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I. INTRODUCTION

In *Crowell v. Benson*, the Supreme Court recognized Congress's power to create "legislative courts" under Article I of the Constitution.[1] However, the Court held that, at most, the jurisdiction of "legislative courts" or "Article I courts" extends to "examin[ing] and determin[ing] various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it."[2] Although these courts are jurisdictionally limited to hearing suits

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1. 285 U.S. 22, 50 (1932) (quoting *Ex parte* Bakelite Corporation, 279 U.S. 438, 451 (1929)); *but cf.* N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 74 (1982) (To allow legislative courts to adjudicate disputes between private parties "would require that we replace the principles delineated in our precedents, rooted in history and the Constitution, with a rule of broad legislative discretion that could effectively eviscerate the constitutional guarantee of an independent Judicial Branch of the Federal Government.").

2. *Bakelite*, 458 U.S. at 74. The Supreme Court, in *CFTC v. Schor*, 478 U.S. 833, 847-59 (1986), later set forth a test to determine whether a tribunal created under Article I or III improperly encroached on the jurisdiction of Article III courts based on an analysis of three non-exhaustive factors: 1) the degree to which the "essential attributes of power" are reserved to Article III courts, and the extent that the agency exercises the jurisdiction and powers normally vested only in Article III courts; 2) the importance of the right to be adjudicated; and 3) the concerns that prompted Congress to depart from Article III norms. In short, because an administrative agency did not exercise all the powers of an Article III court (such as granting writs of *habeas corpus*) it did not infringe on the matters that were, properly, exclusively in these courts' domain.

The Court of Federal Claims has, by statute, the power to hear "references" from Congress. Under the statute, the court sits as a hearing officer over matters which require fact-finding and legal analysis. *See infra* text accompanying notes 252-256, 260. These courts probably need not follow Article III standing principles when hearing a case that could not be appealed to an Article III court. *See* Muskrat v. United States, 219 U.S. 346, 362-63 (1911) (holding that the Supreme Court could not hear appeal of an advisory opinion); Pocono Pines Assembly Hotels Co. v. United States, 73 Ct. Cl. 447, 493 (1932) ("[T]he Supreme Court held [in *Bakelite*] that the Court of Customs Appeals, the Court of Claims, and the courts of the District of Columbia are legislative and not constitutional courts and hence could be invested by Congress with jurisdiction to render advisory opinions, whereas a constitutional court could not be so required."); Am. Mar. Transp. v. United States, 18 Cl. Ct. 283, 290-91 (1989). However, adjudication of congressional references is not subject to appeal and does not constitute a "case or controversy." Therefore, the court may lack the power to compel testimony and issue self-executing writs. Kanehl v. United States, 38 Fed. Cl. 89, 100 n.5 (1997) (Margolis, J.) ("[A] limited exception to the Article III standing requirements are advisory rulings issued by this court pursuant to 28 U.S.C. §§ 1492, 2509. . . . Such advisory rulings are not considered actual cases or controversies under Article III."); *In re* Dep't. of Def. Cable TV Franchise Agreements, 35 Fed. Cl. 114, 116 (1996):

> Thus, a dispute over compensation between the United States government and two private U.S. citizens, who were severely injured by machine gun fire . . . would not be a case or controversy under Article III.

against the government, it has been argued that they may also be circumscribed in the rules of decision that they may apply.[3] In particular, it has been argued that, unlike Article III courts,[4] they lack the power to alter their substantive determinations based on equitable principles[5] and that they lack the inherent power to punish noncompliance with their orders.[6]

Under Article I § 8 of the Constitution, Congress may "constitute Tribunals inferior to the Supreme Court." Article III describes the characteristics of federal courts, namely that they are staffed by judges with life tenure, whose salaries are insulated from diminution.[7] Article III § 2 declares, in part, that "[t]he judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States."[8] It is, therefore, uncontroversial that the lower courts described in Article

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> This case *was* appropriate for consideration by the U.S. Court of Claims as a congressional reference case, however, because it was, in the practical sense, if not the legal sense, a real case and a real controversy.

Id. The rules of the Court of Federal Claims proceed from the proposition that the court can compel testimony. R.CT. FED. CL. APP. D. 5. However, subpoenas issued under this provision have never been enforced. As an aside, the internal rules of the Court of Federal Claims provide that a panel of other "Article I" judges may serve as an appellate body. *Id.*

3. *See infra* note 44 and accompanying text.

4. *See, e.g.*, Smith v. Mulvaney, 827 F.2d 558, 561 (9th Cir. 1987) (finding right of contribution in actions under the Securities and Exchange Act of 1934 and Rule 10b-5 because "[t]o apportion damages without regard to fault reduces, to an extent, the equity which the doctrine was intended to provide. In this case, the potential inequity outweighs the slight administrative benefits to be gained from using the pro rata measure."); United States v. Iron Mountain Mines Inc., 881 F. Supp. 1432, 1452-54 (E.D. Cal. 1995) (holding that in a suit brought by the government arising from statutory cause of action, the "defendant . . . may assert any counterclaim arising from the same transaction or occurrence as the government's action, even though the counterclaim otherwise would be barred by sovereign immunity or the statute of limitations were it brought as a separate action.").

5. *See, e.g.*, Drobny v. Comm'r, 113 F.3d 670, 678 (7th Cir. 1997) (holding that unless fraudulent conduct by attorneys materially altered the outcome of the case, the Tax Court was without power to vacate judgment).

6. *See infra* notes 164-69 and accompanying text.

7. U.S. CONST. art. III, § 1 ("The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall . . . receive for their services, a compensation, which shall not be diminished.").

8. At the time of the drafting of Article III, it seems that the fields of law and "equity" involved rigorous construction of statutes and doctrines. 3 WILLIAM BLACKSTONE, COMMENTARIES, § 27 ("Thus in the first place it is said that it is the business of a court of equity in England to abate the rigour of the common law.") (footnote omitted). The major differences between law and equity were the availability of discovery in the Chancery, and jurisdiction over estates and debts, as well as "most matters of fraud." OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATT'Y GEN.: JUSTICE WITHOUT LAW: A RECONSIDERATION OF THE "BROAD EQUITABLE POWER" OF THE FEDERAL COURTS 21 (1998) [hereinafter OLP]. The courts of equity had exclusive jurisdiction over secured transactions (including mortgages and trusts) as well. *Id.*

III, and created by Congress pursuant to Article I, § 8, exercise the judicial power of the United States described in Article III, § 2.

A literal interpretation of Article III, demanding that all judicial decisions be made by judges with life tenure, has been soundly rejected by the Supreme Court's decisions following *Crowell*.[9] Article I courts may be staffed with judges who lack life tenure because they do not exercise "core" judicial functions for which the federal Constitution requires that judges be insulated from politics. Put another way, decisions of tenured-for-years judges are invalid only if these decisions extend beyond the adjudication of "public rights."[10]

Because Article I courts are staffed by judges who lack life tenure,[11] they are limited to hearing matters that "do not require judicial resolution, even though they are capable of it."[12] On the other hand, this jurisdictional limitation prevents litigants from being hailed into court and forced to try cases before judges without life tenure;[13] or without a jury.[14] Nevertheless,

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9. *See* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (1994) ("But while scholars continue to hold up a literal interpretation of Article III as a goal to which the law might aspire, most everyone agrees that it suffers from serious problems of institutional fit.") [hereinafter *Power*]. Pfander also suggests that the use of the phrase *inferior tribunal* in Article I may suggest that the drafters of the Constitution intended Congress to have the power to create tribunals that did not exercise all of the powers of the lower courts, and that such a reference may be a vestige of the idea of congressionally appointed state judges. *Id.* at 676-77.

10. *N. Pipeline*, 458 U.S. at 70 (1982) ("[*O*]*nly* controversies in the [public rights] category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination."); Pacemaker Diagnostic Clinic of America v. Instromedix, 725 F.2d 537, 541 (9th Cir. 1984) ("At the outset, and leaving aside all consideration of criminal cases, we recognize the principle that parties to a case or controversy in a federal forum are entitled to have the cause determined by Article III judges, with some significant exceptions yet to be fully delineated by the Supreme Court.").

11. Historically, Supreme Court case law confined Congress's power to create Article I courts to certain areas. Professor Chemerinsky describes the permissible areas for Article I courts as 1) courts with jurisdiction over United States possessions and territories, 2) military matters (though these may exist within Article II), 3) civil disputes between the United States and private citizens, and 4) criminal matters or disputes between private citizens where the legislative court serves as an adjunct to an Article III court that can review the legislative court's decisions. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 181-82 (1989); *see also* Amell v. Unites States, 384 U.S. 158, 166 (1966) ("The Court of Claims possesses the expertise necessary to adjudicate government wage claims. It also serves as a centralized forum for developing the law, particularly in large wage claim suits. These tasks have been its responsibility since 1887."). Although the matter is beyond the scope of this paper, in the past other "centralized" courts have existed.

12. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 919 (1988) (citing Crowell v. Benson, 285 U.S. 22, 49-50 (1932)); Ex parte Bakelite Corp., 279 U.S. 438, 449-60 (1929)).

13. Two cases appear to be exceptions to this rule. In *United States v. La Abra*

the question remains: Do Article I courts exercise fewer powers than Article III courts? In particular, are they limited to simply using their powers to make factual findings specified in statutes, or can they use their powers to fashion remedies for government conduct that is "illegal" or deviates from acceptable norms? In some cases, it has been argued that these courts lack the power to fashion remedies that would regulate the behavior of agencies by punishing the agencies for the behavior of the representatives that appear before them.[15] This paper argues, however, that the requirement that Article I courts only hear matters that are "capable of judicial resolution yet do not require it" does not act as a limitation on their powers once a matter comes within their jurisdiction. Once an Article I court is vested with jurisdiction, it exercises all of the powers associated with the "Judicial Power of the United States" pursuant to Article III of the Constitution.

Section II of this article describes two competing models for Article I courts: the "redeterminist" model, which holds that Article I courts do not exercise the judicial power of the United States, and the "institutional

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Silver Mining Co., 32 Ct. Cl. 462 (1897), Congress enacted a statute that allowed the Attorney General to sue La Abra in the Court of Claims with specially-conferred equity jurisdiction. Act of June 18, 1878, ch. 262, § 5, 20 Stat. 144, 145 (1878) (Based on claims of fraud before the claims tribunal established by the treaty of Guadalupe Hidalgo, the President is requested to investigate "claims of fraud."); Act of December 28, 1892, ch. 15, § 1, 27 Stat. 410 (1892). In this case, pursuant to a treaty with Mexico that included an arbitration agreement that was intended to settle the claims of various individuals it was alleged that La Abra had provided false testimony that had resulted in the Mexican government having to pay the U.S. government to compensate La Abra. WILSON COWEN ET. AL., THE UNITED STATES COURT OF CLAIMS: A HISTORY 74-7 (1978). After the court determined that La Abra lied, the U.S. government repaid Mexico, and took the loss for itself. Also, pursuant to 27 Stat. 410, the U.S. brought suit against Mr. Weil who was also accused of defrauding the arbitration panel. Eventually, in United States v. Weil, 35 Cl. Ct. 42 (1900), the court determined that the claims against the Mexican government were false.

14. McElrath v. United States, 102 U.S. 426, 440 (1880) (holding that Seventh Amendment does not apply to actions before the court, because the court does not adjudicate matters arising from the common law); Leandra Lederman, *Equity and the Article I Court: Is The Tax Court's Exercise of Equitable Powers Constitutional?*, 5 FLA. TAX REV. 357, 364 (2001) ("Article I courts are an odd creation. Their very existence appears to be prima facie evidence of an infringement by the legislature on the judicial power expressly granted to Article III courts. Nonetheless, despite the language of Article III, Article I courts are so accepted today that commentators consider 'a return to "Article III literalism" virtually unthinkable.'" (quoting M. Isabel Medina, *Judicial Review— A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1525, 1550 (1997) (footnotes omitted) (quoting Fallon, *supra* note 12, at 938))).

15. *See* the discussion of M.A. Mortenson Co. v. United States, *infra* notes 301-306 and accompanying text.

discipline" model, which holds that Article I courts do exercise such judicial power.[16] The remainder of the paper argues that the "institutional discipline" model is correct, and that Article I courts possess the power to remedy more than just incorrect factual determinations by government agencies. Sections III and IV of this article show that although Article I courts purport to operate within a waiver of sovereign immunity, the very concept of sovereign immunity is a doctrine so rife with legal fictions[17] that it does not operate to constrain the power of Article I courts, as is so often asserted by adherents of the redeterminist model.[18] Section V provides a history of extant Article I courts, tracing the evolution into their modern forms[19] and illustrating how Article I courts exercise "the judicial power of the United States." Although they owe their existence to congressional enactments, their power to provide petitioners with complete remedies derives from the necessity that Article I courts vindicate the "right of the people to petition the government for a redress"[20] (provided, at least, an underlying judicially-cognizable grievance), and the Constitutional dictate that courts exercise jurisdiction over "controversies" and not merely isolated questions.[21] However, the power of Article I courts has been, to varying degrees, constrained by the doctrine of sovereign immunity, which may have been codified, at least in part, by the appropriations clause[22] which limits monetary relief to that which is "in [c]onsequence of [a]ppropriations made by [l]aw."[23] These Constitutional concerns have varied in importance over the years, and history demonstrates how courts have balanced these concerns, often not without inconsistencies. The purpose of section VI is to show that tensions between these three constitutional provisions can be resolved, even if specific remedies are foreclosed by Congress, since the very nature of rights and remedies, as expressed in Professors Hart and Sacks' primary and remedial rights

16. *See infra* part II(A).

17. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 977 (1997) (describing sovereign immunity as a "complex interplay of statutes, judicial decisions, and common law assumptions.") [hereinafter, Pfander, *Petition*].

18. *See infra* Section III.

19. *See infra* Section V(A)(1).

20. U.S. CONST. amend. I.

21. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies.").

22. U.S. CONST. art. I § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

23. U.S. CONST. art. I § 9, cl. 7. The Eleventh Amendment protects only the states—not the federal government—from suit.

dichotomy, allows injured petitioners to use the government's conduct as a theory to reduce their liability.[24]

II. THEORIES OF ARTICLE I COURTS

This section describes two theories of Article I courts, in an attempt to identify their powers, and, more particularly, to determine whether Article I courts exercise the "judicial power of the United States." The "redeterminist theory" posits that the powers of Article I courts are restricted to answering narrow questions of fact and questions of law that clearly fall within the jurisdiction of the agency that the court reviews. Under the broader "institutional discipline theory," Article I courts have the power to provide petitioners with relief from incorrect interpretations of law and from systemic agency problems.[25]

A. THE REDETERMINIST THEORY OF ARTICLE I COURTS

Article I courts have jurisdiction only over actions against the federal government and can only review certain statutorily-defined decisions made by agencies within the executive branch. Under the redeterminist theory, Congress ostensibly has the power to create courts that exercise judicial power only insofar as those courts will serve as neutral fact-finders reviewing certain statutorily-defined executive agency decisions. To support this view, redeterminists point to the narrow waivers of sovereign immunity within which Article I courts operate.[26] They argue that these

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24. See *infra* Section VI(B).

25. Unfortunately, because Article I Courts are not given the same scholarly attention that Article III Courts receive, these terms are my notations for these schools of thought, and, to my knowledge, no judge or commentator describes him or herself as a "redeterminist" or an "institutional disciplinarian." The term "redeterminist" reflects the formal name of most petitions before the Tax Court, which are styled "Petitions for Redetermination," viewed by many as a simple request for review of the Internal Revenue Service's preliminary determination of the amount of tax due. The "institutional discipline model" is so called because it regards Article I Courts as capable of disciplining agencies for their behavior by, at the very least, reducing the amount of money that they are able to exact. *See infra* notes 29 and 49. For a view of judicial discipline of agencies, *see* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1118-19 (1997) ("Retroactivity doctrine limits both the nature of legal change and the manner in which it occurs . . . . [R]etroactivity rules can be viewed as a way of disciplining institutions for improper rulemaking.").

26. A common mantra in these cases is that "the sovereign cannot be sued without its consent, and that consent must be strictly construed, it can decide all the times and

waivers implicitly limit an Article I court's ability to articulate substantive norms of behavior.[27] Specific statutes also explicitly limit the ability of Article I courts to provide injunctive relief beyond mere orders to pay petitioners or to refrain from collecting—or attempting to collect—from a petitioner appearing before the court.[28] In the redeterminist view, Article I courts exist to weigh conflicting evidence and render a conclusion as to the merits of various statutorily-defined matters,[29] such as "adjusted gross

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conditions and name the court to entertain the suit." *See* United States v. Sherwood, 312 U.S. 583 (1941); United States v. Testan, 205 Ct. Cl. 330 (1974), *rev'd*, 424 U.S. 392 (1976). The notion that the sovereign may restrict the available remedies upon consent to be sued likely came from a compilation of British Law. *See* Harold J. Laski, *The Responsibility of the State in England*, 42 HARV. L. REV. 447, 449 (1918-1919) ("[The crown] chooses its own court; it may, save where, of its own grace, it has otherwise determined, avoid the payment of costs." "Laches and prescription lose their meaning when the Crown has become desirous of action.").

27. For example, in the government's brief in *Dixon v.* Comm'r, the government argued that, at best, an Article I court can provide a remedy only if the behavior of government attorneys created a "structural defect" in the trial proceedings that, if the same had happened in a criminal trial, would have constituted more than harmless error. Appellee's Brief at 21-22, Dixon v. Comm'r, 316 F.3d 1041 (9th Cir. 2003) (No. 00-70858), 2002 WL 32096491. Since Article I courts do not hear criminal cases, their powers to regulate norms of behavior are limited to those articulated by Federal Courts of Appeal that hear criminal matters, and their ability to prospectively adopt rules. However, the government conceded that there has never been a case of a structural defect in a civil case. *Id.* at 22 n.4. In other words, the government argued that Legislative Courts have structures that can never be structurally breached, and there is no need for their judges to worry about such breaches.

28. All Article I courts have, by statute, and perhaps by virtue of their inherent power, the power to issue injunctions in *aid* of their jurisdiction. 38 U.S.C. § 5711 (2000). However, such injunctions only exist to preserve their jurisdiction, and a request for such a writ would not provide the basis for a complaint. *See* United States v. Jones, 131 U.S. 1 (1889) (holding that where a District Court's jurisdiction was the same as the Court of Claims, the district court, acting under the jurisdiction of the Tucker Act, could not order an agency to undertake administrative action).

29. Two tax court judges who argued in favor of this view were Judges Meade Witaker and Theodore Tannenwald. Judge Witaker wrote:

> the court does not simply determine which party wins the lawsuit, but instead determines the taxpayer's correct tax liability. This is a different responsibility, for example, from that of the United States district court in a controversy between two parties. To carry out this responsibility, the court must play a different role in the trial process than would normally be expected of a trial court.

Meade Witaker, *Some Thoughts on Current Tax Practice*, 7 VA. TAX REV. 421, 437 (1988). Judge Tannenwald wrote, "the public equally is entitled to assurance that the taxpayer will not be permitted to 'eat, drink, and be merry' at the expense of the federal fisc." Theodore Tannenwald Jr., *Tax Court Trials: A View from the Bench*, 59 A.B.A. J. 295 (1973); *see also* Kuehn v. HHS, 2003 WL 22416683, at *3 (Fed. Cl. Spec. Mstr. 2003) ("[T]he Vaccine Act does not provide any textual authority to the special masters to determine the Constitutional-

income." The only remedies available are court-imposed reductions in the amount the agency can collect, or, when the court determines that an agency owes money to a petitioner, issuance of a judgment for money damages against the agency, payable only out of a specific fund that Congress sets aside for payment of such judgments. [30]

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ity of its provisions. With no textual authority, the undersigned refuses to create any extra textual authority.") *appeal dismissed by stipulation* 85 Fed.Appx. 198 (Fed. Cir. 2003) (cited in Cheskiewicz v. Aventis Pasteur, Inc., 2004 WL 326693 at 5, n.5 (Pa. Super. 2004) (opining that constitutional issues regarding the Vaccine Act *must* be raised before the Federal Circuit and apparently can be raised nowhere else); Akins v. Comm'r, 1993 T.C. Memo. 1993-256, 1993 WL 195425 (1993) (stating that the court does not have jurisdiction to set off proposed deficiency against negligence claim by D.C. employee who was seriously injured as a result of claimed negligence by federal government); Appeal of Kunkel & Co., 3 B.T.A. 133 (1925) (refusing to order Board of Internal Revenue to accept amended returns).

While challenges to the constitutionality of statutes or procedures are properly before a court, it is undisputed that merely asserting a constitutional claim that exists independently of the subject matter that Congress put before the Article I court need not be heard by the Court. *See, e.g.*, HHS, 23 Cl.Ct. 348 (1991) (Lydon, J.). Unlike English courts of equity, no showing will vitiate the jurisdictional requirements, and likewise no overall apparent injustice will deprive a court of jurisdiction. *See also*, Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1248 (2001) ("[G]ood equity cannot establish good subject matter jurisdiction, and bad equity cannot destroy it.").

However, setting aside *Kuehn*, amongst courts of appeal there is no dispute as to whether courts created under Article I can decide constitutional issues. While an individual court may not have the specific power to enjoin certain state or federal actions or issue declaratory judgments, all judges are required to refuse to follow a statute they consider unconstitutional, no matter what court they sit in and regardless of whether or not Congress specifically empowers the court to undue its work. *See, e.g.,* U.S. CONST. art. VI; Jaggard v. Comm'r, 76 T.C. 222, 224 n.6 (1981) ("In its holding, the Fifth Circuit relied on *Simon v. E.K. Welfare Rights Org.*, 426 U.S. 26 (1976), a case dealing with standing in Article III courts, not Article I courts such as the Tax Court. Nothing in the Fifth Circuit's opinion, however, indicates to us that any meaningful distinction should be drawn based on the constitutional derivation of the particular court involved."); United States v. Matthews, 16 M.J. 354, 366 (C.M.A. 1983) ("Likewise, we are sure that Congress intended for this Court to have unfettered power to decide constitutional issues— even those concerning the validity of the Uniform Code. To impute a contrary intent would itself raise the constitutional question whether a judge—even one appointed under Article I, rather than under Article III—could be required by oath to support the Constitution of the United States, *see* U.S. CONST. art. VI, but at the same time be forced to make decisions and render judgments based on statutes which he concluded were contrary to that Constitution."); United States v. Edwards, 430 A.2d 1321 (D.C. 1982) (discussing the constitutionality of pretrial detention provisions of the District of Columbia Code without judicial intimation that Article I status precluded consideration of the constitutional issue), *cert. denied*, 455 U.S. 1022 (1982) (en banc).

30. Indeed, if no such fund was available, a prevailing counterclaimant was, at certain points, entitled to no relief. *See infra* note 99 and accompanying text.

To redeterminists, an individual wronged by the government, or even hoodwinked in litigation before an Article I court, is entitled to no relief. The court is simply in the business of weighing the evidence put before it and perhaps punching a few numbers into a calculator. It may not address broader legal or moral questions[31] or determine the proper interpretation of factual findings.[32]

Under this view, if Congress, in its grace, creates a claim against the government and delegates adjudication of the claim to an executive agency, an Article I court has no more power than that delegated to the agency under its review.[33] The delegation restricts the court's function to inquiring into, at most, the correctness, validity, and perhaps arbitrariness of a final agency decision. The court may not correct the underlying behavior of personnel in the agency, and it certainly may not compensate a petitioner for mischievous behavior by attorneys representing the agency before the court.[34]

Indeed, in extreme cases, it has been argued that even the amount of damages available to the victim of the government's breach of contract should be resolved not by reference to the common law of contracts, but

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31. Examples include a conflict between two statutes or a constitutional issue. *See* Greider v. Sec'y of Dept. of Health and Human Services, 23 Cl. Ct. 348 (1991), which explains how a constitutional claim for money damages might be outside an Article I court's jurisdiction, but analyzing the constitutionality of a statute is not. This view may also find its roots in Story's understanding that "There are many cases against natural justice which are left wholly to the conscience of the party, and are without any redress, equitable or legal." JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 14 (1988 reprint).

32. It should be noted that Article I courts have, on the other hand, held somewhat rigorously that once they properly have jurisdiction, it is not destroyed by the conduct of a party. Connick v. Comm'r, 100 T.C. 495 (1993) (holding that the Tax Court may still determine tax liability even if the parties are fugitives and no longer in the country).

33. Dismuke v. United States, 297 U.S. 167, 172 (1936) (providing that the court's power is "curtailed only so far as authority to decide is given to the administrative officer").

34. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949) ("The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right."). Since the Tax Court and Bankruptcy Court have somewhat overlapping jurisdiction, the Eleventh Circuit has concluded that the Tax Court might discretionarily opt not to exercise jurisdiction over a matter which was primarily bankruptcy in nature, because even though it might be able to review an appeal of a "Collection Due Process" hearing under 26 U.S.C. § 6330, the Tax Court "had reasonable concerns as to whether addressing such issues would constitute the exercise of equitable powers exceeding the Tax Court's statutorily prescribed jurisdiction to handle its particularized area of law by intruding into the particularized area of law delegated by Congress to a different Article I court, the bankruptcy court." Meadows v. Comm'r, No. 04-11089, at *12 (5th Cir. April 6, 2005).

rather by a "redetermination" of the government's own calculations.[35] According to the redeterminists, courts in such a position are not acting to shape broad concepts of justice with the finality of an enforceable judgment. Instead, these courts act as one part of a larger decision-making process.[36] For example, the Tax Court acts as a safety-valve for tax assessments, preventing the Internal Revenue Service from collecting money from a taxpayer once the taxpayer has filed a valid petition with the court, but lacks the inherent power to "to revisit a final judgment to achieve a just result."[37]

Even though redeterminists insist that the court's actions are so constrained, it can be argued that the practical effects of its decisions have substantial influence over the behavior of the agency whose determinations the court reviews. Even if the agency is not bound by a specific mandate or injunction, the agency will acknowledge the precedential effect of the court's decision and resign itself to the likelihood that similar matters will be decided the same way.

B. THE INSTITUTIONAL DISCIPLINE MODEL

In contrast to the redeterminist model, the institutional discipline model posits that the parties before an Article I court have a right to air their dispute before a tribunal endowed with all the powers of an Article III court, at least with respect to matters addressed in the petition.[38] These powers, originally recognized by courts of equity, include the power to hold parties in contempt of court; the power to issue and enforce subpoenas;[39] the power to impose sanctions for bad-faith actions;[40] and even the

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35. Hemphill Sch., Inc. v. United States, 133 Ct. Cl. 462 (1955) (entitling schools to petition the court for additional monies where the Administration had no "general regulatory power" over the school and where Veterans Administration had contracted with school to provide training for returning veterans and the "G.I. Bill of Rights" required that government fix a reasonable rate to pay such schools); *but c.f.* Patterson v. United States, 115 Ct. Cl. 348 (1950) (holding that where claims against the government for valuation of takings of land were handled administratively, Court of Claims could not review decisions, as it lacked appellate jurisdiction over the administrative process).

36. *See* Stephen C. Gara, *Challenging the Finality of Tax Court Judgments: When is Final Not Really Final?*, 20 AKRON TAX J. 35, 44 (2005) ("Another reason for judgment finality unique to the Tax Court is found in section [26 U.S.C. §] 6213 . . . . If a judgment is subsequently reviewed or modified, it delays the government's ability to initiate collection activities.").

37. *Id.* at 56.

38. *See, e.g.*, *infra* note 414, and accompanying text.

39. William A. Richardson, *History, Jurisdiction, and Practice of the Court of Claims of the United States*, 7 S. L. REV. 781, 804 (1882) (describing historic powers of

power to alter the court's own substantive determinations in order to redress interests injured by the conduct of the government and not otherwise provided for by a remedial statute. To institutional disciplinarians, an Article I court can do much more than merely stand in for an agency decision-maker or accountant. Once Congress has waived the government's sovereign immunity, a petitioner seeking relief before an Article I court is entitled to the full panoply of substantive rights as described by Congress or the Constitution, so long as the jurisdiction of the court is properly invoked.[41] While a petitioner may not have the choice of

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court); COWEN, *supra* note 13, at 106. Initially the Court operated with a "Call Statute", 28 U.S.C. § 2507, which allowed the court to call upon any part or agency of the Federal Government for documents. However, the agency could avoid heeding the call by simply asserting that it would be "injurious to the public interest." Such a limitation on discovery powers finds its roots in the common law of evidence, and not necessarily any need to construe the powers of a court of limited jurisdiction narrowly. NORMAN FETTER, HANDBOOK OF EQUITY JURISPRUDENCE §197 (1895). However since 1954, the parties have, by statute, the same procedures available that a U.S. District Court would. 28 U.S.C. § 2507. Of course, should a government agency refuse to provide information, unlike a third party who refuses to comply with a subpoena, the court could simply find the refusals to be deemed an admission. *See also* HARRY N. STULL, A CASE IN THE UNITED STATES COURT OF CLAIMS 55 (1924) ("The Court of Claims may issues subpoenas to require the attendance of witnesses in order to be examined before any person commissioned to take testimony therein. Such subpoenas shall have the same force as if issued from a district court, and compliance shall be compelled under such rules and orders as the court shall establish.") (citing 28 U.S.C. § 168).

40. Some commentators note that non-monetary sanctions may *always* be available, even in administrative actions. *See* Thomas C. Wheeler, 29 PUB. CONT. L.J. 569, 571-580 (2000). These sanctions can be quite forceful, since they include striking responses and eliminating evidence.

41. In one of the darker days for the country, and, unfortunately, for the Court, the Court of Claims held that certain soldiers in the Korean War who had willingly cooperated with the enemy (they had conceded that they were not brainwashed) were not entitled to back pay despite the statute. 37 U.S.C. § 242 (1952). In *Bell v. United States*, 149 Ct. Cl. 248 (1960), *rev'd*, 366 U.S. 393 (1961), the court held that the argument that the soldiers were entitled to back pay was technical and "sheer legalism." Therefore, presumably, the government was entitled to ignore the statute because the plaintiffs were guilty of immoral acts in time of war. The Supreme Court reversed, holding that based on the language of the statute, 37 U.S.C. § 242, the turncoats were entitled to their pay.

In *Ex parte Robinson*, 86 U.S. 505, 510 (1873) (Field, J.), the Court noted that all lower Federal Courts are of limited jurisdiction, but, once in existence, "[t]he power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." *See also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 606 (1992) (arguing that the Court presumes that "once Congress has

whatever remedy she wants,[42] she is entitled to a forum complete with the inherent power to provide her with the same procedural tools to obtain the quantum of relief that she would obtain in another court vested with jurisdiction over the matter.[43]

Professor Lederman has argued meticulously against the institutional discipline model. According to Professor Lederman, Article I courts adjudicate different questions than Article III courts, and therefore appeals for parallel treatment are unwarranted.[44] However, Professor Lederman's argument does not hold water *if* both Article I and Article III courts are "courts" in the constitutional sense of the word.[45] Even if some subject matters are outside the jurisdiction of an Article III court, the court's ability to determine substantive rights and provide remedies[46] may merely be "organized" but not constrained by Congress.[47] No matter how narrowly

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vested federal courts with jurisdiction, it is presumed to vest them with all the traditional facets of the 'judicial power'").

42. *See, e.g.*, OLP, *supra* note 8, at ii (1988) (providing that "the right/remedy principle is a general statement about the role of the judiciary, that it has no peculiar application to equity, and that it is true only if its contra-positive ('where there is no remedy, there is no right') is also true").

43. While Congress seems to have gone out of its way to provide for various forms of due process, it also has gone out of its way to attempt to limit injunctive relief, presumably to channel as much litigation as possible to these forums. Even so, Article III courts have found that they could issue injunctions when the government failed to provide individuals with an opportunity to litigate in Article I courts. *See, e.g.*, Allen v. Regents of Univ. Sys., 304 U.S. 439, 448-49 (1938); United States v. Brodson, 234 F.2d 97 (7th Cir. 1956); Moore v. Welch, 166 F. Supp 36 (S.D. Ohio 1958).

44. Lederman, *supra* note 14, at 396-98. Professor Lederman explains that arguments regarding whether the Tax Court has equitable powers refer to the fact that the Tax Court has similar jurisdiction to other courts that also have jurisdiction to rule on tax matters and to order refund of money. However, Professor Lederman points out that there are significant differences: 1) the pre-requisite for Tax Court jurisdiction is the IRS's assertion of additional monies owed, while in the U.S. District Court and Court of Federal Claims full payment and exhaustion of administrative remedies is required (unless there is a claim made under the Constitution and the Tucker act), so the Tax Court might decide overpayments, whereas the other courts order refunds; 2) in a deficiency case, the taxpayer need not prove an exact dollar amount, but in refund cases the burden as to the exact amount due is still usually on the taxpayer; 3) the District Courts do not accord any burden-shifting effect to matters that the IRS did not include on a statutory notice of deficiency, whereas in the Tax Court the IRS bears the burden of proving things that it did not include on its initial notice. Finally, Professor Lederman notes that the Tax Court, as a pre-payment forum, is not mandated by Fifth Amendment of the Constitution as there is no constitutional right to a pre-assessment forum.

45. *See* Pfander, *Power, supra* note 9.

46. As will be explained later, it is quite possible to have a right without a correlative remedy. *See infra* section IV(B).

47. When faced with a challenge to an administrative decision, the Supreme Court

the subject matter jurisdiction of an Article III court is described, it still exercises the judicial power of the United States by virtue of being a "court" in the constitutional sense of the word. Likewise, if an Article I court is a "court" in the constitutional sense; its subject matter jurisdiction may be narrowly circumscribed without simultaneously eviscerating its exercise of the "Judicial Power of the United States."

At the heart of the debate between redeterminists and institutional disciplinarians is the following question: Are Article I courts analogous to the British courts of common pleas, which could issue relief only by means of certain writs enumerated by the King or Parliament,[48] or do Article I courts function as courts in both "law" and "equity" as described in Article III of the Constitution? Redeterminists subscribe to the view that Article I courts are analogous to courts of common pleas.[49] Institutional discipli-

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held that the Administrative Procedures Act gave parties other than the party granted or denied a license the ability to challenge the matter in court. It concluded that rather than simply organizing a right to seek judicial review of administrative decisions, the Act actually provided parties rights that they did not have before. Data Processing Serv. v. Camp, 397 U.S. 150, 153 (1970) "The 'legal interest' test goes to the merits. The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Thus the Administrative Procedure Act grants standing to a person "aggrieved by agency action within the meaning of a relevant statute." *Id.*; Thomas Wm. Mayor, *The Local Government Antitrust Act: A Comment on the Constitutional Questions*, 50 J. AIR L. & COM. 805 (1985) ("The procedures and remedies that define the 'remedial capacity to invoke a sanction' are generally subject to the control of the legislature."); *see also* Miravalle v. Comm'r; 105 T.C. No. 5 (1995) (holding that Tax Court held no power to stay the sale of property seized pursuant to a jeopardy assessment because there was no specific grant of jurisdiction that would enable the court to issue such an order after the IRS actually had title to the property), *but cf.* Murray v. United States, 817 F.2d 1580 (Fed Cir. 1987) (holding that Court of Claims had jurisdiction under the takings clause to adjudicate claim that IRS's levy on property constitute a taking of the second-mortgagee's interest in the property). As will be discussed later, jurisdiction of the Tax Court to consider equitable claims has caused considerable anxiety in tax circles.

48. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 915-16 (1987) ("The obligation to choose only one writ at a time limited the scope of law suits, as did rules severely restricting the joinder of plaintiffs and defendants.").

49. However, redeterminists concede that Article I courts have been specifically vested with the power to compel testimony via depositions and subpoenas. JOHN INDERMAUR, A MANUAL OF THE PRINCIPLES OF EQUITY 452 (1902). Arguably the foremost redeterminist, Judge Tannenwald, minimized the importance of these powers by saying that they were usually unnecessary to proper determinations by the court. Judge Tannenwald stated:

> I view resolution of a tax dispute as involving more of an investigatory than an adversary process. The concept that a tax case is not a jousting

narians, however, contend that Article I courts exercise the judicial power of the United States, which includes powers originally consigned to both courts of common pleas and to the Chancery.

III. ORIGINS OF SOVEREIGN IMMUNITY

Redeterminists, as illustrated above, believe that the doctrine of sovereign immunity limits the operation of Article I courts. The powers of Article I courts must, therefore, be limited to deciding issues within the narrow statutory waivers of sovereign immunity. However, a historical overview of the adjudication of claims against the government (contrary to the redeterminist view) supports the institutional disciplinarian's view that the doctrine of sovereign immunity imposes no substantive limitations upon the powers of Article I courts.

A. BACKGROUND OF CLAIMS AGAINST THE GOVERNMENT

The modern[50] history of claims against the government probably begins about 1300 A.D. when Edward I returned from the crusades and began to hear complaints against the Crown from any who wished to petition him.[51] The actual payment of sums was at first delegated to the Exchequer, which was initially little more than an administrative agency charged with keeping the King's books.[52] Later, the evaluation of the writs was delegated to "special commissions . . . the Privy Council, or . . . the Chancellor,"[53] which began formulating a jurisprudence to determine the

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> match between gladiators on the field of battle finds particular relevance in the area of discovery . . . . All too often, the Court has found that one party, usually the Government, uses the discovery process to ask for the kitchen sink, a process which can impose an undue burden on taxpayers.

Theodore Tannenwald, Jr. & Mary Ann Cohen, *A Dialogue Between Tax Court Judges*, 46 TAX. LAW. 672, 674 (1993).

50. I refer to this as the "modern" period because our current understanding of the doctrine can be traced to this time. The "medieval" English concept of the king was somewhat more benevolent, and kings were obligated to right wrongs. Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 744-45 (1999).

51. LUDWIK EHRLICH, PROCEEDINGS AGAINST THE CROWN 95 (1921); Charles Chancey Binney, *Origin and Development of Legal Recourse Against the Government in the United States*, 57 U. PA. L. REV. 372, 376 (1908-9); CHARLES H. MCILWAIN, THE GROWTH OF POLITICAL THOUGHT IN THE WEST 198 (1932).

52. THE COLUMBIA ENCYCLOPEDIA (6th ed. 2000).

53. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 5 (1963) [hereinafter, Jaffe, *Officers*] (noting that at the time of the

proper grounds upon which claims should be paid.[54] In theory, the King could, in his sole discretion, refuse one of these "petitions of right." Yet, according to Professor Jaffe, this never actually happened.[55] Initially, these petitions were based on claims against property or chattels.[56] Thus, while the King could not be sued in his own courts, a party could submit a "petition of right" to the King,[57] and the King would either handle the matter himself or delegate the matter to a judge or the Chancellor.[58] Eventually, petitions to sue the King were granted on a routine basis,[59] even though a decision not to follow the court's recommendations could not be enforced via judgment.[60]

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drafting of the American Constitution, parties could attain some remedy from government wrongs by either suits against officers, or via petitioners of right in which consent to sue was given as a matter of course).

54. These writs were included within the common law. Matthew Hale, *The History of the Common Law of England* § II (1713), available at http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/hale/common (last visited Oct. 19, 2005). However, Binney describes these petitions as of right as "really a petition for a right to sue." Binney, *supra* note 51 at 376; *see also* McElrath v. United States, 102 U.S. 426, 440 (1880) ("They are not suits at common law within its true meaning. The government cannot be sued, except with its own consent.").

55. Jaffe, *Officers*, *supra* note 53, at 5 ("In theory at least, and there is no positive evidence as far as I know that practice did not accord with theory, consent was given not on the basis of expediency, but of law."); George M. Davie, *Suing the State*, 18 AM. L. REV. 814, 817 (1884) ("[T]he law of England seemed to be that the courts should be open to all, and that remedial writs might issue against any other person.").

56. Cockburn, C.J. described this limitation in the oft-quoted passage of *Feather v. Regina*, 6 B & S 257, 293 (1865):

> The only cases in which the Petition of Right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or where the claim arises out of a contract, as for goods supplied to the Crown or to the public service.

Remedies under tort theories against the government were left to either specific acquiescence by the government, or suits against the officers. The American experience, as detailed later, was somewhat tortured, as the courts wrestled with the question of whether officers or states could even be sued.

57. COWEN, *supra* note 13, at 1-2. Laski sees petitions of right not as the admission of a legal claim, but rather as "an ungracious effort to do justice *without* the admission of a legal claim." Laski, *Responsibility*, *supra* note 26, at 455.

58. F.W. Maitland, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW, TWO COURSES OF LECTURES 4 (1920) ("Now the king can not be sued by action— no writ will go against him; the heir if he wants justice must petition for it humbly. Such matters as these are referred to the Chancellor."). Failure to heed such petitions was included by Jefferson in the Declaration of Independence. COWEN, *supra* note 13, at 1-2.

59. Davie, *supra* note 55, at 830.

60. *See, e.g.*, Queen v. Comm'rs Treasury, L. R. 7 Q. B. 387, 394 ("When a duty

After the Glorious Revolution and the Bill of Rights in 1688 resulted in Parliamentary control of the "purse" via the Exchequer, the Exchequer began to enjoy surpluses, which could not be turned over to the Crown.[61] Parliament began to approve payments to individuals from the Exchequer to satisfy various claims.[62] Along with the practice of appealing to the Crown, petitioners could also attempt a suit against individual ministers[63] or against the King in those areas to which he was presumed to have consented.[64] After Edward III, the Exchequer's role expanded to include disciplining various bailiffs and sheriffs. However, before judgments were enforced against specific officers, the Exchequer would determine whether the action was properly undertaken in his name, and therefore the officer was entitled to immunity from judgment.[65]

After the Glorious Revolution, the jurisdiction of the Exchequer gradually expanded. Its power reached an apex when it was hearing "common pleas" involving individuals, though such actions were later prohibited by statute.[66] Nevertheless, the Exchequer acquired both "legal"

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has to be performed . . . by the crown . . . this court can not claim . . . to have any power to command the Crown.") *quoted in* United States v. Lee, 106 U.S. 196 (1882).

61. K. BRADSHAW & D. PING, PARLIAMENT AND CONGRESS 307, 310 (1972). Initially, after the "Glorious Revolution" the Exchequer found itself with a surplus of money that it could not return to the King. Parliament began hearing many requests for relief. Some authors characterize the gradual development of the Exchequer from an accounting office to a court-entity as taking hundreds of years, perhaps dating back to the time of King John. *See* THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 160 (5th ed. 1956).

In *Pawlett v. Attorney Gendera*, 145 Eng. Rep. 550 (1668), the Court of the Exchequer found that the King was required to "do equity" and that even though the Court of the Exchequer was a "court of revenue" it could allow a mortgager whose property had been foreclosed to redeem it. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 202 (1965) [hereinafter Jaffe, *Control*].

62. Floyd Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 628 (1985).

63. Laski points out that by even after the Glorious Revolution, "[t]he law knows no such thing as the government." Therefore, if a minister actually makes a decision on his own, absent a statutory protection or indemnification, he is subject to suit. Laski, *Responsibility*, *supra* note 26, at 450. Likewise, as a practical matter, allowing an individual to sue for the reckless actions taken in the name of the state is "no more than a plea that realism be substituted in place of fiction," as such reckless actions are not undertaken on behalf of the sovereign, but, in fact, are no different than they would be if a someone acting on his own behalf had committed them. Laski, *Responsibility*, *supra* note 26, at 452.

64. *See* Jaffe, *Officers*, *supra* note 53.

65. *Id.* at 9. ("Thus, if a servant of the King disseised an individual in the King's name, an action against the servant lay but judgment would not be given before the King's will was done, i.e., would not be given unless he disclaimed the act.").

66. PLUCKNETT, *supra* note 61, at 160.

and "equitable" jurisdiction[67] over 1) suits brought on behalf of or against royal officers and accountants and by anyone regarding any debt to the Crown;[68] 2) persons that the King deemed "favoured persons" such as friars and some merchants, who the king decided could be sued only in the Exchequer; and 3) matters in which the parties had voluntarily deposited their contracts with the Exchequer.[69]

By the time Blackstone wrote his Commentaries on the Laws of England in 1769, relief from government mistakes or inadvertence had been granted with some frequency for over four hundred years. Nevertheless, Blackstone declared in his treatise that the proposition "[t]hat the King can do no wrong, is a necessary and fundamental principle of the English Constitution."[70] Today, Blackstone's pronouncement is frequently interpreted as a cynical declaration of government's infallibility. Yet, given the history of claims against the government and the state of law that existed in Blackstone's time, his pronouncement is better interpreted as expressing the view that remedies for government misdeeds are available, but only because of the King's routine benevolence, and not as an absolute right.

To invoke the King's benevolence, a party petitioned the King for a referral to the Chancery. Blackstone described the process of seeking extraordinary relief via a "prerogative writ."

> Whenever therefore it happens, that, by misinformation or inadvertence, the crown has been induced to invade the private rights of any of its subject, though no action will lie against the sovereign, . . . yet the law has furnished the subject with a decent and respectful mode of removing that

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67. W. H. BRYSON, THE EQUITY SIDE OF THE EXCHEQUER: ITS JURISDICTION, ADMINISTRATION, AND RECORDS 11, 17 (1986) (relating how in many instances the suits could be sought at common law, but the parties often sought injunctive relief).

68. This appears to have included all matters regarding the King's revenues, and taxation matters. *Id.* at 12. ("The exchequer court had jurisdiction over whatever was cognizable in the revenue departments of the exchequer and over anything which touched the profits of the crown."). Indeed, in the Court of the Exchequer, one who owed money to the King could also sue his own debtors, so that the King could in turn assert the Excheuqer's jurisdiction over the Crown's debtor's debtors to further the collection of royal revenue. *Id.* at 18. Indeed, at one point it became a strategic decision for parties to vest or divest the Court of Exchequer of jurisdiction by paying a debt to a party to the Crown, or by satisfying the obligation to the Crown. *Id.* at 27.

69. PLUCKNETT, *supra* note 61, at 160-61. Plunkett also notes that the Crown could sue individuals in the Court of the Exchequer, and many individuals died in debt to the Crown, and their estates came before the Court of the Exchequer for adjudication. *Id.* at 161.

70. BLACKSTONE, *supra* note 8, at 254.

> invasion, **by informing the king of the true state of the matter in dispute**: and, as it presumes that to know of an injury and to redress it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his **judges to do justice to the party aggrieved.**[71]

Blackstone's declaration that the "King could do no wrong" marks an important shift in the rhetoric surrounding claims against the government. The default position, following Blackstone, would be cast as a presumptive immunity of the government from paying up on claims of wrongdoing, rather than as the presumptive right of citizens to receive redress from harms suffered at the hands of government actors.[72] It was in this context that the doctrine of sovereign immunity evolved, and the doctrine began to take on a life of its own as courts extrapolated a theory for when claims should be allowed from instances in which relief had been denied to petitioners.

At the time of the American Revolution, sovereign immunity was not conceived as a simple bar against non-consensual claims against the state. Instead, it was a complex doctrine with intricate contours and exceptions, under which claimants had to navigate among prerogative writs, suits in the Exchequer, and petitions to Parliament in order to obtain relief. Therefore, by the time the British colonies obtained some measure of autonomy, lawyers, legislatures, and colonial governors were faced with a doctrine that was the product of a desire to articulate a formula for when relief should be denied to a petitioner, rather than a long-standing historical assumption that the government was immune from suit.

Colonial America understood that, from time to time, legislatures would have to provide compensation for injuries, breached contracts, or other damages that the government inflicted upon a citizen.[73] In Virginia, for example, the practice of legislative payment of claims became institutionalized.[74] In 1705, judges were tasked with traveling from town to

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71. *Id.* at 255 (emphasis added).

72. Or, as Pfander puts it, Blackstone's articulation of the individual's right to relief from an infallible king was "[n]ot a bad piece of work for a good king's man like Blackstone." Pfander, *Petition*, *supra* note 17, at 926.

73. Davie notes that state constitutions often seemed to allow the legislature to set forth the way that the state could be sued, and that no independent rights existed to bring suit in a court. Davie, *supra* note 55, at 820.

74. The first standing colonial committee on claims was found in Virginia's House of Burgess sometime before 1680. At the time, like in England, a legislative committee served as the highest court in Virginia. Shimomura, *supra* note 62, at 630.

town and "certifying" various claims against the Commonwealth.[75] While the judges did not pass on the credibility or legal merit of the claims, they presented a record to the House of Burgesses, who decided whether to pay, and if so, how much.[76] Indeed, while there might not have been binding review of the decisions of the legislature by an independent judiciary, individuals had a right to have their claims heard, and in one instance, judges were reprimanded for not collecting and certifying the grievances against the commonwealth.77 Moreover, as will be discussed later, even if a decision was wholly within the province of the legislature, and not subject to independent judicial review, it still provided what Professors Hart and Sacks would term a "directive arrangement"[78] to future executive actors.[79]

Likewise, in pre-revolutionary Connecticut, it became common practice for individuals to petition the legislature for relief from the actions of the executive or even judges.[80] This practice of "legislative equity" became so cumbersome that the legislature eventually suggested that citizens attempt to find relief in the courts before going to the legislature.[81]

B. POST-REVOLUTIONARY HOLES IN SOVEREIGN IMMUNITY

Those searching for a source of state sovereign immunity can easily find it in the Eleventh Amendment, and can look to state law (and the jurisprudence surrounding the Fourteenth Amendment) for its waivers.[82]

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75. JAMES MILLER LEAKE, THE VIRGINIA COMMITTEE SYSTEM AND THE AMERICAN REVOLUTION 27-28 (1917).

76. By 1705, the process became somewhat decentralized, and by statute, courts were convened throughout the state to "certify" (but not evaluate) documents that would be presented at the next session of the legislature. *Id.* By the time of the articles of confederation, most state legislators had established standing committees on claims against the state. Shimomura, *supra* note 62, at 633.

77. LEAKE, *supra* note 75, at 27.

78. *See infra* note 491 and accompanying text.

79. Professor Jaffe noted that a king could see the use of the courts in supervising his own officials. Jaffe, *Officers*, *supra* note 53, at 3.

80. It is worth noting that Connecticut did not have an independent judiciary until 1818. Until that time decisions of the courts were appealed to the legislature. CONN. CONST. art. V, § 1 (1818).

81. Pfander, *Petition*, *supra* note 17, at 931. For an analysis of the way states handled their sovereign immunity issues, see, Binney, *supra* note 51, at 392.

82. Davie, *supra* note 55, at 827-8 (describing the Missouri, Alabama, and Delaware Constitutions, as well as statutes of New York City and Philadelphia, which provided the means to sue the state); Charles Martindale, *The State and its Creditors*, 7 S. L. REV. 544, 545-48 (1882) (describing other states' statutory approaches to suits).

However, American courts have given short shrift to the origins of the federal government's sovereign immunity.[83] In most cases, the result is not harsh, as many plaintiffs avail themselves of legal fictions or statutorily created forms of review and sue individuals for violation of their constitutional rights or erroneous statutory interpretations.[84] In other cases, Congress carved out specific exceptions to sovereign immunity, thereby allowing the government to be sued.

Today, the sayings "the King can do no wrong" and "the government always wins" are aphorisms for the view that an individual has no way to complain about harms that befall him at the hands of the state. However, as illustrated above,[85] when these platitudes were first uttered, they were not meant to signify that there was no recourse for governmental wrongs. Instead, closer examination reveals that these sayings meant that the "King" or "sovereign" (which might include any branch of the American government) "must not, was not allowed, not entitled, to do wrong."[86] Therefore, while policy decisions that had the overall effect of hurting someone did not give rise to a remedy, improper implementation of such policies did.

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83. Some say that it emerged from the concept that a feudal lord could never be judged in his own court. CHARLES H. MCILWAIN, THE GROWTH OF POLITICAL THOUGHT IN THE WEST 198 (1932) (relating that by the 13th century it was well settled that lords could not be sued in their own courts); Laski, *Responsibility*, *supra* note 26, at 448 ("It is difficult to say at what precise period this non-suability of the King passed into infallibility."). The first acknowledgement that the U.S. government could not be sued came in *Cohens v. Virginia*, 19 US 264, 411-12 (6 Wheat.) (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits."); *but cf.* Chisholm v. Georgia, 2 U.S. (Dall) 419 (1793) (states could be subject to suit, but later abrogated by eleventh amendment); *Developments in the Law: Remedies Against the United States and its Officers*, 70 HARV. L. REV. 827, 829 (1957) ("There was a widespread belief, albeit unfounded in fact, that the King had once been subject to suit in his own court."); ROBERT DORSEY WATKINS, THE STATE AS A PARTY LITIGANT 197 (2003 reprint) (1927) (noting that explanations are usually ex post facto justifications of what is viewed as an assumption, and questioning why a state would want to completely immunize itself from suit).

84. In comparing the Anglo-American view with that of the French, who set up a system of courts specifically to review acts of an agency, Justice Jackson commented that "[w]e have treated the controversy with the official as a matter of *ultra vires*—if he was outside of his authority he was unofficial and just another citizen." ROBERT JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT, 47 (1955), *quoted in* Clark Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1483 (1962).

85. *See supra* text accompanying note 70.

86. EHRLICH, *supra* note 51, at 42; Jaffe, *Officers*, *supra* note 53, at 3-4 ("Indeed, it is argued by scholars on what seems adequate evidence that the expression 'the King can do no wrong' originally meant precisely the contrary to what it later came to mean.").

However, the American concept of popular sovereignty[87] had no role for an infallible king, capable of fixing any inadvertent mistakes made by his ministers by a benevolent consent to suit—or even for any king.[88] Initially, it was supposed that the legislature and the executive (having been elected by the people) would always act in their best interests.[89] Even though the sovereign would certainly not intend any harm to its people and would act legally given the chance, the question of the mechanisms available to obtain a remedy remained open.[90] Today, while numerous legislative exceptions exist to the doctrine of sovereign immunity, the ability of courts to provide relief for actions of the executive's agents in court remains in flux.

IV. OVERVIEW OF CONSTITUTIONAL VECTORS [91]

If a petitioner finds himself in, or is forced into, an Article I court, it is argued that the substance of the petitioner's rights differs depending on the forum in which they are asserted. This view proceeds from the notion that the government must consent to suit, and that consent must be construed narrowly in order to avoid violating the doctrine of sovereign immunity or to avoid ordering the government to pay money that would normally be specifically appropriated by Congress.[92] However, others (most notably Lord Coke) saw that when the legislature allocated decision-making to the courts, the extent and nature of monetary damages should be construed

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87. Obviously there is some debate as to whether "people" can really govern themselves, or whether there must be some device which places some above others. *See* Harold J. Laski, *The Theory of Popular Sovereignty*, 17 MICH. L. REV. 201, 204 (1919) ("Once we turn to the modern state, with its absence of numerical limits within which the Greek cities were confided, it is obvious that, for the general purposes of daily life, popular sovereignty is non-existent.").

88. Jaffe, *Officers*, *supra* note 53, at 2, 19 ("With the expulsion of the Crown, the citizens of the new Republic lost half of the rights against government which as Englishmen they had previously enjoyed."); Martindale, *supra* note 82 ("Long ago, the old fallacy that 'the king can do no wrong' was exploded in England, but now seems to reviving in a republic, with slight changes.").

89. Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821); *see also* United States v. Clarke, 33 U.S. (8 Pet.) 436 (1834).

90. This is not to say that statutes that provided for consent to sue the government could not be repealed without violating due process. *See* Beers v. State, 61 U.S. 527 (1857).

91. I probably owe this term to Scott Dodson, who defined "vectoral federalism" as "the federal government's power to regulate the states and the concomitant power of the states to resist this regulation." Scott Dodson, *Vectoral Federalism*, 20 GA. ST. U. L. REV. 393, 401-2 (2003).

92. *See* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).

broadly, as long as there was no danger of interfering with proper executive functions and discipline of the lower courts could be accomplished by writs of prohibition or mandamus. Under these circumstances, it was thought that the sovereign had irrevocably placed control over determining the merits of such claims in the hands of the courts.[93]

In the face of American popular sovereignty's conundrum that sovereignty did not come with the waivers of immunity to which subjects of a monarchy had become accustomed, the development of Article I courts that hear claims against the government can be viewed as a struggle between three legal principles. All of these principles have roots in the common law and appear in the text of the Constitution. But because these principles appear to be unable to coexist peacefully, the courts, over the years, have equivocated over which principle is most important.

A. THE APPROPRIATIONS CLAUSE

Article I § 9, cl. 7, which prevents funds from being "drawn from the Treasury, but in Consequence of Appropriations made by Law" is the closest the text of the Constitution comes to acknowledging the principle of sovereign immunity of the federal government.

Since the signing of the Magna Carta, parliaments have guarded their power to tax.[94] Eventually, Parliament assumed most, if not all, of the powers of taxation in England.[95] Colonial legislatures, in an effort to control the royal governor, sought to retain control over not only how money was collected, but also how it was spent.[96] Legislatures were primarily concerned with executive incursions into the public purse, a concern addressed in most state constitutions by provisions declaring that the collection and appropriation of funds was legislative in character.[97] By

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93. *See infra* text accompanying note 150.

94. Col. Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 30-44 (1998) (describing shifting powers to tax between Parliament and the Crown).

95. Col. Rosen concludes that:

> Control over the public purse was the cornerstone of British representative democracy. It served as the instrument for parliamentary supremacy, compelling monarchs to surrender their royal prerogatives in exchange for the revenue required to sustain their administrations . . . . It was also an end in itself, ensuring that taxes would not be raised except with the consent of the taxpayers.

Id. at 44.

96. *Id.* at 47.

97. *Id.* at 70 n.323.

the time of the Constitutional Convention, the Framers were of the mindset that the words "according to law" meant that it was for the legislature to make specific appropriations. Of course, this does not mean that discretion cannot be vested with the executive to pay its debts. However, the Appropriations Clause does raise the question of whether the judicial branch must comply precisely with legislative dictates regarding the form of judgment or order it must issue in order to draw funds from the Treasury.[98]

Arguably the most radical interpretation of the Appropriations Clause occurred in *Reeside v. Walker*.[99] In *Reeside*, the government had sued the estate of one of its contractors which then obtained a large setoff. Despite a jury verdict and a judgment from the Circuit Court of the United States for the Eastern District of Pennsylvania, the Treasury did not pay. The victorious defendant unsuccessfully petitioned the Circuit Court for the District of Columbia for a writ of mandamus. On appeal, the Supreme Court held that "[h]owever much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion."[100]

Today, as Congress has provided numerous funds to pay requests, and has, by statute, allowed for setoffs to claims made by it against defendants, the appropriations clause is usually invoked by the government to avoid disgorging funds that it may have incorrectly taken,[101] or to protect the government from liability under an estoppel theory when government employees give erroneous advice.[102]

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98. *See supra* note 13 (examples of court orders to pay money that were arguably enforceable against the government due to non-compliance with the terms of the appropriation from Congress).

99. 52 U.S. (11 How.) 272 (1850).

100. *Id.* at 289.

101. *See, e.g.*, Republic Nat. Bank of Miami v. United States, 506 U.S. 80, 90 (1992); United States v. Ten Thousand Dollars in U.S. Currency, 860 F.2d 1511, 1514 (9th Cir. 1988) ("If, for example, an agent of the United States had scooped up the cash in dispute and, without waiting for a judicial order, had run to the nearest outpost of the Treasury and deposited the money . . . it would be absurd to say that only an act of Congress could restore the purloined cash to the court.").

102. *See, e.g.*, Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424 (1990).

B. THE PETITION CLAUSE

Most associate the Petition Clause of the First Amendment to the free speech clause[103] of the First Amendment.[104] The usual interpretation of the Petition Clause is that every American has the right to petition the legislature for redress of "political" grievances,[105] but there are few, if any, remedies for the doomed petition beyond the election of more amenable politicians. Some argue, however, that the Petition Clause effectively abrogates sovereign immunity. Most notably, Professor Pfander argues that the history and structure of the Petition Clause is an "antidote to the . . . doctrine of sovereign immunity."[106] According to Pfander, the fact that the framers included the word "government" in the Petition Clause (and not "legislature" or "courts"), indicates that there was a right to petition *any* of the three branches of government, not just the legislature or the executive.[107] The British did not conceive of as strict a separation of powers as the framers did,[108] and hence the Petition Clause is simply a recognition of

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103. The text of the First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to *petition the government for a redress of grievances*." (emphasis added).

104. Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 HARV. L. REV. 1111, 1113 (1993).

105. Robert Tsai offers a theory of the Petition Clause which concludes that a right to litigate constitutional issues is protected by the Petition Clause, as any critique of the government inevitably requires some reference to the question of which branch of government has the final say on the matter. Robert L. Tsai, *Conceptualizing Constitutional Litigation As Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835 (2002). Tsai and others noted that in colonial America, government officials "felt a socio-political obligation to hear those grievances, to provide a response, and often to act upon the complaints." Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2159 (1998), *cited in* Tsai, *supra* at 848.

106. Pfander, *Petition, supra* note 17, at 899, 953-63. Although Pfander argues that the Petition Clause almost completely vitiates sovereign immunity, he also argues that dismissals of petitions on the grounds that they are barred by a doctrine of sovereign immunity are really dismissals for substantive reasons (such as failing to show that all the elements of the claim could be proved, or because the right has been "organized" by Congress, necessitating that the petition begin in a certain form, or that equitable relief is unavailable because a legal remedy is available).

107. Pfander, *Petition, supra* note 17, at 954-56.

108. This arrangement prompted the acknowledgement that while an individual had a constitutional right to petition for redress, this was, in fact, a "naked right." After presentation of a claim, there was no right to investigation, or even action. *See, e.g.*, Richardson, *supra* note 39.

the right to bring a petition to either the courts or legislature.[109] Of course, the legislature was welcome to direct the petitions to the courts, though, such delegation was irrevocable.[110]

Unlike other claims against the government, receiving just compensation under the Fifth Amendment's "Takings Clause"[111] does not require an explicit waiver of sovereign immunity.[112] When it is combined with the Petition Clause, the Takings Clause of the Fifth Amendment gives courts the power to look behind executive claims of immunity, even when couched in legislation, such as statutes of limitations. The Petition Clause gives courts, as well as agencies acting in a quasi-judicial capacity, the ability, and even the duty, to adjudicate both the underlying issue and any collateral "takings" issues that occurred in the course of its procedures.[113]

For the purposes of this article, it is not necessary to adopt Pfander's view in whole. Instead, the Petition Clause can simply be read as demanding that all courts, properly vested with jurisdiction over a claim, address any grievances that arise during the course of the litigation that the legislature has declared cannot be heard elsewhere. This relief cannot be limited by executive action, as the Petition Clause acts to guarantee that a party can make a claim already provided for by the Constitution or by statute and will not by blocked by executive claims of immunity. This view has support not only in the text of the Constitution but also in English

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109. *See also* Louis Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401 (1957).

110. *See infra* text accompanying note 150.

111. The Takings Clause reads: "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

112. *See* United States v. Alcea Band of Tillamooks, 341 U.S. 48, 49 (1951) (noting that no express waiver of sovereign immunity is necessary to obtain an award of interest, if the claim for interest arises under the Fifth Amendment); Cyprus Amax Coal Co. v. United States, 205 F.3d 1369, 1374-5 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001) (a self-executing clause of the constitution, such as the compensation clause or the export clause triggers the application of the Tucker Act's jurisdiction relating to claims founded under the constitution without the need to comply with other statutes). It is worth noting, however, that in actions against states arising under 42 U.S.C. § 1983, "a plaintiff must show that the defendant was personally involved in the alleged deprivation of his constitutional rights, since the doctrine of respondeat superior does not apply to § 1983 actions." Zamakshari v. Dvoskin, 899 F. Supp. 1097, 1109 (S.D.N.Y. 1995).

113. Zimmerman Brush Co. v. Fair Emplmt. Practices Comm'n., 411 N.E.2d 277 (Ill. 1980), *rev'd sub nom*, Logan v. Zimmerman Brush, 455 U.S. 422, 432 (1982); *see also* Lott v. Governors State Univ., 436 N.E.2d 569, 572 (Ill. Ct. App. 1982) (citing *Logan*, the Court of Appeals held that the trial court must allow a plaintiff to amend complaint to include administrative agencies and order the agencies to adjudicate complaint).

history, suggesting that the Framers conceived of petitioners in this way.[114] Moreover, it has even carried the day with the Supreme Court.[115]

To be sure, unlike some others,[116] I do not contend that courthouses are open fora for the airing of any and all grievances against the state. Nor does the Petition Clause remove the need to comply with procedural requirements.[117] Instead, at least in the context of my overall theory, I view the Petition Clause as expanding the power of any forum designated as the exclusive forum[118] for the airing of an otherwise recognized legal theory to encompass the power to adjudicate all individual rights protected by the "takings" and "due process" clauses of the Fifth Amendment.

The Takings Clause and the Petition Clause guarantee that a party aggrieved by government action can go to court, and be provided with just compensation in the case of a taking, according to whatever standards the

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114. It is argued that these rights that are mentioned in the Constitution are "self-executing" and directly traceable to the earlier "petitions of right," and that these narrow categories of suit were exceptions to the general bar against suits against the sovereign. In *United States v. Lee*, 106 U.S. at 205, the Court noted that:

> It is believed that this petition of right, as it has been practiced and observed in the administration of justice in England, has been as efficient in securing the rights of suitors against the crown in all cases appropriate to judicial proceedings, as that which the law affords in legal controversies between the subjects of the king among themselves.

Lee, 106 U.S. at 205. The Court observed that at the time of *Lee*, the Court of Claims existed, but it was not given jurisdiction over such "takings" issues, and therefore the right could be heard in any court. *Id.*; *see also* First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304, 315 (1987) ("We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation.'") *quoting* United States v. Clarke, 445 U.S. 253, 257 (1980).

115. *See infra* note 113.

116. *See, e.g.*, John E. Wolfgram, *How the Judiciary Stole the Right to Petition*, 31 UWLA L. REV. 257 (2000). Attorney Wolfgram, by his own proud admission, has been "blacklisted" under California's vexatious litigant statutes. *Id.* at n.55.

117. *Logan*, 455 U.S. at 437 ("Obviously, nothing we have said entitles every civil litigant to a hearing on the merits in every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, or, in an appropriate case, filing fees." (internal citations omitted)). In the state context, it has been held that there is no per se taking if a state procedure is not followed. Instead there must be an inquiry into the nature of the right deprived. Shango v. Jurich, 681 F.2d 1091, 1101 (7th Cir. 1982). However, the existence of a procedure may be probative of underlying substantive rights. *Id.*

118. To be precise, the sovereign can designate certain other forums for the adjudication of associated rights, and petitioner may have to go to multiple tribunals, but the Supreme Court has said that if relief in another tribunal is merely "speculative" then a forum with slightly less than exclusive jurisdiction over the matter will be subject to this grant of power. *See infra* note 124 and accompanying text.

Fifth Amendment mandates, even if no statute specifically provides for such a forum. Any limitation on a party's ability to be compensated for the deprivation of a right is unconstitutional, and if a court (or agency) is the only avenue that a petitioner has to air his grievance, then any limitation upon that court is unconstitutional.

The Supreme Court appeared to adopt this view when it faced the issue of whether a petitioner, before a state administrative agency, had been denied a chance to argue their case under Illinois' Fair Employment Practices Act when that agency's jurisdiction had evaporated due to the agency's mishandling of her petition. The Court held that the jurisdiction of the agency, as a constitutional matter, *must* expand. The court ruled that:

> A claimant has more than an abstract desire or interest in redressing his grievance: his right to redress is guaranteed by the State, with the adequacy of his claim assessed under what is, in essence, a "for cause" standard, based upon the substantiality of the evidence.[119]

In so ruling, the Court conceived of a claim under Illinois' Fair Employment Practices Act[120] as a property right, protected by the Fifth and Fourteenth Amendments, which, "presumably can be surrendered for value."[121] Likewise, in the case of statutorily created rights, the Petition Clause provides that all parties will have access to a forum to air their grievances, and that that forum will not be hampered in its fact-finding by legislative or executive constraints, because such constraints would allow the executive to "take" whatever property a petitioner might have.[122] The Court concluded that "any other conclusion would allow the State to destroy at will virtually any state-created property interest."[123]

Moreover, in *Logan*, the Supreme Court went even further, and rejected the state's argument that other remedies that might provide the petitioner with compensation for her lost rights were theoretically

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119. *Logan*, 455 U.S. at 431. In earlier cases, the Court has held that an opportunity must be provided to submit a constitutional issue "to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause." Ohio Valley Water Co. v. Borough Of Ben Avon, 253 U.S. 287, 289 (1920).

120. Ill.Rev.Stat., ch. 48, ¶ 851 *et. seq.* (1979).

121. *Logan*, 455 U.S. at 429, 431.

122. *Id.* at 433 ("As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged.").

123. *Id.* at 432.

available, since the possibility of obtaining relief was unavailable, speculative or overly cumbersome.[124] Therefore, the body with jurisdiction *must* adjudicate the issues and provide a remedy regardless of whether there was a theoretical remedy somewhere else. The Court explicitly held that even statutorily-created rights to redress are protected by the Constitution.

This line of reasoning prevailed even in the face of arguments regarding the ability of the courts to second-guess the executives' detention of individuals captured during an armed conflict. Specifically, in the face of the executive's abject refusal to adjudicate an issue, the Supreme Court even went so far as to order a lower court, in *Hamdi v. Rumsfeld*, to provide a habeas petitioner with whatever process the executive refused to provide.[125]

Therefore, action by the government that effectively deprives an individual of her ability to be heard in a forum violates the Petition Clause. Indeed, when the Court applied this doctrine to taxation issues, it found in *McKesson v. Division of Alcoholic Beverages*[126] that a state *must* provide an adequate forum for adjudicating tax disputes. Therefore, at a minimum, a forum for providing retrospective relief for taxes already illegally collected, regardless of the good faith of the tax collectors, is required.[127] Injunctive relief or promises of future constitutional or statutory compliance are not acceptable.[128] Whether the taking resulted from executive misinterpretation of the law, executive incompetence or malfeasance (whether in a quasi-judicial or a purely executive act or as a litigant before a court) the executive must fix whatever mistakes resulted in such a taking.

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124. *Id.* at 436-37 ("Seeking redress through a tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole: the Illinois Court of Claims Act does not provide for reinstatement . . . and even a successful suit will not vindicate entirely [the petitioner's] right to be free from discriminatory treatment.") (citations omitted).

125. Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004) ("In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved.") (citing Army Regulation 190-8, § 1-6 (1997)).

126. 496 U.S. 18 (1990).

127. *Id.* at 39. After taxpayers had prevailed in their effort to invalidate a taxation scheme under the dormant commerce clause, only to have the court issue an injunction but fail to order a refund because of vaguely articulated "equitable" reasons, the Court held that "the state must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a "clear and certain remedy." *Id.*

128. *Id.*

When the courts fashion such *ad hoc* remedies for takings of property, relief can generally be had in courts of general jurisdiction.[129] However, if a party is *forced* (or "channeled") into a court of specialized or limited jurisdiction, or chooses one without the realistic option[130] of pursuing an action in another court, then that forum (even in the face of statutory prohibition) *must* also adjudicate any collateral taking matters,[131] as failing to do so would result in yet another taking! Therefore, even if statutes do not explicitly provide a court with the ability to afford an individual due process or reach a correct decision as to both the underlying substantive law and any takings issues, the court is obligated to fashion a remedy which would vitiate such impairment.[132] For example, in *Dixon v. Commissioner*,[133] the Court of Appeals for the Ninth Circuit held that the Tax Court was obligated to provide a remedy (in this case, a reduction of tax liability based on equitable principles and what appears to be the equitable remedy known as "quasi contract") for the IRS's unfair play before the Tax Court that effectively deprived many taxpayers of a fair

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129. *See* Gagliardi v. Flint, 564 F.2d 112 (3d Cir. 1977) (collecting cases in which lower state courts were required to provide a remedy under the common law of money damages for uncompensated takings).

130. *See supra* note 124, and accompanying text.

131. Historically, state chancellors were even more protective of their jurisdiction. In states with bifurcated equity and law jurisdictions, chancellors held that, since the lack of a legal remedy would usually be the basis for their jurisdiction, the legislature must *explicitly* divest them of jurisdiction in order for the law courts to have exclusive jurisdiction over the adjudication of certain rights. *See, e.g.*, Sweeny v. Williams, 36 N.J. Eq. 627, 1883 WL 468, at *2 (N.J. Eq. 1883) ("When, by statute, a right to administer relief previously administered only by courts of equity is extended to courts of law, the jurisdiction of the courts of equity is undisturbed, unless prohibitory or restrictive words are used in the statute.").

132. The Supreme Court in *Logan* eventually concluded that the Illinois Supreme Court was wrong in granting a writ of prohibition to the respondent, who argued that because the administrative agency had missed a statutory deadline, no relief could be granted. *Logan*, 455 U.S. at 426. The court also noted that the alternative remedy of relief via a tort suit was not adequate as different remedies were available, and at best the chances of actually getting them were speculative. *Logan*, 455 U.S. at 436-37. At least one commentator has noted that in the absence of legislation, issues that arise in unique cases are probably best suited to be remedied by the courts. Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 NW. U. L. REV. 1413, 1446 (2002) ("Realistically, the courts may be the only entity willing to address these more nettlesome issues of implementation.").

133. *Dixon*, 316 F.3d 1041 (9th Cir. 2003); *See infra* note 180, and accompanying text. Briefly stated, in *Dixon*, parties to the same tax shelter had agreed to follow the Tax Court's resolution of test cases of taxpayers. Counsel for the government secretly settled with some designated taxpayers in exchange for their cooperation at trial and reduction of assessed tax liability by the taxpayer's expended attorney fees.

chance to litigate.[134] This was essential because litigation in the Tax Court forecloses a right to seek a refund of taxes later in the District Court or the Court of Federal Claims,[135] and suits against government attorneys for their official misdeeds are doomed from the start.[136]

Finally, the Supreme Court has gone so far as to hold not only that these waivers of sovereign immunity exist regardless of a statute, but that their judgments *must* be paid, and under the U.S. Constitution a statutory regime that allows the executive or the legislature to elect not to pay the judgment runs afoul of its controversy requirement, and the federal courts must not become involved at all.[137] Such an announcement is of considerable moment, as even English and colonial petitions as of right had to be submitted to Parliament to be paid as the controversy requirement prevented them from being heard.[138] Nevertheless, however strong the pull of the Petition Clause, its power to define the role of legislative courts is curtailed by other parts of the Constitution which protect the government.

C. THE CONTROVERSY REQUIREMENT

The "case and controversy" requirement of Article III simultaneously constricts and expands the powers of legislative courts.

1. A Court's Ultra Vires Activities

Because of the structure of the Constitution, when a court renders decision where there is no real controversy, it risks operating outside of its judicial power. Once outside this power, it is beyond the Constitutional protections of the courts, such as Supreme Court review, self-executing judgment, and the inherent power to punish contempt. Outside this power,

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134. *Id.*

135. 26 U.S.C. § 7422(c) ("A suit against any officer . . . for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . shall be treated as if the United States had been a party to such suit in applying . . . proceedings in the Tax Court and on review of decisions of the Tax Court.").

136. *See, e.g.*, Fry v. Melaragno, 939 F.2d 832, 836 (9th Cir. 1991) (holding that absolute immunity protects attorneys for the government for their actions in the course of litigation before the Tax Court).

137. *See infra* notes 240-243 and accompanying text.

138. Pfander, *Petition, supra* note 17, at 985. ("[P]etitions of right did not result in self-executing judgments payable by the Parliament in England or the assembly in Virginia. Rather, legislative control of the fisc entailed legislative control of the decision whether to appropriate funds to pay money judgments rendered against the government.").

which extends to "all cases, in law and equity, arising under this Constitution, the laws of the United States...,"[139] a court's decisions are subject to second-guessing by other branches of government. This "case and controversy clause" has been interpreted as prohibiting the issuance of advisory opinions by federal courts.[140] Yet the Court of Federal Claims is explicitly empowered, and semi-routinely asked, to provide advisory opinions in the form of reports to Congress.[141] Historically the Court of Federal Claims has obliged, and it continues to oblige. However, in writing these reports it can be argued that this "court" is not really a "court" and therefore does not exercise the judicial power of the United States, but instead exercises a legislative power.

2. *The Controversy Clause as a Grant of Power*

Although the controversy clause acts to limit the federal courts to only "live" controversies, it also acts to expand the power of the courts to the entire controversy before it.[142]

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139. U.S. CONST. art. III, § 2, cl. 1. Justice Frankfurter further defined "cases" and "controversies" by describing Art. III as indicating that:

> the limited area within which judicial action was to move-however far-reaching the consequences of action within that area-by extending "judicial Power" only to "Cases" and "Controversies". Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted "Cases" or "Controversies."

Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting).

140. State courts, even when adjudicating causes of action in which a federal statute or the U.S. Constitution provides the rule of decision, need not abide by Article III's "case or controversy" requirement. Doremus v. Bd. of Educ., 342 U.S. 429, 434 (1952) (stating that the U.S. Supreme Court did not have jurisdiction to review a facial challenge to state law brought in state court when state law had not yet been applied, and the individual taxpayer did not have standing).

141. *See supra* note 2.

142. The concept that "[j]urisdiction, once taken, extends to the whole controversy," also has its roots in the common law. Oliver S. Rundell, *Law of Estoppel*, *in* 7 MOD. AM. L. 225-26 (1914).

3. *The Judicial Power to Adjudicate Cases or Controversies*

Article I courts do more than simply decide issues that the legislature or executive could properly determine. These courts, with their neutral decision-makers, often provide petitioners with the constitutionally-required "due process."[143]

Whether one subscribes to a functionalist or formalist model of separation of powers, when these courts entertain a case, they exercise the "judicial power of the United States." Once an issue is packaged into a "case" and that case is within the judicial power, it is not for other branches to interfere with that exercise of power. [144] This judicial power includes the power to adjudicate whatever substantive rights fall within the court's jurisdiction, and to provide the parties with whatever remedies are available.[145] Though Congress may limit the scope of remedies, it may not completely eliminate a court's power to provide certain remedies without infringing on the court's jurisdiction. Henry Hart pointed out that a limitation on remedies is "[o]nly a *limitation* on what a court can do once it has jurisdiction, not a denial of jurisdiction that can hurt a defendant. And if the court thinks that the limitation is invalid, it's always in a position to say so, and . . . to ignore it."[146]

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143. Gordon Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *To* Schor, 35 BUFF. L. REV. 765, 835 (1986) *citing* Phillips v. Comm'r, 283 U.S. 589, 596 (1939) in which Justice Brandeis held that in adjudicating "public rights" the executive had an interest in determining the amount of liability, and review by the judicial branch will be limited to questions of law and to assure that "some evidence" supports the Commissioner's ascertainment of facts.

144. Under the "formalist" model, "judicial power is preserved simply because it has not been delegated to the other branches." Burkeley N. Riggs and Tamera D. Westerberg, *Judicial Independence: An Historical Perspective*, 74 DEN. U. L. REV. 337, 339 (1997). Functionalism, on the other hand, questions whether the "one branch interferes with one of the core functions of another." Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1527 (1991). However, even the most famous adherents to functionalism concentrate on whether the language of a Congressional delegation, rather than the strength of executive will, has been infringed upon. *See* Bowsher v. Synar, 478 U.S. 714, 776 (1986) (White, J., dissenting) (arguing that "the role of this Court should be limited to determining whether the Act so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law").

145. Hoffstadt, *supra* note 124, at 1446 (concluding that since the "case or controversy" clause forces courts to apply generally phrased laws to factual cases, and federal courts are generally not empowered to articulate new rights, creation of "rights of action and forms of relief are ostensibly less troublesome than the concerns related to federal common law that creates new enforceable rights").

146. Henry Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal*

Therefore, once the federal judicial power is triggered by a valid complaint or petition, the Constitution provides that that power extends "to all cases, in law and equity, arising under [the] Constitution . . . the laws of the United States."[147] In practice, this means that where an Article III court reviews the determinations of administrative agencies, even if events transpired after the administrative agency's actions but before the Court of Appeals issued a mandate, it is not bound by the agency's determination of whether a controversy still exists. While the agency's power to regulate the petitioner may have been diminished or mooted, the court's jurisdiction does not commensurately constrict.[148] Therefore, the scope of judicial power to render decisions is not limited by the executive's position on the scope of the controversy.[149] This view has deep historical roots, as even Lord Coke wrote that:

> The King hath committed all his power judiciall, some in one Court, and some in another, so as if any would render

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Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1372 (1953) (emphasis in original).

147. U.S. CONST. art. III, § 2; *cf.* Brian A. Stern, Note, *An Argument Against Imposing the Federal "Case or Controversy" Requirement on State Courts*, 69 N.Y.U. L. REV. 77, 90 (1994):

> A judge, of course, is not free to ignore the article III constraints on the "judicial power" any more than Congress is free to disregard article I limits on "legislative powers," or the President is free to ignore the definition of "executive power" contained in article II. Nor may Congress ignore the limitations placed on it by article III, section 1 with respect to its influence over the judiciary.

Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 647 n.260 (1983) (arguing that the Article III extension of the "judicial Power" to "cases" and "controversies "can be viewed as an obligation to adjudicate "cases" and "controversies" within the court's jurisdiction). For the opposing view, *see* Lockerty v. Phillips, 319 U.S. 182, 188 (1943) (Stone, J.) ("The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'").

148. Humphreys v. DEA, 105 F.3d 112, 116 (3d Cir. 1996) (exercising its discretion not to vacate decision after doctor successfully appealed revocation of his certificate of registration to dispense controlled substances, and Third Circuit reversed, but the doctor died before mandate could issue). Further, the exercise about *whether* to vacate, is equitable in nature, even if the underlying determinations of the administrative agency are statutorily limited to being based on legal grounds. Avellino v. Herron, 181 F.R.D. 294, 295 (E.D. Pa. 1998) (citing *Humphreys*); *see also* Social Sec. Bd. v. Nierotko, 327 U.S. 358, 369 (1946) ("An agency may not finally decide the limits of its statutory power. That is a judicial function.").

149. *Id.*

> himselfe to the judgment of the King in such case where the King hath committed all his power judiciall to others, such a render should be to no effect. And the King doth judge by his Judges (the King having distributed his power judiciall to severall Courts) And the King hath wholly left matters of judicature according to his lawes to his Judges.[150]

By the same token, at least two courts have acknowledged that legislative courts have the inherent power to vacate their own judgments or decisions,[151] though the exercise of their inherent power to give effect to their review of agency actions may be limited by their statutory role.[152]

Unfortunately, in the case of Article I courts, when the judicial power of the United States acts as a safety valve and performs a function that does not require exercise of the "judicial power," rather than providing retrospective relief, there is a plausible argument that it is unable to *ever* exercise any inherent power that could retroactively amend one of its decisions. Under this view, such an act would be unenforceable at best, and could have no real effect upon the agency supposedly under its review. Therefore, in order to actually decide a "controversy" there must be some inherent power to vacate decisions improperly procured.

Whether the controversy requirement is applicable in Article I courts is unsettled. It has also been held that in matters that can be appealed to an

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150. EDWARD COKE, 4 INST. 73 (2002 reprint) (1817); *see also* Edgar H. Brenner, *Judicial Review by Money Judgment in the Court of Claims*, 21 FED. B.J. 179, 204-05 (1961).

151. *See* Dixon v. Comm'r, 316 F.3d 1041, 1046 (9th Cir. 2003) ("Courts possess the inherent power to vacate or amend a judgment obtained by fraud on the court."); Toscano v. Comm'r, 441 F.2d 930, 933 (9th Cir. 1971) (once the Tax Court became a court as opposed to an administrative agency, a decision obtained by fraud on the court could be set aside at any time); Pueblo of Laguna v. United States, 60 Fed. Cl. 133, 135 (2004) (Allegra, J.) ("[the government] argues that because this court is an Article I tribunal, it lacks the inherent powers afforded Article III courts to order the preservation of relevant evidence. This court disagrees."); *see also Freytag*, 501 U.S. at 889; Dismuke v. United States, 297 U.S. 167, 172 (1936). *Cf.* Webbe v. Comm'r, 902 F.2d 688 (8th Cir. 1990) (26 U.S.C. § 7481 prohibits revisitation of Tax Court judgments). Gara, *supra* note 36, at 53 collects instances where courts have hinted that vacation was possible, but concludes that it wasn't warranted. *See also*, Cinema '84 v. Comm'r, 412 F.3d 366 (2d Cir. 2005) (collecting cases, but finding no grounds in the instant case to warrant vacation of a final judgment).

152. *Cf. Fierro*, 197 F.3d 147 at n.9 ("It is true that the exercise of the inherent power of lower federal courts can be limited by statute and rule, for [t]hese courts were created by act of Congress. Nevertheless, we do not lightly assume that Congress has intended to depart from established principles such as the scope of a court's inherent power.").

Article III court, the Article I court should, at least as a courtesy to the reviewing court,[153] scrutinize each case to make sure that it is not adjudicating a moot, unripe or hypothetical case. [154] The Tax Court goes through similar soul-searching when it is told that it must cease adjudications because a controversy no longer exists.[155]

The issue is further muddied when a court first decides the merits of the underlying case, and later the executive takes some action based on the court's decision (such as collecting from a petitioner or assessing taxes). Then, after the executive action, the court later concludes that a petitioner is entitled to some relief based on the behavior of the government while the matter was pending.[156] While the government may have complied with the law by waiting for the statutorily-defined judicial process to end, it is tempting to argue that once the executive takes action, the court is forbidden from exercising the "judicial power" of the United States. Under normal circumstances, this judicial power might include the inherent power to vacate decisions procured by fraud or mistake.[157] However, where the

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153. In Vaccine Act cases, it is possible for a petitioner to "withdraw" from the program or elect to "reject" a judgment, which is a necessary precondition to filing a tort suit against a vaccine manufacturer or administrator. However, if a petitioner does not do this, a judgment will still bind the government. 42 U.S.C. § 300aa-21.

154. Kanehl v. Unites States, 38 Fed. Cl. 89 (1997); *cf.* First Hartford Corporate Pension Plan & Trust v. United States, 54 Fed. Cl. 298, 304 n.10 (Fed. Cl. 2002) (Yock, J.) ("Although this Court is not an Article III court, the 'case or controversy' requirement of Article III is still applicable."); *see also* Mokal v. Derwinski, 1 Vet. App. 12, 15 (1990) ("We recognize the unsettled nature of the law in this area and do not attempt to resolve the controversy for purposes of this case.").

155. Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 249 (1999) (citing the transcript in Smith v. Comm'r, 78 T.C. 350 (1982)). In *Smith* the taxpayers had engaged in a tax strategy that was promoted by Merrill Lynch. Merrill Lynch had later agreed to compensate the taxpayers for any monies due as the result of the Tax Court case. The petitioners then conceded, but such a concession, it appears, was not enough to divest the court of jurisdiction. Compare United States v. Alaska S.S. Co., 253 U.S. 113, 116 (1920) ("Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly.").

156. 26 U.S.C. § 6213(a) ("no assessment of a deficiency in respect of any tax . . . and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day . . . if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final.").

157. Chambers v. NASCO, 501 U.S. 32, 46 (1991) ("the inherent power also allows a federal court to vacate its own judgment . . . . This 'historic power of equity to set aside fraudulently begotten judgments,' . . . is necessary to the integrity of the courts.") (citations omitted); Fierro v. Johnson, 197 F.3d 147, 152 (5th Cir. 1999) ("The power to grant '[e]quitable relief against fraudulent judgments is not of statutory creation.' This equitable

matter may be irretrievably out of the judiciary's hands, it is not too much of a stretch to conclude that such a legislative court is powerless to provide a remedy,[158] and is therefore bound to concede that it can not reverse the harm that was done, perhaps leaving the remedy to another court. In such cases, courts faced a paradox: the initial exercise of jurisdiction is a controversy, but their ability to make decisions is not.

4. *The Power of the Controversy Clause*

Even a court with limited jurisdiction might have some authority to fashion remedies for contempt based on its status as a "court" once the judicial power has been conjured up. Professors Frankfurter and Landis first argued that courts had inherent power because of: 1) "the formulated experience of the past . . ."; 2) the need to "deny these powers and yet to conceive of courts;" and 3) the fact that "courts would otherwise obviously fail in the work with which they are entrusted."[159] In *Michaelson v. United States* the Supreme Court held:

> [T]he power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over . . . at once become possessed of the power. So far as the inferior federal courts are concerned, however, it is not beyond the authority of Congress . . . but the attributes which inhere in that power

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power was 'firmly established in English practice long before the foundation of our Republic,' and the power is vested in courts by their very creation.") (citations omitted); United States v. Twitty, 44 F.3d 410, 413 (6th Cir. 1995) ("Courts inherently possess this equitable power in order to preserve the integrity of the judicial process.").

158. Inherent powers are to be distinguished from implied powers. *Chambers*, 501 U.S. at 43 ("[T]he Court has held that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it."). There is no dispute that all federal courts have the power to regulate their bar, and disbar individuals who misbehave, after providing them with due process. However, to conclude that an Article I court has the power to hear evidence based on an allegation that a lawyer for the government misbehaved, so that the petitioner can have his tax liability reduced (or another the monetary amount of another "public right" increased) is to conclude that the "case or controversy" – or rather just the "controversy" part requires a court to hear matters which involve a dispute between two parties that the court is capable of hearing disputes between.

159. Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts — A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1010-22 (1924).

> and are inseparable from it can neither be abrogated nor rendered practically inoperative.[160]

However, provided that there are at least some types of sanctions for not following rules, the Supreme Court directed that any use of inherent powers should be construed *against* the party seeking relief, provided that he is afforded relief via *some* power.[161]

Although American courts generally do not shift attorney fees without legislative prodding, many statutes provide for shifting fees from party to party,[162] thereby allowing the courts to grant relief to parties who may be injured just by the cost of appearing in court.[163] However, equitable shifting of attorney fees (absent a statute) based on a theory of the court's inherent authority has proved somewhat controversial.[164]

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160. 266 U.S. 42, 65-66 (1924) (citations omitted); *see also* Leslie M. Kelleher, Taking *"Substantive Rights" (In the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 66 n.81 (1998) (collecting cases).

161. Pavelic & Leflore v. Marvel Entm't, 493 U.S. 120, 122 (1989) (Fed. R. Civ. P. 11 provided that sanctions could be imposed against a party or its lawyer. It could not be construed to sanction his law firm.); *Chambers*, 501 U.S. at 46 (stating that neither statutes nor the Fed. R. Civ. P. display the inherent authority of courts to sanction bad-faith litigants). For example, some courts have seen their inherent powers to fashion remedies in the face of conduct that looks and smells like contempt, but the court has not specifically found it to be contempt, which would trigger the court's inherent powers. For example, in *Johnson v. United States*, 578 F. Supp. 226 (S.D.N.Y. 1984), Judge Pollack held that where the IRS had violated a court order, Plaintiff's damages were limited to a statutory cap, and the court was "loath" to inquire as to whether the violation of the court order was willful.

162. For examples of fee-shifting statutes, *see* West Virginia Univ. Hospitals v. Casey, 499 U.S. 83, 88-89 (1991); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260 n.33 (1975).

163. For example, while the First Amendment guarantees individuals at least some freedom from government-sponsored religious indoctrination, in many cases, it is not "self-applying." *See infra* note 502 and accompanying text. It is also difficult to quantify the value of such an injury. Therefore, 42 U.S.C. § 1988 allows courts that have jurisdiction over such First Amendment claims to award attorney fees to a party whose first amendment rights were violated, thereby resolving at least most of the controversy without making the party ask the very party that injured them to compensate them for the cost of the lawsuit.

164. For example, in *Chambers*, a suit for specific performance of a contract for sale of a TV station, Mr. Chambers did numerous things to defraud the court, especially filing frivolous pleadings, and did not cooperate in discovery. *Chambers*, 501 U.S. at 38 n.2 (e.g. motion for recusal of judge). Nevertheless, before trial the parties stipulated that the underlying contract was enforceable, and that it had been breached by failing to file the required paperwork with the FCC. *Id.* at 38-39. After that agreement, Chambers again tried to frustrate the litigation by moving the physical station to another location, not covered by the agreement. Almost at every turn, Chambers or its lawyers were sanctioned by either the district court, or, when they appealed his decisions they were again sanctioned by the Fifth Circuit (by remanding in order to determine the amount of sanctions). NASCO

In general, however, the contempt power has not been used to regulate the conduct of government agencies, despite their considerable power, at least pending judicial disposition, to impound property or determine substantive amounts owed.[165]

Outside the contempt context, even if a court properly has jurisdiction over a matter, "fee-shifting" of legal fees to the loser is not found in the "common law," and it is the exception to the general "American Rule" for a prevailing party to receive attorney fees. Moreover, to enforce such a judgment against the government, absent a specific statute, risks offending Congress's ability to preserve the public fisc and make specific appropriations.

From the "American Rule" against fee shifting, courts have carved out four exceptions in the federal system: [166] 1) the "common fund" exception

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v. Calcasieu Television & Radio, Inc., 797 F.2d 975, 1986 U.S. App. LEXIS 28456 (5th Cir. 1986) (per curiam) (unpublished order). Eventually the district court ordered Chambers to pay almost $1,000,000 in attorney fees and ordered the disbarment of one attorney. NASCO v. Calcasieu Television & Radio, Inc., 124 F.R.D. 120 (W.D. La. 1989). Over time, the court fashioned a sanction for this bad faith in the form of a shifting of attorney fees not based on the statutory mechanisms, but on its inherent power which the Supreme Court accepted. *Chambers*, 501 U.S. at 50 (There is . . . nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney fees as a sanction for bad-faith conduct.) The dissent (Kennedy, J.) castigated the majority by saying that such an ad hoc approach did not adequately put the parties on notice of the penalties they faced, and did not allow for a meaningful review of the use of the court's discretion. *Chambers*, 501 U.S. 32 at 60-61.

165. Armstrong v. Executive Office of the President, 821 F. Supp. 761 (D.D.C. 1993), *aff'd in part*, 1 F.3d 1274 (D.C. Cir. 1993). In *Armstrong*, the Court of Appeals reversed the district court's finding of contempt for failing to promulgate new regulations, as the agency had not been directly ordered to promulgate those regulations, but was, instead informed in a declaratory judgment that its regulations were not in compliance with relevant statutes. *Id.* at 1289. On the other hand, various commentators have taken the more narrow view that the only inherent powers which a court should exercise are those which discipline people in a physical courtroom. For example, Professor Goldfarb argued that courts should only rely on their inherent powers to push people as necessary for its self-preservation. For anything else, a court can rely on imposition of statutorily mandated sanctions to punish contempt. RONALD GOLDFARB, CONTEMPT POWER 181-82, 290-91, 297-98, 304-06 (1963). *See, e.g.*, Lion Raisins, Inc. v. United States, 64 Fed. Cl. 536 (2005) (Miller, J.) (holding government attorneys in contempt and issuing a "contempt citation" for, *inter alia*, violating a protective order, mentions disbarment proceedings, and prohibit use of improperly obtained material).

166. S. D. Shuler, *Recent Development:* Chambers v. NACSO, Inc.*: Moving Beyond Rule 11 Into the Uncharted Territory of Courts' Inherent Power to Sanction*, 66 TUL. L. REV. 591, 593 (1991); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651 (1982).

where, under equitable principles, a party's efforts benefit others[167] who also stand to benefit by a suit to vindicate the rights of identifiable beneficiaries of a trust;[168] 2) where no fee shifting statute exists, but many parties benefited from the litigation;[169] 3) sanctioning the willful disobedience of a specific court order, as is derived from the court's contempt power; [170] and 4) the bad-faith exception, also derived from the court's inherent powers.[171] In addition, in some states, an individual can obtain attorney fees by suing under a "private attorney general" statute which allows a suit in the name of the government in order to obtain a result that would benefit the entire state.[172] However, for the most part, each of these theories proceeds from the premise that a party other than the plaintiff has benefited from the litigation, and the proceedings are in the nature of a *request* for equitable relief.

Unfortunately, even if Article I courts can exercise jurisdiction over an entire controversy, it is doubtful that the "common fund" exception to the American rule would be available in an Article I court as they have generally lacked jurisdiction to impose equitable decrees on the government. Absent a specific statute, a grant of attorney fees for the purpose of benefiting a set of people who had not properly petitioned the court and over whom the court did not properly have jurisdiction would not only interfere with Congress's ability to manage the public fisc and set aside funds for various uses,[173] but might not make sense because the court could

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167. *Alyeska*, 421 U.S. at 257-58.

168. Greenough v. Tax Assessors of City of Newport, 331 U.S. 486, 535-36 (1947).

169. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1970).

170. *Chambers*, 501 U.S. at 45-6 ("Third, and most relevant here, a court may assess attorney's fees when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' In this regard, if a court finds 'that fraud has been practiced upon it, or that the very temple of justice has been defiled,' it may assess attorney's fees against the responsible party, as it may when a party 'shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order.'" (citations omitted)).

171. Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). This "bad faith" exception was codified at 28 U.S.C. § 1927, but the Supreme Court interpreted "costs" not to mean "attorney's fees" but rather simply filing, service fees, and expert witness fees. *Id.* at 757-58.

172. Karla Alderman, Comment, *Making Sense of Oregon's Equitable Exception to the American Rule of Attorney Fees After* Armatta v. Kitzhaber, 35 WILLAMETTE L. REV. 407, 409 (1999).

173. *See Alyeska*, 421 U.S. at 264 n.39. The Court also stated that if state law provided for a shifting of fees on to a victorious private attorney general, then, a federal court would likely have to follow state law on this issue. *Id.* at 259 n.31. However, it is doubtful that an Article I court may actually find itself in the position of having to enforce a policy interest of an individual state.

probably not issue an injunction that would directly benefit similarly situated people.[174]

5. *Actions of Government Counsel May Not Be a Part of a Controversy*

While the above powers may seem grand, there remains yet another obstacle to disciplining the government. Although they sit on opposite sides of the court, a government lawyer may not be truly adverse[175] to the interests of the petitioner (as he might not be personally liable for any reduction in revenue that the public fisc would sustain), and it could be argued that there is no real controversy when the citizen seeks money from the government based on a government attorney's behavior. Therefore, a reduction in the petitioner's tax liability does not directly impact the government attorney's personal pocketbook. Moreover, his client, the government, does not require him to maximize its revenues at all costs.

The closest that the Supreme Court came to deciding this issue was its holding that even a court without subject matter jurisdiction may sanction a party for its behavior before that court under Fed. R. Civ. P. 11.[176] In most sanctions cases, however, the Court has held that it, and lower courts, undoubtedly have jurisdiction over the lawyers, and could issue a self-executing judgment against them. However, since Article I courts likely cannot issue judgments against individuals who did not petition the court in the first place, they probably do not have personal jurisdiction over the lawyers who appear on behalf of the government (at least to issue judgments against them in their personal capacity), and therefore, the court may lack jurisdiction to entertain claims that the lawyers' behavior warrants an imposition of sanctions that, inure to the benefit of a petitioner.[177] Therefore, in the face of misbehavior by the government, the argument goes, if there is no jurisdiction to issue a judgment, there is no "controversy."

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174. *But see supra* Section II(A).

175. Muskrat v. United States, 219 U.S. 346, 357 ("The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.").

176. Willy v. Coastal Corp., 503 U.S. 131, 138 (1992) (holding that a collateral order of sanctions was still within the District Court's determination, despite the fact that the underlying dispute had been dismissed for lack of subject matter jurisdiction).

177. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 55 n.10 (1989) (stating that Congress may not "assign at least the initial fact-finding in all cases involving controversies entirely between private parties to administrative agencies or other tribunals not involving juries, so long as they are established as adjuncts to Article III courts. If that were so, Congress could render the Seventh Amendment a nullity.")

6. *The Government Lawyer as an Agent of the Government*

Under a purely redeterminist model, the actions of the government's lawyers mean little. In this view, the court is charged only with finding facts that relate to the petition or complaint. On review it is deemed to have seen through any chicanery. Yet under the institutional discipline model, courts could attribute the actions of the government's agents to the government under a principal-agent theory, just as the Exchequer was able to determine either that the actions of a sheriff were properly undertaken in the name of the King, or that they merited punishment.[178] This approach is probably the only available approach as there is no chance that the government lawyers could be held liable under a tort theory in a subsequent action.

In other words, since the lawyers for the government are not actually satisfying any grant of attorney fees, any inherent power that courts have to award attorney fees against litigants as a way to punish bad behavior is almost ineffective unless they can issue and enforce a judgment against the individual attorneys. However, not only may this be impossible, but in most cases it would be inadequate to compensate large classes of litigants that have been harmed by their actions.

Even if a lawyer for the government commits the most horrendous violations of court orders and violates whatever ethical duties he is bound by, it is only speculative that such behavior may result in an "injury in fact" to the petitioner.[179] Simply because a lawyer engages in unethical litigation techniques does not automatically mean that the tribunal came to an incorrect result. Therefore, in practice, although the Tax Court was eventually overruled by the Ninth Circuit, in *Dixon*,[180] it initially held even if there is a "fraud on the court" it does not automatically mean that a taxpayer was prejudiced or even had his rights to due process violated.

On the other hand, the Court of Appeals for the Seventh Circuit, in *Drobny*, relied on precedent from when the Tax Court was not an Article I court, but rather an "independent agency within the executive branch," and concluded that the Tax Court's powers were limited, and therefore, where there is no prejudice, there was no "fraud on the court."[181] Furthermore,

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178. *See supra* note 65 and accompanying text.

179. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) ("[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'").

180. T.C. Memo. 1999-101, 1999 WL 171398 (1999).

181. Drobny v. Comm'r, 113 F.3d 670, 677 (7th Cir. 1997) (quoting Kenner v. Comm'r, 387 F.2d 689, 690 (7th Cir. 1968)) ("We think, however, that it can be reasoned

according to *Drobny*, the only reason that fraud upon the court (by the government) was subject to revisitation is because of the legal fiction that any decision tainted by fraud "is not in essence a decision at all, and never becomes final."[182] Amazingly, because *Drobny* and *Dixon* create a remarkable circuit split,[183] and the Tax Court is bound to follow each one depending on where the taxpayer lives, this issue has remained unresolved.[184]

Courts, however, have been reluctant to conclude that lawyers for the government are really agents capable of binding it under anything other than specific procedures set out in statutes or regulations.[185] If the government lawyer was consistently treated as an agent of the government for determining tax liability, then there would be no question as to whether his misbehavior in court was a "controversy" that the court had jurisdiction over, and substantive determinations of liability could be based on his actions. However, due to the federal government's size, a government lawyer is but a cog in a great machine, and courts are reluctant to characterize the lawyer's actions as the actions of an agent of the government, analogous to those of a cashier or a bank teller.[186]

To be sure, courts have tried to use their power to conduct proceedings to hold that government statements *during court proceedings* can be considered "adoptive admissions" for Fed. R. Evid. 801 purposes.[187]

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that a decision produced by fraud on the court is not in essence a decision at all, and never becomes final.").

182. *Id.*

183. The closest the Supreme Court has come to finding that courts possess a power to look beyond statutes precluding judicial review in the case of aberrant government conduct is in Justice Brennan's concurrence in *Heckler v. Chaney* in which he opined that "[i]t is possible to imagine other nonenforcement decisions made for entirely illegitimate reasons, for example, nonenforcement in return for a bribe, judicial review of which would not be foreclosed by the nonreviewability presumption." 470 U.S. 821, 839 (1985).

184. Golsen v. Comm'r, 54 T.C. 742, 757 (1970), *aff'd,* 445 F.2d 985 (10th Cir. 1971) (stating that the Tax Court will "follow a Court of Appeals decision which is squarely in point where appeal from our decision lies to that Court of Appeals")

185. *See, e.g.*, Johnson v. United States, 54 Fed. Cl. 187, 192 (2002) (Gibson, J.) (analyzing regulatory scheme to determine that "associate chief appeals officer" lacked settlement authority and could not create an implied-in-fact contract with government); Gardner v. Comm'r, 75 T.C. 475 (1980) ("Appeals officers . . . do not appear to have been delegated settlement authority, and petitioners thus cannot rely [on their] preliminary approval of the settlement stipulation as being binding on the Commissioner.").

186. *See, e.g.*, LaMirage, Inc. v. United States, 44 Fed. Cl. 192, 200 (1999) (Horn, J.) ("It is well settled that this court is without jurisdiction to entertain claims arising from a contract, based on the theory of promissory estoppel, or based on contracts implied-in-law.").

187. United States v. Kattar, 840 F.2d 118, 130 (1st Cir. 1988) (declining to address whether the government's admissions are those of "agents" under Fed. R. Evid.

However, this does not necessarily mean that the lawyer is acting as an agent of the government, and thereby mandating the satisfaction of monetary obligations. In practice, courts have only gone so far as to hold that U.S. Attorneys' duties to disclose information include a duty to make a reasonable inquiry into what exculpatory information the FBI knows.[188]

It follows that, absent a statutory basis to change the government's liability based on an attorney's actions, a court cannot view a government attorney's actions as part of the live controversy unless it is willing to find that the attorneys for the government are capable of subjecting the government to reduced revenue based on their actions, or to conclude that equity demands a reduction in tax liability. However, to conclude that such equitable interests are in play before an Article I court would shatter the myth that Article I courts are vested with no "general equitable powers."[189] In *Dixon*, by ordering the Tax Court to "enter judgment in favor of Appellants and all other taxpayers properly before this Court on terms equivalent to those provided in the [corruptly obtained] settlement agreement with Thompson and the IRS," the Ninth Circuit did just that.[190]

V. HISTORICAL ANALYSIS OF EXISTING ARTICLE I COURTS

To see how the Ninth Circuit's solution in *Dixon* accurately reflects the nature of the current equilibrium between the above constitutional interests, and therefore should be adopted by all circuits, some history of

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801(d)(2)(D), and instead holding statement admissible under "Rule 801(d)(2)(B) as statements of which the party-opponent 'has manifested an adoption or belief in its truth'"); United States v. Powers, 467 F.2d 1089, 1097 n.1 (7th Cir. 1972) (Stevens, J., dissenting) ("The United States, like other inanimate persons, must, of course, act through its agents. However, just as formal action by a board of directors may clearly evidence the position of a corporation, so does the formal prosecution of a criminal trial establish the position of the United States and not merely the views of its agents who participate therein."); United States v. Harris, 834 A.2d 106, 118 n.3 (D.C. 2003) ("We have held that, in certain circumstances, statements of Assistant United States Attorneys are party admissions that are admissible against the government in subsequent criminal cases . . . [but the] admissions of a party opponent. The Freeland [v. United States, 631 A.2d 1186 (D.C.1993)] court did not mean to suggest that the United States was bound conclusively by its prior statements, as if they were judicial admissions.").

188. United States v. Osorio, 929 F.2d 753, 761 (1st Cir. 1991) (holding that in a criminal trial, where the government did not provide timely discovery that the "prosecutor charged with discovery obligations cannot avoid finding out what 'the government' knows, simply by declining to make reasonable inquiry of those in a position to have relevant knowledge.") (internal citations omitted).

189. *See infra* note 396 to 405.

190. Dixon v. Comm'r, 316 F.3d 1041, 1047 (9th Cir. 2003).

extant Article I courts is needed. At present, Article I courts include: the Court of Veterans Appeals, the Court of Federal Claims, and the Tax Court.[191] Unfortunately, a complete history of these courts is beyond the scope of this article. However, a brief glimpse at the way these courts developed beyond non-reviewable discretionary functions of agencies to their current state will put them in perspective and show that they are intended to protect petitioners from improper actions of the government.

A. HISTORY OF THE COURT OF FEDERAL CLAIMS

Professor Jaffe and others note that in the United States, where there was no king to grant nominal consent, there could be no petition of right.[192] Legislatures, mindful of the public fisc and the pressures of the taxpaying public, were not willing to consent to be sued as a benevolent king would be,[193] and courts were somewhat reluctant to push the issue. In a sense, the greatest obstacles to claims against the government were the concept of popular sovereignty, the need for courts to observe strict separation of

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191. Because bankruptcy courts generally adjudicate claims involving individuals and, by statute, matters requiring Article III adjudication can be readily transferred to a district judge, they are not included in this article. However, statutes provide that bankruptcy courts can adjudicate claims between the IRS and taxpayers in bankruptcy. 11 U.S.C. § 505 (a) ("the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction."); James I. Shepard, *Bankruptcy Court Jurisdiction to Hear Innocent Spouse Defenses in Tax Cases: The Tax Court Leads the Way*, Norton Bankr. L. Adviser, 2001 at 1 (discussing interaction between Bankruptcy Code and Judicial Code). Likewise, military courts are not included because they have criminal jurisdiction, and the lower military courts are creatures of Article II. Moreover, they may exercise supervisory power to dismiss charges where the government is deemed to have behaved badly.

192. *See supra* note 88 and accompanying text.

193. *Lee*, 106 U.S. at 238-39 ("The English remedies of petition of right, monstrans de droit, and traverse of office, were never introduced into this country as a part of our common law; but in the American colonies and states claims upon the government were commonly made by petition to the legislature.") Shimomura also notes that in the colonies, judges were appointed by the King, and the legislatures were not too eager to have their purses depleted by jurists who were beholden to the King, and whose rulings were appealed to courts in England. Shimomura, *supra* note 62, at 633; Davie, *supra* note 55, at 822 (explaining how American courts asserted a broader doctrine of almost absolute sovereign immunity from judicial intervention on the grounds that 1) it was inconsistent with the dignity of the state; 2) taking money from the fisc might impair the prosecution of war); Martindale, *supra* note 82, at 545 (noting that it is not the desire of the people to pay debts, but rather to save money).

powers, and the "wisdom" of exempting government from suit.[194] Congress has been reluctant to cede unfettered discretion to pay claimants to any branch, or to engage in any searching inquiry of the government's behavior. Instead, Congress's approach has been schizophrenic and piecemeal. Indeed, to date, all three branches of the government have played the role of "final arbiter" of the validity of a claim against the government. There is no general waiver of sovereign immunity, or even a theory under which a court can determine whether sovereign immunity *should* be waived, but rather, a hodgepodge of statutes and some constitutional provisions, which the courts have attempted to coalesce into a coherent doctrine that provides claimants with recourse to courts. Consequently, the history of the court's power has been a tug-of-war between sovereign immunity (or Art. I, § 8) and the court's need to exercise jurisdiction over the entire controversy put before them.

1. Background

After the Articles of Confederation were adopted,[195] a three-member "Board of the Treasury" heard cases relating to war debt, as well as cases sounding in tort, usually adhering to some unstated evidentiary requirements and burdens of proof.[196] The Board reported back to Congress, who, in turn, authorized the Treasury to pay the claims.[197] Unlike the arrangement in England, where matters were referred by the King to the courts or Chancery, there was no formal trial procedure or independent review.[198]

Five months after the signing of the Constitution, Congress continued the general pattern of executive fact-finding, followed by Congressional approval of claims, and established a Board of Auditors within the Treasury,[199] which mirrored the system under the Articles of Confedera-

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194. *See* WATKINS, *supra* note 83, at 195 (collecting views of the "wisdom" of sovereign immunity, its "expedience" and a need to allow the executive to go about its business).

195. The terms of the articles placed plenary power to evaluate claims against the state in Congress. Arts. Confederation. art. 8, § 1 (1781) (superseded 1789).

196. Merrill Jensen, *The New Nation: A History of the United States During the Confederation* 1781-1789, 371-73 (1965) (describing work of board, and noting that the board was honest and efficient, many claimants were opportunists, and while the board did not hear testimony it received documentary evidence and actively investigated claims of petitioners).

197. Shimomura, *supra* note 62, at 635.

198. COWEN, *supra* note 13, at 3; Jensen, *supra* note 196.

199. The exact function of the Board of Auditors is subject to some debate. James Madison saw it as principally a judicial function (which should be appealable to the

tion.[200] Congress was free to set aside the legal or factual conclusions of the Board or consider the claim *de novo* before making payment.[201]

In the courts, however, there was some initial breach in sovereign immunity, at least with regard to state governments, as the Supreme Court held in *Chisholm v. Georgia* that states could be directly sued.[202] However, *Chisholm* was quickly abrogated by the Eleventh Amendment. In the end, the Court held that while Article III's reference to suits in which the United States was a party provided the federal government with the power to sue individuals in federal courts, it did not provide individuals with a constitutional right to sue the federal government in such courts.[203]

In 1792, Congress attempted to assign the responsibility of adjudicating support claims by revolutionary war orphans and widows to the courts, which would then pass their recommendations to the Secretary of War.[204]

Supreme Court). However, Congress was not willing to do that, in part because of U.S. Const. art. I. § 9, which held that no money should be drawn from the treasury unless there was a specific appropriation. COWEN, *supra* note 13, at 5.

200. Shimomura, *supra* note 62, at 637; William Wiecek, *The Origin of the United States Court of Claims*, 20 AD. L. REV. 387, 389 (1968).

201. *See, e.g.,* Act of Sept. 29, 1789, ch 26, 6 Stat. 1 (1789) (paying claims to foreign officer and appointing Commissioner to settle claims with states).

202. 2 U.S. (Dall.) 419, 478 (1793) ("[I]n case of actions against the United States, there is no power which the courts can call to their aid."). *See also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411 (1821).

203. COWEN, *supra* note 13, at 6 n.13.

204. Act of Mar. 23, 1792, ch. 11, §§ 2-3, 1 Stat. 243 (1792); Power, *supra* note 10, at 699 ("Although the Supreme Court did not formally invalidate the Act in *Hayburn's Case*, the report of that decision appended letters and opinions in which the lower federal courts expressed substantial doubts about its constitutionality.") (footnote omitted); *see, e.g.*, Case of Hayburn, 2 U.S. (2 Dall.) 408, 409 (1792), in which the court quoted a decision of the Circuit Court of New York which read:

> [t]hat the duties assigned to the Circuit courts, by this act, are not of that description, and that the act itself does not appear to contemplate them as [s]uch; inasmuch as it subjects the decisions of the[s]e courts, made pursuant to tho[s]e duties, fir[s]t to the consideration and [s]u[s]pen[s]ion of the Secretary at War, and then to the revi[s]ion of the legislature; whereas by the Constitution, neither the Secretary at War, nor any other executive officer, nor even the Legislature, are authorized to [s]it as a court of errors on the judicial acts or opinions of this court.

United States v. Ferreira, 54 U.S. (13 How.) 40, 46-52 (1851) (stating that the treaty with Spain did not create a court to determine damages, and unless Congress gave finality to judgments, the courts could not determine facts for Congress to base appropriations upon). The more recent case of *Mistretta v. United States* described *Ferreira* and noted that:

> We did not conclude in *Ferreira*, however, that Congress could not confer on a federal judge the function of resolving administrative claims. On the contrary, we expressed general agreement with the view

This failed when the courts balked at executive review of their judicial decisions, holding that they were not cases or controversies that were within the cognizance of the judiciary.[205] Congress later amended the statute to vest the courts without fact-finding authority, which apparently satisfied some lower courts,[206] at least temporarily.[207] Congress responded by completely foreclosing judicial review of these early veterans benefits,[208] and it remained this way for almost 200 years.[209]

In 1794, faced with judicial reluctance to act in an advisory capacity and without self-executing judgments that could be executed absent congressional acquiescence, Congress set up a standing Committee on Claims.[210] Hearings were *ex parte*.[211] No formal rules of procedure or evidence were observed (other than the Committee's rules), and there was no prohibition against lobbying the Congressmen independently.[212] Indeed,

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> of some of the judges in *Hayburn's Case* that while such administrative duties could not be assigned to a court, or to judges acting as part of a court, such duties could be assigned to judges acting individually as commissioners.

488 U.S. 361, 402-03 (1989). A final decision by the Supreme Court was avoided when Congress enacted a statute that provided that the courts could find facts. Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793); *Hayburn*, 2 U.S. (2 Dall.) at 10 ("That the judges of this court regard them[s]elves as being the commi[s][s]ioners de[s]ignated by the act, and therefore, as being at liberty to accept or decline that office.").

205. Shimomura, *supra* note 62, at 639.

206. The history behind these proceedings is somewhat murky. The best account is found in Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in* Marbury v. Madison, 1986 WIS. L. REV. 301, 305-09 n.13 (1986). There the findings of the New York Circuit Court (in letters addressed to the president) are described:

> The judges of the New York circuit court, John Jay, William Cushing, and James Duane, then declared that, in view of the benevolent purposes of the Act, they would agree to conduct the invalid pensions business as commissioners: As, therefore, the business assigned to this court by the act is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it by official instead of personal descriptions.

A copy of this letter is available at http://lcweb2.loc.gov/ll/llsp/037/0000/00590051.tif (last visited Oct. 19, 2005).

207. Mistretta v. United States, 488 U.S. 361, 402-03 (1989) (collecting cases); Shimomura, *supra* note 62, at 639 (collecting cases where some lower courts held that they can act as fact-finding commissioners); Binney, *supra* note 51, at 3381.

208. *See* Charles Mills, *Is the Veterans' Benefits Jurisprudence of the U.S. Court of Appeals for the Federal Circuit Faithful to the Mandate of Congress?*, 17 TOURO L. REV. 695 (2001) [hereinafter Mills, *Mandate*] .

209. *See infra* notes 453-473 and accompanying text.

210. Shimomura, *supra* note 62, at 644.

211. Richardson, *supra* note 39, at 782.

212. George M. Davie described Washington and state capitals as being deluged

if a claimant failed in one session of Congress, he could seek relief in the next.[213]

In 1797, Congress statutorily authorized courts to setoff claims that the government had against individuals by claims that the individuals had against the government, even if such claims were denied by the Treasury.[214]

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with "claim brokers" and parliamentary agents, as well as lobbyists who sought to influence various legislators. Since claims were resolved on a political basis it was considered clever to introduce them into various legislation while one's opponents were absent, so that they would not be on notice of a potential payout. Davie, *supra* note 55, at 14. At one point, as Mr. Davie relates, Congress was known as the "National Claims Mill."

213. Davie, *supra* note 55, at 816; Shimomura, *supra* note 62, at 644.

214. Act of Mar. 3, 1797, § 3, ch. 20, 1 Stat. 514 (1797); *see also* United States v. Macdaniel, 32 U.S. 1, 17 (1833) (where military officer had been paid in excess of his congressionally authorized salary, but he had done work to earn that amount, the government was not entitled to those excess funds back simply because they could deny that he had an equitable claim to the funds); States v. Ringgold, 33 U.S. 150, 163 (1834) ("If the right of the party is fixed by the existing law, there can be no necessity for an application to congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defense, to a suit by the United States"); Nat'l Bank of N.Y. v. Republic of China, 348 U.S. 356, 359-360 (1955) ("This chilly feeling against sovereign immunity began to reflect itself in federal legislation in 1797 . . . . Congress decided that when the United States sues an individual, the individual can set off all debts properly due him from the sovereign.").

Setoff and counterclaim did not exist at common law. A defendant who asserted a setoff could only assert that the plaintiff owed him some *liquidated* damages. Under British law, setoffs could not be in the nature of penalties. Until 1875, in England, if a Defendant ended up owing more than the Plaintiff had originally sued for, he was required to bring a cross-action for the balance. W. BLAKE ODGERS, THE PRINCIPLES OF PLEADING AND PRACTICE IN CIVIL ACTIONS IN THE HIGH COURT OF JUSTICE 236-37 (7th ed. 1912). Courts of law and equity were very careful to ensure that setoffs were only between the parties acting in the same capacity. Therefore, the debts of an estate could not be set off against the credits of an executor of the estate. *Id.* at 238-39. Counterclaims, unlike setoffs, are more similar to a separate action by a defendant. The ability to bring them did not exist at common law either. *Id.* at 241. For this reason, if the U.S. government, as a defendant, asserts a counterclaim at the Court of Claims, or any court that sits without a jury, a Plaintiff might have a right to a jury trial. In short, the right to setoff requires that:

> [A] party . . . show[s] that he holds a mutual obligation against the party asserting a claim against him which is unrelated to the transaction upon which the other party bases his claim. As for the requirement of a "mutual obligation," the defendant seeking to assert a right of setoff must possess a legal right against the same party making demand of him. It is well established that a right to setoff only exists when the party asserting the right has a claim which arises out of a transaction unrelated to the matter upon which plaintiff is asserting his claim.

Gary E. Sullivan, *In Defense of Recoupment: Why "Setoff" of Prepetition Utility Deposits Against Prepetition Debt is Not Subject to the Automatic Stay*, 15 BANKR. DEV. J. 63, 66 (1998-99) (footnote omitted). Because setoff by its nature involves substantive rights, when the existence of individual rights are at stake, it is treated separately. For example, in the

Over the next seventy years, Congress preserved its "committee on claims"[215] while creating others.[216] While it paid some claims,[217] it also delegated some initial decision-making to various executive agencies. At all times Congress feared fraud[218] and overextending the public fisc.[219]

Before *Reeside*,[220] the courts appeared to allow judgments against the government when it turned out that, after the government had sued a

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bankruptcy context, a party must seek a lifting of the automatic stay of the setoff of one debt against another and historically specific statutes have authorized setoffs. 11 U.S.C. § 362(a)(7) (2000); *In re* Holyhoke Nursing Homes, Inc. v. Health Care Fin. Admin., 372 F.3d 1, 3 (2004) (lifting of automatic stay not requirement to recoup debts, whereas lifting of stay is required for setoff). Unlike setoff, recoupment does not appear in statutes, and requires that the parties' obligations to each other arise in the same transaction. However, historically, it has been used to mitigate damages. *Recoupment*, 7 AM. L. REV. 389, 390 (1872-73) (recoupment is available to reduce liability based on a breach of warranty theory based on a set of facts existing at the date of contract "although perhaps not ascertainable till subsequently.") (footnote omitted).

215. Shimomura, *supra* note 62, at 644 (the committee would "take into consideration all such petitions . . . claims or demands on the United States, as shall be presented, or . . . referred to them by the House, and to report their opinion thereupon, together with . . . propositions for relief . . . as . . . shall seem expedient.") (quoting H.R. REP. NO. 25-730, at 2-3 (1838)).

216. Binney, *supra* note 51, at 381 (listing committees on claims).

217. *See, e.g.*, 30 ANNALS OF CONG. 844 (1817), available at http://case.tm/pubs/sources/Villiers.pdf (referring to the case of Jumonville de Villiers, whose fence was used by American soldiers for fuel and whose sugar cane was allegedly eaten by the soldiers. The committee concluded that Mr. De Villiers was entitled to payment for the fence, but not the cane because "the Government cannot be considered liable for the destruction of the cane or the use of the sugar, it being neither necessary for the service nor for the sustenance of the army.").

218. The statute required the granting of a new trial to the government if it could "satisfy the court that a fraud, wrong, or injustice had been done to the Government. Claimants, however, could get a new trial only if they met the usual requirements of the common law or [C]hancery and made their motion during the court term when the judgment was entered." COWEN, *supra* note 13, at 34; *see also* Act of June 25, 1868, ch. 71, §2, 15 Stat. 75, 75 (1868).

219. After the war of 1812, in 1816 Congress appointed a commission with final authority to decide claims for property lost by citizens who were either volunteering in the war, or for property destroyed by the American army. Act of Apr. 9, 1816, ch. 40, § 11, 3 Stat. 261, 263 (1816) (amended 1817); COWEN, *supra* note 13, at 7. After the Mexican-American War, pursuant to the Treaty of Guadalupe Hidalgo, Congress established a commission to pay claims. Act of Mar. 3, 1849, ch. 107, 9 Stat. 393; COWEN, *supra* note 13, at 11. While the codified statute did not accord finality to the judgments of the three-member commission, the treaty itself did. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1948, U.S.-Mex., art. XV, 9 Stat. 922, 923. Since there was a cap on the amount payable, the treaty did not violate Article I. § 9 of the U.S. Constitution, but the commission certified the amounts due to each petitioner to the treasury department, who, in turn, paid each petitioner their ratable share.

220. *See supra* notes 99-100 and accompanying text.

defendant, it was the government that owed the defendant money.[221] However, several years after Congress allowed for setoffs, the Court took what amounted to a step away from attempting to adjudicate the entirety of the controversy and a step towards protecting the public fisc, and held that if after the resolution of claim and setoff, the government ended up owing, it was impossible to enforce a judgment against the government.[222]

2. *As an Agent of Congress*

From 1855 to 1860,[223] Congress experimented with a three-judge "Court of Claims."[224] This three-judge tribunal did not have the power to order the Treasury to pay, but could hear petitions and adjudicate claims based on statutory, regulatory, or contractual theories[225] argued by

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221. United States v. Fillebrown, 32 U.S. (7 Pet.) 28 (1833). Recently the Tax Court has dealt with a similar issue; however, jurisdictional issues have complicated the subject somewhat. When a Taxpayer petitions for a "redetermination" of proposed Tax Liability, the Tax Court generally has jurisdiction to redetermine the tax liability for the entire year; therefore, one recognized item may be offset against another. Fisher v. United States, 80 F.3d 1576 (Fed Cir. 1996); Americold Corp. v. United States, 28 Fed.Cl. 747, 752 (1993) ("There is no room . . . to deny the government its right of setoff because the taxpayers' claim is relatively small . . . or because the underlying facts are old and complex, or the Internal Revenue Service had a previous opportunity to assess the underpaid tax.") (quoting Dysart v. United States, 340 F.2d 624, 628 (Ct. Cl. 1965) (under § 6402(d) (2000) the government offset refunds against debts to other agencies)). *See* Sorenson v. Sec'y of Treasury, 475 U.S. 851 (1986) (noting excess earned income credits were overpayments subject to intercept).

222. *Reeside*, 52 U..S at 272; Tillou v. United States, 1 Ct. Cl. 220, 1865 WL 1995 (1865), *rev'd sub nom*, United States v. Eckford, 73 U.S. (6 Wall.) 484, 489-90 (1867) (Since right of setoff did not exist at common law, there must be a specific statute that allows plaintiffs to setoff. However, equitable claims for credit may be used to change the amount liability, but they may not result in a judgment against the United States.).

223. The Court of Claims was created by the Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (1855).

224. Richardson, *supra* note 39, at 784.

225. *Id.* at 796; COWEN, *supra* note 13, at 15 ("The original Act provided that the court could receive and file without reference by Congress claims founded: (1) on any law of Congress, (2) upon any regulation of an executive department, and (3) upon any contracts with the United States Government, express or implied . . . . The court could also hear claims referred to it by either House of Congress."). Although a discussion of the procedure in government Contracts is beyond the scope of this article, Congress has the ability of plaintiff contractors to obtain review in court. At one point, it was held that contractors could agree that the decisions of the agency as to the facts and to the law were final, absent fraud. Wunderlich v. United States, 117 Ct. Cl. 92 (1950), rev'd, 342 U.S. 98 (1951). However, Congress abrogated this doctrine to allow for review of the final decisions of an agency based on a clearly erroneous standard, and prohibited clauses in government

petitioners and a solicitor for the government.[226] The judges had life tenure. The statute provided them with the power to appoint and use commissioners to take evidence.[227] However, in practice, the reports were given to Congress, which essentially reviewed (via its Committee on Claims) the court's determinations de novo.[228] Despite the widely-held view that the court should act as a "standard for government morality,"[229] Congress only paid on about half of the court's "judgments."[230]

By the time of the Civil War, after pleas from President Lincoln, a majority in Congress conceded that something should be done about the solely legislative determination of claims. The final version of a bill, passed in 1863, provided that while this court (expanded to five judges[231]) could adjudicate claims, these claims would only be paid based on allocations that Congress made after the judgment. In other words, the judgments were still not self-executing.[232] Congress also imposed a six-year statute of limitations on claims brought before the court which persists, in large part, to this day.[233] Congress further provided, in partial

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contracts which included a waiver of all rights to seek judicial review. Act of May 11, 1954, Pub. L. No. 356, 356, 68 Stat. 81 (codified at 42 U.S.C. § 321).

226. *See* Act of Feb. 24, 1855, ch. 122, §§ 1-2, 10 Stat. 612.

227. § 3, 10 Stat. at 613. Like other judges, they were nominated by the President and confirmed by Congress. Various "commissioners" were appointed who traveled to far away cities, took oaths, served subpoenas, and transcribed depositions of the parties. Although the parties paid the commissioners, the transcripts became part of the record. COWEN, *supra* note 13, at 14-16. In large part, the judges did not hear evidence themselves but acted on the record generated by the commissioners, and oral arguments from counsel. *Id.* at 86. Eventually, the trial judges became bona fide appellate judges, and the commissioners became trial judges similar to the pattern followed in New York State of having a trial-level "Supreme Court" consisting of trial judges and an appellate division. *Id.* at 92; Act of Feb. 24, 1925, ch. 301, 43 Stat. 964 (1925). *See* Court of Claims, General Order Number 2.

228. Shimomura, *supra* note 62, at 653; COWEN, *supra* note 13, at 18.

229. Edmund W. Pavenstedt, *The United States Court of Claims as a Forum for Tax Cases (First Installment)*, 15 TAX L. REV. 1, 3-5 (1959-60).

230. CONG. GLOBE, 36th Cong., 1st Sess. 62, 984 (1860).

231. Act of Mar. 3, 1863, ch. 92, § 112 Stat. 765, 765. Richardson explains how most of the judges had prior judicial experience, usually in state Supreme Courts, and were highly regarded. Richardson, *supra* note 39, at 794. Interestingly, at the same time, Congress made payment of judgments by the government against Tax Collectors explicit. Act of Mar. 3, 1863, ch. 76, § 12, 12 Stat. 737, 741.

232. *See, e.g.*, Act of June 25, 1864, ch. 147, § 1, 13 Stat. 145 (1864) ("Court of Claims . . . . For payments of judgments to be rendered by the court of claims, previous to the thirtieth of June, eighteen hundred and sixty five, three hundred thousand dollars.").

233. Richardson, *supra* note 39, at 796. However, some aggrieved parties continued to petition Congress for waivers of the statute of limitations. *Id.*

abrogation of *Reeside*, that the Court of Claims could adjudicate counterclaims and setoffs that the government asserted against the petitioners.[234]

Although the Court of Claims began to look more like a court, with a statutory right of appeal on behalf of the government or individuals with more than $3,000 in controversy,[235] in *Gordon v. United States*,[236] the Supreme Court decided that the Court of Claims was neither *really* a court nor within the judicial power of the United States. In *Gordon*, the Court held that since a plaintiff could not be awarded damages "till after an appropriation therefore shall be estimated for by the Secretary of the Treasury,"[237] the Supreme Court had no jurisdiction to hear appeals. Because the Court of Claims decided only whether Congress *should* pay (pending Treasury approval) and not what Congress *must* pay, the court was not adjudicating cases or controversies, and therefore, not exercising the judicial power.[238]

3. *Into the Judicial Power*

Responding to the harsh effect of the controversy clause, in 1866 Congress eliminated the requirement of treasury approval.[239] By authorizing the payment of judgments without prior estimates by the secretary of the treasury, Congress placed Court of Claims judges firmly within the ambit of Article III, even though they did not need to be reappointed as Article III judges.[240] Likewise, Congress gave up its claim to de novo

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234. *Id.* at 796. However, in the 1863 provisions, Congress does not appear to have addressed whether the court could adjudicate all claims against the government, even if they were only asserted as a defense to an offset. *See* United States v. Fillebrown, 32 U.S. (7 Pet.) 28 (1833); COWEN, *supra* note 13, at 23. However, judgments against claimants had to be enforced by an action in the U.S. District Court. *See* § 3, 12 Stat. at 765. This does not necessarily extend jurisdiction over a new class of people, as the claims must be transitionally related. Therefore, if the Plaintiff's claim is dismissed for want of jurisdiction, so would the counterclaim. Volk v. United States, 55 Ct. Cl. 87 (1920); STULL, *supra* note 39, at 49-50.

235. *See* Richardson, *supra* note 39, at 788. However, this limitation on the ability to appeal was construed in *United States v. Alire*, 73 U.S. (6 Wall.) 573 (1867) to deny jurisdiction to the court in equitable prayers seeking a decree of specific performance. *See also infra* note 262 (describing limitations upon equitable decrees).

236. 69 U.S. (2 Wall) 561, 1864 WL 6626 (1864).

237. *Id.*

238. *Id.*

239. Richardson, *supra* note 39, at 789.

240. Shimomura, *supra* note 62, at 660-61. In a few cases, executive departments attempted to revise judgments of the courts of claims. *See* United States v. Anderson, 76 U.S. 56, 71-72 (1869) (holding that the Court of Claims was empowered to render judgment

review of the records Court of Claims cases.[241] The Supreme Court then administratively determined that it could hear appeals from the Court of Claims[242] since it was no longer subject to executive control, even though Congress continued to appropriate amounts in advance that would be payable by the court.[243] During the next few years, Congress experimented with prospective and retrospective allocations of funds,[244] mindful of the Supreme Court's distaste for reviewing the decisions of a tribunal that relied on Congress's discretion and grace for payment of its judgments.[245] The controversy clause had forced Congress to endow the Court of Claims with greater power.

In a final attempt to cast the Court of Claims as both fact-finder for Congress and forum for citizen-claimants, Congress passed the Bowman Act.[246] The Act provided for specific references to the Court of Claims from heads of executive departments, provided that: 1) the claims were within the agency's subject-matter jurisdiction;[247] 2) the matter was not

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for a specific sum, and that sum could not later be revised by an executive officer); Brown v. United States, 6. Ct. Cl. 181 (1870).

241. Richardson, *supra* note 39, at 788.

242. Shimomura, *supra* note 62, at 660 (citing 70 U.S. (3 Wall.) vii-viii (1865)). Interestingly, the statute did not provide for appellate review of judgments of under $3,000 if requested by the petitioner. Binney, *supra* note 51, at 385.

243. The first case heard under the new regime by the Supreme Court was *De Groot v. United States*, 72 U.S. (5 Wall.) 419, 427 (1866).

244. *See* United States v. Klein, 80 U.S. (13 Wall) 128, 144-45 (1871) (collecting cases and concluding that finally, "[t]his court being of opinion that the provision for an estimate was inconsistent with the finality essential to judicial decisions, Congress repealed that provision. Since then the Court of Claims has exercised all the functions of a court, and this court has taken full jurisdiction on appeal.") (footnotes omitted).

245. Although the Supreme Court was never faced with the issue, some Congressmen took the position that mere retrospective allocation was not dispositive of its status of a court: Congress was simply free to prevent the fund that the court drew upon from being depleted by a various large claims. 6 CONG. REC. 581, 587 (statement of Congressmen Clymer). Congress also passed specific legislation that asked the court to consider various claims, such as the "Hot Springs Act," which required the Court of Claims to determine proper title to a piece of lucrative property that a number of parties (including the government) laid claim to. Congress directed the court to provide its final opinion to a number of government entities, so that they might be guided in future disputes of a similar nature. Richardson, *supra* note 39, at 791.

246. Bowman Act, ch. 116, 22 Stat. 485 (1883).

247. *See* Pitman v. United States, 20 Ct. Cl. 253, 257 (1885) (declining to find facts in ship collision where the Navy would not have had the legal obligation to compensate the injured ship because "provisions of the act of Congress to afford assistance and relief to the executive departments in the investigation of claims and demands against the government must be construed to apply only to such as are founded on legal rights, and not to extra-official investigations").

completely within the agency's discretion;[248] and 3) the reference was made less than six years after the claim arose.[249] Likewise, the Act prohibited the court from hearing cases if the claimant had settled with the agency—even if Congress referred the matter to the court.[250] However, Congress could remand references back to the Court of Claims for additional findings of fact.[251]

4. Construction and Sovereign Immunity

In 1887 Congress passed the Tucker Act,[252] which remains largely unchanged today. Under the Tucker Act, the Court of Claims had the power to render judgment on claims founded on "the Constitution, . . . any Act of Congress, . . . any regulation of an executive department," and, essentially, on any claim against the government not grounded in tort.[253] Furthermore, the court had the "power" to render advisory opinions (not judgments) on congressional and executive[254] references[255] to Congress

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248. *See In re* Billings, 23 Ct. Cl. 166, 176 (1888) (holding that Court of Claims could not accept reference where matter was wholly within the scope of executive discretion).

249. *See* McClure v. United States, 19 Ct. Cl. 18, 28-29 (1883) (holding that if claims were presented to the department after the department's statute of limitations expired, the court could not act upon such a reference from that department); Alexandria, L. & H.R.R. v. United States, 26 Ct. Cl. 327 (1891) (a claim which was within the agency's statute of limitations but over six years old could not be referred to the court under the Bowman Act).

250. *See* Belt v. United States, 23 Ct. Cl. 317, 319 (1888) (once claimant had submitted his claim to the Treasury Department's Board of Commissioners and they reached a conclusion, his claim was barred under the Bowman Act).

251. *See* Pocono Pines Assembly Hotels v. United States, 69 Cl. Ct. 91 (1930).

252. Tucker Act, ch. 359 § 1, 24 Stat 505, 505 (1887) (giving the Court of Claims jurisdiction of all claims founded on the Constitution, any law of Congress, executive regulation, or contract with the government, or for damages in cases not sounding in tort, where such claims would be redressible "in a court of law, equity, or admiralty if the United States were suable").

253. At one point it was argued that the clause of the Tucker Act that read "actions for damages, liquidated or unliquidated, in cases not sounding in tort," limited jurisdiction exclusively to cases that were not grounded in Tort. However, in *Dooley v. United States.*, 182 U.S. 222, 223 (1901), the court held that the Tucker Act conferred jurisdiction to recover duties illegally extracted. *See also* Cyprus Amax Coal Co. v. United States, 205 F.3d 1369 (Fed. Cir. 2000); *cf.* Daily v. United States, 17 Ct. Cl. 144, 148 (1881) (clause granting jurisdiction to court to act on claims under "Laws of Congress" did not provide an alternative means to either seek review of claims allocated by Congress to the Commissioner of Pensions or to another forum to adjudicate them).

254. Under the Tucker Act, references from executive agencies had to have the consent of both the claimant and the head of the department.

concerning legal, equitable, and moral claims without an appeal to the Supreme Court.[256] The Act also provided the court with jurisdiction over "takings" claims in excess of a threshold amount, now $10,000.

Soon after the passage of the Tucker Act, the question of the scope of the waiver of sovereign immunity began to rear its head: the Supreme Court was faced with determining the scope of the waiver without treading upon the appropriations clause.[257] In *United States v. Realty Co.*, [258] the Supreme Court relied on the proposition that Congress alone had the power to "pay the debts" of the United States,[259] prompting the Court to conclude that any waivers by Congress of its immunity must be narrowly construed. For example, suits grounded in tort would not fall within the scope of the consent already given by the Tucker Act.[260] The Court held that while Congress could determine the morality behind imposing obligations on the public fisc, the courts could only analyze the legal claims within the

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255. *See* 28 U.S.C. §§ 1492, 2509 (2000).

256. Gibbons v. United States, 75 U.S. (8 Wall.) 269, 275-76 (1868) (reversing the judgment of the Court of Claims, and announcing the principle that waivers of sovereign immunity would be construed narrowly).

257. United States v. Jones, 131 U.S. 1, 19 (1889) ("[W]e should have been somewhat surprised to find that the administration of vast public interests, like that of the public lands, which belong so appropriately to the political department, had been cast upon the courts."). The Court in Jones held that the court lacked jurisdiction to render decisions based on equitable doctrines or to order specific performance (requiring the supervision of the court). However, the Court carved out an exception for specifically conferred equitable matters. *Id.* at 2 ("If such is the legislative will, of course the courts must conform to it, although the management and disposal of the public domain, in which the newly-claimed jurisdiction would probably be most frequently called into exercise, has always been regarded as more appropriately belonging to the political department of the government than to the courts, and more a matter of administration than judicature.").

258. 163 U.S. 427, 438 (1896) (denying bounties to sugar manufacturers and concluding that the sovereign cannot be sued without its consent, that consent must be strictly construed, and that it can decide all the terms and conditions and name the court to entertain the suit).

259. U.S. CONST. art. I. § 8, cl. 1. Binney speculated that while Congress has the power to pay the debts of the United States, it may not have the power to determine their validity. Binney, *supra* note 51, at 379.

260. Gibbons v. United States, 75 U.S. (8 Wall.) 269, 275 (1868) ("The language of the statutes which confer jurisdiction upon the Court of Claims, excludes by the strongest implication demands against the government founded on torts."). Initially, the Tucker Act did not cover suits against the "Post Exchanges" of the armed forces. These bodies were essentially government run stores which apparently were financially independent from the government, and therefore none of the reasons for immunizing them from suit in a District Court existed. Standard Oil Co. v. Johnson, 316 U.S. 481 (1942). By the Act of July 23, 1970, Pub. L. No. 91-350(a), 84 Stat. 449, 449 (amending 28 U.S.C. § 1346(a)(2)), these bodies were specifically added to the scope of the Tucker Act. The District Courts retained jurisdiction over cases with an amount in controversy of less than $10,000.

framework provided by Congress. But, Congress was not completely hostile to the development of the concept of equity being delegated to the courts. Indeed, Congress began marking out ad hoc jurisdictions for the court, which, in some cases specifically included the jurisdiction to determine "equitable rights."[261] Ironically, this largely failed as the Supreme Court held that to construe a treaty to render a "more just result" was beyond the scope of the court's jurisdiction, as it intruded into the "domain of the political departments."[262] Therefore, despite an explicit grant of jurisdiction to the court, the Supreme Court held that the appropriations clause prevented the Court of Claims from intruding "upon the domain committed by the Constitution to the political departments of the government."[263]

5. The Case and Controversy Clause and Recoupment

Arguably the biggest obstacle to obtaining relief from the Court of Claims has been the Tucker Act's requirement that a plaintiff whose claims are not grounded in contract must seek damages based on another so-called "money-mandating" statute in which Congress specifically provided for payment. The Tucker Act has a built-in statute of limitations,[264] but often the limitations to the money-mandating statutes are even shorter.[265]

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261. The Act of March 2, 1895, ch. 188, 28 Stat. 876, 898 read in part:

> That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the Court of Claims to hear and determine the said claim of the Choctaws and Chickasaws and to render judgment thereon, it being the intention of this Act to allow said Court of Claims jurisdiction, *so that the rights, legal, and equitable of the United States* and the Choctaw and Chickasaw nations.

Id. (emphasis added).

262. In *United States v. Choctaw Nation*, 179 U.S. 494, 532-33 (1900), the Supreme Court held that "Congress did not intend, when passing the act under which this litigation was inaugurated, to invest the Court of Claims or this court with authority to determine whether the United States had, in its treaty with the Indians, violated the principles of fair dealing."

263. *Id.* at 532.

264. 28 U.S.C. §2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.").

265. *E.g.* 28 U.S.C. §1346(a) ("Claim for credit or refund of an overpayment of any tax . . . shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later.").

Typically, many of the transactions that come within the cognizance of the court cover quite a bit of time, and to fully resolve them, the court must look to events that took place outside the statute of limitations, or to activities that are not solely within the "money-mandating" statute upon which a petitioner relies. However, since the Court of Federal Claims is within the judicial power, it has found that in order to adjudicate the entirety of a controversy that extends beyond the scope of the money-mandating statute, it *must* look outside the time-frame that the statute covers. In short, the controversy clause pushes the jurisdiction of the court outward.

To appreciate the magnitude of the equitable recoupment controversy, it is necessary to understand that at the time of the drafting of the Tucker Act (which provided for money damages if the claimant could show that the government had breached a contract, executive order, or statute providing for money damages[266]), fewer people were subject to federal income tax than today, and the ability to effectively contest tax liability was not settled.[267] Many claims were brought without much thought as to whether the Tucker Act alone could afford the petitioner relief, and the court denied relief to petitioners who could not demonstrate *both* a money-mandating statute, and jurisdiction under the Tucker Act. This left open the question of whether the Tucker Act was the jurisdictional grant, or the specific money-mandating statute that the plaintiff relied upon in his complaint. If both the money-mandating clause and the Tucker Act were treated as jurisdictional, the court could not even inquire into facts alleged that would not, by themselves, satisfy the substantive requirements. Eventually, in *Edison Electric Illuminating v. United States*,[268] the Court of Claims concluded that the Tucker Act was the jurisdictional (and remedial) grant and the money-mandating statute provided the substantive right to relief.[269]

However, *Edison Electric* did not fully answer the question of whether the controversy clause provided a substantive right to relief because a party might fall within the Tucker Act's six-year statute of limitations, but that full adjudication of the controversy required reference to taxes paid outside

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266. *See supra* notes 252-53 and accompanying text.

267. *See infra* notes 297-304.

268. 38 Ct. Cl. 208 (1903).

269. *Id.* (The Revenue Act of July 13, 1866, 14 Stat. 152 "provides for [in] internalrevenue cases like this[,] a judicial remedy . . . . This grant of a judicial remedy to such claimants constitutes what the Supreme Court calls in Nichols [v. U.S., 74 U.S. (7 Wall.) 122 (1868)] 'a system,' containing an exclusive jurisdiction.") (distinguishing U.S. v. Kaufman, 96 U.S. 567 (1877)).

the statute of limitations. In *Bull v. United States*,[270] the Court of Claims grappled with the question of whether, as a court whose jurisdiction might be somewhat limited by the Tucker Act, it possessed jurisdiction to offset a taxpayer's tax liability by money that would normally be due a taxpayer, but as a refund action was barred by the statute of limitations or vice-versa.[271]

The story of *Bull* is part of tax lore. Archibald H. Bull was a ship-broker who had interests in a number of partnerships. The partnership agreements provided two alternatives to the estate upon Mr. Bull's death: 1) within 30 days after his death the estate could withdraw from the partnership; or 2) the partnership would continue paying his estate for another year.[272] When Mr. Bull died, the estate did not withdraw from the partnership, and so the estate received monies from the partnership as if Mr. Bull had survived. The Commissioner of Internal Revenue included the value of his partnership interest as income. The Board of Tax Appeals (the "BTA"), which, at the time, was not preclusive upon any court,[273] rejected the argument that profits paid his estate (and not part of his estate at the time of his death), and therefore, according to his heirs, were unlawfully subject to both income and estate taxes.[274] His estate paid the tax and sued in the Court of Claims for a refund, arguing that the profits were either: 1) not income; or alternatively, 2) not part of the estate, and therefore his estate was entitled to a setoff of amounts against other payments whose recovery was barred by the Tucker Act's statute of limitations. These theories required the court to look to matters that, if plead alone, would have been outside the Tucker Act's jurisdiction. The

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270. Bull v. United States, 79 Ct. Cl. 133 (1934), *rev'd*, 295 U.S. 247 (1935).

271. Equitable recoupment, in essence, allows the court to look beyond the statute of limitations to the whole transaction and thereby to offset one payment of tax on the transaction against another payment to prevent a taxpayer from being taxed twice under two different theories which are mutually exclusive or interrelated. James E. Tierney, *Equitable Recoupment Revisited: The Scope Of The Doctrine In Federal Tax Cases After United States v. Dalm*, 80 KY. L.J. 95, n.16 (2001) (providing examples). Recoupment generally operates as a partial defense and does not provide an independent right, nor a theory of jurisdiction for a specific court. Dalm v. United States, 494 U.S. 596 (1990). In the words of the Tax Court: To "recoup" is to "get back the equivalent of something lost." Equitable recoupment, in turn, is a judicially created doctrine under which a claim for a refund of, or deficiency in, taxes barred by a statute of limitations may nonetheless be recouped, or offset, against a tax claim of the Government (in the case of a time-barred refund) or of the taxpayer (in the case of a time-barred deficiency assessment). Estate of Orenstein v. Comm'r, T.C. Memo 2000-150, at *7 (2000).

272. *Bull*, 295 U.S. at 254-5.

273. *See infra* note 364 and accompanying text.

274. *Id.* at 258.

Court of Claims rejected these theories because it held that it could not look beyond facts relating to taxes paid within the statute of limitations.[275]

The Supreme Court reversed. It emphasized instead that the same stream of income (not identical amounts of income) had been taxed twice.[276] The Court concluded that the "mechanism" of taxation, assessment, and controversy over amounts due, created an exception to "sovereign immunity" and therefore taxpayers were free to assert counterclaims that fell within that carve-out to sovereign immunity.[277] According to the Court, Congress (in keeping with due process concerns) provided the taxpayer the opportunity to seek a refund, and that claim for refund was grounded in a theory of restitution for amounts wrongly paid.[278] Lord Coke would have been proud.[279] The Court pointed out that if such a claim were not based on assessment of tax, but rather a contractual claim between two parties, the party that admitted to wrongly holding the money would not have prevailed.[280] Though the Court used the inflammatory words "fraud"

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275. *Bull*, 79 Ct. Cl. at 143 (1934), held that the Court of Claims could not:

> consider whether the Commissioner correctly included the total amount received from the business in the net estate of the decedent subject to estate tax for the reason that the suit was not timely instituted. The only question for decision is whether the Commissioner correctly included the item of $200,117.09 in income for the purpose of income tax payable by the estate.

Id.

276. *Bull*, 295 U.S. at 256 (1935) ("They were inconsistent. The identical money—not a right to receive the amount, on the one hand, and actual receipt resulting from that right on the other—was the basis of two assessments.").

277. Later cases have held that other grants of jurisdiction to the Tax Court are a separate exception to sovereign immunity. *See, e.g.*, Wagner v. United States, 2002 WL 31476652 (D. Nev. 2002) ("26 U.S.C. § 6331(d) provides a limited waiver of sovereign immunity to taxpayers who disagree with the outcome of a CDP [Collection Due Process] hearing.").

278. *Bull*, 295 U.S. at 260.

279. *See supra* note 150 and accompanying text.

280. *Bull* also refers to *United States v. Ringgold*, which holds:

> [W]hen an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them for costs; *it would be a very rigid principle, to deny to him the right of setting up such claim in a court of justice*, and turn him round to an application to Congress.

33 U.S. 150 (1834) (emphasis added). Finally, the *Bull* court analogized to *United States v. Macdaniel*, 32 U.S. 1, 17 (1833), in which a military officer had been paid in excess of his congressionally authorized salary, but had done work to earn that amount. The government was not entitled to those excess funds simply by denying that he had an equitable claim to the funds.

and "immoral,"[281] it refrained from imposing a constructive trust (the traditional remedy for monies fraudulently taken) on the government.[282] The Court concluded that equitable recoupment *is* a valid defense,[283] and is "never barred by the statute of limitations so long as the main action itself is timely" and that "[a]n action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund."[284] *Bull* demonstrates the power of the "case and controversy" clause to extend the reach of a court beyond its mere statutory jurisdiction to cover all relevant facts.

On the other hand, in the case of taxes that were unconstitutional based on a "self-executing" portion of the Constitution (such as the prohibition against taxes on exports,[285] the takings clause,[286] the just compensation clause of the Fifth Amendment,[287] or a theory of federalism that prevented the federal government from exacting money from the states[288]), the Court of Claims rightfully possessed jurisdiction under the Tucker Act,[289] as no specific money-mandating statute was necessary. However, the Court has consistently held that the jurisdictional grant did

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281. *Bull*, 295 U.S. at 261 ("While here the money was taken through mistake without any element of fraud, the unjust retention is immoral and amounts in law to a fraud on the taxpayer's rights.").

282. Camilla E. Watson, *Equitable Recoupment: Revisiting an Old and Inconsistent Remedy*, 65 FORDHAM L. REV. 691, 719-20 (1996). Professor Watson points out that in the non-tax cases that the court cited, a constructive trust was imposed on the government so as to preserve any monies it may have taken.

283. *See supra* note 214, for a description of the difference between recoupment and setoff.

284. *Bull*, 295 U.S. at 261 (quoting United States v. State Bank, 96 U.S. 30 (1878)).

285. *See, e.g.*, Cyprus Amax Coal Co., 205 F.3d 1369 (Fed. Cir. 2000), citing U.S. CONST. art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State.").

286. Although the Court has jurisdiction to review claims under the takings clause, it has been held that the a claimant may not invoke the court's jurisdiction under this clause to obtain additional review over rate-setting matters, as administrative procedures and other judicial appeals provide claimants with relief. Capital Airlines, Inc. v. United States, 116 Ct. Cl. 850, 858-59 (1950), *cert. denied.*, 340 U.S. 875 (1950).

287. COWEN, *supra* note 13, at 137.

288. South Carolina v. United States, 39 Ct. Cl. 257 (1904), *aff'd*, 199 U.S. 437 (1905) (finding that the federal government did have the power to levy taxes on state liquor stores).

289. A similar situation outside the tax context appeared when an army lawyer was convicted in a sham trial of disrupting a court martial. The Court of Claims found that because the court marital of the lawyer was jurisdictionally infirm, it has jurisdiction to award back pay. Eventually, the President pardoned Lt. Shapiro. Shapiro v. United States, 69 F.Supp. 205 (Ct. Cl. 1947).

not, in and of itself, allow for the award of interest unless a specific statute so provided.[290]

6. *Modern History*

While its ancestors were either a part of Congress or within the executive branch, the status afforded the Court of Federal Claims vacillated. In 1925, the court was divided into judges,[291] and the role of "commissioners" expanded from merely transcribing depositions to that of trial judges.[292] Soon thereafter, in 1929[293] and 1933,[294] the Supreme Court determined that since Article III does not specifically provide for suits against the government, such a court was created under Article I, and therefore the pay of the judges could be diminished. However, twenty years later, Congress declared the court to be an "Article III" court.[295] This declaration was apparently acceptable to the Supreme Court: in *Glidden v. Zdanok*,[296] the Supreme Court agreed and found that a Court of Claims judge, endowed with life tenure, could sit by designation on the Court of Appeals for the Second Circuit.

Indeed, until the enactment of Public Law 92-415 in 1972, allowing for reinstatement of civil servants, the Court of Claims was not able to entertain complaints for purely equitable[297] relief—namely, specific performance—that would order the executive to do anything besides pay money, even though King Edward had allowed the Chancery to hear cases against the Crown.[298]

Finally, in 1982, the Commissioners were renamed trial court judges in a reformulated Article I court named the "United States Claims Court,"[299] and the now-judges of the court became the Article III judges of the Court of Appeals for the Federal Circuit. [300] Despite the different constitutional status, the judges of the court issued "General Order Number

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290. COWEN, *supra* note 13, at 99; 28 U.S.C. § 2516(a); Tektronix v. United States, 213 Ct. Cl. 257 (1977).

291. Act of Feb. 24, 1925, 68 Pub L. No. 451, ch. 301, § 1, 43 Stat. 964 (1925).

292. *Id.*

293. *Bakelite*, 279 U.S. at 452.

294. Williams v. United States, 289 U.S. 553 (1933).

295. Act of July 28, 1953, 83 Pub. L. No. 158, ch. 253, 67 Stat. 226 (1953) (amending 28 U.S.C. § 171).

296. 370 U.S. 530 (1962).

297. United States v. Jones, 131 U.S. 1 (1889).

298. *See supra* text accompanying notes 50-54.

299. Act of Apr. 2, 1982, 96 Stat. 42, 97 Pub. L. No. 64 (1982).

300. *See, e.g.*, Fisher v. United States, 80 F.3d 1576, 1579 (Fed. Cir. 1996).

One" which adopted the precedents of the Court of Claims and its reviewing courts. Ten years later, the name of the trial court was changed to the "Court of Federal Claims."

One last case bears mentioning in the court's history: In *M.A. Mortenson Co. v. United States*, the government argued that it could not be sanctioned in a discovery dispute that transpired before the Claims Court, under R. U.S. Cl. Ct. 37(b)(2), as sovereign immunity precluded summary judgment.[301] Indeed, the waiver of sovereign immunity for payment of judgments in 31 U.S.C. § 1304 prohibits disbursement of money unless the court issues a "final judgment."[302] Interestingly, rather than simply order the government to pay sanctions, Judge Bruggink entered partial summary judgment under R. U.S. Cl. Ct. 56.[303] On Appeal, the Court of Appeals for the Federal Circuit not only affirmed, but treated the partial summary judgment as an order that was not immediately appealable.[304] The claims were settled, and the government appealed again.[305] Although the government argued that the only sanction available to the Claims Court was dismissal or default, the Federal Circuit held that:

> We cannot accept the government's position that it can consent to suit in the Claims Court under the Tucker Act and the Contract Disputes Act, and yet simultaneously may abuse the litigative process to the impairment of fair adjudication. We reject the notion that the government can frustrate and undermine the goals in creating such a tribunal, leaving the Claims Court itself helpless to preclude such conduct on the government's part, and thereby eliminating the possibility of achieving a "fair" result.[306]

At least for the time being, the needs of the court to adjudicate a case or controversy, combined with the congressionally-created avenue to lodge

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301. M.A. Mortenson Co. v. United States, 15 Cl. Ct. 362, 363 (1988).

302. *See* Christian v. United States, 49 Fed. Cl. 720, 727 (2001); *see also* Trout v. Garrett, 891 F.2d 332 (D.C. Cir. 1989) (denying writ of mandamus from District Court that ordered government to pay interim attorney fees, and holding that the "judgment fund legislation, in contrast, authorizes no claims for relief. It is auxiliary legislation; its sole office is to furnish 'a mechanism for facilitating payment of judgments' rendered on claims authorized by *another* statute").

303. *Mortenson*, 15 Cl.Ct. 362.

304. M.A. Mortenson Co. v. United States, 877 F.2d 50, 51-2 (Fed. Cir. 1989).

305. M.A. Mortenson Co. v. United States, 996 F.2d 1177, 1179-80 (Fed. Cir. 1993).

306. *Id.* at 1184.

petitions, has triumphed over the appropriations clause and sovereign immunity.

B. THE TAX COURT

The Tax Court emerged in its current form after a struggle with inefficiency,[307] sovereign immunity, and the country's love-hate relationship with taxes. The Tax Court and its predecessors have journeyed out of the executive and into the judiciary, but the stigma of not being a "real court" persists to this day.

Despite having a much more narrow jurisdiction than the United States Court of Federal Claims (and its previous appellations), the Tax Court has had a more colorful adventure with decisions based on equitable principles.[308] The Tax Court's jurisdiction is limited by statute to inquiries regarding refund requests properly included in the taxpayer's petition and based only on the tax paid for a specific "tax year."[309] It has been argued, often successfully,[310] that to look at any other year would be reaching a decision on equitable grounds, which according to this argument, are beyond the Tax Court's jurisdiction. However, to reach such a conclusion, one must first conclude that the Tax Court serves no institutional disciplinary function, or, in the words of the Sixth Circuit, the Tax Court has jurisdiction to do "*nothing more* than [undertake] the judicial review of an assessment made by an administrative agency."[311]

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307. Professor Ferguson characterized a taxpayer's current menu of remedies as resulting "more from the accidents of history than any unified, full-grown plan." M. Carr Ferguson, *Jurisdictional Problems in Federal Taxation Controversies*, 48 IOWA L. REV. 312, 315 (1963).

308. Lederman, *supra* note 14, at 379 (providing an in-depth discussion of equitable recoupment).

309. 26 U.S.C. § 6214(b) ("The Tax Court in redetermining a deficiency of income tax for any taxable year or of gift tax for any calendar year or calendar quarter shall consider such facts with relation to the taxes for other years or calendar quarters as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year or calendar quarter has been overpaid or underpaid.").

310. *See, e.g.*, Estate of Mueller v. Comm'r, 153 F.3d 302, 304 (6th Cir. 1998) (equitable recoupment not possible); *c.f.* First Chicago Corp. v. Comm'r, 842 F.2d 180, 181 (7th Cir. 1988) ("[t]here is some chance that the taxpayer might obtain relief under . . . the doctrine of equitable recoupment.").

311. *Id.*

1. Prehistory

Long before there was a Tax Court and even before our modern income tax, tax liability was litigated through the ever-present legal fiction of an evil minister who acted on behalf of the government.[312] In this case, the tax collector, after having the Commissioner of Internal Revenue "certify" an assessment,[313] collected the money, and briefly held it in his personal capacity before turning it over to the government. The tax collector was viewed as an agent of the sovereign. As an agent, he could be sued at common law.[314] If the tax collector *knowingly* collected money illegally or erroneously,[315] he would be personally liable under a theory of assumpsit; but, upon such a determination by the court, the tax collector could simply return the money.[316] If he collected money without knowing that the government was not entitled to it (such as when the taxpayer failed to pay "under protest") and passed the money on to the government,[317] the contrived legal theory no longer applied and the taxpayer had no remedy.[318]

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312. Pfander, *supra* note 17, at 926.

313. William T. Plumb, Jr., *Tax Refund Suits Against Collectors of Internal Revenue*, 60 HARV. L REV. 685, 687 (1946-47); BOLTON B. TURNER, THE TAX COURT OF THE UNITED STATES: ITS ORIGINS AND FUNCTIONS IN THE HISTORY AND PHILOSOPHY OF TAXATION 31 (1955) ("The Commissioner of Internal Revenue, either on the basis of returns filed or upon such audits as were made, entered the amount of tax upon assessment lists and certified them to the various collectors for collection.") [hereinafter ORIGINS]. Though the distinction may be somewhat obtuse, a determination of a deficiency is different from the assessment of money. CHARLES D. HAMEL, PRACTICE AND PROCEDURE BEFORE THE U.S. BOARD OF TAX APPEALS 25-26 (1940). Assessments involve the actual taking of money, whereas a determination of a deficiency is a decision made that the taxpayer owes more money for a given year. *See* Terminal Wine Co. v. Comm'r, 1 B.T.A. 697 (1925) ("Therein this Board declined to hold that an assessment constitutes per se a determination.").

314. *See* Howard Dubroff, *The United States Tax Court: An Historical Analysis—Part I—The Origins of the Tax Court*, 40 ALB. L. REV. 7, 36 (1976-76). [hereinafter Dubroff, *Part I*].

315. William Plumb speculated that there might be a difference between monies "illegally" and "erroneously" collected. Plumb, *supra* note 313, at n.2. However, he also notes that the Bureau (or Internal Revenue Service) never availed itself of any substantive distinctions between the two. *See* United States v. Lederer Terminal Warehouse Co., 139 F.2d 679, 681 (6th Cir. 1943) (differentiating between a statute of limitations for illegal collections, and one for an erroneous overpayment).

316. The Tax Collector was initially indemnified by statute, so that he would not have to pay the money himself. *See, e.g.*, Rev. Stat. 989 (1875); 28 U.S.C. § 842 (1940); *The Conqueror*, 166 U.S. 110, 125 (1897).

317. Plumb, *supra* note 313, at 687 ("The Tax Collector who collects an erroneous tax neither commits a wrong nor personally profits from it.").

318. In *Elliott v. Swartwout*, 35 U.S. 137 (1836), the Supreme Court, in an action against the collector of the Port of New York, held that if a payment was made under protest

Since no actions were initially possible against the United States, once the money found its way to the government's coffers, there was no remedy. In 1839, Congress recognized that requiring collectors to retain money paid under protest was inefficient, and directed the collectors to pay the money directly into the treasury.[319] Therefore, for a short period, it was questionable whether taxpayers had any remedy as the collectors now acted without discretion.[320] Five weeks later, Congress adopted corrective legislation that allowed actions nominally against the collectors, with claims paid by the United States.[321] After the creation of the Court of Claims, and the passage of the Tucker Act, these actions against tax collectors duplicated actions under the Tucker Act in the District Courts,[322] suits in the Court of Claims, or direct appeals to Congress.[323]

After the inception of the modern corporate excise tax in 1909[324] and the income tax in 1913, there were statutorily[325] and administratively[326]

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to the collector, one could sue the collector for a refund of the monies. The court reasoned that upon payment under protest, "there can be no hardship in requiring the party to give notice to the collector that he considers the duty claimed illegal, and put him on his guard, by requiring him not to pay over the money. The collector would then be placed in a situation to claim an indemnity from the government." A failure to make such a protest would be considered a payment to the government under a mistake of law, and the government, at the time, was protected by sovereign immunity. *See also* Cary v. Curtis, 44 U.S. 236 (1845) (holding that no action lies against the collectors after the collectors were compelled to pay their funds over to the government); Bend v. Hoyt, 38 U.S. 263 (1839) (where no notice was contemporaneously given to tax collector, importer could not recover duty that he claimed was erroneously collected); Jenks v. Lima Tp., 17 Ind. 326 (1861) (collecting common law applications of this rule).

319. Act of March 3, 1839, § 2, ch. 82, 5 Stat. 348 (1839).

320. Carey v. Curtis, 44 U.S. 236 (1845) ("This section of the act of Congress, considered independently and as apart from the facts and circumstances which are known to have preceded it, and may fairly be supposed to have induced its enactment, must be understood as leaving with the collector no lien upon, or discretion over, the sums received by him on account of the duties described therein; but as converting him into the mere bearer of those sums to the Treasury of the United States, through the presiding officer of which department they were to be disposed of in conformity with the law."). Justice Storey, in dissent, argued that the common law bound even the government. Storey's argument may have carried the day, as the Supreme Court later found that "[i]f the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong." Graham & Foster v. Goodcell, 282 U.S. 409, 431 (1931); *see also* Plumb, *supra* note 313, at 689.

321. Act of Feb. 26, 2845, ch 22. 5 Stat. 727 (1845); 12 Stat. 741 (1863); Plumb, *supra* note 313, at 690.

322. Lederman, *supra* note 14, at 402-03.

323. *See Klein*, 80 U.S. (13 Wall.) at 128.

324. Corporation Excise Tax Act of August 5, 1909, ch 6, 36 Stat. 11, 112, § 38

created procedures for "abatement" of tax,[327] wherein the party seeking an adjustment would post a bond before paying the tax,[328] unless the commissioner decided that the amount required immediate collection, and instituted what was termed a "jeopardy assessment."[329] Just as now, a statute prohibited taxpayers from seeking an injunction against the Bureau from collecting taxes, even if it refused to abate them.[330] Creative legal counsel determined that a suit by shareholders in a corporation to prevent the stockholders from paying what they perceived to be unconstitutional taxes would allow the courts to rule on the validity or construction of the tax before payment.[331]

In 1919,[332] Congress established a "Committee of Review and Appeal" within the Bureau of Internal Revenue, with Treasury Department

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(1909) *cited in* Hays v. Gauley Mountain Coal Co., 247 U.S. 189 (1918).

325. For a description of these early statutory abatement procedures, *see* Dubroff, *Part I, supra* note 319, at 27. It appears that these initial statutory procedures were somewhat short lived. See Revenue Act of 1918, ch 18 §§ 214(a)(12), 234(a)(14), 40 Stat. 1068, 1079 repealed by the Revenue Act of 1924, ch 234 § 279, 43 Stat 300.

326. *See* Dubroff, *Part I, supra* note 314, at 108.

327. If the abatement was granted, the taxpayer could avoid collection of the tax. The taxpayer would be charged a statutory interest rate of 6% on the portion of the claim that was ultimately denied, or 12% if the Commissioner found that the claim for abatement was not filed in good faith. 26 U.S.C. § 250(e) (1918). Abatement was not given as of right. The taxpayer had to submit his legal reasons *before* even an abatement would be granted. *See* ROBERT H. MONTGOMERY, INCOME TAX PROCEDURE 201-02 (1921).

328. Dubroff, *Part I, supra* note 314, at 27-8 ("The claim in abatement . . . permitted the taxpayer to administratively appeal an assessed tax prior to paying the assessment. The claim in abatement . . . permitted a taxpayer to defer payment if he provided a bond for the payment of the tax and any interest or penalties thereon.") (citations omitted).

329. Dana Latham, *Jurisdiction of the United States Board of Tax Appeals under the Revenue Act of 1926*, 15 CAL. L. REV. 199, 204 (1926-1927) (showing how jeopardy assessments were not originally found in statutes, but were originally a Bureau procedure).

330. 26 U.S.C. § 3224 (1918).

331. Miller v. Standard Nut Margarine, 284 U.S. 498 (1932) (collecting cases). Pollock v. Farmers Loan & Trust, 157 U.S. 429, 553-54 (1895) ("The jurisdiction of a court of equity to prevent any threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained."), *reh'd*, 158 U.S. 601 (1895).

332. A failed attempt at providing a taxpayer with pre-payment review came in the form of the "Advisory Tax Board." Revenue Act of 1918, ch. 18, § 1301(d), 40 Stat. 1057 (1918) (codified at 26 U.S.C. § 1301 (1918)). This Board had the power to issue subpoenas and make findings on the request of the Commissioner and the taxpayer questions regarding the interpretation of income, war-profits, or excess profits taxes. The first members of the Board were appointed in March of 1919. By October of the same year, it was abolished, because not enough qualified people could be found to serve on it. MONTGOMERY, *supra* note 332, at 162. The Supreme Court, in dicta, described the work of the Board as such:

> The Commissioner might submit to the Board, and on the request of a taxpayer must submit, any question relating to the interpretation or ad-

personnel as its members.[333] This board heard pre-payment protests of actions taken by the "income tax unit."[334] At the time, the Bureau had a considerable backlog of uncompleted audits. However, it was decided that the board would make an assessment based on returns where there was any doubt as to the validity of deductions, and any questions would be cleared up in the process of a claim for refund or abatement.[335] The Commissioner, via the Solicitor of Internal Revenue, could and did overrule the committee.[336] Despite this check, the Board's enabling legislation allowed the Commissioner to dissolve it, which he did six month's after its creation.[337]

In 1921, Congress required that the Board of Internal Revenue give the taxpayer thirty days to administratively appeal a proposed assessment without payment.[338] However, after such review began, no claims in abatement could be made.[339] Under this procedure, the taxpayer could appeal a decision of the "income tax unit" to the "Committee on Appeals and Review" who heard appeals on behalf of the Commissioner.[340] There were no other limitations on the ability of the Commissioner to collect the underlying tax as well as penalties. Any further review would have to wait until payment. Until 1924, "certain case assessments were made which neither represented the final determination of the Commissioner, [nor] were jeopardy assessments."[341] At that point, an aggrieved taxpayer's remedies were: 1) a suit against the United States in the Court of Claims under the

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> ministration of the income, war profits or excess profits tax. The functions of the Board were, in some degree, similar to those of the excess profits tax advisers and reviewers who had aided the Commissioner in applying the 1917 act.

Williamsport Wire Rope Co. v. United States, at 277 U.S. 551, n.7 (1928) (citations omitted).

333. William J. Gallagher, *Board of Tax Appeals*, 7 LOY. L.J. 145 (1926).

334. *Id.*; *see also* Dubroff, *Part I*, *supra* note 314, at 22 & n.77.

335. Dubroff, *Part I*, *supra* note 314, at 27.

336. HR Doc. 103, 68th Cong, 1. Sess 2: Report of Tax Simplification Board.

337. Revenue Act of 1918, Pub. L. 65-254, ch 18, § 1301(d), 40 Stat. 1141 (1918); Dubroff, *Part I*, *supra* note 3149, at 44.

338. Revenue Act of 1921, Pub. L. 67-98, ch. 136, § 250(d), 42 Stat. 265 (1921).

339. *Id.*; Dubroff, *Part I*, *supra* note 314, at 28.

340. Clarence A. Miller, *The United States Board of Tax Appeals: Its Jurisdiction and Practice*, 11 A.B.A. J. 169 (1925); Dubroff, *Part I*, *supra* note 3149, at 28, 46-48 (explaining how the committee functioned similarly to the tax court: its primary purpose was to resolve tax controversies, its membership was distinguished and collegial, and it held hearings in different parts of the country).

341. Latham, *supra* note 329, at 199 & n.2 ("The amount of tax assessed became a lien on the taxpayer's property. Both real and personal property could be seized and sold for unpaid taxes."). Collection of tax could not be enjoined. *Id.* (citing Dodge v. Osborn, 240 U.S. 118 (1915)).

Tucker Act; 2) a suit against the Tax Collector in a District Court,[342] as Congress had since eliminated the "protest" requirement;[343] or 3) a suit under the Tucker Act in District Court against the United States, provided that the amount in controversy was under $10,000.[344] Whatever the case,

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342. Because of the earlier congressional decision to allow suits against the collector in customs cases, the Supreme Court held, in *Philadelphia v. The Collector*, 72 U.S. (5 Wall) 720 (1867), since the earlier statutes had merely indemnified the tax collectors—provided that they acted according to specific directions or probable cause, suits against tax collectors were still possible, and Congress had thereby recognized the actions grounded in assumpsit). *See also* Dubroff, *Part I, supra* note 314, at 36. The Court also held that since this was a suit against a private litigant, the government had no interest in it, and therefore could not aid the collector by using its subpoena power in discovery. Pacific Mills v. Kenefick, 99 F.2d 188 (1st Cir. 1938) ("We do not think the Commissioner may use his powers of examination to aid the government representative as a litigant in civil proceedings."). Naturally, the tax collector could use the generally available discovery methods.

343. Plumb argues that the elimination of this protest requirement converted the action from a suit at common law to a purely statutory action. Plumb, *supra* note 313, at 691. In 1921, the $10,000 limit was eliminated, *only in cases where the collector had died.* Revenue Act of 1921, Pub L. No. 67-98, ch 136, § 1310 (1921). The "death" requirement for unrestricted suits against tax collectors in District Courts was later replaced with an "out of office" requirement. Act of February 24, 1925, ch 309, 43 Stat 972 (1925).

344. Plumb, *supra* note 313, at 687. Moreover, since multiple tax collectors might have been involved with the same taxpayer, issue preclusion was often unavailable to a taxpayer who needed to sue two tax collectors over the same tax. *Id.* at 693. In actions directly against the government, claim preclusion was available. *Id.* at 693; Dubroff, *Part I, supra* note 314, at 37. Congress, in 1942, attempted to remedy this lack of preclusive effect. 53 Stat. 965. In 1942, Congress required the courts to accord preclusive effect to actions against different tax collectors, so long as the issues were identical. Revenue Act of 1942, Pub. L. 77-753, ch. 619, 56 Stat. 798 (1942).

This legal fiction created another problem: if two tax collectors were involved in the collection of tax on a given transaction, a taxpayer could not sue them in District Court (nor could he sue the Treasury for an amount over $10,000), offsetting one payment against the amount due. Instead, his only remedy was the Court of Claims. Plumb, *supra* note 318 at 695; Lowe Brothers v. United States, 304 U.S. 302 (1938). Therefore, even though the tax was collected by a Tax Collector, who was, either in theory or by Congressional fiat, not subject to sovereign immunity, and the suit was brought in a Court that possessed equitable jurisdiction, the fact that different Tax Collectors were involved precluded any remedy that might have resembled equitable recoupment.

Since the Tucker Act did not require that claims against the government be tried by a jury, it was speculated that claims against the United States, and against a collector may be joined—with one claim tried by the court and one before a jury. Plumb, *supra* note 318 at 700. In some cases, the United States could intervene in a suit against a collector, asserting that additional tax was owed, and, in theory, the tax collector should really be paying the United States the money anyway (though the money was long ago deposited in the Treasury). *Id.* Jury trials in suits against the United States were not authorized in the District Court until 1954. Act of July 30, 1954, ch. 648, §§ 1-2, 68 Stat. 589 (1954); 28 U.S.C § 2402; Wickwire v. Reinecks, 275 U.S. 101, 105-06 (1926). Finally, it has been held that when the government attempts to enforce a tax lien, defenses on the merits may be

none of these remedies provided for pre-payment judicial review, and none of them provided for *any* injunctive relief.[345]

2. *The Board of Tax Appeals*

The story of the Tax Court begins with the creation of the Board of Tax Appeals. Although it was called "quasi judicial" in nature,[346] the history of the court is marked by a constant tension between whether it was, in fact, truly judicial, or something else. And, if the court's nature was judicial, the extent to which Congress could engineer a result different from that reached in another forum, was a question raised.

The Board of Tax Appeals was created by the Revenue Act of 1924[347] as an "independent agency in the executive branch of government"[348] to

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made by the taxpayer absent any earlier issue preclusion. United States v. O'Conner, 291 F.2d 520, 526 (2d Cir. 1961); *but cf.* I.R.S. v. Pransky, 261 B.R. 380, 387 (D.N.J. 2001) ("debtor may not avoid the strict statute of limitations prescribed in the Internal Revenue Code by waiting for the government to institute a legal action after the debtor's claim against the IRS has become time barred").

345. 26 U.S.C. 7421(a). Dubroff notes that this prohibition on injunctive relief was of "common law" origin. *See* Dubroff, *Part I*, *supra* note 314, at 35 & n.145 (citing *Standard Nut Margarine*, 284 U.S. at 509). The *Miller* Court had traced this prohibition to the common law by saying:

> The principal reason is that, as courts are without authority to apportion or equalize taxes or to make assessments, such suits would enable those liable for taxes in some amount to delay payment or possibly to escape their lawful burden, and so to interfere with and thwart the collection of revenues for the support of the government . . . . Section 3224 is declaratory of the principle first mentioned and is to be construed as near as may be in harmony with it and the reasons upon which it rests.

However, *Miller* acknowledged that in some cases, injunctive relief could be sought against the collectors. Miller v. Standard Nut Margarine, 284 U.S. 498, 509 (1932).

346. *See, e.g.*, Goldsmith v. Board of Tax Appeals, 270 U.S. 117, 212 (1926) ("the character of the work to be done by the board, the quasi judicial nature of its duties . . .").

347. Pub. L. 68-176, § 900, 43 Stat. 253, 336 (1924).

348. Revenue Act of 1926, ch. 27, § 2900, 44 Stat. 105 (1926). The Treasury Department was not happy with the elimination of such review functions from under its umbrella, and apparently furiously protested. Walter Hammon, *The United States Board of Tax Appeals*, 11 MARQ. L. REV. 1, 2 (1926-1927). Despite the fact that the Revenue Act of 1924 did not call the Board a court, create it within the judicial branch, or specifically provide for the creation of standards of admission, the Board initially saw its role as more of a court than an executive agency, holding that:

> Section 900 of the Revenue Act of 1924 designates this Board as "an independent agency in the executive branch of the government." Notwithstanding this description, the requirements of the section vest this Board with the main attributes of a court and make it a tribunal, entitled to respect and charged with great responsibilities.

review "final determinations"[349] of income, estate and gift taxes, as well as excess profit taxes[350] on a *de novo*[351] basis by the Commissioner of Internal Revenue without generally requiring that the taxpayer pay first.[352] Its sole purpose was to review deficiencies issued after the enactment of the Revenue Act of 1916,[353] based on a petition filed within sixty days of a notice from the Commissioner.[354]

Old Colony Trust Co. v Comm'r, 279 U.S. 716, 722 (1929) ("The case is analogous to the suits which are lodged in the Circuit Courts of Appeals upon petition or finding of an executive or administrative tribunal."); Appeal of Edward L. Scheidenhelm Co., 1 B.T.A. 864 (1925); Comm'r v. Liberty Bank & Trust Co., 59 F.2d 320, 323 (6th Cir. 1932) ("While it is not a court but is an executive or administrative board, it nevertheless exercises 'appellate powers which are judicial in character.'" (citing Helvering v. Gooch Milling & Elevator Co., 320 U.S. 418 (1943))); Erwin Griswald, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1154 (1943-1944) ("Congress has, of course, declared that the Tax Court is an 'independent agency in the Executive Branch of Governments'. This is a polite fiction that once served a purpose. But the Tax Court is in organization, tradition, and function, a judicial body and should be treated as such in any survey of judicial review in tax cases."); Robert C. Brown, *The Nature of the Tax Court of the United States*, 10 U. PITT. L. REV. 298 (1948-49) ("The Board of Tax Appeals was, or at least was intended to be, an administrative body; and the Tax Court is the same body under a different name, and is likewise explicitly administrative and not judicial." However, Brown concedes that in renegotiation act proceedings, it did act as a court as in 50 U.S.C. § 1191.).

349. HAMEL describes the jurisdiction as not based on existence of notice, but rather on the more metaphysical question of whether the Commissioner has come to a final determination. HAMEL, *supra* note 313, at 26.

350. Revenue Act of 1924, ch. 234, § 900, 43 Stat. 253, 336 (1924). This system was initially patterned on the British system of tax review where a board of "special commissioners," designated by the Exchequer heard appeals from the decisions of various assessors. George O. May, *Accounting and the Accountant in the Administration of Income Taxation*, 47 COLUM. L. REV. 377, 384, (1947). Its fifteen members—just as the Article I judges of today—were appointed by the President with the advice and consent of Congress. J. Gilmer Korner, *The United States Board of Tax Appeals*, 11 A.B.A. J. 642, 642 (1925).

351. *But see* Hammon, *supra* note 229, at 3 ("The Board is not a substitute for the Internal Revenue Unit but an appeal body to review determinations made by it and presupposes a comprehensive consideration of the case there, so that only substantial questions will reach the Board.").

352. Pavenstedt, *supra* note 234, at 26.

353. Appeal of Mills, 1 B.T.A. 199 (1924); *but cf.* Appeal of Hickory Spinning Co., 1 B.T.A. 409, 410-11 (1925) (holding that the Board could consider factual matters before 1916 because "[t]he computation of the profits tax does not and can not stand alone for any one year. Such tax for each year is necessarily dependent upon the income and tax of the preceding year by which the profits-tax credits are determined.").

354. At the time, taxpayers had sixty days from the mailing of such a notice to appeal to the Board. Under today's statutory regime, they have ninety. The 1926 Act (and its later incarnations) provided that under normal circumstances, the Commissioner could not begin to collect until that period of time had passed, providing for injunctive relief if the Commissioner failed to do this. Latham, *supra* note 329, at 210; 26 U.S.C. § 3224 (1926). This period was considered jurisdictional, and the Board strictly construed it. Appeal of

It could not order refunds,[355] even though the Commissioner was in the practice of administratively considering and paying refunds.[356] In fact, while the filing of an appeal stayed collection,[357] payment of the tax deprived the Board of jurisdiction.[358] Its decisions were not binding on the Bureau, and so the Bureau, after losing before the Board could sue the taxpayer in a District Court to collect such taxes from the taxpayer.[359] The Board had no power to change the behavior of the Bureau. For example, it could not order the Bureau to accept amended returns or change the way it proposed to assess taxes.[360]

While it was not bound by the Bureau of Internal Revenue's determination of fact or law,[361] the Board's actual power to act as a court was obviously in question.[362] By statute, it could administer oaths and obtain evidence via subpoenas enforceable in a District Court.[363] However, there

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Satovsky, 1 B.T.A. 22, 1924 WL 17 (1924).

It was argued that, "taxpayers are not prevented from asserting in their appeal to the Board that the proposed assessment of additional tax is in violation of the Constitution, in violation of the provisions of any of the Revenue Acts or illegal for any other reasons." Miller, *supra* note 340, at 171.

355. In *Appeal of Everett Knitting Works*, 1 B.T.A. 5 (1924), the Board wrote:

> The harsh rule of payment first and litigation afterwards was sought to be mitigated. But the consideration of refund claims has no place in this scheme. Payment has already been made and there is nothing upon which the determination of the Board can effectively operate. The taxpayer has now, as he has heretofore had, a right of action in court to recover any amount erroneously collected.

Id.

356. MONTGOMERY, *supra* note 327, at 204.

357. Korner, *supra* note 350, at 642.

358. Appeal of Northwestern Mut. Life Ins. Co., 1 B.T.A. 767 (1925) (noting that taxpayer could have filed a claim for abatement, "and if, after consideration, the Commissioner denied the claim, to appeal to the Board from such denial."). If payment was obtained via a jeopardy assessment under § 274, the Board also lost its jurisdiction.

359. TURNER, ORIGINS, *supra* note 313, at 36.

360. Appeal of Kunkel & Co., 3 B.T.A. 133 (1925).

361. The Board would not accept *ex parte* affidavits relating to disputed questions of fact. Miller, *supra* note 340, at 173.

362. At the time, the board did not consider whether it had the contempt power, or even the scope of its power to enforce judgments. *See* Latham, *supra* note 334, at 203 ("The Board is a tribunal possessed of the attributes of a court and will take jurisdiction only of actually litigated tax problems. It has neither the time nor power under either the 1924 or 1926 acts to consider moot questions."); Korner, *supra* note 355, at 642 ("The purpose of [the BTA's] creation was to provide a tribunal within the executive branch of the government which should be independent of the Treasury Department for the hearing and determination of controversies between taxpayers and the Bureau of Internal Revenue, relative to the assessment and collection of additional taxes.").

363. Revenue Act of 1924, ch. 234, § 900(i), 43 Stat. 253, 338; Blair v. Oesterlein

was never a chance to test whether it had such powers independent of the congressional grant.[364] On the other hand, the court was convinced that, as a matter of procedure, it could consider evidence that was presented to Treasury Department personnel, without formal admission, cross-examination or whatever other devices courts use to ensure credibility.[365] However, a judicial recognition by the Court of Appeals for the Seventh Circuit in *Chicago Ry. Equipment Co. v. Blair*[366] that the Board of Tax Appeals should rely on information collected by an agency, without subjecting it to cross-examination, could either mean that: 1) following the institutional discipline model, the Board of Tax Appeals should determine whether the actions of the agency are reasonable; or 2) it could represent a narrower redeterminist view that the records of revenue agents were sufficiently reliable that they did not require cross-examination, and were an adequate basis for the Commissioner's determinations.

In the Revenue Act of 1926, however, Congress acted to abrogate *Chicago Ry. Equipment Co.*, and held that the Board must follow the rules of evidence as applicable in courts of equity in the District of Columbia,[367] thereby reining in the use of hearsay evidence. By scrutinizing the record of evidence presented by the Board and not the Bureau of Internal Revenue's files, it appears that Congress felt that the role of the Board was to redetermine tax liability, and not to regulate the conduct of the agency,[368] in the way that a court reviewing administrative decisions would.

Mach. Co., 275 U.S. 220 (1927) (subpoenas against government); Norman O. Tietjens, *Some Problems Facing the Tax Court*, 3 WM. & MARY L. REV., 453, 455 (1961-1962); *See, also*, United States v. Union Trust Co., 13 F. Supp. 286 (W.D. Pa. 1936) (records from third parties). However, similar to current procedure, depositions and documents could only be issued upon the permission of a member of the board. Miller, *supra* note 340, at 173.

364. Gallagher, *supra* note 333, at 147 (showing how the Treasury Department envisioned an independent board for settling income tax cases, but Congress empowered the BTA to administer oaths, subpoena documents or testimony, and hold hearings anywhere in the country). Also, in *Goldsmith,* the Supreme Court held that the statute implied the power of the Board to promulgate rules of admission and practice before it. Goldsmith v. BTA, 260 U.S. 117, 120 (1926).

365. *See* Chicago Ry. Equipment Co. v. Blair, 20 F.2d 10, 14 (7th Cir. 1927) ("The schedules made by revenue agents and filed with the Commissioner's answer here, show that those agents made exhaustive investigations into plaintiff's business.") *abrogated by* Revenue Act of 1928, ch. 852, § 907, 45 Stat. 791, 875, 610 (1928) ("The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than the rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia.").

366. *Id.*

367. Revenue Act of 1926, Pub. L. No. 69-20, ch. 27, §§ 897(a), 900(h) 44 Stat. 9 (1926).

368. For the initial dispute as to whether the Board could analyze constitutional

In the period between 1924 and 1926, the decisions of the Board were not subject to direct appeal,[369] as it was considered experimental.[370] However, taxpayers, upon payment, could collaterally attack the decision of the Board in the District Court or Court of Claims, and appeal those decisions to either a Court of Appeals or the Supreme Court. The decisions of the Board were *prima facie* evidence of the facts.[371] By the same token, the Commissioner could sue the taxpayer in a District Court within five years.[372] At this early time, should the Board have considered a year that it did not have jurisdiction to review, those findings of fact were binding on neither the Commissioner nor the taxpayer,[373] because in a roundabout way the Board held that if it were to give any effect to its consideration of earlier years, it would, in reality, be ordering a refund which at the time it had no jurisdiction to do,[374] thereby showing that the board rejected any theories which are usually associated with the controversy clause as would later be raised in *Bull*.[375] Though review on the merits could only be through such collateral attack, in one case, where the BTA found that it lacked jurisdiction, petitioners sought, and were granted, a writ of mandamus, effectively reversing the BTA's decision.[376]

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questions, see HAMEL, *supra* note 313, at 79 & 75 (collecting cases in which some BTA members thought that there was no jurisdiction to pass on constitutionality of statutes or regulations, and later consensus that they were required to do so if asked).

369. Roger John Traynor, *Administrative and Judicial Procedure for Federal Income and Estate Gift Taxes - A Criticism and a Proposal*, 38 COLUM. L. REV. 1393, 1406 (1938).

370. Bolton B. Turner, *The Tax Court of the United States*, 41 LAW LIBR. J. 371, 372 (1948) [hereinafter *Court*].

371. 26 U.S.C. § 284 (1924). Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985, 1002 (1991); Latham, *supra* note 334, at 201. The question of what evidence the BTA would consider was initially left to the Board, with little guidance from Congress. Gallagher, *supra* note 338, at 147 (noting that initial drafts of the Board's enabling legislation used the word "informal" to describe its processes, but later drafts left it up to the BTA to decide what procedure to use). The chairman of the BTA described its rules of evidence in these terms: "Because there is no jury, the strict rules of evidence obtaining in law courts are relaxed, and the rules of evidence observed are more nearly those obtaining in courts of equity." Korner, *supra* note 350, at 643.

It is worth noting that in an analogous situation, with the now-defunct Interstate Commerce Commission, *prima facie* evidence of facts that were found by the ICC, was not conclusively binding upon courts. See Young, *supra* note 148 at 784 & n.99 (citing I. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 387 & n.64 (1931)).

372. Oscar Bland, *Federal Tax Appeals*, 25 COLUM. L. REV. 1013, 1015 (1925).

373. Latham, *supra* note 329, at 216; Miller, *supra* note 340, at 171.

374. Appeal of Estate of Jackman, 2 B.T.A. 515 (1925).

375. See *supra* notes 275 to 289 and accompanying text.

376. United States *ex rel.* Dascomb v. Bd. of Tax Appeals, 16 F.2d 337 (App. D.C.

To correct these problems, the Revenue Act of 1926 specially authorized the Board to consider other years, but the Act expressly stated that the Board had no jurisdiction for tax years other than the ones before the Board.[377] Congress preserved the rights of taxpayers who paid in advance to sue in the Court of Claims or at the District Court. However, once a taxpayer elected to proceed at the BTA, review was by a Court of Appeals where the taxpayer resided and was based on the record before the Board.[378]

In 1926, the Board finally was granted *overpayment* jurisdiction: the authority to determine when a taxpayer had paid excess taxes.[379] When an overpayment was found, the Board commissioner would issue a "Certificate of Over-assessment" which could be used as a credit toward future taxes or submitted for a refund.[380] Technically, the decisions of the board, however, were not self-executing. A taxpayer might still have to file a claim in the District Court for an actual refund of an overpayment.[381]

Though unable to enforce judgments, in 1926, the Board was granted the power by Congress to impose penalties for frivolous appeals,[382] which were enforced by allowing the Commissioner to increase his assessment.[383] However, there does not seem to have been a statutorily-mandated means for the Board to punish bad behavior by representatives of the Commissioner, or other government agents.

1926).

377. *See supra* note 367.

378. Turner, *Court*, *supra* note 370, at 372.

379. The Revenue Act of 1926 also forbade taxpayers from commencing an action with regards to a tax year and then abandoning it to seek a refund. Pub. L 69-20, Ch. 27, § 284(d), § 319(a), 44 Stat. 9 (1926). As always, payment of the asserted deficiency would remove jurisdiction from the board, but filing a petition with the Board removed jurisdiction from any other court where refund litigation might be pending. *See* 26 USC § 7422(e). However, under the 1926 Act, the taxpayer could waive restrictions on collection of the assessment during the pendency of the petition to the Board. This, it was speculated, would not deprive the Board of jurisdiction.

The Commissioner was required to begin assessment immediately if a taxpayer began bankruptcy or receivership proceedings. Latham, *supra* note 334, at 218. However, if the Commissioner failed to file a claim in the court where the action was pending, apparently the Board still would retain jurisdiction. *Id.*

380. JOHN G. HERNDON, JR., INCOME TAX PROCEDURE, 74 (1927).

381. Latham, *supra* note 329, at 217.

382. Revenue Act of 1926 §§ 911, 1000.

383. Revenue Act of 1926 § 911. While the Board, at the time, lacked jurisdiction to set aside or modify closing agreements, it could effectively rule on them by analyzing whether additional tax was actually due in view of the agreement and the party's behavior. Of course, in effect, only the taxpayer's behavior would be at issue. Holmes & James v. Commissioner, 30 B.T.A. 74 (1934).

Despite Congressional concern for the ability of individuals to contest their income tax liability, the jurisdiction of the Board remained subject to some dispute. In 1928, in *Peerless Woolen Mills v. Commissioner*, the Board held that it had jurisdiction to consider not only taxes that were before the Board, but also whether deficiencies for prior years—before the creation of the Board—were barred.[384] Even so, while the appeal was pending, collection of the tax was still pursued. The taxpayer attempted to enjoin collection of the tax at the District Court, arguing that since the taxes related to each other, the collector was prevented from collecting until the Board had reviewed the matter.[385] On appeal, the Court of Appeals for the Fifth Circuit held that, since the Board was considering the statute of limitations issues, "the jurisdiction of the Board extends to the whole controversy, to the end that it may determine or redetermine the correct amount of the tax."[386] The court recognized, even in the BTA's infancy, that resolution of the entire controversy must be had somewhere, and the controversy clause demands that either the courts assert jurisdiction over all of the controversy, or declare that another body is doing so.

3. The Tax Court of the United States

In 1942 the Board's name was changed to "Tax Court of the United States," and the members received the honorific of "judge."[387] In this form, individual judges or commissioners[388] could rule on petitions, subject only to rehearing by the full "court." Although it was named the "Tax Court of the United States," by statute it was an "independent agency within the executive branch."[389] Accordingly, courts initially treated the decisions of the Tax Court with some deference, recognizing its special expertise in the field of taxation.[390] Because of its position within an administrative

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384. 13 B.T.A. 1119 (1928).

385. Peerless Wollen Milles v. Rose, 24 F. 2d 576 (N. D. Ga. 1928) .

386. Peerless Wollen Milles v. Rose, 28 F.2d 661 (5th Cir. 1928); HAMEL, *supra* note 313, at 64.

387. Revenue Act of 1942, Pub. L. No. 77-753, ch. 619, § 504(a), 56 Stat. 798 (1942). David Laro, Panel Discussion: *The Evolution Of The Tax Court As An Independent Tribunal*, 1995 U. ILL. L. REV. 17, 22 (1995); Turner, *Court*, *supra* note 370, at 373.

388. Revenue Act of 1943, Pub. L. No. 78-235, ch. 63, § 503, 58 Stat. 21 (1943) (codified at 26 U.S.C. § 1114 (b)). These commissioners are the ancestors of today's "Special Trial Judges." Like the modern STJs, they were appointed by the judges.

389. It seems to be the general consensus that with its new name, nothing changed. TURNER, ORIGINS, *supra* note 313, at 38.

390. Dobson v. Comm'r, 320 U.S. 489 (1943). In *Dobson*, the court opined that many questions of law appear to be really questions of accounting which the board has

agency, the Supreme Court held, in *Dobson v. Commissioner*,[391] that a reviewing court must defer to the Tax Court as it would to an administrative agency and should regard accounting disputes not as pure questions of law, but rather factual disputes that the Tax Court has special expertise in reviewing.[392] Of course, one could simply avoid Tax Court precedent and "expertise" and seek a refund, if a taxpayer had the money to pay first.

However, in 1948, Congress acted to abrogate *Dobson* by enacting § 1141(a) (now 26 U.S.C. § 7482(a)(1)) specifying that "[t]he United States Courts of Appeals . . . shall have exclusive jurisdiction to review the decisions of the Tax Court . . . *in the same manner and to the same extent* as decisions of the district courts in civil actions tried without a jury." (emphasis added).[393]

Faced with an agency that might lack general equitable powers, the Supreme Court held in *Hormel v. Helvering*[394] that Courts of Appeals could take it upon themselves to "modify or reverse a decision of the Tax Court with or without remanding the cause to the Tax Court 'as justice may require.'"[395] In these cases, it seems the Court of Appeals could use a rule of decision out of reach of the Tax Court: equitable grounds.[396] The Tax Court of the United States was treated by reviewing courts as if it were not capable of exercising all of the judicial power once a controversy was

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special expertise in. Therefore, the Tax Court should only be reversed when it is clearly wrong. *See generally* May, *supra* note 350, at 392-94.

391. 320 U.S. 489 (1943).

392. Equitable Life Assurance Soc'y of America v. Comm'r, 321 U.S. 560 (1944) (stipulated facts require the Tax Court's analysis, the Supreme Court cannot analyze it itself); Lincoln Elec. Co. v. Comm'r, 162 F.2d 379, 380 (6th Cir. 1947) ("[R]eview of Tax Court decisions is governed by the Administrative Procedures Act."); *but see* TURNER, ORIGINS, *supra* note 313, at 444 (indicating that in *MacDonald v. Comm'r*, 165 F.2d 213 (6th Cir. 1947) (affirmation of Tax Court without opinion) the Sixth Circuit's assignment of error based on the failure by the Tax Court to follow the Administrative Procedures Act was without merit).

393. Rules of Decision Act, Pub L. No. 80-773, ch. 646, 62 Stat. 869, 991 (1948) (to be codified at 28 U.S.C.); *see* I.R.S. Tech. Adv. Mem. 83-02-014 (Sept. 30, 1982) (*Dobson* "was legislatively repealed in 1948 by the addition of section 1141(a) (now section 7482) to the 1939 Code"); *An Introduction to the New Federal Judicial Code*, 8 F.R.D. 201, 207 (1949).

394. 312 U.S. 552 (1941).

395. Charles W. Heidenreich, *Scope of Judicial Review of Decisions of the United States Tax Court*, 29 MINN. L. REV. 186, 191-92 (1944-1945).

396. *Id.* at 557 ("Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."); Note, *Reformulation of the Rule Against Introducing New Matter in Appellate Courts*—The Hormel Case, 50 YALE L.J. 1460, 1466 (1940) ("By taking such factors into account in exercising their discretion in specific cases, courts may be expected to utilize the *Hormel* rule to reach equitable results.").

properly before it, as it could consider petitions (or defenses) that were grounded in "law" but not "equity."

Even though it was reviewed as if it were a court, the Tax Court was still rigidly prevented from doing many things that a court could do. It was precluded from considering whether the Commissioner had taken an inconsistent position (assessing a transaction in one year under one theory, and in another year under a different theory), and remedying that inconsistency with equitable recoupment, as even the Court of Claims had in *Bull*, but in *Hormel* its reviewing courts could consider these grounds. However, in *Commissioner v. Gooch Milling & Elevator Co.*,[397] the Supreme Court appeared to retreat from *Hormel*, by stating that "[t]he Internal Revenue Code, not general equitable principles, is the mainspring of the Board's jurisdiction."[398] There was never any answer to the question of whether this "independent agency within the executive branch" must apply the doctrines that the Supreme Court ordered its reviewing courts to apply.

4. *As an Article I Court*

In 1969, the Tax Court was transformed into its present incarnation as an "Article I" court,[399] a change brought about with few public hearings or studies.[400] Nevertheless, the Tax Court moved out of the IRS's headquarters and into its own building in Washington, D.C.,[401] and its name was changed to the "United States Tax Court." To remove all doubt that it was, in fact, a court, Congress statutorily empowered the Tax Court with a specific contempt statute,[402] as well as a self-enforcing subpoena power statute.[403] Of course, as an Article I court, like the Court of Claims, its judges were subject to potential diminution in salary and non-renewal.

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397. 320 U.S. 418, 422 (1943).

398. *Id.* at 422.

399. Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730 (1969).

400. Howard Dubroff, *The United States Tax Court: An Historical Analysis—Part IV—The Board Becomes a Court*, 44 ALB. L. REV. 1, 50 (1976-77).

401. Laro, *supra* note 387, at 22.

402. Pub. L. No. 91-172, § 956, 83 Stat. 732 (codified at 26 U.S.C. § 7456(d)).

403. Christopher R. Kelley, *Recent Federal Farm Program Developments*, 4 DRAKE J. AGRIC. L. 93, 127 n.242 (1999) ("Since the Supreme Court's decision in *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447 (1894), the rule has been that, as a matter of due process, federal agencies cannot be given the power to enforce their subpoenas. *See Shasta Minerals & Chem. Co. v. SEC*, 328 F.2d 285, 286 (10th Cir. 1964)."); *but cf.* SEC v. O'Brien, 467 U.S. 735, 741 (1984) ("Subpoenas issued by . . . [an agency] are not self-enforcing, and the recipients thereof are not subject to penalty for refusal to obey.").

The Tax Court's judges are appointed for a term of years by the President and confirmed by Congress. Most of its decisions review the preliminary determinations of the IRS *de novo*, but the IRS is accorded some deference on questions of interpretation of its own interpretive regulations. The one exception is that when the Tax Court reviews a "collection due process hearing" it sits as an appellate court with exclusive jurisdiction.[404]

As an Article I court, the Tax Court has been hesitant to apply equitable doctrines (including the celebrated "equitable recoupment") in order to right wrongs, or even to vacate decisions procured by fraud.[405] Unfortunately, as of yet, the Supreme Court has not resolved the extent to which the Tax Court's powers include equity. The closest it has come is in a per curium opinion in *Commissioner v. McCoy*.[406] In *McCoy*, the Supreme Court held that where the Court of Appeals for the Sixth Circuit "forgave" interest and penalties "in order to achieve a fair and just result,"[407] the court had overstepped its jurisdiction to review the Tax Court pursuant to 26 U.S.C. § 7482(a). It concluded that the Sixth Circuit "was not empowered to proceed further to decide other questions relating to interest and penalty—questions that were not presented, and could not possibly have been presented, to the Tax Court—or to grant relief that the Tax Court itself had no jurisdiction to provide." Ironically, the Supreme Court also cited *Gooch*, which had originated when the Tax Court's ancestor, the BTA, was firmly planted in the executive branch, for the proposition that "[t]he Tax Court is a court of limited jurisdiction and lacks general equitable powers." However, lower courts' applications of *McCoy* to foreclose equitable recoupment have been criticized by other courts which point out that: 1) all federal courts are of limited jurisdiction, anyway;[408]

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404. 26 U.S.C. § 6330(d)(1)(A); Holliday v. Comm'r, 57 Fed.Appx. 774 (9th Cir. 2003) (Because Holliday's CDP hearing was based on her liability for unpaid income tax, the Tax Court has exclusive jurisdiction over her appeal.); Goza v. Comm'r, 114 T.C. 176, 183 (2000) (issues not raised administratively waived on appeal to the Tax Court); *c.f.* Cortes v. United States, No. CV-S-01-0940-RLH LRL, 2002 WL 1987469 (D. Nev. Jul. 10, 2002) ("Plaintiff's failure to petition the proper court for review of the IRS's administrative determination is not fatal to his claim, since Section 6330(d) permits refiling in the correct court 30 days after this Court's determination."). There are various reasons, however, why the government may wish to sue the taxpayer in district court to collect taxes, such as the appointment of a receiver, or enforcement of a lien on property in which the taxpayer has an interest. Ferguson, *supra* note 307, at 316.

405. Drobny v. Comm'r, 113 F.3d 670 (7th Cir. 1997); Gara, *supra* note 36.

406. 484 U.S. 3 (1987) (per curiam).

407. *Id.* at 5.

408. FAAUO v. Comm'r, 165 F.3d 572, 578 (7th Cir. 1999) (Posner, J.) ("The argument that the Tax Court cannot apply the doctrines of equitable tolling and equitable

and 2) unlike the U.S. Tax Court, the BTA and the Tax Court of the United States were not even courts, but rather agencies within the executive branch.[409]

Unfortunately, much has been made of *McCoy*, and the Courts of Appeals for the Sixth and Seventh Circuits have taken the ball, concluding that the Supreme Court had rejected the institutional discipline view, and embraced a view of Article I § 8 supremacy. Particularly, since the Supreme Court used the words "[t]he Tax Court is a court of limited jurisdiction and lacks general equitable powers . . ."[410] the Court of Appeals for the Sixth Circuit concluded that the Tax Court could "do no more than determine the amount of the deficiency before it."[411] However, this may be misinterpreting the scant guidance given by the per curium opinion in *McCoy*, as the Supreme Court was, as stated *supra*,[412] condemning the court's granting of forgiveness of interest and penalties, "in order to achieve a fair and just result" despite the fact that Congress has presumably already considered the fairness of the tax code.

Finally, as stated *supra*,[413] the court's power has been analyzed not just in terms of its power to remedy the harsh effects of the tax year, but also in the form of its power to remedy abuses of its forum by I.R.S. attorneys. The Court of Appeals for the Ninth Circuit held that the Tax Court *must* use its discretion and fashion an equitable remedy that would put taxpayers victimized by a corrupt agreement between I.R.S. counsel and taxpayer counsel involved in the same tax shelter "in the same position as provided for in the . . . settlement."[414] This equitable remedy, for a breach of a "statutory, official, or customary duty," is known as "quasi-contract."[415]

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estoppel because it is a court of limited jurisdiction is fatuous. *All* federal courts are courts of limited jurisdiction.") (emphasis in original).

409. Branson v. Comm'r, 113 T.C. 6, 10-11 (1999), *aff'd*, 264 F.3d 904, 914 (9th Cir. 2001) (affirming and distinguishing *Gooch Milling*), *cert. denied*, 535 U.S. 927 (2002).

410. Comm'r v. McCoy, 484 U.S. 3, 7 (1987) (per curiam).

411. Estate of Mueller v. Comm'r, 153 F.3d 302, 304 (6th Cir. 1998) (quoting *McCoy*, 484 U.S. at 7).

412. *See supra* note 185 and accompanying text.

413. *Id.*

414. Dixon v. Comm'r, 316 F.3d 1041, 1047 n.11 (9th Cir. 2003).

415. Obviously, in the common law courts, only tort and contractual obligations existed. *See, e.g.*, William Keener, *Quasi-Contract Its Nature and Scope*, 7 HARV. L. REV. 57, 66 (1893-1894) ("The only forms of action known to the common law were actions of tort and contract. If the wrong complained of would not sustain an action, either in contract or tort, then the plaintiff was without redress, *unless the facts would support a bill in equity*." (emphasis added)). The Supreme Court held that such obligations based not on common law torts or contracts willingly entered into are not contracts per se, since they lack the assent of all of the involved parties. In *Louisiana ex rel. Folsom v. City of New Orleans*,

However, because of the split between the Ninth Circuit in *Dixon*, the Sixth Circuit in *McCoy*, and the Seventh Circuit in *Drobny*, a circuit split exists regarding the Tax Court's power to alter the substantive tax liability of taxpayers based on equitable principles, when a strict application of the Internal Revenue Code would result in essentially rewarding the government for the corrupt behavior of its agents.

C. U.S. COURT OF APPEALS FOR VETERANS CLAIMS

The Court of Appeals for Veterans Claims has a much shorter and less spectacular history than the other Article I courts. Initially, an attempt was made to involve the judiciary in determining who was eligible for veterans' benefits; this failed when the courts insisted on having the final say, and balked at adjudicating only part of the case or controversy.[416] Today, while the Court does exercise judicial review over the entirety of the claim, Congress has precluded Article III review (by, ironically, the Article III descendent of the Court of Claims—the Federal Circuit) of the Article I court's factual determinations or challenges to law or regulation as applied to the facts of a particular case,[417] "[e]xcept to the extent that an appeal . . . presents a constitutional issue."[418] These limitations have, for the moment,

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109 U.S. 285, 288 (1883), Justice Field wrote:

> A judgment for damages . . . is sometimes called . . . [a] contract of record, because it establishes a legal obligation to pay . . . and, by a fiction of law, a promise to pay is implied where such legal obligation exists . . . . But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed upon the losing party by a higher authority against his will and protest.

Id.

The remedy of Quasi-Contract is founded "(1) upon a record, (2) upon a statutory, official or customary duty, or (3) upon the fundamental principle of justice that no one ought to unjustly enrich himself at the expense of another." JAMES BARR AMES, LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 160 (1912), *quoted in* Joseph L. Lewinsohn, *Contract Distinguished from Quasi Contract*, 2 CAL. L. REV. 171, 180 (1913-1914).

416. *See supra* note 209-213 and accompanying text.

417. Bustos v. West, 179 F.3d 1378, 1380 (Fed. Cir. 1999) ("[W]e may not review a challenge to a factual determination or a challenge to a law or regulation as applied to the facts of a particular case.").

418. 38 U.S.C. § 7292(d)(2) ("Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.").

satisfied the courts that they are adjudicating enough of the "controversy" so as not to be acting in a commissarial or advisory capacity. Like the Court of Federal Claims, the U.S. Court of Appeals for Veterans Claims acknowledges that, although it is not bound by the controversy requirement, it will not, as a matter of policy, decide moot cases.[419]

1. Background of Veterans Benefits

The Veterans Administration (VA)—now the Department of Veterans Affairs—was created by Congress in 1933,[420] replacing a hodge-podge of other programs.[421] While creating an administrative mechanism for providing veterans with pensions and the like,[422] the Act contained a provision excluding veterans' claims from judicial review,[423] and limited the fees that attorneys could receive to ten dollars.[424] Final administrative appeal, under the Act, was to the 65-member "Board of Veterans Appeals,"

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419. Mokal v. Derwinski, 1 Vet. App. 12, 15 (1990):

> Under these circumstances, it is sufficient to observe that we are granted power judicial in nature and being statutorily characterized as a 'Court' we are free, in the absence of a congressional directive to the contrary, to adopt as a matter of policy the jurisdictional restrictions of the Article III case or controversy rubric.

Id. The court also noted that "[p]ost-Northern Pipeline majority opinions have not discussed the type of power exercised by non-Article III adjudicatory bodies. We recognize the unsettled nature of the law in this area and do not attempt to resolve the controversy for purposes of this case." *Id.* at 15.

420. Economy Act of March 20, 1933, ch. 3, 48 Stat. 8, 9 (1933).

421. *See* Christopher D. Knopf, Note, *One Last Battle: Reform Of The Veterans' Administration Claims Procedure*, 74 VA. L. REV. 937, 938 (1988) ("These programs were administered in the 1920s by the Veterans' Bureau, the Bureau of Pensions of the Interior Department, and the National Home for Disabled Volunteer Soldiers."); Norman G. Cooper & David W. Engel, *November 18, 1988: A Jurisdictional Bright Line in Veterans Law?*, 5 FED. CIR. B.J. 91, 92 & n.1 (1995) (bibliography of history of veterans benefits in the U.S.).

422. In general, most decisions are made in an *ex parte* hearing before a three-person rating board, which can be appealed within the agency. Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN. L. REV. 155, 157-58 (1992-1993).

423. Economy Act of March 20, 1933, ch. 3, § 5, 43 Stat. 8, 9 (1933). *See* Kim Lacy Morris, *Judicial Review of Non-reviewable Administrative Action: Veterans Administration Benefits Claims*, 29 ADMIN. L. REV. 65 & n.3 (1977) for a description of future incarnations of this non-review clause. Veterans' pensions were initially subject to the jurisdiction of the Court of Claims under the Tucker Act, but were later excluded. Stephen Van Dolsen, Note, *Judical Review of Allegedly Ultra Vires Actions of The Veterans' Administration: Does 38 U.S.C. § 211(a) Preclude Review?*, 55 FORDHAM L. REV. 579, 593-96 (1986-1987).

424. *See infra* note 438.

which sits in panels of three,[425] and was bound by decisions of the VA General Counsel and VA regulations.[426] However, the final determinations of the Administration did not have preclusive effect, allowing veterans to resubmit their claims.[427] Likewise, with no court to review the administrative determinations of the VA, there was no guarantee even of complete fact-finding, as "without a court to look over the VA's shoulder, it could issue [a] determination in whatever form it chose without any external accountability."[428]

Throughout it all, there was sick irony in the history of veterans' benefits. While the country has consistently lauded the service of veterans, until fairly recently, many have taken a smug pride[429] in insulating veterans' benefits from judicial scrutiny by deeming them to be a gratuity and not a public right.[430]

Somehow, from professors[431] to veterans' groups to Congress, many were convinced, for quite some time, that there was no need to resort to

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425. 38 U.S.C. § 4004(a) (1991).

426. Knopf, *supra* note 421, at 943.

427. Helfer, *supra* note 422, at 158; WILLIAM L. FOX, THE LAW OF VETERANS BENEFITS, JUDICIAL INTERPRETATION 14 (2002).

428. FOX, *supra* note 427, at 107.

429. For example, lawyers were prohibited from charging more than ten dollars to represent veterans before the agency. Most likely this preserved the power of organizations that represented veterans. *See infra* notes 438 and accompanying text. However, the notion persisted that when a lawyer gets involved in a dispute, somehow less justice is available. Walters v. Nat. Assn. of Radiation Survivors, 473 U.S. 305, 325 (1985) ("The appearance of counsel for the citizen is likely to lead the government to provide one—or at least to cause the government's representative to act like one. The result may be to turn what might have been a short conference leading to an amicable result into a protracted controversy.") (Rehnquist, J.) *quoting* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1287-90 (1975); FOX, *supra* note 427, at 15 (describing Congressional testimony). Of course, when the Veterans Administration sought to collect funds that were wrongfully disbursed to veterans, they didn't rely on lay advocates or informal procedures, nor did Congress require them to. 38 U.S.C. § 3116(a)(1) (1982) (current version at 38 U.S.C. § 5316 (2002)); Knopf, *supra* note 421, at 954 & n.114 (showing lower court split about degree of deference to be accorded the findings of fact by the administration related to the overpayment). Knopf, *supra* note 421, at 955 (indicating that the BVA had 189 lawyers).

430. Before *Goldberg v. Kelley*, 397 U.S. 254 (1970), government largess was not considered a right protected by the Fifth Amendment. Therefore, for most of the history of the Veterans Administration, lack of judicial review was not considered completely aberrant to the constitution. *See also* Board of Regents v. Roth, 408 U.S. 564, 571 (1972) ("The Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights.").

431. FOX, *supra* note 427, at 15 (quoting H.R. No. 963 at 25) (statement of Paul Verkuil that "[the VA procedural system] is informal, efficient, and fair . . . . Indeed, when one considers the declared pro-claimant bias of the agency it is surely one of the most generous benefactor agencies in the world.").

judicial review as, surely, the government that veterans had loyally served would take care of them. Indeed, even administrative procedures were limited.[432] Even so, many veterans' groups, providing lay representation to veterans in administrative procedures before the VA, objected to judicial review. They feared either that it would detract from their ability to lobby Congress or the agency informally,[433] or that lawyers, once admitted, would descend like vultures upon hapless injured veterans, eager to devour their fees in proceedings before courts.[434]

2. *The Minimum Amount of Review*

Whether Congress can isolate some agencies from all judicial scrutiny is a question that has not yet been answered. In 1974, the Supreme Court held in *Johnson v. Robinson*[435] that courts probably could review the constitutionality of the provision that precluded judicial review, where the plaintiff, a conscientious objector seeking veterans' benefits, had raised a constitutional claim. The Court ultimately decided that the government was correct in its determination. However, the Supreme Court did not reach the question of whether individual decisions could be subject to attack via injunctions or writs of mandamus issued by the courts, or whether regulations promulgated by the agency could be subject to attack.[436] Likewise, the Supreme Court later held that it had jurisdiction to decide whether the agency acted outside its jurisdictional grant.[437] Most notably, the court concluded that the ten dollar attorney fee limitation was constitutional, despite a challenge on First and Fifth Amendment grounds. The Court concluded that pro se or non-lawyer advocacy was sufficient to secure the petitioner's meaningful access to the courts, and therefore, "[g]overnment interests [in reducing the administrative burden] favored the

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432. *See* Sandra Murphy, *A Critique of the Veterans Administration Claims Process*, 52 BROOK. L. REV. 533, 544 (1986-87) (explaining *ex parte* hearings and limitation on attorney fees).

433. Helfer, *supra* note 422, at 160 (1992-1993) (citing Joseph C. Zengerle & Charles E. Joeckel, *Vets are Helped*, NAT'L L. J., Aug. 17 1987, at 12).

434. HOUSE COMM. ON VETERANS' AFFAIRS, 100TH CONG., 1ST SESS. PROCEEDINGS OF THE 41ST ANNUAL CONVENTION OF THE NATIONAL ASSOCIATION OF STATE DIRECTORS OF VETERANS AFFAIRS ON JUDICIAL REVIEW OF VA ADMINISTRATIVE DETERMINATIONS 10 (Comm. Print 1988) (statement of Lt. Col. David Passamaneck, AMVETS) *cited in* Helfer, *supra* note 422, at 160.

435. 415 U.S. 361, 366-74 (1974).

436. Jonathan Goldstein, Note, *New Veterans Legislation Opens the Door to Judicial Review. . . Slowly!*, 67 WASH.U.L.Q. 889, 893 & n.29-30 (1989).

437. Traynor v. Turnage, 485 U.S. 535, 541-45 (1988); Van Dolsen, *supra* note 429.

limitation on 'speech' that appellees attack."[438] While this limitation obviously did not apply to the courts, it raises the question of whether the Petition Clause can be invoked independently to remedy deliberate (or inadvertent) government interference with an individual's ability to seek substantive relief, as was the case in *Zimmerman Brush*.[439] To illustrate, in an extreme case, if the government's interest in reducing its burdens can outweigh an individual's interest in at least some form of petition for redress, one wonders if there are situations where the government would be able to assert that it is simply too burdensome to argue the issue in any forum and that it, as a matter of law, is entitled to a court's agreement with whatever legal argument the government uses to justify its behavior. Requiring such acquiescence would surely not find too much sympathy in Professor Pfander's view of the Petition Clause, in which individuals could seek redress via the courts, without regard to the burden it imposed on the government.[440]

Indeed, only after a politically unpopular war, in which veterans exposed to Agent Orange were denied treatment[441] did Congress take action to provide veterans with some judicial review. Compounding the irony, the American victims of Agent Orange were arguably better situated than individual victims of "generic" service-related injuries or those whose claims were based on constitutional arguments such as conscientious objection. There were many victims of Agent Orange,[442] and although they did not initially have the benefit of epidemiologic studies to support their claims, they were able to sue (and eventually settle with) the makers of the defoliant under common law theories.[443] Vietnam veterans began to feel not only that the Veterans Administration (which included many veterans

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438. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 325 (1985).

439. *See supra* note 113 and accompanying text. Justice Stevens, in dissent, appears to have noticed this problem, and expressed his skepticism with the view that the VA's limitations were there to protect veterans from lawyers by quoting Justice Jackson in *American Communications Assn. v. Douds*, 339 U.S. 382, 442-43 (1950):

> The priceless heritage of our society is the unrestricted constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error.

Nat'l Ass'n of Radiation Survivors, 473 U.S. at n.21 (Stevens, J., dissenting).

440. *See supra* note 106 and accompanying text.

441. Murphy, *supra* note 432, at 536.

442. After the Vietnam War, the claims for compensation appear to have increased. Nat'l Ass'n of Radiation Survivors, 473 U.S. at 309.

443. *See In re* Agent Orange Prod. Liab. Litig., 597 F. Supp 740 (E.D.N.Y. 1984) (approving settlement).

of previous wars) was biased against them, but that other veterans' groups did not have their best interests at heart.[444]

In 1989 Congress, fully aware of the constitutional positions of the Claims Court and the Tax Court, enacted the "Veterans Judicial Review Act"[445] which created the Court of Appeals for Veterans Claims as an explicitly Article I court. By statute, this court could overturn "clearly erroneous" findings of fact,[446] and "arbitrary and capricious" conclusions of law.[447] The Act provided specifically for review of individual adjudications, as well as direct challenges to the agency's regulations before the Court of Appeals for the Federal Circuit.[448] The Act went on to provide a level of review at the Federal Circuit (and by a petition for certiorari to the Supreme Court). However, the statute appears to preclude review of as-applied non-constitutional challenges[449] and the application of facts to law.[450] The judges of the court were appointed by the President, confirmed by Congress, and paid according to the salaries of district court judges. Interestingly, while they can be removed by the President for enumerated

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444. Helfer, *supra* note 422, at 162.

445. Veterans' Judicial Review Act, Pub L. No. 100-687, 102 Stat. 4105 (1988).

446. 38 U.S.C. § 7261(a) (1994); *see also* 5 U.S.C.A. § 706(2)(B)-(C) (1996) (standard of review under Administrative Procedure Act).

447. 38 U.S.C. § 7261(a)(3)-(4).

448. 38 U.S.C. § 223.

449. 38 U.S.C. § 7292(d)(2) ("Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case."); Barnett v. Brown, 83 F.3d 1380, 1384 (Fed. Cir. 1996):

> To the extent that Mrs. Barnett's appeal is based on the assertion that the Statement of the Case and the Supplemental Statement of the Case, issued on remand from the Board, were inadequate, her appeal involves a question of the application of a statute or regulation to 'the facts of a particular case' and is thus beyond our jurisdiction.

Goldstein, *supra* note 444, at 907 (describing such a challenge as akin to one in which the petitioner concedes that there may be a valid application of the statute, "but when the statute or regulation is applied to him it violates some outside authority").

450. *E.g.* Rossi v. Principi, 91 Fed.Appx. 141 (Fed. Cir. 2004) (dismissing appeal to Federal Circuit where initial appeal to United States Court of Appeals for Veterans Claims was filed late, yet petition raised a "garden variant excusable neglect" argument but conceded the interpretation of the statute of limitations and the date of filing); Caravella v. Principi, 86 Fed.Appx. 423 (Fed. Cir. 2004) (appeal dismissed because petitioner did not raise a colorable constitutional claim "thus, any review of the decision of the Court of Appeals for Veterans Claims would be a review of a challenge to the court's factual determinations or application of law to the facts of Caravella's case, which 38 U.S.C. § 7292(d)(2) does not permit."); Jim v. Principi, 87 Fed.Appx. 737 (Fed. Cir. 2004) ("challenge pertaining to the weighing of evidence falls outside of this court's jurisdiction under 38 U.S.C. § 7292.").

reasons, it is unclear whether such an action is subject to review by the courts.

The Court of Appeals for Veterans Claims (or its prior appellation, the United States Court of Veterans Appeals)[451] was born into an era when Article I courts were accepted. Congress (or at least a powerful group of lobbyists) understood the need to accomplish the specific task of providing judicial discipline to an agency, both in its rulemaking and in its adjudication.[452] From its inception, the court was specifically empowered to issue writs of mandamus, [453] and it has used this power.[454]

Unlike other Article I courts, the Court of Appeals for Veterans Claims was constituted as an appellate court, perhaps to satisfy concerns that the sheer number of veterans' claims would unduly burden the court system. The scope and nature of its review resembles Article III court review of administrative decisions. This court does not hold fact-finding trials, but remands matters back to the agency when factual findings are required. These remands take the form of a mandate. On occasion, the court has reprimanded the Department of Veterans Affairs for failing to heed its mandate, and suggested that the Department could be held in contempt.[455] However, there is, in general, much less need to specifically discipline parties for their manipulation of evidence because the question of what is in the record before the court is generally not in dispute.

In 1995, the court's role as an appellate court, and not an Article I trial court, became most apparent when it was faced with a claim that the Department had not attempted to issue a subpoena against the warden of a prison, that would presumably have required transportation of a prisoner-veteran claimant to a hospital for examination. While the Department has the power to issue such subpoenas,[456] they are not self-executing. Subpoenas must be enforced by a U.S. District Court.[457] The court held that it would not use its powers under the All Writs Act to enforce a

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451. Formally, the name of the court was changed to the Court of Appeals for Veterans Claims in 1998, but substantively its role did not change. Veteran Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511, 112 Stat. 3341 (1999).

452. Congress, on the other hand, provides the Federal Circuit with the ability to review rulemakings of the Department of Veterans Affairs directly. 38 U.S.C. §§ 502, 7292(c) (2002); Disabled American Veterans v. Gober, 234 F.3d 682 (Fed. Cir. 2000).

453. 38 U.S.C. § 4061; 26 U.S.C. § 1651.

454. 26 U.S.C. § 1651.

455. Harris v. Brown, 7 Vet.App. 547, 548 (1995).

456. 38 U.S.C. § 5711 (2002).

457. 38 C.F.R. § 20.711(i) ("In case of disobedience to a subpoena issued by the Board, the Board will take such steps as may be necessary to invoke the aid of the appropriate district court of the United States in requiring the attendance of the witness and/or the production of the tangible evidence subpoenaed.").

subpoena against the warden, because enforcement of such a writ would not actually be necessary to fulfill its mandate to simply review the Board.[458] Therefore, in the case of incarcerated veterans, the court is in the strange position of not only affirming a decision made by the agency that might otherwise have required the use of a subpoena, even though if an Article III court had original jurisdiction, it would have been empowered to issue a writ of habeas corpus to perpetrate the appearance of a witness.[459] Of course, if the Board were a court, this situation would be different.

While equitable doctrines are not generally used to toll the statute of limitations in claims against the government,[460] the Court of Veterans Appeals has ordered equitable relief in the case of interference with an individual's ability to petition, even if a statute of limitations has elapsed. If the Department breaches its statutory duty to provide claimants with necessary records, causing a petitioner to miss a deadline, the court can provide a petitioner with a remedy by equitably tolling the statute of limitations.[461] Such a remedy may allow the court to provide meaningful relief in a controversy that comes before it, but it may threaten Congress's ability to preserve the public fisc.

Despite acknowledging this equitable power, and allowing veterans to avail themselves of a statutorily-created power to effectively petition the government, the next year the court held that it could not order the agency to exercise its statutory power to relieve a claimant from administrative errors; the Court determined that this matter was within the "sole discretion" of the agency, and therefore "the Court may not review the merits of the appellant's contention of entitlement to equitable relief."[462] Consis-

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458. Bolton v. Brown, 8 Vet.App. 185 (1995). Almost indisputably, the power to issue writs of *habeas corpus* lies within Article III Courts. See 28 U.S.C. § 2241(a). While the Court of Veterans Appeals certainly has the power to issue subpoenas, its power to enforce them is likely limited to subpoenas "in aid of [its] jurisdiction" under the All Writs Act. 28 U.S.C. § 1651(a).

459. 28 U.S.C. § 2241(a).

460. *See* Brice v. HHS, 240 F.3d 1367, 1373 (Fed. Cir. 2001) (finding that in order to determine whether equitable tolling is possible under a given statutory regime courts should ascertain congressional intent by analyzing five factors: 1) the statute's detail; 2) its technical language; 3) its multiple iterations of the limitations period in procedural and substantive form; 4) its explicit inclusion of exceptions; and 5) and its underlying subject matter.") (citing U.S. v. Brockamp, 519 U.S. at 347, 350-52 (1997)).

461. Smith v. Derwinski, 2 Vet.App. 429 (1992).

462. Suttmann v. Brown, 5 Vet.App. 127, 138 (1993). Congress has empowered the agency to grant equitable relief from its own administrative errors, but the Court of Veterans Appeals has held that it lacks the power to order the secretary to conclude that there was an error that demands equitable relief. Smith v. Gober, 14 Vet.App. 227 (2000) ("The Secretary's authority to grant equitable relief under section 503 is wholly within the

tently, the court held that the nature of veterans' claims (generally not subject to statutes of limitations) were such that the doctrine of laches would not apply.[463] The Federal Circuit, however, refused to decide whether the Court of Veterans Appeals has equity powers absent a specific statutory grant,[464] but it has held that specific statutes were intended by Congress to be equitably tolled.[465]

The Court of Veterans Appeals has embraced the concept that, as a court, it carries with it the power to sanction parties for bad conduct. Indeed, in *Jones v. Derwinski*,[466] rather than simply rely on a statement that its power to sanction parties derives from statute,[467] the court cited *Ex Parte Robinson*[468] in support of its conclusion that it possessed inherent powers regardless of the wording of the statute. While the court issued an injunction against the VA and ordered payment of the petitioner's attorneys' fees, two concurring judges argued that the petitioner was entitled to "a large monetary sanction" for the Department's conduct (direct communication with a represented party). However, to this day, the court has not had to decide whether it could order that a veteran be paid *more* money because of the agency's behavior. Therefore, the court has not had occasion to alter substantive determinations of the amounts owed to veterans.

It is unlikely that this court will ever be forced to deal with issues faced by courts that are required to supervise discovery. However, for the moment, it has interpreted the congressional determination that the right to

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Secretary's discretion, and the Court lacks jurisdiction even to review the exercise of the Secretary's equity discretion"); Taylor v. West, 11 Vet.App. 436, 440 (1998) ("The Secretary of Veterans Affairs has discretionary equitable power to provide relief where he determines that veterans benefits 'have not been provided by reason of administrative error on the part of the Federal Government or any of its employees.'"); Harvey v. Brown, 6 Vet.App. 416, 425 (1994) ("[T]his Court may not review the merits of appellant's contention of entitlement to equitable relief and any such claim must be presented directly to the Secretary.").

463. Manio v. Derwinski, 1 Vet.App. 140, 144 (1991); Elsevier v. Derwinski, 1 Vet App. 150 (1991) ("We therefore conclude that here, as in Irwin, there is no basis for tolling the 120-day time limit of 38 U.S.C. § 4066(a).").

464. McCay v. Brown, 106 F.3d 1577, 1581 (Fed. Cir. 1997) ("We need not decide if the Court of Veterans Appeals is devoid of equity powers in all cases, because even if the court may exercise such powers, there would be no need to reverse or to vacate and remand for a determination of the merits of McCay's claims because neither of McCay's theories possibly presents a valid ground for relief.").

465. Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998).

466. 1 Vet.App. 596, 606 (1991).

467. The statutory power of the Court of Veterans Appeals is found in 38 U.S.C. § 7265.

468. 86 U.S. 505, 510 (1873); *see supra* notes 41 and text accompanying note 165.

petition the government is important enough to create a specific court to handle grievances against the executive as a grant of authority to extend statutes of limitations for equitable reasons, perhaps indicating a triumph of the Petition Clause over the appropriations clause.

VI. RIGHTS AND REMEDIES

Faced with seemly *ad hoc* determinations of what constitutional vector prevails, we are left with the following question: what coherent legal theories are available in an Article I court to a litigant injured by the government's conduct? What remedies can an Article I court can provide without exceeding its jurisdiction? To answer these questions we must look to the very nature of rights and remedies.

It is generally assumed that an erroneous *legal* position taken by the government can be remedied by the judiciary once a court has jurisdiction. Even though judicial review of agency positions was not explicitly written into the Constitution (some have even suggested that it was stumbled upon[469]) courts are generally capable of imposing their own statutory or constitutional interpretation upon the government. This imposition may result in a remand to an agency, or money refunded when the agency is required by statute to give or receive money.

Unfortunately, a general reluctance to rely on the "supervisory authority" of the federal courts limits the ability of courts to decide such issues. For example, in *United States v. Horn*,[470] the Court of Appeals for the First Circuit found that to order the payment of attorney fees, absent a specific statute, was an incursion into the public fisc.[471] However, this position has not prevented Article III courts from using their supervisory powers to do what is concededly within their power, such as dismissing criminal charges.[472] While sovereign immunity may prevent courts from fashioning monetary remedies against the federal government, the supervisory power

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469. *See supra* note 84 and accompanying text.

470. 29 F.3d 754, 759 (1st Cir. 1994) (citing McNabb v. United States, 318 U.S. 332, 341 (1943)).

471. *See also* Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983) (holding that, waiver aside, sovereign immunity bars the shifting of attorney fees against the federal government). The court, in *Horn* concluded, however, that "[d]espite the fact that, in recent years, the domain of sovereign immunity has tended to contract and the domain of supervisory power has tended to expand, we believe that sovereign immunity ordinarily will trump supervisory power in a head-to-head confrontation." *Horn*, 29 F. 3d at 764.

472. *See, e.g.*, United States v. Leung, 351 F.Supp.2d 992, 997 (C.D. Cal. 2005) ("Even if the conduct does not amount to a due process violation, a court may nonetheless dismiss charges 'under its supervisory powers.'").

will allow a court to act contrary to government wishes, in whole or in part, once the subject matter is within the court's jurisdiction.

When a petitioner avails himself of judicial review of a specific agency action, for example, after petitioning the Tax Court, that petitioner is forever barred from seeking relief via a separate lawsuit against those involved in defending the agency, and even though the proceedings are supposed to be fair, there may no remedy for government interference with the proceedings in collateral litigation.[473] Recall the government's apparent argument (initially accepted by the Tax Court) in *Dixon* that though a right to honest advocacy exists, there is no specific remedy (apart from, perhaps, a default judgment against the government—a drastic measure rejected by the Ninth Circuit).[474]

Faced with arguments that the Tax Court had not punished the government for letting its attorneys lie and enter into something resembling an undisclosed "Mary Carter" agreement,[475] the Ninth Circuit, in *Dixon*, relied on its inherent power to vacate a judgment that the government had procured by fraud and impose an equitable remedy. The Ninth Circuit had vindicated the right to petition the government and judicial power over controversies, finding that said money should be repaid, perhaps at the expense of the public fisc. The Ninth Circuit left the determination of the exact amount of the refund to the Tax Court, although at the time of this writing no refunds have been made to the aggrieved taxpayers.

Therefore only two questions remain. First, does every right—even those not found in statutes that courts are asked to apply—have a correlative remedy? Second, if the only possible remedy for such a right requires a court to look to equitable principles, *must* a body within the judicial power of the United States have equitable power to provide such a remedy, i.e., vacation of a judgment or final decision that was procured by fraud?

A. CLASSICAL VIEWS OF RIGHTS AND REMEDIES

Throughout history it has been common for lawyers to assert that every right had an accompanying remedy.[476] However, the maxim *ubi jus,*

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473. Attempts to sue IRS agents under *Bivens* have been thwarted as the courts have found that Congress created a separate remedial regime. Hudson Valley Black Press v. IRS, 307 F. Supp. 2d 543, 549-50 (2004). However, this case was not dismissed for lack of jurisdiction, but rather for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

474. Appellee's Brief, *Dixon*, *supra* note 27 at 68-70.

475. For a description of "Mary Carter" Agreements, *see infra* note 547 and accompanying text.

476. *See, e.g.*, United States v. Loughrey, 172 U.S. 206, 232 (1898) ("The maxim,

imi remedium does not necessarily translate into a substantive rule of decision or jurisdictional grant.[477] Indeed, maxims have never been considered substantive rights, but rather observed relationships between various "customs" in the law.[478]

The view that *ubi jus, imi remedium* is a maxim of equity was probably first articulated by Richard Francis.[479] However, others, such as William Blackstone,[480] and Roscoe Pound[481] argued that this is a general principle of law that could be subject to various constructions. Unless it was a "custom" to follow a pattern of behavior, a right is of little effect.[482] Instead, Blackstone saw maxims not as creating "positive law" but rather as a relationship between the law as declared by the "legislator" (which included the king, parliament, various customs, and even the Magna Carta) and the method by which a wrong would be redressed.[483] In today's terms,

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'Ubi jus, ibi remedium,' lies at the very foundation of all systems of law") (White, J. dissenting); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("'In all other cases,' he says, 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'" (quoting BLACKSTONE, *supra* note 8, at 23)); Ashby v. White, 87 Eng.Rep. 808, 816 (1702) ("If a statute gives a right, the common law will give a remedy to maintain that right.").

477. Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies Of Individuals*, 92 COLUM. L. REV. 1082, 1142 (1992).

478. BLACKSTONE, *supra* note 8, at 68.

479. Richard Francis, *Maxims of Equity* (1728). In sum, his maxims, expressed as chapter titles, were as follows: 1) He that will have equity done to him, must do it to the same person; 2) he that hath committed inequity, shall not have equity; 3) equality is equity; 4) it is equity that should make satisfaction, he who receives the benefit; 5) it is equity that should have satisfaction, he who sustained the loss; 6) equity suffers not a right without a remedy; 7) equity relieves against accidents; 8) equity prevents mischief; 9) equity prevents multiplicity of suits; 10) equity regards length of time; 11) equity will not suffer a double satisfaction to be taken; 12) equity suffers not advantage to be taken of a penalty or forfeiture, where compensations can be made; 13) equity regards not the circumstance, but the substance of the act; and 14) where the equity is equal, the law must prevail.

480. BLACKSTONE, *supra* note 8, at 109.

481. ROSCOE POUND, *On Certain Maxims of Equity*, CAMBRIDGE LEGAL ESSAYS 809 (1921).

482. 1 WILLIAM BLACKSTONE, COMMENTARIES §3.

483. OLP, *supra* note 8, at 55 (quoting BLACKSTONE, at 53-54). Blackstone's treatise reads:

> For this purpose every law may be said to consist of several parts: one, declaratory; whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down: another, directory: whereby the subject is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs: a third, remedial: whereby a method is pointed out to recover a man's private rights, or redress his private wrongs; to which may be added a fourth, usually termed the sanction, or vindicatory branch of the law; whereby it is sig-

according to Blackstone, maxims organize whatever substantive rights were provided by the legislature.

Herbert Broom described the maxim "where there is a right there is a remedy" as an observation that if a person has legal authority to demand something he may enforce that remedy via a "cause of action."[484] To Broom, a right was cognizable, but new in "instance" if there was a new set of facts, but a similar underlying principal injury, enabling common law courts to step outside precedent and provide a remedy once the matter is entrusted to them.[485] Hence, in this case, the maxim stands for the proposition that courts *do* grant remedies where there is a right to such a remedy.[486]

Complicating the issue is the tendency of all branches of government to speak of rights without providing a specific remedy for them. In executive orders, the President will usually simultaneously declare that agents of government should do one thing, but add that this order provides no substantive rights.

B. THE HART AND SACKS VIEW OF RIGHTS AND REMEDIES

While some see rights without remedies as either nullities, or mere aspirations about the way society should be,[487] Hart and Sacks' conception provides a working model of the relationship between rights and remedies. In short, while rights may not have free-standing remedies, a right without

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> nified what evil or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty.

Id.

484. HERBERT BROOM, A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED 153-54 (1854).

485. *Id.*

486. *See* Roscoe Pound, *Maxims of Equity*, 34 HARV. L. REV. 809, 832 (1920-1921).

487. *See, e.g.*, Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 724 (1987). Zeigler argues that limited enforcement of a right does not diminish its importance, and suggests that the government be made to show a reason why individual rights should not be enforced against it. However, in exploring the exact relationship between rights and remedies, Hohfield saw that each right came with a correlative duty to act or refrain from acting for the befit of another person. Hohfield, *Fundamental Legal Conceptions* 38 (1919). Therefore, a right without a remedy is nothing more than a "wish" or a "general statement of policy." Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 678 (1987). Likewise, a similar view holds that while such a view may be a good description of the behavior of courts, as if a court is fashioning a remedy it must be basing it on a right, there is no historical support for the notion that rights exist and therefore call into existence a series of remedies. *Id.* at 677.

a remedy may serve as a defense to another cause of action by another. Unfortunately, this dichotomy is turned on its head in Article I courts where it is the petitioner that fires the first shot, suing the government for an incorrect determination. Rather than asserting a defense to the opposing party's cause of action, a petitioner must claim that these rights entitle them to, what amounts to a counter-defense to what is presumably a valid argument by the government—*i.e.*, that they went through the required formalities involved in taking some money.[488] In Article I courts, rather than assert a right without a specific statutory remedy as a defense to a cause of action interposed by the government, a petitioner must assert it in response to the government's claim that it is entitled to receive (or keep) certain funds, and that it has gone through the necessary formalities to keep them.[489]

The question of "what is a remedy" exists outside of a constitutional context and finds its roots in jurisprudential theories predating the Constitution.[490] While many theorists conflated the concepts of legal rights and remedies by arguing that one does not have a right if the courts cannot apply a remedy, Professors Hart and Sacks bifurcated these concepts, arguing that it was possible for primary rights to exist without correlative remedies. Instead, these rights may manifest themselves as a defense. For example, while there is no independent right to be insane, insanity may be raised as a defense to criminal charge because our system of laws finds no utility in criminally punishing the insane.

Hart and Sacks' model of bifurcated rights and remedies is useful in analyzing the powers of a court of limited jurisdiction. It is possible to see that even though a petitioner's first choice of remedies may not be within the jurisdiction of the court to provide, the court may still be able to adjudicate the issue without fear of simply passing on intellectual questions when it has no power to render an enforceable judgment.

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488. *See, e.g.*, Weimerskirch v. Comm'r, 596 F.2d 358, 361 (9th Cir. 1979) ("[the] Commissioner . . . cannot rely on the presumption in the absence of a minimal evidentiary foundation.").

489. For example, at the Tax Court, the IRS must show that it issued a valid and timely statutory notice of deficiency as required by 26 U.S.C. 6212(a), and that it has some basis beyond being "rested on the presumption of correctness and the petitioner challenged the notice of deficiency on the grounds that it was arbitrary." Jackson v. CIR, 73 T.C. 394, 401 1979 WL 3735 (1980).

490. *See supra* notes 476 to 486 and accompanying text.

1. General Directives

Hart and Sacks conceived of a "law" as a series of "directive arrangements."[491] These arrangements are promulgations that are projected into the future and are "entitled to observance and acceptance by all members of the society."[492] Some arrangements speak only to a small group of people or to the government itself.[493] These arrangements are only authoritative because they were made in compliance with an underlying arrangement.[494] Accordingly, underlying directives give governmental bodies the power to create other directives. However, it is not necessary for them to be imposed by constitution, and a legislative body, by paying private claims, would provide such an arrangement for the rest of the government.[495]

General directives, according to Hart and Sacks, are initially formulated by some sort of governing body. Most such directives are "self-applying" and individuals will comply with them voluntarily, even if the arrangement is ultimately "regulatory" or would, at some point, invoke the court's coercive powers. Most norms of behavior that are codified into statutes fit this mold. Others, such as divorce and bankruptcy, are "individually administered" and require the approval of a court.[496]

So, in practice, for example, the Internal Revenue Code generally directs all members of society, in the future, to pay part of their income to the government, via a system of self-reporting and verification.[497] However, as a part of that directive, it allows some groups to reduce that income by other expenses.[498] The Federal Rules of Civil Procedure, court rules, or the portions of Titles 26 and 28 create and regulate the Tax Court and the Court of Federal Claims. Although these powers generally speak to

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491. HENRY M. HART, AND ALBERT M. SACKS. THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 113 (2001).

492. *Id.* at 114.

493. These specific directives, interestingly enough, according to Hart and Sacks, speak to private persons, in so far as they can consider disregarding an unconstitutional Act of Congress. *Id.* at 118. They also note that the Constitution speaks indirectly to the courts to determine whether Congress has done what it was supposed to do (or done something that it was not supposed to).

494. *Id.*

495. *See supra* note 36-37 and accompanying text.

496. HART and SACKS, *supra* note 491 at 120-21 ("You cannot, as a married man, say to yourself, 'such and such has happened, and that women is no longer my wife.'").

497. 26 U.S.C. § 6213(b)(4) ("Any amount paid as a tax or in respect of a tax may be assessed upon the receipt of such payment.").

498. *See, e.g.*, 26 U.S.C. §270(a)(2)(B) (allowing deductions by artists for "expenses paid or incurred by a . . . performing artist in connection with the performances by him of services in the performing arts as an employee").

a relatively small group of people who appear before courts, they exist only because another set of laws mandates that certain people may seek either relief from the government's dictates, or may enlist the government's help in resolving private disputes provided that they comply with certain procedures. In practice, the Internal Revenue Code is individually administered only when the government disputes the amount the taxpayer thinks he is owed or a taxpayer seeks a refund. Most other disputes that come before Article I courts are similar to refund actions, as it is not possible for an individual to unilaterally decide that the government must pay a veterans' benefit or fulfill its obligations under a contract without executive agreement or judicial decision-making.

In Hart and Sacks' world, courts (though some might not want to admit it for political reasons) perform a function similar to that of a legislature by articulating directives. In general, courts make decisions, rather than enacting laws that are less specific about what constitutes a duty. Courts have more flexibility in articulating their decisions,[499] though protocols of review usually require detailed explanations. However, unlike modern American legislatures, they also apply and enforce those directives.

Various actors apply enactments and rely on decisional law. Police officers may give tickets, or individuals may enlist a court's help in using the power of the state to achieve a result. The IRS may send a taxpayer a "Notice of Proposed Deficiency." After the tentative application, a final decision is made which usually includes a punishment or payment of taxes, a penalty, or a fine.[500] This final decision may include "elaboration" in which the body that makes the final determination attempts to discern any unstated or ambiguous meaning in the terms of the directive.[501]

2. *Primary Rights*

Hart and Sacks saw that individuals occupied various "characteristic positions" with regard to others in directive arrangements.[502] These

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499. HART and SACKS, *supra* note 491 at 126.

500. *Id.* at 119-20.

501. *Id.*

502. For the purposes of my argument, other views of the "rights-remedies" dichotomy are of only tangential interest. However, some take the "sanctionist" viewpoint and posit that there is no right if something does not have a remedy. Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 n.230 (1997). According to Professor Katz, if courts are only going to apply so much of the "remedial law" as would effectuate one purpose, but not another, such a choice must be "rationally justified." Al Katz, *The Jurisprudence Of Remedies: Constitutional Legality And The Law*

"characteristic positions" include the various legal duties, individual liberties, government largess, or reductions (and potential refunds of overpayments of) taxes.[503]

Hart and Sacks first articulated that primary law is that which is expected or hoped for when a private arrangement or other legal guarantee works.[504] It exists independent of litigation,[505] and may be articulated in terms of a general policy.[506] Directive arrangements that are addressed to individuals include primary private powers,[507] primary private duties,[508] and primary private liberties.[509]

Of Torts In Bell v. Hood, 117 U. PA. L. REV. 1, 35 (1968). Professor Katz's view may suggest that some primary rights only spring into existence when the taxpayer gives up some rights. By giving up a right to a jury trial, the taxpayer gains access to the Tax Court which serves several purposes – both for the government and, allegedly for the taxpayer (though most are procedural in nature): 1) provided for appointment of "specialist judges" who has much more expertise in deciding complex Tax Cases on a de novo basis; 2) allowed litigants not to prepay their tax liability; 3) provided for nationwide jurisdiction; and 4) provides all parties with quick review of cases, based not only on the court's efficiency, but a 90-day window with which to file suit. Hart and Sacks saw themselves as at odds with others, such as Professors Corbin and Hohfield who, they claimed, blurred the issue by essentially arguing that it is obvious that if there is no remedy, there is no right, but concede that in some circumstances the secondary right may be in addition to an obligation to perform a court-ordered performance of a primary duty.[0] Arthur L. Corbin, *Legal Analysis and Terminology, Night And Day: Coeur D'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction In Eleventh Amendment Doctrine*, 29 YALE L.J. 163 (1919); Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning, and Other Legal Essays*, 23 YALE L.J. 16 (1913), and 26 YALE L.J. 710 (1917). Professor Corbin defines a primary right as "a right resulting from some operative fact that was not itself a violation of some precedent right," and a secondary or remedial right as "a right resulting from some operative fact that was a violation of some precedent right," However, in a strange interaction between constitutional jurisprudence[0] and more rudimentary discussion of the nature of law it is necessary to distinguish between U.S. district courts that are bound by the Constitution's "case or controversy" requirement, and courts that are created under Article I. Therefore, it is possible (and, in fact, likely) that such a court may decide that there, in fact, is a right, but that it is powerless to grant the chosen remedy.

503. HART AND SACKS, *supra* note 491, at 130.

504. *Id.* at 122.

505. Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 249 (1991).

506. *See infra* note 534 and accompanying text.

507. HART AND SACKS, *supra* note 491, at 133-34 (describing a primary private power as "a capacity . . . to effect a deliberate act [that will be] enforced by the official representative of the group.").

508. *Id.* at 130-31 (describing a primary private duty as a "recognized obligation of a private person not to do something, or to do it, or to do it if at all only in a prescribed way.").

509. *Id.* at 132-33 (describing a primary private liberty as a the absence of a duty).

A primary private duty is a "recognized obligation" to do something or refrain from doing something.[510] A breach of such duty might give rise to a remedial private duty—but such instances are rare. Until recently modern criminal statutes did little more than mandate a punishment, and victims were at the mercy of a prosecutor to seek a restitution judgment. Offenders cannot opt, for example, to fix the damage they did, thereby absolving themselves of guilt.[511]

To Hart and Sacks, "a primary private power" is the right of an individual to enlist the help of the state in securing the following: contractual damages, orders of specific performance, actions for ejectment, or tort damages.[512]

Finally, a primary liberty is the absence of one of those duties.[513] Hart and Sacks point out that these liberties refer only to freedom from state interference (such as the ability to resist state indoctrination into a religion), but do not guarantee that an individual actually has the ability to realize their powers insofar as they conflict with another's liberties.[514] However, these rights, by themselves, do not necessarily solve the injured parties' problems.

3. Remedial Rights

On the other hand, a remedial provision "directs that a certain consequence, or sanction, may or shall follow upon an acknowledgement or formal official determination of noncompliance with the relevant primary provision."[515] Remedial provisions 1) must provide enough of a punishment for violation of primary rights that are not violated so commonly as to cause a breakdown in the system;[516] 2) "deal justly with the particular situation that the deviation presents"; and 3) guide parties in working out settlements that would normally be decided by courts.[517] Yet not every primary right is directly associated with a remedial right.

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510. *Id.* at 130.
511. *Id.* at 137.
512. HART AND SACKS, *supra* note 491, at 133.
513. Hohfield referred to this as a privilege. *See supra* note 487.
514. HART AND SACKS, *supra* note 491, at 133.
515. *Id.* at 122.
516. *Id.* at 123.
517. *Id.* at 123-24.

4. *Rights of Action*

The "capacity to invoke the judgment of a tribunal of authoritative application upon a disputed question about the application of preexisting arrangements and to secure, if the claim proves to be well-founded, an appropriate official remedy," is termed, by Hart and Sacks to be a "right of action."[518] This places the holder into a "positive" position rather than merely describing the holder's relation to others.[519] When courts *do* adjudicate all of the rights and duties (an authoritative application) they have adjudicated a remedial duty.[520]

The Supreme Court has, to some extent, conflated remedial rights and primary rights. However, its analysis is not in conflict with the analysis proposed by Hart and Sacks. Instead, it analyzed whether *specific* Congressional directives can allow an individual to invoke a court's power. In order to determine what Congressional policies may give birth to private rights of action, the Supreme Court announced a four-part test in *Cort v. Ash*[521] and *Touche Ross & Co. v. Redington.*[522] The test looked to: 1) whether there is any legislative intent to create or deny a private judicial remedy; 2) whether the plaintiff is in the class the statute sought to benefit; 3) whether a private judicial remedy would be consistent with the legislative scheme; and 4) whether the cause of action is one traditionally relegated to state law. The Comments to Restatement (Second) of Torts § 874A[523] applies a similar methodology in determining whether, in fact, a cause of action exists, looking not just to statutes, but also to administrative regulations.[524] Even after the courts restricted the ability of Congress to

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518. *Id.* at 137-38.

519. *Id.* at 138.

520. HART AND SACKS, *supra* note 491, at 138.

521. 422 U.S. 66 (1975).

522. 442 U.S. 560 (1979). Later opinions reduced this analysis to just two prongs. Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

523. The text of the provision is relatively simple:

> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

RESTATEMENT (SECOND) OF TORTS § 874A (1979).

524. RESTATEMENT (SECOND) OF TORTS §874A, cmt. a (1979) ("As used in this Section, the term "legislative provision" includes statutes, ordinances and legislative regulations of administrative agencies at various levels of government.").

imply a cause of action, commentators still argued that Congress might not ever be able to limit the powers of the courts to imply private rights of action and to fashion remedies thereupon.[525]

When faced with a breach of statutory duty, federal courts traditionally adopted the criteria in the Restatement (Second) of Torts §§ 285-288 to determine whether there was a remedy, and therefore a cause of action,[526] and then simply applied the common law doctrine of negligence per se in determining whether a plaintiff stated a claim.[527]

While the Tax Court has never addressed this issue, the Court of Federal Claims applied the Supreme Court's test in *Ash*, and found that private rights of action *were not* implied in a statute,[528] showing that, at a minimum, Article I courts are capable of this analysis even when the government is the defendant. Likewise, Zeigler also points out that a court *can* act to ensure the effectiveness of a statute.[529]

According to Professor Vazquez, one need not establish that there is a cause of action in order to assert a defense, merely that there is a primary right.[530] However, one may still have to convince a federal court that there is standing to assert such a defense. However, if a party has standing,[531] Vazquez concludes, there is a cause of action.[532] So, in the Tax Court, a violation of right to be free from governmental mischief can be used to offset a proposed deficiency.

Numerous private rights of action find their roots in the Constitution. Specifically, the First Amendment's Petition Clause may, as discussed *supra*, provide a private right of action even in the face of sovereign

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525. *See* Zeigler, *supra* note 487, at 724 (also citing Congressional intent for courts to create causes of action).

526. *Id.* at 708.

527. *See* Cort v. Ash, 422 U.S. 66 (1975).

528. Reidell v. United States, 43 Fed. Cl. 770, 772 (1999). *C.f.* Passaro v. United States, 4 Cl. Ct. 395, 399 (1984), *rev'd.* 774 F.2d 456 (Fed. Cir. 1985) (Tucker Act jurisdiction lacking because no "presently due" money damages were present).

529. Zeigler, *supra* note 487, at 717.

530. Vazquez, *supra* note 477, at 1143 n.251 (1992) ("[A] defendant being prosecuted or sued under a state or prior federal law that is inconsistent with a treaty is entitled to invoke the treaty in court to nullify the state or federal law without having to show that the treaty confers a private right of action."); Kolovrat v. Oregon, 366 U.S. 187, 197 (1961) ("Our National Government's assent to these international agreements . . . precludes any State from deciding that Yugoslavian laws meeting the standards of those agreements can be the basis for defeating rights conferred by the 1881 Treaty.").

531. *Id.* at 1142 n.245 (citing United States v. Salvucci, 448 U.S. 83, 86-89 (1980); United States v. Payner, 447 U.S. 727, 731-33 (1980); Alderman v. United States, 394 U.S. 165, 171-76 (1969)).

532. *Id.*

immunity arguments. Article III may provide for review of agency decisions to ensure that they comport with federal law, even if there is not a statutory mechanism for direct review, though Vazquez and other theorists posit that such review could even be in a state court.[533] Likewise, the Administrative Procedures Act tidied up the process somewhat, by allowing suits to be filed directly against various agencies, rather than against an individual party, such as a tax collector.[534]

As discussed above, when determining what remedies are available, Article I courts are limited to who they have jurisdiction over, but they still possess jurisdiction to issue judgments and decisions. This is not to say that these courts do not attempt to analyze areas of law that they do not have jurisdiction to enforce. They simply do so, not to alter the party's rights vis-à-vis his or her former spouse or business partner, but to determine rights vis-à-vis the government determined by property, contractual, or tort remedies imposed under state or federal law.[535] In most cases, these courts feel confident in adjudicating these questions, but they can and will stay proceedings while another court arrives at the correct result.[536]

Whatever the case, an apparent jurisdictional limitation by Congress does not prevent courts from deciding questions that are inseparable from the controversies before them, or from acting in accordance with the scope of their inherent power. Therefore, a Congressional limitation on the court's jurisdiction only applies to the rights that a party may assert have been violated in his complaint. However, since jurisdiction implies that a court has *some* power, the court may fashion a remedy based on the application of equitable doctrines that become relevant in the course of its proceedings.[537]

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533. *Id.* at 1151 ("[S]ome measure of review by an Article III court—or perhaps a state court—is thought to be required either by Article III or by the Due Process Clause itself.").

534. Robert F. Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law Cases*, 50 GEO. WASH. L. REV. 554 n.110 (1982). For a brief period, smaller suits could be maintained under the Tucker act against the U.S. directly, whereas suits greater than $1,000 had to be against the Tax Collector. Robert B. Nadler, *Math Error Notices: In Search of Taxpayer Rights*, 2003 TNT 131-6 (2003).

535. *See, e.g.*, Utilicorp United v. Comm'r., 104 T.C. 670, 675 (1995) (Court has inherent power to determine whether it may receive offered testimony even if such a conclusion would require inquiry determining whether offered witness was in violation of state law).

536. *See also* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 719-21 (1996) (a federal court may stay action pending resolution of the state-law issue).

537. In most, if not all cases, the government can indisputably argue that the remedy of "specific performance" is not available to its opponents in civil cases, since the

C. SOURCES OF SUBSTANTIVE RIGHTS TO FAIR TREATMENT

While it is easy to condemn misbehavior by government lawyers, courts have been reluctant to fashion remedies for their misconduct in the same manner that they would for other parties. Perhaps this hesitation is tied to the role of government attorneys. An executive understanding of what government attorneys should do, and a view that so-called "Mary Carter" agreements may violate certain canons of ethics and give rise to substantive rights, provide a source of law on the subject.

1. The "Better Than Private Litigants" View

One source of the substantive law governing government lawyers, besides the Petition Clause and *Zimmerman Brush*, may lie in executive procedures. President George H. W. Bush signed an executive order directing government lawyers not only to engage in fair-play, but also to utilize alternative dispute resolution. Unfortunately, the order was "intended only to improve the internal management of the executive branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations."[538] However, even so, the President's view of proper government attorney conduct is some normative indication of which customs will be followed in society, at least, by agents of the government. Therefore, even if the government argues that the constitutional position of a court requires that it only review (or revisit *de novo*) a factual determination of the government, any court must still resolve what effect (if any) such a custom has on its final determination. According to Lord Coke, neither the executive nor the legislature can

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government always has the option of providing "just compensation" to a party for taken property. U.S. CONST. amend. V.

538. Exec. Order No. 12,778, 57 Fed. Reg. 3640 (Oct. 23, 1991). President Clinton signed a similar order, which, although revoking President Bush's order, retained most of the language. Exec. Order No. 12,988, 61 Fed. Reg. 4727 (Feb. 7, 1996). Most, if not all, recent presidents have issued similar orders with similar caveats, and I do not mean to imply that this President did anything out of the normal practice. Standing alone this order has not provided a basis for a motion to dismiss. *See, e.g.*, United States v. Forrester, 2001 WL 1203288 (S.D. Ohio 2001) (after suit was brought against taxpayer, court concluded that this executive order did not require pre-service notice because "[i]t is only when a violation of the [Internal Revenue] Manual [incorporating the executive order] reaches the level of a constitutional violation will any action by the IRS be set aside."). Some speculate that the Taxpayer Advocate Service can act to restrain the IRS from using certain illegally or unethically obtained evidence; however, it is unlikely that this happened.

simply declare that the jurisdiction of the court has evaporated once government conduct outside the accepted norms has been discovered.[539]

In matters before Article I courts, the legislature is not constitutionally obligated to accept judicial fact-finding.[540] However, where Congress has chosen to place these matters in the hands of the judiciary, the right to fair treatment is a substantive right that may be implied in whatever rights are found within the courts' jurisdiction. Even the redeterminists see that government counsel is obligated not just to defend the interests of the government but to assist the court in coming to the correct legal and factual conclusions regardless of the outcome.[541] When Congress created the Article I courts, it did not see such litigation as a nuisance, but rather as a political necessity[542] and specifically declared that the government would be represented by counsel—it even created specific offices to handle these cases.[543] Therefore, since the government has gladly ventured into these forums, should not government attorneys be held to their own norms of behavior? Moreover, once a litigant proceeds in one of these forums, it is unlikely that he can collaterally litigate the behavior of counsel under *Bivens*.[544] Therefore, at least in the case of tax collection, once a litigant petitions an Article I court, there is little chance that collateral litigation or

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539. *See supra* note 150 and accompanying text.

540. Courts have split on whether prosecutorial misconduct (by state actors) in the form of coercing witnesses does not give rise to an action under 42 U.S.C. § 1983, because only the witness's rights (and not the defendant's) are violated. Michaels v. New Jersey, 50 F. Supp. 2d 353 (D.N.J. 1999), *aff'd*, 222 F.3d 118 (2000), *cert. denied*, 531 U.S. 1118 (2001); *cf.* Zahrey v. Coffey, 221 F.3d 342 (2d Cir. 2000) (action available under 42 U.S.C. § 1983 for denials of liberty for manufacture of evidence). Also, as the history detailed above indicates, legislative fact-finding was the norm until the Civil War. *See supra* notes 215-28 and accompanying text.

541. *See supra* note 29 and accompanying text.

542. *See supra* note 231 and accompanying text.

543. At first a special solicitor was appointed to represent the government before the Court of Claims, but later the Department of Justice was assigned the task. 28 U.S.C. § 518(a); Shimomura, *supra* note 62, at 652. At the Tax Court, the Commissioner of Internal Revenue has always been represented by attorneys from the Internal Revenue Service. 26 U.S.C. § 7452 (2004) ("The Secretary shall be represented by the Chief Counsel for the Internal Revenue Service or his delegate in the same manner before the Tax Court as he has heretofore been represented in proceedings before such Court."); William Rands, *Section 356(a)(2): A Study of Uncertainty in Corporate Taxation*, 38 U. MIAMI L. REV. 75 n.203 (1983).

544. In general, in denying a *Bivens* remedy courts seem to look to whether or not there is *some* remedy for denials of rights. Bush v. Lucas, 462 U.S. 367, 385 (1983) ("Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed.").

administrative procedures will be successful, so substantive rights to fair treatment from government adversaries *must* be recognized in these fora.

2. *Mary Carter and the Judiciary*

Besides the executive's stated desire to have its agents behave ethically, the judiciary has addressed, based on common law principles, the need for complete disclosure of the parties' litigative interests in order to avoid improper fact-finding. Punishment of offenses against the court are within the discretion of the trial judge. Once the judge decides that an offense has occurred, he can simply choose to embarrass the litigant with a published decision, or he can impose a fine or require that the guilty party compensate the victim for any losses incurred. During the discovery process, however, the time and effort of parties is at stake, and failure to conform to specific orders or discovery procedure creates a right that the court *must* vindicate.[545]

However, in various fora, defendants in multi-party litigation have chanced upon the idea of making a deal with the plaintiff.[546] In these agreements, the plaintiff and one defendant enter an agreement that obligates the settling defendant to remain in the trial but fixes his liability based on a set amount or formula based on the final judgment against the non-settling defendant.[547] Typically, the "cooperating" defendant does not

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545. For example, in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 376 (1990), the Court noted that Rule 11 sanctions are collateral. Therefore, they *may* be adjudicated after the underlying litigation has terminated. *See also* Hutchinson v. Hensley Flying Serv., No. 98-35361, 2000 U.S. App. LEXIS 402 at *7 (9th Cir. 2000) (noting that under the revised version of Rule 11, it no longer applies to discovery violations under Fed. R. Civ. P. 26-37) (Ferguson, J., dissenting); Topalian v. Ehrman, 3 F.3d 931, 936 n.5 (5th cir. 1993) ("Rule 11 involves mandatory sanctions once a violation is found, while 28 U.S.C. § 1927 leaves the decision whether or not to impose a sanction to the court's discretion; Rule 11 and § 1927 deal with claims and pleadings in general, while Rules 26(g) and 37 deal only with discovery abuses."); Bell v. Bell, No. 86-4321, 1986 U.S. App. LEXIS 36886 (5th Cir. 1996) (interpreting Fed. R. Civ. P. 37(c) as requiring that "[i]f a party has failed to make a requested admission as to a matter later proven to be true, then the rule permits the requesting party to apply to the court for an order requiring the first party to pay him the reasonable expenses incurred in making that proof."); Dorey v. Dorey, 609 F.2d 1128, 1135 (5th Cir. 1980) ("[I]f certain requirements are not met the court *shall* impose sanctions upon application or motion.").

546. *See, e.g.*, Booth v. Mary Carter Paint Co., 202 So.2d 8 (Fla. Dist. Ct. App. 1967).

547. John E. Benedict, Note, *It's a Mistake to Tolerate the Mary Carter Agreement*, 87 COLUM. L. REV. 368, 368 n.1 (1987). The note further describes these agreements as:

have nearly the assets that the other one does. After such a deal, their interests are aligned. Such is the case when a driver of an automobile finds himself a co-defendant with the automobile manufacturer after being sued by the victim of a crash. This is decidedly unethical.[548] To be sure, this situation resembles *Dixon*, except that in "test case" litigation before the Tax Court, the petitioners agree to be bound by the results of one or a few tried test cases, and while similar situations and similar facts are at issue, the parties are not actually "co-parties."

For our purposes, however, the question is whether a defendant who lacks knowledge of the agreement had his rights violated. After all, even though such an agreement is distasteful on its face, the defendant is still able to present his case in its entirety, and, of course, could argue, on appeal, that there was a structural defect in the proceedings. He is only deprived of a potential teammate in the fight against a common enemy, and arguably a procedural right, which, in most cases can be remedied by a new trial.

> First, the settling defendant guarantees the plaintiff a minimum payment, regardless of the court's judgment. Second, the plaintiff agrees not to enforce the court's judgment against the settling defendant. Third, the settling defendant remains a party in the trial, but his exposure is reduced in proportion to any increase in the liability of his codefendants over an agreed amount. Some Mary Carter agreements include a fourth element: that the agreement be kept secret between the settling parties.

Id. at 369-70.

548. Gray Panthers v. Schweiker, 716 F.2d 23, 30 (D.C. Cir. 1983) ("There is, indeed, much to suggest that government counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large."); Cobell v. Babbitt, 1999 U.S. Dist. LEXIS 20918, at *197 (D.D.C. 1999) (collecting cases); Zimmerman v. Schweiker, 575 F. Supp. 1436, 1440 (E.D.N.Y. 1983) ("Any ethical and procedural obligation of a private attorney to be fair to opponents and candid with the court is enforceable when the litigant is represented by an attorney for the government."); City of Los Angeles v. Decker, 558 P.2d 545, 551 (Cal. 1977) (government attorney in eminent domain has affirmative duty to develop full and fair record); MODEL CODE OF PROF'L RESPONSIBILITY, EC 7-14 (1981) ("A government lawyer in a civil action . . . has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results."); Lory A. Barsdate, *The Republican Civic Tradition: Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725, 1738 (1988) ("The government has an obligation to advance the public interest in litigation, a feature distinguishing government attorneys from attorneys for private parties."); *see also* Freeport-McMoRan Oil & Gas Co. v. Fed. Energy Regulatory Comm'n, 962 F.2d 45, 48 (D.C. Cir. 1992) ("We find it astonishing that an attorney for a federal administrative agency could so unblushingly deny that a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission.").

Nevertheless, some courts have held that Mary Carter agreements do substantive damage.[549] For example, plaintiffs may release any claims they might have had against the defendant.[550] Therefore, it is within the power of a court to provide a remedy for such substantive damage.[551]

3. *Substantive Impact of Rules of Professional Responsibility*

Finally, some courts have begun to consider that attorney ethics, customs, and standards of gentlemanly litigation create substantive rights. As it stands now, some discharged attorneys have successfully sued their former employers claiming that they were fired in violation of state public policy – i.e. the applicable attorney disciplinary rules – for doing exactly what they were supposed to do.[552] However, as of yet, it has not been argued that the public policy for ethical attorneys in federal courts is so strong that the court must recognize a substantive right on behalf of adverse litigants to have their opponents follow each rule. Nevertheless, in view of some initial willingness to consider disciplinary rules as creating substantive rights, enforceable by individuals, this may soon be the case.

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549. In *Schick v. Rodenburg*, 397 N.W.2d 464, 466 (S.D. 1986) the court noted that for choice of law purposes the validity of a Mary Carter type release is governed by the substantive law of where the tort occurred, regardless of where the release was signed. In this case, after undertaking the choice of law analysis, the court concluded that under the law of the state where the tort occurred, the release was invalid, not merely inadmissible or otherwise procedurally excluded from the trial. Put in other terms, an undisclosed realignment of the interests of the parties, even before a judge alters their ability to protect their interest. *See also* American Dredging Co. v. Federal Ins. Co., 309 F. Supp. 425, 429; William John Dedrick, *Mary Carter Agreements in Maritime Personal Injury Suits*, 22 S. TEX. L. J. 545, 551 (1982) (describing settling party's adversity as "ostensibly adverse").

550. *See, e.g.*, Margetts et al. v. Timmer et al., [1996] A.R. 42, 53 ¶26. (Alberta Court of Queen's Bench Judicial District of Edmonton 1996).

551. Typically, a remedy for Mary Carter agreement consists of admission of the agreement to show bias. *See, e.g.*, Hatfield v. Continental Imports, 610 A.2d 446 (Pa. 1992); General Motors Corp. v. Simmons, 558 S.W.2d 855, 857 (Tex. 1977). In other cases, courts have reduced the number of preemptory juror challenges available to the colluding codefendants. Greiner v. Zinker, 573 S.W.2d 884, 885 (Tex. Civ. App. 1978). One court has even directed that the colluding parties be struck from the lawsuit. Cox v. Kelsey-Hayes, 594 P.2d 354, 360 (Okla. 1978).

552. *See, e.g.*, Wieder v. Skala, 609 N.E.2d 105 (N.Y. 1992); Matzkin v. Delaney, Zemetis, Donahue, Durham & Noonan, P.C., No. 0440002885, 2005 WL 2009277 (Conn. Super. Ct. 2005).

D. THE NINTH CIRCUIT'S DECISION IN *DIXON*

With these specified roles of counsel, that take on a substantive character and executive declaration of good faith,[553] when litigating in an Article I court, counsel for the government is charged with an implied duty of good faith litigation. Therefore a petitioner or plaintiff has a right to an opponent that acts in good faith. Unfortunately, neither Congress nor the executive specifically provided for any remedy when good faith fails.[554] Nevertheless, simply because there is not an independent right to a remedy does not mean that a court cannot recognize it, especially when the court is specifically imbued with jurisdiction and Congress has specifically placed its lawyers before these courts.

In most cases, courts have fashioned remedies based on their power to conduct a trial, such as denying the government the benefit of their illegal conduct by suppressing the illegally obtained evidence.[555] In the civil context, Article III courts tried a number of remedies. While their inherent power provides the court with the ability to sanction the counsel either monetarily or by way of altering procedures, it does not necessarily provide a basis for altering the scope of substantive relief.[556]

In *Dixon*, where a post-facto analysis was necessary, the Tax Court attempted to ascertain the exact scope of the harm to its proceedings, and initially concluded that there was none.[557] However, the Ninth Circuit held that the taxpayers were entitled to a greater remedy and the Tax Court must exercise its "inherent power" to discipline the government for its con-

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553. *See supra* note 547 and accompanying text.

554. Exec. Order No. 12,778, 57 Fed. Reg. 3640 (Oct. 23, 1991) ("This order is intended only to improve the internal management of the executive branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations.").

555. United States v. Egan, 501 F. Supp. 1252, 1263 (S.D.N.Y. 1980) (dismissal of indictment was not warranted unless delay rises to level of outrageous conduct that shocks the conscience); *see also* Berger v. United States, 295 U.S. 78, 88-89 (1935) (reversal where prosecutor had implied "personal knowledge" of additional evidence because the jury was likely to have faith in the unsupported representations of the representative of the sovereign).

556. "[P]ublic interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice." N.Y. Central R. Co. v. Johnson, 279 U.S. 310, 318 (1929). The Sixth Circuit noted that "[w]here such paramount considerations are involved, procedural niceties will not preclude a court from correcting error." Pierce v. United States, 86 F.2d 949 (6th Cir. 1936).

557. Dixon v. Comm'r, T.C. Memo. 1999-101 (1999).

duct.[558] In essence, the Tax Court found that suitors against the government in Article I courts not only have a right to an ethical adversary, but the courts are *required* to determine whether a right has been breached, and find a remedy. In this case, the Ninth Circuit ordered that the Tax Court reveal the covert agreement to the non-cooperating taxpayers.[559] In short, they ordered that the Tax Court apply the equitable remedy of Quasi-Contract, by finding that the non-cooperating taxpayers should have benefited from the deal that the IRS was willing to make with those who cooperated.[560]

E. THE FALSE PROHIBITION AGAINST EQUITABLE PRINCIPLES

It is argued that Article I courts lack the power to act in equity.[561] This argument, often advanced by courts, misses the mark. There is a difference between the argument that the Tax Code (or other body of law relating to government interactions) is substantively unfair, and the position that equitable principles are needed to accurately *apply* the code. Congress has already considered the substantive fairness of the Tax Code, and (with the exception of Constitutional issues) courts will not revisit its substance. Moreover, Congress has already provided for several substantive safety valves to prevent overly oppressive applications of the Tax Code.[562] On the other hand, when the court determines that the government misbehaved in court, it would be inequitable to give the government what it seeks—an affirmation of its preliminary determination, for example. The petitioner, in such a case, is not asking the court to apply equitable principles to a statute itself, but rather to the government's conduct.

Joseph Story appears to have resolved the apparent inability of some courts to provide equitable remedies by noting that equity jurisprudence is divided into roughly three parts: 1) the parts of equity in which the

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558. *Dixon*, 316 F.3d. at 1047 ("[W]e remand to the trial court with directions to enter judgment in favor of Appellants and all other taxpayers properly before this Court on terms equivalent to those provided in the settlement agreement with Thompson and the IRS.").

559. *Id.* at 1047 n.11 ("We leave to the Tax Court's discretion the fashioning of such judgments which, to the extent possible and practicable, should put these taxpayers in the same position as provided for in the [illegitimate] settlement.").

560. *Id.*

561. *See* Estate of Mueller v. Comm'r, 153 F.3d 302, 304 (6th Cir. 1998); Lederman, *supra* note 14.

562. *See, e.g.*, 26 U.S.C. § 6521 ("Mitigation of effect of limitation in case of related taxes under different chapters"); 26 U.S.C. § 6015 ("innocent spouse" provisions); 26 U.S.C. § 7122 (offers in compromise).

Chancery had concurrent jurisdiction with the courts of law; 2) equitable remedies for what were, in effect, legal wrongs; and 3) the Chancery's "auxiliary" jurisdiction in which it could order various types of specific performance to support the role of the law courts.[563] As stated earlier, the federal "judicial power" includes law and equity, and the American conception of equity has not diverged from English principles of equity.[564] Therefore, those principles are applicable to American courts.[565] Congress has acknowledged this by explicitly providing at least some Article I courts with jurisdiction to hear some equitable claims,[566] and explicitly declaring that they had the power to issue writs that were only available in equity, such as subpoenas.[567] Any resort to a court's equitable power to provide remedies will only take place when a legal remedy is inadequate. It is possible that a legal wrong can be righted with either a legal remedy or an equitable one, though the preference is for a legal remedy.[568]

If the court resorts to equitable principles necessary to preserve a right, it will be acting in areas where the law courts and Chancery had jurisdiction. Article I courts exercise the judicial power of the United States, which includes self-executing writs and subpoenas authorized by statute,[569] if not by their inherent power.[570] The courts appear to be exercising part, if not all, of the Chancery's "ancillary jurisdiction," which aided the law courts by ordering people to do specific things, such as testify, produce documents, or not leave the country.[571] Therefore, their jurisdiction specifically includes Story's third category.[572]

Indeed, a reduction of tax liability, for any reason, would likely not be outside of the Tax Court's jurisdiction, though, of course, it might be an erroneous interpretation of the relevant statutes. Therefore, Congress has,

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563. JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 62 (1972).

564. Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 382 & n.26 (1949) ("Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected.").

565. OLP, *supra* note 8, at 53.

566. *See, e.g., supra* text accompanying notes 302-03 (Public Law 92-415) and 572 (innocent spouse).

567. *See, e.g., supra* note 2601 and accompanying text.

568. *See, e.g.*, Parker v. Winnipiseogee Lake Cotton & Woolen Co., 67 U.S. (2 Black) 545, 551 (1862).

569. 28 U.S.C. § 1651 (All Writs Act applying to "all courts established by [an] Act of Congress"); 26 U.S.C. § 7456(a) (subpoenas in Tax Court). For the history of subpoenas in the Court of Federal Claims, see *supra* note 41. For subpoenas in the Court of Veterans Appeals, see *supra* note 458 and accompanying text.

570. *See supra* Section II(B).

571. Fetter, *supra* note 39, at §§ 197-99 (1895).

572. *Id.*

in fact, explicitly provided them with at least some equitable powers. These equitable powers, in the absence of a specific statute allowing citizens to setoff claims by the government were recognized in the early Court of Claims. While the Supreme Court, in reversing the early Court of Claims, held that while there was no common law right to setoff, "[e]quitable claims for credit . . . may be admitted upon the trial [and] . . . are to be adjudicated as claims for credit, and not as demands for judgment against the United States."[573]

This division between remedies unique to equity and decrees which would be similar to those issued in the law courts (but over areas in which the law courts did not have common-law jurisdiction) shows why a nuanced view of the "rights and remedies" dichotomy is necessary. A petitioner may seek a remedy that is outside the jurisdiction of the court for a right within the court's jurisdiction. In those circumstances, the court need only construe the prayer as asserting a defense in the form of a primary right, without a specific free-standing power to invoke the jurisdiction of the court (that has not been channeled to other forms), and rely on equitable principles to fix the value of its violation in terms of a defense. Therefore, while an Article I court (as in *Dixon*) can only redetermine tax liability, it can calculate it using equitable doctrines such as quasi-contract.[574]

VII. CONCLUSION

Once Congress places the power to adjudicate matters into the hands of an independent judiciary, any executive action that interferes with the power of the judiciary to determine substantive rights risks exposing the public fisc to additional burdens, as the executive now stands in the place of a normal litigant regardless of whether its representatives appear before an Article III or an Article I court.

While the government may be entitled to certain advantages, such as not bearing the risk of liability under a promissory estoppel theory,[575] when a cause of action is properly within the jurisdiction of a court, the government may not claim an absolute immunity from sanctions or remedies for its lawyer's mischief. Instead, Article I courts, when necessary, may use their jurisdiction as a sword to protect victimized claimants by resolving

573. United States v. Eckford, 73 U.S. (6 Wall) 484, 490 (1867).
574. *See supra* note 415 and accompanying text.
575. *See supra* note 102.

that less money is owed to the government, or the government owes the petitioner more money under the theory stated in the complaint.[576]

Therefore, since the government, in its Statutory Notice of Deficiency,[577] has asserted that the taxpayer owes additional monies, the Tax Court is empowered and *required* to provide a remedy for the government's litigative mischief in the form of reduction of the amount the IRS may assess as the Ninth Circuit did in *Dixon*. Absent specific congressional diversion of such claims to another forum, *Zimmerman Bush* operates to allow Article I courts to refund taxes paid in the rare case that the government's behavior is so dastardly that the only remedy is cash.

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576. At present, an Article I court *may* be acting *ultra vires* if it awards the petitioner additional money than is arguably evident on the face of the complaint. However, for the time being, it seems that at least the Federal Circuit has concluded that Article I courts may award sanctions that go beyond the amount stated in the complaint. *See supra* note 15. However, even in *Mortenson*, which was ultimately affirmed, the Article I court described its remedy as a partial summary judgment and not a free-standing award of damages. M.A. Mortenson Co. v. U.S., 15 Cl.Ct. 362, 364 (1988).

577. Clapp v. Comm'r, 875 F.2d 1396, 1403 (9th Cir. 1989) (A statutory notice "is in many ways analogous to filing a civil complaint.").