DePaul Law Review

Volume 35
Issue 1 *Fall 1985*

Article 4

Executability of Article III Judgments and the Problem of Congressional Discretion: United States v. Board of Education of Chicago

Marc S. Mayerson

EXECUTABILITY OF ARTICLE III JUDGMENTS AND THE PROBLEM OF CONGRESSIONAL DISCRETION: *UNITED STATES V. BOARD OF EDUCATION OF CHICAGO*

*Marc S. Mayerson**

TABLE OF CONTENTS

INTRODUCTION

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers in a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.
>
> Justice Jackson[1]

* Marc S. Mayerson, A.B., University of Michigan; J.D., Harvard Law School. Mr. Mayerson is a Law Clerk for Judge Stephen Reinhardt, U.S. Court of Appeals, Ninth Circuit. He wishes to include the following acknowledgment:

I would like to thank Professors David Shapiro and Martha Minow of the Harvard Law School, Professor Theodore Eisenberg of Cornell Law School, Rob Fram, and Howard Adler for their much-needed and much-appreciated substantive and editorial help. They should not be regarded, however, as contributing to any errors in this Article, for those would be mine alone. I would also like to thank Amy Peck. This Article is dedicated to my parents.

1. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

The continuing controversy in *United States v. Board of Education of the City of Chicago*[2] involves the desegregation of Chicago's school system and has developed into a conflict of constitutional dimensions. Less than three months before the 1980 presidential election, the Carter Administration entered into a consent decree that contains what the Seventh Circuit Court of Appeals later described as "a unique funding provision . . . that constitutes an unprecedented settlement of a school desegregation claims by the United States."[3] This funding provision obligates the United States to "make every good faith effort" to provide funds to implement the court approved desegregation plan[4] of the Chicago schools, the third largest system in the country.[5] Since President Reagan assumed office in 1981, the Executive Branch, with congressional acquiescence, has opposed implementation of the United States' responsibilities under the decree.[6] Four years after the district court first approved the consent decree, the Seventh Circuit observed "that the process of dispute resolution has failed remarkably."[7] Part I describes in detail the current conflict in the Chicago desegregation case between the judiciary on the one hand, and the executive and legislative branches on the other. This Article argues that the failure of the dispute resolution process in that case should be attributed to the unconstitutional course of action pursued by the political branches.

The theoretical analysis, parts II and III, addresses the issue of the coercive enforceability of federal judicial decrees which reflects the tension in a coordinated system of government power committed to maintaining an independent judiciary. Part II examines the constitutional limitation on the federal courts against the issuance of advisory opinions and develops the concept of the executability of judgments. The section also explores the judiciary's interest in executability as manifest in the problem of the Supreme Court's appellate jurisdiction from the Court of Claims. Part III discusses the countervailing interests and powers of Congress in controlling the remedies granted by the federal courts. In particular, the section examines the limitations on Congressional power to interfere with the role and function of the federal judiciary through a *post hoc* modification of a judgment. Part III also examines the conflict between the judicial and executive branches in *United States v. Nixon,*[8] and develops a parallel framework to examine a dispute between the judiciary and Congress over the execution of a judgment. Part IV concludes with an application of the analysis to the continuing constitutional conflict between the judiciary and the coordinate branches of government in the *Chicago* case.

---

2. *See infra* note 9.
3. United States v. Chicago Bd. of Educ., 744 F.2d 1300, 1304 (7th Cir. 1984).
4. *See id.* at 1301 (quoting 15.1 of the consent decree).
5. United States v. Bd. of Educ., No. 80C 5124, slip op. at 41 (N.D. Ill. Oct. 15, 1985).
6. *See infra* text accompanying notes 11-25.
7. 744 F.2d at 1304.
8. 418 U.S. 683 (1974).

I. THE CONFLICT AMONG THE BRANCHES OF GOVERNMENT IN THE *CHICAGO*[9] CASE

The scope of the Executive and Congressional power to modify the execution of a court order is currently the central issue in the federal suit to desegregate the Chicago school system. Less than three months before the 1980 presidential election, the Department of Justice under the Carter Administration entered into a consent decree with the Board of Education of the City of Chicago (the "Board"), which obligated the United States to "make every good faith effort to find and provide . . . financial resources adequate for the implementation of the desegregation plan."[10] After he assumed office in 1981, President Reagan and the Congress attempted to circumvent the decree by refusing to appropriate sufficient funding for its implementation.[11]

Under the Seventh Circuit interpretation of the consent decree, the United States must "go beyond assisting the Board in locating and applying for federal funds and that [the decree] imposes a substantial obligation on the government to provide funds to the board."[12] While the Board has spent more than $300 million to implement the court-approved desegregation

---

9. The Justice Department filed United States v. Bd. of Educ. on September 24, 1980. The court had jurisdiction over the case pursuant to 28 U.S.C. §§ 1331, 1345 (1982). On the same day, the court approved a previously negotiated consent decree between the parties. The court later denied intervention to the NAACP and MALDEF-PRLDEF, 88 F.R.D. 679 (N.D. Ill. 1981). Two years later, the court approved the desegregation plan submitted by the parties. 554 F. Supp. 912 (N.D. Ill. 1983). On June 30, 1983, district court Judge Shadur ordered the government to comply with the decree. In order to ensure the availability of monies to fund the decree, the court restrained the Department of Education from spending appropriated monies. 567 F. Supp. 272 (N.D. Ill. 1983). The Seventh Circuit reviewed the actions of the district court in freezing appropriated education funds, and sustained the preliminary injunction but vacated and remanded the rest of the case. 717 F.2d 378 (7th Cir. 1983). On June 8, 1984, the district court once again held that the government's refusal to fund the decree constituted "bad faith," and granted the Board of Education monetary relief. 588 F. Supp. 132 (N.D. Ill. 1984) (findings of fact and conclusions of law); 592 F. Supp. 967 (N.D. Ill. 1984) (supplement to remedial order). On an expedited appeal, the Seventh Circuit vacated the district court's opinion, tentatively approved the priority funding plan of the United States, and remanded the case to a different district court judge. 744 F.2d 1300 (7th Cir. 1984). The Supreme Court denied the petition for certiorari. 105 S. Ct. 2358 (1985). On remand, the federal district court has disposed of the government's claim of privilege regarding certain documents, 610 F. Supp. 695 (N.D. Ill. 1985), and denied the government's motion to vacate a preliminary injunction to preserve the status quo. 610 F. Supp. 702 (N.D. Ill. 1985). On October 15, 1985, the district court held that the government had continued to evade its responsibilities under the decree and ordered permanent relief. No. 80C 5124, slip op. (N.D. Ill. Oct. 15, 1985) [hereinafter cited as *Chicago*]. For other commentary on this case, see Devins and Stedman, *New Federalism in Education: The Meaning of the Chicago School Desegregation Cases*, 59 NOTRE DAME L. REV. 1243 (1984) (giving detailed history of the case and exploring its importance in light of the history and present policy of education funding for desegregation).

10. *See Chicago*, 744 F.2d 1300, 1304 (7th Cir. 1984) (quoting 15.1 of the consent decree).

11. *See infra* text accompanying notes 15-22.

12. *Chicago*, 717 F.2d 378, 383 (7th Cir. 1983).

plan,[13] the federal government, according to the district court, has consistently evaded its complementary responsibilities.

On June 30, 1983, citing the United States' noncompliance with its obligations under the decree, the district court restrained the Department of Education from spending funds appropriated for other purposes in order to ensure the availability of monies to fund the decree.[14] In response to the court's order, Congress passed a special resolution appropriating $20 million to fund the decree.[15] President Reagan, however, vetoed that supplemental appropriation.[16] In the veto message, President Reagan stated:

> This veto is not premised on a desire to protect the Federal budget. It is based upon my conviction that the Constitution and its process of separated powers and checks and balances does not permit the judiciary to determine spending priorities or to reallocate funds appropriated by Congress. Those are exclusively the functions of the Legislative and Executive branches, and the use of judicial decrees to assume such a power raises problems of constitutional significance.[17]

On September 21, 1983, Congressman Sydney Yates proposed the "Yates Bill," which once again appropriated $20 million to fund the decree. The Yates Bill was subsequently signed into law on October 1, 1983.[18] The appropriation, when compared to the expenditures made by the Board, arguably falls far short of the obligations of the United States under the consent decree.[19] Moreover, on October 31, 1983, the President signed Public Law 98-139 which, in a section proposed by Senator Lowell Weicker, § 309, provided that:

---

13. *See, e.g.*, N.Y. Times, Dec. 24, 1985, § A, at 8, col. 6. The district court has noted that these expenditures occurred during a period when the Board "was suffering severe financial constraints and projecting a budget deficit." *Chicago*, 588 F. Supp. 132, 196 (N.D. Ill. 1984).

14. *Chicago*, 567 F. Supp. 272, 289-90 (N.D. Ill. 1983).

15. On July 29, 1983, the House of Representatives agreed to amend H.R. 3069, Supplemental Appropriations, 1983. The amendment would have provided $20 million for Chicago from available Guaranteed Student Loan funds. 129 CONG. REC. H5990-991 (daily ed. July 29, 1983). As the result of an enrolling error, the amendment was not included in the bill later approved by the Senate and signed by the President. 129 CONG. REC. H6129 (daily ed. Aug. 1, 1983). Congress passed H.J. Res. 338 to correct P.L. 98-63 and to provide $20 million to Chicago. 129 CONG. REC. H6127, S11293 (daily ed. Aug. 1, 1983).

16. Message to the House of Representatives Returning H.J. Res. 338 Without Approval, 19 WEEKLY COMPILATION PRES. DOC. 1133 (Aug. 13, 1983) (available on LEXIS).

17. *Id.* President Reagan is in historic company. For example, Thomas Jefferson wrote in 1804:

> The judges, believing the [Sedition Law] constitutional, had a right to [judge the case] . . . because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution.

8 THE WRITINGS OF THOMAS JEFFERSON 310 (1897). *But see infra* note 109.

18. Pub. L. No. 98-107, § 111, 97 Stat. 733, 742 (Oct. 1, 1983).

19. In its October 1985 opinion, the district court noted:

> [T]he level of funding adequate for full implementation of the Plan in school year 1984-85 would have been approximately $171.631 million. Of that amount, Board

> No funds appropriated in any act to the Department of Education for fiscal years 1983 and 1984 shall be withheld from distribution to grantees because of the provisions of the order [restraining monies] entered by United States District Court for Northern District of Illinois on June 30, 1983.[20]

In effect, this provision was an attempt to release the funds that the district court had restrained as a means of securing implementation of the consent decree. The district court observed that "in street language, [the section] seeks to unfreeze previously frozen funds."[21] Furthermore, part of the legislative history of the Weicker Bill indicates that Congress may have affirmatively intended to limit the funds available to the Board to the previously appropriated $20 million.[22]

In an extensive June 1984 opinion that followed the passage of the legislation, the district court dissolved the preliminary injunction freezing the disbursement of education funds and, thus, did not reach the merits of the constitutionality of the Weicker Amendment.[23] Nevertheless, the district

---

> was able to budget approximately $67.773 million, leaving an increment of approximately $103.858 million that Board, despite its best efforts, was not able to fund . . . . [I]t can reasonably be assumed that approximately $171.631 million will be necessary for adequate implementation of the Plan in subsequent school years, including school year 1984-85.

Chicago, No. 80C 5124, slip op. at 104-05 (N.D. Ill. Oct. 15, 1985) (finding of fact # 265B).

20. Pub. L. No. 98-139, § 309, 97 Stat. 871, 895 (Oct. 31, 1983).

21. *Chicago,* 588 F. Supp. 132, 231 (N.D. Ill. 1984) (footnote omitted). The Weicker Amendment does express legitimate Congressional concern. Due to the district court's order, which restrained education monies, third party applicants were prevented from receiving those appropriated funds. As a result, many of the education lobby groups suggested and supported the language of the Weicker Amendment as originally proposed (legislative ceiling) and subsequently enacted. Interview with Amy M. Peck, Legislative Assistant for Council of Chief State School Officers, Washington, D.C. (Nov. 13, 1984) (on file in DEPAUL LAW REVIEW Office).

22. The original language of the relevant section included the following provision: "No funds appropriated in any Act . . . other than those [already] appropriated by [the Yates Bill] shall be available to fund the consent decree between the United States and the Board of Education of the City of Chicago." *Chicago,* 744 F.2d at 1308 n.12; 129 CONG. REC. S13506 (daily ed., Oct. 4, 1983). The government has advanced this interpretation of Congressional intent in this case. 744 F.2d at 1304. The district court held that the creation of such a legislative ceiling constituted a "bad faith" violation of the United States' obligation under the consent decree. Although the Seventh Circuit vacated the district court's opinion on other grounds, *see infra* text accompanying notes 26-27, it did indicate that the statute could be a "possible bad faith violation of . . . the Decree." 744 F.2d at 1308 n.12. Thus, the appellate court, in its remand, directed the district court to examine whether the new law would prevent Congress from appropriating any additional monies in excess of the $20 million previously provided by the Yates Bill. *Id.*

23. *Chicago,* 588 F. Supp. at 233-34 (conclusion of law # 103). Judge Aspen, the new district court judge assigned to the case, agreed with the analysis of Judge Shadur, which he quoted in his opinion:

> [W]e are troubled that the statute reverses a particular judicial order in a particular case . . . . As such, the statute very likely invades the judicial province and violates fundamental constitutional principles of separation of powers . . . . We could hold now that the statute (in all likelihood) is unconstitutional . . . .

Chicago, 610 F. Supp. at 711.

court held that "[a]ll the actions of the United States . . . wholly fail to meet its obligation to 'make every good faith effort' and constitute affirmative bad faith conduct and willful violations of the Consent Decree and orders of this Court and the Court of Appeals."[24] The court relied on the fact that the Executive Branch had opposed enactment of the Yates Bill and had lobbied extensively for the passage of the Weicker language which, in its view, specifically would make unavailable to the Board funds that previously had been restrained by the court.[25] The district court ruled that the United States had an unconditional obligation to provide approximately $104 million to the Board for the 1984-85 school year.[26]

The Seventh Circuit vacated the district court's opinion and remedial order,[27] but did not rule on whether that court had mistakenly construed the government's actions as a bad faith attempt to undermine the decree. Rather, the appellate court held that the district court judge had abused his discretion in fashioning monetary relief by, *inter alia*, failing to consider the government's new plan to provide funds on a priority basis to the Board within the regular competitive process of distribution of desegregation and educational grants.[28]

On October 15, 1985, the district court once again held that the United States had failed in its obligations to the Board as required by the consent decree. Judge Marvin Aspen, replacing Judge Shadur per order of the appellate court, noted that a "remedial order would formally declare, *inter alia*, that the United States violated the Decree by:

> (a) failing to consider the Consent Decree in formulating its allocation decisions with respect to the full amount of available fudns [sic] appropriated by Congress . . . for desegregation . . . .
>
> (b) providing in 1984 zero funding in the [Secretary's] Discretionary Fund [and only limited amounts in other funds].
>
> (c) failing to provide the Board in 1984 the amounts now estimated to represent its substantial share and the maximum level of available funding . . . .
>
> (d) failing to take any step to provide the Board in 1984 the restrained Excess Funds [available to the Secretary] . . . .
>
> (e) failing entirely to conduct any affirmative search for funds that could be used to advance the Board's Plan in fiscal year 1984 and prior years, failing to provide any such funds, and conducting grossly deficient search activities in fiscal year 1985.[29]

The district court interpreted the Seventh Circuit's opinion limiting its remedial powers as evincing a substantive concern that the national character

---

24. *Chicago*, 588 F. Supp. at 212 (finding of fact # 609).
25. *Id.* at 237.
26. *Chicago*, 744 F.2d at 1307.
27. *Id.* at 1308.
28. *Id.* at 1306-07.
29. *Chicago*, No. 80C 5124, slip op. at 278-79.

of statutory programs should be protected.[30] Thus, while the Seventh Circuit opinion "fundamentally shifted the battlefield from the pre-appropriation to the post-appropriation landscape,"[31] the district court ordered the United States to provide the Board with approximately $17 million of "available" funds.[32] The court further noted that "each of the proposed elements of an order . . . stands on its own, as reflecting the proper implementation of the Consent Decree in each instance, and is in addition supported as part of an overall remedy for the United States' historical pattern of failure to comply."[33] Moreover, the court ruled that fiscal year 1985 was essentially "lost" because of the government's actions.[34] The district court noted the consistency of the government's opposition to implementation of the decree, and tentatively held that the obligations of the government under the decree *begin* with the 1985-86 school year, extending for a period of at least five years with continuing supervision by the district court.[35] In effect, the court ruled that the government's actions since the approval of the consent decree in 1980 had essentially prevented any implementation of the decree to date. Indeed, the court further noted:

> [T]his pattern of failure to comply arguably shows that the United States has made every effort to minimize and to avoid its obligations under the Consent Decree and the provision of funding to the Board. This pattern of conduct could constitute a bad faith violation of the Consent Decree . . . . [A]ll of the proposed provisions of this Court's Order . . . could, as a supplemental matter, be grounded upon these bad faith violations. Besides the overall pattern of conduct, certain particular actions could constitute bad faith, such as the Yates-Weicker Activities, . . . the conduct surrounding the excess funds, . . . and the woeful lack of search activities.[36]

Thus, the district court held that the Board was entitled to permanent injunctive relief.[37] This case will be appealed to the Seventh Circuit for the third time.

The United States has not provided substantial funding to implement the desegregation plan of the *Chicago* case. The language of the Weicker Amendment amounts to a Congressional declaration that it would ignore the district court's preliminary injunction issued in order to secure compliance with the decree. Additionally, the Weicker Amendment, according to the government's understanding of its legislative history, created a legislative ceiling for the decree that would limit the ability of the court to implement the court-approved desegregation plan. As the district court's most recent opinion concludes, the pattern of action of the government in the period since approval of the consent decree has effectively nullified the operation of the decree for the past five years.

30. 744 F.2d at 1306; slip op. at 271.
31. Slip op. at 267.
32. *Id.* at 137, 279-83.
33. *Id.* at 283.
34. *Id.* at 282.
35. *Id.*
36. *Id.* at 284.
37. *Id.* at 287.

The Seventh Circuit interpreted "good faith" in the decree as "impos[ing] a substantial obligation on the government to provide funds to the Board."[38] The court's analysis of the case rings generally in contractual terms. The contract-based interpretation has resulted in a five-year litigation involving "three district court opinions of more than 500 pages and two trips to the Court of Appeals with another one perhaps iminent."[39] This Article suggests an alternative analysis based not on contract but on the constitutional status of the court's interest in the executablity of judgments. Parts II and III develop the concept of executability and examine the countervailing concerns and powers of the coordinate branches regarding executability. Part IV then applies the formulated doctrine of executability to the *Chicago* case and argues that the pattern of conduct of the United States in this case has violated the constitutional separation of powers.

II. THE JUDICIARY'S INTEREST IN THE EXECUTIBILITY OF ARTICLE III JUDGMENTS

A. Advisory Opinions and the Judicial Power Granted by Article III of the Constitution

Justice Holmes, in his essay *Natural Law,* observed that "[f]or legal purposes, a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who are said to contravene it."[40] In the vindication of legal rights, courts "dispense" the imaginary substance which directs the public force in safeguarding those rights. Accordingly, from the internal view of the judiciary, a court fails to function as a court when it intervenes in matters for which it is unable to determine, by law or in fact, the binding application of the public force.

Article III of the United States Constitution vests "the judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may . . . ordain and establish."[41] According to Justice Johnson, sitting as Circuit Justice in 1808, "[t]he term 'judicial power' conveys the idea, both of exercising the faculty of judging and of applying physical force to give effect to a decision."[42] Because the only power granted to the federal courts is the judicial power,[43] when a court is unable to exercise that power,

---

38. *Chicago,* 717 F.2d at 383. *See also Chicago,* 592 F. Supp. at 968 (United States is obligated by contract).

39. Slip op. at 287.

40. Holmes, *Natural Law,* 32 HARV. L. REV. 40, 42 (1918).

41. U.S. CONST. art. III, § 1, cl. 1.

42. Gilchrist v. Collector of Charleston, 10 F. Cas. 355, 361 (C.C.D.S.C. 1808) (No. 5,420). For a chronicle of the *Gilchrist* case, one of the judiciary's early confrontations with the executive branch, see II G. HASKINS & H. JOHNSON, HISTORY OF THE SUPREME COURT 298-305 (P. Freund ed. 1981).

43. *See, e.g.,* Gordon v. United States, 117 U.S. 697, 702 (1885) (posthumously published opinion of Chief Justice Taney drafted in 1864), in which Chief Justice Taney stated, "[N]or

intervention would exceed the constitutional role of the judiciary.[44] Thus, according to the Supreme Court in *Flast v. Cohen*,[45] article III courts have developed the doctrine of justiciability, limiting judicial intervention "to those disputes [1] which confine federal courts to a role consistent with a system of separated powers; and [2] which are traditionally thought to be capable of resolution through the judicial process."[46]

The advisory opinion doctrine, "the oldest and most consistent" strand of article III justiciability,[47] prohibits article III courts from exercising jurisdiction when judicial intervention would not effectuate the determinant settlement of the controversy.[48] The duty of the federal courts, according to Chief Justice Hughes in *Aetna Life Insurance Co. v. Haworth*,[49] is to "decide actual controversies by a judgment which can be carried into effect."[50] While court utterances do not actually transform the physical world, when a court enters a judgment—deciding the legal rights and obligations of the parties—the public force will be brought to bear in enforcing the court's pronouncement.[51] Since real world changes usually occur after the actual issuance of the judicial pronouncement, the judgment must be executable[52] in order for that pronouncement not to be merely advisory regarding the court-ordained outcome.

---

can Congress authorize or require this Court to express an opinion on a case where its judicial power could not be exercised."

44. *See generally* Frankfurter, *Advisory Opinions* in 1 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 475 (1st ed. 1930) (decision upon hypothetical fact situation interferes with function of Congress in Constitutional process of legislation).

45. 392 U.S. 83 (1968).

46. *Id.* at 97.

47. *Id.* at 96 (quoting C. WRIGHT, FEDERAL COURTS 34 (1963)).

48. *See, e.g.*, International Tel. and Tel. v. Alexander, 396 F. Supp. 1150 (D.Del. 1975) (dismissed for want of jurisdiction). The court stated, "It should be noted that this conclusion regarding the advisory nature of any opinion on the merits is entirely dependent upon the Court's further conclusion that [the statutes at issue] . . . preclude the granting of injunctive relief that would be necessary to effectuate any declaration of rights." *Id.* at 1161 n.26. *See also* McKee v. Turner, 491 F.2d 1106, 1107 (9th Cir. 1974) (cited in C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 3529.1 n.13 (1984)) (no justiciable controversy presented when defamation plaintiff seeks only apology, not damages); City of Miami v. Sutton, 181 F.2d 644, 649 (5th Cir. 1950) (dismissed for want of jurisdiction because legal impossibility of obtaining relief renders declaration advisory).

49. 300 U.S. 227 (1937) (upholding constitutionality of the Declaratory Judgment Act). *See infra* note 71.

50. *Id.* at 241.

51. *See* Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

52. The fact that a judgment will be executed likens the rendering of judgment, as an exercise of judicial power, to a speech act. A speech act is best illustrated by the example of a baseball umpire calling a base runner out. By the fact that the umpire so spoke, the base runner became "out" for purposes of the game. Another common example is a promise. When I promise something to someone, the verbal formulation conveys more than the mere intention to make a promise; the spoken words themselves constitute the promise. Thus, the act of promising is carried out by saying "I promise." A judgment is similar to a speech act in the sense that it constitutes more than the mere assemblage of words; it is, in effect, an action

An advisory opinion would be the result in a controversy in which article III judicial intervention would not be executable.[53] Unlike an opinion,[54] executability relates to a judgment having legal effect by operation on the rights of the parties.[55] The doctrine of executability provides that the judgment "admit[s] of specific relief . . . of a conclusive character,"[56] providing a remedy for violation of legal right. Moreover, executability implies that a judgment is an exercise of judicial *power.* "[T]o what purpose establish a judiciary," Justice Johnson inquired in 1808, "with power to take cognizance of certain questions of right, but not power to afford such redress as the case evidently requires? . . . The term 'power' [in article III itself] could with no propriety be applied, nor could the judiciary be denominated a

---

accomplished by the rendering of the opinion. *See, e.g.,* SEARLE, "What is a Speech Act?" in THE PHILOSOPHY OF LANGUAGE (J.R. Searle ed. 1971). Professor Searle describes the conditions for the performance of a speech (illocutionary) act [substituting, here, the idea of a legal judgment for a promise]:

> In the performance of an illocutionary act the speaker [the Judge] intends to produce a certain effect by means of getting the hearer to recognize his intention to produce that effect, and furthermore, if he is using words literally, he intends this recognition to be achieved in virtue of the fact that the rules for using the expressions he utters associate the *expression with the production of* that effect . . . . Thus, each condition will be a necessary condition for the performance of the act of [rendering judgment] and taken collectively the set of conditions will be a sufficient condition for the act to have been performed.

Id. at 46-47 (emphasis added). The effect to be produced is the change in the world represented by the judicial order. *See also infra* note 77.

53. The Supreme Court has essentially adopted this view as the rationale for the limitation of its appellate jurisdiction from state courts to those cases without "independent and adequate" state grounds. If the decision of the state court rests upon independent and adequate grounds, the Supreme Court is without jurisdiction to review the case. *See, e.g.,* Herb v. Pitcairn, 324 U.S. 117, 125 (1945) (independent and adequate state ground doctrine reflects limitations of Supreme Court jurisdiction). As Justice O'Connor noted in Michigan v. Long, 463 U.S. 1032, 1040 (1983), "[r]espect for the independence of state courts as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." The Court noted further that the "jurisdictional concern is that we not 'render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.'" *Id.* at 1042 (quoting Herb v. Pitcairn, 324 U.S. at 126). In the terms of this Article, such a result would not be executable.

54. *Cf.* United States v. Los Angeles R. Co., 273 U.S. 299 (1927) (reversing lower court's assertion of jurisdiction of an administrative order by the Interstate Commerce Commission):

> The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is *merely the formal record of conclusions reached after a study of data* . . . .

Id. at 309-10. (emphasis added).

55. *Cf.* North Carolina v. Rice, 404 U.S. 244, 246 (1971) (federal courts without power to decide questions that cannot affect rights of litigants in case before them).

56. Aetna Life Ins. Co. v. Harworth, 300 U.S. 227, 241 (1937).

department of government, without the means of enforcing its decrees."[57] Thus, the executability doctrine reflects the inherent tension within article III as a limitation of power (no advisory opinions) and a grant of power (independent authority of the judiciary).

B. Executability and Article III Power: The Court of Claims Problem

The Supreme Court has never fully resolved the issue of the limits to the executability of article III judgments,[58] although the Court has struggled with the related problem of its appellate jurisdiction from the Court of Claims.[59] An analysis of the evolution of the Court's view of the constitutional status of that court highlights its understanding of the judicial interest in executability.

Under the act creating the Court of Claims in 1855,[60] Congress created a forum for adjudicating claims against the United States. This act, however, did not authorize the Court of Claims to render "final" judgments.[61] Under the Court of Claims Act, the Treasurer of the United States and the Congress could redetermine the merits of a decision against the United States in that

---

57. Gilchrist v. Collector of Charleston, 10 F. Cas. 355, 361 (C.C.D.S.C. 1808) (No. 5,420) (sitting as Circuit Justice). *See supra* note 42.

58. *See, e.g.,* Mishkin, *Federal Courts as State Reformers,* 35 WASH. & LEE L. REV. 949, 969 n.73 (1978). Mishkin noted that "when the issue of whether litigation against the United States could constitute a 'case or controversy' within Article III was considered, though a key element of doubt was the lack of coercive enforceability of orders against the United States, the Supreme Court always has resolved the issue of justiciability without declaring that the judicial orders could be enforced without congressional concurrence." *Id.*

59. The Supreme Court has also examined this question in regard to territorial courts and the courts established by Congress in the District of Columbia. *See, e.g.,* Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 (1927) (dismissed appeal from District Court of Appeals for the District of Columbia's "administrative" or non-article III decision). The Court stated:

> In the exercise of such function [the District Court of Appeals] does not enter a judgment binding parties in a case as the term case is used in the third article of the Constitution . . . . [In prior cases] appeal was denied because the action of the Court of Appeals was not a final judgment. This reason was a true one, but it should not be understood to imply that, in such a proceeding, circumstances might give it a *form* that would make it a final judgment subject to review by this Court.

Id. at 699 (emphasis added). *See generally* Katz, *Federal Legislative Courts,* 43 HARV. L. REV. 894 (1930).

60. Court of Claims Act, ch. 122, 10 Stat. 612 (1855).

61. *See* Pocono Pines Assembly Hotels Co. v. United States, 73 Ct. Cl. 447, 467 (1932), in which the court stated, "The term 'judgment' is not used in the [Court of Claims] act, and obviously it was carefully prepared with a view of the nonsurrender by Congress of its legislative power over claims . . . against the Government." For commentary on the *Pocono Pines* case in which Congress in effect remanded the final judgment of a federal court, see Sloss, *Mandamus in the Supreme Court Since the Judiciary Act of 1925,* 46 HARV. L. REV. 91, 114-17 (1932), and Note, *The Court of Claims: Judicial Power and Congressional Review,* 46 HARV. L. REV. 677 (1933). For a more recent example, *see* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). *See also* Ross v. United States *ex rel* Prospect Hill Cemetery, 8 App. D.C. 32 (1896) (examining congressional remand in the District of Columbia's courts).

court. In the 1864 case of *Gordon v. United States*,[62] the Supreme Court dismissed for want of jurisdiction an appeal brought pursuant to the act, thus nullifying the provision providing for Supreme Court review. *Gordon* was only the fourth time in the Supreme Court's history that the Court invalidated a Congressional enactment.[63] Nonetheless, there was no opinion issued in the *Gordon* case in 1864;[64] two reports of the Court's decision, however, have survived. One report, *United States v. Jones*,[65] claims that in announcing the opinion of the Court, Chief Justice Chase, having recently succeeded Chief Justice Taney, stated that the statutory authority of the Treasurer and the Congress to revise the decisions of the Court of Claims "denies to [that tribunal] the judicial power, from the exercise of which alone appeals can be taken to this Court. The reasons which necessitate this conclusion may be more fully announced hereafter."[66]

The second source, published in an appendix to the U.S. Reporter in 1885, was the draft opinion that Chief Justice Taney had written in *Gordon*.[67] Taney died before he could have the other Justices approve his opinion.[68] This is the opinion to which Chase's statement that the "reasons which necessitate this conclusion may be more fully announced hereafter" refers.[69] According to Chief Justice Taney, the grant of appellate jurisdiction act was unconstitutional because the Court of Claims was not vested with article III power. Taney, in summarizing the importance of executability to the very definition of article III power, argued as follows:

> The *award of execution is a part, and an essential part* of *every judgment passed by a court exercising [article* III*] judicial power. It is no judgment, in the legal sense of the term, without it.* Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power . . . .[70]

Because the Court of Claims lacked power to issue final judgments, the

---

62. 69 U.S. (2 Wall.) 561 (1864) (dismissed for want of jurisdiction) (opinion of Chief Justice Taney posthumously published in Gordon v. United States, 117 U.S. 697 (1885)).

63. VI C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 52 (P. Freund ed. 1971).

64. 69 U.S. (2 Wall.) 561 (1864).

65. 119 U.S. 477 (1886).

66. *Id.* at 478.

67. 117 U.S. 697 (1885).

68. *See* W. COWEN, P. NICHOLS, & W. BENNET, THE UNITED STATES COURT OF CLAIMS: A HISTORY PART II 24 n.77 (1978).

69. 119 U.S. at 478.

70. 117 U.S. at 702 (emphasis added). Some courts have argued that Taney's position was unnecessary to the holding of *Gordon*, but the same courts do not necessarily address or refute his position. *See, e.g.*, Glidden Co. v. Zdanok, 370 U.S. 530, 569 (1962) (citing United States v. Jones, 119 U.S. 477, 478 (1886)). Other courts have either accepted Taney's opinion as the holding of the case or agree with his conception of the nature of article III power. *See, e.g.*,

Supreme Court could not accept jurisdiction, for to have done so would have exceeded its own grant of constitutional authority.[71] Subsequent to the *Gordon* case, Congress amended the Court of Claims act and withdrew the

---

District of Columbia v. Eslin, 183 U.S. 62, 65 (1901) (Harlan, J.); National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 652 (1949) (Frankfurter, J., dissenting). In Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), Justice Brennan cited Interstate Commerce Comm. v. Brimson, 154 U.S. 447, 484 (1894), quoting the first two sentences of the language from Taney's opinion reproduced in the text. 458 U.S. at 86 n.38. *Cf.* Denny v. Mattoon, 84 Mass. (2 Allen) 361, 378, 79 Am. Dec. 784, 790 (1861). The *Denny* court stated, "It is the exclusive province of courts of justice to apply established principles to cases within their jurisdiction, and to enforce their decisions by rendering judgments and executing them by suitable process." *Id.* As to the merits of Taney's claim that what we mean by something being a *legal* judgment entails the application of the power of execution, *cf.* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1953):

> If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgments [in the non-legal sense]. This seems to deny logic, but does not do so. — It is one thing to describe methods of measurement, and another to state the results of measurement. *But what we call "measuring" is partly determined by a certain constancy in results of measurement.*

Id. at § 242 (emphasis added).

71. 117 U.S. at 706. Taney's language in *Gordon* seemed to trouble some commentators who were proponents of declaratory judgments, because there was no formal "award of execution" for "declaratory" relief. The Supreme Court, however, in upholding the constitutionality of the Declaratory Judgment Act as consistent with the limitations on the judicial power in article III in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937), stated the prerequisites to the exercise of jurisdiction to issue a declaratory judgment:

> The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests . . . . It must be a real and substantial controversy . . . as distinguished from an opinion advising what the law would be upon a hypothetical state of facts . . . . Where there is such a concrete case *admitting of an immediate and definitive determination* of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights if the litigants *may not require* the award of process or the payment of damages.

Id. at 240-41 (citations omitted) (emphasis added). A declaratory judgment is a judgment in the legal sense in that the declaration of rights constitutes a sufficient remedy in the circumstance presented. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966) (ruling that accepting jurisdiction would not result in an advisory opinion because "[a]n appropriate remedy is a judicial determination that continued suspension of the new rule is unnecessary to vindicate rights guaranteed by the Fifteenth Amendment").

The prevailing view since *Aetna*, however, interprets that case as implying that executability is not a necessary quality of article III power, and, more specifically, that Taney's thesis in *Gordon* is either aberrant or troublesome. *See, e.g.*, R. WOLFSON & P. KURLAND, ROBERTSON AND KIRKHAM'S JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 241 n.18 (1951); C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 3529.1 (1984) [hereinafter cited as WRIGHT & MILLER]. The developments leading up to *Aetna*, according to one such commentator, laid "Taney's ghost" to rest. R. HARRIS, THE JUDICIAL POWER OF THE UNITED STATES 54 (1940). This view generally begins with the *a priori* assumption that *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (advisory opinion), and Taney's position in *Gordon* "are two distinct sources, of widely different importance and validity . . . . Gordon . . . introduced a deviant theme that caused trouble while it endured." WRIGHT & MILLER, § 3529.1 at 303 (1984). Taney's position, according to this view, was "never an accurate reflection of the full range of judicial business, [and] has now largely vanished." *Id.*

revisory power of the Treasurer.[72] The Supreme Court, thereafter, accepted appellate jurisdiction.[73]

The constitutional status of the Court of Claims remained unclear until the 1962 case of *Glidden Co. v. Zdanok*.[74] In *Glidden,* the question of whether the Court of Claims was a full article III court entered the case indirectly. *Glidden* was not heard in the Court of Claims. However, one of that court's judges, by designation of the Chief Justice of the Supreme Court, had heard the case in the Second Circuit. The petitioners argued in the Supreme Court that because the Court of Claims was not an article III court, the judge could not hear an article III case. Nine years before, Congress had passed a statute purporting to vest the Court of Claims with article III power,[75] although the appropriations statute for payment of the Court of Claims' judgments against the United States, the only defendant, was limited to $100,000.[76] While discussing the question of coercive enforceablity of orders against the United States—i.e. the absence of executability which was fatal to the *Gordon* appeal—the plurality opinion argued that "[i]f this Court may rely on the good faith of state governments or other public bodies to respond to its judgments, there seems to be no sound reason why the Court of Claims may not rely on the good faith of the United States."[77]

For support, the conventional view notes, for example, the Supreme Court's opinion in Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929), which stated that "it is not necessary, in order to constitute a judicial judgment that there should be both a determination of the rights of the litigants and also *power to issue formal execution* to carry the judgment into effect, in the way that judgments for money or for the possession of land usually are enforced." *Id.* at 725 (dicta for alternate holding) (emphasis added). *Old Colony* relies on Fidelity Nat'l Bank & Trust v. Swope, 274 U.S. 123 (1927), for this proposition, which more fully articulates the position of the Court. The *Swope* Court stated that naturalization proceedings, suits to determine marital status, bills to quiet title where there is adverse possession, interpleader in regard to the stakeholder, and instructions to a trustee "are familiar examples of judicial proceedings which result in an adjudication of the rights of litigants, although *execution is not necessary to carry the judgment into effect,* in the sense that no damages are required to be paid or acts to be performed by the parties." *Id.* at 132 (emphasis added). In other words, the mere declaration by the court would be a self-executing alteration of the rights and obligations of the parties. The view expressed in *Swope* is thus consistent with the proposition that executability of judgments is a requirement for article III adjudication. *See also infra* note 82.

72. 14 Stat. 9 (March 17, 1866) (repealing § 14).

73. *See* De Groot v. United States, 72 U.S. (5 Wall.) 419 (1867).

74. 370 U.S. 530 (1962). *See also* Mishkin, *supra* note 58 (commenting on *Glidden).*

75. 67 Stat. 226 (1953), 28 U.S.C. 171.

76. Act of July 27, 1956, § 1302, 70 Stat. 678, 694, 31 U.S.C. § 724a.

77. 370 U.S. at 571. *Cf.* J. RAWLS, A THEORY OF JUSTICE 237 (1971), in which Professor Rawls states:

> [T]he notion that ought implies can [— a necessary correlate of any legal system —] conveys the idea that those who enact laws and give orders do so in good faith. Legislators and judges . . . must believe that the law can be obeyed; and they are to assume that any orders given can be carried out. Moreover, not only must the authorities act in good faith, but their good faith must be recognized by those subject to their enactments.

Although the enforcement of judgments rendered in the Court of Claims was limited to $100,000, the Supreme Court ruled that the Court of Claims was, nevertheless, a full article III court. The Supreme Court did not suggest that the Court of Claims could only exercise article III power until its annual appropriation was depleted; rather, the Court announced a broader proposition: "We conclude that the presence of the United States as a party defendant . . . does not debar . . . courts from exercising the judicial power provided for in Article III."[78]

Two preliminary conclusions are significant. First, when the United States is a defendant in an article III court, the existence of that jurisdiction itself must be, under the *Flast v. Cohen* analysis, "consistent with a system of separated powers."[79] Second, for an article III court to exercise that jurisdiction and not render mere advisory opinions, any judgment entered against the United States must be executable.

In *Glidden,* as in *Gordon,* the Court clearly thought that the judiciary had a strong institutional interest in executability, a concern grounded in the independence of the judicial branch. The effectiveness of the judicial check on the other branches is dependent upon the finality and executability of judgments within the judiciary's jurisdiction.[80] Nevertheless, the judiciary is not the only governmental branch concerned with the finality of judgments. While the *Glidden* Court felt that it could rely on the "good faith" of the

---

"Good faith" can also be understood in the context of a legal judgment being a speech act. *See* SEARLE, *supra* note 52. Professor J.L. Austin described the contingencies regarding effectuation of a speech act in the following manner: "[I]n consequence of the performance of this [speech act/judgment], such-and-such a future event [e.g. execution], *if* it happens will be in *order,* and such-and-such other events, if *they* happen [e.g. "bad faith" non-execution], will not be in order." J.L. AUSTIN, THE PHILOSOPHY OF LANGUAGE 27 (J.R. Searle ed. 1971) (emphasis in original). In order for a judgment to be executable, the court must have the constitutional authority to hear the claim. *Compare* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948) (President can ignore judgment of article III court only if court not authorized to render judgment) *with* J.L. AUSTIN, *supra,* at 14, in which Professor Austin wrote:

> [The speech act] may be, as the lawyers say, "null and void." If, for example, the speaker [the Judge] is not in a position to perform an act of that kind, or if the object with respect to which he purports to perform it is not suitable for that purpose [e.g. non-justiciable case], then he doesn't manage, simply by issuing his utterance, to carry out the purported act.

78. 370 U.S. at 571. Justice Clark, concurring in the result, did not take issue with the plurality's view on article III and suits against the government. *See id.* at 586-87.

79. 392 U.S. 83, 97 (1968).

80. *Cf.* Mandel v. Myers, 29 Cal. 3d 531, 174 Cal. Rptr. 841, 629 P.2d 935 (1981). Judge Tobriner stated that "[j]ust as the courts may not reevaluate the wisdom or merits of statutes which have secured final passage by the Legislature, the Legislature enjoys no constitutional prerogative to disregard the authority of final court judgments resolving specific controversies within the judiciary's domain." 29 Cal. 3d at 547.

In *Mandel,* the state legislature refused to pay a $25,000 award of attorneys' fees in an institutional reform case. The majority sustained the lower court's order to compel payment out of previously appropriated general operating funds. Chief Justice Bird, in dissent, while arguing that the legislature's actions were unconstitutional, did not support affirmance of the lower court's order. *Id.* at 559-573 (Bird, C.J., dissenting).

United States to "respond to its judgments,"[81] a decision against the United States will only be final in fact if the coordinate branches respect and enforce that judgment.[82] In a judgment against the government for damages, for example, must Congress *ipso facto* surrender its article I, section 9, power over appropriations just because a court has awarded damages?[83] To explore this question, it is necessary both to probe into the specific legal powers of the Congress to limit the executability of judgments, and then to examine the limits that the Constitution places on the exercise of such power by Congress.

III. CONGRESSIONAL POWER AND THE INDEPENDENT ROLE OF THE JUDICIARY

A. The Power of Congress over Executability

One of the major compromises of the Constitutional Convention was the creation of an independent judicial power. The judicial power, however, was created only after agreement that it would be limited by the political branches.[84] Thus, the President has the power to appoint federal judges (with the advice and consent of the Senate)[85] and Congress has control over the removal of judges.[86] More importantly, under the exceptions clause

---

81. 370 U.S. at 571.

82. This observation has led some commentators to argue that a strong concept of executability cannot be a critical element of article III power. *See* sources cited *supra* note 71. For support, these commentators, such as WRIGHT & MILLER, rely on the case of Nashville, Chattanooga & St. Louis R.R. Co. v. Wallace, 288 U.S. 249 (1933). In *Nashville,* the Court stated that "[t]his Court has often exerted its judicial power . . . to review judgments of the Court of Claims, although *no process issues against the Government.*" *Id.* at 263 (emphasis added). Executability is not related to the ability to enforce by process. Enforcement of executability against the government would consist of invalidating as unconstitutional all actions but for good faith execution. If the other branch is to act constitutionally, it must generally execute the judgment. *See infra* text accompanying notes 116-19. The significant distinction is between the court's lack of power to actually execute judgments (changing the physical world itself) versus the exercise of judicial power that renders a judgment executable in the sense that the other branches may not refuse to execute (a "passive" power). *Cf.* Nixon v. Sirica, 487 F.2d 700, 708 (D.C. Cir. 1973) (lack of physical power to enforce judgment does not prevent court from deciding otherwise justiciable case). Thus, although the judiciary may not be able to "force" the Congress to abide by a judgment, it can rule that the actions of Congress are unconstitutional when it does not execute a judgment.

83. In United States *ex rel* Goodrich v. Guthrie, 58 U.S. (17 How.) 284 (1855), the Court stated that the idea that a court could "command the withdrawal of a sum or sums of money from the Treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States . . . would seem to carry with it the most startling considerations — nay, its unavoidable negation, unless this should be presented by some positive and controlling command . . . ." *Id.* at 303.

84. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 11-12 (2d ed. 1973).

85. U.S. Const. art. II, § 2.

86. U.S. Const. art. I, § 3.

of article III, Congress has wide power to control the jurisdiction of the federal courts.[87]

Congress can indirectly alter the jurisdiction of the federal courts through the prospective repeal or limitation on the type of remedies available for certain causes of action otherwise cognizable in article III courts. The best-known example of this power is the Norris-LaGuardia Act,[88] which prohibited the federal courts from granting injunctive relief in labor actions. In *Lauf v. E.G. Shinner & Co.*,[89] the Supreme Court upheld the validitiy of the legislation, and ruled that "[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."[90] In other words, Congress has wide latitude to control the types of remedies granted by the inferior courts under its exception clause power.

Although the exceptions clause does not speak directly of the Congressional power to affect the executability of judgments, conceivably this power is implicit in the exceptions clause given the related limitation on judicial power: the advisory opinion doctrine. Should Congress act to render a judgment unenforceable, the legislature would be, in effect, rendering that judgment merely "advisory." Stated otherwise, it is at least plausible that Congressional interference with executability, if carried to the extreme of limiting the ability of a court to provide any remedy in the particular case, represents the exercise of Congressional power under the exceptions clause, the power to limit the jurisdiction of article III courts. The inquiry here focuses on whether Congress can regulate the jurisdiction of the federal courts to retroactively deprive a court of jurisdiction after its judgment has become (for judicial purposes) final. More directly, may the Congress unilaterally modify a remedy granted by an article III court in a given case?

B. The Limitations on the Power of Congress

According to the Supreme Court in *McCullough v. Virginia*,[91] "[i]t is not within the power of a legislature to take away rights which have been once vested by a judgment . . . . [When judicial decisions] have passed into judgment the power of the legislature to disturb the rights created thereby ceases."[92] As the Circuit Court for the District of Columbia has observed, "[a] contrary general rule would subject all judicial action to superior legislative review, a regime obviously inconsistent with due process of law and subversive of the constitutional independence of the judicial branch of government."[93]

---

87. U.S. Const. art. III, § 1.
88. Act of March 23, 1932, ch. 90, 47 Stat. 71, 29 U.S.C. § 107.
89. 303 U.S. 323 (1938).
90. *Id.* at 330.
91. 172 U.S. 102 (1898).
92. *Id.* at 123-24.
93. Daylo v. Administrator of Veterans' Affairs, 501 F.2d 811, 816 (D.C. Cir. 1974).

In the *Wheeling Bridge* case,[94] the Supreme Court nevertheless created a narrow exception to this rule. In an earlier case, the Court had held that a bridge over an interstate waterway constituted a nuisance to a private party whose special damages justified the award of an injunction ordering removal of the bridge and enjoining the defendants from reconstruction or continuance. Subsequent to the litigation, Congress passed a statute that legalized the bridge. The Supreme Court dissolved the injunction and sustained the legislative action.[95] The Court accepted the proposition that legislation "cannot have the effect and operation to annul the judgment of the Court already rendered, or the rights determined thereby in favor of the plaintiff."[96] The Court nevertheless distinguished the action of Congress in "so far as it respects that portion of the decree directing the abatement of the bridge."[97]

The Court's decision did not suggest that Congress has the power to modify all judgments *post hoc*. Rather, the *Wheeling* exception has two necessary components. First, if Congress is to retain discretion to modify a judgment, the relief granted must be, as characterized by the *Wheeling* Court, "executory."[98] According to the Court, in a later case interpreting the executory aspect of the *Wheeling* test, "the distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change [executable remedies], and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative [executory remedies]."[99] As opposed to executable relief, maintenance of the injunction is dependent upon the continuing existence of the right upon which injunctive relief was granted. An executable judgment, on the other hand, is the creation of a legal obligation, usually requiring future action such as the payment of damages, that is based upon a fact situation to which the law provides a legal remedy.[100]

In *Prudential Insurance Co. v. Benjamin*,[101] the Court clarified the second aspect of the *Wheeling* exception: the conditions under which Congress can redetermine the underlying right or limit the scope of the remedy granted. In *Prudential*, Congress had previously enacted legislation which authorized states to tax out-of-state insurance companies differentially. The petitioners argued that Congress could not validate state action that would otherwise,

---

94. Pennsylvania v. The Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855).

95. *Id.* at 437. While the Court dissolved the injunction, it made no mention of whether Congress had retroactively deprived the Court of jurisdiction.

96. *Id.* at 431.

97. *Id.*

98. *Id.*

99. United States v. Swift & Co., 286 U.S. 106, 114 (1932).

100. As the *Wheeling* Court noted:

> [I]f the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages the right to these would have passed beyond the reach of the power of Congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the Court.

59 U.S. (18 How.) at 431.

101. 328 U.S. 408 (1946).

in the absence of such an enabling statute, violate the Commerce Clause. The Court rejected this view, and reasoned that such a position would be tantamount to holding that Congress could not impose a regulation which the Court would find prohibited by the Commerce Clause.[102] According to the *Prudential* Court, such a position would be inconsistent with the *Wheeling* holding, in which the Court had deferred to a "congressional judgment contradicting its own previous one."[103] In a footnote the Court highlighted two relevant factors in sustaining a legislative override of its decision: special Congressional expertise in the fact-finding in a particular area (e.g., regulation of interstate commerce) and reliance by the Court on an inference from Congressional silence for its decision.[104] According to the Court, "Congress' explicit repudiation of the attitude inferentially attributed to it from its silence, compels reversal of the Court's earlier pronounced view."[105]

In areas of special competence, Congress may effectively retain power to reverse the judgment of an article III court when the relief is executory or contingent, and involves the supervision of future conduct dependent upon a right whose existence was inferred from congressional silence. The institutional relationship of the judiciary and the Congress is one rationalization for the *Wheeling* exception. Because an injunction prospectively determines the rights of the parties, the *Wheeling* exception is arguably based upon a principle of deference to the democratic re-determination of the scope of the underlying rights in question. In the *Wheeling* situation, as argued by the *Prudential* Court, the prior decision was based upon an erroneous inference of Congressional intent. If the judiciary prohibited corrective action by the legislature, it would interfere with the Congressional lawmaking function, especially in the area of the regulation of interstate commerce. Rather, if the relief granted by a court is an executable judgment, Congress ordinarily cannot disturb the rights created thereby.

---

102. *Id.* at 422.

103. *Id.* at 424.

104. *Id.* at 425 n. 32. Some commentators view the second aspect of the *Wheeling* test as a congressional redetermination of the scope of a so-called "public right." Although a useful concept, it is difficult to clearly determine what is a public right versus a private one. Gordon Young, for example, acknowledges the malleability of such a distinction at the margin but argues from this reading of *Wheeling*. *See* Young, *Congressional Regulation of Federal Court's Jurisdiction and Processes:* United States v. Klein *Revisited,* 1981 WISC. L. REV. 1189, 1243. Young draws the distinction between government operation in a regulatory capacity ("public") and government involvement in a property contest ("private"), although he noted that "the very difficult question of when the government acts in a regulatory capacity remains." *Id.* The Supreme Court has used the "public rights" framework periodically. *See, e.g.*, Northern Pipe Line Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982) (plurality opinion) (state law claim involved no public right, so that Congress could not exercise judicial authority over matter through article I bankruptcy courts); Hodges v. Snyder, 261 U.S. 600, 603-04 (1923) (McCulloch rule does not apply to suit brought for enforcement of public right, which may be annulled by subsequent legislation after established by the judgment of the court) (citing *Wheeling).* The Court's analysis in *Prudential* provides, in my opinion, a better framework than the classificatory public rights doctrine. Similar factors would be considered in either framework but the focus here is somewhat different.

105. 328 U.S. at 425 n.32. Justice Daniel's concurring opinion in *Wheeling* argued that:

C. *The Separation of Powers Concerns*

Judicial interest in executability derives from the judiciary's need for independence as a co-equal branch of government. In 1792, the judges noted in *Hayburn's Case* that "[n]o decision of any court of the United States can, under any circumstances, . . . agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature in whom no judicial power of any kind appears to be vested."[106] In a suit against the United States, the Supreme Court ruled in *Glidden* that reliance on the good faith of Congress to execute a judgment comported with the limitations on the judicial power created by article III. The Court did not announce a bright line rule that all judgments against the government must be enforced by the coordinate branches. Thus, if jurisdiction over the United States is consistent with the separation of powers, the competing concept of checks and balances may legitimate, under certain circumstances, a congressional refusal to abide by an otherwise executable judgment or a congressional modification of an executory remedy outside the scope of the *Wheeling* exception.

The Supreme Court's opinion in *United States v. Nixon,*[107] provides the basic framework for contemporary analysis of a clash of power between the judiciary and a coordinate branch.[108] Examination of the relevant factors in that case provides a useful background to analyze a conflict between the judiciary and the legislature[109] in a dispute over the execution of a judgment. The inquiry explores the limits of the powers of both branches in the penumbra between good versus bad faith non-execution outside of the general rule as established by *McCullough, Hayburn*, and *Wheeling*.

In *Nixon,* the President asserted a broad claim of executive privilege derived from the grant of the executive power.[110] The privilege would have

---

> [Congress has] completely overthrown every foundation upon which the decrees of this court, the orders of the circuit judge, and every motion purporting to be based upon these or either of them, could rest. I am, therefore, of the opinion that each and every motion submitted . . . under color of the decrees heretofore pronounced . . . should be overruled; that the injunction . . . should be dissolved . . . .

59 U.S. (18 How.) at 458.

106. 2 U.S. (2 Dall.) 409, 413 n. 4 (1792). *See also* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948) (judgments within powers vested in courts by Judiciary Article of Constitution may not lawfully be revised, overturned or refused faith and credit by another department of government).

107. 418 U.S. 683 (1974).

108. *See, e.g., Symposium on* United States v. Nixon, 22 UCLA L. REV. 47 (1974).

109. While the controversy in the Chicago case has centered around both the Congress and the President, the discussion here will focus on the legislature. The President has virtually no authority to disregard an order of the Court. In addition to the *Nixon* case itself, *see* Kendall v. United States, 37 U.S. (12 Pet.) 524, 613 (1838) (contention that obligation imposed on President to see laws executed implies power to forbid execution is novel and inadmissible construction of constitution).

110. The Court acknowledged in its analysis that "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." 418 U.S. at 703.

frustrated the judicial process by preventing the disclosure of relevant and probative evidence in a continuing trial. In sustaining the existence of a presumptive article II Presidential privilege, the Supreme Court noted that it originated from "the supremacy of each branch within its own assigned area of constitutional duties."[111] Nevertheless, the Court went on to compel disclosure of the subpoenaed tapes and documents.

The Court based its decision on constitutional grounds and attempted to resolve the conflict by classifying the competing powers of the two branches: "The *generalized* assertion of [article II] privilege must yield to the *demonstrated, specific need* for evidence in a pending criminal trial."[112] Thus, the Court purported to favor the "specific" need of one branch over the "generalized" grant of constitutional autonomy and power of a second branch.

At face value, the usefulness of the Court's test is limited because the test is significantly malleable. Even in *Nixon,* the President could have argued that under the "general versus specific" test, the President's need for article II privilege was so vital to the daily functioning of the Executive Branch that it outweighed a court's "general" need for evidence in trials—an interest circumscribed by a host of evidentiary rules and privileges.

Apparently, the *Nixon* Court undertook a comparative inquiry measuring the degree to which each branch intruded into the essential operations of the other and, subsequently, invalidated the more intrusive action.[113] The Court recognized the legitimacy of the need for executive privilege "to the extent this interest [in confidentiality] relates to the effective discharge of a President's powers."[114] The Court, however, argued that an absolute Presidential privilege, undifferentiated from any essential need of the Executive, would "gravely impair the role of the courts under Art. III."[115] The President's claim was "general" in the sense that it applied to non-military and non-diplomatic matters. Once the Court focused on the potential scope of the privilege, it naturally became concerned with the degree to which such a "general" privilege might hamper the operation of

111. *Id.* at 705.

112. *Id.* at 713 (emphasis added).

113. *See* Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies,* 30 STAN. L. REV. 661, 700-01 (1978):

> Nixon, then, is a refined application of all four of the traditional judicial standards for separation of powers. It adopts the hydraulic assumption that the power of each branch is delimited by the function of the competing branch. The "essentialness" of the function is relevant as a comparative measure of the degree of intrusion into each branch's function, considered in the abstract. The distinction between "internal" and "external" uses of power is restated as a more general inquiry into the comparative degree of intrusion into the actual operations of each branch. The Jackson formulation [in the Steel Seizure Case, 343 U.S. 579, 635-38 (1952) (concurring opinion)] is followed insofar as it suggests that the authority of one branch should not be invalidated unless there is an actual conflict with another branch, and then only to the minimum extent necessary to resolve the conflict.

114. 418 U.S. at 711.

115. *Id.* at 707.

the courts. Thus, the Court argued that to sustain such a privilege would effectively "cut deeply into the guarantee of due process of law and gravely impair the function of the courts."[116]

The general rule of *Hayburn* and *McCullough* and the judiciary's interest in executability as articulated in *Gordon* and *Glidden*, for example, leads to the presumption that in a conflict between the branches over the execution of a judgment, Congress must counterpose a more specific institutional interest than the President did in *Nixon*. In other words, Congress cannot, consistent with the separation of powers, assert its "general" need to control the appropriations power in contravention of a final court order—a more compelling institutional interest is required.

In a conflict over executability, the Court would examine the extent to which sustaining executability would interfere with the effective discharge of the constitutional obligations of Congress. On the other hand, the Court would consider its own need to secure execution of its judgments in order to preserve the role and function of the courts in a justice system commited to the due process of law. As the Supreme Court noted in the 1980 case of *United States v. Sioux Nation of Indians,*[117] if Congress simply refused to give effect to a judgment, such "legislative review of a judicial decision would interfere with the independent functions of the judiciary."[118] The *Nixon* analysis suggests that only under unusual and compelling circumstances would congressional action refusing to execute a judgment be constitutional.

Although a court may have the power to declare a congressional refusal to execute a violation of the separation of powers, the judiciary lacks real power to enforce its decrees because Congress has the political power to refuse to execute, although it *theoretically* may lack the constitutional authority to do so. But, as Henry Hart noted, "[i]f Congress wants to frustrate the judicial check, our constitutional tradition requires that it be made to say so unmistakably, so that the people will understand and the political check can operate."[119] The limit to the judicial response is the amenability of the other branches to yield to a court's declaration of law. When the coordinate branches refuse to abide by the judiciary's pronouncement, the region of conflict becomes politics.

IV. CHICAGO REDUX: THE EXECUTABILITY OF THE CONSENT DECREE

The history of the *Chicago* case reveals a consistent pattern of Presidential and Congressional action that impairs the executability of a final judicial decree. Albeit in the absence of any independent judicial findings of violation

116. *Id.* at 712.

117. 448 U.S. 371 (1980).

118. *Id.* at 391-92.

119. Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic,* 66 HARV. L. REV. 1362, 1399 (1953); *cf.* Munn v. Illinois, 94 U.S. (4 Otto) 113, 134 (1877) (to protect against abuses by legislatures that courts unable to control, the people must resort to polls).

of law or determination of disputed fact, a consent decree does resolve the case or controversy presented to the court.[120] As the Supreme Court has recognized, "[i]t is a judicial function and an exercise of the judicial power to render a judgment on consent. *A judgment upon consent is a 'judicial act.'* . . . [I]t adjudicates the plaintiff's right of recovery and the extent of it, both of which are essential elements of the judgment."[121] As an exercise of judicial power, a consent decree is, in effect, a judgment to the full extent of the obligation created.[122]

According to the analysis developed in Parts II and III of this Article, Congress may limit the execution of a judgment only if Congress redefines the right—inferred from its silence—upon which executory relief was dependent in an area of particular legislative competence or, under the separation of powers framework of *Nixon,* if Congress can assert an institutional more "specific" need than the judiciary's interest in executability.

The concerns expressed by the Supreme Court in *McCullough*[123]—the protection of settled expectations and the private rights created by a judgment—would be implicated by a revision of the decree by the Congress. With the entry of the decree, the Board acquired contract/judgment rights in the decree. Moreover, the federal government has assumed the responsibility of vindicating the rights of the students in the Chicago school system. In the desegregation context, as the Court noted in *Brown II,* "at stake is the personal interest of [students] in admission to public schools as soon as practicable on a nondiscriminatory basis."[124] In effect, the Department of Justice, the plaintiff in *Chicago,* was authorized to sue as a surrogate for individuals asserting their private rights. Indeed, in this case, the district court both denied intervention to such groups as the NAACP and the

---

120. In *Chicago,* 88 F.R.D. 679 (N.D. Ill. 1981), the court stated, "Here the Consent Decree . . . has been entered *without* the need to establish that the Board's predecessors in office have violated the Constitution." *Id.* at 681 (emphasis in original) (footnote omitted). At least in regard to violation of federal laws, "the long-standing rule is that a district court has power to enter a consent decree without first determining that a statutory violation has occurred." Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1125 (D.C. Cir. 1983), *cert. denied* 104 S. Ct. 2668 (1984). "Finally, in public law litigation, where compliance depends in part upon public acceptance and the least possible acrimony between the parties, settlement is particularly welcome for it signifies cooperation between the parties." *Chicago,* 88 F.R.D. 679, 681 (N.D. Ill. 1981) (quoting initial memorandum of the United States requesting entry of the consent decree).

121. In Pope v. United States, 323 U.S. 1 (1944), the Court stated that "[i]t is likewise a judicial act to give judgment on a legal obligation which the court finds to be established by stipulated facts . . . or when the defendant is in default." *Id.* at 12 (citations omitted) (emphasis added).

122. *See, e.g.,* United States v. ITT Continental Baking Co., 420 U.S. 223, 236 n. 10 (1975) (consent decrees have attributes of contracts and judicial decrees); *Chicago,* No. 80C 5124, slip op. at 2 (N.D. Ill. Oct. 15, 1985) (consent decree is enforceable decree and order of court) (footnote omitted).

123. 172 U.S. 102 (1898).

124. Brown v. Board of Educ. (Brown II), 349 U.S. 294, 300 (1955). The district court's most recent opinion expressed the hope that "the government will rekindle its lost zeal for

Mexican American Legal Defense and Education Fund (MALDEF)[125] and dismissed a continuing private action alleging unconstitutional segregation in the Chicago school system because of the government's suit.[126] Consequently, the government's actions in the *Chicago* case should be scrutinized closely in order to protect both the rights of the Board of Education and the interests of the students in the Chicago school system as represented by the government.

The *Chicago* case does not satisfy the requirements of the *Wheeling* exception, which justifies a congressional modification of an executory judgment. Although the consent decree contemplates future action on behalf of the government, the "substantial obligation" of the United States became fixed with the approval of the decree. The existence of the obligation itself is an executable judgment. The scope of the legal obligation embodied in the consent decree is the result of a judicial act determined by the examination of the relevant negotiations and testimony leading to approval of the decree. Additionally, unlike the issuance of an injuction, the government, by entering into the consent decree, has submitted itself to the supervision of the judiciary. Therefore, according to the *Wheeling* test, Congress cannot extinguish—in law or in effect—the obligations of the government under the decree.[127]

For Congress to interfere with the execution of a judgment outside of the *Wheeling* exception, it must present an exercise of power protecting a specific need essential to that branch's constitutionally assigned duties. Although control over appropriations is one of the national legislature's preeminent powers,[128] fulfilling the obligation created under the decree would not eviscerate Congress' institutionally specific need to control federal expenditures. The amount at stake in the last appeal to the Seventh Circuit was $28 million,

---

representing those whom it sought to protect in the first place when it filed this suit: Chicago's school children who are entitled to receive a quality and desegregated education." *Chicago*, No. 80C 5124, slip op. at 287 (N.D. Ill. Oct. 15, 1985).

125. *Chicago*, 88 F.R.D. 679 (N.D. Ill. 1981).

126. Johnson v. Board of Educ., 567 F. Supp. 290 (N.D. Ill. 1983).

127. *Cf.* Michaelson v. United States, St. P., M. & O. Ry., 266 U.S. 42, 66 (1924) (attributes, such as contempt power, inherent in judicial power and inseparable from it, cannot be abrogated or rendered "practically inoperative"); Fairbank v. United States, 181 U.S. 283, 294 (1901) (result directly restricted by constitution cannot be accomplished indirectly by legislation).

In the context of the *Chicago* case, the district court interpreted the most recent Seventh Circuit opinion as precluding "the court from finding that failure to lobby or reprogram amounts [to fund the decree] amounts to bad faith *per se*, or that the mere act of creating general policy which effectively limits the funds available to the Board amounts to bad faith . . . ." *Chicago*, No. 80C 5124, slip op. at 11 (N.D. Ill. Oct. 15, 1985). This does not mean, however, that Congress or the President has the authority to render the decree itself practically inoperative. The important consideration for the court is the ultimate effect of congressional action upon the decree. While failure to appropriate may not be a *per se* violation, refusing to implement the decree at all would constitute, in effect, a legislative override of the court order, and thus would violate the separation of powers.

128. *See, e.g.*, Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1850) (appropriation by Congress necessary to draw money from Treasury).

roughly equivalent to .003% of the United States annual budget.[129] Additionally, the statute providing for payment of judgments against the United States, which provided for a limit of only $100,000 at the time of *Glidden* in 1962, currently provides no ceiling for the payment of judgments against the United States, thus, evincing Congressional intent to pay judgments as a matter of course.[130] As President Lincoln observed upon establishing the Court of Claims, it is "as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to adminster the same between private litigants."[131] Congress' generalized assertion of the power of appropriations, undifferentiated from any specific institutional need should yield to the judiciary's interest in the executability of its judgments.

More than five years after entry of the consent decree, the political branches have pursued a course of action that impairs the executability of a final judicial order without interposing an especially significant need to refuse to execute in the *Chicago* case. Through their actions, the President and the Congress may have interfered with the role and function of the federal courts and may have violated the constitutional separation of powers.

CONCLUSION

The executability of article III judgments provides for the independence of the sovereign power vested in the judiciary as a co-equal branch of government. Executability as a concept captures the inherent tension within article III as both a grant and a limitation of power. When judicial intervention will not yield an executable judgment, an article III court is disempowered from expressing its view on the subject matter. Executability, as co-extensive with the advisory opinion doctrine, thus confines the federal courts to a limited role in the constitutional order. To the contrary, the constitutional commitment to the independent role of the judiciary implies that another branch of the government cannot arbitrarily revise the judgments of article III courts. Thus, executability also expresses the judiciary's interest in the execution of a judgment once rendered. In the context of the *Chicago* case, the doctrine of executability provides a fruitful analytic framework that exposes many of the deeper issues involved in this continuing constitutional conflict.

---

129. Brief of Board of Education of the City of Chicago, No. 84-2405 at 41, *Chicago*, 744 F.2d 1300 (7th Cir. 1984).

130. 31 U.S.C. §1304 (1982).

131. State of the Union Message of 1861, CONG. GLOBE, 37th Cong., 2d Sess., app. 2 (1862), *quoted in* United States v. Mitchell, 103 S. Ct. 2961, 2966 (1983).