SETOFFS AGAINST THE GOVERNMENT'S JUDGMENT CREDITORS AS COMPULSORY COUNTERCLAIMS (OR, THE ARTFUL ADVOCATE REWARDED)*

THROUGH skillful procedural maneuvering, the compulsory counterclaim rule of the Court of Claims—rule 17(a)—can be played off against the statute permitting the United States to withhold alleged setoffs from its judgment creditors. In substance, rule 17(a) requires the Government to plead "any claim which at the time of serving . . . [its] answer the . . . [Government] has against any plaintiff, if . . . [the claim] arises out of the transaction or occurrence that is the subject matter of the [plaintiff's] petition . . . ."[1] The setoff statute, on the other hand, authorizes the Comptroller General of the United States to withhold from a judgment creditor any amounts which the Government asserts are owed it by the creditor.[2] Should a creditor object to

*United States v. Eastport S.S. Corp., 255 F.2d 795 (2d Cir. 1958), *affirming* 142 F. Supp. 375 (S.D.N.Y. 1956).

1. Compulsory Counterclaims: The answer shall state as a counterclaim any claim which at the time of serving the answer the defendant has against any plaintiff, if it arises out of the transaction or occurrence that is the subject matter of the petition and does not require for its adjudication the presence of third parties of whom the Court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action, and except that in any case, where the hearing in the first instance is limited to the issues of fact and law relating to the right of plaintiff to recover, defendant may plead such a counterclaim within 60 days after the Court shall have rendered judgment determining that plaintiff has a right to recover.

CT. CL. R. 17(a). The Court of Claims had no compulsory counterclaim rule prior to 1953, when the court's rules were generally revised. Rule 17(a) was derived from rule 13(a) of the Federal Rules of Civil Procedure. See U.S. CODE CONG. & AD. NEWS 2645, 2646 (1951).

2. Offsets against judgments against United States. When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the

a withholding, the statute directs the Comptroller to cause suit to be commenced promptly in order that the disputed government claim be reduced to judgment.[3] If the Government loses such a lawsuit, it must pay the creditor

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same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff.

18 Stat. 481 (1875), as amended, 31 U.S.C. § 227 (1952).

Equity has long recognized analogous proceedings for restraining the collection of a judgment when the judgment creditor is possibly insolvent and unable to pay a claim against him by the judgment debtor. North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co., 152 U.S. 596, 616 (1894). Although in practice the Comptroller withholds government claims only when the judgment creditor's solvency is questionable, it has been suggested that the withholding is required in every case. See Whelan, *A Government Contractor's Remedies; Claims and Counterclaims*, 42 VA. L. REV. 301, 306 (1956). The Comptroller acts in a ministerial capacity in settling claims based on judgments; and courts have stated that he cannot go behind a judgment into the merits of a claim and refuse to pay. See, *e.g.*, Hines v. United States *ex rel.* Marsh, 105 F.2d 85 (D.C. Cir. 1939); Foster, *The General Accounting Office and Government Claims* (pts. 1-3), 16 J.B.A.D.C. 193, 275, 321 (1949). Even without the setoff statute, the United States has the conventional creditor's right to apply moneys of his debtor in hand to extinguish debts due from a debtor who is also a nonjudgment creditor. United States v. Munsey Trust Co., 332 U.S. 234 (1947); Barry v. United States, 229 U.S. 47 (1913). The Government may also set off erroneous overpayments on previous claims against a later claim by an overpaid claimant. See, *e.g.*, 22 DECS. COMP. GEN. 952 (1943). But such revision of prior settlements is restricted by a one-year statute of limitations. 28 Stat. 207 (1894), as amended, 31 U.S.C. § 74 (1952), Kruszewski v. United States, 163 F.2d 884 (7th Cir. 1947) (alternative holding), *cert. denied*, 333 U.S. 880 (1948). In contrast, the General Accounting Office has not allowed a private debtor to set off a debt allegedly owed him by the Government. 30 DECS. COMP. GEN. 105 (1950).

In order to facilitate the withholding of setoffs, the General Accounting Office maintains a record of a large number of debts owed the United States. Foster, *supra* at 326. In 1956, the GAO had 160,000 such claims on file; in 1957, 114,363. 1956 COMP. GEN. ANN. REP. 6-7; 1957 *id.* at 284. In 1957, $1,357,097 were collected by the process of setoff. *Ibid.*

3. The Comptroller's duty to sue is mandatory and not discretionary. National Bulk Carriers, Inc. v. Warren, 82 F. Supp. 511 (D.D.C. 1949) (dictum). For the judgment creditor's power to bring mandamus when the Comptroller delays suit on a withholding, see note 42 *infra*. The provision for suit should a judgment creditor object to a setoff is vital to the validity of the act. Otherwise, the re-examination and revision of judgments by an administrative officer would raise constitutional questions. See United States v. O'Grady, 89 U.S. (22 Wall.) 641 (1874). Not the administrative determination that a setoff exists but the consent of the judgment creditor, or, when he protests, the subsequent adjudication, allows the Government to reduce a judgment presented for payment. Hines v. United States *ex rel.* Marsh, 105 F.2d 85, 89 (D.C. Cir. 1939); Bonnafon v. United States, 14 Ct. Cl. 484, 491 (1878). The Comptroller's suit is required even when the Government's claim has been recognized by lawful though nonjudicial authority. Hines v. United States, *supra*.

interest on the withheld sum, as well as the sum itself.[4] Adroit creditors can, however, seize upon rule 17(a) to shortcut these statutory provisions through tactics revealed in recent litigation.[5]

In the 1954 case of *Eastport Steamship Corp. v. United States*, the Court of Claims awarded the petitioning company a $54,097 judgment.[6] When Eastport presented this judgment to the Comptroller General, he paid it in part but withheld $31,102, which represented an unrelated government admiralty claim against Eastport.[7] Disregarding the procedure specified in the setoff statute, Eastport declined to await suit by the Government and, eight days after the withholding, commenced a new action in the Court of Claims to recover the unpaid portion of its original judgment.[8] Thirty-two days later, the United States, pursuant to the setoff law, sued on its admiralty claim in the United States District Court for the Southern District of New York.[9]

In its second action before the Court of Claims, Eastport denied indebtedness to the United States for the withheld $31,102, asserted that the withholding was wrongful, and demanded payment of six per cent interest as authorized by the setoff statute.[10] The United States moved to dismiss Eastport's action on the grounds that it raised issues cognizable only in admiralty, was intended to frustrate the settlement procedure of the setoff statute,

4. Interest at 6% is allowed from the time of withholding if judgment is rendered against the Government, or if the amount the Government recovers by suit is less than the amount withheld. American Potash Co. v. United States, 80 Ct. Cl. 160, 8 F. Supp. 717 (1934) (dictum). Interest at 4% is authorized from the date of the filing of the transcript of the judgment to the date of the mandate of affirmance, should the Supreme Court affirm a judgment against the United States on government petition for review. 28 U.S.C. § 2516(b) (1952).

In other contexts, the United States is not ordinarily liable for interest on claims against it. 28 U.S.C. § 2516 (1952); see, *e.g.*, United States v. Goltra, 312 U.S. 203 (1941); United States v. Commonwealth & Dominion Line, Ltd., 278 U.S. 427 (1929).

5. Eastport S.S. Corp. v. United States, 128 Ct. Cl. 778 (1954) (original judgment); 131 Ct. Cl. 210, 130 F. Supp. 333 (1955) (denial of government motion to dismiss action on judgment); 135 Ct. Cl. 175, 140 F. Supp. 773 (1956) (Eastport's motion to strike government answer granted); United States v. Eastport S.S. Corp., 142 F. Supp. 375 (S.D.N.Y. 1956) (Eastport's motion to dismiss granted), *aff'd*, 255 F.2d 795 (2d Cir. 1958).

6. 128 Ct. Cl. 778 (1954). Eastport purchased a steamship from the United States in 1948 under a contract of sale which provided that the amount paid by Eastport was to be reduced by an amount equal to the cost of repairs necessary to enable Eastport to register the vessel. The action and judgment for $54,097 followed the Government's alleged refusal to reimburse Eastport for such costs. 255 F.2d at 797.

7. The basis of the Government's claim was a lease of government vessels to Eastport. According to the Government, Eastport owed $109,126 additional charter hire of which it had paid only $78,024. *Ibid.*

8. *Id.* at 806.

9. Eastport conceded that the Government's complaint was filed "with uncommon speed." Memorandum in Opposition to Defendant's Motion to Dismiss, p. 14, Eastport S.S. Corp. v. United States, 131 Ct. Cl. 210, 130 F. Supp. 333 (1955).

10. Eastport's Petition in the Court of Claims, Oct. 7, 1954.

and would deprive the United States of control over its own claim.[11] The court denied this motion. In so doing, it held that the setoff statute does not provide an exclusive procedure for adjudicating disputed sums which the Comptroller withholds.[12]

The United States, preferring to prosecute its own action in the district court[13] and finding Eastport to be solvent,[14] then returned the withheld money and, after some hesitation, also confessed judgment for the six per cent interest demanded by Eastport.[15] Meanwhile, back in the district court, Eastport had called attention to its second action in the Court of Claims and moved to dismiss the Government's admiralty complaint.[16] The company had asserted that, under rule 17(a), the government action should now be barred because it rested on a compulsory counterclaim to Eastport's suit for interest in the Court of Claims.[17] Both the district court and the Second Circuit sus-

11. Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim Upon Which Relief May Be Granted, Oct. 29, 1954.

12. 131 Ct. Cl. 210, 130 F. Supp. 333 (1955).

13. The United States hoped to avoid adverse precedent in the Court of Claims. Prior to Sword Line, Inc. v. United States, 351 U.S. 976 (1956), *affirming per curiam* 228 F.2d 344 (2d Cir. 1955), 230 F.2d 75 (2d Cir. 1956)—which held this type of claim, see note 7 *supra*, to sound exclusively in admiralty and not to fall within the Court of Claims' jurisdiction—the Court of Claims had asserted jurisdiction over several cases involving the same issues. And the Court of Claims, in a pair of now-stranded cases, had resolved these issues against the Government. A. H. Bull S.S. Co. v. United States, 123 Ct. Cl. 520, 528, 108 F. Supp. 95, 99 (1952); Southeastern Oil Fla., Inc. v. United States, 127 Ct. Cl. 409, 414, 119 F. Supp. 731, 734 (1933). The United States hoped to prevail in the federal district courts and to avoid these Court of Claims precedents which would, after *Sword Line*, come to life only if a government counterclaim raised the issues. *Compare* Smith-Johnson S.S. Corp. v. United States, 135 Ct. Cl. 869, 139 F. Supp. 298 (1956), *with* Smith-Johnson S.S. Corp. v. United States, 135 Ct. Cl. 866, 142 F. Supp. 367 (1956).

14. The Comptroller's right to withhold under the setoff statute is usually exercised after protest by the creditor only if a question exists as to the judgment creditor's solvency. Interviews with United States Attorneys, Nov. 1958; see Foster, *supra* note 2, at 333. *But see* Whelan, *supra* note 2, at 306 (requiring withholding in every case).

15. Answer of the United States, July 1, 1955; Defendant's Answering Memorandum on Plaintiff's Motion to Strike, March 15, 1956.

16. 142 F. Supp. at 375.

17. Such a bar is of judicial origin and is not specifically required by statute. 3 MOORE, FEDERAL PRACTICE ¶ 13.12, at 27 (2d ed. 1948). Some writers justify the sanction by grounding the compulsory counterclaim rule in principles of res judicata. *Id.* ¶ 13.12; Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 26 (1942). See also Switzer Bros. v. Locklin, 207 F.2d 483, 488 (7th Cir. 1953); Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp., 154 F.2d 814, 818 (2d Cir. 1946) (dissenting opinion); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 832 (1952). This rationale implies that the counterclaim rule broadens the scope of the cause of action determined by the judgment. Wright, *Estoppel by Rule: The Compulsory Counterclaim under Modern Pleading*, 38 MINN. L. REV. 423, 428 (1954). This explanation has been termed correct "only on the assumption that there is but one cause of action; otherwise res judicata can have no application, and the relevant doctrine is that of collateral estoppel, which has not customarily applied to unlitigated issues." *Id.* at 429.

tained the motion to dismiss.[18] These courts reasoned that, since the setoff statute only authorized interest when a claim on which a withholding is based proves groundless, and since the Government's district court claim therefore raised the very issues of merit presented by Eastport's second action in the Court of Claims,[19] Eastport's action for interest and the Government's admiralty claim were "logically related."[20]

The results reached by the Second Circuit and district court were not inescapable, for no clear policy required that rule 17(a), here construed for the first time,[21] be applied. Designed to prevent the relitigation of once-heard facts,[22] the rule seems inapposite in the instant case because Eastport's second Court of Claims action never reached trial.[23] Moreover, the wording "claim which . . . arises out of the transaction or occurrence"[24] suggests that the rule does not comprehend a counterclaim that matures prior to the cause forming the basis of the complaint, nor situations in which the counterclaim pertains to only one of a multiplicity of actionable events alleged in the complaint.

Under this commentator's approach, a compulsory counterclaim would not be barred if the defendant had not knowingly refrained from asserting his claim, or if the previous action had ended in a consent or default judgment concluded before the defendant had actually waived his counterclaim. *Ibid.*

18. 142 F. Supp. 375 (S.D.N.Y. 1956), *aff'd*, 255 F.2d 795 (2d Cir. 1958).

The district court should have denied the motion in view of the fact that the second Court of Claims action was still pending. By the time the case reached the Second Circuit, the second Court of Claims action had been concluded and this issue rendered moot. 255 F.2d at 802 n.10.

19. "Thus, it may be seen that the United States' only hope of succeeding in that suit lay in proving that plaintiff actually owed $31,102 under the bareboat charter." 142 F. Supp. at 376.

"In the present case, the failure of the Government's claim not only would have laid a foundation for Eastport's claim; it would have established it. Conversely, the failure of Eastport to establish its claim for interest would have established the Government's claim for additional charter hire. The issues raised by the respective claims were identical." 255 F.2d at 805.

20. 142 F. Supp. 375, 376 (S.D.N.Y. 1956), *aff'd*, 255 F.2d 795, 804 (2d Cir. 1958).

21. The only previous case involving rule 17(a) was limited to the rule's effect on the statute of limitations. Canned Foods, Inc. v. United States, 140 F. Supp. 771 (Ct. Cl.), *vacated on rehearing*, 135 Ct. Cl. 862, 146 F. Supp. 470 (1956).

22. *Cf.* Louisville Trust Co. v. Glenn, 66 F. Supp. 872, 874 (W.D. Ky. 1946); Gallahar v. George A. Rheman Co., 50 F. Supp. 655, 661 (S.D. Ga. 1943); Schram v. Lucking, 31 F. Supp. 749, 751 (E.D. Mich. 1940).

23. The United States paid the withheld balance of Eastport's judgment on April 28, 1955. Eastport S.S. Corp. v. United States, 135 Ct. Cl. 175, 140 F. Supp. 773, 774 (1956). On October 15, 1956, the United States "confessed judgment" for the interest claimed. Order No. 399-54, Ct. Cl. 1956.

No clear line of authority establishes whether the penalty for failure to assert a compulsory counterclaim applies when the first action results in a consent or default judgment. Wright, *supra* note 17, at 430; *cf.* Douglas v. Wisconsin Alumni Research Foundation, 81 F. Supp. 167, 170 (N.D. Ill. 1948) (dictum) (no bar); Schott v. Colonial Baking Co., 111 F. Supp. 13, 18 (W.D. Ark. 1953) (assuming no bar under federal rules but justifying one under state law).

24. See note 1 *supra.*

Both these factors characterized *Eastport*.[25] On the other hand, identical language in the district courts' compulsory counterclaim rule[26] has been held to embrace claims which are "logically related to" the underlying "transaction or occurrence."[27] Still, the "logically related" test has generally been utilized only when jurisdiction could not be sustained over a counterclaim unless it was treated as compulsory.[28] And courts have been reluctant to invoke the test to render a claimant remediless by barring the separate litigation of unheard claims.[29] The Second Circuit could well have exhibited a similar reluctance in *Eastport*, especially in view of the fact that the Government's admiralty claim would not have been considered a compulsory counterclaim to Eastport's original Court of Claims suit.[30]

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25. The Government's claim for charter hire arose under a lease entered into in 1947. Approximately one year later, Eastport purchased the ship under the contract which was the basis of its judgment in 1954. See note 6 *supra*. A contract of sale and repair in 1948, the judgment in 1954, the appropriation for payment in 68 Stat. 827 (1954), the withholding by the Comptroller in 1954, and Eastport's rights to interest under the setoff statute all made up the subject matter of Eastport's petition in its second Court of Claims action. 255 F.2d at 797.

26. FED. R. CIV. P. 13(a).

27. *E.g.*, United Artists Corp. v. Masterpiece Productions Inc., 221 F.2d 213, 216 (2d Cir. 1955), *reversing* United Artists Corp. v. Grinieff, 15 F.R.D. 395 (S.D.N.Y. 1954); RFC v. First Nat'l Bank, 17 F.R.D. 397 (D. Wyo. 1955); Rosenthal v. Fowler, 12 F.R.D. 388 (S.D.N.Y. 1952); *cf.* Moore v. New York Cotton Exchange, 270 U.S. 593, 610 (1926).

28. *E.g.*, Lesnik v. Public Industrials Corp., 144 F.2d 968 (2d Cir. 1944); Affiliated Music Enterprises, Inc. v. Sesac, Inc., 17 F.R.D. 509 (S.D.N.Y. 1955); In the Matter of Farrell Publishing Corp., 130 F. Supp. 449 (S.D.N.Y. 1955); Douglas v. Wisconsin Alumni Research Foundation, 81 F. Supp. 167 (N.D. Ill. 1948).

Federal courts need not have independent subject matter jurisdiction over compulsory counterclaims so long as jurisdiction exists over the principal claim. But a court may not hear a permissive counterclaim unless subject matter jurisdiction could be sustained in the absence of the principal claim. A compulsory counterclaim is deemed ancillary to the principal claim; a permissive counterclaim is not. See, *e.g.*, Marks v. Spitz, 4 F.R.D. 348 (D. Mass. 1945); 3 MOORE, FEDERAL PRACTICE ¶ 13.15 (2d ed. 1948); *cf.* Moore v. New York Cotton Exchange, 270 U.S. 593 (1926); *but see* Green, *Federal Jurisdiction Over Counterclaims*, 48 NW. U.L. REV. 271, 282-85 (1953) (arguing that permissive counterclaims require no independent jurisdiction).

29. A survey of the cases reveals only one in which FED. R. CIV. P. 13(a) was applied to bar an omitted compulsory counterclaim in a situation in which the counterclaim could be heard in no other way. And in that case the hardship affected but one of a number of defendants. RFC v. First Nat'l Bank, 17 F.R.D. 397 (D. Wyo. 1955). Several courts have barred omitted compulsory counterclaims when the claim could be consolidated with other pending actions. *E.g.*, Speed Products Co. v. Tinnerman Products Inc., 222 F.2d 61, 68 (2d Cir. 1955); E. J. Korvette Co. v. Parker Pen Co., 17 F.R.D. 267 (S.D.N.Y. 1955); Parker Rust Proof Co. v. Dextrex Corp., 14 F.R.D. 173 (S.D. Mich. 1953). See also Wright, *supra* note 17, at 432 (exhaustive search of decisions under state compulsory counterclaim rules reveals only thirteen decisions barring unpleaded claims).

30. See note 6 *supra*. The Court of Claims itself might not have considered the Government's claim a compulsory counterclaim even to the second Eastport action before it,

Focusing on that original suit in another way, the Second Circuit might also have ruled that the subject matter of the second Court of Claims action was the original *Eastport* judgment, since the interest claim was only a continuation of Eastport's initial claim.[31] Pursuing this analysis, a court would hold the Government's action unrelated to the first *Eastport* judgment on the ground that that judgment and the Government's admiralty claim involved no substantial common issues.[32] This approach would accord with the Court of Claims' position that it could exercise jurisdiction over the interest claim only because the claim grew out of its original judgment.[33] The failure of the circuit and district courts to adopt this or a similar rationale may perhaps reflect dissatisfaction with the procedural intricacies which were exhausting judicial energies and approaching the labyrinthine.

The Court of Claims might have nipped Eastport's procedural maneuvering in the bud by accepting either of two arguments which that court chose to reject at the time of litigation. Eastport's action on the initial judgment might have been dismissed on the theory that the Court of Claims is without authority to enforce its judgments against the United States.[34] Or, the setoff statute could be read to preclude private actions on claims for interest[35] or

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for the Government's claim in *Eastport* arose under the Merchant Ship Sales Act, 60 Stat. 41 (1946), 50 U.S.C. APP. §§ 1735-46 (1952), and was a separate statutory cause of action. See Canned Foods, Inc. v. United States, 135 Ct. Cl. 862, 865, 146 F. Supp. 470, 472 (1956) (separate statutory cause of action compulsory in fact but not in law).

31. Compare 255 F.2d at 809 (dissenting opinion).

32. See notes 6, 7 *supra*; *cf.* Nachtman v. Crucible Steel Co. of America, 165 F.2d 997, 999 (3d Cir. 1948).

33. Eastport S.S. Co. v. United States, 131 Ct. Cl. 210, 212, 130 F. Supp. 333, 334 (1955); Eastport S.S. Corp. v. United States, 135 Ct. Cl. 175, 178, 140 F. Supp. 773, 774 (1956).

34. See Hetfield v. United States, 78 Ct. Cl. 419 (1933); Yale & Towne Mfg. Co. v. United States, 67 Ct. Cl. 618, 626 (1929); Foster, *The General Accounting Office and Government Claims* (pt. 3), 16 J.B.A.D.C. 321, 324 (1949); 56 COLUM. L. REV. 274, 276-77 (1956); *cf.* District of Columbia v. Eslin, 183 U.S. 62 (1901); Pocono Pines Assembly Hotels Co. v. United States, 73 Ct. Cl. 447, *mandamus denied*, 285 U.S. 526 (1932) (judgment "remanded" to the Court of Claims by act of Congress).

Execution is generally unavailable against the United States. See FHA v. Burr, 309 U.S. 242, 250 (1940); Buchanan v. Alexander, 45 U.S. (4 How.) 19 (1846); Citizen's Bank & Trust Co. v. United States, 240 F.2d 863, 864 n.1 (D.C. Cir. 1956); 3 MOORE, FEDERAL PRACTICE ¶ 13.31, at 84 (2d ed. 1948). Mandamus to force the Comptroller to *pay*, as distinguished from mandamus to force him to *sue* as required by the setoff statute, is an uncertain remedy. *Compare* Hines v. United States *ex rel.* Marsh, 105 F.2d 85, 93 (D.C. Cir. 1939), *and* National Bulk Carriers, Inc. v. Warren, 82 F. Supp. 511, 514 (D.D.C. 1949), *with* Miguel v. McCarl, 291 U.S. 442 (1934). See also *Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 846 (1957).

35. Interest claims have been heard when expressly authorized by statute. Girard Trust Co. v. United States, 270 U.S. 163, 167 (1926); Chicago, I. & L. Ry. v. United States, 78 Ct. Cl. 96 (1933). *Contra*, Stewart v. Barnes, 153 U.S. 456 (1894). But the setoff statute has not been previously interpreted to authorize such claims prior to suit

on Court of Claims judgments.[36] The former reasoning is not without its difficulties, however, inasmuch as the withholding could also have reached the Court of Claims under the guise of an independent claim for interest.[37] Moreover, a blanket refusal to take jurisdiction would eliminate actions on judgments as devices for bringing setoff disputes into the Court of Claims when the United States is willing to accept that tribunal's decision.[38]

The more satisfactory argument is that the setoff statute establishes an exclusive procedure for judicial review of protested government withholdings against judgment creditors. The statute directs the Comptroller "to cause legal proceedings to be immediately commenced to enforce the . . . [Government's claim] and to cause the same to be prosecuted to final judgment with all reasonable dispatch," whenever a creditor presents a judgment for payment and protests a withholding.[39] The act thus suggests that initiative for suit lies with the Government.[40] In this way, private parties are relieved of the expense of litigating setoffs in the Court of Claims, which may be far removed from pertinent witnesses and records.[41] To protect this privilege, judgment creditors have successfully petitioned for writs of mandamus compelling the United States to sue promptly,[42] although mandamus is not expressly authorized by the statute.[43] The act's legislative background further supports the position that its procedures should be exclusive. It was enacted in 1875 as a result of the Supreme Court's decision in *United States v. O'Grady*.[44] There, a private judgment creditor brought an action on a judgment to contest the authority of the central accounting officer of the United States to withhold the amount of a government claim when paying a Court of Claims judgment. The Supreme Court held that no such authority existed under the

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by the United States. See United States v. Griswold, 30 Fed. 604, 606 (D. Ore. 1887) (setoff statute confers no power on courts to anticipate its provisions); American Potash Co. v. United States, 80 Ct. Cl. 160, 8 F. Supp. 717, 718 (1934); Stewart & Co. v. United States, 71 Ct. Cl. 126, 131-32 (1930) (interest authorized only after withholding proved wrongful); United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 660-63 (1947) (dictum) (setoff statute interest payable only if Government fails to win its suit).

36. See text accompanying notes 39-45 *infra*.

37. See American Potash Co. v. United States, 80 Ct. Cl. 160, 8 F. Supp. 717 (1934); Stewart & Co. v. United States, 71 Ct. Cl. 126 (1930).

38. See, *e.g.*, Stewart & Co. v. United States, *supra* note 37.

39. See note 2 *supra*.

40. See Richmond, F. & P.R.R. v. McCarl, 62 F.2d 203, 207 (D.C. Cir. 1932); United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 662 (1947) (dictum); Eastport S.S. Co. v. United States, 131 Ct. Cl. 210, 215, 130 F. Supp. 333, 335 (1955) (dissenting opinion); 3 MOORE, FEDERAL PRACTICE ¶ 13.31, at 83 (2d ed. 1948).

41. See *id.* ¶ 13.19, at 76.

42. *E.g.*, Hines v. United States *ex rel.* Marsh, 105 F.2d 85, 93 (D.C. Cir. 1939); National Bulk Carriers, Inc. v. Warren, 82, F. Supp. 511, 514 (D.D.C. 1949). *But see* Miguel v. McCarl, 291 U.S. 442 (1934) (Supreme Court reluctant to mandamus Comptroller).

43. See note 2 *supra*.

44. 89 U.S. (22 Wall.) 641 (1874).

then current statutory mandate that the central accounting officer "settle and adjust" all government claims and debts.[45] The setoff statute overruled *O'Grady* and detailed requirements for suit by the United States. These requirements would have been unnecessary had Congress intended to permit creditors to test withholdings through suits on judgments in the Court of Claims.

While not returning precisely to the *status quo* under *O'Grady, Eastport,* by exposing the Government to litigation in unfavorable courts, does render government withholding hazardous. A judgment creditor of the United States need no longer await adjudication of a government claim, but may now allege a wrongful withholding and bring suit for the withheld amount plus interest, or for the interest alone, in the Court of Claims or in any district court open to him.[46] This result may not be wholly undesirable, for it enables private litigants to avoid the crowded dockets of some federal district courts and prevent the needless prolongation of withholdings.[47] On the other hand, a judgment creditor may also use his greater maneuverability to force the United States into a forum where precedent or practice is unfavorable.[48] In fact, *Eastport* encourages forum shopping by demonstrating its advantages.[49] Moreover, if, as some cases suggest, a claim for interest can be litigated independently of the underlying, unsatisfied Court of Claims judgment,[50] a government creditor would commonly be able to sue in any district court having venue [51] and subject-matter jurisdiction, for only claims exceeding $10,000 must be adjudicated by the Court of Claims.[52] After successfully pursuing his demand

45. *Id.* at 647.

46. See notes 51-52 *infra.*

47. The Southern District of New York, where many creditor corporations "reside," is especially crowded. See U.S. COURTS AD. OFFICE ANN. REP. at A-22 (1955) (45.9 month delay from filing to disposition, the longest in the country).

48. See note 13 *supra.*

49. Prior to the adoption of rule 17(a) in 1953, petitions for interest in the Court of Claims would have been pointless, since the United States could not be precluded from suing on its own cause of action in a district court. The Government could default in the Court of Claims and could pay or not pay part or all of the resulting judgment without fear of losing its counterclaim. This course is no longer available.

50. See Girard Trust Co. v. United States, 270 U.S. 163, 168 (1926); Chicago, I. & L. Ry. v. United States, 78 Ct. Cl. 96 (1933).

51. Venue would ordinarily lie in any district where the plaintiff resides. 28 U.S.C. § 1402 (1952). For venue purposes, a corporation "resides" in any district in which it is incorporated, licensed to do business, or doing business. 28 U.S.C. § 1391 (1952).

52. The district courts shall have original jurisdiction concurrent with the Court of Claims, of: . . . Any other civil action or claim against the United States, not exceeding $10,000 in amount, 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. § 1346(a)(2) (1952).

Under the treatment most favorable to the judgment creditor, courts might view the interest claim as unique, unaffected either by the withheld government claim or by the

for interest in a district court, a judgment creditor might then be able to rely on the district court's decision as determinative of the merits of the Government's claim.[53]

The United States can protect itself against forum shopping by having the Comptroller postpone final notification of his intention to withhold until the Attorney General is prepared to institute suit. This practice would be wasteful, however, assuming as it does that every creditor will want to litigate every withholding. Actually judgment creditors frequently assent to withholdings or, when unalterably objecting, often await governmental action under the setoff statute.[54] The inevitable delay attending a preliminary investigation of all withholdings could cause a protesting judgment creditor unjust monetary losses, for no interest is payable on an amount wrongfully withheld until after the Government announces its determination to withhold.[55] Worse, payment of the entire amount of a given judgment might be deferred for extended periods while the Government investigated its most insignificant claims.

If the Government foregoes such dilatory tactics, *Eastport*'s unique procedures and opportunities will remain available for fast-moving government creditors. But if forum shopping can be minimized and the Government's

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original judgment to which it might be joined. Under the most restrictive approach, courts might color the interest claim with the nature of the Government's withheld claim, since they both raise the same issues of merit. Thus, if the government claim were cognizable only in a court of special jurisdiction (an admiralty court in *Eastport*), the interest claim would be dismissed if brought elsewhere. See 28 U.S.C. § 1333 (1952); Calmar S.S. Corp. v. United States, 345 U.S. 446, 455 (1953). Judgment creditors can, as in *Eastport*, gain a middle ground by joining the interest claim with an an action on the original judgment. Under these circumstances, as in *Eastport*, courts will apparently base their subject matter jurisdiction on the judgment rather than the interest claim. Of course, joinder of the original judgment with the interest claim will increase the chances of stating a demand for more than $10,000.

53. If the Government defended the district court action on the merits of the withholding, a determination of that issue would be binding in subsequent actions. See RESTATEMENT, JUDGMENTS § 45(c) (1942). But if the Government defaulted or confessed judgment before actual litigation of the issue in the district court, "collateral estoppel" would not apply. *Id.* § 68(2), comment *i*.

54. Interviews with Justice Department Officials, Nov. 1958.

55. To obtain payment of a judgment, the creditor must have secured a certificate of settlement from the Comptroller General. See Foster, *supra* note 34, at 324. Issuance of a certificate of partial settlement would constitute a withholding upon which the creditor might base a claim for interest. In order to protect itself effectively, the United States would, therefore, be obliged to delay issuance of even the partial certificate until its suit was ready. The creditor can collect the balance of his judgment not withheld and compute the interest due him on the withheld portion only after the issuance of the certificate, which is final notice of the Government's intention to withhold over protest. Therefore no interest would be paid for the period of the delay, even on the portion of the judgment not withheld. For example, in *Eastport*, though the judgment was presented for payment on June 8, 1954, interest was paid only from September 29, 1954, the date the certificate of settlement was issued, and then only on the withheld portion. Plaintiff's Motion to Strike Defendant's Answer, Oct. 5, 1955.

power to withhold preserved, *Eastport*'s substitution of an interest claim for a district court mandamus action may prove as much a blessing as a bane because of the speedier procedures in the Court of Claims. To further the policy of the setoff statute while accepting *Eastport* as precedent, future courts might forbid judgment creditors to bring actions on Court of Claims judgments or on interest claims for alleged wrongful withholdings unless the Government is unable to sue or has delayed suit under the statute unnecessarily.[56] The standard of unnecessary delay might be that previously applied in setoff statute mandamus actions;[57] authority for this standard could be derived from the statutory directive that the Comptroller sue "immediately."[58] Those forum shopping opportunities then left to the judgment creditor would simply serve to encourage expeditious suit by the United States. At the same time, creditors could not exploit *Eastport* to frustrate the objective of the setoff statute—to afford the United States an efficient means of collecting its debts.

56. Compare Standard Dredging Co. v. United States, 71 Ct. Cl. 218 (1930) (construing 28 U.S.C. §§ 1494, 2511 (Supp. II, 1955), and allowing a private party to litigate a government claim against him after a three-year government delay).

57. See Hines v. United States *ex rel.* Marsh, 105 F.2d 85, 93 (D.C. Cir. 1939).

58. See note 2 *supra.*