

The Burger Court Opinion Writing Database

S&E Contractors, Inc. v. United States
406 U.S. 1 (1972)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 30, 1971

Re: No. 70-88 - S&E Contractors v. U. S.

MEMORANDUM TO MR. JUSTICE BLACKMUN:

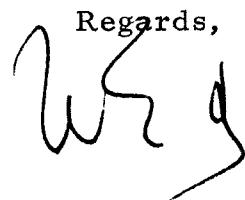
Bill's dissent seems to me to have the better of the argument. My experience in the Department (where all those cases were on my desk) pulls me somewhat due to wide variations in the agencies and their personnel and traditions.

However, Bill's page 8 (third draft) second full paragraph gives me some trouble. The Attorney General is not just another attorney bound to assert or defend all that any agent of the Executive Branch desires. Rather he is a co-equal and in this case he could, by long tradition and practice, have gone either way.

I expressly disagree with the two final sentences on page 8 that "it is the duty of the Attorney General to implement [the] decision" of an agency. On several occasions I flatly declined to do so. The Attorney General's duty and role are something more and something less than Bill sets out. For example, when the Maritime Commission (circa 1946-48) flouted the statutes in fixing a subsidy to the S. S. United States, a terrible row occurred between the GAO and Commerce and it reached Truman's desk for personal decision. It was still there when Eisenhower came in and I was requested to resolve it. I could have gone either way and did so in effect by the compromise we then worked out.

I will see if Bill is amenable to modifying page 8 a bit and if not I plan to join him with that reservation.

Regards,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 9, 1971

Re: No. 70-88 - S&E Contractors v. U. S.

Dear Bill:

This will confirm that the opinion of the Court
in the above case has now been reassigned to you.

Regards,

W^E D^B

Mr. Justice Douglas

cc: The Conference

for
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 3, 1972

No. 70-88 -- S & E Contractors v. U.S.

Dear Bill:

I have already joined you and confirm that as to the most recent draft circulated. I contemplate having Harry recite that I also join in his concurring opinion provided he makes clear that he joins your opinion, as I believe he intends.

Regards,

WB

Mr. Justice Douglas

Wm Douglas
70-88

Oct 71
Not included in file

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 14, 1972

No. 70-88 -- S&E Contractors v. United States

Dear Bill:

Please join me.

Regards,

J. E. B.

Mr. Justice Douglas

Copies to the Conference

(B)
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 17, 1972

Re: No. 70-88 - S&E Contractors v. U. S.

Dear Harry:

Please join me in your concurring opinion.

Regards,

WEB

Mr. Justice Blackmun

cc: The Conference

*As you know I had
already joined W.O.D.*

file
Cir
11/24/71

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-88

S&E Contractors, Inc., Petitioner,
v. United States, } On Writ of Certiorari to the
United States Court of Claims.

[December —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

I cannot agree with the majority's conclusion that the Wunderlich Act, 41 U. S. C. §§ 321-322, gives the Department of Justice—one agency of Government—the power to challenge decisions made by the Atomic Energy Commission—another agency of Government. Here, AEC contracted with petitioner and provided a method for resolving disputes with that contracting agency. That method was followed and disputes were decided in favor of petitioner, but the Department of Justice refused to comply with the decision of the AEC rendered in accordance with the terms of the contract. The majority now places its imprimatur on a practice which lacks that fair dealing which a private citizen should be able to expect from his government.

On August 4, 1961, petitioner contracted with the Atomic Energy Commission to build a testing facility at the National Reactor Test Station in Idaho. The work was completed and accepted by the Atomic Energy Commission on June 29, 1962. Because of various changes in contract specifications and difficulties in meeting performance schedules, petitioner submitted a series of claims to the contracting officer for resolution under the

Wm Dayton
Oct 71

file
Rec'd
11-27

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-88

S&E Contractors, Inc., Petitioner,
v. On Writ of Certiorari to the
United States Court of Claims.
United States.

[December —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

I cannot agree with the majority's conclusion that the Wunderlich Act, 41 U. S. C. §§ 321-322, gives the Department of Justice—one agency of Government—the power to challenge decisions made by the Atomic Energy Commission—another agency of Government. Here, AEC contracted with petitioner and provided a method for resolving disputes with that contracting agency. That method was followed and disputes were decided in favor of petitioner, but the Department of Justice refused to comply with the decision of the AEC rendered in accordance with the terms of the contract. The majority now places its imprimatur on a practice which lacks that fair dealing which a private citizen should be able to expect from his government.

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Wm Dwyer
Dec 71

file
Recd
12/11/71

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-88

S&E Contractors, Inc.,
Petitioner,
v.
United States. } On Writ of Certiorari to the
United States Court of Claims.

[December —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

I cannot agree with the majority's conclusion that the Wunderlich Act, 41 U. S. C. §§ 321-322, gives the Department of Justice—one agency of Government—the power to challenge decisions made by the Atomic Energy Commission—another agency of Government. Here, AEC contracted with petitioner and provided a method for resolving disputes with that contracting agency. That method was followed and disputes were decided in favor of petitioner, but the Department of Justice refused to comply with the decision of the AEC rendered in accordance with the terms of the contract. The majority now places its imprimatur on a practice which lacks that fair dealing which a private citizen should be able to expect from his government.

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Wm. Douglas
Dec 71

Recess

1244/71

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-88

S&E Contractors, Inc., Petitioner,
v. United States. } On Writ of Certiorari to the
United States Court of Claims.

[December —, 1971]

Memorandum from MR. JUSTICE DOUGLAS.

I do not believe that the Wunderlich Act, 41 U. S. C. §§ 321-322 gives the Department of Justice—one agency of Government—the power to challenge decisions made by the Atomic Energy Commission—another agency of Government.—Here, AEC contracted with petitioner and provided a method for resolving disputes with that contracting agency. That method was followed and disputes were decided in favor of petitioner, but the Department of Justice refused to comply with the decision of the AEC rendered in accordance with the terms of the contract. The majority now places its imprimatur on a practice which lacks that fair dealing which a private citizen should be able to expect from his government.

Congress could give the Department of Justice that authority, making it a real ombudsman. But I do not think it did so by the Wunderlich Act.

On August 4, 1961, petitioner contracted with the Atomic Energy Commission to build a testing facility at the National Reactor Test Station in Idaho. The work was completed and accepted by the Atomic Energy Commission on June 29, 1962. Because of various changes in contract specifications and difficulties in meeting performance schedules, petitioner submitted a series of claims to the contracting officer for resolution under the

Wm. Day Jr.
Jan 71

3 2 9

6th DRAFT

Mr. Chief Justice
Mr. Justice Black
Mr. Justice Marlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

No. 70-88

S&E Contractors, Inc., Petitioner,
v. On Writ of Certiorari to the
United States Court of Claims.
United States.

[December —, 1971]

Memorandum from MR. JUSTICE DOUGLAS.

I do not believe that the Wunderlich Act, 41 U. S. C. §§ 321-322 gives the Department of Justice—one agency of Government—the power to challenge decisions made by the Atomic Energy Commission—another agency of Government. Here, AEC contracted with petitioner and provided a method for resolving disputes with that contracting agency. That method was followed and disputes were decided in favor of petitioner, but the Department of Justice refused to comply with the decision of the AEC rendered in accordance with the terms of the contract. Congress could give the Department of Justice that authority, making it a real ombudsman. But I do not think it did so by the Wunderlich Act.

On August 4, 1961, petitioner contracted with the Atomic Energy Commission to build a testing facility at the National Reactor Test Station in Idaho. The work was completed and accepted by the Atomic Energy Commission on June 29, 1962. Because of various changes in contract specifications and difficulties in meeting performance schedules, petitioner submitted a series of claims to the contracting officer for resolution under the standard disputes clause contained in the contract.¹ ask-

¹ The contract provided:

6. Disputes

"(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is

To: The Chief Justice
 Mr. Justice Black
 Mr. Justice Harlan
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun

7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-88

1/19/71

S&E Contractors, Inc.,
 Petitioner,
 v.
 United States. } On Writ of Certiorari to the
 United States Court of Claims.

[December —, 1971]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question presented in this case is whether the Government may challenge the finality of an agency's contract disputes decision in favor of a Government contractor on the grounds specified in the proviso to § 321 of the so-called Wunderlich Act, "That . . . the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."¹

¹ The Wunderlich Act, 68 Stat. 81, 41 U. S. C. §§ 321-322, provides: "41 U. S. C. 321:

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

"41 U. S. C. 322:

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

Wm. Brem
 Jan 71

Mr. T. H.
Mr. F. J.
Mr. G.
Mr. J.
Mr. G.
Mr. J.
Mr. G.
Mr. G.

8th DRAFT

1970: Douglass, J.

SUPREME COURT OF THE UNITED STATES

No. 70-88

Recipient Date: 12/13/21

S&E Contractors, Inc., Petitioner,
v. United States. } On Writ of Certiorari to the
United States Court of Claims.

[December —, 1971]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question presented in this case is whether the Government may challenge the finality of an agency's contract disputes decision in favor of a Government contractor on the grounds specified in the proviso to § 321 of the so-called Wunderlich Act. "That . . . the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."¹

¹ The Wunderlich Act, 68 Stat. 81, 41 U. S. C. §§ 321-322, provides: "41 U. S. C. 321:

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

"41 U. S. C. 322:

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

File
Rec'd

12/14/71

9th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-88

S&E Contractors, Inc.,
Petitioner,
v.
United States. } On Writ of Certiorari to the
United States Court of Claims.

[December —, 1971]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question presented in this case is whether the Government may challenge the finality of an agency's contract disputes decision in favor of a Government contractor on the grounds specified in the proviso to § 321 of the so-called Wunderlich Act, "That . . . the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."¹

¹ The Wunderlich Act, 68 Stat. 81, 41 U. S. C. §§ 321–322, provides: “41 U. S. C. 321;

"No provision of any contract entered into by the United States relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

"41 U. S. C. 322:

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

Mr. Doyle
Oct 71

Leifer
Klein
12-1

10th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-88

S&E Contractors, Inc.,
Petitioner,
v.
United States. } On Writ of Certiorari to the
United States Court of Claims.

[December —, 1971]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question presented in this case is whether the Government may challenge the finality of an agency's contract disputes decision in favor of a Government contractor on the grounds specified in the proviso to § 321 of the so-called Wunderlich Act, "That . . . the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."¹

¹ The Wunderlich Act, 68 Stat. 81, 41 U. S. C. §§ 321-322, provides: "41 U. S. C. 321:

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

"41 U. S. C. 322:

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

©

Oct 71

Wm. Douglas

70-88

file
Recd

1/20/71

11th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-88

S&E Contractors, Inc.,
Petitioner,
v.
United States. } On Writ of Certiorari to the
United States Court of Claims.

[January —, 1972]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question presented in this case is whether the Government may challenge the finality of an agency's contract disputes decision in favor of a Government contractor on the grounds specified in the proviso to § 321 of the so-called Wunderlich Act, "That . . . the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."¹

¹ The Wunderlich Act, 68 Stat. 81, 41 U. S. C. §§ 321-322, provides: 41 U. S. C. § 321:

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41 U. S. C. § 322:

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

Q

Dec 7 1971

John Langbein

file
Rec'd
1-5

12th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-88

[January —, 1972]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question presented in this case is whether the Government may challenge the finality of an agency's contract disputes decision in favor of a Government contractor on the grounds specified in the proviso to § 321 of the so-called Wunderlich Act, "That . . . the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."¹

¹ The Wunderlich Act, 68 Stat. 81, 41 U. S. C. §§ 321–322, provides: 41 U. S. C. § 321:

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

41 U. S. C. § 322:

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

Oct 71

Wm. D. Carter

Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brewer
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

13th DRAFT

From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

No. 70-88

Recirculation

S&E Contractors, Inc., Petitioner,
v. On Writ of Certiorari to the
United States Court of Claims.
United States.

[January —, 1972]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question presented in this case is whether the Government may challenge the finality of an agency's contract disputes decision in favor of a Government contractor on the grounds specified in the proviso to § 321 of the so-called Wunderlich Act, "That . . . the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."¹

¹ The Wunderlich Act, 68 Stat. 81, 41 U. S. C. §§ 321-322, provides: 41 U. S. C. § 321:

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

41 U. S. C. § 322:

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

Rec'd

Rec'd

11th
10th DRAFT

4/3/72

SUPREME COURT OF THE UNITED STATES

No. 70-88

S&E Contractors, Inc.,
Petitioner,
v.
United States. } On Writ of Certiorari to the
United States Court of Claims.

[April —, 1972]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question presented in this case is whether the Department of Justice may challenge the finality of a contract disputes decision made by the Atomic Energy Commission in favor of its contractor, where the contract provides that the decision of AEC shall be "final and conclusive." Section 321 of the Wunderlich Act leaves open for contest a claim that "is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."¹

¹ The Wunderlich Act, 68 Stat. 81, 41 U. S. C. §§ 321-322, provides: 41 U. S. C. § 321:

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

41 U. S. C. § 322:

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

Oct 71

John Douglas

To: The Chief Justice
Mr. Justice Newmann
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Sutherland

17th DRAFT

From: Doug

STATES
Circulated:

No. 70-88

Recirculated: 4-17

S&E Contractors, Inc.,
Petitioner,
v.
United States.

On Writ of Certiorari to the
United States Court of Claims.

[April —, 1972]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question presented in this case is whether the Department of Justice may challenge the finality of a contract disputes decision made by the Atomic Energy Commission in favor of its contractor, where the contract provides that the decision of AEC shall be "final and conclusive." Section 321 of the Wunderlich Act leaves open for contest a claim that "is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."¹

¹ The Wunderlich Act, 68 Stat. 81, 41 U. S. C. §§ 321-322, provides: 41 U. S. C. § 321:

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

41 U. S. C. § 322:

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

the Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Brennan, J.

No. 70-88

Circulated: 4/23/71

Recirculated: _____

S&E Contractors, Inc.,
Petitioner,
v.
United States. } On Writ of Certiorari to the
United States Court of Claims.

[December —, 1971]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether the Government is entitled to challenge a contract disputes decision rendered by an agency in favor of a Government contractor under the standards for judicial review specified in the proviso to § 321 of the so-called Wunderlich Act, "That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."¹

¹ The Wunderlich Act, 68 Stat. 81, 41 U. S. C. §§ 321-322 provides: "41 U. S. C. 321:

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

"41 U. S. C. 322:

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

Wm Douglas Oct 71
70-88

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Appendix not reproduced

Planned in
2nd DRAFT

Mr. Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

No. 70-88

Circulated:

Recirculated:

S&E Contractors, Inc.,

Petitioner.

v.

United States.

On Writ of Certiorari to the
United States Court of Claims.

[December —, 1971]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether the standards for judicial review specified in the proviso to § 321 of the so-called Wunderlich Act, "That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence,"¹ are available to the Government to challenge a contract disputes decision rendered by an agency in favor of a Government contractor.

¹ The Wunderlich Act, 68 Stat. 81, 41 U. S. C. §§ 321-322 provides:
"41 U. S. C. 321:

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

"41 U. S. C. 322:

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

See Pages 1, 4, 10 & 11

✓Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-88

F

11-32-71

S&E Contractors, Inc.,
Petitioner,
v.
United States. } On Writ of Certiorari to the
United States Court of Claims.

[December —, 1971]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether the Government may challenge the finality of an agency's contract disputes decision in favor of a Government contractor on the grounds specified in the proviso to § 321 of the so-called Wunderlich Act, "That . . . the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."¹

¹ The Wunderlich Act, 68 Stat. 81, 41 U. S. C. §§ 321-322, provides: "41 U. S. C. 321:

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

"41 U. S. C. 322:

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

Wm Daigle Oct 71
70-88

cc: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

4th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Brennan

No. 70-88

S&E Contractors, Inc., Petitioner,
v. United States. } On Writ of Certiorari to the
United States Court of Claims.

[December —, 1971]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether the Government may challenge the finality of an agency's contract disputes decision in favor of a Government contractor on the grounds specified in the proviso to § 321 of the so-called Wunderlich Act, "That . . . the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."¹

¹ The Wunderlich Act, 68 Stat. 81, 41 U. S. C. §§ 321-322, provides: "41 U. S. C. 321:

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

"41 U. S. C. 322:

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

Oct 71 Wm Taylor
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M
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 9, 1971

RE: No. 70-88 - S & E Contractors v.
United States

Dear Chief:

I had the enclosed at the Printer before
I got your notice that you had reassigned the
opinion to Bill. Since it's prepared, I thought
I'd send it around anyway. The important
change is an addition at the end of Part I.

Sincerely,

Bill

The Chief Justice

cc: The Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
✓Mr. Justice Marshall
Mr. Justice Blackmun

From: Brennan, J.

5th DRAFT

Circulated:

Recirculated: 12-10-71

No. 70-88

S&E Contractors, Inc.,
Petitioner,
v.
United States. } On Writ of Certiorari to the
United States Court of Claims.

[December —, 1971]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether the Government may challenge the finality of an agency's contract disputes decision in favor of a Government contractor on the grounds specified in the proviso to § 321 of the so-called Wunderlich Act, "That . . . the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."¹

² The Wunderlich Act, 68 Stat. 81, 41 U. S. C. §§ 321-322, provides: "41 U. S. C. 321;

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

"41 U. S. C. 322:

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 15, 1971

MEMORANDUM TO THE CONFERENCE

RE: No. 70-88 - S & E Contractors v. United States

I shall in due course circulate a dissent in the
above.

W.J.B. Jr.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES.

Circulated: 1/4/72

No. 70-88

Recirculated: _____

S&E Contractors, Inc., Petitioner,
v. On Writ of Certiorari to the
United States Court of Claims.
United States.

MR. JUSTICE BRENNAN, dissenting.

Today's decision does more than gut the Wunderlich Act. It also destroys the equality before the courts between Government and contractor built into a structure of law developed over a century to regulate the enforcement of disputes clauses in procurement contracts. The salient features of that structure, eliminated by today's decision, are:

First. Since 1878, this Court has held that the parties may agree that the decision of an official of one of them upon a matter in dispute under the contract will be final and conclusive and, further, that the official's decision is not subject to a court's revisory power in the absence of fraud or gross mistake necessarily implying bad faith by the official. *Kihlberg v. United States*, 97 U. S. 398 (1878).

Today's decision holds that the Wunderlich Act prohibits the Government from entering into a contract that affords it the right to judicial review of disputes decisions on any ground, including fraud. A statute that bars finality is construed to require finality.

Second. The finality of a disputes decision may be challenged for fraud or on other permissible grounds by the party whose official rendered it as well as by the contractor. The right to judicial review is a two-way street. *Chicago, S. F. & Calif. R. R. v. Price*, 138 U. S.

F7
Title: *Argus*

Page 1, 3, 4, 21, 22, 31 v 41

To: The Chief Justice
 ✓ Mr. Justice Douglas
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Black
 Mr. Justice Powell
 Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Brennan, J.

No. 70-88

Circulated: _____

Recirculated: 1-6-7

S&E Contractors, Inc.,
 Petitioner,
 v.
 United States. } On Writ of Certiorari to the
 United States Court of Claims.

[January —, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

Today's decision does more than gut the Wunderlich Act. It also destroys the equality before the courts between Government and contractor built into a structure of law developed over a century to regulate the enforcement of disputes clauses in procurement contracts. The salient features of that structure, eliminated by today's decision, are:

First. Since 1878, this Court has held that the parties may agree that the decision of an official of one of them upon a matter in dispute under the contract will be final and conclusive and, further, that the official's decision is not subject to the courts' revisory power in the absence of fraud or gross mistake necessarily implying bad faith by the official. *Kihlberg v. United States*, 97 U. S. 398 (1878). Congress enacted the Wunderlich Act to expand the grounds for the exercise of this judicial power.

Today's decision holds that the Wunderlich Act prohibits the Government from entering into a contract that affords it the right to judicial review of disputes decisions on any ground, including fraud. A statute that bars finality is construed to require finality.

Second. The finality of a disputes decision may be challenged for fraud or on other permissible grounds by the party whose official rendered it as well as by the

Oct 71, Wm Doug
7088

DO NOT
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR. April 4, 1972

RE: No. 70-88 - S & E Contractors v. United
States

Dear Bill:

In due course I shall circulate a dissent
in the above.

Sincerely,

Bill

Mr. Justice Douglas

cc: The Conference

(7) ~~✓~~ 1, 19-21,
18, 12, 41, 43, 44
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33, 37, 40, 41, 43, 44
of minor styles in (chart)
S

Please forgive my

3rd DRAFT

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES

From: Brennan, J.

No. 70-88

Circulated:

S&E Contractors, Inc., Petitioner,
v.
United States. } On Writ of Certiorari to the
United States Court of Claims. **Recircu**

[January —, 1972]

MR. JUSTICE BRENNAN, dissenting.

This is a suit by petitioner against the United States to recover on a contract between petitioner and the Atomic Energy Commission. The contract included a "disputes clause," which provided that the Commission would decide any factual disputes that arose under the contract and that its decision would "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." The disputes clause also provided that while it did "not preclude consideration of law questions in connection with [disputes] decisions," it was not to "be construed as making final the [Commission's] decision . . . on a question of law." Disputes arose during performance of the contract, and the Commission decided them in petitioner's favor. The General Accounting Office, however, when rendering an advance opinion requested on behalf of the Commission as to one of the disputed items, disagreed with the Commission's decision, and for that reason the Commission refused to pay. In petitioner's subsequent suit in the court of claims, petitioner relied upon the Commission's decision as a "final and conclusive" resolution of the disputes, entitling petitioner to summary judgment. The Department of Justice

✓ Mr. Justice Douglas
✓ Mr. Justice Stewart
✓ Mr. Justice White
✓ Mr. Justice Black
✓ Mr. Justice Marshall
✓ Mr. Justice Clark
✓ Mr. Justice Harlan

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for

From: Bre

4th DRAFT

Circulated

SUPREME COURT OF THE UNITED STATES *Recirculated 4-14-72*

No. 70-88

S&E Contractors, Inc.,
Petitioner,
v.
United States. } On Writ of Certiorari to the
United States Court of Claims.

[January —, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

This is a suit by petitioner against the United States to recover on a contract between petitioner and the Atomic Energy Commission. The contract included a "disputes clause," which provided that the Commission would decide any factual disputes that arose under the contract and that its decision would "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." The disputes clause also provided that while it did "not preclude consideration of law questions in connection with [disputes] decisions," it was not to "be construed as making final the [Commission's] decision . . . on a question of law." Disputes arose during performance of the contract, and the Commission decided them in petitioner's favor. The General Accounting Office, however, when rendering an advance opinion requested on behalf of the Commission as to one of the disputed items, disagreed with the Commission's decision, and for that reason the Commission refused to pay. In petitioner's subsequent suit in the Court of Claims, petitioner relied upon the Commission's decision as a "final and conclusive" resolution of the disputes, entitling petitioner to summary judgment. The Department of Jus-

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

5th DRAFT

From: Brennan, J.

No. 70-88

Recirculated: 4/21/72

S&E Contractors, Inc., }
Petitioner, } On Writ of Certiorari to the
v. } United States Court of Claims.
United States. }

[January —, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

This is a suit by petitioner against the United States to recover on a contract between petitioner and the Atomic Energy Commission. The contract included a "disputes clause," which provided that the Commission would decide any factual disputes that arose under the contract and that its decision would "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." The disputes clause also provided that while it did "not preclude consideration of law questions in connection with [disputes] decisions," it was not to "be construed as making final the [Commission's] decision . . . on a question of law." Disputes arose during performance of the contract, and the Commission decided them in petitioner's favor. The General Accounting Office, however, when rendering an advance opinion requested on behalf of the Commission as to one of the disputed items, disagreed with the Commission's decision, and for that reason the Commission refused to pay. In petitioner's subsequent suit in the Court of Claims, petitioner relied upon the Commission's decision as a "final and conclusive" resolution of the disputes, entitling petitioner to summary judgment. The Department of Justice

Wm Douglas
Oct 7
70 64

70-88

Supreme Court of the United States

Memorandum

December 1, 1974

Dear Shirley,

I think this is an
excellent document and should
be given to join it.

Cottontown

70-88

6A
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 2, 1971

70-88, S&E Contractors, Inc. v. U.S.

Dear Harry,

I am glad to join your dissenting opinion
in this case.

Sincerely yours,

PS.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 14, 1971

70-88, S&E Contractors v. U.S.

Dear Harry,

I should appreciate your adding my name
to your concurring opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

BS
1/2
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 5, 1972

No. 70-88 -- S&E Contractors v. U.S.

Dear Bill,

I am glad to join your opinion for the
Court in this case.

Sincerely yours,

OS
1.

Mr. Justice Douglas

Copies to the Conference

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 12, 1972

70-88, S&E Contractors v. U. S.

Dear Harry,

I should appreciate your adding my name to your concurring opinion in this case.

Sincerely yours,

P. S.

Mr. Justice Blackmun

Copies to the Conference

(3)
R
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 24, 1971

Re: No. 70-88 - S&E Contractors, Inc.
v. United States

Dear Bill:

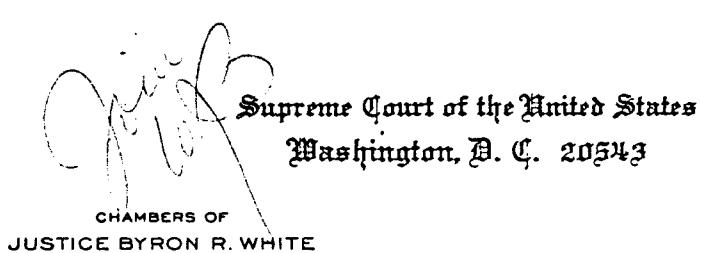
Please join me.

Sincerely,



Mr. Justice Brennan

Copies to Conference



January 6, 1972

Re: No. 70-88 - S&E Contractors Inc.
v. United States

Dear Bill:

Please join me in your masterful dissent in this case. It is quite understandable that the majority's only answer is to underline its own confusion by attempting to put aside cases involving allegedly fraudulent decisions.

Sincerely,

A handwritten signature in black ink, appearing to read "Byron" or "Byron R. White".

Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 13, 1972

Re: No. 70-88 - S&E Contractors Inc.
v. United States

Dear Bill:

Please join me in your
dissent in this case.

Sincerely,

Byron

Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 29, 1971

Re: No. 70-88 - S&E Contractors, Inc. v. U. S.

Dear Bill:

Please join me.

Sincerely,


T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 6, 1972

Re: No. 70-88 - S&E Contractors, Inc. v. U. S.

Dear Bill:

Please join me in your dissent.

Sincerely,


T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 12, 1972

Re: No. 70-88 - S&E Contractors, Inc. v. U. S.

Dear Bill:

Please join me in your dissent.

Sincerely,


T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 29, 1971

Re: No. 70-88 - S & E Contractors, Inc. v. U.S.

Dear Bill:

I, too, may try my hand at a dissent. I shall
endeavor to have it to you within two or three days.

Sincerely,

HAB.

Mr. Justice Brennan

cc: The Conference

Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-88

Circulated: 12/2/71

Recirculated: _____

S&E Contractors, Inc.,
Petitioner,
v.
United States. } On Writ of Certiorari to the
United States Court of Claims.

[December —, 1971]

MR. JUSTICE BLACKMUN, dissenting.

I, too, cannot agree that the Wunderlich Act, 41 U. S. C. §§ 321-322, operates to give the United States the power to challenge a contract disputes clause finding of fact in favor of the contractor by the Government's own contracting agency.

1. It is anomalous, to say the least, that the Court develops at this late date, by a process of statutory construction, a right of review for the United States from its own judgment determination. The contracting officer and the Atomic Energy Commission acted here in an executive capacity for the United States. See *Small Business Administration v. McClellan*, 364 U. S. 446, 448-450 (1960). The Commission is the party to the contract with the contractor. Its exercise of executive judgment is necessarily that of the United States. Yet the Court's decision today grants the United States 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 makes good law.

2. The disputes clause in Government contracts has been employed for over four decades. The clause is one drawn and prescribed by the United States. It is not one drawn by the contractor or by any group of con-

Oct 71 Wm Dsgn
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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
CITATEES
Marshall

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-88

CIVIL 2014-10

S&E Contractors, Inc., }
Petitioner, } On Writ of Certiorari to the
v. } United States Court of Claims.
United States. }

12/6/71

[December —, 1971]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE STEWART concurs, dissenting.

I, too, cannot agree that the Wunderlich Act, 41 U. S. C. §§ 321-322, operates to give the United States the power to challenge a contract disputes clause finding of fact in favor of the contractor by the Government's own contracting agency.

1. It is anomalous, to say the least, that the Court develops at this late date, by a process of statutory construction, a right of review for the United States from its own judgment determination. The contracting officer and the Atomic Energy Commission acted here in an executive capacity for the United States. See *Small Business Administration v. McClellan*, 364 U. S. 446, 448-450 (1960). The Commission is the party to the contract with the contractor. Its exercise of executive judgment is necessarily that of the United States. Yet the Court's decision today grants the United States 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 makes good law.

2. The disputes clause in Government contracts has been employed for over four decades. The clause is one

Oct 11 Sun Isola
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The other Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

3rd DRAFT

SUPREME COURT OF THE UNITED STATES ¹⁸⁷⁵ Blackmun, J.

No. 70-88

Circulated: 12/13/71

Recirculated.

S&E Contractors, Inc., Petitioner,
v. United States. } On Writ of Certiorari to the
United States Court of Claims.

[December —, 1971]

MR. JUSTICE BLACKMUN, concurring.

Because I agree that the Wunderlich Act, 41 U. S. C. §§ 321–322, does not operate to give the United States the power to challenge a contract disputes clause finding of fact in favor of the contractor by the Government's own contracting agency, I join the Court's opinion and its judgment. I venture some supportive comments:

1. The contracting officer and the Atomic Energy Commission acted here in an executive capacity for the United States. See *Small Business Administration v. McClellan*, 364 U. S. 446, 448-450 (1960). The Commission is the party to the contract with the contractor. Its exercise of executive judgment is necessarily that of the United States. Yet the 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.

2. The disputes clause in Government contracts has been employed for over four decades. The clause is one drawn and prescribed by the United States. It is not one drawn by the contractor or by any group of contractors with whom the United States deals. And for years that clause itself has been regarded as conferring no right of judicial review on the part of the Government.

Oct 71 Wm Logg

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Frank Murphy
Mr. Justice Harlan
Mr. Justice Harlan Stone
Mr. Justice Owen Roberts
Mr. Justice Sutherland
Mr. Justice Tamm
Mr. Justice Wherry
Mr. Justice Willis

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-88

Circumstances

S&E Contractors, Inc., Petitioner,
v. United States. } Recirculated: 12/15/71
On Writ of Certiorari to the
United States Court of Claims.

[December —, 1971]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE STEWART joins, concurring.

Because I agree that the Wunderlich Act, 41 U. S. C. §§ 321-322, does not operate to give the United States the power to challenge a contract disputes clause finding of fact in favor of the contractor by the Government's own contracting agency, I join the Court's opinion and its judgment. I venture some supportive comments:

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To: The Chief Justice
 Mr. Justice Douglas
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Powell
 Mr. Justice Rehnquist

5th DRAFT

SUPREME COURT OF THE UNITED STATES, J.

No. 70-88

Circulated: _____

S&E Contractors, Inc.,
 Petitioner,
 v.
 United States. Recirculated: 1/6/72
 } On Writ of Certiorari to the
 } United States Court of Claims.

[December —, 1971]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, concurring.

Because I agree that the Wunderlich Act, 41 U. S. C. §§ 321-322, does not operate to give the United States the power to challenge a contract disputes clause finding of fact in favor of the contractor by the Government's own contracting agency, I join the Court's opinion and its judgment. I venture some supportive comments:

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Oct 11 Wm Doyle
 70-88

8

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 12, 1972

Re: No. 70-88 - S & E Contractors v. U.S.

Dear Bill:

As is apparent from the face of the concurrence
I have today circulated, I also join your opinion.

Sincerely,

Har

Mr. Justice Douglas

Wm. Rogers
70-88 Oct 11 '71

B
pp. 1,2

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

6th DRAFT

SUPREME COURT OF THE UNITED STATES

Blackmun, J.

No. 70-88

Circulated: _____

S&E Contractors, Inc.,

Petitioner,

v.

United States.

Recirculated: 4/12/72

On Writ of Certiorari to the
United States Court of Claims.

[April —, 1972]

MR. JUSTICE BLACKMUN, concurring.

Because I agree that in this case, where neither fraud nor bad faith is charged, the Wunderlich Act, 41 U. S. C. §§ 321-322, does not operate to give the United States the power to challenge a contract disputes clause finding of fact in favor of the contractor by the Government's own contracting agency, I join the Court's opinion and its judgment. I venture some supportive comments:

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2. The disputes clause in Government contracts has been employed for over four decades. The clause is one drawn and prescribed by the United States. It is not one drawn by the contractor or by any group of contractors with whom the United States deals. And for years, with the specified exceptions, that clause itself has

Wm Douglas
Oct 71
70-88

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

7th DRAFT

From: Blackmun, J.

Circulated:

Recirculated: 4/18/72

S&E Contractors, Inc.,
Petitioner,
v.
United States. } On Writ of Certiorari to the
United States Court of Claims.

[April —, 1972]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, concurring.

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Wm Dorff
Oct 1
70-88

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

8th DRAFT

From Blackmun, J.

No. 70-88

Circulated:

Recirculated: 4/20/72

S&E Contractors, Inc.,)

Petitioner,

v.

United States.

On Writ of Certiorari to the
United States Court of Claims.

[April —, 1972]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE POWELL join, concurring.

Because I agree that in this case, where neither fraud nor bad faith is charged, the Wunderlich Act, 41 U. S. C. §§ 321-322, does not operate to give the United States the power to challenge a contract disputes clause finding of fact in favor of the contractor by the Government's own contracting agency, I join the Court's opinion and its judgment. I venture some supportive comments:

1. The contracting officer and the Atomic Energy Commission acted here in an executive capacity for the United States. See *Small Business Administration v. McClellan*, 364 U. S. 446, 448-450 (1960). The Commission is the party to the contract with the contractor. Its exercise of executive judgment is necessarily that of the United States. Yet the 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.

2. The disputes clause in Government contracts has been employed for over four decades. The clause is one drawn and prescribed by the United States. It is not one drawn by the contractor or by any group of contractors with whom the United States deals. And for

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 18, 1972

Re: No 70-88 S&H Contractors, Inc.
v. U. S.

Dear Bill:

Please join me in your opinion for the Court.

I also approve of Harry's concurring opinion, and - by copy hereof - am asking to be joined therein.

Sincerely,

L. F. P.

Mr. Justice Douglas

lfp/ss

cc: The Conference

Mr. Justice Brennan

April 18, 1972

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v. U. S.

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cc: The Conference

Bill -

Bill: I have had considerable ambivalence as to where to come "to rest", as your profound scholarship on the legislative history is impressive. Yet, in final analysis, I do not find that history to be conclusive - especially as it would result in protracted procedures which I cannot quite believe Congress intended.

L. F. T. Jr.

→ A blue point script - Brennan
Oct 71

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 14, 1972

Re: No. 70-88 - S&E Contractors v. U.S.

Dear Bill,

This note is to inform you that I
will not participate in this case.

Sincerely,

W.H.R.

Mr. Justice Douglas

Copies to the Conference