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Tucker Act Jurisdiction over Breach of Trust Claims

*Gregory K. Orme**

I. INTRODUCTION

While an Air Force pilot languished in a North Vietnamese prison camp, the Secretary of the Air Force allowed the pilot's accumulated pay account to be dissipated by his extravagant and adulterous wife. Southern Paiute Indians were eligible to share in a sizable Indian Claims Commission award, but were never notified by the Secretary of the Interior prior to distribution of the fund. Forest lands held by the federal government for individual Quinalt Indians were mismanaged. Pomo Indians of the Robinson Rancheria in California had their rancheria status unlawfully terminated.

The injured party in each of these cases sought recovery in federal court, claiming the action in question constituted a breach of trust by the United States. In each case, damages for breach of trust were sought pursuant to provisions of the Tucker Act, which provides for jurisdiction of claims 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."¹

In each instance, the jurisdiction of the court to consider the claim against the United States based on a breach of trust theory was challenged. This Article considers the propriety of Tucker Act jurisdiction over breach of trust claims against the federal government in the context of these four cases.

II. BACKGROUND: THE TUCKER ACT

Through legislation later known as the Tucker Act,² Congress

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1. 28 U.S.C. § 1346(2) (1976).

2. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (codified in scattered sections of 28 U.S.C.).

The act bears the name of its principal author and promoter, John Randolph Tucker, of the House Committee on the Judiciary. Tucker, a Virginian, served in the House from 1875 to 1887. J. DANIELS, *THE RANDOLPHS OF VIRGINIA* 315 (1976). Tucker was later elected

in 1887 established a jurisdictional scheme, which has survived to the present, covering a broad range of claims against the United States. It was not the first such device for the judicial consideration of claims against the national government.

In 1855, after more than a half-century of wrestling with private claims against the United States through the cumbersome device of special legislation, a beleaguered Congress was ready for a change.³ Creation of a Board of Claims, whose members would serve for four-year terms, was first contemplated in the Senate.⁴ The substitute bill, which became law, provided for a Court of Claims to be composed of judges who would serve "during good behavior."⁵

The court was charged to "hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be sug-

president of the American Bar Association and astounded many of his supporters when he thereafter appeared before the Supreme Court on behalf of the Chicago Haymarket Riot anarchists. When criticized for his actions, Tucker responded: "I do not defend anarchy, . . . I defend the Constitution." *Id.*

3. The quantum of private claims pressed upon the Congress by citizens and their claims agents had grown with the country. As Senator Brodhead explained:

Two days of every week—one third of the time, to say nothing of the time spent by committees—is set apart for the consideration of private bills and reports, and yet not much more than half are acted upon; and yet the people complain that our sessions are too long. Want of time leads to improper legislation, and often to great injustice. Those who have honest claims are postponed for years. . . . The pressure of business of a private character prevents us from considering great questions in a way becoming statesmen representing this great people, and this extended empire. Our time is too valuable to be occupied in discussing the merits or demerits of a private bill. . . . Besides, we are run down by private claimants, and their agents or attorneys; and private claims are either passed or pressed into the appropriation bills the last nights of our sessions, contrary to the rules of the Senate, and injurious to the character of Congress.

CONG. GLOBE, 33d Cong., 2d Sess. 70 (1854).

4. *Id.* at 70-71. The bill was introduced by Senator Brodhead of Pennsylvania, whose remarks on the bill included the colorful, if less than rousing, endorsement: "I am quite certain, and feel justified in asserting, that if it does not do great good, it is free from constitutional objection, and will do no harm." *Id.* at 70.

5. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612. Employment of the quoted phrase from art. III of the Constitution, U.S. CONST. art. III, § 1, did not prevent a lively debate over whether the court's judges would be article III judges. Compare, e.g., CONG. GLOBE, 33d Cong., 2d Sess. 110-11 (1855) (remarks of Senators Pratt and Clayton) with *id.* at 110, 112 (remarks of Senators Weller and Chase).

The Court of Claims, as altered by subsequent legislation, was adjudged not an article III court in *Williams v. United States*, 289 U.S. 553 (1933). The opposite result was reached in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

gested to it by a petition filed therein.”⁶ The court was not vested with the power to render final judgments, but was charged with the responsibility of transmitting to Congress its findings and the testimony taken, together with its opinion and a draft bill “as if enacted, will carry the same into effect” for final disposition.⁷

Within a few years Congress concluded it had not gone far enough. Delay in the final disposition of claims remained significant. In the words of Representative A.G. Porter of Indiana:

Under the practice of the House, the opinion and testimony in each case are referred to the Committee of Claims, where the decision, instead of being treated with the respect due to the solemn adjudication, is regarded, in many instances, with little more consideration than the petition of the claimant.⁸

Legislation was enacted in 1863 that, among other things, made the court’s judgments final and provided for jurisdiction over counterclaims asserted by the government.⁹

By 1886 some members of Congress perceived the need to further broaden the jurisdiction of the Court of Claims. In that year Representative Tucker reported for the House Committee on the Judiciary:

[I]t has long been felt that the benefits could be made much greater by extending the jurisdiction of the court. By confining it to claims under a law of the United States, regulations of Departments, and to cases of contracts expressed and implied, there is still a large class of cases in equity, in admiralty, and in tortious acts of the Government through its agents, which are

6. Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612.

7. *Id.* § 7 at 613.

8. CONG. GLOBE, 37th Cong., 2d Sess. app., at 124 (1862). Representative Porter also quoted from a letter received from an assistant solicitor of the court:

When I first came into the court it was attended by a very numerous and highly respectable bar, and the anxiety of claimants to bring their cases to trial was very great. But by the close of the third session after the organization of the court, claimants saw that its judgments, if favorable, helped them very little in Congress, for it required quite as much labor and expense to procure the passage of the bills reported by the court as to procure the passage of those introduced by members.

Id.

9. Act of Mar. 3, 1863, ch. 92, 12 Stat. 765. The House had passed a bill that would have further broadened the court’s jurisdiction to include all claims against the United States, except those based on treaty or preempted by congressional joint resolution, whether arising in law or equity. See CONG. GLOBE, 37th Cong., 2d Sess. app., at 124 (1862) (remarks of Rep. Porter). That provision did not survive the conference committee. See CONG. GLOBE, 37th Cong., 3d Sess. 1480 (1863) (remarks of Rep. Porter).

left to Congress, for which a court of justice is better fitted to attain the right between the litigants.¹⁰

The committee's draft bill proposed to expand the court's jurisdiction to include "[a]ll claims founded upon the Constitution of the United States or any law of Congress, or any regulation of an executive department," as well as claims "for damages, liquidated or unliquidated, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."¹¹ Provision was also made for concurrent jurisdiction in the regular federal courts for claims less than \$10,000.¹² The House passed the bill in this form, but the Senate appended to the phrase "for damages, liquidated or unliquidated" the qualifying language "in cases not sounding in tort."¹³ This change was accepted by the conference committee¹⁴ and the Tucker Act became law.

10. H.R. REP. NO. 1077, 49th Cong., 1st Sess. 3-4 (1886).

11. H.R. 6974, 49th Cong., 2d Sess. § 1, 18 CONG. REC. 623 (1887) (bill as read by clerk).

Notwithstanding the previously enacted solutions to the problem, the committee was still constrained to report:

The large mass of business now before Congress growing out of private claims consumes its time year after year in committee work, rendered useless by the lack of time to consider and pass upon them. Just claims are painfully deferred without interest, and the credit of the Government, so strictly upheld upon its bonded debt, is justly censured in respect to its honest private claims.

H.R. REP. NO. 1077, 49th Cong., 1st Sess. 4 (1886).

The committee sought a final solution to the continued burden of claims brought before Congress:

Mr. TUCKER. . . . The only cases not provided for are suits upon the use of a patent right by the Government and suits in reference to captured and abandoned property which are now barred by the statutes of limitations. This bill extends the jurisdiction of the Court of Claims to all cases which arise, not only *ex contractu* but *ex delicto*, and to cases in admiralty, so that it will take the whole mass of these claims away from Congress.

Mr. REED. . . . As I understand, the effect of the bill is that the United States can be made a party defendant in any suit where an individual could be made a party defendant.

Mr. TUCKER. Yes, sir.

18 CONG. REC. 622 (1887).

12. H.R. 6974, 49th Cong., 2d Sess. § 2, 18 CONG. REC. 623 (1887).

13. *Id.* § 1, 18 CONG. REC. at 2175 (Senate amendment as read by clerk).

14. 18 CONG. REC. 2611, 2676 (1887) (conference committee report). *See also id.* at 2677 (statement of House conferees). (Claims for pensions, Civil War claims, and previously rejected claims were also excluded.)

The gap left by the exclusion of tort claims was subsequently filled—with abundant exceptions, *see* 28 U.S.C. § 2680 (1976)—by the Federal Tort Claims Act, ch. 753, §§ 401-

Numerous special jurisdiction statutes have been enacted to give the Court of Claims jurisdiction over a particular claim or class of claims not otherwise within its subject matter competence, but the principal jurisdictional grant of the Tucker Act has been little changed. The Judicial Code of 1911 made modest changes in phraseology,¹⁵ but sought only to state "in concise terms the existing jurisdiction of the Court of Claims."¹⁶ The 1948 legislation that revised title 28 of the United States Code and enacted it into positive law¹⁷ listed the Tucker Act claim categories numerically.¹⁸ The phrase "in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable" was also eliminated as "unnecessary" for the rather cryptic reason that "the Court of Claims manifestly, under this section will determine whether a petition against the United States states a cause of action."¹⁹ Subsequent legislation eliminated the numerical listing of the jurisdictional categories and made the phraseology of 28 U.S.C. § 1491, concerning the Court of Claims, correspond to the district court concurrent jurisdiction provision of 28 U.S.C. § 1346(a)(2).²⁰

The Court of Claims' basic jurisdictional provision, contained in 28 U.S.C. § 1491, now 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

424, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.). The Act vested jurisdiction in the district courts over

claim[s] against the United States, for money only, accruing on and after January 1, 1945, on account of damages to or loss of property, or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.

Id. § 410 (current version at 28 U.S.C. § 1346(b) (1976)). Provision was also made for optional appellate review of such cases in the Court of Claims, rather than the circuit courts of appeal, but it is a procedure seldom utilized. *Id.* § 412 (current version at 28 U.S.C. § 1504 (1976)).

15. Judicial Code, ch. 231, § 145, 36 Stat. 1087 (1911).

16. S. REP. No. 388 (pt. 1), 61st Cong., 2d Sess. 58 (1910).

17. Judiciary and Judicial Procedure, ch. 646, 62 Stat. 869 (1948).

18. *Id.* § 1491.

19. H.R. REP. No. 308, 80th Cong., 1st Sess. app., at 138 (1947).

20. Act of Sept. 3, 1954, ch. 1263, § 44, 68 Stat. 1226. See also H.R. REP. No. 1981, 83d Cong., 2d Sess. 16 (1954).

contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.²¹

Section 1346(a)(2) vests in the district courts, concurrent with the Court of Claims, jurisdiction over the same subject matter in cases where the claim does not exceed \$10,000.²²

III. THE *Testan* BACKGROUND

Several modern cases brought pursuant to the general Tucker Act jurisdictional grant involved claims for breach of a federal trust relationship and were decided on the merits with little apparent concern about the existence of jurisdiction.²³ The current controversy must therefore be understood against the background of *United States v. Testan*,²⁴ the latest in a long series of Supreme Court cases circumscribing the scope of Tucker Act jurisdiction.²⁵ Even though the Court in that case claimed to merely apply "established principles,"²⁶ the decision has been treated as announcing a definitive jurisdictional test for a broad range of claims sought to be brought under the Tucker Act.²⁷

Testan involved a claim by two government attorneys that their positions should have been classified as GS-14 rather than GS-13. After exhausting their administrative remedies, the attorneys brought suit in the Court of Claims seeking prospective re-

21. 28 U.S.C. § 1491 (1976).

22. *Id.* § 1346(a)(2). The jurisdiction conferred on the district courts by § 1346(a)(2) is in all respects, save amount in controversy, precisely co-extensive with the Court of Claims' jurisdiction under § 1491, despite the much broader scope of subject matter jurisdiction otherwise enjoyed by the district courts. *See, e.g., United States v. Sherwood*, 312 U.S. 584, 590-91 (1941).

23. *See, e.g., United States v. Mason*, 412 U.S. 391 (1973); *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390 (Ct. Cl. 1975). Not in this category are cases such as *Seminole Nation v. United States*, 316 U.S. 286 (1942), and *Menominee Tribe v. United States*, 59 F. Supp. 137 (Ct. Cl. 1945), which also involved breach of trust claims but which were brought pursuant to expansive special jurisdiction statutes. *See, e.g., Act of May 20, 1924*, ch. 162, 43 Stat. 133, *as amended by Act of Aug. 16, 1937*, ch. 651, 50 Stat. 650; *Act of Sept. 3, 1935*, ch. 839, 49 Stat. 1085.

24. 424 U.S. 392 (1976).

25. *See, e.g., United States v. King*, 395 U.S. 1 (1969) (no jurisdiction to issue declaratory judgments); *United States v. Holland-America Lijn*, 254 U.S. 148 (1920) (no jurisdiction over the alleged torts of federal officials) (distinguishing *Dooley v. United States*, 182 U.S. 222 (1900) (whether or not claim sounds in tort is irrelevant if claim is founded upon law of Congress)); *United States v. Jones*, 131 U.S. 1 (1889) (jurisdiction limited to entering judgments for money; no jurisdiction to command specific performance).

26. 424 U.S. at 400.

27. *See, e.g., Jalil v. Campbell*, 590 F.2d 1120, 1123 (D.C. Cir. 1978); *Hill v. United States*, 571 F.2d 1098, 1102-03 (9th Cir. 1978); *Duarte v. United States*, 532 F.2d 850, 851-52 (2d Cir. 1976); *Gentry v. United States*, 546 F.2d 343, 345-46 & n.1 (Ct. Cl. 1976).

classification and an award of backpay. A divided Court of Claims found the administrative refusal to reclassify plaintiffs arbitrary, but the court concluded that it lacked power to mandate the employees' reclassification. A monetary award was deemed permissible but premature until an entitlement to the governmental position was created by the proper authority. Therefore, the case was ordered remanded to the Civil Service Commission.²⁸ If on remand the Civil Service Commission should order reclassification, that action "could create a legal right which [could then be enforced] by a money judgment."²⁹ The Supreme Court disagreed.

Justice Blackmun, in an opinion that drew no dissent, first quoted from *United States v. King*³⁰ for the proposition that Tucker Act jurisdiction is limited to money claims against the United States.³¹ He then articulated the Court's general approach to the case:

The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages. The Court of Claims has recognized that the Act merely confers jurisdiction upon it whenever the substantive right exists. . . . We therefore must determine whether the two other federal statutes that are invoked by the respondents confer a substantive right to recover money damages from the United States for the period of their allegedly wrongful civil service classifications.³²

The Court first rejected what it deemed the "implicit" conclusion of the lower court that the Classification Act "gives rise to a claim for money damages for pay lost by reason of the allegedly wrongful classifications."³³ The Court stated that, as a sovereignty, the United States cannot be sued without its consent, "and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."³⁴ Such consent to suit "cannot be implied but must be unequivocally expressed."³⁵

28. 424 U.S. at 393-96. The Court of Claims is authorized to remand in the following terms: "In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just." 28 U.S.C. § 1491 (1976).

29. *Testan v. United States*, 499 F.2d 690, 691 (Ct. Cl. 1974).

30. 395 U.S. 1 (1969).

31. 424 U.S. at 397-98.

32. *Id.* at 398.

33. *Id.* at 399.

34. *Id.* (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)).

35. *Id.* (quoting *United States v. King*, 395 U.S. 1, 4 (1969)).

"Thus," wrote Justice Blackmun, "except as Congress has consented to a cause of action against the United States, 'there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States.'"³⁶

The Court also rejected the contention that the Tucker Act itself waived sovereign immunity with respect to all claims "invoking a constitutional provision or a federal statute or regulation."³⁷ Justice Blackmun wrote that since the claim in issue was not based on contract and was not one for the return of money paid the government, "[i]t follows that the asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'"³⁸ He and his brethren declined "to tamper with these established principles,"³⁹ and held that the Court of Claims lacked jurisdiction.⁴⁰

The Court subjected the Back Pay Act to similar scrutiny and found that it granted "a monetary cause of action only to those who were subjected to a reduction in their duly appointed emoluments or position,"⁴¹ not to those who contended they were entitled to positions other than the ones they held. The claimants' suit was ordered dismissed.⁴²

IV. THE BREACH OF TRUST CASES⁴³

A. *Mitchell v. United States*⁴⁴

Mitchell involved four related actions by individual Quinalt

36. *Id.* (quoting *United States v. Sherwood*, 312 U.S. 584, 587-88 (1941)).

37. *Id.* at 400.

38. *Id.* (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). The Supreme Court has since held that an "authorized regulation" that can be so interpreted also satisfies this inquiry. See *United States v. Hopkins*, 427 U.S. 123, 128 (1976) (*per curiam*).

39. 424 U.S. at 400.

40. *Id.* at 403-04. Therefore, the remand ordered by the Court of Claims was inappropriate since remand is available only in "cases already within the court's jurisdiction." *Id.* at 404 & n.7. "The present litigation [was] not such a case." *Id.* at 404.

41. *Id.* at 407.

42. *Id.* at 408. The foregoing discussion of *Testan* is limited to a recapitulation of the Court's decision in order to facilitate understanding of the context in which the cases discussed in the next Section arose. A more critical assessment of the Court's decision in *Testan* is undertaken in Section V of this Article.

43. Excluded from consideration here are trust fund cases like *Hoopa Valley Tribe v. United States*, 596 F.2d 435 (Ct. Cl. 1979), where the claim is actually one to recover money improperly retained by the government. These, together with contract claims, were thought by the *Testan* Court not to require a separate statute or regulation mandating compensation for the damage sustained. See 424 U.S. at 401-02. Trust claims of the *Hoopa*

Indians and the Quinalt Tribe, which were consolidated by the Court of Claims. Pursuant to the General Allotment Act of 1887, the tribe's reservation, which consisted mostly of forested areas, had been divided and allotted to individual Indians.⁴⁵ The Act provided that lands so allotted be held by the United States "in trust for the sole use and benefit of the Indian to whom such allotment shall have been made."⁴⁶ The Interior Department managed the allotted tracts and the proceeds from timber sales.⁴⁷

The *Mitchell* plaintiffs asserted that the United States had breached its trust relationship with the allottees by failing to obtain fair market value for the allottees' timber, failing to obtain adequate interest on monies held, and assessing excessive administrative charges.⁴⁸ The United States contended that the court lacked jurisdiction over breach of trust claims.⁴⁹

The Court of Claims rejected the government's jurisdictional challenge. It noted that the General Allotment Act expressly declared the existence of a fiduciary relationship.⁵⁰ Employing the key phrase from *Testan*, the court held that this explicit congressional declaration of trust status "[could] fairly be interpreted as mandating compensation by the Federal Government for the damage sustained" as a result of a demonstrated breach of that trust.⁵¹ The court relied on its earlier decision in *Eastport Steamship Corp. v. United States*,⁵² a case also relied upon by the *Testan* court, in support of its conclusion that it is not required that Congress state that a damage action for breach of trust will lie. It is enough that a statute, fairly interpreted, grants a right to a monetary recovery by implication.⁵³

The court thus concluded that the General Allotment Act should be interpreted as implying a right to monetary recovery for breach of a trust established pursuant to its terms. To hold

Valley variety therefore do not raise the jurisdictional problems presented by actions seeking damages for the breach of other kinds of trust duties.

44. 591 F.2d 1300 (Ct. Cl.), cert. granted, 99 S. Ct. 2880 (1979).

45. 591 F.2d at 1300.

46. 25 U.S.C. § 348 (1976). See also *id.* § 462.

47. 591 F.2d at 1301.

48. *Id.* at 1301 n.4.

49. *Id.* at 1301. For six years the government was willing to defend on the merits. But in 1977, the year following the Supreme Court's decision in *Testan*, the government belatedly moved to dismiss for lack of jurisdiction. *Id.*

50. *Id.* at 1302.

51. *Id.* (quoting *United States v. Testan*, 424 U.S. at 400).

52. 372 F.2d 1002 (Ct. Cl. 1967).

53. 591 F.2d at 1302 & n.12.

otherwise would permit the government to waste allotted Indian land without providing the wronged party the right to recover in the Court of Claims.⁵⁴ But for a Tucker Act remedy, the plaintiffs, though wronged, would be without a remedy altogether.⁵⁵

The most persuasive reason for the court's holding was that "[t]he trust language in the statute means that compensation can be recovered for a breach of trust"⁵⁶ In a concurring opinion Judge Nichols saw this trust declaration as crucial and as the factor satisfying *Testan*: "If the United States declares itself by statute to be trustee of another's property, it assumes in my view an obligation to respond monetarily, in an action not sounding in tort, for maladministration of the property that deprives the beneficiary of its value."⁵⁷ Both the majority and concurring opinions seem to have had in mind the well-established principal that a right of action against the trustee is an integral element of a trust relationship.⁵⁸ Their implicit rationale was that by the very act of declaring a trust status, Congress impliedly mandated compensation for breach of that trust.

The *Mitchell* court, after making its basic jurisdictional conclusion, went on to show that conclusion to be consistent with its prior cases and with the expectation of Congress.⁵⁹ Having found jurisdiction in the General Allotment Act, the court concluded that it was unnecessary to consider whether other statutes cited by plaintiffs were "independent" sources of jurisdiction.⁶⁰ It was also unnecessary to distinguish numerous cases relied on by the

54. *Id.* at 1302-03.

55. *Id.* This line of reasoning was one of Judge Nichols' points of departure from the majority. In his view,

the doctrine of strict construction of the consent to be sued is relaxed little if at all by the fact, so far as it is the fact, that the claimant has no other remedy. No claimant can be said to be wholly without a remedy as long as Congress sits. Congress has always reserved, and still reserves, adjudication of many claims for itself, and historically, Indian claims have often been in that category.

Id. at 1307-08 (Nichols, J., concurring).

The Supreme Court in *Testan* had itself considered the issue of alternative remedies. Like Judge Nichols, however, the Court specifically rejected a correlation between the lack of another remedy and the jurisdictional propriety of a Tucker Act claim. See 424 U.S. at 401-04.

56. 591 F.2d at 1303.

57. *Id.* at 1306.

58. See note 108 and accompanying text *infra*. The court in *Whiskers v. United States*, 600 F.2d 1332 (10th Cir. 1979), articulated this principle, apparently considering it one for which citation to authority was not required. 600 F.2d at 1335. See Section IV-D *infra*.

59. 591 F.2d at 1303-04.

60. *Id.* at 1304-05.

government as requiring the opposite result.⁶¹ The motion to dismiss on jurisdictional grounds was therefore denied and the case was returned to the court's trial division for a disposition on the merits.⁶² The United States appealed. The Supreme Court granted the government's petition for certiorari.⁶³

B. *Cherry v. United States*⁶⁴

One month after the decision in *Mitchell* was filed, the Court of Claims issued its opinion in *Cherry*, a case involving facts the court found particularly troubling. In October of 1965 Colonel Fred Cherry was shot down over North Vietnam and was captured and imprisoned by the North Vietnamese. The government did not know with certainty what had become of him. During the more than seven years Cherry remained a prisoner of war, nearly \$150,000 in pay and allowances to which he became entitled were paid into an account maintained for him by the Air Force.⁶⁵

Pursuant to the Missing Persons Act, which authorizes the armed services to allot pay and allowances of missing personnel to their families when it is "in the interest of the member, his dependents, or the United States,"⁶⁶ the Air Force paid over to Cherry's wife nearly all of the funds credited to him. While being supported by her captured husband, Mrs. Cherry had a child by another man. Cherry claimed that his wife was extravagant with his funds and that the Air Force had failed to protect his interests by allowing her to dissipate his pay account "without let or hindrance."⁶⁷

The court agreed that the Air Force had neglected its statutory responsibility to consider Colonel Cherry's interest when it authorized depletion of his pay account for the benefit of his adulterous wife. The court concluded that "[t]he Air Force as-

61. *Id.* at 1305-06.

62. *Id.* at 1306. One fairly plain departure from *Testan* was undertaken by the court in *Mitchell*. Although Justice Blackmun had been adamant that the Tucker Act itself was "merely jurisdictional" and that it did not itself "fundamentally" waive the government's immunity from suit on claims coming within its general terms, 424 U.S. at 400, Judge Davis found that in the Tucker Act the United States implicitly consented to be sued. See 591 F.2d at 1301, 1303, 1306.

63. 99 S. Ct. 2880 (1979).

64. 594 F.2d 795 (Ct. Cl. 1979).

65. *Id.* at 797.

66. 37 U.S.C. § 553(e) (1976).

67. 594 F.2d at 797. Cherry also claimed that the Missing Persons Act was unconstitutional because it authorized a confiscation of property without due process of law. The court rejected this argument. *Id.* at 797-99.

sumed the role of trustee for Colonel Cherry's pay and allowances—the Missing Persons Act and the Air Force regulations envision such a relationship, although the word 'trustee' is not specifically used."⁶⁸ The court cited several reasons in support of this conclusion. First, the court suggested that the statute would be unconstitutional unless it were interpreted as contemplating that the holding and disbursement of the fund would be consistent with trust standards.⁶⁹ Second, the court concluded that in carrying out their statutory duties under the Missing Persons Act, including collecting pay and allowances, forwarding previously designated allowances to the family, and making a change in the allotment when changed circumstances warrant, "the armed services [had] accepted the role of trustee for their missing servicemen, with its attendant duties, including the obligation to account for breach of fiduciary duties."⁷⁰ Third, citing *Mitchell*, the court argued that the "[d]efendant [would] not, we think, allege that it owes servicemen missing in action a lower duty than it does an Indian, whose funds it manages in trust."⁷¹ The court therefore concluded that the Air Force had breached its trust duties, was liable to Cherry in some amount, and remanded for a determination of that amount, to be calculated as the total of sums paid by the United States to "Mrs. Cherry in violation of its duty to administer the account of Colonel Cherry in his interest, equally with the interest of his dependents and the United States."⁷²

The majority opinion by Judge Nichols did not focus on the court's jurisdiction to pass on Colonel Cherry's claim, other than to note in a sentence that jurisdiction existed under 28 U.S.C. § 1491.⁷³ *Testan* was not cited, nor did the court analyze whether the Missing Persons Act could "fairly be interpreted as mandating compensation by the Federal Government for the damages sustained."⁷⁴ A forceful separate opinion by Judge Bennett, however, questioned the court's subject matter jurisdiction. Judge Bennett argued that the congressionally created trust relationship in *Mitchell* impliedly authorized a monetary recovery for

68. *Id.* at 799.

69. *Id.*

70. *Id.* at 799-80.

71. *Id.* at 799.

72. *Id.* at 801.

73. *Id.* at 797.

74. *United States v. Testan*, 424 U.S. at 400 (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d at 1009).

breach of trust. That approach was consistent with *Testan*. By contrast, the *Cherry* majority had manufactured a trust relationship, there being nothing in the Missing Persons Act to indicate Congress had ever contemplated one. The court's decision to award damages to Cherry was therefore based on " 'unanchored judge-created principles of fiduciary law' " ⁷⁵ instead of congressional authorization. Judge Bennett concluded that the wrong done Cherry was within the class of wrongs for which there is no judicial remedy. "Such wrongs," he wrote, "are ghosts in the law which the court now would slay with weapons not given to it but belonging to others vested with the exercise of political judgments." ⁷⁶

C. *Duncan v. United States* ⁷⁷

Mabel Duncan and other Pomo Indians of the Robinson Rancheria in California obtained a federal district court declaratory judgment that termination of their rancheria status was unlawful. They sought monetary recovery in the Court of Claims on the theory that the unlawful termination constituted a breach of trust. The United States moved to dismiss for lack of jurisdiction. ⁷⁸

The Robinson Rancheria was established in 1909 as one of many small Indian reservations created in California in the early years of this century to ameliorate the landless condition of many California Indians. In 1958 Congress passed a law providing for the termination of certain California rancherias upon approval by the affected Indians of a plan for distribution of the rancheria lands. Termination of rancheria status had the significant impact of ending the affected Indians' rights to receive special federal

75. 594 F.2d at 803 (Bennett, J., concurring and dissenting) (quoting *Mitchell v. United States*, 591 F.2d at 1302).

76. *Id.* Less convincingly, Judge Bennett argued that Cherry's claim was beyond the court's jurisdiction because the claim was really one based on negligence theory and was therefore a tort claim beyond the scope of the Tucker Act. *Id.* at 802.

The majority opinion in *Cherry* has raised more eyebrows than Judge Bennett's. The Tenth Circuit opinion in *Whiskers v. United States*, 600 F.2d 1332 (10th Cir. 1979), quoted from the *Cherry* dissent and characterized the majority's inattention to *Testan* as curious. *Id.* at 1338 n.13. See Section IV-D *infra*. Indeed, Judge Nichols, the author of the *Cherry* majority opinion, subsequently acknowledged that the opinion's jurisdictional analysis was problematic. See *Sanders v. United States*, 594 F.2d 804, 823 (Ct. Cl. 1979) (Nichols, J., concurring).

77. 597 F.2d 1337 (Ct. Cl. 1979), *petition for cert. filed*, 48 U.S.L.W. 3132 (U.S. Aug. 28, 1979) (No. 79-36).

78. *Id.* at 1339.

services and of exposing the distributed lands to state and local regulation and tax liability. Prior to distribution of the rancheria lands, however, the Secretary of the Interior was to effect certain improvements on the lands, including the installation or rehabilitation of irrigation or domestic water systems that the Secretary and the Indians had agreed upon.⁷⁹

The Pomo Indians of the Robinson Rancheria approved the proposed distribution plan in 1960, and the distribution was completed in 1963. Following a delay due to continued negotiation over the provision of sewer services, the rancheria was formally terminated in 1965. Prior to termination, however, the inadequate water supply and the poor sanitation system had not been improved.⁸⁰ Duncan and the other claimants sought damages for breach of the trust relationship they contended had existed between themselves and the United States. They specifically sought damages for failure to provide adequate water and sanitation systems, failure to reserve a right-of-way in distributed lands to the community wood lot, exposure to state property taxes, loss of federal services provided to reservation Indians, destruction of their native culture, emotional distress, and bodily injuries.⁸¹

Relying on *Mitchell*, the *Duncan* court summarily rejected the government's jurisdictional argument that "even if a statute establishes a trust relationship, that law does not 'fairly mandate compensation' " under the *Testan* principle.⁸² The court then proceeded to analyze whether such a trust relationship existed in favor of the *Duncan* claimants.⁸³ The court's approach was more involved than it had been in *Mitchell*, where the court had reasoned that the word "trust" in the relevant statute mandated compensation by the federal government for the damage sustained.⁸⁴ Citing *Cherry*, the *Duncan* court found that the lack of

79. *Id.* at 1340.

80. *Id.* at 1340-41.

81. *Id.* at 1344 & n.10.

82. *Id.* at 1341.

83. It is not clear whether the court considered the actual existence of a trust relationship to go to the court's subject matter jurisdiction to consider the claims, or whether it considered the jurisdictional requirement satisfied by the allegation that such a trust relationship existed, the final determination of that issue being a necessary element of the court's consideration, on the merits, of the entitlement of the claimants to a monetary recovery.

84. 591 F.2d at 1302. The *Duncan* court took substantial comfort from the indication in the district court's declaratory judgment that the Robinson Rancheria lands had been held in trust, and went so far as to state that it was "bound by that ruling under the doctrine of issue preclusion." 597 F.2d at 1341-42. It would certainly seem that a determi-

trust terminology in the legislation authorizing the establishment of the California rancherias and legislation appropriating funds to purchase the land of which they would be comprised was not crucial given the congressional expectation that the lands be held in trust: "Congress need not expressly use a talismanic phrase such as 'trust relationship' or 'hold in trust' in order to establish a trust relationship."⁸⁵ The Interior Department's continued understanding that the rancheria was held by the United States in trust for the Pomos bolstered the conclusion that the intent of Congress had been to establish a bona fide trust relationship.⁸⁶ The rancheria termination legislation, which employed the phrase "federal trust relationship," was also entitled to "great weight" in construing the original legislation, and confirmed the conclusion that a trust relationship had existed between the Pomos and the United States with regard to the Robinson Rancheria.⁸⁷

The Court of Claims thus concluded that the government's failure to provide adequate water and sanitation systems constituted a "serious breach of trust."⁸⁸ The court rejected any recovery based on injury to Pomo culture or on emotional or psychological injuries. It concluded that, notwithstanding congressional creation of a trust status mandating compensation for certain kinds of damages, it did not authorize a recovery for such

nation for purposes of declaratory and injunctive relief that a trust relationship existed in favor of a group of Indians might not of itself satisfy the *Mitchell-Testan* requirement of congressional declaration of a trust, from which is implied a right to a monetary recovery under the Tucker Act for its breach. The Tenth Circuit, for example, perceived that a relationship could be defined as a "trust" for some purposes, but not for purposes of the jurisdictional inquiry under the *Mitchell-Testan* framework. See text accompanying note 102 *infra*. It was perhaps in tacit acknowledgement of this fact that Judge Davis in *Duncan* undertook plenary consideration of the existence of a trust relationship between the Pomo claimants and the United States.

85. 597 F.2d at 1342.

86. *Id.* at 1342 & n.6.

87. *Id.* at 1343. The Tenth Circuit, in analyzing *Duncan*, took the position that this congressional use of trust terminology, although remote in time from the legislation that gave rise to the creation of California rancherias, was enough to supply the jurisdictional link of congressional authorization of a damages action based on breach of that trust. See *Whiskers v. United States*, 600 F.2d 1332, 1338 (10th Cir. 1979). This view appears correct. There is no suggestion in *Testan* that congressional authorization of a monetary recovery for breach of some substantive right must have been given contemporaneously with the creation of the right itself.

88. 597 F.2d at 1343-44. The loss of land through state tax sales was also considered a compensable breach of trust. *Id.* at 1347 n.14. Claims for damages based on the post-termination sale of rancheria lands to non-Indians and exposure to state regulation of activities on distributed lands were left for further factual development. *Id.* at 1347.

"nebulous and remote" consequential damages.⁸⁹ Remand to the court's trial division was ordered for a determination of the extent of the government's liability.⁹⁰

D. Whiskers v. United States⁹¹

Chloe Whiskers and six other named plaintiffs sought recovery under the Tucker Act, for themselves and the class of Southern Paiute Indians they claimed to represent, for the alleged failure of the Secretary of the Interior to include them in the distribution of an Indian Claims Commission award in which they allegedly were entitled to share.⁹² The claimants relied in large part on breach of trust theories.⁹³ The district court dismissed for lack of jurisdiction.⁹⁴ Plaintiffs appealed.

The Tenth Circuit, in an opinion authored by Judge McKay, briefly reviewed *Testan* and stated that "the controlling question is whether federal law mandates compensation for damages plaintiffs may have sustained because of the Secretary's actions in derogation of their rights."⁹⁵ The court agreed that congressional declaration of trust status for a particular fund "itself mandates compensation for damages sustained from breach of that trust," and thus satisfies the requirements of *Testan*.⁹⁶ The court succinctly stated the rationale for this conclusion:

Liability on the part of a trustee for breach of his fiduciary duties is inherent in a trust relationship. Unless it appeared affirmatively that Congress meant to create something less than a trust relationship when it used the term "trust" in referring

89. *Id.* at 1345-46.

90. *Id.* at 1347.

91. 600 F.2d 1332 (10th Cir. 1979). *Whiskers* is the only one of the four breach of trust cases principally treated in this Article to have been brought in federal district court pursuant to 28 U.S.C. § 1346(a)(2) rather than in the Court of Claims pursuant to § 1491. See note 22 and accompanying text *supra*. In considering the case on appeal, the Tenth Circuit had the benefit of the Court of Claims opinions in the three previously discussed cases and it considered each in reaching its decision. See 600 F.2d at 1335 & n.5, 1338 & n.12.

92. 600 F.2d at 1333-34.

93. *Id.* at 1334. The plaintiffs also sought recovery based on an alleged breach of statutory duties regardless of the existence of a trust, and on fifth amendment theories that the government's failure to award them any portion of the judgment amounted to a deprivation of property without due process and an uncompensated taking. *Id.* These claims were dismissed, although it is not clear whether dismissal of the constitutional claims was for lack of jurisdiction or failure to state a claim. *Id.* at 1338-39.

94. *Id.* at 1334.

95. *Id.* at 1335.

96. *Id.*

to a particular fund, we would necessarily assume that Congress intended to establish nothing less than a valid trust—complete with fiduciary duties and concomitant financial liability for their breach.⁹⁷

The court then considered whether Congress had expressed the intent that the judgment award in question be held in trust pending distribution.⁹⁸

Neither the act that appropriated money to pay the Indian Claims Commission award in favor of the Southern Paiutes nor the act that provided for distribution of the award indicated to the court's satisfaction that the fund was held in trust prior to its distribution.⁹⁹ In reaching this conclusion, the court did not simply ascertain that trust terminology was not employed; it also considered whether the duties statutorily imposed upon the Secretary of the Interior amounted to congressional creation of a trust relationship.¹⁰⁰ Several other statutes utilizing trust terminology were held inapplicable to the judgment fund in question.¹⁰¹ The court also reasoned that the assertion that the "relationship of the United States to its Indian citizens is in the nature of a trust" did not satisfy the *Testan* requirement of "a specific congressional mandate" to compensate monetarily for the damages allegedly sustained.¹⁰² Neither was the court persuaded by language in *Cheyenne-Arapaho Tribes v. United States*,¹⁰³ a pre-*Testan* case, "that funds appropriated to Indians to satisfy judgments of the Indian Claims Commission or of [the Court of

97. *Id.* Just as usage of trust terminology would not necessarily preclude, in the Tenth Circuit's view, a finding that Congress had not intended to create an actual trust relationship in contemplation of law, the absence of such terms would not foreclose the conclusion that Congress had intended to create a trust relationship. *See id.* at 1338. The key in each case, according to the Tenth Circuit, is the intention of Congress.

98. The Tenth Circuit, like the Court of Claims in *Mitchell*, made it clear that a congressional declaration of trust status, from which a right to recover monetarily for its breach could be implied, was a necessary element of its jurisdictional inquiry under *Testan* rather than a question for resolution on the merits. *See id.* at 1335, 1338; note 83 and accompanying text *supra*.

99. 600 F.2d at 1335-56.

100. *Id.* at 1338. On this point it is likely that the *Cherry* court would have gone the other way. Application of that court's freewheeling approach would readily result in the conclusion that in carrying out its statutory duties under Indian Claims Commission award distribution statutes, including enrolling eligible Indians, determining eligibility, and distributing the award, the Interior Department had "accepted the role of trustee" for its Indian distributees. *See text accompanying note 70 supra*.

101. 600 F.2d at 1336-37.

102. *Id.* at 1337.

103. 512 F.2d 1390 (Ct. Cl. 1975).

Claims], as well as funds produced by tribal activities, are, when kept in the Treasury, held in trust for the Indians.'"¹⁰⁴ The court sought—somewhat laboriously—to distinguish the case,¹⁰⁵ but took principal solace from the pre-*Testan* status of that opinion.¹⁰⁶ Finding no congressional trust declaration, the court concluded there was no statute mandating federal compensation to the plaintiffs for the government's alleged breach of trust. Dismissal of their action for lack of jurisdiction was thus affirmed.¹⁰⁷

E. Summary

The basic conclusion of the Court of Claims in *Mitchell* that a congressional declaration of the existence of a trust relationship satisfies the jurisdictional strictures of *Testan* for breach of trust claims against the federal government is not startling. Trust status inherently entails a right of recovery against the trustee by the trust beneficiaries for breach of fiduciary duty.¹⁰⁸ Short of the unlikely appearance in some statute of a phrase such as "violation of this act shall render the United States liable for the damages proximately caused thereby," it is difficult to suggest what type of statutory scheme could more readily be "interpreted as mandating compensation by the Federal Government for the damage sustained" than one that expressly declares the United States to be a trustee with regard to a particular fund or to partic-

104. *Id.* at 1392.

105. *Id.* at 1337 & n.10.

106. *Id.* at 1337-38. In doing so, the court seems justified. Arising as the case did in the pre-*Testan* era, the Court of Claims' subject matter jurisdiction was neither challenged in *Cheyenne-Arapaho* nor treated by the court. In remarking that "funds appropriated to Indians to satisfy judgments of the Indian Claims Commission . . . are, when kept in the Treasury, held in trust for the Indians," the court was not engaged in a *Mitchell*-like quest for the requisite congressional mandate for monetary compensation for damages incurred that is necessary under *Testan* to establish Tucker Act jurisdiction. Indeed, two of the cases cited by the *Cheyenne-Arapaho* court in support of its conclusion, *Seminole Nation v. United States*, 316 U.S. 286 (1942), and *Menominee Tribe v. United States*, 59 F. Supp. 137 (Ct. Cl. 1945), were brought under expansive special jurisdiction statutes, not the Tucker Act. See note 23 *supra*. Neither *Seminole Nation*, *Menominee Tribe*, nor the third case cited by the court, *United States v. Mason*, 412 U.S. 391 (1973), involved judgment funds held in the Treasury. Rather, these cases involved, respectively, a trust fund established pursuant to a treaty, a log fund created by statute, and property held in trust pursuant to an Indian allotment act. It is little wonder the Tenth Circuit declined to read much into the *Cheyenne-Arapaho* characterization.

107. 600 F.2d at 1337.

108. See, e.g., *Standard Mach. Co. v. Duncan Shaw Corp.*, 208 F.2d 61 (1st Cir. 1953); *Luttrell v. Turner*, 307 Ky. 197, 209 S.W.2d 856 (1948); G. BOGERT, *HANDBOOK OF THE LAW OF TRUSTS* § 157 (5th ed. 1973); 3 A. SCOTT, *THE LAW OF TRUSTS* § 205 (3d ed. 1967).

ular property.

The Tenth Circuit's assessment that *Duncan* is indistinguishable from *Mitchell*, given the Congressional declaration in both cases of a trust relationship, seems entirely valid. *Cherry* and *Whiskers* are more troublesome. Given *Testan* and the breach of trust claim refinement offered by *Mitchell*, *Cherry* appears to be wrongly decided. Judge Nichols' opinion in *Cherry* ignores the jurisdictional strictures imposed by *Testan*, in contrast to his concurring opinion in *Mitchell*, which explained more clearly than did the majority opinion how the result reached in *Mitchell* was consistent with *Testan*. The *Cherry* majority failed to treat *Testan*; although the court's rhetorical statement that the United States should not purport to owe a lesser duty to a missing serviceman than it does an Indian trust beneficiary has emotional appeal, it does not satisfy the rigid jurisdictional inquiry required by *Testan*.

In light of *Testan*, *Cherry* should have been decided the same way as *Whiskers*. Notwithstanding the possibility that the *Whiskers* claimants had experienced a true monetary loss at the hands of the government, the court in that case refrained from *Cherry*-style bootstrapping and subjected the statutes in question to the demands of *Testan*. In *Whiskers* the Tenth Circuit has properly at least drawn a line between breach of trust claims that—according to *Testan* requirements—fall within Tucker Act jurisdiction, and those that do not. The *Cherry* court overstepped that line.

V. *Testan* REVISITED

To conclude that on the basis of *Testan* there was no Tucker Act jurisdiction over Colonel *Cherry*'s claim and the claims of the *Whiskers* claimants is not necessarily to conclude that there was no proper Tucker Act jurisdiction over those breach of trust claims. The *Testan* opinion is so fraught with difficulties that the jurisdictional standards it announced must be seriously questioned. Although *Cherry* is contrary to *Testan*, *Testan* is contrary to doctrines of federal jurisdiction in general, and the Tucker Act in particular.

In reaching its decision that there was no Tucker Act jurisdiction over plaintiffs' claims in *Testan*, the Supreme Court relied on the Court of Claims' decisions in *Eastport Steamship v. United States*¹⁰⁹ and *Mosca v. United States*.¹¹⁰ These two cases

109. 372 F.2d 1002 (Ct. Cl. 1967).

110. 417 F.2d 1382 (Ct. Cl. 1969), cert. denied, 399 U.S. 911 (1970).

teach that a claim not based upon a contract or for the return of money paid to the government must be based upon a federal statute that requires compensation by the government for damages.¹¹¹ However, the Court's characterization of this proposition as an "established principle"¹¹² is unwarranted.

The plaintiffs in *Eastport Steamship* alleged that the Maritime Commission wrongfully withheld consent to a ship sale resulting in the loss of a contract more favorable than the one by which the ship was eventually sold.¹¹³ Damages were claimed in the amount of the price differential between the two contracts. Judge Davis stated that the noncontractual claims that come before the Court of Claims are of "two somewhat overlapping" types:

[T]hose 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 that he is nevertheless entitled to payment from the treasury.¹¹⁴

In cases falling within the latter category, "the allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum."¹¹⁵ For this proposition, Judge Davis cited a single case, *South Puerto Rico Sugar Co. Trading Corp. v. United States*.¹¹⁶ This case, however, did not fall within the latter category; it involved a suit to recover an import fee paid the government that was claimed to have been illegally exacted.¹¹⁷ It also failed to employ analysis that segregated Tucker Act claims by category.

Judge Davis reiterated in *Eastport Steamship* that, in the second category of cases, "a claimant who says that he is entitled to money from the United States because a statute or a regulation [or the Constitution] grants him that right, in terms or by implication, can properly come to the Court of Claims, at least if his claim is not frivolous but arguable."¹¹⁸ However, the

111. *United States v. Testan*, 424 U.S. at 400.

112. *Id.*

113. 372 F.2d at 1006-07.

114. *Id.* at 1007.

115. *Id.*

116. 334 F.2d 622 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965).

117. *Id.* at 623-26.

118. 372 F.2d at 1008 (brackets in original) (quoting *Ralston Steel Corp. v. United States*, 340 F.2d 663, 667 (Ct. Cl. 1965)).

quoted opinion, *Ralston Steel Corp. v. United States*,¹¹⁹ made the quoted statement in the context of a first category, or "money retained," case.¹²⁰ The statement apparently referred to all types of claims brought pursuant to the Tucker Act. In addition, the *Ralston Steel* court specifically stated that "[w]here an action rests upon a statute or regulation, that particular enactment need not contain a specific provision permitting a suit for money; our general jurisdictional statute, 28 U.S.C. § 1491, serves the purpose."¹²¹

The Court of Claims in *Eastport Steamship* held that a particular provision of the Shipping Act did not, expressly or by implication, confer a right to recover monetarily against the United States.¹²² But the court did not find that this fact deprived it of jurisdiction, or that it meant that sovereign immunity had not been waived. On the contrary, the court specifically stated that it had jurisdiction over the claim; the plaintiff simply lost *on the merits* since he failed to demonstrate his entitlement to a monetary recovery.¹²³

Two points emerge from this analysis. First, the *Eastport Steamship* opinion's disparate treatment of contract and "money

119. 340 F.2d 663 (Ct. Cl.), *cert. denied*, 381 U.S. 950 (1965).

120. *Id.* at 668.

121. *Id.* at 668 n.5.

122. 372 F.2d at 1009.

123. *Id.* at 1011 n.14. For the *Eastport Steamship* court, the allegation that a statute expressly or implicitly grants a right to money damages was enough to establish the court's jurisdiction; the determination of whether the statute in fact does so was not thought a part of the court's jurisdictional inquiry. Only if the allegations were frivolous would dismissal for lack of jurisdiction be proper. The court did not spell out what would constitute frivolousness in this context, but it is clear the requirement is not a difficult one to satisfy. The court held that plaintiffs' allegation that the Shipping Act granted it the right to compensation was *not* frivolous, although the court had said this of the allegation:

There is *not a word* in the text [of the act] suggesting that the United States will compensate an applicant who suffers a business loss because of the Commission's improper failure to grant the request. *Nor are we pointed to anything* in the Act's legislative history hinting at that result. There is *no decision* of this or any other federal court holding or intimating that the United States will be liable under the Tucker Act for such a commercial injury resulting from a failure or wrong done in the course of the regulatory process. We would have to break *entirely new and treacherous ground* to find in [the act] an implied directive to allow such compensation.

Id. at 1009 (emphasis added). The allegations of a statutory right of recovery in *Whiskers* and *Cherry* would not have been considered frivolous by the *Eastport Steamship* court if it was able to so evaluate the allegation made there and still deem it not frivolous.

The nonfrivolity threshold was treated at greater length in *Ralston Steel*, see 340 F.2d at 666-68 & n.4., which the *Eastport Steamship* court cited in reaching its conclusion. See 372 F.2d at 1011 n.14.

retained" claims on the one hand, and other noncontract claims on the other, was not shown in *Eastport Steamship* to be based upon recognized distinctions; the authorities relied on in making the distinctions did not support them. Second, and more significantly, the *Eastport Steamship* opinion did not ultimately purport to establish criteria for determination of jurisdiction or waiver of sovereign immunity in the manner for which it was cited in *Testan*; the *Eastport Steamship* court deemed jurisdiction satisfied by allegation of statutory right. Its consideration of the actual existence of a statutory right to recover monetarily was considered to be related only to the *merits* of the claim.

Mosca is technically in a similar posture, since the Court of Claims dismissed *Mosca's* petition for failure to state a claim¹²⁴—a dismissal on the merits. However, the *Mosca* court also misperceived *Eastport Steamship* as having held that *jurisdiction* over claims other than those seeking a return of money would be had only where a particular provision of law granted the right to a monetary recovery.¹²⁵

To be sure, by the time *Testan* was decided, the *Eastport Steamship* standards had been openly employed in analyzing jurisdiction; but it is hardly accurate to enshrine them as "settled principles." For example, in his dissent in *Chambers v. United States*,¹²⁶ Judge Skelton utilized the *Eastport Steamship* approach, concluding that Tucker Act jurisdiction was lacking.¹²⁷ The majority, however, including the author of the decision in *Eastport Steamship*, was not concerned about the court's jurisdiction. Judge Skelton also relied on an *Eastport Steamship* jurisdictional test in his dissent in *Allison v. United States*.¹²⁸ Again, the majority did not deem *Eastport Steamship* relevant to jurisdiction. In fact, there is no pre-*Testan* case in which a Court of Claims majority employed the *Eastport Steamship* doctrine, in the manner the *Testan* Court employed it, in determining the existence of subject matter jurisdiction.

It is surprising that Justice Blackmun found any basis for his "settled principles" reference. As a federal circuit judge, he had applied *Eastport Steamship* to jurisdiction—just as he did in *Testan*—but was criticized for this position by the Court of Claims in *Chambers*:

124. 417 F.2d at 1383.

125. *Id.* at 1386.

126. 451 F.2d 1045 (Ct. Cl. 1971).

127. *Id.* at 1083 (Skelton, J., dissenting).

128. 451 F.2d 1035, 1043 (Ct. Cl. 1971) (Skelton, J., dissenting).

[The United States'] primary reliance [for its view that a backpay remedy of the sort at issue in *Testan* was improper], however, seems to be on *Gnotta v. United States*. . . . Judge (now Justice) Blackmun wrote the opinion sustaining dismissal of plaintiff's action by the District Court. He adopted that part of the District Court's opinion which held . . . :

None of the executive orders or regulations which the complaint cites purports to confer any right on any employee of the United States to institute a civil action for damages against the United States, in the event of their violation, even if it should be established that plaintiff's failure to have been promoted . . . was in fact due to discrimination in violation of the Executive Orders pleaded.

The court was of the opinion that the Tucker Act, 28 U.S.C. § 1346(a)(2); (conferring on the District Courts concurrent jurisdiction with the Court of Claims) was not broad enough to confer *jurisdiction* in such a case. Our line of cases, *expressing a different view*, apparently was not cited or considered.¹²⁹

It was, therefore, by no means "settled" that in claims other than those founded upon contract or money improperly retained, a statute need fairly be interpreted as mandating compensation for particular damages before Tucker Act jurisdiction could be found. Indeed, the weight of authority was to the contrary. Reference has been made to several Court of Claims cases that employed jurisdictional analysis at odds with the *Testan* approach¹³⁰ or that proceeded to the merits over a dissenting objection to jurisdiction along the lines of *Testan*.¹³¹ Other pre-*Testan* Court of Claims opinions employed a much less rigid jurisdictional analysis than that which was applied in *Testan*.¹³² In 1974 the Third Circuit rejected the

reasoning, advanced by the United States on Appeal, . . . that the Tucker Act grants jurisdiction to award damages to persons who have a statutory right to receive a sum of money; and, since

129. 451 F.2d at 1052 (citations omitted) (emphasis added) (quoting *Gnotta v. United States*, 415 F.2d 1271, 1278 (8th Cir. 1969)). Justice Blackmun at least had "constructive notice" of the quoted passage, having cited *Chambers* in his opinion in *Testan*. 424 U.S. at 396 n.3, 404, 405.

130. See *Chambers v. United States*, 451 F.2d 1045, 1052 (Ct. Cl. 1971); *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1008, 1011 n.14 (Ct. Cl. 1967); *Ralston Steel Corp. v. United States*, 340 F.2d 663, 666-68 & n.5 (Ct. Cl.), *cert. denied*, 381 U.S. 950 (1965).

131. *Chambers v. United States*, 451 F.2d 1045 (Ct. Cl. 1971); *Allison v. United States*, 451 F.2d 1035 (Ct. Cl. 1971).

132. See, e.g., *Jackson v. United States*, 428 F.2d 844, 846 (Ct. Cl. 1970).

the District Court found that the National Housing Act confers no such right on plaintiffs, the court decided that it had no Tucker Act jurisdiction. . . .

. . . Plaintiffs allege that the National Housing Act implicitly grants them the right to receive damages from the United States for violation of specific provisions. They have asserted a claim "founded upon" an Act of Congress, and their *allegation* supports the district court's jurisdiction to decide the merits of their claim.¹³³

No less a luminary than Justice Holmes saw no distinction, for jurisdictional purposes, between general federal question claims "arising under" and Tucker Act claims "founded upon" a law of the United States.¹³⁴ In his view, the former required of plaintiffs nothing more than a claim, made in good faith and not frivolous, that federal law was the basis of the rights alleged in the complaint.¹³⁵ When such a claim is made, "there is jurisdiction whether the claim ultimately be held good or bad."¹³⁶

The closely intertwined issue of waiver of sovereign immunity in *Testan* is also problematic.¹³⁷ It will be recalled that Justice Blackmun in *Testan* rejected the view that the Tucker Act itself "fundamentally waives sovereign immunity with respect to any claim invoking a constitutional provision or a federal statute or regulation."¹³⁸ Citing and partially quoting *United States v. Sherwood*,¹³⁹ the Court stated that "except as Congress has con-

133. *Davis v. Romney*, 490 F.2d 1360, 1371 (3d Cir. 1974) (emphasis added). The court added: "We reject any statement to the contrary contained in *Eastport Steamship Corp. v. United States*" *Id.*

134. *United States v. Emery*, 237 U.S. 28, 32 (1915).

135. See *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25-26 (1913) (opinion by Justice Holmes).

136. *Id.* at 25. In 1927 Judge Augustus N. Hand stated:

To limit the recovery in cases "founded" upon a law of Congress to cases where the law provides in terms for a recovery would make that provision of the Tucker Act almost entirely unavailable, because it would allow recovery only in cases where laws other than the Tucker Act already created a right of recovery. "Founded" must therefore mean reasonably involving the application of a law of Congress.

Compagnie Gen. Transatlantique v. United States, 21 F.2d 465, 466 (S.D.N.Y. 1927), *aff'd*, 26 F.2d 195 (2d Cir. 1928).

137. Although the questions of Tucker Act jurisdiction and sovereign immunity have sometimes been thought potentially distinct inquiries, see, e.g., *Davis v. Romney*, 490 F.2d 1360, 1371 & n.6, 1372 (3d Cir. 1974), in *Testan* Justice Blackmun equated the two: "[T]he terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit." 424 U.S. at 399 (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)).

138. 424 U.S. at 400. See notes 33-36 and accompanying text *supra*.

139. 312 U.S. 584 (1941).

sented to a cause of action against the United States, 'there is no jurisdiction in the Court of Claims . . . to entertain suits against the United States.'"¹⁴⁰ The Court also reasoned that where a claim is not based on contract or for the return of money paid to the government, the sovereign immunity of the United States is not waived unless the substantive statute or regulation relied on itself authorizes compensation by the United States.¹⁴¹ The accuracy of these views will now be examined.

Eastport Steamship was cited in support of the last-mentioned proposition. The lack of convincing demonstration in that opinion that some Tucker Act claims were to be treated differently than others has been noted,¹⁴² as has the fact that the *Eastport Steamship* test relied on in *Testan* was employed by the Court of Claims to evaluate a claim on the merits, not to determine whether the sovereign immunity of the United States had been waived.¹⁴³

In *Sherwood* the Court did not, contrary to Justice Blackmun's reliance on the opinion, speak of the need for a waiver of sovereign immunity as to a discrete cause of action; rather, the Court spoke of the "classes of claims" as to which the sovereign immunity of the United States had been waived.¹⁴⁴ Most significantly, the *Sherwood* Court's entire discussion of the waiver of sovereign immunity related to the Tucker Act.¹⁴⁵ The Court stated that the Tucker Act "must be interpreted in the light of its function in giving consent of the Government to be sued";¹⁴⁶ the Court also spoke of the Act as "authorizing suits against the Government."¹⁴⁷ It referred to the Act as defining "the classes of claims against the United States which could be litigated in the Court of Claims."¹⁴⁸ The *Sherwood* Court did not perceive any difference between types of Tucker Act claims, treating "suits against the United States to recover damages for breach of contract" and those for "other specified classes of claims" alike.¹⁴⁹

Finally, the *Testan* Court's unsubstantiated view that the

140. 424 U.S. at 399 (quoting 312 U.S. at 587-88).

141. *Id.* at 400-01.

142. See notes 114-20 and accompanying text *supra*.

143. See notes 122-24 and accompanying text *supra*.

144. 312 U.S. at 590.

145. *Id.* at 586-87, 589-91.

146. *Id.* at 590.

147. *Id.*

148. *Id.*

149. *Id.* at 587.

Tucker Act is not itself a fully adequate waiver of sovereign immunity as to actions on any claim coming within its terms is simply contrary to the legislative history of the Act and the great weight of pre-*Testan* judicial authority on the point. The bill that became the Tucker Act was entitled a bill "to provide for bringing suits against the Government of the United States."¹⁵⁰ Proponents of the bill spoke of it as granting "the right to sue the United States."¹⁵¹ It was stated that "the effect of the bill is that the United States can be made a party defendant in any suit where an individual could be made a party defendant."¹⁵² By the same token, opposition to the bill resulted partly from the concern that, through the enactment of such legislation, the United States would be permitting itself to be sued.¹⁵³

It has been noted that *Sherwood* recognized that the Tucker Act waives sovereign immunity as to claims within the categories contained in the Act. Other Supreme Court opinions construing the Tucker Act or its predecessor are to the same effect.¹⁵⁴ In *Ralston Steel*, cited in *Eastport Steamship*, the Court of Claims specifically stated that other statutes need not be looked to for authorization of a suit against the United States for money damages where the action is based on a statute or regulation; the Tucker Act was itself deemed sufficient authorization for such actions.¹⁵⁵ Although there was not a total lack of authority for the view taken in *Testan*,¹⁵⁶ that opinion's conclusion that the Tucker Act does not itself constitute a waiver of sovereign immunity as to claims coming within its terms, which are neither based on contract nor improperly retained money, appears incorrect when viewed against the historical background.

150. 18 CONG. REC. 622 (1887) (remarks of Rep. Tucker). See also H.R. REP. NO. 1077, 49th Cong., 1st Sess. 1 (1886).

151. 18 CONG. REC. 622 (1887) (remarks of Rep. Reed).

152. *Id.* That certain classes of claims were removed from the bill prior to enactment, see notes 13-14 and accompanying text *supra*, does not weaken the force of the statement in regard to those classes of claims that remained in the legislation as enacted.

153. 18 CONG. REC. 2679 (1887) (remarks of Rep. Townshend). In the debate of a similar bill in 1862, Representative Diven complained that "[t]he bill proposes to allow this nation to be sued and brought into court like a corporation or an individual." CONG. GLOBE, 37th Cong., 2d Sess. 1671 (1862).

154. See, e.g., *Soriano v. United States*, 352 U.S. 270, 273 (1957); *Kendall v. United States*, 107 U.S. 123, 125 (1882).

155. 340 F.2d at 668 n.5. See also text accompanying note 121 *supra*.

156. See, e.g., *Davis v. Romney*, 490 F.2d 1360, 1371-72 & n.6 (3d Cir. 1974).

VI. CONCLUSION

Even given the constraints of *Testan*, the Court of Claims was on firm ground in finding that it had jurisdiction over the breach of trust claims raised in *Mitchell* and *Duncan*. Deference to *Testan* precluded the Tenth Circuit from remanding for consideration on the merits in *Whiskers*, and should have prevented consideration on the merits in *Cherry*. But the jurisdictional approach of *Testan* was misguided.

Viewed against the judicial and legislative background examined in this Article, and assuming that the claims raised were not frivolous, the Court of Claims had jurisdiction to consider Colonel Cherry's claim. The district court had similar jurisdiction to review the claims raised in *Whiskers*, since the claims were "founded upon" acts of Congress. By the Tucker Act the United States has consented to suits for money damages founded upon federal statutes and regulations. Sovereign immunity was therefore not a barrier to judicial consideration on the merits of these breach of trust claims.

Once a court has proceeded to consider the merits of a Tucker Act claim, the *Eastport Steamship* doctrine, which was intended to be used in evaluating a claim on the merits rather than as a jurisdictional test, provides a practical means for determining whether a claimant should prevail. Every governmental deviation from a statute or regulation should not result in an award of money to injured persons. Consideration of whether Congress intended by enacting a statute or regulatory scheme to compensate persons deprived of some right thereunder would be helpful in evaluating the propriety of awarding damages to claimants. This consideration, since it is not jurisdictional, should be supplemented appropriately; a court should also consider the decisional law on the compensability of claims of the same general type¹⁵⁷ and recognize that the clear objective of Congress in enacting the Tucker Act was to transfer to a judicial forum vir-

157. The decision in *Eastport Steamship* suggested that judicial precedents might have a role to play in evaluating claims. After concluding that the act there in issue did not mandate compensation for the loss incurred, and that the legislative history was not to the contrary, the Court of Claims also indicated that "[t]here is no decision of this or any other federal court holding or intimating that the United States will be liable under the Tucker Act for such a[n] . . . injury." 372 F.2d at 1009.

During the debate that preceded adoption of the original Court of Claims act, Senator Clayton stated that the court would "decide [cases] according to established rules of justice, and . . . follow those rules as precedents." CONG. GLOBE, 33d Cong., 2d Sess. 111 (1854).

tually all nontort claims for monetary compensation against the United States.¹⁵⁸ For example, in a case like *Whiskers*, it would be appropriate to consider the comparatively liberal judicial doctrines favoring Indians.¹⁵⁹

To be sure, the end result might often be the same as it would be under *Testan*. Dismissal, however, would be on the merits for failure to state a claim for which relief can be granted, rather than for lack of jurisdiction. The Supreme Court has consistently, and in a variety of contexts, recognized the importance of this distinction by making it,¹⁶⁰ as did other courts in the pre-*Testan* era.¹⁶¹

The Supreme Court will review *Mitchell* in the near future. The Court will be able to consider the case even against the strictures of *Testan* and reach the correct jurisdictional result. But given the difficulties that attend the opinion in *Testan*, and unfortunate decisions like *Whiskers*, hopefully the Court will take the opportunity to rethink *Testan* and reformulate the jurisdictional standards contained in that opinion. In reviewing *Mitchell*, the Court would do well to remember the admonition of Justice Holmes that it is "inadmissible" to consider "that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye."¹⁶²

158. See notes 11-13 and accompanying text *supra*.

159. See, e.g., *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *United States v. Oneida Nation*, 576 F.2d 870, 877 (Ct. Cl. 1978).

160. See, e.g., *Hagans v. Lavine*, 415 U.S. 528, 542-43 (1974); *Bell v. Hood*, 327 U.S. 678, 682-83 (1946); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913).

161. See *Davis v. Romney*, 490 F.2d 1360, 1371 (3d Cir. 1974); *Ralston Steel Corp. v. United States*, 340 F.2d 663, 667-68 (Ct. Cl.), *cert. denied*, 381 U.S. 950 (1965).

162. *United States v. Emery*, 237 U.S. 28, 32 (1915).