Bajakajian and Excessive Fines Claims Against the United States

By Scott E. Gant*

Introduction

As the 1997 Supreme Court Term drew toward an end, the Court issued a remarkable decision. Although the Court's 5-4 split in *United States v. Bajakajian*,[1] with Justice Thomas writing for the Court's four more "liberal" Justices,[2] was itself noteworthy,[3] it was the majority's holding which was truly of great moment: for the first time ever, the Court deemed a fine "excessive" and therefore unconstitutional under the Eighth Amendment's Excessive Fines provision.

The Excessive Fines Clause sets out that "excessive fines [shall not be] imposed . . ."[4] In the more than two centuries since the Eighth Amendment

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* B.A., Wesleyan University, 1991; J.D., Harvard Law School, 1995; Associate, Crowell & Moring LLP, Washington, D.C. The author thanks Bruce Peabody, Rachel Stoffa, and Bill Wallace for their valuable suggestions.

[1] United States v. Bajakajian, 118 S. Ct. 2028 (1998).

[2] *See* Marcia Coyle, *OK, Let's All Go to the Right*, National Law Journal at B7 (Aug. 10, 1998) (the Court's "more liberal wing" consists of Justices Stevens, Ginsburg, Souter and Breyer); Ralph R. Reiland, *A Commonsense Ruling on Sexual Harassment*, WASH. TIMES at 28 (July 27, 1998) (the Court's "most liberal members" are Justices Stevens, Souter, Ginsburg and Breyer); John Aloysius Farrell, *Scales of Justice*, BOSTON GLOBE at 16 (May 10, 1998) (Justices Stevens, Ginsburg, Souter, and Breyer "are the heirs and preservers of the court's liberal tradition").

[3] *Bajakajian* was the Court's first 5-4 decision with this particular alignment of Justices. *See The Supreme Court, 1994 Term*, 109 HARV. L. REV. 10, 343 (1995); Thomas C. Goldstein, *Statistics for the Supreme Court's October Term 1995*, 65 LW 3029, 3032 (July 9, 1996); Thomas C. Goldstein, *Statistics for the Supreme Court's October Term 1996*, 66 LW 3068, 3070 (1997); Thomas C. Goldstein, *Statistics for the Supreme Court's October Term 1997*, 67 U.S.L.W. 3101, 3103 (1998). Moreover, it was the only decision of the 1997 Term where neither Justice O'Connor nor Justice Kennedy were in the majority. *See* Debra Cassens, *A Constitutional Siesta*, ABA JOURNAL at 39 (Sept. 1998).

[4] U.S. Const. amend. VIII.

was adopted as part of the Constitution, the Court "has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause."[5] The few decisions addressing the Clause have shed minimal light on its meaning, and in none of those decisions has the Court determined that the Clause was violated.

While this Article briefly describes both the Clause and the Court's decision in *Bajakajian*, its central purpose is to explore an open legal question likely to require a definitive answer in the wake of the Court's decision: whether a claimant may bring an action *for damages* against the United States alleging a violation of the Excessive Fines Clause.

I. The Excessive Fines Clause

While the Eighth Amendment's general purpose "was to limit the government's power to punish," the Excessive Fines Clause[7] specifically "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'"[6]

Although Supreme Court jurisprudence about the Clause is sparse, even before *Bajakajian* several basic teachings were clear. First, only fines imposed as "punishment" can violate the Clause. Second, both criminal and civil fines

[5] *Bajakajian*, 118 S. Ct. at 2033.

[6] Austin v. United States, 509 U.S. 603, 609-10 (1993) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)) (emphasis removed). *See generally Browning-Ferris*, 492 U.S. at 264-73 (discussing the historical antecedents of the Clause).

[7] *See, e.g.*, United States v. Alt, 83 F.3d 779, 783 (6th Cir. 1996) ("Because . . . tax penalties awarded against Alt are not 'punishment' there is no need to address Alt's claim that the penalties constitute an excessive fine under the Eighth Amendment.").

Because the meaning of the term "punishment" has been important in jurisprudence concerning both the Double Jeopardy Clause and the Excessive Fines Clause, the Court has, at times, applied statements developed in the Double Jeopardy context to Excessive Fines cases. For instance, in *United States v. Halper*, a dispute over the Double Jeopardy Clause, the Court explained that "a civil sanction that cannot fairly be said solely to serve a remedial purpose . . . is punishment, as we have come to understand the term." 490 U.S. 435, 448 (1989); *see also Austin*, 509 U.S. at 610 (Excessive Fines case) (quoting *Halper*, 490 U.S. at 448).

However, the Supreme Court's repudiation of parts of its decision in *Halper* may have generated some confusion about the concept of "punishment" as it applies to the Excessive Fines Clause. In 1997, the Court concluded that "Halper's test for determining whether a particular sanction is 'punitive,' and thus subject to the strictures of the Double Jeopardy Clause, has proved unworkable . . . [for we] have since recognized that all civil penalties have some deterrent effect." Hudson v. United States, 118 S. Ct. 488, 494 (1997) (holding that

can be unconstitutionally excessive under the Clause.[8] Third, the Clause does not limit the award of punitive damages to a private party in a civil suit – at least when the government has neither prosecuted the action nor has any right to receive a share of the damages.[9]

When the Clause does apply, the sole issue to be determined by the courts is whether a sanction is excessive. Prior to *Bajakajian* the Supreme Court had declined to establish a test for determining what qualifies as "excessive" under the Clause.[10] By agreeing to hear Bajakajian's appeal, the Court was presented squarely with this question, which it previously had been content to leave to the lower courts.[11]

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protections of the Double Jeopardy Clause are applicable only to criminal proceedings and that the mere presence of non-remedial purposes does not render a sanction criminal rather than civil); *see also* Department of Rev. of Mont. v. Kurth Ranch, 511 U.S. 767, 777 n.14 (1994). The implication of *Hudson's* revelation that "all civil penalties have some deterrent effect" for Excessive Fines analyses is unclear. If *Austin* is still good law, the teaching of *Hudson* applied to *Austin* would seem to be that because "all civil penalties have some deterrent effect," all civil penalties are therefore punitive. Alternatively, *Hudson's* Double Jeopardy analysis may have no bearing on *Austin* or its articulation of what qualifies as punishment under the Excessive Fines Clause. *See* United States v. Ursery, 116 S. Ct. 2135, 2146 (1996) ("*Austin*, it must be remembered, did not involve the Double Jeopardy Clause at all. *Austin* was decided under the Excessive Fines Clause of the Eighth Amendment, a constitutional provision which we never understood as parallel to, or even related to, the Double Jeopardy Clause of the Fifth Amendment."); *cf.* Cole v. United States Department of Agriculture, 133 F.3d 803, 808 (11th Cir. 1998) (explaining, post-*Halper*, that "there is some language in *Austin* suggesting that, unless a civil sanction *solely* serves remedial purposes, it may be considered punishment and thus subject to scrutiny as to whether it violates the Excessive Fines Clause") (citation omitted).

[8] *See Austin*, 509 U.S. at 609; *Hudson*, 118 S. Ct. at 495 ("The Eighth Amendment protects against civil fines . . . .").

[9] *See Browning-Ferris*, 492 U.S. 257 at 264. In *Browning-Ferris*, the Court expressly reserved the questions of whether the Clause applies to the States through the Fourteenth Amendment, and whether it protects corporations as well as individuals. *Id.* at 276 n.22.

[10] *See Austin*, 509 U.S. at 622 (Petitioner "asks that we establish a multifactor test for determining whether a forfeiture is constitutionally 'excessive.' We decline that invitation.") (citation omitted); Alexander v. United States, 509 U.S. 544, 559 (1993) ("whether the forfeiture was 'excessive' must be considered . . . [but we] think it preferable that this question be addressed by the Court of Appeals in the first instance.").

[11] In the absence of Supreme Court guidance, courts of appeals have employed three basic tests to determine whether a fine is excessive: (1) an instrumentality test; (2) a proportionality test; and (3) a hybrid test. The instrumentality test focuses on the qualitative connection between the sanction and the conduct, the proportionality test focuses on the quantitative relationship between the conduct and the sanction, and the hybrid approach applies the

II. The *Bajakajian* Decision

On June 9, 1994, Hosep Bajakajian attempted to leave the United States without reporting that he was transporting more than $10,000 in U.S. currency. Federal law provides that a person convicted of willfully not reporting the transport of more than $10,000 shall forfeit to the government "any property . . . involved in such offense."[12] After Bajakajian had tried to take $357,144 out of the country without advising the authorities, the United States sought the forfeiture of all of the money. Bajakajian argued that such a forfeiture would violate the Excessive Fines Clause of the Eighth Amendment. By a 5-4 vote the Supreme Court agreed, and held the forfeiture would be unconstitutional.

The Court began by briefly addressing the meaning of the term "fine." At the time the Constitution was adopted, a "fine was understood to mean a payment to a sovereign as punishment for some offense."[13] Because a forfeiture is payment as punishment for an offense, the Court concluded that the forfeiture of currency ordered by 18 U.S.C. § 982(a)(1) fell within the ambit of the Excessive Fines Clause.

Having determined the forfeiture of Bajakajian's money would constitute a fine within the meaning of the Clause, the Court turned to consider whether the fine was "excessive," explaining that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[14] The Court, however, acknowledged that the text and history of the Clause provide little guidance about how proportional a punitive forfeiture must be to the gravity of an

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criteria of both the instrumentality and proportionality inquiries. *See, e.g.,* United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994) (instrumentality); United States v. 427 & 429 Hall St., 74 F.3d 1165, 1170 (11th Cir. 1996) (proportionality); United States v. 6040 Wentworth Ave., 123 F.3d 685, 688-89 (8th Cir. 1997) (hybrid); United States v. Milbrand, 58 F.3d 841, 847 (2d Cir. 1995) (hybrid).

[12] 18 U.S.C. § 982(a)(1).

[13] *Bajakajian*, 118 S. Ct. at 2033 (citing *Browning-Ferris*, 492 U.S. at 265).

[14] *Bajakajian*, 118 S. Ct. at 2036. Two years earlier, the Court had suggested that proportionality rests at the heart of the Clause, explaining: "Because the second stage of inquiry under the Excessive Fines Clause asks whether the particular sanction in question is so large as to be 'excessive' . . . a preliminary-stage inquiry that focused on the proportionality of a particular sanction would be duplicative of the excessiveness inquiry that would follow." *Ursery*, 116 S. Ct. at 2146.

offense in order to be "excessive."[15] In the absence of textual and historical guidance, the Court found relevant two considerations in deriving a constitutional excessiveness standard: (1) that judgments about the appropriate punishment for an offense belong in the first instance to the legislature, and (2) that "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise."[16] Because "[b]oth of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense," the Court "adopt[ed] the standard of gross disproportionality articulated in . . . [its] Cruel and Unusual Punishments Clause precedents."[17]

Although the Court noted that the application of this "gross disproportionality" standard should be left to district courts and courts of appeals, the Court nevertheless proceeded to evaluate Bajakajian's claim, concluding that forfeiture of the entire $357,144 he sought to take outside the country would violate the Excessive Fines Clause.[18] The Court observed that Bajakajian's crime was solely a reporting offense and that the money constituted proceeds of legal activity. "Whatever his other vices," the Court explained, "Respondent does not fit into the class of persons for whom the statute was principally designed: he is not a money launderer, a drug trafficker, or a tax evader."[19] Further, "[t]he harm that Respondent caused was also minimal. Failure to report his currency affected only one party: the government, and in a relatively minor way . . . . Had his crime gone undetected, the government would have been deprived only of the information that $357,144 had left the country."[20] In view of these facts, the Court determined that forfeiture of all of the currency would be grossly disproportional to the gravity of his offense.

Justice Kennedy, writing on behalf of the four dissenting Justices, rebuked the majority on several grounds. As an initial matter, Kennedy took issue with the majority's willingness to designate a broad range of sanctions as remedial penalties which fall outside the bounds of the Excessive Fines Clause, because remedial sanctions are (by definition, under Court precedents) not punitive. "The irony of the case," Kennedy explained, "is that, in the end, it may stand for narrowing constitutional protection rather than

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[15] *Bajakajian*, 118 S. Ct. at 2036-37.

[16] *Id.* at 2037.

[17] *Id.*

[18] *Id.* at 2037-38.

[19] *Id.* at 2038.

[20] *Id.* at 2039.

enhancing it."[21] Justice Kennedy also strongly reacted to the majority's "all but say[ing] the offense is not serious,"[22] calling "this disdain for the statute . . . wrong as an empirical matter and disrespectful of the separation of powers."[23]

When turning to the question of excessiveness, however, the dissenting Justices appeared to endorse the majority's "gross disproportionality" standard, explaining that "this test would be a proper way to apply the clause, if only the majority were faithful in applying it."[24] Nevertheless, they rejected the majority's conclusion that forfeiture of all the cash in this case would be grossly disproportional and criticized the majority for not granting to Congress the deference which it conceded the legislature was owed in choosing penalties for offenses.[25]

III. Excessive Fines Claims Against the United States

Bajakajian's holding will likely focus new attention on the Excessive Fines Clause and encourage some litigants to raise claims which might have seemed hopeless before the decision.[26] While most of these claims will not seek damages,[27] some of them undoubtedly will request monetary relief,[28] thereby

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[21] *Id.* at 2041 (Kennedy, J., dissenting).

[22] *Id.*

[23] *Id.*

[24] *Id.* at 2043 (Kennedy, J., dissenting).

[25] *Id.* at 2043-46 (Kennedy, J., dissenting). Not clarified by *Bajakajian*, however, is what fairly can be characterized as a "fine." The decision did no more than repeat the Court's prior assertion that a fine is "payment as punishment for some offense." *Bajakajian*, 118 S. Ct. at 2033 (citing *Austin*, 509 U.S. at 609-10).

[26] *Cf. Bajakajian*, 118 S. Ct. at 2041 (Kennedy, J., dissenting) ("The [majority's] decision is disturbing both for its specific holding and the broader upheaval it foreshadows.").

[27] There are several reasons most actions alleging a violation of the Excessive Fines Clause will not seek damages. First, arguments based on the Clause are often raised in judicial or administrative proceedings *before* property or assets have been forfeited to, and are in the hands of, the government. In those circumstances where the government has not yet consummated the imposition of a fine, a claimant would not yet have a cause of action for *damages*. *See* Aerolineas Argentinas v. United States, 77 F.3d 1564, 1573 (Fed. Cir. 1996) ("when 'the Government has the citizen's money in its pocket' . . . [s]uit can then be maintained under the Tucker Act to recover the money exacted;") (quoting Clapp v. United States, 127 Ct. Cl. 505 (1954)). Second, in some cases, including many forfeiture actions, when a fine has been imposed in accordance with specified judicial or administrative proceedings, damages claims seeking to overturn the results of those proceedings are precluded. *See, e.g.*, Scarano v. United States, 34 Fed. Cl. 775 (1996) (holding that the Court of Federal Claims lacks jurisdiction

inviting consideration of whether an Excessive Fines claim for damages may be brought against the United States.

If such a claim can be brought, it must be brought in the Court of Federal Claims, an Article I tribunal[29] that inherited the responsibilities of the Court of Claims.[30] That Court has "exclusive jurisdiction over [non-tort][31] actions

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over a forfeiture claim brought after the completion of forfeiture proceedings in a district court). In some forfeiture cases, however, suits for damages will be entertained. *See, e.g.*, Vereda, Ltda. v. United States, 41 Fed. Cl. 495 (1998) (finding jurisdiction over claim seeking monetary relief from illegal exaction despite pending petition for remission before Drug Enforcement Agency and dismissal of complaints filed in district court for return of seized property).

[28] One such set of cases is likely to involve forfeiture claims in which the Court of Federal Claims determines that the claimant is not estopped from challenging the forfeiture despite prior judicial or administrative attention to the issue. *Cf. Vereda*, 41 Fed. Cl. 495. Another set of cases will probably concern actions for damages arising from the imposition of administrative or regulatory penalties imposed by (and paid to) the government, allegedly in violation of the Constitution. *Cf. Trayco, Inc. v. United States*, 994 F.2d 832 (Fed. Cir. 1993) (finding lower court had jurisdiction over claim that Customs Service had unlawfully assessed penalty and affirming damages award for money paid under protest by claimant); *Pender Peanut Corp. v. United States*, 20 Cl. Ct. 447 (1990) (granting plaintiff's motion for summary judgment for return of money drawn from letter of credit following assessment of penalty by Department of Agriculture).

[29] Article I courts — also called "legislative courts" —are established and delegated adjudicative power by Congress rather than created pursuant to Article III of the Constitution. *See* U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). *See generally* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L. J. 233 (1990); Richard J. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916 (1988). Although today there is little dispute that the Court of Federal Claims is an Article I court, "[i]n the years preceding 1982, when the Court of Claims was replaced by the United States Claims Court, the Supreme Court seemed to have no doubt about the Court of Claims being a 'constitutional' court, created under Article III." Wright, Miller & Cooper, 13 Federal Practice and Procedure: Jurisdiction 2d § 3528 at 252 (1984).

[30] In 1982, Congress replaced the Court of Claims with the United States Claims Court. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. Then, a decade later, Congress passed the Federal Courts Administration Act of 1992, which changed the name of the court to the United States Court of Federal Claims. Pub. L. No. 102-572, 106 Stat. 4506 (1992); *see also* Calhoun v. United States, 32 Fed. Cl. 400, 404 n.2 (1994) ("The United States Court of Federal Claims is the successor to the United States Claims Court in all respects.").

[31] *See* 28 U.S.C. § 1491(a)(1). Congress remedied the exclusion of tort claims from coverage under the Tucker Act when it enacted the Federal Tort Claims Act, which establishes

against the United States for money damages in excess of $10,000."[32]

A. The Court of Federal Claims

The Court of Federal Claims traces its history back to 1855, when its predecessor, the Court of Claims, was established. Before then, "no general statute gave the consent of the United States to suit on claims for money damages; the only recourse available to private claimants was to petition Congress for relief."[33] Concerned, however, about the increasing number of private petitions presented to it, the legislative branch created the Court of Claims.[34] The act establishing the Court of Claims authorized it to hear claims, report its findings to Congress, and submit drafts of private bills in cases receiving a favorable decision.[35] Six years after the Court of Claims was established, President Lincoln recommended that the Court be authorized to render final judgments, and Congress adopted Lincoln's recommendations during its session in 1863.[36]

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exclusive district court jurisdiction and waives sovereign immunity for certain tort suits against the United States. *See* 28 U.S.C. §§ 1346(b); Sanders v. United States, 34 Fed. Cl. 75 (1995), *aff'd*, 104 F.3d 376 (Fed. Cir. 1996), *cert. denied*, 118 S. Ct. 97 (1997). The Supreme Court has also recognized a right of action for damages for injuries consequent to a violation of the Constitution by federal officials (not against the United States itself) acting under color of law. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Such claims cannot be brought in the Court of Federal Claims. *See* Brown v. United States, 35 Fed. Cl. 258, 267 (1996) ("under § 1491(a)(1) this court has jurisdiction over claims against the United States government, not federal officials").

[32] Marshall Leasing, Inc. v. United States, 893 F.2d 1096, 1099 (9th Cir. 1990). The Tucker Act itself does not state that the Court of Federal Claims has exclusive jurisdiction over such claims; rather, its exclusive jurisdiction is deduced from the fact that concurrent jurisdiction over claims exceeding $10,000 is not conferred upon any other federal court. *See* 28 U.S.C. §§ 1346(a)(2), 1491.

[33] United States v. Mitchell, 463 U.S. 206, 212 (1983). *See generally* Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution From A Legislative Toward A Judicial Model of Payment*, 45 LA. L. REV. 625 (1985).

[34] *See* 10 Stat. 612 [hereinafter "1855 Act"]. For histories of the court, see generally Wilson Cowen *et al.*, *The United States Court of Claims, A History (Part II, Origin—Development—Jurisdiction, 1855-1978)* (1978), *reprinted at* 216 Ct. Cl. 1; William A. Richardson, *History, Jurisdiction, and Practice of the Court of Claims of the United States* (1882), *reprinted at* 17 Ct. Cl. 3.

[35] *See* 1855 Act, § 7, 10 Stat. 612.

[36] 12 Stat. 765 (1863). Although the 1863 Act empowered the Court to impose final judgments, it also contained a provision, the "Hale Amendment," stating that "no money shall be paid out of the Treasury for any claim passed upon by the Court of Claims till after an

Two decades later, in 1887, Rep. John Randolph Tucker introduced a bill which replaced most provisions of the 1855 and 1863 legislation, revising in several respects the jurisdiction and procedures of the Court of Claims.[37] The 1887 Act is widely known as the "Tucker Act," and it established the essential jurisdictional framework for the current successor of the Court of Claims – the Court of Federal Claims.[38] Although several subsequent pieces of legislation have modified the organization and jurisdictional reach of the Court,[39] each refinement of the Court has left intact the fundamental jurisdictional provision set out in the Tucker Act.[40]

B. The Tucker Act

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."[41] With the adoption of the Tucker Act, the United States provided such consent – subjecting itself to suits for many types of claims. The Act provides:

> The Court of Claims 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, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . .[42]

Despite its scope, the Tucker Act itself does not get claimants very far. It is "only a jurisdictional statute . . . [and] it does not create any substantive

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appropriation therefor shall be estimated for by the Secretary of the Treasury." *Id.* at § 14. This provision was repealed in 1866 after the Supreme Court declined review of a Court of Claims decision on the grounds it was not final because it was subject to revision by the Secretary of the Treasury. *See* Gordon v. United States, 69 U.S. (2 Wall.) 561 (1864); 14 Stat. 9 (repealing Hale Amendment).

[37] *See* H.R. 6974, 49 Cong., 1st Sess. 1886.

[38] 24 Stat. 505 (1887).

[39] *See supra* note 30; *see also* 43 Stat. 964 (1925) (authorizing Court of Claims commissioners – transformed into trial judges in 1982 – to conduct formal judicial proceedings); 62 Stat. 976 (1948) (dividing the court into trial and appellate levels); 78 Stat. 699 (1964).

[40] *See* Paul Frederic Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 AM. U. L. REV. 301, 307 (1997) ("the Tucker Act is the most important mechanism of [the Court of Federal Claims'] jurisdiction").

[41] *Mitchell*, 463 U.S. at 212.

[42] 28 U.S.C. § 1491(a)(1). The Tucker Act provides concurrent jurisdiction in the District Court over claims not exceeding $10,000. *See* 28 U.S.C. § 1346(a)(2) (referred to as the "Little Tucker Act").

right enforceable against the United States for money damages."[43] "A substantive right must be found in some other source of law, such as 'the Constitution, or any act of Congress, or any regulation of an executive department.'"[44] Yet not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Act. The claim must be one for *money damages* against the United States.[45] Further, because claims must be for money damages, a claimant must demonstrate that the source of

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[43] United States v. Testan, 424 U.S. 392, 398 (1976); *see also United States v. Mitchell*, 445 U.S. 535, 538 (1980).

[44] *See Mitchell*, 463 U.S. at 216; 28 U.S.C. § 1491(a)(1).

[45] *See* United States v. King, 395 U.S. 1, 2-3 (1969); *Mitchell*, 463 U.S. at 216; United States v. Alire, 73 U.S. (6 Wall.) 573, 575 (1868); Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007 (Ct. Cl. 1967) ("The claim must, of course, be for money"). The Court of Claims also has limited authority to issue declaratory judgments and other equitable relief. *See* 28 U.S.C. § 1491(a)(2) (granting authority to grant judgment for certain claims brought under the Contract Dispute Act of 1978); 28 U.S.C. § 1491(a)(3) (granting authority to grant declaratory judgments and equitable relief, including but not limited to injunctive relief, for claims based in contract brought before the contract is awarded); 28 U.S.C. § 1507 (granting authority to issue declaratory judgment under § 7428 of Internal Revenue Code of 1986); *see also* Austin v. United States, 206 Ct. Cl. 719, 723 ("we have no authority to enter a declaratory judgment, or to grant affirmative non-monetary relief unless it is tied and subordinate to a money award"); Reilly v. United States, 228 Ct. Cl. 843, 844 (1981); Klamath & Madox Tribes v. United States, 174 Ct. Cl. 483, 488 (1966) ("we may exercise equitable powers in some instances as an incident of our general jurisdiction").

The text of the Tucker Act does *not* set forth the limitation that claims against the United States be for *money damages*. *See* 28 U.S.C. § 1491. Rather, the requirement results from a construction of the Act substantially influenced by the history of the Court and notions about its function from the time of its founding. *See King*, 395 U.S. at 2-3 ("Throughout its entire history . . . [the Court of Claims'] jurisdiction has been limited to money claims against the United States Government"); *Alire*, 73 U.S. (6 Wall.) at 575 ("the only judgments which the Court of Claims [is] authorized to render against the government . . . are judgments for money found due from the government to the petitioner"); United States v. Jones, 131 U.S. 1, 11, 18 (1889) (noting that under the 1855 and 1862 Acts, "no power was conferred to render other judgments than for money" and finding that "in the point of providing only for money decrees and money judgments, the law [modified by the Tucker Act] is unchanged"); *Austin*, 206 Ct. Cl. at 723 ("It is of course a cardinal principle of our jurisprudence that the only suits of which we have jurisdiction under 28 U.S.C. § 1491 . . . (our general jurisdiction statute) are those in which the plaintiff seeks and can seek a money judgment."); *see also* North Side Lumber Co. v. Block, 753 F.2d 1482, 1485 (9th Cir. 1985) ("The Tucker Act has been construed as permitting the Claims Court to grant money damages against the government").

substantive law relied upon "can fairly be interpreted as mandating compensation by the federal government for the damage sustained."[46]

C. Claims Under the Constitution

The Supreme Court's formulation that a claimant is entitled to money damages only when the source of law upon which it relies can fairly be interpreted as mandating compensation for damages has become a centerpiece of litigation under the Tucker Act. Although the Court has considered several statutes under which claimants purport to be entitled to money damages,[47] it has only ruled that one particular constitutional provision — the Takings Clause of the Fifth Amendment — can fairly be interpreted as mandating compensation by the federal government for damages sustained.[48]

Nevertheless, the Court of Federal Claims (and its predecessors) and the United States Court of Appeals for the Federal Circuit (which has jurisdiction over appeals from the Court of Federal Claims) have evaluated numerous constitutional provisions and opined on whether they are "money-mandating." These courts have concluded the Takings Clause of the Fifth Amendment[49] and the "Compensation Clause" of Article III, § I[50] are money-mandating, while the First Amendment,[51] the Fourth Amendment's Search and Seizure Clause,[52] the Fifth Amendment's Due Process Clause,[53]

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[46] *See Testan*, 424 U.S. at 400 (quoting *Eastport*, 372 F.2d at 1009); *see also Mitchell*, 463 U.S. at 217.

[47] *See, e.g., Testan*, 424 U.S. 392; *Mitchell*, 445 U.S. 535.

[48] *See Mitchell*, 445 U.S. 535, 540 n.2; *see also Testan*, 424 U.S. at 400-01; United States v. Creek Nation, 295 U.S. 103, 109-110 (1935); Jacobs v. United States, 290 U.S. 13, 16 (1933).

[49] *See, e.g.*, Crocker v. United States, 37 Fed. Cl. 191, 195 (1997) ("the Fifth Amendment specifically anticipates the payment of money damages for its violation, and therefore . . . subject matter jurisdiction is proper in the Court of Federal Claims"); Frank's Livestock & Poultry Farm, Inc. v. United States, 17 Cl. Ct. 601, 607 (1989).

[50] *See* Hatter v. United States, 953 F.2d 626 (Fed. Cir. 1992).

[51] *See* United States v. Connolly, 716 F.2d 882 (Fed. Cir. 1983) ("the first amendment, standing alone, cannot be so interpreted to command the payment of money").

[52] *See, e.g.*, Brown v. United States, 35 Fed. Cl. 258 (1996), *aff'd*, 105 F.3d 621, 623 (Fed. Cir. 1997) ("monetary damages are not available for a Fourth Amendment violation"); Murray v. United States, 817 F.2d 1580, 1583 (Fed. Cir. 1987).

[53] *See, e.g.*, LeBlanc v. United States, 50 F.3d 1025, 1028 (Fed. Cir. 1995); Collins v. United States, 67 F.3d 284, 288 (Fed. Cir. 1995); Heagy v. United States, 12 Cl. Ct. 694, 698 (1987).

the Equal Protection Clause[54] (applied through the Fifth Amendment),[55] and the Ex Post Facto Clause [56] are not money-mandating provisions of the Constitution.[57]

D. Bernaugh, Vereda and the Excessive Fines Clause

It stands to reason that the Supreme Court's historic rendering of a fine as violative of the Excessive Fines Clause will prompt some prospective litigants to bring damages claims based on the Clause against the government in the Court of Federal Claims. When they do, the threshold question that the judges of the Court of Federal Claims – and ultimately the Federal Circuit – will have to address is whether the Clause is a money-mandating provision of the Constitution.

One year before *Bajakajian* a judge on the Court of Federal Claims was confronted with this question. In *Bernaugh v. United States*, a plaintiff alleged that the forfeiture of over $200,000 seized following her arrest for an alleged narcotics transaction violated the Excessive Fines Clause. Judge Moody Tidwell dismissed the allegation, simply observing that the Court of Federal Claims "lacks jurisdiction over such a claim because the Excessive Fines Clause does not create a cause of action of money damages against the United States."[58] Judge Tidwell elaborated no further on Bernaugh's Eighth Amend-

[54] *See, e.g.*, Richardson v. United States, 20 Cl. Ct. 753, 758 (1990); Anderson v. United States, 16 Cl. Ct. 546, 549 (1989); Carruth v. United States, 224 Ct. Cl. 422, 445 (1980).

[55] *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (norms of equal treatment under Fifth Amendment's due process provision are indistinguishable from those of Fourteenth Amendment's equal protection guarantee).

[56] *See* Atlas Corp. v. United States, 15 Cl. Ct. 681, 691 (1988) ("there is no language in the ex post facto clause itself which requires the payment of money damages for its violation").

[57] Other federal courts have found that the United States has not waived sovereign immunity for other constitutional claims. *See, e.g.*, Hohri v. United States, 782 F.2d 227, 244-45 (D.C. Cir. 1986) (rejecting claims under Privileges and Immunities of Fifth Amendment, Sixth Amendment rights to fair trial and to counsel, rights of religion, petition, and assembly under First Amendment, Bill of Attainder Clause, right to the writ of habeas corpus, and Thirteenth Amendment right against involuntary servitude), *vacated on other grounds*, 482 U.S. 64 (1997).

[58] Bernaugh v. United States, 38 Fed. Cl. 538, 541(1997). When evaluating claims invoking the Cruel and Unusual Punishment provision of the Eighth Amendment, courts have asserted the Amendment cannot give rise to a cause of action for money damages. *See, e.g.*, Calhoun v. United States, 32 Fed. Cl. 400, 405 (1994) ("[n]othing in the . . . Eighth Amendment[] creates a cause of action for money damages"); Wright v. United States, 20 Cl. Ct. 416, 421 (1990) ("the terms of the Eighth Amendment do not create a cause of action for money damages against the United States").

ment contention, but did add that even "assuming that the court ha[d] jurisdiction, the Federal Circuit in *Litzenberger v. United States*[59] explained that any substantive arguments as to why property should not be forfeited, such as the Eighth Amendment prohibition against excessive fines, should be raised in condemnation proceedings pursuant to the statutory scheme established by Congress."[60] Because Bernaugh had not contested the administrative forfeiture of her property in the statutorily prescribed manner, Judge Tidwell held she was estopped from raising her Excessive Fines claim.[61]

More recently, in August 1998, Chief Judge Loren Smith of the Court of Federal Claims was presented with a complaint asserting that a purportedly unlawful seizure violated the Excessive Fines Clause and entitled the claimant to damages.[62] Like Judge Tidwell, without any discussion of the question, Judge Smith wrote that "[t]he Eighth Amendment is not . . . a money-mandating provision," and dismissed the count of plaintiff's complaint alleging a violation of the Clause.[63]

E. Reconsidering Bernaugh and Vereda and Indentifying "Money-Mandating" Constitutional Provisions

Although collectively courts have assessed numerous constitutional provisions to determine whether they are money-mandating, no court has yet developed a refined standard for differentiating between money-mandating and non-money-mandating provisions of the Constitution. In fact, in most of the cases where the courts have been presented with claims that constitutional provisions are money-mandating, the courts' analyses have been cursory and their holdings conclusory.

For instance, decisions concluding that the Fifth Amendment's Taking Clause is money-mandating and therefore within the jurisdiction of the

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[59] *See* Litzenberger v. United States, 89 F.3d 818 (Fed. Cir. 1996).

[60] *See Bernaugh*, 38 Fed. Cl. at 541-42.

[61] *See id.* at 542. Ironically, in *Litzenberger* – the Federal Circuit decision Judge Tidwell relied on to conclude Bernaugh's Excessive Fines claim was estopped – the appeals court was also presented with the argument that the Court of Federal Claims has jurisdiction to hear a damages claim brought under the Clause. Unlike Judge Tidwell, however, the Federal Circuit declined to opine on the question, deciding the case on other grounds. *See Litzenberger*, 89 F.3d at 820.

[62] *See Vereda*, 41 Fed. Cl. 495 (1998). Although the *Vereda* opinion was issued after *Bajakajian*, the plaintiff's complaint in *Vereda* was filed before the Supreme Court ruled and Chief Judge Smith made no mention of the Court's ruling in his decision.

[63] *Id.* at 507 (citing *Calhoun*, 32 Fed. Cl. at 404-05).

Court of Federal Claims, have focused on the fact the Amendment "specifically anticipates the payment of money damages for its violation."[64] Courts, understandably, have been content to rely on the seemingly self-evident character of the Takings Clause in concluding that the Court of Federal Claims has jurisdiction over this type of action.

Similarly, focusing on the First Amendment's literal words, in *United States v. Connolly*[65] the Federal Circuit concluded the Amendment is not among the money-mandating provisions of the Constitution. The court explained, "the basic issue is whether the First Amendment 'can fairly be interpreted as mandating compensation for the damages sustained.'"[66] "Like the due process clause of the Fifth Amendment, the *literal terms* of the First Amendment neither explicitly nor implicitly obligate the federal government to pay damages."[67] Because the First Amendment "merely forbids Congress from enacting certain types of laws [and] it does not provide persons aggrieved by governmental action with an action for damages in the absence of some other jurisdictional basis" the First Amendment, "standing alone, cannot be so interpreted to commend the payment of money."[68]

While the literalist approach reflected in these decisions may have properly led courts to conclude that the Takings Clause is a money-mandating provision while the First and Fourth Amendments, and the Fifth Amendment's Due Process Clause, among others, are not, a test which does no more than ask "does the text command payment to some person" is wholly

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[64] *See* Crocker v. United States, 37 Fed. Cl. 191, 195 (1997); *see also Jacobs*, 290 U.S. at 16 (discussing right to compensation under the Fifth Amendment in the context of a partial taking of land by the government, stating: "[a] promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment."); Royce v. United States, 1 Cl Ct. 225, 226 (1982) ("the 'constitutional provision [must] in itself obligate the federal government to pay money damages'") (citation omitted)); *Testan*, 424 U.S. at 401 (rejecting claim that Classification Act is money-mandating and distinguishing Fifth Amendment compensation cases, characterizing them as "tied to the language, purpose and self-executing aspects of that constitutional provision").

[65] 716 F.2d 882 (Fed. Cir. 1983) (*in banc*).

[66] *Id.* at 886 (quoting *Mitchell*, 463 U.S. at 217); *see also* Anderson v. United States, 5 Cl. Ct. 573, 577 (1984) (The Constitution, a statute, or a regulation are "fairly interpreted as mandating compensation" when: "(1) [a] right to a benefit is thereby conferred; (2) [t]he benefit conferred is economic in nature; [and] (3) [t]he Government breaches its duty to confer that benefit.").

[67] *Connolly*, 716 F.2d at 887 (emphasis added).

[68] *Id.*

inadequate.[69] This much the Supreme Court made clear when it explained that the substantive source granting a claimant a right to recover damages may do so "either 'expressly or *by implication.*'"[70]

One of the Federal Circuit's more recent decisions considering whether a particular constitutional provision is money-mandating reflects an appreciation of the need to look beyond its literal terms. In *Hatter v. United States*,[71] the Federal Circuit was presented with a claim by federal judges that the imposition of certain Social Security taxes on them diminished their compensation in violation of the so-called "Compensation Clause," which provides:

> The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.[72]

In *Hatter*, the Federal Circuit reiterated that aside from Tucker Act jurisdiction, "claimants must show that their claim arises under an independent source of federal law. Moreover, the federal law or contract, fairly interpreted, must provide a damages remedy for violations."[73] "In sum, appellants must show that their claim arises from a federal constitutional, statutory, regulatory, or contractual provision that provides damages for its breach."[74]

Three Federal Circuit judges concluded that the Compensation Clause, "in mandatory and unconditional terms, [provides] that judges' salaries 'shall not be diminished during their continuance in office.' This language presupposes damages as the remedy for a governmental act violating the compensation clause. Only a timely restoration of lost compensation would prevent violation of the Constitution's prohibition against diminution of judicial salaries."[75]

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[69] Only the Takings Clause comes close to meeting this standard. Courts have adopted a three-part test for determining whether a provision can be "fairly interpreted as mandating compensation," *see Anderson*, 5 Cl. Ct. at 577, but that test has not been employed when analyzing any *constitutional* provision. Moreover, while the test may be an appropriate one for assessing statutes and regulations, it does not suggest that an interpreter should do anything more than peer at the literal words of a constitutional provision to determine if it is money-mandating.

[70] *Mitchell*, 463 U.S. at 217 n.16 (quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967)) (emphasis added); *see also Anderson*, 5 Cl. Ct. at 576-77 n.11.

[71] 953 F.2d 626 (Fed. Cir. 1992).

[72] U.S. Const. art. III, § 1.

[73] *Hatter*, 953 F.2d at 628.

[74] *Id.*

[75] *Id.*

The analysis set forth in *Hatter* is clearly more sound in its interpretation of the Tucker Act and protection of constitutional rights than the literalist approach. In *Hatter*, the Court did not ask the superficial question whether a provision "specifically anticipates the payment of money damages for its violation"[76] or "merely forbids Congress from enacting certain types of laws."[77] Instead, the Court pierced the words of the Compensation Clause and endeavored to understand the purpose of the provision and determine whether payment might be required to provide proper redress for a violation of its terms.

Applied to the Eighth Amendment, such an approach can lead only to the conclusion that the Excessive Fines Clause *is* a money-mandating provision of the Constitution. More than three decades ago, the Court of Claims explained that the world of non-contractual claims against the United States can be divided into two (overlapping) classes – "those in which the plaintiff has paid money over to the government, directly or in effect, and seeks return of all or part of that sum; and those demands in which money has not been paid but the plaintiff asserts he is nevertheless entitled to payment from the treasury."[78] Quite simply, were the Excessive Fines Clause *not* money-mandating, there would be no remedy for many violations of the Clause which had *already taken place*.[79] Instead, in cases where equitable relief was unavailable or would be insufficient to remedy a violation, the Clause would be transformed into a provision which does nothing more than prospectively instruct the government not to impose excessive fines. This truncated reading of the Clause is incommensurate with any plausible understanding

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[76] Crocker v. United States, 37 Fed. Cl. 191, 195 (1997); *see also Royce*, 1 Cl. Ct. at 226 ("the 'constitutional provision [must] in itself obligate the federal government to pay money damages'") (citation omitted).

[77] *Connolly*, 716 F.2d at 887.

[78] *Eastport*, 372 F.2d at 1007.

[79] While it may be somewhat of an overstatement to assert that the language of the Compensation Clause "presupposes" damages as the remedy for a governmental act violating the Clause, *see Hatter*, 953 F.2d at 628, it does appear more than reasonable that, fairly interpreted, the Clause provides a damages remedy for its violations. As the Federal Circuit correctly pointed out, only a timely restoration of lost compensation would prevent or redress a violation of the Constitution's prohibition against diminution of judicial salaries. *Id.* Similarly, only the return of an excessive (*i.e.*, "grossly disproportionate") fine by the sovereign which imposed the fine and now possesses the proceeds of that excessive sanction would redress a violation of the Excessive Fines Clause.

of its meaning.[80] Indeed, it would deeply undercut the Eighth Amendment's effort to constrain the "potential for governmental abuse of its 'prosecutorial' power."[81]

Conclusion

Although many Excessive Fines cases do not involve damages actions because the sanction is challenged on Eighth Amendment grounds prior to its imposition,[82] there nevertheless is an important subset of potential claims premised on the Clause which may seek the repayment of money *already* paid to, or in the possession of, the government.[83] In such cases, the most appropriate way for a claimant to seek redress for an alleged violation of the Clause may be to frame the cause of action as one for damages against the United States. Because such damages claims may only be brought in the Court of Federal Claims, it is critical to claimants that the Court of Federal Claims retain jurisdiction over these lawsuits.

When next presented with an Excessive Fines argument, the Court of Federal Claims (and the Federal Circuit) should use the occasion to develop a more substantive approach for determining whether a claimant has stated a proper cause of action for damages based upon an alleged constitutional violation — one which looks beyond whether the literal words of a provision compel payment and instead asks if compensation by the government may be necessary to effectuate the relevant constitutional principle. Using this refashioned test, the courts should reconsider the *Bernaugh* and *Vereda* decisions and reverse course, concluding that the Excessive Fines Clause, like the Takings and Compensation Clauses, is a money-mandating provision of the Constitution.

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[80] *Cf. Browning-Ferris*, 492 U.S. at 264-73 (discussing the origins and history of the Excessive Fines Clause).

[81] *Id.* at 266.

[82] *See supra* note 27.

[83] *See Testan*, 424 U.S. at 401 (Tucker Act jurisdiction covers claims for "money improperly exacted or retained").