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admission processes. The effect of this holding can only be hypothesized in light of the prestige of the District Court of the Southern District of New York and the soundness of the court's reasoning. Although the court refused to shift the burden of proof from the applicant to the bar on the question of worthiness, it did severely limit the means used to elicit such proof. This case heralds the application in New York, and predictably in other states with similar procedures, of the first amendment protections to those who wish to practice law.

Refusal to invalidate the statutes involved here is a judicial affirmation of the need for continued careful scrutiny of prospective attorneys. Rather than shifting the burden of proof from the applicant, the court here preferred to more closely supervise the methods used by the bar for determining whether this burden has been met. The general effect of this case will be to make bar procedures less susceptible to arbitrariness and discrimination. It will not, however, significantly alter the right of state bars to require high standards of character and to require proof of this by the applicant. The claimed "chilling effect" which the statutory requirement itself may produce in the law student should be warmed by this court's policing of admission techniques.

## Alice in Wunderlich: The Attorney General's Dream of Limiting the GAO's Claim Settlement Authority

The present controversy over the authority of the General Accounting Office (GAO) to review contract appeals board decisions arose out of a contract between the Air Force and Southside Plumbing Company, Inc. The contract contained the standard "disputes clause" which provides that if a dispute arises under the contract, the contractor can request a decision by the contracting officer.<sup>1</sup> This decision is final unless appealed within 30 days to the department head or his duly authorized representative—in the instant case, the Armed Services Board of Contract Appeals (ASBCA).<sup>2</sup> The decision of the appeals board on questions of fact is "final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence."<sup>3</sup>

Southside claimed additional compensation for work which it asserted was outside the scope of the contract and therefore not covered by the basic price. Both the contracting officer and the ASBCA denied the claim.<sup>4</sup> Rather than appealing to the

1. 32 C.F.R. § 7.103-12 (1968). The contracting officer is the person who executes the contract on behalf of the government. *Id.* § 7.103-1(b).

2. *Id.* § 30.1 (1968).

3. *Id.* § 7.103-12 (1968).

4. Southside Plumbing Co., 1963 GOV'T CONT. REP. ¶ 3982 (ASBCA); 1964 GOV'T CONT. REP. ¶ 4314 (ASBCA).

Court of Claims,<sup>5</sup> Southside submitted its claim to the GAO. The GAO accepted the ASBCA decision on questions of fact, but held that since the contract specifications were ambiguous, and since the contractor had requested but did not receive clarification, the ambiguity should, as a matter of law, be construed against the government.<sup>6</sup> The GAO requested that the Air Force return the case to the ASBCA for a determination of the amount due the contractor as an equitable adjustment. The Air Force, claiming the GAO had no authority to review ASBCA decisions, refused to comply with the directive, and submitted the matter to the Department of Justice.

On January 16, 1969, Attorney General Ramsey Clark issued a formal opinion<sup>7</sup> advising the Air Force that it was not legally required to comply with the GAO request. The Attorney General added that the Air Force should not comply—even as a matter of comity—since GAO procedures fall short of due process requirements. Compliance, argued the Attorney General, would also deprive the government of judicial review in light of the current policy against government appeal of adverse administrative decisions. He pointed out, however, that noncompliance would not foreclose appeal by the aggrieved contractor.

The GAO thereafter informed the Justice Department<sup>8</sup> that it would continue to review contract appeals board decisions presented to it, including those denying relief to the contractor, pursuant to its broad statutory mandate to settle and adjust “[a]ll claims and demands whatever by the Government of the United States or against it . . . .”<sup>9</sup>

This controversy presents issues vital to the efficient functioning of administrative agencies. What authority does GAO possess to bind executive agencies by its review of contract appeals board decisions? Does that authority depend upon whether the board ruling is adverse to the government? Is it desirable for the government to assert its right to judicial review of adverse administrative decisions? If so, who is best suited to determine whether further litigation is warranted? When is an administrative agency, acting within its delegated powers, bound by an opinion of the Attorney General which limits the exercise of those powers?

#### *The GAO's Authority to Review Contract Appeals Board Decisions*

The GAO claims authority to review contract appeals board decisions and to settle by its own determination any question which would be open to a court under

5. Pursuant to 28 U.S.C. § 1491 (1964): “The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States. . . .” If the amount of the contractor’s claim was less than \$10,000, he might alternatively have brought suit in a district court under 28 U.S.C. § 1346(a) (1964): “The district courts shall have original jurisdiction, concurrent with the Court of Claims, of . . . (2) Any . . . civil action or claim against the United States, not exceeding \$10,000 in amount, founded . . . upon . . . any express or implied contract with the United States . . . .”

6. Southside Plumbing Co., GAO: B-156192, Dec. 8, 1966.

7. Letter from Attorney General Clark to the Secretary of the Air Force, . . . . OP. ATT’Y GEN. . . . , (Jan. 16, 1969) [hereinafter cited as Attorney General Clark’s letter].

8. Letter from Comptroller General Staats to Attorney General Mitchell, Feb. 7, 1969.

9. Budget and Accounting Act of 1921, § 305, 31 U.S.C. § 71 (1964).

the disputes clause. In a brief submitted to the Attorney General,<sup>10</sup> the GAO provided an extensive list of cases indicating the long and widespread recognition by some agencies of the GAO's jurisdiction in the disputes area. The brief cited GAO reversals of board decisions both denying and granting relief to contractors, and noted that this was the first dispute in which an agency has refused to abide by a GAO reversal of a board ruling.

The GAO's authority to review board decisions is based primarily on the two statutes from which the GAO derives its claims settlement authority.<sup>11</sup> The Budget and Accounting Act of 1921<sup>12</sup> created the GAO as an independent agency to replace the office of the Comptroller of the Treasury and vested in it authority to examine and audit the financial transactions of government agencies.<sup>13</sup> The Act provides that "[a]ll claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."<sup>14</sup> Determinations made by the GAO in settling accounts are final as against the executive branch, but executive officials are authorized to apply to the Comptroller General for rulings in advance of the settlement of their accounts.<sup>15</sup> The GAO brief emphasized the comprehensiveness of the statutory language<sup>16</sup> and the lengthy history of its broad claims settlement function.<sup>17</sup> The GAO also justifies its authority to review board decisions as "a necessary corollary of the basic settlement and audit authority granted by the Budget and Accounting Act, 1921, as well as the claims settlement authority."<sup>18</sup> In an opinion which was handed down two days before its *Southside* decision, the GAO stated:

[I]t is well established that the legal propriety of payments made by public officers in the transaction of the Government's business is subject to de-

10. Brief on the Jurisdiction of the General Accounting Office in Contract Disputes with Special Reference to B-156192 the *Southside* case, Dec. 8, 1966, GAO: B-156192, Dec. 11, 1967, at 5-6 [hereinafter cited as Brief].

11. Budget and Accounting Act of 1921, § 305, 31 U.S.C. § 71 (1964); Dockery Act of 1894 § 8, 31 U.S.C. § 74 (1964).

12. Ch. 18, 42 Stat. 20 (codified in scattered sections of 31 U.S.C.).

13. Budget and Accounting Act of 1921, §§ 302, 304, 31 U.S.C. §§ 41, 44 (1964). See generally THE GENERAL ACCOUNTING OFFICE, FUNCTIONS OF THE GENERAL ACCOUNTING OFFICE, S. DOC. NO. 96, 87th Cong., 2d Sess. (1962); HOUSE COMM. ON EXPENDITURES IN THE EXECUTIVE DEPARTMENTS, THE GENERAL ACCOUNTING OFFICE, A STUDY OF ITS FUNCTIONS AND OPERATIONS, H.R. REP. NO. 1441, 81st Cong., 1st Sess. (1949).

14. Budget and Accounting Act of 1921, § 305, 31 U.S.C. § 71 (1964). For a thorough discussion of the current practices of the GAO under this broad claims settlement authority, see Note, *The Comptroller General of the United States: The Broad Power to Settle and Adjust All Claims and Accounts*, 70 HARV. L. REV. 350 (1956).

15. Dockery Act of 1894, § 8, 31 U.S.C. § 74 (1964). See also 31 U.S.C. § 82d (1964), which grants to certifying officers the same right to obtain a decision on any question of law involved either in a payment or in vouchers presented to them.

16. See 4 COMP. GEN. 404, 405 (1924).

17. Brief, *supra* note 10, at 2-5. For an excellent discussion of both the history of the GAO's claims settlement jurisdiction and finality of its settlements concerning executive agencies see *Lambert Lumber Co. v. Jones Eng'r & Constr. Co.*, 47 F.2d 74 (8th Cir.), *cert. denied*, 283 U.S. 842 (1931).

18. Brief, *supra* note 10, at 5.

termination by the General Accounting Office and that such payments are not final until settled by the General Accounting Office . . . . Accordingly, in transactions involving an expenditure of public funds we have regularly reviewed the conditions underlying any payment made pursuant to a contractual agreement and . . . we have taken whatever action was necessary to recover any amounts improperly paid . . . . Conversely, a contractor who feels that he is entitled to an additional amount under a contract may present a claim to the General Accounting Office for settlement, regardless of the administrative action taken in the matter. . . . [W]e have always reviewed, and sometimes questioned, administrative decisions under the standard "Disputes" clause on the basis of the standards prescribed in the Wunderlich Act. 41 U.S.C. [§§] 321, 322 [(1964)]. We believe that our jurisdiction to review Disputes clause decisions on such [a] basis . . . is clearly conferred by the basic settlement and audit authority granted by the Budget and Accounting Act, 1921. . . . [O]ur claims determinations thereunder . . . are binding upon the executive agencies.<sup>19</sup>

The Attorney General summarily dismissed this argument, noting that nothing in the cited authorities specifically "provides for remanding a claim to an Executive agency for fact-finding. Nor does any other statute authorize such a remand."<sup>20</sup> The GAO had cited by analogy *United States v. Anthony Grace & Sons, Inc.*<sup>21</sup> and *Robertson Electric Co. v. United States*<sup>22</sup> as a basis for this procedure. Both cases held that the Court of Claims could suspend proceedings and remand a case to the ASBCA for determination of factual issues. In the former case, however, the Supreme Court carefully refused to state whether the ASBCA was bound to make the prescribed determination,<sup>23</sup> and, in the latter case, the court totally avoided the issue. The Attorney General observed that by this argument the GAO has only a right to request review, not to demand it.<sup>24</sup>

Beyond this conclusion, the Attorney General's opinion fails to rebut the GAO's asserted jurisdiction. The Attorney General was required to state only whether the Air Force must obey the GAO directive as a matter of law. Therefore the rest of the opinion concerning whether the Air Force *should* comply with the directive as a matter of comity was dicta.

#### *Due Process and the Wunderlich Act*

Couched in the Attorney General's opinion was the implication that GAO procedures fall short of due process requirements. The Attorney General emphasized

19. S & E Contractors, Inc., 46 COMP. GEN. 441, 453-54 (1966). *Accord*, *Marr v. United States*, 106 F. Supp. 204 (Ct. Cl. 1952), *cert. denied*, 345 U.S. 956 (1953); *C. J. Langenfelder & Son, Inc. v. United States*, 341 F.2d 600 (Ct. Cl. 1965).

20. Attorney General Clark's letter, *supra* note 7, at 7.

21. 384 U.S. 424 (1966).

22. 176 Ct. Cl. 1287 (1966).

23. *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 432-33 (1966). The court merely pointed out that the threat of reversal of the board ruling by the Court of Claims would be an effective means of forcing compliance by the board.

24. Attorney General Clark's letter, *supra* note 7, at 7-8.

that the history of government contract disputes settlement indicates a shift in final decision-making power from the GAO to the courts. He noted that, although originally all such claims were committed to the ultimate discretion of the Comptroller of the Treasury, since the creation of the Court of Claims in 1855,<sup>25</sup> increasingly effective judicial remedies have been provided for such claims. This trend toward ensuring due process in the disputes procedure culminated in the recent development of an elaborate system within the contracting agencies for resolving contract disputes through adversary proceedings subject to judicial review.<sup>26</sup> The effect of this trend has been "for the Government to step down from its sovereign role and submit to the same legal and judicial processes which determine the contract rights and obligations of private citizens."<sup>27</sup>

Partly because of the movement to assure limited judicial review of contract appeals board decisions Congress, in 1954, passed the Wunderlich Act.<sup>28</sup> The immediate motivation for its passage was the desire to nullify two Supreme Court decisions: *United States v. Moorman*<sup>29</sup> and *United States v. Wunderlich*.<sup>30</sup> These cases virtually eliminated the jurisdiction of courts and of the GAO to review contract appeals board decisions rendered pursuant to increasingly used "finality clauses." These clauses specified that all disputes, whether of fact or law, would be conclusively settled within the agency. The Wunderlich Act, the terms of which are embodied in the "disputes clause" now in use, provides that such decisions are *not* final on ques-

25. 28 U.S.C. § 1491 (1964). See also *Glidden Co. v. Zdanok*, 370 U.S. 530, 552-58 (1962) for the history behind the creation of the Court of Claims. "The Court of Claims was created . . . primarily to relieve the pressure on Congress caused by the volume of private bills." *Id.* at 552. Although the court was created in 1855, its judgments were not final prior to 1863. *Id.* at 553-54.

26. For a brief discussion of the movement toward due process in government contract dispute procedures, see Spector, *Is It "Bianchi's Ghost"—Or "Much Ado About Nothing"?* 29 LAW & CONTEMP. PROB. 87, 97-102 (1964). See also vom Baur, *Remedies of Contractors with the Government*, 8 WM. & MARY L. REV. 469, 495 (1967). The ASBCA has been particularly commended for its fair and expeditious procedures. Leventhal, *Public Contracts and Administrative Law*, 52 A.B.A.J. 35, 39 (1966). For a discussion of the weaknesses remaining in the current procedures, see Frana, *Are There Too Many Boards of Contract Appeals?* 17 CATHOLIC U. L. REV. 44, 56-58 (1967).

27. Attorney General Clark's letter, *supra* note 7, at 9.

28. 41 U.S.C. §§ 321-22 (1964).

29. 338 U.S. 457 (1950). The Court held that a disputes clause declaring that an administrative decision would be conclusive upon the parties was valid and enforceable, preventing judicial review on questions of law.

30. 342 U.S. 98 (1951). Prior to the *Wunderlich* decision, the courts had been asserting "arbitrariness," "capriciousness," "gross error implying bad faith," and "fraud" as grounds for reviewing final administrative decisions on questions of fact. The Court of Claims had confined the GAO to the fraud and gross error standards. See Schultz, *Proposed Changes in Government Contract Disputes Settlement: The Legislative Battle Over the Wunderlich Case*, 67 HARV. L. REV. 217 (1953). In *Wunderlich* the Court rejected these grounds, on the basis of the contractor's contractual waiver of further appeal to the courts from an adverse agency decision. Reverting to the basic principle of public contract law laid down in *Kihlberg v. United States*, 97 U.S. 398 (1878), the Court narrowed the scope of review to a single ground—allegation and proof of actual fraud, which it defined as "conscious wrongdoing, an intention to cheat or be dishonest . . . . If the standard of fraud that we adhere to is too limited, that is a matter for Congress." *United States v. Wunderlich*, *supra* at 100.

tions of *fact* if "fraudulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or . . . not supported by substantial evidence."<sup>31</sup> It further provides that "[n]o Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."<sup>32</sup>

The Attorney General's opinion noted that the House Report accompanying the Wunderlich Act stated that the primary objective of the Act in making available this limited judicial review of board decisions was "to require each party [in an administrative hearing] to present openly its side of the controversy and afford an opportunity of rebuttal."<sup>33</sup> The Attorney General concluded that since the "GAO is not equipped for the decision of legal controversies according to the procedures customary to adversary proceedings," its *ex parte* reversal of a board decision as in the *Southside* case would be contrary to the procedural requirements for due process intended by the Act.<sup>34</sup>

The portion of the House Report quoted by the Attorney General, however, is taken out of context.<sup>35</sup> Franklin Schultz, former Chairman of the Agency Adjudication Committee of the American Bar Association, has stated that:

a fair reading of the congressional testimony [on the Wunderlich Act] reveals that administrative due process was not a central issue before Congress. The congressmen who considered the proposed legislation were mainly concerned with restoring the pre-*Wunderlich* standards of review so as to provide a genuine escape from possible arbitrariness and capriciousness on the part of the government officers entrusted with the ultimate authority to decide disputes. . . . [Furthermore] the hearings do not reflect any significant concern with the Court of Claims' procedure for hearing and deciding cases brought by contractors who had been unsuccessful before the departmental boards . . . .<sup>36</sup>

The Attorney General also noted the Act's failure to state which forum or forums may review contract appeals board decisions in accordance with its standards. The failure to specifically mention the GAO in the Act is construed by the Attorney General to be evidence that Congress intended review be granted only to the courts.

31. 41 U.S.C. § 321 (1964).

32. *Id.* § 322.

33. H.R. REP. NO. 1380, 83d Cong., 2d Sess. 5 (1954).

34. Attorney General Clark's letter, *supra* note 7, at 15 n.15. In a disputes clause case, the Comptroller General bases his decision upon the written file provided by the agency and any written arguments submitted by the claimant. There are no oral hearings before any board or official of the GAO; nor is there any facility for fact-finding. As in *Southside*, no briefs or arguments from the contracting agency are solicited. For a discussion of the GAO's claim procedure, see Welch, *The General Accounting Office in Government Procurement*, 14 FED. B.J. 321 (1954).

35. The sentence from which the quotation was taken inexplicably followed a discussion justifying the inclusion in the Wunderlich Act of the substantial evidence rule for the purpose of obtaining a more complete record in government contract disputes.

36. Schultz, *Wunderlich Revisited: New Limits on Judicial Review of Administrative Determination of Government Contract Disputes*, 29 LAW & CONTEMP. PROB. 115, 118 (1964).

The legislative history of the Act reveals that the bill first passed by the Senate contained a provision, proposed by the GAO, which provided that such decisions would not be final if found by "the General Accounting Office or a court, having jurisdiction"<sup>37</sup> to be fraudulent, etc. Because the Department of Defense and various defense industries objected that the GAO proposal could be interpreted to give a GAO determination an effect equal to that of a court, the words were omitted from the final bill.<sup>38</sup> The GAO agreed to the omission because it was assured that specific mention of the GAO and the courts was unnecessary to confer the review jurisdiction which they already possessed.<sup>39</sup> Accordingly, the House Report which accompanied the final bill stated:

The proposed legislation, as amended, will not add to, narrow, restrict, or change in any way the present jurisdiction of the General Accounting Office either in the course of a settlement or upon audit . . . . It is intended that the General Accounting Office, as was its practice . . . shall apply the standards of review that are granted to the courts under this bill. At the same time there is no intention of setting up the General Accounting Office as a 'court of claims.' Nor should the elimination of the specific mention of the General Accounting Office in the bill be construed as limiting its review to the fraudulent intent standard prescribed by the *Wunderlich* decision.<sup>40</sup>

It is clear that the effect of the GAO's compromise was to forego any legislative grant of authority, while remaining free to exercise any independent statutory authority it already had. The above quoted statement, however, gives no indication as to what that independent authority was or should be, thus creating more confusion than clarity. The statement that the GAO's jurisdiction is not increased is in conflict with the additional bases of jurisdiction to decide factual matters which the Act confers,<sup>41</sup> unless this additional jurisdiction was conferred only upon the courts. Yet the House Report expressly grants to the GAO the same standards of review granted to the courts. Conversely, assuming the authority granted to the GAO was to be commensurate with that of the courts, the statement that the GAO's scope of review is broader than the intentional fraud standard of the *Wunderlich* decision serves no purpose.

37. S. 2487, 82d Cong., 2d Sess. 2 (1952). See also S. REP. NO. 1670, 82d Cong., 2d Sess. (1952).

38. See *Hearings on S. 2487 Before a Subcomm. of the Senate Comm. on the Judiciary, Finality Clauses in Government Contracts*, 82d Cong., 2d Sess. 91-93, 112-13 (1952). The main objections to the GAO's applying the same standards as a court were that: (1) it would destroy the finality of the existing, impartial agency procedure; (2) it would unfairly subject contractors to a second and unbargained-for administrative review; and (3) use of the liberal substantial evidence rule by the GAO to reverse an agency ruling on which the contractor relied would create chaos in the contractor's banking and surety relationships.

39. Brief, *supra* note 10, at 8. See *Hearings on H.R. 1839, S. 24, H.R. 3634, and H.R. 6946 Before the House Comm. on the Judiciary*, 83d Cong., 1st & 2d Sess. 36-42 (1954) [hereinafter cited as *Hearings on H.R. 1839*].

40. H.R. REP. NO. 1380, 83d Cong., 2d Sess. 6-7 (1954).

41. Certainly the substantial evidence test is more liberal than any previous standards of review exercised by the GAO. See note 30 *supra*.

The Justice Department resolves this confusion by concluding that under prior statutory authority the GAO is confined to its audit and account settlement authority conferred by the Budget and Accounting Act of 1921 and that this authority is limited to reviewing agency decisions *against* the government, as part of its duty to control the manner in which public money is spent.<sup>42</sup> Under this approach a GAO reversal of a decision *in favor* of the government pursuant to the auditing authority would be *ultra vires*, for it would create a government obligation rather than exercise auditing judgment upon an existing debt.

The GAO, on the other hand, asserts that the Budget and Accounting Act, in authorizing it to settle all claims by, or against, the government, conferred upon it the same standards of review which the courts had in settling claims involving public funds. The GAO claims that it had utilized those same standards of arbitrariness, capriciousness, etc., prior to the *Moorman* and *Wunderlich* decisions, and thus it had a legal mandate to continue to do so.<sup>43</sup> The Court of Claims has consistently recognized the GAO's authority under the Wunderlich Act to overturn disputes clause decisions both for and against the government, at least as to questions of law.<sup>44</sup> In any event, the GAO's interpretation of Southside's contract specifications indisputably in-

42. Attorney General Clark's letter, *supra* note 7, at 14, 17. The Attorney General stated that

[i]n the course of auditing and settling the accounts of . . . disbursing and certifying officers, or in response to a request for an advance opinion as to the allowability of a particular credit in their accounts, GAO is not required to accept a disputes clause decision against the Government which it believes would not be sustained if challenged in court. . . . GAO does not need to rely on the claim settlement authority of 31 U.S.C. 71 to disallow claims against the Government. Where payment of a claim has already been approved by an Executive agency, its disallowance by GAO is an incident of the account settlement authority. In its function of auditing and settling accounts, or advising what its audit decision would be, GAO may determine that a claim should be disallowed without resort to its direct claim settlement authority.

*Id.* at 14, 17. The Attorney General apparently believed that the claim settlement authority of 31 U.S.C. §§ 71, 74 is worthless as a distinct source of jurisdiction, at least where government contract disputes are involved.

43. See quotation from letter of the Comptroller General in *Hearings on H.R. 1839*, *supra* note 39, at 34-35.

44. See, e.g., *C.J. Langenfelder & Son, Inc. v. United States*, 341 F.2d 600, 608 (Ct. Cl. 1965), where the court stated:

One of the major reasons for the passage of the [Wunderlich] Act was to assure the General Accounting Office a limited right of scrutiny comparable to (though perhaps not precisely the same as) that given to the courts. Though his power to utilize all of the Wunderlich standards has been questioned by some, the Comptroller General has asserted, since the enactment of the statute, the same authority as the courts to disallow payment of a contractor's claims . . . . Where the issue is one of law (e.g., interpretation of the contract), this court has upheld exercises of that power. . . . [T]he fact that [GAO] undoubtedly has some role under the Wunderlich Act helps to demonstrate that the statute applies to administrative decisions favoring the contractor, as well as those which are adverse. . . . Issues of law, at the very least, are still open.

See also *Associated Traders, Inc. v. United States*, 169 F. Supp. 502, 506 (Ct. Cl. 1959); *Northrop Aircraft, Inc. v. United States*, 127 F. Supp. 597, 599-601 (Ct. Cl. 1955).

volved a question of law,<sup>45</sup> and was therefore clearly within both the pre-*Wunderlich* practices of the GAO and the express provisions of the Act.

Regardless of which of the conflicting interpretations of GAO's prior statutory authority is correct, the Attorney General's conclusion that the legislative history of the *Wunderlich* Act indicates, on balance, "that Congress did not intend to set GAO up as an additional layer of administrative appeal for contractors on disputes clause questions"<sup>46</sup> is not warranted. This conclusion is based on an inference that Congress would prefer final settlement by an adversary judicial proceeding to a possibly final GAO determination rendered in an administrative proceeding lacking in due process requirements. Aside from the fact that the legislative history of the *Wunderlich* Act offers, at best, meager evidence to support this conclusion, the inference is even more questionable today in the light of the Supreme Court's decision in *United States v. Carlo Bianchi & Co.*<sup>47</sup> limiting judicial review of contract disputes decisions to the administrative record. Thus, the Court of Claims' practice of *de novo* hearings was overruled; the court was cast in the role of an appellate court, with procedures more closely approximating those of the GAO.

It must be concluded that the Attorney General's recommendation to the Air Force that it should not comply with the GAO directive as a matter of comity cannot stand on the basis of a legislative intent to exclude *ex parte* GAO proceedings from the otherwise open and adversary process of government contract disputes settlement. Moreover, if Congress had clearly indicated such an intention, then the *Wunderlich* Act would have been in derogation of the basic auditing and accounts settlement authority granted to the GAO in 1921. As noted above, the Attorney General concedes that this authority necessarily entitles the GAO to disallow claims *against* the government. If the GAO's decision making procedures were declared illegal as violative of due process, the GAO would thereby be denied all discretion to pass on the propriety of payments certified by the executive agencies, as well as the discretion it exercised in the *Southside* case in reviewing the propriety of a decision not to pay. If the basic and long-standing role of the GAO as guardian of the public moneys is to be limited to mere bookkeeping, such an intention must be indicated by Congress in clear and unambiguous language.

It has been cogently argued<sup>48</sup> that the GAO's power to disallow expenditures exerts a strong and disruptive influence upon the policies and programs of the executive agencies, that it denies the agencies the degree of discretion necessary to effective action and that it unfairly subjects contractors to a second and unbargained-for re-

45. It is a well settled rule of public contracts that "[w]hen a decision concerning the allowability of an equitable adjustment turns on the proper interpretation of contract provisions, then what is ultimately involved is a question of law." *Kaiser Indus. Corp. v. United States*, 340 F.2d 322, 334 (Ct. Cl. 1965). *See, e.g., Kayfield Constr. Corp. v. United States*, 278 F.2d 217, 218 (2d Cir. 1960); *C.J. Langenfelder & Son, Inc. v. United States*, 341 F.2d 600, 609 (Ct. Cl. 1965). *See also* Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 LAW & CONTEMP. PROB. 39, 78-80 (1964).

46. Attorney General Clark's letter, *supra* note 7, at 13.

47. 373 U.S. 709 (1963).

48. Note, *The Comptroller General of the United States: The Broad Power to Settle and Adjust All Claims and Accounts*, *supra* note 14.

view by an unrelated agency which they cannot second-guess. These practical criticisms of the breadth of the GAO's claims settlement authority may have merit; but like the due process argument, they are nonlegal approaches to a problem which must be resolved legally, by Congress, if at all. The Attorney General recognized this limitation when he introduced his due process attack in terms of "comity."<sup>49</sup> The Attorney General's due process attack has failed to rebut GAO's asserted legal right, under its broad statutory authority, to settle all claims by or against the government, to (a) disallow a contract disputes claim approved by an agency, and (b) allow a claim denied, by the agency, subject to the following limitations: (1) the Wunderlich Act standards, which circumscribed the GAO's right to review, and (2) the contracting agency's reluctance to perform any further fact-finding necessary before the GAO reversal can be acted upon.

#### *Judicial Review of GAO Action on ASBCA Decisions*

The Attorney General agrees with the GAO that the Comptroller General may disallow claims which boards have awarded to contractors as an incident of the GAO's statutory duty to insure that government funds are expended according to the law. The Attorney General contends, however, that this authority does not extend to the allowance of a claim which a board has denied contractors. He distinguishes between the two situations by their results: the GAO's *allowance* of a claim which the contract appeals board denied would deprive the government of an opportunity for judicial review of the board's decision, while a *disallowance* by the GAO of an item paid the contractor would permit the contracting agency to set off the amount disallowed against other sums due the contractor, ultimately forcing him to sue to recover the withheld amount. If no offset is available, the contracting agency can refer the matter to the Department of Justice, the government's counsel in claims litigation, for suit to recover the erroneous payment from the contractor.<sup>50</sup>

In the instant case, however, the ASBCA decided the *Southside* claim in favor of the government so that no payment was certified thereunder for the GAO's approval. It was Southside who submitted the claim to the GAO, probably to avoid the time and expense of litigation in the Court of Claims.<sup>51</sup> The GAO decided to allow Southside's unpaid claim, but because the amount of the equitable adjustment had not yet been ascertained by the Board, it could not issue a warrant to the Treasury Department to pay the claim; nor could the GAO insist on redetermination of the case by the ASBCA since the GAO was not a party to the contract under which the right of appeal to the ASBCA was created.

The Attorney General stated that compliance would surrender the government's rights "without the opportunity to defend before the Court of Claims . . ." <sup>52</sup> The

49. Attorney General Clark's letter, *supra* note 7, at 8.

50. It is well established that the government may recover funds wrongfully or illegally paid by its agents. *See, e.g.*, *United States v. Wurts*, 303 U.S. 414 (1938); *Wisconsin Cent. R.R. v. United States*, 164 U.S. 190 (1896); *United States v. Bentley*, 107 F.2d 382 (2d Cir. 1939).

51. *See Note, The Comptroller General of the United States: The Broad Power to Settle and Adjust All Claims and Accounts*, *supra* note 14, at 355.

52. Attorney General Clark's letter, *supra* note 7, at 15.

government clearly has the right to initiate judicial review to recover public funds wrongfully or illegally paid, although thus far procedures for doing so have been clandestine and not formalized.<sup>53</sup> There is no reason why that right must be "surrendered" in a case such as this where the GAO has allowed a claim not paid by the agency. Three possibilities are open to the agency. First, it can pay the claim, and then sue to recover the payment in the Court of Claims. The Attorney General admits that such payment is not inconsistent with, or a bar to, appeal by the government.<sup>54</sup> The contracting agency, by certifying payment contrary to the board's decision, would not be in breach of its contract with the contractor, since the disputes clause clearly does not bind either party to the board's decision on questions of law. Second, if there are other sums owing the contractor from the government, the agency can pay the claim and then set off the amount paid against the sums due, ultimately forcing the contractor to sue in the Court of Claims for the withheld amount. Thirdly, the agency can hold back payment (on the basis of the Attorney General's opinion) in which case the aggrieved contractor can still appeal the adverse board decision to the Court of Claims.

In the instant case, the Air Force has chosen the third alternative, and Southside has appealed to the Court of Claims. Evidently, a set off against Southside was unavailable. The first alternative was rejected because the Air Force was reluctant to appeal the adverse GAO determination. There is no distinction between the GAO's disallowance of a board-approved claim and its allowance of a board-denied claim, so far as the government's right to protect its interests through judicial review is concerned. The Attorney General's conclusion that the GAO's right to allow board-denied claims cannot be derived from its claims settlement authority cannot stand when it rests on this fictitious distinction of loss of right to appeal. Even if this distinction were valid, the Attorney General's later recommendation that the government's policy against appeal of adverse decisions should be abandoned, would render this argument worthless.

#### *Government Appeal of Adverse Board Decisions*

The current policy against government appeal of adverse board decisions dates from before the Wunderlich Act. This policy is based upon an equitable theory under which a party to a contract who secures thereunder the privilege of settling any disputes arising out of that agreement ought to be bound by its own determination in the dispute. As government contract disputes procedures were improved and expanded, two conflicting viewpoints arose. One view, in line with the above theory, was that if either party could appeal, this would destroy the finality of the board decision with the result that (1) the contractor's inability to rely on the board decision would

53. See cases cited in note 50 *supra*.

54. Panel Presentation by Deputy Assistant Attorney General Martin Richman, A.B.A. National Institute, *Mechanics of Sale and Dispute: Facets of the Law of Public Contracts*, March 22, 1969. The Attorney General's opinion merely stated that payment followed by suit to recover would be an acceptable procedure in order to avoid delay in payment to the contractor who has been successful at the administrative level. Attorney General Clark's letter, *supra* note 7, at 21-22.

create confusion in his relationships with subcontractors, sureties, and banks; and (2) the usefulness of the complex disputes machinery would be severely limited, perhaps to the point of being economically unfeasible.<sup>55</sup>

Commissioner Spector of the Court of Claims finds support for this view in the Wunderlich Act. In a recent report to the Court of Claims, Commissioner Spector noted with surprise the last sentence of the Appeals Board decision to the effect that: "[t]his decision is returned to the Court of Claims for judicial review in accordance with the Court's Order."<sup>56</sup> The Commissioner stated that:

In addition to the fact that there is nothing in the court's order . . . requiring return of the Board's decision . . . for judicial review, it is virtually unprecedented for an agency to in effect disavow its own decision, or to seek judicial confirmation or reassurance. . . .

If a contracting officer or board were disposed to disavow, or impeach, or challenge the validity of his or its own decision on the ground, as in this case, that it failed to meet Wunderlich Act standards, that contracting officer or board would quite naturally not find for the contractor in the first instance. . . .

Nor does the [agency] defendant's counsel [the Attorney General] stand in a different position than defendant in this regard. He is not empowered to create a dispute, as he does in effect when he assumes the burden of proving that both parties to the dispute, including his own party, are wrong. This is a heavy burden indeed. Nowhere in the standard "Disputes" clause, nor in the regulations establishing the contract appeals board, nor in the Wunderlich Act, nor in its legislative history, is anyone other than the head of the department or his representative mentioned as a decision-making authority. . . .

It is further apparent from that history that the [Wunderlich] act was designed to reopen an avenue of judicial relief to *aggrieved contractors*. There is not a scintilla of evidence in that history to suggest that the Act was intended to provide a means for an *agency* (or its counsel) to test its own decision favoring the contractor. [Emphasis added.]<sup>57</sup>

The second viewpoint, which favors government appeal of adverse board decisions, stresses that the boards have become so impartial and detached from the agencies they represent, that the "agency" would not, in fact, be appealing its own decision. The main argument is that "[t]he settling of claims cannot be a one way street and Congress obviously intended no such result."<sup>58</sup> Both former Attorney General Clark and Comptroller General Staats agree on this view: "It is clear . . .

55. Panel Presentation by Louis Spector, Commissioner, U.S. Court of Claims, A.B.A. National Institute, *Mechanics of Sale and Dispute: Facets of the Law of Public Contracts*, March 22, 1969. See Schultz, *supra* note 36, at 135. "[I]t is arguable that the contractor should be entitled to an appeal to a disinterested board and a final decision which cannot be upset by another government agency. While the GAO is not a party to the contract, it is part of the government and it seems unjust that it should refuse to recognize the bargain the government has struck which includes a finality clause placing serious limitations on the contractor's basic rights and remedies." *Id.* at 133.

56. Report of the Commissioner to the Court on *J. L. Simmons, Co. v. United States*, Court of Claims No. 186-59, Jan. 21, 1969, at 42.

57. *Id.* at 42-44.

58. Brief, *supra* note 10, at 11.

from the legislative history of the Wunderlich Act . . . that Congress intended board decisions to be no more conclusive against the Government than against a contractor."<sup>59</sup>

A subcommittee of the section of Public Contract Law of the American Bar Association has also taken this view. It has recently proposed the formation of a single federal board of contract appeals modelled on a regular court system, with sections in each of the federal circuits.<sup>60</sup> With complete trial jurisdiction over all public contract disputes, the unified board would take claims settlement authority away from the head of the department,<sup>61</sup> and allow the government as well as the contractor a full right of appeal to an entity distinct from the agency.

Assuming that Congress actually did intend that the disputes clause procedures should not be a one-way street, there being no evidence to the contrary, the question remains who, within or without the contracting agency, is best suited to determine whether judicial review of an adverse case is warranted. The Attorney General feels that the responsibility for forcing court review is part of the executive responsibility for administering and enforcing government contracts:

The contracting agencies should call to [the Justice] Department's attention, on a continuing basis, appeals board decisions against the Government which they feel warrant litigation in accordance with the Wunderlich Act. Thereupon, as when a contractor initiates judicial review of a board decision in favor of the Government, [the Justice] Department . . . will make an independent appraisal as to whether the suit can properly be litigated under the Wunderlich Act.<sup>62</sup>

The GAO substantially agreed with the Attorney General. The Comptroller General believed, however, that the Justice Department should not get involved in claims settlement until payment to the contractor has been made, and the decision has been made by the agency to sue to recover the erroneous payment.

The Attorney General noted that the GAO has in the past assured some check on the performance of the boards through its audit of board approved claims, but that the agencies should not allow this check to be an excuse for shirking their duty to represent the government's interests. The problem here is who, within the agency, should be empowered to make the initial decision as to whether the adverse board decision should be appealed. Although the contracting and legal officials of the agency have the most intimate familiarity with the cases, at the same time they would be likely to uphold the board decision, unless specifically delegated the task of

59. Attorney General Clark's letter, *supra* note 7, at 20.

60. Robert Moss, Chairman of the Subcommittee to Propose Public Contract Procedures, Committee on Disputes and Judicial Remedies of the A.B.A. Section of Public Contract Law, presented the proposal to committee members in a letter of March 17, 1969. The plan, entitled *Comprehensive Unified System of Determining Contractor and Government Rights and Remedies*, was presented for debate at the A.B.A. National Institute, *Mechanics of Sale and Dispute: Facets of the Law of Public Contracts*, March 22, 1969.

61. This would dispel the myth of *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963) and *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966), that the board is the "alter ego" of the agency. Although the department heads theoretically do have the final say, they rarely question board decisions.

62. Attorney General Clark's letter, *supra* note 7, at 19.

review with some detachment from agency policies and personalities. Both the Attorney General and the GAO agreed that affirmative procedures should be established within the executive agencies for determining whether it is in the government's best interest to appeal adverse board decisions. A statutory procedure would be helpful, but the agencies are advised (1) to "reconsider" their practice of accepting adverse administrative determinations as final, and (2) to modify their regulations to effect that change in policy, rather than wait for the slow voice of Congress.

#### *The Legal Effect of the Attorney General's Opinion*

The Attorney General justifies his jurisdiction to render an opinion in the *Southside* dispute upon opinions of his predecessors which hold that fundamental questions involving legal relationships between government agencies require resolution by him to the extent that no one agency is empowered to decide such questions.<sup>63</sup> The Attorney General is authorized by law to issue opinions upon request by the President (and, presumably, executive department heads),<sup>64</sup> but the statute is silent as to the legal effect of such opinions on the departments involved. The instant case involves not only a GAO payment which is final as against the Air Force under the GAO's authority, but also an exercise of discretion by the Air Force pursuant to an executive function independently confided to it, *i.e.*, administration and enforcement of defense contracts. The Attorney General asserts that this matter is therefore within the unique competence of the government's counsel, and that his opinion is binding on all agencies concerned.

The Comptroller General has historically refused to be bound by the opinions of the Attorney General, and has disregarded them whenever they have conflicted with his view of the legality of the agency's action.<sup>65</sup> Comptroller General Staats has indicated that his office will continue to review contract appeals board decisions adverse to the contractor, in defiance of the former Attorney General's opinion.<sup>66</sup> It is likely, however, that executive agencies will consider themselves less bound by GAO reversals of such decisions in the future, and that aggrieved contractors, predicting noncompliance by the agencies in cases necessitating a "remand" on a question of fact, will tend to bypass the otherwise shorter, less expensive GAO appeal and sue directly in the Court of Claims.

The Attorney General's opinion will therefore have some practical effect, whether it is right or wrong. Legally, however, the opinion cannot prevent the GAO from pursuing a practice which the Attorney General declares illegal and unwise. The only remedy possible for the Attorney General is an act of Congress either defining the grounds for and the effect of his opinions on the agencies concerned, or, in the instant case, clearly setting out the role and procedures of the GAO in government contract disputes settlement.

63. *See, e.g.*, 33 OP. ATT'Y GEN. 383, 385 (1922); 26 OP. ATT'Y GEN. 81, 87 (1906); 25 OP. ATT'Y GEN. 301, 304 (1904).

64. 5 U.S.C. § 303 (1964).

65. Note, *The Comptroller General of the United States: The Broad Power to Settle and Adjust All Claims and Accounts*, *supra* note 14, at 353.

66. Letter from Comptroller General Staats to Attorney General Mitchell, Feb. 7, 1969.

### Conclusions

Until such time as the Budget and Accounting Act of 1921 is either modified or expanded by Congress to specify the procedures available to the GAO in claims settlement, the GAO is legally authorized to bind executive agencies by its review of contract appeals board decisions both for and against the government. This authority to review is subject to board determinations on questions of fact which conform to the standards of the Wunderlich Act, and to questions of fact (such as the amount of the equitable adjustment in the *Southside* case) which have not been resolved by the board prior to the GAO's consideration of the case, and to any other problems in the GAO's resolution of the claim which might necessitate further action by the agency. There are several practical or policy reasons why the GAO should not have this far-reaching power, notably that the GAO's power to disallow exerts a disruptive influence on the programs and policies of the executive agencies. These reasons have no grounding in statute, however, and until Congress acts definitively on the matter, the rule of practice will continue to put a premium on agency ambitions.

It is desirable that a government contract disputes procedure be adopted that allows both parties to the contract the same right to obtain judicial review of any settlement pursuant to the contract's terms, which they could obtain if both parties were private citizens. There should be some disinterested person or group within each agency, familiar with its regulations and practices, whose duty it is to review that agency's adverse board decisions to determine initially whether appeal to the courts is in the best interest of the government. If it is determined that such a case may warrant further action the claim should be paid and the case sent on to the Justice Department for consideration of the feasibility of suit to recover payment. Withholding payment to force the contractor to sue to enforce his favorable administrative determination would impose on him an unjust burden; a delay in payment might make it impossible for him to continue performance of the contract, and might even force him out of business.

If this system cannot work without effecting chaos in the contractor's business relationships, or without rendering the contract appeals boards relatively useless, then a new system of disputes settlement should be adopted which is distinct from the agencies, and which would serve as a deterrent to unnecessary appeals. It has been suggested that the number of contract appeals boards be reduced to two, one for civilian and one for military agencies.<sup>67</sup> A more radical, but perhaps more practical, suggestion is the recent proposal by the American Bar Association subcommittee of a special court system for the adjudication of all public contract disputes.<sup>68</sup>

An opinion issued by the Attorney General in his capacity of counsel to the government carries no legal weight, and has only as much effect in practice as the agencies involved are willing to give it. It is essentially the advice of an attorney to his client. If the opinions of the Attorney General are to be conclusive on any branch of the government, affirmative action by Congress will be necessary.

67. Frana, *Are There Too Many Boards of Contract Appeals?* 17 CATHOLIC U.L. REV. 44 (1967).

68. See text at note 60 *supra*.