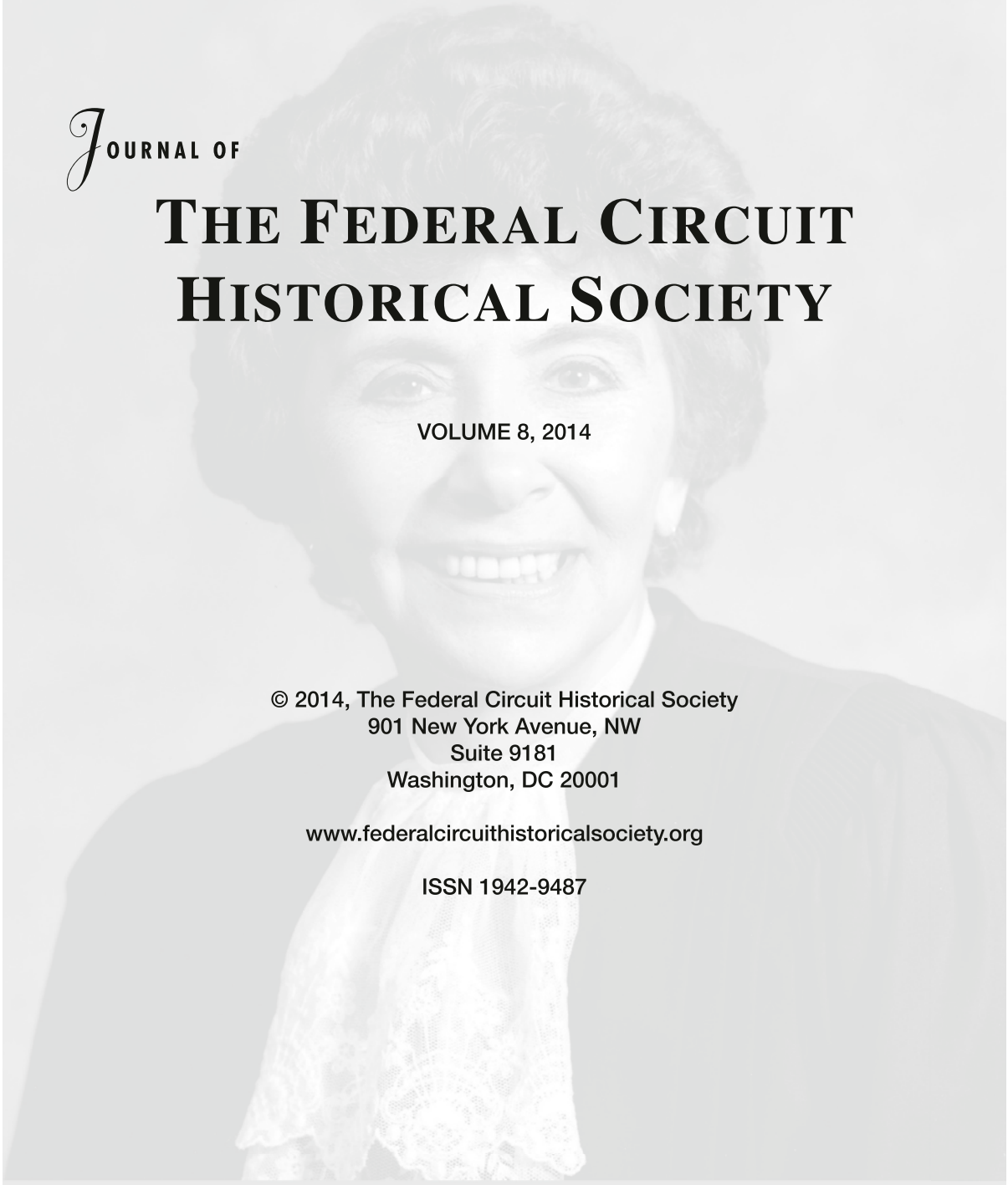

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VI. GOVERNMENT CONTRACTS AND THE FEDERAL CIRCUIT: A HISTORY OF JUDICIAL REMEDIES AGAINST THE SOVEREIGN

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Government contracts cases constitute an important part of the jurisdiction of the U.S. Court of Appeals for the Federal Circuit. Indeed, the Government's liability in contract is considered "the widest and most unequivocal waiver of federal immunity from suit" in the history of the United States.[1] The foundations of this jurisdiction extend back to efforts in the early 1800s to create a mechanism to enforce judicially the Government's obligations and to reduce the influx of private petitions before Congress. These efforts led to the creation of an exclusive judicial forum designed to decide claims against the Government. This forum, which was known as the Court of Claims, existed for more than 120 years until Congress passed the Federal Courts Improvement Act of 1982 and created the Federal Circuit by merging the Court of Claims with the Court of Customs and Patent Appeals.[2]

This article reviews the origins and history of the Federal Circuit's government contracts jurisdiction. As shown below, the history of this jurisdiction reveals the inevitable tensions and difficulties associated with trying to hold a sovereign entity responsible for its contractual obligations. This article chronicles several important milestones, including the mid-1800s creation of the Court of Claims, the development of the boards of contract appeals and other administrative mechanisms to settle contract disputes, and the commencement of bid protest actions in federal courts in the 1970s. This article concludes with a discussion of the Federal Circuit's creation and its acquisition of the jurisdiction of the Court of Claims.

SOVEREIGN IMMUNITY AND THE CONSTITUTIONAL DESIGN

Since the birth of our nation, the United States has enjoyed the inherent constitutional authority to enter binding obligations with private parties.[3] As noted by the Supreme Court of the United States, the "right to make binding obligations is a competence attaching to sovereignty."[4] When the United States becomes a party to a contract or other binding agreement, it is expected to incur the same rights and responsibilities as private parties.[5] Alexander Hamilton recognized the importance of this principle in his communication to the Senate on January 20, 1795, in which he noted:

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> *[W]hen a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it.*[6]

Hence, from the early years of our Republic, the United States was expected to honor its contractual commitments just as if it were a private party.[7]

At the same time, however, our founding fathers imported the concept of sovereign immunity from the English common law, thereby preventing contractors from enforcing their contractual commitments against the United States in courts of law. Sovereign immunity derives from the English precept that "the King can do no wrong" and that he therefore could not be sued in court.[8] "[T]he King was the head of those courts, and it was thought inappropriate for them to render a judgment against him."[9] To obtain redress for wrongs committed by the King, English subjects had to file "petitions for redress" with the Crown directly, and "the King was relied upon to do equity and justice" in favor of the petitioner.[10] Our founding fathers enshrined in the First Amendment of the Constitution the right "to petition the Government for a redress of grievances."[11]

Absent a waiver of sovereign immunity, the only remedy available to contractors was to assert a claim before the Treasury Department or to petition Congress.[12] Indeed, Congress was initially reluctant to allow for the independent judicial determination of claims, believing that it had exclusive constitutional authority to retain control over public expenditures.[13] Congress based this power on article I, section 8 of the Constitution, which gives Congress the authority "to pay the Debts" of the nation, as well as article I, section 9, which provides that "[n]o money shall be drawn from the Treasury, but in consequence of appropriations made by law." Congress feared that delegating to a judicial or executive body the responsibility to decide claims against the United States would both limit Congress's authority over the public fisc and violate the Constitution.[14]

Hence, for the first half-century of our nation's existence, government contractors lacked a judicial remedy if the United States failed to fulfill its contractual commitments. Contracts, by themselves, were insufficient to waive sovereign immunity; they "confer no right of action, independent of the sovereign will."[15] Hamilton noted the lack of a judicial remedy in the Federalist Papers, concluding that contracts with the United States are "only binding on the conscience of the sovereign, and have no pretensions to a compulsive force."[16] The Supreme Court has nevertheless been quick to note that, while Congress has no duty to provide a judicial remedy, "the contractual obligation still exists, and, despite infirmities of procedure, remains binding upon the conscience of the sovereign."[17]

As the nation matured, Congress struggled to handle the large influx of claims. By 1838, the number of petitions had increased sixfold since the early years, and Congress became notorious for its failure to address a large portion of these petitions.[18] Of the 17,574 petitions presented to Congress between 1838 and 1848, Congress acted on approximately half—only 8,948 petitions—and only 910 petitions were approved by both the House and the Senate.[19] Judge Charles C. Nott of the Court of Claims bemoaned the injustice caused by Congress's tardiness and slow progress as a "great and grievous wrong."[20] Congressional propensity to pay claims of dubious validity only compounded the injustice, arousing public suspicion of corruption and lowering "the character of Congress in the public mind."[21]

As a result, many commentators began challenging the legislative model of deciding claims against the Government. John Quincy Adams expressed support for replacing the current system with a judicial model for adjudicating claims:

> *There ought to be no private business before Congress. There is a great defect in our institutions by the want of a Court*

> *of Exchequer or Chamber of Accounts. It is judicial business, and legislative assemblies ought to have nothing to do with it. One-half of the time of Congress is consumed by it, and there is no common rule of justice for any two of the cases decided. A deliberative Assembly is the worst of all tribunals for the administration of justice.*[22]

An 1848 congressional report also questioned whether Congress, as a political body, was capable of impartially adjudicating claims against the United States.[23] The report described the existing system "as plagued with 'evils'" and criticized the practice of taking *ex parte* testimony from claimants with no Government representative.[24] Clearly, change was needed.

CREATION OF THE COURT OF CLAIMS

In 1855, after much debate, Congress created the Court of Claims and began the movement towards a judicial model of adjudicating petitions.[25] In "an Act to establish a Court for the Investigation of Claims against the United States," Congress created a three-judge court to hear claims and make recommendations to Congress on their disposition.[26] Court of Claims judges would be appointed by the President and confirmed by the Senate, and were entitled to hold office "during good behaviour."[27] The court's initial grant of authority included jurisdiction to hear claims based on contracts with the United States:

> *[T]he said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department,* ***or upon any contract, express or implied, with the government of the United States,*** *which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress.*[28]

It is unclear why Congress included certain types of claims in the court's initial grant of jurisdiction while excluding others, such as tort-based claims. Judge Marion Bennett theorized that Congress was reluctant to transfer all types of claims for adjudication by the new court and instead "chose to establish the court on an experimental basis with limited jurisdiction, feeling that inequities in the system could be corrected in later years."[29] In any event, the significance of giving the court jurisdiction over claims based in contract cannot be overstated. For the first time, contractors were given a judicial forum within which to adjudicate their monetary claims against the Government. Justice John Marshall Harlan II would later describe the creation of the Court of Claims "as a fulfillment of the design of Article III."[30]

The court's creation, however, was not a cure-all, and problems continued to plague the claims process. Disputes arose over whether the court was merely an advisory body to Congress or was, in fact, a true independent judicial forum.[31] The Court of Claims was quick to pronounce itself as the latter, proclaiming that its duties "are not advisory" and that "[a] committee may recommend, but a court can only adjudge, and that whether its jurisdiction be final or not."[32] But despite the court's bravado, the court's authorizing statute required the court to submit a report to Congress on each decided case and prepare bills for claimants entitled to relief.[33] Congress aggressively exercised this prerogative, leaving no doubt that its role was beyond rubber-stamping the court's decisions. Congress carefully reviewed the record and briefs in each decision in favor of a claimant, often rejected the court's recommendations, and routinely took no action at all on the court's advice.[34] In short, the processing of claims continued to stall in Congress and was in no better position than before the Court of Claims was created.

The Court of Claims Obtains Final Judgment Authority

It became apparent that if the Court of Claims was to serve its purpose, it would need the authority to render final judgments. President Abraham Lincoln, in his annual address to Congress in 1861, pushed for a "more convenient means" for adjudicating claims and famously pronounced:

> *It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals. The investigation and adjudication of claims,*

> *in their nature belong to the judicial department; besides, it is apparent that the attention of Congress will be more than usually engaged, for some time to come, with great national questions.*[35]

Despite praising the Court of Claims as "an effective and valuable means of investigation," President Lincoln ultimately concluded that the court failed to "effect the object of its creation" due to its lack of power to issue final judgments.[36]

After a much-fought debate, Congress gave the Court of Claims the power to issue final judgments, with the right of appeal to the Supreme Court on all judgments on claims exceeding $3,000.[37] The Act of March 3, 1863 also made several substantive revisions to the court and its jurisdiction, including adding two new judges to the court, establishing a six-year statute of limitations for claims, and giving the court jurisdiction to entertain set-offs and counterclaims by the Government against claimants.[38] Judgments were to be paid by the Secretary of the Treasury "out of any general appropriation made by law for the payment and satisfaction of private claims."[39]

The Tucker Act of 1887 Cements the Court's Authority

In 1887, an act introduced by Virginia Representative John Randolph Tucker further memorialized the Court of Claims's jurisdiction over contract claims and gave the court jurisdiction to hear and determine:

> *All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable[.]*[40]

Later described by Justice Oliver Wendell Holmes, Jr. as a "great act of justice,"[41] the Tucker Act expanded the court's jurisdiction to include "claims founded upon the Constitution of the United States" and cemented the court's adjudicatory authority over the classes of claims listed in the 1855 Act.[42] One member of Congress remarked that the goal of the Tucker Act was to bring the United States in line with other civilized nations by giving citizens "the right to go into the courts to seek redress against the Government for their grievances."[43] Although the Tucker Act has since been interpreted to provide only for monetary redress against the Government,[44] it nevertheless makes "absolutely no distinction between claims founded upon contracts and claims founded upon other specified sources of law."[45] Today, the Tucker Act continues to serve as the bedrock waiver of sovereign immunity for claims founded upon contracts with the United States.

Early Government Contracts Cases

With the Court of Claims's jurisdiction over contract claims firmly established, suits related to government contracts became a significant part of the court's docket.[46] Thus began the slow formation of precedent and the enunciation of legal principles by the Court of Claims and the Supreme Court that would govern the field of government contracts for years to come. Indeed, the Government's consent to suit on matters of contract "is viewed as perhaps 'the widest and most unequivocal waiver of federal immunity from suit.'"[47]

The courts consistently accepted the premise that the United States is governed by the same principles of contract law as private citizens.[48] Government contracts, according to the Court of Claims, "should receive the same fair, liberal, and just interpretation, according to the intent of the parties as gathered from the terms they have used."[49] And the court should "hold the Government to its contracts with the citizen, and to give the latter full redress for any breach of such contracts[.]"[50]

The courts formalized agency principles by routinely examining and defining the authority of government officials to bind the United States in contract. Cognizant of the evolving judicial doctrines associated with apparent authority and recognizing that the Government "is an abstract entity, which has no hand to write or mouth to

speak, and has no signature which can be recognized," the Supreme Court clarified that the Government is capable of "speak[ing] and act[ing] only through agents, or more properly, officers."[51] These officers, accordingly, can bind the United States only when given the explicit statutory authorization to do so.[52] This requirement—that officers possess *actual authority* to bind the United States—continues to this day.[53]

But, the Congressional waiver of sovereign immunity was not limitless. Even before the passage of the Tucker Act, the Supreme Court made clear that the Court of Claims's jurisdiction over implied contracts extended only to contracts implied in fact, not those implied in law.[54] The Court expressed concern that implied-in-law contracts were too akin to actions arising in tort, over which the Court of Claims had no jurisdiction. In *Gibbons v. United States*, the Court characterized the petitioner's case as "an attempt, under the assumption of an implied contract, to make the government responsible for the unauthorized acts of its officers, those acts being in themselves torts[.]"[55] Ten years later, in *Langford v. United States*, the Court again disallowed suits arising out of implied-in-law contracts and explained that "the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of someone."[56] The Court concluded that Congress did not intend to subject the Government to suits arising in tort, and allowing suits based on implied-in-law contracts would effectively "fritter away the distinction between actions ex delicto and actions *ex contractu*[.]"[57]

RISE OF THE BOARDS OF CONTRACT APPEALS AND ADMINISTRATIVE DISPUTE MECHANISMS

As the volume of government contracts grew, various government agencies began adopting standard remedy-granting clauses designed to give the Government increased flexibility to resolve contractual disputes within the four corners of the contract. One clause gave the Government the unilateral authority to modify contracts or order changes in certain aspects of contract performance in exchange for granting the contractor an "equitable adjustment" of the contract price and/or schedule.[58] A later-developed clause allowed the Government to terminate and settle contracts for its convenience, a concept that arose when the Civil War's conclusion left the Government responsible for innumerable defense contracts that were no longer necessary.[59] And, in this context, the most important clause of all was the "disputes" clause, which afforded the parties a process to resolve a broad range of disputes "arising under" the contract without resorting to breach-of-contract actions before the Court of Claims.[60]

The practice of keeping disputes within the scope of the contract became widely prevalent in government contracts, with the contracting officer serving as the cornerstone of this administrative process.[61] As the official agent of the United States on all contract matters, the contracting officer exercises the authority to bind the Government in contract and to modify the contract as necessary, and "is the person to whom the contractor turns for resolution of all contract questions."[62] Under the disputes clause, the contracting officer was given the authority to resolve disputed questions of fact, and his or her decisions were not reviewable in a court of law absent fraud or bad faith.[63] In one of the earliest cases involving this power, the Supreme Court upheld a contract provision granting the contracting officer the exclusive authority to ascertain the distance traveled by the contractor for purposes of payment under a transportation contract.[64] The Court noted that, "by the mutual assent of the parties" and according to the terms of the contract, the contracting officer's determination on "the matter of distances[] was intended to be conclusive."[65] The Court thus refused to reconsider the contracting officer's decision and held that, "in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, [the contracting officer's] action in the premises is conclusive upon the appellant as well as upon the government."[66]

Government agencies promulgated regulations allowing the contractor to appeal decisions of the contracting officer to the agency or department head.[67] This intra-agency review procedure would later result in the formation of the agency boards of contract appeals. In *United States v.*

Adams, the Supreme Court upheld the authority of the Secretary of War to appoint a review board as his representative to hear and decide contract claims at the start of the Civil War.[68] The Secretary had suspended payments on all contracts within the Department of War after receiving allegations of fraud and irregularities committed by the chief quartermaster, who was charged with awarding troop support contracts on the department's behalf.[69] Recognizing the detrimental effects on the contractors of suspending payments, the Secretary appointed a review board to immediately hear and decide upon claims submitted by the contractors.[70] Adams submitted a claim to the board for $183,500 on his contract to deliver boats to the Army. The board granted his claim in part and awarded only $20,196.[71] Adams brought suit for the full amount in the Court of Claims, which ruled in his favor.

The Supreme Court reversed and held that the board's decision on Adams's claim was final and conclusive.[72] The Court affirmed the Secretary's power over the department's contracts and his decision to suspend contract payments, noting that "he was responsible to the government for any detriment to its interests which it was reasonably within his power to prevent or remedy."[73] The Court also upheld the Secretary's authority to appoint the review board as his representative to hear and decide upon any pending claims.[74] While recognizing that the board "possessed no judicial power" and thus could not compel the contractors to submit to its authority, the Supreme Court nevertheless concluded that a claimant who voluntarily submits to the board's procedures must be bound by them, noting that the Secretary had "appointed this board as a favor to its creditors, to enable those who might desire it to have an immediate investigation."[75]

Throughout the Civil War and thereafter, boards of contract appeals were constituted in similar ad hoc fashion as representatives of the various department heads to decide contract claims.[76] Agency heads created individual boards pursuant to their general statutory authority over each of their departments.[77] It was not until 1918 that the War Department established the first permanent board of contract appeals.[78] A standard disputes clause in the defense contracts granted contractors the right to appeal any disputes "aris[ing] under this contract" to the Secretary or his representative, whose decision shall be "final and conclusive on all matters submitted for determination."[79] The Secretary of War created the War Department Board of Contract Adjustment to decide all disputes appealed pursuant to this clause. Although the Board was dissolved at the end of World War I, the heads of the military branches established similar boards that continued to operate.[80] Efforts continued through World War II to standardize the contracts and disputes processes and, in 1949, the Army and Navy boards merged to create the Armed Services Board of Contract Appeals, which continues to exist today.[81] The boards of contract appeals for the National Aeronautics and Space Administration and the Corps of Engineers would also merge with the Armed Services Board of Contract Appeals in 1993 and 2000, respectively.[82] Similar consolidation would later occur among the civilian agencies with the creation of the Civilian Board of Contract Appeals in 2006.[83]

WUNDERLICH AND THE CONTRACT DISPUTES ACT OF 1978: FROM EXHAUSTION OF ADMINISTRATIVE REMEDIES TO ELECTION OF FORUM

With the ad hoc proliferation of the boards of contract appeals and the use of standard disputes clauses giving agencies the power to make conclusive findings of fact in contract disputes, questions began to arise as to whether such efforts effectively prohibited contractors from seeking judicial relief. The resolution of nearly all contract claims during this time period followed the standard disputes clause, which required the contractor to submit a claim to the contracting officer and to appeal any denials to the agency board of contract appeals.[84] Contractors could not seek judicial relief in the Court of Claims pursuant to the Tucker Act until after they had completed this administrative disputes process. The Supreme Court strictly enforced this administrative exhaustion requirement, which it viewed as a simple matter of holding contractors to the terms of their contracts.[85] As the Supreme Court held, "[I]n the absence of some clear evi-

dence that the [contract] appeal procedure is inadequate or unavailable, that procedure must be pursued and exhausted before a contractor can be heard to complain in a court."[86]

The Wunderlich *Decision Limits Judicial Review*

In 1951, the Supreme Court further restricted judicial review of agency board decisions by holding that the "finality" provision in the standard disputes clause prevented contractors from seeking relief in the Court of Claims absent a showing of fraud, even after exhausting all administrative remedies.[87] In *United States v. Wunderlich*, the Supreme Court reversed a decision of the Court of Claims that set aside an action by the Secretary of Interior on a contract claim, noting that "this Court has consistently upheld the finality of the department head's decision unless it was founded on fraud, alleged and proved."[88] The Court relied on the assumption that contractors are not "compelled or coerced" into making contracts with the United States and have thus "contracted for the settlement of disputes in an arbitral manner."[89] Three justices dissented from the Court's decision, with Justice Douglas asserting that the majority's decision "makes a tyrant out of every contracting officer" and gives him or her "the power of life and death over a private business even though his decision is grossly erroneous."[90]

The decision alarmed many in the procurement community.[91] In response, Congress passed the Wunderlich Act, which prevented contractual clauses from limiting the right of contractors to seek judicial review of agency board decisions.[92] The Act provided that board decisions were reviewable by the Court of Claims and would be overturned if found to be "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."[93] Agency decisions were not final as to questions of law.[94]

Under the Wunderlich Act, contractors who were dissatisfied with an agency board decision could once again appeal to the Court of Claims, which would often permit de novo trials on the claim and allow the parties to submit additional evidence before one of its court-appointed trial commissioners.[95] Following World War I, the Court of Claims began appointing trial-level commissioners to take evidence, conduct trials, and recommend decisions on claims to the court's judges. The court's judges then reviewed decisions of the trial commissioners and would decide whether to adopt or amend the decision. The court's trial commissioners were thus analogous in many respects to federal district court judges, except that their decisions were not final until adopted by the court's Article III judges.[96]

In 1963, however, the Supreme Court admonished the Court of Claims for its practice of receiving additional evidence and held that, absent fraud, judicial review under the Wunderlich Act was limited to the administrative record.[97] In 1966, the Supreme Court further held that defects in the administrative record required remand to the agency, and the Court of Claims could not instead hold a trial to resolve these defects.[98] The Supreme Court also held that contractors could not appeal breach of contract claims to the boards of contract appeals because the standard disputes clause did not extend to those types of claims, which were by definition "outside" the scope of the contract.[99] Contractors thus had to divide their claims between two different forums; they had to go directly to the Court of Claims to file their breach claims but were required to follow the contract's administrative disputes process for any claims "arising under" the contract before appealing to the Court of Claims. The disputes process thus remained an "irrational patchwork system" defined by contract clauses, substantial delays and inefficiencies, and the limited ability of contractors to seek judicial relief.[100]

In response, Congress created the Commission on Government Procurement in 1969 to study the disputes process and provide recommendations "to promote the economy, efficiency, and effectiveness in the procurement of goods, services and facilities by and for the executive branch of the Federal Government[.]"[101] Over the next three years, the twelve-member Commission conducted an extensive review and concluded that a comprehensive overhaul was needed to equalize the disputes process and address contractor frustration.[102] The Commission found that "the present system often fails to provide the

procedural safeguards and other elements of due process that should be the right of litigants."[103] The Commission recommended the creation of a "flexible disputes-resolving system" with alternative forums available to encourage greater negotiation and ensure the fair and equitable adjudication of contract disputes.[104] In particular, the Commission recommended that direct access to the courts be restored for contractors:

> *The rationale of the Tucker Act, which ended to a great degree the doctrine of sovereign immunity, is that the Government acting as a buyer subjects itself to this judicial scrutiny when it enters the marketplace,* and should not in all cases be administratively the judge of its own mistakes, nor adjust with finality disputes to which it is a party.[105]

The Contract Disputes Act of 1978: Election of Forum

In 1978, Congress implemented the recommendations of the Commission and passed the Contract Disputes Act.[106] The stated purpose of the Act was to provide "a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving government contract claims."[107] Congress recognized the "unplanned manner" in which the contract disputes system had developed over the years and the tremendous power executive branch agencies wielded over the disputes process.[108] Through the Contract Disputes Act, Congress sought to level the playing field and reinstitute a contractor's right to seek redress in federal courts.[109]

The Act requires contractors to submit contract claims for resolution by the contracting officer, who is required to issue a written decision on the claim within 60 days or notify the contractor of a reasonable time within which a decision will be issued.[110] After the contracting officer issues a written final decision, the Act gives the contractor a statutory right to appeal to a board of contract appeals within 90 days or to file suit in the Court of Claims (today, the Court of Federal Claims) within 12 months.[111] This election of forum allows contractors to seek a de novo trial on their claims in a court of law without first exhausting their administrative remedies and appealing to an agency board. Trials in the Court of Claims were conducted by court-appointed trial commissioners, whose decisions were made final upon review by the court's Article III judges.[112] If the contractor elected to appeal to an agency board, both the Government and the contractor could seek judicial review of the board's decision before the Court of Claims's Article III judges (today, the Federal Circuit).[113] The Court of Claims reviewed board decisions on questions of law de novo and upheld findings of fact by the boards unless they were "fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or . . . not supported by substantial evidence."[114]

The Contract Disputes Act thus removed the contract disputes process from the discretionary realm of agency-imposed contract clauses and established a fixed statutory framework that continues to this day.[115] The agency boards of contract appeals were given independent statutory authority to adjudicate contract claims,[116] and executive agencies could no longer force contractors to relinquish their right to appeal contracting officer decisions.[117] The Act also freed contractors from the "limited confines of administrative law," eliminated the inevitable procedural delays that resulted from the need to exhaust administrative remedies, and restored their access to federal courts.[118] As Congress recognized, "Contractors should not be denied a full judicial hearing on a claim they deem important enough to warrant the maximum due process available under our system."[119]

A NEW TYPE OF ACTION: PROTESTS OF CONTRACT AWARD DECISIONS

As the procurement system continued to develop in the United States, a new type of legal action also began to take shape—the bid protest. This new action allows disappointed bidders to act as private attorneys general by challenging—or "protesting"—contract award decisions they believe are unlawful. Today, protests are viewed as a vital part of the federal procurement system and provide "an important measure of transparency and accountability."[120] The majority of protests are heard by the Government Accountability Office ("GAO"), which has provided an administrative forum for disappointed bidders

since the 1920s[121] and received explicit statutory authority to hear bid protests in 1984 with the passage of the Competition in Contracting Act.[122] The Court of Federal Claims also hears a number of protests each year, which are subject to appeal to the Federal Circuit.[123]

The federal courts were not always open to disappointed bidders. Indeed, it was not until 1970, after passage of the Administrative Procedure Act, that disappointed bidders were given standing to challenge agency award decisions. The judicial remedies that developed through the 1800s were reserved exclusively for parties that held an existing contract with the United States. As early as 1861, government agencies were required by law to adhere to certain advertising requirements when awarding contracts.[124] But disappointed bidders lacked standing to challenge agency actions that violated these requirements. The early case law in the Court of Claims and the Supreme Court involved breach-of-contract actions and held only that contracts awarded in violation of these requirements were not binding on the contractual parties.[125]

1940-1970: No Federal Jurisdiction over Bid Protests

In 1940, the Supreme Court affirmed this view and held that disappointed bidders could not challenge contract award decisions made by the United States.[126] In *Perkins v. Lukens Steel Co.,* the Supreme Court held that disappointed bidders lacked standing to challenge the Secretary of Labor's wage determination under the Public Contracts Act. The Court rejected the bidders' argument that they have "particular rights" to negotiate for government contracts, noting that procurement regulations were "not enacted for the protection of sellers and confer[] no enforceable rights upon prospective bidders."[127] The Court reaffirmed that the Government has unfettered discretion to enter into contracts to purchase supplies and services as needed:

> *Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. Acting through its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, and which create duties to the Government alone. . . .* It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain.[128]

The Court refused to recognize what it described as "a new concept of judicial controversies" that is "contrary to traditional governmental practice" by subjecting government agencies to judicial scrutiny at the insistence of potential sellers.[129] Hence, federal courts were unable to hear bid protests for more than 30 years after the Supreme Court's decision, making the GAO the only forum available to disappointed bidders to challenge award decisions during this time.

Although disappointed bidders could not directly challenge award decisions in federal court, the Court of Claims's existing Tucker Act jurisdiction allowed disappointed bidders to seek a monetary remedy through implied-in-fact contract claims. Under these claims, disappointed bidders sought to recover bid and proposal preparation costs by showing that the agency failed to consider their proposal honestly and fairly. In *Heyer Products Co., Inc. v. United States*, the Court of Claims held that the Government's request for proposals included an implied condition "that each [offer] would be honestly considered, and that that offer which in the honest opinion of the contracting officer was most advantageous to the Government would be accepted."[130] The Court of Claims thus held that a disappointed bidder has standing to bring a breach-of-contract action to recover bid and proposal costs if it can show the Government did not fairly and honestly consider its proposal.[131]

Scanwell Laboratories, Inc. v. Shaffer: *D.C. Circuit Finds Jurisdiction*

Then, in 1970, the U.S. Court of Appeals for the District of Columbia issued a seminal decision in S*canwell Laboratories, Inc. v. Shaffer*, which distinguished *Lukens Steel Co.* and held

that disappointed bidders did, in fact, have standing to seek injunctive relief against an agency's decision to award a contract in violation of procurement law and regulation.[132] The D.C. Circuit held that disappointed bidders suffer a cognizable injury as a result of an agency's illegal actions in awarding a contract to another party, and that suits by these bidders further the public interest in "preventing the granting of contracts through arbitrary or capricious action[.]"[133] The D.C. Circuit distinguished *Lukens Steel Co.* by noting that it was decided "during the heyday of the legal right doctrine" and before passage of the Administrative Procedure Act.[134] Likening bid protests to actions brought by private attorneys general, the D.C. Circuit summed up the issue with a straightforward conclusion:

> *If there is arbitrary or capricious action on the part of any contracting official, who is going to complain about it, if not the party denied a contract as a result of the alleged illegal activity? It seems to us that it will be a very healthy check on governmental action to allow such suits, at least until or unless this country adopts the ombudsman system used so successfully as a watchdog of government activity elsewhere.*[135]

The D.C. Circuit's decision finally allowed disappointed bidders to seek redress in federal district court pursuant to the Administrative Procedure Act. The Court of Claims, however, continued to lack authority to provide equitable and injunctive relief to disappointed bidders until the Federal Courts Improvement Act of 1982 dissolved the Court of Claims and established the trial-level Claims Court with the power to provide injunctive and declaratory relief in pre-award bid protests.[136] Congress would later eliminate *Scanwell* jurisdiction and give the Claims Court's successor, the Court of Federal Claims, exclusive federal jurisdiction over all bid protests.[137]

CREATION OF THE FEDERAL CIRCUIT: THE FEDERAL COURTS IMPROVEMENT ACT OF 1982

In the vast confluence of patent-dominated events that led to the creation of the U.S. Court of Appeals for the Federal Circuit in 1982, very little attention was paid to how the restructuring of the federal judiciary would impact government contracts law. Indeed, the impetus for the Federal Circuit's creation was to address burgeoning federal litigation and inter-circuit splits in the area of patent law.[138] The Federal Circuit obtained jurisdiction over government contracts cases as a necessary consequence of Congress's decision to merge the Court of Claims with the Court of Customs and Patent Appeals. At the time, Congress was concerned with creating a "specialized" court with a limited focus on patent law.[139] The Senate Committee on the Judiciary rejected proposals to expand the jurisdiction of the U.S. Court of Customs and Patent Appeals to all patent appeals, noting that such an approach would be "inconsistent with the imperative of avoiding undue specialization within the Federal judiciary."[140] Congress's solution was to combine the Court of Customs and Patent Appeals and the Court of Claims into a new appellate court, the Federal Circuit, which would retain nationwide jurisdiction over both courts' dockets and have jurisdiction over patent-related appeals.[141] The Federal Circuit's current jurisdiction over government contracts cases was thus no more than the coincidental result of the folding of the Court of Claims into this new appellate court.

Creation of the Trial-Level Claims Court

The Federal Courts Improvement Act also created a new trial-level court called the Claims Court, which would be renamed the Court of Federal Claims just 10 years later.[142] The Claims Court is often perceived as byproduct of the creation of the Federal Circuit "in the sense that the primary concern was with appellate matters."[143] Before its dissolution, the Court of Claims performed a broad range of trial functions through a set of appointed commissioners in addition to its normal appellate functions. The new Federal Circuit's jurisdiction, however, was limited to appellate matters. Congress thus created the Claims Court by granting the Court of Claims's trial commissioners the status of Article I judges serving fifteen-year terms, who would continue performing the traditional trial functions of the Court of Claims.[144] But unlike their prior status as trial commissioners, which could only recom-

mend decisions to the Article III judges of the Court of Claims, the new judges on the Claims Court would operate as an independent tribunal with the power to enter final judgments, reviewable on appeal by the Federal Circuit.

The Claims Court inherited the jurisdiction of the Court of Claims as defined by the Tucker Act and the Contract Disputes Act.[145] These statutes thus continued to serve as the primary vehicles through which government contract disputes are brought to court. Contractors retained the statutory right to bring a suit for damages in the Claims Court based "upon any express or implied contract with the United States" as that phrase has been interpreted for the past 120 years.[146] For contracts covered by the Contract Disputes Act, contractors still have the option of appealing claims to the boards of contract appeals or filing suit directly in the Claims Court. The decisions of both forums are reviewable by the Federal Circuit.

Claims Court/Court of Federal Claims Jurisdiction Over Bid Protests

The Federal Courts Improvement Act of 1982 also granted the Claims Court exclusive jurisdiction over bid protests and the power "to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief."[147] This provision is significant because the Court of Claims traditionally had no power to provide declaratory and injunctive relief. Without the power to issue injunctions, the court was effectively prohibited from hearing bid protests, where the only meaningful remedy was to undo the agency's award decision and obtain a second chance to compete for the contract. The Claims Court's new equitable powers thus enabled it for the first time to hear and decide bid protests.

Subsequent interpretations of this provision, however, limited the Claims Court's equitable jurisdiction to pre-award bid protests. In *United States v. John C. Grimberg Co.*, the Federal Circuit interpreted the provision, which applies to "any contract claim brought before the contract is awarded,"[148] to mean that the Claims Court could not provide equitable relief in post-award bid protests.[149] Under this interpretation, protesters filing suit after contract award still had to seek injunctive relief in federal district court pursuant to *Scanwell Laboratories, Inc. v. Shaffer*.[150] The Federal Circuit's decision thus created a confusing, chaotic, inefficient and costly system that split bid protests between two different fora.[151] Protestors could seek an injunction in the Claims Court as long as the agency had not yet awarded the contract. But after contract award, the Claims Court's equitable jurisdiction was cut-off and the protest had to be filed in federal district court.

Congress corrected this problem in 1996 with the passage of the Administrative Dispute Resolution Act.[152] The Act granted concurrent jurisdiction in the Court of Federal Claims[153] and federal district courts to hear bid protests "without regard to whether suit is instituted before or after the contract is awarded."[154] The Act explicitly provided that the courts had the power to award any proper relief, "including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs."[155] The jurisdiction of federal district courts over bid protest actions terminated on January 1, 2001 pursuant to a sunset provision in the Act.[156] Hence, the Court of Federal Claims today enjoys exclusive court jurisdiction over bid protest actions, with appellate review in the Federal Circuit.

CONCLUSION

Contractors today benefit from a statutorily prescribed system entitling them to seek judicial review of agency actions and to hold the Government to its contractual commitments. The Federal Circuit today hears a wide swath of procurement-related cases, including bid protests, contract claims covered by the Contract Disputes Act, and other contractual disputes arising under the Tucker Act. But the court's jurisdiction over government contracts cases took more than 150 years to develop. Indeed, the history of the court's jurisdiction is replete with examples of the tension between the Government's obligations as a contracting party and its status as a sovereign entity—a tension that continues to exist in the current framework. As the law advances forward, it is useful to remember the lessons of the past and the rich history that

undergirds the Federal Circuit's role in government contracts, as the court will undoubtedly continue to play an invaluable role in the development of government contracts law.

ENDNOTES

1 *United States v. Mitchell*, 463 U.S. 206, 215 (1983) (quoting *Developments in the Law—Remedies Against the United States and its Officials*, 70 Harv. L. Rev. 827, 876 (1957)).

2 Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

3 *See, e.g.*, *Van Brocklin v. Tennessee*, 117 U.S. 151, 154 (1886) (noting that government agencies have the authority to enter into contracts "within the sphere of their constitutional powers" and as "appropriate to the just exercise of those powers, although not expressly directed or authorized to do so by any legislative act").

4 *Perry v. United States*, 294 U.S. 330, 353 (1935).

5 *United States v. Bank of Metropolis*, 40 U.S. 377, 392 (1841); *see also Lynch v. United States*, 292 U.S. 571, 579 (1934) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.").

6 3 Hamilton's Works 287 (Henry Cabot Lodge, ed. 1904).

7 *Perry*, 294 U.S. at 354; *see also The Sinking Fund Cases*, 99 U.S. 700, 719 (1878) ("The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.").

8 C. Stanley Dees, *The Future of the Contract Disputes Act: Is it Time to Roll Back Sovereign Immunity?*, 28 Pub. Cont. L.J. 545, 545 (1999).

9 Marion T. Bennett, The United States Court of Claims: A History, Part II, 1 (1978).

10 *Id.* Many scholars have criticized the continued vitality of the sovereign immunity doctrine. See, e.g., Dees, supra note 8, at 545; John Copeland Nagle, *Waving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 Wis. L. Rev. 771, 836 (1995).

11 U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

12 Binney, *Origin and Development of Legal Recourse Against the Government of the United States*, 57 U. Pa. L. Rev. 372, 378 (1909) ("As soon as the Treasury Department was established, the accounting officers were daily occupied in paying what the government owed for contracts of all kinds; but if those officers refused or cut down a claim, further relief could only be had from Congress itself.").

13 Bennett, *supra* note 9, at 5.

14 *Id.*

15 *Id.* at 1.

16 Alexander Hamilton, Federalist No. 81.

17 *Perry v. United States*, 294 U.S. 330, 354 (1935).

18 Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution From a Legislative Toward a Judicial Model of Payment*, 45 La. L. Rev. 625, 648-49 (1985).

19 Bennett, *supra* note 9, at 10.

20 *Brown v. United States*, 6 Ct. Cl. 171, 191 (1870) ("That such a number of American citizens should have been left by their own government without a hearing, and to that extent at least without redress, was of itself a great and grievous wrong.").

21 *Id.*

22 VIII Memoirs of John Quincy Adams 480 (Charles Francis Adams, ed. 1875) (entry of February 23, 1832).

23 Shimomura, *supra* note 18, at 650.

24 *Id.* at 649.

25 Act of February 24, 1855, ch. 122, 10 Stat. 612.

26 *Id.* § 1.

27 *Id.*

28 *Id.* (emphasis added).

29 Bennett, *supra* note 9, at 16.

30 *Glidden Co. v. Zdanok*, 370 U.S. 530, 558 (1962).

31 Bennett, *supra* note 9, at 17-18.

32 *Todd v. United States*, 1 Cong. Ct. Cl. 1, 3 (1856).

33 Act of February 24, 1855, ch. 122, § 7, 10 Stat. 612.

34 Bennett, *supra* note 9, at 18.

35 Cong. Globe, 37th Cong., 2d Sess. app. 2 (1862).

36 *Id.*

37 Act of March 3, 1863, ch. 92, 12 Stat. 765.

38 *Id.* §§ 1, 3, 10; *see also* Bennett, *supra* note 9, at 23.

39 Act of March 3, 1863, ch. 92 § 7. A last-minute amendment provided that "no money shall be

paid out of the Treasury for any claim passed upon by the Court of Claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury." *Id*. § 14. This provision effectively undermined the Act's "finality" provision and was not corrected until 1866. *See* Act of March 17, 1866, 14 Stat. 9.

40 Act of March 3, 1887, ch. 359, 24 Stat. 505.

41 *United States v. Emery, Bird, Thayer Realty Co*., 237 U.S. 28, 32 (1915).

42 Act of March 3, 1887, ch. 359, 24 Stat. 505.

43 18 Cong. Rec. 2680 (Mar. 3, 1887) (statement of Representative Bayne).

44 *United States v. Jones*, 131 U.S. 1, 18-19 (1889).

45 *United States v. Mitchell*, 463 U.S. 206, 216 (1983).

46 Bennett, *supra* note 9, at 29.

47 *United States v. Mitchell*, 463 U.S. 206, 215 (1983) (quoting *Developments in the Law—Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 876 (1957)).

48 *Cook v. United States*, 91 U.S. 389, 398 (1875).

49 *Gilbert v. United States*, 1 Ct. Cl. 28, 37 (1863).

50 *Corliss Steam-Engine Co. v. United States*, 10 Ct. Cl. 494, 502 (1874).

51 *The Floyd Acceptances*, 74 U.S. 666, 676 (1868).

52 *Id*. at 680 (noting that "in every instance, the person entering into such a contract must look to the statute under which it is made, and see for himself that his contract comes within the terms of the law"). *See also Travers v. United States* 5 Ct. Cl. 329 (1869); *White v. United States*, 15 Ct. Cl. 305 (1879).

53 *See, e.g.*, *Brunner v. United States*, 70 Fed. Cl. 623 (2006).

54 *See Langford v. United States*, 10 U.S. 341 (1879); *Gibbons v. United States*, 75 U.S. 269 (1868).

55 75 U.S. at 274.

56 10 U.S. at 345.

57 *Id*.; *see also Merritt v. United States*, 267 U.S. 338, 341 (1925) ("The Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law.").

58 The Hon. Jeri Kaylene Somers, *Forward: The Boards of Contract Appeals: A Historical Perspective*, 60 Am. U. L. Rev. 745, 747 (2011); *see also* F. Trowbridge vom Baur, *The Origin of the Changes Clause in Naval Procurement*, 8 Pub. Cont. L.J. 175, 715 (1976) (discussing *McCord v. United States*, 9 Ct. Cl. 155 (1873), *aff'd sub nom*., *Chouteau v. United States*, 95 U.S. 61 (1877)).

59 See Collin D. Swan, *Lessons from Across the Pond: Comparable Approaches to Balancing Contractual Efficiency and Accountability in the U.S. Bid Protest and European Procurement Review Systems*, 43 Pub. Cont. L.J. 29, 48-50 (2013) (discussing the origins of the termination for convenience clause). The first decision recognizing the Government's power to halt contract performance and settle with the contractor was *United States v. Corliss Steam-Engine Co.*, 91 U.S. 321 (1875).

60 Somers, *supra* note 58, at 747-48.

61 *Id*. at 748; *see also* Clarence Kipps et al., *The Contract Disputes Act: Solid Foundations, Magnificent System*, 28 Pub. Cont. L.J. 585, 586 (1999) (noting that the boards of contract appeals, through the contracting officer, "handled the vast majority of disputes while the Court of Claims . . . provided an appropriate alternative for larger, more complex claims").

62 Somers, *supra* note 58, at 748.

63 Bennett, *supra* note 9, at 30.

64 *Kihlberg v. United States*, 97 U.S. 398 (1878).

65 *Id*. at 401.

66 *Id*. at 402.

67 Somers, *supra* note 58, at 748.

68 *United States v. Adams*, 74 U.S. 463, 477 (1868).

69 *Id*. at 464.

70 *Id*. at 477-78.

71 *Id*. at 465.

72 *Id*. at 478-79.

73 *Id*. at 477.

74 *Id*. at 478.

75 *Id*. at 480-81.

76 *See, e.g.*, *United States v. Child & Co.*, 79 U.S. 232 (1870); Austin G. Roe, *Lincoln: The First Board of Contract Appeals*, 8 Pub. Cont. L.J. 179 (1976); Somers, *supra* note 58, at 749.

77 Somers, *supra* note 58, at 749.

78 *Id*. at 750.

79 *Id*. at 749-50.

80 *Id*.

81 *Id*.

82 Michael J. Schaengold & Robert S. Brams, *Choice of Forum for Government Contract Claims: Court of Federal Claims v. Board of Contract Appeals*, 17 Fed. Cir. B.J. 279, 285 (2008) (citing 58 Fed. Reg. 44,462 (Aug. 23, 1993) (to be codified at 48 C.F.R. pt. 1833)).

83 *See* Somers, *supra* note 58, at 755-56 (citing National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 847, 119 Stat. 3136, 3191-92). For a discussion of the benefits and drawbacks to consolidating agency boards, see Steven L. Schooner, *What Next? A Heurestic Approach to Revitalizing the Contract Disputes Act of 1978*, 28 Pub. Cont. L.J. 635, 648-49 (1999).

84 *Id*. at 753.

85 *See, e.g.*, *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234, 240 (1946) ("It follows that when a contractor chooses without due cause to ignore the provisions of Article 15 [of the contract] he destroys his right to sue for damages in the Court of Claims. That court is then obliged to outlaw his claims, whatever may be their equity. To do otherwise is to rewrite the contract.").

86 *Id*.

87 *United States v. Wunderlich,* 342 U.S. 98 (1951).

88 *Id*. at 100.

89 *Id*.

90 *Id*.at 101 (Douglas, J., dissenting).

91 Joseph Sachter, *The Court of Claims and the Wunderlich Act: Trends in Judicial Review*, 1966 Duke L.J. 372, 374 (1966).

92 68 Stat. 81 (1954).

93 *Id*.

94 *Id*.

95 Kipps et al., *supra* note 61, at 587; *see also* Sachter, *supra* note 91, at 375.

96 *See* Note & Comment, *Government Contracts Disputes: An Institutional Approach*, 73 Yale L.J. 1408, 1424-25 (1964).

97 *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 714 (1963).

98 *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 431 (1966).

99 *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 404 (1966) (noting that the "power of the administrative tribunal to make final and conclusive findings on factual issues rests on the contract").

100 Kipps et al., *supra* note 61, at 587.

101 Pub. L. No. 91-129 § 1, 83 Stat. 269, 269 (1969).

102 Kipps et al., *supra* note 61, at 588.

103 U.S. Comm'n on Gov't Procurement, 4 Report of the Commission on Government Procurement 3 (1972).

104 *Id*. at 4. The Commission recommended that any solution be structured to achieve the following objectives: "Induce resolution of more contract disputes by negotiation prior to litigation; Equalize the bargaining power of the parties when a dispute exists; Provide alternative forums suited to handle the different types of disputes; [and] Ensure fair and equitable treatment of contractors." *Id*.

105 *Id*. at 24 (emphasis added).

106 Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383.

107 S. Rep. No. 1118, 95th Cong., 2d Sess. 1, *reprinted* in 1978 U.S.C.C.A.N. 5235, 5235.

108 *Id*. at 5236-37.

109 *Id*.

110 Pub. L. No. 95-563 § 6(c).

111 *Id*. §§ 7, 10.

112 *See Government Contracts Disputes*, *supra* note 96, at 1423-24.

113 *Id*. § 8(g).

114 *Id*. § 10(b); *see also* 41 U.S.C. § 7107(b).

115 *See* 41 U.S.C. §§ 7101-09.

116 Pub. L. No. 95-563, § 8; *see also* 41 U.S.C. § 7105.

117 *See Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854, 858 (Fed. Cir. 1997) ("Congress commanded that the [contracting officer's] decision on any matter cannot be denied Board review.").

118 Kipps et al., *supra* note 61, at 591.

119 S. Rep. No. 1118, *supra* note 107, at 5246.

120 Swan, *supra* note 59, at 30 (quoting Daniel I. Gordon, *Constructing a Bid Protest Process: The Choices That Every Procurement Challenge System Must Make*, 35 Pub. Cont. L.J. 427, 427 (2006)); *see also Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 866 (1970) (stating that "the most practicable way to keep the government's contracting officers within their statutory powers is by letting complainants . . . obtain judicial review of the officers' action").

121 The GAO is a legislative agency tasked with the authority to "investigate all matters related to the receipt, disbursement, and use of public money." 31 U.S.C. § 712 (2006). The GAO derived its early bid protest authority from its power to review payments made by federal agencies under contract. *See* Russell N. Fairbanks, *Personal Service Contracts*, 6 Mil. L. Rev. 1, 2 (1959). For a discussion of the GAO's first bid protest decision, see Daniel I. Gordon, *Annals of Accountability: The First Published Bid Protest Decision*, Procurement Lawyer, Winter 2004, at 11.

122 *See* Pub. L. No. 98-369 tit. VII, subtit. D, 98 Stat. 1175. 1199 (1984). GAO's bid protest regulations are codified as Part 21 of Title 4 of the Code of Federal Regulations.

123 For an empirical discussion of protests filed at GAO and the Court of Federal Claims, see Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 Geo. Wash. L. Rev. 714, 755-57 (2003).

124 *See* Swan, *supra* note 59, at 40-42. In 1861, Congress passed a statute providing that "all purchases and contracts for supplies or services in any of the Departments of the Government . . . shall be made by advertising a sufficient time previously for proposals respecting the same." Act of March 2, 1861, ch. 84 § 10, 12 Stat. 220.

125 *See, e.g.*, *United States v. Ellicott*, 223 U.S. 524 (1912); *Schneider v. United States*, 19 Ct. Cl. 547, 551-52 (1884).

126 *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

127 *Id.* at 125-26.

128 *Id.* at 127 (emphasis added).

129 *Id.* at 130.

130 140 F. Supp. 409, 412 (Ct. Cl. 1956).

131 *Id.* at 413-14 ("If this obligation is breached and plaintiff is put to needless expense in preparing its bid, it is entitled to recover such expenses.").

132 424 F.2d 859 (1970).

133 *Id.* at 864.

134 *Id.* at 866.

135 *Id.*at 866-67.

136 *See infra* notes 147-156 and accompanying text.

137 *See infra* notes 152-156 and accompanying text.

138 The Hon. Pauline Newman, *The Federal Circuit—A Reminiscence*, 14 Geo. Mason U. L. Rev. 513, 513-14 (1992).

139 Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 Geo. L.J. 1437, 1454 (2012).

140 S. Rep. No. 97-274 at 6 (Nov. 11, 1981).

141 *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164 § 127, 96 Stat. 25, 37-38; *see also* Richard H. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982*, 71 Geo. Wash. L. Rev. 543, 544-45 (2003); *see also* S. Rep. No. 97-274 at 2 (Nov. 11, 1981).

142 *Id.* § 105, 96 Stat. at 26; *see also* Federal Courts Administration Act of 1992, Pub. L. No. 102-572 § 902, 106 Stat. 4506, 4516 (renaming the Claims Court as the Court of Federal Claims).

143 Daniel J. Meador, *Origin of the "Claims Court"*, 71 Geo. Wash. L. Rev. 599, 599 (2003); *see also* Seamon, *supra* note 141, at 545.

144 *See* Seamon, *supra* note 141, at 545.

145 *See* Pub. L. No. 97-164 § 133.

146 28 U.S.C. § 1491(a)(1).

147 Pub. L. No. 97-164 § 133, 96 Stat. at 40.

148 *Id.*

149 702 F.2d 1362, 1374 (Fed. Cir. 1983). Four judges of the en banc court dissented, asserting that the majority's holding "not only creates an illogical bid protest procedure but also encourages protective litigation by disappointed bidders." *Id.* at 1379 (Kashiwa, J., dissenting).

150 424 F.2d 859 (D.C. Cir. 1970).

151 *See* Swan, *supra* note 59, at 36-37 (noting that "the contracting authority could deprive the Claims Court of its ability to provide injunctive relief in a bid protest simply by awarding the contract").

152 Pub. L. No. 104-320, 110 Stat. 3870 (1996). Interestingly, the Act includes a famous drafting error describing the jurisdiction of the "*United States Court of Federal Claims*," an error that remains on the books today. *See* 28 U.S.C. § 1491(b)(1) (emphasis added).

153 In 1992, Congress renamed this court the Court of Federal Claims and expanded its jurisdiction to include disputes "concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under" the Contract Disputes Act. Federal Courts Administration Act of 1992, Pub. L. No. 102-572 § 907, 106 Stat. 4506, 4519.

154 *Id.* § 12, 110 Stat. at 3874.

155 *Id.*

156 *Id.* § 12(d) ("The jurisdiction of the district courts of the United States . . . shall terminate on January 1, 2001 unless extended by Congress."); *see also* Steven L. Schooner, *Watching the Sunset: Anticipating GAO's Study of Concurrent Bid Protest Jurisdiction in the COFC and the District Courts*, 42 Gov't Contractor No. 12 ¶ 108 (2000); Michael J. Schaengold et al., *Choice of Forum for Federal Government Contract Bid Protests*, 18 Fed. Cir. B.J. 243, 250 (2006).