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Post Civil War Firearm Patent Litigation

Against the U.S. Government

Joshua C. Harrison

ABSTRACT

The Civil War greatly influenced the growth and importance of arms-related intellectual property in the Nineteenth Century. Several legal disputes arose due to the U. S. Government’s use of intellectual property to modernize its armed forces after the War. Given the subject matter of the inventions at issue, it is not surprising that many of the inventors who were ultimately opposed to the Government in legal disputes over arms-related patents after the Civil war, were also U. S. military officers then or before. This paper examines post- Civil War, Nineteenth Century firearm patent litigation against the U.S. Government, the Government’s most common legal defenses against arms-related claims brought by inventors, and how the claimants reacted to those defenses.
I. INTRODUCTION: THE LEGAL TECHNICALITY THAT WAS USED TO DECIDE SEVERAL POST CIVIL WAR FIREARMS PATENT INFRINGEMENT CASES AGAINST THE GOVERNMENT

The Civil War effected a flurry of invention and patent activity related to firearms. The information contained in the resulting new patents provided an important opportunity for the military to improve its arms, but also provided a motivation for patent infringement by the Government. Since patent infringement was a tort for which the Government enjoyed sovereign immunity at the time, inventors could only hope to recover damages under an implied contract theory that could be quite fictitious and self-contradictory. Specifically, victims of infringement that hoped to sue the Government would have to argue that the Government did not infringe - that the claimants themselves had actually given the Government license to use their invention in return for an amount of money not agreed upon prior to litigation. Typically, there was no express contract on which to base this license, so the existence of an implied contract would have to be argued to the court. Although some firearms patent infringement cases against the Government were decided based on the substantive merit of the patent claims, several otherwise meritorious cases turned upon the legal technicality represented by the success or failure of the

1 For example, in the Court of Claims opinion resulting from the Berdan Firearms Manuf'g Co. v. United States litigation (26 Ct.Cl. 48 (1890)), the Court referenced 36 patents and patent applications dated in the period 1860-1870 that were in some way related to the extraction/ejection mechanism that was at issue in that case, but referenced only one patent that pre-dated that period.
2 In a letter from H. Berdan to the Chief of Ordnance of the War Department, Maj. Gen. A. B. Dyer, dated August 3, 1868, Mr. Berdan includes the following comment: “…I am now informed that the business of [the firearms] branch of the Patent Office is some five months behindhand …”. Berdan Firearms Manuf'g Co. v. United States, 26 Ct.Cl. 48 (1890).
3 “This is not a claim for an infringement, but a claim of compensation for an authorized use – two things totally distinct in the law, as distinct as trespass on lands is from use and occupation under a lease. […] We think that an implied contract for compensation fairly arose under the license to use, and the actual use, little or much, that ensued thereon. The objection, therefore, that this is an action for a tort falls to the ground.” Palmer v. U.S., 128 U.S. 262, 269, 9 S. Ct. 104, 105 (1888).
4 See e.g. Morse Arms Manufacturing Co. v. U. S., 27 Ct. Cl. 363 (1892).
aforementioned implied contract argument, with both positive and negative outcomes for the claimants.

2. **INVENTOR WINS THE IMPLIED CONTRACT ARGUMENT: THE STORY OF THE BERDAN FIREARMS CASE**

Shortly after the Civil War, the U.S. Government wanted to upgrade the standard firearms used by the Army, from muzzle-loading muskets to breach-loading rifles and carbines. The protracted Berdan Firearms litigation, that eventually led all the way to the Supreme Court, arose from government infringement of a patent during that effort.

On “January 30, 1866, the Secretary of War issued an order for the meeting and organization of a board of officers of the Army, of which Maj. Gen. [Winfield Scott] Hancock was named as president. Hancock was a very prominent Army officer considered by many to be one of the heroes of the civil war. The board, known as the

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5 Berdan Firearms Manuf’g Co. v. United States, 26 Ct.Cl. 48 (1890).
7 The following biographical summary of General Winfield Scott Hancock was taken from Compton’s Online Encyclopedia at http://www.optonline.com/comptons/ceo/02083_A.html (2000): Winfield Scott Hancock (1824-86) was born on Feb. 14, 1824, in Montgomery County, Pa. He graduated from West Point in 1844 and fought in the Mexican War. One of the best Union officers of the Civil War, Hancock was a fearless and capable leader. Ulysses S. Grant said of him, "Hancock stands the most conspicuous figure of all who did not exercise a separate command." A captain when the Civil War broke out, Hancock was soon commissioned brigadier general. He helped organize the Army of the Potomac, and in 1862 served in the battles of South Mountain and Antietam. At Fredericksburg, that December, he led a desperate attack on Maryes' Height through a deadly fire. At Gettysburg in 1863, his appearance on Cemetery Ridge on the first day of the battle was equal to reinforcement by an army corps. Men who were fleeing stopped and the troops were restored to order. Hancock commanded the Second Corps, and it was his forces that, on the last day of the battle, stopped the charge of Pickett's men, depriving the South of all hope of victory. Hancock was wounded, but he stayed on the field until victory was won. He recovered and in 1864 took part in the hard-fought battles of the Wilderness, Spotsylvania, and Cold Harbor. At Spotsylvania his troops broke through the Confederate defenses, capturing 3,000 prisoners. He was promoted to the rank of major general in 1866. In 1880 the Democratic party nominated him for the presidency. He lost the election to James A. Garfield,
Hancock Board, was “ordered to examine thoroughly the following questions, and make recommendations thereon: (1) What form and caliber of breech-loading arm should be adopted as a model for future construction of muskets for infantry? (2) What form and caliber should be adopted as a model for future construction of carbines for cavalry? (3) What form of breech-loading arm should be adopted as a model for changes of muskets, already constructed, to breech-loading muskets?”.

When the Hancock Board met in Washington in March of 1866, it solicited experimental arms from the general public for testing and possible purchase by the Government for the Army. Today it might seem surprising that the Government would solicit experimental arms from members of the general public, since many modification of firearms by average citizens are now illegal. However, such solicitation made sense in the period following the Civil War because in some important aspects, such as the design of the spent cartridge ejector, the design of firearms was then still an immature and experimental art. Indeed, the list of private parties and individuals that submitted experimental firearms to the Hancock Board appears more like a contemporary list of sellers of self-written computer

who, in addition to his military career, had also served in Congress. Hancock remained in the Army, serving his country for more than 40 years. He died on Feb. 9, 1886, on Governors Island, N.Y.

8 Berdan Firearms Manuf’g Co. v. United States, 26 Ct.Cl. 48 (1890).
9 “[The Hancock Board] met at Washington, March 10, 1866; in the same month the board issued a circular to the public, with the following blank form of proposal, to be signed by those presenting arms for trials …” Id.
10 “The differences between the various devices intended to produce successful extraction and ejection of the cartridge, produced in the years just succeeding the [Civil War], were most minute, and to the layman who now [in 1890] examines them for the first time it might well seem doubtful whether, given the one successful invention, a skilled workman could not have manufactured the other successful invention without the exercise of any inventive genius. But the many patents issued covering such devices show a general effort to accomplish the desired result by methods substantially similar and differing only in apparently trifling details. These details, however insignificant they may have appeared at the time to one not familiar to the art, were then evidently deemed important by experts, as is shown by the many patents applied for and the many patents granted. It does not appear in this case that any practically successful extractor-ejector for a rifle of the Springfield type was produced in advance of the Berdan or Adams device.” Berdan Firearms Manuf’g Co. v. United States, 26 Ct.Cl. 48 (1890).
programs than like any modern-day list of modern firearms manufacturers competing for a large government contract.\footnote{11}

One of the parties that submitted firearm inventions to the Hancock Board was the Berdan Firearms Manufacturing Company. The Berdan firearm invention was also introduced to a second board of officers convened by the Government to inspect new firearm designs, called the ‘Terry Board’ in 1873.\footnote{12} These exhibitions proved futile; the Government did not directly use the Berdan invention.\footnote{13} However, the Government did procure 437,519 improved Springfield infantry muskets\footnote{14} according to an infringing design by one “Mr. Adams”, who was a workman at the National Armory in Springfield, Massachusetts.\footnote{15} Mr. Adams’ design was independently conceived after the Berdan invention, but was essentially its equivalent.\footnote{16}

\footnote{11} Of the 55 proposals submitted to the Hancock Board, that were listed in the published decision by the Court of Claims concluding the Berdan Firearms Manuf’g Co. v. United States litigation (Id.), 27 were named after different single individuals.

\footnote{12} “The Berdan extractor and ejector device (patent 88436) was exhibited in competition with other guns to a board of officers detailed to test guns and called the “Terry Board”, in the year 1873 …” Id.

\footnote{13} “No gun has been bought by the Government from [Berdan Firearms] and no gun has been manufactured by the Government which is a copy of the gun recommended by the Hancock Board.” Id.

\footnote{14} “Manufacture of Springfield model 1866 began in September, 1866, and ceased July 27, 1869. Of this model there were manufactured 52,627 muskets. Manufacture of the model of 1868 (including all subsequent models, which for the purposes of this action do not differ) began in January, 1869; of these guns there were manufactured from January, 1869, and the date six years prior to the beginning of this action, to wit, July 26, 1881, 224,952 muskets; between July 26, 1881, and the expiration of the patent there were manufactured 159,940 muskets.” Id.

\footnote{15} The following quote appears in a letter from Lieutenant Colonel J. G. Benton of the National Armory in Springfield Mass., to the Chief of Ordnance of the War Dept., Maj. General A. B. Dyer, dated September 25, 1868: “Mr. Adams, one of our workmen, suggested the peculiar arrangement of the spiral spring.” Id.

\footnote{16} “The only difference between the Berdan and Adams devices is that Berdan used a flat spring while the Government [Adams] used a spiral spring; both perform the same office and attain the same result in the same way; the use of the flat spring or of the spiral spring is matter of choice, and is in no way material to the result. Adams, when he made his invention, was ignorant of Berdan’s prior invention.” Berdan Firearms Manuf’g Co. v. United States, 26 Ct.Cl. 48 (1890).
Nevertheless, the Berdan Fire-arms litigation did not turn on whether the Army benefited from the use of Berdan’s patented invention; there was no question that it did\textsuperscript{17}. Instead, the outcome of the case depended on whether the use by the Government created an implied contract whose breach the Court of Claims could provide remedy, or else was an “infringement” - a type of tort for which the Court of Claims could not provide remedy\textsuperscript{18}. The jurisdiction of the Court of Claims (where Berdan brought suit) did not extend to cases “sounding in tort” according to relevant case law and the then-relevant jurisdictional act of 1887\textsuperscript{19}.

Ultimately, the Court of Claims held that an implied contract did exist between Berdan and the Government\textsuperscript{20}, because the Government used the invention knowing that it was covered by the Berdan patent, and knowing that Berdan would expect compensation\textsuperscript{21}.

\textsuperscript{17} The Court of Claims expressed the following finding of fact: “The extractor-ejector device found upon the [modified] Springfield musket, which is alleged by the claimants [Berdan] to be covered by their patent No. 88436, is a most efficient, useful, and valuable device, believed by Army officers to be the best known in the art for use in a single-fire military arm of the Springfield type. It is far superior to the Allin extractor-ejector device previously in use upon the Army musket.” Id.

\textsuperscript{18} “If there be an express contract between the patentee and a properly authorized agent of the Government, his remedy is clearly in [the Court of Claims], this would be so if the facts disclose an implied contract; but if the use be in its nature an infringement we are without jurisdiction in the matter.” Id.

\textsuperscript{19} “The jurisdiction of this court, except under special acts, has never extended to cases arising in tort, and by the act of March 3, 1887 (24 Stat. L., 505), being the present jurisdictional act, cases ‘sounding in tort’ are in terms excluded from our jurisdiction, and such has been the uniform holding of the Supreme Court and this court; so that, to entitle the claimant to recover in the present case it is incumbent upon her to show that the claim for which she seeks a recovery is one founded upon a contract, ‘express or implied, with the Government.’” Henry v. U.S., 38 Ct. Cl. 635 (1903). Note: The use of the word “never” in the preceding quote is probably an exaggeration. The case of Greer v. U.S., 5 U.S. Cong. Rep. C. C. 128 (1857) concerned infringing use at the Government’s armories in Harper’s Ferry, Virginia, and Springfield, Massachusetts, of a patented tool for boring rifle and pistol barrels. The jurisdictional limitation against actions sounding in tort was not applied by the Court of Claims in the Greer case, but the limitation could have been applied if it existed when the case was decided (the Greer decision significantly pre-dated the 1887 act mentioned in the preceding quote).

\textsuperscript{20} “… [T]he facts disclose a contract between the parties to this action for the use of the extractor-ejector device.” Berdan Firearms Manuf’g Co. v. United States, 26 Ct.Cl. 48 (1890)

\textsuperscript{21} “Upon the foregoing facts the court find that since 1874 the Berdan extractor-ejector device (described in patent No. 88436) has been used by defendants’ ordnance officers knowingly and without claim of adverse right, believing the device in the Springfield gun to be the device, or the mechanical equivalent of the device, covered by said letters patent, and with the anticipation that should the understanding of the said ordnance
Consequently, the Court of Claims awarded Berdan $95,004.36, which was what the Court calculated to be reasonable compensation for the use of his idea. Berdan’s award in the Court of Claims was no small sum in 1890. According to a calculation based on historical trends in the consumer price index, the sum awarded Berdan in 1890 would exceed $2.6 million in today’s dollars. The Supreme Court affirmed the Court of Claim’s holding on cross appeals by both the Government and by Berdan (who wanted a larger award).

III. INVENTOR LOSES THE IMPLIED CONTRACT ARGUMENT:
THE STORY OF THE RUSSELL CASE

Approximately two decades after initiating the upgrade of standard Army firearms from muzzle-loading muskets to breach-loading rifles, the U.S. Government was ready for another significant improvement: this time to magazine-fed rifles. Again, the Army chose a rifle that infringed upon the patent of an individual inventor (in this case Andrew H. Russell). Again, the resulting litigation reached the Supreme Court which affirmed the decision of the Court of Claims. And, again, the outcome of the case turned upon the legal fiction of implied contract (although in this case with opposite outcome).

The story of the Russell case started on February 4, 1881, when Congress acted to convene a board of officers to select a magazine-fed rifle for the service of the United States.

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22 See id.
23 An online tool for calculating the present and past values of user-specified sums of money, based on historical trends in the consumer price index, is available at http://www.westegg.com/inflation/ .
Andrew H. Russell submitted a patented rifle to this board, and again to a board convened later for the same purpose on December 16, 1890. The second board did not select Russell’s design, but rather selected on September 15, 1892 a design submitted by a Norwegian company, Krag-Jorgensen. Krag-Jorgensen’s rifle had features that were covered by its own patents, but it also had features that infringed upon a patent owned by Russell. Although Russell notified the Government of this infringement on November 16, 1892, the Government did not negotiate with him; the Ordnance Office of the War Department merely informed him that: (1) he might sue in the Court of Claims if he wished, and that (2) Krag-Jorgensen might end up indemnifying the Government from such suit depending on the final wording of a pending contract.

The Ordnance Office ended up taking some indemnity from the Krag-Jorgensen company, indicating that the Office may not have understood the extent of the Government’s immunity from infringement actions. Russell complained to the Ordnance Office (to no avail) that he could have no practical remedy against Krag-Jorgensen since they had no property within the United States. The Government ignored Russell’s complaints and entered into a contract with Krag-Jorgensen on June 7, 1893 to pay royalties in return for the right to manufacture the Krag-Jorgensen design - paying Russell nothing.

Russell sued but ultimately lost. The case turned on the Supreme Court’s refusal to infer an implied contract / license from Russell’s correspondence with the Government regarding its infringement. According to Justice McKenna’s opinion, the taking of

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28 See id. at 520.
29 See id. at 521.
30 See id. at 517.
indemnity by the Ordnance office did not create an implied license since it was “…not in concession of [Russell’s] claim, but for protection against it, if protection should be necessary, and whether it would be or not the Ordnance Office very naturally resolved not to determine.”31. The Supreme Court’s opinion concluded with the following noteworthy description of the Government’s sovereign immunity and the legal technicality on which the case turned32:

“If petitioners have suffered injury it has been through the infringement of their patent, not by a breach of contract, and for the redress of an infringement the Court of Claims has no jurisdiction. This doctrine may be technical. If the United States was a person, on the facts of this record (assuming, of course the petition to be true) it could be sued as upon an implied contract, but it is the prerogative of a sovereign not to be sued at all without its consent or upon such causes of action as it chooses. It has not chosen to be sued in an action sounding in tort this court has declared, as we have seen. Judgment affirmed.”

IV. SWITCHING ROLES: THE CASE OF SULLIVAN FOREHAND V. U. S.

The aforementioned legal technicality appeared with a curious twist in the case of Sullivan Forehand v. U. S. (1888)33. The Forehand case was very atypical because the claimant, who was the patent assignee, intentionally argued that the Government had committed the tort of infringement, whereas the Government was uncharacteristically in the position

31 Id. at 535.
32 Id. at 535.
to benefit by labeling the action as a breach of implied contract. The reason for this reversal in roles was twofold:

1. Firstly, the claimant had been able to get the U. S. Senate to transmit his infringement action to the Court of Claims. That eliminated his need to gain jurisdictional basis by fictionally describing his action as seeking remedy for a breach of implied contract rather than for a tort.

2. Secondly, the Government could use the statute of limitations to bar the action if it could show that the claimant could have brought the case before the Court of Claims previously but failed to do so. This gave incentive to the Government to advocate the potentially fictional labeling of the action as a breach of implied contract—a common fiction that the Government normally opposed.

The Court of Claims ultimately found in the Sullivan Forehand case that the action was for infringement sounding in tort, and so the statute of limitations had not been violated because the Court of Claims had no prior jurisdiction.

V. HOW THE AFOREMENTIONED LEGAL TECHNICALITY AFFECTED THE DISCRETION ENJOYED BY THE COURT OF CLAIMS

The Court of Claims almost certainly had wider discretion in deciding both the Berdan and Russell cases because of the existence of the aforementioned legal technicality. Indeed, the outcomes of both cases consequently depended upon quite discretionary

34 “[The claim in the Sullivan Forehand case] was transmitted to the [Court of Claims] by the committee on Claims of the Senate on the 10th day of January, 1884, under the Bowman Act.” Id. The Bowman Act gave the Court of Claims jurisdiction over cases transmitted to it “by Congress or by a committee thereof.” Id.
35 “If, then, there was no contract, if there was no taking of private property for public use, from which promise to pay would be implied, the claimant had but one remedy against the Government, and that was upon the tort; a remedy only to be obtained from Congress. Never having been a contractor with the Government, he never had the right of action here, and his claim is not barred on that ground.” Id.
findings about implied contract rather than upon more fact-constrained findings of infringement versus non-infringement of patent claims. If the Russell case had been decided based on claim infringement arguments instead of arguments focused on the existence of implied contract, perhaps the Court of Claims would have been constrained to rule in favor of Russell.

The remarkable discretion enjoyed by the Court of Claims in choosing whether or not to recognize an implied contract was most notably apparent in the case of Butler v. U. S. (1888), which concluded a dispute about the widespread installation of a patented hook on government muskets. The addition of the simple hook solved the problem that muskets without bayonets could not be easily stacked in the field. The Court unilaterally construed a contract in the absence of any expressed or implied contract intended between the parties, in order to give itself jurisdiction and to permit a portion of the claimant’s recovery to survive the statute of limitations.

Another example of the aforementioned discretion can be found in the case of Dashiell v. U. S. (1901), where in the absence of contract the Government would have clearly infringed upon two of Dashiell’s patents, both of which claimed mechanisms used to

36 See Butler v. U. S., 23 Ct. Cl. 335 (1888).
37 A general appreciation for the nature and utility of the invention at issue in the Butler case can be gained from the following two quotes taken from the court opinion: “The patented device consists of a simple hook, attached to a musket, rifle, carbine, or other small-arm at the upper band.” Id. “The hook attachments are in general use on both muskets and carbines in the United States Army, and are useful and valuable for stacking the same, supplying an absolute need in the carbine and in the musket as used on the frontiers, where bayonets are not used, and generally a substitute for and an improvement on the use of the bayonets for stacking muskets, and a fair royalty for the invention by the United States is the sum of 8 cents per hook.” Id.
38 “The liability of the Government in this case arises exclusively from its own acts; and the contract which exists, if any, is strictly that which the law implies. There was no express agreement looking to a continuous use of the patent right, and the nature of the thing taken was not of a character to import such an intent, or to impose such an obligation.” Id.
improve the operation of 4 inch naval guns. The Court of Claims recognized an express contract between Dashiell and the Government to license the Government’s use of one aspect of the invention (a breech mechanism). However, the Court refused to find an implied contract between the parties to license the use of another aspect of the invention (a shell extractor) that was also used by the Government in the same gun and that was separately patented before trial.

The Court reasoned that since the breech mechanism could not be used without an efficient extractor of some sort, and the extractor was useless without a breech mechanism of some sort, Dashiell’s prosecution of a second and separate patent for the extractor was an undue attempt to collect increased royalties for an amalgamated invention that he had already fully licensed to the Government. The Court would not allow the license of the invention to be affected by the fact that Dashiell later desired to claim different aspects of the invention in more than one patent. Significantly, the Court achieved this reasonable and just result by denying that an implied license existed for the Government’s use of the later patented aspect of the invention as a separate device.

Two years later, the Court again expressed temporal reasoning similar to that used in the Dashiell case. In the case of Henry v. U. S. (1903), the Court declined to weigh evidence of implied contract that preceded the awarding of a patent for an improved military projectile. The Court’s opinion seemed to indicate that it was impossible for an individual to grant implied license to the Government to use an invention for which the individual did not yet have a vested and exclusive property right (i.e. a patent). Again,

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41 “What took place between the officers of the Government and Parrott in respect to the use of the invention which he claimed, can not avail the claimant in this action, nor can the court from the correspondence between her decedent and the Chief of the Bureau of Ordnance in September, 1859,
the non-recognition of implied contract was the Court’s tool of choice in reaching its holding.

Six years after the Dashiell case was decided, the Court of Claims decided another case about the Government’s use of a patented improvement to large naval guns: the case of Bethlehem Steel Co. v. U. S. (1907). In that case, the Court of Claims explicitly referred to the Fifth Amendment of the U. S. Constitution to hold that an implied contract to pay reasonable royalty must be recognized when the Government appropriates a patent recognizing it as private property. This holding somewhat limited the previously broad discretion of the Court to refuse to recognize certain implied licenses, and to thereby decide related cases by avoiding jurisdiction.

VI. WHEN THE INVENTOR WAS A MILITARY OFFICER OR GOVERNMENT EMPLOYEE

Inventors who were government employees had another hurdle to recovery beyond showing implied license to use an otherwise infringed-upon patent; they often also had to show that they did not perfect the invention using government resources. This additional issue almost arose in the aforementioned Russell case. The claimant and inventor, Andrew H. Russell, was a Captain in the U.S. Army specializing in ordnance. Captain Russell’s Army affiliation did not influence the outcome of the Russell case, however, because the
Government did not allege that Russell developed his invention with any government support.

Military or government affiliation on the part of the inventor was not rare in post-Civil War firearms patent litigation against the Government, and it could determine the outcome (notwithstanding the Russell case). For example, in the case of Kelton v. U. S., the inventor was the adjutant general of a military division and developed his invention “using the time and skill and experience of Government officers and experts and its machinery and appliances to perfect his invention.” Consequently, the Court of Claims decided against the cause of action brought by Kelton’s widow. Similarly, in the case of Eager v. U. S., the infringement claim failed because the inventor (a machinist named James R. Streett) was a government employee who “in the ordinary course of his professional employment, with the surroundings and aids which the Government furnished and the advice and suggestion of his superior officers, produced a device upon which a patent was issued.”

VII. NOT ALL MILITARY OFFICERS WERE TREATED EQUALLY BY THE COURT OF CLAIMS, OR AT LEAST NOT THEIR WIDOWS

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44 Captain Russell was not the only Civil War era inventor with a military or government affiliation whose invention was the focus of an infringement suit against the U. S. Government. Other such inventors included Admiral John A. Dahlgren (see Dahlgren v. U. S., 16 Ct. Cl. 30 (1880)), Lieutenant Junior Grade R. B. Dashiell (see Dashiell v. U. S., 36 Ct. Cl. 115 (1901)), Captain John A. Webber (see Webber v. U. S., 12 U. S. Cong. Rep. C. C. 245 (1860)), Colonel John C. Kelton (see Kelton v. U. S., 32 Ct. Cl. 314 (1897)), and government machinist James R. Streett (see Eager v. U. S., 35 Ct. Cl. 556 (1900)).

45 See Kelton v. U. S., 32 Ct. Cl. 314 (1897).

46 See Eager v. U. S., 35 Ct. Cl. 556 (1900).
The aforementioned government/military affiliation issue conspicuously arose, and was then suspiciously set aside by the Court of Claims, in The Dahlgren Gun Case\textsuperscript{47}.

John A. Dahlgren was a U. S. Navy Rear Admiral who was a resident of Washington D.C. during most of his military career, which included service during the Civil War. He was an ordnance officer who conducted important experiments, trials, and tests on gunnery while in the service of, and at the expense of, the U. S. Navy. These experiments eventually led to improved naval guns that Dahlgren patented as the inventor and that became known as “Dahlgren guns”. Dahlgren guns were used by the U.S.S. Monitor in its battle with the Merrimac\textsuperscript{48}. Rear Admiral Dahlgren died on July 12, 1870. His widow, and the administratrix of his estate, Madeleine V. Dahlgren, brought legal claim to recover royalties for the Government’s use of the Dahlgren guns.

Madeleine Dahlgren’s action could easily clear the first hurdle, but was seemingly doomed by the second. The Government’s use of the Dahlgren guns was clearly under an implied license from Dahlgren, since Dahlgren made the guns for the U. S. Navy, and since the Government was aware that Dahlgren was the inventor. Therefore, the Government could not have defended against Dahlgren’s widow’s claim by arguing that the use constituted a tort (infringement). Nevertheless, under ordinary circumstances the claim

\textsuperscript{47} See The Dahlgren Gun Case. Mrs. Madeleine V. Dahlgren, Administratrix v. The United States, 16 Ct. Cl. 30 (1880).
\textsuperscript{48} The following biographical description of John Dahlgren was taken from the web site of the Central Maryland Heritage League (http://www.cmhl.org/dahlgren.html): Rear Admiral Dahlgren, U.S.N., a close confident of President Lincoln, invented the Dahlgren Gun used by the U.S.S. Monitor in its battle with the Merrimac. He died in 1870 and both Dahlgren Hall and the U.S. Naval Academy in Maryland and Dahlgren, Virginia, home of the Naval Surface Warfare Center, were named in his honor. He is recognized today as the father of the United States naval ordnance.
of Dahlgren’s widow would have been hopeless because Dahlgren clearly perfected his inventions using government resources – a bar to recovering royalties for use by the Navy.

However, Dahlgren’s widow got unusual help from Congress and the Court of Claims. On June 19, 1878, Congress passed a private act that referred the claim of Dahlgren’s widow to the Court of Claims and gave the Court jurisdiction and specific instructions in deciding the case49. The language of the congressional act explicitly asked the Court to consider facts showing that Dahlgren made his invention using government resources when “determining the right of said estate to recover the amount of compensation to be paid said estate for the use of said inventions …”50. When the Court of Claims heard the case in 1880, the Attorney General on behalf of the Government urged a plain-language reading of this portion of the Act: the right to recover should be determined in consideration of the government resources that Dahlgren used while inventing. Such a plain language construction of the Act, if accepted by the Court, would have barred any recovery by Dahlgren’s widow. Instead, the Court used remarkable discretion to construe the language of the act to only require consideration of Dahlgren’s use of government resources when determining the amount of recovery. The Court then generously set that amount at the maximum allowed by the Act.

Even a cursory comparison of the Court of Claims decision in the Dahlgren case with its decision in the Kelton case reveals an obvious disparity in justice. Madeleine Dahlgren’s claim suffered from exactly the same flaw that was later fatal to Josephine P. Kelton’s claim, yet Madeleine received a fortune from the public coffers51 and Josephine received

49 The language of the relevant private act of Congress is reproduced in the Court of Claims opinion in The Dahlgren Gun Case, Id., and is cited therein as “Act June 19, 1878, 20 Stat. L., p. 583, ch. 357.”
50 The Dahlgren Gun Case, 16 Ct. Cl. 30 (1880).
51 Madeleine Dahlgren was awarded $65,000 by the Court of Claims at the end of 1880 (see Id.). According to a calculation based on historical trends in the consumer price index (obtained from the same source that
nothing. The principle that was later held so high by the Court in denying the claim of Colonel Kelton’s widow in 1897, (i.e. that public officers are “guardians of the public welfare” and that a guardian “can not sell to himself”) was intentionally avoided by the Court when it allowed recovery by Rear Admiral Dahlgren’s widow in 1880.

Madeleine Dahlgren’s success despite the law at the Court of Claims might be initially explained by her husband’s position. Indeed, the old adage that “rank has its privileges” may have found some additional support from an unexpected source: nineteenth century intellectual property case law. On the other hand, Madeleine’s own identity might have played as large a role. She was the daughter of a Congressman and was “active in Washington [D.C.] Society.”

VIII. CONCLUSION

was used for the calculation in [FN 23] supra), the sum she was awarded would be worth more than $1.7 million today.

52 See Kelton v. U. S., 32 Ct. Cl. 314 (1897).

53 The following biographical description of Madeleine Dahlgren was taken from the web site of the Central Maryland Heritage League (http://www.cmhl.org/dahlgren.html): Madeleine Sarah Vinton Dahlgren, was the daughter of Congressman Samuel Finlay Vinton of Ohio. Her first husband, David Converse Goddard, died in 1862, leaving her with two small children. She married John A. Dahlgren, a widower with seven children, in 1865. Together they had three more children and were very active in Washington Society. […] Madeleine Dahlgren published many works, among them "Memoirs of Admiral Dahlgren" and "The Executive Power in the United States". She also translated a number of Catholic works from French and Spanish and was identified with her missionary work. Her book "South Mountain Magic" described the folklore of the people she came to know and appreciate. As a wealthy widow, Mrs. Dahlgren maintained both her summer residence on South Mountain and a home on Sheridan Circle in Washington, DC. John Vinton Dahlgren, John and Madeleine's son, was is in the Georgetown class of 1889. With his wife, Elizabeth Drexel Dahlgren, he built a chapel in memory of a son, Joseph, who died in infancy. That memorial, the Dahlgren Chapel of the Holy Heart, was the first free-standing chapel on the campus of Georgetown University.
The U. S. Government used the inventions of many private parties to modernize its armed forces after the Civil War. Where the Government was unaware of a private inventor’s exclusive patent right, the use was often regarded as patent infringement – a tort for which the Government enjoyed sovereign immunity and the Court of Claims had no jurisdiction – and the claimant would consequently lose. Claimants reacted to this by potentially fictitiously arguing that they had given the Government permission to use their inventions. Although this argument conceded away the tortious nature of the infringement, it gave the Court of Claims a basis for jurisdiction. However, the Court of Claims enjoyed broad discretion regarding whether to acknowledge the existence of an implied license, and with regards to what royalties would be considered reasonable in the absence of an express license.

Many of the inventors who were ultimately opposed to the Government in legal disputes over arms-related patents after the Civil war, were also U. S. military officers or government employees at the time of invention. As a general rule, the claims of such military inventors would be doomed if they had used government resources in perfecting their invention. A suspicious exception to this general rule appeared in the Dahlgren case of 1880, where the claim of an influential Admiral’s widow was referred to the Court of Claims by a private act of Congress, and the Court awarded to her the maximum allowable damages despite the fact that her husband’s inventions were conceived, developed, and tested with government resources or support.

IX. ACKNOWLEDGEMENT

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Contra Tanner on Wall Street, Financiers, Inheritance and Egalitarianism

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ABSTRACT:

According to Tanner (2016), financial, stock exchange and other Wall Street services are highly problematic in the free society, and egalitarianism is a desiderata. The present paper takes the opposite point of view, and maintains that inequality, and financial and Wall Street services are perfectly compatible with the free enterprise philosophy.

I. INTRODUCTION:

Tanner (2016) opposes what he considers the financial and stock exchange chicaneries that occur on Wall Street and favors a more egalitarian economy. The present paper diverges from this author on both counts. In section II, we consider his views on Wall Street and finance. Section III is devoted to offering a different perspective than his on inheritance and income and wealth inequality. We conclude in section IV.
II. WALL STREET AND FINANCE

According to Tanner (2016) the following is the case: “… relatively few rich people work on Wall Street or in finance. Most rich people got that way by providing us with goods and services that improve our lives.”

The clear implication here is that unlike those who “provid(e) … us with goods and services that improve our lives” those who “work on Wall Street or in finance” do not “provid(e) … us with goods and services that improve our lives.” Now this is more than passing curious, stemming from the word processor of an analyst from the Cato Institute, which “is a public policy research organization — a think tank — dedicated to the principles of individual liberty, limited government, free markets…”

Presumably this organization is also dedicated to sound economics. But, according to the statement mentioned above, those who “work on Wall Street or in finance” are doing something other than “providing us with goods and services that improve our lives.” What then, are they doing? What is the alternative to “providing us with goods and services that improve our lives?” What else could this be other than exploiting the rest of us. These people are paid handsomely. And, yet, instead of providing the remainder of the population with something of value, in return, they are failing to do so. What else can this mean other than they are, somehow, cheating us.

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1 https://www.cato.org/about
Although this is a false contention, it comes with a certain historical pedigree. The physiocrats maintained that only farmers “provid(e) … us with goods and services that improve our lives.” All others, presumably, exploited us. But then a greater appreciation of economics took hold, and manufactured goods, too, were counted as beneficial. Hooray, now, for both farmers and manufacturers. However, services still had a bandit-like existence at this point in the development of the dismal science. It was not until much more recently that the providers of services were added to the mix, and then we could count on all three to contribute to economic wealth: farms, factories, and those who delivered services to us. But not all services are included. At least according to Tanner, those services emanating from “Wall Street or in finance” still do not fit this bill.

Well, it is time, it is past time, that they were included too. We live in an age of inclusiveness, do we not? We would not want to discriminate, horrors!, against such people. But, before we add them to this list of virtues, let us ask what is it, exactly, that they do add to our economic welfare?

It is simple: they facilitate trade. Commercial interaction, too, makes a valuable contribution to our economy. If oranges are selling for $1 in Florida, and $10 in Montana, then an intermediary, a middleman, a huckster, an entrepreneur, will see to it that they are transferred from the former, where they are in relative abundance, to the latter, where they are in short supply. They will of course profit, but in so doing will increase the value of these items, without growing them, without watering them, without cleaning them, without initially planting the trees that bear this fruit. But the same exact analysis applies to stocks. Wall Street, too, enhances the values of stocks, by facilitating their transfer from

2 “From the standpoint of economic theory, the famous physiocratic tenet that only land is productive must be considered bizarre and absurd.” Rothbard (2011)
those who value them less (bears) to those who value them more (bulls). Nor must we ignore “finance.” People in this industry, too, operate in a similar manner, only instead of increasing the value of oranges, or stocks in corporations, they do so for savers and investors. The former have more money than they know what to do with at present, and the latter are in dire need of same. Switching from one to the other increases the value of both, even though there are the same number of dollars before and after the transaction. Tanner does not mention real estate brokers, but the same analysis applies to them: they facilitate interaction between buyers and sellers of houses to the benefit of both.

But perhaps I am being unfair to this author. The material from him quoted above appeared, only, in the “executive summary” of his essay. What are we to say about the following, then, which appeared in the main body of this publication (Tanner, 2016, p. 8):

…the public increasingly believes that financial traders are up to no good. After all, how many people really understand what derivative trading and other financial activities are and how they benefit the overall economy? Movies such as The Big Short regularly portray Wall Street operators as shady. And there certainly has been more than a little outright criminal activity in the finance industry. Recall Bernie Madoff. But do the stereotypes hold? Are the wealthy really either trust fund babies who inherited their money or shady Wall Street traders?

This author then goes on to “defend” those “shady” people\(^3\) from these charges. But, he does so on the ground that they and their activities are exceedingly difficult to follow. In the event, he seems unconcerned to explain the benefits of “derivative trading and other financial activities” and instead changes the subject to inheritance and egalitarianism which

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\(^3\) With “friends” like Tanner, one may be forgiven for wondering if they really need enemies.
is not exactly responsive. Later on (p. 8) Tanner returns to his “defense” of them, stating “Nor are the rich primarily involved in stock trading or other financial services.” But the clear implication here is that if the wealthy were so involved, then they would be “shady.” In contradistinction to such underhanded ways of earning an income, “The ultra-wealthy are somewhat more likely to be involved in finance, but not much more. Roughly 22 percent of those earning more than $30 million are involved in “finance, banking, and investments. Overall, the rich get rich because they work for it. And they work hard.” Yes, most of the uber-rich “work hard,” are productive salt of the earth people. But this would not seem to apply to that (happily) small percentage of them who, ugh, are “involved in finance.” Again, this is not a defense of them. This is not even damning them with faint praise. This is an out and out condemnation of them. This is a support of the malign contention that “that financial traders are up to no good,” which is precisely the view of “the public increasingly believes,” thanks precisely to authors of this sort.

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4 As a counter-weight to these unjustified smears, see Fabozzi and Kothari, 2007; Howden, 2016; Leathers and Raines, 2008; MacKenzie, 2016; Murphy, 2009; Stringham, 2014, 2015; Van den Hauwe, 2008.

5 According to Rothbard (1995A, p. 426): “Even in the days before perestroika, socialism was never a monolith. Within the Communist countries, the spectrum of socialism ranged from the quasi-market, quasi-syndicalist system of Yugoslavia to the centralized totalitarianism of neighboring Albania. One time I asked Professor von Mises, the great expert on the economics of socialism, at what point on this spectrum of statism would he designate a country as ‘socialist’ or not. At that time, I wasn’t sure that any definite criterion existed to make that sort of clear-cut judgment. And so I was pleasantly surprised at the clarity and decisiveness of Mises's answer. ‘A stock market,’ he answered promptly. ‘A stock market is crucial to the existence of capitalism and private property. For it means that there is a functioning market in the exchange of private titles to the means of production. There can be no genuine private ownership of capital without a stock market: there can be no true socialism if such a market is allowed to exist.’” This is such an important point, and so counter to Tanner’s rejection of the stock market on Wall Street, that I risk a bit of repetitiveness (if Rothbard could quote this two different times in his writings, so can I): "One time, during Mises's seminar at New York University, I asked him whether, considering the broad spectrum of economies from a purely free market economy to pure totalitarianism, he could single out one criterion according to which he could say that an economy was essentially “socialist” or whether it was market economy. Somewhat to my surprise he replied readily: ‘Yes, the key is whether the economy has a full scale stock market.’ That is, if the economy has a full scale in titles to land and capital goods. In short: is the allocation of capital basically determined by government or by private owners?” Rothbard (1991)
III. INHERITANCE AND EQUALITY

Tanner cites Sussman et al (2014) to the effect that there is “‘relative disdain’ for those who inherit their wealth...” Tanner continues: "Inherited wealth, after all, is pretty much the quintessential definition of ‘unearned’ reward. The parents may have earned their estates through hard work, but the heirs did nothing beyond an accident of birth—pure, random luck—to earn an inheritance.”

Does Tanner defend the institution of inheritance, part and parcel of the free enterprise system? Not a bit of it. Instead, he is intent on demonstrating, in similar manner to the above, that “the evidence suggests that inheritance plays a very small role in how people become wealthy. Surveys vary, but it can be said with a fair degree of accuracy that the overwhelming majority of the rich did not inherit their wealth. For example, a study of billionaires around the world finds that fewer than 3 in 10 American billionaires got to that position by inheriting their wealth (emphasis added by present author).”

But this will not do. It constitutes a retreat from defense of our free institutions to merely claim that inheritance plays so small a role in our economy. It concedes to the critic of the market that there is something inherently wrong with this practice; that its only saving grace is that it comprises so insignificant a percentage of total wealth.

So, let us rehearse the reasons for robustly supporting the institution of inheritance.6 It is not so much the right of the recipient to attain this largesse. There is something to be said,

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6 For other critics of inheritance, see Batchelder, 2009-2010; Buchanan, 1983; Matthews, 2014; Prabhakar,
after all, for the claim that such a person is undeserving. What did he do to merit the money he receives, many people might ask.\(^7\)

No, the more powerful case in favor of inheritance, and thus against taxing it, is from the perspective of donor, not the recipient. The former has worked all his days to make the lives of the latter a richer, more wealthy one. To not allow him to do so, or to attenuate his efforts in this regard, is to attack him; to undermine his rights to make a present to his heirs of his own hard-earned wealth. It is in effect to take it away from him; to prevent him from spending it as he wishes.

Then, too, there is the pragmatic consideration. To the extent estates are taxed, their value will be reduced, and people will take wasteful\(^8\) steps to preserve them from the avariciousness of the tax authorities. How will they do so? By making greater gifts during their lives, for example, bigger birthday presents for their children, than would otherwise have taken place. If the taxman attempts to close this “loophole” further misallocations of resources will occur. In the extreme, the government will have to address the fact that many gifts are non-pecuniary, such as reading stories to children, or giving them music lessons. Will the IRS then poke its ugly nose into such goings on? It will have to do so, if the “logic” of the case against inheritance is to be upheld.

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\(^7\) The answer might well be that he deserves it because the gift he receives is made on a voluntary basis. Did he “deserve” the beauty or talent or intelligence he also inherited from his parents? The question makes little sense. All we can see from the libertarian point of view is that if anyone tries to take any of these things away from him by force, any of them, they would be engaged in a rights violation.

\(^8\) Wasteful only from the perspective of the free enterprise system. From the point of view of a tax regime in which estates are taxed, attempts to avoid them are hardly wasteful.
And what, pray tell, are this author’s views on egalitarianism? Not too savory. He starts out, however, on the right foot, with a critique of Piketty (2014), the poster boy for the case that inequality has gotten out of hand. But, as per usual, Tanner does not maintain that *even if* equality has been reduced of late, it makes no never mind to the free society. Instead, he is intent on demonstrating the inequality has not recently surged. Henry Poor was once asked to prognosticate the future course of stock prices. Came the very proper answer: “They will fluctuate.” A similar situation applies here. In future, the level of inequality of wealth or income will also “fluctuate.” Sometimes the Gini coefficient will rise, and at other times it will fall. Surely, a more radical response to this attack on the market is that the level of equality matters not one whit, provided, of course, it emanates from the free operation of laissez-faire capitalism, not the crony variety thereof.

Tanner, however, is not having any of this. Instead, he states: “If one takes into account taxes and social welfare programs, the gap between rich and poor shrinks significantly. Inequality does not disappear after making these adjustments, but it may not be as big a problem or be growing as rapidly as is sometimes portrayed.”

But this will not do. It constitutes mere apologetics for the present mixed economy redistributivist system. Inequality is not a “problem” at all, big or small. The very unwelcome implication here is that if social welfare programs and taxes on the rich were increased, this “problem” would be decreased.10

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10 For a critique of egalitarianism from a libertarian point of view see Howden, 2013; Nozick, 1974; Rockwell, 2015; Rothbard, 1971, 1974, 1995B, 1997, 2005; Salerno, 2013; Sowell, 2012
The usual neo-classical justification for taking money from rich Peter and giving it to poor Paul is the diminishing marginal utility of wealth. The first several thousand dollars is the difference between life and death; the second, between comfort and penury. But, after a while, when income rises to a great enough extent, the opulent light their cigars with $100 dollar bills. To put this in other terms, if we take $100 from a Bill Gates and give it to a poor man, the latter will place far more value, or utility, on it than will the former. Thus, total utility between the two of them will rise from this forced transfer. There are problems here, albeit not in the philosophy of Tanner and other advocates of egalitarianism. First of all, who says the two are on the same downwardly sloping utility curve of money? If the rich man is on a sufficiently higher one, total utility of the two of them can actually decrease. Second, merely drawing up such a function implies invalid cardinal utility, replete with utils and all of that. No, the only valid concept of utility is ordinal, preferring this and setting that aside. But such a system cannot generate any such curves or functions. Third, these exercises in futility involve interpersonal comparisons of utility, surely a problem even for neoclassical economists, let alone Austrians. Fourth, perhaps the rich man will resent the fact that his hard earned money is being taken from him at the point of a gun.

IV. CONCLUSION

Tanner works for the Cato Institute. This is supposed to be a free market or libertarian think tank. It is the very publisher of Tanner (2016). In the event, supporters of capitalism and free enterprise cannot be too satisfied with this publication, at least not if it is interpreted as a support for our free institutions. Attacks on the stock market, on finance, on inheritance, on inequality, are not part and parcel of the defense of the market order.
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