

THE GOVERNMENT’S LIABILITY FOR ACTIONS OF ITS
 AGENTS THAT ARE NOT SPECIFICALLY AUTHORIZED:
 THE CONTINUING INFLUENCE OF *MERRILL* AND
RICHMOND

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I. INTRODUCTION

Principals provide their agents with express direction, as well as limitations on the agent's authority, everyday. The law has generally recognized that specific authorization of every action that an agent takes is, of course, not possible, nor even desirable. Indeed, agents often take actions beyond those expressly provided, and sometimes even take actions contrary to the express limitations set out by their principal. The law of agency deals with such situations through the doctrines of implied authority, and more frequently apparent authority. However, where the Government is the principal, the courts are loathe, in situations not involving torts, to apply notions of apparent authority, at least directly.¹ As a result, average citizens sometimes must bear the brunt of their reliance, however reasonable, on good faith actions and advice of government agents.

Whether the Government will be found to be responsible for an action by one of its agents that is less than specifically provided for in statute or regu-

1. The Federal Tort Claims Act allows claims against the United States:

[F]or . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

Accordingly, where the applicable state law bases the tort liability of a principal in whole or in part on apparent authority, that doctrine can be applied against the United States.

lation quite frequently, however, depends less on the facts and circumstances of the case and more on which of two judicial philosophies is followed by the court. The two competing philosophies evident in these cases are formalism and functionalism.

Formalism, which is exemplified in *Federal Crop Insurance Corp. v. Merrill*² and *Office of Personnel Management v. Richmond*,³ espouses the view that an agent of the Government is authorized to do only that which is specifically delegated to him or her by statute, regulation, or warrant of authority and no more. In its purest form, the philosophy recognizes no exceptions and, by definition, only acts performed by agents with actual authority (either express or implied) may bind the Government.

In contrast, the functional perspective supports the notion of holding the Government liable for actions of its agents taken within the scope of their official duties as objectively determined—provided that there is no express congressional prohibition on the action. Cases decided under the functional approach generally draw some distinction between an agent's specifically delineated authority and the broader notion of the scope of his or her authority and, absent more, in at least some fashion, bind the Government with respect to actions that fall in the latter category. In some instances this binding effect is found even if the action is contrary to law. The most notable application of this approach can be seen in *Del-Rio Drilling Programs, Inc. v. United States*,⁴ *Broad Avenue Laundry & Tailoring v. United States*,⁵ and *John Reimer & Co. v. United States*.⁶

The purpose of this Article is to outline the historical impediments to holding the Government responsible for actions not specifically authorized; to analyze the underpinnings of those impediments still in existence; to review the principled means that have, in fact, been used to deal with some of those situations; and to suggest areas where they can be applied to avoid inequitable results.

II. THE ORIGIN AND EVOLUTION OF THE COMMON LAW DOCTRINE OF APPARENT AUTHORITY

Prior to the Civil War, it was well accepted that an agent's authority could derive only from an explicit grant by the principal. When businesses were relatively small, this rarely posed a problem. The principal knew and supervised all of its agents, and the local business community generally knew the extent of their authority. However, as businesses grew into corporations, a decentralized command structure evolved obscuring just who the principals really were and what authority they may have delegated to their agents. Furthermore, with agents no longer under the direct supervision of the principals,

2. 322 U.S. 380 (1947).

3. 496 U.S. 414 (1990).

4. 146 F.3d 1358 (Fed. Cir. 1998).

5. 681 F.2d 746 (Ct. Cl. 1982).

6. 325 F.2d 438 (Ct. Cl. 1963).

agents were in a position to exercise discretion and act beyond the specific authority that they had been granted. As a result, conflicts often arose between parties who believed that an agent had the principal's authority, and the principals who denied liability for their unauthorized acts.

The American adherence to a subjective standard of liability and authority was rooted in the "will theory" of contract law, which sought to interpret contracts based solely upon the will expressly manifested by the contracting parties.⁷ As some jurists and scholars were seeking to subsume agency law into contract law, the will theory was supported in prevailing treatises on agency law and applied by most courts in cases involving agency. In an 1839 treatise, Supreme Court Justice Joseph Story proposed what amounted to an extension of tort law's doctrine of *respondeat superior* into the law of agency, thus making a principal strictly liable for the conduct of his agent.⁸ Although many scholars and jurists objected to this intrusion into agency law, its effect was limited in any event, since the original *respondeat superior* doctrine was based upon an actual grant of authority by the employer.⁹

During the Civil War, however, a series of New York cases involving railroads and banks led the movement toward the recognition of apparent authority.¹⁰ In these cases, the plaintiffs relied upon representations from the defendants' employees that turned out to be incorrect or fraudulent. With the principals disavowing any acts they had not expressly authorized, a critical question confronted the New York courts: Was it fair to let an innocent third party bear the loss rather than the principal who had held out the employee as authorized to act on the principal's behalf? If the courts continued to apply the will theory and required express grants of authority, corporations could turn a blind eye to questionable acts by their employees, knowing that no liability would attach in the absence of actual authority. Conversely, if the courts chose to hold principals liable for their agents' actions, the agents could defraud their principals to their own ends by overreaching their authority. The courts concluded that the principals were in a better position to bear the loss, and that equity compelled holding the principal liable for the acts of any

7. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISES OF LEGAL ORTHODOXY* 35 (1992).

8. As stated in the *Restatement (Second) of Agency* pursuant to *respondeat superior*, any action of a servant is within the scope of employment and attributed to his principal if:

(a) [I]t is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master, . . . [whereas] (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

RESTATEMENT (SECOND) OF AGENCY § 228 (1958). See, e.g., *Nichols v. Land Transp. Corp.*, 223 F.3d 21 (1st Cir. 2000); *Lyons v. Brown*, 158 F.3d 605 (1st Cir. 1998).

9. See HORWITZ, *supra* note 7, at 42 n.48 (citing John H. Wigmore, *Responsibility for Tortious Acts: Its History II.*, 7 HARV. L. REV. 383, 392 (1894)).

10. See HORWITZ, *supra* note 7, at 44-45 (discussing *Farmers & Mechanics' Bank v. Butchers & Drovers' Bank*, 16 N.Y. 125 (1857); *Griswold v. Haven*, 25 N.Y. 595 (1862); *New York & N.H.R.R. Co. v. Schulyer*, 34 N.Y. 30, 69 (1865)).

agent upon which a third party had reasonably relied, regardless of whether the action was explicitly authorized or not.

Acceptance of these holdings came slowly. A number of scholars continued to insist that a principal could not be bound by its agent's acts without an actual grant of authority, even as the courts were beginning to hold otherwise.¹¹ However, it was not until the early twentieth century that application of the objective standard in agency law became widely adopted in the form of the "scope of employment" standard for *respondeat superior*, as well as the "reasonable person" standard generally used in today's apparent authority doctrine.¹²

III. THE REQUIREMENT FOR SPECIFIC AUTHORIZATION IN ORDER TO BIND THE GOVERNMENT: HOW ABSOLUTE IS IT?

The movement toward the adoption of an objective standard against which to assess the authority of government agents is in much the same position as was the movement to adopt it in the private sector more than a century ago.

A. Federal Crop Insurance Corp. v. Merrill; *The Specific Authorization Requirement—Formalism at Its Most Absolute*

In 1947, in what Justice Kennedy in *Richmond* called "the leading case in our modern line of estoppel decision,"¹³ the Supreme Court, in *Federal Crop Insurance Corp. v. Merrill*, announced that:

Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.¹⁴

In *Merrill*, two Idaho farmers applied to the local agent of the Federal Crop Insurance Corporation, which was wholly owned by the Federal Government, to insure their wheat crop under the Federal Crop Insurance Act.¹⁵ Most of the wheat was spring wheat, to be grown on winter wheat acreage. The local agent for the corporation knew this, yet advised the Merrills that

11. See HORWITZ, *supra* note 7, at 44–45.

12. For further discussion of the apparent authority doctrine see *id.* at 39–51. See also Aaron Lipson, Note, *Whose Fool Is It Anyway: Updating Apparent Authority for Today's Business World*, 33 GA. L. REV. 1219, 1243 (1999) (noting the origin of apparent authority in the evolution of agency law and the doctrine's basis in equity and estoppel).

13. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 420 (1990).

14. *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) (citations omitted).

15. See *id.* at 382.

the entire crop was insurable. However, this information was not included in the written application submitted to and accepted by the corporation's headquarters. Published regulations declared that spring wheat grown on winter wheat acreage was ineligible for insurance. When the Merrills' crop was destroyed, the corporation refused to pay their claim. The Merrills brought suit in state court and the Idaho Supreme Court concluded that the Government "was acting in a proprietary, not a sovereign, capacity, and . . . estopped the corporation to deny the validity of the policy or the liability of the Government for plaintiff's loss."¹⁶ In a five-to-four opinion,¹⁷ the Supreme Court reversed and found that agents of the Federal Government can only act within their express authority, and that parties who deal with them are on a constructive notice of the limits of that authority.

The availability of information on the workings of the Government makes independent verification of the authority of agents at least a theoretical possibility.¹⁸ However, as Justice Jackson stated in his dissent in *Merrill*:

To my mind, it is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops.¹⁹

Indeed, commenting on the *Merrill* Court's requirement that citizens be conversant with the Code of Federal Regulations, in *Broad Avenue Laundry & Tailoring v. United States*²⁰ the Court of Claims stated: "We think it is with small dignity indeed that [the Government] argues that an illegality should be [perceived by the contractor] that was not perceivable to its own Contracting Officer. . . ."

The majority in *Merrill* did not care that, when viewed objectively, the Merrills were quite reasonable in believing that the Government's agent had authority to take the actions that it did. In the years since *Merrill*, many lower courts have enthusiastically embraced the decision, some with due consideration and some without, while others have strained to craft principled exceptions by delving into the depths of the "authority question." During this period, the Supreme Court and other courts have also developed additional tests

16. *Portmann v. United States*, 674 F.2d 1155, 1162 (7th Cir. 1982) (discussing the *Merrill* decision).

17. See *Merrill*, 332 U.S. at 384. The opinion was authored by Justice Frankfurter who, along with Chief Judge Vinson and Justices Reed, Murphy, and Burton made up the majority. Justices Jackson, Douglas, Black, and Rutledge dissented.

18. See Frederick S. Kuhlman, *Government Estoppel: The Search for Constitutional Limits*, 25 *LOY. L.A. L. REV.* 229, 261 (1991).

19. *Merrill*, 332 U.S. at 387 (Jackson, J., dissenting).

20. 681 F.2d 746, 750 (Ct. Cl. 1982). *But see* *Schism v. United States*, 2002 WL 31549178 (Fed. Cir. Nov. 18, 2002), *cert. denied*, 2003 WL 835021, 71 U.S.L.W. 3567 (U.S. June 2, 2003), discussed *infra* Part VI.C.

that putatively must be met in order to hold the Government liable for acts not specifically authorized.

The true scope of a government agent's authority is extremely important, since the limits of that authority are a question that has the potential to arise in virtually every interaction between a citizen and the Federal Government and the existence of authority is a prerequisite to holding the Government responsible for its actions either directly or through equitable estoppel. The criticality of properly determining the scope of an agent's authority notwithstanding, *Merrill*, and its total rejection of an objective test to determine those limits, is still cited as the leading modern case on the subject.²¹ However, whether the *Merrill* approach should be determinative in most circumstances is quite a different question.

The belief that the Government cannot be bound or equitably estopped as a result of an action for which the agent did not have actual authority has historically rested largely upon considerations of sovereign immunity.²² However, as the doctrine of sovereign immunity eroded, it became necessary to justify the Government's exemption from liability on other bases.²³ Thus, in *Merrill* the Supreme Court premised its decision primarily upon a separation of powers rationale, observing "that only Congress had the authority to charge the public treasury. . . ."²⁴ Proponents of this approach have argued that permitting the Government to be bound in the absence of specific authorization would, in effect, allow government employees to "legislate" by misinterpreting or ignoring an applicable statute or regulation.²⁵ Judicial validation of such unauthorized legislation, it is claimed, would also infringe upon Congress's exclusive authority to make law.²⁶

While the majority opinion authored by Justice Frankfurter is quite pointed and appears to leave no doubt that specific authorization is an absolute prerequisite to government liability, a number of subsequent lower court cases did not find *Merrill* and its concern with separation of powers to preclude a more moderate approach.

21. See *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 420 (1990). However, cases comparable to *Merrill* have arisen at least since 1813. See *Lee v. Munroe*, 11 U.S. (7 Cranch) 366 (1813).

22. See *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 99 (9th Cir. 1970); Raoul Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680 (1954); David K. Thompson, Note, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551 (1979).

23. *Portmann v. United States*, 674 F.2d 1155, 1159 (7th Cir. 1982) (citations omitted).

24. *Id.* at 1162 (citing *Fed. Crop Ins. Corp. v. Merrill*, 322 U.S. 380, 385 (1947)). Concern over impairing the public fisc and violating the separation of powers also underlie the doctrine of sovereign immunity, which prohibits suits against the Government without its consent. See Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 344 (1995); Fred Ansell, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53 U. CHI. L. REV. 1026, 1038-39 (1986).

25. See Ansell, *supra* note 24, at 1037.

26. Further expanding on this idea, the court in *Portmann* noted that: "[p]ursuant to this rationale, many courts have explained their refusal to allow estoppel against the government by underscoring 'the duty of all courts to observe the conditions defined by Congress for charging the public treasury,' and by emphasizing the need to prevent the frustration of federal statutes." 674 F.2d at 1159 n.8 (citations omitted).

B. *United States v. Georgia-Pacific—A Footbold for Functionalism*

Starting with *United States v. Georgia-Pacific*²⁷ in 1970, some courts began to move away from the strictures of *Merrill* in cases where the Government was acting in its proprietary capacity. *Georgia-Pacific* involved an agreement made in 1934 by the owner of a substantial number of acres of timberland in Oregon located near the Siskiyou National Forest to gradually donate certain portions of those lands to the Federal Government if the boundaries of the Siskiyou National Forest were extended to include them.²⁸ The company entered into the agreement largely to secure fire protection for those lands, something of substantial benefit to it. Upon execution of the agreement, in 1935, Congress extended the boundaries of the Siskiyou National Forest, thus giving the company the additional fire protection that it had sought. From 1935 to 1958, the company and Georgia-Pacific, to which the company sold its remaining ownership interest in the timberlands to be donated, conveyed much of the land to the Government. However, before all of the lands were donated pursuant to the 1934 agreement, the Government, in the person of the Assistant Secretary of the Interior, retracted the northern boundary of the forest, excluding lands described in the agreement (except, of course, for those lands previously conveyed) and re-established the northern boundary as it was before the 1935 extension. Maps of the forest were changed and Forest Service personnel began to treat the unconveyed lands as though they were no longer part of the National Forest. Indeed, as the court observed, “[f]or all practical purposes [these lands were] not a part of the [Siskiyou] National Forest.”²⁹

In the years following the agreement becoming effective in 1935, the Government had allowed Georgia-Pacific to manage this timberland at considerable expense, thus adding a great deal of value to it. The Government did not compel Georgia-Pacific or its predecessor to convey any land under the agreement and, in fact, made no claim of ownership or other right to the land until 1961.

After 1958, Georgia-Pacific continued to manage the unconveyed lands and harvest timber thereon but the Government afforded them no fire protection. In 1967, the Government brought suit for specific performance of the 1934 agreement. In finding for Georgia-Pacific, the district court held that the 1934 document was a valid contract, but that its purposes had been frustrated by the retraction of the boundaries of the National Forest in 1958 and thus Georgia-Pacific’s duty to convey any lands pursuant to the agreement had been terminated.

On appeal, the Ninth Circuit affirmed the decision of the district court, but did so on the basis that the actions of the Government, particularly in issuing the Public Land Order (P.L.O.) retracting the boundary of the forest, were sufficient to render the Government subject to the defense of equitable

27. 421 F.2d 92 (9th Cir. 1970).

28. *See id.* at 94.

29. *Id.* at 95.

estoppel. The court found that each element necessary to establish an estoppel was present, i.e., (1) the Government knew the facts; (2) the Government intended that its conduct should be acted on or acted in such a manner that the party had a right to believe that the Government's conduct was so intended; (3) the nongovernmental party is ignorant of the true facts; and (4) it relied on the Government's conduct to its injury.³⁰ Moreover, the court also concluded that the Assistant Secretary possessed sufficient authority when he issued the P.L.O. reducing the forest boundaries in 1958.³¹

The court discussed the formalistic position espoused in *Merrill*, that no governmental action is proper unless a specific statute states that it is, but chose to move away from that holding.³² It did so by putting considerable importance on the *scope* of the Assistant Secretary's authority when it dealt with the issue of whether the executive branch's retraction of the forest boundaries was a usurpation of a function reserved to Congress. The court took the functionalistic view that the act in question was permissible because nothing forbade the executive branch's issuance of the P.L.O., since by the Congressional Act of 1897, the president was authorized to modify, reduce, or eliminate any national forest that was established by executive order.³³

In *Georgia-Pacific* and the cases that followed it, the question of whether the government agent was acting within the scope of his or her authority became something considerably more than just whether the actions of the agent were unequivocally specified by statute or regulation. Indeed, in these cases, the courts broke away from simply equating the two concepts as had been done in *Merrill* and began to give "scope of authority" the same meaning in contract cases that they had given "scope of employment" in *respondeat superior* situations.³⁴ By doing so, they reduced the range of actions that could be considered *ultra vires*. Thus, after *Georgia-Pacific*, if a plaintiff could prove both that the action in issue was within the scope of the authority of the government agent and the normal elements of estoppel,³⁵ it generally could recover.

Perhaps no better example of this manner of looking at the scope of a government agent's authority exists than in the case of *Broad Avenue Laundry & Tailoring v. United States*,³⁶ where the Government was estopped to deny the validity of a Contracting Officer's written modification of a contract, even though the modification violated a regulation.³⁷ In *Broad Avenue Laundry*, the

30. *Id.* at 96 (quoting *California State Bd. of Equalization v. Coast Radio Prods.*, 228 F.2d 520, 525 (9th Cir. 1955)).

31. *Georgia Pacific*, 421 F.2d at 97, 102.

32. *See id.* at 100.

33. *Id.* at 101.

34. For a discussion of significant cases, see Alan I. Saltman, *Estoppel Against the Government: Have Recent Decisions Rounded the Corners of the Agent's Authority Problem in Federal Procurements?*, 45 *FORDHAM L. REV.* 497, 503-07 (1976).

35. *See United States v. Georgia-Pacific*, 421 F.2d 92, 96 (9th Cir. 1970).

36. 681 F.2d 746 (Ct. Cl. 1982).

37. *See id.* at 749.

Court of Claims found that the issuance of the modification, despite being the product of a mistake of law, was still within the scope of the Contracting Officer's authority.³⁸

Subsequently, use of the scope of authority approach was further expanded to encompass situations in which the Government was acting in a governmental or sovereign capacity, rather than a purely proprietary one.³⁹ This "expansion" was heralded in cases like *Portmann v. United States*,⁴⁰ which indicated that basing government liability on whether a sovereign or proprietary function of Government was involved had merely "[s]erved as a shorthand reminder that 'protection of the public welfare and deference to Congressional desires are much more apt to outweigh hardships to private individuals in the equitable balance when estoppel is asserted against sovereign acts,' than when purely commercial federal interests are at stake."⁴¹

C. Lazy FC Ranch—*The Balancing Approach*

While some courts were exhibiting independence from *Merrill* by finding the Government responsible for certain actions taken by its agents to be within the general scope of their duties, other courts were going even farther by developing what came to be known as the "balancing approach." These cases were an extension of the affirmative misconduct rule first raised by the Supreme Court in *Montana v. Kennedy*,⁴² and in which it was indicated that in order to hold the Government liable where its agent's authority is at best questionable, there must be affirmative misconduct on the part of the agent.⁴³

The balancing approach cases may be the broadest ever decided on the issue of government agents' authority. Each involved the court's weighing the magnitude of the injustice created by a government agent's action against the importance of the public policy or congressional directive, if any, that would be transgressed by holding the Government liable. The balancing approach was exemplified in cases like *United States v. Lazy FC Ranch*,⁴⁴ where the es-

38. See *id.* This decision, like all opinions of the Court of Claims, is binding on the Federal Circuit. *South Corp. v. United States*, 690 F.2d 1368 (Fed. Cir. 1982).

39. See, e.g., *Watkins v. U.S. Army*, 875 F.2d 699 (9th Cir. 1989) (estopping the Government from barring soldier's reenlistment solely because he was a homosexual); *Johnson v. Williford*, 682 F.2d 868 (9th Cir. 1982) (estopping the Government from enforcing non-parolability provision of a statute proscribing engagement in continuing criminal enterprises). *But see Saulque v. United States*, 663 F.2d 968 (9th Cir. 1981) (citing to *Georgia-Pacific* for proposition that estoppel does not lie against Government for sovereign acts). As the court stated in *Portmann v. United States*:

[T]he line between sovereign and proprietary functions is somewhat artificial and difficult to apply. For example, even routine operational contracts of federal agencies may be conditioned on a variety of special requirements imposed by Congress or the Executive for the promotion of national policy goals, thus adding a "sovereign" element to an otherwise purely commercial transaction.

674 F.2d 1155, 1161 (7th Cir. 1982).

40. 674 F.2d at 1155.

41. *Id.* at 1161.

42. 366 U.S. 308 (1961).

43. See discussion *infra* Part III.E.

toppel doctrine was found applicable to the United States because “justice and fair play require it”; *Brandt v. Hickel*,⁴⁵ because “administrative regularity must sometimes yield to basic notions of fairness”; and *Schuster v. Commissioner*,⁴⁶ where the Commissioner of the IRS was estopped from changing his position on a tax ruling based upon the unfairness to the plaintiff who had relied upon it.⁴⁷

The balancing approach cases provided a useful measure of clarity and justice to this muddled and harsh area of the law, although it has been suggested that they merely exemplify the occasional times when the courts were explicit in balancing the relative weights of governmental and private interests and that there are many more occasions when such a balancing was implicit in government estoppel cases.⁴⁸ In light of the limitations imposed by the separation of powers doctrine, this approach has also been said to be the best rule for restricting the application of estoppel against the Government.⁴⁹ Whether or not this is true, the balancing approach must, nevertheless, be recognized as perhaps the best way to deal with truly egregious situations without requiring that each citizen keep abreast of ever-changing federal statutes and regulations *and* their legal viability.

D. *Portmann v. United States*⁵⁰

Subsequent to the balancing approach falling out of favor, some lower courts, still finding the absolutism of *Merrill* uncomfortable, became bolder. Few cases epitomize this more clearly than the Seventh Circuit’s 1982 opinion in *Portmann*.

In *Portmann*, the plaintiff mailed valuable photographs and paid to insure them after a Postal Service employee assured her that the fee would provide insurance for the photos up to \$50,000, the limit for “nonnegotiable documents.”⁵¹ After the photos were lost, and Ms. Portmann made a claim for their value, the Postal Service asserted that it could pay only \$500 because the applicable regulations classified the photographs as “merchandise” rather than as “non-negotiable documents.”⁵²

The district court granted the Government’s motion for summary judgment on the basis that the “Postal Service regulations define[d] the parameters of package insurance and [could not] be changed by a misunderstanding on plaintiff’s part, however induced.”⁵³ The Seventh Circuit reversed, estopping

44. 481 F.2d 985, 988 (9th Cir. 1973).

45. 427 F.2d 53, 57 (9th Cir. 1970).

46. 312 F.2d 311, 318 (9th Cir. 1962).

47. For a broader discussion of the balancing approach, see Saltman, *supra* note 34, at 508–13.

48. See Kuhlman, *supra* note 18, at 232.

49. *Id.* at 231.

50. 674 F.2d 1155 (7th Cir. 1982).

51. See Ansell, *supra* note 24, at 1034.

52. See *id.*

53. *Portmann*, 674 F.2d at 1157–58.

the Postal Service from asserting the regulation as a defense in the citizen's action and distinguishing *Merrill* on several grounds.⁵⁴ First, the court observed that unlike the farmers in *Merrill*, who had no commercial options to obtain crop insurance, if the postal clerk had accurately answered Ms. Portmann's question about the insurability of her photographs, she would have elected to do business with a private carrier. Second, the court noted that the case "did not deal primarily with a statutory benefit but more directly with a written contract between the Postal Service and a private citizen"⁵⁵ and that the regulations at issue were less than clear. That is, even if Ms. Portmann had read the regulations she would have been reasonable in concluding that the advice she had been given by the postal clerk was correct. Lastly, the court found that because the Postal Service was largely self-financed, any concern that compensating Ms. Portmann would be violative of the concern expressed in *Merrill* about only Congress having the power to charge the public treasury was unfounded.

Clearly, *Portmann* represented a departure from *Merrill* by, among other things, giving credence to the objective manifestations of authority exhibited by the government's agent in a situation where the plaintiff was seeking a benefit for which she would not otherwise have qualified. Although not citing *Reimer*, discussed *infra* in Part III.G, *Portmann* closely parallels the functionalist conclusions in that case by holding the Government liable for an action involving a contract that appeared reasonable to all concerned even if it violated a regulation, where the violation was not clear on its face.

E. *The Affirmative Misconduct Requirement*

Some courts sought to avoid the whole issue of formalism versus functionalism. They did so by attempting to identify a policy of sufficient import to overcome real or imagined separation of powers issues involved in holding the Government liable for less than precisely specified actions. They would neither look at whether the act had been sufficiently specified in statute or regulation nor whether it was within the scope of the agent's duties as objectively viewed. Rather, they concluded that in order for the Government to be held liable for imprecisely specified actions, there must be affirmative misconduct on the part of the agent. The affirmative misconduct cases are little different in theory from those decided pursuant to the balancing approach because, by adopting the affirmative misconduct requirement, courts felt that they were achieving a balancing of public and private interests.⁵⁶ The addition of the affirmative misconduct requirement also permitted courts to comply

54. *Id.* at 1163. See also Ansell, *supra* note 24, at 1034.

55. *Portmann*, 674 F.2d at 1165.

56. Ansell, *supra* note 24, at 1044. Indeed, the court decisions employing either a balancing of interests or the affirmative misconduct rule to justify judicial review did so by applying an analysis similar to that used in equal protection and due process jurisprudence. See Kuhlman, *supra* note 18, at 264.

with the Supreme Court's desire to limit the situations in which less-than-specifically authorized actions could bind the Government.⁵⁷

"The progenitor [of the affirmative misconduct approach] is *Montana v. Kennedy*,⁵⁸ [in which an] American consulate official's 'well-meant advice . . . [was determined to have fallen] far short of misconduct such as might prevent the United States from relying on petitioner's foreign birth.'"⁵⁹ Although the Supreme Court never defined the level of misconduct required for Government liability, application of the approach by other courts indicates that the misconduct had to be "quite serious,"⁶⁰ i.e., encompassing affirmative acts of "misrepresentation or concealment of a material fact,"⁶¹ and "egregious wrongs of an intentional, or since at least a reckless, nature."⁶² With very few exceptions, the courts found that "mere negligence, delay, inaction or failure to follow agency guidelines [did] not constitute affirmative misconduct";⁶³ neither did a government employee's silence, failure to respond, or reluctance to be of assistance.⁶⁴ Typical of these cases, in *Heckler v. Community Health Services of Crawford County*,⁶⁵ the Supreme Court found that erroneous advice given by the Government, to the effect that the plaintiff was entitled to funds in its possession, also did not constitute affirmative misconduct.⁶⁶

Affirmative misconduct has, however, been found in some cases. For example, the Ninth Circuit found affirmative misconduct in *Sun Il Yoo v. Immigration & Naturalization Service*,⁶⁷ where, for no apparent reason, the INS

57. See Kuhlman, *supra* note 18, at 264. But see Thompson, *supra* note 22, at 560 (describing the affirmative misconduct doctrine as "a modest step toward a [more liberal] rule").

58. 366 U.S. 308 (1961).

59. Kuhlman, *supra* note 18, at 255 n.223. The majority opinion in *Richmond*, however, characterized the applicable portion of *Montana v. Kennedy* as dicta. See Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 414 (1990).

60. Peters v. United States, 28 Fed. Cl. 162, 169 (1993).

61. DePaolo v. United States, 45 F.3d 373, 377 (10th Cir. 1995); New England Tank Indus. of New Hampshire, Inc. v. United States, 861 F.2d 685 (Fed. Cir. 1988); *In re Burford*, 231 B.R. 913, 923 (Bankr. N.D. Tex. 1999) (estopping the IRS from collecting \$50,000 in post-petition interest assessed in bankruptcy, because the Government had "deliberately" failed to establish an accurate payment schedule).

62. Kuhlman, *supra* note 18, at 256. See *Rosebud Sioux Tribe v. Gove*, 104 F. Supp. 2d 1194 (D.S.D. 2000), *rev'd on other grounds sub nom.* *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (8th Cir. 2002), *rehearing and rehearing en banc denied* (Aug. 14, 2002), *cert. denied* *Sun Prairie v. McCaleb*, 123 S. Ct. 1255, 154 L. Ed. 2d 1020 (2003). A good case can be made that intentional or reckless actions taken by a government agent, outside the scope of its authority, may very well render the government official personally liable in tort.

63. DePaolo, 45 F.3d at 377. But see *Sun Il Yoo v. Immigration & Naturalization Service*, 534 F.2d 1325 (9th Cir. 1976), where, for no apparent reason, the INS delayed its recognition of fact that the petitioner had in fact given correct information in his application for an immigrant visa for a year. This was found to be affirmative misconduct sufficient to estop the Government from denying Yoo sixth-preference immigrant status because of his occupation as a machinist even though under then-present regulations that fact alone would no longer qualify him for such status and granting it to him would result in the violation of regulation.

64. See *United States v. Ruby Co.*, 588 F.2d 697, 703-04 (9th Cir. 1978). See also *Grumman Ohio Corp. v. Dole*, 776 F.2d 338 (D.C. Cir. 1985). Such holdings have, however, been criticized. See Thompson, *supra* note 22, at 560.

65. 467 U.S. 51 (1984).

66. See *id.* at 64-66.

67. 534 F.2d at 1325. See also *Fredericks v. Comm'r of Internal Revenue*, 126 F.3d 433, 441-42 (3d Cir. 1997) (IRS committed affirmative misconduct by representing that a particular form

delayed for a year its recognition of the fact that the petitioner had in fact given correct information in his application for an immigrant visa. Based on that finding the court estopped the Government from denying Yoo sixth-preference immigrant status because of his occupation as a machinist even though under then-present regulations that fact alone would no longer qualify him for such status and granting it to him would result in the violation of regulation.⁶⁸

Limiting the Government's liability to situations involving affirmative misconduct was not a new development in the law. This approach was present in the common law doctrine of estoppel to assert land titles.⁶⁹ The rationale for limiting the application of estoppel to cases of intentional misconduct was one of policy.⁷⁰ That is, many believe that some principle must be employed to limit the potentially disruptive effect that holding the Government liable via estoppel for acts not specified in statutory authority could have.⁷¹ "Because the cases in which government agencies have intentionally [or wantonly] misled the public are bound to be few," many felt that requiring a showing of affirmative misconduct would severely limit the number of situations in which the Government would be found liable.⁷²

Regardless of the limiting effect that the affirmative misconduct requirement had in cases of this sort, the rule was apparently not deemed to be a sufficient enough barrier, and the Supreme Court, in *Office of Personnel Management v. Richmond*,⁷³ clearly distanced itself from the doctrine, criticizing it as a source of "needless litigation."⁷⁴ The Court also said that the suggestion in some recent cases that there might be situations in which employee misconduct could give rise to estoppel against the Government was dicta.⁷⁵

In the years since *Richmond*, the courts' use of the doctrine has declined markedly, although some cases continue to hold that affirmative misconduct on the part of the Government, though not sufficient to establish liability in and of itself, remains a virtual prerequisite for pressing claim against the Gov-

from the taxpayer was not on file, which induced him to rely upon the one-year extensions to the statute of limitations); *Villena v. Immigration & Naturalization Service*, 622 F.2d 1352, 1361 (9th Cir. 1980) (four-year delay in considering occupational preference classification constituted affirmative misconduct).

68. See *Urban Data Sys., Inc. v. United States*, 699 F.2d 1147, 1154 n.7 (Fed. Cir. 1983) (commenting on the Supreme Court's decision in *Schweiker v. Hansen* 450 U.S. 785 (1981)). See also Michael Cameron Pitou, *Equitable Estoppel: Its Genesis, Development and Application in Government Contracting*, 19 PUB. CONT. L.J. 606, 647 (1990). The Court, however, subsequently sought to distance itself from the doctrine. See discussion *infra* Part III.E.

69. See Kuhlman, *supra* note 18, at 256.

70. See *id.* at 256-57.

71. See *id.* at 257 n.230. "Requiring affirmative misconduct permits a court to provide relief in 'exceptionally sensitive cases without exposing the Government to open-ended liability for merely negligent or improper actions and omissions by its agents.'" *Id.* (quoting Thompson, *supra* note 22, at 560).

72. Kuhlman, *supra* note 18, at 257.

73. 496 U.S. 414 (1990).

74. *Id.* at 423.

75. *Id.* at 414.

ernment for an action that was less than precisely specified in statute or regulation.⁷⁶ Indeed, despite the criticism that the Supreme Court has leveled against that approach, in cases such as *Zacharin v. United States*⁷⁷ and *Rumsfeld v. United Technology Corp.*,⁷⁸ it appears that the Federal Circuit continues to embrace the concept. In *Zacharin*, relying on *Richmond* and a number of Supreme Court decisions that predate *Richmond*, the Federal Circuit stated that: “the Court has suggested that if equitable estoppel is available at all against the government some form of affirmative misconduct must be shown in addition to the traditional requirements of estoppel.”⁷⁹ It is true that in *Richmond* the Court did refer to the cases cited in *Zacharin* and that those cases indicated that some type of “affirmative misconduct” might give rise to estoppel against the Government. However, as noted earlier, the Court characterized the language in those cases as “dicta.”⁸⁰ In doing so, it also indicated disapprovingly that the notion of affirmative misconduct had taken on something of a life of its own, i.e., that affirmative misconduct cases like *Montana v. Kennedy*,⁸¹ *Immigration & Naturalization Service v. Hibi*,⁸² *Schwieker v. Hanson*,⁸³ *Immigration & Naturalization Service v. Miranda*,⁸⁴ and *Heckler v. Community Health Services*⁸⁵ had provided “inadequate guidance for the federal courts and [had] served only to invite and prolong needless litigation.”⁸⁶

Although the panel in *Zacharin* indicated that the Supreme Court had not squarely held that affirmative misconduct is a prerequisite for invoking equitable estoppel against the Government to hold it responsible for actions that were less than clearly specified, it noted that both the Federal Circuit and all other circuits had. Unfortunately, both of the Federal Circuit cases cited by the panel⁸⁷ to justify the continued use of the thesis were issued prior to *Richmond*.

76. See, e.g., *Sullivan v. United States*, 46 Fed. Cl. 480, 489 (2000); *Rosebud Sioux Tribe v. Gove*, 104 F. Supp. 2d 1194 (D.S.D. 2000), *rev'd on other grounds sub nom. Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (8th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3574 (U.S. Nov. 2, 2002) (citing the pre-*Richmond* case of *United States v. Schoenborn*, 860 F.2d 1448, 1453 (8th Cir. 1988)).

77. 213 F.3d 1366, 1371 (Fed. Cir. 2000) (Claim by Army scientist seeking compensation from the Government for its use of a patented invention was denied. Government was not estopped from asserting that item was on sale via a government contract issued for the manufacture of the item entered into more than one year prior to the filing of the patent application even though the government attorneys who filed the patent application were aware of the contract and did not raise the on-sale-bar issue at the time of the application.).

78. 315 F.3d 1361 (Fed. Cir. 2002), *reb'g and reb'g en banc denied* (Apr. 23, 2003).
79. *Zacharin*, 213 F.3d at 1371 (citing *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 421 (1990); *Immigration & Naturalization Service v. Miranda*, 459 U.S. 14, 19 (1982); *Schwieker v. Hansen*, 450 U.S. 785, 788 (1981)).

80. *Richmond*, 496 U.S. at 421.

81. 366 U.S. 308 (1961).

82. 414 U.S. 5 (1973).

83. 450 U.S. 785 (1981).

84. 459 U.S. 14 (1982).

85. 467 U.S. 51 (1984).

86. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 422–23 (1990).

87. See *Henry v. United States*, 870 F.2d 634, 637 (Fed. Cir. 1989); *Hanson v. Office of Personnel Management*, 833 F.2d 1568, 1569 (Fed. Cir. 1987). *But see* *USA Petroleum Corp. v. United States*, 821 F.2d 622, 627 (Fed. Cir. 1987) (Government estopped from recovering full

As to the status of the doctrine in other circuits, the *Zacharin* court cited *Tefel v. Reno*,⁸⁸ a 1999 case in which the Eleventh Circuit adopted the affirmative misconduct requirement and noted that every other court of appeals had already done so.⁸⁹ The court indicated that: “We agree that a rule requiring misconduct as an essential element of establishing estoppel against

amount of overpayment made to contractor as a result of delay in notifying contractor that there was a defect in measurement, during which time contractor paid its suppliers).

88. 180 F.3d 1286, 1303 (11th Cir. 1999).

89. The court in *Tefel* cited the following cases:

The First Circuit:

United States v. Javier Angueira, 951 F.2d 12, 16 (1st Cir. 1991) (which in turn relied on *City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994), and the pre-*Richmond* cases of *Schweiker v. Hansen*, 450 U.S. 785 (1981), and *INS v. Hibi*, 414 U.S. 5 (1973)). *Shalala* in turn relied, without analysis, on *Azizi v. Thornburgh*, 908 F.2d 1130, 1136 (2d Cir. 1990), which, without comment on the Supreme Court’s rejection of affirmative misconduct in *Richmond*, merely cited to the pre-*Richmond* case of *Scime v. Bowen*, 822 F.2d 7, 9 n.2 (2d Cir. 1987) (quoting *Corniel-Rodriguez v. INS*, 532 F.2d 301, 302 (2d Cir. 1976)), and cited *Immigration & Naturalization Service v. Miranda*, 459 U.S. 14 (1982). In sum, in the First Circuit, any post-*Richmond* reaffirmation of the requirement for affirmative misconduct appears to have been based on Second Circuit cases that took no note of the Supreme Court’s criticism of the doctrine in *Richmond*.

The Second Circuit:

Droz v. Immigration & Naturalization Service, 155 F.3d 81, 90 (2d Cir. 1998).

The Third Circuit:

Fredericks v. Commissioner, 126 F.3d 433, 438 (3rd Cir. 1997).

The Fourth Circuit:

United States v. Agubata, 60 F.3d 1081, 1083 (4th Cir. 1995) (relying on *Maryland Dep’t of Human Resources v. United States Dep’t of Agric.*, 976 F.2d 1462 (4th Cir. 1992)). The *Maryland Dep’t of Human Resources* court stated: “The Supreme Court has never explicitly held that the Federal Government may be equitably estopped [citing, e.g., *Richmond* at 426–32, *Heckler v. Miranda*, *Schweiker v. Hibi*, and *Montana v. Kennedy*,] and it is doubtful that the Court would recognize an estoppel where . . . affirmative misconduct by the Government was not even alleged.” 976 F.2d at 1484 n.24. Given the Supreme Court’s criticism of the doctrine in *Richmond*, it is, however, quite doubtful that the Court would require an allegation of affirmative misconduct in order to estop the Government.

The Fifth Circuit:

Fano v. O’Neill, 806 F.2d 1262, 1265 (5th Cir. 1987) (a decision predating *Richmond*’s criticism of the doctrine).

The Sixth Circuit:

United States v. Guy, 978 F.2d 934, 937 (6th Cir. 1992), in which the court said that “At the very minimum, some affirmative misconduct by a government agent is required as a basis of estoppel,” citing *Richmond* at 421 and the pre-*Richmond* case of *U.S. v. River Coal Co., Inc.*, 748 F.2d 1103, 1108 (6th Cir. 1984). However, *Richmond* not only did not impose any such requirement, but Justice Kennedy specifically noted that the Court’s approach in *Hibi*, *Hansen*, and *Miranda*, the three most recent affirmative misconduct cases, “has provided inadequate guidance and served only to invite and prolong needless litigation.” *Richmond*, 496 U.S. at 422–23.

The Seventh Circuit:

Edgewater Hosp., Inc. v. Bowen, 857 F.2d 1123, 1138 (7th Cir. 1988), amended on other grounds, 866 F.2d 228 (7th Cir. 1989) (another pre-*Richmond* decision).

The Eighth Circuit:

United States v. Schoenborn, 860 F.2d 1448, 1451 (8th Cir. 1988) (another pre-*Richmond* decision).

The Ninth Circuit:

Watkins v. United States Army, 875 F.2d 699, 707 (9th Cir. 1989) (another decision predating *Richmond*).

the government is the best way to follow the Supreme Court's command until the Court definitively determines whether and under what circumstances estoppel can be asserted against the government."⁹⁰

While the Eleventh Circuit's adoption of the requirement was done after a thorough re-statement of the Supreme Court's criticism of the use of affirmative misconduct, the court failed to note that the adoptions in most other circuits do not appear to have been done prior to and/or with a similar acknowledgement of the Supreme Court's statements on the doctrine in *Richmond*.

F. *Excising the Illegality and Creating a Valid Implied-in-Fact Contract Pursuant to Which Payment Can Be Made for the Reasonable Value of Goods or Services Provided*

In cases involving either a general lack of authority or a violation of a specific prohibition where the plaintiff seeks something for which it would not have qualified in the absence of the Government's questionable action, with a few notable exceptions, the courts have precluded relief.⁹¹ In contrast, however, where the Government has received a benefit from the performance which was accomplished pursuant to an agreement that contained terms that contravened a statutory directive as to contract form, etc., the illegal portion of a contract has frequently been excised and the plaintiff has simply been paid under an implied-in-fact contract for the reasonable value of services provided. This is perhaps best exemplified by *Urban Data Systems, Inc. v. United States*,⁹² in which, even though the contract in question "constitute[d] cost-plus-a-percentage-of-cost contract proscribed by 41 U.S.C. § 254(b) (1976),"⁹³ the court found the contractor entitled to payment for the reasonable value in the marketplace of the supplies and concomitant services provided and more. Interestingly, the court also noted that: "It is clear, however, that the Government bargained for, agreed to pay for, and accepted the supplies delivered by Urban. It is also plain that only the price terms of the two subcontracts were invalid—not any other part of those agreements."⁹⁴

The Tenth Circuit:

Penny v. Giuffrida, 897 F.2d 1543, 1547 (10th Cir. 1990) (a case that, while containing substantial analysis, predated *Richmond* by three months).

The D.C. Circuit:

LaRouche v. Federal Election Comm'n, 28 F.3d 137, 142 (D.C. Cir. 1994) (a case that relied, without analysis, on the pre-*Richmond* case of *Conax Florida Corp. v. United States*, 824 F.2d 1124, 1131 (D.C. Cir. 1987) (citing *INS v. Miranda*, 459 U.S. 14 (1982))).

The Federal Circuit:

Henry v. United States, 870 F.2d 634, 637 (Fed. Cir. 1989) (another pre-*Richmond* decision).

90. *Tefel*, 180 F.3d at 1303.

91. See, e.g., *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990). But see *John Reiner & Co. v. United States*, 325 F.2d 438 (Ct. Cl. 1963).

92. 699 F.2d 1147 (Fed. Cir. 1983). See, e.g., 33 Comp. Gen. 533 (1954).

93. *Urban Data Systems*, 699 F.2d at 1150.

94. *Id.* at 1154.

As such, the situation met the basic test for the existence of an implied-in-fact contract, i.e., (1) mutuality of intent to contract;⁹⁵ (2) consideration; (3) lack of ambiguity in offer and acceptance; and (4) actual authority in the government representative to bind the Government to the implied contract.⁹⁶ Interestingly, in *Urban Data Systems*, as in most contract cases employing the excision approach, the first three of the above items came from the original illegal contract while, in the absence of ratification, the last and most important one flowed from the general contracting authority of the agent who made the illegal contract in the first place.⁹⁷

In remanding the matter to the Board of Contract Appeals, the *Urban Data Systems* court advised that the amount to which Urban Data Systems was entitled should be based on the reasonable value in the marketplace of the property sold, not on costs. Since the contracts that had been declared illegal had been small disadvantaged business contracts under Small Business Administrations § 8(a) program, the “marketplace” in this case was not the competitive arena of all businesses that could have supplied the contract goods. Rather, the marketplace was only that of 8(a) businesses.⁹⁸ Moreover, because it found only that two terms of the contract were invalid, the court also noted that in the agreement the Government had contracted, not only for the goods specified therein, but also for the less tangible advantages of training Urban Data Systems, a small business, and giving it experience in the business world—a benefit to the Government, “which should be melded into the ultimate determination (unless it is found that no such benefit was in fact received at all in this case).”⁹⁹ Lastly, the court indicated that interest should be included in Urban Data Systems’ recovery, pursuant to the general provisions of both of the voided contracts.¹⁰⁰

Clearly, in *Urban Data Systems*, under the guise of authorizing payment of a *quantum meruit*, the court came as close as it could to simply excising the offending terms and keeping the balance of the contract in place. Interestingly,

95. This does not mean that actual mental assent is required for the formation of an implied-in-fact contract. See *United International Investigative Servs. v. United States*, 26 Cl. Ct. 892, 900 (1992) (The fact that the Government thought it was contracting with entity A when, in fact, the contract had been improperly assigned to and performed by entity B does not preclude the formation of an implied-in-fact contract.). As the court observed, a meeting of the minds can be inferred from the conduct of the parties and the surrounding circumstances. *Id.* (citing *Somali Dev. Bank v. United States*, 508 F.2d 817, 822 (Ct. Cl. 1974)).

96. *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998). See also *Barrett Refining Corp. v. United States*, 242 F.3d 1055 (Fed. Cir. 2001).

97. As stated in *Mega Const. Co., Inc. v. United States*, 29 Fed. Cl. 396, 470 (1993): “In the arena of government contracts, an implied-in-fact contract can exist only if it is entered into with an agent of the government who has the direct authority to obligate funds of the United States.”

98. “Under the [8](a) program, contracts may be let at a price in excess of that at which a non-2[8](a) business could perform, as a means of encouraging small businesses to achieve a competitive place in the market.” *Urban Data Systems, Inc. v. United States*, 699 F.2d 1147, 1155 (Fed. Cir. 1983) (internal citations omitted).

99. Such an “advantage” would, however, be one that seemingly flowed predominately to the § 8(a) contractor not to the Government.

100. See also B-167790, April 12, 1973, in which the Comptroller General indicated that payment for the reasonable value of goods or services provided could include an amount for profit and overhead as would constitute just compensation under the circumstances.

the court considered but rejected the application of the balancing approach espoused in *Lazy FC Ranch*,¹⁰¹ an approach that would have upheld the validity of the contract.

While *Urban Data Systems* certainly pushed the limits of the reasonable value of the goods and services provided, more often, when the excision approach has been used, it has been in conjunction with a more traditional view, where a contractor is simply paid the reasonable value of what has been provided.¹⁰² In either event, replacing an illegal payment term with the requirement to make payment for the value of the goods or services provided, albeit based on a finding of an implied-in-fact contract, nevertheless bears a substantial similarity to courts' acting under § 2–305 of the Uniform Commercial Code to interject a reasonable price term into agreements that are otherwise intended but where the price term is not settled.

The excision approach is, of course, considerably more difficult to apply, and hence less frequently used, where the problem is the basic legality of the initial transaction itself rather than the mere improper inclusion of a particular provision in or use of an improper form of contract.¹⁰³ Indeed, in the latter situation, excision of portions of the transaction is of little effect since doing so does not change the fact that, even after the excision has occurred, the government representative still lacks actual authority to bind the Government. Moreover, in such circumstances, ratification either expressly or by implication¹⁰⁴ is also likely not possible.

Such a situation is exemplified in *Bureau of Land Management: Payment of Pocatello Field Office Photo Copying Costs*,¹⁰⁵ where the GAO determined that a local Kinko's copy shop was not entitled to payment for \$20,000 worth of copies that it made at the request of a government official, even though the Government clearly benefited from the copies, because the contract was in violation of a statute that requires such reproduction work to be done by the Government Printing Office. No excision of any offending provision could change this and create an implied contract regarding which BLM's represen-

101. *United States v. Lazy FC Ranch*, 481 F.2d 985, 989 (9th Cir. 1973).

102. *See, e.g., Gould, Inc. v. United States*, 67 F.3d 925 (Fed. Cir. 1995).

103. *But see, e.g., Wheeler v. United States*, 5 Ct. Cl. 504 (1869). There, even though assignment of express contract for delivery of fire wood from Wheeler to the party that actually performed the contract voided the contract, court effectively found implied-in-fact contract providing payment for the reasonable value of goods or services provided.

104. *See, e.g., Dave Jarrett Construction*, 80–1 CPD ¶ 127, at 139 (1980) (where implied ratification of the original unauthorized contract has occurred, payment need not be made the basis of the reasonable value of the goods or services provided but rather pursuant to the terms of the express contract). *See also In re Rust Tractor Co.*, 58 Comp. Gen. 789 (1979).

105. Comp. Gen. B-290901, 2002 WL 31870646 (C.G. Dec. 16, 2002). *But see* B.G. Loveless, Comp. Gen. B-167723, 1969 WL 3603 (Sept. 12, 1969) (Comptroller General found payment for reasonable value of goods or services provided appropriate even though contract violated the statutory prohibition against entering into contracts for detective services). *Loveless* cited *Pacific Maritime Association v. United States*, 108 F. Supp. 603 (Ct. Cl. 1952), which, unlike *Loveless*, did not, however, involve an agreement that was prohibited by law. *See also* 33 Comp. Gen. 533 (1954); 38 Comp. Gen. 38, 43 (1958). *Cf. Baltimore & Ohio Railroad Company v. United States*, 261 U.S. 385 (1923).

tative or anyone within the agency had actual authority to enter. The same is true in other situations such as the one that existed in *Johnson Management Group Inc. v. Martinez*.¹⁰⁶ In *Johnson Management*, the Government was found entitled to enforce its lien on equipment purchased by a contractor for the performance of the contract as security for a contractor's obligation to repay advance payments, because the Contracting Officer did not have the authority to agree to a contract provision that allowed the contractor to satisfy its advance payments indebtedness by purchasing equipment for contract performance.

As these cases indicate, where an express contract is illegal, an implied-in-fact contract may suffer from the same infirmity, thus precluding recovery.¹⁰⁷ Additionally, even where authority for the express contract is not so grossly lacking, a question may still exist as to whether either of the parties would have entered into a contract with the offending portion excised. This possibility was raised by the Federal Circuit in *American Telephone & Telegraph Co. v. United States*,¹⁰⁸ where AT&T sought to have its fixed-price contract for sophisticated sonar equipment declared illegal for having been let in violation of a statutory provision mandating the use of cost reimbursement contracts in the circumstances. Although a meeting of the minds may be inferred from actual performance,¹⁰⁹ and AT&T's contract had been fully performed, the Federal Circuit noted that if offers had been solicited on a cost-reimbursement rather than the offending fixed-price basis, the Navy may have chosen to award the contract to an offeror with greater technical competence than AT&T.¹¹⁰

Notably in *AT&T*, the court did not excise the offending pricing term and find a valid implied-in-fact contract for the reasonable value of the goods provided. This resulted, not because the excision approach has fallen into disfavor, but rather largely because that route, as well as the *Reimer* approach (discussed *infra* in the Part III.G), appears to have been specifically precluded to it by Congress. That is, a Senate committee report on § 8118 directed that

106. 308 F.3d 1245 (Fed. Cir. 2002).

107. See, e.g., *K & R Engineering Co., Inc. v. United States*, 616 F.2d 469, 475 (Ct. Cl. 1980) (Contractor involved in an arrangement prohibited by conflict of interest statute could not enforce contract against Government nor recover the value of goods and services provided. In fact, the court found the Government entitled to recover amount paid to contractor pursuant to contracts that were procured as consequence of contractor's participation in an arrangement prohibited by conflict of interest statute.). See also *Checker Van Lines*, 82-2 CPD ¶ 219 (since statute limited temporary storage of goods at the Government's expense to a period of 180 days, regardless of the circumstances, express contract to provide storage over 180 days would be illegal as would implied contract to do the same thing) (citing *In re GKS, Inc.*, 78-1 CPD ¶ 461 (where air force had no authority to make express contract for value engineering suggestion, there could be no implied-in-fact contract to accomplish same purpose)).

108. 177 F.3d 1368, 1375-76 (Fed. Cir. 1999) (en banc).

109. See *supra* note 95.

110. *American Telephone & Telegraph Co. v. United States*, 307 F.3d 1374, 1380-81 (Fed. Cir. 2002), *rehearing en banc denied* (Jan. 27, 2003), *petition for cert. filed* (Apr. 25, 2003) (No. 02-1569). This point was, however, challenged by Judge Newman in her dissent when, after a remand, the case came back to the Federal Circuit. *Id.* at 1382.

“this section not be used as the basis for litigating the propriety of an otherwise valid contract.”¹¹¹ As such, the court concluded that, excepting the violation of § 8118, since the fully performed contract was otherwise valid, it was precluded from going any further.

The goal of the excision approach is to create a valid implied-in-fact contract from which the contractor can be paid by excising the legal impediment precluding payment under the illegal/unauthorized transaction. In *AT&T*, § 8118 indicated that, notwithstanding the violation of that section, payment could nevertheless be made pursuant to the contract. As such, excision was unnecessary.

The need for the interim step, i.e., a valid implied-in-fact contract, in order for the Government to pay for what it has received, lies in the fact that the Government’s simply making payment for the goods or services provided, while generally both reasonable and entirely equitable, is something that it can not do. This is not to say that in some instances, despite neither the existence of any actual authority (either express or implied) nor any recognition of apparent authority, that compensation has not been paid for reasons of justice.¹¹² Indeed, several commentators have asserted that it is important for the Government to afford some relief to a contractor even if the contract in issue was plainly illegal because “[p]rocurement officers must navigate a maze of statutes and regulations, about which bidders know little. . . .”¹¹³ However, doing so without first finding a valid implied-in-fact contract is not consistent with the case law.

Providing such compensation irrespective of the existence of a valid implied-in-fact contract may appear to be supported by the following statement from *United States v. Amdahl*:

[I]n many circumstances it violates good conscience to impose upon the contractor *all* economic loss from having entered into an illegal contract. Where a benefit has been conferred by the contractor on the government in the form of goods or services, which it accepted, a contractor may recover at least on a *quantum valebant* or *quantum meruit* basis for the value of the conforming goods or services received by the government prior to the rescission of the contract for invalidity.¹¹⁴

However, such a broad reading of *Amdahl* is unwarranted in light of cases such as *Hercules, Inc. v. United States*¹¹⁵ that reaffirm that courts lack

111. S. REP. NO. 326, 100th Cong., 2d Sess. at 105 (1988).

112. See, e.g., *Anchor Coupling Company, Inc.*, Comp. Gen. B-151796, 1964 WL 3051 (Apr. 29, 1964) (where express contract is invalid, right to payment in *quantum meruit* is predicated on the theory that it would be inequitable for the Government to retain the benefits of the other party’s labor). See also *Prestex Inc. v. United States*, 320 F.2d 367 (Ct. Cl. 1963); *New York Mail and Newspaper Transportation Company v. United States*, 139 Ct. Cl. 751 (1957).

113. Michael T. Janik & Margaret C. Rhodes, Gould, Inc. v. United States: *Contractor Claims for Relief Under Illegal Contracts with the Government*, 45 AM. UNIV. L. REV. 1949, 1975 (1996).

114. 786 F.2d 387, 393 (Fed. Cir. 1986).

115. 516 U.S. 417 (1996) (citing *United States v. Minnesota Mut. Investment Co.*, 271 U.S. 212, 217–18 (1926)); see also *Haberman v. United States*, 18 Cl. Ct. 302, 307 (1989); *Eaton Corp.*, ASBCA No. 38386, 91–1 BCA ¶ 23,398.

jurisdiction to entertain claims against the Government asserting that the law implies a promise to pay a reasonable amount for labor and materials supplied absent a specific contract to that effect.¹¹⁶ Indeed, merely conferring a benefit upon the Government does not create an implied-in-fact contractual relationship.¹¹⁷ Moreover, the above statement in *Amdahl* notwithstanding, the court in that case did, however, reach a proper conclusion by finding that that relief was warranted both because there was a duly authorized implied-in-fact contract and because the illegality was less than palpable.

In contrast to the assertion that it is important to afford some relief to a contractor even if the contract in issue were plainly illegal, historically, contracts made in violation of the rules of contracting were viewed as being void *ab initio* so that contractors were neither able to estop the Government from denying the existence of the contract nor even to recover the value of goods or services provided.¹¹⁸ The basis for this harsh rule was the deep-seated concern over collusion between government agents and contractors.¹¹⁹ Vestiges of this concern can still be seen even in more recent cases such as *K & R Engineering Co., Inc. v. United States*,¹²⁰ wherein the Court of Claims stated that: "Whatever may be the appropriateness of allowing such recovery where the government has received benefits under the tainted contract, recovery is not permissible where, as here, the firm seeking recovery itself was involved in the corruption of the government official."¹²¹

The Supreme Court went even further than this in *United States v. Mississippi Valley Generating Co.*,¹²² holding that a government contract with Mississippi Valley was unenforceable because a special negotiator for the Government was also an officer and director of a financial company that benefited from the resulting contract. The Court found that the individual violated the federal conflict-of-interest statute, and that his illegal conduct tainted the whole transaction. As such, the court ruled that Mississippi Valley was powerless to enforce the contract even though the statute did not specifically provide for the invalidation of contracts made in violation of the statutory prohibition and Mississippi Valley itself "appear[ed to be] entirely innocent."¹²³

As discussed *infra* in Part III.G, given the contractor's ignorance of and lack of participation in the illegal actions, it is questionable that a similar conclusion would have been reached in *Mississippi Generator* had the Court followed the approach taken by the Court of Claims in *Reiner*:

116. See *Mega Const. Co. v. United States*, 29 Fed. Cl. 396 (1993).

117. *Id.*

118. See Kuhlman, *supra* note 18, at 244.

119. *Id.*

120. 616 F.2d 469, 475 (Ct. Cl. 1980).

121. See also *United States v. Acme Process Equipment Co.*, 385 U.S. 146 (1966), in which the Supreme Court found that the participation of a prime contractor's upper echelon managers in a subcontractor kickback scheme that violated the Anti-Kickback Act was a sufficient basis for the Government to cancel the contract.

122. 364 U.S. 520 (1961).

123. *Id.* at 565.

G. Reiner and “Palpable” Illegality

To the same extent that *Merrill* represents a strict view of when the Government is culpable for actions that are not in full accord with prevailing statutes and/or regulations, the 1963 decision of the Court of Claims in *John Reiner & Co. v. United States*¹²⁴ and its progeny represent a pragmatic approach to the question. Indeed, as discussed *infra* in Part VI, *Reiner* is the progenitor of the entire functional approach to such matters exhibited in such notable cases as *Georgia-Pacific, Broad Avenue Laundry & Tailoring v. United States*,¹²⁵ and *Del-Rio Drilling Programs, Inc. v. United States*.¹²⁶

Reiner involved the award of a contract by the Corps of Engineers for 3,500 generator sets. In its decision, the Court of Claims held that it is within the scope of a Contracting Officer’s authority to award contracts to the ostensible, but in fact not actual, low bidder and that a contract so awarded erroneously, but in good faith, is not void *ab initio*.¹²⁷ As stated by the court:

In testing the enforceability of an award made by the Government, where a problem of the validity of the invitation or the responsiveness of the accepted bid arises after the award, the court should ordinarily impose the binding stamp of nullity only when the illegality is plain. *If the contracting officer has viewed the award as lawful, and it is reasonable to take that position under the legislation and regulations, the court should normally follow suit.*¹²⁸

In *Trilon Education Corp. v. United States*,¹²⁹ these tests were restated as being whether the departure from applicable statutes and regulations was substantial and obvious to the bidder.¹³⁰ In this regard, the argument has been made that

124. 325 F.2d 438 (Ct. Cl. 1963).

125. 681 F.2d 746 (Ct. Cl. 1982).

126. 146 F.3d 1358 (Fed. Cir. 1998). *See also* Edward Hines Lumber Co., AGBCA No. 78-121, 79-1 BCA ¶ 13,830 (1979) (holding that the government employee who signed the timber sale contract “for the Forest Supervisor” had apparent authority to act for him in other aspects of contract administration); *In re Todd Shipyards Corp.*, Navy Contract Adjustment Board (August 5, 1982) (while the Contracting Officer’s actual authority was limited to approving transactions of less than \$10,000, Todd in good faith relied on his apparent authority to guarantee payment of \$216,000 due under a subcontract with a minority small business prime contractor).

127. *Fink Sanitary Services*, 53 Comp. Gen. 503 (1974). *But see* *CACI, Inc. v. Stone*, 990 F.2d 1233 (Fed. Cir. 1993). *CACI* was a bid protest in which *CACI* challenged the Army’s award of a contract for automatic data processing services to another offeror. *See id.* at 1233-34. The basis of the protest was that the Army had proceeded without having first obtained a necessary delegation of procurement authority from the General Services Administration as required by regulation. *Id.* at 1234. The court held that the Contracting Officer, as agent of the executive department, has only that authority actually conferred upon him by statute or regulation and that “there can be no clearer example of a case in which the illegality is plain and clear than one in which there is a facial absence of actual authority to enter into the contract.” *Id.* at 1236. “[T]here cannot be a contract when the government agent lacks actual authority to create one.” *Id.* at 1237. In the absence of actual contracting authority, the contract was found to be void. Moreover, the court stated that such a “fatal defect” could not be cured. *Id.* at 1236.

128. *Reiner*, 325 F.2d at 440 (emphasis added). *See also* *United States v. Amdahl*, 786 F.2d 387, 394-95 (Fed. Cir. 1986); *Southwest Marine, Inc.*, 85-2 CPD ¶ 594 (1985); *Memorex Corp.*, 84-2 CPD ¶ 446 (1984); *Fink Sanitary Servs.*, 53 Comp. Gen. 503 (1974); *Director, Defense Supply Agency*, 52 Comp. Gen. 215, 218 (1972).

129. 578 F.2d 1356 (Ct. Cl. 1979).

130. As discussed *infra* in Part VII, the standard for illegality that is “palpable” is even higher than this in situations where the failure to comply with the questionable directive of the government agent would be done at substantial peril.

contractors generally do not possess the wherewithal to determine whether all requirements have been met.¹³¹ Of course, if sophisticated government contractors do not possess the wherewithal to determine if the government's actions are in fact fully authorized, why should ordinary citizens like the farmers in *Merrill* be presumed to know the content of the Code of Federal Regulations and bear the risk of that presumption?¹³²

That the nongovernment party should not always bear the burden of improprieties by the Government's agent of which it is unaware and not in control was noted by the Supreme Court at least as early as 1877. In *Clark v. United States*,¹³³ a statute required that all contracts be in writing and the Contracting Officer file the contract, all bids received, etc., together with an affidavit. While the Court concluded that an oral contract could not therefore be enforced, it further explained that:

[T]he contract itself . . . must conform to the requirements of the statute until it passes from the observation and control of the party [*i.e.*, the contractor] who enters into it. *After that, if the officer fails to follow the further directions of the act with regard to affixing his affidavit and returning a copy of the contract to the proper office, the party is not responsible for this neglect.*¹³⁴

While the emphasized portions of the Court's statement in *Clark* epitomize the functionalistic view, the Court's initial comment, that if the statute requires a writing then an oral contract is void, indicates that functionalism does have its limits. This same recognition can be seen in other cases such as *CACI v. Stone*¹³⁵ and *Johnson Management*¹³⁶ where functionalism ran into explicit, unequivocal statutory requirements, compliance with which the courts held was a prerequisite to *any* valid action by the Government. In the words used in *Del-Rio*, such actions are "explicitly prohibited" by statute and hence not binding on the Government.¹³⁷ Even *Reiner*, albeit in a frequently ignored portion of that decision, indicates that in order for the Government's actions to be given any efficacy, they must have been reasonable under the legislation and regulations.¹³⁸

Indeed, while application of *Reiner* does bring about quite a pragmatic solution in most instances, it cannot be applied in every instance. For example, application of *Reiner* would also have been problematic in *AT&T*, where a contract for sale of the sonar equipment was quite clearly let in contravention

131. See generally Janik & Rhodes, *supra* note 113.

132. As discussed *infra* in Part VI.C., why too should military retirees be held to have known and understood limitations on the authority of recruiters who fifty years ago promised them free health care for life when those limitations on what appeared to be actions taken within the normal scope of the recruiters' duties were not affirmatively spelled out either in the regulations or in statute? See *Schism v. United States*, 316 F.3d 1259 (Fed. Cir. 2002), *cert. denied*, 2003 WL 835021 (U.S. June 2, 2003).

133. 95 U.S. 539 (1877).

134. *Id.* (emphasis added).

135. 990 F.2d 1233 (Fed. Cir. 1993). See also discussion *supra* note 127 and *infra* Part VI.B.

136. *Johnson Management Group CPC, Inc. v. Martinez*, 308 F.3d 1245 (Fed. Cir. 2002). See also discussion *infra* Part VI.A.

137. *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1363 (Fed. Cir. 1998).

138. *John Reiner & Co. v. United States*, 325 F.2d 438, 441 (Ct. Cl. 1963).

of a congressional prohibition against awarding such contracts on a fixed price basis. Among the likely reasons that *Reimer* was not discussed in *AT&T* was the Federal Circuit's view that AT&T was "a sophisticated player,"¹³⁹ to which the substantial departure from applicable statutory directives was obvious. Moreover, the court observed that AT&T had waited far too long to protest the obvious illegality.¹⁴⁰ Likewise, an express congressional prohibition on this type of contracting certainly cast doubt on the reasonableness of the Government's actions. Indeed, it is doubtful that Government's actions met the standard of benign ignorance that Justice Jackson observed in his dissent in *Merrill* when he stated that "the Government apparently no more suspected the existence of a hidden regulation that would render the contract void than did the [Merrills]."¹⁴¹ Absent more, the illegality in *AT&T* appears to have been clearly palpable, which meant that the contract was void *ab initio* and that any recovery by AT&T could only be had in *quantum meruit* if available.¹⁴² The Court did not, however, have to get to this or the possibility of AT&T's being entitled to nothing under the palpably illegal contract because, as noted earlier, a Senate committee report on § 8118 stated that "this section not be used as the basis for litigating the propriety of an otherwise valid contract."¹⁴³

The limitations on the applicability of *Reimer* and its progeny notwithstanding, *Reimer* nevertheless stands as a significant instance where, like the balancing approach and the affirmative misconduct cases, the courts have permitted a limited breach of congressional will in order to achieve a larger congressional end, i.e., a modicum of fair dealing between the Government and the citizenry.

IV. AN ANALYSIS OF SOME OF THE UNDERLYING BARRIERS TO HOLDING THE GOVERNMENT LIABLE FOR ACTIONS THAT ARE NOT SPECIFICALLY AUTHORIZED

A. *The Separation of Powers Barrier: Fact and Fiction*

In *Portmann v. United States*,¹⁴⁴ the Seventh Circuit observed that as the doctrine of sovereign immunity eroded, it became necessary to offer another justification for exempting the Government from liability for the less-than-specifically authorized actions of its agents that were nevertheless reasonably relied upon.¹⁴⁵ One such justification invoked the separation of powers doctrine.¹⁴⁶ As the court stated: "proponents argued that permitting equitable

139. *Am. Tel. & Tel. Co. v. United States*, 307 F.3d 1374, 1380 (Fed. Cir. 2002).

140. *See generally* *Trilon Educ. Corp. v. United States*, 578 F.2d 1356 (Ct. Cl. 1979).

141. *Fed. Crop Ins. Corp. v. Merrill*, 332, U.S. 380, 387 (1947).

142. *Progressive Security Agency, Inc.*, 55 Comp. Gen. 1472 (if a contract is found to be palpably illegal, "then the award may be canceled without liability to the Government except to the extent recovery may be had on the basis of *quantum meruit*").

143. S. REP. NO. 326, 100th Cong., 2d Sess. at 105 (1988).

144. 674 F.2d 1155 (7th Cir. 1982).

145. *Id.* at 1159.

146. *Id.*

estoppel against the government would, in effect, allow government employees to 'legislate' by misinterpreting or ignoring an applicable statute or regulation. Judicial validation of such unauthorized 'legislation,' it was claimed, would infringe upon Congress' exclusive constitutional authority to make law."¹⁴⁷

The separation of powers doctrine has, in fact, for some time now been at the heart of the question of whether the Government will be found liable for acts of its agents that are not specifically authorized.¹⁴⁸ The formalists assert that holding the Government liable in such an instance would cause the executive branch to exercise authority not explicitly provided by Congress.¹⁴⁹ In such situations, they indicate that courts must consider whether holding the Government responsible for its actions would impermissibly conflict with a constitutional or statutory allocation of power among the branches of Government.¹⁵⁰ When the Government is precluded from asserting a legal defense, such as the agent's lack of express authority, it is said that, "the practical effect is to impose a waiver of the regulation or statute on which the defense is based."¹⁵¹

Courts that employ the relatively strict formalist approach to constitutional construction generally support the bright-line *Merrill* approach against such waivers. On the other hand, courts that take a functional view of constitutional construction that is grounded in pragmatism generally do not and thus tend to support an objective test to determine the authority of government agents.

Commentators ascribe this lack of consistency, at least in part, to the fact that the Constitution does not contain a "Separation of Powers" clause.¹⁵² Lacking such a clause, the notion of separation of powers and its meaning comes from the basic structure of our national Government and our understanding of what the Framers of the Constitution contemplated.¹⁵³ The allocation of national power among the legislative, executive, and judicial branches "reflects the Framers' interest in limiting the opportunities for any [one] branch to accumulate too much power. . . ." ¹⁵⁴ In this respect, while the Constitution reflects the Framers' intent to allocate specific authority to each

147. *Id.* (citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *Goldberg v. Weinberger*, 537 F.2d 474 (2d Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977)).

148. Kuhlman, *supra* note 18, at 231. *See also* Thompson, *supra* note 22, at 554.

149. Quite interestingly, at the time of the Constitutional Convention in 1787, many of the Framers were concerned about dangerous intrusions into the sphere of liberty and private property by the legislative branch. *See* GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 389 (1996). Indeed, "[t]he separation of powers was . . . intended to ensure 'the protection of individual rights against all governmental encroachments, particularly by the legislature. . . .'" *Id.* (quoting GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* 609 (1969)).

150. *See* Thompson, *supra* note 22, at 558.

151. *Id.* at 565.

152. DONALD E. LIVELY ET AL., *CONSTITUTIONAL LAW: CASES, HISTORY, AND DIALOGUES* 187 (1996).

153. *Id.*

154. *Id.* at 188.

of the branches,¹⁵⁵ it also reflects a commitment to intermixing power among the branches.¹⁵⁶ That is:

Notwithstanding the vesting language, the breadth and limits of each branch's authority are textually undefined, inviting a degree of fluidity. The concept of separation of powers attributable to our Constitution thus contemplates a structure which provides for both a division and a sharing of power, a governmental framework which in practice . . . invites accommodation by the political branches.¹⁵⁷

Decisions of the Supreme Court have also contributed to the lack of clarity on the doctrine.¹⁵⁸ Indeed, the Court's treatment of separation of powers issues "appears more ad hoc than principled."¹⁵⁹ In fact, the Court has frequently responded to separation of powers problems by making political decisions "masked in lawyers' language, without offering principled analysis for its conclusions and for inconsistently applying [the] doctrine to address pragmatic concerns in a way that defeats the formulation of a consistent theory."¹⁶⁰

1. Violating the Will of Congress; What Was Congress's Will in *Merrill*?

The inconsistency noted above can be seen by comparing *Merrill's* concern that the executive branch not exceed the express will of Congress, with the numerous cases wherein the Court has permitted the executive branch to amass substantial power even without an express indication of Congress's will.¹⁶¹ As noted in *Portmann*, the rigid separation of powers analysis of *Merrill* and its progeny "contrasts sharply with the more realistic and flexible judicial approach to separation of powers problems in other areas such as legislative delegation."¹⁶²

Merrill has long been considered to be the poster child for the separation of powers doctrine. However, the question remains: just what did Congress

155. Article I vests Congress with "[a]ll legislative Powers," Article II grants the president the "executive Power," and Article III provides that the Supreme Court and such "inferior Courts as the Congress may from time to time ordain and establish" with the "judicial Power." U.S. CONST. art. I, § 1; art. II, § 1; art. III, § 1.

156. For example, Congress may be vested with legislative power, but Article I, § 7 nonetheless requires that for a bill to become law, it must be presented to the president for signature or disapproval; Article II provides the president with executive power, but § 2 of that Article requires the advice and consent of the Senate to make treaties and to appoint officers. U.S. CONST. art. I, § 7; art. II, § 2.

157. *LIVELY ET AL.*, *supra* note 152, at 188.

158. *See id.* at 187.

159. *Portmann v. United States*, 674 F.2d 1155, 1159 (7th Cir. 1982).

160. *Id.* *See also* the discussion of *Schism v. United States*, *infra* Part VI.A.

161. *See generally* *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001) (stating that the Clean Air Act's delegation of authority to the Environmental Protection Agency to set national ambient air quality standards at a level "requisite to protect public health" was not an unconstitutional delegation of legislative power). The opinion also contains a list of situations in which the Court has permitted substantial shifting of responsibility to set standards affecting broad aspects of commerce and everyday life from the legislative to the executive branch. *See id.* at 474–75.

162. *Portmann*, 674 F.2d at 1159.

provide in the *Merrill* situation that caused the Supreme Court to take such a hard line on the issue? Did Congress intend to preclude the insurance coverage that the Merrills were promised?

It has been argued that had the Merrills prevailed, they would have obtained a government benefit, i.e., insurance coverage of their crop, for which they would not have qualified in the absence of the agent's mistake and, ostensibly, the sovereign, without its consent, would have given up its absolute immunity.¹⁶³ Moreover, in those circumstances, the argument continues, liability would have been found based on an action of the executive branch that was putatively contrary to the delegation of power by Congress and, thus, in contravention of separation of power principles.¹⁶⁴

The Federal Crop Insurance Act at issue in *Merrill* provided: "Commencing with the wheat . . . crops planted for harvest in 1945 [the corporation is empowered] to insure, upon such terms and conditions not inconsistent with the provisions of this title as it may determine, producers of wheat . . . against loss in yields due to unavoidable causes, including drought. . . ."¹⁶⁵

As can be seen, there was no prohibition in the underlying congressional enactment precluding the corporation from drafting a regulation that would have permitted it to insure spring wheat to be grown on winter wheat acreage. There were no congressional commands or directives in this regard at all. Thus, none would appear to have been violated if the Government had been estopped from denying coverage in *Merrill*. Indeed, under the statute, a regulation providing for the insurance of spring wheat on winter wheat acreage would today be given substantial deference in accordance with *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*¹⁶⁶ As such, the Merrills would not have obtained any benefit that Congress expressly desired to preclude, nor would any impermissible action of the executive branch have been the cause of their obtaining any such benefit. Given Congress's delegation of broad discretion to the agency with respect to the terms of the wheat insurance program, it is difficult to conceive that granting the Merrills relief would have frustrated any identifiable congressional intent.

In this regard, it is significant to note that the lack of violation of any *statutory* prohibition is central to a number of cases in which the Government has been held responsible for actions where the limitation on the agent's authority is not known to the plaintiff because it only existed in internal agency memoranda or directives.¹⁶⁷ For example, in *American Optical Corp. v.*

163. See Ansell, *supra* note 24, at 1040.

164. *Id.* at 1037.

165. Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 381 (1947) (citing Federal Crop Insurance Act, ch. 30, § 508(a), 52 Stat. 74 (1944) (current version at 7 U.S.C. § 1508(a) (1946 & Supp. VI)).

166. 467 U.S. 837, 842-43 (1984) (in the absence of express congressional intent on the precise issue in a statute, the role of the courts is merely to see if the agency's interpretation as expressed in the regulations it promulgates "is based on a permissible construction of the statute").

167. See *In re* Forest Service, Comp. Gen. B-188607, July 19, 1977, 77-2 CPD ¶ 84 (Comptroller General indicating that a party will not be charged with any limitation on the authority

United States,¹⁶⁸ a note on an internal agency copy of an economic price adjustment clause indicated the upper limit to be stated in the clause. However, the note was found to be insufficient to impose a limitation of the authority of the Contracting Officer vis-à-vis the upper limit that could be specified. Such unpublished limitations do, however mean that there can be no express or implied authority. Accordingly, any Government liability in such circumstances must again be premised on the agent's apparent authority.

The legal presumption that all citizens know the content of the Code of Federal Regulations may, in some instances, protect important federal interests. However, it may also preclude appropriate relief even where any threat that the will of Congress is being usurped is minimal.¹⁶⁹ Indeed, as stated in *Portmann*, "reliance on a separation of powers rationale to preclude estoppel against the Government is considerably less persuasive where only an agency's own regulations are at stake than it would be where adherence to government misinformation threatens to contravene an explicit statutory requirement."¹⁷⁰

In the post-*Chevron* world, statutes are, in fact, less frequently the source of constraint on agency actions than regulations are. Accordingly, holding the Government responsible for actions that are not specifically authorized by statute would, in reality, only hold the Government liable for acts that were merely inconsistent with a policy of the executive agency, not a directive of Congress. As Professors Davis and Pierce indicate, "[t]he constitutional and statutory emphasis [taken in *Merrill* and its progeny] would not seem to apply directly to the . . . class of cases," where only an agency regulation would be transgressed by finding the Government responsible for the actions of its agent.¹⁷¹ Nevertheless, the courts regularly refuse to hold the Government liable for actions that conflict only with agency regulations by referencing the separation of powers and citing *Merrill* for the proposition that "the United States is neither bound nor estopped by its agents who act beyond their authority or contrary to statute and regulations."¹⁷²

of a government agent where that limitation is contained in nonstatutory directives issued as an expression of executive policy or to serve as an internal guide to agency action). Likewise, agencies are not legally bound to follow what is expressed in committee reports where those expressions are not explicitly carried over into statutory language. See *Newport News Shipbuilding & Dry Dock Co.*, 55 Comp. Gen. 812, 820–22 (1976); *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975). Of course, limitations on authority, such as those contained in a plaintiff's contract, or those that are otherwise obvious, will, absent more, be enforced. See, e.g., *Thoen v. United States*, 5 Cl. Ct. 823 (1984) (holding Thoen's reliance on extra-contractual promises insufficient to impose government liability).

168. 592 F.2d 1149, 1158–61 (Ct. Cl. 1979).

169. See Thompson, *supra* note 22, at 565.

170. *Portmann v. United States*, 674 F.2d 1155, 1159 (7th Cir. 1992).

171. 2 KENNETH CULP DAVIS & RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE § 13.1 (3d ed. 1994). The professors did opine, however, that the Supreme Court would likely extend its "jurisprudence to preclude estoppel in situations where the effect of the estoppel would be to require the agency to violate its own legislative rule." *Id.*

172. See, e.g., *S.J. Amoroso Constr. Co. v. United States*, 12 F.3d 1072, 1075 (Fed. Cir. 1993) (emphasis added).

Adherence to a strict approach toward the separation of powers remains evident, even in cases involving the distribution of government benefits, federal spending programs and federal contracts.¹⁷³ This is true even though the “problem” posed by a violation of separation of powers is less than compelling in such circumstances.¹⁷⁴ It may very well be appropriate to even permit a limited breach of congressional will in order to achieve a larger congressional end, i.e., a modicum of fair dealing between the Government and the citizenry. There is perhaps no better example of this than *Reiner*.

B. *The Appropriations Clause: Another Barrier?*

In *Office of Personnel Management v. Richmond*,¹⁷⁵ the Supreme Court sought to place yet another barrier in the path of suits for monetary damages against the Federal Government based on less-than-specifically authorized acts of its agents. It did so by indicating that, in the absence of specific authority for an agent’s actions, paying for the consequences of that action from the Treasury could violate the Appropriations Clause of the Constitution.¹⁷⁶ The clause provides that: “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.”¹⁷⁷

As discussed below, this “barrier” is, however, a relatively flimsy one and *Richmond* has not, therefore, served to stop many lower courts from granting plaintiffs relief in situations involving government agents with less-than-specified authorization. Among other things, this section will challenge the Court’s conclusions regarding the Appropriations Clause on the basis that action taken by an agent within the scope of his or her authority is accomplished with the authority of the Congress sufficient to justify payment.

1. *Office of Personnel Management v. Richmond*

In *Richmond*, the Supreme Court recognized that despite the clarity of its seemingly strong pronouncements in *Merrill* and its progeny, the lower courts were still granting relief to claimants who had reasonably relied on the words or deeds of government personnel that were not specifically authorized.¹⁷⁸ In reaction to what Justice Kennedy called the “obviously inadequate guidance” that earlier Supreme Court cases had provided,¹⁷⁹ the Court attempted to

173. See Thompson, *supra* note 22, at 566. See, e.g., *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990) (discussing the use of estoppel against the Government by a benefits claimant given erroneous advice by a government employee) (discussed in detail *infra* Part V).

174. See Thompson, *supra* note 22, at 566.

175. 496 U.S. 414, 424–34 (1990).

176. See *id.*

177. U.S. CONST. art. I, § 9, cl. 7.

178. See *Richmond*, 496 U.S. at 421–22.

179. See *id.*

come to the point of almost closing the courthouse door once and for all. It sought to do this not just by reaffirming that specific authorization was required to bind the Government, but by also invoking, *sua sponte*, the Appropriations Clause of the Constitution to bar paying plaintiffs for the effect of actions that were not specifically delineated in statute or regulation.¹⁸⁰ The Court's perceived need to severely limit the Government's exposure has been criticized on several bases including the grounds that

a misrepresentation by a governmental agent does not represent government policy and has not been checked by the political process. Permitting recovery on the basis of agents' misdeeds should spur the government to supervise its agents more effectively. If there were sound empirical reasons to fear collusion between governmental officials and the public, then protection against the indirect circumvention of purposeful policy might warrant immunity. But in the absence of such data, the justification for continued immunity remains elusive.¹⁸¹

Charles Richmond was a retired civilian employee of the Navy who had qualified for a disability retirement annuity, which was conditioned on his earning capacity remaining below a certain level.¹⁸² Richmond, who had taken part-time work, did not wish to exceed that level, so he asked a Navy Employee Relations Specialist what level of income would trigger the limiting condition attached to his annuity. The specialist informed Richmond that his annuity would not be affected as long as he did not earn more than 80 percent of what he earned at retirement for two consecutive years. Richmond was also given an Office of Personnel Management (OPM) pamphlet that provided the same advice.

Richmond thereafter also requested the same information from other Navy personnel, and again received the same, albeit erroneous, advice. Although the advice that Richmond had received accurately stated the law as it existed prior to 1982, it did not correctly answer Richmond's question. The current law indicated that if in any one year an annuitant earned more than 80 percent of his former salary, the annuitant would, in effect, no longer be deemed disabled and his disability pension would be suspended.¹⁸³

Relying on the outdated advice he had been given on two separate occasions, as well as the outdated OPM pamphlet, Richmond proceeded to earn in excess of the 80 percent limit, thinking that, because his earnings in the previous year had not exceeded the limit, his benefits would not be affected. They were, however, and OPM applied the one-year limitation provision and discontinued Richmond's disability annuity. Richmond was thus precluded from receiving his pension for six months until he became requalified.¹⁸⁴

180. Kuhlman, *supra* note 18, at 231.

181. Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1555 n.95 (1992) (citations omitted).

182. *See* Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 416 (1990).

183. *See id.* at 417.

184. *See id.* at 417–18.

Richmond appealed the matter to the Merit Systems Protection Board (MSPB), which ruled in favor of OPM.¹⁸⁵ He then appealed to the Federal Circuit,¹⁸⁶ which reversed and remanded the matter to the MSPB “with instructions to direct the agency to issue the withheld disability benefits to Richmond.”¹⁸⁷ The circuit court found that the Government was estopped from halting Richmond’s annuity given his reasonable reliance on the advice provided to him by government employees.¹⁸⁸

The Government appealed and the Supreme Court, in turn, reversed the Federal Circuit and, acting without the benefit of briefing or argument on the issue,¹⁸⁹ held that the OPM could not be estopped from denying the binding effect of the specialist’s erroneous advice since doing so, and thus ordering that Richmond be compensated, would violate the Appropriations Clause of the Constitution.¹⁹⁰ The Court reasoned that: “For the particular type of claim at issue here, a claim for money from the Federal Treasury, the [Appropriations] Clause provides an explicit rule of decision. Money may be paid out only through an appropriation made by law. . . .”¹⁹¹

The fact that the Court based its decision on constitutional grounds has been criticized. In particular, it has been said that “[a] rule based upon traditional equitable principles would have clarified governmental estoppel doctrine more effectively and avoided the dangers inherent in rendering an unnecessary constitutional decision.”¹⁹²

The Court also found that the existence of appropriated funds in the permanent indefinite judgment fund¹⁹³ from which Richmond’s claim could have been satisfied was insufficient to meet the requirements of the Appropriation Clause. The Court held that “funds may be paid out only on the basis of a judgment based on . . . the express terms of a specific statute.”¹⁹⁴ In its discussion, the Court noted that “[i]f an executive officer on his own initiative had decided that, in fairness, respondent should receive benefits despite the

185. See *Richmond v. Office of Personnel Mgmt.*, MSPB No. SF831L8710762, 36 M.S.P.B. 438 (Mar. 25, 1988). Richmond appealed pursuant to 5 U.S.C. § 7703(a)(1) (2000), a portion of the Civil Service Reform Act, which gives current or retired federal employees the right to appeal an adverse personnel decision made by OPM.

186. Richmond’s appeal to the Federal Circuit was made pursuant to 5 U.S.C. § 7703(b)(1) (2000).

187. *Richmond v. Office of Personnel Management*, 862 F.2d 294, 301 (Fed. Cir. 1988).

188. See *id.* The Federal Circuit concluded that “the Government’s action in providing Richmond with an OPM letter which summarized a law which had been changed some four years earlier is sufficient misconduct for estoppel to apply.” *Id.* at 299.

189. *The Supreme Court, 1989 Term: Leading Cases*, 104 HARV. L. REV. 286, 292 (1990) [hereinafter *The Supreme Court*].

190. See *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 434 (1990).

191. *Id.* at 424.

192. *The Supreme Court, supra* note 189, at 286–87.

193. 31 U.S.C. § 1304 (1994). The statute provides a permanent indefinite appropriation from which to pay most litigative and many administrative awards against the United States. See detailed discussion *infra* Part V.B.

194. *Richmond*, 496 U.S. at 432.

statutory bar, the official would risk prosecution” for violating the prohibition contained in the Anti-Deficiency Act¹⁹⁵ or knowingly spending money in excess of that appropriated by Congress. It also held that what Richmond sought, i.e., a court order to effect the same result, highlighted the weakness and novelty of his claim.¹⁹⁶ The Court further indicated that even it lacked the authority to order the payment that Richmond sought.¹⁹⁷

The above statements, particularly the latter one, are quite curious because the statute under which the Federal Circuit was empowered to review the Merit System Protection Board’s decision provided it with authority to, among other things, “set aside any agency action, findings, or conclusions found to be—(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁹⁸ Thus, when the Federal Circuit set aside the OPM’s declaration of Richmond’s temporary ineligibility, the OPM had no basis *not* to pay Richmond what was owed him under the disability annuity statute.¹⁹⁹ Accordingly, even if the Court were not authorized to order the payment, no such order was necessary to effectuate the payment.

By holding that money can only be obligated pursuant to substantive law or regulations, the Supreme Court was merely repeating the specific authorization requirement set out in *Merrill*,²⁰⁰ i.e., funds from the Treasury can be spent only pursuant to the express wishes of Congress.²⁰¹ The prime-motivating factor for the Court’s use of the Appropriations Clause to buttress its position on the need to maintain the separation of powers appears to have been its clear and continuing concern for protecting the public fisc. In this regard, the Court restated the long-held fear that if the normal rules of authority applied to the Government, the Treasury would be vulnerable to liability that could not be foreseen, controlled, or prevented by Congress and that such financial exposure does not comport with fundamental notions of sovereignty, nor with constitutional provisions regarding the appropriation of public funds.²⁰² That the Court also believed that the lower courts had continued to keep open the floodgates to an ongoing onslaught of generally frivolous litigation is apparent from its statement denigrating estoppel claims against the Government because “[i]t ignores reality to expect that the Government will be able to ‘secure perfect performance from its hundreds of thousands of employees scattered throughout the continent.’”²⁰³ That said,

195. 31 U.S.C. §§ 1341, 1350 (1988).

196. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 430 (1990).

197. *Id.* at 416.

198. 5 U.S.C. § 7703(c) (2000).

199. 5 U.S.C. § 8102 (2000).

200. *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947).

201. *See Pitou*, *supra* note 68, at 628.

202. *See* Kenneth M. Williams, *Office of Personnel Management v. Richmond: Estopping the Government—a Brighter Line?*, 1 WIDENER J. PUB. L. 455, 464 (1992); Matthew D. Zinn, *Ultra Vires Takings*, 97 MICH. L. REV. 245, 256 (1988).

203. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 433 (1990) (citing *Hansen v. Harris*, 619 F.2d 942, 954 (2d Cir. 1980) (Friendly, J., dissenting), *rev’d sub nom.* *Schweiker v. Hansen*, 450 U.S. 785 (1981)).

the Court nevertheless refused to embrace a rule saying that estoppel could never lie against the Government,²⁰⁴ choosing instead what it said was a narrower ground of decision—the inability to pay a claim “from the treasury contrary to a statutory appropriation.”²⁰⁵

This allegedly “narrower ground of decision” has, however, given rise to the criticism that the Court went too far in *Richmond* in several different respects.²⁰⁶ Among the most cogent of these criticisms is the one relating to the meaning of, and practice under, the Anti-Deficiency Act,²⁰⁷ “one of the two main statutes Congress has enacted to implement the [A]ppropriations [C]ause.”²⁰⁸ The Act enjoins “mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation.”²⁰⁹ In other words, “[i]t forbids the executive to spend more than the aggregate amount allotted to a given activity.”²¹⁰ However, the Act contains no admonition, penalty, or outright prohibition on an agency’s “negligently spending or committing available funds contrary to the substantive standards prescribed by Congress.”²¹¹ This permissiveness would seem to be an entirely proper interpretation of the Appropriation Clause’s commands, particularly given “Congress’ ‘plenary power to give meaning to the [Appropriations Clause].’”²¹²

The permissive interpretation of the Appropriations Clause, which the Anti-Deficiency Act represents, responds to the *Richmond* court’s insinuation that “[i]f agents of the Executive were able, by oral or written statements to citizens to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress, in effect could be transferred to the Executive.”²¹³ That is, the Anti-Deficiency Act, as it has been interpreted, would seem to indicate that any such obligation of funds was not necessarily inconsistent either with the will of Congress or with Congress’s longstanding interpretation of the Appropriations Clause. While the Court in *Richmond* felt otherwise, actions of the executive, to the extent that it is concluded that they were accomplished with implied or apparent authority, would thus certainly seem to allow the courts to order payment with no worry about violating the Appropriations Clause.²¹⁴

204. The Court did note that “[a]s for monetary claims, it is enough to say that this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds.” *Richmond*, 496 U.S. at 434. This statement, however, “appears to be incorrect.” Kuhlman, *supra* note 18, at 247. For example, in his concurring opinion in *Richmond*, Justice White expressed his view that the 1973 case of *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973), “may well have been decided on the basis of estoppel.” *Richmond*, 496 U.S. at 434 (White, J., concurring).

205. *Richmond*, 496 U.S. at 423–24.

206. See *The Supreme Court*, *supra* note 189, at 294.

207. 31 U.S.C. § 1341 (1988).

208. *The Supreme Court*, *supra* note 189, at 294.

209. *Id.* at 295 (quoting 31 U.S.C. § 1341(a)(1)(1994)).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990).

214. See discussion *infra* Part V.B.

Given the interpretation of the Appropriations Clause that the Anti-Deficiency Act represents, there was no need for the Court to have based *Richmond* on a wholly independent and novel view of the mandates of the Clause, a point that was certainly not lost on the dissenters.²¹⁵ “The early government estoppel cases . . . scrupulously avoided basing decisions on the sovereignty of the governmental litigant”;²¹⁶ rather those cases were decided more in accordance with the notion, represented in Supreme Court cases such as *The Siren*, that “judicial limitations on the power of the executive [are] regarded as problematic and [that] limitations on government estoppel developed to protect against that danger.”²¹⁷

Richmond appears to have been intended to send the message that “the proper grounds for estopping the Government are much narrower than many lower courts had heretofore realized.”²¹⁸ However, despite this message, some lower courts have refused to slam the courthouse door shut to claimants who have substantial cases that the Government should bear the burden of less-than-specifically authorized acts of its agents.²¹⁹ This is consistent with the predictions that *Richmond*’s “message” to the lower courts would not have a significant impact on the adjudication of estoppel-type claims against the Government and that the lower courts would continue to have little trouble binding the Government in egregious cases.²²⁰ After all, on at least two previous occasions, *Utah Power & Light Co. v. United States*²²¹ and *Merrill*, the Court forcefully announced a prohibition on binding the Government with respect to actions not expressly authorized by Congress. However, in each instance, the rule was received with mixed results.²²² Indeed, as noted above, after a period of compliance, in *Georgia-Pacific*, the balancing approach cases, and others, the lower courts started finding the Government culpable for the egregious conduct of its agents or where the losses sustained by the plaintiff were severe.²²³

Another possible reason for the predictions that *Richmond* would not achieve the Supreme Court’s objective is the fact that many lower courts simply do not share the Court’s longstanding commitment to the formalistic approach to this subject, but rather take the functionalist view that authority

215. For a discussion of Justice Marshall’s dissenting opinion, see *infra* note 231 and accompanying text.

216. Kuhlman, *supra* note 18, at 237 (discussing *The Siren*, 74 U.S. 152, 154 (1868)).

217. *See id.*

218. *Id.* at 273. *See Richmond*, 496 U.S. at 422–23; *see also The Supreme Court*, *supra* note 189, at 296.

219. *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1367–68 (Fed. Cir. 1998). Many lower courts do not appear to agree that political resolution of such disputes is a viable solution.

220. Williams, *supra* note 202, at 477; *see also The Supreme Court*, *supra* note 189, at 286 (“[R]eliance on the appropriations clause of the Constitution to ground the *Richmond* holding may diminish the effectiveness of the decision and give rise to unintended consequences for appropriations clause jurisprudence.”).

221. 243 U.S. 389 (1917).

222. Williams, *supra* note 202, at 476.

223. *See Saltman*, *supra* note 34, at 508–12.

should be determined on an objective basis. Furthermore, many of the lower courts recognize that rules rendering the Government totally immune from liability for its actions “undermine the public interest in fairness and ‘some minimum standard of decency, honor, and reliability in their dealings with their Government.’”²²⁴ Stated another way, in his excellent treatment of the subject in 1991, Frederick Kuhlman observed that “as the authority of the individual government official increases, or as the difficulty of ascertaining the law increases, the reasonableness of the private individual’s reliance increases, and the more loudly equity will call out for the application of estoppel.”²²⁵ Another possible explanation for the lower courts’ differing approach is that the Court’s rulings in cases like *Richmond* and *Merrill* ignore simple concepts such as the fact that no agent of the Government has express authority to breach a contract or to act negligently. Rather, such “unauthorized” actions are simply done within the scope of the agent’s authority, and yet there appears to be no barrier under Article I, Section 9 of the Constitution to ultimate payment for these actions.

Indeed, this certainly is true where the matter has been the subject of appropriate judicial scrutiny and a judicial order requiring a government official to make payment of federal funds.²²⁶ Moreover, cases going back as far as *United States v. Corliss Steam-Engine Co.*²²⁷ have held that executive agencies have the authority to settle and pay claims for breach of contract.

These points were recognized by Justice Stevens in his concurring opinion in *Richmond* and by Justices Marshall and Brennan in their dissents. Each concluded that the disability payments at issue in *Richmond* could have been made without running afoul of the Appropriations Clause.²²⁸ As Justice Stevens stated:

Payments of pension benefits to retired and disabled federal servants are made “in Consequence of Appropriations made by Law” *even if in particular cases they are the product of a mistaken interpretation of a statute or regulation*. The Constitution contemplates appropriations that cover programs—not individual appropriations for individual payments. The Court’s creative reliance on constitutional text is nothing but a red herring.²²⁹

This view was echoed by Justice Marshall in his dissent:

The majority acknowledges that Congress *has* appropriated funds to pay disability annuities in 5 U.S.C. § 8348(a), but holds that the fund created is intended for the payment of benefits only “as provided by” law, (quoting § 8348(a)(1)(A)). * * *

The Court need not read the statute so inflexibly, however. When Congress passes a law to provide a benefit to a class of people, it intends and assumes that the

224. Williams, *supra* note 202, at 478 (quoting *Heckler v. Cmty. Health Servs., Inc.*, 467 U.S. 51, 61 (1984)).

225. Kuhlman, *supra* note 18, at 262.

226. See discussion *infra* in Part IV.B.ii. concerning Congress’s delegation of its power to claims and provide an appropriation to pay them.

227. 91 U.S. 321, 323 (1875).

228. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 435 (1990) (Stevens, J., concurring).

229. *Id.* at 435 (Stevens, J., concurring) (emphasis added).

Executive will fairly implement that law. Where necessary to effectuate Congress' intent that its statutory schemes be fully implemented, this Court therefore often interprets the apparently plain words of a statute to allow a claimant to obtain relief where the statute on its face would bar recovery.²³⁰

Moreover, as Justice Marshall alluded in his dissent, if the majority in *Richmond*, in desiring to close the door on money claims based on less-than-explicitly authorized acts of government representatives, is correct in its strict construction of the constitutional obligation that "funds may be paid out only on the basis of a judgment based on . . . the express terms of a specific statute,"²³¹ then compensation in many existing circumstances where it is presently paid would be in jeopardy as well.²³² He specifically noted that:

The Court does not decide whether the Appropriations Clause would bar the Judiciary from ordering payments from the Treasury contrary to a statutory appropriation either where such payment would be required to remedy a violation of another constitutional provision, such as the Due Process or Just Compensation Clause, or where Congress' refusal to appropriate funds would violate separation of powers.²³³

Justice Marshall's fear was not totally founded. Even the majority recognized the availability of a general appropriation to pay judgments rendered in suits brought under various statutes authorizing suit against the Government such as the Federal Tort Claims Act²³⁴ and the Tucker Act.²³⁵

It is important to keep in mind that *Richmond* was not a suit for money brought under the Tucker Act.²³⁶ However, as discussed *supra*, this fact did not justify the Court's position that payment could not be made from the Treasury.

As Justice Marshall further noted, prior to *Richmond*, the Supreme Court "never so much as mentioned the Appropriations Clause in the context of a discussion of equitable estoppel . . . nor has the majority's theory ever before been discussed, much less adopted, by any court."²³⁷ The majority retorted: "We have not had occasion in past cases presenting claims of estoppel against the Government to discuss the Appropriations Clause, for reasons that are apparent,"²³⁸ i.e., the supposedly "strict rule against estoppel applied as early

230. *Id.* at 438 (citations omitted) (Marshall, J., dissenting).

231. *Id.* at 432.

232. As one scholar has noted:

In addition, there are indications in *Richmond* that the Court reads the appropriations clause to forbid not only the disbursement of federal funds in direct violation of a statute but also the disbursement of funds when no statute specifically authorizes it. If the latter reading is correct, as the plain language of the clause suggests, the Court may have unwittingly established a constitutional fountainhead for federal sovereign immunity, at least as to money claims.

The Supreme Court, supra note 189, at 295.

233. *Richmond*, 496 U.S. at 437 n.* (Marshall, J., dissenting).

234. 28 U.S.C. § 1345 (1994).

235. 28 U.S.C. § 1491(a)(1) (1994). See *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 431 (1990).

236. See *Richmond*, 496 U.S. at 431.

237. *Id.* at 443 (citations omitted).

238. *Id.* at 426.

as 1813,²³⁹ and the supposed dismissal of all estoppel cases thereafter. The majority's reasons are not, however, sufficiently apparent. Moreover, the majority did not respond to Justice Marshall's point that none of the lower courts that have bound the Government for statutorily unauthorized actions of its agents have examined the Appropriations Clause argument. Indeed, if viable, one would think the Appropriations Clause argument would have been included in every Justice Department brief where there was an issue relating to estoppel, apparent authority, or the like.

In sum, the Court's conclusion in *Richmond* that the Appropriations Clause generally prohibits the executive branch from paying, or even a court from ordering payment, for the consequences of an act that was less-than-specifically authorized is a questionable one. Moreover, the specific conclusion that the Appropriations Clause prohibited paying Mr. Richmond his disability payments is equally doubtful.

2. Use of the Judgment Fund in Light of *Richmond*

As noted above, in *Richmond* the Court eschewed the existence of the general appropriations of funds available to pay judgments against the United States, i.e., the Judgment Fund,²⁴⁰ as a mechanism to pay the respondent.²⁴¹ The potential breadth of this announced inability of the courts to use the Judgment Fund is, needless to say, critical to many potential litigants against the Government.

Indeed, most judgments against the United States (as well as many tort claims settled prior to litigation) are paid out of the Judgment Fund rather than from monies appropriated by the act authorizing the governmental action or contract in issue.²⁴² By this, it has been said that the requirement of Article I, Section 9, which mandates that expenditures be authorized by the legislature, has, in fact, been met.²⁴³ The majority in *Richmond* noted that "Congress has, of course, made a general appropriation of funds to pay judgments against the United States rendered under its various authorizations for suits against the Government, such as the Tucker Act and the [Federal Tort Claims Act] FTCA."²⁴⁴ However, the Court further noted that the Judgment Fund "does not create an all-purpose fund for judicial disbursement."²⁴⁵ This conclusion, however, is very questionable.

Just as Justice Marshall suggested in his dissent, the majority's position is undercut in part by the numerous circumstances in which money from the

239. *Id.* (citing *Lee v. Munroe & Thorton*, 11 U.S. (7 Cranch) 366 (1813)).

240. *See* 31 U.S.C. § 1304 (1994).

241. *See* *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 432 (1990).

242. *See* 31 U.S.C. § 1304 (1994).

243. *See* *Glidden Co. v. Zdanok*, 370 U.S. 530, 551–53 (1962), discussing Congress's delegation of its authority to hear, pass on private claims against the United States, and issue judgments that required no further review by either the Congress or the executive branch in order to be paid.

244. *Richmond*, 496 U.S. at 431.

245. *Id.* at 432.

Treasury is routinely paid pursuant to judgments that are not premised on a substantive right to compensation based on the express terms of a specific statute; in addition to the payments in taking cases under the Fifth Amendment to which Justice Marshall referred, payments made under improper but not “palpably illegal” contracts,²⁴⁶ monetary remedies fashioned under a court’s inherent equitable powers,²⁴⁷ and damages for breach of contract are other examples.²⁴⁸ If paying disability benefits to Richmond out of the Judgment Fund violates the Constitution, so too might any other expenditure of federal money not strictly in accordance with explicit congressional direction. For example, “[l]itigation concerning . . . misallocations of federal resources, tax refund suits, or disputes over government contracts awarded pursuant to statutory guidelines might, [would] all assume constitutional dimensions.”²⁴⁹

In reaching its conclusion about the need for a specific appropriation in order to pay a plaintiff, the majority in *Richmond* relied primarily on the 1851 case of *Reeside v. Walker*,²⁵⁰ in which the Supreme Court addressed a claim brought by the holder of a judgment of indebtedness against the United States. Reeside asked that the Court order the Secretary of the Treasury to enter the claim upon the books of the Treasury so that the debt might be paid. Rejecting the petitioner’s claim for relief, the *Reeside* Court found:

The difficulty in the way [of making payment] is the want of any appropriation by Congress to pay this claim. It is a well-known constitutional provision that no money can be taken or drawn from the Treasury except under an appropriation by Congress.

However 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.²⁵¹

The Court in *Reeside* went on to say: “Hence, the petitioner should have presented her claim on the United States to Congress, and prayed for an appropriation to pay it.”²⁵²

As the Court recounted in *Richmond*, “Congress’ early practice was to adjudicate each individual money claim against the United States, on the ground that the Appropriations Clause forbade even a delegation of individual

246. See, e.g., *Trilon Educ. Corp. v. United States*, 578 F.2d 1356 (Ct. Cl. 1979); *John Reiner & Co. v. United States*, 325 F.2d 438, 440 (Ct. Cl. 1963); *Fink Sanitary Serv.*, 53 Comp. Gen. 503, 507 (1974).

247. See, e.g., *Pauley Petroleum, Inc. v. United States*, 591 F.2d 1308, 1315 (Ct. Cl. 1979).

248. *Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574, 1581 (Fed. Cir. 1993), and its progeny clearly indicate that contract cases will be viewed by the federal circuit as being outside of the holding and analysis of *Richmond*. But see *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1433–34 (Fed. Cir. 1998) (stating that contractual obligations imposed on the Government will not be enforced if the Contracting Officer was not authorized to enter into the contract).

249. *The Supreme Court*, *supra* note 189, at 295.

250. 52 U.S. 272 (1851).

251. *Id.* at 291 (citations omitted).

252. *Id.*

adjudicatory functions where payment of funds from the treasury was involved.²⁵³ However, as the business of the federal legislature grew, Congress, so as to be relieved of the pressure caused by the volume of private bills,²⁵⁴ placed the individual adjudication of claims based on the Constitution, statutes, or contracts, or on specific authorizations of suit against the Government, in the hands of the Court of Claims, which it established in 1855.²⁵⁵ The Court of Claims, just as its present day successor, the Court of Federal Claims, was not an Article III court. Rather, it was created pursuant to Article I and therefore resides in the congressional not the judicial branch of the Government. This fact notwithstanding, in 1863 Congress passed additional legislation making the court's judgments final and not subject to congressional review,²⁵⁶ and in 1887 passed the Tucker Act²⁵⁷ giving the court permanent specific jurisdiction to adjudicate individual claims based on the Constitution, statutes, or contracts.

As the Supreme Court observed in *Glidden Co. v. Zdanok*,²⁵⁸ despite these laws, the Court of Claims historically was often impotent to enforce its judgments and early on also suffered from the revisory authority of the Secretary of the Treasury²⁵⁹ and the lack of appropriation by which to pay judgments. The scope of these problems was, however, substantially reduced by Congress's establishment of the Judgment Fund in 1956²⁶⁰ in response to a recommendation from the General Accounting Office that Congress enact permanent general appropriations for judgments against the United States.²⁶¹ Prior to the establishment of the fund, "each federal agency had to request a specific appropriation [from Congress] to pay a judgment for which it did not have available funds."²⁶² The fund represents a "permanent, indefinite appropriation available to pay most litigative and many administrative awards against the United States"²⁶³ including claims under the Tucker Act, the Fed-

253. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 430 (1990) (citing *W. Cowen et al., The United States Court of Claims, A History*, 216 Ct. Cl. 1, 5 (1978)).

254. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 552 (1962).

255. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612. In 1982 Congress passed the Federal Courts Improvement Act, 28 U.S.C. §§ 171-77, which transferred the functions of the Court of Claims to the newly created Court of Appeals for the Federal Circuit and the United States Claims Court (later renamed the United States Court of Federal Claims).

256. Act of Mar. 3, 1863, ch. 92, § 5, 12 Stat. 765, 766 (adopting the recommendation of President Lincoln in his State of the Union speech of 1861).

257. Tucker Act of 1887, § 1, 24 Stat. 505 (codified as amended at 28 U.S.C. § 1346 (1994)).

258. 370 U.S. 530 (1962).

259. *Id.* at 554-55.

260. Supplemental Appropriations Act of 1957, § 1302, 70 Stat. 678, 694 (1956) (codified as amended at 31 U.S.C. § 1304).

261. See Vacketta & Kantor, *Obtaining Payment from the Government's "Judgment Fund,"* 97-3 BRIEFING PAPERS, Feb. 1997.

262. *Id.*

263. Joseph Summerill, *The Judgment Fund: When Can It Be Used?*, *CONT. MGMT.*, Dec. 2000, at 22. See also *Matter of Availability of Expired Funds for Nonmonetary Judicial Awards*, 70 Comp. Gen. 225 (1991).

eral Tort Claims Act,²⁶⁴ and the Contract Disputes Act. However, it represents a conditional delegation of authority by the Congress to the executive branch to make payments to injured citizens. In order for an executive branch to utilize the fund, there must be a monetary award against the United States or a settlement agreement. In the latter regard, the settlement must either be reviewed by a Board of Contract Appeals,²⁶⁵ be made by the Attorney General (or his representative),²⁶⁶ or be the “direct result of [a court or] board-sponsored alternative dispute resolutions [procedure].”²⁶⁷

Despite Congress’s creation of the Judgment Fund, the Court in *Richmond* not only stated that its existence was insufficient to comply with the Appropriations Clause,²⁶⁸ but further indicated that “[t]he command of the [Appropriations] Clause is not limited to the relief available in a judicial proceeding seeking payment of public funds”²⁶⁹ because “[i]f it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure.”²⁷⁰ The Court also noted that in numerous other contexts where the possibility of significant detrimental reliance on the erroneous advice of government agents existed, Congress had provided appropriate legislative relief in the form of congressional reference cases where Congress refers proposed private bills to the Court of Federal Claims for an advisory determination of the merits of the claim.²⁷¹

The Court’s concern that, unless access to the Judgment Fund were severely limited, the executive branch could become a spendthrift ignores the fact that the fund can be tapped only when there has been approval by a Court, a Board of Contract Appeals, or the Attorney General. The situation does not require a return, as the Court suggested, to the days when only Congress could decide if a claim were worthy and then provide money to pay it, i.e., a time when a claimant “presented [his] claim [against] the United States to Congress, and *prayed* for an appropriation to pay it.”²⁷² Indeed, this suggestion has been criticized for its making a “textually demonstrable constitutional commitment of the issue to a coordinate political department,”²⁷³ and thus, for the first time, turning the issue of holding the Government liable for the less-than-specifically authorized acts of its agents into a political one,

264. See generally Vacketta & Kantor, *supra* note 261.

265. See Summerill, *supra* note 263, at 24.

266. See 28 U.S.C. § 2414 (2003).

267. Summerhill, *supra* note 263. See, e.g., Camp Dix Wood Prod., AGBCA No. 98-183-1, 1999 WL 115196 (Mar. 5, 1999).

268. See *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 432 (1990).

269. *Id.* at 425.

270. *Id.* at 427.

271. *Id.* at 431.

272. *Reese v. Walker*, 52 U.S. 272, 291 (1851) (emphasis added). It has been said that the Supreme Court’s recitation of a litany of political remedies to which the victim of a governmental reversal of position may turn demonstrates that recasting the matter as a political question to be resolved other than in the courts was quite deliberate. See Kuhlman, *supra* note 18, at 254.

273. *Baker v. Carr*, 369 U.S. 186, 217 (1962), cited in Kuhlman, *supra* note 18, at 254.

something beyond the competence of the judiciary.²⁷⁴ It is also impractical in the extreme.

Long ago, Congress rejected the practice of resolving such disputes within its busy halls and delegated power to various judicial bodies to determine whether a claim founded in tort²⁷⁵ or on the Constitution, statutes, or a contract²⁷⁶ was meritorious. More importantly, Congress further authorized the executive branch to pay out monies from the Judgment Fund when directed to do so by these judicial bodies. Congress did the same thing with regard to claims under the Contract Disputes Act pursuant to which both the Court of Federal Claims and the executive branch, in the form of agency Boards of Contract Appeals, were delegated the power to both review the merits of contract claims and, as appropriate, to issue a decision that, in turn, authorized the payment of funds from the Judgment Fund. Accordingly, to the extent that executive spending of monies appropriated by Congress (in the form of the permanent indefinite Judgment Fund) is premised on scrutiny through specific powers delegated by the Congress to the judiciary (or the executive) branch to review the facts and applicable law of each case, the Appropriations Clause issue raised in *Richmond* would seem to be of no concern.²⁷⁷ Generally, judges “can determine whether a breach exists without second-guessing government policy. In [applying the facts and law to a term in] the contract, for instance, a court would no more threaten agency formulation of policy than it does routinely by construing statutes or agency regulations.”²⁷⁸ While this would mean that, absent more, executive agencies could not expend money based on the actions of their agents that are not expressly authorized, without a congressional or congressionally delegated review, it certainly does not mean that the Appropriations Clause precludes estoppel against the Government in all or perhaps even most cases.

3. The Post-*Richmond* Era: Where and How Has *Office of Personnel Management v. Richmond* Been Applied?

Not surprisingly, the holding in *Richmond* has been used in a number of cases to reinforce the limited availability of estoppel,²⁷⁹ although, on occasion,

274. *Id.*

275. Federal Tort Claims Act, 28 U.S.C. § 1345(b) (2003).

276. See The Contract Disputes Act of 1978, 41 U.S.C. § 601 (2000); The Tucker Act of 1887, § 1, 24 Stat. 505 (1887).

277. That Congress conditionally has delegated the authority to pay claims of varying types to other branches of Government based on their review of the facts and circumstances involved is also evident in 31 U.S.C. § 3702, which empowers various executive agencies to resolve various types of citizen claims and in this instance make payment from existing appropriations.

278. Krent, *supra* note 181, at 1565.

279. See, e.g., *Deaf Smith County Grain Processors, Inc. v. Glickman*, 162 F.3d 1206 (D.C. Cir. 1998); *Michigan v. City of Allen Park*, 954 F.2d 1201 (6th Cir. 1992); *Monongahela Valley Hosp., Inc. v. Sullivan*, 945 F.2d 576 (3d Cir. 1991); *Parmenter v. Fed. Deposit Ins. Corp.*, 925 F.2d 1088 (8th Cir. 1991); *Spiroff v. United States*, 95 F. Supp. 2d 673 (E.D. Mich. 2000); *Smith S, Inc. v. Commissioner*, 837 F. Supp. 130 (E.D.N.C. 1993); *Sta-Home Health Agency, Inc. v.*

it has been used in other most interesting and unpredicted ways.²⁸⁰ While suggestions to apply *Richmond*, and, thus, preclude binding the Government, have been rejected in some cases,²⁸¹ the specter of a possible Appropriations Clause violation that the Court raised in *Richmond* has had a limiting effect on plaintiffs' ability to obtain monetary relief in cases brought under statutes other than the Tucker Act, the Contract Disputes Act, or the Federal Tort Claims Act.²⁸²

This limiting effect was evident in the case of *Dun & Bradstreet Corp. Foundation v. United States Postal Service*,²⁸³ in which the Second Circuit, relying on *Richmond*, rejected Dun & Bradstreet's (D&B) claim of detrimental reliance on a postal service employee's representations that D&B would be entitled to a refund for certain mailings if it made them at regular, rather than special, rates.²⁸⁴ Relying on the holding in *Richmond*, the Second Circuit reached a conclusion that was the antithesis of the pre-*Richmond* decision in *Portmann v. United States*, in which the Government was held to the unauthorized statement of its agent that plaintiff's photographs were insured for \$50,000.²⁸⁵ Similarly, in *United States v. Swick*, the court held that even if a former Air Force Academy cadet who had been dismissed for misconduct had been promised that he would be able to repay his obligation to the Air Force for his education through enlisted service, the Government would not be bound by any such statements, since they would have the effect of depriving the United States of public funds, i.e., the statutory ability to recover the cost of the cadet's education.²⁸⁶

Lastly, and again not surprisingly, *Richmond* has also been cited in a number of cases in which the courts have refused to extend statutory benefits to claimants who failed to fully comply with statutory requirements.²⁸⁷ Many of these

Shalala, 1993 WL 475516 (S.D. Miss. 1993); *United States v. Alaska Pub. Util. Comm.*, 800 F. Supp. 857 (D. Alaska 1992); *Meyer v. United States*, 1992 WL 403102 (S.D. Cal. 1992).

280. *See Maryland Dep't. of Human Res. v. U.S. Dep't. of Agric.*, 976 F.2d 1462 (4th Cir. 1992) (By issuing a preliminary injunction preventing USDA from exercising statutory authority to recover funds drawn on the federal treasury in violation of the Food Stamp Act, the district court effectively transferred federal funds to the State of Maryland without an appropriation. Such judicial action offends the Appropriations Clause no less than does a constitutionally impossible estoppel claim for money in violation of a statute.). *See also DeTienne v. DeTienne*, 1993 WL 108071 at *2 (D. Kan. 1993) (court refused to allow the Social Security Administration to use *Richmond* offensively to set aside a judgment previously entered against it garnishing some \$8,596 of Social Security benefits to pay past-due alimony and child support).

281. *See, e.g., Bunting v. R.R. Ret. Bd.*, No. 92-3879, 1993 U.S. App. LEXIS 24663 (6th Cir. Sept. 22, 1993) (unpublished table decision); *Howard Bank v. United States*, 759 F. Supp. 1073 (D. Vt. 1991).

282. *See, e.g., De Sanchez v. United States*, No. 98-16973, 1999 U.S. App. LEXIS 30079 (9th Cir. Nov. 16, 1999).

283. 946 F.2d 189 (2d Cir. 1991).

284. *See id.* at 194-95.

285. 674 F.2d 1155, 1156 (7th Cir. 1982).

286. 836 F. Supp. 442, 445-46 (S.D. Ohio 1993).

287. *See, e.g., Schim v. United States*, 316 F.3d 1259, 1284 (Fed. Cir. 2002) (en banc), *cert. denied*, 2003 WL 835021, 71 U.S.L.W. 3567, 71 U.S.L.W. 3746, 71 U.S.L.W. 3750 (U.S. June 2, 2003) (No. 02-1226), discussed *infra* Part VI.C; *JANA, Inc. v. United States*, 936 F.2d 1265,

cases involve claimants' failure to complete or submit proof-of-loss forms within the statutory time period provided under the National Flood Insurance Program.²⁸⁸

Of course, different results would likely have been reached in *Dun & Bradstreet*, *Swick*, and other post-*Richmond* cases if the courts had recognized that actions taken by an agent within the scope of his or her authority do not, even if negligent or erroneous, necessarily commit appropriated funds contrary to the proscriptions established by Congress.

a) *Burnside-Ott Aviation Training Center v. United States:*

What Appropriations Clause Issue?

One of the first significant cases addressing the issue of government estoppel after *Richmond* was the 1993 Federal Circuit decision in *Burnside-Ott Aviation Training Center v. United States*.²⁸⁹ In *Burnside-Ott*, the Navy initially represented that technicians were included in the classes of workers that could be employed under the contract in issue.²⁹⁰ However, the Navy subsequently dropped technicians as a class employed on such contracts, something that caused the Department of Labor to order *Burnside-Ott* to retroactively reclassify its technicians as higher-paid aircraft workers.²⁹¹ *Burnside-Ott* filed a claim under the Contract Disputes Act in which it asserted equitable estoppel based on the Navy's conduct—namely, verbal representations of support and acquiescence by silence over the course of three separate contracts, during which the Navy had encouraged *Burnside-Ott's* classification of these employees as technicians.²⁹² The Claims Court concluded that the contractor's estoppel claim was barred as a matter of law, noting that in *Richmond* the Supreme Court had “all but slammed closed the door on equitable estoppel claims against the Government.”²⁹³

On appeal, the Federal Circuit reversed, holding that “the Claims Court erred in concluding that *Richmond* [stood] for the proposition that equitable estoppel will not lie against the Government for any monetary claim.”²⁹⁴ It

1270 (Fed. Cir. 1991); *Chanda v. United States Office of Pers. Mgmt.*, 841 F. Supp. 432, 437–38 (D.D.C. 1993).

288. See, e.g., *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 391 (9th Cir. 2000) (finding that “[*Richmond*] preclude[s] a court from granting a remedy that draws funds from the Treasury in a manner that is not authorized by Congress. In light of that conclusion, it is clear that a claimant under a standard flood insurance policy may not avoid strict enforcement of the 60 day sworn proof of loss requirement, except through a valid waiver by the Federal Insurance Administrator.”); see also *Forman v. Fed. Emergency Mgmt. Agency*, 138 F.3d 543, 546 (5th Cir. 1998). For a discussion of how such results could have been easily avoided, see *infra* note 417 and accompanying text.

289. 985 F.2d 1574 (Fed. Cir. 1993).

290. *Id.* at 1575.

291. *Id.*

292. *Id.* at 1576–77.

293. *Burnside-Ott Aviation Training Ctr. v. United States*, 24 Cl. Ct. 553, 564 (1991), *rev'd*, 985 F.2d 1574 (Fed. Cir. 1993).

294. *Burnside-Ott*, 985 F.2d at 1580–81.

noted that *Richmond* was not that broad, being limited instead to “claim[s] for the payment of money from the Public Treasury *contrary to a statutory appropriation*.”²⁹⁵ Because Burnside-Ott’s assertion of the right to reimbursement was grounded in contract rather than statute, and it did not claim entitlement contrary to statutory eligibility criteria, as did the plaintiff in *Richmond*, the Federal Circuit was able to deftly conclude that neither the holding nor analysis in *Richmond* was applicable.²⁹⁶ The Federal Circuit took a similar view in *Gould, Inc. v. United States*, wherein it again found that *Richmond* was inapplicable to contract claims against the Government stating that “[i]t would be stretching *Richmond* totally out of context to apply it here.”²⁹⁷

This is not to say that the Federal Circuit was unmindful of *Richmond*. In his dissent in *American Telephone & Telegraph Co. v. United States*, discussed in detail *supra* in Part III.F, Judge Plager noted:

[T]he court recognizes the language of the Act to expressly prohibit the use of Government funds for such a contract, the obvious and ineluctable conclusion would appear to be that there was no contract, since as a matter of law such contracts were prohibited, and since there could be no consideration offered for the contractor’s promised performance. . . .

Omitting the inapplicable exception language and its related provisos, the operative words of the statute are clear and to the point: “None of the funds provided for the [DoD] in this [Appropriations] Act may be obligated or expended for fixed price-type contracts” It is a rule of constitutional law that, in absence of an express appropriation, agencies may not spend, and *a fortiori* cannot validly contract to spend, any federal dollars The Supreme Court earlier reversed us when in another context we failed to properly apply that principle. . . .

Here, we do not have simply an omission of authorization to expend; we have an outright prohibition: “None of the funds [otherwise appropriated] may be expended” for the precise purpose for which the DoD contracted. Surely it should not be necessary for Congress to have added: “and we mean it,” or perhaps, “and we mean it, and if you try, it won’t be any good, so don’t even bother.”²⁹⁸

Did the Federal Circuit in *Burnside-Ott* and *Gould* deliberately ignore the Supreme Court’s decision in *Richmond*? Not at all; the course charted by the Federal Circuit was consistent with both *Richmond* and other long-standing propositions of law regarding sovereignty. Not only did the court recognize the availability of the Judgment Fund to pay for judgments against the Government in cases such as those brought under the Tucker Act and other statutes authorizing suit involving contracts,²⁹⁹ but it has long been held that “in ordinary contractual relations with its citizens, the Government enjoys the same privileges and assumes the same liabilities as does its citizens.”³⁰⁰ The

295. *Id.* at 1581.

296. *See id.* at 1574.

297. *Gould, Inc. v. United States* 67 F.3d 925, 930 (Fed. Cir. 1995).

298. *Am. Tel. & Tel. Co. v. United States*, 177 F.3d 1368, 1379–80 (Fed. Cir. 1999) (en banc) (citations omitted).

299. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 431 (1990).

300. *C.H. McQuagge v. United States*, 197 F. Supp. 460, 469 (W.D. La. 1961).

basis for this lies in the fact that when the Government enters the market place, it puts itself in the position of seeking to enforce contractual rights that arise from express consent rather than sovereignty.³⁰¹ As one court noted:

Whether the defense of estoppel may be asserted against the United States in actions instituted by it depends upon whether such actions arise out of transactions entered into in its proprietary capacity or contract relationships, or whether the actions arise out of the exercise of its powers of government. The defense of estoppel may be (though sparingly) availed of against the United States in transactions involving its proprietary functions, providing the functions of the government are not impaired thereby.³⁰²

This is compounded by the fact that the Tucker Act is a clear waiver of sovereign immunity with regard to any express or implied-in-fact contract.³⁰³ Importantly, this does not, however, mean that anything labeled a contract falls under the *Burnside-Ott* “exception” to *Richmond*. For example, contracts made by government officials in the implementation of a sovereign function do not exhibit the same consent and are not even amenable to suit under the Tucker Act.³⁰⁴ As the Court of Claims stated in *Kania v. United States*:

The contract liability which is enforceable under the Tucker Act consent to suit does not extend to every agreement, understanding, or compact which can semantically be stated in terms of offer and acceptance or meeting of minds. The Congress undoubtedly had in mind as the principal class of contract case in which it consented to be sued, the instances where the sovereign steps off the throne and engages in purchase and sale of goods, lands, and services, transactions such as private parties, individuals or corporations also engage in among themselves.³⁰⁵

The holding of the Federal Circuit in *Burnside-Ott*, permitting the prosecution of offensive claims based on contract even where the authority of the Government is less than express, has generally been followed. However, *Rich-*

301. See *United States v. Norwegian Barque “Thekla,” Her Tackle, Etc.*, 266 U.S. 328, 339–40 (1924); *Century Indem. Co. v. United States*, 236 F.2d 752, 756 (D.C. Cir. 1956); *United States v. Oklahoma Gas & Elec.*, 297 F. 575, 579 (8th Cir. 1924); *Carstens Packing Co. v. United States*, 62 F. Supp. 524, 525 (W.D. Wa. S.D. 1945); *Kemp v. United States*, 38 F. Supp. 568, 570 (D. Md. 1941). *But see Williams, supra* note 202, at 463 (relying on *Merrill*: “Whether the United States is acting in a traditional sovereign capacity or engaged in activities which are traditionally conducted by private enterprise, the Government cannot be estopped if estoppel would compel a course of action not authorized by Congress”). This thesis is supported by the protection of the public fisc arguments, and the additional assertion as in *Richmond* that such a rule ensures that Congress’s constitutional power to spend and allocate resources is not interfered with by judicial enforcement of unauthorized expenditures. See *id.* at 463–64.

302. *McQuagge*, 197 F. Supp. at 471 (citations omitted); *accord Elrrod Slug Casting Mach. Co. v. O’Malley*, 57 F. Supp. 915, 920 (D. Neb. 1944).

303. 28 U.S.C. §§ 1346(a)(2), 1491 (2000). See, e.g., *Porter v. United States*, 496 F.2d 583, 586 (Ct. Cl. 1974); *N. Bonneville v. United States*, 5 Cl. Ct. 312, 319 (1984).

304. See, e.g., *N. Bonneville*, 5 Cl. Ct. at 320. See also *Schism v. United States*, 316 F.3d 1259, 1268 (Fed. Cir. 2002) (en banc), *cert. denied*, 2003 WL 835021, 71 U.S.L.W. 3567, 71 U.S.L.W. 3746, 71 U.S.L.W. 3750 (U.S. June 2, 2003) (No. 02–1226).

305. *Xania v. United States* 650 F.2d 264, 268 (Ct. Cl. 1981). As discussed *supra* in Part III.F, this is also the rationale as to why the Government is not liable for quasi-contracts/contracts implied in law.

mond has still had an effect,³⁰⁶ even in cases involving the traditional type of contract described in *Kania*.³⁰⁷

This effect notwithstanding, in 1998 the Federal Circuit decided *Del-Rio Drilling Programs, Inc. v. United States*,³⁰⁸ a case that represented a significant, albeit *sub silentio*, departure from *Richmond*. In *Del-Rio*, the court found that a compensable taking had occurred as a result of the Bureau of Land Management's (BLM) misreading of the Tribal Consent Act (TCA)³⁰⁹ and the concomitant denial of a drilling permit to a BLM oil and gas lessee.³¹⁰ Accordingly, the court ordered the Government to pay compensation to the plaintiff.³¹¹

The question was whether or not that payment violated the payment limitations of the Appropriations Clause, as *Richmond* suggests. Clearly, the payment in *Del-Rio* was not premised on consent by an agency acting in a proprietary capacity, as was the case in both *Burnside-Ott* and *Gould*. Indeed, the very gravamen of *Del-Rio's* complaint was that the BLM, acting in its regulatory capacity, had erred when it conditioned exercise of the drilling permits on obtaining consent of the Indian tribe that held surface rights to the land in question.³¹² In this regard, the court concluded that:

[Cases like *Del-Rio*], in which the alleged taking consists of regulatory actions that deprives [sic] a property-holder of the enjoyment of property, government agents have the requisite authorization [to effectuate a taking] if they . . . [acted] within the general scope of their duties, *i.e.*, if their actions are a “*natural consequence of Congressionally approved measures*,” or are pursuant to “*the good faith implementation of a Congressional Act*.”³¹³

In contrast, the court stated that when a government official engages in *ultra vires* conduct, the official “will not, in any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of Congress, cannot create a claim against the Government ‘founded upon the Constitution.’”³¹⁴

Just as in *Richmond*, in *Del-Rio* there was also no substantive statute to pay for the results of the actions of those officials. Nevertheless, the court ordered that *Del-Rio* be paid. The seeming conflict between this ruling and the Court's holding in *Richmond* would appear to be explained on the bases that (1) the Judgment Fund does in fact constitute sufficient congressional authorization to make payment for the consequences of actions for which the Government is found liable; (2) the authority to make payment is inherent

306. See, e.g., Deborah L. Childress, 96–1 CPD ¶ 219, at 6 (1995), *aff'd on recon.*, 96–1 CPD ¶ 226 (1996) (citing *Richmond*, the General Accounting Office found that the Government was not estopped from refusing to pay relocation of service contractor's fee where agency, in error, gave contractor authorization to purchase and resell employee's home).

307. See, e.g., *Westinghouse Elec. Corp. v. United States*, 41 Fed. Cl. 229 (1998).

308. 146 F.3d 1358 (Fed. Cir. 1998).

309. See 25 U.S.C. §§ 323–24 (1994 & Supp. V 1999).

310. See *Del-Rio Drilling Programs, Inc.*, 146 F.3d at 1362.

311. See *id.* at 1366–67.

312. See *id.* at 1361–62.

313. *Id.* at 1362 (citations omitted) (emphasis added).

314. *Hoove v. United States*, 218 U.S. 322, 335 (1910).

where the agent is acting within the scope of his or her authority, i.e., acting with the authority of Congress; and (3) the Judgment Fund's viability is recognized in Tucker Act cases involving contracts, money mandating statutes, and provisions of the Constitution.³¹⁵

C. *The Effect of Anti-Deficiency Act Violations on an Agent's Authority to Bind the Government*

As previously noted, one of the principal statutes enacted to implement the Appropriations Clause is the Anti-Deficiency Act,³¹⁶ which precludes government employees from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation."³¹⁷

Well before the Supreme Court pointed out the putative limits of the Appropriations Clause in *Richmond*, a line of cases existed that took the not-too-dissimilar position that any government agent's action or promise that violates the Anti-Deficiency Act is unenforceable and not binding on the Government. These cases make many solemn promises of the Government not worth the paper on which they are written. The propriety of conditioning the validity and binding nature of the promises made on the continuing availability of appropriated funds to cover the obligation so created is, however, suspect.

Two recent decisions continue this questionable line of reasoning.³¹⁸ Each involves a contract that contained an open-ended indemnity clause, i.e., provisions of the type that the courts and GAO have found most troublesome. The first case, *National Gypsum Company* (NGC), involved an indemnification provision contained in a 1942 contract involving the provision of production equipment and other services for an ordnance plant.³¹⁹ When, in 1998, NGC was joined as a defendant in a suit alleging that all of the prior operators of the facility had, by negligently operating the plant, contaminated adjacent property, it asserted a right of indemnity against the Government for all costs that it incurred.³²⁰ Thereafter, NGC filed a claim against the Government for money it had expended as a result of the litigation.³²¹ In denying NGC's appeal, the ASBCA held that

[t]he Government is not estopped by the representations or assurances of its agents, whether intentional or unintentional, that have the effect of nullifying a statutory requirement or are contrary to an express authority limitation affecting payment

315. See *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 431-34 (1990). For a discussion of the need for a money mandating statute in order to invoke Tucker Act jurisdiction, see *United States v. Mitchell*, 463 U.S. 206, 216 (1983). For a discussion of the similar need for a constitutional provision to be money mandating in order to invoke Tucker Act jurisdiction, see *Hatter v. United States*, 953 F.2d 626, 628 (Fed. Cir. 1992).

316. 31 U.S.C. § 1341 (1988).

317. *The Supreme Court, supra* note 189, at 295 (quoting 31 U.S.C. § 1341(a)(1) (1994)).

318. *E.I. Dupont De Nemours and Co., Inc. v. United States*, 54 Fed. Cl. 361 (2002); *In re Appeals of National Gypsum Company*, ASBCA No. 53,259, 03-1 BCA ¶ 32,054.

319. *National Gypsum Company*, 03-1 BCA ¶ 32,054.

320. *Id.*

321. *Id.*

of money from the Treasury. This rule is applicable in cases of alleged contractual entitlement as well as in cases of alleged statutory entitlement. *See* OPM v. Richmond, 496 U.S. 414 (1990); Johnson Management Group CFC, Inc. v. Martinez, 308 F.3d 1245 (Fed. Cir. 2002); Harbert/Lummus Agrifuels Projects v. United States, 142 F.3d 1429, 1433 (Fed. Cir. 1998), cert. denied, 525 U.S. 1177 (1999); Total Medical Management, Inc. v. United States, 104 F.3d 1314, 1321 (Fed. Cir. 1997), cert. denied, 522 U.S. 857 (1997); CACI, Inc. v. Stone, 990 F.2d 1233, 1236 (Fed. Cir. 1993); City of Alexandria v. United States, 737 F.2d 1022, 1027–28 (Fed. Cir. 1984); Prestex, Inc. v. United States, 320 F.2d 367, 371 (Ct. Cl. 1963).³²²

A similar result was reached in the second case, *E.I. Dupont De Nemours and Co., Inc. v. United States*, where the plaintiff also sought reimbursement pursuant to the indemnity clause of a contract for costs that it had incurred under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) at an ordnance plant in Morgantown, West Virginia, that it built and operated for the Government during World War II on a cost-plus-fixed-fee basis.³²³

In 1946, the contract was terminated, at which time Dupont and the Government entered into a termination agreement.³²⁴ Almost forty years later, the Environmental Protection Agency (EPA) commenced efforts to have Dupont clean up the Morgantown site.³²⁵ As a result of EPA's efforts, Dupont (along with several other potentially responsible parties) agreed to conduct a feasibility study regarding the site.³²⁶ Dupont paid some \$1.3 million to lawyers and environmental consultants for the investigation and study.³²⁷ It submitted a claim to the Government in this amount pursuant to the Contract Disputes Act³²⁸ seeking reimbursement under the indemnification clause.³²⁹

On appeal of the denial of that claim by the Contracting Officer, the Court of Federal Claims found that the indemnification clause was broad enough to include liability for costs incurred pursuant to CERCLA.³³⁰ The court, however, also found that “[r]egardless of how shocking or disappointing the outcome, we have no choice but to conclude that the Indemnification Clause expressly written into the . . . contract and believed by both parties to place such liabilities on the government, is nevertheless unenforceable. . . .”³³¹ Recognizing the basic unfairness of the decision, the court felt compelled to suggest that

[a]lthough we are of the opinion that the current state of the law compels the result expressed, this result is so totally at odds with the agreement the parties clearly made concerning reimbursement and indemnity, and plaintiff is so clearly entitled to the indemnity it seeks under the plain language of the contract it had with the

322. *Id.*

323. *E.I. Dupont De Nemours and Co., Inc. v. United States*, 54 Fed. Cl. 361, 363 (2002).

324. *Id.*

325. *Id.* at 363–64.

326. *Id.* at 364.

327. *Id.*

328. *See generally*, Contract Disputes Act, 41 U.S.C. §§ 601–13 (2000).

329. *E.I. Dupont De Nemours and Co., Inc. v. United States*, 54 Fed. Cl. 361, 364 (2002).

330. *Id.* at 370.

331. *Id.* at 372.

government, made during truly emergency, wartime conditions, we suggest that plaintiff may want to consider the avenue for potential relief available in a Congressional Reference case pursuant to 28 U.S.C. §§ 1492 & 2509.³³²

This conclusion was reached largely in reliance upon a 1955 GAO opinion that held that with respect to open-ended obligations, “the contracting officer exceeded his authority in including such provisions in the [contract] and, accordingly, [the provisions] may not be recognized as imposing any legal obligation on the Government.”³³³ Although citing the Anti-Deficiency Act, GAO also examined the statutory limitation on the obligation of appropriations for such leases and reached its conclusion based on the terms of the Adequacy of Appropriations Act, which provides that “No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment.”³³⁴

Dupont did not make a similar analysis. Nor did the court recognize that the Anti-Deficiency Act, while a clear directive to government employees,³³⁵ does not otherwise limit the authority of government agents vis-à-vis third parties. Were this not the case, a Contracting Officer’s constructive exercise of the changes or the suspension of work clause of a contract for which only a limited earmarked appropriation remained could be a violation of the Act since “the very act of obligating the United States to make payment when the necessary funds are not already in the account is . . . a violation of [the Anti-Deficiency Act].”³³⁶ In such circumstances, under the rationale of the cases discussed *supra* in Part III.F, unless the Government received a tangible benefit from that constructive change or unreasonable suspension and not simply a claim for unabsorbed home office expenses or the like, there would be no basis on which to pay the claim. Moreover, if the agency’s appropriation were exhausted and such an obligation thus purportedly contravened the express wishes of Congress, it would be just as much a violation of the Anti-Deficiency Act for the agency to pay for the reasonable value of the goods and services received as it would to make payments under the contract.³³⁷

Such draconian results are, however, not mandated. As stated by the Court of Claims in *Ferris v. United States*: “An appropriation *per se* merely imposes limitations upon the Government’s own agents; it is a definite amount of money entrusted to them for distribution; but its insufficiency does not . . . pay the Government’s debts, nor cancel its obligations, nor defeat the rights of other parties.”³³⁸

332. *Id.* at 372–73.

333. To the Administrator, General Services Administration, 35 Comp. Gen. 85, 87 (1955).

334. 41 U.S.C. § 11 (2003).

335. See Hopkins & Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 MIL. L. REV. 51, 56 (1978).

336. GENERAL ACCOUNTING OFFICE, 2 PRINCIPALS OF FEDERAL APPROPRIATIONS LAW 6–13 (2nd ed. 1992) [hereinafter GAO].

337. R. Efros, *Statutory Restrictions on Funding of Government Contracts*, 10 PUB. CONT. L. J. 254, 266 (1978).

338. 27 Ct. Cl. 542, 546 (1892) (emphasis added).

Moreover, as the court put it in *Dougherty ex. Rel. Slavens v. United States*: “The statutory [appropriations] restraints . . . apply to the [agency] official but they do not affect the rights in this court of the citizen honestly contracting with the Government.”³³⁹

This view comes through in *Hercules v. United States* wherein the Supreme Court discussed the alleged existence of an implied open-ended indemnification provision in a contract for the supply of Agent Orange.³⁴⁰ Significantly, the Court did not say that in the absence of a huge appropriation for that purpose, no agent of the government had the authority to bind the Government to such a clause. Rather, it simply pointed out that the penalties for any agent’s including such an open-ended obligation were so great that the Court would not presume that an agent would have intended to enter into such an agreement.³⁴¹

In this regard, it should be noted that the Anti-Deficiency Act also contains no admonition, penalty, or outright prohibition on an agency’s negligently spending or committing available funds contrary to the substantive standards prescribed by Congress.³⁴² Rather, it only provides that an employee of the Government who creates a government obligation or makes a payment in violation of the Act is subject to administrative discipline or losing his or her job³⁴³ and an employee who intentionally violates the Act is subject to possible criminal penalties,³⁴⁴ although prosecution is, however, quite unlikely.³⁴⁵

Such being the case, it is difficult to believe that Congress’s intention in enacting the Anti-Deficiency Act was to affect the validity of the Government’s actions vis-à-vis third parties.³⁴⁶ Indeed, there are numerous cases that hold just that, i.e., the obligation of funds in excess of the amount that has been appropriated or remains in an appropriation is not an absolute bar to a third party’s being paid what it is rightfully owed.³⁴⁷

Part of the rationale behind these cases is very simply that in a great many circumstances it is practically impossible to determine what the Government’s liability will be at the time that the obligation is incurred and thus impossible to assure that sufficient appropriated funds are always available. This is true

339. 18 Ct. Cl. 496, 503 (1883).

340. 516 U.S. 417, 426 (1996).

341. *Id.* at 427–28.

342. *The Supreme Court*, *supra* note 189, at 295.

343. Efros, *supra* note 337, at 263.

344. 31 U.S.C. § 1350 (2001). The section provides for a fine of up to \$5,000 and imprisonment for up to two years.

345. *See generally* Efros, *supra* note 337, at 263.

346. *Accord id.* at 264.

347. *E.g.*, *Ross Construction v. United States*, 392 F.2d 984, 986–87 (Ct. Cl. 1968); *Anthony P. Miller, Inc. v. United States*, 348 F.2d 475 (Ct. Cl. 1965); *Joplin v. United States*, 89 Ct. Cl. 345, 361 (1939); *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892); *Myerle v. United States*, 33 Ct. Cl. 1, 25 (1897); *Dougherty ex. rel. Slavens v. United States*, 18 Ct. Cl. 496, 546 (1879); *see also* *New York Airways v. United States*, 369 F.2d 743, 749 (Ct. Cl. 1966). *But see* *California-Pacific Utilities v. United States*, 194 Ct. Cl. 703, 711–12 (1971) (“Based on [a] provision of [the Anti-Deficiency Act], the courts have consistently ruled that clauses relating to indemnification for future damage cannot be entered into on behalf of the United States.”).

for purposes of both the Anti-Deficiency Act and the adequacy of the initial appropriations under the Adequacy of Appropriations Act. While open-ended indemnification provisions such as existed in *NSG* and *Dupont* clearly exemplify just how difficult it is to determine what amount of money might be required in the future, much simpler examples, such as the effects of an escalation clause, or even a contract breach, demonstrate this as well.³⁴⁸

A case in point is *Wetsel-Oviatt Lumber Co. v United States*.³⁴⁹ While the Anti-Deficiency Act requires that an agency have sufficient funds available to pay a contractor if and when contingencies materialize,³⁵⁰ in *Wetsel* the agency was faced with an unanticipated situation that necessitated that the contract be canceled and proceeded to do so even though it lacked funds to pay damages resulting from the breach.³⁵¹ The Government argued that, “if appropriations are unavailable to pay [the contractor] there can be no breach [because the agent committing the breach lacked the authority to do so].”³⁵² However, the court rejected this argument and held that an ostensible violation of the Anti-Deficiency Act caused by the agency’s not having funds available to pay damages created by its agents’ breach of a contract does not render those actions unenforceable or the monetary consequences of those actions unrecoverable.³⁵³ As the Court of Federal Claims found: “Thus, if the [agency] has no funds from which to pay [the plaintiff], this Court may enter judgment for plaintiff and require payment [from the judgment fund].”³⁵⁴

That Anti-Deficiency Act violations do not affect the validity of Government’s obligation to innocent third parties that also can be demonstrated by the fact that when the precursor to the Anti-Deficiency Act was first enacted in 1870,³⁵⁵ there was no need for such limitation. There was no permanent indefinite judgment fund from which the executive branch, acting pursuant to a decision of the Court of Federal Claims or a Board of Contract Appeals, could make any payment for any claim in excess of an appropriation. Rather, claims by parties for which no appropriation was then available would simply have been brought back to Congress, which would decide whether or not to pay them.³⁵⁶

While both the above conclusion and the court’s holding in *Ferris* are quite clear, on many occasions they are simply ignored. The reason for this appears

348. See GAO *supra* note 336, at 6–20.

349. 38 Fed. Cl. 563 (1997).

350. See, e.g., Matter of Industrial Fund: Obligations in Connection with Long Term Vessel Charters, 62 Comp. Gen. 143, 146–48 (1983) (involving termination for convenience costs).

351. *Wetsel-Oviatt Lumber Co.*, 38 Fed. Cl. at 567.

352. *Id.* at 570.

353. *Id.* But see Spriggs, *The Anti-Deficiency Act Comes to Life in U.S. Government Contracting*, 10 NAT’L CONT. MGMT. J., 33, 41 (1977).

354. *Wetsel-Oviatt Lumber Co.*, 38 Fed. Cl. at 571; accord Efros, *supra* note 337, at 266.

355. Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251 (1870).

356. This was the historic way that such deficiencies were funded. In this regard, GAO even talks in terms of the agency having the duty to mitigate any Anti-Deficiency Act violation by seeking a supplemental appropriation. GAO, *supra* note 336, at 6–99. See also To the Chairman, Committee on Appropriations, House of Representatives, 55 Comp. Gen. 768, 772 (1975).

to relate to the size of the Government's liability in particular cases and not to some principle of law. Indeed, because of the size of the Government's potential liability, both the courts and GAO have concluded that, although the promise of indemnification does create an obligation on the Government's part when made, such an open-ended obligation of funds, if it is in excess of the amount that has been appropriated (as it almost certainly will be), immediately nullifies the authority of the government agent to promise the indemnification. Such a conclusion is, however, illogical. This can be seen by the fact that if, instead of a request for indemnification, the matter involved a constructive change order or a breach of contract that necessitated the Government's paying out significantly in excess of any remaining appropriation, there would be no question of the authority of the Contracting Officer to incur such an obligation. Rather, in that instance, if nothing else, the judgment fund, which effectively is a supplemental appropriation, would be more than sufficient and the Government would not be allowed to abrogate its solemn obligations with impunity owing to an alleged Anti-Deficiency Act violation. That such a result would in fact occur is readily apparent from cases such as *United States v. Winstar*³⁵⁷ and its progeny, which involve billions of dollars in government breach of contract liability for which no agency appropriation ever existed and yet the Supreme Court had no problem in finding government liability.

V. THE SEARCH FOR IMPLIED ACTUAL AUTHORITY

Even before *Richmond*, given the Supreme Court's disdain for holding the Government liable based on anything other than an agent's exercise of actual authority, the lower courts started looking for other ways to hold the Government culpable without having to resort to apparent authority. The Federal Circuit's 1989 opinion in *H. Landau & Co. v. United States*³⁵⁸ directed the course of many future inquiries to a search for implied authority of the specific agent who dealt with the plaintiff, i.e., was the agent somehow imbued with authority that existed elsewhere within the agency or in the Secretary thereof?³⁵⁹ In *H. Landau*, the court stated the obvious: implied actual authority, like express actual authority, would suffice to bind the Government.³⁶⁰

H. Landau involved a government contract pursuant to Section 8(a) of the Small Business Act,³⁶¹ in which the prime contractor is the Small Business Administration (SBA). The SBA in turn subcontracts with a small, minority-

357. 518 U.S. 839 (1996).

358. 886 F.2d 322 (Fed. Cir. 1989).

359. As can be seen in cases such as *Schism v. United States*, 316 F.3d 1259, 1284 (Fed. Cir. 2002) (en banc), cert. denied, 2003 WL 835021, 71 U.S.L.W. 3567, 71 U.S.L.W. 3746, 71 U.S.L.W. 3750 (U.S. June 2, 2003) (No. 02-1226), the existence of authority within the secretary or the agency is an absolute prerequisite to impliedly authorizing the particular agent or action either by ratification or acquiescence.

360. See *H. Landau & Co.*, 886 F.2d at 324.

361. 15 U.S.C. § 637(a) (1982 & Supp. V 1987).

owned company.³⁶² In *H. Landau*, the SBA had contracted with the Defense Personnel Support Center (DPSC) for 25,000 sleeping bags.³⁶³ The SBA then subcontracted with Carilee, Inc., to supply the bags.³⁶⁴ The “subcontract” granted responsibility for its administration to DLA.³⁶⁵ It also provided Carilee with advanced financing and specified “that any advance payments to [suppliers] be made through a joint bank account requiring . . . the signatures of both an authorized SBA representative and an authorized Carilee representative.”³⁶⁶ Two DLA officials were designated as the authorized SBA counter-signatories, although neither was the Contracting Officer (CO) who entered into the contract on the SBA’s behalf.³⁶⁷ As Carilee started performing, it attempted to place orders for cloth with Landau, a textile supplier.³⁶⁸ However, since Carilee’s financial situation was unstable, Landau refused to extend credit to Carilee.³⁶⁹ To remedy the situation, one of the DLA officials advised Landau that the SBA would provide letters guaranteeing payment for the cloth.³⁷⁰ Before making this representation, the DLA official had been assured by both SBA’s counsel and DLA’s district director that he, in fact, had the authority to issue such letters.³⁷¹

Thereafter, Landau shipped some cloth and was paid for it out of the joint account.³⁷² The DLA officials, again acting on the SBA’s behalf, issued three more letters, guaranteeing payment for additional shipments of cloth.³⁷³ Relying on these payment guarantees, Landau shipped additional cloth to Carilee but was never paid the full amount for doing so.³⁷⁴

In the ensuing litigation, the Federal Circuit found that SBA’s responsibility for the subcontract’s administration included the duty to see that the subcontractor acquired the necessary raw materials to fulfill its obligation under the contract.³⁷⁵ It went on to conclude that “[t]hat duty, coupled with the authority to draw checks on the joint bank account, may have carried with it the implicit authority to assure suppliers that they would be paid for providing the materials,”³⁷⁶ despite an internal SBA operating procedure that required that “the CO review any requested disbursements from the account and approve, in writing, the countersigning of any withdrawals.”³⁷⁷

362. See *H. Landau & Co.*, 886 F.2d at 323.

363. *Id.* at 323.

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.* at 323–24.

374. *Id.* at 324.

375. *Id.*

376. *Id.*

377. *Id.* at 323. Quite often limitations on an agent’s authority are contained in warrants of authority (e.g., contracting authority up to a specified dollar limit) or unpublished intra-agency

As the *Restatement (Second) of Agency* indicates: “It is possible for a principal to specify minutely what the agent is to do. To the extent that [the principal] does this, the agent may be said to have express authority. But most authority is created by implication.”³⁷⁸ “[U]nless otherwise agreed, authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it.”³⁷⁹ However, an agent’s conduct is not impliedly authorized unless he “is reasonable in drawing an inference that the principal intended [the agent] so to act although that was not the principal’s intent. . . .”³⁸⁰ Moreover, an agent is not authorized to act merely because he believes that the principal would have authorized him to act had the principal known the facts.³⁸¹ Implied authority generally requires the existence of a reasonable inference by the agent based on an actual manifestation of the principal.

In what can be viewed as an exception to this general rule, *Miller Elevator Co., Inc. v. United States* involved the virtual absence of any exercise of authority by the Contracting Officer or his formally designated representative over a contract for elevator maintenance at a federal office building in St. Louis.³⁸² The Government’s assistant field office manager performed the

directives and manuals of which the public knows little. Cases considering the agent’s authority in such circumstances have reached differing results as to the effect of those directives, *etc.*, regarding the agent’s authority vis-à-vis the general public. *See, e.g., Cruz-Pagan v. United States*, 35 Fed. Cl. 59, 62 (1996) (The court emphasized that agency regulations granted payment authority only to specified Drug Enforcement Agency (DEA) officials. As such, all other DEA agents, including the field agents with whom the plaintiff dealt, were subject to a prohibition set forth only in an agency manual and thus could not promise any award in any amount to any informant.); *see also Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1431–34 (Fed. Cir. 1998) (reversing the Court of Federal Claims decision that had found the Contracting Officer to have adopted an oral statement by the agency’s deputy director that the Government would continue its role as guarantor of future borrowing (thus assuring payment to the plaintiff) in exchange for the plaintiff’s continued work on the project; the reversal was based in part on the fact that the Contracting Officer’s delegation of authority, albeit unpublished, contained a provision “which required that all actions entered into by him be accompanied by his prior written approval”). *Id.* at 1432. *But see Am. Optical Corp. v. United States*, 592 F.2d 1149, 1155–56 (Ct. Cl. 1979); *In re Forest Service, Comp. Gen. B-188607*, July 19, 1977, 77–2 CPD ¶ 84, discussed *supra* note 167.

378. RESTATEMENT (SECOND) OF AGENCY § 7 cmt. c (1958). While it is easier to find implied authority where it is an outgrowth of some aspect of an agent’s express authority, contrary to some holdings, *see, e.g., Garza v. United States*, 34 Fed. Cl. 1, 20 (1995), it is not an absolute requirement that express authority must first exist upon which the implied authority can be based. *See Aero-Abre, Inc. v. United States*, 39 Fed. Cl. 654, 657 (1997). It is particularly true that no express authority is first required in order for there to be authority inherent in the agent’s position. *See, e.g., Zoubi v. United States*, 25 Cl. Ct. 581, 587–88 (1992) (The acting Program Director of the Custom Services’ Saudi Arabian Project was engaged in abolishing a training project and establishing a new program. Implicit in this undertaking was the authority to obtain the personnel necessary for establishing the program including contracting with interpreters such as the plaintiff.).

379. RESTATEMENT (SECOND) OF AGENCY § 35 (2002).

380. *Id.* § 7 cmt. b. This, of course, is in contrast to apparent authority, the power of which arises from manifestations by the principal to a third party.

381. *See id.* § 33 cmt. b.

382. 30 Fed. Cl. 662 (1994).

functions of an “informally (impliedly) designated contracting officer.”³⁸³ The court concluded that the assistant field office manager was imbued with limited Contracting Officer authority—i.e., authority to obligate the Government up to \$1,000, later increased to \$2,000—the scope of his authority expanded to cover work outside of the plaintiff’s contract.³⁸⁴ Relying on *Branch Banking & Trust Co. v. United States*,³⁸⁵ the basis for this expansion appears to have been the fact that, “pursuant to the exigencies of the situation,” it was clearly in the interest of the United States that the agent take the steps that he did.³⁸⁶

Against this backdrop, in *H. Landau* the court was correct in assuring that a factual inquiry was made as to the authority conferred on the agents by the SBA whether expressly or impliedly. That inquiry was particularly appropriate because, in the course of performing as SBA agents on the contract, the DLA official’s authority may have been increased by the SBA’s failure to object in any way to his execution of the initial letter guaranteeing payment of about \$250,000 for Carilee’s initial lots of cloth, thus manifesting to the DLA officials that the internal requirement for Contracting Officer review had been waived.³⁸⁷

Inquiries into what authority was an implicit part of an agent’s duties and what was implied by virtue of the agent’s reasonable belief that he or she was authorized are highly appropriate because, however labeled, they help define the agent’s actual authority at the time and whether the act(s) in question fell within those bounds. Indeed, in recent years numerous cases have involved such inquiries. Some cases have found implied authority to exist.³⁸⁸ Typically, however, where no implied authority has been found, the courts’ inquiry appears to have ceased before having fully examined the question whether the act fell within scope of authority as viewed by a reasonable person. See discussion *infra* in Part VIII. Indeed, these cases almost invariably include a knee-jerk citation to *Merrill*, indicating that apparent authority does not exist vis-à-vis the Federal Government.

Starting in the mid-90s, the Court of Federal Claims decided a series of cases in which it consistently found that the duties of field agents of the Drug

383. *Id.* at 694.

384. *Id.* at 700.

385. 98 F. Supp. 757, 766 (Ct. Cl. 1951).

386. *Miller Elevator Comp., Inc.*, 30 Fed. Cl. at 691. Compare *City of El Centro v. United States*, 922 F.2d 816 (Fed. Cir. 1990), which involved hospital costs for illegal aliens apprehended by the United States Border Patrol. In that case, there were also exigencies of the circumstances. However, paying for the services rendered to the aliens would not have directly benefited the United States.

387. See RESTATEMENT (SECOND) OF AGENCY § 33 cmt. b (1958). “[An] agent’s authority [can] therefore be increased, diminished, become dormant or be destroyed, not only by further manifestations by the principal but also by the happening of events, dependent, in many situations, upon what the agent knows or should know as to the principal’s purposes.” *Id.*

388. See, e.g., *Thomas v. I.N.S.*, 35 F.3d 1332 (9th Cir. 1994) (assistant U.S. attorneys had implicit authority to bind INS not to deport criminal defendant); *Zoubi v. United States*, 25 Cl. Ct. 581 (1992) (acting program director of the Custom Services’ Saudi Arabian Project engaged in abolishing a training project and establishing a new program had implicit authority to obtain the personnel necessary for establishing the program).

Enforcement Administration (DEA) and Federal Bureau of Investigation (FBI) did not implicitly include the authority to enter into agreements to reward informants³⁸⁹ and that authority to contract was also not an integral part of a Custom Service agent's duties.³⁹⁰ Concurrently, assistant U.S. attorneys were found not to have implicit authority to bind the Government to refrain from deporting criminal defendants³⁹¹ or to make a deal to forgive an individual's loan with the Farm Services Administration in exchange for his help in avoiding an armed standoff situation.³⁹² However, in *Confidential Informant v. United States*, the Court of Federal Claims relied upon the possibility that the government agent possessed "implied actual authority" to deny a Government's motion to dismiss.³⁹³ In *Confidential Informant*, the plaintiff provided information that allowed the Internal Revenue Service (IRS) to assess over \$72,000,000 in back taxes and penalties against delinquent taxpayers and to seize over \$5,000,000 in cash and property.³⁹⁴ The plaintiff sought a reward for doing so.³⁹⁵ However, the agency denied the request because, *inter alia*, the "[r]ecovery was too small to warrant payment of reward."³⁹⁶ In response to the plaintiff's suit demanding a substantial reward, the Government also argued that any oral assurances of payment that were made by IRS and FBI agents were made by individuals who lacked the actual authority to bind the Government.³⁹⁷ Although the court agreed that these agents lacked "express" actual authority to bind the Government, it found that they may have possessed "implied" actual authority.³⁹⁸ The court stated that implied actual authority may exist when "such authority is considered an integral part of the duties assigned to a Government employee."³⁹⁹

While the court in *Confidential Informant* made no finding as to whether the authority to offer rewards in order to obtain information is in fact an

389. See *Khairallah v. United States*, 43 Fed. Cl. 57 (1999); *Roy v. United States*, 38 Fed. Cl. 184 (1997); *Cruz-Pagan v. United States*, 35 Fed. Cl. 59 (1996); see also *Salles v. United States*, 156 F.3d 1383 (Fed. Cir. 1998).

390. See *Garza v. United States*, 34 Fed. Cl. 1 (1995); *Howard v. United States*, 31 Fed. Cl. 297 (1994).

391. See *United States v. Igonwa*, 120 F.3d 437 (3d Cir. 1997); *San Pedro v. United States*, 79 F.3d 1065 (11th Cir. 1996).

392. *McAfee v. United States*, 46 Fed. Cl. 428 (2000).

393. 46 Fed. Cl. 1, 7–8 (2000).

394. *Id.* at 3.

395. *Id.*

396. *Id.*

397. *Id.* at 6.

398. *Id.* at 7.

399. *Id.* (citing *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989) (quoting JOHN CIBINIC & RALPH C. NASH JR., *FORMATION OF GOVERNMENT CONTRACTS* 43 (1982)); see also *Khairallah v. United States*, 43 Fed. Cl. 57, 63 (1999) (citing *H. Landau & Co.*, 886 F.2d at 324); *Roy v. United States*, 38 Fed. Cl. 184, 189 (1997) (recognizing the implied actual authority of the IRS and FBI agents). *But cf.* *Cruz-Pagan v. United States*, 35 Fed. Cl. 59, 63 (1996) (DEA agent did not have implied actual authority to make compensation agreement based on outcome of mission); *Salles v. United States*, 156 F.3d 1383, 1384 (Fed. Cir. 1998); *Humlen v. United States*, 49 Fed. Cl. 497 (2001); *Toranzo-Claire v. United States*, 48 Fed. Cl. 581 (2001); *Doe v. United States*, 48 Fed. Cl. 495 (2000); *Henke v. United States*, 43 Fed. Cl. 15 (1999).

integral part of the duties of IRS and FBI field agents, in other confidential agent cases, other courts have reached the questionable conclusion that such authority is not necessary for field agents to effectively perform the tasks of developing, controlling, and supervising confidential informants.⁴⁰⁰ The courts have opined that the plaintiffs in these reward cases therefore should only have dealt with a Contracting Officer,⁴⁰¹ i.e., these cases suggest that the contracts being alleged had to have been entered into by a Contracting Officer. However, other cases have held that a procuring agency's Contracting Officer is not the only person capable of binding the agency in contract.⁴⁰² That said, the courts have nevertheless consistently disposed of these reward cases, brought by plaintiffs for whom the courts clearly had no sympathy, by finding that "no actual authority" existed and citing the *Merrill* rubric in its entirety. In so doing, the courts also consistently denied any assertion of estoppel. By this, the courts clearly felt that they could avoid the more difficult question of whether these plaintiffs were unreasonable in concluding that field agents of law enforcement agencies had apparent authority, i.e., were acting within the scope of their authority and not contrary to any express congressional disapproval, to contractually bind the United States to the alleged promises of compensation to plaintiffs. In such an analysis, any unreasonableness of the plaintiffs' reliance might very well have had to be measured against the number of informant compensation contracts that were in fact entered into by Contracting Officers. If, as is likely, the number of such "authorized" contracts were low in comparison to the number of "unauthorized" ones entered into by field agents, then reliance by these informants on the authority of the field agents may not have been unreasonable. Such a finding would also be relevant to the question of whether making such contracts had become an integral part of the field agents' jobs. Moreover, the agency's treatment of previous "unauthorized" contracts would be relevant to whether the field agents had implied authority to enter into such contracts.

VI. THE UNDERLYING CONTINUING TREND TOWARD AND LIMITS OF FUNCTIONALISM

A. Del-Rio Drilling Programs, Inc. v. United States *and Other Cases*

As noted, in *Del-Rio* the plaintiffs, federal oil and gas lessees, alleged that the Bureau of Land Management (BLM) had prevented them from making beneficial use of federal mineral leases by virtue of BLM's erroneous legal belief that Del-Rio's request for drilling permits had to be denied because

400. See *Humlen*, 49 Fed. Cl. at 497; see also *Toranzo-Claure*, 48 Fed. Cl. at 581; *Doe*, 48 Fed. Cl. at 495.

401. Substantial scrutiny of exactly what authority was needed by agents to perform his or her duties can also be seen in *Dolmatch Group, Ltd. v. United States*, 40 Fed. Cl. 431 (1998).

402. See, e.g., *United States v. Bissett Berman Corp.*, 481 F.2d 764, 768-69 (9th Cir. 1973).

approval of a right-of-way by the Indian tribe, which had rights in the surface estate, could not be obtained.⁴⁰³

While both the Court of Federal Claims and the Federal Circuit had no quarrel with the fact that the Government's legal belief was erroneous, the Court of Federal Claims dismissed Del-Rio's claim on the basis that there could not be a taking if the government agents were acting on an erroneous belief.⁴⁰⁴ The Federal Circuit reversed, stating that "[m]erely because a government agent's conduct is unlawful does not mean that it is unauthorized; a government official may act within his authority even if his conduct is later determined to have been contrary to law."⁴⁰⁵ Indeed, an act is not unauthorized merely because it is mistaken, imprudent, or wrongful.⁴⁰⁶ As the Court found, it was part of the Interior Department officials' statutorily authorized duties to interpret the laws governing federal mining leases and to carry them out based on that interpretation⁴⁰⁷ and "there is no reason to suppose that their decision [to deny the drilling permits] reflected anything but a good faith effort to apply the statutes and regulations as they understood them. . . ."⁴⁰⁸

Del Rio, following in the footsteps of *Georgia-Pacific*, *Broad Avenue Laundry*, and *Reiner*, epitomizes the functionalistic approach with its fluid and flexible approach to the relationship among the branches of Government and perception of a greater open-ended, ambiguous quality to the Constitution.⁴⁰⁹ In this respect, it also contrasts directly with the formalistic analysis seen in *Merrill*.

However, while *Broad Avenue Laundry*, and more recently *Del-Rio*, give credence to the view that the actions of a government agent, even if "not legal," can be binding if they are within the scope of the agent's authority, *Del-Rio*, in deference to separation of powers requirements,⁴¹⁰ added that the Government is not, however, bound by actions that are "explicitly prohibited."⁴¹¹ In determining whether an action was explicitly prohibited, the court referred to the opinion of Judge (now Justice) Scalia in *Ramirez de Arellano v.*

403. *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1360 (Fed. Cir. 1998).

404. *See id.*

405. *Id.* at 1362.

406. *See Eyherabide v. United States*, 345 F.2d 565, 570 (Ct. Cl. 1965).

407. In *A-1 Cigarette Vending, Inc. v. United States*, 49 Fed. Cl. 345, 352 (2001), the court described the authority involved in *Del-Rio* as the Interior Department's general authority to regulate mining permits.

408. *Del-Rio Drilling Programs, Inc.*, 146 F.3d at 1363 (citing *Fl. Rock Ind., Inc. v. United States*, 791 F.2d 893, 899 (Fed. Cir. 1986)). Prior to *Del-Rio* at least one court had found apparent authority adequate to give rise to a compensable taking. *See Silberman v. United States*, 71 F. Supp. 895, 896-97 (D. Mass. 1947) (finding "apparent authority" and "ostensible authority" to take plaintiffs' property adequate to bind the Government to payment of compensation). The *Silberman* court hinted, however, that it was significant that the taking occurred during time of war and was done by a military officer. *See id.* at 896. *But see* *Elkins-Swyers Office Equip. Co. v. Moniteau County*, 209 S.W.2d 127, 130-31 (Mo. 1948) (expressly rejecting application of apparent authority to support *ultra vires* takings claim).

409. *See* BARRON ET AL., *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* 256 (1992).

410. *See* Kuhlman, *supra* note 18, at 249.

411. *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1363 (Fed. Cir. 1998); *see also* *John Reiner & Co. v. United States*, 325 F.2d 438, 440 (Ct. Cl. 1963).

Weinberger, where he laid out the test as being whether Congress had expressed a positive intent to prevent the action or to exclude government liability.⁴¹² This test suggests inquiries that include whether anyone in the agency had authority to do what the agent did⁴¹³ or waive the putative impediment to a valid transaction; whether the limitation on authority was procedural or nonlegislative;⁴¹⁴ and whether the agency could have drafted a valid regulation pursuant to which the agent's actions would have been authorized.

Each of these inquiries is useful in establishing that the action of the executive branch agent, while "unauthorized," was in line with the will of Congress and thus not in violation of the separation of powers doctrine.⁴¹⁵ Indeed, as previously noted, reliance on a separation of powers rationale to preclude holding the Government responsible for "unauthorized" acts is considerably less persuasive where only an agency's adherence to its own regulations or limitations is at stake rather than where estoppel threatens to contravene an explicit statutory requirement.⁴¹⁶ For this reason, cases like *Flick v. Liberty Mut. Fire Ins. Co.*, in which the Ninth Circuit found that "[*Richmond*] preclude[s] a court from granting a remedy that draws funds from the Treasury in a manner that is not authorized by Congress," even though it recognized that the plaintiff, a claimant seeking coverage under a standard flood insurance policy, could avoid strict enforcement of the sixty-day sworn proof of loss requirement upon a valid waiver of the requirement by the Federal Insurance Administrator, could have been decided differently since doing so would not have violated the will of Congress.⁴¹⁷

Sometimes, however, determining whether a given action contravenes an explicit statutory requirement is difficult to determine. Such was the case in *Johnson Management Group CFC, Inc. v. Martinez*, where, over a very strong dissent, two judges of the Federal Circuit concluded that the Government was not bound by the Contracting Officer's erroneous inclusion of a special provision in a contract because it conflicted with the one that was required by the Federal Acquisition Regulations.⁴¹⁸ As pointed out by the dissent, in a statement wholly consistent with *Reiner; Broad Avenue Laundry*, and *Trilon*, "if the contracting officer indeed exceeded her authority and violated the law, it

412. 724 F.2d 143, 151 (D.C. Cir. 1983).

413. See *Appeal of Lockheed Shipbuilding & Constr. Co.*, ASBCA No. 18460, 75-1 BCA ¶ 11,246 at 53,551-53, *aff'd*, 75-2 BCA ¶ 11,566 (1975); Paul Shnitzer & Melvin Rishe, *Confusion Still Reigns over Officials' Actual or Apparent Authority*, 2 NAT'L L. J., Apr. 2, 1979, at 25.

414. *Appeal of Lockheed Shipbuilding*, 75-1 BCA ¶ 11,246 at 53,553.

415. Actions taken in violation of a Contracting Officer's warrant of authority, or other in-house limitations on an agent's authority, are "unauthorized." See, e.g., *Harbert/Lumpaus Agri-fuels Project v. United States*, 142 F.3d 1429, 1432 (Fed. Cir. 1998). However, where those limitations are not public, the cases have indicated that there is no basis for the Government not to be estopped to deny such actions if the plaintiff can prove all of the elements of an estoppel. See discussion, *supra* Part III.E.

416. See *Portmann v. United States*, 674 F.2d 1155, 1159 (7th Cir. 1982).

417. *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 391 (9th Cir. 2000).

418. 308 F.3d 1245, 1256-57 (Fed. Cir. 2002).

is improper to place on the contractor the full and sole burden of the Government's error."⁴¹⁹ In support of this proposition, the dissent noted that not only was the provision in question put in the contract by an experienced Contracting Officer and reviewed by supervisory personnel within the agency, legal counsel, and the Small Business Administration, but the fact is that the agency had the authority to deviate from the FAR to meet its needs.⁴²⁰ It also cited to several cases where actions beyond the limits of the Federal Acquisition Regulation (FAR) were nevertheless found binding.⁴²¹ However, what the dissent could not overcome, even though the majority chose not to emphasize it, was that the provision in question in *Johnson Management* was, at least arguably, at total odds with a specific statutory requirement. That is, Congress required that any advance payment clause in the contract include a provision granting the Government a security interest in the money advanced to the contractor, a provision that, at least ostensibly, no government agent could waive.⁴²² Viewed in this light, the holding in *Johnson Management* can be reconciled with both *Del-Rio* and *Reiner*; the latter requires that (1) the Contracting Officer must have viewed his actions as being legal and (2) that position must have been "reasonable . . . under the legislation and regulations."⁴²³ As exemplified *infra* in Part VI.C. reconciling other recent cases with the underlying functionalist trend most recently exemplified in *Del-Rio* cannot be done.

B. Express Congressional Disapproval of Actions Nevertheless Taken by an Agency

In addition to the situations such as those in *Johnson Management*, *CACI v. Stone*,⁴²⁴ and *Urban Data Systems*,⁴²⁵ other instances of unmistakable congressional disapproval include *NBH Land Co. v. United States*⁴²⁶ and *Hooe v. United States*.⁴²⁷ In *Hooe*, the Supreme Court found that there was no authorized

419. *Id.* at 1260.

420. *Id.* at 1262, citing 48 C.F.R. § 1.402 (2002).

421. *LaBarge Products, Inc. v. West*, 46 F.3d 1547, 1552–53 (Fed. Cir. 1995); *New England Tank Industries of New Hampshire v. United States*, 861 F.2d 685 (Fed. Cir. 1988).

422. 41 U.S.C. § 255(d) (2003) states that advance payments by the Government to a contractor, "may be made only upon adequate security. . . . Such security may be in the form of a lien in favor of the Government on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree." (Emphasis added.)

423. *John Reiner & Co. v. United States*, 325 F.2d 438, 440 (Ct. Cl. 1963). This is not to say that *Johnson Management* doesn't involve a situation that is similar to the one that Justice Jackson observed in his dissent in *Merrill, i.e.*, where "the Government . . . apparently no more suspected the existence of a hidden regulation that would render the contract void than did the [Merrills]." *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 387 (1947).

424. 990 F.2d 1233 (Fed. Cir. 1993). See discussion *supra* note 127.

425. 699 F.2d 1147 (Fed. Cir. 1983). See *supra* note 92 and accompanying text.

426. 576 F.2d 317 (Ct. Cl. 1978) (a situation in which Congress had twice expressly rejected Army requests for funds to acquire the land that the plaintiff argued had been taken by the Government). See also *Khairallah v. United States*, 43 Fed. Cl. 57 (1999) (explicit disapproval by implication found by virtue of the scheme that Congress had already established for the payment for rewarding informants).

427. 218 U.S. 322 (1910).

action that could constitute a taking despite the fact that the Government had used a part of the building that had been excluded from the lease.⁴²⁸ The basis for this conclusion was that on numerous occasions the lessor had attempted to rent the entire building to the Government at a higher rental price and on each occasion Congress had specifically refused to appropriate money to do so.⁴²⁹

Explicit congressional disapproval, but of a different sort, also existed in *Babbitt v. Oglala Sioux Tribal Public Safety Dept.*,⁴³⁰ which involved a contract under the Indian Self-Determination and Education Assistance Act⁴³¹ (ISDA). Pursuant to that Act, the tribe and the Secretary of the Interior entered into a “self-determination contract,” which incorporates the provisions of the model contract contained in the ISDA.⁴³² Pursuant to the agreement, the appellee, an Indian tribal company, was responsible for public safety on the Pine Ridge Reservation.⁴³³ Under the ISDA the Department of the Interior was required to both fund the programs and pay the indirect costs of self-determination contractors.⁴³⁴

This provision of the statute notwithstanding, for fiscal year 1995 Congress failed to appropriate sufficient money to cover the indirect costs of all ISDA contractors.⁴³⁵ In fact, as a result the plaintiff received reimbursement for only 91.74 percent of its indirect costs, much of which had been incurred before Congress chose not to fully fund the program.⁴³⁶ The Interior Board concluded that the Department was legally bound to fully reimburse Oglala for all indirect costs incurred notwithstanding Congress’s reduced funding of ISDA contracts. This holding was, however, reversed on appeal by the Federal Circuit on the basis of a portion of ISDA that provided that: “Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations.”⁴³⁷

Based on this language, the court concluded that the appellee’s reliance (by spending indirect cost money before it was appropriated) on the expectation that it would receive full indirect cost reimbursement based on the language of ISDA was not reasonable.⁴³⁸ The court went on to say that “even assuming that [it] were . . . no estoppel may lie against the Government when the claim for payment out of public funds is contrary to a statutory appropriation,” citing *Richmond*.⁴³⁹

428. *See id.* at 335.

429. *See id.* at 333–34.

430. 194 F.3d 1374 (Fed. Cir. 1999).

431. 25 U.S.C. §§ 450–450n (1994).

432. *See* 25 U.S.C. §§ 450l(a), (c) (1994).

433. *Oglala Sioux*, 194 F.3d at 1376.

434. *Id.*

435. *Id.*

436. *Id.* at 1377.

437. *Id.* at 1378 (emphasis omitted); 25 U.S.C. § 450j–1(b) (1994).

438. *Babbitt v. Oglala Sioux Tribal Public Safety Dept.*, 194 F.3d 1374, 1380 (Fed. Cir. 1999).

439. *Id.*

In stark contrast, in *United States v. Locke* the Supreme Court did not view a statute of limitations as an *absolute* congressional disapproval of a late filing where the lateness was due to poor advice by a government employee.⁴⁴⁰ Similar refusals to note the effect of express congressional mandates as a bar to estopping the Government can also be seen in cases such as *Manloading & Management Associates, Inc. v. United States*, where the court, utilizing the balancing approach, went so far as to create the fiction of an exercised option to get around the fact that estopping the Government to deny the efficacy of its agent's representation that the contract would be renewed at the end of its one-year period putatively violated the Anti-Deficiency Act.⁴⁴¹

C. Schism: A Significant Split with Functionalism

In *Schism v. United States*,⁴⁴² an *en banc* decision by the Federal Circuit, the majority completely turned away from the functionalist approach applied in *Del-Rio*—had Congress expressed a positive intent to prevent the action or to exclude government liability?—and returned to the traditional formalistic test of whether Congress had directed that the specific action be taken. In doing so, the court added an additional test for binding the Government: Did the action in question involve an area which Congress had so micro-managed as “to occupy the entire field” and thus not grant the agencies any authority whatsoever except that very explicitly granted in the statute?⁴⁴³ In other words, was the grant of authority to the agency by necessary implication totally precluded? *Schism* also marked the first time that the Federal Circuit had embraced the neo-formalistic approach espoused in *Richmond* of putting less emphasis on *Merrill* and its separation of powers approach while relying on more obscure bases to preclude binding the Government.

Schism involved the question of whether the Government was bound by an implied contract allegedly created when, in the early 1950s, military recruiters, acting in good faith and as directed by their superiors, orally promised recruits “free lifetime medical care” for themselves and their dependents if they stayed on active duty for 20 years.⁴⁴⁴ At least in part relying on these promises, the plaintiffs enlisted and stayed in the military for 20 years.⁴⁴⁵ Many years later, after the plaintiffs retired, the Government failed to live up to this promise and plaintiffs' access to military hospitals became quite

440. 471 U.S. 84, 112 (1985) (O'Connor, J., concurring).

441. 461 F.2d 1299 (Ct. Cl. 1972). See 31 U.S.C. § 1341 (1994); see also *Cray Research, Inc v. United States*, 44 Fed. Cl. 327 (1999) (court strained to construe contract as granting the Government the unilateral annual right to renew so as to avoid putative Anti-Deficiency Act violation). But see discussion *supra* Part IV.C. For a further discussion of the *Manloading* case, see Saltman, *supra* note 34, at 512–13.

442. 316 F.3d 1259 (Fed. Cir. 2002) (*en banc*), *cert. denied*, 2003 WL 835021, 71 U.S.L.W. 3567, 71 U.S.L.W. 3746, 71 U.S.L.W. 3750 (U.S. June 2, 2003) (No. 02–1226).

443. *Id.*, 316 F.3d at 1271.

444. *Id.* at 1262.

445. *Id.*

limited.⁴⁴⁶ Plaintiffs were forced to purchase private insurance and filed suit under the little Tucker Act⁴⁴⁷ for the cost of the premiums they had to pay. In the District Court, the Government's motion for summary judgment was granted based on a finding that the promises were not authorized and thus not enforceable.⁴⁴⁸ This decision was, however, reversed by a unanimous panel of the Federal Circuit, which, relying on *Del-Rio*, held that there was nothing in the statutes that prohibited recruiters from making the promises.⁴⁴⁹ Thereafter, the Government filed a motion for rehearing *en banc* pursuant to which the court, in a 9 to 4 vote, reversed the panel and affirmed the District Court's decision.⁴⁵⁰

In doing so, the court found that applicable statutes did not authorize entitlement to medical care.⁴⁵¹ The court, however, never directly concluded that the statutes prohibited it or that Congress had expressed a positive intent to prevent the action or to exclude government liability. Instead, the court stated that

Congress simply did not intend to delegate its authority over health care benefits for military members [to the agencies]. Rather, it intended to occupy the entire field. In that context one cannot reasonably infer that by empowering the service secretaries to run their respective departments, Congress was silently authorizing them to grant health care benefits via oral promises to recruits by the service's recruiters.⁴⁵²

Clearly this was a throwback to the formalistic approach championed in *Merrill* of looking for specific authorization. However, the decision in *Schism* went considerably further than *Merrill* in at least one very chilling respect. Unlike *Merrill*, there is nothing in the statutes or regulations that would have unequivocally put the plaintiffs on notice that the agency lacked the authority to make these promises. Indeed, the closest that the court gets to dealing with this fact is to imply that there is no way that *the agency* could have reasonably believed at the time that it was statutorily authorized to make such promises, because "[a] reasonable lawyer advising the Secretary of Defense or any of the service secretaries at the time could not have claimed that § 301 created the right to make promises of lifetime health care (beyond space available care) because there were other statutes controlling retiree care at the time."⁴⁵³

Of course, had the legality of government action been examined from the point of view of a "reasonable [government] lawyer," a myriad of cases in which the Government has been found bound by questionable actions would

446. As the court noted, "[t]his was due to the combined effect of Congress downsizing military medical facilities and the 1995 regulations which continued to place retirees 65 or older at the bottom of the preference list of all groups entitled to military medical care." *Id.* at 1263 n.2.

447. 28 U.S.C. § 1346(a)(2) (2000).

448. *Schism v. United States*, 19 F. Supp. 2d 1287, 1295 (N.D. Fla. 1998).

449. *Schism v. United States*, 239 F.3d 1280, 1288 (Fed. Cir. 2001) (vacated).

450. *Schism v. United States*, 316 F.3d 1259, 1300 (Fed. Ct. 2002).

451. *Id.* at 1284.

452. *Id.* at 1271.

453. *Id.* at 1280.

have had to be decided differently. The action at issue in *Broad Avenue Laundry* is but one example of this.⁴⁵⁴ The Contracting Officer's issuance of the modification, despite being the product of a mistake of law, would very likely have failed this test. Similarly, the actions in *Del-Rio* itself may not have cleared this hurdle as well.

The *en banc Schism* court also followed the lead of *Richmond*, even expanding on it in the process, by raising numerous other formalistic barriers to the plaintiffs' ability to recover. At the outset, the court concluded that an action for breach of contract could not lie since the rules of contract have no place in the area of military pay.⁴⁵⁵ This holding goes well beyond *Richmond*, which involved civilian disability benefits, but in which the Supreme Court did, in fact, grapple with contractual implications of less-than-specifically authorized agency promises. Among other things, the *Schism* court also found that the recruiters lacked actual authority, meaning that finding the Government to be estopped would violate the principle enunciated in *Richmond* "that payments of money from the Federal Treasury are limited to those authorized by statute."⁴⁵⁶ It further concluded that Congress did not impliedly authorize entitlement to lifetime free medical care for retirees through acquiescence nor did it ratify the agency's actions; and the Anti-Deficiency Act "arguably" precluded the recruiters from obligating "the Government to spend monies that had not yet been appropriated unless such contract or obligation was authorized by law."⁴⁵⁷

All that said, the court made no note of the fact that the plaintiffs had never argued that they were entitled to free health care on demand. Indeed, the facts indicate that for a great many years since their retirement, plaintiffs had not been dissatisfied with "space available" health care that military retirees had been receiving since at least the 1950s.⁴⁵⁸ Rather, their allegation of breach of contract occurred only when "space available" health care was substantially reduced in 1996.⁴⁵⁹ For reasons that are difficult to understand, in *Schism* the court appears to have gone out of its way to deny any relief whatsoever

454. *Broad Avenue Laundry & Tailoring v. United States*, 681 F.2d 746 (Ct. Cl. 1982).

455. *Schism*, 316 F.3d at 1271.

456. *Id.* at 1284.

457. *Id.* at 1283. In this regard it should be noted that the issue in *Richmond* was the appellee's entitlement to participate in a program that was clearly authorized and funded by Congress because the government agent had said the appellee would meet the eligibility requirements when in fact he would not, whereas in *Schism* the issue, at least as framed by the court, was whether the Government could contract with plaintiffs to provide benefits that Congress had never approved or funded. As discussed *supra*, any putative violation of the Anti-Deficiency Act that may have been created by the unfounded promise of free health care for life did not, however, eliminate the authority of the government agents to make a binding commitment to the plaintiffs. Compare *Manloading & Management Associates, Inc. v. United States*, 461 F.2d 1299 (Ct. Cl. 1972), in which the court, utilizing the balancing approach, went so far as to create a fiction that got around the fact that estopping the Government to deny efficacy of its agent's representation that the contract would be renewed at the end of its one-year period violated the Anti-Deficiency Act.

458. *Schism v. United States*, 316 F.3d 1259, 1262, 1264 (Fed. Cir. 2002).

459. *Id.* at 1270.

to individuals who had performed their part of the putative contract by serving twenty years in the military and regarding whom the court said, “We cannot readily imagine more sympathetic plaintiffs.”⁴⁶⁰

While there is no doubt but that Article I of the Constitution rests the power “[t]o raise and support Armies” and “[t]o make Rules for the Government and Regulation of the land and naval Forces,” both the majority and the dissent in *Schism* chose not to discuss the fact that for many years prior to the acts in issue taking place, the executive branch helped to carry out this power through highly visible recruiting efforts. Indeed, it is difficult to imagine that after WWII Congress was not well aware that for many years the services had spent part of their appropriations on recruiting. This activity took the form of recruiting stations in most cities, as well as magazine, radio, and poster advertising. Indeed, who among us has not seen World War II-era posters proclaiming “Uncle Sam Wants You.”

As the court noted, “[p]ast practice does not, by itself, create power. However, ‘long-continued practice, *known* to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent. . . .’”⁴⁶¹ Notwithstanding the lack of a precise statute, it readily appears that the Congress did, through acquiescence, if not by necessary implication, authorize the military secretaries to recruit individuals to serve in the armed forces. The court indicated that the secretaries’ authority to conduct recruiting did not, however, carry with it the broad authority to make promises that bind future Congresses to appropriate funding for “free lifetime care”;⁴⁶² the precise scope of which is never defined by the court or in any of the preceding opinions in the matter.

Would the plaintiffs have prevailed if the court had applied the functionalist test laid out in *Del-Rio*? There is little doubt that the recruiters were doing the job that they did every day, i.e., recruiting, in which various promises are from time to time made to potential recruits in an attempt to entice them to enlist. Thus, the issue is not the individual agent’s authority but rather the ability of the agency to imbue its employees with legitimate authority to do so. Accordingly the relevant questions, under *Del-Rio*, become whether offering or providing free lifetime medical care was “explicitly prohibited” by Congress⁴⁶³ or had Congress expressed a positive intent to prevent the action or to exclude government liability.⁴⁶⁴ Since Congress was silent on the subject, the answer to both of these questions appears to be “No.” As such, it would seem that had the *Del-Rio* approach been followed in *Schism*, the plaintiffs likely would have prevailed. Moreover, since *Schism* involved the situation where the Government, its agents, and the plaintiff all believed that the prom-

460. *Id.* at 1300.

461. *Id.* at 1295 (citing *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 470–73, 474 (1915))).

462. *Id.* at 1288.

463. *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1363 (Fed. Cir. 1998).

464. *Ramirez de Arellano v. Weinberger*, 724 F.2d 143, 151 (D.C. Cir. 1983).

ises made were legal and authorized when made, the plaintiff took substantial actions in reliance on them, and only thereafter were the Government's promises found to have been illegal, the same result may be reached under slightly different criteria.⁴⁶⁵

The suggestion that a different result could have been reached in *Schism* had it followed *Del-Rio* is not a radical conclusion. Importantly, the court was quite clear that, by both statute and regulation, retirees in the early 50s were entitled to some level of medical care. For example, it noted that former Army Regulation 40–505 ¶ 2(b)(2) stated that: “[T]he Army will, usually through its own facilities, provide medical attendance to . . . [p]ersons who are on the retired list of the Regular Army and who report in person at any Army dispensary or hospital, *provided sufficient accommodations are available* for their treatment.”⁴⁶⁶

The court also pointed out that this “conditional” level of care came to include the provision of medications⁴⁶⁷ and dental care.⁴⁶⁸ Indeed, as the court noted:

The [Dependents Medical Care Act of 1956] provided for conditional health care for retirees: “a member or former member of a uniformed service who is entitled to retired . . . pay may, upon request, be given medical and dental care in any facility of any uniformed service, subject to the availability of space and facilities and the capabilities of the medical and dental staff.”⁴⁶⁹

While “space available” medical and dental care plus the disbursement of medicines is not the same as lifetime unlimited health care on demand, it is no small benefit either. Indeed, it was only after the Government began to take away this “conditional” benefit that the plaintiffs felt compelled to buy supplemental Medicare insurance and sue for the cost thereof.⁴⁷⁰

In this regard, the court, however, seemed mesmerized by the government's characterization in 1996, some forty years after the fact, that “medical care for retirees in military medical facilities has always been, and to this day remains, a privilege, not an absolute right, as has been assumed by many.”⁴⁷¹ This self-serving characterization notwithstanding, what seems clear from the case is that “space available” health care was a valuable benefit that was being provided by the Congress at the time of the contracts in question (and which is still provided, at least to some extent⁴⁷²) and that the recruiters were authorized to offer this benefit to potential recruits on condition that they

465. See discussion *infra* Part VII.

466. *Schism v. United States*, 316 F.3d 1259, 1287 (Fed. Cir. 2002).

467. *Id.* at 1278.

468. *Id.* at 1298.

469. *Id.* (quoting 10 U.S.C. § 1074(b) (1956)) (emphasis omitted).

470. *Id.* at 1263.

471. GENERAL ACCOUNTING OFFICE, OFFICE OF THE SECRETARY OF DEFENSE, MILITARY COMPENSATION BACKGROUND PAPERS: COMPENSATION ELEMENTS AND RELATED MANPOWER COST ITEMS, THEIR PURPOSES AND LEGISLATIVE BACKGROUNDS (5th ed. 1996) at 609 (emphasis omitted).

472. *Schism v. United States*, 316 F.3d 1259, 1277 (Fed. Cir. 2002).

serve twenty years. If nothing else, there is little question that Congress's express decision to continue the space available health care likely ratified the Air Force's authority to make such an offer.

To the extent that the offers in question were accepted and the condition precedent to the Government's having to fulfill its obligation under the implied contract were met, the Government was not empowered to substantially reduce the "space available" level of coverage encompassed within whatever it had promised these individuals without incurring liability. If it did, as appears to have been the case, it breached its contracts with these plaintiffs or more likely took away a valuable property right without compensation.

Looking at the situation this way, it is difficult to conceive that granting *Schism* relief would have frustrated any identifiable congressional intent.⁴⁷³

Schism represents a significant retreat from the approach taken in *Del-Rio*. However, given the substantial history of the Federal Circuit in this area and the Court of Claims precedent, including *Reiner*, to which it is bound,⁴⁷⁴ it is most likely that in future cases the circuit will return to the functionalist path most recently exemplified in *Del-Rio*.

Of course, it should be noted once more that even the rule articulated in *Del-Rio* as to when the Government will be bound by the actions of its agents (or, more precisely, when it will not be bound) is slightly, but yet very significantly, different from general agency law where an agent acting within the scope of his duties, as viewed by a reasonable person, can override explicit limitations on the agent's authority. That is, under general principles of agency law: "A person who is not authorized to make a contract on behalf of a principal but who has apparent authority to do so, subjects both the principal and the other party to liability to the same extent as if the contract were authorized."⁴⁷⁵

VII. DEALING WITH THE EFFECT OF ACTIONS TAKEN UNDER AUTHORITY THAT ARE LATER FOUND TO BE INVALID

As confirmed in *Del-Rio*, mistakes of law made within the scope of the agent's authority can generally bind the Government. Another question, however, is the binding effect of actions that both the Government and its agent believed were fully legal and authorized when taken, only to be found illegal some time thereafter. Examples of this "gotcha" type situation in which citizens that quite reasonably relied on such government actions can find themselves include (A) instances where the Government's exercise of authority to restrict the plaintiff's activity was, after the plaintiff was harmed by that exercise, found to be illegal; and (B) the Government's proceeding with a project in which the plaintiff has an expectancy interest of some sort that was premised

473. See discussion *supra* Part III.E.

474. See *South Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982).

475. RESTATEMENT (SECOND) OF AGENCY § 159 cmt. c (1958).

on proper performance of some preexisting statutory requirement, such as a proper environmental analysis by the Government, and that analysis is later found to be substantially wanting.⁴⁷⁶ Under the formalistic approach, the legal insufficiency of the critical government action insulates the Government from liability for the negative consequences flowing from its illegal actions. Several cases have brought the question into focus.

A. *The Cigarette Vending Machine Cases: A Mix of Formalism and Functionalism*

Cases in the Federal Circuit subsequent to *Del-Rio* have continued to indicate that acts contrary to law can still be authorized, and that the Government can be held responsible for the consequences.⁴⁷⁷ However, in a series of cases involving the Government's attempt to severely regulate cigarette vending machines, the most notable being *Board Machine, Inc. v. United States*,⁴⁷⁸ the Court of Federal Claims grappled with the requirement that, in order to be binding, an action must not be explicitly prohibited and must also be within the scope of the enabling law in order to later be found authorized but illegal and thus capable of constituting a taking.⁴⁷⁹ The problem in *Board Machine* was that the determination that the act was illegal was not made until long after it took place and, at least putatively, adversely affected the plaintiff.

The regulations at issue in *Board Machine* were published by the Food and Drug Administration (FDA) on August 28, 1996,⁴⁸⁰ and governed many aspects of the sale and promotion of tobacco products. They contained specific labeling requirements, promotional and advertising restrictions, as well as access restrictions.⁴⁸¹ The regulations also contained certain restrictions on the sale of tobacco products from vending machines.⁴⁸² Rather than banning the sale of cigarettes and smokeless tobacco from vending machines outright, as had been suggested by the proposed regulations, the final regulations merely limited the sale of tobacco products from vending machines to locations where no one under the age of eighteen was present or allowed to enter at any time.⁴⁸³

476. See, e.g., *Rosebud Sioux Tribe v. Gove*, 104 F. Supp. 2d 1194 (D.S.D. 2000), *rev'd sub nom. on other grounds*, *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (8th Cir. 2002), *reb'g and reb'g en banc denied* (Aug. 14, 2002), *cert. denied*, *Sun Prairie v. McCaleb*, 123 S. Ct. 1255, 154 L. Ed. 2d 1020 (2003).

477. See *Hedrick v. United States*, 215 F.3d 1349 (Fed. Cir. 1999); *Cooley v. United States*, 46 Fed. Cl. 538 (2000); *Mannatt v. United States*, 48 Fed. Cl. 148 (2000).

478. 49 Fed. Cl. 325 (2001).

479. See *id.* at 330. Does this mean that the government action must reasonably be within the scope of the enabling law as viewed by the agency? As viewed by a district court? As viewed by an overwhelming number of the members of the Supreme Court on the day it rules? See discussion *infra*.

480. 61 Fed. Reg. 44,396 (Aug. 28, 1996) (codified at 21 C.F.R. §§ 801, 803, 804, 807, 820, and 897 (1997)).

481. *Id.*

482. *Id.*

483. See *Board Mach., Inc.*, 49 Fed. Cl. at 325; *A-1 Cigarette Vending, Inc. v. United States*, 49 Fed. Cl. 345, 347, *aff'd on other grounds*, *Brubaker Amusement Co., Inc. et al. v. United States*,

While the Federal Circuit ultimately disposed of the cigarette vending machine cases on the basis that the Government had never taken any enforcement action pursuant to regulations that were ultimately voided by the Supreme Court,⁴⁸⁴ the cases are still very instructive.

In *Board Machine* the court noted the functionalist view that “an act is presumed to be authorized if it is arguably within the scope of the actor’s duties, unless clearly precluded”⁴⁸⁵ and added that in determining the scope of the actor’s authority it would in fact be appropriate to consider the viewpoint of a reasonable person.⁴⁸⁶ The court even went so far as to state that

This court simply believes that a presumption in favor of “authorization” is warranted, in cases of Congressional ambiguity, silence or acquiescence, where the agency is enabled by statute, and the [action, here a] taking is effectuated by an actor arguably within [the scope of its authority], taking into account a reasonable person’s view.⁴⁸⁷

Support for a presumption in favor of authorization can be seen in cases such as *Portsmouth Harbor Land & Hotel Co. v. United States*, which involved an alleged taking because the Government had set up heavy coastal defense guns and was firing them over the claimant’s summer resort property.⁴⁸⁸ As the Court stated in *Portsmouth Harbor*:

It very well may be that the claimants will be unable to establish authority on the part of those who did the acts to bind the Government by taking the land, *United States v. North American Transportation & Trading Co.*, 253 U.S. 330. But as the allegation is that the United States did the acts in question, we are not prepared to pronounce it impossible upon demurrer. As the United States built the fort and put in the guns and the men, there is a little natural unwillingness to find lack of authority to do the acts even if the possible legal consequences were unforeseen.⁴⁸⁹

Conversely, of course, if, as stated in *Merrill*, every person is deemed to “know the law,” then no bureaucratic error will ever give rise to reasonable reliance⁴⁹⁰ and no presumption of authorization is ever needed.

Despite the above statements and others regarding the presumption,⁴⁹¹ in *Board Machine* the court found that FDA’s promulgation of a regulation that restricted the location where cigarette vending machines could be situated was outside the scope of the agency’s authority (i.e., was *ultra vires*), and there-

304 F.3d 1349 (Fed. Cir. 2002), *cert. denied*, Penn Triple S v. U.S., 123 S. Ct. 1570, 71 U.S.L.W. 3367, 71 U.S.L.W. 3606, 71 U.S.L.W. 3609 (U.S. Mar. 24, 2003) (No. 02-734).

484. *Brubaker Amusement Co., Inc. et al.*, 304 F.3d at 1353.

485. *Board Mach., Inc. v. United States*, 49 Fed. Cl. 325, 333 (2001).

486. *See id.* at 334 n.13.

487. *Id.* at 335-36.

488. 260 U.S. 327 (1922).

489. *Id.* at 330.

490. *See Kuhlman, supra* note 18, at 262.

491. Most notably, the court also stated that: “If Congress has not clearly disapproved of an act . . . then authority should be presumed if the actor is within its general scope.” *Board Mach., Inc. v. United States*, 49 Fed. Cl. 325, 334 (2001).

fore not a valid basis for a temporary taking claim.⁴⁹² In doing so, the court took the formalistic view of an *ultra vires* act, i.e., one not prescribed in the statutes, rather than the functionalistic view, i.e., an *ultra vires* act is one that is prohibited by statute. Similar conclusions were reached in *A-1 Amusement Co. v. United States*,⁴⁹³ *Brubaker Amusement Co. v. United States*,⁴⁹⁴ *B&G Enterprises, Ltd v. United States*,⁴⁹⁵ and *A-1 Cigarette Vending, Inc. v. United States*.⁴⁹⁶

The conclusion in *Board Machine* was based on *FDA v. Brown & Williamson Tobacco Corp.*, in which the Supreme Court, in a five-to-four decision, had “determined that Congress *expressly* denied the FDA the authority to promulgate its tobacco regulations, with the result that the regulations cannot come within the agency’s general scope of authority.”⁴⁹⁷ Quite consistent with *Del-Rio*, the court in *Board Machine* found that “good faith and general authority [do not] trump *express* Congressional disapproval.”⁴⁹⁸ However, while five justices in *Brown & Williamson* believed that the FDA’s regulation of tobacco had been specifically precluded by Congress, four justices were equally convinced that tobacco products clearly fit within the FDA’s jurisdiction under the Federal Food, Drug and Cosmetic Act (FDCA) to regulate “articles (other than food) intended to affect the structure or any function of the body . . .”⁴⁹⁹ and that the regulations were *in all aspects* valid.⁵⁰⁰ Justice Breyer noted in his dissent that “[a]fter studying the FDCA’s history, experts have written that the statute is a purposefully broad delegation of discretionary powers by Congress. . . .”⁵⁰¹ Additionally, he added:

[N]either the [tobacco] companies nor the majority denies that the FDCA’s literal language, its general purpose, and its particular legislative history favor the FDA’s present jurisdictional view. Rather, they have made several specific arguments in support of one basic contention: Even if the statutory delegation is broad, it is not broad *enough* to include tobacco.⁵⁰²

The dissent further pointed out that the basic purpose of the statute was the overall protection of public health⁵⁰³ and that courts reverse an agency interpretation, such as those made by the FDA, only if Congress clearly answered the interpretive question or if the agency’s interpretation was unreasonable. The dissent claimed that neither applied to the case at hand.⁵⁰⁴

492. *See id.* at 331.

493. 48 Fed. Cl. 63 (2000).

494. No. 98–511C, slip op. (Ct. Fed. Cl. Jan. 12, 2001), *aff’d on other grounds*, 304 F.3d 1349 (Fed. Cir. 2002).

495. 48 Fed. Cl. 866 (2001), *aff’d on other grounds*, 304 F.3d 1349 (Fed. Cir. 2002).

496. 49 Fed. Cl. 345 (2001), *aff’d on other grounds*, 304 F.3d 1349 (Fed. Cir. 2002).

497. *Board Mach., Inc. v. United States*, 49 Fed. Cl. 325, 329 (2001) (emphasis added); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

498. *Board Mach., Inc.*, 49 Fed. Cl. at 330 (emphasis added).

499. 21 U.S.C. § 321(g)(1) (1994).

500. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 126 (Breyer, J., dissenting).

501. *Id.* at 161–63 (Breyer, J., dissenting) (citation omitted).

502. *Id.* at 167.

503. *See id.* at 178.

504. *See id.* at 170–71.

With all due respect to the majority opinion, any putative congressional preclusion of FDA's actions to regulate the location of cigarette vending machines could certainly be viewed by a reasonable person as being a good deal less than express, if in fact there was any specific congressional intent to preclude at all.⁵⁰⁵ Indeed, in other instances, reliance on a law or regulation so premised has been found reasonable if "a person sincerely desirous of obeying the law" would have accepted the information in issue as true.⁵⁰⁶ Here, putting aside the question of whether or not the regulations were valid when issued, the fact is that when these regulations were first subjected to judicial scrutiny, a district court located in no less than the tobacco-producing state of North Carolina upheld the validity of the FDA's tobacco vending machine regulations.⁵⁰⁷ Certainly, this, coupled with the closeness of the decision in the Supreme Court, is substantial evidence that any express congressional preclusion of the FDA's actions in this regard was not readily apparent. For these reasons, the conclusions in the cigarette vending machine cases that FDA's lack of authority to regulate tobacco was "unmistakable,"⁵⁰⁸ that the actions of its agents in doing so were *clearly* outside the scope of their authority,⁵⁰⁹ i.e., *ultra vires*,⁵¹⁰ and that Congress had expressed a positive intent to prevent the action or preclude government liability are all somewhat suspect. Accordingly, had the functionalist point of view prevailed, the result might have been different.

In this regard, contrary to the view expressed by the Court of Federal Claims, it seems that rather than *expressly* disapproving the FDA's regulation of tobacco, Congress had, at least arguably, simply not expressly included the regulation of tobacco within the FDA's duties.⁵¹¹ As such, the FDA had at least putative authority to regulate those items, like tobacco, that it, in good faith, reasonably believed were encompassed in the term "articles (other than food) intended to affect the structure or any function of the body."⁵¹²

Indeed, just as in *Del-Rio*, it was part of FDA officials' statutorily authorized duties to interpret the statutes governing the subject in question and also like the situation in *Del-Rio* "there is no reason to suppose that their decision reflected anything but a good faith effort to apply the statutes as they understood them."⁵¹³ If FDA officials erroneously, albeit plausibly, construed the

505. The same statement could very well be made with regard to Congress's alleged intent to preclude the Air Force from offering free lifetime medical care provided recruits served for twenty years, which was the subject of the decision in *Schism*. See discussion *supra* Part VII.C.

506. *United States v. Lansing*, 424 F.2d 225, 227 (9th Cir. 1970). See also *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (2001), discussed in detail *infra* in Part VII.B.

507. See *Coyne Beahm, Inc. v. U.S. Food & Drug Admin.*, 966 F. Supp. 1374 (M.D.N.C. 1997), *rev'd*, 153 F.3d 155 (4th Cir. 1998).

508. See *Board Mach., Inc. v. United States*, 49 Fed. Cl. 325, 335 (2001).

509. See *id.* at 330.

510. See *id.* at 331.

511. Compare *Johnson Mgmt. Group CFC, Inc. v. Martinez*, 308 F.3d 1245 (Fed. Cir. 2002), discussed *supra* at note 418 and accompanying text, wherein Congress expressly required that any advance payment clause in the contract include a provision granting the Government a security interest in the money advanced to the contractor.

512. 21 U.S.C. § 321(g)(1)(C) (1994).

513. *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1363 (Fed. Cir. 1998).

agency's enabling statute to encompass the regulation of tobacco, that error does not make the actions taken under color of law *void ab initio* because "a government official may act within his authority even if his conduct is later determined to have been contrary to law."⁵¹⁴ On these bases, relief may have been warranted. Of course, the same would not hold true if FDA officials had asserted regulatory authority over some area wholly unrelated to the FDA's enabling statute.

The teachings of *Broad Avenue Laundry*⁵¹⁵ would also have supported the granting of relief to the cigarette vending machine plaintiffs if otherwise warranted. As noted above, *Broad Avenue Laundry* involved a situation in which the Government was estopped by the court to deny the validity of the Contracting Officer's written modification incorporating new prevailing minimum wage rates into the contract (thus requiring the contractor to pay those higher wages), even though the modification violated a regulation.⁵¹⁶ Not only was issuance of the modification, which was the product of a mistake of law, held to have been within the scope of the Contracting Officer's authority, and the modification not deemed palpably illegal, but the court even suggested that the standard for palpable illegality is raised where failure to comply with the questionable order of the Government would be done at substantial peril:

We have some doubt whether the palpable illegality of a contract modification would make the modification void, as in that event the requirement of the disputes article would be nullified and the contractor would not be required to continue performance, pending resolution of the dispute by appeal procedure under the contract.

It may be doubted, therefore, whether a contractor must scrutinize an order for palpable illegality, refuse to perform if it sees palpable illegality, and perform subject to resolution of the dispute on appeal only if the illegality, in its eyes, is not palpable.

If there can be a palpable illegality mandating refusal to comply with a contracting officer's directives, we do not think it present here.⁵¹⁷

As the court further stated, where a plaintiff is in the position of having to comply with a government order on pain of substantial penalty for failing to do so,⁵¹⁸ the order is valid enough to impose a legal duty to comply with the order and on the Government to pay for the effect of that compliance.⁵¹⁹ The

514. *Id.* at 1362.

515. *Broad Avenue Laundry & Tailoring v. United States*, 681 F.2d 746 (Ct. Cl. 1982).

516. *Id.* at 747.

517. *Id.* at 749–50.

518. As the Federal Circuit commented in *USA Petroleum Corp. v. United States*, 821 F.2d 622, 627 (Fed. Cir. 1987), regarding *Broad Avenue Laundry*, "[t]he case recognizes that the contractor has no legal choice but to comply with the contract." *Id.* This fact is, of course, not generally present in cases where the plaintiff is claiming an entitlement based solely on the questionable actions of the Government's agent(s).

519. *Broad Avenue Laundry*, 681 F.2d at 749. Similarly, in *Board Mach., Inc. v. United States*, 49 Fed. Cl. 325 (2001), if the regulations were enforced, the plaintiffs, on pain of a fine, injunction, civil money penalties, product seizure, and prosecution, were compelled to rely on the advice of actions of an entire agency.

Government does not employ Contracting Officers or other highly placed officials “to tender gratuitous legal advice.”⁵²⁰ Accordingly, the court opined that “[t]he government, which clothes its contracting officers with authority to effectuate these consequences on the basis of a mistake of law, cannot turn around and take the wholly inconsistent position that it did not authorize the contracting officer to make legal mistakes.”⁵²¹ Moreover, as noted in *Nolan Brothers*, the granting of relief to the innocent contractor in such circumstances does not turn solely on the existence of an appropriate provision in an applicable contract.⁵²² For this and other reasons, there is no cause to limit this rationale merely to Contracting Officers, as opposed to government officials in general.

Broad Avenue Laundry recognized that, “[o]f course, this cannot be carried too far. The orders [or actions] must be within the officer’s subject matter jurisdiction.”⁵²³ In *Broad Avenue Laundry*, the order in issue related to the payment of prevailing wages (one of the services required of petitioner by the contract) in the course of providing laundry services (something also required of the petitioner).⁵²⁴ So, too, in many other circumstances it has been recognized that it is within the scope of the authority of some government officials to unknowingly do wrongful acts, such as breach contracts or commit torts, for which the Government is liable. The order in question in the cigarette vending machine cases requiring the removal of those machines being related to a subject that was at least ostensibly within the FDA’s purview was another such circumstance.

In *Richmond*, the Supreme Court indicated a belief that holding the Government liable for the erroneous actions of its agents would lead to the Government’s imposing strict controls upon the provision of information and the like in order to limit liability.⁵²⁵ Such predictions, however, seem no more realistic than did similar ones made a century and a half ago that widespread application of the apparent authority doctrine would inhibit the operation of corporations. Moreover, to the extent that a such a chilling effect on governmental actions and information is of concern, it is far more chilling for government officials acting in good faith to fulfill their duties to later be told that the acts that they have committed were not within the scope of their duties, thus excusing the Government of liability, but at the same time perhaps exposing the officials to personal liability.

520. *Broad Avenue Laundry*, 681 F.2d at 749.

521. *Id.*

522. *Nolan Bros., Inc. v. United States*, 405 F.2d 1250, 1254 (Ct. Cl. 1969). *But see* Charlie Driesbock Mach. Tools, 58 Comp. Gen. 240, 79-1 CPD ¶ 56 (discussing how the Comptroller General refused to award breach damages or apply the palpably illegal test to a surplus sale contract that was illegally awarded but contained no termination-for-convenience clause). *Driesbock* was, however, deliberately not followed in *Parkview Terrace Apartments*, HUDBCA No. 82-678-B3, 82-2 BCA ¶ 15,885.

523. *Broad Avenue Laundry & Tailoring v. United States*, 681 F.2d 746, 749 (Ct. Cl. 1982).

524. *Id.* at 748. For further discussion, see *USA Petroleum Corp. v. United States*, 821 F.2d 622, 624-25 (Fed. Cir. 1987).

525. *See* *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 433 (1990).

1. Applying Alternative Approaches

a) *What if Reiner Had Been Applied?*

An approach that would not send similar shivers down the spines of conscientious government employees, and yet might have achieved a fairer result than occurred in *Board Machine*, would be to take the broader view of the scope of the employee's authority and to find at least some government culpability if any illegality were found, provided that the illegality is not palpable.

The fact that the regulations drafted by FDA were upheld by one court, and by the slightest of margins struck down on appeal as inconsistent with the agency's authority to regulate tobacco products, does not make the act of issuing those regulations illegal. Indeed, the act of issuing these regulations was not clearly outside the scope of FDA's authority, i.e., any illegality of those regulations certainly was not palpable. This fact, coupled with the application of *Reiner*, would respond, at least in this instance, to the conundrum that the court posed in *Board Machine*: "it may seem inequitable to the plaintiffs and to the citizens of the United States that the more egregious acts [of the Government], the ones that are completely unauthorized, cannot be compensated as takings, whereas less offensive government acts that are 'merely illegal' [do] qualify for remuneration."⁵²⁶

In *Board Machine*, Judge Damich was so concerned with the inequity of the decision he felt obliged to state that

Because compensation is not available for unauthorized governmental acts under a takings analysis and because recovery does not seem to be available under other theories, future courts might consider a broader conceptualization of "authorized" for takings analysis purposes, the foundation of which is that an act is presumed to be authorized if it is arguably within the scope of the actor's duties, unless clearly precluded.⁵²⁷

Clearly the court was mindful that "[a]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own."⁵²⁸

As noted previously, that *ultra vires* actions are void and cannot therefore be the basis for any claim against the Government has its roots in the concern that there could be collusion between government officials and the persons paid out of the treasury.⁵²⁹ Nearly two centuries ago the Supreme Court said that, "It is better that an individual should now and then suffer by such mistakes, than to introduce a rule against an abuse, of which, by improper collusions, it would be very difficult for the public to protect itself."⁵³⁰

526. *Board Mach., Inc. v. United States*, 49 Fed. Cl. 325, 331 (2001).

527. *Id.* at 333.

528. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971).

529. See Kuhlman, *supra* note 18, at 243–44.

530. *Lee v. Munroe*, 11 U.S. (7 Cranch) 366, 370 (1813).

So strong was the concern about collusion that the courts viewed contracts made in violation of the rules of contracting as being not merely voidable but void so that contractors were neither able to estop the Government to deny the existence of the contract, nor even be paid for goods or services provided.⁵³¹ This concern about authority and collusion by government officials to frustrate legislative policy was even noted in *Richmond*.⁵³²

A century and a half ago the same concern about collusion existed with respect to the actions of corporate agents, i.e., to actions that the corporation itself was incompetent to perform. Application of the *ultra vires* doctrine to private corporations was, however, harshly criticized for its unjust results and is, of course, no longer followed. Nevertheless, the courts have maintained the rule in the context of governmental *ultra vires*.⁵³³ The incidence of “improper collusions” has, however, historically been exceedingly small.⁵³⁴ Moreover, to the extent that a deterrent against public fraud is required, it is readily supplied by the severe criminal sanctions that can be imposed for defrauding the Government. Of course, cases like *Reiner*⁵³⁵ and its progeny have tempered this rule by saying that in order for the determined illegality to totally void the effect of actions taken before a judicial determination of same, the illegality must be “plain or palpable”⁵³⁶ (i.e., did the nongovernment party create or contribute to the “illegality” or did it have knowledge that the Government’s actions were “illegal?”).⁵³⁷ While a contract that is illegal, but not palpably so, is still illegal and thus cannot be continued after the determination of illegality is made, that contract is nevertheless not void *ab initio* and the contractor can obtain termination for convenience damages pursuant to the terms of the contract⁵³⁸ or in the absence of such a clause, breach damages.⁵³⁹

Viewed in this light, since the “illegality” of the regulations that affected cigarette vending machines was certainly neither plain nor palpable, if these regulations had been enforced, would it have been appropriate to have barred the plaintiffs from any relief whatsoever with respect to the effect of actions taken by the Government pursuant to those regulations before a final judicial

531. See Kuhlman, *supra* note 18, at 244.

532. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 433 (1990).

533. See Kuhlman, *supra* note 18, at 244–47; see also discussion *supra* Part III.A.

534. See Raoul Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680, 684 (1954); Kristin A. DeKuijer, *Santiago v. Immigration and Naturalization Service—The Ninth Circuit Retreats from Its Modern Approach to Estoppel Against the Government*, 1976 UTAH L. REV. 371, 372 n.10.

535. *John Reiner & Co. v. United States*, 325 F.2d 438 (Ct. Cl. 1963).

536. See Saltman, *supra* note 34, at 507 n.69.

537. *To the Director, Defense Supply Agency*, 52 Comp. Gen. 215, 218, 1972 CPD ¶ 92. *But see CACI, Inc. v. Stone*, 990 F.2d 1233, 1234–37 (Fed. Cir. 1993); *Bureau of Land Management: Payment of Pocatello Field Office Photo Copying Costs*, Comp. Gen. B-290901, 2002 WL 31870646 (Dec. 16, 2002).

538. See, e.g., *Trilon Educ. Corp. v. United States*, 578 F.2d 1356, 1360 (Ct. Cl. 1978); *Warren Bros. Rds. Co. v. United States*, 355 F.2d 612, 616 (Ct. Cl. 1965); *In the Matter of Fink Sanitary Serv., Inc.*, 53 Comp. Gen. 502, 74–1 CPD ¶ 36; see also *Nolan Bros., Inc. v. United States*, 405 F.2d 1250 (Ct. Cl. 1969) (indicating that this rule is not, however, limited to situations where a termination for convenience clause is contained in the contract).

539. *Nolan Bros.*, 405 F.2d at 1254.

determination was made that the actions were illegal? *Reimer* and its progeny suggest that the answer is “no,” particularly since the plaintiff’s failure to comply with the Government’s order would have put it in substantial peril.⁵⁴⁰

Application of the palpable illegality test more broadly would, as the *Board Machine* court hoped, “minimize those situations in which a citizen’s property is taken by an ostensible government act and no compensation is available.”⁵⁴¹ Of course, this is not to say that if the palpable illegality test were applied more broadly that situations where Congress proscribed relief would become compensable.

In *Board Machine*, the court found that the plaintiff was essentially asserting that the FDA had pre-existing, but limited, authority to regulate tobacco, and, while the vending machine regulation was outside of this limit, it was not outside the scope of the agency’s general regulatory authority.⁵⁴² The plaintiffs argued that the FDA’s actions “were authorized by virtue of the subject matter but nonetheless illegal. . . .”⁵⁴³ As the court stated, the plaintiff attempted to “stuff an act that was ‘unauthorized but lawful’ claim (one done at least under color of law but which was disapproved by Congress) [into the mold of an act that was] ‘authorized but illegal’ and thus binding under *Del-Rio*.”⁵⁴⁴ In ruling against the plaintiff, the court cited *A-1 Amusement Co.*, which in turn relied on the Supreme Court’s decision in *Larson v. Domestic & Foreign Commerce Corp.*,⁵⁴⁵ a case that was also relied on in *Del-Rio*. As the Supreme Court stated in *Larson*:

It is argued that an officer given the power to make decisions is only given the power to make correct decisions. If his decisions are not correct, then his action based on those decisions is beyond his authority and not the action of the sovereign. There is no warrant for such a contention in cases in which the decision made by the officer does not relate to the terms of his statutory authority. Certainly the jurisdiction of a court to decide a case does not disappear if its decision on the merits is wrong. And we have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so. *Adams v. Nagle*, 303 U.S. 532, 542 (1938). We therefore reject the contention here.⁵⁴⁶

In *Del-Rio* the court based its conclusion on this premise and found that actions taken by government agencies are not unauthorized unless they are “either explicitly prohibited or . . . outside the normal scope of the Government official’s duties.”⁵⁴⁷ Notably, in *A-1 Amusement*, the court subtly reversed the functionalist presumption of authorization applied in *Del-Rio* that au-

540. *Broad Avenue Laundry & Tailoring v. United States*, 681 F.2d 746, 749–50 (Ct. Cl. 1982). See *id.* at 749–50; see also discussion *infra* Part VII.B.

541. *Board Mach., Inc. v. United States*, 49 Fed. Cl. 325, 332 (2001).

542. *Id.* at 330.

543. *Id.*

544. *Id.*

545. 337 U.S. 682 (1949).

546. *Id.* at 695.

547. *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1363–65 (Fed. Cir. 1998) (“conduct by a government official who is acting *ultra vires*” is not binding on the Government); accord *Hooe v. United States*, 218 U.S. 322 (1910).

thorization accompanies actions that appear totally regular at the time that they are taken (i.e., actions that the agent reasonably believed are part of his duties). Instead, the *A-1 Amusement* court required a *showing* by the plaintiff that the actions of the agent did not conflict with the terms of his “valid statutory authority,”⁵⁴⁸ i.e., the classic formalist approach. However, as both *Larson* and *Del-Rio* teach, valid statutory authority does not evaporate merely by virtue of an agent’s misinterpretation of law. Moreover, although the court in *A-1 Amusement* found that there must be some congressional authorization, express or implied, for the particular taking claimed,⁵⁴⁹ it failed to recognize that (1) such authorization can be accomplished expressly or *by necessary implication*⁵⁵⁰ and (2) the requisite authorization may very well have existed in the cigarette vending cases, albeit in an implied form. That is, the FDA officials who wrote the regulations and, as the plaintiffs argued, effectuated the temporary taking of plaintiffs’ vending machines did not merely act in good faith when they wrote the regulation. Rather, they believed, and perhaps quite rightfully so at the time, that they were acting in total accord with authority that Congress had given the FDA to regulate “articles (other than food) intended to affect the structure or any function of the body. . . .”⁵⁵¹ That is, the regulations appear to have been issued pursuant to “the good faith implementation of a Congressional Act.”⁵⁵² The FDA officials did not violate the rule that

If an officer of the United States assumes, by virtue alone of his office, and *without the authority of Congress*, to take such matters under his control, he will not, in any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of the Congress, cannot create a claim against the government, “founded upon the Constitution.”⁵⁵³

Unless they were clairvoyant as to how one swing vote on the Supreme Court would be cast years after the fact, the FDA employees were also acting well within the normal scope of their duties.⁵⁵⁴

548. *A-1 Amusement Co. v. United States*, 48 Fed. Cl. 63, 68 (2000) (quoting *Larson*, 337 U.S. at 695). This subtle change in the presumption of authorization is also evident in other cases. See, e.g., *A-1 Cigarette Vending, Inc. v. United States*, 49 Fed. Cl. 345 (2001) (compensable takings claims cannot arise from executive actions that are wholly unauthorized by Congress).

549. See *A-1 Amusement*, 48 Fed. Cl. at 66 (citing *S. Cal. Fin. Corp. v. United States*, 634 F.2d 521, 523 (Ct. Cl. 1980)); see also *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 127 n.16 (1974) (affirming the proposition that government action must be express or implied).

550. *Hooe v. United States*, 218 U.S. 322, 336 (1910) (“The taking of private property by an officer of the United States for public use, without being authorized, expressly or by *necessary implication*, to do so by some act of Congress, is not the act of the Government.”) (emphasis added).

551. 21 U.S.C. § 321(g)(1)(C) (1994).

552. *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998) (quoting *S. Cal. Fin. Corp.*, 634 F.2d 525).

553. *A-1 Cigarette Vending, Inc.*, 49 Fed. Cl. at 353 (citing *Hooe*, 218 U.S. at 335–36).

554. Likewise, the court’s conclusion in *Schism* that Congress had expressed a positive intent to prevent the action or preclude government liability, for the recruiting promises made and relied on, is also questionable. Any illegality of the Government’s offering health care to recruits in exchange for twenty years of service certainly was not palpable to those recruits who relied

The court in *Board Machine* ultimately concluded that the actions of the FDA were *void ab initio*, specifically rejecting what it called the good faith implementation argument “because the regulations did not arise out of a Congressional act, but were initiated by the FDA when it first asserted jurisdiction.”⁵⁵⁵ What the court lost sight of, however, was the fact that the notion of regulating tobacco and cigarette vending machines did not come to the FDA out of thin air. Rather, it came from the FDA’s very reasonable—albeit erroneous by the slightest of margins—interpretation of its own jurisdiction. Under these circumstances, the FDA’s regulations were illegal, but its issuance of regulations was not palpably illegal with respect to the effect that it had on the plaintiffs. Recognition of this would have provided the court with the latitude it believed was lacking, all other things being equal, to rule in plaintiff’s favor.

b) *Can a Lower Court’s Finding of No Illegality Create Implied Authority?*

As noted *supra* in Part VII, an agent’s actual, i.e., implied, authority can be increased by the lack of objection manifested by its principal *or by other events*.⁵⁵⁶ Applying that principle to the FDA regulation at issue in the cigarette vending machine cases, there can be little doubt that when the District Court struck down the portion of the FDA’s regulations restricting advertising and promotion of tobacco products, but upheld the FDA’s authority to issue the vending machine regulations, the FDA was more convinced than ever that, to the extent that it enforced those regulations, it was doing so in accordance with authority provided by Congress.⁵⁵⁷ Moreover, in a practical sense, absent the issuance of an injunction, they did have force and effect.⁵⁵⁸ Based on these

on that promise and invested at least twenty years of their lives to the service of our country at least in part based on that promise. Indeed, a three-judge panel of the Federal Circuit unanimously upheld the legality of the Government’s actions, and four judges dissented from the *en banc* reversal of that conclusion.

555. *Board Mach., Inc. v. United States*, 49 Fed. Cl. 325, 331 (2001).

556. RESTATEMENT (SECOND) OF AGENCY § 33 cmt. b (1958); *see also* *Miller Elevator Co., Inc. v. United States*, 30 Fed. Cl. 662, 691 (1994) (discussing that the basis for the expansion of authority appears to be the fact that “pursuant to the exigencies of the circumstances” it was clearly in the interest of the United States that the agent take the steps that he did).

557. *See* *Coyne Beahm, Inc. v. U.S. Food & Drug Admin.*, 966 F. Supp. 1374 (M.D.N.C. 1997), *rev’d*, 153 F.3d 155 (4th Cir. 1998).

558. While the district court upheld the validity of the FDA’s tobacco vending machine regulations, it nevertheless ordered that the FDA “not implement any of the additional Regulations set for implementation on August 28, 1997, pending further orders by the court.” *Id.* at 1400–01. In *B&G Enterprises Ltd. v. United States*, 48 Fed. Cl. 866 (2001), *aff’d on other grounds*, *Brubaker Amusement Co., et al. v. United States*, 304 F.3d 1349 (Fed. Cir. 2002), *cert. denied*, *Penn Triple S v. U.S.*, 123 S. Ct. 1570, 71 U.S.L.W. 3367, 71 U.S.L.W. 3606, 71 U.S.L.W. 3609 (U.S. Mar. 24, 2003) (No. 02–734), the court dismissed the plaintiff’s complaint on the basis that the cigarette vending machine regulations, having never been enforced, could not have constituted a taking. This position was, in fact, fully affirmed on appeal. While the court’s logic is compelling, neither it nor the Federal Circuit in sustaining it took into account the possible diminution of plaintiffs’ business that may have occurred because the regulations might, based on the vagaries of litigation, have gone into effect at any time.

two facts, any putative action that FDA took toward implementing the regulation could be viewed as having been done with implied authority.⁵⁵⁹

B. *Laguna Gatuna, Inc. v. United States: The Pure Functionalist Approach*

Several months after the Court of Federal Claims issued its decision in *Board Machine*, it issued another opinion that again dealt with the compensability of government actions that appeared to be lawful at the time taken but were subsequently called into question. In that case, *Laguna Gatuna, Inc. v. United States*,⁵⁶⁰ the court took a more pragmatic approach than was evidenced in the cigarette vending machine cases.

Laguna Gatuna involved a thirty-year land use permit issued to the plaintiff in 1979 by the Bureau of Land Management.⁵⁶¹ Pursuant to the permit, the plaintiff was permitted to dispose of oil field brine on a dry lake in New Mexico owned by the Federal Government.⁵⁶² The water that was contained in the brine that plaintiff disposed of left a slurry of salt and other minerals.⁵⁶³

During the term of its permit, Laguna Gatuna had made substantial capital improvements to its disposal facility in the form of pipes to carry the brine from nearby wells to the lake and thus reduce reliance on trucks to transport the brine.⁵⁶⁴ At some point, in the course of investigating dry lakes in New Mexico, the Environmental Protection Agency (EPA) discovered dead birds in the vicinity of the lake and issued an order directing the plaintiff to stop all disposal operations there.⁵⁶⁵ EPA believed that the plaintiff had violated section 301 of the Clean Water Act (CWA), i.e., that the plaintiff had discharged pollutants into the “waters of the United States” without EPA permission.⁵⁶⁶ In ordering the plaintiff to cease and desist, the EPA advised the plaintiff that its failure to do so would render the company subject to civil and criminal penalties pursuant to the CWA.⁵⁶⁷ Given these circumstances, the plaintiff halted its operations.⁵⁶⁸

559. A similar conclusion would not seem possible under the facts in *Schism*. While the legality of the agency’s actions in that case was initially upheld by a unanimous panel of the Federal Circuit, those actions were taken before that decision was issued. The panel’s decision would, however, at least for a time, ostensibly have empowered the agency to ratify the earlier actions of its agents. Of course, if the agency wanted to validate those actions, it could have done so at any time it wished simply by not opposing the plaintiffs’ position or later by not requesting *en banc* rehearing of the panel’s decision.

560. 50 Fed. Cl. 336 (2001). Interestingly, this opinion was issued by Judge Bruggink, whose original opinion was overturned by the Federal Circuit in *Del-Rio*.

561. *Id.* at 338.

562. *See id.*

563. *See id.*

564. *See id.* at 339.

565. *See id.*

566. *See id.* at 340.

567. *See id.*

568. *See id.*

Plaintiff challenged the EPA order in District Court.⁵⁶⁹ However, the District Court dismissed plaintiff's complaint for lack of jurisdiction, stating that EPA orders under the CWA were not subject to judicial review.⁵⁷⁰ The District Court's holding was affirmed on appeal by the Tenth Circuit.⁵⁷¹ Thereafter, Laguna Gatuna filed suit in the Court of Federal Claims asserting that there had been a regulatory taking of its interest in the lake.⁵⁷²

Shortly before trial was to occur on Laguna Gatuna's taking claim, the Supreme Court held in an unrelated case, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*⁵⁷³ (*SWANCC*), that the Army Corps of Engineers' rule extending the definition of "navigable waters" under the CWA to include intrastate waters used as habitat by migratory birds exceeded the authority granted to the Corps by Congress under CWA.⁵⁷⁴ After reading *SWANCC*, the EPA concluded that the case undermined its authority to regulate dry lakes and voluntarily withdrew the cease and desist order issued to Laguna Gatuna in 1992.⁵⁷⁵

This did not, of course, erase the fact that Laguna Gatuna's operations had been halted for nine years.⁵⁷⁶ It did, however, provoke the Department of Justice to argue that when the EPA ordered Laguna Gatuna to suspend its activities at the lake in 1992, it had acted outside of the scope of its congressionally mandated authority.⁵⁷⁷

The court, citing virtually all of the same cases as did the court in *Board Machine*, nevertheless reached a conclusion seemingly at odds with the cigarette vending machine cases. That is, it rejected the notion that the EPA's actions "were not authorized."⁵⁷⁸ It based its conclusion, in part, on the fact that the plaintiff believed the order to be valid (after it promptly sought to have its legitimacy tested in District Court and failed) and, more importantly, that "the EPA's withdrawal of its cease and desist order [came] nearly nine years too late for plaintiff's purposes."⁵⁷⁹ As the court stated, "[a]t a minimum, during the period when the agency's authority was unquestioned, plaintiff would be able to claim a temporary taking."⁵⁸⁰

In reaching this conclusion, the court applied the same general rationale as has been done for years in cases following *Reiner*, *Del-Rio*, and *Broad Avenue Laundry*, namely not to hold an action of the Government *void ab initio* where

569. *See id.*

570. *See id.*

571. *See* Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995).

572. Laguna Gatuna, Inc. v. United States, 50 Fed. Cl. 336 (2001).

573. 531 U.S. 159 (2001).

574. *See id.* at 174.

575. *See* Laguna Gatuna, Inc. v. United States, 50 Fed. Cl. 336, 340 (2001).

576. *See id.* at 343.

577. *See id.* at 340-41.

578. *See id.* at 343.

579. *Id.* The court also noted that the decision in *SWANCC* only directly affected the authority of the Corps of Engineers. *Id.*

580. *Id.*

the nongovernmental party was unaware or had no reasonable basis to know of the “illegality” when the Government took its actions.⁵⁸¹ Moreover, in *Laguna Gatuna*, the court recognized, quite practically, that until struck down by a court, whether because of the five to four vote of the Supreme Court that occurred in *SWANCC*, or withdrawn by the agency, the EPA’s order did have force and effect.⁵⁸² Such an appreciation of the circumstances in which the plaintiff found itself parallels the courts’ recognition in contract cases like *Broad Avenue Laundry* and *USA Petroleum v. United States*⁵⁸³ that where a contractor has no legal choice but to comply with the contract directives, the Government should not later be permitted to assert the illegality of its actions in order to escape liability for those directives.

VIII. SUMMARY AND CONCLUSION

The emergence of *Georgia-Pacific*, the balancing approach, and the affirmative misconduct doctrine in the years following *Merrill* do not, however, guarantee that, even in strong cases of equity, courts will find the Federal Government bound by the actions of its agents, even if those actions are within the scope of the agent’s authority.⁵⁸⁴ The reasons for this appear to be a continuing adherence to *Merrill* in many quarters (principally to protect the public fisc or ostensibly to preserve the separation of powers) and unmistakable signals from the Supreme Court disapproving of the lower courts’ finding that the Government may be liable on the basis of less-than-specific authority.⁵⁸⁵ Moreover, even cases such as *Reiner* and others along the functionalistic continuum that support the notion of holding the Government liable for the actions of its agents taken within the scope of their official duties as objectively determined are inapplicable where there is an express congressional prohibition on the action.⁵⁸⁶

581. *See id.* at 342–43.

582. The court also found that the EPA would have been authorized to issue the cease and desist order under regulations not directly affected by *SWANCC*. *See id.* However, there is little doubt but that the court would have reached the conclusion that it did irrespective of this additional point.

583. 821 F.2d 622 (Fed. Cir. 1987).

584. *See, e.g.*, *Schism v. United States*, 2002 WL 31549178 (Fed. Cir. 2002), discussed in detail *infra* Part VI.C. Other examples include *McAfee v. United States*, 46 Fed. Cl. 428, 435–38 (2000), in which, more than half a century after *Merrill*, another farmer learned the hard way that some courts hold strictly to the view that only those with actual authority can bind the Government.

585. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 422–23 (1990). In *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984), the Court spoke of the evils of estopping the Government and appeared to have specifically rejected the “balancing approach” by stating: “When the Government is unable to enforce the law because the conduct of its agents, has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined.” *Id.* at 60.

586. *See Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358 (Fed. Cir. 1998), discussed in detail *supra* Part VI.A.

Nevertheless, contrary to the still often expressed view that apparent authority does not exist when dealing with the Government,⁵⁸⁷ in the absence of such an express congressional disapproval, these functionalistic cases do bind the Government on the basis of the agents' objective manifestations of authority, i.e., the reasonableness of the third party's reliance on the actions of the Government's agent. Call it what you will, this is awfully close to apparent authority.

These cases make clear that the oft-cited rubric that the scope of a government agent's authority and his or her actual authority are identical⁵⁸⁸ is not correct. If it were, the question in every instance would simply be "whether there had been an exercise of the [agent's] actual authority."⁵⁸⁹ Indeed, as was noted previously, the difference between an agent's specifically delineated authority and the broader notion of the scope of his or her authority is not something esoteric but rather a combination of implied authority based on whether such authority is an integral part of the duties actually assigned to a government employee⁵⁹⁰ and apparent authority⁵⁹¹ or at least something reasonably akin to it.⁵⁹²

Implied authority depends on (1) the manifestations of the principal to the agent and (2) the reasonableness of the agent's belief that he or she had thus been imbued with the authority in question.⁵⁹³ As such, it is not the same thing as apparent authority in a legal sense, since apparent authority is de-

587. See, e.g., Donald P. Arnavas, *Authority of Government Representatives*, BRIEFING PAPERS, Aug. 1999, at 3 ("Apparent authority applies fully to private sector transactions but has no application to the actions of government representatives."); Ansell, *supra* note 24, at 1028 ("While distinguished commentators have argued that the concept of 'authority' should be interpreted broadly so as to widen the applicability of estoppel against the government, the 'authority' line itself has appeared impregnable"). Accord Zinn, *supra* note 202, at 256, 258 ("In short, apparent and actual authority are identical for public officers. Apparent authority is thus irrelevant to the actions of public officers, a point on which numerous federal and state courts have agreed.")

588. Zinn, *supra* note 202, at 256.

589. Saltman, *supra* note 34, at 506.

590. See discussion *supra* Part VII. Whether authority is an integral part of the duties assigned to a government employee, this is a concept that is only a hair's breadth distinguishable from apparent authority.

591. See, e.g., Carl J. Bonidie, Inc., ASBCA No. 25,769, 82-2 BCA ¶ 15,818, where the Board concluded that the Base Civil Engineer had what amounted to apparent authority to direct the appellant to make temporary hot water connections. The Board observed that the appellant was reasonable in concluding that the Base Civil Engineer's directions to perform the work in question had emanated from higher authority. The Board also noted that the Base Civil Engineer, who was the line superior to the Contracting Officer's Technical Representative, was at the project site more frequently than the Contracting Officer and directly participated in the negotiation of all contract modifications.

592. See discussion *supra* Part VI.A. This view is bolstered by cases like *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358 (Fed. Cir. 1998), and *Broad Avenue Laundry & Tailoring v. United States*, 681 F.2d 746 (Ct. Cl. 1982), where an objective view of the official duties of a government agent was adopted.

593. See Pitou, *supra* note 68, at 631-32. For this reason, a limitation on the agent's authority to do an act that is contained in his/her unpublished warrant of authority will, absent more, preclude the agent from having any implied authority to do the act in question. See *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1432 (Fed. Cir. 1998).

pendant on the manifestations made to a third party and the reasonableness of the third party's reliance on those representations.⁵⁹⁴ However, the same manifestations that caused the agent to believe that certain authority was implied or inherent in his or her position, if known to a third party, likely would also have caused a third party to reasonably conclude that the agent had such authority.

In this regard, when unpublished internal agency limitations on an agent's authority exist, and actual or implied authority is thus precluded, the courts nevertheless still have little trouble in holding the Federal Government liable for the agent's actions.⁵⁹⁵ Stated or not, the basis for their doing so is the apparent authority of the government agent, i.e., authority based on those manifestations of authority of which a reasonable person in the circumstances would have been aware, no more and no less. Indeed, in such cases express or implied authority, by definition, cannot exist.

The recognition of apparent authority in these cases and the objective view of government agents' authority taken in other cases notwithstanding, substantial impediments often still preclude the Government from being held liable for actions that are not specifically authorized no matter how reasonable the injured party's reliance. Indeed, if there has been any consistency in this area of the law in the last half century, it has been that a majority of the Supreme Court has been opposed to holding the Government responsible for anything other than actions for which authorization clearly and specifically is delineated.

Portmann v. United States,⁵⁹⁶ in which the plaintiff sought and was granted the benefit of the insurance that she was advised by a postal service employee, albeit incorrectly, would cover photographs that she mailed, exemplifies the kind of case upon which the Supreme Court has not looked with favor. Such cases frequently involve situations in which the plaintiff seeks a benefit to which it clearly would not have been entitled in the absence of some representation or promise by a government official.

After *Portmann*, the Supreme Court, which had remained largely silent on government agent authority questions since *Merrill*, revisited the subject in *Community Health Servs.*⁵⁹⁷ There, the Court chose not to follow the growing

594. See RESTATEMENT (SECOND) OF AGENCY § 27 (1958).

595. *American Optical Corp. v. United States*, 592 F.2d 1149, 1158-61 (Ct. Cl. 1979). See also *In re Forest Service*, Comp. Gen. B-188607, July 19, 1977, 77-2 CPD ¶ 84. See discussion *infra* Part IV.A. Likewise, agencies are not legally bound to follow what is contained in congressional committee reports where those expressions are not explicitly carried over into statutory language. See *Newport News Shipbuilding & Dry Dock Co.*, 55 Comp. Gen. 813 (1976). It should, however, be noted that since implied authority depends on the manifestations of the principal to the agent and the reasonableness of the agent's belief that he has been imbued with the authority in issue, limitations on the agent's authority contained in warrants of authority and the like will generally preclude the agent from having implied authority in excess of that limitation.

596. 674 F.2d 1155 (7th Cir. 1982), discussed *supra* Part III.D.

597. *Heckler v. Cmty. Health Servs.*, 467 U.S. 51 (1984).

trend of the lower courts holding the Government liable for less than clearly authorized actions, and concluded that the plaintiff had not even proven the elements needed to estop a private party, let alone the Federal Government.⁵⁹⁸

In *Community Health Servs.*, the defendant, Community Health Services (CHS), had participated in both Medicare and Comprehensive Employment Training Act (CETA) programs and had been doubly reimbursed for some specific operating expenses because of an overlap of the two programs. Government regulations prevented this double recovery unless the CETA funds were used as “seed money” for a new health care agency or for expanded services at an existing agency. An agent for the Government orally informed CHS that these particular CETA funds fell within the seed money exception. CHS relied on this advice to expand its services and requested reimbursements from the Government while continuing to receive CETA grants. When the Health and Human Services Department later ruled that the CETA grants did not constitute seed money, CHS sought to block recovery of the funds by estopping the Government from asserting its admittedly correct interpretation of the regulations.

While the Third Circuit accepted this argument and estopped the Government, finding “[t]hat the Government may be estopped by the ‘affirmative misconduct’ of its agents,”⁵⁹⁹ a unanimous Supreme Court reversed, holding that CHS had failed to establish even the requisite elements of private estoppel.⁶⁰⁰ The decision “echoed *Merrill*’s insistence that citizens are presumed to know the law and that they may not rely on any government agent’s erroneous statement of it; the Court simply concluded that the government cannot be expected to guarantee that every piece of informal advice [its agents provide] will be accurate.”⁶⁰¹

Community Health Servs., like both *Portmann* and *Merrill*, involved a situation in which the citizen was seeking a government benefit for which, without more, it would not have qualified in the absence of the misrepresentation, a circumstance in which the courts find it particularly difficult to hold the Government liable. Indeed, it has been suggested that to secure a right to which the plaintiff is not clearly entitled by statute or regulation such as was done by the lower courts in *Community Health Servs.*, and *Merrill* is inappropriate because “the consent of the sovereign is necessary to bring such cases.”⁶⁰²

Reiner and its progeny contravene this view. In those cases, the courts largely go beyond the question of whether the government agent had the authority to do what he or she did, and move to the question of whether the plaintiff should, on balance, be afforded some benefit from an infirmed governmental action to which it may not even have had any right in the first place.

598. *See id.* at 67.

599. *Cnty. Health Servs. v. Califeno*, 698 F.2d 615, 617 (3d Cir. 1983).

600. *Cnty. Health Servs.*, 467 U.S. at 60.

601. *Ansell*, *supra* note 24, at 1032.

602. *Id.* at 1039.

In a similar vein, the maxim that the sovereign cannot be bound by estoppel has also been attacked as a fallacy.⁶⁰³ Hence, the force of the traditional argument against the offensive use of estoppel has diminished considerably.⁶⁰⁴ Nevertheless, many courts continue to show an unwillingness to hold the Government responsible for any less-than-specifically authorized action of its agents that promise some benefit to the plaintiff. Holding the Government responsible for such acts either by estoppel or otherwise “[c]ontinues to bear the marks of extreme judicial deference to sovereign power.”⁶⁰⁵

This can be seen in a number of respects. For example, in *Community Health Servs.*, the Supreme Court dealt a substantial blow to the balancing approach by indicating that it would be the rare case indeed “in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.”⁶⁰⁶ Moreover, as discussed in detail *supra* in Part V, after *Community Health Servs.*, the Supreme Court continued the deference to sovereign power, in *Office of Personnel Management v. Richmond*.⁶⁰⁷

In *Richmond*, not only did the Court attempt to reaffirm the holdings in both *Community Health Servs.* and *Merrill*, but it also tried to impose a substantial new barrier to holding the Government for less-than-specifically authorized actions. As also discussed in some detail *supra*, during the ensuing decade that effort succeeded only in part, although several very recent cases do suggest some swing by the lower courts away from the functionalistic trend epitomized by *Broad Avenue Laundry* and *Del-Rio* toward the neo-formalism of *Richmond*. In these cases, less reliance is placed on *Merrill* but more and ever increasingly obscure roadblocks are placed in the path of sympathetic plaintiffs seeking to bind the Government.⁶⁰⁸

Making perfect sense of the myriad of cases in the area of agents’ authority to bind the United States is impossible. There are a number of reasons for this. The most notable is the tension in the courts between formalism and functionalism. Moreover, the formalists have a stronger interest than most functionalists in protecting the public fisc where significant dollars are at stake.

Legal philosophy and the need to protect the taxpayers from otherwise “uncontrollable” government employees are not, however, always the reason for the mixed bag of authority cases that exist. Rather, it appears that the

603. See Kuhlman, *supra* note 18, at 236 n.61 (citing F.E. Farrer, *A Prerogative Fallacy—‘That the Crown Is Not Bound by Estoppel’*, 49 LAW Q. REV. 511, 514–15 (1933)).

604. See Thompson, *supra* note 22, at 554.

605. Kuhlman, *supra* note 18, at 236.

606. Heckler v. Cmty. Health Servs., 467 U.S. 51, 60–61 (1984).

607. 496 U.S. 414, 419 (1990).

608. *E.g.*, Schism v. United States, 316 F.3d 1259 (Fed. Cir. 2002) (en banc), *cert. denied*, 2003 WL 835021 (U.S. June 2, 2003); Dupont v. United States, 54 Fed. Cl. 391 (2002). These cases are discussed at some length *supra* in Parts VI.C. and IV.C., respectively.

assortment of holdings in the area is also, at least in part, a result of insufficient compilations and analysis of the myriad of existing authority cases and a tendency to overly compartmentalize these holdings.

In the nongovernmental context, the principles of agency law do not change based on the subject matter with which the agent was dealing. However, the same is not true when the Government is involved. Indeed, too often there has been a tendency to reject the teachings of what are clearly authority cases on the basis of their subject matter. For example, *Reiner* is often referred to as merely “a contract case” or even more narrowly as one that “only deals with the improper award of a contract,” when the fact of the matter is that *Reiner* talks to a critical question that arises in many cases: who should bear the responsibility of a government agent’s less-than-specifically authorized acts? Pigeon-holing the approaches to the question that have been used in these cases by the subject matter involved does not, however, change the fact that the cases have much to say on critical aspects of the authority question. For example, while the dealings between citizens and the Government that are the subject of the cigarette vending machine cases and *Laguna Gatuna* are more closely proscribed by statute than are government contracts, nonetheless the issues involved in those cases as to who should bear the responsibility for *ex post facto* invalidation of authority is a matter that has application to virtually every type of dealing in which the Government is engaged, including contracts, e.g., *Urban Data Systems*, *CACI*, and *AT&T*, each of which involved the failure to meet statutory prerequisites in a contractual context.

Additional compartmentalization and inconsistencies also exist. As noted, the rules relating to authority where the claimant is seeking to be deemed entitled to the benefits of a government program for which it would not have qualified absent the action of some government employee are often harsher than those applied where the Government is merely acting in a proprietary capacity. Nevertheless, the rules applied in cases like *Merrill* and *Richmond* are frequently applied to nonentitlement cases. In contrast, the functionalist rules often applied in proprietary cases are rarely used in cases where entitlement based on misrepresentation or mistake is involved.

This need not be so. Indeed, there is no reason why *Reiner* should be labeled as a mere contract case. Rather, *Reiner* can equally be characterized as a case in which the claimant sought something to which it would not have been entitled absent the Government’s error, i.e., some of the fruits of a contract, where the court prescribed a form of relief for an action taken by a government agent accomplished within the scope of his authority when viewed objectively even though such action was not in accord with applicable statutes and regulations albeit not flagrantly so. There is likewise no readily apparent reason why the teachings of *Del-Rio* cannot be applied to any number of situations other than to judge the efficacy of actions that the claimant alleges constitutes a taking.

Both lawyers and judges do themselves a disservice if they fall into the trap of dismissing the potential for applying certain authority cases solely because

of the subject matter or type of a case unless there is a reason for limiting its application to a specific category of cases.

Given the frequency of opinions relating to authority, it is also easy to believe that the applicable rules are all well established, well reasoned, and venerable. The truth is that they are not. As such, simply reciting familiar enough precedent without understanding the inconsistencies between various threads that constitute the fabric of the government agent authority issue continues to produce results that are conflicting at best and unnecessarily harsh at worst.

The most common rationales employed by the courts in refusing to impose liability on the Government for reasonably relied upon, but unauthorized, acts of governmental agents rest on notions of protecting the public fisc, concerns about the separation of powers, and general notions of sovereignty. More than a decade ago, in *Richmond*, the Supreme Court also raised questions regarding the existence of an appropriation to pay for the effects of such acts.

Due in no small measure to resignation to, if not outright encouragement of, *Merrill's* continuing viability, concomitant concerns about possible violations of the will of Congress, and, most of all, an adherence to the formalistic view that the scope of an agent's authority is limited only to those actions outlined with specificity in statute or regulation, there continue to be many seemingly rote applications of *Merrill*. Not surprisingly, on more than a few occasions this has led to wholly inequitable results.

On the other hand, given the differing definitions of the scope of a government agent's duties that have been and continue to be used, perhaps not surprisingly, there have been instances where the courts, although unable to call it what it really is, have in fact recognized government agents as having apparent authority. The clearest examples of this are when the courts have concluded that the Government is bound by an action for which the agent was not, in fact, actually authorized, but where limitations on the agent's authority, thus precluding any express or implied authority, were internal to the agency and not contained in either statute or published regulation. These decisions belie the oft-expressed notion that apparent authority has no applicability to agents of the Federal Government.

Moreover, cases like *Del-Rio* also make clear that actions of a government agent, even if "not legal," can, as in situations involving apparent authority in the nongovernmental setting, be binding if they are within the scope of the agent's authority when viewed objectively. However, unlike apparent authority in the nongovernmental context, notwithstanding the reasonable belief by third parties that the agent is authorized, under *Del-Rio* the Government cannot be bound by any action that Congress has expressed a positive intent to prevent or for which it has expressed an intent to exclude government liability. *Reiner* contains a similar limitation. Thus, except perhaps under the "balancing approach" or "affirmative misconduct" doctrine, even an act that unquestionably appears to be within the scope of a government agent's authority is

not binding if Congress has explicitly demonstrated an intent either to prevent such actions or to exclude government liability for it.

Despite the Supreme Court's invocation in *Richmond* of the Appropriations Clause as a new barrier to holding the Government responsible for actions by its agents not specifically authorized, the fact is that the Appropriations Clause does not in and of itself preclude payment for errors made by government agents acting within the scope of their authority. Indeed, the permanent appropriation made by Congress to pay court judgments against the United States constitutes sufficient congressional authorization to make payment for the consequences of actions taken by a government agent within the scope of the agent's authority for which the Government is found liable by a court or board of contract appeals pursuant to jurisdiction granted by the Congress. The delegation by Congress of the power to decide the merits of claims to various judicial bodies coupled with its providing those bodies with the authority to direct payment from the treasury is little more than a delegation of what Congress itself used to do 150 years ago, i.e., decide the merits of claims and provide the money to may those found meritorious. Moreover, under the scheme established by Congress, no money can be drawn from the Federal Treasury, i.e., from the lawful appropriation that the Judgment Fund represents, unless the conditions established by Congress are met. That is, with limited exceptions, a judgment issued by a court or board is a prerequisite to taping the appropriation. As a delegation by Congress, the scheme is in total harmony with the strictures of the Appropriations Clause and the concern that only Congress can charge the public treasury.

The role of the courts in our society is to redress the grievances of the citizenry. Notwithstanding the starting point that the sovereign can do no wrong, the courts of this country, with the assistance of Congress—which, after all, has the constitutional power to establish them and establish their jurisdiction—have come a very long way toward assuring that even those who deal with the sovereign can obtain justice. This is not to say that the goal of justice in every instance has been reached or that the journey has been easy or without its pauses and even reversals.

It is ironic, however, that differing judicial views of the separation of powers doctrine should frequently lead to conflicting results when citizens assert that they reasonably relied on, or were required to follow, the less-than-specifically authorized actions of the Government's agents. Indeed, the separation of powers was intended to diminish the likelihood that any one branch would be able to use its power against the citizenry. Some would thus say that whether the Government should, in a given instance, be held liable for actions that are not specifically authorized is not a proper question for the courts to decide. However, how can this be so when there is no institution of Government anywhere nearly as well suited as the courts to ferreting out the law and the facts necessary to establish the reasonableness either of a government agent's actions or the citizen's reliance or the manifestations of the principal? Indeed, the task is little different than ones that courts perform each day.

The fact of the matter is that the courts of this country are well equipped to determine in a given instance whether reliance was reasonable. The laws are equally well equipped to deal harshly with collusion between government officials and persons paid out of the treasury. If the courts truly lack the resources to handle the workload, something suggested by the Supreme Court in *Richmond*, then for situations involving low-level government employees providing advice to the public, the Government could disclaim the correctness of that advice. Of course, this would be quite impractical and a public relations nightmare for the Government. Moreover, it would work the greatest hardship on those without the resources to obtain correct advice elsewhere. Alternatively, Congress could simply provide the courts with greater resources.

In any event, some viable and consistent avenue of redress must exist for many, if not all, of the actions and good-faith errors of government agents that mislead those who deal with the Government. As to why this must be the case, one need look no further than the succinct statement of the Ninth Circuit in *Brandt v. Hickel*: "To say to [those who deal with and reasonably rely on the words and actions of the United States] 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government."⁶⁰⁹

609. 427 F.2d 53, 57 (9th Cir. 1970).