

# SOVEREIGN IMMUNITY AND NONSTATUTORY REVIEW OF FEDERAL ADMINISTRATIVE ACTION: SOME CONCLUSIONS FROM THE PUBLIC-LANDS CASES

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IT is the inherited wisdom of the American bar that responsible professional comment and criticism are the principal restraints upon judicial arbitrariness at the highest level and major influences in the continuing development of court-made law. If there is one legal development (or, perhaps more accurately, nondevelopment) found in the pages of the United States reports during the present century which would cause the most credulous observer to doubt the truth of this axiom, it is the continued good health of the doctrine of sovereign immunity. Since the end of the last century, learned members of the legal profession have been continuously attacking the roots and branches of that judicially planted growth,<sup>1</sup> calling into question not only its utility but even the legitimacy of its alleged origins.<sup>2</sup> Oddly enough, this criticism has had a palpable effect upon federal legislators,<sup>3</sup> who, according to our agreed-upon

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The writing of this Article was made possible by a summer research grant from the University of Virginia Law School Foundation. I am also indebted to Professor Carl McFarland of the University of Virginia law faculty for his advice and encouragement.

1. E.g., Davie, *Suing the State*, 18 AM. L. REV. 814 (1884); Freund, *Private Claims Against the State*, 8 POL. SCI. Q. 625, 638-40 (1893); Moore, *Liability for Acts of Public Servants*, 23 L.Q. REV. 12 (1907); Laski, *The Responsibility of the State in England*, 32 HARV. L. REV. 447 (1919); Barry, *The King Can Do No Wrong*, 11 VA. L. REV. 349 (1925); Borchard, *State and Municipal Liability in Tort*, 20 A.B.A.J. 747 (1934) (containing bibliography of earlier works); Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946); Comment, *The Sovereign Immunity Doctrine and Judicial Review of Federal Administrative Action*, 2 UCLA L. REV. 382 (1955); Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479 (1962). In 1925, an observer noted that there was "a growing army of modern critics" of the doctrine of sovereign immunity. Angell, *Sovereign Immunity—The Modern Trend*, 35 YALE L.J. 150, 151 (1925). By 1958, that army's ranks had swelled to such a degree that, according to one of the most knowledgeable scholars of the field, "nearly every commentator who considers the subject vigorously asserts that the doctrine of sovereign immunity must go." 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 435 (1958).

2. See, e.g., Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 1, 17-41 (1926).

3. The first broad congressional waiver of sovereign immunity came in 1855 with the Court of Claims Act, 10 Stat. 612, which was later extended in some respects by the Tucker Act, 24 Stat. 505, 506 (1887) (both now codified in scattered sections of 28 U.S.C.). The other sweeping waiver was the Federal Tort Claims Act of 1946, 60 Stat.

notions of the legal process, are supposed to be moved not by learned articles but by lobbies and ballot boxes; it has also had its influence, particularly noticeable in very recent years, upon state supreme courts.<sup>4</sup> But if the United States Supreme Court is to be judged by what it has done concerning the doctrine, as opposed to what it has from time to time said,<sup>5</sup> criticism seems to have confirmed the Court in the error of its ways. Not only has there been no judicial elimination of the doctrine of sovereign immunity as it applies to the federal government, but recently the scope of the doctrine has in some important respects been extended beyond what it was in 1882.<sup>6</sup>

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842 (codified in scattered sections of 28 U.S.C.). There have been numerous waivers of more limited scope, such as the Act of June 25, 1910, ch. 423, 36 Stat. 851, *as amended*, 28 U.S.C. § 1498 (1964) (permitting suit against the United States for patent infringement); the Public Vessels Act, 43 Stat. 1112 (1925), *as amended*, 46 U.S.C. §§ 781-90 (1964) (permitting libel in admiralty against the United States); the Act of May 24, 1938, 52 Stat. 438, *as amended*, 28 U.S.C. § 1495 (1964) (permitting suit against the United States for imprisonment upon unjust conviction); and the Act of November 2, 1966, 26 U.S.C. § 7426 (Supp. IV, 1965-1968) (enabling suit against the United States by a person who claims an interest in property which has been levied upon to secure payment of someone else's tax). In addition to such statutes, which were enacted for the specific purpose of permitting suit, numerous statutes enacted primarily to create or regulate federal agencies authorize suit to review such agencies' actions or determinations. *E.g.*, Federal Trade Commission Act, § 5, 15 U.S.C. § 45(c) (1964); Securities Exchange Act § 25, 15 U.S.C. § 78y (1964); National Labor Relations Act § 10(f), 29 U.S.C. § 160(f) (1964). *See Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 904 n.524 (1957). The Supreme Court has recognized that elimination of immunity is the "trend of congressional policy" [Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 375, 397 (1939)] and the "steady legislative trend" [National City Bank v. Republic of China, 348 U.S. 356, 360 (1955)].

4. A number of state supreme courts have abolished the doctrine of state immunity from tort liability. *E.g.*, Stone v. Arizona Highway Commn., 93 Ariz. 384, 381 P.2d 107 (1963); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 224, 239 P.2d 457, 11 Cal. Rptr. 89 (1961). In some such jurisdictions, the legislatures have intervened to reinstate at least a portion of the immunity. *See, e.g.*, the Illinois statutes referred to in Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 62-63, 203 N.E.2d 573, 574-75 (1965). *See generally* Lawyer, *Birth and Death of Governmental Immunity*, 15 CLEV.-MAR. L. REV. 529 (1966).

5. Most prophetic of change was the following excerpt from National City Bank v. Republic of China, 348 U.S. 356, 359-60 (1955):

[T]he immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment. A reflection of this steady shift in attitude toward the American sovereign's immunity is found in . . . observations in unanimous opinions of this Court . . . . This chilly feeling against sovereign immunity began to reflect itself in federal legislation in 1797 . . . . [A]menability to suit has become a commonplace in regard to the various agencies which carry out "the enlarged scope of government in economic affairs," . . . . The substantive sweep of amenability to judicial process has likewise grown apace.

The outlook and feeling thus reflected are not merely relevant to our problem. They are important. The claims of dominant opinion rooted in sentiments of justice and public morality are among the most powerful shaping-forces in law-making by courts. Legislation and adjudication are interacting influences in the development of law. A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process.

6. *Compare* Malone v. Bowdoin, 369 U.S. 643 (1962), *with* United States v. Lee,

During most of the nineteenth century, the area in which the doctrine of federal sovereign immunity made its most blatant affront to the basic precepts of justice was that of contract law. After its ill effects in that particular area had been substantially eliminated by passage of the Tucker Act in 1887,<sup>7</sup> criticism of the doctrine tended to dwell upon its manifestations in the field of torts.<sup>8</sup> That field in turn having been largely reformed by the Federal Tort Claims Act of 1946,<sup>9</sup> discussion of federal immunity during the past twenty-five years has tended to focus upon the doctrine's application to the expanding and increasingly important field of administrative law—that is, upon the extent to which sovereign immunity prevents judicial control or correction of improper administrative action.<sup>10</sup> More specifically, recent concern has centered on the man-

106 U.S. 196 (1882). To all intelligent observers this development has been incredible in the conventionally hyperbolic sense. To at least one it has been quite literally beyond belief; see the enlightening and entertaining article by Kenneth Culp Davis, *Suing the Government by Falsely Pretending To Sue an Officer*, 29 U. CHI. L. REV. 435 (1962). In this essay, appearing in the Spring issue of the cited publication, Professor Davis has the following to say about *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), the case which clearly enunciated a new and expanded concept of sovereign immunity: "In the long run, the *Larson* attitude cannot survive. It is sure to be superseded by the good sense of cases like [*Vitarelli v. Seaton*, 359 U.S. 535 (1959)]." *Id.* at 456. Two pages later, near the end of the article—where it was doubtless inserted after the publication had gone to press—there appears the following poignant footnote, somehow conveying, even in its law review terseness, a disbelief only strengthened by repeated demonstration of the absurd:

In *Malone v. Bowdoin*, 30 U.S.L.W. 4311 (U.S. May 14, 1962) (No. 113), the Supreme Court, five to two, not only followed the *Larson* decision but expanded the application of its doctrine. The Court, however, rested its decision solely on the authority of the *Larson* case, without a reexamination of its soundness or unsoundness, and it explicitly acknowledged "the seemingly conflicting precedents." *Id.* at 458 n.79. As the reader may gather from the repeated reliance upon Professor Davis' writings in this Article, the foregoing tale is not recounted in depreciation of that eminent scholar's work, nor even of his prophetic powers, which will yet, hopefully, be vindicated. It is precisely because he is one of the most acute observers that his reaction to *Larson* demonstrates the genuine incredibility of the Court's recent actions in this field.

7. Act of March 3, 1887, ch. 359, 24 Stat. 505 (now codified in scattered sections of 28 U.S.C.).

8. In addition to the works from the relevant period cited in note 1 *supra*, see Borchard, *Government Liability in Tort* (pts. 1-3), 34 YALE L.J. 1, 129, 229 (1924-1925), *Governmental Responsibility in Tort* (pts. 4-6), 36 YALE L.J. 1, 757, 1039 (1926-1927).

9. Act of Aug. 2, 1946, ch. 753, tit. IV, 60 Stat. 842 (now codified in scattered sections of 28 U.S.C.).

10. The important article which pointed the new direction was published the month after Congress finally passed the Federal Tort Claims Act: Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946). Subsequent literature includes Walkup, *Immunity of the State from Suit by the Citizens—Toward a More Enlightened Concept*, 36 GEO. L.J. 310, 542 (1948); Note, *The Dollar Litigation: A Study in Sovereign Immunity*, 65 HARV. L. REV. 466 (1952); Comment, *The Sovereign Immunity Doctrine and Judicial Review of Federal Administrative Action*, 2 UCLA L. REV. 382 (1955); Note, *Sovereign Immunity and Specific Relief Against Federal Officers*, 55 COLUM. L. REV. 73 (1955); Cattow, *Sovereign*

ner in which sovereign immunity affects "nonstatutory review" of federal administrative action.<sup>11</sup> That quoted phrase refers to the type of review of administrative action which is available, not by virtue of those explicit review provisions contained in most modern statutes which create administrative agencies, but rather through the use of traditional common-law remedies—most notably, the writ of mandamus and the injunction—against the officer who is allegedly misapplying his statutory authority or exceeding his constitutional power.<sup>12</sup> These remedies gave rise to what Professor Jaffe has aptly called the "common law of judicial review."<sup>13</sup>

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*Immunity in Administrative Law—A New Diagnosis*, 9 J. PUB. L. 1 (1960); Davis, *supra* note 6. Of course, treatises devoted to administrative law have necessarily considered the problem. *E.g.*, 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 27.01-05 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 197-231 (1965).

11. See Jaffe, *The Right to Judicial Review* (pts. 1-2), 71 HARV. L. REV. 401, 769 (1958); Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479 (1962); Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967). That contemporary criticism of federal sovereign immunity continues to focus primarily upon its effects on administrative law is demonstrated by the fact that the most recent proposal for statutory abolition of the doctrine has emanated from the Administrative Conference of the United States. An excellent discussion of those effects and that proposal is contained in 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. 387 (1970).

12. It has been noted that the phrase "nonstatutory review" is imprecise. All actions in federal courts are, strictly speaking, statutory. So-called "nonstatutory review" proceedings are, more accurately, those which are brought under statutes of *general* applicability, as opposed to statutes specifically designed to enable judicial review of the actions of a particular agency or agencies. For example, a common type of nonstatutory proceeding is the suit for injunction, brought under the "federal question" provision and the "all writs" provision of the Judicial Code, 28 U.S.C. §§ 1331, 1651 (1964)—provisions which may support suit against an official of any federal agency or indeed against private citizens. Such a nonstatutory proceeding may be contrasted with a "statutory review" proceeding under 15 U.S.C. § 45(c) (1964), a provision which sets forth in some detail the procedure for obtaining judicial review of a cease-and-desist order issued by the Federal Trade Commission. Thus, the provision of the Mandamus and Venue Act of 1962, 28 U.S.C. § 1361 (1964), giving district courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff," does not remove such actions from the category of "nonstatutory review" proceedings. As so understood, the phrase, despite its imprecision, has distinct utility. See Fuchs, *Judicial Control of Administrative Agencies in Indiana*, 21 IND. L.J. 1, 11 (1952).

13. *The Right to Judicial Review*, 71 HARV. L. REV. 401, 410 (1958). I do not mean to imply that this "common law of judicial review" has application, at the present time, only to nonstatutory review proceedings. On the contrary, the principles which it developed with respect to the scope of review and many other matters are used to fill the numerous interstices which any statutory-review provision contains. Still less do I mean to imply that what are now called the methods of "nonstatutory review" have always been regarded so forthrightly as devices for providing judicial control of administrative action. Until very recent times, the assertion that a suit was brought in order to obtain review of an administrative determination was meant and understood as an assertion that the suit ought to be dismissed. See, e.g., *In re Emblen*, 161 U.S.

Those articles which set out to explain the effect of sovereign immunity upon nonstatutory review demonstrate, often intentionally but sometimes not, that the matter truly surpasseth human understanding—even as the Supreme Court itself has delicately indicated on more than one occasion.<sup>14</sup> The purpose of the present Article is

52, 55 (1896) ("This is an attempt to use a writ of mandamus to the Secretary of the Interior as a writ of error to review his acts, and to draw into the jurisdiction of the courts matters which are within the exclusive cognizance of the Land Department."); *Lane v. Watts*, 234 U.S. 525, 540 (1914) ("This disposes of the contentions of appellants that . . . the suit is an attempted direct appeal from the decision of the Interior Department . . . ."); *United States ex rel. Hall v. Lane*, 48 App. D.C. 279, 284, *affd. sub nom. United States ex rel. Hall v. Payne*, 254 U.S. 343 (1920) ("[I]f we admit [that the appellant has a right to a writ of mandamus in this case], it must be on the assumption that this court has the power to review the decision of the Secretary of the Interior upon an application for such a writ. But it does not possess that power, for it is familiar law that 'the writ [of mandamus] never can be used as a substitute for a writ of error.'"). It is interesting to compare this view with the opinions of modern courts, which not only recognize that review of administrative action is the genuine and thoroughly permissible object of these proceedings, but sometimes have their eyes fixed so clearly upon that object that they omit any reference whatever to the technical character of the suit through which it is pursued (*e.g.*, petition for mandamus, declaratory judgment, or action for review under the Administrative Procedure Act). For example, in *Robertson v. Udall*, 349 F.2d 195 (D.C. Cir. 1965), the court's only description of the nature of the proceeding is as follows:

The district court granted appellee's motion for summary judgment in this action, which we think must be taken to be a suit to review, on the basis of the administrative record, a decision of the Secretary of the Interior to reject certain lease offers as not in compliance with the applicable regulations.

349 F.2d at 196. The Court of Appeals for the District of Columbia Circuit habitually describes nonstatutory review proceedings in such terms, sometimes with no other indication as to the precise character of the suit. *See, e.g.*, *Dusing v. Udall*, 350 F.2d 748 (1965), *cert. denied*, 383 U.S. 912 (1966); *Lord v. Helmandollar*, 348 F.2d 780, *cert. denied*, 383 U.S. 928 (1965); *McNeil v. Udall*, 340 F.2d 801 (1964), *cert. denied*, 381 U.S. 904 (1965). Nor does the Court of Appeals for the District of Columbia stand alone in the practice. *See, e.g.*, *Harvey v. Udall*, 384 F.2d 883 (10th Cir. 1967) (only description of the nature of the action: "This action seeks to overturn the Secretary of the Interior's rejection of appellant's offer for an oil and gas lease . . . . This court has the right to review under Section 10 of the Administrative Procedure Act . . . ."); *Hendriksen v. Udall*, 350 F.2d 949 (9th Cir. 1965), *cert. denied*, 380 U.S. 940 (1966) (only description of the nature of the action: "This is an appeal from a grant of summary judgment . . . , the effect of which was to uphold appellee's decision denying appellants' application for a land patent . . . .").

14. Indeed, the Court seems never to tire of doing so:

And it must be confessed that, in regard to [cases involving both state and federal sovereign immunity], the questions raised have rarely been free from difficulty, and the judges of this court have not always been able to agree in regard to them. Nor is it an easy matter to reconcile all the decisions of the court in this class of cases.

*Cunningham v. Macon & B. R.R.*, 109 U.S. 446, 451 (1883).

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 statement applies with equal force at this day.

*Brooks v. Dewar*, 313 U.S. 354, 359 (1941).

We say the foregoing [sovereign immunity] cases are distinguishable from the present one, though as a matter of logic it is not easy to reconcile all of them. *Land v. Dollar*, 330 U.S. 731, 738 (1947).

There are a great number of [cases following *United States v. Lee*, 106 U.S. 196

not to propose yet another route toward logical reconciliation of the sovereign-immunity cases; but, on the contrary, to urge general acceptance of the fact that such reconciliation is, and will probably remain, unattainable; to explain why this is so; and to suggest why it is not so bad. This modest goal will be attempted through a detailed examination of two recent Supreme Court cases and their most pertinent antecedents.

## I. THE PROBLEM OF SOVEREIGN IMMUNITY IN JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

### A. *The Malone Case*

*Malone v. Bowdoin*<sup>15</sup> was an ejectment action against a Forest Service Officer of the United States Department of Agriculture, commenced in a Georgia state court and removed to a federal court.<sup>16</sup> Insofar as appeared from the facts brought forward in the course of the litigation, the chain of title under which the United States claimed

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(1882)] and, as this Court has itself remarked, it is not "an easy matter to reconcile all the decisions of the court in this class of cases." [The Court's footnote at this point cites *Cunningham, supra*, and then observes that "The ensuing years have not made the task less difficult."]

*Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 698 (1949).

While it is possible to differentiate many of these [sovereign immunity] cases upon their individualized facts, it is fair to say that to reconcile completely all the decisions of the Court in this field prior to 1949 would be a Procrustean task. *Malone v. Bowdoin*, 369 U.S. 643, 646 (1962).

15. 369 U.S. 643 (1962).

16. Removal was based on 28 U.S.C. § 1442 (1964). In addition to service upon the officer, there had been an attempted service upon the United States by the mailing of copies of the petition to the Attorney General. Both parties conceded, however, in the trial court and in the court of appeals, "that the United States was not legally before the court and that the action against it should be dismissed." *Bowdoin v. Malone*, 284 F.2d 95, 96 (5th Cir. 1960). This dismissal was not challenged in the Supreme Court, 396 U.S. at 643 n.1, and hence the opinion does not concern the applicability of the doctrine of sovereign immunity to suits brought against the United States in form as well as in substance. It seems clear, however, that even when that doctrine does not bar a suit against a federal officer to restrain or compel federal action, it does bar a suit formally against the United States for the same purpose. See, e.g., *Chournos v. United States*, 335 F.2d 918 (10th Cir. 1964); *McEachern v. United States*, 321 F.2d 31 (4th Cir. 1963); *Zager v. United States*, 256 F. Supp. 396 (E.D. Wis. 1966). But see *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966), *affd. on rehearing*, 379 F.2d 555 (1967), *revd. on other grounds*, 390 U.S. 599 (1968), in which a judgment was initially rendered against the United States *eo nomine* in order to set aside the invalidation of mining claims by the Secretary of the Interior. The judgment was upon a counterclaim, since the suit had been initiated by the United States; but that fact should have made no difference with respect to the sovereign-immunity point. See note 210 *infra*. The court of appeals managed to correct the bizarre result prior to the rehearing, by the device of entering "an order inviting Stewart L. Udall, Secretary of the Interior, to move to join as a counterclaim defendant and appellee." 379 F.2d at 556. That invitation was—to the court's great relief, one suspects—duly accepted, and the motion was then granted.

to be the owner in fee of the land in question included a purported grant of the fee by a person, subsequently deceased, who had possessed only a life estate; the plaintiffs claimed to be the remaindermen. Upon removal, the defendant moved to dismiss on the ground that "the court has no jurisdiction over Malone since the proceeding is in substance and effect against the United States and that the United States has not consented to be sued or waived its immunity from suit."<sup>17</sup> The federal district court granted the motion,<sup>18</sup> but the United States Court of Appeals for the Fifth Circuit reversed,<sup>19</sup> relying principally upon the old and famous case of *United States v. Lee*.<sup>20</sup>

That case had also been an ejectment action, brought against federal agents by the widow of General Robert E. Lee. The General's Arlington estate had been seized during the Civil War for nonpayment of taxes and was at the time of suit being used as a federal fort and cemetery. The taxes had in fact been tendered by a friend of Lee, but the tax authorities had interpreted the laws as permitting payment only by the owner of record. The trial court found for the plaintiff, and the Supreme Court affirmed, holding explicitly that the doctrine of sovereign immunity posed no obstacle to suit.

The *Lee* case would have provided irrefutable authority in *Malone*, had it not been for the doubts cast upon its continued validity by *Larson v. Domestic and Foreign Corporation*.<sup>21</sup> In *Larson*, suit was brought against the Administrator of the War Assets Administration by a company which claimed that it had purchased from the Administration surplus coal which the Administrator had refused to deliver and had instead contracted to sell to others. The complaint sought both an injunction against sale or delivery to any other person and a declaration that the sale to the plaintiff was valid and the sale to the second purchaser void. The trial court dismissed the suit on the ground of sovereign immunity, but the United States Court of Appeals for the District of Columbia reversed.<sup>22</sup> The Supreme Court, in an opinion written by Chief Justice Vinson, used the case as an occasion to "resolve the conflict in doctrine" posed by the existence of "only one possible exception" to the steady principle which governed and explained all the cases seeking specific relief in connec-

17. *Doe v. Roe*, 186 F. Supp. 407 (M.D. Ga. 1959).

18. 186 F. Supp. at 408.

19. *Bowdoin v. Malone*, 284 F.2d 95, 98-105 (1960).

20. 106 U.S. 196 (1882).

21. 337 U.S. 682 (1949).

22. *Domestic & Foreign Commerce Corp. v. Littlejohn*, 165 F.2d 235 (1947).

tion with property held or interfered with by federal officers.<sup>23</sup> That steady principle was, according to the Court's opinion, that

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.<sup>24</sup>

The Court in *Larson* went on to suggest, in a footnote, that even ultra vires or unconstitutional action may not suffice to avoid the bar of sovereign immunity "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."<sup>25</sup> The *Lee* case was explained on the ground that at the time of that decision there had been no other remedy available to compensate the plaintiff for the taking of the land, and thus the taking had been unconstitutional, whereas in *Larson* there was admittedly a remedy for breach of contract in the Court of Claims.<sup>26</sup> Only three Justices joined with Chief Justice Vinson in the majority opinion. Justice Rutledge concurred solely in the result, and Justice Douglas wrote a separate concurring opinion in which he maintained that "the principles announced by the Court are the ones which should govern the selling of government property."<sup>27</sup> Justice Jackson dissented without opinion, and Justice

23. 337 U.S. at 698, 701. The one case which the Court was willing to allow as a "possible exception" to the admirable uniformity was *Goltra v. Weeks*, 271 U.S. 536 (1926). Even that case was, according to the Court, an exception only in theory, and perhaps not in factual outcome.

24. 337 U.S. at 701-02. It is interesting to compare this principle with that which had been proposed by an article in the *Harvard Law Review* less than three years earlier:

In those cases in which it is alleged that the defendant officer is proceeding under an unconstitutional statute or in excess of his statutory authority, the interest in the protection of the plaintiff's right to be free from the consequences of such action outweighs the interest served by the sovereign immunity doctrine. . . . On the other hand, where no substantial claim is made that the defendant officer is acting pursuant to an unconstitutional enactment or in excess of his statutory authority, the purpose of the sovereign immunity doctrine requires dismissal of the suit for want of jurisdiction.

Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1080-81 (1946). Curiously, the article is cited by Justice Frankfurter in his dissent in *Larson*, 337 U.S. at 715 n.6, but not by the majority opinion. Yet the Court cannot be accused of lack of originality, for whereas Block's article brought forward this solution as a proposed reform, the Court presented it as a description of past practice—leading one to surmise that even if the majority had heard of Block's proposed reform, they would have dismissed it out of hand by observing that "the cure is the same as the disease."

25. 337 U.S. at 691 n.11.

26. 337 U.S. at 703 n.27.

27. 337 U.S. at 705.

Frankfurter, joined by Justice Burton, dissented in an exhaustive opinion which, whether or not it demonstrates the correctness of Justice Frankfurter's theory of sovereign immunity, suffices to convince even the most casual reader that the "ultra vires—unconstitutional" test as the sole criterion of justiciability is, even if correct, at least newly discovered and certainly subject to contradiction by the reasoning of more than one previous Supreme Court decision. The lower federal courts,<sup>28</sup> no less than the commentators,<sup>29</sup> had some difficulty taking *Larson* seriously, not only because of the novelty of its pronouncements and their contradiction of earlier precedents, but also because the Court's opinion had been subscribed to by only a minority of its members.

The opinion of the court of appeals in *Malone* was a clear reflection of that skepticism concerning the vitality of *Larson*,<sup>30</sup> and the basic question before the Supreme Court in *Malone* was whether to stand by or reject that earlier case. The decision was to stand by it, and the judgment of the court of appeals was accordingly reversed.<sup>31</sup> The Court held that even if the plaintiff was the owner, as he alleged, he could not recover possession of his land; the trespassing federal officers were acting within the scope of their authority, even though mistakenly, and the availability of monetary compensation in the Court of Claims prevented the taking from being unconstitutional.<sup>32</sup>

#### B. *The Tallman Case*

A recent case with which *Malone* invites comparison is *Udall v. Tallman*,<sup>33</sup> described by the Supreme Court as "an action in the

28. In *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955), *Larson* was not even mentioned in the majority opinion, although it was cited as controlling by Judge Washington's dissent. In *California v. Rank*, 293 F.2d 340 (9th Cir. 1961), *Larson* was discussed but distinguished "on grounds which seem flimsy." Davis, *supra* note 6, at 456 n.77.

29. E.g., Davis, *supra* note 6, at 454-58; Carrow, *supra* note 10, at 12-13; Jaffe, *supra* note 13, at 434-35.

30. Davis, *supra* note 6, at 456:

The court disparaged the *Larson* case in various ways—by emphasizing that only four Justices concurred in the majority opinion, by paying tribute to the dissenting opinion, by showing that some of the majority in *Larson* had joined in the *Dollar* decision, and by following the *Lee* case after asserting that the *Larson* opinion "is susceptible of being construed as questioning some of the fundamental bases of *Lee*."

31. The decision was 5-2, with Justice Harlan joining in Justice Douglas' dissent, and Justices Frankfurter and White not participating.

32. Significantly, perhaps, the Court at no point in its full discussion of the sovereign immunity doctrine made any reference to the additional limitation upon the granting of affirmative relief which had been asserted in footnote 11 of the *Larson* opinion. See text accompanying note 25 *supra*.

33. 380 U.S. 1 (1965).

nature of mandamus . . . to compel the Secretary [of the Interior] to issue oil and gas leases upon certain federal lands."<sup>34</sup> Plaintiffs claimed that they, as the "first qualified applicants," were entitled to the leases under section 17 of the Mineral Leasing Act.<sup>35</sup> The Secretary had denied their applications because the lands in question had already been leased to prior applicants. He had rejected the contention that, since the application for the earlier leases had been made when, under the pertinent statutes and executive orders, the lands were closed to leasing, those earlier leases were void.<sup>36</sup>

One would surely have expected the doctrine of sovereign immunity, which had been invoked and explained in *Malone*, to be applied with even greater vigor in *Tallman*. In *Malone* the plaintiff's grievance was, in essence, that the Government was holding land which belonged to him; in *Tallman* the plaintiffs' claim was merely that the Government wrongfully refused to sell them a lease. In *Malone*, as far as the opinions indicate, the plaintiff had been accorded no official administrative hearings, much less any administrative appeals to a high level of executive authority; in *Tallman*, on the other hand, the plaintiffs had already gone through a formalized system of administrative hearings and appeals, and their assertions had been heard and rejected in written opinions by a local land office, by the Director of the Bureau of Land Management, and, finally, by the Secretary of the Interior.<sup>37</sup> In *Malone* the suit was merely to enforce a right to possession<sup>38</sup> and technically sought no action by the Government itself; in *Tallman* the petition demanded a transfer of legal interest which could be effected only by the United States. Finally, in *Malone* the central legal issue in dis-

34. 380 U.S. at 3. The complaint also requested declaratory relief and "review [of] the action of the defendant in accordance with the provisions of Section 10 of the Administrative Procedure Act." Record at 9. Pursuant to its recent practice (see note 13 *supra*), the Court of Appeals for the District of Columbia had been even less precise in its description of the nature of the action, contenting itself with the statement that it was "an action to review [the Secretary of the Interior's] decision rejecting appellants' applications for oil and gas leases." *Tallman v. Udall*, 324 F.2d 411 (D.C. Cir. 1963).

35. 30 U.S.C. § 226 (1958), as amended, (1964), which provided, in relevant part, that "the person first making application for the lease who is qualified to hold a lease . . . shall be entitled to a lease of such lands without competitive bidding."

36. That nullity would be the effect of premature application was not disputed. 324 F.2d at 416. The case therefore turned upon the question whether the lands were withdrawn from leasing during the relevant period.

37. The plaintiffs' appeal to the Secretary had actually been disposed of by a deputy solicitor. Plaintiffs objected to this delegation of ultimate authority, and filed a subsequent petition for the exercise of supervisory authority by the Secretary; that petition was itself ruled upon and denied by a deputy solicitor. See ¶¶ 14-15 of the complaint, Record at 7-8.

38. *Bowdoin v. Malone*, 284 F.2d 95, 98 (5th Cir. 1960).

pute involved the chain of title to real estate, a matter supremely appropriate for judicial determination; in *Tallman* the dispute turned principally upon the interpretation and effect of an intricate series of statutes, executive orders, and administrative regulations—all of which are the everyday business of the Department of the Interior rather than the courts.

Nevertheless, as the reader has no doubt surmised by now, the Supreme Court did not dismiss *Tallman* on the grounds of sovereign immunity. On the contrary, it granted to the plaintiffs a thorough, if not exhaustive, review of the administrative agency's denial of their claims. To be sure, the administrative action was not overturned, and the plaintiffs were denied the requested relief; but that action was taken only after a detailed, twenty-page examination of the permissibility of the administrative action under the applicable statutes, executive orders, and regulations. Even more surprising, the bar of sovereign immunity was not mentioned in the Court's opinion; nor had it been mentioned in the opinion of the court of appeals,<sup>39</sup> in the judgment memorandum of the trial court, in the pleadings of the parties, or in the parties' briefs at any level. The narrow objective of this Article is to determine why.

The first explanation which comes to mind is that *Tallman* simply fell within one of those exceptions to the bar of sovereign immunity which both *Larson* and *Malone* had recognized—that is, that the case involved action which either exceeded the officer's statutory authority or was unconstitutional. Some commentators have indeed placed the case within the first of those exceptions:

At least on the surface, it would appear that the doctrine of sovereign immunity thus applied would bar a suit for judicial review of the action of the Secretary of the Interior wherein it is alleged merely that the Secretary while acting within his valid statutory authority misconstrued a statute or made an erroneous determination of fact. However, if the Secretary has in fact misconstrued a statute, his action taken pursuant to his erroneous construction of the terms of the authority granted him by the statute *necessarily* exceeds the terms of his statutory authority, for if they [sic] did not, his construction of the statute could not be erroneous. By the same token, if his decision is based upon an erroneous determination of fact, or a determination of fact which cannot be supported by substantial evidence, and the existence of that fact is essential to his exercise of authority under the statute, then he has either exceeded or failed to exercise the authority and duties conferred upon him by the statute.<sup>40</sup>

39. *Tallman v. Udall*, 324 F.2d 411 (D.C. Cir. 1963).

40. Sperling & Cooney, *Judicial Review of Administrative Decisions Under the Mineral Leasing Act of 1920*, 1 LAND & WATER L. REV. 423, 428 (1966).

Such an interpretation of the phrase, "exceeding the terms of statutory authority," is surely a possible one; but just as surely it is not the one intended by *Larson* and *Malone*.

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 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.<sup>41</sup>

If a forest ranger who is authorized to occupy Government land is also "authorized" to occupy private land which he erroneously believes to belong to the Government, then similarly the Secretary of the Interior is "authorized" to refuse issuance of a lease even for an erroneous reason.

Likewise, the action in *Tallman* does not fall within the other *Larson-Malone* exception, that of unconstitutionality. The mere filing of an application for a lease, even when that filing renders the applicant the "first qualified applicant" under the Mineral Leasing Act, does not appear sufficient to create a property right protected by the fifth amendment.<sup>42</sup> Even if it were, the Court of Claims remedy which prevented the officials' action in *Larson* and *Malone* from being unconstitutional<sup>43</sup> would apply in *Tallman* as well,<sup>44</sup> and with similar effect.

Moreover, even if the agent's action had exceeded the statutory grant of authority, and even if it had been unconstitutional, the relief sought in *Tallman*, unlike that in *Malone*, would have fallen within the limitation which *Larson* placed upon the "ultra vires" and "unconstitutional" exceptions to the bar of sovereign immunity. Under that limitation, even a suit otherwise falling within one of

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

42. See *Southwestern Petroleum Corp. v. Udall*, 361 F.2d 650 (10th Cir. 1966); *Haley v. Seaton*, 281 F.2d 620 (D.C. Cir. 1960).

43. See text accompanying notes 26, 32 *supra*.

44. Cf. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963).

the exceptions may fail "if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property."<sup>45</sup>

A more satisfactory method of reconciling *Tallman* with *Malone* might be found in the argument that section 226-2 of the Mineral Leasing Act, a section that was enacted in 1960, constituted a waiver of sovereign immunity.<sup>46</sup> But if statutory waiver is the explanation, it seems strange, at best, that the Court made no mention of the statute in the *Tallman* opinion. Moreover, if section 226-2 was really intended to allow suit in situations in which none would otherwise lie, Congress certainly chose an excessively subtle means to make that simple purpose manifest. On its face, the section supplies merely a statute of limitations for actions that are already permissible, and on a fair reading is no more a grant of consent for new actions against the Secretary than the general statute of limitations applicable to actions against the United States<sup>47</sup> is a complete waiver of the Government's sovereign immunity. In addition, as will be seen below, *Tallman* is representative of a long line of cases reaching a similar result as to sovereign immunity, some of which did not involve the Mineral Leasing Act, and some of which, while involving the Act, concerned transactions to which the 1960 amendment did not apply.<sup>48</sup>

It might next be suggested that the surprise expressed above at the fact that it was not only the Court which failed to mention sovereign immunity in *Tallman* but the Solicitor General as well, is akin to a child's astonishment at watching a tight-rope walker for the first time—how marvelous that he should not only walk along

45. 337 U.S. at 691 n.11. *But see* note 32 *supra*.

46. 30 U.S.C. § 226-2 (1964) provides:

No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter. No such action contesting such a decision of the Secretary rendered prior to September 2, 1960 shall be maintained unless the same be commenced or taken within ninety days after such [sic] enactment.

47. 28 U.S.C. § 2401(a) (1964), providing in part that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

48. *See, e.g.*, *Boesche v. Udall*, 373 U.S. 472 (1963), which was decided before *Malone* but after *Larson*, and in which the Court made a detailed review of the legitimacy of a lease cancellation by the Secretary, even though the suit was filed before enactment of § 226-2. It is conceivable, although barely, that the statute not only is a source of jurisdiction, but also applies to suits brought before its enactment. The Court, however, did not go into this fine question. On the contrary, its only reference to § 226-2 was not by way of setting forth the sovereign consent under which suit was permitted, but rather in support of the statement that "final action by the Secretary . . . has always been subject to judicial review." 373 U.S. at 486.

such a narrow wire, but carry and balance a long stick at the same time! That is, it might be urged that the failure of the Government to assert sovereign immunity is not a puzzlement added to that of the Court's silence on the point, but is rather the reason for the Court's silence. This explanation would nicely reconcile *Tallman* and *Malone*; and though it would still leave unillumined the reason for the Government's failure to raise the defense, that problem might be dismissed as more appropriate for political scientists, management consultants, or even psychiatrists, than for lawyers. Unfortunately, however, this analysis is vitiated by two well-established propositions concerning sovereign immunity. First, the defense of sovereign immunity can be waived only by express authority of Congress and not by the action or inaction of any federal officer.<sup>49</sup> Second, this defense goes to the jurisdiction of the court,<sup>50</sup> so that an appellate court will not only refuse to find a "waiver" in the failure to raise the defense below,<sup>51</sup> but will remedy, *sua sponte*, the failure to raise it upon appeal,<sup>52</sup> and will dismiss the case, if necessary, over the objections of both parties.<sup>53</sup>

The above are some of the more obvious or apparently cogent explanations of *Tallman*. There are others as well, the most noteworthy of which is the proposition that section 10(a) of the Administrative Procedure Act<sup>54</sup> is a waiver of sovereign immunity—a position which will be considered below in a somewhat different context.<sup>55</sup> Suffice it to say that all of these explanations either do not support *Tallman*'s disregard of sovereign immunity or, in supporting it, contradict *Malone*.

We have thus far been considering *Tallman* as a "sovereign immunity case." The only other cases falling within this category which we have described are *Lee*, *Larson*, and *Malone*. But in its totality, the category is enormous, covering the entire field of public law. To be impressed with this fact, the reader need only scan Justice Frankfurter's dissent in *Larson*,<sup>56</sup> in which even that master of the com-

49. Minnesota v. United States, 305 U.S. 382, 389 (1939); *Stanley v. Schwalby*, 162 U.S. 255, 269-70 (1896).

50. *United States v. Sherwood*, 312 U.S. 584 (1941); *Nassau Smelting & Ref. Works, Ltd. v. United States*, 266 U.S. 101 (1924).

51. *E.g.*, *United States v. Griffin*, 303 U.S. 226, 229, 238-39 (1938).

52. *Mellos v. Brownell*, 250 F.2d 35 (D.C. Cir. 1957). *See Stratton v. St. Louis S.W. Ry.*, 282 U.S. 10 (1930).

53. *E.g.*, *Armstrong v. United States*, 283 F.2d 122 (3d Cir. 1960).

54. 5 U.S.C. § 702 (Supp. IV, 1965-1968).

55. *See* notes 226-29 *infra* and accompanying text and the Appendix following this Article.

56. 337 U.S. at 705-32.

pendious opinion succeeds in collecting only some of the Supreme Court opinions on the subject and fares even more poorly in his attempt to divide them into some logical subcategories.<sup>57</sup> The multitudinous areas of human activity and of legal ordering which the "sovereign immunity cases" cover are exemplified by the following Supreme Court cases: a suit to recover from the Maritime Commission common stock which the plaintiffs asserted had been pledged as collateral for a debt subsequently paid, but which the Commission claimed had been transferred outright;<sup>58</sup> a suit to enjoin a postmaster from infringing the plaintiff's patent on a stamp-cancelling and post-marking machine;<sup>59</sup> a suit to compel the Secretary of the Navy to deliver to the plaintiff a cruiser which the Secretary had advertised for sale and for which the plaintiff had submitted the highest bid;<sup>60</sup> a suit for injunction against a refusal of the Post Office Department to carry certain mail;<sup>61</sup> a suit to restrain the Secretary of War from instituting criminal prosecution of the plaintiff for the construction of a wharf which would cross harbor lines established by the Secretary;<sup>62</sup> a suit to enjoin the Secretary of the Interior from increasing the rentals for, and decreasing the deliveries of, water from a federally operated irrigation system;<sup>63</sup> a suit for declaratory judgment and injunction to prevent the Under Secretary of the Navy from taking action under the Renegotiation Act to stop payments due to the plaintiff under certain contracts;<sup>64</sup> and a suit against a Collector of Internal Revenue for refund of taxes erroneously collected.<sup>65</sup> To this list there may be added, of course, the cases previously discussed—namely, actions of ejectment against federal officers (*Lee* and *Malone*), an action against the War Assets Administrator for, essentially, specific performance at law of a contract to purchase coal (*Larson*), and an action to compel the Secretary of the Interior to issue oil and gas leases (*Tallman*).

In other words, the category of "sovereign immunity cases" (within which, on any proper view of the matter, *Tallman* must be included) represents more of an analytical and theoretical unit than what might be termed an existential one. The only significant factual

57. See 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 27.05, at 571-76 (1958).

58. *Land v. Dollar*, 330 U.S. 731 (1947).

59. *International Postal Supply Co. v. Bruce*, 194 U.S. 601 (1904).

60. *Goldberg v. Daniels*, 231 U.S. 218 (1913).

61. *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962).

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

63. *Ickes v. Fox*, 300 U.S. 82 (1937).

64. *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945).

65. See *Sage v. United States*, 250 U.S. 33 (1919).

similarity which the cases share is the extremely broad one that they all seek some relief against a federal officer or agency. In casual conversation with a colleague, a lawyer would hardly describe the case he was currently working on as a "sovereign immunity case"; that would identify nothing, except one legal issue common to a vast number of cases having highly diverse factual contents, involving claims for very dissimilar relief, and raising a great variety of legal questions in addition to that of the Government's liability to suit. A lawyer might speak of a products liability case, an automobile accident case, or an eviction case; only a scholar is likely to talk of a "sovereign immunity case."

But though most of the "sovereign immunity cases," *Larson* among them, involve unique or rarely recurring fact situations, some fall into well-defined and fully developed "existential" categories of legal activity. There are, for example, the public-lands cases, which constitute what is probably the oldest continuous body of federal case-law relating to the validity and effect of a particular type of administrative activity. It is through an examination of this category, rather than of the "sovereign immunity cases," that an explanation of *Tallman* is to be found.

## II. PUBLIC-LANDS LAW

In the present age, it is difficult to apprehend the former magnitude and importance of public-lands law. Our present society contains no institution, with the possible exception of the federal income tax, whose importance to the federal government and whose effect upon the course of national development remotely approximates the dominating influence of the public lands during the nineteenth century. The federal government at one time or another owned approximately three-fourths of all land in the contiguous United States. The purposes for which this national patrimony was expended have been many: to pay the national debt;<sup>66</sup> to induce and reward military

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66. Prior to 1789 there was indeed no other resource with which the national debt could be paid. The Confederation had no taxing power, but had received cessions of the western claims of five of the original thirteen states. The Land Ordinance of 1785, providing for the sale of these western lands, was born of sheer economic necessity. *See* B. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 32 (1939) [hereinafter HIBBARD]; P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 51-55, 61-63 (1968) [hereinafter GATES]. That the production of revenue was also a prominent purpose, if not the foremost goal, of early federal land-grant legislation is evident from the high minimum sales price (\$2.00 per acre) set by the first federal statute, the Act of May 18, 1796, 1 Stat. 494, and retained until 1820. *See* HIBBARD 76-77. It appears perhaps even more clearly from the fact that the same statute placed responsibility for the sales of public lands on the Secretary of the Treasury, in whom ultimate authority remained until creation of the Interior Department in 1849. *See* GATES 126-28. As late

service;<sup>67</sup> to encourage western migration;<sup>68</sup> to subsidize the construction, by private enterprise, of wagon roads, railroads, and canals;<sup>69</sup> to produce revenue for the individual states;<sup>70</sup> to foster education;<sup>71</sup> to encourage the forestation of the prairies<sup>72</sup> and the reclamation of arid lands;<sup>73</sup> and to spur the exploration for, and

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as in the 1840's, the public lands were still put up for sale primarily for the purpose of raising revenue. GATES 177-78.

67. A number of the states, most notably Virginia and Connecticut, promised military bounties during the Revolution, as did the Continental Congress, before it even had the lands with which to make its promise good. The United States granted land bounties to soldiers of all wars through the Civil War. See HIBBARD ch. VII; GATES ch. XI. In all, about 61,000,000 acres, or an area equivalent to the land contained within the State of Oregon, was disposed of in this manner. See U.S. DEPT. OF THE INTERIOR, PUBLIC LAND STATISTICS 1968, tables 1 & 3 [hereinafter PUBLIC LAND STATISTICS].

68. This purpose, most prominently espoused by Horace Greeley, was behind the Homestead Act, Act of May 20, 1862, 12 Stat. 392. See HIBBARD ch. XVII; GATES ch. XV. A total of approximately 287,500,000 acres, or land area equal to that in the states of Texas, Colorado, and Utah was granted or sold to homesteaders. PUBLIC LAND STATISTICS tables 1 & 3.

69. Pre-eminent among these cessions both in importance and abuse were the Railroad Land Grants, whereby vast areas were conveyed to private companies or to states (which in turn conveyed them to private companies) in exchange for the construction of railroads. See HIBBARD ch. XIII; GATES ch. XIV. A total of 131,400,000 acres, an area slightly in excess of all land within the states of New York and California combined, was disposed of for this purpose alone. PUBLIC LAND STATISTICS tables 1 & 3.

70. The Act of Sept. 4, 1841, 5 Stat. 453, granting 500,000 acres to each of the public-land states and to each state admitted to the Union thereafter, and the general Swamp Lands Act of 1850, 9 Stat. 519, exemplified this purpose in practice, if not in theory. See HIBBARD 228-33, ch. XIV; GATES ch. XIII.

71. The Land Ordinance of 1785 adopted by the Confederation had provided that section 16 of every township in the new territory would be reserved "for the maintenance of public schools within the said township." This scheme became a regular feature of the land-grant system, so that each new state, upon its admission to the Union, if not while it still occupied territorial status, was granted section 16 of each township (or when section 16 was unavailable, suitable "indemnity lands") for school purposes. After 1848, the practice was expanded to include section 36 as well as section 16 of each township. See HIBBARD ch. XVI; GATES 65, ch. XII. A total of 77,600,000 acres, or an area roughly equivalent to land within the states of Oklahoma and Arkansas, has been granted to the states for support of common schools. PUBLIC LAND STATISTICS tables 1 & 3.

72. The Timber Culture Act of 1873, 17 Stat. 605, enabled a settler to acquire title to an entire quarter-section by planting and growing timber on forty acres of that quarter-section. The acreage requirement was reduced to ten in 1878, 20 Stat. 113. See HIBBARD ch. XIX; GATES 399-401. The total amount of land disposed of under this Act alone is relatively insignificant—a mere 10,900,000 acres, an area only slightly larger than the land contained within the District of Columbia and the states of Massachusetts, Connecticut, Delaware, and Rhode Island. PUBLIC LAND STATISTICS tables 1 & 3.

73. The Desert Land Act of 1877, 19 Stat. 377, gave the settler who would irrigate the land and make improvement upon it the right to purchase 640 acres for the low price of \$1.25 per acre. See HIBBARD ch. XX; GATES 401, 635-43. The acreage disposed of under this Act has been 10,600,000 acres, an area roughly equivalent to the land in New Jersey and New Hampshire. PUBLIC LAND STATISTICS tables 1 & 3.

exploitation of mineral resources.<sup>74</sup> For these purposes and others, the federal government has disposed of approximately 1.2 billion acres of land,<sup>75</sup> more than one-half of the land area of the contiguous United States. Moreover, even that figure does not take account of dispositions of less than the fee interest, which have constituted the vast majority of all dispositions since 1920.<sup>76</sup> All of this activity has not occurred without giving rise, from the very beginning, to a constant stream of litigation. In the seventh volume of Wheaton's Reports,<sup>77</sup> for example, eleven of the thirty-one cases reported, and almost one-third of the pages, are devoted to state or federal land-grant matters. In the early part of the nineteenth century, cases involving land-grants from the states or the colonies naturally tended to predominate over those involving grants from the federal government;<sup>78</sup> but the latter began to appear at an early date,<sup>79</sup> and by the end of the century attained what might today be termed habeas corpus proportions.<sup>80</sup>

#### A. *The Early Public-Lands Cases*

One might expect that the older a particular area of administrative law is, the more likely it is to have been permeated by the

74. The Mining Law of 1872, 17 Stat. 91 (now codified in scattered sections of 30 U.S.C.), provided for the survey and sale of lode claims at \$5 per acre and placer claims at \$2.50 per acre. Mineral lands had generally been excluded from the earlier federal grants. In 1920, perhaps reflecting a basic change in attitude as to whether it is desirable for the federal government to transfer its valuable lands to private ownership, Congress passed the Mineral Leasing Act, 41 Stat. 437, now codified in 30 U.S.C. § 181 (1964). This and subsequent statutes provide for the grant of only leasehold interests in what are clearly, during the present century, the most valuable of the federal mineral lands, namely, oil and gas lands. Thus, in 1968 only 39 mineral patents were issued covering only 3,338 acres of land, whereas during the same period 15,445 mineral leases were issued, covering approximately 14,967,000 acres of land, of which all except 191 leases, covering approximately 387,000 acres, were for oil and gas. PUBLIC LAND STATISTICS tables 46, 55, 56. See HIBBARD ch. XXV; GATES ch. XXIII. It was the Mineral Leasing Act which was involved in *Tallman*.

75. GATES ii; PUBLIC LAND STATISTICS table 3.

76. See note 74 *supra*.

77. 20 U.S., Feb. Term, 1822.

78. E.g., *Wilson v. Mason*, 5 U.S. (1 Cranch) 44 (1801) (a suit to prevent the register of the Kentucky land office from issuing a patent to one who claimed to have made a valid entry under a 1779 Virginia statute); *Huidekoper's Lessee v. Douglass*, 7 U.S. (3 Cranch) 1 (1805) (an ejectment action to test whether the Holland Company had effectively acquired title under a 1792 Pennsylvania statute to lands in what is now Ohio).

79. See, e.g., *Matthews v. Zane*, 8 U.S. (4 Cranch) 382 (1808) and *Matthews v. Zane's Lessee*, 9 U.S. (5 Cranch) 92 (1809), an ejectment action in which both parties claimed title from the United States by virtue of certificates received under the Act of May 10, 1800, 5 Stat. 174. The Secretary of the Treasury had declared the first certificate void, and the Court's decision supported that determination.

80. The three Swamp Lands Acts of 1849, 1850 and 1860, for example, had alone given rise to almost 200 Supreme Court cases by 1888. GATES 324.

"antiquated" doctrine of sovereign immunity. It is the fact, however, that during the nineteenth century, despite the considerable volume of public-lands litigation, no public-lands case against a federal officer—for mandamus, injunction, or ejectment—was dismissed by the Supreme Court on the ground of sovereign immunity. Nor, so far as this writer is aware, do any of the summaries of the arguments of counsel printed in the official reports for this period indicate that dismissal on the basis of sovereign immunity was ever seriously urged upon the Court in a public-lands case.<sup>81</sup> That significant absence can certainly not be attributed to a lack of appealing cases in which to raise the point. At least four cases during the nineteenth century involved actions of ejectment against federal army officers occupying military installations—surely a use that is supremely evocative of sovereign connotations. In the first of these, Chief Justice Marshall permitted the plaintiff to eject federal officers from a garrison which had been fortified in 1815 at an expense of thirty thousand dollars.<sup>82</sup> In the others,<sup>83</sup> the rights of the federal officers were upheld, but only after detailed factual and legal analysis which simple application of the doctrine of sovereign immunity would have rendered unnecessary.<sup>84</sup>

The explanation of this phenomenon is that even though the nineteenth century held the principle of sovereign immunity in more veneration than does the twentieth, it also had greater reverence for

81. In *Meigs v. M'Clung's Lessee*, 13 U.S. (9 Cranch) 11 (1815), the point was evidently made and rejected in the lower court [see the discussion of the lower court proceedings in *United States v. Lee*, 106 U.S. 196, 210-11 (1882)]; but it apparently was not referred to by counsel in argument before the Supreme Court, nor was it considered in the Court's opinion. In *Grisar v. McDowell*, 73 U.S. (6 Wall.) 363 (1867), and *Brown v. Huger*, 62 U.S. (21 How.) 305 (1858), the defendants referred to the fact that they occupied the properties in question as agents of the United States; but no argument on the ground of sovereign immunity was apparently made to the Court, nor was sovereign immunity referred to in the Court's opinions.

82. *Meigs v. M'Clung's Lessee*, 13 U.S. (9 Cranch) 11 (1815).

83. *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498 (1839) (defendant was the commanding officer of Fort Dearborn, Chicago); *Brown v. Huger*, 62 U.S. (21 How.) 305 (1858) (defendant was an Ordnance officer in command of the United States Armory at Harper's Ferry—the plaintiff no relation to the Brown who took the property in question by more direct means a year later); *Grisar v. McDowell*, 73 U.S. (6 Wall.) 363 (1867) (defendant was the United States general in command of the military department of California, including the military reserve in San Francisco Bay which was the subject of suit.)

84. Moreover, in *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498 (1839), the clarity of the Court's assumption that the doctrine of sovereign immunity has no application is emphasized by the fact that the opinion explicitly acknowledged that the suit was "in effect against the United States." The Court concluded from this, however, not that sovereign immunity barred the action, but that the defendant must prevail since, no patent having issued, legal title remained in the United States, and since, whatever equities the plaintiff might have possessed, the legal title had to control in an action at law. 38 U.S. (13 Pet.) at 516.

the integrity of the pleadings. If the sovereign was not named, the sovereign was not sued. That issue had been fought sharply during the early years of the century in several cases involving the eleventh amendment, and the outcome had been unequivocal: "In deciding who are parties to the suit, the court will not look beyond the record."<sup>85</sup>

### B. Appearance of the Immunity Obstacle

This admirable freedom from the complications of sovereign immunity, which nonstatutory review of public-lands determinations had originally enjoyed, was seemingly eliminated in the early years of the present century. That development was largely the result of two unfortunate historical accidents.

#### 1. The Eleventh-Amendment Cases

The first was the regrettable equation which had been made during the nineteenth century between what might be called "domestic" and "foreign" sovereign immunity—that is, between the principles governing the amenability of a state to suit before its own courts and those governing its amenability to suit before the courts of another sovereign. The two areas are, of course, not at all the same, as the Supreme Court has explicitly acknowledged in another context.<sup>86</sup> "Foreign" immunity—exemption from the compulsory process of another sovereign—might well be deemed essential to the security and dignity of a state, and it is certainly much more deserving of protection against formalistic evasion than is the exemption of the state's executive or legislative branches from the compulsory process of its own judiciary. The eleventh amendment to the Constitution embodies only that "foreign" immunity, protecting the states from being sued before federal tribunals by citizens of other states or nations. During the nineteenth century, however, the Supreme Court treated cases arising under the eleventh amendment as involving essentially the same issue as those cases which dealt with the "domestic" immunity of the United States itself. Decisions concerning one area were consistently cited as pertinent authority in opinions dealing with the other.<sup>87</sup>

85. *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 220 (1872). *See also United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824); *Board of Liquidation v. McComb*, 92 U.S. 531 (1875).

86. *National City Bank v. Republic of China*, 348 U.S. 356, 358-59 (1955).

87. *See, e.g., United States v. Lee*, 106 U.S. 196 (1882) [a federal sovereign immunity case which cited many eleventh-amendment cases, including *Davis v. Gray*, 83 U.S.

It eventually and inevitably became clear that the "party of record" test described above<sup>88</sup> could not continue to be applied to the eleventh-amendment cases without flouting the clear intent of the Constitution. One has complete control over a state if he has complete control over the agents through whom alone the state can act. Thus, the latter part of the nineteenth century witnessed an effort on the part of the Court to retreat from the "party of record" test in state immunity cases. In a famous series of decisions, the Court held that in certain circumstances—which, it must be acknowledged, the Court was unable to delineate with much precision or consistency—a suit against a state officer would constitute a suit against the sovereign and thus be barred from the federal courts by the eleventh amendment.<sup>89</sup> Those decisions were accompanied by vigorous dissents, but by 1887, in *In re Ayers*,<sup>90</sup> the majority of the Court felt able to say the following:

It must be regarded as a settled doctrine of this court, established by its recent decisions, "that the question whether a suit is within the prohibition of the 11th Amendment is not always determined by reference to the nominal parties on the record."<sup>91</sup> This, it is true is not in harmony with what was said by Chief Justice Marshall in *Osborn v. Bank of the United States* [citation omitted].<sup>92</sup>

As noted above, there was nothing in logic or in policy which required that this new proscription of the technical evasion of "foreign" sovereign immunity—or, more precisely, of that aspect of "foreign" sovereign immunity which was guaranteed to the states by the Con-

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(16 Wall.) 203 (1872), and *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824)]; and *In re Ayers*, 123 U.S. 443 (1887) [an eleventh-amendment case which cited many federal sovereign immunity cases, including *United States v. Lee, supra*, *Meigs v. M'Clung's Lessee*, 13 U.S. (9 Cranch) 11 (1815), *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498 (1839), *Brown v. Huger*, 62 U.S. 305 (1858), and *Grisar v. McDowell*, 73 U.S. 363 (1867)].

88. See text accompanying note 85 *supra*.

89. See *Louisiana v. Jumel*, 107 U.S. 711 (1882); *Antoni v. Greenhow*, 107 U.S. 769 (1882); *Cunningham v. Macon & B. R.R.*, 109 U.S. 446 (1883); *Poindexter v. Greenhow*, 114 U.S. 270 (1884); *Hagood v. Southern*, 117 U.S. 52 (1886); *In re Ayers*, 123 U.S. 443 (1887). Some of these cases mingled the notion that the state is the real defendant and that therefore the eleventh amendment bars the suit, with the concept that the state *ought to be* a defendant, since it is an indispensable party, and that therefore the suit must be dismissed. The fusion, or confusion, of these two grounds is very common. See text accompanying notes 186-89 *infra*.

90. 123 U.S. 443 (1887).

91. Citing *Poindexter v. Greenhow*, 114 U.S. 270 (1884).

92. 123 U.S. at 487. Later cases before the turn of the century appeared to retreat from this position and even to attempt a reinstatement of the "party of record" test of *Osborn* and *Davis*. See *Pennoyer v. McConaughy*, 140 U.S. 1 (1891); *In re Tyler*, 149 U.S. 164 (1893); *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894). But the damage had been done, and the reinstatement was not successful.

stitution—be applied to the “domestic” doctrine as well, thereby destroying or impairing a tradition of nonstatutory review of administrative action as venerable as *Marbury v. Madison*.<sup>93</sup> That tradition, far from considering suits in a state’s own courts against its own officers to be suits against the sovereign without its consent, had considered many such suits—namely, all mandamus actions—to be, in principle, actions *by* the sovereign, on the relation of a private individual, to compel the sovereign’s agent to perform his assigned function.<sup>94</sup> But logic, policy, and history were all beclouded by the ingrained habit of treating the eleventh-amendment cases and the “domestic” sovereign immunity cases alike. Consequently, a change made to protect the states from the federal courts, as the Constitution required, had the very different effect of insulating the federal government from the federal courts, thereby casting a shadow upon the entire field of nonstatutory review.

## 2. *Minnesota v. Hitchcock—Its Birth and Deformation*

Nevertheless, the review of public-lands determinations, because of its importance and its long history, might still have continued unimpaired were it not for another coincidence, or series of coincidences, at the beginning of the present century. In 1899 there was filed in the United States Supreme Court the case of *Minnesota v. Hitchcock*,<sup>95</sup> an original action against the Secretary of the Interior and the Commissioner of the General Land Office, asserting the state’s ownership, under an 1857 school-land grant, of certain lands which, according to the defendants, the United States held in trust for the Chippewa Indians. At issue were some 190,000 acres, and the state was apparently in immediate need of the revenues which could be derived from that land. The defendants’ answer to the bill maintained that the Chippewas were indispensable parties,

93. 5 U.S. (1 Cranch) 137 (1803).

94. The practice in the federal courts has not been consistent as to the naming of the United States as the formal party plaintiff in mandamus actions. Compare the captions of the following Supreme Court cases, all of which were mandamus actions brought by private individuals: *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (original action); *M’Intire v. Wood*, 11 U.S. (7 Cranch) 504 (1813); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838); *United States v. Commissioner*, 72 U.S. (5 Wall.) 563 (1866); *Secretary v. McGarrahan*, 76 U.S. (9 Wall.) 298 (1869); *United States v. Schurz*, 102 U.S. 378 (1880); *In re Emblen*, 161 U.S. 52 (1896) (original action); *Ballinger v. United States ex rel. Frost*, 216 U.S. 240 (1910). It appears that the days in which the sovereign must be named as the formal party are long past and that in most jurisdictions it may be improper to bring the suit in the name of anyone except the real party in interest. See *Annot.*, 105 Am. St. R. 122 (1905); *Annot.*, 64 A.L.R. 622 (1913); 35 Am. JUR. *Mandamus* §§ 318-26, at 71-79 (1941).

95. 185 U.S. 373 (1902).

without whom the Court could not proceed, and that the suit was not within the original jurisdiction of the Court, since the dispute was between the state and the Chippewas, many of whom were citizens of Minnesota. In order to eliminate these objections, political influence was evidently brought to bear, and a bill was drafted which would "dispose of the technical difficulty set forth in the answer."<sup>96</sup> That bill was introduced in the Senate<sup>97</sup> by Minnesota Senator Nelson, and in the House of Representatives<sup>98</sup> by Minnesota Congressman Eddy; it received such speedy attention that it was passed by both houses within two weeks,<sup>99</sup> and signed by the President within three.<sup>100</sup> In its final form, this Act of March 2, 1901 read:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any suit heretofore or hereafter instituted in the Supreme Court of the United States to determine the right of a State to what are commonly known as school lands within any Indian reservation of any Indian cession where an Indian tribe claims any right to or interest in the lands in controversy, or in the disposition thereof by the United States, the right of such State may be fully tested and determined without making the Indian tribe, or any portion thereof a party to the suit, if the Secretary of the Interior is made a party thereto; and the duty of representing and defending the right or interest of the Indian tribe, or any portion thereof, in the matter shall devolve upon the Attorney General upon the request of such Secretary.<sup>101</sup>

The law suit then proceeded. It was argued the following November and decided the next May. Because of its unapparent subtlety and the resultant distorting effect upon the development of nonstatutory review in the public-lands field, the case requires close attention.

What the state sought in *Minnesota v. Hitchcock* was an injunction restraining the Secretary and the Commissioner from selling any of the contested lands. In oral argument, the defendants no longer contested the issue of jurisdiction.<sup>102</sup> The Court, however, was not quite so easily satisfied. Its opinion began as follows:

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96. H.R. REP. NO. 2948, 56th Cong., 2d Sess. 2 (1901).

97. S. 5978, 56th Cong., 2d Sess. (1901).

98. H.R. 14,191, 56th Cong., 2d Sess. (1901).

99. 34 CONG. REC. 2804 (Senate Passage—Feb. 22, 1901), 3071 (House passage—Feb. 26, 1901).

100. 34 CONG. REC. 3523 (March 2, 1901).

101. 31 Stat. 950 (1901).

102. It would certainly have been most unseemly for them to do so since, according to H.R. REP. NO. 2948, 56th Cong., 2d Sess. 2 (1901), the bill specifically designed to eliminate that issue had been "drafted by the attorneys representing the various parties," and according to the statements of Senator Nelson during the brief debate upon the bill in the Senate, it had been "prepared by the Interior Department." 34 CONG. REC. 2804 (1901).

A preliminary question is one of jurisdiction. It is true counsel for defendants did not raise the question, and evidently both parties desire that the court should ignore it and dispose of the case on the merits. But the silence of counsel does not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the Constitution and laws.<sup>103</sup>

By the time of *Minnesota v. Hitchcock* there had been hundreds of cases in the federal courts seeking mandamus or injunction against land-office officials; federal jurisdiction had been easily provided in most such cases arising after 1875 by the existence of a federal question.<sup>104</sup> But although a federal question was clearly involved in the instant case, the Supreme Court was reluctant to rely upon that basis with respect to a suit asserted to be within its *original* jurisdiction. It feared that if the constitutional provision making the Supreme Court's jurisdiction original in "those [cases] in which a State shall be a Party"<sup>105</sup> should be interpreted to apply to all state-party cases which come within federal cognizance for any reason whatever, including mere federal-question jurisdiction, then "many cases, both of a legal and an equitable nature in respect to which Congress has provided no suitable procedure, would be brought within [the Supreme Court's] cognizance."<sup>106</sup> Similarly, the Court was not eager to predicate federal jurisdiction upon the fact that the suit was between a state and citizens of another state.<sup>107</sup> It observed that the Secretary and the Commissioner, "merely as citizens, have no interest in the controversy for or against the plaintiff; [and] in case either of the defendants should die or resign and a citizen of Minnesota be appointed in his place, the jurisdiction of the court would cease, and this although the real parties in interest remain the same."<sup>108</sup> While not necessarily accepting the validity of either of these objections, and indeed framing possible replies to each, the Court nonetheless decided to rest its jurisdiction upon what it considered safer ground:

We omit, as unnecessary to the disposition of this case, any consideration of the applicability of [the two above-discussed bases of

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103. 185 U.S. at 382.

104. The Constitution's grant of general federal-question jurisdiction, U.S. CONST. art. III, § 2, was first implemented by the 1875 Judiciary Act, Act of March 3, 1875, § 1, 18 Stat. 470. See H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 727-30 (1953).

105. U.S. CONST. art. III, § 2.

106. 185 U.S. at 384.

107. U.S. CONST. art. III, § 2 provides in part: "The judicial power shall extend . . . to Controversies . . . between a State and Citizens of another State . . . ."

108. 185 U.S. at 383-84.

jurisdiction] because we think the case comes within the scope of the third . . . , and we need not now go further. This is a controversy to which the United States may be regarded as a party.<sup>109</sup>

The Court then proceeded (and the progression of the argument here is critically important) to meet the objection that the clause of the Constitution conferring federal jurisdiction in situations in which the United States is a party<sup>110</sup> means to refer only to cases in which the United States is the party *plaintiff*. For that purpose, the Court quoted and discussed as being "in point, and . . . very suggestive,"<sup>111</sup> its opinion in *United States v. Texas*,<sup>112</sup> in which it had rejected the contention by the State of Texas that the grant to the Supreme Court of original jurisdiction in "those [cases] in which a State shall be a Party"<sup>113</sup> did not apply to those cases in which the opposite party was the United States. That earlier opinion had reasoned that such construction of the phrase was untenable "unless a State is exempt altogether from suit by the United States";<sup>114</sup> and that the latter proposition clearly could not have been the intent of the framers because it must have been obvious to them that controversies would arise between the federal government and the states, and that the most appropriate forum to resolve those controversies would be the federal courts—more specifically, the Supreme Court. Having concluded its quotation from *United States v. Texas* with these comments of the earlier opinion, the Court in *Minnesota v. Hitchcock* completed its own discussion of the point as follows:

While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition.<sup>115</sup>

It is important to realize that this paragraph was *not* written with an eye to the objection that sovereign immunity barred the suit presently before the Court. That objection had not even been raised in the opinion; and, if it had been, its rebuttal would surely have called for citation of more concrete authority. Rather, the

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109. 185 U.S. at 384.

110. U.S. CONST. art. III, § 2 provides in part: "The judicial power shall extend . . . to Controversies to which the United States shall be a Party . . . ."

111. 185 U.S. at 384.

112. 143 U.S. 621 (1892).

113. U.S. CONST. art. III, § 2.

114. *United States v. Texas*, 143 U.S. 621, 644 (1892), quoted in *Minnesota v. Hitchcock*, 185 U.S. 373, 385 (1902).

115. 185 U.S. at 386.

paragraph was meant only to demonstrate the obviousness of the possibility that, in a suit involving a state, the United States might be a defendant as well as a plaintiff—and hence the certainty that the Court in *United States v. Texas*, in which the United States was the plaintiff, also had the inverse situation in mind when it spoke of the appropriateness of the Supreme Court in particular, and of the federal courts in general, as a forum for federal-state disputes. Considering itself thus enabled to rely upon the reasoning in *United States v. Texas*, the Court in *Minnesota v. Hitchcock* decided that the constitutional grant of federal jurisdiction for cases in which the United States is a party was meant to apply not only to situations in which the United States is a plaintiff, but also to those in which it is a defendant, at least with respect to state-party original-jurisdiction cases.

Having reached that conclusion, the Court then proceeded to raise another possible objection to this ground of jurisdiction: that because the United States had not been named in the case at hand, it was therefore not a party. Predictably, the Court applied to this totally different problem the reasoning of the eleventh-amendment cases, pronouncing once again that the "party-of-record" test was dead, and quoting *Ayers*<sup>116</sup> to the effect that the eleventh amendment applies "when 'the State, though not named, is the real party against which the relief is asked, and the judgment will operate.'"<sup>117</sup> The Court took pains to point out, however, that the *Ayers* doctrine was adopted only for the purpose of determining federal jurisdiction—the general question which both the eleventh-amendment cases and the instant case had in common—and not for the purpose of rendering sovereign immunity applicable to the ordinary mandamus and injunction cases:

Of course, this statement [that the United States is the real party in interest] has no reference to and does not include those cases in which officers of the United States are sued, in appropriate form, to compel them to perform some ministerial duty imposed upon them by law, and which they wrongfully neglect or refuse to perform. *Such suits would not be deemed suits against the United States within the rule that the Government cannot be sued except by its consent, nor within the rule established in the Ayers case.*<sup>118</sup>

Finally, the Court raised and refuted one last objection to its

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116. 123 U.S. 443 (1887).

117. 185 U.S. at 386. This reliance on *Ayers* ignores, of course, the intervening cases referred to in note 92 *supra*, which seemed to withdraw from the clarity of that dictum.

118. 185 U.S. at 386 (emphasis added).

basing jurisdiction upon the fact that the United States was a party to the case—namely, the assertion that because the Government held the lands in trust for the Chippewa Indians and not on its own account, the Chippewas and not the United States were the real parties in interest. It was in reply to this assertion—and with reference to this alone—that the Court referred to the Act of March 2, 1901, discussed above.<sup>119</sup> That Act, it said, amounted to a prescription by Congress that the United States be deemed the real party in interest, and this prescription must be given effect.<sup>120</sup> It must be emphasized that the Act was referred to only in order to overcome the objection that the United States was not the real party in interest, and not with reference to the question of sovereign immunity. Sovereign immunity was not even mentioned in the opinion, except in the paragraph last quoted.<sup>121</sup> The Court's use of the Act, then, was precisely in accord with the Act's purpose, which, as shown by the legislative history, was not to overcome any objection of sovereign immunity, but rather to satisfy the objection originally raised by the defendants' answer to the bill—that the United States was not a party.<sup>122</sup>

The next important case was almost predictable. At least some state attorneys did not miss the opening apparently left by the rationale of *Minnesota v. Hitchcock*. That decision had found the Act of March 2, 1901 essential to the maintenance of the suit only because it eliminated what might otherwise have been the purely

119. See text accompanying notes 96-101 *supra*.

120. The Court was not unaware of the limitation upon this power of Congress to affect the application of article III, section 2 of the Constitution. See note 121 *infra*.

121. There is one portion of the Court's opinion dealing with the Act of March 2, 1901 which might be interpreted to apply to sovereign immunity, but only if read in isolation and without an understanding of the progression of the argument. The Court stated that Congress

has by this legislation in effect declared that the Indians, although the real parties in interest, need not be made parties to the suit; that the United States will, for the purposes of the litigation, stand as the real party in interest, *and so far as it could within constitutional limits has expressed the consent of the Government to the maintenance of this suit in this court.*

185 U.S. at 388 (emphasis added). The "consent" referred to in the italicized portion evokes notions of waiver of sovereign immunity. From both the context of the passage and its content, however, these notions can be seen to be erroneous. The context was discussion concerning whether the United States *was* a real party in interest before the Court, not whether it *could* be. The content included the clause "so far as it could within constitutional limits," which makes no sense as applied to waiver of sovereign immunity, but considerable sense as applied to the congressional power of enabling a suit to be brought in the federal courts simply by decreeing that the United States is to be deemed the party in interest. In other words, the Court was referring to subject matter jurisdiction, rather than jurisdiction over the person. See the Appendix following this Article.

122. See text accompanying note 96 *supra*.

fiduciary character of the United States' interest. So long as the interest of the United States in the matter involved was proprietary and not fiduciary, presumably any state suit against federal officers could be brought as an original action in the Supreme Court—a state of affairs which would vastly increase the burden of the Supreme Court's work, but which seemed clearly indicated by *Minnesota v. Hitchcock*. *Oregon v. Hitchcock*<sup>123</sup> involved an original bill for an injunction against the same Secretary of the Interior and Commissioner of the General Land Office who had been defendants in the *Minnesota* case; and like that earlier case, it involved a state claim to lands which the Secretary was about to dispose of for the benefit of certain Indians. Two crucial factors, however, were different: (1) the state claim was based not upon a school-lands grant, but upon a swamp-lands grant, so that the Act of March 2, 1901, which by its terms was limited to school lands, was not applicable; and (2) the lands in question were asserted to be held by the United States not in trust for the Indians, but rather in its own right, and consequently, at least according to the reasoning in *Minnesota v. Hitchcock*, the Act of March 2, 1901 was unnecessary to sustain the original bill. As the State of Minnesota had done, Oregon sought to rest federal jurisdiction primarily upon the ground that a suit against governmental officers with respect to property which they hold in their official capacity is, for jurisdictional purposes, a suit against the Government.<sup>124</sup> At the same time, however, in order to meet the argument of the defendants (who in this case, unlike the *Minnesota* case, were inclined to challenge jurisdiction), Oregon was obliged to maintain the seemingly inconsistent position that, for purposes of sovereign immunity, the suit was not one against the Government. In support of that latter position, the state could have cited many lands cases, and indeed it did cite five.<sup>125</sup> The Government, on the other hand, could cite no lands case to support its claim that sovereign immunity barred the suit; and for that point it cited only *United States v. Lee*,<sup>126</sup> a case which was also

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123. 202 U.S. 60 (1906).

124. Oregon's argument also asserted, as two "additional" grounds for federal jurisdiction, the other two possible bases which had been mentioned, but mooted, in *Minnesota*—namely, the fact that the suit was between a state and citizens of other states, and the fact that it arose under the laws of the United States. See 202 U.S. at 64-65.

125. *Noble v. Union River Logging R.R.*, 147 U.S. 165 (1893); *United States v. Schurz*, 378 U.S. 196 (1880); *Grisar v. McDowell*, 73 U.S. (6 Wall.) 363 (1867); *Brown v. Huger*, 62 U.S. (21 How.) 305 (1858); *Meigs v. M'Clung's Lessee*, 13 U.S. (9 Cranch) 11 (1815).

126. 106 U.S. 196 (1882), discussed in text accompanying note 20 *supra*.

cited by Oregon and which was quite simply contrary to the Government's position. Counsel for defendants wisely devoted little of their argument to sovereign immunity and went on to discuss other points.

The opinion which the Court finally handed down in *Oregon v. Hitchcock* was a baffling distortion of *Minnesota v. Hitchcock*. It excerpted that portion of the earlier opinion which pertained to "real party in interest" for purposes of federal jurisdiction, but it did so in such a manner as to make it appear that the passage pertained to sovereign immunity. It then asserted that the Court had sustained jurisdiction in the *Minnesota* case only because the Act of March 2, 1901 had been held to be a waiver of immunity (an interpretation which, as far as the enunciated opinion in *Minnesota* is concerned, is simply false),<sup>127</sup> and had also been held to be an assumption by the United States of "full responsibility in behalf of its wards, the Indians, for the result of any suit affecting their rights"<sup>128</sup> (a statement which is quite true, but also quite irrelevant to the factual situation in *Oregon*, in which the United States was clearly the real party concerned because equitable title to the lands in question was not held by the Indians). In view of the fact that seven of the nine members of the *Oregon* Court had also sat in *Minnesota*, and in view of the fact that the two opinions were written by the same Justice (Justice Brewer), it is difficult to avoid a suspicion that the distortion of the earlier case was intentional and that the Court had had some second thoughts about the scope of original-jurisdiction litigation that it was inviting. Be that as it may, relying on its distortion of *Minnesota*, the Court held in *Oregon* that the action was barred by sovereign immunity because the United States was the real party in interest and had not given consent to be sued.

*Oregon v. Hitchcock* was, so far as this writer's research has been able to disclose, the first occasion on which the sovereign immunity doctrine was applied by the Supreme Court against a plaintiff suing a federal official in a public-lands case. The strength of the holding, moreover, is diluted by two considerations. First, the plaintiff in the suit was attempting to maintain the apparently contradictory positions that the United States was a party for purposes of federal jurisdiction,<sup>129</sup> but was not a party for purposes of sovereign immunity. Second, the Court expressed a clear and entirely self-sufficient alterna-

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127. See text accompanying notes 119-22 *supra*.

128. 202 U.S. at 70.

129. Oregon apparently felt it important to establish this ground of jurisdiction because the Court had clearly indicated in the *Minnesota* case its reluctance to rely upon other grounds. See text accompanying notes 104-09 *supra*.

tive ground for the holding—namely, that until legal title, which still remained in the United States, actually passed, “inquiry as to equitable rights comes within the cognizance of the Land Department.”<sup>130</sup>

These grounds of comfort were not present, however, in a case decided the next month, *Naganab v. Hitchcock*.<sup>131</sup> That case, filed in the Supreme Court of the District of Columbia by a Chippewa Indian, concerned a federal statute which had established a forest reservation upon lands allegedly held in trust for the benefit of the complainant and his tribe. The bill sought an injunction restraining the Secretary of the Interior from enforcing the statute, which was asserted to be unconstitutional, and a writ of mandamus requiring the Secretary to execute the alleged trust in favor of the Indians. In a very brief opinion, the Supreme Court affirmed dismissal of the bill on the ground that the sovereign immunity of the United States had not been waived. The only case cited in support of the holding was *Oregon v. Hitchcock*.<sup>132</sup>

In the same term, the new doctrine of sovereign immunity in public-lands cases was arguably reaffirmed, and perhaps drastically

130. 202 U.S. at 70. For what is apparently the first action against a public-lands official which employed this “passage of title” theory to preclude suit, see *Brown v. Hitchcock*, 173 U.S. 473 (1899). The basic principle, as set forth in that case, was that “so long as the legal title remains in the government all questions of right should be solved by appeal to the land department and not to the courts.” 173 U.S. at 477. The prior and subsequent history of the doctrine enunciated in that case is as interesting, and as strewn with misconceptions, as that of sovereign immunity. For present purposes it need only be noted that the Court began to display some defensiveness concerning the theory as early as 1908 [see *Garfield v. United States ex rel. Goldsby*, 211 U.S. 249, 260 (1908)], and effectively repudiated it in 1917 [see *Lane v. Hoglund*, 244 U.S. 174 (1917)]. Cases in direct opposition to the theory appeared regularly after that [see, e.g., *Payne v. Central Pac. Ry.*, 255 U.S. 228 (1921); *Work v. United States ex rel. McAlester-Edwards Co.*, 262 U.S. 200 (1923); *Work v. Louisiana*, 269 U.S. 250 (1925)], but the repudiation was never made explicit, nor were the earlier cases applying the theory specifically overruled. The result is that the old cases remain alive and fertile, unsterilized by *Shepard's*, and capable of spawning confusion for lawyers and judges who have neither time nor inclination to investigate the history of the “passage of title” doctrine. Thus it is that the above quotation from *Brown*, which has not been an accurate statement of the law for half a century, can be dredged up to confuse the issue in as recent a case as *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 338 (1963).

131. 202 U.S. 473 (1906).

132. *Naganab* should perhaps not even be considered a public-lands case, since it relates to the functions of the United States as guardian of, and trustee for, the Indians. Like the functions of managing and disposing of the public lands, those functions happen to be performed by the Secretary of the Interior (though through the Bureau of Indian Affairs rather than the Bureau of Land Management); but they really comprise a separate field of administration, and one which has given rise to its own stream of litigation, not all of which pertains to real estate. Since, however, several of the suits brought against the Secretary by Indians with respect to lands held for them are referred to with some frequency in the public-lands opinions, such cases will, subject to this caveat, be considered in this Article.

extended, by the case of *Kansas v. United States*.<sup>133</sup> That case involved another attempt by a state at an original action in the Supreme Court. The defendants were the United States, its officers, and certain Indian allottees of lands which the state claimed had previously been granted to it in trust for certain railroads. The Court held that, insofar as the United States and its officers were concerned, the suit was one against the sovereign without its consent.<sup>134</sup> In order to dispose of the suit as to the Indian allottees—whose citizenship, Kansas had argued, would still suffice to confer subject matter jurisdiction on the Court, since they were citizens of other states—the Court stretched sovereign immunity still further. It held that as to these defendants, too, the action was one against the United States, since “if their allotments should be taken from them . . . the United States would be subject to a demand from them for the value thereof or for other lands . . .”<sup>135</sup> This last proposition appears to have had neither ancestors, nor, fortunately, progeny. It may perhaps be explained, as indeed the entire application of sovereign immunity in these public-lands cases may be explained, as an unusual theory invoked only to avoid a claim upon the Court’s original jurisdiction. In any event, the precedential effect of the *Kansas* case is weakened by the fact that there was again an alternative ground for dismissal of the bill; indeed, that ground—that the state was not the real party in interest—was the first set forth in the opinion.

The next important case, *Louisiana v. Garfield*,<sup>136</sup> exemplifies a curious, but not uncommon, variant of the doctrine of sovereign immunity. In another attempt to invoke the original jurisdiction of the Supreme Court, the State of Louisiana had brought a bill against the Secretary of the Interior to enjoin his disposition of certain land and to establish the state’s title to it. The Attorney General argued that the suit was against the United States without its consent, citing only the *Minnesota*, *Oregon*, *Naganab*, and *Kansas* cases. The Court, however, in an opinion by Justice Holmes, made no reference to those cases nor to the doctrine of sovereign immunity as such, preferring instead to state that the case “raises questions of law

133. 204 U.S. 331 (1907).

134. In support of this holding, the Court cited only *Minnesota v. Hitchcock*, *Oregon v. Hitchcock*, and *United States v. Lee*—the last of which, as noted above, not only offered no support for dismissal as to the officers, but positively militated against it. See text following note 20 *supra*.

135. 204 U.S. at 342.

136. 211 U.S. 70 (1908).

and of fact upon which the United States would have to be heard,"<sup>137</sup> wherefore "[i]t follows that the United States is a necessary party and that we have no jurisdiction of this suit."<sup>138</sup> Justice Holmes did not cite any authority for that holding. Its theoretical basis is certainly contrary to a vast number of prior and subsequent cases involving suits against government officials, and amounts, of course, to the doctrine of sovereign immunity under a different sheet.<sup>139</sup>

### C. The Withering Away of Immunity

In the same month as that in which *Louisiana v. Garfield* was decided, the Court decided *Garfield v. United States ex rel. Goldsby*.<sup>140</sup> The difference between the two opinions is suggestive of the line which was beginning to develop. *Goldsby* involved a petition for writ of mandamus against the Secretary of the Interior, requiring him to restore the relator to enrollment as a member of the Chickasaw Nation. That enrollment, which entitled the relator to a share in the funds and lands belonging to the Nation, had been cancelled without notice or hearing. The Supreme Court for the District of Columbia granted the writ and the United States Supreme Court affirmed. Neither the Supreme Court nor—so far as the official reports show—either counsel mentioned the doctrine of sovereign immunity. The Court's decision might be explained on the ground that the lands and funds in question were merely held in trust by the United States for the Indians, who thus constituted the real party in interest. But if that were the explanation, one would expect the opinion to contain at least some explicit reference to the crucial fact of trusteeship—which it does not. In light of the later cases, it appears that the operative difference between *Louisiana v. Garfield* and *Goldsby* lay in the fact that the latter case was not an original action in the Supreme Court, but rather an ordinary mandamus petition in the District of Columbia. The limitations upon such an ordinary petition involving public lands were well

137. 211 U.S. at 70.

138. 211 U.S. at 77-78.

139. See 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 27.04, at 558 n.9 (1958); Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1064-66 (1946). Some authors have suggested that the "indispensable party" theory ought to be separated from the sovereign immunity doctrine and be given a useful life of its own. Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1491-93 (1962); H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1177-78 (1953).

140. 211 U.S. 249 (1908).

established; they included the "ministerial-discretionary" test<sup>141</sup> and the "passage of title" concept,<sup>142</sup> but did not include the doctrine of sovereign immunity.<sup>143</sup>

*Conley v. Ballinger*,<sup>144</sup> decided slightly more than a year after *Goldsby*, was an action for an injunction against the Secretary and Commissioner to restrain them from selling or disturbing an Indian cemetery. Although the case could have been disposed of in a few lines if the principle of *Naganab* had been firmly adhered to, the Court examined the merits and found that plaintiff had no legal or equitable title. Dismissal of the bill therefore had to be affirmed "even if the suit is not to be regarded as a suit against the United States within the authority of [Naganab and *Oregon v. Hitchcock*.]"<sup>145</sup> It is again to be noted that this case was not an original action in the Supreme Court.

In *Ballinger v. United States ex rel. Frost*,<sup>146</sup> decided less than a month later, the Court carried its lack of concern with the doctrine of sovereign immunity a step further. The action had been brought in the Supreme Court for the District of Columbia by a Choctaw Indian who sought a writ of mandamus to compel the Secretary of the Interior to deliver to her an executed patent which had been recalled before delivery. The facts bore great resemblance to those of *United States v. Schurz*,<sup>147</sup> a pre-*Minnesota v. Hitchcock* case in which delivery of the executed patent had been compelled. The Supreme Court affirmed a similar judgment in *Frost*, citing, among other cases, *Schurz*, but not citing, just as counsel had apparently

141. See *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840).

142. See note 130 *supra*.

143. *Naganab v. Hitchcock*, discussed in text accompanying notes 131-32 *supra*, appears to be the only case that is inconsistent with this theory—for in that case sovereign immunity was held to bar suit in the District of Columbia for mandamus and injunction. But that case is similarly inconsistent with the other possible reconciliation of *Goldsby* and *Louisiana v. Garfield*—that is, reliance upon the fiduciary nature of the Government's ownership to explain the inapplicability of immunity in *Goldsby*. The property at issue in *Naganab* was likewise held in trust for the complainant's tribe; in fact in that case, unlike in *Goldsby*, the existence of a trust was explicitly referred to in the Court's opinion. Moreover, in a case decided barely a year after *Goldsby*, the Court cited *Naganab* to support the proposition that a trust cannot be enforced against the United States, presumably because of sovereign immunity. *Conley v. Ballinger*, 216 U.S. 84, 90 (1910) (dictum), discussed in text accompanying notes 144-45 *infra*. The problem reduces itself, therefore, to whether *Goldsby* or *Naganab* is the sport. The brevity of the opinion in *Naganab* makes that case the more likely candidate.

144. 216 U.S. 84 (1910).

145. 216 U.S. at 91.

146. 216 U.S. 240 (1910).

147. 102 U.S. 378 (1880).

not cited, any of the sovereign immunity cases discussed above.<sup>148</sup> Indeed, neither the opinion of the Court nor the recorded arguments of counsel made any reference to sovereign immunity. Rather, the battle was fought on the familiar ground of the "mandamus-discretionary" test and the "passage of title" theory. Once again, however, the case was not an original action in the Supreme Court.

Subsequent cases continued the retreat from *Oregon v. Hitchcock* and from *Naganab*, at first only in suits not seeking to invoke the Court's original jurisdiction, but later in original-jurisdiction cases as well. Thus, in *United States ex rel. Ness v. Fischer*,<sup>149</sup> the Court affirmed a denial by the Supreme Court of the District of Columbia of a petition for mandamus against the Secretary, but it used the traditional ground of "discretionary action" and ignored the argument of sovereign immunity which the defendant had somewhat tentatively made.<sup>150</sup> Similarly, in *United States ex rel. Knight v. Lane*,<sup>151</sup> the lower court's denial of a writ of mandamus against the Secretary was affirmed, without reference to sovereign immunity, on the basis of "discretionary action" and the "passage of title" theory. Again, in *Plested v. Abbey*,<sup>152</sup> the lower court's denial of a petition for a restraining and mandatory injunction against federal land officers was affirmed on the basis of the "passage of title" doctrine, without reference to sovereign immunity. Indeed, in *Plested* both the recorded argument for the defendants and the opinion of the Court cited the principal sovereign immunity cases—*Oregon v. Hitchcock* and *Naganab*—along with *Brown* and *Schurz* as instances of application of the "passage of title" rule!<sup>153</sup> Finally, in *Lane v. Watts*,<sup>154</sup> the Supreme Court not only affirmed the issuance of an injunction against the Secretary and Commissioner,<sup>155</sup> but also made its rejection of the argument of sovereign immunity explicit, citing *Ballinger v. United States ex rel. Frost* and omitting any mention of the skeletons in its closet such as *Naganab*.<sup>156</sup> Two years later, in *Lane*

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148. The Attorney General did cite *Oregon v. Hitchcock*, but only for that case's alternative holding which was based on the "passage of title" theory. 216 U.S. at 242.

149. 223 U.S. 683 (1912).

150. 223 U.S. at 688.

151. 228 U.S. 6 (1913).

152. 228 U.S. 42 (1913).

153. 228 U.S. at 46, 51.

154. 234 U.S. 525 (1914).

155. The lower court had enjoined those officials from allowing entries upon certain lands which the plaintiffs claimed the Government had previously granted to them. *Lane v. Watts*, 41 App. D.C. 139, 140 (D.C. Cir. 1913).

156. 234 U.S. at 536, 540.

v. *United States ex rel. Mickadiet*,<sup>157</sup> the Court reversed the granting of a writ of mandamus against the Secretary, but it did so on the "passage of title" theory, despite the sovereign immunity argument made by the Solicitor General.<sup>158</sup> The next year, in *Lane v. Hoglund*,<sup>159</sup> the Court again ignored the Secretary's assertion of sovereign immunity and this time affirmed the granting of a writ of mandamus against him to compel action which had never before been held to be within the courts' power—namely, execution and delivery of a land patent which had not been executed.<sup>160</sup> The Court was not yet prepared, however, to abandon the sovereign-immunity bar as it applied to those public-lands cases brought before its original jurisdiction. Thus, in *New Mexico v. Lane*,<sup>161</sup> it upheld the doctrine in a public-lands case for the first time in over eight years, citing as authority only *Louisiana v. Garfield*.<sup>162</sup> Sovereign immunity was, however, only an alternative ground for the decision. The Court also found that the beneficiary of the patent issuance which the suit sought to enjoin was an indispensable party to the suit, and that since he was presumably a New Mexico citizen his joinder would destroy the diversity of citizenship which was the sole basis of jurisdiction.<sup>163</sup> The next year, in *Minnesota v. Lane*,<sup>164</sup> the Court

157. 241 U.S. 201 (1916).

158. The opinion shows the same tendency as *Plested v. Abbey*, 228 U.S. 42 (1913), to reduce sovereign immunity into the "passage of title" theory. The Court says:

There was a suggestion in argument, which it was conceded was not made in the courts below, of an absolute want of jurisdiction upon the theory that as the title of the allotted property was yet in the United States for the purposes of the trust, there could in any event be no jurisdiction over the cause, since in substance and effect it was a suit against the United States. As, however, the considerations involved in this proposition were absolutely coincident with those required to be taken into view in order to determine the power of the Secretary, we have not deemed it necessary to specially consider the subject.

241 U.S. at 210.

159. 244 U.S. 174 (1917).

160. See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 340-41 (1965); cf. *Brown v. Hitchcock*, 173 U.S. 473, 476 (1899).

161. 243 U.S. 52 (1917).

162. 211 U.S. 70 (1908), discussed in text accompanying notes 136-39 *supra*.

163. 243 U.S. at 58. It is interesting, though upsetting, to observe that this argument brings us full circle from *Minnesota v. Hitchcock*. In that case the Court considered naming the Secretary equivalent to naming the United States so far as subject matter jurisdiction was concerned, while not considering it equivalent for purposes of sovereign immunity. See text accompanying note 118 *supra*. In the *New Mexico* case, on the other hand, the Court considered naming the Secretary equivalent to naming the United States so far as sovereign immunity was concerned, while not considering it equivalent for purposes of subject matter jurisdiction. *Panta rei*.

It is unclear whether the Court's disregard of the possibility that the existence of a federal question could provide federal jurisdiction in an original action was unintentional or calculated. Concerning this issue, see H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 225-27 (1953).

164. 247 U.S. 243 (1918).

again refused to grant the issuance of an injunction in an original action against the Secretary of the Interior, but this time the result was based squarely upon the "passage of title" theory; the doctrine of sovereign immunity was not even mentioned as an alternative ground, nor were any of the cases supporting that doctrine cited.<sup>165</sup>

With *Minnesota v. Lane*, the states apparently got the message which the Court had been trying to convey to them ever since Oregon first took the Court's opinion in *Minnesota v. Hitchcock* at face value and tried to make original actions in the Supreme Court the rule in state-initiated public-lands cases. The only consistent theme of that message was that the Court frowned upon such actions. During the period between 1906 and 1918, the states had lost all five of their attempted original actions,<sup>166</sup> some of them on grounds which were either ignored or expressly or implicitly rejected by the Court in other cases during the same period. It is poetically condign that the state which was responsible for the war—that is, Minnesota, which obtained passage of the Act of March 2, 1901 and evoked the unfortunate opinion which applied it—should have fought and lost the war's last battle. Ever since *Minnesota v. Lane*, no state has sought to bring an original public-lands action against the Secretary in the Supreme Court. It may be added, by way of happy ending, that in both of the subsequent Supreme Court cases involving attempts by states to achieve the same ends through more normal, although more time-consuming, procedures,<sup>167</sup> the Court rewarded the plaintiffs, as worthy pupils who had learned their lesson well, with success—even though the Court purchased that reward at the expense of blatantly ignoring or distorting the two theories (sovereign immunity and "passage of title") which had previously been held determinative in the original-jurisdiction suits.<sup>168</sup>

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165. This resort to the "passage of title" theory is evidence both of the Court's determination to discourage original actions and of its continuing resolve to withdraw from the *Naganab* concept of sovereign immunity in public-lands cases. Only the previous year, the "passage of title" theory had been clearly (though tacitly) repudiated, in *Lane v. Hoglund*, 244 U.S. 174 (1917), and it would continue to be repudiated with regularity in the future. *See note 130 supra.*

166. *Oregon v. Hitchcock*, 202 U.S. 60 (1906); *Kansas v. United States*, 204 U.S. 331 (1907); *Louisiana v. Garfield*, 211 U.S. 70 (1908); *New Mexico v. Lane*, 243 U.S. 52 (1917); *Minnesota v. Lane*, 247 U.S. 243 (1918).

167. *Payne v. New Mexico*, 255 U.S. 367 (1921); *Work v. Louisiana*, 269 U.S. 250 (1925).

168. In *Payne v. New Mexico*, 255 U.S. 367 (1921), the Court made no reference at all to either theory. In *Work v. Louisiana*, 269 U.S. 250 (1925), it ignored the "passage of title" theory, but made a gallant, though clearly unsatisfactory, attempt to avoid some of the sovereign-immunity cases. It distinguished *Louisiana v. Garfield*, *New Mexico v. Lane*, and *Minnesota v. Lane* on the ground that those suits had as

The last public-lands case—or at least arguably a public-lands case<sup>169</sup>—in which the defense of sovereign immunity was sustained by the Supreme Court was *Morrison v. Work*,<sup>170</sup> a suit for mandatory injunction and general relief against the Secretary of the Interior, the Commissioner of the General Land Office, the Commissioner of Indian Affairs, and the Secretary of the Treasury. As in *Naganab v. Hitchcock*,<sup>171</sup> plaintiff was a Chippewa Indian from Minnesota suing on behalf of himself and others similarly situated; and the claim for relief was based on the same statute that had been at issue

their purpose to establish or to quiet the states' title, whereas the suit before the Court sought merely to set aside the Secretary's ruling that he would not issue a patent under the Swamp Lands Act unless and until the state should apply for a hearing in which it would establish the nonoil and nongas character of the land in question. In other words, it was, unlike the other cases, a suit merely to prevent the Secretary from taking into account improper, and therefore illegal, factors in the process of making his administrative determination. Of course, this distinction is utterly nonfunctional. It would mean that one could enjoin the Secretary, while proceedings were still in progress, from taking improper factors into account; whereas when the proceedings had been terminated and had resulted in a determination against the complainant on the sole basis of an improper factor and with all other factors adjudged in complainant's favor, the suit would have to be dismissed because of sovereign immunity if the bill sought reversal of the decision—but could be entertained, presumably, if the bill sought only a rehearing before the Secretary in which all the proper factors already adjudged in complainant's favor would be readjudged. The effect of this principle—in diametric opposition to the effect of the "passage of title" principle which the court ignored—is to make it advantageous to go before the courts prior to administrative finality. Such a principle in fact had no support whatever in prior public-lands cases, although the three cases which the Court used it to distinguish would happen to come out the way they did if the principle were applied to them. To exemplify the numerous cases inconsistent with this principle, it will suffice to refer to the immediately preceding suit in the Supreme Court which involved state claims to public lands. The bill in *Payne v. New Mexico* had sought an injunction against cancellation of a lieu land selection for *any reason*. (That injunction is what the decree below had granted, and it would surely have been worthy of note if the decree had gone beyond the request of the bill.) The effect of such a decree, as the Supreme Court's opinion in the case clearly indicates, is to acknowledge that the state possesses equitable title. 255 U.S. at 371. The Supreme Court, however, did not require the bill to be dismissed merely because it thus went beyond preventing the Secretary from taking into account the single improper factor on which he had based his cancellation. On the contrary, the Court went out of its way to limit the decree to that single improper factor, since in that particular case the Secretary evidently had not ruled upon other relevant factors; and it affirmed the decree as so limited:

We conclude that an injunction was rightly awarded, but that it will be better suited to the occasion if it be confined to directing a disposal of the selection in regular course unaffected by the [improper factor which the Secretary had held determinative]. With this modification the decree is *Affirmed*.

255 U.S. at 373. Surely this limiting of the relief requested to something "better suited to the occasion" is utterly inconsistent with the Court's explanation in *Work v. Louisiana* that sovereign immunity applies when the complainant seeks more than he ought to be given. For other cases to the same effect on this point as *Payne v. New Mexico*, see *Payne v. Central Pac. Ry.*, 255 U.S. 228 (1921); *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930).

169. See note 132 *supra*.

170. 266 U.S. 481 (1925).

171. 202 U.S. 473 (1906), discussed in text accompanying notes 131-32 *supra*.

in the earlier case.<sup>172</sup> The Court's opinion, written by Justice Brandeis, is divided into three parts:

*First.* The four grounds of complaint which rest upon the charge that the defendants are depriving these Chippewas of their property by carrying out the provisions of the six later acts of Congress, have this in common. Each complaint relates to some change made either in the method of managing and disposing of the ceded lands or in the disposition of the proceeds thereof. As to each, it is claimed that the defendants' acts are unlawful because Congress was powerless to make the change without the consent of the Chippewas.<sup>173</sup>

As to these grounds, the Court held that the doctrine of sovereign immunity barred the suit.<sup>174</sup>

*Second.* The three grounds of complaint which rest upon charges that the defendants, acting under color of authority granted by the Act of 1889, have inflicted and threaten injury by the exercise of powers not conferred, have this in common. Each complaint involves the charge that the officials have erred either in construing or in applying that act and the agreements approved March 4, 1890.<sup>175</sup>

The Court's description of its reasons for sustaining dismissal of the bill with respect to these grounds of objection is as follows:

The bill was properly dismissed, so far as concerns these three charges, because the plaintiff is not in a position to litigate in this proceeding the legality of the acts complained of.<sup>176</sup>

[T]he right of the Indians is merely to have the United States administer properly the trust assumed. It resembles the general right of every citizen to have the Government administered according to law and the public moneys properly applied. [The Court here cites, among other cases, *Massachusetts v. Mellon*.<sup>177</sup>] Courts have no power, under the circumstances here presented, to interfere with the performance of the functions committed to an executive department of the Government by a suit to which the United States is not, and cannot be made, a party.<sup>178</sup>

Except for the oblique reference in the last sentence quoted, that portion of the Court's opinion which is devoted to this second group of complaints does not even mention sovereign immunity.

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172. Act of Jan. 14, 1889, 25 Stat. 642.

173. 266 U.S. at 485.

174. 266 U.S. at 486. The Court used the "indispensable party" circumlocution, mentioned above in connection with Justice Holmes' opinion in *Louisiana v. Garfield*, 211 U.S. 70 (1908). See text accompanying note 139 *supra*.

175. 266 U.S. at 486.

176. 266 U.S. at 486.

177. 262 U.S. 447 (1923).

178. 266 U.S. at 488.

The entire discussion is directed to the point of standing, and the last sentence is perhaps best explained as Justice Brandeis' subtle way of implying that in the past the doctrine of sovereign immunity had often been applied to secure ends which could be achieved more properly and directly through the recently expanded principles of standing.<sup>179</sup>

The final section of the Court's opinion deals with those portions of the bill which sought to compel the Secretary of the Interior to grant to the Red Lake Indians certain allotments to which they were allegedly entitled. The plaintiff was not a Red Lake Indian and laid no claim to an allotment. His interest in the Secretary's performance of his duty was more remote. The statute requiring the allotments<sup>180</sup> had reserved for that purpose some 700,000 acres of land, an amount greatly in excess of what would be necessary. After the allotments had been completed, the remainder of the reserved acreage was to become part of tribal lands which the United States was under an obligation to sell for the benefit of all the Chippewas in Minnesota, among whom was numbered the plaintiff. As to these portions of the bill, the Court found that there had been shown both insufficient interest on the part of the plaintiff and insufficient equity to warrant a mandatory injunction, which, "like a mandamus, is an extraordinary remedial process which is

179. The landmark case in the area of standing, *Massachusetts v. Mellon*, 262 U.S. 477 (1923), had been decided only two years before *Morrison*. The *Morrison* Court's apparent reference to sovereign immunity in its statement that courts lack power to interfere with the performance of executive functions "by a suit to which the United States is not, and cannot be made, a party," was prefaced by the words "under the circumstances here presented." The circumstances to which the Court referred must have been those circumstances which had been treated at length in the portion of the opinion to which that sentence forms the conclusion—that is, the circumstances establishing lack of standing.

That Justice Brandeis was attempting to convert into "lack of standing" much of what earlier cases would have called "sovereign immunity" is further supported by an examination of his statement that, "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." 255 U.S. at 487-88. That statement is almost the classic prologue to a sovereign immunity holding. It is usually followed by a sentence such as: "But the United States has not been made a party to this suit, nor can it be, since it has not given the requisite consent." *See, e.g., Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 374-75 (1945). In *Morrison*, however, to the reader's surprise and confusion, the statement is followed by a totally different progression of thought: "In other words, the right of the Indians is merely to have the United States administer properly the trust assumed. It resembles the general right of every citizen to have the government administered according to law and the public monies properly applied." 225 U.S. at 488. The opinion then cites *Massachusetts v. Mellon*, which had held that persons possessing such a "general right" could not enforce it against the Government, not because of sovereign immunity, but because of lack of standing.

180. General Allotment Act of Feb. 8, 1887, 24 Stat. 388.

granted, not as a matter of right, but in the exercise of a sound judicial discretion."<sup>181</sup>

It is of more than passing interest that the Court chose to dissect the case as it did, applying the doctrine of sovereign immunity only to the claims of unconstitutional congressional action. If the Court had decided not to follow the more recent public-lands cases which ignored sovereign immunity, then surely it could have made its task much simpler by applying the doctrine to the entire suit. Why the Court chose the more intricate approach is difficult to surmise. Perhaps it felt unable to follow the more recent public-lands cases in the face of *Naganab*, which was so close in point, involving the same central issue and the same class of plaintiffs. However, since *Naganab* happened to deal with alleged unconstitutionality of congressional action (although the opinion in the case made nothing of that factor), it could be followed on that narrow ground without unduly expanding sovereign immunity and without actually contradicting the more recent decisions that ignored the doctrine. On the other hand, if the object was merely to sterilize *Naganab*, that could have been achieved more simply and more effectively, it seems, by avoiding the sovereign immunity issue entirely. The defect in standing, on the basis of which the Court disposed of the second grounds of complaint, appears to have existed with respect to the first and third as well<sup>182</sup>—so that *Morrison* could have been disposed of as easily on that single basis as on the single basis of sovereign immunity. It may be, then, that Justice Brandeis' intricate opinion must be regarded not as an attempt to limit the precedential effect of *Naganab* in public-lands cases, but rather as an ambitious effort to adjust the role of sovereign immunity in all its applications so that it would be relied upon, when appropriate, only to insulate the *legislative* branch from judicial interference. Under that interpretation, the protection of the *executive* branch would be achieved by other devices, such as (1) the well-established ministerial-discretionary dichotomy—which was referred to explicitly, but mooted, in both the second and third portions of the opinion; (2)

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181. 266 U.S. at 490. At least the equity point is a trifle difficult to accept. The allotments were to have been made "as soon as practicable" after the taking of a census of the Red Lake Indians. Although that census had been taken thirty-two years before the filing of the complaint in the case, no allotments had yet been made. 266 U.S. 481, 489 (1925).

182. The last sentence of the first portion of the opinion indicates that bases other than sovereign immunity could have been used to reach the same result: "The bill, so far as it complains of acts done pursuant to the later legislation, was properly dismissed for this reason [i.e., sovereign immunity], *among others*." 266 U.S. at 486 (emphasis added).

the principle of standing—which was the basis used for the second portion of the opinion, and was explicitly mentioned, but mooted, in the third—perhaps expanded to cover many cases formerly disposed of on the ground of sovereign immunity,<sup>183</sup> and (3) a greater emphasis upon the “discretionary” character of mandamus and injunctive relief—which was the basis used for the third portion of the opinion.<sup>184</sup> This explanation, unlike the first, is consistent with the fact that the *Morrison* opinion cites such a large number of non-public lands cases;<sup>185</sup> it would of course do so if it was attempting to bring a new principle of order into the whole field of sovereign immunity. If that was the attempt, it certainly failed, for *Morrison* has disappeared into the faceless crowd of inconsistent and irreconcilable cases on sovereign immunity.

It might be well at this point to summarize the developments which have heretofore been described in some detail. The doctrine of sovereign immunity was apparently not used by the Supreme Court in cases against public-lands officials until 1906, when *Oregon v. Hitchcock*<sup>186</sup> distorted the earlier holding of *Minnesota v. Hitchcock*,<sup>187</sup> which in turn had been spawned by that unhappy statute, the Act of March 2, 1901.<sup>188</sup> The doctrine was later applied in only five other public-lands cases.<sup>189</sup> Of the six cases, three used the sovereign-immunity doctrine as the basis of merely alternative hold-

183. See note 179 *supra*.

184. It is not suggested that the Court in *Morrison* was proposing a system of separation of powers as rigid as, for example, the French, under which, in practice if not in principle, no legislative action and virtually all executive action is reviewable by the courts. See F. RIDLEY & J. BLONDEL, PUBLIC ADMINISTRATION IN FRANCE 128-30 (1964). Rather, the point is merely that the Court in *Morrison* may have been seeking to take one step in that direction by eliminating the “jurisdictional” defense of sovereign immunity entirely with respect to challenges of executive action, while retaining it for some cases, though not requiring it always, when legislative action is at issue. That the *Morrison* Court was concerned with the differing nature of its roles vis-à-vis the legislative branch on the one hand and the executive on the other, may be seen in the following excerpt from the opinion of the identical Court in *Massachusetts v. Mellon*:

The general rule is that neither department [*i.e.*, of the legislative, executive and judicial] may invade the province of the other, and neither may control, direct, or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials.

262 U.S. at 488.

185. 266 U.S. at 487-88.

186. See note 123-30 *supra* and accompanying text.

187. See notes 95-122 *supra* and accompanying text.

188. 31 Stat. 950 (1901), discussed in text accompanying notes 96-101 *supra*.

189. *Naganab v. Hitchcock*, 202 U.S. 473 (1906); *Kansas v. United States*, 204 U.S. 331 (1907); *Louisiana v. Garfield*, 211 U.S. 70 (1908); *New Mexico v. Lane*, 243 U.S. 52 (1917); *Morrison v. Work*, 266 U.S. 481 (1925).

ings.<sup>190</sup> If one excludes as being *sui generis*—at least when they were decided—those actions which sought to invoke the original jurisdiction of the Court,<sup>191</sup> the number of cases applying sovereign immunity is reduced to two;<sup>192</sup> and if there are also excluded, as presenting special considerations, suits by Indians involving tribal lands<sup>193</sup>—or for that matter, even just Minnesota Chippewa tribal lands—the number is reduced to zero. Four of the six cases were decided between 1906 and 1908.<sup>194</sup> One of the remaining two, decided in 1917, was an original-jurisdiction case in which the sovereign-immunity holding was merely an alternative ground.<sup>195</sup> The last, decided in 1925, was a tribal-lands case that produced a peculiarly narrow application of the doctrine,<sup>196</sup> and can perhaps be explained as a decision which wandered from the re-established path of public-lands cases either because of the strong *stare decisis* effect of an earlier case involving the same parties and subject matter, or because it was seeking that juristic Fountain of Youth—a rationale which would explain and control the doctrine of sovereign immunity in all its applications. With the exception of those two last-mentioned cases, all of the many Supreme Court decisions which have been rendered since 1908 in suits seeking specific relief against public-lands officials consist of holdings explicitly rejecting the doctrine of sovereign immunity,<sup>197</sup> of holdings constituting a clear implicit rejection of the doctrine (sometimes ignoring the defendants' express argument that the doctrine applies),<sup>198</sup> and of rulings denying the plaintiff relief upon other grounds, without mention of sovereign immunity, even though that doctrine would have pro-

190. *Oregon v. Hitchcock*, 202 U.S. 60 (1906); *Kansas v. United States*, 204 U.S. 331 (1907); *New Mexico v. Lane*, 243 U.S. 52 (1917).

191. *Oregon v. Hitchcock*, 202 U.S. 60 (1906); *Kansas v. United States*, 204 U.S. 331 (1907); *Louisiana v. Garfield*, 211 U.S. 70 (1908); *New Mexico v. Lane*, 243 U.S. 52 (1917).

192. *Naganab v. Hitchcock*, 202 U.S. 473 (1906); *Morrison v. Work*, 266 U.S. 481 (1925).

193. See note 132 *supra*.

194. *Oregon v. Hitchcock*, 202 U.S. 60 (1906); *Naganab v. Hitchcock*, 202 U.S. 473 (1906); *Kansas v. United States*, 204 U.S. 331 (1907); *Louisiana v. Garfield*, 211 U.S. 70 (1908).

195. *New Mexico v. Lane*, 243 U.S. 52 (1917).

196. *Morrison v. Work*, 266 U.S. 481 (1925).

197. *Lane v. Watts*, 234 U.S. 525 (1914); *Payne v. Central Pac. Ry.*, 255 U.S. 228 (1921); *Work v. Louisiana*, 269 U.S. 250 (1925).

198. *Garfield v. Goldsby*, 211 U.S. 249 (1908); *Lane v. Hoglund*, 244 U.S. 174 (1917); *Payne v. New Mexico*, 255 U.S. 367 (1921); *Santa Fe Pac. R.R. v. Fall*, 259 U.S. 197 (1922); *Work v. United States ex rel. McAlester-Edwards Co.*, 262 U.S. 200 (1923); *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930); *Ickes v. Virginia-Colorado Dev. Corp.*, 295 U.S. 639 (1935); *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949).

vided a clear and usually simpler method of achieving the same result.<sup>199</sup>

### III. CONCLUSION

The foregoing history suggests an answer to the problems posed at the beginning of this Article. The reason that *Udall v. Tallman*<sup>200</sup> considered utterly irrelevant that issue of sovereign immunity which *Malone v. Bowdoin*<sup>201</sup> had considered utterly dispositive is simply that the former was a public-lands case. It may well be that the *Larson* case,<sup>202</sup> described in *Malone* as "cutting through the tangle of previous decisions,"<sup>203</sup> has finally enunciated a unifying theory of sovereign immunity which the Court will stand by in future suits against government officers—although one must tolerate, if not entertain, a large degree of skepticism on that point, since both *United States v. Lee*<sup>204</sup> and *Morrison v. Work*<sup>205</sup> also posed as Great Water-sheds, only to be ultimately eroded. But however solid and permanent that unifying theory may be, it will not be applied to the area of nonstatutory review of public-lands determinations. The accumulated mass of decisional law in this area contrary to *Larson* is too overwhelming; and in the conflict, it is the general rather than the specific, the theoretical rather than the practical, the abstract thesis rather than the historical actuality, which will yield. I list in a footnote a number of the major public-lands cases prior to *Larson* which are simply inconsistent with its theory.<sup>206</sup> Since *Larson*, that theory

199. *Ballinger v. United States ex rel. Frost*, 216 U.S. 240 (1910); *United States ex rel. Ness v. Fisher*, 223 U.S. 683 (1912); *United States ex rel. Knight v. Lane*, 228 U.S. 6 (1913); *Plested v. Abbey*, 228 U.S. 42 (1913); *Lane v. United States ex rel. Mickadiet*, 241 U.S. 201 (1916); *United States ex rel. Alaska Smokeless Coal Co. v. Lane*, 250 U.S. 549 (1919); *United States ex rel. Hall v. Payne*, 254 U.S. 343 (1920); *Southern Pac. R.R. v. Fall*, 257 U.S. 460 (1922); *Brady v. Work*, 263 U.S. 435 (1924); *West v. Standard Oil Co.*, 278 U.S. 200 (1929); *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414 (1931); *Brooks v. Dewar*, 313 U.S. 354 (1941); *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U.S. 621 (1950); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Boesche v. Udall*, 373 U.S. 472 (1963); *Udall v. Tallman*, 380 U.S. 1 (1965).

200. 380 U.S. 1 (1965), discussed in text accompanying notes 33-55 *supra*.

201. 369 U.S. 643 (1962), discussed in text accompanying notes 15-20, 30-32 *supra*.

202. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949), discussed in text accompanying notes 21-29 *supra*.

203. 369 U.S. at 647.

204. 106 U.S. 196 (1882), discussed in text following note 20 *supra*.

205. 266 U.S. 481 (1925), discussed in text accompanying notes 169-85 *supra*.

206. *United States v. Schurz*, 102 U.S. 378 (1880) (mandamus to deliver patent); *Ballinger v. Frost*, 216 U.S. 240 (1910) (same); *Lane v. Watts*, 234 U.S. 252 (1914) (injunction against approval of homestead entries); *Lane v. Hoglund*, 244 U.S. 174 (1917) (mandamus to issue and deliver patent); *Payne v. Central Pac. Ry.*, 255 U.S. 228 (1921) (injunction against cancellation of selection of indemnity lands); *Payne v. New Mexico*,

has been applied to cases involving such nonroutine matters as (1) the claim that land which the United States purported to own had actually come to it through a grantor who held no more than a life estate,<sup>207</sup> (2) the claim that officials of the Bureau of Reclamation, in their operation of a dam project, were depriving plaintiffs of water rights,<sup>208</sup> and (3) the claim that the Hawaii Statehood Act entitled that state to those unneeded federal lands which the United States had acquired through purchase, condemnation, or gift.<sup>209</sup> In contrast, the theory of *Larson* has not been applied, or even mentioned, in any of the five Supreme Court cases since 1949 concerning the ordinary administration of the public-lands.<sup>210</sup> One of those cases, involving

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255 U.S. 367 (1921) (injunction against cancellation of lieu land selection); Santa Fe Pac. R.R. v. Fall, 259 U.S. 197 (1922) (same); Work v. United States *ex rel.* McAlester-Edwards Co., 262 U.S. 200 (1923) (mandamus to approve and deliver patent); Work v. Louisiana, 269 U.S. 250 (1925) (restraining order and mandatory injunction, preventing denial of patent on one particular ground); Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306 (1930) (mandamus requiring disposition of patent application without regard to particular unlawful factor); Ickes v. Virginia-Colorado Dev. Corp., 295 U.S. 639 (1935) (mandatory injunction requiring vacating of adverse proceedings and of decision declaring placer claims void); Hynes v. Grimes Packing Co., 337 U.S. 86 (1949) (injunction against seizing ships for alleged violation of Indian fishing waters). In all of these cases, the officer would have had authority to do what he did if he had been correct as to the determination of fact or law which the plaintiff challenged; and the determination, moreover, was one which the officer had the primary responsibility of making. Thus, *Larson* would have considered the action within the scope of the officer's authority, even though erroneous. Moreover, since all but the first of these cases were decided after the Court of Claims Act had been amended to allow suits founded "upon the Constitution," the action in question in each of them, even assuming that it constituted a "taking" of property, could have been no more unconstitutional than that in *Larson* or *Malone*. Perhaps some of the cases may be distinguished upon narrow grounds which the opinions themselves did not consider determinative; but the cumulative effect of all of them is undeniably against *Larson*.

207. *Malone v. Bowdoin*, 369 U.S. 643 (1962).

208. *Dugan v. Rank*, 372 U.S. 609 (1963); *City of Fresno v. California*, 372 U.S. 628 (1963).

209. *Hawaii v. Gordon*, 373 U.S. 57 (1963). A fascinating oddity of this opinion is that in addition to citing the most recent and authoritative decisions upholding sovereign immunity—namely, *Larson*, *Malone*, and *Dugan v. Rank*, 372 U.S. 609 (1963)—the Court selected for mention only one other of the vast multitude of sovereign-immunity cases: *Oregon v. Hitchcock*, 202 U.S. 60 (1906). While this may have been a coincidence, it may have had something to do with the fact that *Oregon v. Hitchcock* was the first of that series of cases which employed the doctrine of sovereign immunity to bar original actions in the Supreme Court. See text accompanying note 166 *supra*. *Hawaii v. Gordon* was also an attempted original action.

210. *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U.S. 621 (1950) (denial of injunction against leasing of coal-mining rights); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963) (denial of injunction against administrative proceedings to determine the validity of mining claims—not really a typical public-lands case); *Boesche v. Udall*, 373 U.S. 472 (1963) (denial of injunction against cancellation of mineral lease); *Udall v. Tallman*, 380 U.S. 1 (1965) (denial of mandamus to issue oil and gas leases); *United States v. Coleman*, 390 U.S. 599 (1968) (denial of mandamus to issue mineral patent). In the last-cited case, the relief sought against the federal official was requested by way of counterclaim in an ejectment action initiated by the United

mining claims, contains a dictum describing the state of the law as follows: "Claimants today may appeal the Examiner's decision to the Director of the Bureau . . . , from him to the Secretary . . . , and from there to the courts."<sup>211</sup> Perhaps even more significantly, the lower federal courts have, since *Larson*, continued with regularity to grant specific relief against governmental officers with respect to public-lands matters.<sup>212</sup>

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States. Since, however, that relief went beyond what could be considered a set-off against the Government's recovery, the availability of the sovereign immunity defense would not seem to be affected by the counterclaim factor. See *National Bank v. Republic of China*, 348 U.S. 356 (1955); *United States v. Shaw*, 309 U.S. 495 (1940); *Nassau Smelting & Ref. Works v. United States*, 266 U.S. 101 (1924).

211. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 338 n.7 (1963). The only authority cited for the availability of judicial review was a federal court of appeals case which, like *Best* itself, made no mention whatsoever of the problem of sovereign immunity: *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959).

212. Holdings to this effect have issued from all three of the United States courts of appeals which handle the vast majority of public-lands cases. From the Court of Appeals for the District of Columbia Circuit have come: *McKay v. Wahlenmaier*, 226 F.2d 35 (1955) (mandamus affirmed directing cancellation of one oil and gas lease and issuance of another; dissent specifically refers to *Larson*); *McNeil v. Seaton*, 281 F.2d 931 (1960) (Secretary's attempted alteration of plaintiff's preference rights under the Taylor Grazing Act declared void; sovereign immunity argument explicitly rejected); *Pressentin v. Seaton*, 284 F.2d 195 (1960) (Secretary directed to consider mining claimant's appeal which had been determined to have been filed too late under the applicable regulation); *Brown v. Udall*, 335 F.2d 706 (1964) (declaratory judgment that Secretary's basis for rejection of mineral lease application was invalid). From the Court of Appeals for the Ninth Circuit have come: *Adams v. Witmer*, 271 F.2d 29 (1958) (injunction and mandatory affirmative relief to prevent cancellation of mining claims granted, reversing lower court's determination that sovereign immunity barred suit); *Coleman v. United States*, 363 F.2d 190 (1966), *affd. on rehearing*, 379 F.2d 555 (1967), *revd. on other grounds*, 390 U.S. 599 (1968) (judgment on counterclaim, setting aside Secretary's invalidation of mining claims; see note 210 *supra*); *Tagala v. Gorsuch*, 411 F.2d 589 (1969) (reversal of Secretary's decision automatically dismissing appeal of homestead cancellation because of lateness in filing the appeal under the applicable Regulation; remanded to Director of Bureau of Land Management for exercise of his discretion). Federal district court cases in the Ninth Circuit granting relief against public-lands officials include: *Stewart v. Penny*, 238 F. Supp. 821 (D. Nev. 1965) (judgment for plaintiff in suit to reverse Secretary's decision cancelling homestead entry and to enjoin threatened eviction); *Richardson v. Udall*, 253 F. Supp. 72 (D. Idaho 1966) (decision of Secretary rejecting homestead application set aside, and case remanded to Secretary for further consideration); *Denison v. Udall*, 248 F. Supp. 942 (D. Ariz. 1965) (decision of Solicitor of Department of Interior denying mineral patent applications reversed, and case remanded to Department for further proceedings). From the Court of Appeals for the Tenth Circuit has come: *Foster v. Udall*, 335 F.2d 828 (1964) (suit to enjoin Secretary's rejection of mineral lease offer and his issuance of lease to another private party; summary judgment for defendant reversed). *But cf. Chournos v. United States*, 335 F.2d 918 (10th Cir. 1964) (a puzzling opinion, which in some parts seems to sustain a defense of sovereign immunity with respect to the officer-defendant, but which, in view of its last two sentences, must be explained as an application of the "indispensable superior" doctrine). There have been numerous cases since *Larson* in which the courts of appeals, while finding for the federal officer, have done so on a ground that is much more difficult to establish than sovereign immunity and have either explicitly rejected or completely ignored the availability of the sovereign immunity defense: *District of Columbia Circuit: Cal-*

The correct conclusion to be drawn from this discussion may be an even more general one: Neither *Larson*, nor any other theory which purports to provide a universally valid standard for the applicability of sovereign immunity to suits against federal officials, can or will be followed unless it either rejects sovereign immunity entirely or contains an exclusionary factor based plainly and simply

ifornia Co. v. Udall, 296 F.2d 384 (1961); *Safarik v. Udall*, 304 F.2d 944, *cert. denied*, 371 U.S. 901 (1962); *Morgan v. Udall*, 306 F.2d 799, *cert. denied*, 371 U.S. 941 (1962); *Miller v. Udall*, 307 F.2d 676 (1962), *cert. denied*, 371 U.S. 967 (1968); *Thor-Westcliffe Dev., Inc. v. Udall*, 314 F.2d 257, *cert. denied*, 373 U.S. 951 (1963); *Miller v. Udall*, 349 F.2d 193 (1965), *cert. denied*, 385 U.S. 929 (1966). *Ninth Circuit*: *Pease v. Udall*, 332 F.2d 62 (1964); *Udall v. Battle Mountain Co.*, 385 F.2d 90 (1967), *cert. denied*, 390 U.S. 957 (1968). *Tenth Circuit*: *Pan American Petroleum Corp. v. Udall*, 352 F.2d 32 (1965); *Mecham v. Udall*, 369 F.2d 1 (1966); *Brennan v. Udall*, 379 F.2d 803, *cert. denied*, 389 U.S. 975 (1967) (explicit rejection of sovereign immunity).

A Fifth Circuit case which does apply the doctrine of sovereign immunity to bar a public-lands action is *Ward v. Humble Oil & Ref. Co.*, 321 F.2d 775 (1963). The nature of the action was such, however, that it was far from the "classic" suit for review of a public-lands determination. The plaintiff was not seeking to obtain reversal of any particular denial by the Secretary, but rather was demanding that the Secretary cancel leases to third persons on the ground that those leases clouded the title to the land, which the plaintiff alleged already belonged to him. Although underlying the case was a determination by the Secretary that the plaintiff had not acquired valid title through Mississippi under the Swamp Lands Act, the litigation on its face resembled less the classic public-lands action for review of a patent denial or a lease denial by the Bureau of Land Management than it did the *Malone* case, in which a private citizen was trying to eject governmental officers from land which he claimed belonged to him; the essence of the plaintiff's grievance was *not* that officers had denied him a grant to which he was entitled, but rather that they were interfering with land which he already owned. In addition to this fact that the suit did not have the smell of a public-lands case, it might also be urged that it did not present a characteristic situation for application of the Administrative Procedure Act [hereinafter APA], which is the usual modern excuse for ignoring *Larson*. See the last paragraph of the Appendix following this Article. A similar Fifth Circuit case is *Simons v. Vinson*, 394 F.2d 732, *cert. denied*, 393 U.S. 968 (1968).

Finally, in this discussion of lower court cases, there may be mentioned *White v. Administrator of Gen. Servs. Admn.*, 343 F.2d 444 (9th Cir. 1965), which strongly supports the thesis set forth above that it is only in the classic "nonstatutory review" cases that *Larson* will be ignored. The plaintiffs in *White*, successful bidders for the purchase of United States real estate administered by the General Services Administration, claimed that the deed that was tendered to them did not conform to the invitation for bids which had issued. They sought mandamus requiring defendants to execute a proper deed, and they also sought declaratory relief and relief "under the Administrative Procedure Act." The Court of Appeals for the Ninth Circuit, despite its holding in *Adams v. Witmer, supra*—which has become something of a leading case—and despite its failure to make any reference to sovereign immunity in its decisions cited in this footnote, held that sovereign immunity precluded all relief, including the declaratory judgment and the relief under the APA.

The object of the appellants in the instant suit is to get the title out of the United States and into the appellants. A suit with such an objective is a suit for specific performance, regardless of what may be said in the complaint which initiates the suit. And, the title to the interest which the court is asked to order to be conveyed to the appellants being now in the United States, the order would have to be made against the United States. It follows that the United States would have to be a party to the suit.

343 F.2d at 445. Obviously, the same "object . . . to get the title out of the United States" existed in *Adams v. Witmer* and exists in almost every conventional public-lands case; yet relief was, and is, accorded.

upon historical prescription. There are clearly areas of federal administration in which the entire fabric of judicial review is woven upon the frame of *Davis v. Gray*<sup>213</sup>—that is, based upon the assumption that a suit against the officer cannot constitute a suit against the sovereign. The Bureau of Land Management is one of those areas; another is the Post Office Department. Cases seeking to reverse the postal service's refusal either to deliver certain mail or to accord particular postage rates constitute an "existential" category as distinct and as well-known as the public-lands cases. Moreover, since the delivery of the federal mails, like the granting of interests in the federal lands, began under the Continental Congress, that category likewise stretches well back into the era before statutory provision for judicial review of administrative action became customary.<sup>214</sup> In this area also, the gap was filled by the use of traditional private-law actions against individual officers, without a thought that sovereign immunity could be a bar.<sup>215</sup> Post-office cases form an important

213. 83 U.S. (16 Wall.) 203 (1872). *See* text at note 85 *supra*.

214. The Continental Congress established a General Post Office for the United Colonies on July 26, 1775, with Benjamin Franklin as the first Postmaster General. Article IX of the Articles of Confederation provided for the establishment of a Federal Post Office. *See* H. KONWISER, *COLONIAL AND REVOLUTIONARY POSTS* 49-55 (1931). It did not take long for post-office cases to appear as a regular part of the Supreme Court's business. One of the earliest was argued, and lost, by Francis Scott Key. *Dunlop v. Munroe*, 11 U.S. (7 Cranch) 242 (1812) (suit against postmaster for negligence in losing mail).

215. *See, e.g.*, *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838) (mandamus); *Teal v. Felton*, 53 U.S. (12 How.) 284 (1851) (trotter); *United States ex rel. McLean v. Vilas*, 124 U.S. 86 (1888) (mandamus); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902) (injunction).

Supreme Court cases involving the Post Office were numerous during the nineteenth century, but the vast majority of them were either actions by the United States and its officials [*e.g.*, *Post Master General v. Early*, 25 U.S. (12 Wheat.) 136 (1827) (action of debt on postmaster's bond); *United States v. Mills*, 32 U.S. (7 Pet.) 138 (1833) (criminal action for violation of post-office laws); *Brown v. United States*, 50 U.S. (9 How.) 487 (1850) (action upon account against former treasurer of Post Office Department)], or else actions for money damages by persons providing goods or services to the Post Office [*e.g.*, *Garfield v. United States*, 93 U.S. 242 (1876) (action upon contract to carry mails); *Chicago & N.W. Ry. v. United States*, 104 U.S. 680 (1881) (same)]. The latter type of case presented no jurisdictional problem after enactment in 1855 of the Court of Claims Act, 10 Stat. 612. Prior to that time, relief upon such claims was generally sought through private bills in Congress. *Cf. Kendall v. United States ex rel. Stokes*, *supra*.

Not until the early years of the present century does there begin the well-known line of Supreme Court cases which seek mandamus or injunction against post-office officials in order to overcome their allegedly incorrect interpretation of the mail-carriage statutes and their consequent refusal either to deliver certain material or to accord it preferred rates. *See, e.g.*, *Public Clearing House v. Coyne*, 194 U.S. 497 (1904); *United States ex rel. Milwaukee Social Dem. Pub. Co. v. Burleson*, 255 U.S. 407 (1921); *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962). *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), which was the earliest of these cases, cited no judicial precedent in support of its holding except public-lands cases. The same goal, however, namely, judicial review

part of our body of administrative law. If it was a public-lands case which established the principle, so determinative of the future development of nonstatutory review, that United States courts outside of the District of Columbia did not possess the power of mandamus,<sup>216</sup> it was a post-office case which established the equally critical principle that the courts in the District of Columbia did possess that power.<sup>217</sup> It was a post-office case which is considered to have given the first clear expression to the "presumption of reviewability" of administrative action.<sup>218</sup> Regardless of what *Larson* said, an alteration by the Supreme Court of this ancient and important line of cases, which would thereby force congressional adoption, at this late date, of a "statutory review" provision for the Post Office Department, must certainly be regarded as extremely unlikely,<sup>219</sup> if not utterly incon-

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of the administrators' interpretation of the mail-carriage statutes, had been achieved by another form of action in *Teal v. Felton*, 53 U.S. (12 How.) 284 (1851); and the history of that case suggests a likely explanation for the scarcity of nineteenth-century Supreme Court cases involving nonstatutory review of postal-rate and "mailability" determinations. *Teal* was a trover action against a postmaster in Syracuse, New York, to recover the value of a newspaper which he refused to deliver because of allegedly incorrect postage. At issue was whether the printing on the newspaper wrapper of a letter or initial, distinct from the address, could, as the defendant postmaster claimed, subject a newspaper to ordinary letter-rate postage. In trial before a justice of the peace for Onondaga County, the plaintiff recovered damages of \$.06 plus \$2.89 costs. The case was removed by certiorari to the Onondaga County Court of Common Pleas, which affirmed the judgment and raised the costs to \$22.95. Appeal was then taken to the Supreme Court of New York, which again affirmed, adding \$37.60 costs, for a total of \$60.55. Review was then sought in the New York Court of Appeals, which once again affirmed, giving judgment for \$75.64—thus making a total of \$136.19, of which \$136.13 were costs and \$.06 were damages. The indefatigable defendant also lost his appeal to the Supreme Court of the United States, but the opinion regrettably does not show what court costs were added to the \$.06 at that stage. It should be obvious that, leaving aside the possibility of an occasional "grudge-suit," only a large-scale commercial enterprise, having both a requirement for recurrent use of the mails and a requirement for continuation of the assertedly nonmailable or rate-increasing contents, would find it worthwhile to incur court costs, not to mention attorneys' fees, so disproportionate to the value of the particular mailing, instead of merely deleting the objectionable material in subsequent mailings. Such a confluence of commercial size, reliance upon the mails, and crucial contested material was not likely to occur often in earlier years.

216. *M'Intire v. Wood*, 11 U.S. (7 Cranch) 504 (1813).

217. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838).

218. *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902). See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 339 (1965).

219. See *Reilly v. Pinkus*, 338 U.S. 269 (1949), a case decided less than half a year after *Larson*, affirming an injunction against a mail fraud order. It is true that this case, like most other post-office cases in which relief is granted against the administrator, might be considered to fall within the "unconstitutional action" exception of *Larson*. However, if the Court's jurisdiction (sovereign immunity is a jurisdictional defect—see text at note 50 *supra*) had been based upon the unconstitutionality of the Postmaster General's action, surely there should have been a finding of such unconstitutionality, which there was not. There was not even explicit mention of unconstitutionality, much less a mention of sovereign immunity as the barrier which

ceivable.<sup>220</sup>

A third field of federal administration in which the operation of the foregoing thesis has been evident is, not surprisingly, that of tax collection. This is a federal function which began slightly more recently than that of delivering mail and granting interests in land, since the Articles of Confederation conferred no taxing power upon the federal government. It is nevertheless an activity quite old enough, and obviously quite important enough, to have confronted the courts with the same problem of controlling administrative abuse in the absence of any modern "statutory review" procedures. In this area again, the solution devised from the very beginning was the use of traditional common-law actions against the individual federal officers, with no concern for the obstacle of sovereign immunity.<sup>221</sup> The common-law action against the Collector —later the District Director—of Internal Revenue for money had and received, as a means of correcting an improper assessment, endured until it was specifically abolished by Congress in 1966.<sup>222</sup> The

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would render an inquiry into constitutionality necessary. In one of the most famous post-office cases, the Court explicitly disclaimed any inquiry into constitutional questions. *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 103, 111 (1902). Nor could it be said in either of these cases that the administrator's action was "ultra vires" in the sense in which that term was used in *Larson*.

220. That it is not utterly inconceivable is proved by the fact that several courts of appeals have conceived of it, and have applied *Larson* to post-office cases without, of course, any citation of Supreme Court post-office cases in support. *See Summerfield v. Parcel Post Assn.*, 280 F.2d 673 (D.C. Cir. 1960); *Sergeant v. Fudge*, 238 F.2d 916 (6th Cir. 1956) (alternative holding), *cert. denied*, 353 U.S. 937 (1957); *Doebla Greeting Cards, Inc. v. Summerfield*, 227 F.2d 44 (D.C. Cir. 1955); *Payne v. Fite*, 184 F.2d 977 (5th Cir. 1950) (alternative holding). It is likely that these cases would have been decided as they were without resort to *Larson*, solely on the ground that the administrative action under challenge was within the scope of permissible discretion. *See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 229 n.122 (1965). Another case disposed of on the basis of sovereign immunity and involving the Postmaster General is *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 978 (1966). This case, however, might be described more appropriately as a "government employment" case than a classic suit to review the post office's performance of its distinctive administrative functions.

221. *See, e.g.*, *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137 (1836) (assumpsit against federal customs collector for the Port of New York); *Bend v. Hoyt*, 38 U.S. (13 Pet.) 263 (1839) (same); *Hardy v. Hoyt*, 38 U.S. (13 Pet.) 292 (1839) (same); *City of Philadelphia v. Collector*, 72 U.S. (5 Wall.) 720 (1866) (assumpsit against collector of internal revenue); *Barnes v. The Railroads*, 84 U.S. (17 Wall.) 294 (1872) (trespass against collector of internal revenue). Prior to the 1860's, almost all of the cases involving federal taxes concerned duties upon imports or tonnage. Before the Civil War, internal taxes were imposed by the federal government only during two brief periods—from 1791 to 1802 and from 1813 to 1817; and during those years they produced revenues far less significant than those from customs duties. *See L. DORIS, THE AMERICAN WAY IN TAXATION* 16-18 (1963); *U.S. TREASURY DEPT., THE WORK AND JURISDICTION OF THE BUREAU OF INTERNAL REVENUE* 10-32 (1948).

222. Pub. L. No. 89-713, § 3(a), 80 Stat. 1108 (1956), codified as § 7422(f) of the Internal Revenue Code of 1954. The cause of action against the collector has a peculiar history which raises a definitional problem deserving some mention. In 1839,

injunction against the District Director to prevent an improper collection still survives today,<sup>223</sup> despite the existence, since 1867, of a statute specifically forbidding it.<sup>224</sup> Nonstatutory review in the tax field is assuredly disappearing, as indeed it should, since stat-

Congress enacted a law requiring customs collectors to pay all duties into the Treasury. 5 Stat. 339, 348 (1839). In 1845, the Supreme Court held, with Justices Story and McLean dissenting, that this law had the effect of destroying the common-law action against the collector, which had been based upon the collector's ability, once he had been notified of the protest, to withhold payment over to his principal. *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845). Congress promptly remedied this unfortunate decision by passing "an Act explanatory of [the 1839 statute]." That Act provided that "nothing contained [in the 1839 statute] shall take away, or be construed to take away or impair," the right of action against the collector, and it added to the elements of that right of action the requirement that the protest against payment be in writing. 5 Stat. 727 (1845). *See* *Curtis's Admx. v. Fiedler*, 67 U.S. (2 Black) 461 (1862). Precisely the same issue later confronted the Court with respect to internal revenue collections; and the Court held, even without the benefit of an "explanatory Act," that the requirement of payment into the Treasury did not eliminate the cause of action against the collector. The Court justified its apparent departure from the reasoning of *Cary v. Curtis, supra*, by finding in other statutes the implication that the old right was expected to continue. *City of Philadelphia v. Collector*, 72 U.S. (5 Wall.) 720 (1866). Some cases and commentators consider these developments as having converted the action against the collector from a common-law action to a statutory action. *See, e.g.*, *Plumb, Tax Refund Suits Against Collectors of Internal Revenue*, 60 HARV. L. REV. 685, 690-91 (1947), and cases cited therein at n.32. *But see* *United States v. Nunnally Inv. Co.*, 316 U.S. 258, 260, 263-64 (1942); *United States v. Kales*, 314 U.S. 186, 198-200 (1941); *Lowe Bros. Co. v. United States*, 304 U.S. 302, 306 (1938); *Sage v. United States*, 250 U.S. 33, 36-37 (1919). Presumably the authorities supporting that proposition would maintain that, a fortiori, there has been a congressional waiver of sovereign immunity with respect to such suits and that hence the refund suits against tax collectors could be said not to support the thesis of a "historical-prescription exception to sovereign immunity" proposed in the text.

This controversy should be avoided since it is largely definitional. It might be meaningful to consider as tantamount to a waiver of sovereign immunity that type of "explicit acknowledgment" of the existence of a common-law cause of action which occurred in the customs cases; but if such a waiver is also found (as it was in the internal-revenue cases) in the mere "implicit acknowledgment" arising from the fact that Congress has established adjudicatory and appellate procedures within the administrative structure on the assumption that there is a particular common-law cause of action, then the thesis set forth in the text has simply been rephrased. A long-standing tradition of nonstatutory review in well-defined administrative fields *inevitably* arouses congressional reliance—or, if you will, "implicit acknowledgment." In the public-lands field, for example, there is 30 U.S.C. § 226-2 (1964), discussed in text accompanying note 46 *supra*, establishing a period of limitation for seeking review of a denial of an oil and gas lease by the Secretary of Interior. Indeed, such reliance is the very reason that the exception to any new doctrine of sovereign immunity must be created. One may, if he wishes, describe the outcome as an "implicit waiver" instead of an "historical-prescription exception," but the result is the same. In some cases, however, the congressional reliance may consist entirely of inaction, whereupon the "implicit waiver" rationale becomes increasingly fictional. Consider, for example, the suits for injunction against the collector, mentioned in text immediately following this footnote.

223. *See* *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962); *Allen v. Regents of the Univ. System*, 304 U.S. 439 (1938); *Miller v. Standard Nut Margarine Co.*, 283 U.S. 498 (1932); *Annot.*, 65 A.L.R.2d 550 (1959).

224. Act of March 2, 1867, ch. 169, § 10, 14 Stat. 475, now INT. REV. CODE of 1954, § 7421(a).

utory review is now readily available;<sup>225</sup> but neither before nor after *Larson* has the general doctrine of sovereign immunity had anything to do with that disappearance.

The conceptual justification for the inapplicability of *Larson* to certain classes of cases which seem squarely within its scope, can be found in the Administrative Procedure Act (APA), which was provisionally adopted in 1946, a few years before *Larson* was decided.<sup>226</sup> Although the APA does not appear to be "jurisdictional" in the sense that it waives sovereign immunity with respect to all the matters which it covers,<sup>227</sup> nevertheless even the most restrictive interpretation of the judicial-review section would acknowledge—indeed insist—that it was a "restatement of the existing law."<sup>228</sup> But as has been shown, in certain well-defined and prominent fields of administrative activity, that "existing law" included the availability of review without specific statutory authorization, even though the action challenged was neither ultra vires nor unconstitutional, and even though the suit by which review was sought was, all but nominally, against the United States. If that is so, then it seems that the congressional "restatement" of 1946 took away the Supreme Court's power to deny relief in such fields through subsequent judicial revision of the principles of sovereign immunity. Whether or not the legislative command that "[a]ny person suffering legal wrong because of any agency action . . . shall be entitled to judicial review thereof"<sup>229</sup> prevents the courts from raising *any* new obstacles to suit in the traditional fields of nonstatutory review, surely it at least prevents them from raising those new obstacles which are based—as the doctrine of sovereign immunity is based—solely upon the presumed absence of legislative consent. Hence, however much the Court may alter its general criteria of sovereign immunity, the test in traditional nonstatutory-review fields can be no more restrictive than it was in the golden, permissive, pre-*Larson* days of 1946.

Although this analysis seems sound, and indeed is perhaps sug-

225. INT. REV. CODE of 1954, §§ 7422, 7482. See *United States ex rel. Girard Trust Co. v. Helvering*, 301 U.S. 540 (1937).

226. 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C.).

227. For a discussion of this point, see the Appendix following this Article.

228. The Attorney General, who has never been particularly addicted to a broad interpretation of the APA, maintained both prior to, and immediately after, its passage that "the provisions of section 10 constitute a general restatement of the principles of judicial review embodied in many statutes and judicial decisions." *ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT* 93 (1947) and statements cited therein at n.1.

229. 5 U.S.C. § 1009(a) (1964).

gested by the cases,<sup>230</sup> I am reluctant to advance it without the accompanying observation that it provides a justification rather than a reason. In fact, the tradition of judicial review of public-lands determinations would have continued even if the APA had not fortuitously been passed before, rather than after, *Larson*, and even if no other satisfying conceptual justification could have been devised. The day in which the broad abstraction of *Larson*, however frequently affirmed, can suffice, APA or not, to destroy the vitality of a long line of cases, factually cohesive among themselves and factually divergent from anything specifically considered in *Larson* itself—that day, surely, will be the morning after the twilight of the common law. Until then, it is not the historically consistent factual treatment, but rather the abstraction, which will be twisted into compliance or, if necessary, ignored. As was said quite simply in one of the leading cases rejecting the claim of sovereign immunity in the public-lands field:

Such decisions [of the Bureau of Land Management] have in fact been reviewed by the courts for many years and long before the Administrative Procedure Act came into existence. This fact, in our view, precludes any possible conclusion that they would fall into a non-reviewable category.<sup>231</sup>

Which leads, not inevitably but also not unnaturally, to a concluding observation concerning the difficult role of the scholar in the common-law system. If that system is to be worth all of the trouble which it entails—most notably, the absurd and absurdly increasing mass of published case precedent which must be sifted by judges and advocates—and if it is to make good the boast that its legal rules are hammered out on the anvil of reality, then the common-law scholar, unlike his civil-law counterpart, must derive his unifying principles from the case law instead of imposing them upon it. By and large, American scholarship has faithfully attempted to do this, wherefore the tedious footnotes which accompany the standard law review article. But the task is not easy, and one of its best-concealed pitfalls is revealed in the area of inquiry which has been the subject of this Article. *Larson* did not for a moment

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230. See the last paragraph of the Appendix following this Article.

231. *Adams v. Witmer*, 271 F.2d 29, 34 (9th Cir. 1958). The statement was made not in reply to the contention that sovereign immunity barred the suit, but rather to refute the argument that the administrative decision was, within the meaning of the APA, "by law committed to agency discretion." Hence it cannot be interpreted as a direct confirmation of the theory, set forth in the preceding paragraph of the text, that the APA insulates from *Larson* those lines of nonstatutory review well established in 1946.

mislead federal appellate courts dealing with public-lands cases; working always within the context of a particular set of facts, they felt the pull of factually similar precedent. Scholars, on the other hand, approaching the problem from the top rather than from the bottom, and seeking to follow out a principle rather than to adjudicate a particular dispute, have often overlooked the distinctiveness of the public-lands cases and have discussed them together with all the others which happen to fall within the broad conceptual category under investigation—"suits for specific relief against federal officials." Certainly there is in *principle* nothing distinctive about the public-lands cases. As far as a logical concept of the doctrine of sovereign immunity is concerned, it should make no difference that the defendant happens to be the Secretary of the Interior (*Tallman*) rather than the War Assets Administrator (*Larson*), much less that the suit against the Secretary of the Interior happens to seek a grant of land (*Tallman*) rather than the return of land unlawfully seized (*Malone*).

Thus, scholarly discussion of the application of sovereign immunity to suits against federal officials has tended to proceed at a broad level of generality—close to the cases, but close to *all* the cases; whereas the actual development of the law has to a large extent been compartmentalized—into, for example, public-lands cases, post-office cases, and tax cases. The resultant risk of distortion is twofold: The court-made rules applicable to the general run of cases, such as the theory of *Larson*, may be represented as applicable to certain sectors where they in fact have no place; and at the other extreme, the rationalizations devised in order that the rules may be avoided in special sectors—such as the courts' facile use of the APA in public-lands cases to avoid *Larson*—may be represented as applicable to the general run of cases, where they in fact have no place. What scholars represent as the law has a tendency to become such, with the result that the system retains all of the disadvantages of the common law and yet derives a drastically reduced measure of that pragmatic development which is supposed to be the common law's major benefit. The problem, of course, is not peculiar to the area which has been discussed in this Article. It is a general one, and it is the inevitable effect, one suspects, of the wide distance between the point of departure from which the common-law judge develops his decision and that from which the scholar explains it.

The one remedy (and that far from fool-proof) is constant advertisement to the fact that case law can be understood only in the manner

in which it develops—not as a progression of judgments whose holdings concerning a particular principle, such as sovereign immunity, are determined by the totality of other opinions on the subject, but rather as containing a number of discrete, "existential" groupings of cases whose consistency among themselves is infinitely more important to the public and to the courts, and must therefore be more important to the scholars, than is their reconcilability with the mass of decisions involving the general principle. The legal profession is keenly aware of this fact in some fields. No intelligent commentator mixes FELA cases with the mass of agency cases, nor desegregation cases with the rest of constitutional law, nor life insurance cases with the rest of contracts. The truism behind such selective exclusion—to wit, that the common law often grows into existential, rather than conceptual, compartments—needs wider publicity.

## APPENDIX

### CONCERNING THE QUESTION WHETHER THE ADMINISTRATIVE PROCEDURE ACT IS "JURISDICTIONAL" IN THE SENSE OF CONSTITUTING A WAIVER OF SOVEREIGN IMMUNITY

Judicial and scholarly discussion of whether a particular statute is "jurisdictional" often tends to confuse as much as it clarifies. There appears to be some lack of realization that the statement "the APA (or the Declaratory Judgment Act, or the Mandamus and Venue Act of 1962) is jurisdictional" is as vague and uninformative, without further specification, as is the statement that "the United States District Court for the Southern District of New York lacks jurisdiction." The former, no less than the latter, leaves the reader to guess what particular aspect of jurisdiction is at issue. It may be jurisdiction over the subject matter,<sup>232</sup> or ordinary jurisdiction over the person,<sup>233</sup> or that peculiar aspect of jurisdiction over the person in suits against federal officials which constitutes the doctrine of sovereign immunity.<sup>234</sup> It is not impossible, indeed it is quite ordinary, for a statute to be "jurisdictional" in one of these senses but

232. E.g., must the plaintiff meet the \$10,000 requirement of federal-question jurisdiction under 28 U.S.C. § 1331 (1964) or is the dispute cognizable under some other statute without regard to monetary amount?

233. E.g., is the Secretary of the Interior suable in a federal district court in California or, like most other defendants, only where he resides?

234. E.g., even though the Secretary of the Interior as an individual may be sued in this court, is the nature of the suit such that the United States is also, in effect, a party; and if so, has the court been given jurisdiction over it?

in neither of the other two. To take the most obvious example, the provision of the Judicial Code granting federal-question jurisdiction<sup>235</sup> neither confers jurisdiction over any particular person nor waives the sovereign immunity of the United States when a federal question is involved.<sup>236</sup>

Some statutes make it quite explicit that they are "jurisdictional" both in the sense of granting subject matter jurisdiction and in the sense of waiving sovereign immunity. For example, the Federal Tort Claims Act<sup>237</sup> was worded to provide that the United States district courts "shall have exclusive jurisdiction to hear, determine and render judgment on any claim against the United States [covered by the Act]" and also that "the United States shall be liable in respect of such claims in the same manner, and to the extent as a private individual under like circumstances." Other statutes, while making an explicit grant only of subject matter jurisdiction, waive sovereign immunity by almost unavoidable implication, since the subject matter grant would have no application without the waiver. For example, section 1347 of the United States Code<sup>238</sup> gives federal district courts "original jurisdiction of any civil action commenced by any tenant in common or joint tenant for the partition of lands where the United States is one of the tenants in common or joint tenants." If this provision were to be interpreted as a grant merely of subject matter jurisdiction, thus excusing the plaintiff in such a case from meeting the monetary requirements of the "federal-question" and "diversity" bases, the effect would be to eliminate a relatively minor obstacle to suits which are in any event absolutely barred by sovereign immunity. Clearly a waiver must be implied.<sup>239</sup>

The APA is yet another step removed from a direct waiver of sovereign immunity: not only does it, like the type of statute just discussed, omit any explicit waiver; but it does not even contain any explicit grant of subject matter jurisdiction from which such a waiver might be implied. Professor Byse has argued persuasively

235. 28 U.S.C. § 1331 (1964).

236. See *Maine v. United States*, 134 F.2d 574 (1st Cir.), *cert. denied*, 319 U.S. 772 (1943) (46 U.S.C. § 781 waives sovereign immunity, but does not grant subject matter jurisdiction); *Harms v. FHA*, 256 F. Supp. 757, 760-61 (D. Md. 1966) (12 U.S.C. § 1702 waives sovereign immunity, but does not grant subject matter jurisdiction; APA grants subject matter jurisdiction).

237. 60 Stat. 842 (1946).

238. 28 U.S.C. § 1347 (1964).

239. For similar statutes, see H.M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1140-44 (1953).

that a grant of subject matter jurisdiction is implicit,<sup>240</sup> at least now that legislative purposes have been clarified by the Mandamus and Venue Act of 1962.<sup>241</sup> But it requires yet another step to establish that waiver of sovereign immunity is also implied. Assuming that one will not reject out of hand an implication from an implication, there is nevertheless no real reason to make the second implication. Unlike the example of section 1347 mentioned above, the APA would make sense as a grant of subject matter jurisdiction alone. It would permit those many suits for judicial review which are not barred by sovereign immunity to be entertained without the often troublesome necessity of finding the monetary amount required for "federal-question" jurisdiction.<sup>242</sup>

Of course, the more direct argument remains—that the APA constitutes a waiver of sovereign immunity not because of an implication from the newly manifest grant of subject matter jurisdiction which it contains, but rather simply because provision of a waiver was the original intent of the statute. The statute does, after all, state that "any person suffering legal wrong because of any agency action . . . shall be entitled to judicial review thereof."<sup>243</sup> The legislative history, however, does not establish such an intent; and the Supreme Court's interpretation of the Act, which has now had more than twenty years to develop, not only has not affirmed the existence of waiver, but seems to have denied it. Although the Court stated the proposition in terms more broad than was necessary,<sup>244</sup> the import of its dictum in *Blackmar v. Guerre*<sup>245</sup> is clear: "Certainly there is no specific authorization in [the APA] for suit against the [United States Civil Service] Commission as an entity. Still less is the Act to be deemed an implied waiver of all governmental immunity from suit." Since the enactment of the APA, the Court has upheld the defense of sovereign immunity in a number of suits seeking specific relief against federal officials—including not only *Larson* and *Malone*, but also *Dugan v. Rank*,<sup>246</sup> *City of Fresno v. California*,<sup>247</sup> and *Hawaii v.*

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240. Byse & Fiocca, *supra* note 11, at 326-31.

241. 76 Stat. 744 [codified at 28 U.S.C. §§ 1361, 1391(e) (1964)].

242. See generally 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. 387, 436-48 (1970).

243. 5 U.S.C. § 702 (Supp. IV, 1965-1968).

244. See 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 585 (1958).

245. 342 U.S. 512, 515-16 (1952).

246. 372 U.S. 609 (1963).

247. 372 U.S. 628 (1963).

*Gordon*.<sup>248</sup> In none of these cases did the Court think it necessary to exclude the applicability of, or even to mention, the APA.

A number of federal courts of appeals have specifically held that the APA does not embody a waiver of sovereign immunity.<sup>249</sup> In addition, there are many cases which support the same view by strong implication, since they uphold the officials' defense of sovereign immunity without any reference whatever to the APA.<sup>250</sup>

Probably the best-known and most frequently cited case which holds, although with less than transparent clarity, that the APA waives sovereign immunity is *Adams v. Witner*,<sup>251</sup> a public-lands case. There are many other public-lands cases which, while making no specific mention of sovereign immunity, use language to the effect that the court "has been granted jurisdiction to review under the APA,"<sup>252</sup> or simply describe the suit as one "under the APA."<sup>253</sup> Arguably such references to the APA are intended to meet the objection of sovereign immunity as well as to satisfy the requirement of subject matter jurisdiction. For all of these cases, however, an explanation exists which is more limited than the hypothesis that the

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248. 373 U.S. 57 (1963).

249. *Aktiebolaget Bofors v. United States*, 194 F.2d 145 (D.C. Cir. 1951); *Ove Gustavsson Contracting Co. v. Floete*, 278 F.2d 912 (2d Cir.), *cert. denied*, 364 U.S. 894 (1960); *Local 542, Operating Engrs. v. NLRB*, 328 F.2d 850 (3d Cir. 1964); *Gnotta v. United States*, 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 38 U.S.L.W. 3338 (U.S. Feb. 27, 1970); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967); *White v. Administrator of Gen. Servs. Admn.*, 343 F.2d 444 (9th Cir. 1965); *Motah v. United States*, 402 F.2d 1 (10th Cir. 1968); *Chournos v. United States*, 335 F.2d 918 (10th Cir. 1964).

250. *E.g.*, *Switzerland Co. v. Udall*, 337 F.2d 56 (4th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); *Leber v. Canal Zone Cent. Labor Union & Metal Trades Council*, 383 F.2d 110 (5th Cir. 1967), *cert. denied*, 389 U.S. 104 (1968). A holding to the contrary is contained in *IWW v. Clark*, 385 F.2d 687, 693-94 n.10 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 948 (1968). It is at best an alternative holding, since the opinion itself makes it clear that "[f]irst amendment rights are at stake," which fact would of course call into play one of the exceptions to *Larson*. 385 F.2d at 692. Moreover, the relegation of the point to a footnote, the absence of any authority cited in support, and the very manner of expression ("If consent to suit there must be consent to suit there here is.") 385 F.2d at 694 n.10 lead one to feel that the holding is make-weight and is perhaps deliberately intended as an offhand rebuff to the Government for its temerity in raising such a defense in a "subversive-listing" case. *See also* *Mulry v. Driver*, 366 F.2d 544, 547 (9th Cir. 1966) (technically dictum, since relief denied on other grounds; no authority cited in support); *Powelson Civic Home Owners Assn. v. Department of Housing and Urban Dev.*, 284 F. Supp. 809, 834 (E.D. Pa. 1968) (alternative holding; no supporting holding cited).

251. 271 F.2d 29 (9th Cir. 1958).

252. *E.g.*, *Heffelman v. Udall*, 378 F.2d 109 (10th Cir.), *cert. denied*, 389 U.S. 926 (1967).

253. *E.g.*, *Pease v. Udall*, 332 F.2d 62 (9th Cir. 1964); *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959).

APA constitutes a general waiver, and which would reconcile these cases with what appears to be the overwhelming weight of judicial opinion in other fields—namely, the theory advanced in this Article that there must be acknowledged a separate rule for traditional “nonstatutory review” cases.