IS IT "BLANCHI'S GHOST"—OR "MUCH ADO ABOUT NOTHING"?

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INTRODUCTION

For historical and other background providing a better understanding of this paper, the reader is referred elsewhere in this issue to a related article by an esteemed colleague.¹ You may be relieved to learn, however, that better understanding of the above title does not similarly entail a re-examination of the complete works of William Shakespeare.

The plays of the bard of Avon have remote relevancy herein only for this reason. An unmistakable hue and cry has developed among some attorneys concerned with government contract litigation, following the decision of the Supreme Court in *United States v. Carlo Bianchi and Company*.² Critics of this decision have rallied around a colorful, entertaining, and thought-provoking luncheon address by the Honorable J. Warren Madden, former Judge of the U.S. Court of Claims, the address being entitled "Bianchi's Ghost."³ It is readily apparent from a reading of the address that the speaker had come to bury *Bianchi*, not to praise it.⁴

This article, on the other hand, seeks to represent the viewpoint of many who find this criticism of the *Bianchi* decision unwarranted, or at the very least, premature—in short, "much ado about nothing." In the opinion of this writer, *Bianchi* is neither a unique nor a surprising decision. It is a decision amply supported by facts, logic, precedent, and history. Its critics create a contrary impression, it is believed, because they view it out of context—out of the context of the many other judicial pronouncements on the subject; and out of the context of the historical administrative procedures through which the vast majority of the disputes, claims, appeals, controversy, and potential litigation generated by a massive government contract program are disposed of without resort to litigation, as typified by this particular case.

At the risk of unintentionally contributing to that unwarranted aura of uniqueness which swirls around *Bianchi*, this article seeks to present the case in proper context.

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¹ Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, *supra*, pp. 39-86.

² 373 U.S. 709 (1963).

³ Madden, *Bianchi's Ghost*, an address delivered at the First Annual Luncheon of the Division of Public Contracts, Administrative Law Section, American Bar Ass'n, Chicago, Ill., Aug. 11, 1963, 16 AD. L. REV. 22 (1963).

⁴ Apologies are humbly offered for this irreverent involvement of Shakespeare's *Macbeth* and *Julius Caesar*.

REVIEW OF THE CASE

In 1946, Bianchi took a contract with the United States, acting through the Department of the Army, Corps of Engineers, for the construction of an earthen dam.⁵ He subsequently filed a claim under article four of the contract, entitled "Changed Conditions."⁶ Construction of the dam involved an outlet, which in turn required boring of a tunnel through rock. The tunnel was to be lined with concrete. As protection, the contract called for the first fifty feet at each end of the tunnel to be supported with permanent steel lining. In the remainder of the tunnel, the contract further called for temporary tunnel protection (pending placement of the concrete lining), as necessary for the safety of workmen.

The claim represented the cost of permanent steel lining, over and above that specified for the first fifty feet at each end of the tunnel, it being the contractor's position that this additional protection was necessary because of the unstable character of the rock he encountered. The contracting officer was of the opinion that the temporary tunnel protection contemplated by the contract would suffice, and he declined to pay for permanent steel lining throughout the tunnel length.

On May 29, 1948 an appeal was taken to the Chief of Engineers under the "disputes" article contained in the contract.⁷ The appeal was heard by the Army Corps of Engineers Claims and Appeals Board which concluded, on the basis of expert testimony presented by both sides,⁸ that "changed conditions" were not encountered, that relatively minor rock falls and scaling occurred because the contractor had waited too long after tunneling to place the concrete lining, that during this nine month interval, exposure to the atmosphere had accelerated rock deterioration and scaling, and that in any event, this could have been controlled by the temporary protection contemplated by the contract. This conclusion of the Board was in the form of a recommendation to the Chief of Engineers who adopted the opinion and denied the appeal on December 9, 1948.⁹

It was not until almost six years later (December 1954) that Bianchi brought suit

⁵ These are facts as stated in a decision of the Army Corps of Engineers, Claims and Appeals Board.

⁶ "ARTICLE 4. *Changed Conditions*.—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall with the written approval of the Secretary of War or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions."

⁷ "ARTICLE 15. *Disputes*.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

⁸ Appellant had nine representatives on hand but presented only four of these, according to the Justice Department brief in the proceedings now pending in the Court of Claims on remand.

⁹ Eng. C & A Board Dec. No. 14 (1948).

in the U.S. Court of Claims. This suit is described in the court's opinion as a claim under article four of the contract, "changed conditions," the same theory under which it had been appealed in 1948 under the "disputes" article of the contract.

A new trial was provided before a commissioner of the court, and on this occasion the plaintiff presented fourteen witnesses in contrast to the four presented at the hearing of the administrative appeal. The court, in an opinion by Judge Madden dated January 14, 1959,¹⁰ found the government liable on evidence that it would not have been practical to construct the lining of the tunnel following the installation of only temporary protection; and that this in turn was due to unforeseen conditions within the purview of the "changed conditions" article. The court rejected the conclusion that plaintiff's delay in lining the tunnel had caused his difficulties, finding that exposure to the atmosphere would have had no practical effect upon the stability of the rock.

Significant for our purposes was the court's rejection of the government's argument that the Appeals Board decision was entitled to finality under the so-called "Wunderlich Act."¹¹ To be entitled to finality, the court observed, the decision must be supported by substantial evidence. It concluded that "on consideration of *all* the evidence, the *contracting officer's* decision cannot be said to have substantial support."¹²

Government counsel, pointing to the substantially greater number of witnesses presented by plaintiff at its trial in the court, urged that the Board had not been given a fair chance to decide the case on substantially the same evidence presented in court.

In response, the court's opinion had this to say:¹³

So far as concerns the difference in the number of witnesses, several of the additional witnesses in this court gave unimportant testimony. But some of the expert witnesses who did give important testimony in this court, did not testify before the Board.

In our opinion in *Volentine and Littleton v. United States*, 136 Ct. Cl. 638, holding that the trial in this court should not be limited to the record made before the contracting agency, but should be *de novo*, we recognized that there were logical weaknesses in our position. We concluded, however, that the intent of Congress in enacting the Wunderlich Act was in accord with our conclusion, and we adhere to that conclusion in this case.

¹⁰ 144 Ct. Cl. 500 (1959), 169 F. Supp. 514 (1959).

¹¹ "No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however*, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board. 68 Stat. 81 (1954), 41 U.S.C. §§ 321 and 322 (1958).

¹² (Emphasis added.) The reference to "all" the evidence apparently emphasizes the additional evidence developed in the *de novo* trial before the Court of Claims. The reference to "the contracting officer's decision" is not understood. The Wunderlich Act deals with "judicial review" of "any decision of the head of any department or agency or his duly authorized representative or board. . . ." (Emphasis added.)

¹³ 144 Ct. Cl. at 506, 169 F. Supp. at 517.

These words provided an ideal setting for the granting by the Supreme Court of the government's application for a writ of certiorari,¹⁴ and for a conclusion by our highest Court which is in striking contrast to the preceding quotation from the lower court's opinion. Speaking through Mr. Justice Harlan, the Supreme Court stated:

It is our conclusion that, apart from questions of fraud, determination of the finality to be attached to a departmental decision on a question arising under a "disputes" clause must rest solely on consideration of the record before the department. This conclusion is based both on the language of the statute and on its legislative history.¹⁵

The Court of Claims conclusion was prefaced by an admission of "logical weaknesses." In contrast, the Supreme Court's opinion appears to be amply supported by logic, and by legislative and judicial history. A review of the opinion itself therefore fits more appropriately under the next sub-title.

BIANCHI VIEWED WITHIN THE CONTEXT OF EXISTING STATUTORY AND CASE LAW

The Supreme Court explained that it had granted certiorari to resolve a conflict among the lower courts¹⁶ on the important question of the kind of judicial proceeding to be afforded in cases governed by the Wunderlich Act.

At the very outset, the opinion characterizes itself as simply one of statutory interpretation. It recognizes that the jurisdiction of the Court of Claims extends to suits "founded" upon an "express or implied contract with the United States"¹⁷ and that ordinarily it is the function of the court to receive evidence in such cases.

"But," the opinion adds, "this Court long ago upheld the validity of clauses in

¹⁴ *United States v. Carlo Bianchi*, 371 U.S. 939 (1962).

¹⁵ 373 U.S. at 714.

¹⁶ This conflict is illustrated by a note to the opinion (373 U.S. at 712 n.3) as follows: "With the decision below, compare, e.g., *Allied Paint & Color Works, Inc. v. United States*, 309 F.2d 133 (2d Cir.); *Wells & Wells, Inc. v. United States*, 269 F.2d 412 (8th Cir.). See also *Mann Chemical Laboratories, Inc. v. United States*, 174 F. Supp. 563 (D. Mass.). In suits involving less than \$10,000, the District Courts have concurrent jurisdiction with the Court of Claims over claims arising under government contracts, 28 U.S.C. § 1346(a)(2), and in suits by the government under such contracts have exclusive jurisdiction, see 28 U.S.C. § 1345."

This decision of the Supreme Court in fact confirms the great weight of authority in the lower courts. In addition to the cases cited in the above quoted footnote, the decision of the Court of Claims in *Bianchi* is inconsistent with the following: *Silverman Bros. v. United States*, Civil No. 611, C.C.A. 1st Cir., Nov. 15, 1963; *Lowell O. West Lumber Sales v. United States*, 270 F.2d 12 (9th Cir. 1959); *Hoffman v. United States*, 276 F.2d 199 (10th Cir. 1960); *United States v. McKinnon Construction Co.*, 289 F.2d 908 (9th Cir. 1961); *Langoma Lumber Co. v. United States*, 232 F.2d 886 (3d Cir. 1956); *United States v. Hamden Cooperative Creamery Co.*, 297 F.2d 130 (2d Cir. 1961); *Eder Electric Co. v. United States*, Civil No. 30203, E.D. Pa., June 1, 1962.

Bianchi in the Court of Claims is furthermore inconsistent in its emphasis and rationale with other Court of Claims decisions. Cf. *Racine Screw Co. v. United States*, Ct. Cl. No. 227-56, Feb. 7, 1962; *River Construction Corp. v. United States*, Ct. Cl. No. 13-56, Nov. 7, 1962; *National Electronics Lab., Inc. v. United States*, 148 Ct. Cl. 308 (1960); *P. L. S. Coat & Suit Corp. v. United States*, 148 Ct. Cl. 296 (1960); *Wyoming National Bank v. United States*, Ct. Cl. No. 445-54, July 19, 1961; *Keeco Industries, Inc. v. United States*, Ct. Cl. No. 425-60, June 6, 1962.

In 1960, the "need for certiorari" was highlighted in Harrison, *Eight Years After Wunderlich—Confusion in the Courts*, 28 GEO. WASH. L. REV. 561 (1958).

¹⁷ 28 U.S.C. § 1491 (1958).

government contracts delegating to a government employee¹⁸ the authority to make determinations of disputed questions of fact,¹⁹ and required such determinations to be given conclusive effect in any subsequent suit in the absence of fraud or gross mistake implying fraud or bad faith."²⁰

The reader is reminded by the Supreme Court opinion that the Court of Claims, in trying a contract suit within its jurisdiction, must give effect to all the terms of the contract including the "disputes" clause. The related article elsewhere in this symposium²¹ historically traces the "continuing struggle between the Court of Claims and the Supreme Court" from the time of *Kihlberg* in 1878. This struggle is characterized by the general refusal of the Court of Claims to give effect to the terms of the "disputes" clause, a refusal fleetingly referred to in the Supreme Court's opinion with the statement that "the scope of [judicial] review was somewhat expanded by that court over the years. . . ."²²

In *United States v. Wunderlich*²³ the Supreme Court expressly restricted that judicial review to determining whether or not the departmental decision had been founded on fraud, leading to the Wunderlich statute²⁴ which is the subject matter of this *Bianchi* decision. The statute, the Supreme Court reminds us, is entitled "an Act 'To permit review of decisions of the heads of departments . . . involving

¹⁸ See related article, Shedd, *supra*, pp. 39, at 43-44, for a more detailed history of finality clauses. It is significant that they have been in use and their validity has been upheld by the Supreme Court since 1878. Moreover, their validity was recognized when they vested decision making in "a government employee" as stated by the Court. Present-day procedures, in contrast, vest decision making in boards operating under charter and rules designed to provide the due process characteristic of administrative law.

¹⁹ Although the opinion refers to "questions of fact," *United States v. Moorman*, 338 U.S. 457 (1950) had validated a finality clause which was not limited to questions of fact. See also *United States v. Holpuch*, 328 U.S. 234 (1946), and *Silas Mason Co. v. United States*, 90 Ct. Cl. 266 (1940).

²⁰ 373 U.S. at 713, citing *Kihlberg v. United States*, 97 U.S. 398 (1878), and *Ripley v. United States*, 223 U.S. 695 (1912). See also *Plumley v. United States*, 226 U.S. 545 (1912); *Ruckgaber v. United States*, 241 U.S. 387 (1916); *United States v. Wunderlich*, 342 U.S. 98 (1952); *United States v. Adams*, 74 U.S. (7 Wall.) 463 (1868); *Callahan Walker Construction Co. v. United States*, 95 Ct. Cl. 314 (1942), *rev'd*, 317 U.S. 56 (1942). It is interesting to observe that the Supreme Court in reversing the Court of Claims in *Callahan Walker*, vindicated the dissent of Court of Claims Judge J. Warren Madden, who had urged that the issue involved was a question of fact within the "disputes" clause, and not a question of law.

²¹ Shedd, *supra*, pp. 71-86.

²² 373 U.S. at 713, citing, e.g., *Southern Shipyard Corp. v. United States*, 76 Ct. Cl. 468 (1932); *Needles v. United States*, 101 Ct. Cl. 535 (1944). See also *Volentine and Littleton v. United States*, 136 Ct. Cl. 638 (1956); *Langevin v. United States*, 100 Ct. Cl. 15 (1943); *Railroad Waterproofing Corp. v. United States*, 133 Ct. Cl. 911 (1956); *P. L. Saddler v. United States*, 152 Ct. Cl. 557 (1961); *Fehlhaber Corp. v. United States*, 138 Ct. Cl. 571 (1957); *H. L. Yoh, Inc. v. United States*, Ct. Cl. No. 435-55, April 7, 1961.

Cases decided by the Court of Claims since this Supreme Court decision in *Bianchi* demonstrate that the "struggle" continues. See *Stein Bros. Mfg. Co. v. United States*, Ct. Cl. No. 389-59, July 12, 1963; *W. P. C. Enterprises v. United States*, Ct. Cl. No. 256-59, Oct. 11, 1963; *Laburnum Construction Corp. v. United States*, Ct. Cl. No. 530-59, Dec. 13, 1963; and *Wingate Const. Co. v. United States*, Ct. Cl. No. 394-60, Jan. 24, 1964.

Contrast with these the recent denial by the Supreme Court of certiorari to a U.S. Court of Appeals ruling that a trial court properly confined itself to the record made before the Board in reviewing a Board decision under the Wunderlich Act. *Allied Paint & Color Works, Inc. v. United States*, 375 U.S. 813 (1963).

²³ 342 U.S. 98 (1952).

²⁴ *Supra* note 11.

questions arising under Government contracts.'"²⁵ Critics of the *Bianchi* decision tend to overlook the fact that the Wunderlich statute was a "liberalizing" statute, that it greatly curtailed the finality of administrative decisions and correspondingly expanded judicial review by adding to the prior single test of fraud, a right to have determined whether or not the departmental decision was arbitrary, capricious, grossly erroneous, based on substantial evidence, or based on a question of law.

One of the initial reactions to the *Bianchi* decision was a demand for a statute (presumably a *Bianchi* statute) which would restore "the pre-Wunderlich situation." This is rather astonishing since *Bianchi* was administratively decided in 1948, six years before the Wunderlich statute, and four years before the *Wunderlich* decision. Had suit been more promptly filed and decided (remember that fifteen years have elapsed since the administrative decision), the board decision would not presumably have been entitled upon judicial review to the more liberal "substantial evidence" test enacted in 1954, and applied by the Court of Claims to this case in 1959. It would appear therefore that the Wunderlich statute rather than the *Bianchi* decision is the real object of this disaffection; that *Bianchi* is in reality being utilized as a trigger for a second go-around on the Wunderlich Act.

That statute, as the reports demonstrate,²⁶ was enacted only after the most exhaustive hearings and it is to these hearings that the Supreme Court alludes in *Bianchi*. The Court notes that the statute is designated as an act "to permit review" and "that the reviewing function is one ordinarily limited to consideration of the decision of the agency or court below and of the evidence on which it was based."²⁷

At this point the Court makes an observation which comes as no surprise to attorneys versed in administrative law.

"Indeed, in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no de novo proceeding may be held."²⁸

Congress has frequently employed the standards of review adopted in the Wunderlich Act ("arbitrary," "capricious," "not supported by substantial evidence") and as the Court demonstrates, these standards "have consistently been associated with a review limited to the administrative record."²⁹ The term "substantial evi-

²⁵ 373 U.S. at 714. (Emphasis added.)

²⁶ *Hearings Before a Subcomm. of the Senate Comm. on the Judiciary on S. 2487, Finality Clauses in Government Contracts*, 82d Cong., 2d Sess. (1952) [hereinafter cited as *Senate Hearings*]; *Hearings Before Subcomm. No. 1 of the House Comm. on the Judiciary on H.R. 1839 and S. 24, H.R. 3634 and H.R. 6946, Review of Finality Clauses in Government Contracts*, 83d Cong., 1st and 2d Sess. (1953-54) [hereinafter cited as *House Hearings*].

²⁷ 373 U.S. at 714-15. It could hardly be otherwise. One would not expect that epithets such as "arbitrary," "capricious," and "fraudulent" would be applied by a court to its own decision, and to its own evidence and record.

²⁸ 373 U.S. at 715, citing *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420 (1930); *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943). These cases demonstrate, the Court notes, that "the function of reviewing an administrative decision can be and frequently is performed by a court of original jurisdiction as well as by an appellate tribunal." 373 U.S. at 715.

²⁹ 373 U.S. at 715, citing, e.g., § 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009

dence" in particular is singled out as "a term of art" to describe the basis on which an administrative record is to be judged by a reviewing court. "This standard goes to the reasonableness of what the agency did *on the basis of the evidence before it*, for a decision may be supported by substantial evidence even though it could be refuted by other evidence that was not presented to the decision-making body."³⁰

Of considerable importance is one central theme which runs through the Supreme Court's opinion in *Bianchi*, the House Report on the Wunderlich Act,³¹ and Judge Laramore's dissent in *Volentine and Littleton v. United States*,³² a dissent which was largely adopted by the Supreme Court in *Bianchi*. That central point is that the addition of the "substantial evidence" test characterized above as a "term of art," was not only intended to permit expanded judicial review, but to serve as an incentive for the improvement of the administrative board procedures.

In *Bianchi* this thought is expressed as follows:³³

Indeed with respect to the *procedural* significance of the substantial evidence test, a leading contractor's representative stated that it would "result in these various departments and agencies feeling that they will have to produce their witnesses at these hearings and permit the contractor to examine them, in order to have in the record some substantial evidence to support their decisions when they go up on appeal to the court."

The Court also cites references in the House Report to the Administrative Procedure Act, and to the Court's prior decision in *Consolidated Edison Co. v. Labor Board*.³⁴

Then in the House Committee's Report on the Wunderlich Act, this same theme is expressed in the following oft-quoted paragraph:³⁵

It is believed that if the standard of substantial evidence is adopted this condition will be corrected and that the records of hearing officers will hereafter contain all the testimony and evidence upon which they have relied in making their decisions. It would not be possible to justify the retention of the finality clauses in Government contracts unless the hearing procedures were conducted in such a way as to require each party to present openly its side of the controversy and afford an opportunity of rebuttal.

And finally, Judge Laramore of the Court of Claims expressed it this way:

However, I believe a common sense application of the Act of May 11, 1954,³⁶ considering the background of the legislation and the administrative procedures available to aggrieved contractors, would be to apply the usual administrative review rule and determine the question of arbitrariness, etc., and lack of substantial evidence on the record made

(1958); § 10 of the Fair Labor Standards Act, 52 Stat. 1065, as amended, 29 U.S.C. § 210 (1958); § 10 of the National Labor Relations Act, 49 Stat. 453, as amended, 29 U.S.C. § 160 (1958).

³⁰ 373 U.S. at 715.

³¹ House Comm. on the Judiciary, *Finality Clauses in Government Contracts*, H.R. REP. NO. 1380, 83d Cong., 2d Sess. (1954).

³² 136 Ct. Cl. 638, 650 (1956). See references, *supra*, at notes 14 and 22.

³³ 373 U.S. at 716, quoting *House Hearings*, *supra* note 26, at 79-80.

³⁴ 305 U.S. 197, 229 (1938).

³⁵ House Committee on the Judiciary, *Finality Clauses in Government Contracts*, H.R. REP. NO. 1380, 83d Cong., 2d Sess. 5 (1954).

³⁶ 61 Stat. 81 (1954), 41 U.S.C. §§ 321-322 (1958).

before an appeals board, unless the contractor alleges and proves that because of the procedures available in the Appeals Board as applied to him, he was unable to adequately present his case. That is to say, because of the failure of the Government to produce documents or witnesses or inability of the plaintiff to compel the attendance of witnesses or other procedures that would prevent plaintiff from adequately establishing material facts with reference to his claim, or if the board considered evidence not in the record. Further, he must allege and prove the additional material facts which were not before the Board.³⁷

Mr. Justice Harlan's opinion in *Bianchi* warns of an additional unfortunate consequence if either side were free to withhold evidence at the administrative level, and then to introduce it in a judicial proceeding. He states that "the consequence of such a procedure would in many instances be a needless duplication of evidentiary hearings and a heavy additional burden in the time and expense required to bring litigation to an end."³⁸

The administrative procedures in *Bianchi* consumed six months. The case was thereafter eligible for litigation, or in litigation, for a total of fifteen years.

"This is surely delay at its worst," the Court states, "and we would be loath to condone any procedure under which the need for expeditious resolution would be so ill-served. Here the procedure is clearly inconsistent with the legislative directive."³⁹

There is a residual issue in *Bianchi* which is treated in what could well be considered as dicta. Respondent had contended that the Court of Claims has no power "to remand" a case such as this to the department concerned "and thus if the administrative record is defective or inadequate, or reveals the commission of some prejudicial error, the court can only hold an evidentiary hearing and proceed to judgment."⁴⁰

³⁷ In a case note on *Volentine and Littleton* shortly after its publication, the current Chairman of the Division of Public Contracts, Administrative Law Section, American Bar Association, endorsed this dissent, stating:

"A study of the Act's legislative history strongly indicates that Congress intended that the inclusion of the 'substantial evidence' standard would require the correction of certain defects in administrative appellate hearing procedures. A construction of the act made because of the existence of these defects is of doubtful validity.

"The Court's decision might be justified by giving the Wunderlich Act a literal construction. On the other hand, the legislative history of the act might have been read to show a reason or purpose for the act that would have justified the court for giving a liberal construction of the act and finding for the government. Probably, the fairest and most practical result would have been the common sense application of the act recommended by Judge Laramore." Cuneo, *Judicial Review Under the Wunderlich Act—Volentine and Littleton v. United States*, 17 FED. B. J. 626, 637 (1957). See also, Cuneo, *Determination of Government Contract Disputes*, The Practical Lawyer, March 1958, pp. 54, 66. Speaking of the decision of the majority in *Volentine and Littleton*, he says: "It is a strange result indeed that a decision may be found not supported by substantial evidence when the test is applied on the basis of a new record and not the record from which the decision was made."

³⁸ 373 U.S. at 717.

³⁹ *Ibid.*

⁴⁰ *Ibid.* (Emphasis added.) The treatment of this issue is characterized as in the nature of dicta because it is an issue now pending before the Court of Claims, on remand from the Supreme Court. The charge of a defective or inadequate record is currently being opposed by Justice Department counsel, as being without foundation.

Treating with this contention, the Court observes that "there would undoubtedly be situations in which the court would be warranted, on the basis of the administrative record, in granting judgment for the contractor without the need for further administrative action,"⁴¹ and where that situation did not exist, the court could stay its proceedings pending further administrative action.⁴² The sanction of judgment for the contractor would be available should the department fail to remedy the particular substantive or procedural defect or inadequacy.⁴³

Somewhat anti-climactically, the Supreme Court's opinion concludes with the reminder that it does not pass on the merits of *Bianchi's* "changed conditions" claim, that being an issue not embraced within its grant of certiorari, but rather one reserved for further proceedings in the Court of Claims.

It is difficult to perceive how the Court could have supported a decision different in any degree from that reached. The overwhelming weight of authority endorses the validity of procedures for the disposition of controversy by administrative means, with varying degrees of finality, even when the decision-making is by individuals not governed by the quasi-judicial safeguards typical of present-day appeal procedures, whether law or fact is involved, and whether or not a further appeal is available.

These precedents are all the more persuasive when applied to present-day procedures featuring relatively limited finality, and sophisticated quasi-judicial safeguards.⁴⁴ Nor are the concepts expressed in *Bianchi* peculiar to government contracts. They find a ready parallel in the increasing use of arbitration in non-governmental relationships.⁴⁵

⁴¹It is believed that this is an understatement. The great majority of cases would fall into this category. *Bianchi* was the administrative product of a board established within a Technical Service of the Department of the Army, within the Department of Defense, and this was one of its first cases. Development of these "disputes" procedures has continued during the intervening fifteen years. In 1954, for example, the Wunderlich Act hearings and statute provided impetus for further sophistication of these procedures. The foregoing comment is not addressed to the adequacy of the administrative procedures in the *Bianchi* case, an issue currently before the Court. Its purpose is to express the opinion that today's procedures are such that, should a court on judicial review find that a decision fails to meet the Wunderlich tests, the record will in most cases be complete enough to support the opposite result, if that is the court's judgment, without the need for further administrative action.

⁴²373 U.S. at 718, citing *Pennsylvania Railroad v. United States*, 363 U.S. 202 (1960).

⁴³It seems inconceivable that a department would fail or refuse to remedy a substantive or procedural defect or inadequacy drawn to its attention by the court.

⁴⁴Cuneo, *Determination of Government Contract Disputes*, *The Practical Lawyer*, March 1958, pp. 54, 66, states:

"As the passing of time has constantly resulted in improvements in the administrative appeal procedures, the future will undoubtedly provide more. Presently bills are being prepared by the American Bar Association to bring the ASBCA and other such Boards under the Administrative Procedure Act, to give them the power of subpoena and to authorize their members to administer oaths. *The adoption of these proposals will not result in any substantial changes in the procedures of the ASBCA.*" (Emphasis added.)

⁴⁵The American Arbitration Association describes its procedures as disposing of controversy, "without resort to the courts, and without disrupting current relationships." Even when an engineer or architect who is selected as arbiter acts in other respects as the agent of one of the parties, he is not deemed thereby to be disqualified. See *M. DeMatteo Construction Co. v. Maine Turnpike Authority*, 184 F. Supp. 907 (D. Maine 1960); *Memphis Trust Co. v. Brown-Ketchum Iron Works*, 166 Fed. 398 (6th Cir. 1909). In *Parke v. Pence Spring Co.*, 118 S.E. 508 (W. Va. 1923), the right of an architect to pass upon the issue of his own delays was upheld. See also *Marsch v. Southern New England R. Corp.*, 120

Logic and precedent provide similar overwhelming support for the Court's conclusion that judicial review of such an administrative decision is on the administrative record underlying the decision.

This, then, is the narrow and well-supported holding in *Bianchi*, a holding which is hardly deserving of the adverse reaction which it has engendered among those who fail or refuse to view it within the context of existing statutory and case law.

Indeed, the address entitled "Bianchi's Ghost"⁴⁶ has a haunting refrain. It perceives little merit in the administrative "disputes" procedures, and little merit in *Kihlberg v. United States*.⁴⁷ or in any of the other Supreme Court decisions which have consistently followed that decision since 1878. The cause of this "legal confusion,"⁴⁸ the speaker suggests, "has been and is the conferring of legal status and effect upon proceedings which should have only the status of haggling and negotiation between the parties in an effort to resolve their differences." At a later point, the speaker describes these proceedings as being "of questionable morality."

Bianchi features a dissent by Mr. Justice Douglas which conveys a similar low regard for these administrative proceedings. The dissent assumes as a fact an argument which is presently sharply at issue before the Court of Claims on remand from the Supreme Court, namely, an argument by the plaintiff that the Claims and Appeals Board in *Bianchi* considered evidence which the claimant did not see and which he had no opportunity to refute. Proceeding from this assumption, the dissent labels the administrative decision as "arbitrary and capricious," and the administrative procedures as "subnormal."⁴⁹

The references to these administrative procedures as "haggling," as "subnormal," and as being "of questionable morality," are singularly inaccurate, uninformed, and unfair.

N.E. 120, 123 (Mass. 1918), and *Southern New England R. Corp. v. Marsch*, 45 F.2d 766, 773 (1st Cir. 1931).

Other authorities are cited in the related article, Shedd, *supra*, pp. 43-44.

⁴⁶ Madden, *supra* note 3.

⁴⁷ 97 U.S. 398 (1878).

⁴⁸ Madden, *supra* note 3, at 27. Apparently referring to the continuing difference of opinion between the Supreme Court and the Court of Claims described in note 22, *supra*.

⁴⁹ Mr. Justice Douglas makes two points in his dissent which are puzzling. He states (373 U.S. at 722): "A remand to the agency to determine whether the agency's decision is 'capricious' or 'arbitrary' seems obviously inappropriate since it is the court, not the agency, that should determine that question." There is no suggestion anywhere in the majority opinion of a remand to an agency so that it can determine whether its own decision was arbitrary or capricious. That would be patently absurd.

The dissent concludes: "Like the case where a contractor seeks reformation of his contract (cf. *Blake Construction Co. v. United States*, 296 F.2d 393 (D.C. Cir. 1961)), the only place he can get the hearing Congress intended him to have on whether the decision was 'capricious' or 'arbitrary' is in the courts." 373 U.S. at 722.

In a case involving reformation, there is ordinarily no administrative decision and therefore no judicial review of a prior administrative decision. See note 82 *infra*. The "arbitrary and capricious" tests apply to judicial review of a prior administrative decision. They would have nothing whatever to do with a reformation case, and such cases are not ordinarily decided under the "disputes" procedures.

BIANCHI VIEWED WITHIN THE CONTEXT OF EXISTING ADMINISTRATIVE PROCEDURES

The decision-making procedures which are subject to judicial review under the Wunderlich Act would be of questionable morality if they were not fair, not objective, not independent, not quasi-judicial, and not committed to providing due process and equal treatment. So, for that matter, would any judicial or quasi-judicial procedures be lacking in morality if they failed to meet those tests.⁵⁰

There is overwhelming evidence, however, that the "disputes" procedures meet these standards to a very high degree. The related article in this issue⁵¹ demonstrates this with respect to the Armed Services Board of Contract Appeals (ASBCA) in comprehensive detail not heretofore available. Tracing as it does the history of these contract "disputes" procedures from "Adams" time,⁵² the article demonstrates their long history, their parallel in non-governmental relationships, and the sincere and effective efforts which have been expended, in cooperation with the bar, to invest them with every necessary attribute of due process. The author's account of the World War I procedures, and of the continuous development of present-day procedures over the past twenty years, reflects an administrative process by which the great bulk of the disputes, claims, appeals, controversy and potential litigation generated by a massive government contract program are adjudicated fairly, and without excessive formality or delay. Let us briefly review those procedures.

The charter of the ASBCA declares it to be "the duty and obligation of the members of the Armed Services Board of Contract Appeals to decide appeals on the record of the appeal to the best of their knowledge and ability in accordance with applicable contract provisions and in accordance with law and regulation pertinent thereto." A procedure is established to insure that decisions are board, and not individual, decisions; that they adhere to established precedent; and that they afford equal treatment in comparable cases. The Board is invested by the charter with "all powers necessary and incident to the proper performance of its duties." Communication, unless otherwise desired, is with "one trial attorney in each of the departments or agencies concerning the preparation and presentation of appeals and the obtaining of all records deemed by the Board to be pertinent thereto." A member of the Board or any examiner, designated by the chairman, is "authorized to hold hearings, examine witnesses, receive evidence and argument, and report the evidence and argument to the designated division for consideration and determination of the appeal."

The Administrative Conference of the United States,⁵³ constituted to "assist the President, the Congress, and the administrative agencies and executive departments in improving existing administrative procedures" and to "conduct studies of the

⁵⁰ Including, *e.g.*, proceedings in the regulatory agencies under the Administrative Procedure Act, where facts are determined by hearing examiners employed by the agencies. Reduced to an absurdity, such reasoning would prohibit federal judges from sitting in federal matters.

⁵¹ Shedd, *supra*, pp. 39-86.

⁵² That is, *United States v. Adams*, 74 U.S. (7 Wall.) 463 (1868).

⁵³ Exec. Order No. 10934, 26 Fed. Reg. 3233 (1961).

efficiency, adequacy, and fairness of procedures by which federal executive departments and administrative agencies protect the public interest and determine the rights, privileges, and obligations of private persons," examined into the organization and procedures of the ASBCA during the period 1961-1962. Its recommendation to the President was simply that the ASBCA "be constituted as a unitary board in the Defense establishment, and that, to the extent practicable, subsidiary boards which decide or render opinions upon disputes concerning contracts be eliminated as soon as possible."

This suggestion was promptly adopted and put into effect by the Department of Defense.

The rules of procedure governing practice before the Board state they "will be interpreted so as to secure just and inexpensive determination of appeals without unnecessary delay. Preliminary procedures are available to encourage full disclosure of relevant and material facts." A contracting officer whose adverse decision is being appealed must promptly transmit:

- (1) the findings of fact and the decision from which the appeal is taken, and the letter or letters or other documents of claim in response to which the decision was issued;
- (2) the contract, and pertinent plans, specifications, amendments, and change orders;
- (3) correspondence between the parties and other data pertinent to the appeal;
- (4) transcripts of any testimony taken during the course of proceedings, and affidavits or statements by any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board;
- (5) such additional information as may be considered material.

The appellant prior to hearing is afforded an opportunity to examine these papers and to augment them.

The parties are then afforded an opportunity to exchange pleadings. They are privileged to amend the pleadings and preliminary record. Prehearing briefs may be requested by the Board, or submitted at the discretion of the parties. Similarly a pre-hearing or pre-submission (if the appellant elects to submit on the record) conference may be conducted to simplify and clarify the issues, and to exhaust all opportunities for stipulations, and other agreements designed to avoid unnecessary proof. Results of such pre-hearing conferences are made part of the record.

An accelerated procedure is optionally available for appeals involving \$5,000 in amount or less. Detailed rules outline the practice for the taking of depositions. Time and place of hearings are scheduled with "due regard to the desires of the parties and to the requirement for just and inexpensive determination of appeals without unnecessary delay Appellant and respondent may offer at a hearing on the merits such relevant evidence as they deem appropriate and as would be admissible under the generally accepted rules of evidence applied in the courts of the United States in non jury trials Witnesses before the Board will be examined orally under oath or affirmation"

There is a provision for the submission of post-hearing briefs following receipt

of a verbatim transcript of the hearing, which is part of the record. Settlements are encouraged by provision for suspension of proceedings, or dismissal without prejudice to reinstatement, pending settlement negotiations.

Decisions are published verbatim⁵⁴ and are regularly reported by other publications. The statement in the charter that "decisions of the Board will be made upon the record" is reiterated in the Rules, together with a careful definition of the record. A motion for reconsideration is available.

These Rules are set forth in a mere dozen pages. Yet they provide all of the elements of due process without unnecessary procedural complications. Approximately 800 to 1,000 cases per year are disposed of in an average elapsed time, between docketing and disposition, of eleven months. Much of this time is, of course, taken up by the parties themselves in exchanging pleadings, agreeing upon an appropriate hearing schedule, and exchanging briefs. The procedures afforded compare very favorably with those of other administrative and judicial bodies.

Much of the foregoing, and related commentary demonstrating a comparison with Administrative Procedure Act problems, was summarized by this writer in an article published in 1960.⁵⁵ The current Rules of the ASBCA were reviewed with the Public Contracts Division, Administrative Law Section of the American Bar Association prior to publication.⁵⁶ On prior occasions, the three bar associations having an interest in these administrative procedures have commented on them favorably,

⁵⁴ Commerce Clearing House, Board of Contract Appeals Decisions.

⁵⁵ Spector, *Anatomy of a Dispute*, 20 FED. B. J. 398, 400 n.10 (1960). Portions of note 10 are pertinent at this point:

"... The employment by the Atomic Energy Commission of hearing-examiners, under the Administrative Procedure Act (5 U.S.C. § 1004 (1958)) to discharge these appellate 'disputes' procedures tends to demonstrate that these procedures are a facet of the administrative process, although somewhat divorced from the mainstream of administrative law as developed over the years by the independent agencies under the Administrative Procedure Act. The principal point of departure exists in the fact that these 'disputes' procedures are an extension of the procurement function, grow out of contracting, and are contractual in concept and origin, rather than statutory.

"The administrative process as developed by the regulatory and rate-making agencies is currently under heavy siege. (See Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L. J. 931 (1960); Kintner, *The Current Ordeal of the Administrative Process: In Reply to Mr. Hector*, *id.* at 965.). It is interesting to note, however, that the criticisms levelled against these agencies are not relevant here. Mr. Hector complains, for example, of the intermingling by regulatory agencies of quasi-judicial functions with other functions which are basically executive in nature, and the indiscriminate application of quasi-judicial techniques to both types of function. The function of resolving disputes, in contrast, is monolithically quasi-judicial in nature and has been traditionally recognized as such.

"Mr. Hector and others regret for many reasons the split between the hearing-examiner function, and decision writing. (Note 21 *infra.*) In contrast, the hearing, decision-making and decision-writing responsibilities involved in contract appeals are one integrated function of a single Board. (Note 9 *supra.*)

"Finally, there is an essentially greater procedural flexibility, informality (and informality is sometimes a virtue), and responsiveness to public need in a process which is contractual, rather than statutory, in origin."

⁵⁶ The Association's acknowledgment of this opportunity for review states:

"There was a full discussion of the proposed changes with the pros and cons being stated in a very forthright manner. On the whole, the Division is very much in favor of the changes proposed. . . . A meeting such as was held on June 7, 1963 permits a very satisfactory blending of opinion. . . . I am certain that our common interests have been advanced thereby. The Public Contracts Division is pleased to endorse the proposed changes. . . ."

and with no suggestion of "immorality" or "subnormality."⁵⁷ It is significant that two of these three bar associations have seen fit to organize their public contracts functions under the sections on administrative law, demonstrating the close relationship which exists.

Some critics of *Bianchi* acknowledge all of the foregoing with respect to the ASBCA, but point out that the described procedures are not characteristic of all executive departments engaged in government contracting. The answer to this can be simply stated. Virtually all other executive agencies charged with substantial procurement programs have established boards of contract appeals patterned after that of the Armed Services.⁵⁸ As to those relatively few who may not now employ adequate procedures in this field of administrative law, the answer is corrective action in that limited area, not indiscriminate criticism of the whole.⁵⁹ This is entirely in keeping with the "central theme" found running through the *Bianchi* decision, the House Report on the Wunderlich Act, and the dissent in *Volentine and Littleton*, that the Wunderlich Act should serve as an incentive for the improvement of these administrative board procedures.⁶⁰

The Supreme Court in *Bianchi* spoke of the "sanction of judgment for the contractor" in any case "in which the department failed to remedy the particular substantive or procedural defect or inadequacy." The department and the contractor which fail to avail themselves of the benefits implicit in proper administrative procedures have a great deal more to lose than that. To demonstrate these benefits involves a brief recapitulation of the position occupied by these "disputes" procedures in the overall system reaching from contracting officer to courthouse, for disposing of the massive volume of controversy which is developed by an equally massive government contracting program.

⁵⁷ *Report of the Committee on Public Contracts, Administrative Law Section, District of Columbia Bar Association, to the Subcommittee for Special Investigations of the House Committee on Armed Services*, 86th Cong., 2d Sess. (1960):

"The Board's record over the years has been excellent. It has discharged its important responsibility efficiently. Without doubt, its published decisions provide precedents and guides which are accepted by both contracting officers and contractors with consequent avoidance of numerous possible disputes. Other government agencies have recognized the value of the Board's modern procedures by adopting similar procedures. The general respect of the Bar Associations for the Board is reflected in a letter to the Subcommittee from the chairmen of the Public Contracts Committee of the American Bar Association, the District of Columbia Bar Association, and the Federal Bar Association, which stated in part:

"It is our observation that the Armed Services Board of Contract Appeals . . . is performing an indispensable service in the disposition of disputes between government and contractors. . . . The volume of cases which that Board is called upon to handle and dispose of is to a considerable degree responsible for the relatively light docket that presently exists in the U.S. Court of Claims.'"

⁵⁸ Department of the Interior; General Services Administration; Post Office Department; Veterans Administration; Department of Agriculture; Department of Commerce; National Aeronautics and Space Administration; Department of Army, Corps of Engineers (Civil Works); Atomic Energy Commission.

Four other agencies, having relatively small procurement programs and only occasional appeals, have utilized the ASBCA as "duly authorized representative" to discharge this function.

⁵⁹ Supreme Court Justice Clark, in a talk before the Administrative Law Section of the American Bar Association at its 1960 Annual Convention, admonished those interested in the administrative process to "get off the wrecking crew and get on the construction gang."

⁶⁰ As detailed, *supra*, at notes 31 through 37.

As of June 30, 1963, Department of Defense contracting alone was at an annual rate of almost \$30 billion, involving almost nine million separate contract actions per year.⁶¹ Add to this the contracting activity of other agencies, and the almost infinite variety of commodities and construction purchased, to visualize the flood of disputes, claims, appeals, controversy, and potential litigation which normally results. The phrase "potential litigation" is employed because very little of this controversy is resolved in relatively expensive and time-consuming litigation. *Bianchi's* "changed conditions" claim, with its long history of litigation, is representative of only a very small percentage of the whole.

In the first instance, the existence of a quasi-judicial appellate procedure at the department head level, and the publication of resultant decisions, serves to deter an untold number of disputes which are settled at the contracting officer level and are therefore not subsequently appealed or litigated. Moreover, of those that are appealed, the administrative appeal procedure serves to conclude the dispute in the vast majority of cases tried. Reasonably reliable statistics accumulated as of June 30, 1963, demonstrate that of 11,856 appeals docketed by the ASBCA (and predecessor components) since 1942, only 467 (less than four per cent) have subsequently been filed in a court.

In the cases disposed of (or deterred) by these "disputes" procedures, both parties were spared more expensive and time-consuming litigation. The parties were not limited to the sole alternatives of settlement or litigation. As to those relatively few cases litigated, records were developed while evidence was still fresh and witnesses still available. In all cases, existing relationships were preserved while the dispute was being resolved in an orderly manner.⁶²

Both parties are also indebted to the "disputes" procedures because they constitute the catalyst upon which many administrative adjustment clauses, unique in government contracting, depend for their effective operation. These unique clauses⁶³ have caused some writers to refer to government contracts as "instruments of administra-

⁶¹ Military Prime Contract Awards, July 1962-June 1963, prepared by the Statistical Center, Office of the Secretary of Defense.

⁶² See *Hearings Before the Subcomm. for Special Investigations of the House Comm. on Armed Services on H. Res. 67, Inquiry Into the Administration and Operation of the Armed Services Board of Contract Appeals*, 85th Cong., 2d Sess. 794-95 (1958). A Department of the Army witness stated:

"The purpose of the procedure which gives contractors the right to appeal to this Board is to provide an administrative method of settling these disagreements speedily and fairly, without the necessity of resorting to the courts. It is especially important in purchasing defense material that our contractors proceed with deliveries, even though disagreements may arise in the course of the contract.

"The purpose of the procedure of appeal provided by the terms of our contracts is to permit us to proceed under our contracts, without jeopardizing supply of military equipment by prolonged legal proceedings in the courts.

"Friendly and fair relations between the military departments and those in industry who supply our needs are vitally necessary to effective logistical operations. A method of settling honest disagreements in a fair, impartial, and orderly way is essential to maintaining this relationship. The procedure of appeal and resolution of disputes in which you are interested today, and the activity of the Armed Services Board of Contract Appeals, provide this method of settlement."

⁶³ E.g., "Changes," "Changed Conditions," "Termination for Convenience," "Default," "Inspections," "Government-Furnished Property," and "Suspension, Delay, or Interruption of Work."

tion."⁶⁴ Since each of these clauses is reliant upon the "disputes" procedures for resolution of differences of opinion which may arise thereunder, and since under the "disputes" article, or the particular adjustment article, there is the admonition that the contractor is meanwhile obliged to proceed with the work pending resolution of any dispute, it is difficult to perceive how these various articles could be effective without the related "disputes" procedures.

In summary, aside from the other benefits outlined above, the administrative process serves to dispose of most government contract disputes without litigation, and this is a form of practical finality. The relatively small remainder are litigated and, if previously the subject of an administrative decision, are entitled to a limited degree of finality upon judicial review.

The finality to be accorded prior administrative decisions upon judicial review is referred to as "limited" for three reasons: because of the limitations upon finality enunciated in the Wunderlich Act;⁶⁵ because of the "continuing struggle between the Court of Claims and the Supreme Court" with respect to the degree of finality to be accorded administrative decisions;⁶⁶ and because of the infrequency of review of government contract cases by the Supreme Court.⁶⁷

EFFECT OF *BIANCHI* UPON JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

This article was introduced with a reference to the "unmistakable hue and cry which has developed among some attorneys concerned with government contract litigation following *Bianchi*," and the conclusion that this concern is "much ado about nothing." To demonstrate this, *Bianchi* has been put in proper perspective by measuring it against the great weight of authority dealing with judicial review of administrative decisions, and by measuring it against the procedures for the disposition of all government contract disputes.

In the last analysis, however, this concern over *Bianchi* may be "much ado" for the final and conclusive reason that it appears to have had little practical impact upon pre-*Bianchi* review practices.

It should not be forgotten that the Wunderlich statute construed by *Bianchi* was a "liberalizing" statute in that it expanded judicial review of prior administrative decisions⁶⁸ by substituting six grounds for review where one pre-existed. Four of these grounds are obvious in their implication and therefore need not be extensively discussed herein. In his dissent in *Bianchi*, Mr. Justice Douglas referred to two of these grounds when he characterized the administrative decision as "arbitrary" and "capricious," based on the yet unproven assumption that the Board had relied

⁶⁴ Schultz, *Proposed Changes in Government Contracts Disputes Settlement—The Legislative Battle Over the Wunderlich Case*, 67 HARV. L. REV. 217, 246 (1953); Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 VA. L. REV. 27 (1955); Miller, *Administration by Contract: A New Concern for the Administrative Lawyer*, 36 N.Y.U.L. REV. 957 (1961).

⁶⁵ *Supra* note 11.

⁶⁶ *Supra* note 22.

⁶⁷ The last case on "finality" before *Bianchi* (1963), was Wunderlich (1952).

⁶⁸ *Supra* following note 24.

on evidence not in the record. The ground of "fraud" is traditional, and existed prior to *Bianchi*. "Gross error" as necessarily to imply bad faith, is often equated with fraud.

But the remaining two grounds, absence of "substantial evidence" and presence of a "question of law," provide wide latitude and discretion upon judicial review. The "substantial evidence" test has a long history in administrative law. Suffice it to say for our purposes, that the Supreme Court has refined it over the years to bring it closer to the "preponderance of evidence" test.

In *Consolidated Edison Company v. NLRB*,⁶⁹ the term was defined to mean "more than a mere scintilla. It means, such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." It was further defined in *NLRB v. Columbian Enameling Co.*⁷⁰ as follows: "Substantial evidence . . . must do more than create a suspicion of existence of the fact to be established It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Mr. Justice Frankfurter's more recent opinion in *Universal Camera Corporation v. NLRB*⁷¹ reviews the history of the "substantial evidence" test and concludes that The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. . . . Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

The *Bianchi* decision represents no problem in district and circuit court practice. The decisions of those courts were confirmed by *Bianchi*.⁷² In the Court of Claims, however, there has been a running difference of opinion with the Supreme Court as to the degree of finality to be accorded administrative decisions.⁷³ "Substantial evidence," although not the equivalent of "preponderance of the evidence," provides a fairly broad test and a method for the substitution of judicial opinion for prior administrative decision, where appropriate. It was frequently so utilized by the Court of Claims prior to *Bianchi*, and it has not been neglected since *Bianchi*.⁷⁴ Moreover, and from a pragmatic point of view, it should not be overlooked that Supreme Court review by writ of certiorari has been infrequent in government contract cases, and the writ has heretofore been reserved for matters of broader import than would be presented by the issue of substantiality of evidence in a specific case.

Similarly, the Wunderlich Act, by prohibiting "a provision making final on a question of law, the decision of any administrative official, representative or Board,"

⁶⁹ 305 U.S. 197, 229 (1938).

⁷⁰ 306 U.S. 292, 300 (1939).

⁷¹ 340 U.S. 474, 488 (1951).

⁷² *Supra* note 16.

⁷³ *Supra* note 22.

⁷⁴ See *Stein Brothers, et seq.*, *supra* note 22.

introduces further elasticity into the judicial review process. It does so because, if there is a valid and practical distinction to be made between "law" and "fact," it is a distinction which has traditionally confounded our profession.⁷⁵ Decision-making at the administrative board level is not plagued by the need to make the law-fact distinction as such. The charter of the ASBCA, for example, charges it with considering and determining appeals "on disputed questions," and both it and the standard "disputes" article contemplate decisions on "all questions of law necessary for the complete adjudication of the issue."⁷⁶ But because of the distinctive and opposite standards of finality to be applied upon judicial review to a decision on a question of fact, and a decision on a question of law, and because of the difficulty of making the distinction, there is wide latitude and discretion on judicial review, and it is exercised.⁷⁷

Nor does the foregoing exhaust the possibilities for judicial review. The post-

⁷⁵ It is a distinction characterized as "difficult," "troublesome" and even "impossible" in Birnbaum, *Questions of Law and Fact and the Jurisdiction of the Armed Services Board of Contract Appeals*, 19 FED. B. J. 120 (1959), an article which summarizes the writings of many distinguished legal scholars on this subject.

⁷⁶ The Wunderlich Act and the standard "disputes" article, in stating that decisions on questions of law shall not be final on judicial review, contemplate, of course, that they will have previously been made.

The ASBCA normally determines its jurisdiction (not to be confused with the "finality" tests later to be applied by the courts upon judicial review) by examining the contract to determine whether the dispute is "cognizable" thereunder, *i.e.*, whether there exists a clause or clauses under which it was contemplated by the parties that such claims would be considered and decided.

The "disputes" article, with its reference to "any dispute . . . arising under this contract" is considered not to confer substantive rights, but rather a procedure under which substantive rights described in other clauses, may be reviewed and decided. The article is not deemed to have broader effect than the contract in which it is contained. And therefore decisions are not made on the merits where there does not exist, within the four corners of the contract, machinery under which the decision, if made, could be effectively implemented. See, *e.g.*, Appeal of Simmel-Industrie, ASBCA No. 6141, Jan. 23, 1961, 61-1 BCA ¶2917.

⁷⁷ See, *e.g.*, cases cited note 22 *supra*. See also Case Note, Spector, "Law" Is Where You Find It, or "Fact" Is in the Eyes of the Beholder, 19 FED. B. J. 212 (1959).

The Court of Claims will often characterize as a "breach of contract" (and therefore, presumably a question of law) a case which, up to the point of litigation, was being contested within the framework of one of the standard "equitable adjustment" articles in the contract. (*Supra* note 63.) See, for example, *Volentine and Littleton*, *supra* note 22, and *Western Contracting Corporation v. United States*, 144 Ct. Cl. 318 (1958). In *Western*, it was plaintiff's position that, "since the contracting officer refused to make the equitable adjustment to which it was entitled, the court must now make it for him . . ." but the court persisted in treating the case as a suit for damages for breach of contract. Spector, *Confusion in the Concept of the Equitable Adjustment in Government Contracts*, 22 FED. B. J. 5, 10 n.23 (1962), comments on this case as follows:

"This position by plaintiff, and its supporting line of cases, would appear to be correct. When a controversy arises under one of the contract adjustment clauses, the issues are (a) is the article for application and (b) if it is, what is the amount of the equitable adjustment called for under the circumstances? Those are still the issues, on appeal from an adverse decision of the contracting officer brought before a Board of Contract Appeals. Are they not still the issues when the case is brought before the Court? It is begging the question to assert that every refusal to grant relief under a contract article automatically constitutes a breach of contract. The issue is still whether or not the article is for application, and if it is, the relief mandated thereby. Otherwise, the contracting officer breaches the contract every time he renders an adverse decision on a claim."

See also the recent decision in *W. H. Edwards Engineering Corporation v. United States*, Ct. Cl. No. 218-59, April 5, 1963. *But cf.* *Cannon Construction Co. v. United States*, Ct. Cl. No. 89-57, June 7, 1963.

Bianchi opinions of the Court of Claims in *Stein, W.P.C. Enterprises*, and *Wingate*⁷⁸ were based on the "substantial evidence" and "law-fact" review tests. But in each case the court also relied upon evidence received in a trial de novo, because the government had not objected to the taking of new evidence at the hearing, during oral argument, or in its brief, and had in fact itself introduced new evidence. The court observed, with persuasive logic, that the *Bianchi* "rule" is not jurisdictional and that it therefore can be waived by the Justice Department attorneys representing the government.

Earlier in this article⁷⁹ there was brief discussion of the possible alternatives where the administrative record is deemed defective or inadequate. There may be cases where the record is so inadequate or defective as to constitute no record at all. It is a fair guess that the Court of Claims would not consider itself bound by the *Bianchi* rule under those circumstances.

The cases cited in an earlier note⁸⁰ suggest that the court often considers a case before it on a theory of relief quite different from that under which it was administratively considered and appealed. Setting aside those cases in which this distinction is one of semantics only, there are some cases which are in fact brought on a theory of relief which was not available administratively and which is therefore being raised for the first time before the court. There is a likelihood that the *Bianchi* ruling will be distinguished in such cases on the grounds that it applies to "determination of the finality to be attached to a *departmental decision* on a *question arising under a 'disputes' clause . . .*"⁸¹

Finally, there are a few cases in which the Board dismisses an appeal without considering it on the merits because it is not cognizable under the contract.⁸² Here there is no "departmental decision" and no "record" against which to review it. Hence, the *Bianchi* rule would hardly be for application.⁸³

At this point it is necessary to digress momentarily to observe, with respect to this last category of cases, that the Justice Department is opposed to so restrictive a rule as to the Board's jurisdiction. Charged with defense of the government before the courts in these cases, and understandably in disagreement with the erosion of finality accorded administrative decisions,⁸⁴ the Justice Department has urged before the Court of Claims that:

⁷⁸ *Supra* note 22.

⁷⁹ See notes 41-43 *supra*.

⁸⁰ See note 22 *supra*.

⁸¹ (Emphasis added.) An unpublished paper on this point has been prepared by F. Trowbridge Vom Baur, in connection with consideration of the *Bianchi* decision by a subcommittee of the American Bar Association's Public Contracts Division.

⁸² *Supra* note 76. The cited appeal of *Simmel-Industrie* is typical of these cases.

⁸³ The Court of Claims said as much in a footnote to *Stein Brothers*, *supra* note 22, citing *Brister & Koester Lumber Co. v. United States*, 188 F.2d 986 (D.C. Cir. 1951), and *Maxan v. United States*, 126 Ct. Cl. 434, 442 (1953). See also, *Blake Construction Co. v. United States*, 296 F.2d 393 (D.C. Cir. 1961), note 49 *supra*, and *Thomas Earle & Sons, Inc. v. United States*, 100 Ct. Cl. 494 (1944).

⁸⁴ For example, see notes 16, 22, and 77, *supra*.

1. All disputed questions of fact must be decided by the contracting officer and board of contract appeals.
2. No distinction may be made between questions of fact which underlie questions of law, and those which do not.
3. It is wholly immaterial whether the disputed question of fact concerns a matter over which the agency may (or may not) grant relief.
4. It is immaterial whether boards of contract appeals decide questions of law, since only their determinations of fact questions are entitled to finality.
5. The court may never take evidence in a lawsuit arising under one of these contracts, regardless of the theory of the action.⁸⁵

This somewhat "extreme" position may very well be provoked by the court's use of an occasional case like *Appeal of Simmel-Industrie*⁸⁶ to support de novo trial in a dissimilar case such as *Bianchi*.⁸⁷ The above-summarized Justice Department position is nevertheless rebuttable for the following reasons:

1. The cases tried de novo in the court, because previously dismissed by the Board without hearing on the merits, are relatively few in number.⁸⁸
2. There is no support for this position in the Supreme Court's opinion in *Bianchi*.⁸⁹
3. The "disputes" clause does not cover cases of the type normally dismissed.⁹⁰
4. Findings in the abstract which do not lead to a decision have not been accorded finality under the Wunderlich Act, and have been repeatedly disregarded by the courts.⁹¹
5. If such findings are to be made then, solely for purposes of settlement and to avoid litigation, they might better be made independently of the "disputes" procedures, to avoid confusion with the Wunderlich Act standards of finality.⁹²

⁸⁵ This position was presumably taken (and rejected by the Court) in the *Laburnum* case cited in note 22, *supra*. (See note 5 to the Court's opinion.) Cf. *Robert E. Lee & Co. v. United States*, Ct. Cl. No. 252-60, Jan. 24, 1964 (note 4). In appeal of *The Soundsciber Corp.*, ASBCA No. 8157, Oct. 2, 1962, 1962 BCA ¶3509, with the Justice Department representing the government before the Board, the appeal was dismissed for reasons set forth in the decision. In urging the Board to make findings in this case, the Department of Justice observed that if the findings supported the government's position, they would, by reason of the Wunderlich Act, be conclusive in related litigation then pending in the Court of Claims. If the findings were contrary to the government's position, they could be employed in settlement of that pending litigation, thus saving time and expense.

⁸⁶ *Supra* note 76.

⁸⁷ See also cases cited in note 77 *supra*, and *Wunderlich v. United States*, 117 Ct. Cl. 92 (1950).

⁸⁸ In the case of the ASBCA, records back to 1942 demonstrate that they constitute only about three tenths of one per cent of the cases docketed. And these cases further diminish with each new "equitable adjustment" clause developed to cover a typical "disputes" situation.

⁸⁹ The issue is confined to "a suit governed by this statute" (Wunderlich Act) and to review of the record on issues of fact "submitted to administrative determination." By way of further limitation, the Supreme Court speaks of the function of the Court of Claims in "matters governed by 'disputes' clauses." Finally, the Court observes that respondent "has not argued in this Court that the underlying controversy in the present suit is beyond the scope of the 'disputes' clause in the contract or that it is not governed by the quoted language in the Wunderlich Act." Its conclusions were directly and unequivocally related to "a question arising under a 'disputes' clause" and to "matters within the scope of the 'disputes' clause." Thus the citation of *Bianchi* by the Justice Department as grounds for the expansion of the "disputes" procedures is unwarranted, but it tends to encourage further unwarranted criticism of *Bianchi*.

⁹⁰ As explained in note 76 *supra*.

⁹¹ See *Blake Construction Co. v. United States*, *supra* note 83; *Langevin v. United States*, 100 Ct. Cl. 15, 30 (1943); *Phoenix Bridge Company v. United States*, 85 Ct. Cl. 603 (1937). *Silberblatt v. United States*, 101 Ct. Cl. 54, 80 (1944); *Continental Illinois National Bank v. United States*, 126 Ct. Cl. 631, 640 (1953).

⁹² Shedd, *Administrative Authority to Settle Claims for Breach of Government Contracts*, 27 GEO. WASH. L. REV. 481 (1959) would suggest that the executive departments could, on the basis of such

6. The "disputes" procedures are decision-making and not solely fact-finding procedures. Many cases of this type which are administratively dismissed are not subsequently litigated because the contractor elects to drop the matter there. Findings in such cases would serve no useful purpose.

7. In light of the cases cited in an earlier note,⁹³ it is unlikely that the Court of Claims would stay proceedings in a case of this type, awaiting an administrative finding or decision.

We return then from this digression to the original point, that *Bianchi* appears to have had little practical impact upon pre-*Bianchi* review practices. Although the point is emphasized that the finality to be accorded administrative decisions upon judicial review continues to be very "limited" in scope, it is grave error to underestimate the importance of this residual finality. It is for one thing the motivation, the incentive if you will, for the maintenance of high standards in, and for the improvement of, the administrative Board procedures.⁹⁴ This residual finality appears to be the keystone of the "disputes" procedures, and the "disputes" procedures are in turn the keystone of an overall structure for the administrative disposition of the vast majority of the disputes, claims, appeals, controversy, and potential litigation generated by an equally vast government contract program.⁹⁵ They are the basis for the agreement that the parties will meanwhile proceed with the contract pending resolution of their differences,⁹⁶ and without this sheer chaos would result.⁹⁷

Critics of *Bianchi*, particularly litigation specialists concerned with preserving "two bites of the apple," may find themselves seriously depreciating the all-important first bite. And the second (litigating) bite would be a bitter bite indeed, if it were the only bite. Of even greater significance is the fact that they are also overlooking the General Accounting Office (GAO) "bite." Any erosion of the residual finality above-described automatically erodes the finality to be accorded the countless decisions rendered in favor of contractors, decisions which are rendered at both the contracting officer and the board level. Reckless criticism of *Bianchi* overlooks the fact that he who bites last, bites best.

findings, settle their own disputes of this type without referring the findings to the Justice Department for such an obvious final step. Moreover, this relatively rare type of case (*i.e.*, where no administrative relief is presently afforded) could be eliminated by the simple expedient of a clause agreeing that such cases will be decided administratively. (*Supra* note 88.)

⁹³ See note 83 *supra*.

⁹⁴ As detailed in the text at notes 31 through 37 *supra*.

⁹⁵ As detailed in the text under the subheading, "*Bianchi* Viewed Within the Context of Existing Administrative Procedures," particularly at notes 55 through 64 *supra*. It is interesting to conjecture what would transpire if the pre-Board "disputes" procedures (which did not effectively dispose of contract claims without litigation) were applied to today's enormous volume of government contracting. *Penker Construction Co. v. United States*, 96 Ct. Cl. 1 (1942), is often cited to illustrate the court's dim view of pre-Board "disputes" procedures. And even though the vast majority of government contract disputes are not now litigated because of present-day administrative procedures, the average disposition time for litigated cases is still measured in years.

⁹⁶ The American Arbitration Association refers to this as "the preservation of existing relationships."

⁹⁷ For a brief discussion on this point, see related article in this issue, Shedd, *supra*, pp. 39-41.

THE RELATIONSHIP OF THE GENERAL ACCOUNTING OFFICE TO THE FINALITY CLAUSE

This article does not purport to analyze nor to discuss at any length the jurisdiction of the GAO, nor its relationship to the "disputes" procedures which are part of every government procurement contract.⁹⁸

Suffice it to say that the Budget and Accounting Act of 1921⁹⁹ created the GAO independently of the executive departments and under the control and direction of the Comptroller General of the United States.¹⁰⁰ Under the terms of the act, the GAO has traditionally asserted the right "to examine and audit the financial transactions of the government and settle and adjust all claims and accounts by and against the United States, or in which the United States is concerned."¹⁰¹ This right is, of course, subject to the terms of government contracts as written, including the "disputes" article and its provisions with respect to finality.¹⁰² Prior to the *Wunderlich* case and the act of the same name which followed, GAO exception to a decision (or an agreement embodying a decision) in favor of a contractor was articulated in terms of "illegality" or "overreaching" or "fraud."¹⁰³

In the course of the Wunderlich Act hearings it was clear from the testimony of the Comptroller General that he considered the GAO as fulfilling the same function as a court, in protecting the government's rights against a contractor in contract disputes.¹⁰⁴ Paradoxically, it is the finality provisions of the "disputes" clause which are cited by a court to reaffirm an administrative determination in favor of a contractor, when it had to be sued in court because previously derailed by the

⁹⁸ There is some discussion on this point in the article cited in note 92 *supra*. See also articles listed in Dimond, *Indexed Bibliography of Articles on Government Contracts in Legal and Related Periodicals*, 20 FED. B. J. 167 (1960).

⁹⁹ 42 Stat. 20 (1921), 31 U.S.C. § 1 (1958).

¹⁰⁰ 42 Stat. 23 (1921), 31 U.S.C. § 41 (1958).

¹⁰¹ *House Hearings*, *supra* note 26, at 135.

¹⁰² *Id.* at 134. See also text at notes 18 through 21 *supra*.

¹⁰³ See *United States v. Mason & Hangar Co.*, 260 U.S. 323 (1922).

¹⁰⁴ *House Hearings*, *supra* note 26, at 134-35, 140. The Comptroller stated:

"In the past, questions of fact decided in accordance with the provisions of a clause such as the above were not disturbed by the General Accounting Office or the courts unless the action of the administrative officer was fraudulent, arbitrary, capricious, or so grossly erroneous as to imply bad faith This office is as deeply concerned, however, that the rule allows the contracting officials uncontrolled discretion over the Government's contractual affairs as well and places them in a position to make as arbitrary and reckless use of their power against the interests of the Government as against the interests of the contractor. In other words, deciding officials can make just as arbitrary determinations in favor of contractors at the expense of the taxpayers.

"Of perhaps more serious consequences is the increasing tendency on the part of some executive contracting agencies to include in Government contracts a provision specifying that all disputes, whether of law or fact, are to be finally and conclusively settled administratively, rather than by the accounting officers or the courts Manifestly it is unwise to leave determinations of questions of law to administrative officials.

"H. R. 1839 will have the effect of permitting review in the General Accounting Office or a court with respect to any decision of a contracting officer or head of an agency which is found to be fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative and substantial evidence. Also, it will put an end to the practice of including in Government contracts provisions authorizing questions of law to be finally decided administratively."

"It is believed that the public interest requires that the rights of contractors and the Government to review or appeal should be coextensive."

GAO.¹⁰⁵ This illustrates that the GAO authority is limited by, rather than parallel to, the review available to the courts.¹⁰⁶

Nevertheless, an earlier version of the Wunderlich Act passed by the Senate¹⁰⁷ actually read that "any such provision shall be void with respect to any such decision which the General Accounting Office or a court" finds fraudulent, and so on. Strong objections to this wording were raised by the Department of Defense and by defense industries.¹⁰⁸ Other individual witnesses were similarly alarmed

¹⁰⁵ See, e.g., *McShain v. United States*, 83 Ct. Cl. 405 (1936); *Albina Marine Iron Works v. United States*, 79 Ct. Cl. 714, 720 (1934); *Carroll v. United States*, 76 Ct. Cl. 103 (1932); *Maryland Dredging & Contracting Co. v. United States*, 66 Ct. Cl. 627 (1929); *James Graham Mfg. Co. v. United States*, 91 F. Supp. 715 (N.D. Calif. 1950); *United States v. Mason & Hangar Co.*, 260 U.S. 323 (1922); *John J. Mathis Co. v. United States*, 79 F. Supp. 703 (D.C.N.J. 1948); *Karno-Smith Co. v. United States*, 84 Ct. Cl. 110 (1936); *Livingston v. United States*, 101 Ct. Cl. 625 (1944); *United States Casualty Co. v. United States*, 107 Ct. Cl. 46 (1946); *Brister & Koester Lumber Co. v. United States*, 188 F.2d 986 (D.C. Cir. 1951); *Leeds & Northrup Co. v. United States*, 101 F. Supp. 999 (E.D. Pa. 1951); *Sunroc Refrig. Co. v. United States*, 104 F. Supp. 131 (E.D. Pa. 1952).

Many of these cases are cited in a letter of December 11, 1958, transcribed in *Hearings Before the Subcomm. for Special Investigations of the House Comm. on Armed Services on H. Res. 67, Inquiry Into the Administration and Operation of the Armed Services Board of Contract Appeals*, 85th Cong., 2d Sess. 861-63 (1958). The letter is signed by the then chairmen of the public contracts committees of the American, Federal, and District of Columbia bar associations but in their capacity as private practitioners. Counseling against a procedure for review of board decisions by the Comptroller General, the letter has this to say:

"It seems to us that such a procedure completely disregards the effect of the standard disputes article. In the first place, the Comptroller General has no standing whatever under the standard contract provision relating to disputes, and the Court of Claims has repeatedly held that the Comptroller General may not undertake to exercise the function of the contracting officer or head of the department—Board—to determine the dispute The only result of this procedure would be to delay and perhaps to block the payment of a claim duly allowed by the Board and its adoption in our view would tend to destroy the expeditious relief which the administrative process was intended to afford. In addition, it would unquestionably have the effect of increasing the number of instances in which suit must be filed in the United States Court of Claims."

¹⁰⁶ In his letter to the chairman of the Senate Committee on the Judiciary during earlier consideration of the Wunderlich Act (see note 109 *infra*), the Comptroller General alluded to the *James Graham Mfg. Co.* case, and stated:

"The contracts involved provided that the decisions of the contracting officer as to disputes arising under the contract would be conclusive and binding upon both parties subject to appeal to the head of the department. The district court held that this contract provision was valid and that the Comptroller General does not, absent fraud or overreaching, have authority to determine the propriety of contract payments when the contracts themselves vest final power of determination in the contracting executive department.

"It is the view of this office that no executive agency of the Government should have the authority to agree to a contract provision which would preclude the Comptroller General and the courts from determining the propriety of contract payments on the basis of the facts and the law applicable thereto" *Senate Hearings*, *supra* note 26, at 6.

¹⁰⁷ S. 24. *House Hearings*, *supra* note 26.

¹⁰⁸ These objections are well summarized in the testimony offered on behalf of Aircraft Industries Association of America. *House Hearings*, *supra* note 26, at 91, 92-93. The witness observed:

"It is generally agreed that the use of a disputes clause with some degree of finality is a desirable procedure

"In agreeing to the usual disputes clause a contractor with Department of Defense has permitted the other party to the contract to be the arbiter of all disputed questions of fact. The Government has recognized its responsibilities in this regard, and the Armed Services Board of Contract Appeals is an excellent and impartial body of a judicial character. But, having surrendered such rights of decision, it is hardly fair or just to ask a contractor also to submit to second guessing by a second and unrelated Government agency such as the General Accounting Office Such double administrative review is wholly unnecessary and wholly unfair to the contractor. . . ."

at the prospect that GAO review might be equated with judicial review. They observed that if the GAO applied the same tests as a court, it could "rather easily" upset a decision or agreement on which a contractor relied, on the basis of "the substantial evidence rule," creating chaos in the contractor's banking and surety relationships.¹⁰⁹

As a result, by letter dated December 30, 1953,¹¹⁰ the Comptroller General suggested a substitute draft of a bill which specifically omitted reference to the GAO and made reference only to "judicial review." This is the present wording in the Wunderlich Act.¹¹¹ In submitting the substitute version, the Comptroller explained that "the General Accounting Office has not asked for authority which it did not have before the decision in the *Wunderlich* case."

The Comptroller General further quoted from the committee report on S. 24 (Senate Report 32) as follows:

The Committee wishes to point out with respect to the language contained in the bill, "in the General Accounting Office or a court, having jurisdiction," that it is not intended to narrow or restrict or change in any way the present jurisdiction of the General Accounting Office, either in the course of a settlement or upon audit; that the language in question is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.¹¹²

He concludes: "This was and is precisely the position of the General Accounting Office."¹¹³

The final report of the House Judiciary Committee on the bill¹¹⁴ states:

The proposed legislation, as amended, will not add to, narrow, restrict or change in any way the present jurisdiction of the General Accounting Office either in the course of a settlement or upon audit, and the language used is not intended either to change

This testimony quotes from a prior letter of the General Counsel, Department of Defense, as follows:

"To superimpose General Accounting Office review on existing disputes clause procedures would not only create a completely new review; it would, as a practical matter, eliminate the usefulness of the disputes clauses themselves by destroying the concept of finality and dividing the responsibility for determining the merits of any given appeal This would defeat the aims of both the Government and its contractors by making it impossible to accomplish the very purposes of the disputes clauses, that is, the achievement of proper and expeditious performance of contracts." *Id.* at 93.

Similar views were expressed in the testimony on behalf of the Automobile Manufacturers Association:

"As we read those bills, they purport to make the General Accounting Office another Court of Claims If this agency is made another Court of Claims, in a sense it becomes a judge and jury and a prosecutor. It is submitted that an agency of the legislative department with duties and obligations of the General Accounting Office should not be placed in such a position. It is not in a position impartially to judge these matters The proposed substitute bill does not grant judicial power to the General Accounting Office. . . ." *Id.* at 97. And the testimony on behalf of the National Association of River and Harbor Contractors was to the same effect, as was that of the Radio-Electronics-Television Manufacturers Association. *Id.* at 103, 105.

¹⁰⁹ *House Hearings*, *supra* note 26, at 112, 113; *Senate Hearings*, *supra* note 26, at 119-21.

¹¹⁰ *House Hearings*, *supra* note 26, at 135.

¹¹¹ 68 Stat. 81 (1954), 41 U.S.C. §§ 321 and 322 (1958).

¹¹² *House Hearings*, *supra* note 26, at 136.

¹¹³ *Ibid.*

¹¹⁴ House Comm. on the Judiciary, *Finality Clauses in Government Contracts*, H.R. REP. No. 1380, 83d Cong., 2d Sess. 6-7 (1954).

the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.

The elimination of the specific mention of the General Accounting Office from the provision of the bill as amended should not be construed as taking away any of the jurisdiction of that Office. It is intended that the General Accounting Office, as was its practice, in reviewing a contract and change orders for the purpose of payment, shall apply the standards of review that are granted to the courts under this bill. At the same time there is no intention of setting up the General Accounting Office as a "court of claims." Nor should the elimination of the specific mention of the General Accounting Office in the bill be construed as limiting its review to the fraudulent intent standard prescribed by the *Wunderlich* decision.

The foregoing brief summary of the legislative history of the *Wunderlich* Act, reviewed to cast light upon the relationship of the GAO to the finality clause, appears instead to create ambiguity and confusion. One school of thought (consisting mainly of those most critical of *Bianchi*, incidentally) urges that the deliberate omission of the GAO from the statute, the retention of the words "judicial review," the strong disclaimers of any intent to expand the pre-*Wunderlich* decision authority of the GAO, and the fact that all this was in response to strong testimony counseling against equating GAO with a court, serves to demonstrate conclusively that the present GAO tests of review are as they were before *Wunderlich*.¹¹⁵ They urge that talk of a "government" right of appeal exactly equivalent to that of a contractor is ludicrous, because the government does not appeal from its own decision; that when a decision on appeal allows a contractor's claim in whole or in part, the parties have in effect reached agreement, and a dispute no longer exists.

It is obvious that the GAO does not share this view. That office, relying on the last above-quoted language from the House Report,¹¹⁶ appears to hold that its pre-*Wunderlich* authority to review was exactly equivalent to that of a court, that it is ambulatory and that it continues to be exactly equivalent to the present, post-*Wunderlich* authority of a court. By the same token, if all restrictions upon judicial review were eliminated, that is, if even the residual finality above-described were eliminated, GAO review would be plenary.

There have been several recent evidences of this view. Comptroller General decision B-150173, January 11, 1963, represents a review and reversal of a decision of the Atomic Energy Commission Board of Contract Appeals which had previously held that an appeal to it was timely.¹¹⁷ Decision B-142040, August 27, 1962, reviews a decision of the Interior Department's Board of Contract Appeals at the request of a certifying officer, and finds it based on "substantial evidence." And Comptroller General Decision B-152346, November 22, 1963, holds, contrary to a long line of board decisions, that the department head, acting through the Board, cannot review a contracting officer's refusal to extend the thirty-day provision in the standard

¹¹⁵ See notes 103 through 106 *supra*.

¹¹⁶ See note 114 *supra*.

¹¹⁷ This review was apparently undertaken by GAO on its own initiative.

"changes" clause, a time requirement which has never been deemed jurisdictional.

Decision B-150515, July 1, 1963, carries this parallel with a court to an interesting conclusion. The claimant had previously lost an appeal to the ASBCA involving the termination of his contract for default. He filed a claim with the Comptroller General urging that the ASBCA decision would not meet the Wunderlich Act tests, and furnishing some evidence on the issue of "waiver of due date" which was not presented to the Board. The Comptroller General decision holds:

We believe this evidence has a very material bearing on the question whether the Government led Seaview to believe its default had been "waived." However, none of this evidence was presented to the Board of Contract Appeals. In the light of the decision of the Supreme Court in *United States v. Bianchi*, decided June 3, 1963, we believe our review of the Board's decision must be limited to the record before the Board.¹¹⁸

The most sweeping decision in this area is represented by B-125096, April 30, 1963, in which the Comptroller General issued the following directive to "the heads of departments, agencies, and others concerned":

"Effective immediately, any release or other contractual instruments entered into as a result of a decision by a Board of Contract Appeals, the head of an agency, or a contracting officer under a contract disputes clause shall include a provision to the effect that the instrument is not binding if the decision is later found to be in violation of the standards set forth in the Wunderlich Act (41 U.S.C. 321).

It should be observed that the Wunderlich Act by its terms refers to "judicial review" of "any decision of the head of any department" In this directive it is invoked so as to permit GAO review, in accordance with Wunderlich Act standards, of contracting officers' decisions as well as those of department heads, and so as to diminish the binding effect of contractual instruments resulting from a decision.

The directive results from a report of the Comptroller General taking issue with a decision of the ASBCA which fixed the amount of charges to be paid by an Air Force contractor for commercial use of government-owned facilities. Following the decision, the Air Force entered into an agreement with the contractor covering the amount involved in this dispute plus other matters in dispute. In consideration of payment by the contractor to the government of \$1,765,000, the agreement released the contractor from any further payments on this account.

The GAO directive, referring to the GAO report, observes: "This report shows that further action on an unreasonable decision by a board of contract appeals is barred by such an unconditional release granted to the contractor by the agency that rendered the decision (B-125096, April 1963)."¹¹⁹

¹¹⁸ In an administrative proceeding before the ASBCA, evidence presented by either party while the decision was still under consideration, or reconsideration, would be received and weighed. Moreover, applying the analogy to a court, the *Stein Bros.* case in the Court of Claims, *supra* note 22, would recognize "waiver" of the so-called Bianchi rule where, as here, the evidence in question had already been furnished to the GAO and had been examined.

¹¹⁹ If the Wunderlich Act standards apply to agreements, and if the GAO reviews by these standards,

There was considerable reaction to this directive,¹²⁰ and it was restated September 9, 1963 in different terms so as to apply to releases

given by the government to contractors subsequent to decisions rendered under a disputes clause, which are adverse to the government's interests. . . . It should be pointed out that our directive, as previously indicated, is applicable only to releases given by the government resulting from decisions by contract appeals boards which are adverse to the government's interests and not to ordinary contract modifications, supplemental agreements, and the like.¹²¹

The above illustrations are offered in this article on *Bianchi* only to demonstrate that reasonable men differ in their definition of the relationship of the GAO to the finality clause in government contracts. The author of "Bianchi's Ghost" suggests legislation to insure that administrative decisions have no "binding or conclusive or presumptive effect" at all. Would this apply equally to decisions, and agreements confirming decisions, with which the contractor was satisfied?

CONCLUSIONS

The adverse reaction to *Bianchi* in some circles is premature and unwarranted. *Bianchi* is in accord with the great weight of statutory and case law, and a contrary opinion would have been difficult to reconcile with precedent.

The facile slogan—"Wunderlich case = Wunderlich statute; therefore *Bianchi* case = *Bianchi* statute"—has no validity. The *Wunderlich* case virtually foreclosed judicial review of administrative decisions and invited legislative action. Therefore, the statute greatly expanded judicial review; and *Bianchi* merely interprets that statute in accordance with its exhaustive legislative history, and precedent. This interpretation is consistent with the expressed legislative intent of insuring an administrative procedure which would provide the safeguards and other advantages above outlined.

why would further action be barred by the agreement? Note that "unreasonable" is not one of the Wunderlich Act standards. Those standards are introduced in the GAO report, which reads:

"On the basis of the record, as outlined in our report in this case, we believe that the decision of the Armed Services Board of Contract Appeals was so unreasonable and erroneous as to be arbitrary and that it was not supported by substantial evidence with respect to a crucial point."

¹²⁰ See, for example, 10 FED. BAR NEWS 406 *et seq.* (1963). The columnists cite a reply from the General Counsel, Department of Defense, to the effect that vast numbers of contract modifications are executed in the course of government contracting, and that many of these agreements are alternatives to disputes. They occur routinely both before and after contracting officers' decisions under a "disputes" article, and both before and after appeal to the Board. Since most disputes involve claims by the contractor in which the government is the defendant, the effect of the GAO directive would be to destroy the efficacy of agreements designed to put an end to controversy in which the government is the party being released. And if the directive was intended to qualify only the rare case of a government's release of a contractor (following payment by the contractor to the government), "the ability to accomplish such agreements would be seriously impaired." See also, *The Government Contractor* (Federal Publications, Inc.), Vol. 5, No. 11, May 27, 1963.

¹²¹ This revised language is also discussed at some length in 10 FED. BAR NEWS 406 *et seq.* (1963). Does the directive now mean that a government claim settled by agreement at the contracting officer level would not be subject to review under the "substantial evidence" standard, but that the same claim settled at the department head level would be? What are ordinary modifications, and what standards of review are applied to them?

It is unlikely, the facts of legal life being what they are, that *Bianchi* will have any appreciable impact on pre-*Bianchi* practices with respect to judicial review. But as the exhaustive Wunderlich Act hearings demonstrated, the litigated case is merely the tip of the iceberg. It is part of an interrelated system by which a massive volume of disputes, claims, appeals, and lawsuits are adjudicated. Therefore, any unnecessary, formal effort to rearrange one relatively small part of the structure could serve to disarrange the incentive for maintenance and improvement of the remainder of the structure. And it is this remainder which now disposes of the great bulk of controversy growing out of the government's contracting programs. It is this remainder which preserves the sanctity and certainty of decisions and agreements which are satisfactory to the claimant.

The comprehensive Wunderlich Act hearings, covering this complex and sensitive area of relationship between the government and its citizens, demonstrated that the statute which was ultimately enacted represented a satisfactory solution to all of the diverse interests represented at those hearings. Those who would tamper with that statute are engaged in a dangerous game.

"The difficulty is, as Mr. [Robert] Frost said, about not taking down the fence until you find out why it was put up. I think all of the proposals put up to improve it will really not improve it."¹²²

¹²² As attributed to the late President Kennedy at a press conference with regard to improving the presidential press conference. *Washington Post*, Sept. 13, 1963, p. A-16.