In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 01-0647V

Filed: 3 June 2008

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REGINA and SHANNON LEMIRE, parents of DESTINY LEMIRE,	*	
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Petitioners,	*	
	*	
v.	*	**PUBLISHED DECISION**[1]
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SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
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David Michael Noonan, Esq., Shaheen & Gordon, P.A., Dover, New Hampshire, for Petitioners; *Catharine Elizabeth Reeves, Esq.*, U.S. Department of Justice, Washington, D.C., for Respondent.

ORDER GRANTING MOTION TO DISMISS PETITION AS UNTIMELY FILED AND DECISION

ABELL, Special Master,

On 7 March 2007, Respondent filed his Motion to Dismiss the instant Petition with an accompanying Memorandum of Law in Support of Dismissal (Respondent's Brief). On 30 March 2007, Petitioners submitted a Memorandum in Opposition to Dismissal (Petitioners' Brief). Finally, on 9 April 2007, Respondent filed a Reply Memorandum (Respondent's Reply). Having carefully

[1] This Decision will be published and posted to the Court of Federal Claims website. Therefore, Petitioners are reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b), they have 14 days from the date of this Order within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" may be made available to the public per the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

considered the memoranda submitted by the parties, in light of the pleadings and exhibits filed already in this case, it is now incumbent upon the Court to rule on the Motion.[2]

I. PROCEDURAL BACKGROUND

On 25 September 2002, the special master then-assigned to this case filed a Decision (the Decision) dismissing the Petition "for lack of subject matter jurisdiction" because the Petition was not filed within 36 months of the "first symptom or manifestation of onset" in violation of Section 16(a)(2) of the Vaccine Act.[3] That special master based her analysis of timely filing on the Federal Circuit's opinion in *Brice v. Secretary of HHS*, 240 F.3d 1367 (Fed. Cir. 2001), *cert. denied sub nom. Brice v. Thompson*, 122 S. Ct. 614 (2001).

Subsequent to the Decision, Judge Futey of the Court of Federal Claims granted a petitioner's motion to review and remanded the special master's decision in the case of *Setnes v. Secretary of HHS*, holding that the petition there was timely, explaining, "Where there is no clear start to the injury, such as in cases involving autism, prudence mandates that a court addressing the statute of limitations not hinge its decision on the 'occurrence of the first symptom.'" 57 Fed. Cl. 175, 179 (2003). Due to the particularly insidious and incremental nature of autism's early symptomatology, Judge Futey reasoned, the law should make a distinction between the "occurrence of first symptom" and the "manifestation of onset," using the last-occurring as the proverbial conductor's downbeat for purposes of the limitation of Section 16(a)(2). *Id*. at 179-80.

Thereafter, Petitioners in the instant case filed Motion for Relief from Judgment, pursuant to Vaccine Rule 36 and Rule 60(b) of the Rules of the Court of Federal Claims (RCFC), on 31 July 2003. The motion sought relief under subsections (b)(5) and (b)(6) of Rule 60. Petitioners forewent legal argument on their merits in satisfaction of the standard of Rule 60, preferring instead to argue in that motion that relief was justified "to correct the error and to address this unjust and inequitable result." Petitioners' Motion for Relief from Judgment at 9.

Over Respondent's opposition, the assigned special master filed an "Order of Reinstatement" purporting to "reinstate" the Petition under the authority vested by RCFC 60. The special master asserted therein the jurisdiction under RCFC 60(b)(6) to grant relief for "any ... reason justifying relief from the operation of the judgment" (ellipsis in original), and under RCFC 60(b)(5) to grant relief in cases where "it is no longer equitable that the judgment should have prospective

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[2] This case was originally assigned to Special Master Millman on 16 November 2001, soon after filing. It was then reassigned to Special Master Hastings on 9 September 2002, and then reassigned to Special Master Millman on 20 September 2002. Later, after review of the case by Judge Baskir, the case was assigned to Special Master Hastings on 29 April 2004. On 8 February 2007, the case was reassigned yet again to Special Master Campbell-Smith. Finally, the case came to rest in its current repose when it became the Undersigned's case to judge on 19 November 2007.

[3] The statutory provisions governing the Vaccine Act are found in 42 U.S.C. §§300aa-10 *et seq*. (West 1991 & Supp. 1997). Hereinafter, reference will be to the relevant subsection of 42 U.S.C. §300aa.

application." The special master went on to explain that "the prospective application" of the Decision effectively was to "force" Petitioners out of the Vaccine Program, when, in contrast, "undoubtedly [P]etitioners wish to resume their place among others in the Omnibus Autism Proceedings." The special master concluded the Order of Reinstatement by granting Petitioners' motion for relief from judgment because "[e]quity demand[ed]" it. Respondent moved for Review of the special master's Order of Reinstatement and Petitioners opposed that motion.

By an Order filed 5 March 2004, Judge Baskir of the Court of Federal Claims denied Respondent's motion for review without prejudice, stating that the Order of Reinstatement was not yet ripe for review because the special master had not reached a final ruling on the merits of the Petition. 60 Fed. Cl. 75. He then remanded the Petition back to the Office of Special Masters for further adjudication.

Thereafter, on 20 February 2007, the Federal Circuit released its opinion in the case of *Markovich v. Secretary of HHS*, 477 F. 3d 1353 (Fed. Cir. 2007). In that opinion, the Federal Circuit interpreted from Congress' use of the word "or" in Section 16(a)(2) of the Vaccine Act Congressional intent for a disjunctive rule, and "interpret[ed] the words 'first symptom' and 'manifestation of onset' as referring to two different forms of evidence of injury." 477 F. 3d at 1357. Rejecting the petitioner's argument that an earlier, subtle event constitute onset for causation purposes, while a later, more obvious event serve as the triggering event for the statute of limitations, the Federal Circuit stated, "There is no principled basis to conclude that 'first symptom or manifestation of onset' should be construed one way for causation and another way for the statute of limitations." *Id*. at 1359. The Court ruled against petitioner in that case, holding that "'the first symptom or manifestation of onset,' for the purposes of § 300aa-16(a)(2), is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large." *Id*. at 1360.

Wherefore, Respondent filed the Motion at issue on 7 March 2007, moving for dismissal of the Petition. This case was reassigned and transferred to Chambers for the Undersigned on 19 November 2007. As the issues presented appear ripe for adjudication, the Court proceeds hereby to rule thereupon.

II. LEGAL STANDARD

Procedural practice in the Vaccine Program is governed by the Rules of the Court of Federal Claims (RCFC) as incorporated by reference within Appendix B of same, the Vaccine Rules of the Court of Federal Claims (Vaccine Rules). Vaccine Rule 1. Vaccine Rule 36 establishes the judicial procedure followed when a movant files a motion for relief from judgment, but RCFC 60 is the actual procedural vehicle setting forth the standard to be followed by the Court when considering such a motion. Court rules are not statutes, and thus neither Rule 60 nor any other rule of the Court work to grant to the Court any additional jurisdiction beyond what has been statutorily enacted by Congress. *Patton v. Secretary of HHS*, 25 F. 3d 1021, 1027 (1994). Therefore, the Court considers

these procedural rules (and the burdens contained or set within them) within the context of the Vaccine Act as a jurisdiction-granting statute.

RCFC 60 states, in relevant part, as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... [where] (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) [for] any other reason justifying relief from the operation of the judgment.

RCFC 60 therefore substantially approximates Federal Rule of Civil Procedure (FRCP) 60, which itself states in relevant part:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: ... [where] (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) [for] any other reason that justifies relief.

The variance in wording between RCFC 60(b) and FRCP 60(b) is insubstantial, and it is clear that the draftsmanship of the former is substantially based upon that of the latter for the Court's current intents and purposes. *See Patton v. Secretary of HHS*, 25 F.3d 1021, 1024 n. 4 (Fed. Cir. 1994) ("RCFC 60 is a 'virtual duplicate' of the Fed. R. Civ. P. 60. ... Therefore, we may rely on cases addressing Fed. R. Civ. P. 60"), citing *Info. Sys. & Networks Corp. v. United States*, 994 F.2d 792, 794 n. 3 (Fed. Cir. 1993) and RCFC, Foreword (revised effective March 15, 1992) ("The rules of the United States Court of Federal Claims are based upon the Federal Rules of Civil Procedure."). Therefore, the Court herein considers cases interpreting FRCP 60(b) alongside those interpreting RCFC 60(b).

III. ANALYSIS

The general question presented by Respondent's motion is somewhat obvious: should the Petition be dismissed by the Court as untimely filed? Before that ultimate issue can be determined, however, several underlying issues must also be resolved.[4]

First, Petitioners challenge Respondent's prerogative to move for dismissal of this case at this juncture, given Respondent's repeated challenges to the Petition on the basis of timing. Petitioners

[4] The doctrine of "law of the case" does not obtain here. Judge Baskir did not preclusively rule in any way or otherwise create law of the case, instead finding that the issue presented was not properly before him. Since the only other "judge-made" law at issue here, besides the Decision dismissing the Petition, is comprised of Orders of the previously- and currently-assigned special masters, this case is not affected by that doctrine.

argue that "this motion to dismiss is not properly before this court because it is essentially a second request to review [the Order of Reinstatement], a request that has already been denied by this court." Petitioners' Brief at 5. Petitioners add that they find it improper that the currently-assigned special master revisit the grounds for dismissal raised by Respondent in order to take action "nullif[ying]" the Order of Reinstatement. *Id*.

This principal objection is dispensed with as easily as it was raised, and one need look no further than the procedural rules followed in this Court or any other for justification. RCFC 12 and 56 give the United States as defendant several opportunities to challenge a plaintiff's claim, and no one could sensibly argue that denial of an earlier attempt at dismissal, made pursuant to Rule 12(b) or (c), precluded a later attempt pursuant to Rule 12(c) or Rule 56. *See also* FRCP 12 and 56. In fact, Vaccine Rule 8(d) grants special masters adjudicating claims in the Vaccine Program even more latitude and discretion: "The special master may decide a case on the basis of written filings without an evidentiary hearing. In addition, the special master may decide a case on summary judgment, adopting procedures set forth in RCFC 56 modified to the needs of the case." Of course, the Court must apply the correct standard in reviewing the Petition, depending on the stage to which the case has progressed. *See, e.g., Miller v. Secretary of HHS*, Case No. 07-0530, 2008 WL 458727 (Fed. Cl. Spec. Mstr. Feb. 04, 2008) ("In ruling on a motion to dismiss based on the Petition and accompanying exhibits ... brought pursuant to Vaccine Rule 8(d) and RCFC 12, ... the deciding court must accept as true the allegations in the petition and must construe such facts in the light most favorable to the nonmoving party."), quoting *Nelson Const. Co. v. United States*, 79 Fed. Cl. 81 (2007) and citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) and *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988). However, Respondent has the prerogative as a litigant to move for dismissal whenever within reason a new stage in a proceeding is reached. The Court always has the option of saying "no", which, in the context of moving for dismissal, can and often does mean nothing more than "not yet." Therefore, the Court does consider Respondent's motion as properly made.

Moving on to more substantive aspects of Respondent's motion, and the issues raised for adjudication therein, the Court bears in mind the procedural context of this case as "reinstituted", pursuant to application of RCFC 60(b). This Petition has already been dismissed once, and is only active due to a discretionary conclusion, made by the then-assigned special master, that the legal grounds for such relief were met. The Petition is now before the Undersigned Special Master, who sits in the same position as the previous special master by whom it was "reinstituted". *See Covington*, 629 F.2d 730, 733 (2d Cir. 1980) ("Although Rule 60(b) does not specify the correct forum for presenting a motion for relief from judgment, the motion is generally brought in the [] court rendering judgment" because "the court of rendition will be more familiar with the facts ... and perhaps more conversant with the applicable law."). If such relief was not, in all actuality, proper, then it continues to lie within the sound discretion of the Undersigned to reconsider and readdress the pending status of the Petition. RCFC 59 (a)(2); Vaccine Rules 1 and 10(c). Reconsideration is proper at this stage, because this Petition has been deemed not to have left the purview of the Office of Special Masters. *See* Order Remanding Petition to the Office of Special Masters, filed on 5 March 2007 by Judge Baskir, 60 Fed. Cl. at 79-80; *see also Fields v. Secretary of HHS*, Case No. 02-0311V, slip op. at 2 (Fed. Cl. Spec. Mstr. May 8, 2008).

In the context of Respondent's Motion, the current position of this Petition therefore begs the question: was "reinstitution" of the instant Petition legally justified? If it was justified by an appropriate action of the Court, surmounting the appropriate legal standard, then it may proceed in the Omnibus Autism Proceeding, pending further adjudication; if not, then it should be dismissed immediately with prejudice.

A. Respondent's Challenge to Vaccine Rule 36

First, Respondent has challenged the Court's application of Rule 60 preliminarily as an attack against the validity of the most recent revision of Vaccine Rule 36 (as revised and reissued 1 May 2002).[5] Respondent challenged Vaccine Rule 36 for want of a statutory grant of jurisdiction in Respondent's Opposition to Petitioners' Motion for Relief from Judgment (at note 1), in Respondent's Motion for Review of the Order of Reinstatement (at note 2), and the instant Motion to Dismiss (at note 3), questioning in each whether the "statutory authority to amend a judgment...may be conferred by the [RCFC]." In his Order of Remand, Judge Baskir discussed, in what he admitted was *obiter dicta* (60 Fed. Cl. at 79), Respondent's concern on this point. 60 Fed. Cl. at 77. He stated that, as a procedural matter, "Vaccine Rule 36(a) specifically allows the special master to grant relief from judgment under RCFC 60(b)," and he noted that the dictum of the Federal Circuit in *Patton*, *supra* at 1027, "proposes such authority could be conferred by either the Rules or the Vaccine Act." *Id*. As Respondent has raised this objection in every pertinent pleading filed in this case, the Court finds the issue ripe for adjudication.

Respondent's objection evinces a misunderstanding of the issue. Rules of procedure provide formal, categorical mechanisms for relief, however it is prayed for, so as to be substantively cognizable by the law and appropriately presented for adjudication.[6] A Court's authority to grant relief, just as with the Court's authority to hear a particular subject matter, is granted by the Legislature[7], or, many have argued, may be inherent to the Court's existence as an adjudicatory

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[5] Respondent does not challenge the validity of RCFC 60(b) generally, but only as employed by the Office of Special Masters via Vaccine Rule 36.

[6] *See Sibbach v. Wilson* & Co., 312 U.S. 1, 14 (1941) (holding that rules of procedure are "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them"); *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 202 F.2d 731, 734 (2d Cir. 1953) (ruling that "the one civil action under the [FRCP] is used to vindicate any civil power the district court has; the demand for judgment forms no part of the claim for relief, and does not restrict the relief to be granted against those appearing and defending; and as against such parties the final judgment shall grant all the relief to which a plaintiff is entitled, whether or not demanded in his pleadings."); *Covington Industries*, *supra* ("the outcome [is] not [to] be governed by the label placed upon [a party's] manner of proceeding. Adjudication by nomenclature is a relic of ancient practice, contrary to both the letter and spirit of the [FRCP]"); RCFC 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

[7] Chief Justice Rehnquist, speaking for a unanimous Supreme Court, stated, "Congress, acting pursuant to its authority to make all laws 'necessary and proper' to [inferior courts'] establishment, also may enact laws regulating the conduct of those courts and the means by which their judgments are enforced.") *Willy v. Coastal Corp.*, 503 U.S. 131, 136, (1992). As a matter of constitutional prerogative, the Supreme Court has long upheld Congressional rule-making

body.[8] With the exception of the Supreme Court of the United States, federal courts are, one and

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authority, as well as the concomitant authority to permit the Courts to develop their own procedural forms consistent with the rules Congress itself has endorsed through enactment:

> Congress has expressly enabled the Courts to regulate their practice... It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. ... It certainly will not be contended, that this might not be done by Congress. The Courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended, that these things might not be done by the legislature, without the intervention of the Courts; yet it is not alleged that the power may not be conferred on the judicial department.

Wayman v. Southard, 10 Wheat. (23 U.S.) 1, 42-43 (1825). This prerogative to delegate rule-making authority has been reinforced by later decisions in other subject areas of procedure:

> There is no doubt that Congress might have legislated more specifically on the subject... But it does not follow, that because Congrees might have done this, they necessarily must do it, and cannot commit the power to the Courts of justice. Congress might regulate the whole practice of the Courts, if it was deemed expedient so to do; but this power is vested in the Courts; and it never has occurred to any one that it was a delegation of legislative power.

Bank of United States v. Halstead, 10 Wheat. (23 U.S.) 51, 61 (1825). The Supreme Court has summarized this principle, that:

> "[T]his delegation of power by congress [is] perfectly constitutional; that the power to alter and add to the process and modes of proceeding in a suit, embraced the whole progress of such suit, and every transaction in it from its commencement to its termination, and until the judgment should be satisfied; and that it authorized the courts to prescribe and regulate [procedure]. [In *Wayman* and *Halstead*, the Supreme Court] emphatically laid down, that 'a general superintendence over this subject seems to be properly within the judicial province, and has always been so considered;' and that 'this provision enables the courts of the union to make such improvements in its forms and modes of proceeding as experience may suggest....'"

Beers v. Haughton, 9 Pet. (34 U.S.) 329, 360 (1835).

[8] *See generally Chambers v. NASCO*, 501 U.S. 32, 44-46 (1991); *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949). Although ancillary jurisdiction has been most typically invoked in cases where a federal court has invoked jurisdiction over non-diverse parties in a federal diversity action, the concept is directly related to the conceived inherent authority of courts:

> Once the prerequisites for a federal court's limited subject matter jurisdiction are satisfied, its power to act in order to protect and effectuate that jurisdiction is beyond serious question. The power to protect and effectuate properly acquired subject matter jurisdiction is known as "ancillary jurisdiction". Ancillary jurisdiction is not an anomaly to the principle that the subject matter jurisdiction of federal courts is strictly limited. Ancillary jurisdiction does not supply jurisdiction where none exists; but it is the inherent power of a federal court to act, where it has acquired original subject matter jurisdiction, in order to exercise that jurisdiction over the primary and principal issues before it.

Florida Medical Ass'n v. Department of Health, Educ. & Welfare, 454 F. Supp. 326, 330 (M.D. Fla. 1978). *See also Glus v. G. C. Murphy Co.*, 562 F.2d 880, 886 (3d Cir. 1977) (Ancillary jurisdiction is based upon the concept that once the court has jurisdiction over the claim it may also adjudicate claims arising from the same transaction or occurrence without an independent basis for jurisdiction.); *Aldinger v. Howard*, 427 U.S. 1, 18 (1976) (noting the special

all, creatures of statute;[9] therefore they each exercise limited subject matter jurisdiction which is itself granted by statute.[10] Therefore, they have been granted the authority and power to hear cases (i.e., jurisdiction[11]) where specific subject matter is at issue.[12] Once Congress grants statutory authority over certain subject matter, a secondary, distinct question arises concerning the congressional delegation of authority for the creation of procedural rules.[13] Rules of procedure do

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circumstances of a cause of action for which there is exclusive federal jurisdiction and holding that, "When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. s 1346, the argument of judicial economy and convenience can be coupled with the additional argument that only in a federal court may all of the claims be tried together.").

[9] United States Constitution, Article III, Section 1; *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922). The Supreme Court, in a landmark case on federal jurisdiction, held:

> Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction. Again, this reflects the constitutional source of federal judicial power: Apart from this Court, that power only exists "in such inferior Courts as the Congress may from time to time ordain and establish."

Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701-702 (1982).

[10] This restriction is based upon the appropriate deference due to state governments and laws contemplated by our federal system:

> The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which a federal statute has defined.

Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971), quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934) (internal marks omitted).

[11] The authority and power to hear cases relating to a particular subject matter of substantive law is what is properly referred to as "subject matter jurisdiction." *See generally Da Silva v. Kinsho Intern. Corp.*, 229 F.3d 358, 361 (2d Cir. 2000) (noting with chagrin that "Court decisions often obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim").

[12] *See*, *e.g.*, United States Constitution, Article III, Section 2: "The judicial Power shall extend to all Cases...arising under...the Laws of the United States..."; Vaccine Act, Section 12(a) ("The United States Court of Federal Claims and the United States Court of Federal Claims special masters shall, in accordance with this section, have jurisdiction over proceedings to determine if a petitioner under [section 11] is entitled to compensation under the Program and the amount of such compensation. The United States Court of Federal Claims may issue and enforce such orders as the court deems necessary to assure the prompt payment of any compensation awarded.")

[13] "[T]he administration of legal proceedings [is] an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules. The purpose of the *Erie* doctrine ... was never to bottle up federal courts with outcome-determinative and integral-relations stoppers when there are affirmative countervailing (federal) considerations and when there is a Congressional mandate (the Rules) supported by constitutional authority." *Hanna v. Plumer*, 380 U.S. 460, 472-74 (1965) (upholding "the Constitution's grant of power over federal procedure [and] Congress' attempt to exercise that power in the Enabling Act [as] valid");

not grant subject matter jurisdiction or freestanding substantive rights.[14] The question, then, of whether procedural rules comport with a federal court's substantive jurisdiction is important.

In the case of the FRCP, Congress has passed the Rules Enabling Act (28 U.S.C. § 2072) as the mechanism of delegating rule-making authority.[15] In the Vaccine Program, Congress has delegated rule-making authority to the Court of Federal Claims.[16] Therefore, within the Vaccine Act itself, Congress granted to the United States Court of Federal Claims the authority to create rules of procedure for the Vaccine Act, in addition to granting the Court (*via* the Office of Special Masters) subject matter jurisdiction to hear claims alleging vaccine-related injuries.

Respondent appears to argue that the Court of Federal Claims lacks the substantive power to grant relief from judgment, or, alternatively, assuming it does possess that power itself, was powerless to grant that remedial procedure to the special masters of the Vaccine Program. The generalized reference to "statutory authority" within Respondent's argument seems to imply that any court procedures that are not specifically enumerated in the text of the Vaccine Act itself are *ultra vires* usurpations of authority. Therefore, it is useful to examine the statutory basis for the procedural rules applicable to the Vaccine Program.

At § 12(d)(2) of the Vaccine Act, Congress commanded the Court of Federal Claims to "promulgate [the Vaccine Rules] pursuant to [28 U.S.C. § 2071]," and prescribed certain necessary elements to be included in those rules, such as "flexible and informal standards of admissibility of evidence," "the opportunity for summary judgment," and "limitations on discovery," among others. By its use of the language "shall...provide for" and "shall...include," the list, on its face, is inclusive, not exclusive. § 12(d)(2) itself relies upon 28 U.S.C. § 2071 by incorporation. 28 U.S.C. § 2071(a) reads, in relevant part, "[A]ll courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under [§ 2072]." 28 U.S.C. § 2072, though, does not expressly

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compare with Sibbach, 312 U.S. at 9-10, *supra* at note 2 ("Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States..."), and FRCP 82 ("These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts.").

[14] *See*, *e.g.,* 28 U.S.C.A. § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right."). Even where Congress has provided procedural means to effectuate a remedy, the substance of the remedy must still fall within the limits of subject matter jurisdiction. *Alberta Gas Chems., Inc. v. Blumenthal*, 82 Cust. Ct. 77, 88, 467 F. Supp. 1245, 1254 (Cust. Ct. 1979) ("It is well settled that [the Declaratory Judgment Act] neither creates subject matter jurisdiction where none otherwise exists, nor does the Act expand the scope of existing jurisdiction in the federal courts. Stated otherwise, the Declaratory Judgment Act creates only a particular kind of remedy available in actions where a court already has jurisdiction to entertain a suit.") (internal citations omitted).

[15] *Brown v. E.W. Bliss Co.*, 818 F.2d 1405, 1409 (8th Cir. 1987) ("Congress has the power to promulgate rules governing practice and procedure in the federal courts, and it may exercise that power, as it has, by delegating to the Supreme Court the limited rule-making function granted in the Enabling Act.").

[16] § 12(d)(2) of the Vaccine Act.

encompass the Court of Federal Claims, referring only to district courts and courts of appeals. See § 2072(a).

A plain-word reading of 28 U.S.C. § 2072, noting the omission of the Court of Federal Claims from mention, leads the Court to conclude that neither § 2072, nor the second sentence of 28 U.S.C. § 2071(a), which requires that court rules maintain consistency with federal statutes and § 2072 in particular, have substantial effect on the immediate question at bar.[17] As a result, the Rules of the Court of Federal Claims need not be drafted by the Supreme Court, and need not be presented to Congress in order to be valid. What does seem to control in this instance is the first sentence of § 2071(a), to be read in conjunction with 28 U.S.C.§ 2503 (b) ("The proceedings of the Court of Federal Claims shall be in accordance with such rules of practice and procedure ... as the Court of Federal Claims may prescribe...."). [18] Therefore, the first sentence of 28 U.S.C. § 2071(a), coupled with 28 U.S.C. § 2503(b), statutorily authorize the Court of Federal Claims to create rules such as RCFC 60 and Vaccine Rule 36, as a valid delegation of rule-making authority.

The Federal Circuit in *Patton* referred to the Court of Federal Claims as "the tribunal charged with setting out the rules governing proceedings before the special masters," and enunciated the Court's prerogative to "reserve" (and, by implication, also to grant) "the power to grant Rule 60-type

[17] There is a secondary concern raised by this reference, regarding a need for consistency with the rules enabled by 28 U.S.C. § 2072 (the FRCP), which appears to be adequately addressed in the body of the RCFC itself: "The United States Court of Federal Claims, acting by a majority of its judges, may...make and amend rules governing its practice. *Such rules, to the extent permitted by this court's jurisdiction, shall be consistent with the FRCP*...." RCFC 83(a) (emphasis added).

[18] The entirety of 28 U.S.C. § 2503 (b) states that, "The proceedings of the Court of Federal Claims shall be in accordance with such rules of practice and procedure (other than the rules of evidence) as the Court of Federal Claims may prescribe and in accordance with the Federal Rules of Evidence." However, the controlling authority seems to be § 12(d)(2)(B) of the Vaccine Act, which mandates that "[The Vaccine Rules] shall ... include flexible and informal standards of admissibility of evidence." This section has generally been read to mean that the Federal Rules of Evidence are not binding on the Vaccine Rules or any proceedings in the Vaccine Program. *See, e.g., Banks v. Secretary of HHS*, No. 02-738, 2007 WL 2296047, *20 (Fed. Cl. Spec. Mstr. Jul. 20, 2007).

relief," such as is at issue here.[19] 25 F. 3d at 1026. The fact that the Court of Federal Claims elected to exercise that prerogative in promulgating Vaccine Rule 36, therefore, is altogether unremarkable.

Judge Wolski, opining on this case's doppelganger, *Vessels v. Secretary of HHS*, 65 Fed. Cl. 563 (2005), reached much the same conclusion on this point. His reading of the Federal Circuit's opinion in *Patton* was that there "[t]he Circuit did confirm that [the Court of Federal Claims] may entertain a Rule 60(b) motion in a vaccine case." 65 Fed. Cl. at 566. Later in the same opinion, Judge Wolski proceeded to articulate clearly the flow of 60(b) authority from the judges of the Court of Federal Claims to the Office of Special Masters. *Id*. at 567. "For RCFC purposes, final judgment on a Vaccine Act petition is no different from any other judgment that [the Court of Federal Claims] is authorized to enter." *Id*. Rule 60(b) jurisdiction "must come from the fact that judgment is entered by the clerk [pursuant to Section 12(c)(3) of the Vaccine Act], and thus must be exercised under the Vaccine Act." *Id*. From this it is clear that the exercise of 60(b) authority is statutorily-permissible under the Vaccine Act, requiring for its use only a procedural rule within which to exercise it. Judge Wolski's analysis navigates the propriety of vesting 60(b) relief in the special masters via Vaccine Rule 36, viewing such vestment as a plausible extension of the Court's authority to assign and remand cases to the Office of Special Masters. *Id*.

Therefore, as Judge Baskir stated in the Order of Remand, it appears that the Court of Federal Claims complied with the Federal Circuit's guidance in *Patton*, and created a valid Vaccine Rule which incorporates RCFC 60, so as to make it available for special masters to grant relief from judgment in certain specific, narrowly-prescribed circumstances. As such, the Court rejects Respondent's challenge to the legality of Vaccine Rule 36.

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[19] The Federal Circuit in *Patton* later diverged from this clear explication of the governing rule by differentiating federal district courts, which, it held, possess inherent authority, from the Office of Special Masters, which does not by its estimation. Though there are plenty of distinguishing characteristics that separate federal district courts from the Office of Special Masters, the Federal Circuit based the distinction on the fact that "the Office of Special Masters owes its existence to and derives its powers from [a statute,] the Vaccine Act," and is therefore "a creature of statute" for which jurisdiction must be grounded in statutory grant. 25 F. 3d at 1027. These statements are correct, but they do not somehow distinguish other federal courts from the same description. In fact, every federal court in existence (other than the Supreme Court) owes that existence to statutory grant, and, as a court of limited jurisdiction, is granted jurisdiction only by statute. *See generally* United States Constitution, Article III; *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940) (ruling that "federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed"); *FAAUO v. C.I.R.*, 165 F.3d 572, 578 (7th Cir. 1999) (Posner, J.) ("The argument that the Tax Court cannot apply the doctrines of equitable tolling and equitable estoppel because it is a court of limited jurisdiction is fatuous. All federal courts are courts of limited jurisdiction. We are given no reason to suppose that statutes of limitations are intended to be administered differently in the Tax Court than in the federal district courts, which share jurisdiction in federal tax cases with the Tax Court."); *Terran v. Secretary of HHS*, 195 F. 3d 1302 (1999) ("It is well understood that the Court of Federal Claims, like all federal courts, is a court of limited jurisdiction."). As stated above, this limitation of federal power originates from the sovereignty left in the hands of the individual States, comprised of the remainder that was not transferred by the people to the federal government at the time of ratification of the Constitution. *Cf.* United States Constitution, Amendment X.

B. Relief from Judgment Pursuant to RCFC 60(b)(5) and (6)

In motions for relief from judgment brought *via* Rule 60(b)(5), the Court may only grant relief where "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." The classic example of where this sort of relief is appropriate is in the context of injunctive relief.[20] For example, as the Federal Circuit stated in *W.L. Gore & Associates, Inc. v. C.R. Bard, Inc.*, 977 F. 2d 558 (1992), "The court may modify an injunction when it is satisfied that what it has been doing has been turned into an instrument of wrong." *Id*. at 561.

Here there has been no argument raised that the judgment of dismissal had been "satisfied, released, or discharged," and thus, the first circumstance addressed by subsection (b)(5) clearly does not obtain. There was some ambiguity as to whether some prior judgment upon which the judgment of dismissal was based had been reversed or otherwise vacated. Petitioners argued, and the special master seemed to believe, that the apparent change in (decisional) law, brought about by Judge Futey's ruling in *Setnes*, was a sufficient trigger for the application of this relief. Lastly, it also seems that Petitioners argued, and the special master agreed, that it was no longer equitable for the dismissal to have "prospective application," summoning the third and last of the grounds for relief contained in subsection (b)(5).

By a clear reading on the several cases interpreting (and originating) the grounds for relief from judgment addressed by Rule 60(b)(5), the Court concludes that such relief was not proper in this case. With regard to relief based on reversal or vacation of a prior judgment, the law is clear: "Rule 60(b)(5) requires a showing that the prior judgment which has been reversed governs the judgment sought to be reopened in a *res judicata* or collateral estoppel sense."[21] Similarly, the term "prospective application" is a term of art with specific meaning: Prospective application means a continuing effect of judgment that is "'executory' or involves 'the supervision of changing conduct or conditions'" as defined by two landmark Supreme Court decisions, viewed as the putative progenitors of this form of relief.[22] The Supreme Court, in the formative case of *United States v.*

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[20] The general rule in that context is that, "Rule 60(b)(5) authorizes the court to relieve a party of a judgment or order based upon a prior judgment which has been vacated, provided the motion for such relief is made within a reasonable time." *Jackson v. Jackson*, 276 F.2d 501, 504 (D.C. Cir. 1960) (affirming trial court's order to vacate previous order granting continued prospective relief (a permanent injunction) in the same case, which was no longer equitable to enforce, as it was based on an incorrect application of an initial judgment, also in the same case).

[21] *United States v. Real Property*, 164 F.R.D. 496 (C. D. Cal. 1995) (ruling that the term "prior judgment" in subsection (b)(5) "must be one upon which the instant judgment sought to be reopened 'is based,'" holding that denial of motions for such relief is required by the rule, where the movant "does not point to the reversal of any prior judgment upon which the instant [] judgment [is] based.").

[22] *Twelve John Does v. District of Columbia*, 841 F. 2d 1133 (D.C. Cir. 1988) (applying *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, (1856) and *United States v. Swift & Co.*, 286 U.S. 106 (1932)). *See also Ryan v. U.S. Lines Co.*, 303 F.2d 430 (2d Cir. 1962) (citing *State of Pennsylvania v. The Wheeling & Belmont Bridge Co.*, *supra*, to rule that "Rule 60(b)(5) … properly applies only to judgments with prospective effect,

Swift & Co., "held that it was the inherent right of a court of equity to modify an injunction in adaptation to changed circumstances which rendered the injunction an instrument of wrong;" therefore, "[t]he clause of Rule 60(b)(5) allowing for relief from the inequitable prospective application of a judgment was designed primarily to incorporate that inherent power, and the clause should be used in light of the *Swift* decision." *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F. 2d 645, 651 (1st Cir. 1972). In this case, therefore, it is important to note that "a change in applicable law does not provide sufficient basis for relief under Rule 60(b)(5)."[23]

Given the clarity of the law on this point, the Court is satisfied that subsection 5 of RCFC 60(b) could provide no relief to Petitioners. There has been no mention whatsoever, specifically identifying a particular judgment that has been reversed or vacated, let alone one upon which the dismissal judgment "is based," either within the instant case, or within any other case possessing preclusive effect over the instant case. Secondly, there is, by definition, nothing prospective about a judgment of dismissal. It places no continuing duty on anyone, and has no applicability to future circumstances or events. Moreover, the very nature of the cause of action pursued by petitions in the Vaccine Program is one of an action at law, not a suit in equity.[24] As actions *in rem* to receive monetary compensation from a finite fund, the nature of Vaccine Act petitions fits the most basic and traditional common law definition of an action at law. The denial of such a claim does not alter this fact. As an action for money damages, it is incongruent to a basic understanding of prospective relief. It therefore becomes plain that Petitioners could not receive relief based upon the last clause of Rule 60(b)(5).

Turning to the last basis for relief under Rule 60(b), subsection 6, the Court considers whether there exists "any other reason justifying relief from the operation of the judgment." As a residual clause, "Rule 60(b)(6) is available only in extraordinary circumstances and only when the basis for relief does not fall within any of the other subsections of Rule 60(b)." *Fiskars, Inc. v. Hunt Mfg. Co.*, 279 F.3d 1378, 1382 (Fed. Cir. 2002). Moreover, a movant's argument for relief from judgment under Rule 60(b)(6) "must be one other than those enumerated in 60(b) (1)-(5), and must

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and so does not cover the case of a judgment for money damages").

[23] *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F. 2d 645, 650 (1st Cir. 1972), citing *Berryhill v. United States*, 199 F. 2d 217, 219 (6th Cir. 1952); *See also In re Fine Paper Antitrust Litigation*, 840 F.2d 188 (3d Cir. 1988) (holding that where "[t]here is no issue of satisfaction, release or discharge," and where "[t]he judgment is for money, and thus has no prospective operation," a final money judgment [cannot] be reopened several years after the time for appeal has expired because of a favorable legal ruling in some other party's appeal"); *Marshall v. Board of Ed., Bergenfield, N. J.*, 575 F.2d 417 (3d Cir. 1978) (holding that the failure of [a movant] to do other than characterize the [judgment from which relief is sought] as "unequitable" is insufficient to establish the showing required for the modification of a final judgment, ruling that a trial court's "[r]eliance on a judgment in an unrelated case … does not make the original judgment vulnerable within the 'prior judgment' clause of subsection 5," and viewing the "prospective application" clause of Rule 60(b)(5) as a mere incorporative codification of "the time-honored rule that a court of equity may modify an injunction in adaptation to changed conditions").

[24] *Brice v. Secretary of HHS*, 240 F. 3d 1367, 1372 (2001). The special masters do have occasion to exercise equitable jurisdiction *in personam* within the context of adjudicating claims for vaccine-related injuries: primarily, and most frequently, in the area of *subpoenae ad testificandum* and *subpoenae duces tecum*.

be sufficient to justify the relief sought;" that subsection "is not a substitute for an appeal, and in all but exceptional circumstances, the failure to prosecute an appeal will bar relief under that clause." *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F. 2d 645, 651 (1st Cir. 1972). Here, Petitioners' decision not to move for review of the adverse decision of the Special Master constituted "an exercise of free choice which preclude[s] 60(b)(6) relief." *Id.* Also, based on the express language of 60(b)(6), Petitioners would have to prove compellingly the existence of "extraordinary circumstances" justifying such relief. *Cf. Dowell v. Board of Educ. of Oklahoma City Public Schools*, 8 F.3d 1501, 1509 (10th Cir. 1993).

There is nothing extraordinary about the circumstantial facts of this case. As a cursory reading of cases interpreting Section 16(a)(2) of the Vaccine Act proves, so also does experience in the Program bear out: dismissal for failure to file within the time limits therein is quite common, even ordinary. Likewise, the dismissal of a petition for untimely filing, in accord with a statute of limitation, can hardly be characterized as an exception to a rule. To these plain truths, Petitioners have offered no proof in rebuttal. Their failure to move for review of the dismissal, were they to succeed at that stage and beyond, was a tactical choice on their part that they cannot now avoid. In fact, there is no clear reason why Petitioners would be successful today on the issue of timeliness, if they indeed had followed the course of cases such as *Brice, Setnes*, or *Markovich* on review and appeal.[25] "Relief from a final judgment pursuant to RCFC 60(b)(6) requires a showing of exceptional or extraordinary circumstances," and among these are not included "the impact of tactical litigation decisions that prove to be unsuccessful." *Greenbrier v. United States*, 75 Fed. Cl. 637, 641 (2007) citing *Ackermann v. United States*, 340 U.S. 193 (1950) and *Louisville Bedding Co. v. Pillowtex Corp.*, 455 F.3d 1377, 1380 (Fed. Cir. 2006).

Based on the clear language of RCFC 60, and the judicial interpretations discussed above, the Court holds that relief from the judgment of dismissal was improper. Therefore, the Court hereby **STRIKES** the so-termed Order of Reinstatement.

C. The Problem of Jurisdiction

An unfortunate trend in legal discourse is the flippant use of "the J-Word", i.e. "jurisdictional".[26] The Vaccine Program has not been inoculated against this epidemic. Though such

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[25] Given the 20/20 view given by hindsight, the situation now is not the same as the one that faced the special master granting the Order of Reinstatement. At that time, Judge Futey's opinion in *Setnes* seemed to effect a change in the law, but that putative change is of diminished prominence now that the Federal Circuit ruled in *Markovich*. Even though the Federal Circuit distinguished *Markovich* from *Setnes*, at the very least, the weight of the *Markovich* opinion poses greater difficulty for Petitioners' claim, and undercuts the argument that the special master's Decision of Dismissal was unjust or extraordinarily improper, the threshold necessary to justify relief under Rule 60(b)(6). As the questions raised by *Setnes* and *Markovich* are not now before the Court, the Court declines to render an opinion on that matter.

[26] *See Da Silva v. Kinsho International Corp.*, 229 F. 3d 358, 361-366 (2d Cir. 2000); *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006).

"jurisdictional shorthand"[27] may cut to the quick in discussing certain legal issues and theories, the indiscriminate use of the word is confusing to those both within and without the legal profession.[28] Therefore, it is in all parties' best interest for the Court to analyze where this case lies, now that the judgment for dismissal "for lack of subject matter jurisdiction" is now found once again applicable in full force.

Jurisdiction, simply stated, is proper authority and exercise of power. It has been an area of constant reflection for courts, from the first distinction between courts of law, which exercised jurisdiction only over things ("*in rem* jurisdiction"), and the king's courts of equity, which exercised jurisdiction over individuals in their person ("*in personam* jurisdiction").[29] These two together are what are now referred to as personal jurisdiction.

In the context of federal courts, in the federal experiment of these United States, jurisdiction is often discussed in terms of subject matter jurisdiction. The previously independent, *sovereign* Colonies were each granted independence from King George III,[30] and at first only confederated for mutual benefit under the Articles of Confederation. After some time, the people of these several States decided it was best to divest certain aspects of sovereignty (but only those aspects) from each of the States, and to reinvest that sovereignty in the national government (now termed the "federal" government). As has been repeatedly shown, only those aspects of authority and sovereignty which were vested explicitly in the national government, through the ratification of the United States Constitution, can be exercised by any part of the federal government. United States Constitution, Amendment X. Therefore, in a narrowing cone of authority: the Constitution only grants to the national (federal) government the authority given it by the people of the several States; the national government as a whole may only exercise the authority contained in the body of the Constitution; Congress may only legislate national laws according to the grants and limitations of authority contained in Article I, including their legislation granting judicial authority to the federal courts; and federal courts may only exercise jurisdiction over the subject matter of the legislation passed by

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[27] *See John R. Sand & Gravel Co. v. United States*, __ U.S. __, 128 S. Ct. 750, 753 (2008).

[28] *Arbaugh*, 546 U.S. at 510 ("This Court, no less than other courts, has sometimes been profligate in its use of the term ['jurisdictional']," such that "drive-by jurisdictional rulings" made carelessly by a trial court are "unrefined dispositions ... that should be accorded no precedential effect on the question whether the federal court had authority to adjudicate the claim in suit.") (internal marks omitted).

[29] *See Kunkel v. United States*, 140 F. Supp. 591 (S. D. Cal. 1956) ("The advantages of vesting a court with both legal and equitable powers are not to be denied. But when the doctrines of equity are no longer administered in a separate court, it is all the more important not to lose sight of the fundamental distinction between law and equity,– a distinction as eternal as the difference between rights *in rem* and rights *in personam*."); *see also Atlantic Seaboard Natural Gas Co. v. Whitten*, 315 Pa. 529, 173 A. 305, 93 A.L.R. 615 (1934) ("That equity acts *in personam* is one of the oldest maxims of equity and is a basic principle of equity jurisdiction. Its meaning is that equity deals primarily with the person, and usually only through him with the *res*.") quoting 21 C. J. § 183, p. 194; *In re Portland Elec. Power Co.*, 97 F. Supp. 903 (D. Or. 1947); *1st Nat. Credit Corp. v. Von Hake*, 511 F.Supp. 634 (D. Utah 1981) ("the general rule is that a court of equity acts *in personam*"), citing *Miller v. Miller*, 423 F. 2d 145, 147 (10th Cir. 1970).

[30] Treaty of Paris, Article I (1783).

Congress. As a result, federal courts do indeed wield great power, but they wield that power within a circumscribed area of authority, beyond which they shall not trespass. This is the basis for the distinction between federal courts, which are of "limited" jurisdiction, and courts of the several State governments, which retain general jurisdiction over all subject matter not explicitly and exclusively assigned to the national (i.e. federal) courts.

This brings us back to the Vaccine Program. Congress ostensibly possessed constitutional prerogative to create the Program under the authority of the Taxing and Spending Clause of the Constitution, found at Article I, Section 8, Clause 1. In creating the Program, Congress vested the United States Court of Federal Claims (originally the Claims Court), acting through the Office of Special Masters, with "jurisdiction over proceedings to determine if a petitioner under [Section 11 of the Act] is entitled to compensation under the Program and the amount of such compensation." Section 12 (a). Therein Congress also vested the Court with the power to "issue and enforce such orders as the court deems necessary to assure the prompt payment of any compensation awarded." *Id*. Attorneys' fees are contemplated within the subject matter of "compensation" over which Congress delegated authority to the Court to adjudicate claims in the Vaccine Program. Section 15 (e)(1).

The subject matter jurisdiction of the Court then, by which authority the Court rules here, is then the authority to decide if petitioners are entitled to compensation on their claims of vaccine-related injury, and if so, the appropriate amount of that compensation. The passage of time, therefore, without additional action by Congress, can do nothing to strip subject matter jurisdiction from the Court. If the untimeliness of the Petition strips some type of jurisdiction from the Court, it cannot be subject matter jurisdiction.

Moreover, the Court certainly possesses personal jurisdiction over the parties. Indubitably, a petitioner's election to file a petition in the Program subjects him or her to the Court's control. Likewise, the express language of Congress in the Vaccine Act subjects the available amounts in the Vaccine Compensation Fund to the Court's power, and even grants explicit power to the Court to enforce its orders of payment from the Fund.[31] Section 12 (a).

If not subject matter jurisdiction or personal jurisdiction, what species of jurisdiction is stripped from the Court when a petition is untimely filed? It is a frequent refrain that where a petition is not timely filed, that defect is of a "jurisdictional" nature. In practice, the effect of this statement typically bears more consideration than is afforded to its theory. The result of this understanding is twofold: (1) that the defect cannot be waived by any act or omission by Respondent, or avoided for equitable considerations;[32] and (2) that the Court is powerless to consider attorney fee

[31] In so doing, Congress made the conscious choice to vest adjudicatory authority in the Court of Federal Claims, an "Article I court" whose judges lack life tenure. *Ex parte Bakelite Corporation*, 279 U.S. 438 (1929) ("Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.").

[32] *Brice v. Secretary of HHS*, 240 F. 3d 1367, 1373 (2001) ("*Brice I*").

applications collateral to the untimely petition.[33] The best elaboration that can be mustered of this practice is that where a petition against the federal government is untimely filed, the Court is without statutory authority, without warrant or power, *without jurisdiction* to overlook the defect for equitable reasons or in any wise to proceed further in the case. It is a rule that does not admit of judicial gloss or wiggle-room.[34] It is read as a congressional exclamation that, "We really mean it!" Beyond the rudiments of practice, however, detailed analysis of a jurisdictional bar for untimeliness is not to be found among Vaccine Act cases. For this, the Court turns to recent Supreme Court precedent to understand the logic of this rationale.

In *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), the United States Supreme Court distinguished a statute providing limiting criteria regarding the filing of actions from the statute that provided subject matter jurisdiction to the federal court to hear the case. There the Court repeated the lamentation that, "'Jurisdiction' ... is a word of many, too many, meanings," as well as its current trend to clarify that "time prescriptions, however emphatic, are not properly typed 'jurisdictional.'" *Id*. at 510 (internal marks omitted). The distinction, said the unanimous Court, was "between two sometimes confused or conflated concepts: federal-court 'subject-matter" jurisdiction over a controversy; and the essential ingredients of a federal claim for relief." *Id*. at 503. In that jurisdiction-granting statute, as with Section 12 (a) of the Vaccine Act, "Congress has broadly authorized the federal courts to exercise subject matter jurisdiction" to encompass all claims of a certain type, without further limitation, and contrasted it with the additional amount in controversy jurisdictional prerequisite found in 28 U.S.C. § 1332. *Id*. at 505, 514-515. The Court found it

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[33] *Brice v. Secretary of HHS*, 358 F. 3d 865 (2001) ("*Brice II*") is often cited for this practice. However, the Court there never held that the special master lacked jurisdiction (subject matter or otherwise) to hear the claim, having accepted that uncontested fact from the record below without analysis. 358 F. 3d at 866. The Court, reiterating its former precedent, ruled "that a Special Master does not have jurisdiction to award attorneys' fees and costs under the Vaccine Act *if she does not have jurisdiction to reach the merits of a claim for compensation*." *Id*. at 867 (emphasis added). The holding in that case is that "a petition for compensation filed under the Vaccine Act that is dismissed for want of jurisdiction is not 'a petition filed under section 300aa-11' as provided in section 15(e)(3)." *Id*. at 869.

One cannot assume that the Federal Circuit analyzed whether the special master was correct in her determination that she lacked subject matter jurisdiction. This question was not appealed. Typically, a circuit court of appeals would have to assess whether the lower court had jurisdiction originally, in addition to determining whether it possessed jurisdiction to hear the appeal. *See, e.g., Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d. Cir. 1997) ("Standing is a threshold jurisdictional requirement, derived from the 'case or controversy' language of Article III of the Constitution," and therefore "federal appellate courts have a bedrock obligation to examine both their own subject matter jurisdiction and that of the district courts."). However, because there is some dispute as to whether the Court of Federal Claims, as an Article I court, is bound by the "case or controversy" language of Article III, it does not follow that the Federal Circuit, in Brice, necessarily examined the jurisdictional determinations of the special master. *Zevalkink v. Brown*, 102 F.3d 1236, 1243 (Fed. Cir. 1996) ("As a court established under Article I of the U.S. Constitution, the Court of Veterans Appeals is not bound to the 'case or controversy' requirement of Article III."). Instead, the Federal Circuit treats standing and other Article III jurisdictional requirements as a prudential determination to be decided by the Article I courts it reviews. *American Intern. Specialty Lines Ins. Co. v. United States*, 2008 WL 1990859 (Fed. Cl. 2008) ("the Court of Federal Claims and other Article I courts traditionally have applied the 'case or controversy' justiciability doctrines in their cases for prudential reasons."), citing *CW Government Travel, Inc. v. United States*, 46 Fed.Cl. 554, 558 (2000).

[34] *See Brice I* & *Brice II*.

significant that the limitation at issue "appears in a separate provision that does not speak in jurisdictional terms or refer in any way to the jurisdiction" of the trial court. *Id*. at 515. Given that legislative prescription, the Court thought it best to "leave the ball in Congress' court," ruling that "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional in character." *Id*. at 516.

The next year, the Supreme Court decided the case of *Bowles v. Russell*, __ U.S. __, 127 S. Ct. 2360 (2007), applying a statute and its concomitant procedural rule regarding a filing deadline. In that case, the same statutory provision that granted a district court the authority to extend the deadline for filing a notice of appeal also set the time limitation for the would-be appellant's grace period at 14 days, as did also the language of the procedural rule. *Id*. at 2363; *cf*. 28 U.S.C. 2107; Fed. R. App. P. 4(a)(6). The Court repeated the well-worn rule that "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" *Id*. at 2363. The Court explained that "the accepted fact is that some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants." *Id*. at 2364. The Court noted historical practice to say that "time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century," and the Court's "longstanding treatment of statutory time limits for taking an appeal as jurisdictional" has remained intact throughout that period. *Id*. What this meant in *Bowles* was that even though the district court had been properly allocated statutory authority to reopen the filing deadline for appeal, the appellate court lacked authority to hear the appeal due to the lapse of the statutory 14-day window.

The Court in *Bowles* explained why conditions on jurisdiction within a statute are appropriate by stating, "Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions federal courts can hear them." *Id*. at 2365. The Court explained that the existence of these two statutory components engenders two separate aspects of jurisdiction: "[T]he notion of subject matter jurisdiction obviously extends to classes of cases falling within a court's adjudicatory authority, but it is no less 'jurisdictional' when Congress forbids federal courts from adjudicating an otherwise legitimate class of cases after a certain period has elapsed." *Id*. at 2365-66 (internal marks and citations omitted). The Court did not provide guidance, however, on how lower courts are to divine when Congress "forbids" adjudication by withholding jurisdiction, and when Congress has merely included timely filing within a statute of limitation as a component of the statutory cause of action. The dissenting justices raised this lack, and argued that "limits on the reach of federal statutes ... are only jurisdictional if Congress says so." *Id*. at 2368 (Souter, J, dissenting), citing *Arbaugh*, *supra*.

This year, the Supreme Court decided *John R. Sand & Gravel Co. v. United States*, __ U.S. __, 128 S. Ct. 750 (2008), a case applying the statute of limitations in the Tucker Act (28 U.S.C. § 1491), the statute granting jurisdiction to the Court of Federal Claims to hear claims against the federal government for claims such as breaches of contract, tax overpayments and physical takings. The statute appears among the body of statutes setting forth procedure in the Court of Federal Claims, and states, "Every claim of which the United States Court of Federal Claims has jurisdiction

shall be barred unless the petition thereon is filed within six years after such claim first accrues."[35] 28 U.S.C. § 2501.

The Court in *John R. Sand & Gravel* did not address the statutory context of § 2501, or its separation from the statutory provision granting subject matter jurisdiction, choosing instead to focus on the decisional history and statutory purposes of limitations of this kind, to wit: "facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency." *Id*. at 753. Without specifying how to differentiate this special kind of statutory limitation, the Court stated that "time limits of these statutes [are] more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period." *Id*. Then the Court noted the use of the jurisdictional label for these specific time limitations: "As a convenient shorthand, the Court has sometimes referred to the time limits in such statutes as 'jurisdictional.'" *Id*. What the Court did not do was to blur the distinction between subject matter jurisdiction, which admits of specific semantic boundaries noted *supra*, and jurisdiction as more generically referred to and understood in this context, as conditional limitations on the Court's discretion.[36]

Whereas courts have sometimes viewed statutes of limitations as "conditions on the waiver of sovereign immunity" leading to their strict, even "jurisdictional" application, the more recent trend has been to follow "a more general rule," applying limitation statutes equally to the government as to private citizens. *Id*. at 755 (discussing the rule in *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990)). Interestingly, the crucial deciding factor in the Court's decision that § 2501 was of the more severe class of limitation statutes was not that it addressed claims against the sovereign. The "key respect" which led the Court not to apply the *Irwin* rule of general applicability was "that the Court had [] previously provided a definitive interpretation" for § 2501, which it had not done for other statutes. *Id*. The Court stated that it would follow the general rule "that limitations principles should generally apply to the Government in the same way that they apply to private parties," *but for* "the principles of *stare decisis*," which, the Court held, required rejection of that application in that case. *Id*. at 756, citing, *inter alia*, *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (observing that "in most matters it is more important that the applicable rule of law be settled than that it be settled right").

The most recent iteration of the Court's view of statutes of limitations applicable to this case is *United States v. Clintwood Elkhorn Mining Co.*, __ U.S. __, 128 S. Ct. 1511 (2008), where three coal companies sued in the Court of Federal Claims for federal taxes charged to them in violation of the Export Clause of the Constitution, premising jurisdiction on the Tucker Act, 28 U.S.C. §

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[35] The Court did not pause to explore the duality of types of jurisdiction mentioned by this statute, assuming that timing is necessarily a true statutory condition on jurisdiction. To paraphrase the statutory language: Among the class of cases for which the Court of Federal Claims has *subject matter jurisdiction*, that portion of those cases not filed within six years of accrual are time-barred (because they fail to satisfy the time of filing condition for jurisdiction).

[36] The Court at one point did trespass semantic boundaries, when it stated, "The two linguistic forms ("cognizable by"; "has jurisdiction") mean about the same thing," citing the entry on "jurisdiction" in Black's Law Dictionary, which includes the word "cognizance" in the definition. *Id*. at 755.

1491(a)(1).[37] The Internal Revenue Code provided a shorter time limit within which claims could be made. *Id*. at 1514, interpreting 26 U.S.C. § 7422(a). The Court decided the case, not by applying the terms of the Tucker Act statute of limitations, "but rather [by deciding] which limitation applies." *Id*. at 1518. Of especial note, the Court found that the shorter limitations statute applied, and thus that the claim was time-barred, but did not dismiss for lack of jurisdiction, let alone subject matter jurisdiction. Presumably, because the operative statute of limitation at issue was not that of the Tucker Act, and did not have a long history interpreting it as a condition upon jurisdiction, the general rule of *Irwin* applied, even though the claim was brought against the federal government.

The Federal Circuit however, interpreting the Vaccine Act in *Brice v. Secretary of HHS*, 240 F. 3d. 1367 (2001) ("*Brice I*"), has adopted the stricter rule, that "a statute of limitations is a condition on the waiver of sovereign immunity by the United States," instead of the one adopted by the Supreme Court in *Irwin*, which the Federal Circuit agreed was the "more general rule" of applying the same legal standards against the federal government that are applied against private defendants. *Id*. at 1370. The Federal Circuit based this determination between applicable rules on the presence of two out of five factors of the *Brockamp*[38] test, which it found to be "decisive". *Id*. at 1373. The essential holding of the Federal Circuit's decision in *Brice I* was to hold that equitable tolling is not allowed in Vaccine Act cases. *Id*. at 1368. However, the Court did not address jurisdiction once, aside from passing reference to the decisions below in the recitation of facts, and analyzing the jurisdictional support for the Court to hear the appeal. *Id*. at 1369, 1370.

These several cases answer some questions regarding the current posture of the instant case, but leave others unresolved. On one hand, *Bowles* and *Brice I* (especially as supplemented recently by *Markovich*) seem clearly to require the dismissal of the instant case for untimely filing, and do not leave open the consideration of equitable doctrines to provide relief from the time bar. On the other hand, it is also clear from the foregoing discussion that the dismissal is not properly typed as a dismissal for want of subject matter jurisdiction, and further that there is no currently-valid legal basis for that categorization to be found among cases from the Federal Circuit or the Supreme Court. However, there is an outstanding question whether the Vaccine Act's statute of limitations acts as a condition upon the grant of jurisdiction, sufficient to speak of the statute of limitations generically as "jurisdictional". The Court notes that no appellate court (and no Article III court) has ruled definitively on this issue, and that the statute of limitations (Section 16 of the Act) is separate from

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[37] The Tucker Act at § 1491(a)(1) vests the Court of Federal Claims with "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." *Cf. Brice v. Secretary of HHS*, 240 F. 3d 1367, 1372 (2001) (*Brice I*) ("In substance, a claim under the Vaccine Act is similar to a traditional tort claim in the sense that it seeks monetary recovery from an injury that traditionally was redressed by tort law. The Vaccine Program's procedural and remedial distinctions from the traditional tort system do not change this fundamental fact."). It is not a settled point of law whether the Tucker Act is instrumental in vesting the Court of Federal Claims with jurisdiction to hear Vaccine Act claims, or whether the Vaccine Act itself is the sole basis for such jurisdiction.

[38] *United States v. Brockamp*, 519 U.S. 347 (1997). Those factors are enumerated by the Federal Circuit in *Brice I* at 240 F. 3d at 1371.

the statute granting subject matter jurisdiction to the Court to adjudicate vaccine injury petitions (Section 12). Nevertheless, the practice often followed by this Court is to dismiss untimely petitions for "jurisdictional" defect, without further analysis.[39]

Understood in this context, the Court applies the rule that seems to obtain in this case. Given this definitional gloss of this use of the term "jurisdictional" as a hard-stop condition on the grant of jurisdiction, this Court concludes that Petitioners should be dismissed on these so-called "jurisdictional" grounds. But even if left unstated, everyone involved would be well-served to recall that gloss, bearing in mind that there is nothing about the passage of time that would mean that a petitioner should not bring a vaccine injury claim to the Court, only that he should have brought it sooner.

IV. CONCLUSION

Accordingly, there is no reasonable alternative but to **DISMISS** this Petition for lack of timely filing. The Court hereby **STRIKES** the previous Order of Reinstatement. In the absence of the filing of a motion for review, filed pursuant to Vaccine Rule 23 or 36 within 30 days of this date, the clerk shall forthwith enter judgment in accordance herewith**.**

IT IS SO ORDERED.

Richard B. Abell
Special Master

[39] *See, e.g., Kay v. Secretary of HHS*, 80 Fed.Cl. 601, 604 (2008) ("If the special master determines that a claim under the Vaccine Act is not timely, he dismisses the case for want of jurisdiction."); *cf. Guyton ex rel. Guyton v. Secretary of HHS*, Case No. 03-2737, 2004 WL 2677196 (Fed. Cl. Spec. Mstr. Oct. 28, 2004) (holding, in an autism case, "it seems to make no practical difference at all whether [] I dismiss the case for untimeliness.... In either event, the petitioners will not receive any Program award as a result of this petition.... [I]t is also unclear why respondent believes that I ... should spend time resolving a factual issue that is not necessary to the disposition of the controversy before this court... [I]t appears pointless and wasteful to spend time resolving an issue that is not relevant to the outcome of the Program proceeding").