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THE GENERAL ACCOUNTING OFFICE: ONE HOPE FOR CONGRESS TO REGAIN PARITY OF POWER WITH THE PRESIDENT

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In recent years Congress has seen its role in policy-making eroded at an ever-increasing rate. A war it had not declared and could not end initiated the calls for Congress to reassert its authority. President Nixon's impounding of appropriated funds, although not the first presidential assertion of this power,[1] has further intensified congressional concern.

Forty years of decline in congressional influence will not be stayed overnight. Nor will a single change in congressional procedures accomplish instant parity. Even if Congress' will can be expressed, enforcement of that will is likely to remain a problem.[2] It seems, however, that a significant part of Congress' problem is its relative inability to acquire and assimilate information about existing federal programs, new executive proposals, and alternatives that might be preferable to both.

Formal congressional investigations can never be more than a partial answer. The time of a Senator or Representative is a scace resource, and committee hearings usually consume far more of it than the information developed warrants. More important than formal hearings, Congress needs the capacity to conduct periodic reviews and analyses of low-level agency operations that determine how programs really work and whether services are being delivered.

No radical change in procedure is required to obtain this information. Congress now has an institution, if it will use it, through

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1. President Kennedy, for example, asserted this authority in a celebrated battle with Congress over production of the RS-70 manned bomber. *See* Davis, *Congressional Power to Require Defense Expenditures*, 33 FORD. L. REV. 39 (1964); Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 GEO. WASH. L. REV. 124 (1969). *See generally* Comment, *Executive Impounding of Funds: The Judicial Response*, 40 U. CHI. L. REV. 328 (1973).

2. Possible roles for the General Accounting Office in enforcement of congressional intent are discussed in text accompanying notes 88-90 *infra*.

which to keep informed. That agency is the General Accounting Office (GAO), headed by the Comptroller General of the United States.[3]

THE ORIGINS OF THE GENERAL ACCOUNTING OFFICE

The Budget and Accounting Act of 1921,[4] which created the GAO,[5] was considered in an atmosphere not unlike the present. World War I had just ended. In fiscal year 1914 the entire federal budget had been just over one billion dollars. By fiscal year 1920, however, largely as a result of inflation and military spending, expenditures were projected to be over 10.8 billion dollars. Congress was smarting because of public criticism of its inability to bring spending under control. It determined that part of the fault lay in the system of executive budget submissions by individual agencies:

> [T]he Secretary of the Treasury . . . has no power to . . . coordinate the services of the several bureaus or to prevent duplications in the service. Bureaus under different executive departments doing similar work are thus stimulated in a spirit of rivalry, and so far as the estimates that come to Congress go, no one coordinates or attempts to coordinate the various activities of the several departments.[6]

Three complementary changes were proposed in this system. First, a Bureau of the Budget (now called the Office of Management and

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3. The General Accounting Office has about three thousand professional employees of whom about one hundred are attorneys. 1972 COMP. GEN. ANN. REP. 149. It has field offices in sixteen States and four foreign cities. Nevertheless it remains one of the most anonymous of Government institutions. The present Comptroller General is Elmer B. Staats, appointed in 1966 for a fifteen-year term. He has spent most of his career in federal service and was Deputy Director of the Bureau of the Budget under Presidents Truman, Eisenhower, Kennedy and Johnson. The G.A.O. REV., Summer, 1971, at 186-87.

The preeminent book on the General Accounting Office is still H. MANSFIELD, THE COMPTROLLER GENERAL (1939) [hereinafter cited as MANSFIELD]. It was preceded by two shorter studies by a predecessor to the Brookings Institution, D. SMITH, THE GENERAL ACCOUNTING OFFICE: ITS HISTORY, ACTIVITIES & ORGANIZATION (1927) [hereinafter cited as SMITH]; W.F. WILLOUGHBY, THE LEGAL STATUS & FUNCTIONS OF THE GENERAL ACCOUNTING OFFICE OF THE NATIONAL GOVERNMENT (1927) [hereinafter cited as WILLOUGHBY]. Two more recent books on the GAO are R. BROWN, THE G.A.O.: UNTAPPED SOURCE OF CONGRESSIONAL POWER (1970); MACHINERY & ALLIED PRODUCTS INSTITUTE, THE GOVERNMENT CONTRACTOR AND THE GENERAL ACCOUNTING OFFICE (1966) [hereinafter cited as MAPI STUDY].

4. 31 U.S.C. §§ 1-60, 71, 471, 581, 581a (1970).

5. *Id.* § 41.

6. 58 CONG. REC. 7083 (1919) (remarks of Congressman Good). *See also id.* at 7087 (remarks of Congressman Byrnes); *id.* at 7092 (remarks of Congressman Madden); *id.* at 7096-99 (remarks of Congressman French); *id.* at 7201-03 (remarks of Congressman Williams); *id.* at 7222-23 (remarks of Congressman Hastings); 59 CONG. REC. 6353 (1920) (remarks of Senator Jones). A good history of the budget and accounting process before 1921 can be found in MANSFIELD 23-65; SMITH 1-58.

Budget) was proposed to put absolute responsibility for the budget estimates on the President. Secondly, changes were offered in the House rules providing for creation of a single Committee on Appropriations to replace the eight individual committees theretofore considering budget requests.[7] Thirdly and more important "than any [other] single step we could possibly take," an "accounting department," ultimately called the General Accounting Office, was created to be responsible only to Congress. It was to audit all expenditures and report any payments which were wasteful or not in accordance with law. The House was promised "a wonderful change."

> The officers and employees of this department will at all times be going into the separate departments in the examination of their accounts. They will discover the very facts that Congress ought to be in possession of and can fearlessly and without fear of removal present these facts to Congress and its committees.[8]

The effect of the General Accounting Office, as far as it has gone, has indeed been positive. Its reports to Congress on the administration of programs, while sometimes criticized by the offices under investigation, are widely regarded as objective and non-partisan and are

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7. Technically, this was not part of the Budget and Accounting Act because a change in House rules does not require the approval of the Senate or the President. The proposal was, however, treated as part of the package of reforms proposed. 58 CONG. REC. 7084 (1919) (remarks of Congressman Good); *id.* at 7126-27 (remarks of Congressman Taylor); *id.* at 7209-10 (remarks of Congressman Temple).

8. 58 CONG. REC. 7085 (1919) (remarks of Congressman Good). *See also id.* at 7095 (remarks of Congressman Howard); *id.* at 7215 (remarks of Congressman Purnell); *id.* at 7219 (remarks of Congressman Mandell).

The Special Committee on the Budget had been impressed by and sought to emulate the office of the British comptroller and auditor general. Congressman Good waxed eloquent in often-quoted words. "If the comptroller and auditor general of the British House of Commons is the 'real guardian, on behalf of the House of Commons, of the purse of the nation,' the comptroller general provided for under this bill will become the *real guardian of the Treasury* of the United States." *Id.* at 7085 (emphasis added). *See also id.* at 7088-89, 7901 (remarks of Congressman Byrnes); 81 CONG. REC. 652-56 (1937) (remarks of Congressman Wadsworth recalling circumstances of creation of the General Accounting Office).

The following story was repeated several times during the debates and illustrates the basis of the concern for independence of the executive. "President [Cleveland] desired to use a certain appropriation for a given purpose, and was told by his Comptroller of the Treasury . . . that he could not do it. But the President insisted and finally said, 'I must have the fund, and if I cannot change the opinion of my comptroller, I can change my Comptroller.' . . . Now, we propose to change that." 61 CONG. REC. 982 (1921) (remarks of Congressman Good).

In order to achieve this independence, the Comptroller General was given a fifteen-year term and made removable before that time only by impeachment or a "concurrent resolution" of Congress for named causes. The bill was passed first in 1920, 59 CONG. REC. 7956 (1920), but it was vetoed by President Wilson who considered it unconstitutional to deny the President the right to remove someone he appointed, 59 CONG. REC. 8609 (1920); *see, e.g.*, WILLOUGHBY 7-16.

often the basis for constructive change.[9] As a measure of its impartiality, in recent years specific new challenges have been given to the GAO, notably administration of the extraordinarily sensitive Federal Election Campaign Act of 1971.[10] As one writer put it, at a time

9. In Fiscal Year 1972, a total of 948 formal audit reports were issued, about the same number as in other recent years. 1972 COMP. GEN. ANN. REP. 166. A summary of the findings and recommendations can be found each year in the Appendix to the Comptroller General's Annual Report. Some representative titles should suggest the variety of types of studies conducted. U.S. COMP. GEN., ACQUISITION OF MAJOR WEAPON SYSTEMS, Comp. Gen. Rep. No. B-163058 (July 17, 1972); U.S. COMP. GEN., DEFENSE INDUSTRY PROFIT STUDY, Comp. Gen. Rep. No. B-159896 (March 17, 1971); U.S. COMP. GEN., EFFECTIVENESS AND ADMINISTRATION OF THE COMMUNITY ACTION PROGRAM UNDER TITLE II OF THE ECONOMIC OPPORTUNITY ACT OF 1964, Comp. Gen. Rep. No. B-130515 (March 18, 1969); U.S. COMP. GEN., MANAGEMENT OF FEDERALLY FINANCED RESEARCH BY THE UNIVERSITY OF MICHIGAN—A CASE STUDY, Comp. Gen. Rep. No. B-117219 (Sept. 25, 1970); U.S. COMP. GEN., PROJECTED COSTS OF THE INDOCHINA WAR, Comp. Gen. Rep. No. B-169832 (Aug. 28, 1970); U.S. COMP. GEN., SURVEY OF THE APPLICATION OF THE GOVERNMENT'S POLICY OF SELF-INSURANCE, Comp. Gen. Rep. No. B-168016 (June 14, 1972); U.S. COMP. GEN., TIGHTER CONTROL NEEDED ON OCCUPANCY OF FEDERALLY SUBSIDIZED HOUSING, Comp. Gen. Rep. No. B-114860 (Jan. 20, 1971). The GAO's latest technique is the use of "should cost" analysis to determine the proper price of an item. *See* U.S. COMP. GEN., INDUSTRIAL MANAGEMENT REVIEWS OF DEFENSE CONTRACTORS' OPERATIONS, Comp. Gen. Rep. No. B- (1973).

Of course not everyone agrees that the GAO is objective and helpful. For example, audit reports have been described as "inevitably characterized by a lack of knowledge and sympathy with respect to administrative . . . problems." McDiarmid, *Reorganization of the General Accounting Office*, 31 AM. POL. SCI. REV. 508, 511 (1937). Another has said, "[W]e note increasing tendencies toward an insufferable self-righteousness." 108 CONG. REC. 16,278 (1962) (remarks of Rep. Clem Miller). Professor Cibinic says the Comptroller General is accused of being "a 'second guesser with 20/20 hindsight,' the little man wearing a green eye shade gleefully hunting for errors and improprieties long after transactions have been completed." Cibinic & Laskin, *The Comptroller General and Government Contracts*, 38 GEO. WASH. L. REV. 349 (1970) (hereinafter cited as Cibinic & Lasken). By way of illustration, a private attorney complains, "Audit reports never mention contracts, procedures or procurement practices which are satisfactory. . . . [GAO's] practice is to single out some item . . . which could have been handled differently with alleged savings to the Government. . . . Many believe the GAO audit reports are needlessly undermining public confidence in government procurement and damaging the reputation of government contractors." Beach, *Role of the General Accounting Office in the Regulation of Industry*, 21 BUS. LAWYER 235, 237-38 (1965). *See also* MAPI STUDY 76-79. At the other extreme, Ralph Nader has charged that the GAO hired as an outside consultant to study failings in certain programs, the very accounting firm which had designed cost control for the programs in the first place. Chicago Sun-Times, Sept. 28, 1972, at 14, col. 1. *Cf.* Meyers v. United States, 272 U.S. 52 (1926) discussed *infra* at text accompanying n.87. Congress failed to override the veto but the bill was passed in the next session of Congress and signed by President Harding after the removal language was changed to "by joint resolution of Congress . . . [for named causes or] by impeachment." 31 U.S.C. § 43 (1970). For an extensive discussion of the issues see MANSFIELD 65-70, 74-92; WILLOUGHBY 1-16; MAPI STUDY 22-25.

10. 2 U.S.C.A. §§ 431-54 (Supp. 1973). The Comptroller General's most sensitive task is acting as "supervisory officer" under subchapter I, "Disclosure of Federal Campaign Funds," *id.* §§ 431-42. *See Up from Green Eyeshades*, NEWSWEEK, Sept.

when the remark was a high compliment, "On Capitol Hill, the Comptroller General is accorded a deference comparable to that given the Director of the FBI."[11]

In the half-century of its existence, the responsibilities of the General Accounting Office have expanded far beyond "going into the separate departments in the examination of their accounts." Most importantly, from early in the GAO's history the Comptroller General has asserted the power to determine the "legality" of executive programs and to cut off funds for any not meeting his approval. Some of the practices derived from this assertion of power are based on dubious authority, represent questionable policy, and tend to distract the GAO from the work through which it can be most useful to Congress. This article proposes changes to help the GAO become a more effective agent in Congress' effort to play a major role in policy-making.

ADMINISTRATIVE CONTROL BY AUDIT

The Traditional Financial Audit

Government financial audit procedure has changed somewhat since 1921 but it is still conceptually the same. Each agency pays its bills through persons called "disbursing officers." Such officers may be, but usually are not, in policy-making positions in their agencies. These officers, in turn, submit to periodic accountings of their receipts and expenditures in internal or administrative audits. If all is found in order the agency's accounts are transmitted to the General Accounting Office for review.[12]

11, 1972, at 22. *See also GAO Investigating Secret Gift of $200,000 to Nixon Campaign*, N.Y. Times, March 1, 1973, at 1, col. 2.

11. J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 160 (1964). For two specific illustrations of this deference, *see Hearings on the Capability of G.A.O. to Analyze and Audit Defense Expenditures Before the Subcomm. on Executive Reorganization of the Senate Comm. on Gov't. Operations*, 91st Cong., 1st Sess., at 1-26 (1969); *Hearings Pursuant to S. Con. Res. 2 Before the Joint Comm. on the Organization of the Congress*, 89th Cong., 1st Sess., pt. 9, at 1363-1413 (1965;.

12. The most thorough discussion of this subject is provided by SENATE COMM. ON GOV'T OPERATIONS, FINANCIAL MANAGEMENT IN THE FEDERAL GOV'T, S. DOC. NO. 11, 87th Cong., 1st Sess. (1961); SENATE COMM. ON GOV'T OPERATIONS, FINANCIAL MANAGEMENT IN THE FEDERAL GOV'T, S. Doc. No. 92-50, 92d Cong., 1st Sess. (1971). *See also* MANSFIELD 121-44, 178-97; WILLOUGHBY 22-38, 147-58; 58 CONG. REC. 7199-200 (1919). A good comparison of British and American practice is provided in Goldberg, *Legislative Control over Expenditures*, THE G.A.O. REV., Spring 1971, at 40.

In fact, today the volume of transactions has led to the use of statistical sampling procedures in audit of vouchers under $100. 2 S. Doc. No. 92-50, 92d Cong., 1st Sess. (1971).

At this point, three deceptively simple provisions come into play. The first two were originally passed in 1817 and 1868, respectively, and were continued in the Budget and Accounting Act of 1921. First, section 305 of the Act provides:

> All 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.[13]

Secondly, section 304 states: "Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government. . . ."[14] Finally Congress also provided in section 304: "All powers and duties which on June 30, 1921, were conferred or imposed by law upon the Comptroller of the Treasury . . . shall . . . be vested in and imposed

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Further, some agencies have been given specific exemption from GAO audit. *E.g.*, 38 U.S.C. § 211(a) (1970) (Veterans Administration); *see* R. BROWN, *supra* note 3; 1965 COMP. GEN. ANN. REP. 331-34. *See also Patman, Passman and the G.A.O.*, Wall St. J., Sept. 22, 1972, at 10, col. 1, criticizing the attempt to subject the Federal Reserve Board to GAO audit alleging that it is an attempt to get legislative control of an independent entity.

13. 31 U.S.C. § 71 (1970). This section was originally adopted as Act of March 3, 1817, ch. 45, § 2, 3 Stat. 366: "[A]ll claims and demands whatever, by the United States or against them, and all accounts whatever, in which the United States are concerned, either as debtors or as creditors shall be settled and adjusted in the Treasury Department." *See* 58 CONG. REC. 7287-88 (1919) (explanation by Congressman Good).

14. 31 U.S.C. § 74 (1970). This provision was originally adopted as Act of March 30, 1868, ch. 36, 15 Stat. 54: "The balances . . . stated by the Auditor and certified to the heads of Departments by the Comptrollers of the Treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of Departments, but shall be conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts." At the same time, Congress made clear that the Act of March 3, 1817, ch. 45, § 2, 3 Stat. 366, quoted note 13 *supra*, "shall not be construed to authorize the heads of departments to change or modify the balances that may be certified to them by . . . the comptroller of the treasury, but that such balances . . . shall be . . . final and conclusive upon the executive branch of the government." Act of March 30, 1868, ch. 36, 15 Stat. 54. These sections were passed in order to let Treasury officers force the War Department to pay bonuses due Civil War veterans. Cibinic & Lasken 355-58. From this particularized beginning came the language of broad applicability we have today.

In the Senate version of the Budget and Accounting Act of 1919 (the Act vetoed by President Wilson), provision was made for a Board of Appeals to hear objections to settlement of particular claims. 59 CONG. REC. 6353 (1920). The provision was deleted in conference. *Id.* at 7721. The appellate function was apparently to correspond to the purely appellate role the Comptroller of the Treasury had performed, between 1894 and 1921, which was designed to get consistency among the rulings of the six auditors who headed branches under him. Act of July 31, 1894, ch. 174, § 8, 28 Stat. 208. *See also* 26 CONG. REC. 7474 (1894) (remarks of Senator Sherman).

upon the General Accounting Office and be exercised without direction from any other office."[15]

For purposes of these provisions, according to the Comptroller General, "[t]he word 'settle' means to ascertain and pay while 'adjust' means to determine the amount due. . . ."[16] If a disbursing officer's accounts are found in order, the balances are "certified." If, however, certain payments have been made improperly, an "exception" will be stated and such payments will be "disallowed" by the General Accounting Office. If the Comptroller General cannot be persuaded to change his mind, recovery of the payment is sought first from the payee.[17] If it cannot be recovered in that way, the Department of Justice is required by law to bring suit against the disbursing officer personally to make the Treasury whole.[18]

If this procedure were limited to disallowing payments made culpably or negligently it would not be worthy of special note, but it has not been so limited by the Comptroller General. "Illegal" payments have been disallowed as well. In this context, "illegal" means any payment made under an interpretation of statute or law different from that of the Comptroller General.

A good illustration, but only one of many, is provided by Comptroller General McCarl's first vigorous assertion of this power.[19] The Federal Employee's Compensation Commission had determined to pay compensation to workers for diseases brought on by several years' work under unhealthful conditions. Only a year after taking office, in July 1922, Comptroller General McCarl informed the Commission that compensation could be paid only for personal injury, not such occupational diseases. He refused to pay certain vouchers without docu-

15. 31 U.S.C. § 44 (1964).

16. 4 COMP. GEN. 404, 405 (1924). *But see* 58 CONG. REC. 7129-30 (1919) (colloquy between Congressman Linthieum and Congressman Taylor). Those of the Comptroller General's opinions which are deemed most important are published in annual volumes cited herein as COMP. GEN. The vast majority of decisions, however, are unpublished and only available (free of charge) from the Reference Department of the GAO. In spite of this, the GAO has held all agencies bound to follow all decisions, whether published or not. 28 COMP. GEN. 69 (1948).

17. A voluntary refund will be sought first from the payee, but failing that the Comptroller General may set off the "debt" against a payment currently due the contractor on the same or another contract. United States v. Munsey Trust Co., 332 U.S. 234 (1947); United States v. Cohen, 389 F.2d 689 (5th Cir. 1967). *But cf.* United States v. Isthmian S.S. Co., 359 U.S. 314 (1959) (admiralty case). If set-off is impossible, the matter may be referred for action by the Justice Department. *See* D. PACE, NEGOTIATION AND MANAGEMENT OF DEFENSE CONTRACTS 38 (1970).

18. 31 U.S.C. § 505 (1970).

19. 2 COMP. GEN. 6 (1922).

mentation that the payments had been for disease traceable to specific injuries. The Commission argued that its own findings were controlling on the issue of cause, but the Comptroller General disagreed. Any time the spending of money is involved, he said, the decision of the Comptroller General is final.[20]

The Commission then took the position that the executive agencies are to follow the opinions of the Attorney General, not Congress' agent, the Comptroller General. The Attorney General in this case had held that the Comptroller General was wrong and that his opinion need not be followed.[21] This led to Comptroller General McCarl's famous "declaration of independence," written directly to President Harding:

> I am always pleased to consider most carefully the views of any interested branch of the Government in connection with any matter before me or in support of a proper request for reconsideration of action taken, but I may not accept the opinion of any official, inclusive of the Attorney General, as controlling of my duty under the law.[22]

The Commission stood firm, so the Comptroller General disallowed over ten thousand dollars on the accounts of the disbursing officer (who of course was not a member of the Commission), took action to recover the disallowances from his surety, and withheld payments to him of any further sums.[23]

When the Commission proposed a court test of the issue, McCarl responded with what was undoubtedly his most extraordinary assertion of authority:

> The question as to the right and duty of the accounting officers . . . to refuse to allow credit . . . for payments made in direct contravention of decisions of the Comptroller General of the United States is not a question which properly may be submitted to and determined by any court.[24]

That statement became and apparently still remains GAO doctrine. A GAO attorney rationalized the position this way:

> The Constitution expressly reserves to the legislative department of the government, as against both the executive and judicial departments, control over all moneys in the Treasury of the United

20. 2 COMP. GEN. 225 (1922).
21. 33 OP. ATT'Y GEN. 476 (1923).
22. 2 COMP. GEN. 784, 787 (1923).
23. 3 COMP. GEN. 497 (1924).
24. 3 COMP. GEN. 545, 548 (1924).

> States . . . . [I]f judicial precedents were imperatively binding on the accounting officers, money would be drawn from the Treasury not only by appropriations made by law but by precedents established by courts . . . .[25]

Comptroller General McCarl attempted again and again to control the executive by audit. He spawned countless controversies over such questions as whether prosthetic appliances such as artificial eyes and limbs constituted "reasonable medical . . . supplies" for which the

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25. McGuire, *The Accounting Officers of the United States and Judicial Precedents*, 19 ILL. L. REV. 523, 531-32 (1925). The most articulate assertion of this position had been by Comptroller of the Treasury Lawrence in Meigs' Res Adjudicata Case, VI U.S. First Comptroller's Dec. 220, 244 (1885), refusing to follow Meigs v. United States, 19 Ct. Cl. 497 (1884). Comptroller Lawrence had been willing to abide by decisions of the United States Supreme Court, "the most learned and able judicial body of this or any other country," but argued that the decisions of lower courts might be "erroneous" and conflicting. *See also* WILLOUGHBY 159-70. A directly contrary view of the Comptroller General's duty is taken in Langeluttig, *Legal Status of the Comptroller General of the United States*, 23 ILL. L. REV. 556, 583-87 (1929).

Probably the best impartial analysis is in Mansfield, *Judicial Review of the Comptroller General*, 20 CORNELL L.Q. 459 (1935). Mansfield explains that the Comptroller General was never permitted to appear in the Court of Claims to defend his position, and he considered the Attorney General often to be working at cross-purposes with him. As a result he considered many Court of Claims precedents to be bad law and refused to follow them. *Id.* at 470.

Not surprisingly, the Court of Claims disagreed as to the GAO's authority, and the controversy led to outbursts like the following from the Court:

> This question has repeatedly, in previous cases, been decided in favor of the plaintiff. . . . There is no reason why the plaintiff should have been put to the expense of bringing suit to recover what is unquestionably due him except the arbitrary action of the General Accounting Office in refusing to follow the law as it has been announced by the court in previous decisions. McCabe v. United States, 84 Ct. Cl. 291, 292 (1936). "The excuse for not making payment is stated by the Acting Comptroller General in a letter that is singularly free from any suspicion of logic." Belcher v. United States, 94 Ct. Cl. 137, 140 (1941).

The GAO rarely asserts this position today. *But see* Shnitzer, *The United States General Accounting Office*, 2 WEST'S FEDERAL PRACTICE MANUAL § 1701, at 151 (1970) [hereinafter cited as Shnitzer]. Mr. Shnitzer is Associate General Counsel of the GAO and his statements of policy and practice are reliable and authoritative. He describes lower court opinions as only "persuasive" to the GAO, not "binding." Shnitzer § 1732.

By way of illustration, the Court of Claims held in Tracy v. United States, 142 F. Supp. 943 (Ct. Cl. 1956), that a disabled serviceman's retirement pay is to be computed on the basis of his permanent rank rather than his temporary rank. The Comptroller General criticized the decision and refused to follow it, 36 COMP. GEN. 628 (1957), but after the Court of Claims held the same way in two later cases the Comptroller General gave in, 37 COMP. GEN. 585 (1958). A court decision in the specific case before the GAO, however, is conceded to bind the Comptroller General under the doctrine of "estoppel by judgment." 36 COMP. GEN. 628 (1957); Shnitzer § 1733.

A fascinating recent assertion of this independence is Comp. Gen. Dec. No. B-175004 (Oct. 12, 1972) (unpublished), which asserts that findings of fact and conclusions of law of a district court in a bid protest are not binding upon the GAO, nor even entitled to comity. The case is put in context in text accompanying notes *infra*,

Government might pay.[26] In one case he forbade purchase of discount bridge-toll coupon books as an illegal "advance payment" in spite of a fifty percent saving.[27] Further, in one of many confrontations with President Roosevelt he ruled that the Department of Agriculture could not relocate farmers as part of a New Deal emergency relief program.[28]

The Comptroller General argued that he was not forcing accountable officers to act completely at their peril, since Congress had provided:

> Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement.[29]

The effect of this advance opinion provision, however, is even more to require that executive agencies obtain and follow the Comptroller General's interpretation of what the law requires. The provision gave the Comptroller General the theoretical basis effectively to require advance approval of every payment by a federal agency. The incidents of GAO involvement in executive decisions were often trivial in themselves but led to a situation in which

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26. 5 COMP. GEN. 688 (1926), *aff'g* 5 COMP. GEN. 301 (1925), *and rejecting* 35 OP. ATT'Y. GEN. 36 (1926).

27. Unpublished decision described in McDiarmid, *supra* note 9, at 511 n.12.

28. *See* 40 OP. ATT'Y. GEN. 193 (1942), *citing* Comp. Gen. Dec. No. B-23881 (Mar. 5, 1942) (unpublished).

29. 31 U.S.C. § 74 (1970). Certifying officers may request advance opinions pursuant to 31 U.S.C. § 82d (1970). The Comptroller General has not limited himself to answering questions from certifying officers, disbursing officers or heads of departments. *See, e.g.*, 49 COMP. GEN. 59, 60-61 (1969), the Philadelphia Plan case discussed in text accompanying notes 34-52 *infra*.

An interesting illustration of this advisory function was provided when Rep. Melvin Laird, then Secretary of Defense-designate, asked the Comptroller General whether he could accept the increased pay for cabinet officials scheduled to take effect during the term of the 91st Congress if he were sworn in as a member of that Congress pending his confirmation as a cabinet officer. The Comptroller General and later the Attorney General held that he could, in spite of U.S. CONST. art. I, § 6, provided he were confirmed prior to the time Congress' power to veto the raise had expired. See 42 OP. ATT'Y. GEN. No. 36 (1969), referring to the G.A.O. decision. The Comptroller General's opinion is unpublished because communications between the G.A.O. and members of Congress are treated by the GAO as "privileged."

Private citizens also can get advisory opinions from the GAO even though no provision for such opinions is made in § 74. Such "private inquiries' are most often the bid protests discussed infra in Part III. As Cibinic and Lasken dryly observe: "Left unexplained by the Comptroller General is the derivation of his authority to make exceptions to the statutory law. Cibinic & Lasken 377.

> [s]tatutes were tortured, and the usual legal presumptions reversed, in order to support new pretensions. If this was the meaning of independence, it was abundantly realized. In practice it chiefly meant controversies over the finality of administrative determinations and the continual substitution of the Comptroller General's conclusions on matters of fact and of law for those of the department heads. To a large degree he was successful in these assertions and in consequence he narrowed markedly the previous scope of departmental discretion.[30]

Change to Comprehensive Audits

Comptrollers General since McCarl have continued the attempt to control by audit, albeit less often.[31] One reason the pace has slack-

30. MANSFIELD 71-72; *cf.* WILLOUGHBY 17-38. *See also* McDiarmid, *supra* note 9, at 510: "Since it is removed from actual administration, the General Accounting Office constantly requires detailed information supporting a proposed expenditure of minor proportions. The cost of preparation may exceed many times the amount of the expenditure itself . . . ."

31. For example, in 1955, Congress had prohibited "disposal or transfer by contract or otherwise of work that has been . . . performed by civilian personnel of the Department of Defense unless justified to the Appropriations Committees Act of July 13, 1955, ch. 358, § 638, 69 Stat. 321 (1955). President Eisenhower threatened to ignore this "unconstitutional" constraint on executive action. The Comptroller General thereupon announced that he would uphold the legislation and disallow payments made in violation of it. *See* INDOCHINA: THE CONSTITUTIONAL CRISIS, 116 CONG. REC. 15,414 n.64 (1970). *See also* the GAO's discussion of what it sees as its jurisdiction in 46 COMP. GEN. 441, 453 (1966).

There is another way in which the audit process has gotten the Comptroller General into potentially sensitive areas. As part of the power to settle accounts, the GAO has acted as the arbiter of disputes between federal agencies. For example, in 1970 the Corps of Engineers sought reimbursement from the Department of the Interior for damage to a park caused during construction of a power plant at Grand Coulee Dam. In effect a judicial proceeding was impossible because the courts have said a suit by one agency against another is really one by the United States against itself. *See* Defense Suplies Corp. v. United States Lines Co., 148 F.2d 311, 312 (2d Cir. 1945). The Comptroller General followed his "longstanding rule that one executive department may not reimburse another for use of real property damaged by another agency." 1970 COMP. GEN. ANN. REP. 114, *citing* Comp. Gen. Dec. No. B-169228 (Apr. 14, 1970) (unpublished). *See also* Note, *The Comptroller General of the United States: The Broad Power to Settle and Adjust All Claims and Accounts*, 70 HARV. L. REV. 350, 353-54 (1956).

To date, no major concern seems to have been expressed over the Comptroller General's handling such questions, but one can imaigne problems arising. Anytime agency *A* does something for agency *B* without reimbursement, agency *B* is better able to perform its statutory duties and agency *A* is less able to perform its own. A shift in priorities can thus be accomplished by whoever is the arbiter. For example, the Department of Defense, through its Domestic Action Program, provides manpower and use of facilities to sponsor various social welfare activities in conjunction with other agencies. The General Accounting Office presumably would take the position that it could determine (a) whether the other agencies may, must, or may not reimburse the Department of Defense, or (b) whether the Department of Defense has exceeded its statutory authority. The Attorney Genral might well take another position. Such

ened is that the practical meaning of "audit" as used by the Comptroller General has changed over the years. The most significant development was the Accounting and Auditing Procedures Act of 1950. Where early Comptrollers General relied on "centralized voucher audits," today the emphasis is on "comprehensive audits."

> The centralized voucher audit consists of the examination of expenditure and collection vouchers and related documents submitted periodically in support of financial transactions of Government officers having personal accountability for public funds. The main objectives of this type of audit are to determine whether expenditures are made legally and solely for the objects for which appropriations were made. . . .
>
> In contrast, the comprehensive audit is performed at the site of operations, its scope encompasses the agency as a whole and its activities, and the extent of detailed examination work is governed by the adequacy and effectiveness of the controls exercised by the management over its operations, as determined by a study and testing of those controls.[32]

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questions could become as sensitive as those about the Philadelphia Plan, discussed in text accompanying notes 34-52 *infra*.

32. SENATE COMM. ON GOV'T OPERATIONS, REVIEW OF AUDIT REPORTS OF THE COMPTROLLER GENERAL, S. REP. No. 1572, 84th Cong., 2d Sess. 13 (1956). *See also* S. DOC. No. 11, 87th Cong., 1st Sess. (1961); Staats, *G.A.O. Auditing in the Seventies*, THE G.A.O. REV., Spring 1972, at 1.

The shift from detailed voucher audit to comprehensive audit caused the G.A.O. work force to shrink from 15,000 in 1945 to 4,300 in 1965. *Hearings Pursuant to S. Con. Res. 2 Before the Joint Committee on the Organization of the Congress*, 89th Cong., 1st Sess., pt. 9, at 1388 (1965) (testimony of Acting Comptroller General Weitzel).

Another important feature of the 1950 Act had to do with agency accounting systems. The First Hoover Commission had recommended the creation of a "performance budget" which focused on objectives to be met rather than items to be purchased. It also proposed creation of an Accountant General to prescribe agency accounting methods, subject to approval by the Comptroller General. The Commission believed the accounting is a management tool and thus should be the responsibility of the executive. Congress recognized that accounting and auditing involved more than the processing of agency vouchers, but it did not want to give authority completely to the executive branch. *See* H.R. REP. No. 2556, 81st Cong., 2d Sess. (1950), and S. REP. No. 2031, 81st Cong., 2d Sess. (1950). It made the agencies responsible for initial development of their accounting systems, but left the Comptroller General in charge of (1) prescribing "principles, standards, and related requirements" for agency accounting systems, (2) approval of such systems, and (3) reviewing the systems from time to time. A number of agencies have even now not had their accounting systems approved. *See* H.R. REP. No. 179, 89th Cong., 1st Sess. (1965). With respect to the original understanding of the GAO's role in the development of accounting systems, *see* MANSFIELD 198-224; WILLOUGHBY 109-35.

Another provision, 31 U.S.C. § 60, had been adopted even earlier in 1946. It authorized and directed the Comptroller General to make an "expenditure analysis" of each executive agency "to determine whether public funds have been economically and efficiently administered and expended." However Congress has never appropriated funds to permit the GAO to carry out this task.

The significance of the distinction for our purposes is two-fold. First, under a voucher audit the Comptroller General has many more individual opportunities to make a decision on legality. Each one is a potential disallowance. The present Comptroller General thus expresses his judgments of policy in comprehensive reports more often than in legal opinions on specific payments. Secondly, the disallowances under a voucher audit, although annoying, are often collateral to program objectives and thus only occasionally trigger a violent executive response.[33] Disallowances under a comprehensive audit, however, almost by definition would go to the heart of a program. The response could be expected often to equal the most celebrated threatened disallowance in recent years—that involving the so-called Philadelphia Plan.

The Philadelphia Plan

Executive Orders dating from 1941 have required non-discrimination clauses in government contracts that provided sanctions for racial discrimination during contract performance.[34] In 1966, however, the Labor Department tried to add teeth to the clauses by requiring that bidders submit affirmative action programs for approval by the Office of Federal Contract Compliance (OFCC) *prior* to contract award. The requirement was tested in St. Louis, San Francisco, and Cleveland for almost two years, and in February 1968 the Johnson Administration proposed regulations to implement the practice nationwide.[35]

Representative William C. Cramer of Florida called the Comptroller General's attention to the plan. He objected to the Labor Department's requiring an "acceptable program" without defining in advance for bidders what minimum promise was required for acceptability.

In its first reply to Representative Cramer, the General Accounting Office attempted to avoid a direct confrontation with the executive agency. Assistant Comptroller General Frank Weitzel noted that no

33. This point is perceptively made in Cibinic & Lasken 378-79.

34. Exec. Order No. 8,802, 6 Fed. Reg. 3109, 3 C.F.R. 957 (1938-43 Compilation) (1941), was the first. Exec. Order No. 11,246, 30 Fed. Reg. 12,319, 3 C.F.R. 167 (Supp. 1965) (1965), is the basis of the current clause. Current regulations on equal opportunity in federal contracting are collected in 41 C.F.R. Ch. 60 (1972). A good discussion of the background leading up to the Philadelphia Plan is contained in Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723 (1972).

35. 33 Fed. Reg. 3000 (1968).

cases had yet arisen in which a low bidder had actually lost a contract because of an unacceptable affirmative action program.[36] He acknowledged, however, that failure to include minimum standards of acceptability constituted a "technical violation" of the competitive bidding regulations, which require that a contract must be awarded on the basis of price alone and must not require negotiation after the bids are opened.[37] A letter was sent to the Secretary of Labor "advising" him of this problem.

That, of course, was not what the Labor Department wanted to hear. Apparently, part of the Department's fear was that "minimum standards" would become the maximum proposed. Part of the psychology of affirmative action was getting the contractor to use "the utmost in creativity, ingenuity and imagination,"[38] and the department apparently hoped to use the ambiguity of the situation itself to bluff contractors into more generous, carefully-considered proposals.

Representative Cramer, however, would not quit. He pointed out that the "Philadelphia Pre-Award Plan," adopted in 1967 prior to the 1968 GAO opinion, was equally vague about the minimum standard for compliance and had not been changed in response to the first opinion. In reply to this complaint, the Comptroller General was more direct in his ruling:

> [I]n our view where federally assisted contracts are required to be awarded on the basis of publicly advertised competitive bidding, award may not properly be withheld pursuant to the Plan from the lowest responsible and otherwise responsive bidder on the basis of an unacceptable affirmative action program, until provision is made for informing prospective bidders of definite minimum requirements to be met by the bidder's program and any other standards or criteria by which the acceptability of such program would be judged.
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> . . . [T]he present lack of specific detail and rigid guideline requirements for an acceptable affirmative action program . . . permits denial of a contract to the low bidder to be based on

36. 47 COMP. GEN. 666, 669 (1968).

37. The regulations governing federal civilian procurement, Federal Procurement Regulations (FPR), are found in 41 C.F.R. 6, 1 (1972). Procurement by the Department of Defense is governed by the Armed Services Procurement Regulations (ASPR), published pursuant to 10 U.S.C. § 2202. Part 2 of both FPR and ASPR deals with the requirements for formal advertising.

38. This justification may be found in 48 COMP. GEN. 326, 328 (1968), and is apparently referring to an unpublished letter from the Department of Labor to the GAO.

purely arbitrary or capricious decisions, and award to be made on the basis of similar decisions.[39]

On this point the new Nixon Administration then yielded. Revised standards were issued that required the OFCC Area Coordinator to set a "range of minority manpower utilization of each of the designated trades" which would go out with the invitation for bids. Each contractor was then to be required to submit his own specified range in his proposal. If his range was not equal to or more ambitious than that set by the OFCC, he would be non-responsive and would not get the contract. There was to be no negotiation.[40]

One might have thought that the Comptroller General would be satisfied. His only previous objection apparently had been met in the manner he had suggested. However his involvement in the issue had only begun. In response to further questions from unnamed members of Congress, he solicited a memorandum from the Solicitor of Labor on the legality of the revised plan.

The Solicitor's brief relied heavily on the Government's power to prescribe the terms and conditions on which it will contract,[41] but the Comptroller General was unconvinced. The requirement of goals satisfied the procurement statutes' requirement of specificity, but it raised problems under the Civil Rights Act of 1964. Requiring a contractor to meet minority employment goals, the Comptroller General reasoned, would require him to make race a factor in hiring. Indeed it would constitute a "quota" system expressly prohibited by the Act. Quoting extensively from the legislative history, he concluded that hiring to achieve a racial balance was prohibited.[42]

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39. 48 COMP. GEN. 326, 328 (1968).

40. Order to the Heads of All Agencies from Assistant Secretary of Labor Arthur A. Fletcher Announcing the Revised Philadelphia Plan 6, 9 (June 27, 1969), *reprinted*, 115 CONG. REC. 39,951-53 (1969).

41. The Solicitor's forty-four-page typewritten brief is unpublished and undated but has been reprinted in *Hearings on the Philadelphia Plan and S. 931 before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. at 255-74 (1969).

42. 49 COMP. GEN. 59, 65-67, 71 (1969). There can be no doubt that Comptroller General Staats intended to reiterate the jurisdictional philosophy of Comptroller General McCarl: "Our interest and authority in the matter exists by virtue of the duty imposed upon our Office by the Congress to audit all expenditures of appropriated funds, which necessarily involves the determination of the legality of such expenditures . . . ." *Id.* at 60-61. *See also* 117 CONG. REC. 36,642 (1971), where Senator Ervin quotes Comptroller General Staats as writing: "While the number of instances where these differences over the authority of the GAO is relatively small, we believe . . . they present a substantial threat to the maintenance of effective legislative control over the expenditure of public funds."

The Labor Department had, of course, consulted with the Department of Justice throughout the now eighteen-month-long controversy. At this point, a formal opinion of the Attorney General was solicited. Not surprisingly, the Attorney General flatly disagreed with the Comptroller General's finding of compulsory quotas. He pointed to specific provisions of the plan and said:

> The Plan provides that the contractor's commitment to specific goals "is not intended and shall not be used to discriminate against any qualified applicant or employee (sec. 6(b)(2))." Furthermore, the obligation to meet the goals is not absolute. "In the event of failure to meet the goals, the contractor shall be given an opportunity to demonstrate that he made every good faith effort to meet his commitment. In any proceeding in which such good faith performance is in issue, the contractor's entire compliance posture shall be reviewed and evaluated in the process of considering the imposition of sanctions." (sec. 8(g)).[43]

The Department of Labor thus proceeded with the plan, but many members of Congress, led by Senator Sam Ervin, expressed indignation. The Subcommittee on Separation of Powers of the Senate Judiciary Committee held hearings on "whether the Labor Department has usurped Congressional authority. . . ."[44] Citing the statutory language that the Comptroller General's decisions are "final and conclusive upon the executive branch of the Government," Senator Ervin urged the Senate not to "shirk the Constitutional responsibility of Congress to maintain control over appropriations."[45] Indeed, he intro-

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43. 42 OP. ATT'Y GEN. No. 37 at 4 (1969). The Attorney General reasoned further:

> The United States as a contracting party may not require an employer to engage in practices which Congress has prohibited. It does not follow, however, that the United States may not require of those who contract with it certain employment practices which Congress has not seen fit to require of employers generally. . . .
>
> . . . .
>
> . . . [T]he employer may have a right to refuse to abandon his customary hiring practices, but he has no right to contract with the Government on his own terms.

Id. at 5, 9 (citations omitted). For an opposing view on this particular issue *see* Remmert, *Executive Order 11,246: Executive Encroachment*, 55 A.B.A.J. 1037 (1969).

The Attorney General's closing sentence particularly incensed the Comptroller General: "I hardly need add that the conclusions expressed herein may be relied on by your Department and other contracting agencies and their accountable officers in the administration of Executive Order 11246." 42 OP. ATT'Y GEN. at 11-12.

44. *Hearings on the Philadelphia Plan, supra* note 41, at 1.

45. 115 CONG. REC. 39,126 (1969). The Solicitor of Labor sought to explain why he followed the Attorney General instead of the Comptroller General by saying that while the latter could rule on legality of particular vouchers, the former had authority to direct the executive departments on broad "questions of general importance directly affecting the performance by Executive agencies of functions independently

duced a rider to the Supplemental Appropriation Bill of 1970, considered during Christmas week of 1969, which would have expressly prohibited expenditure of any federal funds on any "contract or agreement which the Comptroller General of the United States holds to be in contravention of any Federal statute."[46] He, of course, asserted that this only confirmed the power the GAO already had.[47]

Congress desperately wanted to get home for Christmas, and President Nixon equally wanted to be free of binding GAO review. The President threatened to veto any legislation, including the supplemental appropriation to run all federal agencies, which contained such a provision.[48] What had begun as an issue over the Civil Rights Act thus ultimately became—or was treated as—a confrontation of legislative and executive power. In that round, Congress gave in to the President, although Senator Ervin's position received considerable support.[49]

The matter never reached the stage of GAO disallowance. Before the plan could be implemented, an association of contractors sued to enjoin inclusion of the Philadelphia Plan provisions in an invitation for bids for construction of a Marsh Creek dam. The district court upheld the plan requirements and granted summary judgment for the government.[50] The court of appeals affirmed,[51] and the Supreme Court denied certiorari.[52]

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confided to them and not those simply involving payments." 115 CONG. REC. 39,123 (1969). The abstract debate over the relative powers of the Comptroller General and Attorney General is lengthy and need not be repeated here. *See* WILLOUGHBY 44-61; Birnbaum, *Government Contracts: The Role of the Comptroller General,* 42 A.B.A.J. 433 (1956); McGuire, *The Opinions of the Attorney General and the General Accounting Office,* 15 GEO. L.J. 115 (1927); Note, *Alice in Wunderlich: The Attorney General's Dream of Limiting the GAO's Claim Settlement Authority,* 18 CATH. U.L. REV. 544 (1969).

46. Introduced as § 904 of H.R. 15209, 91st Cong., 1st Sess. (1969); *see* 115 CONG. REC. 39,944 (1969).

47. The proposed section began, "In view of and in confirmation of the authority invested in the Comptroller General of the United States by the Budget and Accounting Act of 1921 . . . ." H.R. 15209, 91st Cong., 1st Sess. § 904 (1969).

48. 1969 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON 1038, 1039, received by the Congress at 115 CONG. REC. 40,738 (1969).

49. The vote, held late on December 22, was 39-29 to defeat the provision. 115 CONG. REC. 40,749 (1969).

50. Contractors Ass'n of E. Pennsylvania v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970).

51. Contractors Ass'n of E. Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971). The court held that the authority to prescribe the Plan arises from the broad grant of procurement authority in titles 40 and 41 of the United States Code. The court went on, "This [Civil Rights Act] general prohibition against discrimination cannot be construed as limiting Executive authority in defining appropriate affirmative action on the part of a contractor." *Id.* at 173.

52. 404 U.S. 854 (1971). The Comptroller General apparently has acquiesced

Who Shall Restrain the Executive?

The Comptroller General's attempt to stop the Philadelphia Plan and even the controversies of the McCarl era were not solely attempts at institutional empire building. They reflected a functional deficiency in the American system of government. Legislation authorizing executive action can and often does set specific limits on that authority.[53] The power to authorize must necessarily include some power to define the boundaries. Congress, however, cannot have the foresight to define the limits on authority in every concrete case. Moreover, as problems change, limits once precise become hard to apply.

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in the court's conclusions and has made no further objections on this particular issue. *See, e.g.*, 50 COMP. GEN. 844 (1971).

On a later civil rights issue, the legality of the Small Business Administration's program for assisting minority enterprise, the GAO has gone from a position of uncertainty to one upholding the program.

Pacific Coast Util. Serv. v. Laird, Civil No. 71-1035 LHB (N.D. Cal., June 15, 1971), has held this so-called SBA § 8(a) program illegal. That case is now pending before the Ninth Circuit. Another case, Ray Baillie Trash Hauling v. Kleppe, 334 F. Supp. 194 (D. Fla. 1971), had also held the plan illegal, but that case has now been reversed, 477 F.2d 696 (5th Cir. 1973). The plan had been upheld earlier in Kleen-Rite Janitorial Services v. Laird, Civil No. 71-1968W (D. Mass. Sept. 21, 1971), and Space Services of Georgia v. Laird, 18 CCH Cont. Cas. F. ¶ 86,920 (D. Conn. 1972), neither of which was appealed. Up until the Court of Appeals decision in *Baillie*, the law was sufficiently unclear that the Comptroller General refused to rule, Comp. Gen. Dec. No. B-175609 (June 27, 1972) (unpublished). When the Court of Appeals decision was announced, however, the Comptroller General accepted the position that the plan is legal. Comp. Gen. Dec. B-174146 (Feb. 12, 1973) (unpublished); *cf.* Fortec Constructors v. Kleppe, 18 CCH Cont. Cas. F. ¶ 86,845 (D.D.C. 1972), *aff'd*, 18 CCH Cont. Cas. F. ¶ 86,911 (D.C. Cir. 1973). *See generally* Boskoff, *The Small Business Administration and its Minority Subcontracting Program*, 7 PUB. CONT. NEWSLETTER No. 2, at 11 (1972).

53. Most restrictions have been innocuous. *See, e.g.*, 10 U.S.C. § 2207 (1970) (forbidding gratuities to contracting officials); 41 U.S.C. § 48 (1970) (requiring purchase of certain products from National Industries for the Blind). But a few have reflected bitter battles between Congress and the executive over control of national policy. *See, e.g.*, Act of Sept. 16, 1940, ch. 720, § 3(e), 54 Stat. 886 (forbidding deployment of draftees beyond Western Hemisphere and U.S. possessions and territories); Act of July 13, 1955, ch. 358, § 638, 69 Stat. 321 (forbidding "contracting out" of work done by federal civilian employees); Act of Dec. 19, 1963, Pub. L. No. 88-215, 79 Stat. 440 (forbidding use of NASA funds for joint Soviet-American lunar landing program). *See also* 115 CONG. REC. 40,015 (1969), summarizing other examples.

A somewhat different problem was presented in 1962 when Congress sought to *compel* the President to spend funds on the RS-70 manned bomber. *See* Davis, *Congressional Power to Require Defense Expenditures*, 33 FORD. L. REV. 39 (1964); Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 GEO. WASH. L. REV. 124 (1969); *cf.* Goostree, *The Power of the President to Impound Appropriated Funds: With Special Reference to Grants-in-Aid to Segregated Activities*, 11 AM. U.L. REV. 32 (1962). The issue was raised again in the closing days of the 92d Congress when President Nixon sought authority to limit spending to 250 billion dollars in fiscal year 1973. *See generally* Comment, 40 U. CHI. L. REV., *supra* note 1.

Congress sometimes may even leave statutes intentionally vague on controversial issues on which no single position can command a majority.[54]

But just as Congress must have the power to limit authority, it seems fair to suggest that the Executive should have the discretion to choose the strategy for carrying out a given legislative mandate. If the President is to be held responsible for program results, and he should be, he should have as few limits as possible on his choice of methods.[55] What the Constitution has failed to provide is a specific mechanism for determining when the President has gone too far in his choice of alternatives. Without such a constraint the executive branch can be virtually unrestrained in the definition as well as the execution of policy. The critics of recent Presidents' conduct of foreign and domestic affairs have been making what amounts to this same point.

In France, for example, the Cour des Comptes, an administrative court, performs the limiting role.[56] The Republic of China constitution provided for five branches of government, one of which was assigned this task.[57] In the United States the GAO has moved into the vacuum. The question seems to be not whether the role needs performing but whether the GAO is the best agency to do it.

An example may help illustrate the problem. Since 1969 the Defense Appropriations Act has provided that "none of the funds appropriated by this Act shall be used to finance the introduction of American ground combat troops into Laos and Thailand."[58] Suppose it were alleged that Army personnel guarding Air Force bases in Thailand are "ground combat troops." Who is to decide? It might be difficult

54. Koslow, *Standardless Administrative Adjudication*, 22 ADMIN. L. REV. 407 (1970); *cf.* Miller, *Statutory Language and the Purposive Use of Ambiguity*, 42 VA. L. REV. 23 (1956).

55. This was the essential message of Professor Mansfield in 1939. MANSFIELD 11-12, 178-81. *See also* MAPI STUDY 34-38. Professor Cibinic perceptively observes in this same vein that the weak executive does not want to be accountable and uses the GAO as a crutch. When he has a tough issue he can seek a GAO advance decision and try to blame any subsequent problems on the GAO. Cibinic & Lasken 393.

56. *See* C. HAMSON, EXECUTIVE DISCRETION & JUDICIAL CONTROL (1954); J. MAGNET, LA COUR DES COMPTES (1965). The best comparative study of the GAO and its western European counterparts is E. NORMANTON, THE ACCOUNTABILITY AND AUDIT OF GOVERNMENTS (1966).

57. The branch, established by Chapter IX of the 1946 constitution, was called the Control Yuan and was empowered to censure and impeach administrative officials, as well as audit. 2 A. PEASLEE, CONSTITUTIONS OF NATIONS 291 (1966); W. TUNG, THE POLITICAL INSTITUTIONS OF MODERN CHINA (1964).

58. Pub. L. No. 91-172, § 643, 83 Stat. 487 (1969); Pub. L. No. 91-669, § 843, 84 Stat. 2038 (1971); Pub. L. No. 92-204, § 742, 85 Stat. 735 (1971); Pub. L. No. 92-570, § 741, 86 Stat. 118 (1972).

to find a private plaintiff who could properly raise the issue in court. Recent decisions liberalizing rules of standing might conceivably permit a soldier ordered to the area to file suit,[59] for example, but the Comptroller General might argue that he could, quite apart from the courts, simply cut off money for the operation. Indeed, to put the proposition more baldly, it would be consistent with the Comptroller General's previous positions to say that if he at any time had thought the Vietnam War illegal, he could single-handedly have brought it to an end.

Defenders of this role for the GAO argue that because it is a "legislative agency," the GAO is in a better position than the executive agencies to know and carry out congressional intent.[60] Two fallacies in this argument should be plain. First, calling an agency "legislative" does not imbue it with insight. In fact, the GAO is one of the least informed agencies about congressional intent at the time legislation is passed. The agencies or individual legislators, not the GAO, draft most legislation, defend it in hearings, and comment on changes as it progresses through the Congress. In most cases the GAO's insights about legislative intent are reconstructed after the fact and thus are usually less accurate than the insights of agencies and often are little better than those of any other outside observer.

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59. The issues concerning standing to sue have been set out at length elsewhere. *E.g.*, L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, ch. 12, 13 (1965); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE, 208-94 (1958). Briefly, the older cases held that only someone whose "legal right" was infringed by administrative action had standing to complain. This was questioned in cases holding that a "person aggrieved" by administrative action, *e.g.* FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940), or one acting as a "private attorney general," *e.g.* Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir. 1943), had standing to sue.

In Associations of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970), a group of data service companies challenged a rule of the Comptroller of the Currency allowing national banks to provide data services. The lower courts had denied standing, holding that there was no legal injury if their damages stemmed from mere competition. There was no legal right, the court said, to be free from competition. The Supreme Court reversed and specifically rejected the "legal interest" test. The court said that the "question [was] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. *See also* Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970); Barlow v. Collins, 397 U.S. 159 (1970).

Our hypothetical soldier ordered to Laos or Cambodia would have to contend that the restriction was "arguably" designed to protect him. The question is not free from doubt, but he might seem to be *among* the classes Congress had in mind when the section was passed. *Cf.* Holtzman v. Schlesinger, 42 U.S.L.W. 2067 (E.D.N.Y. July 25, 1973) (Congresswoman and pilots seek to enjoin bombing of Cambodia).

60. *E.g.*, Shnitzer § 1734.

Secondly, "congressional intent" is elusive and probably nonexistent on most controversial programs. That is, individual legislators certainly had understandings of what was intended by particular phrases in the Civil Rights Act of 1964, for example, but there probably was no consensus. When one talks about the "intent" shown by legislative silence on an issue, the problem is even worse. This is probably true even if the bill's managers expressed one view or another, since when the vote came theirs counted no more than any others. And if the GAO should act today on some legislator's criticism, based on *present* statements of *previous* intent, the opportunities for error are obvious.

GAO resolution of these issues of intent has at least two other unavoidable consequences. First, GAO consideration of these cases is often shielded from public view and thus can be a way of burying controversy rather than revealing problems. The press and public show signs of greater sophistication about the importance of GAO reports, but the agency is still largely anonymous. If a question were raised about the legality of the Vietnam War or the use of federal funds for busing, for example, it would be publicly reported and the issues aired far better in court instead of before the GAO. Any compromise or settlement of the issues would likewise be open to public scrutiny in a way that the quiet dropping of a GAO investigation would not.

Secondly, it seems a mistake to entrust judgment to an agency "loyal to" one of the disputants. Important as increasing congressional authority may be, reducing executive responsibility for decisions inevitably tends to weaken executive accountabilty for results. It is as important to a healthy balance of power that executive discretion be preserved as it is that congressional limits be respected. It is not unreasonable to expect that a group of legislators—particularly committee chairmen or others with influence and seniority—eager to have a program managed a particular way would call upon the Comptroller General to hold that any other management is "illegal."[61] The GAO has a remarkable record of independence, but as discussed earlier, the Philadelphia Plan issue appears to have been raised in just this way. While there are always some limits on authority, it seems that proceedings to enforce them should not be instigated as a method of sub-

61. J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 161 (1964): "The 'agent of Congress' becomes in effect the agent of powerful individual members, or particular parts of Congress."

stituting congressional for executive management.[62]

Of course, one can argue that an agency could always "appeal" the Comptroller General's decision by asking the full Congress to change the law. If things were that simple, however, individual legislators could equally well accomplish their purposes through new legislation. The fact is that in most cases neither side wants that burden. One need only contemplate the likelihood of achieving either repeal or reconfirmation of the Civil Rights Act of 1964 today to understand the problem.

The Original Understanding of GAO Authority

The question of the Comptroller General's authority really comes down to what the statute means when it says his decisions in settlements of public accounts are "final and conclusive on the Executive Branch."[63] Comptroller General McCarl argued that it means an executive agency is obliged to abide by the Comptroller General's rulings even in the face of contrary judicial opinion.[64]

There is a logical test for that proposition. If it is true, a court should consider the Comptroller General's findings—whether of fact or law—"final and conclusive" in later litigation to enforce his ruling. That does not seem to have been Congress' intent. The power to "settle and adjust," as well as the "final and conclusive" language, were both carry-overs from the powers of the Comptroller of the Treasury. As the Congress was certainly aware, his authority had not been construed to be "binding" on anyone, in the sense later Comptrollers General have used that term, because his decisions were subject to judicial review *de novo* in any proceeding to recover an overpayment or enforce a disallowance.[65]

62. Attempted congressional management of the executive can arise in several other forms. The best account is given in the Brookings Institution study, J. HARRIS, *supra* note 61. Two particularly analogous forms of direct intervention are the requirements that agencies "come into agreement" with the requisite congressional committee before taking action, *id.* at 213-32, and the requirement that a proposed program lie on the table, usually for sixty days, to give the Congress time within which to disapprove the proposal, *id.* at 206-13. The constitutionality of such practices are open to question. *Id.* at 238-48. *See also* Whelan, *Purse Strings, Payments and Procurement*, 1964 PUB. L. 322, 347-48; Whelan & Phillips, *Government Contracts: Emphasis on Government*, 29 LAW & CONTEMP. PROB. 315, 325-31 (1964).

63. 31 U.S.C. § 74 (1970).

64. *See* text accompanying note 24 *supra*.

65. MANSFIELD 106-07. *See generally, id.* 93-117. This has to be qualified in that there were classes of claims against the Government which were cognizable by the Comptroller and Auditors of the Treasury but not by the Court of Claims. *E.g.*,

Kihlberg v. United States[66] was the seminal case in this area. In that case a contract for shipping goods through Indian territory had provided that the Army Quartermaster's determination of the distance shipped would be used to calculate compensation. The Government later tried to set the Quartermaster's determination aside on the grounds that his estimate of distance had been wrong. The Supreme Court however held that the Government is bound by the contracting agent's decision. The payee cannot be forced to give money back even upon the later determination that the Government agent was wrong.

Kihlberg was then the basis for a series of decisions that gave finality to determinations of executive officers. One of these cases related directly to the power of the Comptroller of the Treasury. In *United States v. Mason & Hanger Co.*[67] the issue was whether the contractor had to refund to the Government the cost of a bond premium for which he had been reimbursed under a cost-type contract. The contracting officer had considered it a reimbursable cost, but the Comptroller of the Treasury had disagreed. The Supreme Court followed *Kihlberg* and concluded that "the Comptroller of the Treasury has no power" over payments made in settlement of a contract.

Finally, in *Smith v. Jackson*[68] the Auditor of the Panama Canal Zone had withheld sums from the salary of the district judge to represent rent for Government-furnished quarters for a period when he was absent from the Canal Zone. The judge sued for the amount in question, and the Supreme Court affirmed his right to it in no uncertain terms, saying, "[T]he auditor had no power to refuse to carry out the law and . . . any doubt which he might have had should have been subordinated, first, to the ruling of the Attorney General and, second, beyond all possible question to the judgments of the courts below."[69]

Cases attempting to charge disallowances to the disbursing officer gave equally little weight to the decision of the Comptroller. Comptroller of the Treasury Warwick told Congress:

> [T]here is no great inclination on the part of the courts to recognize what might be called the technical laws for the use of ap-

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United States v. Babcock, 250 U.S. 328 (1919). These never reached the stage of "illegal" payments. More on claims, particularly the impact of S & E Contractors v. United States, 406 U.S. 1 (1972), appears in text accompanying notes 91-168 *infra*.

66. 97 U.S. 398 (1878).

67. 260 U.S. 323 (1922).

68. 246 U.S. 388 (1918).

69. *Id.* at 390-91.

> propriations. If the Government has received a benefit from the use of money, ordinarily the court will not give judgment against the principal for the surety.[70]

For example, in *United States v. Warfield*[71] a Baltimore postal clerk had been assigned to Washington by the Postmaster General, contrary to statute. The Baltimore postmaster, who was a disbursing officer, had no actual knowledge of where the man worked, and all payments were in accordance with departmental regulation. The Comptroller nevertheless sought to hold the postmaster personally liable for repayment of the clerk's salary, a result the court of appeals termed "unconscionable." Quoting the district court, it said:

> I have not found a reported case in which an innocent disbursing agent has been held liable under such circumstances. It hardly seems that the financial operations of the Government could go on if at the peril of refunding the money every subordinate was required to exercise his own judgment as to whether an apparently legal claim which his superior directed him to pay was to be paid or not.[72]

It was against this backdrop that the Budget and Accounting Act of 1921 created the GAO. The cases since 1921 suggest that these principles have not changed. In *Miguel v. McCarl*[73] an enlisted man in the Philippine Scouts sought regular Army retirement pay. When the voucher for that pay came to the Army disbursing officer for Manila, it was sent to the Comptroller General for an advance decision on the legality of payment. Comptroller General McCarl ruled payment illegal and kept the voucher, so an action was brought to compel him by mandamus or injunction to reverse his decision and return the voucher for payment. The Court found not that his decision was "final" but instead that he was so clearly wrong that return of the voucher was in order.

Further, in *United States v. Heller*[74] an Army captain acting as a disbursing officer had bought caskets for reburial in America of soldiers who had died in France. Citing emergency conditions, he had not used formal advertising, and the Comptroller General sought recov-

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70. *Hearings on the Establishment of a National Budget System Before the House Select Comm. on the Budget*, 66th Cong., 1st Sess. 237 (1919).

71. 170 F. 43 (4th Cir. 1909).

72. *Id.* at 45-46.

73. 291 U.S. 442 (1934). Interestingly enough, the Court was wary of issuing a mandatory injunction to a legislative official, so it simply "called [his] attention" to the decision in the belief he would act accordingly. *Id.* at 456.

74. 1 F. Supp. 1 (D. Md. 1932).

ery on his bond for the amount of the expenditure. The court relied heavily on *Warfield* in denying recovery, and its analysis of the respective power of the Comptroller General and the courts is significant:

> [T]he Comptroller General is charged with the duty of seeing that there is some formal investigation, at least, in regard to the propriety of those items—hence this suit—and, of course, it is the duty of the court in a case of this kind to . . . see whether the government has made out its case.[75]

This statement seems to put the issue well. Some commentators, trying to be deferential to the Comptroller General, have said his decisions are "conclusive on the Executive Branch" but not on the judicial branch.[76] That is sheer doubletalk. To say that the Comptroller General's views are "conclusive" at all when in fact they are of no effect in court can only have a chilling effect on executive discretion.[77] This is not to say that the disbursing officer will suffer no penalty if his payment is found in fact to have been egregiously illegal. It is to say that the court will utterly ignore the Comptroller's opinion in making its findings.[78]

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75. *Id.* at 2.

76. Shnitzer § 1739. *See also* 115 CONG. REC. 39,969 (1969) (remarks of Senator Byrd).

77. It can be argued that the Comptroller General's power of disallowance is simply a device to get issues into court for a judicial test. 115 CONG. REC. 39,963 (1969) (remarks of Senator Allott); *id.* at 39,970 (remarks of Senator Holland). As discussed, however, the Comptroller General has not considered himself so limited.

78. *See* Leeds & Northrop Co. v. United States, 101 F. Supp. 999 (E.D. Pa. 1951); James Graham Mfg. Co. v. United States, 91 F. Supp. 715 (N.D. Cal. 1950); Climatic Rainwear Co. v. United States, 115 Ct. Cl. 520 (1950).

It is fair to ask what arguments the Comptroller General has in his favor that has allowed him to maintain his position this long. One is the fact that the Comptroller of the Treasury had been given specific statutory authority to construe statutes in order to provide consistency among the six auditors. Act of July 31, 1894, ch. 174, § 8, 28 Stat. 208. Since the Budget and Accounting Act then provided that the Comptroller General succeeded to the powers of the Comptroller of the Treasury, 31 U.S.C. § 71 (1970); *see* 33 OP. ATT'Y GEN. 383 (1922), the answer to this argument is that an initial construction of statutes is necessary in the process of auditing vouchers and the Comptroller of the Treasury had been given this role to make the various auditors' rulings uniform. 26 CONG. REC. 4299-300 (1894).

Next, there was a repeated discussion of the "judicial role" of the Comptroller General in the debates on the Budget and Accounting Act. *E.g.*, 58 CONG. REC. 7131 (1919) (remarks of Congressman Good); *id.* at 7136 (remarks of Congressman Hawley). From this it might be concluded that he was to have judicial power. In fact, however, the references were all in the context of the salary and tenure the Comptroller General should have. There was substantial concern that he not become beholden to the agencies and that he fearlessly point out their waste, but beyond that the reference to "judicial role" was mere hyperbole. For example, "[J]udicial powers . . . must be exercised by the comptroller general . . . . [However] [a]nyone who feels aggrieved by the decision may go to the Court of Claims and sue there to protect his rights . . . ." *Id.* at 7278 (remarks of Congressman Andrews).

A Matter of Separation of Powers

The question then arises whether Congress could give the GAO such review authority even if it wished to. The suggestion has been made by executive officials from the President on down that a genuine separation of powers issue is presented.[79] The Comptroller of the Treasury could have the power of disallowance, it is argued, because he was in the executive branch. Giving the same power to the GAO, on the other hand, would be unconstitutional because it would be interfering with executive discretion.

As indicated above, there may be practical arguments in favor of this separation of powers approach. It is probably important that no department of government—not even Congress—be both lawmaker and judge. There is little question that Congress can and should assert a rule in policy-making by prescribing particular actions of executive agencies by specific restrictions on appropriations. The separation of powers question is raised only where Congress or its agent also decides when a violation has occurred. Each year Congress must pass a new appropriation. Each year it can thus impose limits on future behavior. Beyond that it probably should not go. A realistic reading of the case law, however, gives little basis to suggest that the courts would find a constitutional issue.

In *Kendall v. United States ex rel. Stokes*[80] Congress had passed a law expressly requiring the Postmaster General to pay the plaintiff a sum owed him. The Postmaster General argued that for the legis-

79. *E.g.*, 1969 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON 1038-39 (1969), also found at 115 CONG. REC. 40,738 (1969); *Hearings Before the Subcomm. on Production and Stabilization of the Senate Comm. on Banking, Housing and Urban Affairs, on S. 669 & S. 1901*, 92d Cong., 2d Sess. 116-18 (1972) (statement of Dwight A. Ink, Office of Management and Budget); 117 CONG. REC. 7278 (1971) (letter from George P. Shultz, Director, Office of Management and Budget); 115 CONG. REC. 39,957 (1969) (letter from Atty. Gen. John Mitchell); *Hearings Before a Subcomm. of the House Committee on Gov't Operations on H.R. 474*, 91st Cong., 1st Sess. 1784-89 (1969) at 1784-89 (testimony of Irving R. Jaffe, Department of Justice).

A related skirmish over separation of powers concerns the Cost Accounting Standards Board, 50 U.S.C. § 2168 (1970). This is a five member board, chaired by the Comptroller General, which seeks to establish uniform accounting rules for federal contracts. It is said to be in the legislative branch of the government, and the Nixon administration wants it moved to the executive branch. *See* S. 1901, 91st Cong., 1st Sess. (1971); *Hearings on S. 699 and 1901 before the Subcomm. on Production and Stabilization of the Senate Comm. on Banking, Housing and Urban Affairs*, 92d Cong., 2d Sess. (1972).

80. 37 U.S. (12 Pet.) 524 (1838). On the question of review of the Comptroller General, see MANSFIELD 106-07.

lative branch to order him, as a discretionary executive official, to act was a breach of the separation of powers. The Supreme Court held, however, that where legislation was specific and otherwise valid, it could create a ministerial duty even for a member of the President's cabinet. In dicta the Court suggested that there were discretionary powers inherent in the Executive that Congress could not regulate, but it did not elaborate further.

The idea of inherent executive authority reached its zenith in *Myers v. United States.*[81] President Wilson had tried to remove a postmaster from office in the face of a statute that said that postmasters could be fired only with Senate approval. The Supreme Court held that the requirement of Senate approval was unconstitutional because removal of inferior officials was an inherent power of the President not subject to congressional review.

The Court's dictum in a case just two years later was even more favorable to this position:

> It may be stated then, as a general rule inherent in the American constitutional system, that, unless . . . incidental to the powers conferred, the legislature cannot exercise either executive or judicial power . . . .
>
> Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.[82]

The argument from these cases would be that the General Accounting Office, a legislative agency, may not use the audit power to direct the day-to-day activities of the managers in the executive branch. Congress may pass legislation, the argument would run, but they cannot directly enforce it.[83]

Later cases, however, have eroded beyond recognition the constitutional concept of inherent power. Less than a decade after deciding *Myers*, the Court all but overruled it in *Humphrey's Executor v. United States.*[84] The cases were different—Humphrey was an FTC Commis-

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81. 272 U.S. 52 (1926).

82. Springer v. Philippine Islands, 277 U.S. 189, 201-02 (1928). The case held that vesting the control of Philippine government corporations in legislative officials violated the separation of powers provisions of the Philippine Organic Act which the Court in the quoted passage compared to the American constitution.

83. The testimony of Mr. Jaffe, *1969 Hearings, supra* note 79, develops this argument most fully.

84. 295 U.S. 602 (1935).

sioner while Myers was a postmaster—but the Court limited *Myers* to cases of "purely executive officers" and specifically disapproved its broad dicta about inherent executive authority and inherent limits on congressional power.[85]

Youngstown Sheet & Tube Co. v. Sawyer[86] further eroded the constitutionally protected sphere of executive discretion. The Supreme Court rejected President Truman's claim of inherent authority to take over steel mills, even in a national emergency. It pointed out that Congress had passed no legislation specifically authorizing seizure and indeed had considered and rejected such a course. Justice Jackson, in his concurring opinion, was more specific:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.[87]

Finally, it goes without saying that Congress can establish administrative agencies with investigative, legislative, and judicial authority substantially intertwined. To be sure, such agencies are generally subject to procedural limitations not imposed upon the GAO, and no pretense is made that they are necessarily loyal to Congress. The point is, however, that Congress can create them largely independent of and to some extent regulating the executive.

The question, then, does not seem really to be whether Congress could give the GAO the power of disallowance. It could. As a bargaining point in the current battle to regain parity with the executive, it even may constitute a credible threat. In an ideal world, however, the argument for separation of function is an argument Congress itself should accept as it seeks to make the GAO a more effective aid in the policy-making process rather than simply a monkey wrench in the executive works.

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85. *Id.* at 626-32. Indeed Justice Frankfurter later dismissed the broad *Myers* dicta as the influence of Chief Justice (and former President) Taft. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 726 (1949) (dissenting opinion).

86. 343 U.S. 579 (1952).

87. *Id.* at 637-38; *see* Kauper, *The Steel Seizure Case: The President and the Supreme Court*, 51 MICH. L. REV. 141 (1952); *cf.* The Floyd Acceptances, 74 U.S. (7 Wall.) 666 (1868); Junger, *Down Memory Lane: The Case of the Pentagon Papers*, 23 CASE W. RES. L. REV. 3 (1971) (arguing that New York Times Co. v. United States, 403 U.S. 713 (1971), presents the same separation-of-powers issue as *Youngstown Sheet & Tube Co. v. Sawyer*).

The Proper Role for the GAO

Three bills pending in the 93d Congress would provide a reasonable compromise. They would empower the GAO to file suit for declaratory judgment or injunction against executive action it believes to be illegal.[88] This power would go beyond the GAO's primary function of reporting to Congress and would provide at least one mechanism by which genuine disagreements over the legality of executive action could be tested.

But the GAO needs more than the power to file suit. A disbursing officer is most often acting in accord with a policy that his agency believes legal. The policy may even have been at least informally approved by the Attorney General. The Justice Department can thus find itself in an inherent conflict of interest in such cases. Its duty to prosecute the disbursing officer can conflict with its desire to defend administration policy. No lawyer or group of lawyers should be faced with this conflict of interest. The Justice Department can and apparently does settle most of the cases, which effectively denies the GAO opportunity to get judicial ratification of its position.[89] Thus Congress should give the Comptroller General the authority to have his own Office of General Counsel initiate and manage all litigation against executive action he believes to be in violation of the law.

As suggested above, the GAO should be specifically empowered

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88. These are S. 460, tit. VII, S. 1042, and S. 2049, tit. I, 93d Cong. President Nixon had originally proposed this as a compromise to prevent Congress' passing Senator Ervin's Philadelphia Plan amendment, discussed in text accompanying note 46 *supra*: "The position I am taking is, therefore, that the amendment . . . should be modified to permit prompt court review of any differences between legal opinions of the Comptroller General and those of the Executive and to permit the Comptroller General to have his own counsel (rather than the Attorney General) to represent him in such cases." 1969 PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES: RICHARD NIXON 1038-39. The legislative debate highlighting these issues and problems is at 115 CONG. REC. 39,970-73 (1969).

WILLOUGHBY 61 expressly criticizes this approach since in his view matters of "efficiency" are no business of the courts. It is doubtful, however, that someone writing now—45 years later—would agree, and indeed the Comptroller General participated in developing S. 460, S. 1042, and S. 2049.

89. *See* MANSFIELD, *supra* note 25. Could the GAO even now do more? Some say no, that all the GAO's power comes down to is the power to recommend actions to the Attorney General who may pursue them or compromise them as he wishes. This, however, ignores 31 U.S.C. § 93 (1970), which provides: "The General Accounting Office shall superintend the recovery of all debts finally certified by it to be due to the United States." Could the GAO "superintend" the Justice Department's handling of a law suit based on a certification of debt? *See* 28 U.S.C. §§ 516, 519 (1970). Could it prohibit a settlement or a confession of error? If this authority were ever asserted by the GAO, a separation of powers question would be sharply presented.

to proceed by way of injunction or declaratory judgment, not simply by disallowance. The validity of a payment is a different question from the culpability of the disbursing officer. Such officers rarely are discretionary officials and the object should be to prevent illegal action, not get "compensation" for it. In order to remove the Comptroller General's alleged "control" function once and for all, absolute personal liability of disbursing and certifying officers should be abolished in theory, as it effectively has been in practice. Such officers should be liable only for payments knowingly or negligently made contrary to a specific court decision or unambiguous statute.[90]

CLAIMS AGAINST THE GOVERNMENT

The Philadelphia Plan illustrates the most dramatic kind of GAO confrontation with the executive branch—the attempt to "disallow" an entire program. But conflicts also occur in more mundane settings, such as over the payment of sums allegedly owed by the Government. The GAO's mandate once again is said to be the statutory direction that "[a]ll claims and demands whatever by . . . the United States or against it . . . shall be settled and adjusted in the General Accounting Office."[91] As previously shown, that language is used to justify disallowances upon audit of completed transactions. It is also used to justify prior GAO-initiated intervention into the process of deciding whether a particular Government creditor should be paid.

The Claims Process Generally

Taking the words literally, one possible interpretation of the language "settle . . . all claims" might be to make the GAO the clearing-

90. A useful analogy is provided by the Anti-Deficiency Act, 31 U.S.C. § 665 (1970), which forbids expenditures in excess of appropriations. Criminal penalties are provided for "knowingly and willfully" violating the Act, 31 U.S.C. § 665(i)(1) (1970), and administrative discipline is authorized for lesser violations. *Id.* A report to the President and Congress is required in either case, 31 U.S.C. § 665(i)(2) (1970), but in no case is the offending official personally liable for the money.

Further, Congress even now has given the Comptroller General authority to relieve disbursing officers from "physical loss or deficiency of Government funds, vouchers, records, checks, securities, or papers in his charge" if such loss or deficiency "occurred without fault or negligence on the part of such officer or agent." 31 U.S.C. § 82a-1 (1970). However "illegal" payments may not be so excused. *Id.* Disbursing officers may also seek relief in the Court of Claims 28 U.S.C. § 1496 (1970).

Certifying officers may be relieved from liability by the Comptroller General even if the certified payment was technically illegal. 31 U.S.C. § 82c (1970). The two sections were passed at different times and no explanation of the different treatment is apparent. *See also* 31 U.S.C. § 95a (1970).

91. 31 U.S.C. § 71 (1970). The history of this section is set out at note 13 *supra.*

house for payment or non-payment of all sums allegedly owed by or to the United States. In theory, for example, to decide whether a man was entitled to a pension, the Comptroller General would determine that a man had been in the Army, had been wounded, had been honorably discharged, and so on. Indeed the Comptroller General stands ready to handle some claims himself exactly that way.[92] A claimant need only write a letter stating the nature of his claim and the amount allegedly due. The GAO will then write to the agency for its version of the facts. When the facts are in dispute, the agency version carries a "presumption of correctness,"[93] but the claimant may submit his own documentary evidence, including affidavits, to try to overcome the presumption. If the GAO has substantial doubt about a claim, it will disallow it.[94]

Of course, most claims are not so considered by the GAO. Even when this section was passed in 1817 the Comptroller did not actually handle each transaction.[95] Then as now the vast majority of claims against the Government were physically handled through the agency disbursing officers we have already discussed, a practice that saves time for agencies and claimants alike.

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92. The procedure is set forth in 4 C.F.R. §§ 31.1-.8 (1972). A more complete description may be found in D. PACE, NEGOTIATION AND MANAGEMENT OF DEFENSE CONTRACTS 38-39 (1970); Foster, *The General Accounting Office and Government Claims*, 16 D.C.B.J. 193, 275, 321 (1949); Shnitzer §§ 1736-1751.

We do not in this section discuss collection of debts *to* the United States. To a great extent that was covered in Part I. Agencies are expected to collect most debts themselves. Uncollected debts go to the GAO for coordination and possible set off against sums owed the same person by another agency. The process is more fully discussed in Shnitzer §§ 1752-1767.

Further, this article does not consider the GAO's special statutory responsibility under 49 U.S.C. § 66 (1970) to audit all transportation claims. *See* Shnitzer §§ 1768-1780.

93. *E.g.*, 42 COMP. GEN. 124, 134 (1962); Foster, *supra* note 92, at 279. The regulations are not so candid and say only: "The burden is on claimants to establish the liability of the United States . . . . The settlement of claims is based upon the written record only." 4 C.F.R. § 31.7 (1972).

If this procedure seems archaic, one must remember that the authority to settle claims has remained virtually unchanged since 1817. That was a time when sovereign immunity was in full flower and there was no such thing as a court of claims. If someone had a claim against the United States he took it to the Comptroller or to Congress, and generally was thankful for anything he got.

94. 42 COMP. GEN. 124, 142 (1962); 33 COMP. GEN. 394 (1954). In doing so, the GAO relies on Longwill v. United States, 17 Ct. Cl. 288 (1881), and Charles v. United States, 19 Ct. Cl. 316, 319 (1884): "When . . . doubts are entertained as to the validity of the demands of claimants, the parties may be sent to this court to prove their cases under the rules and forms of law. . . ."

95. For an extensive discussion of the history of claims settlement, *see* WILLOUGHBY 62-69; Cibinic & Lasken 352-58.

Is a claimant's position any different after a GAO "settlement" than after a mere agency payment? If the claim is paid he is theoretically better off because the GAO will be estopped from later "disallowing" the payment.[96] On the other hand, if the agency turns the claimant down he can then appeal to the GAO, while the converse is not true.

Even GAO denial of a claim is not the last word, however. GAO settlement of a claim is said to be "conclusive on the Executive Branch of the Government but not on the claimant."[97] but once again the talk of a "conclusive" decision confuses more than clarifies the matter. A far better way to put the rationale for the finality of both agency and GAO payments at this initial level is the concept of accord and satisfaction. In reality, when the GAO becomes involved it offers to settle the claim for a particular sum. If the claimant likes the offer, he takes it and the matter is closed.[98] If it is unacceptable, he pursues his further judicial or administration remedies. The power to "settle . . . all claims" appears absolute, but that language was written fifty years before creation of the Court of Claims as a viable judicial remedy.[99] Now many claimants can sue directly in that court, and the GAO's conclusions in the matter are utterly irrelevant,[100] just as settlement negotiations would be in any other case.

Surprisingly little conflict has arisen between the GAO and executive agencies with respect to this parallel and overlapping jurisdiction to settle claims.[101] Sums at stake have usually been small, relatively

96. *Cf.* Lambert Lumber Co. v. Jones Eng'r & Constr. Co., 47 F.2d 74 (8th Cir. 1931).

97. Shnitzer § 1739.

98. *Cf.* Marr v. United States, 106 F. Supp. 204, 207 (Ct. Cl. 1952). Seen in this light, the GAO's presumption that the agency is right seems far less arbitrary. It also is reasonable for it to deny any claim "as to which there exists any substantial question of fact or law." Shnitzer § 1739.

99. The Court of Claims was created in 1855. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (1855). The growth in significance of the Court of Claims seems to have taken the GAO somewhat by surprise. In 1924, Comptroller General McCarl wrote:

> [J]udgments of the courts . . . are to be reported to the Congress for appropriations. The appropriations originally available for the particular subject matter are not ordinarily chargeable with such judgments. . . . The difference in the result in the two forums—the courts and the General Accounting Office—here clearly appears. A favorable determination by the General Accounting Office upon a claim makes it immediately payable from such moneys as may remain unexpended in the obligated appropriation. . . .

4 COMP. GEN. 404, 406 (1924).

100. *E.g.*, Iran Nat'l Airlines Corp. v. United States, 360 F.2d 640, 641-42 (Ct. Cl. 1966).

101. One area of minor conflict is illustrated by Marr v. United States, 106 F. Supp. 204 (Ct. Cl. 1952). There a claim for work done for the Alaskan Road Com-

few claimants have gone to the GAO for relief, and as to those that have, the agencies have tended to believe their position was getting fair consideration from the GAO. In theory, this same basic process might be available for "settlement" of disputed sums due under Government contracts. Whether or not it is so available has been a matter of major controversy reaching the United States Supreme Court.

GAO Intervention in the Disputes Process

A Government contract contains clauses that transform what would ordinarily be a breach of contract by the Government into a claim for "equitable adjustment" of the contract price.[102] The con-

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mission was barred by the Court of Claims' six-year statute of limitations. A claim to the GAO may be filed any time within ten years so the GAO settled the claim in question. The Commission resisted paying this sum since it thought the Court of Claims statute protected it. The Court of Claims held, however, that the GAO has clear authority to so settle. The Court of Claims then had jurisdiction to enforce the GAO settlement even though not the original debt.

102. For example, the "Changes" clause in a standard contract for supply of material reads:

> The Contracting officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) Drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change: *Provided,* however, That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. . . . Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

41 C.F.R. § 1-7.101-2 (1972). The "Disputes" clause then reads:

> (a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be 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. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor

tractor must continue work despite the "breach" and must seek his equitable adjustment first from the contracting officer. If they can agree, that is the end of the matter, but if they cannot agree, the contractor has thirty days to appeal to the head of the agency.

Almost invariably this in practice means bringing the case before a board of contract appeals. Such boards are not creatures of statutes. They are established by administrative regulations of their agencies to hear cases arising under agency contracts.[103] The boards range from legal personnel assigned to hear cases on a part time basis to large, full-time boards sitting in regular panels.[104] All, however, hold full, adversary hearings on the facts and law and render a decision on the merits.

It may initially seem somewhat surprising that the GAO would have tolerated so long such an executive procedure that supplants much of its theoretical authority over claims. Comptroller General McCarl had early declared himself authorized to consider even unliquidated disputed claims.[105] The Supreme Court, however, had long held that the power of executive agencies to make contracts includes the power to settle them.[106] The GAO can, and to some extent has, argued that the Budget and Accounting Act amended that rule, but even McCarl recognized that the General Accounting Office has never been equipped to hold adversary hearings.[107] As a result it has been severely hampered in making factual determinations. Deciding whether work was done, at what cost, whether changes were ordered, appropriate overhead rates, and so on, are virtually impossible for the GAO without

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shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above: *Provided,* That nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

41 C.F.R. § 1-7.101-12 (1972).

103. *See* Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals,* 29 LAW & CONTEMP. PROB. 39, 66 (1964).

104. There are now eleven different boards. A listing of them can be found in 4 REPORT OF THE COMM'N ON GOV'T PROCUREMENT 14 (1972) [hereinafter cited as PROC. COMM'N]. A good discussion of Board rules of procedure is provided in Burch, *Discovery Procedures and Techniques Before Government Boards of Contract Appeals,* 4 PUB. CONT. L.J. 119 (1971).

105. 4 COMP. GEN. 404 (1924).

106. United States v. Corliss Steam-Engine Co., 91 U.S. 321 (1875). *See also* Cannon Constr. Co. v. United States, 319 F.2d 173, 178 (Ct. Cl. 1963).

107. 4 COMP. GEN. 404, 405-06 (1924), *quoting* Comptroller of the Treasury Downey in 21 COMP. DEC. 134, 138 (1914).

some sort of documentary record it can take as true. The GAO likewise has never had technical personnel on its own staff, so it must rely on a written record to assess the quality or sufficiency of work done. As a result, deference to agency fact-finding has been a practical necessity. The GAO calls this "exhaustion of administrative remedies,"[108] but the label is misleading. The practice derives solely from expediency and not from primary jurisdiction or any perceived need to defer agency expertise.[109]

If a contractor is dissatisfied with a board of contract appeals decision, his ordinary remedy is an appeal to the Court of Claims.[110] That court's review is not *de novo*. In the early 1950's, in *United States v. Moorman*[111] and later *United States v. Wunderlich*,[112] the Supreme Court had held that there was no judicial review at all of an administrative decision rendered under the disputes clause absent "conscious wrongdoing, an intention to cheat or be dishonest." Congress reversed those decisions by the so-called Wunderlich Act,[113] which provided for an appeal to the Court of Claims on questions of law and the issue of whether the administrative decision was based on substantial evidence.

The GAO was not disinterested in the content of the Wunderlich legislation. In early drafts of the Act, some prepared by it, the GAO

108. 37 COMP. GEN. 568 (1958); Comp. Gen. Dec. No. B-169376 (May 13, 1970) (unpublished); Comp. Gen. Dec. No. B-166501 (Apr. 7, 1968) (unpublished); Comp. Gen. Dec. No. B-160778 (Apr. 25, 1968) (unpublished).

109. Even now, in fact, the Comptroller General insists that some classes of claims, for example, claims for breach of contract, may only be settled in his office. *E.g.*, 44 COMP. GEN. 353, 358 (1969). *But see* Shedd, *Administrative Authority to Settle Claims for Breach of Government Contracts*, 27 GEO. WASH. L. REV. 481 (1959). This view has been contested by the agencies and the Court of Claims does not agree, *e.g.*, Cannon Constr. Co. v. United States, 319 F.2d 173 (Ct. Cl. 1963), but it illustrates that the GAO still considers determination of sums the Government owes to be its function and any power in the agencies in this regard to be more a matter of convenience than a matter of right. Some have proposed an "all breach" disputes clause to eliminate any distinction between breaches covered by the clause and those which are not. *E.g.*, Lane, *Administrative Resolution of Government Breaches—The Case for an All-Breach Clause*, 28 FED. B.J. 199 (1968); 4 PROC. COMM'N 22-23.

The Supreme Court has insisted upon "exhaustion of administrative remedies" before a contractor can file suit in court. *E.g.*, United States v. Joseph A. Holpuch Co., 328 U.S. 234 (1946). In part, then, the exhaustion of remedies language is one more example of the GAO conceiving of itself as functionally like a court.

110. The court's jurisdiction is based on 28 U.S.C. § 1491 (1970), suits founded upon an "express or implied contract with the United States." Concurrent jurisdiction exists in the United States District Courts for claims not exceeding 10,000 dollars. 28 U.S.C. § 1346(2) (1970).

111. 338 U.S. 457 (1950).

112. 342 U.S. 98 (1951).

113. 41 U.S.C. § 321-22 (1964).

was given a right of review of administrative decisions coequal with the courts.[114] That is, either side could "appeal" a board of contract appeals decision to the GAO. Substantial opposition was raised to that, however, primarily by contractors who feared the GAO would be a "watchdog of the Treasury" and regularly reverse decisions favorable to them.[115] Faced with probable defeat of any bill specifically giving the GAO a right of review, the Comptroller General supported deletion of that power in exchange for the following language in the House committee report: "The elimination of the specific mention of the General Accounting Office from the provisions of the bill as amended should not be construed as taking away any of the jurisdiction of that office."[116] The Comptroller General asserted the GAO had lost nothing and was "in precisely the same situation it was in before [the *Wunderlich* case]."[117]

The Function of a Contract Appeals Board

To find one's way through the rhetoric in this area, it is important to see that there are two inconsistent but often simultaneously held views of the nature of an agency board of contract appeals. On the one hand, the disputes clause provides that the board is the "duly authorized representative" of the head of the agency. This may imply that it provides a high level review from the perspective of the Secretary.[118] On the other hand, the trial-type, objective character of the proceeding and the relative finality that is accorded its findings of fact make the Board seem more like an independent administrative court

114. S. 2487, 82d Cong., 2d Sess. (1952), as amended by the Senate. *See* S. REP. No. 1670, 82d Cong., 2d Sess. 1 (1952). This history is set out in great detail in Justice Brennan's dissent in S & E Contractors v. United States, 406 U.S. 1, 23-90 (1972).

115. The flavor of this period is captured in Schultz, *Proposed Changes in Government Contract Disputes Settlement: The Legislative Battle Over the Wunderlich Case*, 67 HARV. L. REV. 217 (1953); Spector, *Is it "Bianchi's Ghost"—Or "Much Ado About Nothing,"* 29 LAW & CONTEMP. PROB. 87, 108-111 (1964). In particular, concern was expressed over what uncertainty over possible GAO "reversal" would do to a contractor's ability to get further credit. Schultz, *supra* at 243-244.

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

117. *Hearings before Subcommittee No. 1 of the House Judiciary Committee on H.R. 1839 et al.*, 83d Cong., 2d Sess. (1953-54) at 136. The question then arises what the GAO's authority was before *Wunderlich*. Courts following the *Kihlberg* analysis had generally not upheld review. *See* James Graham Mfg. Co. v. United States, 91 F. Supp. 715 (N.D. Cal. 1950); Note, *S & E Contractors and the GAO Role in Government Contract Disputes: A Funny Thing Happened on the Way to Finality*, 55 VA. L. REV. 762, 770-72 (1969).

118. *See, e.g.*, McWilliams Dredging Co. v. United States, 118 Ct. Cl. 1 (1950).

than an extension of the executive agency.[119] In the ordinary case the nature of a Board never becomes an issue, but in some it is decisive.

The importance of the distinction is illustrated by *Continental Aviation & Engineering Corp.*,[120] which concerned the allowability of certain overhead costs and the propriety of the contractor's accounting methods in years prior to the current contract. The Assistant Secretary of the Army unilaterally asked for an opinion of the Comptroller General on the question presented. The Comptroller General held that the contractor's proposed cost allocation violated "universally accepted accounting principles" and suggested that the agency recover payments previously made on the "illegal" basis.[121] "By direction of the Assistant Secretary" of the Army, the contracting officer acted accordingly.

An appeal to the Armed Services Board of Contract Appeals followed. It was urged that the Board could not hear the appeal. The Comptroller General had already heard and decided the legal issues, and the Assistant Secretary of the Army had in effect acquiesced. If the Board is the alter ego of the agency head, the Government reasoned, its decision can have no effect once the Secretary has acted. Once the Comptroller General has ruled, it could also have been said, the agency may not act to the contrary.

The Board rejected this view and upheld the contractor's position.[122] It acted as if it were a court, reached the merits, and decided that under the *Kihlberg* principle we have already seen,[123] settlements made under prior years' contracts cannot be upset.[124]

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119. This position is espoused convincingly in Shedd, *supra* note 103, at 68-69. Even so, it is argued by some that a lesser standard of due process than that prescribed by the Administrative Procedure Act is required for board proceedings. *See* Schultz, *supra* note 115; Cuneo, *The Administrative Procedure Act Does Not Apply to Boards of Contract Appeals*, 1 PUB. CONT. L.J. 18 (1967); Spector, *Public Contract Claims Procedures—A Perspective*, 32 FED. B.J. 1 (1972). *But see* Davis, *The Administrative Procedure Act Applies to Boards of Contract Appeals*, 1 PUB. CONT. L.J. 4, 5-7 (1967).

120. 65-1 B.C.A. 22,284 (Armed Services Bd. Contract App. 1965).

121. Comp. Gen. Dec. No. B-152462 (Jan. 15, 1964) (unpublished). A similar request from the Assistant Secretary of the Army for advice on a pending Armed Services Board of Contract Appeals case was rendered several years earlier in Comp. Gen. Dec. No. B-126848 (Feb. 21, 1956) (unpublished). *See also* Comp. Gen. Dec. No. B-118929 (Apr. 10, 1956) (unpublished) (similar request from the General Services Administration).

122. 65-1 B.C.A. at 22,286.

123. *See* text accompanying notes 66-69 *supra*.

124. It might have openly asserted that it was "independent" and not bound by its alter ego's—the Assistant Secretary of the Army's—apparent concession. Instead it avoided facing the issue directly and asserted that the Secretary of the Army had

In so construing its authority, the Board seemed to be acting consistently with the then-most-recent decision of the Supreme Court, *United States v. Carlo Bianchi & Co.*[125] In *Bianchi* the Armed Services Board of Contract Appeals had made a factual record, but the Court of Claims based its reversal in part on new evidence not presented to the Board. If the Board were simply a required step to let the head of the agency make an "offer" before the contractor went to court, such an approach would be sound. The level at which the contractor introduced his evidence would be his business. If, however, the Board is the "trial court" in a judicial process, no new evidence should come in on appeal.

The Supreme Court took the latter view. It recognized that the administrative proceeding is an essential part of the expeditious, fair resolution of claims. Thus both sides should be compelled to make their best case at the first level. *Bianchi* was immediately seen as an important decision and was widely read to give a quasi-judicial status to Board proceedings.[126]

Even after *Bianchi*, however, the GAO considered that it, too, had a role in the disputes process. For example, in one case it ruled that the AEC Board of Contract Appeals had no jurisdiction to entertain an appeal filed more than thirty days after the decision of the contracting officer. No opinion on the merits of the claim was expressed—that

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never actually considered the issue carefully. Thus, the Board reasoned, it was able to act.

Other boards of contract appeals have held they are not ousted of jurisdiction by the fact that the GAO has previously rendered an opinion on the same factual and legal questions in the same case. Blake Constr. Co., 71-2 B.C.A. 41,986 (Gen. Services Admin. Bd. Contract App. 1971); So-Sew Styles, Inc., 71-1 B.C.A. 41,115 (Armed Services Bd. Contract App. 1971); Emerson Radio & Phonograph Corp., No. NBS-1 (Commerce Dept. Ed. Contract App. Aug. 14, 1957) (unpublished), *discussed in* Comp. Gen. Dec. No. B-120714 (Feb. 27, 1958) (unpublished).

But see Winston Bros. Co., 67-1 B.C.A. 29,367, 67-2 B.C.A. 30,751 (Interior Bd. Contract App. 1967); Reid Contracting Co., 58-2 B.C.A. 8523 (Interior Bd. Contract App. 1958); Lipsett, Inc., 57-2 B.C.A. 4999 (Armed Services Bd. Contract App. 1957).

See also Comp. Gen. Dec. No. B-134500 (Feb. 6, 1961) (unpublished), where the Comptroller General conceded that his earlier decision was not binding on the Board because it was based on incomplete facts.

125. 373 U.S. 709 (1963).

126. *E.g.*, Davis, *supra* note 119; Comment, *Government Contract Disputes: An Institutional Approach*, 73 YALE L.J. 1409, 1443 (1964).

Bianchi was reaffirmed three years later in United States v. Anthony Grace & Sons, Inc., 384 U.S. 424 (1966). There the appeals board had ruled it had no jurisdiction and thus had made no record or findings on the substantive issues. The Court of Claims reversed the jurisdictional point and proceeded to take evidence itself on the substantive questions. The Supreme Court reversed saying the case should have been sent back for the Board to make the record.

was not properly before the Comptroller General—but the AEC was ordered not to pay the sum it had determined was due.[127]

Shortly thereafter, in a case involving the Curtiss-Wright Corporation, the Armed Services Board of Contract Appeals had computed rental on Government-furnished equipment used in commercial work.[128] The GAO thought the formula used was inadequate to compensate the Government, but a final settlement had been made prior to the GAO decision. Rather than proceed down the hopeless road of disallowance, the Comptroller General reacted by sending a directive to all executive agencies:

> Effective immediately, any release or contractual instruments entered into as a result of a decision by a board of contract appeals, the head of an agency, or a contracting officer under a contract disputes clause shall include a provision to the effect that the instrument is not binding if the decision is later found to be in violation of the standards set forth in the Wunderlich Act.[129]

The directive was universally ignored,[130] but the GAO's conception of its role was once again made clear.

The GAO was not alone in its view of its role in disputes cases. It was able to cite what seemed to be judicial confirmation of that role. In *C.J. Langenfelder & Sons v. United States*[131] the Federal Aviation Agency Contract Appeals Panel had reversed the contracting officer and granted the plaintiff's claim. The contracting officer refused to

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127. 42 COMP. GEN. 357 (1963). The substantive point of this decision is probably no longer good law. *Cf.* Money Aircraft Parts, Inc. v. United States, 453 F.2d 1260 (Ct. Cl. 1972). In yet another case, the Comptroller General held *Bianchi* applied to him and forbade his considering evidence not before the Board. 43 COMP. GEN. 1 (1963). In Comp. Gen. Dec. No. B-142040 (Aug. 27, 1962) (unpublished), Comptroller General Campbell had disagreed with the Board but found its opinion supported by substantial evidence and thus did not try to reverse it. *See also* Comp. Gen. Dec. No. B-144847 (Feb. 14, 1961) (unpublished); Comp. Gen. Dec. No. B-136897, B-139976 (Nov. 18, 1959) (unpublished); Comp. Gen. Dec. No. B-105694 (Nov. 16, 1951) (unpublished).

128. Curtiss-Wright Corp., 58-2 B.C.A. 7770 (Armed Services Bd. Contract App. 1958), 59-2 B.C.A. 10,711 (Armed Services Bd. Contract App. 1959), 59-2 B.C.A. 11,603 (Armed Services Bd. Contract App. 1959).

129. Comp. Gen. Directive No. B-125096, at 1 (Apr. 30, 1963). Comptroller General Campbell continued:

> Since the Congress clearly intended that relief would be provided in any case where a disputes decision did not conform with the standards of the Wunderlich Act, it is clearly inappropriate to permit a release or other contractual instrument to create finality in such a decision and thus, as a practical matter, to circumvent the intent of the Congress in the Wunderlich Act.

Id. at 3.

130. Cibinic & Lasken 371.

131. 341 F.2d 600 (Ct. Cl. 1965).

pay, and the plaintiff sought summary judgment to confirm what the Board had awarded. The Court of Claims held that

> [A]dministrative rulings against the Government are not wholly free from judicial review. The Comptroller General had long asserted authority to examine such determinations and to deny payment on the basis of illegality. . . . 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. . . . Where the issue is one of law (*e.g.*, interpretation of the contract), this court has upheld exercises of that power.[132]

Indeed the Court of Claims in *Associated Traders, Inc. v. United States*[133] had expressly permitted GAO disapproval of a Board decision to be used as the basis for a Government "appeal." There the Government simply refused to pay a Board award. That forced the contractor to appeal himself. Rather than enforce the Board decision as final, the Court of Claims reviewed the decision using the Wunderlich Act standards. The right of Government appeal was thus arguably established, at least by the Court of Claims.

The S & E Contractors Case

Although these earlier examples of GAO review of contract appeals board decisions existed, the critical test of GAO authority was provided by *S & E Contractors, Inc. v. United States*,[134] a case which has implications for each of the issues raised in this article about GAO authority.

In 1962 S & E Contractors had built an enclosed testing basin for the Atomic Energy Commission (AEC) at a site in Idaho. Its bid price had been 1.3 million dollars, but its actual costs, including overhead and profit, were 2.7 million dollars. The company filed a claim with the contracting officer for the 1.4 million dollar cost increase.

The contracting officer denied most of the company's claim. Since the AEC had no board of contract appeals at that time, the matter was referred to a hearing examiner who reversed the contracting officer and sustained most of the contractor's demands. The

132. *Id.* at 608 (citing cases).

133. 169 F. Supp. 502 (Ct. Cl. 1959). This case was decided by the Court of Claims the same day it decided Bianchi. The latter was reversed by the Supreme Court in 1963, as we have seen. It took the Supreme Court nine years longer to wipe out *Associated Traders* in S & E Contractors, Inc. v. United States, 406 U.S. 1 (1972).

134. 406 U.S. 1 (1972).

AEC in effect upheld the hearing examiner on four of the eight claims by exercising a certiorari-like power not to review; on three others it affirmed his decision as modified.[135] The contracting officer was directed to determine the amount due and make payment accordingly.

At this point an AEC certifying officer wrote to the GAO for an advance opinion on whether he could legally pay the Commission's award on one of the disputed claims. The GAO ruled that "essentially a question of law" was presented and that because the Wunderlich Act makes board decisions of law not final, it could therefore review the case. It took the GAO almost three years to reach a decision. Then, in late 1966 the GAO ruled that not only the claim it had been asked about, but also all of the contractor's other claims, should be denied because the AEC's decision upholding them was "not supported by substantial evidence."[136] At that point, the AEC concluded that it would "take no action in connection with the claims, inconsistent with the views expressed by the Comptroller General."[137]

The contractor's only recourse was to file suit in the Court of Claims. He cited the decision of the AEC as binding and said the Government was in breach of contract for not paying. Adding breach damages to his original claim, the damages sought rose to almost two million dollars.

The Justice Department in defending the appeal had its own axe to grind. It did not want to concede that the GAO had any right to review the decisions of executive agencies. Instead the Justice Department made a "thorough and independent review" of the whole record itself and made an "uninfluenced" decision that the AEC decision was indeed wrong.[138] The Attorney General urged the court to see the GAO intervention "as being the occasion but not the cause of the litigation and in no way itself an administrative decision having effect . . . or coming under . . . review" in the Court of Claims.[139]

The Court of Claims upheld the Justice Department's view. It held

> that the Comptroller's powers of decision and settlement, though great, may be assumed to lapse and fail at the Court House

135. *Id.* at 5-6.
136. 46 COMP. GEN. 441, 451 (1966). The opinion goes into elaborate detail on the GAO's theory of its jurisdiction. *Id.* at 451-63.
137. 433 F.2d 1373, 1374 (Ct. Cl. 1970).
138. *Id.* at 1375.
139. *Id.*

> door. Therefore, it is not necessary for us to determine what decisions he might make or what finality they might have in cases not brought before us.[140]

The Court, following its own precedents, sent the case back to the Commissioner for review under Wunderlich Act standards.

The Supreme Court reversed in 1972 in an opinion by Justice Douglas. The purpose of the disputes clause is, the Court said, "to provide a quick and efficient administrative remedy and to avoid 'vexatious and expensive and, to the contractor oftentimes, ruinous litigation.'" This case was almost ten years old, the court noted, and that almost *per se* provided an example of "vexatious litigation."[141]

> A citizen has the right to expect fair dealing from his government . . . and this entails in the present context treating the government as a unit rather than as an amalgam of separate entities. . . . [T]he A.E.C. spoke for the United States and its decision, absent fraud or bad faith, should be honored.[142]

The result in the particular case was not entirely unexpected. Indeed even the GAO had admitted that its review authority was indirect and limited to causing the AEC to withold payment.[143] The Government's only real argument was the theory that both parties—not just the claimant—should be held to have a right of appeal. The Court, however, dismissed the idea, saying, "Normally . . . the duty of the Department of Justice is to implement [an agency] decision and not to repudiate it."[144]

More damaging to the GAO than the result, which after all was basically consistent with *Kihlberg*, may be the court's gratuitous dicta. First it spoke of GAO and Justice Department review as "additional

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140. *Id.*

141. 406 U.S. at 8, *quoting* Kihlberg v. United States, 97 U.S. 398, 401 (1878). *Kihlberg* is discussed at text accompanying note 66 *supra*. It, of course, did not involve a disputes clause.

On the matter of the timely decision, *see* Sun Shipbuilding & Dry Dock Co. v. United States, 461 F.2d 1352 (Ct. Cl. 1972). There the Maritime Administration had had a claim before it for four years, and the contractor finally filed suit before the Board decision alleging the delay constituted a breach of contract over which the Court of Claims had jurisdiction. The court agreed that in some circumstances delay could be a breach but found four years was not too long in this case.

142. 406 U.S. at 10.

143. Brief for United States at 44. The Government was represented in the Supreme Court by the Justice Department, specifically by Mr. Irving Jaffe of the Civil Division, who has been at odds with the GAO's view of its jurisdiction. *See* notes 59 & 79 *supra*. In order to get the GAO position before the Court, the GAO prepared a ten-page appendix to the Government's brief.

144. 406 U.S. at 13.

bureaucratic oversight,"[145] hardly boding well for any alleged power of disallowance. Then, in a footnote the Court discussed the specific statutory power given the GAO to inspect contractor records looking for kickbacks and said: "If the Comptroller General has the broad, roving investigatory powers that are asserted, specific statutory grants of authority such as this provision relating to kickbacks would be superfluous."[146]

Justice Blackmun, speaking for four Justices, added insult to injury in a statement directly undercutting any pretentions as to the power to disallow:

> [T]he Government, by its position here, would grant itself the right to challenge its own executive determination whenever the General Accounting Office, by interposition, thinks this should be done. This, for me, does not make good sense and, in the absence of clear congressional authorization, I doubt that it would make good law.[147]

Justice Brennan wrote a lengthy dissent, convincingly showing the role the GAO had played, or tried to play, since 1921. He argued that at the time the Wunderlich Act was passed, a right of appeal existed in the Government, albeit not an appeal to the GAO.[148] Only two other Justices were persuaded, however, and the GAO has gotten out of the disputes business, at least for now.[149]

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145. *Id.* at 14.

146. *Id.* at 10 n.8.

147. *Id.* at 20.

148. *Id.* at 23-90. The opinion was joined by Justices White and Marshall. The Wunderlich Act says simply that the board's decision shall not be "final on a question of law," 41 U.S.C. § 322 (1970), or where its findings are "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence." 41 U.S.C. § 321 (1970). It has been argued that a decision not satisfying those standards is wholly void, and that the invalidity thus may be asserted by anyone, including the GAO. The problem with such reasoning is that the disputes clause is more precise and says a board decision is "final" until reversed "by a court of competent jurisdiction." *See* note 102 *supra.* This more specific language could and should be said to estop the Government from denying finality. Further, *S & E Contractors* could easily have been decided on this more narrow basis and thus could have answered Mr. Justice Brennan's elaborate discussion of legislative intent.

149. Indeed the GAO might argue that its authority to collaterally attack a Board decision is not directly affected by *S & E Contractors.* That is, it might argue it could set off the "illegal" award on a later contract, *see, e.g.*, United States v. Cohen, 389 F.2d 689 (5th Cir. 1967), or direct the Justice Department to sue to recover the "illegal" payment. The message of *S & E Contractors* seems loud and clear, however, that once a contractor gets an award, it is his and no "bureaucratic" review can take it from him. The Court of Claims has so held. In Dynalectron Corp. v. United States, 18 CCH CONT. CAS. F. ¶ 81,757 (Ct. Cl. 1972), the board had ruled partly for the contractor and partly for the government. Each appealed from part of the decision. The court held the contractor's objections could be heard but the government's

What Should the GAO Role Be in the Disputes Process?

If a board of contract appeals proceeding is in effect a request that the head of the agency informally look over what his contracting officer decided, then *S & E Contractors* is right: the board decision should be looked at as a mere offer which the claimant may choose to accept or reject. The claimant should be able to "appeal," *i.e.*, get a binding judgment, but the agency should not be able to impeach its own offer. *A fortiori*, as *S & E Contractors* held, the GAO should be able to criticize agency settlements but not stop payments.

If, on the other hand, a board appeal is seen as the first step in an adversary judicial procedure, it makes little sense to say one litigant is bound by it but not the other.[150] This latter view seemed to have been taken in *Bianchi*, and *S & E Contractors* notwithstanding, it seems more to comport with reality.

Boards of contract appeals today are a mixed lot of varying independence and quality, but the idea of the board acting as alter ego of the head of the agency is ludicrous—at least as regards the major boards. Suggestions have been made to move more nearly to a few full-time independent boards which behave and are treated as independent bodies.[151] The suggestions have regularly been opposed by

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could not. The GAO has heard the message of *S & E Contractors* and has quietly retreated from its practice of review. Comp. Gen. Dec. No. B-174899 at 5 (June 1, 1972) (unpublished): "[T]his Office . . . will no longer review Board of Contract Appeals decisions absent a showing of fraud or bad faith." Indeed in 52 COMP. GEN. 63 (1972), it even withdrew its objection to payment under a Board award it had "reversed" before *S & E Contractors*.

150. Justice Blackmun, joined by Chief Justice Burger and Justices Stewart and Powell, uncritically accepted a proposition that illustrates the problem exactly. He wrote, "The result would be a strange one if, as even the GAO here concedes, a contracting officer's decision favorable to a contractor possesses finality . . . while a decision at the higher level of the agency itself does not." 406 U.S. at 20-21. That result is not at all strange if one sees the contracting officer's decision as an "offer," the acceptance of which constitutes an accord and satisfaction, while the Board's decision is analogous to that of a trial court which may be appealed by either side. Put another way, it is presumably not "strange" that the Government may seek certiorari from a decision of the Court of Claims. To find appeal from a Board decision "strange" is to assume away the question: Is the Board more like a court or more like an informal superior of the contracting officer? The Commission on Government Procurement, by a vote of seven to five, has now proposed reversing *S & E Contractors* by legislation to give both sides the right of appeal. 4 PROC. COMM'N 25-27. This recommendation has been incorporated as § 9(e) of H.R. 9062, 93d Cong., 1st Sess. (1973).

151. *E.g.*, Frana, *Are There Too Many Boards of Contract Appeals?*, 17 CATH. U.L. REV. 44 (1967). The boards are now purely creatures of contract and administrative regulation. In order to confirm their jurisdiction and trial-type character, legislation would be desirable.

In fairness, it should be said that there is a strong current of thought that boards

the small agencies, who believe that separate boards better understand the problems of specific agencies. Consolidation, or at least common rules of procedure,[152] seem essential, however, to have a fair, responsive system.

What would be the GAO's role in such a system? Congress could use *S & E Contractors* as a catalyst for legislation, as it did with *Wunderlich*, and could grant the GAO the power of review. It should not do so, however. First, the GAO is not equipped to act as an appellate court. Of course, in this kind of proceeding, especially after *Bianchi*, fact-finding is no problem. But GAO review is wholly *in camera*, by members of the general counsel's office unknown to the parties. Further, the GAO is an agency with a definite policy-making role. Try as it may to be fair, the GAO is simply not a court.[153]

In its efforts to give dignity and finality to Board decisions, the Court in *S & E Contractors*, and indeed in *Bianchi*, was certainly correct. The Air Force General Counsel put it well when he said:

> [A]t some time, litigation of a dispute must come to an end. The longer cases drag on, the more both sides lose. Litigation costs, uncertainty, impairment of credit and countless other factors make defeat more difficult and victory less real. It is only natural for a losing lawyer—Government or private—to believe that justice

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of contract appeals should either be dissolved altogether and claimants left to a judicial remedy, or that claimants have the alternatives of a judicial remedy. Congressman Celler has so proposed. H.R. 14726, 92d Cong., 2d Sess. (1972). The position is persuasively advocated in Spector, *Public Contract Claims Procedures—A Perspective*, 30 FED. B.J. 1, 11 (1971). Mr. Spector is a Commissioner of the Court of Claims and a former Chairman of the Armed Services Board of Contract Appeals. The alternative direct judicial remedy was also advocated by the Commission on Government Procurement. 4 PROC. COMM'N 23-25. This recommendation is § 7 of H.R. 9062, 93d Cong., 1st Sess. (1973); *cf.* Comment, 73 YALE L.J., *supra* note 126, at 1450-57, which proposes creation of an entirely new court to hear such cases.

152. A proposed set of common rules was prepared by Professor Whelan's seminar at Georgetown University and published as PROPOSED UNIFORM RULES OF PROCEDURE FOR GOVERNMENT AGENCY BOARDS OF CONTRACT APPEALS (1967). "Model Rules for Boards of Contract Appeals," based on the Armed Services Board of Contract Appeals rules, were proposed by a Federal Bar Association Committee, in 1968 and "Proposed Uniform Contract Appeals Rules" were developed by an ABA committee in 1972. *See* Burch, *supra* note 104 at 122-23; FED. CONT. REP. No. 443, Aug. 21, 1972, at E-1.

153. This lack of procedural due process in GAO review has bothered commentators. Doolittle, *Review of Boards of Contract Appeals Decisions*, 39 PA. B.A.Q. 516 (1968); Kostos, *Review of Boards of Contract Appeals Decisions*, 39 PA. B.A.Q. 521, 523-24 (1968). Others, however, suggest that procedural due process was not a central issue in passage of the Wunderlich Act. Schultz, *Wunderlich Revisited: New Limits on Judicial Review of Administrative Determination of Government Contract Disputes*, 29 LAW & CONTEMP. PROB. 115, 118 (1964); Comment, 18 CATH. U.L. REV., *supra* note 45, at 549. The fact that Congress did not make it a basis for decision says nothing, however, about the appropriateness for so considering it.

> would be done if he had but one more chance to appeal. Yet looking at the issue objectively, a system for resolving differences becomes less just, not more, when basically fair, impartial decisions are subject to repeated reviews. Even assuming that each additional review would catch a few more 'mistakes,' in most situations the long run benefits would be less than the long run costs. However well intentioned, then, we believe the GAO's participation in the disputes process would probably not be in the long-run interest either of the Government or of the contractors.[154]

This is the philosophy that should govern the entire disputes procedure. Congress never dreamed of boards of contract appeals in 1817 when it gave claims authority to the forerunner of the GAO. Present authority should reflect current realities and current needs. To the maximum extent possible the Government and contractor should be permitted and encouraged to settle all issues at the lowest possible level —that of the contracting officer. The more levels of appeal there are, the less will be the incentive of either side to negotiate hard and compromise differences. The GAO should, of course, be permitted and encouraged to investigate and criticize any specific settlements. What should be avoided is the GAO's random intervention in cases, either to penalize contractors or to charge disbursing officers for improper settlements.

If, on the other hand, Congress were to change the law and grant the Government a right of appeal, one recent change and an additional one proposed here should reduce the problems feared by the majority in *S & E Contractors*. First, it is ironic that just shortly before the Supreme Court decided *S & E Contractors*, much of the rationale for it was undercut by the long overdue administrative decision to pay six percent interest on claims against the Government from the time they are filed to the time resolved.[155] Thus any delay is now at least partly at the Government's expense, not the contractor's.

Another much needed change would be to simplify the Court of Claims rules so as to accelerate Wunderlich Act appeals. At present, one cannot just file a notice of appeal, then brief and argue his case. The court requires a complaint and answer, followed by a motion for summary judgment.[156] That is fine for an ordinary civil suit in the

154. Doolittle, *supra* note 153, at 518.

155. ASPR 7-104.82, 37 Fed. Reg. 21,499 (1972); FRP 1-1.322, 37 Fed. Reg. 15,152 (1970). The agencies got advance approval of the Comptroller General before agreeing to this practice. 51 COMP. GEN. 251 (1971). This clause applies only to future contracts, of course, and was not used in the contract in *S & E Contractors*.

156. The rules of the Court of Claims are found in 28 U.S.C. (1970). *See gener-*

Court of Claims where the facts to be proved are in doubt, but in Wunderlich Act cases it can take a year to get the case at issue. Even with six percent interest, a Government appeal could be "vexatious" delay under the present rules. With these changes, however, Government contract litigation should be no more time-consuming than any other.

The Southside Plumbing Case

The converse of the *S & E Contractors* situation was presented in a case involving the Southside Plumbing Company.[157] It and *S & E Contractors* were handed down only three days apart and were premised on the same view of the GAO's rule in the disputes process.

Southside had done rehabilitation work on family housing units at Hunter Air Force Base in Georgia. It had been directed by the contracting office to insulate air conditioning ducts in a manner the contractor believed was not required by the specifications. His claim for extra compensation for this work was denied by the contracting officer and, on review, the Armed Services Board of Contract Appeals sustained the administrative decision.[158] Instead of appealing to the Court of Claims, however, the contractor sought relief from the GAO.

In an unusual but not entirely unprecedented decision,[159] the GAO concluded that it had jurisdiction coextensive with the Court of Claims to review Board decisions that had been favorable to the Government. Ruling that interpretation of specifications presents a question of law that the Wunderlich Act makes not binding on either party, it pur-

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ally Jacoby, *Procedure in the United States Court of Claims,* in WEST'S FEDERAL PRACTICE §§ 1930, 1942 (2d ed. M. Volz 1970); King & Little, *Critique of Public Construction Contract Remedies with Recommended Changes,* 5 PUB. CONT. L.J. 6-12 (1972).

157. Comp. Gen. Dec. No. B-156192 (Dec. 8, 1966) (unpublished). The problem raised by *Southside Plumbing* was apparently overlooked by the Commission on Government Procurement.

158. CCH 1964 Bd. Cont. App. Dec. ¶ 4314; CCH 1963 Bd. Cont. App. Dec. ¶ 3982.

159. The written opinion in one earlier case can be found at 44 COMP. GEN. 1 (1964). The GAO reports that it certified a voucher for payment in another case in 1961. Brief on the Jurisdiction of the General Accounting Office with Special Reference to B-156192 (Dec. 8, 1966) (unpublished, submitted to the Attorney General in connection with his review of the case). *See also* Comp. Gen. Dec. No. B-152346 (Nov. 22, 1963, Dec. 31, 1964) (unpublished) (considering an appeal on the merits but rejecting the contractor's claim); Comp. Gen. Dec. No. B-150515 (Nov. 13, 1963) (unpublished), (saying issues were of "sufficient doubt . . . that we must reject your claim and leave you to prosecute it in the courts if you so desire"); Comp. Gen. Dec. No. B-35514 (July 18, 1945) (unpublished).

ported to "reverse" the Armed Services Board of Contract Appeals. At this point, GAO faced its inherent problem; it has no fact-finding machinery. Thus it ordered the Air Force to determine administratively the amount due and then to pay the contractor.

The entire sum claimed was only 45,000 dollars, and one might have expected the Air Force to pay just to keep peace with the GAO. But it did not do so. The Air Force General Counsel wrote the Comptroller General that the GAO had no authority to order an agency to pay what the agency's board of contract appeals had determined was not legally owing.[160] If one views a board decision essentially as factual determinations of the head of the agency, then it is not illogical for the GAO to use it in conjunction with its own perceived statutory responsibility to pay claims. But if that is true, there is no need for the Comptroller General to apply Wunderlich Act standards.

The Air Force submitted the controversy to the Attorney General for directions.[161] Just as he was leaving office, Attorney General Ramsey Clark wrote that the disputes process is a matter between the executive branch and the courts.[162] He accepted the view that the Government could "appeal" an adverse board decision by nonpayment or later set-off, and he encouraged executive agencies to submit such cases to the Justice Department when appropriate. But the GAO had nothing to add, he concluded, either in the *S & E Contractors*-type case or this one. Further, in part because GAO procedures lacked due process, he ruled that its decisions should not even be followed on the basis of executive-legislative comity.

Shortly after the change of administrations, Comptroller General Statts informed Attorney General Mitchell that he rejected the "opinion of your predecessor."[163] At that point the contractor filed suit in the Court of Claims. Rather than get a judicial test of the issues, however, the Justice Department settled the case.

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160. Letter from J. William Doolittle to Frank H. Weitzel, May 15, 1967.

161. Letter from Harold Brown, Secretary of the Air Force, to Attorney General Ramsey Clark, Nov. 13, 1967.

162. 42 OP. ATT'Y. GEN. No. 33 (1969). Attorney General Clark also held that agencies should send him, not the Comptroller General, any decisions of boards of contract appeals which they believed failed to meet Wunderlich Act standards so that he could analyze them and recommend action. Needless to say, after *S & E Contractors*, there is nothing left of that direction.

163. Comp. Gen. Dec. No. B-156192 (Feb. 7, 1969) (unpublished). "This letter has reference to the opinion of your predecessor dated January 16, 1969. . . . [W]e are in complete disagreement with the conclusion reached."

In confirmation of this position, the General Accounting Office agreed to decide

What should the Comptroller General's rule be in such a situation? Is his power to pay claims in the face of a board decision as limited as his power to deny them? The answer to the latter question is probably no. *S & E Contractors* seems to have been decided largely on the basis that contractors should not have to wait for their money. Clearly no such problem exists when the GAO offers to pay.

Then if the GAO rules in favor of the contractor, what rights does the contractor have if, as in *Southside Plumbing*, the agency resists payment? Or indeed, what if the agency pays but then sets off the sum on the next contract in order to recoup the "overpayment"? Before *S & E Contractors* the Court of Claims might have followed *Associated Traders*[164] and *Langenfelder*[165] and treated the resistance as a legitimate Government "appeal" of the GAO decision. On the other hand, the court even then would likely have treated the GAO ruling as "settlement" of the controversy. Indeed the "final and conclusive upon the Executive branch"[166] language was originally adopted to compel recalcitrant agencies to award Civil War bonuses,[167] so a finding of GAO authority to pay contractors would have historical support. Certainly after *S & E Contractors*, such a GAO settlement would be enforced. The real question is not whether the GAO may act but whether it should.

The better view would seem to be that it should not. The General Accounting Office simply has nothing unique to add to the process. The contractor's remedies are too diverse and overlapping as things stand.[168] The aim should be to provide adequate judicial-type fact-finding machinery before the board of contract appeals, plus an expeditious appeal by either side to the Court of Claims. If it is al-

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the "appeal" of the Southwest Engineering Co. from a decision of the Armed Services Board of Contract Appeals. It submitted the contractor's letter to the Air Force for comment. Comp. Gen. Dec. No. B-166157 (Feb. 17, 1969) (unpublished). The Air Force refused to comment. Letter from William Munves, Deputy Air Force General Counsel, to M.E. Miller, Mar. 12, 1969 (unpublished). The GAO ultimately decided the case on the merits, but concluded the Board decision should not be reversed. Comp. Gen. Dec. No. B-166157 (Apr. 11, 1969) (unpublished).

164. Associated Traders, Inc. v. United States, 169 F. Supp. 502 (Ct. Cl. 1959).

165. C.J. Langenfelder & Sons v. United States, 341 F.2d 600 (Ct. Cl. 1965).

166. 31 U.S.C. § 74 (1970).

167. Baltimore & O.R.R. Co. v. United States, 34 Ct. Cl. 484 (1899); MANSFIELD 58; Cibinic & Lasken 355-58.

168. Professors Nash and Cibinic have identified five or more partly concurrent and often overlapping approaches a contractor can take for resolution of a contract controversy. *Hearings before a Subcomm. of the House Comm. on Gov't Operations*, 91st Cong., 1st Sess. 1760-61 (1969). *See also* Whelan, *A Government Contractor's Remedies: Claims and Counterclaims*, 42 U. VA. L. REV. 301 (1956).

leged that an appeal to the Court of Claims is too time-consuming, the remedy should be to streamline the court's procedures as suggested earlier. The General Accounting Office can perform some roles well, but claims settlement in the disputes context is not one of them.

GAO Involvement in Bid Protest Cases

The preceding two examples of GAO involvement in the day-to-day work of executive agencies are, of course, important. Neither, however, approaches the degree of GAO participation in agency decisions through its handling of protests by disgruntled bidders. Once again the protest procedure is simple.[169] A contractor who believes he has been wrongfully denied a Government contract need only write a letter to that effect to the Comptroller General. The GAO then gets the agency's version of the facts, which may be rebutted in writings by the contractor,[170] and renders a decision on the merits. In some cases it will order the agency to change its planned award.

The past three years have seen its role in bid protests go from the only place to get action at all, to a second-class and discredited status, and once again to the predominant "forum" for such cases.[171] Yet there is even less statutory or theoretical basis for the GAO's handling of this protest role than there is for the others, and the pervasiveness of the function makes it an important place to direct attention for reform.

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169. The procedure is set out in 4 C.F.R. 17-19 (1973). *See generally* Shnitzer §§ 1787-91; Dembling, *Administrative Techniques for Challenging the Award of Government Contracts,* Fed. Cont. Rep. No. 351, Nov. 9, 1970, at D-1.

170. Until recently, the agency's statement of the facts was taken as true in bid protest cases just as in claims cases. Shnitzer §§ 1709, 1743, 1783. The new protest regulations discussed at text accompanying notes 234-40 *infra* do not expressly change that rule, but in his 1972 pocket part, Shnitzer asserts that "there is no policy of presuming the correctness of the administrative version of disputed facts in bid protests." *Id.* § 1709. This asserted change in policy is presumably due to the criticism and proposals made in ABA Section of Public Contract Law, Report of the Committee on Bids & Protests 11 (1971).

171. On this chapter in GAO history, *see* Munves, *Judicial Backlash: Second Thoughts and New Judicial Standards from the People Who Brought You Scanwell Labs,* 7 Pub. Cont. Newsletter, Jan. 1972, at 4.

A related area of GAO activity, not treated separately here, is relief from clerical mistakes in bids. The GAO once asserted that only it could permit a bidder to withdraw or alter his bid in such a case, but now it has "delegated" authority to the agencies. Shnitzer §§ 1792-1795. For a criticial view of the GAO's delegating "authority which it does not legally have," *see* Cibinic & Lasken 384-86. *See also* Henry Spen & Co. v. Laird, 354 F. Supp. 586 (D.D.C. 1973) (GAO refusal to let a contractor correct his bid was arbitrary and capricious); Comp. Gen. Dec. No. B-176760 (Jan. 22, 1973) (unpublished) (mistaken bid claims not subject to the time limits discussed in note 240 *infra*).

How the GAO Became Involved in Protest Cases

Most discussion of the GAO's role in bid protests begins with *Perkins v. Lukens Steel Co.*,[172] which for thirty years closed the courts to unhappy bidders and made the GAO's role preeminent. But it is useful to begin the story somewhat earlier.

In 1913 the Court of Appeals for the District of Columbia Circuit decided *B.F. Cummins v. Burleson.*[173] In that case the low bidder had sought to enjoin award of a Post Office contract to anyone other than himself. The court properly saw that an injunction would "interfere with the action of an executive department . . . blocking its actions, and seriously interfering with its orderly and regular administration."[174] It went on to hold that an injunction or mandamus is appropriate "only where a plain or ministerial duty is imposed by law."[175] Because the appropriation act in question required the award to be made on the "basis of cheapness and efficiency," and not necessarily on price alone, the Postmaster General's decision was held to be a matter of "discretion."[176] Thus an injunction would not issue.

Then, in 1918, the Supreme Court decided *United States v. Purcell Envelope Co.*,[177] in which the contractor had been awarded a contract to supply prestamped envelopes and newspaper wrappers to the Post Office Department. The department delayed signing the agreement, and after the contractor had made ready to perform, a new Postmaster General declared the contract void and advertised for new bids. Purcell sought an injunction against the new award, but it was denied by the trial court on the ground that Purcell had an adequate remedy at law. The Supreme Court had before it only the question of breach of contract, and it affirmed a Court of Claims judgment for the contractor. The Government had argued that the contract was never consummated because the Postmaster General had "quasi-judicial" discretion whether or not to commit the Government to the award. The Supreme Court answered in these words:

> There must be a point of time at which discretion is exhausted. The procedure for the advertising for bids for supplies or services to the Government would else be a mockery—a pro-

172. 310 U.S. 113 (1940).
173. 40 App. D.C. 500 (D.C. Cir. 1913).
174. *Id.* at 509.
175. *Id.* at 507.
176. *Id.* at 506.
177. 249 U.S. 313 (1919).

> cedure, we may say, that is not permissive but required. . . . By it the Government is given the benefit of the competition of the market and each bidder is given the chance for a bargain. It is a provision, therefore, in the interest of both Government and bidder, necessarily giving rights to both and placing obligations on both. And it is not out of place to say that the Government should be animated by a justice as anxious to consider the rights of the bidder as to insist upon its own.[178]

Comptroller General McCarl thus took office at a time when the law seems to have recognized both a compulsory character to the formal advertising requirement and the contractor's justifiable interest in fair procedures for contract award. At the same time, the courts had recognized executive discretion as to at least some aspects of contract selection, and had granted injunctions only rarely so as to avoid potential disruption of Government operations.

In his first month in office, Comptroller General McCarl received the Postmaster General's request for an advance decision on whether a contract for insuring for registered mail had to be formally advertised. He answered that it must.[179] The Comptroller General received more than ten such requests for advance decision on procurement matters, from various agencies, during his first four years in office.[180] So too in audits, if the Comptroller General believed a contract had not been properly let, the auditors would disallow payment of the amount due. The Comptroller ultimately seems to have excused and set aside the disallowance in most cases in these early years,[181] but his reputation as an authority on the requirements of the procurement statutes was established.

The GAO protest practice as we know it began as a relatively unimportant adjunct to this practice of rendering advance decisions and settling accounts. The first reported protest to the GAO direct from an unhappy bidder seems to have been in 1925.[182] The Autocar Sales & Service Co. contended that the Panama Canal authorities had drafted truck specifications so as to describe the product of only one

178. *Id.* at 318.

179. 1 COMP. GEN. 21 (1921).

180. 4 COMP. GEN. 1035 (1925); 4 COMP. GEN. 880 (1925); 4 COMP. GEN. 429 (1924); 4 COMP. GEN. 191 (1924); 3 COMP. GEN. 862 (1924); 3 COMP. GEN. 604 (1924); 3 COMP. GEN. 304 (1923); 2 COMP. GEN. 739 (1963); 2 COMP. GEN. 544 (1923); 1 COMP. GEN. 232 (1921).

181. *See, e.g.*, 4 COMP. GEN. 568 (1924); 3 COMP. GEN. 920 (1924); 2 COMP. GEN. 459 (1923).

182. 5 COMP. GEN. 712 (1925). The Commission on Government Procurement asserts that there were two earlier unpublished decisions. 4 PROC. COMM'N 40 n.31.

supplier. On receipt of this "protest," the Comptroller General had sent the letter to the Panama Canal for comment. The Comptroller General's published opinion rejected the idea that although the agency procedure was in violation of statute, it had been in "the best interests of the Government."[183] Nowhere does the opinion reflect recognition that the GAO was making an historic shift in procedures. One reason may be that the protestor neither asked for nor received any personal relief. Likewise the opinion apparently was not even thought of as a binding advance decision. The GAO would find out sometime, the Comptroller General seems to have reasoned, and notification to "correct" the agency "methods of purchase" for the future might as well come now as later.

In 1940 the Supreme Court decided *Perkins v. Lukens Steel Co.*,[184] which for all its later reputation as a landmark case was strikingly consistent in result—though not in dictum—with the prior law. The Walsh-Healey Public Contracts Act[185] required contractors on all Government contracts over ten thousand dollars to pay the prevailing minimum wage in the firm's "locality."[186] Secretary of Labor Perkins had divided the country into six "localities." Lukens Steel and the other plaintiffs were in the "locality" that included thirteen Northeastern states, the District of Columbia, and part of West Virginia. Plaintiffs argued that this definition of "locality" was far too broad and sought an injunction against continuing the prevailing wage determination so made.

The district court refused the injunction but the court of appeals granted it. The court of appeals held that the Secretary of Labor's determination was so wrong as to be "beyond any possible application of the words" and thus beyond her discretion. It recognized that disappointed bidders had previously been denied injunctions against award to another bidder but that was because, the court said, some aspects of selection are matters of discretion. It held that bidders have a "valuable right" to be "free from unlawful restrictions and interference"[187] with the legally established conditions of contracting and thus the injunction was proper.

183. 5 COMP. GEN. at 713.
184. 310 U.S. 113 (1940).
185. 41 U.S.C. § 35 (1970).
186. The facts are laid out most fully in the decision of the Court of Appeals. *See* Lukens Steel Co. v. Perkins, 107 F.2d 627, 629-30 (D.C. Cir. 1939).
187. *Id.* at 639.

It was this decision that the Supreme Court reversed. In doing so, the Court could simply have said that the definition of locality was a matter for the Secretary of Labor to determine. The Court's opinion by Justice Black suggested as much,[188] but it did not stop there. It placed most of its emphasis on a second question—that of standing to sue. Moreover, the opinion was so full of rhetorical overkill that it has frustrated establishment of a reasonable and workable balance between the interests of contractors and those of the Government.

> [N]o legal rights of respondents were shown to have been invaded or threatened. . . . Nor can respondents vindicate any general interest which the public may have in the construction of the Act by the Secretary and which must be left to the political process. . . .
>
> Section 3709 of the Revised Statutes requires for the Government's benefit that its contracts be made after public advertising. It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders. . . .
>
> Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. . . .
>
> [The Public Contract Act] was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain. . . .
>
> Courts have never reviewed or supervised the administration of such an executive responsibility even where executive duties 'require an interpretation of the law'. Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government.[189]

This decision made the GAO the natural place for bidders to turn. The Court had said the procurement statutes were enforceable only "by the Government," and the Comptroller General had a self-declared responsibility for determining "legality" of Government action. Even so, his role in bid protests started slowly, and as late as the mid-1960's the GAO was only deciding about two hundred protests a year. In fiscal 1971 and 1972, however, the GAO decided over seven hun-

188. 310 U.S. at 117-20.
189. *Id.* at 125-28.

dred protests from unhappy bidders.[190] In the first ten months of fiscal 1973, the figure was already close to nine hundred. Such protests had long since replaced the advance decision and the audit as the primary vehicle for rendering procurement opinions.

The Lack of Legal Basis for the GAO's Role

The hearing of bid protests was a natural role for the GAO to assume, but its actual authority to do so was dubious. In a widely quoted opinion, Judge Holtzoff has described the basis of GAO involvement as follows:

> As a matter of convenience, the Comptroller General may render advance rulings on questions whether certain payments, if made, would or would not be approved by him. . . .
>
> [T]he decision of the Comptroller [in a bid protest] . . . is equivalent to an announcement that if the contract were made with the plaintiffs, he would disallow any payments that might be made by any disbursing officer thereunder. As a practical matter, no disbursing officer would make any such payments in the face of this ruling. . . . As a matter of fact, in light of the ruling of the Comptroller General the plaintiffs would be buying a lawsuit if the contract were awarded to them.[191]

At first reading that may seem to be an affirmation of GAO authority, and the GAO has so construed it. It puts bid protest authority on the same level as the power to disallow, however, and as discussed earlier,[192] the latter is little more than a license to harass.

A good case to illustrate the ambiguity of the GAO's actual authority is *Graybar Electric Co. v. United States.*[193] Graybar had been awarded and had begun work on a contract for radio transmitters. The Comptroller General then sent the War Department a letter asserting that the award had been illegal because Graybar had not been the low bidder. The War Department explained that the low bidder's technical drawings had not complied with the specifications and thus he was not responsive to the invitation for bids. The Comptroller General ruled, however, that the low bidder's accompanying promise

190. The figures for 1967-71 were compiled and set forth by the court in Wheelabrator Corp. v. Chafee, 455 F.2d 1306, 1314 n.10 (D.C. Cir. 1971). The fiscal year 1972 and 1973 are reported in FED. CONT. REP. No. 483, June 4, 1973, at A-4. *See also* 4 PROC. COMM'N 77.

191. United States *ex rel.* Brookfield Constr. Co. v. Stewart, 234 F. Supp. 94, 100 (D.D.C. 1964).

192. Text accompanying notes 60-78 *supra.*

193. 90 Ct. Cl. 232 (1940).

to produce a conforming product overcame the defects in the drawings.[194] The War Department notified Graybar of this ruling and the possibility it would not get paid for the work. Graybar suspended production.

Almost a year later, the Attorney General ruled that the award had indeed been valid,[195] so Graybar resumed production and sought to have the period of suspended production treated as an excusable delay in performance. The Department of War, however, relied on the Attorney General's opinion that no reasonable contractor could think that the Comptroller General's opinion had any legal significance and assessed Graybar over thirteen thousand dollars in penalties for late delivery. The Court of Claims ordered return of the penalty. It held that the GAO had no actual authority to award or order the cancellation of contracts, but the possibility of disallowance and consequent harassment of the agency and the contractor made Graybar's delay not imprudent. The court wisely held that the delay was the fault of the Government, not the contractor.

More recently, in *Manloading & Management Associates v. United States*[196] the Department of Housing and Urban Development (HUD) had contracted for conversion of some of its records to magnetic tape. The job was to take two years, but because funds must be appropriated annually the contract was for one year with an "option" for the second. The low bidder's bid had been rejected as "unreasonably low and nonresponsive," a determination with which the Comptroller General disagreed. His solution was to let the first year of the contract run, but he directed HUD not to exercise the option.[197] HUD complied and the bidder filed suit for breach of contract. The bidder alleged that although the form of the contract included an option, a Comptroller General's decision was no basis for refusing to exercise it. The Court of Claims agreed and permitted recovery as if the contract had been terminated under the termination for convenience clause of the contract.

Indeed, in all its review of bid protests the GAO apparently can point to only one judicially confirmed case of a genuinely illegal pro-

194. Comp. Gen. Dec. No. A-68974 (Dec. 23, 1935, Feb. 17, 1936, May 18, 1936) (unpublished).
195. 38 OP. ATT'Y GEN. 555 (1937).
196. 461 F.2d 1299 (Ct. Cl. 1972).
197. Comp. Gen. Dec. No. B-169824 (June 26, 1970) (unpublished).

curement it has set aside. In *Schoenbrod v. United States*[198] the Interior Department solicited proposals for processing and selling Alaskan sealskins for the account of the United States. Five firms submitted proposals, and discussions were conducted with each on everything but price. The firms were then ranked in order of quality, and price negotiations were held with only the best firm, Supara, Inc. A contract then was awarded to Supara without ever discussing price with the other competitors.

A protest was submitted to the General Accounting Office, which ordered termination of the contract about seven months after award.[199] The contract was rescinded as ordered, and the contractor filed suit for breach of contract in the Court of Claims. The court considered the matter *de novo* and gave no special weight to the Comptroller General's findings, but it did agree that an award made without even asking the price of four of the competitors was illegal. Thus the contract was held to have been void *ab initio*, and the contractor did not even get his costs for the period before termination.[200]

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198. 410 F.2d 400 (Ct. Cl. 1969).

199. 43 COMP. GEN. 353 (1963).

200. The court relied on Prestex Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963), invoking this same severe remedy where a contractor proposed to use a type of cloth clearly inferior to that required by the Invitation for Bids. The contracting officer did not discover the discrepancy until after award, and the court held he was not barred from avoiding the contract since he had no authority to accept a bid not conforming to the invitation.

One valid criticism of the GAO would seem to be that it is inconsistent in its rulings. In a case seemingly even more illegal than *Schoenbaum*, the Army sought additional sources for M-16 rifles. Four firms were asked to submit technical proposals, but none were asked for prices until the two winning contractors had been selected. Both losing contractors asserted they would have proposed prices far lower than the winners were to be paid. The Comptroller General took the position that "competitive range is a matter of administrative discretion" and determined that the Army could use its own estimates of contractor cost in making its evaluations, rather than asking the contractors for price proposals. Comp. Gen. Dec. No. B-164313 (July 5, 1968) (unpublished).

On the other hand, in another case the Air Force had solicited proposals (including price) from four firms and had stated at the outset that no further negotiations would be conducted with any firm not meeting minimum performance standards in an actual benchmark test. Only one firm (IBM) passed. There was no issue of the integrity of the test, but the Comptroller General held it to be illegal not to conduct negotiations with the failures as well "in view of the possibility thereby of increasing competition, and the potential savings indicated." 47 COMP. GEN. 29 (1967).

There were probably good practical reasons for both decisions. In the IBM case, the "failures" improved their performance and the award to one of them, Burroughs, saved the government about 150 million dollars over the proposed award to IBM. Likewise, in the M-16 case the Army had been severely chastised in the press and the weapons did, after all, have to be reliable. The objection of bid protestors is not that the GAO is "practical;" it is that it looks at cases from the Government's point

Schoenbrod, however, is the distinct exception. More common is the situation illustrated by *John Reiner & Co. v. United States*.[201] There the invitation for bids specified that a bidder's offering a delivery schedule over sixty days longer than the Government stated "*may* be cause for rejection of bid." The low bidder, Reiner, and some others had proposed schedules beyond the sixty day criterion. Reiner was awarded the contract, but on a protest from a losing bidder, the GAO ruled that the invitation for bids was imprecise as to the firmness of the requirement and thus must be cancelled.

Reiner then sued for breach of contract, arguing that the Comptroller General had no authority to tell the Army what to do. The Court of Claims agreed in part:

> The . . . question . . . whether . . . the award was illegal and void . . . is not precisely the same as that with which the Comptroller General dealt. Because of his general concern with the proper operation of competitive bidding in government procurement, he can make recommendations and render decisions that, as a matter of procurement policy, awards on contracts should be cancelled or withdrawn even though they would not be held invalid in court. He is not confined to the minimal measure of legality but can sponsor and encourage the observance of higher standards by the procuring agencies.[202]

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of view rather than providing a truly independent forum dispensing even-handed, consistent justice. *See generally* Note, *The Comptroller General of the United States: The Broad Power to Settle and Adjust All Claims and Accounts*, 70 HARV. L. REV. 350, 360 n.94 (1956).

201. 325 F.2d 438 (Ct. Cl. 1960).

202. *Id.* at 440. The GAO does not agree that its standard of review is "policy" rather than "legality."

> As to the court's suggestion in the Reiner case that, in view of the Comptroller General's concern with the proper operation of competitive bidding in government procurement," he can "sponsor and encourage the observance of higher standards by the procuring agencies," through the cancellation of contracts which "would not be held invalid in court," our decision in this case was not based upon any such theory, nor do we feel that an assertion of such authority could be supported.
>
> Where a bid acceptance is proposed but not yet consummated by a procuring agency, and our Office considers such acceptance undesirable, we may recommend or direct such action as we believe is required by the public policy expressed in applicable statutory enactments to preserve the integrity of the competitive bidding system. However, the sanction for any decision by this Office holding that an accepted bid did not result in a valid contract is our authority under the Budget and Accounting Act, 1921, 31 U.S.C. 1, *et seq.*, to disallow credit in the accounts of the Government's fiscal officers for any payments out of appropriated funds made pursuant to an illegal contract. We do not employ that sanction if we think a resulting claim would be legally justified and payment could be obtained by instituting judicial proceedings. . . . We therefore believe that any variations in the standards which may be applied by our Office and by the Court of Claims in determining the enforceability of a contract already awarded result from occasionally differing interpretations of governing statutes and regulations, or different factual

The court then held the contract valid, not void as the GAO had determined. Nevertheless the court held the termination to have been for the convenience of the Government, and not a breach of contract. The GAO had no authority to direct the agency to cancel, the court held, but as a practical matter it was politic to go along with the GAO, so the contractor had no right to claim bad faith.

It is tempting to speculate what would have happened in *Schoenbrod* if the contract had been satisfactorily completed. Is it reasonable to suppose the contractor would have received no money? Would he have received only *quantum meruit* if the Government had received the benefits of a contract entered into in good faith? Would some poor disbursing officer have had to pay the contractor himself? None of these likely would have occurred. It seems that the stamp of "illegality" was applied in *Schoenbrod* where little turned on it, but to use this case as illustrating justification for the whole bid protest enterprise would be far-fetched.[203] The GAO's "authority" arises purely and simply from agency willingness to follow GAO directions, whether authorized or not, and the relative inability of contractors to get judicial review of the decisions.

The Pressure for Change

Why has the system lasted as long as it has? Why have agencies tolerated the GAO? Even bidders have not vigorously sought change. The apparent reason is because, in agreeing to hear such cases, the

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conclusions, rather than from any differences in the scope of our respective objectives.

44 COMP. GEN. 223 (1964).

203. The result in *Schoenbrod* is particularly surprising given the holding the previous year in Mid-West Constr., Ltd. v. United States, 387 F.2d 957 (Ct. Cl. 1968). There the plaintiff has been low bidder on a contract for construction of a road in Alaska. The job had been reserved or "set-aside" for a "small business," and the next low bidder protested that the plaintiff, a Canadian firm, did not have "a place of business in the United States" as required by the small-business regulations. 13 C.F.R. § 121.3-2(g) (1963). The SBA Size Appeals Board ruled the plaintiff unqualified and the Comptroller General agreed, 44 COMP. GEN. 253 (1964). The contract was cancelled pursuant to this finding and the contractor sued for breach of contract. The Court of Claims upheld the suit even assuming the plaintiff was unqualified for the award under the regulations. The court read Prestex Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963), to render an award "illegal" only where it deviated from the invitation "substantially," *i.e.*, so as to affect price, quantity or quality. 387 F.2d at 961, *citing* 320 F.2d at 372. *Accord,* Allen M. Campbell Co. v. United States, 467 F.2d 931 (Ct. Cl. 1972). The question of appropriate damages for the Government's breach is considered in Mid-West Constr. Co. v. United States, 461 F.2d 794 (Ct. Cl. 1972). The opinion in *Schoenbrod* did not even mention *Mid-West,* which lends credence to the view that *Schoenbrod* is deviant from the clear trend of the cases.

GAO has performed at least three functions. First, bidders have been given someone to turn to. It costs time and money to bid on a contract, and no one likes to lose unfairly. The bidder may not have a "legal right" to a contract and the GAO may not always get results, but the bidder does get the satisfaction of thinking someone has listened and responded to his problem. And the cost of that listening ear is often simply the cost of a letter.

Secondly, Congress has been given the feeling that an independent agency is watching over the procurement process. Individual congressmen have likewise been provided with a place to refer constituents' problems for "help." Thirdly, executive agencies have likewise not been losers. Of the 758 protests ruled upon in fiscal 1972, the protest was sustained in only fifty-two cases, and in only twelve was the agency directed to cancel the award.[204] Thus agencies have had the appearance of being under tight rein while in fact the GAO rarely imposes an "impractical" limitation on their ability to stretch the rules in particular cases.

These "benefits" have not been insubstantial. Indeed, they created what was for many years considered to be a balanced and practical system. However, there have been periodic efforts to seek judicial relief in addition to or instead of GAO review. Two reasons stand out. First, many bidders are tired of Pyrrhic victories. The GAO has no authority to enjoin an impending "illegal" award to someone else, and as a practical matter it is hard to get GAO to order cancellation of a contract that has been awarded.[205] This explains how in the 1972 statistics, fifty-two protestants were upheld on the law but only twelve received any relief. Secondly, the GAO has no provision for an adversary hearing or any of the other trappings of due process. The protest traditionally has been considered solely on the written record. This effectively makes the agency's version of the facts hard to rebut. That might be tolerable if *de novo* judicial review followed, but in bid protests the "supreme court" has in effect been loaded in favor of one of the parties.

204. 14 THE GOVERNMENT CONTRACTOR ¶ 438 (1972). In fiscal year 1971, out of 715 decisions, the Comptroller General sustained the protest in seventy-four and ordered cancellation in only four cases. Wheelabrator Corp. v. Chafee, 455 F.2d 1306, 1314 n.10 (D.C. Cir. 1971). The figures through April 30, 1973, were 887 protests filed, 24 sustained; figures were unavailable on cancellations ordered. FED. CONT. REP. No. 483, June 4, 1973, at A-4.

205. *Id.* at 1314-15 n.11; Shnitzer § 1788. Agencies often make a practice of suspending award, pending the GAO decision, but need not do so even under the GAO's new rules, 4 C.F.R. § 20.4 (1973), discussed at notes 222-28 *infra*.

Criticisms of this situation are often mistakenly understood to be criticisms of the GAO. They are not. GAO procedures and presumptions were developed when its job was solely to review procurement policy from the perspective of the best interests of the Government. It was never intended to be a fair-minded "forum" from which a litigant had any right to expect real relief.

In the late 1960's, pressure to provide due process was building with respect to all kinds of quasi-administrative decisions. The right to procedural safeguards before denial of admission to the bar,[206] the right to a hearing before loss of welfare,[207] and even the right to a hearing before replevin by a creditor[208] are all illustrations of this awakening consciousness. In many cases a government contract will be a major part of a businessman's projected income for a year. He, too, does not like to lose.

The Rise and Fall of Scanwell Labs

The pressure that built for change culminated in 1970 in *Scanwell Labs v. Shaffer*.[209] In that case the second-lowest bidder had sought to have an award to the low bidder declared void on grounds of nonresponsibility. The low bidder had previously neither installed a system nor obtained a Federal Aviation Administration certificate of performance, both of which were required by the invitation for bids. The district court dismissed the complaint for lack of jurisdiction as *Perkins* seemed to require, but the court of appeals reversed. Modern ideas of standing no longer require the plaintiff to have a "legal right" to an award, it said.[210] It is enough that he be "adversely affected *in fact* by agency action"[211] or that he simply be acting as a "private attorney

206. Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963).

207. Goldberg v. Kelly, 397 U.S. 254 (1970).

208. Fuentes v. Shevin, 407 U.S. 67 (1972).

209. 424 F.2d 859 (D.C. Cir. 1970). The result in *Scanwell* was foreshadowed by the same court's decision in Superior Oil Co. v. Udall, 409 F.2d 1115 (D.C. Cir. 1969). There the Secretary of the Interior had received bids for certain oil leases. The high bidder had failed to sign his bid and the Secretary proposed to throw out all bids and start again. The second-high bidder ($13.6 million vs. $11.6 million) objected and the district court ordered award to him. The court of appeals affirmed in an opinion by Judge Burger which cited Comptroller General opinions as authority. The question of standing was not discussed, but standing was apparently accepted by the court as self-evident. *See generally* Pierson, *Standing to Seek Judicial Review of Government Contract Awards: Its Origins, Rationale and Effect on the Procurement Process*, 12 B.C. IND. & COM. L. REV. 1 (1970).

210. 424 F.2d at 863; *accord*, Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

211. 424 F.2d at 865 (emphasis by the court).

general"[212] to enforce the public interest in proper adherence to the procurement statutes. It thus remanded the case for a hearing on the merits.[213]

Scanwell Labs was followed by more than a dozen cases. Some sought temporary restraining orders and preliminary injunctions pending GAO review.[214] Others sought ultimate judicial disposition on the merits.[215] In some, the question was raised whether the possibility of a protest to the GAO was an administrative remedy that must be exhausted. In each of the early cases the courts answered "no."[216] The GAO may be an informal, alternate remedy, they said, but it is not a prerequisite to review.

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212. *Id.* at 864.

213. Although the Court did not say so, the merits of the situation had been reached by the GAO between the time of the district court and court of appeals opinions. In 49 COMP. GEN. 9, 12 (1969), the GAO had held that the IFB was unclear but that no bidder was prejudiced thereby; and since the award had been made, it should not be set aside.

214. National Cash Register Co. v. Richardson, 324 F. Supp. 920 (D.D.C. 1971); Aerojet-General Corp. v. Thiokol Chem. Corp., 15 CCH Cont. Cas. F. ¶ 83,786 (N.D. Cal. 1970); Page Communications Engr's, Inc. v. Resor, 15 CCH Cont. Cas. F. ¶ 84,116 (D.D.C. 1970), *rev'd*, 15 CCH Cont. Cas. F. ¶ 84,154 (D.C. Cir. 1970); Wheelabrator Corp. v. Chafee, 15 CCH Cont. Cas. F. ¶ 84,009 (D.D.C. 1970), *rev'd*, 455 F.2d 1306 (D.C. Cir. 1971). In Keco Indus. v. Laird, 318 F. Supp. 1361 (D.D.C. 1970), the plaintiff sought an injunction pending GAO review but the court deemed that inappropriate for lack of binding GAO authority and so went on to the merits. *Cf.* Floyd v. Miner Security Services v. Paine, 115 CCH Cont. Cas. F. ¶ 83,967 (D.D.C. 1970) (injunction pending reconsideration by SBA Size Appeals Board).

215. Allen M. Campbell Co. v. Lloyd Wood Constr. Co., 446 F.2d 261 (5th Cir. 1971); Gould & Eltra Corp. v. Chafee, 16 CCH Cont. Cas. F. ¶ 80,499 (D.C. Cir. 1971); Gulf & W. Indus., Inc. v. Resor, 16 CCH Cont. Cas. F. ¶ 80,158 (D.C. Cir. 1971); M. Steinthal & Co. v. Seamans, 15 CCH Cont. Cas. F. ¶ 83,921 (D.D.C. 1970); Big Four Mechanical Contractors, Inc. v. SBA, 15 CCH Cont. Cas. F. ¶ 83,766 (W.D. Okla. 1970); American Standard, Inc. v. Laird, 326 F. Supp. 492 (D.D.C. 1970); Lombard v. Resor, 321 F. Supp. 687 (D.D.C. 1970); A.B. Schoonmaker Co. v. Resor, 319 F. Supp. 933 (D.D.C.), *rev'd*, 445 F.2d 726 (D.C. Cir. 1970). *See also* Northeast Constr. Co. v. Romney, 16 CCH Cont. Cas. F. ¶ 80,459 (D.D.C. 1971) (ordering the agency to let the bidder supply missing racial hiring goals figures, the lack of which had been said by the GAO to make the bid non-responsive), *rev'd*, 18 CCH Cont. Cas. F. ¶ 82,066 (D.C. Cir.), *opinion supplemented*, 18 CCH Cont. Cas. F. ¶ 82,304 (D.C. Cir. 1973); Blount-Barfell-Dennehy, Inc. v. United States, 15 CCH Cont. Cas. F. ¶ 83,917 (W.D. Okla. 1970) (granting a permanent injunction ordering the contracting officer to accept a bond the Comptroller General had said was deficient).

216. Scanwell Labs. v. Shaffer, 424 F.2d 859, 875-76 (D.C. Cir. 1970). In Simpson Elec. Co. v. Seamans, 317 F. Supp. 684, 686 (D.D.C. 1970), Judge Gesell described the Comptroller General's role in bid protests as follows:

> [T]he Comptroller General controls disbursements from the public treasury, and will, upon request, give an advisory opinion on the legality of a particular contract on which payments by the United States are contemplated. Although his decision is as a practical matter usually decisive upon the contracting officer, it does not technically bind him, and the Comptroller, of course, cannot award a contract."

Accord, Keco Indus. v. Laird, 318 F. Supp. 1361, 1363 (D.D.C. 1970).

Lawyers soon found, however, that it was one thing to open the courthouse door and quite another to get relief. Standing has always been only half the battle. It was hard to get injunctions even before *Perkins*, and it proved hard to get them after *Scanwell*. Less than two weeks after denying rehearing in *Scanwell*, the same panel of the Court of Appeals for the District of Columbia Circuit decided *Blackhawk Heating & Plumbing Co. v. Driver*,[217] in which they noted that "the mere fact that a party has standing to sue does not entitle him to render uncertain for a prolonged period of time government contracts which are vital to the functions performed by the sovereign."[218] It thus concluded that summary judgment for the Government should be granted readily in bid protest cases if the pleadings and accompanying documents do not make a convincing case for relief.

In cases that followed, some courts reached the merits of their cases but found the Government had acted properly.[219] In others the contractor's case was insufficient even to justify a preliminary injunction or temporary restraining order.[220] Even when the evidence tended to support the complainant, relief was not always forthcoming. For example, in *Simpson Electric Co. v. Seamans*,[221] the court concluded "that the refusal to accept plaintiff's bid modification as timely was arbitrary and irrational." It went on to say that "it was illegal to award the contract to anyone else." Nevertheless, the contract had already been awarded to another firm and because "injunctive relief is discretionary and a remedy that should be most sparingly used," the plaintiff was left to his remedy, if any, in the Court of Claims.[222] In two other cases, injunctions based on apparently sound grounds were dissolved because the Secretary of Defense had certified that awards must be

217. 433 F.2d 1137 (D.C. Cir. 1970). The panel consisted of Judges Bazelon, Tamm and MacKinnon. Rehearing in *Scanwell* was denied on May 7, 1970; *Blackhawk* was handed down on May 19. *Cf.* Ballerina Pen Co. v. Kunzig, 433 F.2d 1204, 1209 (D.C. Cir. 1970).

218. 433 F.2d at 1141.

219. City Chemical Corp. v. Shreffler, 333 F. Supp. 46 (S.D.N.Y. 1971); Gulf & W. Indus. v. Resor, 16 CCH Cont. Cas. F. ¶ 80,158 (D.D.C. 1971); Lombard Corp. v. Resor, 321 F. Supp. 687 (D.D.C. 1970).

220. Floyd F. Miner Security Service, Inc. v. Paine, 15 CCH Cont. Cas. F. ¶ 83,967 (D.D.C. 1970); American Standard, Inc. v. Laird, 326 F. Supp. 492 (D.D.C. 1970).

221. 317 F. Supp. 684, 686 (D.D.C. 1970) (Gesell, J.).

222. *Id.* at 688. This same approach was taken in Wilke v. Department of the Army, 357 F. Supp. 988 (D. Md. 1973). Judge Gesell was less critical of the Government but equally wary of the use of injunctions in National Cash Register Co. v. Richardson, 324 F. Supp. 920, 921 (D.D.C. 1971), where the standard for injunctive relief was said to be "flagrant disregard for the regularity of contracting procedures."

made to keep up the flow of military material to Viet Nam.[223]

Indeed, relief was granted in only a few cases,[224] and when most of those were reversed on appeal, the euphoria with which contractors had greeted *Scanwell* was quickly deflated and the role of the Comptroller General was rediscovered by the courts. For example, in *A.G. Schoonmaker Co. v. Resor*[225] an unsuccessful bidder had protested to the GAO that the low bidder was not responsive. The Comptroller General ruled that the solicitation was ambiguous and ordered a new solicitation. The Army complied and the low bidder went to court seeking an injunction ordering award to it. The injunction was granted by the district court but reversed by the court of appeals. The district court had looked at the merits of the case itself, the court of appeals said, instead of determining whether there was any basis for the Comptroller General's ordering a resolicitation. The court of appeals found the GAO opinion was not "arbitrary or capricious," and thus the injunction was reversed without "reach[ing] the problem of the authority of the Comptroller to issue decisions in bid protests."[226]

Then in *Wheelabrator Corp. v. Chafee*[227] and *M. Steinthal & Co. v. Seamans*[228] new panels of the Court of Appeals for the District of

223. Pace Co. v. Resor, 453 F.2d 890 (6th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972); Page Communications Eng'rs, Inc. v. Resor, 15 CCH Cont. Cas. F. ¶ 84,154 (D.C. Cir. 1970).

Because of the potentially serious consequences to the Government of enjoining a critical program, some contractors were required to post a bond when the injunction was issued. In Page Communications Eng'rs, Inc. v. Froehlke, 475 F.2d 994 (D.C. Cir. 1973), the court ruled that the district court could propely efuse to assess damages against Page who it found had filed suit in good faith. Northeast Constr. Co. v. Romney, 18 CCH Cont. Cas. F. ¶ 82,066 (D.C. Cir. 1973), *opinion supplemented*, 18 CCH Cont. Cas. F. ¶ 82,304 (D.C. Cir. 1973). *See also* Johnson, *Scanwell Plaintiff's Potential Liability for Damages Caused by an Erroneous Injunction*, 8 PUB. CONT. NEWSLETTER, No. 4, July 1973, at 8.

224. A.G. Schoonmaker Co. v. Resor, 319 F. Supp. 933 (D.D.C.), *rev'd*, 445 F.2d 726 (D.C. Cir. 1970); Blount-Barfell-Dennehy, Inc. v. United States, 15 CCH Cont. Cas. F. ¶ 83,917 (W.D. Okla. 1970); Wheelabrator Corp. v. Chafee, 15 CCH Cont. Cas. F. ¶ 84,009 (D.D.C. 1970), *rev'd*, 455 F.2d 1306 (D.C. Cir. 1971); M. Steinthal & Co. v. Seamans, 15 CCH Cont. Cas. F. ¶ 83,920 (D.D.C. 1970), *rev'd*, 495 F.2d 1289 (D.C. Cir. 1971); Page Communications Eng'rs, Inc. v. Resor, 15 CCH Cont. Cas. F. ¶ 84,116 (D.D.C. 1970), *rev'd*, 15 CCH Cont. Cas. F. ¶ 84,154 (D.C. Cir. 1970); Big Four Mechanical Contractors, Inc. v. SBA, 15 CCH Cont. Cas. F. ¶ 83,766 (W.D. Okla. 1970).

225. 445 F.2d 726 (D.C. Cir. 1971).

226. *Id.* at 728 n.3. The panel in *Schoonmaker* consisted of Judges Bazelon and Tamm, joined by District Judge Smith from Montana. Judge Tamm dissented. It may be inferred that he saw this as a departure from his course in *Scanwell*.

227. 455 F.2d 1306 (D.C. Cir. 1971).

228. 455 F.2d 1289 (D.C. Cir. 1971). Judge Leventhal wrote the opinion in both cases. In 1966, Judge Leventhal wrote an excellent article advocating increasing

Columbia administered the *coup de grace.* Wheelabrator Corporation had developed a portable blast cleaner for cleaning the hulls of ships. The Navy sought to procure the device by a two-step formally advertised competition while Wheelabrator argued that regulations required the Navy to negotiate only with it. The district court enjoined award to the other bidder pending a GAO decision on Wheelabrator's protest.[229] The court of appeals reversed, finding no "prima facie case of illegality." It pointed to the congressional preference for formal advertising and said the decision whether or not to negotiate was "committed to agency discretion" and thus unreviewable, in effect reiterating an approach adopted by that court in 1913.[230]

Steinthal was similarly a question of discretion. There the delivery schedule in the invitation for bids had been interpreted three different ways by the three bidders. The Air Force cancelled the invitation and prepared to readvertise, but two bidders objected, each claiming it was entitled to the award. Both protests were denied by the GAO but the district court granted Steinthal's request for a mandatory injunction making the award to it.[231] The court of appeals —as it had in *Schoonmaker*—properly found the decision to cancel and readvertise to have been consistent with agency regulations.

Both cases were straightforward and would be footnotes in the story but for the extensive dicta in both about the deference the courts should pay to GAO review. For example, in *Wheelabrator* the court said:

> The G.A.O. has established a corps of officials concerned with compliance by procurement officials with provisions of applicable statutes and regulations. Its rulings provide review by an agency that is independent of the executive departments engaged in the procurement. . . .
>
> Under the doctrine of primary jurisdiction, a court may entertain an action for permanent relief and defer its consideration of the merits until an agency "with special competence" in the field

resort to administrative law concepts in government contract cases, although not total applicability of the APA. Leventhal, *Public Contracts and Administrative Law,* 52 A.B.A.J. 35 (1966).

229. 319 F. Supp. 87 (D.D.C. 1970).

230. 455 F.2d at 1311-12. The 1913 case was B.F. Cummins v. Burleson, 40 App. D.C. 500 (D.C. Cir. 1913). *Cf.* Hi-Ridge Lumber Co. v. United States, 443 F.2d 452 (9th Cir. 1971); Curran v. Laird, 420 F.2d 122 (D.C. Cir. 1959); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion",* 82 HARV. L. REV. 367 (1968).

231. M. Steinthal & Co. v. Seamans, 15 CCH CONT. CAS. F. ¶ 83,920 (D.D.C. 1970), *rev'd,* 455 F.2d 1289 (D.C. Cir. 1971).

> has ruled on the issues, if necessary maintaining the status quo pendente lite with injunctive relief avoiding irreparable injury pending such agency consideration.[232]

It went on to say in *Steinthal*:

> We are, finally, concerned that the District Court did not even consider the opinions of the Comptroller General denying the protests of Pioneer and Steinthal and upholding the government's cancellation of the bids under the amended IFB. We are not called upon to make a formal determination concerning the controversy over the legal authority of the Comptroller General to issue decisions in bid protests, and the effect of such determinations on agency procurement policies. Certainly we must acknowledge that the office headed by the Comptroller General provides unique experience in the area of government procurement and a tradition of care and objectivity, including freedom from prior involvement in the matter at hand, that would have provided, "the court with additional guidance in resolving the issues before it."[233]

The GAO was back in judicial good graces. Judical rhetoric had created authority in the GAO that Congress had never chosen to provide. At this point the GAO issued "Interim Bid Protest Procedures and Standards"[234] to systemize the handling of its reaffirmed responsibility. Time limits for submitting information were imposed on the agencies[235] and self-imposed by the GAO on its own decision process.[236] A conference procedure was established to try to end the practice of separate, informal, ex parte conversations with the protector, the agencies, and, some suspected, members of Congress.[237] Agencies were directed to withhold award pending GAO rulings unless a high

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232. 455 F.2d at 1314-16.

233. 455 F.d at 1298. A number of cases since *Steinthal* and *Wheelabrator* have denied injunctions. Northeast Constr. Co. v. Romney, 18 CCH Cont. Cas. F. ¶ 82,066 (D.C. Cir.), *opinion supplemented*, 18 CCH Cont. Cas. F. ¶ 82,304 (D.C. Cir. 1973), *rev'g* 16 CCH Cont. Cas. F. ¶ 80,459 (D.D.C. 1971); Ocean Elec. Corp. v. Laird, 473 F.2d 154 (D.C. Cir. 1972); Wilke v. Department of the Army, 357 F. Supp. 988 (D. Md. 1972). In Serv-Air, Inc. v. Seamans, 473 F.2d 158 (D.C. Cir. 1972), the court upheld the denial of the injunction but went on to explain that an injunction was proper if there was "no rational basis for the agency's decision." Explaining the statement in *Steinthal* that a court might even deny an injunction in such a case, Judge Leventhal (who had also authored *Steinthal* and *Wheelabrator*) wrote that that exception from the right to an injunction was limited to "extreme situations, as where relief would delay or interfere with supply of items urgently needed in military operations." *Id.* at 160. This admonition was apparently not followed by the court in *Wilke*, but an injunction was entered against an already awarded contract in Rudolph F. Matzer & Associates v. Warner, 348 F. Supp. 991 (M.D. Fla. 1972).

234. 36 Fed. Reg. 24,791 (1971).

235. *Id.* § 20.5.

236. *Id.* § 20.10.

237. *Id.* § 20.9.

level official made a written finding that such a delay could not be tolerated.[238]

These were, of course, constructive changes, but restrictions were simultaneously imposed on the contractors' right of protest. Protestors were required to be "interested,"[239] for example, and tight time limits on filing of protests were imposed.[240] Such limits are consistent with a quasi-judicial role but not with the GAO's previous function as critic of genuine wrongs.

Even the GAO conceded that it had no real authority to make its rules binding on the agencies.[241] That, however, did not stop the district court in *General Electric Co. v. Seamans*.[242] The court not only entered an injunction against award pending GAO review; it decreed in advance that if the GAO's decision was in favor of the protestor, the agency must follow it. That was a major development, since it was the first time a GAO decision had ever truly been enforceable against an agency. The court of appeals correctly reversed that part of the district court order, preferring not to "abdicate its responsibilities" to the GAO.[243] The GAO finally rendered the matter moot by ruling that the agency had been right all along.[244] At the same time, however, the GAO took pains to assert that its findings of fact, not the district court's, were controlling under *Wheelabrator* and *Steinthal*. Indeed it held that the court's opinion was not even entitled to comity.

Finally, two district courts in other circuits have now held that

238. *Id.* § 20.4.

239. *Id.* § 20.1.

240. If the basis of the protest is known before bid opening, the protest must be filed then. Otherwise the protestor has five days from the time the "basis for protest is known or should have been known." *Id.* § 20.2(a). The GAO has enforced this provision by ignoring late protests. Comp. Gen. Dec. No. B-175779 (July 13, 1972) (unpublished); Comp. Gen. Dec. No. B-175610 (Apr. 25, 1972) (unpublished). However it waived its time limits in *Serv-Air*, discussed *supra* note 233, once the matter was before the Court of Appeals. 52 COMP. GEN. 161, 163 (Sept. 25, 1972). It was complemented by the court: "This procedural flexibility is responsive to the interests that courts and officials proceed with full regard for and accommodation to the other's province. It is a rightful corollary to the rule of primary jurisdiction developed in *Wheelabrator*." 473 F.2d at 160.

241. Preface to Interim Bid Protest Procedures and Standards, 36 Fed. Reg. 24791 (1971). It has been reported, however, that the Office of Management and Budget is drafting regulations which would be binding on the agencies. FED. CONT. REP. No. 470, Mar. 5, 1973, at A-20.

242. 340 F. Supp. 636 (D.D.C. 1972).

243. General Electric Co. v. Seamans, 14 THE GOVERNMENT CONTRACTOR ¶ 258 (D.C. Cir. 1972).

244. Comp. Gen. Dec. No. B-175004 (Oct. 12, 1972) (unpublished).

Scanwell Labs was wrong *ab initio.*[245] They have denied injunctions for lack of standing to sue, citing *Perkins*, so the stage may be set for an eventual Supreme Court test of the GAO's authority.

How Should Bid Protests Be Handled?

The dilemma in this area has been recognized since before *Perkins v. Lukens Steel.* The more due process is permitted, the more the orderly procurement of material is impaired. Put another way, due process is costly, both to the contractor and to the Government. The question thus should be how one can get the most fairness for the least cost to the parties and the least disruption of the procurement process.[246]

The GAO remedy places a high value on not disrupting the process. As mentioned earlier, if work has begun or if there is an urgent need for the item, the odds of getting the GAO to act fall sharply. The courts seem to place a far lower premium in procurement efficiency, which in large part is why the agencies so fear a judicial remedy.

An illustration of this difference in approach is provided by *Horne Brothers v. Laird.*[247] There the Navy, without notice or hearing, had "suspended" a ship repair contractor for allegedly bribing Navy personnel on earlier contracts. The contractor, who was thus denied future contracts, sought an injunction and protested to the GAO. The GAO opinion denying the protest stressed the government's interest in

245. Gary Aircraft Corp. v. United States, 342 F. Supp. 473 (W.D. Tex. 1972); Rubber Fabrication v. Laird, 14 THE GOVERNMENT CONTRACTOR ¶ 276 (N.D.W. Va.), *injunction dissolved as moot,* 17 CCH Cont. Cas. F. ¶ 80867 (4th Cir. 1971); *cf.* Fortec Constructors v. Kleppe, 18 CCH Cont. Cas. F. ¶ 81,723 (D.D.C. 1972), *aff'd,* 18 CCH Cont. Cas. F. ¶ 81,756 (D.C. Cir. 1972). On the other hand, a district court in the fifth circuit has found standing under *Scanwell* and issued an injunction applying the *Steinthal* test. Rudolph F. Matzer & Associates v. Warner, 348 F. Supp. 991 (M.D. Fla. 1972). A district court in the third circuit had rejected the *Scanwell* position on standing as inconsistent with Sierra Club v. Morton, 405 U.S. 727 (1972). Merriam v. Kunzig, 347 F. Supp. 713, 720-24 (E.D. Pa. 1972). That case, however, has been recently reversed and *Scanwell* embraced by the Third Circuit Court of Appeals. Merriam v. Kunzig, 476 F.2d 1233, 1240-43 (3d Cir. 1973). The court pointed to the GAO protest regulations as a sign from the "agent of Congress in policing Government expenditures" that bidders were within the zone of interest that Congress intended to create with the procurement statutes. 476 F.2d at 1242-43.

246. This problem of how much "agency discretion" is to be recognized—the striking of a balance between the need for review and the practicalities of administration—is far broader than bid protests. The issues are well summarized and analyzed best in Saferstein, *supra* note 230. A particularly insightful discussion of the dilemma in the bid protest area is provided in FED. CONT. REP. No. 281, July 7, 1969, at K-1. *See also* Pierson, *supra* note 209, at 24-31.

247. 463 F.2d 1286 (D.C. Cir. 1972), *rev'g* 342 F. Supp. 703 (D.D.C. 1972).

business integrity. It recognized that a hearing is required before a debarment, which lasts three years. The GAO held, however, that the "temporary" remedy of suspension—even for a year or more—requires a substantially lower level of due process.[248] Both the district court and court of appeals disagreed. They emphasized the harm done the contractor by even "temporary" denial of contracts. The court of appeals thought a one-month suspension without a hearing might be allowable, but in most cases no more.[249] The suspension was thus reversed and sent back to the agency. *Horne Brothers* does not necessarily show that the GAO is less concerned with "fairness" than are the courts. Every case, however, presents some elements of agency convenience conflicting with what a contractor sees as his rights. The GAO simply seems to give convenience or "practical considerations" somewhat more weight.

Special Proposals

The greatest concern of the agencies seem to be that needed material will not be available while courts and lawyers discuss who should supply it. One possible compromise would be to award money damages to any bidder who was improperly denied a contract award. Such recovery was permitted in 1956 in *Heyer Products Co. v. United States*[250] and in two later cases in 1970 and 1971.[251] All three cases held that when the treatment of plaintiff's bid is "arbitrary and capricious" or when the bid is not "honestly and fairly" considered, the plaintiff should be allowed to recover the costs incurred in preparing the bid.

The most recent case, *Continental Business Enterprises v. United States*,[252] expressly spoke of this remedy as being a way around the

248. No. 51 COMP. GEN. (1972).

249. 463 F.2d at 1271. The opinion suggests that if holding an evidentiary hearing could be shown to be prejudicial to a later criminal action against a contractor, for example, the Government might not be required to tip its hand. *Id.*

250. 140 F. Supp. 409 (Ct. Cl. 1956).

251. Continental Business Enterprises, Inc. v. United States, 452 F.2d 1016 (Ct. Cl. 1971); Keco Indus., Inc. v. United States, 428 F.2d 1233 (Ct. Cl. 1970). Both were cases in which a bidder went to court after the GAO had turned him down on the merits, *Continental* in 48 COMP. GEN. 314 (1968) and *Keco* in Comp. Gen. Dec. No. B-162538 (Aug. 15, 1968, Jan. 13, 1969) (unpublished); *cf.* Allen M. Campbell Co. v. United States, 467 F.2d 931 (Ct. Cl. 1972) (contract cancelled by order of federal district court treated as not illegal but as terminated for convenience of the Government, thus allowing payment of costs); 52 COMP. GEN. 215 (1972).

252. 452 F.2d 1016 (Ct. Cl. 1971).

problems that followed *Scanwell Labs.*[253] But at least three problems arise with this approach. The first problem to overcome is how one justifies awarding damages, absent a statute, for failing to give a bidder what he had no "legal right" to anyway. Is improper denial of a contract a tort and thus not cognizable by the Court of Claims?[254] Does one have an express or implied contract right to a contract?[255] The second problem is determining how much in damages should be allowable. *Keco Industries v. United States,* the 1970 decision, said that damages should be measured by bid preparation expenses but not by lost profits.[256] Few bidders would consider that sufficient,[257] yet if one goes farther it is hard to stop. Is lost profit enough? How about

253. 452 F.2d at 102:

"Our decision in *Keco* was premised at least in part on the feeling that aggrieved bidders have the right to require the Government to enforce the statutes and regulations fairly and honestly, either by seeking equitable relief in the Federal district courts or by suing for money damages here.

In requesting that we reconsider our holding in *Keco,* defendant asserts that permitting suits such as the present one could create serious problems in maintaining a smooth and effective procurement system. We have not been told what these problems will be, but we doubt that our holding today will jeopardize the procurement process. Certainly, a suit for damages in this court after the completion of the contract will not disrupt the procurement process as much as an injunction issued before the contract is awarded. M. Steinthal & Co. v. Seamans, . . .

The *Heyer* rule was extended in *Keco* to give aggrieved bidders a damages remedy in lieu of the equitable remedies available in the Federal district courts after Scanwell Lab v. Shaffer, ... In such a suit for damages after completion of the procurement, the merits of each claim can be considered without the time pressures attendant to expedited actions for injunctive relief. Apparently the necessity for such an alternative remedy is even greater than it was when we decided *Keco* because of the difficulties experienced by the district courts in handling *Scanwell*-type cases. See M. Steinthal & Co. v. Seamans, *supra.*"

254. The court's jurisdictional statute, 28 U.S.C. § 1491 (1970), is quite explicit: "The Court of Claims shall have jurisdiction to render judgment upon any claim . . . for liquidated or unliquidated damages in cases not sounding in tort." The remedy for torts is, of course, the Federal Tort Claims Act which vests jurisdiction exclusively in the district courts. 28 U.S.C. § 1346(b) (1970).

255. The only court to consider the question directly decided without explaining that the suit was on a contract under the Tucker Act. Armstrong & Armstrong, Inc. v. United States, 356 F. Supp. 514 (D. Wash. 1973).

256. 428 F.2d 1233, 1240 (Ct. Cl. 1970). The rationale for this measure of damages is as follows. The usual measure for an improper termination is that provided in the termination for convenience clause of the contract, basically cost of work done plus profit on that work. John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963); Albano Cleaners, Inc. v. United States, 455 F.2d 556 (Ct. Cl. 1972) . Where no work has yet been done, there are no costs (except bid preparation) and thus no profits.

257. For example, in Gould, Inc. v. Chafee, 450 F.2d 667, 669 (D.C. Cir. 1971), Judge Leventhal addressed himself generally to this point: "[I]t is questionable whether appellants' legal remedies as aggrieved bidders and contractors are adequate enough to justify dismissal of their suit for want of equity. See Keco Industries v. United States . . . ."

the value of "experience" the contract would have given? Thirdly, what does one do about the situations in which a bid was honestly, but not properly, evaluated? Must bidders take the risk of all but the most egregious conduct? Surely that is in neither the Government's, nor the contractor's interests.[258]

Another alternative, proposed by a subcommittee of the American Bar Association Section of Public Contract Law, is that jurisdiction over bid protests be transferred to agency boards of contract appeals.[259] That would have the advantage of providing a true adversary forum and an opportunity to make a full record. However, there is little connection between the expertise developed hearing disputes cases and the questions involved in bid protests. Likewise, until all boards of contract appeals truly are independent of the heads of their agencies, the possibility of an inherent conflict of interest may be present even more than in a disputes case.

A better view would seem to be that bid protests should be permitted and should be handled by a wholly new division of the GAO. They would no longer be the stepchild of some other GAO function. Such an office expressly should be empowered by statute to hear bid protests and to develop the procedures to do so properly with due process to all parties.[260] While agency convenience is important, it seems

258. The district court in Armstrong & Armstrong, Inc. v. United States, 356 F. Supp. 514 (D. Wash. 1973), granted the bidder damages in what appears to have not been a case of Government bad faith. The issues surrounding damages were not directly addressed, however, and the precedential value of the case seems doubtful.

259. ABA SECTION OF PUBLIC CONTRACT LAW, *supra* note 170, at 22-24.

260. The Commission on Government Procurement also proposed leaving bid protest authority in the GAO, although they did not require a separate division. 4 PROC. COMM'N 40-41. Along with the creation of the new division, it would seem that procurement statutes and regulations should be changed to require announcement of the winning competitor before the actual award, even in negotiated procurements. A protest filed within five days should stay the award unless the agency convincingly demonstrates—not simply alleges—extreme urgency. A conference should be held promptly that would include a representative of the GAO, the agency, the protestor, and the firm proposed for award. Other firms in the bidding would be informed and could also send a representative. The conference could even be held at the field office letting the contract if that were more convenient for most of the participants. Written evidence, or even oral testimony, could be received at that time. Decisions should be prompt and binding with a formal opinion filed later when the time pressure is off. Judicial review could be provided in the form of a suit for recovery of bid preparation expenses by any bidder who can show he would have received the contract but for the illegal action of the procurement authority and the lack of relief from the GAO.

Judicial review is important not only for the protection of the bidder, but also for the review of substantive "common law" made by the GAO in the course of its review. On the GAO's procurement law-making function see Shnitzer, *Changing Concepts in Government Procurement—The Role and Influence of the Comptroller General on Contracting Officer's Operations*, 23 FED. B.J. 90 (1963); Cibinic & Lasken 372-86,

that both bidders and the general public should have a right to know that agencies will follow the law and regulations in making contract awards. Some kind of real forum and real remedy is thus essential.

It may seem that this latter proposal is inconsistent with the rest of this article, which argues for limiting the GAO role in "binding" review of executive action. Nonetheless, the GAO has a unique tradition and an accumulated expertise in this area that should not be lost. The experience of many of the GAO protest experts is far greater than that of most judges, and by removing these GAO decision-makers from the policy-making side of the GAO, their decisions could be even more candid and impartial than today.[261]

Another benefit would accrue from this plan. One value of GAO consideration of protests is the degree to which it lets the GAO keep abreast of and report to Congress problems in administration of the procurement process.[262] That is a value that should be preserved. The proposal made here would have bid protests and reports to Congress handled by distinctly separate divisions, but it would centralize the protest function and make monitoring by the reporting division relatively easy.

THE STAFF ARM OF CONGRESS: PROBLEMS MET BY THE GAO IN ACQUIRING INFORMATION

This article has suggested that the single most important role of the GAO is that of a professional investigative staff for the Congress. It has criticized the diversion of GAO time and resources into attempts to direct or countermand executive behavior and review contract disputes. But the ability to investigate is integral to an effective Congress. As long as the executive departments have information that Congress does not have, it will be difficult for Congress to assume a more active role in decisionmaking. If the GAO can acquire sufficient

261. The Commission on Government Procurement addressed (but left unresolved) the allegation that a separation of powers problem is presented by GAO review of contract awards. 4 PROC. COMM'N 40-41. The issue is the same here as was discussed *supra* at text accompanying notes 79-87. Giving the GAO explicit authority to review bid protests should raise no more genuine constitutional problems than creation of an independent agency to do the same thing.

262. A good recent example is Comp. Gen. Dec. No. B-175292 (June 19, 1972) (unpublished) in which a protest led to a suggested revision of the "brand name or equal clause," ASPR 1-1206.3(b) and FPR 1-1307.6(a)(2). The GAO now reports to Congress all decisions requiring corrective action by an agency. The agencies are required to respond to the GAO report within sixty days. 31 U.S.C. § 1176 (1970); *see* 52 COMP. GEN. 215, 219 (1972).

information sufficiently early, it can help the Congress be in an equally good position to make and assess policy judgments.

Two Fundamental Issues

The Budget and Accounting Act gives the Comptroller General the authority to require the executive agencies to give him "such information . . . as he may from time to time require."[263] Early in the history of that Act, the Attorney General conceded that the Comptroller General may determine how much and what type of information he requires.[264] Subsequent administrations, however, have not acted as though that is in fact the law.

The first line of resistance came on the theory that the Comptroller General's authority to require information was no broader than his power to settle accounts. For example, in connection with an audit of certain real estate transactions, the auditors asked to see abstracts of title and other documents relating to the property interests purchased. The Attorney General has passed on the validity of the titles and asserted that the Comptroller General had no authority to second-guess him.[265]

The Attorney General's position on the GAO's settlement authority is consistent with the view taken in this article. It does not follow, however, that the right of the GAO to acquire information is likewise limited. Criticism of executive action is the GAO's mandate even if countermanding such action is not. When the GAO's audits were wholly transactional, the Attorney General's position may have had arguable merit. Under the system of comprehensive audits, it is intolerable.

Secondly, some agencies take the position that the GAO is entitled to see significantly less information than a member of Congress would be entitled to see. The tripartite structure of our government, the argument runs, raises certain inherent obligations in the Executive to be open with Congress itself. The General Accounting Office, on the other hand, is said to be a mere subsidiary agency whose rights are

263. 31 U.S.C. § 54 (1970).

264. 34 OP. ATT'Y GEN. 446 (1925).

265. 37 OP. ATT'Y GEN. 95 (1933). A close modern analogy is the dispute between the Emergency Loan Guarantee Board and the Comptroller General discussed at text accompanying notes 286-87 *infra*. The GAO there wants to confirm that security deemed acceptable to the Board to support the loan to Lockheed Aircraft Company is in fact sufficient.

strictly limited by the enabling statute.[266]

The scope of the GAO's specific investigative authority is not altogether clear. On the one hand, the GAO is given specific mandates to report on matters of sweeping concern. For example, section 312(a) of the Budget and Accounting Act of 1921 provides, "The Comptroller General shall investigate, at the seat of the government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds. . . ."[267] Section 206 of the Legislative Reorganization Act of 1946 further directs him to "make an expenditure analysis of each agency in the executive branch . . . which . . . will enable Congress to determine whether public funds have been economically and efficiently administered and expended. . . ."[268] In 1970 the responsibility of the GAO was even further expanded by Congress' direction to "review and analyze the results of Government programs and activities carried on under existing law, including the making of cost benefit studies."[269]

Although the Comptroller General is given these broad duties, however, only one section imposes a duty on the executive agencies to cooperate with the GAO. Section 313 of the 1931 Act requires the agencies to supply

> such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he [the Comptroller General] may from time to time require of them; and [GAO employees] . . . shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department.[270]

Section 313 is arguably less broad than it first appears. First, the access to books and records could be said to be only to discover information in the categories enumerated. Of those categories, "powers," "duties," and "organization" are public information and raise no particular issues of disclosure. "Financial transactions" and "methods of business" are likewise the classic stuff of auditors. Only the power to investigate agency "activities" is left as the basis for GAO comprehensive reviews. It can be argued that Congress would not have

266. A specific distinction, for example, is drawn by Department of Defense Directive 7650.1, at 3-4 (July 9, 1958).
267. 31 U.S.C. § 53(a) (1970).
268. 31 U.S.C. § 60 (1970).
269. 31 U.S.C. § 1154 (1970).
270. 31 U.S.C. § 54 (1970).

buried such a potentially sweeping grant of investigative authority among a series of relatively ordinary and obvious powers.

In response to such arguments, the General Accounting Office has suggested that, quite apart from section 313, each new directive to report implies a new correlative investigating authority.[271] Furthermore, in the floor debates on the Budget and Accounting Act of 1921 Congressman Good expressly explained that the reference to "application" of funds in section 312[272] was intended to permit investigation of agency efficiency as distinguished from financial integrity.[273] In addition, if the issue of GAO authority is directly posed, a congressional committee can request the information and turn it over to the GAO.[274]

The ambiguity of GAO authority, however, leaves room for agency evasion where none should be possible.[275] Whatever one thinks of the Comptroller General's proper role in disputes, bid protests, or the settlement of accounts, his ability to ferret out information is essential. To avoid the ambiguity and to reiterate that the GAO is truly a staff arm of Congress, any new statute dealing with GAO responsibilities and power should expressly give the GAO the authority to compel production of any and all information that any individual congressman or committee of Congress could compel.

Some Hard, Concrete Issues

Describing GAO authority as co-equal with that of Congress gives a general measure of proper GAO authority, but it does not decide the concrete cases. The GAO has met and may be expected to continue to meet resistance to its having "ready access to uncensored files" of an agency.[276]

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271. *Hearings on Defense Production Act Amendments—1972 Before the Senate Comm. on Banking, Housing & Urban Affairs*, 92d Cong., 2d Sess. 51-59 (1972).

272. 31 U.S.C. § 53 (1970).

273. 58 CONG. REC. 7292-93 (1919) (colloquy with Congressman Luce).

274. Congress' authority to compel information is codified in 2 U.S.C. §§ 190b (a), 192 (1970). The specific dimensions of Congress' inherent investigative power is beyond the scope of this article. *See* McGrain v. Daugherty, 273 U.S. 135 (1927); 2 ROBERTSON, TRIALS OF AARON BURR 533-36 (1809); *cf.* United States v. Reynolds, 345 U.S. 1 (1953); United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936).

275. Some of the most vigorous resistance to GAO review has come, perhaps surprisingly, from the Internal Revenue Service. The issues apparently do not center on disclosure of individual tax returns; that would indeed raise issues of confidentiality. Instead the IRS seems to take the position that the GAO lacks explicit authority to monitor its methods of operation; *see* 1972 COMP. GEN. ANN. REP. 11, 16, 115.

276. The phrase is from an unpublished letter from Deputy Secretary of Defense

The most obvious—and most extreme—basis for resistance is that of executive privilege. Many words have been spent in analysis of that concept. None have identified a specific constitutional basis for it, but there are unquestionably many cases in which Presidents have asserted the "privilege" and gotten away with it. One Attorney General has not unconvincingly argued that conversations between the President and his advisors should be as privileged from congressional investigations as conferences between Justices of the United States Supreme Court.[277] Most writers argue, however, that the issues are completely different and that the executive has no privilege at all.[278]

The Watergate investigation has brought the issue to public attention once again, but in the long run executive privilege is unlikely to be a major barrier to GAO investigation. Presidents Kennedy, Johnson, and Nixon have decreed that the privilege may be invoked only by them personally.[279] As presidential staffs have grown in recent

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Paul Nitze to Comptroller General Staats, dated November 16, 1967, part of an exchange they had over the degree of appropriate GAO access to Inspector General reports.

277. *Hearings on the Power of the President to Withhold Information From the Congress Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess., pt. 1, at 44 (1958) (testimony of Attorney General Rogers). It should be remembered that at the time this was an appealing position to many since the most probing Congressional investigator of recent years had been Senator Joseph McCarthy. *See also Hearings Before a Subcomm. of the House Comm. on Gov't Operations on United States Gov't Information Policies and Practices—The Pentagon Papers*, 92d Cong., 1st Sess. 358-90, 780-97 (1971) (testimony of Assistant Attorney General Rehnquist).

278. *See* HOUSE COMM. ON GOV'T OPERATIONS, THE RIGHT OF CONGRESS TO OBTAIN INFORMATION FROM THE EXECUTIVE AND FROM OTHER AGENCIES OF THE FEDERAL GOV'T, 84th Cong., 2d Sess. (1956); 118 CONG. REC. E579698 (daily ed. May 25, 1972) (statement of Raoul Berger); Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A.L. REV. 1043 (1965). For middle ground positions, *see* Soucie v. David, 448 F.2d 1067, 1071-72 & nn.8-12 (D.C. Cir. 1971) (Bazelon, C.J.); *id.* at 1080-85 (Wilkey, J., concurring); Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957); *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1217-19 (1972).

279. President Eisenhower construed the doctrine broadly to prohibit all testimony as to "conversations or communications, or any documents or reproductions concerning . . . advice [from one "employee of the Executive Branch" to another on "official matters"]." 1954 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER 483-84.

President Kennedy changed the policy in a letter to the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee, dated March 7, 1962, saying: "Executive privilege can be invoked only by the President and will not be used without specific Presidential approval." President Johnson reaffirmed this policy by a letter to the same committee, April 2, 1965. President Nixon concurred in a memorandum to the executive agencies on March 24, 1969, sent to the House committee on April 7, 1969. HOUSE COMM. ON GOV'T OPERATIONS, ACCESS BY THE CONGRESS TO INFORMATION FROM REGULATORY BOARDS AND COMMISSIONS, 91st Cong., 2d Sess. 39-41 (1970).

years, the number of subjects and incidents arguably privileged has also grown. It still remains true, however, that assertion of executive privilege is comparatively rare.[280]

The GAO has traditionally been most often involved with executive agencies other than the White House staff.[281] The more sensitive the issues become that the GAO investigates, the greater the likelihood that executive privilege may be invoked. If invoked, it will take more congressional protest than heretofore mustered to obtain the secreted information. The real problems for the GAO, however, are likely to continue to come up in more mundane guises that some may describe as raising issues of "separation of powers" but which are really very practical problems of making government work.

Duplicate Material: Inspector General Reports

First, if basic information is available in two forms, can the GAO have both or only the one the agency wishes? The best example of this issue is the continuing battle over GAO access to reports of the Inspectors General of the military services.[282] Audit reports of the departments contain most of the information the GAO needs for traditional financial review. Inspector General reports, on the other hand, are usually more candid and contain more specific recommendations as to both personalities and policies.

President Nixon reaffirmed this policy on March 12, 1973 in a published policy statement. 31 CONG. QUAR. WEEKLY REP. 608-09 (1973) (text of statement). The statement was stimulated by the efforts of two Congressional committees to have White House Counsel John W. Dean III testify about his involvement, if any, in attempts to "bug" the Watergate headquarters of the Democratic National Committee during the 1972 Presidential campaign. *See* 31 CONG. QUAR. WEEKLY REP. 599 (1973). The doctrine has since been further invoked in the Watergate investigation, particularly over the issue of disclosure of tape recordings of Presidential conversations. *See, e.g.*, 31 CONG. QUAR. WEEKLY REP. 1935, 2048 (1973) (text of Presidential letters invoking privilege).

280. One may question on a number of grounds the propriety of using Executive Privilege in the Watergate case. By President Nixon's count, he relied on Executive Privilege only three times in his first term, however, and while there is dispute about the exact number, it would be a mistake to allow headlines of the moment to put the "problem" of Executive Privilege in a distorted perspective. *See* CONG. QUAR. WEEKLY REP. 295 (1973).

281. *But see "White House Bar on G.A.O. Inquiry Charged by Aspin"*, New York Times, Nov. 20, 1972, at 18, col. 4 (midwest edition). The story reports the White House has refused to let GAO auditors determine whether the total number of White House employees exceeded ceilings set by Congress. At this writing the matter apparently is still unresolved.

282. See Comp. Gen. Dec. No. B-107366, B-134192 (June 5, 1967) (unpublished); *Hearings Before a Subcomm. of the House Comm. on Gov't Operations, Availability of Information from Federal Departments and Agencies*, 85th Cong., 1st Sess. pt. 16, at 3627-707 (1958).

For obvious reasons, the GAO wants the latter reports—or preferably both—particularly when it takes a comprehensive look at an agency's practices. To the armed services, however, Inspector General reports constitute candid advice to a commander for him to use to improve his command. If they are potentially open to public inspection, the reasoning goes, criticism will be muted and problems minimized.[283]

One can imagine situations in which Inspector General reports would not be essential for the GAO to do a complete report and as to which the armed services are probably right in saying that they contain little new information. The practical problem in forcing the GAO to show specific need for a document, however, is that the agencies will rarely find the need sufficient and then the GAO must use some other remedy if any is available. The services have offered summaries of the reports as a substitute,[284] but summaries can be genuinely misleading and may even be worse than nothing at all.

It does seem that if the requirement of disclosure to the GAO truly meant the likelihood of candor to no one, the "victory" would not be worth the cost. So far, however, no one has come up with any concrete evidence to show the likelihood of a loss of candor, and one suspects that it is an argument trotted out when no legitimate contentions are left. The GAO should have access to all relevant documents on a question, whether or not some appear to the executive agency to be duplicative.

Underlying Working Papers: PPB Documents

Another area in which resistance has been met is the supplying of information underlying programming, planning, and budgeting documents. In preparing a budget, the Defense Department and now many other executive agencies use elaborate cost-benefit analyses to select among programs and determine the effectivensss of spending alternatives. The decisionmaking process can thus be recreated in some detail, and it would obviously be in Congress' interest to have such analyses to know the bases of the budget data it is receiving.

283. Letter from Paul Nitze, *supra* note 276; *Hearings, supra* note 282, at 3660-63, 3670-72, 3676-77. A good analogy here is (1) FBI reports which the executive has long refused to supply, *e.g.*, 40 OP. ATT'Y GEN. 45 (1941) (opinion of Attorney General Jackson), and (2) personnel records which are concealed to protect the privacy of government employees as much as to encourage candor in reporting.

284. *Hearings, supra* note 282 at 3575-76.

Now, however, the Executive determines which such reports Congress will receive. Again, the theory is that foolish proposals should be freely made and rejected. Officials would be less willing to be candid, it is argued, if they knew their true feelings and assessments might later be made public.

Such an attitude on the part of executive agencies is understandable and practical, but it seems that within limits Congress should protect its interest in obtaining essential information. Here there are no practical alternative sources of this information. Further, much of this data is absolutely essential if GAO is to help Congress determine the effectiveness of programs and the priorities of an Administration. There is a hard-to-define level of preliminary working drafts of documents before which the GAO should not inquire. Plans do change, foolish suggestions are made and dismissed, and early studies can be more misleading than helpful. Agencies and officials should be free to make candid preliminary analyses without being called to account for them later. However, late-stage documents presenting alternative courses of action and support for each should be open for review. They do not "belong" to the executive agencies. They were paid for by the public and should be available to the agency reviewing the proposal, not just to the agency making it.[285]

Advance Information

The GAO has met the most resistance when it has sought to acquire information prior to the time decisions are made. From the congressional perspective, the information is absolutely essential at this stage if Congress is to avoid being presented with a *fait accompli.* From the Executive's point of view, however, this is a direct threat to its authority to make decisions.

For example, in 1971 Congress established the Emergency Loan Guarantee Board in the Treasury Department,[286] which had as its first

285. *See generally* Mink v. EPA, 464 F.2d 742 (D.C. Cir. 1972), *rev'd,* 93 S. Ct. 827 (1973) (Congressmen seek secret reports on underground nuclear tests); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) (citizens granted access to study of SST).

In fairness, it should be said that Deputy Secretary of Defense David Packard went a long way toward making such documents available in his unpublished memorandum for the Secretaries of the Military Departments dated August 27, 1969. Development Concept Papers, Program Change Decisions, Technical Development Plans, Selected Acquisition Reports, Cost Information Reports, and, after the budget is submitted, Program Budget Decisions, were all made available for GAO review on a regular basis.

286. 15 U.S.C. §§ 1841-52 (Supp. 1971).

function the supervision and administration of the 250 million dollar loan given to Lockheed Aircraft Company in connection with the C-5A cost overrun. The GAO has sought to see the data submitted by Lockheed to justify the sums it has received and to document the strength of the security supporting the Government loan.[287] The Board has flatly denied the GAO's request for such information. It will file its public reports, appropriately documented, at the times required by law, it says. It has refused, however, to let the GAO look over its shoulder in the interim.

Another instance of conflict can occur when the Government is negotiating with a contractor and the GAO wants to know the terms of the offers made by each side so as to be able to comment on the wisdom of the proposed settlement. The Executive regularly declines to supply the information prior to settlement on the ground that the information might leak out and might compromise the Government's negotiating position.

Yet a third example of the resistance to supplying advance information is the policy of not submitting budget data to the GAO before the President formally submits the budget to Congress. If the GAO were given tentative information somewhat earlier, it could prepare commentary and criticism of the President's proposals. Even conceding—and perhaps fearing—that it might be helpful to Congress, however, Presidents have not allowed such access. If "leaks" are to be made, Presidents have wanted to make them for their own purposes.

The denial of advance information to the GAO or to Congress presents a difficult question. It can be argued persuasively that it is proper for Congress or the GAO to criticize a policy that has been adopted—or to say the wrong alternative was selected—but that it is improper to subject the Executive to unsolicited advice during the time

287. The GAO says it wants to determine how the Board has placed values on pledged security, why the Board waived the prohibition on Lockheed's making payments on other loans, how the Board decided Lockheed's management was not to blame for the failure to get other credit, and whether the Board has received required financial statements, certifications, and plans from Lockheed. *Hearings before the Subcomm. on Production & Stabilization of the Senate Comm. on Banking, Housing & Urban Affairs*, 92d Cong., 2d Sess. 51-59 (1972). The General Counsel of the Treasury, Samuel R. Pierce, Jr. on the other hand, has stated that "all credits and related agreements" have been made available to the GAO and that only "internal records of the board relating to its decision-making processes" have been withheld. N.Y. Times, May 21, 1972, § 4, at 14, col. 3. The GAO reports that its "impasse" on this issue was "partially resolved" in August 1972. 1972 COMP. GEN. ANN. REP. 11.

decisions are being made. Indeed, it seems inevitable that if given advance information, the GAO would find itself advocating particular policies rather than only reporting them.

Total control over timing release of information, however, would seem to give the President more power than is tolerable today. The budget is now so large and the issues so complex that few appropriations can even be considered between January, when the budget is submitted, and June 30, the end of the fiscal year. Many appropriations are hardly enacted before the budget is presented the following year.[288] If Congress is to understand fully the issues underlying the budget and if it is to have time to work its will, the GAO should have access to budget data in advance of the budget message. If some of the information leaks to the public—and it may—that seems a necessary price to pay.[289]

Foreign Affairs

What may seem a unique set of problems arises in the area of foreign affairs. Vietnam has increased the intensity of the debate but the issues are broader than that. Should the GAO, for example, have access to documents from foreign governments which might not approve of release? Should it have access to candid Defense Department military assessments of the combat effectiveness of our allies' forces? May it examine memoranda relating to the nation's position in pending or completed negotiations? All these issues have arisen and have proved hard to resolve.[290]

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288. The Department of Defense appropriation for fiscal year 1972 was not passed until December 15, 1971. Act of Dec. 18, 1971, Pub. L. No. 92-204, 85 Stat. 716. That same year the basic appropriation for HEW, the Department of Labor and related agencies was passed on August 6, 1971. Act of Aug. 10, 1971, Pub. L. No. 92-80, 85 Stat. 285. This appropriation was supplemented by the Act of Dec. 15, 1971, Pub. L. No. 11955, 85 Stat. 627.

Last year was an election year so Congress completed work somewhat sooner. The Defense appropriation was passed Oct. 13, 1972. Pub. L. No. 92-570, 86 Stat. 1184. However, the HEW appropriation passed on Oct. 14 was pocket vetoed by President Nixon. Thus the Department of Health, Education and Welfare was funded by continuing resolution for all of fiscal year 1973. *See* 1972 CONG. QUARTERLY ALMANAC 865; 31 CONG. QUARTERLY WEEKLY REP. 413 (Feb. 24, 1973).

289. S. 1214, 93d Cong., 1st Sess. (1973), introduced by Senator Muskie and Senator Ervin, would require that each agency's budget request be sent to Congress, with supporting documents, at the time it goes to the Office of Management and Budget or the President. This would help give Congress the information it needs without adding an additional burdensome reporting requirement on the agencies.

290. Memorandum accompanying Comp. Gen. Dec. No. B-163582 (Sept. 10, 1971) (unpublished). In addition, for example, the GAO complained of being denied

It seems, however, that the fact that foreign affairs is involved should not change the principles already discussed. Congress has an interest in many international questions on which it is asked to make appropriations and perhaps support the commitment of troops. It should be entitled to the facts necessary to make those important judgments. Security classifications are no barrier to GAO review since GAO personnel have security clearances and already review countless highly classified projects. Negotiation memoranda as to foreign affairs should be no more and no less available to the GAO and Congress than memoranda on negotiations with domestic contractors, i.e. they should be available after the fact but not before. In only one area does absolute confidentiality seem in order. Foreign governments must, it seems, have the confidence that their own communiques and views will not be released against their will.[291] The marginal gain in congressional insights provided by those messages, while perhaps important in a few cases, seems outweighed by this essential consideration.

A Proposed Remedy for Nondisclosure

But suppose the executive does not turn information over even in situations in which Congress is entitled to it? Today the GAO is basically limited to cajoling and complaining in its effort to get an agency to change its mind. It could, of course, ask a committee of Congress to subpoena the information and then have the recalcitrant official prosecuted for contempt of Congress.[292] But criminal actions are a crude and extreme way to test the legality of sincerely held executive opposition to disclosure.

Senator Fulbright has proposed in Senate Bill 858 that all funds be automatically cut off for any executive agency that fails to turn over all information that the GAO requests. Only the President's personal invocation of executive privilege would save the agency from this sanction.[293] There are significant benefits to this approach. It would

access to Thai and Korean bases in Vietnam where they wished to study use of American furnished equipment. *Id.* at 15-17. Similarly, the State Department denied the GAO access to U.S. records relating to occupation costs in Berlin. *Id.* at 17-18.

291. *Cf.* New York Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring): "Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept."

292. The issue could also get to court if Congress ordered its Sergeant-at-Arms to arrest the official, and he in turn applied for a writ of habeas corpus. Bishop, *supra* note 278, at 484-85.

293. S. 858, 93d Cong., 1st Sess. (1973). The precedent for this fund cut-off is

be basically self-executing. The GAO would ask, and if the agency refused, in forty days the funds would dry up. It would be a powerful club and might make agency resistance a thing of the past. It seems, however, that the proposal constitutes legislative overkill. Presumably, even Senator Fulbright would agree that if a court held the nondisclosure proper, the cut-off of funds should not occur, yet the proposed law would leave a period of uncertainty pending determination by a court. Contractors performing during that period would presumably go unpaid or cease performance completely.[294] Furthermore, even if the cut-off were held proper, the beneficiaries of the program would be the ones to suffer for the resistance of the agency. It seems that people who need housing, for example, should not do without because HUD withholds information from Congress.

A better approach would seem to empower the GAO to seek a court order compelling production of particular types of agency records. In this way the propriety of the agency action could be determined prior to imposition of any sanction. As suggested in the first part of this article,[295] the Comptroller General's own attorneys should represent him in any such enforcement action since the Justice Department will likely side with the executive agency. There is always the remote possibility that an agency would defy a court order in such a case and a recalcitrant official be put in jail, but it seems unlikely this would often happen. The real battle is usually between the will of the agency and the will of the Comptroller General. An impartial judicial ruling in a case presented fairly for both sides will almost surely be respected.[296]

Acquiring Information Directly from Contractors

Of course much of the information sought by the GAO has to do with programs under Government contract. A tempting way around

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the Foreign Assistance Act of 1961, § 634(c), 22 U.S.C. § 2394(c) (1970). However S. 858 goes farther and would give Congress authority to determine the validity of the President's invocation of the privilege.

294. *Cf.* Graybar Elec. Co. v. United States, 90 Ct. Cl. 232 (1940), discussed at text accompanying notes 193-95 *supra.*

295. Text accompanying notes 88-89 *supra.*

296. A bill along these lines has recently been proposed by the GAO and introduced by Senator Ervin. S. 2049, 93d Cong., 1st Sess. (1973). Title IV of that bill would allow the Comptroller General to get a court order compelling production. If the agency refused, the appropriation for that agency would be cut off unless Congress by resolution of either House voted not to have the cut-off occur. *See* text accompanying notes 311-13 *infra.*

the problems in acquiring information directly from executive agencies is that of going to the contractors instead. Not surprisingly, contractors resist any attempt to give the GAO unlimited access to their books and records. They have no constitutional protection against disclosure, but they have a lot to lose.

First, some cost data is extremely sensitive and in the hands of their competitors would affect the firms' commercial positions. Next, the Government might use the data gathered to measure efficiency and thereafter use it against the contractor in renegotiation or in a suit alleging defective cost and pricing data.[297] Thirdly, there may be costs involved in generating data or making it available. In a fixed price contract, the government never offers to pay these costs, and they may be only partly recoverable on later contracts.[298]

The compromise of these conflicting pressures has been 10 U.S.C. § 2313(b), which provides that each negotiated contract with a military department, the Coast Guard, or NASA

> shall provide that the Comptroller General and his representative are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract.[299]

The GAO has audited contractors pursuant to this section without major incident, save for one case, *Hewlett-Packard Co. v. United*

297. The Renegotiation Act, 50 U.S.C. App. §§ 1211-33 (1970), provides for recovery of excessive profits. The Truth in Negotiations Law, 10 U.S.C. § 2306(f) (1970), requires the contractor to supply cost data to justify his proposed price. Inaccurate data can be the basis for a later price reduction.

298. If anything, they would be recoverable as general overhead costs of the contractor and would be borne by the Government on negotiated contracts in the proportion such contracts bear to the contractor's total business during the year.

As to these and other problems from the contractor's perspective, *see* MAPI STUDY 82-111, 150-64.

299. 10 U.S.C. § 2313(b) (1970). The comparable provision for non-defense contracts is 41 U.S.C. § 254(c) (1970).

In a disturbing bid protest case, the GAO came very close to asserting the audit authority extended to advertised procurements as well. IBM was low bidder on a formally advertised procurement of typewriters. It however refused to comply with what it said was an illegal requirement that its books be open to inspection by the purchasing agency and the GAO. When the agency ruled IBM nonresponsive, it protested to the GAO. Nothing in the legislative history of § 254(c) prohibited inserting the requirement in more contracts than the statute required, the GAO said. In the particular case, the contract included some repair and services work to be done on a cost and hourly basis, so the case may not say every attempt to put the requirement in an advertised contract is proper. As argued further herein, however, firms have a legitimate concern for business privacy that should be infringed only where genuinely necessary. Comp. Gen. Dec. No. B-169589 (Nov. 25, 1970) (unpublished).

States.[300] In that case the contractor had been awarded four negotiated fixed-price contracts for electronic testing equipment carried in Hewlett-Packard's regularly published commercial catalogue. GAO investigators were shown all papers relating directly to these contracts, but the contractor balked at supplying other information "necessary [for the GAO] to review the reasonableness of the contract prices."[301]

Hewlett-Packard argued that the basis of its pricing was none of the Government's business. Because the contracts were for "commercial articles," neither the Renegotiation Act nor any other statute would have allowed the Government a price reduction if the price were "excessive."[302] The GAO's right of access is limited to situations it can do something about, the contractor argued. The GAO and ultimately the court of appeals, however, disagreed. The court said:

> [T]he word "contract," as used in this statute is intended to [embrace] not only the specific terms and conditions of the agreement, but also the general subject matter. . . .
>
> Production costs directly pertain to that subject matter, because if out of line with the contract price, the contract may have been an inappropriate means of meeting this particular procurement need of the Government. While this appraisal could not affect these particular contracts, it could lead to the use of other methods of meeting future procurement needs.[303]

A moment's reflection suggests that *Hewlett-Packard* grants extraordinary authority to the GAO. No longer is it limited to assessing performance of government contracting officials relative to the facts they had access to. Now it can also criticize them based on information they could not have known. Of course, this is not unreasonable if one sees the purpose of the statute as being to help educate Congress about procurement generally. If this were the purpose, however, Congress should have permitted audit of formally advertised contracts as well. Hewlett-Packard's testing of the GAO's authority in court does not seem to have been inherently unreasonable.

The GAO was frustrated by the contractor's resistance, however. The audit began in 1962, and the case was not resolved until 1968.

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300. 385 F.2d 1013 (9th Cir. 1967), *cert. denied*, 390 U.S. 988 (1968).

301. 385 F.2d at 1015.

302. The Renegotiation Act has an exception for standard commercial articles. 50 U.S.C. App. § 1212(e) (1970). The Truth in Negotiations Act excepts "catalog or market prices of commercial items sold in substantial quantities to the general public." 10 U.S.C. § 2306(f) (1970).

303. 385 F.2d at 1016.

As a result, the Comptroller General has sought the authority to subpoena information rather than being forced to proceed by injunction as in *Hewlett-Packard.* The importance of this issue is such that some have suggested that contractor resistance to this subpoena authority is what is holding up passage of Senator Ribicoff's omnibus bill for updating GAO's authority in a variety of areas.[304]

It is unfortunate to hold up needed change over such an issue. The addition of subpoena authority would seem unlikely to make the GAO's acquisition of information significantly easier. If one served with an administrative agency's subpoena refuses to turn over the required information, the agency must seek judicial enforcement. In any such proceeding the contractor can argue that the subpoena requests information that the agency is not entitled to have.[305]

The GAO presumably wants the benefit of the rule that the court shall compel production of subpoenaed information that is not "plainly incompetent or irrelevant to any lawful purpose" of the agency.[306] The court in *Hewlett-Packard,* however, took virtually an identical approach. There seems no necessary reason to believe *Hewlett-Packard* would have been resolved significantly faster or that more information would have been available under a subpoena process than under the present system. The GAO must come to recognize that contractors will have the right to make substantive objections to GAO examination of their books and records under any procedure and that that may take some time.

Instead of insisting on addition of this minor procedural refinement, the GAO should concentrate on legislative clarification of the documents it is entitled to see. The GAO's authority, as defined by *Hewlett-Packard,* is probably already excessive. The GAO was originally created to audit and review the executive agencies, not private contractors. The same argument that would justify a GAO audit in *Hewlett-Packard* would justify an audit of contractors doing no gov-

304. The bill is S. 468, 93d Cong., 1st Sess. (1973), the Budget & Accounting Improvement Act, which the GAO has helped draft. The comments as to what is holding up passage were made by persons following progress of the Bill who have specifically asked not to be quoted by name. A virtually identical subpoena provision is contained in S. 2049, 93d Cong., 1st Sess., § 201-02 (1973).

305. *E.g.,* Shasta Minerals & Chem. Co. v. SEC, 328 F.2d 285 (10th Cir. 1964); SEC v. Wall St. Transcript Co., 294 F. Supp. 298 (S.D.N.Y. 1968); FCC v. Cohn, 154 F. Supp. 899 (S.D.N.Y. 1957).

306. Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943); United States v. Feaster, 376 F.2d 147 (5th Cir. 1967); FTC v. United States Pipe & Foundry Co., 304 F. Supp. 1254 (D.D.C. 1969).

ernment business at all. The information might in some way be useful, if only for purposes of comparison with government contractors. To the extent that the GAO audits matters the contracting agency itself has no right to audit or determine, the GAO is infringing upon an area of legitimate business privacy for comparatively little incremental gain in important information.

CONCLUSION

The attempt by Congress to reassert a major role in policy planning may be one of the most important political developmens of the next decade. The Vietnam War initiated a feeling of urgency about the issue. Having the Presidency and the Congress controlled by different parties will likely sustain the concern of Congress about its role.

The General Accounting Office can be one of Congress' most effective instruments for making its influence felt. No other existing institution is equipped to conduct the long-term, in-depth surveillance and analyses necessary to let Congress know the issues and alternatives before it.[307] This article has suggested, first, that the GAO should be given additional authority to help it accomplish this fundamental task, and, second, that it should withdraw from activities—perhaps important in the 1920's—that bear little relation to the problems of Congress today.

Three bills before the 93rd Congress are specifically designed to enhance the GAO effectiveness. [They] encompass several of the suggestions made herein. Senator Ribicoff has proposed in his Budget and Accounting Improvement Act of 1973[308] that the GAO's role and staff be increased so as to make major studies requested by committees or members of Congress, including "reviews of legislative proposals and alernatives to such proposals."[309] Congressman Reid's Congres-

307. The GAO has made and continues to make internal changes necessary to be able to analyze complex programs more intensively. It has gone through several organizational changes in the past two years. On July 1, 1971, an Office of Policy and Program Planning was created to give direction to GAO activities. 1971 COMP. GEN. ANN. REP. 709. Effective April 1972, three new Assistant Comptroller Generals were appointed and a reorganization was made "on a Government function and program basis." THE G.A.O. REV., Spring 1972, at 64. *See also* Staats, *G.A.O. Auditing in the Seventies*, THE G.A.O. REV., Spring 1972, at 1.

308. S. 460, 93d Cong., 1st Sess. (1973). Many of Senator Ribicoff's proposals are outgrowths of the *Hearings Pursuant to S. Con. Res. 2 Before the Joint Committee on the Organization of the Congress*, 89th Cong., 1st Sess. (1965). In the 92d Congress, the bill was S. 1022.

309. S. 460, 93d Cong., 1st Sess. § 101 (1973), *amending* 31 U.S.C. § 53 (1970) to add a new subsection (f)(1). In addition, proposed subsection (h) would require

sional Oversight Act of 1973[310] would go much farther and create an Office of Budget and Expenditure Oversight within the GAO which would "analyze the Budget," review the "accuracy of revenue projections therein" and determine "the extent to which proposed expenditures conform to the legislative proposals of Congress." In addition, the Reid bill would require the President to get the approval of the Comptroller General before impounding any appropriation, and would expressly reaffirm the Comptroller General's authority to determine the legality of particular expenditures. Senator Ervin has recently introduced what is apparently the "official" GAO request for new authority.[311] It resembles most the Ribicoff bill, but goes far beyond that bill toward guaranteeing GAO access to information.

As argued herein, it seems essential that Congress give the Comptroller General the authority and resources to investigate, criticize, and evaluate alternatives to any and all Government programs, whether at the request of a committee or member of Congress or on its own initiative. Bills go far in that direction. Both the Ervin and Reid bills would give the GAO basically the same right to compel production of information from an executive department that a member of Congress would have.[312]

Congressman Reid also would give the GAO authority to appear in court to seek an order compelling production of all records it is entitled to see. Senator Ribicoff, in turn, would give the GAO authority to file suit in federal district court to enjoin any announced or initiated program of activity which the Comptroller General believes

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the GAO to submit regular status reports on major programs, particularly highlighting cost overruns. Title II of the proposed bill would change the name of the General Accounting Office to the Office of the Comptroller General of the United States. Titles III and IV propose technical changes in the audit of Government corporations and other entities. Title V would authorize employment of consultants. Title VI would give the GAO subpoena power. Title VII would give the GAO authority to enforce its findings in court. *But see* Staats, *Objectives of the General Accounting Office*, THE GAO REV., Winter 1973, at 2: "It is certainly not the GAO's objective to become the 'think tank' for the Congress on the best solutions to pressing national problems. Nor is it our job to assess overall national program priorities or budget funding requirements."

310. H.R. 2403, 93d Cong., 1st Sess. (1973).

311. S. 2049, 93d Cong., 1st Sess. (1973). On the "official" status of the bill, see FED. CONT. REP. No. 486, June 25, 1973, at A-12.

312. Neither acknowledges, as suggested earlier in this article, that two exceptions should probably be recognized: (1) executive privilege asserted by the President himself, and (2) confidential communications from foreign governments; *cf.* S. 858, 93d Cong., 1st Sess. (1973) (Fulbright bill on disclosure of information and executive privilege). Yet another bill on advance disclosure of budget requests, S. 1214, 93d Cong., 1st Sess. (1973), is discussed at note 289 *supra*.

to be in violation of federal law. The Ervin bill recognizes, as argued in this article, that a new law should include both powers.[313] Further, the GAO should be represented in court by its own attorneys, something the Ribicoff and Ervin but not the Reid bill recognize.

On the other hand, the Comptroller General should be specifically prohibited from unilaterally disallowing payments that he believes to be "illegal." The Ribicoff and Ervin [bills] seem far preferable to the Reid bill in this regard. As discussed early in this article, the power of disallowance is extraordinarily subject to abuse. The GAO remedies surely should be limited to (1) obtaining an injunction against further spending and (2) referral to the Justice Department of payments made knowingly or negligently in violation of an unambiguous statute or court decision.

Finally, none of the bills consider two other issues raised in this article.[314] As discussed above, the General Accounting Office should be prohibited from review of board of contract appeals decisions, whether in favor of the contractor or of the Government. Further, a new division should be established in the GAO to handle bid protest cases and develop the procedures necessary to provide bidders with the due process that has heretofore been lacking.

The proposals made in this article are not the first proposals for change in the GAO. Just two years after signing the Budget and Accounting Act of 1921, President Harding proposed a return of the GAO's functions to the Treasury.[315] President Hoover also proposed to return some of its powers to the Treasury[316] and President Roosevelt almost succeeded.[317] Later Hoover Commissions renewed the proposals, but all such attempts have failed.[318]

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313. Senator Ervin's bill is more precise about this procedure. He would have the Comptroller General file suit in federal district court. The decision there could be appealed directly to the United States Supreme Court. If an agency failed to comply with a final order to produce, its appropriation would be cut off thirty days after the Comptroller General decided to invoke that remedy if in the interim neither House of Congress had passed a resolution not favoring that sanction. S. 2049, 93d Cong., 1st Sess., § 402 (1973).

314. Two other bills do deal with these issues and incorporate the recommendations of the Commission on Government Procurement, H.R. 9061, H.R. 9062, 93d Cong., 1st Sess. (1973).

315. MANSFIELD 279-80; MAPI STUDY 25.

316. MANSFIELD 280-81; MAPI STUDY 26.

317. MANSFIELD 281-85; MAPI STUDY 26-28. "[T]he . . . legislative record reads something like an early motion picture serial—including a narrow escape from sudden death." *Id.* at 27.

318. MAPI STUDY 28-29. Some of the recommendations of the First Hoover Com-

The proposals made herein are as extensive as any made before. Is there any chance, then, of their success? It seems that there is. All proposals up to now have been proposed and advocated so as to make Congress a net loser at the expense of the executive. The suggestions here do just the reverse. Any "loss" of GAO authority is proposed only to focus its attention on the real business of Congress, the constructive review of Executive programs.

The changes proposed here and in these bills will not of themselves restore Congress to parity of power with the executive branch, but they seem an essential beginning. The real danger seems more and more to be that Congress will be too sluggish or timid to seize the initiative. Senator Packwood has been quoted as saying, "Congress really doesn't want power; it's a lot easier around here if there isn't much responsibility."[319] If that is true, the nation, not just the Congress, will be the loser. Congress is not always right and the President always wrong, but the health of our system depends on a vigorous check and balance between the two. Watergate, unfortunate as it has been for the nation, gives Congress an opportunity almost unique in history to reassert itself—if it has the will to do so. The General Accounting Office can be an important ally in that process.

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mission resulted in the Budget and Accounting Procedures Act of 1950, but Congress did nothing to return any authority to the Executive. *See* discussion *supra* at note 32.

319. Hunt, *Senate and House Move to Reassert Authority But May Lose Initiative,* Wall St. J., Aug. 3, 1973, at 1, col. 1; *cf. 1972-73 Report of the [ABA] Separation of Powers Committee,* 25 ADMIN. L. REV. 351 (1973) (arguing that Congress has abdicated much of its authority by overly broad delegations of power in statutes).