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.
October 21, 1971

Pages 1 thru 37

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

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Thursday, October 21, 1971.

The above-entitled matter came on for argument at 10:52 o'clock, a.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

APPEARANCES:

GEOFFREY CREYKE, JR., ESQ., 1744 R Street, N.W., Washington, D. C. 20009, for the Petitioner.

IRVING JAFFE, ESQ., Civil Division, Department of Justice, Washington, D. C., for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 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, may it please the Court:

This case involves a 1961 federal construction contract in which additional work and extra work doubled the original anticipated effort. There was an administrative appeal pursued through the Atomic Energy Commission under the disputes process, as it's popularly called, which was won by the contractor and accepted by the Atomic Energy Commission.

However, on its own initiative, the General Accounting Office blocked payment of this, forcing the contractor into the Court of Claims. And it's from thence that the case is here.

In this Court the Department of Justice contends that the intervention in this proceeding on the part of the Court of Claims is not material. We say it is the gravamen of the entire situation, and only by a review of all of these circumstances, and a consideration of the impact of this, as well as all of these circumstances, can the Court properly determine a solution to the problem which has been created by this.

The case involves the rights of contractors, it involves the finality of the agency decision, it involves an interpretation of the so-called Wunderlich Act of 1954, and we ask that the Court hold that the findings by the Atomic Energy Commission, accepted by it and not appealed by it as such, be determined to be the final action of the government and binding on the parties in this case.

Reviewing the history, this was originally a contract for $1,272,000 to consume 180 days, starting August of '61. They were to build a large concrete test basin at the Atomic Naval Reactor Test Station in Idaho. The contract was not security classified, it was a standard Form 23-23A type of contract with the usual boiler-plate clauses for equitable adjustments, for changes, suspension of work, change of conditions, and time extensions, and a regular standard disputes clause.

There were six change orders which were agreed upon, and increased the contract price by a little over $100,000.

However, the bulk of the claims for additional work were denied by the contracting officer. The work was completed and accepted 325 days after the original time, which of course threw it into winter work, in the mountains of Idaho in winter.

The claims for additional compensation under the then prevailing practice and rules of the Atomic Energy Commission were referred to a hearing examiner, who, in December

of '62 conducted a 13-day full adversary hearing. At the conclusion of this, he found for the contractor. However, this findings has never yet been implemented. The costs of this work were borne by the contractor, and they still remain unpaid.

The merits of the claims, as such, are not in issue. Rather, it is the treatment of the disposition of them that is in issue.

Generally speaking, they are very ordinary type of claims: delay in site access; additional concrete work; failure of the government to furnish steam; excusable delay for unusually severe weather; order to accelerate, to work around the clock, alleging behind schedule when in fact the time extensions would have put the contractor on schedule; and a backfill claim.

Following the decision by the examiner for S&E Contractors, there was an appeal by the contracting officer to the Commission itself, and there were two decisions of the Commission itself, in essence affirming the decision of the examiner, making only one minor modification. That had to do with the number of days in site access and the start. In other words, administratively, there was not only a determination by the contracting officer and by the examiner, but action by the full Commission itself.

This is at variance with the general practice today throughout the government where these cases are heard by

contract appeal boards, and there is only one administrative determination. But the case was treated in the Court of Claims as being analogous to these types of cases.

While the negotiations were in progress with respect to the amount of the settlement, as a result of these determinations, a certifying officer asked the General Accounting Office for a ruling on $32,000 worth of items which were not directly related to these claims. However, the General Accounting Office, on its own initiative, contending that it had a right to review the determination as to substantial evidence, facts, and law, did so conduct a review, did block the continuation of the negotiations and any payment; and, after 33 months of consideration, rendered a 266-page opinion in December of 1966, holding that S&E had no valid claim against the government. And, in its own comments in the brief of the government before this Court today, characterizing this as advance notice of disallowance.

Placed in this situation, the contractor brought suit in the Court of Claims. The reference to the Commissioner there resulted in his opinion recommending a finding for S&E Contractors. This finding would be based on a breach of contract, failure to pay the administrative award, recognizing that the parties can contract for their own remedies, finding that the General Accounting Office was in excess of its authority, and particularly stressing that this was an ordinary type

of case in which there was no issue of fraud or overreaching involved.

Q Mr. Creyke --

MR. CREYKE: Yes, sir?

Q I take it there is no question of fraud or overreaching here?

MR. CREYKE: Correct.

Q Was there a reason why S&E waited so long to institute its action in the Court of Claims?

MR. CREYKE: The matter was under consideration for 33 months by the General Accounting Office. During this period of time, the reasons were this: practical considerations, one; two, the hope that the General Accounting Office could be convinced: one, that they had no jurisdiction; and two, that the findings were correct.

We --

Q That's almost three years.

MR. CREYKE: Correct.

Q There was no legal reason why they had to withhold suit?

MR. CREYKE: The law with respect to the right to claim a breach of contract had certainly not evolved to a point then when you could make a determination, in our judgment, that under those conditions a breach had occurred. Perhaps this was a judgment matter. It involved, of course, the very

practical problem of a contractor in these financial circumstances starting another action in the Court of Claims, which could easily have resulted in even greater delay.

In hindsight, it might have been better to do so, Your Honor.

Q One last question while I have you interrupted. Was the advice that was sought by the certifying officer chronologically earlier than the decision by the Commission itself?

MR. CREYKE: It was between the two decisions, Your Honor. There was a first decision in November '63, where the Commission granted a partial review and affirmed some of the other claims. The partial review had to do essentially with the timing statutes. That was in November.

The request to the GAO was March of '63, and the final decision of the Commission itself was May 1963.

Following the decision of the Commissioner, the government sought request for review, review was granted, the General Accounting Office filed an amicus brief in the Court of Claims, and of course the Court of Claims opinion came down on a 4 to 3 decision, stating that there was no material difference how the non-payment came about, if the case reached the court it would review it under the standards of the Wunderlich Act.

Essentially the standards there would be the standards

of supporting by substantial evidence the findings involved in these claims.

And the opinion of the Court of Claims remanded the case to its Commissioner for such a review.

The dissent saw the case in what we believe to be the broader issues and the important issues; that is, that it is necessary for the court to give guidance in how the machinery of the government in handling disputes processes will work out. It pointed out that the Atomic Energy Commission was the representative of the government in that case, that it sought no review. The General Accounting Office was not a party and not authorized to act. The Department of Justice's attorney was not authorized to act in the matter, unless the agency delegated with the responsibility of carrying out the function sought its intercession.

Also it was very strongly stressed that this would have a chaotic effect on the operation of the disputes clause which is so essential to the government as well as to industry in doing business with the government. And the people were entitled to certainty, and that under these circumstances, with doubt existing and with the rights existing, apparently, in various parties to take issue with the determination which apparently had been resolved between the parties themselves, as Judge Collins, in his dissent, said, that the government would be foolish to pay any award.

In this case we seek a holding that there was a breach of contract in the failure to pay this award, and ask that the Court of Claims be reversed.

Now, here the government seems to disclaime the General Accounting Office. It asserts that its position is independent of that. We do not agree with that in any way whatsoever. We feel that that is the gravamen of the case. The government also claims that it has an independent right to set up these defenses in a proceeding, ignoring what gave rise to the proceeding, and ignoring altogether the impact of creating this vague, undefined procedure which gives absolutely no guidance to contractors, government, or industry, other than to throw the whole procedure, which has been established over a long period of time, into a state of uncertainty. A state of uncertainty which will impact not only upon contractors but upon bankers, their sureties, their suppliers, their subcontractors, and others.

This developed vehicle of the disputes clause has proved very workable and very advantageous to government and to contractors over a period of years. It provides a means whereby the government's work can go forward, it can change and improve the product or the structure as it sees fit. It permits smaller firms to bid because they finance the contract with government funds. They pay 90 percent as they go along. And note that in the changes and disputes article the contractor

must proceed.

Right there, this power requiring a contractor to proceed as the contract is interpreted by the government, is the key to the whole thing and the key to what happened here. He had an obligation to go forward and do this work, even though his work was doubled, and even though he was barely able to fund it.

If a decision is subject to a collateral attack, that certainty no longer exists, and parties will no longer, in our judgment, want to cover government work, or if they do so they will set up large contingencies in any bids they make, and it will disadvantage everyone.

This Court has held repeatedly that the parties have the right to contract for their own remedies. The uncertainty that arises from this goes to the fact that when the decisions of this Court in 1951 and '2, and the Moorman and Wunderlich cases were decided, the Court in effect announced this principle and invited Congress to change the standards from that of fraud being the sole ground of review, as established by those decisions.

Congress did, and passed this Act, which is -- the Act which is negative in nature, not jurisdictional, does not give powers to anyone. It merely says that no provision of a contract can limit the judicial review to cases where fraud is alleged, provided that the decisions of the agency will be

final, unless they are fraudulent, capricious, arbitrary, grossly erroneous as to imply bad faith, are not supported by substantial evidence. And that no contract shall have a provision making a decision of an official final on the question of award.

Interpretation of this presents a very perplexing problem. This is so acknowledged by anyone who has had to deal with it.

In the initial hearings, when it was proposed that an Act be set up, there was a provision in the bill then proposed that the Comptroller General be set up as a layer of review along with courts of competent jurisdiction.

Objection was made to this by industry, by attorneys, and by officials of the government agencies who were concerned with creating another layer of review and impacting on their ability to implement the government's business. That provision was taken out of the bill and, in the summation of the report, the final draft of the bill, it is stated very clearly that there was no intention to change the powers of the General Accounting Office.

It's most difficult to separate the position of the government and the General Accounting Office, and we say they are inseparable. We say it was envisaged that the General Accounting Office would have certain powers to intercede in these proceedings. We believe it was intended that they be

limited to the powers that they had before the Wunderlich Act in '54 was adopted. And we believe that those powers only relate to protecting the government from fraud and overreaching or with respect to anything which would be of an auditing nature. In other words, matters having to do with fiscal aspects of the law and not matters having to do with the substance of the contract itself.

On that we say that the Atomic Energy Commission, as countenanced by many decisions of this Court, is the empowered sole authorized agent of the government, and not only by the law of the Atomic Energy --

Q And that's in --

MR. CREYKE: Excuse me.

Q -- the Commission's decision still stands, doesn't it? It has never changed its determination?

MR. CREYKE: That is correct. Now, I answer that this way. The Department takes the position in this brief in this Court that the acquiesence in the opinion of the Comptroller General of December '66 constitutes an action; we say otherwise.

We say that, practically speaking, being told by your banker you have no more money, and acting accordingly, plus being susceptible, being personally backcharged for payment so made, does not create an independent action.

Further, the letter which is Exhibit A of the

petition, on page 10 of the Appendix, clearly indicates that the Commission says it will take no action inconsistent with the ruling of the Comptroller General.

Q Did the Commission participate in any way in the Court of Claims case?

MR. CREYKE: No, Your Honor. The Department of Justice represented the United States in the Court of Claims. The General Accounting Office participated in the Court of Claims.

Two more points. One, there is no need for the General Accounting Office to be involved in this case. The government is completely protected, the Atomic Energy Commission has a management technical, legal staff. In this instance they had an extended set of review. Three decisions at three levels. In the normal case that is sufficient.

There will undoubtedly, under these circumstances, if countenanced, occasionally be mistakes made in favor of a contractor, and be mistakes made in favor of the government. But this is the way a $50 billion per annum business has to work.

By and large, absent impropriety, those provisions prove to the advantage of everyone, and should be permitted to stand.

If I may, I will reserve the rest of my time, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Croyke.

Mr. Jaffe.

ORAL ARGUMENT OF IRVING JAFFE, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The issue in this case is simply this: whether in a disputes clause decision the government has the right in a court to challenge a decision favorable to the contractor.

In this particular case, the decision of the Atomic Energy Commission, or that of its hearing examiners, which was not disturbed, is still the only decision that was handed down. It is the only decision that is before the Court of Claims. It is the only decision that the pleadings placed before the Court of Claims, and to which the answer and petition were addressed.

The General Accounting Office did not change that decision. The Department of Justice did not change that decision. There has been no review in the sense that the petitioner alleges which has altered or in any way interfered with the Atomic Energy Commission, except to suggest that the decision itself was not final and, not being final, that payment could not be made thereunder.

Now, the Atomic Energy Commission may disagree with that. It may feel that the decision which it handed down is

sound. Even so, it seems to me it is the height of prudence, if a suggestion is made to it by GAO, by its own general counsel, by any respected attorney, that if there is doubt cast on whether or not the criteria for finality, as enunciated in the Wunderlich Act, have not been met, then payment should not be made, as one way in which judicial review can be compelled.

So that the standards of finality may be applied to that decision.

Furthermore, it might very well be suggested, if it is not so, that payment would have been improper under those circumstances because payment is only required in connection with a final decision of an agency or a board of contract appeal.

Now, the General Accounting Office did nothing more than review this. They reviewed it in response to a request from a certifying officer. That certifying officer was acting under a statute which gave it, gave him the permission and the authority to seek an advance opinion as to what the accounting treatment would be in the event a payment which he was asked to make be made.

The General Accounting Office, in considering that request, was discharging a statutory duty. In discharging that statutory duty it was required to determine whether or not, if this payment were made and it was making a post-audit, would it except to it, would it disallow it. And in making that

determination, it must apply, of course, the applicable principles of law.

In a disputes situation, the only applicable principles of law are the standards provided by the Wunderlich Act.

The Wunderlich Act says that a payment that is a decision will be final if it is not fraudulent, if it is not arbitrary or capricious, if supported by substantial evidence, or is not so clearly erroneous -- or not so grossly erroneous as to imply bad faith.

Now, those are the principles which he must apply. And in applying those he came to the conclusion that if he were to review this, he does not think that the decision met those standards, therefore he would be compelled to disallow it. And he so advised. It was only advice to the Commission. What he told the Commission was that: if you make this payment, I will be compelled to disallow it. He didn't say you can't make it. He couldn't say you can't make it.

Q But it's a pretty effective deterrent, isn't it?

MR. JAFFE: Yes, it is a deterrent. But it is not a legal deterrent. It is a deterrent in that no one wants to risk having a payment disallowed.

But how bad a deterrent is that, Mr. Chief Justice, if you know that the matter can be submitted to a court? Is submission of an issue to a court for a final determination

such a great risk, or is it such a great burden that everyone should shy clear of it?

All that it does, and all that the General Accounting Office can do, is take an action that will precipitate judicial review.

Would it have made any difference if the payment had been made? And then the Department of Justice, at the request either of the GAO or of the agency, had sued for its return on the ground that it was an illegal payment, because it was not paid in pursuance of a final decision.

The judicial review would have occurred one way or the other. The only --

Q Where would they have litigated that?

MR. JAFFE: In the district court. In the district court.

Because in the Court of Claims the defendant is always the United States and not the plaintiff.

Now, the petitioner has alleged that the gravamen of this suit is the intervention and the interposition of the Comptroller General. It is the contention of the government that the role of the General Accounting Office played in this case is wholly irrelevant to the issue. The issue being whether or not favorable decision to a contractor may be challenged by the government in court.

Now, the action of the General Accounting Office is,

in our opinion, irrelevant, because it did not precipitate the suit any -- well, even if it did, it doesn't make any difference because that only gives rise, at that point, to whether or not we can challenge it.

But I don't believe that it precipitated the suit any more than the certifying officer precipitated the suit in addressing an inquiry to it. What did precipitate the suit by the petitioner, instead of by the government, was the failure of the Atomic Energy Commission to make payment.

Now, the legislative history, which the petitioner's brief devotes a good deal of space to, is, in our opinion, significant only in that it shows that Congress did intend for access to the courts to test the finality criteria of that Act, to be available to both parties and not to one.

The petitioner, it seems to me, goes far afield when he addresses his remarks to the role that the GAO was at one time intended to play in this situation. Some of the statutes, not the initial one, but shortly thereafter, included the General Accounting Office as a level of review equal to that of the court.

At that point there was much opposition to the inclusion of the General Accounting Office. The opposition came from industry and from government and from the private bar. But this review is not the review that was ever granted it. That review was the right to change that opinion, to modify it,

reverse it, to make a binding determination on both contractual parties just as would a court.

Now, that was eliminated. It no longer has that. It didn't do it now. This review didn't change any part of the decision.

That being so, the legislative history is only helpful for the other aspect for which it is mentioned by both parties, and that is whether or not Congress intended that judicial review would be available to both parties, the government and the contractor.

And in that connection there were proposals submitted to the Congress expressly to limit judicial review or access to the courts to seek judicial review to the contractor alone. The Congress did not adopt any of those proposals.

One of those proposals was made by the American Bar Association. Their proposal confined judicial review to one requested by the contractor. This wasn't merely something that was submitted to the Congress which may have been overlooked, because one of the leading witnesses before the committee, Mr. Franklin Schultz, addressed himself specifically to that problem. He pointed out that the bill, as proposed and as enacted, would on its face appear to make judicial review available to both parties.

And when Congressman Hyde asked him what was -- pointed out that that was precisely what it would do, Mr. Schultz said,

well, that's what disturbs me. Precisely what disturbs him. And then proposed that the ABA proposal, which confined it only to the contractor, be adopted. And that was not adopted. The congressional committee, at least, that was considering it was well aware of the request by some few people that it be limited to the contractor.

Not only that, Mr. Creyke says that at no time did anyone assume that anyone but the General Accounting Office would be an avenue for review on behalf of the government.

The congressional history shows that Congressman Willis was asked specifically the question: Who, on the part of the government, would ask for the judicial review?

And his response was: The Department of Justice, the Department of Defense, as well as the General Accounting Office.

There was nothing here that went by unnoticed. And the testimony, even the report, indicates very clearly that the lack of judicial review, in essence, as a result of this Court's decisions in the Moorman and Wunderlich cases, that the lack of judicial review, meaningful judicial review, to either of the parties worked as much to the disadvantage of the government as it did to the contractor.

And that both parties should have a day in court, and have access to the court for review, in accordance with standards which the Congress believed would be more meaningful.

And that is precisely what the Wunderlich Act did.

Q Let me back up a little bit, if I may, Mr. Jaffe.

MR. JAFFE: Yes.

Q Suppose this advice of the Comptroller General, the advice not to pay, had been disregarded? Suppose the Atomic Energy Commission simply said, in effect, we have confidence in our conclusions, and paid the money? Then the Comptroller General might, assume for the moment, that he recommended a suit for overpayment.

The ultimate decision on that would be made where?

MR. JAFFE: In the Department of Justice.

Q The Department of Justice would then become really the, for all practical purposes, the final reviewing authority, would they not?

MR. JAFFE: Yes, if you use the word "review" in the sense of making the litigative determination which is the responsibility imposed upon it by statute.

In that sense, yes, it reviews every litigation request that comes before it. We do not institute suit at every request of the agencies, nor do we defend every suit in which an agency is sued. Indeed, in a situation identical to this one, not too long ago, where an agency did refuse to make payment in accordance with a board of contract appeals decision, and the contractor sued in the Court of Claims.

We did not answer that case, because our review, preparatory to filing an answer, convinced us that the decision of the board was supported by substantial evidence, did meet the criteria of the Wunderlich Act, and, when the agency continued to refuse to pay, we consented to the entry of judgment.

Q What happens --

MR. JAFFE: Pardon?

Q That happens, if not frequently, it's not an uncommon occurrence, is it?

MR. JAFFE: Well, I think I would have to say, Mr. Chief Justice, that it's an infrequent occurrence. That is the only instance of which I know. I think it's significant, too, especially since the petitioner has painted a black picture of what happens if you affirm the Court of Claims decision in the contracting field, that since at least the time when the Court of Claims decided the Langenfelder case in 1965, and set forth their view that the Department of -- that the government, rather, had a right to judicial review under the Wunderlich Act, and to challenge a board decision.

We have not had any flood of litigation in which that has occurred, nor, even more significantly, for the past two and a half or more years, since the Attorney General issued his opinion of January 1969 in which he encouraged the agencies to review, themselves, the decisions of their boards. And if they thought that one of those decisions did not meet the

criteria, to send it to the Department of Justice for an advance opinion. We have had very, very few.

And, so far as I know, none in which we recommended that the decision be challenged.

So I don't anticipate the flood, at all.

Q Mr. Jaffe --

MR. JAFFE: Yes, sir, Mr. Justice Blackmun.

Q Is your -- the remark you just made, your explanation of why this issue arises only in 1971? It seems to me it's a late-date for it to arise.

MR. JAFFE: Well, it is. And I'm not certain, Mr. Justice Blackmun, that I can give you an adequate answer. I don't know why it has arisen in this form, or in any form at this time, because I had always been of the impression that it was a generally conceded right for the government to challenge a board decision that was favorable to the contractor. Indeed, in the Langenfelder case, the Court there, Judge Davis, in a footnote, or perhaps in the body, lists many cases in which precisely that was done since at least the Wunderlich Act.

It's very difficult to go earlier than the Wunderlich Act, because there was very little to review. And it worked both ways. Neither the government nor the contractor could upset a decision, except in case of fraud or overreaching.

Q Of course the Wunderlich Act is what, 20 years old?

MR. JAFFE: 1954, it was enacted.

Q The case is 20 years ago.

MR. JAFFE: Yes. Yes, it is.

Now, I would like to touch briefly on the role of the Department of Justice in all litigation. I have alluded to it already.

But, as this Court knows, the relationship between the Department of Justice and its client agencies, if I may refer that way to the various departments and agencies of the government, is not the same as the ordinary attorney-client. Because, by statute, the Department of Justice must make a judgment with respect to whether litigation shall be pursued or instituted or whether or not it shall be defended.

That requires it to make a judgment on the merits of the case. His clients can't discarge him. His client, if you will, is stuck with the Department of Justice.

Now, the Department of Justice under those circumstances is charged with the responsibility of a much more serious review of what is presented by any litigation, that is either defensive or prosecutive, and that decision is an important one.

Therefore, as in this case I wish to point out that the Department of Justice was not involved at any stage in the dispute process prior to the decision of the Atomic Energy Commission. It was not involved in this case after the decision after the decision of the Atomic Energy Commission, and did not

get involved until we received a copy of the petition that had been filed in the Court of Claims by this plaintiff.

At that point we did what we are required to do, we examined it, we examined the petition, we looked at the record before the Atomic Energy Commission, we determined, as we had to, whether or not there were any Wunderlich Act defenses that could be interposed to this. We came to the conclusion that there were. In fact, we came to the conclusion that there was such a defense that ought to be interposed with respect to each and every claim that was asserted in the petition save one.

Well, I'm not even sure of that. We paid one. But I think we found something objectionable to that, too.

Now, that is doing only what the law requires us to do. We must do that. For the petition to suggest that we had only one function to perform, and that is to inquire whether that has been fraud or overreaching, and otherwise to consent to the entry of judgment even if it was clear that there was no evidence to support the decision.

Or that it was clearly erroneous, as a matter of law; or that Section 322 came into play, of the Wunderlich Act. That is, a question of law was decided wrongfully. Or should we submitit to the court.

We didn't reverse the decision. We did decide that the court ought to pass on it. And that is what our answer does: confine to the record before the Atomic Energy Commission.

No one placed before the Court of Claims the lengthy opinion of the General Accounting Office. No one submitted to the Court of Claims, save in our answer, any of the analysis of the Department of Justice, as though it were an opinion or a review which had any effect on this decision or changed it in any way.

That is the role of the Department of Justice. It's its traditional role; it's its statutory role. That is not a review in the sense that the petitioner uses it, or that the dissent in the court below uses it.

Now, I wish to point out here that some of the underlying argument that must of necessity appear in this case, is the suggestion that the board of contract appeals -- it's not a suggestion, it's stated specifically -- act for the head of the department; that they are responsible to the same authorities as is, for example, the contracting officer. In a broad sense, that is true.

The board of contract appeals, however, and the Atomic Energy Commission or the hearing examiner, if you will, in this case, act solely in a judicial capacity. We call it quasi-judicial because they are not judges. But their sole function is a judicial one.

The proceedings that appear before them, that go on before them, are adversary ones. To the extent that any administrative proceeding can be, particularly in the last few

years, it is a full due-process hearing, based upon a record, no ex parte communications.

Now, the suggestion must be, if the government cannot challenge the decision of such a body, that that body is not impartial, that that body always renders a decision which the government would have no reason to question; the fact of the matter is otherwise. As with any judicial body, they may be wrong, they can always issue a decision which may be erroneous as a matter of law, just as any court may.

The evidence upon which they rely may not amount to substantial evidence. I should add that there is no suggestion, I am sure no rational suggestion, such as is made by one of the dissents below, that what we do here is try to re-weigh the evidence in the sense of seeing if there is a preponderance of evidence to overcome the findings of the court below, or less than a preponderance to overcome the board below. That is not so. We know what substantial evidence is, we don't re-try the case, and neither does the petitioner re-try the case in the Court of Claims, as he suggests, when it's challenged. Because all determinations are made on that record, as this Court said it must in the Bianchi case.

Q Mr. Jaffe, if we assume that the Comptroller General was correct on all his points, what is the dollar difference between his position, if I can put it in that rough way, and the amount that the Atomic Energy Commission was

prepared to pay out?

MR. JAFFE: No amounts have been determined. The Comptroller General determined no amount --

Q But they must be known generally, I would think.

MR. JAFFE: Well, generally they may, because at the time that the Comptroller General expressed his opinion that the Wunderlich Act standards would not be met by the decisions in this case, the negotiation was going forward between the contractor and the contracting officer to determine the amounts that would be due under the claims that had been approved and allowed by the Commission and the hearing examiner.

Indeed, the claims that were sent over by the certifying officer were part of these disputes. Those were the ones that,in the Commission's first order, it had decided not to review, and in which the amounts were fixed.

For that reason, the certifying officer was requested to pay it, and it was that request that he sent over to the General Accounting Office.

Now, the General Accounting Office went into all the claims, because one of them, at least one of them, represented a claim by us, that is an offset by us, that would depend on whether or not the contractor had been entitled to extensions of time because of delays. But that claim was still under consideration.

Q What is the resolution of the basic problem,

then?

MR.JAFFE: Well, let me --

Q Negotiation?

MR. JAFFE: In this particular case, assuming that any of the claims of the contractor are upheld, either way, either as a result of judicial action or by this Court saying that the action has already been taken and no one can question it, there still would have to be negotiation between the contractor and the Atomic Energy Commission. No amounts have been determined.

I wish to add --

Q Well, that could be subject to this same sequence of events --

MR. JAFFE: Yes, as a matter of fact --

Q -- couldn't it?

MR. JAFFE: As a matter of fact, the Commission, in its decision, in sending it back to the contracting officer, did so expressly with the subject to return to the Commission if there was any objection or any dispute with respect to the amounts. Yes, that's quite so.

I wish also to point out that this Court and the Court of Claims will never know, quite properly, what the difference is between the GAO opinion and the Atomic Energy Commission, because the GAO opinion is not properly before the Court, nor may it consider it.

Now, the GAO opinion is before the Court in an indirect way, because the Court's commissioner asked for it, and got it as a public document.

Q Did he make any specific findings with respect to any part of the Comptroller General's report?

MR. JAFFE: No, except -- no. Not with respect to the report. No one has considered, and no one has ever suggested, least of all the Comptroller General, that his analysis is before any court.

It is only the decision of the Atomic Energy Commission that is being subjected to judicial scrutiny. No other opinion.

Now, I would like to advert to a point that I should have made sometime ago, and started to. I believe that the statute itself requires no recourse to legislative history for its clarity, except, as I indicated earlier, to show that it does contemplate, it was intended to provide for access to the courts for judicial review for all parties.

I think our briefs amply make reference to the areas of the legislative history which support that.

Now, strangely, the petitioner now says that we have access to the courts only for fraud or overreaching. In other words, that the Wunderlich Act created standards only for the benefit of one party. Of course both parties were subject to the fraud test for overturning an opinion, but now only the

government is still held to that standard, but not the contractor. The contractor has a much more liberalized standard of review. He can receive a reversal if the board was wrong as a matter of law. Or if his findings were not supported by substantial evidence.

The government they say, however, must show fraud, no matter how wrong that board decision is, the government may not have a court -- not itself -- have a court overturn it. Or if it's not supported by substantial evidence, or indeed any evidence, the government is not free to have a court pass upon that.

Now, that, I submit, is directly contrary, that theory, that hypothesis, to the language of the Wunderlich Act. The Wunderlich Act says that no provision of any contract entered into, relating to finality, of any decision of the head of a department shall be pleaded in any suit.

But such a decision shall be final -- now "such a decision" means any decision -- if it is not fraudulent or capricious, et cetera.

Now, it also says that it may not be pleaded as being limited to fraud, that is, that it is not good because of fraud. But the petitioner says that that's the only allegation we can make. He says the government is required to defend only on that basis, not the other.

I believe that the argument is specious, and I believe

that the Congress intended, and the Congress did provide standards for review and those standards for review are applicable to both parties, and it is, in the language of, I believe, the report, a two-way street.

Q Do you see any ambiguity, Mr. Jaffe, or lack of clarity between the main body of Section 321 and the proviso? Or do they -- do they meet end to end, or is that a gap there?

MR. JAFFE: No, I don't think there's a gap, Mr. Chief Justice. I believe that in the first sentence, or the clause before the proviso , is specifically Congress' intention to overcome, in so many words, the Wunderlich decision.

Section 322 overcomes, in so many words, as I see it, the Moorman decision. And the proviso sets forth the standards that Congress thinks should form the scope of judicial review, for review of the decisions.

I believe that is the cohesive whole, with no inconsistency.

Because you'll see that in the proviso they do include fraud.

Q Yes. But then there is the catch-all "or capricious or arbitrary or grossly -- so grossly erroneous as to imply bad faith". Some critics of the provision have suggested that this was giving with one hand and taking away with the other. It isn't as clear, frankly, to me as it seems to be to you.

MR. JAFFE: Well, I must admit that I considered it clear and no difficulty between the two provisions.

Thank you.

MR. CHIEF JUSTICE BURGER: All right.

Mr. Creyke, you have 12 minutes left.

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

ON BEHALF OF THE PETITIONER

MR. CREYKE: Thank Your Honor.

I would like to just question one or two things that the Deputy Assistant Attorney General has said, and make final comment.

With respect to the recitation of the history of the Wunderlich Act and the exchange between Congressman Willis and Franklin Schultz, Esq., we have on page 8 of our Reply Brief continued the discussion which the government adverted to, and pointed out there that in the final exchange Mr. Willis said to Mr. Schultz: "This judicial review referred to in that passage there referring to a review by the GAO, when GAO has been left out deliberately as compared to S.24?

"Well, that is persuasive, sir."

In other words, the exchange was not concluded in the government's brief or in the government's comments here.

With respect to the opinion of the Comptroller General, it is pointed out in that opinion, as well as in its own comments, which are in the Appendix to the government's

brief in this case, that S&E Contractors had no valid claim against the government. They are quoting in the Appendix here their determination.

Also, as I've stated previously, they describe that action as an advance disallowance of payment.

The government has undertaken to state that we think that the government has no rights in situations other than fraud. Our position is not thus. Our position is that the government's rights have been properly protected by the agency with fully qualified personnel and legal staffs under normal circumstances to deal with the routine business, and that the certainty and finality and the powers of that agency to deal with the missions and responsibilities assigned to it demand for the government and for contractors that it carry out those powers without being susceptible to collateral attack in ordinary circumstances.

No one has ever denied, and indeed the Justice Department has brought out, in the opinion of the Attorney General in 1969, that it has a common law right to pursue whatever remedies exist for payments under mistake of law or mistake of fact.

The reference to the Langenfelder case, I respectfully disagree with, too. There are one or two cases cited in the Langenfelder opinion where, in the dictum, Judge Davis did make some comments with respect to the powers of the General

Accounting Office.

However, an examination of those cases will show that in none of them was there any such review as this, ever conducted. In other words, a comprehensive review of a complicated, interrelated claim, essentially involving questions under the contract.

One of the cases cited in Langenfelder involved a backcharge after termination; another required a right to recover back interest from the State -- excuse me, from the contractor, which he'd recovered from the State of California under an agreement where there was a cost-plus contract.

But in no case was there a comprehensive factual review such as this, and in fact in the decisions of the Court of Claims, to the best of my knowledge, an issue has not been raised with respect to this point.

We raise the issue not because we're here to tell the government how it should be run; we would rather not. We would rather you collected our money in 1961 or '62, or at least in 1964 and gone on about our business.

Instead, we lie here inert while other agencies assert what we conceive to be essentially abstract power. The government has complete control over government contracts and over regulations and, indeed, through Congress, over the laws interpreted by this Court.

If they want to do, as the Department of Transporta-

tion has recently done, and set up a precise schedule for a review of its board of contract appeals decisions, it can do so. But in doing so, I think it will destroy the efficacy of the changes clause and the disputes procedure, and it will in effect detract from contractor's interest in participating in goverment work.

I seriously question whether the agencies desire the result which the Court of Claims majority opinion would yield in this case.

Where do the powers stop? This Court has said clearly and unequivocally, in the Mason & Hanger, in the antecedent cases, that where there is a delegation of a fact-finding function to a representative of the United States, it's not to be challenged by anyone in the auditing departments, and expressly ruled in that case.

This unprecedented action has worked a disaster on this contractor. He's spent ten years flat on his back, unable to proceed, still not being paid for the money expended. I ask this Court to deal with the whole problem, to restore the disputes process to the manner in which it has traditionally worked, and which would inure to the benefit of the contractors and government alike.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Creyke. Thank you, Mr. Jaffe. The case is submitted.

[Whereupon, at 11:45 a.m., the case was submitted.]