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# JUDICIAL REVIEW OF GOVERNMENT CONTRACTS DISPUTES—THE LAW-FACT DICHOTOMY

## INTRODUCTION

Today, the typical Government contract contains what is known as a "Disputes clause."<sup>1</sup> These clauses are not without historic precedent; for many years now, Government contracts have contained clauses which provided for their "finality" with respect to disputes arising under them.<sup>2</sup> In the well-noted 1878 case of *Kihlberg v. United States*,<sup>3</sup> the leading case of its day, such a clause in a Government contract provided for:

... transportation to be paid . . . according to the distance from the place of departure to that of delivery, the distance to be ascertained and fixed by the chief quartermaster of the District of New Mexico.

In this case the Supreme Court, facing the "finality clause" for the first time,<sup>4</sup> upheld it on the grounds that an agreement designating one

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1. The current standard Disputes clause as found set forth in 41 C.F.R. § 1-16.901-23A, cl. 6 (1964) provides as follows:

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

2. They were used as early as the Indian Wars. Because of inadequate communications to the rather inaccessible Far West, final responsibility for the payment of troop supplies clearly had to rest on the personnel in the field checking on their condition. *Hearings on H. R. 1838 and S. 24 Before a Subcommittee of the House Committee on the Judiciary*, 83d Cong. 1st & 2d Sess. at 19 (1954).

3. 97 U.S. 398, 400 (1878).

4. In an earlier case, *United States v. Adams*, 74 U.S. (7 Wall.) 463 (1868), a con-

of the contracting parties to finally determine such matters was valid and could not be reviewed by the courts except for "fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment. . . ." <sup>5</sup> The implications of this holding will subsequently be seen.

It has been nearly a century since *Kilberg* or "dispute-type" clauses have appeared in Government contracts, but events have caused a substantial change in the field of public contracting, especially in the last twenty-five years due to the tremendous growth in all areas of Governmental activity. This growth has been characterized essentially by four elements: <sup>6</sup> (1) annual expenditures in the billions of dollars, (2) increasing dependence upon continuing expenditures by the private sector of the economy, (3) the establishment in each government agency of a permanent procurement organization which, under a maze of statutes and regulations, awards and administers contracts and is engaged in rule making and adjudication, and (4) the development of a complex and voluminous body of Government contract law.

In deference to this transformation and the role that Government contracting has assumed in our economy, this discussion will focus attention primarily on the controversy of the "law-fact dichotomy" in the finality of Government contract disputes as a central point about which most, if not all, of the other problems in dispute settlement revolve. This purpose will be effectuated by an examination of the nature of Government contracts, the present state of their dispute settlement, the dialectic process by which Government contracts have arrived at this current status, relevant problems in the area of judicial review, and finally, a practical approach to dealing with these problems.

## PRESENT STATE

### *Government Contracts*

In *Acme Process Equipment Co. v. United States*,<sup>7</sup> the Court of Claims asserted:

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tractor's voluntary submission of his claim to a "noncontractual" Government review board and acceptance of payment pursuant to its decision was held to constitute agreement that the board's decision was final.

5. 97 U.S. at 402. The "Kilberg doctrine" was further spelled out in *Martinsburg & P.R.R. v. March*, 114 U.S. 549 (1885).

6. Speidel, *What Should The Law Schools Do About Federal Government Contracts?*, 18 J. LEGAL ED. 371 (1966). See generally Hannah, *Government by Procurement*, 18 BUS. LAWYER 997 (1963).

7. 347 F.2d 509 (1965), *rev'd on other grounds*, 385 U.S. 138 (1966).

When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments.<sup>8</sup>

Despite the venerable court's statement, a more candid appraisal of the situation would be that:

. . . it is perhaps not too much to say that when a business concern steps into the field of Government contracts, it steps into an area that, in practical terms, is a world of its own.<sup>9</sup>

True, there are few theoretical differences between Government contracts and private contracts; however, an enormous disparity is found in the practical differences.<sup>10</sup> To begin with, in Government contracts there is a marked absence of any real negotiations; they are often mere "rubber stamps"—unilaterally-issued contracts of adhesion whose terms, including the Disputes clause, must be accepted if one wishes to do business with the Government as opposed to the more usual "give and take" found prevalent in commercial transactions.<sup>11</sup> The contractor is handed a mass of small print, the nomenclature of which has been amply termed "boilerplate."<sup>12</sup>

In addition, there is the concept of the irrevocability of bids,<sup>13</sup> that is, once a contractor has submitted a bid on a Government contract and the bids have been opened, he cannot as a rule withdraw it.<sup>14</sup> In the

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8. 347 F.2d at 529.

9. Vom Baur, *Differences Between Commercial Contracts and Government Contracts*, 53 A.B.A.J. 247, 251 (1967).

10. For a discussion of the general similarities and differences between Government contract law and private law, see generally CUNEO, *GOVERNMENT CONTRACTS HANDBOOK* 251-57 (1962).

11. Nor should the importance of unilaterally-issued regulations be underestimated. See, e.g., Stone, *Contract by Regulation*, 29 LAW & CONTEMP. PROB. 32 (1964). Presently, there is a trend from "procurement by negotiations" to procurement by formal advertising, especially in the Department of Defense.

12. These provisions consist essentially of standard clauses that have grown as the needs of Government procurement have developed over the decades and are usually found in a document entitled "General Provisions." In addition to the Disputes clause, such others as the following are but a few of the more common clauses included that provide for their equitable adjustment under the contract: "Changes", 41 C.F.R. §§ 1-16.901-32, cl. 2 (1964); "Changed Conditions", 41 C.F.R. §§ 1-16.901-23A, cl. 4 (1964); "Inspection", 41 C.F.R. §§ 1-16.901-32, cl. 5 (1964); and "Termination-for-Convenience", 32 C.F.R. § 8.701 (1961).

13. Exemplified by ASPR § 2-304.

14. For a criticism of this rule, see generally Stelzenmuller, *Formation of Government*

realm of private contracts, it is, of course, a well-known practice that an offer may be withdrawn before acceptance.<sup>15</sup>

Next, as pointed out in the introduction, there exists a mass of regulations which have the force of law.<sup>16</sup> In the main, the problems with respect to these regulations arise not so much in their vastness or legality per se, but in the alarming regularity with which they change. The adverse effect of this awkward situation is felt in such instances as where it is suddenly required that a certain clause be in a contract, and it is not actually there. The contractor is, nonetheless, bound as if it were stated in so many words.

The legal fiction that has evolved in Government contracts is the "constructive change order," vindicated under the theory that as such it was *intended* to be included in the first place.<sup>17</sup> In the matter of "Changes clauses," which are included as a norm in Government contracts, contracting officers are empowered to make virtually any change in the specifications, and contractors are obliged to comply. (This remains true as long as such changes are within the scope of the contract, but with respect to constructive changes, contractors are often in a quandry as almost *anything* suffices for notice of change.<sup>18</sup>)

These enumerated differences are but a few of the concerns involved in Government contracts, but are the more outstanding ones. It is, however, in the Disputes and Appeals clause that we find the main distinction between Government and private contracts. With a private contract, the matter is ordinarily quite simple; sometimes there are provisions for arbitration, but usually one party brings suit for breach of contract. Not so with Government contracts, for there are in addi-

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*Contracts—Application of Common Law Principles*, 40 CORNELL L.Q. 238 (1955). But see Pasley, *Formation of Government Contracts—Application of Common Law Principles—A Reply*, 40 CORNELL L.Q. 518 (1955) for a justification of the rule.

15. 1 CORBIN, CONTRACTS § 39 (1960). But see UNIFORM COMMERCIAL CODE art. II (Firm Offer).

16. It was made abundantly clear that these administrative regulations are absolutely binding on contractors in *G. L. Christian and Associates v. United States*, 312 F.2d 418, 320 F.2d 345, cert. denied 375 U.S. 954 (1963).

17. For an analysis of the Changes clause with emphasis on constructive changes, see generally Note, *The Government Contract: Its Burdens and Benefits*, 40 ST. JOHN'S L. REV. 82 (1965).

18. Requests in letters, telegrams, or conversations, etc., may constitute such. Basically, they comprise any request, however informal, for additional work over and above that required by the original contract. And then there are also specific types. See generally Spector, *An Analysis of the Standard "Changes" Clause*, 25 FED. B.J. 177 (1965).

tion to claims for breach, those provided for and arising under the contract— and these two classes of claims are mutually exclusive.<sup>19</sup>

Claims arising under the contract can only be presented, as stipulated, for negotiations to the contracting officer, who subsequently makes a unilateral determination if no accord is reached.<sup>20</sup> Under such circumstances, the contractor then has the allowed thirty days in which to pursue an appeal to the relevant Board of Contract Appeals.<sup>21</sup> It must be noted that there has been a recent tendency to include numerous other specific clauses in the contract and providing that such matters come under the purview of the contract.<sup>22</sup>

As to claims not arising under the contract, two forums are available for “pure breach” and review of administrative decisions.<sup>23</sup> These are the various district courts and the Court of Claims, each of which has concurrent jurisdiction over the contract appeals involving claims for less than \$10,000 with the latter exercising exclusive jurisdiction over all appeals entailing more than the \$10,000 amount.<sup>24</sup> Since friction has emanated primarily from Court of Claims’ decisions and as a relatively large number of claims seem to concern more than \$10,000, this analysis will focus entirely on the Court of Claims vis à vis the contract boards.<sup>25</sup>

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19. For an excellent practical approach on how contractors ought to cope with Government contract claims, see generally vom Baur, *Remedies of Contractors with the Government*, 8 WM. & MARY L. REV. 469 (1967).

20. See generally Hanes and Smith, *The Contracting Officer: His Authority to Act and His Duty to Act Independently*, 70 DICK. L. REV. 333 (1966).

21. There are currently 18 Boards of Contract Appeals, largest of which in volume of hearings is the Armed Services Board of Contract Appeals (ASBCA) which handles close to 800-plus cases annually.

22. See note 12 *supra*.

23. Tucker Act (pure breach), 28 U.S.C. § 1346(a)(2) (1964); Wunderlich Act (review on the theory that the Government breached contract by failing to accord contractor all the compensation the contract legally entitled him) 41 U.S.C. §§ 321-22 (1964).

24. *Id.*

25. Claims for breach can also be submitted to the Comptroller General, 4 Comp. Gen. 404 (1924); Comp. Gen. B-155,343 dated 22 December 1964; Comp. Gen. B-155,936 of 5 February 1965, but there exists disadvantages, primary of which is that the GAO as the “Government’s guardian” will as a rule be counted on to take the Government’s side in any dispute. See generally Note, *The Comptroller General of the United States: The Broad Power to Settle and Adjust all Claims and Accounts*, 70 HARV. L. REV. 350 (1956).

Contracting officers also have the power purportedly to settle breach claims, Cannon Constr. Co. v. United States, 319 F.2d 173 (Ct. Cl. 1963); but the Comptroller General takes a dim view of this possibility, 44 Comp. Gen. 353 (1964).

A contractor, who otherwise has no avenue of relief available to him (as, for example, where applicable statutes of limitations have run against him) may seek remedy by

### *The Law-Fact Dichotomy*

Turning to the dichotomy of law and fact,<sup>26</sup> it has been no more appropriately stated than that:

[n]o two terms of legal science have rendered better service than 'law' and 'fact' . . . . They readily accommodate themselves to any meaning that we desire to give them. In them and their kind a science of law finds its strength and durability. They are the creations of centuries. What judge has not found refuge in them? The man who could succeed in defining them would be a public enemy.<sup>27</sup>

Notwithstanding these articulate words, no doubt the individual who in some omnipotent manner could contrive an applicable definition of these two terms could possibly prove of invaluable service in the realm of Government contracts—if he did so for no other purpose than in this area. While historically of some significance in delineating the functions of judge and jury in our system of jurisprudence,<sup>28</sup> the law-fact distinction, as it has been applied in the context of Government contract disputes, has been for the most part policy-oriented.

The problem here arises essentially in the contract sphere where the intent of the parties—most often characterized as a question of fact—eventually will determine the outcome of most dispute cases. The controversy centers on the extent administrative hearings and particularly facts determined thereunder are binding on the Court of Claims conducting a *de novo* review of the question.<sup>29</sup> As the standard Disputes clause purports to be conclusive only on issues of fact, the boards have

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asking Congress to pass a private relief act for his benefit, Public Law 89-681, 80 Stat. 958 (1966).

All Government actions against contractors must be brought in federal district courts, 28 U.S.C. § 1345 (1958).

26. For a general discussion of the problem of distinguishing between law and fact, see generally Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899 (1943).

27. GREEN, JUDGE AND JURY 270 (1930); quoted by Jaffe, *Judicial Review: Questions of Law*, 69 HARV. L. REV. 239, 240 (1955). Basically, a "finding of fact," while necessarily an inference based on evidence and not an absolute reality, is "a description of a phenomenon independent of law making or law applying." *Id.* at 242. Law making is the "authoritative choice from among known or possible modes of conduct. . . ." *Id.* at 247.

28. 9 WIGMORE, EVIDENCE § 2549 (1940).

29. Because the contract jurisdiction of the Court of Claims is original rather than appellate, such an attack takes the form of a trial rather than that of a direct appeal, 28 U.S.C. § 1346(a)(2) (1964).

tended to treat questions of contract interpretation as questions of fact and broaden the term "breach" for their inclusion in the process;<sup>30</sup> while on the other hand, the Court of Claims has regarded them as questions of law and so construed finality clauses narrowly.<sup>31</sup>

*The Mandate of Utah Construction Co.*

In *United States v. Utah Constr. & Mining Co.*,<sup>32</sup> the Supreme Court was confronted with two issues relevant to the above discussed law-fact conflict. The first of these was the question of whether or not all factual disagreements relating to a Government contract, including those involved in a claim for pure breach as well as those in a claim arising under the contract, must be determined pursuant to the directives of the Disputes clause. The second issue involved whether, in the event the first issue was decided in the negative, a board's decision on a fact properly before it in a claim arising under the contract would nonetheless be binding on the Court of Claims in deciding a breach claim entailing the same factual situation.

To the first inquiry, the Court ruled that the Disputes clause was mandatory provisions only in those instances where specific contract adjustment provisions provided for administrative relief, reaffirming the historical dualism of Government contract remedies. The Court's decision was based on:

[a]n examination of uniform continuous, and long-standing judicial and administrative construction of the dispute clause . . . [which established] . . . that the jurisdiction of the Board of Contract Appeals under the dispute clause was limited to claims for equitable adjustments, time extensions, or other remedies under specific contract provisions authorizing such relief and accordingly . . . the contractor need not process pure breach of contract claims through the disputes machinery before filing his court action.<sup>33</sup>

With respect to the latter question, the Court of Claims found itself reversed, the Supreme Court adversely holding to the effect that where a

30. *Randolph Engineering Co.*, ASBCA no. 4872, 58-2 BCA para. 2053, 1 GC 118.

31. *WPC Enterprises, Inc. v. United States*, 323 F.2d 874 (Ct. Cl. 1963); *United States v. Lundstrom*, 139 F.2d 792 (Ct. Cl. 1943); *Gerhard F. Meyne Co. v. United States*, 76 F. Supp. 811 (Ct. Cl. 1948).

32. 384 U.S. 394 (1966).

33. *Id.* at 404-05. See, e.g., *Phoenix Bridge Co. v. United States*, 85 Ct. Cl. 603, 629-30 (1937); *Ekco Products Co. v. United States*, 312 F.2d 768, 773 (Ct. Cl. 1963).



claim in which a Board of Contract Appeals could properly give some form of relief is first brought before the respective board as a dispute and then subsequently appealed to the Court of Claims on a breach of contract theory, the court is nevertheless bound by the Administrative record made before the board. This view was stated as follows:

It would disregard the parties agreement to conclude, as the Court of Claims did, that because the court suit was one for breach of contract which the administrative agency had no authority to decide, the court need not accept administrative findings which were appropriately made and obviously relevant to another claim within the jurisdiction of the board.<sup>34</sup>

It seems a bit pro forma for the Court to have relied on this particular interpretation of the Disputes clause in 1966 after the multitude of cases that had preceded *Utah*, for there does not exist in its language anything that actually gives much of an insight one way or the other.<sup>35</sup> But upon further scrutiny of the Court's decision, it soon becomes apparent what its real motive was in this instance; its real basis was the realization that contractors could circumvent the finality of *any* board findings altogether by merely changing the theory of their case. The Court pointed to this distinct possibility by stating that:

... any claim, whether within or without the disputes clause, can be couched in breach of contract language. The contractual and statutory scheme would be too easily avoided if a party could compel relitigation of a matter once decided by mere use of semantics.<sup>36</sup>

However, recognizing that this possibility would also conflict with the established dualism of remedies, the Supreme Court had already (just prior to *Utah*) expressly rejected this position in *Morrison-Knudsen v. United States*,<sup>37</sup> which kept such matters within the scope of the Dis-

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34. 384 U.S. at 419.

35. Standard Disputes clause, *see* note 1 *supra*.

36. 384 U.S. at 419. The court pointed out that the simple addition of the adjective "unreasonable" for example could in and of itself change the connotation of a claim from "contract" to "breach."

37. 345 F.2d 833 (Ct. Cl. 1965). When the contract makes provision for equitable adjustment of particular claims, such claims may be regarded as converted from breach of contract claims to claims for relief under the contract. *See* Kelly, *Government Contractors' Remedies: A Regulatory Reform*, 18 *AD. L. REV.* 143, 147 (Fall ed. 1965).

putes clause where based on contract. And in light of *Morrison-Knudsen*, its assertion in *Utah* is seemingly nothing more than mere redundancy.

But notwithstanding this fact and more important in its overall implications, *Utah* was basically a reaffirmation of what the Supreme Court had previously asserted in *United States v. Carlo Bianchi & Co.*,<sup>38</sup> that judicial review was limited to the administrative record, and henceforth, there were to be no de novo trials on claims over which a board had jurisdiction, in the absence of fraud, etc. Following *Bianchi*, considerable confusion developed concerning the scope of review—did it exist and, if so, to what extent—with the Court of Claims endeavoring to avoid application of the “*Bianchi* rule” in several cases,<sup>39</sup> distinguishing them mainly on the basis of the Government’s alleged failure to make *timely* objection to the introduction of new evidentiary material and asserting that the rule was procedural and evidential, not jurisdictional in nature.

In addition to the reaffirmation of *Bianchi* by *Utah*, there has also since been in *United States v. Anthony Grace & Sons, Inc.*,<sup>40</sup> a clarification of what was deemed implicit in the *Bianchi* decision by a holding that since a court action with respect to a contract claim within a board’s jurisdiction was appellate in nature, the court itself could not add evidence to an administrative record which was incomplete or defective; rather the reviewing court should refer the case back to the board for perfection or, in extreme cases, enter summary judgment.<sup>41</sup>

To have a full appreciation of the position which *Utah* has reached, as well as the ensuing problems which will be considered, it is necessary to look at the historical process from whence it has evolved.

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38. 373 U.S. 709 (1963).

39. *J. D. Hedin Constr. Co. v. United States*, 347 F.2d 235 (Ct. Cl. 1965); *Garner Displays Co. v. United States*, 346 F.2d 585 (Ct. Cl. 1965); *Kings Electronics Co. v. United States*, 341 F.2d 632 (Ct. Cl. 1965); *Kaiser Indus. Corp. v. United States*, 340 F.2d 322 (Ct. Cl. 1965); *WPC Enterprises, Inc. v. United States*, 323 F.2d 874 (Ct. Cl. 1963); *Stein Bros. Mfg. Co. v. United States*, 337 F.2d 861 (Ct. Cl. 1963).

40. 384 U.S. 424 (1966).

41. The Supreme Court also noted that there may be occasions when the parties will not be required to exhaust the administrative procedure, but “these circumstances are clearly the exceptions rather than the rule and the inadequacy or unavailability of administrative relief must clearly appear before a party is permitted to circumvent his own contractual agreement.” *Id.* at 430.

In another subsequent case, *H. R. Henderson & Co., Inc. v. United States*, 10 CCF para. 72,884 (Ct. Cl. Jan. 22, 1965), it was held that the appealing contractor did not have to introduce into evidence the entire administrative record, that a use of only a part thereof did not constitute a de novo hearing.

## HISTORICAL PERSPECTIVE

During the Civil War, the Secretary of War appointed a Board of Commissioners who, with approval of the contractor, were vested with authority to finally decide the amount owing under a contract.<sup>42</sup> Thereafter, during the period in which *Kihlberg* was decided, until the turn of the century, such single-stage Dispute clauses appeared and constituted the norm. Around 1900, a two-stage type of Dispute clause began to show up in Government contracts, which provided, not only for an initial determination by a contracting officer, but also for an administrative review by the respective secretary (or head) of the governmental department concerned or in lieu thereof another appropriate official designated in his place.<sup>43</sup>

During this same period, the Court of Claims was undergoing its initial growth as well. Just six years prior to the Secretary of War's creation of his board, the Court of Claims was created by statute in 1855.<sup>44</sup> Initially, the court's authority was limited to the investigation and determination of facts in order to make recommendations to the Congress. In 1863, a statute was enacted intending to grant the court the power to enter final judgments without congressional involvement,<sup>45</sup> but such judgments were construed by the Supreme Court as not being conclusive and consequently not subject to judicial review.<sup>46</sup> Finally, an 1866 enactment was promulgated,<sup>47</sup> which overcame the objections.<sup>48</sup>

It was but a mere decade later, while the court was still in its incipient state, that it passed judgment on the *Kihlberg* case to the effect

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

43. *Barlow v. United States*, 35 Ct. Cl. 514, *aff'd* 184 U.S. 123 (1902); *Ripley v. United States*, 223 U.S. 695 (1912).

44. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612. The Court of Claims was originally established in response to problems similar to those which led to the creation of contract boards—the need for an institution which could give effective trial-type hearings to aggrieved contractors. For a general discussion of the origins of the Court of Claims and its evolution into its present form, see generally Evans, *The United States Court of Claims*, 17 FED. B.J. 85 (1957).

45. Act of March 3, 1863, ch. 92, 12 Stat. 765.

46. *Gordon v. United States*, 69 U.S. (12 Wall.) 561 (1864).

47. Act of March 17, 1866, ch. 19, 14 Stat. 9.

48. *United States v. Jones*, 119 U.S. 477 (1886). 28 U.S.C. § 1491 (1964) provides that the Court of Claims shall have jurisdiction to render judgment "upon any claim against the United States founded . . . upon any express or implied contract with the United States. . . ." For a discussion of the types of cases handled by the Court of Claims and the manner in which it so does, see generally Wilkinson, *The United States Court of Claims: Where Uncle Sam is Always the Defendant*, 36 A.B.A.J. 89 (1950).

that the decision of the Chief Quartermaster on the measured distances involved—even though clearly erroneous—was not reviewable on the premise that the parties had agreed in the contract that this determination would be final.<sup>49</sup> At this time, no review standards were discussed or even seemingly contemplated by the Court of Claims. The implications of *Kihlberg* at this point meant that the judicial remedy granted by the Congress could be retracted by the Government through the simple insertion of “*Kihlberg*-type” Disputes clauses in Government contracts.<sup>50</sup> But despite being supposedly “final and conclusive,” the Supreme Court realizing the *human element* concluded that such determinations therefore were not always free from “fraud or gross error, etc.”; and with its affirmation of *Kihlberg*, it afforded the Court of Claims the basic aforementioned criteria for review standards.<sup>51</sup> The “*Kihlberg* scope of review” was enlarged and expanded through the years by the Court of Claims itself until it arrived at the position where it would take review if an administrative decision was “arbitrary,” “capricious,” or “so grossly erroneous as necessarily to imply bad faith.”<sup>52</sup>

The first Boards of Contract Appeals proliferated during the First World War and managed to gain considerable experience, but the post-war era saw virtually all of these boards lapse. However, with the advent of World War II, enormous developments and pressures were wrought in the disputes field; and it was at this time that the Court of Claims in *Penker Constr. Co. v. United States*<sup>53</sup> overturned a decision by an Assistant Secretary of War on the grounds that he had not properly handled an appeal brought under a Disputes clause. The repercussions from this case resulted in an administrative study from whence it was decided that contractors would henceforth be entitled to a hearing commensurate with the right to present evidence to a Board of Contract Appeals, setting the stage for our present-day system.<sup>54</sup>

Following on the heels of this decision, the basic “rule” of administrative law was alluded to in the 1946 case of *United States v. Joseph A.*

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49. 13 Ct. Cl. 148 (1877).

50. Cuneo and Anthony, *Beyond Bianchi: The Impact of Utah and Grace on Judicial Review of Contract Appeals Boards Decisions*, 55 GEO. L.J. 602, 605 (1967).

51. 97 U.S. at 402.

52. See, e.g., *Penner Installation Corp. v. United States*, 89 F. Supp. 545 (Ct. Cl. 1950), *aff'd per curiam* by an equally divided court, 340 U.S. 898 (1950) for a liberal standard of review.

53. 96 Ct. Cl. 1 (1942).

54. For an early analysis of the origins of contract appeal boards, including jurisdiction and practice in contract appeals during World Wars I & II, see generally Smith, *The War Department Board of Contract Appeals*, 5 FED. B.J. 74 (1943).

*Holpuch*,<sup>55</sup> which enunciated the premise that a contractor must first exhaust *all* of his administrative remedies, where such are available, before seeking other modes of redress.<sup>56</sup> The ruling in *Morrison-Knudsen*, as reiterated by Utah, was essentially a strong reinforcement of this position.

The evolution of the Court of Claims from a trial court of contract claims to a review court thereof was witnessed in the early fifties, arising almost wholly from the adamant position taken in two cases. In *United States v. Moorman*,<sup>57</sup> the validity of a Disputes clause (a special "all Disputes clause") which made final agency's decision on an issue of law as well as on fact was upheld. *Moorman* was followed in short order by *United States v. Wunderlich*<sup>58</sup> which cut back the above cited standards of permissive review afforded administrative decisions to "fraud, alleged and proved" meaning "conscious wrongdoing, an intention to cheat or be dishonest . . . ."<sup>59</sup> Limiting review authority to search exclusively for conscious fraud on both legal and factual issues, these two cases, for all intents and purposes, practically eliminated the Court of Claims' involvement in Government contract disputes.

Such an outcry from all quarters<sup>60</sup> immediately followed the *Moorman* and *Wunderlich* decisions that the Wunderlich Act<sup>61</sup> was quickly promulgated, the express purpose of which was to overcome these two cases and particularly *Wunderlich*. The first section of the Act reversed the *Wunderlich* decision by enlarging the standards of review to what the Court of Claims previously had been permitted and added the "substantial evidence" test.<sup>62</sup> The second section abrogated *Moorman* by

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55. 328 U.S. 234 (1946). The judicial relitigation of an issue decided administratively frustrates the use of the Disputes clause as a "mechanism whereby adjustments may be made and errors corrected on an administrative level, thereby permitting the Government to mitigate or avoid large damage claims that might otherwise be created." *Id.* at 239.

56. DAVIS, ADMINISTRATIVE LAW TEXT § 182 (1951).

57. 338 U.S. 457 (1950).

58. 342 U.S. 98 (1951).

59. *Id.* at 100. ". . . if the standard of fraud that we adhere to is too limited that is a matter for Congress." *Id.*

60. See, e.g., *Hearings Before Subcommittee No. 1 of the House Committee on the Judiciary, Review of Finality Clauses in Government Contracts*, 83d Cong., 1st & 2d Sess. 3, 81 (1954).

61. 68 Stat. 81 (1954), 41 U.S.C. §§ 321-22 (1964).

62. *Id.* § 321 provides:

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

asserting that an administrative decision on a legal issue possessed no finality whatsoever.<sup>63</sup> But even with the added "substantial evidence" test,<sup>64</sup> the Wunderlich Act was less a guide than an admonition to improve the state of administrative records made by the boards—negative enforcement—as it professed more concern with review standards than procedure, which had to wait until *Bianchi*.

With the reincarnation of its former status (plus the addition of the "substantial evidence" test),<sup>65</sup> the Court of Claims once more functioned as a true *nisi prius* court.<sup>66</sup> But with definite standards of review set, the question of how they should be applied soon arose. In *Volentine & Littleton v. United States*,<sup>67</sup> the Court of Claims explicitly held that restoration of the status quo ante included the court's admission of *de novo* evidentiary material. However, during this same time (reference having to be made to the district courts here), various dis-

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to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided however*, That any such decision shall be final and conclusive unless the same is fraudulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by *substantial evidence*. (Emphasis added.)

63. *Id.* § 322 provides:

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

64. That administrative decisions must be supported by "substantial evidence" was the novel ingredient of the Wunderlich Act. It was essentially borrowed from the Administrative Procedure Act (APA), 60 Stat. 237 (1946), as amended, 5 U.S.C. §§ 1001-11 (1964), and federal labor regulations, meaning as enunciated by Chief Justice Hughes in *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) that "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

65. The Court of Claims in eroding the scope of review allocated by the Supreme Court in *Kihlberg* had endeavored earlier to utilize the "substantial evidence" test but was confronted with a *per curiam* reversal in *United States v. John McShaine, Inc.*, 308 U.S. 512 (1939) and subsequently again in *United States v. Moorman*, 338 U.S. 457 (1950).

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

67. 145 F. Supp. 952 (Ct. Cl. 1956). Certiorari was not sought in *Volentine*; however, when the identical issue was decided a year later in *Fehlhaber Corp. v. United States*, 151 F. Supp. 817 (Ct. Cl. 1957), *cert. denied*, 353 U.S. 877 (1957), the Justice Department unsuccessfully petitioned the Supreme Court for certiorari.

strict and circuit courts of appeals restricted court review to the administrative record, construing the Wunderlich Act to be so intended.<sup>68</sup>

Viewing the inconsistency, the Supreme Court disagreed with the Court of Claims' attitude on this matter and finally in *Bianchi* granted certiorari, asserting that the Act did in fact limit judicial review to the administrative record.<sup>69</sup> Once again considerable furor developed in the wake of this holding; legal periodicals offered lengthy comment,<sup>70</sup> congressional legislation was introduced to overrule the decision specifically,<sup>71</sup> but apparently the evil did not seem as great as *Moorman* and *Wunderlich*. Actually, here again as with the Disputes clause, the Wunderlich Act on its face does not purport to make board decisions on facts binding,<sup>72</sup> but only serves more as an incentive to improve the condition of administrative records to be subjected to judicial scrutiny, particularly by use of the "substantial evidence" test.

So *Bianchi*, as supplemented by *Utah*, has currently set the stage in the Government contract dispute arena, establishing somewhat of a still uncertain *modus vivendi* between the boards and the Court of Claims. In its decisions since *Grace*, the court has been so far concomitant, recognizing that when relief is available to a contractor under the Disputes clause he is not entitled to a de novo trial on factual questions administratively decided.<sup>73</sup> But by the same token, there has also already been litigation to the effect that only the "ultimate" fact is binding and not "evidentiary" findings unless absolutely indispensable to the "ultimate" fact.<sup>74</sup>

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68. *Allied Paint & Color Works, Inc. v. United States*, 309 F.2d 133 (2d Cir. 1962), cert. denied, 375 U.S. 813 (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); *Wells & Wells v. United States*, 269 F.2d 412 (8th Cir. 1959).

69. 373 U.S. at 715.

70. See, e.g., Schultz, *Wunderlich Revisited: New Limits on Judicial Review of Administrative Determination of Government Contract Disputes*, 29 LAW & CONTEMP. PROB. 115 (1964).

71. H. R. 289, 89th Cong., 1st Sess. (1965): A Bill to Amend the Act of May 11, 1954 [ch. 199, § 1, 68 Stat. 81; 41 U.S.C. 321 (1964)], to provide for full adjudication of rights of Government contractors in courts of law.

72. § 321, see note 62 *supra*.

73. See, e.g., *Midwest Spray & Coating Co. v. United States*, Ct. Cl. No. 354-64 (July 15, 1966); *Jefferson Constr. Co. v. United States*, Ct. Cl. No. 67-65 (July 15, 1966); *Banks Constr. Co. v. United States*, Ct. Cl. No. 17-64 (July 15, 1966); *Allied Contractors, Inc. v. United States*, Ct. Cl. No. 255-61 (July 15, 1966).

74. This view seems to have been recognized by the Court of Claims in *Newport News Shipbuilding & Drydock Co. v. United States*, Ct. Cl. No. 310-64 (March 17, 1967).

Ostensibly so, it is no small conjecture to say that the question posed in administrative review are by no means resolved, especially with respect to the problems exacerbated by this dualism in Government contract dispute remedies, to which attention will now be directed.

#### PROBLEM AREAS IN GOVERNMENT CONTRACT DISPUTES

The distribution of responsibility between the administrative boards and the judiciary has resolved certain major problems and accentuated others at the same time, most of which have already been reasonably inferred, if not overtly manifested, by the previous discussion.

Resolved on the surface of things are the problems of affording contractors a relatively speedy and inexpensive remedy through the medium of the boards by way of the local contracting officer, providing judicial relief where none is administratively available, and the maintenance of judicial surveillance on the entire litigation process.

Faced with the distinct possibility of having their court actions dismissed for failure to exhaust administrative remedies as stipulated by *Holpuch*, the usual process which contractors followed before *Utah* was to present all claims relevant to the contract first to the appropriate board, getting what administrative relief they could, and then to the court for de novo hearing. As a wrong guess in the first place might have foreclosed all remedies, nothing was lost by appealing a board's interlocutory decision where the party was dissatisfied, especially where novel evidence could be introduced. This practice amounted to a second chance in effect. Cognizant of this fact, another motive underlying the *Bianchi* and *Utah* decisions was to enhance the "finality" of the Disputes clause where applicable by encouraging contractors to make a complete disclosure at the board level rather than withhold evidence for a subsequent court review.<sup>75</sup>

The practical problems germane to the law-fact dichotomy which have been occasioned by the endeavors to define jurisdiction and scope of review in Government contract disputes can be reduced into two basic spheres. The first of these concerns, "fragmentation and remand," has been particularly effectuated by the latest decisions; the second, "administrative expertise versus judicial surveillance," has been existent for most of the Disputes clause's history, but has assumed added significance in light of the current mandate.

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75. 373 U.S. 709 (1963).



*Fragmentation and Remand*

*Bianchi* meant that a contractor could no longer conveniently "package his claims" neatly together for a complete hearing by the Court of Claims, but that each of the two types of claims—pure breach and administrative review—must be handled by the court under its two respective types of jurisdiction.<sup>76</sup> The effect of all this procedural differentiation has been termed "fragmentation of remedies,"<sup>77</sup> a state of affairs which is borne out in such instances as witnessed in the *Utah* case where claims arose both for breach and under the contract simultaneously.

Before, as mentioned, a contractor could usually await the expedient handling of his case at the board level and then have matters relitigated; or he could as an alternative concurrently prosecute each of his claims, anticipating that his board action and Court of Claims remedies would be concluded in a quicker manner. But now, the effect seemingly is that court proceedings cannot be effectively held until completion of the administrative hearings where common facts are involved with the contractor having dual claims, which is often the case. The unanswered question is whether a pure breach claim must be stayed in such instances pending the conclusion of board hearings.<sup>78</sup> And then there are the difficulties associated with the additional time involved in scrutinizing the board's decision to ascertain if it conforms to the criteria set forth in the Wunderlich Act.

This latter fact necessitates dealing with the corollary problem of remand. The confrontation here centers on the questions of when the court may itself alter a decision of a board, entering judgment, and when it must return the case for further proceedings to the deciding board due to some deficiency in the administrative record—on some unspecified theory as the traditional doctrine is that the Court of Claims has no power of remand, but can only suspend its proceedings and await

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76. *Id.* at 718. *But see*, *Universal Eesco Corp. v. United States*, 345 F.2d 586 (Ct. Cl. 1965) in which the Court of Claims permitted the contractor to bring all claims directly to the court for a *de novo* trial on the ground that the claims arising under the contract were insignificant in comparison with the breach claims. *Cf.* *United States Steel Corp. v. United States*, 367 F.2d 399 (Ct. Cl. 1966).

77. *See generally* Crowell & Anthony, *Practical Problems Facing Contractors' Counsel as a Result of Fragmentation of Remedies*, 18 *Ad. L. Rev.* 128 (Fall ed. 1965).

78. Another vexing aspect of this problem concerns the statute of limitations and the splitting of causes of action. *See Nager Elec. Co. v. United States*, 368 F.2d 847 (Ct. Cl. 1966).

voluntary rectification by the board involved.<sup>79</sup> Viewing the situation in a realistic manner since the Court of Claims is in fact a *nisi prius* court well equipped to conduct evidentiary trials and not strictly an appellate court, one might ask why the court shall not be allowed to go ahead and make a determination on its own in such instances. It is already a well-established theory that where an administrative remedy is inadequate or unavailable, a direct proceeding in the court may be maintained.<sup>80</sup>

The problems invoked by fragmentation and remand also have had a tendency to make more pronounced the twin effects of time and expense in litigation<sup>81</sup> and their complement, the statute of limitations,<sup>82</sup> in determining the proper course of action for contractors to pursue.

### *Administrative Expertise versus Judicial Surveillance*

The second sphere of problems centers about the desire to reap the fruits of "administrative expertise" (meaning essentially the expediency of the boards)<sup>83</sup> as opposed to the American jurisprudential tradition of adherence to judicial surveillance.<sup>84</sup>

Referring to the administrative mode of redress, it has been stated that, "the administrative process leaves much to be desired."<sup>85</sup> This broad

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79. *United States v. Jones*, 336 U.S. 641 (1949). See generally Jaffe, *Remand Powers in the Court of Claims*, 55 GEO. L.J. 444 (1966). However, Mr. Jaffe argues that the traditional doctrine is a misreading of dicta and could be reversed by the Court of Claims itself.

80. *H. B. Zachry Co. v. United States*, 344 F.2d 352 (Ct. Cl. 1965); *C.J. Langenfelder & Son, Inc. v. United States*, 341 F.2d 600 (Ct. Cl. 1965). But see *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966) and preceding text, *infra*.

81. Processing and trial of a breach claim may begin as a rule only two to four years after completion of the board proceedings which themselves average fourteen months. And with remand, there is, of course, an additional time element. See Crowell & Anthony, *supra* note 77, at 139.

82. See generally Comment, *Mandatory Administrative Proceedings and Statute of Limitations in Government Contract Cases: A Three-Way Conflict*, 53 VA. L. REV. 150 (1967).

83. There is some view to the effect of the inaptness of "administrative expertise" argument in contract interpretation. See Note, *United States v. Carlo Bianchi & Co.: Finality Under the Disputes Clause*, 39 N.Y.U. L. REV. 290, 308-09 (1964).

84. Judge Madden, who wrote the ill-fated Court of Claims' opinions in *Wunderlich*, *Volentine*, and *Bianchi*, objects even to the quasi-judicialization of the contract boards, as he views their role as but the last stage in negotiations. See generally Madden, *Bianchi's Ghost*, 16 AB. L. REV. 22 (1963).

85. *Roberts v. United States*, 357 F.2d 938, 944 (Ct. Cl. 1966). Although the Court of Claims has generally been quite critical of the administrative due process followed in dispute cases, it has dealt with the problem only rarely. For one such instance,

generalized statement points up the basic crux of the problem that specifically concerns the matter in which board cases are facilitated and the administrative record for review produced.

The so-called 'administrative record' is in many cases a mythical entity. There is no statutory provision for these administrative decisions or for any procedure in making them.<sup>86</sup>

As suggested in the above statement, there has been much consternation over the fact that the various contract boards were specifically exempt from the dictates of the Administrative Procedure Act (APA) of 1946,<sup>87</sup> primarily in view of the situation that their jurisdiction arises out of contract and not statute. As such, there does not exist any set procedures for the Contract Boards of Appeals. Although many of the boards have, in fact, published detailed rules of procedure, there, nonetheless, exists a serious lack of uniformity, running the gamut from the Armed Services Board of Contract Appeals (ASBCA), the most inclusive,<sup>88</sup> to the Department of Commerce which has none whatsoever.

The legislative history of the Wunderlich Act indicates that one of the compelling reasons for the inclusion of the "substantial evidence" test was to encourage improvement in administrative proceedings by the boards and the records arising therefrom under the Disputes clause. This intent was duly consummated in *Bianchi*, where Justice Harlan held that the various agencies concerned must "make adequate provisions for a record that could be subjected to judicial scrutiny,"<sup>89</sup> since it was "clearly part of the legislative purpose to achieve uniformity."<sup>90</sup> Quite clearly, the Supreme Court through its own instrumentality of adjudication was endeavoring to stimulate due process at board hearings, since by legislation the boards were not so bound. But upon taking note of the board proceedings and practices utilized in their evidentiary hearings, one has serious misgivings if the efforts of the Supreme

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where the court was severely critical, *see* *Allen & Whalen, Inc. v. United States*, 347 F.2d 992 (Ct. Cl. 1965).

86. *Volentine & Littleton v. United States*, 145 F. Supp. 952, 954 (1956).

87. 60 Stat. 237 (1946), as amended, 5 U.S.C. §§ 1001-11 (1964). § 1001 3(a) excludes "agencies composed of representatives of the parties or of representatives of organizations of the parties to the dispute determined by them." 5 U.S.C.A. § 551 (1) (E) (Supp. I 1966).

88. 28 Fed. Reg. 9348 (1963).

89. 373 U.S. at 718.

90. *Id.*

Court have had any effect. An analysis of the most exemplary of these boards, the ASBCA, shows this observation to be correct.

In comparison with the criterion set forth in the APA, it can be seen that the ASBCA does not even have all the hearing powers as provided for under section 7(b) of the Act, which means for the most part that there is no machinery for the taking of depositions (especially for discovery), the compulsory production of documents, application of the subpoena power, or the administering of oaths.<sup>91</sup> Furthermore, the board may search out on its own and consult other documents of possible relevance, and there are no assurances that the testimony and exhibits will constitute the exclusive record for decision.<sup>92</sup> As a result, he who hears might not be the one who decides. Also lacking is the granting to involved parties the opportunity to submit either proposed findings and conclusions or exceptions to a recommended decision.<sup>93</sup> In view of the insufficiency of safeguards provided for in the procedure of the better, if not the best, of the boards, it can readily be seen why the Court of Claims has been so vehement in exerting its prerogatives.

In light of the mandate as set forth in *Bianchi* and *Utah*, one asks what can be done to preserve the practical advantages of "administrative expertise" and at the same time fulfill the requirements of due process while preventing the fragmentation of remedies and the questions posed in remand.

### CONCLUSION

It can be questioned whether any analytical approach to the law-fact distinction could be effectively applied in Government contract disputes, especially since claims do not always come neatly labeled "breach" or "contract" in the first place. This distinction, as it has been used by the boards and the Court of Claims, has not only delineated the scope of review, but also defined the jurisdictional lines between these bodies. As such, the dichotomy has served as a battleground of prerogatives.

To be constructive, one must be more than negative; and to this proposition, it is submitted that what is needed is not so much a defini-

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91. The boards have no statutory authority for administering oaths, but the False Claim Act, 18 U.S.C. § 287 (1958) or False Statements Act, 18 U.S.C. § 1001 (1958) are usually read as a substitute to witnesses taking the stand.

92. APA at § 7(d).

93. *Id.* at § 8(b). These are procedures which may facilitate the joinder and resolution of law and fact issues.

tion of the terms but a reform of the mechanics of the dispute procedure, so that the dichotomy itself becomes merely rhetorical and of academic interest. To this end, it is proposed that a practical two-pronged approach utilizing the existing disputes machinery be considered.<sup>94</sup>

The conflict in Government contract disputes has been largely the product of unplanned growth and of existing mechanisms reacting ad hoc to rectify the immediate shortcomings. But inasmuch as the vast majority of claims have managed to be satisfactorily adjusted at the administrative level, and congressional study focusing on the problem has concluded that "existing boards" are "doing a pretty good job and appeals are handled with reasonable fairness,"<sup>95</sup> any solution should endeavor to retain the existing boards insofar as possible, making only what have been deemed "necessary reforms" to cover those arising where now applicable.

First, specific internal recommendations should be followed. These would include the further expansion of the contractual basis for relief to bring as many matters as possible, including those for breach, within the scope of the contract, thus aiding in eliminating the possibilities of fragmentation.<sup>96</sup> Next would be the necessity of establishing guidelines for administrative due process. Although there is merit to the contention that adoption of the APA per se would be more of a hindrance, as it was not designed to operate in the contract dispute process,<sup>97</sup> at least, by legislation or by the various agencies themselves (which possess the power), rules could be promulgated effecting certain parts of the APA as to specific needs, providing in the process a uniform set of board practices.

And lastly with respect to this first facet of reform, the function of judicial review should be clarified. The Court of Claims, under its broad rule-making powers,<sup>98</sup> could in and of itself effectuate the necessary changes here, so that pursuant to contract board decisions, it would serve as an appellate court and thereby eliminate a needless duplication of hearings as well as subscribing a measure a finality to administrative

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94. For a treatment of sundry other proposals and the expostulation of yet another, see Note, *Government Contract Disputes: An Institutional Approach*, 73 YALE L.J. 1408, 1450-58 (1964).

95. S. Doc. No. 89 at 131.

96. For comment on possible problems in adopting an "all-encompassing Dispute clause," see 160 Fed. Cont. Rep. A-8 (March 13, 1967).

97. *Id.* at A-1 for the position of the Department of Defense on this view.

98. 28 U.S.C. § 2071 (1964).

decisions.<sup>99</sup> This measure would also help to prevent fragmentation in such instances where it is now prevalent.

Under such a revitalized scheme, the court could still reserve its *nisi prius* jurisdiction where no administrative relief is available and to pure breach claims, meaning essentially those claims that could not be provided for under contract. Contractors who claim violation of Wunderlich Act standards in board determinations would be required to show a *reasonable* basis for their contentions to a Court of Claims' commissioner before being afforded a hearing in the court itself.<sup>100</sup>

In the second place, in answer to those who feel that a formalized set of procedures would no longer insure contractors a speedy and inexpensive remedy—the main attribute in retaining these boards—there is submitted an option formula whereby a contractor could elect in his appeal to the respective board concerned between either an informal proceeding, as is currently conducted, or a formalized proceeding incorporating the aforementioned suggestion for procedures. With a formalized hearing, the Court of Claims should have no qualms about the administrative record with improved standardized procedures. And on appeal from an informal hearing where the contractor has shown good cause as prescribed above, the Court of Claims could return the case to the concerned board for clarification on specifics and on all matters which require a formalized hearing or in *extreme* cases enter direct judgment itself as *Grace* seemingly suggests.

It can be reasonably surmised that the majority of contractors, who with their vested interest of maintaining their "economy of profits," will want their disputes resolved as quickly as possible. Since they are required under the Disputes clause to continue work during the proceedings, it only seems natural that they would prefer an informal hearing with its flexibility, which for the most part would adequately serve its purpose as it has in the past, knowing of course that the alternative of judicial review is available if they are justifiably dissatisfied.

It is felt that by such a practical approach, the fundamental criterion in Government contract disputes can be met inasmuch as the basic ob-

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99. Finality of board decisions, at least where satisfied, is also very important to contractors, particularly relevant to review by the GAO, *Hearings, supra* note 60, at 92-3.

100. In some of its recent proceedings, the Court of Claims has already required a detailed statement of alleged errors of law supposedly committed by the involved board as well as a list of specific findings that are contended not to be supported by substantial evidence. See *Keco Indus., Inc. v. United States*, Ct. Cl. No. 277-56 (July 15, 1966).

jective of the disputes machinery, *i.e.*, the resolution of the dispute at one hearing, can be maintained; administrative due process would be available to ensure a fair and efficient determination of the issues involved; and the fundamental safeguard of judicial review will be preserved.

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