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SUING THE GOVERNMENT BY FALSELY PRETENDING TO SUE AN OFFICER*

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WHEN YOU sue the government for an injunction or a declaratory judgment, you must falsely pretend (in absence of special statute) that the suit is not against the government but that it is against an officer. You may get relief against the sovereign if, but only if, you falsely pretend that you are not asking for relief against the sovereign. The judges often will falsely pretend that they are not giving you relief against the sovereign, even though you know and they know, and they know that you know, that the relief is against the sovereign. Even when the substance of sovereign immunity is gone, the form usually remains.

The courts do not violate the doctrine of sovereign immunity except in substance.

According to the Supreme Court in the key case, "the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign."¹ In this statement the Court is pretending that it cannot grant relief against the sovereign. The falsity of the pretense can be readily seen in such a case as *Vitarelli v. Seaton*,² in which the Supreme Court or-

* This article grows out of preparing pocket parts for the *Administrative Law Treatise* (1958). Appraising new developments causes rethinking of problems of principle and engenders new perspectives. The law about circumventing sovereign immunity is causing much lasting injustice and much needless litigation. Anyone who can see the law of this subject in perspective will readily agree that the need for basic reform is clear and strong. For valuable criticisms of this article, the writer is indebted to Professor Clark Bye of Harvard University, and to Professor Phil Neal of the University of Chicago. An article by Professor Bye, entitled *Proposed Reforms in "Nonstatutory" Judicial Reviews: Sovereign Immunity, Indispensable Parties, Mandamus*, will be published in the June 1962 issue of the *Harvard Law Review*. Its principal thrust is essentially the same as that of the present article.

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¹ *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949).

² 359 U.S. 535 (1959).

dered a discharged federal employee reinstated to his government position. The Court did not order the Government to reinstate the employee; the Court ordered the Secretary of the Interior to do so. The effect of the Court's order was to compel the Government to allow the employee to resume his government duties and to draw a government salary. The law is that the Court can order an officer to reinstate a federal employee to his government position but that it cannot order the Government to reinstate an employee.

The courts are in the process of unmaking the judicially-made law of sovereign immunity. The judges can often grant relief against the sovereign but they usually cannot acknowledge that they do so. They must hide the truth. Judge X hides the truth from Judge Y, who hides the truth from Judge Z, who hides the truth from Judge X. The litigants hide the truth from the judges, and the judges hide the truth from the litigants.

When you sue the Government by pretending to sue an officer, you must be careful that the officer you are not really suing is the right officer and not the wrong officer. Even when everyone knows that the Government is the real defendant, and even when the only employees of the Government who know about the case or care about the case are the Government's lawyers who defend it, you will lose your case if you falsely pretend that Officer A is the defendant instead of falsely pretending that Officer B is the defendant. The law is extremely strict in requiring you to make the right false pretense, not the wrong false pretense. If you make the wrong false pretense, the worst that can happen will be that you will win on the merits in the district court, win again on the merits in the court of appeals, and then lose in the Supreme Court, without a consideration of the merits, on the ground that you failed to make the right false pretense—after the statutory period of limitation has run. A result like this is what we call "justice."³

The law of sovereign immunity, in the present stage of judicial unmaking, permits a court to order a government officer to pay government money to the plaintiff but forbids a court to order the Government to pay government money to the plaintiff. As long as the court can order government money to be paid, one might suppose that nothing hinges on whether the order runs against the Government or against the disbursing officer. But the fact is that meritorious cases are often lost because the wrong officer is made the nominal defendant or because the right officer dies or resigns at the wrong time.⁴

For more than half a century, the law has been firmly established that

³ The Supreme Court has decided nine cases on the question whether suits against subordinate officers as pretended defendants must be dismissed for lack of joinder of superior officers as pretended defendants. The cases are reviewed in 3 DAVIS, ADMINISTRATIVE LAW § 27.08 (1958) [hereinafter cited as DAVIS].

⁴ The key case on naming the right officer who resigns at the wrong time has been *Snyder v. Buck*, 340 U.S. 15 (1950), but the law of this case has been substantially changed by the 1961 amendment of Rule 25(d) of the Federal Rules of Civil Procedure. The amendment is discussed *infra* at pages 451–54.

relief can be granted against the sovereign so long as the parties and the court all falsely pretend that relief is not granted against the sovereign. The foundation case is *Ex parte Young*.⁵ A state attorney general was enjoined from enforcing a statute which the Court held unconstitutional; the theory was that because of the unconstitutionality the attorney general was "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."⁶ Of course, the Court well knew that the attorney general was still attorney general while he was enforcing the statute, and the Court well knew that the effect of enjoining the attorney general was to enjoin the state from carrying out the unconstitutional statute. From that day to this the false pretense made by the Court in *Ex parte Young* has been the mainstay in challenging governmental action through suits for injunctions and declaratory judgments.⁷

When the Court announced in 1908 that sovereign immunity can be violated in substance, the pillars of Government neither crumbled nor cracked. Even the ensuing half century of violation of the substance of sovereign immunity seems to leave the pillars still standing. Could it be that the pillars would crumble if the Court would now go further and relinquish not only the substance but also the forms of sovereign immunity? If the Supreme Court can do the rather wondrous thing of ordering a federal employee reinstated to his government position without granting "relief against the sovereign,"⁸ would the pillars be endangered if the Court should not only order a federal employee reinstated but should also acknowledge that it is granting "relief against the sovereign"?

After more than half a century of firm law allowing sovereign immunity to be violated in substance, a few signs are beginning to appear that the courts may be moving toward a frank acknowledgment of the truth. In one case, three opinions were written, and all three acknowledged the truth that the suit for government money was in reality against the Government, even though the Court's action in the case was based upon the false pretense.⁹ The Supreme Court sometimes casually forgets about the false pretense, as it did in the first sentence of its opinion in *Greene v. McElroy*: "This case involves the validity of the Government's revocation of security clearance. . . ."¹⁰ The truth was that not merely the officers' action but the Government's action was challenged. Sometimes the law seems to be in a transition period in which an acknowledgment of the truth may be whispered but not spoken in a loud voice, or expressed in fine print but not in normal size

⁵ 209 U.S. 123 (1908).

⁶ *Id.* at 160.

⁷ See the analysis of *Ex parte Young* in 3 DAVIS § 27.03.

⁸ *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

⁹ *Snyder v. Buck*, 340 U.S. 15 (1950). The three statements acknowledging the truth are singled out for quotation in 3 DAVIS § 27.09.

¹⁰ 360 U.S. 474, 475 (1959).

print. An example is the 1961 amendment of Rule 25(d) of the Federal Rules of Civil Procedure. To say what was intended by the new Rule would have meant stating in large print that some suits are intrinsically against the Government. But the new Rule does not say this; instead, it says what is not intended. Then, in fine print, in an "Advisory Committee's note," the true intent is stated through reference to "actions . . . intrinsically against the government."¹¹

Is the time approaching, or has the time come, for relinquishing the forms as well as the substance of sovereign immunity in suits for injunctions and declaratory judgments? The forms do matter. Sometimes the judges seem to succeed in fooling themselves by their false pretenses; this is what seems to have happened in some of the key cases. But the false pretenses cause much harm even when no one is fooled by them. This will be shown by examining (1) recent cases involving joinder of superior officers, and (2) recent developments concerning substitution of successor officers.

REQUIRED JOINDER OF SUPERIOR OFFICERS

When you sue the Government and pretend to sue an officer, the judicial failure to acknowledge that the suit is against the Government causes the court to be concerned with which officer is named as defendant. Courts often take great care to prevent the false pretense that a local officer is the defendant, for the false pretense the law requires often is that the local officer's superior in Washington is the proper defendant. To the intelligent layman who emphasizes common sense, the choice between two pretenses both of which are known to be false may seem to be of no importance, but judges and lawyers know that it is important, for the Supreme Court has so held nine times and the lower courts have so held perhaps nine hundred times. The difference is not merely which false name goes on the pleading but which court will consider the case. If the superior officer need not be named, the local officer usually may be sued in the local district convenient to the plaintiff, whereas the national officer usually may be sued only in the District of Columbia.

The intelligent layman might expect that if a choice has to be made between two false pretenses, the choice should be made in favor of the one that helps the plaintiff's convenience, since the real defendant, the Government, has its lawyers in all districts, and can defend a suit about as conveniently in one district as in another. But the lawyers and judges who are trained in the mysteries of the law do not make that choice, except occasionally. The law is that the false pretense which contributes to the plaintiff's convenience must often be rejected in favor of the false pretense which contributes to the plaintiff's inconvenience. And this result is reached by applying logic to concepts invented by the Supreme Court, such as the difference between action of a

¹¹ See the full discussion of the 1961 amendment, including the Advisory Committee's note, *infra* at pages 451-54.

subordinate and action of a superior through a subordinate, a difference which is understandable neither by the Supreme Court nor by the lower courts nor by the practitioners who handle the cases nor by the present writer.¹²

Contrast of United States Government with British Government. The United States Government, even though it does not serve its own convenience by doing so, spends 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 in the district courts convenient to the plaintiffs. No one in the Government seems to be inquiring whether a beneficent government should do what it reasonably can do to prevent officers from illegally injuring private parties, whether the best way to resolve controversies about legality is to allow private parties to challenge official action in the courts, and whether the Government should therefore help instead of hinder such challenges because it has an interest in keeping its officers within the bounds of legality and an interest in facilitating the disposition of controversies, especially those to which it is a party.

The British Government has an attitude which is precisely the opposite of that of the United States Government. Instead of spending taxpayers' money to place technical obstacles in the way of plaintiffs who want to sue the Government, the British Government spends taxpayers' money to help the plaintiffs escape technical complexities about locating proper parties defendant. The Crown Proceedings Act¹³ provides that if the plaintiff "has any reasonable doubt whether any and if so which of those departments is appropriate . . ." as defendant, he may name the Attorney General as defendant; the Attorney General then has the responsibility for locating the proper department to name as defendant.

The British Government thus bears the burden of locating the proper parties defendant in suits against the Government. The United States Government not only does not bear that burden but it pays taxpayers' money to government lawyers to increase the burden on the plaintiffs.

Why?

The reason is not that someone in the Government has decided that the burden on plaintiffs who want to challenge the legality of official action should be heavy instead of light. The reason is not that someone on behalf of the Government has made a malevolent decision against convenience and in favor of inconvenience.

¹² The Court laid down what is supposed to be the guiding principle in *Williams v. Fanning*, 332 U.S. 490, 493 (1947): "[T]he 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." After the Postmaster General had issued a fraud order, may a court enjoin a local postmaster from enforcing the fraud order, or will the injunction require the Postmaster General "to take action . . . by having a subordinate exercise [power] for him"?

¹³ 1947, 10 & 11 Geo. VI, c. 44, § 17(3).

The reason is that the system we have evolved has been planned by no one. Problems of joinder usually seem incidental to main issues as cases develop, and both practitioners and judges seem to give only incidental attention to what seem to be incidental problems. The judges make their choices—and hence create the law—by pondering incredibly difficult or impossible technical issues, such as, for instance, issues about the distinction between action of a subordinate and action of a superior through a subordinate. Confronted with such issues, the judges react to arguments of counsel—arguments that are typically stronger on one side than the other. Government lawyers can and do give sustained attention to contriving technical ways to defeat plaintiffs. Representatives of plaintiffs outside the District of Columbia—and the problem of joinder almost always arises outside the District of Columbia—typically have only occasional litigation against the Government; their briefs typically show they are often baffled by the technical complexities about joinder. Reacting to this typically one-sided influence of counsel, the judges tend to add to the complexities. The law of joinder gradually grows toward bigger and better obstacles to decisions on the merits at places convenient to plaintiffs.

Neither the government lawyers nor the judges normally have occasion to look at the perspectives of the system. If they were to do so, they would see the absurdity of most of the technicalities. They would see wasteful litigation over the joinder problems. They would see much needless expense of litigating in the District of Columbia instead of in the district convenient to the plaintiff. And worst of all, they would see much injustice, for many plaintiffs with meritorious cases spend their money litigating the question of joinder and cannot then afford the expense of suing in the distant District of Columbia.

As the requirement of joinder of superior officers works out in practice, it causes a considerable amount of lasting injustice.

Three separate roads to reform are here suggested: (1) Reform by statute or by amendment of the Rules of Civil Procedure; (2) reform by the Department of Justice; (3) reform by the courts.

Reform by statute or by rule. Either a new statute or an amendment to the Rules of Civil Procedure can readily solve the problem. One approach would be to provide that superior officers need not be joined in designated types of suits against local officers. But a better approach would be to deal with the problem more fundamentally—by dealing with service of process. The officers who are named as defendants are not the parties on whom service should be made. The Secretary of State probably doesn't know and doesn't care that he is named as defendant in twenty or fifty pending cases; the government lawyers do care, for theirs is the exclusive responsibility for handling the suits. And the Government has its lawyers in every district. Therefore, plaintiffs should be allowed to sue any government officers, including top officers, in the districts convenient to the plaintiffs. H. R. 1960, 87th Cong., 1st Sess.,

passed by the House of Representatives in 1960 and again in 1961, provides for actions against officers in a judicial district where a plaintiff resides, where the cause of action arose, or where the property is situated, and allows service on officers by certified mail beyond the territorial limits of the district in which the action is brought. Still better might be a provision that service upon the United States Attorney of the district in which the action is brought shall be deemed to be service upon the defendant.

Reform by the Department of Justice. Government lawyers, like any other lawyers, want to win their cases, and one way to win is to assert technical defenses. But government lawyers, unlike other lawyers, have a peculiar responsibility to contribute to the fairness and efficiency of governmental processes. The Government's interest is not necessarily always on the side of winning a case to which it is a party. In the interests of justice or system, government lawyers may make concessions that other lawyers would be unlikely to make.

The basis for the Supreme Court's most recent decision, *Ceballos v. Shaughnessy*,¹⁴ was a concession in the Government's brief. The concession was made even though the Government had won on the point in both the district court and the court of appeals. The plaintiff sought a declaratory judgment that he was eligible for suspension of deportation. He sued the District Director, even though the final decision he was challenging had been made by the Board of Immigration Appeals. At page 11 of the brief in opposition to the petition for certiorari, Solicitor General Sobeloff said: "Since the district director is the person who would execute the deportation, we think that under this Court's *Pedreiro* decision, he is a sufficient party. This will be the position of the government in future cases." At pages 15-16 of the brief for the respondent, Solicitor General Rankin repeated the statement in substantially the same words. The Court decided accordingly.

The term "future cases" could be interpreted to mean cases involving suspension of deportation, or cases involving deportation, or all immigration cases, or cases involving any other officers of the Government where the same problem of principle is involved. The later case law shows that the position of the Government in the *Ceballos* briefs has not been expanded to non-immigration cases. We shall shortly review seven cases which the Government won after the *Ceballos* case was decided, and every one of the seven cases violates the principle laid down by the Court in that case.

No argument is here advanced that the Government is bound to interpret its *Ceballos* concession in any particular way. It is not bound, but it has the power to make other similar concessions. A beneficent government would and should make the same concession whenever the same problem of prin-

¹⁴ 352 U.S. 599 (1957). In *Luckenbach S.S. Co. v. United States*, 292 F.2d 913 (Ct. Cl. 1961), the plaintiff sought a declaratory judgment in a suit against the United States to determine the amount the plaintiff owed the Government. The court said that the Department of Justice "has vigorously asserted that declaratory relief is available against the Government." *Id.* at 916 n.5.

ciple is involved, even though the seven cases about to be reviewed show that the Government can win cases involving that principle in spite of the authority of the *Ceballos* case to the contrary.

The Department of Justice should give attention to this problem. It should discontinue its usual attitude that the law of joinder of superior officers affords opportunity for government lawyers to win cases on technical grounds without having to litigate the merits. It should consider the problem in the broad perspective of the question how far the government should go in helping, instead of hindering, plaintiffs who seek judicial determination of legitimate issues they have with the government.

Reform by the courts. The courts can do much better on this problem than they have been doing, even though they probably cannot go as far in solving the problem as a simple statute or rule can go. The Supreme Court in its nine opinions on the problem of joinder of superior officers has laid down many contradictory leads. But the Supreme Court's latest two decisions, if read together as superseding earlier confusion, could be the basis for the beginnings of a reasonably satisfactory system. The lower courts, however, have been generally rejecting the Supreme Court's latest holdings.

Because the case law of the last three years is as confused as the earlier law, an attempted summary of it would be unprofitable. We shall therefore limit ourselves to analysis of seven cases that the plaintiffs lost and should have won, and one case that the plaintiff won and should have won. In the one case the court wrote a splendid analysis that should be the law of the future. All eight cases involve the same central question of whether action or decisions by superior officers not before the court can properly be reviewed in suits against local officers who have something to do with enforcing the action or decisions of the superiors.

Typical of the seven cases is *Fagan v. Schroeder*.¹⁵ An employee sued a local postmaster who had demoted him, seeking restoration to his former position. The district court had reached the merits and held for the plaintiff. But the court of appeals held that the Postmaster General, who had reviewed the case and had signed the demotion order, was an indispensable party. The court reasoned that "setting aside the order would require the exercise of agency discretion by the Postmaster General or by inferior officials acting in his behalf."¹⁶ To the argument that the *Pedreiro* case called for weighing the practical hardship of going all the way to the District of Columbia, the court responded: "Alleviation of the alleged hardship cannot be achieved by over-riding accepted principles governing the presence of parties to an action."¹⁷

Both on sound principle and on Supreme Court authority, the *Fagan* case should have gone the other way. The local postmaster was the supervisor of Fagan's work; the local postmaster could comply with an injunction against

¹⁵ 284 F.2d 666 (7th Cir. 1960).

¹⁶ *Id.* at 669.

¹⁷ *Ibid.*

treating Fagan as demoted. True, the order of the Postmaster General demoting Fagan would remain, and the court could not order the Postmaster General to revoke his order demoting Fagan. But the principle is firmly established that a local officer can be enjoined even though the effect of the injunction is to produce a result which is contrary to the action or decision of a superior officer who is not before the court. Furthermore, the Supreme Court has made clear that it will normally assume that officers not before the court will comply with a court's decision.

Five Supreme Court decisions support the statements made in the preceding paragraph. All the cases are discussed in section 27.08 of the *Administrative Law Treatise*; only the one feature of the five cases will be reviewed here.

(1) The key case may still be *Williams v. Fanning*.¹⁸ The action was against a local postmaster to enjoin enforcement of a fraud order issued by the Postmaster General. The Court upheld the injunction because the local court could control the action of the local officer. That the district court could not order the Postmaster General to revoke the fraud order was not regarded as a reason for denying the injunction. That the injunction required the local officer to violate the decision of the Postmaster General was likewise deemed an insufficient reason for denying the injunction. The *Williams* holding is thus clear authority that in the *Fagan* case the court could enjoin the local officer, even though the action of the superior in Washington would be left standing.

(2) In *Colorado v. Toll*,¹⁹ a superior officer issued a regulation governing use of national parks. The Court upheld an injunction against a local officer's enforcement of the regulation. In the *Fagan* case, on authority of *Toll*, the court could have upheld the injunction against the local officer's enforcement of the demotion order of the Postmaster General.

(3) In *Hynes v. Grimes Packing Co.*,²⁰ the Court upheld an injunction against local enforcement of regulations issued by the Secretary of the Interior. On the authority of this case, the court in the *Fagan* case could have upheld the injunction.

(4) In *Shaughnessy v. Pedreiro*,²¹ the alien had been ordered deported, and the Board of Immigration Appeals had upheld the order. He sought review in a suit for a declaratory judgment against the District Director of Immigration in New York. Neither the Board members nor the Commissioner of Immigration were before the district court. The Supreme Court nevertheless held that declaratory relief was appropriate. The Court addressed itself to the argument that the Court's order would not be directed against immigration authorities other than the District Director; it said merely that it could not assume that a judicial decision "would be lightly disregarded by the immigration authorities."²² The opinion emphasized the hardship to the alien of

¹⁸ 332 U.S. 490 (1947).

²¹ 349 U.S. 48 (1955).

¹⁹ 268 U.S. 228 (1925).

²² *Id.* at 53.

²⁰ 337 U.S. 86 (1949).

bringing his suit in the District of Columbia. In the *Fagan* case, the Seventh Circuit held that the Postmaster General was an indispensable party because "setting aside the order would require the exercise of agency discretion by the Postmaster General. . . ." ²³ In *Pedreiro*, a parallel statement would be equally true; the Supreme Court thus specifically rejected the reasoning the Seventh Circuit used in the *Fagan* opinion.

(5) The most important feature of *Ceballos v. Shaughnessy*²⁴ is the apparent retreat from the *Pedreiro* approach of deciding on the basis of hardship of going to the District of Columbia. Yet the plaintiff prevailed in his contention that superior officers need not be joined. He sought a declaratory judgment that he was eligible for suspension of deportation and, in effect, a stay of deportation. A hearing officer had denied his application for suspension, and the Board of Immigration Appeals had denied his appeal. The purpose of the suit against the District Director was to obtain review of the decision by the Board in Washington even though the Board's members were not before the court. Both the district court and the court of appeals had held the superiors to be indispensable parties. The district court had reasoned: "*Effective relief cannot be granted merely by preventing the District Director from deporting an admittedly deportable alien. . . . The District Director can never alter plaintiff's status as an admittedly deportable alien; only the Attorney General notwithstanding such deportability, can suspend his deportation.*"²⁵ The significance of this reasoning is that the Supreme Court rejected it. The Supreme Court held: "In this case the petitioner asks to have the order of deportation suspended and to restrain the District Director from deporting him. Because the District Director is the official who would execute the deportation, he is a sufficient party."²⁶

The Supreme Court thus held the District Director to be a sufficient party even though the plaintiff was seeking review of a decision by superior officers who were not before the court, even though the District Director had no power either to grant or to deny a suspension of deportation or to determine eligibility for suspension, even though the court could not order a suspension of deportation, and even though the plaintiff's ultimate purpose (though not the relief requested) was to obtain a suspension of deportation. The District Director was a sufficient party defendant solely because he was the official who would execute the deportation. The holding is thus the opposite of what the Seventh Circuit held in the *Fagan* case.

If in the *Ceballos* case the decision on the merits had been that the alien was eligible for suspension of deportation, how would the district court enforce that decision against the District Director, the only named defendant, who had no authority to decide such eligibility one way or the other? The

²³ 284 F.2d at 669.

²⁴ 352 U.S. 599 (1957).

²⁵ 130 F. Supp. 32 (S.D.N.Y. 1955) (all italicized in original).

²⁶ 352 U.S. at 603-4.

answer is that it could not do so, but that its inability to do so does not prevent the district court from enjoining the District Director from deporting the alien. The parallel question in the *Fagan* case is: after the Postmaster General has demoted Fagan, how would the district court enforce a decision against the local officer, who had no authority to restore Fagan to his former position? The parallel answer is that it could not do so, but that its inability to do so does not prevent the district court from enjoining the local officer from treating Fagan as demoted. In a case of a discharged federal employee, who for present purposes is just like a demoted federal employee, the Third Circuit has held: "Once the [local officer] has been enjoined from continuing his action pursuant to an illegal separation, [the employee] will have received all the relief requested."²⁷

True, either the demoted employee or the discharged employee may want his former salary restored, and that may require action of a higher officer not before the district court. But the court may require the local officer to take whatever action is appropriate for him to take for restoration of the salary, and the court's decision may be normally expected to override the decision the other way by the superior officers beyond the court's jurisdiction. This is essentially what the Supreme Court has held in all five of the cases discussed; the best explicit discussion by the Supreme Court appeared in the *Pedreiro* opinion. To the argument that a judgment against the District Director would not be binding on other immigration officers, especially those in other districts, the Court responded: "But we need not decide the effect of such a judgment. We cannot assume that a decision on the merits in a court of appeals on a question of this kind, subject to review by this Court, would be lightly disregarded by the immigration authorities."²⁸ After all, government officers will normally either challenge a court decision or obey it, and what is normal should probably be the guide. For the highly exceptional case in which superior officers not before the court refuse obedience to the judicial decision, the plaintiff usually may sue them without fighting out the merits again, for the first decision will be *res judicata*.²⁹ Superior officers who know that refusal to comply with the court's order will not give them another chance to fight out the merits are likely to comply without compulsion. Just as an officer who is named in a court's judgment or decree usually complies in advance of institution of contempt proceedings, an officer who is not named in the court's judgment or decree will usually comply in advance of institution of *res judicata* proceedings.

Each of the five Supreme Court cases stands for the proposition that action or decisions by superior officers in Washington can be reviewed in suits against local enforcing officers, without joinder of the superior officers, and without any

²⁷ *Zirin v. McGinnes*, 282 F.2d 113, 116 (3d Cir. 1960).

²⁸ 349 U.S. at 53.

²⁹ See the full discussion of authorities on the *res judicata* problem in 3 DAVIS § 27.06.

order directed to the superior officers. The authoritative effect of the five decisions in combination is very powerful, and the lower courts surely should be governed by it, even though in some other Supreme Court cases the opposite attitude is expressed. The most troublesome decision the other way is *Blackmar v. Guerre*,³⁰ which has never been explicitly overruled. The *Blackmar* case held that members of the Civil Service Commission are indispensable parties in a suit by a federal employee who sought a declaratory judgment that he had been illegally discharged. The Court indulged in the inherently unpersuasive observation that "it is obvious that no relief can be granted against [the local officer who discharged plaintiff]." ³¹ The case seems contrary to the holdings in *Toll*, *Grimes*, *Williams*, *Pedreiro*, and *Ceballos*. The important fact is that the *Pedreiro* and *Ceballos* cases are the latest Supreme Court decisions, and in the aspect under discussion they are clearly inconsistent with *Blackmar*, which should therefore be deemed superseded.

The central misunderstanding of the Seventh Circuit in the *Fagan* case was the belief that decisions by superior officers in Washington cannot be properly reviewed in suits against local enforcing officers without joining the superior officers. Five Supreme Court cases hold that they can be, and two of the five are the latest decisions of the Supreme Court on the problem.

The same central misunderstanding actuated the thinking of the First Circuit in *Davis v. Trigo Bros. Packing Corp.*³² The suit was in the District of Puerto Rico against the Puerto Rico Supervisor of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, for a declaratory judgment that certain wine regulations were inapplicable to wine bottled in Puerto Rico for local sale and consumption, and for what the court vaguely called "injunctive relief." The court held that the Director in Washington was a necessary party, because an injunction against the local supervisor

would not afford plaintiff the relief it seeks. For such an injunction could not direct the issuance of the necessary certificate of exemption, nor vacate the Director's denial of such a certificate, nor would it render the plaintiff immune from prosecution by the Attorney General as a violator of the Act or stay the hands of the various customs and internal revenue officers who, in the absence of a certificate of exemption, are expressly required by the statute to prevent plaintiff from carrying on its business.

The language just quoted is demonstrably contrary to sound reasoning and contrary to Supreme Court authority. According to the court's own statement of facts, the plaintiff sought an injunction against the local supervisor; the court contradicts itself when it says that such an injunction would not afford plaintiff the relief it seeks. The court is right in saying that the injunction could not direct the issuance of a basic permit to sell wine or an exemption certificate, but the plaintiff in this proceeding was not seeking either a permit

³⁰ 342 U.S. 512 (1952).

³¹ *Id.* at 515.

³² 266 F.2d 174 (1st Cir. 1959).

³³ *Id.* at 179.

or a certificate; it was seeking an injunction against the local officer. The court was right in saying that the plaintiff would not be "immune from prosecution by the Attorney General," but the plaintiff in this proceeding was not seeking such immunity, and the Attorney General would be unlikely to prosecute in the face of a court decision that the Regulations were inapplicable to the plaintiff.

The First Circuit's reasoning would mean that in *Williams* the injunction against the local postmaster would be denied because the injunction could not direct the Postmaster General to cancel the fraud order; the Supreme Court held the opposite. The First Circuit's reasoning would mean that in *Pedreiro* the injunction against the District Director would be denied because the injunction could not direct the Board of Immigration Appeals or the Commissioner to withdraw the deportation order; the Supreme Court held the opposite. The First Circuit's reasoning would mean that in *Ceballos* the injunction against the District Director would be denied because the injunction could not direct the Attorney General to suspend deportation; the Supreme Court held the opposite.

Two cases in the Third Circuit are not only contrary to Supreme Court law but are in part contrary to each other. In *Adamietz v. Smith*,³⁴ a local postmaster discharged an employee, and a Regional Director and the Board of Appeals and Review of the Civil Service Commission affirmed. The court held that a suit against the postmaster for injunction and declaratory judgment could not be maintained without joining individual members of the Commission, because the defendant was "neither able nor authorized to grant all the relief" sought. The court followed *Blackmar* instead of the later cases of *Pedreiro* and *Ceballos*. Yet the same Third Circuit, with seven judges sitting, used a different line of reasoning later the same year and reached a partly opposite result in *Zirin v. McGinnes*.³⁵ A discharged employee sued the District Director of Internal Revenue, who had discharged him. The court said the complaint was "unartfully drawn, but we are not bound by technical rules of pleading and are required to inquire into what relief is actually sought."³⁶ Instead of asserting, as many courts have done, that only the superior officers may order a reinstatement, the court said that "an injunction may be properly framed to substantially accomplish what the appellant desires, i.e., recognition that she was never legally separated."³⁷ Instead of asserting, as many courts have done, that lack of authority of the local officer to reinstate prevents an order against the local officer, the court declared: "Once the appellee has been enjoined from continuing his action pursuant to an illegal separation, appellant will have received all the relief requested."³⁸ Instead of asserting, as many courts have done, that the action of superior

³⁴ 273 F.2d 385 (3d Cir. 1960), cert. denied, 363 U.S. 850 (1960).

³⁵ 282 F.2d 113 (3d Cir. 1960).

³⁶ *Id.* at 115

³⁷ *Ibid.*

³⁸ *Id.* at 116.

officers not before the court cannot be reviewed in a suit against a local officer, the court said: "If we conclude that the dismissal of employees was beyond the power of the District Director here involved, the extensive hearing and administrative appeals that followed could have no curative effect. They were meaningless and as much a nullity as the separation itself."³⁹

The spirit of the Third Circuit's opinion in *Zirin* up to this point was diametrically the opposite of the spirit of the Third Circuit's opinion in *Adamietz*. Instead of searching for technicalities against the plaintiff, the court seemed to be straining each technicality in the plaintiff's favor. One might speculate that the difference is accounted for by the shift from the three judges of *Adamietz* to the seven judges of *Zirin*. But that cannot be the explanation, for the court suddenly lapsed back to the spirit of *Adamietz*. The court said the plaintiff "contends that a judicial tribunal has the right to review administrative action to inquire whether an individual's procedural rights have been safeguarded."⁴⁰ Without saying what officer's procedure was challenged, the court held that the procedure could not be challenged without joining members of the Civil Service Commission. It gave no reason, except that it so held in the *Adamietz* case. The last part of the *Zirin* holding and the holding in the *Adamietz* case are both contrary to the five Supreme Court decisions.

Precisely the same central misunderstanding was the major feature of the opinion in *Texas American Asphalt Corp. v. Walker*.⁴¹ Plaintiff sought a declaratory judgment and sought to enjoin local officers from preventing it from importing oil in noncompliance with the President's Oil Import Program. Plaintiff had applied to the Administrator for a license to import. From a denial the company had applied unsuccessfully to the Oil Imports Board, and to the Secretary of the Interior. The court held that "since plaintiff cannot lawfully import oil without an allocation and license from the Administrator or the Appeals Board, they are indispensable parties, and this action must be dismissed for failure to join them."⁴² A parallel statement about the *Ceballos* facts would be that since the alien cannot lawfully stay in the United States without a suspension issued by the Attorney General, he is an indispensable party. But the Supreme Court rejected that idea: "Because the District Director is the official who would execute the deportation, he is a sufficient party."⁴³ In the *Texas American Asphalt Corp.* case, the court should have made a comparable holding: because the defendants, the local officers, are the officers who enforce the licensing system, they are sufficient parties.

The same central misunderstanding actuated the court in *Maupin v. Fry*.⁴⁴ The plaintiff sought declaratory judgment that he was still entitled to rights and privileges of his office as State Administrative Officer, Agricultural Stabilization Office, and a temporary injunction against interfering with the

³⁹ *Ibid.*

⁴⁰ *Id.* at 118.

⁴¹ 177 F. Supp. 315 (S.D. Tex. 1959).

⁴² *Id.* at 324.

⁴³ 352 U.S. at 603-04.

⁴⁴ 194 F. Supp. 867 (M.D. Tenn. 1961).

discharge of his duties. The action was against local officers who had ousted him, although letters of discharge had been signed by officers in Washington. The court dismissed the action on the ground that the Secretary of Agriculture "or his delegates" were indispensable parties. The court reasoned that a declaration that plaintiff was illegally removed "obviously cannot be effectual by expending itself upon the local members of the ASC State Committee who have no authority to reinstate the plaintiff and who had no authority to remove him."⁴⁵ A parallel statement about the *Williams* facts would be that a declaration that the fraud order was illegal obviously cannot be effectual by expending itself upon the local officer who had no authority either to issue or to withdraw a fraud order. A parallel statement about the *Ceballos* facts would be that a declaration that the alien was eligible for suspension of deportation obviously cannot be effectual by expending itself upon the local officer who had no authority either to grant or to deny suspension of deportation. But that is precisely the reasoning the Supreme Court rejected in each of the five cases we have discussed, including *Williams* and *Ceballos*.

The seventh and last of the wrong cases is *Wen Cheuk v. Esperdy*.⁴⁶ The court considered four cases together, in each of which a plaintiff had unsuccessfully applied for a special non-quota immigrant visa, and each complaint sought a declaratory judgment that plaintiff was entitled to consideration and approval for such a visa, and an injunction against deporting plaintiff until final determination. Each suit was against the District Director, who had processed each application, had furnished all data to the State Department, and had informed each plaintiff of the State Department's denial. The court held: "Since the defendant in this case does not have the power to issue such a visa, no such relief could be obtained against him. The Secretary of State is an indispensable party."⁴⁷ The holding is contrary to the Supreme Court's five cases: joinder of superior officers was held unnecessary in *Williams* even though the local postmaster had no authority either to issue or to withdraw a fraud order, unnecessary in *Toll* and *Grimes* even though the local officer had no authority to issue or modify or revoke a regulation, unnecessary in *Pedreiro* even though the local officer had no authority to withdraw the deportation order, and unnecessary in *Ceballos* even though the local officer had no authority to grant or to deny suspension of deportation.

The courts should have held the other way in each of our seven cases, for an order in each instance could be enforced against the local officer and the plaintiff's convenience should control in absence of inconvenience to the Government. The guiding principle should be that validity of a superior officer's action or decision is challengeable in a suit against a local officer who has responsibility for enforcing the superior's action or decision. This guiding

⁴⁵ *Id.* at 872.

⁴⁶ 178 F. Supp. 787 (S.D.N.Y. 1959).

⁴⁷ *Id.* at 790.

principle is the law of the Supreme Court, even though the lower courts in the seven recent cases have failed to understand that this is so.

After this article was submitted for publication, the opinion of the Fifth Circuit in *Estrada v. Ahrens*⁴⁸ was published. The decision is directly opposed to all seven of the decisions just reviewed and is based upon an analysis by Judge Wisdom which in extraordinary fashion pushes through to a clear understanding of the problem's many facets. Estrada was admitted to the United States at Miami for a limited period. Before the period expired he went to Switzerland without a permit of re-entry. The Commissioner of Immigration then notified all sea and air transportation companies that bringing Estrada to this country without an immigrant visa would be subject to penalties. Estrada sued the District Director of Immigration at Miami for a mandatory injunction to admit him and his family, to enjoin "the defense" from interfering with his proceeding to the United States, and to enjoin "the defendant" from imposing a fine against any carrier. The court held that the Attorney General and the Commissioner were not indispensable parties.

Unlike the seven courts that sank into helplessness on finding that they could not issue commands to officers not before the court, Judge Wisdom was unwilling to allow the processes of justice to become needlessly paralyzed. Even though Estrada had asked for relief the court could not grant, not much judicial ingenuity was required to give Estrada the substance of what he wanted. The essence of what he needed was an authoritative declaration, not a command, and Judge Wisdom perceived this. The court said that in substance Estrada sought "a declaratory adjudication" of his right to re-enter. Such a declaratory judgment could reach not only the District Director who was before the court but also the Commissioner and the transportation companies, who were not before the court. The court pointed out that the statute governing transportation companies applies only "if a visa [is] required," and that the court's determination in Estrada's favor "would render the statute inapplicable, and make it possible for Estrada to obtain the necessary transportation. The effect of the Commissioner's notice to the sea and air carriers would be nullified by a decree favorable to Estrada."⁴⁹

Instead of losing his sense of direction in the wilderness of conceptualism the courts have created on joinder of superior officers, Judge Wisdom kept his eye on some solid practicalities—that "the real party in interest . . . is the Government,"⁵⁰ that "the individual's rights to seek redress against the government"⁵¹ have greatly expanded in recent years, that the Administrative Procedure Act's provisions for challenging administrative action amount to "a clear waiver of sovereign immunity,"⁵² that "it is no longer necessary to complicate the problem of indispensable parties by continuing the fiction that

⁴⁸ 296 F.2d 690 (5th Cir. 1961).

⁴⁹ *Id.* at 701.

⁵⁰ *Id.* at 698.

⁵¹ *Ibid.*

⁵² *Ibid.*

the suit is not against the government,"⁵³ that "in a country such as ours today governmental activity must be decentralized"⁵⁴ and that therefore "it seems only sensible that judicial review of administrative action should occur where the action is taken."⁵⁵

The court was actuated by the realities of geography, not by the unrealities of differences between affirmative relief and negative relief or differences between action of a subordinate officer and action of a superior officer through a subordinate: "In Florida Estrada landed, in Florida he applied for permanent residence in this country, and in Florida his case was handled by the local authorities. . . . The court in Florida is the natural and logical place for this suit to be tried. We order that it be tried there."⁵⁶

Discerning opinions like that of Judge Wisdom will gradually move toward the major idea that when the Government is the real defendant the substance of the relief that is sought—the substance of the relief that counts—is almost always declaratory, even when an injunction is prayed.

The major idea that emerges is that all the perplexities that plague the sick body of law about joinder of superior officers can be easily avoided by nothing more ambitious than a recognition that even when a coercive order of a court will not be issued unless it can be enforced against the officer who is named as defendant, still a declaratory judgment need not be subject to that requirement for the simple reason that a declaratory judgment does not order anyone to do anything. Accordingly, *any local officer who has anything to do with carrying out a governmental program that adversely affects the plaintiff may be held to be a proper defendant in a declaratory action to challenge the program or some facet of it.*

This idea is logical, practical, sensible, only a little bit ahead of what the Supreme Court has already held, and solidly supported by the Fifth Circuit's splendid decision in the *Estrada* case.

SUBSTITUTION OF DEFENDANT OFFICERS' SUCCESSORS

The law concerning substitution of defendant officers' successors has been basically unsatisfactory, as is demonstrated in Section 27.09 of the *Administrative Law Treatise*. That section concludes by suggesting a wholly new approach and by setting forth a recommended draft of a new provision of Rule 25(d) of the Federal Rules of Civil Procedure.

⁵³ *Ibid.*

⁵⁴ *Id.* at 699.

⁵⁵ *Ibid.*

⁵⁶ The decision in the *Estrada* case was all the more difficult because the Fifth Circuit earlier in 1961 had twice held that superior officers were indispensable in circumstances in which the reasons for such indispensability were weaker than they were in the *Estrada* case. Neither opinion shows the discernment that Judge Wisdom showed in his *Estrada* opinion. *Johnson v. Kirkland*, 290 F.2d 440 (5th Cir. 1961); *Rio Hondo Harvesting Ass'n v. Johnson*, 290 F.2d 471 (5th Cir. 1961). The court in *Rio Hondo* based the decision on the statement that "before any official subordinate to the Director may be required to take affirmative action in a matter committed to the Director, the Director is the person entitled to be heard on this very question." *Id.* at 474.

The substance of this recommendation has been adopted by the Supreme Court in an amendment which became effective on July 19, 1961.

Yet in one respect the amendment departs from the recommendation, and in this one respect the amendment may cause trouble. A full discussion is necessary.

The new Rule 25(d) provides:

(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.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

The recommendation in the *Treatise* was that Rule 25(d) should be along the following line:

When an action is by or against a public officer in name but is by or against the government in reality, the substitution of one nominal party for another nominal party is not required. Any judgment or decree for or against an officer in such a case shall describe him by his official title and shall be enforceable by or against the incumbent of the office at the time of enforcement.

The main thrust of the recommendation was to discontinue the requirement that parties must formally substitute one nominal party for another nominal party. The author of the *Treatise* had previously made that recommendation to the Advisory Committee, which had rejected it. Judge Charles E. Clark of the former Advisory Committee, reviewing the *Treatise*, had castigated the recommendation by calling it "both facile and academic; it bypasses completely the long history of sovereign immunity. . . ."⁵⁷ Judge Clark said the proposal "makes the solution seem considerably simpler than it seemed to some of us who have worked upon the substitute drafts to solve the problem."⁵⁸ Judge Clark was surely right in his view that the proposal bypasses sovereign immunity and that it is a simple solution, but those qualities seem to some to be merits, not reasons for rejection. The new Advisory Committee recommended adoption of the main idea behind the proposal, and the Supreme Court adopted it.

Unfortunately, however, one feature of the proposal was not adopted. The application of the main provision of Rule 25(d) is limited by the words:

⁵⁷ Clark, Book Review, 43 MINN. L. REV. 601, 605 (1959).

⁵⁸ *Ibid.*

"When a public officer is a party to an action in his official capacity. . . ." The recommendation made in the *Treatise* would apply "When an action is by or against a public officer in name but is by or against the government in reality. . . ." This difference may cause trouble.

The Advisory Committee was evidently reluctant to acknowledge in formal rule that a suit may be "against the government in reality." But only by expressing this essential idea in some form can the problem be properly solved. Three kinds of suits are brought against officers: (1) a suit which is in reality against the officer personally, and in no sense against the Government; (2) a suit which is nominally against the officer personally or individually, but in reality against the Government; and (3) a suit which is nominally against the officer as an officer, that is, in his official capacity, and in reality against the Government. The rule needs to cover both categories 2 and 3, not merely category 3. Yet the new Rule 25(d) on its face covers only category 3, for it is limited to "a public officer . . . in his official capacity. . . ."

Many suits that are against the Government in reality are nominally against the officer personally or individually, and not against the officer in his official capacity. For instance, in the leading case of *United States v. Lee*,⁵⁹ the Court said that the suit was "against Strong and Kaufman, as individuals, to recover possession."⁶⁰ The foundation of the law of suits against officers is *Ex parte Young*,⁶¹ resting on the theory that when an officer acts without valid authority he is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."⁶² The theory is that the officer is sued in his personal capacity, not in his official capacity. The usual formulation in more recent times is that of *Georgia R.R. & Banking Co. v. Redwine*:⁶³ "We hold that this action against appellee as an individual is not barred as an unconsented suit against the State."⁶⁴

In some cases that are against the Government in reality the suits are called suits against officers in their official capacity, and in some they are called suits against officers as individuals or in their personal capacity.⁶⁵

One way out might be for the practitioner to designate his suit as one against the officer "in his official capacity." But that is dangerous, for a plaintiff in 1944 lost his case in the Supreme Court because he sued the officer "officially" instead of "personally."⁶⁶ Whatever the law ought to be, under the present state of the law a suit against an officer in his official capacity is more likely to be lost on account of sovereign immunity than a suit against an officer as an individual, even though both suits are in reality against the

⁵⁹ 106 U.S. 196, (1882).

⁶² *Id.* at 160.

⁶⁰ *Id.* at 210.

⁶³ 342 U.S. 299 (1952).

⁶¹ 209 U.S. 123 (1908).

⁶⁴ *Id.* at 305.

⁶⁵ For citations, see 3 DAVIS § 27.09.

⁶⁶ See discussion of *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944), in 3 DAVIS § 27.09.

Government. Astute practitioners know this, and suits which are nominally against officers in their personal capacity are likely to be numerous in the future as they have been in the past.

Now, even though the new Rule 25(d) is limited by its words to "a public officer . . . in his official capacity," does it apply to a suit against a public officer in his personal or individual capacity if the suit is in reality against the Government? This is an exceedingly important and practical question.

The answer is that Rule 25(d) will so apply if full effect is given to the explanation in the Advisory Committee's note. The essential idea that is needed is the idea of a suit which is in reality against the Government; that idea appears in the note in the words "intrinsically against the government." The note says:

The expression "in his official capacity" is to be interpreted in its context as part of a simple procedural rule for substitution; care should be taken not to distort its meaning by mistaken analogies to the doctrine of sovereign immunity from suit or the Eleventh Amendment. The amended rule will apply to all actions brought by public officers for the government, and to any action brought in form against a named officer, but intrinsically against the government or the office or the incumbent thereof whoever he may be from time to time during the action. Thus the amended rule will apply to actions against officers to compel performance of official duties or to obtain judicial review of their orders. It will also apply to actions to prevent officers from acting in excess of their authority or under authority not validly conferred . . . or from enforcing unconstitutional enactments. . . .

The question is whether the words "in his official capacity" may be interpreted to include a suit against an officer in his individual capacity. Some courts may have trouble in reaching such an interpretation. But the intent is rather clearly shown by the Advisory Committee's note. A court which emphasizes the intent, as distinguished from the literal words, will interpret the words "a public officer . . . in his official capacity" to include a public officer in his personal or individual capacity whenever the suit is intrinsically against the Government.

REFORMING THE MAIN DOCTRINE OF SOVEREIGN IMMUNITY

The Supreme Court has ample power to do about all that needs to be done to circumvent the doctrine of sovereign immunity in suits for injunctions and declaratory judgments. As the *Treatise* points out, good results can be produced by following the *Kendall*, *Roberts*, and *Miguel* cases⁶⁷ and overruling the three cases⁶⁸ that cannot be reconciled with these three; by following the

⁶⁷ *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838); *Roberts v. United States ex rel. Valentine*, 176 U.S. 221 (1900); *Miguel v. McCarl*, 291 U.S. 442 (1934).

⁶⁸ *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945); *Morrison v. Work*, 266 U.S. 481 (1925); *Louisiana v. Garfield*, 211 U.S. 70 (1908).

Lee, *Goltra*, and *Dollar* cases⁶⁹ and overruling irreconcilable cases including especially the *Larson* case;⁷⁰ and by following the spirit of a 1955 dictum that sovereign immunity "has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment."⁷¹

Much could be accomplished merely by overruling the *Larson* case, which causes more harm than any other case. Both the holding and the opinion are unfortunate. The case holds that the courts in the circumstances were barred from deciding a controversy about the law of contracts and sales and property—the very questions on which courts are peculiarly competent. The Court said that in each suit for injunction "the question is directly posed as to whether, by obtaining relief against the officer, the 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. . . ."⁷² The Court said: "There are the strongest reasons of public policy for the rule that such [injunctive] relief cannot be had against the sovereign. The Government, as a representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right."⁷³

The Court did not even attempt to state what "reasons of public policy" it had in mind. Deep and sound reasons of public policy are readily discernible on the other side. The law should be almost precisely the opposite of what the Court said in the words just quoted; the law should be: there are the strongest reasons of public policy for keeping the Government within the law, and the courts are the primary authorities within our system for determining what the law is when controversies arise. Just as courts protect private rights from illegal encroachment by other private parties, courts should protect private rights from illegal encroachment by the Government. The rule of law in this sense must be preserved. Courts do and must limit themselves to issues which are appropriate for judicial determination, but on such issues the fact that one of the parties is the Government is a reason in favor of the use of judicial power, not a reason against it.

The unsoundness of the *Larson* opinion is easy to see in the light of Supreme Court decisions of the past three years. In the *Vitarelli* case,⁷⁴ the Supreme Court granted a declaratory judgment that the plaintiff's dismissal from his government position was illegal, and the Court issued a mandatory

⁶⁹ *United States v. Lee*, 106 U.S. 196 (1882); *Goltra v. Weeks*, 271 U.S. 536 (1926); *Land v. Dollar*, 330 U.S. 731 (1947).

⁷⁰ *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

⁷¹ *National City Bank v. Republic of China*, 348 U.S. 356, 359 (1955).

⁷² 337 U.S. at 688.

⁷³ *Id.* at 704.

⁷⁴ *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

injunction requiring his reinstatement. The compulsion, in the *Larson* language, was surely "compulsion against the sovereign, although nominally directed against the individual officer." The suit was, in *Larson* language, "in substance, a suit against the Government." Instead of saying, as in *Larson*, that the Government "cannot be stopped in its tracks," the Court upon finding the procedure of discharge to be illegal not only stopped the Government in its tracks but in effect it required the Government to take affirmative action in reinstating the discharged employee. The issue concerning the legality of the procedure was clearly appropriate for judicial determination, as was the issue in the *Larson* case. Therefore the Court's action in *Vitarelli* and other such cases is much to be preferred to that in *Larson*. In the long run, the *Larson* attitude cannot survive. It is sure to be superseded by the good sense of cases like *Vitarelli*.

Similarly, in *Greene v. McElroy*,⁷⁵ the Court held that the procedure used for revoking the plaintiff's security clearance for private employment was inadequate, and the Court granted an injunction and declaratory judgment against the Secretary of Defense and other officers. The effect of the injunction was to stop the Government in its tracks, and that was entirely sound, for the issue was appropriate for judicial determination and the legal rights of the plaintiff were found to be violated. In *Larson* language, the Court's compulsion was "compulsion against the sovereign" and the suit was "in substance, a suit against the Government." Good sense again prevailed over the unfortunate analysis in the *Larson* opinion.

Even the lower courts are straining to escape the unsound results of the *Larson* case. In *Bowdoin v. Malone*,⁷⁶ the Fifth Circuit held that sovereign immunity was no bar to a suit of ejectment against a federal officer who held land on behalf of the Government. The court's elaborate opinion showed that the *Lee* and *Dollar* cases survived the *Larson* decision. The court disparaged the *Larson* case in various ways—by emphasizing that only four Justices concurred in the majority opinion, by paying tribute to the dissenting opinion, by showing that some of the majority in *Larson* had joined in the *Dollar* decision, and by following the *Lee* case after asserting that the *Larson* opinion "is susceptible of being construed as questioning some of the fundamental bases of *Lee*."⁷⁷

⁷⁵ 360 U.S. 474 (1959).

⁷⁶ 284 F.2d 95 (5th Cir. 1960), rehearing denied, 287 F.2d 282 (1961), cert. granted, 368 U.S. 811 (1961).

⁷⁷ *Id.* at 104. Another case that seems to violate the *Larson* precedent is *California v. Rank*, 294 F.2d 340 (9th Cir. 1961). The court quoted from the *Larson* opinion but distinguished it on grounds which seem flimsy.

A recent case in which the *Larson* decision caused injustice is *Michel v. Nalder*, 174 F. Supp. 546 (E.D. Wash. 1959). The court denied a mandatory injunction sought by an applicant for water from the Columbia Basin Project, because the *Larson* opinion said that even if the officer exceeded his authority the suit must fail "if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require

The Supreme Court, in order to reform the law of sovereign immunity in suits for injunctions and declaratory judgments, not only has ample power, but it need not break new ground to produce a satisfactory system. No more is needed than that the Court make clear that it will follow some of its past decisions and reject others. The entire law of the subject is judge-made, and it seems fitting that the judges should straighten out the inconsistent case law in this manner.⁷⁸

Still, because of the continuing troubles with the false pretenses that officers are the defendants, a single, simple statute could undercut all the problems in this area, without creating inordinate new problems. The main difficulty in drafting a statute which would abolish sovereign immunity as a defense in suits for injunctions and declaratory judgments is that sovereign immunity has been used to keep the courts from interfering in unwanted ways with governmental processes. But the courts have a plenitude of other means of restricting themselves, including not only doctrines about case or controversy, political questions, standing, ripeness, primary jurisdiction, and exhaustion, but also doctrines about limitations on reviewability and scope of review. The complexities are probably too much to try to capture in specific statutory language; what is indicated is a somewhat vague but meaningful provision limiting jurisdiction to issues "appropriate for judicial determination." A satisfactory statute might be drafted along the following line:

Consent is given to name the United States as defendant and to grant relief against the United States, irrespective of the doctrine of sovereign immunity, in any suit for an injunction, mandatory injunction, declaratory judgment, or for any combination of these remedies, in any case or controversy in which the court finds that the issue or issues are appropriate for

affirmative action by the sovereign. . . ." 337 U.S. at 691. The only question on the merits was interpretation of a federal statute concerning eligibility for water, a question which judges are especially qualified to decide. The case was faithful to the *Larson* pronouncement, even though the Supreme Court itself departed from that pronouncement in *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

⁷⁸ The Supreme Court's decisions cannot be reconciled. Mr. Justice Frankfurter in his dissenting opinion in the *Larson* case made a valiant effort at reconciliation, but he failed by a wide margin. As is said in 3 DAVIS § 27.05, "caution is necessary in relying on the Frankfurter opinion, for broad generalizations are far from satisfactory." A 1959 case shows this. For instance, Mr. Justice Frankfurter said: "If a defendant is asked . . . to exercise authority with which the State has invested him and the desired action is in fact governmental action . . . such demands . . . require the sovereign's consent as a prerequisite to the grant of judicial remedies." 337 U.S. at 712. In *Vitarelli v. Seaton*, 359 U.S. 535 (1959), the Secretary was asked to exercise authority he had to reinstate the discharged plaintiff, and the desired action of reinstating was surely "in fact governmental action." But the sovereign's consent was not a prerequisite to the judicial remedy which the Court granted. Similarly, Mr. Justice Frankfurter asserted that sovereign immunity is a bar when the relief prayed "brings the operation of governmental machinery into play." *Id.* at 715. The assertion is misleading. Sovereign immunity was not a bar in the *Vitarelli* case, even though the reinstatement of the employee brought the operation of governmental machinery into play.

judicial determination. Service upon the United States Attorney of the District in which the action is brought shall be deemed to be service upon the United States.

SUMMARY AND CONCLUSIONS

In suits against the Government's officers for injunctions and declaratory judgments, the courts do not violate the doctrine of sovereign immunity except in substance. The substance is commonly violated by falsely pretending that a suit is against an officer and not against the Government, even when the relief granted is rather clearly against the sovereign, as when an employee of the Government is ordered reinstated or when an officer is ordered to pay government money to the plaintiff.

When the false pretense is fully followed, as it is in many cases, sovereign immunity is successfully circumvented and the Government is successfully sued. To that extent, the present law is satisfactory. But the present law is decidedly unsatisfactory when a court discovers, as the Supreme Court did in the *Larson* case, that a suit "is, in substance, a suit against the Government"⁷⁹ and therefore denies relief even though the questions at issue are clearly appropriate for judicial determination. This part of the problem the Supreme Court could take care of by definitely overruling the *Larson* case and other cases in which the doctrine of sovereign immunity has prevented the courts from disposing of controversies appropriate for judicial determination. But other difficulties of the present system remain.

The present law is also unsatisfactory in that the false pretense that officers are the defendants causes unnecessary problems about parties defendant. Many of the former difficulties of substitution of parties when officers die or resign are now taken care of by a 1961 amendment of Rule 25(d) of the Federal Rules of Civil Procedure, although faultiness of the draftsmanship of the new Rule may cause trouble. A major difficulty continues in the numerous cases involving the needlessly complex question of whether or when a superior officer must be joined in a suit against a subordinate officer; the Supreme Court's nine opinions on this question have confused more than they have clarified, and many deserving plaintiffs fight out the issues about joinder without ever having their cases decided on the merits. Any one of three roads to reform can take care of the problem of joinder: (1) A statute or rule can provide that in an action which is intrinsically against the Government, service upon the nominal defendant may be made by serving the local United States Attorney. (2) Government lawyers in many ways may help instead of hindering

⁷⁹ *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688, (1949). In *Malone v. Bowdoin*, 30 U.S.L. WEEK 4311 (U.S. May 14, 1962) (No. 113), the Supreme Court, five to two, not only followed the *Larson* decision but expanded the application of its doctrine. The Court, however, rested its decision solely on the authority of the *Larson* case, without a reexamination of its soundness or unsoundness, and it explicitly acknowledged "the seemingly conflicting precedents."

plaintiffs who seek decisions on the merits of their cases; the British Government bears the burden of locating proper parties defendant in suits against the Government, while the United States Government not only does not bear that burden but spends taxpayers' money to pay government lawyers to increase that burden. This result is inexcusable and should be changed, by statute if necessary. (3) The courts should consistently follow the guiding principle that the validity of a superior officer's action or decision is challengeable in a suit against a local officer who has responsibility for enforcing the superior's action or decision. This principle is already the law of the Supreme Court in its most recent cases, although lower courts have recently been violating it. The many barriers to justice that stem from the unsatisfactory body of law about joinder of superior officers can be circumvented by allowing a declaratory judgment to be granted against any local officer who has anything to do with carrying out a governmental program that adversely affects the plaintiff, even when a coercive judgment would be inappropriate because superior officers are not before the court.

Instead of piecemeal action, and instead of judicial action, all the difficulties in the area could be resolved by a simple and basic statute abolishing sovereign immunity as a defense in any suit for an injunction or declaratory judgment whenever a court finds that the issue or issues in any case or controversy are appropriate for judicial determination.

Either by statute or by judicial action, we should return to the wisdom the Supreme Court pronounced 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."⁸⁰ The time has come to readopt this principle, with the qualification that the courts will limit themselves to issues that are appropriate for judicial determination.

⁸⁰ *United States v. Lee*, 106 U.S. 196, 220 (1882).