

remedy deficiencies in “the most applicable express jurisdictional statute.”

To the extent that jurisdiction is available, judicial review of improper agency action is increased.<sup>33</sup> Some commentators feel that the ameliorative effects of such review warrant judicial construction of the APA as a source of jurisdiction.<sup>34</sup> However, because a jurisdictional expansion needs to be integrated with other statutory sources of jurisdiction and involves many collateral issues which are not adequately handled through the judiciary’s piecemeal approach, decisive legislation is most often<sup>35</sup> and more appropriately advocated as the proper solution:

[W]e are dealing with a problem that merits statutory clarification . . . as to the jurisdictional basis for review . . . . If the cases make anything clear, it is the desirability of Congressional action in this murky and troublesome area.<sup>36</sup>

## B. SOVEREIGN IMMUNITY

In 1971 four diverse developments in the doctrine of sovereign immunity<sup>1</sup> furthered a movement to limit or abrogate<sup>2</sup> the doctrine’s

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33. See generally Berger, *supra* note 5, at 86, 93-95; McCarran, *Improving “Administrative Justice”*; *Hearings and Evidence; Scope of Judicial Review*, 32 A.B.A.J. 827, 893-94 (1946).

34. See DAVIS (Supp. 1970) 789-92; JAFFEE 164-65; Byse & Fiocca 329-30.

35. See, e.g., Cramton 445, 468-70. Discussions of this solution, however, are usually directed at eliminating only jurisdictional gaps caused by the minimum jurisdictional amount under 28 U.S.C. § 1331 (1970). See S. 3568, 91st Cong., 1st Sess. (1970) and S. 598, 92d Cong., 1st Sess. (1971). For a discussion of a proposal to amend the APA, see *Pending Proposals To Amend the Administrative Procedure Act: An Analysis of S. 518*, 20 AD. L. REV. 185, 200-06 (1968).

36. *Charlton v. United States*, 412 F.2d 390, 400 (3d Cir. 1969) (concurring opinion).

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1. The doctrine, simply stated, means that the United States may not be sued without its consent. Historically, a variety of bases have been advanced in support of sovereign immunity, but none can withstand a critical analysis. Justice Holmes suggested that a legal right cannot exist against the authority that makes the law on which the right depends. *Kawanakoa v. Polyblank*, 205 U.S. 349, 353 (1907). However, this is not persuasive since the federal government has long obeyed the judgments of courts in cases involving legal rights asserted against it. DAVIS (Supp. 1970) § 27.00-4, at 906-08. Hamilton argued that a suit against the government lies outside a federal court’s jurisdiction as defined by article III of the Constitution. THE FEDERALIST No. 81, 567-68 (Dawson ed. 1867). See also *Williams v. United States*, 289 U.S. 553 (1933). See generally WRIGHT §§ 11, 22. The federal courts, in continually reviewing suits to which the United States has consented, have never accepted Hamilton’s argument. *Id.* § 22. A third early argument for sovereign immunity was that it was a method by which the courts could avoid bankrupting “a young and relatively impoverished federal . . . body politic.” Sherry, *The Myth that the King Can Do No Wrong: A Comparative Study of the Sovereign*

bar to judicial review:<sup>3</sup> (1) the Tucker Act<sup>4</sup> was interpreted to allow judicial review of government violations of rights conferred by Executive Orders and federal administrative regulations unless specifically prohibited;<sup>5</sup> (2) section 10 of the Administrative Procedure Act (APA)<sup>6</sup> was increasingly recognized as an implied waiver of sovereign immunity;<sup>7</sup> (3) an otherwise valid sovereign immunity bar was disregarded through use of a "balancing" test which weighed the benefits of judicial review against those of sovereign immunity;<sup>8</sup> and (4) fur-

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*Immunity Doctrine in the United States and New York Court of Claims*, 22 AD. L. REV. 39, 56 (1969). However, not only is this "a discredited relic of the past," *id.* at 57, but today it is the citizen "who is becoming helpless in the face of growing governmental intrusion into his very life." *Id.* at 58. Finally, it was argued that sovereign immunity reflected an inability of a court to enforce its judgment against the government. Cramton, *Nonstatutory Review* 397. However, such reasoning would undermine *all* judicial review of federal legislation. *Id.* at 397 n. 39.

For a discussion of the justifications presently offered in defense of sovereign immunity, see notes 22, 100 *infra*.

"Of major significance in the development of the confusion concerning the scope of the doctrine is the fact that while the scope is largely determined by the basis arrived at, eminent authorities have been totally unable to agree as to such basis . . ." 16 VAND. L. REV. 231, 232 (1964). See also JAFFE 198 (suggesting that the doctrine developed as a matter of expediency rather than abstract theory); Cramton, *Nonstatutory Review* 396-97.

2. Commentators have long attacked sovereign immunity as inequitable, confusing in operation, and lacking in justification. DAVIS (Supp. 1970) §§ 27.00-.01; Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479 (1962); Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis*, 9 J. PUB. L. 1 (1960); Cramton, *Nonstatutory Review* 419; 1969 *Duke Project* 200. But it has been pointed out that sovereign immunity has been given increased strength as a bar to judicial review during the last twenty-five years. DAVIS (Supp. 1970) § 27.00-2, at 900; H.M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1151 (1953); Cramton, *Nonstatutory Review* 417. However, it is the thesis of this discussion that a gradually emerging movement attempting to curtail sovereign immunity can be discerned from recent judicial opinions and legislative activity.

3. The nature of the bar imposed by sovereign immunity remains confused. Generally it is considered a defect in subject matter jurisdiction. See, e.g., *Case v. Terrell*, 78 U.S. (11 Wall.) 199 (1870); WRIGHT § 22. The doctrine is often viewed as a defect in personal jurisdiction, as is illustrated when the United States is held to be an indispensable party. See, e.g., *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945); *Arnold v. United States*, 331 F. Supp. 42, 43 (S.D. Tex. 1971). Occasionally, the bar will be considered as actually a defense on the merits. See, e.g., *General Motors v. Volpe*, 321 F. Supp. 1112, 1120 (D. Del. 1970). However these distinctions do not have an effect upon the operation of sovereign immunity law. See generally Cramton, *Nonstatutory Review* 392, 399-400. But see note 12 *infra*.

4. 28 U.S.C. §§ 1346(a)(2), 1491 (1970).

5. *Chambers v. United States*, 451 F.2d 1045 (Ct. Cl. 1971); *Allison v. United States*, 451 F.2d 1035 (Ct. Cl. 1971). See notes 33-53 *infra* and accompanying text.

6. 5 U.S.C. §§ 701 *et seq.* (1970).

7. See notes 54-70 *infra* and accompanying text.

8. *Littell v. Morton*, 445 F.2d 1207 (4th Cir. 1071). See notes 71-87 *infra* and accompanying text.

ther legislative steps were taken to expressly abrogate sovereign immunity.<sup>9</sup> In order to provide a backdrop for these developments, a brief three-step review of the present operation of sovereign immunity law is helpful.<sup>10</sup>

First, when does sovereign immunity arise to bar judicial review? Certainly it will be considered to arise if the United States is named party-defendant.<sup>11</sup> Moreover, regardless of the nominal party-defendant and form of suit, sovereign immunity will arise<sup>12</sup> if the judgment would operate against the United States,<sup>13</sup> “expend itself on the public treasury or domain,”<sup>14</sup> or “restrain the Government from acting or . . . compel it to act.”<sup>15</sup> Since the courts liberally construe the effect of a judgment,<sup>16</sup> and sovereign immunity is routinely asserted by the Justice Department,<sup>17</sup> the doctrine not only arises often but can have drastic effects.<sup>18</sup>

The second step in a review of the doctrine is to ask whether

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9. See S. 3568, 91st Cong., 2d Sess. (1970) and S. 598, 92d Cong., 1st Sess. (1971). See notes 89-103 *infra* and accompanying text.

10. “Present” sovereign immunity law began with *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). For a discussion of the charges wrought by *Larson* on the operation of prior sovereign immunity law, see note 27 *infra*.

11. *Cf. United States v. Shaw*, 309 U.S. 495 (1940).

12. Generally, in order for sovereign immunity to arise it must be asserted by the government, since the doctrine will not necessarily be raised independently by the court. For a discussion of cases where the Supreme Court exercised judicial review without raising sovereign immunity on its own, see *Littell v. Morton*, 445 F.2d 1207, 1213-14 (4th Cir. 1971), and *Blaze v. Moon*, 440 F.2d 1348, 1349 (5th Cir. 1971).

13. *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963).

14. *Land v. Dollar*, 330 U.S. 731, 738 (1947).

15. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).

16. See, e.g., *Kuhl v. Hampton*, 326 F. Supp. 439 (E.D. Mo. 1971). The action was brought by mail handlers to compel the Postmaster General to allow them to compete for a new position. A judgment for the plaintiffs would compel the federal government to consider a greater number of applicants and sovereign immunity would therefore arise as a bar to review. See note 15 *supra* and accompanying text. However in allowing the doctrine to arise and bar review the district court did not find it necessary to consider the nature or extent of the resulting action thrust upon the United States.

17. *But see General Motors v. Volpe*, 321 F. Supp. 1112, 1120 (D. Del. 1971). For a discussion of the litigating practice of the Justice Department in asserting sovereign immunity, see note 100 *infra*. See also *Hearings on “Sovereign Immunity” Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 28-30 (1970). Cramton, *Nonstatutory Review* 420-21.

18. Sovereign immunity (1) often causes serious substantive injustice, (2) frequently results in final determinations without the safeguards that are necessary for procedural justice, and (3) causes gross inefficiency in the allocation of functions between officers and agencies by preventing courts from resolving controversies they are especially qualified to resolve. DAVIS (Supp. 1970) 896.

sovereign immunity has been expressly waived by statute and if not, whether it may be circumvented by the "officer suit." Waiver of sovereign immunity, or consent to be sued, must be expressly legislated by Congress<sup>19</sup> and, as a general rule, cannot be implied.<sup>20</sup> Further, it is normally required that such consent be given by Congress itself and not by a federal officer or agency.<sup>21</sup> Statutory consent has been given for most tort and contract suits, but in general has not been given for other types of litigation brought against the government.<sup>22</sup> In order to prevent the injustice of completely unrestrained administrative action, courts have allowed the fiction of the "officer suit" to circumvent sovereign immunity on the grounds that an "improperly" acting official must be acting as a private person rather than as a federal officer.<sup>23</sup> Judicial review has been made available when the

19. *United States v. Sherwood*, 312 U.S. 584, 587-88 (1941); *United States v. Shaw*, 309 U.S. 495, 500-01 (1940); *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 514 (1940).

20. *United States v. King*, 395 U.S. 1, 4 (1969) (no waiver implied from the Declaratory Judgment Act); *White v. Administrator of GSA*, 343 F.2d 444, 447 (9th Cir. 1965) (no waiver implied from the Mandamus Act).

21. See cases cited note 19 *supra*.

22. See, e.g., Federal Tort Claims Act, 28 U.S.C. § 2680 (1970); Tucker Act, 28 U.S.C. §§ 1346, 1491 (1970) (money damages recoverable only). "Governmental responsibility both in contract and in tort is now well established and in broad outline is totally successful." DAVIS (Supp. 1970) 897; Cramton, *Nonstatutory Review* 393. However, unnecessary gaps do remain in both of these areas; for example, in cases involving deliberate torts of governmental employees and governmental contracts implied by law (quasi-contracts), there is immunity when suit is brought against the government. DAVIS (Supp. 1970) 899; Cramton, *Nonstatutory Review* 393-94. It is estimated that the tort and contract cases constitute two-thirds of the litigation brought against the United States. Consequently, in the remaining litigation brought against the government, such as enforcement of contracts, payment of public funds, and transfer of property possessed by the United States, sovereign immunity is still a barrier to judicial review. Cramton, *Nonstatutory Review* 402.

In suits seeking specific relief, sovereign immunity has a special viability. *Mims v. United States*, 324 F. Supp. 489 (W.D. Va. 1971), states the present rationale:

[T]he necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the individual citizen being relegated to the recovery of money damages after the event. *Id.* at 492.

"Specific relief" includes the remedies of "injunction, mandamus, declaratory judgment, ejectment, and specific performance." 1969 *Duke Project* 202 n.174. The explanation in *Mims* of undue judicial interference remains the only respectable justification for the doctrine today. Cramton, *Nonstatutory Review* 397; Byse, *supra* note 2, at 1484. See also Steadman, "Forgive U.S. Its Trespasses?": *Land Title Disputes With the Sovereign—Present Remedies and Prospective Reform*, 1972 *DUKE L.J.* 15, 20-21.

23. The suit is fictitious and illogical because the suit is always against the government. The officer acted under assumed federal authority in pursuance of governmental interests and will be defended by government lawyers. Cramton, *Nonstatutory Review* 399.

officer or federal agency has acted in excess of statutory authority,<sup>24</sup> failed to act while under a statutory duty to do so,<sup>25</sup> acted in an unconstitutional manner, or acted pursuant to an unconstitutional grant of authority.<sup>26</sup> In relying upon these exceptions, the courts have used a variety of approaches.<sup>27</sup> The officer suit has been criticized as

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24. *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701-02 (1949). The officer is acting *ultra vires*. See generally 3 DAVIS §§ 27.01-10.

25. Although not often stated as one of the officer suit exceptions, a failure to act is generally recognized as one, since it is difficult to see any "valid distinction between the public official who has a statutory duty to act and does not and the one who has a duty not to act and does." *Rockbridge v. Lincoln*, 449 F.2d 567, 573 (9th Cir. 1971). Thus, where a statute requires the officer to perform even a discretionary type of act and the officer refuses to comply with the statute, a court can order him to perform the required act. However, the court cannot order him to exercise the act in a particular manner. Furthermore, because the requested relief under this exception will always require affirmative action upon the officer and federal government, the suit is especially susceptible to the *Larson* provision, notes 30-32 *infra* and accompanying text, and consequently it may still fail. See generally Cramton, *Nonstatutory Review* 414-15.

26. *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701-02 (1949). See generally 1969 *Duke Project* 202-03.

27. Under pre-*Larson* law, sovereign immunity was a bar to judicial review where the officer acted pursuant to his valid statutory authority. However, where the petitioner alleged one of the officer suit exceptions, the court would determine the extent of the authority or constitutionality of the officer's actions. If the officer acted within both of these criteria, sovereign immunity was not circumvented and the suit was dismissed for lack of jurisdiction. However, in so doing, the court would find that the question of jurisdiction depended upon the question of the merits. Success against a motion to dismiss meant success on the merits. Under post-*Larson* law, however, the determination of jurisdiction and the merits are separated. Sovereign immunity remains a bar whenever the pleadings show the officer had *prima facie* authority and no inquiry will be made into the merits. See generally Cramton, *Nonstatutory Review* 401-04; Comment, *Immunity of Government Officers: Effect of the Larson Case*, 8 STAN. L. REV. 683 (1956); 1969 *Duke Project* 203-04.

Under post-*Larson* law, a variety of approaches have been used in applying the officer suit exceptions. The Ninth and Tenth Circuits have developed an administrative discretion analysis. Actions clearly within the officer's express statutory discretion cannot be judicially reviewed, but otherwise sovereign immunity is not a bar. Furthermore, if the statute does not mention discretion, it is presumed to be non-discretionary and thus any alleged failure to comply is sufficient to circumvent the doctrine. See generally 1969 *Duke Project* 208-12. The use of this approach continued in 1971. See, e.g., *National Helium Corp. v. Morton*, \_\_\_ F.2d \_\_\_, \_\_\_ (10th Cir. 1971) (the fact that the Secretary of the Interior was compelled by law to act in accordance with the National Environmental Policy Act and that he failed to do so brought the suit within the *ultra vires* exception); *McQueary v. Laird*, 449 F.2d 608 (10th Cir. 1971) (no *ultra vires* exception since the officer's acts were within the ambit of discretion given to him by the Military Storage Act). See also Steadman, *supra* note 22, at 24-28.

A second approach, developed in the Fifth and District of Columbia Circuits, turns upon the allegations in the petitioner's complaint. See generally 1969 *Duke Project* 212-14. Once the *ultra vires* exception is properly pleaded, the threshold bar of sovereign immunity is circumvented. Although this approach has been described as "virtually abandoning *Larson's* dual

illogical and inconsistent,<sup>28</sup> but remains the major means of avoiding the bar of sovereign immunity.<sup>29</sup>

The third and final step in the review of the doctrine is to decide whether sovereign immunity, once it arises, should remain a bar, notwithstanding apparent availability of the officer suit. In the well known footnote 11 of *Larson v. Domestic & Foreign Commerce Corp.*,<sup>30</sup> the Supreme Court stated that if the result of a case would be to force the government to take affirmative action, sovereign immunity could still bar the officer suit even though the officer had acted unconstitutionally or in excess of his authority. This statement has been subsequently modified to mean that relief will be denied where the affirmative action would impose "an intolerable burden on governmental functions."<sup>31</sup> The courts have been unclear in determining under what circumstances the requested relief would be so burdensome. Although frequently mentioning the footnote 11 caveat, the courts have seldom found the burden on the government great enough to prevent the use of the officer suit fiction.<sup>32</sup>

### *Expansion of Waiver Under the Tucker Act*

Judicial relief for government racial discrimination which violates executive orders has been foreclosed largely by the government's imposition of sovereign immunity.<sup>33</sup> However, in *Chambers v. United*

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standard for determining jurisdiction and the merits," *id.* at 214, it does require precise pleading by the litigant's lawyer and does not remove the burden of proof in winning on the merits. *Id.* Both circuits continued to use this approach. See, e.g., *Knox Hill Tenant Council v. Washington*, 448 F.2d 1045 (D.C. Cir. 1971). However, in the District of Columbia this is necessary only where the APA and implied waiver are unavailable. See note 56 *infra* and accompanying text.

28. DAVIS (Supp. 1970) § 27.01; Carrow, *supra* note 2, at 1-4, 8, 13; Cramton, *Nonstatutory Review* 398-99.

29. Cramton, *Nonstatutory Review* 398.

30. Of course, a suit *may* fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, 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. 337 U.S. 682, 691 n.11 (1949) (emphasis added).

31. *Washington v. Udall*, 417 F.2d 1310, 1318 (9th Cir. 1969). See generally Cramton, *Nonstatutory Review* 414-17; 1969 *Duke Project* 214-16.

32. See, e.g., *Rockbridge v. Lincoln*, 449 F.2d 567, 572-73 (9th Cir. 1971); *Washington v. Udall*, 417 F.2d 1310, 1317 (9th Cir. 1969). But see *Knight v. United States*, 443 F.2d 415 (2d Cir. 1971) (where footnote 11 was construed broadly).

33. See *Ogletree v. McNamara*, 449 F.2d 93, 99 (6th Cir. 1971); *Blaze v. Moon*, 440 F.2d 1348, 1349 (5th Cir. 1971); *Gnotta v. United States*, 415 F.2d 1271, 1276-77 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970); *Congress of Racial Equality v. Comm'r*, 270 F. Supp. 537

*States*,<sup>34</sup> the Court of Claims overcame this apparently insurmountable jurisdictional bar by holding that Executive Order No. 11,478<sup>35</sup> provided rights which could be enforced by awarding monetary relief

(D. Md. 1967). *But see* *Mow Sun Wong v. Hampton*, 333 F. Supp. 527, 529-30 (N.D. Cal. 1971) (where sovereign immunity was circumvented by the officer suit).

As the above cases indicate, suing the government for alleged racial discrimination in its hiring and promotion practices has been virtually impossible. A litigant must overcome several substantial hurdles, including statutory jurisdiction, sovereign immunity, the question of reviewability, proving the merits of his suit, and obtaining a satisfactory remedy. In *Ogletree, Blaze*, and *Gnotta* sovereign immunity was the major barrier in preventing judicial review. In each of these cases the petitioners exhausted their administrative remedies without a finding of racial discrimination being made, and therefore sought review in a federal district court. In addition to rejecting various implied waiver arguments, the courts refused to find the Tucker Act, 28 U.S.C. § 1346(a)(2) (1970) applicable. See note 41 *infra*. Sovereign immunity was circumvented in *Mow Sun* but the question of reviewability would also have prevented the court from reaching the merits.

In contrast, judicial review is readily available for suits brought by federal employees alleging wrongful dismissal. See Johnson & Stoll, *Judicial Review of Federal Employee Dismissals and Other Adverse Actions*, 57 CORNELL L. REV. 178 (1972). Sovereign immunity does not present any problems. Furthermore, jurisdiction for such claims is within the scope of the Tucker Act, since they involve questions of government employment contracts. *Id.* at 186. *But see* D. SCHWARTZ & S. JACOBY, *LITIGATION WITH THE FEDERAL GOVERNMENT* 125-27 (1970) (such suits are founded upon a regulation of an executive department). However, dismissal cases are impeded by scope of review problems. See note 45 *infra*.

34. 451 F.2d 1045 (Ct. Cl. 1971).

35. Executive Order No. 11,478, Equal Employment Opportunity In The Federal Government, August 8, 1969, 3 C.F.R. 462 (1971), provides, in part, as follows:

. . . .

Section 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

Section 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. . . . *Id.* at 463.

Executive Order No. 11,246, 30 Fed. Reg. 12319 (1965) has also been involved in suits seeking judicial relief for government racial discrimination. *See, e.g.,* *Ogletree v. McNamara*, 449 F.2d 93 (6th Cir. 1971). The two executive orders are nearly identical and both were promulgated pursuant to an equal employment opportunity statute which provides:

It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex or national origin. The President shall use his existing authority to carry out this policy. 5 U.S.C. § 7151 (1970).

in the Court of Claims and district courts under Tucker Act jurisdiction.<sup>36</sup>

Mrs. Chambers had been denied employment with a Social Security Administration (SSA) district office because of an unverified reference report which attributed to her what was characterized as overzealous pursuit of equal employment rights.<sup>37</sup> The Director of Equal Employment Opportunity for HEW reversed a SSA hearing officer's report of no discrimination and ordered that she be hired as early as possible.<sup>38</sup> Chambers was unsatisfied with merely obtaining employment after the protracted hearings and sought to recover the pay she had lost by not being hired in the first place. When this relief

36. For the Court of Claims:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department . . . 28 U.S.C. § 1491 (1970).

For the district courts:

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

. . . .

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department . . . *Id.* § 1346(a)(2).

In the Tucker Act, the United States has provided both a statutory source of jurisdiction and express statutory consent to be sued. *See National State Bank of Newark v. United States*, 357 F.2d 704, 706 (Ct. Cl. 1966). Despite a literal reading of the statutory text, the Act is available only to particular claims and therefore not every claim which is based upon the Constitution, statute, or federal regulation will be cognizable in the Court of Claims or district court. *Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967). In order for a claim to come within the scope of section 1491 or 1346(a)(2), "what one must always ask is whether the constitutional clause or the legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* at 1009. The claim will be sufficient where monetary relief is expressly provided for. *Id.* at 1007. Furthermore, such relief may be established by implication, where the claim is not frivolous but arguable. *Ralston Steel Corp. v. United States*, 340 F.2d 663, 667 (Ct. Cl.), *cert. denied*, 381 U.S. 950 (1965). For a discussion of Tucker Act claims founded upon a regulation, see *SCHWARTZ & JACOBY, supra* note 33, at 119-32. For a discussion of cases finding no monetary relief implied in the federal regulations and statutes regarding equal employment in the government, see notes 41 *infra*.

37. Chambers had been offered a position earlier with the SSA district office but declined it in favor of another position at a local hospital. Two years later she resigned and again sought employment with the SSA. However, the reference report submitted by the hospital described her as one "not adverse to frivolously alleging racial discrimination and calling in the NAACP." 451 F.2d at 1047.

38. The original finding of no discrimination was based solely upon the fact that another black person had been hired for the position she was seeking. At the EEO hearing the finding was reversed since the SSA had failed to show data on the racial composition of its office and that it had not discriminated against Mrs. Chambers. *Id.* at 1048.

was denied by both the Director of EEO and the reviewing Civil Service Commission Board of Appeals and Review, she brought an action for money damages in the Court of Claims for the pay missed because of the discrimination.<sup>39</sup> The government conceded both that she had been discriminated against and that the discrimination had prevented her employment as a GS-4,<sup>40</sup> but contended that, as held in *Gnotta v. United States*,<sup>41</sup> Executive Order No. 11,478 did not and could not expressly confer the right to seek a judicial remedy under Tucker Act jurisdiction. The court rejected this contention, citing cases wherein it had awarded backpay to government employees who

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39. The procedure for the consideration of such complaints includes at least one review within the executive department or agency and an appeal to the Civil Service Commission. See § 104 of Executive Order No. 11,246, 30 Fed. Reg. 12319 (1965), and § 4 of Executive Order No. 11,478, 3 C.F.R. 462, 464 (1971). The specified procedure does not provide for subsequent judicial review by a federal court.

40. Apparently the issue was conceded in order to avoid a precedent as to the meaning of discrimination under the Executive Order. See 451 F.2d at 1049. However, both of the dissenting judges argued that the facts were insufficient to show racial discrimination. *Id.* at 1058-63, 1086-91.

41. 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970). *Gnotta* held that sovereign immunity barred the court from proceeding to the question of reviewability or to the merits. However, *Gnotta* also rejected any statutory jurisdiction and consent to be sued by the United States under the Tucker Act even though the suit was based upon a claim that Executive Order No. 11,246 was violated. Claims based upon such executive orders are considered insufficient for purposes of the Tucker Act since:

Executive Order No. 11,246 enunciates government policy . . . ; imposes that policy on the head of each executive department and agency; and directs the Civil Service Commission to "supervise and provide leadership and guidance," to provide for the impartial consideration of all complaints of discrimination, for at least one impartial review within the department, and for appeal to the Commission . . . . But none of the Executive Order's language speaks in terms of money damages or of a money claim against the United States. 415 F.2d at 1278. See also SCHWARTZ & JACOBY, *supra* note 33, at 119-21.

Furthermore, *Gnotta* expressly stated that the claim would not be sufficient for purposes of the Tucker Act even if discrimination was in fact found:

None of the executive orders or regulations which the complaint cites purports to confer any right on an employee of the United States to institute a civil action for damages against the United States, in the event of their violation, even if it should be established that plaintiff's failure to have been promoted . . . was in fact due to discrimination in violation of the Executive Orders pleaded. 415 F.2d at 1278.

Since jurisdiction of the Court of Claims for such claims is based on an identical statute (except for jurisdictional amount), see note 36 *supra*, *Gnotta* should have equal applicability to the Court of Claims. *But cf.* SCHWARTZ & JACOBY, *supra* note 33, at 94-96 (jurisdictional findings of district courts must conform to those of the Court of Claims). A circuit court of appeals has also rejected this type of claim as a basis for jurisdiction under the Tucker Act. See *Blaze v. Moon*, 440 F.2d 1348, 1349 (5th Cir. 1971); *cf.* *Ogletree v. McNamara*, 449 F.2d 93 (6th Cir. 1971). *Gnotta* has been severely criticized. See generally DAVIS (Supp. 1970) 904; Cramton, *Nonstatutory Review* 389-91; 1969 *Duke Project* 206-07.

had been discharged in violation of other administrative regulations which had provided no express judicial remedy.<sup>42</sup> Concluding that the President must be assumed to have been aware of this precedent,<sup>43</sup> the court held that the absence of an express *denial* of judicial remedies under Executive Order No. 11,478 implied an intent that judicial relief be allowed.

By finding jurisdiction under the Tucker Act, albeit via implication from the silence of the Executive Order regarding judicial remedies, the Court of Claims circumvented the bar which would ordinarily be raised by the sovereign immunity doctrine, since the Tucker Act provides consent to be sued.<sup>44</sup> The court was then presented with the question of reviewability, a question considered only in dicta in prior hiring and promotion discrimination cases because of the sovereign immunity bar.<sup>45</sup> Since the government had conceded the discrimination and determined the level to which Chambers would have been hired, there was no further administrative discretion to be exercised before an award could be determined, and the court was therefore not precluded by reviewability standards. In prior cases courts had been reluctant to exercise the power of judicial review since they would have had to decide at what level the applicant would have been hired or to what level he should have been promoted.<sup>46</sup> While this problem did not confront the court in *Chambers*, in a companion case, *Allison v. United States*,<sup>47</sup> the court solved this reviewability problem by suspending judicial proceedings until the necessary administrative findings were made as to the grade to which the litigants would have been

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42. E.g., *Simon v. United States*, 113 Ct. Cl. 182, 190-91 (1949). *Chambers* attempted to distinguish *Gnotta* as not having considered or cited Court of Claims cases such as *Simon*. The other purported distinction of *Gnotta* was its lack of prior necessary administrative determinations, see text accompanying note 48 *infra*, which were present in *Chambers*. As is discussed in note 49 *infra*, these distinctions are unpersuasive.

43. 451 F.2d at 1052.

44. See note 36 *supra*.

45. See note 33 *supra*. For a discussion of reviewability in suits alleging wrongful dismissal, see *Johnson & Stoll, supra* note 33, at 182-88 (finding the scope of review quite limited).

46. See, e.g., *Gnotta v. United States*, 415 F.2d 1271, 1276 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970); *Mow Sun Wong v. Hampton*, 333 F. Supp. 527, 529-30 (W.D. Cal. 1971).

47. 451 F.2d 1035 (Ct. Cl. 1971). The process of suspending the proceedings until a more adequate administrative record is obtained has been used prior to *Allison*. See Brenner, *Judicial Review by Money Judgment in the Court of Claims*, 21 FED. B.J. 179, 181 n.7 (1961). The Court of Claims lacks jurisdiction to remand for further administrative proceedings. *Id.* However, a district court could properly remand the case to the administrative agency. See *Johnson & Stoll, supra*, at 187.

hired or promoted. *Chambers* and *Allison* thus appear to permit judicial relief, but only where there are administrative findings that: (1) there was discrimination violating an Executive Order; (2) the litigant would have been hired or promoted but for the discrimination; and (3) the litigant would have been hired or promoted to a designated position.<sup>48</sup>

As vigorously noted by the dissent, the majority's avoidance of the sovereign immunity bar encounters two problems. First and most obvious is the weak rationale used to find the right to judicial relief implied by the executive order.<sup>49</sup> Second, by finding jurisdiction through a combination of Executive Order No. 11,478 and the Tucker Act, the court in effect allowed the Executive to waive sovereign immunity. Only the legislature may give consent to be sued<sup>50</sup> and, since the authorizing statute did not give such consent, the Executive was not empowered to do so.<sup>51</sup>

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48. Apparently, even under *Chambers* and *Allison* the court is not to determine whether there was discrimination which affected a decision to hire or promote. Although these issues are directed at the question of reviewability, they may be related to the sufficiency of the claim within the meaning of the Tucker Act. For example, it could be argued that a claim will not fall within the Tucker Act's jurisdictional scope unless it is based upon an administrative finding of discrimination. A mere allegation of discrimination is not sufficient. See text accompanying notes 52-53 *infra* and note 36 *supra*.

Furthermore, *Chambers* and *Allison* did not completely rule out the possibility of reaching the merits of a racial discrimination claim. For example, where the issue of discrimination is reviewable, the clear implication of *Chambers* is that a court may go on to determine the merits. Cf. DAVIS (Supp. 1970) 904-05. See also text accompanying notes 52-53 *infra*.

49. The majority opinion relied on cases which were factually distinguishable from *Chambers* and *Allison*, since they involved illegal discharge of government employees. See note 33 *supra*. Second, the majority in relying upon the implication found in *Simon*, note 42 *supra*, did not mention or distinguish the holding of *Eastport Steamship Corp. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967), which required that any implication from the statute, regulation or order must be mandated. See note 36 *supra*. "Violation of a statute or nonfulfillment of a statutory scheme does not of itself create a legal claim in a private claimant; it may violate only a duty to the public." SCHWARTZ & JACOBY, note 33 *supra*, at 120. Also, it is unlikely that the President and Congress would have been aware of such cases as *Simon* and still leave judicial review to be implied by the Court of Claims. See note 43 *supra* and accompanying text. Rather, the President and Congress would probably have made express provision for judicial review in order to remove any doubt about such relief. Moreover, as is indicated in *Gnotta*, the absence of an express judicial review provision and the text of the executive order providing for the administrative reviewing procedure, see notes 39, 41 *supra*, would seem to indicate only administrative relief was intended. Lastly, *Gnotta* expressly held the claim would not be sufficient even if discrimination did in fact occur. 415 F.2d at 1277.

50. See notes 19-21 *supra* and accompanying text. However, it might be argued that Congress had delegated its power of consent to be sued to the Executive via the equal employment opportunity statute, 5 U.S.C. § 7151 (1970). Under such an analysis, consent to be sued in a federal regulation might be upheld, although not expressly given in a statute by Congress.

51. See notes 19-21 *supra* and accompanying text.

*Chambers* and its companion case *Allison* are significant in several respects. First, the decisions give rise to an apparent conflict between the Court of Claims and other federal courts with regard to whether a violation of Executive Order No. 11,478 falls within the scope of the Tucker Act and thereby removes the sovereign immunity bar. In addition, the rationale used by the Court of Claims can be criticized and both *Chambers* and *Allison* leave many unanswered questions.<sup>52</sup> Since the findings were conceded by the government in *Chambers* and were not denied in *Allison*, one may wonder in the following situations whether there is a sufficient claim to fall within the Tucker Act, and whether such claim is of a reviewable type: (1) when the Government denies the discrimination; (2) when there are conflicting administrative findings of no discrimination; or (3) when the agencies consistently hold that no discrimination occurred. Furthermore, can the court find discrimination as a matter of law and then suspend the proceedings, as in *Allison*, for the necessary findings prior to awarding a remedy? However, the decisions have a significant, desirable result. Sovereign immunity is no longer a bar to suits seeking judicial review of government racial discrimination and the court can now screen cases under the more appropriate concept of reviewability. Such a result, which ultimately will lead to a review of the merits, has long been advocated.<sup>53</sup>

### *Implied Waiver by the APA*

Courts have increasingly abrogated sovereign immunity by construing the APA as an implied waiver.<sup>54</sup> Recognized in the Court

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52. For a discussion of the weakness in the majority opinion, see notes 36, 49 *supra*.

53. DAVIS (Supp. 1970) 904. While the *Chambers* decision may reach a just result, its shaky judicial reasoning indicates all the more justification for express legislative solutions to the problem of sovereign immunity.

54. National Helium Corp. v. Morton, 326 F. Supp. 151, 154 (D. Kan. 1971), *aff'd on other grounds*, \_\_\_ F.2d \_\_\_ (10th Cir. 1971); School Bd. of Okaloosa Co. v. Richardson, 332 F. Supp. 1263, 1268 (N.D. Fla. 1971); Schroeder Nursing Care, Inc. v. Mutual of Omaha Ins. Co., 311 F. Supp. 405, 409 (E.D. Wis. 1970); Powelton Civic Home Owners Ass'n v. HUD, 284 F. Supp. 809, 834 (E.D. Pa. 1968). See also cases cited in notes 55 and 56 *infra*.

For cases where waiver was originally found but the circuit has subsequently reversed its position, see note 67 *infra*. Commentators have also reached conflicting results. Compare Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 91-93 (1965) (finding waiver) and Cramton, *Nonstatutory Review* 417-18 n.143 (recognizing the possibility but expressing doubts) with Byse & Fiocca 330 (implying no waiver result).

of Appeals for the Second Circuit,<sup>55</sup> the implied waiver theory is now also fully accepted by the Court of Appeals for the District of Columbia Circuit.<sup>56</sup> The leading District of Columbia case is *Scanwell Laboratories, Inc. v. Shaffer*,<sup>57</sup> noted primarily as a case on standing.<sup>58</sup> In *Scanwell* an unsuccessful bidder on a FAA contract brought suit to have the contract award declared null and void, alleging agency action which violated government contracting statutes. Although sovereign immunity would normally have barred the suit, the court held that Congress had implied a waiver of sovereign immunity in section 10 of the APA, noting that “any other construction would make the review provisions illusory.”<sup>59</sup> Section 10 specifically provides that any person adversely affected by agency action is entitled to judicial review.<sup>60</sup> Other courts have reached the same result through an alternative rationale. These courts have viewed sovereign immunity as a subject matter jurisdictional defect and then, holding that the APA is an independent source of statutory jurisdiction which cures subject matter jurisdictional defects, have proceeded to hold that the APA cures the jurisdictional defect of sovereign immunity.<sup>61</sup>

Other considerations also support construing section 10 of the APA as an implied waiver of sovereign immunity. First, the require-

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55. *Kletschka v. Driver*, 411 F.2d 436, 445 (2d Cir. 1969); *Krawez v. Stans*, 306 F. Supp. 1230, 1233 (E.D.N.Y. 1969) (alternative holding). See also 1969 *Duke Project* 216.

56. *Knox Hill Tenants Council v. Washington*, 448 F.2d 1045, 1060 (D.C. Cir. 1971) (concurring opinion); *Lodge 1858, AFGE v. Paine*, 436 F.2d 882, 893 n.69 (D.C. Cir. 1970); *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 873-74 (D.C. Cir. 1970); *Lombard Corp. v. Resor*, 321 F. Supp. 687, 692-93 (D.D.C. 1970); *Schoonmaker v. Resor*, 319 F. Supp. 933, 940 (D.D.C. 1970), *rev'd on other grounds*, 445 F.2d 726 (1971). See also *IWW v. Clark*, 385 F.2d 687, 693 n.10 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 948 (1968). But see *Arizona v. Hobby*, 221 F.2d 498, 500 n.6 (D.C. Cir. 1954).

57. 424 F.2d 859 (D.C. Cir. 1970).

58. See 1970 *Duke Project* 190 n.96; 19 KANSAS L. REV. 558 (1971).

59. 424 F.2d at 874. See also *Byse*, note 2 *supra*, at 1511.

60. Administrative Procedure Act § 10(b), 5 U.S.C. § 702 (1970).

61. See, e.g., *School Bd. of Okaloosa, Co. v. Richardson*, 332 F. Supp. 1263, 1267-68 (N.D. Fla. 1971); *Powelton Civic Home Owners Ass'n v. HUD*, 284 F. Supp. 809, 834 (E.D. Pa. 1968). Under the curing of jurisdictional defects view, “independent source of jurisdiction” and “waiver of sovereign immunity” may be used interchangeably. *Cramton, Nonstatutory Review* 424; 1969 *Duke Project* 216 n.282. However, a second view considers these two concepts distinguishable. *Id.*; *Berger, supra* note 54, at 92 n.199 (1965); *Byse & Fiocca* 330. Under this latter view, conflicting results are advocated. Compare *Berger, supra* (APA is a waiver but is not an independent source of jurisdiction) with *Byse & Fiocca, supra* (APA is an independent source of jurisdiction but no waiver should be implied).

For a discussion of the APA as an independent source of statutory jurisdiction, see pp. 227-33 *supra* and accompanying text.

ments to be met before review is allowed under the APA would protect those governmental interests supposedly guarded by sovereign immunity,<sup>62</sup> so that wholesale interference with governmental operations would be avoided. Second, any increase in judicial review of administrative action by construing the APA as an implied waiver would deter administrative arbitrariness and thus fulfill a basic policy objective of administrative law.<sup>63</sup> Third, judicial action in construing a waiver of sovereign immunity may serve as a catalyst to spur the legislature into enacting much needed legislation.<sup>64</sup> Finally, the waiver theory "possesses the virtues of simplicity and ease of application,"<sup>65</sup> and therefore is preferable to the present erratic and confusing law on sovereign immunity.<sup>66</sup>

However, contrary to the positions taken by the Courts of Appeals for the Second and District of Columbia Circuits, the weight of authority holds that sovereign immunity operates independently of the judicial review provisions of the APA,<sup>67</sup> and the arguments against

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62. A litigant must first show that the APA applies. *See, e.g., Hooper v. United States*, 331 F. Supp. 1056 (D. Conn. 1971) (APA not applicable where money damages are sought). Secondly, in order for the judicial review section to become operative, review must not be precluded by statute nor involve a matter of agency discretion. Administrative Procedure Act § 10(a), 5 U.S.C. § 701(a) (1970).

63. *See Berger, supra* note 54, at 93.

64. The court can best fulfill its role by enunciating a decision which will serve as a catalyst to legislative action and as an interim solution to the many problems which will undoubtedly arise due to a change in a long established policy of governmental immunity. Comment, *The Role of the Courts in Abolishing Governmental Immunity*, 1964 DUKE L.J. 888, 892.

65. *Littell v. Morton*, 445 F.2d 1207, 1212 (4th Cir. 1971).

66. Cramton, *Nonstatutory Review* 418.

67. The First, Fourth and Eighth circuits have rejected implied waiver outright. *Littell v. Morton*, 445 F.2d 1207, 1212 (4th Cir. 1971); *Gnotta v. United States*, 415 F.2d 1271, 1276 (8th Cir.), *cert. denied*, 397 U.S. 934 (1969); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (8th Cir. 1967); *Cyrus v. United States*, 226 F.2d 416, 417 (1st Cir. 1955). The Fifth Circuit originally held there was waiver, *Estrada v. Ahrens*, 296 F.2d 690, 698 (5th Cir. 1961) but has since reversed its position, *Colson v. Hickel*, 428 F.2d 1046, 1050 (5th Cir. 1970), *cert. denied*, 401 U.S. 911 (1971). *But see Blaze v. Moon*, 440 F.2d 1348, 1349 (5th Cir. 1971). Earlier decisions in the Ninth Circuit had also found implied waiver, *Converse v. Udall*, 399 F.2d 616, 618 (9th Cir. 1966), *cert. denied*, 393 U.S. 1025 (1969); *Mulry v. Driver*, 366 F.2d 544, 549 (9th Cir. 1966); *Coleman v. United States*, 363 F.2d 190, 193 (9th Cir.), *rev'd* 390 U.S. 599 (1966); *Adams v. Witmer*, 271 F.2d 29, 34 (9th Cir. 1958), but it too has recently reversed its position. *Rockbridge v. Lincoln*, 449 F.2d 567, 573 (9th Cir. 1971); *Washington v. Udall*, 417 F.2d 1310, 1320 (9th Cir. 1969). Similarly the Tenth Circuit formerly held there was waiver, *Brennan v. Udall*, 379 F.2d 803, 805 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967), but changed its position in *Motah v. United States*, 402 F.2d 1, 2 (10th Cir. 1968).

waiver are substantial. Under the general rules of statutory construction, waiver of sovereign immunity must be express and not implied and it is clear that the APA contains no such express language.<sup>68</sup> Moreover, in dictum the Supreme Court has stated, “[s]till less is the [APA] to be deemed an implied waiver of all governmental immunity from suit.”<sup>69</sup> Finally, the legislative, rather than the judicial forum, is better equipped to provide a comprehensive and uniform solution to the problem of sovereign immunity.<sup>70</sup>

### *The Balancing Approach of Littell v. Morton*

In *Littell v. Morton*,<sup>71</sup> the Court of Appeals for the Fourth Circuit held that, although sovereign immunity was fully applicable to the case, judicial review could not be barred unless “the underlying policies of the doctrine of sovereign immunity are so strong . . . as to require dismissal . . . .”<sup>72</sup> *Littell* was employed as general counsel for the Navajo Indian Tribe under a contract with the Department of the Interior. After sixteen years under the contract the Secretary of the Interior threatened termination, charging *Littell* with misconduct in his relations with the Tribe. *Littell* attempted to enjoin the Secretary from terminating the contract but, after protracted litigation, the Court of Appeals for the Fourth Circuit determined that *Littell* had breached the contract<sup>73</sup> and the Secretary immediately cancelled it.<sup>74</sup> While the contract dispute was being litigated *Littell* continued to

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*But see* National Helium Corp. v. Morton, 326 F. Supp. 151, 154 (D. Kan.) (finding implied waiver), *aff'd*, \_\_\_ F.2d \_\_\_ (10th Cir. 1971) (finding alternative grounds to allow judicial review).

68. Administrative Procedure Act § 10, 5 U.S.C. § 701 et seq. (1970). For a discussion of statutory consent by the United States to be sued, see notes 19-22 *supra* and accompanying text. Also, the legislative history does not support the waiver position. *See generally* Dickinson 546. *But see* Berger, note 54 *supra*, at 92 (arguing that the “no waiver” position is a self-defeating construction contrary to the intent of the legislative history of the APA).

69. *Blackmar v. Guerre*, 342 U.S. 512, 515-16 (1962). Furthermore, in at least five cases the Supreme Court has held without any discussion of the APA that sovereign immunity barred review of administrative decisions. *Hawaii v. Gordon*, 373 U.S. 57 (1963); *Fresno v. California*, 372 U.S. 627 (1963); *Dugan v. Rank*, 372 U.S. 609 (1963); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949). *See also* *Littell v. Morton*, 445 F.2d 1207, 1212-14 (4th Cir. 1971).

70. *See* Cramton, *Nonstatutory Review* 418.

71. 445 F.2d 1207 (4th Cir. 1971).

72. *Id.* at 1214.

73. *Udall v. Littell*, 338 F.2d 537 (D.C. Cir. 1964); 366 F.2d 668 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967).

74. *Udall v. Littell*, 366 F.2d 668 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967).

serve as general counsel but the Secretary refused to pay for those services. After the termination of the original dispute Littell brought a second action to compel the Secretary to pay for those services rendered from the date of the original suit to the date when the court of appeals finally determined his misconduct. The district court concluded that sovereign immunity barred it from taking jurisdiction and, alternatively, that the Secretary's disapproval of the claims was an exercise of discretionary power and not reviewable under the APA.<sup>75</sup>

The court of appeals agreed that normally sovereign immunity should bar judicial review because a judgment for Littell would require the government to pay money. Circumvention by the officer suit was not available since the Secretary's actions were constitutional and clearly within his statutory authority. Although it might be argued that Littell had been deprived of property without due process of law and therefore the constitutional exception was applicable, Judge Winter concluded that *Larson v. Domestic and Foreign Commerce Corp.*<sup>76</sup> precluded any fifth amendment argument based on contract rights. Moreover, in a well reasoned analysis, Judge Winter rejected the theory of implied waiver by the APA.<sup>77</sup>

The court then proceeded to weigh the benefits of allowing judicial review against preclusion of review by sovereign immunity.<sup>78</sup> Judge

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75. *Littell v. Hickel*, 314 F. Supp. 1176 (D. Md. 1970). The circuit court found the Secretary's actions to be discretionary but reversed the non-reviewable action, declaring that "the APA provides limited judicial review to determine if there was an abuse of that discretion." 445 F.2d at 1211.

76. 337 U.S. 682 (1949).

77. See also notes 54-70 *supra* and accompanying text for a discussion of implied waiver of sovereign immunity by the APA.

78. Since Judge Winter went through an analysis of present sovereign immunity law first, *Littell* appears to add a fourth step in the operation of sovereign immunity law. For a discussion of the prior three steps see notes 10-32 *supra* and accompanying text. Consequently, a court need never apply the balancing approach if (1) sovereign immunity does not arise or (2) the doctrine can be circumvented. One unanswered question, however, is whether or not the balancing approach should be applied when the *Larson* proviso operates to prevent the apparent availability of the officer suit, thus barring review. For a discussion of the *Larson* proviso, see notes 30-32 *supra* and accompanying text. Presumably, a suit should be barred under the *Larson* proviso but judicial review could still be allowed under the *Littell* analysis.

Other commentators have suggested balancing type approaches similar to that used in *Littell*. See DAVIS (Supp. 1970) § 27 (asking who is the sovereign and what are the sovereign's interests); Carrow, note 2 *supra*, at 10-21 (finding four criteria: form of proceeding; nature of administrative action; type of interest affected; and character of agency sued).

It can be argued that these types of approaches, including *Littell*, are shifting away from

Winter listed and evaluated a number of factors: (1) the degree of interference with governmental programs caused by review; (2) the nature of the governmental program or agency; (3) the extent to which agency expertise would be supplanted by review; and (4) the appropriateness of judicial review to the individual case. The court considered these factors<sup>79</sup> and found they favored judicial review of *Littell's* case.<sup>80</sup>

*Littell* can be viewed as an intermediate judicial position on sovereign immunity. It represents the most a court can do without fully abrogating the doctrine<sup>81</sup> or, alternatively, accepting the constraints of present sovereign immunity law.<sup>82</sup> The balancing approach denies judicial review only where positive harm to the government would result, and seeks to delineate in a forthright analysis the limits in reviewing governmental action.<sup>83</sup> However, the *Littell* approach does

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the doctrine of sovereign immunity to an analysis of reviewability. In fact, it has been observed that sovereign immunity was a primitive judicial device aimed at reviewability and that today the doctrine is unnecessary since there are more sophisticated methods to govern judicial review. Cramton, *Nonstatutory Review* 425-26. If this is so, the balancing approach should be used in and of itself (without the prior reliance upon sovereign immunity law employed in *Littell*) as a reviewability analysis.

79. An additional factor should be included in the *Littell* approach. Davis states that "there is lack of incentive to provide the kind of procedural safeguards that courts would insist upon if sovereign immunity did not cut off review." DAVIS (Supp. 1970). Thus, a court in weighing the advantages of judicial review should consider the need for a judicial incentive to force agencies to provide adequate procedural safeguards. *Cf. id.* § 27.01.

80. Another 1971 sovereign immunity case illustrates a situation where the balancing approach would reach the opposite result and allow the doctrine to bar judicial review. In *Ogletree v. McNamara*, 449 F.2d 93 (6th Cir. 1971), Black employees at the Wright Patterson Air Force Base brought a class action alleging racial discrimination in the employment practices at the base. The circuit court did not use a balancing approach in dismissing the suit on sovereign immunity grounds. However, two factors were mentioned by the court which would seem to weigh heavily under a *Littell* approach in denying judicial review. First, all employee promotions would be temporarily halted. Presumably, this could be considered an unnecessary degree of interference by the judiciary with a vital governmental program (defense facilities). Second, a district court would be required to supervise the hiring, promotion and termination of all employees. Judicial review would certainly be inappropriate in view of the resulting action thrust upon the district court. Furthermore, it might be argued that the process within the Department of Defense in determining and remedying racial discrimination may be quite satisfactory. Therefore, *Ogletree* would likely affirm using a *Littell* approach.

81. See notes 54-67 *supra* and accompanying text.

82. See notes 10-32 *supra* and accompanying text.

83. Courts have a responsibility to provide a rationale, as opposed to a doctrinal basis for resolving disputes between the government and the individual. Carrow, *supra* note 2, at 22-23. See Byse, note 2 *supra*, at 1490-91 (finding most courts are encouraged by *Larson* and its progeny to shirk such a task).

cause long run costs of its own.<sup>84</sup> A lack of uniformity and consistency will result from the differing attitudes of each court concerning the desirability of judicial review of administrative activities.<sup>85</sup> The analysis may be distorted by a bias to compare a single litigant's interest against a range of governmental interests.<sup>86</sup> In addition, the balancing approach is unnecessary since there are more justifiable methods to screen out undesirable judicial review.<sup>87</sup> However, *Littell* may be beneficial as a temporary solution pending the enactment of more appropriate legislation.

### *Legislative Attempts to Abrogate Sovereign Immunity*

Legislation has long been urged as a method to abrogate sovereign immunity,<sup>88</sup> but it is only since 1969 that active steps have been pursued in Congress. Two reasons may account for the recent legislative activity: as administrative activity becomes more visible, unjust results caused by the doctrine also become more visible; and, legislation is viewed as more desirable than judicial intervention:

The legislature, with its public forum and investigative machinery, is better equipped than the courts to outline the desired scope of government liability. A judicial decision necessarily lacks the political comprehensiveness of a legislative enactment, for the court must primarily address itself to a limited fact situation. Furthermore, a court decree is usually retrospective and effects rights established before the decision date. Thus, far reaching and uncertain consequences may result when judicial rather than legislative abrogation is used.<sup>89</sup>

Currently, an amendment to section 10(a) of the Administrative Pro-

84. For a discussion of the long run costs involved in utilizing the fictitious officer suit to circumvent sovereign immunity, see Cramton, *Nonstatutory Review* 399.

85. For a discussion of how much leeway such a broad and indefinite test would give to a court, see Byse, *supra* note 2, at 1492-93.

86. Sovereign immunity law has a propensity to work a greater injustice on the "small plaintiffs." See *Hearings*, *supra* note 17, at 24.

87. Such methods would include dismissal for lack of ripeness, failure to exhaust administrative remedies, lack of standing, and nonreviewability. Cramton, *Nonstatutory Review* 425.

88. 3 DAVIS ch. 27; JAFFE 197-98, 213-31, 229 n.123; Byse, *supra* note 2, at 1479; Carrow, *supra* note 2, at 23; Currie, *The Federal Courts and the American Law Institute* (pt. II), 36 U. CHI. L. REV. 268, 290 (1969). See generally Cramton, *Nonstatutory Review* 417-20, 428-36 (suggesting Congress act in view of the absence of judicial reform).

Moreover, Professor Davis has also suggested that legislative reform is not necessary if the courts would return to the foundation cases and merely reach consistent, rational and just results. DAVIS (Supp. 1970) § 27.01. See also 1969 *Duke Project* 217.

89. Comment, *The Role of the Courts in Abolishing Governmental Immunity*, 1964 DUKE L.J. 888, 891. See also Cramton, *Nonstatutory Review* 418.

cedure Act<sup>90</sup> is the only actively pursued legislation abrogating sovereign immunity. The amendment was originally formulated in 1969 by the Administrative Conference of the United States, and the Administrative Law Section of the American Bar Association<sup>91</sup> and was approved in principle in February, 1970 by the House of Delegates of the Bar Association.<sup>92</sup> In March of that year Senator Edward Kennedy introduced a bill<sup>93</sup> identical to the Administrative Conference's proposal and hearings on that bill were held in June before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary.<sup>94</sup> However, no action was taken by the Senate.<sup>95</sup> In February 1971 Senator Kennedy reintroduced the proposed amendment<sup>96</sup> which was reported from the subcommittee to the full Judiciary Committee in July, 1971.<sup>97</sup> Prospects of further action are unknown.<sup>98</sup> The amendment has many strong proponents<sup>99</sup> but the Justice Department has opposed the bill.<sup>100</sup>

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90. 5 U.S.C. § 701 *et seq.* (1970).

91. Administrative Conference of the United States, Recommendation No. 9—Statutory Reform of the Sovereign Immunity Doctrine (Oct. 22, 1969).

92. DAVIS (Supp. 1970) § 27.00-8.

93. S. 3568, 91st Cong., 2d Sess. (1970).

94. *Hearings on S. 3568 Before the Subcom. on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 91st Cong., 2d Sess. (1970).

95. No action at all has been taken in the House of Representatives.

96. S. 598, 92d Cong., 1st Sess. (1971).

97. Letter from Senator Edward M. Kennedy, Chairman, Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate to the *Duke Law Journal*, Dec. 14, 1971.

98. *Id.*

99. See *Hearings*, *supra* note 17, at 6-64, 245-54. See also DAVIS (Supp. 1970) § 27; Cramton, *Nonstatutory Review* 428-36; 1969 *Duke Project* 218-20.

100. *Hearings* 64-75. In addition to preventing undue judicial interference with the government, see note 22 *supra*, a second justification for sovereign immunity is offered by the Justice Department: the doctrine screens out unmeritorious suits, thereby preventing the federal government from being subjected to a burdensome and costly plethora of suits. This rationale is reflected in the practice of the Department since the doctrine is asserted in such areas as agricultural relations, government employment, tax investigation, postal matters, administration of labor legislation, control of subversive activities, food and drug, and grant-in-aid programs. Cramton, *Nonstatutory Review* 427-28. However, this second justification is unpersuasive. First, sovereign immunity is likely to be asserted to dismiss meritorious as well as unmeritorious claims, since "[g]overnment lawyers are not unlike other lawyers in that they like to win cases in which they are involved." *Id.* Second, determining whether a suit is meritorious is a function more appropriately left to the courts than to the Justice Department. Third, the apprehension of greater litigation is an exaggerated fear of the unknown; present litigation is not crippling and the cost of bringing a suit eliminates a great deal of litigation. *Id.* Finally, assertion of sovereign immunity is unnecessary, since there are other methods to screen out litigation, *id.*, and is inappropriate because

The proposed amendment would waive sovereign immunity only in matters covered by the APA and only in suits not prohibited by the exceptions to the judicial review provision.<sup>101</sup> The limitations on relief in statutes already granting waiver would not be changed nor would defenses available to the government be affected.<sup>102</sup> It is generally agreed that the proposed statute would not result in undue judicial interference with governmental operations and it is viewed as the most appropriate method to abrogate sovereign immunity.<sup>103</sup>

## VII. JUDICIAL REVIEW—STANDING

### THE DATA PROCESSING STANDARD AND THE RETURN OF DISCRETIONARY FACTORS

In spite of recent attempts by the Supreme Court to clarify and redefine the doctrine of standing,<sup>1</sup> the lower courts still appear to be immersed in the complexity and confusion which has historically plagued this area of federal law.<sup>2</sup> To a large extent many of these

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the additional burden on government lawyers can be justified on the same basis as is judicial review in general—the desirability of a judicial determination of the legality of official action. The ideal of a government under law can be realized only if persons are provided with an adequate set of judicial remedies against that government, its officials and its agencies. *Id.* at 428.

101. Administrative Procedure Act, § 10(a), 5 U.S.C. § 701(a) (1970). To this extent, the amendment and the theory of implied waiver are quite similar. See note 62 *supra*. However, the amendment is preferable since it expressly deals with many other issues in regard to sovereign immunity which are never considered in the implied waiver theory. For example, the amendment would eliminate the prior problems encountered by litigants in naming the proper party defendant when suing the government. See S. 3568, 91st Cong., 2d Sess. (1970) and S. 598, 92d Cong., 1st Sess. (1971). See generally Cramton, *Nonstatutory Review* 449-59. For a discussion of separate legislation waiving sovereign immunity in suits involving land title disputes with the United States, see Steadman, *supra* note 22, at 45-79.

102. DAVIS (Supp. 1970) § 27.00-8; Cramton, *Nonstatutory Review* 418; 1969 *Duke Project* 218-20.

103. DAVIS (Supp. 1970) § 27.00-8; Cramton, *Nonstatutory Review* 425; 1969 *Duke Project* 218-20.

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1. *Barlow v. Collins*, 397 U.S. 159 (1970); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970); *Flast v. Cohen*, 392 U.S. 83 (1968); *Hardin v. Kentucky Util. Co.*, 390 U.S. 1, 5-7 (1968).

2. The law of standing has been characterized as a "complicated specialty of federal jurisdiction." *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 156 (1953). It has also been called "one of the most amorphous concepts in the entire domain of the public law. That this statement is undoubtedly true is evidenced by the mental gymnastics through which the courts