No. 17-50201

In the United States Court of Appeals for the Fifth Circuit

MICHAEL SAMMONS,

Plaintiff–Appellant,

v.

UNITED STATES OF AMERICA,

Defendant–Appellee.

On Appeal from the United States District Court
for the Western District of Texas

No. 5:16-cv-01054 — Judge Fred Biery, Presiding.

MICHAEL SAMMONS' PETITION FOR REHEARING EN BANC

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August 3, 2017

Certificate of Interested Parties

No. 17-50201: *Michael Sammons v. United States of America*

The undersigned counsel of record for Appellant Michael Sammons certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Interested Parties

Federal National Mortgage Association ("Fannie Mae")

Federal Home Loan Mortgage Corporation ("Freddie Mac")

Federal Housing Finance Agency (FHFA)

United States Department of the Treasury

/s/Mahesha P. Subbaraman

ATTORNEY OF RECORD FOR

Michael Sammons, Plaintiff-Appellant

Rule 35(b) Statement of Reasons for Rehearing En Banc

The panel decision conflicts with the following decisions of the U.S. Supreme Court and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions:

- *First English Evangelical Lutheran Church v. Cnty. of Los Angeles,* 482 U.S. 304 (1987).
- *Stern v. Marshall*, 564 U.S. 462 (2011).
- *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).
- *Baltimore & Ohio R.R. Co. v. United States*, 298 U.S. 349 (1936).

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Issues Meriting En Banc Review

1. Whether this Court should overrule *Ware v. United States,* 626 F.2d 1278 (5th Cir. 1980) to the extent *Ware* holds that the Takings Clause is not a self-executing waiver of sovereign immunity.

a. *Ware* conflicts with *First English Evangelical Lutheran Church v. County of Los Angeles,* which holds that the Takings Clause is a self-executing immunity waiver. 482 U.S. 304, 315–16 & n.9 (1987).

b. En banc review is proper in this context. *See* FRAP 35(b).

2. Whether this Court should overrule *Ware* to the extent *Ware* still affirms the sole original jurisdiction of the U.S. Court of Federal Claims ("Claims Court") over takings claims exceeding $10,000.

a. When *Ware* was decided in 1980, the Claims Court was composed of life-tenured Article III judges who exercised Article III power. *See Glidden v. Zdanok*, 370 U.S. 530, 553–58, 584 (1962).

b. In 1982, Congress reconstituted the Claims Court with Article I judges but maintained the Court's Article III powers. *See* 28 U.S.C. § 172(a) (judges); 28 U.S.C. §§ 2501–22 (powers).

c. The Supreme Court has since cemented in *Stern v. Marshall* that Congress cannot withdraw certain matters from Article III courts.

564 U.S. 462 (2011). This includes takings claims. *See Baltimore & Ohio R.R. Co. v. United States*, 298 U.S. 349 (1936); *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

d. En banc review is merited to overrule an earlier panel decision (*Ware*) overtaken by intervening changes in the law.

Course of Proceedings & Case Disposition

In 2012, the Federal Housing Finance Agency and the Treasury Department amended a $1 billion stock-purchase agreement between them related to Fannie Mae and Freddie Mac. (Op.2.) This deprived Michael Sammons of the economic value of $1 million in preferred Fannie/Freddie stock that he held. (*Id.*) Sammons sued in federal district court for "$900,000 in just compensation" based on this regulatory taking. (*Id.*)

The Government moved to dismiss Sammons' complaint for lack of jurisdiction per the Tucker Act, 28 U.S.C. § 1491(a). (*Id.*) Sammons then sought "a declaratory judgment that the Tucker Act [was] unconstitutional as applied to his [takings] claim." (Op.2.) Sammons argued that the Tucker Act currently "violates Article III by vesting constitutional takings claims" in Article I judges. (Op.3.) The district court rejected Sammons' argument and dismissed Sammons' suit for lack of jurisdiction. (Op.2–3.)

Sammons appealed. (Op.3.) The panel concluded that Sammons' argument was "foreclosed" by *Ware v. United States,* 626 F.2d 1278 (5th Cir. 1980). (Op.4–5.) The panel read *Ware* as establishing that "Congress can constitutionally require [takings] cases to be heard" in any forum Congress wishes, including an Article I court. (Op.5–6.) The panel then emphasized that "one panel of this Court may not overrule another." (Op.5.)

Argument in Support of En Banc Rehearing

Michael Sammons wants his $900,000 takings claim to be decided in the first instance by a judge whose "independence of action and judgment" is assured by life tenure—an Article III judge. *Evans v. Gore*, 253 U.S. 245, 253 (1920). The panel ruled, however, that this Court's past decision in *Ware v. United States,* 626 F.2d 1278 (5th Cir. 1980) consigns Sammons' takings claim to the term-limited Article I judges presently seated at the U.S. Court of Federal Claims ("Claims Court"). (Op.4–5.)

This Court should grant en banc review to overrule *Ware.* When *Ware* was decided in 1980, the Claims Court was comprised of Article III judges. The Supreme Court also had not yet cemented that: (1) the Takings Clause is a self-executing immunity waiver (*First English*, 1987); and (2) Article III commits certain matters to Article III judges alone (*Stern*, 2011).

These legal developments ultimately illuminate the importance of Sammons' challenge to Claims Court jurisdiction here. Sammons seeks to vindicate the way "Article III protects liberty… by specifying the defining characteristics of Article III judges." *Stern v. Marshall*, 564 U.S. 462, 483 (2011). This Court should afford him the chance to do so.

1. Given intervening Supreme Court precedent, en banc review is merited to overrule this Court's decision in *Ware* that the Takings Clause is not self-executing.

The panel reasoned that Sammons' appeal "reduces to whether the United States, in the absence of the Tucker Act, has sovereign immunity over takings claims." (Op.4.) The panel then concluded that *Ware* bound the panel to answer 'yes.' (*Id.*) But *Ware* is no longer good law.

A. The Takings Clause is a self-executing immunity waiver.

The Takings Clause of the Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation." In 1987, the Supreme Court clarified that this Clause entitles property owners "**to bring an action in inverse condemnation as a result of [the Clause's] self-executing character.**" *First English Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304, 315 (1987). The Court also expressly rejected the

argument that the Takings Clause is "not a remedial provision" because of "principles of sovereign immunity." *Id.* at 316 n.9.

Four years later, the Ninth Circuit announced the same conclusion in *Azul Pacifico, Inc. v. City of Los Angeles*: "The Fifth Amendment is self-executing. When the government takes private property, it must pay just compensation to the owner. If the government fails to do so, the property owner may bring suit under the takings clause to compel payment. **The Constitution itself provides both the cause of action and the remedy**." 948 F.2d 575, 586 (9th Cir. 1991) (Kozinski, J.) (citations omitted). The Ninth Circuit also observed that "[i]f there was any doubt on this score it was removed by the Supreme Court in *First English*." *Id.*

Judge Tjoflat, in turn, has highlighted the fundamental problem with holding that the Takings Clause is not self-executing: "[P]roceeding as if the clause is not self-executing … means that state and federal statutes that operate to take private property but which do not explicitly provide for just compensation are unconstitutional." *Cable Holdings of Ga., Inc. v. McNeil Real Estate Fund VI, Ltd.*, 988 F.2d 1071, 1071–72 (11th Cir. 1993) (Tjoflat, J., dissenting from denial of rehearing en banc). This conclusion is especially notable because Judge Tjoflat sat on the *Ware* panel.

B. Because the Takings Clause is a self-executing immunity waiver, Sammons is entitled to Article III adjudication of his takings claim in the first instance.

If the Takings Clause is a self-executing waiver of sovereign immunity, then only Article III judges can decide takings claims in the first instance (unless a litigant waives this right). "While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy." *Minnesota v. Hitchcock*, 185 U.S. 373, 386 (1902). And where "the judicial power extends to [a] case, it will be in vain to search in the letter of the [C]onstitution for any qualification as to the tribunal where it depends." *Martin v. Hunter's Lessee*, 14 U.S. 304, 338 (1816).

This reasoning comports with history. The text and structure of the Constitution establish that takings suits belong to Article III judges in the first instance. At the same time, the Constitution does not require Congress to create or identify an Article III court where takings suits can be filed. "[C]ongress may constitutionally omit to vest the judicial power"—and that is just what Congress did for much of this nation's early history. *Martin*, 14 U.S. at 337. Congress chose to rely on private bills rather than courts to resolve claims against the United States. (*See* Op.4.)

But when Congress finally decided to create the Claims Court in 1855, Congress put life-tenured judges with fixed salaries in charge—i.e., Article III judges. *See* Act of February 24, 1855, ch. 122, § 1, 10 Stat. 612, 612. Congress then left these judges in place when it passed the Tucker Act. The Act expanded the Claims Court's jurisdiction to include constitutional claims. *See* Act of March 3, 1887, ch. 359, § 1, 24 Stat. 505, 505. "The creation of the Court of Claims can [thus] be viewed as a fulfillment of the design of Article III." *Glidden v. Zdanok*, 370 U.S. 530, 553–58, 584 (1962).

Of course, Congress may also "make available … quasi-judicial mechanism[s] through which willing parties may, at their option, elect to resolve their differences." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855 (1986). And when claimants take advantage of these alternate remedies, they may well waive other adjudicatory rights that they have. *Cf. Great Falls Mfg. Co. v. Att'y Gen.*, 124 U.S. 581, 598–99 (1888) ("[T]he very act of suing in the Court of Claims … waive[s] … the right … to demand that the amount of compensation be determined by a jury.").

What Congress cannot do is take plaintiffs "entitled to an Article III court" and send them "to an Article I forum for final decision without their consent." *Loveridge v. Hall*, 792 F.3d 1274, 1279 (10th Cir. 2015) (Gorsuch, J.).

That is what Sammons faces here. The Tucker Act requires him to sue in Claims Court, *see* 28 U.S.C. § 1491(a), which presently consists of Article I judges. *See id.* §§ 171(a), 172(a). He is denied an Article III judge in the first instance, unlike takings claimants seeking $10,000 or less, who may elect between district court and Claims Court. *See id.* § 1346(a).

This is a major constitutional problem—one that becomes especially apparent when one recognizes that the Tucker Act "is displaced … when a law assertedly imposing monetary liability on the United States contains its own judicial remedies." *United States v. Bormes*, 568 U.S. 6, 12 (2012). The Constitution is a "superior paramount law" that imposes monetary liability on the United States through the Takings Clause. *Marbury v. Madison,* 5 U.S. 137, 176 (1803). "No just compensation can be made except in money." *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 315 (1795).

The Constitution also contains its own judicial remedies, though it "does not partake of the prolixity of a legal code." *Davis v. Passman*, 442 U.S. 228, 241 (1979). The Constitution instead simply designates rights. *See id.* "[T]he judiciary is [then] clearly discernible as the primary means through which these rights may be enforced." *Id.* That includes the right to just compensation, entitling Sammons to an Article III judge.

2. Given Congress's institution of Article I judges on the Claims Court, en banc review is merited to overrule this Court's decision in *Ware* affirming the Claims Court's sole jurisdiction over takings claims exceeding $10,000.

Even if one assumes that the Takings Clause is not self-executing, this does not mean "Congress can constitutionally require [takings] cases to be heard in an Article I court." (Op.6.) Congress cannot waive immunity in a manner that abridges Article III or the Takings Clause.

A. Congressional waivers of sovereign immunity are subject to the unconstitutional-conditions doctrine.

"The power to waive the United States' sovereign immunity rests solely with Congress." *Kaffenberger v. United States*, 314 F.3d 944, 952 (8th Cir. 2003). But that power is not limitless. "[A] constitutional power cannot be used by way of condition to attain an unconstitutional result." *W. Union Tel. Co. v. Foster*, 247 U.S. 105, 114 (1918). For example, Congress could not condition a waiver of sovereign immunity on a claimant's religion, as this would violate the First Amendment's Free Exercise Clause.

Congress may thus "specify the conditions upon which sovereign immunity is waived, **and within constitutional bounds** may grant or withhold the right of suit." *Timoni v. United States*, 419 F.2d 294, 299 (D.C.

Cir. 1969). The alternative would be "to suppose that, under the sanction of the constitution, [Congress] might defeat the constitution itself." *Martin,* 14 U.S. at 329. As a result, all waivers of sovereign immunity are subject to the operation of the unconstitutional-conditions doctrine.

A powerful example of this is *United States v. Klein*, 80 U.S. 128 (1872). Congress passed a law "direct[ing] the Court of Claims and the Supreme Court to dismiss for want of jurisdiction any claim based on a pardon." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1324 (2016) (summarizing *Klein*). The Supreme Court held that "Congress had no authority to impair the effect of a pardon, for the Constitution entrusted the pardon power to the executive alone." *Id.* (alterations omitted). The Court also rejected the view that the law was valid because "the right to sue the government in the Court of Claims is a matter of favor." *Klein*, 80 U.S. at 144.

Applied here, the unconstitutional-conditions doctrine establishes that the Tucker Act's waiver violates the Constitution by giving the Claims Court sole jurisdiction over takings claims exceeding $10,000.

B. The Claims Court is now an unconstitutional court.

When this Court decided *Ware* in 1980, the Claims Court was an Article III court. *See Glidden*, 370 U.S. at 553–58, 584. Claims Court judges

had life tenure and salary protection—i.e., they were Article III judges. *See id.* And these judges rendered final, binding judgments—i.e., they exercised Article III power. *See id.* Hence, in 1980, no reason existed to doubt the Claims Court's authority to decide takings claims.

In 1982, Congress passed the Federal Courts Improvement Act, Pub. L. No. 97-164, 96 Stat. 25. The Act replaced the Claims Court's life-tenured Article III judges with judges appointed for 15-year terms. *See id.* § 105(a), 96 Stat. at 26–28. The Act did not, however, narrow the Article III power or broad substantive jurisdiction previously allocated to the Claims Court. *See id.* § 139, 96 Stat. at 42–44; *id.* § 133, 96 Stat. at 39–41.

This makes the Claims Court an Article I court with Article III power. *Compare* 28 U.S.C. § 172(a), *with, id.* §§ 2501–22. Takings claims prove this. "[T]he most prototypical exercise of judicial power" is "a final, binding judgment by a court with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime." *Stern*, 564 U.S. at 465–66. Claims Court adjudication of takings claims meets all these elements:

- **Final, binding judgments**. *See* 28 U.S.C. § 2517(a) (finality of Claims Court judgments in favor of claimants); *id.* § 2519 (finality of Claims Court judgments against claimants).

- **Court with broad substantive jurisdiction.** *See* 28 U.S.C. § 1491(a) ("[The] Court of Federal 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….").

- **Common law cause of action**. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 715–16 (1999) (plurality op.) (written by Kennedy, J.; joined by Rehnquist, C.J., Stevens, J., & Thomas, J.) ("[A]s a matter of historical practice … suits to recover just compensation [for government takings] have been framed as common-law tort actions."); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897) (explaining that the Takings Clause is "an affirmation of a great doctrine established by the common law for the protection of private property").

- **Action does not derive from/depend on regulatory regime.** *See First English*, 482 U.S. at 315 (explaining that "suits … to recover just compensation for property taken by the United States" derive from the Takings Clause and that "[s]tatutory recognition [is] not necessary," nor is "a promise to pay").

In short, the Claims Court walks, talks, and chews gum like an Article III court. *See Lake v. Neal*, 585 F.3d 1059, 1059 (7th Cir. 2009) ("[I]f it walks … swims … and quacks like a duck, it's a duck."). But Claims Court judges are term-limited Article I judges. This invalidates the Claims Court. If Congress "can shift the judicial Power to judges without [life tenure]," the "Judicial Branch is weaker and less independent than it is supposed to be." *Waldman v. Stone*, 698 F.3d 910, 918 (6th Cir. 2012). Sammons, in turn, cannot be forced to litigate in an unconstitutional court.

C. Article III does not permit Congress to withdraw takings claims from judicial cognizance.

1. Takings claims are the subject of common-law suits.

In *Stern v. Marshall*, the Supreme Court made it clear that "Congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." 564 U.S. at 484. This includes takings claims.

"Broadly speaking, the United States may take property … in one of two ways." *United States v. Dow*, 357 U.S. 12, 21 (1958). It can "institute condemnation proceedings." *Id.* Or it can take "physical possession of property without authority of a court order," requiring the owner to sue (i.e., inverse condemnation). Both paths give rise to a "matter which … is the subject of a suit at the common law." *Stern*, 564 U.S. at 484.

- **Formal condemnation.** "The right of eminent domain always was a right at common law." *Kohl v. United States*, 91 U.S. 367, 376 (1876). For this reason, "a proceeding to take land is … a suit at common law, when initiated in a court." *Id.*
- **Inverse condemnation.** "[As] a matter of historical practice … suits to recover just compensation [for government takings] have been framed as common-law tort actions." *City of Monterey*, 526 U.S. at 715–16 (plurality op.) (written by Kennedy, J.; joined by Rehnquist, C.J., Stevens, J., & Thomas, J.).

Suits to "recover just compensation under the Tucker Act" are thus "action[s] at law" because "[t]he compensation which [one] may obtain in such a proceeding will be the same as that which [one] might have been awarded had the [government] instituted … condemnation proceedings." *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932). Congress then cannot withdraw takings suits from Article III judges. *See Stern*, 564 U.S. at 484. Congress also cannot justify such withdrawal on the grounds that an Article III court like the Federal Circuit provides appellate review. *See id*. at 500–01.

2. Takings claims entail a "private rights" dispute even though the government is a party.

The Supreme Court also cements in *Stern* that Congress cannot withdraw from Article III courts matters "of private right"—that is, "the liability of one individual to another under the law as defined." 564 U.S. at 465. This marks a key distinction between "private rights" and "public rights" for Article III purposes. Application of this distinction, however, is not simply a question of "the identity of the parties" to a dispute. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985).

For example, the Supreme Court has refused to "limit[] … the public rights exception to actions involving the Government as a party." *Stern*, 564

U.S. at 490–91. The Court has instead found that the public-rights exception may apply to disputes between private parties when these disputes turn on "particular Federal Government action." *Id.* Takings claims break the mold in a similar way: they are private-rights disputes, although the government is a party, because of longstanding common-law tradition.

William Blackstone details this tradition, explaining that when legislatures take property, they must also give the property owner "a full indemnification and equivalent for the injury thereby sustained. **The public is now considered as an individual treating with an individual for an exchange**." 1 COMMENTARIES *139. Baron de Montesquieu says the same: "If the political magistrate would erect a public edifice, or make a new road, he must indemnify those who are injured by it; **the public is in this respect like an individual who treats with an individual**." 2 THE SPIRIT OF LAWS, bk. XXVI, ch. 15, p. 211 (T. Nugent transl., 1752).

Modern practice concurs. "Every sovereign State is of necessity … [an] artificial person … capable of making contracts and holding property." *Cotton v. United States,* 52 U.S. 229, 231 (1851). From this perspective, "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that **as between private parties**, a

servitude has been acquired." *United States v. Dickinson*, 331 U.S. 745, 748 (1947). It then follows that when "the public [takes] property … it [takes] it as an individual buying property from another." *Kelo v. City of New London*, 545 U.S. 469, 510 (2005) (O'Connor, J., dissenting). This affords ample basis to conclude that takings claims are private-rights disputes that cannot be withdrawn from the cognizance of Article III courts.

3. Takings claims fall outside the "public rights" exception to Article III jurisdiction.

The Supreme Court finally observes in *Stern* that Congress may "constitutionally assign to 'legislative' courts for resolution" cases that involve "public rights." 564 U.S. at 485. "Familiar illustrations" of these kinds of cases include taxation, immigration, public lands, and payments to veterans. *See Crowell v. Benson*, 285 U.S. 22, 51 (1932).

Takings claims fall outside the public-rights category. These claims are not matters "that can be pursued only by [the] grace" of Congress or the Executive. *Stern*, 564 U.S. at 493. To the contrary, "suits … to recover just compensation for property taken by the United States" rest "upon the Fifth Amendment." *First English*, 482 U.S. at 315. "Statutory recognition [is] not necessary. A promise to pay [is] not necessary." *Id.*

Takings claims also are not matters that historically could have been **"determined exclusively"** by Congress or the Executive (the political branches). *Stern*, 564 U.S. at 493. This is true for two reasons.

First, takings claims require a "determination [of] whether a taking has occurred." *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 38 (2012). No right to just compensation can vest without this determination. *See, e.g., Reoforce, Inc., v. United States*, 118 Fed. Cl. 632, 666 (2014) (Claims Court making this determination). But if this is true, then determination of takings claims cannot be said to belong to the political branches alone. "The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority." *Marbury,* 5 U.S. at 165.

Second, "[t]he Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893). The Supreme Court and state high courts are united on this point: "The ascertainment of [just] compensation is a **judicial function**." *United States v. New River Collieries, Co.*, 262 U.S. 341, 343–44 (1923); *see also Newport v. Newport Water Corp.*, 189 A. 843, 847 (R.I. 1937); *Rich v. Chicago*, 59 Ill. 286, 290–91, 293–94 (1871); *Isom v. Miss. Cent. R.R. Co.*, 36 Miss. 300, 314–315 (1858).

Conclusion

The Takings Clause "may not be evaded or impaired by any form of legislation." *Baltimore & Ohio R.R. Co. v. United States*, 298 U.S. 349, 368 (1936). Hence, "[a]gainst the objection of the owner of private property taken for public use … Congress may not directly or through any legislative agency finally determine the amount … safeguarded to him by that clause." *Id.* The panel nevertheless held that Congress may assign an Article I judge to decide Michael Sammons' takings claim over his protest. Because that holding contravenes binding Supreme Court precedent, en banc review is warranted to reverse the panel decision, overrule *Ware,* and uphold the Constitution's guarantee of an independent judiciary.

Respectfully submitted,

Dated: August 3, 2017

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Certificate of Service

I, Mahesha P. Subbaraman, certify that:

1. On August 3, 2017, I caused the foregoing document to be filed electronically with the Clerk of Court using the CM/ECF System. The System will send notice to counsel for all the parties. All the parties are registered ECF Filers and will be served by the System.

2. I will cause 20 printed copies of the foregoing document to be sent to the Clerk of this Court via U.S. Priority Mail.

Dated: August 3, 2017

SUBBARAMAN PLLC

By: /s/Mahesha P. Subbaraman
Mahesha P. Subbaraman

Counsel for Plaintiff-Appellant
Michael Sammons

Certificate of Compliance

The undersigned counsel certifies under Fed. R. App. P. 32(g) that Michael Sammons' Petition for Rehearing En Banc meets the formatting and type-volume requirements of Fed. R. App. P. 32(a). This brief is printed in 14-point, proportionately spaced typeface utilizing Microsoft Word 2010 and contains 3,893 words, including headings, footnotes, and quotations, and excluding all items identified under Fed. R. App. P. 32(f).

Dated: August 3, 2017

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Counsel for Plaintiff-Appellant
Michael Sammons

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50201
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
June 19, 2017
Lyle W. Cayce
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MICHAEL SAMMONS,

Plaintiff–Appellant,

versus

UNITED STATES OF AMERICA,

Defendant–Appellee.

Appeal from the United States District Court
for the Western District of Texas

Before JOLLY, SMITH, and GRAVES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Michael Sammons, proceeding *pro se*, brought a takings claim against the United States. The district court concluded that, under the Tucker Act, Sammons must pursue his claim in the Court of Federal Claims ("CFC"), so it dismissed for want of subject-matter jurisdiction. Sammons contends that the Tucker Act is unconstitutional because it requires him to litigate his claim in

an Article I court. We affirm.

I.

Congress created the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") to provide, among other things, liquidity to the residential mortgage market. During the financial crisis of 2008, the two entities faced a sharp reduction in the value of their assets and a loss of investor confidence. In response, Congress passed the Housing and Economic Recovery Act of 2008, which created the Federal Housing Finance Agency ("FHFA") and empowered it to act as conservator of Fannie Mae and Freddie Mac. Shortly after the FHFA placed the enterprises into conservatorship, the Treasury Department purchased $1 billion of preferred stock in each entity. That "Senior Preferred Stock" enjoyed preference as to all other preferred stock and was entitled to an annual cumulative dividend equal to ten percent of the money given to the enterprises from the Treasury. In 2012, the FHFA and the Treasury amended the stock-purchase agreement to change the dividend to one hundred percent of the current and future profits of the enterprises.

Sammons holds $1 million in noncumulative preferred shares in Fannie Mae and Freddie Mac, and he contends that the 2012 amendment permanently deprived him of the economic value of his preferred shares. He thus asserts that the amendment amounted to a regulatory taking and that he is entitled to $900,000 in just compensation.

The government moved to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) because the Tucker Act vests exclusive jurisdiction for takings claims over $10,000 in the CFC. 28 U.S.C. § 1491(a)(1). Sammons moved for a declaratory judgment that the Tucker Act is unconstitutional as applied to his claim. The court rejected Sammons's

constitutional challenge and dismissed for lack of jurisdiction. We review *de novo* a Rule 12(b)(1) dismissal for lack of jurisdiction.[1]

II.

The Tucker Act provides that "[t]he United States Court of Federal 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." 28 U.S.C. § 1491(a)(1). It does not "create substantive rights, but [is] simply [a] jurisdictional provision[] that operate[s] to waive sovereign immunity for claims premised on other sources of law".[2]

Under the Tucker Act, the CFC has exclusive jurisdiction over claims against the United States for more than $10,000.[3] Sammons concedes that, because he seeks more than that, the district court had no statutory jurisdiction. He attempts to get around that by attacking the Tucker Act, theorizing that it violates Article III by vesting the power to hear constitutional takings claims in the CFC, an Article I court.

There are several classes of cases that Congress can permissibly assign to non-Article III courts.[4] One includes cases involving "public rights, which

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[1] *JTB Tools & Oilfield Servs., L.L.C. v. United States*, 831 F.3d 597, 599 (5th Cir. 2016).

[2] *United States v. Bormes*, 133 S. Ct. 12, 17 (2012) (quotation marks omitted and alteration adopted).

[3] *Chichakli v. Szubin*, 546 F.3d 315, 317 (5th Cir. 2008); 28 U.S.C. § 1491(a)(1). If the claim is for $10,000 or less, the Little Tucker Act vests the CFC and district courts with concurrent jurisdiction. *Bd. of Governors of Fed. Reserve Sys. v. DLG Fin. Corp.*, 29 F.3d 993, 999 n.18 (5th Cir. 1994); 28 U.S.C. § 1346(a)(2).

[4] *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64–70 (1982) (plurality opinion) (describing the categories of cases).

may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."[5] One way a right can be "public" is if it is asserted against the United States in its sovereign capacity, such that the government has immunity.[6] In such circumstances, "Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all." *Stern*, 564 U.S. at 489.

The dispute thus reduces to whether the United States, in the absence of the Tucker Act, has sovereign immunity over takings claims. If it does, then Congress can attach conditions to its Tucker-Act waiver, such as requiring claimants to litigate in the CFC. The government maintains that before Congress passed the Tucker Act in 1887, it had not waived sovereign immunity over takings claims. The government observes that, before then, citizens had to request individual waivers of sovereign immunity through private bills in Congress.[7] Sammons counters that the Fifth Amendment automatically waives sovereign immunity. He principally relies on Supreme Court precedent describing the "self-executing" nature of the takings clause.[8]

But whatever the merits of the parties' positions, the issue is foreclosed.

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[5] *Stern v. Marshall*, 564 U.S. 462, 489–90 (2011) (quoting *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 284 (1855)).

[6] *Id.* at 489; *N. Pipeline*, 458 U.S. at 67 (plurality opinion); *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929).

[7] *See Library of Cong. v. Shaw*, 478 U.S. 310 n.3 (1986); *Langford v. United States*, 101 U.S. 341, 343 (1879) ("It is to be regretted that Congress has made no provision by any general law for ascertaining and paying . . . just compensation.").

[8] *See, e.g.*, *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty.*, 482 U.S. 304, 314–16 (1987) ("We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation . . . ") (quotation marks omitted).

"It is well-established in this circuit that one panel of this Court may not overrule another." *United States v. Segura*, 747 F.3d 323, 328 (5th Cir. 2014). Moreover, "[t]he binding force of a prior-panel decision applies not only to the result but also to those portions of the opinion necessary to that result." *Id.* (quotation marks omitted and alteration adopted).

We have decided, in a way that was necessary to the holding, that the Fifth Amendment does not automatically waive sovereign immunity. In *Ware v. United States*, 626 F.2d 1278, 1279–80 (5th Cir. 1980), the plaintiff brought a claim against the United States in district court under the Federal Tort Claims Act and asserted a pendent claim under the Tucker Act. We characterized the Tucker Act claim as a takings claim under the Fifth Amendment. The plaintiff sought $331,607.89 but contended that the Tucker Act's $10,000 limitation on district-court jurisdiction applied only to original jurisdiction and not to pendent claims. *Id.* at 1286.

We rejected the plaintiff's position, explaining that "[t]he United States, as sovereign, is immune from suit except as it waives its immunity, and the terms of its waiver, as set forth expressly and specifically by Congress, define the parameters of a federal court's subject matter jurisdiction to entertain suits brought against it." *Id.* We stated that "[a]ssuming that [the plaintiff] present[ed] a valid Fifth Amendment taking claim, the *only* express waiver of sovereign immunity which vests the district court with jurisdiction over taking claims against the United States [was the Little Tucker Act] and it limits the district court jurisdiction to claims involving $10,000 in damages or less." *Id.* (emphasis added). We said that "this court cannot, by using the judge-made doctrine of pendent jurisdiction waive the immunity of the United States where Congress, constitutional guardian of this immunity, has declined to do so." *Id.* at 1287 (citation omitted and alteration adopted). "[S]ince the government

[had] not specifically consented to such a claim," the district court was "powerless to entertain the claim." *Id.* That holding necessarily assumes that the Fifth Amendment does not provide a self-executing waiver of sovereign immunity. We have reached a similar result in other cases.[9]

Because, under our binding precedent, the United States's sovereign immunity can bar cases against it based on the Takings Clause, those cases fall into the "public rights" category. *See Stern*, 564 U.S. at 489. Thus, Congress can constitutionally require such cases to be heard in an Article I court, as it did in the Tucker Act. *Id.* So Sammons's constitutional challenge to the Tucker Act fails, and the court properly dismissed for want of jurisdiction.

The judgment of dismissal is AFFIRMED.

[9] *E.g.*, *Wilkerson v. United States*, 67 F.3d 112, 119 & n.13 (5th Cir. 1995) (holding that a district court had no jurisdiction to hear a takings claim because "there [was] no waiver [of sovereign immunity] except to have the claims heard in the Court of Claims"); *United States v. Land*, 213 F.3d 830, 837 (5th Cir. 2000) (holding that landowners could not challenge certain aspects of a condemnation damages award because, among other reasons, Congress had not waived sovereign immunity).