

THE ENFORCEMENT OF JUDGMENTS AGAINST THE UNITED STATES

MARGARET G. STEWART*

INTRODUCTION

In the early 1970's, the bankruptcy of seven railroads (including Penn Central Transportation Company) in the northeast and midwest regions of the United States led to grave congressional concern focusing on the national interest in a viable rail system and its apparently imminent demise.¹ The resulting legislation, the Regional Rail Reorganization Act of 1973 ("RRRA"),² established the Consolidated Rail Association ("Conrail"),³ to be created by the transfer to it of rail properties⁴ from those bankrupt railroads incapable of an income reorganization within a reasonable time.⁵ Payment for the property thus transferred, to be made after the transfer was completed, was to be composed primarily of Conrail securities. Only a portion of the compensation was to be guaranteed by the federal government, in the form of United States Railway Association ("USRA") obligations.⁶ Institutional investors⁷ of Penn Central attacked the RRRA as unconstitutional,

* B.A., 1968, Kalamazoo College; J.D., 1971, Northwestern University School of Law. Associate Professor of Law, Chicago-Kent College of Law.

1. Regional Rail Reorganization Act Cases, 419 U.S. 102, 108-09 (1974); Comment, *Regional Rail Reorganization Act of 1973: Was Congress on the Right Track?*, 49 ST. JOHN'S L. REV. 98, 99-106 (1974). For an excellent discussion of the railroads' difficulties and their judicial resolution during the 1960's, see Note, *Takings and the Public Interest in Railroad Reorganization*, 82 YALE L.J. 1004 (1973) (focusing on the New Haven Inclusion Cases, 399 U.S. 392 (1970)).

2. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1974) (codified at 45 U.S.C. §§ 701-793 (Supp. III 1973)). For a general critique of the Act, see Rice, *Consolidated Rail Corporation: Phoenix or Albatross?*, 42 I.C.C. PRACTITIONERS' J. 379 (1975).

3. 45 U.S.C. § 741(a) (Supp. III 1973).

4. *Id.* § 716. This transfer was to be made pursuant to a Final System Plan, to be drafted by the United States Railway Association ("USRA"), a government corporation also established by the RRRA, *see id.* § 711(a), and presented for adoption to Congress within a specified time. The Plan was eventually approved in 1976.

5. *Id.* § 717(b). These determinations of feasibility were to be made within 120 days after the effective date of the RRRA by the district courts having jurisdiction over the bankruptcy proceedings. *Id.*

6. *Id.* §§ 716(d)(1), 720.

7. Plaintiffs included owners of mortgage bonds of Penn Central, lessors of leased lines of Penn Central secured by mortgages on Penn Central rail properties, and banks which were corporate trustees or successor corporate trustees under indentures, mortgages or deeds of trust under which various debt securities of Penn

arguing that the compensation provision of the Act was inadequate both with respect to the primary transfer and as it related to a requirement of continued rail operations prior to that transfer. Finding that the RRA made no provision for compensation regarding losses to the railroads in the interim between passage of the legislation and transfer, incurred because of the continued required operations ("interim erosion"), a three-judge district court enjoined further activity under the Act.⁸ The United States Supreme Court reversed.⁹ The Court relied upon the availability of a suit against the United States, pursuant to the Tucker Act, to recover just compensation for the interim erosion taking as required by the fifth amendment of the Constitution. It read the Act, in light of its legislative history, as not denying the availability of additional compensation pursuant to a Court of Claims' judgment and refused to credit arguments of the investors that the clear intent of the Act was to provide for the purchase of a functioning northeast railway system at the least possible cost to the government, as reflected by the carefully constructed and limited provisions for compensation. Having found that a suit under the Tucker Act would be available, the Court also concluded that the remedy so provided was adequate to preserve the investors' fifth amendment rights and that the Act was, therefore, constitutional. When faced with the possibility that such a judgment might not be paid, the Court was content to rely upon the "good faith of the United States."¹⁰

Subsequent to the Supreme Court decision, Congress

Central had been issued or secured. See Brief of Appellees, Connecticut General Insurance Corporation, et al. at 1, Railway Reorganization Act Cases, 419 U.S. 102 (1974).

8. Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n, 383 F. Supp. 510, 512-13, 530 (E.D. Pa. 1974).

9. 419 U.S. 102, 108 (1974).

10. *Id.* at 149 n.35. The Court has been similarly content to rely on the government's good faith when the just compensation is owned to a foreign sovereign. Silesian-American Corp. v. Clark, 332 U.S. 469, 479-80 (1947). It has been suggested that this "good faith" may be more prevalent when the judgment against the United States is rendered by the Court of Claims. Dissenting in Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp., 258 U.S. 549 (1922), Mr. Chief Justice Taft and Messrs. Justices Van Devanter and Clarke worried that judgments rendered against the defendant (which the majority had found not to be protected by sovereign immunity) by various state courts, lacking uniformity, might face a difficult time in Congress.

On the other hand, a construction which will bring into one tribunal, the Court of Claims, the hearing and decision of this class of cases, will secure uniformity and dispatch and these two elements will make for justice and peace, because Congress pays the judgments of the Court of Claims against the United States in due course.

Id. at 573 (Taft, C.J., dissenting).

amended the RRRRA¹¹ to provide, among other things, for compensation guaranteed by the federal government up to the net liquidation value of the properties taken.¹² That value, however, does not reflect the constitutional minimum value, and thus the possibility of a suit under the Tucker Act for the difference remains.¹³

Such a suit, like all others against the government, is possible only with the consent of the government itself. Absent that consent, the doctrine of sovereign immunity would preclude jurisdiction over the dispute in any court.¹⁴ The Tucker Act¹⁵ is one of the

11. Railroad Revitalization and Regulatory Reform Act of 1976 (hereinafter "RRRRA") Pub. L. No. 94-210, 90 Stat. 31. (1976) (codified in scattered sections of 45, 49 U.S.C.). For an overview of the RRRRA, see Krutter, *The Railroad Revitalization and Regulatory Reform Act of 1976: Improving the Railroads' Competitive Position*, 14 HARV. J. LEGIS. 575 (1977).

12. Instead of the previously authorized USRA obligations, the RRRRA created certificates of value which "constitute general obligations of the United States of America for the payment or redemption of which its full faith and credit are pledged." 90 Stat. 104, 45 U.S.C. § 746(a) (1976). These certificates are to be issued to each transferor of property up to the net liquidation value of the property, less the value of other benefits conferred and plus any amount required to compensate for erosion takings.

13. *In re Val. Proc. Rail Reorg. Act*, 445 F. Supp. 994, 1000 n.5 (Special Ct. 1977).

14. The doctrine originated in the medieval view of England that the king could do no wrong and so was immune from any such allegations as a matter of law; redress could be had only by petition, similar to the concept of consent in current American law. See generally Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1 (1924).

While nowhere mentioned in the Constitution, the United States has long claimed, successfully, the same absolute immunity. *United States v. Sherwood*, 312 U.S. 584, 587 (1941); *The Siren*, 74 U.S. (7 Wall.) 152, 153-54 (1868). Perhaps the most dramatic exposition of the doctrine as well as one of the earliest in the United States, was articulated by Hamilton: "The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will." THE FEDERALIST NO. 81 (A. Hamilton), at 126 (Cent. L.J. ed. 1917). At least traditionally, the source of the right claimed is irrelevant, as is the existence of a cause of action absent a waiver of immunity. *Lynch v. United States*, 292 U.S. 571, 580 (1934), *Bartell v. Riddell*, 202 F. Supp. 70, 73 (S.D. Cal. 1962).

The harshness of the doctrine has been mitigated by the willingness of the courts to distinguish between suits against the sovereign, which are barred absent consent, and those against officers of the sovereign, which may or may not be barred by immunity. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 686 (1949). If the plaintiff alleges either that the actions of the officer giving rise to the cause of action exceeded his statutory authorization to act or that the authorization itself was unconstitutional, immunity presents no bar. Compare *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1123 (8th Cir. 1973) (allegation of lack of statutory authority defeats any defense of sovereign immunity) with *Superior Oil Co. v. United States*, 353 F.2d 34, 38 (9th Cir. 1965) (allegation that officers blocking an easement to leased property were acting outside the scope of their authority defeated by a finding that no easement existed; therefore, the officers acted within their authority and the suit is one against the United States).

However, even if a suit fits within the *Larson* exception to the doctrine, it may be barred by immunity if the order requested by the plaintiff against the defendant officers would "require . . . official affirmative action, affect the public administra-

two¹⁶ key legislative expressions of consent, permitting suits based upon alleged constitutional violations to be heard in either the district courts or the Court of Claims, depending upon the amount in controversy. Yet while the waiver of sovereign immunity in such a context is clearly stated both by legislation and by manifold court decisions, the usefulness of that waiver depends upon the reality of the remedy available because of it. A judgment, for example, that the United States is indebted to railroad investors in some specific sum is of little comfort to those investors in the absence of payment. Since 1977, Congress by statute has provided for the appropriation of whatever funds are necessary to pay all final judgments rendered against the government.¹⁷ Prior to that time, however, and at the time of the Penn Central decision, if the judg-

tion of government agencies and cause . . . the disposition of property admittedly belonging to the United States." *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963). See *Land v. Dollar*, 330 U.S. 731, 738 (1947). See also *Warner v. Cox*, 487 F.2d 1301 (5th Cir. 1974) (suit is against the sovereign since any judgment would expend itself on the Treasury); *Association of N.W. Steel v. United States Army Corps of Eng'rs*, 485 F.2d 67, 69 (9th Cir. 1973); *Washington v. Udall*, 417 F.2d 1310, 1318 (9th Cir. 1969) (suits are against the sovereign where the relief sought would work an intolerable burden on governmental functions, outweighing any consideration of private harm).

See generally D. SCHWARTZ & S. JACOBY, *LITIGATION WITH THE FEDERAL GOVERNMENT* (1970); Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

15. 28 U.S.C. § 1346(a)(2) (1976). The Act was originally passed in 1887; changes in its provisions relevant to this article are discussed at notes 52-54 and accompanying text *infra*.

16. The other major legislation consenting to suits against the United States is the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1976), which permits the district courts to hear and determine

claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id.

The waiver of immunity contained in the Act, however, is far from absolute. All conditions of the statute must be met by a plaintiff; a failure to do so deprives the court of jurisdiction. See *Groce v. Rapidair, Inc.*, 305 F. Supp. 1238, 1241 (W.D.N.C. 1969). Furthermore, the consent to suit is limited by 28 U.S.C. § 2680, which removes from the court's jurisdiction various specific claims, most importantly those based on either intentional or discretionary acts of an officer.

17. 31 U.S.C. § 724(a) (1976) provides in relevant part:

There are appropriated, out of any money in the Treasury not otherwise appropriated . . . such sums as may . . . be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements . . . together with such interest and costs as may be specified in such judgments or otherwise authorized by law. . . .

Id.

ment was in excess of \$100,000, payment was by specific congressional appropriation only.¹⁸ Case law makes it clear that there is thought to be no judicial method by which either Congress can be forced to appropriate necessary funds or by which a party may enforce its judgment absent such appropriation.¹⁹ Compliance is thus left to the discretion of the debtor. The recent exercise of that discretion in favor of payment, reassuring as it may appear,²⁰ does not preclude later exercise of the same discretion to deny payment.²¹ As long as sovereign immunity may provide an effective

18. 70 Stat. 694 (1956), *as amended*, 31 U.S.C. § 724(a) (1976) provided a permanent appropriation for judgments of \$100,000 or less. Transcripts of other judgments were to be filed with the Secretary of the Treasury, who certified them to Congress once the United States had either foregone review of the decision or such review had been denied. 28 U.S.C. § 2518 (1976).

19. *Glidden Co. v. Zdanok*, 370 U.S. 530, 568-71 (1962).

20. The validity of that reassurance, of course, depends upon the likelihood that the appropriation will not be revoked. *See* note 21 *infra*. Apparently the previous \$100,000 limit was removed in an attempt to avoid the time spent in review of judgments in excess of that amount rendered in cases where there existed no policy dispute regarding liability and to avoid the payment of interest on such judgments from the time of the decision to the time of appropriation. H. R. REP. 95-68, 95th Cong., 1st Sess., 184; CONG. REP., 95-166, 95th Cong., 1st Sess., 206. No consideration was given to the situation in which Congress might find itself in disagreement with the court about the existence of liability nor to that in which Congress might wish to retain authority over the amount of a judgment which it considered too great. In the context of the Penn Central dispute, the latter concern was freely and forcibly expressed in debate over the RRRRA. *See* 119 CONG. REC. H11,876 (daily ed. Dec. 20, 1973):

Mr. Kuykendall—Mr. Speaker, I would like to ask the gentleman from Washington . . . one point, and that is the matter of the deficiency judgment. There was a lot of colloquy in the original debate which expressed fears that the Federal Court had the key to the Treasury.

Will the gentleman give us his interpretation of the guarantees we have to keep that from happening in the court proceedings?

Mr. Adams—Mr. Speaker, there is a definite limitation on the total amount that can be authorized under this bill. [Those limits, though changed, continue to exist under the RRRRA.] Any amounts that go beyond that, or the shifting of the way in which it is spent, is to be approved by an Act of Congress, to be signed by the President. . . . [I]t was the clear intent of the managers that any amount other than common stock [of Conrail] was to be at the lowest possible limit to meet constitutional guarantees.

Mr. Kuykendall—There is no way the Federal Court may assess the taxpayers or this Congress on the judgments of the creditors; is that correct?

Mr. Adams—The gentleman is correct.

Mr. Kuykendall—There is no way they can assess the Congress for the money?

Mr. Adams—The gentleman is correct.

Id. While the Supreme Court in the *RRRA Cases* found this exchange and others like it insufficient to constitute a repeal of the Tucker Act remedy, it is certainly sufficient to raise more than a theoretical possibility that the 1977 reassurance will fail to survive a deficiency judgment.

21. In fact, similar blanket prior appropriation has existed in the past and has been revoked. Lump sums were appropriated to cover subsequent judgments of the Court of Claims from 1864 to 1875. *See* Note, 46 HARV. L. REV. 676, 685-86 n.63

shield from execution, the command of the fifth amendment²² may be avoided by the authority it was intended to limit.

Every suit against the United States carries with it a potential conflict between two well-accepted powers: on the one hand, courts of the United States created by or pursuant to article III of the Constitution²³ are representatives of an independent branch of the federal government, and their independence has often been expressed in statements regarding the finality and enforceability of their judgments.²⁴ On the other hand, the Constitution vests in Congress alone the power to appropriate funds of the United States.²⁵ Should a court successfully order payment of an outstanding judgment absent congressional appropriation, it would apparently be exercising legislative rather than judicial power.²⁶ But should Congress refuse to appropriate funds to pay an outstanding judgment, that judgment, denied both finality by the fact of effective review and enforceability by the doctrine of separation of powers, would apparently fail to comport with the requirements

(1933). The practice was abandoned in 1876; in 1890 the practice of appropriating a lump sum for the payment of all judgments under a certain amount was instituted in order both to expedite payment for the plaintiff and to relieve the United States of any obligation, legal or moral, to pay interest on the judgment during the period after its entry and prior to specific appropriation. *See United States v. Maryland*, 349 F.2d 693 (D.C. Cir. 1965). That practice continued until 1977. Legislative history indicates that the abandonment of the lump sum appropriation in 1876 was due to concern that a single judgment might exhaust the fund and leave other creditors without redress. 46 HARV. L. REV. 676, 685-86 (1933). There is obviously no guarantee that such fears may not again lead to the abandonment of automatic appropriation. Of course, rather than return to a case-by-case review of all judgments in excess of a given sum, Congress could return to the lump-sum appropriation of 1864, or might limit the source of funds available to pay outstanding judgments. *See, e.g.*, H. STREET, GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY 183-84 (1953); 69 COLUM. L. REV. 897, 899-900 (1969); 37 LA. L. REV. 982 (1977). None of these choices, however, guarantees payment to the creditor.

22. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

23. That article defines the judicial power of the United States as encompassing only certain cases and controversies, and then vests that judicial power in the Supreme Court and such other inferior federal courts as Congress creates. Courts created under or pursuant to article III may not exercise any authority other than that defined in the article as judicial. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 412 (1792).

24. *See* notes 58-62 and accompanying text *infra*.

25. "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ." U.S. CONST. art. I, § 9, cl. 7.

26. While lack of congressional appropriation has traditionally barred payment, it is clear that once money has been appropriated courts have the authority to mandate its release by the executive branch. *See Higginson v. Schoeneman*, 190 F.2d 32, 34-35 (D.C. Cir. 1951); *City of New York v. Ruckelshaus*, 358 F. Supp. 669, 675 (D.D.C. 1973), *aff'd*, *City of New York v. Train*, 494 F.2d 1033 (D.C. Cir. 1974); *Eastport Steamship Co. v. United States*, 130 F. Supp. 333, 335 (Ct. Cl. 1955).

of an article III court decision.²⁷

To ignore the conflict, finding comfort in the excellent record of past payment or in the current revolving appropriation is neither to answer it nor to moot it. If, in fact, it is impossible to enforce any judgment against the government because of an effective doctrine of immunity from execution, those judgments, while final decisions of liability, are actually only suggestions to Congress. The result is a government theoretically limited in its power but practically absolute, knowing no boundaries other than those it chooses to recognize from day to day. To state the result ought to refute it.²⁸ An attempt must be made to face and resolve apparently opposite constitutional commands before their potential clash becomes actual and constitutional limits on power are made meaningless.

Any "resolution" based upon the exercise of discretionary legislative authority fails to address the actual problem. While the abandonment by statute of sovereign immunity, either in its entirety or with respect to certain claims, is a goal frequently called

27. This lack of enforceability of any judgment rendered against the United States led the Supreme Court in 1933 to hold that the Court of Claims did not exercise judicial power under article III of the Constitution but rather operated as a legislative court deriving its powers from Congress pursuant to article I. *Williams v. United States*, 289 U.S. 553, 567-71 (1933). Article III's grant of judicial power over cases and controversies to which the United States is a party was interpreted to encompass only those suits brought by the government as plaintiff.

Williams was overturned by *Glidden*, in which the Court specifically found that the inability to enforce a judgment against the United States, given the historical record of payment by appropriation and the automatic payment of judgments under \$100,000, did not deprive the Court of Claims of article III jurisdiction. *Glidden Co. v. Zdanok*, 370 U.S. 530, 584 (1962).

28. The result, however, is descriptive of the law of Britain, which also fails to provide any method of enforcing judgments against the Crown even though those judgments are accepted as dispositive of the underlying obligation. See generally Campbell, *Private Claims on Public Funds*, 3 *TASMANIA U.L. REV.* 138 (1969). The lack of enforcement power has been criticized in words equally applicable in the United States:

If the common-law jurisdictions are to operate successfully a private-law system of state liability, then it is essential that no unnecessary hindrances should be imposed on plaintiffs, and that justice should both be and seem to be done. It is, therefore, necessary that parliamentary interference should not exceed that reasonably necessary for the due exercise of the constitutional functions of the legislature. A claim or prerogative must be upheld only where it is necessary in the public interest, and not merely because it is hallowed by long usage. A ready means of enforcement of judgments must be devised so that the citizen no longer has to rely on the polite fiction that to know an injury and to redress it are inseparable in the royal breast.

Street, *Funds in Satisfaction of Governmental Liabilities*, 8 *U. TORONTO L.J.* 32, 47 (1949).

for by commentators,²⁹ the long recognition of the doctrine by the courts suggests that such abandonment could never be binding on future legislators.³⁰ Similarly, prior appropriations for all judgments as to which immunity from liability has been waived may be revoked by Congress at any time, forcing the successful plaintiff to request agreement of the legislature to the judgment rendered.

In the context of the fifth amendment,³¹ it is clear that the courts must be able to provide some remedy for the individual whose property is taken without just compensation. Two possibilities exist; if there is no waiver of sovereign immunity, suit may be instituted against the persons occupying or taking property for equitable relief. However, if the plaintiff-owner may sue the United States for damages, this remedy becomes exclusive. It also becomes meaningless in the absence of judicial enforcement power. It is the thesis of this article that such power must and does exist, irrespective of congressional appropriation.

EQUITABLE RELIEF

Prior to the passage of the Tucker Act, there existed no method by which a person whose property had been taken by the government for public use could force the payment of the just compensation guaranteed by the fifth amendment. The Supreme Court had held that consent to sue the United States for breach of an express or implied contract did not encompass a suit based upon the plaintiff's claim of title to property occupied by the government, at least when the United States disputed that title.³² The waiver of immunity with respect to contract claims was thought to only encompass contracts known to the common law, not those derived from the broader obligations imposed by the Constitution.³³

29. See generally Wall & Childres, *The Law of Restitution and the Federal Government*, 66 Nw. U.L. REV. 587 (1971); 61 GEO. L.J. 1535 (1973).

30. It is interesting to note that in one state, Pennsylvania, the supreme court has completely abolished sovereign immunity as an illogical and unfair doctrine. *Mayle v. Pennsylvania Dep't of Highways*, — Pa. —, —, 388 A.2d 709, 720 (1978). The opinion clearly summarizes the argument for abolition and contains a summary not only of the factors involved but of the commentators' discussion. The *Mayle* opinion can be read to include a waiver of immunity pursuant to the eleventh amendment as well, permitting suits to be instituted against the state in the federal courts. See *Greenfield v. Vesella*, No. 78-342 (W.D. Pa., filed Sept. 11, 1978).

31. For a discussion of the arguable power to enforce judgments against the United States based upon other claims, see notes 120-131 and accompanying text *infra*.

32. *Langford v. United States*, 101 U.S. 341, 346 (1879).

33. *Stovall v. United States*, 26 Ct. Cl. 226, 239 (1891). This accords with the assumption of the Supreme Court a few years later that *only* ejectment provided a remedy for property taken without compensation. See note 34 and accompanying text *infra*.

The only remedy available to one whose property had been taken without payment was ejectment, recognized by the Supreme Court in *United States v. Lee*.³⁴ Both Lee and the United States claimed title to the property; a jury found that it belonged to Lee. The individual defendants then occupying the land as agents of the United States maintained that, even absent title, sovereign immunity prevented their ejectment. Stating that the argued-for result, the admission of a right but the denial of all remedy, would be tyranny, the Court permitted ejectment. While the Court rejected the proffered immunity defense in language indicating only its unwillingness to reach a perceivedly absurd result,³⁵ today, in the absence of any other remedy, ejectment would be available because the agents would not be cloaked, even in theory, with the immunity of the sovereign. If no eminent domain proceedings had been instituted by the United States and if no or inadequate compensation had been paid, the activities of the officers would be clearly unconstitutional. In that instance, as well as in a situation in which federal officers act outside the scope of their authority, they are held to be acting as individuals rather than on behalf of the government.³⁶

The difficulties with such an equitable remedy, however, are both obvious and severe. The disruption of governmental activities creates precisely the situation which sovereign immunity was designed to prevent.³⁷ Furthermore, the realistic availability of the remedy depends in large measure upon the sort of taking involved and the timing of the grant of the remedy vis-a-vis that taking. For example, should the agents have changed the physical properties of occupied land, the reinstated plaintiff might well be deprived to some degree of what he had previously owned. Admittedly, in theory the right to possession does not pass to the government until reasonably certain and adequate provision has been made for the payment of appropriate compensation.³⁸ However, if the government claims title to the property through some chain other than eminent domain, as in *Lee*, this hardly provides protection to the injured plaintiff. Nor does it protect the plaintiff if some compensation has been paid or provided for but the court finds that com-

34. 106 U.S. 196, 223 (1882).

35. *Id.* at 219-20.

36. *See* note 14 *supra*.

37. *Buchanan v. Alexander*, 45 U.S. (4 How.) 19, 20 (1846). *See also* *Collins v. United States*, 15 Ct. Cl. 22 (1879); H. STREET, *supra* note 21, at 182. It is interesting that at least one commentator, in comparing orders for the payment of money and those of an injunctive nature, finds that the effective danger of interference is much greater with respect to the latter. Note, 46 NEB. L. REV. 816, 822 (1967).

38. *Hanson Co. v. United States*, 261 U.S. 581, 587 (1923).

pensation to be inadequate. Finally, if the taking is of property other than land it may be that return is not feasible at all.³⁹ It is difficult to imagine the dissolution, after a number of years, of Conrail and its accompanying complex statutory scheme and the meaningful return, to a company in bankruptcy, of rail properties equivalent to those taken under the RRRRA.

THE REMEDY OF DAMAGES

In response to the holding of the Supreme Court in *Lee*, and in recognition at least of consequent disruption of governmental activity, the Tucker Act was passed in 1887, permitting the institution of a suit for just compensation in the previously established Court of Claims.⁴⁰

The existence of this remedy has been held to justify the denial of other requested relief and indeed, when available, is apparently exclusive. For example, a plaintiff seeking, on facts very similar to those in *Lee*, to eject the forest service officer occupying what was allegedly his land, was denied relief on the basis rejected in *Lee*: that sovereign immunity precluded the maintenance of the suit without governmental consent.⁴¹ The Supreme Court did not overrule *Lee*; rather, it held that such actions were now possible only when the plaintiff alleged that the holding by the government was in violation of the fifth amendment, as, presumably, when the property had been taken for a private rather than public purpose. In that instance, the officer would be acting in a fashion such as to deprive him of immunity. However, given the power of eminent domain and the availability of a Tucker Act suit for compensation, the taking is no longer unconstitutional for failure to reimburse the previous owner. It may be illegal, but given the plain, adequate, and complete remedy available at law, no extraordinary remedy is available, whether it be an ejectment⁴² or an injunction⁴³ that is requested.

39. *Cf. Chernick v. United States*, 372 F.2d 492 (Ct. Cl. 1967):

The plaintiffs discovered their mistake too late for the rescission to appeal as a feasible remedy. The eggs could not be unscrambled. To hold they are restricted to rescission now would be contrary to public policy because it would throw the performance of government contracts into frustration and chaos on any late discovery of an error in a bid.

Id. at 496.

40. Act of March 3, 1887, ch. 359, 24 Stat. 505.

41. *Malone v. Bowdoin*, 369 U.S. 643, 648 (1962).

42. *Id.*

43. *Dugan v. Rank*, 372 U.S. 609, 626 (1963); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932). *See also* *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949); *Buffalo River Conservation & Recreation v. National Park*, 558 F.2d 1342, 1344 (8th Cir. 1977); *In re Erie Lackawanna Ry.*, 393 F. Supp. 352, 359 (N.D. Ohio 1975).

In reliance on this complete remedy, the Court has upheld in the *RRRA Cases* precisely the sort of scheme previously precluded by the logic of *Lee*: rail property passed prior to any valuation and therefore prior to any adequate provision for the payment of compensation. The damage remedy thus is exclusive in fact as well as according to precedent. If a successful plaintiff, however, can be denied payment of its judgment by a statutory change, if that judgment is indeed unenforceable absent congressional consent, the protection offered by the remedy is not only inadequate—it is ephemeral. The fifth amendment compels the conclusion that the same courts which are commanded to state the results of its protection be empowered to enforce those results.

JUDICIAL POWER TO ENFORCE A JUDGMENT AGAINST THE UNITED STATES MAY BE INFERRED FROM THE CONSTITUTION

Plaintiffs who claim compensation for a taking under the fifth amendment have been accorded a unique status by the courts ever since the passage of the Tucker Act. As to such claims the Tucker Act and the Constitution itself provide the basis of a cause of action.⁴⁴ Since the constitutional command constitutes an implied promise to pay what is just,⁴⁵ no other substantive statute need be cited by the plaintiff. In other contexts, the Tucker Act has been held not to support a cause of action not elsewhere defined; the Act constitutes in these instances only a waiver of immunity, not a claim upon which relief can be granted.⁴⁶ Even if the alleged claim is based on a broader due process guarantee, no cause of action exists independently of some other substantive statute.⁴⁷

44. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 149-50 (1974).

45. *Jacobs v. United States*, 290 U.S. 13, 16 (1933). *See also* *Langford v. United States*, 101 U.S. 341 (1879).

46. *United States v. Testan*, 424 U.S. 392, 397-98 (1976). *See also* *Davis v. Romney*, 490 F.2d 1360 (3d Cir. 1974); *McCulloch Gas Processing Corp. v. Canadian Hidrogas Resources Ltd.*, 577 F.2d 712 (Temp. Emer. Ct. App. 1978). The Tort Claims Act is similarly interpreted. *See Feres v. United States*, 340 U.S. 135, 140-41 (1950).

47. *Davis v. Passman*, 571 F.2d 793, 800 (5th Cir. 1978); *Monarch Ins. Co. v. District of Columbia*, 353 F. Supp. 1249, 1253 (D.D.C. 1973), *aff'd*, 497 F.2d 684 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1021 (1974). Compare the result when the suit is brought against an officer of the United States, *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971). The *Davis* court distinguished *Bivens* as involving a more direct infringement of a constitutional right than could be demonstrated by an alleged violation of general due process. 571 F.2d at 796-97.

While it has been urged that the fifth amendment due process clause limits all governmental activities directly, only rarely has a court so held. *Miller v. Howe Sound Min. Co.*, 77 F. Supp. 540, 545 (E.D. Wash. 1948). *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 330-75 (2d ed. 1973); 12 *SANTA CLARA LAW*, 543, 553 (1972).

To argue that the fifth amendment here constitutes not only the source of a plaintiff's right to sue but also a waiver of immunity from execution, and hence a grant of authority to enforce judgments rendered pursuant to it, is not to press for a particularly unique result. It has been suggested that the amendment must constitute at least a waiver of immunity from liability,⁴⁸ and in other contexts immunity has been defeated by constitutional prerogatives. Thus the immunity of a state from suit by another state or by the United States⁴⁹ was waived by the grant of jurisdiction to the Supreme Court contained in article III; that waiver included consent to enforcement of judgments necessary to the purpose of the jurisdiction.⁵⁰

The determination of what constitutes just compensation, and thus the determination of when a taking is constitutional, is by its nature judicial and demands the judgment of a court created pursuant to article III of the Constitution.⁵¹ It was exactly such a court that Congress intended to and did create by the establishment of the Court of Claims, and it was to that court that Congress remanded the plaintiffs deprived of property through the exercise of eminent domain.

The Court of Claims as originally established in 1855 had power only to make findings of fact and recommendations to the Congress for remedies.⁵² The final decision remained with the Congress, as it had prior to the establishment of the court, when petitions for redress were submitted directly to the legislature. When the Act was amended in 1863,⁵³ the power to render judgments was included. However, also included was section 14, which set out the method by which a successful plaintiff was to obtain payment of such judgments; payment was to be made out of any general appropriation passed for the purpose of satisfying private claims, but it was conditioned upon an estimate for payment being

48. See *Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n*, 383 F. Supp. 510, 541 (E.D. Pa. 1974), *rev'd on other grounds*, 419 U.S. 102, 161 (1974). See also note 34 and accompanying text *supra*.

49. See, e.g., *Virginia v. West Virginia*, 246 U.S. 565 (1918) (one state against another state); *Monaco v. Mississippi*, 292 U.S. 313 (1934) (the United States against a state).

50. See note 49 *supra*. See also *Riggs v. Johnson County*, 73 U.S. 166 (1867).

51. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893). *But see Williams v. United States*, 289 U.S. 553, 581 (1933). See also note 23 *supra*.

52. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612. The reason for the restriction was indicated during the debate. At least one member feared that unchecked awards by any body other than Congress would or could result in a severe drain on the national treasury. See Wall & Childres, *Law of Restitution and the Federal Government*, 66 Nw. U.L. Rev. 587, 590 n.6 (1971).

53. Act of March 3, 1863, ch. 92, 12 Stat. 765.

made by the Secretary of the Treasury and congressional appropriation upon that estimate. That review by both the executive and legislative branches was held to preclude jurisdiction on appeal to the Supreme Court; any decision rendered by it in that context would be outside the *judicial* power of the United States courts and so impermissible under article III.⁵⁴ Congress promptly repealed the section and the Court thereafter accepted cases on appeal from the Court of Claims.⁵⁵ Focusing on the freedom from interference by the executive since the repeal of the demand for a treasury estimate⁵⁶, the Court found finality of judgment sufficient to support jurisdiction.⁵⁷

In all other contexts, however, the finality requisite to jurisdiction demands the power of enforcement. As a general principle, inability to enforce a judgment is tantamount to an inability to render it.⁵⁸ Ancillary jurisdiction, codified in the All Writs Act,⁵⁹

54. *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1864). The opinion of the Court was based on a memorandum circulated by Mr. Justice Taney prior to his death. See *Gordon v. United* 117 U.S. 697 (1885) (Appendix I). It is clear from that memorandum that he believed that the legislative as well as the executive review provided for by § 14 prevented an appeal to the Court:

[A]ll that the Court is authorized to do is to certify its opinion to the Secretary of the Treasury, and if he inserts it in his estimates, and Congress sanctions it by an appropriation, it is then to be paid but not otherwise. And when the Secretary asks for this appropriation, the propriety of the estimate for this claim, like all other estimates of the Secretary, will be opened to debate, and whether the appropriation will be made or not will depend upon the majority of each House. The real and ultimate judicial power will, therefore, be exercised by the Legislative Department, and not by that department to which the Constitution has confided it.

... Indeed no principle of constitutional law has been more firmly established or constantly adhered to, than the one above stated—that is, that this Court has no jurisdiction in any case where it can not render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress.

Id. at 702-04.

55. *United States v. Jones*, 119 U.S. 477, 478 (1886); *United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 647-48 (1874).

56. In *Jones*, rather than considering the Taney memorandum which the Court had agreed formed the basis of their judgment in *Gordon*, the Court quoted Mr. Chief Justice Chase's announcement of the decision from the bench:

We think that the authority given to the head of an Executive Department by necessary implication in the 14th section of the Amended Court of Claims Act, to revise all the decisions of that court requiring payment of money, denies to it the judicial power, from the exercise of which alone appeals can be taken to this court.

119 U.S. at 478.

57. 89 U.S. at 647.

58. *District of Columbia v. Eslin*, 183 U.S. 62, 65 (1901).

59. 28 U.S.C. § 1651 (1976). It must be noted that neither this Act, nor the common law authority it codified, is an independent grant of jurisdiction; each speaks only in aid of already existing jurisdiction. *Stafford v. Superior Court*, 272 F.2d 407,

permits a court not only to hear claims related to the primary subject matter,⁶⁰ but also to carry into effect its own prior orders.⁶¹ Indeed, in the past, the conflict perceived between sovereign immunity and the power to enforce a judgment has resulted in a finding that sovereign immunity could not have been waived. Where interpreting language permitting Puerto Rico to "sue or be sued" as not encompassing a waiver of immunity, the Supreme Court stated the result of a contrary holding in this fashion:

[A]s the essence of paramount judicial power over a subject confers the authority and poses the duty to enforce a judgment rendered in the exercise of such power, it follows that the contention is that the government . . . is not the character of government which this court has declared it to be [a sovereign territory] but is, on the contrary, one in which the legislative power concerning claims of every kind against the government is subordinated to the judicial.⁶²

It is presumably better, from the viewpoint of injured citizens, to resolve the conflict by a reliance on the distinction between waivers of immunity from liability and from execution than to adopt the above result. But it is not necessarily logical.

Perhaps in recognition of the inherent conflict, or perhaps in accordance with judicial reluctance to deny judicial power,⁶³ the courts have to some extent limited the theory that ancillary jurisdiction cannot extend to suits against the United States.⁶⁴ In the first place, if the suit is brought against an officer of the United States who allegedly acted either outside the scope of his statutory authority or unconstitutionally, enforcement is both available and proper. One federal district court has reasoned:

The power to declare an action of the legislative or execu-

409 (9th Cir. 1959); *Hill v. United States Bd. of Parole*, 257 F. Supp. 129, 130 (M.D. Pa. 1966).

60. *Dugas v. American Sur. Co.*, 300 U.S. 414, 428 (1937); *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934); *National Treasury Employees Union v. Nixon*, 521 F.2d 317, 320 (D.C. Cir. 1975).

61. *Central Nat'l Bank v. Stevens*, 169 U.S. 432, 464-65 (1898); *Root v. Woolworth*, 150 U.S. 401, 410-11, 413 (1893); *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 189 (1867).

62. *Porto Rico v. Rosaly*, 227 U.S. 270, 276 (1913) (citations omitted).

63. "When a congressional intent [to restrict remedial authority] is unclear, however, no diminution in the remedial powers of the federal courts may be inferred. Congress must speak clearly to interfere with the historic equitable powers of the courts it has created." *In re Letourneau*, 559 F.2d 892, 894 (2d Cir. 1977) (citations omitted).

64. Of course, the converse is not and never has been true. Judgments in favor of the United States are enforceable whether rendered in suits brought by the government as plaintiff or through counterclaims in the Court of Claims. *Pocono Pines Assembly Hotels Co. v. United States*, 73 Ct. Cl. 447, 482 (1932).

tive branch unconstitutional is an empty one if the judiciary lacks a remedy to stop or prevent the action. Few more unseemly sights for a democratic country operating under a system of limited governmental power can be imagined than the specter of its courts standing powerless to prevent a clear transgression by the government of a constitutional right of a person with standing to assert it.⁶⁵

Of course, in such a situation sovereign immunity is no bar in any event, since the suit is not characterized as one against the government.⁶⁶ When the defendant is clearly the United States, a court will utilize ancillary jurisdiction to enforce a prior judgment if consent has been given to hear the substance of the second assertion; no new action need be instituted.⁶⁷ Whether that consent exists, of course, is the question to which, in the context of the Tucker Act, the courts have assumed a negative response. However, in at least one other context consent has been found, in reliance on traditional ancillary power. Congress had vested jurisdiction in the Court of Claims to determine what monies were then owing, by virtue of treaties, to certain Indian tribes. Subsequent to the court's determination of the sum due, and subsequent to congressional appropriation and distribution, other parties appeared to claim their entitlement to some share of the fund. The Court of Claims was held to have jurisdiction to determine the merits of their claim:

The jurisdiction of a court is not exhausted by the mere entry of a judgment. It always has power to inquire whether that judgment has been executed, and the contention here is—and it is the basis of this suit—that the judgment which was rendered in the prior suit has not been executed. It would be an anomaly to hold that a court having jurisdiction of a controversy and which renders a judgment in favor of A against B had no power to inquire whether that judgment has been rightly executed by a payment from B to C. If the Court of Claims had no authority to inquire into the execution of its judgment it was shorn of a part of the ordinary jurisdiction of a court.⁶⁸

For the most part, however, courts have adhered to the tradi-

65. *Cortwright v. Resor*, 325 F. Supp. 797, 813 (E.D.N.Y. 1971) (citations omitted) (quoting *Bivens v. Six Unknown Named Agents*, 409 F.2d 718, 723 (2d Cir. 1969)), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

66. *See note 14 supra*.

67. *Dixie Highway Express, Inc. v. United States*, 268 F. Supp. 239, 240 (S.D. Miss. 1967), *rev'd on other grounds*, 389 U.S. 409, 410 (1967).

68. *Pam-To-Pee v. United States*, 187 U.S. 371, 382 (1902). *Compare In re Sanborn*, 148 U.S. 222, 223-24 (1893), in which the determination by the Court of Claims of the plaintiff's right to share in an appropriated fund was held to be

tional holding that judgments against the United States are not enforceable through reference to ancillary jurisdiction, either by execution or garnishment.⁶⁹ Neither may a claim be brought against the United States for its failure to pay a judgment; unless an appropriation has been made for that judgment the plaintiff is seeking nothing more than a reaffirmation of the first decision and raises no issue which has not already been litigated.⁷⁰ This immunity from execution is justified as necessary both to the doctrine of separation of powers, since only Congress may appropriate monies of the United States,⁷¹ and to the unhampered performance of public duties by the other governmental branches.⁷² Its existence, while admittedly subjecting judgments against the United States to effective legislative review, has been held not to destroy the judicial nature of cases in which the sovereign is a defendant; as long as those determinations remain free from executive control, they may be determinations made under article III and reviewed in the Supreme Court.⁷³ The Court has justified such legislative review by pointing to other situations in which it also saw enforceability as impossible, but in which it had claimed and would continue to claim jurisdiction.⁷⁴ Unfortunately, none of those other situations

outside the permissible scope of Supreme Court review as an exercise of referral legislative power (in part because the court's decision was unenforceable).

69. See, e.g., *United States v. Krakover*, 377 F.2d 104, 106 (10th Cir. 1967). This case can be narrowly read as holding only that execution is unavailable when the government has not consented to suit in the first instance. It is true that the ultimate holding of the court was that certain general statutory authority regarding the payment of a debtor's wages to a bankruptcy trustee did not encompass the situation in which the employer was the United States. However, the basis of that holding was the assumed inability of a court to enforce such an order and hence the futility of its issuance. *Id.* *Pocono Pines Assembly Hotels Co. v. United States*, 73 Ct. Cl. 447, 500 (1932); *Collins v. United States*, 15 Ct. Cl. 22, 35-36 (1879); D. CURRIE, *FEDERAL COURTS: CASES AND MATERIALS* 8 n.1 (2d ed. 1975); H. STREET, *supra* note 21, at 182. See also *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705, 708-09 (2d Cir. 1930); *Bradford v. Chase Nat'l Bank*, 24 F. Supp. 28, 38 (S.D.N.Y. 1938), *aff'd*, 105 F.2d 1001 (2d Cir. 1939), *aff'd*, 309 U.S. 632 (1939).

70. *Citizens Bank & Trust Co. v. United States*, 240 F.2d 863, 863-64 (D.C. Cir. 1956), *cert. denied*, 355 U.S. 825 (1957). See also *Helfield v. United States*, 78 Ct. Cl. 419 (1933).

71. See notes 92-102 and accompanying text *infra*.

72. See note 37 *supra*.

73. See notes 27 and 57 and accompanying text *supra*. See also D. SCHWARTZ & S. JACOBY, *supra* note 14, at 82.

74. *Glidden Co. v. Zdanok*, 370 U.S. 530, 571 (1962). In deciding a somewhat related issue the Court had earlier upheld a declaratory judgment act against a constitutional "case or controversy" attack, based on the lack of any enforceable judgment. *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 259-60 (1933). As in *Glidden*, the Court cited various instances in which jurisdictionally proper judgments were "unenforceable," including those rendered against the United States. *Id.* The following analysis of other such situations will include those cited by the Court in both cases.

present comparable problems. The great majority of them—requests to decree boundaries,⁷⁵ naturalization proceedings, suits to determine status, bills to quiet title, and declaratory judgment proceedings in all guises⁷⁶—do not involve a judgment necessary of enforcement. In only one instance did the Court identify a similar difficulty: a claim for damages for breach of contract brought by one state against another was allowed “despite persistent and never-surmounted challenges to its power to enforce a decree.”⁷⁷ However, reference to the actual opinion in that case, *Virginia v. West Virginia*,⁷⁸ raises serious doubts about the Court’s later use of it. In a previous action, Virginia had obtained a judgment against West Virginia, which had not been paid. Virginia then sought an order directing a tax levy by the West Virginia legislature. While finally refusing the requested relief because of a continuing hope that West Virginia would pay the judgment of its own volition, the Court clearly stated that the refusal was not based upon any lack of authority: “That judicial power essentially involves the right to enforce the results of its exertion is elementary. And that this applies to the exertion of such power in controversies between States as the result of the exercise of original jurisdiction conferred upon this court by the Constitution is therefore certain.”⁷⁹

Rejecting an argument that to compel the exercise of the state’s taxing power, and hence to force satisfaction out of governmental funds, would be to infringe unconstitutionally on the state’s governmental authority, the Court held that its grant of jurisdiction over disputes between states modified that authority and permitted enforcement.⁸⁰ In other words, one provision of the

75. See, e.g., *Michigan v. Wisconsin*, 272 U.S. 398, 398 (1926); *Oklahoma v. Texas*, 272 U.S. 21, 23 (1926); *Georgia v. South Carolina*, 257 U.S. 516, 517 (1922); *Arkansas v. Tennessee*, 246 U.S. 158, 160 (1918). In *Louisiana v. Mississippi*, 202 U.S. 58, 58-59 (1906), the Court, having previously decreed the boundary, enjoined Mississippi from disputing Louisiana’s sovereignty under that prior decree; there was no indication that that injunction was not enforceable.

76. *Fidelity Nat’l Bank v. Swope*, 274 U.S. 123, 132 (1927).

77. *Glidden Co. v. Zdanok*, 370 U.S. 530, 571 (1962). The Court also referred to *South Dakota v. North Carolina*, 192 U.S. 286 (1904), involving a similar dispute. The Court in that case set out the dilemma presented by a constitutional grant of jurisdiction over a dispute which traditionally could not result in an enforceable judgment, but failed to answer that dilemma in the hope that further activities of the parties would preclude the necessity of answering the problem. Interestingly, the Court’s description of the result of a lack of enforcement power implies consequent lack of jurisdiction: “such lack of power is conclusive evidence that notwithstanding the general language of the Constitution, there is an implied exception of actions brought to recover money.” *Id.* at 318.

78. 246 U.S. 565 (1918).

79. *Id.* at 591 (citations omitted).

80. *Id.* at 594-96.

Constitution modified the apparently absolute nature of another and the constitutionally compelled waiver of immunity from liability implied a waiver of immunity from execution.⁸¹

It is unclear why an article III court may render a judgment against the United States which is unenforceable absent congressional appropriation and hence subject to legislative review. Legislative power to refuse payment would seem to impinge as directly and as disastrously on the finality and independence of such judgments as would the executive review historically rejected.⁸² The only feasible explanation involves a continuing attempt to ignore the supposedly inherent conflict, aided by the wisdom of Congress in only infrequently making such conflict actual.⁸³

81. The Court reasoned that

not a want of authority in Congress [under the Articles of Confederation] to decide controversies between States, but the absence of power in Congress to enforce as against the governments of the States its decisions on such subjects, was the evil that cried aloud for cure, [and which was cured by the grant of Supreme Court jurisdiction over such disputes contained in article III].

Id. at 599.

Courts have recognized waiver of this immunity from execution by implication in the context of suits involving foreign sovereigns who fail to object timely to the attachment or sale of their property. *Flota Maritima Browning de Cuba v. Motor Vessel Ciudad*, 335 F.2d 619, 621 (4th Cir. 1964); *United States v. Harris & Co. Advertising, Inc.*, 149 So. 2d 384, 386 (Fla. Dist. Ct. App. 1963).

Also, the immunity can be waived by the United States and, in the context of federal instrumentalities, has been. See notes 121-122 *infra*. Such waivers, however, are construed as being addressed solely to funds in the possession of the instrumentality, severed from the Treasury and from Treasury control. *Federal Housing Admin. v. Burr*, 309 U.S. 242, 250 (1940). Such a limitation, of course, may make the waiver meaningless, since such funds are generally deposited in the Treasury. *Id.* at 250-51.

82. See notes 54-57 and accompanying text *supra*.

83. That this infrequency is necessary to continued review in the Supreme Court and to the continued article III status of the Court of Claims was suggested 40 years ago in a slightly different context. Commenting on the congressional referral of *Pocono Pines Assembly Hotel Co. v. United States*, 73 Ct. Cl. 447 (1932), to the Court of Claims for findings of fact, one commentator stated that

frequent review by Congress of the facts upon which judgments are based, under the guise of inquiry into the desirability of payment, may force the Supreme Court to review the objections to finality raised by the *Gordon* case. It is possible that appellate jurisdiction in the Supreme Court is conditioned upon congressional power to "remand" judgments for further facts . . . remaining dormant. To force a reconsideration of the basis of the Court's appellate jurisdiction would be doubly unfortunate, since it is difficult to see how Congress could later obtain a review of the judgments of the Court of Claims if the Supreme Court should decide that they now lack practical finality.

Note, 46 HARV. L. REV. 676, 686-87 (1933).

NEITHER THE ABILITY OF CONGRESS TO CREATE A RIGHT WITHOUT
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The congressional creation of a remedy against the United States is thought in all contexts to demand a waiver of the immunity of the sovereign, which waiver is solely within the discretion of Congress. While courts do not lightly assume that no remedy has been provided, it is recognized that such is possible, and the existence of an administrative remedy may well satisfy the court that none other was intended.⁸⁴ Congress may provide alternative administrative and judicial remedies which it may make mutually exclusive;⁸⁵ it may also condition access to a judicial remedy upon prior administrative action, even though compliance with such conditions is dependent solely on the government.⁸⁶ In the latter situation, it is clear that whatever "remedy" is provided is in fact illusory; nonetheless, the statute remains controlling.

The corollary of the power to deny all remedies is the power to revoke remedies previously granted. For example, since 1877, the

84. *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943). The Court reasoned:

If the absence of jurisdiction of the federal courts [to review decisions of the National Mediation Board regarding proper participants in a union election] meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control.

Id. at 300. The inference, however, clearly could be defeated.

85. *See, e.g., Morgan v. Bureau of Alcohol, Tobacco & Firearms*, 389 F. Supp. 1099, 1101 (E.D. Tenn. 1974).

86. *Hobby v. Hodges*, 215 F.2d 754 (10th Cir. 1954). In a dispute over social security payments, the plaintiff's request for an administrative hearing was denied and suit was brought to reverse the refusal. The appellate court reversed, for lack of jurisdiction, a lower court holding issuing the order. Judicial review by statute demanded the hearing prior to court action.

It is urged that if a prior hearing is jurisdictional to a court action, the Administrator may defeat the statutory right of review by denying the request for a hearing. The immunity rule in many instances may appear to be harsh, but it is well established that without specific statutory authority, an individual has no right of action against the United States in the courts even though the statute creates rights in the individual against the United States. Congress may create rights without providing a remedy in the courts.

Id. at 757-58 (citations omitted).

Tucker Act has provided consent of the government to be sued on claims founded upon the Constitution; reliance on that consent, however, is misplaced when consent with respect to the specific kind of claim presented by the plaintiff is withdrawn. Thus, an allegation that the forced sale at a settled price to the government of gold deprived the plaintiff of property without just compensation in violation of the fifth amendment was dismissed for want of jurisdiction; all prior consent to suits arising out of the "surrender, requisition, seizure, or acquisition of any . . . gold . . . and involving the effect or validity of any . . . regulation of the value of money" had been withdrawn. Holding that the power to withdraw consent was unlimited, the Ninth Circuit Court of Appeals refused to reach the constitutional merits of the plaintiff's claim.⁸⁷ Similarly, in *Lynch v. United States*,⁸⁸ a plaintiff-beneficiary under a governmental insurance contract was precluded from seeking payment under the contract because of a withdrawal of consent. The Supreme Court, while agreeing that Congress could not annul the contract without violating the fifth amendment, held that the right to sue the United States on the contract could be revoked: "For consent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration."⁸⁹

87. *Laycock v. United States*, 230 F.2d 848, 850 (9th Cir. 1956), *cert. denied*, 351 U.S. 964 (1956).

The courts recognize the same power of foreign governments to revoke prior consent. The court in *Rich v. Naviera Vacuba, S.A.*, 197 F. Supp. 710, 719-20 (E.D. Va. 1961), *aff'd*, 295 F.2d 24 (4th Cir. 1961), held effective Cuba's revocation of consent respecting the sale of attached assets in satisfaction of judgment, even though that revocation clearly constituted a breach of a prior contractual agreement.

88. 292 U.S. 571 (1934).

89. *Id.* at 581 (citations omitted). Neither did the withdrawal of consent unconstitutionally impair the obligation of contract; "[c]ontracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened. A different rule prevails in respect to contracts of sovereigns." *Id.* at 580 (footnote omitted).

While the concept of a sovereign capable at will and with impunity of breaching all agreements may be enshrined in history, it is certainly antithetical to current concepts of limited government. In an earlier case, and in a slightly different context, the Court found another justification for the withdrawal of consent—its prior lack of effectiveness absent the power to enforce a judgment. In *Railroad Co. v. Tennessee*, 101 U.S. 337 (1879), a state bank was allegedly indebted to the plaintiff on a liability which had arisen when state law permitted suits against the state. After that consent was withdrawn, the plaintiff sued arguing that the withdrawal impaired the obligation of contract and so was inoperative. The Court disagreed:

The remedy, which is protected by the contract clause of the Constitution, is something more than the privilege of having a claim adjudicated. . . . There must be the power to enforce the results of such an inquiry before

Obviously, if Congress is free to deny any remedy, it is free to offer merely one limited by the need to obtain congressional approval prior to the payment of judgments.

The difficulty with the analysis, in the context of a claim for just compensation, is that the basis of the right claimed is not congressional but constitutional—while the suit for damages may demand a waiver of immunity capable of revocation, in its absence a plaintiff must be able to obtain equitable relief.⁹⁰ The denial of that relief depends upon the availability of the other,⁹¹ both cannot be denied.

The inability of either the executive or judicial branch to command the payment of government funds absent a congressional appropriation has long been recognized.⁹² A suit against the United States based on congressional refusal to appropriate funds in order to pay a judgment fails for lack of subject matter jurisdiction.⁹³ Moreover, at least prior to 1962,⁹⁴ Congress in determining whether or not to appropriate funds could refer a claim back to the Court of Claims for factual findings.⁹⁵

there can be said to be a remedy which the Constitution deems part of the contract.

Id. at 339. Since the prior consent was only to adjudication (payment of judgments was only by appropriation); no actual remedy had ever existed and hence the withdrawal of consent did not impair the contract. *Id.* at 340.

90. See note 34 and accompanying text *supra*.

91. See note 41 and accompanying text *supra*.

92. *Reeside v. Walker*, 52 U.S. (11 How.) 271 (1850); *Buchanan v. Alexander*, 45 U.S. (4 How.) 19; 20 (1846) (precluded attachment of funds owed by the United States to a debtor of the plaintiff; the funds of the government are specifically appropriated and may not be diverted); *Haskins Bros. & Co. v. Morgenthau*, 85 F.2d 677; 682-84 (D.C. Cir. 1936); *cert. denied*, 299 U.S. 588 (1936) (suit for refund of allegedly unconstitutional exacted tax dismissed; remedy is statutory suit against the United States; not a mandamus action against the Secretary of the Treasury; who has no authority to withdraw funds absent any appropriation).

At least one commentator has indicated that the possible conflict posited in this article has been avoided in the past in part by a generous view as to the breadth of this power of appropriation. See D. SCHWARTZ & S. JACOBY, *supra* note 14, at 85.

93. *Hetfield v. United States*, 78 Ct. Cl. 419 (1933). In *Hetfield*, the underlying judgment was apparently not based on any constitutional provision. The court found that since the enforcement action was not based on any act of Congress or on an implied contract to pay; there was no claim stated upon which relief could be granted. *Id.* at 420; 423.

94. In *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962); the Supreme Court indicated that given the article III status of the court; this exercise of legislative authority should cease; only the judicial power of the United States could be exercised. See note 23 *supra*.

95. *Pocono Pines Assembly Hotel Co. v. United States*, 73 Ct. Cl. 447 (1932). While agreeing that it would be unconstitutional for Congress to order a new trial; the court distinguished between its judicial role (in which it had finally determined the liability of the United States) and its role as a legislative court under article I. In the latter guise; it was capable of aiding the purely legislative determination regarding an appropriation. *Id.*

Congress may not, however, utilize its appropriation power to accomplish other, unconstitutional, ends. In two cases the Supreme Court has struck down legislation over an argument of unfettered appropriation discretion. *United States v. Klein*⁹⁶ involved a congressional attempt to prescribe for the courts the effect of a presidential pardon. The act was included in the appropriation for payment of judgments of the Court of Claims; however, it did not speak to the disbursement of funds but to the jurisdiction of the court. Finding that Congress intended to and had created a judicial rule of decision, forbidding the Court to give the proper effect to evidence of a pardon, the Court held the legislation unconstitutional. No part of the legislation precluded payment of judgments which rested on pardons, and the case provided no indication of the possible success of such a tactic. Perhaps both Congress and the Court assumed the validity of that kind of control; a similar scheme had recently been upheld in *Hart v. United States*.⁹⁷ Congressional legislation forbidding the payment of pre-Civil War claims if the plaintiff had sustained the rebellion was held to deny jurisdiction over a claim brought by such a plaintiff. There was no method by which payment could be made on any judgment rendered, therefore, there was no jurisdiction to hear the claim. This method of limiting jurisdiction, however, is subject to constitutional constraint; the power to appropriate or refuse to appropriate funds cannot be used to create the equivalent of a bill of attainder. In *United States v. Lovett*,⁹⁸ congressional legislation precluding the use of appropriated funds to pay salaries or other compensation for personal services rendered to three named parties (because of alleged subversive activities) was denied effect by the Court. The government had argued that the legislation was a mere appropriation measure and, therefore, immune from constitutional attack as raising a political issue over which Congress had the final say. The Court disagreed. The purpose of the act was to bar the three individuals from government service. The Court noted that "[w]ere this case to be not justiciable, congressional action, aimed at three named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result."⁹⁹ Indeed, the Constitution specifically forbade the result, and that command made futile an appeal to the broad appropriation power.

96. 80 U.S. (13 Wall.) 128 (1871).

97. 118 U.S. 62 (1886).

98. 328 U.S. 303 (1946).

99. *Id.* at 314.

No court opinion, however, has expanded the *Lovett* prohibition to statutes such as that involved in *Hart*, which speak in generalities rather than in specifics and which preclude payment in a class of cases rather than to individual parties.¹⁰⁰ Nonetheless, the constitutional command of the fifth amendment is as clear and as binding as that precluding bills of attainder, and the power of Congress to appropriate funds ought to be limited as obviously by the one as by the other.¹⁰¹ While it is Congress' prerogative to define the remedy by which the fifth amendment shall be enforced, the remedy which it defines must be sufficient. If damages are that remedy, their payment must be enforceable.¹⁰²

JUDICIAL POWER TO ENFORCE A JUDGMENT AGAINST THE UNITED STATES MAY BE IMPLIED FROM STATUTORY WAIVERS OF IMMUNITY FROM LIABILITY

While the Constitution itself commands the judiciary to provide effective redress for an individual whose property is taken without just compensation, and this implies the enforceability of an exclusive damages remedy, in other contexts it remains true that the enforceability of any claim against the government must rely upon a congressional waiver of immunity from execution. Should Congress intend to retain discretion to pay or not pay resulting judgments, no appeal to the Constitution could deny the

100. Indeed, upon occasion the Court has struggled to prevent appropriation legislation from being read as an unconstitutional restriction on the rights of an individual. Thus, specific legislation permitting the purchase of certain property for up to \$65,000 was held not to preclude the taking of that property by eminent domain and the setting of just compensation at a figure higher than that appropriated. *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 589 (1923). Compare the analysis of the Court in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). See notes 9-10 and accompanying text *supra*.

At least one case, however, has upheld a congressionally imposed limit on possible recovery in the face of an argument that such a limitation constituted an invalid attempt to exercise judicial power. In *Nock v. United States*, 2 Ct. Cl. 451 (1866), the court found that the congressional act was not an attempt either to award the judgment or to grant a new trial; instead Congress, as the defendant, had waived certain defenses consenting to a trial on the merits, but conditioning that consent upon a limited recovery. *Id.* at 457-58.

101. Such implied limitations have been found in other contexts. For example, the fourteenth amendment has been held to limit the apparently absolute protection given to states by the eleventh amendment against suits in federal courts. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Furthermore, the apparently absolute power of the House of Representatives to control the disposition of United States' property does not preclude the ratification of the Panama Canal Zone treaty by the Senate. *Edwards v. Carter*, 580 F.2d 1055, 1076-80 (D.C. Cir. 1978). See also note 80 and accompanying text *supra*.

102. In the context of state immunity, one commentator has suggested that failure to pay only certain judgments might create difficulties under the equal protection clause of the fourteenth amendment. Note, 37 LA. L. REV. 982, 988 (1977).

immunity so claimed. However, it is arguable that, even absent prior appropriation, the waiver of immunity from liability implies the waiver of that immunity as well.

As a general proposition, any waiver of the sovereign's immunity, which is in derogation of the common law, is strictly construed.¹⁰³ Very frequently, that canon is cited in conjunction with the ability of Congress to condition the waiver in whatever manner it sees fit.¹⁰⁴ Such conditions thus become jurisdictional prerequisites, and failure to comply with them results in dismissal.¹⁰⁵ However, the demand for strict construction also frequently results in a holding that whatever waiver is cited by the plaintiff in fact fails to include consent to the suit actually filed. Thus a statute waiving immunity with respect to suits to partition land held by tenants in common failed to support a suit by a party who alleged such title when the United States asserted sole title and possession; the action was characterized as one to try title, partition being only an incident of relief if title were found in the plaintiff. As to such a claim, there was no waiver, and hence no jurisdiction.¹⁰⁶ Similarly, by assuming the status of a plaintiff, the United States is not held to have waived its immunity and may assert that immunity to defeat an otherwise permissible counterclaim,¹⁰⁷ although such

103. *United States v. Sherwood*, 312 U.S. 584, 590 (1941).

104. *See* note 86 *supra*.

105. *See, e.g., United States v. John Hancock Mut. Ins. Co.*, 364 U.S. 301 (1960) (United States permitted to redeem property as junior lienholder, although state law gave the right to the mortgagor, since the statutory right was a condition of the waiver allowing the United States to be joined in foreclosure proceedings); *Best Bearings Co. v. United States*, 463 F.2d 1177 (7th Cir. 1972) (an administrative claim is a jurisdictional prerequisite to suit under the Tort Claims Act); *United States v. Rochelle*, 363 F.2d 225 (5th Cir. 1966) (claim for a tax refund is a jurisdictional prerequisite to suit under the Tucker Act); *United States v. Christensen*, 207 F.2d 757 (10th Cir. 1953) (claim under an insurance policy must first be filed with and rejected by the Veterans' Administration); *Groce v. Rapidair, Inc.*, 305 F. Supp. 1238 (W.D.N.C. 1969) (the statute of limitations contained in the Tort Claims Act is jurisdictional in nature); *Kaufman v. Scanlon*, 245 F.Supp. 352 (E.D.N.Y. 1965) (a demand that the plaintiff demonstrate that under the most liberal view of the law and facts the government cannot recover a penalty tax assessment is jurisdictional; it is not met by a showing of extreme hardship and irreparable injury).

106. *Rambo v. United States*, 145 F.2d 670 (5th Cir. 1944), *cert. denied*, 324 U.S. 848 (1945). In defining the scope of the waiver, the court referred to the past practices of the High Court of Chancery, which did not include suits to try title when the plaintiff was not in possession in petitions for partitions. *See also Stanton v. United States*, 434 F.2d 1273 (5th Cir. 1970).

107. *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940); *United States v. Shaw*, 309 U.S. 495, 504 (1940); *United States v. Patterson*, 206 F.2d 345, 348 (5th Cir. 1953); *United States v. Merchants Transfer & Storage Co.*, 144 F.2d 324, 327 (9th Cir. 1944), *distinguishing Luckenbach S.S. Co. v. The Thekla*, 266 U.S. 328 (1924) as involving an admiralty proceeding where the court is obliged to determine the cross-libel as well as the original libel to reach its conclusion; *United*

claims may be used to the extent necessary as set-offs.¹⁰⁸ Furthermore, the existence of authority under some other federal statute or rule may not be read in conjunction with a waiver of immunity to encompass a claim not specifically allowed under the waiver.¹⁰⁹ Even if the statute consenting to suit refers to another statute, the reference may not be permitted to expand jurisdiction.¹¹⁰ The doctrine also has been used to limit the intendment of the scope of the waiver statute itself. When jurisdiction was granted to the Court of Claims in 1877 to hear constitutionally based claims, the new statute included a section which referred to "money or any other thing claimed" by the plaintiff. Arguing that the section expanded the court's jurisdiction to claims for equitable rather than monetary relief, a party sued to compel the sale of land to him by the United States. Over two dissents, the Supreme Court denied jurisdiction, holding that the section was merely "one of those general

States v. Wickersham, 10 F. 505, 510-11 (W.D. Tenn. 1882). See also Note, 45 N.C. L. REV. 1049, 1053 (1967).

108. United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 511 (1940).

109. United States v. Sherwood, 312 U.S. 584, 591-92 (1941). Plaintiff, a judgment creditor of X, attempted to sue the United States and X, alleging that the United States had breached a contract with X. Sherwood argued that out of X's recovery his judgment could be paid. The lower court allowed the suit since the district court had jurisdiction under the Tucker Act to adjudicate a claim between the United States and X, and since New York law (applicable under FED. R. CIV. P. 17b, which makes capacity to sue a matter determined by the law of the plaintiff's domicile) allowed suit by a judgment creditor of a person indebted to the judgment debtor; it was held permissible to exercise both grants of jurisdiction in a single suit. The Supreme Court reversed. The United States had not consented to a suit so structured, and the federal procedural rules in no way expand the jurisdiction granted by the Tucker Act. *Id.* at 589-90.

Similarly, the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1976), does not encompass claims for fees against the United States, even though there has been a waiver of immunity with respect to the primary claim. Shannon v. HUD, 577 F.2d 854, 856 (3d Cir. 1978). Compare note 126 and accompanying text *infra*.

110. Uarte v. United States, 7 F.R.D. 705, 708 (S.D. Cal. 1948). The plaintiff sued the United States under the Tort Claims Act and attempted to join, as a defendant, another party pursuant to FED. R. CIV. P. 20. Authority to do so was denied:

Reference in a waiver statute to other statutes [here the FED. R. CIV. P.], as governing the procedure under it, means nothing more than that certain *formal* rules of procedure obtain in actions as to which the waiver relates. But even the most general reference to such other statutes, . . . *cannot* affect the *manner* and the *conditions* of the waiver. They are strictly delimited by the waiver statute itself, and no change in its conditions or restrictions can be read into it inferentially by such reference to procedural incidences.

7 F.R.D. at 711.

Neither may the unhappy plaintiff rely on the concept of pendent or ancillary jurisdiction to allow joinder of the second defendant. Benbow v. Wolf, 217 F.2d 203, 205 (9th Cir. 1954); Wasserman v. Perugini, 173 F.2d 305, 306 (2d Cir. 1949). Whether this is because the court in the absence of diversity lacks jurisdiction over the third party or because the Tort Claims Act does not support an action against an agent of the United States is unclear. See *id.*

expressions which must be restrained by the more special and definite indications of intention furnished by the context."¹¹¹ Since the act left unchanged various other sections which couched jurisdiction as well as appellate and collection procedures solely in monetary terms, the court's jurisdiction was also held to have been left unchanged.

Strict construction of the scope of a waiver admittedly applicable to a specific case can, of course, bind the government as well as the individual. For example, permission to allow money damages to be assessed against the United States has been construed to permit only the award of a lump sum; the award must be in accordance with the common law since the statute nowhere indicates authority beyond that derived by necessary implication from the phrase used.¹¹² Thus, although a large award made to an injured plaintiff, if placed in trust to be paid during the plaintiff's lifetime, might in the end cost the government less than the immediate payment of the entire sum, the court could order only the latter. However, most frequently the principle of strict construction operates to deprive the individual plaintiff of a remedy. The clearest such restriction is also the most important; the Tucker Act does not permit the Court of Claims to order equitable rather than monetary relief.¹¹³ Any equitable remedy available against the government

111. *United States v. Jones*, 131 U.S. 1, 19 (1889). A more recent case indicating the need for a specific waiver of immunity is *Henry v. Textron, Inc.*, 577 F.2d 1163, 1164 (4th Cir. 1978).

112. *Frankel v. Heym*, 466 F.2d 1226, 1228-29 (3d Cir. 1972). The court reasoned: Admittedly, courts of law had no power at common law to enter judgment in terms other than a simple award of money damages. In view of that limitation, we have examined the enactment, 28 U.S.C. Ch. 171, that authorized and circumscribed tort actions against the sovereign and, to some extent, prescribed the procedure for such cases. More particularly, section 2679(b) of Title 28, makes the remedy provided in section 1346 of Title 28 the exclusive resort of such claimants as the plaintiffs. Among other things, Section 1346(b) authorizes district courts to entertain "civil actions on claims against the United States, for money damages. . . ." Arguably, this language at least implies that primary awards in such civil suits must take the form of common laws [*sic*] money judgments, the only form of "money damages" known to the common law. More probably, the Congress never considered whether it might be desirable that some awards be made in a different form.

[I]n administering the legislation in question a . . . court should not make other than lump-sum money judgments unless and until Congress shall authorize a different type of award . . . If novel types of awards are to be permitted against the government, Congress should affirmatively authorize them.

Id.

113. *See, e.g., Lee v. Thornton*, 420 U.S. 139, 140 (1975) (request for declaratory judgment that a statute was unconstitutional and an injunction against its enforcement denied); *Richardson v. Morris*, 409 U.S. 464, 465 (1973) (request to enjoin enforcement of statute as unconstitutional denied); *Hatahley v. United States*, 351

must be only incidental to the primary award of damages.¹¹⁴ The Declaratory Judgment Act does not affect the jurisdiction granted by the Tucker Act,¹¹⁵ nor, apparently, does the Administrative Procedure Act.¹¹⁶

Similarly, garnishment of monies owed by the United States to a debtor of the plaintiff has long been recognized as demanding a waiver of immunity.¹¹⁷ Plaintiffs have urged that, when the United States consents to suit, it consents also to the garnishment process. The argument has been denied, in the absence of a specific waiver,¹¹⁸ and even when such waivers are found, they too are strictly construed.¹¹⁹ If the general consent to suit does not en-

U.S. 173, 182 (1956) (award of damages for destruction of horses upheld, but injunction prohibiting further interference denied); *Wells v. United States*, 280 F.2d 275, 277 (9th Cir. 1960); *Blanc v. United States*, 244 F.2d 708, 709-10 (2d Cir. 1957); *Clay v. United States*, 210 F.2d 686, 686 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 927 (1953) (suits for declaratory judgments dismissed); *Bower v. United States*, 347 F. Supp. 1252, 1254 (W.D. Pa. 1972) (suit to recover specific property dismissed); and *R.E.D.M. Corp. v. Lo Secco*, 291 F. Supp. 53, 58 (S.D.N.Y. 1968), *aff'd*, 412 F.2d 303 (2d Cir. 1969) (suit for mandamus dismissed).

114. *Werner v. United States Dept. of Interior, Fish & Wildlife*, 581 F.2d 168, 171 (8th Cir. 1978). See also note 113 *supra*. Apparently even such incidental equitable relief requires specific authorization. *Melvin v. Laird*, 365 F. Supp. 511 (E.D.N.Y. 1973), discussing the 1972 amendment to 28 U.S.C. § 1491, permitting the Court of Claims to order "restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records" as an incident of a primary monetary award. *Id.* at 518.

115. *United States v. King*, 395 U.S. 1, 5 (1969); *Twin Cities Properties, Inc. v. United States*, 81 Ct. Cl. 655, 658 (1935). See also cases cited at note 113 *supra*. This is clearly in accord with the reluctance of the courts to read two statutes together in order to expand the waiver granted by one. See note 109 and accompanying text *supra*. The Court in *King* reasoned:

For the court below, it was sufficient that there was no clear indication that Congress affirmatively intended to exclude the Court of Claims from the scope of the Declaratory Judgment Act. We think that this approach runs counter to the settled propositions that the Court of Claims' jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and that such a waiver cannot be implied but must be unequivocally expressed.

395 U.S. at 4 (citations omitted).

116. *Washington v. Udall*, 417 F.2d 1310, 1320 (9th Cir. 1969) (citations omitted).

117. *United States v. Krakover*, 377 F.2d 104, 106 (10th Cir. 1967) (an order of garnishment would have an impact on the government, no matter how slight, and in any event is unenforceable); *Allen v. Allen*, 291 F. Supp. 312, 313-14 (S.D. Iowa 1968) (an order of garnishment would increase the costs of administration and so would expend itself upon the public treasury). See generally *Buchanan v. Alexander*, 45 U.S. (4 How.) 19 (1846) (to permit the reallocation of funds by the court would interfere with Congress' power of appropriation and would adversely affect the functions of government).

118. *Chilean Line, Inc. v. United States*, 344 F.2d 757, 762 (2d Cir. 1965). See also *Porto Rico v. Rosaly*, 227 U.S. 270, 276-77 (1913), construing away the apparent consent to suit given by the Puerto Rican government in the Organic Act.

119. See generally *May Dept. Stores Co. v. Smith*, 572 F.2d 1275, 1278 (8th Cir. 1978); *Overman v. United States*, 563 F.2d 1287, 1292-93 (8th Cir. 1977) (statutory

compass this relatively mild form of court interference, it may not encompass enforcement orders, which would obviously more seriously affect the functions of other governmental branches.

However, even in light of the general rule of strict construction, in certain instances courts have permitted inferential remedies, refusing to sustain the argument that such remedies, no matter how useful, would impede government activity.¹²⁰ If the defendant is a federal instrumentality, rather than the government itself, liberal rather than strict construction in all contexts is given to a waiver of immunity and power to "sue and be sued" carries with it amenability not only to garnishment proceedings¹²¹ but also to other enforcement orders.¹²² Yet there are instances, absent any justification involving the commercial nature of the instrumentality or the distinction between such instrumentalities and the sovereign, in which courts have implied waiver¹²³ and rem-

waiver of immunity with respect to garnishment writs issued by state courts as to governmental employees did not encompass a suit challenging that garnishment by an employee).

120. *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). Construing the applicability of the Federal Tort Claims Act, the Court stated: "Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Id.* at 69.

121. *FHA v. Burr*, 309 U.S. 242, 246-47 (1940). Six circuits have held that the recently created United States Postal Service is not immune from garnishment. *Associates Fin. Serv's. of America, Inc. v. Robinson*, 582 F.2d 1, 1 (5th Cir. 1978); *Beneficial Fin. Co. v. Dallas*, 571 F.2d 125, 128 (2d Cir. 1978); *General Electric Credit Corp. v. Smith*, 565 F.2d 291, 292 (4th Cir. 1977); *Goodman's Furniture v. United States Postal Serv.*, 561 F.2d 462, 464 (3d Cir. 1977); *May Dept. Stores Co. v. Williamson*, 549 F.2d 1147, 1148-49 (8th Cir. 1977); *Standard Oil Div., American Oil Co. v. Starks*, 528 F.2d 201, 202 (7th Cir. 1975).

122. *Federal Land Bank v. Priddy*, 295 U.S. 229, 236 (1935) (permitting attachment to obtain jurisdiction upon a finding that attachment and execution available by implication from consent to sue and be sued). *See also Maricopa County v. Valley Nat'l Bank*, 318 U.S. 357, 361 (1943), denying a state's power to tax a national banking association because such power was congressionally withdrawn. Absent that specific withdrawal, however, the tax, which provided for lien, assessment, and collection, would have been proper. *Id.* at 360.

123. For example, the District of Columbia Circuit has long read § 10 of the Administrative Procedure Act (5 U.S.C. § 702) as including an implied waiver of immunity: "It seems axiomatic to us that one must imply, from a statement by the Congress that judicial review of agency action will be granted, an intention on the part of Congress to waive the right of sovereign immunity; any other construction would make the review provisions illusory." *Scanwell Laboratories, Inc. v. Schaffer*, 424 F.2d 859, 874 (D.C. Cir. 1970). *See New York v. Train*, 494 F.2d 1033, 1038 (D.C. Cir. 1974), *aff'd*, 420 U.S. 35 (1975). *See also Sonitz v. United States*, 221 F. Supp. 762, 765 (D.N.J. 1963) (consent to dispute the merits of a tax assessment in the course of a suit to enforce a tax lien encompasses a suit by the taxpayer to expunge the lien); *National Iron Bank v. Manning*, 76 F. Supp. 841, 844 (D.N.J. 1948); *Tower Prod. Co. v. United States*, 61 F. Supp. 411, 413 (W.D. Okla. 1945) (suit to enjoin a tax lien not barred by statute prohibiting suits to restrain tax collection, when suit is brought

edies from general consent statutes, and also have refused to imply restraints on admitted waivers which would vitiate their effectiveness.¹²⁴

Understandably, therefore, permission to seek a declaratory judgment of water rights against the United States was held to include the right of a successful plaintiff to an injunction enforcing that judgment. The Tucker Act and the Tort Claims Act already provided the possibility of monetary relief; to foreclose the possibility of an injunction would not only make the equitable remedy meaningless but would also make the statute frivolous. Statutory language subjecting the United States to jurisdiction "in the same manner and to the same extent as a private individual" was cited by the court as supporting the inference of amenability to enforcement decrees.¹²⁵ Similarly, the payment of attorneys' fees by the deduction from the paychecks of a successful class of plaintiff government employees was upheld as ancillary to the mandamus jurisdiction of the court in the original suit.¹²⁶ Under the authority of the Tucker Act, courts have ordered the return of property¹²⁷ and reformed government contracts rather than rescind them and grant damages.¹²⁸ In instances where both the Tucker Act and some other statute have provided the plaintiff with a possible remedy, some courts have read the statutes as complementary rather than exclusive.¹²⁹

by a third party claiming ownership of the property sought to be taxed). *Compare* Washington v. Udall, 417 F.2d 1310, 1320 (9th Cir. 1969).

124. *See, e.g.,* Carriso, Inc. v. United States, 106 F.2d 707, 712 (9th Cir. 1939) (existence of an administrative remedy does not preclude jurisdiction under the Tucker Act); Erie Basin Metal Prods., Inc. v. United States, 107 F. Supp. 588, 590 (Ct. Cl. 1952) (requirement of notice by the Department of Justice not jurisdictional in suit to recover monies owing under a terminated war contract, since to require such notice before allowing the plaintiff to sue would be to make counsel for the United States the judge of the merits of the case). *Compare* Hobby v. Hodges, 215 F.2d 754, 757-58 (10th Cir. 1954). *See also* note 86 and accompanying text *supra*.

125. Rank v. United States, 142 F. Supp. 1, 80 (S.D. Cal. 1956) (construing 43 U.S.C. § 666).

126. National Treasury Employees Union v. Nixon, 521 F.2d 317, 320 (D.C. Cir. 1975). *Compare* cases cited at notes 117-118 *supra*.

127. Menkarell v. Bureau of Narcotics, 463 F.2d 88, 90 (3d Cir. 1972); United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353, 1356 (5th Cir. 1972); Melendez v. Schultz, 356 F. Supp. 1205, 1208 (D. Mass. 1973).

128. *See* note 39 *supra*.

129. Thus, a court-martialed officer seeking declaratory and injunctive relief from a conviction he alleged had been unconstitutionally obtained was not precluded from suing in the district court pursuant to 28 U.S.C. § 1331 or the habeas corpus statute merely because similar relief would be available to him under the Tucker Act in the Court of Claims. Melvin v. Laird, 365 F. Supp. 511, 516 (E.D.N.Y. 1973). Mandamus remains an appropriate remedy even if a plaintiff could fit his claim under the Tucker Act. United States v. Pennsylvania, 394 F. Supp. 261, 265 (M.D. Pa. 1975); Minnesota v. Weinberger, 359 F. Supp. 789, 791 (D. Minn. 1973). *But*

Perhaps the most interesting example of a court's willingness to imply its ability to enforce a judgment is found in *Hamilton v. Nakai*.¹³⁰ A dispute between the Hopi and Navajo Indians concerning their respective rights to reservation land resulted in the judgment of a three-judge court that both tribes had undivided and equal rights to a portion of the land occupied solely by the Navajo. When the Navajo continued their exclusive occupation, the Hopi petitioned for an order of compliance or writ of assistance. Rejecting an argument that the sovereign immunity of both the United States (which held trust title to the land) and of the Navajo precluded such enforcement, the court granted the writ, which under Arizona law apparently amounted to a writ of execution. The waiver of immunity with respect to suits to quiet title did not specify that such an order was unavailable, and "the remedial powers of the court are not restricted absent an express provision in the authorizing legislation."¹³¹ Since those powers are coextensive with subject matter jurisdiction, the writ was appropriate. The defendant argued that the converse of the court's statutory construction was correct—that *only* those remedies specifically enumerated in the waiver are available. However, the Ninth Circuit Court of Appeals disagreed; while Congress can limit remedies or make one remedy exclusive, a statutory waiver which contains no such restriction includes authority to issue whatever orders of garnishment or execution are necessary to enforce the judgment. Whether the court would have enforced an order for the payment of funds is unclear. But the logic of its opinion clearly indicates that, unless otherwise stated, waiver from liability implies waiver from execution.

CONCLUSION

In the context of the just compensation clause of the fifth amendment, the judiciary is under a constitutional obligation to provide an effective remedy for those whose property is improv-

see *Carter v. Seaman*, 411 F.2d 767, 774 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970) (finding the existence of mandamus jurisdiction but refusing to exercise it when an alternative and adequate remedy existed and where its exercise would undermine the jurisdiction of the Court of Claims). However, courts consistently refused to grant jurisdiction under the Administrative Procedure Act when the plaintiff had a remedy under the Tucker Act. *International Eng'g Co. v. Richardson*, 512 F.2d 573, 580 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1048 (1976); *Warner v. Cox*, 487 F.2d 1301, 1305 (5th Cir. 1974); *Aktiebolaget Bofors v. United States*, 194 F.2d 145, 149 (D.C. Cir. 1951).

130. 453 F.2d 152 (9th Cir. 1971), *cert. denied*, 406 U.S. 945 (1972).

131. *Id.* at 158.

erly taken. If a damage remedy against the United States, made possible by a waiver of immunity from liability, is the exclusive method of obtaining redress, that remedy must be enforceable.

Execution of the judgment need not be denied in deference to the appropriation power of Congress, as that power is limited by other provisions of the document which created it and may not be exercised so as to destroy those provisions. Nor need execution be denied in deference to congressional power to limit the availability of appropriate remedies. No one disputes that body's authority to choose one remedy over others or to make the chosen remedy exclusive. But the remedy so chosen must be complete. Should the courts determine that that was the intent of Congress, and that the waiver of immunity from liability implied a waiver of immunity from execution, the constitutional question need not be reached. But in one way or another, it is time that the courts guarantee to the people of the United States an effective remedy for the deprivation of a right promised by their Constitution.

