

1956

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### Recommended Citation

C. S. McClelland, *Government Advocacy as Related to Appeal Procedures Unaccomplished Since the Wunderlich Legislation*, 25 Fordham L. Rev. 593 (1956).

Available at: <https://ir.lawnet.fordham.edu/flr/vol25/iss4/1>

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# GOVERNMENT ADVOCACY AS RELATED TO APPEAL PROCEDURES UNACCOMPLISHED SINCE THE WUNDERLICH LEGISLATION

C. S. McCLELLAND\*

*"Decisions must be made on their merits as objectively and realistically as conscientious and intelligent men can make them. Fairness, impartiality, and freedom from irrelevant considerations are now as important for the legislator and the administrator as for the judge, perhaps even more important."*<sup>1</sup> (Emphasis added.)

IT would seem reasonable to assume that, as with respect to the armed services, the Federal Government has developed and maintains its legal services to the extent that they are reasonably adequate at all times to protect the public interest. With an average of at least one and one-sixth billion dollars of public funds committed to Government contractors every month during the period January 1, 1953, to June 30, 1955,<sup>2</sup> the importance of adequate legal protection of the public interest is apparent. The litigation arising from a substantial number of the contracts involves many millions in public funds and a great variety of questions of fact and law. The decisions rendered in that litigation affect many additional millions paid from the same source. If those decisions appear erroneous and reviewable, it would follow that the legal services of the Government should provide advocacy of its position sufficiently aggressive and competent to pursue any reviewable decision against the Government through the highest appellate court, if necessary. One type of case decided for a number of years by the Armed Services Board of Contract Appeals, or a predecessor board, on an entirely irrelevant ground has precluded Government recovery of very substantial sums of money. Yet no one, duly appointed as an advocate of the Government, sought a review of those decisions in the public interest.

## I. THE LEGISLATIVE INTENT

It would also seem reasonable to assume that if Congress, by duly enacted legislation, directed that certain review of administrative decisions

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This article was submitted by the author in response to the Fordham Law Review's standing invitation for contrary observations.

1. S. Rep. (Committee Print) of Senate Committee on Labor and Public Welfare on Ethical Standards in Government, 82d Cong., 1st Sess. 16 (1951).

2. Hearing [No. 42] Before House Committee on Armed Services, on H.R. 7995 and H.R. 8499, to amend the Armed Services Procurement Act of 1947, 84th Cong., 1st Sess. 5029 (Foreword) (1956).

be provided, compliance with that direction would follow as a matter of course. Such is not the case, however. On May 11, 1954, approval was given to an act<sup>3</sup> permitting review of decisions of the heads of departments, or their representatives or boards, involving questions arising under Government contracts. It is stated in the legislative history<sup>4</sup> of the act that the purpose of the legislation is to overcome the effect of the Supreme Court decision in *United States v. Wunderlich*,<sup>5</sup> under which the decisions of Government officers rendered pursuant to the standard "Disputes" clause in Government contracts are held to be final absent fraud on the part of such officers. That history further shows that the legislation was not intended to add to, narrow, restrict, or change in any way the present jurisdiction of the General Accounting Office either in the course of a settlement or upon audit. It was the intention of Congress 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 the act. As expressly stated in the history, the elimination of specific mention of the General Accounting Office in the original bill is not to be construed as limiting its review to the fraudulent intent standard prescribed by the *Wunderlich* decision.<sup>6</sup>

## II. GENERAL ACCOUNTING OFFICE JURISDICTION AND ACCORD FOR ITS CONTINUANCE UNDER THE ACT

The jurisdiction exercised by the General Accounting Office prior to the *Wunderlich* case is clearly shown in the earlier legislative history of the act. The Assistant Comptroller General testified that in the past, administrative decisions on questions of fact were not disturbed by the General Accounting Office or the courts unless the action of the administrative officer was fraudulent, arbitrary, capricious, grossly erroneous, or without foundation in fact. When any of those elements was present, the courts or the General Accounting Office, whichever happened to have jurisdiction of the questions at the time, took action to correct the fault of the settlement in the administrative department.<sup>7</sup> By the proposed legislation, "the contractors would have, as is normal in other cases, the restored avenue of access to the General Accounting Office with their claims if they felt aggrieved or unjustly treated by the administrative official or body within the contracting department."<sup>8</sup> And the contractors

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3. 41 U.S.C.A. 321 (Supp. 1955).

4. U.S. Code Cong. Ad. News 2191-97 (1954).

5. 342 U.S. 98 (1951).

6. U.S. Code Cong. Ad. News 2197 (1954).

7. Hearings Before a Subcommittee of the Senate Committee on the Judiciary, on Finality Clauses in Government Contracts, 82nd Cong., 2d Sess. 8 (1952).

8. *Id.* at 11.

would have restored to them the avenue of the courts, which is normal in such cases, and which the General Accounting Office believed should be restored. Also, at those hearings, representatives of the Associated General Contractors of America testified that their organization advocated that more administrative review be available, not only within a particular department, or bureau, but by an independent agency as well; their organization welcomed further administrative review, believing it to be "good government, and good practice and good procedure."<sup>9</sup>

### III. EXECUTIVE IMPLEMENTATION OF THE ACT

Contrary to the views expressed by representatives of industry, it is shown in the later legislative history that while the Defense Department noted the desire of the General Accounting Office to have the same authority it had prior to the *Wunderlich* decision, that Department actually desired to exclude the General Accounting Office by limiting the review to "courts of competent jurisdiction."<sup>10</sup> While it was not successful in excluding the General Accounting Office in the legislation enacted, the Department of Defense and the General Services Administration nevertheless have continued to use a "Disputes" clause, adopted after the *Wunderlich* decision, which does not allow a contractor, who is not satisfied with the administrative disposition of a factual dispute between him and the Government, to seek a review of the matter by the General Accounting Office but requires him to incur the expense of having the matter determined by a court of competent jurisdiction.<sup>11</sup>

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9. *Id.* at 31.

10. Hearings Before Subcommittee No. 1 of the House Committee on the Judiciary, on Review of Finality Clauses in Government Contracts, 83d Cong., 1st and 2d Sess., ser. 12, at 54-55 (1954).

11. The Defense Department indicated in the earlier hearings, *supra* note 7, at 91, that it intended to use such restrictive language in an amendment which was done in a restatement of the clause as follows:

**"DISPUTES**

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Head of the Agency, and the decision of the Head of the Agency or his duly authorized representative for the determination of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive; Provided, That, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute

In other words, the two largest procurement agencies of the Government seem to have ignored the express intent of the act by persisting, for approximately three years since the act, in the use of an amendment to the "Disputes" clause which does precisely what Congress has said should not be done—narrow, restrict and change the jurisdiction of the General Accounting Office by confining any further consideration of questions of fact to a court of competent jurisdiction.<sup>12</sup> It thus appears that unless their authority is challenged, the agencies involved will not conform to the act.

#### IV. FAILURE OF CONGRESS TO PROVIDE GOVERNMENT APPEAL PROCEDURES

Another important aspect of the hearing on the "Disputes" clause was the testimony relating to the need for providing an effective means for the Government to appeal from administrative decisions and rulings against it. Industry appeared to agree with Government representatives that appeal rights should be fully realized by both contracting parties.<sup>13</sup> The Comptroller General pointed out that the rule of the *Wunderlich* decision placed contracting officials "in a position to make as arbitrary and reckless use of their power against the interests of the Government as against the interests of the contractor."<sup>14</sup> The Assistant Comptroller General explained that the experience of the General Accounting Office had been that such decisions were not infrequent<sup>15</sup> and that certainly the rights of contractors and the Government to review or appeal should be coextensive.<sup>16</sup> Even the representative of the Department of Justice, who approved the *Wunderlich* decision, testified that it seemed quite possible that article 15 of Government contract form 23 was a one-way street open to the contractors but not to the Government and that the contractor is given the right to appeal to the head of the department concerned, whereas the article is completely silent as to the Government's right of appeal.<sup>17</sup> In the same vein is the testimony of the representative of the Associated General Contractors of America that notwithstanding the availability of further administrative review, the procedure should permit judicial review, whether it be the Government or the contractor, and that his organization wanted to take the position of being absolutely

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hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision." (Emphasis added.)

12. The Defense Department has admitted that "the legislation goes farther than the revision we have made to our contracts." Hearings, *supra* note 10, at 124.

13. Hearings, *supra* note 7, at 31, 83-84.

14. *Id.* at 6.

15. *Id.* at 9.

16. *Id.* at 12.

17. *Id.* at 15-16.

fair in urging legislation that would protect the rights of both parties.<sup>18</sup> Yet it has not been found that Congress has, or that the administrative agencies have, taken any action to give the Government effective procedures to appeal whenever an adverse administrative ruling or decision appears in error.

#### V. IMPORTANCE OF UNDERSTANDING THE ROLE OF THE GOVERNMENT ATTORNEY

Since any Government appeal procedures that might be established would involve added or new responsibility for certain Government attorneys, some consideration of the functions and responsibilities of the Government attorney appears in order. The mechanism of such appeal procedures would be operated most effectively by Government attorneys with a clear conception of their duties and responsibilities.<sup>19</sup> It would appear important to consider the extent to which such a conception now exists. An appropriate inquiry might involve the uniformity of thinking among Government attorneys relating to the extent of the aggressiveness which they are expected to exercise as advocates of the Government. It seems certain that there would be a great variety of answers if all Government attorneys suddenly were requested to write, without delay, their exact understanding of this matter.

At the outset, it would seem indispensable that the advocacy of the Government's position must proceed unconfused and uninfluenced by any situation such as described in certain testimony in a Senate report:

"Judge Hand. May I say something that perhaps I should not say. I hope this will not offend you. Take the immigration cases. I have seen in a good many records, quite often, that Congressman Jones or Senator McGill is 'interested' in this case. Now, frankly, when I see that, I do not like it. I hope it does not influence me in the result, but truly it makes me pretty mad.

"Senator Douglas. We undoubtedly sin, but there are other sinners besides ourselves."<sup>20</sup>

Those who serve in any agency where they are expected to resolve a matter strictly along judicial lines, and therefore without partiality, obviously cannot defend the Government's position with the aggressiveness that may be required to match or overcome that of the attorney for the private party. In other words, since man is unable to serve two masters at the same time, it is manifest that no Government attorney can treat a matter judiciously for both parties and at the same time treat it with the aggres-

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18. *Id.* at 31-32.

19. "In the last analysis, the adequacy of legal services . . . depends upon the ability of individual Government attorneys." Hoover Commission Task Force Report on Legal Services and Procedures, at 12 (1955).

20. Hearings Before a Subcommittee to Study Senate Concurrent Resolution 21 of the Senate Committee on Labor and Public Welfare, on a Commission on Ethics in Government, 82d Cong., 1st Sess. 228 (1951).

siveness required by the Government, as one of the parties. The Government must have the same protection as that enjoyed by the other party whose private attorney is not circumscribed by attempting to serve in a dual capacity.

Various public remarks about Government personnel, in general, have been made from time to time which may give the impression that there is no reasonable uniformity of thought and action in Government advocacy and that the Government and the taxpayer suffer from such a situation. In the hearings on the establishment of a Commission of Ethics in Government, it was stated that there is too much truth in the belief that it is dangerous for public servants to put their necks out to defend the public interest and that it is generally thought that promotion and confirmation may be more readily secured by those who do not do so.<sup>21</sup> It was noted at those hearings that the country needs public servants who are not only ethical, honorable, and competent, but also those who have backbone. Somewhat along the same line was a further comment that:

"... one of the common criticisms of Government service, and the military service, too, is that by the system of rating schedules, the conformist and the man who plays safe, the man who curries favor with his superior, tends to be rewarded on the fitness reports. The innovator tends to get penalized. After a time, men decide that the way toward promotion is acquiescence, currying favor with the superiors, and a species of timidity."<sup>22</sup>

In that connection it is of interest to note the remarks of a former assistant to a Secretary of Agriculture that in most instances, it is obligatory that the representations made by powerful individuals and groups be referred by higher Government officials to subordinate levels and that, therefore, the manner of the reference is crucially important so that the subordinate feels free to base his action entirely on the merits of the matter<sup>23</sup> and that:

"Every time that a subordinate official is caused to arrive at a different judgment because of influence from on high, without an explanation that shows intrinsic considerations, he is inclined to think that is a directive to practice favoritism.

"That goes on so often—poor references and misunderstood references made so often that the people down the line think that they are being counseled in the direction of favoritism, and then they are not as courageous and not as firm in their attitudes as they themselves would like to be."<sup>24</sup>

It is to be noted that the Hoover Commission found that, "too often, the attorney in the Government is considered and treated as an employee with special talent, to be called upon to submit opinions sustaining a posi-

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21. *Id.* at 294.

22. *Id.* at 142.

23. *Id.* at 169.

24. *Id.* at 175.

tion previously determined by a nonlawyer superior. Hence the term 'pushbutton' lawyer."<sup>25</sup> A member of Congress previously has expressed a similar view:

"It is the government lawyer to whom the Administration turns for legal justification of whatever policy may be desired. It is the government lawyer who is called upon to find a way around the law—if necessary—to tailor an interpretation which will fit a preconceived notion by the executive branch of what the law should be, not necessarily what Congress intended it should be."<sup>26</sup>

On the other hand, it has been said that:

"The Government has grown so big that the people at the head of agencies . . . are devoting their entire time to politics and policy. The decisions that are actually made are made at the lower echelons. They are made on memoranda prepared by people way down the line most of the time."<sup>27</sup>

How can the Service attorney, who represents the Government in a case before the Armed Services Board of Contract Appeals, secure General Accounting Office review of an adverse decision by the Appeals Board on a disputed question of fact? It would seem that once the advocate for the Government, the Service attorney, has exhausted his rights before a "Disputes" board, he must abandon his client, the Government, and take up the next case before his employer, who, through the Board, has just ruled against him. That attorney soon might be *persona non grata* if he sought a review by an agency which his employer pointedly is trying to exclude by specific language in the pertinent contract provision. The pertinent administrative regulations of the Department of Defense contain no outline of procedures to show that the Department is even cognizant of the importance of making definite provisions for Government appeal procedures, even as to "a court of competent jurisdiction," and of making certain that all personnel involved are fully aware of those procedures and of the obligation to insist on their use whenever the Government appears entitled to "another day in court." Moreover, since the language of the "Disputes" clause shows that the decision of the Appeals Board is the decision of the head of the Department, it hardly seems likely that any part of the Government but Congress can take the action necessary to protect the public interest in this respect. This could be

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25. Legal Services and Procedure, a Report to the Congress by the Hoover Commission on Organization of the Executive Branch of the Government 17 (1955). The Hoover Task Force found that morale among attorneys in the executive branch is not as high as it should be and that the primary difficulty is that they do not have the feeling of professional service which characterizes the performance of legal work in other areas; that an attorney in a Government legal position is concerned about the possibility of political considerations affecting his tenure and promotions. Hoover Commission Task Force Report on Legal Services and Procedures, Hoover Task Force Report 15, 93 (1955).

26. Halleck, The Role of the Lawyer in Government, 37 A.B.A.J. 859, 891 (1951).

27. Hearings, *supra* note 20, at 445.



accomplished by making it mandatory that each of the executive departments establish effective Government appeal procedures whereby the Government is completely assured of an adequate mechanism for review of an appealable administrative decision in any contract case, and whereby the employee representing the Government is fully protected. Otherwise, it appears very probable that pride of authorship in the decisions rendered will preclude any real voluntary effort within the various departments to provide the necessary effective procedures.

The Hoover Commission has stated that in the construction and the application of statutes, attorneys in Government should be a restraining influence in keeping administrative action within the letter and spirit of the law. To perform that responsibility properly, the Commission reported that Government attorneys must have that degree of independence from administrative control which will enable them to serve as lawyers in Government and not merely as employees of Government.<sup>28</sup> But Congressman Halleck warns that ever-increasing authority over the life of America has passed from the hands of Congress into the hands of the Government lawyer and asserts that:

"We are rapidly becoming a nation which operates under a system of 'procedural regulations' based on interpretations of the laws passed by the Congress. It is the Government lawyer who is writing these hundreds upon hundreds of rules and regulations under which the statutes are implemented."<sup>29</sup>

In the material that has been written on the Government attorney,<sup>30</sup> including the work of the Hoover Commission and the regulations of the executive agencies, there has been found no discussion of the extent to which attorneys have been assigned the job of appealing from decisions and rulings adverse to the Government. It has been said that the Government as a contractor should be regarded as any other contracting party. Therefore, if the best interests of the Government are to be fully protected, it would seem especially important that an attorney representing the Government should be made fully aware that he is expected to be at least as aggressive as he would be if he were the attorney for the other party.

#### VI. IMPORTANCE OF UNDERSTANDING THE GENERAL ACCOUNTING OFFICE'S REAL STATUS

A clear understanding of the extent to which an independent office, such as the General Accounting Office, could implement the establishment of effective procedures to protect the Government's interests against ad-

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28. Hoover Commission, Report to Congress, *op. cit.* supra note 25, at 17.

29. Halleck, *op. cit.* supra note 26.

30. See, e.g., Baldwin and Hall, *Using Government Lawyers to Animate Bureaucracy*, 63 *Yale L.J.* 197 (1953).

verse decisions of "Disputes" boards should leave no doubt as to the importance of utilizing its full authority to that end. The General Accounting Office has the authority to take issue with such boards whenever their decisions, adverse to the Government, involve questions of law or mixed questions of law and fact, or questions of fact in which the decision is "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence."<sup>31</sup> If the matter involves questions of law or mixed questions of law and fact, the reasonableness of the board's decision does not affect the General Accounting Office's authority to question the merits of the decision.

*a. Possibilities Inherent in the General Accounting Office's  
Audit Functions*

The audit function of the General Accounting Office is always entitled to operate if the "Disputes" board's decision be erroneous in law, or "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence."<sup>32</sup> The fact that in effect the General Accounting Office would be auditing the action of the head of the Department, who had acted through his appeal board, would appear to be a mere incident in the functioning of audit operations. Any question that a contracting officer may raise against a contractor and thereby initiate a potential case for a "Disputes" board, is one that a General Accounting Office auditor may raise. The exact question a contracting officer may have raised may be one he knows was raised or was threatened to be raised by an auditor under the same or similar contract. The mere fact that the question has been resolved in favor of the contractor at the highest level, rather than at the contracting officer echelon in the executive agency, should be no bar to an audit exception by the legislative office authorized to perform the audit, if the decision be reviewable. Such audit action conceivably could have a most salutary restraining effect upon the decisions rendered by "Disputes" boards, especially where the question basically is a question of law and therefore reviewable without regard to the standards stated in the "Disputes" clause.

*b. Weaknesses of Adverse Criticism of GAO*

There has been too much publicity given to views which profess to acknowledge the desirability of an independent office, such as the General

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31. 41 U.S.C.A. § 321 (Supp. 1955).

32. *Ibid.* In view of the legislative history heretofore considered, showing the clear intention of Congress to retain GAO's jurisdiction as it was prior to the Wunderlich case, administrative retention of language "by a court of competent jurisdiction" could be ignored by the General Accounting Office in its audit action even though such language *prima facie* excludes it.

Accounting Office, but which fail to show how it is to justify itself if it cannot be allowed to operate in such a manner as to be fully effective. One view, which had no objection to the principle of surveillance, declared that surveillance would be obtained "from inside the agencies" but failed to show how it could be accomplished. Another has said that the complaint has been that the General Accounting Office "goes into the merits of the thing"<sup>33</sup> but he did not indicate how it could determine the legality of anything without considering its merits. Also, administrative findings of fact are not considered binding when the matter is a mixed question of law and fact.<sup>34</sup>

Still another writer accepts the principle of an independent office but he does not explain how its function, its responsibility only to Congress, and the desire of successive Comptroller Generals to retain the independent status, have led to a ". . . bureaucratic ideology which is often harmful not only to Government contractors but to the best interests of the Government".<sup>35</sup> In the absence of any explanation for such a statement, it is difficult to avoid the conclusion that the writer is one of those who pay mere lip service to the principle of independence involved but who actually objects to such use of that independence as will make the office effective.

In August 1954, a report<sup>36</sup> of the Committee on Comptroller General—General Accounting Office, of the Administrative Law Section of the American Bar Association seemed to rely on but four cases<sup>37</sup> in a period of over thirty years to support its conclusion, as to the Comptroller General and the General Accounting Office, "that there is much to criticize so that many loose practices may be lightened to the end that the public interest will be better served." Even if all four of those decisions could conclusively be said to show the Comptroller General in error, which the Committee has failed to do, four errors in a period of thirty years is an unusually good fielding average when compared with the various courts of the country. However, aside from that fact, it is obvious from the impression it attempted to create, that the Committee does not subscribe to the prin-

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33. Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary, on bills To Provide for the Settlement of Claims Arising from Terminated War Contracts, 78th Cong., 2d Sess., ser. 16, at 226, 271 (1944).

34. *Palace Corp. v. United States*, 124 Ct. Cl. 545, 110 F. Supp. 476, cert. denied, 346 U.S. 815 (1953); *Allied Contractors v. United States*, 129 Ct. Cl. 400, 124 F. Supp. 366 (1954).

35. Cable, *The General Accounting Office and Finality of Decisions of Government Contracting Officers*, 27 N.Y.U.L. Rev. 780, 790 (1952).

36. 6 Ad. L. Bull. 195-203 (1954).

37. *Belcher v. United States*, 94 Ct. Cl. 137 (1941); *McCabe v. United States*, 84 Ct. Cl. 291 (1936); *Moreno v. United States*, 70 Ct. Cl. 758, 762, 764 (1930); 31 Comp. Gen. 370 (1952).

ciple of independence which the General Accounting Office is obligated by law to observe and that it does not fully understand the position that the General Accounting Office must take so long as Congress considers it in the Government's interests to maintain such an independent office. Not too many years ago, Congress had an ample opportunity to question the General Accounting Office and its conception of certain of its duties and obligations, but instead appeared to approve that conception.<sup>38</sup> More recently members of Congress, industry and the legal profession have stated that the General Accounting Office serves "a very good purpose"; that it does "excellent work";<sup>39</sup> and that the General Accounting Act represents one of the great advances in the administration of the Government.<sup>40</sup>

*c. The General Accounting Office as an Appeals Board*

Any suggestion of the General Accounting Office as an appeals board is certain to be met with protests that it would become another Court of Claims. Yet the foundation of such a protest appears no more certain in the establishment of an appeals board in an independent office of the legislative branch of the Government than it does in connection with the similar board in the Defense Department or in any of the other agencies of the executive branch.<sup>41</sup>

The importance of examining the role of the Government attorney is clearly shown by visualizing the relative position of the contracting parties after the attorney for the Government succeeds in appealing to the Comptroller General from an adverse ruling by the Appeal Board. If the Government is to have the full benefit of an appeal to the Comptroller General as the head of a legislative agency, uncircumscribed in its advocacy of the Government's position by any shortcomings in such advocacy by the legal representatives in the executive agencies, it would seem reasonable to expect that the case on appeal would be handled by two attorneys, rather than one. The duty of one of those attorneys would be to write the decision in the case. Since the role of the Comptroller General in deciding the case on appeal would be quasi-judicial in nature, the attorney writing the decision necessarily could not act either with any

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38. Hearings, *supra* note 32, at 226.

39. Hearings, *supra* note 7, at 84.

40. Hearings, *supra* note 10, at 18; See also Hearings Before Subcommittee of House Committee on Appropriations, on Independent Offices Appropriation for 1957, 84th Cong., 2d Sess., at 1399 (1956).

41. Consideration of the matter by an adjustment board of an independent legislative office, such as the General Accounting Office, would seem appropriate procedure if either party has the right to appeal from the decision of the Board in the executive branch. The use of a Board by the General Accounting Office would appear equally as important and justifiable as its use in the Defense Department and in other agencies of the executive branch. Cf. first full statement, Hearings, *supra* note 32 at 225.

of the competitive aggressiveness of the contractor's attorney or with any of the general aggressiveness expected of the office which is the agent of Congress and the watch dog of the Treasury. At the same time, if the interests of the Government are to be protected, that aggressiveness, which the decision attorney could not exercise, must be otherwise accomplished in the Comptroller General's office. To accomplish that would be the duty of the other General Accounting Office attorney assigned to the case. To be certain that such an attorney would be able to exercise the appropriate aggressiveness in his advocacy of the Government's position, it would appear necessary that he and the group of attorneys who would be permanently assigned to that type of advocacy, occupy the same rank and status under the Comptroller General as that which would be occupied by the decision group. Such an arrangement would, of course, necessitate the establishment of something in the nature of an adjustment or appeals board which would render the decisions previously rendered in the name of the Comptroller General. While the board would be under the general jurisdiction of the Comptroller General, it would have complete independence in the rendering of decisions. The advocacy group would have the same independence of action, especially in deciding whether an adverse decision by the General Accounting Office adjustment board should be referred to the Attorney General for suit in the courts. The Comptroller General would have a supervisory function to see that both the board and the advocacy group operated smoothly. Of equal importance to that function would be that official's responsibility to make to the appropriate committee of Congress periodic reports of all cases which did not receive appropriate aggressive advocacy after they left his office. One duty of the advocacy group would be to see that it was kept fully informed of the progress of the case after it reached the Justice Department, especially with respect to offers of compromise, and to make certain that the Comptroller General was well briefed for his periodic reports on the progress of cases closed and pending in the Department of Justice. Such procedure would be an essential part and "follow through" of the aggressiveness incumbent upon the advocacy group if Government appeal procedures are to be fully effective. Otherwise, the high degree of aggressiveness attained in the advocacy of the Government's position after the case came from the executive to the legislative branch might be lost when the case reappeared in the executive branch whose opinion is being challenged.<sup>42</sup>

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42. This will be challenged as an attempt to substitute the judgment of the Comptroller General for that of the Attorney General as to whether a case should be pursued. No such attempt is intended. Instead, the idea is to provide means of assuring an evaluation, by an independent legislative agency, of the considerations which influenced the judgment exercised in a given case. If that judgment was exercised on sound, valid grounds, it will withstand

Other obligations of the advocacy group would be to see that all of the facts, legal precedents, legislative history, etc., were presented to and considered by the adjustment board, to seek reconsideration by the board if its ruling sustained the Appeals Board, and to see that the complete set-off resources of the Government were fully realized and coordinated in the case.

#### VII. IMPORTANCE OF ADMINISTRATIVE RULINGS SUCH AS THOSE BY THE ARMED SERVICES BOARD OF CONTRACT APPEALS

It has been said that the number of claims arising out of contracts with the Federal Government is enormous; that the technicalities require fact findings of great length and complexity; and that the litigation involves nearly every conceivable question of administrative and contract law.<sup>43</sup>

Approximately three years ago, it was indicated that many lawyers have no knowledge about boards of contract appeals.<sup>44</sup> No doubt that is still true today among lawyers as well as among most laymen. Yet during the ten years of its existence prior to May 1953, it has been reported that the Armed Services Board of Contract Appeals (ASBCA) and its predecessors have received 3,431 appeals and have rendered 2,688 written decisions.<sup>45</sup> This report states that those appeals involved millions of dollars and just about every conceivable dispute that can arise during the performance of military contracts which have totaled billions of dollars. With the further fact in mind that the decisions rendered affected many more millions of dollars involved in questions which never reached the Board because contracting officers, influenced by those decisions, allowed many items which would have been questioned, it can be understood how important it is that the decisions be fully supportable on the merits and without regard for irrelevant considerations.<sup>46</sup>

An attempt has been made by the Defense Department to show that because over a nine-year period there was an average of only two cases per year in which the Contract Appeals Board was actually reversed, the fairness and effectiveness of the administrative handling of disputes has

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any valid evaluation. If it was not so exercised, the evaluation will and should disclose it. If the General Accounting Office does not perform its evaluation function, then it is cut short before it has the opportunity for necessary fulfillment. Action in the Government's interest initiated in such a legislative office should not have to anticipate any frustration in a later executive step in that action.

43. Comment, Appeals from Administrative Decisions in Government Contract Disputes, 31 Texas L. Rev. 552 (1953).

44. Cuneo, Armed Services Board of Contract Appeals, Tyrant or Impartial Tribunal?, 39 A.B.A.J. 373 (1953).

45. *Id.* at 375.

46. S. Rep. *supra* note 1.

been demonstrated.<sup>47</sup> But those statistics overlook the fact that during that period, as at present, the Government's position really had no effective advocacy. Therefore, if an examination of certain Board decisions discloses a number of cases decided against the Government on irrelevant considerations, the need for a careful analysis of all those decisions, as well as the establishment of definite appeal procedures for the Government, seems most compelling. The fact that studies have indicated that the number of Board decisions appealed to the General Accounting Office are few in number refers,<sup>48</sup> of course, to appeals by contractors only, since no procedures yet exist for the Government to make such an appeal. It is safe to say that the need for an appeal by the Government could be found in many other cases besides those analyzed in this article if the Board did not fail so frequently to show the argument presented by the Government in support of the contracting officer's action. Without that knowledge there is no means of accurately evaluating the merits of many decisions. To present the argument of one side only in a dispute seems a strange way to present a written opinion on the controversy.

Since the *Wunderlich* legislation, contractors have been relatively successful in appealing to the Court of Claims from administrative decisions. There would appear to be no reason why the Government, with equally aggressive appellate advocacy, could not be equally, if not more successful, in securing reversals by an appropriate adjustment board or court. In the case of *Wagner-Whirler Derrick Corp. v. United States*,<sup>49</sup> the court found as to one item, among others, that the contracting officer's decision not only was not supported by substantial evidence, but that it closely approached being capricious, and so grossly erroneous as to show recklessness, if not to imply bad faith. On the other hand, in the case of *F. H. McGraw & Co. v. United States*,<sup>50</sup> the court held that the contracting officer's finding as to equitable adjustment was binding on the court since it was not seriously contended that it was unsupported by substantial evidence, citing the case of *United States v. Callahan Walker Co.*<sup>51</sup> Similarly, in the case of *Hadden v. United States*,<sup>52</sup> the court held that the Contract Appeal Board's finding as to the facts relative to the propriety of termination for default was binding on the court since there was no allegation by the contractor that the findings were arbitrary, capricious or not supported by substantial evidence. However, in the case of *Williams v. United States*,<sup>53</sup> the court found that

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47. Hearings, *supra* note 10, at 54.

48. *Supra* note 44, at 373, 436.

49. 128 Ct. Cl. 382, 121 F. Supp. 664, 670 (1954).

50. 131 Ct. Cl. 501, 130 F. Supp. 394, 400 (1955).

51. 317 U.S. 56 (1942).

52. 131 Ct. Cl. 326, 130 F. Supp. 610, 614 (1955).

53. 130 Ct. Cl. 435, 127 F. Supp. 617, 621, cert. denied, 349 U.S. 938 (1955).

the decision of the head of the department was not supported by substantial evidence and refused to be bound. The court also rejected the administrative findings in *General Casualty Co. of America v. United States*,<sup>54</sup> where it was held that the contracting officer's failure to make an equitable adjustment for removal of shale was arbitrary and not supported by substantial evidence, and thus not conclusive.

#### VIII. CASES ILLUSTRATING NECESSITY OF ESTABLISHING APPEAL PROCEDURES

##### *a. The Metro Case and the Covenant Against Contingent Fees*

An excellent illustration of the cost of not challenging certain very vulnerable opinions of The Appeals Board is to be found in one case involving at least \$173,000. In that case<sup>55</sup> the Metro Engineering and Manufacturing Company agreed to pay to an agent partnership ten per cent of the gross dollar amount of each order for the sale of services and products accepted by Metro. The agency obtained 225 Government contracts for which Metro is reported to have paid the agency \$173,500.77. The question was whether under the agency agreement the contractor, Metro, violated the covenant against contingent fees in each of the contracts. This covenant read as follows:

"The contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee."

The Board cited the cases of *United States v. Buckley*,<sup>56</sup> *Reynolds v. Goodwin-Hill Corp.*,<sup>57</sup> and *A-B Stoves Division*,<sup>58</sup> as recognizing that the language of the exception stated in the covenant is not clear, and stated that the decisions of the Federal courts are not in harmony as to the meaning to be given to the exception, especially the word "maintained", referring to the cases of *Bradley v. American Radiator & Standard Sanitary Corp.*,<sup>59</sup> and *United States v. Paddock*.<sup>60</sup> What it failed to mention

54. 130 Ct. Cl. 520, 127 F. Supp. 805, cert. denied, 349 U.S. 938 (1955).

55. Metro Engineering Co., ASBCA No. 1495, 6 CCF ¶ 61,567 (1954).

56. 49 F. Supp. 993 (D.D.C. 1943).

57. 154 F.2d 553 (2d Cir. 1946).

58. ASBCA No. 1224 (1953).

59. 159 F.2d 39 (2d Cir. 1947).

60. 178 F.2d 394 (5th Cir. 1949), petition for rehearing denied, 180 F.2d 121 (5th Cir.), cert. denied, 340 U.S. 813 (1950).



is that only the last cited of these cases actually contains an assertion of what the word means.<sup>61</sup> As to that meaning the Board apparently agreed with the court in the case of *Beach v. Illinois Lumber Mfg. Co.*,<sup>62</sup> which criticized it as rendering the exception to the covenant meaningless, and proceeded to follow Armed Service Procurement Regulation 1-505.4 which the Board described as an endeavor to be realistic and to recognize the true intent and purpose of the covenant by giving it a reasonable construction. The Board refers to that regulation as an excellent statement of the principles and standards to be used as a guide in determining whether the agency involved qualified under the covenant. The regulation contains no language to explain the principles or standards to be used in determining whether an agent is "maintained", as required by the covenant. However, the Board ignored that omission and limited its discussion of the facts of the agency to the various parts of the regulation and then concludes that the agency was "maintained" and that the contracting officers were in error when they found to the contrary. It is clear that without stating its interpretation of the word "maintained", and without stating any reason for concluding that the agency was maintained, the Board, not the court in the *Paddock* case, rendered the exception meaningless. At the same time, by ignoring one of the important words in the exception, the Board also rendered the covenant meaningless. Either the exception must be interpreted in the light of the significance of each of its terms or the process becomes one of interpolation rather than one of interpretation. The Board would have been in a stronger position if it had stated any meaning at all for the word, even if the meaning had been insupportable. By not giving any meaning after an unpersuasive rejection of the meaning given by a court of competent jurisdiction which held in favor of the Government, and yet stating the conclusion which it did, the Board gives the distinct impression of being evasive and slurring over the most important issue in the case. And by allowing an agency to qualify, that was not "maintained" as required by the exception, the Board placed the Government in no better position than it would have been if there had been no covenant against contingent fees in any of the contracts awarded to Metro. Since the Board did not analyze the case in the light of the proper meaning to be attributed to the word "maintained", no space will be consumed in showing why the *Paddock* case interpretation is correct. Suffice to note that in the case of *LeJohn Manufacturing Co. v. Webb*<sup>63</sup> it was said that the restrictive approach of the *Paddock* case is necessary if the purpose and intent of the covenant is not to be destroyed.

It would seem obvious that an opinion against the Government as vul-

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61. *Ibid.*

62. 92 F. Supp. 564 (E.D. Ill. 1950).

63. 222 F.2d 48, 51 (D.C. Cir. 1955).

nerable as that in the *Metro* case should be appealed to the highest court, if necessary, to correct such a flagrant disregard of the law. The case involved a question of law and the Board's view was not final.<sup>64</sup> Yet present procedures are such that no one has assumed the responsibility to institute an appeal. Such a situation would seem of interest to the legislative as well as to the executive branches of the Government. It should be of particular interest to the Judiciary Committees and the Committee on Government Operations. Among others, it also should interest the Committees on Appropriations since the \$173,000 involved in this case presumably is but a trifle compared to the total amount involved in all the other similar agency agreements which have remained unchallenged because of what the Board did in the *Metro* case.<sup>65</sup>

If the Government is not to adopt some appeal procedures that will give the general public at least as much protection as it now affords the private litigant who proceeds against the Government, then it would seem that the least that could be done would be to make a few competent individual employees of the Government responsible for following all cases involving the Government and reporting to the Congress all instances in which the Government's rights are not fully protected. That procedure, although it involves a mere reading of the opinions rendered and reporting on them, would seem to offer a restraining influence on a board such as the Armed Services Board of Contract Appeals.

#### *b. The Carteret Case and the Default Article*

Another striking example of the need for establishing appeal procedures to protect the Government's interest against adverse decisions of "Disputes" boards is to be found in that class of cases involving claims for damages sustained by contractors during delays caused by the Government. For at least eighteen years prior to 1942, the Court of Claims had imposed affirmative damages against the Government for its delays, but in that year the Supreme Court overruled the Court of Claims,<sup>66</sup> and four years later in another case, held that the Government cannot be held liable unless the contract can be interpreted to imply an unqualified warranty by the Government to perform promptly.<sup>67</sup> However, the Contract Appeals Board has declared that differences between the contract provisions in the case of *United States v. Rice*<sup>68</sup> and those in the case of

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64. 41 U.S.C.A. § 321 (Supp. 1955).

65. Similar agency agreements could exist between the *Metro* agents and other contractors as well as between other agents and contractors.

66. *United States v. Rice*, 317 U.S. 61 (1942).

67. *United States v. Foley*, 329 U.S. 64, 67 (1946).

68. See note 66 supra.

*Carteret Work Uniforms*<sup>69</sup> were such that the *Rice* case was not controlling. The Board pointed out that in the *Carteret* contract, the Government expressly agreed to deliver Government furnished material pursuant to a definite schedule. While the *Rice* case emphasized the fact that the Government was under no obligation to have the contemplated structure ready at a fixed time, it also showed that the Supreme Court considered it well established that where the contract contains clauses providing for an equitable adjustment if changes cause an increase or decrease of cost or affect the length of time of performance, delays incident to such changes will not subject the Government to damage beyond that involved in the changes themselves.

But the Board held that if article 32 (a)<sup>70</sup> of the *Carteret* contract had intended to exclude all costs of delay, it would not have specifically excluded consequential damages or loss of profit only, and that the damages involved were natural or direct, as distinguished from consequential. On the basis of that reasoning, the Board allowed labor and overhead expenses amounting to a total of \$25,017.04.

The Government argued that since the alleged costs were of a type very similar to some of the costs in the *Rice* case, which the Supreme Court held to be consequential damages, the Board should hold the *Carteret* items as consequential damages. The Board referred to the Restatement<sup>71</sup> description of the two types of damages, but failed to show why the *Carteret* damages were not, as stated in the Restatement, or as shown in the cited case of *Otis Elevator Co. v. Standard Constr. Co.*,<sup>72</sup> those that might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of such contract. Nor does the Board demonstrate how the *Carteret* items of damage were "direct" or "general" (those that arise natur-

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69. ASBCA No. 1015 (1952). The provision under discussion provided:

"(a) Property to be Furnished.—The Government shall furnish to the contractor for use in connection with and under the terms of this contract the property or equipment (hereinafter referred to as 'Property') which the attached Schedule and/or the specifications state the Government will furnish, at the time or times, if any, and at the place specified therein. Title to the Property shall remain in the Government. The dates fixed for the contractor's performance of this contract are based upon the expectation that the Property will be furnished to the contractor at the times stated, or if no times are stated, in sufficient time to enable the contractor to meet such dates. In the event that any Property is not furnished to the contractor at such time the contracting officer shall, if duly requested by the contractor, make a determination of the delay occasioned the contractor thereby and an equitable adjustment on account of such delay under the section of this contract entitled 'Changes', provided, however, that the Government shall not be liable to the contractor for, and no such adjustment shall include, consequential damages or loss of profit."

70. *Ibid.*

71. Restatement, Contracts § 330 (1932).

72. 92 F. Supp. 603 (D. Minn. 1950).

ally, according to the usual course of things, from the breach of the contract itself, as defined in the Restatement). Instead, the Board did what it is prone to do in other types of cases, such as those involving violations of the contingent fee covenant.<sup>73</sup> It reviewed the facts, cited the law, and then proceeded to state a decision, without showing how the decision was supported by the law cited. The Board merely stated that it is difficult for it to conceive of any other costs being a more natural or direct result of the delay in delivering Government-furnished material than those alleged. Yet, it did not show why those damages were not what may reasonably be supposed to have been in the contemplation of both parties, and it has persisted in following the *Carteret* case in its later decisions on the subject.<sup>74</sup>

The conclusion is inescapable, from a reading of this decision, that no contractor's attorney would accept the Board's reasoning as final if his client had been the one against whom the Board ruled. If appropriate appeal procedures had been in existence at the time, it is certain that no Government attorney, sufficiently briefed as to his responsibility, would assume the risk of leaving such a decision unchallenged. As a matter primarily involving the construction of the contract, the decision involved a question of law which is reviewable without question. The standard of doubt which is commonly used to determine the propriety of pursuing an appeal is not at all difficult to fulfill. The statement of the *Carteret* decision is replete with doubt, so much so that it concludes by grasping at a rule of construction based upon doubt<sup>75</sup> as an apparent attempt to show some semblance of legal logic in the decision. Since such damages as here allowed by the Board involve matters considerably speculative in nature, it would seem reasonably possible that the Government would be upheld on an appeal. Obviously, there is no question of authority to question the Board's decision on the matter, and the need to question it should be equally apparent. The future costs to the Government of a well-established precedent of paying contractors for Government delays would seem too great to allow without an expression from the highest court on the type of contract involved. Even though the Board were to be upheld by such a court, the matter would not rest until

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73. See pp. 607-09 supra.

74. *C. K. Turk Corp.*, ASBCA Nos. 2098 and 2307 (1955); *The Foster Co.*, ASBCA Nos. 975, 976 and 1225 (1952).

75. "... while contracting parties may provide for a limitation on the right to recover damages, the harshness of that result, where there is doubt as to meaning, calls for strict construction of the language relied upon to bar recovery."

"... any doubt as to meaning of a written contract provision must be resolved against the party who prepared the contract." ASBCA No. 1015 at 12. The doubt in this case would seem to be in the logic of Board's reasoning rather than in the meaning of the contract provision.

the contract provision was thoroughly considered and approved or rejected by Congress, if the Government were served by appropriate aggressiveness in the advocacy of its position.

In *Norris-Thermador Corp.*<sup>76</sup> the question was whether the Air Force had properly terminated the contract for default and charged the contractor the excess cost of more than \$400,000 which occurred in the repurchase of the items involved. The Board held that the termination should have been for the convenience of the Government. The effect of that was to relieve the contractor of its liability to the Government for the excess costs and make the Government liable to the contractor for such expenditures as it could establish as damages caused by the termination. The contract provided for default termination if the contractor failed to deliver within the time specified, or perform any of the other contract provisions, or failed to make progress so as to endanger performance of the contract. It was not to be terminated, and there was to be no liability for any excess cost, if any failure to perform arose out of causes beyond its control and without its fault or negligence. The contractor experienced production difficulties almost from the start, and found itself unable to meet the contractual delivery schedule.

Instead of analyzing the case to show whether the contractor was legally entitled to be relieved of the default termination and the resultant excess costs, the Board seems to state the case as the contractor's attorney might state it. Without showing its necessity in determining the real controversy—the cause of contractor's failure to perform—the Board devotes considerable space to praising the contractor's achievements, apparently for the purpose of showing why the Army wanted to have the contractor released from its Air Force contract, and devote its full production to steel cartridge cases. The Board stated that the contractor was able and willing to complete the Air Force contract unless released, although the facts showed that it had completely failed to meet its commitments under the contract. By referring to a few very inconclusive communications, the Board attempted to show that the Government had in effect released the contractor from the Air Force contract before it was terminated for default. Reference is made to a letter of January 25, 1951, from the Army, not the Air Force, stating that the request was logical and reasonable and that immediate action would be taken to expedite its processing. The Board then refers to a telephone conversation in which an Air Force representative is stated to have said that a meeting would be held to determine how the Air Force contract would be terminated, and to a later similar conversation in which the same representative said that the contractor could expect termination for the con-

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76. ASBCA Nos. 989 and 1290, 6 CCF ¶ 61,487 (1953).

venience of the Government. Immediately thereafter the contractor cancelled outstanding orders for certain special equipment for the Air Force contract. After advising the Air Force by letter of February 19, 1951, that to meet the schedule under its expected Army contract, it would be essential to discontinue production under the Air Force contract by March 31, 1951, the contractor entered into the commitments with the Army which would necessitate the use of its facilities which had been devoted to the Air Force contract.

The Board stated that the true issue in the case was whether the contractor acted with reasonable care and prudence in the circumstances with which it was confronted. The Board does not state how the reasonable care and prudence of the contractor is related to the real issue—not recognized by the Board—as to whether the contractor's failure to perform arose out of causes beyond the contractor's control and without its fault or negligence. The advancement of a fictitious issue in disregard of the real issue, and the reference to the contractor's good reputation for cutting through "red tape" and acting promptly upon oral requests, seems to be an attempt to justify the contractor's precipitate actions following the inconclusive communications received from the Government. It is plain enough that the contractor had practically everything to gain, and little, if anything, to lose by discontinuing work on the Air Force contract and entering into commitments with the Army. The Army contract offered means to cushion the contractor's loss on the Air Force contract if eventually terminated for default and, if not so terminated, the Army contract would be even more valuable.

Early in its opinion the Board states that the contract was not terminated, and would not have been terminated for delays since they were considered as excusable by responsible Government officials. But the opinion fails to show persuasively that the statements of those officials were intended to bind, or did in fact bind the Government as a determination, under the default article of the contract. While the Board itself did not make such a determination expressly, it impliedly did so by treating the termination under section (e) of the default article of the contract.<sup>77</sup> Certainly, its opinion contains no statement of the cause of the contractor's failures under the contract. It is crystal clear in the default article that responsibility for the cause of the delay involved is the only

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77. "(e) If, after notice of termination of this contract under the provisions of paragraph (a) of this clause, it is determined that the failure to perform this contract is due to causes beyond the control and without the fault or negligence of the Contractor pursuant to the provisions of paragraph (b) of this clause, such Notice of Default shall be deemed to have been issued pursuant to the clause of this contract entitled 'Termination for Convenience of the Government,' and the rights and obligations of the parties hereto shall in such event be governed by such clause."

issue in a case in which it is sought to transform a termination for default into one for the convenience of the Government. That was completely ignored by the Board.

Actually, the Board seems to give the impression that the facts of the case warranted a determination that the Government made binding representations to the contractor that it would not terminate for default, and that, therefore, the Board was justified in holding that the default termination should have been one for the convenience of the Government. Thus, the case as stated by the Board seems to be one presenting a question of a waiver, by responsible officials, of the Government's vested right to terminate for default, rather than a definite determination by those officials that the case involved an excusable cause for the delay. The Board side-stepped the issue of ruling on the binding effect of the waiver, if any, and sought to justify its determination in the case by a mere reference to section (e). The Board did not disclose the reasons assigned by the Government in requesting reconsideration and very little of the Government's original argument. Without an examination of the briefs<sup>78</sup> it is difficult to avoid the conclusion that the opinion is based upon entirely irrelevant grounds. If appeal procedures had existed for the use of a Government attorney obligated to pursue the case to the court of last resort, it seems certain that the Board would have sought much more persuasive grounds before ruling against the Government on an item of \$400,000.

*c. The Iso Products Case and the Measure of Damages on Default*

In the case of the *Iso Products Co.*,<sup>79</sup> the appeal concerned the damages assessed after a termination of the company's Government contract for default. The Board held that the damages should have been computed upon the basis of a price quoted by Western Gear Works on March 22, 1950, before any delivery was due from Iso Products, rather than on the basis of the price quoted by Western Gear in December when the Government made its replacement purchase. The Board's opinion was based upon its declaration and construction of the common law rule that the amount of such damages is the difference between the contract price and the market value of the supplies on the date of the breach. Out of a panel of fourteen members, there were five who dissented from the opinion in the case. It seems reasonably certain that if the Defense Department had appropriate appeal procedures for the Government, an appeal eventually would have produced a reversal. No record has been found of any publication of the dissenting opinions, if any actually were written. It is true, as the Board states, that there was a breach on March 31, 1950,

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78. Briefs filed with ASBCA are not available as they are in most courts.

79. ASBCA No. 879, 6 CCF ¶ 61,483 (1953).

because Iso Products failed to deliver fifty per cent of the items as the contract required, but the remaining fifty per cent was not due until June 30, 1950, and it was found that in the absence of a request for termination and with the knowledge that the contractor was continuing efforts to perform, the contracting officer was acting within the limits of sound discretion in continuing the life of the contract until he received Iso Products' letter of August 19, 1950. The contracting officer terminated the contract for default under the date of August 31, 1950, and on December 4, 1950, purchased the items, against the contractor's account, from Western Gear Works at a unit price of \$155. Under those circumstances the Board has shown no sound reason for requiring the Government to use as a basis for computing its excess costs the price of \$139.50 bid by Western Gear on March 22, 1950, in response to an inquiry by Iso Products. The common law rule, referred to by the Board, contemplates that the purchaser shall have a reasonable time within which to make a replacement after it becomes definitely established that default has occurred and the right to proceed has been terminated.<sup>80</sup> Obviously, the purchaser cannot be expected to make a firm commitment for repurchase until appropriate action has been taken, by termination, to relieve the purchaser of any obligation to the defaulting contractor. In this case, such a firm commitment could not have been made prior to September 1, 1950, and the Board did not find that the Government had consumed an unreasonable length of time in not repurchasing until December 4, 1950, as it did in the case of *George S. Rumley*<sup>81</sup> involving a delay of six months, or that the repurchase price would have been any lower if repurchase had occurred in September rather than in December 1950.

The General Accounting Office has relied upon *Board of Education v. Maryland Casualty Company*,<sup>82</sup> which measured the damages involved upon the basis of the difference between the defaulter's price and the price of the subsequent letting.<sup>83</sup> So measured, the damages in this case would not be confined to a price bid some months before the expiration of the period in which the Board itself admitted the contracting officer was exercising sound discretion in delaying termination.

#### *d. The General Porcelain Case and Default for Convenience*

In the case of the *General Porcelain Enameling & Mfg. Co.*,<sup>84</sup> the Board excused the contractor's delays on the ground that it was required to substitute material without any prior disclosures that would have

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80. The Board recognizes this in the case of *George S. Rumley*, ASBCA No. 1059 (1953).

81. *Ibid.*

82. 27 F.2d 20 (3d Cir. 1928).

83. 23 Comp. Gen. 237 (1943); 22 Comp. Gen. 1035, 1038 (1943).

84. ASBCA No. 1274 (1953).



enabled it to anticipate that possibility, and was, therefore, "caught by unforeseeable conditions necessitating a change", in view of which the Board held that the termination should have been for the convenience of the Government rather than for the default of the contractor. Two of the thirteen members of the Board, who considered the case, dissented. From the facts as stated in the opinion, it is not difficult to determine grounds for appeal by the Government, if appeal procedures had been available, or to identify the errors considered by those who dissented, even though no actual dissenting opinion was apparently written. A disgruntled employee filed with the Government a statement charging the contractor with fraudulently shipping rejected items with those accepted, with the result that the contractor had difficulty getting material from its suppliers and was unable to get loans from other banks. On the basis of the charge, the Government made rather careful inspection of the contractor's product and found that glassine wrappings were pitting the prefabricated drum parts involved in the contract. The Government ordered such wrapping stopped until a solution could be determined, then directed resumption of work with polyethylene wrappings. The contractor claimed difficulty in getting its employees back, and in locating the necessary polyethylene paper for wrapping. As of January 18, 1952, the contractor was delinquent as to 956,220 sets of drum parts and by letter of January 21, 1952, the contract was terminated for default. Later, the parties executed a supplemental agreement amending the termination notice of January 21st to show that 955,700 instead of 956,220 sets were terminated for default, and making a change in one part of the pertinent contract specification so as to add the phrase "other than glassine lined bags" after the words, "barrier material", referred to in that specification. By reason of that change, the supplement recited that the unit price for 473,440 of the sets delivered would be increased by \$.02471 per set, or a total sum of \$11,698.70. In addition to that sum, the Government agreed, in the supplement, to pay the contractor the sum of \$2,953 in reimbursement of its cost of repackaging 8,080 sets of drum parts which had been packed in glassine lined bags but, at the request of the Government, were repacked in polyethylene bags, and also to pay the contractor the sum of \$25,555 for 461,310 glassine lined bags located at the contractor's plant, and 1,162½ square yards of 25" glassine material owned by the contractor but located at the Central States Paper Bag Company, St. Louis, Missouri, rendered of no value to the contractor by reason of the specification change.

The Government apparently argued that other paper could have been used in place of polyethylene if the latter were unavailable. The Board reasoned, however, that since polyethylene had met with Government

approval, and since the use of glassine paper had proved unsatisfactory, the contractor would reasonably be inclined to follow through with the use of the polyethylene rather than take chances "on further unforeseen developments." The Board declared it to be a rather unusual situation "that neither the Government nor the contractor knew, at the time [presumably, at the time the contract was executed], the effect of glassine wrappings," and expressed the view that there was clearly nothing about the discovery of that effect which could in any way "be laid upon the contractor's shoulders as a failure in its contractual responsibilities." The fallacy of the Board's reasoning is not difficult to see when it is noted that it fails to state just what were the contractor's responsibilities as to making deliveries which met the specifications of the contract. It is clear that the contractor was required to deliver drum sets that were not pitted and that the packaging specifications for those drum sets did not expressly refer to any particular kind of paper, such as glassine lined kraft bags. It is also clear that irrespective of how the drum sets were packaged, the Government's inadvertent acceptance of drum sets not conforming to the contract specifications, over a period of time, would not at any time preclude the Government from demanding sets which did meet such specifications, without regard to the contractor's malperformance which caused the delivery of faulty drum sets, or without regard to the stage at which such malperformance occurred. Since that is true, the mere fact that malperformance appears to have arisen out of the method used by the contractor to package its product for delivery does not alter the obvious fact that the Government cannot be held chargeable with the contractor's failure to deliver drum sets that would meet the specifications of the contract. The situation would have been entirely different if the specifications had required the contractor to use glassine lined bags. In that event, the Government's acceptance of deliveries packaged with such material would have given the contractor some ground for claiming the sums which the Government agreed to pay under the supplemental agreement, but on the facts as presented in the opinion there appears to be no doubt that instead of reversing the termination for default, the Board should have upheld the termination and pointed out the total lack of consideration issuing to the Government under that agreement. The terms of this agreement alone should show the importance not only of establishing definite procedures whereby the Government may appeal from administrative opinions, but also of a careful analytical study of all Board opinions as they are issued. The aspect of the Government's entering into such agreements without consideration is serious enough, but it appears doubly serious to read an administrative opinion quoting such an agreement without observing this fact. The weaknesses of the Board in that respect are surpassed only in

the vulnerability of the reasoning process by which it concluded that the default termination should have been one for the convenience of the Government. And the fact that the termination was not immediate—a situation which is very common, as the Board well knows, to give contractors every reasonable chance to perform—was no justification for the Board's expressed assumption that the Government recognized the delays as excusable.

*e. The Construction Service Case and the Extra Work Article*

In the case of the *Construction Service Company*,<sup>85</sup> the pertinent portion of the contract required the appellant contractor to replace certain substandard fire hydrants at Fort Dix, New Jersey, which were to be connected to the mains with six-inch diameter pipe. It was discovered with respect to thirteen of the twenty-three hydrants involved, that while the two outlets forming part of the water main were of the same size as the main, the size of the outlet for the laterally connecting pipe was only four inches. This made it necessary to install reducers, or to remove the existing "T" pipes and replace them with those which had six-inch lateral outlets, for which the appellant requested—but had been denied by the contracting officer—an increase in the contract price. The Board held that the decision of the contracting officer required the replacement of substantial portions of the main itself, which was extra work as anticipated by and provided for in paragraph three of the contract.

Eight members of the Board concurred in the decision but five members dissented, one of these writing a dissenting opinion. In the dissent the testimony of a witness for the appellant is quoted to show that before signing the contract, the appellant knew that some of the hydrants had four-inch inlets and laterals, but had assumed that they were connected at the main by a six-inch "T" with a reducer. The dissenting opinion would appear to leave no doubt that had appeal procedures been in existence for the Government, those responsible under such procedures would have been persuaded to appeal from the Board's disposition of the case. The dissenting opinion pointed out that the known presence of hydrants with four-inch inlets and four-inch laterals should have warned appellant that there were two possibilities to be found in the "T"s: four-inch "T"s, or six-inch "T"s with reducers; that appellant made only one assumption—the wrong one—and that it then sought to hold the Government because the other turned out to be the correct one. The prevailing opinion is criticized for supporting the appellant upon the theory of a Change Order under and pursuant to the "Changes and Extra" article, by its finding, in effect, that to connect the new hydrants to the mains by a six-inch pipe does not

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85. ASBCA No. 1415, 6 CCF ¶ 61,494 (Aug. 28, 1953).

include furnishing and installing the connection. The dissenting opinion noted that the contract provided that hydrants shall be connected to the mains with six-inch diameter pipe, and raises a question as to how pipes can be connected with a main, either as replacements or as new installations, without furnishing the necessary connecting material. Pertinent parts of the contract involved, emphasizing that the responsibility for a complete job was on the contractor, even though every detail was not specifically covered, were quoted to show the error of the prevailing opinion. In concluding, reference is made to the play upon the word "main" and the confidence which the appellant displayed in arguing that the contract did not require it to make any corrections or repairs in the main. The dissenting opinion agrees that no repairs are required but points out that replacing a four-inch "T" with a six-inch "T" was not correcting the main in the sense of repairing it, but was the method of attaching the six-inch lateral to the main, contemplated by the word "connected" in the specifications.

#### IX. SUMMARY

It is serious enough to find administrative decisions, adverse to the Government, involving considerable sums of money and based upon irrelevant grounds. It is shocking to learn that those decisions are made without any procedures in existence to provide the Government with an effective means to challenge them, unfettered by "influence from on high."<sup>86</sup> The need for a comprehensive study of the extent to which the

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86. Among other cases where the existence of appellate advocacy for the Government clearly should have resulted in a successful appeal against the Board's ruling are McGrath & Co., ASBCA No. 1949 (1956), in which six members of the Board dissented from the holding that delivery of items of no value to the Navy was a matter beyond the appellant's control and without its fault or negligence; Mario G. Mirabelli & Co., ASBCA No. 1726 (1955), in which the contractor was held not to be in default at the time its contract was terminated; Lincoln Industries, ASBCA No. 334, 5 CCF ¶ 61,250 (1951), involving liquidated damages in the sum of over \$55,000, where the Board waived many days of delay and found the contractor entitled to consume approximately 129 days from the date of the contract to find and report a specification error which the Government found was easily ascertainable; Hayward-Schuster Woolen Mills, Inc., ASBCA No. 1337, 6 CCF ¶ 61,506 (1953), an appeal from the contracting officer's unilateral determination of the contract price, under the price revision article. Two members dissented from the Board's allowance of profit of 11.98 per cent as against contractor's estimate of 6 per cent of agreed unit costs. Dunn Constr. Co., and Polk Smartt Paving Co., ASBCA No. 1697 (1948), where the Army Board of Contract Appeals denied the Government the right to have reconsidered the matter of the contractor's liability for Government-furnished material, on the ground that the evidence relied upon was not "new and influential"; and Mifflin Body Works, ASBCA No. 723, 5 CCF ¶ 61,276 (1951), where the Board found that the delays of the Government in making payments for lumber delivered by the contractor under certain of its contracts caused the contractor's failure to perform under eight other contracts and that, therefore, the contractor was not liable for the excess costs.

Government may actually lack effective advocacy of its legal position in all of its agencies is apparent. If, as our armed services in the past have experienced, there be fetters or mere mismanagement, or a combination of both, which restricts the advancement of our legal service beyond a certain parallel line, no change in the status quo can be expected until the public is made fully aware of the situation. Whether one agrees or disagrees with the case analysis presented in this article, one indisputable fact remains: adequate protection of the Government's interest requires that appeal from administrative decisions should not be a privilege of the contractor alone.