1984

Soverign Immunity in Indian Tribal Law

Ralph W. Johnson
University of Washington School of Law

James M. Madden

SOVEREIGN IMMUNITY IN INDIAN TRIBAL LAW

*Ralph W. Johnson**
and
*James M. Madden***

Suits in tribal courts against tribal governments and their officials are increasingly common. Plaintiffs often claim tortious injury or improper denial of contract and other rights. Defendants often assert sovereign or official immunity in response.[1] The tribal judge is faced with a major and fundamental issue: whether sovereign immunity, which protects the government itself from suit, has been "enacted" into tribal law or whether the doctrine is declared tribal common law. Frequently, the judge must also decide whether a similar tribal sovereign immunity doctrine shields tribal officials who have allegedly acted outside their official legal authority, or in a manner or under a law that is unconstitutional.

Tribal court judges have usually turned to federal and state case law for insights into these questions, but have had difficulty making sense of the non-Indian courts' jurisprudence. Sovereign immunity is an exceptionally complex doctrine. The ancient origin of the sovereign immunity doctrine is murky. It is cluttered with historical concepts, such as "the King can do no wrong," which are distinctly out of step with contemporary Indian views of the role of tribal governments. During the past quarter century, the

* Professor of Law, School of Law, University of Washington.
** Attorney

The authors wish to express their appreciation to the National American Indian Court Judges Association and to the many individual Indian Court judges who generously provided their unpublished court decisions, their suggestions, and their encouragement for the writing of this article.

Drafts of the article were also reviewed by tribal attorneys Steven S. Anderson, Sasha Harmon, Michael O'Connell, Michael E. Taylor, and Alvin J. Ziontz, all of whom offered helpful criticism which we gratefully acknowledge. The authors wish to acknowledge receipt of a summer research grant from the University of Washington School of Law which aided in the completion of this writing.

1. In general, on Indian tribal sovereign immunity, see FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 318-28 (R. Strickland et al., eds. 1982) [hereinafter cited as COHEN]; Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D. L. REV. 1 (1975); Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058 (1982). None of these sources directly addresses the issue of immunity in tribal courts. On sovereign immunity in the federal and state courts generally, see K. DAVIS, ADMINISTRATIVE LAW (2d ed. 1984); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION § 6 (1965); B. SCHWARTZ, ADMINISTRATIVE LAW §§ 9.17-9.27 (2d ed. 1984).

doctrine has undergone major reform; in many jurisdictions it is now a mere shadow of its former self. Moreover, the basis for its existence, in whatever form, has changed over the years. Tribal courts and councils face the challenge of deciding whether or in what form to adopt the doctrine.

In 1980 there were 117 Indian tribal courts, 23 Code of federal regulations courts, and about 270 Indian court judges.[2] These Indian courts exercise jurisdiction over an area of approximately 70 million acres, roughly ten times the size of New England. The tribal governments exercise broad civil jurisdiction over both Indians and non-Indians who live, work, play, own property in, and travel through Indian country. Tribal councils have regulatory jurisdiction over zoning, water rights, game management, taxation, building and health regulations, environmental management, and most other subjects customarily covered by state or municipal laws. Tribal courts exercise broad civil jurisdiction, hearing cases on torts, contracts, property, administrative law, taxation, and other areas of law within the competence of state courts of general jurisdiction.

Civil lawsuits, once unusual in tribal courts, are now common. Some of these suits are filed against tribal governments and others against tribal officials. This is especially true since *Santa Clara Pueblo v. Martinez*.[3] There the Supreme Court held the 1968 Indian Civil Rights Act[4] did not waive sovereign immunity of the tribal governments in federal court suits against tribes for violations of the Act or against the United States as trustee for tribes, except in habeas corpus actions. After *Martinez*, the principal forum available to a party aggrieved by tribal government action is the tribal court.

Only eighteen tribal court decisions have dealt with sovereign immunity since 1978. Four were decided by tribal appellate courts, fourteen by trial courts. The paucity of tribal court decisions on sovereign immunity can be explained on several grounds. First, although nearly all tribes have appellate courts, few appeals are actually perfected. Unlike the non-Indian court system, few trial court decisions are published. Second, of the appellate court decisions rendered by tribal courts, only the Navajo decisions have

2. 9 Indian Courts Newsletter, No. 2, at 7 (1983).
3. 436 U.S. 49 (1978).
4. 25 U.S.C. §§ 1301-1303 (1982).

been published on a regular basis.[5] A few other Indian court opinions were published in 1978 and 1979 in the now defunct *Indian Court Reporter*.[6] Since January 1983, the *Indian Law Reporter* has published tribal court decisions when they are available. Several tribal court judges have also provided these writers with their trial court opinions dealing with sovereign immunity issues.

Third, relatively few civil cases were tried in tribal courts before the late 1970s. In 1978, *Indian Courts and the Future* reported that "[c]ivil caseloads of most tribes are very small. Most are under 10 percent of the total caseload and the civil caseloads of only a few tribes exceed 20 percent."[7] That study predicted, however, that "[c]ivil jurisdiction should increase substantially as judges receive training in this area and start to feel more comfortable with it."[8] In response to requests by Indian court judges, the National American Indian Court Judges Association (NAICJA) initiated its first civil law training program in 1977; similar training programs have been offered in each successive year. Although no reliable statistics have been found on the total number of civil trials in tribal courts since 1978, numerous Indian court judges report a rapidly increasing number since that date. These cases now involve important issues of tribal government, including the validity of elections of tribal officials, property use, water use, lease rights, and personal injury claims (upwards of $100,000).

Prior to the Indian Civil Rights Act (ICRA), Indian court opinions were generally unpublished, but apparently few raised the issue of sovereign immunity.[9] (This author could locate none.) This is not surprising in view of the obscure nature of the doctrine, the small civil caseload in tribal courts, the lack of legal training of the judges, and the widespread assumption after 1968 that the Indian Civil Rights Act had waived tribal sovereign immunity in federal courts for due process and other civil rights violations.

The paucity of Indian court sovereign immunity cases is also explained by the differences among some Indians and tribes about

5. Reports of the Navajo Court.

6. Published by the American Indian Lawyers' Training Program. The same publisher now provides tribal court opinions in the *Indian Law Reporter*, beginning with volume 10 in 1983.

7. "Indian Courts and the Future," Report of the NAICJA Long Range Planning Project (1978). Published by National American Indian Court Judges Association.

8. *Id.* at 47.

9. 25 U.S.C. §§ 1301-1303 (1982).

whether tribal courts should have the power to challenge tribal legislative or executive actions. Some tribes clearly prefer different means of dispute resolution. Tribes are not required by federal law to adopt federal and state doctrines about judicial review and sovereign immunity; some prefer not to. While judicial review and alternative means of dispute resolution are beyond the scope of this article,[10] they are nonetheless relevant to understanding how and why sovereign immunity issues are now arising.

An examination of the tribal courts' civil jurisdiction and sovereign immunity decisions, and a review of the doctrine's origins and purposes in federal and state law reveal the increasing importance of the sovereign immunity doctrine and suggest several options to tribal councils and courts in deciding which aspects of the doctrine to retain. The article concludes that:

(1) The doctrine of sovereign immunity is not part of the controlling federal law applicable to Indian tribal courts, except where trust property is involved.

(2) Each Indian tribe has inherent sovereign power to adopt, reject, or waive the doctrine of sovereign immunity for suits in tribal courts, except those concerning trust property. In such actions, only Congress may waive sovereign immunity.

(3) Where a tribal constitution or ordinance fails to address sovereign immunity, the tribal court must decide whether the doctrine is part of the common law of that tribe and whether and to what extent the doctrine should be limited by exceptions.

While sovereign immunity is widely criticized, both the federal and state governments continue to retain certain aspects of the doctrine. Indian tribal governments may find it useful to do the same.

Sovereign Immunity in Tribal Law

Indian tribes have broad civil and criminal jurisdiction. The exercise of tribal civil authority over persons and property on the

10. Alvin J. Ziontz has given the most comprehensive treatment to the issue of judicial review in the Indian tribal setting. He concludes that "judicial review is inconsistent with the traditions and the structure of tribal government and is likely to lead to disruptive conflict," and that tribal courts "may encounter serious difficulties in identifying the requisite boundaries of judicial review." He also notes that judicial review of legislation has not been characteristic of most legal systems outside the United States and may not fit the traditions or aspirations of some Indian tribes. *See* Ziontz, *After Martinez: Civil Rights Under Tribal Government*, 12 U.C.D. L. REV. 1, 12, 15 (1979).

reservation affects private rights and gives rise to potential actions against tribal governments and officials. These suits raise the issues of sovereign immunity and of official immunity. It is important, therefore, to understand the broad scope of tribal judicial and legislative jurisdiction.

The United States Supreme Court continues to affirm that Indian tribes have broad civil regulatory authority over persons and property on reservations.[11] As to Indians on the reservations, this power is comparable to that of a state government. Many tribal laws now include provisions on building standards, water pollution, game management, zoning, planning, juvenile delinquency, family welfare, probate, and many other topics found in state and municipal laws.[12] Tribal civil jurisdiction over non-Indians is not as broad, but it is still substantial.[13]

11. Montana v. United States, 450 U.S. 544 (1981).

> Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members [citations omitted]. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation [citations omitted] . . . . Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations [the tribe cannot so regulate.]

Id. at 564, 565.

The Court found here that the Crow Indians had not traditionally relied on fishing for a livelihood, as distinguished from the tribes in Washington state who have historically depended on salmon and other seafood for survival. But, the tribes still retain some civil jurisdiction over nonmembers of the tribe, such as over such consensual relations as commercial dealings, contracts, and leases through taxation, licensing, and other means. Also, the tribe retains inherent civil authority over non-Indians when their conduct "threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe." None of these were alleged here. *Id.* at 565-66. *See also* White Mt. Apache Tribe v. Bracher, 448 U.S. 136, 142 (1980), where the Court said, "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and territory."

12. *Indian Tribal Codes*, (R. Johnson ed. 1981) (microfiche collection), University of Washington Law Library.

A review of the ninety-nine tribal codes contained in the above microfiche collection illustrates the scope of tribal civil regulatory authority. These codes, especially the ones that have recently been revised, tend to look like the municipal codes of large cities or counties, both in size (500 pages or more) and coverage.

13. In Knight v. Shoshone Arapahoe Indian Tribe, 670 F.2d 900, 903 (10th Cir. 1982), the court held that tribal zoning applied to fee land owned by a non-Indian. In Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982), the court held that the Quinault Tribe could close a non-Indian-owned store on fee land for violation of tribal health regulations. In Lummi Indian Tribe v. Hallauer, 9 Indian L. Rep. (Am.

Tribal courts have broad criminal jurisdiction over Indians, although their power to punish is limited to six months and $500 for each offense.[14] They have no criminal jurisdiction over non-Indians.[15]

Thus, today's Indian tribal governments tend to look, act, and exercise broad civil regulatory powers much like the off-reservation governments of states, counties, and cities. Therefore, challenges to the use of this regulatory power raise questions about whether and to what extent tribal governments should receive the same protection that the doctrine of sovereign immunity offers to their nonreservation counterparts.

Congress has authority to waive both tribal sovereign immunity and the federal government's immunity as trustee for the tribes in federal and state courts. For example, in the 1952 McCarran Amendment Congress waived tribal and governmental immunity in actions to adjudicate all water rights to a stream system.[16]

No federal legislation waives sovereign immunity in *tribal* courts, although Congress has the power to do so, especially in regard to trust property. Congress has on occasion waived sovereign immunity of tribal governments in federal courts, thus allowing at

---

Indian Law. Training Program) 3025 (W.D. Wash. 1982), the court held that the tribe could build and operate a sewer system for the entire reservation and require non-Indian fee owners to hook up to that system. In Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir.), *cert. denied*, 103 S. Ct. 314 (1982), the court held the bed of Flathead Lake was owned by the tribe rather than by Montana, and that the riparian rights of shoreline fee landowners could be regulated by the tribe for the economic security, health, and welfare of the tribe. In Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981), the court held that the tribe rather than the state could regulate non-Indian fee owners using water on the reservation where the stream originated and died on the reservation. However, in United States v. Anderson, 746 F.2d 1487 (9th Cir. 1984), the court held that the state, rather than the tribe, could regulate non-Indian fee owners' water use of tribally owned surplus waters from a stream that originated above the reservation and continued to flow on below it. In Babbitt Ford, Inc. v. Navajo Tribe, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984), the court upheld a tribal law imposing liquidated damages on a non-Indian off-reservation car dealer who repossessed a car on the reservation in violation of tribal procedural requirements. In Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), the Court held that the tribe could levy taxes on non-Indian activities on the reservation. In United States v. Mazurie, 419 U.S. 544 (1975), the Court held that the tribe could regulate a non-Indian-owned tavern on fee land on the reservation.

14. 25 U.S.C. § 1302(7) (1982).

15. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

16. 43 U.S.C. § 666 (1982).

least one forum for suits by tribal members against their tribal governments.[17]

Where trust property is held by the United States for the tribe or for an individual, the Supreme Court has said that *only* the United States may waive immunity from suit.[18] The cases are less settled on this rule's application to suits involving non-trust assets of the tribes. The 1982 edition of *Cohen's Handbook of Federal Indian Law* concludes that while tribes may have inherent authority to waive their immunity to suit in their own courts, it is less likely that a tribe can waive its immunity to suit in a state or federal court without congressional authority.[19] Tribal governments retain those sovereign powers not ceded in treaties nor expressly taken away by federal law, nor necessarily inconsistent with overriding federal interests. Therefore, the power to raise or waive tribal sovereign immunity, like taxation and other powers, should remain as an inherent sovereign power. Recent cases support the tribes' ability to waive their own immunity when trust assets are not involved. In *Merrion v. Jicarilla Apache Tribe*,[20] the court stated: "We believe the grant of power under the Indian Reorganization Act of 1934 is broad enough to encompass express waiver of sovereign immunity to suit when the ordinance, as here, has been specifically approved by the Secretary of the Interior."[21] In *United States v. Oregon*,[22] the Court of Appeals for the Ninth Circuit gave an even broader ruling, holding that Indian tribes may consent to suit without explicit congressional authority. The bringing of a legal action in tribal, federal, or state courts is itself a waiver of sovereign immunity since it allows entry of a judgment against the sovereign. The court stated that its decision was supported by precedent,[23] by federal policy favoring

17. *See, e.g.*, Appropriations Act of Mar. 3, 1905, Pub. L. No. 212, § 1, 33 Stat. 1048, 1071 (1905). *See* Cherokee Intermarriage Cases, 203 U.S. 76 (1906).

18. United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 513 (1940). No waiver of sovereign immunity by a tribe can bind the United States as trustee. Privett v. United States, 256 U.S. 201, 204 (1921); Bowling v. United States, 233 U.S. 528, 534-35 (1914). Tribes cannot waive their immunity by contract in matters affecting trust property without secretarial or congressional consent. 25 U.S.C. § 81 (1982).

19. F. COHEN, *supra* note 1, at 325. The early case of Thebo v. Choctaw Tribe, 66 F. 372 (1895), says in dicta that a tribe may not waive its own immunity from suit.

20. 617 F.2d 537 (10th Cir. 1980), *aff'd on other grounds*, 455 U.S. 130 (1982).

21. 617 F.2d at 540.

22. 657 F.2d 1009 (9th Cir. 1981).

23. *Id.* The court cited as precedent: Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968); Turner v. United States, 248 U.S. 354 (1919); Merrion v. Jicarilla Apache

self-determination, and by the need to encourage banks and other business organizations to deal with the tribes, without the deterrent of sovereign immunity invariably barring prospective suits.[24] An additional ground not mentioned by the court is the tribes' broad powers inherent in their sovereignty.

Any waiver of sovereign immunity, whether by Congress or a tribe, must be clearly expressed to be effective. In *Santa Clara Pueblo v. Martinez*,[25] the Supreme Court refused to find a waiver of sovereign immunity in the Indian Civil Rights Act because it was not "expressed unequivocally."

The Indian Reorganization Act

The Indian Reorganization Act authorized tribes to create two separate types of entities.[26] The tribe could organize itself under section 16 as a government,[27] with authority to exercise preexisting powers of self-government. If the tribe organized as a government under section 16,[28] it could also organize a wholly owned corporation to engage in business transactions under section 17.[29] Tribes organizing corporations received a charter from the Bureau of Indian Affairs. "Virtually all of the corporate charters contain a 'sue and be sued' clause, waiving at least some of the immunity that the corporation enjoyed as part of the tribal entity."[30] These waivers, even though not explicitly authorized by Congress, were recently held to be effective.[31] However, they are limited to

---

Tribe, 617 F.2d 537 (10th Cir. 1980), *aff'd* 455 U.S. 130 (1982); Fontenelle v. Omaha Tribe, 430 F.2d 143 (8th Cir. 1970); Maryland Cas. Co. v. Citizens Nat'l Bank, 361 F.2d 517 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966).

24. In United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981), the court found the Yakima Tribe had waived its immunity in two ways—through a 1977 agreement and by intervening in the lawsuit. *Cf.* Rehner v. Rice, 678 F.2d 1340 (9th Cir. 1982).

25. 436 U.S. 49, 58. *See* Turner v. United States, 248 U.S. 354, 359 (1919). *Cf.* United States v. Testan, 424 U.S. 392, 399 (1976); United States v. King, 395 U.S. 1, 4 (1969). The Supreme Court held in these cases that congressional waivers of the federal government's immunity cannot be broadened by implication.

26. 25 U.S.C. §§ 461-479 (1982).

27. 25 U.S.C. § 476 (1982).

28. *See* F. COHEN, *supra* note 1, at 326.

29. 25 U.S.C. § 477 (1982).

30. *See* Taylor, *The Effect of Tribal Sovereign Immunity on Economic Development*, 8 A SELF-HELP MANUAL FOR TRIBAL ECONOMIC DEVELOPMENT (Native Am. Rights Fund 1982). The author was the attorney for the Colville Tribe in 1983, and he gives an informative analysis of the issues relating to sovereign immunity and economic development.

31. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir. 1980), *aff'd on other grounds*, 455 U.S. 130 (1982).

actions involving the business activities of the corporation.[32]

A recurring problem is that tribal officials and others tend to confuse the operation of the tribal governing body with that of the tribal corporation. In some instances, the membership of the tribal council is identical with the membership of the corporation's board of directors,[33] and documents used by the council contain the term "Incorporated," suggesting that the corporation is the one engaged in the activity. In such cases, the courts generally hold that if the corporation takes the action, it can be sued under the "sue and be sued" clause; but if the action is taken by the tribal government, sovereign immunity bars suit. The immunity issue ordinarily turns on whether the plaintiff's business relationship was with the corporation or the tribal government, which is a question of fact to be determined at trial.[34]

The tribe may waive sovereign immunity in tribal court. An examination of a number of tribal codes illustrates how different tribes have treated the sovereign immunity issue in tribal ordinances.

As sovereign governments, Indian tribes can adopt or reject sovereign immunity either as a whole, or in some limited form, or create waivers. No federal law requires any particular result; the choice is up to each tribe.

Some tribes have chosen to deal with sovereign immunity in tribal constitutions. Others have addressed it in legislation. Others, without constitutional or legislative language, have left the matter to the tribal courts. The variations among the tribes are similar to those found among the states.

A review of forty tribal codes[35] shows that twenty-nine have

32. Boe v. Fort Belknap Indian Community, 455 F. Supp. 462 (D. Mont. 1978); Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977).

33. *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 157 n.13, (1973).

> This should not broaden the consent provision, because congressional authority for consent to suit is clearly predicated on the existence of two different organizations, and is limited to business transactions [citations omitted]. Any action against the tribe acting in a governmental capacity is beyond the scope of the waiver and should be barred.

COHEN, *supra* note 1, at 326.

According to Cohen, the most thorough analysis of this question in case law is in Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977). *See also* Boe v. Fort Belknap Indian Community, 455 F. Supp. 462 (D. Mont. 1978); Parker Drilling Co. v. Metlakatla Indian Community, 451 F. Supp. 1127 (D. Alaska 1978); 65 Int. Dec. 483 (1958).

34. *See* Kenai Oil & Gas, Inc. v. Department of Interior, 522 F. Supp. 521 (D. Utah 1981); Colliflower v. Fort Belknap Indian Community Council, 628 P.2d 1091 (Mont. 1981).

35. These codes were selected at random from among the ninety-nine codes included in *Indian Tribal Codes*, *supra* note 12. The forty codes examined include the following

no provision concerning sovereign immunity.[36] Eleven tribes expressly adopt the doctrine.[37] A common adoption clause provides: "The tribal court shall have no jurisdiction over any suit brought against the Tribe without the consent of the Tribe. Nothing in this code shall be construed as consent by the Tribe to be sued."[38]

Three tribes have codes that provide specific protection to tribal officials but limit that protection to "the performance of their official duties," thus impliedly denying protection when they are not in performance of official duties. The Zuni, Colville, and Cheyenne River Sioux tribal codes contain the following provision:

> Except as required by federal law, or the Constitution of the Tribe, or as specifically waived by a resolution or ordinance of the Council specifically referring to such, the Tribe shall be

---

reservations: Acoma, Blackfeet, Cheyenne River Sioux, Choctaw, Coeur d'Alene, Colorado River, Colville, Flathead, Fort Belknap, Fort Hall, Fort Mojave, Gila River, Hopi, Kiowa, Laguna, Lummi, Makah, Menominee, Muckleshoot, Navajo, Oglalla, Pine Ridge, Port Madison, Puyallup, Quinault, Rocky Boy, Rosebud, Sac & Fox, San Juan, Santa Clara, Sauk-Seattle, Sisseton-Wahpeton, Spokane, Standing Rock, Turtle Mountain, Uintah & Ouray, Umatilla, Warm Springs, Yakima, Zuni.

36. Those tribes where no code provisions were found on sovereign immunity are: Acoma, Blackfeet, Choctaw, Colorado River, Flathead, Fort Belknap, Fort Mojave, Gila River, Hopi, Kiowa, Laguna, Lummi, Makah, Muckleshoot, Navajo, Oglalla, Pine Ridge, Port Madison, Puyallup, Quinault, Rocky Boy, Sac & Fox, San Juan, Santa Clara, Spokane, Umatilla, Warm Springs, Yakima. Two additional tribes, the Sauk-Seattle and the Turtle Mountain, appear to have no code provisions on sovereign immunity; however, their personnel manuals contain provisions waiving sovereign immunity in certain situations (*see* Moses v. Joseph, 2 Tribal Ct. Rptr. A-51 (1980), and Turtle Mountain Band of Chippewa Indians v. Parisien, 1 Tribal Ct. Rptr. A-95 (1979)).

Other tribes may have personnel manuals or other regulations containing provisions on sovereign immunity; however, these sources are not readily available in published form. Anyone involved in a sovereign immunity issue on a particular reservation would do well to make a careful study of the tribal code, constitution, tribal resolutions, regulations of different committees, corporate charter, corporate minutes, insurance contracts, and other sources. Any of these may contain provisions relating to the sovereign immunity question.

Additional caveat: the volume "Indian Tribal Codes" was published in 1981. It was difficult at that time to obtain precise, up-to-date copies of the codes, although most of those published are probably accurate as of that date. Nevertheless, anyone working on a sovereign immunity problem should examine carefully the entire official copy of the tribal code and all amendments, especially since 1981.

37. Those eleven tribal codes adopting sovereign immunity are: Cheyenne River Sioux, Colville, Fort Belknap, Fort Hall, Menominee, Rosebud, Sisseton-Wahpeton, Standing Rock, Turtle Mountain, Uintah-Ouray, Zuni.

38. This provision is contained in the codes of the following tribes: Fort Belknap, Fort Hall, Sisseton-Wahpeton, Standing Rock, Turtle Mountain. This provision does not expressly provide immunity for officers and agents of the tribes.

> immune from suit in any civil action, and their officers and employees immune from suit for any liability arising from the performance of their official duties.[39]

The Menominee code is the only one examined that contains an explicit waiver of sovereign immunity. This code, adopted at the time of the Menominee restoration in 1973, provides:

> The Tribal Legislature shall not waive or limit the right of the Menominee Indian Tribe to be immune from suit except as authorized by this Article and by Article XII of this Constitution.
>
> The Menominee Tribe shall be subject to suit in Tribal Courts by persons subject to Tribal jurisdiction for the purpose of enforcing rights and duties established by this Constitution and By Laws, by the ordinances of the Tribe, and by the ICRA, 25 USC Sec. 1301 and 1302. The Tribe does not, however, waive or limit any rights which it may have to be immune from suit in the courts of the United States or of any State.[40]

In *Cudmore v. Cheyenne River Sioux Tribal Council*,[41] the tribal court found a waiver of immunity in a code section providing that "no security shall be required of . . . [the] Tribe, or of its officers or agency" when a restraining order is issued against it. The court said this language waived sovereign immunity in injunction suits because such a clause would otherwise be unnecessary. The impact was lessened, however, because sovereign immunity was unavailable as a defense in this case because it would prevent the court from testing whether a tribal resolution was in conflict with the constitution and bylaws of the tribe.

A tribal waiver of sovereign immunity may appear in some document other than the tribal code. In *Loncassion v. Leekity*,[42] the court found a waiver of sovereign immunity in an agreement to develop a law enforcement program between the tribe and the Bureau of Indian Affairs (BIA). The agreement required the tribe

39. See the codes for Zuni, Colville, and Cheyenne River Sioux tribes, in *Indian Tribal Codes*, *supra* note 12. *But see* Stone v. Somday, 10 Indian L. Rep. (Am. Indian Training Program) 6039 (Colv. Tr. Ct. 1983), where the Colville Tribal Court allowed suit for violation of rights protected by the Indian Civil Rights Act on the theory of *Ex parte* Young, 209 U.S. 123 (1908), that government cannot authorize or protect illegal acts in excess of authority.

40. *See* Menominee Const. art. XVIII, § 1. This provision was adopted at the time of Menominee restoration in 1973.

41. 10 Indian L. Rep. (Am. Indian Law. Training Program) 6004 (Ch. R. Sx. Tr. Ct. 1981).

42. 334 F. Supp. 370, 373 (D.N.M. 1971).

to be "responsible for all damages or injury to any person or property . . . because of wrongful conduct of its officers." The court ruled this language constituted a waiver of sovereign immunity. In two other cases tribal courts have found waivers of sovereign immunity in personnel manuals.[43]

Current BIA policy is to include a clause in all contracts under authority of Public Law 93-638[44] requiring Indian tribes to obtain public liability insurance. The federal regulation implementing this policy provides:

> Liability and motor vehicle insurance. (a) Tribal organizations shall obtain public liability insurance under contracts entered with the Bureau under . . . [these regulations]. (b) . . . any contract which requires or authorizes, either expressly or by implication, the use of motor vehicles must contain a provision requiring the tribal organization to provide liability insurance, regardless how small the risk.[45]

Insurance policies obtained by tribes under this regulation are required to include a provision prohibiting the insurer from raising the defense of sovereign immunity if the claim is within the policy limits. These provisions state that:

> [T]he insurance carrier waives any rights which it may have to raise as a defense the tribe's sovereign immunity from suit, but such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy of insurance. The policy shall contain no provision, either express

43. Moses v. Joseph, 2 Tribal Ct. Rptr. A-51 (1980); Turtle Mountain Band of Chippewa Indians v. Parisien, 1 Tribal Ct. Rptr. A-95 (1979).

44. *See* Pub. L. No. 93-638, 88 Stat. 2206 (codified as 25 U.S.C. § 450f(c) (1982)) which provides:

> (c) Procurement of liability insurance by tribe as prerequisite to exercise of contracting authority by Secretary: required policy provisions.
>
> The Secretary is authorized to require any tribe requesting that he enter into a contract pursuant to the provisions of this subchapter to obtain adequate liability insurance: Provided, however, that each such policy of insurance shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the tribe's sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance.

45. 25 C.F.R. § 271.45 (1986).

or implied, that will serve or empower the insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance.[46]

No federal court decisions have been found holding that sovereign immunity has been waived in tribal court. A number of cases that might have raised this issue were decided between 1968, when the ICRA was enacted, and 1978 when the Supreme Court in *Santa Clara Pueblo v. Martinez*[47] held that the Indian Civil Rights Act only waived sovereign immunity for habeas corpus suits.

In this ten-year period lower federal courts held the ICRA impliedly waived sovereign immunity of Indian tribes in federal courts and that injunctions and other remedies (besides habeas corpus) were available to complainants alleging violations of their rights under this Act.[48] These cases also held that before seeking relief in the federal courts, claimants had to exhaust their remedies in the tribal forums.[49] These suits were brought against tribes and tribal officials and might have raised the issues of sovereign immunity and official immunity in tribal courts; however, only one case has been found where these issues were explicitly addressed. In *O'Neal v. Cheyenne River Sioux Tribe*,[50] the tribal code

46. BIA General Contract Provisions, Pub. L. 93-638, Contract-Tribal Organization (PNW 4-7-80 art. III, § 321(e)).

For a thoughtful analysis of the meaning of this language and problems raised by it, *see Mitchell v. Confederated Salish and Kootenai Tribes of the Flathead Reservation. Tribal Memorandum of Opinion—Sovereign Immunity*, written by Evelyn Case Stevenson.

In Quam v. Thurber, (Zuni Tr. Ct., July 10, 1981), the court relied on tribal sovereign immunity to dismiss a suit against tribal police for alleged tortious misconduct. The tribe had obtained insurance to cover such misconduct under BIA regulations, but there was no waiver of sovereign immunity in the insurance policy. As a result, the insurer stood "in the shoes" of the tribe and thus was protected from suit by sovereign immunity. The author is advised that the Zuni insurance policies have since been changed to include a provision waiving the insurers' sovereign immunity to the extent of the policy limits. Interview with Michael Taylor, attorney for the Colville Tribe, (July 18, 1983).

47. 436 U.S. 49 (1978).

48. For a review of these cases, *see* Santa Clara Pueblo v. Martinez, *id. See also* COHEN, 1982, *supra* note 1, at 324-28, 669-69; Johnson & Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587 (1979).

49. *See* Howlett v. Salish & Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); O'Neal v. Cheyenne River Sioux, 482 F.2d 1140 (8th Cir. 1973); Jacobson v. Forest County Potawatomi Community, 389 F. Supp. 994 (E.D. Wis. 1974).

50. 482 F.2d 1140 (8th Cir. 1973). In most of the cases the issue was never presented to the tribal court, so the sovereign immunity issue would not have arisen in tribal court.

recognized sovereign immunity as a valid defense for the tribe. The plaintiff claimed that a tribal court suit would be useless because it would be barred by sovereign immunity. The court of appeals rejected this view on two grounds: (1) that the tribal code provision on sovereign immunity probably did not apply to this particular claim, and (2) even if it did, the plaintiff would not be unduly burdened by having to seek special permission from the tribal council to file suit.

In all but one of eighteen cases where sovereign immunity was an issue, the tribal courts applied the doctrine either as provided by the tribal code or as an interpretation of the common law. Only one tribal court decision rejected sovereign immunity as the controlling law of that jurisdiction.[51] Seven cases were from reservations where the tribal code expressly declared sovereign immunity applicable to the reservation.[52] Two involved tribes that had adopted sovereign immunity in personnel manuals.[53] One involved

---

See Howlett v. Salish & Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976); Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir. 1975); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); Johnson v. Lower Elwha, 484 F.2d 200 (9th Cir. 1973); Daly v. United States, 483 F.2d 700 (8th Cir. 1973); White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973); Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971).

The tribal sovereign immunity issue was not raised in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Mrs. Martinez was held to have exhausted her remedies at the tribal level through presentations to the council, which in the peublo served the role of an appellate judicial body as well as a legislative body.

51. O'Brien v. Fort Mojave Tribe, 11 Indian L. Rep. (Am. Indian Law. Training Program) 6001 (Ft. Moj. Tr. Ct. 1983). Plaintiff O'Brien brought suit against the tribe, and Chairperson Minerva Jenkins for back salary alleged due him because of wrongful dismissal as Director of Health for the tribe. Defendants both moved to dismiss on grounds of sovereign immunity. The motion was denied. After reviewing the early English and American history of the sovereign immunity, the court concluded the doctrine was not appropriate for the Fort Mojave Tribe, saying "the court rejects that adoption of sovereign immunity as an affirmative defense and holds that the full range of court authority be available to afford relief against tribal officials whose actions contravene the legal rights of plaintiff." 11 Indian L. Rep. at 6002.

52. Stone v. Somday, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6039 (Colv. Tr. Ct. 1983); Miller v. Adams, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6083 (Intertr. Ct. App. 1982); Cudmore v. Cheyenne River Sioux Tribal Council, 10 Indian L. Rep. (Am. Indian Law Training Program) 6004 (Ch. R. Sx. Tr. Ct. 1981); George v. Colville Tribes Business Council, CV 84-402, (Colv. Tr. Ct. 1984); Chapoose v. Uintah & Ouray Tribal Business Comm., Civ. No. 133-177 (Tribal App. Ct., Ute Indian Tribes of the Uintah & Ouray Reservation, Jan. 22, 1981), *opinion on reh.* Nov. 23, 1981; Burnette v. Rosebud Sioux Tribe, 1 Tribal Ct. Rptr. A-51 (Rosebud Sx. Tr. Ct. 1978)); Quam v. Thurber, (Zuni Tribal Ct., July 10, 1981).

53. Moses v. Joseph, 1 Tribal Ct. Rptr. A-51 (Sauk Seattle Tr. Ct. 1980)); Turtle Mt. Band of Chippewa Indians v. Parisien, 1 Tribal Ct. Rptr. A-95 (Turtle Mt. Ct. App. 1979)).

a waiver of sovereign immunity in an insurance policy.[54] Nine tribal courts applied sovereign immunity under common law principles without the aid of a tribal code provision.[55]

Most of the tribal courts[56] that rely on the common law apply the rule summarized by the United States Supreme Court in *Dugan v. Rank*,[57] permitting suits against government officials in two situations: "Those . . . are (1) actions by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void."[58]

Of the eighteen tribal court cases examined, seven held that official immunity barred the particular suit.[59] In all seven of these cases the courts found that the individual officials were acting within the scope of their constitutional and statutory authority when performing the acts in question and thus were protected by immunity.

In another nine cases the courts declined to bar suits for injunctions against tribal officials because the plaintiffs were able to show, at least for the purpose of motions to dismiss, that defendants had acted unconstitutionally, or in violation of the tribal code, or in violation of the ICRA.[60]

---

54. Mitchell v. Confederated Salish & Kootenai Tribes (Flathead Tr. Ct. Mar. 9, 1982).

55. Garman v. Fort Belknap Community Council, 11 Indian L. Rep. (Am. Indian Law. Training Program) 6017 (Ft. Blkp. Tr. Ct. 1984); O'Brien v. Fort Mojave Tribal Council, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6001 (Ft. Moj. Tr. Ct. 1983); Satiacum v. Sterud, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6013 (Puy. Tr. Ct. 1982); Holy Rock v. Tribal Election Bd., 10 Indian L. Rep. (Am. Indian Law. Training Program) 6009 (Og. Sx. Tr. Ct. 1982); Grant v. Grievance Comm. of Sac & Fox, 1 Tribal Ct. Rptr. A-39 (1981); Kiowa Business Comm. v. Ware, 1 Tribal Ct. Rptr. A-45 (1980); Halona v. Macdonald, 1 Tribal Ct. Rptr. A-70 (1978); Flett v. Spokane Tribe of Indians, No. 83-071-CV (Spokane Tribal Ct., June 15, 1983); Mitchell v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, (Flathead Tri. Ct., Mar. 9, 1982).

56. *See, e.g.*, Burnette v. Rosebud Sioux Tribe, 1 Tribal Ct. Rptr. A-51 (1978).

57. 372 U.S. 609 (1963).

58. *Id.* at 621-22.

59. Garman v. Fort Belknap Community Council, 11 Indian L. Rep. (Am. Indian Law. Training Program) 6017 (Ft. Blkp. Tr. Ct. 1984); Stone v. Somday, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6039 (Colv. Tr. Ct. 1983); Satiacum v. Sterud, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6013 (Puy. Tr. Ct. 1982); George v. Colville Tribes Business Council, CV 84-402 (Colv. Tr. Ct., May 9, 1984); Flett v. Spokane Tribe, No. 83-071-CV (Spokane Tr. Ct., June 15, 1983); Quam v. Thurber, (Zuni Tr. Ct., July 10, 1982); Grant v. Grievance Comm. of Sac & Fox, 2 Tribal Ct. Rptr. A-39 (1981).

60. Miller v. Adams, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6034 (Intertr. App. Ct. 1982); Cudmore v. Cheyenne River Sioux Tribal Council, 10 Indian

While several tribal court decisions have simply relied on the brief rule stated in *Dugan v. Rank*,[61] a few have articulated a somewhat more comprehensive test of the exceptions for suits against officials. In *Moses v. Joseph*,[62] the court said:

> [S]o long as the tribal officer was acting in good faith his actions are immune from suit. However [in spite of good faith] two exceptions to the doctrine . . . will be recognized by the court.
>
> One is when an officer's power has been limited by statute and his actions were beyond the statutory limits. . . . The other instance . . . is when he acts unconstitutionally or pursuant to an unconstitutional grant of power. To incur liability for such a constitutional tort the act must be one which a tribal officer of average intelligence and knowledge would understand violates the . . . Tribal constitution.

This test was approved in *Satiacum v. Sterud*[63] and *Flett v. Spokane Tribe*,[64] although the court in *Satiacum* articulated the rule somewhat differently:

> First, the tribe's immunity to suit shall extend only to persons acting in their official capacity at the time the act . . . occurred. Second, the officer must have acted in good faith to enjoy the immunity. Third, an official shall be liable for acts that a reasonable person would know were in excess of his or her lawful authority.[65]

L. Rep. (Am. Indian Law. Training Program) 6004 (Ch. R. Sx. Tr. Ct. 1981); Moses v. Joseph, 2 Tribal Ct. Rptr. A-51 (1980); Kiowa Business Comm. v. Ware, 1 Tribal Ct. Rptr. A-45 (1980); Turtle Mt. Band of Chippewa Indians v. Parisien, 1 Tribal Ct. Rptr. A-95 (1979); Halona v. Macdonald, 1 Tribal Ct. Rptr. A-70 (1978); Burnette v. Rosebud Sioux Tribe, 1 Tribal Ct. Rptr. A-51 (1978); Mitchell v. Confederated Salish & Kootenai Tribes, (Flathead Tri. Ct., Mar. 9, 1982); Chapoose v. Uintah & Ouray Tribal Business Comm., Civ. No. 133-77 (App. Ct. of Uintah & Ouray Reservation, Jan. 22, 1981), opinion on reh. Nov. 23, 1981.

61. See *supra* note 50.

62. 2 Tribal Ct. Rptr. A-51 (1980).

63. 10 Indian L. Rep. (Am. Indian Law. Training Program) 6013 (Puy. Tr. Ct. 1982).

64. No. 83-071-CV (Spokane Tr. Ct., June 15, 1983).

65. 10 Indian L. Rep. (Am. Indian Law. Training Program) 6013, 6016 (Puy. Tr. Ct. 1982). Injunctive relief against unconstitutional action or action in excess of lawful authority is generally available wholly aside from good faith. There is no reason to allow government action to go forward when it is illegal or unconstitutional, even though in good faith. Recent cases permitting suits for damages against officials committing "constitutional torts" have allowed the defense of good faith when the official can show that

Presumably the officials would be individually liable for damages if their actions were not protected by official immunity. In *Satiacum* the plaintiff requested only an injunction; however, in *Moses* the plaintiff asked for reinstatement of his job and pecuniary relief. In *Quam v. Thurber*,[66] the court, relying on the tribal code, which prohibited suits against the tribe, barred a suit against police officers as individuals because they were acting within the scope of their official capacities and their actions were considered those of the tribe (the sovereign). Presumably, if the court had found the police to be acting outside their "official capacity," they could have been individually liable for damages.

Tribal courts have generally chosen to follow the federal court decisions, including those allowing suits against officials for acts that are unconstitutional or outside the scope of their official authority. Only one court, on the Fort Mojave Reservation, appears to have totally rejected sovereign immunity as the controlling doctrine. (This view must be deemed tentative as it is based on only one case.)

Sovereign Immunity in the Non-Indian Setting

Tribal courts are not bound by federal or state common law on sovereign immunity, nor by federal or state statutes waiving or changing the doctrine in federal or state courts. Tribal courts have nonetheless tended to rely on federal cases and to a lesser extent on state cases and on standard non-Indian treatises and articles for ideas, wisdom, and authority. Because of the complexity of the subject and the often limited library facilities available to tribal courts, the history, development, and current status of the doctrine in federal law and in selected states is summarized below.

A distinction should be made at the outset between governmental or sovereign immunity, Indian or non-Indian, and immunity of government officials. The former refers to the immunity of the government itself from judgment, and the latter refers to the immunity of government officials from suit. The two concepts are closely interrelated but different.

---

he did not know, and could not reasonably have known, that his actions would violate the plaintiff's constitutional rights. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982), and discussion of constitutional torts later in this article.

66. (Zuni Tr. Ct., July 10, 1982).

Historical Development of the Doctrine

The rule that the United States or a state cannot be sued without its consent developed slowly in the nineteenth century as a tacit assumption rather than a reasoned doctrine.[67] The first mention of the doctrine by the United States Supreme Court was in dictum in 1834.[68] Chief Justice Marshall noted that "[a]s the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it."[69] In 1846, Marshall's dictum became doctrine when the Supreme Court held that a federal circuit court had no jurisdiction to hear an equity action against the United States: "government is not liable to be sued, except with its own consent, given by law."[70]

Five rationales have been proposed as the basis for the doctrine of sovereign immunity. Justice Holmes created the most widely known rationale in *Kawananakoa v. Polyblank*,[71] where he stated that the doctrine rested "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[72]

Second, it has been argued that the doctrine derives from the traditional immunity of the English sovereign: the idea that the King can do no wrong.[73]

Third, some legal authorities have argued that the doctrine of separation of powers is the basis of sovereign immunity. Thus

67. The adoption of the doctrine by the states was also more tacit than express. One of the earliest state decisions adopting the doctrine was Black v. Republic, 1 Yeates 139 (Pa. 1792). During the Revolutionary War, officers of the Pennsylvania state navy had seized some provisions from the plaintiff's decedent to keep them from falling into the hands of the advancing British; the plaintiff sought to recover from the commonwealth the value of these provisions. The court asserted that it had no jurisdiction to hear the case unless Pennsylvania had consented to be sued. No clear rationale for this rule was announced.

68. United States v. Clarke, 33 U.S. (8 Pet.) 436 (1834).

69. *Id.* at 443.

70. United States v. McLemore, 45 U.S. (4 How.) 286, 288 (1846).

71. 205 U.S. 349 (1907).

72. *Id.* at 353. Holmes's argument has been criticized as too formalistic; his "logical" ground ignores that the government can and does make itself responsible for some of its actions. *See* Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955*, 1966 U. ILL. L.F. 795, 799 (1966).

73. *See*, A. HAMILTON, THE FEDERALIST 541, 548 (J. Cooke ed. 1961). For a detailed account of remedies against the Crown, *see* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

the courts, as one branch of government, cannot enforce judgments against another branch of government without the latter's consent.[74]

A fourth rationale, which is now widely regarded as the most respectable by courts and commentators, is that official actions of the government must be protected from undue judicial interference.[75]

Finally, a rationale especially relevant to smaller governments is that the doctrine prevents burdensome financial losses that could seriously impair or destroy governmental operations. This rationale is especially relevant for tribes because tribal governments are weaker financially and have poorer revenue-raising capacity than most non-Indian governments.[76]

Common Law Doctrines: Suits Against Federal Officials for Nonmonetary Relief

Sovereign immunity protects the government from suit without its consent. Under the early common law, public officers were not protected by the government's immunity and were "answerable as ordinary citizens for wrongs committed in the exercise of their official functions, just as a private agent is liable for a wrong done by him on behalf of or at the command of his principal."[77] The officer could claim he acted under legal authority, and the court had to decide that issue to determine personal liability. If it found that the officer acted ultra vires, beyond his official authority, then he could be held personally liable.

Federal courts still hold that sovereign immunity does not prevent suits against state or federal officers who act either beyond their official authority or in violation of the Constitution. The

74. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 478 (1793).

75. *See, e.g.*, Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81 (1968). Reynolds gives three reasons for governmental immunity for discretionary acts. First, the doctrine of separation of powers requires that some official acts be free from judicial oversight. Reynolds notes also that the possibility of suit for every official decision would create an atmosphere of fear and impair efficient governmental functioning. Second, Reynolds argues that courts are poorly equipped to second-guess most executive or legislative policy decisions. Third, he suggests that broad governmental liability in tort would create an unmanageable financial burden. *Id.* at 121-23.

76. "The principle of immunity from suit . . . is of tremendous importance to Indian tribes" because of their limited resources, dependency on the federal government, and modest taxing powers. *See* Ziontz, *supra* note 1, at 34.

77. B. SCHWARTZ, *supra* note 1, at 558.

landmark case for this principle is *Ex parte Young*,[78] where the Supreme Court, after first holding unconstitutional a Minnesota statute providing for common-carrier rate fixing, went on to hold that the state attorney general could be enjoined from enforcing the unconstitutional statute.[79] The Court reasoned that the attorney general's enforcement of an unconstitutional law was without state authority and did not involve the state in its sovereign or governmental capacity. This type of suit became known as the "officer's suit."[80] *Edelman v. Jordan*[81] limited the *Young* doctrine by ruling that courts would enjoin *future* unconstitutional conduct, but would refuse to award damages for *past* conduct by state officials. The recent case of *Pennhurst State School & Hospital v. Halderman*[82] modifies the rule of *Ex parte Young* even further. *Pennhurst* was a suit alleging that state officials were violating state law by maintaining poor conditions in an institution for the mentally retarded and that such violations infringed on due process and other rights protected by the fourteenth amendment. The court declined to issue an injunction, however, stating that to do

78. 209 U.S. 123 (1908).

79. Although *Young, id.*, was concerned with the extent of a state officer's immunity from suit, the reasoning has applied equally to suits against federal officers. As noted by Jaffe: "no distinction has ever been explicitly recognized in the cases between suits against state and against federal officers, since rationalization has proceeded in terms of an abstract sovereign equally applicable to both types of case." L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 216-17 (1965).

80. From the beginning, the rationale of *Young* was recognized as a legal fiction by which a suit purporting to be a personal action against a government officer was in fact a suit against the government. By means of the fiction courts were able to exert some power of review over administrative actions, a review that would be prohibited by a literal application of the doctrine of sovereign immunity.

The fictional basis for the officer's suit led to conceptual difficulties. In the first place, while a court could obtain jurisdiction by treating an officer's suit as one against a private person, in finding the officer's acts unconstitutional a court would in most cases treat the acts of the officer as "state action." Second, the fiction led courts to refuse to award specific performance of a state obligation. As the court explained in *In re* Ayers, 123 U.S. 443 (1887), if the defendant officer is stripped of his state authority when he offends the Constitution, he cannot be sued for specific performance of the state's obligation. Finally, the pursuit of rationality is strained by a fiction that forces judges to treat things as other than they are. A conscientious judge who is unfamiliar with the vagaries of the historical fiction will look at the reality and find that in fact the suit against the officer involves the state. Thus, the memory of the fiction's original purpose, circumvention of the immunity doctrine, has faded over time.

81. 415 U.S. 651 (1974).

82. 464 U.S. 89 (1984).

so would require the federal court to determine whether state officials were complying with state law, which is prohibited under the eleventh amendment.[83]

Before 1976 it was generally held that suits for affirmative relief against the United States and against federal officials were prohibited, although the earliest case in this area seemed to uphold the right of plaintiffs to affirmative relief. In *United States v. Lee*,[84] the court found that plaintiff Lee was the rightful owner of land which had been taken over by the United States as a result of an invalid tax sale. The court declined to allow the defense of sovereign immunity in an ejectment suit because its use would result in a taking of the plaintiff's property in violation of the fifth amendment and would be unconstitutional. However, the court ruled differently in *Larson v. Domestic & Foreign Commerce Corp.*,[85] a case where the government allegedly took private property. Holding that sovereign immunity barred the suit, the Court said "if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency."[86] But sovereign immunity would not bar a suit against a federal official where he acted beyond his constitutional authority. The Court noted that when the federal official acted beyond his statutory or constitutional

83. The court also noted that the relief sought would have an impact directly on the state itself. *See* 3 K. DAVIS, ADMINISTRATIVE LAW § 26.01 (1958).

Acts that have been declared ministerial include the preparation of ballots, registration of voters, recording and filing of documents, care of prisoners, driving vehicles, repair of highways, collection of taxes, and dipping of sheep. *See* W. PROSSER, Torts 990 (1971).

The immunity of legislators, or judges exercising "legislative" functions, has been held to prohibit suits for injunctions as well as damages. Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980). Prosecutors, on the other hand, are enjoined regularly under *Ex parte* Young, 209 U.S. 123 (1908).

The duties of police officers are generally regarded as ministerial so that they are personally liable when they step outside their authority. However, police are not liable for the execution of an invalid search or arrest warrant if the invalidity is not facially apparent. Police are also entitled to use reasonable force in the execution of searches and arrests. Most suits for police misconduct are filed under the civil action provisions of 42 U.S.C. § 1983 (1982).

84. 106 U.S. 196 (1882).

85. 337 U.S. 682 (1949). *See also* Dugan v. Rank, 372 U.S. 609 (1963). These cases are analyzed in SCHWARTZ, *supra* note 1, at 576-82.

86. 337 U.S. at 695.

authority, a suit against a federal official may be dismissed as a suit against the sovereign "if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property."[87] *Larson* was heavily criticized.[88] In 1976, Congress enacted a statute reestablishing and filling out the doctrine of *United States v. Lee*.[89] This statute, an amendment to section 702 of the Administrative Procedures Act, waives sovereign immunity when a federal agency is sued for nonmonetary relief.[90] When a particular suit does not fall within the purview of section 702, *Larson* is controlling.

Suits Against Federal Officials for Monetary Damages: Official Immunity

The question of whether to impose liability for tort damages on public officers raises somewhat different policy issues than those arising in suits against officers for nonmonetary relief such as mandamus, injunction, or specific performance. Suits against public officers for tort damages are not considered a threat to the public treasury since the officer alone traditionally bears liability once immunity is found to be inapplicable. But such suits can impede the "fearless administration of the law"[91] by causing public officers to be concerned more for their personal liability than for the performance of public duties. This concern has caused the courts to create the "discretionary-ministerial distinction."

The general rule is that public officers are not liable for civil damages for "discretionary" acts, with certain exceptions. The earliest cases recognized the need for discretionary freedom for judges. Judges had to be free to decide cases under the law and their conscience, or the judicial system would become ineffective.[92] Courts gradually extended the immunity enjoyed by judges to administrative officers exercising judicial functions.[93] In *Barr v. Mat-*

87. *Id.* at 691 n.11 (officials were attempting in good faith to carry out their official duties).

88. *See* SCHWARTZ, *supra* note 1, at 580.

89. Administrative Procedures Act, § 10, 5 U.S.C. § 702 (1977). See *infra* notes 134-136 and accompanying text.

90. Administrative Procedures Act, § 10.

91. *See, e.g.*, Booth v. Fletcher, 101 F.2d 676, 680 (D.C. Cir. 1938), *cert. denied*, 307 U.S. 628 (1939).

92. Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871).

93. Butz v. Economou, 438 U.S. 478 (1978).

teo,[94] this immunity was extended even further to include all government officers exercising discretionary functions. As long as the federal official acts "within the outer perimeter" of his duties, he has absolute immunity, even though he acts maliciously. Furthermore, the immunity is not limited to high-level officers but extends far down into the administrative hierarchy.

Discretionary acts are those requiring personal deliberation, decision, and judgment, as opposed to merely "ministerial" acts involving obedience to orders or the performance of a duty where the officer is left no choice of his own. In providing immunity for discretionary acts of public officers, the "discretionary-ministerial" distinction promotes the "fearless administration" of discretionary duties. This principle is especially important for judges, legislators, and prosecutors. It has been applied to other public officers on a case-by-case basis.[95]

The rule concerning ultra vires acts complicates the "discretionary function" exception. The exception does not apply when the officer acted outside of his jurisdiction or outside his official authority. The officer is then regarded as not acting as a public officer, although his conduct may be "discretionary." Confusion can occur at the margin of this sub-exception; however, modern courts generally will find an official act to be in excess of jurisdiction only where there is clearly no jurisdiction or authority over the subject matter.[96]

If a public officer is acting with proper authority and the acts are "discretionary," the Court in *Barr v. Matteo* held there is no liability even though the officer acts willfully or maliciously.[97] Despite the apparently unjust result as between a malicious officer and an innocent plaintiff, courts generally uphold the immunity of the malicious officer. The justification offered for the rule is the ease of alleging malice by plaintiffs wishing to circumvent the immunity of the discretionary acts of officers. If officials were forced to litigate whenever a general allegation of malice is made, the purpose of discretionary immunity would be thwarted; "the burden of a trial and . . . the inevitable danger of its out-

94. 360 U.S. 564 (1959).

95. Officers to whom courts have extended immunity include the U.S. Attorney General, parole board members, wardens of prisons, FBI agents, building inspectors, health officers, and city mayors.

96. *See* DAVIS, *supra* note 1, § 26.05 at 533.

97. 360 U.S. 564 (1959).

come . . . would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."[98]

Constitutional Torts

The advent of "constitutional torts" in 1971 substantially reduced the scope of the immunity defense in suits against public officers. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[99] the Supreme Court awarded damages against narcotics agents for making a warrantless search of an apartment without probable cause in violation of the fourth amendment. Eight years later, in *Davis v. Passman*,[100] the Supreme Court extended the *Bivens* "constitutional tort" doctrine to *all* constitutional rights. Constitutional torts may include such actions as simple battery, improper arrest, illegal detention, abusive treatment of prisoners, and seizure of property to satisfy a pretended tax lien. Put simply, public officials who violate constitutional rights might be personally liable to the injured person for damages.[101]

Under *Butz v. Economou*,[102] most public officers who commit constitutional torts receive only qualified immunity rather than the absolute immunity available for nonconstitutional torts under *Barr v. Matteo*.[103] They are protected only where they act in good faith, that is, where they did not know or could not reasonably have known their actions would violate the plaintiff's constitutional rights.[104] *Butz* opened the door to some of the liability foreclosed by *Barr* because tortious official conduct can often be framed in constitutional terms. Even where the immunity is lost through lack of good faith, the plaintiff must still prove damages.[105]

98. Judge L. Hand in Gregoire v. Biddle, 177 F.2d 579, 580-81 (2d Cir. 1949).

99. 403 U.S. 388 (1971).

100. 442 U.S. 228 (1979).

101. For other examples of constitutional torts, *see* B. SCHWARTZ, *supra* note 1, at 563, and K. DAVIS, *supra* note 1, at 170.

102. 438 U.S. 478 (1978).

103. 360 U.S. 564 (1959).

104. Harlow v. Fitzgerald, 457 US. 800, 818-19 (1982). In *Harlow*, the Supreme Court modified the good faith standard of the qualified immunity defense, as enunciated in *Butz*, by eliminating its subjective element. *Harlow* defined "the limits of qualified immunity essentially in objective terms." The Court held "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

105. Carey v. Piphus, 435 U.S. 427 (1978).

Inverse Condemnation

Notwithstanding a prevailing rule of immunity, governmental liability may be allowed in the action of "inverse condemnation." This action is available only where a property interest has been taken or injured and is derived from the constitutional prohibition against a taking of private property without payment of just compensation. It is not applicable to bodily injuries. When the government has taken private property in order to advance the public welfare but has not initiated a formal eminent domain action to condemn the property, the private owner is entitled to sue to compel the government to pay the just compensation which would have been required in the eminent domain action.

The just compensation clause of the fifth amendment to the United States Constitution prohibits governmental taking of private property without just compensation. This amendment is applicable to the states by the fourteenth amendment. Nearly all of the states have similar constitutional provisions. Many states have expressly expanded their constitutional language to ban not only the taking of but also the damaging of private property.[106]

The Indian Civil Rights Act also contains a just compensation clause, which is binding on all Indian tribes.[107] In addition, many tribal constitutions contain just compensation clauses. In tribal courts either of these provisions could serve as a basis for rejecting sovereign immunity as a defense in suits against tribal governments for the taking or damaging of private property.

Statutory Developments

It is clear that the doctrine of sovereign immunity has undergone a marked decline over the past century. Not only have the courts made major common law inroads into the doctrine, for example, through "officers' suits," but Congress and the state legislatures have consistently reduced its scope and importance. The reasons for this decline include a growing suspicion that the doctrine is rooted more in the principle of stare decisis than in logic or experience, and the conviction that it is unfair that the burden of loss should fall on those persons injured by tortious acts or omissions of public servants. Often the doctrine is first limited or rejected judicially, then legislation is later enacted to deal with the issue more comprehensively.

106. This discussion of inverse condemnation is based on S. SATO AND A. VAN ALSTYNE, STATE AND LOCAL GOVERNMENT LAW 772-73 (1977).

107. Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1982).

Tucker Act

In 1855, Congress created the Court of Claims to hear claims against the United States arising from contract or based on any law or regulation.[108] As amended in 1887,[109] the Tucker Act gives the Court of Claims power to issue final judgments against the United States that are not subject to the approval or disapproval of Congress.

The key provision of the Act states:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution or any Act of Congress, or any regulation of an executive department or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.[110]

After the Tucker Act, there was a gradual but persistent congressional repudiation of the United States' immunity from suit. While the establishment of the Court of Claims had made the United States suable in contract to substantially the same extent as a private person, attempts to provide similar rights to tort claimants failed. Congress did enact a long series of statutes which, in hodge-podge fashion, permitted limited tort relief for specific types of claims. The number of private relief bills also increased, especially with the advent of the automobile, until by 1940 about 2,300 private claims were being brought before the House of Representatives every congressional term.[111] One of the primary purposes of the Federal Tort Claims Act of 1946 was to relieve Congress of the heavy burden of considering these private bills.[112]

Federal Tort Claims Act

The key provision of the Federal Tort Claims Act was enacted in 1946.[113] It provides:

> The United States shall be liable, respecting the provisions of

108. Court of Claims Act, ch. 122, 10 Stat. 612 (1855).

109. Act of Mar. 3, 1887, 28 U.S.C. §§ 1346(a)-1491 (1982).

110. 28 U.S.C. § 1491, 28 U.S.C. § 1346(a) (1982). The federal district courts have concurrent jurisdiction with the Court of Claims up to the amount of $10,000.

111. 86 CONG. REC. 12018 (1940) (statement of Rep. Celler).

112. Codification has distributed the statute rather widely. The Act is 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2402, 2441, 2412, 2671-2678, 2680 (1982).

113. *Id.*

this title relating to tort claims, in the same manner and to the same extent as a private individual under the same circumstances, but shall not be liable for interest prior to judgment or for punitive damages.[114]

[Jurisdiction is conferred on the federal district courts for claims] for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[115]

The Act contains thirteen exceptions to governmental liability; two are of major importance. The first one is the so-called "intentional" torts exception. It excepts the government from liability for claims arising out of libel, slander, misrepresentation, deceit, or interference with contract rights. In addition, any claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process are barred unless these torts were committed by investigative or law enforcement officers of the United States government.[116]

The remaining exception to liability is both the most important and the most problematic. This is the "discretionary function" exception, which includes

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government whether or not the discretion be abused.[117]

The first part of this exception is fairly straightforward and has caused little litigation. It precludes actions against the government when federal employees carry out the directions of a statute or regulation and act with due care. The purpose of this language is to preclude testing the validity of a statute or regulation for

114. 28 U.S.C. § 2674 (1982).
115. *Id.* § 1346.
116. *Id.* § 2680(h).
117. *Id.* § 2680(a).

acts or omissions of governmental employees who are negligent or otherwise wrongful.

The second part of the exception—the "discretionary function" provision—has spawned a great deal of litigation and commentary. It preserves governmental immunity when governmental employees perform or fail to perform any "discretionary function or duty," regardless of whether they abuse their discretion or are in some way at "fault." The root of the interpretation problem is the difficulty in defining "discretionary" acts. Courts and commentators have labored to find a meaning for "discretionary" other than the usual dictionary definitions. Judicial interpretations of the scope of the discretionary exception are extremely diverse and inconsistent.[118]

118. The Supreme Court itself can be seen as responsible in part for the confusion, based on two early decisions interpreting the Tort Claim Act. In Dalehite v. United States, 346 U.S. 15 (1953) and Indian Towing Co. v. United States, 350 U.S. 61 (1955), the Court adopted two different, and possibly inconsistent, interpretations of the meaning of "discretionary." The *Dalehite* case arose out of the Texas City disaster of 1947, in which fires and explosions erupted after the federal government had loaded ships with a fertilizer containing combustible ammonium nitrate. Negligence on the part of the government was alleged in adopting the plan to export the fertilizer, in controlling its manufacture, in handling and shipment, and in failing to police the loading and fight the fire. The *Dalehite* majority held for the government on all counts, giving a broad scope to the discretionary exception of the Act. While deciding to define precisely where discretion ends, the Court held that it includes more than the initiation of governmental programs, including also "determinations made by executives or administrators in establishing plans, specifications or schedules of operation." 346 U.S. at 35.

If the *Dalehite* test for discretionary acts is the oft-quoted statement that "[W]here there is room for policy judgment and decision there is discretion" (*id.* at 36), the scope of the exception would seem broad enough to include the action of a negligent mail-truck driver in deciding to turn left in front of traffic as a discretionary act. However, the majority also made use, somewhat vaguely, of what has since come to be known as the "planning-operational" distinction. Interpreting the discretionary exception in the light of this distinction is more helpful than merely treating every "judgment" as "discretion." Decisions made in the planning stages of governmental action may be more likely to involve policy decisions of which judicial review would be inappropriate. While it is clear that not every "planning" act involves important governmental policy decisions, the planning-operational distinction is at least a start toward an interpretation of the discretionary exception.

Indian Towing suggests a much narrower scope for governmental immunity under the Tort Claims Act. The case involved a claim for the loss of a cargo that occurred when a tug ran aground. The loss was allegedly caused because of the negligence of the Coast Guard in the inspection and repair of an unwatched lighthouse and in failing to give warning that the light was not operating. The Court held the government was liable, stating that although the Coast Guard was not obligated to operate a lighthouse, once it exercised its discretion to do so, it was under a duty to use due care in its operation. This approach

One leading commentator in the field describes the scope of the discretionary exception as follows:

> Government may possess discretionary authority to perform or not to perform certain functions; but that should not immunize it from liability where the functions are performed negligently in circumstances where a private person could be liable. The difference is that between planning and operation: the discretionary function exception is limited to the policy or planning level [the decision whether or not to maintain lighthouse service] and does not apply to the operational level [the failure to keep the light in good working order].[119]

Civil Suits under 42 U.S.C. § 1983

42 U.S.C. § 1983 gives individuals cause of action for damages and injunctive relief against state officials who violate the individuals' constitutional rights under color of state law.[120] Enacted in 1871, section 1983 lay dormant for ninety years until in 1961 the Supreme Court gave it new life in *Monroe v. Pape*.[121] Since *Monroe*, the number of actions under section 1983 has multiplied

---

has been characterized as analogous to the "good samaritan" rule in torts. If applied strictly to the governmental immunity issue, the approach treats as "planning" or "discretionary" only the initial decision by the government to proceed with a course of action. Thereafter, the government is liable to the same extent as any citizen. If so applied, this rule may be too liberal in allowing suit against the government because presumably important policy decisions may be involved subsequent to the initial decision to proceed.

Thus, while the *Dalehite* approach treats as discretionary all but the most menial act, the *Indian Towing* approach treats as operational all but the originating decision to proceed with the course of conduct. It has been suggested that lower court interpretations of the scope of the discretionary exception can be analyzed as adopting one or the other of these approaches. *See* Reynolds, *supra* note 75, at 103.

119. B. SCHWARTZ, *supra* note 1, at 571.

120. 42 U.S.C. § 1983 (1982) provides:

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

121. 365 U.S. 167 (1961). Prior to *Monroe*, courts had refused to allow section 1983 suits when the alleged violation was prohibited by the state as well as the federal Constitution. In such cases, the plaintiff was required to exhaust state judicial remedies. The *Monroe* Court held that "[t]he fact that Illinois . . . outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court." *Id.* at 183. The Court also held that a specific intent to deprive a person of a federal right need not be shown. *Id.* at 187.

every year. In 1983, 38,162 suits were filed.[122] The section is now the principal statutory basis for police misconduct actions, including the following actionable conduct: false arrest, false imprisonment, illegal search and seizure, the use of excessive force, coercion, and illegal interrogation.[123] Section 1983 is also a basis for civil rights suits in other than police misconduct cases, such as claims associated with voting, jobs, accommodations, and welfare benefits.[124]

Local governments are "persons" for section 1983 purposes,[125] but states as such are absolutely immune.[126] Both the individual offender and the responsible local government may be held liable under section 1983. State legislators, prosecutors, and judges have absolute immunity from damage liability for acts taken while performing their respective functions;[127] however, judges are liable for attorney fees in actions to enforce section 1983.[128] All other government employees are protected by the affirmative defense of qualified immunity.[129] The responsible governmental entity, however, is not protected by the employee's qualified immunity defense.[130] Nevertheless, local governments are not liable for punitive damages.[131] Many issues remain unresolved concerning the scope and meaning of section 1983.[132]

Suits for Judicial Review of Federal Agency Actions

Section 10 of the Administrative Procedures Act gives individuals

122. *See* K. DAVIS, *supra* note 1, at 168.

123. *See* Littlejohn, *Civil Liability and the Police Officer: the Need for New Deterrents to Police Misconduct*, 58 U. DET. J. URB. L. 365, 412-13 (1981).

124. For a table showing the number of all civil rights actions filed in federal courts each year from 1969 through 1978, see Littlejohn, *supra* note 123, at 370-71.

125. Monell v. Department of Social Servs., 436 U.S. 658 (1978), overruling the holding in *Monroe* that only the individual who committed the violation was liable.

126. Quern v. Jordan, 440 U.S. 332, 342 (1979).

127. Civil Rights Attorneys Fees Act, 42 U.S.C. § 1988; Pulliam v. Allen, 466 U.S. 522 (1984).

128. Pulliam v. Allen, 466 U.S. 522 (1984).

129. *See, e.g.*, Procunier v. Nararette, 434 U.S. 555, 561 (1978) (prison officials).

130. Owen v. City of Independence, 445 U.S. 622, 650 (1980).

131. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981).

132. Particularly difficult is the question of whether negligence is actionable under seciton 1983. Courts have been apprehensive about allowing negligence as a basis for section 1983 liability would result in that section engulfing state tort law concerning government employees as defendants. The U.S. Supreme Court recently held that negligence may be actionable under section 1983 if an adequate remedy is not available to plaintiff under state law. Parratt v. Taylor, 451 U.S. 527 (1981). *See* DAVIS, *supra* note 1, at 164.

a right to judicial review of federal agency actions.[133] Under a 1976 amendment, the defense of sovereign immunity ordinarily cannot be raised in these suits.[134] Some authority exists for arguing that the 1976 amendments did not (and should not) totally abolish the sovereign immunity defense in this context.[135] It remains a difficult issue as to whether and to what extent this defense is available in judicial review of federal agency action under the Administrative Procedures Act.[136]

Of course it is exceptional, in any event, to find cases overruling agency actions in view of the judicial presumption favoring their validity. Agency actions will not generally be overturned by the courts unless they are arbitrary, capricious, an abuse of discretion, or in violation of some law or regulation.

State Statutory Waivers

Not surprisingly, the states are exceedingly diverse in their treat-

133. § 10(a), 5 U.S.C. § 702 (1982), states: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Although this section creates a cause of action for persons harmed by federal agency action, the section is not a jurisdictional grant. Instead, jurisdiction for actions under the APA is based on jurisdictional statutes in the Judicial Code, 28 U.S.C. §§ 1330-1363. Most nonstatutory review actions fall within the jurisdictional ambit of the federal question (28 U.S.C. § 1331 (1982)), or mandamus statutes, 28 U.S.C. § 1361.

134. 5 U.S.C. § 702 provides in part:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, that any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.

As Professor Davis says:

> The meaning of the 1976 legislation is entirely clear on its face, and that meaning is fully corroborated by the legislative history. That meaning is very simple: Sovereign immunity in suits for relief other than money damages is no longer a defense. The United States is liable in such suits as if it were a private party.

K. DAVIS, *supra* note 1, at 192.

135. *See* Comment, *Sovereign Immunity: A Modern Rationale in Light of the 1976 Amendments to the Administrative Procedure Act*, 1981 DUKE L.J. 116.

136. Traditional administrative law principles accommodate cases involving important governmental functions by disallowing judicial review of actions which are committed to agency discretion. Arguably, the large and growing body of cases interpreting agency discretion is a substitute for the sovereign immunity doctrine in administrative law.

ment of sovereign immunity. Some states retain a full-strength doctrine of governmental immunity, while others have tried to make the state fully liable in tort. This article does not attempt to survey the laws of all fifty states. Of existing surveys, the most current appears to be that published in the *Restatement (Second) of Torts*,[137] as updated by Professors Sato and Van Alstyne in their 1977 casebook on state and local government law.[138] That survey shows that twenty-six states have abolished sovereign immunity, subject to "normal exceptions";[139] eight states have partially abolished the doctrine;[140] six states deem immunity waived when the public entity is insured;[141] and ten states retain the doctrine entirely.[142] These figures are now unreliable, however, both because they are out of date and because of the difficulty in classifying the nature and extent of any given state's sovereign immunity doctrine. It is clear, however, that the doctrine of sovereign immunity in the states has undergone a marked decline in the last twenty years.

The status of sovereign immunity in four states, California, Montana, New York, and Washington, illustrates the transitions in the doctrine's application and the aspects of the doctrine which were retained as necessary for effective government. New York and California were selected because they are widely considered as two of the leading states in legislative reform and judicial innovation. Montana is included because it went farther than any other state in attempting to abolish sovereign immunity, and then reversed its position at the next legislative session by reestablishing aspects of the doctrine. The Washington legislature also went far toward eliminating sovereign immunity in the tort area, but the

137. RESTATEMENT (SECOND) OF TORTS § 895(A) (Tent. Draft No. 19, 1973).

138. S. SATO & VAN ALSTYNE, *supra* note 106.

139. Alabama, Alaska, Arizona, California, Colorado, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Montana, Nebraska, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, Washington, Wisconsin, and the District of Columbia. "Normal exceptions" presumably include immunity for judges, legislators, police, and fire departments. The authors have added Montana to the list of states, since Montana abolished sovereign immunity by constitutional amendment in 1972. Also added in Virginia, which enacted a state tort claims act in 1982.

140. Connecticut, Kentucky, Michigan, Minnesota, Tennessee, North Carolina, South Carolina, and Texas.

141. Georgia, Maine, New Hampshire, New Mexico, North Dakota, and Oklahoma.

142. Arkansas, Delaware, Florida, Maryland, Massachusetts, Mississippi, Missouri, Ohio, South Dakota, and Wyoming.

Washington Supreme Court judicially defined the legislation to retain aspects of the doctrine, fearing as did the Montana legislature that total elimination of the doctrine was unwise.

California. In California the tort liability of public agencies and employees is wholly governed by statute.[143] The impetus for this legislation was a 1961 California Supreme Court decision[144] that eliminated governmental immunity by making it clear that no level of government in the state could rely on the "governmental" nature of its functions as a defense to tort liability.[145] The legislature responded by enacting a two-year moratorium on litigation of tort claims, pending a comprehensive study of the issue. The study culminated in the Tort Claims Act of 1963.[146]

The 1963 Act identified several governmental immunities that would continue. The most important immunity is for "discretionary" functions of government officials.[147] Also immune were adopting or failing to adopt a law, enforcing or failing to enforce a law,[148] and prosecutorial activities,[149] police activities, fire protection, public health activities, and property inspection.[150]

Montana. Montana is unique in its approach to the problem of governmental immunity in that the 1972 constitution completely abolished the defense: "The state, counties, cities, towns, and all

143. *See* CAL. GOV'T CODE §§ 810-996.6 (West 1977); CAL. GOV'T CODE § 815 (West 1977); CAL. GOV'T CODE §§ 815(b), 815.2 (West 1977).

144. Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

145. In concluding that "the rule of governmental immunity must be discarded" as both "mistaken and unjust," Justice Traynor, writing for the majority, reviewed the erosion of the immunity of all levels of governmental entities which had taken place through a combination of statutory and judicial developments. *Id.* at 213, 359 P.2d at 458, 11 Cal. Rptr. at 90. He pointed out that "in holding that the doctrine of governmental immunity for torts for which its agents are liable has no place in our law we make no startling break with the past, but merely take the final step that caries to its conclusion an established legislative and judicial trend." *Id.* at 221, 359 P.2d at 463, 11 Cal. Rptr. at 95.

146. The legislative proposals are contained in "Recommendation Relating to Sovereign Immunity," 4 Cal. Law Revision Comm'n 801. These proposals were reinforced by a factual study of the fiscal consequences of governmental tort liability which was made concurrently by a legislative committee. *Cal. Senate Fact Finding Comm. on Judiciary, Seventh Progress Report to the Legislature: Governmental Tort Liability* (Reg. sess. 1963). *See generally* Cobey, *The New California Governmental Tort Liability Statutes*, 1 HARV. J. ON LEGIS. 16 (1964).

147. CAL. GOV'T CODE § 820.2 (West 1977).

148. *Id.* §§ 818.2, 820.4.

149. *Id.* § 821.6.

150. *Id.* §§ 818.6, 821.4.

other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature."[151] This comprehensive action was greeted with alarm by one commentator, who envisioned "the paralysis of governmental functions while judges and juries deliberate the rightness or wrongness of governmental undertakings."[152] In the next session,[153] the legislature enacted limiting legislation that preserved four specific kinds of governmental immunity: (1) immunity from suit for legislative acts or omissions;[154] (2) immunity from suit for judicial acts or omissions;[155] (3) immunity from suit for certain gubernatorial acts;[156] and (4) immunity for actions in good faith under invalid or unconstitutional laws.[157] The legislation also put a monetary ceiling on governmental liability,[158] banned punitive damages,[159] created a comprehensive state insurance plan, and provided procedures for claims against public entities.

New York. New York was the first to legislatively allow claims against the state.[160] As early as 1876, a State Board of Audit was established with power to hear all private claims against the state. In 1929 a statute was passed that waived governmental immunity in tort. The 1939 amended version of the waiver of immunity reads:

> The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article.[161]

151. MONT. CONST. art II, § 18.

152. Hjort, *The Passing of Sovereign Immunity in Montana: The King is Dead!*, 34 MONT. L. REV. 283, 297 (1973).

153. The act is titled Liability Exposure and Insurance Coverage, MONT. CODE ANN. §§ 2-9-101 to 2-9-805 (1981).

154. *Id.* § 2-9-111.

155. *Id.* § 2-9-112.

156. The governor is immune for the lawful discharge of an official duty associated with vetoing or approving bills or in calling sessions of the legislature. *Id.* § 2-9-113.

157. *Id.* § 2-9-103.

158. *Id.* § 2-9-104 limits damage claims to $300,000 for each claimant and $1 million for each occurrence.

159. *Id.* § 2-9-105.

160. For a history of governmental liability law in New York, *see* MacDonald, *The Administration of a Tort Liability Law in New York*, 9 L. & CONTEMP. PROBS. 262 (1942).

161. N.Y. Ct. Cl. Act § 8 (McKinney 1963):

The state hereby waives its immunity from liability and action and hereby assumes

Because of the brief statement of the New York statutory waiver, much was left to court decisions and some confusion has resulted from the numerous cases.[162] However, some immunities have clearly existed, such as the immunity of legislators for legislative acts and of judges for judicial duties.[163] Policy decisions on what constitutes adequate police protection have been held immune as a governmental activity.[164] Also, state actions concerning inspections and the issuance of licenses have been generally protected by immunity.[165] A federal court applying New York law stated that the test for governmental liability was whether in a particular case it was desirable for courts and juries to become involved in state and local administrative matters.[166]

Washington. In 1961 the Washington legislature enacted a statute consenting to suits for damages arising from its tortious conduct. As amended, the statute reads: "The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."[167] This statute is substantially the same as the New York statutory waiver of sovereign immunity noted above, except that the Washington version expressly repudiates the "governmental-proprietary" distinction.[168] The statute was held to have waived municipal immunity as well.[169]

In the first major decision interpreting the statute, the Washington Supreme Court reinstated a broad range of governmental immunity in tort. In *Evangelical United Brethren Church v. State*,[170] the court endorsed immunity for "legislative, judicial,

---

liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article.

162. One commentator suggests that the inconsistencies in New York case law concerning governmental functions is attributable to the lack of statutory guidance and recommends a more detailed statutory approach. *See* Herzog, *Liability of the State of New York for "Purely Governmental" Functions*, 10 SYRACUSE L. REV. 30, 43 (1958).

163. *See Id.*

164. Bass v. City of New York, 38 A.D.2d 407, 330 N.Y.S.2d 569 (N.Y. App. Div. 1972).

165. *See* Herzog, *supra* note 162, at 36.

166. Petition of Alva S.S. Co., 405 F.2d 962 (2d Cir. 1969).

167. WASH. REV. CODE § 4.92.090 (Supp. 1983).

168. Nevertheless, a subsequent Washington Supreme Court decision applied the "governmental-proprietary" distinction. Hosea v. Seattle, 64 Wash. 2d 678, 393 P.2d 967 (1964).

169. Kelso v. City of Tacoma, 63 Wash. 2d 913, 390 P.2d 2 (1964).

170. 67 Wash. 2d 246, 407 P.2d 440 (1965).

and purely executive processes of government, including . . . the essential quasi-judicial or discretionary acts and decisions within the framework of such processes."[171] As a test for determining immune governmental actions, the court stated that liability could not be imposed if the suit would bring into question "the propriety of governmental objectives or programs."[172] Subsequent Washington case law has interpreted this test as a "discretionary function" immunity.[173]

It is clear from an examination of the state laws that the doctrine of sovereign immunity is far from dead, although to a considerable degree it is now being retranslated as a "discretionary function" immunity. One commentator suggests that the principal rationale of the new immunity doctrine is the need to prevent juries or judges sitting as triers of fact from evaluating the policy decisions of public officials made with the discretion given the officials by statute.[174]

All of the four states reviewed retain three key immunities: (1) immunity of legislatures for enacting or failing to enact legislation;[175] (2) immunity of judges for acts within their judicial discretion; and (3) immunity of prosecutors for charging or failing to bring charges. These immunities are designed, in essence, to protect the highest functions of the three branches of government: legislative, executive, and judicial. In addition, all the states except Montana have either legislatively or judicially preserved immunity for "discretionary functions" of government.

There is also general agreement on the need for immunity relating to police and fire protection. While torts in the day-to-day functions of the police and fire departments should be actionable, broad policy decisions, such as how to allocate fire protection and resources, should not. Such policy decisions may be protected by either a specific statutory immunity or by a legislative-

171. *Id.* at 253, 407 P.2d at 444.

172. *Id.* at 254, 407 P.2d at 404, following Peck, *The Federal Tort Claims Act*, 31 WASH. L. REV. 207 (1956).

173. *See* Stewart v. State, 92 Wash. 2d 285, 597 P.2d 101 (1979); Loger v. Washington Timber Prods., Inc., 8 Wash. App. 921, 509 P.2d 1009 (1973); Barnum v. State, 72 Wash. 2d 928, 435 P.2d 678 (1967). The *Barnum* opinion stated the test for governmental immunity in terms of a "discretionary-operational" distinction.

174. VAN ALSTYNE, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919, 975 (1966).

175. Immunity for actions in good faith under invalid or unconstitutional laws may be seen as a corollary of this legislative immunity.

ly or judicially created "discretionary function" exception to liability.

Summary of the Sovereign Immunity and Official Immunity Doctrines

This article has briefly reviewed the contours of the doctrine of sovereign immunity in the non-Indian courts and legislatures. It is important to keep in mind that the doctrine of sovereign immunity is not a single whole. The immunities of executive officers are based on different considerations than those of judges or of legislators. The types of facts necessary to apply the immunity are different in each situation, and the basis for finding a waiver is frequently different. The scope of the immunity and the rules for providing waiver of immunity reflect the defendant's identity, the activity, and the relief requested.

At common law a distinction developed between suits for damages and suits for relief other than damages. In damage suits, courts developed the "discretionary-ministerial" distinction, with immunity granted for discretionary acts. The purpose of immunity for discretionary acts was to promote the fearless administration of the law. In suits for relief other than damages, for example, injunctions and mandamus, a general rule of governmental immunity was broken only by the judicially invented "officer's suit." Such suits were permitted against public officers who acted beyond their statutory authority or in violation of the Constitution. Nevertheless, courts disfavored "affirmative relief" against public officers, refusing to order any action that would have a significant impact on the public finance.

The common law liability of public officers for tort damages was traditionally very limited. Courts narrowly read the scope of actionable "ministerial" functions. Because of the unfair results of this doctrine, Congress and state legislatures enacted legislation waiving governmental immunity in contract and some torts committed by officials in their ministerial capacity. Since the enactment of the Federal Tort Claims Act in 1946, a majority of states have waived their immunity in tort, retaining only certain key immunities; thus, absolute immunity has been granted to judges, prosecutors, and legislators. A substantial number of states have also retained, either legislatively or judicially, immunity for discretionary governmental acts. As a result, the modern doctrine of governmental tort liability, like the older version, to a large extent revolves around the issue of the scope of discretionary functions.

The common law "officer's suit" in most states and in the federal government has been supplanted by legislation regulating judicial review of agency action. The model for this legislation is the Federal Administrative Procedures Act. In theory, the scope of judicial review of agency action is narrow under the APA: courts can only overturn agency action that is arbitrary and capricious. In reviewing agency action, courts often look to whether the action is outside of the relevant statutory authorization. In this respect, modern judicial review parallels the officer's suit for acts beyond statutory authority or in violation of the Constitution.

Sovereign Immunity and Indian Tribes

Federal law does not compel the use of the doctrine of sovereign immunity in tribal courts except in cases involving trust property. Each tribe may choose to adopt, reject, or waive the doctrine either by statute or judicial interpretation of the common law. Two competing interests must be weighed in the decision: the need to provide relief to persons harmed by government actions, and the need to allow governments to make and enforce basic policy decisions without constant threat of litigation from disaffected parties. Several factors affect the balance and they vary with the nature of the government and society's values.

The first factor is the relative weight the culture gives to protecting individuals from government power and to maintaining the government's effectiveness and efficiency. For example, where paternalism or reverence for authority is a cultural value, then broad immunity may be more favored.

A second factor in weighing individual fairness and government efficiency is the government's size and resources. One justification for government tort liability is the government's better position both to prevent the harm through in-depth planning and to spread the costs of loss over a broad basis. Thus, it is arguable that it is fairer and more efficient to make a government rather than the individual bear the costs of torts. But a small, undeveloped governing body is less equipped to foresee and guard against harm and to distribute the loss over a broad basis. Even if liability insurance is available, the size of a governing body will raise economic issues that must be considered in determining a policy on governmental immunity.

The relative strength and independence of the judiciary is a third factor. Because the courts must hear and enforce any relief in suits against the government, their ability to assert their in-

dependence will determine the effectiveness of the relief. In a small government, such as most tribal structures or most rural non-Indian communities, a court that technically has the power to review may be unwilling to use it because of possible political repercussions. If the separation of powers of government is not fully developed and communally supported, a court may be hesitant to effectively review the acts of other government offices.[176]

If the balance is decided in favor of allowing suits against the government, there remain questions of the kinds of suits to allow and the boundaries of liability. As the state examples discussed earlier suggest, the possible parameters of governmental liability range from a detailed and comprehensive statute like California's to New York's general statutory waiver of immunity, with the details left entirely to courts' discretion. A third possibility, of course, is to allow the courts the power to draw from the various common law doctrines to create the desired degree of government liability.

The best approach is probably one that combines the comprehensiveness of a statutory scheme with the flexibility of a judicially defined doctrine. A "bare essentials" statute similar to Montana's would be a good beginning.

Such a statute might include the following elements: First, it could contain general declarations for tort liability of the government and its officers, for judicial review of certain nontortious actions, and for governmental liability for claims based on contract or breach of law or regulations.

Second, the statute should list specific exceptions to governmental liability in tort. Absolute immunity should be granted to legislators for legislative acts or omissions, to judges for judicial acts or omissions, to prosecutors for acting or failing to enforce the law, and for acts performed in good faith under the apparent authority of an enactment later held invalid, unconstitutional, or inapplicable. Other specific exceptions might include, for example, immunities for fire protection and health care functions.[177]

Third, a "bare essentials" statute should contain a general test for courts to determine whether particular acts are immune from suit. The most obvious choice is the immunity for discretionary

176. *See generally* Ziontz, *supra* note 10.

177. The California Tort Claims Act is helpful in drafting these immunity provisions. A book-length explication and annotation of the Act is A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY (California Continuing Education of the Bar, Practice Book No. 24 1964).

functions: absolute immunity of public officers for their acts or omissions resulting from the exercise of discretion vested in them by law, whether or not such discretion is abused.

The vagueness of the discretionary immunity need not be an insurmountable problem if the purpose of the immunity is kept in mind. As a guide for interpreting this immunity, the California Supreme Court stated:

> In drawing the line between the immune "discretionary" decision and the unprotected ministerial act we recognize both the difficulty and the limited function of such distinction. . . . A workable definition nevertheless will be one that recognizes that "[m]uch of what is done by officers and employees of the government must remain beyond the range of judicial inquiry" (3 Davis, Administrative Law Treatise (1958) section 25.11; p. 484); obviously "it is not a tort for government to govern" (Dalehite v. United States, 346 U.S. 15 (1953) (Jackson, J., dissenting)). Courts and commentators have therefore centered their attention on an assurance of judicial abstention in areas in which the responsibility for basic policy decisions has been committed to coordinate branches of government. Any wider judicial review, we believe, would place the court in the unseemly position of determining the propriety of decisions expressly entrusted to a coordinate branch of government.[178]

Another California court listed three factors to help decide whether a particular governmental function should be immune: "the importance to the public of the function involved, the extent to which governmental liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages."[179]

Fourth, the model statute should contain guidelines for review of nontortious government action. Modern judicial review of agency action under administrative procedure statutes is similar to the common law officer's suit in that the issue is whether the public officer has exceeded his statutory or constitutional authority.

178. Johnson v. California, 69 Cal. 2d 713, 447 P.2d 325, 73 Cal. Rptr. 240, 248 (1968). The court held that the state was liable for injuries to the plaintiff caused by a 16-year-old ward who had been placed for foster care in the plaintiff's home. The court found that the state's failure to warn plaintiff of the boy's propensity for homicidal violence was actionable negligence.

179. Lipman v. Brisbane Elem. School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97, 99 (1961).

Thus, the main judicial review provisions of the federal Administrative Procedures Act can serve as a guide in reviewing nontortious government action the provisions might read as follows:

> Persons who suffer legal wrong because of governmental action and who seek relief other than money damages are entitled to judicial review of the action.
>
> Except where statutes preclude judicial review or an action is committed to government discretion by law, courts shall hear claims that the government or its agent acted or failed to act in an official capacity or under color of legal authority.[180]

Finally, tribal waiver statutes should state specifically in which courts to bring suit. A general waiver may be construed as waiving sovereign immunity in state and federal courts as well as tribal courts; this may not be the desired result.

A few tribal legislative bodies have enacted ordinances defining the scope of sovereign immunity for their reservation. Most tribes, however, have not taken legislative action. Recently, some tribal courts have spoken on this issue; all but one have decided that the doctrine applies on the reservation, either through ordinance or common law. All have indicated that the major common law exception to the doctrine, the "officer's suit," will apply as part of tribal law.

We hope this article will assist tribal councils and tribal courts in exploring whether this doctrine should become, or remain, part of the law of each tribal jurisdiction.

180. The scope of judicial review in this provision is substantially similar to the common law rule of Dugan v. Rank, 372 U.S. 609 (1963). See *supra* note 58 and accompanying text.