In the

Supreme Court of the United States

S&E CONTRACTORS, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 70-88

Washington, D. C.
March 20, 1972

Pages 1 thru 56

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

S&E CONTRACTORS, INC.,

Petitioner,

v. No. 70-88

UNITED STATES OF AMERICA,

Respondent.

Washington, D. C.,

Monday, March 20, 1972.

The above-entitled matter came on for argument at 1:15 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice

APPEARANCES:

GEOFFREY CREYKE, JR., ESQ., Hudson, Creyke, Koehler, Brown & Tacke, 1744 R Street, N. W., Washington, D. C. 20009; for the Petitioner.

IRVING JAFFE, ESQ., Civil Division, Department of Justice; for the Respondent.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 70-88, S&E Contractors against the United States.

Mr. Creyke, you may proceed whenever you're ready.

ORAL ARGUMENT OF GEOFFREY CREYKE, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. CREYKE: Mr. Chief Justice, and may it please the Court:

This case is also here for reargument, and it comes from the United States Court of Claims. It involves the finality under a 1961 federal construction contract of an administrative disputes decision favorable to the contractor allowing payment for certain routine contract changes, which decision was accepted by the contractor and by the agency, the Atomic Energy Commission, but was collaterally attacked by the Comptroller General on his own initiative precluding payment and forcing us to sue in the Court of Claims.

There is no issue as to the authority to enter the contract, obligate funds, or indeed to conduct the disputes process; neither is there any allegation of any fraud, wrongdoing or impropriety whatsoever on the part of anyone connected with the contractor or the AEC.

The matter is simply one which we say the Comptroller General, in an overreaching of his powers, has blocked payment of the resolution of this matter under the disputes process,

forcing the contractor into litigation. The Department of Justice here takes the position that the action of the Comptroller General is immaterial; and, although it is not supported by the Atomic Energy Commission in its pursuit of this, nevertheless contends that this creates a right of judicial review of this proceeding.

The case was decided by the Court of Claims in a 4-to-3 opinion, the majority holding that regardless of what precipitated the litigation there would be a judicial review conducted under the standards of the Wunderlich Act of 1954. And the case was remanded to the Commissioner of the Court of Claims for a hearing on the merits.

Therefore, the case is not here on the merits as such, but on the question of the finality of this determination under the disputes process, and the rights of the contractor, which he is asserting to hold that that disputes process, having been accepted by the agency, was final, and is not subject to collateral attack. The case therefore involves a contract between the agencies and an interpretation of this Wunderlich Act.

If I may briefly review the history of the case itself, it is laid out as a chronology on page 1 of the Appendix. It was a lump-sum competitively bid construction contract to build a portion of the Atomic Reactor Test Station for the Navy in Idaho.

The original sum was $1,272,000 and the contract performance period was 180 days, or to run from August of '61 to February of '62.

The contract was entered into on a U. S. Standard Form 23, 23A, and so forth, based on a contract of the 1953 edition, with the normal and usual adjustment clauses, changes, changed conditions, and other factors in the contract.

The work, however, due to extra work and extra time, actually consumed 325 days, or, in effect, approximately double the time of performance and the expenditures involved.

Six claims arose out of this, amounting to $1,950,000; and claims for an additional 120 days of time extensions. They are routine claims, nothing extraordinary, other than the magnitude of them in relation to the basic contract, the type of thing that is encountered in almost all federal construction contracts.

Denied by the Contracting Officer, a timely appeal taken, they were referred by the Atomic Energy Commission under then existing practice to an Examiner, who heard, at a 13-day hearing, the claims; and an adversary proceeding found in December '62 for the appellant here on liability. The matter was remanded by him to the Contracting Officer to negotiate quantum.

The Contracting Officer appealed to the Commission itself. This proceeding, to this extent, being a little

different from your normal Board of Contract Appeals type of proceeding, which is prevalent throughout most of the federal departments today.

The full Commission --

Q You mean including this Commission, Mr. Creyke?

MR. CREYKE: Sir, today --

Q Yes.

MR. CREYKE: -- they have a Board of Contract Appeals just as does the Department of Defense and other agencies.

Q Yes.

MR. CREYKE: In November of '63 the full Commission reaffirmed some of the claims and granted a review by the full Commission on several, mostly pertaining to time extensions. In May 13, 1964, the Commission itself, in a formal act, affirmed the claims other than a slight modification on one regarding time of site access, which it remanded for negotiation, and directed the Contracting --

Q Do I gather that today that kind of action would be taken not by the Commission itself but by Board of --

MR. CREYKE: The Atomic Energy Commission Board of Contract Appeals --

Q Yes.

MR. CREYKE: -- which is very much like the counterpart of the Armed Services Board of Contract Appeals.

Q Yes.

MR. CREYKE: Yes, sir, Your Honor.

There was this remand to the Contracting Officer again in May of '64, then by the full Commission, but in the meanwhile the Disbursing Officer had addressed an inquiry to the General Accounting Officer regarding certain setoffs, involving about $32,000, items which were independent of the merits of the claims themselves, and so found by the Commission or the Court of Claims who reported on this case.

But the request which went to the General Accounting Office expressly stated that it was not to be construed as a request for a review of or concurrence in the dispute.

Nevertheless, the General Accounting Office did, contending that it had a right, acting in an executive capacity and under the standards of the Wunderlich Act, to review the entire decision, did so, taking 33 months to do it; and in a 260-page opinion set aside the entire decision. It allowed not one cent, it allowed not one day's time extension. And in its own papers filed in these proceedings, it characterizes this action as an advance notice of disallowance.

Q Well, you said they set aside. Is that what GAO did, or --

MR. CREYKE: Perhaps I inadvertently used the words "set aside", I should have said they simply blocked payment of this, taking the position that the contractor was not entitled to any compensation whatsoever.

Q And suppose, despite GAO's expressing disapproval, AEC had gone forward nevertheless and paid it; what would have been the risk in making the payment that the members of the Commission would take?

MR. CREYKE: I suppose they would be subjected to possible charges personally, or their bond being charged by the Comptroller General for the amount so disbursed, if his position has ultimately been maintained.

Q And the amount involved was about a million dollars, was it?

MR. CREYKE: Sir, the amount claim was $1,950,000.

Q Well, I mean, the agreed settlement was for how much?

MR. CREYKE: There was never an agreed settlement.

Q Oh, I see.

MR. CREYKE: The Examiner found liability --

Q Yes.

MR. CREYKE: -- the Commissioner affirmed liability.

Q So the amount had not been fixed?

MR. CREYKE: The amount had not been resolved.

Q But whatever it was --

MR. CREYKE: It was in negotiation; the amount claimed as a million nine hundred.

Q But if the payment had been made, if settlement had been agreed upon and the payment made, a million dollars,

whatever the amount was, then the members of the Commission ran the risk, by paying it, of personal liability?

MR. CREYKE: Correct, sir. Or a liability under bond, or the Disbursing Officer might have run that risk.

Q Yes.

MR. CREYKE: That is not altogether clear to me, the full extent of that proposal.

Q Well, I expect --

MR. CREYKE: But it would be, as we view it, a total deterrent to making disbursements.

Q Well, if you or I were members of the Commission, we'd hesitate twice with that sword over our heads, wouldn't we? Making the payment.

MR. CREYKE: Agreed. I quite agree, Mr. Justice Blackmun.

Q What happened to the petitioner in the meantime? Is the petitioner still in business?

MR. CREYKE: Sir, the petitioner is not in business. He's been unable to continue in business ever since.

Q Is there anything in the record about this?

Well, don't -- I don't want to take up your time, but I just --

MR. CREYKE: I would say there is no -- nothing in the record itself to this effect, bearing in mind, sir, that the record, as such, can only be the record of the Atomic

Energy Commission proceeding, as reviewed under the motion for summary judgment proceeding in the Court of Claims.

Q When, as, and if they receive some money, will they receive interest from the time when it was due?

MR. CREYKE: Under the present state of the law, no, sir.

Q The Court of Claims cannot make an allowance of interest, as such, can it?

MR. CREYKE: No, it cannot. There have been some decisions in recent years which have enabled the Court of Claims to recognize as overhead expense certain interest accruing during a period of extended overhead while the work was being performed. But there is no basis for allowing interest for the period beyond the time when the contract was completed, which was of course in 1962.

Q It would take special legislation to treat that aspect of the problem, I suppose?

MR. CREYKE: I would think it would. There is a remote possibility that it has been discussed, that one might go for an amendment without consideration under Public Law 87-653. It is unprecedented, but it is simply something that has run through our thinking.

Q Mr. Creyke, in the -- then you had to bring the lawsuit as a consequence?

MR. CREYKE: Correct.

Q Now, in that lawsuit, the government defended of course, is this 260-page memorandum of any binding effect on anyone in the lawsuit?

MR. CREYKE: None whatsoever, sir.

Q It's as if it were never read.

MR. CREYKE: It is a published opinion, and therefore we feel free to refer to it because it's in the opinions of the Comptroller General.

Q But the issue --

MR. CREYKE: But the issue in this suit, once we brought it --

Q Yes.

MR. CREYKE: -- in the Court of Claims, it came to issue on cross-motions for summary judgment.

Q Yes.

MR. CREYKE: Now, we --

Q But those cross-motions have to be decided by the Court of Claims independently of this 260-page memorandum or anything said in it?

MR. CREYKE: Yes. But it should be noted that in the Court of Claims, not only the Department of Justice but an attorney from the General Accounting Office appeared with the government; at a later point they diverted, and we were faced with more than one adversary. But initially, in the initial motion, it was filed not only by the Department but by

the -- joined by the Comptroller General.

If I may discuss the Court of Claims proceeding --

Q May I ask a question before you proceed?

What was the scope of the review of GAO? Was it de novo?

MR. CREYKE: They reviewed it, as I understand it, on the basis of saying that it was a review as to whether the decision of the AEC, affirming the Examiner's decision, was supported by substantial evidence, and whether it was correct as a matter of law. They found it was not.

Q Did GAO accept findings of fact by the AEC or its Examiner?

MR. CREYKE: Negative.

Q They made its own findings of fact?

MR. CREYKE: Yes, sir.

Q And no payment could be made in face of that decision by GAO?

MR. CREYKE: Practically speaking, that is correct, yes. But no payment has been made.

Q Yes. Only practically speaking. AEC could have gone ahead and told its Disbursing Officer to pay it anyway, couldn't it?

MR. CREYKE: I think the Disbursing Officer would have been within his own rights to independently refuse to make that, at the direction of his superiors.

Q And neither was going to risk making that payment, for fear of a personal liability if they did it in face of a disapproval of the General Accounting Office; wasn't that it?

MR. CREYKE: I quite agree.

Q And when you answered Mr. Justice Powell that this was a de novo review, I gather it's not a review of any kind, whatever that 260-page memorandum, it has no legal effect except as the statement of why GAO disapproved; wasn't that it?

MR. CREYKE: Yes, sir.

Q Historically I understand there have been occasions where payments were made notwithstanding the opposition of the Comptroller General, but that was where the Attorney General took the opposite position.

MR. CREYKE: Historically, and particularly in the period of the 19th Century, there were numerous cases and some in this century where the Attorney General took an entirely different view of the rights of the Comptroller General and specifically held that in matters vested in the discretion of the administrative official that he had no right to superimpose his judgment.

And one of the big issues in this case will be whether that was altered by the Wunderlich Act. In other words, this Court, in Mason & Hanger, very clearly held that the Comptroller General had no right to inject --

Q I'm going to tell him, Mr. Creyke. In this very case, suppose the Attorney General had said, No, I don't agree with the Comptroller General and I'm not going to defend this suit. Might he have done that?

MR. CREYKE: Yes.

Q And the General Accounting Office would be helpless to do anything about it?

MR. CREYKE: I think that's so.

Q And judgment would have gone as a course for your client?

MR. CREYKE: I think that's correct, Your Honor.

But our point here is there there would be no case on which to make such a determination were it not for the improper, unwarranted, and illegal act of the Comptroller General.

In fact, if we can go back just a second to the proceedings in the Court of Claims, I think it's important to bring out that having been referred to the Commissioner first, he made a recommendation to the Court that the Court find that this was a breach of contract and that it render summary judgment.

Q Tell me, Mr. Creyke, suppose the Comptroller General had not taken the action he did, but the Disbursing Officer, for whatever reason, he just refused to pay; you would then still have had to sue, wouldn't you?

MR. CREYKE: If the Disbursing Officer --

Q -- had refused to pay.

MR. CREYKE: -- had refused to pay, in accordance with the --

Q No, the GAO did nothing.

MR. CREYKE: Yes.

Q But the Disbursing Officer just refused to pay; you would still have to sue, wouldn't you?

MR. CREYKE: I believe not, because it would have been taken away from him by the action of the Commission, by which he would be bound, since there is a formal act of the Commission. And the hypothetical situation you're projecting, as I understand it, would entail a reversal of position on the part of the Commission or its representative.

Q But you don't get a check until the Disbursing Officer fills it out and sends it to you, do you?

MR. CREYKE: That's correct.

Q So, he doesn't fill it out and doesn't send it to you. Then what's your position? What do you have to do?

MR. CREYKE: If such a situation were to occur, then I would suppose that in due course if we were unable to resolve it we would have the possibilities of either seeking a mandamus action, which has been done in some cases where it involves simply a ministerial action to carry out the obligation of the United States, or the possibility of bringing an action in the

Court of Claims.

Q In either event, the Attorney General would defend your action, I take it?

MR. CREYKE: In either event the Attorney General would have the responsibility of defending a suit against the United States.

Q And suppose the Attorney General were then to say, Well, GAO may have thought this was all right, but I don't, and I'm going to defend it on the ground on which the GAO says it should have been set aside?

MR. CREYKE: Well, this is a procedure which actually the Attorney General suggested in that opinion in January of 1969 with which we took such strong issue. In other words, in effect he suggested that anyone within the government who was not satisfied had the right to short-circuit, if you will, the disputes process and throw the thing into litigation, whereby the contractor who is plagued by the government's rule accepted this onerous contract with all the incumbent responsibilities of carrying forth changes at his expense. Of carrying forward at his expense in accordance with the Contracting Officer's determination while the dispute is being resolved. He would still have the additional onus, having won, of carrying on this litigation.

Now, that is not the way the disputes process works.

Q Mr. Creyke, I'm not sure I followed those

hypothetical situations as they evolved in this colloquy, but if the Comptroller General had taken no position and if the Atomic Energy Commission had approved the payment, but its Disbursing Officer refused to pay, the Atomic Energy Commission might solve that by just getting a new Disbursing Officer, might they not?

MR. CREYKE: Quite so.

Q In other words, he has no authority to interpose himself, no legal authority to interpose himself between a decision of the Commission and a contractor?

MR. CREYKE: Absolute case of insubordination because in that situation, by statute, the Atomic Energy Commission is the delegated representative of the government. And in this situation the Commission itself has acted, has made a determination, and that determination has never yet been altered.

Q But I suppose, then, in light of that theory, as Professor Petrowitz, in his amicus brief filed, suggests you'd have then a suit against the government for damages for breach of its disputes contract?

MR. CREYKE: I agree with that theory. Now, in fact, Commissioner White's opinion in the Court of Claims held that this non-payment in our case constituted a breach of contract, because the remedies, as suggested, as required, were not carried out, were unavailable.

Q That sometimes takes a long purse to assert

contractual rights.

MR. CREYKE: I would say it does. It took a long time in this case, Mr. Justice Douglas.

We're -- one of our problems in this case, of course, is that S&E Contractors is taking on not one but three adversaries, really, in a sense; although we have no conflict with the Atomic Energy Commission at this point in time, we do have problems, on the one hand, with the Comptroller General, and on the other hand with the Attorney General.

As I started to say a little bit ago, in the initial proceedings in the Court of Claims they were together. Later, after the Commissioner found for S&E and after we filed -- excuse me; after the government jointly filed a brief seeking review, and we responded, they split and took different positions and filed amicus brief in behalf of the Comptroller General asserting different positions from those which the Department of Justice had asserted.

The Department of Justice seemed to bottom its case on this nebulous right of making independent review, notwithstanding the circumstances of how the matter came about.

It is our position that you simply cannot arrive at such a situation without giving recognition to and approval of what is a breach of contract and an illegal failure on the part of the agency of the United States, the Atomic Energy Commission, to carry out its agreement with this contractor.

Now, from time immemorial, this Court has recognized the rights of and encouraged parties to provide methods whereby they could resolve their own disputes.

In the case of the government this has been recognized particularly in the Jones case 120 years ago, as well as in the Mason & Hanger case to which I adverted a little while ago, which both specifically involved an attempt by the Comptroller General to overrule the head of an agency on a routine contract matter.

There this Court held that there was no such power.

Now, was this altered by the Wunderlich Act? Remember that that Act came about as a result of two decisions of this Court in 1950 and 1951, whereby this Court, in upholding the rights of parties to contract for their own remedies, said that they had contracted away the right to judicial review.

In the Moorman case, involving questions of law, and in the Wunderlich case, involving questions of fact, the Court suggested that if Congress felt a different standard should be applied, it was a matter for Congress to undertake. Congress did enact this Wunderlich Act. We have it on page 3 and 21 of our own petition. It's short --

Q Well, Mr. Creyke, apart from the Wunderlich Act, I guess all the way back, as you said, 100 years ago or so?

MR. CREYKE: We cited the Jones case in the 1850's,

yes, six.

Q Yes, and Kihlberg, and the rest of them --

MR. CREYKE: Yes.

Q Certainly these were all done -- this was a contractual matter, wasn't it?

MR. CREYKE: Correct.

Q And the parties would contract, as I recall it, they'd leave the decision to an official of one of them, and that any matter in dispute would be resolved by him and that his decision would be final and conclusive. That's as much as the clause said initially, isn't that right? The original form of the clause is a very short thing --

MR. CREYKE: Yes.

Q -- for something like that, wasn't it?

I gather the fraud exception was engrafted by the courts, wasn't it?

MR. CREYKE: Excuse me, what exception?

Q The fraud exception. The exception for fraud.

MR. CREYKE: Yes. It actually came about more or less concurrently, because --

Q Yes.

MR. CREYKE: -- in the Wunderlich decision, you had said --

Q No, no. I'm getting back to 1878, back to the time of Kihlberg. At that time the form of the clause, the

disputes clause, was simply that the decision of an official of one of the contracting parties would be conclusive and binding, and the Court said that that was enforcible, in the absence of fraud. Is that right?

MR. CREYKE: Yes, Your Honor.

Q And if there were fraud, then even the party whose official had been agreed upon as the one who should make -- should decide the dispute, even that party could attack the award, could he not, for fraud?

MR. CREYKE: I regard as analogous the situation in the private contract, whether it's fraud by --

Q Well, as a matter of fact, this whole thing grew out of private contract agreements, didn't it?

MR. CREYKE: Yes, sir.

Q Railroad construction, and all the rest of them?

MR. CREYKE: Yes. It has been characterized as tantamount to arbitration by some, although we say it is not because --

Q Well, now you have a contract in which you have a provision which expands, doesn't it, on the initial form of the disputes clause, from the simple clause it includes these exceptions, that may be set aside where fraudulent -- fraud is expressly stated -- and in four other exceptions.

Now, just as a matter of contract law under the old vital cases, why isn't that enforcible?

Just as the initial clause was always enforcible, and the fraud exception, of course; why do you even have to get to the Wunderlich Act here?

MR. CREYKE: It is not enforcible, if you please, Mr. Justice Brennan, because there is no --

Q Well, was one of the --

MR. CREYKE: -- effort to enforce it on the part of the official, the government, the Atomic Energy Commission; which is that which --

Q Well, how does your clause read in this?

MR. CREYKE: It is on page 3 or 21 of our brief --

Q Yes, it's page 5, I guess, isn't it?

Q "The decision ... shall be final and conclusive unless" --

MR. CREYKE: Oh, yes --

Q "Unless".

MR. CREYKE: Yes.

Q Unless?

Q Unless it's fraudulent. There's no claim of fraud here, is there?

MR. CREYKE: None, Your Honor.

Q No, but there is. Then it goes on: "unless it's fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence." And that's the one that's involved

here, isn't it?

On page 6.

MR. CREYKE: Yes. Yes, it runs from 5 to 6, I'm sorry, I gave you --

Q Well, I don't quite understand why, under everything since Kihlberg, these clauses have been enforcible at the suit of either, why that isn't enforcible as to all those grounds of attack.

MR. CREYKE: Sir, if you take the exact wording of the clause, it's plainly intended only to provide for the contractor, because it says, "The decision ... shall be final and conclusive unless ... the Contractor mails or otherwise furnishes to the Contracting Officer" --

Q You mean -- is this to say now that the government, under this clause, cannot attack, as it always could ever since Kihlberg, the act of its own official for fraud?

MR. CREYKE: No, it is not, sir. That is, it's saying that the government cannot attack under this clause the decision ofthe Contracting Officer and of the Commission.

Q Well, no, that isn't what it says. It says, "The decision of the Commission or its duly authorized representative for the determination of such appeals", which I take it would be the Contract Appeals Board today, "shall be final and conclusive unless determined by a court of competent

jurisdiction to have been fraudulent" -- doesn't that mean the government could attack it for fraud?

Q But there's no fraud here, as I understand.

MR. CREYKE: No fraud here, Mr. Justice.

Q All right. -- "or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence." Which is the ground here. Isn't it?

MR. CREYKE: Yes, it is.

But this clause, in its application, has always been construed as only providing for a means for a contractor to go forward with these appeals. It is --

Q I suggest not where fraud was involved. It was always, even without the word "fraud" in the disputes clause, the government could attack the award of its own official for fraud, couldn't it?

MR. CREYKE: It could for fraud.

Q All right. Well, now they put the word "fraud" in the provision itself and then added several other grounds of attack.

MR. CREYKE: The clause which is in question here, of course, was not the Wunderlich Act clause, which words it a little different, but this is the clause for our contract, and we are --

Q Yes, this is the clause -- what I'm reading from

is --

MR. CREYKE: It is the clause under our contract.

Q Yes.

But which you, I gather, negotiated with the government? I take it, when the contract was entered into.

MR. CREYKE: Well, the word "negotiated" has other broad implications there --

Q Well, you would not have had the contract if you hadn't agreed to a contract which included that provision, I take it? Is that right?

MR. CREYKE: That's correct, sir.

I would like to conclude by saying that I feel if this case is one in which the broad aspects of this entire problem, the application of the disputes process, is of value to the government and the contracting industry, it should be given very serious consideration. That the power to control the incidence of contract, including this, should be limited to those of the using agency, that it be determined that traditionally, although construction might indicate the power existed by the government to process this, in fact over the years there is no background or no experience of it having been done, that the government has the power to write contracts and regulations to give itself powers of review which it did not do so here.

And that there will be a vast harm done to this

contractor as well as to the entire contracting industry if this case is not overruled.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Creyke --

Q Mr. Creyke, let me follow through on one of Justice Brennan's questions, because I'm not sure that you caught the full import of it.

I think it is his position that at all times the government could appeal on the ground of fraud. At all times, prior to Wunderlich, at any time?

MR. CREYKE: Yes, Your Honor.

Q And the next step is that by putting in the language of "fraud", into the contract, this didn't disturb that rule; and by putting in other grounds for appeal, the implication is that the government can appeal with respect to all those other grounds as well.

What I'd like to get is your answer to that suggestion.

MR. CREYKE: As I read the background of that, Mr. Justice Blackmun, the intention of putting that reference to fraud in there, and it's brought out in the amicus brief of the American Bar, was to expressly overcome the strict standards established by this Court,in limiting a contractor to right of review in the Wunderlich decision, in cases where fraud was alleged. It said it shall not be limited to that, and that the same, nevertheless, shall be presumed final unless

not supported by substantial evidence as well as not fulfilling the other four standards as set out in the latter part of that article.

MR. CHIEF JUSTICE BURGER: Mr. Creyke, since you've answered that last question after you had yielded the lectern, we'll give you the three minutes you were trying to save; and we'll enlarge you accordingly, Mr. Jaffe.

MR. CREYKE: Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Jaffe.

ORAL ARGUMENT OF IRVING JAFFE, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. JAFFE: Mr. Chief Justice, may it please the Court:

The real issue in this case is whether or not the government may challenge in court a decision favorable to a contractor rendered by an agency under the standard disputes clause, on the ground that it does not meet the standards of the Wunderlich Act.

Now, it should be borne in mind that the only decision placed before the Court of Claims was not the GAO's opinion, not anything that the Department of Justice had done, but the Atomic Energy Commission decision; and that decision is challenged. That is, the finality of that decision is challenged, in our answer, on the ground that it does not comport with the standards of the Wunderlich Act.

Q In going to the practical matters that we have explored --

MR. JAFFE: Yes.

Q -- in the colloquy, if the General Accounting Office had never got into this situation at all, what would the Atomic Energy Commission have done at the conclusion of the performance?

MR. JAFFE: Well, let me answer that question --

Q Is it fair to assume that they would have paid the contractor?

MR. JAFFE: Well -- yes. In the normal course of events, as happens with all of these contracts, the matter would have been continued and concluded before the Contracting Officer, which was where the Atomic Energy Commission sent it, presumedly an amount that was due, since they found the government liable on several of the claims, would have ultimately been determined and paid by the agency's Disbursing or Certifying Officer.

However, I would like to answer the question that was posed by Mr. Justice Brennan: Suppose that the Disbursing Officer had not paid? This is not a hypothetical situation, except for this particular case, because the Disbursing Officer of another agency not so long ago refused to pay.

I say that mandamus would not lie, it's not a ministerial act, because that decision which the Disbursing

Officer refused to pay could be subjected to challenge by the very device of refusing to pay. It is not a decision which requires payment unless it is one which is not fraudulent, not arbitrary or capricious, not clearly so erroneous as to apply bad faith; it must be supported by substantial evidence. And one step more, it must be correct as a matter of law. That's Section 320 -- the second section of the Wunderlich Act.

So that on any of these grounds there is no -- that is, if any of those grounds are not met, there is no requirement to pay.

Now, the Disbursing Officer, assuming that he came to the conclusion that this decision was infirm under the standards of the Wunderlich Act, could not be compelled in mandamus, in my opinion, to pay; it is not a ministerial act required of him. And the case to be subjected to judicial scrutiny.

In this case there has not yet been a determination by a court of competent jurisdiction, namely the Court of Claims, that this decision of the Atomic Energy Commission has any viability whatever or that any payment is required. The reason it has not reached that decision is because the plaintiff has contended, and this Court has granted certiorari, that the standards of the Wunderlich Act are available only to the contractor; that there was nothing under the Wunderlich

Act which enabled the government to challenge a decision of its own agency.

Q That depends upon who the government is.

MR. JAFFE: Well, I think I can answer that, Mr. Justice Douglas --

Q Yes. Is the government the AEC in this case, or is it the Department of Justice?

MR. JAFFE: Well, I think what you're really asking me is the mechanics of procedure as to how the matter gets into court. And it can get into court in a variety of ways. The government, as Congressman Willis said when the question was posed to him in the consideration of the Wunderlich Act, said that it might be the General Accounting Office, it might be the Department of Justice, it might be the agency involved.

Now, let us assume, for example, another means by which this could have come to court, and how the government would have asserted its rights. Suppose, for example, the disbursing officer did pay, as would have been true in the normal course of events, and then the General Accounting Office, in auditing these accounts, looks at this decision and comes to the conclusion that it's erroneous as a matter of law on the basis of the decision on its face, and therefore transmits it to the Department of Justice with the request that we look into it for the purpose of recouping money erroneously

or illegally paid, because the decision of an agency, under a disputes clause, was not entitled to finality under the Wunderlich Act.

Now, that would be another way, as the Attorney General said in his opinion of January 6, 1969, in which this could be tested.

Q Mr. Jaffee, what's the risk that the Commission ran here, after the GAO 260-page memorandum, and then they paid; if they had gone through with the payment, who would have taken what risk?

MR. JAFFE: Well, the risk, there is a risk, Mr. Justice Brennan, because the statutes which govern the General Accounting Office also provide that if a payment is illegally or erroneously made, and I won't go into the bad faith or the other factors that exist, but just plainly the illegally or erroneously that he may charge the accountable officer for that payment.

Q Personally?

MR. JAFFE: Personally. Or through his bondsman. I wish to mention in passing that this is so seldom used that I can find no case that's upheld it, absent corruption or venality.

But, nevertheless, on its face, that is a remedy which is available. And it is that a --

Q Well, isn't it a practice in government, when

GAO indicates disapproval of a payment about to be made, is it the general practice to make it or does sometimes GAO decides, or what happens?

MR. JAFFE: The general practice is, I must admit, to use discretion as the better part of valor and not pay.

However, there are innumerable circumstances in which the agency head, having received an opinion of the General Accounting Office, usually an advance opinion, that a payment, if made, would be disallowed by him in the subsequent audit of accounts.

And, incidentally, the General Accounting Office uses language which indicates that it's his opinion, that it is advisory, "I advise", et cetera, as he did in this case.

However, they do not pay. But I submit that that's a matter of prudence, particularly in this kind of a situation, and they should not pay, because it never results in anything other than a resort to the courts, where -- and no one has ever contended --

Q Well, now, suppose there is, as was here, then, a suit is brought; what could the Attorney General do about the lawsuit?

MR. JAFFE: One of two things. He would examine, as he did in this case, the decision -- incidentally, the Attorney General did not get into this suit at all, for any purpose, or in any way interfere or intervene in the disputes process.

Q Until the lawsuit.

MR. JAFFE: Until the lawsuit was filed.

Q Yes.

MR. JAFFE: When we received the petitions that were filed in the Court of Claims, we did with that petition exactly what we do with every other petition, summons or complaint which we receive. We obtain from the interested agency all the background data, their advice and assistance which we got here, and we examine into it. We were aware at that point of the action of the Comptroller General. We paid no attention to it, because we knew that what they said was not binding in court, and that we had a statutory responsibility to exercise a litigative judgment.

Q So you could have confessed judgment, so to speak?

MR. JAFFE: We certainly could have, as we did in another case not so long ago, where the GAO was not involved, I must admit, but where the Disbursing Officer refused to pay the decision of the Board of Contract Appeals of his agency, because he thought it was an unsound decision.

We disagreed with that Disbursing Officer and confessed to the entry of judgment, and it was a substantial sum.

Now, in this particular case, we did examine the record, that is the record before the agency; we examined it

from the point of view of the evidence that was submitted. We examined it from the point of view of the decisions of the Hearing Examiner, which were not disturbed by the Atomic Energy Commission, and we examined the decision of the Atomic Energy Commission to the extent that it passed on any of the claims.

We came to the conclusion, which, only coincidental, was almost the same as that of the Comptroller General, that this decision in this case did not satisfy the standards of the Wunderlich Act.

Q Well, tell me, Mr.Jaffe, could you have defended simply on the basis of the provisions of the clause that Mr. Creyke and I were discussing, without reference to the Wunderlich Act?

MR. JAFFE: Oh, I think we could, if we had no Wunderlich Act, because I do not think that there is anything in the Wunderlich Act or in the judicial precedents which would make that kind of a contract provision unenforcible.

However, I do want to add that the language in this contract tracks the language of the Wunderlich Act; it is virtually the same. And I call to the Court's attention that the Wunderlich Act is worded that in terms of no provision of any contract may limit finality only to fraud, provided, however, that finality will attach unless the decision of the head of an agency or a Board of Contract Appeals.

So the fact that the AEC in this case was the agency whose decision, itself, does not make it any different at all from that of a Board of Contract Appeals. There's no immunization from the -- any greater immunization from the head of the department between a Board of Contract Appeals and the head of the agency itself.

Now, of course, the way the petitioner would have this Court construe this contract would be in direct contravention of the language of the Wunderlich Act. The petitioner contends that the disputes clause in this contract must be read, as he argues, as limiting the government to setting a decision of an agency head aside only if he can show fraud or overreaching; that the entire history, says he, which we dispute, of the Wunderlich Act shows that the recourse to the courts for judicial review was intended to be available only to the contractor.

Q Who wrote the Wunderlich Act? Actually wrote it?

MR. JAFFE: Actually written by the General Accounting Office, in my opinion.

Q And this is an argument that the General Accounting Office wrote on behalf of the government, a statute which would limit attack on these contracts only to attacks by the contractor?

MR. JAFFE: Well, of course, the General Accounting Office never had that in mind, as the legislative history

clearly shows.

Q But it seems rather peculiar, I should think, --

MR. JAFFE: Well, they --

Q -- that the General Accounting Office would be acting as the agent of the contractor to get such legislation.

MR. JAFFE: The General Accounting Office repeatedly stated to the committee that it was asking for this legislation not only for the benefit of the contractor but because the narrow, limited test of fraud hampered the government, and hampered the GAO in auditing accounts.

Q Now, the General Accounting Office, though, in the initial draft that it offered as a substitute for the McCarran proposal --

MR. JAFFE: Yes.

Q -- this was on the McCarran proposal, did have more than just an expanded basis of judicial review; it also would have, if it had got that legislation, as I remember, would also have had the authority itself to act as a court of claims.

MR. JAFFE: Right. Now, let me comment on that, Mr. Justice Brennan.

The original statute as drafted by GAO, I believe, included "unless the General Accounting Office or a court found", et cetera, et cetera.

Now, the interpretation of that clause, in my opinion,

would have equated the General Accounting Office precisely as it would a court, it would have had authority to reverse an opinion --

Q Well, in any event, the GAO itself withdrew that when it got to the House in the succeeding --

MR. JAFFE: Yes. And itself suggested a substitute which eliminated the words "General Accounting Office or a court". Now, of course, the statute speaks in terms of judicial review, and there was never any question of access to a court.

Q But the expanded ground of judicial review remained, as GAO initially wrote it in the first substitute for the McCarran one?

MR. JAFFE: Yes. And the GAO felt at that time, and I submit to this Court that they were correct, that the GAO authority would not be hampered, that is the authority that they wanted to have and that they thought they always did have before this Court's decision in the Wunderlich case, that in auditing accounts, to use a broad standard of review. And indeed they must. For them to determine whether a payment is or will be illegal, or unlawful, or within the contemplation of statute or law, they must apply the applicable principles of law.

In a contract dispute, those applicable principles and the standards to be applied are those set forth in the

Wunderlich Act.

So whether or not they are mentioned when they audit accounts, when they render an advance opinion, in order to determine whether it is or will be a lawful expenditure, they must apply the applicable law, the Wunderlich Act.

Now, there's no suggestion, I am sure, and none have been made, that the Wunderlich Act in any way repealed those provisions of the law which give to the General Accounting Office the authority to render an advance opinion to a Certifying Officer, as was the case here, or to audit accounts and to disallow items which were illegally or erroneously paid.

Now, in a contract matter, that must be the standard of the Wunderlich Act.

Now, I will not dwell on the legislative history, because we believe that it supports the view that the government has equal access to the courts with the contractor, without question. However, the legislative history of the Wunderlich --

Q Well now, in this -- excuse my interrupting you -- in this case, let me pose the question --

MR. JAFFE: Yes.

Q --Mr. Justice Douglas put. Right at that stage of this problem, when you say the government you mean what entity? What part of the government?

MR. JAFFE: I mean any -- the agency, the General Accounting Office, or the Department of Justice.

I think what we're really speaking about is not who is the only person who may speak, but who and under what circumstances can the matter be precipitated into a court review.

Now, I think that that can occur in many ways. I think the most usual way would be by failing to pay. Now, who is going to make that determination? Perhaps the best answer is how that determination has been made in the many instances which have occurred in the past, prior to this case, prior to the Langenfelder case, many cases that Judge Davis of the Court of Claims detailed in the Langenfelder case.

The usual way is not to pay, and who determines that? Normally it's the general counsel of the agency who -- and how does that come about? The angry trial attorney, and we always have him, the angry trial attorney who has lost a case before this Board, who feels that the Board was wrong, that they have no legal sense, that they're way off base, complains to his general counsel. In 99 cases out of 100 he addresses deaf ears. Perhaps even more.

But occasionally the general counsel is persuaded. And the general counsel will block the payment. It doesn't go to GAO at all. And that precipitates payment.

Occasionally the matter will be submitted to the

Department of Justice. Somebody in the agency, and it has to be someone high up, because we do not accept communications from trial attorneys or lower staff echelons, someone in the general counsel's office or an Assistant Secretary will write to us and say they're disturbed about an opinion, as did NASA, as did FAA, as did several agencies. And the question they ask us is not to intervene in the disputes process, as the petitioner would have you believe; the decision has already been rendered. The disputes process is at a close.

The question is, if we don't pay, will you defend us? Will this withstand scrutiny?

Now, so far, unfortunately, we found that it wouldn't withstand scrutiny. All we could find is that if we were the judges, we would have decided differently. But that's no reason for challenging, as the courts have frequently said.

We haven't found one yet, although several have been submitted to us, where we thought we would defend it. But that is a method in which it can be done. Sometimes the GAO will come across it, either by advance opinion, as happened here, or perhaps in a post-audit. I can't imagine how else, at the moment, although there may be other ways, it would be that the government would have this right of appeal, which I submit is a misnomer. We're not appealing, we're seeking judicial review.

We don't change the opinion,neither the Department of Justice did; the GAO did not, the only opinion before the Court is the Atomic Energy Commission opinion. It is not true to say that they still are straining at the leash to pay this man, or to go forward. They've assisted us in our defense. They are yielding, whether or not they still agree with their own decisions, they are yielding to the possibility that the GAO was reasonable or may be right.

Q Isn't that chiefly, Mr. Jaffe, because once it went into litigation the Atomic Energy Commission lost control?

MR. JAFFE: Lost completely control, Your Honor, but I am speaking about --

Q The Attorney General is the sole control, once the litigation has started.

MR. JAFFE: That is correct.

Q But if the Atomic Energy Commission had just decided to ignore the Comptroller General and pay the money out, that would, in all probability, have been the end of the matter, would it not?

MR. JAFFE: That probably would have been the end of the matter, but perhaps not. I should remind the Court of a possibility. That in this particular case, for example, the Comptroller General having written a 260-page opinion might not have ignored the matter had it been paid. But he would be powerless to do anything except send it to the Department

of Justice for prosecution, either against the surety, against the Disbursing Officer, or perhaps, which is more likely, against the recipient of the money, as the contractor, to recoup it. If we agreed.

Q It doesn't happen very often, does it?

MR. JAFFE: Very, very seldom.

I should add here, in tis particular case the only real relief available was not to pay. The reason I say that is because prior to the completion of this contract the -- all payments thereunder, at least six months before the contract was completed, and while it was being performed, all payments hereunder were assigned to a bank. I therefore wonder why we speak so much about the -- that the contractor went out of business because of the delay in payment.

The contractor received almost -- that is, we paid the full contract price under this contract. These are the extras, the things that have not yet been determined that they are entitled to payment on. And any payment we decide, or is ultimately decided, that S&E Contractors are entitled to, will not go to S&E Contractors but to the bank, to whom they assigned the payments.

Q But there's nothing unusual about having a businessman have the proceeds of a contract with the government pledged as collateral to a bank, is there?

MR. JAFFE: No, there isn't. I merely say that

the failure hasn't thrown them out of business.

Q Well, we have no way of knowing that one way or the other, really, have we?

MR. JAFFE: Well, except from that fact alone. We don't, and therefore I think it should not be urged upon the Court that it did. Except from that fact alone, that payments were assigned to a bank, who alone is entitled to payment? There are many factors, we believe, that put the matter of business up to --

Q Well, what's the issue that would be decided in the Court of Claims, on the merits?

MR. JAFFE: What issue was?

Q What issue will be decided on the merits in the Court of Claims?

MR. JAFFE: Whether or not the decision of the Atomic Energy Commission is entitled to finality under the standards of the Wunderlich Act.

Q Well, what standards --

MR. JAFFE: Oh, we're challenging it on two standards only. That is, that either is not supported by substantial evidence, various of the Commission's allowances, and in many instances, at the same time, that it's erroneous as a matter of law.

Q That's under the second section --

MR. JAFFE: Under the second section, that it cannot

be finalized on any question of law.

Q Yes.

MR. JAFFE: Now, I had been about to speak briefly about the legislative history. The legislative history, of course, as some lawyer in the field has once said, has a little bit of verything for everybody and therefore is a little confusing.

What we had originally was a proposal, a Wunderlich Act proposal, which would have included the GAO equally with the courts. That was deleted. And the GAO was taken out, and the word "court" was taken out, but we still speak of the judicial review.

It was quite clear, we say,from the legislative history; two things were quite clear. That this access to the courts for judicial review under the standards they were setting forth was available to both parties. The reason that I say that it was aware is because there were bills before the Congress, including one presented by the American Bar Association, specifically to limit this judicial review to the contractor. But Congress did not accept any of those.

There were debates on whether or not this wouldn't be equally available to the government as well as the contractor, and that the Congressmen indicated that they thought it was.

There is no suggestion that it isn't available to them,

and there's certainly nothing on the face of the Act which indicates that it is available only to the contractor. The Act itself would seem to make that clear. It says "any decision of the head of a department" and "any such decision shall only have finality", if it is not fraudulent or capricious, et cetera.

Now, it doesn't say any decision adverse to a contractor; and I don't think that that should be read in, particularly in the light of the legislative history.

It is also strange, it seems to me, that the argument should be made that the Wunderlich Act actually provides for two standards: one standard for the contractor, which covers this entire panoply of broadened standards; and quite another for the government. The government is limited to fraud and overreaching. That is precisely what it was that the Wunderlich Act was seeking to overcome.

As a matter of fact, if that were true, then the language of the Wunderlich Act, which says that no provision of any contractor shall limit any decision of the head of an agency or by the Board of Contract Appeals to fraud would again have to be interpolated as meaning only as against the contractor's complaint. But it could be so limited as far as the government was concerned.

I submit that there is nothing in the language, nothing in the history, nothing in the logic, which would call

for that view.

I submit that the government should have and does have equal access to the courts to challenge the decision of an agency head or of a Board of Contract Appeals on the basis set forth in the Wunderlich Act; that is, that the standards there have not been met, that no finality should therefore attach to the decision, and therefore no payment, if one is ordered, should legally or lawfully be made under such a decision.

Now, the question that's raised: Who is the government? I have answered in the only way that I can, the normal way in which the government gets a case into court.

Now, that could be done, normally, in one of the three ways I suggested. I don't think we need look for any others. That's ample protection for the government, that payment can be made, as the Attorney General said, and we can seek to recoup it in a private suit of our own, if it, in fact, was erroneous; and we would have the test in that suit in the District Court.

Q How -- does this procedure go on every day in the week?

MR. JAFFE: The disputes procedure goes on every day in the week. The involvement of not paying a decision of a Board of Contract Appeals rises very rarely. The way that -- frankly, the way in which the government's access to the

courts has arisen in the past most frequently has been where a contractor submits several claims to a board; the board rules in the contractor's favor with respect to three or four of them, and rules against him with respect to two or three of them. And he's dissatisfied with the two or three which have been adverse to him, and he institutes a suit in the Court of Claims seeking to set aside the Board's decision with respect to those which were adverse, and we, in defending, again look at the entire record.

We come to the conclusion that the Board was correct in denying the two or three it did, but was incorrect in allowing two of the four that they had allowed, because it wasn't supported, let's say, by substantial evidence or was erroneous as a matter of law. We have done that in many, many instances, and we have been successful in some.

Now, that's merely another manner in which the government has asserted its right to test a decision rendered under the disputes clause under the standards of the Wunderlich Act.

Now, in this particular case payment was stopped. That's happened before, too. And then the contractor goes into court. Had we paid this one, we would never have been able to recoup it, because we can't recoup it from a bank, an assignee. 31 USC 203 prohibits that procedure.

So that we would have been out.

So, in this case, even if he had wanted to pay and let it go the other way, the Atomic Energy Commission would have been ill-advised to do so.

Q We have no way of knowing on this record, of course, whether the bank kept all of this or whether they then returned half of it or some other part, do we?

MR. JAFFE: Well, we do. I don't think I'm bespeaking myself. Paragraph 20 of the petition in this very case here says, Petitioner assigns its rights to amounts to be received under this contract to the First Citizens Bank of Dallas, Texas. September 12, 1961, The contract was completed and accepted in June of '62.

Q Well, that doesn't prevent your recovery, your recoupment against the principal, because the --

MR. JAFFE: Against the principal, sir?

Q Yes.

MR. JAFFE: Oh, no, not against the principal, but he would not have received the money, and I don't know that we would have -- I mean it would have been -- well, that's correct. I did bespeak myself.

Q Well, we don't know anything about that on this record, do we?

MR. JAFFE: We don't know anything about the situation there, although we did know in 1966 when the payment had to be made.

Q So when you say the government must have its day in court, it certainly has a day in court by the recoupment route, does it not?

MR. JAFFE: It could. That could be one way. But I don't think that that should militate against seeking its day in court in another way.

Bear in mind, if you please, Mr. Chief Justice, if this decision is not entitled to finality, the payment should not be made. So withholding payment is not, in any sense, a penalty. It's doing something we may not be required to do; in fact it would be --

Q Under the contract itself, you mean?

MR. JAFFE: Under the contract itself. We are only required to make certain payments under the contract. It's the same as any private dispute, where one of the parties to the contract says, I don't owe you this money; and the other says, You do.

Now, there's no reason why --

Q Then this can't be a breached contract, I gather?

MR. JAFFE: Oh, it definitely cannot be a breach of contract, because if it were then the holding that it's a breach would be holding contrary to the terms of the Wunderlich Act.

Q And to the terms of the contract.

MR. JAFFE: And to the terms of the contract, which track it.

Q Mr. Jaffe, I'm still bothered, I think, by your answer to Justice Douglas's question, as to who is the government. What comes to me out of your explanation is that this contractor has three tiers to overcome: the agency, the Comptroller General, and the Attorney General.

MR. JAFFE: He really doesn't have three tiers to overcome. All he has, if it please you, Mr. Justice Blackmun; first, the General Accounting Office is never a threat to the contractor. He needn't wait one moment for the General Accounting Office to act or consider the advance opinion, or have any advance request from any Disbursing Officer or Certifying Officer. He can go into court immediately he hears that the General Accounting Office views have been solicited.

So the General Accounting Office provides no tier to him at all. It is one means for the government to be aware that there may be an illegal payment about to be made, or, if it is made, to recoup it. That's the manner in which the General Accounting Office enters the picture, but it's not a tier of review, as such.

Now, the Department of Justice comes in, only if an agency should decide to ask the Department, first, Will you defend us? Or, in this case for example, where the

Comptroller General has issued an opinion which he says that this would be an invalid payment, the head of the department could come in and say to us, Do I have to listen to the Comptroller General? And we could, as we have as recently as 1969, have told the Agency, Your accountable officers need not fear the Comptroller General. We think you can make the payment, and we do direct you.

So that, I don't know to what extent these tiers of review really are administrative hurdles. All it is, really, is: Do we have a basis for defending a suit, or for prosecuting a suit?

In neither event do I think the Court should assume that the contractor is entitled to money, any money, or any payment until the Court has had an opportunity to scrutinize that decision under the standards of the Wunderlich Act. Until then, it is not an order or a decision entitled to finality, which requires any payment.

Q Well, I expect, Mr. Jaffe, this may be a very cumbersome and difficult and, in terms of modern business, quite inefficient way of doing things. But that's the way Congress has ordered, I gather you suggest, that government business shall be carried on in these instances?

MR. JAFFE: I think that that's the natural consequence of the Wunderlich Act, and the terms of the contract which require it --

Q And of the very existence of the GAO? The Comptroller General is supposed to be the congressional watchdog, isn't it, over expenditures?

MR. JAFFE: Yes, sir, he is.

Q And unless you're going to abolish him, I don't see how --

MR. JAFFE: We can't avoid just looking at it, either before or after. And in either event there will be a suit.

Q Maybe he ought to be abolished. When I was in that position, I used to think so.

MR. JAFFE: I'm not authorized to comment on that.

[Laughter.]

Q Mr. Jaffe.

MR. JAFFE: Yes, sir.

Q The Comptroller General's function is essentially a post-audit function, is it not?

MR. JAFFE: It is.

Q He's not part of the discretionary decisions during the evolution of these things?

MR. JAFFE: No, sir, he's not.

Q He's strictly an auditor?

MR. JAFFE: Correct. Except for one provision. 31 USC 74, and 31 USC 82(d) give to the Comptroller General, on request, the right to render advance opinions, which was

precisely what was done here. So that he does come into it in a pre-audit system, if an executive branch officer, that is a Disbursing Officer or a Certifying Officer, asked him for an advance opinion. And that was what was done here.

Q That's advisory only, isn't it?

MR. JAFFE: And that's advisory.

Q Now, if a dispute, disagreement, difference in position evolves between the contracting agency and the Comptroller General, the Attorney General really becomes the referee, does he not?

MR. JAFFE: Well, he becomes a referee with punch. Because his decision is binding on the agency.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Jaffe.

Mr. Creyke, you have three minutes left.

REBUTTAL ARGUMENT OF GEOFFREY CREYKE, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. CREYKE: Thank you, Mr. Chief Justice.

A study of the intent and history of the Wunderlich Act will disclose that the Comptroller General, in the 82nd Congress, having sought to and having been included expressly in a bill as a tier of review --

Q He did write the bill, didn't he, Mr. Creyke? Remember, initially Mr. McCarran introduced the bill.

MR. CREYKE: That is --

Q And then it was substituted for that a bill --

Q Well, I'm sure I read the same history available to you, and the Comptroller -- and it was substituted for the McCarran bill, the bill that the Comptroller General --

MR. CREYKE: The bill that the Comptroller -- I do not know, Your Honor, who wrote the first bill.

Q It's right in the history; so it says.

Q Well, I don't know who wrote the --

MR. CREYKE: The Comptroller General proposed in the 82nd Congress, when the bill was under consideration, that he be included; he was. Strong objection was made --

Q And he wrote the very bill that included him.

MR. CREYKE: Yes?

Q The Comptroller General wrote the very bill that included him.

MR. CREYKE: Oh, yes, I thought you were speaking of the very initial bill, Senate 2487, and that's the one I don't know who wrote it.

Q No, I don't either, and the history doesn't show.

MR. CREYKE: Right.

Q But the bill that became law is the one that the Comptroller General wrote, with one minor exception, and the deletion of the provision which gave him, with the courts, the power of independent review.

MR. CREYKE: The provision for the Comptroller General

represented a compromise proposed by him, correct, Mr. Justice Brennan. Due to objections raised by the Department of Defense, contractors and others, that they would create this additional tier of review which has proved so awkward in this situation, to participate --

Q Well, didn't they actually refer to it, that it would make the GAO a second court of claims? That's the words they used.

MR. CREYKE: Yes, they did. And here's the letter, which I have in House Report 1380, which says in effect that it is intended -- it is not intended to either change jurisidction or to grant any new jurisdiction, but to recognize the jurisdiction which he has. Which we say is not intended.

Now, with respect to the over-all intent of the Act, one,we don't believe that it was ever intended that a using agency would attack its own decision by fraud. With respect to fraud otherwise, there are always remedies available to the government otherwise.

But the procedure, as it has been aborted here, to take away from the disputes process its efficacy is simply calamitous within the operation of the system as it now works. When a contractor signs a government contract, and he agrees to the changes clause, and to do the work as it's changed, and he agrees to the disputes clause and says he'll keep right on going at his expense, as the government interprets the

contract, in which he did here, that I think the quid pro quo involved there, of those omnipotent powers being granted to the government, the government is given the right to decision itself.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Creyke.

Thank you, Mr. Jaffe.

The case is submitted.

[Whereupon, at 2:21 o'clock, p.m., the case was submitted.]

- - -