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THE EFFECT OF SOVEREIGN IMMUNITY ON ENVIRONMENTAL PROTECTION SUITS AGAINST GOVERNMENT OFFICIALS

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The King moreover is not only incapable of doing *wrong, but even of* thinking *wrong; he can never mean to do an improper thing: in him is no folly or weakness.*[1]

INTRODUCTION

The ancient doctrine of sovereign immunity continues to flourish in the rule that the federal government may not be sued by name without its consent.[2] Since governmental immunity in the United States affects the subject matter jurisdiction of the courts,[3] it cannot be waived by federal officials; only express congressional authorization will suffice.[4] There have been numerous legislative waivers of sovereign immunity,[5] and most judicial review of federal administrative activity now proceeds under some statutory review procedure.[6] However, some governmental functions, especially those committed to one of the older executive departments, remain insulated from direct review by the courts.[7] Thus, the immunity doctrine survives despite its universal condemnation as an unwarranted impediment to the judicial review of improper administrative conduct.[8]

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1. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 245 (S. Tucker ed. 1803).

2. State sovereign immunity will not be discussed in this article. However, it occasionally figures in environmental litigation. *See* Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967).

3. Minnesota v. United States, 305 U.S. 382 (1939); Case v. Terrell, 78 U.S. (11 Wall.) 199 (1870).

4. Dalehite v. United States, 346 U.S. 15 (1953).

5. *E.g.*, Tucker Act, 28 U.S.C. § 1346 (1970); Court of Claims Act, 28 U.S.C. § 1491 (1970); Federal Tort Claims Act, 60 Stat. 842 (1946).

6. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant,* 68 MICH. L. REV. 389, 394 (1970) [hereinafter cited as Cramton].

7. *Id.*

8. Byse, *Proposed Reforms in Federal "Non-statutory" Judicial Review: Sovereign Immunity, Indispensible Parties, Mandamus,* 75 HARV. L. REV. 1479 (1962) [hereinafter cited as Byse]; Cramton 419.

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Sovereign immunity, however, has never entirely precluded suits by persons harmed by official actions. Injunctive relief, along with the declaratory judgment suit,[9] has long provided a means of contesting administrative decisions in a nonstatutory review action against the officer who authorized or performed the act. The so-called officer suit proceeded on the theory that one who committed a wrongful act was answerable in tort for his conduct.[10]

The emergence of the environmental protection suit is one of the most significant legal developments of the past decade.[11] Recent legislation enacted in response to the growing public desire for conservation and protection of the environment has entrusted broad powers to federal agencies to further these objectives.[12] At the same time, federal courts have demonstrated an increased willingness to allow private individuals and conservationist groups to challenge the failure of governmental agencies to discharge their recently acquired environmental responsibilities.[13] In these cases, the primary emphasis has been placed on the question of standing to sue, but as this problem approaches final resolution,[14] sovereign immunity may replace it as the major impediment to review of administrative action in this crucial area.

A number of excellent articles have been published on the general subject of federal sovereign immunity in recent years,[15] but most of them

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9. Declaratory Judgment Act, 28 U.S.C. § 2201 (1970). *See* Cramton 394.

10. *See generally* Comment, *Immunity of Government Officers: Effects of the Larson Case,* 8 STAN. L. REV. 683 (1956).

11. For a discussion of the environmental protection suit see LAW AND THE ENVIRONMENT (M. Baldwin & J. Page eds. 1970); J. SAX, DEFENDING THE ENVIRONMENT: STRATEGY FOR CITIZEN ACTION (1971); Lynch & Stevens, *Environmental Law—The Uncertain Trumpet,* 5 U. SAN FRANCISCO L. REV. 10 (1970); Comment, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution,* 16 WAYNE L. REV. 1085 (1970).

12. *E.g.,* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970); Wild and Scenic Rivers Act, 16 U.S.C. § 1271 *et seq.* (1970); Wilderness Act, 16 U.S.C. § 1131 *et seq.* (1970); Land and Water Conservation Fund Act of 1965, 16 U.S.C. §§ 460*l*-4 to -11 (1970); Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-66 (1970); Estuarine Areas Act of 1968, 16 U.S.C. §§ 1221-26 (1970); Water Resources Planning Act, 42 U.S.C. §§ 1962 *et seq.* (1970); Clean Air Act, 42 U.S.C. §§ 1857 *et seq.* (1970); Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1151 *et seq.* (1970); Oil Pollution Act, 1961, 33 U.S.C. §§ 1001 *et seq.* (1970).

13. *E.g.,* Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966); Citizens Committee for the Hudson Valley v. Volpe, 297 F. Supp. 809 (S.D.N.Y. 1969); Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967). *See also* Association of Data Processing Services Organization, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Comment, *The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality,* 17 U.C.L.A.L. REV. 1070 (1970).

14. *But see* Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).

15. Byse 8; Cramton 6; Davis, *Suing the Government by Falsely Pretending to Sue an Officer,* 29 U. CHI. L. REV. 435 (1962); Jaffe, *Suits Against Governments and Offi-*

have been substantially concerned with legislative or judicial reform of this and related doctrines. The growing importance of environmental values as significant social and legal interests compels an examination of the relationship between sovereign immunity and the environmental protection suit. This article will trace the past and recent development of the immunity doctrine and consider its present and potential impact on environmental litigation.

HISTORICAL EVOLUTION OF THE IMMUNITY DOCTRINE

The actual origins of the doctrine of sovereign immunity are far from certain.[16] The former belief that it stemed from Roman law has now been discredited.[17] The earliest evidence of the doctrine in England dates from the reign of Henry III;[18] Bracton stated in the thirteenth century that the king could not be sued in royal court without his consent,[19] and a decision in 1234 asserted the immunity of the sovereign.[20] It would seem that the doctrine of sovereign immunity during the middle ages was associated with the royal person of the king. Although the immunity was personal in nature,[21] the theoretical basis for the doctrine is less clear. Blackstone ascribed the maxim that "the King could do no wrong" to the royal prerogative, "that special preeminence which the King hath over and above all other persons, and out of the course of the common law, in right of his royal dignity."[22] Although the maxim "the King can do no wrong" is often cited as the basis of sovereign immunity, the belief that the king was above the law was not widely held during the period in which the doctrine first developed.[23] Sovereign immunity may have had nothing to do with the royal prerogative, but rather, proceeded from the medieval notion that no man could be sued in

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cers: Sovereign Immunity, 77 HARV. L. REV. 1 (1963); Scalia, *Sovereign Immunity and Non Statutory Review of Federal Administrative Action: Some Conclusions from the Cases,* 68 MICH. L. REV. 867 (1970).

16. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity,* 13 LA. L. REV. 476, 477 (1953).

17. *Id.*

18. Holdsworth, *The History of Remedies Against the Crown,* 38 L.Q. REV. 141, 142 (1922).

19. 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 516 (2d ed. 1968).

20. *Id.* at 516 n. 7. Not only was the king immune from suit as a party defendant in the first instance, but he could not be impleaded in a suit between subjects, as for example under voucher or warranty. Holdsworth, *supra* note 18, at 143-45.

21. Borchard, *Government Liability in Tort,* 34 YALE L.J. 1, 4 (1924).

22. 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 239 (S. Tucker ed. 1803).

23. *See* Blachly & Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey,* 9 LAW & CONTEMP. PROB. 181, 182 (1942).

his own court: "He [the king] can not be compelled to answer in his own court, but this is true of every petty lord of every petty manor; that there happens to be in this world no court above his is, we may say, an accident."[24] Whatever its origin, the personal immunity of the king from suit was gradually transformed during the Tudor period into the modern theory of governmental immunity.[25]

Remedies such as the petition of right, the traverse of facts and the *monstrans de droit* gradually evolved during the late middle ages.[26] However, none of these remedies provided relief from tortious conduct by administrative personnel,[27] and royal consent was required before suit could be brought against them.[28] Acts of the king's agents were considered to be acts of the king, thereby requiring complaints against these agents to be made to the king himself or those delegated by the king to hear such complaints. Even when the king did assume responsibility, the subject's only redress was through a petition to the king.[29] Suits against officers without royal permission were gradually allowed during the reign of Edward I and his immediate successors,[30] although obedience to a royal command was still considered to provide full justification for an otherwise unlawful act.[31] By this time, however, waiver by the king of his sovereign immunity enabled the plaintiff to bring suit against the officer in a common law court.[32] Finally, it was recognized by the fifteenth century that if a royal officer engaged in wrongful conduct, he alone would be liable.[33] By the late seventeenth century, even the defense of obedience to royal command failed to provide protection to officials since the fiction had developed that the king would not authorize an illegal act.[34]

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24. POLLOCK & MAITLAND, *supra* note 19, at 518.

25. Laski, *The Responsibility of the State in England,* 32 HARV. L. REV. 447 (1919); Pugh, *supra* note 16, at 478.

26. The petition of right permitted the subject to institute, with royal permission, a legal action against the king where the litigant's claim would be valid but for the royal status of the defendant. This procedure, however, was often quite lengthy and Parliament in 1360 enacted a statute which allowed litigants in special cases to traverse findings of fact by royal officials. The scope of the traverse of fact was greatly expanded by legislation in 1362, and this eventually led to the remedy of *monstrans de droit.* Holdsworth, *supra* note 18.

27. Pugh, *supra* note 16, at 479.

28. H. BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, 171b, 172a (T. Twiss ed. 1878).

29. Blachly & Oatman, *supra* note 23, at 185.

30. Holdsworth, *supra* note 23, at 185.

31. Blachly & Oatman, *supra* note 23, at 185.

32. *Id.*

33. *E.g.,* Statute of Westminster I, 3 Edw. 1 (1275); Statute of Westminster II, 13 Edw. 1 (1285).

34. *See* Sand v. Child, 83 Eng. Rep. 725 (K.B. 1693).

Despite its seeming inconsistency with the principles of democratic government,[35] the doctrine of sovereign immunity was quickly accepted in the United States. Perhaps the principal reason for the adoption of the immunity doctrine in America was an eminently practical one. Many states had incurred substantial debts during the Revolutionary War, and sovereign immunity appealed to the states as a means of avoiding the embarrassment of being sued by creditors.[36] Indeed, such prominent figures as Hamilton,[37] Madison[38] and Marshall[39] endorsed the doctrine in their efforts to secure ratification of the Constitution.[40] The concept of sovereign immunity developed slowly in the federal courts during the nineteenth century.[41] Cases involving the issue occurred infrequently before 1875 because federal courts were not given general jurisdiction over federal questions until then.[42] Congress in 1855 enacted the first general provision for the recovery of damages against the federal government by creating the Court of Claims with jurisdiction over actions arising out of government contracts.[43]

As in England, the officer suit developed as a means of circumventing the bar to direct suits against the government.[44] Under this approach, the plaintiff could institute legal actions against an administrative officer, alleging that the defendant had interfered with a legal right. If the officer could show that he had acted pursuant to valid statutory authority, the defense of sovereign immunity would be effective and the court would be compelled to dismiss the action for want of jurisdiction.[45]

The defense of sovereign immunity, however, was subject to various exceptions; it was not available as a defense to actions by the officer which exceeded the scope of his authority,[46] actions brought under an

35. Laski, *supra* note 25, at 464-66.
36. Pugh, *supra* note 16, at 481.
37. THE FEDERALIST No. 81 (A. Hamilton).
38. 3 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 533 (1836).
39. *Id.* at 555-56.
40. However, soon afterwards the Supreme Court limited state sovereign immunity in *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 16 (1793). The eleventh amendment was the immediate response to the Court's action. Although it did not prohibit suits against the federal government, it indirectly influenced the development of the immunity doctrine in subsequent federal decisions. Pugh, *supra* note 16, at 485.
41. *See* United States v. Clarke, 33 U.S. (8 Pet.) 151 (1834); United States v. McLemore, 45 U.S. (4 How.) 117 (1846); Buchanan v. Alexander, 45 U.S. (4 How.) 10 (1846); Hill v. United States, 50 U.S. (9 How.) 189 (1850).
42. Cramton 396.
43. 10 Stat. 612 (1855).
44. *Ex parte* Young, 209 U.S. 123 (1908).
45. *E.g.,* Wells v. Roper, 246 U.S. 335 (1918).
46. *E.g.,* Land v. Dollar, 330 U.S. 731 (1947); Waite v. Macy, 246 U.S. 606 (1918); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912).

unconstitutional statute[47] or involving an unconstitutional taking,[48] and the doctrine did not apply to actions which, unless justified, would have constituted a common law tort.[49] Tortious conduct which involved an erroneous exercise of authority was presumed to be unauthorized unless the action was committed to the discretion of the officer by statute.[50] If the plaintiff based his suit on one of the factors mentioned above, the court would not dismiss the action without considering the nature of the officer's authority. Since valid immunity would deprive the court of jurisdiction, this approach meant that the question of jurisdiction and the merits of the case itself rested upon the same considerations.[51] In practice, the court would make a preliminary determination of jurisdiction on the pleadings[52] followed by a hearing on the merits unless it appeared that "the actions alleged could not be said to be in excess of the statutory authority pleaded by the defendants . . . ."[53]

Through the legal fiction of treating a government official as a private individual, the courts were able to exercise some powers of review over the actions of the executive departments of government.[54] Even where the allegedly wrongful act fit into one of the above three categories, jurisdiction would be denied when the relief sought was of certain kinds: 1) the courts would not enforce specific performance of contracts against the government;[55] 2) the courts would not direct government officials to pay over public funds;[56] 3) the courts normally would not direct officials

47. *E.g.*, Rickert Rice Mills, Inc. v. Fontenot, 297 U.S. 110 (1936); *Ex parte* Young, 209 U.S. 123 (1908); Smyth v. Ames, 169 U.S. 466 (1898).

48. Tindal v. Wesley, 167 U.S. 204 (1897); United States v. Lee, 106 U.S. 196 (1882).

49. *See* Comment, *Immunity of Government Officers: Effects of the Larson Case*, 8 STAN. L. REV. 683, 684-85 (1956).

50. *See, e.g.*, Mulry v. Driver, 366 F.2d 544 (9th Cir. 1966). But the extent of the official's discretion is subject to judicial interpretation. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951).

51. *Federal Administrative Law Developments—1969*, 1970 DUKE L.J. 67, 204 (1970) [hereinafter cited as *Administrative Law Developments*].

52. Ickes v. Fox, 300 U.S. 82 (1937); West Coast Exploration Co. v. McKay, 213 F.2d 582 (D.C. Cir. 1954), *cert. denied*, 347 U.S. 989 (1954).

53. Comment, *supra* note 49, at 686.

54. Byse 1485. In theory the government was not bound by an adverse judgment against the officer. For a discussion of the res judicata effects against the United States when a government counsel defends the action see 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 27.06 at 576 (1958).

55. Wells v. Roper, 246 U.S. 335 (1918); United States *ex rel.* Goldberg v. Daniels, 231 U.S. 218 (1913); Hagood v. Southern, 117 U.S. 52 (1886); Louisiana v. Jumel, 107 U.S. 711 (1882).

56. *E.g.*, Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371 (1945); Morrison v. Work, 266 U.S. 481 (1925); Belknap v. Schild, 161 U.S. 10 (1896). *But see* Roberts v. United States, 176 U.S. 221 (1900); Plumb, *Tax Refund Suits Against Collectors of Internal Revenue*, 60 HARV. L. REV. 685 (1947).

to give over property the title to which was unquestionably in the federal or state government.[57]

PRESENT IMMUNITY RULES

The modern doctrine of sovereign immunity in the United States emerged from the decision in *Larson v. Domestic & Foreign Commerce Corp.*[58] In this case, the plaintiff, charging that the War Assets Administration had sold him certain surplus coal and then refused to deliver it, brought suit to enjoin the sale or delivery of the coal to any other person. The controversy concerned the terms of the contract regarding the manner of payment. The plaintiff maintained that the contract did not require payment prior to delivery, while the government demanded full payment before transfer of possession. When the plaintiff tendered an unsatisfactory letter of credit instead of a cash deposit, the War Assets Administrator treated this as a breach of the contract and refused to make delivery.

The circuit court had held that jurisdiction depended upon whether title to the coal had passed from the government to the plaintiff.[59] The Supreme Court, however, declined to consider the question of title and held that the suit was barred regardless of which party actually had title to the coal.[60] The Court instead addressed itself to the issue of whether erroneous or tortious conduct by the government officer was *ipso facto* beyond the scope of his statutory authority. The plaintiff, relying on existing case law, asserted that such conduct could never be within the scope of the officer's authority and thus was outside the protection of sovereign immunity.[61] The Court rejected this position and distinguished between the type of wrongful act required to state a cause of action and that which was beyond the scope of the officer's authority:

> It is argued that an officer given the power to make decisions is only given the power to make correct decisions. If his decisions are not correct, then his action based on those decisions is beyond his authority and not the action of the sovereign. There

57. *See, e.g.,* Minnesota v. United States, 305 U.S. 382 (1939); Louisiana v. Garfield, 211 U.S. 70 (1908); Oregon v. Hitchcock, 202 U.S. 60 (1906). *But see* Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306 (1930); Santa Fe Pac. R.R. v. Fall, 259 U.S. 197 (1922); West Coast Exploration Co. v. McKay, 213 F.2d 582 (D.C. Cir. 1954), *cert. denied,* 347 U.S. 989 (1954).

58. 337 U.S. 682 (1949).

59. Domestic & Foreign Commerce Corp. v. Littlejohn, 165 F.2d 235 (D.C. Cir. 1947).

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

61. *Id.* at 692.

> is no warrant for such a contention in cases in which the decision made by the officer does not relate to the terms of his statutory authority. Certainly the jurisdiction of a court to decide a case does not disappear if its decision on the merits is wrong. And we have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so. We therefore reject the contention here. 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. A Government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign.[62]

In the course of the opinion, the majority reviewed the leading cases in support of the parties' respective positions. *Goltra v. Weeks,*[63] which was a suit to enjoin a federal officer from attempting to repossess barges leased to the plaintiff by the government, held that such repossession by the government would constitute a trespass and was thus beyond the officer's statutory authority. The *Larson* court, however, refused to follow the *Goltra* decision and instead accepted the contrary position exemplified by *United States ex rel. Goldberg v. Daniels.*[64] The plaintiff in *Goldberg* had submitted the winning bid on a surplus war vessel, but the Secretary of the Navy refused to complete the sale and deliver the vessel. The Court invoked the doctrine of sovereign immunity and declared that the plaintiff's suit must fail even if title had actually passed.

It may be argued that the result in the *Larson* case was in accord with prior decisions. In *Goltra,* the plaintiff was already in possession of the barges under a leasehold interest. His rights could be secured by simply prohibiting the officer from acting to repossess. On the other hand, in both *Goldberg* and *Larson* possession had not left the government. Therefore, to require the officer to take the affirmative step of delivering the property to the plaintiff would have amounted to specific performance against the government.

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62. *Id.* at 695 (citation omitted).
63. 271 U.S. 536 (1926).
64. 231 U.S. 218 (1913).

The Court's doctrinal justification for this result, however, is open to serious question. Instead of simply holding that specific performance against the government was an impermissible form of relief, the Court enunciated the troublesome rule that erroneous or tortious conduct by an officer would no longer always be considered outside the scope of his authority.[65] The *Larson* decision also suggested that relief might be denied even though the officer's conduct fell within one of the exceptions "if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property."[66] This principle, set forth in the celebrated footnote eleven of the Court's opinion, has contributed its share to the confusion surrounding sovereign immunity.[67]

Turner v. Kings River Conservation District[68] interpreted the language of footnote eleven as being discretionary rather than mandatory since it stated that a suit "may" rather than "must" fail when certain forms of relief are requested. *Turner* was an action by owners of riparian and overlying lands against officials operating the Pine Flat Dam and reservoir on Kings River in California to prevent interference with their water supply. The court held that footnote eleven did not control the decision because the plaintiffs would have an adequate remedy by restraining governmental intereference with their water rights without requiring a disposition of government property.[69] In the later case of *Washington v. Udall,*[70] the Ninth Circuit reaffirmed its position rejecting footnote eleven.

One recent case, however, seems to have taken a contrary view. In

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65. The *Larson* decision raised an additional question by apparently associating sovereign immunity with the law of agency. 337 U.S. at 695. Fortunately, this aspect of the case has not been favorably received. *But see* Hudspeth County Conservation & Reclamation Dist. No. 1 v. Robbins, 213 F.2d 425 (5th Cir. 1954), *cert. denied,* 348 U.S. 833 (1954).

66. 337 U.S. at 691 n.11.

67. *See* Cramton 414-15. Footnote eleven of *Larson* first attracted notice in *West Coast Exploration Co. v. McKay* where the court stated:

> [W]e think that the holding of the Larson case . . . recognizing the two jurisdictional exceptions is not modified or lessened in force by the footnote referred to, and that it does not preclude the application of the exceptions to cases in which Government property is involved.

213 F.2d 582, 596 (D.C. Cir. 1954), *cert. denied,* 347 U.S. 989 (1954).

68. 360 F.2d 184 (9th Cir. 1966).

69. *Id.* at 189 (citation omitted). The court, however, did determine that the Flood Control Act of 1944, under which the project was operated, permitted the interference with plaintiff's water rights. As a result, the plaintiff was limited to an action for damages.

70. Washington v. Udall, 417 F.2d 1310 (9th Cir. 1969). *See also Administrative Law Developments, supra* note 51, at 215-16.

Zapata v. Smith,[71] members of VISTA brought suit against the Governor of Texas and the Director of the Office of Economic Opportunity alleging that they had been illegally removed from participation in a VISTA project. The plaintiffs sought a declaratory judgment invalidating the officers' actions and also requested damages for back pay. The court reviewed the general test of immunity and the scope of authority doctrine, but then stated:

> At first glance our case would appear to come within this exception [ultra vires acts] since the plaintiffs have pled that the dismissal of the VISTA volunteers was both unauthorized by statute, or, if authorized, was an unconstitutional deprivation of due process. However, there is a well recognized exception to the exception which applies to this case and which makes it clear that, despite the statutory and constitutional allegations of the plaintiffs, the suit is nevertheless one against the United States.[72]

Quoting from footnote eleven of *Larson,* the court held that affirmative action would be required for the government to pay back wages. Since this made the government an indispensable party to the action, the suit could not be maintained without its consent. It is noteworthy that the court gave footnote eleven mandatory effect without referring to those cases which had held it to be nonmandatory.

Although *Larson* has been universally criticized,[73] the Supreme Court has steadfastly refused to retreat from its position and has further developed it in later cases. In *Malone v. Bowdoin,*[74] the plaintiff had filed a common law ejectment action against a federal Forest Service officer, claiming title to property in the possession of the government.[75] The Supreme Court held that the suit was barred by the Government's immunity and indicated that *United States v. Lee*[76] had little validity after the *Larson* decision. The *Lee* case had held that governmental officers who trespassed upon the plaintiff's land could be sued for specific relief. While some cases subsequent to *Lee* had suggested limitations on

71. 437 F.2d 1024 (5th Cir. 1971).
72. *Id.* at 1025.
73. *See, e.g.,* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 27.05 (1958); GELLHORN & BYSE, ADMINISTRATIVE LAW, CASES AND COMMENTS 354-55 (4th ed. 1960); Byse 1485-91; Cramton 404-11; Jaffe, *The Right to Judicial Review,* 71 HARV. L. REV. 401, 433-37 (1958).
74. 369 U.S. 643 (1962).
75. *See* 17 RUTGERS L. REV. 475, 467 n.1 (1963).
76. 106 U.S. 196 (1882).

the "tortious act" theory,[77] it had uniformly been held that sovereign immunity did not automatically bar an action to recover real property where it was alleged that title was in the plaintiff.[78] In addition, numerous suits involving disputes over federal land grants to the states or to the railroads had been allowed against the federal government without recourse to the immunity doctrine.[79] The plaintiff's position in *Malone* greatly resembled that of the dissenting justices in *Larson* who had asserted that sovereign immunity should not impair a person's right under general law to regain possession of wrongfully withheld property.[80] Under this view, the defense of sovereign immunity would be available to the government only after a court had determined that ownership of the property was not vested in the plaintiff.

The court in *Malone,* however, reaffirmed the *Larson* holding and determined that the officer had not exceeded his statutory authority when he wrongfully and tortiously withheld the plaintiff's land. Consequently, the only question for decision was whether or not there had been an unconstitutional taking of the plaintiff's property without compensation. It was decided that *Lee* was no longer controlling in this respect since Congress now provided a remedy in the Court of Claims.[81]

In *Dugan v. Rank,*[82] the Supreme Court held that the immunity doctrine would bar an action by riparian owners to prevent officials of the Bureau of Reclamation from impounding water at a federal dam on the San Joaquin River as part of the Central Valley Project.[83] The Supreme Court drafted a general test to determine if a suit was one against the government by declaring that sovereign immunity would normally bar an action if " 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' "[84] In *Dugan,* a grant of injunctive relief to the plaintiff would clearly have resulted in termination or modification of a large-scale, congressionally authorized federal project . Although the

77. United States *ex rel.* Goldberg v. Daniels, 231 U.S. 218 (1913).

78. *The Supreme Court, 1961 Term,* 76 HARV. L. REV. 54, 220-22 (1962).

79. *E.g.,* Payne v. Central Pac. Ry., 255 U.S. 228 (1921); Noble v. Union River Logging R.R., 147 U.S. 165 (1893). *See also* 23 S. CAL. L. REV. 258 (1950).

80. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 717 (1949) (dissenting opinion) *quoting* Land v. Dollar, 330 U.S. 731, 736 (1946).

81. Malone v. Bowdoin, 369 U.S. 643, 647 (1962); 17 RUTGERS L. REV. 475 (1963).

82. 372 U.S. 609 (1963).

83. For a discussion of the project see Graham, *The Central Valley Project: Resource Development of a Natural Basin,* 38 CALIF. L. REV. 588 (1950).

84. Dugan v. Rank, 372 U.S. 609, 620 (1963) (citation omitted) *quoting with approval* Land v. Dollar, 330 U.S. 731, 738 (1947) and Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949).

Court appeared to base its decision solely on the general test of immunity enunciated above without placing much emphasis on the unconstitutional and ultra vires exceptions, it would seem that neither was relevant since a method of compensation had been provided by Congress.[85]

Hawaii v. Gordon[86] also involved an application of the general test of sovereign immunity. In this case, the state brought suit to require the Director of the Budget to withdraw his advice to federal agencies that lands in Hawaii obtained by the United States through purchase, condemnation or gift were not lands to be conveyed to Hawaii by virtue of the statehood act.[87] The Court denied the requested relief since "the order requested would require the Director's official affirmative action, affect the public administration of government agencies and cause as well the disposition of property admittedly belonging to the United States."[88]

From these cases it can be seen that an action against a government officer will be barred by sovereign immunity if: 1) the decree would operate against the sovereign, 2) the judgment would expend itself upon the public treasury or domain or 3) the judgment would restrain the government from acting or compel it to act.[89] Even if the immunity rule would not bar an action under one of these general rules, the *Larson* decision had established that a suit against a government officer would nevertheless be barred if the officer was properly exercising the discretion afforded him under the appropriate statute. The limits of an official's statutory discretion, however, remained subject to various judicial interpretations.[90]

Error in the Exercise of Authority—Approaches to Statutory Discretion

One of the salient features of the *Larson* decision was the rule that tortious or erroneous actions by a government officer would not neces-

85. The Court also rejected the argument that the McCarren Act, 43 U.S.C. § 666 (1970), constituted a waiver of immunity. 372 U.S. at 617.

86. 373 U.S. 57 (1963).

87. Hawaii Statehood Bill, 73 Stat. 4 (1959).

88. 373 U.S. at 58.

89. *See* Hawaii v. Gordon, 373 U.S. 57, 58 (1963); Dugan v. Rank, 372 U.S. 609, 620 (1963); Malone v. Bowdoin, 369 U.S. 643, 647 (1962); Land v. Dollar, 330 U.S. 731, 738 (1947).

90. Another matter which has continued to perplex the courts is whether the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1970), should be construed as a waiver of sovereign immunity. Many courts have held that the A.P.A. has not waived governmental immunity. *E.g.*, Blackmar v. Guerre, 342 U.S. 512, 515-16 (1952); Motah v. United States, 402 F.2d 1 (10th Cir. 1968); Chournos v. United States, 335 F.2d 918 (10th Cir. 1964). *But see* Toilet Goods Ass'n v. Gardner, 360 F.2d 677 (2d Cir. 1966), *aff'd* 387 U.S. 158 (1967); Cappadora v. Celebreeze, 356 F.2d 1 (2d Cir. 1966); Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961); Adams v. Witner, 271 F.2d 29 (9th Cir. 1958).

sarily be construed as being beyond the scope of his authority. Although this position was almost immediately accepted by the lower federal courts,[91] *Larson's* treatment of the scope of authority doctrine has received a variety of interpretations. Such differences have primarily centered around the method of examining the officer's statutory discretion.

General Statutory Authority

The *Larson* opinion implied that only those actions which directly conflicted with an officer's general authority were within the ultra vires exception.[92] This language has led some courts to conclude that an officer need have only general authority to do the sort of act in question in order to invoke the doctrine of sovereign immunity.[93] This result may be reached even where the statute upon which the parties rely contains no explicit authorization for erroneous decisions. Such an approach, however, frequently enables courts to avoid the difficult task of interpreting statutes to determine the limits of administrative discretion.

> It is perfectly possible for a court to hold that an official has authority to make erroneous as well as correct determinations. Such a holding, of course, should rest on a reasoned determination that Congress intended to confer so broad a discretion. But under *Larson, Doehla, et al.,* the courts seem to interpret the statutes cursorily to authorize the defendant official to act in the "general" area in question; so long as the official remains within the "general" area, his erroneous acts are unreviewable whether or not the statute properly construed was intended to confer such an unreviewable discretion. This . . . is an abdication of judicial responsibility.[94]

Illustrative of this general authority approach is *Doehla Greeting*

91. Arizona *ex rel.* Arizona State Bd. of Pub. Welfare v. Hobby, 221 F.2d 498 (D.C. Cir. 1954). *See also* Kennedy v. Rabinowitz, 318 F.2d 181 (D.C. Cir. 1963), *aff'd on other grounds,* 376 U.S. 605 (1964); Doehla Greeting Cards, Inc. v. Summerfield, 227 F.2d 44 (D.C. Cir. 1955); Wohl Shoe Co. v. Wirtz, 246 F. Supp. 821 (E.D. Mo. 1965).

92. "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 . . . ." Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 695 (1949).

93. Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969), *cert. denied,* 397 U.S. 934 (1970); Iowa Pub. Serv. Co. v. Iowa State Commerce Comm'n, 407 F.2d 916 (8th Cir. 1969), *cert. denied,* 396 U.S. 826 (1969); Simms v. Vinson, 394 F.2d 732 (5th Cir. 1968); Colter Corp. v. Seaborg, 370 F.2d 686 (10th Cir. 1966); Doehla Greeting Cards, Inc. v. Summerfield, 227 F.2d 44 (D.C. Cir. 1955).

94. Byse 1491.

Cards, Inc. v. Summerfield,[95] where the plaintiff attemped to enjoin the Postmaster General from enforcing new postal rates with respect to certain fourth class mail.[96] The statute upon which the parties relied empowered the Postmaster General, based upon his experience, to reform postage rates if he found the costs of operation to be greater than the receipts.[97] The court concluded that even if the officer had not made such a finding before raising the rates, his action was only erroneous and therefore within the scope of his authority. There was, of course, nothing in the statute referring to erroneous decisions; the court merely assumed that this authority was implied in the official's general authority to establish rates.

The general authority approach was also followed in *Gardner v. Harris.*[98] This action was brought against the superintendent of the Natchez Trace Parkway to compel him to remove barricades which blocked the plaintiff's access to the highway.[99] After discussing the scope of authority rule, the court declared that, under the applicable statute,[100]

> the Superintendent was charged with the responsibility, as an agent of the Secretary of the Interior, of administering and maintaining the Natchez Trace. No limits on his authority are cited to us, either by the Goverment or by the Court below, as long as it is reasonably connected with the administration of the Trace.[101]

In effect, the absence in the statute of any express limitation on the officer's discretion virtually precluded judicial inquiry into the limits of the discretion itself or the validity of the particular act in question.

In *Gnotta v. United States,*[102] the defense of sovereign immunity was accepted by the court with little examination of the officer's discretionary authority. The plaintiff alleged that he was denied a promotion despite more than eleven years service with the U.S. Army Corps of

95. 227 F.2d 44 (D.C. Cir. 1955). *See also* Comment, *Immunity of Government Officers: Effects of the Larson Case,* 8 STAN. L. REV. 683 (1956).

96. The district court had dismissed the complaint because plaintiff failed to name an indespensable party. Doehla Greeting Cards, Inc. v. Summerfield, 116 F. Supp. 68 (D.D.C. 1953).

97. Act of Feb. 28, 1925, ch. 368, § 207, 43 Stat. 1067; Doehla Greeting Cards, Inc. v. Summerfield, 227 F.2d 44, 46 (D.C. Cir. 1955).

98. 391 F.2d 885 (5th Cir. 1968).

99. The lower court had found that the defendant had exceeded his authority. *Id.* at 887.

100. 16 U.S.C. § 460 (1970).

101. 391 F.2d at 888 (footnote omitted).

102. 415 F.2d 1271 (8th Cir. 1969), *cert. denied,* 397 U.S. 934 (1970).

Engineers because of discrimination on the basis of his Italian ancestry.[103] Upholding the lower court's dismissal, the circuit court applied the *Larson* criteria in determining that the action was one against the sovereign. There was no real consideration of the allegations of ultra vires conduct; instead, the court summarily concluded that "[t]his obviously is not a case which concerns either of the exceptions recognized in Dugan v. Rank . . . ."[104] While the court may have assumed that the internal operation of the agency was properly within the exclusive discretion of the supervisory personnel, the plaintiff had raised issues that arguably placed him within the exception to the immunity rule. Discrimination on the basis of race, creed or national origin was expressly prohibited.[105] The court itself admitted "that Executive Orders such as Nos. 11246 and 10925 are to be accorded the force and effect of an act of Congress."[106] While the court may have been correct in assuming that the executive order itself did not support a cause of action,[107] it failed to consider that the order placed the officials' conduct outside the scope of their authority. Surely, the court did not believe that Congress had given officials within the agency the power to discriminate on the basis of national origin.[108]

Perhaps the court was reluctant to interfere with internal affairs of the agency and to substitute its judgment for that of the officials who had evaluated Gnotta's performance. However, a possible solution would have been to decide that Gnotta had simply failed to prove his allegations. This would have been preferable to a decision based on sovereign immunity. There is language in the opinion to suggest that such a conclusion might reasonably have been reached.[109]

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103. *See* Note, *The Scope of Judicial Review Afforded a Civil Service Employee's Discharge,* 3 HARV. LEGAL COMMENTARY 12 (1966).

104. Gnotta v. United States, 415 F.2d 1271, 1277 (8th Cir. 1969) (citation omitted); *see* note 84 *supra* and accompanying text.

105. Exec. Order No. 11,246, 3 C.F.R. 339 (Supp. 1965); Exec. Order No. 10,925, 3 C.F.R. 448 (Supp. 1963).

106. 415 F.2d at 1275.

107. Executive orders merely constitute policy formulations by the president to guide administrative agencies and do not create a private right of action. Blaze v. Moon, 345 F. Supp. 495, 496 (S.D. Tex. 1970). *See* Gnotta v. United States, 415 F.2d 1271, 1275 (8th Cir. 1969); Farkas v. Texas Instruments, Inc., 375 F.2d 629, 633 (5th Cir. 1967); Congress of Racial Equality v. Comm'r, 270 F. Supp. 537 (D. Md. 1967). *See generally* Comment, *Racial Discrimination in the Federal Civil Service,* 38 GEO. WASH. L. REV. 265 (1969).

108. *See Administrative Law Developments* 207.

109. We could proceed to attempt to resolve the question whether agency inaction of the type complained of here is reviewable by federal courts and, if the answer should be in the affirmative, to resolve the secondary question whether on this record, with its conflicting testimony, the agency decision is to remain undisturbed. Or we might assume a positive answer to the first

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Subsequent to the *Gnotta* decision, a district court case involving similar facts was resolved in much the same fashion. In *Blaze v. Moon*,[110] the plaintiff, a former employee of the Corps of Engineers, sought to enjoin allegedly discriminatory employment, advancement and retention practices within the agency. In his complaint, the plaintiff alleged that the nominal defendant, the District Engineer of the Galveston, Texas District, had acted beyond his authority by not adhering to certain statutes, executive orders and agency regulations prohibiting discriminatory practices.[111] The court, however, avoided discussion of the plaintiff's allegation of ultra vires conduct and instead remarked that "[a] suit against an officer of the United States is one against the United States itself if the effect of the judgment would be to 'restrain the Government from acting, or to compel it to act.' Accordingly, this must be treated as a suit against the United States."[112] The significance of this case is not its eventual disposition, but rather the court's willingness to decide the case upon sovereign immunity instead of reaching the merits.

Actual Statutory Authority

Most decisions involving the immunity doctrine are decided according to the general authority approach. Some decisions, however, reflect a subtle move toward a more thorough examination of an officer's statutory authority. Under one such approach, the court accepts the plaintiff's factual allegations at face value for the purpose of determining whether they will support a charge of ultra vires conduct. The court must interpret the statute upon which the parties rely in order to discover whether it permits the officer to commit the act in question. If authorization for the particular act is found in the statutory language, the suit will then be barred by sovereign immunity. On the other hand, the suit will be allowed to proceed where the court finds that the discretion allowed under the statute did not include the right to commit the act.[113]

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question, without deciding it, and arrive at a positive answer to the second, on the theory that personality conflict and a non-communicating coworker do not of themselves equate the national origin discrimination, that the record at best is conflicting, and that there is substantial evidence to support the agency decision.

Gnotta v. United States, 415 F.2d 1271, 1276 (8th Cir. 1969).

110. 315 F. Supp. 495 (S.D. Tex. 1970).

111. The plaintiff based his complaint, in part, on the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970); Exec. Order No. 10,925, 3 C.F.R. 448 (Supp. 1963); the fifth amendment; and the Tucker Act, 28 U.S.C. § 1346 (1970).

112. 315 F. Supp. at 496 (citation omitted) *quoting* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949).

113. *Administrative Law Developments* 212-14. *See* United Federation of Postal Clerks v. Watson, 409 F.2d 462 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 902 (1969).

This represents an improvement over the "general authority" approach to the extent that it permits a meaningful inquiry into the merits of the case.

This procedure was first articulated in *West Coast Exploration Co. v. McKay,*[114] where the plaintiff sought to require the Secretary of the Interior to issue a patent to certain lands allegedly allotted to him under the provisions of the Gerard Act.[115] The real question was whether the Gerard Act applied to mineral lands. The court stated that where a party asserts that a government officer is acting beyond his statutory powers, the court, in deciding the preliminary jurisdictional question of whether the United States is a necessary party, will accept the allegations at face value for this limited purpose unless they are "so unsubstantial and frivolous as to afford no basis for jurisdiction."[116] The court also declared that this approach was consistent with the *Larson* opinion. After interpreting the statute, the court concluded that the Secretary had acted properly.

More recently, several cases have utilized this approach in determining the applicability of sovereign immunity. *Taylor v. Cohen*[117] concerned an attempt to restrain a local school board from adopting any desegregation plan other than "freedom of choice" and to prohibit the Department of Health, Education and Welfare from requiring the school board to act in any other fashion. The plaintiff argued that HEW officials, acting pursuant to provisions of the 1964 Civil Rights Act,[118] had exceeded their statutory authority in declining to allow freedom of choice. The court did not immediately dismiss the complaint, but rather, discussed the statute in question and finally determined that it allowed sufficient discretion to permit the contested governmental action even though the officials may have proceeded erroneously.

In *Carter v. Seamans,*[119] an action brought by a discharged Air Force officer seeking to invalidate his dismissal from service, the court stated:

> It should at once become evident that a determination of the sovereign immunity issue requires a ruling on the ultimate questions in the suit. In order to avoid deciding a case on the merits under the guise of resolving preliminary jurisdictional

114. 213 F.2d 582 (D.C. Cir. 1954), *cert. denied,* 347 U.S. 989 (1954).
115. 10 Stat. 849 (1855).
116. 213 F.2d at 593.
117. 405 F.2d 277 (4th Cir. 1968).
118. Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000*d* (1970).
119. 411 F.2d 767 (5th Cir. 1969), *cert. denied,* 397 U.S. 941 (1971).

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> issues, the courts have adopted the procedure of accepting at face value, for jurisdictional purposes, the averments of the complaint unless they are so transparently insubstantial or frivolous as to afford no possible basis for jurisdiction, and of giving the averments thus accepted their natural jurisdictional consequences.[120]

Although the court determined that the defense of sovereign immunity was not available to the Government, it dismissed the suit on the grounds that the plaintiff had an adequate remedy in the Court of Claims for damages.

These and similar cases may be viewed as a substantial qualification of *Larson's* dual procedure for determining jurisdiction and the merits. This is not to say, however, that this necessarily represents a return to the unitary standard of pre-*Larson* decisions under which success on the motion to dismiss was equivalent to success on the merits.[121]

Explicit Statutory Authority

Another more radical approach is to require the statute upon which the parties rely to contain rather explicit authorization for erroneous or tortious conduct by the officers. This, of course, marks the greatest departure from the general authority doctrine espoused by the majority of decisions since *Larson*. This approach was apparently used in *Washington v. Udall*.[122] In this case, Washington brought suit to secure review of a decision by the Secretary of the Interior that the state was not entitled to delivery of water from the Columbia Basin Project for more than 160 acres of irrigable, state-owned land.[123] The state argued that federal officials had exceeded their authority in construing the phrase "land held in private ownership" to apply to state school lands. The court agreed that while administration of the Reclamation Act was within the Secretary's general authority, the particular act might be ultra vires if the statute did not permit him to make an erroneous decision:

> [T]he mere allegation that a federal officer's action is erroneous, due to a mistake of fact or law, does not necessarily constitute a claim that he was acting beyond his delegated authority. Nevertheless, if the State's interpretation of 43 U.S.C. §423e is correct, the Secretary's imposition of a 160-acre limitation

120. *Id.* at 770.
121. *Administrative Law Developments* 214.
122. 417 F.2d 1310 (9th Cir. 1969).
123. Reclamation Act of 1902, 43 U.S.C. § 423*e* (1970).

> does not appear to be within his delegated powers. The resolution of this issue depends on whether Congress granted to the Secretary of the Interior, in his executing of contracts for the delivery of irrigation water, the discretionary authority to make incorrect as well as correct decisions concerning the necessity for the inclusion of 160-acre limitations in the contracts.[124]

The court examined the statute and decided that, while discretion was explicitly found in other parts of the legislation, the imposition of acreage limitations was nondiscretionary.

This discretion-hunting formula appears to indicate that if nothing in the statute is said about the officer's discretion, the court will assume that it does not perimit the officer to make incorrect decisions. Where the statute gives some discretion, but is silent on the right to make erroneous decisions, at least one court has found such authority to be implied. *New Mexico State Game Commission v. Udall*[125] was a suit by state officials to determine whether federal officials had the authority to kill deer for research purposes within the boundaries of the Carlsbad Caverns National Park without obtaining state permits. After analyzing the powers of the Secretary of the Interior under the legislation in question,[126] the court concluded that it conferred sufficient power upon the officer to kill animals detrimental to the park. The issue in question was actually the extent to which federal officials were bound by state statutes in administering federal park lands. Perhaps, if the court had followed the approach of the *Washington* case,[127] it would have concluded that the officer's conduct was ultra vires. Instead, sovereign immunity barred determination of an important federal-state question.[128]

Each of these approaches to the ultra vires exception has found proponents in the lower federal courts. The willingness of some courts to adopt the "actual statutory authority" and the "explicit statutory authority" positions in lieu of the more conventional "general statutory authority" approach seemingly required by *Larson* indicates considerable judicial dissatisfaction with sovereign immunity and forecasts a less prominent role for the doctrine in the future. This is an encouraging sign in light of the doctrine's potential harmful effect in environmental litigation.

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124. 417 F.2d at 1316 (citations omitted).
125. 410 F.2d 1197 (10th Cir. 1969), *cert. denied,* 396 U.S. 961 (1969).
126. 16 U.S.C. § 407*a* (1970).
127. *See* note 122 *supra* and accompanying text.
128. *Administrative Law Developments* 212.

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A SURVEY OF RECENT ENVIRONMENTAL CASES

Few environmental protection cases have specifically involved sovereign immunity, but an examination of these cases reveals some tendency on the part of the courts to restrict the application of the doctrine. Although it is sometimes difficult to justify these decisions with the doctrinal requirements of *Larson,* it can be argued that they are in accord with the broader policy of sovereign immunity. Whatever the origins of the immunity doctrine, its sole justification today is to prevent unnecessary and harmful judicial intereference with the orderly processes of government,[129] and there is no place for sovereign immunity in suits which do not conflict with this objective.

The great bulk of prior case law concerning sovereign immunity involved the assertion of private rights against the government. Although frequently couched in terms of constitutional or statutory protections, the interests in question were either economic or translatable into economic terms. Without disparaging the importance of such interests, it can be seen that environmental interests differ significantly from these traditional rights, and, arguably, they warrant different treatment. Since private rights were generally of a pecuniary character, the plaintiff could normally obtain compensation under the Tucker Act or in the Court of Claims even though his suit for specific relief was barred by sovereign immunity.[130] This also meant that the merits of his case would ultimately be considered. This is not true of the environmental protection suit. One who asserts an environmental interest generally represents the public and has no private property interest to vindicate by an award of damages.[131] Since he cannot sue for damages, no consideration of the merits of his case will be made by any court if the suit is barred by sovereign immunity. Consequently, administrative discretion on environmental matters could be abused without challenge or penalty. This is particularly acute since the environment is essentially irreplaceable. For these reasons, the apparent judicial hostility to sovereign immunity in the environmental context seems justified.

One of the first cases considering sovereign immunity in an en-

129. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine,* 59 HARV. L. REV. 1060, 1061 (1946); Byse 1484.

130. *Administrative Law Developments* 203 n.185.

131. Environmental rights based on the ninth amendment to the Federal Constitution have been proposed by commentators, but have found little favor with the courts to date. *See generally* Roberts, *The Right to a Decent Environment; E=MC²: Environment Equals Man Times Courts Redoubling Their Efforts,* 55 CORNELL L. REV. 674 (1970); Note, *Toward a Constitutionally Protected Environment,* 56 VA. L. REV. 458 (1970).

vironmental action applied the *Larson* criteria with little or no reference to the environmental protection aspects. *Delaware Valley Conservation Association v. Resor*[132] was an action brought by a conservation association to enjoin federal officials from proceeding with a recreation and reservoir project. The district court's dismissal of the complaint on the basis of sovereign immunity[133] was upheld. The opinion concentrated on the general test of whether a suit was one against the sovereign and only briefly examined the officers' statutory authority in light of the scope of authority rule. This was primarily because the plaintiffs had failed to set forth any specific limitations on the officers' authority which would have clearly prohibited the actions complained of.[134] This procedure was in accord with the general authority approach of *Larson*.[135] Although the court evinced concern for the project, it concluded that the plaintiffs' suit was barred by sovereign immunity since neither the Delaware River Basin Compact[136] nor the Federal Power Act[137] could be construed to grant consent to suits of this type.

While the decision in *Delaware Valley* was proper in light of *Larson*, it is subject to criticism on the ground that the merits of the case were never reached. The district court noted that the plaintiffs' allegations were stated in "broad, conclusory and extremely general terms."[138] Even so, the general nature of the allegations were detectable.[139] In essence, the plaintiffs were concerned with the effect on the environment of certain power contracts that government officials were contemplating in the future.[140]

The "hands off" policy of the court in *Delaware Valley* does not

132. 392 F.2d 331 (3d Cir. 1968).

133. Delaware Valley Conservation Ass'n v. Resor, 269 F. Supp. 181 (M.D. Pa. 1967).

134. 392 F.2d at 335.

135. *Id.*

136. Delaware River Basin Compact § 15.1, 75 Stat. 688, 713 (1961).

137. Federal Power Act § 317, 16 U.S.C. § 825*p* (1970).

138. Delaware Valley Conservation Ass'n v. Resor, 269 F. Supp. 181, 183 (M.D. Pa. 1967).

139. The refusal of the court to proceed without explicit directions from the plaintiff should be contrasted with the actions of the court in *Izaak Walton League v. St. Clair*, 313 F. Supp. 1312 (D. Minn. 1970). *See* note 147 *infra* and accompanying text.

140. The gravammen of appellants' complaint as indicated in their brief is that "defendants individually, in concert and through their agents and representatives are engaging in a series of unlawful and unconstitutional activities against plaintiff, including, inter alia, arbitrarily and discriminatorily proceeding with acquisition and condemnation of lands and waters and entering into illegal power contracts for the reservoir project and recreation area without statutory authority and without satisfying the preconditions of the purported enabling act, in violation of applicable law and without funds to pay just compensation."
Delaware Valley Conservation Ass'n v. Resor, 392 F.2d 331, 333 (3d Cir. 1968).

seem in keeping with the tradition of *Scenic Hudson Preservation Conference v. Federal Power Commission,*[141] where the court found a clear congressional concern with environmental matters in the Federal Power Act. Even if the plaintiffs' case in *Delaware Valley* was groundless, it is unfortunate that the court never actually examined the nature of the Government's authority to negotiate power contracts which might be harmful to the environment. If the Federal Power Act placed limitations on this discretion, then sovereign immunity should not have been applicable.[142]

Despite a somewhat unpromising beginning with *Delaware Valley,* most of the recent environmental cases show a more critical attitude toward the immunity doctrine. A few decisions, such as *Parker v. United States,*[143] have disposed of sovereign immunity by accepting allegations of ultra vires conduct at face value for the purpose of determining jurisdiction. *Parker* was an action to restrain the defendants from allowing the selling or cutting of timber in the East Meadow Creek area of the White River National Forest in Colorado. The plaintiffs asserted that the area was suitable for classification as "wilderness" under the 1964 Wilderness Act[144] and that failure to fully consider the recreational and wilderness qualities of the area was contrary to the Multiple Use-Sustained Yield Act of 1960.[145] In rejecting the defendants' motion for summary judgment, the district court remarked that:

> The Supreme Court has recognized that the applicability of this doctrine [sovereign immunity] is not dependent upon the denomination of the party defendant. In the present case plaintiffs claim that the various named government officials have acted outside of and in excess of any statutory authority conferred upon them. Such a claim clearly takes this action outside of the scope of sovereign immunity, for if the plaintiffs' claim proves true, the actions of the defendants must be considered individual rather than sovereign acts.[146]

Although the discussion of sovereign immunity in the *Parker* case was brief, the court's resolution of the immunity question must be regarded as significant.

In another case involving federal lands, a district court refused to

141. 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966).
142. *See, e.g.,* Federal Power Act § 10(a), 16 U.S.C. § 803(a) (1970).
143. 307 F. Supp. 685 (D. Colo. 1969).
144. 16 U.S.C. § 1131 *et seq.* (1970).
145. 16 U.S.C. § 529 (1970).
146. 307 F. Supp. at 687 (citation omitted).

entertain a sovereign immunity defense in an action to enjoin federal officers from allowing various persons to enter the Boundary Water Canoe Area for the purpose of drilling, exploring or removing minerals. The court in *Izaak Walton League v. St. Clair*[147] exhibited a clear hostility toward sovereign immunity and declared that the plaintiff's allegations of ultra vires conduct were sufficient to overcome the immunity defense:

> Such allegations are in effect present here. While it is true that plaintiff's complaint does not allege *in haec verba* that defendants have done or are threatening to do an unlawful act, by violating their management authority over the National Forests or the BWCA but is directed for the most part to defendants St. Clair and Yawkey, clearly it is pregnant with the claim and assertion that granting permission to these latter defendants is "inconsistent with the state and federal zoning laws and the public policies of the United States and the State of Minnesota which have been established to regulate mineral development in the BWCA." This it seems to the court is a sufficient allegation to bring this case which is one for injunctive relief against the federal defendants within the first exception above set forth [ultra vires acts] to the doctrine of sovereign immunity.[148]

This language should be contrasted with the strict pleading requirements imposed on the plaintiffs in the *Delaware Valley* case.[149] The court in *Izaak Walton* not only accepted the plaintiff's allegations at face value, but went to some lengths to discover them! It seems certain that a finding of sovereign immunity could have been made under the general authority approach of *Larson.* Instead, the court proceeded to the merits of the case in addition to interpreting the footnote eleven limitations[150] on the type of relief in a manner favorable to the plaintiff.

As in *Parker,* the court's treatment of the immunity question was not extensive. Apparently, there was little consideration of whether the legislation in question permitted erroneous decisions by federal officers.

147. 313 F. Supp. 1312 (D. Minn. 1970).

148. *Id.* at 1314.

149. *See* note 138 *supra* and accompanying text. The court also noted that sovereign immunity was not raised as a defense in either *Association of Data Processing Servicing Organizations, Inc. v. Camp,* 397 U.S. 150 (1970), or *Barlow v. Collins,* 397 U.S. 159 (1970), despite the fact that one or more of the defendants in each case were federal employees whose actions as government officials were under challenge. 313 F. Supp. at 1315.

150. *See* note 66 *supra* and accompanying text.

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By implication it did not, since the defense of sovereign immunity was rejected. Approving the plaintiff's assertions of ultra vires conduct, the court indicated that it subscribed to the language used by Justice Douglas in his dissent to *Malone v. Bowdin*,[151] that "[s]overeign immunity has become more and more out of date as the powers of the government and its vast bureaucracy have increased."[152]

CONCLUSION

As environmental litigation continues to flourish, the various tests of ultra vires conduct will continue to be applied in this new context in order to avoid the immunity bar. Cases involving the National Environmental Policy Act[153] will most likely indicate the relative strength or weakness of the defense of sovereign immunity in the environmental protection area.

Potentially, the National Environment Policy Act represents one of the greatest threats to the continued existence of the immunity doctrine in environmental litigation.[154] The Act sets forth a congressional manifestation of interest in and concern with protection of the environment. In addition to the declaration of a national policy concerning the environment, the N.E.P.A. requires certain measures by governmental agencies to protect natural resources.[155] In particular, one provision of the Act requires each agency to submit environmental impact statements.[156] The Act also sets forth certain procedures to be followed in formulating such environmental impact statements.[157]

At the present time it is impossible to predict how the courts will view the National Environmental Policy Act and the obligations it seemingly places upon officers of the government. Perhaps the courts will interpret the Act so broadly as to characterize as ultra vires any governmental action which appears to be at variance with the general policies articulated by it. More likely, the courts will approach the Act cautiously and examine only noncompliance with specific procedures or requirements. Already it appears that the courts have taken a position against retroactive enforcement of the N.E.P.A.[158] One case has already

151. 369 U.S. 643, 652 (1962); *see* notes 74-81 *supra* and accompanying text.

152. 313 F. Supp. at 1314 *quoting with approval* Malone v. Bowdoin, 369 U.S. 643, 652 (1962) (dissenting opinion).

153. 83 Stat. 852 [hereinafter sometimes referred to as N.E.P.A. or the Act].

154. *See* Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970).

155. National Environmental Policy Act of 1969 §§ 101-03, 83 Stat. 852.

156. *Id.* at § 102(c).

157. *Id.*

158. Texas Comm. on Natural Resources v. United States, 430 F.2d 1315 (5th Cir.

arisen involving a failure to file any impact statement at all. In *Environmental Defense Fund v. Corps of Engineers,*[159] suit was brought to halt construction of a dam across the Cossatot River. The district court declared that while the Government itself was not bound by the outcome of the suit, an injunction could be issued against the Secretary of the Army and the Chief of the Army Corps of Engineers. The plaintiff had alleged that the defendant's failure to file the required environmental impact statement rendered any further work on the project ultra vires. The court accepted these charges at face value and agreed that the defense of sovereign immunity was not available.

It remains to be seen whether failure to comply with the statutory procedures for obtaining information in the formulation of an impact statement can be characterized as ultra vires conduct. Another area of future controversy is whether sovereign immunity would bar a private challenge to the accuracy, completeness or content of such an impact statement.

It seems clear that if the N.E.P.A. has vitality of its own and is not simply used as a makeweight in environmental litigation, it will further reduce the already declining influence of sovereign immunity in such cases. With the advent of a new interest and awareness in environmental matters both by the government and by private individuals, it is hoped that such doctrines as sovereign immunity will not continue to vitiate the efforts of concerned persons to secure a review of dubious or harmful governmental policies and operations.

1970); Pennsylvania Environmental Council v. Bartlett, 315 F. Supp. 238 (M.D. Pa. 1970).

159. 325 F. Supp. 728 (E.D. Ark. 1971).