

**THE DECLINE OF THE COURT OF FEDERAL CLAIMS
IN *Nebraska Public Power District v. United
States*, 590 F.3d 1357 (Fed. Cir. 2010)**

The Tucker Act assigns to the Court of Federal Claims (CFC) jurisdiction over claims for money damages against the federal government.¹ As a result, the CFC traditionally had exclusive jurisdiction to hear contract claims against the government seeking more than \$10,000.² The Supreme Court began eroding that exclusivity, however, in its 1988 decision *Bowen v. Massachusetts*.³ The Court in *Bowen* authorized the district courts to hear any claim against the government for monetary relief so long as the pleadings characterized the claim as seeking “declaratory or injunctive relief” rather than “money damages.”⁴ Consequently, any plaintiff seeking past due sums from the government may avoid the CFC’s jurisdiction by casting his claim as one for an injunction ordering the government to pay, rather than as one for damages.⁵ Two plaintiffs with substan-

1. See 28 U.S.C. § 1491(a)(1) (2006) (“The United States Court of Federal 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.”).

2. See *Sharp v. Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986) (Scalia, J.) (“The sole remedy for an alleged breach of contract by the federal government is a claim for money damages . . . in the [CFC] under the Tucker Act . . .”). This exclusivity derives not from an affirmative congressional statement, but from the absence of an overlapping statutory grant to any other court. See *Bowen v. Massachusetts*, 487 U.S. 879, 910 n.48 (1988) (“[The CFC’s exclusive jurisdiction] is not based on any language in the Tucker Act granting such exclusive jurisdiction to the [CFC]. Rather, that court’s jurisdiction is ‘exclusive’ only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the [CFC].”).

3. *Bowen*, 487 U.S. 879.

4. See *id.* at 892–93 (construing the APA’s waiver of sovereign immunity for all claims against the United States for “relief other than money damages” to include claims for specific relief ordering the payment of money (quoting 5 U.S.C. § 702)).

5. See *id.* at 915–16 (Scalia, J., dissenting) (“It does not take much lawyerly inventiveness to convert a claim for payment of a past due sum (damages) into a prayer for an injunction against refusing to pay the sum, or for a declaration that the sum must be paid, or for an order reversing the agency’s decision not to pay.”); Subur-

tively identical claims may thus end up in different courts, merely because the form of their pleadings differs. *Bowen* has received significant criticism for its unnecessary formalism, which diminishes the CFC's exclusive jurisdiction.⁶ Consequently, some lower courts have construed it narrowly,⁷ but the Supreme Court has not overturned it.

Recently, the Federal Circuit again addressed the extent of the CFC's jurisdiction in *Nebraska Public Power District v. United States (NPPD II)*.⁸ Rather than continuing to limit the reach of *Bowen*, however, the court once more elevated form over substance to open a new front in the assault on the jurisdiction of the CFC. The court's decision allows courts other than the CFC to interpret contractual provisions whenever the construction of a statute influences the outcome of the contractual issues. Consequently, *NPPD II* enhances the ability of plaintiffs to forum shop while further diminishing the exclusive jurisdiction of the CFC.

The dispute in *NPPD II* arose out of the unique structure of the Nuclear Waste Policy Act of 1982 (NWPA),⁹ which provides for the development of a repository to store the nation's spent nuclear fuel.¹⁰ To that end, the NWPA established a series of deadlines for the Department of Energy (DOE) to complete intermediate steps toward the construction of a repository.¹¹ Con-

ban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116, 1124 (Fed. Cir. 2007) ("One consequence of the *Bowen* case has been to create a sort of cottage industry among lawyers attempting to craft suits, ultimately seeking money from the Government, as suits for declaratory or injunctive relief without mentioning the money.").

6. See, e.g., *Bowen*, 487 U.S. at 919 (Scalia, J., dissenting) (describing how one could characterize most of the suits on the CFC's docket as claims for specific relief, such that *Bowen's* reasoning could mean that "the [CFC] is out of business"); Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 604-05 (2003) (describing how other courts now routinely hear claims previously within the exclusive jurisdiction of the CFC); see also Michael F. Noone, Jr. & Urban A. Lester, *Defining Tucker Act Jurisdiction after Bowen v. Massachusetts*, 40 CATH. U. L. REV. 571, 588-90 (1991) (listing criticisms of *Bowen's* reasoning).

7. See Sisk, *supra* note 6, at 604.

8. 590 F.3d 1357 (Fed. Cir. 2010).

9. Pub. L. No. 97-425, 96 Stat. 2201 (1983) (codified as amended at 42 U.S.C. §§ 10101-10270 (2006)).

10. *Id.* § 111(b)(1).

11. See, e.g., *id.* § 112(a) (giving the DOE 180 days after passage of the NWPA to issue guidelines for choosing a repository site); *id.* § 112(b)(1)(B) (requiring the

gress did not, however, mandate a final deadline for the opening of the repository. Instead, it required the DOE to sign a standard contract with all utilities operating a nuclear power plant.¹² The NWPA only specified a final deadline for the program within the directions about the terms of contract, requiring that the standard contract provide for the removal of spent nuclear fuel “beginning not later than January 31, 1998”¹³ in return for the utilities’ obligation to pay fees into the Nuclear Waste Fund.¹⁴ Following a period of notice and comment rule-making, the DOE promulgated a standard contract with the required provisions,¹⁵ signed the contract with seventy-six nuclear utilities,¹⁶ and began to implement the statutory program.

But all did not go as planned. Complex environmental regulations, fierce litigation from communities near the proposed repository sites, and congressional apathy slowed progress to a crawl.¹⁷ By the mid-1990s, the DOE had given up hope of meeting the January 31, 1998 deadline.¹⁸ In an attempt to mitigate its potential liability to the utilities for breach of contract, the DOE issued an interpretation of the NWPA concluding that it had no statutory or contractual obligation to accept nuclear fuel so long as the repository was not in existence.¹⁹ Facing the prospect of receiving nothing for the billions of dollars they had

DOE to recommend three sites to the President by January 1, 1985); *id.* § 112(c)(1) (giving the President sixty days after the recommendation to approve or disapprove a recommended site).

12. *See id.* § 302(a) (authorizing the DOE to enter into the contracts); *id.* § 302(b)(1)(A) (preventing the Nuclear Regulatory Commission from licensing a nuclear utility which has not signed the standard contract).

13. *Id.* § 302(a)(5)(B).

14. *Id.* § 302(c).

15. *See* Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, 48 Fed. Reg. 16,590 (Apr. 18, 1983) (codified at 10 C.F.R. § 961.11 (2009)).

16. *Budgeting for Nuclear Waste Management: Hearing Before the H. Comm. on the Budget*, 111th Cong. 8 (2009) (statement of Michael F. Hertz, Deputy Assistant Att’y Gen., Civil Div., U.S. Dep’t of Justice) [hereinafter *Hertz Statement*].

17. *See* Annemarie Wall, *Going Nowhere in the Nuke of Time: Breach of the Yucca Contract, Nuclear Waste Policy Act Fallout and Shelter in Private Interim Storage*, 12 ALB. L. ENVTL. OUTLOOK J. 138, 175–83 (2007).

18. *See* Final Interpretation of Nuclear Waste Acceptance Issues, 60 Fed. Reg. 21,793, 21,794 (May 3, 1995).

19. *Id.* at 21,793–94.

paid to the fund,²⁰ several utilities immediately challenged the DOE's interpretation in the D.C. Circuit²¹ under the NWPA's jurisdictional provision, which provides for expedited review of the DOE's actions directly in the courts of appeals.²²

The litigation resulted in two significant victories for the utilities. First, the D.C. Circuit ruled in *Indiana Michigan Power Co. v. Department of Energy* that the NWPA imposed on the DOE an unconditional obligation to accept spent nuclear fuel by January 31, 1998.²³ The D.C. Circuit then enforced *Indiana Michigan* in *Northern States Power Co. v. U.S. Department of Energy* by issuing a writ of mandamus ordering the DOE "to proceed with contractual remedies in a manner consistent with NWPA's command that it undertake an unconditional obligation."²⁴ More specifically, the D.C. Circuit ordered the DOE not to invoke the standard contract's Unavoidable Delays clause,²⁵ which absolved a party of paying damages for breaches arising "out of causes beyond the control and without the fault or negligence of the party failing to perform."²⁶

Seventy-one utilities, including NPPD, subsequently filed separate damage claims for breach of the standard contract in the CFC.²⁷ The D.C. Circuit's mandamus order in *Northern States* initially removed the Unavoidable Delays defense and forced DOE to admit liability.²⁸ Litigation over the amount of damages has continued since 1998.²⁹ During pretrial oral argument in *Nebraska Public Power District v. United States (NPPD I)*, however, CFC Judge Francis Allegra questioned the validity of the D.C.

20. As of July 2009, the utilities had paid approximately \$17 billion into the Nuclear Waste Fund. *Budgeting for Nuclear Waste Management: Hearing Before the H. Comm. on the Budget*, 111th Cong. 5 (2009) (statement of Christopher A. Kouts, Acting Dir., Office of Civilian Radioactive Waste Mgmt., Dep't of Energy). The utilities often are able to pass these fees through to their customers, however. Milton R. Benjamin & Howard Kurtz, *Congress Passes Nuclear Waste Measure*, WASH. POST, Dec. 21, 1982, at A5 ("While utilities would be required to pay this fee, they could add it to customers' electric bills where public utility commissions permit.").

21. *Ind. Mich. Power Co. v. Dep't of Energy*, 88 F.3d 1272, 1273-74 (D.C. Cir. 1996).

22. See NWPA § 119(a)(1)(A), 42 U.S.C. § 10139(a)(1)(A) (2006).

23. *Ind. Mich.*, 88 F.3d at 1277.

24. *N. States Power Co. v. U.S. Dep't of Energy*, 128 F.3d 754, 760 (D.C. Cir. 1997).

25. *Id.*

26. 10 C.F.R. § 961.11, art. IX(A) (2009).

27. *Hertz Statement*, *supra* note 16, at 8.

28. See *id.* at 12.

29. *Id.* at 8.

Circuit's mandamus order in *Northern States*.³⁰ After additional briefing, he issued an opinion concluding that the D.C. Circuit's writ of mandamus was void and allowing the DOE for the first time to invoke the Unavoidable Delays defense.³¹

The court's decision to alter the course of the litigation after eight years rested on two grounds. First, the court held that the NWPA's jurisdictional grant to the courts of appeals did not extend to disputes about the standard contract,³² particularly those requiring interpretation of contractual provisions—an activity solely within the jurisdiction of the CFC.³³ Second, even if the D.C. Circuit did have jurisdiction, neither the NWPA nor the Administrative Procedure Act (APA) provided a waiver of sovereign immunity allowing a suit against the government to proceed in the courts of appeals.³⁴

The Federal Circuit accepted an interlocutory appeal,³⁵ decided to hear the case en banc,³⁶ and reversed in an 11-1 decision.³⁷ Writing for the majority, Judge Bryson rejected both grounds for the trial court's decision.³⁸ First, the court rejected the contention that the NWPA's jurisdictional grant did not extend to disputes about the standard contract.³⁹ Section 119 of the NWPA states that the courts of appeals shall have original jurisdiction to review "any final decision or action of [the DOE] under [Subtitle A of Title I]"⁴⁰—the subtitle regulating the development of a repository. The provisions relevant to the dispute in *Northern States*—those dealing with the formation and

30. Neb. Pub. Power Dist. v. United States (*NPPD I*), 73 Fed. Cl. 650, 655 (2006).

31. *Id.* at 674.

32. *See id.* at 660–61.

33. *See id.* at 663 ("[T]o the extent that the D.C. Circuit's mandamus writ departs from resolving the validity of the provisions of the Standard Contract and instead enforces particular interpretations thereof, it plainly encroaches upon this court's jurisdiction and thus exceeds whatever jurisdiction is granted by section 119 of the NWPA.").

34. *See id.* at 667–68.

35. Neb. Pub. Power Dist. v. United States, 219 Fed. App'x 980 (Fed. Cir. 2007).

36. Neb. Pub. Power Dist. v. United States, 335 Fed. App'x 42 (Fed. Cir. 2009) (per curiam).

37. Neb. Pub. Power Dist. v. United States (*NPPD II*), 590 F.3d 1357 (Fed. Cir. 2010).

38. Judge Bryson was joined by Chief Judge Michel and Judges Newman, Mayer, Lourie, Rader, Schall, Linn, Dyk, Prost, and Moore.

39. *NPPD II*, 590 F.3d at 1365–68.

40. NWPA § 119(a)(1)(A), 42 U.S.C. § 10139(a)(1)(A) (2006). Subtitle A of Title I does not mention the standard contract.

content of the standard contract—are in Section 302 of Title III, not Subtitle A of Title I.⁴¹ Nonetheless, the court cited legislative history to show that the contractual provisions were located outside Subtitle A of Title I only because of “pure happenstance.”⁴² To “correct” this mistake, the court invoked a recent case concluding that any matters in Title III “which relate to the creation of repositories” would be included in the jurisdictional grant under Subtitle A of Title I, as Congress surely intended them to be.⁴³ Here, these related matters included the formation of the standard contract, for Section 111(b) stated that a purpose of Subtitle A of Title I is “to establish a Nuclear Waste Fund”⁴⁴ and the contractual provisions in Section 302 “fill[] in the details” for the administration of the fund.⁴⁵ The court thus concluded that all of Section 302, including the January 31, 1998 deadline, had a sufficient relation to Subtitle A of Title I to be included in the jurisdictional grant.⁴⁶

The court also rejected the contention that the D.C. Circuit had infringed on the exclusive jurisdiction of the CFC over construction of government contracts, describing the D.C. Circuit’s proscription of the Unavoidable Delays defense as merely an “implementation of its statutory ruling.”⁴⁷ Federal Circuit precedent had already established that the D.C. Circuit had jurisdiction to decide whether the standard contract included all of the clauses Section 302 of the NWPA required.⁴⁸ It was only a small step from there to the conclusion that the D.C. Circuit also had jurisdiction to prevent the evisceration of these

41. *Id.* §§ 1, 302.

42. *NPPD II*, 590 F.3d at 1366 (quoting *Gen. Elec. Uranium Mgmt. Corp. v. U.S. Dep’t of Energy*, 764 F.2d 896, 903 (D.C. Cir. 1985)) (describing how the contractual provisions migrated from Title I to Title III without explanation during consolidation of two different bills in the House, and stating that it would be “inconceivable” that Congress could have thereby intended to remove contractual matters from the jurisdictional grant (quoting *Gen. Elec.*, 764 F.2d at 901–02)).

43. *Id.* at 1367 (quoting *PSEG Nuclear, L.L.C. v. United States*, 465 F.3d 1343, 1349 (Fed. Cir. 2006)).

44. NWPA § 111(b)(4).

45. *NPPD II*, 590 F.3d at 1366.

46. *Id.* at 1368. Finally, the court noted the general principle that any ambiguity should be resolved in favor of finding jurisdiction in the courts of appeals, as it is more efficient than finding jurisdiction in trial courts. *Id.* at 1366–67 (citing decisions).

47. *Id.* at 1365.

48. *Id.* at 1374 (quoting *PSEG*, 465 F.3d at 1350).

clauses through contractual interpretation.⁴⁹ Such action was, the court held, “equivalent to having omitted the clause . . . from the Standard Contract in the first place.”⁵⁰ The issue before the D.C. Circuit thus involved more than mere contractual rights, so it did not detract from the exclusive jurisdiction of the CFC over contractual disputes.⁵¹

On the second issue, the court found a waiver of sovereign immunity within the general waiver for judicial review of administrative actions in the APA,⁵² which applies only to “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.”⁵³ The court acknowledged that it was possible to read the modifier “for which there is no other adequate remedy” as applying to both special statutory review and final agency action.⁵⁴ The more natural reading, however, applied the modifier only to final agency action, as other courts had uniformly done.⁵⁵ Because the NWPA made the DOE’s action reviewable by statute, the APA’s waiver of sovereign immunity applied even though another adequate remedy was available in the CFC. The D.C. Circuit therefore possessed jurisdiction and its writ was valid.

Judge Dyk concurred, expressing his understanding that the majority opinion barred the government only from using the Unavoidable Delays clause to contest liability.⁵⁶ In his opinion, the government was thus still free to invoke the clause to avoid money damages.⁵⁷

49. *See id.* at 1375.

50. *Id.*

51. *Id.* (citing *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 609 (D.C. Cir. 1992)).

52. 5 U.S.C. § 702 (2006).

53. 5 U.S.C. § 704 (2006).

54. *NPPD II*, 590 F.3d at 1369–70.

55. *Id.* at 1370 (citing cases).

56. Judge Dyk was joined by Judge Linn.

57. 590 F.3d at 1376–77 (Dyk, J., concurring) (mentioning that the contract might allow other remedies, such as restitution). Reading the majority opinion to allow a damages defense under the Unavoidable Delays clause would establish *NPPD* as a pyrrhic victory for the utilities, who might then be shut out of any recovery. Given that the majority affirms an order expressly condemning the “DOE’s current [non-damages] approach toward contractual remedies,” *N. States Power Co. v. U.S. Dep’t of Energy*, 128 F.3d 754, 756 (D.C. Cir. 1997), however, the concurrence’s interpretation is unlikely to stick.

Judge Gajarsa, dissenting, objected to “the sheer mushy applesauce consistency of the majority opinion.”⁵⁸ The majority merited such criticism for its “cleverly worded interstitial attempt” to characterize the D.C. Circuit’s order as merely enforcing a statutory construction, while ignoring the reality that the order was affecting the remedy for the government’s breach of the standard contract.⁵⁹ Simply acknowledging this reality would show that the D.C. Circuit impinged on the exclusive jurisdiction of the CFC by moving beyond the jurisdictional grant of the NWPA, which was “entirely silent on the issue of contractual remedies.”⁶⁰

The dissent highlights that the dispute in *NPPD II* is one of form versus substance: Should one accept the D.C. Circuit’s insistence that its mandamus order is formally based on an interpretation of the NWPA? Or should one view the order as an interpretation of the standard contract, because it in effect resolves a dispute about the meaning of one of the contract’s terms? The majority resolved these questions by elevating form over substance and thus, in effect, allowing the adjudication of contractual issues outside of the CFC. The court therefore opened a new door to forum shopping.⁶¹ Just as plaintiffs after *Bowen* can avoid the CFC by characterizing money damages as specific relief, plaintiffs now can do the same by characterizing an issue of contract interpretation as one of statutory construction.⁶²

58. *NPPD II*, 590 F.3d at 1386 (Gajarsa, J., dissenting).

59. *Id.* at 1381.

60. *Id.* at 1382.

61. By doing so, the court directly contradicts its typical skepticism, developed in response to *Bowen*, of forum shopping through artful pleading. See *Suburban Mortgage Assocs., Inc. v. U.S. Dep’t of Hous. & Urban Dev.*, 480 F.3d 1116, 1124 (Fed. Cir. 2007) (“To thwart such attempted forum shopping, our cases have emphasized that in determining whether a plaintiff’s suit is to be heard in district court or the Court of Federal Claims, we must look beyond the form of the pleadings to the substance of the claim.”); *Consol. Edison Co. of N.Y. v. United States*, 247 F.3d 1378, 1385 (Fed. Cir. 2001) (“This court and its sister circuits will not tolerate a litigant’s attempt to artfully recast its complaint to circumvent the jurisdiction of the Court of Federal Claims.”).

62. For example, the utilities here could have brought their contract claims in the Court of Federal Claims initially without the prelude of the D.C. Circuit’s mandamus order. They therefore had the luxury of picking whichever court they thought most favorable. Any plaintiff seeking money damages on a contract will still ultimately have to bring a claim in the CFC, of course, but *NPPD II* establishes that the decisions of other courts about specific elements of that claim will now be binding in the CFC, making the CFC proceeding a mere formality.

NPPD II thus has the potential to reshape the jurisdictional landscape significantly by further diminishing the CFC's exclusive jurisdiction. The majority nonetheless failed to acknowledge the drastic implications of its decision,⁶³ nor did it find justification in the NWPA for such a large jurisdictional shift. One might argue that Congress invites forum shopping when, as in the NWPA,⁶⁴ it dictates some terms of a contract in a statute while leaving others open to agency discretion.⁶⁵ A careful examination of the NWPA, however, reveals that far from undermining the preexisting jurisdictional scheme, the NWPA actually presupposes and affirms it. Rather than engaging in this analysis and seeking congressional approval before enacting a significant jurisdictional change, however, the majority ignored several clear textual and structural cues demonstrating that Congress intended to protect the jurisdiction of the CFC rather than to leave it open to slow erosion by forum shopping.

The majority's first error arose in its mischaracterization of the trial court's opinion. According to the majority, the need to protect the CFC's jurisdiction provided an independent ground for the trial court's opinion, separate from its construction of Section 119.⁶⁶ In fact, the trial court had considered the jurisdictional exclusivity as a background norm against which to interpret the text of Section 119.⁶⁷ The majority's confidence that

63. See *NPPD II*, 590 F.3d at 1376 ("We are satisfied that the D.C. Circuit's order was confined to the issue of statutory interpretation and did not impermissibly invade the jurisdiction of the Court of Federal Claims . . .").

64. See NWPA § 302(a), 42 U.S.C. § 10222(a) (2006).

65. Of course, so long as Congress separates the adjudication of contract disputes from other claims against the government in the CFC, resolving jurisdictional issues in such hybrid situations will always be difficult. See generally Richard H. Fallon, Jr., *Claims Court at the Crossroads*, 40 CATH. U. L. REV. 517, 530–31 (1991) (discussing the future of the CFC).

66. See *NPPD II*, 590 F.3d at 1364 ("The trial court based its decision on three grounds. First, the court held that section 119 of the NWPA . . . did not give the D.C. Circuit jurisdiction . . . Third, and relatedly, the trial court held that the D.C. Circuit had improperly addressed contract interpretation issues that were within the exclusive jurisdiction of the Court of Federal Claims." (emphasis added)).

67. See *Neb. Pub. Power Dist. v. United States (NPPD I)*, 73 Fed. Cl. 650, 663 (2006). ("[T]o the extent that the D.C. Circuit's mandamus writ departs from resolving the validity of the provisions of the Standard Contract and instead enforces particular interpretations thereof, it plainly encroaches upon this court's jurisdiction and thus exceeds whatever jurisdiction is granted by section 119 of the NWPA." (emphasis added)).

it was “inconceivable”⁶⁸ that Congress would have intentionally removed Section 302 of the NWPA from the jurisdictional provisions in Section 119 results from its artificial bifurcation of the issue. When one considers Section 119 against a background norm of the CFC’s jurisdictional exclusivity, the purpose of excluding Section 302 is easy to explain: Section 302 deals with the standard contract, contractual issues are already within the exclusive jurisdiction of the CFC, and Congress did not want to infringe on this jurisdiction. Therefore, rather than dismissing the structure of the NWPA as “pure happenstance,”⁶⁹ the majority should have seen it as a reaffirmation of the unique purpose of the CFC.

Other provisions of the NWPA support the conclusion that Congress conceived of a contract as a unique policy tool serving different purposes than a statutory mandate, and deserving specialized judicial attention. A statute is an excellent tool for imposing an absolute deadline on an agency; indeed, the NWPA contains many such statutorily imposed deadlines.⁷⁰ Congress singled out only the January 31, 1998 deadline, mandating that it be put into a contract rather than mandating it directly. This special treatment suggests that it uniquely intended the January 31, 1998 deadline to be subject to the qualifications that can be imposed through the remedial scheme of a contract. Indeed, Section 302(a)(6), ignored by both the majority and the dissent, states as much through its command that the DOE “shall establish in writing criteria setting forth the terms and conditions under which [the] disposal services [mandated in Section 302(a)(5) to begin by January 31, 1998] shall be made available.”⁷¹ Congress thus expected that its contractual mandate would be modified by agency discretion,⁷² unlike the absolute statutory deadlines. It likely also expected a contract formed in part by agency discretion to be interpreted like all other such contracts—in the CFC.

68. *NPPD II*, 590 F.3d at 1365 (quoting *Gen. Elec. Uranium Mgmt. Corp. v. U.S. Dep’t of Energy*, 764 F.2d 896, 901–02 (D.C. Cir. 1985)).

69. *Id.* at 1366 (quoting *Gen. Elec.*, 764 F.2d at 903).

70. *See supra* note 11.

71. NWPA § 302(a)(6), 42 U.S.C. § 10222(a)(6) (2006).

72. The inclusion of the Unavoidable Delays clause in the Standard Contract is an example of the exercise of this discretion.

Rather than carefully parsing these provisions in an attempt to understand the statutory scheme, however, the majority dismissed the structure of the NWPA as a mistake. By neglecting the NWPA's guidance about the uniqueness of government contracts in Congress's jurisdictional scheme, the majority uncritically accepted the D.C. Circuit's characterization of its writ of mandamus as an interpretation of the statute. The case thus resulted in an empty formalism that facilitates artful pleading and excessive forum shopping.

Creative lawyers will likely find many opportunities for this type of forum shopping, including any situation in which statutory provisions influence the interpretation of the government contracts they authorize. The largest category of cases subject to such artful pleading are those dealing with federal grant programs, many of which require government agencies to enter contracts whose content has been established in part by statute.⁷³

To take one of many potential examples, in *San Juan City College v. United States* a private college alleged that the Department of Education had breached a contract, whose terms were dictated in part by the Higher Education Act, to provide financial aid funds.⁷⁴ The college sued in the CFC by alleging that the Department of Education breached the contract when it ceased paying funds that the college thought it was due.⁷⁵ After *NPPD II*, however, a plaintiff in the same situation could just as easily sue in a district court to challenge the agency's action as an invalid implementation of the statutory requirements for the contract.⁷⁶ Even if such a plaintiff could not obtain complete monetary relief in the district courts,⁷⁷ it could obtain a declara-

73. See *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985) ("Unlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." (citation omitted)).

74. 391 F.3d 1357, 1360 (Fed. Cir. 2004) ("Title IV student financial aid programs under the Higher Education Act must enter into 'a program participation agreement with the Secretary,' which 'shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with' numerous specific and detailed requirements the statute lists." (quoting 20 U.S.C. § 1094(a)).

75. See *id.* at 1359.

76. The college's complaint in fact included a second count alleging that the Department of Education had violated the Higher Education Act, although this second count did not motivate an attempt to sue outside the CFC. *Id.*

77. Under *Bowen*, the college could obtain the missed student loan payments that it alleged were past due funds in the district courts, so long as it cast its claim as

tory judgment of liability,⁷⁸ which, under *NPPD II*, would be binding on the CFC in its later adjudication of the contract. Other federal grant programs will now be open to similar forum shopping by plaintiffs.⁷⁹

The consequences of the court's decision in *NPPD II* will be grim. First, the DOE is now incapable of contesting its liability in a case that could cost the government as much as \$50 billion.⁸⁰ The DOE may deserve to lose on the merits, but its contentions about the applicability of the Unavoidable Delays clause deserve more than the one-page dismissal they received from the D.C. Circuit in *Northern States*, particularly when so much money is at stake.

The broader and more troublesome consequence of the court's decision, however, is the further erosion of the jurisdiction of the CFC. The potential benefits of placing the adjudication of all contract claims against the government in one court and thus building a single consistent body of government contract law are well known. Professor Joshua Schwartz argues, for example, that government contract law is unique because of the special considerations that arise when contracting with the sovereign.⁸¹ Generalist courts accustomed to normal contract disputes will not be able to strike an effective or consistent balance between treating the government as sovereign and treat-

one for injunctive relief ordering the payment, rather than for money damages. See *supra* text accompanying notes 3–5. The college also sought lost profits it would have earned had the Department of Education not forced it to close, *San Juan City Coll.*, 391 F.3d at 1359, however, which are difficult to characterize as a claim for equitable relief, and which the district courts under *Bowen* thus could not grant.

78. A savvy court that wished to foreclose any disputes about the validity of its order in the CFC would likely mimic the D.C. Circuit in *Northern States*, issuing a writ of mandamus ordering the government not to pursue any contractual defense to liability that would contradict the court's interpretation of the statute.

79. See, e.g., *Franconia Assocs. v. United States*, 61 Fed. Cl. 718, 731 (2004) (noting when adjudicating a dispute under a federal housing program that "[o]f course, unlike private contractual undertakings, the contracts here originated in legislation passed by Congress"); *Cuyahoga Metro. Hous. Auth. v. United States*, 57 Fed. Cl. 751, 761 (2003) (same).

80. *Hertz Statement*, *supra* note 16, at 8. The utilities estimate that damages in the spent nuclear fuel cases could run as high as \$50 billion, while the DOE estimates its liability at \$12.3 billion. *Id.*

81. Joshua I. Schwartz, *Public Contracts Specialization as a Rationale for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 863, 863 (2003) ("[T]he semi-specialization of the [CFC] in litigation arising from government contracts lends it uniquely a genuine potential to contribute to the salutary development of the law in this field.").

ing it as a typical party to a contract, especially when they deal with such cases only sporadically.

Not all commentators agree, of course. Some argue that an extra tribunal unnecessarily consumes resources, creates wasteful jurisdictional disputes, and leads to inefficient adjudication.⁸² Deciding which side has the better argument is irrelevant here, however. Even if abolishing the CFC is a good idea, the abolition should come through an act of Congress after full public debate, not through the slow erosion of the court's jurisdiction on account of the opaque decision of an appellate tribunal. By usurping Congress's role here, *NPPD II* may have given us the worst of both worlds: watering down the CFC's exclusive jurisdiction without abolishing the court itself. The decision will thus limit the benefits of the CFC's special focus on government contracts, but will also maintain the cost of operating an additional court and will increase wasteful jurisdictional disputes.⁸³

Moreover, insofar as *NPPD II* and *Bowen* rest on the same acceptance of form over substance in a plaintiff's description of contract claims, *NPPD II* unfortunately reaffirms the flawed reasoning of *Bowen*. Consequently, it represents a troubling reversal of the lower courts' tendency to read *Bowen* narrowly. The Federal Circuit has thus passed up a key opportunity to restore order to the jurisdictional scheme that Congress has established for suits against the government.

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82. See, e.g., Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 714, 751, 770-71 (2003) (pointing out the number of contract suits that are adjudicated elsewhere in the federal system, thus minimizing the benefits of specialization, and arguing that the CFC's docket could be distributed to the district courts at minimal additional cost).

83. The artful pleading that *NPPD II* invites will inevitably lead to more litigation as plaintiff's attorneys push the boundaries. Justice Scalia's comments in dissent in *Bowen* are just as applicable to the Federal Circuit's decision here: "Nothing is more wasteful than litigation about where to litigate, particularly when the options are all courts within the same legal system that will apply the same law. Today's decision is a potential cornucopia of waste." *Bowen v. Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting).

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