Catholic University Law Review

Volume 40
Issue 3 *Spring 1991*

Article 5

1991

Claims Court at the Crossroads

Richard H. Fallon Jr.

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation

Richard H. Fallon Jr., *Claims Court at the Crossroads*, 40 Cath. U. L. Rev. 517 (1991).
Available at: http://scholarship.law.edu/lawreview/vol40/iss3/5

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

ARTICLES

CLAIMS COURT AT THE CROSSROADS

Richard H. Fallon, Jr. *

The Claims Court stands at a crossroads. To cite just one piece of evidence, the Supreme Court's decision in *Bowen v. Massachusetts*[1] has raised profound questions about the vitality of the Claims Court's traditional role. In *Bowen,* the Supreme Court upheld the jurisdiction of a federal district court to order the payment of money by the Secretary of Health and Human Services (HHS) to the State of Massachusetts under the Medicaid Program.[2] The Court did so over the Secretary's objection that the suit, which involved an asserted obligation to pay money out of the federal treasury, lay at the heart of the traditionally exclusive jurisdiction of the Claims Court. The Supreme Court in *Bowen* explicitly rejected this claim of exclusive Claims Court jurisdiction.[3] But *Bowen's* threat to the Claims Court went even further. The Supreme Court also suggested—although it did not hold—that the case could not have been brought in the Claims Court at all, even if the plaintiff had preferred to litigate there. If this is so, the Claims Court's jurisdiction is significantly diminished, and its future role is in doubt.

My main thesis, intended to provide a historical perspective on the Claims Court and its unfolding future, is that *Bowen* reflects a simultaneous climax in two stories that do not, ultimately, fit together in a rational and orderly way. One is the story of sovereign immunity as a generative constitutional principle. This is the story that led to the creation of the Claims Court as an article I court, authorized to hear claims against the United States as a matter of grace, not right.[4] This story includes the principle that waivers of

---

* Professor of Law, Harvard Law School. This Article is a slightly revised version of a lecture delivered at the Claims Court Judicial Conference, November 29, 1990. I am grateful to Dan Meltzer for helpful comments and to John Parry for valuable research assistance.

1. 487 U.S. 879 (1988).

2. *See id.* at 912.

3. *See id.* at 905-07.

4. Congress created the Claims Court in 1982. *See* Federal Courts Improvement Act, Pub. L. No. 97-164, § 105(a), 96 Stat. 27, 28 (1982). Its predecessor, the Court of Claims, was created by the Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.

sovereign immunity will be strictly construed.[5] Within this story, suits against the sovereign are suspect, even when allowed, and should presumptively occur in an article I tribunal, the Claims Court, with its remedial capacities generally limited to awards of money damages.

The other story that I want to tell involves the emergence of the modern administrative state. The administrative state has too much power not to be accountable to law. Within the story of the flowering of the administrative state in the twentieth century, there is a strong presumption that agency action is reviewable in article III courts.[6] Section 702 of the Administrative Procedure Act (APA),[7] which waives sovereign immunity in suits for relief other than money damages, is an important part of this story, but only a part. This story's basic thrust is that there should be complete and effective relief for all governmental wrongs as a matter of right, not grace, and that the preferred forums are the federal district courts.

These two stories collided in *Bowen v. Massachusetts,* and it was the theme of the second story that prevailed: the apparent technical obstacles were made to give way, and the Secretary of HHS was held suable for money damages in federal district court. Writing in dissent, Justice Scalia argued that the first story, the story of sovereign immunity and the Claims Court, could not, after *Bowen,* go on as before.[8] But I think he was wrong about that, as I shall explain in due course. First, however, I need to develop the two traditions or stories that I have spoken of and to discuss how they relate to the Claims Court.

I. Two Traditions

A. *Sovereign Immunity and the Claims Court*

The core of the story that leads to the Claims Court lies in the concept of sovereign immunity—the idea that the sovereign cannot be sued without its consent. Sovereign immunity, which originated in England, was well established in the colonies by the time of the American Revolution.[9] The general understanding is that federal sovereign immunity survived the Constitution.[10] Although the Constitution creates rights against the government, the

5. *See, e.g.,* United States v. King, 395 U.S. 1, 4 (1969).

6. *See, e.g.,* Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967).

7. 5 U.S.C. § 702 (1988).

8. *See* Bowen v. Massachusetts, 487 U.S. 879, 913-30 (1988) (Scalia, J., dissenting).

9. *See, e.g.,* L. Jaffe, Judicial Control of Administrative Action 197-231 (1965).

10. The Supreme Court has consistently held that federal sovereign immunity bars unconsented suits against the United States. *See, e.g.,* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821). Prior to the ratification of the eleventh amendment, it was a debated question

rights generally cannot be enforced through suits directly against the sovereign unless the sovereign consents.

Sovereign immunity has proved problematic from the beginning, and for an obvious reason. It simply does not mesh well with the rule of law, and with the idea of *Marbury v. Madison*[11] that ours should be a government of laws and not of men. As a result, there always have been, because there have had to be, ways around sovereign immunity—some created by courts, others created by Congress. Of the ways created by courts, by far the most important is the device, and often the fiction, of an "officer suit."[12] The basic idea is that although the government cannot be sued without consent, its officers can—even if they get themselves into legal trouble only as a result of acting in their capacity as government officers. If an official commits a tort, the official is and always has been suable—sometimes for an injunction, and sometimes for damages.[13]

There are limits, of course, to the doctrines that permit plaintiffs to evade sovereign immunity by suing an official instead of the government. Without such limitations, the concept of sovereign immunity would not have been significant. Historically, two limitations on the availability of officer suits are of foremost importance. First, suits against officials cannot be used to enforce contracts against the government, because the government, not the official, is the real party in interest.[14] Second, except in the most limited of circumstances, officer suits are not available when the remedy sought is a payment of money out of the state or federal treasury.[15] Where money is directly at stake, the fiction that it is the officer who is being sued, and not the sovereign, cannot be maintained. These limits on officer suits reinforce the original premise: sovereign immunity is an important doctrine of constitutional stature, and the sovereign cannot be sued without its consent.

It bears repeating, however, that the doctrine of sovereign immunity has always been a problematic one, even within the story that affirmed it.[16] There is, accordingly, a historical tradition of legislatively as well as judicially created exceptions. Suppose that the government breached a contract,

---

whether state sovereign immunity had similarly survived the Constitution's ratification. *See, e.g.*, Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 9-11 (1972). Even today, the relationship between the eleventh amendment and state sovereign remains a subject of debate.

11. 5 U.S. (1 Cranch) 137 (1803).

12. *See, e.g.*, L. JAFFE, *supra* note 9, at 232-60.

13. *See, e.g.*, Engdahl, *supra* note 10.

14. *See* L. JAFFE, *supra* note 9, at 221.

15. *See* Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1782-83 (1991).

16. *See id.* at 1781-86.

or refused to pay money that it had a duty to pay. In these cases, officer suits would typically not have provided effective relief under any judicially created exception to sovereign immunity.[17] As a result, Congress, from the very outset of American constitutionalism, has thought it necessary to provide for such cases. Initially Congress did so through a system of "private bills," under which aggrieved persons would lobby their congressmen to introduce legislation calling for individualized compensation from the federal treasury. Congress enacted an average of a thousand private bills per year during some parts of the early 19th century.[18] But Congress felt sufficiently burdened by the responsibility of fact-finding that it tried repeatedly to pass this job onto agents and agencies that would report back to it with recommendations.[19]

Inevitably, however, there were problems. Although informal tribunals could find facts, there was no system of precedent, and claims tended to be filed on a hit-or-miss basis. In addition, even after the tribunals reported back to Congress, it remained cumbersome for Congress to have to enact bills providing for compensation in individual cases.

Ultimately, Congress gave up and created a system that evolved into what we now know as the Claims Court and the Court of Appeals for the Federal Circuit. Judges were commissioned as early as 1855, though the Court of Claims thus set up soon became a mere advisory body.[20] Congress established a genuinely judicial court in 1863,[21] the judicial status of which was confirmed in 1866.[22] Twenty-one years later, Congress enacted the Tucker Act[23] and conferred jurisdiction on the Court of Claims in cases presenting claims against the government not sounding in tort. Officer suits remained the vehicle for tort claims.

We can skip over most of the Claims Court's subsequent history, except to note a few conceptual points. First, much influenced by the tradition of sovereign immunity, the Tucker Act assumes that an article III trial court is not required in suits against the government. Because suing the government is a matter of grace, not right, the government can attach strings. Second, the government's consent to suit is limited: outside of expressed, statutory exceptions, money damages are the only remedy available under the Tucker

17. *See id.* at 1781-83.

18. *See, e.g.*, Wiecek, *The Origin of the United States Court of Claims*, 20 ADMIN. L. REV. 387, 392-93 (1968).

19. *See id.* at 390-91.

20. *Id.* at 395.

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

22. Act of March 17, 1866, ch. 19, 14 Stat. 9.

23. Ch. 359, 24 Stat. 505 (1887) (codified as amended at 28 U.S.C. § 1491 (1988)).

Act.[24] Third, within this unfolding story, statutes authorizing the payment of money are to be strictly construed.[25] Waiving sovereign immunity is a serious matter, not something lightly inferred. All of these themes are familiar in the history and practice of the Claims Court.

There is an obvious objection to the way I have developed the story so far. From another perspective, the enactment of the Tucker Act and the establishment of the Claims Court would not stand within the tradition of sovereign immunity, but would mark a departure from it. Immunity is, after all, waived. Further, the Claims Court, in construing its jurisdiction, has frequently done so with the specific aim of promoting justice. For example, the court has upheld its own jurisdiction to entertain claims for the recovery of money that was illegally exacted, even though such cases might be pleaded as tort actions against individual officers, and even in cases in which no statute specifically created a right to repayment.[26] This objection does not lack for plausibility. But it shows a tension at the heart of the Tucker Act and the jurisdiction of the Claims Court that is better explained as an outgrowth of the problematic tradition of sovereign immunity. For it is the very fact of sovereign immunity, and the need for its waiver, that explains why the Claims Court is an article I court rather than an article III court; why the Claims Court has never had jurisdiction over tort claims (which were not actionable against the government at all until the enactment of the Federal Tort Claims Act in 1946[27]); and why the Claims Court's remedial capacity is generally limited to money damages. To understand the development of the Claims Court and the definition of its jurisdiction, we must tell a story in which sovereign immunity plays a crucial, generative role.[28]

B. *Judicial Review of the Administrative State*

I now want to describe a rival tradition that unfolds into a rival story. Sovereign immunity is an old doctrine, which was most at home in the 18th

24. Although not mandated by the language of the statute, judicial interpretations are clear on this point. *See, e.g.*, United States v. King, 395 U.S. 1 (1969); United States v. Jones, 131 U.S. 1 (1889).

25. United States v. Testan, 424 U.S. 392, 399-400 (1976); *King*, 395 U.S. at 4.

26. *See, e.g.*, Eastport S.S. Corp. v. United States, 372 F.2d 1002 (Ct. Cl. 1967); Clapp v. United States, 117 F. Supp. 576 (Ct. Cl.), *cert. denied*, 348 U.S. 834 (1954).

27. Ch. 753, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. § 1346 (1988)).

28. The jurisdiction of the Claims Court under the Tucker Act, dating from its 19th century origins, has operated at the traditional, functional center of the doctrine of sovereign immunity. I use the term "functional center" advisedly, for even though an express waiver of sovereign immunity existed in contract and takings cases before tort cases, that is because tort actions always lay outside the functional, if not the conceptual, core of sovereign immunity. Tort cases could always be pleaded as officer suits, with either damages or injunctive relief available against the tort-feasing officer in his individual capacity.

and 19th century worlds of limited government. The watchman state of the 18th century kept the peace and operated the mails, but did relatively little else. Within such a regime, it seemed less difficult to reconcile sovereign immunity with the rule of law through suits against individual officers who committed torts than it does within the administrative state that has grown up since. Today, as we all know, a vast governmental bureaucracy has assumed responsibility for managing the economy and administering social service programs upon which millions of people depend for their livelihoods.

The administrative state developed gradually, largely through the establishment of what we now call administrative agencies. Nevertheless, it is striking that Congress, almost from the beginning, has thought it practically if not constitutionally necessary to subject the most important decisions of administrative agencies to review in article III courts.[29] The development of the administrative and welfare bureaucracy has thus stood largely—although not wholly—outside the tradition of sovereign immunity.[30] An unelected bureaucracy with so much power simply has to be accountable, and the means of accountability that lay readiest at hand was that of judicial review. By 1902, a common law of judicial review had developed.[31] Most statutes establishing and empowering administrative agencies specifically provide for judicial review of their decisions.[32] The APA, enacted in 1946,[33] reflects a strong presumption that such review will be available. The 1976 amendment to section 702 of the APA, which explicitly waives any residue of federal sovereign immunity in suits against federal officials not involving claims for money damages, is an extension of this tradition. The House Report on the bill that became section 702 termed sovereign immunity an "anachronism[]" that had "outlived [its] usefulness."[34]

C. *The Potential for Collision*

The two traditions that I have identified—one embracing sovereign immunity and permitting only limited suability of government and the other re-

29. As Professor Jaffe explains, "The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid." L. JAFFE, *supra* note 9, at 320.

30. *See generally* L. JAFFE, *supra* note 9, at 353-76 (sovereign immunity has traditionally been applied to enforcement of contracts and equitable claims against government property).

31. *See* American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).

32. *See, e.g.*, 15 U.S.C. § 57a(e) (1988) (providing for review of Federal Trade Commission rules).

33. Administrative Procedure Act, ch. 324, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections 5 U.S.C. (1988)).

34. H.R. REP. NO. 1656, 94th Cong., 2d Sess. 20, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6121, 6140.

jecting sovereign immunity and treating review in an article III court as the norm—are inconsistent, at least in terms of their underlying spirits and assumptions. They have not often collided, however. Generally, the sovereign immunity tradition has prevailed in suits that fall within that tradition's historical, functional core—in suits for money damages and in actions to enforce contracts and to procure compensation for takings.[35] Such suits could often be brought, but generally only in the Claims Court, and only as a matter of explicit legislative grace. The competing tradition of full judicial oversight and effective remedies has more often prevailed in cases in which other, non-compensatory relief is sought.

But collision obviously can occur, as when a question arises about whether a particular suit is or is not a suit for money damages, or whether a borderline suit lies within the jurisdiction of the Claims Court or of a federal district court. If a suit is within the jurisdiction of the Claims Court, the philosophy of the sovereign immunity tradition and the Tucker Act calls for statutes purportedly authorizing the payment of money to be strictly construed and for relief generally to be limited to money damages. If, on the other hand, the suit can be brought in a federal district court, the immanent philosophy of the administrative state, symbolized by section 702 of the APA and its waiver of sovereign immunity in non-damages actions, will view sovereign immunity as virtually a historical anachronism.

A collision thus occurs at the point of the jurisdictional determination. Based upon the language of the relevant statutes, if a suit *is* for money damages and does not sound in tort, it cannot be heard in the federal district courts if the amount in controversy is more than $10,000.[36] If the dispute is *not* a suit for money damages, so that it *can* be heard in the federal district courts under section 702, then it apparently *cannot* be heard in the Claims Court.[37]

35. *But cf.* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). To the extent that Congress has explicitly considered the matter at all, this seems to have been Congress's intent. Congress, in enacting section 702, limited its reach to suits not seeking money damages and indicated that no suit should be available in federal district court if there were an adequate remedy available under the Tucker Act. *Id.* at 12-13.

36. 28 U.S.C. § 1346(a)(2) (1988). APA section 702 independently calls for this result: it excludes suits for money damages from its waiver of sovereign immunity and concomitant authorization to sue the government. 5 U.S.C. § 702 (1988). APA section 704 also bars suit in district court directly under the APA where there is an "adequate remedy in a court" under any other statute. 5 U.S.C. § 704 (1988).

37. Although the language of the Tucker Act does not expressly limit the Claims Court's jurisdiction to suits for money damages, this construction is generally settled. *See* United States v. Jones, 131 U.S. 1 (1889).

II. BOWEN AND THE TRADITIONS

Bowen v. Massachusetts[38] exhibits the tension between the two traditions that I have described. The dispute in *Bowen* involved the administration of the Medicaid program. Medicaid is a complicated federal-state program, in which participating states, as long as they stay within bounds established by federal statutes and regulations, are expected to develop their own standards of eligibility and covered services. The federal grants to the states to run the program, which are called "reimbursements," are paid quarterly, based upon the states' estimates of their anticipated future expenditures.[39] In *Bowen*, the Secretary of Health and Human Services (HHS) decided to "disallow" Massachusetts's claim to funding for a particular, narrow category of rehabilitative services.[40]

Following HHS's disallowance, which was based on the Secretary's interpretation of the statute, Massachusetts brought a suit for declaratory and injunctive relief in the Federal District Court for the District of Massachusetts.[41] The state claimed authorization to sue under section 702 of the APA, which waives sovereign immunity in suits against the federal government seeking relief "other than money damages."[42] The Secretary objected not to the fact of suit, but to the court in which the suit was filed. The Secretary argued that the suit *was* a suit for money damages, because the state's aim was to secure payment of money from the federal treasury, and that the action therefore had to be brought in the Claims Court.[43]

The Secretary had two arguments. First, the suit was not authorized by section 702 because the Commonwealth of Massachusetts sought monetary relief and section 702 is expressly limited to cases seeking non-monetary remedies.[44] Second, the suit was independently barred by section 704 of the APA, which allows suits directly under the APA only when no other statute provides "an adequate remedy in court."[45] According to the Secretary, there was an adequate remedy in a suit for damages in the Claims Court.[46]

38. 487 U.S. 879 (1988). For a thorough discussion of *Bowen*, see Noone & Lester, *Defining Tucker Act Jurisdiction After* Bowen v. Massachusetts, 40 CATH. U.L. REV. 571 (1991).

39. *See* 42 U.S.C. § 1396b(d) (1988).

40. *See* 42 U.S.C. § 1396b(d)(5).

41. *Bowen*, 487 U.S. at 887.

42. 5 U.S.C. § 702 (1988).

43. *Bowen*, 487 U.S. at 888-89.

44. *See id.*

45. 5 U.S.C. § 704 (1988).

46. *See Bowen*, 487 U.S. at 891.

The Supreme Court, by a 6-3 majority,[47] upheld the jurisdiction of the federal district court. The Court stated first that the case could go forward in the district court because the plaintiff was not seeking "money damages."[48] The basis for this holding is unclear. At one point, the Court suggests that the framing of the prayer for relief is crucial; although Massachusetts wanted money out of the federal treasury, it expressly prayed for declaratory and injunctive relief, not damages.[49] This, however, seems too broad a basis to provide persuasive support for the Court's holding. Every claim for damages could be styled as a request for an injunction ordering the defendant to pay money.[50] As a second ground for its holding, the Court suggested that money due under a grant program does not constitute damages.[51] Damages, the Court reasoned, compensate for a wrong done. By contrast, an order to pay money under a grant program does not provide compensation for an injury, but rather creates a situation in which there *is* no injury, because the plaintiff obtains the very thing denied.[52]

Having determined that the case was not a suit for money damages, the *Bowen* Court went on to find that because there was no adequate remedy in the Claims Court, jurisdiction in federal district court was not barred by APA section 704. The Court's reasoning was again opaque. There were hints of several explanations, of which two deserve notice. First, even if there could be a remedy in the Claims Court, the Supreme Court suggested that the possibility of getting "damages" after the fact would not be "adequate" for the state within the meaning of section 704, because the state needs to be able to plan its future activities in light of firm revenue estimates.[53] Second, the Supreme Court raised the possibility that there might not in fact be a remedy available in the Claims Court at all. The Claims Court can grant damages under the Tucker Act only where Congress mandates this relief, and in *Bowen* the Court thought it unclear that Congress had done so.[54] Although the statutory scheme put HHS under a duty to make payments to states complying with applicable federal guidelines, the Court found it uncertain that Congress had intended the relevant substantive statutes to mandate payments in compensation for past wrongs. Congress may have had no such remedial intent when it enacted the substantive stat-

47. Justice Stevens wrote the majority opinion, which was joined by four other Justices. Justice White concurred in the judgment only.

48. *Bowen*, 487 U.S. at 893-901.

49. *Id.* at 893, 900.

50. *See id.* at 915-16 (Scalia, J., dissenting).

51. *Id.* at 897-98.

52. *Id.* at 900-01.

53. *Id.* at 905-07.

54. *Id.* at 905 n.42.

utes, the Court reasoned, because Congress might have been counting on the relief in the federal district courts that, in the absence of special statutory provision, is available under the APA.[55]

This is all very complicated, but two things stand out. Let me focus on them. First, the Supreme Court held that suits against the United States seeking the payment of money out of the federal treasury may sometimes be brought in the federal district courts, rather than the Claims Court, on the theory that they are suits for declaratory and injunctive relief, not suits for money damages. Second, the Supreme Court suggested, but did not hold, that suits that could be brought in federal district court on this theory could not under any circumstances be brought in the Claims Court because they do not seek "damages," but rather money to which the plaintiff claims a legal right.

III. CLEANING UP AFTER THE COLLISION

Where does this leave us in terms of the two stories that I have been telling, about competing traditions that *Bowen* brought into collision? It may help to separate two questions. First, which cases in which plaintiffs seek monetary relief from the United States can now be brought in the federal district courts? Second, what does *Bowen* mean for the jurisdiction, and the future, of the Claims Court?

A. *District Court Jurisdiction*

After *Bowen,* the outer bounds of district court jurisdiction in suits seeking money from the United States are hard to identify. The requirements are that the suits must seek a form of monetary relief other than "damages" and that the Claims Court remedy must not be "adequate."[56] Exactly how these two criteria fit together is not wholly clear. The facts of *Bowen* seem to establish that suits arising out of the operation of federal grant programs generally lie within the district courts' jurisdiction. It is a good deal less clear that *Bowen* should be read to extend the jurisdiction of the district courts to the contract[57] and takings cases that were the traditional, functional heart of the federal tradition of sovereign immunity. The relief sought in such cases is easily classifiable as "damages," and a Claims Court remedy might well be held "adequate." It seems significant that *Bowen* involved a grant program in which the central, operating rules of a classic administra-

55. *Id.*

56. *See supra* text accompanying notes 47-55.

57. *See, e.g.,* Eagle-Picher Indus., Inc., v. United States, 901 F.2d 1530, 1532 & n.1 (10th Cir. 1990); Rieschick v. United States, 21 Cl. Ct. 621, 625-26 (1990).

tive state bureaucracy potentially affected a stream of payments over time, not a one-time claim of entitlement.[58]

B. Claims Court Jurisdiction

Does the possibility of jurisdiction in a federal district court—notably in suits involving federal grant programs—necessarily defeat the Claims Court's jurisdiction? Dissenting in *Bowen,* Justice Scalia argued that it did. So far, however, the Claims Court has resisted Justice Scalia's conclusion. In several important cases involving the administration of federal grant programs, including *Kentucky ex rel. Cabinet for Human Resources v. United States*[59] and *City of Wheeling v. United States,*[60] the Claims Court has held that it retains jurisdiction. *Bowen,* the Claims Court has reasoned, was explicitly about federal district court jurisdiction, not that of the Claims Court, and because the Supreme Court did not discuss prior Federal Circuit cases upholding Claims Court jurisdiction, those cases are still binding on the Claims Court. Will the Claims Court decisions that reach this conclusion withstand analysis?

It is easy to develop a logical argument that district court jurisdiction implies lack of jurisdiction in the Claims Court. The cause of action that *Bowen* recognized rests on section 702 of the APA. This section states explicitly that "[n]othing herein . . . confers [district court] authority to grant relief if any other statute that grants consent to suit [for money damages] expressly or impliedly forbids the relief which is sought."[61] Moreover, the congressional committee reports make clear Congress' understanding that the Tucker Act, by authorizing suits for damages in the Claims Court, impliedly forbids suit in the district courts.[62] In other words, Congress clearly seems to have contemplated that there can be no suit in federal district court if the suit can instead be brought in the Claims Court under the Tucker Act. Thus, if *Bowen*-type cases *can* be brought in the federal district courts, it seems to follow that they *cannot* be brought in the Claims Court.[63]

58. The Supreme Court in *Bowen* distinguished the Federal Circuit's decision in Chula Vista City School District v. Bennett, 824 F.2d 1573 (Fed. Cir. 1987), *cert. denied,* 484 U.S. 1042 (1988), on this basis. *See Bowen,* 487 U.S. at 882 n.1. The Claims Court has relied on this distinction in post-*Bowen* cases. *See, e.g.,* City of Wheeling v. United States, 20 Cl. Ct. 659 (1990), *aff'd without opinion,* 928 F.2d 410 (Fed. Cir. 1991); Rieschick v. United States, 21 Cl. Ct. 621, 625-26 (1990).

59. 16 Cl. Ct. 755, 759-62 (1989).

60. 20 Cl. Ct. at 662-65.

61. 5 U.S.C. § 702 (1988).

62. H.R. REP. NO. 1656, 94th Cong., 2d Sess. 12-13, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6133.

63. *See* Bowen v. Massachusetts, 487 U.S. 879, 915 (1988) (Scalia, J., dissenting).

It is impossible to conclude definitively whether this argument will prevail in the Court of Appeals for the Federal Circuit or in the Supreme Court. My guess, however, is that this argument will not prevail. To explain why, let me begin with Holmes's famous aphorism:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[64]

The argument that federal district court jurisdiction must preclude Claims Court jurisdiction is a "logical" argument, which assumes that the various pieces of the jurisdictional puzzle can and must fit together: if a claim can be heard by the federal district courts, it therefore *cannot* be heard by the Claims Court. Experience suggests, however, that the pieces of the jurisdictional puzzle do not always fit together neatly. As my account of the two legal traditions was meant to suggest, the Claims Court and the Tucker Act are located in one legal tradition, built on the central concept of sovereign immunity, while the jurisdiction of the federal district courts under the APA reflects a quite different tradition. These traditions did not cohere very well before *Bowen,* and there is no reason to think they will cohere any better afterward.

Indeed, the Supreme Court in *Bowen* opened the door to the possibility that a case might involve a claim for money damages for purposes of Claims Court jurisdiction, even if it would be deemed a claim for non-damages relief if it were filed in federal district court. By explicitly limiting its pronouncement that there might not be Claims Court jurisdiction on the facts of *Bowen* to the status of a suggestion, the Supreme Court appeared to signal that the district court could have jurisdiction, even if the Claims Court might also have taken jurisdiction, had the plaintiff made a different forum choice.[65]

It is here that Holmes's allusion to "felt necessities" may be relevant. Behind the refined legal argumentation, the Supreme Court's purpose in upholding federal district court jurisdiction in *Bowen* was probably to allow the plaintiff its choice of forum, in this case a federal district court, where complete relief was available. That purpose would not require excluding from the Claims Court a plaintiff who chose, for whatever reason, to bring suit there.

---

64. O. HOLMES, THE COMMON LAW 1 (1881).

65. *See Bowen,* 487 U.S. at 904-05 ("the availability of any review of a disallowance decision in the Claims Court is *doubtful*") (emphasis added).

In short, my guess is that the practical effect of *Bowen* will be to establish concurrent federal district court and Claims Court jurisdiction in cases involving the administration of federal grant programs.[66] As a formal matter, the Claims Court's jurisdiction will not be substantially limited. As a practical matter, however, many plaintiffs who previously would have sued in the Claims Court may now choose to proceed instead in a federal district court, because district courts have the capacity to grant more complete, non-damages relief. *Bowen* thus reflects a considerable triumph of the legal tradition that denigrates sovereign immunity and prefers review by article III courts over the tradition that exalts sovereign immunity and gives a central role to the Claims Court.

C. *Assessing the Claims Court's Loss*

If *Bowen* implies that many more cases now *can* be brought in federal district court instead of in the Claims Court, there is no reason, pragmatically, to regret this development. One of the striking things about the fact situation in *Bowen* is that there was no strong, functional reason—outside of

66. There is a potential obstacle to this conclusion. The Supreme Court in *Bowen* suggested a possible stiffening in the test for satisfying the Tucker Act's jurisdictional requirements for claims founded on a statute. The Court suggested that for a damages claim to be properly founded on a statute, the statute must not only mandate the payment of money, but also must expressly or impliedly create a cause of action to compensate for past wrongs. *See Bowen*, 487 U.S. at 905 n.42; *see also* Maryland Dep't of Human Resources v. HHS, 763 F.2d 1441, 1450-51 (D.C. Cir. 1985) (Title XX of the Social Security Act held not to create a right in the state to recover money damages for allegedly misspent funds). Again, purpose is crucial. The purpose that moved the Supreme Court to uphold district court jurisdiction in *Bowen*, respecting the plaintiff's forum choice, does not suggest that Claims Court jurisdiction should be barred when preferred by the plaintiffs. Thus, the Supreme Court explicitly stated in *Bowen* that federal district court jurisdiction could be upheld even on the supposition that a damages remedy *was* available in the Claims Court. *See Bowen*, 487 U.S. at 901-08. The suggestion that there might be no remedy at all in the Claims Court was an alternative foundation for concluding that APA section 704 did not bar the suit. A slightly different route yielding the same result would be to base Tucker Act jurisdiction on the ground that the federal government enters into implied contracts when it enters cooperative funding arrangements. *See, e.g.*, Commonwealth of Ky. *ex rel.* Cabinet For Human Resources v. United States, 16 Cl. Ct. 755, 762 (1989) (Child Support Enforcement Program administered by the HHS under the Social Security Act).

Claims Court jurisdiction over illegal exaction claims should be expected to survive for similar reasons. Illegal exaction claims are one of the two distinct kinds of claims for money under the Tucker Act that the court distinguished in Eastport S.S. Corp. v. United States, 372 F.2d 1002 (Ct. Cl. 1967). *See* U.S. v. Testan, 424 U.S. 392, 401-02 (1976) (approving the distinction). In such cases, the court implied, there was no need for a law that expressly or impliedly grants a right to payment of a certain sum. Illegal exaction claims would thus not seem to be threatened by the Supreme Court's suggestion that the Claims Court might lack jurisdiction in a case such as *Bowen* because the Medicaid Act may create no statutory right to sue for money.

a sort of worshipful stance toward sovereign immunity—to prefer having the case brought in the Claims Court. The general administration of the Medicaid Act is not an area in which the Claims Court has specialized subject matter expertise. Plaintiffs can bring some Medicaid cases, arising on other bases, in the federal courts of appeals of various circuits.[67] There was, accordingly, no possibility of achieving uniformity by placing all cases within the jurisdiction of a single court. Moreover, the federal district courts may be more convenient for many plaintiffs. In cases involving a mix of state and federal law, the federal district courts may also be closer to the relevant local law.[68]

IV. The Claims Court's Future

If the federal district courts are appropriate forums for cases like *Bowen*, does this mean that the Claims Court will or should become an anachronism? There is reason to think not. The jurisdiction of the Claims Court, from the beginning, rested on two very different sorts of hypotheses. The first was that sovereign immunity made suits against the federal government a matter of grace, not right. The second was that a specialized tribunal would achieve enhanced accuracy and efficiency through the development of subject matter expertise. Even if sovereign immunity is a fading tradition, the interest in achieving the benefits of tribunals with specialized subject matters remains important. Congress has recently created a Veterans Court on this model.[69] The Bankruptcy Court,[70] the Court of International Trade,[71] the Court of Military Appeals,[72] and the Tax Court[73] furnish other examples.

If I had to hazard a guess, it would be that the future of the Claims Court, whether as a result of legislation or of creative judicial lawmaking, will increasingly be that of a specialized tribunal, with expertise in particular subject areas. Such specialization already exists with respect to government contracts and takings cases. The category of money claims against the government not sounding in tort, however, is simply too sprawling to permit the benefits of a truly specialized tribunal. No real, specialized expertise could span the entire field. Yet it takes real specialization, to the extent that it

67. *See Bowen*, 487 U.S. at 908.
68. *See id.*
69. 38 U.S.C. § 4051 (1988).
70. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended at 28 U.S.C. § 151 (1988)).
71. 28 U.S.C. § 251 (1988).
72. 10 U.S.C. § 867 (1988).
73. 26 U.S.C. § 7441 (1988).

exists or could be made to exist, to create a functional interest in achieving exclusive, or relatively exclusive, jurisdiction in the Claims Court, and to supply a policy-based rationale—which was missing in *Bowen*—for excluding jurisdiction by the federal district courts.

Presently, the Claims Court is an anomaly in the federal jurisdictional scheme: a somewhat generalist article I court. We have article I courts with specialized subject matter expertise. We have article III courts with a proudly generalist tradition. But we have no article I courts, with the partial exception of the Claims Court, that are not justified by the asserted benefits of specialization. An anomaly of this kind may do no particular harm, but it is hard to see how it could do much particular good, either. To paraphrase Holmes again, it would be discomfiting to have no better justification for the existence of a peculiar kind of court than that it happened to be set up that way in the 19th century.[74]

Insofar as the benefits of specialization are involved, the Claims Court's article I status should provide no barrier to the expansion of its jurisdiction in virtually any plausible direction. The Supreme Court recently tried to explain the permissibility of adjudication by non-article III courts in terms of the public rights tradition—a concept that closely overlaps that of sovereign immunity.[75] There is, however, a better basis, which is already reflected in the statutory structure surrounding the Claims Court. Initial adjudication by an article I tribunal should be permissible whenever there is adequate appellate review by an article III court, such as the Court of Appeals for the Federal Circuit.[76] Indeed, it would be my guess that the relationship between the Claims Court and the Court of Appeals for the Federal Circuit—one an article I trial court, the other an article III appellate court—defines a model that will be widely followed in providing specialized and unified adjudication in other areas in the years ahead.

V. CONCLUSION

The current structure for judicial review of claims against the government is made up of two halves that do not cohere. *Bowen* showed this. In his dissent in *Bowen,* Justice Scalia suggested that the half rooted in the Administrative Procedure Act and favoring fully effective remedies from the federal district courts might have obliterated the other half, the one growing out of

74. *Cf.* Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.").

75. *See, e.g.,* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989).

76. *See* Fallon, *Of Legislative Courts, Administrative Agencies, and Article III,* 101 HARV. L. REV. 916 (1988).

the tradition of sovereign immunity, in which the Claims Court is located.[77] Justice Scalia is probably wrong, at least in part: although the jurisdiction of the federal district courts is expanded in cases challenging the management of federal grant programs, the jurisdiction of the Claims Court is not obliterated. In the future, *Bowen* could conceivably be rethought, but it is doubtful that it should be. Currently, there is no strong rationale for preferring Claims Court jurisdiction in cases like *Bowen.* The future of the Claims Court should be determined through consideration of the categories in which the court does or could possess sufficient, specialized expertise to warrant its exercising relatively exclusive jurisdiction. It is difficult to predict how things will turn out. The years ahead, however, should be as intellectually exciting as they are likely to be anxious for those who work in this area.

77. Bowen v. Massachusetts, 487 U.S. 879, 917 (1988) (Scalia, J., dissenting).