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Capacity To Commit in the Absence of Legislation:

Takings, Winstar, FTCA, & the Court of Claims

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INTRODUCTION

This paper examines four mechanisms through which the executive branch can obligate the government to spend through its actions: committing torts, taking private property, breaching contracts and creating *Winstar* liability. The paper assesses the allocation of power behind each mechanism by examining the role of institutional actors in creating and funding the liability. In addition, the paper analyzes the extent to which each mechanism is understood through the incentives it creates.

The power of individuals to sue the government and to obtain payment to compensate for the underlying tort, taking of private property, or breach of contract raises significant separation of powers questions. Sovereign immunity, grounded in the English notion that the 'king can do no wrong', prevents the United States from be sued without its consent. Often justified by separation of powers arguments[1], sovereign immunity has been described as a 'structural protection for democratic rule'[2] because it ensures that, unless Congress has specifically authorized it, the judiciary cannot render judgments that might impede congressional policy[3].

Because of this function of sovereign immunity, courts hold that the executive branch cannot waive immunity and require a clear waiver before immunity is considered waived[4].

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[1] *See, e.g.* Krent, Harold, *Reconceptualizing Sovereign Immunity,* 45 Vand. L. Rev. 1529 (1992).
[2] *Id. at* 1531.
[3] This rationale for sovereign immunity has been sharply contested. *See, e.g.,* John Paul Stevens, *Is Justice Irrelevant,* 87 Nw. U.L. Rev. 1121 (1993).
[4] *See* Chemerinsky, Erwin. *Federal Jurisdiction at* 610 - 11 (4th ed. 2003). For an example of the Court's refusal to apply estoppel and grant a claim for damages where an individual lost pension benefits as a result of agency misinformation, see *Office of Personnel Management v. Richmond,* 496 U.S. 414 (1990). The Court reasoned that awarding damages would have resulted in a payment in excess of express statutory provisions, and would violate the Appropriations clause. Thus, a distinction can be drawn between statutory claims under the FTCA or claims under the Takings clause, and claims of entitlement to payments greater than express statutory provisions allow.

COURT OF CLAIMS

In 1885 Congress established the Court of Claims to resolve claims arising from the Civil War[5]. In 1887, the Tucker Act was adopted[6], giving the Court of Claims full jurisdiction over all legal, equitable, and admiralty claims against the U.S., and providing concurrent jurisdiction in Circuit Courts[7]. More recently, Congress has passed a number of statutes expressly waiving immunity, the Federal Tort Claims Act (FTCA)[8] (which provides for concurrent jurisdiction in federal district courts and the Court of Claims), and the Contract Disputes Act[9]. These statutes expanded the jurisdiction of the court[10] and the ability of individuals to bring suit far beyond the constitutional minimum, which would allow suits for due process violations and takings.

SOVEREIGN IMMUNITY WAIVERS AND APPROPRIATIONS

A waiver of sovereign immunity allows a court to enter a judgment against the United States. However, because the Appropriations Clause prohibits the withdrawal of money except under appropriation[11], the claim cannot be paid without approval from Congress[12]. A 1904 statute requiring that judgments be transmitted to Congress led to an understanding that agency operating appropriations were not available to pay

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[5] *See* Shimomura, Floyd D. *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment,* 45 La. L. Rev. 625, 663 (1985)
[6] 28 U.S.C. 1346(a).
[7] *Id.*
[8] 28 U.S.C. 1346(b), 2671-2680.
[9] 41 U.S.C. 601 et seq.
[10] In 1982, The Federal Courts Improvement Act was passed (Pub. L. No. 97-164, 96 Stat. 25), and divided the court's jurisdiction, with appellate jurisdiction to the U.S. Court of Appeals for the Federal Circuit and trial jurisdiction to a new legislative Claims Court. *See* Chemerinsky, Erwin. *Federal Jurisdiction at* 29. (4th ed. 2003).
[11] U.S. CONST.art. I, § 9 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.").
[12] GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW v. III at 14-15 (2d ed 1994)

judgments[13]. As a result, Congress had to pass specific appropriations authorizing payment before judgments could be settled. Although Congress could refuse to appropriate to resolve a judgment, such refusals were rare. In *Gliddon Co. v. Zdanok*[14], the Supreme Court noted a 1933 study finding only 15 instances where Congress refused to pay a judgment in a 70-year period.

The need for specific Congressional appropriations to pay most claims was eliminated in 1956 when Congress passed the Automatic Payment of Judgments Act (also known as the Supplemental Appropriation Act)[15]. The Act established the Claims and Judgment Fund, a permanent, indefinite appropriation that is treated as mandatory spending[16]. There are no fiscal year limitations, no limit on the amount, and no need for Congress to appropriate annually. The fund ". . . operates completely independent of the congressional authorization and appropriation process . . . . [and] is, in effect, standing authority to disburse money from the general fund of the Treasury".[17] The fund authorizes payment for final judgments and settlements associated with the following:

- ♦ Military Claims Act (10 U.S.C. § 2733)
- ♦ Foreign Claims Act (10 U.S.C. § 2734)
- ♦ Federal Tort Claims Act (28 U.S.C. § 2672)
- ♦ Small Claims Act (31 U.S.C. § 3723)
- ♦ National Guard Claims Act (32 U.S.C. § 715)
- ♦ Brooks Act (40 U.S.C. § 759(h)(5)(C)
- ♦ Contract Disputes Act/Board of Contract Appeals Awards (41 U.S.C. § 612)
- ♦ Selected NASA claims (42 U.S.C. § 2473(c)(13)

[13] *Id at* 10-6.
[14] 370 U.S. 530, 570 (1962).
[15] 31 U.S.C. 1304, 70 Stat. 678, 694.
[16] *See* GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW v. III at 14-12 (2d ed 1994).
[17] *Id.*

As originally enacted, the fund applied only to judgments (settlements were excluded) and was limited to judgments under $100,000[18]. In 1961, the scope of the fund was expanded to include settlements[19]. The $100,000 limit was removed in 1977, eliminating the need for congressional appropriation for awards in excess of $100,000[20].

The judgment fund is only available for judgments, awards, and settlements that are 'not otherwise provided for' and are 'final'. No payment can be made until after Comptroller General certification of the claim to ensure it meets the requirements of 31 U.S.C. § 1304[21]. The judgment fund is merely an authorization for payment, not a waiver of immunity[22]. According to the President's 2006 Budget, the judgment fund recorded 2004 obligations of $878 million, including $125 million for contract disputes. Absent specific statutory requirements, agencies are not required to reimburse the judgment fund for claims paid.

FEDERAL TORT CLAIMS ACT - BACKGROUND

Until 1946, the United States could not be sued in tort, and the only recourse for a victim of tortious government action was to seek a private relief bill from Congress. That changed in 1946, when Congress passed the Federal Tort Claims Act[23]. The Act establishes that the government will be liable in tort just as a private party under certain circumstances. However, while the Act authorizes suit, it has significant exceptions. For example, discretionary functions and misrepresentations on the part of government

[18] *Id at* 14-7.
[19] Public Law 87-187, 75 Stat. 416.
[20] *Id.*
[21] *Id.*
[22] The Supreme Court, in *Office of Personnel Management v. Richmond,* 496 U.S. 414, 432 (1990) noted that 31 U.S.C. §1304 "does not create an all purpose-fund for judicial disbursement… Rather, funds may be paid only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute.", quoted in GAO, Appropriations Law Volume IIII, page 14-12.
[23] Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. 1346(b), 2671-2680.

employees are excluded from the waiver[24]. The discretionary function exception is discussed in more detail below.

A number of reforms have been passed since the original Act. Under the original Act, agencies only had authority to settle claims under $2,500, and compromise settlements in any amount had to be paid from agency funds[25]. A 1966 reform eliminated the ceiling on agency settlement authority (although agencies still must get the Attorney General's approval for settlements over $25,000), and allowed settlements over $2,500 to be paid from the judgment fund[26]. In 1977, Congress determined that the $100,000 limitation on payments from the judgment fund was too low, given the need for routine appropriations for judgments, and removed the $100,000 limitation for all types of claims reimbursable from the judgment fund, including torts[27].

FEDERAL TORT CLAIMS ACT - CRITIQUES

Academic critique of the FTCA has largely focused on the scope of the Act and the consistency of the Act with broader separation of powers concerns. Unlike other areas of executive obligation discussed in this paper, very few reform proposals or discussions have centered around the incentives created by the use of the judgment fund to pay for tort claims.

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[24] 28 U.S.C. §2680. For an application of the rationale of the misrepresentation to a claim for benefits, see *Office of Personnel Management v. Richmond,* 496 U.S. 414, 429 – 30 (1990) (reasoning that the misrepresentation exception indicates Congressional unwillingness to allow plaintiffs to make claims based solely on incorrect information from a government official).

[25] *See* Bermann, George A., *Federal Tort Claims at the Agency Level: The FTCA Administrative Process,* 35 Case W. Res. 509, 529 (1985)

[26] *See* Government Accountability Office, *Principles of Appropriations Law,* v. III, at 14-10 (2d ed 1994).

[27] Pub. L. No. 95-26, 91 Stat. 61, 96 (1977) removed the $100k limitation; *see also* Government Accountability Office, *Principles of Appropriations Law,* v. III, at 14-10 (2d ed 1994).

Discussion of the scope of the Act focuses primarily on the discretionary function exception, which shields the government from liability for "the exercise or performance or the failure to exercise or perform a discretionary function or duty"[28]. This exception has provoked considerable scholarly debate. Several commentators have argued that the exception, undefined in the Act and broadly construed by the courts[29], undermines the animating notion behind the FTCA – that the government should be liable for tortious conduct just as a private actor would[30]. The rationale behind this gaping exception is generally understood through separation of powers. Critics of the discretionary function exception argue that it undermines deterrence and have suggested various approaches to cabining the exception[31]. Supporters of the exception argue that it is necessary to prevent judicial interference with policymaking functions[32], and contend that judicial review of discretionary actions under state law (as provided for in the FTCA) could threaten agency policymaking[33]. Although the discretionary function exception is most commonly justified through separation of powers, one commentator has suggested that the primary purpose of the exception may be fiscal, as it protects the government from 'massive' liability[34].

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[28] 28 U.S.C § 2680 (a).

[29] *See, e.g.,* Zillman, Donald N. *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act,* 47 Me. L. Rev 366, 388 (1995) (concluding that 'a fiscally cautious Congress has reason to be pleased with the evolution of discretionary function law').

[30] *See, e.g.,* Levine, James R. *The Federal Tort Claims Act: A Proposal for Institutional Reform,* 100 Colum. L. Rev. 1538, 1547 n. 47 (2000) (citing numerous attacks on the exception as undermining the act).

[31] *See* Levine, *Proposal for Institutional Reform,* 100 Colum. L. Rev. at 1548 – 50 (discussing reform proposals).

[32] *See, e.g.,* Krent, Harold J. *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort,* 38 UCLA L. Rev. 871 (1991).

[33] *Id* at 886 – 89.

[34] *Id.* at 1538. Levine argues that fiscal concerns can be protected through more appropriate means. He argues that the problem with the exception is not its fiscal purpose, but rather the 'arbitrary and inequitable way' in which the Treasury is protected. *Id* at 1553.

Scholars also disagree over where the locus of power behind resolution of federal tort claims lies. Professor Bermann argues that agencies have a stronger role than usually recognized. He recognizes that the FTCA adopted a judicial model for claim resolution (diverging from earlier tort claim bills which contemplated an administrative model of liability), but argues that agency roles were enhanced by the 1966 reforms[35]. Bermann contends that these reforms, which gave agencies settlement authority regardless of amount (subject to approval of the Attorney General for claims over $25,000)[36], were designed to facilitate administrative settlements[37]. If the original Act was designed to shift the burden for resolving tort claims from Congress to the Courts, Bermann argues, the 1966 reform sought to transfer the burden to agencies[38].

In contrast, others have argued that the judicial model of tort claims resolution continues to dominate. For example, one commentator argues that the Federal Tort Claims Act, the Automatic Payments of Judgments Act of 1956, and the 1977 removal of the $100,000 limitation on the Automatic Payment of Judgments Act signal relinquishment of Congressional control in favor of judicial resolution of claims[39]. While in some tension, these understandings are not mutually exclusive. The distribution of power created by the combination of the Federal Tort Claims Act and the Automatic Payment of Judgments Act is perhaps best understood as a careful allocation among all institutional actors. The executive branch is not only the allegedly tortious actor, but is

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[35] *See* Bermann, George A., *Federal Tort Claims at the Agency Level: The FTCA Administrative Process,* 35 Case W. Res. 509, 531 (1985).

[36] Pub. L. No. 89-506 § § 1(a), 9(a), 80 Stat. 306 (1966) (amending *28 U.S.C. § 2672).*

[37] Bermann, *Federal Tort Claims at the Agency Level,* 35 Case W. Res. at 532 (arguing that provisions such as the authorization to pay settlements from the judgment fund, elimination of court approval of settlements, and retention of the provision requiring agency action before suit served to encourage agency administrative settlements).

[38] *Id*.

[39] *See* Shimomura, Floyd D. *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment,* 45 La. L. Rev. 625, 682 (1985).

empowered to settle claims. The judicial power is reflected in claims that are adjudicated. While congressional power is significantly curtailed from the age of specific appropriations, Congress retains not only ultimate authority over the waiver of immunity, but also over the appropriation. The existence of a permanent and indefinite appropriation to pay these claims is not a complete abdication of power, for Congress could alter the arrangement for payment of claims at any time.

While the incentives created by the Act are not a major focus of analysis, some scholars have questioned whether the economic model that uses tort liability to attain optimal deterrence applies equally to government actors[40]. Because this concept of deterrence relies on the notion that actors are profit-maximizers, critics argue that government cannot be expected to respond in the same manner as the private sector[41]. In analyzing the discretionary function exception, Professor Harold Krent argues that deterrence is undermined because the public sector passes tort costs to taxpayers (suggesting that these costs are not internalized in the same manner as private sector costs). He argues that political repercussions of damage awards and the distraction from agency operations that occurs through litigation are more effective deterrence mechanisms of government behavior than actual payments[42]. Professor William Kratzke concurs that because all taxpayers share in the loss associated with tort payments, and

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[40] *See, e.g.,* Levine, James R. *The Federal Tort Claims Act: A Proposal for Institutional Reform,* 100 Colum. L. Rev. 1538, 1569 - 70 (2000) (arguing that "Where tort judgments are taken from public coffers, there is a possibility of non-deterrence or only slight deterrence…").

[41] *See* Daryl J. Levinson, *Making Government Pay:* Markets, Politics and the Allocation of Constitutional Costs, 67 U. Chi. L. Rev. 345 (2000). Professor Levinson argues that government does not internalize costs like a private firm because it responds to political rather than financial incentives. He contends that while financial costs can create political costs, the relationship between financial and political costs is complicated and does not permit the assumption that payment of judgments results in automatic internalization of social costs by government.

[42] *See* Krent, Harold, *Preserving Discretion Without Sacrificing Deterrence: Federal Government Liability in Tort,* 38 UCLA L. Rev. 871, 887 (1991).

because FTCA judgments do not impact agency budgets, the deterrent effects of the Act on a substantial portion of conduct are neutralized[43]. However, while economic deterrents are limited, he does recognize that political pressure can deter tortious conduct[44]. Interestingly, in contrast with the takings context discussed below, Kratzke's discussion of the deterrent effects of claim payments through the judgment fund is characteristic of discussions of the FTCA, which discuss the source of funding for tort judgments only in passing and not as a possible area for major reform. These incentives tend to be framed in the context of the discretionary function exception and have not led to major reform initiatives targeted at the funding mechanism for tort claim reimbursement.

Unlike the takings claims context, where property rights activists clamor for a requirement that agencies reimburse the judgment fund as a mechanism to create disincentives for agency takings (see discussion below), there have been few examples of pressure for an agency reimbursement requirement in the tort context. One example of pressure that has resulted in a reimbursement requirement for torts is the No FEAR Act[45]. The Act passed in response to a $600,000 award to a federal employee for race and sex discrimination and requires that agencies reimburse the judgment fund for judgments, awards and settlements in connection with lawsuits brought under the federal anti-discrimination and whistleblower laws.[46] The Department of Justice has predicted that the Act may create disincentives for agencies to settle claims, due to concern about

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[43] *See* Kratzke, William P. *The Supreme Court's Recent Overhaul of the Discretionary Function Exception to the Federal Tort Claims Act*, 7 Admin. L.J. Am. U. 1, 6 - 7 (1993)

[44] *Id*.

[45] Pub. L. No. 107-177, 116 Stat. 566 (2002), 5 USCA 2301.

[46] According to a recent GAO report, the Treasury reports that early No FEAR collection efforts may lead to low reimbursement rates. According to the report, Treasury anticipates that reimbursement rates may be as low as those reflected in Contract Disputes Act claims, where federal agencies reimbursed Treasury for one of every five dollars owed. *See* GAO, TREASURY ESTIMATES OF CLAIM PAYMENT PROCESSING COSTS UNDER THE NO FEAR ACT AND CONTRACT DISPUTES ACT, April 2004.

finding funds to reimburse the judgment fund and a possible desire to delay payment[47]. These factors, coupled with the fact that agencies are represented by DOJ Attorneys for whom agencies do not bear the cost, may lead agencies to pursue trials in lieu of settlement[48].

TAKINGS – BACKGROUND

The Fifth Amendment's Taking Clause[49] mandates that individuals who suffer takings be compensated. Until 1887, Congress maintained jurisdiction over takings claims[50]. With the passage of the Tucker Act in 1887, the Court of Claims was empowered to adjudicate claims for breach of contract and other monetary non-tort claims, and the court's jurisdiction was expanded to include takings cases[51]. However, like other claims against the United States, a takings claim could not be satisfied without a specific Congressional appropriation for compensation[52]. A two-tiered system has emerged for payment of takings claims. Condemnations, or takings that occur as a result

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[47] *See* Nina Wang, "Putting Bite Into Federal Employment Discrimination Law: Litigation Strategies After the No FEAR Act"¸ in *Employment Discrimination Issues,* United States Attorneys' Bulletin, v. 52 (3), May 2004.
[48] *Id.*
[49] U.S. Const. amend V, ("Nor shall private property be taken for public purpose, without just compensation").
[50] Shimomura, Floyd D. *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment,* 45 La. L. Rev. 625, 664 - 65 (1985).
[51] *Id. See also* 28 U.S.C. §1346(a), 1491.
[52] *See* Tiefer, Charles. *Controlling Federal Agencies by Claims on Their Appropriations? The Takings Bill and the Power of the Purse,* 13 Yale J. on Reg. 501 (1996). There is some support for the notion that a waiver of sovereign immunity would not be required for federal courts to hear taking claims if all other remedies were foreclosed. *See* R. Fallon, D. Meltzer, & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 822 - 23 (5th ed. 2003) ("Although dictum in First English suggests that the just compensation obligation overrides any claim of sovereign immunity, lower court decisions actually awarding compensation against an unconsenting sovereign are hard to find… "). Regardless of whether a waiver of immunity is required, taking claims do require appropriation from Congress before payment can be made. *See* Gliddon v. Zdanok, 370 U.S. 530 (1962).

of purposeful acquisitions, are funded through annual appropriations[53]. Until 1956, inverse condemnations (or "regulatory takings") were paid through specific appropriations[54]. With the passage of the Automatic Payment of Judgments Act, these claims are now paid from the judgment fund[55]. According to a Congressional Budget Office report, these claims led to approximately $350 million in awards during the period of 1992 to 1997[56]. Under current law, agencies are required by Executive Order 12630 to conduct a cost benefit analysis of regulatory actions that may effect a taking[57]. These "taking implications assessments" include identification of any alternative actions that would avoid a taking, an analysis of the seriousness of the harm at which the regulation is aimed, and the potential liability for takings associated with the regulation; the assessments are not published[58].

TAKINGS – CRITIQUES

Property rights advocates have proposed reforms for the funding of regulatory takings claims. A 1995 bill which was passed in the House[59] would have established a statutory definition of taking that was broader than the constitutional definition, and would have required agencies to pay for claims from their agency budgets[60]. This bill and

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[53] *Id. at* 506.
[54] *Id. at* 505.
[55] *Id.*
[56] *See* CBO, REGULATORY TAKINGS AND PROPOSALS FOR CHANGE*,* December 1998 at 9. Interestingly, CBO used data from the Clerk of the Court of Claims to determine the dollar amount of claims, suggesting that a complete accounting for judgment fund payments by type with associated agency information is not readily available.
[57] Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988).
[58] *See* CBO, REGULATORY TAKINGS AND PROPOSALS FOR CHANGE*,* December 1998 at XIV – XV.
[59] Private Property Protection Act of 1995 (H.R. 925, 104th Cong., 1st Sess.)
[60] A 2001 bill, Private Property Protection Act of 2001 (H.R. 212, 107th Cong., 1st Sess.) was also proposed in the House. However, the 2001 bill would not have changed the funding system, but would have required that Federal agencies establish procedures to assess whether regulations might result in takings. It does not appear that legislation has been introduced to continue the use of the judgment fund for

similar attempts to reform the method of resolving regulatory takings reflect a concern that agencies regulate excessively due to inadequate deterrents[61]. Critics argue that the use of the judgment fund to pay takings claims results in a lack of adequate financial disincentives to decisions that will result in compensation[62]. They suggest that a requirement to pay takings claims from agency budgets will increase agency care and discourage agencies from taking action to infringe property rights. [63]

The success of such reforms would depend on several factors. First, as the Congressional Budget Office notes, the success of fiscal deterrents is predicated on the agency's ability to anticipate which actions will result in awards (a difficult task given the complexity of the Court's regulatory takings jurisprudence)[64]. In addition, takings can only be avoided if agencies have discretion to implement regulatory alternatives that will satisfy their legal obligations without effectuating a taking[65].

Requiring agencies to pay compensation from their budgets could reduce resources available to meet other statutory obligations. In addition, Congressional appropriations committees would have to retain ultimate responsibility for approving bills to allocate funds for payment of compensation and for responding to agency requests for supplemental appropriations[66]. As the Congressional Budget Office notes, the language of an appropriation can significantly constrain the ability of agencies to use funds to

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takings claims, but require that agencies reimburse the fund (as required by the Contract Disputes and No Fear Acts). This may be due to the poor rate of reimbursement associated with those acts. *See generally* GAO, TREASURY ESTIMATES OF CLAIM PAYMENT PROCESSING COSTS UNDER THE NO FEAR ACT AND CONTRACT DISPUTES ACT, April 2004 (describing poor reimbursement rates under those Acts).

[61] For a summary of criticisms of the current system, see CBO, REGULATORY TAKINGS AND PROPOSALS FOR CHANGE, December 1998.

[62] *Id. at* XV.

[63] *Id.* at 20, 54.

[64] *Id. at* XV.

[65] *Id.*

[66] *Id.*

compensate for takings – if appropriations were worded generally, agencies would be more able to use general appropriations to pay claims (although this would also lead to greater effects of the payments on other programs)[67]. Other mechanisms for making funding available could include reprogramming funds or obtaining transfer authority from Congress[68]. In cases where compensation exceeded available funds, agencies could face conflicts between Congressional directives to regulate and compensation claims[69].

Others argue that the reform is not needed, because Congress has adequate oversight in the current system, given that Congress's 'arsenal' for influencing agency activity already includes amending the law, changing the charter of the agency, adding an amendment to the agency's appropriation, and oversight hearings[70]. However, this oversight is made more difficult under the current system of automatic payment of claims from the judgment fund. Oversight of the fund in not centralized in any one committee, with the House and Senate Judiciary Committees, House Government Reform Committee, and Senate Homeland Security and Governmental Affairs Committees sharing much of the cognizance.[71] Further, the Financial Management Service, which administers the judgment fund, does not make annual reports to any Congressional committee detailing which agencies are responsible for different types of liability.[72] Although the Service does respond to requests from Congress, the default structure

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[67] *Id.* at 55.
[68] *Id. at* 56.
[69] *Id.*
[70] *See* Tiefer, Charles, *Controlling Federal Agencies by Claims on Their Appropriations? The Takings Bill and the Power of the Purse,* 13 Yale J. on Reg. 501, 513 (1996).
[71] Interview with Tom Longnecker, Financial Management Service, Dept. of Treasury, May 2, 2005.
[72] *Id.* The agency does make an annual report of liability incurred by agencies under the No Fear Act.

suggests that committees with operational oversight over agencies may not be aware of the amount of takings claims against the agencies.[73]

In addition, Professor Levinson's arguments that economic deterrents are not justified when applied to government actions[74] would counsel against requiring agencies to fund compensation claims from their budgets. Others who do not dispute the theoretical use of economic deterrents contend that the proposal could lead to over-deterrence, possibly resulting in too little regulation by agencies[75].

As with tort claims, discussion of the proper method of appropriations for takings claims often centers on separation of powers principles. For examples, critics of the Private Property Protection Act argued that paying taking claims from the judgment fund ensures that the Executive Branch can take care to execute the laws, as mandated by the constitution. Critics of the reform proposals argue that requiring agencies to pay claims from their budgets could interfere with the ability of the agency to accomplish its missions – particularly for small agencies or those with large value claims relative to their budget[76]. In support of the current system, Professor Charles Tiefer argues that it enhances certainty, by allowing agencies to execute their legal responsibility without

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[73] *See supra note* 56, noting that CBO compiled dollar values of claims from Court of Claims data, not from data reported to Congress. If no such report is available, it is likely that not only are agency committees unaware of the full value of takings claims against the agency, but the committee with oversight over the judgment fund may also be unaware of the source of liability for judgment fund payments.

[74] *See* Daryl J. Levinson, *Making Government Pay:* Markets, Politics and the Allocation of Constitutional Costs, 67 U. Chi. L. Rev. 345 (2000). Professor Levinson argues that government does not internalize costs like a private firm because it responds to political rather than financial incentives. He contends that while financial costs can create political costs, the relationship between financial and political costs is complicated does not permit the assumption that payment of judgments results in automatic internalization of social costs by government.

[75] CBO, REGULATORY TAKINGS AND PROPOSALS FOR CHANGE*,* December 1998 at 54.

[76] *Id. at* XVI.

operational insecurity and by providing private claimants with certainty regarding payment of their claims[77].

Changing the source of funding would not only undermine claimants' certainty of payment, but it would also undermine the current stability of appropriations. It would no longer be possible for Congress to expect a particular level of activity from a certain funding level, given that judgments can be irregular and uncertain[78]. The significant time required to resolve takings claims through litigation would further undermine the stability of appropriations, as agencies might receive claims on current appropriations to pay for actions that occurred well before the current administration took office. This lag between regulatory action and judgment could further undermine deterrence, as agencies might rely on litigation delays to forestall payment, leaving it to a subsequent administration.

Depending on how a reform bill is structured, agencies could use the budget process to avoid claim payments. Discussing a reform bill that made payment "subject to the availability of appropriations", Professor Tiefer argues that the agencies could respond to legislation requiring payment of claims from agency budgets by using the allotment process to make funds unavailable to pay claims[79], resulting in a need for Congress to make determinations about whether to make additional appropriations to pay claims. In addition, he argues that Congressional backlash could further endanger separation of powers, if Congress responds by threatening to use earmarks to take away agency discretion, potentially undermining the executive branch's latitude to execute

[77] Tiefer, Charles, *Controlling Federal Agencies by Claims on Their Appropriations? The Takings Bill and the Power of the Purse,* 13 Yale J. on Reg. 501, 512 and 517 (1996).
[78] *Id at* 515 – 17.
[79] *See id at* 518 – 20, arguing that agencies could use allotments to set aside very limited amounts for claims payments, making the remainder of the appropriation unavailable for claims payment.

laws as it sees fit[80]. While these reforms have not yet been passed and takings claims continue to be paid from the judgment fund, the debate over funding demonstrates the delicate balance of powers at play in suits and claims against the government.

CONTRACTUAL LIABILITY – BACKGROUND

The resolution of claims against the federal government arising out of contract is principally governed by the Tucker Act[81] and the Contract Disputes Act of 1978.[82] The Tucker Act gives the Court of Federal Claims "jurisdiction to render judgment upon any claim against the United States founded … upon any express or implied contract with the United States."[83] The substantive law governing these claims is the federal common law of contracts,[84] which differs in some significant respects from most state contract law.[85] Despite, the Court of Federal Claims's jurisdiction, the Contract Disputes Act of 1978 requires that claims stemming from contracts pertaining to procurement first go through an intra-agency procedure.[86] Claims are first presented to the agency officer responsible for the contract. If the claimant is dissatisfied with the outcome, they can appeal either to the Court of Federal Claims, or to the agency's board of contract appeals. Either the government or the claimant can appeal the outcome from that stage to the Federal Circuit

[80] *Id*.
[81] 28 U.S.C. § 1491(a)(1).
[82] 41 U.S.C. §§ 601 – 613.
[83] 28 U.S.C. § 1491(a)(1).
[84] Gregory C. Sisk, *the Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the States*, 71 GEO. W. L. REV. 602, 614 (2003)
[85] *See, e.g.*, Merritt v. United States, 267 U.S. 338, 341 (1925) (holding that the Tucker Act did not authorize claims based on implied-in-law contracts).
[86] *See* 41 U.S.C. §§ 601 – 613. *See also* Joshua I. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 Geo. Wash. L. Rev. 633, 651 n.103 (1996) (summarizing the dispute resolution mechanism).

Court of Appeals.[87] Claims awarded pursuant to the Contract Disputes Act are paid out of the judgment fund.[88] However, 41 U.S.C. § 612(c) requires the agency to reimburse the judgment fund either out of available funds or by attaining additional appropriations, shifting liability for contract breaches back to the agency who breached.

CONTRACTUAL LIABILITY – CRITIQUES

One strain of commentators assessing the system of government contractual liability seems to embrace the general framework of the Contract Disputes Act, while proposing moderate adjustments to make the system more efficient. Whatever its faults, commentators tend to view the system created by the Act as a tremendous improvement over the predecessor "'system' that could be best described as a mess."[89] While contract dispute resolution was previously driven by the clauses that each agency would include in its contracts, the CDA "lifted the dispute resolution system out of the discretionary realm of agency clauses and placed the process squarely within a fixed statutory framework."[90] Importantly, the Act also gave contractors choice between more informal agency resolution and "a judicial forum with maximum due process protections."[91] Despite these overall favorable assessments, commentators generally supportive of the framework pose mid-level critiques of the Act and reforms of the process. For example, W. Stanfield Johnson criticizes the Act's ambiguous definition of "claim" and the failure of regulators

[87] *See* 3 GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW V. III at 12-75 to 12-76 (1994)
[88] 41 U.S.C. § 612(a) (directing that payment be made out of the fund created by 31 U.S.C. § 1304).
[89] Clarence Kipps et al., *The Contract Disputes Act: Solid Foundations, Magnificent System*, 28 Pub. Cont. L.J. 585, 585 (1999). *See also* Gene Perry Bond, *Introduction: The Contract Sisputes Act of 1978 Twentieth Anniversary Esays*, 28 Pub. Cont. L.J. 525 (1999) (describing the CDA as an improvement over the previous system).
[90] Kipps et al., *supra* note 89, at 591.
[91] *Id.*

and courts to adequately address it,[92] and the impact of anti-fraud provisions on the system's efficiency.[93] Similarly, Rebecca E. Pearson generally accepts the Act's framework but critiques the inability of agency contract officers "to issue a final decision on a claim that is not the same as a claim pending before the Court of Federal Claims."[94]

Other commentators see more fundamental problems with the framework created by the Contract Disputes Act. For instance, C. Stanley Dees takes issue with the limited remedies available under the Act, which allows primarily monetary damages.[95] To him, this limitation is an out-dated vestige of sovereign immunity.[96] He argues that parties contracting with the government should generally be able to access the full array of remedies, including restitution and specific performance, that they can access when dealing with private parties. He would only disallow specific performance in two situations: "no court can compel the executive branch to expend money for future performance … for which Congress has not appropriated funding, and … no court can compel specific performance contrary to a department secretarial-level determination *that national security would be endangered*."[97] Judge Eric Bruggink, who sits on the Court of Federal Claims, agrees with Dees that the court should have a broader range of remedies at its disposal.[98] In addition to this criticism, and his frustration that fellow courts often use the wrong name when referring to the Court of Federal Claims,[99] Judge Bruggink

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[92] W. Stanfield Johnson, *A Retrospective on the Contract Disputes Act*, 28 Pub. Cont. L.J. 567, 569 – 78 (1999).
[93] *Id.* at 578 – 83.
[94] Rebecca E. Pearson, *Should Congress Squeeze the Sharman?*, 28 Pub. Cont. L.J. 597, 598 (1999).
[95] C. Stanley Dees, *The Future of the Contract Disputes Act: Is It Time To Roll Back Soveriegn Immunity*, 28 Pub. Cont. L.J. 545, 556 (1999). The Court of Federal Claims can sometimes make a ruling akin to a declaratory judgment. *Id.*
[96] *Id.* at 545.
[97] *Id.* at 557. Emphasis added.
[98] Eric Buggink, *A Modest Proposal*, 28 Pub Cont. L.J. 529, 531 – 32 (1999)
[99] *Id.* at 529 – 30.

argues that the system would be function better if the Court of Federal Claims had Article III status.[100] An additional source of controversy is whether the statute's two-forum design has been undermined by the "judicialization" of the intra-agency appeal process. Thomas C. Wheeler argues that because the boards of contract appeals "have yielded to due process pressures over the years … in efforts to afford … litigants fair procedures," the panels "almost mirror the [Court of Federal Claims]," rendering the choice of forum less meaningful.[101] However, other commentators have presented historical evidence suggesting that any "judicialization" of the intra-agency procedures occurred prior to the Contract Disputes Act, and was not caused by it.[102] With the exception of demands for broader remedies, there does not seem to be the same level of theoretical dispute surrounding the purpose of the contract liability system as does surround government tort liability. While theorists dispute the deterrence/compensation rationales behind the latter, there seems to be a general consensus that the government has an interest in providing an effective contract dispute resolution system because the availability of such a system increase the willingness of private parties to contract with the government.

THE *WINSTAR* CASE – BACKGROUND

Under the *Winstar* Case,[103] executive branch agencies, in exercise of delegated authority, can contract with regulated parties over the manner in which the parties will be

[100] *Id.*
[101] Thomas C. Wheeler, *Let's Make the Choice of Forum Meaningful*, 28 Pub. Cont. L.J. 655, 656 (1999).
[102] Nicholas "Chip" P. Reston & Craig S. Clarke, *Overjudicialization of the Contract Disputes Process – Fact or Fiction*, 28 Pub. Cont. L.J. 613 (1999).
[103] United States v. Winstar Corp., 518 U.S. 839 (1996).

regulated, and the federal government can be contractually liable for financial losses caused by a subsequent shift in policy.[104]

The *Winstar* Case arose out of the savings and loan crisis of the late 1970's and 1980's, which began when dramatic increases in interest rates trapped savings and loans (S&Ls) who were locked into fixed rate mortgages at low rates, too low to generate enough revenue to cover the interest the S&Ls had to offer to attract depositors.[105] The federal government, who through the Federal Savings and Loan Insurance Corporation (FSLIC) insured S&L deposits,[106] responded to the crisis by deregulating the industry and loosening asset to loan ratios.[107] Despite these measures, "the multitude of already-failed savings and loans confronted the FSLIC with deposit insurance liabilities that threatened to exhaust its insurance fund."[108] To minimize the number of failed S&Ls it would have to liquidate, the FSLIC sought to encourage "healthy" S&Ls to merge with "sick" S&Ls — staving off failure. Since healthy S&Ls had no incentive to merge with institutions whose "liabilities … far outstripped their assets,"[109] the FSLIC made "express agreements"[110] with acquirers that "the acquisitions would be subject to a particular accounting treatment" which allowed the acquirer to show a short-term paper profit and more easily meet federal capitalization requirements, freeing funds for investment.[111] These guarantees induced some S&Ls, including the plaintiffs in *Winstar*, to merge with "sick" S&Ls.

[104] *Id.* at 843; 868 – 70; 910.
[105] *Id.* at 845.
[106] *Id.* at 844, citing the National Housing Act, Ch. 847, 48 Stat. 1246 (1934), which created the FSLIC.
[107] *Id.* at 845 – 46.
[108] *Id.* at 846.
[109] *Id.* at 848.
[110] *Id.* at 853.
[111] See *id.* at 847 – 57 for an extensive discussion of the agreements and the accounting tricks at issue.

However, Congress soon came to believe that the regulatory response as not working and enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA),[112] which overhauled the regulatory scheme.[113] Among other changes, the Act instituted stricter accounting standards for S&Ls which expressly forbade the treatments FSLIC had promised to S&Ls who took over "sick" companies.[114] Many of these S&Ls "immediately fell out of compliance with regulatory capital requirements, making them subject to seizure."[115]

The plaintiffs in *Winstar* brought suit against the government for damages for breach of contract. The government presented a number of defenses to contractual liability. It argued that the agreements at issue sought to waive sovereign powers, that such agreements had to "unmistakably" do so, and that these contracts failed to — the Court rejected this defense because it read the contracts not as waiving sovereign powers, but as shifting the risk to the government for financial loss created by a subsequent change in policy.[116] The Court rejected the government's arguments that the FSLIC lacked the authority to bind Congress on similar grounds.[117] Lastly, the government attempted to argue that the "sovereign acts" doctrine demanded that the government as contractor not be liable for the actions of government as lawmaker.[118] The court rejected this argument on two grounds. First, the "sovereign acts" doctrine only put the government in the same place it would have been as a private party contracting, who would not be liable if general changes in law made performance impossible. Here, the

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[112] Pub. L. 101-73, 103 Stat. 183.
[113] *See Winstar Corp.*, 518 U.S. at 856 – 57 (describing the Act's provisions).
[114] *See id*. at 857.
[115] *Id.* at 858.
[116] *Id.* at 871.
[117] *See id.* at 888 – 91.
[118] *See id.* at 891.

government action creating impossibility of performance was not sufficiently general because it had a "substantial effect" on the government's obligations.[119] Further, the government in this case was not purchasing toothpaste — its contracts had a regulatory goal and were animated by a conception of the public interest. Legislative reversal of that policy was just that — Congressional override of an agency's regulatory decisions.[120]

After rejecting the government's defenses, the plurality in *Winstar* held that the government could be liable for breaching its contracts with the S&Ls, and remanded back to the Court of Federal Claims to adjudicate damages.[121] The Office of Legislative Counsel noted that after *Winstar*, a "large number of cases premised on identical or similar theories of relief that had been stayed pending the Supreme Court's decision were activated."[122] Estimates of the cost of Winstar-related litigation are as high as $100 billion.[123] The OLC also decided that judgments and settlements from those cases would be paid not out of the Judgment Fund, but rather out of the FSLIC Resolution Fund.[124] The FLSIC Resolution Fund is operated by the FDIC, the successor agency to FSLIC. While the Fund has approximately $3.5 billion in assets, none are set aside for *Winstar* claims.[125] However, the Consolidated Appropriations Act, 2000, contains an open-ended appropriation for liability "arising from the Financial Institutions Reform, Recovery and

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[119] *See id.* at 895 - 96.
[120] *See id.* at 891 – 94.
[121] *Id.* at 910.
[122] Office of Legal Counsel, *Settlements in* United States v. Winstar Corp. *and Related Cases* (Memorandum Jully 22, 1998), *at* http://www.usdoj.gov/olc/winstarfinal.htm.
[123] *See* Daniel R. Fischel & Alan O. Sykes, *Government Liability for Breach of Contract* 7 n.23, Working Paper, *available at* www.ssrn.com.
[124] Office of Legal Counsel, *supra* note 122.
[125] FDIC 2004 Annual Report 81, 89.

Enforcement Act [FIRREA (which prompted *Winstar*)] and its implementation,"[126] which the FDIC plans to rely on to cover the liability.[127]

Approximately 49 *Winstar* cases[128] are currently being litigated in the Court of Federal Claims and Court of Appeals for the Federal Circuit.[129] In addition to liability stemming from the *Winstar* cases, the decision has already served as precedent for companies advancing similar theories of liability against the government. For example, in *Mobil Oil Exploration & Producing SE, Inc. v. United States*,[130] the Supreme Court awarded two oil companies $156 million in restitution because they had paid that amount to the government "in return for a contractual promise to follow the terms of pre-existing statutes and regulations"[131] and a subsequent congressional Act forced the government to break that promise and breach the contract.[132]

THE *WINSTAR* CASE – CRITIQUES

There has been a significant amount of commentary and analysis on the *Winstar* Case and its meanings for government liability. One set of commentators has called it "probably the most important government contracts case ever decided."[133] Fischel and Sykes argue that *Winstar* was economically misguided and promotes inefficiency. They believe that the Supreme Court "misunderstood and misapplied" doctrines particular to

[126] Consolidated Appropriations Act, 2000, Title I, § 110, Pub. Law No. 106-113.
[127] FDIC 2004 Annual Report, 89–90.
[128] *Id.* at 89.
[129] The Court of Federal Claims conveniently links to all of its published *Winstar* opinions at http://www.uscfc.uscourts.gov/winstar.htm.
[130] 530 U.S. 604 (2000).
[131] *Id.* at 624.
[132] *See id.* at 624.
[133] Fischel & Sykes, supra note 123, at 7.

government contract law.[134] They argue that the court's understanding of the underlying economic transaction was errant,[135] and worse yet that the Court misunderstood the economic underpinnings of the unmistakability doctrine, which if properly applied would have led to the opposite result in the case.[136] As a result of the court's decision, Fischel and Sykes argue that "interest groups deals will be more durable" and less visible because of the diminished unmistakability doctrine.[137] Professor Macey echoes these concerns, arguing that the *Winstar* doctrine will lead courts to protect "special-interest group bargains" between a regulated industry and temporary majorities in Congress and agencies.[138]

Other critiques of *Winstar* have been based on democratic theory, rather than economics. Writing in 1992, before the maturation of the *Winstar* litigation, Professor Toscano argued that "performing its obligations under a contract requires the government to limit the exercise of some facet of its sovereignty, from the ability to establish budget priorities freely to the prerogative to regulate economic behavior. Thus, enforcing government contracts, especially those that purport to limit future exercises of regulatory powers, is problematic in a democratic political system."[139] Others, looking into the future, have argued that the government should not be willing to trade policy for funds through regulatory contracts.[140]

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[134] *Id.* at 8 – 9.
[135] *Id*. at 55 – 56.
[136] *Id.* at 57-58.
[137] *Id.*
[138] *See* Jonathan R. Macey, Winstar*, Bureaucracy, and Public Choice*, 6 S. Ct. Econ. Rev. 173 (1998).
[139] David P. Toscano, *Forbearance Aggreements: Invalid Contracts for the Surrender of Sovereignty*, 92 Colum. L. Rev. 426, 426 (1992).
[140] *See* David Dana & Susan P. Koniak, 148 U. Pa. L. Rev. 473 (1999).

In contrast to these criticisms, other commentators have argued that there are economic benefits to forcing the government to keep its word.[141] Professor Hadfield, in the course of arguing that reliance costs are the proper measure of damages for government contracts, argues that liability "preserves the incentive for private contractors to rely on government contracts (and hence facilitates the use of private resources to perform government functions), and achieves the right balance between the role of the courts and the role of the political process with respect to a government's decision to breach contracts."[142] In a sense, these commentators do not differ with their peers as to the effect of the *Winstar* Case — all agree that it makes forward looking regulatory contracts between government and regulated parties easier to form and more durable. The chief debate seems to turn on the wisdom of these contracts themselves — whether the risk of entrenchment and interest-group ideals outweighs benefits potentially flowing from the added regulatory capability derived from the contracts.

An interesting contrast can be drawn between the Court's decision in *Winstar* and an earlier case, *Office of Personnel Management v. Richmond*.[143] In *Richmond* the Court refused to award damages on the basis of equitable estoppel to a federal employee who had been temporarily deprived of disability benefits as a direct consequence of relying on erroneous government explanation of its disability policy.[144] In that decision, the Court relied heavily on the principle that "payments from the Federal Treasury are limited to

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[141] *See, e.g.*, Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment* 1143 – 49 (1996) (analogizing, favorably, to *Winstar*-type situations while arguing government precommitment mechanisms in tax).
[142] Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. Cal. Interdisc. L.J. 467, 469 (1999).
[143] 496 U.S. 414 (1990).
[144] *Id.* at 415–19.

those authorized by statute,"[145] and asserted that the plaintiff's claim did not fall under any of the categories delineated in the Tucker Act.[146] The Court also seemed to be motivated by the burden of litigating estoppel claims and their potential as a "drain on the public fisc."[147] An argument could be made that these values, especially the Court's unwillingness to find liability absent clear statutory litigation, would have suggested a different result in *Winstar*. However, even though the plaintiffs in both actions relied on government advice, it may be possible to draw a distinction on the character of the government action that induced the reliance. In *Winstar*, the government knowingly accepted the risk of a subsequent change in policy (if one accepts the Court's theory), while in *Richmond* the government agent unknowingly induced detrimental reliance through its incorrect advice. The Court may regard consider the unforeseeable damages possible with equitable estoppel to require additional congressional authorization, yet comfortably allow an agency to knowingly assume risk in the course of exercising powers delegated to it by Congress.

Whatever one's position on regulatory contracts, it should be clear that Congress is not absolved from responsibility for the liability they create. First, executive agency power to contract stems from congressional delegation and is subject to political discipline from Congress. Second, waiver of sovereign immunity and court jurisdiction to hear *Winstar*-type claims are acts of Congress. Lastly, due to the Appropriations Clause, *Winstar* judgments cannot be paid without the assent of Congress.

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[145] *Id.* at 416.
[146] *Id.* at 431–32.
[147] *Id.* at 433.

Table I: Allocation of power in takings, tort claims, Winstar and Contract Disputes

Institution and its role	Takings	Tort claims	Winstar	Contract disputes
Congress	1. Establish allocation to judgment fund	1. Establish allocation to judgment fund 2. Waive immunity/ determine scope of right/exceptions 3. Establish agency reimb. requirements	1. Delegate authority to agency allowing to contract for regulatory policy. 2. Establish allocation to fund to pay judgment if contract breached. 3. Waive sovereign immunity for claims.	1. Delegate authority to agency to contract. 2.Establish allocation to pay judgments for breaches of contracts. 3. Waive sovereign immunity for claims.
Judiciary	1.Adjudicate claims. a. define scope of right b. assess damages	1.Adjudicate claims. a. define scope of right b. assess damages	1.Adjudicate claims. a. define scope of right b. assess damages	1.Adjudicate claims. a. define scope of right b. assess damages
Executive/ Agency	1. Regulate in a manner that effects a taking 2. Settle claims	1. Tortious conduct 2. Settle claims 2. Reimburse judgment fund in some cases	1. Contract with party over future regulatory policy. 2. Changes policy, whether in concert with Congress or unilaterally. 3. Settle claims.	1. Make contract. 2. Breach contract. 3. Settle claims. 4. Reimburse judgment fund.

	Takings	Tort claims	Winstar	Contract disputes
Annual exp. or est. liability	$60-100m* (est)	$300 - 400m* (est)	Up to $100B*	$125m
Agency refund rules	Not required; reform proposed but not adopted	Required only for claims paid under anti-discrimination and whistleblower act	Not applicable	Agency required to reimburse Judgment fund. 41 USC § 612(c)
Analysis of Incentives	Deterrence is focus of the literature and reform proposals – several bills have been introduced to require payment from agency budgets.	Deterrence is not a major focus of literature or reform. Where mentioned, it is generally in the context of the discretionary function exception. One exception: No Fear Act which requires agencies to reimburse the judgment fund.	Agreement that forward-looking regulatory contracts are easier to make and more durable with Winstar. Debate whether this incents more effective, leveraged regulation, or self-entrenching special interest deals.	Commentators seem to agree that the purpose of the system is to reduce government contracting costs by subjecting government to the same deterrents that affect purely private contracting.

*These numbers are rough estimates. The Takings estimate is estimated using as a benchmark the Congressional Budget Office, *Regulatory Takings and Proposals for Change,* December 1998 at 9, reporting approximately $350 million in takings claims between 1992 and 1997. The torts estimate is a very rough approximation based on the President's Proposed Budget for 2006, which reflects $878 million in obligations in the judgment fund, including $477 million for district court judgments and $264 million in Court of Claims judgments. The estimate is extrapolated from this data, and the probability that tort claims are the largest volume of claims resulting from district courts; while most taking claims are under the jurisdiction of the Court of Claims. The *Winstar* estimate is from Daniel R. Fischel & Alan O. Sykes, *Government Liability for Breach of Contract* 7 n.23, Working Paper, *available at* www.ssrn.com.

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