

INDISPENSABILITY OF GOVERNMENT OR OF SUPERIOR OFFICER IN ACTIONS TO REVIEW ADMINISTRATIVE DETERMINATIONS†

FLEMING JAMES, JR.*

SUITS which are brought to review the propriety of administrative action often present problems which are cast in terms of indispensable parties. In the absence of a statutory procedure for such review it must usually be sought by a suit to restrain or coerce the appropriate individual in the administrative hierarchy.¹ One line of cases holds that in some contexts such a suit is in reality one against the sovereign; or, as it is alternatively put, that the sovereign is an indispensable party.² Where the sovereign is indispensable the action must fail because of sovereign immunity. The other difficulty exists only in cases where this first hurdle has been met and concerns the indispensability of a superior officer when a subordinate has originally been sued. A ruling of indispensability here does not foreclose relief altogether, but may mean that plaintiff must come to the seat of government to pursue his challenge and cannot do so where he lives or where his business is located.³ If the case concerns federal administrative action, a ruling that the superior is indispensable does mean just that.

† This article will appear as part of a forthcoming text on procedure by Professor James, to be published by Little, Brown & Company.

* Professor of Law, Yale Law School, B.A., 1925, LL.B., Yale University. Member, Connecticut Bar.

¹ The Administrative Procedure Act, while assuring judicial review of administrative action, does not provide any specific procedure for securing it. 60 Stat. 243 (1946), 5 U.S.C.A. § 1009 (1952).

² "A statement that the United States is an indispensable party is the equivalent in substance of a statement that sovereign immunity bars the suit against the officer. Nothing of substance depends upon the form of statement." 3 Davis, *Administrative Law Treatise* 558 n.9 (1958) (hereinafter cited as Davis). Cf., however, Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 *Harv. L. Rev.* 1060, 1064 (1946), suggesting that holding an action to be one against the United States has jurisdictional implications which the failure to join an indispensable party does not have. It is no doubt true that a dismissal for failure to join an indispensable party is not equivalent to a ruling that the court lacks jurisdiction over present parties. See Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 *Mich. L. Rev.* 327, 332-334 (1957).

But such failure is not a waivable defect and may be raised even in the appellate court on its own motion. See *McShan v. Sherril*, 283 F.2d 462, 464 (9th Cir. 1960). Cf. *Fed. R. Civ. Proc.* 12(h). If there is a difference between the practical effects of these two lines of reasoning, it would therefore appear only on collateral attack.

See also Hart & Wechsler, *The Federal Courts in the Federal System* 1117-1179 (1953).

³ Unless of course he happens to live or do business at the seat of government.

THE GOVERNMENT AS AN INDISPENSABLE PARTY

The source of the first difficulty is the doctrine of sovereign immunity which is said to render the federal government and each state government immune from suit without its consent.⁴ And generally this consent may be given only by the appropriate legislature.⁵ The natural way to review administrative action would be, in the absence of some statutory procedure, to sue the administrative agency or officer concerned. But suit against the agency or against the officer *as officer* is foreclosed by sovereign immunity; such a suit is regarded as essentially one against the sovereign itself.⁶ But complete absence of judicial review of administrative action leaves the individual exposed to invasion of his property and civil rights from official mistake, or official zeal or even official usurpation. The method worked out by American courts for affording judicial review was the suit against the officer *as an individual* to restrain him from acting *beyond* his legal authority.⁷ This notion is a familiar one where it is claimed either that the officer is acting (or threatens to act), beyond the authority conferred upon him by statute or where his action is pursuant to a statute which is itself attacked as unconstitutional. Perhaps the leading case is *Ex Parte Young*,⁸ in which the Supreme Court characterized an act thus beyond legal authority as "one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a State official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional."⁹ The officer who seeks to proceed under such a law is, in doing so, "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."¹⁰ The Court was not talking about personal liability for damages, but about an injunction which, though directed against the officer's person after the traditional manner of equity, would in effect stop the challenged governmental action. In his Adminis-

⁴ See on the general subject of sovereign immunity Borchard, *Government Liability in Tort*, 34 *Yale L.J.* 129, 229 (1924-1925); *Governmental Responsibility in Tort*, 36 *Yale L.J.* 1, 757, 1039 (1926-27); *Governmental Responsibility in Tort*, 28 *Colum. L. Rev.* 577, 734 (1928); Watkins, *The State as a Party Litigant* (1927); 2 Harper & James, *Law of Torts* ch. 29 (1956) (hereinafter cited as Harper & James).

⁵ 2 Harper & James, § 29.4.

⁶ This is the procedure employed in some states. See *Rommell v. Walsh*, 127 *Conn.* 16, 15 *A.2d* 6 (1940); *Moline Tool Co. v. Department of Revenue*, 410 *Ill.* 35, 101 *N.E.2d* 71 (1951); *Board of Adjustment v. Stovall*, 147 *Tex.* 366, 216 *S.W.2d* 171 (1949).

⁷ 3 Davis, ch. 27.

⁸ 209 *U.S.* 123 (1908).

⁹ *Id.* at 159-160.

¹⁰ *Ibid.*

trative Law Treatise, Professor Davis states that it is "indulging in [a] false pretense" to say "that such a suit is not against the government, even though all concerned are fully aware that it is."¹¹ The fictional nature of this reasoning is emphasized by the fact that suits against government officials are in fact handled and controlled throughout by the Department of Justice. Professor Davis nevertheless concludes that the continued presence of sovereign immunity makes this pretense benign, and that consistent adherence to it is what is needed.¹²

The doctrine of *Ex parte Young* represents the prevailing view.¹³ There are however, some contexts in which the sovereign's presence is required; where the fiction of *Ex parte Young* is not indulged in. The decisions which have sought to define this area make a confusing and inconsistent line of precedents in which two competing attitudes have striven for dominance. One of them approaches, but perhaps does not quite reach, Professor Davis' conclusion.¹⁴ It is championed in the majority opinions in *United States v. Lee*,¹⁵ and *Goltra v. Weeks*,¹⁶ among others.

In *Lee*, the son of the famous general sought possession of a military station and a national cemetery in Arlington, Virginia, from federal officials, who had possession of it in the Government's behalf. Lee traced his title to his maternal grandfather. Defendants claimed under a tax sale and certificate, the validity of which was challenged by Lee. Under proper instructions the jury found title under the tax sale invalid. But the Attorney General of the United States suggested that the court lacked jurisdiction because the suit was really one against the United States. The Supreme Court held otherwise declaring the doctrine of sovereign immunity, "if not absolutely limited to cases in which the United States are made defendants by

¹¹ 3 Davis at 545. See also Block, Suits Against Government Officers and the Sovereign Immunity Doctrine, 59 Harv. L. Rev. 1060, 1079 (1946).

¹² *Ibid.*

¹³ See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Hill v. Wallace*, 259 U.S. 44 (1922); *Ickes v. Fox*, 300 U.S. 82 (1937); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁴ In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824) the Court did take the position that the 11th Amendment "is, of necessity, limited to those suits in which a state is a party on the record." *Id.* at 857. But the stark simplicity of this position did not long endure. See *Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110, 122-124 (1828). Both opinions were written by Chief Justice Marshall. See also note, 35 Iowa L. Rev. 320 (1950). The position taken in *Osborn* was finally abandoned in *In re Ayers*, 123 U.S. 443, 487-492 (1887). See Block, *op. cit.* supra note 11, at 1067.

¹⁵ 106 U.S. 196 (1882).

¹⁶ 271 U.S. 536 (1926).

name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit."¹⁷ The Court relied in part on the reasoning in *Osborn v. Bank of the United States*,¹⁸ wherein Ohio State officials were ordered to restore to the United States money taken from the Bank under a tax statute which was being challenged as invalid in the action before the court. The Court there recognized Ohio's interest, and that process was substantially, though not in form, against the state which should have been made a party if it were amenable to suit. But since it was not, "the court may act upon agents employed by the State and on the property in their hands."¹⁹

In *Goltra*, plaintiff sought to enjoin the Secretary of War and a subordinate from seizing boats which had been leased to plaintiff, and to compel the return of boats already seized. The lease had a clause warranting terminations for breach of condition. The bill alleged that defendants had wrongfully prevented plaintiff from fulfilling the terms of the lease and wrongfully declared the contract terminated. The Court held the United States was not an indispensable party. Plaintiff was seeking an injunction against trespass to his property. "If it was a trespass, then the officers of the Government should be restrained whether they professed to be acting for the Government or not. . . . By reason of their illegality, their acts or threatened acts are personal and derive no official justification from their doing them in an asserted agency for the Government."²⁰

Examples of a different viewpoint are found in *Goldberg v. Daniels*²¹ and in *Larson v. Domestic & Foreign Corporation*.²² Goldberg sought to compel the Secretary of the Navy to deliver to him a warship which had been condemned and put up for bids. Goldberg was the high bidder but the Secretary accepted none of the bids. The lower court denied relief because it found the transaction incomplete until the bid was accepted. The Supreme Court was inclined to agree, but found another reason dispositive. "The United States is the owner in possession of the vessel. It cannot be interfered with behind its back and, as it cannot be made a party, the suit must fail."²³

Larson also involved a sale of surplus government property, coal. Plaintiff claimed that title to the coal had passed to it by virtue of

¹⁷ 106 U.S. at 207, 208.

¹⁸ 22 U.S. (9 Wheat.) 737 (1824).

¹⁹ *Id.* at 842.

²⁰ 271 U.S. at 544.

²¹ 231 U.S. 218 (1913).

²² 337 U.S. 682 (1949).

²³ 231 U.S. at 221.

acceptance of its bid and sought to enjoin sale of the coal to another by the War Assets Administration. Defendant claimed that plaintiff had failed to meet the credit terms of the transaction and also claimed that the suit should be dismissed as one against the sovereign. A majority of the Supreme Court agreed with this latter contention. The opinion pointed out that there was no claim that the administrator was acting unconstitutionally or beyond the authority given him by statute. Rather he was being charged with a mistake in exercising his statutory authority which (according to plaintiff's theory) amounted to the tort of converting plaintiff's property. While this might render the officer personally liable in damages, it did not warrant an injunction. "The Government, as a representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right."²⁴ The decision seems inconsistent with *Lee* and with *Land v. Dollar*,²⁵ decided just two years before, which in one of its aspects contemplated compelling the Maritime Commission to return to plaintiff shares of stock held by it under a pledge²⁶ which had been fulfilled. These decisions were distinguished on grounds which do not seem satisfactory.²⁷ The Court in *Larson* recognized, however, that its decision was inconsistent with *Goltra* and in effect overruled it.²⁸

Larson has been much criticized,²⁹ but three recent decisions make it clear that it represents the view of the present Supreme

²⁴ *Larson v. Domestic and Foreign Corporation*, 337 U.S. 682, 704 (1949).

²⁵ 330 U.S. 731 (1947).

²⁶ The Commission claimed that the transfer had been outright, as it purported to be, rather than by way of pledge.

²⁷ *Dollar* was distinguished by the facile device of ignoring the reasoning described above, expressly given as one alternative basis of decision in the *Dollar* case, and stating that the case stood for the single proposition that administrators who act beyond their statutory powers may be enjoined. 337 U.S. at 702, n.26.

Lee was distinguished as involving an unconditional taking of property for public purposes without compensation. "But the complaint was in ejectment and did not allege unconstitutional taking." Note, 55 Colum. L. Rev. 73, 77, note 25 (1955). The "taking," it seems, is predicated on the finding of title in plaintiff and could be similarly found in *Larson*. Cf. Note, 65 Harv. L. Rev. 466, 476 (1952), suggesting that in *Larson* such a basis was lacking "because the plaintiff had a contract claim, enforceable in the Court of Claims, which would provide just compensation." Justice Frankfurter, however, thought that no recovery in the Court of Claims was available. 337 U.S. at 717, 718 and note 10. Cf. 3 Davis, 565-569.

²⁸ 337 U.S. 682, 700-702 (1949).

²⁹ The decision was noted only in 35 Iowa L. Rev. 320 (1950) and 23 So. Cal. L. Rev. 258 (1950) immediately after it was handed down. Both notes were disapproving. More disapproval came later. Note, Sovereign Immunity and Specific Relief Against Federal Officers, 55 Colum. L. Rev. 73 (1955); Comment, Immunity of Government Officers: Effect of The *Larson* Case, 8 Stan. L. Rev. 683 (1956); 3 Davis, § 27.05; Hart & Wechsler, *The Federal Courts & The Federal System* 1169-1178 (1953).

Court.³⁰ Specific relief by way of injunction, a possessory action or the like is not available under the *Ex parte Young* technique where the officer's conduct is not beyond his statutory or constitutional authority, though it may involve a common law tort. Surely such official conduct ought to be reviewable by some means other than the generally worthless tort claims against the individual officer;³¹ and while an injunction is not a well designed form of review in many situations (probably including *Larson*), yet it surely should not be withheld till the legislature affords a better one.

The decisions before *Larson* might have warranted a distinction between cases where plaintiff claims ownership or a possessory interest in property (even though the government disputes this claim), and cases where plaintiff makes no such claim.³² Other limitations on the availability of the injunction suit against an officer are perhaps more clearly defined and less controversial. The device may not be used where its effect will be (1) to compel specific performance by the government of its contracts; (2) to collect money from the public

³⁰ *Malone v. Bowdoin*, 369 U.S. 643 (1962); *Dugan v. Rank*, 372 U.S. 609 (1963); *Hawaii v. Gordon*, 373 U.S. 57 (1963).

Malone seems the least defensible in terms of the balancing of interests which, it is submitted, should govern decision here. See dissenting opinion by Douglas, J., 369 U.S. at 648; text at notes 37-39 *infra*; The Supreme Court 1961 Term, 76 Harv. L. Rev. 54, 220-2 (1962); Note, 16 Vand. L. Rev. 231 (1962). Here plaintiffs brought an action of ejectment claiming title to land held by defendant as Forest Service Officer of the United States Department of Agriculture. Their claim was derived from a remainder interest in land under a will of 1857 and they asserted that the United States' claim was based on a purported devise in fee by the life tenant under that will. The Lee case was not overruled, but explained as involving an unconstitutional taking without compensation since it was decided before there was any "remedy by which the plaintiff could have recovered compensation for the taking of his land." 369 U.S. 643, 647 (1961).

The other decisions, like *Larson* itself, could well be justified on the basis of prevailing equitable doctrines without invoking the broad basis which seems to give the unwanted doctrine of governmental immunity a new lease on life. But see, 24 U. Pitt. L. Rev. 631 (1963).

³¹ Not only is this often worthless, where it is theoretically available, because of the officer's limited means, but it is often not even theoretically available because of the law's understandable reluctance to make the public service unattractive or to discourage public servants from exercising disinterested and fearless judgment. See 2 Harper & James, §§ 29.8-29.10.

³² Cf. Note, *The Dollar Litigation: A Study in Sovereign Immunity*, 65 Harv. L. Rev. 466 (1952); sources cited note 28, *supra*.

The Dollar litigation note suggests five classes of suits against an officer: (1) those "involving a claim of interest in property the title to which was admittedly in the Government, or called for the assertion of official authority," (2) cases in which possession was sought of goods which the government had contracted to sell but refused to deliver; (3) cases in which an injunction was sought against unconstitutional action; (4) or against action not authorized by statute; (5) or against tortious action. In the first two classes relief is denied. In 3 and 4 it is regularly given. Lee and other cases gave relief in 5 but *Larson*, in effect, overruled this line of cases.

treasury; or (3) to get possession or property "the title to which is unquestionably in the Government."³³ In each of these cases the government is an indispensable party and the relief sought is precluded by sovereign immunity unless the sovereign has consented to suit and to liability. Thus in *Wells v. Roper*³⁴ the Court dismissed a suit for injunction against the Postmaster General where the relief would in effect specifically enforce a contract for the use of plaintiff's automobiles to carry the mails. And in *Mine Safety Appliance Co. v. Forrestal*,³⁵ the Court decided that "[w]here the effect of a private suit is to compel or increase the disbursement of public funds, as—for example—by preventing the Treasury from withholding challenged payments. . . ,"³⁶ the suit is one against the United States. Any hardship which may come to individual claimants from cases of the second type is at least mitigated by the wide availability of procedures for enforcing contract claims against the government.³⁷ That the sovereign should be immune from specific performance seems debatable, but the debate is scarcely one for the limited scope of this article.

The whole doctrine of sovereign immunity is of doubtful validity in terms of today's needs.³⁸ This does not mean, however, that society would be well served by allowing every disgruntled citizen to hail the government into court and involve it in the efforts and expenses of litigation. There should be some sort of screening process which strikes a balance between genuine individual hardship and unreasonable harassment of government and interference with its process.

³³ Douglas, J. in *Land v. Dollar*, 330 U.S. 731, 737-8, (1947), in distinguishing the cases on which the Government relied, characterized the difference thus: "This is not an indirect attempt to collect a debt from the United States by preventing action of Government officials which would alter or terminate the contracted obligation of the United States to pay money. . . . It is not an attempt to get specific performance of a contract to deliver property of the United States. . . . It is not a case where the sovereign admittedly has title to property and is sued by those who seek to compel a conveyance or to enjoin disposition of the property, the adverse claims being based on an allegedly superior equity or on rights arising under Acts of Congress." Cf. also sources cited notes 28 and 31, *supra*.

³⁴ 246 U.S. 335 (1918).

³⁵ 326 U.S. 371 (1945).

³⁶ Judge Washington so characterized the holding in the *Forrestal* case. *George v. Mitchell*, 282 F.2d 486, 490 (D.C. Cir. 1960). He added "But where the suit is one to enjoin regulatory administrative action not involving disbursement of funds to a private claimant . . ." the United States is not indispensable. The Court held that a suit to enjoin the Secretary of Labor from blacklisting plaintiff under the Walsh-Healy Act fell into the latter category; but plaintiff lost on the merits.

³⁷ Note, *Sovereign Immunity and Specific Relief against Federal Officers*, 55 *Colum. L. Rev.* 73, 80 (1955); Note, *The Dollar Litigation: A Study on Sovereign Immunity*, 65 *Harv. L. Rev.* 466, 469 n.31 (1952).

³⁸ See sources cited *supra* notes 4, 28, 31.

The rules in this field should embody tests which are consciously adapted to the need for striking this balance. While some of them may be (e.g., the denial of injunctive relief where there is adequate remedy in the Court of Claims), yet there seems something wrong with a system which allows courts to topple a nationwide administrative program on grounds which represent largely political and economic judgments (paraded as constitutional objections),³⁹ yet which will stay their hands when they are asked to stop the government from converting a few tons of surplus coal. Surely this cannot be justified on the ground that courts are better equipped to make political and economic judgments than to pass on questions of tort and contract law. If *Larson* can be justified, it is in terms of equity doctrine rather than sovereign immunity. And indeed the whole screening process would probably be done adequately in terms of familiar legal and equitable rules if sovereign immunity were altogether banished from the scene.⁴⁰

THE SUPERIOR OFFICIAL AS AN INDISPENSABLE PARTY

Where a program of the federal government is being administered locally by local federal officials, the question often arises whether administrative action taken in the course of the program may be reviewed by suit against the local federal official or whether his superior in Washington is an indispensable party. This question will arise only if the action is maintainable as a suit against *some* officer without the necessity of joining the United States. Before October 5, 1962, this was an important question because of the great hardship which was imposed upon persons who were compelled to sue and try their cases in the District of Columbia at a distance from their homes or places of business where the administrative action had actually impinged upon them.⁴¹ This harsh consequence of a ruling that the superior is indispensable was radically changed, as we shall see,⁴² by an amendment to the venue statute, but the concept of indispensability remains though its practical importance has shrunk.

The decisions on the question of the superior's indispensability represent a confused and unsatisfactory picture.⁴³ The Supreme Court

³⁹ See, e.g., *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935); *United States v. Butler*, 297 U.S. 1 (1936).

⁴⁰ See Block, *op cit.* supra note 11, at 1081 et seq.

⁴¹ See Note, *Doctrine of Indispensable Parties As Supplied in Review of Administrative Action*, 103 U. of Pa. L. Rev. 238, 253 (1954).

⁴² Text at note 57, *infra*.

⁴³ "Only slight exaggeration is involved in the statement that nine Supreme Court decisions provide nine solutions." 3 Davis, 587.

The nine cases are: *Warner Valley Stock Co. v. Smith*, 165 U.S. 28 (1897);

tried to formulate the test in 1945, in the case of *Williams v. Fanning*.⁴⁴ There the Court declared "that the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him."⁴⁵ On the other hand the superior need not be made a party "if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court," even though the decree would leave the subordinate "under a command of his superior to do what the court has forbidden."⁴⁶ The case itself involved a challenge to a fraud order issued by the Postmaster General directing the postmaster at Los Angeles, where plaintiffs did business, to refuse payment of money orders drawn in plaintiff's favor, to advise the remitter of this prohibition, and to stamp "fraudulent" on all mail directed to plaintiffs and return it to the senders. Plaintiffs sued the local postmaster in Los Angeles to enjoin him from carrying out the order. Under the tests laid down by the court the Postmaster General's presence was held unnecessary. The Court pointed out that it was the local postmaster who would do the act sought to be restrained. "If he desists in those acts, the matter is at an end. That is all the relief which petitioners seek. The decree in order to be effective need not require the Postmaster General to do a single thing. . . ."⁴⁷

This test is not entirely clear or satisfactory. For one thing it "leaves unsettled the case when the subordinate is in a position to give the relief the plaintiff seeks but his doing so may require exercise of a power lodged, at least formally, in his superior."⁴⁸ For another, the test seeks to attach significance to the distinction between affirmative and negative conduct which has proven so disappointingly elusive throughout the history of our law.⁴⁹ Of course where specific relief is

Gnerich v. Rutter, 265 U.S. 388 (1924); *Webster v. Fall*, 266 U.S. 507 (1925); *Colorado v. Toll*, 268 U.S. 228 (1925); *Williams v. Fanning*, 332 U.S. 490 (1948); *Hynes v. Grimes Packing Co.*, 337 U.S. 85 (1949); *Blackmar v. Guerre*, 342 U.S. 512 (1952); *Shaughnessy v. Pedreira*, 349 U.S. 48 (1955); *Ceballos v. Shaughnessy*, 352 U.S. 599 (1957).

⁴⁴ 332 U.S. 490 (1947).

⁴⁵ *Id.* at 493.

⁴⁶ *Id.* at 494.

⁴⁷ *Id.* at 494.

⁴⁸ Wisdom, J. in *Estrada v. Ahrens*, 296 F.2d 690, 696 (5th Cir. 1961). Cf. Note, *Williams v. Fanning Revisited: The Indispensability of a Superior in Judicial Review of Administrative Act*, 54 Colum. L. Rev. 1128, 1132 (1954).

⁴⁹ See, e.g., note, 54 Colum. L. Rev. 1128, 1134-5 (1954); Cf. Lord Eldon's famous decree wherein he circumvented the traditional reluctance to give mandatory orders by enjoining defendant from keeping a canal out of repairs and "continuing the removal of the Stop-gate." *Lane v. Newdgate*, 10 Ves. Jun. 192, 32 Eng. Rep. 818 (Ch. 1804).

asked against the superior this cannot be granted against him unless he is a party.⁵⁰ But the attempt to make the distinction beyond this point overlooked the practicalities of the situation and the extent of the decentralization and delegation of authority which are inextricably a part of most federal administrative programs.⁵¹ What was even more important is the Court's failure in *Williams* to mention expressly other factors which were entitled to the greatest weight, namely, the balancing of practical hardships and convenience to the parties⁵² in determining what was really a kind of venue problem: whether the individual would be compelled to come to Washington, or the government to go where the individual lived.

A later decision of the Supreme Court gave greater recognition to the realities of the situation as it existed under the old venue statute. In *Shaughnessy v. Pedreiro*,⁵³ an alien sought review of a deportation order of the District Director of Immigration by suing the District Director in New York and asking that the order be declared void and its enforcement enjoined. The Government attorneys who represented the Director claimed that the Commissioner of Immigration and Naturalization and Attorney General were indispensable parties. The courts denied this claim; both the Court of Appeals and the Supreme Court stressed practical factors. The latter said:

Otherwise in order to try his case an alien might be compelled to go to the District of Columbia to obtain jurisdiction over the Commissioner. To impose this burden on an alien about to be deported would be completely inconsistent with the basic policy of the Administrative Procedure Act to facilitate court review of such administrative action. We know of no necessity for such a harsh rule.⁵⁴

A still later case, however, *Ceballos v. Shaughnessy*,⁵⁵ repeated the language of the earlier formal test,⁵⁶ though the actual decision

⁵⁰ Perhaps this was all that was involved in *Warner Valley Stock Co. v. Smith*, 165 U.S. 28 (1897), the case that started all the trouble.

⁵¹ See *Estrada v. Ahrens*, 296 F.2d 690, 699 (5th Cir. 1961), for a consonant judicial view.

⁵² See Note, 54 Colum. L. Rev. 1128, 1138-1141 (1954); Note, 103 U. of Pa. L. Rev. 238, 253 (1954); 3 Davis, *Administrative Law Treatise* 596 (1958).

⁵³ 349 U.S. 48 (1955).

⁵⁴ *Id.*, at 53.

⁵⁵ 352 U.S. 499 (1957).

⁵⁶ "[D]etermination of the question of indispensability of parties is dependent, not on the nature of the decision attacked, but on the ability and authority of the defendant before the court to effectuate the relief which the alien seeks." 352 U.S. at 603.

As Professor Davis points out this is not realistic since further proceedings in Washington would have been effectual to secure compliance with the decree, if indeed the superior withheld needed action simply because the court's order did not run to him personally. 3 Davis, *Administrative Law Treatise* 591 (1958).

against the superior's indispensability went further than *Pedreiro* did.⁵⁷

The gordian knot was cut by Congress in an amendment to the venue statute which provides:

(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.⁵⁸

This does not purport to change the rule governing the superior's indispensability but it does draw the rule's fangs in most cases;⁵⁹ as we have noted the problem was primarily one of venue. Since the rule no longer controls venue the commendable balancing of interests in *Pedreiro* is no longer very relevant. It is interesting to speculate, therefore, whether the courts will revert to mechanical tests for determining the superior's indispensability.

⁵⁷ Ceballos involved the suspension of a deportation order. This is a stronger case for the superior's presence than *Pedreiro* since suspension is a discretionary matter.

Ceballos did not seek suspension itself in the action, but rather a declaration that he was eligible for suspension. But this had been treated as involving discretion. *De Pinho Vas v. Shaughnessy*, 208 F.2d 70 (2d Cir. 1953), *aff'd*, 349 U.S. 48 (1955); *Pedreiro v. Shaughnessy*, 213 F.2d 768 (2d Cir. 1954) (distinguishing *De Pinho Vas* because that involved "essentially a discretionary matter."); *Ceballos v. Shaughnessy*, 229 F.2d 592 (2d Cir. 1956).

⁵⁸ 28 U.S.C.A. § 1391(e) (1962).

⁵⁹ In *Doyle v. Fleming*, 219 F. Supp. 277 (Can. Zone 1963) it was held that the Canal Zone was not a "judicial district" within the meaning of this statute.