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THE DISPUTES ARTICLE IN GOVERNMENT CONTRACTS

Leslie L. Anderson*

An approach to the subject of government contracts requires some departure from the lawyer's usual concept of a legal right. In this field, departures from generally accepted principles of contract law have developed in no small part from administrative practice, and the concept of a legal right cannot be thought of simply from the angle of enforceability in court. In transactions between private parties, the fact that the United States Supreme Court in Chase Securities Corporation v. Donaldson recently treated a legal right as being in essence merely dormant after the running of the statute of limitations against it would be meaningless if it had not declared also that a statute passed later could revive the right to sue. It happens that claims against the United States, however valid they might be under the law of private contracts, can never be the subject of a lawsuit except to the extent that Congress consents. Until the establishment of the United States Court of Claims in 1855, Congress had denied suit against the government generally on contract claims. Even now, where suit against the government is permitted, the judgment creditor's claim will not permit of a levy of execution for its enforcement. Having consented that the gov-

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2 Lynch v. United States, 292 U.S. 571, 54 S.Ct. 840 (1934). This immunity from suit may be extended by Congress to a corporation owned wholly by the United States. Maricopa County v. Valley National Bank of Phoenix, 318 U.S. 357, 63 S.Ct. 587 (1943). In The Siren, 7 Wall. (74 U.S.) 152 (1868), Mr. Justice Field said (on p. 154) that "the same exemption from judicial process extends to the property of the United States, and for the same reason." See also United States v. Alabama, 313 U.S. 274, 61 S.Ct. 1011 (1941), in which the state attempted to foreclose a tax lien against real estate owned by the federal government; Minnesota v. United States, 305 U.S. 382, 59 S.Ct. 292 (1939), in which the state attempted to condemn land for a right-of-way over lands held by the United States in trust for Indians; and Stitzell Weller Distillery v. Wallace, (D.C.D.C. 1940) 30 F. Supp. 1010, in which an attempt was made to proceed against a fund in which the United States claimed some interest.

For a general discussion, see Grismore, "Contracts with the United States," 22 Mich. L. Rev. 749 (1924).
ernment be sued in any case or class of cases, Congress may choose not to pay the claim after it is reduced to judgment, or may let the judgment creditor wait until Congress has taken all the time it wants before it provides for payment. Nevertheless, usage justifies the claimant’s saying in the field of government contracts that he has a right, one supported by legal rules on which the federal courts do act whenever litigation against the government is properly before them.

Methods of Determining Government Contract Claims

Some of the principal distinctions between the law of government contracts and that of private contracts arise out of the methods by which disposal is made of claims in each field. If there is no other method of recovery, relief under a government contract may always be sought in Congress, even in cases where the claim is stale. As compared to judicial relief, awarded upon the basis of legal principles, the results may be more dependent upon non-legal consideration. Mention of approaching Congress for relief sounds as if the outcome might be determined pretty much by the claimant’s favor with his Congressman, but persons in private business, upon whom the conduct of government is dependent in no small part, regard the right generally as a judicially-determinable claim which is not dependent upon favoritism for its adjudication. Moreover, from the government’s own position, the task of paying claims against the government is so substantial that a busy Congress has had to delegate to other agencies the power to consider many claims and to allow them if proper; and courts have had to be given some authority to determine them.

By the Budget and Accounting Act of 1921 Congress provided in general terms that claims by and against the United States shall be “settled and adjusted” within the General Accounting Office, and that that office be “independent of the executive departments and under the control and direction of the Comptroller General of the United States.” The Comptroller General and Assistant Comptroller General were to take the place and assume the functions generally of the Comptroller of the Treasury and his six auditors whose offices were abolished by the 1921 act. When the General Accounting Office and the contractor are in accord, resort to the courts becomes unnecessary. The power of the General Accounting Office to adjust claims includes the power to

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accomplish administratively what a court could do by way of giving equitable relief if the contractor had sued. When the General Accounting Office and the contractor are not in accord, the contractor still may sue to the extent that Congress has permitted suit against the government. Nor is going to the General Accounting Office a condition precedent to the contractor's bringing suit. If he so desires, he may disregard that office entirely and commence action. However, in the interests of economy and more rapid settlement of claims, it was clearly the intention of Congress that insofar as the General Accounting Office can adjust claims satisfactorily it should do so and the courts should be spared unnecessary litigation before them.

In more specific terms, Congress has provided a judicial method for the determination of contract rights. Under a series of similar statutes, referred to as the Tucker Act since it was enacted in that form in 1887, Congress has permitted the United States to be sued in the Court of Claims in any amount and in the United States district courts in an amount not in excess of $10,000 in actions based "upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort . . . ."

A still further method for the settlement of differences between the government and the contractor has been adopted within the executive departments on their own initiative and without the aid of specific legislation. They have provided for insertion into government contracts of what is known as a "disputes" article, setting forth, in short, that if certain disputes arise under the contract they will be disposed of by some administrative officer of the government's choosing. This administrative procedure has been used over a considerable period of time and appears, at least, never to have been frowned upon by Congress.

Provisions of Disputes Articles

The following is an extract from a standard "disputes" article:

"Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this

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5 By mutual oversight, a certain clause was omitted from a written government contract. The Comptroller General ruled that, in making the final settlement of sums due under the contract, the General Accounting Office might authorize adjustments made necessary by the mistake which would accomplish the same result as if a court had decreed a reformation of the instrument. 17 Comp. Gen. 452 (1937).

contract, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail a copy thereof to the Contractor at his address shown herein. Within 30 days from said mailing the Contractor may appeal in writing to the Secretary of War, whose written decision or that of his designated representative or representatives thereon shall be final and conclusive upon the parties hereto. 

It will be observed that this article refers only to questions of fact. Some government contract "disputes" articles contain broad language that covers all disputes, leaving room for the possible construction that all questions, whether of fact or law or mixed questions of law and fact, are to be determined by the designated administrative officer. Sometimes labor issues are excepted from the provisions of the broad article and left for determination by the head of the executive department involved. Even though the narrow article quoted above may be used in the contract, specifications of the work to be done often also contain a "disputes, protests and appeals" article which purports to give the contracting officer and appellate body power to decide certain types of disputes irrespective of whether they be of law or of fact. The standard article shown above makes the decision of the head of the executive department on appeal final and conclusive. It does not say specifically that the decision of the contracting officer will be final in the event the contractor makes no timely appeal, but it is construed to

7 Such an article reads in part, "All disputes concerning questions arising under this contract shall be decided by the Contracting Officer, etc."

8 A typical provision concerning labor disputes reads, "All labor issues arising under this contract which cannot be satisfactorily adjusted by the Contracting Officer shall be submitted to the Head of the Department."

9 Reading: "If the Contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the Contracting Officer or of the inspectors to be unfair, the Contractor shall without undue delay, upon such demand, action, or ruling, submit his protest thereto in writing to the Contracting Officer, stating clearly and in detail the basis of his objections. The Contracting Officer shall thereupon promptly investigate the complaint and furnish the Contractor his decision in writing, thereon. If the Contractor is not satisfied with the decision of the Contracting Officer, he may, within thirty days, appeal in writing to the Secretary of War, whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions or decisions of the Contracting Officer shall be final and conclusive."
mean that it will be. It is not infrequent to provide in the specifications accompanying the contract that certain types of determinations by the contracting officer shall be final without any right of appeal. The extent to which administrative officers may determine finally questions of law under government contracts is discussed later in this article.

Problem of Narrowing Judicial Review by Contract

The rule has long been established in private contract law that parties to a contract may agree in advance to be bound by the decision of some person other than the courts in the event that disputes arise. The same rule has been carried over to government contract law, so that the decision may be made by some government agent. Even though the administrative settlement provisions of the "disputes" article are not the product of any specific statute, it is established that the decision of the administrative officer designated in the government contract is binding, not only on the parties, but on the courts and on the General Accounting Office, even despite a mistake on the part of the

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10 Kihlberg v. United States, 97 U.S. 398 (1878); Comb Co. v. United States, 100 Ct. Cl. 259 (1943); Hirsch Shirts Corp., B.C.A. No. 429, January 21, 1944. The words that the decision "shall prevail," are synonymous with "shall be final and conclusive." Dayton Airplane Co. v. United States, (C.C.A. 6th, 1927) 21 F. (2d) 673.

11 Specifications showing the work for which the contract was made sometimes contain the following clause: "The decision of the contracting officer or his authorized representative as to the proper interpretation of the drawings and specifications shall be final." Where the contract provides that the contracting officer shall interpret the drawings and specifications, but does not say that his interpretation is final, it will not be treated as final and the contractor will be able to appeal under at least the broad "disputes" article which does not limit appeals to questions of fact. Comb Co. v. United States, 100 Ct. Cl. 259 (1943).


14 Mr. Justice McKenna said in United States v. Mason & Hanger Co., 260 U.S. 323 at 326, 43 S. Ct. 128 (1922), "... the parties can so provide and... the decision of the officer is conclusive upon the parties. [Citation of cases.]... This is extending the rule between private parties to the Government. There were such decisions... Over the effect of these the Comptroller of the Treasury has no power." Goltra v. Weeks, 271 U.S. 536, 46 S. Ct. 613 (1926); Saalfield v. United States, 246 U.S. 610, 38 S. Ct. 397 (1918); Comb Co. v. United States, 100 Ct. Cl. 259 (1943); Lyons v. United States, 98 Ct. Cl. 533 (1943); Yale & Towne Mfg. Co. v. United States, 58 Ct. Cl. 633 (1923).
administrative officer, in the absence of arbitrariness, capriciousness, fraud or bad faith on his part.

So far as disputes outside the provisions of the "disputes" article are concerned, the contractor still may press his claim within the General Accounting Office or in the courts. In borderline cases, he may resort to the court only to find there that the decision should have been made under the "disputes" article within the executive department concerned and be informed to his sorrow and financial embarrassment that it is too late to appeal in accord with the procedural provisions within the contract. In order to save his remedy, therefore, it may be advisable to appeal under the administrative provisions of the contract in the case of all disputes and sue in court only when that procedure fails for want of jurisdiction. If the contractor elects to resort to the courts for relief, the courts may not of their own accord require the claimant to show that he has pursued his remedy within the government department without success, where the contract itself does not require such procedure. The Supreme Court has said that the jurisdiction of the courts is established by the Tucker Act, and further jurisdictional restrictions may be imposed only by Congress. Without specific legislation directing it to do so, then, the contracting agencies of the government may limit the extent of judicial review in at least some degree by agreement with the contractor, but the courts may not impose their own limitations upon such review. How far it is possible to limit resort to the courts by agreement is a problem of considerable controversy dis-

25 In Needles v. United States, 101 Ct. Cl. 535 (1944) (holding the decision of the contracting officer to be so grossly erroneous under the terms of the contract as to imply bad faith); Judge Littleton defined arbitrariness and bad faith (at pp. 602-606): "... no question of personal animosity or calculated bias, prejudice, or actual dishonesty is necessarily involved in an ultimate finding of implied bad faith. A decision or finding may be held to be arbitrary when existing important facts, conditions, and express contract provisions should obviously have been considered and given due and proper weight, but were not. ... bad faith in a legal sense could be inferred from the grossly erroneous character of the decision itself. ... The fact that the decision was very erroneous ... is not sufficient to justify its being overturned if the officer appears to have known or considered fairly the facts and circumstances." (Mistake, but no fraud or gross mistake) Kennedy v. United States, 24 Ct. Cl. 122 (1889). (Mistake by arbitrators) Burchell v. Marsh, 17 How. (58 U.S.) 344 (1854).

26 This procedure is recommended in C.C.H. War Law Service, Govt. Contracts, § 1181. The mere fact that the contractor did not appeal on time because of his own confusion as to whether questions of law or fact were involved was felt not to show "good cause" for hearing a late appeal by the War Department Board of Contract Appeals. Corson and Gruman Company, B.C.A. No. 316, September 21, 1943. Clyde v. United States, 13 Wall. (80 U.S.) 38 (1871); Plato v. United States, 86 Ct. Cl. 665 (1938).
cussed to some extent herein and perhaps answerable in part by visualizing the nature of the administrative procedure for which the "disputes" article provides.

**Disputes Article Method and Arbitration**

The courts themselves, on occasions, have referred to administrative officers, such as those provided for in the article, as "arbitrators" and to their decisions as "awards," the latter being arbitration language. Having used such language, they explained subsequently that such officers are not arbitrators in the true sense and that there are some differences between arbitration and this administrative method of settling controversies. It is true that both methods are pursued in accord with an agreement between the parties. It has become not unusual, too, to refer to almost any person who helps to settle controversies, other than a court or a statutory administrative body, as an arbitrator. The courts look through the language used to designate such methods, however. Thus they recognize a distinction between persons appointed to appraise property and those appointed to arbitrate a dispute concerning the property, in spite of the fact that some agreements may have called the appraisers "arbitrators."

To help justify the position which the Comptroller General takes toward arbitration, as will appear later in this discussion, it may be well to emphasize that appraisers act on the basis of their own specialized knowledge in making evaluations outside of what they may learn at any hearing, and ordinarily they are not required to receive evidence from the parties and their opinions are not final. The administrative officers specified in the "disputes" article of a government contract actually make determinative rulings and always act as agents of the government in doing so. Their duties are purely ministerial, as distinguished from judicial, for they do not purport to be impartial judges.

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18 DeGroot v. United States, 5 Wall. (72 U.S.) 419 (1866); ("arbiter") The Penker Construction Company v. United States, 96 Ct. Cl. 1 (1942); Lower Baraboo River Drainage District v. Schirmer, 199 Wis. 230, 225 N.W. 331 (1929).
22 Silas Mason Co. Inc. v. United States, 90 Ct. Cl. 266 (1940).
Arbitrators are usually chosen by some method agreed upon by the parties, but their status is semijudicial and they are to act impartially. Often their appointment is pursuant to a rule of court, but the extent of their authority is still limited by the agreement of the parties to the contract. The effort is to divorce such arbitrators from any blemish of party representation irrespective of who may have chosen them or will pay for their services. While the agreement defines the extent of their functions, the usual purpose of arbitration is to accomplish substantial justice between the parties by a simple and inexpensive hearing. Arbitrators are judges of the parties' own choosing. In their effort to bring about an equitable result, they are expected to disregard the law at times, even as it is generally understood in advance that they are not apt to be persons learned in the law. The prevailing view among state courts is that arbitration awards are conclusive upon the parties as to questions of law as well as to questions of fact.

However, when the government is a party, arbitration may not ordinarily be employed. The Comptroller General, in so ruling, points, not only to the provisions of the Budget and Accounting Act of 1921 which provides that claims by and against the government shall be settled and adjusted within the General Accounting Office, but also to statutes which prohibit payment by the government of the expenses of any commission, council, board or other similar body that might be appointed to determine matters arising under contracts, except as such payments have been authorized by law.

In the Contract Settlement Act of 1944, Congress has made specific provision for arbitration in the field of termination of war contracts.

The legal basis for settlement of controversies under the "disputes" article is well established, notwithstanding anything the Comptroller General may decide about arbitration. He did sanction a proposed lease of a restaurant concession at Washington National Airport which provided for a five-year rental at a specified price with an option on the part of the lessee to renew the lease for another five years at rent not less than the government would receive during the first five years, but at a figure to be determined by three "arbitrators." He pointed out that the arbitrators under the lease were unable to impose any additional burden on the government, would only be able to add to the government income, and were not to determine any questions of law. The Comptroller General has also upheld the appointment of "arbitrators" to give their opinion as to the reasonable value of emergency plant facilities, their function being much like that of appraisers and not true arbitrators.

Mr. Justice Story once said that reliance upon arbitration as a method of settling controversies might interfere with the administration of justice, and suggested that executory agreements to arbitrate should not be specifically enforced. The Supreme Court thereafter indicated that arbitration between private parties conflicted with Article III, Section 2, of the Constitution of the United States, which provides that the judicial power of the United States shall extend to all cases in law and equity arising under the Constitution and the laws of the United States. Yet federal courts have not been hostile to arbitration awards, once made, insofar as they have been limited to the determination of questions of fact upon which legal actions might be based, or where there might be submitted to "a supervising umpire or technical

28 22 Comp. Gen. 140 (1942).
29 20 Comp. Gen. 95 (1940). On the other hand, the Attorney General ruled that it was bad to sell government property at a price to be fixed by arbitrators. 33 Op. Atty. Gen. 160 (1922).
30 STORY, COMMENTARIES ON EQUITY, § 670 (1836). To the same effect, see The Excelsior, 123 U.S. 40, 8 S. Ct. 33 (1887); Munson v. Straits of Dover S. S. Co., (D.C.N.Y. 1900) 99 F. 787, affirmed in (C.C.A. 2d, 1900) 100 F. 1005.
expert or one man who is both, questions of fact arising under his super­vision or pertaining to his specialty, and such questions of construction of law as are incidental to the controversy which may arise upon the subject.” We have yet to learn whether the United States Supreme Court would go as far today as various of the state courts have gone in permitting arbitrators to make final determination of questions of law. Some federal courts have said that the decision of arbitrators as to ques­tions of both law and fact may be final. The similarities between arbi­tration and the administrative method provided by the “disputes” artic­le are so substantial that, on principle, the law covering both ought to be the same generally on this subject except as statutes or the language of agreements may compel a different conclusion.

Congress has expressed its favor of the arbitration method in The United States Arbitration Act by making executory private agreements to arbitrate specifically enforceable. A number of states have passed somewhat similar statutes. There has been some agitation for legisla­tion approving the arbitration method for settling disputes under gov­ernment contracts. Congress, it is argued, is denying to the govern­

85 The Michigan statute reads in part: “A provision in a written contract to settle by arbitration under this act, a controversy thereafter arising between the parties to the contract, with relation thereto, in which provision the method of selecting an arbitrator or arbitrators is designated and it is agreed that a judgment of any circuit court, or other court of competent jurisdiction, designated in such contract may be rendered upon the award made pursuant to such agreement, shall be valid, enforceable and irrevocable . . . Such an agreement shall stand as a submission to arbitration under this act . . . ” Mich. Comp. Laws (Mason, 1942 Supp.), § 15394; Mich. Stat. Ann., 1943 Rev., § 27.2483. The Minnesota statute on the subject, for example, however, does not deal explicitly with specific performance. Minn. Stat. (Mason, 1927), §§ 9513-9519; Minn. Stat., 1941, §§ 572.01-572.07. Mr. Justice Brandeis discussed the application of state arbit­ration statutes to admiralty cases in Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 44 S. Ct. 274 (1924).
86 Long note, “Arbitration and Government Contracts,” 50 Yale L. J. 458 (1941); Graske, “Settlement of Government War Contract Disputes,” 29 A. B. A. J. 13 (1943). Such bills were introduced in both Houses during the 2d session of the 77th Congress, S. 2350 (1942), and H. R. 7163 (1942), and again in the 1st session of the 78th Congress, H.R. 3665 (1944). The Yale Law Journal note (at p. 470) recommends an amendment to The United States Arbitration Act to read substantially as follows: “Any officer of the United States, or of a department or agency thereof, au-
ment as to its own contracts the very benefits it has provided for private parties in The United States Arbitration Act. The use of the “disputes” article indicates a desire by the government to discourage litigation. It is fairer to the contractor and less harsh on him to permit settlement by arbitration rather than by the decision of some agent of the government.

**Similarity to Contracts for Satisfactory Performance**

On the other hand, it is doubtful that arbitration would meet sufficiently the purpose behind the “disputes” article. Perhaps the closest category of cases to which those arising under that article could be likened are those in which a service contracted for must be performed to the satisfaction of one of the contracting parties. If he is not satisfied with the performance, he need not accept it. Such agreements may put the performing party at a disadvantage, but the promise of the other party is real and satisfaction is what the performing party agreed to give.

In *Goltra v. Weeks,* the Chief of Engineers, in behalf of the government, leased premises to another with the understanding that the chief could terminate the lease at any time “if in his judgment” the lessee was not complying with the obligations of the contract. The Supreme Court held that such a provision did not require a hearing as authorized to enter into a written contract on behalf of the United States government or such department or agency, may agree to settle by arbitration a controversy thereafter arising out of or with respect to such contract, or to submit to arbitration any existing controversy arising out of or with respect to such a contract. Such an agreement shall be subject to the provisions of the United States Arbitration Act.” In opposition to such legislation, see Kronstein, “Business Arbitration—Instrument of Private Government,” *Yale L. J.* 36 (1944). The writer of that article is a special attorney in the Department of Justice. That department opposed H. R. 3665, but amendments have been proposed which may lessen substantially the extent of the department’s opposition to such a bill in the amended form. The Contracts Division of The Judge Advocate General’s Department favored the legislation, in opinion SPJGC 1943/17373-A, March 29, 1944, signed by Colonel J. Alton Hosch.

271 U.S. 536, 46 S. Ct. 613 (1926). In cases of a contract for performance by one party to the satisfaction of the other, the latter’s determination must be reasonable unless the contract clearly shows that it need not be. **Contracts Restatement,** § 265 (1932); Barnett v. Beggs, (C.C.A. 8th, 1913) 208 F. 255; Adamson v. Milburn Co., (C.C.A. 2d, 1921) 275 F. 148; American Music Stores v. Kussell, (C.C.A. 6th, 1916) 232 F. 306; Bay Shore Investment Co. v. Palmer, (D.C. Fla., 1922) 284 F. 979; Fidelity Fuel Co. v. Martin Howe Coal Co., (C.C.A. 7th, 1926) 15 F. (2d) 470; Thompson-Starrett Co. v. La Belle Iron Works, (C.C.A. 2d, 1927) 17 F. (2d) 536. Distinction should be made between the narrowing of judicial inquiry by the courts under the “disputes” article and other types of cases where public policy is stronger against limitation of resort to the courts. In *Fidelity & Casualty Co. v. Eickhoff,* 63 Minn. 170 at 178-179, 65 N.W. 351 (1895), Justice Mitchell said, “The
to compliance, that determination by the Chief of Engineers was enough. Chief Justice Taft said in his opinion for the Court:

"The cases leave no doubt that such a provision for termination of a contract is valid, unless there is an absence of good faith in the exercise of the judgment. ... Such a stipulation may be a harsh one or an unwise one, but it is valid and binding if entered into. It is often illustrated in government contracts in which the determination of a vital issue under the contract is left to the decision of a government officer."\(^8\)

**Appeal Provisions**

The "disputes" article provides for an administrative appeal to the head of the government department or his designated representative. The appeal by the contractor must be made in writing within thirty days after a copy of the contracting officer's decision has been mailed to him. The right of appeal belongs only to the contractor, and it is not shared by the government. The decision by which the contractor has agreed to be bound is certainly only a good faith decision. The government has the whip hand, and the courts expect that it will be used fairly.\(^9\) However, as to matters within the purview of the "disputes" article, the fact that the contracting officer's decision breathes of bad faith does not relieve the contractor of exhausting the procedures specified within the contract prior to going into the courts.\(^10\) One of the primary purposes of appeal is to meet the possibility that the contracting officer may have been at fault in some way. Another purpose of the appeal provision is to assure the contractor of a fair hearing. The right of a party to waive the protection of the law is subject to the control of public policy. ... Thus an agreement to waive the defense of usury is void. ... The agreement under consideration ... provides that the plaintiff may, by his own ex parte acts, conclusively establish and determine the existence of his own cause of action. ... The case is not at all analogous to the common provisions in building and construction contracts, by which the determination of some third person such as an architect or engineer, as to the amount or character of the work, is made conclusive between the parties, in the absence of fraud or mistake. ... In the present case the attempt is to provide that, after the alleged cause of action has accrued, the plaintiff shall be the sole and exclusive judge of both its existence and extent. Such an agreement is clearly against public policy."\(^8\)

\(^8\) 271 U.S. 536 at 548, 46 S. Ct. 613 (1926).

\(^9\) Mr. Justice Lamar said in Ripley v. United States, 223 U.S. 695 at 701-702, 32 S. Ct. 60 (1912), "But the very extent of the power and the conclusive character of his decision raised a corresponding duty that the agent's judgment should be exercised—not capriciously or fraudulently, but reasonably and with due regard to the rights of both the contracting parties."

mere fact that he is allowed to present his grievance to someone higher up who will listen to him anew is some satisfaction to him, too, and in this way the appeal provision has a psychological benefit.\textsuperscript{41}

The appellate provisions in the article impose a duty on the contracting officer to make some decision when disputes arise. He may have a reasonable time in which to think the problem through, but an unreasonable delay is beyond the contemplation of the parties and the courts thereafter will entertain the contractor's suit.\textsuperscript{42} The application to the head of the department is appellate only.\textsuperscript{43} Until the contracting officer has given his decision, the contractor has no determination from which to appeal. After unreasonable delay by the contracting officer in deciding the case, the contractor's movement can be only to the General Accounting Office or to the courts; or else he can lay his case before Congress.

The same conclusion would seem to follow where the contracting officer disclaims jurisdiction. He may believe erroneously that the particular subject is not for him, but for the Comptroller General. He may make a ruling by which he declines jurisdiction and send the contractor to the General Accounting Office where the Comptroller General in turn rules that the contracting officer should have made the determination. Appeal may still be timely; but if more than thirty days have elapsed since the contracting officer first refused to act, the question will arise whether the original decision was a determinative one. If it was, then it is too late now for the contractor to appeal and the determination will have been conclusive. There is surely a distinction, however, between a disclaimer of jurisdiction under the terms of the contract and a decision on the merits. Only the latter is determinative, and the contracting officer has made no determinative decision within a reasonable time. The contractor has his remedy in court, for it would be unfair if the government could direct its contractors down

\textsuperscript{41} See Smith, "The War Department Board of Contract Appeals," in 5 Fed. B. A. J. 74 (December 1943). Colonel Hugh Carnes Smith, U. S. Army, was until recently president of the board to which his article refers.

\textsuperscript{42} Cape Ann Granite Co., Inc. v. United States, 100 Ct. Cl. 53 (1943); Cooper v. United States, 8 Ct. Cl. 199 (1872).

\textsuperscript{43} Broderick & Gordon, B.C.A. No. 446, Jan. 31, 1944. There must be an existing active contract, not, for instance, one terminated by payment in full which has been accepted already. The Trinidad Bean & Elevator Co., B.C.A. No. 1083, August 6, 1945; William Edward Kapp, B.C.A. No. 1088, August 6, 1945. Contra if parties have not treated contract as closed. Jacob Siegel Co., B.C.A. No. 1037, July 23, 1945.

\textsuperscript{44} Cape Ann Granite Co. v. United States, 100 Ct. Cl. 53 (1943); James McHugh Sons, Inc. v. United States, 99 Ct. Cl. 414 (1943).
blind alleys and then tell them on their return that it is too late now to assert their claims.\footnote{Earle & Sons, Inc. v. United States, 100 Ct. Cl. 494 (1944).}

Is there a difference in substance, however, between leading contractors down blind alleys on the one hand and being so disagreeable to them that they hesitate to appeal within the executive department for fear of retaliation? It is a breach on the part of the government to prevent performance by the contractor, and, on principle, it seems that the government may not affirmatively hinder the contractor’s performance of a contract and that such hindrance would be a breach.\footnote{(Preventing performance) \textit{United States v. Peck}, 102 U.S. 64 (1880); \textit{Lovell v. St. Louis Mutual Life Insurance Co.}, 111 U.S. 264, 4 S. Ct. 390 (1884); \textit{DuPont de Nemours Powder Co. v. Schottman}, (C.C.A. 2d, 1914) 218 F. 353. (Hindering performance) \textit{Contract Restatement}, § 315(1) (1932). In \textit{Graybar Electric Co., Inc. v. United States}, 90 Ct. Cl. 232 at 246 (1940), the contractor was excused for late performance due to breach by government in holding up payments to the contractor. The Court of Claims said, “... a failure on the part of the one demanding performance to do that which it required of him ... to enable the other party to perform without hindrance or delay within the time limit operates as a waiver of the time provisions of the contract.”}

Is this conclusion that the government may not hinder the contractor’s performance to be extended still further to cover a case of non-cooperation by the government? Is a government agent’s disagreeableness, moreover, to be treated as hindrance by the government or only as failure to cooperate? The United States Court of Claims gave judgment for a claimant upon concluding that various unauthorized acts, rulings, and instructions of a government superintendent were unreasonable and in many instances arbitrary, capricious and suggestive of bad faith. That court found that certain government officers had required the contractor “to do things admittedly not required of him under the contract on threat of reprisal for refusal.”\footnote{321 U.S. 730, 64 S. Ct. 820 (1944).} The government appealed, however, and the Supreme Court, in the case of \textit{United States v. Blair},\footnote{Blair v. United States, 99 Ct. Cl. 71 at 98 (1942), subsequently reversed on appeal, as appears hereafter.} reversed the decision of the Court of Claims.

\footnote{321 U.S. 730, 64 S. Ct. 820 (1944).} See also \textit{Myers v. Bethlehem Shipbuilding Corp.}, 303 U.S. 41, 58 S. Ct. 459 (1938); \textit{Leebern v. United States}, (C.C.A. 5th, 1941) 124 F. (2d) 505; \textit{Fitzgibbon v. United States}, 52 Ct. Cl. 164 (1917); and Klepinger, “The Government Contract ’Dispute Clause’ Pitfall,” \textit{48 Law Notes} 19 (May-July 1944). In the Blair case, the government had awarded two contracts related to the construction of certain buildings at Veterans’ Administration Facility at Roanoke, Virginia. A construction contract was given to Blair who was to complete his work within 420 days after receiving notice to proceed. Concurrently, a mechanical contract for plumbing, heating and electrical work was awarded to Redmon, who was to commence work promptly after being notified to proceed. Blair could have completed his work in 314 days had Redmon done his part on time.
the decision of the Court of Claims. The "disputes" article in the contract provided a procedure for appeal which the contractor had not followed. Having chosen not to follow his only avenue of relief within the thirty-day period provided in the contract, the contractor was held to have relinquished any remedy for correcting the abuses. His failure to appeal under the facts of this case was felt by the Supreme Court to be without due cause.

On the other hand, a contracting officer may be solicitous of the contractor's interests and be so hesitant to offend the contractor's feelings that it may be difficult to ascertain from the language he uses whether he is making a decision or merely expressing a tentative opinion. The thirty-day appeal period does not begin to run until a determinative ruling has been mailed to the contractor. However, administrative practice does not require that the ruling be in any particular style or language. It is a sufficient definitive ruling, for instance, that the contracting officer write the contractor in denial of his claim, "It is the opinion of this office that full compensation under the terms of the contract has been received by the contractor." 49 By like token, a letter from an aggrieved contractor is sufficient to constitute a notice of appeal if it is in such language as to lead the contracting officer and appellate body to treat it as a notice. An extreme example of such letter to a contracting officer determined to be a sufficient notice of appeal was one which read, "We see no reason why we should have to make an appeal to the Secretary of War for an adjustment which is specifically contained in a Contract and Change Order which have been formally and properly executed by both the Government and ourselves." 60

With language as in the latter case, it could easily be possible that the contracting officer would treat the words, not as a notice of appeal, but as a request to him to reconsider his decision. If he reconsiders it, Redmon was unable to proceed, but the government delayed in terminating his contract and in obtaining a new mechanical contractor. Blair was thus unable to finish his work within 314 days, but he did complete it within the 420 days specified in the contract. Held, he had no right of recovery. Said Mr. Justice Murphy, (at p. 734), "To hold that he can exact damages from the Government for failing to cooperate fully in changing the contract by shortening the time provisions would be to imply a grossly unequal obligation. We cannot sanction such liability without more explicit language in the contract." Suppose Blair had been unable to complete the work until 450 days. It would seem that the government would have been liable to him for 30 days delay on the ground of the government's hindrance.

49 Corson and Gruman Co., B.C.A. No. 316, Sept. 21, 1943.
the question arises whether the thirty-day appeal time runs anew from the date of reconsideration or runs only from that of the original determination. Courts amend their findings on occasions. No reason is perceived why a contracting officer may not do so under some conditions. If he should reverse a ruling after the contractor has acted upon it, the government will be bound for any costs which the contractor has been obliged to incur by reason of such reversal. 51

The right of a contractor to have a determinative ruling reconsidered raises the question as to his right to keep the appeal period alive on his own initiative. Simply requesting reconsideration with or without good cause may not be used as a wedge, when on reconsideration the claim is denied again, to start the appeal period running anew. 52 Suppose, however, that on request for reconsideration the contracting officer should decide to reverse his original decision. More specifically, assume that thirty days have passed and now he is asked to rule to the detriment of the government. At the end of those thirty days, the government had acquired a vested right. The contracting officer may not waive it, for it is established that except as Congress has given him such power, no agent of the government may waive a vested right belonging to the government. 53 On the other hand, suppose the thirty-day appeal period has not run and the facts are such that if the contractor should appeal, the contracting officer feels certain his original decision will be reversed. It would be wasteful to require the contractor, who has been alert in the protection of his rights, to go to the trouble and expense of taking an appeal. Here no vested rights of the government would be waived, and the reconsideration to the detriment of the

51 Langevin v. United States, 100 Ct. Cl. 15 (1943); W. S. King & Co., Inc. v. United States, 80 Ct. Cl. 325 (1934).

52 "To rule otherwise would permit one party to extend this period indefinitely by the simple expedient of addressing requests for reconsideration to the contracting officer."—Paul E. Griffin & Co., B.C.A. No. 475, April 22, 1944. See J. A. Terteling & Sons, B.C.A. No. 396, Jan. 29, 1944. See H. R. H. Construction Corp., B.C.A. No. 1058, July 30, 1945.

53 Royal Indemnity Co. v. United States, 313 U.S. 289, 61 S. Ct. 838 (1941); Pacific Hardware & Steel Co. v. United States, 49 Ct. Cl. 327 (1914); American Sales Corp. v. United States, (C.C.A. 5th, 1929) 32 F. (2d) 141; Goldschmidt & Bethune Co., B.C.A. No. 886, Feb. 5, 1945; Hartwell Brothers, B.C.A. No. 517, Feb. 29, 1944; Corson and Gruman Co., B.C.A. No. 316, Sept. 21, 1943; 17 Comp. Gen. 354 (1936). In the event of appellant's failure to file an appeal within thirty days from the adverse decision of the contracting officer, the board considers itself powerless to take jurisdiction or to waive the delay. H. R. H. Construction Corp., B.C.A. No. 1058, July 30, 1945; Guy A. Thompson, Trustee, B.C.A. No. 1075, July 18, 1945.
government would be permissible. It has been held to be sufficient if the request for reconsideration be transmitted within the thirty days. The contracting officer should have time to think the matter through, and his favorable reconsideration was said to have been properly made even after the thirty days had run. 54

A liberal trend thus appears in the determination of the time after which the claimant is precluded from appeal. The tendency is to avoid causing forfeiture of rights merely for the failure of the contractor to pursue technical procedures strictly. Where a contracting officer has denied an extension of time for delivery on one ground, the contractor, more than thirty days thereafter, was permitted to request such extension again on other grounds and appeal the latter decision. 55 Where a ruling of the contracting officer was dated January 26, but the record did not disclose the date when it was mailed, the contractor was given the benefit of the reasonable doubt so that a letter of appeal dated thirty-one days later was held to be timely. 56 Subcontractors are not in privity with the government and it is doubtful that they have rights in their own names to proceed under "disputes" clauses in prime contracts with the government. 57 Major subcontracts do sometimes contain "disputes" articles providing for appeal. 58 In the absence of such

54 The original decision in such case would not be treated as a final determination. Jacob Kleinman, B.C.A. No. 939, May 9, 1945.
55 Chessler, B.C.A. No. 451, Jan. 21, 1944.
57 In a private contract between A and B, it was set forth that A would assume all of B's obligations to C. C claimed the contract was for his benefit and could be enforced by him. "That such is the general rule can not be controverted.... [Citation of cases.] However, before such rule can be applicable in a given case, it must appear that the agreement was made for the direct benefit of the third party, and not merely incidentally for his benefit. . . . Each case must depend upon the intention of the parties as that intention is to be gleaned from a consideration of all of the contract and the circumstances surrounding the parties at the time of its execution."—In re A. C. Becken Co., (C.C.A., 7th, 1935) 75 F. (2d) 681 at 685. Where a prime contractor with the government sues for damages sustained by both himself and a subcontractor, but the sub has absolved the prime of liability due to government delays, the prime can recover only for his own loss; and the sub may not assign his claim to the prime for purposes of suit. Severin v. United States, 99 Ct. Cl. 435 (1943). Distinguish a subcontract not containing a "disputes" article from a supplementary agreement running between the prime and the government not containing such an article. If the original agreement between the prime and the government contains a "disputes" article, it would seem that the same article should cover any supplementary agreements between the government and the prime. Peterson & Co., B.C.A. No. 420, Jan. 13, 1944.
58 In such case it has been held administratively that the major subcontractor can appeal only if the prime contract authorizes the major sub to appeal. General Motors
"disputes" article within the subcontract and provision for it in the prime contract, a subcontractor may find himself aggrieved by what the contracting officer has decided. One procedure would be for the prime contractor to appeal for him. In another, the subcontractor is permitted to appeal through the prime who adopts the subcontractor's notice as his own. In at least one case of administrative practice, when a subcontractor appealed through a prime contractor in reliance upon the "disputes" article in the prime contract, it was concluded that the date on which the subcontractor mailed his notice of appeal was the date of appeal and not the date the prime contractor mailed it on with his approval.

The right of appeal is purely contractual. Where the contract contains no "disputes" article, no right of appeal exists and the claimant's entire remedy is in the courts. Where the contract does contain a "disputes" article, an aggrieved contractor who bends to the side of peaceful relationships will jeopardize his rights by cooperating with the contracting officer without protest until the period of appeal has passed. The contractor has a contractual right, moreover, to the independent decision of the designated contracting officer. He need not accept a decision involving the exercise of judgment or discretion imposed upon that officer by someone of superior authority in his depart-


Subcontracting has become an extremely necessary practice in government World War II transactions. It is done under cost-plus-a-fixed-fee contracts only with the consent of the contracting officer. The government in such case reserves the right to pay the sub directly. It would seem that such contracts are made for the direct benefit of subcontractors. See Nemmers, "The Problem of Government Liability to Subcontractors under Terminated CPFF Prime Contracts—The Third Party Beneficiary Theory," 31 Va. L. Rev. 161 (1944). It would seem less clear and yet not unpersuasive that, where it is known that subcontracting will surely be done, subcontractors shall acquire some rights as third party beneficiaries under even fixed price or lump sum prime contracts.

W. D. Peck & Co., Inc., B.C.A. No. 527, April 18, 1944.


"Plaintiff's willingness to cooperate was the occasion for his doing considerable extra work which he would not have been required to do without additional compensation under the strict terms of his contract. Unfortunately, his failure to comply with the method set out in the contract for protecting his rights, and his failure to produce records showing the amount of his damage make it impossible to allow him for such items." McGlone v. United States, 96 Ct. Cl. 507 at 540 (1942). See also American Bridge Co. v. United States, (D.C. Pa. 1938) 25 F. Supp. 714.
ment or by the General Accounting Office. The contracting officer should certainly be able to give weight to precedent where a body of administrative determinations has been established, but the exercise of judgment in the case must, finally, be his own.

War Department Board of Contract Appeals

On appeal, similarly, the contractor has a contractual right to the independent determination of the person designated in the contract to hear appeals. It will be observed in this connection that in the particular "disputes" article set forth above, the decision on appeal is to be that of the Secretary of War or his designated representative. It is not infrequent for heads of executive departments to hear such appeals themselves, but the impossibility of the Secretary of War to hear them personally during the press of war business is obvious. He tried designating the Assistant Secretary of War to act for him in some cases. The assistant was obliged to tell an appealing contractor that "he didn't have time to hear appeals, that he couldn't take the time to consider these matters or pass judgment on them because he had too many weighty things to do." Some junior officer in the Quartermaster Corps assembled the data for the appeal, and this, the Assistant Secretary said, would be the record upon which any decision would be made. It was not even clear that he had looked at the record when he sustained the contracting officer. The contractor was left dissatisfied. The court entertained his suit on the ground that the contract had been breached.

The solution within the War Department as a wartime measure

63 James McHugh Sons, Inc. v. United States, 99 Ct. Cl. 414 (1943); Karno-Smith Co. v. United States, 84 Ct. Cl. 110 (1936); Sun Shipbuilding & Dry Dock Co. v. United States, 76 Ct. Cl. 154 (1932).

64 Sun Shipbuilding & Dry Dock Co. v. United States, 76 Ct. Cl. 154 (1932). In Appeal of Ford Motor Co., B.C.A. No. 912, April 25, 1945, the cost-plus-a-fixed-fee contract provided that in allowing costs to the contractor the government would be guided by Treasury Decision 5000. That Treasury Decision provided among other things a test for determining salaries for corporation officers. From Headquarters, Army Air Forces, Materiel Command, there was issued a regulation forbidding contracting officers to allow such salaries in excess of $25,000 per year. The contracting officer disallowed Ford claims for salaries in excess of that amount, and the company appealed. The War Department Board of Contract Appeals set aside the ruling on the ground that the contractor was entitled to the independent decision of the contracting officer. The board said, "Of course, in a given case a contracting officer might decide that a $25,000 maximum salary was reasonable but salaries in excess of that amount can be deemed reasonable in proper circumstances as has been decided by the War Department Board of Contract Appeals."

65 The Penker Construction Co. v. United States, 96 Ct. Cl. 1 (1942).
has been the creation of the War Department Board of Contract Appeals in the Office of the Under Secretary of War. Contract forms were amended to make it clear that the board might act as the secretary's designated representative in matters of appeal. Where the board is not specified within the contract, its president acts as the representative. When a majority of the board cannot agree in cases where the board is supposed to act, the Under Secretary of War will then make the determination. When the president of the board acts as the Secretary of War's designated representative, he considers the recom-

66 Constituted in the Office of the Under Secretary of War by memorandum of the Secretary of War, dated August 8, 1942. See War Department Procurement Regulations, PR 318-D through 318-F. 5.

67 PR 326 requires all War Department contracts of $20,000 or more, and authorizes such contracts in amounts less than $20,000, to contain the following articles without deviation:

"Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail a copy thereof to the Contractor at his address shown herein. Within 30 days from said mailing the Contractor may appeal in writing to the Secretary of War, whose written decision or that of his designated representative or representatives thereon shall be final and conclusive upon the parties hereto. The Secretary of War may, in his discretion, designate an individual, or individuals, other than the Contracting Officer, or a board as his authorized representative to determine appeals under this Article. The Contractor shall be afforded an opportunity to be heard and offer evidence in support of his appeal. The president of the board, from time to time, may divide the board into divisions of one or more members and assign members thereto. A majority of the members of the board or of a division thereof shall constitute a quorum for the transaction of the business of the board or of a division, respectively, and the decision of a majority of the members of the board or of a division shall be deemed to be the decision of the board or of a division, as the case may be. If a majority of the members of a division are unable to agree upon a decision or if within 30 days after a decision by a division, the board or the president thereof directs that the decision of the division be reviewed by the board, the decision will be so reviewed, otherwise the decision of a majority of the members of a division shall become the decision of the board. If a majority of the members of the board is unable to agree upon a decision, the president will promptly submit the appeal to the Under Secretary of War for his decision upon the record. A vacancy in the board or in any division thereof shall not impair the powers, nor affect the duties of the board or division nor of the remaining members of the board or division, respectively. Any member of the board, or any examiner designated by the president of the board for that purpose, may hold hearings, examine witnesses, receive evidence and report the evidence to the board or to the appropriate division, if the case is pending before a division. Pending decision of a dispute hereunder the Contractor shall diligently proceed with the performance of this contract. Any sum or sums allowed to the Contractor under the provision of this Article shall be paid by the United States as part of the cost of the articles or work herein contracted for and shall be deemed to be within the contemplation of this contract."
mendation of the board. Should he disagree with the board’s recommendation, the matter again is submitted to the Under Secretary of War for his decision. 68

What Questions May Be Determined Administratively

We have indicated how far the courts have gone in permitting boards of arbitration and administrative officers under contracts requiring satisfactory performance to make final determinations of law and fact so as to narrow the scope of judicial review. The same rules will not always apply to the scope of administrative determinations under “disputes” articles because of the way they are worded and in the light of existing statutes, but generally they should be applicable. The rule as to division of functions, often loosely stated in the trial of lawsuits, has never been applied on any strict apportionment basis that all fact questions go to the jury and all law questions are for the judge; and it would also seem impractical to say that an administrative officer’s functions must any the more be restricted to determination of fact questions only. A judge determines numerous questions of fact preliminary to the determination of questions of law, and the jury rules on legal effects to be attached to various facts. 69 Under the Tucker Act, we shall see that the Court of Claims has treated questions both of breach and of the amount of unliquidated damages as law questions, to be judicially determined, whereas they would ordinarily be determined by a jury in the trial of a lawsuit after it has been instructed in the law by the judge. Moreover, the administrative officer in a government contract case must make his entire determination without the benefit of instructions from the court. Even under the narrow “disputes” article, he should be allowed to make his own preliminary legal determinations whereas in a lawsuit the judge would be available to make them for the jury. If, in the government contract case, the court determines that the government has breached its contract, it will, under the Tucker Act, 70

68 PR 318-D.4 and 318-D.5.


70 “... the primary questions presented are questions of fact, and, therefore, the appeal involves a mixed question of law and fact. Under such circumstances, this Board has consistently held that the decisions of the contracting officer are appealable under the simple disputes clause...” N. P. Severin Co., B.C.A. No. 124, May 27, 1944.
Act, disregard to a great extent any findings of fact that may have been made by any administrative officer, except as it may conclude that they show him to have made admissions by which the government should be bound.

There does not appear to be any constitutional barrier as to how far Congress may go in these cases to oust the judiciary of its functions. Congress created the Court of Claims to lessen the Congressional burden. The original act of 1855 limited that court generally to investigatory powers. It was known as “An Act to establish a Court for the Investigation of Claims against the United States.” In 1863, for the first time, the Court of Claims was authorized to render final judgments, and the new statute contained a provision not in the act today “that no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.” Today the decision of the court is looked upon as final, and from it one appeals directly to the Supreme Court, although in fact an appropriation in some form is still prerequisite to payment. In short, the Court of Claims was originally an administrative or advisory body. It is still called upon by Congress for advisory opinions. While it is a judicial body now, it has not the sort of judicial power contemplated by Article III, Section 1, of the Constitution. It is a legislative tribunal as distinguished from a constitutional one. Perhaps one may say that it and the district courts

72 Langevin v. United States, 100 Ct. Cl. 15 (1943).
75 Act of March 3, 1863, 12 Stat. L. 765 at 768, § 14. The judicial power of the Court of Claims is derived from the Congressional authority provided by Art. I, Sec. 8, of the Constitution: “... to pay the debts ... of the United States.” United States v. Sherwood, 312 U.S. 584 at 587, 61 S.Ct. 767 (1941). It is not an unconstitutional encroachment for Congress to recognize a moral claim to be legal and direct the Court of Claims to render judgment accordingly, even though the Court of Claims may have previously rejected the claim. Pope v. United States, 100 Ct. Cl. 375 (1944).
76 Williams v. United States, 289 U.S. 553, 53 S. Ct. 751 (1933); Ex parte Bakelite Corporation, 279 U.S. 438, 49 S. Ct. 411 (1929); United States, for use of Mutual Metal Mfg. Co. v. Bigge, (D.C. Ill. 1942) 46 F. Supp. 8. For the Court of Claims’ reaction to the Supreme Court’s conception, see Pope v. United States, 100 Ct. Cl. 375, hearing on petition for a retrial, 53 F. Supp. 570 (1944) and the comeback of the Supreme Court on certiorari at 323 U.S. 1, 65 S. Ct. 16 (1944). Cf. O’Donohue v. United States, 289 U.S. 516, 53 S. Ct. 740 (1933) in which District of Columbia courts were held to be constitutional courts under the protection of Art. III, Sec. 1, of the Constitution. The District of Columbia is a permanent territory of the United States. Other territories are in the territorial status only temporarily, and may subsequently be admitted to the union as states. Their courts are legislative courts.
are performing a legislative function by a judicial process in government contract cases.

It would seem that the degree to which it is possible to deprive the courts of jurisdiction by agreement in government contracts is substantially dependent upon statutory interpretation as to how much jurisdiction Congress intended the courts to have. Or, again, how much has been left to the executive departments to determine disputes by the administrative process? Then there is a question of construction of the language in the "disputes" article itself. Of how much judicial protection does the article purport to deprive the contractor? If the claimant feels aggrieved by the administrative determination under the "disputes" article, into how much may the courts inquire?

*Gray v. Powell*76 dealt with a review in the courts of an administrative ruling under the Bituminous Coal Act of 1937. Under that statute, a coal producer might obtain an exemption from an excise tax in the event that he is also the consumer. A proceeding before the National Bituminous Coal Commission, a statutory administrative body, and "review" in the United States Circuit Court of Appeals is provided by the statute. The act provides that "the finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." In *Gray v. Powell*, Seaboard Airline Railway Company applied for an exemption from the tax on the ground that it was both producer and consumer. An order was issued by the director of the commission against the company. After review, the Circuit Court of Appeals reversed the order of the director. The Supreme Court, however, reversed the Circuit Court of Appeals and affirmed the director's order.

Mr. Justice Reed, in writing the majority opinion for the Supreme Court, said:

"In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here . . . , the function of review placed upon the courts by § 6(b) is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasonable manner . . . . Congress, which could have legislated specifically as to the individual exemptions from the code, found it more efficient to delegate that function to those whose experience in a particular field gave promise of a

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( Distinction between military commission and constitutional court) Ex parte Quirin, 317 U.S. 1, 63 S. Ct. 1, 2 (1942).
better informed, more equitable, adjustment of the conflicting interests of price stabilization upon the one hand and producer consumption on the other. . . . It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action. 77

Government attorneys argued to the Supreme Court only recently, in the case of United States v. Beuttas, 78 that the broad "disputes" article permits final determinations of questions of law by the contracting officer, and that distinctions between questions of fact and those of law are irrelevant to disputes under such an article. The Supreme Court found it unnecessary to decide the question since it said the government had committed no breach of contract anyway. In the event of breach, the position taken by the Court of Claims, at least, is that the subject of actual damages then to be imposed is one of law to be decided, not under the "disputes" article, but judicially. Insofar as we are concerned with whether only questions of fact, mixed questions of law and fact, or even pure questions of law can be determined under "disputes" articles, the Supreme Court has never explicitly drawn any distinction between the categories. Distinctions that have been drawn by the Court of Claims and the War Department Board of Contract Appeals incline

78 (U.S. 1945) 65 S. Ct. 1000. The contract was for the construction of foundations for the Jane Addams Houses, a PWA project, in Chicago. It provided that designated classes of workmen be paid specified minimum wages, and that if the government should find it desirable to pay higher than that minimum it might establish different rates and adjust the contract price accordingly. After the foundation work was commenced, the government advertised for bids for construction of the superstructure, and specified payment of higher minimum wages for the same categories of workmen than were required in the foundation work. Thereupon the workmen went on strike for wages in the same amount as on the superstructure. The foundation contractor had to meet their demands in order to settle the strike. The contracting officer made a decision under the "disputes" article that the contractor was not entitled to reimbursement for the increased wages, and the Administrator of Public Works on appeal sustained the contracting officer's ruling. The administrator was in error as to some facts, but it is not suggested that he acted arbitrarily or in bad faith. The contractor then sued and the Court of Claims allowed recovery on the ground that the government had breached the foundation contract. [Beuttas v. United States, 101 Ct. Cl. 748 (1944)]. On appeal, the Supreme Court reversed the Court of Claims decision, Mr. Justice Roberts (at p. 1002) saying that the government had not "knowingly hindered respondents in the performance of the contract or culpably increased their costs." Were the rule that the government must cooperate with its contractors, it would seem sufficient to sustain liability that the government should have known the effect its wage-fixing as to the superstructure would have had on foundation work wages.
toward the liberal side, except that the Court of Claims is definite that pure questions of law may be finally determined only by the courts. The rule seems to be that whether the "disputes" article in the government contract is the broad or narrow one, a decision on questions under it will be held conclusive by the courts if "they relate to questions of fact or questions of law arising in connection with questions of fact." Even this rule is not universally accurate, and reasonable minds might well differ as to the propriety of the categories of law or fact into which the courts have placed certain types of questions. It is established that questions of breach and unliquidated damages are in the law category, and that questions of determining the amount of liquidated damages owed by the contractor to the government are in the category of fact. Where a government contract contains a "changes"


81 Thus one United States district court said the question as to whether the installation of steel shelving met specifications is one of fact for the contracting officer to decide. General Steel Products Corp. v. United States, (D.C. N.Y. 1941) 36 F. Supp. 498. A Circuit Court of Appeals held that the question whether the contract called for hauling "knocked down" sections of houses as distinguished from ordinary lumber for a C.C. Camp was one of law determinable by the court. United States v. Lundstrom, (C.A. 9th, 1943) 139 F. (2d) 792.

82 After construing the broad disputes article as not allowing the question of breach to be conclusively determined by an administrative officer, Judge Whitaker said for the Court of Claims in Beuttas v. United States, 101 Ct. Cl. 748 at 769 (1944), "Such an agreement would be contrary to the Act of Congress giving its consent that the United States might be sued. . . . Not only is it beyond the power of a party to bargain away this right given by Congress, but it must be borne in mind that bidders on this work were forced to enter into this sort of an agreement." In the same case, at p. 772, the concurring opinion of Judge Madden read in part, "... in practice, the contractor, if he meant, by agreeing to Article 15, to lodge in the contracting officer the power to decide questions of breach of contract, has given that official power to decide cases against him, but no power to decide cases, effectively, in his favor. No contractor in his right mind would ever intend to do that. And no Government official, in drawing a contract, would intend to include in it such an unconscionable provision." See Irwin & Leighton v. United States, 101 Ct. Cl. 455 (1944); Coath & Goss, Inc. v. United States, 101 Ct. Cl. 702 (1944); The Penker Construction Co. v. United States, 96 Ct. Cl. 1 (1942).

83 A classic case on this subject is Power v. United States, 18 Ct. Cl. 263 (1883), in which the court said, at p. 275; "An account is something which may be adjusted and liquidated by an arithmetical computation. One set of Treasury officers examine
article permitting the contracting officer to make structural changes in the drawings and specifications during the progress of the work, he may hold up the work and take reasonable time out while he determines exactly what changes he will order. The contractor, parenthetically, will be allowed an equitable adjustment of his charges if the change order puts him to additional expense. A delay for an unreasonable time caused by the contracting officer is not contemplated by the “changes” article. Should it occur, there will have been a breach which the courts will review and with relation to which they will assess all damages, liquidated or unliquidated. It is provided in the Tucker Act that the

and audit the accounts. Another set is intrusted with the power of reviewing that examination, and with the further power of determining whether the laws authorize the payment of the account when liquidated. But no law authorizes Treasury officials to allow and pass in accounts a number not the result of arithmetical computation upon a subject within the operation of the mutual part of a contract. Claims for unliquidated damages require for their settlement the application of the qualities of judgment and discretion. They are frequently, perhaps generally, sustained by extraneous proof. . . . The results to be reached in such cases can in no sense be called an account, and are not committed by law to the control and decision of Treasury accounting officers.” See William Cramp & Sons Ship and Engine Building Co. v. United States, 216 U.S. 494, 30 S. Ct. 392 (1910); Plato v. United States, 86 Ct. Cl. 665 (1938); Pioneer Contract Co., Inc., B.C.A. No. 1016, May 17, 1945; Asbestos Wood Manufacturing Co., B.C.A. No. 386, Jan. 25, 1944; Olson Construction Co., B.C.A. No. 454, Feb. 22, 1944; A. S. Wikstrom, B.C.A. No. 98, March 24, 1943; Harry Boyer, Son & Co., B.C.A. No. 6, March 5, 1943.

A Changes article is followed by an Extras article. The following language is frequently used for each:

“Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: Provided, however, That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.”

“Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.”

Irwin & Leighton v. United States, 101 Ct. Cl. 455 (1944). Merely alleging there is a breach by the government, too, cannot be used as a trick to get the court
Court of Claims and district courts have jurisdiction in certain cases, not sounding in tort, of "liquidated or unliquidated" damages. By established practice, liquidated damages have long been settled within the executive departments also, whereas unliquidated damages have not been so settled.\(^{86}\)

In the language permitting equitable adjustment under the "changes" article, one finds an analogy to words in section 77B of the Bankruptcy Act by which the courts are authorized to make a determination that a proposed plan of business reorganization is "fair and equitable." These words from the Bankruptcy Act have been treated as words of art for a law determination; and yet equitable adjustment has been treated as a decision of fact under the "changes" article. In *United States v. Callahan Walker Construction Company*,\(^{87}\) the Supreme Court even treated the determination of profits as one of fact in connection with a contract where the contractor was entitled to an equitable adjustment for such simple items as the cost of digging, moving, and placing earth, and, in addition, a reasonable and customary allowance for profit.

It would seem that the profits to be allowed in such case are in the nature of unliquidated damages to be charged against the government. On this theory, their determination is one of law. As alternative explanations of the Supreme Court's position it might be said, either that the determination of profits was treated as fact here because they were so simple to determine in this particular case, or that the decision denotes a willingness to hold all items of profit, simple or complex, to be a subject for administrative determination. A further explanation might be suggested, however, that a change order is in the nature of an amendment to the original contract or of some agreement supplementary thereto. According to the language of the Court in *United States v. Corliss Steam Engine Company*,\(^{88}\) a leading case in the termination to assess the liquidated damages owed by the contractor. The government's breach must have been actual. *American Engineering Co. v. United States*, (D.C. Pa. 1938) 24 F. Supp. 449.


\(^{87}\) *317 U.S. 56*, 63 S. Ct. 113 (1942). See also as related cases *Securities and Exchange Commission v. United States Realty and Improvement Co.*, 310 U.S. 434, 60 S. Ct. 1044 (1940); *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 60 S. Ct. 1 (1939); *L. E. Myers Co. v. United States*, 101 Ct. Cl. 41 (1944); *Silberblatt & Lasker, Inc. v. United States*, 101 Ct. Cl. 54 (1944); *R. C. Huffman Construction Co. v. United States*, 100 Ct. Cl. 80 (1943); *San Ore Construction Co.*, B.C.A. No. 352, Jan. 29, 1944.

\(^{88}\) In this case, *91 U.S. 321* at 322-323 (1875), Mr. Justice Field, referring to termination by the contracting officer, said, "As, in making the original contracts, he
of shipbuilding contracts made during the Civil War, this is significant. If the change order is to be treated simply as an amendment to the contract, the equitable adjustment would not be by way of determining damages at all. The contracting officer had latitude in entering into the original agreement. During performance, he could make further incidental agreements for the benefit of the government in improving or modifying or amending or terminating the original plans, so long as the contract is an active one.

By a variation in the facts involving the "changes" article, dispute might arise between the parties as to whether what the contracting officer orders is a change or whether it is an item which the contractor is obliged to perform under the contract. Here the common provision previously referred to in this article, that the contracting officer shall be the interpreter of drawings and specifications, becomes important. This makes him the interpreter of the contract itself in some respects, and as such, his decision becomes a law determination. These provisions have been upheld. Occasionally they are referred to by courts as calling for fact rulings. This is not a very satisfactory explanation, and the better reasons for leaving this category of determinations to administrative officers would appear to be historic and practical. It has long been recognized as desirable to keep work moving along by having decisions on certain disputes made promptly on the spot where the work must agree upon the compensation to be made for their entire performance, it would seem, that, when those contracts are suspended by him, he must be equally authorized to agree upon the compensation for their partial performance. Contracts for the armament and equipment of vessels of war may, and generally do, require numerous modifications in the progress of the work, where that work requires years for its completion. With the improvements constantly made in ship-building and steam-machinery and in arms, some parts originally contracted for may have to be abandoned, and other parts substituted; and it would be of serious detriment to the public service if the power of the head of the Navy Department did not extend to providing for all such possible contingencies by modification or suspension of the contracts, and settlement with the contractors."

89 "It is the duty of the court to construe written instruments; but the application of their provisions to external objects described therein is the peculiar province of the jury." Richardson v. The City of Boston, 60 U.S. 263 at 270 (1856). See also Davis and Fowler, Trustees v. United States, 82 Ct. Cl. 334 (1936); Phoenix Tempe Stone Co. v. De Waard, (C.C.A. 9th, 1927) 20 F. (2d) 757; Green v. Foundation Co., 44 N.Y.S. (2d) 547 (1943); Fred A. M. de Groot, Inc., B.C.A. No. 108, June 8, 1943. (Some substantial support for the interpretation) King v. United States, 100 Ct. Cl. 475 (1944). (No reasonable basis for the ruling) Bein v. United States, 101 Ct. Cl. 144 (1943).

90 "We are of opinion that they [the government] intended to demand only that the contracting officer should decide questions of fact arising as the work progressed, such as the proper interpretation of the requirements of the contract documents. . . ." Beuttas v. United States, 101 Ct. Cl. 748 at 770 (1944).
is performed. Designated administrative officers are usually technical experts in their fields, and are able to arrive at conclusions related to drawings and specifications more correctly than the average court could do. There is some analogy here to the persuasive value of expert testimony in the trial of lawsuits.

Frequently, but not always, these articles specify that the interpretations by the officer on the job shall be final. Where they do so specify, the aggrieved contractor may not appeal under the "disputes" article by its very language, and his only relief in court will be for fraud, arbitrariness, or bad faith of the administrative officer. Where the contract says nothing about the finality of the contracting officer's interpretation, however, the right of the contractor to appeal to the head of the executive department or his designated representative will depend upon the language of the "disputes" article itself. If the "disputes" article is limited by its terms to fact questions, since interpretation is a law determination, no appeal may be made from it. When, however, it has been necessary to interpret the terms of the contract and the provisions of the specifications incidental to determining fact disputes, the War Department Board of Contract Appeals has treated the primary questions as those of fact, to which interpretation is secondary, and the appeal as involving mixed questions of law and fact and proper under even the simple "disputes" clause.

Under the First War Powers Act

In an effort to rush along the war procurement program during World War II, Congress authorized the President to give authority to any department or agency of the government exercising war functions "to enter into contracts and into amendments or modifications of contracts . . . without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war." By Executive Order No. 9001, the President delegated such

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authority to the War Department, Navy Department and the United States Maritime Commission. By a series of further delegations, contracting officers within the War Department were given such authority under the First War Powers Act that they can rule finally against contractors under a “disputes” article and thereafter by supplemental agreement amend the contract to give the contractor what he feels should have been conceded to him anyway, provided it is first administratively determined that to do so would facilitate the prosecution of the war. In this way, the contracting officer may overcome legal obstacles to justice by means of a supplementary agreement to allow the war contractor to have that to which it seems he should properly have been entitled in the first place. In cases where he has not shown himself ready to do so under War Department contracts, the Board of Contract Appeals adopted a recommendation of The Judge Advocate General of the Army that, after making its decisions on appeal, it proceed to express opinions as to the law and justice in the case and make further recommendations for the contracting officer’s guidance.\textsuperscript{95} This board so won the confidence of both businessmen and the government that the Secretary of War by memorandum dated July 4, 1944 directed it to exercise all the delegable authority the Secretary of War himself “might exercise either through contractual power or otherwise” in disposing of appeals in order to arrive at the just disposition of the dispute involved in the appeal.\textsuperscript{96}

\textit{Recommended Legislation}

Broad powers thus given to administrative officers necessarily reduce judicial inquiry in the courts. It has been argued that resort to the courts would not be robbed of utility in proper cases if the “disputes” article could be made to cover, at all times, all questions, whether of law or fact, since the administrative decision may be disregarded by the courts if it is arbitrary, capricious, fraudulent, or so grossly erroneous as to imply bad faith. The scope of a court’s authority cannot be reduced materially, however, without at the same time amended by Exec. Order 9296, Jan. 30, 1943, 8 Fed. Reg. 1429 (Feb. 3, 1943). On relief under the First War Powers Act and Exec. Order 9001, see Kramer, “Extraordinary Relief for War Contractors,” 93 Univ. Pa. L. Rev. 357 (1945).

\textsuperscript{95} JAG Opinion SPJGC 1943/2811, Feb. 13, 1943, 2 J.A.G. Bul. 69, § 726 (41); Line Construction Co., Inc., B.C.A. No. 267, Jan. 14, 1944; Dawson Engineering Co., B.C.A. No. 513, April 5, 1944. From that point on the War Department Board of Contract Appeals proceeded to consider and administratively pass upon appeals whether or not based upon issues made appealable by the terms of the contract. John E. Bennett Co., B.C.A. No. 26, Feb. 16, 1943.

\textsuperscript{96} War Department Procurement Regulations, PR 318-D.7.
affecting its dignity adversely. The Court of Claims is a specialized court dealing, in large part, with government contract law questions; if it is ousted from the function of deciding such questions one of the major functions which that court has long exercised will have disappeared. At least the Court of Claims insists that it may not be ousted of the function of deciding pure law questions by such provisions in a government contract, which, that court has pointed out, the contractor has no other alternative than to acquiesce in if he wants to get the government business. Congress gave that court and the district courts jurisdiction to determine claims under government contracts. In Gray v. Powell, the authority of the administrative officer had been given by statute. In government contract cases, the authority of the contracting officers is limited by what Congress authorized them to do. They have no power to make contracts except as Congress has authorized them to do so. At least, Congress has never expressly authorized the use of provisions in contracts to oust the courts of the jurisdiction the Tucker Act has given to them. Moreover, the language used in the "disputes" articles is the workmanship of the government executive departments and is to be construed most strongly against the person using it. Thus, it is persuasive to argue that the articles should not be so construed as to deprive the contractor of resort to the courts on pure questions of law unless the language used in the article clearly requires such construction.

Meanwhile, during the pressure of the war emergency, the administrative method has been used for the settlement of disputes under government war contracts with an efficiency which it is doubtful if courts could have achieved; and this has been accomplished without sacrifice of fairness to contractors. Members of the War Department Board of Contract Appeals, all members of the Army and acting as representatives of the government, give their full time to this specialized field of contract problems. If the use of "disputes" articles is to be continued, experiences in this field during the war should not be lost sight of, and jurisdictional lines between the administrative officers, the General Accounting Office and the courts under the Tucker Act should be clarified by statute. Heads of executive departments are busy with other matters and the determination of contract disputes calls for a specialized treatment. It is desirable to build an administrtaive body of decisions that may be common to all of the contracting agencies. Instead of providing for appeals to the heads of the departments, it would seem more sensible to provide by an act of Congress for the appointment of a central contract appeal board, like that used during
the war in the War Department, to hear appeals under contracts made by any department of the government.

There should be some opportunity for the contracting agencies to experiment in methods of administrative settlement of disputes to ascertain by what procedure the fairest results can be obtained for both sides, and, at the same time, by what procedure the greatest confidence of business in government transactions may be assured. To this end, Congress should authorize settlement of government contract controversies by arbitration as well as by the present standard "disputes" article. Arbitration surely should not be looked upon here as a means for experimentation for government's own purposes alone. The public should be carefully guarded in all governmental transactions to assure that a good bargain is made, in a competitive market whenever feasible, in the case of every purchase by public money; and there is no reason for departing from the concept that he who deals with the government must be alert to turn square corners in his dealings. But why expect a contractor to be at a greater disadvantage in the determination of disputes arising honestly between himself and the government than he would be if the dispute were with a private contractor? or to be bound by what Chief Justice Taft referred to, in Goltra v. Weeks, as a harsh or unwise stipulation if it appears that it is such under existing facts? Arbitration provides a speedy method for determining controversies which purports to place both parties to the contract on an equally favorable footing. Its availability should be encouraged as a matter of right to either party if that method seems fairer under specific circumstances as they arise than the unilateral administrative method provided by the present standard "disputes" article would be.

Finally, there is no justification for a contest between the administrative agencies and the courts on the basis that a number of the heads of departments acting individually can dispose of appeals faster than the one Court of Claims can try cases with such help as that court gets from the district courts in smaller controversies. The problem is essentially one, not of speed, but, again, of accomplishing fairness and justice and at the same time protecting the public interest. If the Court of Claims has more business than it can handle with reasonable celerity, the solution would be better not to reduce the protection the contractor may receive from the court, but either to provide more judges for that court so it can be divided up into sections for trying cases, or to increase the jurisdictional amounts of the government contract cases which the various district courts may handle.