

GINSBURG, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 16–498

DAVID PATCHAK, PETITIONER *v.* RYAN ZINKE,
SECRETARY OF THE INTERIOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[February 27, 2018]

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, concurring in the judgment.

What Congress grants, it may retract. That is undoubtedly true of the Legislature’s authority to forgo or retain the Government’s sovereign immunity from suit. The Court need venture no further to decide this case.

Patchak sought relief from the Secretary of the Interior “other than money damages,” 5 U. S. C. §702; because he confined his complaint to declaratory and injunctive relief, the Administrative Procedure Act’s (APA) waiver of the Federal Government’s immunity from suit, *ibid.*, enabled Patchak to launch this litigation. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U. S. 209, 215–224 (2012) (*Patchak I*) (APA waiver of immunity covers Patchak’s suit). But consent of the United States to suit may be withdrawn “at any time.” *Lynch v. United States*, 292 U. S. 571, 581 (1934); see *Maricopa County v. Valley Nat. Bank of Phoenix*, 318 U. S. 357, 362 (1943) (“[T]he power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations.”). Congress’ authority to reinstate sovereign immunity, this Court has recognized, extends to pending litigation. *District of Columbia v. Eslin*, 183 U. S. 62, 65–66 (1901).

Just as it is Congress’ prerogative to consent to suit, so too is it within Congress’ authority to withdraw consent

GINSBURG, J., concurring in judgment

once given. Retraction of consent to be sued (effectively restoration of immunity) is just what Congress achieved when it directed in the Gun Lake Act: “Notwithstanding any other provision of law, an action . . . relating to the [Bradley Property],” including any pending action, “shall not be . . . maintained in a Federal Court and shall be promptly dismissed.” Gun Lake Trust Land Reaffirmation Act, Pub. L. 113–179, §2(b), 128 Stat. 1913; see H. R. Rep. No. 113–590, p. 2 (2014) (framed with *Patchak I* in view, §2(b) provides an “unusually broad grant of *immunity from lawsuits pertaining to the Bradley Property*” (emphasis added)); S. Rep. No. 113–194, p. 2 (2014) (discussing *Patchak I*); *Patchak I*, 567 U. S., at 223–224 (argument that allowing suits challenging land trust acquisitions would harm tribe’s economic well-being “is not without force, but must be addressed to Congress”). Notably, the language Congress employed in the Gun Lake Act (any “action . . . relating to the [Bradley Property] . . . shall be promptly dismissed”) is the mirror image of the APA’s immunity waiver, which instructs that suits “against the United States” for declaratory or injunctive relief “shall *not* be dismissed.” 5 U. S. C. §702 (emphasis added).

In short, Congress acted effectively to displace the APA’s waiver of immunity for suits against the United States with a contrary command applicable to the Bradley Property: No action concerning the trust status of that property is currently attended by the sovereign’s consent to suit. For that reason, I would affirm the judgment of the Court of Appeals for the District of Columbia Circuit upholding the District Court’s dismissal of Patchak’s case.*

*Patchak argues that restoration of sovereign immunity would not dispose of his suit, for his claim is that federal officials have acted in excess of their statutory authority. Reply Brief 18. The argument fails because his action is, “in effect, a suit against the sovereign.” *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 687 (1949); see

GINSBURG, J., concurring in judgment

Block v. North Dakota ex rel. Board of Univ. and School Lands, 461 U. S. 273, 281–282 (1983) (officer suit is an improper vehicle for resolving property disputes with the United States); *id.*, at 284–286 (officer suit unavailable to circumvent the Quiet Title Act’s reservations of immunity).