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tended in the Offerman case that the evidence of the conversation between the two officers was necessary to show how the tests were performed, and not to prove that the same speeds were registered by each of the two devices. The witnesses' independent testimony as to what they actually observed could be used to prove the speeds as indicated by the speed meter and the speedometer.

North Carolina has still another basis upon which such evidence could be admitted. The peculiar rule in North Carolina which permits a corroborating witness to relate past conversations with the first testifying witness would allow this type of evidence, if used for corroboration only and not as evidence of the truth of the matter asserted. Each officer could "corroborate" the other as to the conversation between the two. As this peculiar rule is already overworked and has been criticized, this method of getting the evidence before the court is not recommended.

While there have been no reported decisions in North Carolina concerning the admissibility of evidence obtained by use of the "whammy," there is no reason why such evidence should not be admitted if it is properly presented. To prevent any possible contention that the evidence of the radar-patrol car team is hearsay, it is suggested that the procedure by which the evidence was presented in the Dantonio case be followed.

Michael P. McLeod.

Federal Jurisdiction—The Sovereign Immunity Doctrine—Actions Against Federal Officials—Equitable Relief and Mandamus

The doctrine of the sovereign's immunity from suit has been a part of our jurisprudence at least since the days of Edward I of England. It is elementary that the sovereign is not amenable to suit in his courts unless he has consented to be sued. Amendment XI of the Constitution of the United States expressly grants to states in the union immunity from suits brought in the federal courts by citizens of other states or by citizens or subjects of any foreign state; however, the doctrine of the immunity of the federal government from suit is judge-made.

15 Burnett v. Wilmington, New Bern and Norfolk Ry., 120 N. C. 517, 26 S. E. 819 (1896).
17 State v. Parrish, 79 N. C. 610 (1878).
18 By judicial construction, the Amendment extends to suits against a state brought by a citizen of that state. Hans v. Louisiana, 134 U. S. 1 (1890). Furthermore, foreign states cannot sue one of the United States without its consent. Principality of Monaco v. Mississippi, 292 U. S. 313 (1934).
19 Justice Frankfurter has said, "As to the states, legal irresponsibility was written into the Constitution by the Eleventh Amendment; as to the United
The United States cannot be sued without its consent, and any person who seeks to assert a claim against the United States can do so only within the limits of federal statutes granting jurisdiction of suits against the United States to the district courts and the Court of Claims. Although the federal government has consented to be sued for damages in actions involving contracts, it has long been established that the United States has not consented to suits for specific performance of contracts to which it is a party. With certain enumerated exceptions, the federal government is now subject to suit in tort for damages inflicted by its agents, but no statute consents to suits


The legal issues involved are the same whether a state or a federal official is involved, and the same rules are applied to determine if a suit against an official of either government is in reality a suit against the government which employs him, a suit which cannot be maintained absent consent of that government. Great Northern Life Ins. Co. v. Read, 322 U. S. 47 (1944); In re Ayers, 123 U. S. 443 (1887).


If the defendant is a governmental agency, the tests to be applied to determine if the action is in effect one against the sovereign without its consent are the same as with individual defendant officials. Reconstruction Finance Corp. v. MacArthur Mining Co., Inc., 184 F. 2d 913 (8th Cir. 1950), cert. denied, 340 U. S. 943 (1951).

The Court of Claims, established in 1855, has jurisdiction over claims against the United States founded upon the Constitution, any Act of Congress, any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. 28 U. S. C. § 1491 et seq. (1952). The Court of Claims has appellate jurisdiction of final judgments of the district courts arising under the Tort Claims Act, if all of the appellees consent. 28 U. S. C. § 1504 (1952).

The districts courts have original jurisdiction of petitions for partition of lands wherein the United States has an interest as tenant in common or as joint tenant. 28 U. S. C. § 1347 (1948). Since 1946 the district courts have had exclusive jurisdiction of tort claims against the United States. 28 U. S. C. § 1346(b) (1952). Since 1887 the district courts have had original jurisdiction, concurrent with the Court of Claims, of claims not exceeding $10,000 founded upon the Constitution, any Act of Congress, an executive department regulation, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. 28 U. S. C. § 1346(a) (2) (1952).

The United States does not waive its immunity by instituting an action against those who seek to assert a counterclaim against it which could not have been asserted in an original action, if that counterclaim would not be a defense against the original action as between private litigants. United States v. Patterson, 206 F. 2d 345 (5th Cir. 1953).

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in equity against the United States for relief controlling the tortious activity.

Undoubtedly it is this unavailability of specific performance against the United States and the freedom of the sovereign from equitable decrees curbing tortious activity which have given rise to the complex development of the doctrine of sovereign immunity in suits against federal officials. Courts of equity generally allow specific relief between private parties whenever money damages are inadequate or the plaintiff makes a showing of need; in many situations such relief is also desirable in suits against the United States, but the only possible way to obtain it is to seek a decree against the individual officials involved.

If the court holds that the suit is in effect one against the federal government, it must dismiss the complaint for lack of jurisdiction. This is illustrated in the leading case of *Larson v. Domestic & Foreign Commerce Corp.* In this case the plaintiff contracted with the Regional Director of the War Assets Administration to buy surplus coal. The plaintiff arranged an irrevocable letter of credit payable to the War Assets Administration in spite of the Regional Director's insistence that under the terms of the contract the plaintiff was to deposit cash with a named bank. The Director cancelled the contract and arranged to sell the coal to another party. The plaintiff proceeded against the War Assets Administrator, contending that title to the coal had passed to it, that the defendant was acting "illegally," and that his refusal to effect a delivery of the coal was "unauthorized," and prayed that the defendant be enjoined from selling or delivering the coal to anyone other than the plaintiff. The Supreme Court held that the plaintiff was asking relief against the United States, for the reason that the Regional Director had authority to construe the sales contract whether or not he had actually made an error in construction, and that the complaint must therefore be dismissed for lack of jurisdiction.

The significance of this and other cases dealing with suits against federal officials can be more readily ascertained by dividing the subject matter into several categories.

1. Suits involving official action in excess of valid authority or pursuant to invalid authority. An official's actions are his individual acts and not those of the sovereign if he acts in excess of or without authority, or if the grant of authority itself is unconstitutional, and he may be sued. The language of the court in the *Domestic & Foreign* case re-

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7 337 U. S. 682 (1949).
9 Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 (1952); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 (1951); Lincoln
affirmed this rule and emphasized that a mere showing that the defendant official made an error in the interpretation or application of his authority did not meet the requirements for jurisdiction. Even when it was contended that the officer had made an error so gross as to amount to total lack of authority, the rule has been applied.

2. Suits to prevent wrongful withholding or unconstitutional taking of plaintiff's property. Many cases proceed upon the basis of the right under general law to recover specific property wrongfully withheld.

Several early cases allowed suits for specific relief against federal officers to prevent a wrongful taking without careful examination of whether the officials were acting for the United States pursuant to authority granted or were acting only as individuals. In *Land v. Dollar*, decided shortly before *Domestic & Foreign*, the Maritime Commission contracted with stockholders in a financially weak corporation to grant it an operating subsidy, release certain obligations, loan it money, and procure a loan for it from the Reconstruction Finance Corporation, all for a delivery of the stockholders' shares indorsed in blank to the Commission. When the debtor corporation's


The Court rejected the contention that an officer given the power to make decisions is authorized only to decide correctly. *Id.* at 695. This strict rule is a departure from earlier cases. *Payne v. Central Pacific R. R.*, 255 U. S. 228 (1921).

Rogers v. Skinner, 201 F. 2d 521 (5th Cir. 1953); American Dredging Co. v. Cochrane, 190 F. 2d 106 (D. C. Cir. 1951); Metropolitan Training Center v. Gray, 188 F. 2d 28 (D. C. Cir. 1951); Fay v. Miller, 183 F. 2d 986 (D. C. Cir. 1950). *Contra:* Farrell v. Moomau, 85 F. Supp. 125 (N. D. Cal. 1949) (court decided that officials did not strictly adhere to provisions of the Veteran's Preference Act of 1944 in discharging the plaintiff, thereby acting in excess of statutory authority, and distinguished the *Domestic & Foreign* decision as dependent upon the sovereign property therein involved).


Ickes v. Fox, 300 U. S. 82 (1937) (wrongful invasion of property rights is enjoinable); Goltra v. Weeks, 271 U. S. 536 (1926) (wrongful trespass against personal property is enjoinable); Lane v. Watts, 233 U. S. 525 (1913) (plaintiff can restrain Secretary of Interior and subordinates from acts which would cast a cloud upon plaintiff's title, even though such acts were under color of office); United States v. Lee, 106 U. S. 196 (1882) (officials can be ejected from plaintiff's land to prevent an unconstitutional taking). *Cf.* Perkins v. Lukens Steel Co., 310 U. S. 112 (1940) (Court found that defendant acted pursuant to valid authority and rejected plaintiff's contention that there was a tortious invasion of private rights); Philadelphia Co. v. Stimson, 223 U. S. 605 (1912) (courts have jurisdiction of actions to prevent wrongful invasions of property rights, but plaintiff loses on the merits if official was acting pursuant to a valid grant of authority); Naganab v. Hitchcock, 202 U. S. 473 (1906) (contention rejected that sale of Indian lands pursuant to Act of Congress would be an unconstitutional taking from the tribe).

successor corporation had fully paid all its debts to the United States
the members of the Maritime Commission refused to return the shares,
contending that the stock had been transferred outright, not pledged
as collateral.\textsuperscript{15} The stockholders instituted proceedings against
the members of the Commission to compel return of the stock, alleging
that it had been merely pledged and that the defendants were unlaw-
fully in possession and wrongfully withholding the shares, or, even if
the stock had been transferred outright, the defendants were exceeding
their authority\textsuperscript{16} which allowed the Commission to receive only property
pledged as collateral. The Supreme Court held that if the shares were
pledged the defendants could be sued to compel a return to the right-
ful owners; therefore, since the jurisdictional issue depended upon a
decision on the merits, the district court had jurisdiction to determine
its jurisdiction. Subsequently the Court of Appeals for the District
of Columbia decided that there had been only a pledge of the shares
and granted coercive relief to compel their return.\textsuperscript{17}

After stating that the two major categories of cases where there
will be jurisdiction are (a) where the officer acts in excess of his
authority and (b) where his authority is unconstitutional, the Domes-
tic \& Foreign opinion emphatically rejects the contention that there
is a third category in which official action may be directed or re-
strained—the category of cases which proceeds upon the theory that
the official is "wrongfully" or "illegally" withholding the property of
the plaintiff.\textsuperscript{18} The Court states that such a theory is erroneous in
that it confuses the doctrine of sovereign immunity with the require-
ment that a plaintiff state a cause of action.\textsuperscript{19} The argument that
the sovereign cannot authorize the commission of a tort is also rejected
as the Court points out that under agency law the fact that the agent
acts tortiously does not mean that \textit{ipso facto} he has exceeded his author-
ity, to the extent that he would be acting for himself alone and not
for his principal.\textsuperscript{20} The Court uses broad language to the effect that
specific relief compelling the return of property tortiously taken or
withheld cannot be had against a government officer unless his acts
conflict with the terms of a valid grant of authority and would not be

\textsuperscript{15} Subsequently, the members of the Commission voted the stock at the cor-
poration's annual meeting and participated in the conduct of corporate affairs.
\textsuperscript{17} Dollar v. Land, 184 F. 2d 245 (D. C. Cir.), cert. denied, 340 U. S. 884
(1950). For subsequent developments in the Dollar litigation see Land v. Dollar,
190 F. 2d 366 (D. C. Cir. 1951); Sawyer v. Dollar, 190 F. 2d 623 (D. C. Cir.
1951); United States v. Dollar, 188 F. 2d 629 (D. C. Cir. 1951); Sawyer v.
Dollar, 344 U. S. 806 (1952) (dismissed as moot).
\textsuperscript{18} Larson v. Domestic \& Foreign Commerce Corp., 337 U. S. 682, 692 (1949).
\textsuperscript{19} Id. at 693.
\textsuperscript{20} Id. at 695.
regarded under the law of agency as the actions of the principal.21 A
government, like a corporation, can act only through its agents; there-
fore, to hold that an action will be entertained against an official who
is acting within the scope of his authority for and on behalf of the
sovereign merely because the officer is withholding property “wrong-
fully” would amount to a rejection of the doctrine of sovereign im-
munity. The Court distinguished earlier cases which ostensibly al-
lowed tortious withholding of property as being hinged upon uncon-
stitutional action or lack of authority.22

The language used in Domestic & Foreign would seem to be a
repudiation of all that Land v. Dollar stands for, but the Court did
not overrule the latter case. The Court explained the case23 on which
Land v. Dollar principally relied as one involving an unconstitutional
taking of property, and stated that Land v. Dollar itself proceeded upon
allegations in the complaint that the members of the Maritime Com-
mission were acting without authority.24 The two cases cannot easily
be reconciled. Jurisdiction of the action against the members of the
Maritime Commission was entertained even though the shares of stock
were only pledged, which was exactly the security transaction allowed
by the statute.25 If the Commissioners in Land v. Dollar had received
an outright transfer of the shares, then their acts would have conflicted
with their statutory authority. If the Domestic & Foreign majority
meant by their explanation26 of Land v. Dollar that jurisdiction there
depended upon whether the Maritime Commissioners were authorized
to commit the tort of retaining the shares after the principal debt had
been discharged, this would be inconsistent with the Court’s attempt to
focus attention in all cases to an examination of the official’s grant of
authority, whether he had exceeded it or merely made an erroneous
interpretation, and whether as a matter of agency law the official’s acts
were attributable to his principal.27 In almost any case it would seem
that the plaintiff could show that there was no specific authority to
retain the tortiously withheld property.28

The courts have not decided whether a tortious or wrongful with-

21 Id. at 695.
24 Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682, 702 n. 26
(1949). The footnote states that the complaint in Land v. Dollar alleged that
any acquisition by the Commission which was not a mere pledge of collateral
would violate its statutory authority; therefore, the complaint alleged that the
defendants acted in excess of statutory authority.
25 See note 16 supra.
26 See note 24 supra.
28 No court has explained the Dollar case as involving an unconstitutional
taking.
holding would also be unconstitutional so as to allow jurisdiction whether or not the officer’s activities conflicted with the terms of his grant of authority. A taking of property pursuant to an invalid grant of authority may be enjoined; however, a grant of authority otherwise valid would probably not be held unconstitutional merely because it allows government officials tortiously to withhold property belonging to private persons. In situations involving government property, recent cases where the plaintiffs proceeded upon a theory of wrongful taking or withholding of their property have not met with success; for instance, if plaintiff seeks an order compelling the defendant official to release irrigation waters in which plaintiff has vested rights, relief will be denied if it requires operation of federal dams and the release of federally owned water impounded behind them.

Under the language employed by the Supreme Court in *Domestic & Foreign* it seems certain that if allegations are made that the officer is withholding plaintiff’s property without authority, or in such a manner as to amount to an unconstitutional taking, if not frivolous, will entitle the plaintiff to affirmative relief if he proves the allegations, even though he might also have an action for money damages under the Federal Tort Claims Act.

3. **Suits involving the sovereign’s property.** It was well established that relief which sought to control the disposition of sovereign property would usually be denied. This result was reached either on the theory that the action was in effect one against the sovereign, or because the United States would have to be joined as party defendant. However,

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30 Hudspeth County Conservation & Reclamation Dist. No. 1 v. Robbins, 213 F. 2d 425 (5th Cir. 1954).
32 Story v. Snyder, 184 F. 2d 454 (D. C. Cir.), cert. denied, 340 U. S. 866 (1950), plaintiff sued trustees of Library of Congress Trust Fund to recover a sum for services due, contending that the defendants held his money as constructive trustees, citing Land v. Dollar, 330 U. S. 731 (1947), as supporting his claim for relief. The court rejected his contentions, pointing out that the defendants in the Dollar litigation were tortfeasors.
33 Hudspeth County Conservation & Reclamation Dist. No. 1 v. Robbins, 213 F. 2d 425 (5th Cir. 1954).
35 For the magic effect of the allegation “unconstitutional” see Doehla Greeting Cards, Inc. v. Summerfield, 116 F. Supp. 68 (D. C. 1953) (although officer had authority to make an incorrect decision, plaintiff was entitled to his day in court on basis of allegations that defendant acted arbitrarily and capriciously so as to deprive plaintiff of property without due process of law).
36 Mine Safety Appliances Co. v. Forrestal, 326 U. S. 371 (1945) (action to compel official to cease withholding payments due held to be an action designed to reach money owned by the United States); Maricopa County, Arizona v. Valley Nat. Bank of Phoenix, 318 U. S. 357 (1943) (national bank stock in possession of the Reconstruction Finance Corporation); Minnesota v. United
if the plaintiff had acquired title to what had formerly been sovereign property, federal officers could be restrained from wrongfully interfering with plaintiff's property rights.\textsuperscript{36}

*Domestic & Foreign* contains no language which could be construed to relax the established rule where disposition of sovereign property is sought;\textsuperscript{37} moreover, most recent decisions have reaffirmed that doctrine.\textsuperscript{38} However, in this connection *West Coast Exploration Co. v. McKay*\textsuperscript{29} should be noted. There the plaintiff owned certificates, called "scrip" which gave the owner the right to select public lands for entry. The Director of the Bureau of Land Management with the concurrence of the Secretary of the Interior rejected plaintiff's application for a certain location on the ground that the land sought was mineral land, not subject to selection and entry by any "scrip" holder. The relief sought was a decree compelling approval of plaintiff's application and issuance of a patent to the land, based upon the defendant Secretary of the Interior's alleged lack of authority in rejecting the

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\textsuperscript{36} States, 305 U. S. 382 (1938) (attempt by state to condemn land held in trust by the United States for Indians); New Mexico v. Lane, 243 U. S. 52 (1917) (where dispute is over title to public lands, the United States is entitled to be heard); United States *ex rel.* Goldberg v. Daniels, 231 U. S. 218 (1913) (bidder cannot compel delivery of surplus warship owned by the United States Navy); Naganab v. Hitchcock, 202 U. S. 473 (1906) (action to restrain sale by official of lands held by the United States in trust); Oregon v. Hitchcock, 202 U. S. 60 (1906) (action to restrain officials from alienating Indian lands); Young v. Anderson, 160 F. 2d 225 (D. C. Cir.), *cert. denied*, 331 U. S. 824 (1947) (action to restrain official from leasing lands of the United States).

But a suit to restrain the Secretary of the Interior from placing the burden upon the states to show that swamp lands are non-mineral in character in order to acquire title is not a suit against the United States, even if the disposition of sovereign property might ultimately be affected, where the Secretary acted in excess of his authority. *Work v. Louisiana*, 269 U. S. 250 (1925).

\textsuperscript{37} Ickes v. Fox, 300 U. S. 82 (1937); *Lane v. Watts*, 234 U. S. 525 (1913). \textsuperscript{38} Vinson, C. J., in the majority opinion stated, "In a suit against the officer to recover damages for the agent's personal actions that question is easily answered. The judgment sought will not require action by the sovereign or disturb the sovereign's property." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 687 (1949). "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...." *Id.* at 691 n. 11

\textsuperscript{29} New Haven Public Schools v. General Services Administration, 214 F. 2d 592 (7th Cir. 1954) (public land); New Mexico v. Backer, 199 F. 2d 426 (10th Cir. 1952) (Bureau of Reclamation and Development dam); American Dredging Co. v. Cochran, 190 F. 2d 106 (D. C. Cir. 1951) (United States' barge); Stack v. Strang, 94 F. Supp. 54 (S. D. N. Y. 1950), *rev'd on other grounds*, 191 F. 2d 106 (2d Cir. 1951) (gold coin of the United States). *Accord*: *Seiden v. Larson*, 188 F. 2d 661 (D. C. Cir. 1951), *overruled by West Coast Exploration Co. v. McKay*, 213 F. 2d 582 (D. C. Cir.), *cert. denied*, 347 U. S. 988 (1954) insofar as it held that a suit could not be maintained against a federal officer where government property was involved even if the official acted without statutory authority.

application and alleged clear duty to issue the patent. Even though there was a dictum in Domestic & Foreign that there would be no jurisdiction of an action against a federal official which would require disposition of sovereign property despite claims that the officer acted in excess of statutory authority, the Court of Appeals for the District of Columbia stated that it would be proper to entertain the action if the Secretary had in fact acted without authority, and then proceeded to the merits to the extent necessary to decide the question of authority.

4. Suits turning on the necessity of joining the United States as party defendant. Some of the earlier cases turned on consideration of the indispensability of or the necessity of naming the United States as party defendant. Of course if the United States must be joined this cannot be done without its consent, and the whole action is dismissed. This would seem to be merely a shorthand way of deciding whether the original action is in fact one against the United States, but a dismissal for failure to join a necessary or indispensable party is not technically a dismissal for lack of jurisdiction. The use of this technique often

40 Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682, 691 n. 11 (1949). See note 37 supra. The Court of Appeals pointed out that a homesteader or the locator of a mining claim satisfying requirements under the law could be arbitrarily denied patents and have absolutely no recourse in the courts, just because sovereign property was involved, if the dictum in the Domestic & Foreign opinion were followed. West Coast Exploration Co. v. McKay, 213 F. 2d 582 (D. C. Cir.), cert. denied, 347 U. S. 988 (1954). Apparently the court felt that the Supreme Court did not intend to preclude relief in the nature of mandamus, where the plaintiff was otherwise entitled to it, solely because government property was involved.

43 The court came to the conclusion that the Secretary of the Interior was authorized to make the decision he made, and remanded the case with directions to dismiss for lack of jurisdiction. West Coast Exploration Co. v. McKay, 213 F. 2d 582, 610 (D. C. Cir.), cert. denied, 347 U. S. 988 (1954). Other federal courts have been more strict in allowing jurisdiction when government property is involved. In New Haven Public Schools v. General Services Administration, 214 F. 2d 592 (7th Cir. 1954), plaintiff was seeking a decree compelling conveyance of public land, and he alleged that the official was acting wrongfully in privately contracting to sell the land. The court readily affirmed a dismissal by the district court; however, in this case dismissal could have been for failure to state a claim for relief. In Stack v. Strang, 94 F. Supp. 54 (S. D. N. Y. 1950), rev'd on other grounds, 191 F. 2d 106 (2d Cir. 1951), it was claimed that the defendant Secret Service agent took a gold coin of the United States from the plaintiff while acting wrongfully and without authority. The action was dismissed. See Seiden v. Larson, note 38 supra.

49 Minnesota v. United States, 305 U. S. 382 (1939) (proceeding against property in which the United States has an interest); Wells v. Roper, 246 U. S. 335 (1918) (action to restrain Assistant Postmaster General from cancelling mail carrying contract and from putting new plan into effect); United States ex rel. Goldberg v. Daniels, 231 U. S. 218 (1913) (bidder for surplus warship sought to compel delivery of the craft by Navy Secretary); Young v. Anderson, 160 F. 2d 225 (D. C. Cir.), cert. denied, 331 U. S. 824 (1947) (action to restrain Secretary of Agriculture from leasing government land). Cf. Goltra v. Weeks, 271 U. S. 536 (1926) (United States not a necessary party in action to enjoin Secretary of War from unauthorized seizure of plaintiff's barges).

avoids consideration of the basic questions whether the relief asked would interfere with the administration of governmental affairs, or whether the acts complained of were in fact the acts of the sovereign because the official was acting within the scope of his authority. *Domestic & Foreign* does not attempt to alter this approach to the basic immunity question, but it is encouraging to note that recent cases have met the issue of sovereign immunity squarely and have not approached the issue from the standpoint of whether the United States is an indispensable or necessary party.

5. Suits where official action is necessary to effectuate the relief asked. Although the claim for relief is based upon allegations that the official acted as an individual in injuring the plaintiff's legally protected interest, an issue which might affect the availability of relief in every case is whether the relief sought would require action by the defendant in his official capacity. Seemingly there would be very strong reasons for refusing to entertain an action which seeks to control or direct the official activities of members of the executive branch, but the courts have never refused relief on this ground alone; rather, they seem to use this factor only as a make-weight. Indeed, any

44 Cases recognizing the importance of the effects of the action upon governmental affairs: Perkins v. Lukens Steel Co., 310 U. S. 113 (1940) (many suits had frustrated the policies of the Public Contracts Act and had tied up its administration for more than a year); Wells v. Roper, 246 U. S. 335 (1918) (an intolerable interference with governmental processes to seek to compel Assistant Postmaster General to retain old-fashioned methods of mail delivery); Louisiana v. McAdoo, 234 U. S. 627 (1913) (suit would disturb the whole revenue system and affect the revenue to be anticipated if defendant were ordered to revise tariff rates).

45 Two exceptions: Aktiebolaget Bofors v. United States, 194 F. 2d 145 (D. C. Cir. 1951); Jackson v. Sims, 201 F. 2d 259 (10th Cir. 1953).

The complaint may be dismissed for failure to name another official as defendant. Snyder v. Buck, 340 U. S. 15 (1950) (successor in office not joined in time); Cha-toine Hotel Apartments Building Corp. v. Shogren, 204 F. 2d 256 (7th Cir. 1953) (failure to join Federal Housing Administrator); Payne v. Fite, 184 F. 2d 977 (5th Cir. 1950); N. Y. Technical Institute of Maryland, Inc. v. Limburg, 87 F. Supp. 308 (D. Md. 1949). Cf. Youngstown Sheet & Tube Co. v. Sawyer, 103 F. 2d 610 (D. C. Cir. 1953), cert. denied, 347 U. S. 903 (1954) (prayer that defendant be ordered to issue license authorizing payment of plaintiff's claim, or pay the plaintiff out of seized assets of alien corporation; controlling reasons for denying relief: official discretion involved, and failure to join Alien Property Custodian); American Dredging Co. v. Cochran, 100 F. 2d 106 (D. C. Cir. 1951) (plaintiff sought to compel return of surplus barge formerly owned by it; controlling reasons for dismissal: defendants acting pursuant to authority, sovereign property involved, and no purely ministerial duty to deliver the barge to plaintiff); Payne v. Fite, 184 F. 2d 977 (5th Cir. 1950) (prayer that postmaster be ordered to deliver mail three times daily instead of only once; controlling reasons for denying jurisdiction: official discretion involved, failure to join Postmaster General). Cf. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 (1951); United States *ex rel.* Goldberg v. Daniels, 231 U. S. 218 (1913).
suit for specific relief against a government official wherein the doctrine of sovereign immunity might have application necessarily involves the official capacity of the defendant. He is sued only because he holds an office; the relief sought of necessity would restrain official action or require affirmative official action.\textsuperscript{48} If the officer has acted without authority or unconstitutionally the jurisdictional question should not hinge upon whether an order rectifying damage done to the plaintiff requires action or inaction in some official capacity.\textsuperscript{49} If the jurisdiction of the courts depended upon whether the relief asked would control official action, federal officials would be absolutely immune from suit.\textsuperscript{50} The very fact that official activity can be directed and controlled by court decree in itself shows that there is more fiction than fact to the theory that there will be jurisdiction if the official acted in an "individual" capacity rather than as an agent of the sovereign.

6. Suits against officials to compel payment of money due under contract. The rule remains unchanged by Domestic & Foreign that an action against an official which has as its object the payment of money pursuant to the terms of a contract made with the defendant in his official capacity, or which prays for money damages because of breach of such a contract, cannot be maintained.\textsuperscript{51} The only course

In Sawyer v. Dollar, 190 F. 2d 623 (D. C. Cir. 1951) the Secretary of Commerce had been ordered to indorse and return certain shares of stock to the plaintiffs; the Secretary contended that he could not be required to act in an official capacity, i.e., indorsing the stock as Secretary of Commerce. The Court of Appeals held that since it had been decided that the defendant had possession of the stock as an individual, he could be required by court decree to yield whatever possession he had, with appropriate indorsements.

Plaintiffs proceeding against government officials for affirmative relief invariably substitute defendant’s successor in office as party defendant, in case of death or retirement. Substitution is governed by F.R. Civ. P. 25(d).

In Doehla Greeting Cards, Inc. v. Summerfield, 116 F. Supp. 68 (D. C. 1953) the court states by way of footnote, “This court interprets the reference in Larson v. Domestic & Foreign Commerce Corp., . . . to a 'suit for specific relief against the officer as an individual' to mean a suit against the individual officer in his official capacity where necessary to effect the relief sought, as distinguished from a suit against the officer which is in effect a suit against the United States.” Id. at 76n.

That they should not be so immune: West Coast Exploration Co. v. McKay, 213 F. 2d 582, 596 (D. C. Cir. 1954), and Sawyer v. Dollar, 190 F. 2d 623 (D. C. Cir. 1951).

Mine Safety Appliances Co. v. Forrestal, 326 U. S. 371 (1945); Nimro v. Davis, 204 F. 2d 734 (D. C. Cir. 1953); Burkley v. United States, 185 F. 2d 267 (7th Cir. 1950); Reconstruction Finance Corp. v. MacArthur Mining Co., Inc., 184 F. 2d 913 (8th Cir. 1950).

There is no jurisdiction to entertain such actions even under the theory of Land v. Dollar, 330 U. S. 731 (1947), to the effect that the plaintiff owns the money and the defendants wrongfully withold it from him. Story v. Snyder, 184 F. 2d 454 (D. C. Cir. 1950) (plaintiff contended that defendants held the money in trust for him).
open to the complaining party is to proceed against the United States for damages in the district courts or in the Court of Claims. 53

7. Suits to compel performance of purely ministerial duties. The Domestic & Foreign opinion also leaves substantially unchanged the availability of relief in the nature of mandamus against an officer to compel performance of a clear legal duty. 53 It had never been held that an action to compel the performance of a purely ministerial duty is in effect a suit against the United States or one requiring the joinder of the United States as a party defendant. 54 On the other hand, if the action is to compel performance of an official duty which involves the exercise of discretion it is a suit against the United States if that exercise is pursuant to the terms of a grant of authority. 55 If the question of clear legal duty turns on the authority of the defendant to refuse to release the property the plaintiff is seeking, then the Domestic & Foreign rule that the defendant's acts must conflict with the terms of the grant of authority comes into play. 56 This illustrates the close interrelationship and interplay of established rules in every suit against federal officers.

Although many actions against federal officers might be disposed of on non-jurisdictional grounds such as failure to exhaust available remedies before seeking equitable relief, 57 it is desirable that the jurisdic-

53 Aktiebolaget Bofors v. United States, 194 F. 2d 145 (D. C. Cir. 1951); see note 4 supra.
Although Fed. R. Civ. P. 81(b) abolishes the writ of mandamus, the remedy itself is still available and may be obtained by appropriate action or motion. Hammond v. Hull, 131 F. 2d 23 (D. C. Cir. 1942). The general principles governing its use are: (1) the duty should be clearly defined and the obligation to act peremptory; (2) the party seeking relief must show that defendant has breached his duty; (3) the courts have no general supervisory power over the executive branch; (4) if the defendant's duty requires an interpretation of the law governing that duty, it will not be interfered with absent arbitrariness or capriciousness on the part of the official; (5) generally, the party seeking this relief must exhaust any administrative remedies available. Hammond v. Hull, 131 F. 2d 23 (D. C. Cir. 1942).
56 Wells v. Roper, 246 U. S. 335 (1918).
58 Franklin v. Jonco Aircraft Corp., 346 U. S. 868 (1953); Rogers v. Skinner, 201 F. 2d 521 (5th Cir. 1953). One district court has stated that if the threat of irreparable injury is serious or if the officer is allegedly acting without authority or unconstitutionally, other remedies need not be exhausted. Parker v. Lester, 98 F. Supp. 300, 307 (N. D. Cal.), appeal dismissed, 191 F. 2d 1020 (9th Cir. 1951); Farrell v. Moomau, 85 F. Supp. 125, 127 (N. D. Cal. 1949).
Cases which could have been disposed of on the ground that plaintiff had suffered no injury to a legally protected interest: New Haven Public Schools v. General Services Administration, 214 F. 2d 592 (7th Cir. 1954); Guiberson v. Reconstruction Finance Corp., 196 F. 2d 154 (5th Cir. 1952). In some cases this was the reason for dismissal. Perkins v. Lukens Steel Co., 310 U. S. 113
The doctrine of sovereign immunity with all of its subtleties is one which frequently confronts the federal courts. It has been suggested that a test avoiding all fictions should be adopted, that only those suits should be dismissed which would unduly interfere with government operations. This measure of jurisdiction would certainly be more in keeping with the fundamental nature of a form of government which derives its authority and power from consent of the governed; however, such a test is not without shortcomings. If adopted it would place upon the courts the heavy burden of predicting the effect of each action upon the operations of the governmental machinery involved, and the necessity of weighing that effect against the interests of the plaintiff and all persons similarly situated.

There is little, if any, likelihood of Congressional action on this subject; therefore, future cases will in all probability continue the same pattern of case by case adjudication and application of the doctrine of sovereign immunity to the peculiar facts of the litigation before the court.

R. G. Hall, Jr.

Insurance—Recovery under Windstorm Clauses

As a result of the recent hurricane which struck North Carolina, many problems will arise as to what damages are recoverable under windstorm clauses of insurance policies. This note is an attempt to set forth some of the rules of law applicable to windstorm clauses.

The extended coverage endorsement generally in use in North Carolina covers direct loss by windstorm. Expressly excepted are all losses caused directly or indirectly by water, whether driven by wind or not, unless the water entered the building through an opening made by wind. Damage to seawalls, docks, piers, boathouses, cabanas, and bulkheads is also excepted.1

1 An example of the usual extended coverage endorsement approved by the North Carolina Fire Insurance Rating Bureau is: "EXTENDED COVERAGE: In consideration of the premium for this coverage shown on the first page of this policy, and subject to provisions and stipulations (hereinafter referred to as ‘provisions’) herein and in the policy to which this endorsement is attached, including riders and endorsements thereon, the coverage of this policy is extended to include direct loss by Windstorm, Hail..."