Winning the Battle but Losing the War: The Contract Disputes Act and Why Mineson Simultaneously Got It Right, and Wrong

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INTRODUCTION

In *Minesen Co. v. McHugh*, decided March 2012, the United States Court of Appeals for the Federal Circuit (“Federal Circuit”), in a two to one decision, held that the Contract Disputes Act of 1978 (“CDA”) permits government agencies to write contracts with clauses (“Minesen clauses”) allowing contractors to waive appeal to the Federal Circuit from a Board of Contract Appeals (“agency board”). Judge Bryson vigorously dissented. The court, in holding these Minesen clauses were permitted by the CDA, effectively endorsed a drastic change in government contracting rules, and thus the incentives guiding government contracts. While this paper supports the majority’s legal conclusion, Judge Bryson was right to be very concerned about enforcing appeal waivers. Though a policy analysis of the consequences of allowing contractors to waive their appeal rights would not have been sufficient to change the holding, it would have better highlighted the seriousness of the issue. In addition to a thorough a review of majority and dissent reasoning, this paper aims to provide that policy analysis.

This paper has four primary goals. First, untangle the historical foundation of the CDA so that the reader can fully understand the majority and dissent’s dispute over Congress’s legislative intent for the CDA. Second, analyze each side’s arguments, including possible but unmade arguments, showing why the majority holding is correct based on both the statutory analysis and the legislative intent of the CDA. Third, analyze the policy implications created by the Minesen decision that were unexamined by both the majority and the dissent. Finally, offer a recommendation based on all the above analysis.

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1 671 F.3d 1332 (2012).
2 *Id.* at 1343 (Bryson, J. dissenting).
3 *Id.*
I. HISTORICAL STATUTES RELATED TO MINESEN

Congress viewed the 1978 Contract Disputes Act (“CDA”) as a necessary amalgamation and clarification of the statutes and case law dealing with contractor remedies in suing executive agencies of the government. The scope of the CDA, however, was purposefully not coextensive with the broader Tucker Act, and the nuances of what Congress intended to subsume and achieve with the CDA is debatable. Therefore, to understand the dispute in Minesen over what the CDA really intended, one must trace the CDA back to its legislative and legal roots. The roots of the present day CDA developed in three parts: Pre-Tucker Act events; the Tucker Act; and finally, United States v. Wunderlich and the Wunderlich Act.

A. Pre-Tucker Act Events: Piecemeal Waiver of Sovereign Immunity

In 1855, the United States Congress passed the Court of Claims Act, enacting the government’s first significant waiver of sovereign immunity and creating the Court of Claims. The Court of Claims jurisdiction extended to all claims founded on a law of Congress, a regulation of an executive department, or any contract, express or implied, with the government of the United States. The relationship between the now abolished Court of Claims and the present day equivalents can be confusing, and warrants a brief explanation.

The 1982 Federal Courts Improvement Act abolished the Court of Claims and established the United States Claims Court and the United States Court of Appeals for the Federal Circuit (“Federal Circuit”). Subsequently, in 1992, Congress renamed the United States Claims Court the U.S. Court of Federal Claims (“Court of Federal Claims”). Thus, today, the Court of Federal

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4 See S. Rep. 95-1118, at 3 (1978) (“In large part, the present government contract remedies system has developed in an unplanned matter. Many of the rules and requirements that govern the system are the result of unstructured reactions to various events and decisions.”).
5 342 U.S. 98 (1951).
6 ERWIN CHEMERINSKY, FEDERAL JURISDICTION 649 (Vicki Been et al. eds., 5th ed. 2007).
7 Ch. 122, § 1, 10 Stat. 612, 612 (1855).
8 Ch. 122, § 1, 10 Stat. 612, 612 (1855); Pub. L. No. 97-164, 96 Stat. 25 (1982).
Claims and the Federal Circuit are the progeny of the original 1855 Court of Claims. In broad terms, the new Court of Federal Claims assumed the original jurisdiction of the Court of Claims (that is, trial level jurisdiction,) while the new Federal Circuit assumed appellate jurisdiction for the new Court of Federal Claims, as well as additional jurisdiction unimportant for the purposes of this paper. The Court of Federal Claims is a legislative, or Article I, court, while the Federal Circuit is a United States Court of Appeals Article III court.9

The original Court of Claims power was very limited under the 1855 Act. Though the court heard a variety of claims, it could only issue Congress advisory recommendations for claim appropriations, which Congress could ignore.10 In 1863, at President Lincoln’s insistence, Congress removed itself from appropriating claims and gave approval authority for claims to the U.S. Treasury.11 While the 1863 amendment of the 1855 Act successfully removed Congress from approving and appropriating awards of the Court of Claims, it also gave either the contractor or the government the power to appeal a Court of Claims decision to the Supreme Court “under such regulations as the said supreme court may direct.”12

The U.S. Treasury’s final say on appropriations effectively made the Supreme Court reviewable by an executive department. Supreme Court Chief Justice Taney, in the last judicial paper from his pen before his death, unsurprisingly took issue with the legislative and executive usurpation of the Supreme Court’s Constitutional grant of judicial power and held in Gordon v. United States13 that the Supreme Court could not have jurisdiction in such circumstances.14

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9 Chemerinsky, supra note 6, at 29.
10 Id.
11 Ch. 92, § 14, 12 Stat. 765, 767 (1863) (“And be it further enacted, That [sic] no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.”).
12 Id. at 766 (“And be it further enacted, That [sic] either party may appeal to the supreme court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court wherein the amount in controversy exceeds three thousand dollars, under such regulations as the said supreme court may direct.”).
13 69 U.S. 561 (1864).
1866, Congress faced the choice of removing Supreme Court appellate review or removing the
U.S. Treasury’s approval authority and chose to maintain Supreme Court review and repeal
Treasury approval.\textsuperscript{15}

The Supreme Court’s subsequent foray into government contracting disputes clause cases
occurred most conspicuously between 1878 and 1885 in \textit{Kihlberg v. United States},\textsuperscript{16} \textit{Sweeney v. United States},\textsuperscript{17} and \textit{Martinsburg & Potomac R.R. Co. v. March}.\textsuperscript{18} All of the contracts in these
cases had disputes clauses under which the government-contracting officer had the sole power to
decide “change” or “changed condition” questions of fact.\textsuperscript{19} The clause in \textit{Martinsburg} is
representative; it read:

To prevent all disputes, it is hereby mutually agreed that the said engineer shall, in
all cases, determine the amount or quantity of the several kinds of work which are
to be paid for under this contract, and the amount of compensation at the rates
herein provided for, and also that the said engineer shall in all cases decide every
question which can or may arise relative to the execution of this contract on the
part of said contractor, and his estimate shall be final and conclusive.\textsuperscript{20}

The conclusion in \textit{Kihlberg}, echoed in \textit{Sweeney} and \textit{Martinsburg}, was that the Court of Claims
could only review a government-contracting officer’s judgment if there was “fraud or such gross

\textsuperscript{14} \textit{Id.} at 704 (“Indeed no principle of constitutional law has been more firmly established or constantly adhered to,
than the one above stated – that is, that this Court has no jurisdiction in any case where it cannot render judgment in
the legal sense of the term, and when it depends upon the legislature to carry its opinion into effect or not, at the
pleasure of Congress.”).
\textsuperscript{15} Ch. 19, § 3, 14 Stat. 9, 9 (1866) (“And be it further enacted. That [sic] at the end of every term of the Court of
Claims, the Clerk of said Court transmit a copy of the decisions thereof to the heads of Departments; . . . and to other
officers charged with adjusting claims against the United States.”).
\textsuperscript{16} 97 U.S. 398 (1878).
\textsuperscript{17} 109 U.S. 618 (1883).
\textsuperscript{18} 114 U.S. 549 (1885).
\textsuperscript{19} See Kihlberg, 97 U.S. at 400 (“Transportation to be paid in all cases according to the distance from the place of
departure to that of delivery, the distance to be ascertained and fixed by the chief quartermaster of the district of
New Mexico,”); Sweeney, 109 U.S. at 618 (“It is agreed that from time to time, and when completed, the said wall
shall be inspected by an officer of the U.S. Army, or by a civil engineer or other agent, to be designated by the party
of the first part, and after such officer, or civil engineer, or other agent, shall have certified that it is in all respects as
contracted for, it shall be received . . . .”); Martinsburg, 114 U.S. at 549.
\textsuperscript{20} Martinsburg, 114 U.S. at 549.
mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment.”

The Kihlberg, Sweeney, and Martinsburg decisions made clear that under traditional disputes clauses the Court of Claims should question the government-contracting officer’s judgment only in extreme circumstances. Nevertheless, between 1885 and 1951 a number of Court of Claims decisions effectively lowered the standard to arbitrary, capricious, or even grossly erroneous.

B. The Tucker Act of 1887 and Limited Waiver of Sovereign Immunity

The 1887 Tucker Act was a jurisdictional statute for the Court of Claims that provided a limited waiver of sovereign immunity, but did not create substantive rights of recovery. The same is true today; there has been little substantive change to the act in the last one hundred and twenty-five years. Though the original Court of Claims Act of 1855 evolved through the 1863 and 1866 amendments to resemble the Tucker Act of 1887, the titles of the two acts show the major policy shift that occurred over thirty years. The 1855 Court of Claims Act was titled “An Act to establish a Court for the Investigation of Claims against the United States” whereas the 1887 Tucker Act was titled “An act to provide for the bringing of suits against the Government of the United States.” The contrast is stark and telling. It is stark because it shows a fundamental softening in Congress’s policy toward invoking sovereign immunity; it is telling

21 Kihlberg, 97 U.S. at 402.
24 Ch. 359, § 1, 24 Stat. 505, 505 (1887) (“That the Court of Claims shall have jurisdiction to hear . . . All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable.”); 28 U.S.C. § 1491(a)(1) (2006) (“The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.”)
25 Ch. 122, § 1, 10 Stat. 612, 612 (1855); Ch. 359, § 1, 24 Stat. 505, 505 (1887).
because it foreshadowed the Court of Claims’ post Tucker Act reluctance to enforce the Supreme Court’s strict *Kihlberg* fraud standard against contractors challenging the government.

Even though the Supreme Court had reaffirmed *Kihlberg* in its *Martinsburg* decision just two years before Congress passed the Tucker Act, the Act ultimately signaled a more lenient policy toward contract claims against the government. This leniency was borne out as the Court of Claims, and even the Supreme Court, had trouble applying the harsh *Kihlberg* standard to difficult cases. For example, as early as 1912 the Supreme Court stated in *Ripley v. United States* that the “agent’s [government contracting officer] judgment should be exercised not capriciously or fraudulently, but reasonably, and with due regard to the rights of both the contracting parties.” The Court of Claims expanded on this leniency in a string of cases beginning in 1930, *Heid Bros., Inc. v. United States*, and culminating in the 1943 concurrence by Judge Madden in *Bein v. United States*. *Bein* first formulated the standard that ultimately became the basis for the Wunderlich Act: “the court may review an administrative decision when all substantial evidence and relevant data known to the officer and normally considered in arriving at such a decision are against it. Under such facts the decision would be so grossly erroneous as to justify the inference of bias or bad faith.”

26 See supra Pre-Tucker Act Events.
28 223 U.S. 695 (1912).
29 Id. at 702.
30 69 Ct. Cl. 704 (1930).
31 101 Ct. Cl. 144 (1943).
C. Wunderlich and the Wunderlich Act of 1954

The Wunderlich Act, unlike the historical background above, is much more subject to divergent interpretations that have substantial implications for Minesen’s various views on the Contract Disputes Act. This section provides background on the Wunderlich Act; later sections address and analyze the disputed aspects of the act.

In United States v. Wunderlich, 1951, the Supreme Court, despite previous wavering, reasserted the strict Kihlberg requirements in protecting a contracting officer’s decision against the Court of Claims’ consistent loosening of the standard. In emphatic terms the Court stated, “By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest . . . If the standard of fraud that we adhere to is too limited that is a matter for Congress.”33 After the Court’s decision, “no litigant before the United States Court of Claims or before any other court . . . [was] successful in establishing the mental state of fraud as defined by the majority opinion.”34 Motivated by the strong reaction of contractors who read and experienced Wunderlich as effectively ending judicial review of government contracts, Congress soon made it their matter.35

Congress passed the Wunderlich Act36 in 1954 after numerous hearings, multiple bills, and considerable input from various constituencies. Only the Department of Justice supported the status quo;37 all others, including private contractors, trade associations, the American Bar Association, the Defense Department, General Services Administration, and the Comptroller General, were dissatisfied with Wunderlich for various reasons.38

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33 Wunderlich, 342 U.S. at 100.
35 Schultz, supra note 22 at 116.
37 Schultz, supra note 22 at 116.
38 Id. at 115-16.
Section 321 of the resulting Wunderlich Act, which remained unchanged until its repeal in January 2011,\textsuperscript{39} stated:

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: \textit{Provided, however,} That [sic] any such decision shall be final and conclusive unless the same is fra[u]dulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.\textsuperscript{40}

Section 322 went on to state:

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.\textsuperscript{41}

The House Report accompanying its passage made clear that the main purpose\textsuperscript{42} of the act was to overcome the effects of the \textit{Wunderlich} decision.\textsuperscript{43} The effect of this was to restore the pre-\textit{Wunderlich} Court of Claims standards of review announced in \textit{Bein}, including arbitrariness, capriciousness, and a broader fraud standard, “gross mistake tantamount to bad faith.”\textsuperscript{44}

II. MODERN STATUTES RELATED TO \textit{MINESEN}

It was almost twenty-five years after the Wunderlich Act before Congress made substantial legislative changes to dispute resolution between contractors and the federal

\textsuperscript{40} 41 U.S.C. § 321 (2006).
\textsuperscript{42} Though overcoming \textit{Wunderlich} was without doubt the main purpose of the act, the insertion of review standards similar to the Administrative Procedure Act, “or is not supported by substantial evidence[,]” definitely had consequences that went beyond the restoration of pre-\textit{Wunderlich}. \textit{See} Clarence Kipps et al., \textit{The Contract Disputes Act: Solid Foundations, Magnificent System}, 28 Pub. Cont. L.J. 585 (1999); Schultz, \textit{supra} note 22 at 117. That aspect of the Wunderlich Act, however, and its subsequent remedy by the Contract Disputes Act, is not important for the purposes of this paper.
\textsuperscript{43} H.R. Doc. No. 83-1380, at 2191 (1954) (“The purpose of the proposed legislation, as amended, is to overcome the effect of the Supreme Court decision in the case of United States v. Wunderlich, 342 U.S. 98, 72 S.Ct. 154, rendered on November 26, 1951, under which the decisions of Government officers rendered pursuant to the standard disputes clauses in Government contracts are held to be final absent fraud on the part of such Government officers.”).
\textsuperscript{44} Schultz, \textit{supra} note 22 at 117.
government. The legislation that ensued, with few exceptions, was well researched, reasoned, and effective.\textsuperscript{45}

A. \textit{The Contract Disputes Act of 1978}

Congress passed the Contract Disputes Act of 1978 primarily to address the undesirable consequences of multiple Supreme Court decisions which thoroughly confused the purpose of the Wunderlich Act.\textsuperscript{46} Similar to the Wunderlich Act, unfortunately, the CDA had unintended consequences and is subject to somewhat divergent interpretations that substantially affect the \textit{Minesen} decision analysis below. The information in this section concentrates on non-contentious background. It is important to note that the CDA, 41 U.S.C. §§ 601-09, was recodified and enacted into positive law 41 U.S.C. §§ 7101-09 on January 4, 2011 (both §§ 601-09 and §§ 7101-09 hereinafter “CDA”).\textsuperscript{47}

The CDA does not replace the Tucker Act, and the two acts do not cover the same scope of government contracts. The Tucker Act is a very broad jurisdictional statute for both the Court of Federal Claims and the Federal Circuit, whereas the CDA is a comprehensive system for resolving contract disputes involving “any express or implied contract . . . made by an executive agency for . . . property [other than real] . . . services . . . construction, alteration, repair, or maintenance of real property . . . or the disposal of personal property.”\textsuperscript{48} Though the reach of the

\textsuperscript{45} Kipps et al., \textit{supra} note 42, at 585.

\textsuperscript{46} See United States v. Bianchi & Co., 373 U.S. 709 (1963) (holding the Court of Claims was limited to the record developed by an agency board and could not consider new evidence in a dispute governed by the Wunderlich Act); United Stated v. Anthony Grace & Sons, Inc., 384 U.S. 424 (1966) (holding that the Court of Claims had to stay proceedings and remand a dispute to the agency rather than hold a trial to remedy defects in the administrative record); United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966) (required contractors to file all “breach” contract claims in court, but pursue all claims “under” the contract at the board of contract appeals).


\textsuperscript{48} 41 U.S.C. § 7102 (2011). The CDA also applies to \textit{some} non-appropriated fund instrumentalities (“NAFIs”), which are executive activities not funded by Congress. An example of this would be the FDIC, which the banks it
CDA is also broad, it excludes any contracts made by the legislative or judicial branches of government, which presumably could fall under the Tucker Act.

The CDA significantly changed and clarified the claims resolution procedures applicable to executive branch contracts. First, the act required that the contractor or government must submit claims to the contracting officer for decision, and that the contractor must certify claims over $50,000 (today $100,000). Second, the contracting officer was empowered to decide or settle all claims, including contract breach, reformation, or rescission. Third, the CDA statutorily created agency boards of contract appeals, though they existed prior to the CDA, and gave the boards the same adjudicative powers as the Court of Federal Claims including breach, reformation, and rescission. Fourth, after the contracting officer’s final decision the contractor could appeal the decision to the agency board (within 90 days) or commence a suit directly in the Court of Claims (now Court of Federal Claims) within 12 months. Fifth, the CDA gave both the contractor and the government the right to appeal an adverse agency board decision. Finally, agency board decisions were substantially final on questions of fact, and not final for questions of law.

regulates and insures fund through fees. The extent of the CDA’s application to all NAFIs is still up for debate after Slattery v. United States and Minesen. See Slattery v. United States, 635 F.3d 1298, 1301 (2011) (holding that claims against NAFIs have Tucker Act jurisdiction – “Thus we confirm that Tucker Act jurisdiction does not depend on and is not limited by whether the government entity receives or draws upon appropriated funds.”); Minesen Co. v. McHugh, 671 F.3d 1332, 1337 (2012) (“Because the question of whether claims against NAFIs can be made pursuant to the CDA is complex post-Slattery . . . ”).

The changes and clarifications discussed are the most pertinent to the analysis that follow, not a comprehensive list.

49 41 U.S.C. § 7103 (2011). There was substantial machination over the “certification” process which was subsequently remedied by the Federal Courts Administration Act. Kipps et al., supra note 42, at 592.

50 41 U.S.C. § 7103. Previously there was significant debate over the contracting officers power to settle various claims.


52 41 U.S.C. § 7104 (2011). Previously the contractor would often first have to litigate the claim at the appropriate board of contract appeals. George M. Coburn, The Contract Disputes Act 6 (Selma Arnold, 1982).


54 Id.

55 Id.
B. **Present Day Boards of Contract Appeals**

Federal agency boards of contract appeals existed prior to the CDA. The CDA, however, took multiple steps attempting to make agency boards a quicker and cheaper alternative to the Court of Claims. The CDA encouraged their use by specifically authorizing federal agencies to create boards, highlighting their independence and quasi-judicial functions, removing them from the control of procuring agency authorities, and creating strict requirements for the judges. The Administrator of General Services appoints board judges in the same manner as administrative law judges, and, unlike Court of Federal Claims or Federal Circuit judges, agency board judges must have at least five years of experience in public contract law. Further, board judges are only removed for cause.

The FY 2006 National Defense Act further simplified and clarified the status of the agency boards. The Act consolidated the jurisdiction of eight civilian boards into the new Civilian Board of Contract Appeals (“CBCA”) which left three main boards; the CBCA, the Armed Services Board of Contract Appeals (“ASBCA”), and the Postal Service Board of Contract Appeals. While debate remains on the overall efficiency of boards relative to the Court of Federal Claims, the consolidation of the boards could not help but decrease the variety of differing procedures among the boards, and thereby procedural costs.

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56 Schaengold et al., *supra* note 23, at 283.
57 *Id.* at 283-84.
60 The act consolidated the boards of the General Services Administration, Department of Transportation, Department of Agriculture, Department of Veterans Affairs, Department of the Interior, Department of Energy, Department of Housing and Urban Development, and Department of Labor. Schaengold et al., *supra* note 23, at 284.
61 *See* Schaengold et al., *supra* note 23, at 285 (stating that “the prevailing wisdom among practitioners was that board litigation tended to be less expensive than litigation in the CFC[,...] but also acknowledging practitioner reports of some judges not limiting depositions and not adhering to a strict discovery and trial schedule, thereby increasing costs). For the purposes of this paper we will assume that the goal of the CDA is to have agency boards be a quicker and cheaper alternative to the Court of Claims, and that the goal has been partially realized.
C. The CDA (Eventually) Repeals the Wunderlich Act: So What?

The 1978 Senate Report on the CDA stated that Section 14(i) of the CDA repealed both sections of the Wunderlich Act because they “set a standard of review for agency board appeals which is no longer applicable in [the CDA].”\(^\text{62}\) Section 14(i) of the CDA stated: “[The Tucker Act] is amended by adding the following sentence at the end of the first paragraph thereof: ‘The Court of Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act of 1978.’.”\(^\text{63}\) However, the planned 1978 repeal of the Wunderlich Act never happened, apparently due to an oversight. A 2009 House Report\(^\text{64}\) (“House Report”) acknowledges the oversight, and in 2011, Congress finally repealed the Wunderlich Act simultaneous with its recodification of the CDA and its implementation as positive law.\(^\text{65}\)

First, it is important to clarify that although there appears to be a slight difference between the 1978 CDA Senate Report’s reason for repeal, and the subsequent House Report’s reason for repeal, they are largely the same.\(^\text{66}\) The CDA justifies the Wunderlich Act repeal with the amendment of the Tucker Act, which gives the Court of Claims jurisdiction on any claim arising under the CDA.\(^\text{67}\) In 1982, that reference to the CDA in the Tucker Act was made even

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\(^\text{62}\) S. REP. NO. 95-1118, at 34.


\(^\text{66}\) The 1978 Senate Report’s reason addressing “standard of review” is not a concern because, although it is a unique reason, it does not conflict with the other two reasons, and was a well-known issue of the Wunderlich Act as interpreted by Supreme Court cases like Bianchi. See supra note 46 and accompanying text. The 1978 Senate Report says the Wunderlich Act is being repealed because its’ standard of review for agency board appeals is no longer applicable. S. REP. NO. 95-1118, at 34.

more specific when it referred directly back to section 10(a)(1) of the CDA of 1978. Similarly, the House Report justifies the Wunderlich Act repeal by citing directly back to section 10 of the CDA, instead of through the Tucker Act. Thus, the differences in justification are inconsequential.

The repeal justifications, however, are still informative because their language and intent are distinguishable from the language and intent of the Wunderlich Act. Recall that section 321 of the Wunderlich Act allowed judicial review where there was not “substantial evidence” to support a question of fact:

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of . . . any . . . board in a dispute involving a question arising under such contract, shall . . . limit[] judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, That [sic] any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

And section 322, allowing judicial review for all questions of law:

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

Compared to section 10 of the CDA, which justifies the Wunderlich Act’s repeal:

Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court.

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68 28 U.S.C. § 1491(a)(2) (1982)(“The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.”). Section 10(a)(1) of the CDA references § 609(a)(1), and in 1982 41 U.S.C. § 609(a)(1) read: “Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.” 41 U.S.C. § 609(a)(1) (1982). 41 U.S.C. § 609(a)(1) would be recodified to 41 U.S.C. § 7104(b)(1) in 2011.
Thus, under section 321 and 322 of the Wunderlich Act, judicial review on a question of fact could not be denied if the agency or board’s decision was fraudulent, capricious, arbitrary or so grossly erroneous as necessarily to imply bad faith, or was not supported by substantial evidence; and judicial review on a question of law could never be denied. In Minesen, however, the Court found that section 10 of the CDA, the purported Wunderlich Act replacement, permits the contractor to waive appeal to the Federal Circuit, thus making the agency board’s review of a question of law final. Under the CDA, given the CDA’s relationship to the Wunderlich Act, can a board’s decisions on questions of laws and fact be final? If so, should they be?

III. **MINESEN CO. v. MCHUGH – DOES THE CDA ALLOW A SOPHISTICATED CONTRACTOR TO WAIVE THEIR APPEAL BEFORE THE FEDERAL CIRCUIT?**

In 1993, Minesen Company (“Minesen”) entered into a contract with the United States Army’s Morale, Welfare, and Recreation Fund (“The Fund”). The Disputes Clause of the contract stated: “The Contracting Officer’s final decision may be appealed by submitting a written appeal to the Armed Services Board of Contract Appeals [ASBCA] within 90 days of receipt of the Contracting Officer’s final decision. Decisions of the Armed Services Board of Contract Appeals are final and are not subject to further appeal.”

In 1999 and 2000, Minesen filed two certified claims with the Contracting Officer (“KO”) alleging breach and seeking anticipatory profits. The KO denied both claims; Minesen appealed both to the ASBCA.

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74 Minesen, 671 F.3d at 1334. The United States Army’s Morale, Welfare, and Recreation Fund is a nonappropriated fund instrumentality (“NAFI”). As discussed previously in note 48, this designation has complicated consequences. The Federal Circuit, because of these consequences, ignored the NAFI status of the contract and assumed jurisdiction. Id. at 1337. The contract’s NAFI status will also be ignored for the purpose of this analysis because including it would add little but certainly confuse the pertinent issues.
75 Id. at 1334.
76 Id.
In 2006 the ASBCA found for Minesen and remanded the case to the KO to determine damages.\textsuperscript{78} The Fund then identified various documents it needed from Minesen to determine damages.\textsuperscript{79} Despite never producing the required documents, in 2008 Minesen filed a new claim with the KO alleging that the Fund had not cured its ongoing breach.\textsuperscript{80} The KO stated that there was no new dispute, and denied the new claim.\textsuperscript{81} Minesen then appealed to the ASBCA a second time, and moved for partial summary judgment based on the Fund allegedly having done nothing to cure its breach.\textsuperscript{82} The Fund countered with a motion to dismiss.\textsuperscript{83} In 2010, the ASBCA granted the Fund’s motion to dismiss, and denied Minesen’s motion for partial summary judgment, holding that the only “new” facts related to the time required to resolve the controversy, thus the claim did not state a new cause of action, was duplicative, and must be dismissed.\textsuperscript{84} Minesen then appealed the ASBCA’s dismissal directly to the Federal Circuit.\textsuperscript{85}

The main issue for the Federal Circuit was: Could Minesen, under the contract’s disputes clause, waive its right to appeal to the Federal Circuit?\textsuperscript{86} In analyzing the issue, both the majority and the dissent essentially break their arguments into two traditional justifications; statutory interpretation,\textsuperscript{87} and congressional legislative intent.

\textsuperscript{77} Id.
\textsuperscript{78} Id. at 1335.
\textsuperscript{79} Minesen, 671 F.3d at 1335.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 1336.
\textsuperscript{85} Minesen, 671 F.3d at 1336.
\textsuperscript{86} See id.
\textsuperscript{87} Because Minesen addresses Federal Circuit legal precedent primarily in order to address statutory interpretation, those two justifications, which would often exist separately, are combined in this analysis.
A. Statutory Interpretation: 41 U.S.C. § 7107(a) and 7104(b) Trump 41 U.S.C. § 7107(b)

Under the CDA, a contractor appealing the decision of a KO has to choose first between appealing to the appropriate agency board, or the Court of Federal Claims. Implicit in choosing the Court of Federal Claims is the certain right of appeal to the Federal Circuit, because the Federal Circuit has exclusive jurisdiction “of an appeal from a final decision of the United States Court of Federal Claims.” The majority and dissent in Minesen disagree over whether a contractor who chooses to appeal to the agency board enjoys, even in the face of bilateral waiver, a similar guarantee of appeal to the Federal Circuit under the CDA. Though the majority argument that the CDA does not guarantee this type of appeal is stronger, the dissent’s counter-argument is also colorable. Additionally, arguments overlooked by both the majority and the dissent enlighten the debate.

1. Statutory Arguments of the Majority and Dissent in Minesen

The majority in Minesen states that 41 U.S.C. § 7107(a) does not “proscribe a waiver of appeal rights through contract” and that “Congress was aware of how to make CDA provisions unwaivable when it wanted.” As proof, the Majority cites to Do-Well Machine Shop, Inc. v. United States, which addresses a contractor’s argument that the limitation periods established in the CDA should not impair a contractor’s settlements on termination for convenience clauses. This citation is slightly ironic because the cited portion of Do-Well actually refers back to 41 U.S.C. § 609(b), which is 41 U.S.C. § 7107(b) today, the very statute the dissent uses to support

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90 See Minesen, 671 F.3d at 1342.
91 Id. at 1338, 1342.
92 870 F.2d 637 (1989).
93 Id. at 641.
its argument that appeal to the Federal Circuit is not waivable.\textsuperscript{94} Irony aside, the majority’s argument is strong. Section 7107(a)(1)(a) of the CDA does not contain the “notwithstanding” term that Congress was aware of and typically used to prevent waiver.\textsuperscript{95}

The dissent’s counter-argument confronts the absence of “notwithstanding” in Section 7107(a)(1)(a) by stating that though 7107(a)(1)(a) lacks the important term, Section 7107(b), the CDA’s standard of review provision, does.\textsuperscript{96} Additionally, the dissent highlights that Section 7107(b) “carefully tracks” the original phrasing of the Wunderlich Act, and that the original Wunderlich Act “was designed to invalidate jurisdiction-defeating clauses such as the one at issue in this case.”\textsuperscript{97} Thus, Congress, through 7107(b), was trying to “make clear” that the CDA continued to prohibit contractual provisions foreclosing judicial review, like the one in this case.\textsuperscript{98}

2. Overlooked Statutory Arguments by the Majority and Dissent in \textit{Minesen}

While both the majority and dissent muster effective opposing arguments, multiple points go unaddressed. Considering these points clarifies both positions, but ultimately further strengthens the majority’s position. The dissent’s omissions are understandable because they essentially drag prior Federal Circuit precedent through the mud; presumably, both majority and dissent would prefer to avoid that if other arguments are available. A similar explanation is not available to the majority.

\textsuperscript{94} \textit{Id.} at 641 (“Where Congress did not want the Act altered by parties’ agreements, it said so. \textit{See}, e.g., 41 U.S.C. § 609(b) (“notwithstanding any contract provision, regulation, or rules of law to the contrary.”). Perhaps a better citation by the majority would have been to 41 U.S.C. § 7104(b), as they do at the conclusion of the opinion. \textit{Minesen}, 671 F.3d at 1343 (“In passing the CDA, Congress already renewed the guarantee of direct access from the partial CO to the Court of Federal Claims, ‘notwithstanding any contract provision . . . to the contrary,’ 41 U.S.C. § 7104(b).”).

\textsuperscript{95} \textit{Id.} at 641 (“Where Congress did not want the Act altered by parties’ agreements, it said so. \textit{See}, e.g., 41 U.S.C. § 609(b) (“notwithstanding any contract provision, regulation, or rules of law to the contrary.”). Perhaps a better citation by the majority would have been to 41 U.S.C. § 7104(b), as they do at the conclusion of the opinion. \textit{Minesen}, 671 F.3d at 1343 (“In passing the CDA, Congress already renewed the guarantee of direct access from the partial CO to the Court of Federal Claims, ‘notwithstanding any contract provision . . . to the contrary,’ 41 U.S.C. § 7104(b).”)

\textsuperscript{96} \textit{Minesen}, 671 F.3d at 1346 (Bryson, J. dissenting).


\textsuperscript{98} \textit{Minesen}, 671 F.3d at 1347 (Bryson, J. dissenting).
In discussing *Burnside-Ott Aviation Training Center v. Dalton* the dissent missed three important points in countering the majority’s interpretation of 41 U.S.C. § 7107(a)(1)(a). In *Burnside*, the government and a contractor agreed in their contract that any KO decisions regarding award fees would be final and not subject to the contract’s dispute clause. When *Burnside* subsequently tried to appeal the award fees to the agency board under the CDA in contravention of the contract, the government argued that the agency board did not have jurisdiction. The Federal Circuit held in *Burnside* that the CDA gives an agency Board jurisdiction to hear an appeal in spite of any contract provision to contrary. In *Minesen* the dissent discussed *Burnside* in order to outline the statutes that the Federal Circuit used in justifying the agency board’s jurisdiction; 41 U.S.C. § 605(a) (1994) (recodified 41 U.S.C. § 7103(e)) and 41 U.S.C. § 609(a)(3) (1994) (recodified 41 U.S.C. § 7104(b)(4)). The dissent’s recognition and acknowledgment of *Burnside*, and specifically the justifying statutes in *Burnside*, is excellent. Unfortunately, the analysis stops there.

First, the dissent misses the opportunity to make clear that *Burnside* discusses 41 U.S.C. § 606 (recodified to 41 U.S.C. § 7104(a)), a statute that is structurally similar to the statute at issue in *Minesen*, 41 U.S.C. § 7107(a)(1)(a). Thus, if 41 U.S.C. § 606 was adequate to allow

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99 107 F.3d 854 (Fed. Cir. 1997).
100 *Id.* at 856. In the case the fee award were actually calculated by the “fee determining officer” and approved by the KO, but the effect for these purposes is the same. *Id.* at 857.
101 *Id.* at 857
102 It is interesting to note that nowhere in the *Burnside* opinion is 41 U.S.C. 606, which is undoubtedly what the case deals with, mentioned. See *Burnside*, 107 F.3d 854 (1997).
103 *Id.* at 859. There is also a caveat in *Burnside* stating that a contract provision itself based on a statute in some instances could remove board jurisdiction. *Id.*
104 *Id.* at 858 (“41 U.S.C. § 605(a) (1994), and the appeal ‘shall proceed de novo in accordance with the rules of the appropriate court.’”).
106 41 U.S.C. 7104(a) (2011) (“A contractor, within 90 days from the date of receipt of a contracting officer’s decision under section 7103 of this title, may appeal the decision to an agency board as provided in section 7104 of this title.”); 41 U.S.C. 7107(a)(1)(a) (“a contractor may appeal the decision to the United States Court of Appeals of the Federal Circuit within 120 days from the date the contractor receives a copy of the decision;”)
Burnside to appeal to the agency board, the structurally similar statute, 41 U.S.C. § 7107(a)(1)(a), should grant Minesen access to the Court of Federal Claims. Second, the dissent does not emphatically highlight that the two statutes that provide adequate support for the *Burnside* holding, 41 U.S.C. § 605(a) and 609(a)(3) (1994), discuss the Court of Federal Claims standard of review – just like section 7107(b) offered as justification by the dissent. The majority, however, belittles the dissent’s 41 U.S.C. § 7107(b) statutory justification *exactly because* it relates to standard of review: “By its terms, § 7107(b) merely defines this court’s standard of review in CDA cases.”

The standard of review related statute cannot simultaneously be inadequate justification in *Minesen* and adequate justification in *Burnside*. Finally, the dissent fails to point out that the reason *Burnside* resorts to justifying 41 U.S.C. § 606 (recodified § 7104(a)) with the aforementioned standard of review statutes is because it does not have the “notwithstanding” language that the majority says is required, and Congress knows how to implement. The majority’s position gets a free pass on these inconsistencies.

Admittedly, however, the *Burnside* argument is very distinguishable from the *Minesen* argument. Had *Burnside* interpreted section 606 to allow contractors to waive their right to review by an appeals board, the Federal Circuit would have undermined the critical dual avenue of review required by the CDA. In *Minesen*, the Federal Circuit allows a contract provision to deny access to the Federal Circuit only after a litigant has already knowingly made the choice to forego its opportunity to litigate before the Court of Federal Claims, thereby including the additional right to appellate review at the Federal Circuit. But, this is a policy argument that the dissent could have countered with the above statutory arguments. Unfortunately, the

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107 *Minesen*, 671 F.3d at 1342.
108 *Id.* at 1341.
109 See *Id.* at 1342.
dissent’s failure to make these arguments allowed the majority to avoid developing a plausible statutory argument to counter the dissent’s statutory argument.

In the final paragraphs before concluding its opinion, the majority in *Minesen* addresses the dissent’s 41 U.S.C. § 7107(b) arguments as they relate to the Wunderlich Act. The majority states: “In passing the CDA, the Congress already renewed the guarantee of direct access from the partial CO [Contracting Officer review] to the Court of Federal Claims,” citing 41 U.S.C. § 7104(b). While this is a fine explanation of why section 7104(b) implements the Wunderlich Act, it does not really counter the dissent’s argument that 7107(b) also implements the intent of the Wunderlich Act by providing contractors judicial access to the Federal Circuit from agency boards. In short, section 7104(b)’s implementation of the Wunderlich Act does not necessarily preclude section 7107(b) from also implementing it.

The majority failed to present a simple and devastating statutory counter-argument to the dissent’s 41 U.S.C. § 7107(b) statutory argument outlined above. Though the dissent accurately portrays the history of the Wunderlich Act, its final repeal and absorption into the CDA in 2009 means that Congress, finally, decided what part of the Wunderlich Act carried forward, and where in the CDA that part exists. The legislative implementation of the CDA of 1978 makes clear that section 10(a)(1) is Congress’s reason for repealing the Wunderlich Act. To be clear, section 10(a)(1) of the CDA of 1978 addresses present day 41 U.S.C. § 7104(b)(1), not 41

110 Id. at 1343.
111 Id. at 1346 (Bryson, J. dissenting).
112 Id. at 1347 (“The Wunderlich Act prevented government contractors from ‘bargain[ing] away their right to full-scale judicial review of administrative decisions on questions of law,’(citing Lockheed Aircraft Corp. v. United States, 375 F.2d 786, 790 (Ct. Cl. 1967)).
113 28 U.S.C. § 1491(a)(2) (1982)(“The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.”). Section 10(a)(1) of the CDA references § 609(a)(1) , and in 1982 41 U.S.C. § 609(a)(1) read: “Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.” 41 U.S.C. § 609(a)(1) (1982). 41 U.S.C. § 609(a)(1) would be recodified to 41 U.S.C. § 7104(b)(1) in 2011.
U.S.C. § 7107(b), as offered by the dissent. Thus, if section 7107(b), which is structurally similar to the statute used to justify the conclusion in *Burnside*, is not included in Congress’s justification for the repeal of the Wunderlich Act, it cannot rely upon the Wunderlich Act’s judicial access goals. Viewed objectively, the section 7104(b)(1) justification by Congress is unsurprising. Plainly, section 7104(b)(1) prevents a contractor from bargaining away their access to the Court of Federal Claims; the Wunderlich Act, at its core, protected judicial access, and the majority is correct to point out that it remains protected under their interpretation of section 7104(b)(1), regardless of how 7107(b) is interpreted.\textsuperscript{114}

3. What is the Point of the Missed Statutory Arguments?

Highlighting the missed statutory arguments above serves two main purposes. One, it makes clear that if you stare at the statutes and case law long enough, nuanced and unconsidered arguments are likely to appear. Two, and relatedly, it emphasizes the limited value of statutory interpretation for the CDA. The CDA is not only a statute with extensive legislative history explaining its roots and what it was and is trying to remedy, it is also a statute that in implementation is observable, measurable, and quantifiable with respect to actions brought and the time and expense to resolve them. As such, *Minesen*, and thereby the functioning of the CDA, should not solely hinge on Congress’s omission of “notwithstanding.”

B. *Legislative Intent: The Dissent Comes Out Swinging*

Using legislative intent to interpret a statute can be a controversial undertaking. Many view it as “[t]he equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.”\textsuperscript{115} While the legislative history of the CDA does not escape these

\textsuperscript{114} *Minesen*, 671 F.3d at 1342.

criticisms, given the amount of history, and its relative recentness, it does have value, and is certainly on no less solid foundation than the tenuous statutory arguments outlined previously.

1. Majority’s Legislative Intent Arguments – Failure to Launch

The majority’s analysis of Congress’s legislative intent in passing the CDA is cursory and unconvincing, citing three primary passages. First, Congress’ express purpose for the CDA was to induce the resolution “of more contract disputes by negotiation prior to litigation.”\(^\text{116}\) Second, Congress wanted to “encourage the informal, quick resolution of disputes before they can develop into expensive and time-consuming administrative tangles or litigation.”\(^\text{117}\) Third, Congress wanted a “flexible system that provides alternative forums for resolution of particular kinds of disputes.”\(^\text{118}\)

These first two passages have limited applicability to the facts of Minesen, and to any fact pattern in which Minesen applies. How does preventing a party from appealing an agency board decision to the Federal Circuit in any way “induce negotiation prior to litigation” or “encourage . . . resolution . . . before litigation”?\(^\text{119}\) Negotiations in Minesen had already failed or not occurred under the CDA’s alternative dispute resolution options, thus requiring litigation at the agency board level.\(^\text{120}\) Under the optimism model of litigation, however, Minesen’s ex-ante awareness of appellate access to the Federal Circuit would increase uncertainty, thus causing optimism bias. Minesen’s optimism, under the model, would then lead to the failed negotiation and subsequent litigation.\(^\text{121}\) Such an argument, however, ignores the parties different stakes.

\(^{116}\) Minesen, F.3d at 1338.
\(^{117}\) Id.
\(^{118}\) Id. at 1341.
\(^{119}\) Id. at 1338.
\(^{120}\) 41 U.S.C. § 7103(h) (2011).
\(^{121}\) Richard A. Posner, Economic Analysis of Law 765 (8th ed. 2011). Applying the optimism model to Minesen may seem inappropriate given the clarity of the contract clause preventing appeal to the Federal Circuit in Minesen. However, the fact that Minesen actually appealed to the Federal Circuit strongly supports that from the start of
Any participant in litigation with a government agency (at an agency board) or the Department of Justice ("DOJ") (at the Court of Federal Claims) is plainly aware of two facts that strongly support settlement, even in the face of optimism bias. First, agency or DOJ counsel is a sunk monetary cost. Though there is opportunity cost, no government attorney sends the government additional charges at the end of the litigation. Second, both the agency and DOJ participate in contract litigation continually, and neither wants to develop a reputation for "rolling over," thereby increasing the likelihood of litigation. Given agency and DOJ incentives relative to plaintiffs, appellate access to the Federal Circuit should not create unreasonable optimism in a rational plaintiff with a reasonable preference for risk aversion.

Admittedly, the majority’s third passage does have merit regarding flexibility. It is possible that both the government and contractor would want to eliminate the possibility of having to litigate in the Federal Circuit after going to an agency board of appeals. However, this argument assumes equal bargaining power, which is not necessarily valid for the reasons stated previously, and those discussed below in part 2c. Further, allowing even this limited waiver of a forum is not in any way providing “alternative forums for resolution of particular kinds of disputes” – quite the opposite.

2. Dissent’s Legislative Intent Arguments – Channeling the CDA & Wunderlich Act

The dissent founds its’ legislative history arguments in both the CDA and the Wunderlich Act, through the CDA’s attempted assimilation of the Wunderlich Act. Upon close examination,

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123 Samuel R. Gross & Kent D. Syverud, Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial, 90 Mich. L. Rev. 319, 329 (1991) ("[R]epeat litigants (such as insurance companies) whose opponents are not repeat litigants are more likely to favor hard bargaining strategies, since by doing so they will influence the expectations of future opponents. The model predicts a higher rate of trial in such cases than in cases where repeat litigants sue other repeat litigants.").
124 Minesen, 671 F.3d at 1341.
however, they are not completely convincing. The dissents’ three primary arguments are: One, Congress intended contractors who choose the agency board route to still have access to judicial review; two, agency boards should not be setting procurement law precedent; and three, contractors’ lack negotiating power vis-à-vis the government.

   a. *A Contractor’s Right to Federal Circuit Judicial Review from an Agency Board*

   In making this argument, the dissent cites pieces of the Senate Report on the CDA for the proposition that “Congress intended the CDA to continue to permit contractors to appeal to this court from decisions of agency boards of contract appeals notwithstanding any contractual provision to the contrary.”\(^{125}\) Of the dissent’s three supporting citations, one is badly out of context, one is debatably in context, and one is in context.

   The badly out of context quote states “certain disputes ‘ultimately must go to court[.]’\(^{126}\) The quote actually concerns the Senate Report’s discussion of direct access to the Court of Federal Claims, not judicial access in appealing an agency board decisions. This conclusion is apparent from both the heading of the section, “Direct Access to the Court” and the previous sentence: “Direct access to the courts guarantees that, at the option of the contractor, the remedial process extends from the contracting officer to the courthouse on all aspects of a dispute.” This support, therefore, does not move the scale.

   The contextually debatable quote states “it would be an anomaly in the American judicial system for [agency boards] to have the final authority on decisions that set important precedents in procurement law[.]”\(^{127}\) This quote discusses section 8(g)(1)(B) of the original legislation, which grants the *government* the right to judicial review of adverse agency board decisions, not

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\(^{125}\) Id. at 1348 (Bryson, J. dissenting).
\(^{126}\) Id. (quoting S.Rep. No. 95-1118, at 26).
\(^{127}\) Id. The substitution of “agency boards” for “such a trial tribunals” is insignificant.
The argument for agency boards not having final authority for important precedents likely applies equally to the government and the contractor; however, that is not the context of the statement, and the statement has nothing to say about waiver.

Finally, the contextually correct quote states “agency boards are a forum for the ‘initial resolution of disputes’”). This quote is under the “Agency Boards of Contract Appeals” heading in the Senate Report, and the context of the statement makes it clear that they are referring to agency boards. The dissent focuses on the word “initial,” which strongly suggests an appeal process in the event of error. This statement is good circumstantial evidence that Congress intended contractors to be able to appeal from agency boards. Again, however, the statement and the surrounding context have nothing to say about waiver.

Two of these three quotes suggest that congress intended contractors to be able to appeal an agency board decision, but they are not absolute proof. Further, neither quote specifically addresses the issues of waiver central to Minesen.

b. Agency Boards Should Not Have Final Authority on Procurement Law

Another legislative history argument offered by the dissent is that it would be anomalous “for [agency boards] to have the final authority on decisions that set important precedents in procurement law.” This is a potentially powerful argument, but it first requires explanation. One must first understand the precedential relationship between agency boards, the Court of Federal Claims, and the Federal Circuit. Only the Federal Circuit and the United States Supreme Court can establish precedent for all the agency boards, and the Court of Federal Claims.

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128 S. Rep. 95-1118, at 26 (“Section 8(g)(1)(B) grants to the government the clear right to seek judicial review of adverse agency board decisions.”).
129 Minesen, 671 F.3d at 1348 (Bryson, J. dissenting) (quoting S. Rep. No. 95-1118, at 13).
131 Minesen, 671 F.3d at 1348 (Bryson, J. dissenting) (quoting S.Rep. No. 95-1118, at 26).
132 Schaengold et al., supra note 23, at 289.
Second, an agency board’s decision is not binding precedent on the other boards or the Court of Federal Claims, and vice versa. Ordinarily, however, a board will follow its previous panel decisions, and must follow its full board decisions. Thus, while an agency board cannot have “final authority” on anyone except itself, if government contracts systematically eliminate the right to appeal to the Federal Circuit, that authority can become temporarily final for litigants who do not wish to pursue their appeals through the Court of Federal Claims. Given this practical limitation and confused precedential structure, it is unsurprising that Congress was concerned with protecting the Federal Circuit’s (at that time it was the Court of Claims) power to establish binding precedent.

Two examples, admittedly extreme, are demonstrative of the circumstances the dissent appears concerned about. First, if a contractor were to proceed to one of the three agency boards under a contract with a Minesen clause and receive a favorable, but erroneous, ruling, the government would be unable to appeal that ruling. Subsequently, if the government continued to use Minesen clauses in contracts appealable to that board, and contractors continued to choose the board over the Court of Federal Claims, contractors would continuously win their appeals under the favorable precedent. However, though the dissent’s concern is hypothetically real, it is immediately obvious that the government has recourse. If the government removes the Minesen clauses and then successfully appeals a similar decision to the Federal Circuit, that new precedent becomes binding on all the agency boards and the precedential “problem,” as far as the government is concerned, is solved.

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133 Id.
134 Id.
135 See S. REP. 95-1118, at 26 (“[S]ince it would be an anomaly in the American judicial system for such a trial trial tribunals (sic) to have the final authority on decisions that set important precedents in procurement law.”). As outlined previously, the full context of the quote actually deals with the government’s right to seek judicial review. The underlying principle, however, is the same in these circumstances. See id.
The second example is the more devious and troubling. Assume all the same facts in the previous example, that is, no Minesen clause in the contract, contractor wins judgment at the agency board, government appeals, government wins judgment at the Federal Circuit thus establishing favorable, but erroneous, precedent. Now assume two new facts; one, the contractor does not appeal to the Supreme Court; and two, the government subsequently reinserts Minesen clauses into all its contracts. If Minesen clauses are acceptable, then the contractors’ only recourse to get the precedent changed is to continually pursue their similar claims through the Court of Federal Claims, and hope they or the government appeals the case to Federal Circuit in order to get the opportunity to have the unfavorable precedent overturned.136

These examples demonstrate three things. First, they demonstrate that in every circumstance, the party facing the unfavorable precedent does have recourse to get it changed, and thus the dissent’s concern about agency boards having final authority on important precedents in procurement law is somewhat unfounded.137 Second, and much more importantly, they demonstrate the absurd opportunities for gamesmanship that manipulation of the Minesen clause creates. Finally, they make it clear that these opportunities disappear if appeal to the Federal Circuit is available through either the agency boards, or the Court of Federal Claims.

c. Contractors’ Lack of Negotiating Power Vis-à-Vis the Government

In their third legislative history argument the dissent examined the implicit assumption in both of the “final authority” examples above: the assumption that contractors lack “ordinary

136 An interesting twist on this hypothetical is the consequences if the contractor was to win at the Court of Federal Claims, in contravention of Federal Circuit precedent, and the government did not immediately appeal. Were this to happen, the contractor would continue to win all similar cases when they chose to litigate in the Court of Federal Claims, but lose if they went to the agency board (because Court of Federal Claims precedent is non-binding on agency boards, but Federal Circuit precedent is). Obviously this hypothetical would likely not exist for too long, because the government would likely quickly appeal the unfavorable decision from the Court of Federal Claims.

137 This statement assumes that the government would have the ability to insert and remove a Minesen clause as necessary to regain access to the Federal Circuit, a fairly safe assumption given the parties relative bargaining power.
negotiating power when entering into government contracts[].” The idea that a contractor inherently lacks power to negotiate terms with the government has been a source of debate since the United States acceptance of sovereign immunity. This heated debate came to a boil in Wunderlich, when Justice Minton, for the majority, argued that contractors do have negotiating power:

Respondents [dam contractors] were not compelled or coerced into making the contract. It was a voluntary undertaking on their part. As competent parties they have contracted for the settlement of disputes in an arbitral manner . . . . The limitation upon this arbitral process is fraud, placed there by this Court. If the standard of fraud that we adhere to is too limited that is a matter for Congress.

Congress disagreed. Speaking about the disputes clause at issue in Wunderlich, the House Report on the Wunderlich Act stated:

Reservations of this character have never been made the basis for mutual negotiation and it has been made abundantly clear to the committee that any bid which a contractor might file seeking to eliminate such a reservation from the contract would be characterized as irregular and would result in the bid being ignored.

The question is, does the dissent properly apply the Wunderlich Act’s concern for contractor negotiation power to the circumstances in Minesen? Probably not.

Though the Wunderlich Act was clearly concerned with contractors’ inability to bargain effectively with the government, this concern only extended far enough to prevent their “bargaining” away their right to have the judiciary branch “finally declare the law of a contract

138 Minesen, 671 F.3d at 1347 (Bryson, J. dissenting) (the quoted passage is actually citing a House of Representatives Report on the Wunderlich Act); S. Rep. No. 95-1118, at 3 (“Direct access to the courts is limited to so-called breach of contract claims, and the agencies can, and do, circumscribe such access by terms and conditions in contracts that are not, in general, subject to negotiation. In other words, a contractor has little choice in the matter.”).

139 See United States v. Lee, 106 U.S. 196, 205 (1882) (“The principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.”) (citations omitted); Schultz, supra note 27 at 219-24.

140 Wunderlich, 342 U.S. 98, 100 (1951).

or to finally interpret the legal effect or meaning of the contract documents.”\(^{142}\) The *Minesen* clause does not require the contractor to bargain away that right. As the majority correctly highlights, Congress ensured *Minesen* immutable access to the Court of Federal Claims under § 7104(b).\(^{143}\) Thus, the government can enforce the voluntary contractual waiver, even in the face of superior bargaining power, since no statute prohibits it.\(^{144}\)

3. Additional Legislative History to Consider: A Basis for Public Policy Arguments

In the “Purpose” paragraph of the House and Senate Reports on the Contract Disputes Act of 1978, the very first sentence stated, “The Contract Disputes Act of 1978 Provides a Fair, Balanced, and Comprehensive Statutory System of Legal and Administrative Remedies in Resolving Government Contract Claims.”\(^{145}\) It is very instructive to keep this overarching purpose of the CDA in mind when examining the possible public policy implications of the act outlined below.

IV. PUBLIC POLICY: SHOULD THE CDA ALLOW A SOPHISTICATED CONTRACTOR TO WAIVE THEIR APPEAL BEFORE THE FEDERAL CIRCUIT?

In the statutory, subsidiary case law, and congressional legislative intent arguments outlined above, the majority opinion in *Minesen* stands on firmer ground than the dissent.

Statutorily, 41 U.S.C. § 7104(b) gives contractors clear access to judicial remedies, consistent with both the CDA and the original Wunderlich Act. In contrast, under 41 U.S.C. § 7107(a) a contractor can waive access because of the conspicuously absent “notwithstanding” terminology, and 41 U.S.C. § 7107(b) appears inapplicable to the issue because it is a standard of review statute. Further, given the majority’s sturdy statutory justification, the dissent’s legislative arguments

\(^{142}\) *Id.*
\(^{143}\) *Minesen*, 671 F.3d at 1341.
\(^{144}\) *Id.* at 1339 (“The Supreme Court and this court have long held that the government, if not otherwise prohibited by statute, can enforce a voluntary contractual waiver with the same force as a private party, notwithstanding superior bargaining power.”).
\(^{145}\) S. Rep. 95-1118, at 1.
history arguments do not overcome their burden. The CDA, even with *Minesen* clauses imposed on contractors, seems to address Congress’s concerns about judicial review and its relationship with contractors’ negotiating power vis-à-vis the government. Even the dissent’s strongest argument, agency boards setting procurement law precedent, does not hold true despite the absurd opportunities for temporary precedential gamesmanship and manipulation by both contractors and the government.

Nonetheless, an analysis of *Minesen* is not complete without looking at broader public policy issues.\(^{146}\) Understandably, but unfortunately, nowhere in the opinion of the majority or the dissent do they conduct an ex-ante analysis of the incentives created by the rule in *Minesen*, or how those incentives relate to the purposes of the CDA. Foremost, the purpose of the CDA is to provide a “fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving government contract claims.”\(^{147}\) Does the CDA provide this if it allows *Minesen* clauses?

1. Will a *Minesen* Clause Create “Fair” Legal and Administrative Remedies?

Three fairness related issues will quickly develop if the government continues to insert *Minesen* clauses in CDA contracts. First, agencies will rationally use *Minesen* clauses to reduce their legal risk and burden by shifting both to the contractor and to the DOJ civil division. Second, *Minesen* clauses will largely force contractors to choose the more expensive Court of Federal Claims over the less expensive agency boards in order to maintain their ability to appeal. Finally, contractors that continue to select the agency boards will not receive a higher contract price commensurate with the increased certainty resulting from their inability to appeal.

\(^{146}\) This analysis will make certain assumptions. First, Congress’s goals for the CDA remain unchanged from its passage in 1978. Second, the CDA has met the goal of having agency boards being a quicker and cheaper alternative to the Court of Claims, and thereafter the Court of Federal Claims.

\(^{147}\) S. Rep. 95-1118, at 1.
a. Agencies Will Rationally Use Minesen Clauses to Shift Their Legal Burden

Agencies hiring contractors can often use their greater bargaining power to decide to include a *Minesen* clause in a contract. The advantages of a *Minesen* clause for the agency will generally outweigh the disadvantages, and as a rational actor, they will do what is in their best interest. The first advantage a *Minesen* clause provides an agency is a quicker conclusion to any appeal that proceeds to an agency board. Because agency counsel litigates their own cases in front of agency boards, a case without the chance of an appeal means less total investment of agency counsel resources in litigation. The second advantage is that the removal of the contractors’ ability to appeal to the Federal Circuit from an agency board makes contractors more likely to choose the Court of Federal Claims over an agency board to maintain their ability to appeal (*see* part 1b, immediately below). A contractor choosing the Court of Federal Claims is an advantage for the agency because it shifts the primary litigation burden to the DOJ, vice the agency. Though the agency appoints counsel to help DOJ litigate and is ultimately responsible for any awards resulting from the litigation, when DOJ is the primary litigation authority, agency counsel’s responsibilities are significantly less than if they were solely responsible for litigating the case in front of the agency board. By DOJ becoming primary counsel, agency counsel is free to focus on challenges in the agencies future, rather than focusing on a past contract.

b. Contrary to the CDA, the Court of Federal Claims becomes the Forum of Choice

An explicitly stated goal in the CDA was “a flexible system that provides alternative forums for resolution of particular kinds of disputes.”148 Under the old litigation adage of “economical, thorough, or speedy, pick two” – the CDA set up agency boards to focus on speed and economy. However, if agency incentives are to insert *Minesen* clauses in all contracts, contractors are strongly encouraged to select the Court of Federal Claims for any significant

148 *Id.*
dispute to preserve their secondary right of appeal to the Federal Circuit (see part 1a, immediately above). Given that smaller disputes have other means of remedy like Alternative Dispute Resolution and agency board procedures for accelerated and small claims under 41 U.S.C. § 7106, a Minesen clause would be an unlikely factor for those disputes anyway. Thus, in total, Minesen clauses will likely cause a significant shift in medium and larger sized disputes from agency boards to the Court of Federal Claims, in direct conflict with the stated goals of the CDA to provide contractors with economical alternative means of dispute resolution. Though this choice is technically consistent with the CDA and does maintain a contractor’s judicial access, it is not consistent with the fairness and options that the CDA originally envisioned.

c. Agency Board Participants Do Not Receive the Benefit of Their Bargain

Forcing contractors to make the above choice would be more acceptable if the contracting agency could effectively price the contractor’s reduced options into the contract, thereby allowing the contractor to receive the benefit of their bargain. Agencies cannot give this discount to the contractor, however, because the contractor, despite a Minesen clause, always can choose to proceed to the Court of Federal Claims under 41 U.S.C. § 7104(b) and thus maintain appeal to the Federal Circuit.\footnote{41 U.S.C. § 7104(b) (2011).} Stated differently, the law requires that a contractor must always choose ex-post, so there is no way to guarantee a dispute resolution process to an agency board, with no appeal. Hence, the agency will price the contract lower to reflect the greater risk of the agency having to expend resources to litigate all the way to the Federal Circuit, despite a Minesen clause removing one of the avenues originally envisioned by the CDA to proceed to the Federal Circuit. The contractor, in essence, is paying for the same amount of insurance envisioned by the CDA’s dual paths of appeal to the Federal Circuit, but actually receiving less insurance.
2. Will a *Minesen* Clause Create “Balanced” Legal and Administrative Remedies?

“Balance,” admittedly, is a subjective standard to measure. In examining the effects of *Minesen* clauses, however, it will be more important to recognize imbalance than to maintain perfect balance. Immediately, *Minesen* clauses create imbalance by unequal judicial access, and over time will likely create imbalance between the case loads of the agency boards and the Court of Federal Claims.

a. *Judicial Access is Unbalanced*

If an agency requires a contractor to initially choose between disparate means of appeal, the agency board and the Court of Federal Claims, and only one of those means provides follow on access to Article III judicial review, that is unbalanced judicial access. The important assumption is that the means of initial appeal are “disparate.” If the CDA deemed the agency board and the Court of Federal Claims paths equivalent, or even intended them to be equivalent, unbalanced judicial access would not be an issue under a *Minesen* clause. The CDA, however, intended agency boards to be the economical and speedy path as compared to the Court of Federal Claims.150 Thus, when contractors choose the path the CDA created to be economical and speedy, and *Minesen* clause denies them judicial access, even though the denial is an ex-ante choice by the contractor, it creates unbalanced judicial access under the CDA.

b. *The Court of Federal Claims Will Receive Many More CDA Cases*

If the above conclusions about agency and contractor incentives are true, a logical and reasonable conclusion is that contractors are going to favor adjudication of medium and larger sized cases in the Court of Federal Claims. This bias will likely result in a measurable increase in the Court of Federal Claims docket for those type cases and a commensurate decrease in appeals board dockets for those type cases. This imbalance in caseload could be the ratio that

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the CDA originally envisioned in “provid[ing] alternate forums suitable to handle the different types of disputes[.]”\textsuperscript{151} It is more likely, however, that the CDA envisioned a linear escalation in litigation based on the stakes of the dispute. That is, the Court of Federal Claims was the route of choice for those disputes that “ultimately must go to court” without delay, rather than the default of all medium and above sized disputes that may \textit{eventually} need judicial attention.\textsuperscript{152} Regardless of legislative intent, \textit{Minesen} will likely shift the balance of cases from agency boards to the Court of Federal Claims, likely creating imbalance.

3. Will a \textit{Minesen} Clause Create “Comprehensive” Legal and Administrative Remedies?

The disagreement between the majority and the dissent, at its core, is about the comprehensiveness of a system that allows \textit{Minesen} clauses. The majority argues that so long as the statute gives a contractor the option of pursuing a judicial remedy with the Court of Federal Claims, that initial choice provides “comprehensive” legal and administrative remedies. The dissent argues that access to an agency board without subsequent appellate access to the Federal Circuit does not meet the required “comprehensive” remedies.

A thorough investigation of the legislative intent of the CDA is unlikely to reveal conclusively what Congress’s intention was, given these two possible interpretations. The only safe conclusion is that the majority’s view is less “comprehensive” than the dissent’s view, but whether forcing the initial choice makes it non-comprehensive is debatable. In examining comprehensiveness, nonetheless, it is valuable to return to what the contractor is getting for their bargain (\textit{see} part 1c, immediately above). Contractors are not getting the comprehensiveness they have paid for if they choose the agency board path, thus, regardless of adequacy of the

\textsuperscript{151} Id. at 1.
\textsuperscript{152} Id. at 12.
comprehensiveness contractors are getting in absolute terms, it is an inadequate amount in terms of fairness.

CONCLUSION

The above public policy analysis of fairness, balance, and comprehensiveness shows sound reasons why the government’s inclusion of *Minesen* clauses in government contracts goes against the foundational goals of the 1978 Contract Disputes Act. Nonetheless, the decision in *Minesen* is consistent with the CDA statute and the majority of its legislative history, even if it is not entirely consistent with the spirit of the CDA. The conflict in *Minesen* is strikingly similar to the conflict from 1885 to 1951 between the original Tucker Act and the *Kihlberg* standard the Supreme Court applied to the Tucker Act. In that case, the Court of Claims unsuccessfully attempted to loosen the *Kihlberg* standard, but Congress’s eventual action through the Wunderlich Act remedied the conflict. In this situation involving *Minesen* clauses, as in those historic events, Judge Minton’s words are appropriate and they show the overall wisdom of the Federal Circuit’s decision: “If the standard . . . that we adhere to is too limited that is a matter for Congress.”153 *Minesen* clauses, like the standard in question in the *Wunderlich* decision, are a matter for Congress. We should hope, for the sake of all interested, that this congressional matter does not take sixty-six years to remedy.

153 *Wunderlich*, 342 U.S. at 100.