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CLAIMS FOR MONEY IN THE CLAIMS COURT

David M. Cohen*

The Tucker Act¹ in relevant part provides: "The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department"² At first glance, the Tucker Act appears remarkably similar to the statute which confers "federal question" jurisdiction upon the federal district courts.³ A reasonable expectation, therefore, is that the courts would construe the two statutes in a similar manner. This has not been the case, however. In general, the "federal question" jurisdiction of the district courts extends to any "'substantial claim' founded 'directly' upon federal law."⁴ In contrast, courts have construed the Tucker Act to vest jurisdiction in the Claims Court only to entertain "claims for money."⁵

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1. 28 U.S.C. § 1491 (1988). In the Federal Courts Improvement Act of 1982, Congress merged the Appellate Division of the Court of Claims with the Court of Customs and Patent Appeals to create the Court of Appeals for the Federal Circuit. Congress simultaneously created the Claims Court, which is vested with the trial jurisdiction of the Court of Claims. See S. REP. NO. 97-275, 97th Cong., 1st Sess. 2 (1981) (explaining that the changes were necessary "to fill a void in the judicial system by creating an appellate forum capable of exercising nationwide jurisdiction over appeals in areas of the law where Congress determines there is a special need for nationwide uniformity . . . and to provide an upgraded and better organized trial forum for government claims cases"). Decisions of the Court of Claims are binding upon the Court of Appeals for the Federal Circuit and the Claims Court. Therefore, the term "Court of Claims" as used in this Article refers to the successor courts, the Court of Appeals for the Federal Circuit and the Claims Court. See *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (adopting as precedent the laws of the Court of Claims and the Court of Customs and Patent Appeals); United States Claims Court General Order No. 1.

2. 28 U.S.C. § 1491(a)(1).

3. 28 U.S.C. § 1331 (1988). This section establishes that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.*

4. WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3562, at 46 (2d Ed. 1984) (quoting Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 168 (1953)).

5. *E.g.*, *United States v. Jones*, 131 U.S. 1, 18 (1889). With respect to earlier versions of the Tucker Act, see, for example, *United States v. Alire*, 73 U.S. (6 Wall.) 573, 575-76 (1868).

Claims for money may take two forms. A plaintiff may seek the return of funds that it has paid to the government as a result of a mistake or as the result of an allegedly illegal exaction. Alternatively, the plaintiff may seek the payment of money that it contends the government is required to remit and that the government has failed or refused to pay.

This Article first discusses what constitutes a monetary claim. It then describes what types of statutes evidence an intent to require monetary payments. The Article concludes that, although courts have not clearly stated how to determine if a remedy is adequate, the availability of an alternative remedy is a major factor in determining Claims Court jurisdiction over statutory monetary claims.

I. DEFINING MONETARY CLAIMS

In 1915, the United States Supreme Court held, in *United States v. Emery, Bird, Thayer Realty Co.*,⁶ that a claim for a refund of a tax was a monetary claim founded upon a statute and thus was within the jurisdiction of the Court of Claims.⁷ The Court offered no reason for its decision. Instead, the Court merely stated that an argument that the Court of Claims lacked jurisdiction rested upon the "inadmissible premise" that the Tucker Act was to be "construed strictly and read with an adverse eye."⁸ This appears to be the only Supreme Court decision to indicate that the Tucker Act should be construed liberally.

The Court of Claims in *Clapp v. United States*⁹ extended the *Emery, Bird, Thayer* decision. In *Clapp*, the court held that it possessed jurisdiction to entertain "a claim to recover an illegal exaction made by officials of the Gov-

6. 237 U.S. 28, 30 (1915). Members of the Emery, Bird, Thayer Dry Good Company organized the Emery, Bird, Thayer Realty Company to acquire and lease the property of the dry goods company eighteen months before the passage of the Corporation Tax law of 1909. *Id.* The Collector of the United States assessed a corporate tax against the realty company, which the members paid under protest. *Id.* at 31. The Supreme Court held that merely acquiring and leasing the property did not constitute "doing business" under the statute, and affirmed the district court's finding for the realty company. *Id.* at 31, 33.

7. *Id.* at 32. The suit was actually instituted in a district court pursuant to the "Little Tucker Act," *current version* at 28 U.S.C. § 1346 (1988). The act granted concurrent jurisdiction to the district courts and the Court of Claims in cases involving claims for less than \$10,000. Some early cases held that the Court of Claims could entertain a suit to recover money illegally extracted or retained because the claim was based on an "implied contract" to make restitution. *E.g.*, *Kirkendall v. United States*, 31 F. Supp. 766, 769 (Ct. Cl. 1940).

8. *Emery, Bird, Thayer*, 237 U.S. at 32; *see Dooley v. United States*, 182 U.S. 222, 228 (1901).

9. 117 F. Supp. 576 (Ct. Cl.), *cert. denied*, 348 U.S. 834 (1954). The Maritime Administration had compelled the plaintiff in *Clapp* to pay \$7,500 to the government for the release of his obligation to operate a vessel under United States law. *Id.* at 578. The plaintiff paid the money under protest and asserted that he was entitled to a full refund. *Id.*

ernment, which exaction is based upon a power supposedly conferred by a statute"¹⁰ Although it provided a number of quotations from different cases to support that conclusion, the court did not explain its reasoning in any detail.¹¹

The *Emery, Bird, Thayer and Clapp* cases are important because they hold that the Claims Court's jurisdiction extends to a claim for money which has been unlawfully exacted¹² or retained¹³ without regard to the nature of the statute upon which the United States relied to collect or retain the funds. The situation is different where a plaintiff claims entitlement to money that the United States has refused to remit.¹⁴ In the latter case, the nature of the statute upon which the plaintiff relies is significant because the United States clearly is not required to respond with the payment of money in every case in which the government violates a statute.¹⁵ Instead, the relevant inquiry in each case is whether Congress intended to create a monetary damages remedy for violation of the statute in question.

The Supreme Court's decision in *United States v. Mitchell (Mitchell I)*¹⁶ illustrates the type of inquiry which the courts view as appropriate in cases where the plaintiff challenges the government's refusal to remit money owed. In the General Allotment Act of 1887,¹⁷ the act in question in *Mitchell I*,

10. *Id.* at 580.

11. *Id.* at 579-80. The Court, however, did state that the case holding was a "best estimate of the present law." *Id.* at 580.

12. "Exacted", in this context, refers to the situation in which the government requires the payment of a sum, the plaintiff pays the sum, and the plaintiff then institutes suit to recover the sum paid. *E.g.*, *Alaskan Arctic Gas Pipeline Co. v. United States*, 831 F.2d 1043 (Fed. Cir. 1987), *later proceeding*, 19 Cl. Ct. 211 (1990).

13. "Retained", in this context, refers to the situation in which the government owes a sum to a plaintiff but for some reason refuses to pay all or some of it to the plaintiff. *E.g.*, *United States v. Sperry Corp.*, 493 U.S. 52 (1989).

14. "Remit", in this context, refers to the situation in which a statute requires the government to pay money under certain conditions and, although the plaintiff contends that he meets those conditions, the government refuses to pay the money. *E.g.*, *Diamond v. United States*, 213 Ct. Cl. 766 (1977).

15. *See, e.g.*, *United States v. Testan*, 424 U.S. 392, 400-02 (1976) (finding that the federal Classification Act did not provide a money damages remedy through retroactive reclassification of civil servants improperly classified). A claim for "just compensation" resulting from the federal government's alleged taking of a person's property is a claim "founded upon the Constitution." *Jacobs v. United States*, 290 U.S. 13, 16 (1933). For all practical purposes, the takings clause of the fifth amendment is the only federal constitutional basis for bringing a claim in the Claims Court. *Cf. Wright v. United States*, 20 Cl. Ct. 416, 420-21 (1990).

16. 445 U.S. 535 (1980) ("*Mitchell I*"), *on remand*, 664 F.2d 265 (Ct. Cl. 1981), *aff'd*, 463 U.S. 206 (1983). In *Mitchell I*, individual Indians and two Indian groups alleged that the federal government's mismanagement of Indian lands constituted a breach of trust. *Mitchell v. United States*, 591 F.2d 1300, 1300-01 (Ct. Cl. 1979), *rev'd*, 445 U.S. 535 (1980), *on remand*, 664 F.2d 265 (Ct. Cl. 1981), *aff'd*, 463 U.S. 206 (1983).

17. 25 U.S.C. §§ 331-34, 349, 341, 342, 348, 349, 354, 381 (1988).

Congress authorized the President to allot to each Indian residing on a reservation a specified amount of land found within the reservation. The act specifically provided that the United States retain title to the allotted lands "in trust for the sole use and benefit" of the allottees.¹⁸

Several allottees instituted suit in the Court of Claims alleging, *inter alia*, that the United States' management of the land failed to ensure the highest possible return to the allottees.¹⁹ The Court of Claims held that it possessed jurisdiction to entertain the suit.²⁰ The court reasoned that establishing the United States as a trustee to administer a trust corpus for the benefit of specified beneficiaries demonstrated Congress' intent to require the United States to respond in damages if the United States breached the fiduciary duty which common law imposed upon a trustee.²¹

The Supreme Court, in its first review of this case, disagreed.²² In the Court's view, the legislative history of the General Allotment Act clearly indicated that Congress intended for the United States to

'hold the land . . . in trust' not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from state taxation.²³

The Supreme Court therefore concluded that the Claims Court lacked jurisdiction over the suit.²⁴

Another case in which the Court held that a statutory claim was not within the jurisdiction of the Claims Court is *United States v. Testan*.²⁵ In *Testan*, government employees contended that they were receiving the salary of the civil service grade GS-13 positions to which they had been appointed.²⁶ They alleged that they performed the same work as employees

18. 25 U.S.C. § 348.

19. *Mitchell*, 591 F.2d at 1301.

20. *Id.* at 1304.

21. *Id.* at 1301-04.

22. *Mitchell I*, 445 U.S. 535, 538-40 (1980).

23. *Id.* at 544 (quoting 25 U.S.C. § 348 (1988)).

24. *Id.* at 545-46. The Supreme Court held that the General Allotment Act did not create a fiduciary responsibility in the federal government for the management of the lands, but rather provided for a limited trust. *Id.* at 542, 546.

25. 424 U.S. 392 (1976).

26. *Id.* at 393-94. Since *United States v. Wickersham*, 201 U.S. 390, 399-400 (1906), a statute requiring the payment of a particular salary to a federal employee occupying a specific position in the civil service has been considered a money mandating statute. Thus, prior to the Civil Service Reform Act, a federal employee removed from a civil service position could institute suit in the Court of Claims alleging that the removal was unlawful and, thus, a nullity. See *United States v. Fausto*, 484 U.S. 439, 442, 444-45 (1988). Therefore, the employee could

who were serving in civil service grade GS-14 positions, which garner higher salaries than the salaries the claimants received. According to the claimants, the payment of higher salaries to GS-14 employees violated the principle of the Classification Act,²⁷ which required classification of civil service positions in a manner assuring "equal pay for substantially equal work."²⁸ The claimants requested the Court of Claims to award them the difference between the GS-13 and GS-14 level salaries.²⁹

The Supreme Court in *Testan* did not reach the merits of the plaintiffs' claims. Rather, the Court held that the Classification Act was not a statute upon which a claim within the jurisdiction of the Court of Claims could be founded and, therefore, that the court lacked jurisdiction to hear the suit.³⁰ In support of its conclusion, the Court noted that the equal pay for substantially equal work principle was located in the Classification Act's "purpose" section.³¹ The Court further observed that no provision in the statute permitted an award of backpay to a person who had been erroneously classified.³² In addition, the Court emphasized that the plaintiffs had not been appointed to positions at the GS-14 level and, in accordance with the established rule for federal employees, were not entitled to the benefit of a position until appointed to that position. Furthermore, the Court stated that neither the Classification Act nor its legislative history indicated that Congress intended to alter the general rule.³³

The decision of the Court of Appeals for the Federal Circuit in *Hambusch v. United States* provides a third, and more recent, example of the appropriate analysis to determine whether a federal statute confers jurisdiction upon the Claims Court to hear a claim that the government has unlawfully refused to remit money.³⁴ The case involved a statute providing that a federal law enforcement officer shall not be placed on sick leave for absence due to in-

also assert an entitlement to the salary that the statute required to be paid to the employee occupying the position from which the employee was allegedly removed. *Id.*

27. 5 U.S.C. § 5101 (1988).

28. *Testan*, 424 U.S. at 394, 399 (citing 5 U.S.C. § 5101(1)(A)).

29. *Id.*

30. *Id.* at 401-03.

31. *Id.* at 394.

32. *Id.* at 399-400, 407.

33. *Id.* at 402. The Court also expressly disapproved the reasoning of the Court of Claims in *Pettit v. United States*, 488 F.2d 1026 (Ct. Cl. 1973), and *Allison v. United States*, 451 F.2d 1035 (Ct. Cl. 1971). *Testan*, 424 U.S. at 405. In those two cases, the Court of Claims held that it could entertain a suit based upon an executive order which provided that the policy of the United States was to ensure equal employment opportunities for employees without discrimination. *Pettit*, 488 F.2d at 1031; *Allison*, 451 F.2d at 1035, 1039.

34. *Hambusch v. United States*, 848 F.2d 1228 (Fed. Cir.), *vacated*, 857 F.2d 763 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1054 (1989).

jury in the line of duty.³⁵ Mr. Hamsch claimed that, while employed as a federal law enforcement officer, he had been injured in the line of duty and that, as a result of the injury, he had not reported for duty.³⁶ The employing agency determined that if Mr. Hamsch had been injured, the injury had not occurred in the line of duty.³⁷ Therefore, Mr. Hamsch was placed on sick leave for the days that he failed to report for work.³⁸ Mr. Hamsch instituted a suit in the Claims Court challenging the agency's decision,³⁹ but the Claims Court held that the employing agency had correctly determined that he was not injured in the line of duty.⁴⁰

The Court of Appeals for the Federal Circuit, *sua sponte*, raised the issue of the Claims Court's jurisdiction,⁴¹ and held that the Claims Court lacked jurisdiction to entertain Mr. Hamsch's claim.⁴² The appellate court found that the statute upon which the plaintiff had relied was not a "money mandating" statute.⁴³ A federal employee accumulates a specified number of "sick leave" hours each pay period. If the employee misses work due to illness or injury, the number of hours of absence is deducted from the employee's accumulated hours of sick leave. As long as the number of hours missed is equal to or less than the number of hours of accumulated sick leave, the employee receives his regular salary during the absence. If the number of hours of absence exceeds the number of hours of accumulated sick leave, however, the employee is not paid for the hours exceeding accumulated sick leave.⁴⁴

35. *Id.* at 1230; see 5 U.S.C. § 6324 (1988).

36. *Hamsch*, 848 F.2d at 1230.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* A claim that an agency erroneously deducted certain hours of absence from an employee's sick leave account, which the agency should have counted as administrative leave, may not constitute a claim for money within the jurisdiction of the Claims Court. In *United States v. King*, the Secretary of the Army retired a colonel based upon length of service. 395 U.S. 1, 1 (1969). The colonel asserted that the Army should have based his retirement upon disability, which would have entitled him to an income tax exemption. *Id.* at 1-2. The Supreme Court stated that the colonel must have reduced his claim of erroneous classification of his retirement to a judgment from a court other than the Court of Claims before the latter court could award the relief he sought. *Id.* at 3. The Supreme Court thereby reaffirmed that the Court of Claims' jurisdiction was limited to awarding money damages and that it had no power to grant a declaratory judgment. *Id.* at 3-4. Accordingly, a claim that an agency wrongfully debited a plaintiff's accumulated hours of sick leave may require equitable relief that the Claims Court cannot award.

43. *Hamsch*, 848 F.2d at 1232.

44. 5 U.S.C. § 6324 (1988).

If a law enforcement officer is injured in the line of duty, and must miss work as a result of the injury, the officer might exhaust accumulated sick leave solely as a result of the line of duty injury. As a result, an officer could lose pay if he subsequently became ill, not in the line of duty, and was required to excuse himself from work due to the illness. Congress apparently believed that this result would be unfair because law enforcement is a hazardous occupation, and the risk of sustaining an injury in the line of duty is greater for a law enforcement officer than for other federal employees. Congress enacted the statute at issue in *Hamsch* to prevent the unfair result which could occur if an injury occurring in the line of duty depleted an officer's accumulated sick leave.⁴⁵

Apparently, the court of appeals believed that the statute involved in *Hamsch* was not "money mandating" because it provided only that an officer injured in the line of duty should not be placed on sick leave.⁴⁶ The statute did not specifically provide that the officer should be placed on administrative leave in lieu of sick leave; a federal employee on administrative leave continues to receive salary.⁴⁷ According to the court of appeals, the failure to include the latter provision in the statute evidenced a lack of an intent to compensate an officer who was erroneously placed on sick leave.⁴⁸ This conclusion is correct because a reversal of an erroneous decision placing an employee on sick leave would not automatically require placement of the employee on administrative leave. Rather, by the terms of the statute, Congress could have intended either to require the officer either to return to duty despite the injury, or to place the officer in a "leave without pay" status. Therefore, the court determined that, because the reversal of an erroneous decision under the statute would not necessarily result in the payment of money, the statute was not money mandating.

Notably, three Justices dissented from the denial of a petition for a writ of certiorari that Mr. Hamsch filed in a companion case.⁴⁹ According to the dissenting Justices, the legislative history presented sufficient evidence to

45. *Hamsch*, 848 F.2d at 1230.

46. *Id.* at 1231.

47. 5 U.S.C. §§ 6321-6325 (1988).

48. *Hamsch*, 848 F.2d at 1231-32. Thus, if the statute had provided that any officer injured in the line of duty shall not be placed on sick leave but, instead, shall be placed on administrative leave, then the statute would have clearly evidenced an intent to pay money to an officer who was erroneously placed on sick leave.

49. *Hamsch v. United States*, 490 U.S. 1054, 1054-58 (1989) (O'Connor, Scalia, and Kennedy, JJ., dissenting). The only difference between the two cases is that Mr. Hamsch contended that he had suffered a psychological injury in the line of duty in the first case and that he had suffered a physical injury in the line of duty as the result of a motorcycle accident in the case in which he filed the petition for writ of certiorari. See *Hamsch v. United States*, 857 F.2d 763 (Fed. Cir. 1988).

conclude that Congress intended an officer injured in the line of duty to be placed upon administrative leave.⁵⁰ Thus, an erroneous decision to place an officer on sick leave in violation of the statute would necessarily lead to the payment of money.⁵¹

II. STATUTES WHICH REQUIRE MONETARY PAYMENTS

Congressional intent, as expressed in a particular statute, determines whether the United States is subject to money damages as a result of the government's violation of a statute. For example, in *Eastport Steamship Corp. v. United States*,⁵² the Court of Claims attempted to describe the type of statute which, according to past decisions, evidences a congressional intent to require a money payment to redress a violation of the statute.⁵³ The court held that it possessed jurisdiction to entertain a claim founded upon a statute if "the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum."⁵⁴

This formulation expresses the corollary principle that the Claims Court does not possess jurisdiction to entertain claims for damages resulting from "misgovernment, *i.e.*, for misfeasance in the exercise of peculiarly governmental functions."⁵⁵ Yet, the formulation provides little guidance as to the factors which courts are to apply in determining whether a particular statute provides a basis for a claim cognizable in the Claims Court. For that guidance, reference to other decisions is necessary.

50. *Hambach*, 490 U.S. at 1057-58. A fourth Justice issued a memorandum emphasizing that the denial of "a petition for a writ of certiorari is not a ruling on the merits of any question presented by the petition." *Hambach*, 490 U.S. at 1054 (Stevens, J., concurring).

51. *Id.* at 1057 (O'Connor, Scalia, and Kennedy, JJ., dissenting).

52. 372 F.2d 1002 (Ct. Cl. 1967). In *Eastport*, the Maritime Commission denied plaintiff permission to sell a ship to a Danish buyer. At the time of the denial, the Commission was formulating a policy of charging money for approvals of sales to foreigners which the Court of Claims later held illegal. *Id.* at 1006-07. The plaintiff located an Israeli purchaser who offered \$200,000 less than the Danish purchaser. *Id.* at 1006. The Court of Claims awarded the plaintiff the \$10,000 that the plaintiff had paid for approval, but denied recovery of the differences in purchasing prices because Congress did not intend for the Shipping Act to compensate for commercial injury. *Id.* at 1009, 1010-11.

53. *Id.* at 1007-11. *Smithson v. United States*, 847 F.2d 791 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989), is the contractual analogue of *Eastport*.

54. *Eastport*, 372 F.2d at 1007.

55. *United States v. Mitchell*, 664 F.2d 265, 280 (Ct. Cl. 1981) (Nichols, J., concurring in part and dissenting in part), *aff'd*, 463 U.S. 206 (1983).

A. Monetary Character and Nondiscretionary Payments

A statute which possesses a monetary character⁵⁶ and requires a nondiscretionary payment⁵⁷ is more likely to be viewed as money mandating. As the court noted in *Eastport*, the Claims Court's jurisdiction would encompass a claim premised upon "some specific provision of law [that] embodies a command to the United States to pay the plaintiff some money, upon proof of conditions which he is said to meet."⁵⁸ For example, a statute which provides that the Secretary of the Treasury is to pay one hundred dollars to every citizen who fulfills conditions *X* and *Y* is clearly money mandating. Accordingly, the Claims Court would possess jurisdiction to entertain a suit in which a claimant contended that it had fulfilled conditions *X* and *Y* but that the Secretary of Treasury had failed to pay one hundred dollars.⁵⁹

The leading case on the question of the nature of a money-mandating statute expresses the view that the statute must require the payment of a "certain sum."⁶⁰ This does not appear to be a necessary requirement, however. No case has held that the Claims Court lacks jurisdiction where a claimant relied upon a statute which requires the payment of money, but does not require the payment of a "certain sum." The same is not true with respect to the discretionary nature of the payment. A discretionary element in the statute precludes Claims Court jurisdiction of a claim based upon that statute. The statute must require a payment upon the satisfaction of certain terms in the sense that the payment must not be discretionary if the conditions set forth in the statute are fulfilled.⁶¹

B. Authority to Provide Monetary Payments

A court will be more likely to hold that a statute is money mandating if it provides for the payment of money "in itself."⁶² Where a claimant seeks to establish a violation of one statute to obtain the payment of money as pro-

56. *United States v. Mitchell*, 463 U.S. 206, 218 (1983) ("*Mitchell II*") (defining a statute which possesses a monetary character as one which "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained"); see *United States v. Testan*, 424 U.S. 392, 402-03 (1976) (same).

57. See *Adair v. United States*, 648 F.2d 1318, 1322 (Ct. Cl. 1981) (holding that a necessary prerequisite for Court of Claims' jurisdiction is that the claimant have a vested right to payment under a statute or regulation and that a discretionary bonus is not sufficient).

58. *Eastport*, 372 F.2d at 1008.

59. See, e.g., *Campbell v. United States*, 107 U.S. 407, 411 (1883) (allowing a claimant to bring suit in the Court of Claims against the Secretary of the Treasury to recover a refund of import duties pursuant to a statute which provided for a refund when goods manufactured from imported materials were exported).

60. *Eastport*, 372 F.2d at 1007.

61. See, e.g., *Adair*, 648 F.2d at 1322.

62. *Eastport*, 372 F.2d at 1008.

vided in another statute, the claimant, in reality, is seeking a declaratory judgment under the first statute, and the Claims Court lacks jurisdiction to grant that relief.⁶³ For example, the Claims Court would lack jurisdiction to entertain a military officer's claim that the government erroneously retired him because of age instead of disability so that he may subsequently file a claim for a refund of the taxes remitted on his retirement pay.⁶⁴

A related principle, although not directly concerned with the nature of the statute upon which a claim is founded, is that a claimant must seek money which is "presently due." The Claims Court lacks jurisdiction to issue a declaratory judgment. It therefore lacks jurisdiction to hear a claim that, at some time in the future, the claimant will be entitled to a payment of money. For example, in *Bowen v. Massachusetts*,⁶⁵ the Supreme Court considered whether a district court possessed jurisdiction pursuant to the Administrative Procedure Act (APA)⁶⁶ to entertain a suit by a state seeking to compel the Secretary of Health and Human Services to reimburse the state for certain expenditures that the state made as a participant in the Medicaid program.⁶⁷

In deciding this question in the affirmative, the Court discussed the jurisdiction of the Claims Court, and expressed doubt as to whether that court would have possessed jurisdiction to entertain the suit.⁶⁸ The Court expressly noted that the Secretary already had paid money to the state and had determined to recoup some of those funds as an overpayment.⁶⁹ Nevertheless, the record did not clearly indicate whether, at the time the state brought the suit, the Secretary had withheld some of the funds otherwise payable to the state.⁷⁰ If the Secretary had not withheld funds from the state contemporaneously with commencement of the suit, Claims Court jurisdiction would have been doubtful. This result follows because the Secretary would not presently have owed money to the state.

The *Hambusch* case provides another example of the requirement that the government currently owe the plaintiff money.⁷¹ Although the decision appears to be based upon a determination that the statute involved was not "money-mandating," depending upon the actual facts presented, the case might have been decided upon the basis that no money was presently due.

63. *United States v. King*, 395 U.S. 1, 3 (1969).

64. *Id.*

65. 487 U.S. 879 (1988).

66. 5 U.S.C. §§ 701-706 (1988).

67. *Bowen*, 487 U.S. at 882.

68. *Id.* at 905.

69. *Id.* at 909-10.

70. *Id.* at 887 n.9, 907 n.44.

71. *See supra* notes 34-51 and accompanying text.

Assuming that the statute provided that a law enforcement officer injured in the line of duty should be placed on administrative leave⁷² instead of sick leave, a reversal of a decision to place an officer on sick leave would simply result in a correction of the officer's record to reflect that the officer received the salary accrued during his absence and that the officer was on administrative leave. The hours erroneously debited as a result of his absence from work should then be restored to the officer's sick leave account. In this circumstance, a reversal of the agency's decision that the officer had not been injured in the line of duty would not necessarily result in a monetary payment to the officer. In fact, the only result of the correction would be an increase in the officer's sick leave account which is available for future use. If, however, as a result of the erroneous decision to place the officer on sick leave, the officer exhausted his accumulated sick leave and was placed in a leave without pay⁷³ status for the remainder of his absence from work, then a reversal of the decision would require a monetary payment to the officer.

If the officer had exhausted the sick leave to which he was entitled, then a reversal of the agency's decision would result in a conversion of the number of hours of leave without pay to hours of administrative leave. Because an employee on administrative leave continues to receive compensation, that conversion would result in a payment of the officer's salary for the hours which had previously been considered to constitute hours on leave without pay.⁷⁴

In contrast, if the officer had not exhausted his accumulated hours of sick leave due to absence as a result of an injury allegedly suffered in the line of duty, then a reversal of the decision that the officer had not been injured in the line of duty would not require the immediate payment of additional sal-

72. "Administrative leave" refers to "an authorized absence from duty with pay without charge to leave." GENERAL ACCOUNTING OFFICE, CIVILIAN PERSONNEL LAW MANUAL, TITLE II-LEAVE, 5-1 (3d ed. 1990).

73. "Leave without pay" refers to "a temporary nonpay status and absence from duty." *Id.* at 5-36.

74. A reversal of the line of duty determination could also have monetary consequences if the officer remained in government service and if, at some time in the future, the officer exhausted his sick leave. In that event, the officer would be placed on leave without pay for the duration of his absence from duty due to illness because the previous injury in the line of duty exhausted the officer's sick leave. Upon depletion of sick leave, the officer could institute suit in the Claims Court because a line of duty determination would result in a retroactive correction of the officer's record to reflect an increase in the number of sick leave hours. The number of hours during which the officer was absent on leave without pay would then be subtracted from the officer's increased sick leave account. Therefore, the officer would receive his salary for the hours formerly charged to leave without pay but now "covered" by the hours of sick leave newly credited to the officer's sick leave account. Thus, a reversal of the erroneous administrative decision would result in a payment to him of his salary notwithstanding his absence from duty until the officer's sick leave account was again exhausted.

ary. Instead, only an increase in the number of hours credited to the officer's sick leave account would result. In that case, the officer arguably could not institute suit in the Claims Court seeking to reverse the line of duty determination because a reversal would have no immediate monetary consequences.

This principle effectively forces such claimants to institute suit in a district court pursuant to the APA. In a district court, the officer could challenge the administrative decision to deduct the hours of absence from the officer's sick leave account. If the officer succeeded, the hours previously deducted from the officer's sick leave account would be restored. If the officer's employing agency failed to restore the hours of sick leave and if, subsequently, the officer were placed on leave without pay because he had exhausted his hours of sick leave, the officer has two options. First, the officer could file a motion for contempt if the district court issued an injunction requiring the agency to increase his sick leave. Second, if the officer does not obtain an injunction, then he could, based on the district court judgment, institute a suit in the Claims Court to obtain a payment of salary for the hours of absence from work that were erroneously charged to leave without pay.

C. *Adequate Remedy in an Alternative Forum*

Courts also appear to be more likely to hold that a statute will support a suit in the Claims Court if the claimant had no other "adequate" remedy. Of course, if Congress has made available a remedy other than a suit in the Claims Court and has explicitly or implicitly indicated that this remedy is to be exclusive, suit in the Claims Court will be precluded.⁷⁵ Where there is no indication that Congress intended the other remedy to be exclusive, however, the courts will examine the other remedy to determine whether that alternative is "adequate."

For example, in its decision in *United States v. Mitchell*, (*Mitchell II*),⁷⁶ the Court considered whether certain statutes gave rise to a claim cognizable in the Claims Court if the United States failed to manage the land to obtain the best return possible. The statutes at issue provided that the United States should manage land held in trust for certain Indians taking into account the needs and best interests of the beneficiaries.⁷⁷ The United States

75. *E.g.*, *United States v. Fausto*, 484 U.S. 439, 452-53 (1988); *Matson Navigation Co. v. United States*, 284 U.S. 352, 360 (1932). With respect to claims founded upon the fifth amendment for compensation resulting from an alleged taking of the claimant's property, Congress must exhibit "an unambiguous intention to withdraw the Tucker Act remedy." *Preseault v. Interstate Commerce Comm'n*, 110 S. Ct. 914, 922 (1990) (quoting *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984)).

76. *United States v. Mitchell*, 463 U.S. 206 (1983).

77. *Id.* at 211 (the statutes at issue governed timber management, roadbuilding and rights of way, Indian funds, and government fees).

contended that the availability of an action in the Claims Court was unnecessary because suits in the district courts for declaratory, injunctive, or mandamus relief could remedy the government's violation of the various statutes.⁷⁸ The Court rejected this argument and held that the Claims Court possessed jurisdiction on the grounds, among others, that suits in the district courts often could be instituted only after considerable damage had occurred and could not provide the beneficiaries with compensation for that past damage.⁷⁹

In contrast, if a court is convinced that a remedy in another court is "adequate," the courts will be more inclined to hold that the Claims Court lacks jurisdiction. Thus, in *Testan*, the Court noted that the plaintiffs could institute suit in a district court seeking declaratory, injunctive, or mandamus relief to remedy the government's improper classification of their civil service positions, and this alternative appeared to influence the Court's ultimate holding that the Claims Court lacked jurisdiction.⁸⁰

Neither *Mitchell II* nor *Testan* involved the APA and its relationship to the Tucker Act. Since 1976, however, when Congress amended the APA to waive the sovereign immunity of the United States,⁸¹ the relationship between these two statutes has become important. The APA provides that a person adversely affected or aggrieved by agency action may obtain judicial review of that action.⁸² These suits are instituted in the district courts pursuant to the federal question statute.⁸³

The APA provides that it does not apply to suits for "money damages"⁸⁴ and that it does not apply if there is an "adequate remedy" in another court.⁸⁵ The Supreme Court addressed these two provisions in *Bowen v. Massachusetts*.⁸⁶ *Bowen* presented the question of whether a district court possessed jurisdiction to entertain a suit seeking to prevent the United States from withholding reimbursement to a state of amounts allegedly due to the state for certain expenditures the state had made under the Medicaid pro-

78. *Id.* at 237.

79. *Id.* at 227-28. Similarly, the Court has held that the availability of a suit in a district court against an officer would not prevent the Claims Court from entertaining a suit against the United States. *E.g.*, *Hatzlach Supply Co. v. United States*, 444 U.S. 460 (1980); *United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 30 (1915).

80. *United States v. Testan*, 424 U.S. 392, 403-04 (1976).

81. P.L. No. 94-574, § 1, 90 Stat. 2721 (codified as amended at 5 U.S.C. §§ 702-703 (1988)).

82. 5 U.S.C. § 702 (1988).

83. 28 U.S.C. § 1331 (1988).

84. 5 U.S.C. § 702.

85. 5 U.S.C. § 704 (1988).

86. 487 U.S. 879 (1988).

gram.⁸⁷ After holding that the suit sought specific relief and not money damages within the meaning of the APA,⁸⁸ the Court considered whether the APA precluded the suit because the state possessed an adequate remedy in the form of a suit in the Claims Court.⁸⁹

The Court concluded that the availability of a suit in the Claims Court was doubtful, and that even if the availability of a suit were assumed, a suit in the Claims Court would not provide an adequate remedy.⁹⁰ While the Court provided a number of reasons for this conclusion, including the inability of the Claims Court to provide injunctive relief and the possible need for a court which possessed familiarity with state law,⁹¹ the Court's discussion of the state's financial position if it were required to institute suit in the Claims Court⁹² is the most relevant to this Article.

If the state were required to institute suit in the Claims Court, it would have to await an actual withholding of funds by the government. At that point, the state could allege that the government had failed to pay money which was presently due.⁹³ In this situation, the state would be required to continue to provide the program at issue with its own funds pending completion of the litigation or to abandon the program until the litigation was concluded. The Court apparently concluded that this dilemma would necessarily make state planning for future expenditures difficult, if not impossible, and the Court was unwilling to place the state in this position.⁹⁴

Viewed from this perspective, the result in *Bowen* is simply the corollary of the result in *Mitchell II*. In *Mitchell II*, the Court held that a prospective remedy in the district court was not an adequate alternative to a suit in the Claims Court because a prospective remedy would occur too late to prevent potentially irreparable damage and would not provide the claimants with a remedy for those past damages.⁹⁵ In contrast, the *Bowen* Court concluded that a remedy in the Claims Court was inadequate because it would be available only upon the occurrence of certain conditions: the withholding of funds, which would cause an injury to the state, and the inability to plan

87. See *supra* notes 65-70 and accompanying text.

88. *Bowen*, 487 U.S. at 893.

89. *Id.* at 901-08.

90. *Id.* at 901.

91. *Id.* at 905, 907-08.

92. *Id.* at 905-07.

93. See *id.* at 914 (Scalia, J., dissenting) (citing *United States v. King*, 395 U.S. 1, 3 (1969)).

94. *Id.* at 905-07.

95. *United States v. Mitchell*, 463 U.S. 206, 227-28 (1983).

future expenditures during the pendency of the litigation, which the payment of money would not fully remedy.⁹⁶

III. CONCLUSION

The adequacy of alternative remedies, a suit in a district court, a suit in the Claims Court, or an administrative remedy, has always been an important factor in determining the jurisdiction of the Claims Court to entertain a suit for money founded upon a statute. Unfortunately, the courts have not provided much guidance as to the criteria which are to be applied to determine whether a remedy is adequate. Instead, the courts have simply tended to describe the consequences if a claimant were required to institute an action in one court or another, and have then stated the conclusion that the consequence renders the remedy adequate or inadequate. Accordingly, the emergence of the appropriate criteria will have to await future developments.

96. *Bowen*, 487 U.S. at 901-08.

