GOVERNMENT CONTRACTS DISPUTES: AN INSTITUTIONAL APPROACH

I. INTRODUCTION

The burgeoning responsibilities of the federal government in providing for the defense and welfare of the nation have caused it to enter into an increasing number of supply and construction contracts with private parties. These contracts are the basis of a complex of relationships to which considerations of both administrative and commercial law must be brought to bear. Because of the hybrid nature of the problem, contract disputes resolution has been uncertainly and unsatisfactorily allocated among institutions in the several branches of the government.

Since there is little statutory guidance in this area, the fundamental source of this allocation has been a system of contract clauses governing the resolution of disputes. For most contractors the standard form government contract

1. For discussion of the striking impact of government procurement spending on the private sector, see Hannah, Government Buying Erodes Management, Harv. Bus. Rev., May-June 1964, pp. 53-54. The Chairman of the Armed Services Board of Contract Appeals (ASBCA), Louis Spector, has pointed out that over half of the national budget, approximately $100 billion, is devoted to defense, and that over half of defense expenditures ($30 billion) is disposed of by contracts with the private sector. Over 9 million separate contract actions are entered into by the Department of Defense each year. Interview with ASBCA Chairman Spector, Washington, D.C., June 1, 1964 (hereinafter cited as Spector Interview).

2. Commentators have come to refer to government contracts as “Instruments of Administration.” For the development of this idea, see, e.g., 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).


5. The basic clause out of which the formal machinery for reviewing contract disputes has grown is the “disputes clause.” See, e.g., 41 C.F.R. § 1-16.901-23A, cl. 6 (1964) (construction contracts); 41 C.F.R. § 1-16.901-32, cl. 12 (1964) (supply contracts).

Nor should the importance of unilaterally issued regulations be underestimated. See, e.g., Stone, Contract by Regulation, 29 LAW & CONTEMP. PROB. 32 (1964).
is, in effect, a contract of adhesion whose terms must be accepted if he wishes to do business with the government. The contractor accepts as part of the contract a battery of clauses providing that the government contracting officer adjust anticipated disputes arising during the performance of the contract. Institutions and procedure to resolve disputes under these operational clauses are highly developed, and have long been a matter of concern and debate. It is upon this area — enforcement and administration of government contract provisions — that this Comment will focus its attention.

For many years, government contracts have contained clauses which provide for "finality":

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. . . .

These clauses are not without historical and commercial precedent. Because of difficulty in communication, they were in use as early as the Indian Wars. It may be doubtful whether this historical justification is still tenable in the modern context, but finality arrangements are common and deemed necessary in a wide variety of commercial settings. For example, arbitration clauses providing for final dispute settlements are often used to insure speed and certainty of decision; some of these clauses even provide that only one of the parties to the dispute may select the arbitrator.

6. One commentator has estimated that ninety percent of language in these contracts is prescribed by the government. Id. at 32.

This adhesionary tendency has resulted in a sharp infringement of private management functions. See Hannah, supra note 1, at 55-62.


Equitable Adjustments are authorized by these clauses, which provide that failure to agree to adjustments under them are disputes over questions of fact within the meaning of the disputes clause. The mechanics of these clauses are discussed in Cuneo, op. cit. supra note 3, at 46-58, 112-42. For statements of the principles applied in the execution of these clauses, see Spector, Confusion in the Concept of the Equitable Adjustment in Government Contracts, 22 Fed. B.J. 5 (1962); see also McBride, Confusion in the Concept of Equitable Adjustments in Government Contracts: A Reply, 22 Fed. B.J. 235 (1962).

8. 41 C.F.R. § 1-16.901-23A, cl. 6 (1964).

9. For an extended development of the history of finality in disputes clauses, see Shedd, supra note 3, at 43-57.

10. The Secretary of War could not, for example, check whether there were weevils in the flour supplied to troops in the inaccessible Far West and personally decide whether the suppliers should be paid; final responsibility clearly had to rest with the men in the field. Hearings on H.R. 1839 and S. 24 Before a Subcommittee of the House Committee on the Judiciary, 83d Cong. 1st & 2d Sess. 19 (1954) (Testimony of Alan Johnstone at hearings on "Review of Finality Clauses in Government Contracts").

11. 3 Williston, Contracts §§ 794-803 (1936); 3A Corbin, Contracts § 652 (1960). Architects often arbitrate disputes to which either they or their principles are
The Supreme Court upheld such a "finality" clause in a government contract when it first faced the problem in 1878. The parties had bargained for the terms of the contract, proclaimed the Court, and therefore they should be bound. "In the absence of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment ... [the contract officer's] action in the premises is conclusive upon the appellant as well as the government."

The Supreme Court, however, soon expanded the grounds for overturning departmental decisions to include caprice and lack of due regard to the rights of the contracting parties, and in a string of subsequent decisions, the Court of Claims added several additional tests, including arbitrariness and lack of substantial evidence. Congress confirmed this trend in 1954 through enactment of the Wunderlich Act. This expansion of the scope of judicial review probably reflected a balancing of considerations. On one hand, commercial and parties. See, e.g., M. DeMatteo Constr. Co. v. Maine Turnpike Auth., 184 F. Supp. 907 (D. Maine 1960); Parke v. Pence Springs Co., 94 W. Va. 382, 118 S.E. 508 (1923).


13. Id. at 402. See also Sweeney v. United States, 109 U.S. 618, 620 (1883); Merrill-Ruckgaber Co. v. United States, 241 U.S. 387, 393 (1916); Plumley v. United States, 226 U.S. 545, 547 (1913).
14. The Court established the "duty that the agent's judgment should be exercised — not capriciously or fraudulently, but reasonably and with due regard to the rights of both the contracting parties." Ripley v. United States, 223 U.S. 695, 701-02 (1912). For other Supreme Court decisions where a more liberal standard than Kihlberg was applied, see, e.g., Penner Installation Corp. v. United States, 116 Ct. Cl. 550, 564, 89 F. Supp. 545, 547-48, aff'd per curiam by divided court, 340 U.S. 898 (1950).
15. See Needles v. United States, 101 Ct. Cl. 535 (1944). [T]he court may review an administrative decision when all the substantial evidence and relevant data known to the officer and normally considered in arriving at such a decision are against it. Under such facts the decision would be so grossly erroneous as to justify the inference of bias or bad faith.

historical justifications for finality weighed heavily; but on the other, there was some recognition that under contemporary circumstances the government was no ordinary private party and that the contractor did not really have the power to bargain over the question of whether the government should be arbitrator.17

The unsatisfactory nature of a system of final contracting officer decisions and judicial review limited by the finality doctrine became plainly evident during the First World War, when the pressures of government procurement resulted in a greatly increased number of disputes and in general dissatisfaction by both contractors and executive department officials with the decisions reached by contracting officers. In response to this, some executive departments — without legislative assistance — developed internal machinery for what originally was conceived of as “appellate” review of contracting officers.18 Thus, in current standard government contracts, the same clause which provides for finality also provides that:

the decision of the contracting officer shall be final and conclusive unless within 30 days from the date of receipt of [the written decision of the contracting officer] the contractor . . . furnishes to the contracting officer a written appeal addressed to the head of the agency involved. The decision of the head of the department or his duly authorized representative for the determination of such appeals shall be final and conclusive.19

In most departments the job of reviewing contract officer decision was delegated to a “contract board,” and their review has taken on the nature of a de novo trial;20 despite the increased importance of the contract boards, Congress, prior to 1954, had made no effort to control their growth or regulate their procedures.

A distinction may be made between the jurisdiction of the contract boards and the finality which is afforded their decision by the courts. The scope of finality has been statutorily defined and judicially construed so that it is dependent upon the uncertainties of the law-fact distinction. Contract board determinations on “questions of fact” may not be upset in the courts unless arbitrary or capricious procedures or lack of substantial evidence are shown. Board determinations of “questions of law,” however, are afforded no finality.

18. See Shedd, supra note 3, at 42-56, for a detailed historical presentation of the events leading up to the formation of the Armed Services Board of Contract Appeals (ASBCA). While the history of contract boards representing the heads of departments stretches back to the Civil War — see United States v. Adams, 74 U.S. 463 (1868), and final appellate decision by department heads was upheld in 1913 in Plumley v. United States, 226 U.S. 545 (1913) — no formal mechanisms were established until World War I. The roots of the present ASBCA lie in boards set up during World War II.
The jurisdiction of the contract boards also hinges, theoretically, on the law-fact dichotomy. If a particular dispute is characterized as a "pure" question of law, the contract board normally declines to hear the case. On the other hand, disputes labeled questions of fact or mixed law and fact are originally cognizable by the boards. It is for this reason that a distinction is drawn between a breach of contract case which may be brought originally before a court and disputes arising under a contract clause, such as an adjustment clause, which must be appealed to the contract board. The former are viewed as presenting only questions of law, the latter as also involving factual issues. If, for example, a construction contractor discovers a subsoil condition which he did not anticipate or the government finds it does not need what it has ordered and wishes to terminate a contract for its convenience, a contractor aggrieved by the compensation determination of a contracting officer must go to the contract board because his grievance is covered by the standard contract adjustment clause in his contract. The contract boards are

21. For a general discussion of the problem, see Birnbaum, Questions of Law and Fact and the Jurisdiction of the Armed Services Board of Contract Appeals, 19 Fed. B.J. 120 (1959). The ASBCA's charter provides:

[W]hen an appeal is taken pursuant to a disputes clause in a contract which limits appeals to disputes concerning questions of fact, the Board may in its discretion hear, consider, and decide all questions of law necessary for the complete adjudication of the issue.


23. See generally vom Baur, Claims Under a Government Contract and Those for Breach of It, 2 Gov. Contr. Rev. 5 (May 1958). See also McCord v. United States, 9 Ct. Cl. 155 (1873), aff'd sub nom. Chanteau v. United States, 95 U.S. 61 (1877), for an example of how the breach of contract suit under a contract distinction was applied in the days of the first ironclad battleships. The case illustrates a modern problem which contract clauses were designed to deal with — disputes arising out of an agreement to create something whose precise characteristics, cost, and "sticky points" cannot, by virtue of the newness of the thing to be created, be anticipated at the time of contracting. But for the existence of adjustment clauses, the occurrence of "contract breaches" would be unavoidable. The ASBCA observes the distinction between contract breach and adjustment under these clauses. See, e.g., Bonaco Constr. Co., 61-1 B.C.A. 15,228 (1961); Donald M. Drake Co., 57-2 B.C.A. 4,533 (1957). The ASBCA does not grant relief for damages for breach
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thus concerned, in practice, with whether a particular dispute is covered by a contract provision in which obligations and rights are fixed and in which liquidated damages may be awarded.\(^{24}\) Contract boards will, however, determine all of the issues in a case, including questions of law, so long as the case arises under the contract.\(^{25}\) This is in keeping with the disputes clause, which informs the contractor that although its terms speak of finality only on questions of fact, it "does not preclude consideration of questions of law in connection with decisions provided for in [the finality of fact dispute determination] paragraph."\(^{26}\) Boards could not do otherwise; the jurisdiction typically marked out by the executive department requires a board to handle disputes in their entirety, in such a way as to entail no extradepartmental litigation.

One consequence of this law-fact distinction has been to create doubt as to when a contractor must exhaust the departmental remedies afforded him. If a contractor fails to appeal to the contract board, in most cases he is barred from suit against the United States in federal court. But in instances where a "pure" question of law is at issue, contractors may go directly to court, without first exhausting departmental remedies. In practice most contractors do appeal to the contract boards, perhaps because a wrong guess as to whether their dispute presents a "pure" question of law may effectively foreclose all review.\(^{27}\)


24. This point is strongly emphasized and documented in Birnbaum, Questions of Law and Fact and the Jurisdiction of the Armed Services Board of Contract Appeals, 19 Fed. B.J. 120 (1959).

25. There is some question as to how this principle should be applied when a question arises over what standards of performance the contract requires — i.e., problems of contract interpretation and construction. While courts have generally treated such questions as ones of law — see, e.g., Kayfield Constr. Co. v. United States, 278 F.2d 217 (2d Cir. 1960) — the ASBCA classifies contract interpretation disputes as "mixed" questions of law and fact, has heard timely appeals on these matters — e.g., Rogers Constr. Co., 58-1 B.C.A. 6172 (1958) — and has granted adjustment relief in cases where the contract officer's interpretation of an ambiguous document was no more reasonable than those of the contractor — e.g., Keco Industries, Inc., 1962 B.C.A. 17,627. Compare the Court of Claims position as expressed in WPC Enterprises, Inc. v. United States, 323 F.2d 874, 878 (Cl. Ct. 1963); Bell Aircraft Corp. v. United States, 120 Ct. Cl. 398, 100 F. Supp. 651 (1959), aff'd by equally divided court, 344 U.S. 860 (1952).


The volume of cases falling under contract board jurisdiction has grown significantly over the years, not only because of the increased number of government contracts, but also because of the way in which the standard form contracts have been drafted. The value to government departments of that portion of the disputes clause which provides that:

Pending final decision of a dispute, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.\(^{28}\)

has led to the proliferation of such clauses in procurement contracts. Provisions for continuing price determinations and cost computation in cost-plus-fixed-fee contracts have been developed to bring additional cases within contract board jurisdiction.\(^{29}\)

Other developments in the manner in which procurement is conducted, moreover, have tended to cut down the extent to which disputes are adjudicated outside executive departments. The great dollar volume of defense contracts are "negotiated," not "advertised"; rather than holding competitive bidding, the government seeks out those few firms capable of meeting its needs, and confers the contract on the best price-product package offered. Such contracts are the basis of a continuing relationship between government and contractor, during which government needs or other circumstances may change. Hence, there is express or tacit recognition that the details will be worked out as the project evolves. Through such contracts the government of Claims is criticized. See generally Speidel, *Exhaustion of Administrative Remedies in Government Contracts*, 38 N.Y.U.L. Rev. 621, 625-26 (1963), who derives the basis of the law-fact distinction in the "exhaustion" context from the fact that in Holpuch an "all disputes" rather than a fact-limited disputes clause was involved. He takes a pragmatic approach to the contractor's problem:

The duty to exhaust depends neither upon the manipulation of the law-fact distinction nor court treatment of board decisions, but whether, in any given dispute, the cognizant board of contract appeals has power under its charter and the contract to make a decision which, if acquiesced in by the contractor, will settle the dispute for all practical purposes.

\(^{143}\)at 632.


29. See Bragdon, *Administrative Resolution of Delay Claims in Government Contracts*, 14 Ad. L. Bull. 8, 13 (1961); Shedl, *Administrative Authority to Settle Claims for Breach of Government Contracts*, 27 Geo. Wash. L. Rev. 481, 515-16 (1959). See also G. L. Christian & Associates v. United States, 312 F.2d 418 (Ct. Cl. 1963), cert. denied, 32 U.S.L. Week 3220 (U.S. Dec. 17, 1963), rehearing denied, 32 U.S.L. Week 3291 (U.S. Feb. 18, 1964), which is commented upon in Cibinic, *Contract by Regulation*, 32 Geo. Wash. L. Rev. 111 (1963). Christian suggested that if the regulations (ASPRs) had required a contract to include an adjustment clause, the contractor was bound to that clause even though it did not appear in the contract which he had signed. It has been suggested, however, that Christian may not have the broad impact which a literal reading of it implies. Interview with Professor Ralph Nash of The George Washington University in Washington, D.C., June 4, 1964 (hereinafter cited as Nash Interview).
benefits from corporate flexibility and know-how without having to assume a business function itself. Such contracts represent an alternative to standard form or "control" contracts, which are supplemented by the unilateral issuance of government regulations. When difficulties do arise under negotiated contracts, they are usually handled by contract boards. Although negotiated contracts usually provide that costs be automatically reimbursed, and although few difficulties are presently encountered, it has been suggested that disputes growing out of negotiated contracts may increase within the next few years.30

Thus, from the simple idea of a contract clause delegating authority for final payment to a government representative in a position to observe easily whether the contract's terms had been fulfilled, an institutional system for the resolution of almost all contract disputes has grown. Contracting officers, executive department bodies, and courts (notably the Court of Claims) are the participants in this system.

The two adversaries who make use of this system — the contractor and the particular executive department — are each motivated by multiple interests. While the contractor and the executive department probably agree that the decision making process should remain rapid and inexpensive, their respective concerns tend to diverge beyond this point. Executive agencies wish to keep contractors at work during disputes. Further, they want to keep the settlement of disputes confined to their own departmental machinery as far as possible, so that uniform contract interpretations can be developed. Such uniformity presumably makes possible department reliance upon standard clauses to cover dispute contingencies. It is also in departmental interest to develop machinery to oversee the work of both the contractors and the contracting officers, making it possible to enforce more uniform standards of job performance and job administration. And, of course, the executive departments want to keep down the costs of contract performance.

The interests of contractors are initially shaped by the fact that they are linked by adhesionary contracts to the contracting officer—contract board


There is some indication, however, that, as a policy matter, fewer negotiated contracts are entered into. This result is achieved in the defense area by dividing new weapons into component parts so that competitive bids can be sought on each part. Duscha, The Costly Mysteries of Defense Spending, Harper's Magazine, April, 1964, pp. 59, 63. See also Lazure, Why Research and Development Contracts are Distinctive, 17 Fed. B.J. 255 (1957); Cuneo, Research and Development Problem Areas as Reflected in Board of Contract Appeals Cases, 17 Fed. B.J. 386 (1957). The Nash Interview suggested the monetary importance of negotiated contracts and the possibility that a greater number of disputes will arise out of them in the future than have in the past. One possible reason for this is the policy decision, at least in the Defense Department, to shift away from cost-plus-fixed-fee contracts to incentive contracts which reward efficiency and penalize shoddy or tardy work. See Wall Street Journal, June 11, 1964, col. 6.
system of resolving disputes. Although some of the larger contractors, through associations, may have helped to shape a standard clause when it was originally drafted or later modified, they will have had no opportunity to bargain over its insertion in any particular contract, and they will be bound by the terms of the clause in any given case to the same extent as a small contractor.\(^3\)

Even if disputes are less frequent under negotiated contracts or if a large contractor has available greater means of procuring a favorable settlement with the contracting officer,\(^2\) when a dispute does arise the large contractor's interest in the machinery by which resolution is effected would seem identical to that of the small contractor.

The first interest of contractors is to secure a fair hearing with the contracting officer. To this end a right of appeal is necessary in order to deter the contracting officer from arbitrary decisions and to provide a remedy for improper decisions. A second related concern is that the forum for appeal be one in which due process can be had — especially one where both parties must present all evidence relied upon for decision and opportunity for rebuttal exists. Finally, contractors have an interest in the existence of judicial review outside of the contracting department itself to remedy unsatisfactory contract board procedures and incorrect holdings. Underlying all of these concerns, of course, is the survival interest motivating all contractors: preserving their profit margin.

This Comment will examine the interaction of the parties concerned with contract disputes — the adversary participants, the contract boards, the federal courts, the Department of Justice, and the General Accounting Office — and attempt to evaluate the relative importance of the factors which have been primarily responsible for the shaping of the current contract dispute machinery and law. First, the nature and shortcomings of the currently participating institutions will be examined; the recent development of their interrelationships will be analyzed; and finally, possible solutions to the problem of how government contract disputes may be resolved will be evaluated. In conducting this analysis, several themes will reappear. The existing mechanism for resolution of contract disputes is largely the product of unplanned growth; as specific problems have arisen the various institutions have reacted in an

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\(^3\) See Pasley, *The Interpretation of Government Contracts: A Plea for Better Understanding*, 25 FORDHAM L. Rev. 211, 213-14 (1956). While conceding that government contracts are ones of adhesion, this commentator points out that they are negotiated over time by representatives of various trade associations and organizations such as the N.A.M.

\(^2\) It has been scathingly suggested that the main harmful effects of the way in which the process of procurement and procurement disputes administration is conducted falls upon small businessmen whose whole livelihood is dependent on government contracts. See Lidstone & Witte, *Administration of Government Contracts*, 46 VA. L. Rev. 252, 252-56 (1960). One explanation for this uneven impact may be that it is small contractors who “sharpen their pencils” when making their bids, hoping to make a profit on “extras” acquired from the government in the course of the transaction, who must litigate to protect their profit margin. Lidstone & Witte, *supra* at 255. Nash Interview.
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ad hoc manner, seeking rectification only of the immediate shortcomings of the system. No overall systematic solution has been sought. The concern of the participants with their own institutional prerogatives has exacerbated the problems arising from this ad hoc development. Finally, the institutions involved typically have attempted to solve new problems as they arise by reference to other bodies of law, even though the analogies drawn may not have been wholly appropriate. Thus, the contract boards have often justified their role by reference to commercial law; the Supreme Court has appealed to administrative law as a model for the relationships between the contract boards and the Court of Claims; and the Court of Claims has protected its position by manipulating the law-fact distinction which was originally developed in the judge-jury context. It will be argued that rather than seeking to preserve a delicate balance of prerogatives between the interested institutions, it would be more desirable to examine their respective capabilities and to synthesize these capabilities into a mechanism designed to be more sensitive to all interests than is the present one.

II. THE INSTITUTIONS

A. Intra-Departmental Dispute Resolution

At present, some fourteen contract boards have been set up by executive departments and agencies. The most important of these, in terms of case-load and dollar volume handled, is the Armed Services Board of Contract Appeals (ASBCA). As government spending patterns shift, it is quite possible that other contract boards will become of importance; but the present preeminence of the ASBCA justifies centering attention upon it. Military contract appeal boards have the longest history of continuous operation, and


34. Spector Interview; Nash Interview.

35. See Shedd, supra note 3, at 44-63.
the ASBCA has developed procedural safeguards of a rather high level of sophistication. These procedures have in fact served as models for many departmental contract boards. Although some contract boards observe less stringent procedural standards, the ASBCA presents a good example of the fair procedures executive departments can provide for contractors.

1. Contracting Officers

The relationship of the contracting officer to the contractor will necessarily depend, to a certain extent, upon the nature of the contract review machinery which his executive department has created. For example, the extent and manner in which his decision will be reviewed within the department will undoubtedly influence his methods of administering the contract. Under any system of review, however, he is the person designated to oversee the day-to-day operation of the contract; all disputes involving the contract are initially considered by him. Under the authority vested by the contract's finality clause, the contracting officer makes a decision as to what contract adjustment should be made. In many instances the contracting officer is really something of an "institution," supported by an office in which technical and legal advice is available. He is in a position to consult both with the contractor and the contractor's technical advisors and consultants and to reach a mutually agreeable solution. But contracting officers are in no sense impartial fact-finders analogous to or held to the standards of Administrative Procedure Act (APA) trial examiners. In the Defense Department context, they are often military personnel charged with upholding the government's interest. It is difficult to see how the contracting officer can vigorously and fairly fulfill both his role as "manager" of the contract, in which he must keep government costs down, and his role as umpire of disputes, in which he is envisaged as an impartial arbiter. Despite the theoretical unfairness to the contractor implicit in the officer's dual role, many contract disputes are, in practice, satisfactorily settled at the contracting officer's level. Where no settlement is reached, the con-
tracting officer's adjustment of the contract dispute may be appealed by the contractor to the ASBCA; absent appeal, the officer's decision is final. Upon appeal to the ASBCA there is no presumption of validity attached to the contracting officer's decision.

2. The Contract Boards

The ASBCA has been characterized by its chairman as "monolithically quasi-judicial"; its similarity to the independent administrative agencies, which often adjudicate the disputes of private parties, has thus been stressed. The ASBCA, moreover, operates with a relative degree of flexibility, speed, and inexpensiveness—the characteristics often attributed to the administrative process. Unlike administrative agencies, however, contract boards, the ASBCA among them, have their legal basis in contract dispute clauses and departmental authorization, rather than in congressional enabling acts. They do not exist to "regulate" the activities of government contractors in accordance with public policies established by Congress; ostensibly their only function is to adjudicate contract disputes. Further, since the contract boards are non-statutory in origin, and since the board is comprised of employees of the same department which is party to the dispute, contract board hearings are not subject to the APA, which governs the hearings of the major administrative agencies. An added consequence of the boards' lack of formal separation from their respective departments is that they are not insulated from outside pressures in the same manner as are the independent agencies. While the ASBCA is known for its independence, one may wonder if the other boards can avoid being influenced by the contract policies established by their respec-

40. 32 C.F.R. § 30.1, Part II (Supp. 1963), as amended, 28 Fed. Reg. 9348 (1963). While most appeals are from the decisions of contracting officers, the ASBCA is authorized to hear appeals taken pursuant to the provisions of any directive whereby right of appeal not contained in the contract has been granted by one of the secretaries. Id. at § 30.1(I)(b).

41. Spector Interview.

42. Chairman Spector has asserted:

[T]he criticisms levelled against these agencies are not relevant [to the ASBCA]. Critics complain, 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 functions. The function of resolving disputes [in the ASBCA], in contrast, is monolithically quasi-judicial in nature and has been traditionally recognized as such. Spector, supra note 4, at 400 n.10.

43. Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. § 1001(a) (1958) [hereinafter cited as APA]. Under the terms of § 2(a) of the Act, the board would be exempted from the "agency" label since it is a body composed of the representatives of one of the parties to the disputes. Moreover, since the adjudication of disputes is required by contract, not statute, it is not subject to the hearing requirements of § 5. U.S. Dept. of the Army, Procurement Legal Service 132 (Pamphlet No. 715-50-3, 1963). See also G.A.O. B-152346, 32 U.S.L. Week 2280 (Nov. 22, 1963).
five executive departments. A final distinction between contract boards and the independent agencies is their selection of hearing officers. Contract board hearing officers vary greatly in status. Although ASBCA members also serve as hearing examiners, in some boards hearing officers are drafted from offices such as the department's general counsel's office without conferring on the draftee any quasi-judicial status.

When an aggrieved contractor avails himself of his right to appeal to the ASBCA, the contract officer is required to forward to the Board and the government trial attorney all information and material which bears on the dispute, whether or not it would be admissible in a court. The ASBCA then usually assigns one of its members to hold hearings, examine witnesses, and report back his findings to one of the board's "divisions," which is comprised of three members, and which decides the case.

The ASBCA has established a fairly elaborate procedural framework for its hearings. Its procedures have been defended as flexible and fair; this very flexibility presents a potential for abuse, though the ASBCA apparently has so far succeeded in avoiding that pitfall. While in most aspects an ASBCA hearing is quite similar to a civil trial without jury, the proceedings may be, according to the ASBCA charter, "as informal as may be reasonable and appropriate under the circumstances." The Board is empowered to disregard the accepted rules of evidence if it chooses, and has complete discretion as to what weight to attach to evidence. Except in cases where the government is seeking a refund of money, the contractor must always go forward with the evidence.

Two serious criticisms have been leveled at the mechanics of the contract board decision-making process: first, that the "appeal file" relied upon by

44. Members of the ASBCA are jointly appointed by an Assistant Secretary of Defense and the assistant secretaries of the military departments responsible for procurement, 32 C.F.R. § 30.1 (Supp. 1963). Contract board members are generally departmental appointees. The suggestion has been made that the degree of independence exercised by a contract board will be a function of the extent to which it operates full time and the extent to which the impact of its decisions on contractors leads them in turn to bring countervailing pressure to bear on the boards. This pressure would tend to counteract intra-agency pressure to conform to departmental procurement policy. Note, United States v. Carlo Bianchi & Co.: Finality Under the Disputes Clause, 39 N.Y.U.L. Rev. 290, 316 (1964).


46. The pertinent ASBCA rules of procedure may be found at 28 Fed. Reg. 9351 (1963). See ASBCA Rule 28. Good discussions suggesting the intermeshing of these rules as they bear on the development of the appeal file and the board decision may be found in Cuneo, Development of the Administrative Record, Gov't Contract Rev., Nov., 1957, p. 4. Miller, supra note 33, at 118-22; and Spector, supra note 4, at 97-100.

47. Spector Interview.


board members for decision is incomplete; second, that "deciding officers" within executive departments search out and consult other documents of possible relevance, without regard to the presence or absence of the claimant, although the ASBCA bars such procedures. The ASBCA has made an effort, moreover, to meet the former objection, by instituting a relatively sophisticated technique for the development of the appeal file. In addition to the material submitted by the contracting officer, an ASBCA appeal file contains the pleadings, pre- and post-hearing briefs, such depositions and interrogatories as are permitted, and records of pre-hearing conferences and the hearing itself. Both the government lawyer and the contractor are notified when any material is added to the file; the contractor is always free to inspect the record and raise objections to the materiality of anything in it. However, there are deficiencies in the Board's machinery for building the appeal file. Unlike agencies operating under the APA, the ASBCA lacks an effective subpoena power or power to compel production of documents. It has, moreover, no statutory power to place a witness under oath — though it may inform him of the criminal consequences of lying in a suit involving claims against the United States. Further, an ASBCA member is not required to afford parties the opportunity to submit proposed findings and conclusion or exceptions to a recommended decision. Nor does the ASBCA charter guarantee, as does the APA, that the testimony and exhibits will constitute the exclusive record for decision. Some of these criticisms may not be of great importance. Practically all witnesses will be accessible either to the government or to the contractor, so that the Board's lack of subpoena power is of less importance than it might seem. An old United States Code provision has recently been dredged up and pressed into service to provide other witnesses where necessary, and there


51. See Cuneo, supra note 46, at 4, 19.


53. See note 46 supra.

54. The Board's exemption from the APA is discussed in note 43 supra.

55. Cf. APA § 8(b).

56. APA § 7(d).

57. Spector Interview.


59. A subpoena ad testificandum has been issued in one case (Appeal of Merritt-Chapman & Scott, Inc., Department of Interior Board of Contract Appeals No. 365),
are sufficient penalties for lying on the witness stand to render relatively in-
nocuous the lack of power to place under oath.\textsuperscript{60}

The ASBCA does afford contractors at least minimum relief from the potentially arbitrary actions of contracting officers. In the ASBCA, contractors are provided with a forum which has experience and technical knowledge and in which they can confront all government witnesses. Furthermore, the ASBCA commands the respect of the contract officers. Its decisions provide the officers with legal guidance, and its very presence serves as a ready and visible check on unfair or arbitrary practices. Clearly, the ASBCA, from the contractor's viewpoint is preferable to \textit{ex parte} determinations by department officers; it is valuable from an administrative standpoint to department heads, who are insulated by the boards from clamoring contractors. Board procedures also provide for speedier and more economical resolution of disputes than is available in the Court of Claims. Finally, the Court of Claims has been saved from inundation by litigation resulting from the vastly increased government procurement program.\textsuperscript{61} It seems clear that most of these advantages are dependent on the existence of the finality of Board decisions; absent finality the ASBCA would become a mere stop on route to court appeal, and its decisions would have no binding effect. One of the ASBCA's chief interests thus appears to be the prevention of tampering with the finality doctrine.\textsuperscript{62}

In sum, the example of the ASBCA suggests that it is possible to establish machinery which, though both non-judicial and outside the APA, can accomplish a great deal of what contractors demand and government procurement administration requires. It seems evident, though, that the standards maintained by contract boards depend a great deal on the amount of authority conferred upon them by the departments and agencies and on the caliber of men the departments choose to assign to the boards. This problem is intensified by the institutional framework of the boards. The whole process of dispute resolution occurs within a single executive department in which effective insulation and impartiality is difficult. The boards are not charged with maintaining an elaborate statutory scheme; their charters are their authorizing

\footnotesize{and a subpoena duces tecum has been issued in another (Appeal of Merritt-Chapman & Scott, Inc., ASBCA No. 8293) (these were separate cases involving the same company). See Miller, \textit{supra} note 33, at 125 n.92. In agreeing to procure the latter subpoenas, the Justice Department successfully sought agreement that the right to use this mechanism would be extended by department heads to private litigants. Rose Interview.

\textsuperscript{60} As a substitute for an oath, board members read to each witness as he takes the stand the False Claims Act, 18 U.S.C. \textsection 287 (1958), or the False Statement Act, 18 U.S.C. \textsection 1001 (1958).


\textsuperscript{62} Id. at 406. See Spector, \textit{Is It “Bianchi’s Ghost” — or “Much Ado About Nothing”?}, 29 \textit{Law & Contemp. Probs.} 87, 102-07 (1964), where emphasis is placed upon the mere “residue of finality” of ASBCA decisions and upon its “limited” formal scope, narrowed not only by statute, but by the “continuing struggle between the Court of Claims and the Supreme Court.”}
statutes, but they draw their own charters. This paradoxical position of contract boards, heightened by the way in which the law-fact distinction impinges upon board jurisdiction and upon the finality of board decisions, has made judicial review even more an instance of tortured line drawing than is review of the independent administrative agency.

B. The Court of Claims

Two forums for review of contract board decisions are available. All government actions against contractors must be brought in federal district courts. The district courts and the Court of Claims have concurrent jurisdiction over contractor appeals involving claims for less than $10,000. The Court of Claims has exclusive jurisdiction over all appeals involving more than $10,000. Since friction has arisen primarily from Court of Claims decisions, and since a relatively large number of appeals seem to involve more than $10,000, this analysis of appellate review of contract board decisions will focus exclusively on the Court of Claims.

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. The most distinctive characteristic of the Court of Claims is the commissioner system, which was devised after the court was engulfed by the wave of procurement litigation which followed World War I. Originally, seven attorneys were appointed to handle hearings and make rulings on evidentiary points. Over the years, the role of the commissioners was expanded, so that in many respects they are now analogous to federal district judges sitting without juries or, to some extent, APA hearing examiners. Commissioners are formally permitted to “exercise the power to regulate all proceedings and do all acts necessary for the efficient performance of their duties.” A commissioner is authorized, for example, to have the attorneys appear before him in order to clarify issues and simplify pleadings and to consider the possibility of avoiding unnecessary proof; he may hold a pre-trial conference. The commissioner then holds a trial, at which provisions similar to the Federal Rules of Civil Procedure are in force. The decisions of the commissioners, however, are not final. At the trial’s close, the commissioner prepares

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63. Spector Interview.
65. 28 U.S.C. §§ 1346(a) (2), 1491 (1958). When the contractor consents to the disputes procedure, he does not promise to settle any dispute by agreement with the contracting officer or board.
66. For general discussion of the types of cases handled by the Court of Claims, and the manner in which it handles them, see Wilkinson, The Court of Claims: Where Uncle Sam is Always the Defendant, 36 A.B.A.J. 89 (1950). See also Brenner, Judicial Review by Money Judgment in the Court of Claims, 21 Fed. B.J. 179 (1961); Hoyt, Legislative History, 1 United States Court of Claims Digest XIII-XXXVI (1950).
a report to the court on his findings of fact, which bears a presumption of
correctness in the Court of Claims itself. When directed by the court, the
commissioner may also submit recommendations for conclusions of law. In
the absence of exceptions by the parties, such recommendations are adopted
as conclusions of law by the Court of Claims, and judgment is entered upon
them. In effect, the commissioner writes a tentative opinion which the court's
judges rely upon or adopt. The five judges, sitting en banc, hear oral argument
and prepare a written decision.68 Certiorari may be had to the Supreme Court
by either party to the suit.

The Court of Claims is, effectively, a bifurcated body. The judges originally
intended by Congress to be trial judges are now more like appellate
judges sitting on all cases decided by the commissioners.69 In those breach
of contract cases which are originally brought in the court, the commissioner's
role as a fact-finder is a meaningful one since a contract board has not heard
the case or made findings of fact. But it remains unclear how the Court of
Claims ought to act in cases where a contract board has already found the
facts. Judicial review of administrative agencies is, of course, appellate in
practically all instances; judicial review of contract boards by commissioners
playing their traditional role is, however, de novo trial review.70

Although a variety of legislative and judicial guidelines have been laid
down in the past decade, the Court of Claims has fastened upon the law-fact
dichotomy as a rationale for allowing its commissioner to conduct a de novo
hearing in a great number of cases already heard by contract boards. Thus
the Court of Claims has tended to construe finality clauses narrowly, to
broaden the definition of a breach of contract case, and to define generously
the term "question of law." The result has been to create more questions of
law over which the Court of Claims has the right to conduct de novo hearings.71
In a related line of cases, the Court of Claims attempted to broaden the scope
and standards of review over the final "fact" determinations reached by con-

68. See Gamer, Some Notes on Court of Claims Practice, Gov't Contract Rev.,
April, 1958, p. 4; Evans, supra note 67.
69. Commentators' views toward the functional role of the Court of Claims have
changed, in the light of legislation and judicial decisions. Compare Schultz, Proposed
Changes in Government Contract Disputes Settlement: The Legislative Battle over the
Wunderlich Case, 67 Harv. L. Rev. 217, 238 (1953), with Schultz, supra note 52, at 134.
71. Ad hoc accommodation to legislative and judicial guidelines has produced the
ways in which the Court of Claims preserves its jurisdiction. See, e.g., pre-Wunderlich
Act: Southern Shipyard Corp. v. United States, 76 Ct. Cl. 468 (1932); John McShain,
Inc. v. United States, 88 Ct. Cl. 284 (1939), rev'd, 308 U.S. 512 (1939), modified, 308
U.S. 520 (1939); Callahan Walker Constr. Co. v. United States, 95 Ct. Cl. 314, rev'd,
317 U.S. 56 (1942); Beuttas v. United States, 60 F. Supp. 771 (Cl. Ct. 1944), rev'd on
other grounds, 324 U.S. 768 (1945); post-Wunderlich Act: Railroad Waterproofing
Corp. v. United States, 133 Ct. Cl. 911 (1956); Fehlhaber Corp. v. United States, 138
Ct. Cl. 571, cert. denied, 355 U.S. 877 (1957); P.L. Saddler v. United States, 152 Ct.
Cl. 557 (1961).
tract boards. These precedents served not only to provide contractors with a ready forum for appeal from allegedly final decisions, but for a long while enabled the court to overturn board decisions on factual issues and to justify readjudicating factual disputes with *de novo* hearings on all issues. The court's behavior may have been due to a desire to do equity on the particular facts of a case; it may have resulted from a scorn for contract board procedures; or it may have been motivated by a concern for the preservation of its own prerogatives.

Although many faults may be found with Court of Claim proceedings, among them the three year wait necessary for a decision, and its proclivity for conducting *de novo* hearings, the contractors, as a class, favor its retention of current status. Under the present institutional set-up, the court is the only source of judicial review for contractors with expensive claims, and it has developed a certain amount of expertise. Of equal significance has been the court's preservation of its independence and its willingness to find for contractors in instances where the literal reading of Supreme Court holdings might have precluded such results. For this reason, when judicial review by the Court of Claims was effectively cut off, contractors rose in arms and assured its restoration. Certainly, little merit can be seen in letting circuit

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72. See notes 14 & 15 supra and accompanying text, discussing the development of standards for the overturning of contract board fact findings. Concern with this trend was voiced by the Justice Department's representative at the Wunderlich Act Hearings when he was queried as to the value of the proposed standards of judicial review of contract board fact findings. *Hearings Before Senate Committee on the Judiciary, Finality Clauses in Government Contracts*, 82d Cong., 2d Sess. 19 (1952) [hereinafter cited as *Senate Wunderlich Hearings*].

73. An example of the Court of Claims' independence in interpretation of Supreme Court rulings in the government contract area is its handling of the question of what remedy a contractor should get for delays caused by the government. In general, it has been kinder to the contractor than Supreme Court holdings might have led it to be. See, e.g., Speck, *Delays — Damages on Government Contracts: Constructive Conditions and Administrative Remedies*, 26 Geo. WASH. L. Rev. 505, 533-38 (1958); Seltzer & Cross, *Federal Government Construction Contracts: Liability for Delays Caused by the Government*, 25 FORNRA L. Rev. 423 (1956). The *Volentine & Littleton Case*, 144 Ct. Cl. 723 (1959), and notes 142-43 infra and accompanying text, illustrate the Court of Claims' concern with substandard contract board proceedings.

Representatives of the Court of Claims and the ASBCA do not believe a conflict exists between the two bodies. "Traditionally each [the ASBCA and the Court of Claims] has its own sphere and each has respected the other's." Letter from Saul R. Gamer, Commissioner of the Court of Claims, to the *Yale Law Journal*, May 30, 1964, on file in the Yale Law Library. "I would suggest that the Court of Claims could not exist in its present form were it not for us. We, on the other hand, are staunch supporters of the Court of Claims. We recognize that in the very few cases which go from our Board to the Court, judicial review is an essential right." Letter from Louis Spector, Chairman, Armed Services Board of Contract Appeals, to the *Yale Law Journal*, April 29, 1964, on file in the Yale Law Library.

courts take over the job of reviewing the contract boards; their dockets are as crowded, and their expertise might be less. If a new sort of judicial review is to supplant that of the Court of Claims, it should be developed afresh.

C. General Accounting Office

The General Accounting Office (GAO) was established under the terms of the Budget & Accounting Act of 1921. It regards its function in the government contracts area to be that which it exercises over the rest of the government:

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.

The GAO has asserted a right coextensive with that of the federal courts to review contract board decisions, but it appears that it will generally review only those cases not appealed to a court. Hence, settlements and awards made by contract boards to contractors may be set aside by the GAO in situations where such decisions would not be accorded finality by a court.


76. House Wunderlich Hearings 135.

77. After United States v. Mason & Hanger Co., 260 U.S. 323 (1922), the GAO limited the extent of its review to the same degree as did courts. See also Braucher, Arbitration under Government Contracts, 17 LAW & CONTEMP. PROB. 473, 489 n.116 (1952).

The Government may not directly re-open a controversy decided unfavorably to it. See Bell Aircraft Corp. v. United States, 120 Ct. Cl. 398, 100 F. Supp. 661 (1951), aff'd by equally divided Court, 344 U.S. 860 (1952). Government judicial relief from contract board decisions is obtained in an indirect manner. The Comptroller General refuses to pay the amount owing to the contractor by reason of a disputes decision. The suit brought by the contractor based on his contract board decision is defended against under the terms of the Wunderlich Act, permitting GAO review. See Joy, The Disputes Clause in Government Contracts: A Survey of Court and Administrative Decisions, 25 FORDHAM L. REV. 11, 28-29 (1956).

For discussion of the instances in which the GAO will enter the dispute picture and the kind of claims adjudicated by its Claims Division, see Schultz, Proposed Changes in Government Contract Disputes Settlement, 67 HARV. L. REV. 217, 230-33; Miller, supra note 33, at 126-29. The relationship of the GAO to the contract boards can grow intricate. GAO reversal of an ASBCA decision was upheld by the Court of Claims after a de novo review of the evidence on the theory that a question of law was involved. Associated Traders, Inc. v. United States, 144 Ct. Cl. 744, 169 F. Supp. 502 (1959). For discussion of the problem dealing with the competing interpretation of the law of different forums, engendered by GAO policy, see Lidstone & Witte, Administration of Government Contracts: Disputes and Claims Procedures, 46 Va. L. Rev. 252, 271-76, 286-89 (mistakes in bids); Birnbaum, Government Contracts: The Role of the Comptroller General, 42 A.B.A.J. 433, 436, 488-92 (1956). Since United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963), the GAO has abrogated the power to take de novo evidence, as have the courts. See Schultz, supra note 45, at 133 n.86.

78. The GAO pressed for the Wunderlich legislation, which liberalized the standards of judicial — and GAO — review of the contract boards. Its position was that the Wun-
If the GAO's powers are those of a court, its procedures fall far short of any judicial model. When there is a conflict between the assertion of the contractor and the findings of the contracting officer, and a lack of evidence sufficiently convincing to overcome a presumption of correctness, the GAO's established rule is to accept as fact the report of the officer. The GAO has no formal hearing procedure, and relies almost exclusively on written evidence, yet it is jealous of its pretension of being a court. It recently reacted to a release foreclosing GAO review, executed after an important ASBCA decision, by issuing a strongly worded directive to all executive agencies requiring any future release or other contractual instrument entered into as a result of appeal board decision to provide for GAO review under the congressionally established tests applicable to courts.

The actual role of the GAO in the resolution of contract disputes has been more of a potential threat than a daily reality. Contractors do not want review in the GAO to become frequent, because they fear the reversal of successful settlements and the effect which the possibility of such review will have on their credit opportunities. Finality of contract board decisions, at least in cases in which the departmental decision has satisfied them, is thus very important to contractors.

III. The Wunderlich Cycle

Since 1950 there has been a cycle of judicial and legislative efforts at allocating the phases of dispute resolution between the contract boards and the Court of Claims. Both judicial decisions and legislation have been phrased by requiring proof of actual fraud, made it virtually impossible for it to fulfill its statutory duty of auditing government accounts. See Senate Wunderlich Hearings 5 (letter from Lindsay C. Warren, Comptroller General). Despite contractor fears that the GAO's powers of review would be expanded, see, e.g., House Wunderlich Hearings 92, 93, the bill was passed. The House Report on the bill, H.R. REP. No. 1380, 83d Cong., 2d Sess. (1954) [hereinafter designated House WUNDERLICH REPORT] asserts that:

> 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.

Id. at 7. But it was immediately added that at the same time there was no intention of setting up the GAO as a court of claims.

79. For thorough discussion of GAO procedures, see the articles cited in notes 75, 77 supra.

80. This directive, and the reaction of the Department of Defense to it, are discussed in Spector, supra note 36, at 112-13; Schultz, supra note 45, at 133 n.85.

81. This assertion is based both on the House Wunderlich Hearings 92, 93, and on the argument against extensive GAO review presented by Schultz, supra note 45, at 133. See also Schultz testimony, House Wunderlich Hearings 109 (discussing the impact of GAO review on contractors' credit); Spector, supra note 35, at 107-13 (the GAO and importance of finality to contractors). But see, e.g., McClelland, Government Advocacy as Related to Appeal Procedures Unaccomplished Since the Wunderlich Legislation, 25 FORDHAM L. REV. 593, 600-05 (1956).
in terms of the law-fact distinction, largely because the standard disputes clause, the source of contract board jurisdiction, has always explicitly conferred finality only on departmental findings of fact. The issue has always been one of the degree of finality to be accorded board decisions; however, since the degree of finality defines the scope of review, jurisdictional overtones have always characterized the cases. While generalization is hazardous, it may fairly be said that, in the cases in which it has sought certiorari, the Department of Justice has sought to promote the internal resolution of contract disputes within executive departments, and correspondingly to narrow Court of Claims de novo review because of its particularly upsetting effect on contract board finality. The Court of Claims, on the other hand, has generally sought to preserve for itself as broad an area of de novo review of contract board decisions as possible. The Supreme Court, in the three recent major cases in which it has construed finality clauses, has reversed the Court of Claims and generally accepted the position of the Department of Justice. The contract boards, while not active litigants in these disputes, have been keen observers of their interests and effective publicists of their views, which generally have favored the Supreme Court's (as opposed to the Court of Claims') approach to disputes clauses. Contractors, while glad to have an efficient quasi-judicial departmental remedy, have been generally sympathetic to the Court of Claims position, since they desire to preserve as full an opportunity for judicial review as possible. The influence of the contractors on Congress has been a significant one.

A. United States v. Moorman

The cycle of judicial and legislative interaction began in 1950 with the Supreme Court's decision in United States v. Moorman, involving a contractor's attempt to recover for work done which allegedly had not been required by the contract specifications. Moorman was handled by the Supreme Court as a straight contract interpretation case, without much explicit cognizance of its institutional implications. The relationship of two contract clauses was at issue. One clause, in the "specifications" of the contract, provided that if a contractor felt any work demanded of him to be outside the requirements of the contract, he must utilize the departmental disputes procedure and be finally bound by the contract board decision. The second clause was a standard dispute clause, which limited the finality of board decisions to questions of fact. The contractor convinced the Court of Claims that his grievance was one of contract interpretation, a "question of law"; the issue was not, then, covered by the dispute clause of the contract. The Court of Claims held that the dispute provision in the specifications was subordinate to and controlled by the standard disputes clause involved in United States v. Moorman, 338 U.S. 457 (1950).

82. Compare paragraphs 2-16 of the specifications, id. at 458-59, with the disputes clause involved, id. at 459.
ard dispute clause contained in the "formal" contract; despite the specifications clause, finality would only be accorded board determination of questions of fact. Consequently, the Court of Claims ignored the contract board's resolution of the case, made new findings of fact pursuant to its determination of the law question, and awarded to the contractor more than he had received from the board.84

The Supreme Court, however, found the contractor's intent in the specifications provision, rather than in the more limited contract dispute clause. By finding that the contractor had indicated his desire, by contract, for final board review of "all disputes," the Court did not have to reach the question of whether under the terms of the standard disputes clause the Court of Claims might properly take evidence de novo on questions of contract interpretation.85

The Supreme Court's pique with the Court of Claims and the Supreme Court's realization that its holding was opening a way for the allocation of final determination of questions of law to the contract boards, were evident:

The oft-repeated conclusion of the Court of Claims that questions of "interpretation" are not questions of fact is ample reason why the parties to the contract should provide for final determination of such disputes by a method wholly separate from the fact limited provisions of the finality clause.86

It is noteworthy that the Court chose this broad approach rather than relying on other Justice Department arguments which would have had less impact on the finality dispute between the contract boards and the Court of Claims.87

Even when reading the case as a resolution of a contract dispute, the Supreme Court's opinion in Moorman seems to be insensitive to some of the problems presented. The contractor had entered into a contract of adhesion,88 yet the Court treated it as if it had been the product of actual bargaining. Perhaps the contractor had been aware of the specifications dealing with disputes; but equally plausible was his assertion that he was concerned only with the specifications for the job he had undertaken, and that he had not considered that the specifications might establish substantive rights.89 Nor did the Court ever acknowledge the truly ambiguous relationship between the specifications and contract clauses or mention the traditional contract doctrine that ambiguous adhesionary clauses are construed against the drafter.90

84. Ibid.
85. Ibid.
86. Ibid. (emphasis added). The Court also sharply criticized the Court of Claims "hostility" to the disputes clauses which had resulted in "blindness to a plain intent." Id. at 462.
88. See note 6 supra.
In short, the Court’s vision in *Moorman* seems to have been consciously limited to upholding contract clauses permitting final resolution of all disputes to be made within the executive departments. There are several possible explanations for this narrow focus. Perhaps the Court was merely trying to indicate that its decision in an earlier case upholding an “all disputes” clause must be broadly respected; viewed in this light, *Moorman* is a sharp rebuke to the Court of Claims, which may have ignored the earlier decision. Broader policy concerns, however, may also be sensed in the opinion. The Court may have envisaged contract boards as knowledgeable and experienced federal agencies administering a complex and expensive-to-litigate area of government action; since appellate review by the contract boards provided sufficient protection for the contractors, judicial review could be confined within narrow bounds. Or the Court may have felt that the government’s interest as a private orderer was at stake; by opening the door to departmental insulation of administrative contract proceedings, the Court may have sought both to give the executive departments the ability to rely on low bids made with cognizance of the dispute mechanism provisions, and to allow them to litigate the great bulk of their disputes in a forum sensitive to departmental procurement needs. Whatever its policy motivations may have been, in *Moorman* the Court effectively reallocated the institutional responsibilities of boards and courts to sharply diminish the relative importance of the latter’s role. In effect, the Supreme Court invited executive departments to utilize their superior bargaining position to preclude virtually all court review of questions of law. In so doing the Court, perhaps unconsciously, solved some of the problems of *de novo* review by the Court of Claims — but only at the expense of denying contractors the right to a hearing by a tribunal wholly separated from the executive department which was party to the contract dispute.

B. *United States v. Wunderlich*

In *United States v. Wunderlich* the Supreme Court laid down principles governing the extent of finality to be accorded determinations of “fact” made by executive departments and contract boards. The contractor had sought to increase his compensation for a construction project on the ground that the contracting officer’s method of computing the adjustments was improper. The Court of Claims found the Interior Department’s equitable adjustment computations “arbitrary and capricious,” declared itself therefore not bound

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91. The Court referred to its intent to reaffirm the principle laid down in its *per curiam* decision in *United States v. John McShain, Inc.*, 308 U.S. 512, modified, 308 U.S. 520, which it felt had been flouted. *Id.* at 461. Perhaps it made its position plain at the expense of the merits of the instant case.


93. See note 100 *infra*, discussing the articulation of this policy by the Department of Justice in *Wunderlich*.


95. 342 U.S. 98 (1951).

96. The disputes clause at issue is set out in *id.* at 99.
by departmental fact determination, and awarded a judgment to the contractor.\textsuperscript{67} This standard of review was deemed improper by the Supreme Court, which held that the departmental decision had to be treated as final in the Court of Claims unless conscious fraud was alleged.\textsuperscript{68} A narrow reading of its previous decisions and an emphasis on the voluntary quality of contract negotiation were the sole bases of the Court's decision.\textsuperscript{68} \textsuperscript{100} While the Court thus engraved an invitation for Congress to expand the scope of judicial review of contract board findings,\textsuperscript{101} it left little doubt that in its view traditional doctrines of contract law, considerations of administrative neatness within executive departments, and concern with government economy in the procurement program had carried the day.\textsuperscript{102}

The Court's opinion in \textit{Wunderlich} complemented \textit{Moorman's} treatment of questions of law by cutting back the Court of Claims' scope of review of contract board decisions on questions of fact. No longer could the Court of Claims utilize the standards — arbitrary, capricious, bad faith, or lack of substantial evidence — developed over the years to overturn contract board determinations.\textsuperscript{103}

This reallocation of power evoked dissent in \textit{Wunderlich} from Supreme Court Justices whose concern was with the fairness of the process, rather

\textsuperscript{97} The Court indicates, "although there was some dispute below, the parties now agree that the question decided by the department head was a \textit{question of fact}." \textit{Ibid.} (emphasis added). The Department of Justice apparently had initially argued that the case represented an attempt by the Court of Claims to circumvent \textit{Moorman}. See Petition for Writ of Certiorari, pp. 2-3, United States v. Wunderlich, 342 U.S. 98 (1951).

\textsuperscript{98} 342 U.S. at 100.

\textsuperscript{99} \textit{Ibid.}

\textsuperscript{100} An interesting gloss on the freedom of contract rationale for contract board finality was made in the Department of Justice's brief:

\textquote{The judicial function in [disputes clause] review situations is \textit{quite different} from that traditionally involved in the review of \textit{administrative determinations}. Article 15 disputes clause is a contractual not a statutory provision. It embodies a deliberate bargain — if made honestly and in good faith, and is \textit{not to be the subject of court litigation}. Like every other provision of a government contract, it is an element which doubtless affects the contract price.}


The Court was also invited to (and evidently did) view the problem from the standpoint of the government as a private party seeking to maximize its own economic advantage:

\textquote{The obvious purpose of such provisions is to avoid the expense and delay of litigation. . . . [T]he advantages of competitive bidding will be lost to the Government if contractors are requested to submit bids on the basis of a contract providing for the final settlement of disputes by the department head, and the successful bidder is later permitted to disregard this requirement which undoubtedly was given substantial weight in the bids of others.}

\textit{Ibid.}

\textsuperscript{101} 342 U.S. at 100.

\textsuperscript{102} The opinions have been characterized as having a "curiously laissez-faire tone, almost an archaic or nostalgic ring . . ." Braucher, \textit{Arbitration Under Government Contracts}, 17 Law \& Contemp. Prob. 473, 500 (1952).

\textsuperscript{103} See notes 14, 15 \textit{supra}. 

\textsuperscript{67} The Court indicates, "although there was some dispute below, the parties now agree that the question decided by the department head was a \textit{question of fact}." \textit{Ibid.} (emphasis added). The Department of Justice apparently had initially argued that the case represented an attempt by the Court of Claims to circumvent \textit{Moorman}. See Petition for Writ of Certiorari, pp. 2-3, United States v. Wunderlich, 342 U.S. 98 (1951).

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\textsuperscript{103} See notes 14, 15 \textit{supra}. 

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than solely with its efficiency. Mr. Justice Douglas emphasized that the
majority’s destruction of judicial review threw out of kilter the balance be-
tween the executive and the judiciary; by subjecting the contractors to poten-
tially “tyrannous” behavior of contracting officers, he asserted, it endangered
individual liberty.104 Perhaps because there had been no contract board in the
Interior Department, Douglas’s opinion indicated no awareness of the ex-
istence of contract boards and of the possibility that such boards might either
reduce or aggravate these dangers.105 Mr. Justice Jackson, dissenting separa-
tely,106 emphasized that the finality clause enabled the contracting officer
to assume a peculiar position of power. Asserting suggestively that “men
are more often bribed by their loyalties and ambitions than by money,”107
Jackson urged that a fiduciary duty, embodying the “vanishing standard of
good faith and care”108 should be placed on the government contracting offi-
cers and should be the basis of judicial review. There is an implicit tension
in Jackson’s opinion between the hope that contracting officers would exercise
self-restraint in the exercise of their newly sanctioned power and the tradi-
tional concept that one body (contracting officers and boards) could only
be held in check if subjected to another (the Court of Claims). Justice
Jackson, however, failed to indicate any rationale for his position of limiting
agency finality, other than elementary notions of fairness; he pressed no
analogy either to contracts of adhesion or to the administrative process. Nor
did he suggest a basic structural reorganization of the contract boards or
the Court of Claims.

C. The “Wunderlich Act”

Unswayed by judicial freedom of contract arguments,109 and pressed hard
by contractors anxious to preserve their access to the courts,110 Congress
responded to the Wunderlich decision by enacting a law designed to enlarge
the channels of judicial review of executive department contract dispute
dispositions.111 The “Wunderlich Act” provides:

104. 342 U.S. 98, 101 (dissenting opinion, in which Reed, J., concurred).
105. In Wunderlich the Secretary reviewed the contract officer’s decision, and fully
approved it, without a hearing. Schultz, Proposed Changes in Government Disputes
106. 342 U.S. at 102.
107. Id. at 103.
108. Ibid.
109. See, e.g., House Wunderlich Hearings 47 (Representatives Celler and Willis),
39 (Representative Walter).
110. Id. at 10-12 (testimony of vice president and counsel of the Wunderlich Con-
tracting Co.). The Court of Claims had made plain the harsh significance of the Wun-
derlich decision to contractors in Palace Corp. v. United States, 124 Ct. Cl. 545 (1953).
111. SENATE COMMITTEE ON THE JUDICIARY, FINALITY CLAUSES IN GOVERNMENT
CONTRACTS, S. REP. No. 1670, 82d Cong., 2d Sess. 1 (1952) [hereinafter cited as SENATE
WUNDERLICH REPORT].
Section 321
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 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 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.

Section 322
No government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.\footnote{112. 68 Stat. 81 (1954), 41 U.S.C. §§ 321-22 (1958).}

The first sentence of Section 321 plainly was intended to overrule \textit{Wunderlich}. The proviso was to embody the standards of judicial review. Section 322 was intended to overrule \textit{Moorman}: due to ambiguities in the \textit{Moorman} opinion, however, overruling may have meant either to prevent the contract board from deciding questions of law with finality even in the absence of a contract provision, or — reading the case more restrictively — to prevent merely the use of contract clauses, similar to that in \textit{Moorman}, binding contractors to the legal findings of non-judicial bodies.\footnote{113. These two interpretations can be extracted from \textit{House Wunderlich Report} 5.}

The Wunderlich Act represented a compromise of many interests. It attempted to resolve the immediate problem of the scope of judicial review without coming to grips with the institutional problems inherent in the question of whether judicial review should be based on \textit{de novo} evidence or on the record. One reason for this was almost certainly the ambiguity which existed in the role of the GAO, which asserted the same right of review in its audits as any court. Because of a fear that the GAO would use a broader based standard of review to reverse more frequently contract board decisions favorable to contractors, some large military contractors, otherwise desirous of judicial review, shrank from urging that contract board finality be cut back.\footnote{114. But compare \textit{House Wunderlich Hearings} 91-95 (representative of Aircraft Industries Association); \textit{id.} at 104-06 (representative of Radio-Electronics-Television Manufacturer's Association), with \textit{id.} at 5 (statement of general contractor less concerned with the impact of GAO review); \textit{id.} at 127-28 (a sweeping proposal, doing away with the law-fact distinction and retaining GAO review).} Another explanation for the act's ambiguous treatment of the nature of judicial review may derive from the varying interests in judicial review among contractors themselves. Those contractors bound by contracting officers' decisions (i.e., in departments with no contract appeal boards) wanted to stand on equal footing with the government's representatives. For them, \textit{de novo} review in the Court of Claims was clearly preferable; the possibility of review was seen as a means of protection against arbitrary or capricious
treatment by contract officers. On the other hand, contractors who had recourse to departmental contract boards were generally satisfied with judicial review on the record — provided that it was assured that the contract board’s record would be complete and its procedures fair.

These conflicting interests influencing Congress may also have caused the ambiguity in the standards applicable to court review of contract board determinations of fact. The House Report may be read to suggest that two different standards of review are embodied in the act. The standards drawn from earlier cases — fraud, caprice, gross error, bad faith — would mainly, though not exclusively, be of use in keeping contract officers in line. The “substantial evidence” test, drawn from the APA, was apparently viewed as the basis for correction of the “lack of uniformity” and quality in procedures among the various departments. It is thus possible that Congress may have included the substantial evidence test less as a guide to judicial review than as an admonition to the contract boards to improve their procedures. The legislative history is, however, subject to the alternative plausible interpretation that Congress intended the contract board to be reviewed in the same manner as courts would review independent agencies subject to the APA. Under this theory, contract board determinations of fact could only be upset when they failed to meet the substantial evidence test. Support for this latter view can be found in the frequent mention of the APA in the House Report, as well as in the testimony by the American Bar Association in the congressional hearings.

A second cause of the ambiguity as to the meaning and role of the substantial evidence test may be the fact that controversy over the proper roles of contract boards and courts, which characterized the relevant litigation,

115. *Id.* at 12, 13 (discussion of subpar departmental proceedings by counsel for Wunderlich).

116. Compare the testimony of John W. Gaskins, attorney, *id.* at 78-79 (emphasizing need for the improvement of quasi-judicial review in departments such as the Veterans Administration), with his testimony in *Senate Wunderlich Hearings* 35 (emphasizing the lack of any real quasi-judicial review in others, such as the Interior Department, and contrasting this lack with the developed procedures of the ASBCA).


118. It is believed that if the standard of substantial evidence is adopted this condition [lack of uniformity] *will be corrected* and that the records of hearing officers will hereafter contain all the . . . 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.

*Id.* at 5.


120. *House Wunderlich Report* 45. See *House Wunderlich Hearings* 88-91 (statement of David Reich).
was virtually absent at the hearings. The Wunderlich Act does not purport to define the procedures of the contract boards; it clearly does not apply the APA to them. Although the act is divided into “fact” and “law” sections, this was probably intended not as a basis for a re-allocation of functions — though in the cases prior to the act the concepts had been used for that purpose — but rather to remedy what were regarded as important injustices resulting from the Wunderlich and Moorman cases respectively.

Whatever the reasons for the act’s ambiguity regarding standards of review, the consequences of choosing between its alternative readings are significant. Treating the substantial evidence test as a broad admonitory standard of review would make it possible for the Court of Claims to overturn many board determinations as having been improper and would enable the court to conduct more de novo hearings. Application of the APA-type substantial evidence test would limit the Court of Claims’ opportunity to overturn contract board findings of fact and reduce the number of de novo hearings which could be held by the court. The Wunderlich Act, in short, left the relationship between the contract boards and the Court of Claims in as much doubt as it left the form of judicial review which was to be applied.

D. Construction of the Wunderlich Act by the Federal Courts

Following the Wunderlich Act, the Department of Justice ceased emphasizing contract arguments and adopted the position that if there is “substantial evidence” in the administrative record to support a contract appeals board holding, the Court of Claims may not make de novo findings of fact unless the contractor makes a showing of fraud, or at least gross procedural unfairness. Thus framed, the issue logically breaks down into two traditional administrative law questions: (1) What degree of evidence must a court find to uphold an administrative agency? and (2) Shall courts hold a trial de novo on matters already administratively processed?

The great majority of lower federal courts accepted the administrative law frame of reference, and almost always refused to review de novo contract board findings. First, the district and circuit courts decided whether they

121. But see House Wunderlich Hearings 46 (representative of Department of Justice).
122. Rather, it appears, the focus was on the institution of judicial review alone. Compare House Wunderlich Hearings 89 (American Bar Association Representative), with House Wunderlich Report at 4.
123. House Wunderlich Report 1, 5.
124. Substantial evidence would then become a term of art of a special nature in the government contract area, justifying a broad review of contract board procedures and holdings.
125. These arguments are well marshaled in Mann Chem. Labs, Inc. v. United States, 174 F. Supp. 563 (D. Mass. 1958). Another concern of the district courts in the cases cited infra was, of course, the duplication of board and court hearings, resulting in greater expense of time and money. See also United States v. MacKinnon, 289 F.2d 908 (9th Cir. 1961); Hoffmann v. United States, 276 F.2d 199 (10th Cir. 1960); Lowell O. West
were facing a judicially cognizable "question of law" or a "question of fact" whose finality was defined by Wunderlich Act tests. If the former, de novo evidence was sometimes heard. If the latter, the only question the courts chose to face was whether "substantial evidence" existed to support the contract board’s findings, a question which logically seemed soluble only by looking at the record accumulated before the boards. Support for this approach was drawn from administrative law, where "supported by substantial evidence" is a term of art implying review on the record, and from the Wunderlich Act’s legislative history. Two circuit courts of appeal, however, while accepting the law-fact distinction as a meaningful one in most contexts, suggested that a functional approach might be taken to the question of when de novo review of facts was proper. Thus, the Second Circuit held that de novo hearings would be afforded contractors in circumstances where the evidence presented by the government was "so insubstantial as to make it a question of lay." In United States v. Blake Construction the District of Columbia Circuit went slightly further in developing a functional approach. Faced with a problem of contract reformation, which, unlike questions of whether certain work falls under contract specifications, is not a matter requiring expert determination, the court held that since the district judge was probably better equipped to handle the question than a contract board, he should be permitted to make de novo findings of fact if necessary. It therefore denied summary judgment for the government, and remanded to the district court for de novo review.

The Court of Claims’ approach differed radically from that of other federal courts. It rejected the idea that the Wunderlich Act had transformed the Lumber Sales v. United States, 270 F.2d 12 (9th Cir. 1959); Wells and Wells, Inc. v. United States, 269 F.2d 412 (8th Cir. 1959); Langoma Lumber Corp. v. United States, 232 F.2d 886 (3d Cir. 1956); M. Berger Co. v. United States, 199 F. Supp. 22 (W.D. Pa. 1961). For a discussion of these cases, see Harrison, Eight Years After Wunderlich — Confusion in the Courts, 28 Geo. Wash. L. Rev. 561 (1960).


128. 296 F.2d 393 (D.C. Cir. 1961). Reformation of contract cases are not handled by contract boards such as the ASBCA, and hence the Blake problem will not arise in the Defense Department. Spector Interview. The Department of Justice has questioned the validity of the Blake decision. See Brief for Appellee, Silverman Bros. v. United States, 324 F.2d 287 (1st Cir. 1963). Compare Note, 48 Va. L. Rev. 756 (1962), with Note, 75 Harv. L. Rev. 1645 (1962).

129. See, e.g., Fehlhaber Corp. v. United States, 138 Ct. Cl. 571, 151 F. Supp. 817, cert. denied, 355 U.S. 877 (1957); H. L. Yoh Co. v. United States, 288 F.2d 493 (Cl. Ct. 1961). Prior to the Wunderlich Act, the Court of Claims had taken de novo evidence in cases which had been before the contract boards. See, e.g., Wagner Whirler & Derrick Corp. v. United States, 128 Ct. Cl. 382, 121 F. Supp. 664 (1954).
contract boards into administrative agencies, and had, correlative, transformed the jurisdiction of the Court of Claims into that of an appellate court. It leveled serious criticism at contract board deficiencies in building its record, and emphasized that the Wunderlich Act had made no provision in this regard. Conceding the logic of having review on the record, it rejected this approach on the practical ground that it would lead to a need for two proceedings: one at which the administrative record—"in many cases a mythical entity"—was pieced together and evaluated; and the second, if shown to be required by the inadequacy of the administrative record, a de novo evidence review. The court also emphasized its view that the Wunderlich Act had restored the entire government review situation to its pre-Wunderlich status, including the nature and scope of review by the Court of Claims.131 The Court of Claims did adopt a summary judgment procedure based on the administrative record,132 but this was small solace to the Department of Justice, which successfully sought certiorari in United States v. Carlo Bianchi & Co.133

E. United States v. Carlo Bianchi & Co.

In Bianchi the contractor was seeking additional compensation for safety provisions which he had installed in a tunnel he was building under contract. The government challenged the right of the Court of Claims to reverse the contract board and to award compensation to a contractor under the standard "changed conditions" clause of the contract after a de novo trial, at which some crucial testimony was presented by witnesses who had not appeared before the Board of Claims and Appeals of the Corps of Engineers.134 In the government's view, since there was "substantial evidence" on the board's record, the case should not have been re-opened. The board, it argued, had been treated as a mere "trial run," and had not been given an opportunity to consider and process the case fully.135 Moreover, the appeal to the Court of Claims had taken place six years after the Board's ruling,136 by which time possible witnesses might well have died or relevant material might have become unavailable. On the other hand, as the dissenters in Bianchi emphasized,


131. Judge Littleton, concurring, id. at 955-56, emphasized the sketchiness (and non-jurisdictional nature) of the Wunderlich Act, and made the point that if Congress had wanted to limit judicial review, it was perfectly capable of making this clear.

132. See P.L.S. Coat & Suit Corp. v. United States, 148 Ct. Cl. 296, 180 F. Supp. 400, 407 (1960), holding that before trial de novo could be granted, plaintiff must show from the record that a genuine issue of material fact existed. Arguably, the court's action in this case might be characterized as a type of appellate review.


134. 373 U.S. at 711, 712.


136. 373 U.S. at 711.
“subnormal administrative procedures” had marked the formulation of the Board’s decision, which had been based on a letter which “somehow, in a manner not disclosed by the record” had come into its hands. There had been no opportunity to rebut the letter’s contents until the case was before the Court of Claims. 137

The Supreme Court’s opinion was framed as an interpretation of the Wunderlich Act and its legislative history 138 — a difficult task, in view of the competing policies represented in the act’s cryptic language. 139 Although the government was apparently arguing only that de novo evidence should not have been taken because “substantial evidence” existed on the administrative record, 140 the Court’s holding went further:

Apart from questions of fraud, determinations of the finality to be attached to a departmental decision on a question arising under a “dispute” clause must rest solely on consideration of the record before the department. 141

Thus, the standards of arbitrary, capricious, and in bad faith were subsumed under the substantial evidence test. The Court supported this position by analogizing the court-board relationship to the judicial review of administrative


138. The majority drew heavily, though without reference, on Judge Laramore’s dissent in Valentine, supra note 137.

139. See the discussion of the Wunderlich Act at notes 109-23 supra and accompanying text.


141. 373 U.S. at 714.

First, the bill was entitled an act “to permit review.” Review, where procedurally not provided for, had been held to be confined to the administrative record. 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 are not necessarily in point. They involved rate-fixing and regulation promulgation — typical administrative agency functions, which were not involved in Bianchi. Moreover, these operations have come under the APA. See note 137 supra. If the Court was urging Congress to create a procedure act for contract boards, it might have been more argumentative, rather than assertive of existing “fact,” in its opinion.

Second, the Court pointed out, 373 U.S. at 715, that “substantial evidence” was a term of art associated with review limited to the administrative record. As indicated above, the role which the substantial evidence test was to play was unclear at the time of the passage of the Wunderlich Act; as will be shown, there is doubt as to what meaning Congress ultimately intended to affix to the term — i.e., whether the test was intended to be applied in the same way in the board-court context as in the APA and the Taft-Hartley Act.
tive agencies. The Court strongly emphasized the administrative law connotations of the terms used in the Wunderlich Act and the House Report; congressional intent to provide contractors with judicial relief similar to that before Wunderlich was played down.\textsuperscript{142} Finally, as a basic objection to Court of Claims \textit{de novo} review, the Court emphasized an important practical administrative concern: the avoidance of "needless duplication of evidentiary hearings and a heavy additional burden in time and expense . . . surely delay at its worst."\textsuperscript{143} The picture the Court created was of an interest in the perfection of the administrative process. The Court thus chose to adopt the narrow APA standard of fact review rather than the admonitory standard which would have given broader scope to Court of Claims review.

The Supreme Court then sought to accommodate the obvious congressional concern with the improvement of contract board procedures by formulating an alternative means of Court of Claims supervision over contract board procedures. The Court asserted that the policy underlying the Wunderlich Act necessitated a procedure somewhat analogous to the federal courts' doctrine of abstention:\textsuperscript{144}

In situations where the Court [of Claims] believed that . . . the departmental determination could not be sustained under the standards laid down by Congress [procedural standards suggested by the Wunderlich Act] . . . the Court could . . . stay its own proceedings pending \textit{some further action} before the agency involved.\textsuperscript{145}

Should an agency fail to remedy a particular "substantive or procedural" inadequacy, the Court of Claims would then find for the contractor\textsuperscript{146} — though in cases where the merits supported the government's case, the theory on which this would be done is unclear. The Court thus assumed that the Court of Claims could make out what standards of board due process Congress

\begin{itemize}
  \item 373 U.S. at 715-16. But see discussion of contractors' different interests, at notes 109-17 \textit{supra} and accompanying text.
  \item 373 U.S. at 717.
  \item 373 U.S. at 717-18 (emphasis added).
  \item 373 U.S. at 718. The Court thus provides for two situations in which the Court of Claims may reverse the determination of the contract board, the other being where decision for the contractor is justified on the face of the administrative record. Perhaps, the Court had in mind the kind of model proposed by Chairman Spector of the ASBCA, 20 Fed. B.J. 398, 407 (1960), where he suggested that the Court of Claims should make a threshold judgment as to procedural regularity; and if satisfied that a contract board's proceeding has been procedurally satisfactory, it should proceed to review the board on the record, according to the standards of the Wunderlich Act. (Spector suggested, however, that should the board procedure prove below par, the Court of Claims should take \textit{de novo} evidence in the case.) \textit{Id.} at 408. Spector does not think the whole remand problem of great relevance. 29 \textit{Law \& Contemporary Prob.} 87, 95 n.41 (1964). Consequently, he does not think much use will be made of the Court of Claims new uniformity enforcing powers. Spector Interview.
\end{itemize}
had laid down,\textsuperscript{147} and could negatively coerce "uniformity"\textsuperscript{148} in contract board procedures.

The Supreme Court's opinion in \textit{Bianchi} was its first conscious attempt to work out a relationship between the bodies responsible for resolving government contract disputes. However, the Court's decision is flawed in that, like many judicial attempts to rectify legislative inaction or ambiguity, it sought to use courts to implement policies for which the legislature could have created more sharply honed tools.\textsuperscript{149} The time and expense of applying its "abstention" doctrine may become as great as would be involved in full-scale Court of Claims review of the boards. The Court of Claims has no remand power to the contract boards. It can only stay its proceedings and let contractors return, on some unspecified theory, to the boards.\textsuperscript{150} Nor is it clear how the boards will react to this improvised remand procedure: will boards try to retain their challenged procedure by raising the amount of a contractor's award in order to discourage further appeal, or will they make honest efforts to correct their procedures?

It is also unclear what additional remedies are available to contractors for board heel-dragging or non-uniform response to procedural challenges. A contractor in such an "abstention" situation lacks a final Court of Claims judgment on which he can seek \textit{certiorari} to the Supreme Court, and he may find himself unable to get his case speedily re-examined by a recalcitrant contract board. The Court's suggestion, moreover, may tend to aggravate court-board relations by assigning to the Court of Claims the role of continual overseer of contract board procedures. Finally, it is certainly questionable whether the Court of Claims — a commercial court with a crowded docket — is suited to making such decisions regularly. It is unfair, in sum, to put a

\textsuperscript{147} Schultz, \textit{29 Law & Contemp. Prob.} 115, 126 n.49 (1964), suggests that such a standard will be based on Morgan \textit{v. United States}, 298 U.S. 468 (1936), and Morgan \textit{v. United States}, 304 U.S. 1 (1938), which had been recognized by the Court of Claims as applicable to the boards prior to \textit{Wunderlich}. See also the \textit{Bianchi} dissenters, 373 U.S. at 720. Cf. \textit{Reich}, \textit{The New Property}, 73 \textit{Yale L.J.} 733, 778-87 (1963).

\textsuperscript{148} 373 U.S. at 718.


The Pennsylvania R.R. \textit{v. United States}, 363 U.S. 202 (1960), cited by the Court in defense of its theory, 373 U.S. at 717-18, held it error for the Court of Claims to render a judgment based on an Interstate Commerce Commission order prior to determination of the order's validity by the District Court. The Court of Claims should have stayed its proceedings until that ruling was made. Query how much in point is that decision, which concerned not review proceedings but a determination of rate reasonability and applicability, even assuming that contract boards are properly accorded the same treatment as administrative agencies.
contractor in the position of having to ride a pogo stick between the Court of Claims and a contract board in search of adequate procedures when his livelihood — particularly if he is litigating to maintain his profit margin — is dependent on the manner and extent to which he pursues this course.151

Even if the stay procedure outlined by the Supreme Court can be effectively worked out so as not to prejudice a contractor, there are other problems present in the Court's opinion in Bianchi. For example, what has become of the procedural tests of "arbitrary" and "capricious" of the Wunderlich Act? If a contractor alleges that a contract board utilized extra-record information in reaching its decision, would a de novo hearing be proper to establish the validity of his charge?152 Nor does Bianchi address the issue of board and court jurisdiction regarding "questions of law." If contract boards reversed their current policy and began to hear breach of contract cases, would the Court of Claims be precluded from conducting a full trial in these cases as it has traditionally done? A similar issue faces the Court of Claims if a contractor, who has failed below, first raises the issue of breach of contract before the court. Shall the Court of Claims disregard those relevant facts which the contract board found in the adjustment case below, or shall its de novo hearing rehash these facts? May the court hear any additional evidence relating to the new legal theory, or must it send the case back to the board for new findings of fact? Another area of doubt is how the Bianchi opinion affects Court of Claims procedures where the substantial evidence test is not met by a contract board record. Should the Court of Claims now reverse the board decision on the face of the record, or conduct a de novo hearing, or utilize the stay mechanism even though the case is not one involving procedural irregularity?153

Bianchi was a case with a theory. The contract boards were to be shoehorned into the model of independent administrative agencies — even though they were not subject to the APA and had procedural shortcomings. The Court of Claims was to be flattened from a split level government contracts court which took de novo evidence to a somewhat artificial court of appeals largely reviewing on the record. Given the material at hand, the Court has built a system which can probably work, although it may cause an occasional outrageous result. Its decision is more institutionally oriented than earlier ones. But it still falls short of offering a satisfactory solution to the complex institutional problem of administering government contracts and adjudicating contract disputes.

151. Perhaps this overstates the problem. Chairman Spector asserts that on remand contract boards would act quickly. Spector Interview. But Commissioner Gamer emphasizes that shuttling a contractor back and forth between court and board may eventually lead him to give up the pursuit of his remedy. Gamer Interview.

152. See Schultz, supra note 147, at 126-27.

F. Judicial Response to Bianchi

In several cases since Bianchi the Department of Justice has sought to internalize almost all findings of fact in government contract disputes within executive departments, even if the questions of fact are the basis for the determination of questions of law. Thus in Stein Bros. Mfg. Co. v. United States, the department took the position that the Court of Claims may never take evidence in a lawsuit arising under a contract containing a disputes clause regardless of the theory of the action. Acceptance of the department's contention would have resulted, in many respects, in a return to the situation existing prior to the passage of the Wunderlich Act: since decisions on questions of law are often dependent upon findings of fact, sometimes the Court of Claims' scope of review on questions of law would be limited to the point where board determinations of law questions would effectively be final.

In Stein Bros., and again in Wingate Construction Co. v. United States, the Court of Claims rejected the government assertion that it was barred by Bianchi from taking de novo evidence. Placing itself in clear opposition to the Department of Justice's position, the court reiterated the continuing validity of the law-fact distinction, and made it clear that it would consider a great many issues subject to de novo review under the generous rubric of "questions of law." And in WPC Enterprises v. United States it suggested that subordinate "factual" findings were wholly "subsumed" in the larger legal problem of contract interpretation, and could be re-examined de novo. The Court of Claims also suggested in this case that if "substantial evidence" could not be found in the record, the board decision need not be treated as final and the court could make independent findings. The Court of Claims thus laid

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155. Memorandum of Law submitted by the Department of Justice in the Stein case, set out in Spector, Is It "Bianchi's Ghost" — or "Much Ado About Nothing"?, 29 Law & Contemp. Probs. 87, 105-06 (1964). Related propositions advanced were:
   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 decided questions of law, only their determinations of fact questions are entitled to finality.

Ibid. (emphasis added): See the discussion id. at 106 n.85, for an indication of the way the Justice Department would "use" the contract boards if its position were accepted. Spector does not accept this position, id. at 106-07.
156. "If you scrutinize a legal rule, you will see that it is a conditional statement referring to facts." Frank, Courts on Trial 14 (1963 ed.).
the foundations for fairly extensive *de novo* review of facts. The Justice Department will certainly press its position, and may well be more successful in the district and circuit courts. The *Wunderlich* cycle of haphazard board, court and legislative tugging and pulling will continue, passing by the fundamental questions as to the nature and the role of the institutions involved.

IV. POSSIBLE APPROACHES TO THE PROBLEM OF GOVERNMENT CONTRACT DISPUTES RESOLUTION — AND A PROPOSED SOLUTION

Where the *Wunderlich* cycle will lead is unclear. In response to *Bianchi*, several alternative resolutions of the contract disputes problem have been formulated. Some of these are based on an acceptance and elaboration of the *Bianchi* decision; some are more drastic in nature. What follows is an evaluation of the likely lines of development and the current proposals to modify or divert their course. Finally, an institutional solution to the problem will be suggested, synthesizing elements of some of the proposals.

A. Development of the Status Quo — Application of Administrative Law Concepts

*Bianchi* suggested that henceforth contract boards are to be treated as independent administrative agencies; the Court thus implied that the scope of judicial review of the contract boards was to be governed by the concepts developed in administrative law. It is submitted that these concepts — specifically “law-fact” and “substantial evidence” — are poor guides to a meaningful judicial review in the government contracts area and to a permanent allocation of roles between court and board.

1. The law-fact distinction

The law-fact distinction, the Court of Claims’ chosen battlefield for preserving its jurisdiction, is one of shifting sands. While historically of some meaning in drawing a line between judge and jury, the distinction has thus far proved elusive as a tool for separating the proper functions of non-judicial bodies from those of the courts. Commentators have suggested that law and fact are merely labels pasted by courts on particular situations as they arise, in order to reflect a policy determination as to the appropriateness of review. The Supreme Court has often sidestepped the law-fact issue entirely by asking simply whether a “rational basis” existed for adminis-

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159. See Schultz, *supra* note 147, at 126 n.27; Note, 39 N.Y.U.L. Rev. 290, 312-14 (1964) (considering the relative merits of the Court of Claims and Department of Justice positions as illuminated by the House *Wunderlich* Report).
160. See, *e.g.*, Silverman Bros., Inc. v. United States, 324 F.2d 287 (1st Cir. 1963).
161. The contract board will not necessarily be unhappy with this development. See Spector, *supra* note 155, at 104-07.
163. 9 WIGMORE, EVIDENCE § 2549 (3d ed. 1940).
164. 4 DAVIS, ADMINISTRATIVE LAW § 30.02 (1938). Davis distinguishes between the analytical approach which judges purport to be using and the practical policy considera-
In dealing with "mixed questions of law and fact," the Court has sometimes recognized that it may have to overstep the analytical line between the two, since:

Where what purports to be a finding upon a question of fact is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter, the Court will, in order to decide the legal question, examine the entire record, including the evidence if necessary, as it does in cases coming from the highest court of a state.

In dealing with "mixed" questions of law and fact in situations where it does not wish to substitute its judgment for that of a body claiming particular expertise, the Court has readily found all problems of petitioners to be simply questions of fact—despite the Court's recognition that a final decision on the facts will often either foreclose examination of most law questions, or will so shape the case that only one legal conclusion may follow. This would seem especially true in the contract area in general, where the intent of the parties, most often characterized as a question of fact, will eventually determine the outcome of most cases.

In short, since the law-fact distinction, as it is currently applied in the courts, is largely policy-oriented, the Supreme Court, as the final arbiter of how the law-fact policy line shall be drawn, may well adopt the position of the Department of Justice, and draw the line between law and fact in such a way as to treat most matters as questions of fact cognizable by the contract boards. This approach would, of course, leave the Court of Claims with few questions of law to decide, and would, effectively, prevent it from conducting de novo hearings in procurement contract cases.

The results of taking a more analytical approach to the law-fact distinction are, unfortunately, no more helpful in the contract disputes context. Professor Jaffe, the leading proponent of this approach, concedes the particularly intimate association of law and fact in the administrative process:


168. The Court of Claims is well aware of this proposition. See, e.g., Langevin v. United States, 100 Ct. Cl. 15, 30 (1943).

169. Jaffe, Judicial Review: Question of Law, 69 Harv. L. Rev. 239 (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.
[The] law-making aspect of the fact-finding process is particularly pronounced in administrative fact-finding; for we have a fact-finder who combines expertness and a responsibility for policy making. His experience tends to beget rules for drawing inferences, his devotion to the purposes of the statute tends to beget presumptions for resolving doubtful questions in favor of his theory of statutory purpose.\textsuperscript{170}

In Jaffe's view, courts should test exercises of the administrative power to create rules having the effect of law in terms of the accordance of such rules with what can reasonably be treated as statutory purpose.\textsuperscript{171} This principle, though, can provide but scant guidance for the Court of Claims in its review of contract boards. The Wunderlich Act, while authorizing Court of Claims review on questions of law, provides the court with no statutory guidance on the policies to be implemented on such review. Contract boards may make decisions based not only on general notions of contract law but also on departmental procurement policies. Certainly, a court review restricted to considerations of general contract law would be sterile if contract boards were not restricted to the same body of law. Even if the Court of Claims were considered to have a role in reviewing departmental procurement policy, and were it able to isolate these policy ingredients in contract board fact determinations, how could the court evaluate a contract board's interpretation of departmental policies? A related difficulty with applying Jaffe's analytical approach to the law-fact distinction is that in practice contract boards do not attempt to fragment their decisions into discrete law and fact issues. Such separation would seem necessary in order to permit an effective court review on the decisions of law actually made by the contract board. And, as noted above, the Court of Claims lacks the power to remand improperly decided cases to the contract boards for further clarification. Finally, one might question whether any analytical approach to the law-fact distinction could be effectively applied in the government contract area. The distinction, as currently used by the boards and the court, not only delineates the scope of review, but also defines the jurisdictional lines between the bodies and determines the right of the court to conduct \textit{de novo} hearings. As such, the dichotomy is the battleground of prerogatives between the Court of Claims and the contract boards. The institutional consequences of the characterization of an issue as law or fact seems too great to yield to the careful and objective analysis required by Jaffe's approach.

2. The "Substantial Evidence" Test

In \textit{Bianchi} the Court singled out the substantial evidence test for greater emphasis than any of the other Wunderlich Act tests.\textsuperscript{172} This was in keeping with a recent trend toward the development of a "uniform conception on

\textsuperscript{170} Id. at 245.
\textsuperscript{171} See id. at 261.
\textsuperscript{172} 373 U.S. at 715.
which to ground the judicial review of administrative findings of fact.\textsuperscript{173} An initial problem with the use of a substantial evidence test is determining the intended content of that test — was it viewed as the equivalent of the APA standard of review or was it meant to be less rigorous?\textsuperscript{174} A more fundamental problem is that the substantial evidence test is not an abstract principle which can be mechanically applied, but serves as a guide to courts in structuring their relationships with statutorily authorized administrative bodies. Judges most often seek a showing of conscientiousness on the part of the administrative bodies in exchange for the deference which they extend to administrative expertise.\textsuperscript{175} Much of the theoretical justification for judicial deference to agency fact findings is lacking, however, in the contract board context. The contract boards are not charged with the implementation of statutory policies, they do not serve a ministerial function, and the need for uniformity in their decisions would seem to be correspondingly less, at least from the contractor’s point of view. Moreover, since the basic issues in most cases relate to contract interpretation, the contract boards may not be able to claim a special technical knowledge or experience.\textsuperscript{176}

The indefinite quality which characterizes the substantial evidence test, moreover, makes the standard a particularly uncertain guide to the allocation of institutional functions in the contract dispute area. There is some evidence that the Court of Claims will in the future use a strict substantial evidence concept in order to overturn more board decisions and to conduct \textit{de novo} hearings. On the other hand, it seems likely that the Supreme Court will

\begin{itemize}
  \item \textsuperscript{174} The \textit{House Wunderlich Report} 4 refers to the definition of substantial evidence — “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion” — given in \textit{Consolidated Edison Co. v. NLRB}, 305 U.S. 197, 229 (1938). See Stason, “\textit{Substantial Evidence in Administrative Law}, 89 U. Pa. L. Rev. 1026, 1049-50 (1941). But the APA, cited often in the House Report, provides for a broader review: in setting aside agency action unsupported by substantial evidence, “the court shall review the whole record or such portions thereof as may be cited by any party.” APA § 10(e) (emphasis added). And in \textit{Universal Camera Corp. v. NLRB}, 340 U.S. 474 (1951), the Supreme Court, construing the new APA provisions, broadened the \textit{Consolidated Edison} scope of review: “The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.” \textit{Id}. at 488.
  \item The \textit{House Wunderlich Report} neither cites \textit{Universal Camera} nor sets up APA standards nor expressly mentions review on the whole record. It is hence somewhat unclear whether the limited \textit{Consolidated Edison} or the broader \textit{Universal Camera} approach was intended, by Congress or the Court, to be applied by the Court of Claims when reviewing a contract board’s “administrative record” under the substantial evidence test. See Schultz, \textit{supra} note 147, at 125.
  \item \textsuperscript{175} \textit{Universal Camera, supra} note 174, at 488-89.
  \item \textsuperscript{176} Commentators have emphasized the inaptness of the “administrative expertise” argument in the review of contract boards by the Court of Claims. See Schultz, \textit{supra} note 147, at 131-32; Note, 39 N.Y.U.L. Rev. 290, 308-09 (1964).
\end{itemize}
react to such an attempt to derogate from contract board finality by construing the test as permitting but a narrow scope for court review of board determinations.\textsuperscript{177}

If the present system of judicial review of contract boards is to be perpetuated and developed rationally, it would seem advisable for the Department of Justice and the Court of Claims not to place too much weight upon mechanical application of the substantial evidence test. They should look instead to the practical considerations which commentators have identified as properly influencing judicial application of the substantial evidence test: e.g., the degree to which the agency decision is actually dependent on a possessed expertise; the relationship of the agency decision to a relevant statutory or administrative scheme; the need for judicial rather than administrative pronouncement on a particular question; and the duty of the court as "the guardian of the integrity of the legal system."\textsuperscript{177} Such an approach might avoid straining the awkward analogy which \textit{Bianchi} drew between the machinery for resolving contract disputes and the administrative process; it would not, however, satisfy the need for a new institutional solution to the contract disputes problem apparent to many commentators.

\textbf{B. Development of the Status Quo — the Quasi-Judicialisation of the Contract Boards.}

The second major thrust of \textit{Bianchi} is to require both the contractor and the executive departments to focus litigation not in the courts, but in the contract boards. It is for this reason that the Court placed such great emphasis on the need for the improvement of contract board procedures. Contract board proponents have suggested, further, that once such improvements are made, the finality of board decisions over all questions of fact will be justified.\textsuperscript{179} The approach advocated is to seek the establishment of a minimum administrative due process, either through adoption of the APA — though this is often rejected as cumbersome or unnecessary\textsuperscript{180} — or through patchwork reforms such as the addition of the subpoena power and the power to place

\textsuperscript{177} The Court's treatment of contract board finality throughout the Wunderlich cycle seems indicative of this outlook on its part.

\textsuperscript{178} Jaffe, \textit{supra} note 169, at 264. See also 4 Davis, \textit{op. cit. supra} note 164, at 269-70 (Davis places emphasis on the subjective opinions of administrative agencies held by courts).


witnesses under oath, the increased use of pre-trial briefs, and the elimination of the possibility of reference to outside authorities.\textsuperscript{181}

Retired Judge Madden of the Court of Claims has strongly opposed such "quasi-judicialization" of contract boards, on the ground that the dispute procedure is merely the final step in the process of negotiation of the contract, and should not be given the status of an adjudication. In his view, the appeal to a contract board is intended to provide procurement officials with an opportunity to review the decision of their departmental subordinates on a contract matter — to "wash dirty linen in private." This position may represent a misconception of the procurement dispute process.\textsuperscript{182} Madden’s objections to the increased cost to the contractor resulting from quasi-judicialization has, however, drawn support. A frequently cited virtue of the contract boards has been that they afford speedy, inexpensive relief with a measure of finality, insulating contractors from possible GAO reversal. Were the process of dispute resolution before the boards to take as long as court proceedings, one major advantage of board resolution — at least from the contractors' point of view — would be negated; court review, with its formal due process, might then be thought preferable.\textsuperscript{183}

One commentator has suggested that the judicialization problem might be solved by having the boards afford contractors an informal, non-final proceeding, in which the contractor could settle;\textsuperscript{184} an additional quasi-judicial proceeding, final within the bounds of the Wunderlich Act, would be available within the department should the contractor be dissatisfied with the informal resolution. This suggestion, while attractive on its face, and undoubtedly a practical one for contractors in the short run, only highlights the anomalous results to which quasi-judicialization might lead: in the name of the admin-

\textsuperscript{181} Cuneo, supra note 180; Miller, supra note 179, at 135-37. Some of these reforms — such as the power of subpoena and oath administration — would automatically result from applying the APA to contract boards.

\textsuperscript{182} Madden, Bianchi’s Ghost, 16 AD L. Rev. 22 (1963). As dispute adjudicating bodies, the contract boards have little to do with the day-to-day process of contract administration. On the other hand, their existence is related to the settlement of contract disputes. See Shedd, Disputes and Appeals, 29 LAW & CONTEMP. PROB. 39, 65 (1964).

[T]he opportunity for settlement by agreement continues to exist during the third phase appeal up to the time the dispute is finally decided by the board of contract appeals; and in many instances settlements are negotiated after an appeal is filed and sometimes after the hearing. Not infrequently the hearing brings out facts previously unknown to one or both of the parties which produce a settlement.


\textsuperscript{184} Schultz, supra note 147, at 130. The ASBCA presently does provide an optional accelerated procedure in appeals amounting to $5,000 or less. These appeals are handled on an expedited basis without regard to their normal position on the docket. If the parties so elect, pleadings and hearings may be waived, and the appeal decided on the record. In all other respects, the ASBCA’s rules apply to the dispute. ASBCA Rule of Practice 12, 28 Fed. Reg. 9350 (1963).
trative process and efficiency, all review would be placed within the executive department, and the judicial review envisioned by the Wunderlich Act cut off. Contract boards, after all, are not courts, nor are they independent administrative agencies charged with the development and administration of a comprehensive statutory scheme. Their members are employees of the executive department, not judges. Their orientation may be directed toward departmental procurement needs as well as toward contractor equities; this orientation might not be reflected in specific bias in an individual case, but it will likely permeate the long-range development of precedents and regulations. To center all judicial power in bodies nestled within executive departments is contrary to the traditional American emphasis on separation of power, and might well lead to an unreviewable body of law. Perhaps Bianchi offers no alternative to quasi-judicialization. If this is the case, it is to be hoped that the channels of judicial review of contract boards will be kept open to at least the same extent as those of the ordinary administrative agency.

C. The Destruction of Bianchi — A Draconian Solution

Judge Madden, who wrote the major Court of Claims decisions in the government contract disputes area, has embodied his long opposition to contract board finality in legislation now before the House Judiciary Committee. The proposed legislation would blandly supplant the Wunderlich tests of finality with no finality at all. All contract boards, in effect, would be reduced to mere “waystations.” Such a solution fails to recognize the contract boards’ experience in fact-gathering and evaluation in this area. It can be expected, moreover, that if there were broader de novo fact review in the Court of Claims, there would be a marked increase in appeals from the boards, since a contractor who failed before a board would have nothing to lose by appealing from the board’s interlocutory decision. Were the number of appeals to increase; the docket of the Court of Claims could be expected to grow, lengthening the already long period of time required for resolution of

185. This is the very heart of the matter. As was said by the Special Committee on Legal Services and Procedure, Report, 81 A.B.A. Rep. 491, 513 (1956) [hereinafter cited as ABA Procedure Report]:

Where the machinery of administrative action is essentially the machinery of litigation and adjudication, in substance equivalent to judicial adjudication, the arguments for a full separation of functions are strongest and those against that course weakest.

Ibid.

186. For a situation in which departmental appeals determination and procurement policy were intimately related, see, e.g., Western Contracting Corp. v. United States, 144 Ct. Cl. 318, 325 (1958).

187. E.g., Wunderlich, Volentine, and Bianchi.

188. The positive virtues of the proposal are that it would leave the disputes procedure in existence — making settlement still the norm — and, by removing the responsibility for maintaining the variety of “due process” held to be concomitant with the finality requirement, would allow a more informal procedure to be used by the contract boards. The negative considerations discussed in the text, however, seem to outweigh these factors.
cases in that court. The possibility of extensive GAO review would also be increased.

D. An Institutional Analysis

1. Suggestions Based on Existing Models

Rather than accepting Bianchi and trying to force the contract boards into the administrative agency model, or destroying Bianchi, and making the contract boards meaningless stops en route to judicial review, the problems inherent in the operation of current contract dispute machinery might be resolved by the creation of appropriate new institutions. The scope of the problem requiring solution is quite broad: how shall the governmental departments be regulated and fairness to the contractor be assured, when an executive department is involved in the contractual relationship as a private party to the contract, as administrator of the terms of the contract, and as final arbitrator of fact disputes. The problem is exacerbated by the nature of the contract relationship involved: contracts are by necessity open-ended; contractors are dependent upon continued government largesse; the government is dependent upon uniform adherence to contract interpretations by contractors in order to achieve its many ends.

Any institution which is developed to accommodate these interests would, hopefully, eliminate the overlap of functions and the institutional friction which characterize the present system. Absent such specific improvements, the upheaval of reform would not be justified. Thus the proposed solution should be characterized by one clear and speedy route of review, lined with procedural safeguards in order to protect the individual contractor. Simultaneously, any proposed plan should provide for the uniform development of government contract law, upon which both the government, as private orderer, and the contractor might rely.

One possible solution, based upon the administrative agency model, would be to mesh the procedures of the contract boards and the Court of Claims, while still retaining the existing institutional framework of contract boards separate from the courts. This meshing would eliminate much of the jurisdictional friction between the board and the courts, and would remove one

189. The term is used in Reich, *The New Property*, 73 *Yale L.J.* 733 (1964), as descriptive of the almost donor-donee relationship between a government and its citizens.

190. This solution is to be contrasted with an alternative meshing solution, proposed by an attorney in private practice, calling for the abolition of the boards as such and the constitution of their members as Court of Claims commissioners operating under revised procedures similar to those of the ASBCA. Spector Interview. Under the plan, however, a contractor would still have to subject himself (absent a settlement with the contracting officer) to both a trial before a Court of Claims commissioner and, since commissioner decisions are not final, to a compulsory “appeal” to the court’s judges. This suggestion would also deprive the executive departments of much of the opportunity to settle disputes internally in accord with their particular procurement policies and needs. Finally, since the proposal would eliminate the concept of finality within the departments, it would open up the possibility of broad scale GAO review.
of the major objections to the present contract dispute machinery — the redundant reviews of a contractor's case by the contract boards and the Court of Claims, resulting in loss to both parties of time and money. The prerequisite of this approach would be an improvement in contract board procedures: that is, implementation of the kind of reforms supported by the advocates of complete contract board finality. It might then be reasonable for the Court of Claims to give deference to board decisions by limiting its review and by indulging a presumption in favor of the validity of a board's finding similar to that afforded independent administrative agencies. The law-fact criterion would be dispensed with as a guide to the allocation of jurisdiction: the board would consider the total problem presented, including questions of law such as breach of contract, and the limited review by the Court of Claims would be on the whole record.\textsuperscript{191} The substantial evidence test could meaningfully be applied in the same way as in the administrative process, and no finality would be accorded board decisions on questions of law. There are, however, several possible objections to the meshing solution. To gain any significant advantage from the meshing, the commissioner system would have to be by-passed and a special appeal route constructed for this single class of Court of Claims cases. Not only would this cause substantial dislocation to existing Court of Claims procedures, but it might also add to the delay in the court's docket. The contract boards, moreover, even with improved procedures, would still be subject to criticism because of their lack of insulation from the executive department. Finally, since the meshing proposal utilizes existing institutions, there could be no guarantee that the present concern for institutional prerogatives would be abandoned.

A second approach would abandon both the contract boards and review by the Court of Claims in favor of a newly constituted specialized court. Thus, several commentators\textsuperscript{192} have suggested that the contract boards might be done away with completely by providing that contractors be deemed to have exhausted their remedies if the government had not settled their claims within six months. The contractor's appeal from a contracting officer's decision would be to a trial Court of Contract Appeals analogous to the Tax Court. This new court, to be made up of former contract board members and others experienced in the procurement field, would handle all government contract disputes cases, whether arising from contractors' claims against the government.
government or from contractor appeals from government deficiency assessments. Appeal from the Court of Contract Appeals, as from the Tax Court, would be to the appropriate circuit court of appeals. The plan clearly has merit: simplification and elimination of delay and institutional friction. On the other hand, it places a great deal of faith in the contracting officers and the informal settlement process. The plan could be successful only if the settlement process envisioned at the contracting officer level disposed of many cases and if the proposed administrative court could provide as speedy and inexpensive a remedy to contractors dissatisfied with contracting officers' decisions as do present contract boards. It is at least questionable whether the speed of the proposed trial court would be much greater than that of the Court of Claims; it is also possible that if contractors flocked to the new court, its docket would become intolerably crowded, and the availability of the forum would be of little practical use.

A third possible solution, calling for major procedural reform of contract dispute machinery, would be to reorganize the contract boards along the lines of the approach taken recently by the Atomic Energy Commission. Following preliminary procedures similar to those of the ASBCA, through which an appeal file is developed, the AEC provides for a trial de novo before a hearing examiner qualified under the APA, at which law as well as fact decisions are made, and at which the party making the claim has the burden of proof. The hearing examiner's powers are broader than those of the ASBCA: subcontractors are permitted direct appeal; subpoenas may be issued by the hearing examiner; and persons whose interests may be affected by the decision may intervene. Commission review of the hearing examiner's decision may be sought by the contractor or be certified by the commission. The commission is empowered to consider all of the equities of a case, and such questions of law, policy and discretion as it considers relevant.

While some commentators have had high praise for the AEC's procedure, others have pointed out that the AEC hearing examiners handle a very small number of cases, and have suggested that a larger case load might well cause the hearing machinery to break down. It is difficult to see, though, why...

193. A contractor wishing to enforce a claim he had filed could petition either the Court of Claims or the Court of Contract Appeals. Government actions for default would be represented by deficiency notices similar to those issued by the Internal Revenue Service under Int. Rev. Code of 1954 § 6212. Lidstone & Witte, supra note 192, at 294.


195. Subcontractors do not have direct appeal to the ASBCA. See Miller, supra note 179, at 125, discussing the relevant Armed Services Procurement Regulation (ASPR) 3-903.5, and indicating the possibility of indirect appeal. See also Cuneo, Disputes between Subcontractor and Prime Contractor under Government Contracts, 16 Fed. B.J. 246 (1956).

196. Compare Miller, supra note 179, at 124; Comment, 39 N.Y.U.L. Rev. 290, 316 (1964), with Spector Interview. Another criticism, by the Chairman of the Interior Department BCA, is that employing hearing examiners may mean the sacrifice of some of the legal (and presumably also technical) know-how which has partly justified board replacement. Note, 39 N.Y.U.L. Rev. 290, 316 n.125 (1964).
APA hearing examiners would take longer or be less effective in trying a case than contract board members; and an ASBCA member’s assertion that putting that board under the APA would not substantially affect its operations suggests that those who criticize APA hearing examiner machinery in the contract dispute context may be overstating their case.

The substitution of the AEC’s procedures for the present machinery might afford a remedy to the trend since Bianchi of trying to quasi-judicialize contract boards. But it might also create an intolerable situation in which a contractor who desired judicial review of his claim would have to wade through four levels of hearings: AEC-type examiner, AEC-type commissioner, Court of Claims commissioner (either reviewing the record or taking de novo evidence), and Court of Claims judges. This time consuming double scrutiny could, of course, be done away with by foreclosing Court of Claims review. But the practical concerns which led Congress in the APA to provide appellate review of agency decisions are surely equally applicable to the area of government contract dispute adjudication, so it seems hardly likely that Congress would want to carve out an exception to judicial review in this area.

2. Synthesizing the Administrative and Judicial Models: A Proposed Solution

Each of the foregoing proposals for a unitary institution for resolution of government contract disputes is subject to criticism; therefore, there is reason for attempting to synthesize their best elements into a new proposal which, hopefully, will avoid many of the objections raised against them.

Some general observations should first be made as to the characteristics which any new institution — or system of institutions — for the resolution of contract disputes ought to possess to meet the practical needs of the parties. Several factors would initially indicate that the new system should embody many of the characteristics usually attributed to the judicial process. Resolving contract disputes seems to present an adjudicatory rather than a legislative or administrative problem. The administrative process is characterized by its policy making functions — the elaboration or application of complicated regulatory schemes. Yet, presumably, the issues raised by contract disputes are seldom foreign to general contract law; instead, the cases usually present questions of contract interpretation, a type of legal dispute traditionally placed within the competence and domain of courts. A second consideration suggesting the adoption of a judicial approach grows out of the immense amount of money involved in government contracts. This factor has led inevitably to intense political competition in obtaining government contracts; some of the political influence wielded here might carry over into dispute resolution.197 To prevent this occurrence, an institution wholly in-

dependent of political pressure, such as an Article III constitutional court, whose judges enjoy life tenure, would seem appropriate. Finally, the technicality of the subject matter and the political implications of a decision contribute to the possibility that the significance of important decisions will not be evident to the public at large; it is possible that abuse by lack of due process might go unnoticed and uncorrected. This possible lack of publicity in the contract dispute area might well be aggravated if decisions were made within the confines of the administrative process. These tendencies might be prevented by placing the decision making power in an independent judicial institution.

On the other hand, merely giving jurisdiction of contract disputes to already constituted federal courts would preclude utilization of some of the more desirable features of the administrative process. At the very least, any new solution should try to preserve the virtues of the old: speed, relatively low costs, the possibility of private settlement, and some measure of intra-departmental finality to reduce the possibility of collateral attack by the GAO. Placing jurisdiction within federal district courts, for example, would sacrifice the technical knowledge and experience already possessed by the current institutions. If jurisdiction were given to federal district courts, the uniformity in interpretation of standard contract clauses would be lost, to the detriment of both parties to the contract. If, however, jurisdiction were placed in a single court to gain uniform decisions, the opportunity for local hearings would be lost, raising the litigative burden on both parties.

One feasible solution, drawing explicitly upon the previous proposals and encompassing the desirable aspects of the judicial and administrative processes, would be the establishment of a new system of contract resolution operating on three levels: contracting officer, hearing officer, and appellate court. The first level would be the contracting officer, who would continue to administer contracts on a day-to-day basis and to seek settlements when disputes arose. In order to keep the cost and volume of litigation of the proposed system within reasonable limits, and to enable contractors to rely on contracting officers’ determinations, a binding quality should be retained for their decisions. To ascribe finality to these decisions, though, is not

199. Cf. 1 Davis, Administrative Law §§ 4.01-.03 (1958).
200. Courts have absolutely nothing to gain from their decisions, and they are not as subject to outside pressures as agencies may be. And responsibility is imposed upon them by the expectation that they will write reasoned opinions and the fact that they may not invoke the doctrines of unreviewable discretion as easily as may administrative agencies.
201. While a theoretician views the administrative agencies as quasi-each-branch of the Government, a laborer in the field of government practicalities has a different view. To him agencies are power tools, of functional design. . . . Prentyman, Trial by Agency 5 (1959).
202. The contracting officer would handle all administrative problems, whether they represented classical “cases or controversies” or not. During the time of contracting officer determination and appeal, the contractor would be required to continue work. Should he
only misdescriptive of the present legal situation, but may not be justified: the contracting officer is often too involved in the life of the contract to be regarded as a wholly impartial arbiter. Indeed, the officer’s relationship with the contractor is one that itself should be subject to disinterested scrutiny; a contract officer might overpay in order to avoid being dragged into litigation, or he might be overzealous in protecting the government’s interests. For this reason, a more realistic and appropriate label than “finality” should be attached to the decisions of the contracting officer: “reviewable only for good cause shown” conveys the sense, if not the precise legal term which should be applied.

The contracting officer would continue to settle a large number of minor disputes. But in cases where the contractor or the executive department is so dissatisfied with the contracting officer’s decision that intra-departmental resolution is impossible, appeals would be made to a neutral official somewhat analogous to a hearing examiner under the APA, or a Court of Claims commissioner. As envisaged, the hearing officer would be held to APA standards in the hearing and would be responsible for the building of a record.203 The new hearing officer would also be able to conduct hearings in the field. The hearing officer would, however, be given additional responsibility, differentiating him from either APA hearing examiners or Court of Claims commissioners. Rather than being an employee of an agency or an officer of a court, he would be given independent status similar to that of a trial court judge.204 This independence would, hopefully, lead to greater impartiality

suffer damages in the course of an appeal by the government, he could receive them at the same time as the validity of the government appeal is determined.

203. The status of the hearing officer under the APA as “judicial” officer reviewed by courts is described by Davis, Administrative Law §§ 10.02-10.04 (1958). In practice, the scope of his deciding powers is limited by agency review. Universal Camera Corp. v. NLRB, 340 U.S. 474, 492-97 (1951), provided for some weight to be given to the examiner’s decision — but this weight necessarily was tempered by the deference to be given to the agency decision. Davis concludes that “the plain fact is that examiner’s functions remain subordinate,” and recommends their strengthening, e.g., through raising pay. Davis, op. cit. supra at § 10.05.

The American Bar Association has pressed for the increase in the status and separation of function of the hearing examiner from the agency. See Benjamin, A Lawyer’s View of Administrative Procedure — The American Bar Association Program, 26 Law & Contemp. Prob. 203, 228-30 (1961).

204. The use of hearing officers in the way proposed bears a strong resemblance to the type of trade court proposal developed by the American Bar Association, which would embody the adjudicatory functions of the Federal Trade Commission in a court which was part of the judicial branch (i.e., an Article III court like the Court of Claims). See Pretzman, op. cit. supra note 201, at 51-52; Berger, Removal of Judicial Functions from Federal Trade Commission to a Trade Court: A Reply to Mr. Kintner, 59 Mich. L. Rev. 199 (1960). See also the proposal of a court analogous to the Tax Court, Lidstone & Witte, supra note 192, at 294-95. (The ABA proposal, 81 A.B.A. Rep. 491, 495, Resolution 4.1 (1956), would make the Tax Court part of the judicial branch.)

Fundamentally, there would appear to be two criticisms of this proposal as applied in the government contracts area. First, that the hearing officers would lack the expertise of
and would encourage the recruitment of able personnel. More important, the hearing officer would render decision on all of the issues presented in the case, both issues of fact and law. Lastly, the officer's opinion would be final unless appealed.

The judicial nature of the proceedings conducted at the hearing officer level might deprive the process of some speed. But such time as would be lost should be more than made up for by the elimination of the extra steps and institutional overlap characterizing the current system, achieved through merging the functions of the contract boards and the commissioners. Nor need this combination of functions sacrifice experience and technical learning, for hearing officers might readily be recruited from the ranks of the current contract boards or the commissioners.

Appeals from a hearing officer's decision would be to a newly constituted court of contract appeals, unaffiliated with any executive department or administrative agency. Review of the hearing examiner would be on the record, contract board members, and would be less efficient. See, e.g., the criticism of the A.E.C. system, note 196 supra and accompanying text. Much of this criticism might be met by having "sections" of hearing examiners, who handled unique cases: e.g., atomic agency, weapons systems. For the handling of general construction contract cases, which presently arise frequently in several contract boards, no such division of labor would be necessary.

A second more fundamental criticism of both the approach taken and of the Bar Association approach is that it represents the creation of a false dichotomy between regulation (embodying policy formation) and adjudication:

Many policies must be forged in the case-by-case mill . . . . Many policies must be developed gradually, moving from problem to problem and observing the effects of prior decisions. Without this process, some rules may be meaningless or so rigid that they defeat some of their own purposes.

Massel, *The Regulatory Process*, 26 Law & Contemp. Probs. 181, 188 (1961). This commentator, however, also emphasized the interaction of parties that takes place in the formulation of administrative policies:

[T]he regulated industry participates in policy formulation through its pressures for changes in policy and through the information and arguments that it presents to the Congress, the agency, and the courts in individual cases; and much of the policy development depends upon judicial interpretations.

Ibid. (emphasis added).

In the light of this second comment, it is clear that the criticism offered of reformers of the administrative process is inapt in the contract disputes context. Procurement policies are not handled by the contract boards, though they necessarily have a feed-back effect on them. Judicial decisions certainly affect the shape of administrative law; the extent to which the shape of government contracts is designed to minimize this very impingement on government policies runs counter to this trend. As indicated by Pasley, *The Interpretation of Government Contracts: A Plea for Better Understanding*, 25 Fordham L. Rev. 211 (1956), the form of government contract clauses is affected by private pressure, but it is doubtful for whose benefit this pressure primarily works. See the comments of Lidstone & Witte, *supra* at 252-56. It is submitted that while there may be merits in the position of the critics of what has been termed (by them) the "judicialization" of the "administrative process," their arguments do not have telling impact in the government contract disputes area, because what is involved is clearly the judicialization of an essentially judicial process.
and the law-fact distinction would, of course, be applied. Review on questions of law would be similar to the appellate review of district courts on questions of law. Review of questions of fact might be governed either by the Wunderlich Act standards, primarily "substantial evidence," or the "clearly erroneous" standard commonly used in review of courts sitting without jury.205

Use of the law-fact distinction would seem feasible once the institutional frictions implicit in the current system were removed. A needed degree of experience and technical competence could be assured the court if its judges were selected from the existing institutions for resolving government contract disputes.206

The function of hearing contract appeals might alternatively be assigned to the Court of Claims. There are, however, several objections to this proposal. Special provision would have to be made to eliminate the commissioners from the appeal process, or the functions of the commissioners would have to be redrawn to equal the duties of the proposed hearing officers. Either alternative would require a major revision of existing Court of Claims procedures in the area of contract disputes. Nor would either of these alternatives solve the problem of the three year docket delay. Finally, retention of the Court of Claims' jurisdiction, coupled with abolition of the contract boards, might result in a hostile reaction to the entire plan by the executive departments affected.

Another distinguishing characteristic of the proposed court would be that the executive department party to the contract might appear as plaintiff. Elimination of the contract boards and the opportunity to secure intra-departmental settlement which they presented207 would seem to require that the government be able to appeal to the hearing officer from a contracting officer's decision. This right to appeal would stem not only from the department's position as party to the contract, but also would give the department a chance to vindicate and enforce its procurement policies as embodied in its contracts. A further corollary of the department's right to appeal at all stages would be the elimination of GAO right to review; since the department could easily vindicate its interests within the proposed system, there would be no reason to retain the possibilities of collateral attack at the instigation of either the parties or the GAO itself.

205. It has been suggested that this test may be appropriate in reviewing the administrative agencies. See ABA Procedure Report, at 506-07. See also Jaffe, supra note 169, at 1040-44. Cf. District of Columbia v. Pace, 320 U.S. 698 (1944). But compare Davis, op. cit. supra note 164, at § 29.

206. Special expertise can, moreover, be furthered in appropriate instances through the process of specialized litigation in which the executive department, familiar with the field and with adequate powers of investigation, can present all relevant factors for consideration by the specialized court. Cf. ABA Procedure Report, at 513.

A final implication of the proposal would be the centralization of all contract disputes within the proposed system. There would no longer be any reason to maintain jurisdiction in the district courts over any department claims or contractors' claims under $10,000. Similarly, all possible overlap between the proposed system and the Court of Claims should be eliminated. This would necessarily mean that all breach of contract cases would be handled by the proposed system. This centralization would also have several beneficial consequences. It would eliminate the last possible source of jurisdictional friction by obviating all need for distinguishing between cases labeled breach of contract or question of interpretation. Finally, the creation of a unitary system embodying comprehensive jurisdiction and a single road to appeal would probably eliminate any administrative inefficiencies caused by the current system of alternate appeal routes. No longer will either party run the risk of choosing the wrong route; and the district courts will not have to grapple with technical factual questions presented in government contract cases.

The establishment of a judicial forum in which both parties may litigate contract disputes is a recognition of the partial validity of old "freedom of contract" cases which recognized that executive departments acting in the government contract area are, in a sense, "private orderers" — though of an unusual sort. Hearing examiners are common in the administrative process and they have played some role in the government contracts area. The use of judicial type officers to handle essentially adjudicatory questions previously in the province of administrative agencies has been urged by the American Bar Association. It is submitted that only by the fusion of these approaches, and the concomitant elimination of institutional frictions can the Wunderlich cycle be satisfactorily terminated.

208. Contractors are currently bound by their contracts to observe numerous "policy" provisions, influencing their hiring practices, labor conditions, and business ethics. See CUNEO, GOVERNMENT CONTRACTS HANDBOOK 5-9 (1962); Hannah, Government Buying Erodes Management, Harv. Bus. Rev. 57-61 (May-June 1964).

The penalty for violation of these public policy clauses may be either suspension or debarment. The procedures within the executive departments leading to the application of these sanctions has been sketchy. For criticism of them, and proposal for reform, see Administrative Conference of the United States, Debarment and Suspension of Bidders on Government Contracts and the Administrative Conference of the United States, 5 BOSTON COLLEGE IND. & COM. L. Rev. 89 (1963). The courts have begun to awaken to the contractor's right of due process in debarment proceedings. See Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368 (D.C. Cir. 1961); Gonzalez v. Freeman, No. 17765, D.C. Cir. (May 17, 1964). Cf. Reich, The New Property, 73 YALE L.J. 733 (1964).

The debarment problem might also be an appropriate one for the proposed court structure to handle. Compare Administrative Conference of the United States, supra at 283 (proposal of single debarment board for the Department of Defense: ASBCA would be acceptable).