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Let the Government Contract: The Sovereign has the Right, and Good Reason, to Shed Its Sovereignty when It Contracts

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 SOVEREIGN HAS THE RIGHT, AND GOOD REASON,
 TO SHED ITS SOVEREIGNTY WHEN IT CONTRACTS

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I. The Problem: The Understandable but Misguided Judicial Instinct to Overprotect the Sovereign When It Acts in Its Contracting Capacity	2
II. Conflation and Considerable Confusion in the Application of the Three Distinct Legal Principles in the Context of Deciding Government Contract Disputes: The Presumption of Good Faith, the Duty of Good Faith and Fair Dealing, and the Sovereign Acts Doctrine	8
A. The Evolution of the Core Tenet in the Decisions of the Supreme Court: The Sovereign Has the Right to Contract and Shed Its Sovereignty to Pursue Commerce in the Marketplace	8
B. An Overview of the Principles That Govern the Rights and Obligations That the Government Enjoys in Its Sovereign Capacity Compared with Those It Enjoys in Its Contracting Capacity	15
1. Principle 1: The Presumption of Good Faith	17
2. Principle 2: The Duty of Good Faith and Fair Dealing, and Its Corollaries, the Duty to Cooperate and Not to Hinder	17
3. Principle 3: The Sovereign Acts Doctrine	18
C. Some Decisions of the Federal Circuit and Tribunals Below Have Created Confusion	20
1. Principle 1 (Presumption of Good Faith) Is Separate and Distinct from Principle 2 (Duty of Good Faith and Fair Dealing)	20

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- 2. Recent Federal Circuit Decisions in This Area of the Law Have Been Inconsistent and Confusing, Effectively Importing the Concept of Subjective Bad Faith from Principle 1 (Presumption of Good Faith) into Application of Principles 2 (Duty of Good Faith and Fair Dealing) and 3 (Sovereign Acts Doctrine) 23
 - a. *Am-Pro Protective Agency, Inc. v. United States* 23
 - b. *Centex Corp. v. United States* 25
 - c. *Precision Pine & Timber Co. v. United States* 26
- III. The Ill Effects of Overprotecting the Government and Conflating the Three Principles..... 32
 - A. Some Decisions Issued After the Federal Circuit’s Decision in *Precision Pine* Have Conflated and Confused the Three Principles, Applying *Precision Pine*’s Legal Analysis to Situations Where Only Government Contractual Acts, Not Sovereign Acts, Were Involved 32
 - B. Other Decisions Have Employed a More Careful Analysis in an Attempt to Partially Undo Some of the Melding of the Three Principles That Has Followed the Federal Circuit’s Decisions in *Am-Pro Protective Agency, Inc.* and *Precision Pine* 36
- IV. Conclusion: The Practical Effects of Conflating the Three Principles 39

I. THE PROBLEM: THE UNDERSTANDABLE BUT MISGUIDED JUDICIAL INSTINCT TO OVERPROTECT THE SOVEREIGN WHEN IT ACTS IN ITS CONTRACTING CAPACITY

Originally, this Article intended to cover a number of topics and decisional patterns in which some decisions issued by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) have had the effect of overprotecting the Federal Government in its contractual relationships, to the detriment of all constituents to the procurement process. Thus, decisions that this Article might have discussed include those concerning the application of mutual obligations to file claims under the Contract Disputes Act;¹ the disproportionate application of massive forfeitures and penalties to contractors in situations in which they, like the Government, were victims;² and a series

1. Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. §§ 7101–7109 (Supp. IV 2010)); *see, e.g., M. Maropakos Carpentry, Inc. v. United States*, 609 F.3d 1323, 1328–29 (Fed. Cir. 2010) (finding that the court lacked jurisdiction over the contractor’s defense that the Government caused delays because the contractor failed to submit a valid claim); *Parsons Global Servs., Inc. v. McHugh*, 677 F.3d 1166, 1170–72 (Fed. Cir. 2012) (finding that the court lacked jurisdiction over the contractor’s claim because its request was not nonroutine).

2. *See, e.g., Long Island Sav. Bank, FSB v. United States*, 503 F.3d 1234 (Fed. Cir. 2007). The chairman and chief executive officer of Long Island Savings Bank (LISB), James J. Conway Jr.,

of decisions from *Am-Pro Protective Agency, Inc. v. United States*³ through *Precision Pine & Timber, Inc. v. United States*⁴ that addressed the Government's rights and responsibilities when it acts in its contracting capacity rather than in its sovereign capacity. These decisions appear to apply the law incorrectly.⁵

However, the aforementioned assertions are not intended to ascribe improper motives to the judges who issued the decisions. Instead, the theme that seems to underlie these decisions is recognition that the sovereign is, after all, the sovereign;⁶ that the sovereign must be accorded sovereign rights;⁷ and that it is the judiciary's charge to protect these sovereign rights.⁸

Ultimately we settled on one topic, the last of the three we mention above: those Federal Circuit decisions that address the Government's rights and responsibilities when it acts in its contracting capacity, rather than in its sovereign capacity. This topic has importance and relevance not only in the judicial world but also in the practical world of government contracting.⁹ Of course, the path to this discussion is well-worn; it is not the path less taken.¹⁰ Tons of expert commentary, case law, and academic work product lend considerable guidance, and some misguidance, to this topic.¹¹ On the one hand,

funneled the bank's business to his law firm, thereby receiving illegal kickbacks. *See id.* at 1239. The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) found that Conway breached his fiduciary duty to LISB. *Id.* at 1247. Nonetheless, the court imputed Conway's fraudulent behavior on LISB. *See id.* at 1249. The court held that LISB's contract with the Government was void ab initio as a result of the fraud. *Id.* at 1251.

3. 281 F.3d 1234 (Fed. Cir. 2001).

4. 596 F.3d 817 (Fed. Cir. 2010).

5. *See, e.g.,* Steven L. Schooner & Pamela J. Kovacs, *Affirmatively Inefficient Jurisprudence?: Confusing Contractors' Rights to Raise Affirmative Defenses with Sovereign Immunity*, 21 FED. CIR. B.J. 685, 686 (2012) (criticizing the Federal Circuit's *Maropakis* decision for not being "well-grounded in relevant precedent" and "ignor[ing] the realities of the congressionally mandated contract disputes process"); Ralph C. Nash Jr., *Postscript: Breach of the Duty of Good Faith and Fair Dealing*, 24 NASH & CIBINIC REP. ¶ 22, at 67–68 (May 2010) [hereinafter Nash, *Postscript*] (criticizing the Federal Circuit's *Precision Pine* decision as failing to rest on "sound reasoning" because the court applied a concept unique to savings and loans cases to a timber sales case).

6. *See* ACQUISITION ADVISORY PANEL, REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 84 (2007).

7. *See id.* at 110 (recognizing that the Government is entitled to special rights when it acts in its sovereign capacity, but noting that the judiciary also has applied these special rights when the Government acts in a contracting capacity).

8. *See* W. Stanfield Johnson, *The Federal Circuit's Great Dissenter and Her "National Policy of Fairness to Contractors,"* 40 PUB. CONT. L.J. 275 (2011) [hereinafter Johnson, *The Federal Circuit's Great Dissenter*].

9. *See infra* discussion Part IV.

10. *See* ROBERT FROST, *The Road Not Taken*, in MOUNTAIN INTERVAL 9, 9 (1920).

11. *See, e.g.,* *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 757–69 (2005) (discussing the evolution of presumption of good faith); Johnson, *The Federal Circuit's Great Dissenter*, *supra* note 8, at 276 (summarizing twenty-two dissents written by Judge Newman to demonstrate how "the Federal Circuit has inappropriately moved the balance of its government contract jurisprudence toward protecting the sovereign"); W. Stanfield Johnson, *Mixed Nuts and Other Humdrum Disputes: Holding the Government Accountable Under the Law of Contracts Between Private Individuals*, 32 PUB. CONT. L.J. 677, 678–79 (2003) [hereinafter Johnson, *Mixed Nuts and Other Humdrum Disputes*] (examining recent cases to show how the courts tend to use special rules to protect the Government, rather than treat it as a private contracting party).

it seems folly to tread where other experts have led the discussion. But on the other hand, the topic is one that builds upon prior analysis that, unfortunately, twists and turns upon itself, raising specters and mischiefs that were once thought put to rest. Consequently then, discussing prior analyses on the subject of distinguishing the Government's contracting capacity from its sovereign capacity is not only warranted, but inevitable.¹²

Recent jurisprudence on the Government's contracting power in comparison to its sovereign power has revealed a Core Tenet and three interwoven but distinct principles that flow from the Core Tenet.¹³ The Core Tenet has served as the foundation for decisions of the U.S. Supreme Court,¹⁴ the Federal Circuit,¹⁵ and tribunals below¹⁶ when deciding disputes between the Government and its contractors. The Core Tenet has often been expressed in a quotation by Justice Brandeis: "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."¹⁷

Further judicial analysis of the Core Tenet has produced three other distinct but related principles: Principle 1—the presumption of good faith;¹⁸ Principle 2—the duty of good faith and fair dealing;¹⁹ and Principle 3—the sovereign acts doctrine.²⁰ When assessing the applicability of each principle to a particular set of facts, it is important to remember that each is unique.²¹ Principle 1 (the presumption of good faith) is an evidentiary standard that provides that a plaintiff, alleging that the Government is liable for

12. Mark Twain's musing about the challenges of original thought and advancing upon the well-conceived thoughts of others is particularly salient here: "What a good thing Adam had—when he said a good thing he knew nobody had said it before." ALBERT BIGELOW PAINE, MARK TWAIN'S NOTEBOOK 67 (1935).

13. This Article employs shorthand phrases—Core Tenet and three underlying principles—to reference four related concepts consistently discussed by courts.

14. *See, e.g.*, *Lynch v. United States*, 292 U.S. 571, 579 (1934).

15. *See, e.g.*, *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1345 (Fed. Cir. 2010).

16. *See, e.g.*, *Metcalf Constr. Co. v. United States*, 102 Fed. Cl. 334, 346 (2011). Please note, the authors refer to the U.S. Court of Federal Claims and its predecessor, the U.S. Claims Court, as well as the Boards of Contract Appeals, as "the tribunals below."

17. *Lynch*, 292 U.S. at 579.

18. *See, e.g.*, *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 757–69 (2005).

19. *See, e.g.*, *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005) (explaining that the "covenant of good faith and fair dealing . . . applies to the [G]overnment just as it does to private parties") (citations omitted).

20. *See, e.g.*, *United States v. Winstar Corp.*, 518 U.S. 838, 891 (1996) (discussing when the sovereign acts doctrine can be used to protect the Government from liability for breaching a contract). Many decisions have addressed the separate but related unmistakability doctrine in tandem with the sovereign acts doctrine. *See, e.g., id.* at 871–72; *Timber Prods. Co. v. United States*, 103 Fed. Cl. 225, 243 (2011). However, most recent decisions issued by the Federal Circuit and tribunals below forgo discussion of the unmistakability doctrine and address its effects by discussing the applicability of the sovereign acts doctrine in a particular situation, and this Article follows that trend. *See, e.g.* *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 819 (Fed. Cir. 2010); *Fireman's Fund Ins. Co. v. United States*, 92 Fed. Cl. 598 (2010); *Am. Gen. Trading & Contracting, WLL*, ASBCA No. 56758, 12-1 BCA ¶ 34,905, at 171,636.

21. *See* discussion *infra* Part II.B.

damages due to the acts or omissions of government employees acting in their sovereign capacity, must prove by clear and convincing evidence that the government employees acted with subjective bad intent, bad faith, or animus towards the plaintiff.²² In other words, government employees who are acting in their sovereign capacities are presumed to act in good faith.²³ Principle 1 applies exclusively to the Government's exercise of its sovereign power, such that it does not apply in the Government's exercise of its contractual power.²⁴

Principle 2 (the duty of good faith and fair dealing) is a principle of contract law that is implied into every contract, including every government contract.²⁵ Principle 2 provides that each party to a contract owes the other the duty to cooperate, not to hinder the other party's performance, and to take all actions necessary to permit the other party to enjoy the benefit of its bargain.²⁶ Principle 2 applies only in the contractual arena and not when the Government acts in its sovereign capacity.²⁷ Principle 2 reflects mutuality, which is fundamental to bilateral contracts.²⁸ The principle arises in the context of a government contract dispute when a contractor alleges that the Government has breached the duty of good faith and fair dealing by failing to cooperate or by hindering the contractor's performance.²⁹ To prevail, a contractor must prove by a preponderance of the evidence that the Government breached the duty of good faith and fair dealing.³⁰ Principle 1

22. See *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239–40 (Fed. Cir. 2002) (explaining that clear and convincing evidence of specific intent is required to overcome the presumption that government officials act in good faith); see also *Tecom*, 66 Fed. Cl. at 757–69 (tracing the evolution of the presumption of good faith).

23. See *Am-Pro Protective Agency, Inc.*, 281 F.3d at 1236.

24. Stuart B. Nibley, *Unraveling the Mixed Messages That Government Procurement Personnel Receive: Message 1: Act Absolutely in the Government's "Best Interests"; Message 2: Act "Ethically,"* 36 PUB. CONT. L.J. 23, 25 (2006). A limited exception to this rule applies when a contractor specifically alleges that government employees acting in their contractual capacity acted in bad faith, with intent to harm the contractor, or with animus. See *White Buffalo Constr., Inc. v. United States*, 101 Fed. Cl. 1, 13 (2011).

25. See *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005) (explaining that the "covenant of good faith and fair dealing . . . applies to the [G]overnment just as it does to private parties") (citations omitted); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

26. See *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 820 n.1 (Fed. Cir. 2010) ("Both the duty not to hinder and the duty to cooperate are aspects of the implied duty of good faith and fair dealing.") (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981)); *Centex Corp.*, 395 F.3d at 1304 ("The covenant [of good faith and fair dealing] imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.").

27. See *Centex Corp.*, 395 F.3d at 1304 (noting that the covenant is applied to the parties of a contract).

28. *Centerville Builders, Inc. v. Wynne*, 683 A.2d 1340, 1341 (R.I. 1996) ("It is a fundamental principle of contract law that a bilateral contract requires mutuality of obligation.").

29. See, e.g., *Precision Pine*, 596 F.3d at 819, 820 n.1 (noting that the contractor had alleged a breach of the duty of good faith and fair dealing based on the Government's multiple suspensions of the contract).

30. Linda P. Armstrong et al., *Federal Procurement Ethical Requirements and the Good Faith Presumption*, 20 NASH & CIBINIC REP. ¶ 29, at 94 (June 2006).

(the presumption of good faith) is irrelevant to the applicability of Principle 2 because applying Principle 2 does not involve assessment of subjective intent, bad faith, or animus on the part of government employees.³¹ Rather, applying Principle 2 requires assessing objective criteria by determining whether the Government's alleged acts and omissions had deprived the contractor of a benefit it reasonably anticipated it would have received when it executed the contract.³²

Principle 3 (the sovereign acts doctrine) applies when an action the Government takes or fails to take in its sovereign capacity has the effect of depriving a government contractor of a benefit the contractor reasonably expected when it contracted with the Government.³³ Principle 3 therefore assesses sovereign actions that affect the contractual arena.³⁴ Stated generally, case law has provided that, when the Government acts in its sovereign capacity in a "public and general" manner, it is shielded from liability for damages arising from an alleged breach of its duty of good faith and fair dealing under a government contract.³⁵ Conversely, if the Government acts in its sovereign capacity with primary intent to erase contract obligations already existing, the sovereign acts doctrine will not relieve the Government from liability.³⁶ Unfortunately, as Justice Souter recognized in *United States v. Winstar Corp.*,³⁷ a governmental act can have "public and general" effects, at least prospectively, and yet still have intentional adverse effects with regards to its retrospective application.³⁸

Even though, as discussed above, the three principles are best understood as distinct and subsidiary to the Core Tenet, the Federal Circuit's decisions in *Am-Pro Protective Agency, Inc.* and *Precision Pine* have placed the three principles into a judicial fondue pot that melts the concepts of each principle and merges them into a single standard.³⁹ The new, single standard created by these recent Federal Circuit decisions relies exclusively and erroneously on

31. See *id.* As previously noted, the exception is when a contractor specifically alleges that government employees acted with intent to harm the contractor, and that this bad faith itself breached the contractual duty of good faith and fair dealing. See discussion *supra* note 24.

32. See *Centex Corp.*, 395 F.3d at 1304.

33. See *United States v. Winstar Corp.*, 518 U.S. 839, 891 (1996).

34. See *id.* (citing *Horowitz v. United States*, 267 U.S. 458, 461 (1925)).

35. *Id.* at 893.

36. See *id.* at 896 ("[S]ome line has to be drawn . . . between regulatory legislation that is relatively free of Government self-interest and . . . statutes tainted by a governmental object of self-relief . . . in which the Government seeks to shift . . . costs.").

37. 518 U.S. 839 (1996).

38. See *id.* at 893–99. Justice Souter rejected the Government's argument that "the dual characters of Government as contractor and legislator are never 'fused' . . . so long as the object of the statute is regulatory and meant to accomplish some public good." *Id.* at 893. He then pointed to the legislation at issue as an example of when the dual natures of the Government become "fused." *Id.* at 894. In other words, the legislation "protected the Government in its capacity analogous to a private insurer" (Government acting as contractor retrospectively), while also "advanc[ing] a broader public interest" (Government acting as sovereign prospectively). See *id.* Justice Souter then explained "that such fusion" would likely become "common in the modern regulatory state." *Id.*

39. See discussion *infra* Part II.C.

an analysis of subjective bad faith and animus on the part of government employees, even when the government acts under consideration are taken solely in the contractual arena.⁴⁰ Specifically, while the court in *Precision Pine* may not have intended to conflate the rules governing contractual acts with those governing sovereign acts, the imprecise language and analysis in that decision have led to this result.⁴¹ Consequently, a number of judges have imported the subjective intent analysis applicable only under Principle 1 into their analysis of Principles 2 and 3.⁴²

Conflating the rules governing the Government's contractual acts with those governing its sovereign acts not only creates law and guidance that are highly confusing, but also erodes substantially the Core Tenet—both as a legal principle and as a beacon to guide government employees acting in the contractual arena as they administer contracts. By eroding the Core Tenet, judicial decisions may undermine the Government's credibility at the bargaining table, as an air of distrust develops when contractors and government contract administrative personnel realize that the acts and omissions of government personnel cannot subject the Government to liability under bilateral obligations otherwise implied into every contract.⁴³

The Federal Circuit needs to issue a cleaner articulation of how the three principles work, where they overlap, and how they support the Core Tenet. The Federal Circuit is ultimately the forum responsible for ensuring that fairness and neutrality guide the Government's contracting activities.⁴⁴ After all, President Lincoln in 1861 petitioned Congress to increase the Court of Claims' jurisdiction and powers⁴⁵ in order to ensure that “[i]t 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.”⁴⁶ Since 1861, President Lincoln's clarion call for fairness has often

40. *See id.*

41. *See* discussion *infra* Part III.A.

42. *See id.*

43. *See Winstar*, 518 U.S. at 884 (noting that overprotection “undermin[es] the Government's credibility at the bargaining table and increase[s] the cost of its engagements”).

44. *See* 2 WILSON COWEN ET AL., *THE UNITED STATES COURT OF CLAIMS: A HISTORY 1* (1978) (noting that the Court of Claims “provid[ed] a means of efficiently and fairly handling the large number of claims that were being filed against the Government”). The Government chartered the U.S. Court of Claims—the Federal Circuit's predecessor—in 1855 as a forum to adjudicate claims brought against the United States by Mexican-American War veterans. *Id.* at 11–15.

45. President Lincoln was concerned by the Court of Claims' inability to render final judgments against the Government. *See* President Abraham Lincoln, First Annual Message (Dec. 3, 1861) (emphasis added), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=29502>. President Lincoln contended that “[i]t is important that some more convenient means should be provided, if possible, for the adjustment of claims against the [G]overnment, especially in view of their increased number by reason of war.” *Id.*

46. *Id.* President Lincoln went on to state:

[i]t was intended by the organization of the Court of Claims mainly to remove [the investigation and adjudication of claims against the Government] from the halls of Congress; but while the court has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation for want of power to make its judgments final.

been revived and reiterated, and is now chiseled into the entrance to the Federal Circuit’s courthouse.⁴⁷ Moreover, Lincoln’s call for fairness now underscores the Federal Acquisition Regulation (FAR).⁴⁸ If the Federal Circuit provided clarification on the three principles, then it would promote this fundamental goal of fairness by giving tribunals, regulators, federal employees, and contractors clear guidance about their respective rights and responsibilities under government contracts. Such clarification would begin to remove the ill effects of the judiciary’s well-meant but misguided decisions that overprotect the Government in its contracting capacity.⁴⁹ By providing clear and well-articulated clarification, the Federal Circuit would give meaning to the Supreme Court’s imperative—let the Government contract.⁵⁰

II. CONFLATION AND CONSIDERABLE CONFUSION IN THE
APPLICATION OF THE THREE DISTINCT LEGAL PRINCIPLES
IN THE CONTEXT OF DECIDING GOVERNMENT
CONTRACT DISPUTES: THE PRESUMPTION OF GOOD
FAITH, THE DUTY OF GOOD FAITH AND FAIR
DEALING, AND THE SOVEREIGN ACTS DOCTRINE

A. *The Evolution of the Core Tenet in the Decisions of the Supreme Court: The Sovereign Has the Right to Contract and Shed Its Sovereignty to Pursue Commerce in the Marketplace*

For nearly eighty years, Supreme Court decisions have emphasized the importance of allowing the Federal Government to enjoy the benefits of, and to be held accountable for, the obligations it creates through bilateral contracting.⁵¹ These decisions flow from a Civil War-era decision issued

Fully aware of the delicacy, not to say the danger, of the subject, I commend to your careful consideration whether this power of making judgments final may not properly be given to the court

Id.

47. See *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1335 n.3 (Fed. Cir. 2010) (Newman, J., dissenting) (quoting Lincoln, *supra* note 45) (noting the engraving and reminding all entrants that “[i]t is as much the duty of Government to render prompt justice against itself, in favor of its citizens, as it is to administer the same, between private individuals”).

48. The Federal Acquisition Regulation (FAR) was “established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies.” FAR 1.101. In its “Statement of guiding principles,” the FAR advises that “[t]he vision for the Federal Acquisition System is to deliver on a timely basis the best value product or service to the customer [i.e., the Government], *while maintaining the public’s trust* and fulfilling public policy objectives.” FAR 1.102 (emphasis added). The FAR affirms that government procurements must be done “with integrity, *fairness*, and openness.” FAR 1.102(b)(3) (emphasis added).

49. See discussion *infra* Part III.

50. Ever since *United States v. Timgey*, 30 U.S. 115, 128 (1861), the Supreme Court has consistently recognized the Government’s ability to enter into contracts.

51. See, e.g., *Lynch v. United States*, 292 U.S. 571, 579 (1934) (“[W]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.”).

by the Court of Claims, colloquially known as *Deming's Case*.⁵² In 1861—coincidentally, just as President Lincoln invoked the goal of fairness and exhorted Congress to strengthen the Court of Claims' remedial powers—Israel Deming contracted with the Government to provide daily rations to the U.S. Marine Corps.⁵³ However, later that year, and again in 1862,⁵⁴ Congress imposed new, generally applicable duties that increased Deming's costs, leading him to perform his contracts at a financial loss.⁵⁵ Deming sued to recover his losses, arguing that Congress had “in effect imposed new conditions upon the performance of [his] two contracts”⁵⁶

Unfortunately for Deming, the Court of Claims dismissed his claims.⁵⁷ The Court of Claims, in this “seminal” decision,⁵⁸ held that the Government's general actions as a sovereign are immune from liability.⁵⁹ More importantly, however, the court distinguished the Government's actions as a sovereign from the Government's actions as a contractor.⁶⁰ Accordingly, the Government should be held accountable as any other private party would be when it acts in its contracting capacity. Deming lost his case only because he sought to hold the Government to a standard of liability that was greater than that which would apply to private parties.⁶¹

52. See *Deming v. United States (Deming's Case)*, 1 Ct. Cl. 190 (1865).

53. *Id.*

54. The Government renewed its contract with Mr. Deming in 1862. See *id.*

55. See *id.*

56. *Id.*

57. *Id.* at 191.

58. Joshua I. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 GEO. WASH. L. REV. 633, 652 (1996) [hereinafter Schwartz, *Liability for Sovereign Acts*].

59. *Deming's Case*, 1 Ct. Cl. at 191. In the words of the court:

A contract between the [G]overnment and a private party cannot be *specialy* affected by the enactment of a *general* law. . . . In form, the claimant brings this action against the United States for imposing new conditions upon his contract; in fact he brings it for exercising their sovereign right of enacting laws.

Id. (emphasis in original).

60. *Id.* at 190. The Court stated that

the [G]overnment entering into a contract, stands not in the attitude of the [G]overnment exercising its sovereign power of providing laws for the welfare of the State. *The United States as a contractor are not responsible for the United States as a lawgiver*. Were this action brought against a private citizen, against a body corporate, against a foreign government, it could not possibly be sustained. In this court the United States can be held to no greater liability than other contractors in other courts.

Id. at 191 (emphasis added); see Schwartz, *Liability for Sovereign Acts*, *supra* note 58, at 653 (“According to *Deming's Case*, then, the United States should be regarded as though it were two separate entities, the sovereign and the contractor-government.”).

61. See *Deming's Case*, 1 Ct. Cl. at 191. In other words, absent a risk allocating provision in his contract, Deming would not have been able to sue a private party for breach of contract on the basis that the Government had passed a law increasing duty fees. See Schwartz, *Liability for Sovereign Acts*, *supra* note 58, at 658–59. An apt summary of this holding comes from Professor Joshua Schwartz:

The general lawmaking actions of the sovereign should not be attributed to the [G]overnment as contractor and are therefore not to be regarded as breaching the contractor's obligations

Seventy years later, in *Lynch v. United States*,⁶² the Supreme Court arrived at a similar conclusion.⁶³ In *Lynch*, the beneficiaries of government-issued World War I-era “War Risk” insurance policies sued the Government for payment on the policies.⁶⁴ In his majority opinion, Justice Brandeis left no doubt that the insurance policies were binding contracts and that the “War Risk policies, being contracts, [were] property and create[d] vested rights” for the beneficiaries.⁶⁵ Justice Brandeis also reaffirmed that, despite the Government’s general privilege of sovereign immunity, the policies subjected the Government to liability.⁶⁶ Indeed, Justice Brandeis noted that “Congress, as if to emphasize the contractual obligation assumed by the United States when issuing war risk policies, conferred upon beneficiaries substantially the same legal remedy which beneficiaries enjoy under policies issued by private contractors.”⁶⁷

Although *Lynch* did not involve a procurement contract,⁶⁸ courts routinely have recalled its language when articulating the distinction between acts the Government takes in its sovereign capacity and acts it takes in its contracting capacity.⁶⁹ Justice Brandeis emphasized that “[v]alid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States.”⁷⁰ And in language that affirms the importance of judicial neutrality towards the Government and government contractors, he also stated that the “[p]unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors.”⁷¹ Finally, Justice Brandeis articulated the Core Tenet by declaring that “when the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.”⁷²

under the contract. This bifurcation allocates the risk of general government action that interferes with the performance of a government contract in the same manner that the risk is allocated in a similar nongovernment contract.

Id. at 653 (emphasis added).

62. 292 U.S. 571 (1934).

63. *See id.* at 579.

64. *Id.* at 574.

65. *Id.* at 577; *see Schwartz, Liability for Sovereign Acts, supra* note 58, at 675.

66. *See Lynch*, 292 U.S. at 579; *Schwartz, Liability for Sovereign Acts, supra* note 58, at 677 (explaining that “*Lynch* rests to some extent on the conclusion that Congress had not expressly reserved the power to reduce payments under the War Risk Insurance policies”).

67. *Lynch*, 292 U.S. at 581.

68. Writing for the majority, Justice Brandeis noted that “[t]hese contracts, unlike others, were not entered into by the United States for a business purpose.” *Id.* at 576.

69. *See, e.g., Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 646 (2005); *United States v. Winstar Corp.*, 518 U.S. 839, 884–85 (1996).

70. *Lynch*, 292 U.S. at 579.

71. *Id.* at 580.

72. *Id.* at 579; *see also Schwartz, Liability for Sovereign Acts, supra* note 58, at 675 (discussing *Lynch* and noting the majority’s holding that “[t]he United States are as much bound by their contracts as are individuals”) (alteration in original) (internal quotation marks and citation omitted).

Sixty years later, in *Winstar*, the Supreme Court again examined the rights and responsibilities the Government bears in its contracting capacity.⁷³ The Court's plurality opinion articulated the same, fundamental conclusions expressed in *Lynch*.⁷⁴ The opinion stressed the significance of the Core Tenet to the judiciary's resolution of government contract disputes.⁷⁵ The Court also considered the application of Principle 3 (the sovereign acts doctrine) as a defense when a contractor alleges that the Government has breached a contract.⁷⁶ Upon examining the sovereign acts defense, *Winstar* set the stage for subsequent judicial assessment of the application and interplay of the Core Tenet and the three principles.

Winstar is a product of the savings and loan, or "thrift," crisis.⁷⁷ In the early 1980s, thrifts rapidly began to fail.⁷⁸ In response, the Government encouraged healthy thrifts to acquire failing thrifts in a process known as "supervisory mergers" and offered, as inducement, favorable accounting standards for the healthy, acquiring thrifts.⁷⁹ In 1989, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA),⁸⁰ which altered the thrifts' accounting standards, eliminating the once-favorable treatment.⁸¹ FIRREA's impact was "swift and severe,"⁸² and the

73. *Winstar*, 518 U.S. at 860 ("We took this case to consider the extent to which special rules, not generally applicable to private contracts, govern enforcement of the governmental contracts at issue here.").

74. *Id.* at 884–85 (citing *Lynch*, 292 U.S. at 580) ("As Justice Brandeis recognized, '[p]unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of the public as well as private debtors.'").

75. *See id.* at 895.

76. *Id.* at 891–910.

77. *Id.* at 844–48 (recounting the history of "[t]he modern savings and loan industry"); *see also* Joshua I. Schwartz, *Assembling Winstar: Triumph of the Ideal of Congruence in Government Contract Law?*, 26 PUB. CONT. L.J. 481, 482 (1997) [hereinafter Schwartz, *Assembling Winstar*].

78. *Winstar*, 518 U.S. at 845. As recounted in Justice Souter's plurality opinion, "the combination of high interest rates and inflation in the late 1970[s] and early 1980[s] brought about a . . . crisis in the thrift industry." *Id.* Many thrifts suffered as "the costs of short-term deposits overtook the revenues from long-term mortgages. . . ." *Id.* As a result, "435 thrifts failed between 1981 and 1983." *Id.*

79. *Id.* at 847–48 ("[T]he principal inducement for these supervisory mergers was an understanding that the acquisitions would be subject to a particular accounting treatment that would help the acquiring institutions meet their reserve capital requirements imposed by federal regulations."). Among the accounting incentives: the recognition of supervisory goodwill, the ability to amortize goodwill assets, and the "double counting of the cash as both a tangible and intangible asset" to meet capital requirements. *Id.* at 849–53; *see also* Schwartz, *Assembling Winstar*, *supra* note 77, at 484. Professor Schwartz explains:

To encourage and facilitate these supervisory mergers, the federal thrift agencies allegedly promised the acquiring entities that they would enjoy favorable regulatory accounting treatment that would permit them to treat the amount by which the purchase price paid exceeded the market value of the insolvent thrift institutions as goodwill that could be used to satisfy capital requirements imposed by regulators.

Id.

80. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183.

81. *Winstar*, 518 U.S. at 856–57.

82. *Id.* at 857.

revised financial standards drove once-healthy thrifts to the brink of insolvency.⁸³

The three *Winstar* plaintiffs had acquired failing thrifts through supervisory mergers.⁸⁴ In FIRREA's wake, two of the plaintiffs were seized and liquidated, while the third narrowly avoided the same fate.⁸⁵ The plaintiffs sued and "claimed that the application of [the] new, statutorily mandated standards constituted a breach of the agreements that they had entered into with federal regulators in connection with the supervisory mergers that they had undertaken."⁸⁶ The Claims Court⁸⁷ and an en banc Federal Circuit⁸⁸ agreed with the plaintiffs.⁸⁹ The Federal Circuit concluded that the Government had formed express contracts with the plaintiffs and that these contracts were predicated on the Government's promise of favorable accounting.⁹⁰

The Supreme Court granted certiorari for the express purpose of evaluating whether and to what extent government contracts are governed by general contract law and to evaluate the viability of the Government's unique defenses of "unmistakability" and "sovereign acts."⁹¹ Justice Souter—joined by Justices Stevens, Breyer, and (in part) O'Connor—authored the Court's plurality opinion.⁹² The plurality opinion examined when it is appropriate

83. See *id.* at 857, 858 (noting that "many institutions immediately fell out of compliance [after FIRREA's enactment] . . . making them subject to seizure by thrift regulators").

84. *Id.* at 858.

85. *Id.*

86. Schwartz, *Assembling Winstar*, *supra* note 77, at 485; see *Winstar*, 518 U.S. at 858 ("Believing that the [government agencies] had promised them that the supervisory goodwill created in their merger transactions could be counted toward regulatory capital requirements, respondents each filed suit against the United States . . .").

87. See *Winstar Corp. v. United States*, 26 Cl. Ct. 904 (1992).

88. See *Winstar Corp. v. United States*, 64 F.3d 1531 (Fed. Cir. 1995) (en banc). Initially, on interlocutory appeal, a divided panel of the Federal Circuit reversed the Claims Court. See *Winstar Corp. v. United States*, 994 F.2d 797, 811–13 (Fed. Cir. 1993). However, the Federal Circuit reheard the case en banc and reversed its first decision. *Winstar*, 64 F.3d 1531. W. Stanfield Johnson has illuminated Judge Newman's critical role as the dissenting judge on the original Federal Circuit panel in *Winstar*. See Johnson, *The Federal Circuit's Great Dissenter*, *supra* note 8, at 284–87. Mr. Johnson describes Judge Newman's dissenting opinion as "rare because it ultimately prevailed—and can be said to have had a significant impact on the Federal Circuit's contract jurisprudence." *Id.* at 284–85. Further, his description of Judge Newman's dissenting opinion harkens to the normative goals of neutrality, as he describes her emphasis on "the bargaining of contracts, the essentiality of the Government's commitments, and the financial benefits to the government." *Id.* at 286. According to Mr. Johnson, *Winstar* is the "high-water mark" in Judge Newman's "persistent—and largely lonely—advocacy of fairness in the adjudication of contractor disputes with the sovereign." *Id.* at 333.

89. *Winstar*, 518 U.S. at 859.

90. *Winstar*, 64 F.3d at 1540.

91. See *Winstar*, 518 U.S. at 860 ("We took this case to consider the extent to which special rules, not generally applicable to private contracts, govern enforcement of the governmental contracts at issue here.")

92. *Id.* at 843. Justice Breyer wrote a separate concurring opinion. *Id.* at 910 (Breyer, J., concurring). Justices Scalia, Kennedy, and Thomas concurred in the judgment, with Justice Scalia writing separately. *Id.* at 919 (Scalia, J., concurring). Chief Justice Rehnquist and Justice Ginsberg dissented. *Id.* at 924 (Rehnquist, J., dissenting).

to apply the sovereign acts doctrine to shield the Government from liability for breach damages, for which it would otherwise be liable.⁹³ Under the facts of *Winstar*, the Court found that the sovereign acts doctrine did not shield the Government from liability.⁹⁴

Many have attempted to find a consensus among the Court's plurality and separately written opinions.⁹⁵ While it is not the purpose of this Article to cover this same ground, it is worth noting that other authors have persuasively argued that the plurality in *Winstar* did affirm the Core Tenet.⁹⁶ For example, the language used by Justice Souter reaffirmed what Justice Brandeis had advised in *Lynch*: "[W]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."⁹⁷ Justice Souter recognized that the "practical capacity to make contracts" is, by itself, "the essence of sovereignty."⁹⁸ The *Winstar* plurality also stressed that the judiciary undermines the Government's ability to contract—or, in other words, interferes with the Government's sovereign right to contract—when it treats

93. *Id.* at 891–910 (plurality opinion).

94. *Id.* at 891. The Court held:

The Government's position cannot prevail, however, for two independent reasons. The facts of this case do not warrant application of the [sovereign acts] doctrine, and even if that were otherwise the doctrine would not suffice to excuse liability under this governmental contract allocating risks of regulatory change in a highly regulated industry.

Id.

95. See, e.g., Rodger D. Citron, *Lessons from the Damages Decisions Following United States v. Winstar Corp.*, 32 PUB. CONT. L.J. 1 (2002); Joshua I. Schwartz, *The Status of the Sovereign Acts and Unmistakability Doctrines in the Wake of Winstar: An Interim Report*, 51 ALA. L. REV. 1177 (2000) [hereinafter Schwartz, *The Status of the Sovereign Acts and Unmistakability Doctrines*]; Thomas J. Gilliam Jr., Note, *Contracting with the United States in Its Role as Regulator: Striking a Bargain with an Equitable Sovereign or a Capricious Siren?*, 18 MISS. C. L. REV. 247 (1997); Schwartz, *Assembling Winstar*, *supra* note 77.

96. See Schwartz, *Assembling Winstar*, *supra* note 77, at 489–533 (describing Justice Souter's plurality opinion, which supports applicability of general common law); *id.* at 533–34 (describing support for the same principle in Justice Breyer's opinion); *id.* at 543 (describing Justice Scalia's opinion, which appears to support this principle as well).

97. See *Winstar*, 518 U.S. at 895 (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934)). In addition to *Lynch*, Justice Souter recited other cases supporting the application of general contract law to government contracts. See *id.* at 884 n.28 ("[T]he Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights . . .") (alteration in original; emphasis added) (quoting *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986)); *id.* at 886 n.31 ("[I]t is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their [G]overnment.") (emphasis added) (quoting *Heckler v. Comm. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 61 n.13 (1984)); *id.* ("It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street.") (quoting *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 387–88 (1947) (Jackson, J., dissenting)); *id.* at 895 n.39 ("The United States does business on business terms.") (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 369 (1943)); *id.* ("The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf.") (emphasis added) (quoting *United States v. Bostwick*, 94 U.S. 53, 66 (1877)).

98. *Id.* at 884 (quoting *United States v. Bekins*, 304 U.S. 27, 51–52 (1938)).

the Government differently than it would treat a private party to a contract.⁹⁹ Justice Souter noted, as an “essential point” from precedent, that the Government, in its contracting capacity, should be “put . . . in the *same position* that it would have enjoyed as a private contractor.”¹⁰⁰ When the judiciary overprotects the Government in government contract disputes, it inhibits the Government’s freedom to contract, with “the certain result of undermining the Government’s credibility at the bargaining table and increasing the cost of its engagements.”¹⁰¹

In addition, the Court in *Winstar* wrestled with the need to define and reassess the circumstances under which it is appropriate to relieve the Government from liability for breach of contract by reason of the exercise of a sovereign act (Principle 3, the sovereign acts doctrine).¹⁰² The plurality rejected the Government’s argument that all government actions designed to advance the general welfare automatically invoke the sovereign acts doctrine.¹⁰³ The plurality recognized that, sometimes, the Government acts in a way that blurs the divide between the Government’s role as sovereign and its role as contractor.¹⁰⁴

To address the phenomenon of the Government acting at once as a sovereign and a contractor, the plurality recognized that it is important to examine the multiple effects that can follow from a government action, rather than merely the motive that originally led to that action.¹⁰⁵ As such, “a governmental act will not be public and general if it has the substantial effect of releasing the Government from its contractual obligations.”¹⁰⁶ Here, the Court stressed that the “substantial effect” of FIRREA was to relieve the Government of the inducements it promised to the thrifts.¹⁰⁷ Thus, the Court rejected the Government’s argument that FIRREA did not explicitly “target particular transactions” because the end result of the legislation did just

99. See *id.* at 884–85 (noting negative effects of overprotecting the Government when it acts in a contractual capacity).

100. *Id.* at 892 (emphasis added) (discussing *Horowitz v. United States*, 267 U.S. 458, 461 (1925)).

101. *Id.* at 884.

102. See *id.* at 891–910.

103. *Id.* at 893.

104. *Id.* at 893–94. Quoting from the Government’s Brief, the plurality explained:

The Government argues that “[t]he relevant question [under these cases] is whether the impact [of governmental action] . . . is caused by a law enacted to govern regulatory policy and to advance the general welfare.” . . . *This understanding assumes that the dual characters of Government as contractor and legislator are never “fused” (within the meaning of Horowitz) so long as the object of the statute is regulatory and meant to accomplish some public good. That is, on the Government’s reading, a regulatory object is proof against treating the legislature as having acted to avoid the Government’s contractual obligations, in which event the sovereign acts defense would not be applicable. But the Government’s position is open to serious objection.*

Id. (alterations in original; emphasis added).

105. See *id.* at 899–903.

106. *Id.* at 899.

107. See *id.* at 902–03.

that.¹⁰⁸ This is not to conflate or confuse the rights and obligations the Government has when it acts in its sovereign capacity vis-à-vis those it has when it acts in its contracting capacity. Rather, it is to say that a single government act may be sovereign in nature in some respects, and therefore shield the Government from exposure with regard to the “public and general” effects of the act, and at the same time contractual in nature in other respects, and thus subject the Government to liability for breach damages with regard to adverse effects on existing government contracts.¹⁰⁹

The Supreme Court’s decisions following *Winstar* have continued to affirm the Core Tenet.¹¹⁰ For example, in *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*,¹¹¹ the Court analyzed whether legislation enacted subsequent to the Government’s execution of offshore drilling leases granted to the plaintiffs breached the Government’s obligations under the leases.¹¹² Even with the intricate regulatory framework applicable to offshore energy exploration,¹¹³ the Court’s analysis began by reiterating the “basic contract law principles” first announced in *Lynch* and reaffirmed in *Winstar*.¹¹⁴ Then, in a decision “peppered with references to the Restatement of Contracts, as well as citations to contract law treatises by Professors Williston, Corbin, and Farnsworth,” the Court rejected the “variety of statutes and regulations which, the [Government] claimed, justified its actions.”¹¹⁵

B. *An Overview of the Principles That Govern the Rights and Obligations That the Government Enjoys in Its Sovereign Capacity Compared with Those It Enjoys in Its Contracting Capacity*

Nearly every decision in the federal judiciary that has dealt with the Government’s contracting capacity has acknowledged the universal applicability of the Core Tenet: “When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.”¹¹⁶ However, a number of judges have

108. See *id.* (recognizing that “[l]egislation can almost always be written in a formally general way, and the want of an identified target is not much security when a measure’s impact nonetheless falls substantially upon the Government’s contracting partners”).

109. See *id.*

110. See, e.g., *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 607–08 (2000).

111. *Id.* at 604.

112. See *id.* at 611–14.

113. Thomas J. Madden & Andrew S. Gold, *Supreme Court Holds Government to Same Standards as Private Party in Breach Action; Future of “Sovereign Acts” Doctrine in Doubt*, 42 GOV’T CONTRACTOR ¶ 277, at 1 (2000) (“[T]he Court recognized that [g]overnment delay could constitute a breach where complex regulations are involved.”).

114. *Mobil Oil*, 530 U.S. at 607–08 (citing *Winstar*, 518 U.S. at 895).

115. Madden & Gold, *supra* note 113, at 4 (discussing the Supreme Court’s decision in *Mobil Oil*).

116. *Lynch v. United States*, 292 U.S. 571, 579 (1934). Decisions from the Supreme Court down to the Court of Federal Claims still apply the Core Tenet today. See, e.g., *Mobil Oil*, 530 U.S. at 607; *Metcalf Constr. Co. v. United States*, 102 Fed. Cl. 334, 346 (Fed. Cl. 2011).

misapplied the Core Tenet when evaluating one or more of the trio of principles that underlie it.¹¹⁷ These judges have conflated, melded, or ignored one or more of the principles.¹¹⁸

The fundamental problem is the unwillingness of some judges to employ rigorous analysis to ensure recognition that the rights and effects that define and flow from the Government's sovereign acts are distinct from the rights and effects that define and flow from the Government's contractual acts.¹¹⁹ The problem derives from certain decisions issued by the Federal Circuit regarding the three principles, which have been perpetuated recently in some decisions issued by the tribunals below.¹²⁰ Accordingly, this part of the Article examines the fundamentals of each of the three principles that are subordinate to the Core Tenet, which together shape this area of law. The next part then analyzes how some decisions issued by the Federal Circuit and tribunals below have merged the three distinct principles, creating confusion.

Each of the three principles is properly understood by examining whether or not the principle applies (1) in the context of the Government acting in its sovereign capacity; (2) in the context of the Government acting in its contracting capacity; or (3) in situations relating solely to Principle 3, where the Government acts in a way that has sovereign effects as to the general public, but contractual effects as to contractors adversely affected by the sovereign act. Broadly stated, the operative rule is that each of the three principles operates only in one of the two arenas (the sovereign arena or the contractual arena), but not in both.¹²¹ Of course, this rule has some important exceptions.¹²² But it is the rule, not the exceptions, that matters.

Let us restate our understanding of the three legal principles and the law that governs.¹²³

117. See discussion *infra* Part II.C.2.

118. See discussion *infra* Part II.C (noting the imprecision in recent Federal Circuit decisions); discussion *infra* Part III.A (noting the messy results in tribunals below as a result of the Federal Circuit's imprecision).

119. See generally Ralph C. Nash, *The Government's Duty of Good Faith and Fair Dealing: Proving a Breach*, 23 NASH & CIBINIC REP. ¶ 66, at 189 (Dec. 2009) [hereinafter Nash, *Proving a Breach*] (noting that different standards of analysis apply depending upon whether the Government is acting as a sovereign or as a contracting party and that recent decisions have "not articulate[d] a clear line between the two situations").

120. See discussion *infra* Parts II.C; III.A.

121. See *Fireman's Fund Ins. Co. v. United States*, 92 Fed. Cl. 598, 677–78 (2010). The court distinguished between the two types of situations in which each principle applies. If "the Government's alleged wrongful conduct . . . arise[s] directly out of the contract," then duty of good faith analysis (Principle 2) applies. *Id.* On the other hand, if "another government actor" causes the breach (e.g., Congress passing legislation), then sovereign acts analysis applies (Principle 3). *Id.*

122. See discussion *supra* note 24; *infra* note 126 and accompanying text.

123. The statement of the principles here is the authors' articulation based upon their understanding of the applicable case law. The authors state the principles first in their own words, and then follow with discussion of the case law that has led them to their understanding.

1. Principle 1: The Presumption of Good Faith

The presumption of good faith presumes that government employees act properly and in good faith when they perform their professional duties.¹²⁴ Principle 1 applies in the sovereign arena and not in the contractual arena, with one exception.¹²⁵ The exception is that the presumption can apply in a dispute in the contractual arena, but only if the contractor to the dispute alleges bad faith on the part of one or more government employees.¹²⁶ Where a contractor in a contract dispute alleges bad faith on the part of one or more government employees, courts have imported the evidentiary rule that the contractor must prove by clear and convincing evidence subjective bad faith or animus on the part of the government employee(s).¹²⁷

2. Principle 2: The Duty of Good Faith and Fair Dealing, and Its Corollaries, the Duty to Cooperate and Not to Hinder

Principle 2 applies to the Government's contractual powers, rather than to its sovereign powers. This principle is a fundamental precept of contract law, which posits that each party to a contract owes a duty to the other to allow the other to enjoy the fruits of its bargain.¹²⁸ The duty involves affirmative obligations, such as the duty to perform actions that are foreseeable at the time of contracting and necessary to enable the other party to enjoy the fruits of its bargain (the duty to cooperate), and involves obligations of restraint, such as the duty not to take action that will frustrate the other party's ability to enjoy the fruits of its bargain (the duty not to hinder).¹²⁹ The duty of good faith and fair dealing applies with equal force to both parties to a contract.¹³⁰ Courts at every level have stated that the Government and contractors alike are subject to the duty of good faith and fair dealing.¹³¹

124. See, e.g., Armstrong et al., *supra* note 30, at 93 (discussing this "well-established presumption").

125. See Nibley, *supra* note 24, at 25–26.

126. Regulatory bodies have created a small number of exceptions where regulations and/or contract clauses commit action or inaction to the discretion of applicable government employees, such as the Termination for Default clause. See FAR 49.4. But these are very few in number; an increase would run afoul of the Core Tenet and the Supreme Court decisions discussed above.

127. See, e.g., Major Bryan O. Ramos, *Never Say Die: The Continued Existence of the Government Officials' Good Faith Presumption in Federal Contracting Law and the Well-Nigh Irrefragable Proof Standard After Tecom*, 63 A.F. L. REV. 163, 165–67 (2009).

128. See *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005) ("The covenant [of good faith and fair dealing] imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract."); see also RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

129. See, e.g., *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 820 n.1 (Fed. Cir. 2010) ("Both the duty not to hinder and the duty to cooperate are aspects of the implied duty of good faith and fair dealing.").

130. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("*Every contract imposes upon each party a duty of good faith and fair dealing.*") (emphasis added).

131. See, e.g., *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 770 (2005) (citing many cases in which the Government has been found to be in breach of the implied duty of good faith).

Establishing a breach of the duty of good faith and fair dealing involves assessment of objective evidence.¹³² Thus, it is not necessary to examine the intent of the allegedly breaching party.¹³³ Rather, the question is: Does a preponderance of the evidence establish that one party breached its duty by not cooperating or by hindering the other party in the performance of the contract?¹³⁴ Evidence of the subjective bad intent of the allegedly breaching party can, but need not, be evidence that is assessed in determining if a preponderance of the evidence exists to establish a breach of the duty of good faith and fair dealing.¹³⁵ In sum, Principle 2 has no place in the sovereign arena but occupies a paramount perch in the contractual arena.¹³⁶

3. Principle 3: The Sovereign Acts Doctrine

As the name implies, Principle 3 applies to the Government's sovereign capacity. However, unlike Principle 1 (the presumption of good faith), it can become an important consideration when applying Principle 2 (the duty of good faith and fair dealing), but only in certain circumstances.

In simplistic terms, Principle 3 stands for the proposition that the sovereign is the sovereign, and except in rare instances, no entity can take action that would strip the sovereign of its power.¹³⁷ The sovereign acts doctrine enters the contractual arena when the Government is alleged to have breached a government contract through its exercise of a sovereign power that deprives a contractor of all or a portion of the benefit the contractor reasonably expected to receive from a preexisting contract with the Government.¹³⁸ In such instances, the contractor alleges that the Government's exercise of its sovereign power—for example, the enactment of legislation—has

132. See *id.* (applying a reasonableness standard to determine whether the Government's alleged breach violated the duties to cooperate and not to hinder performance).

133. *Id.* Examination of intent is only necessary when trying to overcome the presumption of good faith (Principle 1). See, e.g., *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002).

134. See *Armstrong et al.*, *supra* note 30, at 94; see also *Fireman's Fund Ins. Co. v. United States*, 92 Fed. Cl. 598, 679 (2010) (applying preponderance of evidence standard to contractor's claim that Government breached duty of good faith).

135. See generally RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (listing actions likely to qualify as indicia of bad faith).

136. As the authors discuss in more detail below, it is remarkable to discover that the rules that fall from Principle 1 are often merged into those that govern Principle 2 for seemingly no other reason than that both Principles use the term "good faith." With no more than this lily pad to stand on, a number of decisions have reasoned a breach of the duty of good faith and fair dealing requires a showing of bad faith, bad intent on the part of the Government, which can only be overcome by rebutting the presumption of good faith, wrongly imported in these misguided decisions from the sovereign arena into the contractual arena.

137. See generally ACQUISITION ADVISORY PANEL, *supra* note 6, at 84 (listing some of the special advantages that the Government enjoys when it acts as sovereign).

138. See, e.g., *Mobil Oil Exploration & Prod. Se., Inc. v. United States*, 530 U.S. 604 (2000) (considering the application of the sovereign acts doctrine when the enactment of the Outer Banks Protection Action (OBPA) deprived government contractors of their rights under preexisting oil drilling lease contracts).

the effect of frustrating the contractor's ability to enjoy the fruits of the bargain that it anticipated when it contracted with the Government.¹³⁹

As might be expected, and as discussed above, Principle 3 is among those rare issues pertaining to government contracts law that has found its way to the Supreme Court more than once in the last two decades.¹⁴⁰ In both *Winstar* and *Mobil Oil*, the Court found it necessary to assess whether or not the sovereign acts doctrine relieved the Government of contractual obligations of its contracts.¹⁴¹ The Court in those decisions relied, and arguably expanded upon, precedent.¹⁴² The decisions have been interpreted to articulate a rule that establishes that the Government is shielded from liability for breach of contract if the effects of its sovereign act are "public and general" in nature.¹⁴³ Conversely, if at least part of the motivation for and effect of the Government's exercise of sovereignty is to deprive a contractor of benefits it reasonably believed it would derive from a contract with the Government, the Government cannot be shielded from liability for breach.¹⁴⁴ Thus, if the "sovereign act" is the enactment of legislation, and it is this sovereign act that allegedly caused a breach of contract, the question is whether the legislation has broad and general effects and applies in a "public and general" manner, or, conversely, has effects that fall primarily upon a class of entities within which the complaining contractor falls.¹⁴⁵ But as the plurality in *Winstar* recognized, merely because it is proper to find that the Government owes one or more contractors under the sovereign acts doctrine does not mean that the finding of liability blocks the Government's ability to pursue the sovereign act in question.¹⁴⁶

The underpinning of the sovereign acts doctrine is that the Government cannot contract away its sovereign power.¹⁴⁷ For example, the Government cannot through contract agree to refrain from enacting certain legislation or from regulating in a certain way.¹⁴⁸ The sovereign acts doctrine prevents

139. See, e.g., *id.* at 611–14. In *Mobil Oil*, the contractors claimed that OBPA interfered with the fruits of their government contracts by substantially delaying the Department of Interior's approval of their leasing programs. See *id.*

140. See discussion *supra* Part II.

141. See *Mobil Oil*, 530 U.S. at 618–20 (holding that the sovereign acts doctrine does not apply); *United States v. Winstar Corp.*, 518 U.S. 839, 891 (1996) (holding that the sovereign acts doctrine did not excuse the Government's breach of a preexisting contract).

142. See *Winstar*, 518 U.S. 839, 891–910 (1996). In *Winstar*, the Supreme Court based its decision on precedent, such as *Horowitz v. United States*, 267 U.S. 458 (1925). See *Winstar*, 518 U.S. at 891–92. However, the Court also expanded upon precedent through its focus on the substantial effects of a sovereign act. See *id.* at 899–900.

143. See *Winstar*, 518 U.S. at 891.

144. See *id.* at 900 ("[H]olding that a governmental act will not be public and general if it has the substantial effect of releasing the Government from its contractual obligations . . .").

145. See *id.* at 897–98 (discussing the importance of generality to the sovereign acts doctrine).

146. See *id.* at 879.

147. *Id.*

148. See *id.* at 877 (recognizing the "general principle that, absent an 'unmistakable' provision to the contrary, 'contractual arrangements, including those to which a sovereign is party, remain subject to subsequent legislation by the sovereign.')" (quoting *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 51 (1986)).

private parties, including contractors, from enjoining the sovereign from exercising its power.¹⁴⁹ It exempts the Government from the fundamental rule of contract law that a party to a contract cannot blame its own breach on the impossibility of performance when its own acts or inactions created the impossibility.¹⁵⁰ And the doctrine recognizes that contract law should not be applied to disputes involving the Government in a way that would have the effect of blocking the Government from exercising sovereign power.¹⁵¹ In discussing the origins and purposes behind the sovereign acts doctrine, Justice Souter stressed that the doctrine was conceived to work with the Core Tenet, not against it:

An even more serious objection is that allowing the Government to avoid contractual liability merely by passing any “regulatory statute” would flout the general principle that, “[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.” *Careful attention to the cases shows that the sovereign acts doctrine was meant to serve this principle, not undermine it.*¹⁵²

C. Some Decisions of the Federal Circuit and Tribunals Below Have Created Confusion

Some Federal Circuit decisions and a number of decisions issued by tribunals below have applied these three principles in a loose fashion—mixing and matching concepts, importing some aspects of each in certain situations, and leaving other aspects behind. Specifically, some Federal Circuit judges appear to have confused the distinction between Principles 1 and 2, giving murky precedent to lower courts.¹⁵³ The following parts of this Article discuss the differences between Principles 1 and 2 as well as the confusion resulting from the Federal Circuit’s decisions in *Am-Pro Protective Agency, Inc. v. United States*,¹⁵⁴ *Centex Corp. v. United States*,¹⁵⁵ and *Precision Pine & Timber, Inc. v. United States*.¹⁵⁶

1. Principle 1 (Presumption of Good Faith) Is Separate and Distinct from Principle 2 (Duty of Good Faith and Fair Dealing)

As previously discussed, Principle 1 is unrelated to Principle 2.¹⁵⁷ And the conflation of the two principles by some federal judges has been the subject

149. *See id.* at 879.

150. *See id.* at 895–96.

151. *Id.* at 896 (“The sovereign acts doctrine thus balances the Government’s need for freedom to legislate with its obligation to honor its contracts . . .”).

152. *Id.* at 895 (emphasis added; citations omitted) (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934)).

153. *See discussion infra* Parts II.C.2; III.A.

154. 281 F.3d 1234 (Fed. Cir. 2002).

155. 395 F.3d 1283 (Fed. Cir. 2005).

156. 596 F.3d 817 (Fed. Cir. 2010).

157. *See discussion supra* Part II.B.

of extensive analysis and commentary.¹⁵⁸ On the one hand, Principle 2 (the implied duty of good faith and fair dealing) is succinctly stated in the Restatement (Second) of Contracts: “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”¹⁵⁹ Here, “good faith” means “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.”¹⁶⁰ Although a party acting in subjective bad faith can breach this duty, a breach does not require proof of subjective bad faith.¹⁶¹ Indeed, the Restatement’s examples of what constitutes a breach of the duty of good faith and fair dealing demonstrate that proof of subjective bad faith is not necessary:

Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance.¹⁶²

Further, the Restatement extends the duty of good faith and fair dealing to “the assertion, settlement and litigation of contract claims and defenses,”¹⁶³ for which the Restatement again does not require proof of subjective bad faith to find a party’s liability for breach:

The obligation is violated by dishonest conduct such as conjuring up a pretended dispute, asserting an interpretation contrary to one’s own understanding, or falsification of facts. It also extends to dealing which is candid but unfair, such as taking advantage of the necessitous circumstances of the other party to extort a modification of a contract Other types of violation[s] have been recognized in judicial decisions: harassing demands for assurances of performance, rejection of performance for unstated reasons, willful failure to mitigate damages, and abuse of a power to determine compliance or to terminate the contract.¹⁶⁴

These examples demonstrate that, in the context of the duty of good faith and fair dealing, the term “bad faith” refers to the absence of good faith,

158. See, e.g., Nibley, *supra* note 24, at 25–26 (contrasting the implied duty of good faith and fair dealing with the presumption of good faith); Karen L. Manos, *Changes—Constructive Changes—Breach of Implied Duty to Cooperate and Not Hinder Performance*, in GOVERNMENT CONTRACTS COSTS & PRICING § 87:6, at 727 (2d ed. 2011) (“[T]he implied duty to cooperate . . . is an aspect of the implied obligation of good faith and fair dealing, [and] it should not be confused with the presumption of good faith.”); Nash, *Postscript*, *supra* note 5, at 67–68 (contrasting these principles in light of *Precision Pine*); Nash, *Proving a Breach*, *supra* note 119, at 188–89 (contrasting these principles in light of Court of Federal Claims decisions).

159. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

160. *Id.* § 205 cmt. a (1981) (“Meanings of ‘good faith.’”).

161. See *id.* § 205 cmt. d (“Good faith performance.”).

162. *Id.*

163. *Id.* § 205 cmt. e (“Good faith in enforcement.”).

164. *Id.*

rather than to conduct taken with subjective bad faith, intent to injure, or animus.¹⁶⁵

On the other hand, Principle 1 provides that government employees acting in their sovereign capacities are presumed to act in good faith.¹⁶⁶ Here, subjective bad faith is the touchstone: the presumption of good faith “can be overcome only by ‘clear and convincing’ evidence of *subjective* bad faith, which means *personal animus*.”¹⁶⁷ The presumption that government employees act in good faith did not spring from contract law.¹⁶⁸ Instead, it “has its roots in English law” as an evidentiary presumption created to shield the Government from liability otherwise caused by discretionary, sovereign actions.¹⁶⁹ During the mid-twentieth century, Principle 1 appeared in the government contracts settings but was “largely restricted” to the adjudication of claims arising out of discretionary government actions such as contract terminations.¹⁷⁰ Since then, courts have occasionally applied the presumption to other areas of government contracts law.¹⁷¹ With few exceptions, courts had not applied the presumption—and its heavy evidentiary burden—to the resolution of disputes between the Government and its contractors before the Federal Circuit’s *Am-Pro Protective Agency, Inc.* decision.¹⁷²

165. See Johnson, *Mixed Nuts and Other Humdrum Disputes*, *supra* note 11, at 704 (“[B]ad faith’ is simply the other side of the coin or a lack of good faith.”) (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981)).

166. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239–40 (Fed. Cir. 2001).

167. W. Stanfield Johnson, *Needed: A Government Ethics Code and Culture Requiring Its Officials to Turn “Square Corners” When Dealing with Contractors*, 19 NASH & CIBINIC REP. ¶ 47, at 153 (Oct. 2005) [hereinafter Johnson, *Needed: A Government Ethics Code*] (emphasis in original).

168. See *Tecom v. United States*, 66 Fed. Cl. 736, 757–69 (2005); see also Johnson, *Mixed Nuts and Other Humdrum Disputes*, *supra* note 11, at 703–04 (“There is no such rule in the general law of contracts. . . . A very different concept of ‘good faith and fair dealing’ pervades contract law.”).

169. See, e.g., *Tecom*, 66 Fed. Cl. at 758. In modern jurisprudence, the good faith presumption appears to have emerged in personnel disputes; Johnson, *Mixed Nuts and Other Humdrum Disputes*, *supra* note 11, at 699 (“[T]he rule finds its genesis in personnel disputes. . . .”); *Gonzales v. West*, 218 F.3d 1378, 1381 (Fed. Cir. 2000) (applying presumption when veteran challenged disability rating assigned by Department of Veterans Affairs); *Gonzales v. Def. Logistics Agency*, 772 F.2d 887, 889 (Fed. Cir. 1985) (“Penalty decisions are judgment calls best left to the discretion of the employing agency. The presumption is that government officials have acted in good faith.”) (citing *Boyle v. United States*, 515 F.2d 1397, 1401 (Ct. Cl. 1975)).

170. Johnson, *Needed: A Government Ethics Code*, *supra* note 167, at 153.

171. See, e.g., *Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1328–30 (Fed. Cir. 2004) (applying presumption when assessing agency action in bid protest challenge under Administrative Procedure Act); *Precision Standard, Inc. v. Widnall*, No. 97-1096, 1997 WL 794107, at *3 (Fed. Cir. 1997) (applying standard when private contractor appealed termination for default); Nash, *Proving a Breach*, *supra* note 119, at 190 (discussing application of presumption to terminations for default).

172. See Johnson, *Mixed Nuts and Other Humdrum Disputes*, *supra* note 11, at 701. W. Stanfield Johnson explained:

Before *Am-Pro [Protective Agency, Inc.]*, the Federal Circuit (and the Court of Claims before it) had never applied the onerous “bad faith” test to government duties in the performance of its contracts. Indeed, government contract tribunals have held government officers to standards of “good faith” in other contractual dealings, applying tests more akin to the general

2. Recent Federal Circuit Decisions in This Area of the Law Have Been Inconsistent and Confusing, Effectively Importing the Concept of Subjective Bad Faith from Principle 1 (Presumption of Good Faith) into Application of Principles 2 (Duty of Good Faith and Fair Dealing) and 3 (Sovereign Acts Doctrine)

a. *Am-Pro Protective Agency, Inc. v. United States*

In 2002, the Federal Circuit decided *Am-Pro Protective Agency, Inc. v. United States*.¹⁷³ In *Am-Pro Protective Agency, Inc.*, a private contractor (Am-Pro) alleged that the Government was liable for additional employee compensation costs Am-Pro incurred during contract performance.¹⁷⁴ The Government argued that it had already released its claims, to which Am-Pro responded that its purported releases were made under duress and thus were void.¹⁷⁵ On a motion for summary judgment, the Court of Federal Claims found for the Government,¹⁷⁶ and on appeal, the Federal Circuit affirmed.¹⁷⁷ Curiously, the Federal Circuit's ruling ignored the relevant standards for the implied duty of good faith and fair dealing (Principle 2), which—given the facts alleged by Am-Pro—might have been breached.¹⁷⁸ For example, aside from the mere “absence of good faith,” Am-Pro's allegations suggested a genuine issue of material fact regarding the Contracting Officer “[evading] the spirit of the bargain,” interfering with Am-Pro's performance, “taking advantage of necessitous circumstances,” and abusing her authority.¹⁷⁹

Instead, the Federal Circuit began and ended its analysis with Principle 1, “[t]he presumption that government officials act in good faith”¹⁸⁰ The court emphasized the considerable burden of proof that a plaintiff must meet to overcome the presumption: “we are ‘loath to find to the contrary of [good faith], and it takes, and should take, well-nigh irrefragable proof to induce us

law of contracts, and without presumption and without wresting through unnatural issues of malice, personal animus, or specific intent to injure.

Id.

173. 281 F.3d 1234 (Fed. Cir. 2002).

174. *Id.* at 1236–38.

175. *Id.* at 1237–38.

176. *Am-Pro Protective Agency, Inc. v. United States*, No. 98–940C, slip op. (Fed. Cl. Feb. 2, 2001).

177. *Am-Pro Protective Agency, Inc.*, 281 F.3d at 1243.

178. Specifically, Am-Pro alleged that the Contracting Officer threatened to cancel Am-Pro's contract and “adversely impact [its] ability to contract with other agencies” if Am-Pro maintained its original claims. *Id.* at 1237 (alteration in original). Am-Pro withdrew its claims and “effectively releas[ed] the [G]overnment from any future claims” *Id.*

179. See RESTATEMENT (SECOND) OF CONTRACTS § 205, cmts. d, e (1981). W. Stanfield Johnson has reassessed *Am-Pro Protective Agency, Inc.* under the Restatement's standards for good faith and fair dealing and has argued that, “under the law of contracts between private individuals, *Am-Pro [Protective Agency, Inc.]* could not have been decided as it was.” Johnson, *Mixed Nuts and Other Humdrum Disputes*, *supra* note 11, at 705. Further, “*Am-Pro [Protective Agency, Inc.]* does not appear to be consistent with prior government contract precedent dealing with duress and good faith in performance. . . .” *Id.*

180. *Am-Pro Protective Agency, Inc.*, 281 F.3d at 1239.

to do so.”¹⁸¹ Then, before weighing Am-Pro’s allegations under this burden, the court withdrew somewhat from its application of a subjective intent standard, noting that “the presumption of good faith, as used here, applies only in the situation where a government official allegedly engaged in fraud or in some other quasi-criminal wrongdoing.”¹⁸² Finally, the court found no genuine issue of material fact with regard to the contractor’s allegations that the Government had acted with subjective bad faith.¹⁸³ According to the court, Am-Pro had not shown that (1) the Government intended to injure Am-Pro, (2) the Contracting Officer’s threats were based in malice, (3) there was proof of a conspiracy against Am-Pro, (4) the Government’s actions were oppressive, or (5) the Contracting Officer acted out of animus toward Am-Pro.¹⁸⁴

Following *Am-Pro Protective Agency, Inc.*, a number of decisions have merged the burden for the presumption of good faith into the standard that private contractors must meet to prove the Government’s breach of the duty of good faith and fair dealing.¹⁸⁵ Some judges now require proof by clear and convincing evidence of “bad faith,” or personal animus—not just the absence of good faith (such as slacking, lack of diligence, or failure to cooperate)—to prove breach of the duty of good faith and fair dealing.¹⁸⁶ Conversely, other decisions have expended considerable effort to clarify the distinction between the presumption of good faith (Principle 1) vis-à-vis the duty of good faith and fair dealing (Principle 2).¹⁸⁷ However, the confusion between the two principles continues to persist, and as it does, government contracts as bilateral deals become further imbalanced.¹⁸⁸

181. *Id.* (alterations in original) (quoting *Schaefer v. United States*, 633 F.2d 945, 948–49 (Ct. Cl. 1980)).

182. *Id.* (citing *Addington v. Texas*, 441 U.S. 418, 423–24 (1979)).

183. *See id.* at 1243.

184. *Id.* at 1240–41.

185. *See, e.g., Nash, Proving a Breach, supra* note 119, at 191; Johnson, *Mixed Nuts and Other Humdrum Disputes, supra* note 11, at 703 (predicting that, “[i]f *Am-Pro [Protective Agency, Inc.]* is not seen as an aberration overcome by a renewed application of general contract law, its precedential effect would be to grant government contracting officials a dangerous license to ignore those obligations of good faith and fair dealing in contractual actions that government contract law has already adopted from the law of contracts between private individuals”).

186. *See, e.g., Cal. Human Dev. Corp. v. United States*, 87 Fed. Cl. 282, 295 (2009); *Keeter Trading Co. v. United States*, 85 Fed. Cl. 613, 617–18 (2009); *N. Star Alaska Hous. Corp. v. United States*, 76 Fed. Cl. 158, 187–88 (2007).

187. *See, e.g., Universal Shelters of Am., Inc. v. United States*, 87 Fed. Cl. 127, 145 (2009) (Wolski, J.); *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 757–72 (2005) (Wolski, J.); *see also Helix Elec., Inc. v. United States*, 68 Fed. Cl. 571, 586–88 (2005) (Williams, J.); *Jay Cashman, Inc. v. United States*, 88 Fed. Cl. 297, 308 n.15 (2009) (Allegra, J.) (“While most cases seem to suggest that there can be no violation of the duty to cooperate without a showing of bad faith, that view is not universal.”).

188. *See* discussion *infra* Part III.A.1 (explaining how judges in the tribunals below have imported the subjective intent analysis applicable only under Principle 1 into their analysis of Principles 2 and 3); *see, e.g., White Buffalo Constr., Inc. v. United States*, 101 Fed. Cl. 1, 13 (2011); *Metcalf Constr. Co. v. United States*, 102 Fed. Cl. 334, 346 (Fed. Cl. 2011); *D’Andrea Bros., LLC v. United States*, 96 Fed. Cl. 205, 221–22 (2010).

b. Centex Corp. v. United States

The Federal Circuit's decision in *Centex Corp. v. United States*¹⁸⁹ involved a lawsuit similar to that addressed in *Winstar*—i.e., a suit for breach of contract claim filed by a trust company (the contractor) that had acquired failed thrifts pursuant to agreements with the Federal Savings and Loan Insurance Corporation under which the contractor and the Government expected that the contractor would enjoy certain tax benefits.¹⁹⁰ The Government's enactment of the subsequent legislation deprived the contractor of the tax benefits it had expected to enjoy through the execution and performance of the contract.¹⁹¹ The Federal Circuit's decision in *Centex Corp.* not only hewed to the *Winstar* plurality's reasoning, it also rounded it out and introduced Principle 2 to the analysis.¹⁹²

The Federal Circuit began with a straightforward recitation of the duty of good faith and fair dealing (Principle 2).¹⁹³ However, the court then confronted the question of when it should consider legislation to be a sovereign act that shields the Government from liability for breach of contract damages (Principle 3).¹⁹⁴ The Government asserted that the legislation at issue was an insulating exercise of sovereign power.¹⁹⁵ The Federal Circuit concluded that the legislation did not serve to insulate the Government from liability, however, because it had been “specifically targeted” at reappropriating contractual benefits and abrogating contractual obligations.¹⁹⁶ The Federal Circuit also followed *Winstar* in finding that the imposition of damages for the Government's breach of contract did not block the Government's right to exercise its taxing authority in a public and general manner.¹⁹⁷

The Federal Circuit noted that “[t]he question raised by this case is whether the [G]overnment is liable in damages for breach of the contract when Congress enacts specifically targeted legislation that appropriates for the [G]overnment a portion of the benefits previously available to the contractor.”¹⁹⁸ Applying the plurality decision from *Winstar*, the court held that, while “[t]he Government cannot make a binding contract that it will not exercise a sovereign power, . . . it can agree in a contract that if it does so, it will pay the other contracting party the amount by which its

189. 395 F.3d 1283 (Fed. Cir. 2005).

190. *See id.* at 1287–88; *see also* Nibley, *supra* note 24, at 27–28 (discussing *Centex Corp.*). Soon after *Centex Corp.*, the Federal Circuit decided *First Nationwide Bank v. United States*, 431 F.3d 1342, 1353 (Fed. Cir. 2005), a similar case with a similar outcome.

191. *Centex Corp.*, 395 F.3d at 1289.

192. *See id.* at 1305–11.

193. *Id.* at 1304 (affirming that it “imposes obligations on both contracting parties” and “applies to the [G]overnment just as it does to private parties”).

194. *Id.* at 1305–11.

195. *Id.* at 1309 (arguing that “this case involves a uniquely sovereign act, namely, the right to tax”).

196. *Id.* at 1308.

197. *Id.* at 1309.

198. *Id.*

costs are increased by the Government's sovereign act.'"¹⁹⁹ The court then concluded:

Thus, a claim for damages arising from the breach of a contract by an act of Congress does not bar Congress from exercising its taxing power; it merely ensures that if the exercise of that power breaches a particular contractual obligation, the injured party will have redress for the breach.²⁰⁰

In *Centex Corp.*, the court ultimately held that the Government had breached its duty of good faith and fair dealing.²⁰¹ Unfortunately, a number of decisions subsequent to *Centex Corp.* have primarily focused on the decision's use of the term "specifically targeted," such that some judges have required contractors to prove subjective bad faith or animus (associated with Principle 1) to demonstrate that the Government breached the contractual duty of good faith and fair dealing (Principle 2).²⁰²

c. Precision Pine & Timber Co. v. United States

The Federal Circuit's treatment of these issues in a more recent decision, *Precision Pine & Timber Co. v. United States*,²⁰³ is rooted in *Centex Corp.*'s language and analysis.²⁰⁴ However, the *Precision Pine* decision discussed Principles 2 and 3 in a way that not only appeared to invoke Principle 1 (which had no application to the matter) but also led to the merging of all three principles.²⁰⁵

In *Precision Pine*, the Federal Circuit reversed the Court of Federal Claims, which held that the Government had breached both an express warranty and the implied duty not to hinder the contractor at issue in its performance of fourteen timber-harvesting contracts with the Forest Service.²⁰⁶ Although the Federal Circuit reversed on both issues,²⁰⁷ the first issue, the alleged breach of express warranty, is discussed herein only insofar as it pertains to the second issue, which involves allegations of the Government's breach of the duty not to hinder the contractor's performance. As to the second issue, the Federal Circuit found that the lower court erred in holding that the Government had breached the duty of good faith and fair dealing.²⁰⁸

As background to the Federal Circuit's decision, it should be noted that a federal district court in Arizona had ordered timber harvesting under the

199. *Id.* (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 881 (1996)).

200. *Id.*

201. *Id.* at 1311, 1314.

202. See, e.g., *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 829–30 (Fed. Cir. 2010); *D'Andrea Bros. LLC v. United States*, 96 Fed. Cl. 205, 222 (2010).

203. 596 F.3d 817 (Fed. Cir. 2010).

204. See *id.* at 829. *Precision Pine* also relies on *First Nationwide Bank*, which immediately followed *Centex Corp.* See discussion *supra* note 190.

205. See Nash, *Postscript*, *supra* note 5, at 65–67 (explaining how *Precision Pine*'s articulation of the duty of good faith standard—Principle 2—"flies in the face of almost all prior decisions"); see also discussion *infra* Part III.A (merging of the three principles).

206. *Precision Pine*, 596 F.3d at 820.

207. *Id.* at 834.

208. *Id.*

contracts at issue suspended until the Forest Service “consulted with the U.S. Fish and Wildlife Service about the pertinent land resource management plans.”²⁰⁹ The order explained that such consultation was required under § 7 of the Endangered Species Act²¹⁰ due to the recent listing of the Mexican spotted owl as an endangered species.²¹¹ “The fourteen contracts remained suspended until completion of the consultation process in December 1996.”²¹² Given this delay, the contractor alleged that its timber-harvesting contracts included express warranties that the Forest Service had complied with the requirements of the Endangered Species Act.²¹³ The Federal Circuit rejected this argument, finding that the contracts did not include express warranties.²¹⁴

The Federal Circuit also reversed the tribunal below with regard to the alleged breach of the implied contractual duty of good faith and fair dealing.²¹⁵ The trial court found that the Forest Service unreasonably delayed the resumption of the timber-harvesting contracts in several ways²¹⁶ and supported its findings by citing to the Arizona district court, “which had reprimanded the Forest Service on several occasions for attempting to resume timber harvesting while the injunction remained in effect.”²¹⁷ The Federal Circuit, in reversing the findings of the trial court, articulated two reasons why the contractor was not entitled to recover damages in relation to the Government’s alleged breach of the duty not to hinder performance (Principle 2): “[t]he Forest Service’s actions during these formal consultations were (1) not ‘specifically targeted’ [at the contractor], and (2) did not reapropriate any ‘benefit’ guaranteed by the contracts, since the contracts contained no guarantee that Precision Pine’s performance would proceed uninterrupted.”²¹⁸

209. *Id.* at 819–20 (citing *Silver v. Babbitt*, 924 F. Supp. 976, 989 (D. Ariz. 1995)).

210. 16 U.S.C. §§ 1531–1544 (2006).

211. *See Silver*, 924 F. Supp. at 989.

212. *Precision Pine*, 596 F.3d at 820.

213. *Id.* at 824–25.

214. *Id.* at 825.

215. *Id.* at 834.

216. The Federal Circuit summarized the trial court’s findings as follows:

The trial court found that Forest Service’s actions during the suspension resulted in the suspension being unreasonably long. . . . Specifically, the trial court concluded that the Forest Service hindered the contracts because twelve days elapsed after the Arizona district court’s order in *Silver* before the Forest Service requested formal consultation. . . . The trial court also found the two-month delay that preceded the actual start of formal consultations unreasonable; the Forest Service spent this period formulating and revising its Biological Assessment to include requested information. . . . Finally, the trial court found the Forest Service unreasonably delayed the consultation process by failing to provide a legally sufficient Biological Opinion that conformed to a joint stipulation with the environmental groups in *Silver*.

Id. at 819–20 (citations omitted).

217. *Id.* at 829.

218. *Id.* (quoting *Centex Corp. v. United States*, 395 F.3d 1283, 1306 (Fed. Cir. 2005)). The authors of this Article believe that the order in which the *Precision Pine* decision addressed these two reasons has caused confusion in the tribunals below, at least within the Court of Federal Claims. *See* discussion *infra* Part III.A.

In some ways, the Federal Circuit created a straw man issue with regard to its consideration of the contractor's allegations that the Government breached its duty of good faith and fair dealing, given the disposition of the express warranty issue. As stated, the court first found that the timber-harvesting contracts did not include express warranties guaranteeing that performance would not be suspended by reason of the Forest Service's consultation with the U.S. Fish and Wildlife Services under the Endangered Species Act.²¹⁹ The court then stated that, "[b]ecause the suspensions were authorized, the only *remaining* question [was] whether the Forest Service's actions during the suspensions violated the implied duty of good faith and fair dealing."²²⁰ Thus, the court waited until the *second* reason (for finding no breach of the duty of good faith and fair dealing) to announce that there can be no breach of the implied duty of good faith and fair dealing under the circumstances—simply by virtue of the fact that there were no express warranties under the contract. Importantly, the court stated that "[t]he implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions."²²¹

Therefore, the court found that because the parties had not contemplated a guarantee of uninterrupted performance, the contractor had no expectation, and no express warranty, that the Forest Service would not delay performance due to its other statutory obligations.²²² Having found that the contracts did not include express warranties, the court could have disposed of the allegation of the breach of the duty of good faith and fair dealing without further discussion. In other words, the court could have articulated its second reason first (that no "benefit" or reasonable expectation for the contractor existed that could be frustrated by *any* type of government action or inaction, sovereign or otherwise), and it could have thereby avoided the confusion it created by stating its first reason first. However, the court did not do this.

Rather, the court began the discussion of its ruling with regard to consideration of Principle 2 (the duty of good faith and fair dealing, which includes the duty not to hinder) with language suggestive of subjective bad intent.²²³ Furthermore, the court began by discussing the legal standard that should be applied to assess the government conduct at issue, before even discussing the nature of that conduct itself—i.e., whether or not the government conduct under review involved the Government acting in its sovereign capacity or in its contracting capacity, or both.²²⁴ As previously discussed, the relevant

219. *Precision Pine*, 596 F.3d at 825.

220. *Id.* at 828 (emphasis added).

221. *Id.* at 831 (citing *Centex Corp.*, 395 F.3d at 1304–06).

222. *See id.*

223. *See id.* at 829 (requiring "indicia of a governmental bait-and-switch," "double crossing," or subsequent action "specifically targeted" to "reappropriate any 'benefit'").

224. *See id.*

legal standard to be applied depends upon the nature of the government conduct that is being reviewed,²²⁵ such that the Federal Circuit in *Precision Pine* should have resolved whether sovereign or contractual acts were at issue before addressing the applicable legal standard. Finally, the court seemed to invoke the sovereign acts doctrine (Principle 3) in its opinion without mentioning it by name or engaging in a full analysis of the doctrine's components.²²⁶

Consequently, *Precision Pine* has led to considerable confusion.²²⁷ *Precision Pine* failed to clearly articulate the individual principles and subconsiderations at work. As an initial problem, the court's partial articulation of the sovereign acts doctrine may allow, if not encourage, judges to apply *Precision Pine* in all instances in which a contractor has alleged that the Government has breached its duty of good faith and fair dealing, and not merely to instances involving sovereign acts.²²⁸ *Precision Pine*'s imprecise articulation of the sovereign acts doctrine enables judges who are so inclined to merge the three principles into a single, incorrect, articulation of law.²²⁹ And only after it stated the legal standard to be applied did the Federal Circuit explain that the standard applies only to the Government's sovereign actions, not the Government's contractual actions.²³⁰

To summarize then, the first significant problem with *Precision Pine* is that its imprecise analysis and explanation of the applicable principles fuel the confusion that already exists in the case law. The decision invites, and indeed has resulted in, judicial inattention to the crucial distinction between the Government acting in its sovereign capacity and the Government acting in its contractual capacity—leading some judges to apply the *Precision Pine* “specifically targeted” standard to actions the Government takes strictly in its contracting capacity.²³¹

Second, the same imprecision in the decision invites tribunals below to impute the concepts of subjective bad faith from Principle 1 (the presumption of good faith) into applications of Principles 2 (the duty of good faith

225. See discussion *supra* Part II.B. When the Government acts in a contracting capacity, the objective duty of good faith standard is supposed to apply. On the other hand, when the Government acts in a sovereign capacity, the subjective presumption of good faith should be applied.

226. See *Precision Pine*, 596 F.3d at 829 (“The [G]overnment may be liable for damages when the subsequent government action is specifically designed to reappropriate the benefits the other party expected to obtain from the transaction, thereby abrogating the [G]overnment’s obligations under the contract.”).

227. See discussion *infra* Part III.A.

228. See *supra* note 226.

229. See discussion *infra* Part III.A.

230. Eventually, after articulating the legal standard to be applied, the court explains that the government conduct in question is sovereign in nature. *Precision Pine*, 569 F.3d at 830 (noting that the Forest Service’s obligations under the Endangered Species Act are to the U.S. Fish and Wildlife Services). Even then, the court does not articulate this clearly—it never mentions the term “sovereign acts”; it simply announces the “specifically targeted” standard, and subsequently points out that it finds that the conduct in question is sovereign in nature. See *id.*

231. See, e.g., *White Buffalo Constr., Inc. v. United States*, 101 Fed. Cl. 1, 13 (2011); *Metcalf Constr. Co. v. United States*, 102 Fed. Cl. 334, 346 (Fed. Cl. 2011).

and fair dealing) and 3 (the sovereign acts doctrine). This is inappropriate, given that *Precision Pine* only dealt with Principles 2 (the duty of good faith and fair dealing) and 3 (the sovereign acts doctrine) and did not deal with Principle 1 (the presumption of good faith).²³²

Finally, upon addressing Principle 3, the court never mentioned “sovereign acts” or addressed the legal underpinnings supporting Principle 3.²³³ Instead, it used language applicable to Principle 1 (the presumption of good faith): “misbehavior,” “the old bait and switch,” and “a governmental bait and switch or double-crossing.”²³⁴ These are words of bad intent, not applicable to Principle 2 (the duty of good faith and fair dealing) and only marginally connected with Principle 3 (sovereign acts doctrine).²³⁵

The Federal Circuit’s migration from *Centex Corp.* to *Precision Pine* has had the effect of importing the subjective intent standard into analysis of the applicability of the sovereign acts doctrine (Principle 3) and the duty of good faith and fair dealing (Principle 2) in a number of instances, which has further resulted in the merging of the three principles into a single principle dependent upon a subjective intent analysis.²³⁶ For example, the court’s application of Principle 3 showed no evidence that the Federal Circuit considered the possibility that a sovereign act can be both “public and general” and “specifically targeted” in nature.²³⁷ The Federal Circuit’s focus solely on bad motive (the “specifically targeted” language) sullies the sovereign acts doctrine analysis. With regard to the application of Principle 3, courts should first turn to Justice Souter’s articulation of the “public and general” consideration of a governmental sovereign act as having a “public and general” effect prospectively, but having the effect of depriving one or more contractors of the benefit of their contractual bargains with regard to the act’s retrospective application.²³⁸ Finding that the Government has breached its duty of good faith and fair dealing by frustrating contractor rights does not necessarily mean that the sovereign act under review must be viewed solely in a binary manner—i.e., either as a prospective sovereign act or as a retrospective act specifically targeted at existing contracts. Instead, the sovereign act may be properly motivated as to its prospective application—i.e., a proper exercise of the Government’s “public and general” right to legislate—but at the same time, it may subject the Government to liability with regard to existing contracts retrospectively affected by the legislation.²³⁹ In such instances, motive becomes less relevant.

232. See *Precision Pine*, 569 F.3d at 827, 830.

233. See *id.* at 829.

234. *Id.*

235. See discussion *supra* Part II.B.

236. See, e.g., *White Buffalo Constr., Inc.*, 101 Fed. Cl. at 13; *Metcalf Constr. Co.*, 102 Fed. Cl. at 346.

237. See discussion *supra* note 38.

238. See *United States v. Winstar Corp.*, 518 U.S. 839, 893–94 (1996); Schwartz, *Assembling Winstar*, *supra* note 77, at 520.

239. See *Winstar*, 518 U.S. at 899 (adopting “substantial effect” test).

In his plurality decision in *Winstar*, Justice Souter examined the conundrum presented by attempting to protect *both* the Government's right to be unfettered in its exercise of its sovereign powers *and* the Government's need to create enforceable contracts with benefits and obligations.²⁴⁰ Justice Souter recognized that the Government may at times act in its contractual capacity when it exercises a sovereign power.²⁴¹ Referring to the Government's "dual characters . . . as contractor and legislator," he recognized that a specific sovereign act may be undertaken to affect "some public good," but at the same time may be designed to relieve the Government of obligations it has accepted through contracts.²⁴² Justice Souter determined that the concept of finding the Government liable for damages for the retrospective application of a sovereign power is not incompatible in all instances with recognizing the Government's right to exercise sovereign power prospectively.²⁴³ As such, Justice Souter reasoned that neither the contracts themselves nor the award of damages has the effect of limiting the Government's ability to "exercise . . . authority to modify banking regulations."²⁴⁴

The *Precision Pine* decision lost sight of Justice Souter's assessment of the sovereign acts doctrine.²⁴⁵ Courts should be careful to limit their focus on evidence of sovereign subjective intent when they assess the applicability of the sovereign acts doctrine (Principle 3), just as they should avoid introducing considerations of subjective intent when considering the application of Principle 2, the duty of good faith and fair dealing.²⁴⁶ The Government's motive behind its exercise of a sovereign act may be pure, and therefore appropriate as to its prospective effect, but less pure, and therefore inappropriate as to its retroactive effect.²⁴⁷ In other words, the Government's desire to see the prospective application of legislation may not involve "misbehavior," "bait and switch," or "double-crossing" (negative aspects of subjective intent), and yet that same legislation may have the effect of negating contractor rights under existing contracts (which may or may not be motivated by bad intent).²⁴⁸ Thus, a legal standard that examines a sovereign act solely on the basis of whether it resulted from subjective bad intent inappropriately melds

240. See, e.g., *id.* at 894 (recognizing the Government's dual roles with regards to FIRREA).

241. See *id.* at 893–94.

242. *Id.*

243. See, e.g., *id.* at 894.

244. *Id.* at 881, 890 n.35 ("[W]hile the [C]ontracting [O]fficers of Agency X cannot guarantee that the United States will not perform future acts of effective government, they can agree to compensate the contractor for damages resulting from justifiable acts of the United States in its 'sovereign capacity.'") (alteration in original) (citing Richard E. Speidel, *Implied Duties of Cooperation and the Defense of Sovereign Acts in Government Contracts*, 51 GEO. L.J. 516, 542 (1963)).

245. See discussion *infra* Part III.A.

246. See discussion *supra* Part II.B.

247. See, e.g., *Winstar*, 518 U.S. at 894.

248. See generally *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 829 (Fed. Cir. 2010).

a concept from Principle 1 into Principle 3, resulting in a narrower interpretation of the sovereign acts doctrine than what the Supreme Court described in *Winstar*.²⁴⁹

III. THE ILL EFFECTS OF OVERPROTECTING THE GOVERNMENT AND CONFLATING THE THREE PRINCIPLES

A. *Some Decisions Issued After the Federal Circuit's Decision in Precision Pine Have Conflated and Confused the Three Principles, Applying Precision Pine's Legal Analysis to Situations Where Only Government Contractual Acts, Not Sovereign Acts, Were Involved*

In some lower court cases, judges have concluded from *Precision Pine* that the Federal Circuit intended to extend the precedent set in *Precision Pine* to both the Government's sovereign and contractual acts. However, none of these cases involved sovereign acts to which the sovereign acts doctrine (Principle 3) should apply; rather they dealt with contractor claims that the Government breached the duty of good faith and fair dealing in administering the contracts at issue. And yet, the judges in these cases applied the legal standard that the Federal Circuit articulated in *Precision Pine*.

In *White Buffalo Construction, Inc. v. United States*,²⁵⁰ a contractor asserted that the Government had breached its duty of good faith and fair dealing in administering its construction contract.²⁵¹ The contractor alleged that the Government breached its contractual duty of good faith and fair dealing by concealing a differing site condition on the construction site, by failing to pursue certain permits required to enable performance, by misrepresenting that the Government had pursued the permits, and by other acts that had the effect of hindering the contractor's performance.²⁵² In assessing these allegations, the court imported the bad faith standard applicable under Principle 1 (the presumption of good faith) to its consideration of the applicability of Principle 2 (the duty of good faith and fair dealing) by citing to the standard articulated in *Precision Pine*, which dealt with Principle 3 (the sovereign acts defense).²⁵³ The court paid the standard homage to the Core Tenet and noted that the duty of good faith and fair dealing is implied into every contract.²⁵⁴ The court then conflated Principles 1 and 2, stating that a contractor can *only* prove breach of the duty of good faith

249. See *id.* (sovereign motive); *Winstar*, 518 U.S. at 899 (substantial effect test).

250. 101 Fed. Cl. 1 (2011).

251. *Id.* at 3. It appears that the contractor alleged both breach of the duty of good faith and fair dealing (Principle 2) and bad faith (Principle 1) in contract administration, which may have contributed to the court's conflation of the principles. See *id.*

252. See *id.* at 13–19.

253. See *id.* at 13.

254. *Id.* The court held:

Generally, every contract includes an implied duty of good faith and fair dealing. . . . The covenant of good faith and fair dealing is an implied duty that imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance

and fair dealing by overcoming the presumption of good faith—i.e., by proving bad faith by clear and convincing evidence (Principle 1).²⁵⁵ The court also brushed aside the contractor’s argument that the court had wrongly conflated Principles 1 and 2, and expressly stated that both principles involve proof of bad faith on the part of the Government.²⁵⁶ Additionally, the court imported the subjective intent and bad faith concept from the presumption of good faith (Principle 1) to assess whether or not the Government had breached its contractual duty of good faith and fair dealing (Principle 2).²⁵⁷

The same outcome befell the contractor in *Metcalf Construction Co. v. United States*.²⁵⁸ In *Metcalf Construction Co.*, the court completely merged the three distinct principles into one. According to the court, *Precision Pine* required a contractor to prove subjective bad intent on the part of government personnel in all situations, not merely situations that involve sovereign acts or where the contractor specifically alleges bad faith.²⁵⁹ Like the facts at issue in *White Buffalo Construction, Inc.*, the facts in *Metcalf Construction Co.* involved government acts that were taken solely in the contractual arena, not in the sovereign arena.²⁶⁰ The court in *Metcalf Construction Co.* found that the Government engaged in the kinds of conduct referenced in the Restatement (Second) of Contracts as archetypical of a breach of the duty of good faith and fair dealing, such as failure to promptly take action necessary to allow the contractor to perform, poor communication, and acts of retaliation.²⁶¹

and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.

Id. (citing *Precision Pine*, 596 F.3d at 828; *Bannum, Inc. v. United States*, 80 Fed. Cl. 239, 246 (Fed. Cl. 2008); *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005)).

255. *Id.* The court noted that “government officials are presumed to act conscientiously and in good faith in the discharge of their duties” and therefore “a plaintiff must present clear and convincing evidence of bad faith” in order to overcome that presumption. *Id.* (quoting *Bannum, Inc.*, 80 Fed. Cl. at 249).

256. *Id.*

257. *See id.*

258. 102 Fed. Cl. 334 (2011).

259. *See id.* at 346.

260. *See id.* at 342 (“Metcalf claimed that the Navy breached the [c]ontract by failing to *administer it in good faith.*”) (emphasis added). It is possible that the contractor contributed to some of the confusion because, according to the court’s decision, the contractor claimed that the Government subjected it “to numerous instances of bad faith conduct” and that the Government had breached its duty of good faith and fair dealing. *Id.* at 339 (quoting Complaint at ¶¶ 17, 84–95, *Metcalf Constr. Co., Inc. v. United States*, 102 Fed. Cl. 334 (2011) (No. 07-777C)). Thus, the contractor might have specifically alleged bad faith as well as breach of the duty of good faith and fair dealing. This does not, however, explain the court’s conflation and melding of the legal standards.

261. *Id.* at 361, 364. Indeed, the court there noted that “[t]he record establishes . . . a *retaliatory aspect* to some of the noncompliance notices that the Navy issued.” *Id.* (emphasis added). Further, the court stated that the Contracting Officer’s “lack of knowledge and experience significantly contributed to the lack of trust and *poor communication* that plagued the [project] at the beginning.” *Id.* (emphasis added).

Under Federal Circuit precedent, the type of failure to cooperate and hindrances on the part of the Government in *Metcalf Construction Co.* should have been more than enough to establish that, as an objective matter, the Government had breached the duty of good faith and fair dealing it owed to the contractor.²⁶² For example, the Federal Circuit in *Malone v. United States*²⁶³ found the Contracting Officer's action at issue breached the duty of good faith and fair dealing under a reasonableness standard and the criteria discussed in the Restatement (Second) of Contracts.²⁶⁴ The Federal Circuit in *Malone* did not inject elements of subjective intent, bad faith, or animus into its assessment of whether the Government had breached its duty of good faith and fair dealing.²⁶⁵ Rather, it interpreted this duty in a way that makes it consistent with the Core Tenet—that the Government and its contractors owe certain reciprocal duties to one another.

Even though the court in *Metcalf Construction Co.* cited *Malone*, it nonetheless read the decision in a way that effectively requires contractors to demonstrate the kind of subjective bad faith that Principle 2 simply does not entail.²⁶⁶ The *Metcalf Construction Co.* court added the word “only” to its paraphrase of the *Malone* ruling, which makes it appear as if *Malone* is in line with *Precision Pine's* “specifically targeted” standard, which it is not.²⁶⁷ *Malone* did not state that *only* the facts before it would suffice to prove a breach of the Government's duty of good faith and fair dealing, as *Metcalf Construction Co.* suggests.²⁶⁸

Thus, by turning away from the *Malone* reasonableness standard, the *Metcalf Construction Co.* court determined that the sufficiency of the Government's contract administration acts should be assessed under the standard announced in *Precision Pine*,²⁶⁹ which according to the court mandated a showing of subjective bad intent or bad faith, even though the governmental

262. See, e.g., *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988). The court in *Malone* found that the Contracting Officer had been “evasive” in refusing to answer questions that would direct the contractor's continued performance; he refused to answer the contractor's “explicit question concerning whether the standard of workmanship had changed”; and he failed to allow the contractor to know the true performance requirements even though he continued to make progress payments to the contractor. *Id.*

263. *Id.* at 1441.

264. See *id.* at 1445 (citing RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981)). The court specifically stated that “[a]ccording to [the] Restatement (Second) of Contracts § 241(e) (1981) . . . [s]ubterfuges and evasions violate the obligation of good faith, as does lack of diligence and interference with or failure to cooperate in the other party's performance.” *Id.* (alteration in original) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 241 cmt. d (1981)).

265. See *id.* at 1445–46.

266. See *Metcalf Constr. Co.*, 102 Fed. Cl. at 346.

267. See *id.* at 346. The court summarized the *Malone* holding as “holding that *only* where the CO's evasive conduct misled [plaintiff] to perform roughly 70% of its contractual obligation in reliance on a workmanship standard” was the issue of breach of good faith and fair dealing invoked.” *Id.* (alteration in original; emphasis added) (quoting *Malone*, 849 F.2d at 1445–46).

268. See *Malone*, 849 F.2d at 1445.

269. *Metcalf Constr. Co.*, 102 Fed. Cl. at 346 (citing *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 828 (Fed. Cir. 2010)).

acts at issue were contractual and not sovereign.²⁷⁰ The court in *Metcalf Construction Co.* simply followed the lead of the Federal Circuit in *Precision Pine* by injecting language tinged with subjective bad intent—“misbehavior”—in assessing whether the Government’s conduct breached its duty of good faith and fair dealing.²⁷¹ Relying upon the imprecise language and analysis in *Precision Pine*, the *Metcalf Construction Co.* court therefore merged all three principles into one concept, centered on subjective bad intent and targeted animus.²⁷²

Fortunately, other lower court decisions issued after *Precision Pine* have avoided the confusing legal standard set out by the Federal Circuit in *Precision Pine* by reversing the order in which issues were disposed. As noted earlier, one of the factors that contributed to the confusion surrounding *Precision Pine* is that the Federal Circuit waited until *after* it articulated the “specifically targeted” legal standard to rule that the contractor could not pursue its allegation of breach of the duty of good faith and fair dealing on the basis that the contractor had no right to expect the contractual benefit it alleged the Government’s sovereign act had negated.²⁷³ A number of lower court judges found it unnecessary to interpret the precise meaning and applicability of *Precision Pine*’s “specifically targeted” standard because they have addressed the benefit issue *first*.

In *AECOM Government Services, Inc.*,²⁷⁴ for example, the contractor alleged that the Government breached its duty of good faith and fair dealing when Congress enacted legislation that subjected the contractor to certain taxes it had not been liable for at the time the contract was formed.²⁷⁵ *AECOM Government Services, Inc.* thus involved a sovereign act, such that the Government asserted the sovereign acts doctrine (Principle 3) as a defense.²⁷⁶ The Armed Services Board of Contract Appeals cited to the

270. *See id.* (citing *Precision Pine*, 596 F.3d at 829). The court held:

In addition, our appellate court requires that a breach of the duty of good faith and fair dealing claim against the Government can only be established by a showing that it “specifically designed to reappropriate the benefits [that] the other party expected to obtain from the transaction, thereby abrogating the [G]overnment’s obligations under the contract.” . . . Short of such interference, it is well established that federal officials are presumed to act in good faith, so that “[a]ny analysis of a question of [g]overnmental bad faith must begin with the presumption that public officials act conscientiously in the discharge of their duties.”

Id. (second alteration in original; citations omitted).

271. *Id.* at 364 (citing *Precision Pine*, 596 F.3d at 829, for the proposition that “[n]ot all *misbehavior* . . . breaches the implied duty of good faith and fair dealing”) (alterations in original; emphasis added).

272. *See id.* at 346. Elsewhere, in *D’Andrea Brothers LLC v. United States*, 96 Fed. Cl. 205, 221 (2010), the court also applied the subjective bad faith standard to another situation in which there were no sovereign acts involved.

273. *Precision Pine*, 596 F.3d at 831; *see discussion supra* Part II.C.2. The court held that the contractor had no right to assume that the Government—the Forest Service in that case—had taken all necessary actions to warrant that the contractor’s performance would remain uninterrupted—i.e., there was no reasonable expectation of a benefit. *See Precision Pine*, 596 F.3d at 831.

274. ASBCA No. 56861, 10-2 BCA ¶ 34,577.

275. *Id.* at 170,466–68.

276. *See id.* at 170,465.

Restatement (Second) of Contracts and quoted *Precision Pine's* “old bait and switch” and “specifically targeted” language.²⁷⁷ In doing so, the board rejected the contractor’s reliance upon *Centex Corp.* by finding that, unlike the government contract in *Centex Corp.*, the contract in *AECOM Government Services, Inc.* did not contain a “bargained-for benefit.”²⁷⁸ Rather, because the contract was silent as to the contractor’s responsibility to pay the new taxes, the board held that the Government “did not breach its implied duty of good faith and fair dealing.”²⁷⁹ Therefore, while the board carefully quoted the legal standard for Principle 3 (the sovereign acts doctrine) announced in *Precision Pine*, its decision rested on its primary determination that there was no bargained-for contractual benefit that could be targeted by the new legislation.²⁸⁰

B. Other Decisions Have Employed a More Careful Analysis in an Attempt to Partially Undo Some of the Melding of the Three Principles That Has Followed the Federal Circuit’s Decisions in Am-Pro Protective Agency, Inc. and Precision Pine

As the previous part of this Article addressed, the *White Buffalo Construction, Inc.* and *Metcalf Construction Co.* decisions ignored the fact that those

277. See *id.* at 170,468 (citing *Precision Pine*, 596 F.3d at 829–30; *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981)).

278. See *id.*

279. *Id.* The board reasoned:

Unlike the contracts in *Centex [Corp.]*, AECOM’s contract did not contain a bargained-for benefit. AECOM’s contract was silent with respect to the tax status of offshore subsidiaries. As a result, we conclude that the [G]overnment did not breach its implied duty of good faith and fair dealing. . . . It is undisputed that the FAR does not provide a basis for relief from after-imposed F.I.C.A. taxes. Accordingly, the [G]overnment’s motion for summary judgment is granted only as to the implied duty of good faith and fair dealing.

Id. (citations omitted).

280. See *id.* The decision might be questioned in this regard. The board’s decision discusses the purposes behind Congress’s decision to enact the HEART Act, which imposed the Federal Insurance Contributions Act obligations on offshore subsidiaries of U.S. companies. *Id.* at 170,466. The decision quotes from the *Congressional Record*. *Id.* at 170,466–67. The quote contains language suggesting that Congress’s intent for the HEART Act was not only “public and general” in nature, but also “specifically targeted” at existing government contracts. See *id.* at 170,466–68 (quoting 154 CONG. REC. S4773–74 (daily ed. May 22, 2008); 154 CONG. REC. E1077–78 (daily ed. May 20, 2008)). As the board noted, the *Congressional Record* contains the following comments regarding the HEART Act:

[Sen. Baucus (D-MT)]: This bill is paid for by requiring that *companies that do business with the Federal Government* pay their employment taxes. The bill makes sure that foreign subsidiaries of U.S. parent companies *that have contracts with the Federal Government* pay employment taxes for their employees. . . .

[Sen. Grassley (R-IA)]: The bill also ensures that U.S. employers of Americans working abroad *pursuant to a [g]overnment contract* pay Social Security and Medicare taxes, regardless of whether they operate through a foreign subsidiary.

Id. at 170,467 (emphasis added) (quoting 154 CONG. REC. S4773–74 (daily ed. May 22, 2008)). Despite the inapposite legislative history, the *AECOM Government Services, Inc.* decision concluded that while contractors were enjoying the benefit of tax-exempt holdings, they had no right to assume at the time they contracted that the benefit flowed from the contract, or that Congress could not take that benefit away. *Id.* at 170,468.

cases did not involve sovereign acts.²⁸¹ In contrast, the court's decisions in *Fireman's Fund Insurance Co. v. United States*²⁸² and *Timber Products Co. v. United States*²⁸³ recognized the importance of analyzing whether the underlying act at issue is contractual or sovereign, and used this analysis to help clarify some of *Precision Pine's* holding.

In *Fireman's Fund Insurance Co.*, one of the contractor's allegations was that the Government breached the duty of good faith and fair dealing (Principle 2) when the Government waited many months before informing the contractor's surety of its disapproval of a site rewatering plan.²⁸⁴ The Government cited the language and analysis in *Precision Pine* as a defense to the contractor's claim.²⁸⁵ The court began its discussion with a recitation of the Core Tenet and Principle 2.²⁸⁶ After the court paid homage to the Core Tenet and Principle 2, it then discussed the Federal Circuit's ruling in *Precision Pine* regarding the issue of breach of the duty of good faith and fair dealing because the Government insisted that *Precision Pine* applied to all of the contractor's claims.²⁸⁷ However, the court found that the Federal Circuit's ruling in *Precision Pine* applied only to situations that involve sovereign acts and government conduct that arises *outside* the context of contract administration, consistent with Principle 3 or the sovereign acts doctrine.²⁸⁸

281. See discussion *supra* Part III.A.

282. 92 Fed. Cl. 598 (2010).

283. 103 Fed. Cl. 225 (2011).

284. See *Fireman's Fund Insurance Co.*, 92 Fed. Cl. at 680–82.

285. See *id.* at 675.

286. *Id.* at 660, 675. The court held:

“The United States, no less than any other party, is subject to this covenant.” . . . “Both the duty not to hinder and the duty to cooperate are aspects of the implied duty of good faith and fair dealing.” . . . The specifics of the parties' duties under this covenant are dependent on the particular circumstances of the case. . . . *The [G]overnment breaches these duties when it acts unreasonably under the circumstances, viz., if it unreasonably delays the contractor or unreasonably fails to cooperate.*

Id. at 660 (emphasis added) (quoting *Precision Pine & Timber v. United States*, 596 F.3d 817, 820, 828 (Fed. Cir. 2010)) (citing *Milmark Servs., Inc. v. United States*, 731 F.2d 855, 859 (Fed. Cir. 1984); *C. Sanchez & Son, Inc., v. United States*, 6 F.3d 1539, 1542 (Fed. Cir. 1993); *Commerce Int'l Co. v. United States*, 338 F.2d 81, 86 (Ct. Cl. 1964)).

287. *Id.* at 676.

Because defendant trumpets the decision as a *deus ex machina* for all of plaintiffs' claims involving [g]overnment-caused delay, and because *Precision Pine's* holding as to the implied duty of good faith and fair dealing impacts the allegations of [g]overnment-caused delay in the [b]oard claims differently from those implicated by plaintiffs' labor claim, a further analysis of *Precision Pine* and its holding is warranted.

Id.

288. *Id.* at 677.

Precision Pine's two-part test for whether the Government breaches the implied duty of good faith and fair dealing *must be read in this particular context, a situation where the Government's alleged wrongful conduct does not arise directly out of the contract, i.e., key to the alleged breach are actions involving another government actor or a third party.* . . . In *Precision Pine* the alleged breach occurred during a period of suspended contract performance, during which the Forest Service breached its statutory duty arising under the ESA, *a duty owed not to the plaintiff, but to the Fish and Wildlife Service.* Similarly, in the two cases primarily relied on by the Federal Circuit, *First*

Instead, the court in *Fireman's Fund Insurance Co.* stated that the standard set out in *Malone* and subsequent decisions (Principle 2) continued to govern situations in which an alleged government failure to cooperate or hinder performance arises from acts the Government has taken in its contractual capacity.²⁸⁹ The court concluded that "*Precision Pine* does not foreclose consideration of whether the Corps breached its contractual duty of good faith and fair dealing based on the standards set forth in *Malone* and its progeny. . . . [T]he facts giving rise to *Precision Pine*'s holding are sufficiently distinguishable from this case."²⁹⁰

The facts in *Timber Products Co.* presented a somewhat more complicated situation. However, the court carefully analyzed the nature of the government acts and omissions at issue.²⁹¹ In *Timber Products Co.*, the contractor alleged that the Government had breached the contractual duty of good faith and fair dealing (Principle 2) by awarding timber sale contracts prior to performing required environmental surveys.²⁹² The contractor alleged that the Government awarded the contracts by relying upon an interpretation of applicable environmental law that it knew would be unlikely to prevail in a pending federal district court action.²⁹³ The Government asserted the sovereign acts doctrine in defense, claiming that the Government's obligation to observe and execute environmental laws was a sovereign act.²⁹⁴ The court disagreed with the Government, finding that the contractor's allegation was aimed at the Government's decision to award the contracts prior to performing the required surveys, rather than the Government's failure to perform the necessary environmental surveys themselves.²⁹⁵ The court stated that the duty breached ran specifically to the contractor, not to third parties or the public in general, as did the duty in *Precision Pine*.²⁹⁶

The court in *Timber Products Co.* relied on the reasoning in *Fireman's Fund Insurance Co.* by outlining when *Precision Pine* does and does not apply and affirming that the "reasonableness" standard articulated in *First Nationwide Bank v. United States*²⁹⁷ and *Centex Corp.* determines whether the Govern-

Nationwide and Centex [Corp.], Congress was alleged to breach the implied duties in contracts between the plaintiffs and the Federal Savings and Loan Insurance Corporation. . . . It is in this context, where the government conduct giving rise to the allegation of breach does not arise directly out of the contract, that the Federal Circuit clarified the rule that the Government's liability attaches when the "subsequent government action is specifically designed to reappropriate the benefits the other party expected to obtain from the transaction." . . . Here, by contrast, the Corps's obligations arise out of its [c]ontract with the Joint Venture, and the alleged breach involves the Corps's performance under the [c]ontract.

Id. (internal citations omitted) (quoting *Precision Pine*, 596 F.3d at 829).

289. *Id.* at 678.

290. *Id.* (citing *Precision Pine*, 596 F.3d at 830).

291. *Timber Prods. Co. v. United States*, 103 Fed. Cl. 225, 244 (2011).

292. *Id.* at 245.

293. *See id.* at 242–43.

294. *See id.* at 243.

295. *See id.* at 244–46.

296. *See id.* at 245.

297. 431 F.3d 1342 (Fed. Cir. 2005).

ment has breached the contractual duty of good faith and fair dealing.²⁹⁸ Applying this standard to the facts, the court found that (1) the Government's conduct arose from a duty owed to the contractor, not to third parties; (2) therefore, the Government's conduct should be assessed under a reasonableness standard (Principle 2), not a "specifically targeted" or other subjective intent standard (Principle 1) or *Precision Pine's* articulation of the sovereign acts doctrine (Principle 3); and (3) the Government's conduct of awarding contracts while knowing that a court would likely enjoin performance violated the duty of good faith and fair dealing (Principle 2) it owed the contractor.²⁹⁹

IV. CONCLUSION: THE PRACTICAL EFFECTS OF CONFLATING THE THREE PRINCIPLES

It would be easy to dismiss the melding of the Core Tenet and the three principles by the Federal Circuit and some lower court judges as merely an unfortunate legal detour. What more is it than case law gone awry? That would not be the first time this has happened, nor will it be the last, some might argue. Like the environment, case law tends to heal itself if left alone. Isn't this somewhat of an overblown academic exercise? No, we think not. Justices Souter³⁰⁰ and Breyer,³⁰¹ the panel that decided *Malone* and panels that decided several decisions similarly reasoned, Judge Newman³⁰² and several other judges, and many commentators and scholars from W. Stanfield Johnson³⁰³ to Professors Nash³⁰⁴ and Schwartz³⁰⁵ think not. But as this Article has demonstrated, the Federal Circuit's use of impre-

298. See *Timber Prods. Co.*, 103 Fed. Cl. at 243–44.

299. The court stated:

Unlike *Precision Pine*, the Forest Service's obligations here ran directly to Timber Products under the Jack Heli contract, not to a third party under a statute or a different contract, and the alleged breach directly impacted Timber Products' ability to perform under this contract. As such, the *Scott Timber* reasonableness standard, not *Precision Pine's* specifically-targeted standard, applies. . . . As the court in *Scott Timber* recognized a breach of the implied duty of good faith and fair dealing may occur "as" a contract is awarded. . . .

Id. (citing *Scott Timber Inc. v. United States*, 86 Fed. Cl. 102, 117 (2009)). Therefore, the court concluded:

the Government acted unreasonably and breached its duties to cooperate and not hinder performance by awarding the timber sale knowing of the risk of an injunction and suspension, but never telling Timber Products. Because of these breaches, the Government's liability is not limited to out-of-pocket expenses.

Id. at 226 (emphasis added).

300. See *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (Souter, J.).

301. See *Mobil Oil Exploration & Prod. Se., Inc. v. United States*, 530 U.S. 604, 607–08 (2000) (Breyer, J.).

302. See Johnson, *The Federal Circuit's Great Dissenter*, *supra* note 8.

303. See *id.*

304. See Nash, *Postscript*, *supra* note 5.

305. See Schwartz, *The Status of the Sovereign Acts and Unmistakability Doctrines*, *supra* note 95; Schwartz, *Assembling Winstar*, *supra* note 77.

cise language and analysis regarding this important area of government contracts law has caused considerable confusion within the federal judiciary. Over time, the practical effects of conflating the three principles could become even more corrosive to the relationship between the Government and its contractors.

At the heart of the Core Tenet is the concept that it is not only good and fair to contractors to place them on an equal footing with the Government when they enter and perform government contracts, but it is good and fair to the Government as well.³⁰⁶ If the Government cannot be trusted as a reliable partner in contracting, the pool of entities willing to contract with the Government would likely shrink, and those that remain may inject risk factors into their pricing. In the end, the Government will pay more, and consequently so too will the taxpayer. As the Supreme Court has stated:

Injecting the opportunity for unmistakability litigation into every common contract action would, however, produce the untoward result of compromising the Government's practical capacity to make contracts, which we have held to be "of the essence of sovereignty" itself. . . . *From a practical standpoint, it would make an inroad on this power, by expanding the Government's opportunities for contractual abrogation, with the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements. As Justice Brandeis recognized, "[p]unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors."*³⁰⁷

Standards, including legal principles, drive conduct. This is not a matter of ethics; it is a matter of human nature and business. How many businesses, or individuals, pay more taxes than they are required to pay? They may contribute generously to charities, but few if any pay more taxes than they are required to pay.

Government procurement and contract administration employees are obligated to obtain the best value for the taxpayer money they are charged with spending.³⁰⁸ They are obligated to pursue the most favorable conditions and outcomes they can obtain.³⁰⁹ But if government employees are allowed to pressure contractors into giving extra-contractual concessions during contract performance without subjecting the Government to liability, then the practical effect would be preventing the contractor from realizing the benefits it reasonably anticipated when it entered into its government contract.

The same would be true if the balance were tipped in favor of the contractor side. Government contracts clients ask, "What are we *required* to do?" when seeking advice about compliance with a regulation or contract provision. They may decide that it is prudent as a business matter to foster

306. See generally *Lynch v. United States*, 292 U.S. 571, 579 (1934) (explaining the Core Tenet).

307. *United States v. Winstar Corp.*, 518 U.S. 839, 884 (1996) (emphasis added; alteration in original) (quoting *Lynch*, 292 U.S. at 580) (citing *United States v. Bekins*, 304 U.S. 27, 51–52 (1938)).

308. See FAR 1.102(a).

309. See *id.*

their long-term relationship with a government customer—i.e., to do more than that which is required of them by contract or regulation in a particular circumstance. However, a determination of what is *required* is almost always a starting point. If a lower level of performance is required, decision making starts at that point; if a higher level of performance is required, decision making starts at that point.

Again, although consideration of ethics may be relevant to this analysis, the analysis does not rest on considerations of ethics. People in business are busy; they do not get to some tasks; they mean no harm to their contracting partners when they miss response deadlines. Absent the use of risk-shifting provisions, universal rules of contracting make a party who contracts with another liable to the other for delays in performing tasks that would allow the other to enjoy the benefits of the contract the two have executed. The *Precision Pine* language and analysis, however, and the manner in which some tribunals have interpreted it, negate these universal rules of contracting and substantially erode the Core Tenet.³¹⁰

Left as is, application of the conflated principles articulated in *Precision Pine* and its progeny will likely lead to the deterioration of government-contractor relations and will undermine the Government's credibility at the bargaining table, leading to higher procurement costs. The Federal Circuit should find occasion to revisit its articulation and analysis of the principles that govern this area of the law to give clear guidance to the tribunals below, regulators, government contract administration personnel, and contractor personnel. Such analysis would do well to avoid overprotection of the Government as a contractor and to pay heed to the Supreme Court's advice—let the Government contract.³¹¹

310. See discussion *supra* Part II.C.

311. See *United States v. Tingey*, 30 U.S. 115, 128 (1861).