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## THE *S & E CONTRACTORS CASE*—BEHEADING THE HYDRA OR WREAKING DEVASTATION?

ROBERT S. PASLEY\*

Stated briefly, the question in *S & E Contractors, Inc. v. United States*<sup>1</sup> was whether the Government could appeal an agency decision under the standard disputes clause of a government contract. Stated bluntly, the answer of the Supreme Court was "No." "And there's an end on't," as the old saying goes.

But neither the question nor the answer is quite that simple. For the question, as I hope to show, may be put in quite a different fashion. And the answer was given by a Court which divided 5 to 3,<sup>2</sup> reversing a 4-3 decision of the Court of Claims,<sup>3</sup> which in turn had overruled a decision of the Atomic Energy Commission (AEC)<sup>4</sup> after the Comptroller General had ruled that the Commission's decision was not "final and conclusive."<sup>5</sup> In all, these four sets of opinions take up over 250 pages of the reports. Obviously, the question seemed far from simple to those who had to decide it.

The facts of the case are complicated, but the essentials are stated clearly and succinctly in Justice Brennan's dissenting opinion:<sup>6</sup>

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\* Professor of Law, Cornell University. A.B. 1933, Princeton University; LL.B. 1936, Cornell University.

1. 406 U.S. 1 (1972).

2. Justice Douglas wrote the opinion of the Court. Justice Blackmun wrote a concurring opinion, in which Chief Justice Burger and Justices Stewart and Powell joined. Justice Brennan wrote a dissenting opinion, in which Justices White and Marshall joined. Justice Rehnquist did not participate.

3. 433 F.2d 1373 (Ct. Cl. 1970).

4. 2 A.E.C. 850, *modifying* 2 A.E.C. 631 (1964).

5. 46 COMP. GEN. 441 (1966).

6. The somewhat longer statement of facts found in the opinion of the Court, 406 U.S. at 5-7, may be consulted for a detailed account of just what happened, but

This is a suit by petitioner against the United States to recover on a contract between petitioner and the Atomic Energy Commission. The contract included a "disputes clause," which provided that the Commission would decide any factual disputes that arose under the contract and that its decision would "be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence." The disputes clause also provided that while it did "not preclude consideration of law questions in connection with [disputes] decisions," it was not to "be construed as making final the [Commission's] decision . . . on a question of law." Disputes arose during performance of the contract, and the Commission decided them in petitioner's favor. The General Accounting Office, however, when rendering an advance opinion requested on behalf of the Commission as to one of the disputed items, disagreed with the Commission's decision, and for that reason the Commission refused to pay. In petitioner's subsequent suit in the Court of Claims, petitioner relied upon the Commission's decision as a "final and conclusive" resolution of the disputes, entitling petitioner to summary judgment. The Department of Justice defended the suit on the grounds that the Commission's decision was not supported by substantial evidence and was erroneous on questions of law. The issue before us is whether the Government, through the Department of Justice, may assert those defenses.<sup>7</sup>

The disputes clause, which has long been used in government contracts, provides in brief that any dispute concerning a question of fact arising under the contract shall be decided in the first instance by the contracting officer, with the right in the contractor to appeal to the head of the contracting agency or his designated representative, which in practice usually means a board of contract appeals. (In the *S & E* case, the AEC had not yet established a board of contract appeals, and the contractor's appeal was referred to a hearing examiner, subject to review by the Commission.) The decision of the agency head or board of contract appeals is final and conclusive, subject to certain exceptions. Meanwhile the contractor has to go forward with the work. In other words, within the scope of the disputes clause, the contractor forgoes any resort to the courts and agrees to accept a kind of unilateral arbitration. In theory, this process assures him of speed and simplicity in the settlement of most of

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Justice Brennan's summary should be sufficient for an understanding of the issues involved.

7. 406 U.S. at 23-24.

his claims. In theory, and in fact as well, it assures the Government of continued performance while the dispute is being settled.<sup>8</sup>

Although originally designed to handle factual disputes, the disputes procedure has, by a kind of bootstrap operation through the process of contract definition, been extended to cover all sorts of questions which one would not ordinarily think of as "questions of fact."<sup>9</sup> For example, the dispute in the *S & E* case concerned the amount of equitable adjustment due the contractor under various change orders issued by the Government. "Questions of law," in the strict sense, were another matter, and it was generally conceded that finality did not attach to board decisions on these.<sup>10</sup> Of this, more anon. From the first employment of the disputes procedure, however, it was recognized that fraud was an exception to the rule of finality and that the contractor could challenge a board decision based on fraud,<sup>11</sup> or "such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment."<sup>12</sup> Over the years, the Court of Claims extended this exception to include board decisions which it could characterize as "capricious" or "arbitrary"<sup>13</sup> or, occasionally, as having "no substantial evidence to support [them]."<sup>14</sup> This process of extension came to an abrupt halt in 1951 when the Supreme Court in *United States v. Wunderlich*<sup>15</sup> held that "fraud" meant just that—namely, "conscious wrongdoing, an intention to cheat or be dishonest."<sup>16</sup>

This decision, reached by a divided court,<sup>17</sup> provoked conster-

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8. For a full account, see Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 LAW & CONTEMP. PROB. 39 (1964).

9. This device has received the tacit approval of the Supreme Court. See *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966).

10. *But see United States v. Moorman*, 338 U.S. 457 (1950).

11. *United States v. Wunderlich*, 342 U.S. 98 (1951).

12. *Kihlberg v. United States*, 97 U.S. 398, 402 (1878). See also *Ripley v. United States*, 223 U.S. 695 (1912); *Sweeney v. United States*, 109 U.S. 618 (1883).

13. See, e.g., *Penner Installation Corp. v. United States*, 89 F. Supp. 545 (Ct. Cl. 1950).

14. *Id.* at 547 (dictum); cf. *Mitchell Canneries, Inc. v. United States*, 77 F. Supp. 498, 503 (Ct. Cl. 1948) (substantial evidence test satisfied).

15. 342 U.S. 98 (1951).

16. *Id.* at 100. The Court did not, however, expressly overrule its prior decisions equating bad faith or dishonesty with fraud.

17. The vote was 6-3. Mr. Justice Douglas wrote an eloquent dissent with which Mr. Justice Reed concurred. *Id.* at 101. Mr. Justice Jackson wrote a separate dissent, in which he stated his belief that the majority had ruled out the exception based on "such gross mistake as necessarily implied bad faith." *Id.* at 102.

nation in industry and even made the procuring agencies unhappy.<sup>18</sup> In response, a number of bills were introduced in Congress, and after extensive hearings, the so-called Wunderlich Act<sup>19</sup> became law. It is still in effect and reads as follows:

§321. *Limitation on pleading contract-provisions relating to finality; standards of review*

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

§322. *Contract-provisions making decisions final on questions of law*

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.<sup>20</sup>

The disputes clause used in the *S & E* contract (which differed only slightly from the standard disputes clause<sup>21</sup>) reflected the Wunderlich Act and read as follows:

## 6. *Disputes*

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the

18. The agencies responded negatively, partly because of a desire to maintain good relations with their contractors, and partly from concern that the latter might inflate their prices to include a contingency factor which would balance the virtual loss of judicial review occasioned by the decision.

19. 41 U.S.C. §§ 321-22 (1970). The statute might more appropriately be called the "Anti-Wunderlich Act," as was observed by Judge Collins, dissenting in the Court of Claims, 433 F.2d 1373, 1393 (Ct. Cl. 1970).

20. 41 U.S.C. §§ 321, 322 (1970).

21. See Armed Services Procurement Regulations, 32 C.F.R. § 7.103-12 (1972); Federal Procurement Regulations, 41 C.F.R. § 1-7.101-12 (1972). These are the clauses prescribed for fixed-price supply contracts. Similar clauses are prescribed for other types of contracts.

Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Commission. The decision of the Commission or its duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This 'Disputes' Clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.<sup>22</sup>

#### THE OPINIONS OF THE JUSTICES

The decision of the Supreme Court in the *S & E* case was that the judgment of the Court of Claims, which had upheld the right of the Government to raise the defenses which it had set forth and had remanded the case to its commissioner for his consideration and report on the merits,<sup>23</sup> should be reversed. Mr. Justice Douglas wrote the opinion of the court; there was a concurring opinion by Mr. Justice Blackmun and a dissenting opinion by Mr. Justice Brennan.

#### *The Douglas Majority Opinion*

In his usual forceful and succinct style, Mr. Justice Douglas made the following points:

1. The disputes clause is intended to provide a quick and effective administrative remedy.<sup>24</sup> This requires that, absent fraud or bad faith, finality be attached to the decision of the contracting agency without the subsequent interposition of further re-

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22. 406 U.S. at 3 n.2.

23. The Court of Claims had disagreed, 4-3, with the initial report of its Commissioner, The Honorable Mastin G. White, formerly Solicitor for the Department of the Interior, who had recommended granting the plaintiff's motion for summary judgment.

24. 406 U.S. at 8.

view by other government officials. Any other result might be "sheer disaster."<sup>25</sup> In the particular case, almost 10 years had passed between completion of the contract and the final decision of the Supreme Court.

2. The Government should be regarded "as a unit rather than as an amalgam of separate entities."<sup>26</sup> Here the AEC spoke for the Government. The Comptroller General had no further power of review and the Wunderlich Act failed to give him such power; in fact "Congress . . . plainly denied"<sup>27</sup> it to him. The function of the Attorney General's office is to conduct and supervise government litigation and in that connection normally to implement rather than to repudiate the decision of a coordinate branch. The Wunderlich Act gives it no "right to appeal"<sup>28</sup> a decision of the contracting agency. In fact, the Wunderlich Act did not in itself confer any rights of appeal. It was simply designed to overrule the *Wunderlich* case. "It should not be construed to require a citizen to perform the Herculean task of beheading the Hydra in order to obtain justice from his Government."<sup>29</sup>

3. A contractor's fraud is a different matter.<sup>30</sup> Fraud is always ground for setting aside a judgment. Apart from the "inherent power of courts to deal with fraud,"<sup>31</sup> various statutes<sup>32</sup> indicate that "the Department of Justice indubitably has standing to appear or intervene at any time in any appropriate court to restrain enforcement of contracts with the United States based on fraud."<sup>33</sup> But here no fraud or bad faith was involved or even claimed.

4. Finally, if "the General Accounting Office or the Department of Justice is to be an ombudsman reviewing each and every decision rendered by the coordinate branches of the Government, that mandate should come from Congress, not from this Court."<sup>34</sup>

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25. *Id.*

26. *Id.* at 10.

27. *Id.* at 12.

28. *Id.*

29. *Id.* at 14. Mr. Justice Douglas apparently forgot that beheading the Hydra was not enough, for according to the legend this only caused two heads to grow where there had been but one before. But his meaning is plain enough.

30. 406 U.S. at 15.

31. *Id.* at 17.

32. For example, Mr. Justice Douglas cited 41 U.S.C. §§ 116(b), 118(d), 118(e), 119 (1970); 40 U.S.C. § 489(b) (1970); 28 U.S.C. § 2514 (1970). 406 U.S. at 16.

33. 406 U.S. at 17.

34. *Id.* at 19.

*Justice Blackmun's Concurring Opinion*

Mr. Justice Blackmun wrote an eight-point concurring opinion, in which Chief Justice Burger and Justices Stewart and Powell concurred.<sup>35</sup> Besides reemphasizing the points made by Mr. Justice Douglas, he added the following observations:

1. It makes no sense for the Government, through one agency, to challenge its own executive determination made by another agency.<sup>36</sup>

2. The disputes clause has been employed for over 40 years,<sup>37</sup> was drawn by the Government itself, and, with specified exceptions, has never been regarded as conferring the "right of judicial review on the part of the Government."<sup>38</sup>

3. The Government's position is anomalous in that, while it recognizes the finality of an *unappealed* decision of the contracting officer, it would deny that finality to a decision reached, after appeal, by the agency head.<sup>39</sup>

4. For the Government to disavow the decision of the agency head is to impose an additional contract term never accepted by the contractor, very possibly a breach of contract.<sup>40</sup>

5. The legislative history of the Wunderlich Act is unclear, at best "decidedly ambiguous."<sup>41</sup> But there is nothing in it to indicate a "nod in the direction of the Government,"<sup>42</sup> and the "flat rejection by Congress of the proposed provision for GAO review is significant."<sup>43</sup>

*The Brennan Dissenting Opinion*

Mr. Justice Brennan, joined by Justices White and Marshall,<sup>44</sup> wrote a long and forceful dissent, accompanied by an appendix de-

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35. *Id.*

36. *Id.*

37. *Id.* at 20. While this may be true of disputes *clauses* of the sort now in use, the disputes *procedure* goes back at least to *Kihlberg v. United States*, 97 U.S. 398 (1878), and possibly to *United States v. Adams*, 74 U.S. 463 (1868).

38. 406 U.S. at 20.

39. *Id.*

40. *Id.* at 21. Some of the briefs filed on behalf of the petitioner make much of this point, but it really begs the question.

41. 406 U.S. at 22.

42. *Id.*

43. *Id.*

44. *Id.* at 23.

tailoring the legislative history of the Wunderlich Act.<sup>45</sup> The main points of the opinion were these:

1. Prior to the Wunderlich Act, the contractor could challenge the finality of a disputes decision solely on the ground of fraud, dishonesty, or bad faith.<sup>46</sup> The Government had the same right. The former would raise the issue by a suit in the Court of Claims under the Tucker Act<sup>47</sup> for breach of contract. The latter would raise it by refusing to pay, usually at the instance of the Comptroller General, thus forcing the contractor to bring a suit which would be defended by the Attorney General.

The only change in this procedure brought about by the Wunderlich Act was to broaden the grounds of challenge from fraud, dishonesty, and bad faith to include the additional reasons listed in the Act, such as lack of substantial evidence.<sup>48</sup> If a court determines that the decision is not final and conclusive under any of the grounds specified in the Act and now spelled out in the disputes clause, then the decision is not final and conclusive. It makes no difference, under the Act or the clause, which party raises the issue in court or by what procedural route.

2. "Today's decision is demonstrably wrong."<sup>49</sup> It is "without an iota of support in the language of the Act, which expressly governs 'any' disputes decision in 'any suit,' or in the Act's legislative history, which confirms that the expanded grounds of judicial review were to be available to both the Government and contractors. . . ." <sup>50</sup>

3. From *Kihlberg v. United States*,<sup>51</sup> decided in 1878, until today, the Supreme Court has never deviated from the position that the same standard of judicial review of a disputes decision is available to both sides.<sup>52</sup> In support of this proposition, Mr. Justice Brennan reviewed the leading cases since *Kihlberg*, including a number involving contracts between private parties which contained a comparable disputes clause. He observed:

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45. *Id.* at 69.

46. *Id.* at 24.

47. 28 U.S.C. § 1491 (1970). The district courts have parallel jurisdiction over claims not exceeding \$10,000. 28 U.S.C. § 1346 (1970).

48. 406 U.S. at 26. See text following note 20 *supra*.

49. 406 U.S. at 29.

50. *Id.*

51. 97 U.S. 398 (1878).

52. 406 U.S. at 31-37.

We thus have an unbroken line of cases in this Court, from 1878 to 1951, applying a simple, straight-forward rule of judicial review. A contractual disputes clause making final a decision by an agent of one of the parties was given full effect in court, subject to the judicially created exception that allowed relief to the party challenging the decision if he was able to prove that it was fraudulent. This rule applied whether the contract was Government or private and no matter which party challenged the finality of the decision. In short, a disputes clause was *equally* binding upon both parties.<sup>53</sup>

The Court of Claims, which has decided most of the court cases arising under the disputes clause, has consistently taken the same position.<sup>54</sup>

4. The Comptroller General's opinion of a disputes decision is irrelevant in court. This is true even where he favors the contractor. Where he favors the Government, his "only power—the power of the purse—[is] to force the contractor to bring suit and thus obtain judicial review for the Government."<sup>55</sup> Once the case reaches the court, review is the same for both parties.

5. When the *Wunderlich* case effectively limited judicial review to cases of fraud, the first important corrective bill<sup>56</sup> would simply have overruled that case, without specifying what the expanded scope of judicial review was to be. A substitute bill,<sup>57</sup> offered by GAO, (1) explicitly defined the expanded scope of review, and (2) authorized GAO review in addition to court review. The latter went beyond any prior power the GAO had (which was merely to block payment) and would have given GAO authority to upset a disputes decision, increasing its power "enormously."<sup>58</sup> "Not surprisingly, this part of GAO's proposal became highly controversial."<sup>59</sup> As reported out of committee, amended S. 2487 incorporated the GAO proposal<sup>60</sup> but, although this bill passed the Senate, the House had not acted on it when the Eighty-second Congress expired.

In the Eighty-third Congress, the GAO provision provoked con-

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53. *Id.* at 37.

54. *Id.* at 37-44.

55. *Id.* at 39.

56. S. 2487, 82d Cong., 2d Sess. (1952).

57. See *Hearings on S. 2487 Before a Subcomm. of the Senate Comm. on the Judiciary*, 82d Cong., 2d Sess. 7 (1952).

58. 406 U.S. at 49.

59. *Id.*

60. S. REP. No. 1670, 82d Cong., 2d Sess. 1 (1952).

troversy, not because it afforded *judicial* review at the behest of either party, but because it would set up the GAO as a *separate* reviewing authority, a kind of court in its own right. Bowing to this opposition, the Comptroller General agreed to deletion of the objectionable provision,<sup>61</sup> claiming (erroneously) that he had not asked for any authority which he did not already possess.<sup>62</sup>

In urging passage of the substitute bill, GAO's General Counsel stated (correctly, from his point of view) that it would protect not only contractors but also the Government by providing an expanded, but coextensive, *judicial* review.<sup>63</sup> During the course of the hearings, no one questioned this position; in fact, a version of the bill which would have expressly limited the right of judicial review to contractors was rejected.<sup>64</sup>

The bill, as finally reported and adopted, "expanded the scope of judicial review, and that was all it did."<sup>65</sup> This is clear from the text of the Act, the committee reports, the testimony in committee, and the explanation of the bill's sponsors on the floor of the House.

Moreover, the "bill that became the Wunderlich Act was a *Government* bill. . . . It is absurd to suppose that the *Government* pressed for a bill that granted *contractors* an expanded scope of judicial review, inserted in the bill by the *Government*, yet denied the *Government* judicial review on those same grounds."<sup>66</sup> This interpretation is "preposterous."<sup>67</sup>

6. The majority opinion seems motivated by a determination to attribute to Congress an intention to "abolish the authority of GAO to disapprove payments to contractors under disputes decisions, thus forcing contractors to sue. . . ."<sup>68</sup> Its "*bête noire* then, is primarily the General Accounting Office, with a sideswipe at the Department of Justice."<sup>69</sup> And it assumes that Congress shared its "distaste for the activities of those agencies in these cases. . . ."<sup>70</sup>

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61. *Hearings on H.R. 1839 and S. 124, H.R. 3634, and H.R. 6946 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 83d Cong., 1st & 2d Sess. 136 (1953-54).

62. *Id.* at 135.

63. *Id.* at 39.

64. *Id.* at 89.

65. 406 U.S. at 56.

66. *Id.* at 59.

67. *Id.* at 60.

68. *Id.* at 62.

69. *Id.*

70. *Id.*

To this there are three answers:

a. "The notion that Congress enacted the Wunderlich Act to abolish the authority of GAO and the Department of Justice is completely a figment of the Court's own imagination. As the judicial history shows, both agencies have exercised for decades powers identical to those exercised in this case. . . ."71 This is supported by the Committee report that accompanied the Wunderlich bill.<sup>72</sup>

b. It is irrelevant that "the AEC withheld payment solely because of the views of the Comptroller General."<sup>73</sup> The only question is the scope of *court* review.

c. It is inapposite to say that the Department of Justice is claiming a "right to appeal" or a "power to appeal."<sup>74</sup> That Department is involved only because, as a result of GAO's refusal to sanction payment, a lawsuit has been created which it is the duty of the Department of Justice to defend.

7. By overturning established precedent, the Court's decision wreaks "devastation"<sup>75</sup> upon Government procurement practices. Not only do American taxpayers stand to lose over a million dollars in this case, but "countless millions"<sup>76</sup> are at stake in other cases. Immediate congressional action is required to "restore the former balance between Government and contractor"<sup>77</sup> and to "make more explicit what is already explicit in the Wunderlich Act, but this time in terms so plain that even this Court will be unable to thwart the congressional will."<sup>78</sup>

8. Mr. Justice Brennan's opinion also discussed at some length the fraud exception, taking issue with the majority's approach to the fraud problem, and, more briefly, the "question of law" exception, which was not discussed in the majority or concurring opinions. These two matters will be discussed separately later on.

### *A Postscript*

As can be seen from the foregoing summary of the contentions advanced in the majority, concurring, and dissenting opinions, the

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71. *Id.* at 63.

72. H.R. REP. No. 1380, 83d Cong., 2d Sess. 6-7 (1954).

73. 406 U.S. at 65, *quoting id.* at 10 (opinion of the Court).

74. *Id.* at 65, *quoting id.* at 12-13 (opinion of the Court).

75. *Id.* at 31.

76. *Id.* at 60.

77. *Id.* at 31.

78. *Id.*

arguments pro and con regarding government appeal of agency contract dispute decisions are numerous and diverse. Still more arguments are adduced in the majority and dissenting opinions of the Court of Claims,<sup>79</sup> in the opinion of the Comptroller General,<sup>80</sup> and in a prior opinion of the Attorney General in a different case involving the same general problem.<sup>81</sup> There would be little point in listing all of these now, although some of them will be mentioned later.

Nor is there really any point in debating whether the Supreme Court correctly decided the case. *Roma locua est*. A law review, or even a law professor, is not a higher court of appeal.<sup>82</sup> If the law is to be changed now, the change must come from Congress.<sup>83</sup> Rather, I propose to concentrate on two aspects of the problem:

1. Retrospectively, how can one account for the extraordinary diversity of opinion among the judges, the public officials, and the commentators on what seems to be a very simple question?
2. Prospectively, what, if any, remedial legislation is desirable?

#### JUDICIAL REVIEW UNDER THE WUNDERLICH ACT

Philosophers know that, far more important than the answer to any problem, is the question which is asked. For the latter will dictate, if not the answer itself, the terms of reference (the "parameters" to use the current jargon) within which the debate will be conducted.

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79. 433 F.2d 1373, 1381, 1392 (Ct. Cl. 1970).

80. 46 COMP. GEN. 441 (1966).

81. 42 OP. ATT'Y GEN. No. 33, 13 CCH CONT. CAS. FED. ¶ 82,490 (Jan. 16, 1969).

82. As of this writing, there appear to have been relatively few law review articles or notes on the decision of the Supreme Court in the *S & E* case. See, e.g., 48 NOTRE DAME LAW. 483 (1972). There were, however, a number of commentaries on the case in its prior stages or on the general problem. See, e.g., Cibinic & Lasken, *The Comptroller General and Government Contracts*, 38 GEO. WASH. L. REV. 349, at 366-72 (1970); Kipps, *The Right of the Government to Have Judicial Review of a Board of Contract Appeals Decision Made Under the Disputes Clause*, 2 PUB. CONT. L.J. 286 (1969); Comment, *The Government's "Right of Appeal" from Adverse Decisions of the Board of Contract Appeals*, 22 BAYLOR L. REV. 191 (1970); Comment, *S & E Contractors and the GAO Role in Government Contracts Disputes: A Funny Thing Happened on the Way to Finality*, 55 VA. L. REV. 762 (1969); Note, *GAO Review of Contract Appeal Board Decisions*, 54 MINN. L. REV. 694 (1970); 18 CATH. U.L. REV. 544 (1969).

83. Or, the change could be made administratively, by a recasting of the disputes clause. This possibility will be discussed *infra* pp. 37-38, along with legislative proposals.

And so here. If we ask the question, "May the Comptroller General or the Attorney General review and reverse an agency decision under the disputes clause or, stated otherwise, may the Government seek to repudiate its own decision?", then the negative answer of the majority in the *S & E* case is highly persuasive. If on the other hand, we ask the question, "May a court having jurisdiction, by whatever procedural route such jurisdiction has been obtained, review and nullify a disputes decision, whether for or against the contractor, for failure to meet the standards for finality of the Wunderlich Act?", then the logic of the dissent becomes almost compelling.

I suggest that a good deal of the problem presented by this case arises from a failure to understand the precise meaning of the phrase "judicial review," as used in this procedural context and in the Wunderlich Act itself, and a failure to note the very great transformation which that concept has undergone since enactment of the Act.

#### *What is "Judicial Review" Under the Wunderlich Act?*

Judicial review is a phrase of many meanings. It is often used to refer to the power of a court to pass upon the constitutionality of a statute.<sup>84</sup> Obviously, this definition is not relevant here.

The term is also used in a loose sense when what is really meant is appellate review, the power of an appellate court to review the proceedings of the court below (usually only on the record) and affirm, modify or reverse the judgment, remand for further proceedings, or take other appropriate action. Some of the language used in the *S & E* case and elsewhere in discussions of the Wunderlich Act might lead the unguarded to believe that this is what is involved here. For example, Mr. Justice Douglas says: "Some have urged that where a decision of a board of contract appeals is involved, the United States should have standing to appeal to the Court of Claims."<sup>85</sup> And Mr. Justice Brennan says, of the post-Wunderlich disputes clause: "It does *not* direct that the Commission's decision is final and conclusive unless the *contractor appeals* to the courts."<sup>86</sup> At the hearings on the Wunderlich bill a witness for industry

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84. Dean Strong prefers the term "constitutional review" for this concept. Strong, *Three Little Words and What They Didn't Seem to Mean*, 59 A.B.A.J. 29 (1973); Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law*, 69 W. VA. L. REV. 111, 249 (1967).

85. 406 U.S. at 18.

86. *Id.* at 26-27 n.1.

testified that as a result of the *Wunderlich* case "neither the Government through the GAO, nor the contractors through the courts have any right to *appeal* from contracting officers' decisions even though they may be grossly erroneous."<sup>87</sup> But elsewhere in the *S & E* case the Court noted that the "power to appeal to the Court of Claims a decision of the federal agency under a disputes clause . . . is not to be found in the *Wunderlich* Act and its underlying legislative history."<sup>88</sup> Mr. Justice Brennan commented that "[n]o one suggests that the Department of Justice has a 'right to appeal.'"<sup>89</sup>

The latter statements are correct for a very simple reason. The Court of Claims is not an appellate court, but a court of original jurisdiction.<sup>90</sup> So far as pertinent here, its jurisdiction is to hear and decide any claim against the Government founded "upon any express or implied contract with the United States."<sup>91</sup> The same is true of the district courts with respect to their more limited jurisdiction under the Tucker Act.<sup>92</sup>

What happens, at least in theory, when a contractor believes that a disputes decision fails to meet the standards of the *Wunderlich* Act, is that he files a suit in the Court of Claims, or in a district court, under the Tucker Act for breach of contract. This is a suit *de novo* and in no sense an appeal. The Government's answer is to plead the disputes decision as final and conclusive, thus barring the claim. Only if the court finds that the disputes decision does not meet the standards of the *Wunderlich* Act is it authorized to consider it on the merits. This is, of course, a kind of judicial review, albeit a limited one, but it is not *appellate* review. Moreover, it explains the rather strange and backhanded language of the *Wunderlich* Act:

No provision of any contract . . . relating to the finality or con-

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87. *Id.* at 78 (emphasis added) (statement of George P. Leonard, an officer of the *Wunderlich* Contracting Company).

88. *Id.* at 13.

89. *Id.* at 65.

90. It is true that in most cases the actual trial is held before a Commissioner, and the Court of Claims acts in a quasi-appellate capacity, reviewing the Commissioner's report and recommendations after receiving briefs from the parties and hearing arguments. See Bennett, *The United States Court of Claims, a 50 Year Perspective*, 29 *FED. B.J.* 284, 290-98 (1970). But for the present purposes the Court of Claims and its Commissioners may be regarded as a single entity.

91. 28 U.S.C. § 1491(4) (1970).

92. *Id.* § 1346(a)(2) (1970) (claims not exceeding \$10,000). Hereafter, when reference is made to the Court of Claims, it should be understood as including the district courts as well, unless the context indicates otherwise.

clusiveness of any decision of the head of any department or agency or his duly authorized representative or board . . . shall be *pleaded* in any suit . . . as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged. . . .<sup>93</sup>

This precise procedure was not available to the Government, not because it had no "right of appeal" from a disputes decision, but because the Tucker Act made no provision for suits *by* the Government against a contractor for breach of contract—the only purpose of the Tucker Act was to remove the bar of sovereign immunity in suits *against* the Government. (Outside the disputes clause area of factual controversy, the Government may sue its contractors in the ordinary way in the district courts or even in the state courts.) But the Government could, and occasionally did, obtain judicial review of a disputes decision by refusing payment, forcing the contractor to sue for breach of contract, and then raising the defense of non-finality. Or the Government could counterclaim in a suit brought by the contractor on another claim. Or it might even bring an independent action in a federal district court against the contractor for recovery of money allegedly owed by the contractor which the contractor claimed was not owing because of a disputes decision. Of course, all these avenues of defense or recovery by the Government are now barred as a result of the *S & E* case.<sup>94</sup> And yet, as the dissent argues, there does not seem to be anything in the Wunderlich Act itself to compel this result.

#### *What Has Judicial Review Become Under the Wunderlich Act?*

Technically, the foregoing analysis is still legally correct. But "a funny thing happened on the way to the form."<sup>95</sup> The fly in the ointment was the inclusion of the phrase "not supported by substantial evidence" at the end of the proviso to the first section of the Wunderlich Act,<sup>96</sup> an insertion which had the effect of converting the Court of Claims into an appellate court, for all practical pur-

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93. 41 U.S.C. § 321 (1970) (emphasis added). The Wunderlich Act is not well drafted, but in this respect it is at least technically accurate.

94. This was pointed out by Mr. Justice Brennan. 406 U.S. at 28 n.3. Furthermore, the Court of Claims has already ruled out the possibility of circumventing the *S & E* rule by use of a counterclaim. *Dynalectron Corp. v. United States*, 18 CCH CONT. CAS. FED. ¶ 81,757 (Ct. Cl. 1972).

95. With apologies to the author of Comment, 55 VA. L. REV., *supra* note 82.

96. 41 U.S.C. § 321 (1970).

poses, whenever it was called on to consider the effect of a disputes decision.

It is true that, prior to the Wunderlich Act, the Court of Claims had occasionally refused to attach finality to a disputes decision under a substantial evidence test.<sup>97</sup> But such decisions were not numerous and were overshadowed by the more frequent invocation of the grounds of capriciousness or arbitrariness. During the period between the *Wunderlich* case and the Wunderlich Act, the Department of Defense had been using its own contract clause to negative the effect of the *Wunderlich* case, and that clause made no mention of "substantial evidence."<sup>98</sup> Just how the phrase got into the bill is uncertain, but it is clear that it was inspired by section 10 of the Administrative Procedure Act (APA)<sup>99</sup> and by such cases as *Consolidated Edison Co. v. NLRB*.<sup>100</sup> The APA reference is to judicial review of agency action based on an administrative hearing under sections 7 and 8 of the Act "or otherwise reviewed on the record of an agency hearing provided by statute."<sup>101</sup> The *Consolidated Edison* case, decided before enactment of the APA, involved a petition to the Court of Appeals for the Second Circuit under the National Labor Relations Act<sup>102</sup> to review and set aside an order of the National Labor Relations Board, the Board in turn asking the court to enforce the order. Whatever the statutory procedure involved, this was in substance an appeal to an appellate court from an administrative order made after a hearing.

The inclusion in the Wunderlich Act of what amounted to a new criterion for review (although there was some precedent for it) provoked very little debate.<sup>103</sup> But it did cause some. At the time, I was Assistant General Counsel of the Navy and testified briefly in support of the bill, taking the position that it did little more than reaffirm what the agencies were already doing by means of a contract clause. But I added:

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97. See cases cited in note 14 *supra*.

98. See Shedd, *supra* note 8, at 80.

99. 5 U.S.C. § 706(2)(E) (1970).

100. 305 U.S. 197 (1938).

101. 5 U.S.C. §§ 556, 557 (1970).

102. 29 U.S.C. §§ 151-168 (1970).

103. It was referred to as an "additional standard" in the Report of the House Committee on the Judiciary. H.R. REP. NO. 1380, *supra* note 72, at 4. See also Schultz, *Wunderlich Revisited: New Limits on Judicial Review of Administrative Determination of Government Contract Disputes*, 29 LAW & CONTEMP. PROB. 115, 117 (1964).

Sir, our revised article, we feel, does take care of most of the features of the Wunderlich case that contractors found objectionable. We provide in there that a decision will not be final if it is found by a court of competent jurisdiction that it is arbitrary or capricious. We do not say anything about "substantial evidence." How much difference that makes, in fact, I do not know. . . .<sup>104</sup>

With the benefit of almost 20 years of hindsight, I would now characterize that as the understatement of several decades.

Other observers were more emphatic. One witness doubted the advisability of the substantial evidence test "where you have neither a full-fledged administrative record for a court to examine, nor a court . . . designed to provide appellate review."<sup>105</sup>

But neither the Department of Defense nor the General Services Administration opposed inclusion of the new criterion, while conceding that it appeared "to provide an appellate type of review of the administrative decision."<sup>106</sup> The strongest argument in its favor was that it would force those agencies which "did not have a hearing procedure comparable with Armed Services Board of Contract Appeals [ASBCA] to produce their witnesses at a hearing and disclose to the contractor the evidence relied on to support the decision."<sup>107</sup> What was only dimly perceived, if perceived at all, was that the type of judicial review contemplated by the APA was a review *on the record* and only on the record.

The Court of Claims, consistently with its status as a court of original jurisdiction, had always given a contractor a *de novo* trial in a suit under the Tucker Act: it would hear and consider all relevant evidence, from either side, bearing on the claim, including the question whether the agency disputes decision, if there had been one, met its standards for finality and, if not, whether the Government had in fact breached the contract. It continued to take this position after passage of the Wunderlich Act. The Department of Justice, on the other hand, was equally determined to limit judicial review to review on the record without consideration of any new or extraneous evidence.

The stage for decision of the issue was set dramatically by the

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104. *Hearings on H.R. 1839 and S. 124, H.R. 3634, and H.R. 6946 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 83d Cong., 1st & 2d Sess. (1953-54).*

105. *Id.* at 119.

106. *Id.* at 57.

107. Shedd, *supra* note 8, at 83.

case of *Volentine and Littleton v. United States*.<sup>108</sup> Plaintiffs brought suit under the Tucker Act, claiming additional amounts beyond those awarded by the contracting officer and alleging that the disputes decision which had been made was arbitrary, capricious, fraudulent, and not based on substantial evidence. They introduced evidence intended to show that there had been a breach of contract by the Government and that there was no substantial support for the departmental disputes decision. The Government, through the Department of Justice, declined to introduce any evidence, taking the position that plaintiffs had failed to produce the only piece of evidence that was material—namely, the record made before the contracting officer and the head of the department. The Court of Claims refused to adopt the Government's position: "What the Government asks us to do would run counter to the traditional handling of the problem."<sup>109</sup> Significantly, the concurring opinion said:

The word "review" when used in statutes does not necessarily imply review in the appellate sense. . . .

While the expression "supported by substantial evidence" . . . is normally found only in statutes conferring appellate jurisdiction . . . without more [it] does not amount to a definition of the scope of judicial review. . . . [T]he reference in House Report 1380 to section 10 of the Administrative Procedures [sic] Act . . . does not warrant our reading into the Wunderlich Act provisions contained in the Administrative Procedures [sic] Act but not appearing in the Wunderlich Act.<sup>110</sup>

Even the dissenting judge did not disagree with this formulation. He merely thought that in most cases a review on the record would be (1) necessary and (2) sufficient to dispose of the finality issue.<sup>111</sup>

Subsequently, the question was presented to the courts of appeals in various circuits, with divergent results.<sup>112</sup> The Supreme Court brought the debate to an end in the important case of *United States v. Carlo Bianchi Co.*<sup>113</sup> In a 7-2 decision the Court held that, apart from questions of fraud, determination of the finality to be

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108. 145 F. Supp. 952 (Ct. Cl. 1956).

109. *Id.* at 642.

110. *Id.* at 645.

111. *Id.* at 650.

112. Compare *Allied Paint & Color Works v. United States*, 309 F.2d 133 (2d Cir. 1962) and *Wells & Wells, Inc. v. United States*, 269 F.2d 412 (8th Cir. 1959) with *Lowell O. West Lumber Sales v. United States*, 270 F.2d 12 (9th Cir. 1959).

113. 373 U.S. 709 (1963).

attached to a departmental disputes decision under the Wunderlich Act must rest solely on consideration of the record before the department, and no new evidence might be received or considered.

With the correctness of this ruling we are not now concerned. The important point is that it was the decisive step in transforming for all practical purposes any Tucker Act proceeding which involves a disputes decision into an appeal (although an appeal within the relatively narrow bounds of the Wunderlich Act). But the legal theory of a suit *de novo* in a court of original jurisdiction was not repudiated. Mr. Justice Harlan, writing for the majority, agreed that ordinarily the function of the court in such a suit was to receive evidence and make findings on disputed facts. But to follow this procedure where a disputes decision was involved would cause delay and duplication and, more importantly, would frustrate the congressional purpose to force the agencies to provide a full and fair administrative hearing and to compel both sides to present all their evidence at such hearing without the privilege of withholding some of it for a subsequent judicial proceeding. The dissenting opinion by Mr. Justice Douglas focused on the "subnormal administrative procedures"<sup>114</sup> of some boards of contract appeals and their occasional practice (as had been alleged in the *Bianchi* case itself) of relying on *ex parte* hearsay outside the record. Mr. Justice Douglas did not discuss the theoretical question whether an "appeal" or a suit *de novo* was involved. But it is hard to disagree with one commentator, who said:

*Bianchi* was a case with a theory. The contract boards were to be shoehorned into the model of independent administrative agencies—even though they were not subject to the APA and had procedural shortcomings. The Court of Claims was to be flattened from a split level government contracts court which took *de novo* evidence to a somewhat artificial court of appeals largely reviewing on the record.<sup>115</sup>

The *Bianchi* case provoked considerable discussion at the time, and there were proposals for congressional overruling.<sup>116</sup> But noth-

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114. *Id.* at 721.

115. Note, *Government Contracts Disputes: An Institutional Approach*, 73 *YALE L.J.* 1408, 1441 (1964).

116. See, e.g., Madden, *Bianchi's Ghost*, 16 *AD. L. REV.* 22 (1963); Spector, *Is It "Bianchi's Ghost"—Or "Much Ado About Nothing"?*, 22 *LAW & CONTEMP. PROB.* 87 (1964). Judge Madden had written the initial opinion of the Court of Claims in *Carlo Bianchi & Co. v. United States*, 169 *F. Supp.* 514 (Ct. Cl. 1959), which was eventually reversed by the Supreme Court, 373 *U.S.* 709 (1963), but he had retired

ing came of these and, while the debate lingers on,<sup>117</sup> the rule of the case has come to be accepted by government procurement specialists.

The trend set in motion by the *Bianchi* case was confirmed by a trilogy of cases decided by the Supreme Court in 1966 and 1967. Again, we are not concerned with the merits of the decisions in these cases, but only with their relation to the question of the real nature of "judicial review" of a disputes decision.

In *United States v. Anthony Grace & Sons, Inc.*,<sup>118</sup> the Court held unanimously that, where a board of contract appeals had improperly dismissed an appeal from a disputes decision by a contracting officer for lack of timely filing, the Court of Claims could not hear the claim *de novo* but had to send it back to the board for a hearing on the merits and a final disputes decision. In other words, when the disputes procedure is applicable, it must be followed, and there can be no circumventing it by granting a trial *de novo*, even in the interest of saving time.

*United States v. Utah Construction & Mining Co.*<sup>119</sup> was more complicated. Here three claims were involved, two involving a disputes decision, at least in part, and the third, a "pure" breach of contract claim as to which the board of contract appeals had disclaimed jurisdiction.<sup>120</sup> Underlying the first two claims were certain questions of fact on which the board had made findings, although it was able to grant only partial relief. The Supreme Court held unanimously: *first*, that only the claims, or aspects thereof, which were covered by the disputes clause of the contract (or by other contract clauses specifically incorporating the disputes clause) could be decided with finality by a board of contract appeals; *secondly*, that claims not so covered, as well as those aspects of other claims

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from the Court when he gave the address on which this article was based. Louis Spector was the Chairman of the Armed Services Board of Contract Appeals.

117. It is interesting that, although in 1964, Mr. Spector defended the *Bianchi* decision against Judge Madden's criticisms and concluded that no legislation was necessary, Spector, *supra* note 116, in 1971, when he had become a Commissioner of the Court of Claims, he thought that restoration of the procedure which had existed in the Court of Claims prior to *Bianchi* might be a good idea, Spector, *Public Contract Claims Procedures—A Perspective*, 30 FED. B.J. 1, 11 (1971). Legislation to this effect was introduced by Chairman Celler of the House Judiciary Committee in 1964, H.R. 10765, 88th Cong., 2d Sess. (1964) and again in 1972, H.R. 14726, 92d Cong., 2d Sess. (1972).

118. 384 U.S. 424 (1966).

119. 384 U.S. 394 (1966).

120. It had also held that the claim was untimely. *Id.* at 403.

as to which the board could not grant relief (in this case delay damages as opposed to extensions of time), were open to a suit in the Court of Claims; and *thirdly*, in such a suit the Court of Claims could not reconsider any findings of fact properly made by the board in support of the decisions which it did have power to make. In other words, a finding of fact, made by the board as a necessary incident to its decision on a disputes claim, was binding on the Court of Claims in its consideration of a related claim not governed by the disputes clause. Stated otherwise, such a fact could not be found one way by the board and another way by the Court, even though the two were deciding separate claims, one subject to the disputes procedure, and the other not. The Court called this an illustration of the general principle of collateral estoppel.<sup>121</sup>

The third case to be mentioned is *Crown Coat Front Co. v. United States*.<sup>122</sup> The Supreme Court, resolving a conflict among the circuits and the Courts of Claims,<sup>123</sup> held, again unanimously, that in a Tucker Act case the six-year statute of limitations<sup>124</sup> did not begin to run until conclusion of the proceedings, if any, taken under the disputes clause. In view of the rule that the contractor must always "exhaust his remedies" under the disputes clause,<sup>125</sup> the fact that he frequently cannot be sure whether a given claim is recognizable under the disputes clause or is a "pure" breach of contract claim, the fact that both types of claims will arise under the same contract at about the same time, and the collateral estoppel rule laid down in *Utah Construction*, this seems to be the only fair result. But it is hardly consistent with the theory that a Tucker Act proceeding is a suit de novo for breach of contract on which the statute, under all orthodox principles, begins to run from the date of breach, and with the fact that there is no statutory provision for its tolling by the pendency of a disputes proceeding. From the standpoint of pure logic, it is hard to refute the reasoning of the Second Circuit in this respect.<sup>126</sup> But the theory of the Supreme Court was that, by the disputes clause, the contractor had "agreed in effect to

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121. 384 U.S. at 421.

122. 386 U.S. 503 (1967).

123. *Crown Coat Front Co. v. United States*, 363 F.2d 407 (2d Cir. 1966) (5-4 decision); *Nager Elec. Co. v. United States*, 368 F.2d 847 (Ct. Cl. 1966); *Northern Metal Co. v. United States*, 350 F.2d 833 (3d Cir. 1965).

124. 28 U.S.C. § 2401(a) (1970).

125. *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234 (1946).

126. *Crown Coat Front Co. v. United States*, 363 F.2d 407 (2d Cir. 1966), *rev'd and rem'd*, 386 U.S. 503 (1967).

convert what otherwise might be claims for breach of contract into claims for equitable adjustment"<sup>127</sup> subject to the disputes procedure. If he does subsequently take his case to court, "[t]he court performs principally a reviewing function,"<sup>128</sup> focusing on "the validity of the administrative action."<sup>129</sup> Not until the disputes decision is made, does the contractor's right to bring a civil action in the courts mature.

I submit that the ultimate result of the *Bianchi* case, reinforced by the *Grace, Utah Construction*, and *Crown Coat* cases, has been to transform what was originally conceived as a suit de novo for breach of contract into an appeal, admittedly one of limited scope, but an appeal nevertheless. But even if this conclusion is accepted, what is there in it to explain the *S & E* decision? Why cannot such an appeal be mutual? If the contractor can appeal, why not the Government?

This question brings us to the heart of the majority opinion. For who is to take such an appeal on behalf of the Government? Not the contracting agency, because it is the very agency which made the decision, either directly, as in the *S & E* case, or more commonly, through a board of contract appeals, expressly designated in the governing regulations as the "authorized representative" of the head of the agency, with power to act finally in his name and stead.<sup>130</sup> Under the current disputes procedure, the agency head cannot reverse the decision of the board,<sup>131</sup> why should he be allowed to "appeal" it?

As a practical matter, this leaves only two officials who could force, or "take," an appeal, the Comptroller General and the Attorney General. Without getting into the vexed questions of the powers of these agencies (to be discussed later), or the metaphysical question of the One and the Many (the Government as "Hydra"), the question really becomes one of standing to appeal: Does the

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127. 386 U.S. at 511.

128. *Id.* at 513.

129. *Id.*

130. See 32 C.F.R. § 30.1 (1972); 41 C.F.R. § 5-60.101(a) (1972).

131. 32 C.F.R. § 30.1, para. 1 (1972); 41 C.F.R. § 5-60.101(a) (1972). Certain exceptions are made to cover cases where, under older versions of the dispute clause, the agency head can reject or accept the recommendation of the board and cases where the agency head directs the board to render him only an advisory opinion. But such cases are now rare and, when they do arise, there is no final decision until the agency head himself makes it, in which event the case against appeal by the agency is even stronger.

Government, or any part of it, have standing to appeal a disputes decision in favor of a contractor? This was clearly perceived by Judge Skelton, dissenting in the Court of Claims.<sup>132</sup> In fact, Judge Skelton went further and denied that there was any *controversy* between the Government and the contractor in the case, let alone an "appeal," and argued that therefore there was no question before the court to be decided.<sup>133</sup> The AEC had never repudiated its decision. The GAO was not a party to the contract or to the suit: it was guilty of "unjustified and completely unauthorized interference."<sup>134</sup> And the Attorney General, by his own admission in prior rulings, "has no authority to review or overturn decisions of other executive agencies upon questions of fact, of mixed fact and law, policy, discretion, expediency or other matters peculiarly within the jurisdiction of such agencies."<sup>135</sup> He is the Government's lawyer, no more, no less. In short, to allow an agency to appeal from its own decision would be "to sanction an absurd and ridiculous proceeding";<sup>136</sup> the Comptroller General is a stranger to the proceeding; and the Attorney General has no authority to take an appeal which the executive agency itself is "without power to engage in."<sup>137</sup> Neither Mr. Justice Douglas' opinion for the Court nor the concurring opinion by Mr. Justice Blackmun add very much to this admirable summation of what is really at issue, although they do sweep aside the possible exceptions that Judge Skelton was willing to concede might exist to his approach.

Of course the situation would be very different if the disputes decision were made by a tribunal completely independent of the contracting agency, as the Tax Court is independent of the Treasury Department. Judge Nichols, writing the majority opinion for the Court of Claims, went to great length to assert the *de facto* independence of the boards of contract appeals:

We think the Wunderlich Act and the Supreme Court decisions interpreting it, in attributing finality to the extent they do to decisions of these Boards, necessarily imply an expectation that the Boards . . . will enjoy a degree of independence approaching and comparable to that of the various independent quasi-judicial and regulatory boards and commissions which, too, can make binding

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132. 433 F.2d at 1381.

133. *Id.* at 1381-82.

134. *Id.* at 1382.

135. *Id.* at 1388.

136. *Id.* at 1390.

137. *Id.*

fact findings. . . . Having achieved this, it would be inconsistent and unfair for the law to turn around and pretend that the Board and the Secretary were the same.<sup>138</sup>

One can concede the impartiality and de facto independence of the various boards of contract appeals. It remains true that they are not *legally* independent of their respective agencies, which appoint them, pay them, furnish them staff and facilities, and so on.<sup>139</sup> Until this changes, and the boards become independent tribunals in their own right, it is difficult to see how the agency head can dissociate himself from one of their decisions by "appealing" it. And of course in the *S & E* case itself, as Judge Nichols admitted, there was no board at all; the decision was made by the AEC itself.

To summarize:

1. Under the traditional view, embodied in the statutes and nowhere expressly repudiated, that an action under the Tucker Act is a suit de novo, to which the finality of a disputes decision is only a plea in bar, there is really no answer to Mr. Justice Brennan's argument that the question of finality is litigable, within the confines of the Wunderlich Act, by either party, by whatever procedural device the issue is brought before the court;

2. Under a more realistic view, that what is really involved is an appeal from a disputes decision, there is no satisfactory answer to Judge Skelton's argument, adopted in substance if not expressly by a majority of the Supreme Court, that under existing procedures there is no agency or official in the Government with standing to prosecute an appeal from a disputes decision adverse to the Government.

As stated above, I do not propose to try to resolve this dilemma. Rather, I prefer to discuss what, if any, legislative change is now indicated. Before doing so, however, I would like to discuss briefly a few of the other problems raised or touched on in the majority, concurring, and dissenting opinions.

*"The Curious Role of the Comptroller General."*<sup>140</sup>

The action which the Comptroller General took in the *S & E Contractors* case was based initially on a statute which reads:

138. *Id.* at 1379-80.

139. An exception must be made for those agencies which do little contracting and refer the few contract disputes that they have to one of the major boards. But this hardly changes the overall picture.

140. The phrase is used in Schultz, *supra* note 103, at 132.

The liability of certifying officers or employees shall be enforced in the same manner and to the same extent as now provided by law with respect to enforcement of the liability of disbursing and other accountable officers; and they shall have the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification.<sup>141</sup>

But he went on to consider not merely the specific voucher presented to him, which involved only a small part of the contractor's claim, but also the entire decision of the AEC. He based his authority to do this on section 305 of the Budget and Accounting Act of 1921, which reads:

All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting office.<sup>142</sup>

The Comptroller has always given this language a broad interpretation, arguing that it grants him the authority not only to "settle and adjust," but to allow or disallow payment of claims, and to recover (by way of offset) claims which may have been improperly paid.<sup>143</sup> He concedes, of course, the power of the courts to adjudicate claims properly brought before them and of the Attorney General to compromise and settle claims in the course of litigation. But otherwise, he has asserted final authority over claims handled by the executive branch, including contract claims. If the claim was based on a disputes decision, he would recognize the finality of that decision, but only within the confines of the Wunderlich Act.<sup>144</sup>

The Comptroller General was able to exercise this extraordinary power because, whereas in all other matters the contracting officer reigns supreme over his contract (subject only to an appeal under the disputes clause) and takes orders from no one, he has no authority to make payments to the contractor. All he can do is forward a contractor's vouchers to a certifying officer for certification, who in turn forwards them to a disbursing officer for payment. Each of the latter, no matter how low down on the totem pole, has

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141. Disbursing and Certifying Officers Act of 1941, 31 U.S.C. § 82d (1970).

142. 31 U.S.C. § 71 (1970).

143. Jurisdiction of the General Accounting Office—Damages, Contracts, 4 COMP. GEN. 404, 405 (1924).

144. S & E Contractors, Inc., 46 COMP. GEN. 441, 459 (1966).

a direct line to the Comptroller General and can ask him whether a particular voucher may properly be certified for payment, and the Comptroller will render a decision in the matter.<sup>145</sup> The certifying or disbursing officer does this for his own protection because, if he approves or makes an improper payment, the Comptroller General can surcharge his accounts and hold him personally liable.<sup>146</sup>

Critics of the Comptroller General, who are legion,<sup>147</sup> argue that the statutory language "settle and adjust" is much too vague and general to confer the power to *disallow* claims already decided by a contracting agency, that at most they grant the ordinary power of an accountant and auditor who, while he may question the propriety of certain claims, and report accordingly, must leave the decision thereon to management.<sup>148</sup>

This controversy has never been finally resolved by the Supreme Court as a matter of general principle. But in the *S & E* case, the Court quite clearly ruled that, once a disputes decision has been made within the contracting agency, the Comptroller General has no further power to question it, even if it fails to meet the standards for finality of the Wunderlich Act.

It was argued to the Court that the Comptroller General had not claimed any power to "review" the AEC decision, but only "to force the contractor to bring suit and thus to obtain judicial review for the Government."<sup>149</sup> Technically, this may be correct, but it is a matter of semantics. In fact, as Mr. Justice Douglas observed, the Comptroller General "conducted a 33-month de novo review of the AEC proceedings."<sup>150</sup> In the course thereof, he obtained the complete record of the appeal proceedings before the AEC (except for

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145. See note 126 *supra* and accompanying text.

146. 31 U.S.C. § 82c (1970).

147. "A policeman's lot is not a happy one," and the Comptroller General has never had a good press in procurement circles. Contractors do not like it when he disallows their claims (although of course they welcome his intervention when he rules in their favor), and the contracting agencies do not like to be second-guessed by an "outsider." For overall, more balanced views, see Birnbaum, *Government Contracts: The Role of the Comptroller General*, 42 A.B.A.J. 433 (1956); Cibinic & Lasken, *supra* note 82; Welch, *The General Accounting Office in Government Procurement*, 14 FED. B.J. 321 (1954). Specifically, on the Comptroller's settlement powers, see Cibinic & Lasken, *supra*, at 351-52, 362-66; Note, *The Comptroller General of the United States: The Broad Power to Settle and Adjust All Claims and Accounts*, 70 HARV. L. REV. 350 (1956).

148. See, e.g., Note, *supra* note 147, at 364-65.

149. 406 U.S. at 12.

150. *Id.*

certain exhibits) and "reviewed the entire record, not only with respect to the particular items involved in the voucher submitted but also with respect to all of the claims considered."<sup>151</sup> He obtained comprehensive briefs from the attorneys for each side, held several conferences with these attorneys, and, finally, wrote a decision of 102 printed pages. If this is not "judicial review," it is certainly "review"; in fact, this is the term the Comptroller himself used.<sup>152</sup>

The answer of the dissent is that "GAO's view of the disputes decision, however, was of no consequence in court,"<sup>153</sup> and that "neither GAO nor the Department of Justice can take a favorable decision away from the contractor. Only a *court* can do that."<sup>154</sup> But the dissent could not, and did not, deny that the GAO review had taken place and that it was a precipitating factor in bringing about the law suit.

Again, it is not the purpose of this article to pass on the respective merits of the two positions as to the powers of the Comptroller General (if indeed it can be said that the dissent took any position at all on the matter). What is suggested is that, whether or not the result in the *S & E* case is to be changed by legislation, there should at least be a comprehensive overhaul of the Budget and Accounting Act, now over 50 years old, and of the statutory provisions on the duties of disbursing and certifying officers and their relationship to the Comptroller General, now over 30 years old.

#### *The Even More Curious Role of the Attorney General*

In an opinion to the Secretary of the Air Force dated January 16, 1969,<sup>155</sup> which was given in a different case, the then Attorney General, Ramsey Clark, took the position that the Comptroller General had no authority to disapprove a disputes decision (this one happened to be in favor of the Government) even on a question of law, and to request that the claim be remanded to the ASBCA for further proceedings in accordance with his opinion.<sup>156</sup> He conceded, however, the authority of the Comptroller to block payment under a disputes decision in favor of a contractor by disallowing

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151. 46 COMP. GEN. 441, 451 (1966).

152. *Id.*

153. 406 U.S. at 25.

154. *Id.* at 66-67.

155. 42 OP. ATT'Y GEN. NO. 33, 13 CCH CONT. CAS. FED. ¶ 82,490 (Jan. 16, 1969).

156. 13 CCH CONT. CAS. FED. ¶ 82,490, at 88,000.

the item while performing his auditing function, or by giving an advance opinion to a disbursing or certifying officer against allowability, thus forcing the contractor to sue, citing the Comptroller's decision in the *S & E* case.<sup>157</sup> But, he added, this was not the only avenue of relief open to the Government. The contracting agency on its own initiative could obtain judicial review of such a decision, through the Department of Justice, by calling to that Department's attention, "on a continuing basis, appeals board decisions against the Government which they feel warrant litigation in accordance with the Wunderlich Act."<sup>158</sup> The Department of Justice would then, "as the attorneys for the Government," "make an independent appraisal as to whether the suit can properly be litigated under the Wunderlich Act."<sup>159</sup> He justified his proposed procedure as "part of the Executive responsibility for administering and enforcing Government contracts."<sup>160</sup> Admittedly, he said, "not all the procedural possibilities for accomplishing this result have been the subject of definitive judicial pronouncements. . . ."<sup>161</sup>

In a footnote he distinguished the "separate functions of adjudication and advocacy" within the contracting agency, the former belonging to the board of contract appeals and the latter to "other organs of the agency," whether representing the agency before the board or deciding to seek review.<sup>162</sup> (This seems to be an obvious attempt to forestall the objection that the agency would be repudiating its own decision.)

It is not known whether any agencies took advantage of this generous invitation. The proposed procedure was not directly before the Court in the *S & E* case, but the Court's opinion effectively disposes of it in two steps:

1. The disputes decision is the decision of the agency, in fact of the Government as a whole, and may not subsequently be repudiated by any government agency (except of course a court), even for the purpose of obtaining judicial review.

2. The Attorney General's duty is to "conduct" and "supervise"<sup>163</sup> litigation to which the United States is a party. There is

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157. 46 COMP. GEN. 441 (1966).

158. 13 CCH CONT. CAS. FED. ¶ 82,490, at 88,003-04.

159. *Id.* ¶ 82,490, at 88,004.

160. *Id.* ¶ 82,490, at 88,003.

161. *Id.*

162. *Id.*

163. 406 U.S. at 12, citing 28 U.S.C. §§ 516, 519 (1970).

nothing in the statutes which gives him the right to "appeal"<sup>164</sup> from a disputes decision made by a contracting agency. "Normally, where the responsibility for rendering a decision is vested in a coordinate branch of Government, the duty of the Department of Justice is to implement that decision and not to repudiate it."<sup>165</sup>

Judge Skelton, dissenting in the Court of Claims,<sup>166</sup> used even stronger language. Citing numerous precedents, including prior statements of the Attorneys General themselves, and an Executive Order<sup>167</sup> which gave the Department of Justice broad powers to handle cases in court for governmental agencies, he said he could find nothing which gave the Attorney General "any review or revisory power over decisions made by other agencies on matters peculiarly within their jurisdictions."<sup>168</sup>

I submit that these views (even though that of Mr. Justice Douglas is qualified by the word "normally") are too narrow. The Attorney General is more than a mere "mouthpiece" for the executive agencies. He is a member of the Cabinet and the chief legal adviser to the President, with important responsibilities in his own right: to name only two, enforcement of criminal and antitrust laws. Should he not have the power, somehow, to challenge in court a decision of an executive agency which in his opinion raises a serious question of law?

The Government's brief in the *S & E* case, prepared of course by or under the supervision of the Solicitor General, argues against a narrow reading of the authority of the Attorney General:

The statutes do not subject [his] authority . . . to the ultimate control of the agency whose decision may be the cause of the litigation. Thus, unlike attorneys representing private clients, the Attorney General cannot be replaced by his "client," for failure to follow instructions, but has the full responsibility to determine and defend the government's interest.<sup>169</sup>

Nevertheless, within the framework of the disputes procedure, there remain serious practical problems and questions of standing, of the kind discussed above, which make it difficult for the Attorney

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164. 406 U.S. at 12.

165. *Id.* at 13.

166. 433 F.2d at 1381.

167. Exec. Order No. 6166, 5 U.S.C. § 901 (1970).

168. 433 F.2d at 1390.

169. Brief for United States at 33, *S & E Contractors, Inc. v. United States*, 406 U.S. 1 (1972).

General to assert the authority he has claimed, and Ramsey Clark's opinion of January 16, 1969, does not really offer any clearcut solution. Of course the point is now academic under the *S & E* decision. But, whether or not *S & E* is to be overruled by Congress, and apart from the context of the disputes procedure, the overall question of the authority and responsibility of the Attorney General in conducting government litigation is too important to remain in the unsatisfactory state where the opinion of the Supreme Court leaves it. Again, legislative action seems called for. At the very least, the Attorney General should be able to litigate important questions of law on behalf of the Government, whatever the wishes of the "client" agency.

It is interesting that, while Attorney General Ramsey Clark was prepared to concede the power of the Comptroller General to take the action he had in the *S & E* case, Solicitor General Griswold refused to take a position on the point, advancing the argument, which was accepted by Mr. Justice Brennan, that the question was not involved in the case once the matter came before the Court.<sup>170</sup> Instead, he allowed the Comptroller General to set forth his own views in a ten page appendix to the Government's brief.<sup>171</sup>

To petitioner's contention that the question of the Comptroller General's authority was crucial to the case, the Solicitor General answered that the action of the Comptroller was irrelevant; that what really "triggered" the law suit was the AEC's refusal to pay, and that this might have been occasioned by doubts as to the soundness of its own prior decision, after the GAO intervention, and a resolve to seek judicial review.<sup>172</sup> This appeal to the discredited doctrine of the "intervening cause"<sup>173</sup> is not very convincing. To use another formula from the murky cauldron of causation, we could say that, "but for"<sup>174</sup> the action of the Comptroller General, it is quite clear that the *S & E* case would never have come to court.

### *The Role of the Contracting Officer—"Curiouser and Curiouser!"*

The Wunderlich Act says nothing, as such, about the Contracting Officer, the person whose initial decision starts the whole disputes procedure into motion. Section 1 speaks only of a "decision

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170. *Id.* at 24-27.

171. *Id.* at 41-50.

172. *Id.* at 27-29.

173. See W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 44 (4th ed. 1971).

174. See *id.* § 41.

of the head of any department or agency or his duly authorized representative or board."<sup>175</sup> (Section 2, dealing with questions of law, speaks of the decision of "any administrative official."<sup>176</sup> This would of course include a Contracting Officer, but of this, more anon.)

If we turn to the standard disputes clause, however, we find a good deal about the Contracting Officer. He is to decide "any dispute concerning a question of fact arising under this contract which is not disposed of by agreement," and "reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor."<sup>177</sup> There is no requirement that he conduct a hearing, write an opinion, or indeed give any reasons at all for his decision, although of course he is not precluded from doing any of these things. The clause goes on to say that the "decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary."<sup>178</sup> No exception to this finality provision is made for fraud, capriciousness, arbitrariness, or lack of substantial evidence.

Clearly this provision binds the contractor under the doctrine of exhaustion of administrative remedies.<sup>179</sup> It has always been assumed that it binds the Government as well.<sup>180</sup> This would result in the anomaly, if the Government's position in *S & E* were sound, that, whereas a mere Contracting Officer's decision, made without any requirement of a hearing or formal justification, is binding in all events on the Government, the decision of the head of the agency, or his duly designated representative, is not. Judge Collins made much of this anomaly, dissenting in the Court of Claims: "While an agency will still be bound by the decisions of its contracting officers, it will not be bound by decisions made at the highest level."<sup>181</sup> In his concurring opinion in the Supreme Court, Mr. Justice Blackmun repeats this argument and quotes Judge Collins' observations.<sup>182</sup>

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175. 41 U.S.C. § 321 (1970).

176. *Id.* § 322.

177. 32 C.F.R. § 7.103-12 (1972); 41 C.F.R. § 1-7.101-12 (1972).

178. *Id.*

179. *See* *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234 (1946).

180. *See* *Shedd*, *supra* note 8, at 64.

181. 433 F.2d at 1398.

182. 406 U.S. at 21.

To the extent that the anomaly exists, it is inherent in the language of the disputes clause itself and in the silence of the Wunderlich Act on the matter and is really not very persuasive in construing quite different language relating to the *agency* decision which is found both in the clause and in the Act.<sup>183</sup> But if the anomaly persists, it is simply one more strange and curious aspect of the "Alice-in-Wunderlich"<sup>184</sup> world of the disputes procedure.

The Comptroller General's answer to the argument was that:

There is a fundamental distinction between the decision of a contracting officer and that of a Board of Contract Appeals. . . .

. . . .

. . . Boards function as independent tribunals, much like courts. Contracting officers, on the other hand, are expected to represent the government's interests. This distinction between a Board and a contracting officer is important. Boards of Contract Appeals should function as independent adjudicators of contract disputes, with both parties having equal rights to challenge their decisions.<sup>185</sup>

This argument is repeated in a footnote to the main portion of the Government's brief,<sup>186</sup> but obviously it did not persuade Mr. Justice Blackmun, whatever else may be said for it.

### *Questions of Law*

Even before the Wunderlich Act, the Court of Claims had consistently held that a disputes decision would not be accorded finality on "questions of law."<sup>187</sup> Most disputes clauses limited finality to questions of fact, but sometimes an "all-disputes" clause, not so limited, was used. The validity of such a clause was upheld by the Supreme Court in *United States v. Moorman*,<sup>188</sup> and boards of con-

183. This is pointed out by Mr. Justice Brennan. *Id.* at 26 n.1.

184. *Cf.* 18 CATH. U.L. REV. 544 (1969).

185. Brief for United States, *supra* note 169, at 49.

186. *Id.* at 29 n.15.

187. *Moorman v. United States*, 82 F. Supp. 1010 (Ct. Cl. 1949), *rev'd*, 338 U.S. 457 (1950); *Pfotzer v. United States*, 77 F. Supp. 390 (Ct. Cl.), *cert. denied*, 335 U.S. 885 (1948); *Callahan Constr. Co. v. United States*, 91 Ct. Cl. 538, 616 (1940). The law-fact dichotomy is as difficult to apply in this area as in any other, and no attempt is made here to explore its ramifications. See Birnbaum, *Questions of Law and Fact and the Jurisdiction of the Armed Services Board of Contract Appeals*, 19 FED. B.J. 120 (1959); Spector, "Law" Is Where You Find It, Or "Fact" Is in the Eye of the Beholder, 19 FED. B.J. 212 (1959); Note, *Judicial Review of Government Contracts Disputes—The Law-Fact Dichotomy*, 9 WM. & MARY L. REV. 857 (1968).

188. 338 U.S. 457 (1950). The strength of this case as a precedent is weak-

tract appeals regularly passed on questions of law (not necessarily with finality) in deciding questions of fact.

Section 2 of the Wunderlich Act expressly prohibits use of a disputes clause which purports to make "final on a question of law the decision of any administrative official, representative, or board."<sup>189</sup> Echoing this provision, the standard disputes clause, while it permits consideration of law questions, specifically provides that nothing in the contract "shall be construed as making final the decision of any administrative official, representative, or board on a question of law."<sup>190</sup>

One of the grounds on which the Comptroller General placed his ruling in the *S & E* case was that it contained "serious errors of law."<sup>191</sup> When suit was brought in court, one of the defenses raised by the Department of Justice was that the decision was "erroneous as a matter of law."<sup>192</sup>

Although the point thus seems to have been squarely presented, neither the opinion of the Court nor the concurring opinion says a single word about it beyond reciting the bare fact of the pleadings. While this seems astonishing, it may be due in part to the fact that the Government's brief itself relegated the matter to a footnote at the very end.<sup>193</sup> Be that as it may, Mr. Justice Brennan aptly observed in his dissent:

Finally, the Act flatly prohibits disputes clauses that make disputes decisions final on questions of law. The clause before us, following the Act, expressly provided that the Commission's disputes decisions could not be final on questions of law. Yet, in the face of the Act and the disputes clause, the Court holds that the Commission's decision is final on questions of law.<sup>194</sup>

It is hard to answer this. The implication of the Court's decision on this point, so far as the Government is concerned, is either that—

1. section 2 of the Wunderlich Act does not mean what it says; or

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ened, however, by uncertainty whether the dispute really involved a question of law or a question of fact—an uncertainty which the Court did not resolve.

189. See note 176 *supra* and accompanying text.

190. See note 177 *supra* and accompanying text.

191. 46 COMP. GEN. at 463.

192. 406 U.S. at 3.

193. Brief for United States, *supra* note 169, at 40 n.21.

194. 406 U.S. at 30-31.

2. it means what it says, but is illusory.

The former is untenable, the latter unsatisfactory.

### *The Problem of Fraud*

As the Court noted, the issue of fraud was not before it. But the Douglas opinion discusses the matter at some length:

A contractor's fraud is of course a wholly different genus. . . . Even where the contractor has obtained a judgment and the time for review of it has expired, fraud on an administrative agency or on the court enforcing the agency action is ground for setting aside the judgment.<sup>195</sup>

He proceeded to list a series of judge-made rules and statutes, other than the Wunderlich Act, which he concluded afforded the Government adequate protection.<sup>196</sup>

All this is true but, as Mr. Justice Brennan points out,<sup>197</sup> it is beside the point. The fraud which the Wunderlich Act speaks of is not the contractor's fraud, but fraud committed by the contracting agency, specifically by the board or other representative making the disputes decision. As against this kind of fraud, the *S & E* decision gives the Government no more recourse than in the case of questions of law, despite the plain language of the statute that a disputes decision is not final where it is fraudulent. In particular, Mr. Justice Brennan notes:

Today's decision produces the absurd result that when the Government agreed to a disputes clause with no provision for judicial review [referring to the pre-Wunderlich clause], it could nevertheless challenge the finality of a disputes decision at least for fraud, but now that the Government has agreed to a disputes clause specifying five grounds of judicial review, including fraud, it is entitled, holds the Court, to none at all. The Government's position is thus worse than it was before the Act, for it is deprived of even the limited review for fraud to which it was entitled under Wunderlich.<sup>198</sup>

As a practical matter, though, fraud by a board of contract appeals is extremely rare, virtually non-existent. If it ever does occur, in a decision against the Government, it would nearly always be accompanied by collusion with the contractor, who would be equally

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195. *Id.* at 15.

196. *Id.* at 15-17.

197. *Id.* at 30 n.4.

198. *Id.* at 30.

tainted with the fraud. In such a case, Mr. Justice Douglas's remedies would be applicable, and perhaps that was what he had in mind. But it does seem a backhanded way of approaching a problem on which the Wunderlich Act speaks very plainly.

Moreover, while it might be possible to conjure up a case in which a board of contract appeals was guilty of fraud (or its near relative, bad faith) without the collusion of the contractor, it is probable that in any such case the Government could set aside any award to the contractor on a theory of mistake or unjust enrichment.<sup>199</sup> So, while Mr. Justice Brennan's criticism seems well-taken, its practical import is not great, if indeed it has any practical significance at all.

#### IS AMENDATORY LEGISLATION NECESSARY?

In the preceding sections dealing with the roles of the Comptroller General and of the Attorney General, it was suggested that clarifying legislation would seem to be in order to define their authority and responsibility more precisely after the uncertainties created by the *S & E* decision (uncertainties which admittedly existed even before that decision). But is broader legislation desirable; specifically, a statute overruling the *S & E* case itself?

Before addressing ourselves to this question, we should dispose of one bugbear, namely the horrendous consequences of the *S & E* decision predicted by Mr. Justice Brennan. The Court's decision, he says, "might mean the loss of more than one million dollars to American taxpayers. But at stake are countless millions."<sup>200</sup> And again, "[T]he devastation today's decision wreaks upon Government procurement practices is sufficient justification [for the length of his opinion], and Congress should be alert to the urgent need for immediate remedial legislation."<sup>201</sup>

Both statements are exaggerations. It is true that over a million dollars was involved in the *S & E* case. This is a large sum indeed, but it is still a minuscule percentage of an annual federal budget of over \$250 billion. Moreover, there is no assurance that a contrary decision by the Court would have netted a million dollars for the

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199. *Cf. United States v. Wurts*, 303 U.S. 414, 415 (1938); *Wisconsin Cent. R.R. v. United States*, 164 U.S. 190 (1896); *J.W. Bateson Co. v. United States*, 308 F.2d 510 (5th Cir. 1962).

200. 406 U.S. at 60.

201. *Id.* at 31.

taxpayers. The case had yet to be tried on the merits. A trial might have gone either way or have resulted in an intermediate sum being found due. Weighing against this uncertainty was the unconscionable delay and great hardship caused to the contractor. As for the countless other millions at stake and the "devastation" wrought upon government procurement practices, these charges are simply not true. By the Solicitor General's own admission,<sup>202</sup> the number of cases in which the Government has sought judicial review of a disputes decision has been very few, with no evidence of an impending increase.

In short, the practical result of the *S & E* decision will not be very great. If legislative change is to be justified, it must be on broader grounds. I submit that the problem can only be considered sensibly as part of the more general question whether legislative overhaul of the entire disputes procedure is in order. As to this, there are as many views as there are commentators. But broadly speaking, the different suggestions can be grouped under four general headings.

#### *Retention in Substance of the Present Procedure*

On the whole, the disputes procedure has worked well. A study made in 1958 showed that only one contract transaction out of 10,000 resulted in an appeal to a board of contract appeals.<sup>203</sup> The average time for disposing of such an appeal in the ASBCA has in recent years been about 11 months,<sup>204</sup> and over 95 per cent of these are disposed of without further court action.<sup>205</sup>

And so it is not surprising that the most comprehensive study of the disputes procedure which has been undertaken, that conducted by Professor Harold C. Petrowitz for the Select Committee on Small Business of the United States Senate,<sup>206</sup> should have concluded that no major legislative reform was necessary, although it did recommend a number of procedural reforms, which could be accomplished administratively.

It is submitted that, if this is to be the approach, it would be

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202. Brief for United States, *supra* note 169, at 37-39.

203. DISTRICT OF COLUMBIA BAR ASS'N, REPORT OF THE COMM. ON PUBLIC CONTRACTS, *cited in* Shedd, *supra* note 8, at 41.

204. Shedd, *supra* note 8, at 41.

205. *Id.*

206. See S. Doc. No. 99, 89th Cong., 2d Sess. (1966).

unwise, as well as unnecessary, to attempt legislative repeal of the *S & E* result. The problem is simply not that important, and the difficulties of engrafting an "appeal" by the Government on the existing procedures are too great to warrant it. It is more than likely that such legislation would create as many problems as it would solve.

### *The "All Disputes" Approach*

Probably the greatest difficulty with the present system is the "fragmentation of remedies" problem.<sup>207</sup> Disputes as to "facts" go the board of contract appeals route; claims for "breach" go to the courts. But it is often very difficult for the contractor to know which he has; often he has both, intertwined in the same group of claims. His only safe course is to pursue both remedies. If the appeals board lacks jurisdiction, or thinks it does, it will dismiss the appeal. Meanwhile, the Court of Claims will stay its proceedings until conclusion of the proceedings before the appeals board. But this is cumbersome. Although the statute of limitations problem has been resolved by the *Crown Coat*<sup>208</sup> case, much confusion, uncertainty, and delay remain.

A solution, given tacit approval by the Supreme Court in the *Utah Construction*<sup>209</sup> case, is to move to an "all-disputes" procedure—that is, revise the disputes clause and other contract clauses to provide that all disputes and claims, of whatever nature, be taken first to a board of contract appeals. If the contractor were satisfied with the result, the matter would stop there. If he wished to pursue a further "appeal" to the courts, he might do so within the limits of the Wunderlich Act.

This change could be accomplished administratively without legislative action. It has the merit of apparent simplicity, and some commentators have urged it vigorously.<sup>210</sup> Others, including the

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207. Cf. Shedd, *Fragmentation of Remedies—The "All Disputes" Solution*, 28 FED. B.J. 185 (1968).

208. See notes 122-29 *supra* and accompanying text.

209. See notes 119-21 *supra* and accompanying text.

210. Lane, *Administrative Resolution of Government Breaches—The Case for an All-Breach Clause*, 28 FED. B.J. 199 (1968); Moss, *Judicial Review of Federal Contract Appeals Decisions Today—The Necessity For an All Disputes Procedure*, 3 PUB. CONT. L.J. 80 (1970); Sachter, *Resolution of Disputes Under United States Government Contracts: Problems and Proposals*, 2 PUB. CONT. L.J. 363 (1969); Shedd, *supra* note 207.

former Chairman of the ASBCA, see many difficulties.<sup>211</sup> One which occurs to me is that the position of the Government would be greatly impaired in the case of breach of contract claims. At present, when a breach of contract case is heard in the courts, the Government gets a full hearing, with the same rights of review or appeal as the contractor. If the same case were to be decided by a board of contract appeals, while the Government would have a full hearing before the board, it would not be able to obtain judicial review in consequence of the *S & E* decision. The anomaly which now exists with respect to questions of law which arise in connection with factual disputes would be greatly compounded. If this proposal were adopted, therefore, it would appear to be necessary to give the Government the right to obtain judicial review, at the very least, of all breach of contract cases, if not of all questions of law. This would require legislation, and it is more than likely that the Department of Justice would urge that such legislation go further and cover all the exceptions of the Wunderlich Act. The advantages, if any, of the new procedure to the contractor would be offset, and he would lose some or all of the benefits of the *S & E* decision. The overall gain to the administrative process would be dubious.

#### *The Election-of-Remedies Proposal*

Another suggestion is to give the contractor an election, after an adverse decision by the contracting officer, to follow the board of contracts appeals route or to go directly to court for a complete trial of his whole case on the merits.<sup>212</sup> Insofar as the contractor might elect the judicial remedy, the proposal is just the reverse of the "all-disputes" clause approach: the court would have full jurisdiction over all claims, whether based on factual or legal disputes.

Adoption of this proposal would not seem to have any immediate impact on our problem. In those cases in which the contractor appealed to a board, the situation would be as it now is. Where he followed the judicial route, the same avenues of review or appeal would be available to both sides as now exist with respect to Tucker Act claims in the courts. In neither case would remedial legislation appear to be necessary.

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The "all-disputes" clause is beginning to make its appearance. See, e.g., *Patton Wrecking & Demolition Co. v. TVA*, 465 F.2d 1073 (5th Cir. 1972).

211. Spector, *supra* note 117. See also Speck, *Concerning an "All-Breach" Contract Disputes Clause*, 29 *FED. B.J.* 47 (1968).

212. Spector, *supra* note 117, at 11.

### *The Institutional Approach*

The fourth approach is to "judicialize" the whole disputes procedure.<sup>213</sup> In lieu of the present boards of contract appeals in the separate agencies, there would be established a government-wide Court of Contract Appeals, on the analogy of the United States Tax Court, which "would handle all government contract disputes cases, whether arising from contractors' claims against the government or from contractor appeals from government deficiency assessments."<sup>214</sup> Appeal would lie from this court to the United States Court of Appeals, as in the case of the Tax Court, and such an appeal could be taken by either side. A variant on this would be to interpose an impartial hearing officer between the contracting officer and the Court of Contract Appeals.<sup>215</sup> Under one version of this proposal, the new court would take *all* claims by government contractors, including breach of contract claims.<sup>216</sup> This would virtually eliminate Court of Claims jurisdiction over contract cases, unless indeed the Court of Claims itself became the Court of Contract Appeals.<sup>217</sup>

The proposal has a certain attractiveness from the standpoint of symmetry and order. It would assure greater independence to the appeals tribunal, would cure the "fragmentation of remedies" problem, would eliminate the *S & E* controversy, and would probably have other benefits as well. On the other hand, there are serious objections: the substitution of a new and untried court for both the present boards of appeal and the Court of Claims, with their accumulated expertise, the tremendous workload which would be thrust on the new court, and the undoubted delay and increased formality which are almost bound to accompany judicialization of an administrative process, to say nothing of the unforeseen problems which always arise when new legislation is enacted.<sup>218</sup>

### CONCLUSION

To those who have followed the evolution of the contract disputes procedure since the *Wunderlich* case, the result of the *S & E*

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213. Lidstone & Witte, *Administration of Government Contracts: Disputes and Claims Procedures*, 46 VA. L. REV. 252 (1960); Note, *supra* note 115.

214. Note, *supra* note 115, at 1451-52.

215. *Id.* at 1454-57.

216. *Id.* at 1458; Lidstone & Witte, *supra* note 213, at 294-95.

217. Note, *supra* note 115, at 1457.

218. Some of the objections are outlined by Frenzen, *Some Thoughts on the Similarity of the Boards of Contract Appeals and Commercial Arbitration*, 3 PUB.

*Contractors* case comes as no great surprise. It can be defended as consistent with the aims and purposes of the disputes procedure and with the way that procedure has actually developed in practice since the Wunderlich Act. It can be criticized as failing to give the Government its "day in court," especially on questions of law, and as inconsistent with precedent, with the theory of suits under the Tucker Act, and with the language of the Wunderlich Act.

Given the decision as a *fait accompli*, however, and given the present procedure without substantial change, amendatory legislation would seem to be unwise and unnecessary. But if there should be wide adoption of an "all-disputes" clause, the question will have to be reconsidered. And if a sweeping "judicialization" reform is adopted, the problem will solve itself.\*

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CONT. L.J. 56, 77-79 (1970); Spector, *supra* note 117; Spector, *Government Contract Disputes and Judicial Remedies—An Overview*, 2 NAT'L CONT. MANAGEMENT J. 7 (1968).

\* AUTHOR'S NOTE: Since completion of this article, my attention has been called to the Report of the Commission on Government Procurement, created in November 1969, to study and recommend to Congress methods "to promote the economy, efficiency, and effectiveness" of procurement by the executive branch of the Government. Act of Nov. 26, 1969, Pub. L. 91-129, 83 Stat. 269. The Commission's Report was published in December 1972. It concludes that "the present system for resolving contract disputes in connection with contract performance needs significant change if it is to provide effective justice." 4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, pt. G (1972). Although it would retain the basic structure of the present disputes procedure, the Commission has recommended, *inter alia*, adoption of an "all-disputes" clause, the election of remedies approach, and, most important in the present context, overruling of the *S & E* decision so as to "grant both the Government and contractors judicial review of adverse agency boards of contract appeals decisions" (Recommendation 7). Five of the twelve Commissioners dissented from the latter recommendation on the grounds that to grant the Government the right to judicial review "(1) would undermine the integrity of the disputes process, (2) would expose contractors to protracted reviews of disputes, and (3) is unneeded."

Unfortunately, time and space do not permit a more detailed discussion of the position of the Commission on this matter.