Cornell Law Review

Volume 40
Issue 1 *Fall 1954*

Article 2

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SOVEREIGN IMMUNITY IN SUITS AGAINST OFFICERS FOR RELIEF OTHER THAN DAMAGES

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> Courts of justice are established, not only to decide upon controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government. . . .[1]

This mild proposition, asserted by the Supreme Court in 1882, is sensible and sound. It should be the law. It is now sometimes the law and sometimes not. Inconsistencies in Supreme Court holdings on sovereign immunity in suits against officers are so flagrant as to make many decisions seem almost capricious.

Adjudication of controversies is better than settlement of controversies by sheer force, whether or not the government is one of the parties. Yet a holding that sovereign immunity is a bar to a decision on the merits when a state or federal officer is one of the parties means that the controversy is likely to be disposed of by use of force, or at best by resort to political power. Even though the courts are especially qualified to decide questions of law and fact concerning property and contracts and torts, these are the very questions which the doctrine of sovereign immunity most often prevents the courts from deciding.

Five powerful reasons show the need for reform: (1) the injustice of refusing judicial relief when government officers infringe the legal rights of a private party, (2) the impracticability of substituting force or political power for adjudication of controversies that courts are especially qualified to determine, (3) wasteful litigation which stems from judicial fluctuation from one line of authority to another, (4) the almost unbelievable lack of specific judicial inquiry into reasons for the basic doctrine, and (5) disappearance of the only reasons that supported the doctrine of sovereign immunity when the doctrine was introduced into American law during the first half of the nineteenth century.

The fourth factor is indeed an astonishing legal phenomenon. The doctrine of sovereign immunity came into American law without a judicial discussion of its merits and demerits,[2] and recent Supreme Court opinions are characteristically lacking in perspective of the doctrine's overall consequences. The single modern judicial effort to treat the basic doctrine comprehensively is seriously faulty.[3]

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* See Contributors' Section, Masthead, p. 94, for biographical data.

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

2 The observation of Mr. Justice Miller to this effect is discussed below at page 6.

3 This effort is discussed in detail below at pages 26-30.

The fifth factor apparently has never been mentioned in any Supreme Court opinion. During the first half of the nineteenth century, sovereign immunity in suits for relief other than damages could reasonably have been thought desirable in order to prevent the courts from assuming the burdens of operating the government. The judicial instinct that many or most issues arising out of governmental activity were nonjusticiable may have been entirely sound. The Supreme Court in 1840 declared without qualification: "The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief."[4] In 1900 the Supreme Court generalized very broadly: "It has been repeatedly adjudged that the courts have no general supervising power over the proceedings and action of the various administrative departments of government."[5]

Whatever may have been sound in 1840 and in 1900, the twentieth century has developed highly refined doctrines of unreviewability and of scope of judicial review.[6] The doctrine of sovereign immunity is no longer needed, as it may once have been, to prevent the courts from taking over government administration. Now that our elaborate bodies of law concerning availability and scope of review operate satisfactorily to prevent the courts from going too far into administration, the main practical effect of the doctrine of sovereign immunity in suits for relief other than damages is to prevent the courts from deciding the very questions they are best qualified to decide—indeed, the very questions the courts have held that they are best qualified to decide.

Yet neither legislation nor radical change is requisite. No more is necessary than that the Supreme Court should consistently follow certain of its past holdings. The thesis of this article is a very conservative one —that the Supreme Court should resolve the inconsistencies in its holdings on sovereign immunity in suits against state and federal officers for relief other than money damages, and that in doing so it should follow the holdings which make for government responsibility and should reject the holdings which make for government irresponsibility. This proposal will be elaborated and made more specific in the final pages of this article.

In the ensuing six sections we shall consider: (1) the origin and early development of the basic doctrine, (2) the cases which develop and apply the dominant generalization that sovereign immunity does not

[4] Decatur v. Paulding, 14 Pet. 497, 516 (1840).

[5] Keim v. United States, 177 U.S. 290 (1900).

[6] These bodies of law are summarized in Davis, Administrative Law 812-928 (1951), as supplemented by Davis, Unreviewable Administrative Action, 15 F.R.D. 411-452 (1954).

prevent a suit against a state or federal officer who is acting either beyond his authority or in violation of the Constitution, (3) the cases which are opposed to this dominant generalization, (4) the holdings both ways in cases in which no claim is made of excess of authority or unconstitutionality, (5) judgments in suits against officers as res judicata against the government when government counsel defend the suits, and (6) specific recommendations for reform.

I. The Background of the Law of Sovereign Immunity in Suits against Officers

The doctrine of sovereign immunity has its origin neither in the Constitution nor in an interpretation of the Constitution nor in any specific enactment of Congress.[7] The doctrine is therefore unquestionably judge-made, even though it did not come into existence in any specific decision. In one curious sense the law of sovereign immunity was found and not made, for it developed not through conscious judicial creation but through judicial assumption that it had already come into existence.

In 1793, Mr. Justice Wilson, who had attended the Constitutional Convention, analyzed not only the Constitution but also "the laws and practice of other States and Kingdoms" and concluded: "We see nothing against, but much in favour of, the jurisdiction of this Court over the State of Georgia, a party to this cause."[8] Chief Justice Jay in the same case thought the question whether the government could be sued without its consent should be left open: "I wish the State of society was so far improved, and the science of Government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not to be thus collaterally and incidentally decided: I leave it a question."[9]

According to a later opinion of the Supreme Court,[10] the first recognition of the doctrine of sovereign immunity was in 1821, when Chief Justice Marshall said: "The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits."[11]

[7] The Eleventh Amendment creates sovereign immunity of states in certain suits in the federal courts. No difference is discernible in modern law between suits against states in the federal courts, and suits against the United States in federal courts. The two classes of suits are here considered together, for the principles are common to both classes.

[8] Chisholm v. Georgia, 2 Dall. 419, 461 (1793).

[9] Id. at 478.

[10] United States v. Lee, 106 U.S. 196, 207 (1882).

[11] Cohens v. Virginia, 6 Wheat. 380 (1821).

In 1846 the language ripened into holding; a suit to enjoin enforcement of a judgment against the United States was dismissed for lack of jurisdiction, because "the government is not liable to be sued, except with its own consent, given by law."[12] The Court significantly gave no reason and cited no authority.

When in 1882 the Supreme Court came at last to a direct consideration of the doctrine of sovereign immunity, it acknowledged in *United States v. Lee*[13] that "the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine."[14] The Court went on to say in effect that the doctrine of sovereign immunity was concerned only with form and not with substance: ". . . there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit."[15] The Court went on to quote from the 1824 opinion of Chief Justice Marshall in *Osborn v. Bank*: ". . . if the person who is the real principal . . . be himself above the law . . . it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit."[16]

If the Supreme Court had only followed the 1824 lead of Chief Justice Marshall, which it quoted with approval in 1882, the law of sovereign immunity would be far more satisfactory than it is today.

The pre-1882 law is neatly summarized by the Court in an opinion by Mr. Justice Miller in *United States v. Lee*. The statement of two earlier cases is especially important: "The cases of *The Siren*, 7 Wall. 152 [1868], and *The Davis*, 10 Wall. 15 [1869], are instances where the court has held that property of the United States may be dealt with by subjecting it to maritime liens where this can be done without making the United States a party. This examination of the cases in this court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in

[12] United States v. McLemore, 4 How. 286 (1846).

[13] 106 U.S. 196 (1882).

[14] Id. at 207.

[15] Id. at 207-208.

[16] Id. at 213, quoting from Osborn v. United States Bank, 9 Wheat. 738, 842 (1824).

every case where it has been necessary to decide it. . ."[17] From the law embodied in this 1882 statement of earlier cases, the Court in more recent times has unfortunately departed, as we shall see.

The holding in *United States v. Lee,* as well as the comprehensive opinion, is especially important, for it has become the subject of controversy in recent years. The action was in ejectment "against Strong and Kaufman, as individuals, to recover possession"[18] of 1100 acres of land. The Court said that "the officers who are sued assert no personal possession, but are holding as the mere agents of the United States."[19] The Court also noted that the United States was defending the action "by its proper law officers."[20] The case came up on "two writs of error to the same judgment, one prosecuted by the United States, *eo nomine,* and the other by the Attorney General of the United States in the names of Frederick Kaufman and Richard P. Strong, the defendants against whom judgment was rendered in the circuit court."[21]

The Supreme Court first held that the plaintiff had title to the land in controversy, and then it considered the contention "that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents for the government."[22] The Court stated that "The first branch of this proposition is conceded to be the established law of this country. . ."[23] The issue was thus limited to the second part of the proposition. On that issue the Court held for the plaintiff.

The Court reasoned that even though the property was devoted to public uses as a cemetery and as a fort, still "those who are so using it under the authority of the United States"[24] may be sued for its possession, because "the verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and without compensation."[25] The Court thus relied upon the due process clause of the Fifth Amendment. But the major proposition of the opinion did not rest upon due process: "Courts of justice are established, not

17 106 U.S. at 215-216.
18 Id. at 210.
19 Ibid.
20 Id. at 196-197.
21 Ibid.
22 Id. at 204.
23 Ibid.
24 Id. at 217.
25 Id. at 218.

only to decide upon controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government. . . ."[26]

II. Cases Holding Sovereign Immunity No Defense in Suits Against Officers Who Allegedly Act Unconstitutionally or in Excess of Authority

Sovereign immunity is today sometimes a defense in suits against officers, and sometimes not. The law of the subject is often uncertain, for the cases are conflicting. Speaking of its past decisions on the subject, the Supreme Court said in 1947 that "as a matter of logic it is not easy to reconcile all of them."[27]

Mr. Justice Frankfurter, with unusual frankness, has endeavored to explain the inconsistencies in the holdings: "The course of decisions concerning sovereign immunity is a good illustration of the conflicting considerations that often struggle for mastery in the judicial process, at least implicitly. In varying degrees, at different times, the momentum of the historic doctrine is arrested or deflected by an unexpressed feeling that governmental immunity runs counter to prevailing notions of reason and justice. Legal concepts are then found available to give effect to this feeling, and one of its results is the multitude of decisions in which this Court has refused to permit an agent of the government to claim that he is pro tanto the government and therefore sheltered by its immunity."[28]

Despite the pervasive inconsistencies, the case law is dominated by one outstanding generalization that is usually followed but sometimes violated—that sovereign immunity does not prevent a suit against a state or federal officer who is acting either beyond his authority or in violation of the Constitution.

The foundation case is *Ex parte Young*.[29] The Court first held unconstitutional a Minnesota statute providing for rate fixing and for penalties for violating rates fixed, and then it inquired into the question whether the suit to enjoin the state's attorney general was barred by the Eleventh Amendment. After reviewing eleven previous decisions, the

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[26] Id. at 220.

[27] 330 U.S. 731, 738 (1947). Another typical acknowledgment appears in Brooks v. Dewar, 313 U.S. 354, 359 (1941): "As this Court remarked nearly sixty years ago respecting questions of this kind, they 'have rarely been free from difficulty' and it is not 'an easy matter to reconcile all the decisions of the court in this class of cases.'" The court cited Cunningham v. Macon & Brunswick R. Co., 109 U.S. 446, 451 (1883).

[28] Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 709 (1949).

[29] 209 U.S. 123 (1908).

Court announced the basic principle: "The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."[30] The rationale of allowing the suit against the officer was stated: "The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."[31]

Why did the Court say that an officer who acts under an unconstitutional statute is "stripped of his official or representative character"? Is he not still an officer when he is obeying what the State Legislature has officially enacted? Is he not still acting in a representative character when he prosecutes a violator of the enactment? The Court in *Ex parte Young* was not confused about these questions; it knew the answers. It was deliberately indulging in fiction in order to find a way around sovereign immunity. It knew that the injunction against the attorney general was in truth a means of preventing the state from enforcing the statute. The reality is all too obvious that the suit was in practical effect a suit against the state.

That the Court was not unaware of this reality was doubly assured by the dissenting words of Mr. Justice Harlan: "The suit was, as to the defendant Young, one against him as, and only because he was, Attorney General of Minnesota. No relief was sought against him individually but only in his capacity as Attorney General. And the manifest—indeed, the avowed and admitted—object of seeking such relief was to tie the hands of the state, so that it could not in any manner or by any mode

[30] Id. at 155-156.
[31] Id. at 159-160.

of proceeding in its own courts test the validity of the statutes and orders in question. It would therefore seem clear that within the true meaning of the Eleventh Amendment the suit brought in the federal court was one, in legal effect, against the state."[32]

The clear meaning of *Ex parte Young* is that the enforcement officer may be enjoined even though both the purpose and the effect are to enjoin the state. The Court allowed the injunction without effectively denying that the "avowed and admitted" object was "to tie the hands of the state."

The basic principle of the *Young* case, even though obviously founded upon fiction, has become firmly established. This is asserted, for instance, in the orthodox 1952 opinion in *Georgia R.R. & Banking Co. v. Redwine*.[33] The company sued the State Revenue Commissioner to enjoin collection of certain taxes, on the ground that the taxes were in violation of the Federal Constitution. The Supreme Court, in an opinion by Chief Justice Vinson, allowed the suit: "This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State. These decisions were reexamined and reaffirmed in Ex parte Young . . . and have been consistently followed to the present day. . . . The State is free to carry out its functions without judicial interference directed at the sovereign or its agents, but this immunity from federal jurisdiction does not extend to individuals who act as officers without constitutional authority."[34]

The statement just quoted is the dominant principle; it is usually, though not always, reliable.[35]

In the 1912 case of *Philadelphia Co. v. Stimson*,[36] the Court made clear that not only an officer who acts under an unconstitutional statute but also an officer who acts in excess of his authority may be enjoined, even though the effect is to enjoin the government. A statute authorized the Secretary of War to fix a harbor line beyond which the building of piers or other works was a misdemeanor. The plaintiff sued to enjoin the Secretary from prosecuting the plaintiff on account of construction of a wharf beyond the line the Secretary had fixed. The principal question was whether the Secretary had gone too far in interfering with the plaintiff's property rights. Mr. Justice Hughes summarized the law for the unanimous Court: "The exemption of the United States from

[32] Id. at 173-174.

[33] 342 U.S. 299 (1952).

[34] Id. at 304, 305-306.

[35] The exceptions are discussed in the following section.

[36] 223 U.S. 605 (1912).

suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. . . . The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. . . . And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred."[37]

The Court in the *Philadelphia Company* case recognized no exception to this broad statement of principle. It did not carve out an exception to take care of issues about property. Indeed, in one aspect of the case, the problem was one of property ownership, and the Court specifically said: "If the conduct of the defendant [the Secretary] constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States." Another formulation in the opinion seems especially significant: "The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."[38]

Down through the years the Supreme Court has permitted suits against officers, to test constitutionality or limits of authority. In *Hammer v. Dagenhart*,[39] the suit was to enjoin Hammer, a United States Attorney, from enforcing the child labor statute. In *Waite v. Macy*,[40] the suit was to enjoin Waite and his colleagnes, members of a tea board, from forbidding importation of tea containing artificial coloring. *Hill v. Wallace*[41] was a suit to enjoin the Secretary of Agriculture from taking any steps to compel the Board of Trade to comply with the Grain Futures Act. *Ickes v. Fox*[42] was a suit to enjoin the Secretary of the Interior from refusing certain irrigation water in which the plaintiffs had property rights.

That the unconstitutionality claimed need not be unconstitutionality of a statute is entirely clear. After all, in the 1882 case of *United States v. Lee*,[43] the Court talked the langnage of due process of law concerning the possession by the officers of property belonging to the plaintiff. In *Joint Anti-Fascist Refugee Committee v. McGrath*,[44] the Court held that the

37 Id. at 619-620.
38 Id. at 620.
39 247 U.S. 251 (1918).
40 246 U.S. 606 (1918).
41 259 U.S. 44 (1922).
42 300 U.S. 82 (1937).
43 106 U.S. 196, 218 (1882).
44 341 U.S. 123 (1951).

Attorney General's action was unconstitutional in putting the organization on the subversive list, but no statute was involved. In *Youngstown Sheet & Tube Co. v. Sawyer*,[45] the Court held that the President's seizure of the steel mills was unconstitutional, because no statute had authorized the seizure.

The plain fact can hardly be overemphasized that in each of these cases the plaintiff's real purpose and the practical effect of the decision were to put a stop to the governmental processes which the plaintiff was challenging, including even programs enacted by Congress. The form is suit against the officer; the reality is suit against the government.

III. Cases Holding Sovereign Immunity a Defense in Suits Against Officers Who Allegedly Act Unconstitutionally or in Excess of Authority

In a few cases the Supreme Court seems to forget the fiction that a suit against an officer in his official capacity is not a suit against the government and to be actuated by the reality. We turn now to these cases—cases in which sovereign immunity is held a bar to a suit against an officer who is allegedly acting either unconstitutionally or in excess of authority.

In the 1908 case of *Louisiana v. Garfield*,[46] Louisiana sued the Secretary of the Interior and another officer to establish title to certain swamp lands and to enjoin the officers from making other disposition of the lands. The Secretary's predecessor had interpreted an Act of 1849 as conveying the land to Louisiana and had written an endorsement, "approved to the state of Louisiana." Mr. Justice Holmes wrote the opinion for a unanimous Court: "We will assume, for purposes of decision, that, if the United States clearly had no title to the land in controversy, we should have jurisdiction to entertain this suit, for we are of opinion that, even on that assumption, the bill must be dismissed."[47] The Court then proceeded to hold that the Secretary's "approval" to Louisiana was based upon a "manifest mistake of law" and was therefore "void upon its face."[48] Title was accordingly in the United States. In this aspect, Louisiana successfully sued the United States without its consent, but lost on the merits. The Court, however, went on to consider whether a statute limiting suits by the United States to vacate patents to five years applied to approvals when they are given the effect of patents: "The doubt is

[45] 343 U.S. 579 (1952).
[46] 211 U.S. 70 (1908).
[47] Id. at 75.
[48] Id. at 77.

whether Louisiana has not now a good title by the lapse of five years since the approval. . . . But that doubt cannot be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard. . . . It follows that the United States is a necessary party and that we have no jurisdiction of this suit."[49]

The holding that sovereign immunity prevents the Court from deciding the limitation issue is quite unsatisfactory. If the courts may not decide such issues about ownership of real property, then the courts are deprived of power at the precise point where they are best qualified and most useful. The opinion is also unsatisfactory in that, by passing upon the principal question of title and then holding that sovereign immunity prevents a decision on the question of limitation, the Court seems to hold that the Court will decide the merits when the merits are clearly in favor of the United States, but that when the merits are doubtful, sovereign immunity prevents the Court from deciding the merits.

The holding that sovereign immunity was a bar to determination of the limitation issue is inconsistent with many other cases. In *United States v. Lee*,[50] a question of title to real property was resolved in a suit against officers, even though the officers claimed that title was in the United States. The Court in the Louisiana case could have used the technique of *Ex parte Young*;[51] it could have said that if the Secretary was taking Louisiana's land without compensation[52] he is "stripped of his official or representative character."

If courts may put an end to major programs enacted by Congress, as they have often done in suits against officers, how curious that sovereign immunity prevents courts from putting an end to a wavering decision of the Secretary of the Interior concerning ownership of swamp lands. One might think that a suit which is in reality against the government is more appropriate to determine ownership of real property than it is to kill a program which the people's representatives have enacted.

Another important case in which sovereign immunity was a bar to a

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[49] Id. at 77-78. The holding that sovereign immunity was a bar in one aspect of the case is closely similar to both an earlier decision and a later decision. New Mexico v. Lane, 243 U.S. 52 (1917); Oregon v. Hitchcock, 202 U.S. 60 (1906).

A statement that the United States is an indispensable party is the equivalent in substance of a statement that sovereign immunity bars the suit against the officer. Nothing of substance depends upon the form of statement.

[50] 106 U.S. 196 (1882).

[51] 209 U.S. 123, 160 (1908).

[52] The complainant argued, as reported in 211 U.S. at 73, that the Secretary should not be "permitted to exert his agency in violating the law and the Constitution and then claim exemption from the processes of the court, whose duty it is to guard against abuses. . . ."

suit against an officer who was assertedly acting unconstitutionally is *Morrison v. Work*.[53] The plaintiff sued the Secretary of the Interior and other officers, on behalf of Chippewa Indians, asserting that the defendants "undertook to modify or to ignore rights of the Chippewas which had become fixed by the agreements" of 1890. The plaintiff asserted that the defendants were acting unconstitutionally and without authority. The case came up on motion to dismiss the complaint. For a unanimous Court, Mr. Justice Brandeis said: "Morrison's contention is that . . . the rights of the Indians in the lands and in the fund to be formed became fixed as individual property. . . . The claim of the United States is, at least, a substantial one. To interfere with its management and disposition of the lands or the funds by enjoining its officials, would interfere with the performance of governmental functions and vitally affect interests of the United States. It is, therefore, an indispensable party to this suit."[54]

The Court ignored the *Lee* case,[55] where government officers were ejected from land even though the claim of the United States was a substantial one. The Court did not mention the usually-followed principle of *Ex parte Young*[56] that unconstitutional or unauthorized action of an officer strips him of his official or representative character. The Court said nothing of the proposition it had laid down in *Philadelphia Co. v. Stimson*: "The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded."[57]

The central proposition of the *Morrison* opinion is directly opposed to many other cases: "If through officials of the United States these lands, or the proceeds thereof, or the accruing interest, are improperly disposed of, it is the United States, not the officials, which is under obligation to account to the Indians therefor. . . ."[58] This proposition, if consistently applied, would prevent all suits against officers when the real purpose is to sue the government—even including the scores of cases in which the purpose is to challenge constitutionality of a statute.

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53 266 U.S. 481 (1925).

54 Id. at 485-486.

55 United States v. Lee, 106 U.S. 196 (1882).

56 209 U.S. 123 (1908).

57 223 U.S. at 619-620. Tending to support the Morrison decision is Naganab v. Hitchcock, 202 U.S. 473 (1906). An Indian sought to enjoin the Secretary of the Interior from diverting to unlawful purposes lands conveyed to the United States and held in trust, "without due process of law." The Court held that because legal title was in the government, and because the Secretary had no interest in the controversy, the suit was in effect against the government.

58 266 U.S. at 487-488.

The latest and possibly most important case in which the Supreme Court has held sovereign immunity a bar to a suit to enjoin allegedly unconstitutional action of an officer is *Mine Safety Co. v. Forrestal.*[59] The Under Secretary of the Navy determined that the company had received excessive profits under the Renegotiation Act and notified the company that unless it took action to eliminate the profits he would direct government disbursing officers to withhold payments due the company on other contracts. The company sought an injunction and declaratory judgment that the Renegotiation Act was unconstitutional. The Court held the government to be an indispensable party. The Court reasoned: "The sole purpose of this proceeding is to prevent the Secretary from taking certain action which would stop payment by the government of money lawfully in the United States Treasury to satisfy the government's and not the Secretary's debt to the appellant. The assumption underlying this action is that if the relief prayed for is granted, the government will pay and thus relinquish ownership and possession of the money."[60] The Court's statement so far is unquestionable. But the Court continued: "In effect, therefore, this is an indirect effort to collect a debt allegedly owed by the government in a proceeding to which the government has not consented."[61] This statement is demonstrably a non sequitur. To prevent the Secretary from interfering with payment of the debt is one thing; to collect the debt is quite another. The plaintiff sought an injunction against unconstitutional interference, not an order to pay. If the injunction had been granted against the Secretary, the disbursing officers would still have been free to pay or not to pay.

The basic doctrine of *Ex parte Young,*[62] applied in scores of other cases, was fully applicable, for the Court could have indulged in the fiction that if the Secretary was acting under an unconstitutional statute, he was "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

The Court specifically acknowledged the principle established by the *Philadelphia Company* case[63] and other cases that if the Secretary, "acting as an individual and not as an officer of the government,"[64] was committing a tort consisting of a trespass against the company's property,

59 326 U.S. 371 (1945).

60 Id. at 374-375.

61 Id. at 375.

62 209 U.S. 123, 159-160 (1908).

63 Philadelphia Co. v. Stimson, 223 U.S. 605 (1912).

64 The Court in the Mine Safety case quoted this part of the fiction without questioning it, and with apparent approval. 326 U.S. at 373.

then the company would be entitled to equitable relief. But the Court held this principle to be inapplicable because "Here, the essential allegations and the relief sought do not make out a threatened trespass against any property in the possession of or belonging to the appellant."[65]

If one may believe the opinion in the *Mine Safety* case, then, the law is that sovereign immunity does not prevent a court from enjoining an officer's unconstitutional trespass against tangible property of the plaintiff, but sovereign immunity does prevent a court from enjoining an officer's unconstitutional interference with an intangible right of the plaintiff to receive money. Why sovereign immunity should depend upon tangibility or intangibility of the right to be protected the Court does not attempt to explain.

Not only was the suit in the *Mine Safety* case not an "effort to collect a debt allegedly owed by the government," but even if it were, the assumption that an injunction against an officer cannot be granted to help a plaintiff collect a debt owed by the government is highly questionable. True, the United States can be named as the defendant only in the Court of Claims when the purpose is to collect a debt. But the suit in the *Mine Safety* case named the Under Secretary as the defendant. Why not follow consistently the fiction that when the officer acts unconstitutionally or without authority he is stripped of his official or representative character? The Supreme Court in other cases has granted relief even when the purpose was to collect a debt owed by the government. For instance, in *Roberts v. United States ex rel. Valentine,*[66] the Court held that mandamus should be issued against the Treasurer of the United States ordering him to pay certain money to the plaintiff; the Court reasoned merely that the duty to pay was "ministerial" and that therefore "mandamus will lie to compel him to perform his duty."[67] In *Miguel v. McCarl,*[68] the Comptroller General had advised a disbursing officer not to pay the plaintiff a retirement allowance, and the Supreme Court held that a mandatory injunction against the disbursing officer was proper "directing a disposal of petitioner's application for pay upon the merits, unaffected by the opinion of the Comptroller General, and in conformity with the views expressed in this opinion as to the proper interpretation and application of the pertinent statutes."[69]

The *Roberts* and *Miguel* holdings are to be preferred to the *Mine*

[65] 326 U.S. at 374.
[66] 176 U.S. 221 (1900).
[67] Id. at 229-230.
[68] 291 U.S. 442 (1934).
[69] Id. at 456.

Safety holding because government responsibility is to be preferred to government irresponsibility, and because courts are better qualified than executive officers to decide questions of law about contracts and debts and constitutionality.

According to a 1944 opinion, the practitioner should take care, in suing an officer to enjoin unconstitutional or unauthorized action, to sue the officer "personally," and not "officially." The theory of *Ex parte Young* was that the suit was "against him [the officer] personally as a wrongdoer and not against the State."[70] The case which makes clear what happens if the officer is sued officially instead of individually—and thereby reaches an all-time maximum of harmful formalism—is *Great Northern Ins. Co. v. Read.*[71] The company paid an Oklahoma tax under protest and sued the officer to recover the money paid. The Supreme Court held that "the suit was against the official, not the individual,"[72] and that an Oklahoma statute specifically providing for suits against collecting officers to recover taxes paid was limited to suits in Oklahoma courts and did not apply to federal courts even though it said nothing about either Oklahoma courts or federal courts.[73]

Although winning or losing a case may thus depend upon the difference between an individual and an official, the Court does not tell us how to detect the difference. It does not even bother to mention how the defendant was designated. The title of the case in the official report shows that the defendant was "Read, Insurance Commissioner." The record

70 Ex parte Young, 209 U.S. 123, 159-160 (1908).

71 322 U.S. 47 (1944). Accord: Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945). The Ford case also holds that the defense of the Eleventh Amendment may be raised for the first time in the Supreme Court, and that the state attorney general's defense of the case on the merits was not a waiver of sovereign immunity under the Indiana law.

In Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573 (1946), the Court followed the Read case even though the Utah statute provided that suit could be brought in a "court of competent jurisdiction." Three of the seven participating justices dissented.

72 322 U.S. at 53.

73 The statute provides that "the aggrieved person shall pay the full amount of the taxes . . . and shall give notice to the officer collecting . . . that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart. . . . All such suits shall be brought in the court having jurisdiction thereof. . . ." Okla. Stat. § 12665 (1951).

Even if the idea of sovereign immunity is followed, nothing in the nature of things prevents a suit against an officer in his official capacity. For instance, in Garfield v. United States ex rel. Goldsby, 211 U.S. 249 (1908), the Court granted mandamus against the Secretary of the Interior even though in the first sentence of the opinion the Court said that the suit was against the Secretary "in his official capacity." Traditionally, when the government is the real defendant, the Court has not distinguished between official capacity and personal capacity of officers.

shows that the complaint designated the defendant as "Jess G. Read, Insurance Commissioner for State of Oklahoma, Defendant." A close reading of the complaint fails to answer the artificial but all-important question whether the defendant in collecting the tax was acting as an official, as an individual, or as both an official and an individual.

Mr. Justice Reed for the majority apparently bases his assumption that "the suit was against the official, not the individual" upon the assumption that the suit was under the Oklahoma statute, and upon the further assumption that a suit under the statute could not be a suit against the individual. Mr. Justice Frankfurter in dissent asserts the assumption that the suit was not under the statute but was "an ordinary common law action."[74] The complaint seems consistent with either a statutory or a common-law proceeding.

The one feature of the *Great Northern* case that is entirely clear is that sovereign immunity was a bar only because the plaintiff failed to put into the complaint the right magic words. The suit should have been against the individual and not against the official. Perhaps the combined requirements of extreme technicality and acceptable humor would be satisfied by a designation of the defendant as "Jess G. Read, as an individual who is 'stripped of his official or representative character' as Oklahoma Insurance Commissioner by reason of the unconstitutionality of the statute under which he collected the tax money which this action is brought to recover."

IV. Sovereign Immunity in Suits Against Officers Who Act within Valid Authority

Circumvention of sovereign immunity is easy when the courts can indulge in the fiction that an officer acts as an individual when he acts unconstitutionally or in excess of his authority. When the officer is acting within authority conferred by a valid statute, a court is more likely to consider the action to be against the sovereign.

The key case is *Larson v. Domestic and Foreign Commerce Corp.*[75] The War Assets Administration sold some coal to the plaintiff, interpreted the contract to require a deposit, and when an unsatisfactory letter of credit was offered in place of a deposit, entered into a contract to sell the coal to another. The plaintiff sought an injunction against selling the coal to anyone but the plaintiff, and a declaratory judgment that the sale to the plaintiff was valid and the sale to the second purchaser invalid.

[74] 322 U.S. at 64.

[75] 337 U.S. 682 (1949).

The Court first emphasized that the contract was with the United States, not with the officer personally, and then it said that "the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign."[76] The Court said nothing to indicate awareness of the plain fact that in a large proportion of the many cases in which officers are enjoined the reality is that the relief is against the sovereign. The Court said that "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions," and that unconstitutional conduct is "not the conduct of the sovereign."[77] The Court then declared: "These two types have frequently been recognized by this Court as the only ones in which a restraint may be obtained against the conduct of Government officials."[78] For this, the Court quoted from *Philadelphia Co. v. Stimson*[79] a passage which does not support the "only" in the Court's statement, and it offered neither reasoning nor authority to support the "only." The Court specifically rejected the argument that an officer's tortious or "illegal" taking of property may be enjoined, for tort or illegality is not sufficient: "Since the sovereign may not be sued, it must also appear that the action to be restrained or directed is not action of the sovereign."[80] The Court stated its specific holding in the form of a generalization: "We hold that 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."[81]

The Court almost reached the basic problem of policy when it said: "There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right."[82] The Court did not say what the "reasons of public policy" are, except for the statement of the conclusion about stopping the Government in its tracks. If that conclusion means only that the plaintiff's case on the disputed question of property or contract right must have merit

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76 Id. at 687.
77 Id. at 689-690.
78 Id. at 690.
79 223 U.S. 605, 620 (1912).
80 337 U.S. at 693.
81 Id. at 695.
82 Id. at 704.

before the Government can be stopped in its tracks, then it is hardly worth stating. In the context of refusal to consider the plaintiff's argument concerning the interpretation of the contract of sale, the Court's statement evidently means that even one who has a meritorious case concerning a disputed question of property or contract right cannot stop the Government in its tracks. This proposition is the equivalent of a statement that the courts have no role to play if the government is lawless in disregarding the property and contract rights of a private party. Only a little regard for the practical facts that property and contract rights may be better determined by adjudication than by use of force, and that no other authority is so well equipped as a court to determine such rights might have led the Court to say exactly the opposite—that there are the strongest reasons of public policy for permitting courts to decide disputed questions of property or contract rights, even when a government officer is one of the parties, and even when no claim of unconstitutionality or excess of authority is made.

The law of the *Larson* case seems to be that the courts may not adjudicate the disputed contract and property rights. Even if the plaintiff owned the coal, and even if the Government was committing a tort in taking it, still the plaintiff has no redress. The issues must be resolved by some means other than adjudication in the courts.

The *Larson* holding is directly opposed to the simple, fundamental, and sound proposition laid down by the Supreme Court in the basic decision of *United States v. Lee*: "Courts of justice are established, not only to decide upon controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government. . . ."[83]

Yet the Court in the *Larson* opinion purported to distinguish the *Lee* case. In that case the Court entertained the suit to eject government officers from land to which the government claimed title. On their facts, the *Larson* and *Lee* cases are on all fours, except that the one involved a dispute over coal and the other a dispute over real property. The Court did not purport to distinguish the facts of the *Lee* case; instead, it said that the basis for the decision was lack of constitutional authority of the officers to keep the land if the title was in the plaintiff. In this aspect, the *Larson* case turned upon failure of the plaintiff's counsel to put the right magic words into the complaint: "There is no allegation of any statutory limitation on his [the Administrator's] powers as a sales agent. . . . There is no claim that his action constituted an unconstitutional

[83] United States v. Lee, 106 U.S. 196, 220 (1882).

taking."[84] The plaintiff should have alleged—so we are told—that no statute had authorized the Administrator to commit a tort, and that the taking of the plaintiff's coal without compensation was a denial of due process.

The Court in the *Larson* opinion, being unable to distinguish *Goltra v. Weeks*,[85] found an overruling or disapproval of that case to be necessary. Government officers in the *Goltra* case attempted to repossess certain barges in the plaintiff's possession, and the Court held that a suit to enjoin them from doing so was not a suit against the United States. For a unanimous Court, Chief Justice Taft said: "If it was a trespass, then the officers of the Government should be restrained whether they professed to be acting for the Government or not. . . . By reason of their illegality, their acts or threatened acts are personal and derive no official justification from their doing them in asserted agency for the Government."[86] The Court in the *Larson* case specifically rejected the *Goltra* view and asserted "the principle which has been frequently repeated by this Court, both before and after the Goltra case: the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void."[87]

Aside from the fundamental assumption of the *Goltra* opinion that property rights should be adjudicated by courts and the fundamental assumption of the *Larson* case that the courts cannot interfere with action of government officers even if it is lawless, the *Goltra* case differs from the *Larson* in the Court's assumption that "trespass" should be treated as unauthorized. The Court in the *Larson* case assumed that even if the Administrator's action was a trespass it was authorized: "There is no allegation of any statutory limitation on his powers as a sales agent. In the absence of such a limitation he, like any other sales agent, had the power and the duty to construe such contracts and to refuse delivery in cases in which he believed that the contract terms had not been complied with. His action in so doing in this case was, therefore, within his authority even if, for purposes of decision here, we assume that his construction was wrong and that title to the coal had, in fact, passed to

84 337 U.S. at 703.

85 271 U.S. 536 (1926).

86 Id. at 544. Mr. Justice McReynolds wrote a rather vehement concurring opinion.

87 337 U.S. at 701-702.

the respondent under the contract."[88] As a matter of logic, it would have been easier to say that the officer was not authorized to commit a tort. As a matter of policy, the view that the officer was not authorized to commit a tort would have meant that property rights could be determined by courts.

If the Court means what it says in discrediting the *Goltra* case, then government officers may seize possession of a citizen's property, and the citizen has no legal redress, even though the sole issue presented is one of property law! Law which is at once so unjust and so impracticable is not likely to endure; the *Goltra* case in the long run will survive its overruling.

The Court in the *Larson* opinion reduced to a footnote its effort to distinguish three additional cases. The *Sloan Shipyards* case[89] was distinguished on the ground that the defendant was not an officer but a government corporation "which had not acted in the name of the United States but in its own corporate name and right."[90] The illogic of the distinction can be seen by a statement of the law that seems to result from this part of the footnote: If the government commits a tort through an individual officer the court may not enjoin the tort, but if the government commits a tort through a government corporation which acts through an individual officer, the court may enjoin the tort.

Land v. Dollar[91] is a very important decision, even though the Court in the *Larson* opinion disposed of it in eight lines of a footnote. Stockholders of the Dollar Steamship Lines entered into a contract in 1938 with the Maritime Commission; they delivered their common stock to the Commission, endorsed in blank, and the Commission released some of them from certain obligations, agreed to grant the company an operating subsidy, and agreed to make a loan to the company and to obtain for it another loan from the Reconstruction Finance Corporation. After the debts to the government had been fully paid, the stockholders demanded return of their stock, claiming it had been pledged as collateral for a debt which had been paid. Members of the Commission refused on the ground that the stock had been transferred outright and not as a pledge. The suit was then brought against members of the Commission, praying that defendants be restrained from selling the stock and be directed to return it to the plaintiffs. The Supreme Court held that the suit was not against the United States.

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[88] Id. at 703.

[89] Sloan Shipyards v. U.S. Fleet Corp., 258 U.S. 549 (1922).

[90] 337 U.S. at 702.

[91] 330 U.S. 731 (1937).

The Court said that the defendants would be unlawfully withholding plaintiffs' property under the claim that it belongs to the United States "if either of [the plaintiffs'] contentions were established: (1) that the Commission had no authority to purchase the shares or acquire them outright; or (2) that, even though such authority existed, the 1938 contract resulted not in an outright transfer but in a pledge of the shares."[92] After holding the *Lee* case applicable and after distinguishing opposing authority, the Court stated the governing principles: "But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld."[93]

The holding in the *Dollar* case and the statement of principles on which the holding was based are both fully applicable to the facts of the *Larson* case, for the plaintiff in the latter case asserted that the public officials were unlawfully seizing the plaintiff's coal. In the *Larson* case footnote, however, the Court purported to distinguish the *Dollar* case by saying "it was contended that any other kind of acquisition [than a pledge] would constitute a violation of § 207 of the Merchant Marine Act, which allegedly gave the Commission authority to acquire stock only as collateral. The complaint therefore alleged that the members of the Commission 'acted in excess of their authority as public officers.' "[94]

It is true that the complaint in the *Dollar* case alleged excess of authority. But that was only one of two contentions. The other contention was that, as the Court put it, "even though such authority [to acquire the shares outright] existed, the 1938 contract resulted not in an outright transfer but in a pledge of the shares."[95] That the holding in the *Dollar* case did not rest upon excess of authority is entirely clear, for the case was remanded to the district court with the instruction that "if it is decided on the merits either that the contract was illegal *or that respondents [plaintiffs] are pledgors,* they are entitled to possession of the shares. . . ."[96] (Emphasis supplied.)

The footnote in the *Larson* case purporting to distinguish the *Dollar*

92 Id. at 735-736.
93 Id. at 738.
94 337 U.S. at 702.
95 330 U.S. at 735-736.
96 Id. at 739.

case thus rests upon a clear-cut mistake. The *Dollar* case still stands as authority for the proposition that if the shares were pledged as collateral for a debt that has been paid, the pledgors may recover possession in a suit against the officers, even though the contract was not between the plaintiffs and the officers but was between the plaintiffs and the Maritime Commission. The *Dollar* and the *Larson* cases are squarely opposed, and the law of the future may follow either one. Nothing in the *Larson* opinion answers the observation in the *Dollar* opinion that when government officers unlawfully seize property, "The dominant interest of the sovereign is then on the side of the victim. . . ."[97]

The third case the Court distinguished in its *Larson* footnote was *Ickes v. Fox*;[98] the Court was right in saying that the decision rested in part upon the theory that the officer was acting in excess of his authority.

The Court in the *Larson* opinion thus unsatisfactorily distinguished three cases—*Lee*, *Sloan*, and *Dollar*—and satisfactorily distinguished the *Fox* case. It did not try to distinguish the *Goltra* case, and accordingly overruled it. The only case the Court used in support of its decision was *Goldberg v. Daniels*,[99] which was a suit for mandamus to compel the Secretary of the Navy to deliver a government cruiser to the plaintiff, who had submitted the highest bid in response to the Secretary's advertisement for bids. Except for citations, the entire opinion on the sovereign immunity question was in two sentences: "The United States is the owner, in possession of the vessel. It cannot be interfered with behind its back, and, as it cannot be made a party, this suit must fail."[100]

Although it was the Court's sole authority in the *Larson* opinion, the *Goldberg* case is both distinguishable and questionable. In the *Goldberg* case, the government was the owner; in the *Larson* case, the question whether the government was the owner was the question the plaintiff wanted to litigate. In the *Larson* case, the plaintiff sought to prevent unlawful taking of property; in the *Goldberg* case, the plaintiff sought to compel affirmative action that was within the Secretary's discretionary authority. In the *Dollar* case the Court had no difficulty distinguishing the *Goldberg* case; it said merely that the *Dollar* suit was "not an attempt to get specific performance of a contract to deliver property of the United States."[101] The principal idea of the *Goldberg* opinion that the United

[97] Id. at 738.

[98] 300 U.S. 82 (1937).

[99] 231 U.S. 218 (1913).

[100] Id. at 221, 222.

[101] Land v. Dollar, 330 U.S. 731, 737 (1947). In the Larson case, the suit was not to get specific performance of the contract to sell coal; the prayer was for an injunction against

States cannot be "interfered with behind its back" seems to overlook the fact that the Solicitor General was representing the Secretary, as the report of the case shows. The *Goldberg* case was probably sound in result, but the reason should have been that the Court in the circumstances would not compel the Secretary to exercise his discretion in a particular manner.

The Court in the *Larson* case could more appropriately have relied upon *International Postal Supply Co. v. Bruce*,[102] which provides better support for the *Larson* decision than does the *Goldberg* case, and which is one of the simplest outrages ever committed in the name of sovereign immunity. The plaintiff sought to enjoin a local postmaster from infringing the plaintiff's patent on a stamp cancelling and postmarking machine. The Court held that because the postmaster had no personal interest in the use of the machine, "the suit really was against the United States."[103] The Court said that the United States had the "right" to use the machine under the terms of a lease of the machine, and that "This right cannot be interfered with behind its back."[104] Yet the postmaster was represented by an Assistant Attorney General, as the report of the case shows.

The decision in the *Larson* case was six to three, with Mr. Justice Douglas concurring in a short opinion, Mr. Justice Rutledge concurring in the result, Mr. Justice Jackson dissenting without opinion, and Mr. Justice Frankfurter writing a dissenting opinion in which Mr. Justice Burton concurred.

Mr. Justice Douglas said cryptically: "To make the right to sue the officer turn on whether by the law of sales title had passed to the buyer would clog this governmental function with intolerable burdens."[105] Mr. Justice Douglas does not explain wherein the law of sales is so "intolerable" that it cannot be applied to the government as a seller of coal. Nor does he explain why, if the law of sales is "intolerable," it should be applied to private sellers of coal. He goes no further than to take the position that the government as a seller must enjoy special privileges that other sellers do not enjoy. The argument seems to be that the sovereign must be above the law that applies to others! The king can do no wrong—even in this American democracy!

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sale of the coal to anyone but the plaintiff, and for a declaration that the sale to the plaintiff was valid and the sale to the other purchaser invalid.

102 194 U.S. 601 (1904).

103 Id. at 605. The Court relied heavily upon a similar holding in Belknap v. Schild, 161 U.S. 10 (1896).

104 194 U.S. at 606.

105 337 U.S. at 705.

Nearly all Supreme Court opinions on sovereign immunity in suits against officers focus upon a narrow segment of the whole subject. This fact in part explains the inconsistencies. The outstanding modern effort to deal with the subject comprehensively is that of Mr. Justice Frankfurter in his dissent in the *Larson* case.[106] The opinion is valuable for its analysis of some of the principal cases, and for its partial collection, in an appendix, of Supreme Court decisions "concerning suits against governmental agents in which defense of sovereign immunity was raised."[107] The Frankfurter analysis abundantly supports the observation that "The subject is not free from casuistry."[108]

Yet caution is necessary in relying on the Frankfurter opinion, for the board generalizations are far from satisfactory. Of his first category of "Cases in which the plaintiff seeks an interest in property which concededly, even under the allegation of the complaint, belongs to the government, or calls for an assertion of what is unquestionably official authority,"[109] he says: "The governing principle is clear enough. If a defendant is asked to transfer the possession or title of property which is the Government's, judged by the conventional tests of possession or ownership, or if he is asked to exercise authority with which the State has invested him and the desired action is in fact governmental action so far as an individual is ever pro tanto the impersonal government, such demands are effectively demands upon the sovereign, which require the sovereign's consent as a prerequisite to the grant of judicial remedies."[110]

This so-called "governing principle" is in two parts. The first part seems to say that sovereign immunity bars a court from ordering an officer "to transfer the possession or title of property which is the Government's, judged by the conventional tests of possession or ownership." Of course, apart from sovereign immunity, a court will not order a transfer of title of government property unless the plaintiff is legally entitled to the transfer. The fact is that the Supreme Court has often ordered government officers to transfer government property to plaintiffs

106 For an article the thesis of which is that sovereign immunity should not be a defense when the officer acts without valid authority but should be a defense when he acts within valid authority, see Block, "Suits against Government Officers and the Sovereign Immunity Doctrine," 59 Harv. L. Rev. 1060 (1946).

107 337 U.S. at 729.

108 Id. at 708.

109 Id. at 709-710. The first category clearly overlaps each of the other three. Indeed, each of Mr. Justice Frankfurter's four categories overlaps each of the others, except that categories two and three do not overlap each other.

110 Id. at 712.

who are held to be entitled to such a transfer.[111] An outstanding example is *Wilbur v. United States ex rel. Krushnic,*[112] in which the Supreme Court granted mandamus against the Secretary of the Interior to compel issuance of a land patent to one who was held to have located a mining claim on property which, apart from the location of the claim, was concededly the government's.

Does the second part of the "governing principle" mean that the decisive question is whether the relief sought requires affirmative official action, as distinguished from an injunction? If so, is Mr. Justice Frankfurter ignoring the law of mandamus as it has been applied in suits against officers for more than a century?[113] When is "the desired action . . . in fact governmental action"? If the court orders the Secretary of the Interior to issue a patent to land, as it did in the *Krushnic* case,[114] is the Secretary's action "in fact governmental action"? If it is, then a whole line of Supreme Court decisions is contrary to the Frankfurter statement.[115] If it is not, then how can any action of any officer ever be "in fact governmental action"?

Mr. Justice Frankfurter's second category is "Cases in which action to the legal detriment of a plaintiff is taken by an official justifying his action under an unconstitutional statute."[116] He summarizes the law of this category: "The matter boils down to this. The federal courts are

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111 In addition to the Krushnic case see: United States v. Schurz, 102 U.S. 378 (1880) (holding that title had passed to petitioner from the government, and officer was therefore ordered to deliver land patent); Garfield v. United States ex rel. Goldsby, 211 U.S. 249 (1908) (holding that relator's name was unlawfully erased from rolls, thereby depriving him of 320 acres of land; mandamus granted against officer to restore status quo); Ballinger v. United States ex rel. Frost, 216 U.S. 240 (1910) (mandamus granted to compel Secretary to issue land patent to one in whom Court held title had vested).

112 280 U.S. 306 (1930).

113 Kendall v. United States, 12 Pet. 524 (U.S. 1838); Roberts v. United States ex rel. Valentine, 176 U.S. 221 (1900); Wilbur v. United States ex rel. Krushnic, 280 U.S. 306 (1930). In each of these cases and in many others the Supreme Court has approved the issuance of mandamus to compel officers to take affirmative action.

All experience shows the unworkability of a line between the affirmative and the negative. The test under Williams v. Fanning, 332 U.S. 490 (1947), has caused confusion precisely because it depends upon the difference between affirmative and negative decrees—a difference which has proved impossible to apply. See the discussion infra at p. 29.

Mr. Justice Frankfurter himself demonstrated in Rochester Tel. Corp. v. United States, 307 U.S. 125, 140-142 (1939) that it had become "abundantly clear that 'negative order' and 'affirmative order' are not appropriate terms of art. . . . 'Negative' and 'affirmative,' in the context of these problems, is as unilluminating and mischief-making a distinction as the outmoded line between 'nonfeasance' and 'misfeasance.'"

114 Wilhur v. United States ex rel. Krushnic, 280 U.S. 306 (1930).

115 All four cases cited above in notes 111 and 112 are such cases.

116 337 U.S. at 710.

not barred from adjudicating a claim against a governmental agent who invokes statutory authority for his action if the constitutional power to give him such a claim of immunity is itself challenged."[117] This must be an inadvertence, for no case cited involves a challenge of the constitutionality of giving a governmental agent either immunity or "a claim of immunity." Mr. Justice Frankfurter continues: "Sovereign immunity may, however, become relevant because the relief prayed for also entails interference with governmental property or brings the operation of governmental machinery into play. The Government then becomes an indispensable party and without its consent cannot be implicated."[118] This langnage seems to say that sovereign immunity is a bar to judicial determination of the merits of a case when the relief prayed either (1) entails interference with governmental property or (2) brings the operation of governmental machinery into play. Let us examine each of these two propositions.

When a plaintiff prays for relief that entails interference with governmental property, he asserts either that what he prays is not interference or that the property is not the government's. In the usual case, the plaintiff claims an interest in property and the government's officer refuses to convey title or to deliver possession. Is such a plaintiff barred by sovereign immunity? Mr. Justice Frankfurter seems to say that he is. But since the cases hold both yes[119] and no,[120] an unqualified statement either way is unjustified.

Mr. Justice Frankfurter says that sovereign immunity is a bar when the relief prayed "brings the operation of governmental machinery into play."[121] This resembles his earlier statement that sovereign immunity is

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117 Id. at 715.

118 Ibid.

119 Mr. Justice Frankfurter properly cites Morrison v. Work, 266 U.S. 481 (1925). He might also properly have cited New Mexico v. Lane, 243 U.S. 52 (1917); Louisiana v. Garfield, 211 U.S. 70 (1908); and Oregon v. Hitchcock, 202 U.S. 60 (1906).

120 United States v. Lee, 106 U.S. 196 (1882) is directly in point. In an ejectment suit against officers who asserted that title was in the United States, the Court held that sovereign immunity was no defense.

Land v. Dollar, 330 U.S. 731 (1947) is a recent holding that sovereign immunity is not a defense to a suit in which a plaintiff sought possession of property held by officers who were acting on behalf of the government.

In all four cases cited above in notes 111 and 112 sovereign immunity failed to prevent litigation of the question whether the plaintiff was entitled to a land patent; in each case the Court approved a writ of mandamus compelling the defendant officer to issue a patent.

121 The cases of the first category are listed twice, once in the footnote to the statement of the first category, and once in the appendix to the opinion, but three of the eighteen cases of the appendix are omitted from the footnote, without explanation. The heading in

a bar if "the desired action is in fact governmental action."[122] Both tests seem to depend upon the unworkable affirmative-negative distinction.[123] If in the *Larson* case the decree had enjoined the Administrator from transferring the coal to the second purchaser, would the decree have brought the operation of governmental machinery into play? Mr. Justice Frankfurter's answer must be no, for sovereign immunity would be a bar if it did, and the purpose of his dissent was to argue that sovereign immunity was not a bar. Then, when does a decree bring governmental machinery into play? The answer must be, when it requires affirmative action. For instance, if a writ of mandamus compels the Secretary of the Interior to issue a land patent to the plaintiff, governmental machinery must be brought into play when the Secretary complies. But if this is the meaning of the Frankfurter statement—and what else can it mean?—then it is directly opposed to the line of cases approving writs of mandamus to compel the Secretary of the Interior to issue land patents.[124] The Frankfurter statement is directly opposed to such cases as *Kendall v. United States,*[125] where the Supreme Court issued mandamus ordering the Postmaster General to credit the relators with an amount of money; *Roberts v. United States ex rel. Valentine,*[126] where the Supreme Court issued mandamus to compel the Treasurer of the United States to pay interest on certificates; *Garfield v. United States ex rel. Goldsby,*[127]

the appendix is: "Plaintiff sought interest in property which concededly belong to the Government, or demanded relief calling for an assertion of what was unquestionably official authority." Why the two seemingly incompatible parts are put together into one category is unexplained. Some of the cases listed are hard to square with the heading. In Governor of Georgia v. Madrazo, 1 Pet. 110 (U.S. 1828), the plaintiff asserted a right to slaves held by the governor, and to proceeds of sale of slaves; the slaves did not "concededly" belong to the State. The case went off on the ground that the governor was sued by title and not by name.

Five of the eighteen cases were suits by holders of state bonds, seeking to collect or seeking action to help them collect; possibly it was the money which "concededly" belonged to the states.

In Belknap v. Schild, 161 U.S. 10 (1896), a suit was brought to enjoin naval officers from infringing a patent. What property "concededly" belonged to the government is unelear unless it was the property used in the infringement. The suit did not seek an assertion of official authority, but an injunction against continued infringement.

Oregon v. Hitchcock, 202 U.S. 60 (1906), and Louisiana v. Garfield, 211 U.S. 70 (1908) did not involve property which "concededly" belonged to the government, for in both cases the plaintiff claimed the property. The only assertion of "unquestionably official authority" involved issuance of a land patent to the plaintiff.

122 337 U.S. at 712.

123 See note 113 supra.

124 Four such cases are cited in notes 111 and 112 supra.

125 12 Pet. 524 (U.S. 1838).

126 176 U.S. 221 (1900).

127 211 U.S. 249 (1908).

where the Court issued mandamus to require the Secretary of the Interior to erase certain marks and notations striking the name of Goldsby from the rolls; and *Miguel v. McCarl*,[128] where the Court affirmed a mandatory injunction against a disbursing officer "directing a disposal of petitioner's application for pay upon the merits, unaffected by the opinion of the Comptroller General" that the petitioner was not entitled to the pay.

Mr. Justice Frankfurter generalizes later in the opinion: "When a pleading raises a substantial claim that the defendant is wrongfully withholding from the plaintiff property belonging to him; the defendant has not heretofore been permitted to shield himself behind the immunity of the sovereign."[129] In at least three Supreme Court decisions, the defendant officer successfully shielded himself behind the immunity of the sovereign, when such a substantial claim was raised.[130]

Analysis of the Frankfurter analysis goes far toward proving that a comprehensive treatment of the law of this subject must be partly creative if it is to succeed in advancing a set of intelligible principles.

V. Judgments in Suits Against Officers as Res Judicata Against the Government When Government Counsel Defend

The cases on sovereign immunity as a defense have only occasionally considered the vital question whether sovereign immunity affects the normal operation of the doctrine of res judicata. Obviously, a judgment against an officer is binding upon the same officer, and a judgment against the government is binding upon both the government and its officers. The troublesome problem is whether a judgment against an officer is res judicata against the government or against other officers.

The Supreme Court made a clear statement of principle in 1940 in *Sunshine Anthracite Co. v. Adkins*:[131] "There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government." This statement seems plausible enough, for both the first and the second suit can depend upon the fiction that the officer instead of the government is the party to the litigation, thereby avoiding the doctrine of sovereign immunity. The holding, however, was not that a judgment against an officer was binding upon another officer of the same govern-

128 291 U.S. 442 (1934).

129 337 U.S. at 726.

130 New Mexico v. Lane, 243 U.S. 52 (1917); Louisiana v. Garfield, 211 U.S. 70 (1908); Oregon v. Hitchcock, 202 U.S. 60 (1906).

131 310 U.S. 381, 402-403 (1940).

ment, for the party to the first suit was not an officer but was the Bituminous Coal Commission, an agency of the government.

Under the doctrine of the *Sage* and *Nunnally* cases,[132] a judgment in a suit by a taxpayer against a federal tax collector is not binding upon the Commissioner of Internal Revenue or upon the United States. But these cases have been explicitly overruled by statute.[133] Furthermore, they are distinguishable from the present problem in that a suit against a tax collector has a unique tradition of its own. For instance, a suit against a collector cannot be continued against his successor,[134] although suits against other officers customarily can be continued against their successors.[135] The law that makes a suit against a collector so peculiarly personal rests upon statutes.[136] The Supreme Court has at least twice specifically refused to apply the law concerning a suit against a collector to a suit against another officer.[137]

Another guide from the tax field is the Supreme Court's holding in *Tait v. Western Maryland Ry. Co.*[138] that a suit against the Commissioner

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132 Sage v. United States, 250 U.S. 33 (1919); United States v. Nunnally Investment Co., 316 U.S. 258 (1941).

133 56 Stat. 956 (1942), 26 U.S.C. § 3772(d) (1952).

134 Smietanka v. Indiana Steel Co., 257 U.S. 1 (1921).

135 E.g., Snyder v. Buck, 340 U.S. 15 (1950).

136 The original case held the collector liable at common law. Elliott v. Swartwout, 10 Pet. 137 (U.S. 1836). But after Congress enacted a requirement that collectors pay money collected into the Treasury, the Supreme Court held the collector not personally liable. Cary v. Curtis, 3 How. 236 (U.S. 1845). But Congress later recognized such suits. E.g., Rev. Stat. § 989 (1878). See the explanation in Smietanka v. Indiana Steel Co., 257 U.S. 1 (1921). See Plumb, "Tax Refund Suits against Collectors of Internal Revenue," 60 Harv. L. Rev. 685 (1947).

137 In Sunshine Coal Co. v. Adkins, 310 U.S. 381, 403 (1940), the Court said that cases holding that a judgment in a suit against a collector is not a bar to a subsequent suit by or against the United States are not in point because the suit against the collector is personal. In Snyder v. Buck, 340 U.S. 15, 18 (1950), the action was against Buck, Paymaster General of the Navy for an order to pay an allowance. The Court distinguished a suit against a tax collector: "The complaint in this case makes no claim against Buck personally. Therefore we put to one side cases such as Patton v. Brady, 184 U.S. 608, dealing with actions in assumpsit against collectors for taxes erroneously collected. The writ that issued against Buck related to a duty attaching to the office."

Mr. Justice Frankfurter, dissenting, agreed with the Court that a suit to compel the Paymaster General of the Navy to pay an allowance was not a personal action and added: "That suits against a collector of revenue for illegal exactions under the Revenue Acts are deemed personal actions enforceable as such against the collector is an anomalous situation in our law which calls for abrogation instead of extension."

138 289 U.S. 620, 627 (1933): ". . . where a question has been adjudged as between a taxpayer and the Government or its official agent, the Commissioner, the Collector, being an official inferior in authority, and acting under them, is in such privity with them that he is estopped by the judgment." The suit was "against the United States and the Collector."

is binding in a subsequent action against the United States and the collector. The *Tait* case is unaffected by the unique considerations that apply to the res judicata effect of judgments in suits against collectors. But a suit against the Commissioner is probably a suit against the office, not against the officer.

An important additional factor affecting the question whether the government is bound by a judgment against an officer is the consistent practice of government counsel defending suits against officers whenever the government, disregarding the fiction, is the real defendant. When this factor is taken into account, the reasons in favor of res judicata become much stronger. The basic principle that comes into play is neatly and authoritatively stated by the Restatement of Judgments: "A person who is not a party but who controls an action, individually or in co-operation with others, is bound by the adjudication of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound."[139]

The Supreme Court has laid down "the principle that one who prosecutes or defends a suit in the name of another, to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly, to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it, as an estoppel against an adversary party, as he would be if he had been a party to the record."[140]

This principle is clearly a necessary feature of the law of res judicata for the purpose of res judicata is to prevent a relitigation of the same issues between the same parties or their privies. If in a suit against an officer the only counsel for the officer is a government lawyer, and if the officer has no personal interest in the action, the government is obviously the real party in interest for purposes of carrying out the policy behind the doctrine of res judicata.

The argument to the contrary is that the government cannot be sued without its consent and that only Congress can give consent. Should this argument prevail?

Although the Supreme Court's decisions on this question are confused, as we shall presently see, the answer seems clear as a matter of principle. Even if we accept the idea that the government cannot be sued unless

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139 Restatement, Judgments § 84 (1942).

140 Souffront v. La Compagnie des Scureries, 217 U.S. 475, 486 (1910).

Congress consents, the conclusion does not follow that the government cannot become bound by a judgment unless Congress consents, and the problem here is whether the government becomes bound, not whether it can be sued. That the government can become bound by a judgment in absence of consent of Congress is entirely clear. Whenever government lawyers bring a suit on behalf of the government as a plaintiff, the government becomes bound by the judgment. The reasons behind the doctrine of res judicata—avoiding relitigation of the same issues between the same parties or their privies—are just as strong whether the government is a plaintiff or a defendant in the first proceeding, and whether the government is a party both in form and in substance or only in substance.

The Supreme Court's holdings have often been in accord with this understanding of principle. Such a holding is *Gunter v. Atlantic Coast Line R.R. Co.*[141] In the first proceeding a stockholder sued the railroad and the treasurers of two counties to enjoin the railroad from paying and the treasurers from collecting certain taxes. A joint answer was filed for the treasurers, signed by "The Attorney General for the State of South Carolina, for defendants." An injunction was granted, which the Supreme Court affirmed in 1873. In 1900 a new act was passed by the legislature of South Carolina, and the Attorney General of the state thereafter commenced actions against the successor railroad to collect the tax that had been enjoined. The question whether the state was bound by the decree in the first proceeding was thus squarely presented. The Court said that "the inquiry reduces itself to this: Did the State of South Carolina become, in substance and effect, a party to the [first] case?"[142] The Court said that "the State was directly interested" because officers characterized as "nominal defendants" were charged with the

141 200 U.S. 273 (1906). A forerunner of the Gunter case was the holding in New Orleans v. Citizens' Bank, 167 U.S. 371 (1897). The case was the sixth time the bank had litigated the question of exemption from taxation, the first three times under the original charter, and the last three under an extended charter. The problem in the sixth case was whether the judgments in the fourth and fifth cases were res judicata. In the fourth case the bank had sued the state board of assessors, the state auditor, the city of New Orleans, and the state tax collector. In the fifth case the bank had sued the board of assessors. In the sixth suit the defendants were the city of New Orleans, the board of assessors for the parish of Orleans, and the state tax collectors for the various taxing districts in the parish of Orleans, and a supplemental bill was filed against the sheriffs of thirteen parishes in the State of Louisiana outside the parish of Orleans, who were ex officio tax collectors. The Court held the prior judgments res judicata, even though the tax was for different years.

In City of New Orleans v. Whitney, 138 U.S. 595 (1891), the Court had held that a city was bound by decrees against grantees of the city because the city had assumed the defense of the suits; the Court said nothing of sovereign immunity.

142 200 U.S. at 284.

collection of both county and state taxes.[143] After noting a statute authorizing the county treasurer to employ counsel and to pay fees and damages that might be awarded against the treasurer, the Court laid down the proposition that "where a suit was brought against a county treasurer in respect to county taxes, that official was empowered to represent the county for the purpose of the defense of its interest, and a judgment rendered against such official was therefore made binding upon the county."[144] The Court accordingly held that the state and the Attorney General were "privies to and bound by the decree" of the first case.

Another clear-cut holding is *United States v. Candelaria,*[145] where the Supreme Court said in answer to a certified question: "But, as it appears that for many years the United States has employed and paid a special attorney to represent the Pueblo Indians and look after their interests, our answer is made with the qualification that, if the decree was rendered in a suit begun and prosecuted by the special attorney so employed and paid, we think the United States is as effectually concluded as if it were a party to the suit." Since this statement was made in partial answer to a certified question, it must be regarded as a square holding.

In 1945 the Supreme Court reaffirmed the *Candelaria* holding when it added a slight qualification in another Indian case: "If the United States in fact employs counsel to represent its interest in a litigation or otherwise actively aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its results. . . . But to bind the United States when it is not formally a party, it must have a laboring oar in a controversy."[146] The qualification that the government must have "a laboring oar" has no effect in the typical case in which the only attorneys representing the defendant officer are in the employ of the government.

The *Gunter, Candelaria,* and *Drummond* cases are strong and clear authorities,[147] even though the Supreme Court at times either has been unaware of them or has knowingly disregarded them.

The best authority to the contrary is the 1878 case of *Carr v. United*

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143 Id. at 285.

144 Id. at 286.

145 271 U.S. 432, 444 (1926).

146 Drummond v. United States, 324 U.S. 316, 318 (1945).

147 In City of Elmhurst v. Kegerreis, 392 Ill. 195, 64 N.E.2d 450 (1945), a judgment against a building superintendent was held res judicata against a city on the theory that the city was in privity with its superintendent. In Millikan v. City of LaFayette, 118 Ind. 323, 20 N.E. 847 (1889), a judgment against a city treasurer was held res judicata against a city.

States.[148] The government brought a bill to quiet title, and the defendants asserted that previous judgments in suits brought against officers and defended by government attorneys were res judicata. In holding against this defense, the Court was actuated by the idea that when it appears "that the possession attempted to be assailed was that of the government . . . the jurisdiction of the court ought to cease. Otherwise, the government could always be compelled to come into court and litigate with private parties in defense of its property."[149] The holding is weakened by its assumption that the law was the opposite of what the Court held in the *Lee* case only four years later.[150]

The *Carr* case, however, does not stand alone. It was followed in a dictum in the important case of *United States v. Lee*,[151] in a holding in 1911,[152] and in several dicta in the *Dollar* case of 1947.[153] In the *Dollar* opinion, the Court gave no indication that it inquired into the question any further than the dictum in the *Lee* case.

The Supreme Court has thus failed to enunciate clear and consistent law on the question whether a judgment in a suit against an officer is res judicata against the government. The authority that such a judgment is res judicata is probably stronger than the opposing authority. Reason and policy are emphatically on the side of res judicata. After a case has been litigated between a private party and government attorneys who are representing the government's interest, the government should be bound in the same way that any other litigant would be bound, unless we insist on the divine right of kings to such an extent that we want to waste the time of parties and of courts in multiple litigation of the same issues.

VI. Perspective and Recommendations

In practical effect, the judge-made doctrine of sovereign immunity has been partially unmade by the judges, but the extent of the unmaking fluctuates drastically from one Supreme Court case to another. The

148 98 U.S. 433 (1878).

149 Id. at 438.

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

151 Id. at 222. See also the dictum in Tindal v. Wesley, 167 U.S. 204, 223 (1896).

152 Hussey v. United States, 222 U.S. 88 (1911). In Bank of Kentucky v. Kentucky, 207 U.S. 258 (1907), a judgment against one county and members of a state board was held not binding on another county.

153 Land v. Dollar, 330 U.S. 731, 736, 737, 739 (1947). A court of appeals in later Dollar litigation considered itself bound by these dicta. United States v. Dollar, 196 F.2d 551 (9th Cir. 1952).

Mr. Justice Douglas, concurring separately in Georgia R. Co. v. Redwine, 342 U.S. 299, 307 (1952), thought that the state should be bound by a prior judgment against an officer, distinguishing Land v. Dollar on the ground of absence of "special circumstances."

theory that the government cannot be sued without its consent continues, but the practicality is that the government usually can be sued without its consent if the plaintiff will falsely pretend that his suit is against an officer, and not against the government. The form of sovereign immunity continues, but the substance is often largely gone; even when the substance has given way to the needs of justice, the form lingers on.

The principal escape from the substance of sovereign immunity has been by way of the fiction which is best exemplified by the leading case of *Ex parte Young*, that an officer who acts without valid authority is "stripped of his official or representative character."[154] This fiction has served the needs of justice in innumerable cases and it should be continued and expanded. The weakness of the fiction is that it is a fiction; unpredictable results stem from the occasional judicial action taken on the basis of the realization that a suit which is nominally against an officer is in reality a suit against the government. Substantive harm results not from the fiction but from departures from the fiction.[155]

The Supreme Court usually holds that sovereign immunity does not prevent a suit against an officer who acts either unconstitutionally or in excess of authority. The Court should consistently so hold. The exceptional cases in this category cannot be justified either analytically or on policy gronnds. Suits against officers to test the constitutionality of statutes are very common; courts in such cases have often put an end to programs enacted by Congress and by state legislatures. In this perspective, the cases refusing to enjoin illegal action of an officer on the ground that an injunction "would interfere with the performance of governmental functions"[156] seem quite incongruous, for the result is that courts may interfere with choices made by the people's representatives but not with choices made by a single officer. In another aspect, the result is that courts may pass upon the policy problems that Congress has decided but may not pass upon the problems of property or contracts law that an administrative officer has decided. The need in this category of cases is for a *consistent* application of the principle that sovereign immunity does not prevent enjoining an officer's unconstitutional or unauthorized

154 209 U.S. 123, 160 (1908).

155 It is arguable that abolition of the doctrine of sovereign immunity is preferable to continuing the fiction. But the less radical recommendations here made will satisfy all reasonable needs and leave the more drastic action to Congress. Furthermore, keeping the law of suits against state officers in the federal courts the same as the law of suits against federal officers in the federal courts is advantageous, and the Eleventh Amendment cannot be changed basically by judicial action.

156 The quoted words are those of the Court in Morrison v. Work, 266 U.S. 481, 485-486 (1925).

action. This principle should be applied irrespective of the question whether the court's order will require affirmative governmental action, and irrespective of the question whether the subject matter is property or contracts or torts or constitutionality. The Court should follow its holdings in the *Kendall, Roberts* and *Miguel* cases;[157] the cases that cannot be reconciled with these three cases, including the prominent cases of *Louisiana v. Garfield, Morrison v. Work,* and *Mine Safety Co. v. Forrestal,* should be overruled.[158]

The recent effort to make decisive the distinction between suing an officer personally and suing an officer officially is unworkable and should be discontinued. The Court has not provided and probably cannot provide satisfactory criteria to determine when an officer is an individual, when he is an official, and when he is both; in absence of such criteria, the attempted law-making in *Great Northern Ins. Co. v. Read*[159] is palpably unsound. The Court should permit suits against officers to challenge authority and constitutionality irrespective of the distinction between individual and official action.

The area of greatest confusion about sovereign immunity as a defense is in the cases in which no claim is made of unconstitutionality or excess of authority. The Supreme Court should follow its holdings in the *Lee, Goltra,* and *Dollar* cases.[160] These three holdings should be made the foundation for future law, and the Court should overrule all decisions that are irreconcilable, including especially the *Larson* case[161] in which the Court discredited the *Goltra* case and purported to distingnish the *Lee* and *Dollar* cases. The basic principle should be simply that of *Ex parte Young*—that an officer who acts illegally is "stripped of his official or representative character"[162] for purposes of application of the doctrine of sovereign immunity. An officer should be deemed to act illegally not only if he acts unconstitutionally and not only if he acts contrary to or

157 Kendall v. United States, 12 Pet. 524 (U.S. 1838) (mandamus order against Postmaster General requiring him to credit relators with an amount of money); Roberts v. United States ex rel. Valentine, 176 U.S. 221 (1900) (mandamus against Treasurer of the United States to compel payment of money); Miguel v. McCarl, 291 U.S. 442 (1934) (mandatory injunction to disbursing officer directing disposal of claim unaffected by opinion of Comptroller General).

158 Louisiana v. Garfield, 211 U.S. 70 (1908); Morrison v. Work, 266 U.S. 481 (1925); Mine Safety Co. v. Forrestal, 326 U.S. 371 (1945). Each of these cases is fully discussed in the foregoing pages.

159 322 U.S. 47 (1944).

160 United States v. Lee, 106 U.S. 196 (1882); Goltra v. Weeks, 271 U.S. 536 (1926); Land v. Dollar, 330 U.S. 731 (1937).

161 Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949).

162 209 U.S. 123, 160 (1908).

in excess of specific limitations on his authority but also if he acts contrary to the legal rights of the plaintiff, whether those rights involve property, contract, or other law. What is needed is a return to the proposition laid down by Chief Justice Taft in the *Goltra* case: "If it was a trespass, then the officers of the Government should be restrained whether they professed to be acting for the Government or not. . . . By reason of their illegality, their acts or threatened acts are personal and derive no official justification from their doing them in asserted agency for the Government."[163] In this passage, the word "trespass" should be interpreted to include any and all interference with legal rights of the plaintiff, whether tangible or intangible. In other words, in absence of clear statutory authority, an officer should be deemed to be without authority to commit a trespass or any other tort, to violate the plaintiff's contract or property rights, or to take any other action which interferes with what the court recognizes as legal rights of the plaintiff.[164]

The practical effect of the recommendation just made is to reduce the doctrine of sovereign immunity to a right of Congress to authorize government infringement of the legal rights of private parties without judicial redress. In absence of such authorization from Congress, sovereign immunity will never prevent a suit against an officer for relief other than money damages. Existing statutes, of course, may be interpreted as providing such authorization.

The Supreme Court has held both ways on the question whether a judgment in a suit against an officer should be res judicata against the government. The Court should resolve the inconsistencies in favor of the cases holding that the government is bound. The government is bound when government lawyers institute a proceeding on behalf of the govern-

163 Goltra v. Weeks, 271 U.S. 536, 544 (1926).

164 The most radical feature of this proposal is the idea that an officer should be held to have no authority to break a valid contract with a private party. But this idea is already the law in such cases as Kendall v. United States, 12 Pet. 524 (U.S. 1838); Roberts v. United States ex rel. Valentine, 176 U.S. 221 (1900); Miguel v. McCarl, 291 U.S. 442 (1934). In other words, even the most radical feature of the proposal involves no more than getting rid of inconsistencies in the Supreme Court's holdings.

From the standpoint of both justice and desirable policy, the notion that the courts should not enforce against the government a contract which the government has freely entered into is thoroughly pernicious. The Supreme Court might take a leaf out of the book of an enlightened state court to see how simply the notion can be rejected. A good example is Meens v. State Board of Education, 267 P.2d 981 (Mont. 1954). The sole question was whether the state board of education could be sued for breach of contract. In holding that it could be, the court relied upon authority that "Where there is an act of the state Legislature authorizing a contract by a state department, the courts have power to enforce the contract against the state."

ment as a plaintiff; the government should equally be bound when government lawyers on behalf of the government defend a suit against an officer. Otherwise, the same issues will be litigated more than once between the same real parties. The government as a party to litigation should have no special privileges that are not equally enjoyed by other litigants. Here, as elsewhere, the divine right of kings has no place in twentieth-century America.