

# REPORT OF THE COMMITTEE ON JUDICIAL REVIEW IN SUPPORT OF RECOMMENDATION NO. 18

*Prepared by*  
*Roger C. Cramton*  
*University of Michigan*

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## I. INTRODUCTION

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. *Gnotta v. United States*<sup>1</sup> is illustrative. Gnotta, an engineer of Italian descent employed 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>2</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 Department of the Army, the Civil Service Commission, and seven 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>3</sup> The United States Court of Appeals for the Eighth Circuit affirmed the dismissal, holding that "Gnotta's appeal neces-

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<sup>1</sup> 415 F.2d 1271 (8th Cir. 1969).

<sup>2</sup> Exec. Order No. 11,246 (1965), 30 Fed. Reg. 12,319.

<sup>3</sup> 415 F.2d at 1276. The district court decision is unreported.

sarily falls because of the identity of the defendants he had chosen to sue.”<sup>4</sup>

Why were the defendants chosen by Gnotta improper? The court listed these reasons:

(1) “One cannot sue the United States without its consent. . . .”<sup>5</sup>

(2) The Department of the Army and the seven individual officers could also cloak themselves in the mantle of the sovereign;<sup>6</sup> and

(3) “Congress has not constituted the [Civil Service] Commission a body corporate or authorized it to be sued *eo nomine*.”<sup>7</sup> 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.

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>8</sup> or that the particular matter of personnel advancement was “committed to agency discretion by law” and hence nonreviewable.<sup>9</sup> But it is disheartening that technical and foolish rules about parties defendant should foreclose judicial review of federal administrative action.

The tangled web of problems involving parties defendant in judicial-review actions has been ameliorated over the years, but

<sup>4</sup> 415 F.2d at 1276.

<sup>5</sup> 415 F.2d at 1276, citing *United States v. Sherwood*, 312 U.S. 584, 586-88 (1941).

<sup>6</sup> 415 F.2d 1271, 1277. Enactment by Congress of legislation implementing Recommendation 9 of the Administrative Conference of the United States, adopted October 21, 1969, would eliminate the sovereign immunity objection in a case of this type.

<sup>7</sup> 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). It should be noted that if Gnotta had named “Members of the United States Civil Service Commission” as parties defendant, and served process on them, his complaint could not have been dismissed, since Federal Rule 25(d) permits a public office to be described by title rather than individual name.

<sup>8</sup> Compare *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950) (judicial review of the discharge of a federal employee is limited to determining whether the employee received the protection of prescribed administrative procedures), *affd* by an equally divided Court, 341 U.S. 918 (1951), with *Charlton v. United States*, 412 F.2d 390 (3d Cir. 1969) (scope of judicial review is governed by the Administrative Procedure Act).

<sup>9</sup> 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.

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>10</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>11</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>12</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>13</sup> and (3) adopting several minor changes in the language of section 1391(e) of title 28—the venue provision of the Mandamus and Venue Act of 1962.<sup>14</sup>

## II. PRIOR ATTEMPTS TO PROVIDE SOLUTIONS

The unsatisfactory state of the law of parties defendant has been recognized for some time<sup>15</sup> and three attempts have now

<sup>10</sup> Conley v. Gibson, 355 U.S. 41, 48 (1957).

<sup>11</sup> 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).

<sup>12</sup> See text accompanying notes 16-20 *infra*.

<sup>13</sup> See text accompanying notes 54-59 *infra*. This suggestion has already been adopted by the Administrative Conference of the United States as part of Recommendation 9 of the Conference (October 21, 1969).

<sup>14</sup> See text accompanying notes 60-65 *infra*, and the proposed revision of 28 U.S.C. § 1391(e) in the conclusion of this Report. 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 Central Labor Union v. Fleming*, 246 F. Supp. 998 (D.C.Z. 1965) (same) *revid.* on other grounds *sub nom.* *Leber v. Canal Zone Central Labor Union*, 383 F.2d 110, 113 n.3 (5th Cir. 1967). 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.

<sup>15</sup> See the full discussion in *Bye, Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action*, 77 Harv. L. Rev. 40 (1963); Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. Chi. L. Rev. 435 (1962).

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.

*A. Section 1391 (e) : Service of Process, Venue, and Indispensable Parties*

Apart from section 1391(e) the service in process in non-statutory 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 district 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>16</sup> although a few decisions prior to the 1966 amendment of rule 15(c)<sup>17</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>18</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

<sup>16</sup> *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).

<sup>17</sup> The "relation back" amendment of rule 15(c) is discussed in the text accompanying notes 43-49 *infra*.

<sup>18</sup> *Rollins v. United States*, 286 F.2d 761, 768 (9th Cir. 1961); *Fugle v. United States*, 157 F. Supp. 81 (D. Mont. 1957).

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>19</sup>

Section 1391(e), which was added to the Judicial Code in 1962,<sup>20</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>21</sup> In cases of this type, delivery of the summons 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>22</sup> Although adopted as part of the Mandamus and Venue Act of 1962,<sup>23</sup> section 1391(e) is not limited to mandamus actions but applies broadly to all types of suits

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<sup>19</sup> For an excellent discussion of rule 4(d)(5), see 4 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 1106-07 (1969).

<sup>20</sup> Section 1391(e) is the venue part of the Mandamus and Venue Act of 1962, 28 U.S.C. § 1391(e) (1964).

<sup>21</sup> H. R. Rep. No. 536, 87th Cong., 1st Sess. (1961).

<sup>22</sup> For excellent general discussions of the Mandamus and Venue Act of 1962, see Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308 (1967); Jacoby, The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review, 53 Geo. L.J. 19 (1964).

<sup>23</sup> See note 20 *supra*.

against federal officers or agencies except those governed by a special statutory review provision that deals with venue.<sup>24</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>25</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>26</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 it for him."<sup>27</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>28</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>29</sup> The Congress noted that the

<sup>24</sup> See Jacoby, *supra* note 22, at 32.

<sup>25</sup> *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).

<sup>26</sup> See the proposed revision of 28 U.S.C. § 1391(e) in the conclusion of this Report, 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 section 1391 would not displace the special venue provisions applicable to the United States (see note 25 *supra*) since special venue provisions would override the general provision.

<sup>27</sup> *Williams v. Fanning*, 332 U.S. 490, 439 (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 11, at 438-51.

<sup>28</sup> 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 "Non-statutory" Judicial Review, 75 Harv. L. Rev. 1479, 1493-99 (1962).

<sup>29</sup> H.R. Rep. No. 536, 87th Cong., 1st Sess. (1961).

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>30</sup> Hence Congress seems committed to providing a path through the procedural maze.

The confusing law governing the required joinder of superior officers,<sup>31</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>32</sup> That argument should be 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>33</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>34</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> 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).

<sup>32</sup> 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 47 *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 16 *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 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.

<sup>33</sup> See discussion of rule 15(c) in the text accompanying notes 43-49 *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* 461-63 (1965).

<sup>34</sup> See text accompanying note 66 *infra*.

*B. 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>35</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>36</sup> A general recognition that this harsh rule produced unjust results provided the impetus for the 1961 amendment.<sup>37</sup>

As amended in 1961, rule 25(d) provides for automatic substitution of public officers.<sup>38</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>39</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>40</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>41</sup> Thus, rule 25(d) is applicable except when the officer is not acting under color of

<sup>35</sup> *Vibra Brush Corp. v. Schaffer*, 256 F.2d 681, 684 (2d Cir. 1958).

<sup>36</sup> *Klaw v. Schaffer*, 357 U.S. 346 (1958); *McGrath v. National Assn. of Manufacturers*, 344 U.S. 804 (1952); *Snyder v. Buck*, 340 U.S. 15 (1950).

<sup>37</sup> See, e.g., Davis, *Government Officers as Defendants: Two Troublesome Problems*, 104 U. Pa. L. Rev. 68 (1955).

<sup>38</sup> 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."

<sup>39</sup> 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 (1962).

<sup>40</sup> Advisory Committee Note to 1961 amendment, reprinted in 3B J. Moore, *Federal Practice* 578 (1968).

<sup>41</sup> *Id.*

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 to a subordinate; the secretary later delegates the function to a subordinate; a subsequent legislative reorganization proposal vests the function in a semi-autonomous 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 need is to 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>42</sup>

### *C. 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>43</sup> the Department of Health, Education, and Welfare,<sup>44</sup> the "Federal Security Administration" (a predecessor agency),<sup>45</sup> and a Secretary who had

<sup>42</sup> See 3B J. Moore, *Federal Practice* ¶ 25.09 (1968); Comment, 52 Mich. L. Rev. 433, 450 (1952).

<sup>43</sup> *Cunningham v. United States*, 199 F. Supp. 541 (W.D. Mo. 1959).

<sup>44</sup> *Hall v. Department of Health, Education & Welfare*, 199 F. Supp. 833 (S.D. Tex. 1960).

<sup>45</sup> *Cohn v. Federal Security Administration*, 199 F. Supp. 884 (W.D.N.Y. 1961).

retired from office nineteen days before.<sup>46</sup> The statutory review provision requires that judicial review of denials of social security benefits be brought against the Secretary within sixty days.<sup>47</sup> By the time the claimants discovered their mistakes, the statutory limitation period had expired, and they were denied judicial review.<sup>48</sup> Academic criticism of these decisions<sup>49</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 any 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>50</sup> Dismissal is

<sup>46</sup> *Sandridge v. Folsom*, 200 F. Supp. 25 (M.D. Tenn. 1959).

<sup>47</sup> 42 U.S.C. § 405(g) (1964).

<sup>48</sup> It is only fair to point out that 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). 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 been served within the statutory period. 29 Fed. Reg. 8209 (1964), 20 C.F.R. § 404.954(b).

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 (action of the Securities and Exchange Commission must be brought against its individual members)).

<sup>49</sup> See *Byse*, *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action*, 77 Harv. L. Rev. 40 (1963).

<sup>50</sup> 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 of 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 partv." 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

proper under the amended Rules only when the plaintiff fails to amend his pleading and to complete service on 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 proven 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.

### III. PROPOSALS FOR REFORM

The partial elimination of sovereign immunity, proposed in Recommendation 9 of the Administrative Conference,<sup>51</sup> will help in solving the problems in the law of parties defendant by eliminating the related notion that the United States is an indispensable party to certain actions. But even if the sovereign immunity and indispensable party doctrines are 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 an amendment to section 703 of title 5, which is concerned with form of proceeding in actions for judicial review, to add the following language:

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note 16 *supra*, with cases cited in note 18 *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 punctillious exactitude.

<sup>51</sup> Recommendation 9, Administrative Conference of the United States (October 21, 1969).

If no special statutory review procedure is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.<sup>52</sup>

The second reform is the amendment of section 1391(e) of title 28 to allow a plaintiff to utilize that section's broadened venue and extraterritorial service of process in actions in which non-federal defendants who can be served within the states in which the action is brought are joined with federal defendants.<sup>53</sup> 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.

A. *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.

1. *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>54</sup> Since rule 25(d) provides that a public officer "may be 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

<sup>52</sup> 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."

<sup>53</sup> See the proposed revision of 28 U.S.C. § 1391(e) in the conclusion of this Report.

<sup>54</sup> *Congress of Racial Equality v. Commissioner*, 270 F. Supp. 537, 542 (D.Md. 1967) (alternative holding). See also *Bell v. Groak*, 371 F.2d 202 (7th Cir. 1966).

process on the local United States Attorney, the Attorney General, or the agency to amend his pleading without penalty.<sup>55</sup>

Allowing the plaintiff to sue the agency by its official title would be a step in the right direction.<sup>56</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.

2. *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 and 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>57</sup> That proposal would discourage the suit against the officer and grad-

<sup>55</sup> See text accompanying notes 33, 50 *supra*.

<sup>56</sup> The Task Force of Legal Services and Procedures of the Commission on Reorganization of the Executive Branch (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 211 (March 1955).

Proposed revisions of the APA have also included language amending § 10(b), now 5 U.S.C. § 703, 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).

<sup>57</sup> 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.

ually 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>58</sup> Settled rules concerning legal representation of governmental interests might also be affected.<sup>59</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 psychic advantages in 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 "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

<sup>58</sup> 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 recreated.

<sup>59</sup> This problem is not likely to be a very serious one. See text accompanying notes 68-70 *infra*.

matters have been solved, and the proposal advanced in this Report would complete the task.

*B. 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>60</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 action "in which *each* defendant is an officer or employee of the United States or an agency thereof."<sup>61</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>62</sup> Indeed, apart from the language, there is no functional justification for this limitation, for it prevents relief in some situations in which the federal courts can make a special contribution.<sup>63</sup> In many public land controversies, for ex-

<sup>60</sup> U.S. Dept. of Justice, Manual for United States Attorneys, Tit. 3, p. 3 (1962).

<sup>61</sup> 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).

<sup>62</sup> 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 Civil 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 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.

<sup>63</sup> In *Town of East Haven v. Eastern Airlines*, 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."

ample, 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>64</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>65</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 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 accomplish part of this objective. The addition of a new sentence permitting joinder of non-federal 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 dimension of the lawsuit and to protect particular parties, would be unaffected. Since the plaintiff must state a substantial claim against federal officers, use of this special venue provision as a sham to circumvent other venue requirements will not be a problem.

### C. *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

<sup>64</sup> 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.

<sup>65</sup> See cases cited in notes 62–63 *supra*.

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 that 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>66</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>67</sup>

#### D. *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 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>68</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>69</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* suits to review its orders need

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<sup>66</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).

<sup>67</sup> See text accompanying note 34 *supra*.

<sup>68</sup> See Exec. Order No. 6166 (June 10, 1933), 3 C.F.R. 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).

<sup>69</sup> 28 U.S.C. §§ 2341-2351 (Supp. IV, 1965-1968).

not be brought under special statutory review provisions.<sup>70</sup> Although there might be such a situation, none has been found. This particular 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>71</sup> A long line of cases states the rule that the United States is not bound by a judgment in an unconsented in personam action against one of its officers.<sup>72</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

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<sup>70</sup> 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.

<sup>71</sup> 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 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).

<sup>72</sup> 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."

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>73</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>74</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>75</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 should be bound by a judgment when it has controlled the defense in a suit against the officer.<sup>76</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

The remaining problems associated with the law of parties defendant are overdue for total elimination. The Department of Justice should take active steps to instruct its lawyers not to seek dismissal of cases seeking judicial review of federal administrative action on the basis of technical defects in parties defendant. Congress, by adopting the provisions indicated below, can make a substantial contribution to society through rationalizing a complex and intricate specialty of federal law.<sup>77</sup>

<sup>73</sup> U.S. Dept. of Justice, *Manual for United States Attorneys* 4 (1962). See also D. Schwartz & S. Jacoby, *Government Litigation—Cases and Notes* 19-20 (1963).

<sup>74</sup> See cases cited in notes 71-72 *supra*.

<sup>75</sup> 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 (1944), 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 the controversy".

<sup>76</sup> See, *e.g.*, *Souffront v. Compagnie des Sucereries*, 217 U.S. 475, 486 (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."

<sup>77</sup> Language to be added is in italics; language to be deleted is blocked out.

## UNITED STATES CODE

## Title 5

## § 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 of 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

## § 1391. Venue generally

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(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.