

# GOVERNMENT COUNTERCLAIMS AND JUDICIAL REVIEW OF ADMINISTRATIVE DETERMINATIONS IN GOVERNMENT CONTRACT DISPUTES

Those who enter into fixed-price supply contracts<sup>1</sup> with the federal government must accept a number of special contract terms. Among these terms is a disputes clause<sup>2</sup> requiring the contractor to forego initial resort to the courts<sup>3</sup> and to submit all disputes with the

---

## THE FOLLOWING CITATIONS WILL BE USED IN THIS NOTE:

Pasley, *The S & E Contractors Case—Beheading the Hydra or Wreaking Devastation?*, 1973 DUKE L.J. 1 [hereinafter cited as Pasley];

Spector, *Disputes Arising in Connection with Contract Performance—A Comment on the Report of the Commission on Government Procurement*, 33 FED. B.J. 160 (1974) [hereinafter cited as Spector].

1. See 32 C.F.R. § 7.103 (1974); 41 C.F.R. § 1-7.102 (1974).

2. The text of the standard disputes clause is as follows:

(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 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. The decision of the Secretary or his 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. 32 C.F.R. § 7.103-12 (1974); 41 C.F.R. § 1-7.102-12 (1974).

3. If it were not for the disputes clause, every failure by the government to comply with its contractual obligations would be a breach of contract which could form the basis of a court's original jurisdiction. *Morrison-Knudsen Co. v. United States*, 345 F.2d 833, 837 (Ct. Cl. 1965). Included in claims which "arise under" a disputes clause and are therefore subject to initial administrative determination are those claims asserted under other contract clauses which provide for equitable adjustments of price and time upon the occurrence of certain conditions. *Crown Coat Front Co. v. United States*, 386 U.S. 503, 505-06 (1967). One such clause is the standard changes clause, which empowers the government's contracting officer to order certain modifications in the supply contract with a consequent failure to agree upon the resulting adjustment in price or the performance schedule becoming a dispute concerning a question of fact within the scope of the disputes clause. For the typical format of a changes clause, see 32 C.F.R. § 7.103-2 (1974); 41 C.F.R. § 1-7.102-2 (1974). This clause is one of those required in all government supply contracts by 32 C.F.R. § 7.103 (1974) and 41 C.F.R. § 1-7.102 (1974), respectively.

government arising under the disputes clause to the government's arbitration machinery.<sup>4</sup> The disputes clause further provides that administrative determinations of fact are final unless a court of competent jurisdiction finds that certain limited standards of fairness have been violated.

In considering cases arising under the disputes clause, the courts have sometimes been presented with conflicting considerations of fairness and statutorily-prescribed finality.<sup>5</sup> The administrative procedure for resolving contract disputes is generally regarded by commentators as favoring the government at the expense of complete fairness to the contractor.<sup>6</sup> Nevertheless, courts are restricted from redressing this imbalance by the finality provisions of the Wunderlich Act,<sup>7</sup> which prescribe limited standards by which a court may review an administrative decision. In an attempt to make the contractor more equal with the government, the Supreme Court, in *S & E Contractors, Inc. v. United States*,<sup>8</sup> recently interpreted the finality policy of the Wunderlich Act as prohibiting even indirect judicial challenge by the government to any part of its own administrative determination.<sup>9</sup> The broad language of this decision can be read as making the contractor more than equal in court by preventing the government from challenging any part of the administrative decision even when a contractor initiates judicial review of a partially favorable administrative determination rendered under a disputes clause.<sup>10</sup> However, in the 1974 decision of *Roscoe-Ajax Construction Co. v. United States*,<sup>11</sup> the Court of Claims rejected such an interpretation of *S & E Contractors* and held that, in certain limited situations, the government has the right to assert a counterclaim when the contractor initiates judicial review of an administrative decision partially favorable to him.<sup>12</sup>

---

4. "[A]ny dispute concerning a question of fact arising under the contract shall be decided in the first instance by the contracting officer, with the right of 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." Pasley 2. See also Schultz, *Wunderlich Revisited: New Limits on Judicial Review of Administrative Determination of Government Contract Disputes*, 29 LAW & CONTEMP. PROB. 115, 115-16 (1964).

5. See Wunderlich Act, 41 U.S.C. §§ 321-22 (1970), the text of which is set forth in note 20 *infra*.

6. See note 67 *infra* and accompanying text.

7. 41 U.S.C. §§ 321-22 (1970).

8. 406 U.S. 1 (1972). For a more complete discussion of this case, see notes 31-40 *infra* and accompanying text.

9. *Id.* at 4, 13-14.

10. See *Dynallectron Corp. v. United States*, 199 Ct. Cl. 996 (1972), discussed at notes 41-43 *infra* and accompanying text.

11. 499 F.2d 639 (Ct. Cl. 1974). See notes 44-58 *infra* and accompanying text.

12. *Id.* at 646.

This Note will discuss and critically evaluate the conditions that the *Roscoe-Ajax* opinion laid down for permitting government counterclaims. The court's guidelines will be analyzed in terms of the often conflicting policies of finality of administrative decision-making and fairness to both the contractor and the government. Initially, the standards for judicial review of disputes clause determinations as they have developed over the years will be briefly set forth. Then the Supreme Court's interpretation of the present judicial review standard will be examined for its effect on the right of the government to challenge its own administrative disputes decision. Finally, recent decisions of the Court of Claims considering the right of the government to challenge any part of the administrative decision in a contractor-initiated judicial appeal will be discussed and critically evaluated.

#### DEVELOPMENT OF THE STANDARDS FOR REVIEW

Traditionally, the Supreme Court had taken a liberal view of the authority which the pre-Wunderlich Act disputes clause vested in administrative decision-makers to resolve questions falling within its purview.<sup>13</sup> Until the early 1950's, it could be stated as an "established

---

13. See Note, *Government Contracts: Court of Claims Circumvents Bianchi's Prohibition of De Novo Review by Narrow Interpretation of Disputes Clause*, 1965 DUKE L.J. 654, 656.

In its initial confrontation with a disputes clause, the Supreme Court in *Kihlberg v. United States*, 97 U.S. 398 (1878), upheld the validity of a provision vesting final authority in a government quartermaster to fix distances not clearly specified in the contract on the basis of which the private contractor was to be paid for his transportation costs. The Court then enunciated, albeit in dictum, the standard of judicial review which formed the basis for the decision of subsequent disputes cases in the federal courts: "[I]n the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive upon the appellant [contractor] as well as upon the government." *Id.* at 402. Several subsequent cases dealing with government contract disputes applied this standard of review to administrative determinations of fact. See, e.g., *Ripley v. United States*, 223 U.S. 695 (1912); *United States v. Gleason*, 175 U.S. 588 (1900); *Sweeney v. United States*, 109 U.S. 618 (1883); *Carroll v. United States*, 76 Ct. Cl. 103 (1932); *Penn Bridge Co. v. United States*, 59 Ct. Cl. 892 (1924). Later cases added a substantial evidence test. See, e.g., *Penner Installation Corp. v. United States*, 89 F. Supp. 545, 547 (Ct. Cl.), *aff'd per curiam by an equally divided court*, 340 U.S. 898 (1950); *Mitchell Canneries, Inc. v. United States*, 77 F. Supp. 498 (Ct. Cl. 1948); *Loftis v. United States*, 76 F. Supp. 816 (Ct. Cl. 1948); *Needles v. United States*, 101 Ct. Cl. 535, 607 (1944). Another line of authority, this one intermixed with private contract cases, reaffirmed the *Kihlberg* dictum that the disputes decision was equally binding upon both parties to the contract although the challenge in most cases, predictably, was by the private contractor. See, e.g., *United States v. Mason & Hanger Co.*, 260 U.S. 323, 326 (1922); *Sheffield & Birmingham Coal, Iron & Ry. Co. v. Gordon*, 151 U.S. 285 (1894); *Martinsburg & Potomac R. Co. v. March*, 114 U.S. 549, 554 (1885); *Central Trust Co. v. Louisville, St. L. & T. Ry.*, 70 F. 282 (C.C.D. Ky. 1895); *Albina Ma-*

principle of law" that factual determinations under disputes clause procedures were binding "upon both the Government and the contractor" in the absence of "fraud, gross error or arbitrariness . . . amounting to bad faith" if there was "substantial evidence to support such findings,"<sup>14</sup> while decisions on questions of law would not be given such finality.<sup>15</sup> Then, in *United States v. Moorman*<sup>16</sup> and *United States v. Wunderlich*,<sup>17</sup> the Supreme Court severely restricted judicial review. In *Moorman*, the Court held that agency decisions rendered under a disputes clause in a government contract were final on questions of law as well as on questions of fact where the contract so provided.<sup>18</sup> In *Wunderlich*, the Court held that, absent a showing of fraud, narrowly defined as "conscious wrongdoing, an intention to cheat or be dishonest," by a contracting officer or a board of contract appeals, the mere finding that a decision was arbitrary, capricious, or grossly erroneous was insufficient to overturn its finality.<sup>19</sup>

Congress responded to this drastic reduction in the standard of judicial review by enacting the Wunderlich Act.<sup>20</sup> This Act provides that

---

rine Iron Works, Inc. v. United States, 79 Ct. Cl. 714 (1934); Yale & Towne Mfg. Co. v. United States, 58 Ct. Cl. 633 (1923). For a comprehensive treatment of these cases and others, see *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 32-44 (1972) (Brennan, J., dissenting).

14. *Mitchell Canneries, Inc. v. United States*, 77 F. Supp. 498, 502 (Ct. Cl. 1948).

15. See, e.g., *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).

16. 338 U.S. 457 (1950). In *Moorman*, the contractor entered into a contract with the government to grade the site of a proposed aircraft assembly plant. The dispute arose over whether the contractor was required to grade a certain taxiway, which was shown in the drawings which constituted a part of the contract, but which was not located within the plant site as described in the specifications. The contractor graded the taxiway and its claim for additional compensation was rejected by the contracting officer and the Secretary of War. The Court of Claims awarded a money judgment for the contractor but the Supreme Court reversed and reinstated the Secretary's decision. *Moorman v. United States*, 82 F. Supp. 1010 (Ct. Cl. 1949), *rev'd*, 338 U.S. 457 (1950).

17. 342 U.S. 98 (1951). In *Wunderlich*, several disputes arose under a contract providing for the construction of a dam. The Court of Claims set aside the decision of the department head, the Secretary of the Interior, but the Supreme Court reversed and reinstated the departmental decision. *Wunderlich v. United States*, 117 Ct. Cl. 92 (1950), *rev'd*, 342 U.S. 98 (1951).

18. 338 U.S. at 462-63.

19. 342 U.S. at 100. In addition to eliminating several review criteria, the Court's narrow definition of fraud also introduced elements of intent which had not been regarded as essential in prior cases. Those cases took the position that "no question of personal animosity or calculated bias, prejudice or actual dishonesty is necessarily involved in an ultimate finding of implied bad faith." See *Needles v. United States*, 101 Ct. Cl. 535, 602 (1944).

20. 41 U.S.C. §§ 321-22 (1970). The Act reads as follows:

§ 321. No provision of any contract entered into by the United States, relating

government contracts shall not contain provisions purporting to make final administrative decisions as to questions of law,<sup>21</sup> and that factual findings shall be final and conclusive unless found to be "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or . . . not supported by substantial evidence"<sup>22</sup> by a court of competent jurisdiction.<sup>23</sup> In effect, this statute reinstated the

---

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 [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

§ 322. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board. *Id.* (footnote omitted).

In the *Wunderlich* case, the Court invited just such a legislative response: "If the standard of fraud that we adhere to is too limited, that is a matter for Congress." 342 U.S. at 100. The report of the Judiciary Committee which accompanied the Wunderlich Act to the floor of the House demonstrates that Congress indeed intended the Act to be a direct rebuttal of the positions espoused in the *Wunderlich* and *Moorman* cases:

The purpose of the proposed legislation . . . is to overcome the effect of the Supreme Court decision in the case of *United States v. Wunderlich* . . . . H.R. REP. No. 1380, 83d Cong., 2d Sess. 1 (1954).

The validity of a contract provision reserving to Government officials the right to determine legal questions has been upheld by the Supreme Court in *United States v. Moorman* . . . .

. . . Section 2 of the proposed legislation will prohibit the inclusion of such reservation in future contracts . . . . *Id.* at 5.

21. 41 U.S.C. § 322 (1970).

22. *Id.* § 321. "Substantial evidence" is a term of art which goes to the reasonableness of what the agency did on the basis of the evidence before it. The reviewing court examines only the administrative record, "for a decision may be supported by substantial evidence even though it could be refuted by other evidence that was not presented to the decision-making body." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963). This test is clearly consistent with the Court of Claims' role as an appellate tribunal in Wunderlich cases. See note 23 *infra*.

23. "The Wunderlich Act, which is the basic document for judicial review of Government contract determinations, is as its language indicates a finality statute, not a jurisdictional statute." Jaffe, *Administrative Finality on Judicial Review*, 2 PUB. CONTRACTS L.J. 115, 116 (1968). The Court of Claims, which hears most disputes clause cases, is given jurisdiction in this area by the Tucker Act, 28 U.S.C. § 1491 (Supp. II 1972), amending 28 U.S.C. §§ 1491, 1503 (1970), which provides in pertinent part that "[t]he Court of Claims shall have jurisdiction to render judgment on any claim *against* the United States founded . . . upon any express or implied contract with the United States . . .," *id.* § 1491 (Supp. II 1972) (emphasis added), and further that "[t]he Court of Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court," *id.* § 1503 (1970).

A trio of Supreme Court decisions, in conjunction with the administrative procedures detailed by the disputes clause and the criteria for review set forth in the Wunderlich Act, have transformed the Court of Claims from its original role as a trial court under the Tucker Act into what must be realistically regarded as an appellate tribunal when dealing with claims "arising under" the contract. *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966) (holding that when a board of contract appeals im-

broader review criteria which were applied in government contract disputes cases prior to the *Moorman* and *Wunderlich* decisions.<sup>24</sup>

INTERPRETATION OF THE WUNDERLICH ACT—  
S & E CONTRACTORS

Presumably, neither the *Moorman* and *Wunderlich* decisions nor the Wunderlich Act had any impact upon the prevailing rule that administrative decisions on questions of fact in contract dispute cases

---

properly dismisses an appeal on grounds the Court of Claims later rejects, that court cannot hold a trial de novo but rather the factual issues to be resolved must be remanded to the board for initial determination); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966) (holding that a finding of fact by a board of contract appeals relevant to its decision on a matter governed by a disputes clause is binding on the Court of Claims in a subsequent breach suit which was not within the scope of the disputes clause); *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963) (holding that apart from questions of fraud, the Court of Claims may not receive new evidence in determining the finality to be attached to an administrative disputes decision under Wunderlich Act standards but rather must confine itself to review of the record that was before the agency); see *Crown Coat Front Co. v. United States*, 386 U.S. 503, 513 (1967); Anthony & White, *Contract Suit Practice and Procedure in the United States Court of Claims*, 49 NOTRE DAME LAW. 276, 279 (1973); Pasley 24; Williams, *Use of Dispositive Motions Before Government Boards of Contract Appeals*, 5 PUB. CONTRACTS L.J. 151, 157 (1972). This transformation has led two critical commentators to argue that

the system of use of Commissioners in contract appeal cases is outmoded. A Commissioner's role in American jurisprudence has traditionally been like that of a master, that is to hear evidence and to draft findings of fact and recommended decisions on the basis of the evidence heard for later consideration by judges. In the vast majority of contract cases coming to the court today, there is no evidence to hear but only a cold administrative record to legally review.

. . . . The continuation of the use of Commissioners in contract cases strongly suggests that the court has not yet clearly perceived nor accepted its role as an appellate rather than trial court in this area. . . .

. . . . [I]t is clear that the Court of Claims has been scrambling for ways to protect its ability to react to factual situations unhindered by the standard tests for appellate review of administrative proceedings, *i.e.*, "supported by substantial evidence." King & Little, *Critique of Public Construction Contract Remedies With Recommended Changes*, 5 PUB. CONTRACTS L.J. 1, 6-7 (1972).

The rulemaking power of the Court of Claims, see 28 U.S.C. § 2071 (1970), has been exercised to delineate its practices and procedures. Chapter XIV of the Rules of the Court of Claims governs Wunderlich Act review of administrative disputes clause determinations, although it is clear that this chapter is intended to supplement, rather than supplant, the other rules of the court. See Ct. Cl. R. 161; Anthony & White, *supra*, at 297.

The Court of Claims' refusal to recognize its role as an appellate court reviewing only the record in Wunderlich Act cases has led to some confusion over terminology. Thus, the court, in reviewing an administrative record, still utilizes terms more appropriately applied to de novo review such as "summary judgment" and "counterclaim." Although it is realized that these terms are anomalous in appellate-type review proceedings, in order not to add to the confusion most commentators have utilized these misapplied terms when discussing the Court of Claims. This Note will conform to that convention.

24. See *Wagner Whirler & Derrick Corp. v. United States*, 121 F. Supp. 664, 667 (Ct. Cl. 1954).

were equally binding on both parties to the contract.<sup>25</sup> The plain language of the Wunderlich Act applies to "any such decision," not merely those unfavorable to contractors.<sup>26</sup> While the government is not able to appeal unfavorable board decisions to the Court of Claims directly,<sup>27</sup> prior to the Supreme Court's decision in *S & E Contractors, Inc. v. United States*<sup>28</sup> the government was able to obtain judicial review indirectly merely by refusing to pay administrative disputes awards that the General Accounting Office ruled were unjustified, thereby forcing the contractor to bring a Tucker Act<sup>29</sup> suit to collect the monies due it, which the Department of Justice would defend by assailing the validity of the award under Wunderlich Act standards. This process seemed permissible and was found appropriate by the Court of Claims because the Wunderlich Act prohibits the inclusion of any

---

25. See text accompanying notes 14-15 *supra*. Within a month after the *Wunderlich* case was decided, its restricted standard of review was applied against the government in *Leeds & Northrup Co. v. United States*, 101 F. Supp. 999 (E.D. Pa. 1951). In *Leeds & Northrup*, the contractor brought an action for summary judgment in a district court to recover an amount awarded to it by the Bureau of Supplies and Accounts under a contract disputes procedure. The government counterclaimed and refused to pay the award, claiming a set-off for an earlier award under a previous contract allegedly made and paid by mistake. The court granted summary judgment for the contractor as to its claim and as to the portion of the government's counterclaim which only the GAO believed was paid incorrectly under the previous contract but denied summary judgment for the contractor as to that portion of the government's counterclaim which both the GAO and the Navy thought should not have been awarded under the earlier contract. *Id.* at 1003.

26. 41 U.S.C. § 321 (1970). The Act is quoted in full in note 20 *supra*. "The language of this provision makes no reference or qualification as to *who* may seek judicial review; rather, it deals with the *scope* of judicial review, and it states a general rule which applies to 'any' administrative decision made pursuant to a government contract . . . ." 48 NOTRE DAME LAW. 483, 491 (1972).

In his dissent to the *S & E Contractors* decision, Justice Brennan said: "It is impossible to read the plain words of this statute as directing that judicial review is available only for disputes decisions unfavorable to contractors. Indeed, the language is so clear that there should be no need to search through the legislative history for a contrary meaning. That history, in any event, demonstrates that the Act means exactly what it says." 406 U.S. at 58. A substantial portion of this dissent and an appendix to it are devoted to an analysis of the legislative history of the Wunderlich Act. *Id.* at 47-60, 69-90. The concurring opinion written by Justice Blackmun found this legislative history "decidedly ambiguous at best" on this issue, *id.* at 22, and the majority also adopted this position, *id.* at 13 n.9.

27. The Tucker Act, 28 U.S.C. § 1491 (Supp. II 1972), amending 28 U.S.C. §§ 1491, 1503 (1970), gives the Court of Claims jurisdiction to hear suits brought against the government but does not grant jurisdiction to hear government-initiated claims. See note 23 *supra*.

28. 406 U.S. 1 (1972). For commentary on this case, see Pasley; 48 NOTRE DAME LAW. 483 (1972); 25 U. FLA. L. REV. 400 (1973).

29. 28 U.S.C. § 1491 (Supp. II 1972), amending 28 U.S.C. §§ 1491, 1503 (1970). See note 23 *supra*.

clause making administrative decisions completely final and makes no exception for decisions sustaining the contractor.<sup>30</sup>

However, this position was repudiated by the Supreme Court in *S & E Contractors*. In that case, the contractor sought payment of a favorable award made by the contracting agency, the Atomic Energy Commission (AEC), under a disputes clause in a contract which called for the construction of a testing facility. The AEC subsequently refused to pay the award after the Comptroller General reviewed the AEC proceedings and concluded the payment voucher could not be certified. The contractor asserted the finality of the AEC's disputes decision against the Department of Justice, which defended the suit on the ground that the AEC's decision was not supported by substantial evidence and was erroneous as a matter of law.<sup>31</sup> Relying upon precedent,<sup>32</sup> the Court of Claims sanctioned the indirect invocation of judicial review by the government's withholding of the award, stating "the government has the right to the same extent as the contractor to seek judicial review of an unfavorable administrative decision on a contract claim."<sup>33</sup> Reversing in an opinion written by Mr. Justice Douglas, the Supreme Court, without distinguishing between questions of law and questions of fact,<sup>34</sup> held that an agency's disputes clause determination is binding on the government, absent fraud on the part of the contractor,<sup>35</sup> that neither the disputes clause nor the Wunderlich Act empowered review of the AEC's decision by the General Accounting Office,<sup>36</sup> and that the Wunderlich Act does not give the Department of Justice the right to appeal an administrative disputes decision.<sup>37</sup> As the rationale for its decision, the Court looked to the general policy underlying the disputes clause and found it was "intended, absent fraud or bad faith, to provide a quick and efficient administrative remedy

---

30. *C.J. Langenfelder & Son, Inc., v. United States*, 341 F.2d 600, 607 (Ct. Cl. 1965); *accord*, *Acme Process Equip. Co. v. United States*, 347 F.2d 538 (Ct. Cl. 1965); *see* Kipps, *The Right of the Government to Have Judicial Review of a Board of Contract Appeals Decision Made Under the Dispute Clause*, 2 PUB. CONTRACTS L.J. 286, 296 (1969).

31. *S & E Contractors, Inc. v. United States*, 433 F.2d 1373, 1374-75 (Ct. Cl. 1970), *rev'd*, 406 U.S. 1 (1972).

32. This body of precedent is discussed in note 13 *supra*.

33. 433 F.2d at 1378.

34. *But see* 406 U.S. at 30-31 (Brennan, J., dissenting).

35. *Id.* at 15.

36. 406 U.S. at 9. The majority noted that in enacting the Wunderlich Act, Congress defeated proposals which would have given the Comptroller General such a power of review. *Id.* at 11.

37. *Id.* at 12-13.



and to avoid 'vexatious and expensive and, to the contractor oftentimes, ruinous litigation.'"<sup>38</sup>

Further, the majority noted that the committee reports accompanying the Wunderlich Act indicated that limited "judicial review was provided so that contractors would not inflate their bids to take into account the uncertainties of administrative action" and that this goal would be defeated if outside agencies such as the GAO or Department of Justice were allowed to intervene in the disputes process.<sup>39</sup> Characterizing the *S & E* situation as one of agency intermeddling, however, the Court left open the possibility that finality of a disputes decision could be avoided by repudiation on the merits by the contracting agency making the initial award, as contrasted with review by an outside agency.<sup>40</sup>

### THE COUNTERCLAIM PROBLEM

While barring the government from obtaining judicial review of adverse agency disputes decisions either directly by bringing suit or indirectly by refusing to pay a board award, *S & E Contractors* did not explicitly explore the right of the government to counterclaim when a private contractor seeks judicial review of a partially favorable administrative determination. Although the majority in *S & E Contractors* was obviously concerned with the problem of the finality of agency disputes decisions, its reasoning in this regard was also influenced by the unfairness of one agency reversing a determination, favorable to a contractor, made by another agency. Subsequently, the Court of Claims has grappled with *S & E Contractors'* finality and fairness policies in deciding several cases which have not involved the additional factor of outside agency interference.

*Dynalectron Corp. v. United States*,<sup>41</sup> which appears to be the first Court of Claims case to consider the counterclaim issue after the *S & E Contractors* decision, involved a procurement contract for certain air-

---

38. *Id.* at 8.

39. *Id.* at 14. More generally, "[a] citizen has the right to expect fair dealings from his government, . . . and this entails in the present context treating the government as a unit rather than as an amalgam of separate entities. Here the AEC spoke for the United States and its decision . . . should be honored." *Id.* at 10. The Court refused to construe the Wunderlich Act as requiring a citizen to present his claim before several agencies in order to obtain justice from the government. *Id.* at 14.

40. The Court was careful to add that "[t]his case does not involve the situation where an administrative agency, upon timely petition for rehearing or prompt *sua sponte* reconsideration, determines that its earlier decision was wrong and, for that reason, refuses to abide by it." *Id.* at 18-19.

41. 199 Ct. Cl. 996 (1972).

craft antenna systems which proved defective, causing the government to terminate the contract. The Board of Contract Appeals upheld the termination by the government, but held the contractor was not liable for procurement costs because the government was at fault in providing deficient specifications, and in fact had later reprocedured a different type of antenna.<sup>42</sup> When the contractor brought suit in the Court of Claims challenging the default termination, the government counterclaimed for its excess procurement costs. The court dismissed this counterclaim by holding flatly that "the decision of the Supreme Court in *S & E Contractors* . . . precludes the government from obtaining review, under Wunderlich Act standards, of the Board's decision,"<sup>43</sup> without further explanation.

In a 1974 case heard by all of its judges, *Roscoe-Ajax Construction Co. v. United States*,<sup>44</sup> the Court of Claims undertook a more detailed and definitive consideration of the counterclaim problem<sup>45</sup> and held

---

42. Dynalectron Corp.-Pacific Div., 69-1 CCH Bd. Cont. App. Dec. ¶ 7595, at 35,265 (Armed Services Bd. of Contract Appeals 1969), *aff'd on other grounds*, 199 Ct. Cl. 996 (1972).

43. 199 Ct. Cl. at 997.

44. 499 F.2d 639 (Ct. Cl. 1974).

45. In two cases decided after *Dynalectron*, the court circumvented the counterclaim issue. In *Boeing Co. v. United States*, 480 F.2d 854 (Ct. Cl. 1973), the contractor asserted that it was entitled to allocate certain state and local taxes assessed on its property to the cost of performing the contract while the government counterclaimed with respect to other taxes which had previously been found allocable to the government by the ASBCA. The trial commissioner's preliminary report cited *S & E Contractors* as standing for the proposition that a court is unable to review in any way an agency disputes decision favorable to a contractor, but the Court of Claims deemed it unnecessary to resolve that controversy. *Id.* at 856. Instead, the court unanimously concluded that the government had stated no case on the merits against the board decision and avoided resolving the uncertainties of the counterclaim problem inherent in the Wunderlich Act and the *S & E Contractors* decision. *Id.*

Another method of avoiding the counterclaim was employed in a 1974 case, *Sea-Land Serv., Inc. v. United States*, 493 F.2d 1357 (Ct. Cl. 1974), *cert. denied*, 95 S. Ct. 69 (U.S. Oct. 15, 1974). There, the dispute centered on the exchange of three vessels owned by Sea-Land for three vessels owned by the government pursuant to a contract under the Vessel Exchange Act, 46 U.S.C. § 1160(i) (1970). Sea-Land brought a Wunderlich suit in the Court of Claims challenging the values assigned to the ships by the contracting officer, which had been upheld by the Assistant Secretary of Commerce for Maritime Affairs. The government asserted a compulsory counterclaim under Court of Claims Rule 40(a) for an amount representing the plaintiff's alleged liability for certain repairs to the ships under a separate use agreement which chartered the vessels traded by Sea-Land back to it while the vessels traded by the government were being converted into container ships. Although the counterclaim was challenged by the contractor, the court did not consider it on its merits because under the logic of the *Anthony Grace* decision, *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966) (discussed in note 23 *supra*), the issues presented by it should have been before the administrative agency for initial consideration, and therefore judicial proceed-

that when a government contractor seeks judicial review under Wunderlich Act standards of a partially favorable Armed Services Board of Contract Appeals (ASBCA) determination of a contractual dispute, the government may assert counterclaims with respect to those portions of the Board's decision which constitute part of the same dispute which was brought by the plaintiff contractor.<sup>46</sup>

In that case, a government procurement contract between Roscoe-Ajax and the Army Corps of Engineers provided for the construction of fifty-six missile launcher shelters. Roscoe-Ajax entered into a subcontract for the installation of roof-and-door-opening mechanisms on the shelters. Numerous difficulties arose in the completion of this phase of the project, and several modifications ordered by the government were incorporated into the contract and subcontract in the course of its performance. The contract contained a disputes clause which provided for three levels of administrative determination and review of the amount due Roscoe-Ajax as a result of any modifications directed by the government in the performance of the contract.<sup>47</sup>

In seeking judicial review of the ASBCA decision in the Court of Claims under Wunderlich Act standards, Roscoe-Ajax contested the Board's failure to include an additional sum of money in its calculation but did not attack any of the Board's factual determinations as to the quantum of adjustment for any of the series of contract modifications.<sup>48</sup>

---

ings on the counterclaim were suspended for six months pending administrative resolution. 493 F.2d at 1372.

46. 499 F.2d at 646.

47. Roscoe-Ajax Constr. Co., Inc., 71-1 CCH Bd. Cont. App. Dec. ¶ 8828, at 41,035 (Armed Services Bd. of Contract Appeals 1971), *modified*, 18 CCH Cont. Cas. F. ¶ 82,224 (1973) (report of the Trial Commissioner of the Court of Claims), *aff'd*, 499 F.2d 639 (Ct. Cl. 1974). At the initial stage of the disputes process, *Roscoe-Ajax* presented claims for increased costs incurred by its subcontractor to a contracting officer, who rendered a decision awarding Roscoe-Ajax \$144,065. *See* *Roscoe-Ajax Constr. Co. v. United States*, 18 CCH Cont. Cas. F. ¶ 82,224, at 87,475-76 (1973) (report of the Trial Commissioner of the Court of Claims), *aff'd*, 499 F.2d 639 (Ct. Cl. 1974). Dissatisfied with the amount of this award, Roscoe-Ajax pursued the second stage of the administrative process established in the disputes clause by appealing to the Corps of Engineers Board of Contract Appeals. Although the Engineer Board determined that Roscoe-Ajax was unable to prove its entitlement to the full amount awarded by the contracting officer, the board affirmed the contracting officer's award as equitable in light of the lack of definite proof of certain costs. *See* 18 CCH Cont. Cas. F. ¶ 82,224, at 87,476. Still dissatisfied, Roscoe-Ajax appealed to the ASBCA, where a *de novo* hearing was held, and the government filed a counterclaim asserting it was entitled to recover certain overpayments from the contractor. 71-1 CCH Bd. Cont. App. Dec. ¶ 8828, at 41,036. The counterclaim arose out of the discrepancy between the contracting officer's award and the Engineer Board's finding on the amount the contractor was able to prove it was owed, and the ASBCA entered a money judgment allowing the government partial recovery of the amount for which it counterclaimed. *Id.* at 41,060.

48. 499 F.2d at 641. The specific objections were that two modifications ordered

The government, seeking a larger overpayment recovery than that awarded to it by the ASBCA, filed a counterclaim which sought a re-computation of the quantum of equitable adjustments allowable to the contractor for the individual changes in performance.<sup>49</sup>

Confronted with the problem of whether or not the *S & E Contractors* interpretation of the Wunderlich Act's effect on the finality of a Board of Contract Appeals decision permitted a government counterclaim, the majority opinion in *Roscoe-Ajax*, joined by five of the seven judges of the Court of Claims, initially distinguished the case at bar from the fact situation in *S & E Contractors*. According to the Court of Claims, "*S & E Contractors* obviously controls where the claimant accepts the agency decision *in toto*, but gives no flat directive where, as here, the contractor brings suit attacking a part of the administrative decision which is unfavorable to him."<sup>50</sup> The court then examined the diametrically opposed positions advanced by the parties. The government contended that *S & E Contractors* did not foreclose the counterclaim issue and that a contractor's acceptance of an administrative disputes decision is an all-or-nothing proposition: if any part of the decision is challenged by the contractor, the government may then attack any other determination. The court rejected this "decision standard" because the joinder and docketing of issues in a single administrative proceeding often depends upon irrelevant factors, such as the time at which claims arise or the order in which they are decided by the contracting officer, and it would be "inimical to a fair and rational disputes procedure to leave the important question of absolute finality solely to

---

by the contracting officer were independent increases in the contract price and not partial payments of the amount found due on various changes by the ASBCA and therefore that the government audit incorrectly totalled the sums due the contractor. *Id.* at 641-42. The Court of Claims regarded this as an attempt to have part of the increased costs included in the final disputes award twice and denied this double recovery. *Id.* at 642.

49. *Id.* at 648-49. In addition, the government contended that the board committed a legal error by considering a claim designated item W in making its findings and that it was also error for the board to deny the government interest of six percent on the overpayment. *Id.* at 648 n.14. The Corps of Engineers contested *Roscoe-Ajax*'s entitlement in the *de novo* proceeding before the ASBCA because this claim (item W) was never presented to the contracting officer. It involved the cost of preparing a detailed engineering study undertaken to rebut allegations by the contracting officer that certain hydraulic components used in the roof-opening mechanisms did not meet government specifications. 71-1 CCH Bd. Cont. App. Dec. ¶ 8828, at 41,053.

50. 499 F.2d at 643. The case came before the Court of Claims on cross-motions for summary judgment and was referred to a trial commissioner for a preliminary report. In some ways presaging the decision of the court, the Trial Commissioner concluded that "[h]aving no right to seek judicial review . . . in its own right, the defendant should not be permitted to use plaintiff's petition as a vehicle by which to obtain judicial review of factual determinations wholly unrelated to the errors assigned by the plaintiff." 18 CCH Cont. Cas. F. ¶ 82,224, at 87,477 (emphasis added).

such chance (or tactical) elements.”<sup>51</sup> Further, the court recognized that adoption of such an all-encompassing waiver of immunity from government claims could lead to precisely the type of vexatious and potentially ruinous litigation *S & E Contractors* aimed at preventing.<sup>52</sup> Conversely, *Roscoe-Ajax* proposed that every administrative finding or determination accepted by the contractor should be final against the government. The court repudiated this “finding standard” by stating that

[s]uch one-sidedness runs against the grain. Where there is but a single integral dispute, it is discriminatory to allow one party to take unchallengeable advantage of all elements in the administrative decision which are favorable to his position while putting the other side to the test of supporting all the aspects favorable to it. A concern for striking a fair balance . . . was prominent in the prevailing *S & E* opinions.<sup>53</sup>

After rejecting these extreme positions, the court discussed what it perceived to be “the principle at the heart of *S & E Contractors*—the full acceptance by that contractor of the . . . resolution of its dispute with the [government], so that the particular dispute was wholly ended.”<sup>54</sup> Designating its criterion as the “dispute standard,” in contrast to the “decision” and “finding” standards of the respective parties, the court characterized its task as one of defining the particular dispute involved and determining whether the contractor had accepted the administrative resolution of that dispute or whether it was being kept alive by him in court. If a specific dispute is no longer alive because the contractor is satisfied, the court would not allow the government to challenge it by way of counterclaim if the contractor chose to litigate some other dispute, even if both disputes arose under the same agreement or were resolved in the same board decision.<sup>55</sup>

The majority conceded that defining the bounds of a single dispute is a difficult task no less elusive than delineating a “claim” for purposes of applying *res judicata* or other principles hinging on such a determination. In attempting to enunciate such a definition, the court stated that “[t]his concept of the ‘same dispute’ . . . encom-

---

51. 499 F.2d at 644.

52. “It is vital to the proper functioning of this system, as evaluated and applied by the Supreme Court in *S & E Contractors*, that a contractor not be forced to risk what he has gained before the agency—regardless of the lack of, or minimal connection between, the favorable and adverse components of its determination—whenever he seeks Wunderlich Act review of an unfavorable portion of an administrative decision.” *Id.* at 644.

53. *Id.* at 645.

54. *Id.* at 646.

55. *Id.*

passes, in general, those aspects of a controversy which are so related to one another that they form parts of a whole and ought to be decided together."<sup>56</sup> While the court went on to spell out a two-prong test of what constitutes a dispute, centering on (1) the treatment of the matter by the parties and the ASBCA, and (2) the legal, logical, and practical relationships among the issues involved, it also cautioned that neither of these components is dispositive.<sup>57</sup>

---

56. *Id.* The compulsory counterclaim rule of the Court of Claims embraces a somewhat similar notion by providing in relevant part that the government's "answer shall state as a counterclaim any claim which . . . arises out of the transaction or occurrence that is the subject matter of the [contractor's] petition . . ." Ct. Cl. R. 40(a).

57. 499 F.2d at 647-48. The majority opinion applied its two-pronged dispute standard to the facts in *Roscoe-Ajax* in the following manner. Since the contractor challenged only the computational methods of the ASBCA, a legal issue, while the first part of the government's counterclaim sought to reopen factual findings as to the amount awarded for a certain modification and the assignment of a fifteen percent overhead rate to the subcontractor, the court found that *separate disputes* were involved, and thus the government could not raise that portion of the counterclaim. *Id.* at 649. "It is as if the plaintiff, accepting all the individual amounts, were merely claiming that the Board made a mathematical error in adding up these individual amounts, and the defendant took that as its cue for asking the court for reexamination of the underlying factual determinations of all the individual costs." *Id.*

A second aspect of the government's challenge was the contention that the board committed legal error by considering a claim designated item W in assessing the award. See note 49 *supra*. Again the court found separate disputes, but went on to resolve the question on the merits, observing that "[i]n some instances, it may be easier to decide against the defendant on the merits than to wrestle initially with the problem of whether the counterclaim is maintainable at all." *Id.* at 650 n.17. Here the court found that the government failed to object to the introduction of this matter at the hearings before the Engineer Board and the ASBCA and thereby waived its right to do so later.

The third element of the government's counterclaim asserted its entitlement to six percent interest on the overpayment recovery awarded to it by the ASBCA. As to this aspect of the counterclaim, the court found a single dispute vis-à-vis the plaintiff's computational objection, but ruled against the government on the merits because it had initially supported use of the accounting method which led to the overpayment and therefore was in no position as a matter of fairness to demand interest on its overpayment. *Id.* at 650.

In *Northland Camps, Inc. v. United States*, 499 F.2d 658 (Ct. Cl. 1974), a companion case to *Roscoe-Ajax*, the Court of Claims again applied the dispute standard. *Northland Camps* sought Wunderlich Act review of an ASBCA decision that it was liable for the cost of repairing certain electrical defects in air conditioners it had supplied for government trailer-type housing, and the government counterclaimed, challenging the board's refusal to also grant it the cost of adding front baffle plates and side windshields to the air conditioners. The plaintiff then moved to dismiss the counterclaim. The opinion, which confined itself to applying the guidelines set forth in *Roscoe-Ajax*, held that both claims were "integral parts of the same contract dispute and should be decided together." *Id.* at 659. The court found it "hard to envisage a closer physical connection and interrelationship," *id.*, and noted that the board treated both demands "as part of the same fabric," *id.* at 660. Moreover, *Northland's* petition expressly raised two issues—whether it was responsible for design of the trailers and whether any of the defects in the air conditioners were latent—which involved legal and factual considerations com-

Judge Nichols, dissenting from that part of the majority opinion which dismissed the government's counterclaim, noted that the majority's standard would produce more expense, delay, and uncertainty in the already complex area of Wunderlich Act litigation and that its application would require a thorough and detailed knowledge of the particular facts of each case. After reviewing the precedent in the area, Judge Nichols suggested what he viewed as a more fruitful approach which would delineate a dispute by ascertaining the items the parties would normally trade off in the negotiation process.<sup>58</sup>

#### ANALYSIS OF THE *Roscoe-Ajax* "DISPUTE" STANDARD

Although the Tucker Act, the basic jurisdictional provision empowering the Court of Claims to hear contractor-initiated government contract cases, permits counterclaims,<sup>59</sup> the real question is whether the *S & E Contractors* interpretation of the Wunderlich Act makes agency decisions so final as applied against the government as to preclude counterclaims when the private contractor judicially appeals a portion of an administrative disputes determination.

As stated by the Supreme Court in *S & E Contractors*, the primary purpose of the disputes clause in government contracts is to eliminate vexatious, expensive litigation which could be potentially ruinous to the contractor.<sup>60</sup> Although *Roscoe-Ajax* may invite vexatious counterclaims by the government, it will do so only within the presumably narrow bounds of a single dispute which a contractor has decided to raise. Moreover, the dispute standard and the limited counterclaim it permits may have the beneficial effect of discouraging frivolous litigation by contractors who would have little but the costs of litigation to lose if the government were bound by all administrative decisions favorable to the contractor and were not permitted to challenge anything by way of counterclaim.<sup>61</sup>

---

mon to both the claim and the counterclaim. Since a single unresolved dispute was involved, the court found the government was entitled to pursue its counterclaim and denied the contractor's motion to dismiss, returning the case to the Trial Commissioner for further proceedings.

58. *Id.* at 657 (Nichols, J., concurring in part and dissenting in part).

If the parties and the Board treat as related parts of one "dispute" what appears to be on its face an unrelated series of claim items, I would presume, if not irrebuttably, at least strongly, that they know what they are doing . . . . Within the ordinary contract "dispute" a list of several claims items lists counters to be played on the same checkerboard. Such counters have a relationship in the minds of the players, and we do not always understand their play. *Id.* at 656.

59. See 28 U.S.C. § 1503 (1970). See note 23 *supra*.

60. See text accompanying note 38 *supra*.

61. See 499 F.2d at 645.

The most convincing argument against allowing government counterclaims regarding board of contract appeals decisions adverse to the government is that the government should not be able to contest what is, in effect, its own decision.<sup>62</sup> Of course, this argument assumes that when the board announces a decision favorable to the contractor, an agreement has been reached and a dispute no longer exists. Certainly it would seem that some area of dispute could be said to be still alive if the contractor invoked judicial review of part of that decision, thereby rejecting at least some part of the government's settlement offer. From this perspective, the dispute standard set forth in *Roscoe-Ajax* seems quite proper and in harmony with the other policies espoused in *S & E Contractors*. That is, a unitary notion of government would be preserved, and the contractor would not be forced to present his claims before several agencies in order to obtain justice since he would be seeking judicial review voluntarily and the possibility of a limited government counterclaim presumably would not inject the same uncertainties and motivation for inflating bids as might additional challenges by different parts of the bureaucracy.<sup>63</sup>

In discussing the potential cost to taxpayers which could result from the *S & E Contractors* decision and the need to balance the interests of both parties to a government contract, Mr. Justice Brennan's dissenting opinion in *S & E Contractors* properly interjected a consideration seemingly overlooked by the majority in that case—the fairness of the decision to the government.<sup>64</sup> Although the concurring opinion in the case emphasized that the rights of the government are adequately protected in the disputes process,<sup>65</sup> not all commentators have agreed.<sup>66</sup>

---

62. *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 10 (1972); *id.* at 20 (Blackmun, J., concurring); Comment, *S & E Contractors and the GAO Role in Government Contract Disputes: A Funny Thing Happened on the Way to Finality*, 55 VA. L. REV. 762, 778 (1969).

63. See text accompanying note 39 *supra*. There would be no forced imposition of an additional tier of federal review which the Court found objectionable in *S & E Contractors*, 406 U.S. at 4, since the contractor would be invoking judicial review by his own choice. It is important to note that in *Roscoe-Ajax* there was lacking the element of outside agency intermeddling, which the dissent in the *S & E* decision properly characterized as the majority's *bete noire*. *Id.* at 62 (Brennan, J., dissenting).

64. Justice Brennan's dissent in *S & E Contractors* saw the majority position as destroying the former balance between government and contractor, *see id.* at 31, at a potential cost to taxpayers of "countless millions," *id.* at 60. *But see* Pasley 35-36, where it is argued that Justice Brennan's characterization is exaggerated and that the practical impact of *S & E Contractors* will not be very great.

65. The issue is not whether advantage is or is not to be taken of the Government. Of course, the Government's rights are to be protected. That protection, however, is afforded by the nature and workings of the contract disputes system, by its emphasis on expeditious performance and getting the job done, and by the presence of the contracting officer and the agency . . . . 406 U.S. at 23 (Blackmun, J., concurring).

66. Regardless of the philosophical and legal arguments that have been made



Even conceding that "there is a general feeling among contractors that the contractor's unilateral right of appeal serves to 'even up' a dispute process that would otherwise be unduly loaded in favor of the government,"<sup>67</sup> it can be argued that *S & E Contractors* reinstated the kind of nonreviewability the Wunderlich Act sought to avoid, at least with regard to disputes decisions favoring the contractor.<sup>68</sup> Thus, the *S & E Contractors* decision "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."<sup>69</sup> In *Roscoe-Ajax*, the Court of Claims appeared to be moving toward remedying this problem by allowing judicial review of administrative disputes decisions adverse to the government in certain limited situations, thereby correcting the imbalance in favor of the contractor inherent in its initial reading of the *S & E Contractors* decision in the *Dynalectron* case, which flatly prohibited all government counterclaims.<sup>70</sup>

---

in support of the contractor-only appeal system, it must be admitted that it is inherently unfair [to the government] since the system itself exerts a tremendous pressure on the boards in the direction of decisions that will not be upset on appeal, namely, deciding for the only party having a right of appeal—the contractor. . . . The court has . . . not been dealing with anything like a balanced or normal selection of appellate problems but has been considering the 'rejects' of a generally contractor and settlement-oriented system. Considered in this light, the Government should prevail in far more of the court's decision than it does. King & Little, *supra* note 23, at 8.

See also Little, *The Procurement Commission Recommendations on Dispute Resolution*, 42 GEO. WASH. L. REV. 306, 307 (1974).

67. Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 LAW & CONTEMP. PROB. 39, 73 (1964). This imbalance favoring the government is said to exist for a number of reasons, including the fact that the government largely imposes the terms of the contract, Hiestand & Williamson, *The Procurement Commission's Contract Remedies & Award Protest Recommendations: A View from the Inside*, 42 GEO. WASH. L. REV. 224, 229 (1974), the contractor bears the financial burden of continuing performance in the face of changes or difficulties, 48 NOTRE DAME LAW. 483, 488 (1972), the "virtually unlimited ability of the government to litigate," Gantt, *A Critique of the Disputes Resolution Recommendations*, 42 GEO. WASH. L. REV. 288, 295 (1974), and the fact that a successful contractor cannot recover his litigation expenses in the Court of Claims, *id.*; Anthony & White, *supra* note 23, at 403; Hiestand & Williamson, *supra*, at 229.

68. 25 U. FLA. L. REV. 400, 405 (1973). See text accompanying notes 16-24 *supra*.

69. Pasley 40. Since the Court in the *S & E* decision failed to differentiate between finality for questions of law and for questions of fact, its holding, see text accompanying notes 34-37 *supra*, would seem to prevent the government, at least in cases of agency intermeddling, from obtaining indirect judicial review of questions of law as well as questions of fact. In his dissent to the *S & E* opinion, Mr. Justice Brennan criticized the majority for misreading the Wunderlich Act, which expressly provides that administrative disputes decisions are not final on questions of law. 406 U.S. at 30-31. See note 20 *supra*.

70. See text accompanying notes 41-43 *supra*.

There are obviously competing interests in this area—the government seeks timely and proper performance of the contract at the least cost to the taxpayer, while the contractor seeks assurance of fair compensation for bearing the burden of government-directed changes—and a balancing of these interests is clearly necessary. While a government contract should not be regarded as “a license for warfare” and the savings to contractors who know that they will not have to function in a hostile and litigious setting will be reflected in more competitive bids from qualified contractors,<sup>71</sup> it can be argued that a contractor who is inherently favored in litigation will be “encouraged to try to drive harder bargains with the Government.”<sup>72</sup> Obviously, this is an area where the public interest should not be ignored in striking a balance, and in a search for this balance the dispute standard adopted in *Roscoe-Ajax*, allowing limited counterclaims by the government, is preferable to a “finding standard” precluding all government counterclaims,<sup>73</sup> a position which would jeopardize the public interest by allowing the contractor to risk nothing but the cost of litigation in coming to court, as well as a “decision standard” permitting all counterclaims,<sup>74</sup> a position which would tip the scales too far in the other direction by allowing the kind of vexatious government challenges *S & E Contractors* sought to preclude. Moreover, permitting a limited government counterclaim might protect the contractor from unbalanced appeals board decisions. If the board of contract appeals realized that the contractor could appeal all unfavorable administrative determinations, while favorable decisions by the board would remain sacrosanct, whenever the board decided that the contractor should lose on the merits it might steamroll the opinion by deleting any intermediate findings favoring the contractor in a decision ultimately unfavorable to him.<sup>75</sup>

Perhaps the greatest virtue of the dispute standard formulated in *Roscoe-Ajax* is its flexibility; the court was admirably unwilling to opt for a mechanistic test in a highly complex area of law where a decision should hinge on the facts of each particular case. Counterbalancing this, however, are the problems inherent in applying such a vague standard, which were effectively exposed by Judge Nichols' dissent in *Roscoe-Ajax*.<sup>76</sup> Perhaps the greatest of these is the familiarity with

---

71. Little, *supra* note 66, at 310.

72. King & Little, *supra* note 23, at 10.

73. See text following note 50 *supra*.

74. See text accompanying note 53 *supra*.

75. See *Roscoe-Ajax Constr. Co. v. United States*, 499 F.2d 639, 653-54 (Ct. Cl. 1974) (Nichols, J., concurring in part and dissenting in part).

76. See note 58 *supra* and accompanying text.

the peculiar facts of each case that will be required to delineate what falls within the boundaries of a single dispute. In Wunderlich Act cases, review is limited to the administrative record<sup>77</sup> and it is arguable that the court will not be able to gain the degree of factual intimacy with the case necessary to apply the dispute test. Unfortunately, however, it seems fair to say that Judge Nichols' suggestion that disputes be defined in terms of the perceptions of the parties as they engage in the negotiation process would entail no less complexity and uncertainty than the majority's position, at least if it would truly require probing the relationships perceived in the minds of the parties.<sup>78</sup> Further, the same type of factual familiarity as that required by the majority's dispute standard is presumably involved in deciding whether to give res judicata effect to administrative disputes findings in separate judicial proceedings for breaches of contract which do not fall within the disputes clause and are therefore not subject to administrative resolution—a problem often faced by the Court of Claims.<sup>79</sup>

Another criticism, implicit in Judge Bennett's concurring opinion in *Roscoe-Ajax*, is that in many instances it presumably would be less time-consuming simply to decide the case on the merits.<sup>80</sup> As suggested by Judge Bennett, such judicial decisions on the merits, as contrasted with those that become entangled with the court's right to entertain the claim, serve as a deterrent to unnecessary litigation, as a guide

---

77. See note 23 *supra*.

78. See note 58 *supra* and accompanying text.

79. For instance, in *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966), the Supreme Court made it clear that administrative findings of fact in disputes cases are res judicata in later suits for breach of contract in the Court of Claims, stating that

[o]ccasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose. *Id.* at 421-22.

In determining what constitutes a "claim" for res judicata purposes "the rule stresses the transaction or occurrence as the subject matter of a claim rather than the legal rights arising therefrom. . . . The term 'claim' is used to denote the aggregate of operative facts which give rise to a right enforceable in the courts." *United States v. Iroquois Apartments, Inc.*, 21 F.R.D. 151, 153 (E.D.N.Y. 1957); *accord*, *Original Ballet Russe, Ltd. v. Ballet Theatre, Inc.*, 133 F.2d 187 (2d Cir. 1943); *see* 2 K. DAVIS § 18.04, at 568 ("most problems of res judicata in administrative law involve collateral estoppel"); 2 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 2.06, at 361 (2d ed. 1974) (procedural notion of "a set of facts which group themselves together conveniently for trial"); Note, *The Application of Res Judicata to Administrative Determinations*, 1970 DUKE L.J. 133; Note, *supra* note 13, at 658-60 (detailing the pros and cons of applying principles of res judicata to contract appeal board determinations).

80. 499 F.2d at 652 (Bennett, J., concurring). This approach was taken in *Boeing Co. v. United States*, 480 F.2d 854, 856 (Ct. Cl. 1973), discussed in note 45 *supra*.

to agency officials in dealing with claims at lower levels, and as an incentive to the settlement of cases even after they have been taken to court.<sup>81</sup> However, in some cases, new factual issues could be raised by a government counterclaim which would require a remand to the board of contract appeals for initial determination,<sup>82</sup> and thereby result in precisely the type of vexatious and potentially ruinous delay the disputes clause aims at preventing.<sup>83</sup>

Although the *Roscoe-Ajax* formulation of the dispute standard arguably achieves a proper balance of fairness between the government and the contractor, a literal reading of the standard does so at the expense of the finality provisions of the Wunderlich Act. Under that Act, administrative determinations of fact are final unless certain limited standards are met, while such determinations of law are not final and are judicially reviewable without restriction.<sup>84</sup> While the demarcation between questions of law and questions of fact is especially hazy in government contract disputes,<sup>85</sup> the Wunderlich Act nevertheless mandates that that difficult determination be made. If the dispute standard is read literally to open up government counterclaims on questions of fact which are part of the same dispute as the contractor's challenge on a pure question of law, the *Roscoe-Ajax* formulation inappropriately penalizes the contractor for exercising this right of review granted to him without restriction by the Wunderlich Act. Thus, if the dispute standard is to achieve legitimacy, it must be read so as to permit government counterclaims as to questions of *fact* only when the contractor also seeks judicial review of an administrative determination of *fact*.<sup>86</sup>

---

81. Spector 161.

82. See *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966), discussed in note 23 *supra*.

83. See note 38 *supra* and accompanying text.

84. See note 20 *supra*.

85. See generally 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).

86. Although the *Roscoe-Ajax* court used a broadly-worded formulation, it may in application have recognized the fact-law limitation inherent in any Wunderlich Act review case. For instance, in applying the dispute standard to the government's counterclaim as to certain administrative factual determinations where the contractor sought review in the Court of Claims of only the method of calculation—classified by the court as a question of law—the *Roscoe-Ajax* court found them not to be part of the same dispute. 499 F.2d at 649. See note 57 *supra*. Even though the court reached the correct result, it did so in a rather cumbersome manner. Rather than applying the dispute standard, it should have immediately stated that questions of law are explicitly prohibited from being given finality under the Wunderlich Act, and since the contractor only sought review of a question of law, the government should not be able to counterclaim

## CONCLUSION

At least within the confines of the present disputes system<sup>87</sup> and the guiding precedent of *S & E Contractors*, the decision of the Court of Claims in *Roscoe-Ajax Construction Co. v. United States* permitting limited government counterclaims seems a small step toward the basic goal of insuring fairness to both parties to a government contract. While the dispute standard may produce some uncertainty as to its scope and therefore some wasteful litigation concerning the permissibility of government counterclaims, it will do so only when the contractor has chosen to come into court. The ultimate impact of the decision may not be great, however, because the government may be able to avail itself of the loophole of agency reconsideration of disputes decisions left open by *S & E Contractors*<sup>88</sup> in those instances when the dispute

---

as to a question of fact. To reason otherwise would penalize a contractor for exercising its statutory right to seek judicial review of a question of law.

87. Many commentators have suggested that only a legislative overhaul of the disputes process can restore efficiency and a semblance of justice to the government procurement system. The proposals are varied: some have advocated an all disputes clause which would effectively eliminate the distinction between breach and "arising under" claims, see note 4 *supra*, by allowing initial administrative determination of all controversies in connection with the contract, King & Little, *supra* note 23, at 15-16; Moss, *Judicial Review of Federal Contract Appeals Decisions Today—The Necessity for an All Disputes Procedure*, 3 PUB. CONTRACTS L.J. 80, 95-96; see Pasley 37-38; others, an election of remedies which would allow the contractor to appeal an adverse decision by the contracting officer within the agency, or, alternatively, seek direct judicial review, King & Little, *supra* note 23, at 15; Kipps, *supra* note 30, at 286; Spector 167; Spector, *Public Contract Claims Procedures—A Perspective*, 30 FED. B.J. 1, 11 (1971); see Pasley 38; others, an institutional approach involving a synthesis of the judicial and administrative models, Note, *Government Contracts Disputes: An Institutional Approach*, 73 YALE L.J. 1408 (1964); see Pasley 39; others, mandatory arbitration of disputes, King & Little, *supra* note 23, at 12; 25 U. FLA. L. REV. 400, 407 (1973); and yet others allowing de novo judicial review not limited to the administrative record, Spector 167; Spector, *Public Contract Claims Procedure*, *supra*, at 11. A Committee on Government Procurement conducted an intensive two-year study of government procurement and submitted a report to Congress on December 31, 1972, containing, *inter alia*, extensive proposals for reforming the present disputes system. See generally Spector; *Symposium on Government Procurement: Comments on the Procurement Commission's Disputes Remedies and Award Protest Recommendations*, 42 GEO. WASH. L. REV. 222 (1974). By a seven to five vote, the Commission recommended allowing both contractors and the government to seek judicial review of adverse agency disputes clause decisions, but Judge Spector cautions that the twelve recommendations made in the Report must be viewed as a package and this particular proposal would entail merit only if the contractor "were not compelled to expend the time and money involved in assuming the risk of such an appeal, but could instead elect to proceed initially in the court." Spector 164.

Despite the proliferation of proposals for reform, it has been demonstrated that existing procedures actually work quite well and "[i]t is more than likely that such legislation would create as many problems as it would solve." Pasley 37.

88. See note 40 *supra*.

standard adopted in *Roscoe-Ajax* would preclude it from counterclaiming in litigation brought by the contractor. But under current procedures, an agency head cannot reverse a decision of a board of contract appeals,<sup>89</sup> and the requirement that board reconsideration be "prompt"<sup>90</sup> could make even the limited ability of the government to maintain counterclaims recognized in *Roscoe-Ajax* an important element in restoring the balance *S & E Contractors* seemed to ignore.

---

89. Pasley 22 & n.131; see 32 C.F.R. § 30.1(1) (1974); 41 C.F.R. § 5-60.101(a) (1974).

90. 406 U.S. at 18.