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PRIVATE CLAIMS ACTS AND
CONGRESSIONAL REFERENCES

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PRIVATE CLAIMS ACTS AND
COMMISSIONERS

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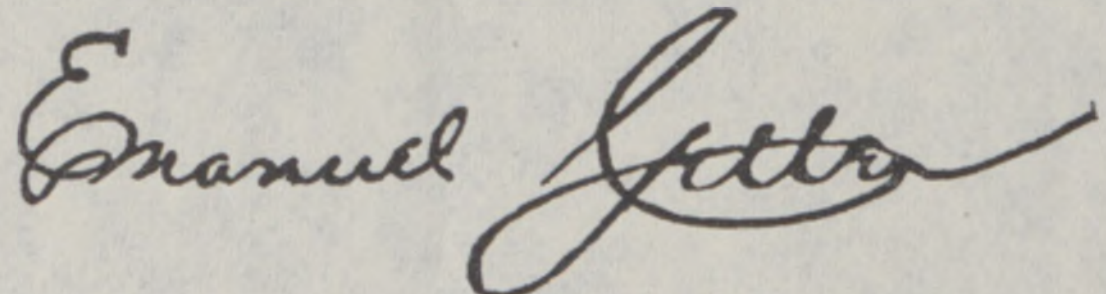
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FOREWORD

The article "Private Claims Acts and Congressional References" was originally contained in the November-December 1967 issue of "The U.S. Air Force JAG Law Review," a special issue of the Law Review composed of writings by reserve judge advocates. The author, Marion T. Bennett, is the Chief Commissioner of the U.S. Court of Claims. He is a member of the bars of Missouri and the District of Columbia and served three terms as a Member of Congress from the State of Missouri. He holds the rank of colonel in the U.S. Air Force Reserve.

This article contains much information which serves to clarify the nature of private claims legislation. Its explanations should be helpful to all interested, Members of Congress, attorneys, and claimants.

This committee receives many inquiries concerning procedures relating to claims against the Government. This committee print will bring added enlightenment to those concerned with this area of legislation.

A handwritten signature in cursive script, reading "Emanuel Latta". The signature is fluid and elegant, with a long, sweeping tail on the final letter.

Chairman.

FOREWORD

The Senate Committee on Governmental Reform, created by the Senate on December 19, 1947, is pleased to present this report. The report is the result of a study of the operations of the Government, conducted by the Committee and its staff, and is intended to provide a basis for the improvement of the Government. The report is divided into two parts: the first part contains a general statement of the Committee's findings and recommendations, and the second part contains a detailed statement of the Committee's findings and recommendations on specific subjects. The Committee believes that the report will be of great value to the Government and to the people of the United States.

Samuel J. Hays

Chairman

PRIVATE CLAIMS ACTS AND CONGRESSIONAL REFERENCES

(By Col. Marion T. Bennett, Air Force Reserve)*

It is a safe surmise that when the Founding Fathers wrote the Constitution of the United States they did not have in mind any specific need for Boards for the Correction of Military Records or Boards of Contract Appeals. But, so great was their wisdom, that they reserved to Congress the broad authority "To make Rules for the Government and Regulation of the land and naval Forces,"¹ and declared that Congress should pay the Nation's debts.² The first of the Bill of Rights, Amendment No. 1 to the Constitution, prohibits Congress from making any law abridging "the right of the people . . . to petition the Government for a redress of grievances." It is clear, therefore, that from the very beginning, Congress has had a responsibility to act in areas which by statute, regulation, and contract are now delegated to others, but not altogether.

Citizens continue to petition Congress for the redress of wrongs, real or imagined. General laws cannot cover all situations equitably and "private laws" have been the standard answer for special cases. Private laws, however, are permitted to deal only with relationships between the Government and its citizens and not as between private parties, although in the early days of the Republic this was not so. Judicial thought has now evolved to the point where the latter, broader type of private law might be considered a bill of attainder against the individual suffering detriment under it or might be unconstitutional as a denial of equal protection under the Due Process clause.³

There are two main types of private bills: (1) Those excepting certain persons from immigration and naturalization requirements; and, (2) those concerning claims against the United States, including waiver of claims by the Government against its citizens. We are here concerned only with the second category and how the petition to Congress is redressed. The petition itself, of course, does not confer on Congress any right to act. That right is spelled out and limited by Article I of the Constitution and the Bill of Rights. The courts also have refined that right. When Congress pays a "debt" by private law it need not be a legal one but may be "honorary" or "moral" in the broadest sense of equity, and as such, a demonstration of the "Nation's

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¹ U.S. Const., Art. 1, sec. 8, cl. 14.

² U.S. Const., Art. 1, sec. 8, cl. 1. These debts may be legal or merely moral or honorary. *Columbia Hospital v. United States*, 125 Ct. Cl. 712 (1953).

³ *Bolling v. Sharpe*, 347 U.S. 497 (1954); *United States v. Brown*, 381 U.S. 437 (1965).

conscience.”⁴ In this context, equity appears to be ethical rather than jural and not grounded in any sanction of positive law.

In seeking private legislation, the petitioner is confronted with the necessity of convincing Congress that he has a claim it should consider. Having done so, he may obtain relief from a private bill passed for his benefit by both the Senate and the House and signed into law by the President, or he may be required by resolution of either House to present his petition to the Chief Commissioner of the Court of Claims who will accord him an adversary trial on the merits and make findings and a recommendation to the House that referred the bill to him.⁵ This then becomes the foundation for a private relief bill. At one time both the judges and the commissioners of the Court of Claims resolved these matters for Congress. However, the Supreme Court has now declared the Court of Claims to be a constitutional court created under Article III of the Constitution and has suggested that it is improper for it to perform extrajudicial functions.⁶ So, the Court of Claims no longer considers congressional references but limits its consideration to legal claims over which it has general jurisdiction or where jurisdiction has been conferred upon it by special legislation. The commissioners, who are the trial judges of the court but are not constitutional judges, continue to consider congressional references to determine their equities as that term has been defined above. In so doing, the commissioners are actually performing a legislative function in a judicial manner. Certain well-defined guidelines have been laid down for consideration of these claims for private relief and they will be identified here. First, we will look at the standards of review observed by Congress and then at those regarded by the commissioners of the Court of Claims.

CONGRESSIONAL PROCEDURES

Disillusionment is invited by the claimant who has been defeated in exhausting his administrative remedies, or who has failed to exhaust them where so required, and who gets his congressman to introduce a private bill for his relief, thinking that political influence will solve his problem. It just usually doesn't work that way, despite the fact that Congress is a political body. While Congress acts as a sort of ancient court of equity in dispensing benefits on an *ad hoc* basis when it makes a law applied to an individual case, or to a few persons similarly situated, it still has its rules and procedures that must be complied with. In the House of Representatives, private claims bills are referred to the Judiciary Committee which automatically sends them to its claims subcommittees.⁷ The Senate has

⁴ “* * * the term ‘equitable claim’ as used in 28 U.S.C. 2509, is not used in the strict technical sense meaning a claim involving consideration of principles of right and justice as administered by courts of equity, but the broader moral sense based upon general equitable considerations.” *Burkhardt v. United States*, 113 Ct. Cl. 658, 667, 84 F. Supp. 553 (1949). See also *B Amusement Co. v. United States*, 148 Ct. Cl. 337, 342, 180 F. Supp. 386 (1960); *Georgia Kaolin Co. v. United States*, 145 Ct. Cl. 39, 44-45 (1959); *O'Donnell v. United States*, 166 Ct. Cl. 107, 118 (1964); *Cuyahoga County, Ohio v. United States*, 155 Ct. Cl. 307, 314, 294F. 2d 775, 778-79 (1961); *Ellison Centennial Address*, 132 Ct. Cl. 1 (1955).

⁵ Act of October 15, 1966, Pub. L. 89-681 (80 Stat. 958) amending 28 U.S.C. 792(a), 1942, and 2509. Pursuant to this Act either House of Congress may refer a claim bill, except a bill for a pension, to the Chief Commissioner of the Court of Claims and he, by rules which he promulgates for the handling of such claims, shall refer the same to a trial commissioner who shall hear the case and make findings and conclusions as to whether the claim is a legal or equitable claim or for a gratuity and as to the amount legally or equitably due from the United States to the claimant. The Chief Commissioner shall designate a panel of three other commissioners to review the report, and their determination, by majority vote, shall be transmitted by him back to the appropriate House of Congress.

⁶ *Glidden Co. v. Zdanok*, 370 U.S. 530, 587 (1962); see also the Act of July 28, 1953, 67 Stat. 276, 28 U.S.C. 171.

⁷ Private bills carving out exceptions to the Immigration and Nationality Act are referred to the Judiciary subcommittees on Immigration and Naturalization in the Senate and House.

no comparable standing subcommittee. A Judiciary Committee staff member is assigned, by the committee chairman, to evaluate private claim bills in the Senate. He prepares a proposed report which is circulated to the committee members prior to its consideration in an executive session.

In either House or Senate a hearing may be held on one of these bills but not until after the bill has been submitted for a report on the views of all interested Executive agencies and the Bureau of the Budget. A favorable departmental report will usually result in passage of the bill. An unfavorable report does not necessarily mean death to the bill, but it does mean more attention by the committee, leading to a hearing or to a request for additional supporting information from the bill's sponsor, or even referral to the Chief Commissioner of the Court of Claims when the matter seems unduly complex and necessitates a judicial-type adversary proceeding which may be protracted, and which may have to be held in a location other than Washington, D.C. The threat of a Presidential veto of the pending private bill does not usually deter the committees unless there has already been such a veto and the bill is proposed for reconsideration. Assuming subcommittee and full Judiciary Committee approval, a private bill goes on the private calendar of the House or the regular calendar in the Senate. While these bills are usually passed by unanimous consent, there is a group of six duly designated objectors in the House—three members from each major political party—whose job it is to screen these measures. Two objections will kill a private bill. One objection will cause it to be passed over for later reconsideration. In the Senate, the Democratic and Republican Policy Committees screen reports on private bills for possible objection.

There is still the final hurdle of Presidential approval after approval by House and Senate. Presidential vetoes of private bills have been overridden only six times, and this has not happened since President Grover Cleveland's administration.⁸ Lack of general interest in a private bill makes it almost impossible to surmount a veto.

COMMITTEE RULES

As a result of many years of experience with thousands of private claims bills, the House Judiciary Claims Subcommittee has evolved 19 basic rules which constitute the frame of reference within which it considers such proposals. These principles are also generally respected by the Senate, which has not so formalized its standards for consideration of claims. The subcommittee holds regular weekly meetings. There are seven members and two staff lawyers. A quorum consists of four members. So far as pertinent here, these published rules may be summarized and paraphrased as follows:

* * * * *

Rule 4. No consideration shall be given to any bill until request is made by its author who shall file sufficient evidence in its support, and until the report of the Government department or office has been secured.

Rule 5. A bill may be considered either by the subcommittee or a special subcommittee of one or more members designated by the Chairman.

⁸ Berdhal, *The President's Veto of Private Bills*, 52 Pol. Sci. Q. 505, 508 (1937).

Rule 6. Presentation of oral evidence at hearings on private bills shall be limited to 15 minutes on each side, subject to modification by the chairman in his discretion.

* * * * *

Rule 8. The chairman is authorized to report favorably bills appropriating not more than \$500, when such bills are recommended for enactment by the Government department or office involved.

Rule 9. The subcommittee shall not consider any claim which accrued prior to January 1, 1952, unless it was favorably reported during the 89th Congress or finally disposed of by a court or Government agency.⁹

Rule 10. The subcommittee shall not consider any claim adversely reported or rejected by it except upon presentation of new or additional evidence disclosing a material change in the facts.¹⁰

Rule 11. The subcommittee shall not consider any bills which would make a substantive change in the treatment accorded pursuant to the Federal Employees' Compensation Act, as amended. The committee believes that if relief under the general law is inadequate the remedy must come by general law, not by enactment of discriminatory private legislation in selected cases. However, on a proper showing of good cause for failure to make a timely claim, the committee will consider waiver of the statute of limitations applicable to such claims.

Rule 12. The subcommittee shall not consider any claim for retirement benefits, compensation, pension, or gratuity by an employee of the Government, or a member of the Armed Forces or the Reserves, or by his dependents, when the retirement benefits, compensation, pension or gratuity to which such persons claims to be entitled is specifically covered by statutes, which apply in a uniform manner to all similarly situated individuals. To do otherwise would confer a special benefit or privilege on a claimant. Such bills would be discriminatory and would set the precedent for an unending stream of similar private legislation.

Rule 13. The subcommittee shall not consider any claim for injuries or damage, either to a member or to third persons, resulting from service in or activities by the National Guard maintained within the several states.¹¹

Rule 14. The subcommittee shall not consider any claim over which another tribunal, court or department has jurisdiction, until all remedies under such jurisdiction are exhausted.¹²

⁹ In accordance with established practice, the date is advanced 2 years at the beginning of each new Congress. The limit allows a period considerably longer than any statute of limitations enforced by the courts. The statute for the Court of Claims is 6 years in Tucker Act cases. 24 Stat. 505. Where a person is under legal disability or beyond the seas at the time the claim accrues, suit may be filed within 3 years after the disability ceases. 28 U.S.C. 2501. There is a 2-year statute of limitations on tort claims against the United States. 28 U.S.C. 2401. These claims are tried in the United States district court.

¹⁰ This is what a court would do. Newly discovered evidence is insufficient unless material. Materiality depends upon the facts.

¹¹ While the Federal Government assists in Guard maintenance and training, since it is a potential arm of federal forces, it is primarily a state organization. Article I, section 8, clause 16, of the Constitution. Claims arising from training activities may be settled administratively under the authority of 32 U.S.C. 715.

¹² Since Congress has provided the other forums, such as the Court of Claims, for adjudication of legal claims, it will insist that they be used. In many claims entertained by Congress, however, no other source of redress has ever existed. It is such claims that will command the attention of the Judiciary committees or be referred to the Chief Commissioner of the Court of Claims pursuant to 28 U.S.C. 1492, 2509, as amended in 1966 by Pub. L. 89-681. There have been a few exceptions to the committee rule which found their way to court on the grounds of good cause for failure to exhaust a mandatory administrative remedy. For examples, see *Adams v. United States*, 175 Ct. Cl. 288, 358 F. 2d 986 (1966); *Aurex Corp. v. United States*, 175 Ct. Cl. 1 (1966); *Chicago School of Automotive Trades v. United States*, 167 Ct. Cl. 106 (1964).

Rule 15. The subcommittee shall not consider any claim approved by the Congress and vetoed by the President, except upon a material change in the facts or written evidence that administration disapproval has been withdrawn, and this rule may be waived only upon order of two-thirds of the subcommittee present and voting.¹³

* * * * *

Rule 17. The subcommittee shall not consider any claim for retirement benefits, compensation, pension, or gratuity under the Railroad Retirement Act when it has been considered on its merits and disallowed, or otherwise interferes with the provisions and compensation of that Act, except bills to waive the limitation of time.

Rule 18. The restrictions of the foregoing paragraph also apply to claims bills for benefits under the Social Security Act.

* * * * *

The foregoing and other rules of House Judiciary Subcommittee No. 2, which has jurisdiction over claims, are available in printed form from the committee. They are founded squarely upon statute, 60 Stat. 831, and the rules of the House of Representatives itself. Rule XXII, clause 2. They also cite the pertinent statutes dealing with claims against the United States. What has been said here might suggest that Congress has a rigid, unsympathetic attitude toward private bills. This is not the fact. Since the formation of the Union, Congress has been busy dealing with such claims. At various stages of our history, the burden has been overwhelming. This occasioned the creation of the Court of Claims in 1855 and its gradual evolution as the principal forum for adjudication of legal claims against the United States.¹⁴ Equitable claims are now the province either of the Congress itself, in the first instance, or by reference of one House to the Chief Commissioner of the Court of Claims for findings and a recommendation, with final decision being reserved to Congress on the payment of an equitable claim by private law. Congress has not only delegated to the Court of Claims and to the U.S. district courts the authority to enter final judgments on legal claims against

¹³ President Eisenhower vetoed a private bill for relief of several citizens who claimed their lands were damaged by floods caused by activities of the Fish and Wildlife Service. The President felt that the Government had not been given adequate opportunity to present its side of the matter to Congress and that the problem should be referred to the Court of Claims. Congress, by special jurisdictional act, then conferred jurisdiction upon the court to determine whether there was any legal or equitable claim for alleged losses, notwithstanding the statute of limitations. After trial, the petition was dismissed, it being found that the flooding was not the Government's fault, but due to weather, topography, and other causes. *Anderson v. United States*, 147 Ct. Cl. 691, 174 F. Supp. 945 (1959).

¹⁴ 10 Stat. 612 (1855); 12 Stat. 765 (1863); 14 Stat. 9 (1866); 22 Stat. 485 (1883); 24 Stat. 505, 507 (1887); 43 Stat. 964 (1925). Also, *Court of Claims Symposium*, 55 GEO. L.J., Nos. 3-4 (1966-67); Richardson, *History of Court of Claims*, 17 Ct. Cl. 3 (1882).

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." [28 U.S.C. 1491.] The Court of Claims has exclusive jurisdiction of patent and copyright infringement claims against the United States pursuant to Titles 10, 22, 28, 35, and 42 of the United States Code. The bulk of the court's docket consists of tax refund suits, contract claims, military and civilian pay cases, transportation and taking cases, in that order. It has appellate jurisdiction over the Indian Claims Commission.

The only relief the court can grant is a money judgment. It does not have the power to grant equitable relief, such as by injunction or specific performance. However, as an incident to a money judgment it will reform a contract or require conveyance of an easement. Schwartz & Jacoby, *Government Litigation—Cases and Notes* 189 (1963).

The Court of Claims has no jurisdiction over claims between private parties. *Rolls-Royce Ltd. v. United States*, 176 Ct. Cl. 694, 364 F. 2d 415 (1966).

the United States,¹⁵ it has granted Executive agencies broad authority to settle claims administratively.¹⁶ It is only where, for one reason or another, such as absence of or a limitation on the delegation of power to settle, or an alleged abuse of discretion by the administrative officer, that the Congress comes into the picture with a private law for direct relief or an act conferring special jurisdiction upon the Court of Claims to dispose of a claim or, in equitable claims, a reference to the Chief Commissioner of the court by simple resolution of either House.

As a practical matter, does this extensive machinery for disposing of claims by delegated authority leave much for Congress itself? The answer will always be in the affirmative. It is just not possible to anticipate every situation that can give rise to a claim in a nation of 200 million citizens who have ever-increasing relations with their Government and with the Government itself engaged in unnumbered sorts of activities world-wide. However, it is not the basic intention of Congress to grant gratuities. When the Court of Claims or Judiciary Committees have found neither a legal nor an equitable claim, but have concluded that any payment Congress would make on the facts found would be a "gratuity," this ends the matter adversely to the

¹⁵ Except in tax refund suits, the jurisdiction of the District Courts, to the extent it is concurrent with the Court of Claims, is limited to claims not in excess of \$10,000, 28 U.S.C. 1346. Claims for larger amounts must be brought in the Court of Claims. The rules of the latter court, although it has a nationwide jurisdiction, are essentially similar to those for civil procedure in the District Courts. However, the commissioners of the court hear the cases, as do the District judges. They use their own or the district court courtrooms throughout the country and sit without juries. Cases are tried where most convenient to the parties. The Attorney General, Department of Justice, defends the Government. The plaintiff furnishes his own lawyer or represents himself. The commissioner's findings of fact and opinion on the law can be reviewed by the seven judges of the court, on request for review. Their judgment is final, subject only to certiorari by the Supreme Court. Congress pays the judgments as a matter of course on legal claims. 28 U.S.C. 2517 (1964). If the judgment is for less than \$100,000 it is paid by the General Accounting Office. The writer could find only one instance of a veto of a bill for payment based on a decision of the court in a congressional reference case. *Catalina Properties, Inc. v. United States*, 158 Ct. Cl. 205, 305 F. 2d 380 (1962). Plaintiff's principal, but not sole, stockholder was a "bookie." The court recommended that Congress pay plaintiff \$29,425, being the amount of rentals found lost by reason of inaction by the Government after filing a tax lien against plaintiff's hotel. The loss of rentals was caused by the Government's refusal to let the tenants pay plaintiff and failure of the Government to collect the rents itself. President Kennedy said that the primary beneficiary would be the bookmaker whose fraudulent evasion of taxes caused the levies. Congress passed the bill again and it was vetoed by President Johnson who agreed with his predecessor's reasoning. H. R. Rept. No. 224, 88th Cong., 1st Sess. (1963); S. Rept. No. 964, 88th Cong., 2d Sess. (1964). Neither President made any reference to the rights of other stockholders.

¹⁶ An example of this arises under the standard Government construction contract's Disputes clause, pursuant to which the Government's contracting officer is given authority to decide all disputes arising under the contract, subject to appeal by the contractor to the head of the department, who is represented by a board of contract appeals. Court review of the decision, except in breach of contract claims, is then limited to review of the administrative record under the standards of the Wunderlich Act, 68 Stat. 81 (1954), 41 U.S.C. 321, 32 (1958). *United States v. Anthony Grace & Sons*, 384 U.S. 424 (1966); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966). See also, Kelly, *Accord & Satisfaction—Should this Solution Always be Available in Government Contracts?* 8 AF JAG L. Rev. (No. 5), Sep-Oct 66; Burns, *The Trial Attorney*; *HO AFLC*, 7 AF JAG L. Rev. (No. 4), Jul-Aug 65. 7 AF JAG L. Rev. (No. 2), Mar-Apr 65, contains a collection of articles dealing with administrative settlement of Air Force claims. See also, generally, Powers, *The Military Personnel Claims Act*, *ibid.*, together with 10 U.S.C. 2731, *et seq.*, and Air Force Manual 112-1, 24 February 1967, and 31 U.S.C. 241, as amended by Pub. L. 89-185, increasing the ceiling on administrative settlements to \$10,000. Pertinent, also, is the Federal Claims Collection Act of 1966, Pub. L. 89-508 (80 Stat. 308, 309) 31 U.S.C. 951, 952, 953, and its implementing regulations, 31 Fed. Reg. 13381-85, which do not appear to authorize administrative suspension or termination of claims by the criteria of equity and good conscience. Admiralty claims by and against the United States are treated in 10 U.S.C. 4802, 4803, 7622, 7623, 9802, 9803. It is also relevant to note that the Federal Tort Claims Act, 28 U.S.C. 2671-80, provides a broad area of jurisdiction in the Federal courts over claims which before enactment of said act were proper subjects for private bills now banned by law. 60 Stat. 831. The act also broadly authorizes administrative adjustment of claims arising from negligent or wrongful acts of Government employees acting within the scope of their employment. 28 U.S.C. 2672, as amended by Pub. L. 89-506 (80 Stat. 306) 1966. Representative statutes authorizing administrative settlements by specific Government agencies include: NASA, 42 U.S.C. 2473 (b) (13); AEC, 42 U.S.C. 2207; State Department, 5 U.S.C. 170g (f); Peace Corps, 22 U.S.C. 2509(b); Foreign Claims Settlement Commission, 50 U.S.C. App. 2001-17; United States Coast Guard, 14 U.S.C. 645.

claimant.¹⁷ Perhaps the semantics here are not entirely precise. But, they have well served the purpose of the Congress in its evaluation of these matters.

CONGRESSIONAL REFERENCES

When Congress decides it wants a private claim evaluated by judicial methods in an adversary proceeding, it has made a decision in accord with its policy expressed as follows:¹⁸

* * * general legislation, where feasible, is preferable to private relief legislation, * * * Congress should exercise restraint in the utilization of this legislation, referring claims for private relief to the chief commissioner of the Court of Claims only when complex issues of fact must be resolved as a prerequisite for relief.

The reference, pursuant to 28 U.S.C. §§ 1492 and 2509, is circumscribed in the following statutory language:

Section 2509(c). The trial commissioner to whom a congressional reference case is assigned by the chief commissioner shall proceed in accordance with the applicable rules to determine the facts, including facts relating to delay or laches, facts bearing upon the question whether the bar of any statute of limitation should be removed, or facts claimed to excuse the claimant for not having resorted to any established legal remedy. He shall append to his findings of fact conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if, any, legally or equitably due from the United States to the claimant.

Fairly definite and reliable doctrines have developed in the congressional reference field. The Court of Claims has handled over 100 such cases since World War II. While numerically these cases thus represent only a small part of its total caseload, the complexity, importance and amount of money involved in such cases are often significant. Such cases have represented a complete cross section of the types of cases the court handles when they fall within its general jurisdiction. Before making specific reference to some of these cases and the doctrines they represent, brief comment may be helpful concerning procedure in these cases.

The rules to be followed are generally those applicable to other cases in the court. (See 28 U.S.C. App. 6204 (1964 ed.)) The court's rules have been adopted to the extent feasible by two general orders entered by the Chief Commissioner and which are sent to claimants or their attorneys when either House of Congress files with the Clerk of the court a resolution or reference.¹⁹ In brief, the claimant must file a petition which will be answered for the Government by the appropriate Assistant Attorney General. The requirements of content and style of petition, answer, reply, and counterclaim, if any, are set forth in the rules and orders, and the time therefor and number of copies are designated. Papers are not captioned as *In the United States Court of Claims* but as *Before the Chief Commissioner of the United States Court*

¹⁷ Where the court has found a legal right to recover in a congressional reference case it has entered judgment. Where there is no legal right but the court has been satisfied that there are equitable grounds for recovery it has so recommended and Congress has paid. Although reserving its right to disagree with the court, Congress has, almost without exception, agreed. Where there is neither a legal nor an equitable right to recover, but any payment would be a pure gratuity, the court has customarily declined to make a recommendation for payment, as payment of a gratuity would be within the sole discretion of Congress. When the court did not follow this rule and recommended payment of a gratuity to be fixed by the Veterans Administration, in *Torti v. United States*, 135 Ct. Cl. 214 (1956), Congress refused to approve the recommendation. However, Congress agreed to what appears to be a gratuity recommended in *Froman v. United States*, 157 Ct. Cl. 661 (1962), discussed in note 33 *infra*. Research discloses no other known cases where the court overstepped the rule. Cf. *Columbia Hospital v. United States*, *supra* note 2.

¹⁸ S. Rept. No. 1643, 89th Cong., 2d Sess. 5 (1966).

¹⁹ 176 Ct. Cl. xxxi (1966). For a perceptive discussion of the practical difficulties of implementing the statute by new rules see 55 Geo. L.J. 397, 418-19 (1966).

of Claims in Congressional Reference Case No. However, the Clerk's office and all facilities and personnel of the court are made available to the extent necessary for the filing and processing of these reference cases. This is mandatory by the statute.²⁰

When the pleadings are complete, the case proceeds much as any other through discovery, pretrial, trial, the submission of requested findings and briefs, and decision. Thereafter, a review panel of three commissioners sits in appellate review of the trial commissioner's determination. The review panel takes the place formerly occupied by the judges of the court in congressional reference cases and still occupied by them on all other types. Oral argument is afforded by the panel upon exceptions to the trial commissioner's findings and conclusions. The decision of the review panel is transmitted to the House of Congress referring the claim. When Congress concurs in the recommendation it is by a private law enacted to pay the plaintiff. If the recommendation is adverse, the matter is concluded. The new congressional reference statute specifically provides that (none of the rules, rulings, findings, or conclusions authorized by this section shall be subject to judicial review.²¹ In other words, the commissioners of the court are an arm of the Congress for the handling of these cases and there is no appeal from them except to Congress itself.

Filing fees are the same as for other cases but the parties are saved the expense of printing their papers. They may be produced by mimeograph, multilith, typewriter, or a xerox-type process.

Procedurally, a final note of caution is necessary. Plaintiffs sometimes have assumed that when Congress sends a congressional reference case to the court or commissioners it has decided liability in favor of the claimant and all that remains is for the judicial authorities to determine the damages. Nothing could be farther from the truth or the intent of Congress. By such action, Congress intends only to afford an impartial and independent forum for determination of the merits of a complex claim by judicial methods.²²

REFERENCE DOCTRINES

The principal doctrine running through all congressional reference cases is that there must be a clear equitable reason, such as mutual mistake, frustration, or impossibility of performance, to soften the legal result, and as a rule, this reason must be stronger in times of war than at other times because sacrifices in wartime are the usual rather than the exceptional.²³ Some fault or omission on the part of the United States must usually supply the foundation for an equitable claim, and it is plaintiff's burden to show this dereliction.²⁴ So, where plaintiff's own fault or negligence contributed to his loss he is likely

²⁰ 28 U.S.C. 2509(g). Pub. L. 89-681 (1966).

²¹ 28 U.S.C. 2509(b).

²² A jurisdictional act will not be construed to confess liability unless that intention is clearly expressed *California v. United States*, 127 Ct. Cl. 624, 119 F. Supp. 174 (1954), cert. denied, 347 U.S. 1016; *Zephyr Aircraft Corp. v. United States*, 122 Ct. Cl. 523, 104 F. Supp. 990 (1952), cert. denied, 344 U.S. 878; *Hempstead Warehouse Corp. v. United States*, 120 Ct. Cl. 291, 305, 98 F. Supp. 572, 573 (1951).

²³ *S.N.T. Fratelli Gondrand v. United States*, 166 Ct. Cl. 473, 484 (1964); *Chicago School of Automotive Trades v. United States*, *supra* note 12 at 116; *Moorland Court, Inc. v. United States*, 174 Ct. Cl. 810, 818-19, 357 F. 2d 362, 367 (1966); *J. A. Zachariassen & Co. v. United States*, 136 Ct. Cl. 63, 70, 141 F. Supp. 908, 912 (1956); *Gorham v. United States*, 127 Ct. Cl. 750, 770, 119 F. Supp. 409, 420-21 (1954); *Electric Ferries, Inc. v. United States*, 137 Ct. Cl. 400, 408 (1957); *Matson Nav. Co. v. United States*, 135 Ct. Cl. 526, 535, 141 F. Supp. 929, 934-35 (1956); *cf. Aurex Corp. v. United States*, *supra* note 12.

²⁴ *B Amusement Co. v. United States*, 148 Ct. Cl. 337, 180 F. Supp. 386 (1960); *Krueger v. United States*, 161 Ct. Cl. 599 (1963); *Drake America Corp. v. United States*, 168 Ct. Cl. 318 (1964).

to lose his case.²⁵ But, defendant's fault and plaintiff's contributory negligence are not hard and fast rules in congressional reference cases.²⁶ It is the equity of the situation that really counts and it varies with the facts of a particular case. Sometimes when the fault of the parties seems equally divided, the loss has been divided equally.²⁷ Close questions of causation are often decided in favor of the plaintiff and the level of proof is generally less than necessary in a court of law. Although there are no juries in these suits against the United States, a commissioner (or the court in the past) often must make what amounts to a "jury verdict" in arriving at the damages.²⁸

A recurring theme in congressional reference cases is one in which the Government has received a benefit by reason of the claimant's efforts and expenditures and for which the Government, in good conscience, ought to pay.²⁹ A slight variation of that theme would be where the Government has a full legal right to retain money paid to it under a contract, such as a deposit, but would sustain no loss if it returned the money to the claimant.³⁰ However, if the benefit was received under a contract and the Government has paid the full contract price, such payment is usually considered to be fair consideration for the benefits received.³¹ As in equity matters generally, however, the claimant must come seeking relief with "clean hands." If he has, for instance, obtained a contract by the use of influence or procedures barred by statute, he cannot get relief.³²

It has been noted, heretofore, that the rules of the House Judiciary Claims Subcommittee prohibit consideration of claims that would, if allowed, give preferential treatment at variance with established statutes which apply in a uniform manner to all similarly situated individuals. Such statutes include the Federal Employees' Compensation Act, the Railroad Retirement Act, the Social Security Act, and the various laws providing retirement benefits, compensation, pensions and gratuities for members of the Armed Services. To allow such claims would open the floodgates for similar private legislation. Congress has, on rare occasions, referred such claims but, with one out-

²⁵ *Teutsch v. United States*, 153 Ct. Cl. 86, 92, 288 F. 2d 920, 923-24 (1961); *O'Donnell v. United States*, 166 Ct. Cl. 107 (1964); *Kraemer Mills, Inc. v. United States*, 162 Ct. Cl. 367, 319 F. 2d 535 (1963); *F. & M. Schaefer Brewing Co. v. United States*, 146 Ct. Cl. 629, 632, 175 F. Supp. 180, 181-82 (1959).

²⁶ *Rumley v. United States*, 169 Ct. Cl. 100 (1965); *Town of Kure Beach v. United States*, 168 Ct. Cl. 597, 622-23 (1964).

²⁷ *Cuyahoga County, Ohio v. United States*, *supra* note 4 at 318, 294 F. 2d at 781; *Central R.R. Co. of N.J. v. United States*, 125 Ct. Cl. 562, 576, 113 F. Supp. 457, 458-59 (1953); *Nash v. United States*, 141 Ct. Cl. 135, 142 (1958).

²⁸ *Todd v. United States*, 155 Ct. Cl. 87, 98, 292 F. 2d 841, 847 (1961); *Hipkins v. United States*, 124 Ct. Cl. 708, 111 F. Supp. 274 (1953). Lost profits are often too speculative as a basis for an award. There must be "well grounded proof that they in all probability would have been made" and it must be possible to estimate them with a "fair degree of accuracy." *Aurex Corp. v. United States*, *supra* note 12; *Chicago School of Automotive Trades v. United States*, *supra* note 12; *Huntley v. United States*, 133 Ct. Cl. 226 (1955).

²⁹ *Gay St. Corp. v. United States*, 130 Ct. Cl. 341, 350, 127 F. Supp. 585, 590-91 (1955); *Palmer-Bee Co. v. United States*, 142 Ct. Cl. 485, 490 (1958); *Clavier v. United States*, 139 Ct. Cl. 98, 112, 153 F. Supp. 451, 458-59 (1957); *Schutt Constr. Co. v. United States*, 173 Ct. Cl. 836, 844-45, 353 F. 2d 1018, 1023 (1965); *Smelcer v. United States*, 130 Ct. Cl. 510, 511-12 (1955).

³⁰ *Overseas Nav. Corp. v. United States*, 131 Ct. Cl. 70, 77, 129 F. Supp. 206, 210 (1955).

³¹ *Drake America Corp. v. United States*, *supra* note 24 at 331.

³² *Eglin Manor, Inc. v. United States*, 150 Ct. Cl. 143, 153, 279 F. 2d 268, 274 (1960).

standing exception, they have failed.³³ The Court of Claims has found and concluded that such payments would be gratuities and, as such, Congress has refused to pay them.

Congress is frequently called upon to waive the bar of the Statute of Limitations. The House subcommittee rules make allowance for such claims upon a showing "of good cause." Such claims have sometimes been referred to the Court of Claims which has done equity and recommended waiver of the bar if it has not been waived in the reference itself. Good cause has been found where the Government's administrative consideration of the claim was slipshod and desultory, thereby contributing to the delay which caused the damage; where the claimant has relied on Government advice to his detriment; where he was not sleeping on his rights because justifiably relying on others; where the Government has been unjustly enriched; and where the failure to proceed in timely fashion was the result of incapacity.³⁴ Where "good cause" does not exist the court has not been willing to waive the bar when considering the claimant's equitable claim.³⁵

The doctrine of *res judicata* usually prevents a claimant from recovering on his legal claim but this has not prevented the court from going on to consider the merits of the case where the question of an equitable claim could not have been before the court in previous actions.³⁶ While Congress has usually felt that a party should have no more than one day in court, in exceptional cases which involve unusual hardship or which Congress feels were not adequately litigated, the claimant has been referred to the Court of Claims and, in some in-

³³ Here are three typical examples and the exception: (1) Plaintiff, a veteran, sought disability retired pay for a service-connected injury not found disabling at time of separation from active service and for which he was receiving benefits from the Veterans Administration. No errors by the Correction Board were alleged. Recovery denied. *Stone v. United States*, 160 Ct. Cl. 128 (1963). (2) A suit for damages for alleged malpractice by Air Force surgeons. Recovery denied. The court found no malpractice but said that under the Federal Tort Claims Act the United States would not be liable for such negligence in any event. *Mackie v. United States*, 172 Ct. Cl. 393 (1965); cf. 28 U.S.C. 2672 (1964). (3) Plaintiff, employee of the Army Exchange Service, suffered personal injuries when assaulted in Germany after working hours. Injuries incurred not in the course of employment are barred by the Federal Employees Compensation Act and claims arising in a foreign country are barred by the Federal Tort Claims Act. Recovery denied. *Elmers v. United States*, 172 Ct. Cl. 226 (1965). The extraordinary exception to the precedents was in the case of *Froman v. United States*, *supra* note 17. Plaintiffs, three civilian entertainers, were seriously injured along with others in a USO troupe (23 were killed) in the accidental crash of a commercial airline plane at Lisbon while en route voluntarily to entertain troops in 1943. Their transportation was paid by the Federal Government. Although not Government employees they were each paid approximately \$24,000 by private law, payments being what they would have received under the Federal Employees' Compensation Act of 1916 had they been Federal employees injured in the scope of employment. Plaintiffs sought additional relief under the 1949 amendments to said act. In the meantime, they had also received settlements from the airplane company, payments from their sponsors, and substantial contributions from friends and the public. The parties stipulated that there was no legal liability by the United States and the Senate referred the claims to the Court of Claims. The court recommended they each be paid an additional \$20,000 and this was done. Prior to the crash, Miss Froman's largest annual income was \$36,692. Partly due to the publicity about the accident, her income, 1944-60, was \$1,450,000. Whitaker, *Judge*, dissenting, said that had plaintiffs been Government employees they would have received no more than given them in the first instance and that the decision was a negation of the principle, "Equal justice to all and special privileges to none." Under the circumstances, the payments appear to be gratuities and in violation of the rules and precedents, *supra*.

³⁴ *S.N.T. Fratelli Gondrand v. United States*, 1966 Ct. Cl. 473 (1964). The related doctrine of laches, on the part of plaintiff, will not bar his claim where no prejudice has been done defendant by the delay, but laches may bar interest in a taking case. *Todd v. United States*, 155 Ct. Cl. 87, 292 F. 2d 841 (1961).

³⁵ *Group v. United States*, 165 Ct. Cl. 612 (1964); *Ralph Feffer & Sons v. United States*, 66 Ct. Cl. 506 (1964); *Galen H. Clark Packing Co. v. United States*, 158 Ct. Cl. 93 (1962); *Fidelity Trust Co. v. United States*, 101 Ct. Cl. 831 (1944). Compare *Abbott v. United States*, 146 Ct. Cl. 272, 175 F.Supp. 917 (1959), where the resolution of reference waived the statute of limitations. *Dickson v. United States*, 159 Ct. Cl. 185 (1962), was a claim for disability retired pay which had been denied by appropriate military review boards and by the Board for Correction of Military Records. The disability was service-connected and the Court of Claims said plaintiff would be entitled to recover but for the 6-year statute of limitations. The reference statute, 28 U.S.C. 2509, authorized the court to make a recommendation for removal of the bar but it did not do so, identifying no good cause for such recommendation. The court's opinion, however, was equivocal and said that, from any recovery Congress might allow, payments made to plaintiff by the Veterans Administration should be deducted. Congress waived the statute of limitations, authorized the deduction, and paid plaintiff by Priv. L. 88-215, 88th Cong. (1964). The Air Force recommended a veto, saying that waiver of limitations on a claim 18 years old would set an undesirable precedent, but the recommendation was not accepted. See generally, *Private Bills in Congress*, 79 HARV. L. REV. 1684, 1695 (1966).

³⁶ *North Counties Hydro-Elec. Co. v. United States*, 170 Ct. Cl. 241, 248-49 (1965); *Rumley v. United States*, 169 Ct. Cl. 100, 108 (1965); *Creek Nation v. United States*, 168 Ct. Cl. 483, 488 (1964).

stances, has been able to recover.³⁷ A similar rule applies to the doctrine of collateral estoppel. That doctrine will not prevent determination of the facts of an equitable claim by a *de novo* proceeding, but it may bar recovery if the facts produced in a *de novo* trial are the same as in the administrative record considered by another court which had held against plaintiff. In such a situation plaintiff has not shown that he was hurt by failure to grant him a *de novo* trial in the earlier litigation; thus he has not shown an equitable right to recover on that ground.³⁸

The existence of a release will not automatically preclude an equitable claim. In its determination of the effect of a release on such a claim the commissioners and the court have gone beyond the traditional grounds for avoiding such an instrument, *i.e.*, mutual mistake, duress, *etc.*, and have looked into all the circumstances which gave rise to the release. But, it is a rare situation in which a valid release can be ignored. Such a situation was found where a general release did not contemplate disposition of the matter in issue.³⁹

Under the Federal Tort Claims Act, a tort to be compensable must have been committed by a government employee acting within the scope of his employment or "in line of duty." 28 U.S.C. 2671. In the several congressional references involving this act it has not been found necessary to waive the requirement of the traditional "scope" doctrine. One celebrated congressional reference case involved the death of 19 members of the United States Navy Band who were killed in a crash of their plane while on an official tour in South America. Under the Federal Tort Claims Act the United States is not liable for injuries sustained by servicemen while on active duty, due to the negligence of others in the Armed Forces, *Feres v. United States*, 340 U.S. 135 (1950), nor does the Act apply to claims arising in a foreign country. 28 U.S.C. 2680(k). (See note 33, *Mackie v. United States*.) However, the court found that it was within the scope of the drum major's regular duties to distribute flight insurance forms prior to flights and that he had negligently failed to do so. Recovery was recommended and allowed within the concept of equity as applied in congressional reference cases.⁴⁰ However, in a case where some drunken servicemen blew up and set fire to the Royal Flush Bar and Grill on Lenox Avenue in New York City and injured some patrons with stolen hand grenades, and the Government was not shown to have been in any way negligent in the matter, equitable recovery was denied.⁴¹ The servicemen were clearly on a frolic of their own and not acting "within the scope of their employment."

³⁷ *Georgia Kaolin Co. v. United States*, 145 Ct. Cl. 39 (1959). Plaintiff recovered \$22,537 in the District Court when he established that the Army which had leased his land for a firing range had not, as agreed, restored it but had left it littered with buried, unexploded 105 mm. artillery shells. Dissatisfied with the amount of his judgment he was able to get a congressional reference and another trial. The Court of Claims recommended \$105,000 damages as representing the loss in market value of the land and its cost of restoration, but said that the amount previously awarded should be deducted. Congress agreed. 73 Stat. A. 103.

³⁸ *North Counties Hydro-Elec. Co. v. United States*, 170 Ct. Cl. 241 (1965); *Fairbank v. United States*, 164 Ct. Cl. 1 (1964). But, collateral estoppel is a good defense against a counterclaim by the Government. *Adams v. United States*, 175 Ct. Cl. 288, 300, 358 F. 2d 986, 993 (1966). Since a counterclaim is a legal defense, commissioners of the Court of Claims cannot enter a final judgment upon it. However, they can reduce the amount of recovery recommended for plaintiff by the amount of the counterclaim, if they think it is a good one, and advise Congress thereon so that a later suit by the Government would fail. Cf. *Maco Warehouse Co. Cal. v. United States*, 144 Ct. Cl. 538, 169 F. Supp. 494 (1959).

³⁹ *Rocky River Co. v. United States*, 169 Ct. Cl. 203, 207-08 (1965); *Harvey-Whipple, Inc. v. United States*, 169 Ct. Cl. 689, 699-700, 342 F. 2d 48, 53-54 (1965).

⁴⁰ *Armiger v. United States*, 168 Ct. Cl. 379, 339 F. 2d 625 (1964).

⁴¹ *Gordon v. United States*, 148 Ct. Cl. 31, 180 F. Supp. 591 (1960).

CONCLUSION

Hundreds of examples could be given, but little more need really be said to illustrate the concepts which have won the approval of Congress or the Judiciary in private claims bills and congressional references. In the 89th Congress (which adjourned October 22, 1966) 22,483 bills and 4,083 resolutions were introduced. Out of this volume, 349 public laws and 214 private laws were enacted, many of the latter having nothing to do with claims against the United States. Annually for several years past, only a fraction of the private claims bills have required adversary, judicial processing. A backlog of potential references has been gathering as the Court of Claims has refused to accept any such cases since 1962 when the Supreme Court said it should not do so.⁴² Insufficient time has elapsed, since Congress in 1966 revised a substitute method for judicial processing relying only upon the court's commissioners, to determine how extensively they will be used in these matters or whether their approach will differ in any material way from the precedents which have been described above. There seems to be no reason to assume a difference. The umbilical cord between Congress and a branch of the Judiciary it conceived for a specific purpose over 100 years ago has simply been restored. The commissioners have been hearing such references since the first one was appointed in 1925 and the only new element here is that, under supervision of the Chief Commissioner, they will now provide their own appellate review and Congress will receive their recommendations directly, by-passing the judges of the court.

The overall volume of private claims bills and congressional references, when contrasted to the many thousands of overpayment claims and other claims annually asserted against the Government, bears eloquent testimony to the effectiveness and fairness of the manner in which most of them are disposed of administratively by Uncle Sam's departments and agencies. But, there will always be the unusual and closely contested claims, those suggesting need for an equitable exception to the general law, and claims which an agency is simply not authorized to adjust or will not for policy reasons. It is in this area that the sovereign has reserved its right to exercise its conscience with measures for special relief. The touchstone for such relief is that of moral and honorable treatment in the broadest sense of equity, such as exercised by the ancient chancellors in equity centuries ago. To the extent that in dispensing such relief, Congress will be aided by an institutional check which assures restraint, absence of political pressures, and regularity of procedure and decision, it has now called upon the commissioners of the United States Court of Claims to carry on in the manner of their court which has merited the confidence of Congress, the President, and the Nation since 1855.

⁴² *Glidden Co. v. Zdanok*, *supra* note 6.