

American University Law Review

Volume 60 | Issue 4

Article 4

2011

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A Random Walk: The Federal Circuit's 2010 Government Contract Decisions

A RANDOM WALK: THE FEDERAL CIRCUIT'S 2010 GOVERNMENT CONTRACTS DECISIONS

STEVEN L. SCHOONER*

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INTRODUCTION

Despite the large number of potentially precedential opinions issued by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit or court) in 2010, the government contracts cases—as a group—appear to lack significant volume, thematic coherence, or

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dramatic impact. Indeed, particularly if the three non-mainstream¹ *Winstar* and Spent Nuclear Fuel cases are excluded, the court's government contracts output this calendar year seems unusually small and highly disaggregated. Instinct suggests that 2010 will not prove a memorable year for Federal Circuit government contracts jurisprudence.

Accordingly, this Article will begin with some scholarly perspective on, and empirical quantification of, the Federal Circuit's level of specialization and evolving jurisprudence in the field of government contracts. The article then turns to a hodge-podge of, frankly, unrelated cases grouped as follows: three award controversies (or bid protests), a handful of post award performance disputes, a few selections from the ongoing behemoths of litigation in the U.S. Court of Federal Claims—*Winstar* and Spent Nuclear Fuel, and a potentially analogous implied warranty case.

The article resists the urge to characterize this relatively small, disparate body of work.² Indeed, I continue to struggle to divine

1. Forgive this distinction, but, as a general rule, my primary focus lies with the more than \$500 billion the U.S. government spends annually through Executive branch procurement contracts, covered by the Federal Acquisition Regulation (FAR), 48 C.F.R., and chronicled in the Federal Procurement Data System (FPDS—Next Generation), available at <https://www.fpds.gov> and <http://USASpending.gov>. To elaborate, the conventional world of federal government procurement contracts is (1) typically defined by the government's expenditure of Congressionally-appropriated funds, and (2) organized in terms of what the government is purchasing (e.g., services (human capital and, typically, but not always, also research), supplies (or deliverables), and construction (improvements to real property)). Neither the aftermath of the Savings and Loan crisis nor the fallout from the Yucca Mountain debacle, both discussed at some length below, fit neatly within either model.

2. Nonetheless, I applaud the efforts of my predecessors who sought to do so. See, e.g., David W. Burgett et al., *2006 Government Contract Decisions of the Federal Circuit*, 56 AM. U. L. REV. 1073, 1115 (2007) ("The Federal Circuit did not issue any particularly surprising or innovative rulings on government contracts, although there were a number of instances in which the court reached different conclusions than the COFC or Boards of Contract Appeals. While the Federal Circuit faces far fewer government contract cases than do the tribunals whose decisions it reviews, it does not hesitate to assert its independent judgment on questions of law in that realm, any more than in fields such as patent law, that comprise a greater part of its own docket. This should encourage practitioners who are unsuccessful in the first instance to consider appeal in cases not clearly governed by Federal Circuit precedent."); Daniel P. Graham, et al., *2009 Government Contract Law Decisions of the Federal Circuit*, 59 AM. U. L. REV. 991, 995 (2010) (noting, among other things, that "the Federal Circuit continued to decide questions of contract interpretation according to its view of the 'plain meaning' of the contract language at issue, in some cases concluding that this plain meaning had eluded the lower tribunal"); Lionel M. Lavenue, *Survey of Government Contract Cases in the United States Court of Appeals for the Federal Circuit: 1997 In Review*, 47 AM. U. L. REV. 1393, 1489 (1998) ("[G]overnment contract practitioners may wish to become ever more active and visible in this court of appeals bar, a bar that has traditionally focused primarily on patent law. After all, due to the infrequency of Supreme Court review of government contract cases, the Federal Circuit represents the court of last resort for virtually all matters involving government contracts."); David Robbins, *2004 Government Contract Decisions of the*

unifying themes that define the court's government contracts jurisprudence. If anything, I find myself increasingly drawn to the perception that the court does not, and does not desire to, embrace the unique nature of the federal government contract regime as an analytical premise or predicate. Rather, the court prefers what some have described as a more consistent, streamlined, simplified, or even formalistic approach to its highly varied docket.

Where the Federal Circuit once resolved issues based upon "all the facts and circumstances," it now more often applies a discrete list of factors. Where the court once employed standards, it now employs rules. Where the court once had dense rules, they have become leaner. In short, the Federal Circuit has embraced an increasingly formal jurisprudence.³

Of course, this convenient description is an over-simplification. But it seems entirely consistent with the reality that, at least in the government contracts sphere, the present court's claim to specialization is tenuous at best.

I. SPECIALIZATION: SOME PERSPECTIVE

A. *Government Contracts Specialization: An Empirical Snapshot*

As his retirement approached, Chief Judge Paul Michel repeatedly acknowledged the Federal Circuit's lack of unique expertise in contracts and, specifically, government contract law.

Judge Michel urged the members of the Government contracts bar to consider seeking the nomination of persons with Government contracts expertise and experience as replacements for the Federal Circuit judges who would be retiring or taking senior status [T]he appointment of one or more individuals with such experience could go a long way towards raising the court's understanding of the real-world effects of its decisions in the Government contracts area.⁴

Federal Circuit, 54 AM. U. L. REV. 1205, 1238 (2005) ("While the Federal Circuit issued a number of decisions that could be termed 'pro-contractor,' when taken as a whole, the 2004 government contract decisions of the Federal Circuit likely will make life more difficult for contractors. The lasting impact of the Federal Circuit's 'pro-contractor' indemnification and price increase decisions will be outweighed by other decisions restricting remedies available to contractors.").

3. John R. Thomas, *Formalism at the Federal Circuit*, 52 AM. U. L. REV. 771, 773-74 (2003).

4. Robert K. Huffman, *Federal Circuit Decisions On Government Contracts: Insights From The Roundtable*, 24 NASH & CIBINIC REP. ¶ 8, at 25, 28 (Feb. 2010); see also Paul R. Michel, *Past, Present and Future in the Life of the U.S. Court of Appeals for the Federal Circuit*, 59 AM. U. L. REV. 1199, 1201 (2010) ("In my view, the wide variety of our pre-appointment experiences is actually the greatest strength of our court. Consider the varied backgrounds of the present eleven non-patent law judges: one judge was a tax lawyer; two were Assistant Solicitors General; one a law school dean; another a civil

Of course, government contract law is not alone in this regard at the Federal Circuit.⁵ In discussing the court's diversity in the context of then-pending vacancies at his final Judicial Conference, Judge Michel "note[d] that [the] court lacks anyone from West of the Allegheny Mountains, any Asian-American or African-American and anyone appointed who has specialized in contract, international trade, veterans or personnel law."⁶ Granted, Judge Michel also pointed out—at the time—the absence of any "former district judges[;]" an absence which no longer persists.⁷

Specialization can mean many things: whether training in, or devoting oneself to, a specific area of study; pursuing a specific occupation; or concentrating on a unique field. Of course, experience with or familiarity to the practice area prior to nomination and appointment is one factor. But, as noted above, no current Federal Circuit judges claim pre-appointment experience in government contracts. After appointment, however, a steady diet of cases should build a certain type of, at first, familiarity, and, over time, expertise.

appeals specialist; three . . . came to the court with varied experiences that included drafting legislation as Senate staffers; another had a civil practice in a distinguished law firm; and another litigated for the United States before becoming a special assistant to the then-Attorney General. . . . [T]hree judges had clerked for Supreme Court Justices, and a fourth served as Special Assistant to the Chief Justice of the United States after graduating from West Point and seeing combat duty in Vietnam, experiencing private practice, and serving as Acting U.S. Special Counsel and a judge on the Claims Court. So we are both *patent specialists* and nonspecialists" (emphasis added)).

5. See Pauline Newman, *The Federal Circuit in Perspective*, 54 AM. U. L. REV. 821, 823 (2005) ("A related argument against the proposed national [patent] court was based on the historical antipathy to 'specialized' courts, for common law tradition favors a generalist approach to adjudication, at least in the appellate courts. The concern is that specialists are likely to have a narrow viewpoint, and tend to favor vested interests and lose sight of the larger national interest. Indeed, this concern directed the design of the Federal Circuit to have extremely diverse subject matter jurisdiction to reduce the risks of specialization.") It appears, at least in the government contracts, that any such risks remain low.

6. Chief Judge Paul R. Michel, State of the Court Address at the Judicial Conference for the United States Court of Appeals for the Federal Circuit 1-2 (May 20, 2010), available at <http://www.cafc.uscourts.gov/images/stories/announcements/2010/stateofthecourt10.pdf>. Potential relief awaits for at least one of these areas of law, with the nomination of Jimmie Reyna, an international trade specialist. Alas, at the time of this writing, the nominations of Edward DuMont and Reyna remain pending. Neither, of course, boasts pre-nomination strength or unique familiarity with government contract law.

7. *Judge Michel Offers Views on Federal Circuit Judicial Nominees*, THE BLT: THE BLOG OF LEGAL TIMES (Mar. 19, 2009), <http://legaltimes.typepad.com/blt/2009/03/judge-michel-offers-views-on-federal-circuit-judicial-nominees.html>. Late last year, Judge Kathleen (Kate) O'Malley became the first judge on the court with previous experience as a district court judge. For more than 15 years, Judge O'Malley served as a U.S. District Judge in the Northern District of Ohio.

The numbers do not demonstrate a steady diet. Not surprisingly, in 2010, most Federal Circuit judges were not exposed to a large number of government contracts cases.⁸ Indeed, as Table 1, below, demonstrates, in 2010, no judge participated in ten, and the vast majority of judges participated in fewer than half a dozen, government contracts related matters. Of course, judges participated in many more cases than they wrote.⁹ Judge Bryson, the most prolific writer on government contracts matters, participated in nine cases, and Judge Lourie participated in eight. Four judges participated in five cases—Judges Newman, Prost, and Rader; two judges participated in four cases—Dyk and Moore. Judges Clevenger, Linn, and Mayer each participated in three; Judge Gajarsa participated in two.

Far more striking is that, in 2010, only one Federal Circuit judge, Judge Bryson, wrote more than two government contracts related decisions. Judge Bryson issued five opinions. Two judges—Judges Prost and Dyson—wrote two. Judge Dyson, however, also wrote two concurring opinions; earning him the bragging rights as the second most prolific judge on these matters. Five judges—Judges Gajarsa, Linn, Lourie, Mayer, and Rader—wrote one. Judge Gajarsa, however, also drafted the only dissenting opinion in a government contracts related case in 2010. Neither Judge Michel nor Judge Moore drafted a government contracts related opinion in 2010, nor did Senior Judges Archer, Clevenger, Friedman, Plager, or Schall. In other words, Judge Mayer was the only senior judge (or judge entering a retirement year) to participate in a government contracts matter and also write an opinion.

8. In the spirit of full disclosure, case selection methodology is neither entirely scientific nor uniformly consistent. Accordingly, in the appendices to this Article, I list the cases I have included, and readers can decide whether I have been overly inclusive or exclusive. For example, I chose not to include *Bornes v. United States*, 626 F.3d 574 (Fed. Cir. 2010), a class action brought pursuant to the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681n(a), that morphed into a complex jurisdictional challenge, and produced some extensive—but, for the purposes of this article, largely irrelevant—analysis of the Little Tucker Act, 28 U.S.C. § 1346(a)(2). Conversely, I included—but did not discuss separately in this Article—*Arctic Slope Native Assoc. v. Sebelius*, No. 2010-1013, 2010 WL 5129708 (Fed. Cir. Dec. 15, 2010), where the court affirmed the Civilian Board of Contract Appeals (CBCA's) grant of summary judgment in favor of the government in "the latest in a long-running dispute between the various Indian tribes and the Secretary concerning the Secretary's obligation to pay contract support costs" under a contract to supply health services under the Indian Self-Determination Act. *Id.* at 1 (citing *Arctic Slope Native Assoc. v. Dep't of Health & Human Servs.*, CBCA 294-ISDA, 09-2 BCA ¶ 34,281 (C.B.C.A. 2009)).

9. Two cases—*Sullivan v. United States*, 625 F.3d 1378 (Fed. Cir. 2010) (per curiam), and *Ham Investments, LLC v. United States*, 388 F. App'x 958 (Fed. Cir. 2010) (per curiam)—were issued per curiam, and the judges received credit for participating but not writing the opinion.

Table 1: Government Contracts Activity Per Federal Circuit Judge 2010

| Judge | Participated in Decision | Participated Without Writing | Drafted Decision | Concurring Decision | Dissenting Decision |
|----------------------------|-----------------------------|------------------------------------|---------------------|------------------------|------------------------|
| Bryson | 9 | 4 | 5 | | |
| Lourie | 8 | 7 | 1 | | |
| Newman | 5 | 5 | | | |
| Prost | 5 | 3 | 2 | | |
| Rader | 5 | 4 | 1 | | |
| Dyk | 4 | | 2 | 2 | |
| Moore | 4 | 4 | | | |
| Linn | 3 | 2 | 1 | | |
| Gajarsa | 2 | | 1 | | 1 |
| Michel ¹⁰ | 1 | 1 | | | |
| <i>Senior Judges, etc.</i> | | | | | |
| Clevenger | 3 | 3 | | | |
| Mayer | 3 | 2 | 1 | | |
| Archer | 1 | 1 | | | |
| Friedman | 1 | 1 | | | |
| Plager | 1 | 1 | | | |
| Schall | 1 | 1 | | | |
| Kendall ¹¹ | 1 | 1 | | | |

As detailed in Appendices A and B, which identify the cases summarized in Tables 1 and 2, even this level of participation somewhat exaggerates the various judges' exposure to government contracts matters. For example, *Nebraska Public Power District v. United States*,¹² decided en banc and discussed at length below, involved twelve judges. In addition, Judge Rader received full credit for penning the unpublished, non-precedential opinion in *Ham Investments, LLC v. United States*.¹³ In what can fairly be described as an unremarkable case, the court found "no genuine issue of material fact as to whether the Government waived the requirements of the Anti-Assignment Acts" and affirmed the Court of Federal Claims' grant of summary judgment in favor of the government.¹⁴ My sense is

10. Retired, May, 2010.

11. District Judge sitting by designation.

12. (*NPPD II*) 590 F.3d 1357 (Fed. Cir. 2010) (en banc).

13. 388 F. App'x 958 (Fed. Cir. 2010) (per curiam).

14. *Id.* at 961.

that little or no familiarity with federal government contracting was required for the court to resolve this matter.¹⁵ Indeed, the court explained that “HAM does not argue on appeal that the assignment met the requirements of the Anti-Assignment Acts. Thus, this court need not address that issue[, and] the only issue on appeal is whether the Government waived the requirements of the Anti-Assignment Acts.”¹⁶

Conversely, the process may not have been fully consistent in not including *Sullivan v. United States*,¹⁷ a short, per curiam decision. Sullivan was excluded from formal discussion because the Federal Circuit concluded that it was not a government contract case. After a United States Postal Service contractor’s truck hit the Sullivans’ car, Mrs. Sullivan received \$20,000, the maximum liability coverage under the contractor’s insurance policy.¹⁸ The Postal Service contract, however, required the contractor to carry at least \$750,000 in liability insurance, but the contractor failed to do so.¹⁹ The Sullivans sued as third party beneficiaries to the Postal Service contract, asserting that, as motorists, they were intended to benefit from the contract’s insurance requirements.²⁰ That seemed like a reasonable argument, and the trial court agreed.²¹ The Federal Circuit, however, was not persuaded.²² In reversing the trial court’s decision, the Federal Circuit explained: “Regardless of whether the trial court properly classified the Sullivans as third party beneficiaries, the Sullivans still could not succeed in this breach of contract action against the

15. None of this should suggest that anti-assignment issues are either unimportant or uninteresting. See generally Heidi M. Schooner & Steven L. Schooner, *Look Before You Lend: A Lender’s Guide to Financing Government Contracts Pursuant to the Assignment of Claims Act*, 48 BUS. LAWYER 535 (1993). Here, in a lengthy decision, rich in factual detail and sprinkled liberally with deposition testimony, the lower court, the U.S. Court of Federal Claims, concluded that no valid assignment of payments had taken place. *Ham Invs., LLC v. United States*, 89 Fed. Cl. 537, 553 (2009), *aff’d* 388 F. App’x 958 (Fed. Cir. 2010) (per curiam). The trial court fleshed out two issues: whether the assignee qualified under the statutory and regulatory definition of a “financing institution” and whether the government waived certain statutory requirements. *Id.* at 548–52. “The Anti-Assignment Acts limit assignments of government contracts to third parties. . . . Statutory exceptions, however, may allow assignments, but only if certain requirements are fulfilled.” *Id.* at 547, (citing 31 U.S.C. § 3727 (2006); 41 U.S.C. § 15 (2006) (renumbered as 41 U.S.C. § 6305 pursuant to Act of Jan. 4, 2011, Pub. L. No. 111-350, 124 Stat. 3677, 3804 which recodified Title 41)).

16. *Ham Investments*, 388 F. App’x at 960.

17. 625 F.3d 1378 (Fed. Cir. 2010) (per curiam).

18. *Id.* at 1379.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 1380–81.

Government. [The contractor], in whose shoes the Sullivans must stand, breached the contract, not the Government.”²³

Granted, the sparse number of government contracts cases looks less stark when the more numerous cases from the prior year, 2009, are combined with 2010. Indeed, the numbers more than double, to the extent that 2010 appears to have been a relatively light year. Still, over a two-year period, some trends become slightly more pronounced. Judge Bryson remains the most prolific judge on government contract matters. Moreover, at least in my opinion, he drafted two or three of the more significant opinions in 2010. At the opposite end of the spectrum, Judge Moore, a patent scholar before joining the bench, appears to have been the only active judge not to draft a government contract opinion in either 2009 or 2010. More significantly, all five senior judges and six active judges—Judges Linn, Lourie, Michel, Moore, Newman, and Rader—drafted two, one, or no opinions over a two-year period. Judge Michel’s service as Chief Judge and his pending retirement make his inclusion less significant and any concern regarding his lack of participation substantively less noteworthy than that of Judge Moore.

*Table 2: Government Contracts Activity Per
Federal Circuit Judge 2009 and 2010 (combined)*

| <i>Judge</i> | <i>Participated in Decision</i> | <i>Participated Without Writing</i> | <i>Drafted Decision</i> | <i>Concurring Decision</i> | <i>Dissenting Decision</i> |
|----------------------|-------------------------------------|---|-----------------------------|--------------------------------|--------------------------------|
| Bryson | 16 | 7 | 9 | | |
| Lourie | 15 | 13 | 1 | | 1 |
| Newman | 12 | 9 | 2 | | 1 |
| Prost | 10 | 5 | 5 | | |
| Rader | 12 | 10 | 2 | | |
| Dyk | 12 | 3 | 6 | 2 | 1 |
| Moore | 6 | 6 | | | |
| Linn | 6 | 5 | 1 | | |
| Gajarsa | 7 | 2 | 3 | | 2 |
| Michel ²⁴ | 5 | 4 | 1 | | |
| Schall ²⁵ | 9 | 5 | 4 | | |

23. *Sullivan v. United States*, 625 F.3d 1378, 1380 (Fed. Cir. 2010) (per curiam). For an extensive discussion of an ill-conceived legislative solution to such a potential contractor liability, see *Schooner*, *infra* note 187.

24. Retired, May, 2010.

25. Judge Schall took senior status in 2009.

| <i>Senior Judges</i> | | | | | |
|--------------------------------------|----|---|---|--|--|
| Clevenger | 4 | 3 | 1 | | |
| Mayer | 10 | 8 | 2 | | |
| Archer | 1 | 1 | | | |
| Friedman | 3 | 2 | 1 | | |
| Plager | 4 | 2 | 2 | | |
| <i>Judges Sitting By Designation</i> | | | | | |
| Arterton ²⁶ | 1 | 1 | | | |
| Huff ²⁷ | 1 | 1 | | | |
| Kendall ²⁸ | 1 | 1 | | | |
| Posner ²⁹ | 1 | 1 | | | |
| Walker ³⁰ | 1 | | 1 | | |
| Ward ³¹ | 1 | 1 | | | |

In light of this empirical snapshot, it seems reasonable to ask whether this rather light volume of government contracts decisions permits judges to become specialists.³² The frequency with which judges have sat by designation on these matters might suggest that they are not daunted by the issues involved. Indeed, particularly in

26. District Judge sitting by designation.

27. District Judge sitting by designation.

28. District Judge sitting by designation.

29. Circuit Judge sitting by designation.

30. Chief District Judge sitting by designation.

31. District Judge sitting by designation.

32. It is not my intent here to rehash (but, instead, add an empirical element to) this debate. That ground has been, and continues to be, consistently trodden.

The potential benefits of placing the adjudication of all contract claims against the government in one court and thus building a single consistent body of government contract law are well known. . . . Generalist courts accustomed to normal contract disputes will not be able to strike an effective or consistent balance between treating the government as sovereign and treating it as a typical party to a contract, especially when they deal with such cases only sporadically.

Not all commentators agree, of course. Some argue that an extra tribunal unnecessarily consumes resources, creates wasteful jurisdictional disputes, and leads to inefficient adjudication.

Daniel Thies, *Recent Development: The Decline of the Court of Federal Claims in Nebraska Public Power District v. United States*, 590 F.3d 1357 (Fed. Cir. 2010), 33 HARV. J.L. & PUB. POL'Y 1203, 1214–15 (2010) (citing Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 714, 751, 770–71 (2003) (pointing out the number of contract suits that are adjudicated elsewhere in the federal system, thus minimizing the benefits of specialization, and arguing that the COFC's docket could be distributed to the district courts at minimal additional cost)); see Joshua I. Schwartz, *Public Contracts Specialization as a Rationale for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 863, 863 (2003) (“[T]he semi-specialization of the [Court of Federal Claims] in litigation arising from government contracts lends it uniquely a genuine potential to contribute to the salutary development of the law in this field.”).

light of the non-mainstream government contracts cases included in this review—most dramatically, the non-procurement and, arguably, *sui generis*, *Winstar* cases and the Spent Nuclear Fuel cases—it seems that most Federal Circuit judges have very limited in-depth exposure to the Federal Acquisition Regulation (FAR),³³ the uniform, government-wide regulation that applies to executive agency procurement contracts.

As noted above, it appears that Judge Bryson has taken the lead in crafting the court's opinions in government contracts. Judge Bryson's work appears careful and well reasoned, but it remains unclear whether Judge Bryson offers a unique philosophy on these cases, and only time will tell if he sustains his current pace. More broadly, few Federal Circuit judges present an extensive, consistent body of work. Probably the most significant exception would be Judge Pauline Newman. Whether I agree with Judge Newman—or, whether, as a young Justice Department advocate,³⁴ I expected a

33. 48 C.F.R. Chapter 1 contains the government-wide regulation, and the following chapters represent agency-level supplements to the regulation.

34. It seems only appropriate, on this note, to mention that the Supreme Court granted certiorari for the purpose of reviewing to what extent the government's invocation of the state secrets privilege may have impacted the outcome of this long-running litigation. *McDonnell Douglas Corp. v. United States*, 567 F.3d 1340 (Fed. Cir. 2009), *cert. granted sub nom. Boeing Co. v. United States*, 131 S. Ct. 62 (2010). Oral argument took place on January 18, 2011. The Federal Circuit described this litigation as the American version of *Jarndyce and Jarndyce*, *id.* at 1342, the fictional court case in the Charles Dickens novel *Bleak House*. CHARLES DICKENS, *BLEAK HOUSE* 20 (Signet Classic 1980) (1853) (“This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means.”). This stage of appellate review guarantees that this long running dispute will survive into its twentieth year. In June of 1991, when the contractors filed their lawsuit in the U.S. Court of Federal Claims, I was a trial attorney at the Department of Justice. Now, “final resolution . . . may well turn on the complicated and little explored interplay between the Government's right to protect highly sensitive information [in] dispute resolution on contracts involving that information.” Neil H. O'Donnell & Dennis J. Callahan, *Feature Comment: The A-12 Saga Continues*, 52 GOV'T CONTRACTOR ¶ 388, Dec. 8, 2010, at 1–3; *see also* Nash, *January 2011*, 25 NASH & CIBINIC REP. ¶ 1, at 1 (Jan. 2011) [hereinafter Nash, *January*]. My predecessor on this faculty, Ralph Nash, criticized the reasoning of the Federal Circuit's 2003 decision for reasons I revisit, in a similar context, in this article's discussion of *Maropakis*, *infra* Part II.B. The Federal Circuit reasoned

that the nondisclosure of vital information defense was not a normal defense because the contractors were plaintiffs presenting a contractor claim [U]nder the Contract Disputes Act, contractors are always the plaintiffs even though they are litigating Government claims. Up until the Federal Circuit decision, almost everyone had understood that this was merely a procedural matter but that the Government was the actual party asserting the claim when litigating the validity of a default termination. (The burden of proof has always been on the Government to uphold the validity of the default termination.) . . . [M]aking contractors plaintiffs in all cases [may be] a “convenient fiction.” But the Federal Circuit's analysis makes it rather inconvenient for the contractors (at a cost of approximately \$3 billion).

daunting challenge persuading her—I respect her consistency and vision. As an academic, I admit a fondness for overarching principles and theories that help explain regimes or resolve difficult problems.³⁵ Accordingly, I find myself increasingly drawn to her opinions, perspective, and jurisprudence.

B. Judge Newman: A Unique Niche?

Long well-respected in the patent bar, Judge Newman also has established a unique place in government contracts. Stanfield Johnson's recent article chronicles her highly individualistic quest and heralds her as the court's "great dissenter."³⁶ Johnson makes a compelling case that over a twenty-year period, particularly through her numerous dissenting opinions, Judge Newman has articulated a unique judicial approach to government contracts cases. More importantly, she effectively has distinguished herself from her judicial colleagues. Judge Newman's "dissents respectfully but emphatically criticize her colleagues for not recognizing legitimate interests of contractors . . . seeking remedies from the Government . . . [and] consistently reflect the view that a primary responsibility of the court is to serve 'the national policy of fairness to contractors.'"³⁷

Johnson accurately describes Judge Newman's judicial approach towards government contracts over the years as "persistent—and

Nash, *January*, *supra* ¶ 1, at 1. It is hard not to be at least somewhat cynical about an acquisition regime and a judicial system that permits this story to continue unfolding today. See also Natanya DeWeese & James Rumpf, *General Dynamics Corp. v. United States*

(09-1298); *Boeing Company v. United States* (09-1302), *LIBULLETIN*, <http://topics.law.cornell.edu/supct/cert/09-1298> (last visited Mar. 14, 2011).

35. See, e.g., Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 *PUB. PROCUREMENT L. REV.* 103, 110 (2002) ("Ultimately, each government must decide how much discretion or flexibility it wishes to delegate to its buyers. . . . No system can achieve all of [the discussed] goals. Nor can a state expect that its objectives for its system will remain constant over time. Determining which goals are most important is a daunting, ever-evolving challenge."); Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, 40 *PUB. CONT. L.J.* 63, 63–64 (2010) ("Long established in economics and the other social sciences, the principal-agent model . . . provides a model to explain successes (and failures) in organizational structures, and also to understand the procurement system and its rules."); see also RALPH C. NASH, JR. ET AL., *THE GOVERNMENT CONTRACTS REFERENCE BOOK: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT* (3d ed. 2007) (organizing the variety of government contract terms and definitions alphabetically).

36. W. Stanfield Johnson, *The Federal Circuit's Great Dissenter and Her "National Policy of Fairness to Contractors"*, 40 *PUB. CONT. L.J.* 275 (2011).

37. *Id.* at 276 (manuscript at 3) (citing *England v. Contel Advanced Sys., Inc.*, 384 F.3d 1372, 1383 (Fed. Cir. 2004) (Newman, J., dissenting)).

largely lonely[.]”³⁸ I sense that he is correct to employ the word “advocacy” in describing her jurisprudence.³⁹ Johnson explains that:

At the core of Judge Newman’s dissenting jurisprudence is the premise that the sovereign as a contracting party should be accountable for its actions, subject only to limited exceptions not to be presumed, unnecessarily expanded, or imposed in a formalistic, doctrinaire way that ignores or masks the facts of government conduct. Where the facts justify it, contractors should be entitled to a “fair and just” remedy, and the Federal Circuit is there to make sure this happens.⁴⁰

Indeed, Johnson properly identifies Newman’s unique place on the court’s spectrum in the context of the never ending balance that must be struck in government contracts cases: “How [should judges] harmonize the court’s general duty to hold the Government accountable under the law of contracts with its duty to protect the sovereign and its funds? Which judicial duty has priority?”⁴¹ Some of Johnson’s most compelling analysis derives from his frustration that—despite years of her “advocacy”—Judge Newman appears to have gained little ground in moving the court along the spectrum toward a hypothetical center. Despite the historical grounding of her jurisprudence, Judge Newman apparently has failed to convert her colleagues.

Her jurisprudence is so consistent with the authorized history of the jurisdiction inherited from the Court of Claims, declaring the court as a nation’s “conscience,” that one wonders why she appears a maverick among the judges of the Federal Circuit. And why is she so frequently alone in objecting to obstacles to justice raised by her colleagues, frustrating the court’s historic “unique and permanent contribution” of making “Government officials accountable?”⁴²

As discussed at length below, Judge Newman proved true to form in 2010, dissenting in *M. Maropakis Carpentry, Inc. v. United States*,⁴³ expressing disapproval, if not exasperation, with the majority’s unwillingness to protect the interest of a government contractor.⁴⁴

38. *Id.* at 333.

39. *Id.*

40. *Id.* at 338.

41. *Id.* at 339. “In some respects the differences between Judge Newman and her colleagues involve this sorting out process—with Judge Newman on what might be called the liberal equitable side, and the majorities on the conservative, stricter side of the divide.” *Id.*

42. *Id.* at 333 (citing 2 WILSON COWEN ET AL., THE UNITED STATES COURT OF CLAIMS: A HISTORY 170 (1978)).

43. 609 F.3d 1323 (Fed. Cir. 2010).

44. *Id.* at 1332, 1334–35 (Newman, J., dissenting).

C. A Level Playing Field?

What is particularly striking about this long running debate is that, in the end, it returns to the amount of deference that the government enjoys in federal court and, more specifically, in a highly specialized appellate court, in Washington, D.C., with a heavy diet of cases in which the government is one of the parties. Johnson correctly “suspect[s] the reader will . . . find that his or her own judgments will turn on fundamental views about what the relationship between the sovereign and its contractors should be—and what the role of the Federal Circuit in overseeing that relationship should be.”⁴⁵ In other words, most readers will not hesitate, when confronted with a government contracts case, to opine whether the Federal Circuit should attempt to manage a level playing field, or whether the government—for whatever reason—should expect to enjoy a leg up. Consistent with a career in private practice, Johnson voices the perspective that: “One would think that . . . the Federal Circuit would provide a level playing field between the sovereign and its contractors [a]nd, further, that the court would without hesitation seek to serve its historic mission of holding the Government accountable as the law would hold private individuals.”⁴⁶ For those unfamiliar with this aspect of the court’s jurisprudence, Johnson persuasively disabuses the notion of the level playing field. Rather, as a general rule, the government, as defendant and litigant, enjoys both deference and access to a broad arsenal of defenses. Looking back, the congressionally created Acquisition Advisory Panel’s 2007 report⁴⁷ attempted to air this issue. The panel began from the premise that the:

fundamental difference between government and commercial contracting is unequal treatment of the parties in the contracting process. The government enjoys certain contractual “advantages” by virtue of its status as the “sovereign” resulting in benefits from the centuries-old, judicially created doctrine of sovereign or governmental immunity. The prime example of this doctrine is that the government cannot be sued unless (and only to the extent that) it consents to be sued⁴⁸

Conversely, “[t]he United States Supreme Court . . . has held for some 130 years that the same rules of contract interpretation and

45. Johnson, *supra* note 36 at 333.

46. *Id.* at 343.

47. REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS (Jan. 2007), *available at* <https://www.acquisition.gov/comp/aap/finalaapreport.html>.

48. *Id.* at 84 (emphasis removed).

performance apply to both the government and contractors.”⁴⁹ The Acquisition Advisory Panel, however, described a phenomenon in which the courts and board of contract appeals have ignored the Supreme Court’s guidance and provided favorable treatment to the government rather than contractors without a statutory, Constitutional, or contractual basis. “These areas included the presumption of regularity (that actions of the government were conducted properly and correctly), estoppel against the government, the presumption of good faith, and interest as damages.”⁵⁰

Ultimately, the panel found that providing unequal treatment in government contracts is “inconsistent with commercial practices[.]” The government and its contractors should enjoy equal treatment “unless the Constitution of the United States or special considerations of the public interest require otherwise.”⁵¹ All of which leads, in Johnson’s opinion, to “the bottom-line effect that the Government avoids accountability and the public fisc is protected.”⁵²

From this, Johnson concludes:

[T]he Federal Circuit has made protection of the public fisc its priority. Plainly, . . . it is no longer considered a priority or “special responsibility” of the court “to make government officials accountable to the citizens whose servants they are” or for the Government “to render prompt justice against itself.” And thus, sad to say, the court no longer defines “its mission” as “hold[ing] and speak[ing] a nation’s conscience.”⁵³

D. *The Federal Circuit’s Role?*

Johnson was not alone in voicing this theme in 2010. My predecessor and colleague, Emeritus Professor Ralph C. Nash, Jr., articulated that, historically, the Federal Circuit’s predecessor, the

49. *Id.* at 85.

50. *Id.*

51. *Id.* at 98. The panel also noted the concluding language in the American Bar Association’s Section of Public Contract Law’s comments:

The contractor and the Government shall enjoy the same legal presumptions, if any, in discharging their duties and in exercising their rights in connection with the performance of any Government contract, and either party’s attempt to rebut any legal presumption that applies to the other party’s conduct shall be subject to a uniform evidentiary standard that applies equally to both parties.

Id. at 86 (quoting Letter from A.B.A. Section of Pub. Contract Law to Laura Auletta, Exec. Dir., Gen. Servs. Admin. (June 22, 2006), available at <https://www.acquisition.gov/comp/aap/documents/sectionofpubliccontractlawaba-22june06.pdf>).

52. Johnson, *supra* note 36 at 343.

53. *Id.* at 346 (citing 2 WILSON COWEN ET AL., THE UNITED STATES COURT OF CLAIMS: A HISTORY (1978) at 170–71).

Court of Claims, “perceived itself as the conscience of the nation.”⁵⁴ Indeed, that court’s output and generally accepted philosophy indicated that “[n]othing could be more important than ensuring that the citizens of this country believe that their federal government treats them fairly.”⁵⁵ Today, Nash joins Johnson in concluding that the “Federal Circuit seems to have slowly drifted away from this view of its role.”⁵⁶

Nash offers “three possible factors moving the Federal Circuit in the direction it has taken.”⁵⁷ First, he postulates that the court prefers strict, rather than flexible, rules for the government’s public procurement regime. “There seems to be a belief that there are no shades of gray in contracting—that the issues are either black or white.”⁵⁸ Nash also senses that the Federal Circuit’s judges increasingly appear to mistrust trial judges, whether at the U.S. Court of Federal Claims or at the agency boards of contract appeals.⁵⁹

The fashioning of strict legal rules appears to be taking discretion away from the judges on the Court of Federal Claims and the boards of contract appeals to assess the facts fully and seek a fair outcome. This trend can be seen in [many] areas . . . particularly in the accounting area demanding use of the *Eichleay* formula to the exclusion of accounting evidence, thereby depriving judges of the advice of experts in complex accounting matters. The reversals of carefully analyzed board decisions in *Winter* and *Rumsfeld* are striking in this regard. Yet the board judges are the most experienced judges in their field in the federal arena—with a requirement of five years of experience before appointment and having served, in most cases, for many years hearing only government contract disputes. Similarly, the judges on the Court of Federal Claims are highly competent—albeit with less government contracts experience. Historically, all of these judges have demonstrated the ability to sift through complex facts and apply the law to arrive at a fair result. The Federal Circuit’s efforts to restrict this endeavor seem misplaced.⁶⁰

54. Ralph C. Nash, Jr., *The Government Contracts Decisions of the Federal Circuit*, 78 GEO. WASH. L. REV. 586, 587 (2010) [hereinafter Nash, *Government Contracts*].

55. *Id.* at 587–88.

56. *Id.* at 588.

57. *Id.* at 612.

58. *Id.* at 612. Nash criticizes this perception, pointing out that all contract disputes, particularly with interpretation and authority disputes, turn on case specific facts and the legal rules to be applied to those facts. “The dogmatic application of a strict legal rule in these situations—without a close analysis of the factual nuances—can lead to unfair results.” *Id.* at 612–13.

59. *Id.* at 613.

60. *Id.*

Nash's third theory for explaining the trend is that the court would like to "impose more rigorous standards on the people in the government and industry that draft and perform government contracts."⁶¹ Nash suggests, and few would disagree, "that government contracting would be more effective if all of the participants in the process were more careful in the language that they use and the techniques they adopt to achieve satisfactory performance."⁶² Like Nash, however, I am not sanguine that attempting to impose such an outcome, by force of will, will bear fruit either for the court or the taxpayers.⁶³ Ultimately, as a result, Nash concludes that the government, the private sector, and the public are worse off. "It appears that the court does not seek to show the citizenry that the government deals fairly with it."⁶⁴ While that assessment may seem harsh, the weight of precedent indicates that it is increasingly accurate.

E. Another Way Forward?

There may be another way forward—not necessarily that the Federal Circuit should be more solicitous of contractors and claimants, but rather that the court's judges should more fully recognize, and engage in, their roles in shaping the evolving government procurement legal regime. That was certainly the Court of Claims' role, in its heyday, before the Federal Acquisition Regulation helped codify and harmonize federal procurement law in 1984.⁶⁵ The old Court of Claims, which was folded into the Federal

61. *Id.* at 614.

62. *Id.*

63. *Id.* First,

[g]overnment contracting is done by business-trained people, generally without legal training, who are pressed for time to get their immediate task accomplished. Thus, most contracts are signed without careful legal review, and the major contracts are so complex that even legal review is not likely to catch all of the glitches in the document. These same contracts are frequently performed under stressful conditions where the main focus is to get the job done. The people on both sides of the transaction generally try to follow the precise rules applicable to government procurement, but there are inevitable failures in this regard.

Id. Second, it is unrealistic, for the foreseeable future, to expect a significant upgrade in the performance of the government's acquisition workforce, which has been stretched past the breaking point. *See, e.g.*, Steven L. Schooner & Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, 6 J. CONT. MGMT. 9 (Summer 2008) (arguing that there is no short-term solution to the lack of resources available to the Department of Homeland Security and other agencies).

64. Nash, *Government Contracts*, *supra* note 54, at 614.

65. The FAR took effect on April 1, 1984. The rule-makers' description of the new, consolidated regulation sheds light on its purpose and, more broadly, hints at why some authority may have shifted from the courts to the rule-makers: the transaction costs of running and enhancing complex procurement systems drop

Circuit, served a central role in defining and refining federal procurement law.⁶⁶ In many ways, the Federal Circuit today has departed from that role.

The other two branches of government, in contrast, are intensely engaged in shaping the procurement law regime; in practice, Congress and the Executive Branch often compete for primacy. The most recent defense authorization act, for example, included provisions on business systems regulation⁶⁷ and intellectual property⁶⁸

dramatically if direction for that system can come from a centralized rulemaking process, rather than from the courts. The introductory statement for the FAR stated, in late 1983:

The [FAR] establishes (a) a single regulation for use by all Executive agencies in their acquisition of supplies and services with appropriated funds, and (b) the [FAR] System consisting of the FAR and agency acquisition regulations that implement or supplement the FAR. The FAR is prepared, issued, and maintained, and the [FAR] System is prescribed, jointly by the Secretary of Defense, the Administrator of General Services, and the Administrator, National Aeronautics and Space Administration, under their several statutory authorities. The FAR, together with agency supplemental regulations, replaces the current Federal Procurement Regulations System, the Defense Acquisition Regulation, and the NASA Procurement Regulation. . . . The major intended effects of the FAR are to (a) *produce a clear, understandable document* that maximizes feasible uniformity in the acquisition process, (b) *reduce the proliferation of agency acquisition regulations*, (c) implement recommendations made by the Commission on Government Procurement, the Federal Paperwork Agency, industry, and public participation in the development and maintenance of the FAR and agency acquisition regulations.

Establishing the Federal Acquisition Regulation, 48 Fed. Reg. 42102, 42102 (Sept. 19, 1983) (to be codified at 48 C.F.R. Ch. 1) (emphasis added).

66. Paul D. Carrington & Paulina Orchard, *The Federal Circuit: A Model For Reform?*, 78 GEO. WASH. L. REV. 575, 577 (2010) (noting that the Court of Claims folded into the Federal Circuit); see Richard Linn, *The Future Role of the United States Court of Appeals for the Federal Circuit Now That It Has Turned 21*, 53 AM. U. L. REV. 731, 732 (2004) (noting that the Federal Circuit accepted as binding precedent the law of the Court of Claims); Pauline Newman, *The Federal Circuit in Perspective*, 54 AM. U. L. REV. 821, 823–24 (2005) (explaining the origins of the Federal Circuit); Daniel J. Meador, *Retrospective on the Federal Circuit: The First 20 Years—A Historical View*, 11 FED. CIR. B.J. 557, 558 (2001-2002) (explaining the formation of the Federal Circuit); Pauline Newman, *Origins of the Federal Circuit: The Role of Industry*, 11 FED. CIR. B.J. 541, 541 (2001-2002) (describing the origins of the Federal Circuit). See generally 2 WILSON COWEN, ET AL., THE UNITED STATES COURT OF CLAIMS: A HISTORY (1978) (summarizing Court of Claims' procurement caselaw).

67. Compare Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 893, 124 Stat. 4137 (2011) [hereinafter Ike Skelton National Defense Authorization Act] (directing the Secretary of Defense to initiate a program for the improvement of contractor business systems with Congressional guidelines), with Defense Federal Acquisition Regulation Supplement; Business Systems—Definition and Administration, 75 Fed. Reg. 75550 (Dec. 3, 2010) (to be codified at 48 C.F.R. pts. 215, 234, 242, 244, 245, and 252) (proposing an amendment of the Defense Federal Acquisition Regulation Supplement (DFARS) to improve the Department of Defense's oversight of contract business systems) (proposed rule). See generally Christopher R. Yukins & Kristen E. Ittig, *Feature Comment: The Defense Authorization Act for FY 2011—A Bounded Step Forward for Acquisition Reform*, 53 GOV'T CONTRACTOR ¶ 8, Jan. 12, 2011, at 7 (describing the

that in many ways overlapped pending regulatory reforms. This vibrant exchange between Congress and the regulators means, in practice, that the U.S. procurement regime hurtles more rapidly down an evolutionary path of improvement. Because other systems proceed on parallel paths,⁶⁹ it seems reasonable to assume that if the Federal Circuit engaged more actively and knowledgeably, the U.S. system would move ever more rapidly towards progress.

Besides the Court of Claims' historical model, there are contemporary examples for a fully engaged circuit—a full partner in the legislative and regulatory efforts to develop the law. The Second Circuit is well known for its contributions to securities law, and the D.C. Circuit plays an enormous role in shaping administrative and antitrust law. In short, there is no reason for the Federal Circuit not to engage more fully, and serve as the third co-equal branch in shaping procurement law in the federal government.

II. THE 2010 GOVERNMENT CONTRACTS CASES

This journey now turns to what the introduction previously described as a rather small hodge-podge of, frankly, unrelated government contracts cases resolved by the Federal Circuit in 2010. The article first discusses three award controversy or bid protests matters. Then, it examines a handful of post-award performance or contract administration disputes. The article then directs attention to a few selections from the ongoing behemoths of litigation in the U.S. Court of Federal Claims—the sui generic *Winstar* and Spent Nuclear Fuel debacles. Finally, the piece concludes—I think fittingly—with a potentially analogous implied warranty case.

conflict between legislative and rulemaking efforts to improve contractor business systems).

68. Compare Ike Skelton National Defense Authorization Act § 801, with Defense Federal Acquisition Regulation Supplement; Patents, Data, and Copyrights, 75 Fed. Reg. 59412 (Sept. 27, 2010) (to be codified at 48 C.F.R. pts. 212, 227, 246, and 252) (proposing amendments to the DFARS rule on technical data rights).

69. See Steen Treumer, *The Discretionary Powers of Contracting Entities—Towards a Flexible Approach in the Recent Case Law of the European Court of Justice?*, 15 PUB. PROCUREMENT L. REV. 71, 72–73 (2006) (discussing the growing role that the European Court of Justice is playing in shaping European member states' procurement law). My colleagues and I continue to see great value in looking abroad. See Christopher R. Yukins & Steven L. Schooner, *Incrementalism: Eroding the Impediments to a Global Public Procurement Market*, 38 GEO. J. INT'L L. 529, 565 (2007) (describing among other things, “rationalization, the process of ensuring that the instruments being relied upon by individual states to open markets do, in fact, produce a legislative and regulatory template for procurement procedures which are fundamentally sound (e.g., reflect best practices) and which produce efficient, value-based results”).

A. *Disappointed Offeror Litigation or Bid Protests*

In *Resource Conservation Group v. United States*,⁷⁰ problems arose out of the attempt to lease the former Naval Academy dairy farm property. Resource Conservation Group proposed to lease the property so that it could mine it for sand and gravel.⁷¹ The contracting officer determined that mining would entail the disposal of real property and, therefore, deemed Resource Conservation's proposal outside the scope of the solicitation.⁷² Resource Conservation sued, in the United States Court of Federal Claims, but did not challenge the actual award of the contract. Rather, it merely sought to recover the \$500,000 it expended in bid preparation costs and fees.⁷³ Resource Conservation asserted that the government's failure to timely warn prospective offerors of its interpretation foreclosed Resource Conservation's offer.⁷⁴ Among other things, Resource Conservation alleged that the Navy breached the implied contract of fair and honest consideration.⁷⁵

The court "express[ed] no opinion on whether the government was obligated to inform potential bidders of the perceived limitations imposed by 10 U.S.C. § 6976[,]"⁷⁶ so the only real significance of the case lies in what seems to be the never ending saga of federal court disappointed offeror jurisdiction.⁷⁷ The court revisited the scope of the Court of Federal Claims' bid protest jurisdiction under 28 U.S.C. § 1491. Because the matter involved the lease of government property, rather than a government purchase, the court concluded that "the Court of Federal Claims was correct in holding that relief under 1491(b)(1) is unavailable outside the procurement context."⁷⁸ But the case is far more interesting to the extent that the court determined that the COFC could assert implied-in-fact jurisdiction over *nonprocurement* solicitations. The court concluded that "the implied-in-fact contract jurisdiction under 28 U.S.C. § 1491(a)(1)

70. 597 F.3d 1238 (Fed. Cir. 2010).

71. *Id.* at 1240.

72. *Id.* at 1241.

73. *Id.*

74. *Id.*

75. *Id.* at 1240–41.

76. *Res. Conservation Grp. v. United States*, 597 F.3d 1238, 1247 (Fed. Cir. 2010).

77. Prior to the Administrative Dispute Resolution Act, federal district courts exercised jurisdiction—separate and apart from the Tucker Act—under the Administrative Procedure Act to review challenges to the award of federal government contract. *See, e.g., Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 872 (D.C. Cir. 1970) (holding that the Administrative Procedure Act entitled aggrieved bidders judicial review).

78. *Res. Conservation Grp.*, 597 F.3d at 1245.

that existed prior to 1996 survived the enactment of the ADRA, . . . where the new statute does not provide a remedy.”⁷⁹

Specifically, the court rejected the government’s argument that “continuation of the implied-in-fact jurisdiction would be inconsistent with the purposes of the ADRA, which clearly was designed to place all bid protest challenges in a single court (after a sunset period) under a single standard (the APA standard).”⁸⁰ The court went so far as to intuit that, based upon its analysis, “a disappointed bidder in a nonprocurement case could also theoretically bring its bid protest challenge in a federal district court, since the ADRA only repealed jurisdiction over procurement cases.”⁸¹ The court conceded that “[D]ividing jurisdiction between the Court of Federal Claims and the district courts for non-procurement bid protests may lead to similar problems that led to the enactment of 1491(b)(1). However, if the statute [must] be amended, that amendment must be undertaken by Congress and not this court.”⁸²

One surprising feature of this decision is how the court considers “the meaning of the phrase ‘in connection with a procurement or a proposed procurement.’”⁸³ The court explains that “[i]n construing statutory language, we look to dictionary definitions published at the time that the statute was enacted.”⁸⁴ That seems fine, but the reader is not alone in thinking that a better place to start may have been with Title 41 of the United States Code,⁸⁵ which the court

79. *Id.*

80. *Id.* at 1246.

81. *Id.* at 1246 n.12.

82. *Id.* at 1246. I hope that the worst case scenario does not play out. Experience suggests that clear jurisdictional lines produce far more efficient outcomes. See, e.g., Christopher M. Chaisson, et al., *The Sunset of Scanwell Jurisdiction and the Award of Attorney’s Fees to Disappointed Offerors*, 30 PUB. CONT. L.J. 65, 86–87 (2000) (urging that district courts maintain jurisdiction over bid protest cases); Michael F. Mason, *Bid Protests and the U.S. District Courts—Why Congress Should Not Allow the Sun to Set on this Effective Relationship*, 26 PUB. CONT. L.J. 567, 597 (1997) (concluding that the district courts have served as an adequate court to remedy government violations of procurement laws); Steven L. Schooner, *Feature Comment: Watching The Sunset: Anticipating GAO’s Study Of Concurrent Bid Protest Jurisdiction In The COFC And The District Courts*, 42 GOV’T CONTRACTOR ¶ 108, Mar. 22, 2000, at 3–4 (asserting that GAO should have concluded that the elimination of District Court jurisdiction would hinder the opportunity of small businesses to challenge violations of federal procurement law); Peter Verchinski, *Are District Courts Still a Viable Forum for Bid Protests?*, 32 PUB. CONT. L.J. 393, 404 (2003) (arguing that district courts provide an adequate alternative forum for small business in bid protest cases).

83. *Res. Conservation Grp.*, 597 F.3d at 1243.

84. *Id.* at 1243–44 (discussing BLACK’S LAW DICTIONARY 1208 (6th ed. 1990), and WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1809 (1993)).

85. See Office of Procurement Policy Act, 41 U.S.C. § 403 (2006) (renumbered as 41 U.S.C. § 111 pursuant to Act of Jan. 4, 2011, Pub. L. No. 111-350, 124 Stat. 3677, 3681 which recodified Title 41) (defining the term “procurement” as used in public contracts).

subsequently addresses. As Ralph Nash noted, commenting on the Federal Circuit's reliance on dictionary definitions:

This is backwards. Dictionary definitions of terms of art in the world of Government contracting are a highly unlikely source of meaning, much less plain meaning. Yet the court is wedded to dictionaries . . . [B]oth Mr. Webster and Mr. Black are long gone and neither they nor their successors have had the vaguest notion of how words are used when the Federal Government buys goods and services.⁸⁶

That seems eminently reasonable. Context matters.

While I am hesitant to call any government contracts case uninteresting, some are; yet I do appreciate periodically seeing the court describe the government's actions as rational. In *Savantage Financial Services, Inc. v. United States*,⁸⁷ the court affirmed the COFC's denial of a garden variety pre-award protest. The protest arose when the Department of Homeland Security (DHS) "required proposers to offer a system that is integrated and currently fully operational within the federal government."⁸⁸ Obviously, such a requirement restricts competition, which, in a vacuum, is inappropriate.⁸⁹

The court found the restriction reasonable.⁹⁰ Among other things: "On a question such as whether to implement a pre-integrated system or to build a system by beginning with a core financial system and then integrating other systems afterwards, an agency's preferences are entitled to great weight."⁹¹ Further, to the extent that DHS had struggled to create such a system from the ground up, the "DHS could reasonably prefer a system that is already operating successfully."⁹²

In *Pai Corp. v. United States*,⁹³ the court, affirming the COFC, chose not to overturn a contract award based upon an alleged organizational conflict of interest (OCI).⁹⁴ "The trial court found

86. Ralph C. Nash, *Postscript: The Implied Contract to Fairly and Honestly Consider an Offer*, 24 NASH & CIBINIC REP. ¶ 27, at 85 (June 2010).

87. 595 F.3d 1282 (Fed. Cir. 2010).

88. *Id.* at 1284.

89. See 48 C.F.R. § 6.101(a) (2008) ("[C]ontracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contracts.").

90. *Savantage Fin. Servs., Inc.*, 595 F.3d at 1288. The appellate court also, as a matter of fact, found "no support for [the] argument that DHS's requirements constitute a pretextual attempt to circumvent the trial court's earlier injunction and procure an Oracle-based system." *Id.*

91. *Id.* at 1286.

92. *Id.* at 1287.

93. 614 F.3d 1347 (Fed. Cir. 2010).

94. 48 C.F.R. § 2.101 (2008) ("*Organizational conflict of interest* means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the

that the integrity of the procurement was not compromised[,]”⁹⁵ and the appellate court agreed. The court showed sufficient deference, explaining that it would “not overturn a contracting officer’s determination unless it is arbitrary, capricious, or otherwise contrary to law.”⁹⁶ But even that deference was unnecessary, to the extent that the court concluded that “the contracting officer fully complied with the FAR requirements . . . [,] timely identified and evaluated any potential conflicts . . . [,] pursued a number of steps to resolve any potential conflicts, . . . [and] also completed an additional and comprehensive conflicts investigation[.]”⁹⁷

I do not mean to suggest this particular case also was uninteresting, but I sense that, this year, most practitioners will be far more interested in the potentially dramatic ongoing regulatory developments involving OCI’s. Late in the year, the Department of Defense (DoD) issued a final rule on organizational conflicts of interest in major defense acquisition programs, pursuant to the Weapon Systems Acquisition Reform Act of 2009 (WSARA).⁹⁸ The parallel efforts of the FAR Council and DoD and how they eventually are reconciled should be interesting to watch.⁹⁹ Moreover, the

person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.”); *see also* 48 C.F.R. pt. 9.5 (addressing organizational conflicts of interest); Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 PUB. CONT. L.J. 25, 25–26 (2005) (broadly discussing organizational conflicts of interest in the global context).

95. *Pai Corp.*, 614 F.3d at 1349.

[T]he [CO] determined that, although [competitors] had access to non-public information through their existing contracts, such information had no competitive value in the present procurement. The [CO] also found that, with respect to ITP, the information to which it had access involved constantly changing requirements, was quickly outdated, and was therefore of little value.

Id. at 1350.

96. *Id.* at 1352.

97. *Id.* at 1353.

98. *See* Final Rule, Defense Federal Acquisition Regulation Supplement; Organizational Conflicts of Interest in Major Defense Acquisition Programs, 75 Fed. Reg. 81908 (Dec. 29, 2010) (to be codified at 48 C.F.R. pts. 209 and 252) (explaining that the law “allows DoD to establish such limited exceptions as are necessary to ensure that DoD has continued access to advice on systems architecture and systems engineering matters from highly qualified contractors, while also ensuring that such advice comes from sources that are objective and unbiased.”); *see also* Weapon Systems Acquisition Reform Act of 2009, Public Law No. 111-23 § 207, 123 Stat. 1704, 1728–30 (2009) (to be codified at 10 U.S.C. § 101) (outlining organizational conflicts of interest in major defense acquisition programs).

99. While the proposed Defense Department rule would have applied sweeping new OCI rules government-wide, and would have recast OCI issues as matters of contractor integrity (in the Defense Department supplement to FAR Part 3) rather than contractor qualification (FAR Part 9)—a relatively radical change—the final rule took a more conservative approach, and confined the new rule to major Defense Department acquisitions and Part 3 of the Defense Federal Acquisition Regulation Supplement. The prefatory language to the final DFARS rule clarifies that “because the FAR proposed rule has not yet been published, and because the decision has

promulgation of the new rules likely will not come soon enough to stem the “flurry of Government Accountability Office protests this year on organizational conflicts of interest.”¹⁰⁰

B. Post-Award Contract Administration and Contract Performance

Turning to the world of post-award government contract management and disputes, many observers found *Precision Pine & Timber v. United States*¹⁰¹ to be problematic. The Forest Service’s timber contracts are unique, and the 1993 listing of the Mexican spotted owl as an endangered species threw quite a wrench into the works.¹⁰² Among other things, significant contractual delays resulted. The procedural history of the case is complex due, in part, to (1) the distinction between the individual timber contracts and the Forest Service’s land management documents (or Land Resource Management Plans (LRMPs)) and (2) proceedings in the U.S. District Court of Arizona and the Ninth Circuit Court of Appeals.¹⁰³ Briefly, however, the court faced two issues: “whether clause CT 6.25 of the timber contracts create[d] an express warranty; [and] whether the government breached the implied duty of good faith and fair dealing.”¹⁰⁴ The Federal Circuit read the contractual language, determined its plain meaning, and came to a conclusion different from the trial court.¹⁰⁵ The court concluded that “CT 6.25 did not create an express warranty and the Forest Service did not breach its implied duty of good faith and fair dealing.”¹⁰⁶ Other commentators have attempted to explain the difference in approach between the trial and appellate court:

been made to limit this rule to implementation of OCIs in [major defense acquisition programs (MDAPs)] . . . this final rule has been located primarily in [DFARS] subpart 209.5, until such time as the FAR coverage on OCIs may be relocated.” Defense Federal Acquisition Regulation Supplement; Organizational Conflicts of Interest in Major Defense Acquisition Programs, 75 Fed. Reg. 81908, 81910 (Dec. 29, 2010) (to be codified at 48 C.F.R. pts. 209 and 252).

100. Ralph C. Nash, *Postscript IV: Organizational Conflicts of Interest*, 24 NASH & CIBINIC REP. ¶ 25, at 76 (May 2010) (“[S]ince the FAR is obsolete, the rules of the game have to be learned from the litigated cases.”).

101. 596 F.3d 817 (Fed. Cir. 2010).

102. *Id.* at 819–20. Under the Endangered Species Act (ESA), the Forest Service was required to consult with U.S. Fish & Wildlife Service (FWS) to ensure that no action would “jeopardize the continued existence of any endangered species . . . or result in the destruction or adverse modification of habitat of such species.” 16 U.S.C. § 1536(a)(2) (2006).

103. See *Precision Pine*, 596 F.3d at 821–24 (discussing, inter alia, *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) and *Silver v. Babbitt*, 924 F. Supp. 976 (D. Ariz. 1995)).

104. *Id.* at 824.

105. *Id.* at 826.

106. *Id.* at 834. Among other things, *Precision Pine* was not entitled to a “guarantee of uninterrupted performance.” *Id.* at 831.

The COFC construed [the relevant contract clause,] CT 6.25 as creating an express warranty that the Forest Service had analyzed reasonably available information and identified special measures that it knew or should have known about that were necessary to comply with the [Endangered Species Act or] ESA. The COFC held that the Forest Service breached this warranty by failing to consult formally on the forest management plans after the Ninth Circuit's decision in *Pac. Rivers*. Because the Forest Service did not follow ESA procedures, the COFC said the Forest Service had no reasonable basis to know whether the measures identified in the contract were adequate.

The Federal Circuit rejected this interpretation of CT 6.25 because the plain language of the clause did not guarantee that the Forest Service would follow a particular procedure or statutory requirement in devising the protective measures listed in CT 6.25. Although the clause referred to the ESA, that reference merely explained the source of the special measures and did not impose obligations on the Forest Service¹⁰⁷

In so doing, the court appears to be breaking new ground, raising the bar, and setting forth:

a new standard for establishing a breach of the Government's duty to cooperate and not to hinder where the alleged breach is based on Government delay. Before *Precision Pine*, most cases addressing such allegations focused on whether the Government's delay was objectively unreasonable. *Precision Pine*, by contrast, appears to require something more akin to bad faith—evidence that the Government engaged in action “specifically targeted” at the other party, and that this action attempts to reappropriate a benefit guaranteed by the contract.¹⁰⁸

At least one other observer questioned whether the court found ill-conceived linkages between disparate types of unique government contracts, specifically those dealing with savings and loan institutions and those involving timber sales. “The . . . court believes that all Government contracts are the same . . . [and] that it can state a generic rule of contract law that applies to all types of contracts. We

107. Daniel P. Graham, Tara L. Ward & Craig Smith, *Feature Comment: Fed. Cir. Resets Standard for Breach of the Duty to Cooperate and Not to Hinder*, 52 GOV'T CONTRACTOR ¶ 97, Mar. 18, 2010, at 3–4.

108. *Id.* at 1. The comment also asserts that: “*First*, the Court's newly articulated standard appears inconsistent with precedent[.] . . . [*S*]*econd*, the *Precision Pine* panel decision departs from well-established and widely cited common law principles. Restatement 205 comment (d), cited in *Precision Pine*, states that a party to a contract violates its duty of good faith and fair dealing (of which the duty to cooperate and not to hinder is a part) if that party unreasonably acts or fails to act . . . [, and] [*f*]*inally*, neither party briefed or argued for the standard adopted by the *Precision Pine* panel. *Id.* at 5–6.

don't believe this is sound reasoning, and it is particularly troubling when such concepts are imported into procurement contracts."¹⁰⁹

I share the concern that conventional FAR-based procurement contracts are poor analogues to the court's S&L and timber experiences. I also agree that the government routinely benefits from the implicit understandings that animate these contracts. Indeed, I share the concern that, if taken to its logical conclusion and applied broadly, *Precision Pine* could encourage contractors to offer less favorable pricing to its government customers, as contractors engage in risk-averse behavior and increase their pricing to account for, or insure against, the government's license to engage in uncooperative behavior. That would be a tragic result.

Contractors selling supplies and services to the Government have traditionally priced such supplies and services on the basis that the law will protect them from unreasonable conduct by the Government during the performance of the conduct. This belief has been fostered by decades of decisions by the boards of contract appeals and the courts granting equitable adjustments, price adjustments, or damages when the Government does not meet this reasonableness standard. The Government has been the major beneficiary of this traditional view in that, while it has occasionally been required to pay additional compensation to a contractor, it has obtained lower prices on many, if not most, of its procurements.

Perhaps the court is right in raising the standard with regard to savings and loan institutions and buyers of timber. The savings and loan litigation is all in the past tense[,] and the fact that the Government will get a lower price for its timber probably will not have a great effect on the treasury. But higher prices on the \$500 billion worth of procurement contracts that are awarded each year are a serious matter. We desperately need the court to think through the impact of these generic rules that it is formulating and give assurance to contractors selling supplies and services to the Government that they can expect reasonable performance by the agency with which they deal.¹¹⁰

On a more positive note, in *Donley v. Lockheed Martin*,¹¹¹ the Federal Circuit appears to have rendered a relatively routine Cost Accounting Standards (CAS) opinion. One senses, however, that this opinion's brevity may mask its impact in light of a two current trends: (1) the government-wide effort to make the government more transparent

109. Ralph C. Nash, *Postscript: Breach of the Duty of Good Faith and Fair Dealing*, 24 NASH & CIBINIC REP. ¶ 22, at 67–68 (May 2010).

110. *Id.*

111. 608 F.3d 1348 (Fed. Cir. 2010).

and (2) mounting tension between the Defense Contract Audit Agency (DCAA) and its constituents.

Judge Bryson explained that this case derived from the “rephasing” of the 1991 contract between Lockheed Martin and the Air Force for the development of F-22 aircraft.¹¹² Not long after the contract award, both parties faced impediments. “In 1992, the Air Force informed Lockheed that it anticipated a funding shortfall for the F-22 program. At the same time, Lockheed told the Air Force that it expected the costs of the F-22 project to increase.”¹¹³ The Air Force approached Lockheed Martin about rephrasing the contract and sought estimates based on, among other things, deleting two aircraft and addressing certain weight related challenges. Later in the year, the government modified the contract to mandate the rephasing.

Concurrent with this effort, the Air Force encouraged Lockheed Martin (and certain other contractors) to alter its (and their) cost accounting practices. Specifically, “the government urged Lockheed to change its accounting practices and directly charge certain personnel costs to the F-22 contract.”¹¹⁴ After voicing concern, Lockheed Martin agreed to do so. The changes to accounting practices were not insignificant. Lockheed Martin estimated, at the time, that they would exceed \$10 million.

A number of years later, the DCAA “concluded that the change in Lockheed’s accounting practices caused a significant increase in the cost to the United States of the F-22 contract.”¹¹⁵ In 2002, a new contracting officer agreed with DCAA and issued a decision asserting a government claim of approximately \$14.7 million. The government, however, failed to convince either the Armed Services Board of Contract Appeals (ASBCA) or the Federal Circuit that there was a change in accounting practice that increased the price on an “affected contract.”¹¹⁶ Rather, “the parties created a wholly new cost estimate[.]”¹¹⁷

112. *Id.* at 1354.

113. *Id.* at 1350.

114. *Id.* at 1351.

115. *Id.* at 1352.

116. *Id.* at 1354 (“The critical inquiry under the FAR provision that defines an ‘affected contract’ is not whether there is an entirely new contract; it is whether costs were estimated under one accounting practice but reported under another. The Board answered that factual question in the negative.”).

117. *Id.* at 1355; *see, e.g.*, Terry L. Albertson & Linda S. Bruggeman, *Feature Comment: Donley v. Lockheed Martin Corp.: Only Contracts ‘Affected’ By Accounting Change Are Subject To Price Adjustment*, 52 *GOV’T CONTRACTOR* ¶ 363 (Nov. 10, 2010) (providing an in depth discussion of this issue). Mr. Albertson and Ms. Bruggeman were counsel of record for Lockheed Martin for the ASBCA proceedings; Mr. Albertson argued the case before the Federal Circuit. The authors suggest that “[t]his is an important decision that interprets for the first time the meaning of

Both the ASBCA and the Federal Circuit, which affirmed the ASBCA's decision, approached this dispute as a matter in which the new contracting officer basically rejected the pre-existing bargain between the contracting parties. Neither the board of contract appeals nor the appellate court would permit the government to suggest that the original bargain between the contracting parties failed due to a lack of authority on the part of the initial contracting officer.¹¹⁸ It seems reasonable to hope that, in the future, the case serves as a good example of the benefits of transparent business dealings.

[T]he government's contention that Lockheed "did not disclose its intent to remove the F-22 contract from the universe of CAS-affected contracts" and "failed to fully disclose the effect of its increased cost to the Government" is totally without merit. The Board found, with considerable evidentiary support, that Lockheed made the cost effects of its accounting changes clear to the Air Force negotiators and that they understood the effects of those changes.¹¹⁹

The Obama administration has maintained its commitment to transparency,¹²⁰ and the contractor community—for legitimate reasons—views many of the transparency related initiatives with fear and skepticism.¹²¹ But transparency—at least sometimes—can benefit

'affected' contract, and which could also determine whether price adjustments must be made in other circumstances." *Id.* at 3.

118. As the ASBCA explained: "We conclude that CAS administration requirements do not supersede or permit restructuring of the results of the parties' arms length price negotiations conducted by the Air Force with full knowledge and integration of the changed practices. The PCO had authority to negotiate the rephrased contract price." Appeal of Lockheed Martin Corporation, ASBCA No. 53822, 07-2 BCA ¶ 33,614 at 21.

119. *Donley*, 608 F.3d at 1355.

120. "My Administration is committed to creating an unprecedented level of openness in Government." Memorandum for the Heads of Executive Departments and Agencies: Transparency and Open Government, 74 Fed. Reg. 4,685 (Jan. 26, 2009); see also Memorandum for the Heads of Executive Departments and Agencies: Freedom of Information Act, 74 Fed. Reg. 4,683 (Jan. 26, 2009) ("A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, 'sunlight is said to be the best of disinfectants.'").

121. See, e.g., *The Federal Awardee Performance and Integrity Information System*, PAST PERFORMANCE INFORMATION RETRIEVAL SYSTEM, available at <http://www.ppirs.gov/fapiis.html> (last visited Jan. 30, 2011) (describing FAPIIS as "an information system that contains specific information on the integrity and performance of covered Federal agency contractors and grantees"); see also *New Law Requires Public Posting Of Contractor Responsibility Data*, 52 GOV'T CONTRACTOR ¶ 281, Aug. 18, 2010, at 7 (stating that "[t]he Professional Services Council warns that publicly releasing FAPIIS [contractor qualification and misconduct] data could create 'a politically motivated blacklist of vendors and improperly limit the Government's ability to access the best qualified vendors in the marketplace.'"); Gloria Sochon, *Federal Awardee Performance and Integrity Information System (FAPIS): Spotlight on Contractor Responsibility*, CONT. MGMT. 36, 39-40 (Jan. 2011) (describing the types of information that must be reported to FAPIIS).

the contractor in dealing with its government customer. For that reason, it is heartening to see the Federal Circuit affirm the fact findings of the ASBCA.¹²²

The case should also interest both contractors and agency personnel frustrated with their current business relationship with DCAA.¹²³ Expressing a sense of déjà vu earlier this year, Vern Edwards referred to the Arthur Anderson report that accompanied the 1986 Packard Commission Report, which, twenty five years later, seems eerily current.

Deterioration of the contracting officer's authority as the government's team leader together with an apparent increase in DCAA's authority appears to be a principal cause of the duplication and inefficiency in the audit and oversight process. *There is a perception among contractors that DCAA is marching to its own drummer, who may or may not be playing the same tune as the rest of the government. . . . Contractors believe that the practical . . . result . . . has been a change in the role of DCAA auditor from adviser to decision maker and negotiator. In this latter role, contractors see DCAA as generally inflexible and [Administrative Contracting Officers] as reluctant to take a position contrary to DCAA because of concern about being subjected to criticism. The net effect of this situation is a procurement environment fraught with indecision, delays, and unnecessary and costly disputes.*

. . . [A]t times, contracting officers simply find it easier to "go along" with DCAA than to challenge the auditor's position. This is precisely the perception that many contractors have of the contracting officer in today's environment.

. . . .

. . . [A DCAA representative responded that DCAA] should be under no constraint as to what it can say or challenge. . . . DCAA's purpose is not to support the [contracting officer]'s procurement objectives, but rather to protect the taxpayers' dollars. . . . [H]e sees DCAA as having to be "independent" from both contractors and contracting officers. . . . *[I]t is not difficult to see how internal disagreements, "turf battles," and lack of communication can occur, and*

122. Indeed, as a general rule, CAS cases seem like a particularly logical place for the Federal Circuit to defer to both the finder of fact and the board judges' superior expertise and familiarity with this regime.

123. See, e.g., Vernon J. Edwards, *Reliving History: The New DOD Policy On Resolution Of Contract Audit Recommendations*, 24 NASH & CIBINIC REP. ¶ 3, at 11 (Jan. 2010) (discussing, among other things, a 1984 Cuneo Lecture at the Army Judge Advocate General's School, in which Lockheed's John Cavanaugh said: "Industry reaction has been that in effect the contracting officer is being required to share his authority with government auditors, who in the past have had an advisory role").

*how this can lead to the lack of coordination and efficiency in the audit and oversight process experienced by the contractors . . .*¹²⁴

History repeats itself. Edwards opines that: “Taken individually, these limitations on [contracting officer] authority and increases of auditor authority may be unobjectionable. However, in today’s environment, and when considered in their totality, they appear to have a significant chilling effect on [contracting officer’s] performance of their duty to personally and independently issue final decisions on contractors’ claims.”¹²⁵

Returning to the cases, I also struggled with *M. Maropakis Carpentry, Inc. v. United States*,¹²⁶ one of the court’s most formalistic decisions.¹²⁷ As discussed below, I was not alone.

Maropakis completed the contract, for roof and window replacement, more than a year late. Maropakis put forward a number of alleged excuses or justifications for its delayed performance, including the inability to locate a window manufacturer and the search for a metal fabricator, the need to re-submit plans, the discovery of lead based paint, and the Navy’s prohibition of the use of asphalt as a roofing adhesive.¹²⁸ The contracting officer responded “that Maropakis did not ‘present[] sufficient justification to warrant the time extension’ requested.”¹²⁹ Subsequently, the contracting officer noted Maropakis’ failure to respond to that letter or request a contracting officer’s final decision.¹³⁰ The contracting officer also reminded Maropakis that the contract’s liquidated damages clause entitled the government to recover \$650 from Maropakis for each day after the passage of the modified delivery date.¹³¹ After an additional exchange of correspondence, the contracting officer rendered a decision demanding approximately \$300,000 in liquidated damages.¹³²

124. THE PRESIDENT’S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT, *Conduct and Accountability: A Report to the President*, app. D at 135–36 (June 1986) (emphasis added).

125. Edwards, *Reliving History*, *supra* note 123, at 12 (emphasis omitted) (quoting Ralph C. Nash & John Cibinic, *Role of the Auditor: Any Room Left for the Contracting Officer?*,

1 NASH & CIBINIC REP. ¶ 66 (1987)); *see also* Thomas P. Barletta & William T. Keevan, *Feature Comment: Legal, Accounting and Practical Considerations in Responding to DCAA Audits of Contractor Internal Controls Systems*, 33 GOV’T CONTRACTOR ¶ 298, Sept. 1, 2010, at 8 (“DCAA’s recent guidance on audits of contractor internal controls presents a number of issues and potential risks for contractors . . .”).

126. 609 F.3d 1323 (Fed. Cir. 2010).

127. *See, e.g.*, Thomas, *supra* note 3, at 773–75 (discussing “formalism”).

128. *Maropakis*, 609 F.3d at 1325–26.

129. *Id.* at 1326 (omission in original).

130. *Id.*

131. *Id.* at 1325–26 (citing 48 C.F.R. § 52.211–12).

132. *Id.* at 1326.

Maropakis sued in the Court of Federal Claims.¹³³ The court eventually dismissed Maropakis' claim for time extensions and granted summary judgment in favor of the government on the liquidated damages.¹³⁴ On appeal, among other things, Maropakis asserted "that it was not required to comply with the jurisdictional prerequisites of the [Contract Disputes Act of 1978 (CDA)] to assert its claim for a time extension as a defense to the government's counterclaim for liquidated damages."¹³⁵

With regard to its claim for time extensions, the majority concluded that "there is nothing in the CDA that excuses contractor compliance with the explicit CDA claim requirements."¹³⁶ Accordingly, the majority held that the trial court "correctly dismissed Maropakis's breach of contract claim for lack of jurisdiction."¹³⁷ Similarly, with regard to the liquidated damages, the majority held that "the Court of Federal Claims correctly required Maropakis to comply with the CDA requirements notwithstanding Maropakis's styling of its claim as a defense to a government counterclaim[.]"¹³⁸ The majority explained:

The statutory language of the CDA is explicit in requiring a contractor to make a valid claim to the contracting officer prior to litigating that claim. The purpose of this requirement is to encourage the resolution of disagreements at the contracting officer level thereby saving both parties the expense of litigation. . . . Maropakis does not point to any authority that provides an exception to the CDA claim requirements when a contractor's *claim for contract modification is made in defense to a government claim*. And we see no reason to create such an exception. Thus, we hold that *a contractor seeking an adjustment of contract terms must meet the jurisdictional requirements and procedural prerequisites of the CDA, whether asserting the claim against the government as an affirmative claim or as a defense to a government action*.¹³⁹

What is particularly striking is that no one disputed the COFC's jurisdiction. The court conceded that: (1) the Court of Federal Claims had jurisdiction over both Maropakis's claim relating to the liquidated damages *and* the government's counterclaim by the government; and (2) both parties agreed that certification was

133. *Id.*

134. *Id.* at 1326–27.

135. *Id.* at 1327.

136. *Id.* at 1329.

137. *Id.*

138. *Id.* at 1331.

139. *Id.* at 1331 (internal citations omitted) (emphasis added); *see* 48 C.F.R. § 33.204; *see also Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1580 (Fed. Cir. 1995).

unnecessary for the liquidated damages claim; the contracting officer's final decision on that issue was proper.¹⁴⁰

Accordingly, in light of the discussion, above, it is only fitting that Judge Newman dissented, vigorously, in this case.

The issue here is not whether Maropakis perfected a monetary claim of its own, but whether Maropakis is to be permitted to defend against the government's claim. No rule or precedent holds that a contractor forfeits its right of defense if it does not file its own claim. And the court is misguided in its ruling that the government's claim for damages cannot be defended against unless the contractor first undertakes the formal procedures of contract modification. . . .

The right to defend against an adverse claim is not a matter of "jurisdiction," nor of grace; it is a matter of right.¹⁴¹

Like many commentators, I find myself aligned with the dissent.¹⁴² Historically, there seems no debate that the government's demand for liquidated damages is, well, a government claim. Accordingly, familiarity with the CDA leads me to agree with the assertion – indeed, I find it seemingly axiomatic – that “a defense to a government claim is not a request for a contract modification—it is simply a defense and nothing more.”¹⁴³

Prior decisions of both the [BCA's] and the COFC's predecessor courts have discussed the difference between a contractor's affirmative CDA claims arising out of or relating to the contract to combat a liquidated damages assessment versus a contractor's defenses against an assessment through an attack of its factual underpinnings. The key to understanding this distinction is in the form of relief requested. An affirmative CDA claim is an attempt to modify or adjust the contract to counter the liquidated damages assessment (e.g., compensable time extensions as a result of government delays). A factual defense to a liquidated damages assessment merely serves to attack the assessment itself (e.g., the government's assessment was incorrect because the delay was excused as a result of government delays). Plainly stated, a CDA claim seeks affirmative relief under the contract through a contract

140. *Maropakis*, 609 F.3d at 1330.

141. *Id.* at 1334-35.

142. Daniel Seiden, *Federal Circuit Says Valid CDA Claim Needed for Jurisdiction to Defend Government Claim*, 93 FED. CONT. REP. (BNA) 441 (2010) (citing senior bar members' reactions, including: "It is shocking that the court would ascribe to Congress such a bizarre and unjust intent in enacting the Contract Disputes Act"; "An unfair formalism creating obstacles to a just result is bad enough, but this is appalling"; and describing the decision as "another dismaying performance by the Federal Circuit").

143. *Id.* (citing interview with John Pachter).

adjustment; a factual defense only attempts to reduce or eliminate the liquidated damages assessment.¹⁴⁴

Despite any confusion that arose leading up to the litigation, “the bottom line still should be that there is a difference between an affirmative claim for costs due to a government delay versus a factual defense that the government’s actions delayed the contract resulting in an improper liquidated damages assessment.”¹⁴⁵

It is difficult to conceive of a more bizarre holding than this rule that if a defense looks like an affirmative claim, it can only be asserted if it meets the standard of being a proper CDA claim. We can find nothing in the CDA that would lead to this conclusion and it surely flies in the face of the congressional purpose of providing contractors a fair procedure for resolving disputes. We never had any problem with the holding in *Ruhnau-Evans-Ruhnau Associates v. U.S.*, 3 Cl. Ct. 217 (1983), that precludes interest on a Government claim unless it is converted into a contractor claim. However, it is far stretch to hold that a contractor cannot even assert a defense to a Government claim unless it is converted into a contractor claim. We agree with the dissent that this decision is “an affront to the principles upon which these courts were founded.”¹⁴⁶

I doubt that *Maropakis* will prove to be the Federal Circuit’s last word on this issue.

Turning to terminations and breach, in *McHugh v. DLT Solutions, Inc.*,¹⁴⁷ the Federal Circuit reversed the Armed Services Board of Contract Appeals (ASBCA). The most significant aspect of the dispute is that the court agreed with the ASBCA that the government properly terminated the contract for the convenience of the government. “[T]he software was never deployed . . . [and] the contracting officer returned all compact disks and software documentation relating to the contract”¹⁴⁸

The unique aspect of the case was the breach claim, which the ASBCA granted, but the appellate court rejected. Prior to the termination, the parties modified the contract “to include a non-substitution clause that prevented [the government] from replacing the leased Oracle software with functionally similar software for a

144. Raymond S.E. Pushkar & Justin M. Ganderson, *Federal Circuit Contravenes Purposes of CDA in Holding on Government Liquidated Damages Assessments*, 94 FED. CONT. REP. (BNA) 81 (2010) (emphasis omitted).

145. *Id.* (emphasis omitted).

146. Ralph C. Nash, *Defense to a Government Claim is a Contractor Claim: A Weird Thought*, 24 NASH & CIBINIC REP. ¶ 42, at 135 (Sept. 2010); see also *CDA Procedures Apply To Contractor Defense To Government Claim, Fed. Cir. Holds*, 52 GOV’T CONTRACTOR ¶ 225 (June 30, 2010).

147. 618 F.3d 1375 (Fed. Cir. 2010).

148. *Id.* at 1377–78.

period of one year after the expiration or termination of the contract.”¹⁴⁹ After the termination, the contractor “alleged that the government had breached the non-substitution clause of the contract by replacing the . . . software with functionally equivalent . . . software.”¹⁵⁰ Even acknowledging that the government did not use the software, the ASBCA “reasoned that the non-substitution clause was bargained-for consideration between the parties and was binding. . . . [Accordingly, the government] breached the non-substitution clause in the contract and was liable for expectation damages.”¹⁵¹

The Federal Circuit rejected the ASBCA’s interpretation of the contractual language. True to form, the court noted that “[c]ontract interpretation begins with the plain language of the written agreement” and reached for Webster’s Dictionary.¹⁵² Finding that “[t]he dictionary definition of the word ‘replace’ requires substitution of one by another [or] . . . ‘to put something new in the place of[,]’” the court found that the government’s use of pre-existing applications did not amount to replacements.¹⁵³

The Federal Circuit addressed a long-simmering cost and pricing issue in *ATK Thiokol, Inc. v. United States*.¹⁵⁴ The court affirmed the COFC decision¹⁵⁵ holding that the Independent Research and Development (IR&D) costs at issue had been properly allocated as indirect costs under the Cost Accounting Standards (CAS) and the FAR.¹⁵⁶ Even though the courts agreed on the outcome, “[t]he Federal Circuit took a more traditional, legalistic approach.”¹⁵⁷ Rarely have the Federal Circuit’s forays into the CAS concluded as efficiently.¹⁵⁸ As the contractor’s advocates explained:

149. *Id.* at 1377.

150. *Id.* at 1378.

151. *Id.* at 1379. Given the ASBCA’s findings, the award of expectation damages for breach of a government contract would be the correct, but nonetheless an exceptional, remedy.

152. *Id.* at 1380. It is not my intent to suggest that this instance, alone, confirms that the “court is wedded to dictionaries.” See, e.g., Nash, *Implied Contract to Fairly and Honestly Consider an Offer*, *supra* note 86, at 85. Conversely, I am confident that at least some readers will be interested to know that the court relied on the online version of Webster’s.

153. *McHugh*, 618 F.3d at 1380.

154. 598 F.3d 1329 (Fed. Cir. 2010).

155. 68 Fed. Cl. 612 (2005), *aff’d* 598 F.3d 1329 (Fed. Cir. 2010).

156. *Id.* at 645.

157. Paul E. Pompeo, *Practitioner’s Comment: Fed. Cir. Adopts Broad View of IR&D*, 52 GOV’T CONTRACTOR ¶ 129, Apr. 7, 2010, at 12–13 also opining that the “decision should not be tallied as a ‘win for contractors’—it benefits both contractors and the Government”).

158. No doubt, however, the government must have been frustrated by how little traction its arguments achieved. Nor does the court offer an explanation for the more than four year period required for the appeal to be resolved.

For the last four decades . . . there has been much debate regarding when contractors can recover R&D costs as indirect costs, or [IR&D] costs, spread over multiple contracts, as opposed to direct costs of a single contract. This debate centers on the regulatory requirement that R&D costs are recoverable as indirect IR&D costs unless the R&D effort is “required in the performance of a contract.” . . .

. . . [T]he court] held that R&D effort is only “required in the performance of a contract” when the effort is specifically required by a contract’s terms. . . .

. . . [This] should end much of the uncertainty

The . . . decision . . . provides added confidence to contractors that their adherence to the terms of their [CAS] Disclosure Statements will guide whether R&D costs are properly classified as indirect costs under CAS 420 and are allowable under [FAR] 31.205-18. Indeed, the Federal Circuit affirmed that *contractors, within the broad parameters established by the CAS, are free to adopt cost accounting practices that make sense for their businesses and that, once established and not otherwise non-compliant, bind the contractor and the government.*

Finally, the . . . decision provides guidance on proper contractor accounting for bid and proposal (B&P) costs, costs that are similar to IR&D costs and governed by the same regulatory framework.¹⁵⁹

As a related aside, I was surprised, in September, by the passage on IR&D costs contained in Under Secretary of Defense Ashton Carters’ *Better Buying Power* memorandum, promoting his high-profile efficiency and productivity initiative.¹⁶⁰ Carter reported that DoD “reimburses industry as an allowable cost over \$3 billion annually” in IR&D.¹⁶¹

The paltry sum was stunning. Carter suggested that “there is some evidence that the defense industry has reduced its in-house laboratory infrastructure to a point not envisioned in the 1990s[,]”¹⁶² which seems particularly disturbing given the government’s currently meager level of investment in path-breaking research and its future prospects in light of the government’s dire fiscal condition.

159. Thomas A. Lemmer, et al., *Maximizing Contractor Recovery of IR&D Costs: Federal Circuit Affirms ATK Thiokol*, 45 PROCUREMENT LAW., Summer 2010, at 27, 27–28 (emphasis added); see also Thomas A. Lemmer & Phillip R. Seckman, *Federal Circuit Provides Needed Clarity on Proper Classification of IR&D Costs*, 93 FED. CONT. REP. (BNA) 286 (2010) (summarizing *ATK Thiokol*).

160. See Memorandum from Ashton B. Carter, Under Secretary of Defense for Acquisition Professionals, *Better Buying Power: Guidance for Obtaining Greater Efficiency and Productivity in Defense Spending* (Sept. 14, 2010), available at http://www.acq.osd.mil/docs/USD_ATL_Guidance_Memo_September_14_2010_FINAL.PDF.

161. *Id.* at 8.

162. *Id.*

Moreover, it was also intriguing to read Carter's perspective on limited visibility into contractor's "independent" efforts, particularly as he bemoaned that DOD lacks "insight into how or where these funds go or if they benefit the Department or promote the technological prowess of our industry."¹⁶³ As is the case with many of these initiatives, it will be fascinating to learn, over time, which reforms, if any, take hold at DoD.

C. Winstar Cases

In *Holland v. United States*,¹⁶⁴ the court noted that this was one of the last in a long line of cases¹⁶⁵ which stemmed from the Supreme Court's decision in *United States v. Winstar Corp.*¹⁶⁶ *Winstar*, of course, opened the door for certain financial institutions to recover damages when the government, by legislation, in effect broke its promises to allow the plaintiffs to use special accounting methods to salvage failed thrifts.¹⁶⁷ While that long procession of cases may be drawing to a close, the precedents that flowed from those cases—including *Holland*—are likely to echo for many years to come. It remains a matter of some debate, of course, what impact these cases will have—in the short or the long-term—on traditional government contracts.¹⁶⁸

In *Holland*, the court reversed a 2008 decision of the Court of Federal Claims, in which the trial court held the government liable for \$18 million in damages.¹⁶⁹ Plaintiffs, investors that had acquired

163. *Id.*

164. 621 F.3d 1366 (Fed. Cir. 2010).

165. *Id.* at 1373.

166. 518 U.S. 839 (1996).

167. *Id.* at 909–10. See generally Federal Deposit Insurance Corporation (FDIC), *The S&L Crisis: A Chrono-Bibliography*, <http://www.fdic.gov/bank/historical/s&l/> (last updated Dec. 20, 2002) (summarizing key events in the Savings and Loan Crisis).

168. See, e.g., Michael R. Rizzo & Virginia M. Gomez, *Erosion of the Sovereign Acts Doctrine? How Recent Winstar and Spent Nuclear Fuel Litigation Impacts Government Contractors*, 42 PROCUREMENT LAW., Spring 2007, at 3 suggesting that: "Contractors should keep in mind that (1) the courts are inclined to review this new generation of breach of contract claims on a case-by-case basis and to construe strictly the terms and circumstances of the particular contract, and some judges and courts still look for exceptions to shield the Government from large damage awards; (2) the Government will undoubtedly attempt to insert risk-shifting or non-liability provisions into contracts that expressly protect it from the consequences of regulatory or statutory change; and, as a result, (3) contractors that decide to bring breach of contract claims arising out of regulatory or legislative changes that alter the Government's existing contractual obligations should be prepared for potentially long and expensive litigation."; see also Joshua I. Schwartz, *The Status of the Sovereign Acts and Unmistakability Doctrines in the Wake of Winstar: An Interim Report*, 51 ALA. L. REV. 1177, 1179 (2000) (arguing that *Winstar* has not "effected any radical change in the law respecting the liability of the United States for retroactive legislation affecting the government's contractual undertakings").

169. *Holland v. United States*, 86 Fed. Cl. 681, 699 (2009), *rev'd* 621 F.3d 1366 (Fed. Cir. 2010).

failing thrifts under assistance agreements with the Federal Savings and Loan Insurance Corporation (FSLIC), claimed (as is the norm in the *Winstar* cases) that those agreements were breached by Congress' enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), which erased many of the regulatory benefits previously agreed to by the FSLIC under the assistance agreements.¹⁷⁰ The government argued, however, that the plaintiffs' claims had been erased by a settlement agreement that the Federal Deposit Insurance Corporation (FDIC) entered into with certain involved parties.¹⁷¹ Under that settlement agreement, the FDIC agreed, inter alia, to pay \$3.3 million in financial assistance as "full satisfaction of any and all remaining payments or contributions due or to become due under the Assistance Agreements."¹⁷²

Noting that the case presented an "unusual factual situation,"¹⁷³ the Federal Circuit relied narrowly on Illinois law (the law governing the settlement agreement)¹⁷⁴ to conclude that "Plaintiffs' release of all claims against the FDIC . . . in the Settlement Agreement also effected a release of all claims against its co-obligor, the [Office of Thrift Supervision]."¹⁷⁵ Because the settlement agreement did not explicitly *exclude* the regulatory promises that had earlier been made to plaintiffs, the Federal Circuit held that the settlement agreement covered the government's obligations under those regulatory promises, as well.¹⁷⁶

On its face, the decision is highly fact-specific, and arguably may be limited to the unique circumstances of the *Holland* case. It is possible, however, that the *Holland* decision may have a broader impact. In the coming years, as budgetary pressures grow, federal agencies will be more likely to rely upon private capital and investment to accomplish public objectives and missions.¹⁷⁷ In

170. *Id.* at 687.

171. *Id.*

172. *Id.* at 686.

173. *Holland*, 621 F.3d at 1373–74.

174. *Id.* at 1383 ("Neither party has pointed to any 'controlling federal law' on the effect of an accord and satisfaction with one co-obligor on other co-obligors. Thus, pursuant to the choice-of-law provision of the Settlement Agreement, we will analyze the issue under Illinois law.").

175. *Id.* at 1384; *see also id.* at 1377–78 (clarifying that "release and accord and satisfaction are distinct contractual defenses[,] but concluding, nonetheless, that "an agreement may constitute both a release and an accord and satisfaction, either of which may bar future claims").

176. *Id.* at 1383.

177. I fervently hope that the modern-era financial crisis and the Troubled Asset Relief Program (TARP) will not spawn a comparable generation of litigation. *See, e.g.*, CONGRESSIONAL OVERSIGHT PANEL, OCTOBER OVERSIGHT REPORT EXAMINING TREASURY'S USE OF FINANCIAL CRISIS CONTRACTING AUTHORITY (Oct. 14, 2010), available at <http://cop.senate.gov/documents/cop-101410-report.pdf>. One familiar

resolving problems that arise under those increasingly complicated arrangements, which are likely to span multiple agencies, private parties will have to be careful not to surrender too much in settlements with individual agencies. In light of *Holland*, it will be important to exclude other potential claims, against other agencies, in any settlement with an individual agency.

*Anchor Savings Bank v. United States*¹⁷⁸ is another of the vanishing breed of *Winstar* cases. The plaintiff bank had been forced to sell a valuable asset, a mortgage banking company, as a result of the capital shortfall when its regulatory agreements with the government were undermined by the FIRREA legislation.¹⁷⁹ Plaintiff sought damages, including lost profits, for that divestiture. After a long trial, the Court of Federal Claims awarded plaintiffs approximately \$382 million in damages, including, in part, lost profits.¹⁸⁰ On appeal, the Federal Circuit held that lost profits are, under certain circumstances, recoverable from the government, so long as (1) the lost profits were reasonably foreseeable, (2) the loss of profits was caused by the government's breach, and (3) the amount of the lost profits has been established with reasonable certainty.¹⁸¹

The government argued that Anchor's purchase and then forced sale of the asset were not reasonably foreseeable by the government, and so the damages were not recoverable.¹⁸² The Federal Circuit disagreed, however, and held that the trial court had

refrain voiced by the Congressional Oversight Panel resonated with me: "Initially, Treasury did not have enough trained [contracting officer's technical representatives (COTRs)] to manage the contracts, so it assigned a number of its senior officials as COTRs. Given the limited timeframe for executing the program, some of these officials were assigned COTR responsibilities without receiving formal training in their acquisition-related responsibilities. While Treasury replaced the senior-level COTRs with certified COTRs over time, the fact that officials without proper procurement training were charged with the administration and monitoring of contracts for a time potentially impeded efforts to implement effectively and oversee the TARP." *Id.* at 44. The federal government's consistent failure to staff the contract administration function is as well documented as it depressing. *See, e.g.,* Schooner & Greenspahn, *supra* note 63, at 16; Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549, 557 (2005) (noting that "[l]ack of training was not only evident on the side of the contractors. Military personnel themselves did not have the necessary training in the area of contract administration to adequately monitor and oversee the contracts").

178. 597 F.3d 1356 (Fed. Cir. 2010).

179. *Id.* at 1359–60.

180. *Anchor Sav. Bank v. United States*, 81 Fed. Cl. 1, 153 (2008) (the damages decision on appeal), *aff'd in part and remanded in part* 597 F.3d 1356 (Fed. Cir. 2010); *see also* *Anchor Sav. Bank v. United States*, 52 Fed. Cl. 406, 421 (2002) (the preceding liability decision).

181. *Anchor Sav. Bank*, 597 F.3d at 1361 (citing authorities). Each of these inquiries, the Federal Circuit noted, "presents a question of fact as to which we exercise 'clear error' review." *Id.*

182. *Id.* at 1630.

properly required only a general showing that (1) the government could reasonably have foreseen that the influx of supervisory goodwill under [the regulatory agreements] would cause the . . . institution to make investments in order to generate profit and rehabilitate the failing acquired thrifts; and (2) the government could reasonably have foreseen that a breach of contract would cause the acquiring institution to sell off those very investments in order to raise capital to meet the regulatory requirements.¹⁸³

Under this more expansive test, the court held that the trial court did not commit clear error in finding that Anchor's loss was foreseeable.¹⁸⁴

The ability of *Winstar* plaintiffs to recover lost profits differs markedly from traditional government contracts cases.¹⁸⁵ The court's introduction to its damages analysis describes a familiar common-law solution, but one that, for most part, is divorced from federal government contracting remedies. "Damages for breach of contract are designed to make the non-breaching party whole. One way to accomplish that objective is to award 'expectancy damages,' i.e., the benefits the non-breaching party would have expected to receive had the breach not occurred. Expectancy damages 'are often equated with lost profits, although they can include other damage elements as well.'"¹⁸⁶

Under traditional federal contracting cases, which typically arise out of lengthy, specific, standardized federal procurement contracts, the courts and the boards have been reluctant to allow lost profits because damages under those contracts are typically defined by heavily regulated and closely drafted remedy-granting clauses. Indeed, the government's extensive use of remedy-granting clauses causes what the common-law would deem breaches to remain within the contract's remedial scheme.¹⁸⁷ The contrast between the more

183. *Id.* at 1363 (rejecting the government's attempt to draw a more stringent foreseeability test from Federal Circuit case law).

184. *Id.* at 1364.

185. See, e.g., Rodger D. Citron, *Lessons From the Damages Decisions Following United States v. Winstar Corp.*, 32 PUB. CONT. L.J. 1, 32 (2002) (interpreting the courts' traditional refusal to assess expectancy damages against the government as a vestige of the ancient doctrine of sovereign immunity); Jon W. Burd, Note, *Where the Rabbit Hole Ends: A Working Model For Measuring Winstar-Type Damages in the Federal Circuit*, 13 FED. CIR. B.J. 657, 673 (2004) (explaining that expectancy damages, while commonplace in run of the mill contract cases, remain novel in the government contracts context).

186. *Anchor Sav. Bank, FSB v. United States*, 597 F.3d 1356, 1361 (Fed. Cir. 2010) (citing *Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374, 1380 (Fed. Cir. 2001) (recounting blackletter law concerning the basis for expectancy damages)).

187. It is easy to contrast the government's typical remedy-granting clause regime: [P]arties to government contracts use standardized remedy-granting clauses to allocate the risk of anticipated and unforeseen contingencies

expansive *Winstar* damages and the traditional presumption *against* lost profits under government contracts suggests that, as the government embarks on more complex commercial arrangements in the future, the government may attempt, by contract, to limit the remedies available to exclude the recovery of expectancy damages by the private parties potentially injured by government actions.

D. *Spent Nuclear Fuel*

Arguably the most intriguing case of the year, *Nebraska Public Power District v. United States*, not only involved a dozen Federal Circuit judges, but also pitted the exclusivity of the U.S. Court of Federal Claims against the generalist federal courts. Of course, it also involves the long-running Spent Nuclear Fuel saga.¹⁸⁸ The delays

between the parties. The implicit premise of these clauses is that they (1) dissuade contractors from padding their bids, offers, or proposals when competing for government business, and (2) reassure those contractors that the government will equitably adjust contracts to reimburse for unforeseen contingencies. This “contingency promise” essentially provides that in exchange for the contractor’s willingness not to inflate its contract price to insulate itself against certain potential, although unknown, liabilities, the government agrees to make the contractor whole when such liabilities are incurred.

During the performance of government contracts, if an unanticipated contingency arises that requires the contractor to incur additional costs, the parties have a number of options. The contracting officer and the contractor can agree upon compensation and bilaterally modify their contract. Alternatively, the contracting officer can unilaterally determine the additional compensation to be paid. If the contractor is dissatisfied with the amount of compensation, it can file a claim, which commences the disputes process.

Steven L. Schooner & Erin Siuda-Pfeffer, *Post-Katrina Reconstruction Liability: Exposing the Inferior Risk-Bearer*, 43 HARV. J. ON LEGIS. 287, 319–20 (2006).

188. This brief coverage, of course, cannot do justice to this topic, but recent commentary builds upon a rich source of analysis. See generally Marta Adams, *Yucca Mountain-Nevada’s Perspective*, 46 IDAHO L. REV. 423 (2010) (evinced typical NIMBY enthusiasm for the political derailment of the Yucca Mountain project); Thomas B. Cochran & Geoffrey H. Fettus, *Response: NRDC’s Perspective on the Nuclear Waste Dilemma*, 40 ENVTL. L. REP. 10791, 10792 (2010) (stating out the stark position that “the process of developing, licensing, and setting environmental and oversight standards for the proposed repository were repeatedly rigged or dramatically weakened to ensure the licensing of the proposed site rather than to provide safety for the length of time that the waste is dangerous”); Charles de Saillan, *Disposal of Spent Nuclear Fuel in the United States and Europe: A Persistent Environmental Problem*, 34 HARV. ENVTL. L. REV. 461 (2010) (providing a broad survey of how the disposal issue is handled internationally); David R. Hill, *Response: The NWPA and the Realities of our Current Situation*, 40 ENVTL. L. REP. 10795 (2010) (taking the position that “while [the statutory regime governing nuclear energy] may have significant problems and difficulties, [it] is worth salvaging”); Richard B. Stewart, *Solving the U.S. Nuclear Waste Dilemma*, 40 ENVTL. L. REP. 10783 (2010) (cautioning that the primary lesson of the Yucca Mountain boondoggle is that any future repository project must include “the informed assent of the public and of host localities”); Daniel T. Swanson, *Response: NWPA Is Still a Viable Option for Solving the Nuclear Waste Dilemma*, 40 ENVTL. L. REP. 10800 (2010) (arguing that there is still hope for Congress to create a permanent repository under the current legislation). The last four sources are most readily

associated with the construction and operation of the Yucca Mountain nuclear fuel repository generated endless litigation involving tens of billions of dollars of potential damages due under the Energy Department's Standard Contract. Still, I remain far more troubled that, today, after two decades of study, construction, and, of course, litigation, the federal government appears to have no viable alternative solution on the horizon for this significant problem.¹⁸⁹ Recent events involving the state of Japan's nuclear industry following the March 2011 earthquake and tsunami serve as a potent reminder of the stakes involved.¹⁹⁰

Pursuant to the Nuclear Waste Policy Act (NWPA),¹⁹¹ the United States Department of Energy (DOE) entered into contracts—referred to as the “Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste”—with nuclear power producers, including Nebraska Public Power District (NPPD), to dispose of the radioactive waste and spent nuclear fuel that the producers' power plants generated.¹⁹² The deal was relatively simple. The nuclear power producers paid fees with the understanding that DOE would begin picking up and disposing of the spent nuclear fuel no later than January 31, 1998.¹⁹³ The producers have paid their fees; indeed, the court notes that the utilities pay \$750 million into the spent nuclear fuel fund annually.¹⁹⁴ Despite DOE's stated

available via the Environmental Law Reporter's online database at <http://www.elr.info/NewsAnalysis/nasearch.cfm>.

189. “While DOE reaffirms its obligations to take possession and dispose of the nation's spent nuclear fuel and high-level nuclear waste, the Secretary of Energy has decided that a geologic repository at Yucca Mountain is not a workable option for long-term disposition of the materials.” U.S. Department of Energy Motion to Withdraw, *In re U.S. Dep't of Energy (High-Level Waste Repository)*, No. 63-001 (N.R.C. Atomic Safety and Licensing Board March 3, 2010) (withdrawing application for a license for a permanent repository at Yucca Mountain and noting that the Blue Ribbon Commission on America's Nuclear Future will undertake a review of alternative solutions), available at http://www.energy.gov/news/documents/DOE_Motion_to_Withdraw.pdf. See generally *Key Issues, Repository Development*, NUCLEAR ENERGY INSTITUTE, <http://www.nei.org/keyissues/nuclearwastedisposal/yuccamountain> (last visited Mar. 14, 2011); Barack Obama, *Presidential Memorandum-Blue Ribbon Commission on America's Nuclear Future* (Jan. 29, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-blue-ribbon-commission-americas-nuclear-future>, (“[T]he Nation's approach, developed more than 20 years ago, to managing materials derived from nuclear activities, including nuclear fuel and nuclear waste, has not proven effective.”).

190. Eric Niiler, *Japanese Nuclear Crisis Boosts Interest in At Home Radiation Monitoring*, WASH. POST, Mar. 21, 2011, available at http://www.washingtonpost.com/national/japanese-nuclear-crisis-boosts-interest-in-at-home-radiation-monitoring/2011/03/21/ABS0DA8_story.html.

191. 42 U.S.C. §§ 10101–10270 (2006).

192. 10 C.F.R. § 961.11 (2010).

193. 42 U.S.C. § 10222(a)(5)(B).

194. *NPPD II*, 590 F.3d 1357, 1360–61 (Fed. Cir. 2010) (en banc).

confidence,¹⁹⁵ no spent nuclear fuel has been collected. DOE then “took the position . . . that it did not have an unconditional obligation under the statute or the Standard Contract to accept nuclear waste by . . . 1998 [Rather,] the statutory deadline did not apply if DOE did not have a facility available to accept nuclear waste by that date.”¹⁹⁶ Not surprisingly, litigation resulted, including dozens of breach of contract actions commenced in the Court of Federal Claims.¹⁹⁷

Many suits were filed elsewhere, and, in 1996, an important development played out in the U.S. Court of Appeals for the D.C. Circuit. In *Indiana Michigan Power District v. United States*,¹⁹⁸ the D.C. Circuit concluded that DOE had an unconditional obligation under the NWPA to accept spent nuclear fuel by January 31, 1998.¹⁹⁹ Then, in 1997, in *Northern States Power Co. v. Department of Energy*,²⁰⁰ the D.C. Circuit issued a writ of mandamus ordering the DOE to proceed with contractual remedies consistent with NWPA’s mandate.²⁰¹ Intending to leave no wiggle room, the D.C. Circuit specifically denied DOE the ability to invoke the standard contract’s Unavoidable Delays clause. As a result, DOE could no longer assert that it was not responsible for damages that arose “out of causes beyond the control and without the fault or negligence of the party failing to perform.”²⁰²

Nearly a decade later, Court of Federal Claims Judge Francis Allegra concluded that the D.C. Circuit had over-reached and that its writ of mandamus was void.²⁰³ To the extent that Judge Allegra’s decision would have allowed DOE, once again, to invoke the

195. The court explained:

In response to questions about the remedies that would be available to ensure that DOE would perform its contractual obligations in a timely fashion, and in particular that it would meet the 1998 deadline, DOE stated, “The 1998 date is called for in the Act, and we believe it to be a realistic date. Our performance will be judged by meeting this date.” 48 Fed. Reg. at 16,598.

Id. at 1360.

196. *Id.* at 1361.

197. *Neb. Pub. Power Dist. v. United States (NPPD I)*, 73 Fed. Cl. 650, 673 (2006), *rev’d*, 590 F.3d 1357 (Fed. Cir. 2010).

198. 88 F.3d 1272 (D.C. Cir. 1996).

199. *Id.* at 1277.

200. 128 F.3d 754 (D.C. Cir. 1997).

201. *Id.* at 761.

202. *Id.* at 760 (quoting 10 C.F.R. § 961.11 (2010) (Article IX(A) of the contract, entitled “Unavoidable Delays by Purchaser or DOE”).

203. *NPPD I*, 73 Fed. Cl. at 674. The court admonished that

[a]ny notion that there is a meaningful distinction between interpreting a statute or a regulation so as to control an agency’s interpretation of a contract and interpreting the contract itself is belied by a legion of cases in this circuit that have construed contracts originating in legislation passed by Congress and done so by reference to the underlying statute.

Id. at 663.

Unavoidable Delays clause as a defense, an interlocutory appeal was taken to determine “whether the D.C. Circuit’s decisions in *Indiana Michigan* and *Northern States* are entitled to res judicata effect in the proceedings before the Court of Federal Claims.”²⁰⁴ The court heard the case en banc and, in a decision written by Judge Bryson, reversed. The Federal Circuit concluded that “the D.C. Circuit’s decisions in the *Indiana Michigan* and *Northern States* cases were not barred by sovereign immunity and should not have been denied res judicata effect on that ground.”²⁰⁵

The court systematically rejected the three rationales put forward by the COFC.

First, based on the analysis of the D.C. Circuit in *General Electric* and the decision of this court in *PSEG Nuclear, L.L.C. v. United States*, 465 F.3d 1343 (Fed. Cir. 2006), . . . section 119 of the NWPA authorized the D.C. Circuit to review the utilities’ statutory claim arising under section 302 of the Act. Second, . . . the ‘no adequate remedy’ requirement in section 10(c) of the APA does not apply to special statutory review provisions such as section 119 of the NWPA. Section 10(c) of the APA therefore did not bar the D.C. Circuit from exercising its jurisdiction to determine the scope of the government’s obligations under section 302 of the NWPA and to order appropriate relief to enforce those obligations. Finally, . . . the D.C. Circuit’s decision construing section 302 of the NWPA, and its order directing the government to act in accordance with the utilities’ rights under that provision, did not improperly intrude on the jurisdiction of the Court of Federal Claims to address NPPD’s breach of contract claim.²⁰⁶

The cadre of attorneys immersed in litigating spent nuclear fuel cases no doubt have been intrigued by the appellate court’s lengthy analysis of these issues. Most government contracts counsel, however, will find them of little utility. Ultimately, the Federal Circuit concluded that the D.C. Circuit did not usurp the COFC’s prerogatives.

The D.C. Circuit’s order prohibited the government from using contract interpretation as a means of avoiding its statutory obligations under section 302, which the D.C. Circuit was authorized to do as a means of enforcing the statutory claim that was brought before it in the *Indiana Michigan* case. Beyond that implementation of its statutory ruling, the D.C. Circuit properly left

204. *NPPD II*, 590 F.3d at 1363.

205. *Id.* at 1376.

206. *Id.* at 1364–65.

all issues of contract breach, enforcement, and remedy to be determined in the litigation before the Court of Federal Claims.²⁰⁷

Judge Gajarsa dissented vigorously, arguing that the D.C. Circuit interpreted the Standard Contract rather than the statute and, in so doing “infringe[d] upon the Court of Federal Claims’s exclusive Tucker Act jurisdiction over the administration of contract disputes, thereby impacting the sovereign immunity of the United States and undermining this court’s duty to review the contract decisions of the Court of Federal Claims.”²⁰⁸ Judge Gajarsa’s frustration with his colleagues is clear, and he sees the majority’s lengthy opinion as no more than a bow to the D.C. Circuit. He concludes: “I can appreciate the majority’s attempt to avoid criticism of a sister court, but the sheer mushy applesauce consistency of the majority opinion in avoiding a jurisdictional confrontation with the D.C. Circuit should be obvious.”²⁰⁹

Judges Dyk and Linn, in a pithy concurrence, attempt to cabin Judge Gajarsa’s “overreading” of the majority opinion.²¹⁰

The court appears to be unanimous in agreeing that the District of Columbia Circuit had jurisdiction to interpret the statute, and that the D.C. Circuit did not (and could not) address purely remedial questions. . . . [C]ontrary to the dissent, I do not read either the D.C. Circuit or the majority here as ordering the government to pay money damages (expectancy damages) for breach of the agreement.²¹¹

At least one commentator read the Federal Circuit’s decision as diminishing the role of the Court of Federal Claims and an invitation to forum shop.

Rather than continuing to limit the reach of *Bowen*, however, the court once more elevated form over substance to open a new front in the assault on the jurisdiction of the [COFC]. The [Federal Circuit’s] decision allows courts other than the [COFC] to interpret contractual provisions whenever the construction of a statute influences the outcome of the contractual issues. Consequently, [this case] enhances the ability of plaintiffs to forum shop while further diminishing the exclusive jurisdiction of the [COFC].²¹²

207. *Id.* at 1365.

208. *Id.* at 1377 (Gajarsa, J., dissenting).

209. *Id.* at 1386–87.

210. *Id.* at 1376 (Dyk, J., concurring).

211. *Id.* at 1376–77.

212. Thies, *supra* note 32, at 1204 (citing *Bowen v. Massachusetts*, 487 U.S. 879 (1988)).

This seems extreme. Dozens of spent nuclear fuel cases have now percolated up through the Court of Federal Claims and Federal Circuit for more than a decade. One trial judge analyzed the state of play and saw the landscape differently from his colleagues. He laid out his objections, supported them, and stood behind his principles. The Federal Circuit properly chose to engage in the matter and, given the significance of the issue, provided en banc review. A surprising level of cohesion—favoring the pre-existing status quo—developed. The court explained, at great length, its reasoning. Moreover, though the trial court had gone so far as to postulate “that the mandamus derivatively threatens the jurisdiction of the Federal Circuit,”²¹³ the Federal Circuit, with the exception of Judge Gajarsa, did not share that concern. In sum, the system remained intact.

At no point did the Federal Circuit digress into hand-wringing over the sad reality that surrounds the spent nuclear fuel cases. These cases involve a large number of entities engaged in a sophisticated business that is heavily regulated by the government. The government—for now a generation—has tied an entire industry’s hands with regard to a solution to an immense, complicated problem. The government mandated that private industry contribute staggering sums to fund that mandated solution. The government invested much time and energy in that solution, all the while brashly, publicly, eschewing a fallback position. Through no fault of the affected industry, the government’s solution stalled and, subsequently, entirely derailed. The government does not wish to reimburse the industry for its investment into the spent nuclear fuel fund or the damages caused by the solution’s implosion. There is little point in inquiring into whether those funds may be required to fund the “next” solution. The courts must now resolve what, frankly, remains a no-win situation. At least the nuclear industry, the attorneys, and the courts are not headed back to square one.

CONCLUSION: A CONVERGENCE OF JUSTICE AND RISK ALLOCATION?

This article concludes with the admittedly unusual matter of *Agredano v. United States*.²¹⁴ *Agredano*’s inclusion here is not meant to suggest this case is of significance to government contracts practitioners. Rather, unlike most of the cases this year, it speaks volumes of how some of the judges on the court view the modern

213. *NPPD I*, 73 Fed. Cl. 650, 673–74 (2006) (explaining—or perhaps more accurately, speculating—that if the Court of Federal Claims respected the D.C. Circuit’s writ of mandamus, then the writ might be off-limits to the Federal Circuit on appeal).

214. 595 F.3d 1278 (Fed. Cir. 2010), *cert. denied*, 131 S. Ct. 994 (2011).

court's role. As suggested above, it could offer an example of the court's preference for simple, formalistic solutions to complex problems.²¹⁵ But I sense I am not alone in reading this case as one in which the court chose to cast itself as a gatekeeper and protector of the public fisc rather than the last station at which some minimal amount of fairness for those who do business with the government will be maintained. The court succinctly explains:

Agredano purchased a 1987 Nissan Pathfinder at [a government] auction. The vehicle had been seized by Customs . . . when its previous owner attempted to transport marijuana across the Mexican border While Customs agents detected and removed some of the marijuana at that time, more [OK, a mere seventeen kilograms, or more than thirty-five pounds] remained in the vehicle unbeknownst to Customs or Agredano. Several months after the auction, . . . Agredano was traveling in the Pathfinder in Mexico with . . . his business partner and brother-in-law. The two men were stopped at a checkpoint by Mexican soldiers who inspected the vehicle and found the hidden marijuana. Both men were arrested and spent nearly a year in prison before being exonerated by a Mexican appellate court²¹⁶

After being denied a remedy in District Court,²¹⁷ Agredano sought relief in the Court of Federal Claims. Chief Judge Emily Hewitt crafted a lengthy, detailed opinion, in which she determined that the government breached its contract when it sold Agredano an automobile with a stunning quantity of marijuana hidden inside.²¹⁸ Among other things, Judge Hewitt explained that, although Agredano knew the cars available at government auctions had been seized, he had no knowledge as to where or why they were seized. Agredano previously had purchased several vehicles at U.S. government auctions without incident.²¹⁹ In addition, “[p]laintiff was unable to open the doors and inspect the interior of the [car] directly,”²²⁰ and, more significantly, “[e]ven if plaintiff [and his colleague] had been able to inspect the interior of the car, the

215. See Thomas, *supra* note 3, at 777 (arguing that “a formalist movement is afoot” in the Federal Circuit).

216. *Agredano*, 595 F.3d at 1279–80.

217. The United States District Court for the Southern District of California granted summary judgment against Agredano on his claim under the Federal Tort Claims Act claim because—regardless of where the tortious act or omission occurred—his arrest occurred in Mexico, a foreign country. *Agredano v. United States*, No. 02CV2243B, Docket Entry No. 71 (S.D. Cal. Nov. 3, 2004) (relying on *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)).

218. *Agredano v. United States*, 82 Fed. Cl. 416, 452 (2008), *rev'd*, 595 F.3d 1278 (Fed. Cir. 2010), *cert. denied*, 131 S. Ct. 994 (2011).

219. *Id.* at 421.

220. *Id.* at 422.

testimony at trial established that they, as lay people, would have been unlikely to discover the contraband themselves.”²²¹ Indeed, “[s]everal Customs agents testified that no layperson could discover hidden contraband within a vehicle.”²²²

Accordingly, the trial court found an implied-in-fact warranty that the automobile was free from contraband at the time of sale.²²³ “When plaintiff purchased the [car] from defendant, both parties had the same expectation: that the [car] was free of *all* contraband. That mutual and common expectation is the ‘meeting of minds’ within this contract.”²²⁴ Specifically, the trial court found that “the ‘as is’ clause in the contract does not preclude the existence of a possible implied-in-fact warranty in this case because the ‘as is’ clause does not cover a situation in which defendant sells the [car] with concealed contraband to plaintiff.”²²⁵ The trial court awarded Agredano \$350,000 for attorneys fees incurred during his criminal proceedings in Mexico; \$48,000 for lost income; \$10,000 for medical bills incurred from the injuries and illnesses resulting from his imprisonment and \$80,000 for foreseeable future medical expenses; \$12,500 for psychiatric bills and \$46,500 for reasonably foreseeable future psychiatric expenses; \$2,600 for automobile’s fair market value; and \$1,254 for Agredano’s family’s expenses bringing him supplies while he was in prison.²²⁶

The Federal Circuit reversed. The court tersely concluded that:

Customs’ responsibility to remove contraband from forfeited vehicles does not provide a contractual warranty to future purchasers of the vehicles that it has done so. . . . [T]he source of any responsibility on the part of Customs to search vehicles and remove contraband is its regulatory function[,] and a failure to adequately perform this responsibility does not provide a contractual remedy.²²⁷

221. *Id.* at 436.

222. *Id.* at 445.

223. *Id.* at 430.

224. *Id.* at 440.

225. *Id.* at 435. Moreover, the “evidence at trial is consistent with the court’s earlier holding that the ‘as is’ clause does not preclude the existence of an implied-in-fact warranty, (citation omitted) and demonstrates as well that, as a matter of fact, plaintiff could not reasonably have been expected to discover hidden narcotics in the Pathfinder.” *Id.* at 437.

226. *See id.* at 452 (reciting the laundry list of damages Agredano incurred). “The ‘meeting of the minds’ in this case . . . is a mutual, if tacit, understanding, between plaintiff and defendant that the Pathfinder was free of all contraband when defendant sold the Pathfinder to plaintiff.” *Id.* at 430.

227. *Agredano v. United States*, 595 F.3d 1278, 1281 (Fed. Cir. 2010) (citation omitted), *cert. denied*, 131 S. Ct. 994 (2011). Judge Dyk concurred:

Absent a contractual warranty disclaimer, . . . the sale of an automobile . . . likely carries with it an implied-in-fact warranty of fitness, including a

Given the trial court's painstaking analysis, the Federal Circuit's conclusion seems not only incorrect, but unnecessarily timid. Contract law serves, in large part, to allocate risk. As my predecessor and colleague Emeritus Professor Ralph Nash explained:

[R]isk allocation generally occurs only when the results of strict enforcement would be harsh. Hence, this reallocation is probably better characterized as a safety valve releasing the pressure generated by an agreement that does not satisfactorily resolve a problem that occurs during performance. The price of this safety valve is unpredictability. This price seems worth paying, however, to assure that risk allocation between the parties retains some degree of balance in terms of the events that actually occur during contract performance.²²⁸

The outcome in *Agredano*, by any objective measure, is harsh. An individual purchased an automobile from the government, at auction, for under \$3,000. As a direct result, he and his colleague sustained epic monetary and non-monetary damages. The government, rather than the individual, Mr. Agredano, was the party to the transaction best positioned to avoid the risk associated with, or absorb the harm caused by, the government's failure to fulfill its regulatory duty and discover contraband in the vehicle prior to its resale.²²⁹ Nor is it reasonable to assume that either party anticipated this particular risk or this result. It seems inexplicable that this court—of all courts—could conclude that the proper allocation of

warranty that the vehicle does not contain illegal drugs. [Nonetheless, he agrees] that the contract here explicitly disclaimed all warranties [and concludes that the] government's regulatory practice of inspecting such vehicles for contraband cannot overcome this disclaimer.

Id. at 1282 (Dyk, J., concurring).

228. Ralph C. Nash, Jr., *Risk Allocation in Government Contracts*, 34 GEO. WASH. L. REV. 693, 718 (1966) (primarily discussing pricing provisions).

229. Indeed, the United States was the superior risk bearer in this case:

The superior risk bearer is the party best positioned to (1) appraise, in advance, the likelihood that the risk will occur and the magnitude of the harm if it does occur, (2) insure against the risk, either through self-insurance or market insurance, and (3) bear the cost of the harm. . . .

Similarly, the least cost risk avoider is the party best positioned to take steps to avoid or minimize the harm.

Schooner & Siuda-Pfeffer, *supra* note 187, at 310–11 (citing, inter alia, Christopher J. Bruce, *An Economic Analysis of the Impossibility Doctrine*, 11 J. LEGAL STUD. 311, 322–23 (1982); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View at the Cathedral*, 85 HARV. L. REV. 1089 (1972); Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977) (analyzing risk allocation in the context of contract impossibility)). *But see* Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDISC. L.J. 467, 515–18 (1999) (suggesting that the allocation of risk to the party best able to bear the risk is less appropriate when the government is one of the contracting parties because private sector assumptions of efficiency fail when transported to the public sector).

risk here—either in this case or a matter of precedent—should expose an individual to this type of harm caused directly by government action (or inaction) without appropriate government compensation. All of which begs the question: What *is* the proper role of the Federal Circuit?

APPENDIX A

GOVERNMENT CONTRACTS ACTIVITY PER FEDERAL CIRCUIT JUDGE 2010

| <i>Judge</i> | <i>Participated Without Writing</i> | <i>Drafted Decision</i> | <i>Concurring Decision</i> | <i>Dissenting Decision</i> |
|--------------|--|---|--------------------------------|--------------------------------|
| Bryson | <i>Arctic Slope; Ham Investments; Pai Corp; Sullivan</i> | <i>Anchor Savings; ATK Thiokol; Donley; Nebraska;</i> | | |
| Lourie | <i>Arctic Slope; Ham Investments; Holland; Maropakis; Nebraska; Precision Pine; Resource</i> | <i>McHugh</i> | | |
| Newman | <i>Anchor Savings; Bormes; Maropakis; Nebraska; Savantage</i> | | | |
| Prost | <i>Nebraska; Pai Corp; Savantage</i> | <i>Holland; Precision Pine</i> | | |
| Rader | <i>Anchor Savings; Ham Investments; Holland; Nebraska</i> | <i>Bormes</i> | | |
| Dyk | | <i>Arctic Slope; Resource</i> | <i>Agredano; Nebraska</i> | |
| Moore | <i>ATK Thiokol; Bormes; McHugh; Nebraska</i> | | | |
| Linn | <i>Donley; Nebraska</i> | <i>Maropakis</i> | | |
| Gajarsa | | <i>Pai Corp</i> | | <i>Nebraska</i> |
| Michel | <i>Nebraska</i> | | | |

| <i>Senior Judges</i> | | | | |
|------------------------|---|-----------------|--|--|
| Clevenger | <i>Agredano; Donley; Sullivan</i> | | | |
| Mayer | <i>Precision Pine; Nebraska</i> | <i>Agredano</i> | | |
| Archer | <i>ATK Thiokol</i> | | | |
| Friedman | <i>McHugh</i> | | | |
| Plager | <i>Sullivan</i> | | | |
| Schall | <i>Nebraska</i> | | | |
| Kendall ²³⁰ | <i>Resource</i> | | | |

230. District Judge sitting by designation.

APPENDIX B

GOVERNMENT CONTRACTS ACTIVITY PER
FEDERAL CIRCUIT JUDGE 2009–2010 COMBINED

| <i>Judge</i> | <i>Participated Without Writing</i> | <i>Drafted Decision</i> | <i>Concurring Decision</i> | <i>Dissenting Decision</i> |
|--------------|---|---|----------------------------|----------------------------|
| Bryson | <i>Arctic Slope II;</i> <i>Biltmore;</i> <i>Carolina;</i> <i>Ham Investments;</i> <i>LAI Services;</i> <i>Pai Corp;</i> <i>Sullivan</i> | <i>Anchor Savings;</i> <i>Arctic Slope I;</i> <i>Astoria;</i> <i>ATK Thiokol;</i> <i>Donley;</i> <i>Grant County;</i> <i>Nebraska;</i> <i>Savantage;</i> | | |
| Lourie | <i>Arctic Slope I;</i> <i>Arctic Slope II;</i> <i>Bank of Guam;</i> <i>Ham Investments;</i> <i>Holland;</i> <i>Maropakis;</i> <i>Nebraska;</i> <i>Precision Pine;</i> <i>Raytheon;</i> <i>Republic;</i> <i>Resource;</i> <i>States Roofing;</i> <i>Winter</i> | <i>McHugh</i> | | <i>Telecom</i> |
| Newman | <i>Alabama Aircraft;</i> <i>American Contractors;</i> <i>Anchor Savings;</i> <i>Bormes;</i> <i>Labatt;</i> <i>Maropakis;</i> <i>Nebraska;</i> <i>Savantage;</i> <i>Stockton</i> | <i>Slattery;</i> <i>States Roofing</i> | | <i>Bell</i> |

| | | | | |
|---------|--|---|-------------------------------------|-------------------------------------|
| Prost | <i>Centech;</i> <i>Nebraska;</i> <i>Pai Corp;</i> <i>Savantage;</i> <i>Telecom</i> | <i>Axiom;</i> <i>Bell;</i> <i>Holland;</i> <i>Precision Pine;</i> <i>Winter</i> | | |
| Rader | <i>Anchor Savings;</i> <i>Arko;</i> <i>Astoria;</i> <i>Bell;</i> <i>Centech;</i> <i>Ham Investments;</i> <i>Holland;</i> <i>Nebraska;</i> <i>Tyler Const;</i> <i>Weeks Marine</i> | <i>Bormes;</i> <i>Carolina</i> | | |
| Dyk | <i>Arko;</i> <i>Astoria;</i> <i>First Home</i> | <i>American Contractors;</i> <i>Arctic Slope II;</i> <i>Biltmore;</i> <i>Daewoo;</i> <i>Resource;</i> <i>Telecom</i> | <i>Agredano;</i> <i>Nebraska</i> | <i>Weeks Marine</i> |
| Moore | <i>Alabama Aircraft;</i> <i>ATK Thiokol;</i> <i>Bormes;</i> <i>McHugh;</i> <i>Moore;</i> <i>Nebraska</i> | | | |
| Linn | <i>Axiom;</i> <i>Donley;</i> <i>Grant County;</i> <i>LAI Services;</i> <i>Nebraska</i> | <i>Maropakis</i> | | |
| Gajarsa | <i>Bank of Guam;</i> <i>Stockton</i> | <i>First Home;</i> <i>Pai Corp;</i> <i>Raytheon</i> | | <i>Nebraska;</i> <i>Slattery</i> |
| Michel | <i>Nebraska;</i> <i>States Roofing;</i> <i>Tip Top;</i> <i>Winter</i> | <i>McDonnell</i> | | |

| | | | | |
|--------------------------------------|--|--|--|--|
| Schall | <i>American Contractors; Grant County; Labatt; Nebraska; Republic</i> | <i>Bank of Guam; Centech; LAI Services; Weeks Marine</i> | | |
| <i>Senior Judges</i> | | | | |
| Clevenger | <i>Agredano; Donley; Sullivan</i> | <i>Republic</i> | | |
| Mayer | <i>Arctic Slope I; Carolina; Daewoo; First Home; Nebraska; Precision Pine; Raytheon; Tyler Const</i> | <i>Agredano; Labatt</i> | | |
| Archer | <i>ATK Thiokol</i> | | | |
| Friedman | <i>Daewoo; McHugh</i> | <i>Tyler Const</i> | | |
| Plager | <i>Biltmore; Sullivan</i> | <i>Alabama Aircraft; Stockton</i> | | |
| <i>Judges Sitting By Designation</i> | | | | |
| Arterton ²³¹ | <i>Axiom</i> | | | |
| Huff ²³² | <i>McDonnell</i> | | | |
| Kendall ²³³ | <i>Resource</i> | | | |
| Posner ²³⁴ | <i>Tip Top</i> | | | |
| Walker ²³⁵ | | <i>Arko</i> | | |
| Ward ²³⁶ | <i>Slattery</i> | | | |

231. District Judge sitting by designation.

232. District Judge sitting by designation.

233. District Judge sitting by designation.

234. Circuit Judge sitting by designation.

235. Chief District Judge sitting by designation.

236. District Judge sitting by designation.