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THE TUCKER ACT AND PAYMENT BOND SURETY'S EQUITABLE CLAIM OF SUBROGATION POST-*BLUE FOX*: KEYS TO THE COURTHOUSE DOORS

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Imagine you are preparing to present a claim against the Government before a court. Your focus is on supporting the substantive validity of the claim. Whether the court has jurisdiction to hear the claim, and whether sovereign immunity bars the claim, are of less concern to the action because they are seemingly settled issues. On these issues, you rely on over 100 years of precedent in which courts have heard claims similar to yours.

Suddenly, you learn that, despite the century of precedent, the court will not hear your claim. Even more alarming, the court tells you that it has determined that the cases upon which you relied are not precedent regarding jurisdiction because they never addressed any jurisdictional issues. Instead, the court declares that the so-called precedent issue dealt solely with the substantive merits of a claim. The court has closed the doors to any relief you had sought. Although this sudden and dramatic change has an air of Kafka,[1] the circumstance in this tale is one that payment bond sureties may have to face after the Supreme Court's decision in *Department of the Army v. Blue Fox, Inc.*[2]

A surety bond is a three party contract in which an obligation owed by one party (the bond principal) to another (the obligee) is guaranteed by a third party (the surety).[3] Project owners commonly require surety

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1. *See generally* FRANZ KAFKA, *The Metamorphosis*, *in* SELECTED SHORT STORIES OF FRANZ KAFKA 19 (Willa & Edwin Muir trans., Random House 1952) (1936). While the author is not suggesting that the scenario is identical to changing into a "gigantic insect," the change is just as dramatic. *Id.*

2. 525 U.S. 255 (1999).

3. 1 JOHN B. FITZGERALD ET AL., PRINCIPLES OF SURETYSHIP 1 (1st ed. 1991). Suretyship, the guaranteeing of one's debts to another, is an ancient concept that has existed for thousands of years. The Book of Proverbs cautions against becoming surety for a stranger. *Proverbs* 11:15. In *The Merchant of Venice*, Shakespeare created a unique surety bond, a pound of flesh, that secured Antonio's repayment of a loan from Shylock. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 1, sc. 3. Fortunately for the

bonds as security for the completion of a construction contract.[4] In this context, the bond principal is the construction contractor who owes an obligation to the project owner, the obligee. The surety, usually an insurance company, secures the obligation, which is the construction of the project.[5] The contractor provides two bonds: a performance bond and a payment bond.[6] A performance bond guarantees the full and faithful performance of the contract.[7] A payment bond guarantees that the contractor will pay its subcontractors and suppliers.[8] The Miller Act[9] requires both performance and payment bonds as security on construction projects over $100,000 on which the Federal Government is the project owner.[10] The regulatory provisions of the bond requirement are set forth in the Federal Acquisition Regulations.[11]

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author and his colleagues in the surety industry, the type of bond posted today is less detrimental to one's health. Surety bonds have even played a part in the movie industry. Movie completion bonds have assured the production of movies such as *Driving Miss Daisy* and *Malcolm X* when the film goes over budget or falls behind schedule. Joanne Wojcik, *Film Guarantors Vie for Top Role After Firm Folds*, BUS. INS., Nov. 29, 1993, at 3.

4. In 2001, over $1.9 billion in premiums were paid to purchase bonds that secured contracts. THE SURETY ASS'N. OF AM., CLASSIFICATION EXPERIENCE SUMMARY: FIDELITY AND SURETY. For more information regarding construction surety bonds, see SURETY INFORMATION OFFICE, *at* http://www.sio.org (last visited Oct. 12, 2004).

5. *See* Stewart R. Duke & Mary Jeanne Anderson, *How Contract Surety Bonds Are Underwritten*, *in* THE LAW OF SURETYSHIP 49, 49 (Edward G. Gallagher ed., 2d ed. 2000). In their article, Duke and Anderson concisely describe the wide-ranging obligations that a contractor takes on when undertaking a construction contract:

> These undertakings are performed by contractors who tell the owner, . . . "I will build that project according to a set of plans and specifications you provide and I will see that all the bills are paid for all the material and labor that goes into that project. Further, I will build it for a firm price that I have 'estimated' today, regardless of what it actually costs me to do it. I will sign a contract telling you that I will build this project within a given time for a pre-determined price even though the project may take one, two or three years longer to complete than anticipated."

Id.

6. FITZGERALD, *supra* note 3, at 36.

7. THE SURETY ASS'N. OF AM., GLOSSARY: FIDELITY AND SURETY 24 (1997).

8. *Id.* at 20.

9. 40 U.S.C.A. §§ 3131–3133 (Supp. 2004). The Miller Act's impact on a subcontractor's ability to sue the Government was an issue in *Blue Fox*. Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 264 (1999). The Supreme Court stated that the right to sue on a payment bond, as granted by the Miller Act, serves as the subcontractor's sole recourse for nonpayment since it may not sue the Government directly. *Id.*

10. 40 U.S.C.A. § 3131(b) (Supp. 2004). A predecessor to the Miller Act was the Heard Act, which was enacted in 1894. ch. 280, 28 Stat. 278 (1894). The Heard Act provided that any person entering into a contract with the United States was required to execute "the usual penal bond, . . . with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them [with] labor and materials." *Id.* at 278. The House report accompanying the legislation noted that the United States had been requiring a bond on its construction projects to protect

A significant function of a surety bond is to protect the owner financially in the event the contractor fails to perform or fails to pay its subcontractors and suppliers.[12] If the contractor defaults, the surety steps in and provides a remedy in accordance with the terms and conditions of the surety bond.[13] A surety could remedy a default under a performance bond by undertaking completion of the construction contract.[14] A surety remedies a default under a payment bond by paying subcontractors and suppliers.[15] Unlike other forms of insurance, a surety writes a bond expecting no losses.[16] In order to mitigate any losses it does incur, a surety seeks to obtain the balance of funds owed by the project owner in order to undertake completion or pay the subcontractors and suppliers.[17]

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the United States against the default of performance. H.R. REP. NO. 53-97, at 1 (1893). However, payment of subcontractors and suppliers was not an obligation covered under the bond. *Id.* The Heard Act established this "additional obligation" of payment and gave subcontractors and suppliers a direct right of action under the bond. 28 Stat. at 278. However, two obligations (performance and payment) under the same bond created significant administrative difficulties for a subcontractor in making a claim. H.R. REP. NO. 74-1263, at 2 (1935). The Miller Act House report noted that under the Heard Act, subcontractors encountered "undue delay, with resultant hardships, in the collection of moneys due them by suits on bonds." *Id.* at 1. Moreover, the United States had priority in making a claim under the bond. *Id.* at 2. The Miller Act remedied these problems by requiring two separate bonds: one covering the performance obligation and one covering the payment obligation. *Id.* As a result, subcontractors and suppliers with claims for nonpayment are no longer forced to compete with the United States' performance claims.

11. 48 C.F.R. § 28.102-2(b) addresses the amount of the bond required by the Miller Act. It provides that the performance bond and payment bond must each be in the amount of 100% of the original contract price. 48 C.F.R. § 28.102-2(b) (2003).

12. Lynn M. Schubert, *Why Obligees Buy Bonds*, *in* THE LAW OF SURETYSHIP, *supra* note 5, at 41, 43.

13. *Id.* at 43 ("The most immediately attractive benefit to the obligee is the obligation of contract completion.").

14. *See generally* James J. Mercier & John T. Harris, *Rights of Surety in Event of Default*, *in* THE LAW OF PERFORMANCE BONDS 37 (Lawrence R. Moelmann & John T. Harris eds., 1999) (describing the surety's options in remedying default: takeover and project completion, tender of a new contractor, financing the principal, or financial settlement with the obligee).

15. Kelly Allbritton Katzman, *Purpose of the Payment Bond and Who and What Is Covered*, *in* THE LAW OF SURETYSHIP, *supra* note 5, at 147, 147.

16. Susan M. Camilli et al., *Understanding Workers' Compensation Bonds in Today's Market*, IAIABC J., Fall 2003, at 56, 58 n.4 (2003).

> [I]nsurers write surety bonds expecting no loss. A bond is written successfully if it is written for a bond principal that will fully perform the obligation or has the security or financial ability to reimburse the surety for any payments made by the surety. Experience has shown that the key to a profitable surety line of business is sound underwriting.

Id.

17. *See* Edward G. Gallagher, *Entitlement to Contract Proceeds* [hereinafter Gallagher, *Payment Bonds*], *in* THE LAW OF PAYMENT BONDS 223, 223 (Kevin L. Lybeck & H. Bruce Shreves eds., 1998); Edward G. Gallagher, *Entitlement to Contract Proceeds*

The surety obtains contract balances under a variety of legal theories.[18] The theory relevant to this Comment is equitable subrogation.[19]

By completing the performance of its principal, the surety is subrogated to the rights of the parties that benefited from the surety's discharge of the obligation.[20] In essence, by performing the obligations of the defaulted principal, the surety is equitably assigned the rights of the parties to the bond contract.[21] It stands in the shoes of the parties that benefited by the surety's discharge of the bonded obligation.[22]

A surety on a bond required by the Miller Act must make its equitable subrogation claim for contract balances against the Federal Government.[23] Unlike action against private owners, the surety must

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[hereinafter Gallagher, *Performance Bonds*], *in* THE LAW OF PERFORMANCE BONDS, *supra* note 14, at 61, 61-62.

18. Gallagher, *Payment Bonds*, *supra* note 17; Gallagher *Performance Bonds*, *supra* note 17, at 62.

19. *Restatement (Third) of Suretyship and Guaranty* explains the concept of subrogation:

> Subrogation is a term used by the law to describe the remedy by which, when the property of one person [(the surety)] is used to discharge a duty of another [(the principal)] . . . under such circumstances that the other [(the obligee)] will be unjustly enriched by the retention thus conferred, the former [(the surety)] is placed in the position of the obligee . . . . Subrogation does not spring from contract although it may be confirmed or qualified by contract.

RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 27 cmt. a (1996). Section 27(1) states: "Upon total satisfaction of the underlying obligation, the secondary obligor [(the surety)] is subrogated to all rights of the obligee with respect to the underlying obligation [(e.g., the construction contract)] to the extent that performance of the secondary obligation [(the surety's performance under the bond)] contributed to the satisfaction." *Id.* § 27(1). The right of subrogation involves four elements: "An obligation of the contractor to the owner; The failure of the contractor to perform that obligation; Rights in the owner arising from the contractor's failure to perform; The performance by the surety, pursuant to the suretyship, of the obligation which the contractor has failed to perform." Daniel Mungall, Jr., *The Buffeting of the Subrogation Rights of the Construction Contract Bond Surety by* United States v. Munsey Trust Co., 46 INS. COUNS. J., 607, 607 (1979).

20. George J. Bachrach & John V. Burch, *The Surety's Subrogation Rights*, *in* THE LAW OF SURETYSHIP, *supra* note 5, at 419, 419-20 ("The surety who completes the performance of its principal is subrogated to the rights of the creditor and the principal.").

21. *Id.* at 421. Notably, the concept of subrogation as a surety right was well established at the time of the Tucker Act's enactment in 1887. A book on equity stated:

> It is a settled principle of equity that a surety will be entitled to every remedy which the creditor has against the principal debtor . . . . This right of the surety stands not upon contract, but upon the same principal of natural justice upon which one surety is entitled to contribution from another.

MELVILLE M. BIGELOW, ELEMENTS OF EQUITY FOR THE USE OF STUDENTS 281 (1879).

22. Bachrach & Burch, *supra* note 20, at 419 ("Historically, subrogation has been described as the substitution of one person (the surety) in place of another (the creditor) with respect to the other's lawful claim or right.").

23. *Id.* at 449.

confront the issue of sovereign immunity when asserting a claim against the Government.[24] Unless expressly waived, the Government is immune from valid claims.[25] Sovereign immunity is an ancient concept from English law holding that the King is immune from suit because the King is the law.[26] The concept carried over to the Government of the United States.[27] Sovereign immunity protects the Federal Government against otherwise valid claims.[28] As contact and interaction between citizens and the Federal Government grew, Congress relaxed the prohibition and expanded exceptions to its immunity.[29] One such exception is the Tucker Act.[30] The Tucker Act waives sovereign immunity and provides the Court of Federal Claims with jurisdiction over certain claims.[31]

For over a century, since *Prairie State Bank v. United States*,[32] courts have construed the Tucker Act and precedent as providing jurisdiction

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24. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits.").

25. *See, e.g.*, United States v. Sherwood, 312 U.S. 584, 586 (1941).

26. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2 (1963).

27. *See Cohens*, 19 U.S. (6 Wheat.) at 411-12; THE FEDERALIST NO. 81, at 414 (Alexander Hamilton) (Buccaneer Books ed., 1992).

> It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. . . . The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will.

Id. Contra THE FEDERALIST NO. 80, *supra*, at 403 (Alexander Hamilton) (suggesting that controversies in which the United States is a party should be heard by "national tribunals").

28. In an article recounting the oral argument of *Blue Fox*, Blue Fox's attorney, Thomas Spaulding, noted that Justice Scalia acknowledged the injustice of unsatisfied claims by stating, "'This happens all the time when people are confronted with the defense of sovereign immunity. That's the whole beauty of the defense,' . . . 'It lets the government get off when the government ought to pay.'" Thomas F. Spaulding, *A Lawyer's Day at the United States Supreme Court*, 63 TEX. B.J. 140, 141 (2000).

29. Paul Frederic Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 AM. U. L. REV. 301, 302 (1997).

30. Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended in scattered sections of 28 U.S.C.).

31. 28 U.S.C. § 1491 (2000). Another provision of the U.S Code provides concurrent jurisdiction to the U.S district court and the Court of Federal Claims for claims not exceeding $10,000 and "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." *Id.* § 1346(a)(2).

32. 164 U.S. 227 (1896).

for sureties' equitable subrogation claims against the Government.[33] Other precedent in addition to *Prairie State Bank*, such as *Henningsen v. United States Fidelity and Guaranty Co.*[34] and *Pearlman v. Reliance Insurance Co.*,[35] have become the cornerstone on which sureties rely to establish their right to sue the Government.[36] Under these cases, sureties successfully asserted subrogation claims against the Government in order to obtain funds to complete projects and pay subcontractors.[37] For over 100 years, a right (equitable subrogation) and a remedy (suit against the government) have existed in these matters.[38]

However, the recent decisions in *Blue Fox* and *Insurance Co. of the West v. United States*[39] have made the surety's ability to assert its equitable subrogation claim and sue the Government based on Tucker Act jurisdiction far less certain.[40] The payment bond surety's ability to

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33. *See, e.g.*, Balboa Ins. Co. v. United States, 775 F.2d, 1158, 1163 (Fed. Cir. 1985) ("Several cases, although not decided on the merits in favor of a plaintiff surety, have recognized jurisdiction over a surety's cause." (citing Am. Fid. Fire Ins. Co. v. United States, 513 F.2d 1375 (Ct. Cl. 1975)); United States Fid. & Guar. Co. v United States, 475 F.2d 1377 (Ct. Cl. 1973); United Pac. Ins. Co. v. United States, 319 F.2d 893 (Ct. Cl. 1963); Newark Ins. Co. v. United States, 169 F. Supp. 955 (Ct. Cl. 1959); Home Indem. Co. v. United States, 376 F.2d 890, 892 (Ct. Cl. 1967) ("The rights of the surety in the final contract payment have long been recognized."); *see also* Bachrach & Burch, *supra* note 20, at 446-47.

> While the Tucker Act is merely jurisdictional, and does not create any substantive rights, there are a legion of cases in which the federal courts have found that the Tucker Act provides a vehicle for the surety to assert its claims of equitable subrogation to the contract funds on federal government contracts.

Id. *See generally* THE SUBROGATION DATABASE: CASES CONCERNING THE SUBROGATION OF THE CONTRACT BOND SURETY (George J. Bachrach ed. 1995) (listing cases awarding contract funds retained by the United States to the surety).

34. 208 U.S. 404 (1908).

35. 371 U.S. 132 (1962).

36. *See* discussion *supra* note 33.

37. *Pearlman*, 371 U.S. at 133, 141-42; *Henningsen*, 208 U.S. at 404, 410, 412; *Prairie State Bank*, 164 U.S. at 231, 240.

38. *Prairie State Bank*, 164 U.S. at 227-28, 240.

39. 243 F.3d 1367 (Fed. Cir. 2001).

40. Over the years, sureties have established Tucker Act jurisdiction based on principles other than equitable subrogation. Marilyn Klinger, *The Surety's Right of Equitable Subrogation Versus the U.S. Government's Right to Sovereign Immunity*, 36 TORT & INS. L.J. 23, 28 (2000). For example, sureties have argued that a bond is a three party contract and, therefore, the surety is in contractual privity with the Government. *Id.* Under this argument, Tucker Act jurisdiction is based on the fact that the surety has a claim founded on an express contract with the United States. 28 U.S.C. § 1491(a)(1) (2000). In *Balboa*, the Federal Circuit found that a surety had standing to sue the United States based partly on the surety's contractual relationship with the Government. Balboa Ins. Co. v. United States, 775 F.2d. 1158, 1160 (Fed. Cir. 1985) ("[A] surety, as bondholder, is as much a party to the Government contract as the contractor."). However, subsequent case law has undercut this argument. Five years later, the Federal Circuit "clarified" its

sue the Government under the Tucker Act has not been tested since *Blue Fox*.[41] When the issue does reach the courts, the payment bond surety must be prepared to present arguments that will preserve jurisdiction of its claim under the Tucker Act.

This Comment argues that the Tucker Act contemplated money claims based on equitable principles, and that the waiver of sovereign immunity in the Tucker Act is broad enough to permit suit by a payment bond surety. This Comment will examine the surety's ability to sue the Government for contract balances under the Tucker Act, pre and post *Blue Fox*. Part I of this Comment will discuss the Tucker Act and its predecessor Act of 1855. It also sets forth a review of the holdings of *Blue Fox* and *Insurance Co. of the West*, and the "cornerstone" cases on which sureties relied to establish Tucker Act jurisdiction. Part II will argue that that *Blue Fox* and *Insurance Co. of the West* are not authority for the proposition that payment bond sureties may not sue the government. Part II also provides an alternative argument establishing a jurisdictional basis by examining the legislative history of the Tucker Act.[42] Ultimately, this Comment establishes that the drafters of the Tucker Act contemplated Court of Claims jurisdiction for claims such as sureties' equitable subrogation claims.[43]

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position in *Balboa* in *Ransom v. United States*, 900 F.2d 242 (Fed. Cir. 1990). The *Ransom* court explained that *Balboa* did not place the Government in contractual privity with the surety but rather the Government was a "stakeholder" for the contact balances. *Id.* at 245; *see also* Admiralty Constr. Inc. v. Dalton, 156 F.3d 1217 (Fed. Cir. 1998); Fireman's Fund Ins. Co. v. United States, 909 F.2d 495, 499-500 (Fed. Cir. 1990) (noting that the Government is not a party to the performance bond).

> And while the government is identified as the intended third-party beneficiary of the performance bond, it did not sign the bond or undertake any obligation to Fireman's Fund in it . . . . Thus, Fireman's Fund is neither the intended third-party, nor the direct, beneficiary of any promise by the government, whether contained in the bonded contract or the performance bond.

Id. at 500. *Contra* Shwarz v. United States, 35 Ct. Cl. 303, 309 (Ct. Cl. 1900) (noting that two cases heard by the Court of Claims, "both of which went to the Supreme Court," held that the surety "stands in direct contract relation with the United States"). The cases referenced by the *Shwarz* court were *Prairie State Bank* and *United States v. Behan*, 110 U.S. 338 (1884). *Id.* It remains to be seen whether the Supreme Court views these cases as standing for the proposition that the surety is in privity with the Government.

41. In *Insurance Co. of the West*, the surety was a performance bond surety. 243 F.3d at 1370.

42. Using legislative history is an acceptable form of statutory interpretation in the United States. In his book, Christian Mammen states, "[T]he Supreme Court has used legislative history as a source of guidance in statutory interpretation for virtually its entire history." CHRISTIAN E. MAMMEN, USING LEGISLATIVE HISTORY IN AMERICAN STATUTORY INTERPRETATION 77 (2002).

43. This Comment will demonstrate that the Tucker Act's drafters contemplated equitable claims for money damages beyond those grounded on the Constitution, law or regulation, or express or implied in fact contract. Such claims can be found outside of the

I. EQUITABLE SUBROGATION CLAIMS AGAINST THE GOVERNMENT – THE LEGAL LANDSCAPE

A. The Tucker Act and the Act of 1855

The Tucker Act waives the sovereign immunity of the United States so persons may bring certain claims against the Government.[44] The Tucker Act provides that necessary express waiver of immunity to open the door to suit against the Federal Government. A discussion of the background and circumstances surrounding the Tucker Act and its predecessor is helpful in understanding the Tucker Act's original intent. When Congress enacted the Act of 1855,[45] it had been beset with a large number

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surety context. For example, the Court of Federal Claims has held that a claim founded upon promissory estoppel is not within the court's jurisdiction under the Tucker Act. *See, e.g.*, Schuhl v. United States, 3 Cl. Ct. 207, 210-11 (Cl. Ct. 1983); Biagioli v. United States, 2 Cl. Ct. 304, 308 (Cl. Ct. 1983); Pasternack v. United States, 12 Cl. Ct. 707, 709 (Cl. Ct. 1987). In *Biagioli*, the court refused to "broaden the waiver of sovereign immunity" by granting Tucker Act jurisdiction based on a claim founded on the theory of equitable estoppel. *Biagioli*, 2 Cl. Ct. at 308. With a broader reading of the Tucker Act to include all claims with limited exceptions, claims founded on equitable estoppel could find Tucker Act jurisdiction. Nevertheless, even if the argument is applied exclusively in the context of suretyship, jurisdiction over a surety's claim affects more than just surety companies. From a practical standpoint, if payment bond sureties are blocked from suing the Government to recover contract funds, the corresponding increased risk of loss would have two consequences. First, in light of a higher risk of loss, it would prompt the surety to increase its underwriting parameters and write bonds for only the most financially secure contractors, limiting the availability of bonds to smaller contractors, and thereby reducing the number of contractors that can compete for a project. Reduced competition would then lead to higher project costs. Second, a surety would compensate for the increased risk by increasing premiums. The two consequences, higher underwriting parameters and increased premiums, ultimately translate into increased construction costs for the taxpayer. *See* Brief of Amicus Curiae The Surety Association of America Urging Affirmance of the Order of the Court of Federal Claims at 2-3, 17-18, 21-24, *Ins. Co. of the West* (No. 00-5039) (noting adverse effects if the court denies jurisdiction of surety claims against the Government).

> If this Court were to adopt the position urged by the United States [(i.e. that the surety may not sue the Government for contract funds)], it would make it very difficult for the surety on a federal project to finance a troubled contractor and thus avoid a default and consequent delay to the project. The type of actions taken by ICW [(the surety)] to meet its obligations would expose a surety to a risk of loss not contemplated when the bond was written . . . .

Id. at 2-3.

44. 28 U.S.C. § 1491(a)(1) (2000).

45. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (repealed 1887).

> [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

of private bills asserting claims against the United States.[46] In addition, the use of private bills to provide individualized relief proved inadequate from the perspective of the claimant.[47] The Act of 1855 established the Court of Claims as a body to investigate claims within its scope.[48] However, all of the court's decisions were subject to review by Congress's Committee on Claims.[49] Therefore, Congress remained overburdened with issues regarding private bills.[50] Congress passed various other acts subsequent to the Act of 1855 which rendered the court's decisions final and not subject to Congress's review.[51]

The scope of the Court of Claims' jurisdiction remained largely unchanged until the passage of the Tucker Act.[52] For several years after the passage of the Act of 1855, private bills continued to inundate Congress.[53] In 1886, Representative John Tucker proposed legislation that would expand the scope of the Court of Claims' jurisdiction to relieve Congress from addressing many of the private bills.[54] Tucker's

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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.

Id.

46. Kirgis, *supra* note 29. A private bill was the sole mechanism by which a citizen could secure relief against the Government before Congress established waivers of sovereign immunity and jurisdiction in the courts. *See id. See generally* Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684, 1684 (1966) (assessing the constitutionality of Congress's private lawmaking function). Although rare, private bills for relief exist even today. For example, in 1996, the U.S. House of Representatives considered House Bill 2894 to pay for the legal expenses of the employees who were fired from the White House travel office. H.R. 2894, 104th Cong. (1996).

47. In addition to the burdensome nature of private bills, the process involved in their investigation and resolution has proved highly inadequate. WILSON COWEN ET AL., THE UNITED STATES COURT OF CLAIMS 8-10 (1978). Between the years 1831-1837, 14,602 private claims were presented to Congress and 8811 were not resolved. *Id.* at 9. Between 1838 and 1848, only 910 of 17,573 claims were acted upon by both houses of Congress. *Id.* at 9-10. Private bills were also viewed as unjust. In a speech concerning a predecessor statute of the Tucker Act, Representative A.G. Porter noted the "inconvenience and injustice" to a citizen seeking private relief because Congress did not have time to address the matter sufficiently. CONG. GLOBE, 37th Cong., 2d Sess. app. at 123 (1862). Porter observed, "A business man ordinarily felt that it was better to submit at once to the loss of his claim than to lose the time, incur the expense, and subject himself to the annoyance and uncertainty incident to its prosecution in each House of Congress." *Id.*

48. COWEN, *supra* note 47, at 15-16.

49. *Id.* at 18.

50. *Id.*

51. *Id.* at 20-25.

52. *See id.* at 39-40.

53. *Id.* at 39.

54. *See* H.R. REP. NO. 49-1077, at 4 (1886). In the House report, Tucker stated:

It is needless to say more than has already been intimated as to the general policy of this legislation. The large mass of business now before Congress

legislation proposed to expand jurisdiction beyond that established under the Act of 1855 to matters involving equity and admiralty.[55] The legislation was similar to the Act of 1855, except for the jurisdictional provision, "[F]or damages, liquidated or unliquidated, 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."[56]

As originally drafted, the Tucker Act stated:

> [T]he Court of Claims shall have jurisdiction to hear and determine the following matters:
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> First. 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, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, . . . *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* . . . .[57]

Currently, the Tucker Act does not contain the emphasized words. It simply requires that a claimant must establish that the claim is based on the Constitution, a law or regulation, an express or implied contract with the Government, or liquidated or unliquidated damages not arising in tort law.[58] As noted by the Court of Claims in *Pauley Petroleum Inc. v. United States*,[59] Congress deleted the language in 1948 merely because it was deemed unnecessary with no intent to change the law substantively.[60]

> growing out of private claims consumes its time year after year in committee work, rendered useless by the lack of time to consider and pass upon them.

Id.

55. *Id.*

> By confining [jurisdiction] to claims under a law of the United States, regulations of Departments, and to cases of contracts expressed and implied, there is still a large class of cases in equity, in admiralty, and in tortious acts of the Government through its agents, which are left to Congress, for which a court of justice is better fitted to attain the right between the litigants.

Id. at 3-4.

56. 18 CONG. REC. 623 (1887).

57. *Id.* (emphasis added).

58. 28 U.S.C. § 1491 (2000).

59. 591 F.2d 1308 (Ct. Cl. 1979).

60. *Id.* at 1316 ("The particular language in the Tucker Act . . . was omitted in the 1948 recodification, but the reviser's note clearly indicated that no substantive change was intended."). *See* § 1491 historical and revision notes.

> Words "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" were omitted as unnecessary since the Court of

Despite the omitted reference to claims in a court of equity, the Court of Federal Claims has continued to utilize equitable theories to award money damages in Tucker Act cases.[61]

While basing monetary damages on equitable principles does not defeat Tucker Act jurisdiction, claims seeking equitable remedies such as specific performance fall outside the Court of Federal Claims' jurisdiction.[62] Thus, two distinct concepts exist: application of equitable principles to support a monetary remedy (damages) and a purely equitable remedy.[63] The deletion of words referring to courts of equity did not represent a legislative mandate that equitable claims against the Government fell outside the jurisdiction of the Federal Court of Claims[64] because the Court of Claims still could hear such claims if monetary damages were sought.[65]

Notably, the last enumerated claim for which there is express jurisdiction under the Tucker Act, liquidated and unliquidated damages

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> Claims manifestly, under this section will determine whether a petition against the United States states a cause of action.

Id.; *see also* COWEN, *supra* note 47, at 43.

61. Williard L. Boyd III & Robert K. Huffman, *The Treatment of Implied-in-Law and Implied-in-Fact Contracts and Promissory Estoppel in the United States Claims Court*, 40 CATH. U. L. REV. 605, 610 (1991) (citing Passaro v. United States, 774 F.2d 456 (Fed. Cir. 1985) and *Pauley Petroleum*). The *Pauley* court stated, "Equitable doctrines can be employed incidentally to this court's general monetary jurisdiction either as equitable procedures to arrive at a money judgment, or as substantive principles on which to base the award of a money judgment." 591 F.2d at 1315 (citations omitted).

62. *See, e.g.*, United States v. Jones, 131 U.S. 1, 17 (1889) (finding that the Tucker Act permitted suits against the Government involving "claims for money only, or they may be claims for property or specific relief, according as the context of the statute may require or allow"). *Jones* involved a suit for specific performance seeking to force the United States to deliver "patents for timber land." *Id.* at 1. The Supreme Court determined that such a claim was outside Tucker Act jurisdiction. *Id.* at 19. The Court interpreted the Tucker Act by comparing it with its predecessor statute, and found that the language was nearly identical, except for an extension to claims for damages not sounding in tort for which remedy may be obtained in a court of law, admiralty, or equity. *Id.* at 15-16. The Court concluded that Congress could not have intended the additional language to expand the jurisdiction to suits seeking specific performance, since such an expansion would provide the judiciary the power to manage federal lands. *Id.* at 19.

63. In 1972, the Court of Claims clarified the distinction this way:

> The correct premise is, not that we are without equity jurisdiction, but that we cannot grant nonmonetary equitable relief such as an injunction, a declaratory judgment, or specific performance. Where the relief is monetary, we can call upon such equitable concepts as rescission and reformation to help us reach the right result.

Quinault Allottee Ass'n v. United States, 453 F.2d 1272, 1274 n.1 (Ct. Cl. 1972) (citations omitted). The court rejected the "ancient but inaccurate shibboleth" that it does not have any equity jurisdiction. *Id.*

64. *See* § 1491 historical and revision notes.

65. *See* discussion *supra* note 63.

not sounding in tort, has gone largely unnoticed by the courts. Courts have deflated the text and have confined allowable claims only to those based on the Constitution, a law or regulation, or an express or implied contract with the Government.[66]

B. Blue Fox *and* Insurance Co. of the West *–Courts Attack Sureties' Standing Under the Tucker Act*

1. Department of the Army v. Blue Fox, Inc.*–An Ominous Sign*

In *Blue Fox*, the Supreme Court held that the Administrative Procedure Act (APA)[67] did not waive sovereign immunity to allow subcontractors and suppliers to assert claims against contract funds held by the United States.[68] This is not a novel principle.[69] However, the Court added that "other creditors" are also barred from making equitable claims.[70] This vague statement raises an important question: did the Supreme Court hold that sureties have no standing to sue the Government?

Blue Fox involved a contract between Verdan Technology (Verdan) and the Department of Army (Army) to install a telephone switching system.[71] Verdan employed Blue Fox, Inc. as a subcontractor.[72] Verdan failed to pay Blue Fox $46,586.[73] Despite Blue Fox's notification to the

66. *See, e.g.*, Ins. Co. of the West v. United States, 243 F.3d 1367, 1372-74 (Fed. Cir. 2001). The Federal Circuit stated the principle that a waiver of sovereign immunity must be "unequivocally expressed." *Id.* at 1372 (quoting United States v. Nordic Vill. Inc., 503 U.S. 30, 33 (1992)). However, it ignored that principle by observing, "ICW relies on only one statutory basis for the waiver of sovereign immunity"—a claim founded on express contract. *Id.* Nonetheless, ICW argued that its jurisdictional claim was based also on the Tucker Act provision permitting claims for liquidated damages not sounding in tort. Brief of Plaintiff-Appellee at 22-25, *Ins. Co. of the West* (No. 00-5039). ICW noted, "[T]his little noted section of the Tucker Act has been recognized by the Supreme Court." *Id.* at 22. It pointed to two cases where the Supreme Court found jurisdiction on the "damages not sounding in tort" provision: *United States v. Atlantic Mutual Insurance Co.*, 298 U.S. 483 (1936), and *United States v. Cornell Steamboat Co.*, 202 U.S. 184 (1905). *Id.* at 22-23. Despite ICW's arguments, the Federal Circuit seemingly ignored this statutory basis.

67. Ch. 324, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

68. Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 265 (1999). This case involved the APA, rather than the Tucker Act. Nevertheless, as will be discussed, *Blue Fox*'s impact on surety claims via the Tucker Act is substantial.

69. *See, e.g.*, United States v. Munsey Trust Co., 332 U.S. 234, 241 (1947) ("[N]othing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation.").

70. *Blue Fox*, 525 U.S at 264-65.

71. *Id.* at 257.

72. *Id.*

73. *Id.* at 258.

Army that Verdan had failed to pay, the Army continued making progress payments to Verdan.[74]

Blue Fox sued the Army in federal district court for the balance due and asserted an equitable lien on the funds based on jurisdiction provided by § 702 of the APA.[75] The district court granted the Army's motion for summary judgment, holding that the sovereign immunity waiver in the APA was not applicable to Blue Fox's claim because the claim involved money damages, which are outside the scope of the § 702 waiver.[76]

The Court of Appeals for the Ninth Circuit reversed, holding that Blue Fox could assert an equitable lien under the APA because it was an equitable claim for "specific performance for the payment of money . . . [and] not an action for money damages."[77] In supporting its holding that subcontractors have equitable rights against the Government, the court noted that a line of Supreme Court cases have upheld a surety's equitable rights of subrogation by recognizing the equitable rights of the subcontractor.[78] These cases are discussed later as cornerstone suretyship cases.[79]

The Supreme Court reversed the circuit court's decision and held that liens, although equitable in nature, are still claims for compensatory relief.[80] Therefore, the claim was beyond the scope of the § 702 waiver.[81] The Court also responded to Blue Fox's assertion that based on the Court's recognition of the surety's equitable claims, it was implicitly

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74. *Id.*

75. *Id.*; *see also* Administrative Procedure Act, 5 U.S.C. § 702 (2000) ("An action in a court of the United States seeking relief other than money damages . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . . ."). Blue Fox's alternatives in seeking repayment were fairly limited. Blue Fox could not make a claim under a payment bond since Verdan did not post any bonds. *Blue Fox*, 525 U.S. at 258. Blue Fox sought jurisdiction under the APA because it believed the Tucker Act did not permit suits in which equitable rights were asserted. Respondent's Brief, *Blue Fox* (No. 98-1642), 1998 WL 713458, at *9.

76. Blue Fox, Inc. v. United States Small Bus. Admin., No. CIV. 95-612-FR, 1996 WL 293363, at *5 (D. Or. May 24, 1996), *rev'd in part and aff'd in part and remanded* 121 F.3d 1357 (9th Cir. 1997), *rev'd and remanded sub nom.* Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999).

77. Blue Fox Inc. v. Small Bus. Admin., 121 F.3d 1357, 1359 (9th Cir. 1997), *rev'd and remanded sub nom.* Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999).

78. *See id.* at 1361-62.

79. Pearlman v. Reliance Ins. Co., 371 U.S. 132 (1962); Henningsen v. United States Fid. & Guar. Co., 208 U.S. 404 (1908); Prairie State Bank v. United States, 164 U.S. 227 (1896).

80. *Blue Fox*, 525 U.S. at 265.

81. *Id.* at 262.

recognizing subcontractor's equitable rights.[82] The Court stated that the line of cases involving the surety's claim of equitable subrogation did not address the issue of sovereign immunity and stated that sovereign immunity prevents claims brought by subcontractors and "other creditors."[83]

2. Insurance Co. of the West v. United States – *A Direct Blow*

The surety's ability to make claims for contract balances was at issue for the first time since *Blue Fox* in *Insurance Co. of the West v. United States*.[84] In that case, Insurance Company of the West (ICW), the performance bond surety, remedied the performance default.[85] The surety then sued the United States, the obligee on the bond, under the Tucker Act to recover funds that the Government paid the contractor directly after agreeing to send future payments to ICW.[86] The Federal Circuit held for ICW.[87]

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82. *See* Brief for the Respondent, *Blue Fox*, 525 U.S. 255 (1999) (No. 98-1642), 1998 WL 713458, at *10 ("This suit seeks to declare and enforce equitable rights. The rights of unpaid laborers and materialmen to payment from unexpended contract balances are long-recognized in this Court's decisions.").

83. *Blue Fox*, 525 U.S. at 265. Thomas Spaulding, Blue Fox's attorney, reported that the Supreme Court dismissed the argument as not supported by Supreme Court precedent. Spaulding, *supra* note 28, at 142.

> Where in the Supreme Court's decisions, Rehnquist demanded to know, did I find authority for a subcontractor to assert such a lien? Although a line of Supreme Court suretyship cases stretching back 100 years had expressly recognized such rights, Rehnquist was unconvinced that a lien could arise against the government as a stakeholder of funds: "With a body that has sovereign immunity, you just don't lightly say they were a stakeholder unless there is some authority," he proclaimed. The Chief, I also learned, was only interested in Supreme Court authority. When I uttered in passing the name of a lower federal court, Rehnquist cut me off in mid-sentence: "We're not bound by Court of Claims cases here."

Id.

84. 243 F.3d 1367 (Fed. Cir. 2001).

85. *Id.* at 1369.

86. *See id.* If ICW had not remedied the default, it could have attempted to assert an overpayment defense. Contractors are typically paid progress payments. Robert B. Flaig et al., *Suing the Private Owner*, *in* CONSTRUCTION LITIGATION: REPRESENTING THE CONTRACTOR § 5.9 (John D. Carter et al. eds., 2d ed. 1992). That is, contractors are paid in relation to the work completed. As guarantor of the contractor's performance and obligations, the surety has a strong interest that the obligee (the project owner) will not pay the contractor in advance of performance. James A. Knox, Jr., *Quid Without Quo: The Surety's Overpayment Defense*, 13 CONSTRUCTION LAW 3 (1994), WESTLAW, 13-OCT CONSLAW 3, at *3. Otherwise, if payments get too far ahead of the contractor's progress, the project owner loses the financial carrot over the contractor to complete the project, and the surety loses necessary contract funds to complete the project. *Id.* at *4. The law generally protects the surety against the obligee's overpayment by discharging the surety from its obligations. *Id.* at *3. "Depending on the jurisdiction . . . that discharge

The Government, in *Insurance Co. of the West*, argued that *Blue Fox* barred a surety's right to sue the Government for contract funds.[88] In this case, the Air Force awarded a construction contract to P.C.E. Limited (PCE).[89] PCE subsequently advised the project owner that it would be unable to complete the contract, and that its surety, ICW, would undertake completion.[90] PCE directed that the Air Force pay all remaining funds directly to ICW.[91] The Air Force issued a contract modification changing the remittance address to ICW's address.[92] Despite this modification, the Air Force continued to remit payments to PCE.[93] Asserting jurisdiction under the Tucker Act, ICW filed suit in the Court of Federal Claims to recoup $174,000 in funds that the Air Force improperly paid to PCE.[94] The Court of Claims certified to the Federal Circuit the question of whether a surety had standing to sue under the Tucker Act in light of *Blue Fox*.[95] The Federal Circuit held that, in light of *Blue Fox*, courts may not rely on *Prairie State Bank*, *Henningsen*, or *Pearlman* to support a waiver of sovereign immunity in cases involving

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will be either total or to the extent of any prejudice." *Id.* The overpayment defense arises from the obligee's duty of good faith and a duty to inform the surety of a material increase in risk. *Id.* This duty is breached when "(1) the obligee knows or should know of a material increase in the surety's risk; (2) the surety does not know of the increased risk; and (3) the obligee has a reasonable opportunity to inform the surety but fails to do so." *Id.* This general obligation of care in making progress payments to the contractor exists with respect to construction contracts involving the Federal Government. If the government acted arbitrarily and capriciously, a pro tanto discharge may result. M. Michael Egan & Marla Eastwood, *Discharge of the Performance Bond Surety*, *in* THE LAW OF SURETYSHIP, *supra* note 5, at 119, 125. In *Balboa*, the surety sued the United States to recover improperly paid progress payments that the Government paid to the contractor after the surety notified it of the contractor's default. 775 F.2d 1158, 1159-60 (Fed. Cir. 1985). The Federal Circuit held that the Government must exercise "reasonable discretion" in making payments to the contractor after it has notice that the contractor is having difficulties. *Id.* at 1164. Generally, the overpayment defense is not available to the surety against claims submitted under the payment bond. Knox, *supra*.

87. The court reconciled its holding with *Blue Fox* by asserting that *Blue Fox* was merely restating well-settled law that a subcontractor may not sue the Government. *Ins. Co. of the West*, 243 F.3d at 1371. However, the court stated that because Insurance Company of the West, as performance bond surety, was subrogated to the rights of contractor (and not the subcontractor), it may bring suit against the United States. *Id.*

88. *Id.* at 1370; *see also* Brief of Defendant-Appellant at 6, *Ins. Co. of the West* (No. 00-5039).

89. *Ins. Co. of the West*, 243 F.3d at 1369.

90. *Id.*

91. *Id.*

92. *Id.* Modifications of government contracts are issued pursuant to part 43 of the Federal Acquisition Regulation (FAR). 48 C.F.R. pt. 43 (2003).

93. *Ins. Co. of the West*, 243 F.3d at 1369.

94. *Id.*

95. *See* Ins. Co. of the West v. United States, No. 99-124C, 1999 WL 33604131, at *2 (Fed. Cl. Dec. 10, 1999), *aff'd and remanded* 243 F.3d 1367 (Fed. Cir. 2001).

surety claims against the Government.[96] Therefore, sureties must assert Tucker Act jurisdiction based on the text of the Tucker Act.[97] The court noted that ICW established jurisdiction based on the provision in the Tucker Act that waived immunity for a claim against the United States founded on contract with the United States.[98] The court found that, as a performance bond surety, ICW was subrogated to the rights of the contractor, which possessed the original claim based on its contract with the Government.[99] Therefore, the court held that ICW could bring suit against the United States.[100] However, in dictum damaging to payment bond sureties, the Federal Circuit stated that a payment bond surety "is subrogated only to the rights of the subcontractor" and "has no enforceable rights against the government."[101]

The case was remanded to the Court of Federal Claims for trial on the merits.[102] The trial court held that a surety that discharges the performance of the contractor (a performance bond surety) is subrogated to the rights of the defaulted contractor.[103] Therefore, ICW could claim that the Air Force improperly paid the funds.[104] The court withheld final judgment, however, pending a determination of the reasonableness of the payments made by the government.[105] The trial court also commented on the Federal Circuit's dicta concerning a payment bond surety's subrogation rights, stating, "[T]his court respectfully must conclude that the dicta in *West II*—stating that a surety steps in the shoes of a subcontractor, and not the contractor for which it issued bonds—are not supported by precedent."[106] This statement is only mild consolation to payment bond sureties, because it is dictum by a lower court regarding dictum by a higher court in a case involving a performance bond surety, not a payment bond surety. Therefore, the status of the payment bond surety as a valid claimant remains in doubt.[107]

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96. *Ins. Co. of the West*, 243 F.3d at 1372.

97. *See id.*

98. *Id.*; 28 U.S.C § 1491(a)(1) (2000).

99. *Ins. Co. of the West*, 243 F.3d at 1375.

100. *Id.*

101. *Id.* at 1371 ("It is well-established that a surety who discharges a contractor's obligation to pay subcontractors is subrogated only to the rights of the subcontractor. Such a surety does not step into the shoes of the contractor and has no enforceable rights against the government.").

102. *Id.* at 1375.

103. Ins. Co. of the West v. United States, 55 Fed. Cl. 529, 544 (Fed. Cl. 2003).

104. *Id.*

105. *Id.*

106. *Id.* at 535.

107. *See supra* text accompanying note 101.

C. The Cornerstone Suretyship Cases

Analysis of *Blue Fox* and *Insurance Co. of the West* requires an understanding of the precedent discussed in these cases. As noted, *Blue Fox* advanced this precedent in its brief, attempting to establish the subcontractor's equitable rights.[108] The Supreme Court dismissed these cases as not pertinent to the sovereign immunity issue.[109] In *Insurance Co. of the West*, the Government characterized the Supreme Court's dicta as overruling precedent sub silentio,[110] precluding any sovereign immunity waiver based on these cases.[111]

1. Prairie State Bank v. United States

Prairie State Bank involved a dispute over funds held by the Government relating to a construction contract in which the contractor, Charles Sundberg & Co. (Sundberg), agreed to construct a customhouse in Galveston, Texas.[112] The dispute was between Prairie State Bank, which made a loan to Sundberg secured by the final payment under the construction contract,[113] and Charles Hitchcock, the surety, who completed the construction contract after Sundberg defaulted.[114] The lower court decided that the final payment should be paid to Hitchcock.[115] The Supreme Court affirmed that the surety's subrogation claim in equity was superior to the bank's claim.[116] The Court characterized the principle that a surety is entitled to assert its equitable subrogation claims as "elementary"[117] and deeply rooted in the common law.[118] The Court noted that the surety was subrogated not only to the

108. *See* Brief for the Respondent, Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999) (No. 97-1642), 1998 WL 713458, at *10-11.

109. *Blue Fox*, 525 U.S. at 265.

110. Precedent that is overruled sub silentio is overruled by the court without any express acknowledgement or notice that it is doing so. *See* BLACK'S LAW DICTIONARY 1442 (7th ed. 1999).

111. Brief of Defendant-Appellant at 13-14, Ins. Co. of the West v. United States, 243 F.3d 1367 (Fed. Cir. 2001) (No. 00-5039) ("Jurisdiction to entertain equitable subrogation claims has been based solely on judicial precedent. The Supreme Court recently made clear that this prior judicial precedent does not support a waiver of sovereign immunity . . . .").

112. Prairie State Bank v. United States, 164 U.S. 227, 228 (1896).

113. *Id.* at 228-29.

114. *Id.* at 229.

115. *Id.*

116. *Id.* at 240.

117. *Id.* at 231.

118. *See id.*

rights of Sundberg, but also to the right of the United States to use the contract funds that it held to complete the work itself.[119]

The holding in *Prairie State Bank* is significant for two reasons. First, it serves as the legal foundation to support the validity of sureties' equitable subrogation claims.[120] Second, the Court established that a surety that remedies a default in performance is subrogated to the rights of the contractor (the bond principal) *and* the Government (the obligee).[121]

2. Henningsen v. United States Fidelity & Guaranty Co.

Henningsen also involved a dispute over contract funds between a surety and a bank. Specifically, Henningsen entered into a contract with the United States to construct certain buildings at a military installation.[122] Pursuant to statute, Henningsen provided a bond underwritten by the United States Fidelity and Guaranty Co. (USF&G) to secure its performance and payment to subcontractors.[123] Subsequently, Henningsen obtained a loan from the National Commerce Bank of Seattle and secured it with an assignment of contract funds.[124] Because Henningsen failed to pay certain subcontractor claims, USF&G paid the claims.[125] To recoup its losses and collect contract funds, USF&G filed suit to enjoin the bank from collecting any contract balances.[126]

In *Henningsen*, the Court expanded the principles enunciated in *Prairie State Bank* regarding a surety that remedies a *performance* default, and held that a surety that remedies a *payment* default (pays subcontractors and suppliers) is entitled to subrogation rights.[127] The Court also stated that the surety is subrogated to the rights of the contractor and the Government, which is "released . . . from all equitable obligations to see that the laborers . . . were paid."[128] The Court

119. *Id.* at 232-33.

120. *See* Bachrach & Burch, *supra* note 20, at 421.

121. *Prairie State Bank*, 164 U.S. at 232-33.

122. Henningsen v. United States Fid. & Guar. Co., 208 U.S. 404, 404 (1908).

123. *Id.* at 406.

124. *Id.* at 405.

125. *Id.* at 404-05.

126. *Id.* at 405.

127. *See id.* at 410.

128. *Henningsen*, 208 U.S. at 410. This statement flatly contradicts the position held by the Federal Circuit in *Insurance Co. of the West*, which is that a payment bond surety is subrogated solely to the rights of the subcontractor. Ins. Co. of the West v. United States, 243 F.3d 1367, 1371 (Fed. Cir. 2001). In his 1979 article, Daniel Mungall exposes the error in such a position. Mungall, *supra* note 19, at 608 ("Such analysis fails to recognize the

ultimately found that the surety's subrogation claims were superior to the bank's claim, and therefore, the surety was entitled to the funds.[129]

3. Pearlman v. Reliance Insurance Co.

Pearlman involved a dispute between the surety and bankruptcy trustee of Dutcher Construction Corp. (Dutcher).[130] Dutcher entered into a contract with the United States to work on the St. Lawrence Seaway project.[131] It posted performance and payment bonds underwritten by Reliance Insurance Co. (Reliance).[132] Dutcher experienced financial difficulties and was unable to pay certain subcontractors and suppliers.[133] The surety, Reliance, fulfilled its obligations and paid approximately $350,000 to subcontractors.[134] The Government turned over the contract balance of $87,000 to Pearlman as bankruptcy trustee.[135] Reliance then sued Pearlman, claiming entitlement to the funds.[136] The Court based its decision on *Prairie State Bank* and *Henningsen,* which affirmed the surety's right to subrogation whether the surety is a performance bond surety or a payment bond surety.[137]

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true nature of the obligation which the surety discharges."). Mungall explains that the surety is also subrogated to the rights of the project owner:

> When an owner requires a payment bond, it thereby obtains from the contractor an undertaking to pay the suppliers. The suppliers are third party beneficiaries of the payment bond undertaking; *but* the undertaking is nonetheless by the contractor as promisor to the owner as promisee. . . .
>
> When the promisor of a third party beneficiary undertaking fails to perform, the third party beneficiaries have a right to enforce the promise; but so also does the promisee!

Id. In addition, *Henningsen* recognizes the Government's equitable obligations to subcontractors, despite a lack of privity.

129. *Henningsen*, 208 U.S. at 411.

130. Pearlman v. Reliance Ins. Co., 371 U.S. 132, 133 (1962).

131. *Id.*

132. *Id.*

133. *Id.* at 134.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 139 ("These two cases . . . establish the surety's right to subrogation in such a fund [the contract balances] whether its bond be for performance or payment.").

II. CLAIMS AGAINST THE GOVERNMENT POST *BLUE FOX*—A SOLUTION

A. A Critique of Blue Fox *and* Insurance Co. of the West

Blue Fox and *Insurance Co. of the West* have weakened the foundations supporting the payment bond surety's ability to sue the Government. Therefore, a closer examination of these cases is in order. The principles and concepts left untouched by these cases are as significant as their central holdings.

1. Blue Fox

For a case that had such significant implications regarding the surety's ability to sue the government under the Tucker Act,[138] *Blue Fox* did not involve a surety,[139] nor did it involve the Tucker Act.[140] Blue Fox asserted a claim against the Government through the APA.[141]

The surety-related implications were introduced to the case through an argument by the subcontractor (Blue Fox), asserting that it had equitable rights that were enforceable through the APA.[142] To explain the nature of a subcontractor's equitable rights, Blue Fox discussed the cornerstone surety decisions that upheld "the equitable subrogation rights of sureties under federal contracts."[143] Blue Fox explained that the sureties' equitable rights relied on the equitable rights of subcontractors.[144] Therefore, the cornerstone surety cases reflect a judicial recognition of a subcontractor's equitable rights. Blue Fox believed that it had a remedy (suit through the APA), and sought to establish that it had an enforceable right through precedent regarding a surety's equitable right of subrogation.[145]

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138. The surety industry was quite interested in the case, its outcome, and its potential effects. *See, e.g.*, Brief of Amicus Curiae The Surety Association of America in Support of Neither Party at 1-2, Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999) (No. 97-1642) (stating "[s]ureties, therefore, have a keen interest in the portions of this case which involve the existence and extent of Blue Fox's equitable lien"); Gallagher, *Payment Bonds*, *supra* note 17, at 227 (describing the Ninth Circuit's decision); Klinger, *supra* note 40, at 23 ("The purpose of this article is to analyze the Court's opinion in *Blue Fox* . . . and explore the potential for far-reaching effects of the Court's decision.").

139. *Blue Fox*, 525 U.S. at 256-57.

140. *Id.* at 258.

141. *Id.*

142. Brief of Respondent, *Blue Fox* (No. 97-1642), 1998 WL 713458, at *10.

143. *Id.*

144. *Id.*

145. *Id.* at *6. Blue Fox asserted a rather novel argument that it was not claiming money damages, which are outside the scope of the APA, but equitable relief through the enforcement of a lien. *Id.*

The Supreme Court's curious response to this argument was needlessly damaging to sureties. It could have acknowledged that subcontractors do indeed have equitable rights, but unlike a surety's rights, they are not enforceable, reaching the same result in the instant case.[146] Such a position would be reasonable and consistent with precedent.[147] Unfortunately, the Court mischaracterized Blue Fox's reason for discussing the surety precedent. The Court stated that Blue Fox presented the surety precedent to suggest that subcontractors can sue the Government.[148] However, Blue Fox's aims in presenting these cases were less ambitious: they were not asserting the surety precedent as proof positive that subcontractor can sue the Government. Rather, Blue Fox discussed the cases only to establish its right to recover against the Government.[149] Its assertion that it could enforce this right through suit against the Government is not in the discussion regarding the surety cases, but elsewhere in the argument.[150]

Because of the mischaracterization, the Court, in essence, responded to an unasked question. Blue Fox was not advancing *Prairie State Bank*, *Henningsen* and *Pearlman* as direct support of a waiver of sovereign immunity. However, the Court, responding to the cases as if it were, stating:

> None of the cases relied upon by respondent involved a question of sovereign immunity, and, in fact, none involved a subcontractor directly asserting a claim against the

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> Respondent is not asking for the government to pick up the tab whenever the prime contractor was supposed to pay, but did not. That would be damages. Rather, Respondent seeks to be paid from remaining funds, if any. If no funds remain, then there is nothing to lien. In this regard, Respondent seeks nothing more than the ability—which sureties have had for decades—to enforce payment from remaining contract monies.

Id. at *7.

146. A long line of cases have held that subcontractors may not sue the Government. *See, e.g.*, United States v. Munsey Trust Co., 332 U.S. 234, 241 (1947).

147. *See, e.g.*, Henningsen v. United States Fid. & Guar. Co., 208 U.S. 404, 410 (1908) (recognizing the Government's obligations to see to it that subcontractors are paid). In *Balboa Insurance Co. v. United States*, 775 F.2d 1158 (Fed. Cir. 1985), the Federal Circuit synthesized Supreme Court precedent which held that subcontractors may not sue the Government and precedent which upheld surety claims against the Government and concluded, "Decisions of our predecessor court and the Supreme Court make clear that a surety is *not* in the same position as that of a contractor or materialman." *Id.* at 1160.

148. *Blue Fox*, 525 U.S. at 264.

149. Brief of Respondent, *Blue Fox* (No. 97-1642), 1998 WL 713458, at *10 ("The rights of unpaid laborers and materialman to payment from unexpended contract balances are long-recognized in this Court's decisions. To understand the nature of these rights . . . it is useful to first consider this Court's decisions upholding the equitable subrogation rights of sureties under federal contracts.").

150. *Id.* at *12-13.

> Government. Instead, these cases dealt with disputes between private parties over priority to funds which had been transferred out of the Treasury and as to which the Government had disclaimed any ownership.[151]

Although the cases did not explicitly involve a waiver of sovereign immunity, one of the cases, *Prairie State Bank*, contrary to the Supreme Court's assertion, did indeed involve funds held by the Government.[152] In *Henningsen* and *Pearlman*, the Government paid the funds to a party other than the surety.[153] Thus, these cases questioned whether the Government paid the funds to the correct party.[154] The Government, especially in *Prairie State Bank*, played a part in the dispute.[155] Despite

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151. *Blue Fox*, 525 U.S. at 265.

152. As amicus curiae in *Insurance Co. of the West*, The Surety Association of America points out that the trial court involved in the *Prairie State Bank* case noted that the funds in dispute were held by the Government. Brief of Amicus Curiae The Surety Association of America Urging Affirmance of the Order of the Court of Federal Claims at 20, Ins. Co. of the West v. United States, 243 F.3d 1367 (Fed. Cir. 2001) (No. 00-5039); *see also* Hitchcock v. United States, 27 Ct. Cl. 185 (Ct. Cl. 1892). The facts in *Hitchcock* indicate that the final payment that the surety sought to recover was held by the U.S. Treasury at the time of the dispute. The statement of the facts in the reported opinion stated:

> The price of the work has been paid except the retained 10 per cent on the whole contract price . . . all of which is claimed by said Hitchcock [(the surety)], part of which is adversely claimed by said bank, and none of which is claimed at the Treasury Department by said Charles Sundberg & Co. [(the defaulted contractor)]. The defendants [(the United States)] recognize the rights of one of the petitioners herein to favorable findings and conclusions, and are ready and willing to pay the same to whomsoever is found by the court to be entitled thereto.

Id. at 198. Therefore, contrary to the Supreme Court's reading of the facts, the Government was holding the funds in dispute and the surety had sued the United States for recovery.

153. *See* Henningsen v. United States Fid. & Guar. Co., 208 U.S. 404, 405 (1908).

> This suit was commenced by the Guaranty Company by a bill in the Circuit Court of the United States for the District of Washington to restrain the appellants from collecting or accepting the balance due on the contract from the United States. It appeared at the time of the commencement of the suit that there was in the hands of the quartermaster, due upon the contract, the sum of $13,066, which he was about to pay to Spencer [(trustee of the bank)] . . . . On June 17, 1904, an arrangement was made between the parties, by which the sum of $8,024.21 was paid to certain creditors, and the balance . . . was applied in conditional payment of the indebtedness of the contractors to the bank, with a stipulation that if it should be finally determined that the Guaranty Company was entitled to receive it then the bank should pay it to the Guaranty Company.

Id.; see also Pearlman v. Reliance Ins. Co., 371 U.S. 132, 134 (1962) (noting that after the surety discharged the bond principal's obligation, the Government turned over the contract balance to the bankruptcy trustee).

154. *Pearlman*, 371 U.S. at 134; *Henningsen*, 208 U.S. at 405.

155. *See* discussion *supra* note 152.

the misreading of precedent and the mischaracterization of Blue Fox's argument, the Court's decision is a signal to sureties that they cannot rely on *Prairie State Bank*, *Henningsen*, and *Pearlman* in seeking a waiver of sovereign immunity.[156]

Nevertheless, the Court's decision yields a few positive observations concerning a payment bond surety's ability to sue the Government. First, the Court did not dispute that *Prairie State Bank*, *Henningsen*, and *Pearlman* firmly established the surety's equitable subrogation rights[157] and the existence of the Government's equitable obligations to ensure payment of subcontractors.[158] Thus, these principles remain in place. Second, the Court maintained the distinction between equitable remedies, which fall outside of the Court of Claims' Tucker Act jurisdiction, and the use of equitable principles to enforce the award of monetary damages, which are within Tucker Act jurisdiction.[159] Blue Fox asserted that the remedy it sought was equitable and, therefore, jurisdiction could be founded upon the APA.[160] However, the Court rejected this argument and held that although the lien sought by Blue Fox was equitable in nature, the remedy requested was "money damages."[161] Similarly, a payment bond surety could argue that although its theory is equitable, it is seeking damages, which are within the scope of the Tucker Act, to recoup its losses. Finally, the Supreme Court did not hold that sureties could not sue the Government. Rather, the Court's dicta concerning the surety precedent only indicated that sureties must look elsewhere to find Tucker Act jurisdiction.[162]

2. Insurance Co. of the West

In *Insurance Co. of the West*, the Government used the Supreme Court's statement regarding surety precedent to attack the surety's claim of a sovereign immunity waiver under the Tucker Act.[163] The

156. *Blue Fox*, 525 U.S. at 265.

157. *See* Prairie State Bank v. United States, 164 U.S. 227, 231 (1896).

158. *See Henningsen*, 208 U.S. at 410.

159. *Blue Fox*, 525 U.S. at 260-61.

160. *Id.*

161. *Id.* at 262 ("[T]he equitable nature of the lien sought by respondent here does not mean that its ultimate claim was not one for 'money damages' . . . .").

162. There is the possibility that the Court knew where it was heading. Perhaps the comments regarding the surety precedent were intentional to lead to the conclusion that "sovereign immunity bars . . . other creditors" from making claims against the Government. *Id.* at 265. Perhaps the Supreme Court is of the opinion that sureties may not sue the Government. However, since *Blue Fox*, the question has not been addressed by the Supreme Court.

163. Brief of Defendant-Appellant at 6, Ins. Co. of the West v. United States, 243 F.3d 1367 (Fed. Cir. 2001) (No. 00-5039).

Government argued, "The Supreme Court recently made clear in *Department of the Army v. Blue Fox, Inc.*, that its prior precedent does not support a waiver of sovereign immunity for equitable subrogation claims. Accordingly, the precedent of this Court and the Court of Federal Claims is unfounded and no longer valid."[164] The Government argued that sureties typically have relied upon "a core of three Supreme Court cases" to establish a sovereign immunity waiver but will no longer be able to do so in light of *Blue Fox*.[165] The court agreed with this argument but found jurisdiction through the text of the Tucker Act.[166]

Nevertheless, the Federal Circuit's decision is flawed in three respects. First, the decision rests on the effect of the Supreme Court's statement regarding the surety precedent.[167] As noted previously, the Supreme Court's reading of the surety precedent is incorrect.[168] In *Prairie State Bank*, the Government held the funds that the surety was seeking to recover.[169] Although a sovereign immunity waiver was not explicitly addressed in this case, it was implied because the Government was a key player by holding the funds in the dispute, and the Court enforced the sureties' equitable subrogation rights.[170]

The second flaw in the Federal Circuit's decision is the court's misunderstanding of subrogation. When a surety discharges a principal's obligation, it is subrogated to the rights of the obligee that benefited

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164. *Id.* (citations omitted). In the United States Attorneys' Manual, the Department of Justice emphasizes that any sovereign immunity waiver must be construed narrowly. *See* U.S. DEP'T OF JUSTICE, CIVIL RESOURCE MANUAL § 31 (1998), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title4/civ00031.htm (last visited Oct. 30, 2004).

> The terms of a statute waiving immunity from suit define the court's jurisdiction to entertain suit, and the consent is no broader than the limitations which condition it. Inasmuch as the United States may not be sued in the absence of consent legislation, the claimant's right to sue is necessarily subject to such conditions as Congress has seen fit to impose, including restrictions as to time, place, and manner of suit. No representative of the United States has the power to waive jurisdictional conditions or limitations.
>
> Jurisdiction cannot be extended by implication beyond the plain language of the statute.

Id. (citations omitted)

165. Brief of Defendant-Appellant at 14-18, *Ins. Co. of the West* (No. 00-5039).

166. *See infra* Part I.B.2.

167. *Ins. Co. of the West*, 243 F.3d at 1372 ("[W]e agree with the government that, after *Blue Fox*, we can no longer rely on those three cases to find a waiver of sovereign immunity. . . . This court is obligated to follow the Supreme Court's interpretation in *Blue Fox* of those three cases, even though that interpretation may be dicta." (citation omitted)).

168. *See supra* Part II.A.1.

169. *See* discussion *supra* note 152.

170. *See* discussion *supra* note 152.

from the discharge.[171] Thus, whether a contractor defaults under a performance bond or a payment bond, the surety, by completing the project or by paying subcontractors, is subrogated to the rights of the obligee.[172] The Federal Circuit held that a performance bond surety is subrogated only to the rights of the contractor[173] and a payment bond surety is subrogated only to the rights of the subcontractor.[174] However, the Federal Circuit's dicta regarding a payment bond surety's subrogation rights is not only contrary to surety principles, but also it clearly contradicts precedent holding that the surety is subrogated to the rights of the subcontractor, contractor and obligee.[175]

The third flaw is the court's reading of the Tucker Act. The court held that because of *Blue Fox*, a surety cannot use the surety cornerstone cases and their progeny, but must find a statutory basis to establish the existence of a waiver of sovereign immunity.[176] The court found this statutory basis under the Tucker Act provision permitting suits "founded . . . upon any express or implied contract with the United States."[177] The court held that as subrogee to the contractor, which is a party to a contract with the United States, the performance bond surety may find Tucker Act jurisdiction based on a claim founded on contract.[178] However, in its dicta concerning a payment bond surety, the court did not follow its own advice that "it is possible to find support for a waiver of sovereign immunity not only in statutory language but also in statutory purposes and history."[179]

B. History of the Tucker Act

The general purpose of the Tucker Act, as envisioned by the drafters, was to relieve Congress from many of the claims it was required to consider as private bills, and to transfer those claims to the Court of

171. Mungall, *supra* note 19, at 607 ("[Upon subrogation], the surety is substituted for the owner with respect to the rights which the owner has against the contractor as a result of the latter's failure to perform.").

172. *Id.*

173. Ins. Co. of the West v. United States, 243 F.3d 1367, 1375 (Fed. Cir. 2001) ("[A]fter stepping into the shoes of a contractor, [the surety] may rely on the waiver of sovereign immunity in the Tucker Act . . . .").

174. *Id.* at 1371 ("[The payment bond surety] is subrogated only to the rights of the subcontractor. Such a surety does not step into the shoes of the contractor and has no enforceable rights against the government.").

175. *See infra* Part I.B.2. In fact, the case upon which *Insurance Co. of the West* primarily relies is *Pearlman*, a payment bond case.

176. *Ins. Co. of the West*, 243 F.3d at 1372.

177. *Id.*; 28 U.S.C. § 1491(a)(1) (2000).

178. *Ins. Co. of the West*, 243 F.3d at 1375.

179. *Id.* at 1372.

Claims.[180] In order to achieve its objective, Congress intended to establish a substantially broad jurisdiction for the court.[181] The practically all-encompassing nature of the legislation is demonstrated by the House discussion. Consider the interchange between Representatives Reed and Tucker during a debate on January 13, 1887:

> Mr. Reed: Is the bill sufficiently broad to cover all claims against the United States? Does it give the right to sue the United States in all cases?
>
> Mr. Tucker: Not in all cases.
>
> Mr. Reed: I mean in *all* cases where there is a *claim of right in law or equity*, technically so called.
>
> Mr. Tucker: Yes; equity and admiralty. The *only* cases not provided for are suits upon the use of a patent right by the Government and suits in reference to captured and abandoned property which are now barred by the statutes of limitations.[182]

Immediately prior to the vote, Representative Bayne commented that the legislation would "give the people of the United States what every civilized nation of the world has already done—the right to go into the courts and seek redress against the Government for their grievances."[183]

Congress's clear intent was to establish broad jurisdiction for the Court of Claims. To interpret the intent otherwise would directly conflict with its stated objective: relieving Congress's burden in regard to private bills. Construing the Tucker Act as constraining the types of claims to textual limitations (claims founded upon the Constitution, act of Congress,

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180. H. R. REP. NO. 49-1077, at 4 (1886). Prior to the passage of the Tucker Act, seeking relief from Congress was a citizen's only remedy for a claim against the United States. Over fifty years before the Tucker Act's enactment, a Senate report contained the following observation regarding a claim for relief brought by a surety:

> As between citizen and citizen, a court of equity would relieve against a mistake under similar circumstances, so the Congress of the United States, in the exercise of the equitable powers which they have reserved to themselves, ought to relieve the sureties . . . against all the moneys expressed in the two bonds . . . with interest thereon, as expressed in the bill.
>
> The United States have not permitted the courts of justice to sustain bills in equity against the United States as defendants . . . nor have the courts of justice used or claimed to hold cognizance of such bills in equity without the special authority of an act of Congress.

S. REP. NO. 23-38, 1st Sess., at 3 (1834).

181. 18 CONG. REC. 622 (1887)

182. *Id.* (emphasis added). Upon presentation of the conference report regarding the legislation, Representative Tucker stressed the broad nature of the intended jurisdiction. *Id.* at 2678 ("[T]he purpose was to extend it to all claims in law, or equity, or admiralty . . . .").

183. *Id.* at 2680.

regulation, or express or implied contract) is contrary to the drafter's intent.[184]

Private bills were founded on equitable principles.[185] Therefore, in addition to the intended broad scope of jurisdiction, the fact that the Court of Claims's jurisdiction was meant to replace Congress's consideration of private bills indicates that the drafters intended the court to consider matters of equity. Equitable remedies are provided on what is just and right, rather than on a strict legal basis.[186] Therefore, as the replacement of Congress's consideration of private bills, the Court of Claims has the statutory and contextual basis under the Tucker Act to act out of equity in a suit for money. In addition, by using the history of private bills as an indicator of the Court of Claims's intended jurisdiction,

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184. As noted previously, the 1948 deletion of the language referencing claims to which a person would be entitled in courts of law or equity was not a substantive reduction in scope, but rather an elimination of surplusage. *See supra* note 60.

185. *See* United States v. Realty Co., 163 U.S. 427, 440 (1896) (presenting an equitable basis for private bills).

> The nation, speaking broadly, owes a "debt" to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law.

Id.; *see also Private Bills in Congress*, *supra* note 46, at 1703 ("The procedures and standards developed by Congress in handling private bills are intended to yield a roughhewn system of equity, so as to provide evenhanded treatment of individual claims that may merit the exercise of the sovereign's conscience.").

186. For an illustration of Congress acting out of equity and fairness, see, for example, H.R. REP. NO. 35-197 (1858). In this House report, the House Committee of Claims considered the referral of Senate Bill 68 to provide relief to an individual named Elias Hall. *Id.* at 1. According to the report, Mr. Hall had provided weapons repair services to the Army. *Id.* at 2. The commanding officer, General Dearborn, had proposed to pay Mr. Hall "$50 per month and rations." *Id.* Mr. Hall was paid for a period of time, but subsequently was not paid when General Dearborn left command and there was no official record of the arrangement. *Id.* Mr. Hall submitted the claim to the Army. *Id.* Because of the lack of any formal contract with Mr. Hall, the Army believed that it was not authorized to pay the claim. *Id.* Mr. Hall submitted the claim to Congress, and upon consideration Congress concluded that Hall should be paid. *Id.* at 3. The House report quoted the findings contained in the Committee on Claims of the Senate:

> The committee, therefore, concur with the head of the Ordnance Department, after a full examination of the facts, that this venerable patriot has a *just and equitable claim* upon the government; and as he has already completed his seventy-sixth year, if his last days are to be cheered by a *manifestation of justice and magnanimity* of his country, immediate action is indispensable.

Id. at 3 (emphasis added). Note, however, that Congress's jurisdiction for moral claims generally has been broader and more flexible than any jurisdiction for moral claims held by the courts. DAVID SCHWARTZ & SIDNEY B. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT § 6.119.2(b) (1970).

it is significant that on several occasions Congress *has* granted relief to sureties by discharging or reducing sureties' liability.[187]

CONCLUSION

In the aftermath of *Blue Fox*, the payment bond surety can present a two-pronged argument in asserting that it may sue the Government under the Tucker Act. First, it can argue that *Blue Fox* and *Insurance Co. of the West* failed to understand or simply ignored precedent that supported a payment bond surety's ability to sue the Government.[188] With respect to *Blue Fox*, the Supreme Court held that the precedent of *Prairie State Bank*, *Henningsen*, and *Pearlman* did not address the issue of a waiver of sovereign immunity, but rather dealt with a dispute between two private parties.[189] The facts of the cases, specifically those of *Prairie State Bank*, belie this sweeping conclusion. The facts of *Prairie State Bank* indicate that the disputed funds were in the hands of the Government during the dispute.[190] Therefore, the fact that the Supreme Court permitted suit where the Government held the funds implies that the Court granted a waiver of sovereign immunity.[191] With respect to *Insurance Co. of the West*, the Federal Circuit's dicta regarding the payment bond surety's subrogation rights contradict precedent and commonly understood surety principles which clearly establish that a payment bond surety is subrogated to the right of the obligee.[192]

The second prong of the payment bond surety's argument is necessary in light of the possibility that the Supreme Court in *Blue Fox* intentionally read the surety precedent in such a way as to lead to a conclusion that sureties may not sue the Government. Therefore, assuming that the precedent of *Prairie State Bank*, *Henningsen*, and *Pearlman* no longer effectively grant admission to the courts, a new tact is needed. Sureties can look to the drafting history of the Tucker Act, which indicates a strong intent to grant Court of Claims jurisdiction for claims for money damages founded on equitable principles.[193]

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187. *See, e.g.*, S. REP NO. 23-38, 1st Sess., at 1-3 (1834) (reliving sureties of a tax collector of liability which was based on an improperly calculated amount by the Treasury Department).

188. *See supra* Part II.

189. Dep't of the Army v. Blue Fox, 525 U.S. 255, 265 (1999).

190. *See supra* note 152.

191. *See supra* Part I.C.1.

192. *See supra* Part I.B.2.

193. Note that the purpose of legislative history in this Comment is to understand the context of the legislation in order to illuminate the plain meaning of the text. The author is not using legislative history in a manner that is most controversial with respect to its legitimacy as an interpretive tool—using legislative history to change the meaning of the text.

Considering the precedent, which clearly recognizes the validity of the surety's equitable subrogation rights, and the background and context regarding the creation of the Tucker Act, there is enough room in Mr. Tucker's vision of the Tucker Act to accommodate subrogation claims brought by a payment bond surety against the United States.[194]

194. In the context of the law's history and origins, the intended scope of jurisdiction under the Tucker Act is broad enough to accommodate a payment bond surety's equitable subrogation claims. Christian Mammen asserts that part of legislative history's value is that it provides context. MAMMEN, *supra* note 42, at 2-3. He states, "Legislative history conveys a certain degree of expertise and/or provides certain contextual information about the subject-matter of the statute. Such contextual information and expertise can be helpful in interpreting statutes (just as contextual information is often helpful in understanding the meaning of utterances)." *Id.* Context is the value that legislative history brings to the Tucker Act.