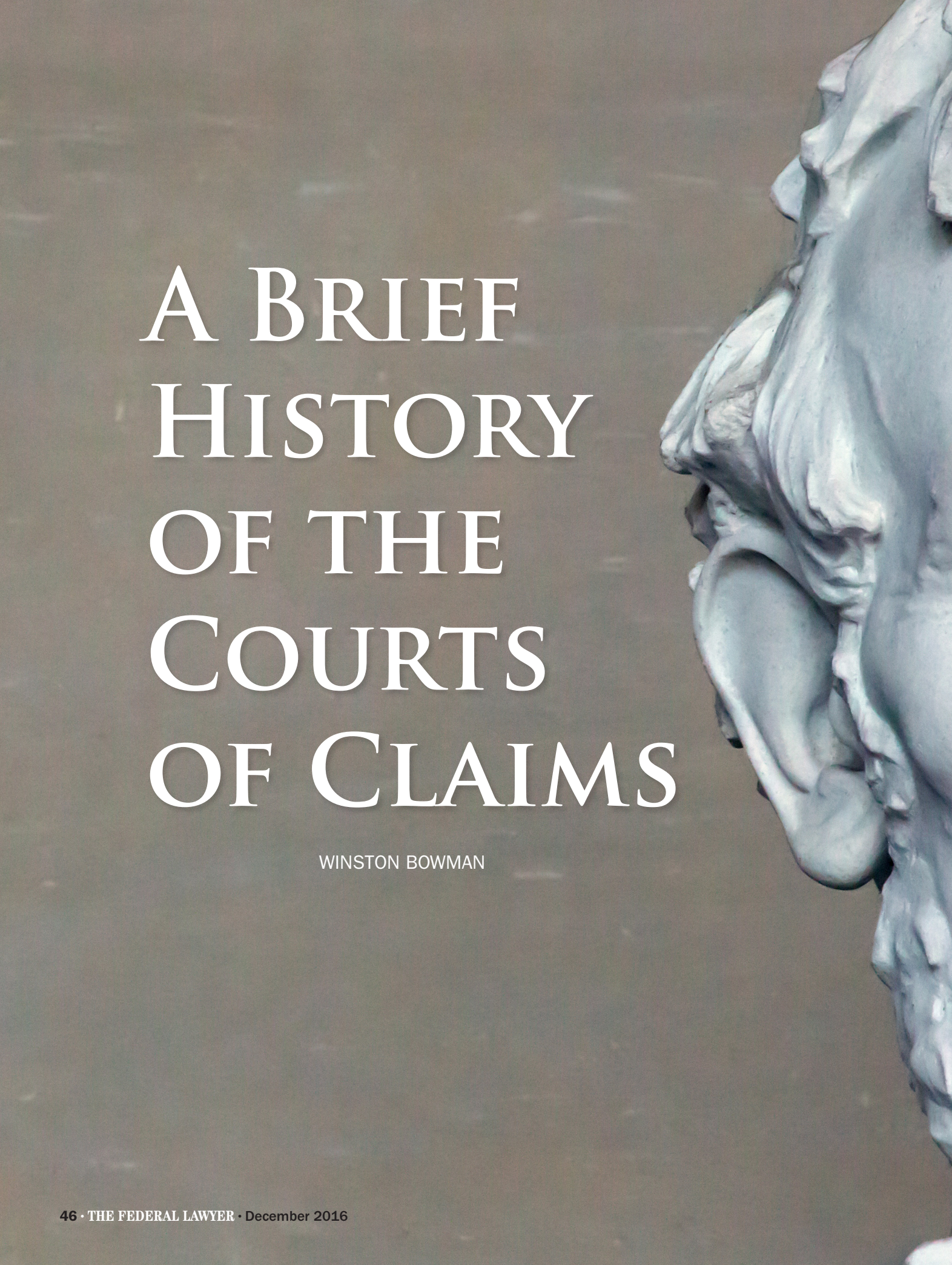

A Brief History of the Courts of Claims

WINSTON BOWMAN

"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."

—Abraham Lincoln, First Annual Message, 1861

President Abraham Lincoln was a busy man in 1861. He was also not renowned for his advocacy of federal judicial power, having attacked the very notion of judicial review in his First Inaugural Address. Even so, in his First Annual Message that December, Lincoln pressed Congress to enhance the power and independence of the Court of Claims as a matter of national urgency. Though forgotten by many contemporary lawyers and absorbed into modern tribunals in 1982, the Court of Claims was created in 1855 to adjudicate monetary claims against the United States and was the first national trial court and first federal court of special jurisdiction. Adjudicating claims on the national purse may sound like the stuff of painstaking detail rather than earthshaking principle, but Lincoln and his compatriots understood that, as the primary vehicle for the government "to render prompt justice against itself," the Court of Claims could bolster confidence in the federal government's fairness in times of crisis.[1]

Modern federal courts have durable structures and well-defined roles. This was not always the case for the Court of Claims, however. Indeed, it was far from clear that the tribunal could properly be considered a court at all in its early years. Though Lincoln was eventually vindicated in his insistence that "adjudication of claims in their nature belong to the judicial department[,]" not all members of Congress initially accepted this premise. Some found the idea of the national government waiving its sovereign immunity and consenting to suit before unelected judges to be unseemly or undemocratic.[2]

Reflecting these tensions, the court developed an institutional hybridity that placed it somewhere between Congress and the judiciary in its first several decades. It took on work previously assigned to legislative committees and performed an advisory role for the political branches redolent of a modern agency. Even so, its judges were appointed by the president for life with senatorial consent and the Supreme Court heard direct appeals from the court for most of its existence. This blended institutional makeup forced Congress and the Supreme Court to wrestle with the powers and limitations of the federal judiciary for over a century and helped forge modern conceptions of what a federal court *is*. As the nation's politicians and justices worked through this process, however, the Court of Claims' status as an Article III court was often contested or unclear.

To understand why the Court of Claims took on this innovative structure, it is in-

structive to look at how claims against the government were resolved before the court's creation. In the immediate aftermath of independence from English rule, the Confederation Congress took sole responsibility for assessing the validity of claims against the United States. This system seems to reflect both colonial practice and the absence of an executive sovereign analogous to the king, whose ministers had resolved petitions in England.[3]

In what would become a recurring theme, war gave rise to an unusually high number of claims against the government. In response, Congress passed a law in 1792 authorizing the widows and orphans of Revolutionary soldiers to claim their pensions and assigned adjudication of such claims to the federal circuit courts.[4] The law also empowered the Secretary of War to suspend any circuit court judgment he found erroneous and to report the same to Congress.[5] Several circuit courts declined to enforce the statute, reasoning that this proviso robbed the courts' judgments of finality and rendered them advisory. Allowing the other branches to gainsay judicial decisions was, as two Supreme Court justices and a district court judge wrote to President George Washington, "radically inconsistent with the independence of that judicial power which is vested in the courts[.]"[6]

ing reading: "out of 16,573 petitions … and 3,436 bills reported," the report noted, "only 1,796 passed the House, and but 910 passed both Houses."[10] Connecticut Rep. John Rockwell called the system "about the worst that could be devised."[11]

While many members of Congress recognized the problems with their own system, it was not obvious that the solution lay in the creation of an independent claims body. In a period characterized by populist critiques of supposedly elitist judges and widespread calls for a more egalitarian society, the idea of handing over important congressional duties to unelected judges or commissioners faced real opposition. In a debate over an 1849 bill that would have created a national claims commission, for example, Illinois Rep. Orlando Ficklin lamented, "[i]f these gentlemen were to hold office during life, why not make the offices hereditary, and let the oldest sons succeed to their fathers?"[12] Missouri Rep. James Bowlin went further, calling the proposal "a base abandonment by the representatives of the people of the curatorship of the Treasury of the United States to a few commissioners."[13]

Although these arguments stymied the attempt to create a body dealing with all claims, Congress did set up the Mexican War Claims

Finally, in 1855 Congress passed an act that satisfied a critical mass of both houses by leaving many of the difficult questions up in the air and answering others ambiguously. The act named the three-judge tribunal the "Court of Claims."

Though Congress resumed the lion's share of claims adjudication for the first half of the 19th century, the question of whether it should retain a veto over the payment of claims remained a subject of debate. Many members of Congress considered such a power essential to congressional sovereignty. Others suggested that allowing a court to render a final judgment might also violate the Appropriations Clause of Article I, § 9, which forbade money to be taken from the national treasury except by a congressional appropriation. But, as John Quincy Adams suggested in his diary in 1832, there was a growing body of political opinion that insisted this work belonged with the courts "and legislative assemblies ought to have nothing to do with it. One-half of the time of Congress is consumed by it," he complained, "and there is no common rule of justice for any two of the cases decided."[7]

There may have been real substance to Adams' remonstrations. By 1838, claimants were filing approximately six times as many petitions as they had during the republic's early years.[8] Many of these claims were related to events of the War of 1812, with everything from the loss of a volunteer's gun to the razing of valuable property constituting a potential claim.[9] With the number of claims growing again as a consequence of the Mexican-American War (1846-1848), an 1849 congressional report stated that the claims system had degenerated into one "of unparalleled injustice, and [was] wholly discreditable to any civilized nation." The numbers made for alarm-

Commission from 1849-1851 to adjudicate claims related to the Treaty of Guadalupe Hidalgo. Staffed by temporary political appointees, however, this panel could never shake the impression that it was a profiteer's plaything. Politicians and petitioners alike complained that the commission proceeded largely in private and without adversarial hearings.[14] Though New Hampshire Sen. John Hale's claim that it facilitated "the most enormous frauds that were ever heard of in the history of civilization" seems hyperbolic, the committee's reception did not auger well for extra-congressional claims adjudication.[15] Congress, then, continued to limp along with claims adjudication for several years as eight more attempts to create a separate claims body failed to gain traction.

Finally, in 1855 Congress passed an act[16] that satisfied a critical mass of both houses by leaving many of the difficult questions up in the air and answering others ambiguously. The act named the three-judge tribunal the "Court of Claims." Its judges would be appointed by the president with the "advice and consent of the Senate" and they would hold their offices "during good behavior" in keeping with Article III, § 1, of the Constitution. However, as a national trial court, the Court of Claims' proceedings took a slightly unusual form, with commissioners dispersed around the nation (future President Benjamin Harrison was among the first) to take evidence, which they would mail to the court in Washington, D.C., for decision. Moreover, the degree of finality accorded the court's actions remained nebu-

lous. The act required the judges to "report" their findings to Congress, along with draft legislation enforcing the decision, but these bills became operative only "if enacted" by Congress.[17] The House interpreted this language to require a *de novo* review of all claims, effectively rendering the court little more than an advisory board.[18]

It was the lack of finality of Court of Claims decisions that agitated Lincoln in the early days of the Civil War. A protracted conflict on home soil was bound to invite a massive number of claims as Union forces contracted for, damaged, and destroyed a vast amount of private property. Lincoln argued that instead of busying Congress with these claims at a time when it should be "more than usually engaged … with great national questions," the court's decisions should be treated as final judgments, subject to judicial appeal, but with no further review from Congress.[19] After a few false starts, Congress responded with the Court of Claims Act in 1863.[20] In addition to adding two new judges to the court to deal with a burgeoning caseload, this law partially redressed the lack of finality and assuaged Appropriations Clause worries by providing a general appropriation of funds to cover judgments. A last-minute amendment to the bill, however, meant that meritorious claims had to be "estimated for" by the secretary of the treasury before they could be paid.[21]

This proviso became an important part of the first, and oddest, major Supreme Court case dealing with the Court of Claims. Though it reached the court in 1865, *Gordon v. United States* began as a claim for property damage incurred by a Florida landowner in combat between native tribes and the United States military in 1813. Following a complex 50-year claims process, the Court of Claims denied a petition seeking more than $66,000 (the equivalent of more than $1 million today) in interest.[22] After hearing oral argument on appeal, Chief Justice Roger Taney wrote an opinion holding that the Court could not hear the case because the Court of Claims was not, as Congress had supposed, exercising judicial power. Taney died shortly before the justices could meet to discuss the opinion, but his colleagues agreed to adopt it anyway. At some point thereafter, someone lost Taney's draft opinion. As a result, the official report of the case carried only a note from reporter John William Wallace stating the Court's decision.

Taney's successor, Salmon Chase, then issued a one-paragraph opinion in the unofficial *Lawyers' Edition* reports that focused on potential revision by the secretary of the treasury. This lack of finality, he reasoned, denied the Court of Claims "the judicial power from the exercise of which appeals can be taken to this court."[23] Congress responded by repealing the section referring to Treasury estimates in 1866, with the intention of securing the Court of Claims' footing.[24] The Supreme Court responded in kind, adopting appellate rules contemplating appeals from the Court of Claims.[25]

Some 17 years later, however, Taney's opinion was discovered in the effects of a dead friend who had served, perhaps ironically, as the register for wills for Baltimore County, Md. After a few years' delay, a donor gave the opinion to the Supreme Court, which finally published it in 1886. Taney's opinion was far more combative in tone and broad in substance than Chase's. In language freighted with the violent tragedy of his times, Taney portrayed Congress's attempt to create appeals from the Court of Claims to the Supreme Court as an assault on the equality between the branches of government that was essential to "prevent an appeal to the sword and a dissolution of the compact[.]"[26] On this premise, Taney continued, the Court of Claims' reliance on a congressional appropriation to fund its judgments was as troublesome as the section on which Chase and Congress had focused their energies. From beyond the grave, Taney had once more cast a pall over the constitutional status of the Court of Claims. Though the Supreme Court did not definitively rule on the court's status for another 47 years, this lingering precedent made the probable outcome of such a decision unclear.

The cases the Court of Claims heard were not just controversial because they asked questions about the court's own status. During and after the Civil War, for instance, the court was charged with determining the validity of claims by civilians that their property had been confiscated or destroyed by Union troops. This necessitated findings on such vexed issues as the scope of the war, the army's "right to capture" enemy property, and the timing of the peace.[27]

Moreover, claimants had to prove they had remained loyal to the Union cause to prevail. This required complex interrogations into the nature of loyalty and the evidence that could be used to prove it. The Court of Claims had to decide, for instance, whether to apply a different standard of proof of loyalty for black and white Southerners (it did) and what effect to give renunciations and pardons.[28] In 1869, the Supreme Court upheld a Court of Claims ruling that a presidential pardon established loyalty in law.[29] This decision was politically unpopular because it suggested the prospect of erstwhile rebels taking millions from the national coffers. The Court of Claims had already found for a claimant on the basis of just such a pardon in a separate case then on appeal. Congress took action, passing legislation stating that pardons were evidence of *dis*loyalty (or what would there be to pardon?) and ordering the Supreme Court to dismiss any case in which the Court of Claims had found for a pardoned claimant.[30] This was strong stuff, and in *United States v. Klein* (1871), the Supreme Court struck the law down, establishing the important principle that Congress cannot use its jurisdictional powers to compel a decision on the merits.[31]

Nevertheless, Congress continued to enhance the Court of Claims' jurisdiction in subsequent decades. In 1887, for instance, Congress passed the Tucker Act, which expanded the court's reach to the vast majority of non-tort claims against the federal government. The act also empowered the court to produce advisory findings on cases referred to it by Congress or federal agencies.[32] Congress subsequently expanded this advisory role by entrusting the court with the interpretation of important treaties with native tribes with a view to deciding claims made under them. The opinions the Court offered in such cases were not binding judgments and thus threatened to resurrect the problems pointed up by Taney's opinion in *Gordon*, which had been published the year before the Tucker Act.

At first, both the Court of Claims and the Supreme Court sidestepped the issues raised by the court's unusual role by embracing a clever duality when it came to claims cases. Where the court decided claims authorized by common or statutory law, the Supreme Court took its appeals and operated as though the Court of Claims was an Article III tribunal. Where the court performed an advisory role, however, no appeal was available because the court was performing nonjudicial business.[33]

The Court of Claims adopted a more literal duality in 1925 when it divided into appellate and trial divisions with a bolstered core of commissioners for the latter designed to redress the World War I-era backlogs that, in the words of one judge, had led to a "prevalent opinion that the distant heirs get judgment after the parties suffering the

real injury have long since been dead[.]"[34] Questions over the status of the Court of Claims became particularly important as the judicial branch began to grapple with the labyrinthine issues presented by the rise of the federal administrative state in the first half of the 20th century, however. As these agencies took on much of the workload previously shouldered by the nation's judges, the stakes for defining the meaning of judicial power rose.

In 1933, *Williams v. United States* presented these questions in an unusual way with the peculiarity of a judge suing the government in his own court. Judge Thomas Williams took this rare step when his salary was reduced by depression-era legislation cutting the salaries of all federal judges except those whose pay was protected by Article III, § 1. The comptroller general had determined Williams and the other claims judges did not sit on Article III courts and were thus subject to the salary reduction. Relying on *Gordon*, Justice George Sutherland agreed. The Court of Claims' primary function was once performed by Congress, he reasoned, and the Tucker Act entrusted it with tasks more akin to an agency's work. As a result, the court did not exercise power that was fundamentally "judicial." Congress, however, had other ideas. After curtailing the court's advisory work, the national legislature passed a law explicitly declaring the Court of Claims an Article III court in 1953.[35]

The Supreme Court finally acceded to this in *Glidden Co. v. Zdanok* (1962). The case involved an appeal decided by a divided panel of the Court of Appeals for the Second Circuit whose opinion was written by Judge J. Warren Madden, a Court of Claims judge sitting by assignment from Chief Justice Earl Warren. The losing party appealed, arguing that Madden should not have been permitted to hear the case. A 5-2 majority of the Supreme Court (Justices Frankfurter and White did not take part in the decision) determined that the Court of Claims was, after all, an Article III tribunal and Madden was thus properly assigned to the Court of Appeals.

Two decades later, all the Court of Claims' Article III judges found themselves permanently assigned to a Court of Appeals. The Court of Claims was broken up in 1982 as part of the Federal Courts Improvement Act, with the appellate division judges being absorbed into the newly created Court of Appeals for the Federal Circuit and the trial judges (as the former commissioners were known since 1973) forming the Article I United States Claims Court (renamed the United States Court of Federal Claims in 1992).[36] Perhaps ironically, given its status as the nation's first and longest-lasting court of special jurisdiction, the Court of Claims was folded into the Federal Circuit in part to answer criticisms of the specialization of that court. Should the Federal Circuit become devoted exclusively to patent appeals, critics argued, its judges might become too cloistered and their focus too narrow. The Court of Claims' unique blend of breadth and specialization made it a natural balm for such concerns.[37]

Over its 127 years, the Court of Claims played an important role in the development of the federal courts. Though the court has been folded into modern tribunals that take on much of the same work, it helped realize Lincoln's conviction that the judiciary could provide the best means for the government "to render prompt justice against itself[.]"[38] And in doing so, it forced the judicial and political branches to answer probing questions about the possibilities of judicial power and the nature of the judiciary itself. ⊙

Winston Bowman is an associate historian in the Federal Judicial History Office at the Federal Judicial Center. His research focuses on U.S. legal history and the federal courts. He previously taught at Brandeis University.

Endnotes

[1]Abraham Lincoln, First Annual Message (Dec. 3 1861).
[2]*Id.*
[3]*See* Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 La. L. Rev. 625, 634-36 (1985).
[4]Act of Mar. 23, 1792, c. 11, 1 Stat. 243 §§ 1-2.
[5]*Id.*, § 4.
[6]*Hayburn's Case*, 2 U.S. (2 Dall.) 409, 411 (1792).
[7]Memoirs of John Quincy Adams (Charles Francis Adams, ed.) (1874-1877), vol. VIII, 480 (entry of Feb. 23, 1832, *quoted in* William M. Wiecek, *The Origin of the United States Court of Claims*, 20 Admin. L. Rev. 387, 392 (1967-68)).
[8]*See* H.R. Rep. No. 730, 25th Cong., 2d Sess. 7 (1838), 4.
[9]*See* Wilson Cowen, et al., 2 The United States Court of Claims: A History 7 (1978).
[10]H.R. Rep. No. 498, 30th Cong. (1st Sess. 1848), 2-4 (*quoted in* Shimomura, *History of Claims*, 649).
[11]Cong. Globe, 30th Cong., 2d. Sess. 139 (1849).
[12]*Id.* at 142.
[13]*Id.* at 168.
[14]*See* Cong. Globe, 32d Cong., 1st Sess. 328-330, 878 (1853); 33d Cong., 1 Sess. 765-766 (1854); 33 Cong., 2d Sess. 70-74 (1854) (discussing criticisms of and possible frauds committed in the Mexican War Claims Commission).
[15]*Id.*, 37th Cong., 2d Sess. 416 (1863).
[16]Act of Feb. 24, 1855, 10 Stat. 612.
[17]*Id.*, 613 § 7.
[18]*See* Wiecek, *Origin*, 397.
[19]Lincoln, First Annual Message, *supra* n.1.
[20]Act of Mar. 3, 1863, 12 Stat. 765.
[21]*Id.*, 768 §§ 7, 14.
[22]*See Gordon's Case*, 1 Ct. Cl. 1 (1863).
[23]*Gordon v. United States*, 17 L. Ed. 921, 922 (1865).
[24]14 Stat. 9 (1866).
[25]3 Wall. VII-VIII (1866).
[26]*Gordon v. United States*, 117 U.S. 697, 701 (1865, published in 1886).
[27]*See, e.g.*, *Grossmeyer's Case*, 4 Ct. Cl. 1 (1868).
[28]*See Dereef's Case*, 3 Ct. Cl. 163 (1867).
[29]*See United States v. Padleford*, 76 U.S. (9 Wall.) 531 (1869).
[30]*See Wilson's Case*, 4 Ct. Cl. 559 (1868).
[31]*United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).
[32]Tucker Act, 24 Stat. 505 (1887).
[33]*See, e.g.*, *In re Sanborn*, 148 U.S. 222 (1893).
[34]*Quoted in* Cowen, 2 U.S. Court of Claims, 88.
[35]*See* Act to Amend Title 28, U.S. Code, 67 Stat. 226 (1953).
[36]Federal Courts Improvement Act, 96 Stat. 25 (1982).
[37]*See* Justin Crowe, Building the Federal Judiciary 254-257 (2012).
[38]Lincoln, First Annual Message, *supra* n.1.

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tion to the likely Supreme Court adjudication of *Grimm*, though as of yet no petition for certiorari has been granted.

In conclusion, a well-developed body of federal law on transgender rights already exists, and the broad thrust of the law over the past approximately 25 years has been toward greater protection against transgender discrimination. Employers who seek to impose restrictions on transgender employees that conflict with their gender identities or who wish to make employment decisions on the basis of an individual's transgender status will expose themselves to potential significant liability. When advising clients, the safest route to take is to recommend that they proceed as if transgender were a protected class. This is the *de facto* status that has been achieved through the *Price Waterhouse* gender stereotyping line of cases, even though transgender is not currently a specifically protected class. However, the *Grimm* case, which appears to be poised for decision by the Supreme Court, will likely have a major impact on future transgender litigation. ⊙

Endnotes

[1]*Holloway v. Arthur Andersen & Co.*, 556 F.2d 659 (9th Cir.1977).
[2]*Sommers v. Budget Mktg. Inc.*, 667 F.2d 748 (8th Cir. 1982).
[3]*Id.* at 750.
[4]*Fabian v. Hospital of Cent. Conn.*, __ F. Supp. 3d __, 2016 WL 1089178, at *7 (D. Conn. Mar. 18, 2016).
[5]*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
[6]*Id.* at 235.
[7]*Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004).
[8]*Id. at 574.*
[9]*Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).
[10]*Id.* at 1314.
[11]*City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 446-47 (1985).
[12]*Glenn,* 663 F.3d at 1318-19.
[13]*Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).
[14]*Glenn,* 663 F.3d at 1320.
[15]*Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007).
[16]*Id.*
[17]*Id.* at 1224.
[18]*Preston v. Commonwealth of Va. ex rel. New River Cmty. Coll.,* 31 F.3d 203 (4th Cir. 1994).
[19]*Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015).
[20]*Grimm v. Gloucester County Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016).
[21]*Johnston*, 97 F. Supp. 3d at 680.
[22]*Id*. at 681.
[23]*Grimm*, 822 F.3d at 715.

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overbreadth of her seizure of documents.").
[24]*United States ex rel. Cieszyski v. LifeWatch Servs. Inc.,* 2016 WL 2771798 (N.D. Ill., May 13, 2016).
[25]*Id.* at *5.
[26]*Id.*
[27]*See Walsh v. Amerisource Bergen Corp.*, No. 11-7584, 2014 WL 2738215, at *6 (E.D. Pa., June 17, 2014) (noting that courts "have focused on the reasonableness and scope of the plaintiff's disclosure in determining whether to permit counterclaims in an FCA action"); *Siebert v. Gene Sec. Network Inc.*, No. 11-CV-01987-JST, 2013 WL 5645309, at *8 (N.D. Cal. Oct. 16, 2013) (recognizing public policy preventing counterclaims based on taking documents, but declining to dismiss counterclaim in that case "because it is possible that Siebert also took confidential documents that bore no relation to his False Claims Act claim").
[28]*United States ex rel. Wildhirt v. AARS Forever Inc.*, No. 09 C 1215, 2013 WL 5304092, at *6 (N.D. Ill. Sept. 19, 2013). Although the issue of dependent and independent claims is not a topic for this article, in discussing a series of Ninth Circuit cases, the court in *U.S. ex rel. Battiata v. Puchalski*, 906 F. Supp. 2d 451 (D.S.C. 2012), held that: "[i]f a defendant's counterclaim is predicated on its own liability, then its claims against the relator typically will allege that the relator … caused the defendant some damage by the act of being a relator, that is, by disclosing the defendant's fraud…. This … kind of action has the same effect of providing contribution or indemnity, with the perverse twist that the relator is not even accused of contributing to the defendant's fraud…. If such suits were allowed, they would punish innocent relators, which would be a significant deterrent to whistleblowing and would imperil the government's ability to detect, punish, and deter fraud." *Id.* at *7.
[29]*Id.* at *3.
[30]*Id.*
[31]*Id.*
[32]*Walsh v. Amerisource Bergen Corp.*, No. Civ.A 11-7584, 2014 WL 2738215, at *7 (E.D. Pa., June 17, 2014) (denying the relator's motion to dismiss counterclaim based on taking documents where the relator "fail[ed] to provide any justification in response to [the] defendants' allegation that he disclosed, to his personal attorneys, information that was protected by the attorney-client privilege").
[33]The crime fraud exception to the attorney-client privilege is not a topic for this article.
[34]*U.S. ex rel. Gaston v. Mount Sinai Hosp.*, No. 13 CIV. 4735 RMB, 2015 WL 7076092, at *5 (S.D.N.Y. Nov. 9, 2015).
[35]18 U.S.C. §§ 1833(b)(1)(A)(i)-(ii) (2016).
[36]18 U.S.C. § 1833(b)(3)(A).
[37]*U.S. ex rel. Ceas v. Chrysler Group*, Case No. 12-cv-2870 (N.D. Ill., June 10, 2016).
[38]*Id.* at *2.
[39]*Id., citing Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876, 879-880 (N.D. Ill. 2002).
[40]*Ceas*, 2016 WL 3221125, at *2.
[41]*See X Corp. v. Doe*, 805 F. Supp. 1298 (E.D. Va. 1992), *aff'd*, 17 F.3d 1435 (4th Cir. 1994).
[42]*See Pearson v. Dodd*, 410 F.2d 701, 706 (D.C. Cir. 1969); *Furash & Co. Inc. v. McClave*, 130 F. Supp. 2d 48, 58 (D.D.C. 2001).