Understanding Legal Claims Against the Federal Government: 
Causes and Consequences of Sovereign Immunity

by

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# Understanding Legal Claims Against the Federal Government: Causes and Consequences of Sovereign Immunity

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Preface

I would like to thank first and foremost my thesis advisor Dr. Randall Calvert. This thesis arose from conversations that began in March of 2011. Those conversations turned into a directed reading, which turned into an independent study, which was accompanied by writing a blog, which turned into this final product. It has been a great pleasure to receive your guidance and I truly appreciate it.

Additionally, I would like to thank a few people who provided some comments on my ideas, like Professors Paul Figley, David Konig, Donald Doernberg, Ronald Levin, and Herb Johnson, my peers in the political science thesis writing cohort, Jason Jones of the Chronicle of Higher Education’s ProfHacker Blog, and most of all my family Glen A. Guenther, Glen E. Guenther and Ines Guenther.

All errors and omissions are my own.
Introduction

“When men reflect about government, whether practically or academically, they always turn up, if they think deeply enough, two central problems: first, how to ensure that government shall do what it is supposed to do, and secondly, how to ensure that it shall not do other things. One is the problem of efficiency, the other the problem of control; and around the two is built the so-called science of politics.

The competing claims of efficiency and control have often expressed themselves in the form of controversy concerning the comparative merits of government by discretion and government by law—or, in Harrington's phrase, a government of laws and a government of men.”

The balancing act required to maintain an efficient yet accountable government is perhaps one of the most fundamental dilemmas in the realm of politics—it requires drawing a line separating acceptable and unacceptable government behavior. It is a recurring theme in American politics, and just where to draw the line has been debated in Congress, litigated in the Supreme Court, and enforced in different ways by the Executive branch.

What happens when a government official crosses the line? We are familiar with some examples: a President can be impeached and removed by Congress, Senators and Representatives can be voted out of office, and federal agents can be fired by their Director. All of these procedures are embedded in the Constitution, or have existed since its ratification.

There is another category of remedies that differs from the above examples in that it involves using the courts to right wrongs committed by the government. We hear stories of lawsuits over police brutality, slip and fall accidents on public lands, and car accidents with mail trucks. These types of lawsuits proceed in federal court every day, and their occurrence is hardly out of the ordinary.

1 (Dickinson 1928, 275).
It usually surprises people to learn that prior to 1946 one could not automatically get a day in court if someone in the federal government caused them bodily injury or even death. Furthermore, prior to 1855, you could not sue the federal government if it infringed on your patent, broke its contract with you, crashed its ship into your ship, or even violated the 5th amendment prohibition on taking of your property without just compensation.

The reason the legal system was like that is because of a doctrine known as sovereign immunity. Sovereign immunity says that no one may sue the government for the injuries that it causes, unless the government passes a law authorizing such a suit. That this doctrine would exist in a democracy puzzles most people. The truth is that it was once one of the most entrenched ideas in American law for the first half of the country’s existence.

This thesis paper tries to systematically address this puzzle in a novel fashion: from the perspective of political science and American political development. Beyond simply listing the historical events, it uses the analytical tools of political science to provide explanation for the institutional changes. More specifically, the goal of this thesis is to accomplish three things:

The first goal is to answer to the question, “What is the basis of sovereign immunity and how did it come to be established in the United States?” This in and of itself is a formidable story to tell in a concise manner given that the theory predates even the formation of the United States. The subject is widely explored by the legal academy, but virtually untouched by the modern

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3 Not available until the creation of the first Court of Claims in 1855, and even then it was not a day in court similar to an experience in a regular Article III federal district court.
4 Not available until the passage of the Suits in Admiralty Act of 1920 and the Public Vessels Act of 1925.
5 Not available until the passage of the Tucker Act in 1887, although injunctions preventing the action might have been possible.
political science community, and this thesis argues that sovereign immunity is an issue dealing with core topics of political theory: democracy, sovereignty, constitutionalism, and the power of the judiciary.

Thus, Chapter 1, “Early Conceptions of Sovereign Immunity” looks at the philosophical underpinnings of the doctrine beginning with the writing of English philosopher Thomas Hobbes and continuing through the writing of American Supreme Court Justice Joseph Story and early American court decisions regarding sovereign immunity. These philosophers and jurists offered many rationales including “the sovereign power is absolute”, “a suit against a sovereign would be unenforceable”, and “the inconvenience of subjecting the sovereign to suit by anyone would disrupt justice for everyone” as justifications for immunity.

I conclude that sovereign immunity in the United States was a harsher version of the English doctrine and was shaped by the clashing of democratic idealism and political realities in early American history, including a post-Revolutionary War fiscal crisis. I provided additional support for the argument of Professor Paul Figley and Jay Tidmarsh that the history and implementation of the Appropriations Clause of the Constitution indicates that the Framers wanted control of the Treasury to fall to Congress and therefore Congress was able but generally not required to authorize money to be paid out to claimants.

The second goal is to provide a new institutional history of the mechanisms created to deal with allegations of misconduct by the government. This involves answering the question “How did ways of dealing with government wrongdoing take shape over time?” I catalog the development of major institutions, Legislative, Executive, and Judicial, that evolved since the

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6 With the notable exception of (Weaver and Longoria 2002).
7 (Tidmarsh and Figley 2009).
creation of the first Congressional Committee on Claims, looking beyond the historical events and focusing on the political forces and conditions from which they arose.

In Chapter 2, “Private Bills”, I provide a novel way of thinking about how and why injured citizens took their complaints to the legislative and not judicial branch. A piece of legislation that a congressman can introduce on behalf on their constituents and receive instant credit for is an attractive prospect. However, once the incentive structure of such as system takes hold, there is danger of falling into a social trap of logrolling that leads to corruption and the over-consumption of Congressional resources.

Once Congress realized private bills were an inefficient manner of dealing with claims, they began experimenting with outsourcing claims management to number of institutions, which is the subject of Chapter 3, “Dealing with Private Bills through Bureaucracy”. The story of claims management experimentation in the 1800s and early 1900s is one of failure, questionable constitutionality, and incomplete assistance to claimants. My argument is that the source of all of this conflict was the inherent dilemma of Congress wanting to save itself time and energy by outsourcing the work of claims adjudication while also wanting to retain ultimate control over the disposal of claims. This was further complicated by the fact that the limits of judicial power were still unknown and no one really knew what kind of institutions the Constitution permitted Congress to create to deal with claims.

The third goal, and perhaps most importantly, I hope to build on the conclusions from those chapters to explain another puzzle: Once sovereign immunity was firmly entrenched in American law, why would the federal government decide to give it up in many areas?
To answer that question, Chapter 4, “Developing the District Court Remedy for Torts”, lays the foundation for explaining one of the most important ways the government allows itself to be sued: the Federal Tort Claims Act (FTCA). Not passed until 1946, the FTCA is the exclusive remedy against the federal government for the tortious actions it commits, and Chapter 5 explains the “Operation of the Federal Tort Claims Act” by outlining some of the major cases invoking that law.

In Chapter 6, “Reasons for Abandoning Sovereign Immunity” I directly grapple with the counterintuitive notion that a sovereign with total immunity from suit nevertheless might want to give up its immunity. I reject, at least in part, these often pointed to explanations:

- The government suddenly realized that sovereign immunity is unjust and incompatible with democratic government
- The government wanted to relieve itself of the duties of private bills

I offer and support several alternative explanations:

- The government wanted to be able to make credible commitments with businesses
- Changing societal and legal norms in other aspects of public life had changed
- The federal judiciary had begun to enter maturity and could exercise substantial power
- Government had become so pervasive in everyday life that society could not function without a way to sue the government

Finally, in Chapter 7, I draw upon the field of law and economics and argue that to understand sovereign immunity is to understand the optimal assignment of risk and liability in a society. From there, I make the claim that the only possible justification of sovereign immunity is that liberal democratic government is in the business of providing and regulating private goods and its public policy decisions necessarily create winners and losers.

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8 But, see also *Bivens* actions as a remedy against individual agents of the federal government in their personal capacity for torts based on violations of Constitutional rights.
In order to make this thesis as accessible to as many audiences as possible, I have included a primer on the legal terms and concepts required to understand the rest of the thesis on the next two pages. On page 9, I have also included a one page Quick Reference Companion Guide with the most important laws, court cases, and dates organized chronologically—useful for even the most expert of readers. Lastly, Appendix 1 at the end of the paper contains a flowchart of the major laws dealing with sovereign immunity and the courts with jurisdiction over those types of claims.
Primer: Defining a tort in general

What exactly is a "tort" and why do we care? The first answer seems relatively straightforward. A tort has the following qualities:

(1) Torts are wrongs recognized by law as grounds for a lawsuit
(2) Torts require harm, involving conduct below some legal standard, caused by the defendant.\(^9\)

Generally, torts involve some kind of injury to someone’s physical body or their property, but can also include intangible harm, such as to one’s reputation.\(^{10}\) People who commit torts are known as tortfeasors, and can be sued in courts for their actions or even inaction. However, corporations, cities, states, and the United States government can be sued as entities. When this happens, the larger organization has either willingly taken the place of (indemnified) its employee, or been forced to account for its agent's actions.

We can talk about two kinds of torts: the intentional torts and the negligence torts. The intentional torts are actions that we are fairly familiar with: battery\(^{11}\), assault\(^{12}\), false imprisonment\(^{13}\), trespass\(^{14}\), and conversion (stealing)\(^{15}\). The other class of torts arises out of negligence, which is "overt conduct that creates unreasonable risks that a reasonable person would avoid".\(^{16}\)

Primer: Defining Sovereign Immunity

Understanding torts is important to understanding the concept of sovereign immunity. The government can do many things that people may believe is wrong, but it might not be a tort. It can pass an unfavorable law, deny social security benefits, declare war against another

\(^9\) (Dobbs, Hayden, and Bublick 2009, 2).
\(^{10}\) (Dobbs, Hayden, and Bublick 2009, 2).
\(^{11}\) (Dobbs, Hayden, and Bublick 2009, 27).
\(^{12}\) (Dobbs, Hayden, and Bublick 2009, 44).
\(^{13}\) (Dobbs, Hayden, and Bublick 2009, 48).
\(^{14}\) (Dobbs, Hayden, and Bublick 2009, 51).
\(^{15}\) (Dobbs, Hayden, and Bublick 2009, 54).
\(^{16}\) (Dobbs, Hayden, and Bublick 2009, 112).
country, or leave a piece of mail on your doorstep that causes you to trip and fall. Believe it or not, the only action in that list that is legally considered to be a tort is the last one.¹⁷

What a citizen is allowed to do after he or she thinks the government has harmed him or her is the core of this paper. Throughout its history, the United States federal government has employed various combinations of executive, legislative, and judicial institutions to deal with people it has harmed. When the government denies a citizen the judicial route, it does so under the doctrine of “sovereign immunity”.

However, the government may deny a citizen’s claim in other ways. One could write a letter to Congress asking for special legislation called a “private bill” to award them money for their injuries. If Congress declines to do so, sovereign immunity is not at play. Sovereign immunity should be understood as a special status that prevents the government from being sued in courts for the harm it causes. So, to trigger traditional sovereign immunity, you must have a tort lawsuit. A tort lawsuit is one where the complainant alleges an action that falls under the tort category of harms mentioned above, i.e. battery, assault, negligence, and seeks monetary compensation, and the complaint must be a formal legal complaint filed in a competent court of law.

If both of those conditions are met, and the government does not allow for the lawsuit to go forward, it is using the doctrine of sovereign immunity. Really, the key to understanding sovereign immunity is understanding that it has to do with claims asking for monetary compensation. The government is sued for a variety of other reasons, with plaintiffs asking for different kinds of relief.

¹⁷ Furthermore, in *Dolan v. USPS et al*, 546 U.S. 481 (2006), the Supreme Court held that tripping and falling over mail “negligently delivered” falls within the United States’ general waiver of sovereign immunity under the Federal Tort Claims Act.
Primer: What Sovereign Immunity is Not

Sovereign immunity is sometimes simply reduced to “you cannot sue the government” which is not correct. There are a number of different types of lawsuits where the government (either a government agent or the United States) is named, but have never been barred by sovereign immunity. These are lawsuits that have been authorized since the beginning of the country’s history and should be noted as being different that suits seeking money for injuries.

Mandamus

Perhaps most famous for its role in the seminal case Marbury v Madison\textsuperscript{18}, the writ of mandamus\textsuperscript{19} is “an extraordinary remedy, which should only be used in exceptional circumstances of peculiar emergency or public importance.”\textsuperscript{20} From the Latin “we command”, writs of mandamus compel agents of the government to perform non-discretionary actions. The “All Writs Act”\textsuperscript{21} permits appellate courts to issue commands to the lower federal courts, and 28 USC § 1361 gives the district courts “original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff”. The writ of mandamus is “limited to the enforcement of nondiscretionary, plainly defined, and purely ministerial duties”,\textsuperscript{22} which means, "the duty in a

\textsuperscript{18} Marbury v. Madison, 5 U.S. 137 (1803). William Marbury sought a writ of mandamus from the Supreme Court compelling Secretary of State James Madison to deliver his commission to become a Justice of the Peace in the District of Columbia. The Supreme Court ruled that, while Marbury should have received his commission, the Judiciary Act of 1789, which authorized the Supreme Court to hear the case, was unconstitutional as it tried to increase the original jurisdiction of the Supreme Court. The districts courts, however, can be and have been empowered to hear mandamus suits.

\textsuperscript{19} Excerpted from (Justice n.d., sec. 4).


\textsuperscript{21} 28 U.S.C. § 1651(a).

\textsuperscript{22} Decatur v. Paulding, 39 U.S. (1 Pet.) 496, 514-17 (1840).
particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command.”

**Injunction**

The partner to the mandamus writ, which commands performance of a specific action, the injunction prevents an official from taking specific action. It is also considered to be an “extraordinary and drastic remedy” and will only be issued when the action to be taken will cause irreparable harm and there is no other adequate remedy. Temporary loss of income or other alleged injury involving only the loss of money is not irreparable injury.

**Habeas Corpus**

A hallmark of criminal law, the writ of habeas corpus allows prisoners in state or federal prisons to challenge their convictions and sentences in federal court. “A habeas petition proceeds as a civil action against the State agent (usually a warden) who holds the defendant in custody. It can also be used to examine any extradition processes used, amount of bail, and the jurisdiction of the court.”

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24 Excerpted from (Justice n.d., sec. 4)
26 County of Santa Barbara v. Hickle, 426 F.2d 164 (9th Cir. 1970), cert. denied, 400 U.S. 499 (1971).
29 Codified at 28 USC § 2255 and 28 USC § 2241.
30 (Law n.d.)
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Chapter 1: Early Conceptions of Sovereign Immunity

It is known that the petition of right developed during the reign of Edward I, and it has been argued that prior to the reign of Edward I, the king was subject to suit in his own courts, but in their authoritative work on early England, Pollock and Maitland state as a simple fact that even at that time, the king was free from suit and prosecution in his own courts. It is here suggested that if Henry III had been capable of being sued, “he would have passed his life as a defendant.”

Well before the American legal system was established in the present-day United States, sovereign immunity was a concept that attached itself to the royal crown of England. Most English philosophers embraced it in some fashion and most English jurists declared it to be the undisputed law of the land. Should something bad happen because of the government, it was the fault of the King’s ministers, not the King.

To someone familiar with the principles of republicanism and democracy, sovereign immunity may seem like a foreign concept with no possible justification. However, in practice, absolute sovereign immunity for torts was the default position of England and the United States until the 20th century. And it is quite clear that the theory was not merely an invention of the English monarchy to maintain power—major political and legal philosophers of the 17th, 18th, and 19th centuries gave credence to the idea that the governing body, whether King or Federal Government, would be immune in the courts of its own creation.

In the next sections, I move to an examination of primary documents from the philosophers who offered affirmative defenses of sovereign immunity in the period leading up to and directly after the American Revolutionary War.

31 (Pugh 1952, 477).
1.1 English Conceptions of Sovereign Immunity

Hobbes’ Leviathan (1651)

Political philosopher Thomas Hobbes is generally thought to be an absolutist in terms of the sovereign’s power in general. Specifically, he premised immunity from lawsuits on the reason that the sovereign’s power consists of the citizen’s surrendered right to govern. Part of what citizen’s given up when they surrender power to a sovereign is the right to sue the sovereign:

“The sovereign of a Commonwealth, be it an assembly or one man, is not subject to the civil laws. For having power to make and repeal laws, he may, when he pleaseth, free himself from that subjection by repealing those laws that trouble him, and making of new; and consequently he was free before…Nor is it possible for any person to be bound to himself, because he that can bind can release; and therefore he that is bound to himself only is not bound.”

Hobbes later hits on the important notion that, since the sovereign power is the creation of the people, all of its acts are necessarily authorized and suing the sovereign would be essentially suing one’s self:

“Every subject is by this institution author of all the actions and judgements of the sovereign instituted, it follows that whatsoever he doth, can be no injury to any of his subjects; nor ought he to be by any of them accused of injustice. For he that doth anything by authority from another doth therein no injury to him by whose authority he acteth…and consequently he that complaineth of injury from his sovereign complaineth of that whereof he himself is author, and therefore ought not to accuse any man but himself…”

The take away message is that the influential English philosopher Hobbes, who indeed claimed the best form of government to be monarchy, figured that as sovereignty ultimately flowed from the citizens’ forfeiture of their liberty to govern, the governing body would be immune from suits by those same citizens. However, attention is rarely paid to another section of

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32 (Hobbes 1668) at XXV.
33 (Hobbes 1668) at XVIII.
Hobbes’ Leviathan wherein he outlines instances under which a sovereign could be subject to suit:

“If a subject have a controversy with his sovereign of debt, or of right of possession of lands or goods, or concerning any service required at his hands, or concerning any penalty, corporal or pecuniary, grounded on a precedent law, he hath the same liberty to sue for his right as if it were against a subject, and before such judges as are appointed by the sovereign.

The suit therefore is not contrary to the will of the sovereign, and consequently the subject hath the liberty to demand the hearing of his cause, and sentence according to that law. But if he demand or take anything by pretence of his power, there lieth, in that case, no action of law: for all that is done by him in virtue of his power is done by the authority of every subject, and consequently, he that brings an action against the sovereign brings it against himself.”

Blackstone (1765)

If Hobbes provides the English philosophical view, then Blackstone provides the overview of the actual operation of English law. One of the most influential treatise writers on English law, Sir William Blackstone (1723-1780) provides an authoritative explanation of the elusive notion of English common law. His Commentaries on the Laws of England was “a wild best seller in legal circles on the American side of the Atlantic”, “the skeleton key to the mysteries of English law” and has even been called “the most influential law book in Anglo-American history.”

So, what did this treatise author have to say with regards to the British system of sovereign immunity? Blackstone offers a more nuanced version of Hobbes’ theory:

“Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the

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34 Emphasis added. (Hobbes 1668) at XXI. It is also an interesting parallel to one of the commands in the United States Constitution relating to sovereign immunity: the 5th amendment prohibition on uncompensated takings.
35 (Friedman, 2004, 31).
36 (Seidman, 2005, 479).
sentence of a court would be contemptible, unless that court had power to command the execution of it; but who, says Finch, shall command the king? 

Hence it is likewise, that by law the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction had this power, as was formerly claimed by the pope, [or] the independence of the kingdom would be no more: and, if such a power were vested in any domestic tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power. (emphasis added)37

While Hobbes predicated sovereign immunity on the idea that the consent of the governed gave a sort of preclearance to almost all future acts of the sovereign, Blackstone pointed out that the system of English government could not tolerate a court system with jurisdiction over matters that it could not enforce. Like the Leviathan, the Commentaries also contain qualifying language:

“Are then…the subjects of England totally destitute of remedy, in case the crown should invade their rights, either by private injuries, or public oppressions? To this we may answer, that the law has provided a remedy in both cases.

As to private injuries; if any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion… though no wise prince will ever refuse to stand to a lawful contract.38 And, if the prince gives the subject leave to enter an action against him, upon such contract, in his own courts, the action itself proceeds rather upon natural equity, then upon the municipal laws. For the end of such action is not to compel the prince to observe the contract, but to persuade him.

And, as to personal wrongs; it is well observed by Mr. Locke "the harm which the sovereign can do in his own person not being likely to happen often, nor to extend itself far; nor being able by his single strength to subvert the laws, nor oppress the body of the people, (should any prince have so much weakness and ill nature as to endeavor to do it) — the inconvenience therefore of some particular mischiefs, that may happen sometimes, when a heady prince comes to the throne, are well recompensed by the peace of the public and security of the government, in the person of the chief magistrate being thus set out of the reach of danger."

37 (Blackstone 1765) Book1, Chpt. 7.
38 See later section in this paper on credible commitments, Chapter 6.
Next, as to cases of ordinary public oppression, where the vitals of the constitution are not attacked, the law has also assigned a remedy. For, as a king cannot misuse his power, without the advice of evil counselors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments, and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the laws of the land. But it is at the same time a maxim in those laws, that the *king himself can do no wrong*; since it would be a great weakness and absurdity in any system of positive law, to define any possible wrong, without any possible redress.\textsuperscript{39}

In those paragraphs, Blackstone outlines three possible abuses of the Crown and the remedy available to a citizen. First, if the abuse follows from a dispute over property, a citizen may invoke a “petition of right” under which, if the King agrees, the Court of Chancery would hear the case. Second, if in the unlikely event the King in his personal non-royal capacity should commit some harm, it seems Blackstone states that it is a small price to pay for security of having a stable government. Lastly, in the case of “ordinary public oppression”, the King cannot commit such violations on his own, his royal advisors and co-conspirators could be subject to judicial actions.

It is not even until the third book that the most cited version of the “King can do no wrong” quote appears, which has been referred to as the premise for sovereign immunity, and it is useful to read it in full context:

\begin{quote}
“That the king can do no wrong, is a necessary and fundamental principle of the English constitution: meaning only, as has formerly been observed, that, in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the king; nor is he, but his ministers, accountable for it to the people: and, secondly, that the prerogative of the crown extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudice.

Whenever therefore it happens, that, by misinformation or inadvertence, the crown has been induced to invade the private rights of any of its subject, though no action will lie against the sovereign, (for who shall command the king?) yet the law has furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute: and, as it presumes that to know of an
\end{quote}

\textsuperscript{39} Id.
injury and to redress it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.”

Blackstone explained that if something had gone wrong, it was not personally the fault of the King, in addition to echoing Hobbes’ claim that the sovereign exists for the benefit of the people and can only do better than the state of nature. Maybe most importantly, the second paragraph also seems to indicate that sovereign immunity is not a theory that relieves the monarchy of “doing right by his people” in administering justice, but instead presupposes that when an aggrieved citizen petitions for a hearing, the King will authorize a court to hear and decide the matter.

What Sovereign Immunity Actually Meant

Unfortunately, even looking at some of the most cogent arguments from those Englishmen does not fully illuminate what sovereign immunity really meant. What can be said is that reducing the English concept of sovereign immunity as “the King can do no wrong” is grossly misleading. According to one scholar, that phrase alone has meant at least four different things in English history:

(1) The King is literally above the law and cannot do wrong by definition. *This is similar to Richard Nixon’s famous “When the President does it, it’s not illegal” quote*

(2) Even if the king’s actions are not lawful by definition, there is no remedy for the king’s actions through the courts.

(3) The King is eminently capable of doing wrong but cannot do so lawfully.

(4) (True Origin) The King has no power or capacity to do wrong (King Henry III as the example).

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40 Blackstone, Book 3, Chapter 17.
41 (Seidman 2005, 396) gives the most thorough and readable exploration of early English sovereign immunity doctrinal origin.
Things are further confused when one considers that during the period from 14th to 19th centuries at least four different kinds of legal thinking related to sovereignty were going on in England: Roman, ecclesiastical, tribal, and feudal. I will pause to clarify that all of the previous analysis is to say that sovereign immunity in England was anything but a simple command that the ruler of a country could not be sued in courts.

Yet, one of the first puzzles this thesis aims to grapple with is why the American colonists embraced sovereign immunity with such open arms. As the next sections show, not only did early colonists and Americans embrace sovereign immunity, they embraced an understanding of it that lacked the nuance of their English cousins. If English sovereign immunity was a complex set of expectations and understandings about the powers and privileges of the King in relation to his subjects, then American sovereign immunity was a blunt force object that unequivocally barred citizens from suing the federal government.

**English Common Law in the Colonies**

It is known that the English common law was largely imported into the legal system of the colonies and later United States. Hall explains that colonial charters granted by the Crown contained language to the effect of importing the common law, but still allowed for alterations given the “basic social and economic differences existing between England and the newly-settled wilderness.”[42] Further blurring the distinction between English and American law was that different colonies (the southern and middle especially) were also more likely to closely follow the English system than others.[43] Some also argue that English common law did not really enter the American system until the late 18th century.[44] Nevertheless,

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[42] (Hall 1950, 791).
[43] (Hall 1950, 795).
[44] (Hall 1950, 797).
“The basic conclusion is that law administration in America, as it existed around the middle of the 18th century, may aptly be classified as a development of the English common-law system. True, it was not a complete reception of British legal institutions, but fundamentally it was the common-law system which has secured a foothold strong enough to withstand the popular hostility to England and anything English which was being expressed and which reached its greatest outcry during the Revolutionary War and the post-Revolutionary period.”

We next turn to seeing how prominent American thinkers portrayed the sovereign’s immunity.

1.2 American Interpretations of English Common Law

Alexander Hamilton, Federalist 81 (1788)

How exactly was sovereign immunity adapted and molded to the American landscape? Early American authors’ were very familiar with and wrote extensively on Blackstone, as well as sovereign immunity in general. For instance, Alexander Hamilton, writing as Publius, declared:

“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal.

The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.”

Hamilton brings up the point that it would be difficult to enforce any judgments against the sovereign without creating an inter-branch struggle. An ardent Federalist, Hamilton surely

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45 (Hall 1950, 797).
46 (Publius n.d.).
47 See (Herz 1990) and (Posner and Vermeule 2007).
did not represent the entirety of American political thought, however, his was the dominant and showcases the American “hard-line” approach to sovereign immunity.

**Justice Joseph Story (1833)**

American jurist and Supreme Court Justice Joseph Story published a treatise entitled *Commentaries on the Constitution of the United States* in 1833. Writing on the jurisdiction of the Article III courts, Story explained that the Article gave the court the power to hear cases where the United States was the plaintiff, but:

“It is observable, that the language used does not confer upon any court cognizance of all controversies, to which the United States shall be a party, so as to justify a suit to be brought against the United States without the consent of congress. And the language was doubtless thus guardedly introduced, for the purpose of avoiding any such conclusion. It is a known maxim, justified by the general sense and practice of mankind, and recognized in the law of nations, that it is inherent in the nature of sovereignty not to be amenable to the suit of any private person, without its own consent.

This exemption is an attribute of sovereignty, belonging to every state in the Union; and was designedly retained by the national government. The inconvenience of submitting the government to perpetual suits, as a matter of right, at the will of any citizen, for any real or supposed claim or grievance, was deemed far greater, than any positive injury, that could be sustained by any citizen by the delay or refusal of justice. Indeed, it was presumed, that it never would be the interest or inclination of a wise government to withhold justice from any citizen. And the difficulties of guarding itself against fraudulent claims, and embarrassing and stale controversies, were believed far to outweigh any mere theoretical advantages, to be derived from any attempt to provide a system for the administration of universal justice.”

Here, we get another theory of the utility of sovereign immunity: an endless number of frivolous suits against the government would cripple its ability to do its more important functions. Just like Blackstone pointed out the King’s personal immunity was outweighed by safety and security, Story claims governmental immunity trumps a severely impaired government.

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48 Emphasis added. (Story 1833, sec. 1669).
49 We see more on this subject later in Chapter 2’s investigation of the private bills system.
Early Court Cases

Early American case law on sovereign immunity generally held states’ immunity to be intact and always held the federal government’s immunity from tort lawsuits to be intact. Then, in 1793 *Chisholm v. Georgia* \(^50\) the Supreme Court held that states were liable to be sued in federal court. Due to this ruling, the 11\(^{th}\) amendment was swiftly passed which barred suits from an individual of one state suing another state.\(^51\) Later in 1890, in *Hans v. Louisiana*, the Supreme Court ruled that citizens of one state could not sue their own state in federal court absent consent of that state.\(^52\)

Early American case law on federal sovereign immunity is sparser, but generally agrees with Blackstone and Story. In an 1821 opinion authored by Chief Justice John Marshall, the United States Supreme Court held in dicta that federal sovereign immunity was firmly established: “The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act {of 1789} does not authorize such suits.”\(^53\)

In a very short 1846 opinion, the court again reiterated,

“There was no jurisdiction of this case in the Circuit Court, as the government is not liable to be sued, except with its own consent, given by law. Nor can a decree or judgment be entered against the government for costs.”\(^54\)

An 1850 opinion upholding a motion by the US government to dismiss a suit against it stated,

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\(^{50}\) 2 U.S. 419 (1793).

\(^{51}\) “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State”.

\(^{52}\) 134 U.S. 1 (1890).

\(^{53}\) *Cohen’s v. Virginia* 19 U.S. 264 (1821). “Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior Court, where they have, like those in favor of an individual, been re-examined, and affirmed or reversed. It has never been suggested, that such writ of error was a suit against the United States, and, therefore, not within the jurisdiction of the appellate Court.”

\(^{54}\) *United States vs. McLemore*, 45 U.S. 286 (1847).
“No maxim is thought to be better established, or more universally assented to, than that which ordains that a sovereign, or a government representing the sovereign, cannot ex delicto be amenable to its own creatures or agents employed under its own authority for the fulfilment (sic) merely of its own legitimate ends. A departure from this maxim can be sustained only upon the ground of permission on the part of the sovereign or the government expressly declared, and an attempt to overrule or to impair it on a foundation independently of such permission must involve an inconsistency and confusion, both in theory and practice, subversive of regulated order or power.\(^{55}\)

Court cases of the early era were short and succinct: no suits against the federal government. For the most part, the Justices did not even go into a detailed discussion of why this sovereign immunity existed; it just did. Law Professor Peter Shuck sums up the legal landscape of sovereign immunity up through about 1850:

“...the immunity of the United States and its officials, then, was substantially complete and absolute by the beginning of (the 19\(^{th}\) century, the major chink in their armor being official’s liability for purely ministerial acts. Immunity also prospered under state law, being virtually absolute in suits against governmental entities in the absence of a statutory waiver.”\(^{56}\)

A Lone Dissenter: St. George Tucker (1803)

In 1803, St. George Tucker published a five volume copy of Blackstone’s Commentaries with over 1,000 footnotes which became known as “America’s Blackstone”.\(^{57}\) In what was the minority view of sovereign immunity for the time, Tucker rails against the absolutist rhetoric of Blackstone:

*On the King’s Prerogative*

“The title "prerogative" it is presumed was annihilated in America with the kingly government, It will however be of use to the student to observe in the course of this chapter how many of the flowers of the crown, which were formerly stiled prerogatives, have been rejected as nuisances, by our own constitutions; or, where necessarily retained, have been confided to safer hands than those of a single hereditary executive magistrate. The governor of Virginia shall not under any pretence exercise any power or Prerogative by virtue of any law, statute, or custom of England...”

“This definition of prerogative is enough to make a citizen of the United States shudder at the recollection that he was born under government in which such doctrines are received as

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\(^{55}\) Hill et al. v. The United States et al., 50 U.S. 386 (1850).

\(^{56}\) (Shuck 1983, 38).

\(^{57}\) (Douglas 2006).
catholic: and must at the same time fill the heart of every true friend to his country with joy and gratitude for that deliverance, which, under the auspices of an Almighty Providence, has been happily achieved by us.”

*On the King’s Personal Eminence*

“In the United States of America, all notions of personal eminence are consigned to oblivion, and it is hoped will forever remain buried under the immovable mass of equal rights.”

*On “the King can do no wrong”*

“When it is laid down as a maxim, that a king can do no wrong, it places him in a state of similar security with that of ideots, and persons insane, and responsibility is out of the question with respect to himself. It then descends upon the minister, who shelters himself under a majority in parliament, which, by places, pensions, and corruption, he can always command; and that majority justifies itself by the same authority with which it protects the minister,” quoting Paine's Rights of Man, part 1, p. 118, Albany, 1794.”

To sum up, theories offered to support it came mainly from political and legal philosophers. The Englishmen Hobbes and Blackstone viewed the nature of sovereignty and sovereign immunity flowed from the absolute nature of the government’s authority to rule. As the common law began to be practiced in the United States, political figures like Alexander Hamilton adopted the English view, while Joseph Story predicated sovereign immunity on the necessity of operating the government. Early court cases offer little in the way of explaining sovereign immunity other than to declare it a “well established maxim” of law.

**1.3 Explaining Sovereign Immunity within the American Republic**

But this does not explain how sovereign immunity came to be in the United States. In fact, it is most often referred to as a “mystery of United States legal evolution”. There were to

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58 (Tucker 1803, chap. 7).  
59 (Tucker 1803, chap. 7).  
60 (Tucker 1803, chap. 7).  
61 (Cook 1973, 2) refers to it as “something of a mystery”, (Street 1949, 342) calls it “a mystery of legal evolution, (Pugh 1952, 477) states that “obscurity and uncertainty must characterize any discussion of the historical bases of the doctrine of sovereign immunity”. (Seidman 2005, 395) quotes Christine Desan, “There are ghosts that haunt the early republic…Sovereign immunity is one of the most infamous”, these are but a few examples.
be no Kings in the new republic—it was to be a ruled by laws, not men. How could the new leaders embrace both democratic principles and sovereign immunity?

The answer must lie in the paradoxical nature explored in the quote about efficient and accountable government that begins the introduction to this thesis. Early political figures understood this dilemma, exemplified by James Madison’s famous quotation,

“If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”

In sum, the idealism of democratic governance met the reality of running a government. In an effort to allow the government to control the governed, the Framers of the Constitution envisioned a federal government would have both the power to tax and enforce the laws that the new Congress would pass. This differed from the weaker association of states under the Articles of Confederation, which served primarily as a coordinating body. To complement the taxing power, the Framers placed the ability to appropriate that money firmly in the hands of Congress.

The Appropriations Clause Argument

Thus, one explanation for sovereign immunity in the United States is deliberate Constitutional construction, namely the Appropriations Clause that gave Congress the power to appropriate taxpayer dollars. This idea is expressed by Paul Figley and Jay Tidmarsh in their paper “Appropriations Power and Sovereign Immunity.” The authors argue that the power of

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62 So, can sovereign immunity square with the democratic and republican idealism of the American Revolution? The Declaration of Independence complained that the King had “obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers” and “refused his Assent to Laws, the most wholesome and necessary for the public good.” See (Doernberg 2005) who says quite simply, no.
63 See page 1.
64 (Madison 1788)
65 Art. I, §9, Clause 7.
66 (Tidmarsh and Figley 2009).
the purse was hotly debated at the Constitutional Convention.\textsuperscript{67} There was debate over whether appropriation power would rest in the House or the Senate,\textsuperscript{68} but it was widely understood that it would remain in Congress and Congress alone.\textsuperscript{69}

As this appropriation power was vested in Congress, the Treasury would not be able to make payments to people the government had injured, at least not without the express consent of Congress. As the courts have repeatedly expressed, Congress does have the power, but not the obligation, to authorize payments for the torts the government commits.\textsuperscript{70}

**The Fiscal Crisis Argument**

One other related explanation could explain the hesitancy to make the government liable to suits for money damages. It is not an overstatement to say that the new states and the new republic were cash-strapped in 1787. As Bordo et al. explain,

> “Until the early part of the 1790s, American finances were in a shambles. The issue of paper currency (the “continentals”) to finance the Revolutionary war led to high inflation and extensive depreciation of the American currency. By the end of the Revolutionary war, the U.S. position in terms of debt to revenues ranked among the worst of the sovereigns in Europe – comparable to Spain, the Kingdom of Poland and lesser German states.”\textsuperscript{71}

Both individuals and other countries were owed money and a major default on the war debt would be a severe embarrassment to the new country. In fact, the issue of debt repayment

\textsuperscript{67} (Tidmarsh and Figley 2009, 1250).
\textsuperscript{68} (Tidmarsh and Figley 2009, 1251).
\textsuperscript{69} However, one should understand the development of the judiciary as part of the story of why sovereign immunity diminished.
\textsuperscript{70} Virtually all cases starting with previously discussed United States v. McLemore maintain such a position. One large exception is the 1971 case, Bivens v. United States, where the Supreme Court held that certain claims for money damages against federal agents could be maintained based on the Constitution, even if Congress had failed to pass a statute authorizing the suit.
\textsuperscript{71} (Bordo, Redish, and Meissner 2003, 7)
made it into the very words of the Constitution in Article VI, where it was decided that all debts owed prior to ratification would remain valid.\(^72\)

Furthermore, there is evidence that early political figures were worried about claims against the government causing a bankruptcy. During the first Congress, Senator Paine Wingate wrote to Josiah Bartlett that, “We have had a host of private petitioners before Congress, who if they were all to be gratifyed would nearly swallow up the whole revenue.”\(^73\)

The fear that too many individuals would use the courts to obtain judgments against the government and drain the already burdened public Treasury is a legitimate answer to why the Framers would insert sovereign immunity into the American legal system. Professors Figley and Tidmarsh also provide an insight into the belief that Congress, not the Courts or the Executive, would have control over the taxpayers money.

Yet, the government must have some duty to compensate its citizens for damages it causes them, and some suggest the Framers understood that.\(^74\) The next chapter explores the different method of dealing with complaints against the government (one that further supports the dominance of Congress in handling debts theory), was also operating—the private bills system.

\(^{72}\) “All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.”

\(^{73}\) (“Birth of a Nation: The First Federal Congress” n.d.)

\(^{74}\) For instance (Richardson 1885, 3) claims that the 1\(^{st}\) amendment’s petition clause “Congress shall make no law… abridging the…right of the people… to petition the government for a redress of grievances” was an important constitutional rights the framers meant to uphold with private bills and the Court of Claims.
Chapter 2: Private Bills

With sovereign immunity almost fully intact up until the 1850s, what were you to do if, say, the federal government had occupied and severely damaged your schoolhouse during the Revolutionary war? What about if your ship’s cargo was destroyed in a fire while in the possession of a customs official? What if you fell down an elevator shaft while visiting the Treasury Department?75

Since the courts would not hear your claim, during the early history of the country you would need to get in touch with your Congressman. In the same way that Congress can use its Article I power to pass a new set of taxes76, it can pass a private bill, which is a special piece of legislation to “provide benefits to specified individuals (including corporate bodies) who request relief through private legislation when administrative or legal remedies are exhausted.”77 Having the full force of law, private bills must go through the Constitutionally mandated procedure of passage through both the House and Senate, and require the signature of the President (or 2/3 Congressional veto override). Presidents have exercised the veto power in private bill circumstances and even in bills for private relief.78

75 If it happened in 1903, you might be able to get $2,500 from Congress like William Leech did. An Act for the Relief of William Leech. Act of March 3, 1903.
76 Art. I Sec. XIII, Cl. I. “The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States”
77 (Mantel 2007) Mantel describes several theories of the origin of the power to pass private bills, including the 1st amendment right for a redress of grievances, the clause authorizing the payment of debts Art. I, § 8, cl. 1, as well as fiat and custom.
78 I took data from the United States Senate website and compiled this summary of instances where a President vetoed a bill that began with “For the relief of [individual]” or bills that had to do with military pensions, ability to sue in the court of claims, etc. In cases of private bills for solely for extraordinary personal relief, President Andrew Jackson vetoed “S. 5. For the final settlement of the claims of States for interests on advances to the United States, made during the last war” in 1832, as well as “S. 160, To authorize the Secretary of the Treasury to compromise the claims allowed by the commissioners under the treaty with the King of the Two Sicilies, concluded October 14, 1832”; President Tyler vetoed, “H.J. Res. 37 Directing payment of the certificates or awards issued by the commissioners under the treaty with the Cherokee Indians” in 1843; President Polk vetoed, “S. 68. To provide for the ascertainment and satisfaction of claims of American citizens for spoliations committed by the French prior to the July 31, 1801” in 1846; Pierce vetoed, “H.R. 117. To provide for the ascertainment of claims
Early private bills encompassed a wide range of topics beyond tort-like claims: veterans being granted pensions\textsuperscript{79}, bills releasing convicts from prisons\textsuperscript{80}, a bill granting the witnesses in the Samuel Chase impeachment trial a $3 per diem.\textsuperscript{81} even a bill granting Martha Washington the franking privilege to send mail for free.\textsuperscript{82} Private bills seem to have near unlimited scope\textsuperscript{83} and play a role in other Constitutional provisions such as the emolument clause\textsuperscript{84} and the natural born citizen clause.\textsuperscript{85} It is important to distinguish private bills from sovereign immunity—because sovereign immunity prevented some of these types of claims (tort claims) from reaching the courts, private bills were necessary. However, some private bills, like veteran’s pension bills do not relate to sovereign immunity directly.

\textsuperscript{79} An act directing the Secretary of War to place certain persons on the pension list. Act of Feb. 2, 1798. II Stat. Chap XI.
\textsuperscript{80} An act for the relief of Solomon Boston. Act of Jan. 30, 1801.
\textsuperscript{81} An act making provision for the compensation of witnesses who attended the trial of the impeachment of Samuel Chase. Act of April 21, 1806.
\textsuperscript{82} An act to extend the privilege of franking letters and packages to Martha Washington. Act of April 3, 1800.
\textsuperscript{83} (Mantel 2007)
\textsuperscript{84} The Emoluments Clause of the Constitution (Art. I, § IV, Cl. 8) requires that no office holder of the government may accept a title of nobility from another government, without the consent of Congress. An example of a private bill waiving this provision is, Private Resolution No. 4, Joint Resolution giving consent of Congress to Professor Joseph Henry, secretary of the Smithsonian Institution, to accept the title and regalia of a commander of the Royal Norwegian Order of St. Olaf, conferred upon him by the King of Sweden and Norway, Grand Master of said order. Act of April 20, 1871.
\textsuperscript{85} For instance modern private bills granting an alien citizenship prior to the creation of the INS.
2.1 Congressional Committees for Private Bills

Just like regular legislation, private bills begin in committee. Both houses of Congress in the early era of the United States had committees on claims. The First Congress contained ad-hoc select committees devoted to various claims, but the total number of claims sent to Congress soon warranted standing committees.\(^{86}\)

The House of Representatives had an official standing committee, aptly called the Committee on Claims, as early as 1794 broadly empowered to, “take into consideration all petitions and matters or things touching claims and demands on the United States as shall be presented or shall or may come in question and be referred to them by the House, and to report their opinion thereon, together with such propositions for relief therein as to them shall seem expedient.”\(^{87}\)

Other committees were later formed with a narrower jurisdiction. For instance, the House Committee on Pensions and Revolutionary War Claims\(^{88}\) was empowered to “take into consideration all such petitions, and matters, or things, touching military pensions; and also claims and demands originating in the Revolutionary War, or arising therefrom . . . and to report their opinion thereupon, together with such propositions for relief therein as to them shall seem expedient.”\(^{89}\)

\(^{86}\) (Schamel et al. 1989)
\(^{88}\) Name changed to the Committee on Revolutionary Pensions in 1825, and days later abolished and split into the Committee on Military Pensions and the Committee on Revolutionary Claims.
Similarly in the Senate, a standing Committee on Claims existed as an original standing committee.\textsuperscript{90} Related committees in the Senate included the Private Land Claims, Revolutionary Claims, Judiciary Committees and all served the same basic purpose: to provide “relief” to some aggrieved party.

After a complainant found a congressman to bring their claim to committee, they would prepare affidavits and other documents to be presented \textit{ex parte} to the relevant committee.\textsuperscript{91} Since most people with claims could not have traveled to Washington, D.C., “claimants were supported by …the influence of such friends as they could induce to appear before the committees in open session, or to see the members in private.”\textsuperscript{92}

\subsection*{2.2 A Politicized Process}

Little is known about what happened in the congressmen’s decision-making process. The primary documents suggest an opaque, and possibly corrupt, process of voting on claims. Congressmen privately claimed that “considerations other than the strict merits of the claim, such as political factors or the popularity or influence of the supporting or opposing Congressmen, play a part in the disposition of the legislation.”\textsuperscript{93} Another legislator described the process as being fraught with,

“caprice, commiseration, political partiality, or prejudice…the popularity and tact of the member having a claim in charge, a sudden and hasty consideration of the question in a confused or thin House, and – very rarely—interest, hidden out of sight; all these became elements not seldom controlling, very frequently affecting the decision of claims.”\textsuperscript{94}

\begin{thebibliography}{9}
\bibitem{90} Coren et al. 1989.
\bibitem{91} Richardson 1885, 4.
\bibitem{92} Richardson 1885, 4.
\bibitem{93} Office 1942, 40.
\bibitem{94} Cong. Globe, 37\textsuperscript{th} Cong., 2\textsuperscript{nd} Sess. 123-124 (1862)
\end{thebibliography}
Outright bribery is also recorded as having occurred. As Court of Claims Judge Nott wrote in *Brown’s Case*[^95], “a seal was set upon the degradation of one of the Houses by the expulsion of three members for receiving bribes for the prosecution through Congress of private claim”.[^96]

### 2.3 Fraudulent Claims

It also was not just Congressmen accused of conducting shady dealings in negotiating the passage of private bills, but also fraud by citizen making claims:

“The Calendar of each House was filled with claims, persistently pressed from Congress to Congress, by dishonest claimants, and more dishonest claim agents, which no court would have entertained, and which had no foundation of justice whatever. Yet these claims, made specious by fraudulent proofs and representations…were frequently passed by Congress, to the great detriment of the Treasury.”[^97]

It difficult to evaluate the validity of these claims because the transcripts of the debates on private bills, if debate ever occurred, are infrequently available. Moreover, the debates never approached what one would see in a judicial proceeding in terms of strict rules of evidence, a representative defending the executive branch, cross examination of witnesses, or an impartial arbiter.

### 2.4 Time Consumption and Opportunity Cost

A Senator or House Member’s most precious commodity might very well be her time. Considering that Congressmen have a myriad of groups and projects pressing for their time, not to mention their job of passing public legislation, many expressed their dissatisfaction in being made into full time claims representatives:

[^96]: Nott cites “the Congressional Globe for the third session of the Thirty-Fourth Congress, under the expressive title of "Corruption of Members of Congress"; however the record seems to reflect that the members resigned while maintaining their innocence, rather than technical expulsion.
[^97]: (Office 1942).
“Two days of every week—one third of the time, to say nothing of the time spent by committees—is set apart for the consideration of private bills and reports, and yet not much more than half are acted upon; and yet the people complain that our sessions are too long. Want of time leads to improper legislation, and often to great injustice…Besides, we are run down by private claimants, and their agents or attorneys; and private claims are either passed or pressed into the appropriation bills the last nights of our sessions, contrary to the rules of the Senate, and injurious to the character of Congress”

Figure 1 shows the number of private bills passed from 1789 to 2012, with the number of members in the House of Representatives superimposed over it.

Figure 1. Number of Private Bills Passed 1776-2013

99 Data compiled by author from Statutes at Large (1776-1946) and Vital Statistics on Congress (1946-2012).
It is important to note that the number of private bills passed does not necessarily represent the number of people receiving some benefit from Congress. For instance in the Congresses from 1907 to 1917, the graph shows that there were approximately 1,000 private bills passed. However, in the 61st Congress (1909-1911) alone there were more than 5,000 named beneficiaries, and just listing the names took up 661 pages in the United States Statutes at Large.

The way this occurred was that often a single private bill would be directing the Secretary of War or the Secretary of the Interior to add several hundred people to the list of veterans who should be receiving pensions. Yet for unknown reasons, sometimes a Congress would pass each addition to the veteran pension list as an individual bill, as was the case with the outlying 69th (1905-1907) Congress.

The time spent on private bills was time that could not be spent on other important national issues like war or domestic policy. In fact, this opportunity cost was a driving factor for many of the proposed reforms discussed in the subsequent chapters, and a key point that Presidents like Franklin Roosevelt used in urging Congress to abandon private bills as a way of disposing of claims.

2.5 Direct Costs

Besides being a heavy drain on time, private bills also had a direct financial cost in terms of simply printing out the bills. From 1916 to 1926, for example, one Congressman calculated that the cost in that decade for printing private bills was in excess of $500,000. In a 1942 letter to Congress, President Franklin Roosevelt pointed out that it cost approximately $200 to pass any given

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100 However, this opportunity cost should be discounted for the fact that even modern House members spend nearly a third of their time on constituent services, and their staff nearly half (Fiorina 1989, 55).
101 See infra footnote 209.
102 (Underhill 1926).
private bill; this was particularly troublesome given that many private bills awarded less than $200 to claimants.

Even more discouraging was that in 1940, the President of the Federal Bar Association estimated that the time between when an accident occurred and when any payment was made averaged ten years.103

2.6 Conclusion

It quickly became apparent that private bills were not successful by any benchmark. Corrupt, costly, and slow, members of Congress began to realize reform was necessary. Just what institutions would supplement, or ultimately replace, the private bill system remained to be seen. The next chapter traces the life, death, and re-birth of a variety of claims institutions.

103 (Office 1940, 15).
Chapter 3: Dealing with Private Bills through Bureaucracy

Given the troublesome nature of the private bill system, various proposals were drawn up to provide for new institutions to hear private bill-like claims. Reforms in 1792 and 1855 tried to enlist put into place various judicial bodies to deal with claims against the government. Both, however, spectacularly failed, although in very different ways. It was not until 1863 that a relatively workable court was created, the precursor to today’s modern Court of Federal Claims.

3.1 An Executive Branch Approach: The Invalid Pension Act (1792)

As mentioned, military affairs were central to the core purposes of the early and even pre-federal government. The Revolutionary war had been won, but it remained to be paid for. Even before the federal government was established, veterans, widows, and contractors all pressured the Continental Congress to pay war debts. The Continental Congress tried to settle these claims, and prevent future problems by passing a number of resolutions that set a date after which no new claims could be registered; August 1st, 1786 for claims for military services provided, and June 23rd, 1788 for claims relating to supplies provided. After these dates, all future claims were to be forever barred.

One can imagine that a widow, veteran, or supplier who had a claim to bring after that time would not think kindly of these limitations. Once an elected Congress came to exist under the United States Constitution we know today, it was quick to pass an act suspending those time limitation to allow citizens to bring new Revolutionary War claims during the two year window between 1792 and 1794. Congress also passed legislation, the Invalid Pension Act, outlining

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104 Acts of November 2nd, 1785, and July 23rd, 1787.
105 Act of March 27th, 1792.
the process by which war claims would be handled in that window.\textsuperscript{106} Claimants would need to go to the federal circuit court (today’s federal courts of appeal) in their jurisdiction and supply a document from their commanding officer or two verifiable witnesses that explained their disability and prove they deserved disability compensation. The judges of the circuit court would then evaluate the injuries and veracity of the evidence and make a recommendation to the Secretary of War, who had the final authority to dispose of the claim.\textsuperscript{107}

This scheme had been in place for all of two weeks before it was attacked by the judiciary as a violation of the non-delegation doctrine and the separation of powers doctrine, and as such, unconstitutional.\textsuperscript{108} The Invalid Pension Act was challenged in \textit{Hayburn’s Case}\textsuperscript{109}, a case involving the United States Attorney General suing for a writ of mandamus to compel the uncooperative Circuit Court for Pennsylvania to hear William Hayburn’s disability claim in the manner prescribed by the Invalid Pensions Act. In the extensive footnote to the case, the circuit court explained its rationale for refusing to participate in Congress’ program in a letter to President Washington:

“It is a principle important to freedom, that in government, the judicial should be distinct from, and independent of, the legislative department. To this important principle the people of the United States, in forming their Constitution, have manifested the highest regard. They have placed their judicial power not in Congress, but in "courts." [The case cannot proceed]

1st. Because the business directed by this act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States; the Circuit court must, consequently, have proceeded without constitutional authority.

"2d. Because, if, upon that business, the court had proceeded, its judgments (for its opinions are its judgments) might, under the same act, have been revised and controled

\begin{itemize}
\item \textsuperscript{106} Invalid Pensions Act of March 23\textsuperscript{rd}, 1792.
\item \textsuperscript{107} Invalid Pensions Act, Section II.
\item \textsuperscript{108} Record of the decisions of Justices Cushing, Jay, and Duane, acting as Circuit Court judges for New York, April 5\textsuperscript{th}, 1791.
\item \textsuperscript{109} 2 U.S. 409 (1792).
\end{itemize}
by the legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts.”

The Circuit Court for Pennsylvania was not the only one to disagree with the foundations of the Invalid Pension Act—the Circuit Courts for New York and North Carolina similarly refused to implement the program, also citing non-delegation doctrine and separation of powers issues, but adding in another reason:

“That whatever doubt may be suggested, whether the power in question is properly of a judicial nature, yet inasmuch as the decision of the court is not made final, but may be least suspended in its operation by the Secretary at War, if he shall have cause to suspect imposition or mistake; this subjects the decision of the court to a mode of revision which we consider to be unwarranted by the Constitution.”

This last reason is probably what Hayburn’s Case is most known for: courts will almost never entertain jurisdiction in cases where they do not have the final determination of disposition of the case. The actual case was mooted when, while the case was before the Supreme Court, Congress replaced the Invalid Pension Act with another scheme that used federal district court judges to act as commissioners with a fact finding role only.

Once the judicial route seemed untenable, Congress all but abandoned the idea until 1855. In the interim, Congress relied on the private bill committees discussed in the previous

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110 Hayburn’s Case, 409, Footnote 2. Letter to President George Washington, dated April 18th, 1792, by Justices Wilson, Blair, and Peters, acting as judges in the Circuit Court for Pennsylvania.
111 Hayburn’s Case, 409. “That neither the Legislative nor the Executive branches, can constitutionally assign to the Judicial any duties, but such as are properly judicial, and to be performed in a judicial manner.”
112 Hayburn’s Case, 409 “That the legislative, Executive, and Judicial departments, are each formed in a separate and independent manner; and that the ultimate basis of each is the Constitution only, within the limits of which each department can alone justify any act of authority.”
113 Emphasis added. Hayburn’s Case, 409.
114 Additionally, legal history students can point to it as an earlier example of a law impliedly struck down as unconstitutional before Marbury v. Madison.
115 Act of February 28, 1793.
section. While debate sporadically came up in the records of Congress, the next instance of actual legislation came in 1855 in the form of an advisory board known as the Court of Claims.

3.2 A Legislative Approach: Advisory Court of Claims (1855)

Senator Richard Broadhead accurately described his plan for this new “court” as one that “if it does not do great good, [at least] it is free from Constitutional objection, and will do no harm, and is certainly proper as an experiment”. One would certainly hope it would turn out as a better experiment than the Invalid Pension Act.

Broadhead described three scenarios of how the problem of too many private bills could be dealt with: enlarging the powers of the accounting (Executive/Treasury) officers, enlarging the power of the judiciary, or establishing a commission or board. The enlarging of the executive branch was seen as a dangerous idea given that “executive officials need to be governed by law” and “Congress would not know how much money or for what objects to appropriate it”.118

Enlarging the judiciary was just as undesirable, as it was “very doubtful whether we [Congress] have power under the Constitution to waive sovereignty and authorize the government to be sued in law or equity [at the risk of] placing the public Treasury at the disposal of the courts contrary to the meaning of the Constitution and sound policy”. 119

Furthermore, Broadhead was worried about which cases the courts would get jurisdiction over:

“Our government, in its various transactions, must of course deal with, and make contracts with thousands of citizens annually, and of course there must many questions

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116 Cong. Globe, 33rd Cong., 2nd Sess. 70 (1854).
117 (Cong. Globe 1854, 70).
118 (Cong. Globe 1854, 70).
119 (Cong. Globe 1854, 70).
arise involving a necessity for the exercise of discretionary power. There are, also, cases
not founded on contract, which could not be made out in any court according to the rules
of law or equity. They are applications to the will of the sovereign to the sense of
liberality and generosity of the people or Government, and Congress, exercising, to a
limited extent, the sovereign power, is the only tribunal which can grant relief. It would
be difficult, if not impossible, to define or classify the cases in which the courts should
have jurisdiction.”120

As for his plan, Broadhead explains: “Its proceedings will be public, both sides will be
heard, lawyers of high character will appear before it, its decisions will not be final, and its
opinions and decisions will be published before both Houses of Congress.”121 He continues,

“It proposes the appointment [by the President] of three commissioners…to hold these
officers for four years, to whom all petitions against the United States, shall be referred.
This board will be in the nature of a judicial tribunal..they will be in session the whole
year…When this board is established, members of Congress will have a place to refer
private claimants to, and hence will not be electioneered with… I have not made the
decision of the board final in any case…”122

Senator Hunter then interjected his preference for Article III type judges:

“But, sir, I should vastly prefer, on account of the tenure, that, instead of commissioners
appointed for four or five years, and removable at the pleasure of the President, we
should have two judges sitting here, who should hold their office as judges do under the
Constitution…because…to the credit of this country, in the history of its judicial
proceedings, there is hardly a taint on the judicial ermine in regard to the purity of the
motives which influence their decisions.123

To which Senator Clayton added, “I think it was in the convention of Virginia that John
Marshall said, of all the evils that could be inflicted upon a sinning people by an angry Heaven, a
dependent judiciary was the worst.”124

Arguing for the ability of individual direct suits against the government, Senator Pettit
then delivered a scathing condemnation of sovereign immunity:

120 (Cong. Globe 1854, 70).
121 (Cong. Globe 1854, 70).
123 (Cong. Globe 1854, 71).
“Now, I ask why it is, upon the principles of justice and reason, that we refuse to allow a citizen to sue his government for redress, and yet provide by law that if one hundred persons... as members of a corporation, or as individuals, owe debt to one individual, that one individual may sue the whole one hundred?... Upon what principle is it, that you say, that if all of the people of the United States, consisting of twenty-five millions, owe a debt to an individual, the individual shall not have a right to sue all?”

Petit maintained that if a corporation of 100 could be sued, why not a country of 25 million? He went on to delineate those claims that might still be decided by Congress and those which could be decided by regular judicial process:

“Let all those of a different kind, for extraordinary gallant services or accidental or casual patriotic exertions be presented here, where they ought to be presented and rewarded with a munificent hand; but let all those which are of a nature which might be enforced in our courts of record, if they existed between individuals, be referred to the courts, there to be dealt with, there to be prosecuted, there to be terminated, precisely as though they were between individuals...”

The details of such a plan were given by Senator Jones:

“This, I apprehend, is one of the most important measures in the history of the country. I am exceedingly anxious myself to vote for any bill that will remedy the evils that now exist...I think there is but one safe mode of doing it, and that is to establish a court of claims—an independent judiciary, upon the same principle as the Supreme Court. Let the cases go there, and after the examination of witnesses, and the arguments of counsel, let them be decided, and then let there be an appeal to the Supreme Court of the United States.”

In the end, the Congress passed a compromise law in 1855: it created a “Court of Claims” consisting of three judges that held their position during good behavior, gave each claim individual attention, and appointed a special attorney to represent the government. It would have jurisdiction over all claims “founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the...

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United States…and also all claims which may be referred to said court by either house of Congress.”

One section, however, ensured the certain and swift death of the 1855 Court of Claims: “And be it further enacted that said reports [from the court] shall, if not finally acted upon during the session of Congress to which the said reports are made, be continued from session to session until the same shall be finally acted upon…” This relatively benign section expressed Congress’ desire that this essentially advisory body would do the difficult work of the adjudication (reading petitions, assessing evidence, listening to witnesses) and then make a recommendation to Congress as to whether to grant or deny the petition. Congress would then hear a monthly report from the court, and decided on those claims in committee, and then again refer them to Committee of the Whole House. Two major problems presented themselves within the first term of the court: the same problem of finality of the Court’s decision experienced in *Hayburn’s Case* and secondly that having the report read in committee and then referred back to the Committee of the Whole saved almost no time.

For whatever reason, the Congressmen who passed this law did not think back to the Invalid Pension Act and the *Hayburn’s Case* fiasco. Proper Article III courts clearly would not undertake non-judicial activity that included any decisions that could be directly overruled by the legislative branch. Congress might have thought that it was creating an Article I tribunal, but it gave the judges of the court life tenure and made them follow the Constitutional Appointments provision regarding Presidential nomination and Senate consent, which are characteristics of Article III Courts.

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129 Act of Feb. 24, 1855.
130 Act of Feb. 24, 1855.
131 (Shimomura 1984, 653).
In the Invalid Pension Act plan, the circuit courts refused to take on any aspect of the advisory role Congress wanted them to. The opposite problem occurred with the 1855 Court of Claims—the new court took on all of the power Congress gave it, and more.

The first case that the Court handled, *Todd v. United States*, is instructive in seeing an overview of the process an individual would go through. The plaintiff, Samuel P. Todd, was suing to recover $553 he alleged he was owed from his time as the money manager aboard the United States Navy flotilla *Delaware*. He first wrote a letter to the Secretary of the Treasury and received notice that the Treasury would not honor his request. His next step was to file in the Court of Claims, which found in his favor in the sum of $553.

After announcing the judgment, the Court added in a few lines to let Congress know what it thought of the idea it was making mere recommendations:

“It may, perhaps, be said that as our judgments are not final, and as we must report to Congress, our decisions can be regarded only as recommendatory in their nature…We do not think of Congress, by establishing this court, intended to constitute a council to advise them what course it would be honest and right, or expedient, for them to pursue in any given case. They meant, as the title of the act denotes, "to establish a court for the investigation of claims," to ascertain the facts in each case, and the legal rights and liabilities arising from those facts.

It is only by acting upon some settled plan, and according to some fixed principles, that the duties of the court can be performed with any prospect of administering substantial justice. The obvious duty of the court is to expound the law as they find it established, and apply it to the cases before them, and not to create it; jus dicere (to expound the law), and not jus dare (to make the law).”

The Court had asserted itself as the final arbiter and as such expected Congress would merely read its report and appropriate the money. The truth was far from that. Between 1855 and

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132 1 U.S. Cong. Rep. C.C. 1
134 *Todd* at 5. Whether or not the government needed to pay interest was a separate, very difficult, question. The court decided not to award interest.
135 *Todd* at 6.
1862, claimants sought roughly $12,000,000 in damages and the Court of Claims awarded roughly $530,000; at the end of 1862 Congress had only appropriated approximately half of the judgments.\textsuperscript{136} One could easily envision this situation devolving into a Constitutional crisis between all three branches of government:

The Court of Claims renders a large verdict against the United States. Congress, for whatever reason, declines to authorize the funds. Alternatively, the Secretary of the Treasury could decline to actually sign the check to the plaintiff. The Court could issue a writ of mandamus instructing the Secretary to issue the check, but if it refused, it would not be the first time the Executive Branch told the judiciary “you’ve made your decision, now enforce it!”\textsuperscript{137} The Court might try to hold the Secretary in contempt, but it could be easily ignored.

Such a hypothetical crisis did not occur in the 1860s because a very real crisis, the Civil War, overshadowed any other problems. While no Constitutional crisis emerged from any one particular claim, it was apparent that the advisory court was not getting the job done. President Lincoln felt compelled to relay that fact to Congress, which was no doubt fully aware of the dysfunction of the advisory court: “It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals. The investigation and adjudication of claims, in the nature, belong to the judicial department…”\textsuperscript{138}

\textsuperscript{136} (Shimomura 1984, 653) citing Cong. Globe, 36\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. 984 (1860); Cong. Globe, 37\textsuperscript{th} Cong., 2\textsuperscript{nd} Sess. 123-124 (1862).

\textsuperscript{137} Instances that come to mind are Marbury v. Madison, 5 U.S. 137 (1803), and Worcester v. Georgia, 31 U.S. 515 (1832), the case which President Andrew Jackson is (mistakenly) thought to have said, “John Marshall has made his decision, now let him enforce it!”

\textsuperscript{138} Annual Message to Congress, Cong. Globe, 37\textsuperscript{th} Cong., 2d Sess. App 1-4 (1862).
3.3 The Independent Court of Claims (1863)

With a new mandate from the President, Congress again returned to the task of creating a Constitutionally sound way of dealing with claims against the government. Nearly all of the same issues that plagued previous attempts at a court reappeared, however on March 3, 1863 Congress was able to pass a set of amendments to the original Court of Claims Act. These amendments included:

§5, retaining the appeal to the Supreme Court for cases involving more than $3,000

§7, establishing that payment would come from general appropriation from the Treasury

§9, which excluded from its jurisdiction any claims against the government by foreign and Indian nations not already under way,

§10, creating a six year statute of limitations, and

§14, stipulating that no money was to be paid out of the Treasury for Court of Claim judgments until the appropriation was estimated for by the Secretary of the Treasury.

Section 7 (providing for general appropriation of money claims) was important because instead of Congress passing a bill authorizing every judgment rendered against it, it would provide a lump sum year to year. This would seem to insulate the judiciary from Congress being unhappy with any one verdict and refusing to pay. They would have to cut out the whole lump sum for all claims. The final stipulation in §14 was yet another brief set of words in an amendment to the Court of Claims Act that would be its undoing. Not understood by any member of Congress to be problematic, its inclusion was nonetheless insisted upon by Senator

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140 Act to Amend, 766.
141 Act to Amend, 766.
142 Act to Amend, 767.
143 Act to Amend, 767.
144 Act to Amend, 768.
Hale of New Hampshire.\textsuperscript{145} Senator Hale was perhaps one of the fiercest opponents of judicial “interference” in the Congressional settlement of claims, going so far as to say that future historians would mark March 3\textsuperscript{rd}, 1863 as the day the great American Republic “began its progress to decay”.\textsuperscript{146}

To its credit, the 1863 rendition of the Court of Claims existed for longer than the Invalid Pension Act plan did before a legal challenge to its Constitutionality came to the Supreme Court, although two weeks was a rather low bar. In a remarkable multi-opinion case, \textit{Gordon v. United States}, the Supreme Court surprised all observers by ruling that the Court of Claims was not an Article III Court.

The case has an interesting history as there are actually two \textit{Gordon v. United States} opinions, one written by Chief Justice Roger Taney who died before the Court resumed session to rule on the case\textsuperscript{147}, and another short opinion\textsuperscript{148} that the remaining Justices wrote to actually decide the case. Both cases dismissed Gordon’s appeal from the Court of Claims citing Constitutional issues with hearing cases where the Secretary of the Treasury would have to

\textsuperscript{145} (Wiecek 1967, 400).
\textsuperscript{146} The entire speech is worth repeating:
“I think, sir, when some future Gibbon shall write the history of the decline and fall of the great Republic, and shall give the indications which marked its progress to decay, one of them will be that about the year of grace 1863 the Thirty-Seventh Congress took it into their head that they were wiser than everybody that went before them, and departed from all the precedents established by their fathers, and started out on new, untried, and extravagant theories and notions. Sir, from the time of the adoption of the Federal Constitution to this time, the Congress of the United States have been jealous upon this subject. They would never allow a dollar to be taken out of the Treasury on a verdict of twelve men, and a judgment of law that the verdict should stand.” (Shimomura 1984, 658) citing Cong. Globe, 37th Cong., 3d Sess. 310 (1863)
\textsuperscript{147} \textit{Gordon v. United States}, 117 U.S. 697 (1865). The Taney opinion was not published until a year later.
\textsuperscript{148} \textit{Gordon v. United States}, 69 U.S. 561 (1864).
“estimate” the appropriation of a judgment.\textsuperscript{149} In 1866, Congress repealed the problematic §14 and declared that the Supreme Court should hear appeals from the Court of Claims.\textsuperscript{150}

3.4 Identity Crisis: A Century of Uncertainty

So, after no small amount of political wrangling, the Court of Claims was on relatively stable footing in 1866. Congress and the Supreme Court seemed to be in agreement about the nature of the Court of Claims: it was a court of law made pursuant to Article III of the Constitution. But, as the title of this section suggests, the Court of Claims had only seen the beginning of litigation surrounding its constitutional status. In the next century of the Court of Claims’ history, major lawsuits disputing the Constitutional status of the Court of Claims reached the United States Supreme Court six more times.

Before launching into a discussion of the six cases, it is worth explaining what the Article I/Article III distinction is and why it is important. On a theoretical level, Article I institutions are extensions of the legislative branch (Congress), while Article III institutions belong to the Judicial branch. Article I institutions are accountable to Congress, and Congress is in turn ultimately accountable to the electorate. Article III institutions are purposefully given independence from the executive and legislative branches, and certainly from the pressures of the electorate.

On an operational level, the Constitution requires a number of conditions be met in order to have a valid Article III institution, such as life tenure for judges, salaries that cannot be

\textsuperscript{149} See \textit{supra} note 144.
\textsuperscript{150} An Act in Relation to the Court of Claims, Act of March 17, 1866, 14 Stat. 9.
diminished, and Presidential nomination with Senate confirmation.\textsuperscript{151} No such conditions exist in Article I.

It is these differences that make the Constitutional status of an institution be of great importance. Whether the institution would answer to the people through their representatives in Congress, or answer to no one\textsuperscript{152} makes a great deal of difference. Confusion over what type of institution the Court of Claims was persisted through the mid-twentieth century, as illustrated by the following six Supreme Court cases.

\textit{(1) McElrath v. United States}

In 1880, a dismissed Marine Corps officer challenged the constitutionality of a Court of Claims decision by alleging a violation of the Seventh Amendment’s preservation of jury trials where the value in controversy exceeds twenty dollars in a suit at common law.\textsuperscript{153} The \textit{McElrath} Court used the sovereign immunity doctrine to declare that claims against the government were not properly suits at common law, and therefore Congress could create whatever kind of rules it wanted for deciding claims:

\begin{quote}
“Suits against the government in the Court of Claims…are not controlled by the Seventh Amendment…The government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States”.\textsuperscript{154}
\end{quote}

\textsuperscript{151} These operational level differences are discussed in full in the second part of the following section 3.5 “The Unknown Bounds of the Judicial Power”.

\textsuperscript{152} Of course, the judiciary is not \textit{totally} independent. Congress can impeach judges for serious crimes as well as remove the jurisdiction of even Article III courts.

\textsuperscript{153} U.S. Const. Amend. XII.

\textsuperscript{154} \textit{McElrath v. United States}, 102 U.S. 426, 440 (1880).
(2) Muskrat v. United States

Thirty years later, Congress once again tried to push the boundaries of the Court of Claims. It passed a law\textsuperscript{155} in 1907 that purported to give the Court of Claims, and the Supreme Court by way of appeal, the jurisdiction to hear a “reference case”\textsuperscript{156} relating to the constitutionality of a previously passed law about Cherokee Indian land allotments. Drawing from the previously discussed Hayburn’s Case,\textsuperscript{157} the Supreme Court in Muskrat v. United States\textsuperscript{158} held that Congress could not give such power to the Court of Claims (possibly implying the Court was Article III) and remanded the case with instructions for the Court of Claims to dismiss for want of jurisdiction.

(3) Miles v. Graham

Controversy struck again when in 1925, Congress tried to make a Court of Claims judge pay taxes on his income, which would be unconstitutional if it happened to an Article III judge. Relying on precedent from another case about the diminution of a federal district court judge’s salary\textsuperscript{159}, the Court in Miles v. Graham\textsuperscript{160} held that Congress could not tax the salary of a judge of the Court of Claims. While not a case distinctly on the nature of the Court of Claims, the decision implicitly placed the Court of Claims on Article III standing and its judges within its protections.

(4) Ex Parte Bakelite

A mere 4 years later, in a case actually about another special institution, the Court of Customs Appeals, the Supreme Court took time to give its opinion on the nature of the Court of

\textsuperscript{155} Act of March 1, 1907.
\textsuperscript{156} A reference case is one in which Congress or the President asks the Court to rule on the constitutionality of some act, before any case or controversy arises, and violates the case or controversy requirement of Article III § 2 clause I.
\textsuperscript{157} See supra note 109.
\textsuperscript{158} Muskrat v. United States, 219 U.S. 346 (1911).
\textsuperscript{159} Evans v. Gore, 253 U.S. 245 (1920).
\textsuperscript{160} Miles v. Graham, 268 U.S. 501 (1925).
Claims. The Supreme Court in *Ex Parte Bakelite*\(^{161}\) declared that the Court of Claims was in fact a legislative, meaning Article I, institution! Moreover, it held that the Court of Claims had *always* been an Article I Court since the original 1855 Court of Claims enabling act, a claim further supported by the 1863 amending act that had allowed for Congressional references cases to be submitted to it.\(^{162}\) It claimed that its earlier *Miles* decision was not dispositive on the nature of the Court of Claims, and only stood for the proposition that the Court of Claims was a “court of the United States” for purposes of judicial salary.

(5) *Williams v. United States*

Exactly 4 years after *Bakelite*, the Supreme Court heard a case with identical issues to the *Miles* salary reduction case. The case, *Williams v. United States*,\(^{163}\) ended up sending the Court of Claims back into Article I limbo. The Comptroller General had interpreted the Constitution to mean that Court of Claims judges were *not* protected by Article III §1, and the taxed judge sued. Citing *Bakelite*, the Supreme Court ultimately overruled *Miles*, without actually saying that it was overruling *Miles*.

Displeased with the result of *Williams*, in 1953 Congress took an active role in the debacle by passing a law that declared the Court of Claims to be “established under article III of the Constitution.”\(^{164}\) Even this declaration was not enough to end the debate because the Court of Claims was questioned again in 1962. The Court would go through one more major Supreme Court case and change in enabling act before the question was settled.

\(^{161}\) *Ex Parte Bakelite Corporation*, 279 U.S. 438 (1929). Some (the Court in *Glidden v. Zdanok*) consider the part of this case relating to the Court of Claims to be merely *dicta*.

\(^{162}\) See *supra* note 139.

\(^{163}\) *Williams v. United States*, 289 U.S. 553 (1933).

(6) *Glidden v. Zdanok*

After *Williams*, the law provided that the Chief Justice of the United States could assign a Court of Claims judge to sit as a federal circuit court judge, and active Court of Claims Judge Warren Madden had been called to serve as a circuit court judge in a collective bargaining lawsuit. The losing party in that case appealed the decision arguing that Judge Madden was improperly allowed to sit on the Second Circuit Court of Appeals, since the court only had jurisdiction over the dispute by virtue of the Diversity Clause of Article III. If Judge Madden was not an Article III judge, then the collective bargaining lawsuit would have to be reargued.

So, there was a lot at stake when *Glidden v. Zdanok* came before the Supreme Court. First, the Court stated that while Congress’ declaration that the Court of Claims was an Article III Court was helpful in deciding the case, a court’s constitutional character is not determined by Congressional fiat. It would rest on the nature of that court’s jurisdiction and the types of cases that it heard. Pushing aside *Williams* and *Bakelite*, the Supreme Court announced a complicated defense of the Article III status of the Court of Claims.

They could only marshal a plurality opinion in which Justice John Marshal Harlan II, joined by Justices William Brennan and Potter Stewart, announced that the Court of Claims was in fact an Article III court. Justice Thomas Clark joined Chief Justice Earl Warren in an opinion that agreed in the result, but not the reasoning of the plurality. Dissenting on the matter were Justices William O. Douglas and Hugo Black who claimed that because Congress’ main power

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166 U.S. Const. Art. III § 2, “The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority…between citizens of different states…”.
for creating the Court of Claims stemmed from Article I § 8, the Court must be a legislative court.

The opinion was lengthy (74 pages) and the briefs even longer (533 pages) on what the Justices agreed was a confusing, controversial, and abstract issue.\(^{168}\) *Glidden* was the last case the Supreme Court heard on the status of the Court of Claims, and possibly the first time that the Comptroller of the Treasury, the Supreme Court, and Congress could all come to an agreement on what the constitutional nature of the Court of Claims was.

The Court of Claims would remain as an uncontested Article III court for twenty years, until Congress created the Article III Court of Appeals for the Federal Circuit, which took the Court of Claims’ appellate jurisdiction, and left its trial division to be an Article I court known as the United States Claims Court.\(^{169}\) After a minor name change in 1992, the present day United States Court of Federal Claims can claim to have one of the most interesting and controversial histories of any American political institution. Today, it is empowered to hear an eclectic set of issue areas including government contracts, Constitutional claims, tax refunds, Indian claims, civilian and military pay claims, patent and copyright matters, and vaccine injury claims.\(^{170}\)

Over the course of the court’s extraordinary history, it went from being: an advisory court that did not do enough to relieve Congress of its burdens (1855) to being an Article III Court (1863) to being ruled an Article I court (1864-5), to being altered to be an Article III Court again (1866), to being impliedly an Article III court (1911), to having its judges declared to be Article III in *dicta* (1925), to being ruled an Article I court (1929), to having its judges declared to be Article I judges (1933), to having Congress declare it to be an Article III Court (1953), to having

\(^{168}\) *Glidden* at 534 footnote 7.
\(^{169}\) (Association n.d., 8)
\(^{170}\) (Association n.d., 12)
the Supreme Court declare it Article III (1962), to being split into Article III Court of Appeals for the Federal Circuit (appellate) and the Article I United States Claim Court (trial) (1982), to finally being renamed the United States Court of Federal Claims where it remains today as an Article I Court of the United States (1992).

3.5 A Theory on the Source of the Court of Claims Conflict: Delegation Dilemmas

Why did the early (pre-1960s) Court of Claims seem to be so prone to Constitutional litigation? No institution in American history seems to have been as plagued by Congressional impasse, uncertain jurisdiction, Presidential condemnation, and contradictory Supreme Court decisions as the institutions set up to deal with claims. The string of failed attempts to create a system to deal with non-tort claims must have created a pessimistic attitude towards the thought of ever extending jurisdiction to include tort cases. But, why so much conflict?

I advance the argument that the early Court of Claims was stuck in a Congressional dilemma related to delegating power to a separate institution, complicated by the fact that the nature of judicial power and the distinction between Article I and Article III Courts was still ill-defined.

The Congressional Dilemma

A member of Congress is faced with a difficult task when it comes to claims against the government. There are a number of difficult decisions the member needs to make:

1. **Should I vote to abrogate sovereign immunity?**

   This question was relatively well understood. Congress was aware that it was the only institution that could realistically abrogate the federal government’s sovereign immunity. The
early Supreme Court jurisprudence on sovereign immunity (e.g. McLemore, Hans) was clear that sovereign immunity was the law of the land and the strings of the purse were well within the hands of Congress.

The more normative question of whether the government should be financially responsible for the damage it does is more complicated. Actually, it is more than a normative question of what a member personally feels is right; voting behavior is more complex. The nature of being a politician is that you will have to listen and respond to multiple constituencies with often contradicting wishes. You have duties to uphold the Constitution, provide services to your constituents, manage the nation’s finances, and of course be re-elected.

It does not help that your constituents are themselves of two minds on the issue. Take the preferences of a self interested citizen:

- I would prefer that if the government harms me that they should compensate me

- I would also prefer that my tax dollars in the treasury go towards public goods like highways and national defense than to compensate other individuals’ claims

These competing interests show that even before getting into the question of institutional design, the framers of the various claims systems had to decide if they even wanted the institution to exist. Given a background of sovereign immunity, Congress did not need to pass any legislation that provided for compensation for aggrieved citizens. Some reasons why they might nevertheless have wanted to are explored in Chapter 6.

2. Should I vote for the continued use of private bills to deal with claims, or create some other kind of institution?
Once a representative had decided to start paying for claims, it remained to be seen how it would be done. Private bills are an attractive option. A legislator is able to claim a certain amount of credit for passing a private bill for a constituent. Moreover, since any individual private bill is unlikely to empty the Treasury there is little incentive to abstain from introducing a bill on behalf of a constituent. However, once the member realizes that their fellow members have little incentive to vote for a bill that helps only someone else’s constituent (and takes resources from the Treasury that could go to their own constituents) the legislator will see the advantage of promising future votes (logrolling) on colleagues’ bills.

Too much logrolling, however, could lead to a social trap resulting in a tragedy of the commons. The commons is Congressional resources (their time and the Treasury) and the tragedy would be bankruptcy and the consumption of the Congressional calendar. It is fair to say that Congress did fall into the trap as far as the consumption of time went, and the events discussed in Chapter 2 suggest that this was at least partially a catalyst for why Congress decided to create some other kind of institution.

3. Should I vote to create an institution subject a Congressional veto or completely delegate the handling of claims to another institution?

Once a majority of Congressmen agreed to outsource claims management, they had to decide how much discretion to give this new institution. Since the first Court of Claims was admittedly an experiment, Congress was wary of giving it too much discretion lest it go overboard in entering judgments against the government.

This hesitation would make maintaining a veto over unworthy claims seem very attractive. Unfortunately, the only way maintain a veto could work is if every determination of
the Court of Claims was reviewed again by Congress, essentially giving the Court of Claims no discretion or finality. The dilemma Congress faced was that discretion given to the Court of Claims was directly correlated to the time and resources Congress would save: no discretion meant no time saved.

In the end, Congress cautiously allowed the Court of Claims to determine the facts of a case, and deliver a non-binding recommendation as to the disposition of the case. But, as already mentioned, there was no significant time saved.

**The Unknown Bounds of the Judicial Power**

Congress was clearly conflicted internally about what it wanted to do, and what its constituents would have it do. Complicating this was that creating the Court of Claims was also pushing the unknown boundaries of what the Constitution allowed. As the previous section on the identity crisis of the Court of Claims shows, the role of the judiciary was not as established as it is today.

There was virtually no precedent for the creation of a body like the 1855 Court of Claims (certainly no case law to guide its first judges). The closest thing was some of the issues that the earliest territorial courts had encountered. In an important 1828 case, the Supreme Court upheld the legitimacy of the territorial court of Florida and first announced the idea of a “legislative court”.

The records of the debates on the creation of the Court of Claims do not suggest that there was widespread knowledge of what exactly a legislative court was, versus a traditional

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Article III federal court. The Supreme Court seemed to reverse itself on that very issue well into the twentieth century.

Looking at the Constitution, it might seem straightforward what is and is not allowed. The United States Constitution only explicitly mandates the existence of one court: the Supreme Court.\textsuperscript{172} All other courts, are realized through some other part of the Constitution. The “inferior courts”, are said to exist at the will of Congress because the Constitution states that Congress “may from time to time ordain and establish” them.\textsuperscript{173}

The most familiar inferior courts are the lower federal courts: the federal district courts and the circuit courts of appeal. The existence of these courts has never really been controversial—Article III of the Constitution governs their existence. Once Congress creates such courts, judges are nominated by the President, confirmed by the Senate, serve for life, and cannot have their salary reduced.\textsuperscript{174}

There are also institutions known as Article I Courts (Legislative Courts) (Tribunals) based on the power of Congress to “constitute tribunals inferior to the Supreme Court.”\textsuperscript{175} They draw their jurisdiction from some other part of Article I, like the general welfare clause.\textsuperscript{176}

\begin{footnotesize}
\begin{itemize}
\item [172] U.S. Const. Art. III, § 1, “The judicial power of the United States shall be vested in one Supreme Court…”
\item [174] It is worth noting that Congress can also disband federal courts and/or reduce the number of federal judges. See the actions of Congress in 1802 relating to the Supreme Court’s summer session and the abolition of 16 judgeships.
\item [176] U.S. Const. Art. I, § 8, clause 1, “the Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States”.
\end{itemize}
\end{footnotesize}
Judges of Article I courts are not Constitutionally guaranteed tenure and salary like their Article III counterparts.177

Figure 2 below explains how the preferences of Congress clashed with the provisions of the Constitution. The solid black lines represent the boundaries the Constitution draws between Article I and Article III courts, and the dashed lines represent jurisdiction that cannot be added to that specific type of court. The attributes shaded in gray represent what Congress would ideally like to have in an institution. Displayed like this, it is easy to see that Congress wanted to have the best parts of Article I and Article III courts, but their various plans violated the constraints of the Constitution.

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177 This is the very basic level of the courts of the United States Government. There are also what I consider to be Article II Courts (military courts-martial created by the President), the Article IV territorial courts exercising Article I powers of Congress over territories, and a complicated host of ad-hoc quasi-judicial entities that have existed such as the Private Land Claims Court and the Iran-United States Claims Tribunal.
Congress and the Supreme Court eventually came to an agreement about what the Court of Claims could be. But before that happened, these distinctions modeled above were part of the source of the constant invalidation of Congressional blueprints for a claims management institution. Coupled with the internal dilemmas Congressmen had to deal with regarding if they even wanted to abrogate sovereign immunity, it is hardly a surprise that the Court of Claims was unsuccessful at first.

These problems set the stage for the debates that were emerging on what institutions could be constructed in place of or in addition to the Court of Claims. As the next chapter describes, the next step in the development of sovereign immunity was adding jurisdiction to the already existing Article I lower federal courts.
Chapter 4: Developing the District Court Remedy for Torts

4.1 Legislative Context

The previous chapter explored the Constitutional issues the Court of Claims was dealing with, from its creation in 1855 to its designation as an Article I court in 1982. At the same time all of the events discussed in that chapter were occurring, there was an equally important set of changes being made to the sovereign immunity landscape. That set of changes is the series of laws granting the Court of Claims and the district courts jurisdiction over more types of claims.

It bears repeating that every development relating to the Court of Claims deals with claims that are not torts. This is an important distinction that will be discussed later, but at this point it is enough to introduce the classes of cases that Congress began granting the Court of Claims and later the lower federal courts jurisdiction over.

Increasing Court of Claims Jurisdiction

The first major piece of legislation that increased the Court of Claim’s jurisdiction was the 1887 Tucker Act, which let it hear,

“All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract expressed or implied with the government of the United States…in cases not sounding in tort…”178

The phrasing of “all claims founded upon the Constitution of the United States” seems to be a broad waiver of sovereign immunity, but in reality it is not. The key words of the Tucker Act are “in cases not sounding in tort” which means that all of the cases dealing with accidental or negligent damage to person or property were not included.

178 An act to provide for the bringing of suits against the Government of the United States, Act of March 3, 1887, 24 Stat. at L. 505.
The Tucker Act was, however, a step forward for those who felt their Fifth Amendment rights had been violated by an illegal federal government “taking” of their property without just compensation. The Tucker Act is most often invoked in the circumstances of Fifth Amendment takings cases and breach of contract cases.

In 1910, Congress allowed the United States to be sued in the Court of Claims for the unlawful use of another’s patent. After President Woodrow Wilson nationalized the country’s rail system in 1917 due to World War I, Congress passed the Railroad Control Act which allowed for suits to be brought in the Court of Claims when the railroads and government could not agree on what “just compensation” was. Another example is that the Court of Claims was also given the important jurisdiction to “hear and determine claims for damages to oyster growers .... arising from dredging operations and use of other machinery and equipment in making such improvements.” Given the piecemeal characteristic of these additions to Court of Claims’ jurisdiction, one can speculate that whenever it was met with cries of a particular injustice, Congress felt comfortable abrogating sovereign immunity in very narrow circumstances and preferred the Court of Claims venue.

**Increasing District Court Jurisdiction**

The expansion of federal *district* court jurisdiction began with torts that occurred on the sea. In 1920, the Suits in Admiralty Act waived immunity for torts involving United States

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179 From (“The Fifth Amendment and the Tucker Act” 1923):
“Because of governmental immunity from suit, prior to the legislation establishing the Court of Claims, there existed no legal machinery to compel payment by the government, where private property had been taken and applied to a public use. Officers attempting to appropriate private property could, at the outset, be enjoined from so doing until compensation had been made. See *United States v. Great Falls Mfg. Co.* (1884) 112 U. S. 645, 5 Sup. Ct. 306. But, until this legislation, the property owner was dependent for relief upon the grace of Congress, where his property had once been applied to the public use.”


182 Section 3 of the Rivers and Harbors Act of 1935.
owned merchant vessels or tug boats.\textsuperscript{183} Five years later, the Public Vessels Act expanded the category to include its Naval and Coast Guard vessels.\textsuperscript{184} These admiralty acts are important for two reasons: first, they are the first times that the government waived sovereign immunity in respect to torts; secondly, they authorized the suits to occur in the traditional Article III federal district courts. The importance of allowing tort suits seems fairly straightforward, but the change in venue from the Court of Claims to the district courts is more subtle. One reason to see this as an important event is that it can be viewed as a signal that Congress was getting more comfortable with allowing suits against it in the district courts where it had less control than it did in the Court of Claims.

**Increased availability of settlements**

During this same time period, Congress was passing legislation that gave Executive branch officials more leeway in settling tort claims. For instance, the 1921 Postal Claims Act\textsuperscript{185} gave the Postmaster General the discretionary authority to settle claims related to the delivery of mail. Similarly, the Small Claims Act of 1922 allowed

“the head of each department and establishment to consider, ascertain, adjust, and determine claims of $1,000 or less for damage to, or loss of, privately owned property caused by the negligence of any officer or employee of the Government acting within the scope of his employment.”\textsuperscript{186}

\textsuperscript{183} Suits in Admiralty Act, 41 Stat. 525 (1920).
\textsuperscript{184} Public Vessels Act, 43 Stat. 1112 (1925). It should be noted that was a pretty big deal for the time because admiralty was a pretty big deal. Also, as (Sisk 2006, 188) explains, these laws did not allow for suits \textit{in rem}, which would normally apply in admiralty cases. With an \textit{in rem} suit, the defendant’s ship can actually be seized during the trial so that the defendant cannot sail away with the collateral if they lose the case! Since the United States will always technically have the money to pay, government vessels will never be seized as collateral. This also makes sense as it would probably have to be the government who impounds the ship and they are obviously a party to the case.
\textsuperscript{185} Postal Claims Act of June 16th, 1921. The act actually received its own appropriation in the amount of $35,000.
\textsuperscript{186} Act of December 28, 1922, 42 Stat. 1066. Notably, this law did not allow for the settlement of claims alleging personal injury or death.
Anecdotal evidence suggests that these settlement practices were effective. Three years later, after over 1,200 claims had been adjusted under the act, when Congress was considering a general purpose tort claims bill five years later, Representative Underhill remarked that the Small Claims Act “has worked so well that [the] committee recommends increasing the amount to $5,000.”187

4.2 Towards a Federal Tort Claims Bill

The next major development in the sovereign immunity landscape would be the passage of a law allowing for citizens to sue the government for torts. The gradual granting of additional jurisdiction to the Court of Claims and the lower federal courts indicates that Congress was slowly but surely lowering the shield of sovereign immunity.

Early Attempts

As early as 1926, Congress began to seriously contemplate a general purpose tort claims act.188 The first stated purpose for the 1926 bill was to “relieve Congress from the intolerable situation” that private bills were causing.189 However, closer examination hints at the idea that the authors of the bill were also concerned with the legitimacy of a country that did not allow for suits against the government: “Courts of claims that cannot take jurisdiction of a claim based on tort strongly suggest the persistence of ideals of autocracy”.190

Mechanically, a federal tort claims act differed from the earlier laws relating to the Court of Claims, like the Public Vessels Act and the Small Claims Act. In contrast to the 1922 Small Claims Act, the 1926 federal tort claims proposal included a provision allowing for claims

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187 (Underhill 1926).
188 (Underhill 1926).
189 (Underhill 1926, 1).
190 (Underhill 1926, 2).
resulting from personal injury and death (the Small Claims Act only related to property claims). 191

Representative Cellar, a member of the House Committee on Claims asked a number of federal judges, including Chief Justice of the Supreme Court William H. Taft, to comment on the desirability of the proposed legislation, eliciting a surprisingly varied set of responses. Chief Justice Taft expressed the desire to have a report commissioned to see how much litigation such a bill would cause, while New York federal district court judge George Sutherland wrote that when the government was acting like a business it should be liable, but to hold it liable when it was performing normal government functions would be to “take a step of rather doubtful wisdom.” 192

At any rate, the 1926 attempt failed to pass both Houses of Congress, and when a substantially similar bill did finally pass through Congress in 1929, President Calvin Coolidge pocket vetoed it. 193 Efforts to pass nearly identical legislation failed in 1931 194, and in 1932 Congress failed in passing a bill that, for the first time, barred claims arising from “assault, battery, false imprisonment, false arrest, malicious prosecution, abuse or process, libel, slander, misrepresentation, deceit, or interference with contract rights”. 195 This provision would feature prominently in the 1946 version that did pass.

In 1940, efforts got very serious and a number of different organizations such as the American Bar Association and the D.C. Bar Association as well as former attorneys general and

191 (Underhill 1926, 4).
192 (Underhill 1926, 13).
193 (Cellar 1945).
194 (Irwin 1931).
195 (Office 1932, 4).
law professors testified at the hearings.\textsuperscript{196} Nearly all present spoke in favor of the bill, with the exception of Representative Ambrose Kennedy of Maryland, chair of the House Committee on Claims, who offered strong dissent multiple times throughout the Senate hearings.\textsuperscript{197}

Kennedy interrupted the presentation of Charles Ruzicka of the American Bar Association to ask him to substantiate his claim that defending tort suits would not cost the government any more money given that the district courts were already hearing cases like this involving private parties.\textsuperscript{198} The Representative pressed Ruzicka twelve times to give the number of new cases the proposed legislation would create in the district courts, a number Ruzicka obviously could not know.\textsuperscript{199}

Kennedy also disagreed with the premise that private bills were the wrong way to deal with claims, and further disagreed that opening up the district courts was the proper remedy. One concern he had was that anyone could ask their Congressman for a private bill whereas under a tort claims act, a claimant would have to first hire a lawyer.\textsuperscript{200} It was his firm belief that while he would support having the burden of private bills lessened, Congress could “more economically handle these matters than the departments or the courts”.\textsuperscript{201}

A new dimension was added into the debates when the subject of the military came up in the 1942 effort to pass a bill. Debated in the midst of World War II, the bill contained language that exempted military and naval activity in times of war from lawsuits.\textsuperscript{202} Representative Shea pointed out the difficulty of “[saying] to a colonel who is miles distant from the country, possibly

\textsuperscript{196} (Office 1940, 3).
\textsuperscript{197} Other than the fact Kennedy was chair of the House Committee on Claims, it is unclear exactly why a member of the House of Representatives was present at the Senate hearing, let alone interrupting the witness so much.
\textsuperscript{198} (Office 1940, 29).
\textsuperscript{199} (Office 1940, 29–31).
\textsuperscript{200} (Office 1940, 51–52).
\textsuperscript{201} (Office 1940, 66).
\textsuperscript{202} (Office 1942).
in the Philippine Islands, “Come back to testify in this tort case.” It is out of the question in these times.” This signaled that while Congress was generally sympathetic to the needs of individuals harmed by the government, there were clearly matters of national or collective importance that could supersede those concerns.

The other interesting thing about the 1942 plan was that the requirement to present a claim to the administrative agency that was responsible for the tort was an option, not a requirement. Additionally, once a federal tort case against the government was concluded, a plaintiff could not bring a separate case against the employee in his or her personal capacity. The government, of course, would be free to pursue disciplinary action against the negligent employee. The 1942 bill also a provision that barred claims arising from an official’s use of discretion, whether abused or not. This would later become known as the “discretionary function exemption” and is discussed in detail in the conclusion to Chapter 6.

One final element of the 1942 debates and hearings primed the 79th Congress (1945-1947) to pass the bill that became the Federal Tort Claims Act: a letter from the President of the United States. Like Presidents Adams, Fillmore, and Lincoln before him, President Franklin Delano Roosevelt wrote to Congress inviting them to change the way claims against the government were handled. Roosevelt began by citing military necessity as the reason why Congress needed to dispense with dealing with private bills, and instead deal with the more important matters of the day. It is interesting to note that both Lincoln and Roosevelt were writing to Congress on the brink of major wars—Lincoln eight months after the firing on Fort

\[^{203}\text{(Office 1942, 12).}\]
\[^{204}\text{(Office 1942, 19).}\]
\[^{205}\text{(Office 1942, 31).}\]
\[^{206}\text{(Office 1942, 33).}\]
\[^{207}\text{(Figley 2011, 347).}\]
\[^{208}\text{(Roosevelt 1942).}\]
Sumter and FDR a month after Pearl Harbor. Roosevelt also brought to their attention a fact they were no doubt aware of: private bills are inefficient, especially those private bills that awarded someone less than the $200 the bill cost to print.\(^{209}\)

### 4.3 Final Passage: The 1946 Law

By any account, 1946 was a landmark year for American legislation, if not for American history itself. World War II had ended, Truman had succeeded FDR, the Baby Boomers were being born, and economic conditions were changing. Of relevance to this paper is that the three of the most important pieces of legislation in the field of administrative law were passed: the Administrative Procedure Act (APA)\(^{210}\), the Legislative Reorganization Act (LRA)\(^{211}\), and of course, the Federal Tort Claims Act (FTCA).\(^{212}\)

#### The Legislative Reorganization Act

A brief discussion of the contents and purpose of the LRA is warranted to provide the proper context for evaluating the Federal Tort Claims Act and the changes in the post-New Deal federal government. The present day Federal Tort Claims Act was passed as Title IV of the Legislative Reorganization Act on August 2\(^{nd}\), 1946. The LRA has been described as the “blueprint for the modern Congress”\(^{213}\), the “most far-reaching organizational restructuring since the 1\(^{st}\) Congress”\(^{214}\) and “a milestone in the treatment of legislative matters”.\(^{215}\) To exclude it

\(^{209}\) (Roosevelt 1942)

\(^{210}\) An Act: To improve the administration of justice by prescribing fair administrative procedure, Administrative Procedure Act, 60 Stat. 237, PL 79-404 (1946).


\(^{212}\) Also a number of non-administrative laws were passed: the Bretton-Woods international monetary policy law, the Lanham Trademark Act, the Atomic Energy Act, and the National School Lunch Act.


\(^{214}\) (Davidson 1990, 1).

\(^{215}\) (Shull 1946, 394).
from any examination of the development of the federal government in the 20\textsuperscript{th} century would be to miss a major piece of the story of modern government.

The LRA contained six titles:

I. Changes to the Rules of the House and Senate
II. Miscellaneous
III. Regulation of Lobbying
IV. Federal Tort Claims
V. General Bridge Act
VI. Compensation of Members of Congress.

The LRA sought to simplify the committee system, an objective pursued with Titles I and II. The overall number of standing committees was reduced from 81 to 34, while the number of subcommittees, 131, remained the same.\textsuperscript{216} Relative to claims against the government, the Senate standing committee on claims was abolished and the House also maintained no standing committee on claims.\textsuperscript{217}

A second objective of the LRA was to increase the capacity of Congress to simply process all of its administrative tasks, accomplished through II and VI. The amount of money appropriated for Congressional staff, the Legislative Research Service (now Congressional Research Service), the Office of Legislative Council, and the pay of all congressmen increased dramatically, in total multiplying five-fold by 1951.\textsuperscript{218}

A third objective was to regulate the lobbying activities of interest groups by requiring anyone who engages in lobbying to register with the Clerks of the House and Senate and disclose

\textsuperscript{216} (Galloway 1951, 43)
\textsuperscript{217} LRA at 812.
\textsuperscript{218} (Galloway 1951, 56).
how much they are paid and by whom.\textsuperscript{219} This provision was included in the final passage of the bill at the recommendation of the American Political Science Association, in order to allow Congress to “better meet its responsibilities under the Constitution”.\textsuperscript{220}

A final relevant goal of the LRA was to institute long overdue changes in the private bill system. On paper, the reorganization banned the introduction of private bills that dealt with pensions, the construction of a bridge, the correction of a military record, or the payment of money for property damage, personal injury, or death that could be addressed with the Federal Tort Claims Act.\textsuperscript{221}

The next chapter fleshes out what exactly the Federal Tort Claims Act does and does not cover. The FTCA is distinguished from the Tucker Act because the FTCA is an action in Article III federal courts and not the Court of Claims.\textsuperscript{222} More importantly, the types of cases argued against the government are different; the Tucker Act is for non-torts, and the FTCA obviously covers torts. The FTCA is not without exceptions, and the next section details how Congress, while abrogating sovereign immunity, still managed to set very strict standards of what types of claims it envisioned being brought under the FTCA.

\textsuperscript{219} LRA 841.
\textsuperscript{220} (Galloway 1951, 65).
\textsuperscript{221} LRA at 831.
\textsuperscript{222} Tucker Act jurisdiction is actually concurrent between the Court of Claims and the district courts.
Chapter 5: Operation of the Federal Tort Claims Act

So, the first general remedy against the government for money damages due to torts was finally created. It still serves today as the exclusive remedy in many instances when people are harmed at the hands of the government. This section discusses the operation, including the various exceptions, to this important piece of legislation.

5.1 Procedure to Filing an FTCA Claim

After one believes that they were injured by negligent government action, they must first submit their claim to the proper government agency for an administrative review. Failure to do so invalidates a Federal Tort Claims Act lawsuit. Depending on the dollar amount of the claim, the agency, the Department of Justice’s Tort Branch Director, or the United States Attorney General can settle the claim without going to court.

5.2 Commencement and Adjudication of a Suit

If after six months the government agency has not settled the suit or the injured party is not satisfied with the government’s offer, the claimant can sue in the federal district court where the event occurred or that they live in. In an FTCA action, no individuals or agencies can be named—the only proper defendant is the United States.

A case then proceeds similarly to normal litigation between private parties, with the Department of Justice defending the government. There are some idiosyncrasies to FTCA trials,

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223 It should be noted that FTCA suits are actually based on state tort law liability.
224 Under the statute, a tort claimant must first present the claim to the appropriate federal agency within 2 years of accrual; the agency then has 6 months to attempt to resolve the claim before the claimant can file suit in federal court. 28 U.S.C. §§ 2401(b), 2675(a).
225 28 U.S.C § 2672.
226 See (Figley 2012) for an overview of all of the mechanics of FTCA actions.
including the lack of jury trials\textsuperscript{227}, the bar against assessing punitive damages or interest on
damages against the United States\textsuperscript{228}, the use of the local state tort law where the event occurred
to decide issues,\textsuperscript{229} and a host of special considerations when the federal government is a party,
like discovery related to classified documents.\textsuperscript{230}

\section*{5.3 Exceptions to the FTCA}

\subsection*{Statutory Exceptions}

Even as encompassing as the FTCA is, various exceptions are an absolute bar to filing a
FTCA suit, including ones currently written into the statute:

\begin{enumerate}
\item [(1)] Any claim based upon an act or omission of an employee of the Government, exercising
due care, in the execution of a statute or regulation, whether or not such statute or
regulation be valid, or based upon the exercise or performance or the failure to exercise
or perform a discretionary function or duty on the part of a federal agency or an employee
of the Government, whether or not the discretion involved be abused.\textsuperscript{231}
\item [(2)] Claims related to the delivery of postal mail\textsuperscript{232}
\item [(3)] Claims related to the assessment of taxes and customs duties\textsuperscript{233}
\item [(4)] Claims related to medical quarantines\textsuperscript{234}
\item [(5)] Claims of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse
of process, libel, slander, misrepresentation, deceit or interference with contraction rights
a. Since 1974, assault, battery, false imprisonment, false arrest, abuse of process,
and malicious prosecution \textit{can} apply to federal law enforcement and investigative
agents\textsuperscript{235}
\item [(6)] Claims related to the operation of the Treasury or regulation of the monetary policy\textsuperscript{236}
\item [(7)] Any claim arising out of the combatant activities of the military or naval forces, or the
Coast Guard, during time of war.\textsuperscript{237}
\end{enumerate}

\textsuperscript{227} 28 U.S.C § 2404.
\textsuperscript{228} 28 U.S.C § 2674.
\textsuperscript{229} 28 U.S.C. § 2671 et seq.
\textsuperscript{230} (Sisk 2006, 38)
\textsuperscript{231} 28 USC § 2680(a). This important exception is known as the discretionary function exception (DFE).
\textsuperscript{232} 28 USC § 2680(b).
\textsuperscript{233} 28 USC § 2680(c). These would be covered under provisions of the Tucker Act 28 USC § 1346(a)(1).
\textsuperscript{234} 28 USC § 2680(f).
\textsuperscript{235} 28 USC § 2680(h). This was the March 16\textsuperscript{th}, 1974 amendment (88 Stat. 50) to the FTCA.
\textsuperscript{236} 28 USC § 2680(i).
\textsuperscript{237} 28 USC § 2680(j).
(8) Any claim arising in a foreign country.238
(9) Any claim arising from the activities of the Tennessee Valley Authority.239
(10) Any claim arising from the activities of the Panama Canal Company.240
(11) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.241

Discretionary Function Exception

“It’s not a tort for the government to govern”242

While all of these exceptions are important and have prevented people from successfully recovering against the federal government, the most notable exception is the so-called discretionary function exemption. The discretionary function exception immunizes even negligent or wrongful behavior243, and if accepted by the court, causes the suit to be dismissed and prevents it from being re-filed in another forum.244 Given its importance in understanding the modern day tort landscape, a brief discussion of the major cases involving the discretionary function exemption (DFE) is warranted.

Dalehite

In 1943, the Tennessee Valley Authority, a New Deal era federal government corporation, began manufacturing Fertilizer Grade Ammonium Nitrate (FGAN). After World War II, the United States began to send the highly explosive fertilizer to the war ravaged countries of Europe. Approximately 1,850 tons of FGAN and an unknown quantity of explosives were aboard the Europe-bound steamship Grandcamp and an additional 1,000 tons of FGAN and

238 28 USC § 2680(k). Antarctica and “sovereignless” areas are considered a foreign country for purposes of the FTCA. Smith v. United States, 507 U.S. 197 (1993). Interesting issues of tort liability come up in discussions of the realm of outer-space and even intergalactic government missions. See (Bornemann 1997) footnote 9.
239 28 USC § 2680(l).
240 28 USC § 2680(m).
241 28 USC § 2680(n).
244 Irving v. United States, 909 F.2d 598, 600 (1st Cir. 1990); Rosebush v. United States, 119 F.3d 438, 442 (6th Cir. 1997).
2,000 tons of sulfur on the neighboring ship High Flyer, when the smoke was seen rising from the Grandcamp. The subsequent explosion destroyed much of the town of Texas City, Texas, killed at least 560 people, and resulted in approximately 300 different lawsuits by over 8,000 plaintiffs claiming over two hundred million dollars from the government’s negligence. The cases were consolidated and appealed to the Supreme Court in Dalehite v. United States, where the DFE made its debut.\footnote{Dalehite v. US, 346 U.S. 15 (1953).}

The Court ruled in favor of the government and set the foundations for future interpretation of the DFE:

“It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680 (a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.”\footnote{Emphasis added. Dalehite at 35.}

\textbf{Varig}

Another case based on a grave tragedy would again test the limits of the DFE. On July 11, 1973, a commercial jet aircraft owned by Varig Airlines was flying from Rio de Janeiro to Paris when a fire broke out in one of the aft lavatories. The fire produced a thick black smoke, which quickly filled the cabin and cockpit. Despite the pilots' successful effort to land the plane, 124 of the 135 persons on board died from asphyxiation or the effects of toxic gases produced by the fire.\footnote{United States v. S. A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) et al., 467 U.S. 797 (1984).}
The plane had been manufactured by Boeing, purchased by the American company Seaboard, sold to the Brazilian company Varig Airlines, and issued a safety certificate by the Civil Aeronautics Agency (precursor to the Federal Aviation Administration) of the United States federal government. At the time, the practice of the CAA was to merely spot check some random number of planes for safety violations; the record reflects that the defective Boeing was not inspected by the CAA.\textsuperscript{248}

The Supreme Court once again upheld the government’s actions as falling within the DFE. As Hyer explains,

“the Court turned away from the Dalehite Court’s focus on the planning/operational distinction, noting that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." The Court observed that Congress’s intent in enacting the exception was to "prevent judicial 'second-guessing'" of policy decisions made by other branches of the government.”\textsuperscript{249}

\textbf{Berkovitz}

On May 10, 1979, Kevan Berkovitz, then a 2-month-old infant, ingested a dose of Orimune, an oral polio vaccine manufactured by Lederle Laboratories. Within one month, he contracted a severe case of polio. The disease left Berkovitz almost completely paralyzed and unable to breathe without the assistance of a respirator. The Communicable Disease Center, an agency of the Federal Government, determined that Berkovitz had contracted polio from the vaccine.\textsuperscript{250} The Court found that the government was not immunized by the DFE. Hyer explains the new two pronged test the Court articulated in determining the scope of the DFE:

“With regard to this first prong, the Court explained that the “exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for

\begin{thebibliography}{99}
\bibitem{Varig} Varig at 814.
\bibitem{Hyer} (Hyer 2007, 1100)
\end{thebibliography}
an employee to follow." In the absence of a mandatory course of action, under the second prong, "[the] court must determine whether [the employee's] judgment is of the kind that the discretionary function exception was designed to shield.”

Accordingly, the Berkovitz Court concluded that the exception "protects only governmental actions and decisions based on considerations of public policy.” Thus, the fact that the agency actor actually took into account public policy factors is key under the second step in Berkovitz”. 251

**Gaubert**

The most recent influential DFE case was *Gaubert v. United States*252 where plaintiffs sued the government for the financial regulation activities of the Federal Home Loan Bank Board. The key addition this case made to DFE jurisprudence was in altering the second prong of the “Berkovitz test” by setting out the following rule:

“Where a regulation allows “the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations”. The Court further explained this "presumption" by stating that "when established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent’s acts are grounded in policy when exercising that discretion.”253

**Feres Doctrine**

The Court has also “found” exceptions to the Federal Tort Claims Act including the *Feres* doctrine, which prevents members of the armed services from utilizing the Federal Tort Claims Act. Rudolph Feres, a lieutenant in the Army, was killed when his Pine Camp, New York barracks caught on fire due to a defective heating plant. The executrix of his estate sued the federal government under the Federal Tort Claims Act, alleging negligence on the part of the fire supervisor, and the barracks officers.

251 (Hyer 2007, 1102).
253 (Hyer 2007, 1106).
The Court in *Feres v. United States* 254 articulated three main reasons for barring claims by servicemen:

“First, the existence and availability of a separate, uniform, comprehensive, no-fault compensation scheme for injured military personnel;

Second, *the effect upon military order, discipline, and effectiveness of its service members* if service members were permitted to sue the Government or each other; and,

Third, the distinctively Federal relationship between the Government and the members of the armed services and the corresponding unfairness of permitting service-connected claims to be determined by non-uniform local tort law” 255

### 5.4 Conclusion

While the FTCA is a broad waiver of sovereign immunity it is clear that Congress very deliberately left a wide range of functions outside of the jurisdiction of the courts. The discretionary function exemption is the most important, and is also the only one that has received explicit attention from political scientists. Professors Weaver and Longoria examined 377 federal circuit courts of appeals cases where the DFE was invoked, in order to find any patterns.

Their results are very telling—in 72% of the cases where the government invoked the DFE, the court ruled in favor of the government. In class actions suits against the government, the DFE immunized the government in 100% of cases. 256 A similar study found the success rate to be 74.08%. 257 However, second study also found wide variation in the success of the DFE based on which circuit the case was filed in—the success rate in the Fourth Circuit was 91.80% and the success rate in the First Circuit was only 57.80%. Obviously the DFE is a very strong weapon in the Justice Department’s arsenal, and one used strategically. United States attorneys

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255 (United States Senate 2002, 2).  
256 (Weaver and Longoria 2002, 345).  
257 (Nelson 2009, 290).
are required to get approval from the Department of Justice Torts Branch before raising the DFE, and it seems to be reserved for the cases where the stakes are high.\textsuperscript{258}

\textsuperscript{258} (Weaver and Longoria 2002, 342).
Chapter 6: Reasons for Abandoning Sovereign Immunity

So far, I have tried to explain why the various institutions created to deal with claims took the form they did. One of the questions this thesis addresses, once sovereign immunity was entrenched in the United States’ legal institutions, why would officials choose to abandon it? In this section, I offer a critique of a number of theories that attempt to answer that question. To be successful, the theory should both explain why Congress would lay down the shield of immunity at all, and why it happened in 1855 (Court of Claims) and in 1946 (Federal Tort Claims Act).\textsuperscript{259}

6.1 The Altruism Theory

One theory is that Congress realized that blanket sovereign immunity was fundamentally unjust and decided in 1946 to change the law. Their motivations for doing so were purely out of altruism and concern for their fellow man, and part of an effort to bring the legal system into a more enlightened era. Perhaps some were realizing that sovereign immunity was clashing with democracy and the rule of law.\textsuperscript{260} Others could have been persuaded to make a change after tragic events like the 1945 crash of an Army B-25 bomber into the Empire State Building left the decedents with no legal recourse against the government.\textsuperscript{261} At any rate, this theory holds that a sufficient number of Congressmen and Congresswomen took the normative stance that sovereign immunity was \textit{wrong} on some moral level.

\textsuperscript{259} A truly great theory could also explain the passage of the Administrative Procedure Act, probably an even more important piece of administrative law than the Federal Tort Claims Act. However, procedural challenges of the type generally envisioned by the APA escape the scope of this thesis, although its judicial review provisions are pertinent. Much has been already written on the subject, both from the legal and political science and political economy fields. For explanatory work in political science and political economy on the APA, see generally (McNollGast 1999) and for Congressional delegation of discretion to agencies specifically, see (Calvert, McCubbins, and Weingast 1989). For a legal perspective see generally (Levin 1996) and work cited within, as well as (Asimow 1994), and (Levin and Asimow 2009) for a general overview of administrative law.

\textsuperscript{260} An idea articulated in (Doernberg 2005).

\textsuperscript{261} (Richman 2008).
Reading the rhetoric of Congressmen debating the issues, one might be led to believe that releasing sovereign immunity was an act of pure altruism. Recall this quote from the debate on the creation of the 1855 Court of Claims:

“Now, I ask why it is, upon the principles of justice and reason, that we refuse to allow a citizen to sue his government for redress, and yet provide by law that if one hundred persons… as members of a corporation, or as individuals, owe debt to one individual, that one individual may sue the whole one hundred?” 262

Likewise from the debates on the passage of the Federal Tort Claims Act:

“Courts of claims that cannot take jurisdiction of a claim based on tort strongly suggest the persistence of ideals of autocracy.” 263

Even the Supreme Court gave credence to this theory when describing the FTCA:

“It was the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work.” 264

Without saying that Congress had ulterior motives, I would say that the altruism theory does not have much explanatory power. In fact, the altruism theory does not make much sense given that sovereign immunity had been slowly eroding since the turn of the 20th century. There is no evidence that attitudes on sovereign immunity alone suddenly changed in 1854 and 1945, leading to an enlightened session of Congress passing progressive laws.

One would expect that a nation caught up in the rhetoric of the Declaration of Independence and lofty language of the Preamble of the Constitution in the late 1700s to have abandoned sovereign immunity right after dissolving their political bonds with King George. Quite the opposite was true—sovereign immunity was most firmly entrenched in the beginning.

262 See note 125, Cong. Globe, 33rd Cong., 2nd Sess. 72-73 (1854).
263 See note 190, (Underhill 1926, 2).
264 Dalehite at 24.
of the country’s history. However, as I argued in the first chapter, this was likely due to the political realities of operating a fledgling nation with large debts.

The altruism theory is problematic because it fails to account for the multitude of considerations facing Congress as it tried to create institutions to deal with claims. If it were purely an issue of whether Congressmen felt that sovereign immunity was “right” or “fair” to the everyday citizen, the altruism theory could carry weight. Given that a legislator’s personal belief on the morality of sovereign immunity likely was only considered after her constituents’ beliefs, her Constitutional duties, and her political needs, the altruism theory cannot offer a full account of the abandonment of sovereign immunity.

6.2 The Private Bill Relief Theory

Yet another theory is that the Federal Tort Claims Act was passed merely as a mechanism to deal with the flood of private bills. Chapter 2 on private bills certainly shows that their prevalence and inefficiency was indeed a driving force for starting debates on ending sovereign immunity. It seems plausible to say that private bills were a driving force for the creation of the Court of Claims, however sovereign immunity was not truly breached until the passage of the FTCA, which private bills alone cannot explain.

Figure 1 from Chapter 2 detailing the number of private bills over time shows that the years directly preceding the creation of the Court of Claims and the passage of the FTCA were not particularly high compared to other years. Also, if change occurred just because of private bills, their solutions did not do much to immediately solve the problem. Confirming this, in a
report looking at the LRA and FTCA five years after its passage, George Galloway noted that any gain in the reduction of private bills in the 80th Congress was lost by the 81st. 265

Moreover, if private bills were the only concern of the 79th Congress, they could have merely increased the Court of Claims’ jurisdiction to include private bills for torts or created some other sort of commission to deal with claims. Instead, they gave the district courts the power to hear claims against the government for matters the Court of Claims could not hear. This indicates that they did not see this purely as an issue of relieving their private bill load.

6.3 The Changing Norms, or the “Liability Explosion” Thesis

Another explanation is that legal norms were changing across the board. As noted law professor and legal historian Lawrence Friedman has written, the twentieth century saw many new developments in tort law generally. 266 This is a similar, but more complicated and nuanced version of the altruism theory. It posits that public opinion about a wide range of issues was changing, not just attitudes about sovereign immunity.

In the landmark 1916 products liability case, *MacPherson v. Buick* 267 there was a departure from the previous English common law precedent of the “privity rule”. MacPherson had been injured by his 1909 Buick Runabout, and under the privity rule MacPherson’s only recourse was to sue the car dealer, and not the manufacturer. However, the *MacPherson* court, in an opinion written by future Supreme Court Justice Benjamin Cardozo, rejected this rule in favor of allowing manufacturers to be held liable for defective products.

Another compelling example from Friedman is medical malpractice. As he explains:

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265 (Galloway 1951, 57)
266 The section is based largely on (Friedman 2004, 129–131).
267 217 N.Y. 382, 111 N.E. 1050 (1916).
“It was always true, in theory, that a doctor, like anybody else, could be held responsible for a careless mistake. But lawsuits against doctors were in fact rare until the middle of the twentieth century…But in the course of time, the practice of medicine became more impersonal—and more technological. People expected more of doctors; they expected miracles.”

These examples are actually fairly compelling examples of how a broader change in legal and social attitudes could have been important in the passage of the APA, LRA, and FTCA. People began to expect more of doctors at the same time people began to expect more out of their federal government. In the wake of the New Deal citizens had begun to rely on the federal government for everything from Social Security to the protection of their savings accounts to the delivery of their mail. Government had become larger, more impersonal, more technocratic, and more centralized in Washington, D.C.

The liability explosion was not limited to the United States either—changes were also occurring in England. One year after the Federal Tort Claims Act, Parliament passed the Crown Proceedings Act. As E.C.S Wade explains,

“The object of the Crown Proceedings Act is to put as far as practicable the Crown in its public capacity in the same position for the purpose of the law of torts as a private person of full age and capacity in four separate circumstances:

1. Where the tort is committed by its servants or agents.
2. Where there has been a breach of a common-law duty which a person owes to his servants and agents as their employer.
3. Where there has been any breach of the duties attaching at common law to the ownership, occupation, or possession of property.

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268 (Friedman 2004, 130).
4. Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, failure to comply with that duty subjects the Crown to any liabilities in tort to which a private person would be subject.269

This theory has much to offer as an explanation of why changes finally happened. We know that discussions of when and how to abrogate sovereign immunity had been going on essentially since the beginning of the country. It is also very plausible that public attitudes changed over time, for a variety of reasons. Changing norms about liability as a larger social issue provides a more comprehensive theory than pure altruism does.

6.4 The Credible Commitment Theory

In his paper “The Autocrat's Credibility Problem and Foundations of the Constitutional State”, Roger Myerson provides an explanation for why an autocrat would purposefully create a political mechanism that could lead to their own downfall.270 The reason is that absolute rulers can only come to and maintain power by recruiting supporters who believe their leader will continue to provide them with benefits. Their only assurance of continued benefit from the autocrat is some kind of institutional check, a personal constitution or a court of advisors with removal power, that cause the autocrat’s promises to be credible.

As the narrative goes, the United States government was formed on a basis of rejecting autocracy for democracy, so how can this theory apply? It applies because a democratic government needs to be able to make credible commitments, not in this case for maintaining the support of political elites, but for being able to conduct commercial business transactions.

There are some things that it makes more sense for the government to hire outside contractors for than to do itself. For instance, in building a new courthouse it may make more

269 (Wade 1954, 1421).
270 (Myerson 2008).
sense economically to hire a construction company than to form a government construction company. However, the owner of a construction company may be unwilling or at least hesitant to enter into a contract with someone who can break the contract with total impunity.

Recognizing this fact, government officials might pass legislation giving up their total immunity in order to make business transactions. This theory could very well explain the Tucker Act of 1887 which allowed the federal government to be sued for breach of contract among other things, and is important to recognize. However, it is not a great explanation for the other breaches of sovereign immunity, such as liability for torts and other government wrongs.

6.5 The Prevalence of Government Theory

This theory maintains that as government became more ubiquitous in everyday life, tort liability necessarily followed. This parallels some of the other theses, with the difference being that the growth of government necessitated the changes. Qualitative data supports this argument—in discussing the need for a federal tort claims act in 1926, one congressman remarked that, “the State and Federal Governments are daily inserting themselves, more and more, into the affairs of the individual. The danger, therefore, to the individual by negligent and perverse action of Government officials becomes all the greater.”

Some quantitative data also suggest this is plausible. Consider the list of new agencies created in the New Deal period from 1933 to 1946 with many agents capable of committing torts:

1933
Tennessee Valley Authority

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271 See Chapter 4, “Increasing Jurisdiction”.
272 (Underhill 1926, 10).
Civilian Conservation Corps
National Recovery Administration, as part of the National Industrial Recovery Act
Federal Deposit Insurance Corporation (through the Banking Act of 1933)
Civil Aeronautics Authority (now Federal Aviation Administration)
Civil Works Administration
Agricultural Adjustment Administration¹⁸³
1934
National Labor Relations Board
Federal Housing Administration
Securities and Exchange Commission
Federal Communications Commission
Import-Export Bank
1935
Works Progress Administration
Rural Electrification Administration
Social Security Board (now Social Security Administration)
Federal Bureau of Investigation (modern version)
1936
United States Maritime Commission
1938
Federal Food, Drug and Cosmetic Act empowers FDA to issue regulations
Federal Crop Insurance Corporation
1942
Office of Strategic Services (now CIA)
1946
Atomic Energy Commission (now Nuclear Regulatory Commission)

In essence, the total amount of damage the government could do was increasing exponentially. In the first hundred years of its existence, the federal government could not have caused very much damage, or at least not on the scale it could today. There were no Hoover Dams, space programs, or thousands of mail trucks on the road. The development of nuclear power and weapons alone created the possibility of causing catastrophe on totally new level.²⁷⁴

6.5 The Maturation of the Federal Judiciary Theory

²⁷³ The government also ended prohibition maybe leading to an increase in workplace accidents, however it is unlikely that this would ever be legally actionable.
²⁷⁴ See (Rosenthal, Korn, and Lubman 1963) for an excellent overview of catastrophic liability of the government.
This theory maintains that a necessary, but probably not sufficient, explanation for abandoning sovereign immunity lies with the maturation of the federal judiciary. This explanation is useful to understanding part of the reason why the FTCA was passed in 1946, and not earlier.

Beginning in 1891 with the Evarts Act\textsuperscript{275}, the federal courts began a transformation towards a more independent and modernized institution. The Evarts Act abolished the practice of Supreme Court Justices having to “ride circuit” and travel to different areas of the country to sit as courts of appeals, created additional judgeships, and removed the right of appeal to the Supreme Court in diversity and some other suits.\textsuperscript{276}

Next, the Administrative Office Act\textsuperscript{277} of 1939 further enabled the federal courts to be a strong institution with the capacity to act as a check on the activities of the bureaucracy. The Act transferred the budgetary and personnel powers of the federal courts from the Executive branch controlled Justice Department, to the Administrative Office of the U.S. Courts. The courts were now more professional, independent, and operating with a higher capacity to hear cases. I also argue that in the decades before the passage of the 1946 FTCA the federal judiciary had been increasing its willingness to assert power over Executive branch activities.

In the midst of the federal government expansion of the New Deal, the Supreme Court was a major player in shaping public policy, and showed limited hesitation in striking down major legislation. In the short two year period from 1935 to the end of 1936, the Supreme Court

\begin{footnotesize}
\footnote{275 An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes, 26 Stat. 826 (1891).}
\footnote{276 (Center n.d.)}
\footnote{277 An Act to provide for the administration of the United States courts, and for other purposes, 53 Stat. 1223 (1939).}
\end{footnotesize}
struck down the National Industrial Recovery Act,\textsuperscript{278} the Railroad Retirement Act,\textsuperscript{279} the Frazier-Lemke Bankruptcy Act,\textsuperscript{280} the Agricultural Adjustment Act,\textsuperscript{281} the Bituminous Coal Conservation Act,\textsuperscript{282} and the Municipal Bankruptcy Act.\textsuperscript{283}

It is true that after the introduction of the 1937 Judicial Procedures Reform Bill\textsuperscript{284}, FDR’s “court-packing plan”, the Court struck down no legislation until 1942, and very little until the 1960s (see Figure 3\textsuperscript{285} below). Regardless, there would no longer be any doubt that the Supreme Court would strike down legislation, large or small.

![Number of Laws Ruled Unconstitutional](image)

Figure 3. Number of Laws Ruled Unconstitutional 1787-2013, by Decade

This theory of increased judicial institutional capacity carries weight with not only within the realm of high profile Supreme Court cases, but also with the everyday caseload of the lower
federal courts. Consider Figure 4 showing the number of civil cases involving the United States as either a defendant or plaintiff in federal court:\footnote{286}{Data compiled from (Center n.d.) by author.}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure4.png}
\caption{Number of Civil Cases with US as a Party \textit{All Federal Courts Combined}}
\end{figure}

The increase in the number of judges, willingness of the Supreme Court to strike down legislation, and the amount of cases the lower courts were disposing of are strong signals that the federal judiciary was maturing. So, in 1946 when Congress was debating the passage of the LRA and FTCA, they were well aware that the courts were a powerful instrument. On the one hand, this might discourage them from giving too much discretion to the courts for fear of them overreaching. On the other hand, they would have felt confident that there was a capable institution that could work as an independent check on Executive and legislative activity.\footnote{287}{As a side note, this helps answering the question of why Congress did not merely transfer private bills power to the federal courts in 1855—the judiciary was not nearly as institutionally strong as it was by 1946. Credit for this idea goes to Professor Herb Johnson.}
Chapter 7: Democracy and the Political Economy of Sovereign Immunity

“We find, indeed, a memorable instance of folly recorded in the 3rd Vol. of Clarendon's History, where it is mentioned, that the Lord Mayor of London, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to the removing the furniture, &c. belonging to the Lawyers of the Temple, then on the Circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt.”

The previous six chapters have formed this paper’s new narrative of the philosophical, political, and institutional developments associated with claims against the government. Within that narrative, I have included explanations for various puzzles that have emerged out of the study of sovereign immunity.

Chapter 1 provided an answer to the background question of “What is sovereign immunity?” The examination of the primary sources of Hobbes’ Leviathan, Blackstone’s Commentaries on the Law of England, Hamilton’s Federalist 81, and Story’s Commentaries on the Constitution provided the philosophical justifications on which judges and politicians would base sovereign immunity. Their justifications included the absolute nature of the sovereign’s power, the impossibility of enforcing judgments against the sovereign, “the King can do no wrong”, and the inconvenience of subjecting the sovereign to so many suits.

Chapter 1 also gave an answer to the question, “Why do we have sovereign immunity in the United States?” One logical explanation comes from Professors Figley and Tidmarsh’s argument that the Appropriations Clause of the Constitution was very purposefully crafted to give Congress total control over the Treasury, and by extension, payouts to money-seeking

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288 Respublica v. Sparhawk, 1 U.S. 357 (1788), as seen in (Schuck 1980, 281).
citizens. Add to that a cash-strapped new government dealing with the realities of governance, and it is fairly easy to see why and how sovereign immunity could have entered into our legal system.

Chapters 2, 3, 4, and 5 covered the evolution of claims institutions from private bills to the Court of Claims to the passage of the Federal Tort Claims Act. As the introduction to this paper mentions, the chapters do this not merely by listing the historical events, but instead by emphasizing thematic patterns and explanations for political phenomena in the tradition of the America Political Development subfield.

Chapter 6 looked at six possible explanations for why a sovereign would give up some or all of their immunity. The altruism and private bill theories were shown to be unlikely explanations for why the United States federal government created the Court of Claims and passed the Federal Tort Claims Act. Better theories were offered: norms about liability were changing in a more general sense, the government needed to be able to make credible commitments to potential contractors, the increased prevalence of government after the New Deal necessitated a change in the liability system, and lastly, that the maturation of the judiciary was a key component to the story.

In this final chapter, I build off of all of those themes to construct a theory about how sovereign immunity should properly be thought of. First, I demonstrate how past defenses of sovereign immunity have been flawed or incomplete. Second, I draw upon the field of law and economics to introduce a more rational method of thinking about sovereign immunity. Lastly, I apply this new line of thinking to posit how sovereign immunity can fit into a democratic state.
7.1 Flawed Defenses

Almost all historical defenses of sovereign immunity are untenable and their use in the debates on sovereign immunity is unproductive:

- Hobbes takes sovereign immunity too far by making it absolute and saying that it would be a logical fallacy for a sovereign to make a law binding itself. These arguments are flawed, first, because sovereign immunity is a spectrum, not all or nothing, and second, a sovereign can certainly divide power and provide for institutional checks and balances to its own power.

- The notions that “the King can do no wrong” or “It’s not illegal when the President does it” are undeniably false. Governments are certainly capable of causing harm, whether by accident, through negligence, or with purposeful malice.

- Hamilton’s contention that the nature of sovereignty somehow necessitates total sovereign immunity is circular logic. Even less convincing is his simple reliance on the fact that sovereign immunity has always been the general practice of mankind.

- Justice Joseph Story comes closest to a defensible justification for sovereign immunity by claiming that the inconvenience of subjecting the sovereign to suits outweighs the injury that could be caused to one individual. This account is incomplete, however, because it fails to state why the government should get to make that determination in the first place.

In the following sections of this chapter, I offer an improved theory of thinking about and defending sovereign immunity based on rational economic thinking.
7.2 The Problem of Social Cost

The ideas behind Ronald Coase’s seminal work, “The Problem of Social Cost” motivate much of this analysis. While not necessarily endorsing any of the specific solutions that Coase suggests or implies, using his widely recognized theoretical notions about liability are helpful.

In “The Problem of Social Cost”, Coase is concerned with the optimal assignment of liability between two individual parties. He classifies the previous approaches as looking at the question of “How do we stop A from harming B?” and tries to focus our attention instead to the question of “Should A get to harm B, or should B get to harm A?” Through a number of examples, Coase shows that our first instincts about who should have to pay damages for causing harm are often wrong. A frequently cited example is that of the rail line that runs adjacent to a farmer’s field. We might expect that the railroad operator should be liable for any damages the train might cause to the farmer, but Coase illustrates a situation where holding the railroad operator liable would be inefficient.

What does Coase’s example have to do with sovereign immunity? At its most basic level, assessing sovereign immunity is partaking in the exercise that Coase does in “The Problem of Social Cost”: determining the optimal assignment of risk and liability amongst parties. I argue that this is proper way to go about discussing sovereign immunity.

If we engage in this type of thinking, we see that in the early part of American history all of the risk of injury was borne by citizens and none of the liability by the government. Over time, sovereign immunity was eroded and some of the costs of governing shifted to the government.

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289 (Coase 1960).
290 (Coase 1960, 2).
291 Coase’s example is detailed in Appendix 2.
So, can we conclude from Coase that sovereign immunity is always more economically efficient than a sovereign that can be sued? That question cannot be answered in a way that encompasses all scenarios. Coase admits that every assessment of liability depends on the specific facts of the situation. Returning to the train example, sometimes we would want the train to be liable for the damage it causes, but other times it would prove more efficient if it was immune.

The answer of “it depends” seems unsatisfying. However, there is one important lesson in Coase: we should not always stand by our first inclination to assume a party should always be liable for its acts. This allows for the possibility of accepting, or even supporting sovereign immunity in a narrow set of cases, a contention discussed next.

### 7.3 Differentiating the Government from the Firm

A powerful objection to the idea of accepting sovereign immunity is that the rule of law requires that all parties be treated equally under the law. Even Coase would agree that there are times when we would want institutions to have to internalize the damage that they do and not be allowed pass it on to an innocent third party. For example, it would seem to go against public policy if Wal-Marts were allowed to be immune from premises liability, and could therefore fail to put salt on icy sidewalks and not place caution signs on slippery wet floors with impunity. Why should the government be treated any differently than a large corporation?

I argue that the only difference is in the nature of the goods that a corporation provides and those that the government provides. A corporation like Wal-Mart has a fixed number of shareholders for whom it has a fiduciary duty to make profit and pay dividends. As such, they take part in the economic marketplace and attempt to provide as much private good to their

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(Doernberg 2005) makes this argument most convincingly.
shareholders as they can. The more externalizing of liability costs it can get away with, the more it will.  

A liberal democratic government, on the other hand, is theoretically in existence to provide public goods, regulate the commons, and offer other services that could otherwise not exist in private markets. Because the government does things like provide for the national defense, manage the vast expanse of public lands, and enforce property rights, we can differentiate it from a regular corporation and justify some of its immunity.

One can still be unconvinced that the nature of the goods provided has any bearing on the question of legal liability. One could object and say that no part of the mandate to govern includes the ability to cause harm or shift all risk of injury to citizens. The following section argues that governing necessarily creates winners and losers through any given policy decision and the best way to make those decisions is with a political body accountable to the citizenry.

7.4 Finding Sovereign Immunity’s Place in a Liberal Democracy

It should be emphasized here that another important function of government goes hand in hand with providing and regulating public goods: the creation of winners and losers in any given policy decision.

For example, granting an exclusive land use permit to a rancher benefits the rancher, but it causes the corn farmer who wanted to use the land to suffer. Increasing the minimum age for Social Security payments benefits college age students, but harms those nearing retirement. Dedicating one part of the wireless spectrum to satellite radio is great for that business, but will result in a financial loss to the television station that lost the bid. Even in the context of torts,

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293 This account seems cynical and somewhat oversimplifies the nature of the firm by not taking into consideration norms about social responsibility, but the rational choice and law and economics literature tends to characterize the firm in this way.
holding the Postal Service accountable for accidents could mean the operation of less mail trucks or an increase in the cost of delivering mail.

One could argue that the extra cost of delivering mail is a fair price to pay so that the innocent victim of a mail truck collision can be compensated. Another could counter that everyone in the country should not have to foot the bill for the misfortune of one individual. Both are valid arguments and deciding which one is the “better” argument is a difficult empirical question. It is clear that whichever policy that the government chooses will create a winner and a loser. Just how that choice is made is the final critical factor in this analysis.

In the United States, that choice is of course made by Congress, the political branch of the government. The making of public policy decisions is fundamentally a political activity. We can feel somewhat better about the fact that government creates winners and losers because we assume that in a liberal democracy the government is maintaining power because a sufficient number of people believe that the well-being of everyone is being considered in the law-making process. Because a liberal democracy has either direct voting or elected representatives, its deliberative body (e.g. Congress) is accountable to the people and best suited to make the decisions that assign liability. The nature of American Constitutionalism also supports this argument because it is supposed to be Congress, not the judiciary, which resolves political questions as well as manage all appropriations of taxpayer money.

In “The Problem of Social Cost”, Coase surprises us with some examples of times when immunity actually ends up providing the optimal arrangement of liability. This idea was taken and applied to the context of sovereign immunity to open the door to the possibility that sovereign immunity could be tolerated or even supported in some cases. From there, I argued that what separates the government from any other corporation is the nature of the goods it
provides, public versus private. I acknowledged that objections could still be raised and showed why an understanding of the role of government in creating winners and losers provides a basis for sovereign immunity. In liberal democracies, this task of making public policy is given to a deliberative body with an electoral connection and accountability to the citizens.

To be clear, I do not advocate a system of total sovereign immunity. There are no situations under which the sovereign should be totally immune from all lawsuits. Furthermore, there are situations when sovereign immunity makes sense and can actually lead to the most efficient outcomes. Deciding whether sovereign immunity is the best decision will come down to a situation by situation analysis. This application of Coase to sovereign immunity should encourage scholars of government liability to take a somewhat different direction in their analyses.

What this paper has accomplished is to show how significant the topic of sovereign immunity is to democratic theory. Sovereign immunity, especially the story of the Court of Claims, stands as an excellent under-explored instance of a power struggle between Congress and the federal judiciary. In the vein of the field of American Political Development, this paper has gone to great lengths to show that ideas (whether well formed or not) do truly matter and influence institutional development. Beyond merely telling the chronological story of how sovereign immunity came to be, it provides compelling theories as to why institutional innovations took place, ranging from principled arguments about efficiency and accountability to simple political pressures. The lessons and new knowledge gained not only illuminate the mystery of sovereign immunity, but give us a new lens by which we can understand the boundaries of the judicial power outlined in the Constitution.
Supplementary Material

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Appendix 2 Example from Coase’s “Social Cost”

Consider a railway, which is not liable for damage by fires caused by sparks from its engines, which runs two trains per day on a certain line. Suppose that running one train per day would enable the railway to perform services worth $150 per annum and running two trains a day would enable the railway to perform services worth $250 per annum. Suppose further that the cost of running one train is $50 per annum and two trains $100 per annum. Clearly the railway would find it profitable to run two trains per day.

But suppose that running one train per day would destroy by fire crops worth $60 and two trains, $120. In these circumstances running one train per day would raise the value of total production but the running of a second train would reduce the value of total production. The second train would enable additional railway services worth $100 per annum to be performed. But the fall in the value of production elsewhere would be $110 per annum; $50 as a result of the employment of additional factors of production and $60 as a result of the destruction of crops. Since it would be better if the second train was not run and since it would not run if the railway were liable for damage caused to crops, the conclusion that the railway should be made liable for the damage seems irresistible.

Now, suppose that the railway is liable for damage from fires caused by sparks from the engine. A farmer on lands adjoining the railway is then in the position that, if his crop is destroyed by fires caused by the railway, he will receive the market price from the railway; but if his crop is not damaged, he will receive the market price by sale. It therefore becomes a matter of indifference to him whether his crop is damaged by fire or not.

So, assume that with the railroad being liable, there is a doubling in the amount of crop destruction due to railway-caused fires due to the indifference of the farmer. With one train per day, crops worth $120 would be destroyed each year and two trains, $240. It follows that it would not be profitable to run any trains. With the figures in our example we reach the following result: if the railway is not liable for fire-damage, two trains per day would be run; if the railway is liable for fire-damage, it would cease operations altogether.

The important question is if the railroad should run any trains at all. To calculate that from an economic point of view, we take the gain from operating the railway with 2 trains, $250 (the value of the transport services) minus $100 (the cost of the factors of production) minus$120
(the value of crops destroyed by fire) minus $160 (the fall in the value of crop production due to the abandonment of cultivation) plus $150 (the value of production elsewhere of the released factors of production). Overall, operating the railway will increase the value of total production by $20.

It is enough for my purpose to show that, from an economic point of view, a situation in which there is "uncompensated damage done to surrounding woods by sparks from railway engines" is not necessarily undesirable. Whether it is desirable or not depends on the particular circumstances. These tables show how Coase’s calculations are made, with the checkmark indicating what the railroad company would do.

<table>
<thead>
<tr>
<th>If the railroad is not liable</th>
<th>Railroad earns A-B, and it externalizes C</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>A</td>
</tr>
<tr>
<td>Optimal for Railroad if:</td>
<td>Marginal Revenue {Railroad Profit}</td>
</tr>
<tr>
<td>Total Profit&gt;$0</td>
<td>1 Train</td>
</tr>
<tr>
<td></td>
<td>2 Trains ✓</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>If the railroad is liable</th>
<th>Railroad earns A - (B+C), because it internalizes C</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>A</td>
</tr>
<tr>
<td>Optimal for Railroad if:</td>
<td>Marginal Revenue {Railroad Profit}</td>
</tr>
<tr>
<td>Total Profit&gt;$0</td>
<td>0 Trains ✓</td>
</tr>
<tr>
<td></td>
<td>1 Train</td>
</tr>
<tr>
<td></td>
<td>2 Trains</td>
</tr>
</tbody>
</table>

294 Adaptation of Coase 32-34.