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Cover Page Footnote

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ESTOPPEL AGAINST THE GOVERNMENT: HAVE RECENT DECISIONS ROUNDED THE CORNERS OF THE AGENT'S AUTHORITY PROBLEM IN FEDERAL PROCUREMENTS?*

ALAN I. SALTMAN**

Men must turn square corners when they deal with the Government.

—Mr. Justice Holmes¹

It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street.

—Mr. Justice Jackson²

The above quoted passages reflect differing judicial attitudes toward the rights of private parties when dealing with the Government or, more precisely, with agents of the Government.³ Indeed, the Government does not exist or act but through the actions of its agents.⁴ These agents are not, however, imbued with the same mantle of authority as are their counterparts in the private sector.

An agent can only bind his principal to the extent permitted by the principal.⁵ A principal may give the agent authority by expressly setting forth the precise limits of the agent's power to bind him. On the other hand, authority may be implied⁶ through a simple directive or an

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1. Rock I., Ark. & La. R.R. v. United States, 254 U.S. 141, 143 (1920). Mr. Justice Frankfurter said that this view "does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury." Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385 (1947).

2. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 387-88 (1947) (Jackson, J., dissenting). Accord, Oil Shale Corp. v. Morton, 370 F. Supp. 108, 127 (D. Colo. 1973).

3. Compare Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 386-88 (1947) (Jackson, J., dissenting) with Oil Shale Corp. v. Morton, 370 F. Supp. 108, 127 (D. Colo. 1973).

4. See Cooke v. United States, 91 U.S. 389, 398 (1875).

5. F. Mechem, *Outlines of the Law of Agency* § 34 (4th rev. ed. P. Mechem 1952) [hereinafter cited as Outline]; W. Sell, *Agency* § 2, at 4 (1975) [hereinafter cited as Agency].

6. Of course, the agent's implied authority can be expressly limited by the principal. Outline, supra note 5, § 34.

appointment of the agent to a particular position.⁷ In both of these situations the agent's authority is "real" or "actual."⁸

An agent may also have "apparent" authority which is derived from a representation to a third party by the principal that the agent has authority to act for the principal.⁹ Ordinarily the principal is bound by the actions of his agent within the scope of that agent's apparent authority.¹⁰ This is true even though the principal may have expressly limited the agent's actual authority:¹¹ "[O]ne who allows another to appear to be his agent [bears] any loss resulting to a third party from his dealings with the apparent agent . . . in reliance on his supposed authority."¹²

It has been held, however, that agents of the Government do not have any apparent authority.¹³ Those who deal with governmental agents, the courts indicate, have a duty to accurately ascertain the agent's actual authority as granted by applicable statutes and regulations.¹⁴ As a general rule, the United States is not liable for the erroneous acts or advice of its officers, agents or employees, even if committed in the performance of their official duties.¹⁵

The most notorious case dealing with the limitations imposed on the apparent authority of government agents is *Federal Crop Insurance Corp. v. Merrill*.¹⁶ In *Merrill*, an Idaho wheat farmer applied to the

7. Agency, *supra* note 5, §§ 40-43. This may be termed "incidental" or "implied" authority.

8. Outline, *supra* note 5, § 31, at 35; Agency, *supra* note 5, § 40.

9. Agency, *supra* note 5, § 35. Like actual authority, apparent authority may arise from the appointment of the agent to a position.

10. Agency, *supra* note 5, § 35. This is true if the third party does not have notice of the limitations.

11. There are two rationales for this result. The first is that the principal is estopped to deny the apparent authority of his agent. Outline, *supra* note 5, §§ 85-88; Agency, *supra* note 5, § 35 at 26. The second is that under the objective theory of contracts appearances are determinative. A "real" contract arises between the principal and the third party when the agent exercises his apparent authority. Outline, *supra* note 5, § 89. Although these two theories "differ as to origins, elements and results," Agency, *supra* note 5, § 5, in practice the choice of rationale is unimportant. Outline, *supra* note 5, § 90.

12. Outline, *supra* note 5, § 84.

13. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *Whiteside v. United States*, 93 U.S. 247, 257 (1876). See *Whelan and Dunigan, Government Contracts: Apparent Authority and Estoppel*, 55 Geo. L.J. 830 (1967) [hereinafter cited as *Government Contracts*]; Note, *Taxation: Reliance on Advice of Government Officials*, 33 Cornell L.Q. 607 (1948); Note, *Government Contractors Today Turning Square Corners in a One-Way Street?*, 4 Indiana Leg. F. 489 (1971).

14. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947).

15. *Atlantic Richfield Co. v. Hickel*, 432 F.2d 587, 591-92 (10th Cir. 1970); *Oil Shale Corp. v. Morton*, 370 F. Supp. 108, 125 (D. Colo. 1973); *von Kalinowski v. United States*, 151 Ct. Cl. 172 (1960), cert. denied, 368 U.S. 829 (1961).

16. 332 U.S. 380 (1947).

local agent of the petitioner, a wholly-owned government corporation, to insure his wheat crop, most of which was being reseeded on winter wheat acreage. The local agent knew these facts, but the information was not included in the written application. The agent advised the respondent that the entire crop was insurable and the corporation accepted Merrill's application. Thereafter, the crop was destroyed by drought but the corporation refused to pay Merrill's claim. Its published regulations declared that spring wheat reseeded on winter wheat acreage, such as Merrill's, was ineligible for insurance. Although Merrill was victorious in the Idaho Supreme Court, the United States Supreme Court reversed. In a stern decision,¹⁷ the Court concluded that Merrill could not be paid since, even though neither Merrill nor the agent himself may have been aware of it, the rules and regulations appearing in the Federal Register defined the bounds of the agent's authority.¹⁸ Since Congress had defined the scope of the local agent's actual authority, actions outside this authority could not bind the Government.¹⁹ The Court, therefore, refused to apply estoppel where the agent was not acting within his actual authority.²⁰

The rule as it has been applied is a harsh one. However, as shall be pointed out elsewhere in this analysis, in recent years some attempts have been made to circumvent the *Merrill* doctrine. This has been manifested by an increasing willingness, primarily on the part of the federal judiciary, to invoke the doctrine of equitable estoppel against the Government. This Article will examine the growing use of equitable estoppel and the basis for it. It will also analyze the barriers, both real and imagined, which preclude its even wider application.

I. TRADITIONAL APPLICABILITY OF ESTOPPEL

The doctrine of equitable estoppel is based on grounds of public policy and good faith. It is intended to afford protection against injustice and fraud to an injured party by denying another party the

17. The Court stated: "Accordingly, the Wheat Crop Insurance Regulations were binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance. The oft-quoted observation in Rock Island, Arkansas & Louisiana Railroad Co. . . . that 'Men must turn square corners when they deal with the government,' does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Id.* at 385.

18. The pertinent regulation stated: "Upon acceptance of an application by a duly authorized representative of the Corporation, the insurance contract shall be in effect, provided such application is submitted in accordance with the provisions of the application and of these regulations, including any amendments thereto." *Id.* at 385-86 n.3.

19. *Id.* at 384.

20. *Id.* at 384-85.

right to repudiate any acts, admissions or representations which have been relied on by the injured party to its detriment.²¹ As one court has opined: "Equitable estoppel prevents a party from assuming inconsistent positions to the detriment of another party."²²

The traditional reluctance to invoke equitable estoppel against the Government is primarily derived from the doctrine of sovereign immunity²³ although other considerations do have relevance. It has been asserted that the Government's welfare outweighs injury to any individual.²⁴ This theory is based on the premise that the sovereign as representative of all the people is charged with the protection of the public purse and should not be estopped by a plaintiff who asserts his private financial interests.²⁵

21. Pomeroy has defined estoppel as precluding a party "from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy." 3 Pomeroy, *Equity Jurisprudence* § 804, at 189 (5th ed. Symons 1941).

22. *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970). See *Miller v. United States*, 500 F.2d 1007 (2d Cir. 1974); *Exchange & Sav. Bank v. United States*, 226 F. Supp. 56 (D. Md. 1964). Both cases are distinguished in *De Gregory v. United States*, 395 F. Supp. 171 (E.D. Mich. 1975).

Estoppel has traditionally been applied against the Government only when it acts in its proprietary capacity, e.g., *United States v. Georgia-Pacific Corp.*, 421 F.2d 92 (9th Cir. 1970) (grant of land); *United States v. Big Bend Transit Co.*, 42 F. Supp. 459 (E.D. Wash. 1941) (same); *Emeco Industries Inc. v. United States*, 485 F.2d 652 (Ct. Cl. 1973) (per curiam) (the award of government contracts); *Fink Sanitary Service*, 53 Comp. Gen. 503 (1974) (same). It has been available even when the Government is acting solely in its sovereign capacity. *Miller v. United States*, 500 F.2d 1007 (2d Cir. 1974); cf. *Moser v. United States*, 341 U.S. 41 (1951); see *K. Davis, Administrative Law* § 17.03, at 347-48 (1972). See also *I.N.S. v. Hibi*, 414 U.S. 5, (1973) (per curiam).

23. *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 99 (9th Cir. 1970); see *Oil Shale Corp. v. Morton*, 370 F. Supp. 108 (D. Colo. 1973); *Elrod Slug Casting Mach. Co. v. O'Malley*, 57 F. Supp. 915 (D. Neb. 1944); *K. Davis, Administrative Law* § 17.01, at 343 (1972); *Berger, Estoppel Against the Government*, 21 U. Chi. L. Rev. 680, 683 (1954); *Pillsbury, Estoppel Against the Government*, 13 Bus. Law. 508, 510 (1958); Note, *The Proper Case for Estoppel Against Federal Administrative Agencies*, 28 Notre Dame Law. 234, 235 (1953).

24. See *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917).

25. *K. Davis, Administrative Law* § 27.02, at 498 (1972). This simplistic view of why the government should not be estopped is related to the slightly more enlightened philosophy that the resources of the Government should not suffer from the shrewd efforts of private individuals or from the indifference of government agents. *Whiteside v. United States*, 93 U.S. 247 (1876); *Montana Power Co. v. Federal Power Comm'n*, 185 F.2d 491 (D.C. Cir. 1950), cert. denied, 340 U.S. 947 (1951); see *Government Contracts*, supra note 13. However, as recognized by certain courts, this view should not permit the Government to deal capriciously with its citizens. *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 100 (9th Cir. 1970); *Emeco Industries, Inc. v. United States*, 485 F.2d 652 (Ct. Cl. 1973) (per curiam); see *Government Contracts*, supra note 13, at 847-49.

More ingrained, perhaps, in this judicial reluctance is the basic concept that "where Congress has laid down restrictions on government action or governmental spending, those restrictions should *never* be transgressed . . ."²⁶ The tendency against estoppel is particularly strong where conduct of the agent involves what are essentially legislative determinations.²⁷ It is upon this foundation that the rules relating to the government agent's ability to impose legally binding relationships on the Government have been taken up by the courts.²⁸ Accordingly, the judicial reluctance to estop the Government is perpetuated.²⁹ The cases manifesting this point of view often reject attempts to estop the Government by indicating simply that an agent's lack of actual authority is fatal to a claim of estoppel based on the conduct of that agent.³⁰

II. THE *Georgia-Pacific* APPROACH

With the expansion of the federal government and the increase in governmental interaction with private parties, some courts have reconsidered their reluctance to apply the doctrine of equitable estoppel.³¹ The belief that Washington is the public guardian and therefore should not be bound by its agents' actions beyond the scope of their actual authority is logical. It should, however, be balanced against the harm to the public when the Government is dishonest, or unconscientious.³² This is especially true today when few can escape dealings with the Government.³³

26. Government Contracts, *supra* note 13, at 834 (emphasis added) (footnotes omitted); see *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947).

27. See *Schuster v. Commissioner*, 312 F.2d 311, 317 (9th Cir. 1962).

28. Government Contracts, *supra* note 13, at 835. See *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *Wilbur Nat'l Bank v. United States*, 294 U.S. 120 (1935); *Yuma County Water Users Ass'n. v. Schlecht*, 262 U.S. 138 (1923); *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917); *Posey v. United States*, 449 F.2d 228 (5th Cir. 1971); *Goldstein v. United States*, 227 F.2d 1 (8th Cir. 1955); *United States v. Globe Indem. Co.*, 94 F.2d 576 (2d Cir.), cert. denied, 304 U.S. 575 (1938); *Bornstein v. United States*, 345 F.2d 558 (Ct. Cl. 1965).

29. See *Union Oil Co. v. Morton*, 512 F.2d 743, 748 n.2 (9th Cir. 1975).

30. See, e.g., *Smale & Robinson, Inc. v. United States*, 123 F. Supp. 457, 465 (S.D. Cal. 1954).

31. E.g., *Miller v. United States*, 500 F.2d 1007 (2d Cir. 1974); *United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973).

32. *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 100 (9th Cir. 1970).

33. As the Ninth Circuit noted in *Brandt v. Hickel*: "[t]o say to . . . [private parties dealing with the government], '[t]he joke is on you. You shouldn't have trusted us.' is hardly worthy of our great government." 427 F.2d 53, 57 (9th Cir. 1970). In this case, appellants' offer for a noncompetitive oil and gas lease to the Bureau of Land Management had been rejected. Relying on the erroneous advice of the Bureau's Los Angeles office, appellants submitted an amended offer rather than appealing the rejection. This misplaced reliance resulted in loss of priority to a subsequent offer. *Id.* at 54-55. While noting that "[n]ot every form of official misinformation

*United States v. Georgia-Pacific Co.*³⁴ presented a departure from the *Merrill* doctrine. In this case, the Government sought specific performance³⁵ of a thirty-year-old contract whereby Georgia-Pacific's predecessor in title promised to convey land to the Government in exchange for an extension of a national forest boundary.³⁶ The Government, even though it had previously extended the boundary, withdrew the new forest designation after some land was conveyed by Georgia-Pacific's predecessor. The conveyances required under the contract were never completed. During the thirty-year period between the contract execution and the institution of the suit, the Government made no claim under the contract. The Ninth Circuit allowed the defendant to successfully invoke the defense of estoppel against the Government.³⁷ The court held that as a condition precedent to the application of estoppel against the Government it must first determine if the general principles of estoppel—those necessary in any estoppel case—were satisfied:

'Four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.'³⁸

will be considered sufficient to estop the government," the court held nevertheless that "some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the mistatement." *Id.* at 56.

34. 421 F.2d 92 (9th Cir. 1970).

35. The Government also sought a declaratory judgment. *Id.* at 93-94.

36. *Id.* at 94.

37. *Id.* at 95, 103.

38. *Id.* at 96, quoting *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960); see *California State Board of Equalization v. Coast Radio Prod.*, 228 F.2d 520, 525 (9th Cir. 1955); 18 Cal. Jur. 2d 406. The court in *United States v. Standard Oil Co.*, 20 F. Supp. 427, 452 (S.D. Cal. 1937), set out five conditions for estoppel: "(1) false representations or concealment of material facts, (2) made with knowledge [of the actual facts] to (3) a person without knowledge or means of [obtaining such] knowledge, (4) with intention that they be acted upon, and (5) action thereon to one's prejudice." Traditionally, inaction has not provided a basis for estoppel. But see *United States v. Hanna Nickel Smelting Co.*, 253 F. Supp. 784, 795 (D. Ore. 1966), aff'd, 400 F.2d 944 (9th Cir. 1968); *United States v. Brabham*, 122 F. Supp. 570, 572 (E.D.S.C. 1954).

Previous requirements that the actions of government agents amount to fraud, *United v. Standard Oil*, 20 F. Supp. 427, 452 (S.D. Cal. 1937), have been abandoned in favor of a standard whereunder an agent need not act malevolently but merely improperly in order to create governmental liability. This evolution seems to have closely paralleled other federal and administrative attempts in the area of government contract law to remove fraud or bad faith standards and replace them with an objective standard based on a finding of arbitrary or capricious action or lack of a reasonable basis for the action taken. Compare *Heyer Prods. Co. v. United States*, 140 F. Supp. 409 (Ct. Cl. 1956) (a standard of fraud in the inducement) with *Keco Indus., Inc. v. United States*, 492 F.2d 1200 (Ct. Cl. 1974) (arbitrary and capricious action measured in part by the lack of a reasonable basis for the agent's actions) and *Excavation Constr., Inc. v. United*

The court determined that Georgia-Pacific fulfilled these four criteria and went on to decide whether "under the circumstances such estoppel [could] be raised against [the] Government."³⁹ It found that it could apply estoppel if two requirements were met—(1) that the government was acting in its proprietary capacity,⁴⁰ and (2) that the agent was acting within the scope of his authority.⁴¹ These requirements were satisfied in *Georgia-Pacific*.

Georgia-Pacific, while perhaps increasing the use of estoppel in the context of Government contracts as well as in other areas,⁴² has not led to the promulgation of reasoned guidelines to determine just how square a corner contractors must turn when dealing with the Government. This is because the phrase "scope of authority" was not defined.⁴³ The principal impediment to such a definition remains the well-entrenched *Merrill* doctrine which refused to bind the Government except when the agent was acting within his actual authority. However, the pre-eminence of that doctrine has, of late, been shaken both directly⁴⁴ and indirectly.⁴⁵

III. *Georgia-Pacific* AND GOVERNMENT PROCUREMENTS

In the realm of government procurement contracts, the *Georgia-Pacific* rationale has been adopted but cases have developed conflicting definitions of scope of authority. In *Lockheed Shipbuilding and Construction Co.*,⁴⁶ the *Georgia-Pacific* criteria were applied and estoppel successfully asserted against the Government.

States, 494 F.2d 1289 (Ct. Cl. 1974) (same). See *In re T & H Corp.*, 54 Comp. Gen. 1021 (1975). See also *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971).

39. 421 F.2d at 98.

40. It is extremely difficult to determine when the Government is acting within its sovereign capacity and when it is within its proprietary. "While it is said that the Government can be estopped in its proprietary role, but not in its sovereign role, the authorities are not clear about just what activities are encompassed by each. In its proprietary role, the Government is acting as a private concern would; in its sovereign role, the Government is carrying out its unique governmental functions for the benefit of the whole public." 421 F.2d at 101. See *United States v Lazy FC Ranch*, 481 F.2d 985, 989 n.5 (9th Cir. 1973).

41. 421 F.2d at 101.

42. See note 23 supra.

43. Nowhere in *Georgia-Pacific* does it state that express authority is needed. It simply refers to "scope of authority." 421 F.2d at 101. In the case, however, the agent did have express authority. *Id.*

44. *United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973).

45. *Moser v. United States*, 341 U.S. 41 (1951); *Miller v. United States*, 500 F.2d 1007 (2d Cir. 1974); *Semaan v. Mumford*, 335 F.2d 704, 706 n.7 (D.C. Cir. 1964); *In re LaVoie*, 349 F. Supp. 68 (D.V.I. 1972); *Gestuno v. District Director of Immigration*, 337 F. Supp. 1093 (C.D. Cal. 1971); *Exchange & Sav. Bank v. United States*, 226 F. Supp. 56 (D. Md. 1964); *Fink Sanitary Service, Inc.*, 53 Comp. Gen. 503 (1974).

46. 75-1 B.C.A. ¶ 11,246 (ASBCA), aff'd, 75-2 B.C.A. ¶ 11,566 (ASBCA 1975).

In *Lockheed*, the Armed Services Board of Contract Appeals held that the conduct of government officials, primarily that of the Assistant Secretary of Defense, led Lockheed reasonably to expect the approval of a tentative multi-million-dollar settlement of a shipbuilding claim but the settlement never received the required approval. Lockheed, in severe financial straits, had relied upon the statements of the Assistant Secretary of Defense and altered its position by formulating a credit arrangement with its creditors which took into account the tentative settlement. Lockheed also withdrew its appeal on other claims and accepted a fixed loss in another program.⁴⁷

The Board determined that the Government was acting within its proprietary capacity⁴⁸ and the agent within the scope of his "actual" authority. Interpreting *Merrill* and *Georgia-Pacific*, it stated:

In *Georgia-Pacific* . . . the Ninth Circuit . . . held that an estoppel could lie against the Government. While the reasoning of the courts on this point is not always clear, the apparent discrepancy [between *Merrill* and *Georgia-Pacific*] can be resolved on the basis that in *Merrill* the Government agent acted in a manner inconsistent with certain governing regulations and therefore exceeded the scope of his actual authority, whereas in *Georgia-Pacific* . . . the agents acted within the scope of their actual authority.⁴⁹

In essence, the Board looked to the fact that in the prior cases where the Government had been estopped,⁵⁰ the agents had possessed actual authority and it concluded that the courts in those decisions meant actual authority when they wrote "scope of authority."

Two cases⁵¹ in the government procurement area have differed in the definition of scope of authority and effectively held that apparent authority is sufficient to estop the government. In *Emeco Industries, Inc. v. United States*⁵² plaintiff submitted the lowest timely bid for a Government contract to furnish index card boxes.⁵³ A late bid by

47. *Id.* at 53,549.

48. More significant, however, was the fact that the Board chose to analyze the mandate of the regulation which must be transgressed to hold the Government estopped—the Navy regulation required the tentative settlement be approved by higher authority prior to its becoming final. This regulation was found to be procedural or nonlegislative and intended merely for the benefit of the Government rather than for any party dealing with the Government. 75-1 B.C.A. ¶ 11,246 at 53,553.

49. *Id.* at 53,552.

50. E.g., *United States v. Fox Lake State Bank*, 225 F. Supp. 723, 724 (N.D. Ill. 1963), aff'd and rev'd, 366 F.2d 962 (7th Cir. 1966); *Shotwell v. United States*, 163 F. Supp. 907, 915 (E.D. Wash. 1958); *Smale & Robinson, Inc. v. United States*, 123 F. Supp. 457 (S.D. Cal. 1954).

51. *Emeco Indus., Inc., v. United States*, 485 F.2d 652 (Ct. Cl. 1973) (per curiam); *Fink Sanitary Service, Inc.*, 53 Comp. Gen. 503 (1974).

52. 485 F.2d 652 (Ct. Cl. 1973) (per curiam).

53. Subsequent to the bid opening General Services Administration (GSA) requested a plant inspection report to determine if Emeco's facilities were capable of producing the required boxes

another company was accepted for part of the order after it was determined eligible for consideration because its late arrival was caused by a postal delay.⁵⁴ Emeco was allowed to furnish the remaining boxes. However, acting on the belief that it was awarded the whole contract,⁵⁵ Emeco purchased expensive dies, built a preproduction sample and placed orders for the necessary production material. It commenced production and continued producing until it found that the other company had been awarded part of the contract. After concluding that no contract for all the boxes had been entered into between the Government and Emeco,⁵⁶ the Court of Claims held that the Government was estopped from denying the existence of such a contract.⁵⁷

The court followed the initial estoppel criteria set out in *Georgia-Pacific* precisely,⁵⁸ and concluded that the four estoppel criteria were met. Without considering whether the Government was acting in its proprietary capacity,⁵⁹ the court held that in view of the Government's

within the time required by the solicitation. Pre-award surveys of the type here outlined are, under certain circumstances, required by the Federal Procurement Regulation, 41 C.F.R. § 1-1.1205-4(b) (1975). However, plant inspections are not usually required on contracts for under \$10,000. 41 C.F.R. § 1-1.310-9(b) (1975). The completed report in Emeco indicated that Emeco did indeed have the capability to perform the contract within the required time limit. The report also noted that Emeco had already made arrangements to purchase four dies at a total cost of \$10,300, which were essential to manufacture the boxes. Emeco had made this arrangement in advance of any award. Delivery of the dies was to be within thirty days of the GSA approval of Emeco's preproduction sample. 485 F.2d at 653.

54. See generally late bid provisions, 41 C.F.R. § 1-2.303 (1975). Art Steel's bid, however, was limited to supplying only 29,183 of the 31,896 required boxes. Bidding on such partial quantities was permitted in accordance with clause 10c of Standard Form (SF) 33A which was included in the Invitation for Bids. 41 C.F.R. § 1-16.901-33A(b)(1976). Clause 10c reads "Unless otherwise provided in the schedule, offers may be submitted for any quantities less than those specified; and the Government reserves the right to make an award on any item for a quantity less than the quantity offered at the unit prices offered unless the offeror specifies otherwise in his offer." (boldface in original). The contracting officer may initially have anticipated making a single award to the low bidder; he apparently decided to split the award between Emeco and Art Steel. Again, this was permissible in accordance with clause 10c of SF 33A. Emeco was to deliver 2,713 units at a total price of \$8,247.52, while Art Steel was to deliver 29,183 units.

55. The award to another company was not communicated to Emeco until a much later time. Indeed the only communication received by Emeco in this regard was a December 3 purchase order for 2,713 boxes.

56. 485 F.2d at 656-57.

57. Id. at 657-59. See *Manloading & Management Associates, Inc. v. United States*, 461 F.2d 1299 (Ct. Cl. 1972); *Fink Sanitary Service, Inc.*, 53 Comp. Gen. 503 (1974). However, damages for the Government's failure to proceed under this contract were to be calculated in accordance with the contract's termination for convenience provision, which precluded compensation for anticipated profits or consequential damages. 485 F.2d at 659; accord, *G. L. Christain & Associates v. United States*, 312 F.2d 418 (Ct. Cl.), cert. denied, 375 U.S. 954 (1963).

58. 485 F.2d at 657.

59. However, in making this contract for index card boxes, the Government was obviously acting in its proprietary capacity.

misleading course of conduct it should be estopped. *Emeco* also impliedly defined "scope of authority." The case might be read as holding that the contracting officer did have the actual authority to award contracts even to other than the low bidder. However, under basic agency rules,⁶⁰ if the government agent was acting with such actual authority, estoppel would not be necessary since the acts of the agents could bind the Government.⁶¹ The inquiry would simply be whether there had been an exercise of the actual authority. This, however, cannot explain the *Emeco* decision because the agent in *Emeco* was not acting with actual authority. The contracting officer was only authorized to award contracts to the lowest responsible bidder.⁶² *Emeco* was not the lowest bidder for all the boxes.⁶³ In *Emeco* "scope of authority" must be read as including apparent authority within its breadth. The agent did have apparent authority since he was a contracting officer and, absent the acceptance of the lower bid, a contract with *Emeco* would have been valid.

The same definition was used in *Fink Sanitary Service, Inc.*⁶⁴ Fink's bid for refuse collection was accepted as the lowest bid when its discount was taken into consideration. However, on further examination of the bid, it was found that the discount offered by Fink could not properly be evaluated for award.⁶⁵ As a consequence, the Fink bid evaluated at its non-discount price was not the lowest bid. Nevertheless, Fink, in reliance upon the representations of the Air Force that it was awarded the contract, purchased additional refuse trucks.

In concluding that the Government was estopped from denying the existence of a contract with Fink, the Comptroller General found that the four tests for estoppel set out in *Georgia-Pacific* and *Emeco* were met.⁶⁶ Unlike *Emeco* which made no express determination of the

60. See notes 5-12 supra and accompanying text.

61. In *Walsonavich v. United States*, 335 F.2d 96 (3d Cir. 1964), the court first made a lengthy discussion of actual, albeit implied, authority and then for further support relied upon estoppel.

62. E.g., *Schoenbrod v. United States*, 410 F.2d 400 (Ct. Cl. 1969); *Prestex, Inc. v. United States*, 320 F.2d 367 (Ct. Cl. 1963).

63. 485 F.2d at 654.

64. 53 Comp. Gen. 503 (1974).

65. Id. at 504. Paragraph 9(a) entitled 'Discounts' indicated the following: "Notwithstanding the fact that a blank is provided for a ten (10) day discount, prompt payment discounts offered for payment within less than twenty (20) calendar days will not be considered in evaluating offers for award, unless otherwise specified in the solicitation. However, offered discounts of less than 20 days will be taken if payment is made within the discount period, even though not considered in the evaluation of offers." 41 C.F.R. § 1-16.901-33A(a) (1976). See Armed Services Procurement Regulation, 32 C.F.R. § 2-407.3(c) (1976).

66. 53 Comp. Gen. at 506.

agent's authority, *Fink*⁶⁷ ruled that the contracting officer had no authority to award the contract:

[T]he Court of Claims did not address itself to the important problem inherent in holding the Government liable on a contract which its agent (the contracting officer) . . . *had no authority to enter*. Emeco was not the lowest responsive, responsible offerer [sic] on the portion of the solicitation to which estoppel was applied. Neither, in fact, was Fink low bidder on [the] procurement.⁶⁸

The agent did, however, have apparent authority to enter into the contract since he held the position of contracting officer. He merely exceeded his actual authority:

The . . . action in giving the contract number to the apparent low bidder . . . is, we believe, an action which a reasonable bidder has a right to believe was intended for it to act upon . . .⁶⁹

67. In this discourse, however, the Emeco case is distinguishable in that the Comptroller General in that case felt the Government had knowledge of the facts when it acted or failed to act so as to induce Emeco into its detrimental course. *Id.* But in *Fink*, as of the date of the inducing action, the Government by its own misfeasance, in not recognizing the problem of evaluating a ten-day discount, was not aware of the true facts. This mistake was held not to provide a basis for relieving the Government of liability. *Id.* at 507. Thus, *Fink* expanded the first Georgia-Pacific test to include an examination of whether the party to be estopped must have known or should have known the true facts. See notes 38-41 *supra* and accompanying text; *National State Bank v. Terminal Constr. Corp.*, 217 F. Supp. 341 (D.N.J. 1963), *aff'd*, 328 F.2d 315 (3d Cir. 1964) (per curiam).

68. 53 Comp. Gen. at 506-07 (emphasis added). See *Schoenbrod v. United States*, 410 F.2d 400 (Ct. Cl. 1969); *Prestex, Inc. v. United States*, 320 F.2d 367 (Ct. Cl. 1963); *Carrol Beaver, B-184130, 75-2 CPD 14*, 2 (July 3, 1975) stated: "The Government only has power to contract through its agents whose authority is prescribed and limited by statute, regulation, and judicial and administrative determinations. To make the Government liable for anything more than the *benefits* it has *received* would permit Government agents to obligate the Government in direct violation of those prescriptions and limitations."

69. 53 Comp. Gen. at 506. The court held that in this case the "binding stamp of nullity" should not be imposed. 53 Comp. Gen. at 507. Accord, *John Reiner & Co. v. United States*, 325 F.2d 438, 440 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964). The Court of Claims held: "In testing the enforceability of an award made by the Government, where a problem of the validity of the invitation or the responsiveness of the accepted bid arises after the award, the court should ordinarily impose the binding stamp of nullity only when the illegality is plain. If the contracting officer has viewed the award as lawful, and it is reasonable to take that position under the legislation and regulations, the court should normally follow suit." *Id.* at 440. The court indicated that the termination-for-convenience clause could be an alternate means to protect the Government's interest and prevent a clash between the procuring agency and the GAO. *Id.* at 440 n.3. Thus, the GAO applied its two-fold test for plain or palpable illegality: 1) did the contractor's actions cause the award to be made contrary to regulatory requirements, or 2) did the contractor receive direct notice that the contracting agent's procedures were in violation of the requirements. Memorandum to the Director, Defense Supply Agency, 52 Comp. Gen. 215, 218 (1972). If neither of these questions could be affirmatively answered then the award would not be considered plainly or palpably illegal and the contract could then only be terminated for the convenience of the Government. *Brown & Son Electric Co. v. United States*, 325 F.2d 446 (Ct. Cl. 1963); *John*

IV. BALANCING APPROACH

Some courts have established a balancing test when determining whether to apply estoppel against the Government. This approach

Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964). While the two-fold test stated in Memorandum to the Director, Defense Supply Agency, *supra*, is a practical means of implementing the Reiner mandate that few contracts be cancelled outright and that mere impropriety in the award process should be remedied primarily by terminating those resulting contracts for convenience, there is a problem with it. The basis alleged by the Comptroller General for establishing the test is *Prestex, Inc. v. United States*, 320 F.2d 367 (Ct. Cl. 1963), and *Schoenbrod v. United States*, 410 F.2d 400 (Ct. Cl. 1969). These cases, however, involve the limits on the authority of the contracting officer to enter into particular transactions. By switching the basis of the illegality to the actions (or knowledge) of the contractor, the Comptroller has significantly deviated from the *Prestex* reasoning, although the result reached is practical and consistent with Reiner. Nevertheless, it is difficult to rationalize the test stated in the Memorandum to the Director, Defense Supply Agency, *supra*, with other decisions cited dealing with the precise limits of the contracting officer's authority.

In light of the ruling in *United States v. American Renaissance Lines Inc.*, 494 F.2d 1059 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974), fear has been expressed that since by definition contracts that become viable only through the application of estoppel are generally not written, those oral contracts may not be enforceable in accordance with 31 U.S.C. 200(a)(1) (1970). That statute reads in pertinent part: "After August 26, 1954 no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of—(1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed . . ." Since in an estoppel situation like *Fink* (and to a lesser degree *Emeco*) there is no binding agreement until so decreed by a tribunal, whether administrative or judicial, it seems difficult to believe that the statute could be a bar to the enforcement of a binding agreement, the binding effect of which may have been determined long after the expiration of the period for obligation of the appropriation. Moreover, it should be noted that *American Renaissance* may by its own terms be limited to those situations where the Government, rather than the contractor, seeks to enforce an executory oral agreement. As pointed out in a recent article, Patten, *Government Contracts—Are They Enforceable If Not in Writing?*, 7 Pub. Contract L.J. 232 (1975), 31 U.S.C. § 200(a)(1) was never intended by Congress to be a Statute of Frauds. Congress merely contemplated it to be an "internal housekeeping requirement related to obligated funds that have been appropriated to executive department agencies." *Id.* at 234. Mr. Patten also cites: (1) the fact that the Tucker Act, 28 U.S.C. §§ 1346, 1491 (1970), as amended (Supp. IV 1975) granted the Court of Claims and the district courts jurisdiction "upon any express or implied contract with the United States" clearly in anticipation of some litigation between private parties and the Government on unwritten contracts, (2) previous Comptroller General decisions interpreted the statute as one involving "housekeeping," (3) contrary decisions of the Court of Claims, and (4) the fact that the protection of the public purse which so concerned the court in *American Renaissance* is provided by the Anti-Deficiency Act, 31 U.S.C. § 665 (1970), 41 U.S.C. § 11(a) (1970). In sum, *American Renaissance* may not be the bar initially foreseen. See *Cooke v. United States*, 91 U.S. 389 (1875). See also *United States v. Hadden*, 192 F.2d 327 (6th Cir. 1951); *Winn-Senter Constr. Co. v. United States*, 75 F. Supp. 255 (Ct. Cl. 1948); *McIntire, Authority of Government Contracting Officers: Estoppel and Apparent Authority*, 25 Geo. Wash. L. Rev. 162 (1957).

weighs the magnitude of the injustice created by the Government's agent against the importance of the public policy and/or congressional

In determining what are the duties of the agent, cases like Fink and Miller certainly indicate that the private party need not, however, resort to the Federal Register or the statutes in every instance. See text accompanying note 81 infra. In *Dana Corp. v. United States*, 470 F.2d 1032 (Ct. Cl. 1972) (per curiam), it was held that a contracting officer who "knew that the [contractor] was performing in excess of the contract requirements and expected to be paid therefor" and who continued to make payment orders and did not inform the contractor that there was no money authorized for the extra work, was acting within the scope of his authority. See *Gresham & Co. v. United States*, 470 F.2d 542 (Ct. Cl. 1972); *Deloro Smelting & Refining Co. v. United States*, 317 F.2d 382 (Ct. Cl. 1963).

Contrary to the view expressed in *California-Pacific Util. Co. v. United States*, 194 Ct. Cl. 703 (1971) (per curiam) (those who deal with a Government agent, officer, or employee are deemed to have notice of the limitation of his authority), the concept of "scope of authority," or, in other words, the consistency with official duties, is really more closely akin to apparent authority than it is to express authority. In *Whike Constr. Co. v. United States*, 140 F. Supp. 560, 564 (Ct. Cl. 1956), the Court of Claims held that the Government's legal representatives were acting in such circumstances so as to lead any normal person to regard them as having the capacity to act in that matter. For the Government to escape responsibility completely would set a trap to lure the unwary into signing a contract. *Dumont Oscilloscope Laboratories, Inc.*, B-183434, 76-1 CPD 15 (Jan. 15, 1976) can be read broadly as holding that in an equitable estoppel situation, a private party, to show reasonable reliance, must have relied on the representations of someone whose duties included the power to bind the Government with regard to the representation. See *Monitor Products Co.*, B-182437, 75-2 CPD 215 (Oct. 9, 1975); *Abbott Laboratories*, B-183799, 75-2 CPD 171 (Sept. 23, 1975); *Flippo Constr. Co.*, B-182730, 75-1 CPD 139 (March 7, 1975), aff'd, 75-1 CPD 303 (May 20, 1975). See also *Fink Sanitary Service, Inc.*, 53 Comp. Gen. 503 (1974); *Lockheed Shpbldg. & Constr. Co.*, 75-1 B.C.A. ¶ 11,246 (ASBCA), aff'd, 75-2 B.C.A. ¶ 11,566 (ASBCA 1975). The only distinction between this view and that expressed in Merrill is that there the Supreme Court forced the plaintiff to research the regulations in detail to ascertain the precise duties of the agent. Under the more enlightened view, the party asserting the estoppel must merely show the reasonableness of his reliance on what objectively appears to be the agent's official duties. See *Miller v. United States*, 500 F.2d 1007 (2nd Cir. 1974); *Emeco Indus. Inc. v. United States*, 485 F.2d 652 (Ct. Cl. 1973) (per curiam); *Fink Sanitary Service, Inc.*, *supra*.

The argument was made in Comment, *Emergence of an Equitable Doctrine of Estoppel Against the Government—The Oil Shale Cases*, 46 U. Colo. L. Rev. 433 (1975) [hereinafter cited as *Equitable Doctrine*] that the court in *Oil Shale Corp. v. Morton*, 370 F. Supp. 108 (D. Colo. 1973) found that the Secretary of the Interior taking action in 1935 to rescind his earlier findings which invalidated the plaintiff's mining claims: (1) acted under the authority set forth in *Knight v. United States Land Ass'n*, 142 U.S. 161 (1891), and (2) that this action was in compliance with the holding in *Ickes v. Virginia-Colorado Dev. Corp.*, 295 U.S. 639 (1935). It, furthermore, contended that since the Supreme Court thirty-five years thereafter found in *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970) that the Department's 1935 view of the Virginia-Colorado case was incorrect, the actions which the plaintiff relied on in 1935 and in subsequent years "were erroneous as based upon a mistake of law." *Id.* at 453. Therefore, contrary to the District Court's view, the Comment indicated that these acts were not within the scope of the Secretary's authority. The Comment spoke of this fact in seemingly critical terms and without recognizing the logical consequences of its conclusion even though it observed that the court rejected the narrow absolutism incumbent in the term "scope of authority" and replaced it with "a form of apparent authority." The Comment stated that "the court . . . simply recognized that, without benefit of the Supreme Court's belated enlightenment in *Hickel*, [in 1935] anyone would (indeed, everyone did)

directive which was transgressed.⁷⁰ While this approach avoids any need for a determination of proprietary capacity,⁷¹ there nevertheless remains the question of reasonableness. The contractor therefore will be required to show that he reasonably relied on a government agent's representations. Reliance on the advice of relatively minor officials is unreasonable⁷² and the balancing approach cannot be employed. Thus, the reasonableness of the reliance would probably vary in direct relationship to the position of the agent making the representation and the materiality of the representation. It would also seem to vary inversely with both the degree and the consequences of the reliance.⁷³

Cases in the Ninth Circuit have determined the applicability of estoppel solely by ascertaining "if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel."⁷⁴ In *United*

interpret Virginia-Colorado" as did the Department. Id. at 456. It indicated thereafter that since in 1935 the Department was (against its own wishes) merely complying with the Supreme Court's decision and thus acting on the Supreme Court's authority in finding an estoppel against the Government, it was the Supreme Court that is being estopped from effectuating its 1970 decision in Hickel. This is fallacious. As the court in Morton properly concluded, the Secretary's 1935 actions were based on the law of that day (which appeared to be correct until 1970) and he was thus acting in a manner consistent with it. Therefore, at the very least he was acting in a manner entirely consistent with his official duties, and as the court again quite properly found, Oil Shale was entirely reasonable in relying on these actions (mistaken as they retrospectively were found to be) to its detriment. The Secretary was not acting on the authority of the Supreme Court. He was simply following the law of the time. What the District Court may have done in reaching its conclusion was to weigh the consequences of the plaintiff's reliance on the Secretary's actions for nearly 30 years against the mandate set up in 1970 by the Supreme Court in Hickel. This mandate was that the Department need not have done what it did in 1935. Furthermore, the court may have determined that equity and fair governmental dealings with private citizens required that the Government not escape the consequences of its actions reasonably relied upon.

370 F. Supp. at 126.

70. Acme Process Equipment Co. v. United States, 347 F.2d 538, 552 (Ct. Cl. 1965), reconsidered, 351 F.2d 656 (Ct. Cl. 1965) (per curiam). Accord, Miller v. United States, 500 F.2d 1007, 1010 (2d Cir. 1974); Gestuvo v. District Director of Immigration, 337 F. Supp. 1093, 1101-02 (C.D. Cal. 1971). See also Equitable Doctrine, *supra* note 69.

71. United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973); Carroll Beaver, B-184130, 75-2 CPD 14 (July 3, 1975).

72. Southern Hardwood Traffic Ass'n v. United States, 283 F. Supp. 1013, 1020 (W.D. Tenn 1968), aff'd, 411 F.2d 563 (6th Cir. 1969) (per curiam); Feil v. Gardner, 281 F. Supp. 983, 985 (E.D. Wis.), aff'd, 402 F.2d 481 (7th Cir. 1968).

73. For example, a contractor should not expend \$100,000,000 in reliance upon the opinion of an assistant to the contracting officer at a small facility or agency. He could, however, reasonably rely on such a statement made or some action undertaken by the Secretary of Defense in certain situations.

74. United States v. Lazy FC Ranch, 481 F.2d 985, 989 (9th Cir. 1973); accord, Brandt v. Hickel, 427 F.2d 53, 56-57 (9th Cir. 1970); Schuster v. Commissioner, 312 F.2d 311, 317-18 (9th

*States v. Lazy FC Ranch*⁷⁵ this approach was evident. A partnership divided up its land among its partners to gain maximum payments under the Soil Bank Act.⁷⁶ This was done on the advice of the manager of the local Agricultural Stabilization and Conservation Service (ASCS), with the approval of the local and state association offices. Even though the state ASCS office determined that the contracts violated regulations, it permitted the partnership to retain the payments since it determined that the regulations did not preclude such a scheme. Subsequently, the United States brought suit to recover the payments as "false claims." The Government, however, was estopped from maintaining the action because of the advice of the manager.⁷⁷ The court did not consider the *Georgia-Pacific* tests at all but merely held: "We think the estoppel doctrine is applicable to the United States where justice and fair play require it."⁷⁸

Similarly, in *Schuster v. Commissioner*,⁷⁹ this balancing approach was applied. The Commissioner of Internal Revenue determined that the assets of an estate were not taxable. In reliance upon this ruling the trustee distributed all the estate's assets. The Commissioner reversed his ruling a year later and required taxes to be paid. The Ninth Circuit estopped the Commissioner from asserting liability against the trustee,⁸⁰ noting:

It is conceivable that a person might sustain such a profound and unconscionable injury in reliance . . . as to require, in accordance with *any sense of justice and fair play*, that the [Government] not be allowed to inflict the injury.⁸¹

Cir. 1962); see, *In re LaVoie*, 349 F. Supp. 68, 73-74 (D.V.I. 1972); *Gestuvo v. District Director of Immigration*, 337 F. Supp. 1093 (C.D. Cal. 1971).

75. 481 F.2d 985 (9th Cir. 1973).

76. Law of May 28, 1956, ch. 327, § 102, 70 Stat. 188. Each partner was given a part of the partnership land and responsibility for specialized areas of production. The land was leased to the partners and the partnership retained twenty per cent of the increase as rent with the lessees receiving eighty per cent. 481 F.2d at 986.

77. Id. at 986-89.

78. Id. at 988.

79. 312 F.2d 311 (9th Cir. 1962).

80. The beneficiaries were, however, held liable. Id. at 318.

81. Id. at 317 (emphasis added). This same philosophy was present in *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970). See note 33 supra. In *Miller v. United States*, 500 F.2d 1007 (2d Cir. 1974) the Second Circuit has even gone so far as to estop the government from imposing a particular statute of limitations. In *Miller*, a tax case, the plaintiff executed a waiver of formal notice of disallowance on November 7, 1966. This waiver caused a two-year statute of limitations to begin to run on a refund action. The Internal Revenue Code of 1954, § 6532(a)(3) (1964) was in effect at the time. Thereafter, an agent of the Internal Revenue Service sent *Miller* a notice of disallowance dated May 20, 1968. The disallowance stated that the taxpayer had two years from that date to file for a refund under the Internal Revenue Code of 1954, § 6532(a)(1)

The balancing approach has been taken to its furthest extent in the government procurement contract area. In one case, the Court of Claims employed the balancing test to estop the Government when the agent's actions were contrary to a specific congressional mandate. In *Manloading & Management Associates, Inc. v. United States*,⁸² plaintiff entered into a one year contract with the Government. In submitting its bid Manloading relied upon the pre-bid representations of a government agent that the contract would be renewed at the end of the fiscal year.⁸³ When the contract was not renewed at the end of its one year period, plaintiff brought suit. Even though plaintiff knew that the Government could not originally sign a contract for a longer period due to a lack of funds, the agent was aware that the contract could not become profitable unless extended. The court held that the Government was estopped from denying its agent's representations:

The purpose of the bidding conference was to provide the bidders with the information which they needed . . . [The agent] was fully authorized to provide such information, and it is undisputed that plaintiff relied on it to its detriment. It was obvious that the successful bidder would have to incur a considerable amount of preparatory costs . . . Since the question of renewal was of such paramount importance to the prospective bidders, it cannot be doubted that [the agent] intended for them to rely upon his statement.⁸⁴

The court determined that the plaintiff had every reason to rely upon the statements of the agent and that failure to estop the government would cause serious harm to the contractor.⁸⁵

This case, however, differs from the aforementioned decisions since in *Manloading* the court estopped the government when the agent

(1964). While recognizing the line of authority that unauthorized acts of the Government agent will not support an estoppel, the court held that it would do no violence to the spirit of the aforementioned statute, in its entirety, to hold that under the circumstances of this case the inadvertent action of the director estopped the Government from asserting the shorter statute of limitations. While the case seems four square with the balancing test, the court stopped short of stating that the act was unauthorized.

Miller was distinguished in *De Gregory v. United States*, 395 F. Supp. 171 (E.D. Mich. 1975), on the basis that the De Gregory court was presented with a limitation under another section of the Internal Revenue Code of 1954 which provided a shorter and less flexible time limit, and that the IRS District Director's letter some 21 months after the expiration of the statute of limitations could not have reasonably been relied on.

82. 461 F.2d 1299 (Ct. Cl. 1972). The contracting agent stated: "any prospective bidder should be assured that funds were available and that there would be no question about the renewal of the contract . . ." Id. at 1301 (emphasis omitted).

83. Id. at 1301.

84. Id. at 1302-03.

85. The court also seemed to accept the Georgia-Pacific tests of proprietary capacity. Id. at 1303.

acted contrary to an *express* congressional mandate. The court seemed to recognize that such a holding would have created a violation of the Anti-Deficiency Act,⁸⁶ which among other things, precludes contracting officers from entering into contracts of a continuing nature with annual appropriations where the contract does not by its own terms cease at the end of each fiscal year.⁸⁷ The Court of Claims, however, created a fiction to salvage the contract, ruling that the extension "in effect, result[ed] in an amendment that renewed the contract . . . for the next fiscal year."⁸⁸ The court did not hold that the agent's action in signing the contract extended the initial term of the contract from the end of the first renewal option period. Instead, the court ruled that an option had been exercised at the appropriate time—the end of the fiscal year—rather than admit that the basic period had in fact been extended by the unauthorized acts of the Government agent.⁸⁹ Therefore, where the balance is in favor of the Government because of an express congressional determination, the court may still find for the contractor.

86. 31 U.S.C. § 665(a) (1970), states that: "No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law." 41 U.S.C. § 11(a) (1970) provides that: "No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment"

87. Storage Technology Corp., B-182289, 75-1 CPD 261 (April 25, 1975); 48 Comp. Gen. 497 (1969); 48 Comp. Gen. 494 (1969); 42 Comp. Gen. 272 (1962). See Goodyear Tire & Rubber Co v. United States, 276 U.S. 287 (1928); Leiter v. United States, 271 U.S. 204, 207 (1926); Gay St. Corp. v. United States, 127 F. Supp. 585 (Ct. Cl. 1955). Contract provisions which allow the Government at its option to continue the contract do not, of course, violate the act.

88. 461 F.2d at 1303.

89. Manloading is interesting from another aspect. It countermanded the general philosophy that representations made as to future events do not generally provide a basis for estoppel. See Continental Cas. Co. v. Associated Pipe & Supply Co., 447 F.2d 1041, 1060 (5th Cir. 1971); V-M Corp. v. Bernard Distrib. Co., 447 F.2d 864 (7th Cir. 1971). See generally Doody v. John Sexton & Co., 411 F.2d 1119 (1st Cir. 1969). Estoppel may be found, however, where the representation as to future events would either perpetrate a fraud or work an injustice. United States ex rel Humble Oil & Ref. Co. v. Fidelity & Cas. Co., 402 F.2d 893 (4th Cir. 1968). However, as noted by the dissent, the Manloading case does not seem to have been a case which cried out for this exception. 461 F.2d at 1304 (Nichols, J., dissenting). To the extent that Manloading reflects the adoption of the balancing test, it should be considered part of the increasing number of judicial opinions holding the Government estopped even where estoppel is founded upon unauthorized, improper, or even illegal acts of Government agents. United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973); Oil Shale Corp. v. Morton, 370 F. Supp. 108 (D. Colo. 1973); In re LaVoie, 349 F. Supp. 68 (D.V.I. 1972); Gestuvo v. District Director of Immigration, 337 F. Supp. 1093 (C.D. Cal. 1971).

V. CONCLUSION

The doctrine of estoppel is currently being employed against the Government. Two different methods for the use of this doctrine have evolved since the Supreme Court's decision in *Federal Crop Insurance Corp. v. Merrill*.⁹⁰ The *Georgia-Pacific* approach has sought to employ estoppel consistently with *Merrill*. This has led to contrary results since some tribunals have not uniformly defined "scope of authority." While one court⁹¹ adheres to a strict *Merrill* approach in which only actions within the agent's actual authority are sufficient to estop the Government, other courts⁹² have widened the relevant scope of authority to include the agent's apparent authority.

On the other hand, the Ninth Circuit has not sought to work within the guidelines of *Merrill* but has developed a new stance toward estoppel.⁹³ This approach balances the Government's needs and detriment against those of the contractor. This second approach appears to be a more enlightened means of determining the rights and obligations of the Government when it deals with private parties. The federal government has increased in size to such an extent that it appears unreasonable to hold a contractor responsible for knowledge of all the many rules and regulations promulgated by federal agencies.

90. 332 U.S. 380 (1947).

91. See notes 46-49 supra and accompanying text.

92. See notes 51-68 supra and accompanying text.

93. See notes 69-89 supra and accompanying text.