FEDERAL PROCEDURE

INDISPENSABLE PARTIES IN INJUNCTION SUITS AGAINST FEDERAL ADMINISTRATIVE OFFICERS

The doctrine of *laissez-faire,* though it lingers in our economic vocabulary, disappeared as a working principle of American government with the establishment of the Interstate Commerce Commission in 1887, and the enactment of the Sherman Act three years later. The passage of regulatory statutes may not again match the crescendo of the Thirties, but repeal of basic control legislation seems remote. The administrative process impinges upon the daily schedule of most people. When they feel injured by the functioning of the process (or feel that business success is more likely without govment interference) they habitually resort to the courts.[1]

A seemingly inconsequential opinion handed down at the present term of the United States Supreme Court has unusual practical significance when laid in this background of daily contact with the executive branch of the Government—Mr. Williams conducts a weight-reducing business in Los Angeles, California, and uses the mails to "treat" his obese clientele. The Postmaster General, after a hearing in Washington, D.C., determined that this was a fraudulent enterprise. He then issued a "fraud order" directing Fanning, the postmaster at Los Angeles, to stop the delivery of mail to Williams, to refrain from paying money orders addressed to him, and to stamp "fraudulent" on his incoming correspondence and return it to the sender.[2] Williams thereupon brought an in-

---

1. Injunction Actions Against Federal Agencies Commenced in United States District Courts, 1941-1947*

Year	*84 Districts*	*District of Columbia*	*Percent of total brought in District of Columbia*
1941	178	165	51.9%
1942	215	161	42.8%
1943	227	108	32.2%
1944	331	158	32.3%
1945	328	116	26.3%
1946	335	144	30.0%
1947	266	143	35.0%

* Compiled from Annual Report of the Director of the Administrative Office of the United States Courts (U.S. Gov't Printing Office)

2. Rev. Stat. §§3929, 4041 (1875), 39 U.S.C. §§259, 732 (1940) give the Postmaster General authority to issue fraud orders "upon evidence satisfactory to him." The postal service statutes were passed in substance in 1872. 17 Stat. 322, 323. They differ from legislation of more recent vintage by providing for neither a hearing

junction suit against Fanning in the Federal District Court in California seeking to enjoin him from carrying out the order and to have the order itself set aside.

On motion the suit was dismissed on the ground that the Potmaster General was an indispensable party. The Ninth Circuit Court of Appeals affirmed, *per curiam*, relying on its previous holding.[3] On certiorari to the Supreme Court, *held*, reversed. Where relief may be granted without decreeing that the department head take action he is not an indispensable party to the suit. *Williams v. Fanning*, 332 U.S. 490 (1947) (Vinson, C.J., and Burton, J., dissenting without opinion.)

I

The problem of determining when a superior government officer is an indispensable party[4] to a suit instituted against his subordinate administrative officer has long been a vexing

---

nor judicial review. Justices Holmes and Brandeis had misgivings that the power given by the statute was a previous restraint. See dissenting opinion in Leach v. Carlile, 258 U.S. 138, 140 (1922). It was held, however, that the delegation of authority to issue fraud orders was constitutional, provided there be judicial review where the Postmaster General has acted illegally. Public Clearing House v. Coyne, 194 U.S. 497, 509 (1904); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 109 (1902).

A hearing also is customarily afforded, and perhaps must be given. Elliott Works v. Frisk, 58 F.2d 820, 824 (S.D. Iowa 1932) (a full hearing should be permitted on demand); Donnell v. Wyman, 156 Fed. 415, 416 (C.C.E.D.Mo. 1907) (findings must be after investigation and hearing to be binding on the Court). Whether the adequacy of the hearing is to be measured by the usual standards seems not to have been squarely met. In Pike v. Walker, where the procedural due process argument was made, Judge Groner avoided the constitutional issue, putting his decision on the ground that petitioner was conducting an obviously fraudulent enterprise and was not prejudiced by the failure of the Postmaster General to read the evidence before signing the order. 121 F.2d 40 (App. D.C. 1941), Note, 50 Yale L. J. 1479. The post office department's procedure in these cases is reviewed with recommendations in "Final Rep. Att'y Gen's Comm. on Ad. Proc.," 150-155 (1941).

3. Neher v. Harwood, 128 F.2d 846 (C.C.A. 9th 1942), cert. denied, 317 U.S. 659 (1942).

4. The rule has been frequently invoked in litigation between private parties. The classic statement of it is that of Mr. Justice Curtis in Shields v. Barrows. He defined indispensable parties as "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." 17 How. 130, 139 (U.S. 1854).

one. The consequences, however, of holding him to be indispensable are clear—the suit must be dismissed[5] and may then be brought only at the seat of the government, *i.e.*, in the District of Columbia. This is almost invariably true for there are two barriers to proceeding with the suit in the plaintiff's district: (1) Without consent of the superior or his fortuitous presence in the plantiff's district the federal court does not have jurisdiction of his person; (2) The general venue statute provides that except in diversity cases the plaintiff must sue in the defendant's district.[6]

The first American case to apply the indispensable party rule to governmental officers was *Warner Valley Stock Co. v. Smith*, decided in 1897.[7] It was there held that a mandatory injunction suit against the Land Commissioner and the Secretary of the Interior to compel the issuance of land patents abated after the latter's resignation, since relief was sought primarily against him. The minor official was sued, said the Court, only to restrain him from carrying out the orders of his superior. The rule of this case seemed destined to fall into desuetude, for it was not resorted to for twenty-seven years, when it appeared in *Gnerich v. Rutter*.[8] There the Commissioner of Internal Revenue was authorized by the National Prohibition Act to issue liquor permits. A suit brought against a subordinate in California was dismissed on the ground that he acted only under the direction of the Commissioner, who was therefore an indispensable party. The same principle was applied at the next term in *Webster v.*

5. Mallow v. Hinde, 12 Wheat. 193 (U.S. 1827). There is scant literature on the problem of superior government officers as indispensable parties. The question is effectively treated in Note, 50 Yale L. J. 909 (1941). See also Alpert, "Suits Against Administrative Agencies Under N.I.R.A. and A.A.A.," 12 N.Y.U.-L. Q. Rev. 393, 405-411 (1935); 37 Col. L. Rev. 140 (1937); 4 U. of Chi. L. Rev. 342 (1937). See Note, 158 A.L.R. 1126 (1945).

6. 49 Stat. 1213 (1936), 28 U.S.C. §112 (1940). See 2 Moore "Federal Practice" 2138 (1938). These cases do not come within the diversity clause because an officer having his residence in the District of Columbia is not a citizen of a state within the meaning of that clause. Hooe v. Jamieson, 166 U.S. 395 (1897). See Dykes and Keefee, "Diversity of Citizenship Clause—1940 Amendment" 21 Tulane L. Rev. 171 (1946). Lack of personal jurisdiction or lack of venue when the indispensable party rule is invoked are important factors influencing the high percentage of total suits brought to enjoin federal agencies which in the past have been commenced in the District of Columbia. See table n.1, supra.

7. 165 U.S. 28 (1897).

8. 265 U.S. 388 (1924).

Fall, a suit brought against a representative of the Secretary of the Interior.[9]

As a consequence of this line of cases and the strong language used[10] it seemed early in 1925 that in most conceivable circumstances a superior government officer was an indispensable party to a suit against his subordinate. Then came Mr. Justice Holmes' decision in *Colorado v. Toll.*[11] There Colorado sought to enjoin the superintendent of a national park from enforcing regulations issued by the Director of the National Parks Service excluding from park property automobiles for hire, unless the driver had a permit from the Director. The Government, contending that the Secretary of the Interior was an indispenable party,[12] cited the *Warner Valley, Gnerich* and *Fall* cases. But the Court ignored them. Without further explanation Mr. Justice Holmes stated that the superior need not be joined, and gratuitously added that the suit was not one against the United States. He cited *Missouri v. Holland*[13] and *Philadelphia v. Stimson*[14] as authority for these two propositions. The *Holland* case was dubious authority for the indispensable party rule since the

9. 266 U.S. 507 (1925). The Court was unembarrassed by the numerous cases where suit had been brought against the subordinate official alone in the period between the Warner Valley and Gnerich cases and there had been a determination of the cause on the merits. See, e.g., Swigart v. Baker, 229 U.S. 187 (1913) (suit against reclamation officers of an irrigation project without joinder of Sec'y of the Interior); Public Clearing House v. Coyne, 194 U.S. 497 (1904) (bill in equity against Chicago postmaster decided on the merits). Cf. Hill v. Wallace, 259 U.S. 44 (1922). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." Webster v. Fall, 266 U.S. at 511.

10. "To maintain such a bill against the subordinate officer alone, without joining his superior, whose acts are alleged to have been unlawful, would be contrary to settled rules of equity pleading." Warner Valley Stock Co. v. Smith, 165 U.S. 28, 34 (1897). "He [the superior] is the public's real representative in the matter, and if the injunction were granted his are the hands which would be tied. All this being so, he should have been made a party defendant—the principal one—and given opportunity to defend his direction and regulations." Gnerich v. Rutter, 265 U.S. 388, 391 (1924).

11. 268 U.S. 228 (1925).

12. Mr. Justice Douglas' abstract of Colorado v. Toll in the instant case is slightly inaccurate in this respect. The park was put under the general control of the Secretary of the Interior by the statute, 38 Stat. 798 (1915), and it was the Secretary and not the Director whom the Government insisted was an indispensable party.

13. 252 U.S. 416 (1920).

14. 223 U.S. 605 (1912).

question was not raised there. In the *Stimson* case the Secretary of War and his subordinates were sued in the District of Columbia, and one question before the Court was whether it was a suit against the United States.

The passage of the opinion seems to have been the inception of a confusion which plagues us yet, *viz.*, the relation between the sovereign immunity doctrine and the indispensable party rule. It has become the practice in recent years to cite cases from either of these two lines indiscriminately on the indispensable party question.[15] Holmes' citation of one case for each point retained an essential bifurcation which has thus been regrettably ignored.

The sovereign immunity body of law has had a perceptible and confusing influence on the progress of the indispensable party rule, an influence which no opinion has articulately examined. This confusion has manifested itself in two ways. First, sovereign immunity cases hold that where the *allegation* is one of trespass to property or lack of constitutional or statutory authority there is jurisdiction to hear the case because the United States is not the real party in interest.[16] Many courts transposed this rule into the indispensable party area without real consideration, and held that where the allegation was one of action taken under an unconstitutional statute or beyond the authority granted in the statute, the court had jurisdiction to hear the case without requiring the superior to be before it.[17] The reasoning of the immunity cases was merely a useful device by which suit might be allowed although arguably against the United States. It was not appropriate reasoning, nor was it useful, to determine the indispensability of a superior officer. Its inutility is seen when it is noted that those courts which imported the immunity rule that suit would lie where an attack was

15. See n.17 infra.

16. Ickes v. Fox, 300 U.S. 82 (1937); U.S. v. Lee, 106 U.S. 196 (1882). Cf. Land v. Dollar, 330 U.S. 731 (1947); Philadelphia v. Stimson, 223 U.S. 605 (1912).

17. For sovereign immunity cases exemplifying the rule see cases n. 16, supra. A negative implication from the rule is that if the officers are acting within their statutory authority then suit cannot be brought without the consent of the United States. Ferris v. Wilbur, 27 F.2d 262 (C.C.A. 4th 1928). Indispensable party cases transposing the sovereign immunity line of authority are: Neher v. Harwood, 128 F.2d 846 (C.C.A. 9th 1942); Yarnell v. Hillsborough Packing Co., 70 F.2d 435 (C.C.A. 5th 1934); Brotherhood v. Madden, 48 F.Supp. 366 (D.C.Md. 1944). The rule is of course circular, jurisdiction turning on the point to be decided.

made on the base of the officer's authority made the tenuous distinction that when the allegation was abuse of discretion by the superior he was an indispensable party.[18]

There is a second element in some of the sovereign immunity cases which makes jurisdiction turn not only on the *allegation* made, but also on the *consequences* of the decree sought. The focal point in those cases is the ability of the court to grant relief without interfering with the Government, *e.g.*, by requiring money to be paid out of its treasury. Thus in the famous case of *Osborn v. Bank of the United States*[19] state officials had seized money from the bank in violation of an injunction against collection by them of an unconstitutional state tax. In an action by the bank to recover the tax the officers' plea of sovereign immunity under the Eleventh Amendment failed.[20] This result was reached not only by considering the act of the officials a trepass for which they were personally liable, but the Court also pointed out that the funds remained segregated and had not been mingled generally with other treasury funds. Because of the latter fact the lower court could grant restitution. In *Mine Safety Appliances Co. v. Forrestal*[21] the then Under Secretary of the Navy, having determined that Mine Safety was receiving excessive profits on government contracts within the meaning of the Renegotiation Act, threatened to direct disbursing officers to withhold payments. In an injunction action to restrain him from carrying out his threat the Supreme Court decided that the suit was essentially one "designed to reach money which the government owns . . . the government is

18. Suppose the Postmaster General determines that a certain "cure" is fraudulent, basing his order on opinion evidence. If the Supreme Court construes the statute to cover only fraud "in fact" has the Postmaster General abused his discretion or acted beyond his authority? See American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902). It has been held that an assertion of arbitrariness or error in arriving at a conclusion is not a challenge of the foundation of the superior's authority but merely assails the manner of its exercise. Acret v. Harwood, 41 F.Supp. 492, 494 (S.D.Calif. 1941).

19. 9 Wheat. 738 (U.S. 1824).

20. No explicit provision in the Constitution gives the Federal Government immunity from suit as is the case with the states, to which the Eleventh Amendment applies. But the United States may not be sued without its consent, U.S. v. Clarke, 8 Pet. 436, 444 (U.S. 1834), and the strength of the doctrine of immunity seems to be the same with regard te both governments. See Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381, 388 (1939).

21. 326 U.S. 371 (1945).

an indispensable party."[22] The bearing of this type of sovereign immunity reasoning on the indispensable party question becomes apparent upon examination of the case of *Land v. Dollar*,[23] a sovereign immunity case written by Mr. Justice Douglas at the last term of Court. There a stockholders' suit was brought against members of the Maritime Commission seeking to command the return of stock, record title to which was in the Commission. It was held that the District Court had jurisdiction to hear the case on the merits since the judgment sought was not one which "would expend itself on the public treasury or domain, or interfere with the public administration."[24] In the instant case the Justice stated that the department head is not an indispensable party "if the decree which is entered will effectively grant the relief by expending itself on the subordinate official who is before the court.[25] It thus becomes evident that the derivation of the *Williams v. Fanning* rule lies not in indispensable party authority but in the sovereign immunity cases.

In view of the source of the rule as now formulated it is not surprising that the lower federal courts, who have been faced since 1925 with the two incongruous lines of authority (*Warner Valley, Gnerich* and *Fall* as opposed to the *Toll* case), were not able to find a satisfactory rationale in those cases. Judge Learned Hand, for example, suggested that *Toll* might be confined to cases in which the quasi-sovereign rights of a state were involved.[26] He concluded that the superior was an indispensable party in all situations, for otherwise the minor official might find himself in a "cross-fire" between what his superior had commanded and the court forbidden.

In the interim between *Toll* and *Fanning* the Supreme Court consistently refused to intimate its position.[27] Mr. Jus-

22. Id. at 375.
23. 330 U.S. 731 (1947).
24. Id. at 738.
25. Williams v. Fanning, 332 U.S. at 494. The Douglas rule obtains oblique support from the first case on the indispensable party problem. Vernon v. Blackerby, 2 Atk. 145, 21 Eng. Rep. 491 (1740). See also Rood v. Goodman, 85 F.2d (C.C.A. 5th 1936); Note, 50 Harv. L. Rev. 796, 802 (1937).
26. National Conference on Legalizing Lotteries v. Goldman, 85 F.2d 66, 67 (C.C.A. 2d 1936).
27. See, e.g., Varney v. Warehime, 147 F.2d 238 (C.C.A. 6th 1945), cert. denied, 325 U.S. 882 (1945) (War Food Administrator not an indispensable party where his statutory power drawn in ques-

tice Roberts did state in *Brooks v. Dewar,* where it had been argued that the Secretary of the Interior and the United States were both indispensable parties to a suit, that it was not "an easy matter to reconcile all the decisions of the court in this class of cases. . . . We are not disposed to attempt a critique of the authorities."[28] However, the Supreme Court stated with assurance in the principal case that the distinction between its former cases was clear. It must be concluded, nevertheless, that the Court was free to choose between its own irreconcilable decisions. In terms of result it chose to allow suit to lie against the subordinate alone. In what seems to be a pure policy decision, bolstered by the analogy of the immunity cases, it found the "distinction" that the superior is an indispensable party only where 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."[29] Presumably, in all other cases the subordinate alone might be sued. In so holding the Court has indorsed a policy of decentralization.

Although the Court did not discuss relevant policy considerations, essentially it was making a judgment as to whether suit should be limited to the seat of our centralized government or be allowed to be brought in the states. The cost of litigation far from plaintiff's districts and the resultant disadvantage of being restricted to deposition procedure (in lieu of taking witnesses to Washington) make a sympathetic case for allowing suit in the district of the challenger of governmental action.[30] Balanced against this is the interference with

---

tion); Jump v. Ellis, 100 F.2d 130 (C.C.A. 10th 1938), cert. denied, 306 U.S. 645 (1939) (suit against Indian Agency superintendent could not be maintained without joining the Secretary of the Interior); Rood v. Goodman, 83 F.2d 28 (C.C.A. 5th 1936), cert. denied, 299 U.S. 551 (1936) (Postmaster General held an indispensable party).

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

29. 332 U.S. at 493.

30. Cf. Senator Dill of Washington in floor debate on the Federal Communications Act of 1934: "Those owners of radio broadcasting stations living long distances from the District of Columbia should not be required to come to Washington to prosecute an appeal from a decision. . . . A station owner who lives in the Rocky Mountain area, or who lives in the Far West, and who is compelled to come to the District of Columbia to prosecute his appeal, finds himself faced with an expense of from $400 to $500 for the mere trip of coming here, an equal amount for his attorney, if he brings one, and then the attorney fees in addition. I say of personal knowledge that some of the station owners have found it almost im-

the Government which might result from requiring it to defend a large number of geographically dispersed suits. Of course a United States Attorney will defend in either event, and it seems a less onerous burden on the Government to defend in the several districts than to require plaintiffs to go to Washington.[30a] Where because of the number of federal courts passing on the same matters, conflicting decisions or interpretations of statutes develop, the Supreme Court will perform its customary role of leveller.

A survey of Congressional policy as expressed in more recent statutes shows an understanding by that body of plaintiffs' problems in a country so large as ours and a marked trend toward decentralization for the purposes of bringing suit. For example, the National Labor Relations Act,[31] the Fair Labor Standards Act,[32] and the Public Utility Holding Company Act[33] provide for review of regulations in the Circuit Courts of Appeals where plaintiffs transact business. The Federal Tort Claims Act,[34] passed in 1946, presents an interference with the Government, in that it requires the Government both to defend actions and to expend its funds. Yet Congress there made a judgment that this minimal inconvenience is outweighed by the burden on plaintiffs, if they are required to go to Washington, and so provided that suit may be brought in the district where the act complained of took place.

---

possible to finance appeals in that way." 78 Cong. Rec. 8825 (1934).

30a. In the states a somewhat different transportation problem is presented. For example, in Indiana a claim for money damages may be brought only in the Marion County Court, i.e., at the seat of government. Ind. Stat. Ann. (Burns, 1933) §4-1501. However, "any party or person aggrieved" is entitled to judicial review of a determination by a state administrative agency in the circuit or superior court of the county where that person resides or where the order is to be enforced. Ind. Acts 1947, c.365, §14. See 22 Ind. L. J. 319, 323 (1947).

31. 49 Stat. 457 (1935), 29 U.S.C. §160(f) (1940).

32. 52 Stat. 1060 (1938), 28 U.S.C. §210 (1940).

33. 49 Stat. 838 (1935), 15 U.S.C. §79(x) (1940). Most of the statutes are collated in 32 Ill. L. Rev. 99 (1938).

34. 60 Stat. 842, 28 U.S.C.A. §921 (Supp. 1947). Congress might provide for decentralization in the indispensable party area by passing a venue and process statute allowing a plaintiff to join a superior government officer in any federal court and obtain personal service on him in the District of Columbia. 4 U. of Chi. L. Rev. 342, 343 (1937).

II

The rule which emerged from Mr. Justice Douglas' policy judgment in the instant case, *viz.*, a superior government officer is an indispensable party if the decree granting the relief will require him to do an act, brings to mind other legal distinctions which have not withstood critical examination: equity could give a prohibitive but not a mandatory injunction; there was no judicial review of a "negative order" in administrative law. Is the rule of *Williams v. Fanning* similarly doomed?

Occasional statutes do give power to the superior alone to do some act, as to issue a license. But in fact he is only a repository of the power. Thus in the *Warner Valley* case the plaintiff sued for the affirmative act of the issuance of a patent by the superior. Under the Douglas rule it would seem that he might not sue for the issuance of the patent at all, but merely seek to restrain the Land Office Commissioner, the subordinate, from interfering with his occupancy of the land. In the *Gnerich* case where the local prohibition director was sued to restrain him from giving effect to a particular restriction as to amount in a liquor permit, the Commissioner of Internal Revenue was held to be an indispensable party. It would appear an opposite result would be required under the new rule. Certainly the decree would expend itself on the subordinate. A request for negative relief against the subordinate will never require the superior to do a new act.[35] And so plaintiffs, in situations such as that in *Grimes Packing Co. v. Hynes*,[36] may evade the prima facie operation of the rule by suing, not for the superior's permission to fish in certain waters, but may bring suit against the subordinate to restrain his enforcement of the regulations promulgated by his superior.

The crux of the matter is that whichever course a plaintiff pursues the identical question is before the court, that is, the legality of a department or board's action. Yet the mere form of the relief requested (*i.e.*, not that the superior be required to do an act, but that his subordinate be prevented from doing one) determines jurisdiction under the Douglas rule, and the verbally astute attorney can save his client the

35. See National Conference on Legalizing Lotteries v. Goldman, 85 F.2d 66, 67 (C.C.A. 2d 1936).

36. 67 F.Supp. 43 (D.C.Alaska 1946).

trip to Washington. A court should be focusing its attention on the merits of the case before it, rather than contemplating whether the decree it will have to frame in the event of a plaintiff's success will necessarily require a department head to do an act.

III

Thus over a period of fifty years, during the last two decades of which the problem has come up frequently, the courts have struggled with the formulation of an indispensable party rule with questionable results. If it is permissible to say they are yet unsuccessful, would they not do well to abandon the task? One clean approach occurs.

Fundamentally, the unprofitable dwelling on deciding who are indispensable parties arises because courts are preoccupied with the party theory of the suit. This preoccupation with parties is engendered by two factors. The first of these is the fiction that in an injunction action against a government officer who is threatening to enforce an invalid statute the officer loses his representative character and that consequently the suit is against him as a private party and is not barred by the doctrine of sovereign immunity.[37] The second factor is the tradition that equity acts *in personam.*

Is it necessary to retain the fiction that a public officer loses his representative character when it is alleged that he is acting illegally? In the field of proprietary corporations the present "climate of opinion" on the Court is that in the absence of a specific endowment with immunity such corporations are amenable to suit at law in tort or contract.[38] Proprietary corporations may be considered as unique. Yet even in the ordinary realm of administrative agencies Congress usually provides for judicial review of administrative action. The effect is to allow suit against the administrator. When there is not a statutory procedure for testing the validity of administrative determinations, the older devices of extraordinary legal remedies may be utilized.[39] Or as was true of the fraud order statute involved in the instant case, the courts may deem it necessary to engraft judicial review

37. Ex parte Young, 209 U.S. 123 (1908).
38. Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381 (1939).
39. For bibliography of the literature on the non-statutory remedies with respect to administrative action see Gellhorn, "Administrative Law, Cases and Comments" 807 (2d ed. 1947).

on the statute to save it from constitutional attack.[40] In the light of this legislative and judicial inclination to allow review of acts of administrative officers it does not seem that the ancient rigor of the sovereign immunity doctrine should prevent adoption of the view that suits against administrative officers are against them as representatives of the government. And this theory still allows equity to act against the person.

The suggestion that injunction suits be viewed henceforth as against officers *as* officers is not to urge that new rights or remedies be created against the United States. Viewing the suit as one against the officer in his representative capacity does not change any existing right or remedy against the Government. It merely approaches the *existing* review procedure in another way. It recognizes that an act of a department is being challenged as illegal, and that wherever defended the Government is the real party in interest. Were the courts to accept this view the indispensable party problem would become unimportant. Whenever a responsible official threatened to enforce a statute or regulation his action would be treated as official conduct. It would become the Government's duty to defend injunction actions brought against such an officer.

This approach would obviate the inherent difficulties which have arisen in attempting to formulate and administer an indispensable party rule. It would also allow a democratic government to defend allegedly despotic acts at the door of the person who considers himself oppressed and not at the seat of the oppressor. Mr. Justice Douglas' rule that a superior officer is an indispensable party only when the decree requires him to do a new act, or conversely, when the decree will not "expend itself" on the subordinate, appears to reach the suggested result, *i.e.*, decentralization of suits, in most cases. But this may not be uniformly true, because as shown, under his test plaintiffs' attorneys must choose accurately the stage of the administrative process at which to assert an alleged right and frame their prayers for relief with precision. Also implicit in his rule is acceptance of a useless fiction, the individual theory of the suit. If like results may be attained by a straightforward approach, why adhere to an elusive indispensable party rule?

---

40. See n.2 supra.