THE HOUSE BUILT ON A HILLSIDE: THE UNIQUE AND NECESSARY ROLE OF THE UNITED STATES COURT OF FEDERAL CLAIMS

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INTRODUCTION

Imagine yourself as proprietor of a small business, or owner of a local property, a member of the armed services, or parent of an injured child. Now imagine that in this capacity, you have some interaction with the federal government of the United States of America, the sovereign power of the current world hegemon. Within this interaction, the federal government improperly charges you for taxes you do not owe, or seizes your property for public use, or breaches a contract with you, or refuses to pay you for your work in the military or as a civilian federal employee. What can one citizen do to correct a legal wrong in this scenario? It would take a special court to closely examine your claim for legal merit, and, if justified, to hold the most powerful entity in the world to account. Is there a court like that? Perhaps, it might be said, no court could put an individual on equal footing with the sovereign power of the federal government. But there is such a court that acts as leveler of the playing field, created especially for this very purpose. It is a court like none other in the federal system, and has taken on many new challenges over its one-hundred-and-sixty-year history, still with the same mission, to mediate the relationship between the people and their government. It is the Court of Federal Claims. This Article is dedicated to that court, its modern role, and its many virtues.

Sixteen years ago, several notable legal authorities convened an academic discussion by contributing articles that discussed the ongoing utility of the United States Court of Federal Claims (COFC).[1] At the occasion of the court's fifteenth judicial conference, they looked in retrospect on the preceding twenty years since the court had been reorganized under the Federal Courts Administration Act in 1982.[2] The difference in the

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1. Judge Bohdan A. Futey, *Suing the Sovereign in the Twenty-First Century: Introductory Remarks*, 35 GEO. WASH. INT'L L. REV. 517, 517 (2003) ("The conference took place on October 3–4, 2002, to celebrate the twentieth anniversary of the Federal Courts Improvement Act of 1982, which organized the United States Court of Federal Claims (Court) in its present form.").

2. Chief Judge Edward J. Damich, *Introduction to the United States Court of Federal Claims Fifteenth Judicial Conference*, 71 GEO. WASH. L. REV. 540, 540–41 (2003). Pub. L. No. 102-572, § 901, 106 Stat. 4506, 4516 (1992) (codified as amended at 18 U.S.C. § 171 (2006)). For the decade prior to 1992, the Court had existed as the United States Claims Court, as it had been organized by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 105, 96 Stat. 25, 26-27 (1982) (codified as amended at 28 U.S.C. § 171 (2006)). Before

perspectives held by these scholars centered primarily around two questions: did the Court of Federal Claims perform its designated role well, and would the cases on its docket have been decided just as well elsewhere if the court did not exist? Viewpoints ranged from laudatory recognition of the court's special role, to specific analyses of the court's distinct position within the structure of the Constitution, to suggestions for improving the court's ability to perform its tasks, all the way to arguments that the court was obsolete and unnecessary. Most of the writers commented on the curious assortment of subject matter that sits within the court's jurisdiction: cases before the court are simultaneously rather narrow in focus and particularized, while also quite diverse and wide-ranging in subject matter topics.[3] What indeed, they each asked, could be the organizing principle of a court that claimed to be specialized while hearing cases that range between property takings, large-scale vendor contracts, employment disputes, and vaccine injuries? Most of the authors praised the court for its history of vindicating individuals in their claims against the federal government, while some argued that the court had outlived its usefulness. But it was Senior Judge Loren Smith, formerly Chief Judge of the court, whose article best articulated its unique character, the special *arête* of the court:

> The court is the specialist or expert in litigation between citizen and sovereign. This specialty is not found in any specific subject-matter area of the law. It is not a specialty of technique like mediation or litigation or brief writing. It plays a vital role, however, in creating government legal accountability in the government's day-to-day dealings with citizens.[4]

This note takes the position espoused by Senior Judge Loren Smith in his article written for that conference, but expands upon

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that, the Court had been organized as the United States Court of Claims.

3. The broadest statement of the Court's jurisdiction is the Tucker Act (28 U.S.C. § 1491(a)(1)), which establishes the Court's jurisdiction over any claim against the federal government for money damages (not sounding in tort) that is premised upon the Constitution, acts of the Congress, Executive Department regulations, or contracts with the federal government, whether express or implied-in-fact. More specifically, the Court exercises jurisdiction in subject matters ranging between contract claims and bid protests, military and civilian pay claims, tax claims, Indian claims, patent and copyright claims, vaccine injury claims, congressional reference cases, and claims arising from the Constitution, most notably Takings claims. *See generally* U.S. COURT OF FED. CLAIMS BAR ASS'N, DESKBOOK FOR PRACTITIONERS (6th ed. 2017).

4. Judge Loren A. Smith, *Why a Court of Federal Claims?*, 71 GEO. WASH. L. REV. 773, 782–83 (2003).

it from the perspective of a practicing attorney representing private individuals before this court. As Judge Smith illuminated, to look for a unifying *raison d'être* for the court in the specific areas of subject matter within the court's jurisdiction is to "miss the real point."[5] The Court of Federal Claims maintains its specialty and expertise by its unitary focus upon "litigation between citizen and sovereign."[6] This may be an incidental or abstract consideration to those working in an academic, bureaucratic, or governmental position, but to individual citizens with a claim against the federal government, it is no small trifle.

This Article will avoid arguing from a Platonist ideal or a utopian Neverland, and it will refrain from presenting statistics regarding how quickly various federal courts process the volume of cases on their docket like so many cattle through a judicial abattoir. Although noble pursuits, from the perspective of an individual facing litigation with the federal government, things like intellectual coherence and administrative efficiency are means, not ends.[7] Rather, this article seeks to highlight the overall purpose of the court, and to analyze the practical application of its special mission now and into the future.

The Court of Federal Claims exists within a philosophical tension embedded within American law, between the reality of federal sovereignty, and the nation's founding principles regarding individual liberty. In his volume on the law of takings, Richard Epstein's thesis proceeded from a normative argument that in civil litigation the sovereign should be treated as just another individual litigant—no more, no less.[8] At most, he

5. *Id.*

6. *Id.* at 778 ("What may well be the heart of the Court of Federal Claims' reason for being is a sensitivity to both the fundamental rights of citizens and an appreciation of government's unique duties under the Constitution."). It should be noted that the court hears cases of all sorts of private parties (and non-federal governmental bodies) against the federal government, not just those brought by individual citizens who are natural persons. This includes businesses large and small, Indian Tribes, local governments, and even States. *See infra* fn. 72–87 and accompanying text. Although it may be said that each of these categories enjoy their own particular degree of sovereignty and free agency, all of them are subject to the sovereignty of the federal government. That superseding sovereignty of the federal government is the power dynamic that is the focus of this article.

7. *See* NASSIM NICHOLAS TALEB, THE BLACK SWAN 285 (2010) ("Elegance in the theories is often indicative of Platonicity and weakness—it invites you to seek elegance for elegance's sake."); s*ee generally* BRIAN OSTROM & ROGER HANSON, NAT'L CTR. FOR ST. CTS., RESEARCH DIVISION, ACHIEVING HIGH PERFORMANCE: A FRAMEWORK FOR COURTS, (2010) (suggesting methodical steps to address backlog in court dockets).

8. RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 36 (1985) ("The analysis of the private situation has necessary consequences for the public

contended, the representative government should have no more power in legal interactions than would the aggregate of all the citizens of the nation—that the federal government should have no more rights as against an individual than the sum of the constituent fellow citizens would enjoy in a collective action.[9] He admitted,[10] however, that this position is not reflected in current legal interpretation or in practice: the federal government enjoys privileges and immunities that no private citizen can claim—not the least of which is its recourse to the murky concept of sovereign immunity.[11] In reality, the federal government is not just another party in litigation, but enjoys special power in its relationship with individual claimants. Any judicial edifice that would be built on this tilted plane must be specially calibrated for the purpose—the equivalent of a house built on a hillside.

I. BACKGROUND AND REASON FOR THE COURT

The original necessity for the Court of Federal Claims arose out of the disparate bargaining position between individual private parties and the federal government. The legal method by which citizens bring their claims against the sovereign authority is a problem that must be resolved in any legal system. Sovereign immunity is a longstanding principle which maintains the

law. On Lockean principles the government stands no better than the citizens it represents . . . .").

9. *Id.* at 12–13 ("[T]he rights of government are derived only from the individuals whom it represents in any given transaction . . . . Every transaction between the state and the individual can thus be understood as a transaction between private individuals, some of whom have the mantle of sovereignty while others do not.").

10. *Id.* at ix–x ("The state can now rise above the rights that it cannot derive from the persons whom it benefits. Private property once may have been conceived as a barrier to government power, but today that barrier is easily overcome, almost for the asking."). *Id.* at 71–72 (Epstein's book laments the "unacceptable tendency to create two sets of property rules in eminent domain cases, one for ordinary people and one that yields unprincipled advantages to the government").

11. *See id.* at 42 ("Sovereign immunity thus depends upon an absolute power of the government that is wholly inconsistent with the theory of the state which the eminent domain clause presupposes. If the state obtains its authority only from the rights of those whom it represents, it can never claim exemption from the duty to compensate on the ground that it is the source of all rights. The natural rights theory behind the Constitution precludes that result."); *see also* Hon. S. Jay Plager, *Abolish the Court of Federal Claims? A Question of Democratic Principle*, 71 GEO. WASH. L. REV. 791, 796 (2003) (observing that sovereign immunity "was an unfortunate legal concept from the beginning . . . [which today] ought not [be] tolerate[d] . . . except in very limited and special areas," and arguing that "the rule ought not be, although too often stated, that waivers of sovereign immunity are narrowly construed" but that "the posture of the government, including the courts, ought to be exactly the opposite—sovereign immunity should be disfavored except in very special circumstances").

sovereign's prerogative to avoid suit except in the manner that such authority consents to being sued.[12] Under the system of monarchy, within which the English common law arose, suing the sovereign had remained a practical, prudential problem of persuading the king (or his representative in Chancery) to recognize the legitimacy of a claim.[13] By contrast, bringing suit against the United States government presented a much more technical, structural problem to be addressed. In the American setting, pursuing a claim against the federal government became more than just a matter of asking whether the government consents to suit through a waiver of sovereign immunity, and then choosing the most convenient forum and format to proceed on that claim. The issue was how both to adjudicate claims and then of powers with concomitant checks and balances between branches. Payment from the public treasury became a technical, legal problem nearly as difficult to surmount as the doctrine of sovereign immunity itself.[14]

Article I, Section 8 of the Constitution dictates the means by which public money is to be allocated and spent, giving Congress alone the plenary power both to "lay and collect Taxes" and to "pay the Debts" of the United States;[15] that is the only means by which money may be allocated and paid from the public fisc. However, if money from the national treasury can only be spent as allocated by Congress, then every debt, even the most picayune, must find its funding in an act of Congress, passed by the constitutional method prescribed in Article I, Section 7 of the

12. *See* Alden v. Maine, 527 U.S. 706, 728–29 (1999) (establishing that sovereign immunity "derives . . . from the structure of the original Constitution itself" and that "the scope of the States' immunity from suit is demarcated . . . by fundamental postulates implicit in the constitutional design"); *see also* United States v. Testan, 424 U.S. 392, 399 (1976) (citing United States v. Sherwood, 312 U.S. 584, 586, (1941)) ("[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'"). Sovereign immunity is a remnant of our English common law history, but it persists to the current day embedded within the law. *See* Alden, 527 U.S. at 733.

13. *See, e.g.*, Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. R. 1207, 1212 (2009) (collecting authorities that show "all requests for royal justice, including requests to bring suit against the Crown, began as petitions that passed before the King and Chancellor," assumed the nature of a "respectful request for royal aid," and thus could never be regarded "as a routine matter").

14. *Id.* at 1239 ("We then draw the inference—supported by the language in the *Federalist Papers* and the ratification debates, and reflected in the subsequent writings of St. George Tucker and Joseph Story—that the Appropriations Clause embodied the same congressional control over the national government's legal obligations that Parliament had achieved in England.").

15. U.S. CONST. art. I, § 8, cl. 1.

Constitution.[16] Should there be any dispute about the validity or amount of a debt asserted against the government, Congress is not an efficient venue to ascertain the merits of a claim, which is best answered within a judicial setting. Nevertheless, because of the constitutional structure separating the branches of government, neither the judicial nor the executive branches can command the legislative branch to allocate and spend money in satisfaction of these claims.[17]

Thus it was after sixty-five years without such a mechanism that, in 1855, Congress created the antecedent to the Court of Federal Claims to become "the clearing house where the government must settle up with those it has legally wronged."[18] Prior to that point, individuals with claims against the federal government had to proceed through their Congressmen to get a private bill passed that awarded compensation for each claim. By the time of the court's creation in 1855, "20,000 private bills were pending before Congress," and obtaining justice "became a lottery where few had any chance of garnering Congress's limited time for their claim."[19]

What kind of court would emerge that might be able to hear these claims on behalf of Congress? Perhaps, some had reasoned, the judicial branch could assess those legal issues, and then advise Congress of their findings? This was found not to work, because, due to strict application of justiciability doctrines, federal courts organized under Article III of the Constitution cannot provide merely advisory opinions, but must give final rulings with binding effect.[20] This impasse required a structural compromise and required the creation of a special court to assess claims on Congress' behalf.[21] This was the genesis

16. U.S. CONST. art. I, § 7, cl. 1–3.

17. *See, e.g.*, Figley & Tidmarsh, *supra* note 13, at 1252–55 (surveying the August 1878 discussions at the Constitutional Convention).

18. Smith, *supra* note 4, at 773.

19. *Id.* at 779.

20. *See generally* David A. Case, *Article I Courts, Substantive Rights, and Remedies for Government Misconduct*, 26 N. ILL. U. L. REV. 101 (2005) (discussing the historical issues and controversies of the Court of Federal Claims, and other courts, as Article I courts).

21. Judith Resnik, *Of Courts, Agencies, and the Court of Federal Claims: Fortunately Outliving One's Anomalous Character*, 71 GEO. WASH. L. REV. 798, 801, 814 (2003) ("When a court of claims was first born . . . it was a true oddity and a real invention . . . . And the court had special links to Congress, both because it could receive cases by reference and because implementation of its remedies depended on congressional appropriations of funds to provide payments."); Craig A. Stern, *Article III and Expanding the Power of the United States Court of Federal Claims*, 71 GEO. WASH. L. REV. 818, 819 (2003) (discussing the court's

for what we now know as the Court of Federal Claims as an "Article I court."[22]

In the beginning of the court's history, its decisions functioned as reports to Congress, weighing the merits of each claim and recommending an amount of payment for compensation of claims, which Congress allocated through specific legislation.[23] Established as such, the court could advise Congress regarding claims for money damages arising from a contract or debt obligation.[24] In 1877, Congress passed the original Tucker Act, which granted jurisdiction to the court to "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[25] The Tucker Act has remained the court's touchstone ever since. By threading this constitutional needle, citizens finally had access to a special court which could hear their claims against the sovereign for debts it owed to them.

Therefore, the *raison d'être* for the Court of Federal Claims was first and foremost as a necessary intermediary between the federal government and the individual citizens whom the government represents. And given the history of the twentieth century and the metastasization of the administrative state,[26] the court's role is all the more precious, not less so.

The American form of government arose in the context of the seventeenth century's theoretical debate regarding governmental

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constitutional function—and the limits of its available authority—in the context of "public-rights" theory and separation of powers doctrine, and observing that "[t]he Court of Federal Claims, though a respected court and operationally independent of both the executive and the legislative branches, is strictly, as a constitutional matter, acting for the federal government in determining what claims are to be paid").

22. An Article I court is a court which does not enjoy the full panoply of judicial power available to federal courts under Article III of the Constitution but serves and advises Congress in a way that would be impermissible for those other courts. *See* E. Bruggink, *A Modest Proposal*, 28(4) PUBLIC CONTRACT L. J. 529, 530 (1999) (arguing that the Court of Federal Claims "is judicial, in that it hears similar cases and in the same manner as Article III courts, and yet it advises Congress").

23. Act of Feb. 24, 1855, ch. 122, § 7, 10 Stat. 613 (1855).

24. *See* Pocono Pines Assembly Hotels Co. v. United States, 73 Ct. Cl. 447, 472 (1932) (explaining that, at its inception, the court "was a court merely in name, for its power extended only to the preparation of bills to be submitted to Congress").

25. 28 U.S.C. § 1491 (2012).

26. Marcia G. Madsen and Gregory A. Smith, *The Court of Federal Claims in the 21st Century: Specific Proposals for Legislative Changes*, 71 GEO. WASH. L. REV. 824, 826–27 (2003) (surveying the growth in the breadth and depth of the government's reach within the private economy and in the lives of citizens).

power, most notably argued between Thomas Hobbes and John Locke.[27] That argument centered around the relationship between the citizen and the state. The Lockean position assumed inherent natural rights that are held by citizens and *must* be recognized and protected by government. The Hobbesian view was that civil society, governed by a sovereign, requires the surrender of a large measure of autonomy in exchange for state-enforced order, and the citizen enjoys only such residual rights as are allowed by the ruling authority.[28] As noted by Richard Epstein, American law as it exists embraces both of these contradictory positions, which must be weighed in the appropriate balance within the judicial mind.[29] This is the place in which the Court of Federal Claims performs its task, leveling the plane upon which the citizen interacts with the state, notwithstanding the uneven contours inherent within that relationship. However, despite the leveling work done by the court, there can be no question that the interactions are naturally uneven.

A private party suing the federal government as sovereign will encounter significant divergence from the common law rules of litigating claims between private citizens. This divergence becomes apparent when, for example, the government exercises condemnation against privately-owned property as a "takings."[30] When one private citizen trespasses upon or confiscates the property of another, the property owner has an equitable remedy of removing or separating the trespassing party from the property and restoring the property to its lawful owner.[31] However, in a takings claim, there is no quibble that the government has the legal authority to take a citizen's property for public use; the only open question is how much the government will pay to compensate for its exercise of its sovereign prerogative.[32]

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27. EPSTEIN, *supra* note 8, at 7–10.

28. The "absolutist origins" of sovereign immunity "are well revealed in the classic justification offered by [Supreme Court Justice Oliver Wendell Holmes]: 'A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.'" EPSTEIN, *supra* note 8, at 42 (quoting Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907)).

29. EPSTEIN, *supra* note 8, at 9–10.

30. The law of condemnation through eminent domain provides just compensation for private property taken by the federal government for public use, pursuant to the Fifth Amendment to the Constitution. U.S. CONST. amend. V.

31. *See, e.g.*, Whiteman v. Chesapeake Appalachia, L.L.C., 729 F.3d 381, 386 (4th Cir. 2013) (explaining a remedy for a continuing trespass under Virginia law).

32. The Fifth Amendment's Takings Clause allows the federal government to deprive

Beyond that more patent example, the disparity of the government-citizen relationship is also evident in any interaction where the federal government enters into a contract with a private party, because it acts as more than just a typical contracting party; it exercises its sovereign prerogative by superseding ordinary contractual rules. The federal government maintains a right to cancel contracts for convenience, and retains a unilateral right to amend the contract after formation, so as to modify the terms of performance. To highlight this issue, the Federal Acquisition Regulation ("FAR"), which serves as the template for most government contracts, includes as contractual boilerplate the unilateral prerogative of the federal government to extend[33] or to terminate early[34] a contract, even well after the contract has been ratified. This exceptional prerogative is not considered a result of an extralegal, tyrannical usurpation by the government, but is a role recognized within the law as a necessary outgrowth of federal sovereignty. If these standard clauses were to be omitted by accident within a particular contract, they nevertheless would be read into that contract by operation of law.[35]

Even if we as citizens acknowledge from a prudential standpoint that this prerogative is beneficial to society and the efficient administration of our cooperative endeavor, it is useful to understand and reconcile the logic of why the government, unlike any other entity, should be able to act in such a unilateral way.[36] It

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from private persons their vested property rights, so long as the property is taken for "public use" and "just compensation" is paid to them. Landgraf v. USI Film Prod., 511 U.S. 244, 266 (1994). The Federal Torts Claims Act does provide a remedy for incidental trespass committed by the federal government in which the trespass does not constitute a taking. "At common law . . . any interference with possession is an act which will entitle the injured party to bring an action in tort." Anderson v. United States, 259 F. Supp. 148, 150 (E.D. Pa. 1966) (quoting Ure v. United States, 93 F. Supp. 779, 782 (D. Or. 1950).

33. 48 CFR 17.208(f)–(g); 48 CFR 52.217–8 ("The Government may require continued performance of any services within the limits and at the rates specified in the contract."); 48 CFR 52.217–9; *see also* Crown Coat Front Co. v. United States, 386 U.S. 503, 506 (1967) (noting that if the government's decision to change the contract results in alterations to the contract price or delivery schedule, the contract shall be equitably adjusted).

34. 48 CFR 49.502; 48 CFR 52.249–1 ("The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest."); 48 CFR 49.503; 48 CFR 52.249–6 ("The Government may terminate performance of work under this contract in whole or, from time to time, in part, if [*inter alia*] The Contracting Officer determines that a termination is in the Government's interest.").

35. G.L. Christian & Assocs. v. United States, 312 F. 2d 418, 427 (Ct. Cl. 1963).

36. "It is an often-stated maxim that when the government 'enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.' Despite its repetition, this statement is not accurate." Madsen & Smith, *supra* note 26, at 851, (quoting United States v. Winstar Corp., 518 U.S. 839, 895 (1996)).

is doubtful that any private party, no matter how outsized its bargaining power, would ever enjoy such unilateral power in a contractual relationship, and moreover, to have that power enforced by the courts.[37] From these examples, it is clear that the relationship between citizen and the government is not inherently equal as it would be between two private parties; there must be some entity to level the playing field.

Professor Joshua Schwartz has developed the terms "congruence" and "exceptionalism" to describe the tension between the federal government acting in one sense as an otherwise typical contracting party ("congruence"), and, on the other hand, as the party to any contract with special executive rights ("exceptionalism"), divergent from the common law rules of contracts.[38] Litigation against the federal government does not merely represent a quantitative disparity in bargaining power but, even more, a qualitative difference in legal powers as well as a disparity in motivating considerations: From a litigation standpoint, the federal government, as the financial as well as legal sovereign, is largely shielded from fears of financial ruin or considerations of profit motive, the motivations that dominate the perspective of every other party against whom it litigates.[39] Thus, any court that would adjudicate cases in this context must bear this reality in mind when weighing the merits of a claim, and that is the role performed by the Court of Federal Claims.

The court has another function in its role as an Article I court. It is as a legal gatekeeper to the Congressional purse-strings. Just as the court must award compensation for those to whom we as a

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37. *See, e.g.*, Madsen & Smith, *supra* note 26, at 855.

38. Joshua Schwartz, *Public Contracts Specialization as a Rationale for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 863, 863–64 (2003).

> Briefly, "congruence" is the idea that, when it comes to interpretation and enforcement, federal government contracts are legally indistinguishable from private contracts. Conversely, "exceptionalism" is the tendency to conclude that because of its sovereign status, unique functions and special responsibilities, the federal government as a contracting party is not subject to all of the legal obligations and liabilities of private contracting parties.

Id. (internal marks omitted).

39. On the cost/benefit analysis applicable to private litigants, compare David M. Engel, *Perception and Decision at the Threshold of Tort Law: Explaining the Infrequency of Claims*, 62 DEPAUL L. REV. 293, 297–98, 301–02 (2013) (arguing that individuals' decisions to bring tort suits are the product of physical, social, and cultural influences rather than rational choice), with David M. Trubek *et al.*, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 77–78 (1983) (hypothesizing that litigation 'investments' by private parties are dictated by logical assessments of the importance of the litigation matter and the projected investments of the opposing party).

nation owe a debt, the court must likewise guard jealously the public funds against improperly paying on claims that are truly without legal merit.[40] This is no easy or simple task, and it takes a keen, practiced eye to discern the complicated legal basis of the underlying claim. Such knotty calculus has been the bailiwick of the Court of Federal Claims since its creation by Congress over one hundred and fifty years ago.

There certainly may be a legitimate theoretical argument to be made that a private citizen's legal interactions with the federal government should be identical to what would be encountered while transacting with other private citizens, because the government is merely representing the rest of the people in the interaction, and, as such, may only represent the aggregated sum of those other private citizens' positions.[41] However, that viewpoint does not correlate to any historical articulation or application,[42] and it does not correspond to the extant reality of current practice. Given this special legal relationship between the individual and the state, the important question becomes how best to fashion a fair and just legal order to vindicate citizens' cognizable rights against the state, even if it will likely be substantially different from the landscape in other settings.

What is inadvisable is to lump these citizen–state cases in with citizen–citizen cases (and much less so criminal cases). The special relationship between private entities and the federal government must remain a ready touchstone for whatever court would hear cases involving that relationship. It is not a task for just any court with some room on its docket. To employ our metaphor again, a house must be different, in both design and application, if it is to be built on a fundamentally tilted surface. Constructing a typical, prefabricated house onto a steep hillside will eventually result in an unfortunate outcome; instead, to serve its function in such a setting, a home must be custom-built to take this context into account.

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40. Frommhagen v. United States, 216 Ct. Cl. 1, 170 (1978) (citing Marion T. Bennett, SECTION THREE, 1925-1978, THE UNITED STATES COURT OF CLAIMS, A HISTORY) (just as "[t]he individual needs protection against the excesses of big government, . . . the Government needs protection against the unreasonable demands of some citizens").

41. *See* EPSTEIN, *supra* note 8, at 12.

42. The First Amendment to the Constitution admits of this lopsided relationship even while working to provide a bulwark against the federal government's absolute power over the individual citizen: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I. The Court of Federal Claims is, first and foremost, a venue for the people to petition the federal government for a redress of certain types of grievances.

II. DIFFERING VIEWPOINTS ON THE COURT'S ROLE

At the time of the aforementioned conference, marking twenty years of the Court of Federal Claims in its current form, the court was subject to a variety of academic opinions expressed through articles those scholars contributed, including its share of criticism from some of those writers.[43] The authors contributing to the symposium were made up of judges, practicing attorneys with experience appearing before the court, and several law professors. While several of those scholars made suggestions to improve the court without diminishing its special role, some of the contributing authors stood out in particular, as their arguments broached the court's potential obsolescence and dissolution.[44] Certainly, there have been individual articles since that symposium as well, but most of those focus on a particular legal issue or topic of subject matter within recent case decisions from the court. The 2003 symposium gave its full consideration to the court itself, its role, and its relative performance of that role.

As initiator of the conference, Judge Smith's contribution focused on what made the court special in its original mission and its ongoing purpose. For Judge Smith, the issue for consideration was how to vindicate the American foundational ideals within the interactions of people with their government, and he concluded that the COFC "makes a unique contribution to the accountability and protection of individual rights that is so axiomatic a part of our civilization," even acting as "the conscience of the federal government."[45] He viewed its singular nature as a strength, to provide "a single place where citizen and government coherently and efficiently can resolve disputes . . . on a relatively even playing field."[46] "The Court of Federal Claims is a vital mechanism that protects that civil liberty in relations between the citizen and government. If the Court of Federal Claims did not exist, then it would have to be created."[47] For Judge Smith, any arguments against the necessity of the court's function or existence constitute "a solution in search of a problem," and create "a problem in

43. Schwartz, *supra* note 38, at 863.
44. *Id.*
45. Smith, *supra* note 4, at 773, 787. "What may well be the heart of the Court of the Federal Claims's reason for being is a sensitivity to both the fundamental rights of citizens and an appreciation of government's unique duties under the Constitution." *Id.* at 778.
46. *Id.* at 774.
47. *Id.* at 788.

search of a target."[48] Abolition of the court "would seriously harm both the government interests in national uniformity of rule, and private interests in a sensitivity to providing a fair forum for litigation against the sovereign."[49]

The other judge who wrote a contribution was Circuit Judge Plager of the Federal Circuit Court of Appeals.[50] In his contribution to the symposium, Judge Plager discussed some of the peculiarities specific to the procedure and subject matter jurisdiction of the COFC, noting (as many others had) that the court's cases are at once both very specific but simultaneously very diverse in topics.[51] Importantly, he pointed out the crucial fact that if the Court of Federal Claims did not exist, the cases on its docket would need to be decided by local federal district courts instead.[52] This observation is revelatory, because the real governing metric for the court should not be to compare the Court of Federal Claims to an abstraction or against a standard of subjective perfection, but to compare the work of the court to the outcomes reached in federal district courts under similar factual circumstances.[53] Judge Plager did recognize the unequal footing between the government and private litigants, and saluted the special role of the court as necessary to act as arbiter in that relationship.[54] Although Judge Plager acknowledged some of the arguments made against the court's continued existence, which will be addressed further below, he ultimately concluded that the court's historical role and tradition argued for its continuation.[55]

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48. *Id.* at 785.

49. *Id.*

50. Judge Plager, *Abolish the Court of Federal Claims? A Question of Democratic Principle*, 71 GEO. WASH. L. REV. 791 (2003).

51. *Id.* at 792–93.

52. *Id.* at 791.

53. *See id.* at 796–97 (postulating that the question in determining whether to abolish the Court of Federal Claims is whether the district courts could fulfill the role and discussing some of the COFC's comparative advantages over the district courts).

54. *Id.* at 796 ("In this setting, it is even more necessary that the courts serve as the intermediary between the citizen and the government. Consider the fact that a trial judge, or a panel of appellate judges, can tell the government, 'Government, you committed a wrong as we see it, and now you must compensate the plaintiff.'").

55. *Id.* at 797 ("[H]owever we may tinker with the details of its jurisdiction, the symbolic importance of having the COFC exactly where it is, as the recognized successor to over 100 years of level playing field between the citizen and the government, is sufficient justification for its continuance into the indefinite future. In my judgment, though Professor Schooner's arguments in favor of simplification, efficiency, and economy are valid, I find more persuasive Judge Smith's argument that there are some institutions, although not always the most efficient, which are nevertheless important, indeed necessary, to the foundations of American democratic society. The COFC is one such institution, and

The main voice at the conference symposium that took the exceptional position against the Court's ongoing role was a law professor, Steven Schooner.[56] Because Professor Schooner's article presented the strongest position against the court's jurisdiction—and even its continued existence—it is worth delving into his arguments in greater detail, and performing some point-by-point analysis. His analysis makes for a ready framework for assessing the merits of the court's role and function. If his critiques can be successfully countered here, we can conclude that the strongest criticisms of the court will have been answered and rebutted. What follows is an analysis of those critiques of the court that were directed at its existential core purpose at that anniversary conference by Professor Schooner.

In his article, Professor Schooner's primary consideration was judicial economy and efficiency.[57] The focus of his approach became very concerned with a form of efficiency that is better termed optimality, and the form of analysis he employed bears the hallmarks of a corporate executive evaluating a subsidiary company following a merger, looking for redundancies to eliminate for downsizing.[58] His thesis was that the court's cases could be heard just as efficiently elsewhere within the federal judiciary, and that the court therefore need not continue to exist.[59] Thematically, Professor Schooner's foundational premise is a formalist criticism, arising from the observation made by many of the other authors about

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it should not be abolished."); *cf.* TALEB, *supra* note 7, at 371 ("Have respect for time and nondemonstrative knowledge . . . . Things that have worked for a long time are preferable—they are more likely to have reached their ergodic states . . . . Remember that the burden of proof lies on someone disturbing a complex system, not on the person protecting the status quo.").

56. Steven L. Schooner, Symposium, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 714 (2003).

57. *Id.* at 717.

58. *But see* TALEB, *supra* note 7, at xxiv ("It is much easier to deal with [unforeseeable risks] if we focus on robustness to errors rather than improving predictions."); *id.* at 312 ("[R]edundancy equals insurance, and the apparent inefficiencies are associated with the costs of maintaining these spare parts and the energy needed to keep them around in spite of their idleness. The exact opposite of redundancy is naïve optimization."); *id.* at 371 ("Avoid optimization; learn to love redundancy . . . . Overspecialization also is not a great idea."); *id.* at 313 ("Mother Nature does not like overspecialization, as it limits evolution and weakens the animals.").

59. Schooner, *supra* note 56, at 717 ("Congress could create a more organized, satisfactory, and efficient system for resolving money claims against the government without employing the Court of Federal Claims (as we know it today). Accordingly, it seems prudent to discuss potential reasons for simply eliminating the court and dispersing its current workload.").

the wide variety of legal topics heard by the court.[60] However, for Professor Schooner in particular, the court's areas of jurisdiction are simultaneously too specialized but not specialized enough. He asserted that the court is "not truly a specialized court," because its jurisdiction is not limited to a narrower niche of statutory subject matter, but instead hears a "hodge-podge" of cases, which he found to be inefficient.[61] If the court were not truly specialized to more limited topics, he argued, why not disperse its cases among truly generalized judges in the district courts?[62]

The content of his article assessed each area of the court's jurisdiction to argue that the cases would be just as efficiently heard elsewhere.[63] Professor Schooner believed that the court had been outpaced by district courts and administrative law fora, and was no longer needed to hear the varied types of cases currently within its jurisdiction; the court could thus be downsized without negative consequence.[64] This green eyeshade perspective neglected the court's necessity in evaluating claims brought by citizens against the sovereign, however, and instead framed the issue around whether district court judges of general jurisdiction have sufficient time and acuity to consider the discrete legal issues raised in cases of a particular subject matter, so that the COFC's cases could be dispersed without losses to efficiency.[65] His approach did not address whether the cases would be more fairly considered and

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60. *Id.* at 715–16.

61. Explaining why the Court of Federal Claims is not specialized, Professor Schooner asserted:

> If one defends the court on the grounds that it is a specialty court, this paper empirically retorts that no single jurisdictional grant enjoys sufficient dominance to permit the expected level of expertise. Cumulatively, the court's jurisdiction is so diverse that the court cannot truly claim to be a specialized forum.

Id. at 717; *see also id.* at 720.

62. Other contributing authors disputed this characterization:

> [I]t is not obvious that having several specialties necessarily compromises fatally the benefits usually ascribed to specialization . . . . [C]oncentration of a sufficient number of cases in a particular forum creates a unique opportunity to recognize recurring issues in the cases and the larger patterns lurking in the case-specific issues, and to discern . . . . the serious tensions that beset the doctrines being applied.

See, e.g., Schwartz, *supra* note 38, at 867.

63. Schooner, *supra* note 56, at 722–32.

64. *Id.* at 717–18.

65. *Id.* at 741–42.

adjudicated, but framed the discussion around this pursuit of bureaucratic optimality.[66]

In this endeavor, Professor Schooner mounted an "empirical" criticism of the court on the basis of case management statistics, to provide a body of data in support of the court's dissolution, and redistribution of its cases, judges, and statutory jurisdiction throughout the nation's other courts.[67] Although the general topical question for all the writers of the conference was to address "what service does the court ultimately perform and how well situated is it to accomplish its mission," Professor Schooner transformed the inquiry into a more critical formulation, questioning "what function the COFC performs that could not be performed equally well elsewhere"?[68]

Professor Schooner argued that if all the court's cases were redistributed evenly to all federal district courts, it would result in only one additional case per district judge, which he then equated to "a workload increase of less than 0.25%," based on the average number of typical cases on the average district judge docket.[69] But the special cases currently litigated at the Court of Federal Claims are not equatable to a typical case on a district judge's docket.

As Professor Schooner's article conceded, the average federal district judge "juggles a criminal docket that (numerically) exceeds a COFC judgeship's total docket by almost 50%," and "a federal district court judgeship bears more than eight cases for each case allocated to a COFC judgeship," although COFC cases represent "a heavy dose of large and complicated cases."[70] Even so, he concluded that "throwing the Court of Federal Claims' incoming docket into that mix would have a negligible effect on federal district judges."[71] If I were a private party seeking redress for a complicated regulatory

66. Professor Schooner downplayed the negative effect of potential forum shopping between the different district courts, and thereby determined that dispersing the COFC's docket of cases across the many courts in the country would actually "reduce confusion in law and practice." *Id.* at 718. However, by minimizing the centrifugal force of forum-shopping in creating haphazard divergences in case outcomes, Professor Schooner had narrowed his focus only to its effect on individual cases and litigants, ignoring the scalability of the problem upon the construction of a coherent interpretation of the law.

67. *Id.* at 718.

68. *Id.* at 716.

69. *Id.* at 738.

70. *Id.* at 739.

71. *Id.* at 741. Remarking on this comment, Judge Plager wondered about the effect on the judiciary of such a redistribution, stating "[Professor Schooner] describes this as 'a drop in the bucket,' though some district judges might think of it as the straw that breaks the camel's back." Plager, *supra* note 50, at 793.

taking or an obscure vaccine injury, whether my case posed a "negligible effect" would not be my primary consideration.[72]

Another argument raised in Professor Schooner's article targeted some special (albeit less frequent) types of cases for which the court has long held jurisdiction, such as Native American claims and Congressional Reference cases.[73] His argument was that these sorts of cases are too infrequent to matter in judicial economy terms and that their relative paucity in turn limits the court's ability to specialize in their subject matter.[74] Speaking specifically about Congressional Reference cases, in which the court returns to its original function of providing advisory opinions to Congress to appoint funds for compensation of special claims, he offered a solution: abolish the court and "this issue will be rendered moot."[75] The obvious question raised is where would Congress turn (other than to an Article I court like the COFC) to address these special cases? Ignoring the specific constitutional basis for the court's original mandate as an Article I court,[76] he reiterated the same bureaucratic reasons why all the court's cases should be shifted to Article III courts.[77]

Professor Schooner's specialty is in government contracts law, and he projected this focus rather narrowly onto the entire caseload

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72. Professor Schwartz is insightful on this point:

> [T]he specialization of the court in this area has in fact had a noticeable impact on the development of the law of takings. In this instance, the specialized jurisdiction of the COFC has produced decisions more sympathetic to the claim of uncompensated taking than might otherwise be expected, especially in cases that cannot readily be judged as categorical takings (or non-takings) at the threshold of litigation. It may be that this is traceable in part to the availability, in the court, of sufficient judging and trial time resources to make it possible to entertain highly fact-specific claims of uncompensated taking. Professor Schooner's caseload data suggest that such claims might be viewed much more dimly by district judges were such cases within their jurisdiction. But it is also plausible to suggest that takings cases in fact recur sufficiently frequently in the court's workload that the court has developed a working mastery of the takings doctrine, widely viewed as arcane, that permits it to thoughtfully address issues disregarded by other forums that address these issues less regularly. Note that this phenomenon does not depend on recruiting judges with a background in takings cases, and its development does not seem to have been forestalled by the multiple specialties that the COFC possesses.

Schwartz, *supra* note 38, at 875–76.

73. Schooner, *supra* note 56, at 743.

74. Schooner, *supra* note 56, at 747; *but see infra* pages 22–45.

75. Schooner, *supra* note 56, at 746–47; *but see infra* pages 22–45.

76. *See generally*, Schooner, *supra* note 56.

77. *Id.* at 747–50. After addressing these reasons without examining the more fundamental purpose of the court, he again concluded, "Nothing that the Court of Federal Claims does could not be done more efficiently elsewhere." *Id.* at 750.

of the court, as if government contract cases were the only cases relevant to the consideration of the court's work.[78] This narrow perspective on the court's role produced faults within the contours of his general argument, inasmuch as this area of law is, in significant ways, anomalous among the types of cases heard by the court.[79] Professor Schooner viewed government contract cases as the "bread and butter" of the court's jurisdiction, and dismissed the other areas of the court's jurisdiction as ancillary.[80] This singular focus was the basis for Professor Schooner's dismissal of Judge Smith's explanation of the court's core purpose, and he ignored the court's special role as arbiter between citizen and sovereign.[81] Thus, the arguments he raised lost much of their vigor when extended to other types of cases within the court's jurisdiction.[82]

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78. *Id.* ("The Court of Federal Claims, first and foremost, resolves matters related to federal government contracts. Yet even in that sphere, its role is marginal, rather than dominant."); *cf. id.* at 721, n. 29 (stating that "public contracts dominate the court's docket"). Later he concedes that government contract cases comprised only about a third of the court's caseload. *Id.* at 722.

79. For example, bid protests involve disputes between private parties, acting as competing contractors. In all government contract cases, the government may assert counter-claims in determining contractual liability. Neither of these feature in other cases before the court, all of which more closely follow a more classic pattern of citizen-sovereign disputes.

80. *See id.* at 753–70 (arguing that, statistically, contract disputes comprise a disproportionately large percentage of the court's docket). Other writers have given thoughtful counterarguments to the points Professor Schooner raised. For example, Professor Schwartz noted:

> If, however, federal government contracts litigation were to be dispersed among the district courts in accordance with one of Professor Schooner's proposed alternatives, it is unlikely that the characteristic tension between exceptionalism and congruence that underlies many public contracts cases would be recognized sufficiently to evoke thoughtful consideration of these issues . . . . it is unrealistic to expect the district courts to contribute constructively to the resolution of this complex of issues.

Schwartz, *supra* note 38, at 865.

81. Schooner, *supra* note 56, at 720. Responding somewhat to this critical concept, Professor Schooner simply dismisses the special role of the court out of hand, noting that "federal district courts routinely resolve staggering numbers of suits involving citizens and the sovereign, both criminal and civil." *Id.* at 720–21. But he does not apply the same standard there he had earlier pronounced: Are those courts resolving these issues "equally well" when compared to the COFC? In comparing the court to administrative boards which also hear government contract cases, he merely points out that those cases likewise feature the government as a party, as a summary rebuttal to Judge Smith's conceptual argument about discerning the relationship between citizens and their government. *Id.* at 721, n.29.

82. Another prime example of the difference between government contract litigants and other private parties appearing before the COFC is notice and acceptance of the potential for litigation against the federal government. The voluntary nature of government contracts means that all litigants have accepted the potential risk of litigation against the federal government long before they became litigants, when they were yet offerors. By stark contrast, victims of vaccine injury have no advance notice prior to receiving a vaccine that they will need to sue against the government to recover

Of course, efficiency is a fine goal to prioritize, but courts do not exist to create efficiencies, least of all in the context of cases against the sovereign. They exist for the crucial interest of producing a more just society, which is a goal more important than optimality, and creates a more robust cooperation between the people of a nation.[83] The most efficient outcome, if that is the only or highest priority, is to dismiss (or entirely disallow) any suits brought by citizens against the federal government. In this context, the least burdensome, most bureaucratically optimized manner of dealing with all of these special cases (in which citizens seek to vindicate legal rights against the government) would be to defer to the government's discretionary prerogative. No, on a fundamental basis, any analysis that concerns itself with efficiency to the exclusion of all else will fail to account for the real purpose of courts, and the COFC in particular—to work justice for those who have been materially wronged. In a nutshell then, the arguments raised in Professor Schooner's article are overcome by the greater interest in justice. No argument was made that other courts could perform the mission of the COFC better than the COFC, or that other courts are more careful in their consideration of this complicated subject matter. Moreover, the arguments made against the COFC on the basis of efficiency are disproved empirically by recent empirical studies,[84] which have delved more deeply into the court's performance of its task than the review of court statistics performed by Professor Schooner in his article. But again, to the extent that Professor Schooner's argument holds weight, it is rather limited to the realm of government contracts litigation. However, it is outside of Professor Schooner's specialty of government contract cases where the court more often interacts with claims by individual

compensation for their injuries. Less stark but yet still relevant, owners of property typically have no notice at the time of purchase (other than the most generalized possibility) of the potential for an eventual taking by the government. And there is nothing voluntary for taxpayers paying taxes that will ultimately form the basis of a tax refund suit. Whether in the context of informed consent in medical care or acceptance of terms of service in commercial dealings, the law usually requires a greater degree of care where the injured party has not voluntarily accepted a potential risk of harm in the interaction with defendant.

83. *See* JAMES C. DUFF, JUDICIAL CONFERENCE OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 2 (2015) (listing "rule of law," "equal justice," and "accountability" amongst the U.S. courts' core values).

84. MARK V. ARENA ET AL., RAND CORP., ASSESSING BID PROTESTS OF U.S. DEPARTMENT OF DEFENSE PROCUREMENTS: IDENTIFYING ISSUES, TRENDS, AND DRIVERS 51–55 (2018).

persons, where the balance between citizen and sovereign must be carefully weighed in coming to a just resolution.[85]

One example of the court's jurisdiction in which the evidence contradicts Professor Schooner's critique of the court is the National Vaccine Injury Compensation Program (NVICP), heard by the Office of Special Masters within the COFC, as a sort of court within a court.[86] There the anachronistically-termed "special masters" act analogously to magistrates within a federal district court setting, managing vaccine injury cases during their pendency, ruling on factual matters of causation and damages, and making conclusions of law regarding entitlement to compensation in final Decisions.[87] In coming to their rulings, the special masters must consider medical issues of neurology, immunology, rheumatology, orthopedics, and genetics, to name a few. Those Decisions may be reviewed by the judges of the main Court of Federal Claims upon motion of either party, before undergoing appeal at the Federal Circuit if necessary.[88] With very little exception, all vaccine injury cases in the country must be heard in the setting of this compensation program within the COFC, and the repository fund for the compensation is held by the Department of Health and Human Services, who is the designated Respondent in these cases.[89] Because injured petitioners in the program assert their claim for compensation against part of the federal government, Congress ultimately

85. In his search for a metric to evaluate the court's performance, Professor Schooner seized upon the ratio of cases for which opinions of the court's judges are designated for publication. Schooner, *supra* note 56, at 729–33. He contrasted government contracts and civilian/military pay cases with vaccine injury compensation cases to demonstrate a point, but clearly miscounted or misunderstood the court's jurisdiction of the latter. The point is not worth further argument or clarification, though, as there is little in the way of a meaningful conclusion to be gained through this ratio, a point his article concedes. His inquiry assumes that the Court's efficacy and existential *arête* can be quantified by how many of its cases result in published opinions, but Professor Schooner provides no similar measure for comparison to the federal district courts to which he would transfer the court's jurisdiction.

86. 42 U.S.C. § 300aa-10 (2012).

87. 42 U.S.C. § 300aa-12(d) (2012). Because most of these cases are finally resolved by the special masters, without additional adjudication by the judges of the main court, these Decisions are not published in the court's official reporting publication, although a great many cases are still designated as published and made available on the court's website, as well as on Westlaw and Lexis. In the infrequent cases that are reviewed by the judges of the court (following a timely motion for review) the court's decisions are published in the court's official reporting publication, and those cases that are further appealed to the Federal Circuit are published in the Federal Reporter.

88. § 300aa-12(e)–(f) (2012).

89. § 300aa-11(a)–(b) (2012).

placed jurisdiction of the program within the purview of the Court of Federal Claims.[90] Despite significant challenges and early predictions that the Program would be unsuccessful, the court and the practicing bar have performed admirably to make the Program a success.[91]

At the time of the Program's creation, however, Congress strongly considered whether to do just what Professor Schooner's article advocated: to disperse the cases to the district courts across the country, or to hear the cases in an administrative setting: In early drafts of the statute that created the NVICP, all cases would have been assigned to the federal district court for the D.C. District, with appeal to the D.C. Circuit Court of Appeals.[92] Interestingly, constructing the program entirely within the Department of Health and Human Services as an administrative proceeding was rejected outright, and viewed as creating an improper conflict of interest.[93] In later drafts, the working proposal shifted so as to distribute the vaccine injury cases to the local district court closest to the geographical location of the vaccination or injury, with assigned special masters and/or magistrates in a nationwide distribution, and with appeal to the several Circuit Courts of Appeal, depending on the district.[94] This

90. § 300aa-11(a).

91. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES, VACCINE INJURY COMPENSATION: MOST CLAIMS TOOK MULTIPLE YEARS AND MANY WERE SETTLED THROUGH NEGOTIATION GAO-15-142 (2014).

92. The earliest proposal followed the recommendations of the "Commission on National Vaccine Injury Compensation" as reflected in Senate Bill 2117 (mirrored in HR 5810), which would have vested jurisdiction for vaccine injury petitions in the District Court for the District of Columbia with a right of appeal to the D.C. Circuit Court of Appeal. *Hearing before the S. Comm. on Labor and Human Res. on S. 2117*, 98th Cong. 187 (1984); *accord Hearings before the H. Subcomm. on Health and the Env't of the Comm. on Energy and Commerce*, 98th Cong. 3 (1984).

93. The AMA's Ad Hoc Commission on Vaccine Injury Compensation had recommended that petitions should be pursued exclusively as an administrative suit within the Department of Health and Human Services, and only would receive judicial review of the claim after exhausting administrative remedies and only on procedural or legal defects, but that was never strongly pursued because of the conflict of interest. *Hearing before the S. Comm. on Labor and Human Res. on S. 2117*, 98th Cong. 200 (1984); *see also id.* at 204 ("If a claimant's claim is denied, or the amount awarded is disputed, the claimant may appeal the decision to a federal court after exhausting administrative remedies. The Secretary would enjoy a presumption that substantial evidence supported her decisions; review would not be de novo but limited to a review as to whether HHS had properly interpreted and fulfilled its statutory obligations.").

94. *See Hearings before the H. Subcomm. on Health and the Env't of the Comm. on Energy and Commerce on H.R. 1780, H.R. 4777, and H.R. 5184*, 99th Cong. 48–49 (1986); *see also id.* at 53 and 57 (spreading the cases throughout the district courts was viewed poorly by the American Academy of Pediatrics). *Id.* at 123–28.

would almost certainly have created a wide inconsistency in outcomes. Congress rejected both alternatives in favor of housing the VICP solely within the Court of Federal Claims, with nationwide jurisdiction of all vaccine injury claims.[95]

Far from illustrating "a useful anecdote" to critique the court's jurisdiction over this subject matter,[96] this decision of Congress had already considered but rejected this argument raised by Professor Schooner, and the results have been better for it.[97] He had argued that housing the Program within the COFC lacked an "obvious justification," and critiqued the special masters as having been appointed with "no unique education, training, or experience" gained prior to joining the court.[98] Based on this premise, he concluded that these specialized cases could be dispersed to other courts across the country without creating an "[undue] burden [upon] any of the fora most likely to bear the brunt of the distribution."[99] Once again, his perspective focused narrowly on how convenient this dispersal would be for the several judges of the federal district courts, not on the proper and consistent adjudication of claims. Also, given the complexity of

95. *See* 42 U.S.C. § 300aa-10 (2012).

96. Schooner, *supra* note 56, at 735.

97. This is, obviously, a conclusion regarding which reasonable dispute may exist. Pharmaceutical companies, almost entirely shielded from private action for vaccine injuries by the Act, have traditionally supported the Program as conceived and implemented. *See* Bruesewitz v. Wyeth LLC, 562 U.S. 223, 243 (2011) (holding that the Vaccine Act preempted state-law claims for injury from vaccine side-effects which were unavoidable even though the vaccine was properly prepared and accompanied by proper warnings). Although opposed by some plaintiff groups in its initial period, the Program currently enjoys the stated support of the Vaccine Litigation Group of the American Association of Justice. *Litigation Groups: Vaccines* AM. ASS'N FOR JUST., https://perma.cc/2TV2-YM4Z. That is not to say that the Program is free from challenges facing its ongoing viability. A serious funding shortfall currently limits the capacity of the court, the Respondent agency (HHS), and the section of Department of Justice representing the government to keep up with the inflow of filed cases (the still-in-effect original statutory language of the Vaccine Act limits the court's roster to eight special masters for the entire country). ADVISORY COMM'N ON CHILDHOOD VACCINES, RECOMMENDATIONS (Dec. 16, 2016), https://perma.cc/A6TP-F5SM.

98. Schooner, *supra* note 56, at 735. He argues too much in this regard. The Federal Circuit hears appeals of all patent cases in the country, and the appellate judges there seldom have possessed specialized qualifications prior to their appointment to that bench. *See, e.g.*, Vernon M. Winters, *Judicial Profile: Hon. Paul R. Michel, Chief Judge, U.S. Court of Appeals for the Federal Circuit*, FED. LAWYER, Feb. 2008, at 2 (noting that the chief judge of the federal circuit had neither a technical background nor a focus on patent law during law school or the first several years of practice). However, whether considering the special masters or the judges of the Court of Federal Claims or the judges of the Federal Circuit, it is the experience and knowledge they gain on the job that makes their specialization within a single court useful in crafting a unified, coherent body of decisional law to interpret the applicable statutes.

99. Schooner, *supra* note 56, at 736.

vaccine injury claims, it is quite doubtful that those claims would have imposed no significant burden on district judges. However, even if his assertion were true, his argument assumes a bureaucratic view focused on optimized judicial management of cases, not on justice for truly vaccine-injured parties. In this author's experience with fellow practitioners, no attorney practicing in this area has supported his proposal for dispersal.[100] Nevertheless, Professor Schooner focused narrowly on court statistics to conclude that "if all of the court's current work were to be distributed to the federal district courts, the effect would be negligible."[101] The reality of actual practice does not support his conclusion. Whatever the effect might be for the courts that would need to learn these complicated subject areas of law, the effect on the litigants would surely be substantial, and there was no evidence offered that the effect would be beneficial to the actual litigants in these cases.

Even within the context of Professor's specialty of government contract cases, recent data contradict his position, and support the COFC as an excellent forum for hearing government contract cases, and bid protests in particular. The Rand Corporation performed a study over the last year, examining the efficacy and efficiency of bid protest litigation, both at the COFC and at the Government Accountability Office (GAO).[102] The study was funded by Congress in response to federal agency complaints that bid protests were making the contracting process more onerous and inefficient than it needed to be.[103] At the COFC, the number of cases is steadily increasing, and the majority of those filed at the court are identified as small businesses.[104] Following extensive research (including several interviews with practitioners and stakeholders), the Rand Study indicated that the COFC was efficient in processing most cases and took a more detailed approach where the facts of the protest were more complicated.[105] It certainly appears from the study that the COFC handles bid

100. I have represented vaccine-injured petitioners and have been an active member of the Vaccine-Injured Petitioners Bar for nearly eight years, following four years as a law clerk within the Office of Special Masters.

101. Schooner, *supra* note 56, at 737.

102. RAND CORP., *supra* note 84.

103. *See, e.g.*, *id.* at xi–xiii (noting Department of Defense personnel complaints that the bid protest system gave contractors "too much time to protest" and permitting weak protests).

104. *Id.* at 43–48.

105. *Id.* at 52–53, 69.

protests much more quickly and efficiently than a district court would be able to do, where bid protests would make up a much smaller portion of the docket.[106]

From reading the recent Rand study, the conclusion emerges that the COFC is as efficient as could be desired while maintaining the capacity to delve deeply into knotty factual issues as may be necessary in certain cases. Most bid protest cases at the COFC are resolved within a ninety-day period; however, when cases have more complicated issues to be decided, the cases may take much longer without artificial constraint.[107] The court does its best to move the cases without delay: "Typically, within 24-48 hours of filing, the judge will hold a scheduling conference to set timing for the protest case and to determine the status of the procurement."[108] Taken together, the Rand study's findings indicate that "firms may be more willing to file protests with COFC," and "[t]he appeals rate is declining over time," which denotes greater acceptance of the court's resolution of cases.[109]

Consistent with the court's purpose of plumbing the balance of power between citizen and sovereign, small businesses with bid protest claims tend to prefer the COFC even over the ostensibly less formal and less costly forum of the GAO, and tend somewhat to be more successful at the COFC than at the GAO.[110] The conclusion reached in the study was that, because of the

106. *See generally id.* This seems also to have been the case in 2003, when the COFC conference symposium was convened. Judge Smith's article referenced a GAO study from 2000 which found that, given their choice of forum, most litigants preferred the COFC over bringing bid protest cases in federal district courts. *See* Judge Smith, *supra* note 4, at 781 (explaining that litigants preferred to file their claims in the [COFC] by a margin of more than three-to-one).

107. RAND CORP., *supra* note 84, at 69.

108. *Id.* at 52.

109. *Id.* at 54.

110. *Id.* at 68. "[T]he majority of protesters at COFC were self-identified small businesses." *Id.* at 48; *see also id.* at 55 (highlighting the fact that COFC's sustain rate is declining, when GAO's is holding steady or trending up). "This result suggests that when small businesses are forced to use legal counsel, their protest sustained rates are similar to those of larger firms." *Id.* at 51. As for whether the more formalized court setting of the COFC leaves it more hidebound than the GAO, the following findings may be surprising:

> Cases at COFC tend to be higher in value than at GAO. The shift to higher procurement values is, perhaps, not surprising, as the costs to file protests at COFC presumably are higher due to the requirement to be represented by legal counsel (unlike at GAO, where representation is optional). GAO was set up to be an "inexpensive and expeditious forum for the resolution of bid protests." However, during our discussions, some disputed whether there was a real difference in the costs between the two venues.

Id. at 48.

heightened formality and higher expense of litigation in the COFC (GAO cases are more administrative and do not require representation by an attorney, for example), cases that do proceed in the COFC tend to be more carefully considered prior to filing and often more meritorious.[111] Although bid protests remain somewhat atypical within cases heard at the COFC (they somewhat resemble intervenor actions between contractors, not strictly cases of parties aggrieved by direct governmental action), from a broader perspective, they fit well within the court's greater functions of upholding the public trust in paying from government funds, and leveling the power balance between the federal government and private citizens.[112]

These factual findings serve to rebut further Professor Schooner's critique of the court targeted specifically upon government contract cases, and depict the court as an efficient and integral subject matter specialist in bid protests. Thus, these current, real-world data points support the court's continued role as a specialized forum, and argue against the criticism that the court's jurisdiction should be removed and dispersed across the district courts. From these data, it becomes apparent that even in the main subject area of Professor Schooner's critique, government contract cases, the court is performing as well or better than other judicial alternatives that have been proposed.

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111. *Id.* at 51.

112. The Rand study made an insightful triad of points relevant to this topic:

> This idea that the government's use of funds must be held to a higher standard goes beyond the idea of fairness. Taxpayers are also concerned with integrity, and, as such, the federal government should ensure that the process and methods by which it allocates funds exhibit the highest possible degree of integrity. U.S. agencies are held to a different set of standards than their private counterparts, simply because they are using government funds . . . .The second theory underlying the current bid protest system is that officials allocate contracts with public funds and do not experience the same incentives that they might with their own agencies' money. Private firms have their own method for compensating for the weaker incentives of their agents (i.e., compensation schemes and monitoring). But in the public sector, bid protests are designed to compensate for such weaker incentives.From the perspective of potential offerors, a third theory holds that the protest system acts as a signaling mechanism to potential private partners. Government contracting bears unique risks that are absent in private or commercial contracts . . . . The existence of a system for private companies to lodge a complaint or to protest a contract decision signals that the government is a suitable partner; such a system shows that if a decision is perceived to be unfair, protesters can appeal the decision and have another party review it.

Id. at 12.

Even if the court were not performing as efficiently as it is, that would not mean that the court's cases should be dispersed to district courts. To take a broader perspective, the court's role as intermediary between citizen and sovereign should be the proper perspective for evaluation. Although certainly within Tucker Act jurisdiction and the court's historical jurisprudence, government contracts litigants are not on as unequal a footing as other parties who bring cases to the court, and do not suffer nearly as much from the uneven relationship.[113] Several of the primary contractors are usually quite large, with ample political influence with which they could potentially vindicate their rights even if the court did not exist, and it is smaller businesses that are increasingly seeking redress in the COFC, as data from the above-mentioned Rand study bear out.[114] To frame the entire consideration of the court's utility on this single area of practice (which does not comprise a majority of the cases filed in the court)[115] fails to comprehend the larger animating purpose for the court.

Furthermore, this view ignores the potential for misallocation of judicial resources on this category of cases, which might otherwise be available to address other cases. If procurement cases were removed from the court's jurisdiction tomorrow, would that leave the court with nothing to do? Or would that allow more individual litigants to pursue their takings cases, their military and government employment cases, etc.? As the power and reach of the federal government continues to grow, the work of the court is more vital than it has ever been. If anything, the area of greatest concern, where there is room for improvement, is in the level of access for litigants to pursue their claim in the COFC. The court is short-staffed in both its judges and its VICP special masters, and filling vacancies should be a top priority for anyone considering the plight of the court.[116]

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113. Here I do not mean to say that government contractors are not subject to the disparate footing between private parties and the federal government. My point is that, of all litigants in the **c**ourt, they would be the most able to vindicate their rights if the **c**ourt did not exist. There are certainly excellent reasons for the **c**ourt to maintain its government contracts jurisdiction. *See* Schwartz, *supra* note 38, at 867 ("The COFC may thus help to produce a body of doctrine that is relatively clear and consistent and that strikes appropriately particularized balances between the influences of exceptionalism and congruence and between the interests of the government and contractors.").

114. RAND CORP., *supra* note 84, at 75.

115. The recent Rand study noted that bid protest litigation makes up between one tenth and one fifth of cases filed at the COFC. *Id.* at 44.

116. *See id.* at 80; ADVISORY COMM'N ON CHILDHOOD VACCINES, *supra* note 97.

Another area where improvement could be made to increase access to the court would be to make the process more affordable to litigants with meritorious claims. In the current circumstance, it is an expensive venue for litigation, and some older precedents have limited the full effect of the Tucker Act's potential for redress of claims.[117] Military and civilian employees with disputes about unpaid compensation must often form a class to be able to bring their claims to the court because of the expense of litigation.[118] Any residual limitations call for greater access to the court, to strike the proper balance between citizens and sovereign, not the dissolution of the special role for which it was established.[119]

On this point of improving access to the court, Congress would do well to consider the very specific and helpful suggestions made by attorneys Marcia Madsen and Gregory Smith in their thoughtful and detailed contribution to the anniversary

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117. Much of the history of jurisprudence interpreting the Tucker Act does not align with its role as remedial legislation, but has followed the "beady-eyed" interpretive model more appropriate for rent-seeking legislation. On the practical differentiation between remedial legislation and rent-seeking legislation, see generally Frank H. Easterbrook, *Foreward: The Court and the Economic System*, 98 HARV. L. REV. 4, 15–19 (1984).

118. *See, e.g.*, Barnes v. United States, 68 Fed. Cl. 492, 499–500 (2005) (ruling for class certification in a civilian pay case based (*inter alia*) on the reality that, "the small recoveries expected to be received by these individuals—estimated to be individually in the hundreds of dollars—render it less likely that, without the benefit of class representation, they would be willing to incur the financial costs and hardships of separate litigations, the costs of which would certainly exceed their recoveries many-fold"); *see also* Curry v. United States, 81 Fed. Cl. 328, 329–30 (2008) (granting Veterans Affairs employees' motion for class certification).

119. In her article, Professor Judith Resnick addressed the need for an expanded, not reduced role for the court, "to make the federal government more accountable to those who challenge its actions," and championed the court's capacity to grant appropriate remedies through Congressional delegation of authority to the court. Judith Resnik, *Proceedings of the 15th Judicial Conference Celebrating the 20th Anniversary of the United States Court of Federal Claims: Of Courts, Agencies, and the Court of Federal Claims: Fortunately Outliving One's Anomalous Character*, 71 GEO. WASH. L. REV. 798, 801, 814 (2003). See also Judge Bruggink's thoughtful critique of the uneven allocation of the Court's jurisdiction on various matters. One example is joinder of claims:

> As the Supreme Court wrote in *Cherry Mills v. United States*, "We have no doubt but that the set-off and counterclaim jurisdiction of the Court of Claims was intended to permit the Government to have adjudicated in one suit all controversies between it and those granted permission to sue it." Somewhat incongruently, the legal edifice does not afford the same courtesy to citizens suing the Government, who must either pursue relief in more than one forum or forgo part of the relief to which they believed they were entitled.

Bruggink, *supra* note 22, at 534, quoting 327 U.S. 536, 539 (1946). Another example is the grant of equitable relief: Although not logically required by the sovereign immunity doctrine, early, formative decisions interpreting the Tucker Act excluded equitable relief from its purview. *Id.* at 533; United States v. Testan, 424 U.S. 392, 397–98 (1976); United States v. King, 395 U.S. 1, 3 (1969).

symposium.[120] Whereas many of the other article contributors were judges or academics, Madsen and Smith brought their perspective of attorneys practicing before the court.[121] Their article presented a very detailed list of typical hurdles that can impede or frustrate private litigants in vindicating their claims for relief at the court, and then provided concrete legislative changes that would rectify those issues of concern.[122] Their criticism was not directed at the court or its vital mission, but emphasized several practical challenges and the most efficient changes that could be made by Congress to remedy those limitations to the court's ability to work justice.[123] From the confused holding of the Supreme court in *Bowen v. Massachusetts*,[124] in which a divided Supreme Court conflated payment of compensatory damages with specific performance, to, more recently, the seemingly haphazard investment by Congress of procurement dispute litigation in other, unrelated bodies, their note studiously examined the actions that have negatively affected the court's jurisdiction, and the least disruptive methods to fix them.[125] Their insights stood out from many of the writers who have made suggestions for the court, in that their recommendations were both constitutionally coherent and realistic for solving many of the quandaries that beguile litigants bringing their claims to the COFC.

III. A SUGGESTION FOR INCREASING ACCESS TO THE COURT

To their excellent suggestions, I add one of my own, directed specifically at widening the access for regular Americans to seek redress at the court, and this suggestion requires no change in the law as currently interpreted. The proposal is simply to utilize contingency fee arrangements more frequently in cases involving claimants who are individual persons. Currently, contingency fee arrangements are infrequently used,[126] which might limit the

120. *See generally* Marcia G. Madsen & Gregory A. Smith, *The Court of Federal Claims in the 21st Century: Specific Proposals for Legislative Changes*, 71 GEO. WASH. L. REV. 824, 824–862 (2003).

121. *Id.* at 824.

122. *Id.*

123. *Id.* at 825.

124. *Id.* at 829–30 ("One example of this phenomenon is that the decision in *Bowen v. Massachusetts* undermined both the COFC's importance as a specialized court and its principal statute, the Tucker Act.").

125. *Id.* at 829–32, 844–45.

126. Contingency fee arrangements are prohibited within vaccine injury cases, which represent a high proportion of the Court's total caseload. 42 U.S.C. § 300aa-15(e)(3)

availability of counsel to claimants without the funding necessary to pay their attorneys throughout the pendency of a case. A broader market for contingency fee arrangements in cases before the COFC might allow many more meritorious claims to proceed which otherwise would not, due to funding constraints.

Although attorneys' fees are not customarily awarded as of right for most claimants who bring their claim to the court, for smaller businesses and for individuals beneath a certain monetary threshold of assets, fees and costs may be sought under the Equal Access to Justice Act (EAJA).[127] "The 1980 EAJA rested on the premise that individuals and small businesses 'may be deterred from seeking review of, or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights.'"[128] For those qualifying claimants who prevail on the merits of their underlying claim, the EAJA requires the grant of attorneys' fees and costs "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[129] The Federal Circuit has held that the term "'substantial justification' requires that the Government show that it was *clearly* reasonable in asserting its position, including its position at the agency level, in view of the law and the facts" and "that it has not 'persisted in pressing a tenuous factual or legal position, albeit one not wholly without foundation'" noting that it is insufficient "for the Government to show merely the existence of a colorable legal basis for the government's case."[130]

(2012). The majority of references to contingency fee arrangements in the court come from the "Rails-to-Trails" subset of Takings cases, which does allow for contingency fees in conjunction with statutory fee-shifting compensation or under the common fund doctrine in class actions. *See, e.g.*, Voth Oil Co., Inc. v. United States, 108 Fed. Cl. 98, 104 (2012); Lambert v. United States, 124 Fed. Cl. 675, 682 (2015). Contingency fee arrangements also appear with some regularity in class action cases asserting civilian or military pay claims. *See, e.g.*, Quimby v. United States, 107 Fed. Cl. 126, 134 (2012). Contingency fee arrangements appear much less frequently in more general Takings claims, though still used at times. *See* Otay Mesa Prop., L.P. v. United States, 124 Fed. Cl. 141, 149 (2015); Osprey Pac. Corp. v. United States, 42 Fed. Cl. 740, 742 (1999). Moreover, contingency fee arrangements are referenced quite infrequently in government contracts cases, given their respective proportion of the court's docket. *See, e.g.*, SUFI Network Servs., Inc. v. United States, 105 Fed. Cl. 184, 191 (2012); KMS Fusion, Inc. v. United States, 39 Fed. Cl. 593, 604–05 (1997).

127. 5 U.S.C. app. § 505 (2012); 28 U.S.C. § 2412 (2012) (codifying the Equal Access to Justice Act).

128. Gavette v. Office of Pers. Mgmt., 808 F.2d 1456, 1459 (Fed. Cir. 1986) (*en banc*) (quoting H.R.REP. NO. 1418, at 12 (1980)).

129. § 2412(d)(1)(A); *see also* 5 U.S.C. § 504(a)(1) (2012).

130. *Gavette*, 808 F.2d at 1467.

Many private parties that are aggrieved by governmental action against their property or income are unable to pay their attorney up front, or contemporaneously during the pendency of the case, for prosecuting the claim, even with the hope of such reimbursement at the conclusion of the case. This situation provides potential for industrious attorneys to represent those claims on a contingency fee basis. If the claim is meritorious and successful, the claimant is able to recover a substantial portion of his damages, and, if the fee agreement with counsel is drafted well, also has the potential to recover fees and costs incurred from the case if the government's action was unreasonable. The issue becomes whether a claimant can recover the fees and costs incurred from the case if payment of fees is deferred by the attorney to the conclusion of the case, such that the claimant does not pay the attorney contemporaneously during the case.

The Federal Circuit has interpreted the EAJA to allow for such an arrangement, beginning with the Circuit's decision in *Phillips v. General Services Admin.*[131] In *Phillips*, a claimant paid her attorney a retainer at the outset of the proceeding, but the balance of the attorney's fee was payable on contingency of a successful result.[132] The claim was successful, and the Federal Circuit awarded fees and costs at the rates provided by the EAJA.[133] In another case, *Ed A. Wilson, Inc. v. General Services Admin.*, this question was addressed more thoroughly by the Federal Circuit, explaining those facts that must be present to find that a claimant has "incurred" fees and costs.[134] There the Federal Circuit ruled:

> Generally, awards of attorneys' fees where otherwise authorized are not obviated by the fact that individual plaintiffs are not obligated to compensate their counsel. The presence of an attorney-client relationship suffices to entitle prevailing litigants to receive fee awards . . . . It is well-settled that, in light of the act's legislative history and for reasons of public policy, plaintiffs

131. 924 F.2d 1577 (Fed. Cir. 1991).

132. *Id.* at 1582.

133. *Id.* at 1583 (holding (1) that "to be 'incurred' within the meaning of a fee shifting statute, there must also be an express or implied agreement that the fee award will be paid over to the legal representative[,]" (2) that "a fee award [cannot] be made to a party to be retained[,]" and (3) that a claimant "incur[s] attorney fees within the meaning of the EAJA only in such amount as may be awarded to [the claimant]"). *But see id.* at 1583, n.5 ("If the party seeking legal fees is obligated to pay them to a third party which is not the professional providing the legal service, an award under EAJA has been deemed inappropriate.").

134. 126 F.3d 1406 (Fed. Cir. 1997).

> who are represented without charge are not generally precluded from an award of attorneys' fees under the EAJA . . . . [A]ttorney fees are incurred by a litigant if they are incurred in his behalf, even though he does not pay them.[135]

The Federal Circuit there also discussed its prior holding in *Phillips*:

> [W]e held that a prevailing party was entitled to attorney fees in excess of the $2,500 she was obligated to pay, in light of a fee arrangement with her attorney that any additional payment obligation would be contingent upon success and based on a statutory fee award if she prevailed. We construed this arrangement to mean that the prevailing party incurs any attorney fees that may be awarded to her, even though she, herself, would never be responsible for paying her attorney any amount exceeding $2,500. There must be an express or implied agreement, however, that the fee award will be paid to the legal representative.[136]

Given this precedent, it would seem that parties who cannot fully pay their attorneys contemporaneously during the pendency of the suit may nonetheless pursue attorneys' fees under the EAJA where the government's actions in the underlying matter have not been proven to be reasonable, provided that there has been "actual payment of attorney fees, the existence of an attorney-client relationship, or the incurrence of fees on behalf of an applicant."[137] Of course, the claimant and the claimant's attorney will not know for certain prior to a case's filing whether the court will find the government agency's action to be unreasonable, but that is a matter to be addressed within a well-crafted fee agreement. Perhaps contingency fee arrangements will allow even more claimants to have access to the consideration of the COFC over their claims, and to recover all or most of their damages.

IV. INSPECTING THE HOUSE BUILT ON A HILLSIDE: ANALYSIS OF SELECTED CASES

Having considered and addressed some of the different views of the court and its assigned duties, the remainder of this article turns to consider how the court balances this relationship between citizens and the federal government within actual cases, from a review of actual decisions. As explained in the introduction, the

135. *Id.* at 1409 (internal marks and citations omitted).
136. *Id.*
137. *Wilson*, 126 F.3d at 1410.

focus of this comment is not to decide whether the concept of the Court of Federal Claims satisfies an abstract standard of bureaucratic optimality, but rather to evaluate how the court fulfills its special purpose. Does the Court of Federal Claims perform a unique function, and does it perform that function well? I believe the cases that follow demonstrate an enthusiastically affirmative answer.

The cases that follow reflect the dense, fact-specific docket of cases before the court, and yet provide useful reference points to examine how the judges of the court hold and weigh the balance of power between the federal government and private claimants. This balancing function is not always apparent, so some esoteric analysis is sometimes necessary. The lopsided balance of power between sovereign and citizen raises important considerations to watch for.

Of course, there are some background imbalances, inherent in the relationship between the government and private individuals, over which the court has no control. For instance, private litigants have limited time, limited monetary resources to invest in litigation, and limited patience and attention to devote to the process. These inherent limitations constrain private parties in a way that does not similarly affect the federal government, which has essentially unlimited time and resources in the context of litigation. Although no court can remedy this disparity between private litigants and the federal government, there are certain other power disparities specific to citizen–sovereign litigation to bear in mind, for which this court does have special influence.

The first is whether the government is leveraging this imbalance in resources and bargaining position to gain an unfair advantage in litigation or settlement negotiations. No matter how fairly Department of Justice attorneys strive to treat counterparties, it is hard to avoid the reality in negotiations or litigation that no private litigant has the freedom of time, resources, or institutional options available to the government. If the government does exert its leverage unfairly in litigation or within the facts of the underlying dispute, the court can act to hold the government to account. Clearly the government may still retain its special prerogatives available as necessary for efficient administration of its duties (e.g., post-formation revision or early termination of contracts), as was discussed above. But, to summon the specter of Justice Holmes, sometime the exercise of that

prerogative goes "too far."[138] As the following cases demonstrate, the Court of Federal Claims maintains better sensitivity to this tension than is typical in other venues.

Secondly, some observers might question whether the Court of Federal Claims is subject to the risk of favoritism, because of the frequency of the government as a party in every case. But there is an aspect of familiarity that breeds a healthy realism. The Court of Federal Claims has ample practice in telling the government "no" just as it does in telling private litigants the same.[139] Likewise, the court hears cases involving a great variety of agencies without developing too cozy a relationship with any one of them. The only governmental body that the court interacts with in every case is the Department of Justice, as that department represents the multifarious agencies before the court.[140] Even so, there is a great variety within the Department of Justice, and thus no one governmental body could entwine itself too closely with the court.[141]

Relatedly, a third consideration for monitoring the citizen–sovereign relationship relates to the strict application of legal rules to parties in an unfair balance. Despite the difference in relative power between citizen and sovereign in a litigation context, one can imagine potential for a tendency to be strict to an outsider private attorney with a first case before a court, and to grant greater leeway or even unfair deference for a familiar governmental agency or attorney. As the later cases in the following series show, the court has shown its vigor in calling the government to account when appropriate, while asking the same level of professionalism and adherence to the rules from attorneys

138. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

139. *See generally, e.g.*, ANNUAL REPORT OF THE UNITED STATES COURT OF FEDERAL CLAIMS FOR THE YEAR ENDED SEPTEMBER 30,2016 (2017) https://perma.cc/4MVU-C7GZ.

140. 28 U.S.C. § 518(a) (2016) (The Department of Justice "shall conduct and argue . . . suits in the United States Court of Federal Claims"); *see also* 28 U.S.C. § 516 (2016) ("[T]he conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice.").

141. Drawing from some of the more prevalent areas of subject matter that appear before the Court, the Court might have appearing before them, in any given case, an attorney from the Constitutional & Specialized Torts Litigation Section of the Torts Branch within Civil Division, others from the National Courts Section or Intellectual Property Section also within the Civil Division, another attorney from the Tax Division, and another from the Environment & Natural Resources Division.

representing private parties. With those considerations in mind, let us turn to some cases.

A recent case[142] from 2018 involved a fact pattern that might make for a thrilling Scorsese film: A trucking company employee who was acting as a DEA informant agreed to drive a shipment of contraband from Houston to Rio Grande City, Texas for the transaction, and then return to Houston.[143] There were two problems. The first was that he used the company's truck under false pretenses, without telling the owner the actual purpose of the trip; in fact the owner of the truck was wholly ignorant of the employee's confidential involvement with the DEA.[144] The second problem was that the informant and the truck were intercepted by hostile parties *en route*, the truck was "wrecked and riddled with bullet holes," and the informant–driver was killed in the process.[145] The truck was then impounded by the police, and the owners of the trucking company were deprived of its use for approximately one hundred days.[146]

The owner sued first in district court pursuant to the Federal Tort Claims Act, but that claim was dismissed on summary judgment by the district judge under that statute's discretionary function exception.[147] Following that dismissal, the owner filed a takings claim at the Court of Federal Claims, alleging that the property had been taken for public use without just compensation.[148] The government moved to dismiss on two grounds: that the suit sounded in tort, not in contract, and that the governmental action was pursuant to police power, and thus did not implicate the Takings Clause.[149] Judge Bruggink of the Court of Federal Claims differentiated this fact pattern from one in which property was seized or forfeited because that property was used in commission of crime.[150] By contrast, here "the government simply seize[d] property as a convenience to the government in pursuing unrelated law enforcement."[151] "[T]here is a difference between

142. Patty v. United States, 136 Fed. Cl. 211 (2018).
143. *Id.* at 213.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Patty*, 136 Fed. Cl. at 213.
149. *Id.* at 213–14.
150. *Id.* at 214–15.
151. *Id.* at 215. Judge Bruggink explained further:

If defendant's position is the law, the police power would swallow private

government action that merely appropriates a benefit from unoffending private property and the government seizing private property that is a nuisance, caught up in criminal activity, or somehow related to an investigation."[152] Judge Bruggink found "striking similarities to cases in which the government has chosen simply to appropriate private property to secure a benefit for the public," and reaffirmed the rule that the Takings Clause was "designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[153] Based upon that reasoning, the court denied dismissal and allowed plaintiff to proceed on his claim that "the government involuntarily imposed . . . an obligation that should have been shared by the public at large."[154]

In another bizarre fact pattern, the facts in the case of *Goodsell v. United States*, decided in 2017 by Senior Judge Hodges, would cause frustration in the mind of nearly any private citizen who might read about it.[155] In that case, the owner of a multi-tenant commercial building, Mr. Goodsell, leased some of the office space to an agency of the federal government.[156] The lease was a five-year firm/ten-year lease, and Mr. Goodsell paid for the architectural and construction services necessary to build out the space to accommodate the agency's plans.[157] However, the agency required a change order two months later, after the award of the contract, which required additional expenses for these services, and Mr. Goodsell was obligated to comply.[158]

During formation of the lease agreement, the agency negotiated for a higher than typical proportion of publicly-accessible parking spots as well as private parking spots behind the building, which were secured by a rolling gate with a combination lock.[159] Some months later, the government agency claimed

> property whole. Neither plaintiffs nor their truck were the subject of an investigation, their truck did not belong to a person who was the subject of an investigation, nor was it related, before the fact, to any violation of regulation or statute . . . . [H]ad it not been for their driver working with the DEA, their truck would have never been involved in the operation.

Id.

152. *Id.* at 215.
153. *Patty*, 136 Fed. Cl. at 216.
154. *Id.*
155. 135 Fed. Cl. 163 (2017).
156. *Id.* at 164.
157. *Id.*
158. *Id.*
159. *Id.* at 165.

entitlement to additional parking spaces (ignoring the terms of the lease contract) and attempted to withhold rents.[160] The agency employees were "haphazard" in locking the gate, and as a result Mr. Goodsell sustained theft and vandalism to his property.[161] When he made sure to secure the gate, the agency employees removed or else destroyed the gate lock on three separate occasions, after which he installed a non-cuttable lock and advised the agency employees to park using only spaces in the unsecured front lot instead.[162] Even so, he kept the contractual number of parking spaces available for the agency's employees and clients for the duration of the lease.[163] The agency's employees also instructed the agency's clients to double- and triple-park in no parking zones.[164] Even so, soon after the change to restrict access to the secured rear lot spaces, the governmental agency again indicated it would withhold a portion of rent for spaces it claimed had been agreed upon during contract negotiation, as well as for the restriction from access to the secured rear lot.[165]

At that point, the agency unilaterally modified the lease so that it was obligated to pay for fewer parking spaces, while the agency's employees and clients continued to use the original number of spaces.[166] When Mr. Goodsell asked for clarification, no response was forthcoming, and the rents were withheld and reduced according to the agency's unilateral modification. A few months later, the agency's contracting officer gave notice that the agency was terminating the lease without the contractual notice period and would vacate the premises in three days' time, which it did.[167] The agency's notice failed to indicate whether the lease contract was terminated for a perceived default on the landlord's part, or for the government's convenience.[168]

Mr. Goodsell sued in the Court of Federal Claims. The government moved to dismiss for lack of subject matter jurisdiction, on the basis that no "certified claim" had been filed with the agency pursuant to the Contract Disputes Act.[169] Mr.

160. *Id.*
161. *Goodsell*, 135 Fed. Cl. at 165.
162. *Id.*
163. *Id.*
164. *Id.* at 165–66.
165. *Id.*
166. *Id.* at 166.
167. *Goodsell*, 135 Fed. Cl. at 166.
168. *Id.*
169. *Id.* at 166–67.

Goodsell argued that the contracting officer's termination letter constituted a "claim" under the terms of that statute, and the court agreed.[170] Judge Hodges denied the dismissal motion, ruling that the court had jurisdiction because the law only requires one party to make a written assertion to give rise to a claim.[171] The government also moved for dismissal on grounds that Mr. Goodsell had failed to state a claim upon which relief could be granted by law.[172] Specifically, the government argued that the damages from unpaid rents were speculative, that the declaratory relief requested was moot because termination extinguished any contractual rights Mr. Goodsell had under the lease, and that Mr. Goodsell had failed to allege facts to prove a breach of good faith and fair dealing, because he could not offer evidence of the agency's malice or specific intent to injure him.[173] The court rejected those arguments and allowed the case to proceed to the merits of his claim.[174]

To take a step back, the court does not rule uniformly for "the little guy" irrespective of reasonability and a correct application of the law—far from it. Among several cases where the court dismissed claims that failed on their legal merits, one example is sufficient to avoid redundancy. However, it is a useful example to show the court's consistent application of the law while also bearing in mind the special relationship between private parties and the federal government. To reiterate, the court's role is not simply to compensate private parties against government overreach, but also to guard public funds from loss to unreasonable claims.

In *Senate Builders and Construction Managers, Inc. v. United States*,[175] the facts of the case arose from a government contract for construction of explosive storage magazines with the Army Corps of Engineers.[176] During the solicitation of the contract, the government had answered certain questions from the claimant about the soil conditions at the building site, before the contract was ultimately formed and work began.[177] The contract offering

170. *Id.*
171. *Id.* at 167.
172. *Id.*
173. *Goodsell*, 135 Fed. Cl. at 167–68.
174. *Id.* at 168.
175. 131 Fed. Cl. 719 (2017).
176. *Id.* at 720.
177. *Id.* at 721–22.

had placed responsibility for sourcing backfill of a defined quality level with the builder, and certain excavation work that was part of the project required soil to use as backfill.[178] The claimant had relied upon an answer to one of the questions regarding backfill, which stated that "unsuitable material is not encountered" at the building site, and presumed that to mean "that all soil on site would meet the requirements for use as backfill."[179] Some of the soil excavated from the site was not sufficient for that use, and the claimant sought redress with the contracting officer for the additional expense in response to which the officer pointed to the standards for backfill in the solicitation.[180] The contracting officer stated that the question and the answer had not addressed the amount of backfill material that would be needed, nor had the government indicated whether that backfill could all be sourced from the site itself.[181] The contractor would have to provide the additional backfill necessary to complete the project at their own expense.[182] Based on that expense, the claimant sued at the Court of Federal Claims under several theories of breach of contract.

Following what Professor Schwartz' classification would refer to as "congruence,"[183] the court relied on the rule that "[g]overnment contract disputes are adjudicated under normal principles of contract interpretation," including, most importantly, the plain meaning rule.[184] The court restated the common law rule of *contra proferentem* which interprets latent ambiguities against a contract's drafting party, and noted that the rule should be applied "with extra vigor," where, as in this case, the government is the drafting party.[185] Even with that balancing of the power dynamic between the government and the private party, however, the interpretation urged by the claimant was held to be unreasonable.[186] The builder's position required the court to ignore plain wording in the contract proposal, to take the question and answer out of their context, and to stretch the

178. *Id.* at 721.
179. *Id.* at 723.
180. *Id.*
181. *Senate Builders*, 131 Fed. Cl. at 723.
182. *Id.*
183. Schwartz, *supra* note 38.
184. *See Senate Builders*, 131 Fed. Cl. at 723–24 (stating the general rule that the Court must first examine the plain meaning of a provision).
185. *Id.* at 724.
186. *Id.* at 727.

meaning of the words themselves irrationally.[187] Judge Wolski, ruling on the case for the court, granted the government's motion for summary judgment with prejudice.[188]

As seen in *Senate Builders*, the Court of Federal Claims generally applies the plain-meaning rule of interpreting contracts, statutes, and regulations, even against creative arguments that resort to expansive doctrines of legislative intent and statutory purpose.[189] This makes for a fairer administration of justice under the law (or contract) as written, without room for special preferences for either party. Also, the court's vigorous application of *contra proferentem* against the government demonstrates the balancing the court performs as intermediary between citizen and sovereign. The next few cases bear this out in greater detail.

In a 2011 bid protest case, the government's defense to the protestor's claim of unreasonable, arbitrary and capricious action in bid solicitation rested upon a claim that the plain meaning of a statutory provision should be ignored, based upon arguments of statutory purpose and legislative intent.[190] Within an in-depth decision that sorted through the finer points of agency discretion in bid solicitations, Judge Wolski took care to explain the course correction of Supreme Court precedent in its use of the canons of statutory interpretation (which the Federal Circuit has likewise followed).[191] Following a period of looser and more creative construction of legal text, the court had returned to more traditional canons of interpretation, starting (and often ending) with the plain meaning rule.[192] The facts of the case were quite complicated,[193] and not relevant to the discussion here; however,

187. *Id.* at 724–27.

188. *Id.* at 727.

189. On the principled justifications for adhering to the plain-meaning rule, see generally W. ESKRIDGE, P. FRICKEY, & E. GARRETT, LEGISLATION AND STATUTORY INTERPRETATION, 375–83, App. C (2000); ANTONIN SCALIA, A MATTER OF INTERPRETATION 18–23 (1997); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–875 (1989).

190. Mori Assocs. v. United States, 102 Fed. Cl. 503, 536 (2011).

191. *Id.* at 537–40.

192. Judge Wolski explained the doctrinal return from loose construction to more traditional canons of interpretation:

> [T]he government seems to have missed the Supreme Court's shift in approach to the question of when courts may depart from plain statutory language, and its resulting impact on Federal Circuit decisions. But the ensuing years have brought the law of statutory interpretation full circle, restoring the approach traditionally followed by the Supreme Court.

Id. at 537.

193. *Id.* at 511–17.

the judicial analysis throughout the decision is painstaking and thorough, and the section on statutory interpretation in particular could be used as a primer for law students on the topic of legislative interpretation.[194] The issue was resolved by Judge Wolski's application of the plain meaning of the statutory language, instead of the more imaginative meanings inferred by the government's arguments for statutory construction by reference to legislative intent or statutory purpose.[195] Ultimately, the court found the federal agency's action lacked a reasonable explanation, and was therefore arbitrary and capricious.[196]

A similar issue was raised in *Silver Buckle Mines, Inc. v. United States*, an illegal exaction case that was litigated before both Judge Wolski and Judge (now Chief Judge) Sweeney.[197] The facts of the case involved the charge of a maintenance fee assessed on mining claim-holders by the Bureau of Land Management (BLM), and the central legal issue was the proper interpretation of the governing statute, which changed in wording over time.[198]

Up until 1993, holders of unpatented mining claims had been required by statute[199] to perform a basic level of activity at their mines or risk forfeiture of the claim for desuetude.[200] In 1993, Congress amended that statutory provision to require instead the filing of an annual maintenance fee with the BLM, in lieu of performing the previously-required maintenance activity.[201] By the statutory wording, the fee was to be paid by every holder of an unpatented mine claim, whether located "before or after" the enactment of that 1993 amendment to the statute.[202]

Where the dispute arose was that, in 2011, Congress again amended that statutory provision as part of an expansion of the statutory scheme to differentiate different types of mines. In reference specifically to holders of "unpatented lode mining claims, mill sites, and tunnel sites" that were located "*on or after*

194. *Id.* at 537–40.
195. *Id.* at 541.
196. *Mori Assocs.*, 102 Fed. Cl. 503 at 551.
197. 117 Fed. Cl. 786 (2014).
198. *Id.* at 791.
199. 30 U.S.C. § 28f (2014).
200. *Silver Buckle*, 117 Fed. Cl. at 789. The purpose of this requirement was for each claimant to demonstrate "that he was not acting on the principle of the dog in the manger." *Id.* (quoting Chambers v. Harrington, 111 U.S. 350, 353 (1884)).
201. *Id.* (referencing Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 § 10101, 107 Stat. 312, 405).
202. *Id.* at 789–90.

August 10, 1993," the law required payment of the claim maintenance fee.[203] Despite the fact that the amended language did not make reference to holders of claims located *before* that date,[204] the BLM demanded and collected maintenance fees from those holders as well.[205] A couple of years later, Congress once again amended the applicable statutory section, and part of the change was to add back in the word "before" so that the relevant provision was changed to read, "before, on, or after August 10, 1993."[206]

Silver Buckle Mines sued for a refund of the maintenance fees they had paid for mines that were located before the 1993 date, on the basis that the statute's wording from 2011 until 2013 did not include those mines among those required to pay the fee.[207] The government moved for 12(b)(6) dismissal on two grounds: that Congress had made a scrivener's error, and had actually meant to include pre-1993 claims in the fee requirement; and that, because Silver Buckle had paid the fee at the time without objection or protest, no recompense could later be sought.[208] Judge Wolski reiterated the maxim that "resort to extrinsic evidence is warranted when a statutory provision is ambiguous," but noted that, in the case at bar, "the government ha[d] revealed no gap or ambiguity for interpretive tools to eliminate," such that "there [was] nothing on which the canons of construction [might] operate."[209] Moreover, the Government did not adduce affirmative evidence of Congress' intent on the matter.[210] Given the unambiguous text, Judge Wolski ruled that BLM's charge of the maintenance fee was *ultra vires*.[211] The government's second argument for dismissal was that a literal interpretation would thwart the purpose of the statute and effectuate an absurd result—namely it "would cause a loss of revenue to BLM."[212] Judge Wolski ruled such loss of revenue did not rise to the level of legal absurdity.[213]

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203. Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, § 430, 125 Stat. 786, 1047 (2011) (emphasis added).
204. *See generally id.*
205. *Silver Buckle*, 117 Fed. Cl. at 789–90.
206. Consolidated and Further Continuing Appropriations Act of 2013, Pub. L. No. 113-6, § 1403, 127 Stat. 198, 419 (2013).
207. Silver Buckle Mines, Inc. v. U.S., 117 Fed. Cl. 786, 790 (2014).
208. *Id.* at 790, 792.
209. *Id.* at 792.
210. *Id.* at 793.
211. *Id.*
212. *Id.*
213. *Id.* at 794.

As the Silver Buckle case proceeded, it was reassigned to Judge Margaret Sweeney.[214] Judge Wolski's opinion on the motion to dismiss had addressed the legal issue of statutory interpretation, and Judge Sweeney was evaluating the parties' motions for summary judgment.[215] The government's position rested on two arguments: that allowing compensation would create a "windfall" for parties like Silver Buckle, and that, by complying with the BLM's requirement for payment of the fee, Silver Buckle had made a voluntary payment, which they could not thereafter retract on the basis that it was an illegal exaction.[216]

Judge Sweeney relied upon Supreme Court precedent that where a private party "had no choice because it was required to submit to an illegal exaction or discontinue its business," then "that money paid, or other value parted with, under such pressure, has never been regarded as a voluntary act, because the parties did not stand upon an equal footing and the payer really had no choice."[217] Judge Sweeney's decision maintained consideration of the uneven plane between the government and private parties, and this touchstone informed her reasoning in the decision.

Turning to the windfall argument, Judge Sweeney compared these facts to taxation cases where the government had overpaid a tax refund, and then used legally improper and heavy-handed means to recollect the amount it had paid in error.[218] "These 'erroneous refund' precedents demonstrate that when the government acts beyond the statutory authority granted by Congress, it is appropriate to allow a claimant to recoup its money regardless of the potential for a windfall."[219] Furthermore, she said, this case argued even more strongly for compensation, because in those tax cases, the government was actually owed the amount erroneously refunded, and it was the method of extracting the refunded sum that ran afoul of the law, whereas in the case at bar, "plaintiff seeks to recoup money paid to the government that was collected contrary to law, *i.e.*, that was never owed in the first place."[220]

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214. Judge Sweeney was appointed Chief Judge of the Court by President Trump on 12 July 2018. *Margaret Sweeney*, U.S. COURT OF FED. CLAIMS, https://perma.cc/R8M2-RKHF.

215. *Silver Buckle Mines*, 132 Fed. Cl. at 84.

216. *Id.* at 85.

217. *Id.* at 86 (quoting Swift & Courtney Beecher Co. v. United States, 111 U.S. 22, 28–30 (1884) (internal citations and quotations marks omitted)).

218. *Id.* at 90–91.

219. *Id.* at 91.

220. *Id.*

These cases applying the plain meaning of statutes, even when the government raises arguments that doing so would contravene the actual intent of Congress, are more important than may be apparent at first glance. Were a judge to rule for the government under the auspices of effectuating "what Congress *really* meant," such a judge would be departing from the rule of law. Where a judge "fills in the gaps" of a statute inconsistent with its actual text, that judge may be enabling Congress to shirk its necessary duty to make the hard choices of allocating funding.

A good example of this situation is the following case, another recent case revolving around statutory interpretation. In this case, Judge Kaplan considered whether Congress' shortfall in funding a statutory program allowed the government to avoid paying local governments the amounts owed under that program.[221] As background, in certain counties where a significant portion of the land within the county is federally owned, those counties face a loss of property tax revenue, because they cannot tax the federal government.[222] As a remedy, Congress had previously enacted a "Payments in Lieu of Taxes" (PILT) program which designated that those counties receive an amount from federal funding, prescribed by a set formula, to be administered by the Secretary of the Interior.[223] However, in fiscal years 2015 and 2016, Congress did not appropriate sufficient funds to make full payments pursuant to that formula, and the Department of Interior reduced the funds paid on a *pro rata* basis.[224] Kane County, Utah sued in the Court of Federal Claims to recover the shortfall.[225] Given this issue of "whether the government was obligated by the PILT Act to make payments . . . in the full amounts determined by the statutory formulas, notwithstanding that the amounts due were not fully funded by congressional appropriations," Judge Kaplan "reject[ed] the government's argument that the Secretary's obligation was limited by Congress' failure to appropriate sufficient moneys to fully fund the PILT program."[226]

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221. Kane Cty, Utah v. U.S., 135 Fed. Cl. 632, 633 (2017).

222. *See* McCulloch v. Maryland, 17 U.S. 316, 436–37 (1819) (holding unconstitutional state taxation of the federal government).

223. *Kane Cty, Utah*, 135 Fed. Cl. at 633–34; 31 U.S.C. §§ 6901-07 (2016).

224. *Kane Cty., Utah*, 135 Ct. Cl. at 634–35.

225. *Id.* at 635.

226. *Id.*

The central issue in the case was the statutory interpretation of the relevant statutory provision.[227] The wording of the mandating statute stated "the Secretary of the Interior shall make payment for each fiscal year to [the local government],"[228] and Judge Kaplan ruled that the plain meaning of that wording created an obligation for payment according to the terms of the statute.[229] Prior to 2008, § 6906 of the same statute had included a provision providing for the Secretary's appropriation of the funds, but limited the Secretary's payments, stating "Amounts are available only as provided in appropriation laws."[230] However, Congress amended § 6906 in 2008 and the new version, which was in effect from 2008 through 2014, did not include that limiting language. Therefore, Judge Kaplan applied the rule that "the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute."[231]

To this, the government pointed to congressional history, in the form of the explanatory statement from the Chairman of the House Appropriations Committee, to prove that Congress' actual intent, notwithstanding the wording of the statute, was to limit the allocation below the amount required by the PILT program.[232] Judge Kaplan nonetheless held the government to account: "[L]egislative history cannot be employed to supply words that are not contained in the statute itself"; it lacks "the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating."[233]

Judge Kaplan's decision in that case demonstrates another aspect of the court's role in mediating the relationship with the sovereign federal government: It is not merely individuals or businesses whose unequal bargaining power must be taken into account, but also local and subsidiary governments, and even the individual States themselves.

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227. *Id.* at 633.
228. § 6902(a)(1) (2016).
229. *Kane Cty, Utah*, 135 Fed. Cl. at 633–34.
230. *Id.* at 634 (quoting 31 U.S.C. § 6906 (1982), *amended by* 31 U.S.C. § 6906 (2008)).
231. *Id.* at 638 (quoting Greenlee Cty. v. United States, 487 F.3d 871, 877 (Fed. Cir. 2007)).
232. *Id.*
233. *Id.* (quoting Thompson v. Cherokee Nation of Okla., 334 F.3d 1075, 1085 (Fed. Cir. 2003)).

To expand on this point, Judge Kaplan has presided over another, very interesting set of cases that address the relationship between the federal government and the state governments from which it was vested power as ultimate sovereign. These cases present a useful real-world point of comparison between the careful work performed by the Court of Federal Claims and how a federal district court judge might rule on the same facts pursuant to the Administrative Procedure Act. The facts are somewhat detailed, and revolve around the federal Department of Treasury's obligations under the federal savings bond program.

When Congress created the savings bond program, it delegated authority to the Secretary of the Treasury to regulate details of the issuance of savings bonds, restrictions on their transfer, and the "conditions governing their redemption."[234] The Treasury Department promulgated regulations that assigned ownership of a bond to the person to whom it is registered with the Treasury, and proscribed transferability of the bonds, making them "payable only to the owners named on the bonds, except as specifically provided in these regulations and then only in the manner and to the extent so provided."[235] The savings bonds mature by the terms of the bond, and are then redeemable for their face value, but they do not expire, and can be redeemed at any point after maturity; however, they are only paid for their face value after maturity.[236] The issue had arisen that many of the savings bond claims were never redeemed by the registered owners, and for decades various State governments sought to claim title of those bonds that had matured but had never been redeemed, based on the States' own unclaimed property statutes.[237] Many of these unclaimed property statutes were modeled on the "Uniform Unclaimed Property Act," which, in turn, is founded on the common law doctrine of escheat, in which the relevant State, acting as sovereign, takes either custodial possession or ownership of abandoned property, based on whether the property has physically remained in the State, or where the owner's last-known address was within that State.[238] This distinction between whether

234. Estes v. U.S. Dep't of the Treasury, 219 F. Supp. 3d 17, 22 (D.D.C. 2016) (quoting 31 U.S.C. § 3105 (2012)).

235. 31 C.F.R. § 315.5(a) (2012); 31 C.F.R. § 315.15 (2012).

236. 31 U.S.C. § 3105(b)(2)(A) (2012).

237. Estes v. United States, 123 Fed. Cl. 74, 77 (2015).

238. *Id.*

the State merely takes custodial possession or actually assumes title had previously been viewed by the Treasury Department as the critical factor in determining whether a State could recover unredeemed savings bonds.[239]

In this case, the State of Kansas acquired ownership of all unredeemed bonds within its boundaries, through a state court declaratory judgment proceeding that utilized service by publication for the unknown prior owners.[240] In so doing, the State acquired title to bonds for which it possessed the bond instruments themselves, as well as those bonds for which it did not have physical possession. In fact, the State had obtained actual physical possession of only a fraction of the total bonds for whom registered owners had been Kansas residents, based on their last-known address.[241] In response, the Treasury Department only recognized as valid (and thus paid) those bonds for which the State had actual possession of the bond instruments.[242] The Department denied payment on those bonds claimed by the State without physical possession of the instruments, explaining "Treasury is bound to its contract with the registered owners of these savings bonds, and would violate that contract if it redeemed them to a third party."[243] The government's position therefore did not give effect to the state-level judicial proceeding effecting escheat, but held firm that, should an actual registered owner in possession of a bond present it for redemption, Treasury would have to pay that person the bond proceeds, notwithstanding the effect of the State's escheat judgment.[244] Kansas filed suit at the Court of Federal Claims, and the government moved for dismissal. Judge Kaplan denied the motion to dismiss, because "the government's position [was] inconsistent with the position that

239. *Id.* (citing a Letter from the Secretary of the Treasury to the Comptroller of the State of New York, reproduced in Treasury Bulletin No. 111 (1952)) ("In that letter, the Secretary explained that Treasury would pay the proceeds of savings bonds to New York if it actually obtained *title* to the bonds based upon a judgment of escheat, but it would not do so if the State merely acquired a right to take custody of the proceeds.") (emphasis in original).

240. *Id.* at 79.

241. *Id.* at 80.

242. *Estes*, 123 Fed. Cl. 74 at 80.

243. *Id.* at 79.

244. *Id.* at 80. In that letter of denial, the Treasury Department represented its past interpretation of the governing regulations as willing to allow only those escheatment claims in which the State "possesses the savings bond in its claim," and thus Kansas could not redeem those not in its possession "because it is not the registered owner of the bonds, nor does it possess them." *Id.*

Treasury has articulated for over sixty years through interpretive guidance, statements on its website, and positions taken in litigation as recently as . . . just one month before Kansas requested payment on the bonds."[245]

The government argued that the savings bond regulations promulgated by the Department of Treasury did not require the Department of the Treasury to recognize the State's ownership rights or the escheat proceedings by which the State acquired title.[246] The most pertinent subsection of the regulations stated, "The Department of the Treasury will recognize a claim against an owner of a savings bond . . . if established by valid, judicial proceedings, but only as specifically provided in this subpart. Section 315.23 specifies the evidence required to establish the validity of the judicial proceedings."[247] 31 C.F.R. § 315.20(b). The government argued that the escheat proceedings did not meet the level of "valid, judicial proceedings" because it was not listed among the specific categories of judgments that are listed among the scenarios contemplated in the regulation, but did not otherwise dispute the validity of those proceedings.[248] In their respective pleadings, Kansas viewed the specified list of legal proceedings as nonexclusive exemplars of a general category of "valid, judicial proceedings," whereas the government read the modifier "specifically provided" as language of limitation.[249] The dispute then centered on the meaning applied to the word "as" in the phrase "as specifically provided in this subpart."[250] Applying the canon of interpretation that would avoid rendering statutory text superfluous,[251] Judge Kaplan sided with Kansas, but then considered whether the Department of Treasury was owed deference in its interpretation of its regulations. It was on this question that Judge Kaplan's ruling shows the special consideration of the relationship between the federal government and the States.

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245. *Id.* at 85.
246. *Id.* at 83.
247. *Id.* at 77.
248. *Estes*, 123 Fed. Cl. 74 at 84–85. Examples of cognizable proceedings which satisfy the regulations include claims premised on gifts causa mortis and division of property in divorce.
249. *Id.*
250. *Id.* at 85.
251. *Id.* at 85–86 (determining that to interpret the categories of proceedings listed as exclusive would render superfluous some additional provisions in that section that describe the criteria that would render a potential proceeding legally invalid).

Judge Kaplan summarized a general rule of administrative law, that an agency's interpretation of its regulation should be given deference unless that interpretation conflicts with a prior interpretation the agency has previously provided, or "when it appears that the interpretation is nothing more than a convenient litigating position [or] a post hoc rationalization advanced by an agency seeking to defend past agency action against attack."[252] Judge Kaplan found that the government's offered interpretation diverged from prior interpretation and guidance from the Treasury Department: "Indeed, this conflict, in conjunction with other inconsistencies within the arguments the government has made in this litigation, convinces the court that the position being advanced in this case is merely a post-hoc rationalization for Treasury's decision not to honor the Kansas state court judgment."[253] It was this point that Judge Kaplan focused on, summarizing in detail the history of the government as it moved proverbial goalposts so as to give new reasons not to pay out on the bonds. Judge Kaplan explained how the Treasury's position was inconsistent over time, between different cases, and even internally inconsistent within the same case.[254]

Judge Kaplan's decision contrasts sharply with a related case between the same parties heard in the federal district court for the District of Columbia.[255] In reaction to Judge Kaplan's decision at the Court of Federal Claims, the Treasury Department had acted to revise the regulations that provided the legal standard for redemption of savings bonds.[256] And so Kansas and the sister States sued to challenge this new rule that the Treasury Department had proposed in reaction to the litigation at the Court of Federal Claims.[257] One issue was the same: the inconsistently shifting position taken by the Treasury Department in its otherwise consistent denial of State escheat claims. In the district court ruling, Judge Christopher Cooper noted the inconsistencies between the rationales followed by Treasury, but found that there had been insufficient showing by the States "that

252. *Id.* at 86 (internal marks and citations omitted).
253. *Id.* at 87.
254. *Estes*, 123 Fed. Cl. 74 at 87–89. Additionally, while the litigation was ongoing, Treasury published a notice of proposed rulemaking "to change those regulations to reflect the position that the government is taking in this case." *Id.* at 90.
255. Estes v. U.S. Dep't of the Treasury, 219 F. Supp. 3d 17 (2016).
256. *Id.* at 26–27.
257. *Id.* at 27.

Treasury departed from a clear policy without adequate explanation," and so he upheld the Treasury's proposed rule change as proper.[258]

After reciting the history of attempts by States to redeem savings bonds, only to fail because of the "failure to transfer actual title," Judge Cooper then indicated the greater motivation for the Treasury Department before ultimately vindicating it: "Treasury's position, however, was also grounded in the broader purposive considerations . . . emphasiz[ing] that the new escheat statutes 'would undermine the central purpose of the savings-bond program: to raise revenue for the United States Government.'"[259] Left unsaid by Judge Cooper was the reality that the only way for a debtor to "raise revenue" from an outstanding debt instrument is to avoid payment on it.[260] State efforts to redeem the unclaimed bonds of their deceased residents undermined this federal revenue stream.

The district court opinion summarized the newly proposed rule offered by Treasury, which significantly enhanced previous requirements to redeem bonds by any State pursuant to escheat.[261] The new rule required the State to have actual possession of the bond instruments themselves, to satisfy notice requirements in the escheat proceeding, and affirmative evidence of abandonment. Also, "[c]onsistent with Treasury's litigating position before the Court of Federal Claims, the Rule locates the regulatory authority for recognizing claims on escheated bonds not in the 'valid, judicial proceedings' clause of 31 C.F.R. § 315.20(b), but as a discretionary 'waiver' of the regulatory provisions under 31 C.F.R. § 315.90."[262]

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258. *Id.* at 22. Judge Cooper's opinion is less clear about what that policy is, beyond a generalized policy of denying payment to States on their citizens' escheated savings bonds.

259. *Id.* at 24.

260. *Id.* "As of March 2012, the value of such matured, unredeemed savings bonds was approximately $16 billion." Laturner v. United States, 133 Fed. Cl. 47, 51 (2017). Taking the effects of long-term inflation into account, the longer the federal government can forestall redemption of these bonds, the greater is the value extracted, since the bonds accrue no interest once mature, and are payable only at their face value.

261. *Estes*, 219 F. Supp. 3d at 26.

262. *Id.* Not only did the proposed revision to the rule add a provision stating that "[e]scheat proceedings will not be recognized under this subpart," but the Treasury added a new subsection to the regulation pertaining specifically to claims by a State for abandoned bonds which granted complete discretion to the Treasury regarding whether to "recognize an escheat judgment that purports to vest a State with title to a definitive savings bond . . . [that] is in the State's possession." *Laturner*, 133 Fed. Cl. at 63-64 (discussing 31 C.F.R. § 315.20(b) and § 315.88, as amended). Moreover, § 315.88 went on to completely deny validity of any escheat judgment "purport[ing] to vest a State with title to a bond that the State does not possess." *Estes*, 219 F. Supp. 3d at 26.

Kansas and the other States argued that this new rule promulgated by the Treasury Department had violated the Tenth Amendment and the Appointments Clause of the Constitution, and that it gave the Department of Treasury reviewing authority over the court judgments of the sovereign States.[263] That argument did not persuade Judge Cooper, who found the Treasury's position regarding the proposed rule to be sufficiently rational and consistent to survive the challenge.[264] He noted that, whereas in previous instances, the State had obtained possession of the bond without full title and was denied redemption, here the States may have obtained legal title, but lacked physical possession of the bonds, and were thus similarly defeated from redeeming the funds from the Treasury. "In this respect Treasury was no more 'inconsistent' than a shopkeeper who one day refuses service to a man with a shirt on the grounds that he is not wearing shoes, and the next day does the same to a man wearing shoes on the grounds that he lacks a shirt."[265] Judge Cooper's decision did concede that, "Although the Rule effected no reversals in *policy*, certain aspects of Treasury's *reasoning* in promulgating the Rule were inconsistent with prior rationales."[266] Nevertheless, he ruled that, "These contradictions are not sufficient to render the Rule arbitrary and capricious,"[267] and ultimately decided that the proposed rule was valid as promulgated.[268]

While the States had been challenging the new rule in federal district court, the main case was still proceeding in the Court of Federal Claims, and had matured to the point of summary judgment motions by the parties.[269] Judge Kaplan began by reviewing the decades-long history of litigation over redemption of unredeemed savings bonds, during which Treasury had indicated that it would "recognize claims by States for payment of United States securities where the States have actually succeeded to the title and ownership of the securities pursuant to valid escheat proceedings."[270] This prior judicial history had

263. *Estes*, 219 F. Supp. 3d at 27.
264. *Id.* at 27.
265. *Id.* at 29.
266. *Id.* at 31.
267. *Id.* at 31.
268. *Id.* at 31–32.
269. Laturner v. United States, 133 Fed. Cl. 47 (2017). Jake Laturner was the successor Treasurer for the State of Kansas, replacing Ron Estes as the named lead plaintiff.
270. Estes v. United States, 123 Fed. Cl. 74, 78 (2015).

culminated in 2004 when the Third Circuit ruled, on the principle of intergovernmental immunity, that States' unclaimed property statutes interfered with federal power, under a theory that, prior to payment on a valid bond claim, "the funds remain federal property" subject to federal authority and discretion.[271] Even having acknowledged that "savings bonds are contracts,"[272] the Third Circuit nevertheless "determined that the states' unclaimed property laws would unlawfully regulate the federal government by requiring it to comply with state accounting, record-keeping, and reporting requirements," inasmuch as they would require the federal government "to account to the plaintiff States for unredeemed savings bonds or their proceeds [which] would result in a direct regulation of the Federal Government in contravention of the Supremacy Clause."[273]

As an aside for the sake of clarification, the federal government is contractually obligated to pay on savings bonds as very basic debt instruments—i.e., contracts.[274] The savings bonds were issued as basic contracts for the payment of money. There can be no dispute that the sovereign States retain a common law right, as custodians of their citizens, to accept or claim ownership of unclaimed property pursuant to escheat doctrines.[275] In the context of a judicial proceeding that is undisputedly valid in providing procedural due process, the ownership interest in this unclaimed property is thus transferred to the State. If the transferred property interest were a debt note between any private parties, there would be no dispute that the State as successor creditor could rightfully collect on the escheated debt instrument. Conversely, if a divorcing spouse sued to claim title over the bond pursuant to a property division decree, there could likewise be no dispute that their claim would be honored.[276] However,

271. *Laturner*, 133 Fed. Cl. at 56–57 (quoting Treasurer of N.J. v. U.S. Dep't of the Treasury, 684 F. 3d 382, 410 (3d Cir. 2012)).

272. *Id.* (quoting *Treasurer of N.J.*, 684 F. 3d at 411–12).

273. *Id.* at 57, (quoting *Treasurer of N.J.*, 684 F. 3d at 411–12).

274. *See* U.C.C. § 9-102(65) (AM. LAW INST. & UNIF. LAW COMM'N 2001) (defining a promissory note).

275. "[U]nclaimed property acts come . . . with a patina of ancient history [and] there is a presumption against preemption of laws of such origin." *Treasurer of N.J.*, 684 F. 3d at 411 (quoting State of Ariz. v. Bowsher, 935 F.2d 332, 335 (D.C. Cir. 1991) (internal marks omitted)); *see also* Sean M. Diamond, *Unwrapping Escheat: Unclaimed Property Laws and Gift Cards*, 60 EMORY L.J. 971, 978 (2011) ("[R]eal and tangible personal property transfers in title to the state, provided the state has enacted specific legislation.").

276. 31 C.F.R. § 315.22(a) (2017) ("The Department of the Treasury will recognize a

reminiscent of Professor Schwartz's dual concepts of congruence and exceptionalism, when the State attempts to collect on this otherwise unremarkable contractual debt from the federal government, this transforms the exercise into an unlawful infringement upon the preeminent sovereign power, at least by the reasoning of the Third Circuit in *Treasurer of N.J.*[277]

This logic exemplifies the overreach of the sovereign immunity doctrine and may even implicate the nondelegation doctrine to some extent.[278] In contracting with its citizens by issuing savings bonds, the federal government had consented to be held to account, and to pay back the debt. Repayment of the debt was conditioned on very specific criteria that limited the bondholder from transferring ownership outside of certain circumstances, but was otherwise payable on demand after maturity.[279] Those debt instruments were backed by the Full Faith and Credit Clause. A casual observer would be forgiven for thinking that this amounted to a waiver of sovereign immunity on that debt. Yet the Treasury Department was not made to pay out on bonds that had matured, even where transfer had technically complied with the governing regulation. While this would be frustrating for an individual, these facts concern the States and thus implicates concerns related to federalism—a term used to describe the power dynamic between the States that had once held sovereignty and the federal government which acceded to it. Here yet again, we find one more scenario where a special insight is necessary to mete out the bounds of this uneven ground. We need the Court of Federal Claims.

Returning to the progression of the Kansas's case at the Court of Federal Claims, the parties had finished discovery and had each moved for summary judgment; Judge Kaplan was ready to rule for

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divorce decree that ratifies or confirms a property settlement agreement disposing of bonds or that otherwise settles the interests of the parties in a bond. Reissue of a savings bond may be made to eliminate the name of one spouse as owner, coowner, or beneficiary, or to substitute the name of one spouse for that of the other spouse as owner, coowner, or beneficiary pursuant to the decree.").

277. *Treasury of N. J.*, 684 F.3d at 410–11 (relying on U.S. CONST. art. IV, § 3, cl. 2 to rule that "the unclaimed property acts would interfere with Congress's power to dispose of and make all needful Rules Acts and Regulations respecting the Property belonging to the United States" and thus "would violate the governmental immunity of the United States").

278. Despite the fact that one of the specific duties delegated to Congress by Article I, Section 8 of the Constitution is to "pay the debts" of the United States, U.S. CONST. art. I, § 8, cl. 1, Congress had delegated to the Treasury Department of the Executive Branch quite comprehensive authority over specifying the terms and conditions for payment of these debts in regulations.

279. 31 C.F.R. § 315.35 (2017); 31 C.F.R. § 315.5–7, 315.15–16 (2017).

the court on the merits of the claim. Judge Kaplan summarized the intervening facts of how the Treasury Department, rather than conforming its interpretation to the regulation, had instead simply rewritten the applicable regulation in order to conform to the Treasury's newly-developed interpretation.[280] Judge Kaplan discussed Judge Cooper's decision on the rule change and differentiated the district court's decision from the case at bar before stating the court's ruling.[281]

The Court of Federal Claims ruled that Kansas had acquired ownership of the absent bonds under the terms of the agency's regulation, and that, therefore, Treasury's refusal to redeem the bonds amounted to a breach of contract.[282] The government had argued for an interpretation that "state judgments of escheat can never confer ownership, regardless of whether the state has possession of the bond certificates," and that, "to redeem even the bonds in possession to which it holds title pursuant to valid judicial proceedings, the state must persuade Treasury to waive its regulations."[283] As discussed above, this rationale would raise the concept of sovereign immunity to new heights indeed, and Judge Kaplan addressed the arguments for what they were: "Treasury's ever-shifting explanations for denying states' requests to redeem absent bonds resemble nothing so much as a game of 'whack-a-mole' in which the federal government's rationale for denying such requests changes each time the states satisfy the most recently articulated condition for doing so."[284] Kansas was awarded summary judgment on the merits, but the case is being stayed while Judge Kaplan's ruling is certified to the Federal Circuit.[285] The entirety of this case demonstrates the careful scrutiny of complicated facts applied by the Court of Federal Claims, in comparison with other federal courts considering the same legal issues and facts.

Turning to one last example of the court's decisions, we bring this discussion back in a full circle; in fact, this case was decided not long before the symposium regarding the court's continuing role, and the case was decided by then Chief Judge Loren Smith.

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280. Laturner v. United States, 133 Fed. Cl. 47, 63–64 (2017).
281. *Id.* at 64.
282. *Id.* at 65. The Court also ruled that Treasury's refusal to provide information regarding the bonds was likewise a breach of contract.
283. *Id.* at 67 (emphasis in original).
284. *Id.* at 68.
285. *Id.* at 506.

The decision showcases the court's role as arbiter between the bureaucratic power of the federal government and the interests of private individuals.

As an aside, this case is in one respect rather atypical for the court. As a court which primarily hears disputes over matters such as property, contracts, scientific arguments regarding vaccine injury, and other technical topics, the matters discussed within the court's decisions are not usually the "hot-button" issues that typically divide public opinion on social policy controversies. But this case involved the mass firing of the Army's officer corps on the basis of sex and race, which is the sort of topic sure to garner more popular attention. Even so, the court performed the detailed analysis for which it is known.

In *Christian v. United States*,[286] the U.S. Army had involuntarily retired a substantial portion of its corps of lieutenant colonels due to budget cuts.[287] As a way to decide which lieutenant colonels should be retired in this way, the Secretary of the Army instructed the Selective Early Retirement Board to consider the mandatory early retirement in light of designated selection goals and requirements, and depending on the individual's career field or skill set.[288] At the first step of this review, the Secretary's instructions provided "a goal for the percentage of minorities and women to be retired and provided different evaluation standards for minorities and women than for officers in general, ostensibly due to possible past personal or institutional discrimination."[289] Based on the numeric scores gleaned from the differently applicable standards, all the candidates were ranked into an "order of merit."[290] Then, at the second phase of the process, the selection board cut the number of officers necessary to meet the retirement goal. Again, at this second phase, the mandatory retirements of women and minorities were measured against all other officers, as there were "selection goals for minority and female officers which called for the [board] to achieve a percent of minority and female officers recommended for retirement [that was] not greater than the rate for all officers in the zone of

286. 46 Fed. Cl. 793 (2000).
287. *Id.* at 797.
288. *Id.*
289. *Id.* at 797.
290. *Id.*

consideration."[291] One Lieutenant Colonel involuntarily retired through this process, Robert F. Christian, II, brought suit after exhausting administrative remedies with the Army Board for Correction of Military Records.[292]

Judge Smith began with the acknowledgement that, "It is clear on its face that the [Secretary's instructions] created a race and gender-based goal and that it required consideration of different factors in evaluating minority and female officers than when evaluating white male officers."[293] Therefore, he reasoned, the Fifth Amendment's Due Process Clause required that he analyze the Army's actions using a strict scrutiny standard, necessitating that the Army demonstrate a compelling governmental interest that was narrowly tailored to accomplish that interest.[294]

Despite the Secretary's explicitly stated race-based goals, the government argued that his memorandum did not "create a racial classification."[295] The court dismissed this argument by simple reference to the different standards of evaluation used between minority and non-minority officers.[296] Admitting its racially-focused goals, the government then argued that this was "a goal rather than a quota," and that there existed "no resulting repercussions or adverse consequences [to the board members] for not meeting any/all female or minority selection or retention goals."[297] On the basis of clear precedent, the court ignored the

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291. *Id.* at 798. The instructions from the Secretary stated the following (*inter alia*) as a requirement in evaluating the minority and female officers:

> The goal for this board is to achieve a percent of minority and female officers recommended for early retirement not greater than the rate for all officers in the zone of consideration . . . . [T]o the extent that each board achieves it, the Army at large will have a clear perception of equal opportunity and the officers not recommended for early retirement will enjoy the opportunity for continued career progression to the benefit of the Army. This goal is not intended as guidance for you to meet any "quota." . . . [T]he board should consider that past personal and institutional discrimination may have disadvantaged minority and female officers. Such discrimination may include . . . disproportionately lower evaluation reports, assignments of lesser importance or responsibility, and lack of opportunity to attend career building military schools. Take these factors into consideration in evaluating these officers' potential to make continued significant contribution to the Army . . . . [The board] must review and report the extent to which minority and female officers were recommended at a rate greater than males and non-minority officers.

Id. at 803.

292. *Christian*, 46 Fed. Cl. 793 at 799.

293. *Id.* at 803.

294. *Id.* at 804.

295. *Id.*

296. *Id.*

297. *Id.* at 804–05.

insufficient distinction made by the government, inasmuch as the instructions "appl[ied] one standard to one racial group and a different standard to another racial group."[298] The final argument raised to defend the governmental action was that white men as a group had never been "subjected to specific discriminatory acts based upon their race, ethnicity, or gender," and thus could not claim to have been illegally prejudiced by the unequal treatment.[299] Judge Smith reiterated the fundamental premise of equal protection jurisprudence: "All governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed."[300]

The government's dual justifications for the discriminatory action were remarkably weak (at least as they were recounted in Judge Smith's decision), and were certainly insufficient to satisfy a compelling interest. The first of the two justifications for the race- and sex-based discrimination was the Army's policy goal to influence the perceptions that people had of "the Army at large," but Judge Smith noted that seeking "to manipulate private perceptions can never by itself justify the use of race-conscious policies" because they "are simply too subjective to rely upon as a justification for trampling an individual's right to be treated equally."[301] The second offered justification was the Army's interest in remedying past discrimination against the affected minorities and women.[302] However, the Army pursued this objective by interpreting a lower achievement level by a woman or minority as potential proof of discrimination against that woman or minority.[303] Then, in view of this lower achievement level, the Army sought to prevent the effects of potential past discrimination from prejudicing their chances for retention. Judge Smith noted that such a policy was not remedial, because it was not directed at specific people who had actually suffered from improper discrimination in the past, only people who belonged to groups with a history of suffering from discrimination.[304] Lastly, the government strained toward an argument similar to "disparate

298. *Christian*, 46 Fed. Cl. 793 at 805.
299. *Id.*
300. *Id.* at 806 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).
301. *Id.*
302. *Id.* at 807.
303. *Id.*
304. *Christian*, 46 Fed. Cl. 793 at 807.

impact" to argue that such extreme counter-discrimination was necessary because statistics indicated "that minorities were promoted at different rates from white officers," despite an inability to "pinpoint any single systematic reason for the disparity [] observed."[305] Judge Smith observed that "the Army's plan was not addressing the present effects of past discrimination, but merely statistical disparities it did not like."[306] Ultimately, Judge Smith certified a class action composed of similarly-situated plaintiffs, and then, a year later, awarded damages on the basis of the constructive service remedy.[307]

As noted above, this case was not a typical COFC case, but it illustrates the court's acuity and flexibility in fashioning relief for those that are harmed by government action. Rather than simply deferring to the government's bureaucratic prerogative, the judge here vindicated those individuals harmed by the otherwise unchecked power of the sovereign.

V. CONCLUSION

This review of cases decided by the Court of Federal Claims brings three points to the forefront: First, the subject matter of the cases heard by the court can be quite detailed and complicated, and, as a rule, the judges of the court take special care to delve into the relevant facts to make a thorough determination and to consider well the underlying cause of action. Second, the judges of the Court of Federal Claims take great care to bear in mind the special relationship between citizen and sovereign, and to evaluate claims with fairness while bearing in mind the contours of this uneven and yet fundamental relationship. Third, the cases reiterate that, in the context of an expansive, encroaching administrative state, there is an abiding need for a specially-designated arbiter to fairly weigh the interests of the sovereign government against the interests of private citizens, and to find a just outcome.

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305. *Id.* at 810.

306. *Id.*; *see also id.* at 814 ("The government's policy appears to be tailored to prevent underrepresentation, and not to remedy past racial discrimination.").

307. *Id.* at 816–18; Christian v. United States, 49 Fed. Cl. 720, 728 (2001). On motion, Judge Smith certified the case to the Circuit before proceeding further. The Federal Circuit upheld Judge Smith's opinion on liability, but, relying on the "harmless error" doctrine, reversed his award of remedy and remanded the case back to him to readdress the remedy and then remand the case back to the Secretary. Christian v. United States, 337 F. 3d 1338, 1349 (Fed. Cir. 2003). From there, Judge Smith oversaw the parties' accommodation on the issue of damages. Christian v. United States, 60 Fed. Cl. 550, 551 (2004).

People can and should debate whether this is an optimal system for redress of grievances, or whether this is what the Founders would have intended. Yet, while such arguments are worthy of contemplation, people's lives and businesses are increasingly affected by the reality of governmental action exerted through its myriad of agencies. It is this reality that must be faced when contemplating the court that will hear the claims of those adversely affected by governmental action. Our government exists for the people it represents, not for the sake of the government itself. Just the same, the court that hears such claims exists for the people, not for the convenience of the government. The Court of Federal Claims is proud to call itself "the People's Court,"[308] and so it should be. It is for the people of the Republic that it exists. Although it was not ordained by George Mason or James Madison, I think the court's continued, robust success would be an institution of which they would heartily approve. If our nation is to remain a beacon of freedom and a city on a hill, then this house built on a hillside must stand firm in its foundations.

Beyond the involved technicalities of litigation, I hope that this discussion (among others) brings greater awareness of the court's mission and purpose, and the good work it performs day in and day out. Its cases are not often glamourous, and seldom does the court hear the politically-charged cases that garner public attention. However, it is a primary means by which the goals of the founding and the protections of the Constitution are brought to bear. It remains a crucial venue for citizens to petition their government for the redress of grievances, affecting their life and liberty, and encountered in their pursuit of happiness. Every citizen should glory in the knowledge of the Court of Federal Claims as a bulwark of their liberty.

With that, let us then return to the scenario with which this article began. Imagine you have lost your property, money, or livelihood due to the actions of the most powerful entity in the modern world, the federal government of the United States. But now consider how you might fare in that unwelcome situation if the Court of Federal Claims had never existed, or had ceased to exist—its functions scattered to the four winds. Unless you had a direct connection to legislators with influence over funding

308. *U.S. Court of Federal Claims: The People's Court*, FED. LAWYER, Oct. 2007, at 28; *The Senior Judges in the U.S. Court of Federal Claims*, FED.L LAWYER, Sept. 2017, at 37.

allocation, your claim would likely never be considered. Even if your claim were fortunate enough to be given a hearing, you would have to trust to Congress to deliberate on a fair resolution of what potentially might be a very complicated fact pattern or legal theory. It would be an untenable predicament, to be sure. Or perhaps, in the other alternate reality, your recourse would be confined solely to the potentially disparate outcomes of either district courts or administrative boards for vindication of your claim. That would still be no guarantee of a just resolution. When faced with these alternatives, this author is glad that the Court of Federal Claims is there to level the plane and to mediate the relationship between citizen and sovereign. Here's to another one hundred and sixty years of the court's success.