ARBITRATION UNDER GOVERNMENT CONTRACTS

ROBERT BRAUCHER*

Major programs for the national security were taking some 14 per cent of the gross national product at the end of 1951, and an increase to 18 per cent was forecast during 1952.¹ This means that contracts of the Federal Government will account for the payment of three or four billion dollars a month to thousands of contractors for some time to come. Efficient operation under those contracts is not only of financial significance; it may properly be regarded as a matter of life and death to the American people.

One aspect of efficient operations, an aspect of peculiar concern to the legal profession, is the orderly settlement of disputes. Even if contract terms are clear and precise, and contractors and Government cooperate with the greatest enthusiasm and good will, it is impossible to avoid disputes over the quality of work done or material delivered, over the amount of adjustment to be made for changes ordered by the Government, over the proper application of provisions for flexible pricing. The procedure for the settlement of such disputes has given rise to a vast body of statutes, regulations, contract clauses, forms, and other machinery. Large amounts are often at stake; the settlement process affects the interests of large numbers of people; and many men take part.

In all this, arbitration, in the usual sense of that word, plays a negligible role. That fact has been the subject of comment, often of agitation for change.² But the procedure developed under the standard "Disputes" clause of the Government contract has so far held the field. That procedure, recently characterized by the Supreme Court as "the settlement of disputes in an arbitral manner,"³ has undergone a good deal of development in recent years, and it is appropriate to reexamine it in comparison with commercial arbitration as we know it in other areas.⁴

* A.B. 1936, Haverford College; LL.B. 1939, Harvard Law School. Member of the New York and Massachusetts bars. Professor of Law, Harvard University, since 1946. Author, *INTRODUCTION TO COMMERCIAL LAW* (1950) (with Charles Corker); *CASES ON COMMERCIAL LAW* (1951). Contributor to legal periodicals. Consultant, Office of General Counsel, Department of the Air Force. The opinions expressed in this article are those of the author and do not necessarily coincide with those of the Department of the Air Force.

¹ The Economic Report of the President, N. Y. Times, Jan. 17, 1952, p. 14.

² See 9 WILLISTON, *CONTRACTS* (Graske, War Contract Claims) c. XV (1945); Anderson, *The Disputes Article in Government Contracts*, 44 MICH. L. REV. 211 (1945); Graske, *Settlement of Government War Contract Disputes*, 29 A.B.A.J. 13 (1943); Comment, *Arbitration and Government Contracts*, 50 YALE L. J. 458 (1941). In defense of the status quo, see Kronstein, *Business Arbitration—Instrument of Private Government*, 54 YALE L. J. 36, 52, 68-69 (1944).

³ *United States v. Wunderlich*, 342 U. S. 98, 100 (1951).

⁴ On arbitration of private contracts, see STURGES, *COMMERCIAL ARBITRATION AND AWARDS* (1930); CHAFEE AND SIMPSON, *CASES ON EQUITY* 520-590 (1934); KELLOR, *ARBITRATION IN ACTION* (1941); KELLOR, *AMERICAN ARBITRATION* (1948); 1950 ANN. SURVEY AM. L. 832-844 (1951).

I

ARBITRATION

A. The Judge-Made Doctrine

In *United States v. Ames*, decided in 1845, the United States brought an action of trespass on the case for flowing Government land, and the federal circuit court rejected a defense based on an award of arbitrators on the ground of "the want of authority in any officer of the United States to enter into a submission in their behalf, which shall be binding."⁵ That decision rested on the constitutional provision vesting judicial power in constitutional courts;⁶ "no department nor officer has a right to vest any of it elsewhere; and it has been questioned even if Congress can vest it in any tribunals not organized by itself."

The basic reason given for the *Ames* decision was not peculiar to contracts of the Government. The argument as to judicial power under the Constitution was equally appropriate to support the rule that a private party could not by executory agreement in advance bind himself not to resort to the courts.⁷ The standard doctrine was that an arbitration agreement between private parties was valid as a basis for nominal damages, and that an award once made was binding, but that the agreement was revocable while executory and would not be specifically enforced so as to "oust the jurisdiction of the courts."⁸ On the other hand, a pending suit could be referred to arbitration under an agreement that the award would become the decree of the court; and that procedure was upheld by the Supreme Court in a suit to which the United States was a party.⁹

In refusing to enforce an award once made, however, the *Ames* case went beyond the law for private agreements. And the broad holding that no Government officer could bind the United States by submission to arbitration is contrary to the later Supreme Court decision upholding a submission of a pending suit. The Court of Claims early in its history held that a naval contracting officer could not, "without being specially authorized to do so," bind the United States by arbitration, and refused to enforce the award against the United States.¹⁰ But later, in the *Great Falls* case,¹¹ where the submission was executed by the Secretary of the Interior, the Court of Claims upheld an award of compensation for property taken by the construction of a dam. The award was made before the dam was built, and the court held it to be an "appraisement," rather than an arbitration, and as such to be a proper incident of the power to purchase. Alternatively, the Secretary had power to submit to

⁵ *United States v. Ames*, 24 Fed. Cas. No. 14,441 at 789 (C. C. D. Mass. 1845).

⁶ U. S. CONST. Art. III, §1.

⁷ See *Insurance Co. v. Morse*, 20 Wall. 445, 453 (U. S. 1874).

⁸ See *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 120-123 (1924); *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982-985 (2d Cir. 1942); RESTATEMENT, CONTRACTS §§445, 550 (1933).

⁹ *United States v. Farragut*, 22 Wall. 406 (U. S. 1874).

¹⁰ *McCormick v. United States*, 1 Rep. Ct. Cl. No. 199, 36th Cong., 1st Sess., 1, 44 (1860).

¹¹ *Great Falls Mfg. Co. v. United States*, 16 Ct. Cl. 160, 193-196 (1880), *affirmed*, 112 U. S. 645 (1884).

arbitration if he had power to carry into effect the decree which the award might direct; and any lack of authority was cured by congressional ratification through subsequent appropriations for the dam.

The Supreme Court found it unnecessary, in affirming the *Great Falls* decision, to pass on the authority to submit to arbitration, and in 1885 the Court of Claims said "it has not yet been finally determined" how far submission to arbitration is an incident of the power to settle and adjust claims.¹² Since, however, executive officers had no power to allow claims for damages for breach of contract, they could not "bind the United States by the arbitration of claims over which they have no jurisdiction."

Most of the cases have involved submission of existing disputes rather than contract clauses for the arbitration of disputes arising under the contract. In the early Court of Claims decision,¹³ lack of authority to contract in advance was thought to follow from lack of authority to submit. Modern decisions under the "Disputes" clause, discussed below, make it reasonably clear that the conclusion no longer follows from the premise, but administrative rulings in the period following World War I adhered to the conclusion. The Judge Advocate General of the Army ruled that contract clauses providing for arbitration were against public policy and void as attempts "to oust the jurisdiction of the court."¹⁴ The Attorney General held that heads of executive departments, authorized by statute to fix the terms of sale of Government property, could not delegate that power to arbitrators; contracts to sell at a price to be fixed by arbitrators were therefore invalid.¹⁵

B. The United States Arbitration Act, 1925¹⁶

The Arbitration Act was designed to place an arbitration agreement "upon the same footing as other contracts, where it belongs"; it imposes on the courts an "obligation to shake off the old judicial hostility to arbitration."¹⁷ The constitutional difficulty suggested in the *Ames* case¹⁸ and the policy against "ousting the jurisdiction" of the courts are swept away by the Act and the Supreme Court decision upholding it.¹⁹ So far as suits against the Government are affected, the supposed constitutional obstacle has also been eliminated in another way: such suits are not part of the "judicial power" defined in the Constitution, and the Court of Claims, which regularly tries them, is a legislative rather than a constitutional court; they are "equally susceptible of legislative or executive determination."²⁰

¹² *Brannen v. United States*, 20 Ct. Cl. 219, 224 (1885); cf. *Benjamin v. United States*, 29 Ct. Cl. 417, 419 (1894).

¹³ *Supra* note 10.

¹⁴ 542.02, May 5, 1919 (U. S. Shipping Board charters), and 164, Apr. 14, 1920 (War Department contract), DIG. OP. J.A.G., 1912-1940, §726(41) (1942).

¹⁵ 33 OPS. ATTY. GEN. 160, 165-166 (1922).

¹⁶ 43 STAT. 883 (1925), codified, 61 STAT. 669 (1947), 9 U. S. C. A. §§ 1-14 (Supp. 1951).

¹⁷ See *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942); cf. *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3, 5 (3d Cir. 1943).

¹⁸ *Supra* note 5.

¹⁹ *Marine Transit Corp. v. Dreyfus*, 284 U. S. 263 (1932).

²⁰ *Williams v. United States*, 289 U. S. 553, 579-581 (1933).

Section 2 of the Act validates both arbitration clauses "in any maritime transaction or a contract evidencing a transaction involving commerce," and agreements to submit to arbitration existing disputes arising out of such a transaction or contract. Section 1 defines "commerce" in broad terms to include commerce "among the several states or with foreign nations, or in any Territory of the United States or in the District of Columbia," with the sole exception of certain employment contracts. No case seems to have passed on the validity of an arbitration clause in a Government contract, but Section 2 has been applied to the International Refugee Organization, an international organization to which the United States is a party and which is immune from suit.²¹ It is now clear in other connections that some contracts of the United States involve "commerce" among the several states,²² and it would be easy to read the Act as validating arbitration clauses in such contracts. Since the statute used the broad language of the Constitution, it would not necessarily be fatal to such an interpretation that it was not suggested until many years after the enactment of the statute.²³

But the Act does not purport to affect the authority of contracting agents. It might be fair enough to reexamine in the light of the statute the grounds on which the authority of Government agents to contract for arbitration has been denied. But not every Government contract involves "commerce" as defined in the Act,²⁴ and it would be unfortunate if the validity of an arbitration clause in a Government contract turned on the question whether interstate commerce was involved. Section 3 of the Act, providing for a stay of an action "upon any issue referable to arbitration," and Section 4, providing for an order directing arbitration by a federal court which would have jurisdiction save for the agreement, are not in terms limited to maritime transactions or contracts involving commerce; and those procedures could be made available under Government contracts containing valid arbitration clauses, whether or not commerce was involved. The stay provision has been applied in a suit under the Miller Act by a subcontractor on a Government building, without regard to "commerce."²⁵ But judicial interpretation of Section 4, providing for affirmative enforcement, has thus far limited that section by the definition of "commerce."²⁶

The jurisdictional provisions of the Arbitration Act do not fit smoothly when applied to Government contracts. Both Section 3 and Section 4 refer to any court "of the United States," a term which might well include the Court of Claims. But

²¹ *International Refugee Organization v. Republic S.S. Corp.*, 93 F. Supp. 798 (D. Md. 1950), *mandamus granted on other grounds*, 189 F.2d 858 (4th Cir. 1951).

²² *Powell v. United States Cartridge Co.*, 339 U. S. 497, 511-512 (1950) (Fair Labor Standards Act; transportation of Government munitions).

²³ *Cf. United States v. South-Eastern Underwriters Ass'n*, 322 U. S. 533, 553-562 (1944) (insurance as "commerce").

²⁴ *Cf. Murphy v. Reed*, 335 U. S. 865 (1948) (construction work under Fair Labor Standards Act); see Braucher, *Federal Enactment of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 100, 109 (1951).

²⁵ *Agostini Bros. Bldg. Corp. v. United States for the use of Virginia-Carolina Electrical Works, Inc.*, 142 F.2d 854 (4th Cir. 1944).

²⁶ *San Carlo Opera Co. v. Conley*, 72 F. Supp. 825, 830 (S. D. N. Y. 1946), *affirmed*, 163 F.2d 310 (2d Cir. 1947).

arbitration proceedings ordered by the court must be held "within the district" where the petition is filed. Unless the agreement specifies a court, the proper court to confirm, vacate or modify an award is the "United States court in and for the district" in which the award was made, although nonresidents of that district may be served with process elsewhere.²⁷ Those provisions suggest that enforcement by the Court of Claims, except perhaps by a stay, is not contemplated. The district courts have jurisdiction of actions by the United States, and of contract actions against the United States not exceeding \$10,000 in amount; but contract actions against the United States for more than \$10,000 must be brought in the Court of Claims.²⁸ Thus, if the United States refused to arbitrate as agreed in a case involving more than \$10,000, the contractor's only remedy might be to sue in the Court of Claims to enforce his claim without arbitration; and the procedure of the Act might not be available to a contractor holding an award against the United States for more than \$10,000, unless the agreement provided that the award would be made a judgment of the Court of Claims. Even so, however, such an award could be given effect as a binding determination in an action in that court.

C. The Comptroller General

Comptroller General McCarl asserted in 1928 that "boards of arbitration are prohibited in the determination of the rights of the United States."²⁹ In addition to the *Ames* case,³⁰ he relied upon two statutes concerning the payment of the expenses of commissions and boards³¹ and on the Budget and Accounting Act of 1921;³² he made no reference to the Arbitration Act. His argument from the expense statutes has largely been repudiated since his term expired in 1936, but his conclusion has not.

Section 3681 of the Revised Statutes forbids the payment of expenses connected with any commission or inquiry, except military or naval courts-martial or courts of inquiry, until special appropriations have been made for them. That statute seems to have little bearing on the problem whether an arbitration clause is valid; it seems to have been used as a makeweight except in one case where the Comptroller General was passing on a voucher for an arbitrator's services.³³ A statute of 1909, however, was very important for a time. It forbids the payment of expenses of "any commission, council, board, or other similar body" unless its creation was "authorized by law," and also forbids the detailing of Government employees to such bodies.

Shortly after the 1909 statute was enacted, the Attorney General, relying on its legislative history,³⁴ ruled that it was sufficient if the appointment of a board "were

²⁷ Sections 9-12.

²⁸ 28 U. S. C. A. §§1345, 1346(a)(2), 1491 (Supp. 1951).

²⁹ 8 COMP. GEN. 96, 97 (1928); 7 COMP. GEN. 541 (1928).

³⁰ *Supra* note 5.

³¹ REV. STAT. §3681 (1878), 31 U. S. C. §672 (1946); 35 STAT. 1027 (1909), 31 U. S. C. §673 (1946).

³² 42 STAT. 23 (1921), as amended, 31 U. S. C. §§41-56, 71 (1946).

³³ 5 COMP. GEN. 417 (1925).

³⁴ 43 CONG. REC. 3118-3119 (1909).

authorized in a general way by law."³⁵ The Comptroller of the Treasury followed that ruling,³⁶ and held a board unauthorized only when there was no implied authority for it.³⁷ Comptroller General McCarl, however, found in the 1909 statute a requirement of "specific statutory authority" for the creation of a board.³⁸ That requirement was made the basis for denying credit to a disbursing officer for the payment of compensation to an arbitrator under a Navy contract,³⁹ and later for holding invalid contract clauses providing for the arbitration of future disputes.⁴⁰

That interpretation of the 1909 statute apparently would have prevented the detailing of Government employees as arbitrators or as members of a Board of Contract Appeals without specific statutory authority. Arbitration by private citizens without fee or at the contractor's expense might have avoided the difficulty. But the point is now largely academic. For, although Comptroller General McCarl's rulings were followed in one case after he left office,⁴¹ in 1942 Comptroller General Warren reexamined the point and reasserted the view of the 1909 statute established in the early decisions under it, saying that the intervening decisions "may not have taken cognizance of the earlier history of the matter."⁴² In the 1942 decision, authority was implied because there was "clearly a situation calling for an impartial determination," and hence the creation of a board of appraisers was "wholly appropriate" in carrying out the statutory power of the Administrator of Civil Aeronautics to lease "upon such terms as he may deem proper."

The other main ground taken in Comptroller General McCarl's rulings on arbitration has not been repudiated by his successor. It was that the Budget and Accounting Act provided for the determination of claims against the Government by the General Accounting Office, and that dissatisfied claimants could obtain judicial determinations.⁴³ That ground amounted to the addition of a policy against "ousting the jurisdiction" of the Comptroller General to the ancient policy against ousting the jurisdiction of courts. That additional policy is equally hard to reconcile with the policy of the Arbitration Act, and it seems to be squarely repudiated in the judicial decisions under the "Disputes" clause, discussed below.⁴⁴ Nevertheless, so long as the Comptroller General adheres to it, it is a very substantial deterrent to the settlement of disputes by arbitration.⁴⁵

³⁵ 27 OPS. ATTY. GEN. 432, 437 (1909). See also *id.* 300, 308, 406, 459 (1909); 28 OPS. ATTY. GEN. 270 (1910); 37 OPS. ATTY. GEN. 484 (1934).

³⁶ 16 COMP. DEC. 278 (1909); 16 COMP. DEC. 422 (1910).

³⁷ 20 COMP. DEC. 643 (1914).

³⁸ 5 COMP. GEN. 231, 233 (1925). See also 5 COMP. GEN. 553 (1926); 6 COMP. GEN. 140 (1926). But see 11 COMP. GEN. 495 (1932).

³⁹ *Supra* note 33.

⁴⁰ *Supra* note 29.

⁴¹ 19 COMP. GEN. 700 (1940).

⁴² 22 COMP. GEN. 140, 143 (1942).

⁴³ *Supra* note 29.

⁴⁴ *United States v. Mason & Hanger Co.*, 260 U. S. 323 (1922); *Bell Aircraft Corp. v. United States*, 100 F. Supp. 661, 692 (Ct. Cl. 1951), *cert. granted*, 72 Sup. Ct. 646 (1952); see notes 116, 174 *infra*.

⁴⁵ See MANSFIELD, *THE COMPTROLLER GENERAL* 116-117 (1939).

D. Appraisal

Courts have often drawn a rather unsatisfactory distinction between arbitration and appraisal,⁴⁶ and there is a hint of such a distinction in the *Great Falls* opinion of the Court of Claims,⁴⁷ where the "arbitrators" were to "assess the price" to be paid to the claimants under each of four plans for dam construction. In that case, however, the Government could choose the plan after the "appraisement," and the agreement provided for review in the courts. Where an agreement purported to commit the Government to sell property at whatever value was fixed by arbitrators, the Attorney General held the provision invalid.⁴⁸

Two decisions of the Comptroller General before and during World War II go further than previous decisions in upholding contract provisions for appraisal, but fall short of full recognition of their binding force. The first, in the summer of 1940,⁴⁹ approved a War Department proposal to enter into contracts for aircraft under which contractors would be reimbursed, over a five-year period, for the cost of plant facilities. At the end of the period, or upon earlier termination of the contract, the contractor would have an option either to transfer the facilities to the Government or to pay their fair value to him at that time; fair value would be determined by arbitration. The Comptroller General's approval was conditional: "if, as is understood from your submission, they go no further than to provide for a determination of the fact of reasonable value, without imposing any legal obligation on the Government, and leave no questions of legal liability for determination by arbitrators." The only explanation of the ruling was a statement that "apportioning the equities in advance and agreeing on a procedure for subsequent adjustment would appear beneficial to both parties by largely removing from such transactions the element of risk as to future value to the contractor."

The second decision, in 1942, approved an "arbitration" clause in a lease of Government property.⁵⁰ The lessee was to have an option to renew on terms "no less favorable to the Government than those provided for the original term." If the parties could not agree on the amount to be paid, it was to be fixed by "arbitrators." The Comptroller General cited his 1940 decision, said that the proposed duties appeared "to be more in the nature of those of appraisers than of arbitrators," and relied heavily on the fact that the arbitrators could not impose any additional obligation on the Government.

Thus the decisions of the Comptroller General to date seem to draw a fine line. Arbitrators or appraisers, it seems, cannot decide "questions of legal liability," nor can they by determining the "fact" of value impose on the Government a "legal

⁴⁶ See STURGES, *COMMERCIAL ARBITRATIONS AND AWARDS* §§7-12 (1930).

⁴⁷ *Supra* note 11.

⁴⁸ *Supra* note 15. Cf. *McCormick v. United States*, *supra* note 10 (assessment of damage); 5 COMP. GEN. 417 (1925), *supra* notes 33, 39 (fixing patent royalty); 8 COMP. GEN. 96 (1928), *supra* notes 29, 40 (market value of gas rights and cost of drilling); 19 COMP. GEN. 700, *supra* note 41 (selling price for lessee's option in lease of Government property).

⁴⁹ 20 COMP. GEN. 95, 99 (1940).

⁵⁰ 22 COMP. GEN. 140, 145 (1942), *supra* note 42.

obligation." But if a legal obligation is imposed by another clause of the contract, appraisers may be authorized by contract to make a determination of fact which will decrease the sum to be paid or increase the sum to be received by the Government. The foundations upon which such distinctions rest have crumbled; but if they are accepted as continuing in force, the lesson is fairly clear: appraisers must work up from a floor in Government sales and down from a ceiling in Government purchases.

E. Government Corporations

Commentators have suggested that Government corporations are not bound by the supposed limitation on the power of Government officers to contract for or submit to arbitration.⁵¹ During World War II it was reported that Government corporations, apparently acting on that view of the law, had included arbitration clauses in a large number of contracts;⁵² and at least one award of arbitrators against the Defense Plant Corporation has withstood attack in a lower New York court.⁵³

The argument begins with the fact that "an important if not the chief reason for employing these incorporated agencies was to enable them to employ commercial methods."⁵⁴ For some purposes they are agencies of the Government, and in that capacity they have been held entitled to some privileges, immunities, and protection not given to private individuals or corporations.⁵⁵ The United States has been permitted to assert sovereign privileges when asserting claims as the real party in interest in transactions of its corporations.⁵⁶ But Government corporations have long been regarded as entities separate from the Government,⁵⁷ denied much of the special protection available to the Government.⁵⁸

⁵¹ See Note, *Authority of Government Corporations to Submit Disputes to Arbitration*, 49 COL. L. REV. 97, 101 (1949); 9 WILLISTON, CONTRACTS (Graske, War Contract Claims) §249 (1945).

⁵² *Ibid.*; see Graske, *Settlement of Government War Contract Disputes*, 29 A.B.A.J. 13 (1943).

⁵³ Application of P. J. Carlin Const. Co., 61 N.Y.S. 2d 771 (Sp. Term, N. Y. Co. 1946).

⁵⁴ See *United States ex rel. Skinner & Eddy Corp. v. McCarl*, 275 U. S. 1, 8 (1927).

⁵⁵ *McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819) (immunity from state tax); *Osborn v. Bank of the United States*, 9 Wheat. 738 (U. S. 1824) (statutory right to sue in federal court); *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180 (1921) (statutory immunity from state taxation); *United States Grain Corp. v. Phillips*, 261 U. S. 106 (1923) (free shipment on public vessel); *United States v. Walter*, 263 U. S. 15 (1923) (crime to "defraud the United States in any manner"); *Clallam County v. United States*, 263 U. S. 341 (1923) (immunity from state tax); *Emergency Fleet Corp. v. Western Union Tel. Co.*, 275 U. S. 415 (1928) (reduced telegraph rate); *Inland Waterways Corp. v. Young*, 309 U. S. 517 (1940) (validity of security for deposits in national bank); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95 (1941) (statutory tax immunity); *Federal Crop Ins. Corp. v. Merrill*, 332 U. S. 380 (1947) (limitation of agent's apparent authority by regulation).

⁵⁶ *Erickson v. United States*, 264 U. S. 246 (1924) (federal jurisdiction); *United States v. Summerlin*, 310 U. S. 414 (1940) (freedom from statute of limitations); *United States v. Emory*, 314 U. S. 423 (1941) (priority in receivership); *Cherry Cotton Mills, Inc. v. United States*, 327 U. S. 536 (1946) (counterclaim in Court of Claims); *cf. Priebe & Sons, Inc. v. United States*, 332 U. S. 407 (1947) (suit in Court of Claims); see Coffman, *Legal Status of Government Corporations*, 7 FED. B. J. 389, 400-404 (1946).

⁵⁷ See *Bank of the United States v. Planters' Bank*, 9 Wheat. 904, 907-908 (U. S. 1824).

⁵⁸ *Bank of United States v. Donnelly*, 8 Pet. 361 (U. S. 1834) (subject to statute of limitations); *National Home for Disabled Volunteer Soldiers v. Parrish*, 229 U. S. 494 (1913) (liability for interest); *United States v. Strang*, 254 U. S. 491 (1921) (employee not criminal as "agent of the United States"); *Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corp.*, 258 U. S. 549 (1922) (no immunity from suit or priority in bankruptcy); *U. S. Shipping Board Merchant Fleet Corp. v. Harwood*,

Congress has regularly given such corporations created by it power to sue and be sued, and the Supreme Court has found that that power was implied in the creation of subsidiary corporations by the Reconstruction Finance Corporation.⁵⁹ That power has not been interpreted merely as a waiver of sovereign immunity from suit. It raises a presumption that the corporation launched "into the commercial world . . . is not less amenable to judicial process than a private enterprise under like circumstances would be," embraces "all civil process incident to the commencement or continuance of legal proceedings," and places the corporation "upon an equal footing with private parties as to the usual incidents of suits in relation to the payment of costs and allowances."⁶⁰ An agreement for arbitration is normally held a proper incident to the powers of a private or municipal corporation to make contracts, settle claims, and conduct litigation.⁶¹ If Government corporations have such powers, perhaps they also have power to submit to arbitration.

Many Government corporations have not been subjected to other limitations on contracting imposed on other Government agencies, such as the requirement of formal advertising and competitive bidding.⁶² Many of their expenditures have not been subject to control by the Comptroller General, and claims against them have been settled without submission to the General Accounting Office.⁶³ Although the Government Corporation Control Act of 1945,⁶⁴ the Federal Tort Claims Act,⁶⁵ and the Federal Property and Administrative Services Act of 1949⁶⁶ have somewhat impaired their autonomy in such matters, authority may remain from which a power to submit to arbitration might be inferred.

The Government Corporations Control Act requires wholly owned Government corporations to submit annually a "business-type budget," and subjects both "wholly owned" and "mixed-ownership" Government corporations to audit by the

281 U. S. 519 (1930) (no immunity from suit); *Continental Illinois National Bank & Trust Co. v. Chicago, R.I. & P. Ry.*, 294 U. S. 648 (1935) (liquidation of security suspended in reorganization); *Federal Land Bank v. Priddy*, 295 U. S. 229 (1935) (subject to attachment); *Keifer & Keifer v. RFC*, 306 U. S. 381 (1939) (no immunity from suit); *United States v. Marxen*, 307 U. S. 200 (1939) (priority in bankruptcy); *Federal Housing Administration v. Burr*, 309 U. S. 242 (1940) (liability to garnishment); *Reconstruction Finance Corp. v. J. G. Menihan Corp.*, 312 U. S. 81 (1941) (liability for costs); *Pierce v. United States*, 314 U. S. 306 (1941) (no crime to impersonate agent of TVA).

⁵⁹ *Keifer & Keifer v. RFC*, 306 U. S. 381, 390 (1939); see Note, *The Liability of Public Corporations in England and America*, 2 VAND. L. REV. 83 (1948).

⁶⁰ *RFC v. J. G. Menihan Corp.*, 312 U. S. 81, 84-86 (1941).

⁶¹ *Alexandria Canal Co. v. Swann*, 5 How. 83, 89 (U. S. 1847); see *District of Columbia v. Bailey*, 171 U. S. 161, 171-173 (1898); STURGES, *COMMERCIAL ARBITRATION AND AWARDS* §§49, 50 (1930).

⁶² See Lilienthal and Marquis, *The Conduct of Business Enterprises by the Federal Government*, 54 HARV. L. REV. 545, 567 (1941); Coffman, *Legal Status of Government Corporations*, 7 FED. B. J. 389, 404-405 (1946). But see 4 COMP. GEN. 788 (1925); 7 COMP. GEN. 600 (1928).

⁶³ *United States ex. rel. Skinner & Eddy Corp. v. McCarl*, 275 U. S. 1, 8 (1927); see MANSFIELD, *THE COMPTROLLER GENERAL* 215-218 (1939); Lilienthal and Marquis, *supra* note 62, at 568, 577-586.

⁶⁴ 59 STAT. 597 (1945), as amended, 31 U.S.C.A. §§841-869 (Supp. 1951); see Pritchett, *The Government Corporation Control Act of 1945*, 40 AM. POL. SCI. REV. 495 (1946); Coffman, *supra* note 62, at 390-395.

⁶⁵ 60 STAT. 843 (1946), as codified and amended, 28 U. S. C. A. §§1346(b), 2401(b), 2671-2680 (1950); see Note, 2 VAND. L. REV. 83, 94-96 (1948).

⁶⁶ 63 STAT. 378 (1949), as amended, 41 U. S. C. A. §§201-290 (Supp. 1951).

General Accounting Office "in accordance with the principles and procedures applicable to commercial corporate transactions and under such rules and regulations as may be prescribed by the Comptroller General."⁶⁷ The Comptroller General, in reporting the audit to Congress, is to "show specifically" any transaction which in his opinion has been carried on without authority of law.⁶⁸ That provision suggests that the Comptroller General's duty is to report illegality rather than to stop it by controlling expenditures. And the Comptroller General has ruled that claims against Government corporations need not be submitted to him for settlement, on the ground that such a requirement would be inconsistent with their power to sue and be sued in their own names and "to settle their own claims and to have their financial transactions treated as final and conclusive."⁶⁹ Thus, while the duty to report to Congress gives the Comptroller General's views moral force, those views do not have the practical finality that often results when he has power to disallow payments.⁷⁰

The Tort Claims Act and the Federal Property statute take substantial steps to put Government corporations on the same footing as other Government agencies. The Tort Claims Act defines "federal agency" to include "corporations primarily acting as, instrumentalities or agencies of the United States," provides that the power of a federal agency to sue and be sued in its own name shall not authorize suits on claims cognizable under the Act, and makes its remedies exclusive.⁷¹ Those provisions have been held to forbid common law tort actions against the Inland Waterways Corporation, since under the Act the defendant must be the United States.⁷² The Act authorizes federal agencies to "consider, ascertain, adjust, determine and settle" claims of \$1,000 or less; after suit the Attorney General may "arbitrate, compromise, or settle" any claim.⁷³ The Attorney General has ruled that the Inland Waterways Corporation nevertheless continues to have power to settle administratively tort claims over \$1,000;⁷⁴ but the statutory provision for arbitration by the Attorney General, coupled with failure to mention arbitration by the agency, raises a substantial question as to agency power to submit to arbitration. That question, however, relates only to the submission of tort claims, and would seem not to affect either contracts to arbitrate future disputes or submission of existing contract disputes.

The Federal Property and Administrative Services Act of 1949 established the General Services Administration and gave the Administrator broad power with respect to the procurement of personal property and nonpersonal services for "executive agencies"

⁶⁷ Secs. 102, 105, 202; 27 COMP. GEN. 789 (1947).

⁶⁸ Secs. 106, 203.

⁶⁹ 27 COMP. GEN. 429, 432 (1948); cf. 30 COMP. GEN. 489 (1951); see Blanchard, *Government Corporations and Compliance Statutes*, 11 FED. B. J. 163 (1951).

⁷⁰ See MANSFIELD, *THE COMPTROLLER GENERAL* 116-117 (1939).

⁷¹ 28 U. S. C. §§2671, 2679.

⁷² *Wickman v. Inland Waterways Corp.*, 78 F. Supp. 284 (D. Minn. 1948).

⁷³ 28 U. S. C. §§2672, 2677.

⁷⁴ 40 OPS. ATTY. GEN. 527 (1947).

and with respect to the disposition of surplus property.⁷⁵ "Executive agency" includes "any wholly owned Government corporation," but the freedom of such corporations is preserved with respect to property accounting systems, supply catalog systems, and standard purchase specifications.⁷⁶ The Administrator may delegate and "authorize successive redelegation" of many of his powers, including the power to procure and dispose of property, either to any official in the GSA or to the head of any other Federal agency.⁷⁷ The breadth of those powers is underlined by a provision that supply contracts negotiated under GSA authority, except as otherwise provided, "may be of any type which in the opinion of the agency head will promote the best interests of the Government."⁷⁸ Unless there is a rigid rule that statutory authority for arbitration must be specific, those provisions would seem broad enough to permit the Administrator to provide for arbitration clauses in many Government contracts. But they lend no support to the view that Government corporations have greater power than other agencies in this regard.

F. Emergency Power

The First War Powers Act, 1941,⁷⁹ provided that the President might authorize agencies exercising functions in connection with the prosecution of the war effort to make and amend contracts "without regard to the provisions of law relating to the making, performance, amendment or modification of such contracts whenever he deems such action would facilitate the prosecution of the war," with provisos forbidding cost-plus-a-percentage-of-cost contracting and preserving laws on profit limitation. By Executive Order 9001,⁸⁰ the President authorized the War and Navy Departments and the United States Maritime Commission to exercise the full power granted by the statute, "within the limits of the amounts appropriated therefor" and subject to limitations not affecting the power to contract for arbitration. Later the Act was extended to numerous other agencies.⁸¹

Early opinions of the Comptroller General asserted an interpretation of the statute and executive order which would have preserved a considerable number of traditional restrictions on procurement.⁸² But the matter was submitted to the Attorney General, who rejected any such restrictive interpretation, relying on the debates in Congress to reinforce the sweeping language of the statute.⁸³ Under the Attorney General's interpretation, which was acted on throughout World War II, it would seem clear that arbitration clauses could have been authorized for use in

⁷⁵ Secs. 101, 201, 203.

⁷⁶ Secs. 3, 205(b), 206(b), 602; *cf.* Budget and Accounting Act of 1950, Sec. 118, 64 STAT. 837 (1950), 31 U. S. C. A. §65a (Supp. 1951); 30 COMP. GEN. 489 (1951).

⁷⁷ Sec. 205(d).

⁷⁸ Sec. 304(a); *cf.* Armed Services Procurement Act of 1947, Sec. 4(a), 62 STAT. 23 (1948), 41 U. S. C. A. §153(a) (Supp. 1951).

⁷⁹ Sec. 201, 55 STAT. 839 (1941), 50 U. S. C. App. §611 (1946).

⁸⁰ 6 FED. REG. 6787 (1941).

⁸¹ See Kramer, *Extraordinary Relief for War Contractors*, 93 U. OF PA. L. REV. 357, 361 n. (1945).

⁸² 21 COMP. GEN. 835, 1019 (1942).

⁸³ 40 OPS. ATT. GEN. 225 (1942); see Kramer, *supra* note 81, at 363-366.

war contracts if the proper officials had determined that such use would facilitate the prosecution of the war.⁸⁴ But no such determination seems to have been made.

The situation is much the same today. In January 1951 the First War Powers Act was amended to refer to the "national defense" instead of the "prosecution of the war," and was extended during the present national emergency until June 30, 1952 or such earlier time as Congress or the President may designate.⁸⁵ Executive Order 10210 and succeeding executive orders have authorized the Department of Defense and other agencies to act with much the same freedom as under Executive Order 9001 during World War II.⁸⁶ But no action seems to have been taken under that power to authorize arbitration clauses.

G. Specific Statutes; the Contract Settlement Act of 1944

In addition to the arbitration provision of the Federal Tort Claims Act, referred to above,⁸⁷ three other statutes specifically authorize the submission to arbitration of claims against the United States. The Suits in Admiralty Act⁸⁸ authorizes the Secretary of any Government department, or the board of trustees of any wholly owned Government corporation, to "arbitrate, compromise, or settle" claims under that Act; the Public Vessels Act⁸⁹ gives similar authority to the Attorney General once a libel or cross libel has been filed; and the Contract Settlement Act of 1944⁹⁰ authorized contracting agencies to submit to arbitration all or part of any claim of a World War II contractor for fair compensation under a terminated war contract. No judicial decisions have been found under any of those provisions. None of them purports to treat wholly owned Government corporations any differently from other Government agencies in respect of arbitration.

The arbitration provision in the Contract Settlement Act followed recommendations of the National Association of Manufacturers, the Illinois Manufacturers' Association, the American Arbitration Association, and the New York Chamber of Commerce, despite adverse comments by the Attorney General, concurred in by the General Accounting Office.⁹¹ The demand for such a provision was coupled with a demand for relief from "Disputes" clauses providing for final decision by the contracting agency, and the latter demand was also met by the statute.⁹² The

⁸⁴ Cf. *Waller v. United States*, 114 Ct. Cl. 640, 78 F. Supp. 816 (1948).

⁸⁵ 64 STAT. 1257 (1951), 50 U. S. C. A. App. §611 (Supp. 1951).

⁸⁶ Exec. Order No. 10210, 16 FED. REG. 1049 (1951) (Defense, Commerce); Exec. Order No. 10216, 16 FED. REG. 1815 (1951) (Agriculture, Atomic Energy Commission, National Advisory Committee for Aeronautics, Government Printing Office); Exec. Order No. 10227, 16 FED. REG. 2675 (1951) (GSA); Exec. Order No. 10231, 16 FED. REG. 3025 (1951) (TVA); Exec. Order No. 10243, 16 FED. REG. 4419 (1951) (Federal Civil Defense Admin'n); Exec. Order No. 10281, 16 FED. REG. 8789 (1951) (Defense Materials Procurement Agency); Exec. Order No. 10298, 16 FED. REG. 10915 (1951) (Interior).

⁸⁷ Note 73 *supra*.

⁸⁸ Sec. 9, 41 STAT. 527 (1920), as amended, 46 U. S. C. §749 (1946).

⁸⁹ Sec. 6, 43 STAT. 1113 (1925), 46 U. S. C. §786 (1946).

⁹⁰ Sec. 13(c), 58 STAT. 660 (1944), as amended, 41 U. S. C. A. §113(c) (Supp. 1951).

⁹¹ Problems of Contract Termination, *Hearings before a Subcommittee of the Senate Committee on Military Affairs on S. 1268, S. 1280, and S. 1470*, Pt. 6, 78th Cong., 2d Sess. 391, 425, 433, 435-443, 525-526 (1944).

⁹² Sec. 13(c).

Attorney General's objections to arbitration were (1) that the Government would lose the benefit of the uniform body of law built up by judicial precedents, (2) that occasional arbitrators might be influenced, like a jury, by the comparative financial position of the Government, and (3) that delay would result if a question common to many cases could not be disposed by an authoritative precedent in a single test case. It was also suggested (4) that there might be a shortage of trained personnel to act as arbitrators, and (5) that the Government would be able to appoint better-trained arbitrators than contractors could.

As enacted, the Contract Settlement Act made arbitration optional with the contracting agency as well as with the contractor. The War and Navy Departments, the Reconstruction Finance Corporation, and the Maritime Commission authorized resort to arbitration,⁹³ but there is no indication in the reports of the Director of Contract Settlement that that authority was used to any significant extent. One reason may be the limitation of the authority in the Joint Termination Regulations of the War and Navy Departments to cases where the service or bureau chief "believes that the basic objectives of the act will be better served by its use than by resort to the other methods provided." Another reason may be the extraordinary success of the program in achieving negotiated termination settlements: by the end of 1946, 99 per cent of the 318,866 terminated war contracts had been settled, and only 158 cases had been filed with the Appeal Board.⁹⁴ In any event, the program did not provide the proving-ground for arbitration of Government contract disputes hoped for by the sponsors of the arbitration provision.

The statutory provision in the Contract Settlement Act gave authority for submission of existing termination claims to arbitration, rather than for contracts to arbitrate future disputes. The submission was to be agreed to by "the contracting agency responsible for settling" the claim, and the arbitration proceedings were to be governed by the United States Arbitration Act "as if" authorized by an effective agreement in writing. The award was to have the same finality as a negotiated settlement, but without approval by any settlement review board. Arbitration was authorized "without regard to the amount in dispute," but no provision was made to clear up the jurisdiction of the Court of Claims.⁹⁵

H. The Situation Today

This survey indicates that the supposed rule that Government disputes could not be arbitrated without specific authority from Congress was contrary to an authoritative precedent.⁹⁶ Its main foundation was undermined by the enactment of the Arbitration Act, and it has been subjected to supposed "exceptions" for appraisals and for contracts of Government corporations. In several situations specific statutory authority has been given.

⁹³ See WAR CONTRACT TERMINATIONS AND SETTLEMENTS, REPORT BY THE DIRECTOR OF CONTRACT SETTLEMENT, THIRD REPORT 20 (April, 1945); Joint Termination Regulations 516, 625.2, 10 FED. REG. 10793 (1945), 10 CODE FED. REGS. §§845.516, 846.625 (Supp. 1945).

⁹⁴ See WAR CONTRACT TERMINATIONS AND SETTLEMENTS, REPORT OF THE OFFICE OF CONTRACT SETTLEMENT, TENTH REPORT 1-2 (Jan. 1947).

⁹⁵ See notes 27 and 28 *supra*.

⁹⁶ United States v. Farragut, *supra* note 9.

The Armed Services Procurement Act of 1947⁹⁷ and the Federal Property and Administrative Services Act of 1949⁹⁸ have provided broad authority for the use by Government agencies of commercial methods of procurement and disposal of personal property. Both the Armed Services and the General Services Administration have issued regulations to carry out that authority. If those regulations provided for arbitration clauses, it is most unlikely that the clauses would be held invalid in the courts on the basis of antique decisions of lower federal courts or on the basis of administrative reiteration of an outworn phrase.

But the regulations of the Armed Services and of the GSA do not authorize arbitration clauses; in their standard "Disputes" clauses they provide a different procedure under which the contractor does not participate in the selection of the "arbitral" tribunal.⁹⁹ It is still reasonably clear that a subordinate contracting officer cannot bind the Government by a contract provision contrary to applicable regulations.¹⁰⁰ Thus the very statutes which have broadened the power to adopt commercial practices by regulation may have narrowed the discretion of contracting officers and even impaired the contracting autonomy of individual Government agencies. Under the Armed Services Procurement Regulation, for example, it seems clear that an arbitration clause would be a "deviation" from the mandatory "Disputes" clause. This means that it is beyond the authority of the Air Matériel Command as "sole procuring activity" of the Air Force; deviations must be approved at least by the Deputy Chief of Staff, Matériel, Headquarters, USAF.¹⁰¹

It seems most unlikely that even an agency head would authorize the use of an arbitration clause as a deviation from published regulations, unless a very clear need were shown. And there is no present indication that such clauses will be generally authorized by regulation. Whether such a development would be desirable depends to some extent on the adequacy of the alternative procedure under the "Disputes" clause, to which we now turn.

II

THE "DISPUTES" CLAUSE

A. The Standard Clause

The Armed Services Procurement Regulation requires in all "fixed-price supply contracts," and the General Services Administration prescribes for supply contracts, the following clause:¹⁰²

⁹⁷ 62 STAT. 21 (1948), 41 U. S. C. A. §§151-161 (Supp. 1951).

⁹⁸ 63 STAT. 378 (1949), 41 U. S. C. A. §§201-290 (Supp. 1951).

⁹⁹ Armed Services Procurement Regulation (ASPR) 7-103.12, 14 FED. REG. 5074 (1949), 32 CODE FED. REGS. §406.103-12 (Supp. 1950); GSA General Regulation No. 4, par. 3, Nov. 20, 1950; GSA Standard Form 32, par. 12, Nov. 1949; GSA Form 281c, par. 22, March, 1951.

¹⁰⁰ Federal Crop Ins. Corp. v. Merrill, 332 U. S. 380 (1947); Mock v. United States, 183 F.2d 174 (10th Cir. 1950); cf. McCormick v. United States, *supra* note 10.

¹⁰¹ ASPR 1-108, 15 FED. REG. 8025 (1950), 32 CODE FED. REGS. §400.108 (Supp. 1950); Air Force Procurement Procedures (AFPP) 1-1-9, 15 FED. REG. 8970, 32 CODE FED. REGS. §1000.109 (Supp. 1950).

¹⁰² *Supra* note 99. See Anderson, *The Disputes Article in Government Contracts*, 44 MICH. L. REV. 211 (1945); Smith, *The War Department Board of Contract Appeals*, 5 FED. B. J. 74 (1943).

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. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive: *Provided*, That, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. 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.

The clause may be modified to provide for intermediate appeal to the head of the procuring activity concerned.

Substantially similar clauses have been used in supply and other contracts of the Government for many years; a very similar "Disputes" clause was apparently adopted as part of a standard construction contract in 1926; and a construction contract of the Army Engineers containing such a clause was made in 1931 and litigated in 1936.¹⁰³ Long before then Government contracts had provided for the determination of particular questions by Government officers, and clauses have sometimes been used which provided for administrative decision of "disputes concerning questions arising under this contract," without restriction to "questions of fact."¹⁰⁴

Clauses of narrower scope have sometimes been included in the same contract with a general "disputes" clause, raising the question whether the two clauses operated independently or whether they should be read together.¹⁰⁵ The Armed Services Procurement Regulation attempts to avoid this difficulty by cross-reference. Thus the standard "Changes" clause provides for an equitable adjustment in contract price or delivery schedule, or both, when changes in the contract are ordered by the contracting officer, and adds:¹⁰⁶

Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

Similar provisions are found in the ASPR clauses entitled "Inspection" and "Default," in Army "Price Escalation" and "Price Redetermination" clauses, and in

¹⁰³ *Davis v. United States*, 82 Ct. Cl. 334 (1936); see *Harwood-Nebel Construction Co. v. United States*, 105 Ct. Cl. 116, 129-131, 139-141, 147 (1945); *Pfotzer v. United States*, 111 Ct. Cl. 184, 226, 77 F. Supp. 390, 399 (1948).

¹⁰⁴ *United States v. Beuttas*, 324 U. S. 768, 770 (1945); *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234, 236 (1946); cf. *Barlow v. United States*, 35 Ct. Cl. 514, 544 (1900), *modified*, 184 U. S. 123 (1902).

¹⁰⁵ *E.g.*, *United States v. Moorman*, 338 U. S. 457 (1950); cf. *Wunderlich v. United States*, 117 Ct. Cl. 92, 210 (1950), *reversed on other items*, 342 U. S. 98 (1951); *Bell Aircraft Corp. v. United States*, 100 F. Supp. 661, 696 (Ct. Cl. 1951), *cert. granted*, 72 Sup. Ct. 646 (1952).

¹⁰⁶ ASPR 7-103.2.

Army and Air Force clauses on "Termination for Convenience of the Government."¹⁰⁷

B. The Armed Services Board of Contract Appeals

In 1942 the Secretary of War created the War Department Board of Contract Appeals to act as his representative to determine appeals under contract provisions for the settlement of disputes, and the Navy Department created a similar board in 1944; other Government agencies have followed suit.¹⁰⁸ Effective May 1, 1949, the Departments of the Army, Navy, and Air Force issued a joint charter for the Armed Services Board of Contract Appeals,¹⁰⁹ designating that Board as the representative of the respective Secretaries to determine appeals of contractors (1) pursuant to contract provisions, (2) pursuant to directives granting a right of appeal not contained in the contract, (3) pursuant to the Contract Settlement Act of 1944. Here we are concerned only with the jurisdiction conferred by contract, as elaborated by the following provisions in the charter:

When an appeal is taken pursuant to a disputes clause in a contract which limits appeals to disputes concerning questions of fact, the Board may nevertheless in its discretion hear, consider, and decide all questions of law necessary for the complete adjudication of the issue. Unless the contract provides otherwise, when in the consideration of an appeal it appears that a claim for unliquidated damages is involved therein, the Board shall insofar as the evidence permits, make findings of fact with respect to such claims without expressing opinion on questions of liability.

C. Validity of the Clause

Perhaps the leading case on the finality of administrative determinations under Government contracts is *Kihlberg v. United States*,¹¹⁰ where a contract for the transportation of Government supplies provided for payment according to distance, "the distance to be ascertained and fixed by the chief quartermaster of the district of New Mexico." An order fixing distances "less than by air line" was upheld, on the ground that

the action of the chief quartermaster, in the matter of distances, was intended to be conclusive. There is neither allegation nor proof of fraud or bad faith upon his part. The difference between his estimate of distances and the distances by air line, or by the road usually travelled, is not so material as to justify the inference that he did not exercise the authority given him with an honest purpose to carry out the real intention of the parties, as collected from their agreement.

¹⁰⁷ ASPR 7-103.5, 7-103.11; Army Procurement Procedure (APP) 7-151, 7-152, 8-1003 to 8-1007, 16 FED. REG. 3987, 4043-4048, 4058-4062 (1951); Contract Termination Regulations, paragraphs 72, 73, Headquarters, Air Materiel Command, Directorate Office Instruction No. 73-3, September 10, 1950, 2 CCH GOVERNMENT CONTRACTS REP. ¶¶42072, 42073.

¹⁰⁸ See Smith, *The War Department Board of Contract Appeals*, 5 FED. B. J. 74 (1943); Anderson, *The Disputes Article in Government Contracts*, 44 MICH. L. REV. 211 (1945); CCH GOVERNMENT CONTRACTS REP. 10701-10771.

¹⁰⁹ ASPR Appendix A, 16 FED. REG. 4320 (1951).

¹¹⁰ 97 U. S. 398, 401 (1878).

Subsequent cases in the Supreme Court have uniformly followed the *Kihlberg* case.¹¹¹ In *United States v. Gleason*,¹¹² the rule was stated broadly that a construction contract could provide for final administrative decision "of all or specified matters of dispute that may arise during the executing of the work," and that such decisions would stand "in the absence of fraud or of mistake so gross as to necessarily imply bad faith." The doctrine was applied to give finality to decisions interpreting drawings and specifications,¹¹³ determining the allowability of an expense item under a cost-plus contract,¹¹⁴ and terminating a lease for default.¹¹⁵ In the lease case the Court faced squarely the point that the administrative decision was that of one of the parties to the contract and held, by analogy to private contracts calling for performance to the satisfaction of one of the parties, that "good faith is all that is required." The doctrine has been applied against the Government as well as in its favor: the Comptroller of the Treasury and his successor the Comptroller General have been denied the power to disallow payments made pursuant to final administrative decisions.¹¹⁶

Difficulty has nonetheless arisen, not only with respect to the interpretation of particular contract clauses, and the application of the "bad faith" exception, but also, until recently, with the validity of contract provisions for final administrative decisions on "questions of law," especially on questions of contract interpretation.

D. Questions of Law

The Court of Claims in 1866 asserted that contract clauses could not give finality to administrative decisions "made after the contract has expired, and when the rights of the parties have become settled and fixed."¹¹⁷ The analogy of submission of an existing dispute to arbitration would have provided a basis for ruling that in such a case an award could be reviewed for violation of law and justice seen on the face of the award,¹¹⁸ and the Court of Claims did later assert that "it is the province of the court to determine the law of the contract."¹¹⁹

¹¹¹ In addition to the cases cited *infra*, see *Sweeney v. United States*, 109 U. S. 618 (1883); *Martinsburg & Potomac R. R. v. March*, 114 U. S. 549 (1885); *Chicago & Santa Fe R. R. v. Price*, 138 U. S. 185 (1891); *Ripley v. United States*, 223 U. S. 695, 704 (1912).

¹¹² 175 U. S. 588, 602 (1900).

¹¹³ *Plumley v. United States*, 226 U. S. 545 (1913); *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387 (1916).

¹¹⁴ *United States v. Mason & Hanger Co.*, 260 U. S. 323 (1922).

¹¹⁵ *Goltra v. Weeks*, 271 U. S. 536, 548 (1926).

¹¹⁶ *United States v. Mason & Hanger Co.*, *supra* note 114; *Yale & Towne Mfg. Co. v. United States*, 58 Ct. Cl. 633, 638 (1923); *National Contract Co. v. United States*, 59 Ct. Cl. 441 (1924); *Penn Bridge Co. v. United States*, 59 Ct. Cl. 892 (1924); *Carroll v. United States*, 76 Ct. Cl. 103, 126 (1933); *Sun Shipbuilding & Dry Dock Co. v. United States*, 76 Ct. Cl. 154, 193 (1933); *Albina Marine Iron Works, Inc. v. United States*, 79 Ct. Cl. 714, 720 (1934); *McShain Co. v. United States*, 83 Ct. Cl. 405, 409 (1936); *Mitchell Canneries, Inc. v. United States*, 111 Ct. Cl. 228, 247, 77 F. Supp. 498, 502 (1948); *Bell Aircraft Corp. v. United States*, 100 F. Supp. 661, 692 (Ct. Cl. 1951), *cert. granted*, 72 Sup. Ct. 646 (1952); *John H. Mathis Co. v. United States*, 79 F. Supp. 703 (D. N. J. 1948); *James Graham Mfg. Co. v. United States*, 91 F. Supp. 715 (N. D. Cal. 1950); *Leeds & Northrup Co. v. United States*, 101 F. Supp. 999 (E. D. Pa. 1951).

¹¹⁷ *Douglas v. United States*, 2 Ct. Cl. 347, 352 (1866).

¹¹⁸ *United States v. Farragut*, 22 Wall. 406, 424 (U. S. 1874).

¹¹⁹ *Lyons v. United States*, 30 Ct. Cl. 352, 365 (1895); *Collins v. United States*, 34 Ct. Cl. 294, 332 (1899).

In *Barlow v. United States*,¹²⁰ finally decided in 1902, the contract provided for administrative decision of "any doubts or disputes . . . as to the meaning . . . of anything in the contract," with an appeal to and final decision by the Secretary of the Navy. The Court of Claims indicated that the clause could not be effective according to its terms, since it would bind "one party to abide as to every matter of fact, and as to every question of legal right, by the decision of the other party," and interpreted it as inapplicable to the particular claim. The Supreme Court reversed the allowance of that claim on other grounds, and found it unnecessary to pass on the "doubts and disputes" clause.

The Court of Claims, under clauses providing for finality only as to facts, has interpreted contracts for itself as a matter of law, and has sometimes used language suggesting that the "competency of the parties" was limited to questions of fact.¹²¹ In 1939, in *John McShain, Inc. v. United States*,¹²² such language was made the basis for judicial reversal of the contracting officer's interpretation of drawings and specifications. As the Supreme Court said in a later case, that holding "was considered such a departure from established contract law" that the Supreme Court summarily reversed in a per curiam opinion. Neither the record in the Supreme Court nor any of the opinions discloses the crucial terms of the contract in the *McShain* case, but the briefs agree that the contract contained both a clause providing for finality "as to the proper interpretation of the drawings and specifications" and an omnibus "Disputes" clause not limited to questions of fact.

In 1942 the Court of Claims passed squarely on a "Disputes" clause providing specially for "labor issues" and giving finality to administrative decisions on "all other disputes concerning questions arising under this contract."¹²³ On the ground that provisions preventing resort to the courts should be strictly construed, the court limited the clause to questions as to what work was required of the contractor and interpreted for itself a contract provision for deductions from the price. The broad "Disputes" clause was again considered by the Court of Claims in *Beuttas v. United States*,¹²⁴ and again limited to "disputes arising in the course of the work." If intended to have the broad scope contended for by the Government, said the court, it would be clearly illegal as a contract not to resort to the courts. The court relied on the rules established for non-statutory arbitration and on the statutes conferring

¹²⁰ 35 Ct. Cl. 514, 546 (1900), *modified*, *United States v. Barlow*, 184 U. S. 123, 134 (1902).

¹²¹ *Albina Marine Iron Works, Inc. v. United States*, 79 Ct. Cl. 714, 722 (1934); *Davis v. United States*, 82 Ct. Cl. 334, 347 (1936); *Rust Engineering Co. v. United States*, 86 Ct. Cl. 461, 474 (1938); *Schmoll v. United States*, 91 Ct. Cl. 1, 33 (1940); *Callahan Construction Co. v. United States*, 91 Ct. Cl. 538, 616 (1940); *Ruff v. United States*, 96 Ct. Cl. 148, 165 (1942); *B-W Construction Co. v. United States*, 97 Ct. Cl. 92, 118 (1942); *John McShain, Inc. v. United States*, 97 Ct. Cl. 281, 295 (1942); *Gerhardt F. Meyne Co. v. United States*, 110 Ct. Cl. 527, 548, 76 F. Supp. 811, 814 (1948). *Accord*: *United States v. Lundstrom*, 139 F.2d 792 (9th Cir. 1943).

¹²² 88 Ct. Cl. 284, 295-297 (1939), *reversed per curiam*, *United States v. John McShain, Inc.*, 308 U. S. 512, 520 (1939); *Brief for the United States*, pp. 4-5; *Brief for Respondent*, p. 3; see *United States v. Moorman*, 338 U. S. 457, 461 (1950); note 113 *supra*.

¹²³ *Penker Construction Co. v. United States*, 96 Ct. Cl. 1, 36-39 (1942).

¹²⁴ 101 Ct. Cl. 748, 766-770 (1944), *reversed*, *United States v. Beuttas*, 324 U. S. 768, 772 (1945).

jurisdiction on the Court of Claims, and distinguished between questions of fact and the question whether the contract had been broken. On appeal the Supreme Court reversed on the merits and found it unnecessary to decide whether administrative finality could be provided for questions of law or only for questions of fact and questions of mixed fact and law; a possible clue was given however, in the comment, "Our cases have not explicitly drawn any distinction between the two categories."

The Supreme Court has given effect to the broad disputes clause both before and since the *Beuttas* case without explicit distinction between fact and law, and the Court of Claims seems to have accepted the view that the contracting officer can be made the final arbiter of the meaning of the contract.¹²⁵ The last word of the Supreme Court on the subject, in *Moorman v. United States*,¹²⁶ gives no hint of limitation on the power to contract for final administrative decision of questions arising under the contract. That case upheld an administrative decision as to the scope of the work required by the contract, even on the assumption that the question was one of law.

On the assumption that a Government contract can effectively provide for final administrative decision of questions of law, there remains the question what contract language has that effect. In *Pfotzer v. United States*¹²⁷ the specifications contained a clause making the contracting officer the interpreter of the drawings and specifications, without any provision for appeal, while the "Disputes" clause provided for final decision, subject to administrative appeal, of questions of fact only. The Court of Claims held that the specifications clause was merely intended to insure that the contractor would obey directions of the contracting officer while the dispute was being decided. Otherwise, said the court, the standard "Disputes" clause, carefully formulated and approved by the President, would be "left to the whim of the specification writer." Hence the administrative decision, in accordance with the "Disputes" clause, was final only on questions of fact, not including interpretation of the contract. In the *Moorman* case,¹²⁸ the Court of Claims followed that decision, although the specification clause was quite explicit and did provide for an appeal; but the Supreme Court reversed.

The Supreme Court answered the contention that there was an unauthorized deviation from the standard "Disputes" clause by pointing to the language "Except as otherwise specifically provided in this contract," contained in the "Disputes" clause. The Court reaffirmed the doctrine that an intention to submit to final determination outside the courts "should be made manifest by plain language," but

¹²⁵ *United States v. Blair*, 321 U. S. 730 (1944); *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234 (1946); *George F. Driscoll Co. v. United States*, 104 Ct. Cl. 762, 774, 63 F. Supp. 657, 662 (1945), *cert. denied*, 328 U. S. 854 (1946).

¹²⁶ 338 U. S. 457 (1950).

¹²⁷ 111 Ct. Cl. 184, 224-228, 77 F. Supp. 390, 399-400 (1948).

¹²⁸ *Moorman v. United States*, 113 Ct. Cl. 159, 178-180, 82 F. Supp. 1010, 1013-1014 (1949), *reversed*, *United States v. Moorman*, 338 U. S. 457 (1950), *supra* note 126. In accord with the Supreme Court's interpretation, see *Needles v. United States*, 101 Ct. Cl. 535, 609 (1944).

said that "blindness to a plain intent" was not justified. "Ample reason" for the provision was found in "the oft-repeated conclusion of the Court of Claims that questions of 'interpretation' are not questions of fact." While there was "much to be said for the argument that the 'interpretation' here presents a question of fact," that argument need not be considered. For the dispute was covered separately by the clause in the specifications.

E. Questions of Fact

In the *Wunderlich* case,¹²⁹ the Court of Claims reexamined in the light of the *Moorman* decision its "oft-repeated conclusion" that a "Disputes" clause limited to questions of fact does not cover questions of contract interpretation. Upon reexamination, it adhered to its former conclusion on the ground that the characterization of interpretation as a question of law, "though analytically inaccurate," was "quite universal" when the standard "Disputes" clause was adopted. That conclusion was reinforced by reference to decisions of departmental Boards of Contract Appeals, which had treated such questions as questions of law which they might decide or refuse to decide in their discretion.

That reexamination was made by the Court of Claims in the first part of its opinion, before it took up separately the many claims involved in the case. One of several claims decided against the Government was taken to the Supreme Court, and there the judgment was reversed on the assumption, agreed to by both parties, that "the question decided by the department head was a question of fact."¹³⁰ The opinion of the Supreme Court does not disclose which claim was before it; but the briefs do, and they make it clear that the Court of Claims' conclusion on contract interpretation was not before the Supreme Court.

The claim involved was Claim No. 17, for the use of equipment and its operating expense, for which the contracting officer had allowed some \$145,000 and the Court of Claims, "using proper accounting methods," allowed over \$100,000 more.¹³¹ The Court of Claims considered the claim under the "Extras" clause of the specifications, calling for the payment of "actual necessary cost as determined by the contracting officer, plus 10 per cent for superintendence, general expense, and profit," the cost to include "a reasonable allowance for the use of his plant and equipment." The computation of allowances for rent, repair, and maintenance of equipment was found to have been "arbitrary and capricious." In the Supreme Court, the Government contended that the question properly arose under the standard "Changes" article, providing for an "equitable adjustment" when the contracting officer made changes in drawings and specifications, that what is an equitable adjustment is a question of fact, and that the Court of Claims had erred in treating it as a question of law. The contractor agreed that the question was one of equitable adjustment, and that

¹²⁹ *Wunderlich v. United States*, 117 Ct. Cl. 92, 212-215 (1950), *reversed on one claim*, *United States v. Wunderlich*, 342 U. S. 98 (1951); see note 121 *supra*. *Accord*: *McWilliams Dredging Co. v. United States*, 118 Ct. Cl. 1, 15-17 (1950).

¹³⁰ 342 U. S. at 99.

¹³¹ 117 Ct. Cl. at 102-103, 150-175, 217-219.

it was a question of fact, and argued that the Court of Claims had so treated it. Apparently the contracting officer had purported to make an equitable adjustment under the "Changes" clause, but had adopted the cost-plus-ten-percent basis provided in the "Extras" clause.

The agreement of the parties in *Wunderlich* that "equitable adjustment" was a question of fact was based on the decision in *United States v. Callahan Walker Construction Co.*,¹³² where the Court of Claims was reversed on precisely that issue. There the contractor had failed to take an appeal under a "questions of fact" type of "Disputes" clause, and was therefore held precluded from attacking the contracting officer's decision that no allowance should be made for alleged additional work. The "equitable adjustment," said the Court, "involved merely the ascertainment of the cost of digging, moving, and placing earth, and the addition to that cost of a reasonable and customary allowance for profit. These were inquiries of fact."

Despite the language of the *Callahan* case, which suggests that "cost" is an obvious inquiry of fact, the status of cost is not always clear. In *Bell Aircraft Corporation v. United States*,¹³³ the Court of Claims passed on a cost-plus-a-fixed-fee contract containing the "questions of fact" type of "Disputes" clause, and held that it was not bound by a decision of the War Department Board of Contract Appeals disallowing a claim for nearly a million dollars of deferred experimental, development, and production tooling expense. Article 3 of the contract provided that "allowable items of cost will be determined by the Contracting Officer in accordance with" T.D. 5000, an official statement of cost principles, and Article 6 that the Government would reimburse the contractor for "such expenditures made in accordance with Article 3 hereof as may be approved or ratified by the Contracting Officer." The court held that the question of allowability required interpretation of the contract and of T.D. 5000 and was therefore a question of law. Certiorari has been granted on the Government's petition.

F. Unliquidated Damages

The charter of the Armed Services Board of Contract Appeals reflects the view expressed in 1943 by the then President of the War Department Board of Contract Appeals:¹³⁴

It has been held time and again that in the absence of an authorizing statute, the Secretary of War is without authority to adjust and settle claims against the United States for unliquidated damages; and the Board has followed those decisions.

That view was largely based on language used by the Supreme Court in one case and by the Court of Claims in several cases, none of which involved a claim under a contract providing for such adjustment.¹³⁵ Beginning in 1937, the Court of

¹³² 317 U. S. 56, 61 (1942).

¹³³ 100 F. Supp. 661, 694-697 (Ct. Cl. 1951), *cert. granted*, 72 Sup. Ct. 646 (1952).

¹³⁴ See Smith, *supra* note 108, at 85.

¹³⁵ See *William Cramp & Sons Shipbuilding Co. v. United States*, 216 U. S. 494, 500 (1910); *Carmick v. United States*, 2 Ct. Cl. 126, 140 (1866); *McClure v. United States*, 19 Ct. Cl. 18, 28 (1883);

Claims held claims for unliquidated damages outside the scope of the "Disputes" clause,¹³⁶ partly on the basis of an early decision that a Court of Claims rule, requiring that claims be submitted before suit to the appropriate department, established "a jurisdictional requirement which Congress alone had the power to establish."¹³⁷

That doctrine seems to have begun as part of the now-obsolete hostility of the Court of Claims to the ousting of its jurisdiction by contract provision. In a concurring opinion in the *Beuttas* case,¹³⁸ Judge Madden pointed out that contracting officers have often disclaimed power to decide whether the contractor was entitled to damages, since they could not award compensation "except by the expedient of covering it into some change or adjustment" which was authorized. In this situation, said Judge Madden, the contractor could not have intended to give the contracting officer "power to decide cases against him, but no power to decide cases, effectively, in his favor." Nor would a Government official intend "such an unconscionable provision"; if intended, it would be void.

The point has lost some of its importance in cases of claims for delay caused by the Government because of Supreme Court decisions restricting the liability of the Government for damages in such cases.¹³⁹ But those decisions, like the reversal in the *Beuttas* case, were rendered on the merits rather than on the ground of administrative finality. The Court of Claims has continued to exclude claims for unliquidated damages from the operation of "Disputes" clauses,¹⁴⁰ and it is still possible that Judge Madden's views will prevail. But those views are difficult to reconcile with the language of the broad "Disputes" clause and the decisions under it.¹⁴¹ Under the "questions of fact" clause, the Armed Services Board of Contract Appeals has made findings of fact in such cases,¹⁴² and it is hard to see why those findings should not bind both the Government and the contractor in later proceedings.¹⁴³

Brannen v. United States, 20 Ct. Cl. 219, 223 (1885); 33 OPS. ATTY. GEN. 354 (1922); 18 COMP. GEN. 199 (1938); 18 COMP. GEN. 261 (1938).

¹³⁶ Phoenix Bridge Co. v. United States, 85 Ct. Cl. 603, 629-630 (1937); Plato v. United States, 86 Ct. Cl. 665, 677-678 (1938); Langevin v. United States, 100 Ct. Cl. 15, 29-31 (1943); cf. General Steel Products Corp. v. United States, 36 F. Supp. 498 (E. D. N. Y. 1941) (claim against contractor).

¹³⁷ Clyde v. United States, 13 Wall. 38, 39 (U. S. 1871).

¹³⁸ *Supra* note 124, 101 Ct. Cl. at 771-772.

¹³⁹ United States v. Rice, 317 U. S. 61 (1942); United States v. Howard P. Foley Co., 329 U. S. 64 (1946); see J. J. Kelly Co. v. United States, 107 Ct. Cl. 594, 602-605, 69 F. Supp. 117 (1947). *But cf.* George A. Fuller Co. v. United States, 108 Ct. Cl. 70, 69 F. Supp. 409 (1947); Kehm Corp. v. United States, 119 Ct. Cl. 454, 93 F. Supp. 620 (1950).

¹⁴⁰ Schmoll v. United States, 105 Ct. Cl. 415, 458, 63 F. Supp. 753, 759 (1946); Anthony P. Miller, Inc. v. United States, 111 Ct. Cl. 252, 330, 77 F. Supp. 209, 212 (1948); cf. Kehm Corp. v. United States, 119 Ct. Cl. 454, 468, 93 F. Supp. 620, 623 (1950).

¹⁴¹ George F. Driscoll Co. v. United States, 104 Ct. Cl. 762, 63 F. Supp. 657 (1946), *cert. denied*, 328 U. S. 854 (1946); cf. United States v. Blair, 321 U. S. 730 (1944); United States v. Joseph A. Holpuch Co., 328 U. S. 234 (1946).

¹⁴² Armond Cassil, Inc., A. S. B. C. A. No. 438, 1 CCH GOVERNMENT CONTRACTS REP. 10721.15 (1950). *But cf.* Flour City Ornamental Iron Co., A. S. B. C. A. No. 288, 4 C. C. F. 60791 (Army 1949); B. G. Gury, Co., A. S. B. C. A. No. 286, 4 C. C. F. 60799 (Navy 1949); Gimbel Motors, Inc., A. S. B. C. A. No. 515, 4 C. C. F. 60962 (Army 1950).

¹⁴³ Cf. American Construction Co., B. C. A. No. 340, 2 C. C. F. 233, 235 (1944); Silas Mason Co. v. United States, 90 Ct. Cl. 266, 275 (1940).

G. Confusion and Bad Faith

Government officers having contractual power of decision have not always followed the procedure indicated by the contract clauses, and the Court of Claims has sometimes felt a duty to "step in and protect plaintiff's rights" when "the procedure was a travesty of justice."¹⁴⁴ Thus that court has felt free to make an independent decision when the appointed arbiter, instead of deciding the matter referred to him by the contract, has turned it over to the Comptroller General or some other person,¹⁴⁵ or when the arbiter has failed to make any decision;¹⁴⁶ and it has awarded damages when work has been held up by delay in decision.¹⁴⁷ In *Penker Construction Co. v. United States*¹⁴⁸ the contractor, attempting to exercise its contractual right to appeal "to the head of the department concerned or his duly authorized representative," was referred to a subordinate of the contracting officer, who refused access to the report of the "constructing quartermaster." The contractor obtained an interview with the Assistant Secretary of War, who said "he couldn't take the time to consider these matters . . . because he had too many other weighty things to do." The contractor was then referred to six officers in downward succession through the Army hierarchy, the last of whom was the same subordinate of the contracting officer. The Court of Claims inferred that no superior of the contracting officer had given genuine consideration to the appeal, and undertook to review and reverse the finding of fact made.

The Supreme Court has been quite strict in holding the contractor to the procedure provided by the "Disputes" clause, and has made it clear that when the contracting officer makes an erroneous decision under that clause, the administrative appeal provided by it is "the only avenue for relief."¹⁴⁹ That rule was applied in *United States v. Blair*¹⁵⁰ in the face of findings that the Government superintendent had made false reports about the contractor and had made numerous rulings in bad faith in order to punish the contractor for appealing to the contracting officer, and that the contracting officer, when informed of the situation, had said there was

¹⁴⁴ *Penker Construction Co. v. United States*, 96 Ct. Cl. 1, 46 (1946).

¹⁴⁵ *Sun Shipbuilding & Dry Dock Co. v. United States*, 76 Ct. Cl. 154, 185-187 (1932); *Karno-Smith Corp. v. United States*, 84 Ct. Cl. 110, 124 (1936); *Rust Engineering Co. v. United States*, 86 Ct. Cl. 461, 474 (1938); *Livingstone v. United States*, 101 Ct. Cl. 625, 638 (1944); *United States Casualty Co. v. United States*, 107 Ct. Cl. 46, 68, 67 F. Supp. 950, 954 (1946); *cf. Climatic Rainwear Co. v. United States*, 115 Ct. Cl. 520, 564-566, 88 F. Supp. 415, 424 (1950); *Bell Aircraft Corp. v. United States*, 100 F. Supp. 661, 693 (Ct. Cl. 1951), *cert. granted*, 72 Sup. Ct. 646 (1952).

¹⁴⁶ *Heid Bros., Inc. v. United States*, 69 Ct. Cl. 704, 712 (1930); *James McHugh Sons, Inc. v. United States*, 99 Ct. Cl. 414, 431 (1943); *Cape Ann Granite Co. v. United States*, 100 Ct. Cl. 53, 71 (1943), *cert. denied*, 321 U. S. 790 (1944); *Thomas Earle & Sons, Inc. v. United States*, 100 Ct. Cl. 494, 504-505 (1944); *Manufacturers' Casualty Ins. Co.*, 105 Ct. Cl. 342, 351, 63 F. Supp. 759, 760 (1946); *Climatic Rainwear Co. v. United States*, 115 Ct. Cl. 520, 567, 88 F. Supp. 415, 425 (1950). *Accord: Brister & Koester Lumber Corp. v. United States*, 188 F.2d 986 (D. C. Cir. 1951).

¹⁴⁷ *Carroll v. United States*, 76 Ct. Cl. 103, 117 (1933); *B-W Construction Co. v. United States*, 97 Ct. Cl. 92, 120 (1942); *United States Casualty Co. v. United States*, 107 Ct. Cl. 46, 67, 67 F. Supp. 950, 954 (1946).

¹⁴⁸ 96 Ct. Cl. 1, 42-46 (1942), *supra* note 144.

¹⁴⁹ *United States v. Callahan Walker Construction Co.*, 317 U. S. 56, 61 (1942).

¹⁵⁰ 321 U. S. 730, 734-737 (1944).

practically nothing he could do about it and the contractor "would just have to do the best he could to get along." There was no finding, said the Court, "that appeal to the head of the appropriate department or to his authorized representative would have been futile or prejudicial."

In *United States v. Joseph A. Holpuch Co.*¹⁵¹ the contract provided for increases in price to reflect increases in minimum wages. The contracting officer ruled that wages on all projects in the vicinity should be increased in accordance with a decision of the Board of Labor Review with respect to the "prevailing" wage on a neighboring project, and informed the contractor that he could appeal under the contract to the Board of Labor Review. The contractor protested but paid the increased wages without appealing. The Court of Claims allowed recovery of the increased wages, but the Supreme Court reversed because the contractor had not appealed to the head of department under the "Disputes" clause. The protest was correct; the decision of the Board of Labor Review established a minimum wage only on the neighboring project; therefore the increased wages were not reimbursable under the contract. The error of the contracting officer in directing the increase could have been corrected by appeal to the department head, and that remedy was exclusive. Two judges dissented on the grounds that the contracting officer and the Court of Claims were right in thinking that minimum wages had been increased, and that if the contractor had paid the wages without protesting there would have been no "dispute" and no ground for denying reimbursement.

Even if the proper procedure is followed, there is some room for review of the administrative decision under the "Disputes" clause. The Supreme Court, in upholding administrative decisions, had regularly indicated that the decision was final only "in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment."¹⁵² On occasion the Court has stated a duty to decide "not arbitrarily, but candidly and reasonably."¹⁵³ And in at least two cases, the contractor's claim was upheld in the face of an adverse administrative decision. In *Ripley v. United States*,¹⁵⁴ that result was reached only after two remands had produced findings that the engineer in charge of the construction of a jetty had known that large parts of it were ready for the laying of "crest blocks," and that his refusal to permit them to be laid for several months thereafter "was gross error and an act of bad faith." In *United States v. Smith*,¹⁵⁵ the engineer in charge of a dredging job designated limestone bed rock as "clay, gravel, sand and boulders"; "his conduct, to use counsel's description, 'though perhaps without malice or bad faith in the tortious sense,' was repellent of appeal or of any alternative but

¹⁵¹ 328 U. S. 234 (1946).

¹⁵² See, e.g., *Kihlberg v. United States*, 97 U. S. 398, 402 (1878); cf. *United States v. Moorman*, 338 U. S. 457, 461 (1950).

¹⁵³ See *Saalfeld v. United States*, 246 U. S. 610, 613 (1918); cf. *Ripley v. United States*, 223 U. S. 695, 702 (1912).

¹⁵⁴ 220 U. S. 491 (1911), 222 U. S. 144 (1911), 223 U. S. 695 (1912).

¹⁵⁵ 256 U. S. 11, 16 (1921).

submission with its consequences." In neither case did the contract provide for appeal from the decision of the engineer in charge of the work.

The Court of Claims has endeavored to formulate the exception for "implied bad faith" in several cases. In *Bein v. United States*,¹⁵⁶ the court found that decisions of the contracting officer and the head of department on appeal were "so grossly erroneous that they amounted to bad faith." Judge Madden, concurring,¹⁵⁷ while recognizing that the distinction he suggested might be "only a verbal one," urged that the administrative decision should not stand "when all the substantial evidence and all the relevant data normally considered in arriving at such a decision are against the decision." The relation of administrative official to court, he said, should be that of jury to judge, or quasi judicial fact finder to court; "neither should be required to apply epithets to the other, as a condition precedent to jurisdiction." The Court of Claims subsequently incorporated Judge Madden's views into the concept of "implied bad faith";¹⁵⁸ and in one case Judge Madden, for the court, refused to apply "words such as 'arbitrary,' 'capricious,' or 'bad faith,'" in setting aside the appellate decision of a head of department, holding "that unawareness of the problem on the part of the deciding officer is an equally good reason why his decision should lack finality."¹⁵⁹

In *Penner Installation Corporation v. United States*,¹⁶⁰ the matter came to a head, but with the inconclusive result of affirmance by an equally divided Supreme Court. The case was decided against the Government on the merits, and then a motion for a new trial was held pending the decision of the Supreme Court in the *Moorman* case.¹⁶¹ After the *Moorman* decision the Court of Claims reconsidered the *Penner* case, amended its findings to add a finding that "the decisions of the contracting officer and the head of the department on plaintiff's claim were arbitrary and so grossly erroneous as to imply bad faith," made minor corrections, and rendered judgment against the Government for a slightly smaller amount than before. The finding of bad faith was based on three items; on one the Court of Claims found that the number of cubic yards of excavation was three times that found by the contracting officer. Five other smaller items had been decided at the time without any indication of arbitrary action, but the court concluded "from the record as a whole" that the "biased attitude" of the contracting officer affected all the items.

¹⁵⁶ 101 Ct. Cl. 144, 158 (1943).

¹⁵⁷ *Id.* at 168-169.

¹⁵⁸ *Needles v. United States*, 101 Ct. Cl. 535, 604-607 (1944); *Loftis v. United States*, 110 Ct. Cl. 551, 610-611, 630, 76 F. Supp. 816, 827 (1948).

¹⁵⁹ *Henry Ericsson Co. v. United States*, 104 Ct. Cl. 397, 429, 62 F. Supp. 312 (1945), *cert. denied*, 327 U. S. 784 (1946). *Accord:* *Climatic Rainwear Co. v. United States*, 115 Ct. Cl. 520, 566, 88 F. Supp. 415, 425 (1950); see Madden, J., concurring in *Beuttas v. United States*, 101 Ct. Cl. 748, 771 (1944), *reversed on the merits*, 324 U. S. 768 (1945).

¹⁶⁰ 114 Ct. Cl. 571, 86 F. Supp. 129 (1949), 116 Ct. Cl. 550, 89 F. Supp. 545 (1950), *affirmed by an equally divided court*, 340 U. S. 898 (1950). Cf. *Ramseluis v. United States*, 116 Ct. Cl. 612, 633, 90 F. Supp. 547, 548 (1950); *Great Lakes Dredge and Dock Co. v. United States*, 116 Ct. Cl. 679, 684, 90 F. Supp. 963, 965 (1950), 119 Ct. Cl. 504, 96 F. Supp. 923 (1951), *cert. denied*, 72 Sup. Ct. 624 (1952).

¹⁶¹ *Supra* note 128.

The court asserted that bad faith on the part of a contracting officer could be found "when there is no substantial basis in the contract to support his ruling, or no substantial evidence to support it, or when his decision is grossly erroneous." By such a finding the court meant "only that he has not in good faith discharged his duties as an impartial, unbiased judge," and did not "impugn his fidelity to his employer."

The Government again took the matter to the Supreme Court in the *Wunderlich* case,¹⁶² where the Court of Claims had found only that the administrative treatment of the claim had been "arbitrary and capricious," and "grossly erroneous."¹⁶³ This time the Supreme Court reversed, three justices dissenting, but the opinion leaves it unclear whether anything more is settled than the verbal form in which the Court of Claims must make a finding of "bad faith." The Supreme Court did not advert to the facts of the particular dispute, but said that "gross mistake implying bad faith" had been "equated" to "fraud," that fraud meant "conscious wrongdoing, an intention to cheat or be dishonest" and must be alleged and proved. "Since there was no pleading of fraud, and no finding of fraud, and no request for such a finding," there was no need to remand; if the evidence had shown fraud, the Court of Claims would have so found.

The result is to make it clear that there must be a finding of "fraud." But perhaps a finding in the words "gross mistake implying bad faith" might be "equated" to fraud. No help is given in determining what sort of situation falls within the verbal formula. Perhaps the Supreme Court has not decided anything except, to paraphrase Judge Madden,¹⁶⁴ that the use of suitable epithets is a condition precedent to the jurisdiction of the Court of Claims. On the other hand, if "conscious wrongdoing" were to be given its full flavor, no decision would be reversible which was motivated by fidelity to the Government or by righteous wrath, or which was the result of moral myopia or even insanity. The matter is left at sea.

Another problem not yet finally resolved is the extent to which a "final" administrative decision can be reopened administratively. Since the arbiter under the "Disputes" clause is also the responsible representative of the Government, there is ordinarily no provision for an appeal by the Government from a decision adverse to it. In view of that fact, and of the informality with which such decisions are sometimes made, one might expect that such doctrines as "res judicata" and "the law of the case" would be treated more as guides to discretion than as inexorable commands.¹⁶⁵ Where the contracting officer has directed the contractor to perform work in a certain manner, a succeeding contracting officer should not be permitted to

¹⁶² *United States v. Wunderlich*, 342 U. S. 98 (1951), reversing 117 Ct. Cl. 92 (1950).

¹⁶³ *Id.* 117 Ct. Cl. at 167, 170, 219. Cf. *Great Lakes Dredge and Dock Co. v. United States*, *supra* note 160, 119 Ct. Cl. at 554, where the Court of Claims found a determination of equitable adjustment to be "arbitrary and capricious and not in accord with the contract requirements," and the Supreme Court, after the *Wunderlich* case, denied certiorari.

¹⁶⁴ *Supra* note 157.

¹⁶⁵ See *Douglas Aircraft Co., W. D. B. C. A. No. 1392*, 4 C. C. F. 60160 (1946); cf. DAVIS, ADMINISTRATIVE LAW §§171-181 (1951).

reverse the decision to the contractor's financial detriment.¹⁶⁶ An unappealed decision that specifications had not been complied with, made early in the performance of the contract by the contracting officer on the ground, probably should not be reversed by the head of department a year later in an appeal from a decision on the cause of delay.¹⁶⁷ Perhaps payments made on the basis of an unappealed decision should not be recouped.¹⁶⁸ But the literal language of the "Disputes" clause goes further and makes the unappealed decision "final and conclusive."¹⁶⁹

*Bell Aircraft Corporation v. United States*¹⁷⁰ illustrates the problem of the scope of that finality. The plaintiff, a cost-plus contractor, claimed that certain expenditures made before the contract was negotiated were properly to be deferred and charged as costs. If correct, the claim should have been paid periodically; the contracting officer had considered the problem and decided in plaintiff's favor, and several vouchers had been approved and paid. A successor contracting officer was then appointed, and he purported to render a decision that both past and future payments should be disallowed. Plaintiff appealed under the "Disputes" clause only as to the vouchers not yet paid, and lost; but the Court of Claims upheld the entire claim. One judge, dissenting, wanted to decide against the contractor on all the vouchers; another wanted to disallow only those never paid. The majority held that approval and payment was final even if erroneous; and it reviewed and upheld on the merits the claim on the unpaid vouchers. No point seems to have been made of the obvious desirability of consistent accounting, which might well have led to a ruling that a final decision on one voucher prevented reexamination of the same point in connection with later vouchers.

III

CONCLUSION

A. The Finality Problem

In the recent cases under the "Disputes" clause, the Supreme Court seems to have abdicated to the contracting agencies the responsibility for the fair and orderly settlement of disputes under Government contracts. Those agencies are left with ample power: it is hard to believe, for example, that the Court which decided the *Moorman* and *Wunderlich* cases would have difficulty in upholding an arbitration clause. But there is little hint that the Court is willing to participate and assist in the case-by-case development of a sound disputes procedure.

¹⁶⁶ *Langevin v. United States*, 100 Ct. Cl. 15, 40-41 (1943).

¹⁶⁷ *Cf. B-W Construction Co. v. United States*, 97 Ct. Cl. 92, 116-119 (1942); *Dunn Construction Co., Army B. C. A. No. 1697*, 4 C. C. F. 60478 (1948).

¹⁶⁸ *Cf. Bell Aircraft Corp. v. United States*, 100 F. Supp. 661, 690-694 (Ct. Cl. 1951), *cert. granted*, 72 Sup. Ct. 646 (1952); *Continental Aviation & Engineering Corp., Army B. C. A. No. 1403*, 4 C. C. F. 60525 (1948). *But cf. John Arborio, Inc. v. United States*, 110 Ct. Cl. 432, 451, 76 F. Supp. 113, 116 (1948).

¹⁶⁹ See Littleton, J., dissenting in *Clarke Bros. Construction Co.*, 103 Ct. Cl. 57, 92 (1945); Madden, J., dissenting in *John Arborio, Inc. v. United States*, 110 Ct. Cl. 432, 456-457, 76 F. Supp. 113, 119 (1948).

¹⁷⁰ *Supra* note 168.

The Court's opinions have a curiously laissez-faire tone, almost an archaic or nostalgic ring: "Respondents were not compelled or coerced into making the contract. It was a voluntary undertaking on their part."¹⁷¹ Again, "parties competent to decide for themselves" are not "to be deprived of the privilege" of agreeing on the procedure for settling disputes.¹⁷² An uninformed reader might almost infer that the "Disputes" clause before the Court was the product of bargaining between the Government and the particular contractor. A more legitimate inference would be that the Court is prepared to enforce the clause literally, without too much regard for the commercial impact or fairness of the result. The recent "Disputes" cases have upheld Government contentions, but other cases suggest that the Government too must render the pound of flesh called for by the letter of the bond.¹⁷³

So interpreted, the "Disputes" clause seems not to have provided a completely satisfactory procedure. The Court of Claims, like other courts faced with standardized contract clauses, has tried through the process of interpretation to reach sensible commercial results. Dissenting justices in the Supreme Court have supported the endeavor, but the majority seem to have insisted on administrative finality without examination of facts or consequences, referring vaguely to the possibility of relief in Congress. One result is a report that the General Accounting Office is concerned over the possibility that arbitrary administrative action may produce waste of Government funds.¹⁷⁴ Another is the introduction in Congress of bills designed to overrule the *Wunderlich* case.¹⁷⁵

These are symptoms of dissatisfaction. But it may be more serious that after the "Disputes" clause has been in use for more than twenty years, it still produces preoccupation with questions of jurisdiction, procedure, and the scope of review, beclouding the consideration of the merits. Judge Frank once said that when arbitration statutes attempt to choke off judicial discretion "litigation—which the arbitration statutes are designed to reduce—is augmented."¹⁷⁶ It may well be that a similar situation obtains under the "Disputes" clause.

The basic difficulty, as in so much Government activity, is to reconcile flexibility of administration with safeguards against arbitrary action. The contracting officer is in effect a party adverse to the contractor. To protect the Government he must be free to cooperate, to cajole, to dicker, to direct; but then it is hard to expect him to be a judge as well. So review is provided, first by the head of department, then, because he is too busy, by his representative, and finally by a Board of Contract Appeals. If the reviewing authority is the representative of the Government, trying to get the work done, decision again is likely to be rough-cut, and finality seems unfair.

¹⁷¹ *United States v. Wunderlich*, 342 U. S. 98, 100 (1951).

¹⁷² *United States v. Moorman*, 338 U. S. 457, 462 (1950).

¹⁷³ *Cf. United States v. Bethlehem Steel Corp.*, 315 U. S. 289 (1942); *Muschany v. United States*, 324 U. S. 49 (1945). It is said that in arguing the latter case Government counsel unsuccessfully attempted to draw a distinction between administrative "discretion" and administrative "indiscretion."

¹⁷⁴ See 20 U. S. L. WEEK 2227 (1951).

¹⁷⁵ S. 2432, S. 2487, H. R. 6214, H. R. 6301 and H. R. 6338, 82d Cong., 2d Sess. (1952).

¹⁷⁶ See *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 987 n. 32 (2d Cir. 1942).

But if it tries to act like a judge, in come all the paraphernalia of litigation—rules of procedure, hearings, delay, expense, precedents, and inflexibility. Make the job full-time, add security of tenure, and you have a court.

B. Arbitration

Arbitration preserves flexibility, but tries to assure impartiality by giving both parties a voice in the selection of the arbitrators. The principal difficulty in applying arbitration to Government contracts has been what appears to be a rather flimsy legal technicality. But if that disappears, other difficulties arise. Arbitration compulsory on either Government or contractor loses most of its appeal, and the most that seems likely to be acceptable to contracting agencies is a practice like that authorized by the Contract Settlement Act of 1944,¹⁷⁷ leaving it to the agency's discretion whether to submit to arbitration, except that the discretion might extend to agreements to submit future disputes.

But if arbitration is authorized only in the discretion of the contracting agency, the experience under the Contract Settlement Act does not indicate that the authority would be widely used. Contracting officers might well fear a tendency to charge the long purse, and so long as the "Disputes" clause procedure is familiar and available, it is likely to be preferred. For the ordinary contractor is not in a position to take a firm position on such matters when bargaining with the Government, even in times of emergency. And only collusion among bidders could change such terms when offered in a peace-time invitation for competitive bids.

C. Legislation

Contrasting Congressional precedents for disputes procedure under Government contracts are found in Section 13 of the Contract Settlement Act of 1944 and in Section 108 of the Renegotiation Act of 1951.¹⁷⁸ Both insist on an initial decision by the negotiating agency, but provide against finality for that decision; both provide that if the contractor seeks review the Government may counter with a claim that the initial decision was too favorable to the contractor. Both types of provision seem to have worked fairly well, without producing an excess either of procedural dissatisfaction or of litigation.

If judicial review is to be eliminated, the Renegotiation Act provides a model. A decision of the contracting agency, with or without internal appeal, would be the mandatory first step, and that decision would be final unless within a prescribed time the contractor filed a petition for redetermination of his claim. To insure uniformity, all such petitions would be heard in a single administrative court like the Tax Court. The proceeding there would be a proceeding *de novo*, and the redetermination would not be subject to review by any other court or agency. An appropriate administrative court would be the Court of Claims; if it were selected,

¹⁷⁷ Sec. 13(e), 58 STAT. 660 (1944), as amended, 41 U. S. C. A. §113(e) (Supp. 1951).

¹⁷⁸ See note 177 *supra*; Pub. L. No. 9, 82d Cong., 1st Sess. (1951), 50 U. S. C. A. App. §1218 (Supp. 1952).

provision for concurrent jurisdiction of the district courts and for review by the Supreme Court on certiorari would be eliminated.

The analogy of the Contract Settlement Act would require an initial decision by the contracting agency, followed alternatively by (1) appeal by the contractor to a special Appeal Board, (2) suit by the contractor in any appropriate court, or (3) arbitration by agreement of both parties. Contractors would be relieved from contractual provisions for administrative appeal and administrative finality, but the Administrator of General Services could require resort to administrative appeal within the agency. Awards to the contractor over a prescribed amount might not become final until approved by a reviewing authority within the agency. Findings of the contracting agency would be "prima facie correct," but would not be binding on either the Appeal Board or the court. After a decision of the Appeal Board, suit could be brought in court as if no appeal had been taken.

The procedure under the Contract Settlement Act seems unnecessarily complex. It could be simplified by eliminating the optional review by the Appeal Board. The essential features common to both the renegotiation and termination statutes could be preserved: all disputes, without distinction between law and fact, would have to be submitted to the contracting officer in the first instance, and his decision would be final if no review were sought within a prescribed time. Review within the agency might be required before the contractor could seek review elsewhere, but the agency decision, whether on fact or law, would have only prima facie validity; the reviewing tribunal, probably the Court of Claims, would have power to decide either more or less favorably to the contractor who sought review.

Such provisions would give adequate protection to the contractor, and the possibility of losing the benefit of a partially favorable agency decision would provide a sufficient deterrent to contractor appeals. But it might be desirable to leave more room for the Government to reopen an unappealed decision of a contracting officer than the fraud exception in the Contract Settlement Act would permit.¹⁷⁹ Limitation of the exception to fraud was justified there by the need for speedy reconversion from war production to civilian production; in a broader provision for all contract disputes the exception might be broadened to cover bad faith, arbitrary and capricious action, and gross error as well as fraud.

Less close statutory analogies are found in the Arbitration Act¹⁸⁰ and in the Administrative Procedure Act.¹⁸¹ The Arbitration Act provides for minimal review for partiality, corruption, misconduct of the arbitrators, decision beyond their powers, or evident miscalculation or misdescription; such provisions are less appropriate when the contractor has no voice in selecting the arbitrators. The Administrative Procedure Act requires the reviewing court to substitute its judgment on questions of law, to set aside agency action which is "arbitrary, capricious, an abuse

¹⁷⁹ Secs. 6, 16, 58 STAT. 652, 664, 41 U. S. C. A. §§106, 116 (Supp. 1951).

¹⁸⁰ Secs. 10, 11, 61 STAT. 669 (1947), 9 U. S. C. A. §10 (Supp. 1951).

¹⁸¹ Sec. 10, 60 STAT. 243 (1946), 5 U. S. C. A. §1009 (Supp. 1951).

of discretion, or otherwise not in accordance with law," and, if the agency decision is reviewed on the record of an agency hearing provided by statute, to set aside action found to be "unsupported by substantial evidence" on review of "the whole record." The *Wunderlich* case by implication holds that contract disputes are not subject to those provisions, perhaps under the statutory exception for agency action which is "by law committed to agency discretion."¹⁸² But the Administrative Procedure Act provides a standard very close to that developed by the Court of Claims before the *Wunderlich* decision, if, as the Court of Claims thought, the "substantial evidence" rule is included in the concept of "arbitrary and capricious" action. If it is desired to treat Boards of Contract Appeals as quasi-judicial rather than commercial bodies, the Administrative Procedure Act provides an appropriate model for legislation.

D. Contractual Reform

Legislation may be necessary to change the procedure under contracts now outstanding, unless authority to make amendments to accomplish the same end is granted under the First War Powers Act.¹⁸³ But many of the changes which have been suggested could be put into effect for future contracts by amendment of the standard "Disputes" clause. Such action would have the advantage that it would not be so inflexible as legislation, and it could reflect the experience of the contracting agency with particular types of problems.

The following clause is suggested as an example. It is drawn to reflect some of the policies of the Contract Settlement Act. Changes from the present clause are in italics:

Disputes.—Except as otherwise provided in this contract, *any dispute 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. Within 30 days from the date of receipt of such copy, *or, if no copy has been furnished, within 90 days after making a written demand for such copy,* the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive *unless within 90 days after receiving notice of the determination of the appeal, or, if the right of action has not then accrued, within 90 days after the right of action first accrues, the Contractor brings suit against the United States on a claim to which the decision relates.* If no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive *on the Contractor, and shall be final and conclusive on the Government unless fraudulent, arbitrary, capricious, or so grossly erroneous as to imply bad faith.* 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.

¹⁸² Cf. DAVIS, ADMINISTRATIVE LAW §240 (1951).

¹⁸³ Title II, 55 STAT. 839 (1941), as amended by 64 STAT. 1257 (1951), 50 U. S. C. A. App. §611 (Supp. 1952); see 16 FED. REG. 2623 (1951), 32 CODE FED. REGS., Part 438, *supra* note 79.