193</sup> is unaffected. In these cases, in which an employee of the United States allegedly owes money to a creditor who attempts by means of state garnishment process to reach wages due the employee from the United States, the action does not involve a claim that "an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." Moreover, the principal action is usually one for monetary relief.

Special doctrines favoring the United States as a plaintiff<sup>194</sup> are also unaffected by the proposal. The exemption of the United States from statutes of limitations<sup>195</sup> is not based on sovereign immunity but on the separate ground that the public interest should not suffer because of the negligence of public officers. Moreover, the proposal is applicable only to situations in which the action is *against* the United States, not to those in which the United States is a plaintiff.

Because the proposal is to be added to section 702 of title 5, a provision of the Administrative Procedure Act (APA) entitled "right of review," it will be applicable only to functions falling within the definition of "agency" in the APA. Section 701(b)(1), formerly section 2(a) of the APA, defines "agency" very broadly as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," except for a list of exempt agencies or functions: Congress, federal courts, governments of territories or of the District of Columbia, mediation boards, courts-martial, and certain other military, wartime, and emergency functions.<sup>196</sup> Each of these exclusions embodies a congressional desire to limit or foreclose judicial review by placing a function outside the provisions of the APA. A partial elimination of sovereign immunity should not be used as a vehicle for wholesale revision of these

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193. See *FHA v. Burr*, 309 U.S. 242 (1940).

194. The United States is not liable for costs either as an unsuccessful plaintiff or as a defendant, unless there is an authorizing statute. 28 U.S.C. § 2412(a) (1964). Although the Federal Rules of Civil Procedure are generally applicable to the United States as a litigant, rule 13(d) provides that the counterclaim provisions do not "enlarge beyond the limits now fixed by law the right to assert counterclaims against the United States." A person sued by the United States may counterclaim for damages only as a defensive set-off or recoupment. See *United States v. Shaw*, 309 U.S. 495 (1940); *Bull v. United States*, 295 U.S. 247, 261-62 (1935).

195. See *United States v. Summerlin*, 310 U.S. 414 (1940).

196. Other statutes that contain provisions exempting a function from the judicial review sections of the APA include the following: export of scarce materials [50 App. U.S.C. § 2027 (1964)]; selective service proceedings [50 App. U.S.C. § 463(b) (1964)]; employment and discharge of National Security Agency personnel [50 U.S.C. § 835 (1964)]; renegotiation of defense contracts [50 App. U.S.C. § 1221 (1964)]; certain mine inspection functions [30 U.S.C. § 483 (1964)]; and certain water resource land acquisition functions [33 U.S.C. § 597 (1964)].

congressional desires, which should be respected until they are re-considered in a more discriminating fashion than is possible in connection with general legislation.<sup>197</sup>

b. *Law other than sovereign immunity unchanged.* The proposal, after forthrightly abolishing sovereign immunity as a defense in nonstatutory-review actions, provides that

Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground . . . .

This important protective language insures that the abolition of sovereign immunity will not result in undue judicial interference with governmental operations or in a flood of burdensome litigation. Grounds for dismissal or denial of relief under present law include but are not limited to: (1) The plaintiff's lack of standing;<sup>198</sup> (2) the absence of a matured controversy;<sup>199</sup> (3) the availability of an alternative remedy in another court;<sup>200</sup> (4) the express or implied preclusion of judicial review;<sup>201</sup> (5) the commission of the matter by law to the defendant's discretion;<sup>202</sup> (6) the privileged nature of the defendant's conduct;<sup>203</sup> (7) the plaintiff's failure to exhaust his administrative remedies;<sup>204</sup> and (8) the discretionary authority of a court to refuse relief on equitable grounds.<sup>205</sup>

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197. Professor Byse has suggested a remedial statute that would take the form of an amendment to chapter 161 of the Judicial Code, which is concerned with the United States as a party. *See* Byse, *supra* note 185, at 1528. *See also* note 144 *supra*.

198. *See, e.g.*, *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Pennsylvania R.R. v. Dillon*, 335 F.2d 292 (D.C. Cir. 1964).

199. *See, e.g.*, *International Longshoremen's Union, Local 37 v. Boyd*, 347 U.S. 222 (1954).

200. *See, e.g.*, *American President Lines, Ltd. v. Federal Maritime Board*, 235 F.2d 18 (D.C. Cir. 1956). *See also* statutory and rule provisions denying authority for injunctive relief, such as 26 U.S.C. § 7421 (1964) and 28 U.S.C. § 2201 (1964), prohibiting injunctive and declaratory relief against the collection of federal taxes.

201. *See, e.g.*, *Schilling v. Rogers*, 363 U.S. 666 (1960) (implied preclusion); *Barefield v. Byrd*, 320 F.2d 455 (5th Cir. 1963) (express preclusion).

202. *See, e.g.*, *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309 (1958).

203. *See, e.g.*, *Barr v. Matteo*, 360 U.S. 564 (1959); *United States v. Reynolds*, 345 U.S. 1 (1953).

204. *See, e.g.*, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

205. In situations for which Congress has not expressly or impliedly precluded specific relief, injunctive relief will nevertheless be denied if harm to public interests would result from such relief. By long-standing tradition, an equity court balances the interests of the parties in deciding what kind of relief is appropriate: "The court, in its discretion, may refuse . . . to give a remedy which would work public injury or embarrassment, . . . just as in sound discretion a court of equity may refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest." *United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 360 (1933). *See also* *Morrison v. Work*, 266 U.S. 481, 490 (1925); APA § 10(d), *as amended*, 5 U.S.C. § 705 (Supp. IV, 1965-1968).

Incorporation of the reform proposal into the judicial review provisions of the Administrative Procedure Act reinforces the preservation of the existing law of judicial review. As is evident from prior discussion, abolition of sovereign immunity cannot be considered except in relation to the general law governing the availability and scope of judicial review.<sup>206</sup> That law is now codified in sections 701 to 706 of title 5, formerly section 10 of the APA, and the incorporation of the abolition of sovereign immunity into section 702 draws on the broader context. The whole matter, for example, is clearly subject to the prefatory language of section 701(a): "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." The same conclusion would probably be reached in any event, but the APA context lends clarity to the limited nature of the proposal.

The only valid function served by sovereign immunity—preventing undue judicial interference with governmental programs that should not be subjected to judicial review—would be performed by the equitable considerations that control the grant of specific relief and by the more discriminating and intelligible doctrines governing the availability of judicial review.<sup>207</sup> The most useful of those doctrines is the nonreviewability of action that is expressly or impliedly precluded from review or committed to agency discretion. Sovereign immunity and unreviewability are two separate ideas, and unreviewability is clearly retained under the proposal. It is fanciful to suppose that abolition of sovereign immunity will allow the courts to decide issues about foreign affairs, military policy, and other subjects inappropriate for judicial action.<sup>208</sup> Courts are not unaware of their capabilities and limits; much of the law of unreviewability consists of marking out areas in which legislative action or traditional

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206. See text accompanying notes 171-83 *supra*.

207. Byse, *Proposed Reforms in "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1530 (1962):

Although I cannot pretend to an encyclopedic knowledge of governmental regulation or to the prescience needed to foretell judicial reaction to ingenious efforts of resourceful counsel to extend any statute to its utmost, I am confident that the various doctrines and principles that govern the availability of judicial review are sufficiently comprehensive and flexible to prevent an undue increase in the availability of judicial review and to avoid improper judicial interference with federal regulatory action.

208. See *Gardner v. Toilet Goods Assn.*, 387 U.S. 167 (1967) (dealing with the reviewability of FDA regulations prior to their enforcement); *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 304 (1958) (holding that the refusal of the Canal Company to prescribe new rates was not subject to judicial review because the decision to prescribe rates was "committed to agency discretion by law"). In those cases, the Court, dealing with matters of the kind that lower courts have held foreclosed by sovereign immunity, addressed itself to the question of "the appropriateness of the issues for judicial determination." 387 U.S. at 170.

practice indicates that courts are unqualified or that issues are inappropriate for judicial determination.

Finally, the partial elimination of sovereign immunity will not allow judges to substitute their judgment for that of administrators. Established limits on the scope of judicial review will continue to be operative. Section 706 of title 5<sup>209</sup> limits review to questions involving constitutionality, statutory authority, proper procedure, abuse of discretion, and whether findings are supported by substantial evidence. The scope of review in a case formerly kept out of court by sovereign immunity will be the same as the scope of review in a case that has always been reviewable. Substitution of judgment, *de novo* consideration, and the like are not permitted.

The proposal does not attempt to state considerations governing the grant of specific relief.<sup>210</sup> The factors involved are so numerous and their application so dependent upon the circumstances of individual cases that the attempt to spell them out is an exceedingly difficult task. It is, moreover, a hazardous one, since any attempt to restate a complex body of law creates problems while attempting to solve them. Language suggesting that the law of judicial review is being changed in one direction or another is almost impossible to avoid, and any partial restatement of relevant factors creates negative implications with respect to factors or doctrines that are omitted. Thus it seems wiser to withdraw the defense of sovereign immunity in certain situations in which its application is inappropriate, leaving all other law unrestated and unchanged.

It is true that the proposal vests considerable discretion in the judiciary, and so the possibility of occasional error remains. But that possibility is an inevitable concomitant of the administration of any system by human beings. The risk must be weighed against the injustices and uncertainties resulting from the sovereign immunity doctrine.<sup>211</sup> If the fear of improper judicial interference does prove warranted—an unlikely occurrence—the Government is in a good position to obtain statutory amendments that would have the effect of correcting abuses.

c. *Situations for which Congress has provided an exclusive*

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209. 5 U.S.C. § 706 (Supp. IV, 1965-1968) is often referred to by its original numbering as § 10(e) of the APA.

210. In this respect the proposal differs from one tentatively advanced by Professor Davis. See 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 27.10, at 165 (Supp. 1965); note 144 *supra*.

211. Error, of course, is possible even under the sovereign immunity doctrine. In the situation in *Dugan v. Rank*, 372 U.S. 609 (1963), lower courts interfered with the administration of the Central Valley water project for several years until they were reversed by the Supreme Court.

*remedy*. With the exception of the judge-made law governing non-statutory review, remedies against the United States and its officers are governed by a large number of statutes, each of which constitutes a limited consent to suit.<sup>212</sup> The harmful consequences of sovereign immunity as a barrier to nonstatutory review must be eliminated without effecting an implied repeal of any prohibition, limitation, or restriction of review contained in those existing statutes. While this result could probably have been achieved solely by the proposed statute's language preserving all other "legal or equitable ground[s]" for dismissal, which include the designation by Congress of an exclusive remedy or method of review, a final proviso to the statute is intended to prevent any question on this matter from arising:

Nothing herein . . . (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

The policy underlying this proviso does not rest on the notion that the present statutory pattern of remedies is an ideal one. Indeed, it is apparent that there are deficiencies in the existing remedial pattern both in terms of omission<sup>213</sup> and coordination.<sup>214</sup> Recon-

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212. For a discussion of the statutory development up to 1953, see H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1140-50 (1953).

213. There are several situations in which neither monetary nor specific relief can now be obtained and the plaintiff has no judicial remedy at all, even though the matter is otherwise appropriate for judicial consideration. These cases come about mainly because of gaps in the Tucker and Tort Claims Acts. There are two situations in which monetary relief should probably be expanded. The first is that in which tort damages cannot be recovered under the Federal Tort Claims Act because of its exceptions—especially that excluding most intentional torts. See 28 U.S.C. § 2680 (1964). Reconsideration of the question of when the United States should be liable for the torts of its officers is long overdue; in the process it may be desirable to clarify inconsistent interpretations of other aspects of the Tort Claims Act. The second situation for the expansion of monetary relief is that in which such relief cannot be obtained in the Court of Claims or under the Tucker Act because the claim is quasi-contractual or restitutionary in character, that is, the claim is based on a contract implied in law rather than on a contract implied in fact. See, e.g., *United States v. Algoma Lumber Co.*, 305 U.S. 415, 423 (1939); *United States v. Minnesota Mut. Inv. Co.*, 271 U.S. 212, 217 (1926). Even though the Court of Claims has been adept at circumventing the limitation by holding that the particular contract is "implied in fact," a statutory amendment providing for restitution damages is desirable. The relation of these matters to sovereign immunity is readily apparent. So long as there are unjustified gaps in the availability of monetary compensation, there is pressure to grant specific relief, even in instances in which monetary relief is clearly preferable. Such pressure creates a substantial risk to the development of an orderly and coherent body of law.

214. The lack of full coordination between the two legislative damage systems creates pressures which may warp them. The exclusion of contracts "implied in law" from the Tucker Act tends to push such claims under the Tort Claims Act or to expand the concept of contracts "implied in fact" beyond a reasonable meaning. In situations in which no monetary relief is available, the claimant may be forced to bring an injunction suit even though he would prefer money. Other examples come

sideration of the remedial pattern, however, requires detailed consideration of each area involved and such consideration is not feasible in connection with the limited reforms that are proposed in this Article. Hence the proposed legislation takes care not to make inadvertent changes in matters that cannot be reconsidered systematically at this time.

The proviso is concerned with situations in which Congress has consented to suit but in which the remedy provided is intended to be the exclusive one. The Tucker Act<sup>215</sup> provides an apt illustration. When Congress created a damage remedy for contract claims, with jurisdiction limited to the Court of Claims except in suits for less than 10,000 dollars, it intended to foreclose specific performance of government contracts.<sup>216</sup> In the terms of the proviso, a statute granting consent to suit, in this case, the Tucker Act, "impliedly forbids" relief other than the remedy provided by the Act. Thus the partial abolition of sovereign immunity brought about by the proposal does not change existing limitations on specific relief, limitations which are derived from statutes dealing with such matters as government contracts,<sup>217</sup> Indian claims,<sup>218</sup> patent infringement,<sup>219</sup> tax claims,<sup>220</sup> and tort claims. Statutes providing an exclusive method of judicial review of particular administrative action also remain unaffected.<sup>221</sup> The language of the proviso directs attention to particular statutes and the decisions interpreting them. If a statute "grants consent to suit" with respect to a particular subject matter, specific relief may be obtained only if Congress has not intended

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from some of the exceptions to the Tort Claims Act which tend to put expansive pressure on the concept of a "taking" redressable under the Tucker Act. For Congress to be in a position to make an intelligent choice among the possibilities of monetary compensation, specific relief, or both, the statutory exclusions from the Tucker and Tort Claims Acts should be reviewed for current soundness.

215. 24 Stat. 505, *as amended*, 28 U.S.C. §§ 1346(a), (b), (d) (1964) (district courts); 28 U.S.C. § 1491 (1964) (Court of Claims).

216. *See, e.g.*, *United States v. Jones*, 131 U.S. 1 (1889) (Tucker Act is limited to claims for money and does not provide for specific performance).

217. *See* 28 U.S.C. § 1499 (1964).

218. *See* 28 U.S.C. § 1505 (1964) (jurisdiction of the Court of Claims over certain types of Indian claims against the United States); 28 U.S.C. § 1353 (1964) (district court jurisdiction over claims by persons of Indian blood or descent to land allotments under statute or treaty).

219. *See* 28 U.S.C. § 1498 (1964) (jurisdiction of Court of Claims over patent infringement claims against the United States).

220. 26 U.S.C. § 7421 (1964) prohibits suits to restrain the assessment or collection of taxes. *See, e.g.*, *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962). 28 U.S.C. § 2201 (1964) exempts controversies "with respect to Federal taxes" from the authority to grant declaratory judgments.

221. *See, e.g.*, 28 U.S.C. §§ 2341-51 (Supp. IV, 1965-1968).

the provision for monetary relief to be the exclusive remedy. The intent of the proposal, however, is to overrule *Malone v. Bowdoin*,<sup>222</sup> which held that sovereign immunity barred specific relief for an alleged unconstitutional taking.<sup>223</sup>

On the other hand, the language of the proviso should not be taken as withdrawing existing or alternative remedies. While no new authority is conferred in situations dealt with by statutes granting consent to suit, nothing is taken away. Presumably there are, at present, situations in which specific relief can be obtained even though monetary relief for the claim involved is not authorized by a statute constituting a consent to suit. An example might be a suit to enjoin a federal officer from engaging in an intentional tort. In that situation, a damage remedy against the United States is excluded by the Tort Claims Act, but the existence of that exclusion does not affect the availability of specific relief.

The doctrine of sovereign immunity is confused, artificial, and conducive to unjust results. Statutory reform is long overdue. Increasing sentiment in favor of reform is evidenced by the recommendation adopted by the Administrative Conference of the United States with only one dissenting vote.<sup>224</sup> Congress should now turn its attention to the matter.

## II. SUBJECT MATTER JURISDICTION

In the main the federal courts possess subject matter jurisdiction that is adequate to provide a degree of judicial scrutiny of federal administrative action. There are, however, two puzzling gaps in the jurisdictional provisions, and both need rectification: (1) the lack of subject matter jurisdiction of certain cases which challenge federal administrative action and in which the plaintiff cannot establish that the value of his claim exceeds 10,000 dollars; and (2) the lack of a

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222. 369 U.S. 643 (1962).

223. Both the contract claim, in which specific performance is excluded, and the claim for an unconstitutional taking arise under provisions of the Tucker Act. Yet there is a vast difference in theory and policy between the two claims. Congress has expressed a judgment that specific performance cannot be obtained for a contract claim for which the Tucker Act provides a monetary remedy. The claim for an unconstitutional taking in the Court of Claims—a last-gap measure to prevent violation of the fundamental law—is not the same claim as that for specific performance, which is a private action to prevent interference with property. Congress, by providing a money remedy for an unconstitutional taking, should not be understood as removing the pre-existing remedy of injunction to protect property. It is hoped that the proposed statute will be viewed as overruling *Malone v. Bowdoin*, 369 U.S. 643 (1962), discussed in text accompanying notes 110-17 *supra*.

224. Recommendation 9 of the Administrative Conference, adopted Oct. 21, 1969. See 38 U.S.L.W. 2242 (1969).

general provision authorizing federal district courts to entertain quiet-title suits brought against the United States.

A. *Elimination of Jurisdictional Amount  
in Federal-Question Cases*

An anomaly in the law relating to federal court jurisdiction deprives a United States district court, otherwise competent, from entertaining certain cases involving nonstatutory review of federal administrative action in the absence of the jurisdictional amount required by section 1331 of the Judicial Code,<sup>225</sup> the general "federal question" provision. These cases "arise under" the Federal Constitution or federal statutes, and—subject to the various limiting rules of standing, exhaustion of remedies, finality, ripeness, and the like—they are appropriate matters for the exercise of federal judicial power.

Under present law there are a significant number of situations involving nonstatutory review in which a plaintiff must ground his action on section 1331 and must be prepared to establish not only that the action arises under the Constitution, laws, or treaties of the United States but also that "the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs." In some of these cases the jurisdictional-amount requirement cannot be met because it is impossible to place a monetary value on the right asserted by the plaintiff.<sup>226</sup> How is one to value an individual's claim

225. 28 U.S.C. § 1331(a) (1964):

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000 . . . and arises under the Constitution, laws, or treaties of the United States.

226. It is very difficult to place a monetary value on certain reputational or intangible interests. See *Oestereich v. Selective Serv. Sys.*, 280 F. Supp. 78 (D. Wyo. 1968), *aff'd.*, 390 F.2d 100 (10th Cir. 1968), *remanded for determination of amount in controversy*, 393 U.S. 233, 239 (1968) (freedom from induction resulting from selective service reclassification); *Giancana v. Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965) ("Courts may not treat as a mere technicality the jurisdictional amount essential to the 'federal question' jurisdiction, even in this case where there is an allegedly unwarranted invasion of plaintiff's privacy [by continuous FBI surveillance].") 335 F.2d at 368.; *Vorachek v. United States*, 337 F.2d 797 (8th Cir. 1964) (disclosure of confidential information about plaintiff by federal officers); *Jackson v. Kuhn*, 254 F.2d 555 (8th Cir. 1958) (constitutionality of military presence at Little Rock High School; jurisdictional-amount requirement held not satisfied). With respect to military status, see *Jones*, *Jurisdiction of the Federal Courts To Review the Character of Military Administrative Discharges*, 57 COLUM. L. REV. 917, 937-41 (1957):

[T]he jurisdictional amount may prove an insurmountable obstacle since the plaintiff-veteran [in military discharge situations] probably would not be able to establish that the requisite \$3,000 is involved in the controversy over the character of his discharge, a matter as to which he has the burden of proof.

See also Meador, *Judicial Determinations of Military Status*, 72 YALE L.J. 1293, 1298 n.27 (1963).

that he is entitled to remain free from military service, to travel abroad, or to be free from continuous police surveillance? In other cases the plaintiff's claim that he is entitled to a federal grant or benefit, such as federal employment or the use of public lands, may be assigned a monetary value, but the amount in controversy may be 10,000 dollars or less.<sup>227</sup> Although judicial review of these and similar claims may be unavailable or limited in scope for other reasons, judicial consideration of the plaintiff's claim should not be foreclosed solely because of a lack of the jurisdictional amount.

The problem is illustrated by the recent case of *Boyd v. Clark*,<sup>228</sup> in which four Selective Service registrants challenged the constitutionality of college-student deferments provided by the Military Selective Service Act of 1967,<sup>229</sup> on the ground that student deferments arbitrarily discriminate against persons who are economically unable to attend college. The three-judge district court, in an opinion by Judge Hays, granted the Government's motion to dismiss for lack of jurisdictional amount:

Plaintiffs' counsel concedes that he cannot prove that any of the plaintiffs will suffer a monetary loss of more than \$10,000 by reason of the injury alleged [increased likelihood of induction].

It is firmly settled law that cases involving rights not capable of valuation in money may not be heard in federal courts where the

227. *Employment interests*: E.g., *Neustein v. Mitchell*, 130 F.2d 197 (2d Cir. 1942) (loss of a state office because of federal enforcement of the Hatch Act prohibitions on political activity); *Carroll v. Somervell*, 116 F.2d 918 (2d Cir. 1941) (the value of federal employment measured by lost wages); *Fischler v. McCarthy*, 117 F. Supp. 643 (S.D.N.Y.), *affd. on other grounds*, 218 F.2d 164 (2d Cir. 1954) (the bare allegation that the value of federal employment exceeded \$3,000 was not accepted); cf. *Friedman v. International Assn. of Machinists*, 220 F.2d 808 (D.C. Cir. 1955) (the value of a member's expulsion from a union is to be measured by loss of wages). One line of cases that formerly was troubled by the jurisdictional-amount requirement involved the preferential employment rights of veterans. See *Christner v. Poudre Valley Cooperative Assn.*, 134 F. Supp. 115 (D. Colo. 1955), *affd.*, 235 F.2d 946 (10th Cir. 1956). This particular problem has now been cured by a statute which specifically provides for federal jurisdiction in such cases without regard to jurisdictional amount.

*Freedom from regulatory interference*: E.g., *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir. 1966) (freedom of an Indian reservation from state civil and criminal authority); *Gavica v. Donough*, 93 F.2d 173 (9th Cir. 1937) (enforcement of regulations governing grazing on public lands); *Dewar v. Brooks*, 16 F. Supp. 636 (D. Nev. 1936) (same); *Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945) (creation of a national monument); cf. *Empresa Hondurena de Vapores, S.A. v. McLeod*, 300 F.2d 222 (2d Cir. 1962) (employer's suit to enjoin the regional director of the National Labor Relations Board from conducting a representation election).

*Property rights*: E.g., *Cameron v. United States*, 146 U.S. 533 (1892) ("It is not, however, the value of the property in dispute in this case which is involved, but the value of the color of title to this property, which is hardly capable of pecuniary estimation, and if it were, there is no evidence of such value in this case." 146 U.S. at 535.); *Helvy v. Webb*, 36 F. Supp. 243 (S.D. Cal. 1941) (value of grazing lands).

228. 287 F. Supp. 561 (S.D.N.J. 1968).

229. 50 U.S.C. § 456(h)(1) (Supp. IV, 1965-1968).

applicable jurisdictional statute requires that the matter in controversy exceed a certain number of dollars. . . . The "right to the custody, care, and society" of a child, the court noted [in *Barry v. Mercein*, 46 U.S. (5 How.) 103 (1847)], "is evidently utterly incapable of being reduced to any pecuniary standard of value, as it rises superior to money considerations." 46 U.S. at 120. Since the statute permitted appeals only in those cases where the "matter in dispute exceeds the sum or value of two thousand dollars," the court concluded that it was without jurisdiction:

"The words of the act of Congress are plain and unambiguous . . . . There are no words in the law, which by any just interpretation can be held to . . . authorize us to take cognizance of cases to which no test of money value can be applied."<sup>230</sup>

Judge Edelstein dissented, arguing that the plaintiffs' allegation that the matter in controversy exceeded 10,000 dollars should not be scrutinized, at least when the defendant did not move to dismiss on that ground, or, alternatively, that the court should "assume that freedom from an unconstitutional discrimination exceeds the sum or value of \$10,000.00."<sup>231</sup> He suggested that the jurisdictional-amount requirement was an unconstitutional one in situations, such as this, in which the action, because it is against federal officers, could not be brought in a state court.<sup>232</sup>

The reasons for objecting to the absence of federal jurisdiction in a case like *Boyd v. Clark* are readily apparent. The factors relevant to the question of whether or not a federal court should be available to a litigant seeking protection of a federal right have little, if any, correlation with the minimum jurisdictional amount. Instead they involve such considerations as whether there is a need for a specialized federal tribunal and whether there are defects in the state judicial system that might substantially impair consideration of the plaintiff's claim. These factors have special force in cases in which specific relief is sought against a federal officer, because state courts generally are powerless to restrain or direct a federal officer's action which is taken under color of federal law.<sup>233</sup> In this respect, a suit against a federal officer differs from other federal-

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230. 287 F. Supp. at 564. In support of its holding, the court cited *Kurtz v. Moffitt*, 115 U.S. 487, 498 (1885); *First Natl. Bank of Youngstown v. Hughes*, 106 U.S. 523 (1882); *Giancana v. Johnson*, 335 F.2d 366 (7th Cir. 1964); *Carroll v. Somervell*, 116 F.2d 918 (2d Cir. 1941); *United States ex rel. Curtiss v. Haviland*, 297 F. 431 (2d Cir. 1924); and 1 J. MOORE, *FEDERAL PRACTICE* ¶ 0.92[5] (2d ed. 1964).

231. 287 F. Supp. at 568.

232. 287 F. Supp. at 568.

233. See Arnold, *The Power of State Courts To Enjoin Federal Officers*, 73 *YALE L.J.* 1385 (1964).

question cases subject to the jurisdictional-amount requirement, such as those attacking state statutes on federal constitutional grounds. In those cases an alternative state forum is available to the plaintiff; but in the situation in question here, the denial of a federal forum for lack of the jurisdictional amount may be a denial of any remedy whatsoever. As Judge Edelstein pointed out in his dissent in *Boyd v. Clark*, jurisdictional provisions which deny a litigant any opportunity to present federal constitutional claims may themselves present constitutional difficulties.<sup>234</sup>

The lack of a state forum in actions against federal officers serves to distinguish this recommendation from other and more general proposals to eliminate the jurisdictional-amount requirement in federal-question cases. The American Law Institute, for example, has recommended that the jurisdictional-amount requirement be abandoned in federal-question cases.<sup>235</sup> Whether or not that broader proposal is accepted, the narrower problem with which this recommendation is concerned needs correction.

It is unclear why Congress, when, in 1958, it increased the jurisdictional amount in diversity-of-citizenship cases from 3,000 dollars to 10,000 dollars, also raised the minimum jurisdictional amount in federal-question cases arising under section 1331. The legislative history merely asserts that the effect of the change is insignificant because the only cases affected are those involving the constitutionality of state statutes and those arising under the Jones Act.<sup>236</sup> Virtually all other cases were said to fall within one of the special federal-question statutes which require no minimum jurisdictional amount.<sup>237</sup> If this were the case, however, it is difficult to see why the provision was enacted, since the only purpose of increasing the jurisdictional amount was to reduce the workload of the federal courts, a purpose which would not be advanced if federal-question cases were unaffected.<sup>238</sup> Moreover, the assertion that the significant cases

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234. 287 F. Supp. at 568.

235. ALL, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1311 and commentary at 172-76 (1969).

236. See, e.g., 104 CONG. REC. 12,688-89 (June 30, 1958); S. REP. NO. 1830, 85th Cong., 2d Sess. (1958). Since cases brought under the Jones Act, 46 U.S.C. § 688 (1964), are actions by seamen or their personal representatives to recover damages for personal injury or wrongful death, the jurisdictional-amount requirement is not a barrier as a practical matter. In such actions the plaintiff can always allege "pain and suffering" in excess of the jurisdictional amount.

237. 104 CONG. REC. 12,689 (June 30, 1958); S. REP. NO. 1830, 85th Cong., 2d Sess. 6 (1958).

238. For an excellent discussion, see Friedenthal, *New Limitations on Federal Jurisdiction*, 11 STAN. L. REV. 213, 216-18 (1959).

which arise under section 1331 are limited to the two categories mentioned is misleading and erroneous. There is an important third category—the one with which this recommendation is concerned—in which persons aggrieved by federal administrative action are seeking nonstatutory review in an action brought against the officer. In these cases the plaintiff must follow one of the following courses: (1) he can satisfy the minimum jurisdictional amount required by section 1331; (2) he can bring his action in the District of Columbia; (3) he can cast his action in the form of a mandamus proceeding, thus qualifying under the provisions of the Mandamus and Venue Act of 1962;<sup>239</sup> or (4) he can attempt to persuade the court that section 10 of the Administrative Procedure Act<sup>240</sup> provides an independent jurisdictional basis for judicial review of federal administrative action, a proposition that is much in doubt. Brief consideration will be given to the unsatisfactory nature of each of these alternatives.

With respect to the first, the principles for determining whether the amount in controversy satisfies statutory requirements are well established. The plaintiff has the burden of alleging and proving jurisdictional facts. The plaintiff's *ad damnum* is ordinarily taken at face value unless it appears not to have been made in good faith, or unless the court believes that as a matter of legal certainty the value of the right in controversy is less than the minimum amount.<sup>241</sup> There is no guarantee, however, that the court will not examine in detail the value of the plaintiff's claim. In *Carroll v. Somervell*,<sup>242</sup> for example, in which a federal employee sought to enjoin his dismissal for failure to sign a non-Communist affidavit, the employee alleged that his loss of standing in the community was worth more than 3,000 dollars. Nevertheless, the case was dismissed for lack of jurisdictional amount on the ground that the value of the claim was measured by the maximum compensation—less than 3,000 dollars—that the employee would be entitled to receive during the ensuing year.

As the *Carroll* case indicates, the methods of valuation in injunction suits are conservative. In *McNutt v. General Motors Acceptance Corporation*,<sup>243</sup> it was held that in an attack on a regulatory statute the amount in controversy is not the value of the business or other

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239. 28 U.S.C. §§ 1361, 1391(e) (1964).

240. 60 Stat. 237 (1946), as amended, 5 U.S.C. §§ 701-06 (Supp. IV, 1965-1968).

241. See, e.g., *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938); Note, *Determination of Federal Jurisdictional Amount in Suits on Unliquidated Claims*, 64 MICH. L. REV. 930 (1966).

242. 116 F.2d 918 (2d Cir. 1941).

243. 298 U.S. 178 (1936).

activity regulated, but the difference between its value regulated and unregulated.<sup>244</sup> Although some cases ignore these principles by treating the plaintiff's *ad damnum* as conclusive,<sup>245</sup> a plaintiff seeking judicial review of federal administrative action cannot rely on the possibility that this approach will be taken. The frequency with which the problem arises has already been indicated.<sup>246</sup>

As a second alternative, the plaintiff might elect to litigate in the District of Columbia. The district court for the District of Columbia has long been viewed as inheriting the inherent and common-law powers of the Maryland courts.<sup>247</sup> Prior to 1962, this inheritance meant that the courts in the District of Columbia were the only federal courts that possessed the power to issue original writs of mandamus as a general matter.<sup>248</sup> The mandamus problem was cured by the Mandamus and Venue Act of 1962, which conferred power on district courts everywhere to entertain "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."<sup>249</sup> In addition to its mandamus power, however, the district court for the District of Columbia also "has a general equity jurisdiction,"<sup>250</sup> which it may exercise without regard to the amount in controversy.<sup>251</sup>

The resulting situation is hardly a logical or defensible one. Congress, in 1962, disturbed by the inability of litigants to obtain mandamus relief in local courts distributed around the country, conferred such jurisdiction on all district courts without regard to the amount in controversy. The more traditional exercise of injunctive or declaratory authority, however, remains subject to the requirement of a minimum jurisdictional amount whenever no special federal-question statute is available—except in the District of Columbia. The same arguments that supported the Mandamus and

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244. See also *Healy v. Ratta*, 292 U.S. 263 (1934) (the amount in controversy in tax litigation is measured by the amount of the tax rather than of the penalty).

245. See, e.g., *Flast v. Cohen*, 392 U.S. 83 (1968) (federal taxpayer's attack on federal grants to religious schools); *Townsend v. Zimmerman*, 237 F.2d 376 (6th Cir. 1956) (attack on selective service classification).

246. See, e.g., cases cited in notes 226-27 *supra*.

247. See *Byse*, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1499-502 (1962).

248. See, e.g., *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838); *Marshall v. Crotty*, 185 F.2d 622, 627 (1st Cir. 1950).

249. 28 U.S.C. § 1361 (1964).

250. *Stark v. Wickard*, 321 U.S. 288, 290 (1944).

251. D.C. CODE ANN. §§ 11-521, 11-961, 11-962 (Supp. II, 1969).

Venue Act of 1962—the expense and inconvenience of forcing litigants from all over the country to bring their claims to a District of Columbia court—support the elimination of the remaining anachronism in injunction suits against federal officers.

The third alternative available to a plaintiff is to cast his suit against the officer in the form of a mandamus action and to bring it in a local district court. As has already been indicated, the Mandamus and Venue Act of 1962, was intended to provide litigants with a convenient local forum in actions to require a federal officer to perform a duty owed to the plaintiff. No jurisdictional amount is required in actions coming within section 1361. However, in situations in which the federal officer does not “owe a duty” to the plaintiff, but has unlawfully interfered with the plaintiff’s rights—the traditional situation giving rise to injunctive relief—section 1361 cannot provide the basis for federal jurisdiction. Moreover, since an action under section 1361 is “in the nature of mandamus,” there is a risk that the court will hold that a negative decree cannot be issued or that the ministerial-discretionary distinction and other technicalities of mandamus law will significantly narrow the scope of review. These problems have been ably discussed by Professor Byse and a co-author, who have concluded that the present availability of the mandamus remedy does not dispose of all of the troublesome limitations on the availability of nonstatutory review.<sup>252</sup>

As a final possible course of action, a plaintiff might rely on section 10 of the APA as an independent source of federal jurisdiction. Section 10 of the APA provides that, subject to some qualifications, “a person suffering legal wrong because of agency action . . . is entitled to judicial review thereof” and that “final agency action for which there is no other adequate remedy in a court is subject to judicial review.”<sup>253</sup> It also provides that “[t]he form of proceeding for judicial review” may be brought “in a court of competent jurisdiction.”<sup>254</sup> Although the section does not expressly confer jurisdiction on federal courts and has been generally viewed as restating the existing law of judicial review, it is arguable—though unlikely—that section 10 was intended to be an independent grant of federal jurisdiction to review “final agency action.” If that argument were accepted, such a holding would go far to ameliorate the prob-

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252. 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).

253. 5 U.S.C. § 702 (Supp. IV, 1965-1968).

254. 5 U.S.C. § 703 (Supp. IV, 1965-1968).

lem created by the jurisdictional-amount requirement. Cases seeking judicial review of federal administrative action could be entertained by federal courts without regard to jurisdictional amount, except in those situations exempt from the APA or included within the qualifying phrase of section 10: "except to the extent that . . . statutes preclude judicial review . . . [or] agency action is committed to agency discretion by law."<sup>255</sup> Thus, the crucial question is whether section 10 is in fact an independent ground of federal jurisdiction.

Four courts have recently concluded that it is.<sup>256</sup> It is doubtful, however, that in any of those cases the jurisdiction of the district court had to be rested on section 10: special federal-question provisions existed in two of the cases,<sup>257</sup> and it is probable that the minimum jurisdictional amount under section 1331 could have been satisfied in the others.<sup>258</sup> Moreover, none of the cases contains an extensive or reasoned discussion of the question whether section 10 is an independent ground of subject matter jurisdiction in federal courts. A number of other cases—at least five—have reached the conclusion that the APA is not a source of jurisdiction.<sup>259</sup> But these decisions are no more satisfactory in reasoning than those going the other way.<sup>260</sup> Despite the conflict of circuits, however, the Supreme

255. 5 U.S.C. § 701 (Supp. IV, 1965-1968).

256. *Brennan v. Udall*, 379 F.2d 803 (10th Cir.), cert. denied, 389 U.S. 975 (1967) (determination by the Department of the Interior which adversely affected a landowner's title); *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966), affd. on rehearing, 379 F.2d 555 (1967), revd. on other grounds, 390 U.S. 599 (1968) (determination by the same department concerning the validity of a mining claim); *Cappadora v. Celebrezze*, 356 F.2d 1 (2d Cir. 1966) (alternative holding) (the refusal of the Social Security Administration to reopen a claim for survivors' benefits); *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir. 1961) (Immigration and Naturalization Service action excluding an alien from entry).

257. *Cappadora* and *Estrada*.

258. *Brennan* and *Coleman*.

259. *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967) (attack on the manner of holding tribal election); *Chourmos v. United States*, 335 F.2d 918 (10th Cir. 1964) (determination of the Department of the Interior concerning the validity of placer mining claim); *Local 542, Operating Engrs. v. NLRB*, 328 F.2d 850 (3d Cir. 1964) (NLRB refusal to hold a representation election); *Ove Gustavsson Contracting Co. v. Floete*, 278 F.2d 912 (2d Cir. 1960) (termination of a government contract); *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir.), cert. denied, 350 U.S. 884 (1955) (federally supported power program).

260. In *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (8th Cir. 1967), the court merely stated a conclusion that § 10 "does not confer jurisdiction upon federal courts. Its purpose is to define the procedures and manner of judicial review of agency action rather than confer jurisdiction." *Chourmos v. United States*, 335 F.2d 918 (10th Cir. 1964), really involved the separate problem of whether § 10 waives sovereign immunity, while *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir. 1955), involved standing rather than subject matter jurisdiction. The remaining two cases appear to have been correctly decided on other grounds: In *Local 542, Operating Engrs. v. NLRB*, 328 F.2d 850 (3d Cir. 1964), the court held that nonstatutory review of NLRB matters under the doctrine of *Leedom*

Court has not yet spoken on the question, although in *Rusk v. Cort*,<sup>261</sup> the Court appears to have assumed that section 10 is a jurisdictional grant. Accordingly, the question remains an open one, clouded by uncertainty.

Thus, since none of the possible courses of action available to a plaintiff in seeking nonstatutory review is satisfactory or free from doubt, the jurisdictional-amount requirement remains a problem in suits against federal officers for injunctive or declaratory relief. The jurisdictional-amount requirement in such cases serves no useful purpose and should be eliminated. Because it is at best doubtful that this objective can be reached by interpretation of the APA, enactment of new legislation to handle the problem is desirable. Remedial legislation might take either of two forms: first, an abandonment of the jurisdictional-amount requirement in all federal-question cases;<sup>262</sup> or second, the addition of a new special federal-question provision to the Judicial Code. A recent recommendation of the Administrative Conference of the United States follows the second approach in urging that federal district courts be given subject matter jurisdiction "without regard to the amount in controversy, of any action in which the plaintiff alleges that he has been injured or threatened with injury by an officer or employee of the United States or any agency thereof, acting under color of federal law."<sup>263</sup>

Of these two alternatives, the former should be given a slight preference. Elimination of the jurisdictional-amount requirement in all federal-question cases is a simpler and easier remedy than is the attempt to create a new special federal-question provision for judicial-review actions. The limiting language that is included in any provision of the latter type could prove troublesome in some applications; and there is a slight danger that the provision of a new jurisdictional basis for judicial-review actions would be viewed as affecting special statutory review provisions. Moreover, elimination

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v. *Kyne*, 358 U.S. 184 (1958), takes place in district courts rather than in a court of appeals as had been urged; and in *Ove Gustavsson Contracting Co. v. Floete*, 278 F.2d 912 (2d Cir. 1960), the court held that district court jurisdiction of claims arising out of government contracts is precluded because of the existence of an adequate statutory remedy.

261. 369 U.S. 367, 371-72 (1962) (passport issuance).

262. This approach would have the virtue of achieving the broader purposes urged by the ALI Study. See ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* § 1311 and commentary at 172-76 (1969). See the proposed revision of § 1311 in the conclusion of this Article, p. 469 *infra*.

263. Recommendation 7 of the Administrative Conference of the United States, adopted Dec. 11, 1968.

of the jurisdictional-amount requirement in all federal-question cases is desirable for its own sake.<sup>264</sup> The jurisdiction of federal district courts would be extended to only one significant category of cases in addition to that involving judicial review of federal administrative action. Such cases are those in which a state statute is challenged on federal constitutional grounds,<sup>265</sup> and they too should not be barred from federal courts merely because the plaintiff is unable to establish the requisite jurisdictional amount.

B. *Property Disputes Between the United States and Private Persons*

Federal law does not contain any general provision authorizing quiet-title suits involving land claimed by the United States. In the absence of such a provision, attempts to obtain specific relief against a federal officer in possession of disputed land have foundered on the sovereign immunity doctrine. *Malone v. Bowdoin*,<sup>266</sup> in which it was held that sovereign immunity barred a suit to try title, denies specific relief to the private landowner, leaving him a damage remedy under the Tucker Act<sup>267</sup> for an unconstitutional "taking."

The invocation of the sovereign immunity defense in land disputes like *Malone* works an unnecessary injustice on private persons holding bona fide claims against the United States. Specific relief is a highly appropriate remedy in these situations. Land has traditionally been viewed as a unique form of property, and this uniqueness favors the application of equitable remedies when there is a dispute over possession. Yet, as illustrated in *Malone*, the sovereign immunity defense operates to foreclose the possibility of specific relief, and relegates the private plaintiff to a damage remedy under the Tucker Act, a remedy which is inadequate under traditional principles of equity. Moreover, the damage remedy may be unsatisfactory in other respects. If the value of the disputed property exceeds 10,000 dollars, the plaintiff must bring his action in the Court of Claims, which has exclusive jurisdiction over claims exceeding that amount.<sup>268</sup> The Court of Claims is a distant and unfamiliar tribunal, more expensive and time-consuming than is a local federal district court.

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264. See the discussion in the ALI Study, *supra* note 262.

265. For the argument that the jurisdictional-amount requirement is not a practical impediment to cases brought under the Jones Act, see note 236 *supra*.

266. 369 U.S. 643 (1962), discussed in text accompanying note 110 *supra*.

267. 24 Stat. 505 (1887), as amended, 28 U.S.C. § 1346(a), (b), (d) (1964) (district courts); 28 U.S.C. § 1491 (1964) (Court of Claims).

268. See 28 U.S.C. § 1346(a)(2) (1964).

In land dispute cases, then, specific relief should be available in federal district courts. If the sovereign immunity defense were abolished, and if subject matter jurisdiction over land disputes existed, a nonstatutory suit for specific relief could be brought in the district court of the state in which the land is located.<sup>269</sup> The availability of such an action would provide the landowner with an easily accessible and inexpensive local forum. Moreover, the local federal district court would be ideally suited for determining the issues which arise in these cases, since those issues usually involve a blend of state land law and federal statutory law.

The availability of specific relief in federal courts would also have a salutary substantive effect. Cases now dismissed on technicalities would be decided on the merits, thereby subjecting governmental practices to more scrutiny than they now receive. Hopefully, the Government would be forced to adhere to prescribed processes for exercising the power of eminent domain. *Simons v. Vinson*<sup>270</sup> presents an example of a case in which sovereign immunity allowed the Government to seize land without following eminent domain procedures. In that case, sovereign immunity was held to bar a claim to accreted land formed along a river which divided land owned by the United States from that of the plaintiffs. The Government could not have legitimately exercised its power of eminent domain since no public purpose could have been shown—apparently the Government's only purpose in "taking" the disputed land was to collect royalties from oil produced on it. Thus, the sovereign immunity defense prevented any scrutiny of the Government's activities and deprived the plaintiffs of an opportunity to prove the lack of public purpose. In other cases, such as *Malone* or *Gardner v. Harris*,<sup>271</sup> in which the disputed land was part of a larger parcel devoted to a public purpose, eminent domain was probably available, but the "taking" was not in accordance with prescribed procedures. Once again, however, sovereign immunity resulted in dismissal without a consideration of the merits. It would not seem too much to ask that condemnation of private land be accomplished in accordance with the policies and procedures established by Congress, rather than being carried out by the unilateral decision of a government officer, perhaps a subordinate one, in claiming the land or taking possession of it.

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269. In such a suit, service of process and venue would be governed by 28 U.S.C. § 1391(e) (1964). See text accompanying notes 292-96 *infra*.

270. 394 F.2d 732 (5th Cir.), *cert. denied*, 393 U.S. 968 (1968).

271. 391 F.2d 885 (5th Cir. 1968).

The partial abolition of sovereign immunity, urged in part I of this Article, would help to ensure that proper procedures are followed. It would, moreover, do much to open the door to suits for injunctive or declaratory relief in land dispute cases in which the plaintiff frames his complaint so as to meet federal-question requirements. But if the abolition of sovereign immunity is not supplemented by a corresponding expansion of subject matter jurisdiction, private persons would still be unable to sue the government in the form of a quiet-title action. The availability of specific relief, then, would depend either upon the plaintiff's ability to cast his complaint in the form of a suit to enjoin an unconstitutional taking<sup>272</sup> or else upon his satisfaction of the diversity-of-citizenship requirement in section 1332.<sup>273</sup> There should be no such premium on a plaintiff's ability to adapt the substantive claim to fit technical procedural forms.

The importance of the problem suggests a broad proposal vesting in United States district courts subject matter jurisdiction of "any civil action to quiet title, or to remove a cloud on title, to real property where a matter in controversy arises out of a claim by the United States of an interest in the real property other than one arising from unpaid federal taxes."<sup>274</sup> The need for a statutory provision authorizing federal, and perhaps state, courts to resolve land disputes is widely accepted. A report prepared for the Public Land Law Review Commission, for example, stated that "[t]here seems to be somewhat general agreement that there should be statutory provision for suits to try title."<sup>275</sup> There is gamesmanship involved in the only present method of circumventing sovereign immunity—getting federal officials to take the initiative in bringing court suits. Sometimes government lawyers are unwilling to take this step merely because they do not want to shoulder the plaintiff's burdens. The ability of the private claimant to initiate suit would remedy that problem.

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272. See *White v. Sparkhill Realty Corp.*, 280 U.S. 500 (1930), stating that a suit to enjoin unconstitutional conduct comes within the federal-question jurisdiction but that an ejectment complaint, "without anticipating possible defenses, would not present a case arising under the Constitution or a treaty or law of the United States." In *Malone v. Bowdoin*, 369 U.S. 643 (1962), an ejectment action against a federal officer originally brought in a state court, federal jurisdiction rested upon the removal statutes; but it is doubtful that the case could have been brought originally in a federal district court in the absence of diversity of citizenship and jurisdictional amount, since the plaintiff's claim rested on state law.

273. 28 U.S.C. § 1332 (1964).

274. The quoted language is from a tentative draft of a proposed quiet-title statute, which would be added to the Judicial Code as 28 U.S.C. § 1347A.

275. C. McFarland, *ADMINISTRATIVE PROCEDURES AND THE PUBLIC LANDS—A REPORT PREPARED FOR THE PUBLIC LAND LAW REVIEW COMMISSION* 305 (1969).

Remedial legislation on this subject has been drafted by the Department of Justice, but thus far has not received priority on the Department's legislative program.<sup>276</sup> A number of substantial issues need to be explored before effective legislation can be enacted. Should the legislation permit the extinguishment of ancient conditions and reservations contained in the original disposition of the public domain?<sup>277</sup> Should concurrent jurisdiction be given to state courts?<sup>278</sup> What precautions should be taken to ensure that such legislation would not reopen vexing questions involving water rights, Indian claims, and the like? Moreover, some procedural aspects of land dispute litigation involving the United States deserve special treatment; such aspects include questions of interlocutory relief, jury trial, multiple parties, and relation to eminent domain. All of these questions are beyond the scope of this Article, and therefore no specific proposal will be made here. It is to be hoped, however, that a careful study of these and other questions by the Public Land Law Review Commission or others will result in the early enactment of sound legislation.

### III. PARTIES DEFENDANT

The size and complexity of the federal government, coupled with the intricate and technical law concerning official capacity and parties defendant have given rise to innumerable cases in which a plaintiff's claim has been dismissed because the wrong defendant was named or served. The *Gnotta* case,<sup>279</sup> discussed at the outset of

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276. Letter to the author from Shiro Kashiwa, Assistant Attorney General, Department of Justice, July 15, 1969.

277. In the disposal of public domain land, the United States has quite commonly imposed conditions and reserved a variety of rights such as easements. Many of these residual interests have been in existence for seventy-five years or more. Many have never been exercised and are obsolete today. Yet they remain as troublesome exceptions to any title examiner's report. Since the title of most of the land in thirty-one states has come from the United States, and since state quiet-title laws are powerless to deal with these matters, there is a great need for federal quiet-title legislation that will provide the basis for the extinguishment of such residual interests after some extended period of time, perhaps forty years, unless the United States asserts such an interest in a properly founded quiet-title proceeding.

278. Because the United States has been the origin of title for a very large portion of the real property of the nation, a substantial volume of litigation might be generated by federal quiet-title legislation. Much of this litigation could be adequately handled by state courts under appropriate enabling legislation. There is no compelling reason for federal courts to have exclusive jurisdiction of situations in which the United States has been out of possession for more than forty years. On the other hand, it may be desirable to vest exclusive jurisdiction in federal courts in cases in which the United States now has possession of the real property or claims the right to possession at the time a quiet-title proceeding is initiated.

279. *Gnotta v. United States*, 415 F.2d 1271 (8th Cir. 1969), discussed in text accompanying notes 4-10 *supra*.

this Article, is illustrative. The plaintiff in that case attempted to obviate the problem by naming as defendants the United States, the Department of the Army, the Civil Service Commission, and seven individual officers of the Army Corps of Engineers. The United States could not be sued without its consent; the Department of the Army as "a part of the executive branch" of the Government could also cloak itself in the mantle of the sovereign;<sup>280</sup> and poor Gnotta, in suing "the United States Civil Service Commission" failed to understand that the Supreme Court had required that actions attacking determinations of the Commission must be brought not against the Commission but against its individual members.<sup>281</sup>

The tangled web of problems involving parties defendant in judicial-review actions has been ameliorated over the years, but substantial room for improvement remains. The ultimate goal has been clearly stated by the Supreme Court: modern procedure "reject[s] the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept[s] the principle that the purpose of pleading is to facilitate a proper decision on the merits."<sup>282</sup> What is true of ordinary civil litigation is even more true when a citizen is attempting to obtain redress from his government. The ends of justice are not served when government attorneys advance highly technical rules in order to prevent a determination on the merits of what may be just claims.<sup>283</sup>

The numerous problems relating to parties defendant can be cured by (1) recognition and acceptance by the Department of Justice that Congress and the draftsmen of the Federal Rules of Civil Procedure have provided a solution for most of the problems that arise when the plaintiff sues the wrong defendant or fails to join a superior officer;<sup>284</sup> (2) amending section 703 of title 5 to allow the plaintiff to name as defendant in judicial review proceedings the United States, the agency by its official title, the appropriate officer, or any combination of them;<sup>285</sup> and (3) adopting several minor

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280. 415 F.2d at 1277.

281. 415 F.2d at 1277. See *Blackmar v. Guerre*, 342 U.S. 512, 514-16 (1952); *Bell v. Groak*, 371 F.2d 202, 204 (7th Cir. 1966).

282. *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

283. Professor Davis asks whether the Government should "spend taxpayers' money to pay government lawyers to use their ingenuity in developing technical complexities that will prevent plaintiffs from getting their cases decided on the merits . . ." Davis, *Suing the Government by Falsely Pretending To Sue an Officer*, 29 U. CHI. L. REV. 435, 439 (1962).

284. See text accompanying notes 288-322 *infra*.

285. See text accompanying notes 326-31 *infra*, and the proposed revision of 5 U.S.C. § 703 in the conclusion of this Article, p. 469 *infra*.

changes in the language of section 1391(e) of title 28—the venue provision of the Mandamus and Venue Act of 1962.<sup>286</sup>

### A. Attempts To Deal with the Problems

The unsatisfactory state of the law of parties defendant has been recognized for some time<sup>287</sup> and three attempts have now been made to cure the deficiencies. *First*, Congress, in 1962, amended section 1391(e) of title 28 in order to allow broadened venue and extraterritorial service in suits against federal officers and thus to circumvent the formally troublesome requirement that superior officers be joined as parties defendant. *Second*, rule 25(d) of the Federal Rules of Civil Procedure was amended in 1961 to provide for the automatic substitution of successors in office. That rule also states that “any misnomer not affecting the substantial rights of the parties shall be disregarded” and that the officer may be “described as a party by his official title rather than by name.” *Third*, rule 15(c) of the Federal Rules was amended in 1966 to deal with a plaintiff’s failure to name any appropriate officer or agency as defendant. Each of these three remedial provisions will now be discussed in detail.

#### 1. Section 1391(e): Service of Process, Venue, and Indispensable Parties

Apart from section 1391(e) the service of process in nonstatutory review actions is governed by the Federal Rules of Civil Procedure. Rule 4(d)(4) covers the service of process upon the United States. It provides that process must be served by delivery of a copy of the summons and complaint to the United States Attorney for the dis-

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286. See text accompanying notes 332-37 *infra*, and the proposed revision of 28 U.S.C. § 1391(e) in the conclusion of this Article, p. 469 *infra*. A minor anomaly in the coverage of § 1391(e) may also deserve legislative correction. Because various territories of the United States are not “judicial districts” within the meaning of 28 U.S.C. § 451 (1964), the extraterritorial service of process and broadened venue of § 1391(e) are not available. See *Doyle v. Fleming*, 219 F. Supp. 277 (D.C.Z. 1963) (quashing service of process under § 1391(e) because Canal Zone is not a “judicial district”); *Canal Zone Cent. Labor Union v. Fleming*, 246 F. Supp. 998 (D.C.Z. 1965), *revd. on other grounds sub nom. Leber v. Canal Zone Cent. Labor Union*, 383 F.2d 110, 113 n.3 (5th Cir.), *cert. denied*, 389 U.S. 1046 (1967) (same). Requiring the Secretary of the Army to defend an action in the Canal Zone or Guam places no greater burden on government attorneys than does sending them to defend an action in Hawaii. The omission of territorial courts should be corrected unless considerations with respect to the nature or powers of those courts provide a rational basis for the omission.

287. See the full discussion in Byse, *Suing the “Wrong” Defendant in Judicial Review of Federal Administrative Action: Proposal for Reform*, 77 HARV. L. REV. 40 (1963); Davis, *Suing the Government by Falsely Pretending To Sue an Officer*, 29 U. CHI. L. REV. 435 (1962).

tract in which the action is brought. In addition, a copy of the summons and complaint must be sent by registered or certified mail to the Attorney General of the United States in Washington, D.C. Failure to notify the Attorney General has been held to require dismissal,<sup>288</sup> although a few decisions prior to the 1966 amendment of rule 15(c)<sup>289</sup> permit the defect to be cured when dismissal would mean the barring of plaintiff's claim because of the running of the statute of limitations.<sup>290</sup> Moreover, in an action against the United States attacking the validity of an order of a federal officer or agency, if the officer or agency has not been made a party to the action, a copy of the summons and complaint must also be sent by registered or certified mail to the relevant federal officer or agency.

Rule 4(d)(5), which supersedes prior inconsistent statutes, must be followed to effect service of process on an officer or agency of the United States. A copy of the summons and complaint must be delivered to the officer or agency being sued and service must be made on the United States itself as provided for in rule 4(d)(4). If the federal agency involved is a corporation, rule 4(d)(5) requires that service also be made on the agent of the corporation as provided in rule 4(d)(3), in addition to service upon the United States under rule 4(d)(4).<sup>291</sup>

Section 1391(e), which was added to the Judicial Code in 1962,<sup>292</sup> dispenses with the requirement of personal service in actions in which each defendant is an officer or employee of the United States or any agency thereof, acting in his official capacity or under color of legal authority. Nationwide service of process in such actions has circumvented difficulties stemming from holdings that superior officers are indispensable parties, and has allowed the citizen to sue his Government in a local federal district court. The provision reflects a congressional decision that "[r]equiring the Government to defend Government officials and agencies in places other than Washington" is fairer to citizens and is not "a burdensome imposition" on the Government.<sup>293</sup> In cases of this type, delivery of the summons

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288. *Smith v. McNamara*, 395 F.2d 896 (10th Cir. 1968); *Messenger v. United States*, 231 F.2d 328 (2d Cir. 1956); *Lemmon v. Social Security Administration*, 20 F.R.D. 215 (E.D.S.C. 1957).

289. The "relation back" amendment of rule 15(c) is discussed in the text accompanying notes 315-21 *infra*.

290. *Rollins v. United States*, 286 F.2d 761 (9th Cir. 1961); *Fugle v. United States*, 157 F. Supp. 81 (D. Mont. 1957).

291. For an excellent discussion of rule 4(d)(5), see 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 1107-08 (1969).

292. Section 1391(e) is the venue part of the Mandamus and Venue Act of 1962, 28 U.S.C. § 1391(e) (1964).

293. H.R. REP. NO. 536, 87th Cong., 1st Sess. (1961).

and complaint may be by certified mail rather than personal delivery if the officer or agency to be served is beyond the territorial limits of the district in which the action is brought. Other aspects of rule 4, however, continue to be applicable. Thus in any such case service must be made upon the United States by notifying the Attorney General as provided in rule 4(d)(4).

With respect to venue, section 1391(e) allows actions against federal officers or agencies, acting in their official capacity or under color of legal authority, to be brought in the district in which "(1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action."<sup>294</sup> Although adopted as part of the Mandamus and Venue Act of 1962,<sup>295</sup> section 1391(e) is not limited to mandamus actions but applies broadly to all types of suits against federal officers or agencies except those governed by a special statutory review provision that deals with venue.<sup>296</sup>

Section 1391(e) is phrased in terms of suits against officers and does not appear to be applicable to suits against the United States *eo nomine*. Detailed venue provisions govern suits against the United States.<sup>297</sup> If plaintiffs were to be given an option of suing the United States in addition to or in lieu of suing the officer, section 1391(e) would need to be broadened to control venue in such actions.<sup>298</sup>

By allowing nationwide substituted service on the superior officer, section 1391(e) circumvents the technical requirement that superior officers be joined as parties defendant. A long line of cases established the proposition, easy to state but difficult to apply, that "the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise

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294. For an excellent general discussion of the Mandamus and Venue Act of 1962, see Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Non-statutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967); Jacoby, *The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review*, 53 GEO. L.J. 19 (1964).

295. See note 292 *supra*.

296. See Jacoby, *supra* note 294, at 32.

297. *E.g.*, 28 U.S.C. § 1402(a) (1964) (tax refund claims against United States); 28 U.S.C. § 1402(b) (1964) (tort claims against United States).

298. See the proposed revision of 28 U.S.C. § 1391(e) in the conclusion of this Article, p. 469 *infra*, which would add actions against "the United States" to the categories of cases in which venue and service of process are governed by that section. The addition of the United States to the general venue provisions of § 1391 would not displace the special venue provisions applicable to the United States (*see* note 297 *supra*) since special venue provisions would override the general provision.

it for him."<sup>299</sup> Prior to the enactment of section 1391(e), limitations on venue and on service of process often gave decisive significance to the plaintiff's failure to join a superior officer.<sup>300</sup> Broadened venue and extraterritorial service under section 1391(e), however, have, for the most part, eliminated the importance of the indispensability doctrine, since the superior officer can now be joined as a defendant in any local district court. The legislative history of the section demonstrates that the law should not be tailored for the convenience of the Government, but that, rather, there should be "readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government."<sup>301</sup> The Congress noted that the law of parties defendant was not altogether clear in either logic or consistency and that such actions "are in essence against the United States."<sup>302</sup> Hence Congress seems committed to providing a path through the procedural maze.

The confusing law governing the required joinder of superior officers,<sup>303</sup> however, has been circumvented rather than eliminated. Government attorneys who are more interested in scoring tactical points than in obtaining just results may still argue that an unjoined superior is indispensable and that he cannot be joined at a later time if the passage of time creates a bar.<sup>304</sup> That argument should be

299. *Williams v. Fanning*, 332 U.S. 490, 493 (1947) (the Postmaster General was not indispensable to a suit against a local postmaster, because the latter could resume delivery of mail properly withheld). For an ample impression of the degree of confusion in the case law, see Davis, *supra* note 283, at 438-51.

300. Since venue was proper only where "all defendants reside" or where "the claim arose," 28 U.S.C. § 1391(b) (1964), and since service of process could not be effected on a superior in the plaintiff's home district, the plaintiff's only choice was to sue the superior in the District of Columbia. Limitations on venue and service of process thus had the effect, when combined with the indispensable party rule, of centralizing in the District of Columbia a great deal of nonstatutory review of federal administrative action, thereby causing inconvenience and expense to distant plaintiffs. See Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1493-99 (1962).

301. H.R. REP. NO. 536, 87th Cong., 1st Sess. 3 (1961).

302. *Id.* at 4.

303. Compare *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949) (the Secretary of the Interior is not an indispensable party to a suit to enjoin a regional director from enforcing regulations interfering with plaintiff's fishing rights), with *Blackmar v. Guerre*, 342 U.S. 512 (1952) (members of the Civil Service Commission are indispensable parties to a reinstatement action brought by a discharged employee against his regional supervisor).

304. In some situations, such as review of social security determinations, a statute of limitations bars a review proceeding that is not properly brought within a designated period (see note §19 *infra*). In other situations the doctrine of laches performs a similar function. Dismissal may also result because the plaintiff has failed to perfect service of process within a reasonable time (see cases cited in note 288 *supra*).

In *Bell v. Groak*, 371 F.2d 202 (7th Cir. 1966), a discharged postal employee sought mandatory relief to require the Civil Service Commission to entertain his administrative appeal. The suit was brought against the Chairman of the Commission as an

rejected. The remedial purposes of the 1966 amendment to rule 15(c) of the Federal Rules clearly contemplate that an amendment adding a superior officer relates back to the filing of the original complaint if process has been served on the Government's lawyers.<sup>305</sup> The inevitable uncertainty implicit in attempting to unravel the authority of officials in order to ascertain whether a subordinate indeed has authority to afford the relief sought can be met, of course, by joining all possible officers as parties defendant. But plaintiffs who do not thus encumber their complaints cannot properly be thrown out of court. In view of the liberal "relation back" provisions of rule 15(c), government lawyers should take prompt steps to remedy any defects arising from the nonjoinder of superior officers. The Department of Justice should instruct United States Attorneys to assist plaintiffs in curing such defects, rather than to move for dismissal on that ground.<sup>306</sup>

## 2. Rule 25(d): Substitution of Successor Officers and Misnomer

Prior to its amendment in 1961, the provision of rule 25(d) of the Federal Rules, which deals with the continuance of actions brought by or against public officers who died or were separated from office, was "a trap for unsuspecting litigants . . . unworthy of a great government."<sup>307</sup> Authoritative Supreme Court decisions had construed the language of rule 25(d) to require abatement of an action in which plaintiff failed to substitute a successor officer within six months after the original defendant had died or left office.<sup>308</sup> A general recognition that this harsh rule produced unjust results provided the impetus for the 1961 amendment.<sup>309</sup>

As amended in 1961, rule 25(d) provides for automatic substitu-

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individual. After the Government had objected that the other members of the Commission were indispensable parties, the complaint was amended to join them, but no attempt was made to serve process on them. On appeal, the failure to perfect service resulted in dismissal even though the decision below was not based on that ground. If the plaintiff had had warning, he might have requested time within which to perfect service.

305. See the discussion of rule 15(c) in the text accompanying notes 315-21 *infra*. See also the explanation of the purpose of the 1966 amendment to rule 15(c) in the Advisory Committee's Note, reprinted in 3 J. MOORE, FEDERAL PRACTICE 1049-53 (2d ed. 1968).

306. See text accompanying note 338 *infra*.

307. *Vibra Brush Corp. v. Schaffer*, 256 F.2d 681, 684 (2d Cir. 1958).

308. *Klaw v. Schaffer*, 357 U.S. 346 (1958); *McGrath v. National Assn. of Mfrs.*, 344 U.S. 804 (1952); *Snyder v. Buck*, 340 U.S. 15 (1950).

309. See, e.g., *Davis, Government Officers as Defendants: Two Troublesome Problems*, 104 U. PA. L. REV. 68 (1955).

tion of public officers.<sup>310</sup> It eliminates the needless formality of numerous orders of substitution in situations in which a public officer, by whose name or against whom a great many actions have been brought, dies or resigns. If, as frequently happens, the parties and the court are unaware of the change in the office, the litigation can be continued under the name by which the action was commenced without affecting its validity. When and if the Government raises the question, the name can be changed, no matter how much time has elapsed.<sup>311</sup>

The Advisory Committee's note to the 1961 amendment makes it clear that "mistaken analogies to the doctrine of sovereign immunity" should not control the determination of whether the officer is acting "in his official capacity" within the meaning of the rule.<sup>312</sup> A common-sense approach makes the rule applicable "to any action brought in form against a named officer, but intrinsically against the government . . ." <sup>313</sup> Thus, rule 25(d) is applicable except when the officer is not acting under color of federal law or when he is personally liable in damages. Problems with respect to the substitution of officers have been eliminated.

Rule 25(d) also deals with the problem of misnomer. The constant growth and reorganization of the federal government make it difficult for even the well-informed citizen to be certain which officer or agency is responsible for a particular activity and under what official title. A statute often empowers a cabinet-level secretary to perform a particular function; a regulation of the secretary later delegates the function to a subordinate; a subsequent legislative reorganization proposal vests the function in a semiautonomous board within the department; and later legislation may even transfer the board and function to another department. Instances of this type, in which it is difficult to determine precisely who is responsible for a particular activity, are frequent and familiar. The problem is to

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310. FED. R. CIV. P. 25(d)(1):

When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

311. For an excellent discussion of the meaning and application of the amended rule, see Wright, *Substitution of Public Officers: The 1961 Amendment to Rule 25(d)*, 27 F.R.D. 221 (1961).

312. Advisory Committee Note to 1961 amendment, reprinted in 3B J. MOORE, FEDERAL PRACTICE ¶ 25.09[3], p. 25-404 (2d ed. 1969).

313. *Id.*

ensure that a plaintiff who makes his intent to review a particular administrative activity fairly clear is not thrown out of court on the ground of misnomer. Rule 25(d) of the Federal Rules of Civil Procedure attempts to solve the problem by providing that "any misnomer not affecting the substantial rights of the parties shall be disregarded" and that the officer may be "described as a party by his official title rather than by name." The use of the official title without any mention of the officer individually recognizes the intrinsic character of the action and assists in eliminating concern with the problem of substitution. In fact, when an action is brought by or against a board or an agency that has continuity of existence, naming the individual members serves no useful purpose.<sup>314</sup>

### 3. Rule 15(c): Failure To Name Any Appropriate Defendant

In some instances, the problem is more than misnomer and involves the failure to name any appropriate officer or agency as defendant. With respect to such a situation, unjust results were frequent prior to the 1966 amendment to rule 15(c). In these cases, most of which involved attempts to obtain judicial review of social security disability determinations, the plaintiffs mistakenly named as defendants the United States,<sup>315</sup> the Department of Health, Education, and Welfare,<sup>316</sup> the "Federal Security Administration" (a predecessor agency),<sup>317</sup> and a Secretary who had retired from office nineteen days before.<sup>318</sup> The statutory review provision requires that judicial review of denials of social security benefits be brought against the Secretary within sixty days.<sup>319</sup> By the time the claimants discovered their mistakes, the statutory limitation period had expired, and they were denied judicial review.<sup>320</sup> Academic criticism

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314. See 3B J. MOORE, FEDERAL PRACTICE ¶ 25.09 (2d ed.); Comment, *Civil Procedure—Abatement—Status of Suit Nominally Against Government Official When Official Leaves Office*, 50 MICH. L. REV. 443, 450 (1952).

315. *Cunningham v. United States*, 199 F. Supp. 541 (W.D. Mo. 1958).

316. *Hall v. Department of Health, Education & Welfare*, 199 F. Supp. 833 (S.D. Tex. 1960).

317. *Cohn v. Federal Security Administration*, 199 F. Supp. 884 (W.D.N.Y. 1961).

318. *Sandridge v. Folsom*, 200 F. Supp. 25 (M.D. Tenn. 1959).

319. 42 U.S.C. § 405(g) (1964).

320. It is only fair to point out that the Government took administrative steps to cure the problem. The Department of Justice instructed United States Attorneys "to take especial pains to be sure that our practice of advising the plaintiff of the defect is followed where the plaintiff's failure is noted before the running of the sixty-day limitation period." Department of Justice Memorandum No. 380 (July 14, 1964) (available at the Library of the Department of Justice, Washington, D.C.). The Secretary of Health, Education, and Welfare issued a regulation liberally authorizing an extension of time within which to file a new suit when an incorrect defendant had

of these decisions<sup>321</sup> led to the inclusion of a curative provision in the 1966 amendment to rule 15(c). That provision states that an amendment of the pleadings, adding or changing parties defendant in actions "with respect to the United States or any agency or officer thereof," relates back to the date of the original pleading whenever process was delivered or mailed "to the United States Attorney or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named." This sentence allows a plaintiff who is in doubt about the identity of the proper officer or agency to commence his action by serving process on one of those designated parties. Difficulty in ascertaining the proper defendant is often understandable in light of the vast array of government officers and agencies and in light of the technicalities that govern parties defendant. Under rule 15(c) the plaintiff who has served any one of the persons designated may correct his pleading when the United States moves to dismiss on grounds that a particular officer was not named or joined as a defendant.<sup>322</sup> Dismissal is proper under the amended Rules only when the plaintiff fails to amend his pleading and to complete service on

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been served within the statutory period. 29 Fed. Reg. 8209 (1964), 20 C.F.R. § 404.954(b) (1969).

The problem, however, is not confined to social security disability determinations. See, e.g., *Bell v. Groak*, 371 F.2d 202 (7th Cir. 1966) (failure to perfect service on all members of the Civil Service Commission); *Chournos v. United States*, 335 F.2d 918 (10th Cir. 1964) (the plaintiff named as defendants the Bureau of Land Management and the Department of Interior rather than individual officers; the court held that the named defendants "are not suable entities"); *M.G. Davis & Co. v. SEC*, 252 F. Supp. 402 (S.D.N.Y. 1966) (nonstatutory review action challenging an action of the Securities and Exchange Commission must be brought against its individual members).

321. See Byse, *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 HARV. L. REV. 40 (1963).

322. Cases holding to the contrary either were decided prior to the 1966 amendment of rule 15(c) or they are erroneous. In *Smith v. McNamara*, 395 F.2d 896 (10th Cir. 1968), for example, in which the court dismissed an action because the proper officer was not served, the court's attention was not directed to the amendment to rule 15(c).

There is a degree of tension between rule 4(d)(4) and rule 15(c). When the action "attack[s] the validity of an order of an officer or agency not made a party," rule 4(d)(4) requires that a copy of the summons and complaint be sent by registered mail to such officer or agency. Dismissals have resulted in some cases when the plaintiff has failed to perfect service on the officer or agency within a reasonable time. Compare cases cited in note 288 *supra*, with cases cited in note 290 *supra*. On the other hand, rule 15(c) contemplates great liberality in amending a complaint to add an additional defendant who is indispensable, so long as the Government has received notice of the action by service being made upon the local United States Attorney, the Attorney General, or an officer or agency who would be a proper defendant if named. The underlying purpose of rule 15(c)—that a plaintiff's claim against the Government should not be dismissed because the wrong defendants were named—should take precedence over older notions requiring service to be performed with punctilious exactitude.

the proper officer within a reasonable time after the defect is raised.

A liberal application of these three remedial provisions should prevent dismissals based on technicalities of the law of officers, for the Congress and the draftsmen of the Federal Rules have indicated with great clarity that actions challenging federal conduct should be decided on the merits rather than on narrow procedural grounds. Unfortunately, however, the attempts of Congress and the draftsmen to ameliorate the law of parties defendant have not been entirely successful. That failure results from the fact that no attempt was made to change the law of parties defendant, but only to alleviate particular problems that had proved troublesome. Moreover, neither the Department of Justice nor lower courts have accorded these measures the liberal reception they deserve. Elimination of difficulties in this area will come only if the choice of defendants and their capacity to be sued is dealt with directly. Consequently, further changes are required.

### B. *Proposals for Reform*

The elimination of sovereign immunity, proposed in part I of this Article, will help in solving the problems in the law of parties defendant. As noted previously, the indispensability of the United States as a party to certain actions is variously viewed as merely a different way of phrasing the doctrine of sovereign immunity and as a separate doctrine with an independent rationale.<sup>323</sup> The same arguments that support the partial elimination of sovereign immunity also support the elimination of the indispensability notion. The proposal urged in part I and adopted by the Administrative Conference of the United States accomplishes this desirable objective.

But even if the sovereign immunity doctrine is eliminated as a barrier to judicial review of federal administrative action, the technical requirements with respect to parties defendant will remain as troublesome relics of the past. Thus, the elimination of sovereign immunity is not enough; the technicalities themselves must be eliminated. This goal can be accomplished by two amendments to the United States Code. The first is the amendment of section 703 of title 5, which is concerned with form of proceeding in actions for judicial review, to add the following language:

If no special statutory review procedure is applicable, the action for

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323. See note 46 *supra* and accompanying text.

judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.<sup>324</sup>

The second reform is the amendment of section 1391(e) of title 28 to eliminate the word "each" in the present language limiting the section's broadened venue and extraterritorial service of process to "[a] civil action in which each defendant is an officer or employee of the United States."<sup>325</sup> The amendment would allow a plaintiff to utilize the broadened venue and extraterritorial service of process of section 1391(e) in actions in which nonfederal defendants who can be served within the state in which the action is brought are joined with federal defendants. Such a provision would eliminate improper venue as an objection to such joinder, but would not affect the discretion of the court under the Federal Rules to determine that joinder was improper, or not in the interests of justice in a particular case.

1. *Section 703: Capacity To Sue an Agency by Its Official Title and Capacity To Sue the United States*

When an instrumentality of the United States is the real defendant, and an authorized legal representative of the United States has been served, the names on the pleading should be irrelevant. The plaintiff should have the option of naming as defendants the United States, the agency by its official title, appropriate officers, or any combination of them, and the outcome should not turn on the plaintiff's choice. The proposed amendment of section 703 will accomplish these ends.

a. *Capacity to sue an agency by its official title.* The lower federal courts, at the behest of government lawyers, continue to dismiss actions of which the Government has received adequate notice, on the ground that other names should have gone on the pleadings. A recent suit against "the Chairman, Civil Service Commission" was dismissed because the other Commissioners were indispensable parties.<sup>326</sup> Since rule 25(d) provides that a public officer "may be

324. See the proposed revision of 5 U.S.C. § 703 in the conclusion of this Article, p. 469 *infra*. The quoted sentence was included in Recommendation 9 of the Administrative Conference of the United States, adopted on October 21, 1969. Recommendation 9 also would amend 5 U.S.C. § 702 to add the following sentence: "The United States may be named as a defendant in any such action [for judicial review of administrative action], and a judgment or decree may be entered against the United States."

325. See the proposed revision of 28 U.S.C. § 1391(e) in the conclusion of this Article, p. 469 *infra*.

326. *CORE v. Commissioner*, 270 F. Supp. 537, 542 (D. Md. 1967) (alternative holding). See also *Bell v. Groak*, 371 F.2d 202 (7th Cir. 1966).

described as a party by his official title rather than by name," the defect would not have been present if the suit had been brought against "the members of the United States Civil Service Commission." Dismissals of this type since the effective date of the 1966 amendment to rule 15(c) are questionable, since rule 15(c) allows the plaintiff who has served process on the local United States Attorney, the Attorney General, or the agency, to amend his pleading without penalty.<sup>327</sup>

Allowing the plaintiff to sue the agency by its official title would be a step in the right direction.<sup>328</sup> Under the proposal an "agency," as defined in the APA, would possess a limited capacity to be sued, applicable only to actions seeking judicial review of the agency's activities. The agency could not be sued in other types of actions, such as one to recover damages in tort. In this way, one common type of defect concerning the naming of parties defendant would disappear.

b. *Capacity to sue the United States.* The suit against the officer, challenging his official conduct, served a useful purpose as a device for circumventing the sovereign immunity doctrine. Once sovereign immunity is tamed, however, requiring the plaintiff to cast his suit in that form is no longer essential. Everyone recognizes that the suit is in fact against the United States or one of its agencies and involves the legality of governmental action. The important objective at this point is to eliminate any remaining technical requirements. This objective is best achieved by allowing the plaintiff a wide choice in naming defendants and sanctioning his choice whatever it may be. The United States should be one of the available alternatives. The complaint, of course, must indicate the nature of the plaintiff's claim

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327. See text accompanying notes 305, 322 *supra*.

328. The Task Force on Legal Services and Procedures of the Commission on Organization of the Executive Branch of the Government (Second Hoover Commission) recommended that "any problem of just who the true defendant is" should be avoided by allowing proceedings for review to be brought against "(1) the agency by its official title, (2) individuals who comprise the agency, or (3) any person representing an agency, or acting on its behalf or under color of its authority." REPORT ON LEGAL SERVICES AND PROCEDURES 211 (March 1955).

Proposed revisions of the APA have also included language amending § 10(b), as amended, 5 U.S.C. § 703 (Supp. IV, 1965-1968), to provide that "[t]he action for judicial review may be brought against the agency by its official title." An accompanying committee report stated:

This language would not preclude the bringing of the action against the individual comprising the agency or any person representing the agency or acting on its behalf in the matter under review. Bringing the action against the agency by name, however, would be simpler and more effective and would avoid those technical difficulties encountered in the past when the officials against whom an action was brought have resigned or have died or have been replaced for some other reason.

S. REP. NO. 1234, 89th Cong., 1st Sess. 23 (1966).

so that service of process under rule 4(d)(4) will suffice to give government lawyers adequate notice of the claim.

Professor Davis has urged the adoption of a statutory proposal that would tie the elimination of sovereign immunity to a form of suit in which the United States is named as defendant.<sup>329</sup> That proposal would discourage the suit against the officer and gradually displace it with an action against the United States. One objection to Davis' position is that a mandatory requirement of form of suit creates a new technical trap that some lawyers and plaintiffs would be certain to fall into. Moreover, the profession is familiar with the suit against the officer or agency, and federal statutes and the Federal Rules of Civil Procedure have been drafted in the light of existing practice. Fundamental changes in the form of the suit would require reconsideration and possible revision of these other provisions.<sup>330</sup> Settled rules concerning legal representation of governmental interests might also be affected.<sup>331</sup> Besides, the form of suit against the officer or agency, when relieved of the artificialities of the sovereign immunity doctrine, is not distasteful. On the contrary, the individual is in fact complaining about the conduct of a particular officer or agency and there may be psychological advantages in

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329. The statutory proposal advanced in 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 27.10, at 165 (Supp. 1968), did not tie waiver of sovereign immunity to a form of suit in which the United States is named as defendant, but Professor Davis has advanced this position in subsequent letters and memoranda sent to the author.

330. Revision of § 1391(e) of the Judicial Code to allow the use of extraterritorial service of process and local venue when the United States is named as a defendant in an action for judicial review is desirable in its own right. Section 1391(e) at present does not appear to be applicable to suits against the United States *eo nomine*, since the United States cannot be considered to be an "officer or agency" of the United States. Although there is a special venue provision dealing with actions in which the United States is a defendant, that provision, 28 U.S.C. § 1402 (1964), applies to only three kinds of damage actions brought under 28 U.S.C. § 1346 (1964) (Tucker Act cases, Federal Tort Claims Act cases, and federal tax cases). In addition, the general venue provision applicable to federal-question cases, 28 U.S.C. § 1391(b) (1964), is difficult to apply, since it allows the action to be brought only in the district in which "all defendants reside, or in which the claim arose." If the United States, like a corporation, resides where it is doing business, that is, everywhere, the general venue provision of § 1391(b) is too broad, since suit could be brought on any claim in any judicial district chosen by the plaintiff. On the other hand, if, as seems more likely, a residence cannot be attributed to the United States, the action may be brought only where the cause of action arose, a much narrower venue choice than that provided by 28 U.S.C. § 1391(e) (1964), which was drafted with the situation of the suit against the officer in mind. In short, broadened venue of judicial review actions in which the United States is named as a defendant is a desirable reform in any event. It becomes a necessity if the plaintiff, in order to circumvent sovereign immunity, is required to bring his action against the United States. Without the reform, the inconvenience and unfairness of requiring plaintiffs to come to Washington, D.C., to attack local administration of federal activities would be re-created.

331. This problem is not likely to be a very serious one. See text accompanying notes 340-42 *infra*.

allowing him to bring his suit against the officer or agency that allegedly has harmed him. In addition, the anonymity of the United States will bury all cases involving nonstatutory review in indices and case finders with all criminal cases and damage cases under the uninformative heading of "Doe v. United States." The nature of the case is revealed much more by "Doe v. Laird" or "Doe v. Secretary of Defense."

The problems with the suit against the officer or agency, then, are not in its form. Rather the problems revolve around the technical rules that some courts have applied on such matters as capacity of an agency to be sued, identification of the proper officer, and indispensability of superior officers. Most of these matters have been solved, and the proposal advanced in this Article would complete the task.

## 2. Section 1391(e): Joinder of Third Persons as Parties Defendant

For reasons of its own convenience in litigation, the Department of Justice prefers to have federal interests and federal law resolved in law suits in which the Department can exercise a high degree of control over the joinder of related parties and issues. United States Attorneys are told that "they are not authorized to waive objections as to . . . third-party joinders and the like, without first clearing such matters with the Civil Division [in Washington] which in turn will clear them with the affected agencies."<sup>332</sup> When section 1391(e) was enacted in 1962, the availability of the extraterritorial service of process and the broadened venue was limited—apparently at the behest of the Department of Justice—to judicial review actions "in which *each* defendant is an officer or employee of the United States or an agency thereof."<sup>333</sup>

Remarkable as it may seem, there is a conflict of authority on whether the statute means what it says—that the plaintiff cannot join nonfederal third persons as defendants in an action under section 1391(e).<sup>334</sup> Indeed, apart from the language, there is no func-

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332. U.S. DEPT. OF JUSTICE, MANUAL FOR UNITED STATES ATTORNEYS tit. 3, at 3 (Supp. 1965) (available at the Library of the Department of Justice, Washington, D.C.).

333. 28 U.S.C. § 1391(e) (1964) (emphasis added). The legislative history provides no explanation for the inclusion of the word "each." See S. REP. NO. 1992, 87th Cong., 2d Sess. (1962).

334. Compare *Chase Sav. & Loan Assn. v. Federal Home Loan Bank Bd.*, 269 F. Supp. 965 (E.D. Pa. 1967), in which the court dismissed an action joining the federal board and a local bank, on the ground of improper venue, with *Powelton Civic Home Owners Assn. v. HUD*, 284 F. Supp. 809, 833 (E.D. Pa. 1968), in which the court held that effectuation of the "apparent intent" of § 1391(e) requires that the "each de-

tional justification for this limitation, for it prevents relief in some situations in which the federal courts can make a special contribution.<sup>335</sup> In many public land controversies, for example, three parties are involved—the official, a successful applicant, and an unsuccessful one. Effective relief cannot be obtained in an action in which the United States or its officer is not involved; but if the Government is named as defendant, section 1391(e) prevents the joinder of the other private person as a defendant, and that person cannot be joined as a plaintiff because his interest is adverse to that of the plaintiff.<sup>336</sup> Another common type of situation in which the limitation is troublesome is that in which specific relief is sought against federal and state officers who are cooperating in a regulatory or enforcement program.<sup>337</sup>

The crux of the matter is whether there are sound reasons of policy for excepting actions brought against federal officers or agencies from the general principles that control party joinder in federal courts. The embarrassment of being joined as a defendant by state officers or private persons with whom it may be alleged that federal officials cooperated does not seem to be a sufficient basis for special

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defendant" language be read as referring "only to defendants who are beyond the forum's territorial limits." Hence, the court held, the joinder of state officers who could be served within the district was proper.

335. In *Town of East Haven v. Eastern Airlines, Inc.*, 282 F. Supp. 507, 510-11 (D. Conn. 1968), the court reluctantly dismissed for improper venue after criticizing the requirement of § 1391(e) that "each" defendant be a federal officer or agency:

The wording does prevent the hardship which could result if a non-government defendant were subjected to the provision's liberal service of process and venue rules merely because the government was also joined as a defendant in the same action. But the wording does appear unnecessarily broad and without justification where there is independent authority for service of process and venue with respect to each non-government party joined as a defendant. The only possible argument in support of the requirement in such instances is that enough of a burden has been placed on government officials and agencies by subjecting them to suits away from their official residences without placing upon them the additional burden of defending a suit with non-government co-defendants. The weakness of this argument is evident. The burden, if it is one at all, cannot be a great one and certainly is minor in comparison to the burden placed on the plaintiff of having to bring separate actions. At any rate, there is no indication that Congress was acting to avoid this additional burden upon the government.

336. Section 1391(e) is unavailing in the typical case involving the use of public lands. In such a case, the Secretary of the Interior makes an award to an individual defendant but the plaintiff claims a right to it. The problem arises since the plaintiff is unable to join the Secretary and the individual defendant as parties defendant without creating a venue objection. The same problem of parties emerges, moreover, if the court proceedings take the form of an action between private parties—an action in which the Secretary is not heard and in which the United States may not be named without danger of a dismissal on the ground that the suit is one against the United States and hence not maintainable without the latter's consent. For the protection of third parties, private or governmental, the laws relating to the federal court system are simply inadequate.

337. See cases cited in notes 334-35 *supra*.

treatment. Thus, section 1391(e) should be amended to allow for effective relief and binding judgments in multiple party situations. Deletion of the word "each" and substitution of "a" will achieve part of this objective. The addition of a new sentence permitting joinder of nonfederal defendants who can be served in accordance with the normal rules governing service of process, would cure the venue objection that now stands in the way of convenient and appropriate joinder. Other objections to such joinder, stemming from the discretion vested in the trial judge under the Federal Rules to control the dimensions of the lawsuit and to protect particular parties, would be unaffected. Since the plaintiff would be required to state a substantial claim against federal officers, use of this special venue provision as a sham to circumvent normal venue requirements will not be a problem.

### 3. Role of the Justice Department

If these statutory reforms are to be effective, the Department of Justice must make firm efforts to instruct its lawyers and United States Attorneys not to raise technical defects with respect to the naming of parties defendant but to take active steps to cure such defects. Once a plaintiff has stated the gravamen of his complaint and has served process in accordance with rule 4(d)(4), the burden should be on the Department to determine who within our complex federal establishment is responsible for the alleged wrong.<sup>338</sup> If there are reasons for joining that individual or agency as a party defendant, the Department of Justice should take the initiative in adding the desired party defendant. In any case, the Department should *never* urge that a case be dismissed because of technical defects about naming parties defendant.<sup>339</sup>

### 4. Legal Representation and Res Judicata

The proposed amendments advanced with respect to parties defendant raise two potential problems. The first concerns the proposal allowing but not requiring a plaintiff to bring his action for judicial review against the United States: if a plaintiff did bring such an

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<sup>338</sup> Cf. the provisions of the Crown Proceedings Act of Great Britain. Section 17(3) of that Act provides that in tort claims against the government such

[c]ivil proceedings against the crown shall be instituted against the appropriate authorized Government department, or, if none of the authorized Government departments is appropriate or the person instituting the proceedings has any reasonable doubt whether any and if so which of those departments is appropriate, against the Attorney General.

10 & 11 Geo. 6, c. 44 (1947) (emphasis added).

<sup>339</sup> See text accompanying note 306 *supra*.

action, would it affect the question of whose lawyers should represent the defendant? The problem arises because the Department of Justice alone is authorized to defend "the United States" in court,<sup>340</sup> while a limited number of federal agencies have authority to defend their own orders in suits brought against them. The proposal's potential impact, however, appears to be nonexistent. The provisions authorizing agencies to defend their own orders are generally part of statutory review provisions such as the Judicial Review Act of 1950.<sup>341</sup> Since specific statutory review provisions are unaffected by the proposal, and since nonstatutory review actions against those agencies must now—at least in theory—be defended by the Department of Justice, the opportunity to name the United States could affect the question of representation only if an agency has general authority to represent itself *and* if suits to review its orders need not be brought under special statutory review provisions.<sup>342</sup> Although there might be such a situation, none has been found. The whole problem, of course, is of interest only to government lawyers who are attuned to intragovernmental feuding and are sensitive to the desire of agencies to control the defense of their own activities.

The second problem raised by the proposals concerns the effect on the United States of a judgment rendered in a suit against an officer or agency. The theory of the officer's suit is that the officer, by acting unconstitutionally or in excess of his authority, is no longer acting in his official capacity. This fiction allowed circumvention of sovereign immunity, but raised questions concerning the judgment's binding effect on the United States, which was not and could not be made a party.<sup>343</sup> A long line of cases states the rule that

340. See Exec. Order No. 6166 (June 10, 1933), in 2 THE PUBLIC PAPERS AND ADDRESSES OF F.D.R. 223 (S. Rosenman ed. 1933), which concentrated all government litigation functions in the Department of Justice. For a partial list of statutes and executive orders with respect to the conduct of government litigation by lawyers of agencies other than the Department of Justice, see D. SCHWARTZ & S. JACOBY, GOVERNMENT LITIGATION—CASES AND NOTES 26-27 (1963).

341. 28 U.S.C. §§ 2341-51 (Supp. IV, 1965-1968).

342. The authority of the ICC "to appear for and represent the Commission in any case in court" appears to be so broad and specific [49 U.S.C. § 16(11) (1964)] that it would not be overridden by a general provision allowing the plaintiff, in nonstatutory review actions, to name the United States as defendant. The question, of course, might never arise because judicial review of ICC orders is controlled by exclusive and detailed statutory provisions which provide for parties defendant and for separate representation of the Commission by its own lawyers.

343. See, e.g., Carr v. United States, 98 U.S. 433 (1878), in which the Court held that the United States was not precluded by a judgment in an ejectment suit brought by the present defendant's predecessor against government agents who were in possession of the disputed land. See also Stanley v. Schwalby, 162 U.S. 255 (1896). In Land v. Dollar, 330 U.S. 731, 736 (1947), in which the Court held that a suit against an officer was not barred by sovereign immunity, Justice Douglas twice stated that "an adjudication [against the officer] is not *res judicata* against the United States because

the United States is not bound by a judgment in an unconsented in personam action against one of its officers.<sup>344</sup> These cases rest on the premise that, since only Congress can waive sovereign immunity, it would be anomalous to allow the same result to be reached by the decision of a government lawyer to defend a suit brought against an officer. If sovereign immunity is eliminated in actions for specific relief, however, the limited effect of a judgment against an officer would vanish with the disappearance of its underlying rationale. The suit against the officer who is acting in his official capacity would be seen as it really is—as an action against the United States brought with its consent.

As a matter of general policy, the Department of Justice affords counsel and representation to federal employees when suits are brought against them in connection with the performance of their official duties.<sup>345</sup> The policy extends even to in personam actions that arise out of their official duties. A few cases, difficult to reconcile with the larger number to the contrary,<sup>346</sup> apply more usual notions of collateral estoppel in holding that the United States is bound by a judgment against its officers, when authorized legal representatives of the United States have represented the officer and controlled the defense.<sup>347</sup> With the partial elimination of sovereign immunity, these decisions will represent federal law. General principles of res judicata and finality support the proposition that the United States

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it cannot be made a party to the suit." A similar statement was repeated in his dissenting opinion in *Malone v. Bowdoin*, 369 U.S. 643, 650 (1962).

344. See, e.g., *Stanley v. Schwalby*, 162 U.S. 255, 270 (1896):

The United States, by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a State in any case. Neither the Secretary of War nor the Attorney General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers. . . . The answer actually filed by the District Attorney, if treated as undertaking to make the United States a party defendant in the cause, and liable to have judgment rendered against them, was in excess of the instruction of the Attorney General, and could not constitute a voluntary submission by the United States to the jurisdiction of the court.

345. U.S. DEPT. OF JUSTICE, *MANUAL FOR UNITED STATES ATTORNEYS* tit. 3, at 4 (Supp. 1965) (available at the Library of the Department of Justice, Washington, D.C.). See also D. SCHWARTZ & S. JACOBY, *GOVERNMENT LITIGATION—CASES AND NOTES* 19-20 (1963).

346. See cases cited in notes 343-44 *supra*.

347. See, e.g., *United States v. Candelaria*, 271 U.S. 432, 444 (1926), in which the Court held that the United States was estopped from asserting title to land claimed by an Indian pueblo if the United States had employed and paid a special attorney to litigate title on behalf of the pueblo in a prior suit. See also *Drummond v. United States*, 324 U.S. 316 (1945), in which the Court held that payment by the United States of the fee of an attorney who represented an Indian in land litigation did not bind the United States; the Court stated that in order "to bind the United States when it is not formally a party, it must have a laboring oar in a controversy."

should be bound by a judgment when it has controlled the defense in a suit against the officer.<sup>348</sup> In the future it will appear natural and just if the United States is precluded under such circumstances, and unconscionable if the United States is not bound.

#### IV. CONCLUSION

Compared to the great problems of our age—racial conflict, nuclear war, environmental quality, and so on—sovereign immunity and the other matters dealt with in this Article are relatively trivial and unimportant. Yet they are subjects that cry out for reform. The doctrine of sovereign immunity has long since outlived its usefulness. An expansion of federal jurisdiction to broaden the opportunities of citizens to obtain judicial review would also be beneficial. Finally, the remaining problems associated with the law of parties defendant are overdue for total elimination.<sup>349</sup> Congress, by adopting the provisions indicated below, can make a substantial contribution to society by promoting rationality in a complex and intricate specialty of federal law.<sup>350</sup>

### UNITED STATES CODE

#### Title 5

##### § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. *An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United*

348. See, e.g., *Souffront v. Compagnie des Sucreries*, 217 U.S. 475, 486-87 (1910):

The persons for whose benefit, to the knowledge of the court and of all the parties to the record, litigation is being conducted cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of its own, and who does this openly to the knowledge of the opposing party is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record.

349. Another needed reform—a federal statute providing for a quiet-title proceeding to which the United States may be made a party—is badly needed. See text accompanying notes 266-76 *supra*. The development of detailed statutory provisions, however, requires further study than has been possible in connection with this Article.

350. Language to be added is in italics; language to be deleted is blocked out.

*States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.*

### § 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. *If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.* Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

## Title 28

### § 1331. Federal questions; ~~amount in controversy; costs~~

~~(a) 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 interest and costs, and arises arising under the Constitution, laws, or treaties of the United States.~~

~~(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of \$10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.~~

### § 1391. Venue generally

. . . .

(e) A civil action in which ~~a each~~ defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United

States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. *Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure without regard to other venue requirements.*

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.