THE IMPACT OF *EASTERN ENTERPRISES* AND POSSIBLE LEGISLATION ON THE JURISDICTION AND REMEDIES OF THE U.S. COURT OF FEDERAL CLAIMS

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I. INTRODUCTION

Under the Tucker Act, the Court of Federal Claims ("CFC") has jurisdiction over most money claims against the United States, including those "founded . . . upon the Constitution."[1] The Tucker Act, however, only waives sovereign immunity and vests jurisdiction; it creates no right of action.[2] As a result, a Tucker Act suit must be based in addition on an independent provision of law—one that mandates the payment of money for its violation.[3] The Takings Clause has long been held to be such a provision.

The CFC's Tucker Act jurisdiction is *exclusive* when the claim is for more than $10,000.[4] It is exclusive not by affirmative statement, but by default—that is, because Congress simply has not granted jurisdiction to other courts for the type of claims discussed here. CFC jurisdiction is *concurrent* with the U.S. district courts when the claim is for $10,000 or less.[5] Appeal from both the CFC and the district courts (for non-tax claims under the Little Tucker Act) is exclusively to the Federal Circuit.[6]

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1. 28 U.S.C. § 1491(a)(1) (1994).
2. United States v. Testan, 424 U.S. 392, 398 (1976).
3. United States v. Mitchell, 463 U.S. 206, 218 (1983); *Testan*, 424 U.S. at 400-02.
4. *See* 28 U.S.C. § 1346(a)(2) (1994) ("Little Tucker Act").
5. *Id.*
6. 28 U.S.C. § 1295(a)(2)-(3) (1994); *see* United States v. Hohri, 482 U.S. 64, 72

As pertinent here, the CFC lacks power to grant specific equitable relief,[7] though it may use equitable doctrines incidental to its general monetary jurisdiction.[8]

II. *EASTERN ENTERPRISES* AND THE INVALIDATION REMEDY

Rumors of the death of the invalidation remedy for takings as the result of *First English Evangelical Lutheran Church v. County of Los Angeles*[9] have proved to be exaggerated. Even as *First English* was proclaiming that the Takings Clause demands compensation,[10] it was not to be doubted that the invalidation remedy remained appropriate for some rarely seen types of takings suits—those asserting that (1) a government activity is not for a "public use;" (2) Tucker Act jurisdiction for the government activity has been withdrawn by Congress and no alternative forum provided; and (3) in the event of a taking, there might otherwise be an uncompensated injury. Uncompensated injury might occur, for example, because Congress placed a cap on the allowable recovery.[11] In addition, the decision in *Hodel v. Irving*,[12] shortly before *First English*, and the companion decision in *Babbitt v. Youpee*,[13] years afterward, both witnessed the Supreme Court strike down a statute found to be a taking, rather than awarding money.[14]

Thus the Supreme Court's opinions in *Eastern Enterprises v. Apfel*[15] do not, by endorsing invalidation in various ways, plow virgin soil. Yet the decision is significant. First and foremost, it addresses two new circumstances—not rare ones, either—where

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(1987).

7. *See* 28 U.S.C. § 1491(a)(1) (1994) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim. . . .").

8. Pauley Petroleum, Inc. v. United States, 591 F.2d 1308, 1315 (Ct. Cl. 1979).

9. 482 U.S. 304 (1987).

10. *First English*, 482 U.S. at 321.

11. Duke Power v. Carolina Envtl. Study Group, 438 U.S. 59, 71 n.15 (1978) (noting that the claim that the nuclear liability act does not provide assurance of full compensation in the event of takings supports suit for declaratory judgment in district court).

12. 481 U.S. 704 (1987).

13. 519 U.S. 234 (1997).

14. *Babbitt*, 519 U.S. at 245; *Hodel*, 481 U.S. at 718.

15. 524 U.S. 498 (1998).

invalidation may be the proper remedy despite a cause of action initially being viewed as a taking. One circumstance is the taking claim premised more on the arbitrariness or irrationality of the government's conduct than on its economic impact. A five-justice majority of the *Eastern Enterprises* Court rejected the use of takings theory for such conduct, preferring substantive due process instead.[16] The other circumstance-an explicit holding of the plurality but rejected by the majority of justices-is where the taking inheres in a generalized monetary liability imposed on the plaintiff.[17] Beyond this, the plurality opinion indicated for the first time that the Court understands what it did in *Hodel* and *Babbitt* when it went the invalidation route.[18]

Despite embracing a majority of the Justices, the Kennedy concurrence and the four-Justice Breyer dissent have no precedent value in the formal sense. Yet they clearly change the strategic calculus for a prospective plaintiff in that Justice Kennedy and the Justice Breyer dissent could support a future majority opinion of the Court. Of course, "the only *binding* aspect of *Eastern Enterprises* is its specific result—holding the Coal Act unconstitutional as applied to Eastern Enterprises."[19]

The implications of *Eastern Enterprises* for the CFC are significant, but not great. This conclusion assumes, of course, that *Eastern Enterprises* is not a harbinger of additional Supreme Court opinions extending the use of the invalidation remedy for government conduct now addressed chiefly as a potential taking.

First, consider the slim majority of the *Eastern Enterprises* Justices calling for the use of substantive due process alone in situations formerly thought to be addressable by both substantive due process and takings. At first blush, this due-process-alone view would seem to deflect to the district courts under federal question jurisdiction certain cases now coming to the CFC. The Federal Circuit has repeatedly held the Due Process

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16. *Eastern Enters.*, 524 U.S. at 537-38 (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)).

17. *Id.* at 529.

18. This Article discusses both the plurality opinion, on the one hand, and the congruent views of the Kennedy concurrence and four-Justice Breyer dissent, on the other.

19. *Apfel*, 156 F.3d at 1255 (emphasis added).

Clause not to be a money-mandating provision, hence conferring no Tucker Act jurisdiction on the CFC.[20] It would seem, however, that the number of such switch-over claims would be small. The large majority of takings claims in the CFC appear to allege takings by virtue of severe economic impact, not the arbitrariness or irrationality of government behavior.

Plainly, it would be easy enough to recast many economic-impact-based takings cases as unreasonability-based due process cases. As the *Eastern Enterprises* plurality noted: "Our analysis . . . under the Takings and Due Process Clauses is correlated to some extent. . . ."[21] Since a key prong of the takings test is the extent to which the government interferes with reasonable investment-backed expectations,[22] takings cases often deal in the disruption of settled understandings-the very essence of retroactivity challenges customarily addressed in due process terms. Because the line between takings and substantive due process is blurry, so is the jurisdictional line between the CFC and the district courts. Still, plaintiffs tempted to transform their takings cases into due process ones may wish to think twice. *Eastern Enterprises* can hardly be read as a repudiation of sixty years of Supreme Court jurisprudence disfavoring the use of substantive due process to strike down government regulation not implicating suspect classifications or fundamental interests.[23]

Eastern Enterprises also has led to speculation that the Supreme Court may be poised to define narrowly the scope of its decisions in *Nollan v. California Coastal Commission*[24] and *Dolan v. City of Tigard*.[25] This pivotal issue is before the Court now, in the case of *City of Monterey v. Del Monte Dunes, Inc.*[26] *Nollan* and *Dolan*, recall, announced takings standards for evaluating exaction conditions on development permits and were explicitly based on the Supreme Court's due process-like takings

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20. Crocker v. United States, 125 F.3d 1475, 1476 (Fed. Cir. 1997).

21. 524 U.S. at 537.

22. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980).

23. *Eastern Enters.*, 524 U.S. at 537 (noting that "this Court has expressed concerns about using the Due Process Clause to invalidate economic legislation").

24. 483 U.S. 825 (1987).

25. 512 U.S. 374 (1994).

26. 526 U.S. 687 (1999).

precept that government actions failing to "substantially advance legitimate state interests" are takings.[27] Given their due process roots, *Nollan* and *Dolan* sit uncomfortably in takings law following *Eastern Enterprises*.

But this fact means little in the CFC. Both *Nollan* and *Dolan* and the failure-to-substantially-advance rule generally have played little role in CFC takings decisions to date. The reason is straightforward: The United States does not routinely engage in the imposition of development exactions.[28]

Second, consider the circumstance found by the *Eastern Enterprises* plurality to warrant invalidation: generalized monetary liability found to be a taking.[29] This conclusion also should not greatly alter the CFC status quo since it merely endorsed what was already the majority view.[30]

Eastern Enterprises did nothing, it would seem, to modify the CFC's jurisdiction. First, the Supreme Court was more concerned with whether the case before it had properly come up from the district court than with whether it also could have been heard in the CFC.[31] Second, the plurality cited several of the Court's Tucker Act decisions with approval.[32] Thus, it is tough to argue that *Eastern Enterprises* somehow endorsed a kind of ancillary CFC jurisdiction over takings like due process/invalidation claims. CFC opinions since *Eastern Enterprises* seem to assume that, as to the court's jurisdiction at least, nothing has changed because of *Eastern Enterprises*.[33]It may be that

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27. *Nollan*, 483 U.S. at 834; *Dolan*, 512 U.S. at 385 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

28. *See* Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 390 (1988) (declining to find a taking based solely on the government action's failure to substantially advance a legitimate government objective).

29. 524 U.S. at 537.

30. Sallie Mae v. Riley, 104 F.3d 397, 401-02 (D.C. Cir. 1997) (explaining that an association claiming that a fee imposed by Congress is a taking may properly seek declaratory judgment in district court); *In re* Chateaugay Corp., 53 F.3d 478, 493 (2d Cir. 1995) (holding that a coal company claiming that federally imposed monetary liability for retiree health benefits is a taking may properly seek declaratory judgment in district court); Branch v. United States, 69 F.3d 1571, 1576 (Fed. Cir. 1995) (stating that a taking claim based on monetary liability amounts to the contention that the Constitution forbids its enforcement).

31. *Eastern Enters.*, 524 U.S. at 520-22.

32. *Id.* at 520, 546-47.

33. *See* New York Power Auth. v. United States, 42 Fed. Cl. 795 (1999). *But see Branch*, 69 F.3d at 1575 (constituting a pre-*Eastern Enterprises* decision in which

by creating confusion over whether takings or due process is the appropriate theory in a given case, *Eastern Enterprises* will prompt plaintiffs to file actions in *both* the CFC and district courts. Such joint filing no longer offends the general statutory bar on simultaneous actions in the district court and CFC,[34] owing to the Federal Circuit's reinstatement in 1994 of the different-type-of-remedy exception.[35] With joint filing, the greater number of legal theories assertable in a district court may lead the CFC to stay its own proceedings until the district court action is resolved.[36]

If *Eastern Enterprises* results in more takings actions being filed in the district courts, there will be a greater potential for inconsistent development of federal government takings law. It was noted earlier that pursuant to 28 U.S.C. § 1295(a)(2)-(3), both CFC takings decisions under the Tucker Act and district court takings actions under the Little Tucker Act, are appealed to the Federal Circuit.[37] The Federal Circuit then can harmonize inconsistent lower court development of jurisprudence. However, takings cases redirected to the district courts by *Eastern Enterprises* would not be heard under the little Tucker Act, but rather under the federal question statute.[38] Thus, appeal would be taken to any of twelve different circuits, arguably a situation less conducive to harmonious development of federal-government takings law.

That federal government takings law is a body of jurisprudence having special need for harmonious development was an explicit assumption underlying Congress' creation in 1982 of the current court configuration, in which almost all takings cases against the United States are appealable to the Federal Circuit.[39]

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the Federal Circuit proceeded to decide taking claim after determining that the claim essentially sought invalidation).

34. 28 U.S.C. § 1500 (1994).

35. Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1555-56 (Fed. Cir. 1994) (en banc).

36. *See New York Power Auth.*, 42 Fed. Cl. at 802 (stating that where actions based on the same facts are filed in two courts, the court with the narrower claim should stay its case in favor of the court with the broader claim).

37. *See supra* note 4 and accompanying text.

38. *See infra* Part II.

39. *See* S. REP. NO. 97-275, at 4 (1982) ("[A]dequate showing has been made for

Seven days before the Supreme Court's decision in *Eastern Enterprises*, the Federal Circuit handed down *Del-Rio Drilling Programs, Inc. v. United States*.[40] There, the court interpreted narrowly the oft-stated CFC/Federal Circuit rule that takings claims against the United States cannot be based on "unauthorized" government action.[41] The rule, explained the court, reaches only *ultra vires* government conduct—i.e., conduct that was explicitly prohibited or outside the normal scope of the government official's duties.[42] The mere fact that a government action would be found legally erroneous if challenged in court does not constitute "unauthorized" conduct precluding a taking claim.[43]

Thus, a CFC taking case may be dismissed (under the dissenters' view in *Eastern Enterprises*) as essentially concerned with the rationality or reasonableness of the government's behavior[44] or (under *Del-Rio*) as at bottom asserting the ultra vires nature of such government behavior.[45] In either case, the result is the same: A plaintiff must go to district court and seek to set aside the government act.[46] There is obvious, but nowhere near complete, overlap between these two categories of official misconduct. The irrationallity targetted by the *Eastern Enterprises* dissenters seems to cast a much wider net than the egregiously out-of-line, not remotely authorized actions seemingly contemplated by *Del-Rio*. A Federal Circuit synthesis of the two doctrines might prove useful.

There is a narrow circumstance where a claim is apparently *not* outside Tucker Act jurisdiction merely because the government action is invalid. Under the "illegal exaction" doctrine, Tucker Act claims may be made for *recovery of monies* that the

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nationwide subject matter jurisdiction in the areas of patent and claims court appeals."); United States v. Hohri, 482 U.S. 64, 72 (1987) ("Nontort claims against the Federal Government present one of the principal areas in which Congress [in 1982] sought . . . uniformity.").

40. 146 F.3d 1358 (Fed. Cir. 1998).

41. *Del-Rio*, 146 F.3d at 1362-63.

42. *Id.* at 1363.

43. *Id.*

44. *Eastern Enters.*, 524 U.S. at 543-45 (Kennedy, J., concurring in the judgment and dissenting in part).

45. *Del-Rio*, 146 F.3d at 1362-63.

46. *See id.*

government has required to be paid contrary to law.[47] An illegal exaction claim arises when a "'plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum' that was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation."[48] The "in effect" phrase means that the money exacted need not have been paid directly to the government.[49] It is sufficient that it was paid to others at the direction of the government in order to meet a governmental obligation.[50]

The allegation of an illegal exaction bypasses the usual Tucker Act demand for a money-mandating provision. That is, "[i]n illegal exaction cases, in contrast to other actions for money damages, jurisdiction exists even when the provision allegedly violated does not contain compensation mandating language."[51] Thus, a taking claim found under *Eastern Enterprises* to warrant an invalidation remedy or recharacterization as a due process claim may nonetheless seemingly remain in the CFC for the limited purpose of allowing the plaintiff to recover monies actually paid.[52]

Are we headed toward a two-court arrangement, where takings and due process challenges to economic regulation are heard in the district courts and regulatory takings cases not involving economic regulation are heard in the CFC? Only in small part, it would seem. The universe of economic-regulation takings claims includes many that do not involve the rationales that the *Eastern Enterprises* Justices found to belong in the district courts.[53] Nor, as noted, may plaintiffs see strategic ad-

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47. Aerolinas Argentinas v. United States, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996).

48. *Aerolinas Argentinas*, 77 F.3d at 1572-74 (quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007 (Ct. Cl. 1967)).

49. *Id.* at 1573.

50. *Id.*

51. Bowman v. United States, 35 Fed. Cl. 397, 401 (1996); *see, e.g.*, Mallow v. United States, 161 Ct. Cl. 446 (1963) (holding that a fine paid pursuant to court martial was conducted in violation of due process).

52. *But see* Lark v. United States, 17 Cl. Ct. 567, 569-70 (1989) (denying illegal exaction jurisdiction).

53. *See, e.g.*, Adams v. Hinchman, 154 F.3d 420, 426 n.9 (D.C. Cir. 1998) (holding that the district court lacked jurisdiction to hear an overtime-pay taking claim by a federal employees since, unlike in *Eastern Enterprises*, there was no

vantage in filing in district court.[54]

III. Effect of the CFC's Lack of Tucker Act Jurisdiction Over Claims Other Than Takings

It is important to remember that a Tucker Act suit in the CFC generally must cite to some money-mandating provision of law.[55] In the Constitution, the only money-mandating provision is the Takings Clause.[56] Thus, the Tucker Act confers no jurisdiction over claims based on due process, equal protection, the Fourth Amendment, or other constitutional guarantees.[57] A minor exception allows the CFC to consider constitutional issues that are factors in establishing a claim under a money-mandating statute, but this appears to have little application here.[58]

In a nutshell, the CFC has the Takings Clause, and little else, with which to express its views on the essential fairness of government property-use controls. In vivid contrast, other courts routinely confront a broad array of causes of action—both constitutional (takings, substantive due process and equal protection are the usual)[59] and nonconstitutional (petitions for procedural and substantive review of administrative action).[60] A prominent example on the constitutional side is the series of decisions from the Washington state courts opting for use of substantive due process, rather than takings, to resolve certain property disputes.[61] A recent example is *Estevanovich v. City of Riverside*.[62]

"direct transfer of funds"), *cert. denied*, 119 S. Ct. 2046 (1999).

54. *See supra* Part II.

55. *See supra* note 2 and accompanying text.

56. *See* U.S. CONST. amend. V.

57. *See, e.g.*, Murray v. United States, 817 F.2d 1580, 1583 (Fed. Cir. 1987) (explaining that there was no CFC jurisdiction over a due process claim), *aff'd*, 864 F.2d 148 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1055 (1989); Brown v. United States, 105 F.3d 621, 623 (Fed. Cir. 1997) (holding that there was no CFC jurisdiction over a Fourth Amendment claim).

58. Hatter v. United States, 953 F.2d 626, 628 (Fed. Cir. 1992), *rev'd*, 64 F.3d 647 (Fed. Cir. 1995), *aff'd*, 519 U.S. 801 (1996).

59. *See* Buckles v. King County, 191 F.3d 1127 (9th Cir. 1999).

60. *See* Brooks v. Giuliani, 84 F.3d 1454 (2d Cir. 1996), *cert. denied*, 519 U.S. 992.

61. *See, e.g.*, Guimont v. Clarke, 854 P.2d 1 (Wash. 1993) (holding that a state statute requiring mobile home park owners to contribute to tenant relocation costs is not a taking but that it does violate substantive due process), *cert. denied*, 510 U.S.

Thus confined to takings, the CFC can respond to many property owner grievances only by asking: Do we compel the United States to buy a property interest from the plaintiff, or do we not? This rigid approach underscores the desirability of the current ADR pilot program now being conducted by the U.S. Department of Justice in connection with its takings docket.[63] Through the use of "transactional settlements" embodying substantive accommodations between program agency and property owner, the program offers an alternative to the all-or-nothing money remedy of takings law.[64]

IV. Congressional Proposals to Allow All Claims in Property Rights Cases To Be Heard in One Court

A person aggrieved by federal agency action may have two options: Seek to have the agency action set aside on some ground, or pursue compensation under the Takings Clause. If both avenues are to be pursued, however, the person usually must litigate in two courts. The invalidation claim, often under the Administrative Procedure Act, must go to a federal district court, often under federal question jurisdiction.[65] The compensation claim, pursuant to the Takings Clause, usually has to be filed in the CFC under the Tucker Act (if the claim is for $10,000 or more).[66] Plaintiffs' efforts to blur this jurisdictional rubicon—e.g., seeking to remain in district court by arguing that a taking claim raises a federal question or by framing a complaint to seek invalidation relief when the effect is to obtain money damages—are uniformly rejected.[67]

1176 (Cal. 1994).

62. 81 Cal. Rptr. 2d 684 (1999) (holding that an ordinance restricting poolroom hours of operation violates equal protection because of the absence of a rational link to a reasonable government purpose), *review granted and opinion superseded*, 975 P.2d 29 (Cal. 1999).

63. Robert Meltz, *"Takings Claims Against the Federal Government," Inverse Condemnation and Related Government Liability Cosponsored by the Pacific Legal Foundation*, 43 A.L.I.-A.B.A. 57, 62 (1998).

64. *Id.*

65. 28 U.S.C. § 1331 (1994).

66. *See supra* note 1 and accompanying text.

67. *See* State of New Mexico v. Regan, 745 F.2d 1318 (10th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985).

As a general proposition, such jurisdictional bifurcation is surely undesirable—inefficient of court and litigant resources.[68] The Federal Circuit has expressed concern about "duplicative litigation due to jurisdictional conflicts."[69] "This situation often arises when . . . plaintiffs must bring their action for equitable relief in a United States district court, while their monetary damages claims must be brought in this court."[70]

In recent years, Congress has leaped into the breach, considering bills that would allow all related claims—in cases involving property rights—to be filed either in the district court or the CFC. But while consolidation of claims is beneficial in general, many issues have been raised as to how these bills propose to get there. The result: no enactments to date.

In the 105th Congress, the vehicle in the House was H.R. 992 (Rep. Lamar Smith, R-Tex.).[71] Calling itself the "Tucker Act Shuffle Relief Act," H.R. 992 would have given each court-the CFC and the district courts-jurisdiction of the type it now lacks—but only for suits against the United States that involve property rights.[72] The CFC would obtain some jurisdiction to invalidate acts of Congress and agency regulations and to issue injunctive and declaratory relief.[73] The district courts would get jurisdiction to hear Fifth Amendment compensation claims based on such acts and regulations, without the current $10,000 cap.[74] Thus, two courts of concurrent juridiction would exist for challenges to federal actions adversely affecting property rights.[75] In addition, the bill gave a plaintiff the sole power to choose between the CFC and district court, directed appeals from actions under the bill in either court to the Federal Circuit, and repealed the restriction on CFC jurisdiction in 28 U.S.C.

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68. *See infra* Part III.

69. Far West Federal Bank v. Office of Thrift Supervision, 930 F.2d 883, 891 (Fed. Cir. 1991).

70. New York Power Auth. v. United States, 42 Fed. Cl. 795 at 800 (1999). And there is Justice Scalia's famous statement: "Nothing is more wasteful than litigation about where to litigate. . . . " Bowen v. Massachusetts, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting).

71. *See generally* H.R. 992, 105th Cong. (1997).

72. *Id.* § 2(a).

73. *Id.*

74. *See id.* § 3(4).

75. *See id.* § 2(a).

§ 1500.[76]

H.R. 992 passed the House by a 230-180 vote.[77] In the Senate, the as-introduced version of H.R. 992 was fused with another process-type property-rights bill and proceeded as H.R. 1534.[78] After being reported by the Senate Committee on the Judiciary, H.R. 1534 came to the Senate floor as S. 2271.[79] There, it was defeated on a motion to cut off debate (requiring sixty votes) by 52-42.[80] The Clinton Administration opposed H.R. 992 but chiefly because it vested an invalidation authority in the CFC, not because it expanded compensation-granting authority in the district courts.[81]

In part, H.R. 992 and the companion Senate bill provisions were defeated because the property-rights lobbying in the 105th Congress was overwhelmingly directed at the other process-type approach being debated. That approach, which proposed to lower abstention and ripeness barriers to property-rights-based § 1983 actions in the federal courts, galvanized a powerful persuasion campaign by the National Association of Home Builders. By contrast, H.R. 992 seemed esoteric, and little in the way of an organized lobbying push was evident.

To be sure, there were also substantive issues in H.R. 992 and its Senate companion bill, and these were as follows:

1. Why Single Out Property Rights Claims?—There are other situations, not involving takings, where a plaintiff has to split causes of action arising from the same facts between the CFC and the district courts—as when a plaintiff has both a breach of contract claim (CFC) and an invalidation action (district court) or a Contract Disputes Act claim (CFC) and a tort action (district court). This fact led one witness at the hearing on H.R. 992 to suggest that if the issue of split CFC/district court jurisdiction is to be addressed by Congress, the debate should not be confined to property-rights-related claims.

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76. H.R. 992, § 2(a)(2).
77. 144 CONG. REC. H1140 (daily ed. Mar. 12, 1998).
78. *See supra* note 58.
79. 144 CONG. REC. 58022 (daily ed. July 13, 1998).
80. 144 CONG. REC. 58049 (daily ed. July 13, 1998).
81. 144 CONG. REC. 58030 (daily ed. July 13, 1998); *see* Item Five below.

2. Ambiguous Magnitude of Problem.—Congress was provided with no documentation during the debate on the claims-consolidation bills that the current CFC/district court split has been a daunting litigation obstacle in a significant number of cases.

3. Shift from the CFC's Historical Focus on Monetary Remedies.—While the CFC has limited jurisdiction to grant equitable relief, in the large majority of CFC cases, plaintiffs primarily seek money.[82] Indeed, the resolution of monetary claims against the United States has been the court's prime thrust since its creation in 1855.[83] Were H.R. 992 enacted, the number of cases where non-monetary relief is sought from the CFC would likely increase, in part owing to conventional wisdom that the CFC is a plaintiff-friendly court.

4. Effect of Federal Government Takings Law Being Developed in Many Courts.—Under H.R. 992, the law of takings as applied to the federal sovereign would evolve in district courts in addition to the CFC—not, as now, almost exclusively in the CFC.[84] The prospect that such multiple forums would yield inconsistent rulings is reduced, according to bill proponents, by provisions channeling appeals from the district courts, along with those from the CFC, to the Federal Circuit.[85] This arrangement extends the existing channelling to the Federal Circuit in 28 U.S.C. § 1295 to a new and potentially large category of cases. Query how the large-scale entry of district courts into the field would affect decision-making in the CFC, a court that currently cites takings precedent from other circuits only infrequently.

Another issue is the opportunities created by the bill for forum shopping—a practice decried by some but seen by others as relatively harmless. The bill would give a plaintiff the choice of both trial court and appellate court.[86] The choice of a trial

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82. *See, e.g.*, United States v. King, 395 U.S. 1 (1969) (holding that the CFC lacks authority to issue declaratory judgments).

83. *King*, 395 U.S. at 2-3; Son Broadcasting, Inc. v. United States, 42 Fed. Cl. 532, 535 (1998).

84. *See* H.R. 992, 105th Cong. § 2(a) (1997).

85. 144 CONG. REC. H1092 (daily ed. Mar. 12, 1997).

86. *See* H.R. 992, § 2(a)(2).

court, as noted, is explicit in the bills.[87] The choice of an appellate court is made by a plaintiff through his or her decision of whether to attach the requisite property rights allegations to the invalidation claim.[88] When property rights allegations are attached, the appeal goes to the Federal Circuit; when there are no such allegations, the appeal goes to the circuit in which the district court is located.[89] Of course, Congress has established duplicative jurisdiction between the CFC and the district courts in several settings, so arguably it has a certain tolerance for forum shopping.[90]

5. Constitutionality of Article I Courts Invalidating Acts of Congress.—An old and still unresolved debate exists as to whether Article I forums, such as the CFC, may constitutionally be vested with jurisdiction to rule on certain matters that Article III forums can. H.R. 992 thrusts one into the midst of this debate by authorizing the CFC to invalidate federal regulations and acts of Congress.[91] To be sure, Supreme Court criteria for defining the outer bounds of Article I judicial functioning are broad.

In practice, the CFC has ruled on the constitutionality of congressional enactments, though research reveals no instance where the Article I question was addressed.[92] In any event, the 105th Congress was treated to sharply opposing views as to the constitutionality of H.R. 992's conferral of statute-invalidation authority on the CFC. The Department of Justice argued unconstitutionality;[93] bill supporters argued the opposite.[94]

This constitutionality issue can easily be circumvented. The bill's claims-consolidation purpose can be achieved solely by expanding the jurisdiction of the district courts, leaving the CFC

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87. *Id.*

88. *See supra* note 58.

89. *Id.*

90. *See, e.g.*, 28 U.S.C. §§ 1491(a), 1346(a)(1) (tax refund cases).

91. *See* H.R. 992, § 2(a)-(d).

92. *See, e.g.*, IBM Corp. v. United States, 31 Fed. Cl. 500 (1994), *aff'd*, 59 F.3d 1234 (Fed. Cir. 1995), *aff'd*, 517 U.S. 843 (1996).

93. 1997 WL 560849 (F.D.C.H.) (statement of Assistant Attorney General Eleanor Acheson to the House Committee on the Judiciary).

94. 144 CONG. REC. H1087 (daily ed. Mar. 11, 1998) (statement of Rep. Lamar Smith).

as is. Such a district-court-only approach was contained in an amendment offered by Representative Melvin Watt during full-committee markup of H.R. 992 and during House floor debate.[95] The amendment was rejected each time, though on the latter occasion only by a tie vote of 206-206.[96]

6. Effect on "Preclusive Review Provisions" in Existing Regulatory Statutes.—The Senate companion bill (S. 2271), more so than the House-passed version of H.R. 992, raised the issue of whether Congress intended to override the preclusive review provisions found in various federal regulatory statutes.[97] These provisions are designed to put an early end to legal skirmishing over new agency rules, allowing an agency and the regulated community to commit the necessary resources for enforcement and compliance, with confidence that the rule has some permanence. If S. 2271 were to override these provisions, the length of time in which to raise legal challenges to agency rules would be greatly lengthened, and the court of original jurisdiction would be changed in many cases from the circuit courts to the district court or the CFC.

Early indications are that bills similar to H.R. 992 will be reintroduced in the 106th Congress.[98]

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95. 144 CONG. REC. H1094 (daily ed. Mar. 12, 1998).

96. 144 CONG. REC. H1138 (daily ed. Mar. 12, 1998).

97. *See, e.g.*, Clean Air Act, § 307(b), 42 U.S.C. § 7607(b) (1994) (limiting judicial review of nationally applicable regulations under the Clean Air Act to the D.C. Circuit and requiring that petitions for review be filed within 60 days of Federal Register notice).

98. 145 CONG. REC. S5266 (daily ed. May 13, 1999).