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THE ILLEGALITY OF PROGRESS PAYMENTS AS A MEANS OF FINANCING GOVERNMENT CONTRACTORS

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> When we should write anything into the statutes, it is better to do it that way than to leave it to Department rules and regulations, because the Department rules and regulations mean one thing and the law means another.[1]

Many are familiar with the business policy of appealing to the individual to "buy now, pay later," which allows the purchaser to secure actual delivery and use of the subject matter of the sale by paying little, if anything, at the time of delivery. Many more are equally unfamiliar with the fact that by applying an earlier Comptroller General's decision so widely as to destroy the effectiveness of a clear statutory prohibition of long standing, the executive agencies of the Government for a number of years have been pursuing a contrary policy. By a broad use of the Comptroller's decision, in which possession of title is equated to the possession of the subject matter required by the statute, and which declares an exception in the statute which expressly precludes any exception, executive agencies have

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1 *Hearings on H.R. 9822 to Expedite Naval Shipbuilding, House Committee on Naval Affairs,* 75th Cong., 3d Sess. 3170 (1940).

been continuously advancing great sums of public funds in direct contravention of the statute, and without interest, to various businesses as "progress payments" for goods or services not delivered or furnished at the time the funds were paid.

These sums are a very substantial part of the progress payments which, in the Department of Defense alone, excluding construction contracts, appear to have been allowed to remain outstanding and unliquidated in a sum exceeding $4 billion a year, exclusive of interest. As a result, they have become a serious factor in creating a tight money market, with all the crises such a market can have, and has had, for both Government and private business, and in threatening the national debt limitation.[2] As such a threat to the extent of well over $4 billion annually, such illicit use of public funds stands out in bold, and disreputable, relief against post-Sputnik reports of Government economy measures to save $1½ or $2 billion which should have been spent on missile projects. Nevertheless, while the unauthorized circumvention of the statute has been proceeding on a large scale at the expense of such vital projects, and since no one in a position of responsibility for detecting and disclosing the matter has done so and demanded an accounting, the executive agencies have piously sought from time to time, and Congress, apparently without ascertaining for itself the actual significance of executive policies on the prohibitory statute, has solemnly approved legislation authorizing circumvention in certain comparatively minor situations and left the great volume of circumvention without legislative sanction or attention. Concurrently, and undaunted by the sweeping language of the statutory prohibition which stipulates that "No advance of public money shall be made *in any case* . . . ," (emphasis added)[3] certain executive agencies

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2 *Hearings before the Subcommittee on Participation of Small Business in Military Procurement*, 83d Cong., 2d Sess. 333 (1954).

3 REV. STAT. § 3648 (1873), as amended, 31 U.S.C. § 529 (1952) as follows: "No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or for the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. It shall, however, be lawful, under the special direction of the President, to make such advances to the disbursing officers of the Government as may be necessary to the faithful and prompt discharge of their respective duties, and to the fulfillment of the public engagements. The President may also direct such advances as he may deem necessary and proper to persons in the military and naval service employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled cannot be regularly effected." . . .

of the Government, somewhat prodded or encouraged by parts of the legislative branch, have — except for one very brief interlude[4] interrupted by pressures which apparently found no courage to combat them — resorted to various tactics in their efforts to increase the liberality of their administration by measures designed "to facilitate and accelerate"[5] such advances, or "payments."

One tactic has been to attempt to achieve some dignity as well as validity for the advances by having them associated with the President's Cabinet Committee on Small Business and approved by the Comptroller General of the United States. Fairly recently, the tacticians were able to secure a White House press release to announce the issuance of a new administrative regulation on the subject of advances in the form of progress payments. The regulation furnishes what purports to be a definition of progress payments and stipulates certain general conditions under which they are to be made. What it fails to state, however, is any authority for permitting such advances of public moneys in the form of progress payments. Yet, the regulation "prescribes basic policies and procedures governing executive agencies in making partial payments and in providing contract financing in the form of progress payments." As such, without reference to any authority and without any authority in fact, it is shocking, to say the least, that it not only was issued but still allowed to exist. Certain earlier regulations on the subject of progress payments by another executive agency, disclose a similar unconcern for the lack of any authority for making progress payments. Everybody, including the President's Cabinet Committee on Small Business, appears to be taking it for granted that progress paymenst may be made at any time desired and that they should be made as soon as possible upon the receipt of an appropriate request.

The situation is but one of a number in which the processes of administrative interpretation, as implemented and projected by administrative regulations, have been allowed to proceed without challenge in the public interest to the point that the interpretation has become an interpolation and certain basic laws designed as safeguards of the public purse have been compromised to practical extinction, usually on the basis of some vague

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4 *Hearings, supra* note 2, at 331-33.

5 Department of Defense Directive No. 7800.4, 1 CCH GOV'T CONTRACTS REP. ¶23,126 (1) (1956).

theories of expediency. While the quotation at the beginning of this article is from a statement made at a time when the Congress was studying an exception to the statute now under consideration, it seems certain from the full text of the source that neither the speaker nor others present fully realized that it could be as extremely prophetic as it may then have appeared dogmatic.

The Congress of the United States has consciously permitted comparatively few broad exceptions to the statutory prohibition against the payment of public monies in advance of delivery of goods or services. Those exceptions have been accomplished by duly enacted legislation. However, since that same branch of the Government apparently has unconsciously[6] permitted various agencies of the Government to make predelivery (progress) payments without the enactment of any legislation, the Defense Department has for a number of years assumed the authority to do for the Army and the Air Force, what Congress has found necessary to do by legislation, for the Navy, and earlier for the Treasury Department, to permit payments from public funds to be made in advance of delivery to the Government if a superior lien on the goods is obtained. Executive agencies have become so encouraged by the fact that the legislative branch continues to appear completely oblivious to the utter illegality of the Defense Department procedure that invitations to bid have been issued in which prospective bidders have been invited to choose between post-delivery and predelivery payments. And most recently all Government agencies have been issued regulations which require them to invite requests for progress payments in issuing invitations for bids.

It is hardly likely that the important significance of existing serious conflicts between executive regulations and certain

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[6] One writer has stated that the enactment of 55 STAT. 147 (1941), 40 U.S.C. § 270 (e) (1952), waiving the performance bond requirement in certain types of contracts, seems to indicate congressional approval of the known practice of making progress payments in return for title to the work in progress. Whelan, *Government Supply Contracts: Progress Payments Based on Costs; The New Defense Regulations,* 26 FORDHAM L. REV. 224, 231-32 n.33 (1957). However, the writer appears to have overlooked the fact that eight months later, when Congress enacted the First War Powers Act, 55 STAT. 839 (1941) (later amended by 64 STAT. 1257 (1951), later amended by 50 U.S.C. APP. § 611 (1952)), it considered it necessary to include progress payments, to avoid the prohibition of REV. STAT. § 3648 (1873), as amended, 31 U.S.C. § 529 (1952). Therefore, if the legislative branch knew of the decisions and opinions, to which the writer refers, or is chargeable with the knowledge of them, its enactment of the First War Powers Act demonstrated that they were not considered as establishing any lawful means of circumventing the prohibition of the statute, such as by attempting to equate lien of title to delivery required by the statute. The legislative branch demonstrated the fact again when it enacted 60 STAT. 809 (1946), 31 U.S.C. § 529 (1952). See p. 386 *infra.*

statutory laws is known by many, including the Congress and high executive officials as well as the general public, most of whom are bewildered as well as shocked by the current indications that substantially greater sums must be spent than the staggering amounts previously spent and being spent for defense, to overtake and surpass certain scientific achievements of our competitors. Some who are or may become familiar with the significance of those conflicts may not find them particularly palatable to acknowledge, for political or other reasons,[7] especially if they happened to be among those who are responsible for creating and perpetuating the existing conflicts. The cost of the facade which perpetuates errors to save the face of those responsible in both the executive and legislative branches of the Government is not limited to the statute involved in this article.[8] And it appears that the longer the facade is allowed to remain the more ingrained becomes the obsession that the facade must be maintained at any cost to protect the ever-increasing number of those who, wittingly or unwittingly, have participated in building the facade. Since the structure seriously affects vital parts of the national economy and security, it may well be that an appropriate appointment of one with czaristic powers is the only solution.

I. The Background and Progress of Section 3648, Revised Statutes

Section 3648 was derived from an act of January 31, 1823,[9] and its language[10] is substantially the same as that contained in the 1823 act. Its progress has been like that of many statutes which were intended to protect the public interest in the use of its funds. It has failed in great measure to accomplish the pro-

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7 For example, the Small Business Administration appears to take pride in its part in establishing a policy designed to facilitate and accelerate the making of progress payments, *Hearings Before the Senate Select Committee on Small Business*, 85th Cong., 1st Sess. 5 (1957); but is is doubtful whether the Administrator, who expressed that pride, was aware that no authority then existed (or now exists) for the payments to which he referred.

8 Rev. Stat. § 3678 (1873), as amended 31 U.S.C. § 628 (1952) is another good illustration. See McClelland, *The Proposal For a Work Suspension or Government Delay Clause*, 18 U. Pitt. L. Rev. 754 (1957). Title II of the First War Powers Act, 55 Stat. 839 (1941), as amended 64 Stat. 1257 (1951), as amended 50 U.S.C. App. § 611 (1952), is another, McClelland, *The Administration of Title II of the First War Powers Act*, 61 Dick. L. Rev. 215, 226-29 (1957).

9 3 Stat. 723, (later revised by Rev. Stat. § 3648 (1873), as amended, 31 U.S.C. § 529 (1952).

10 As will be seen, the important language, which makes the statutory prohibition unequivocal, has remained intact and unaffected in meaning by any later expressions of Congress in that respect.

tection intended because the Government has no advocacy appropriate to compel an accounting by those who long have violated, and continue to violate, such statutes.[11] An examination of the advancement of section 3648 will show that neither the Congress nor the President intend that it is to be avoided without appropriate legislation. Nevertheless, executive agencies have proceeded to use tremendous amounts of public funds[12] in making progress payments in complete disregard of that fact.

The act of January 31, 1823 provides in pertinent part, as follows:

> That, from and after the passing of this act, no advance of public money shall be made in any case whatever; but in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment:
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> Sec. 3. *And be it further enacted,* That every officer or agent of the United States, who shall offend against the provisions of the preceding sections, shall, by the officer charged with the direction of the department to which such offending officer is responsible, be promptly reported to the President of the United States, and dismissed from the public service: *Provided,* That in all cases, where any officer, in default as aforesaid, shall account to the satisfaction of the President for such default, he may be continued in office, any thing in the foregoing provision to the contrary notwithstanding.[13]

It is important especially to observe that the language of the statute specifically makes the prohibition against the advance of public money applicable "in any case."[14] As stated many years ago by the Court of Claims, it would be almost impossible to frame more general, sweeping, or stronger prohibitions than this statute contains. Both the penalty and the

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11 *Cf.* McClelland, *The Proposal For a Work Suspension or Government Delay Clause,* 18 U. PITT. L. REV. 754, 754-61 (1957); McClelland, *Government Advocacy as Related to Appeal Procedures Unaccomplished Since the Wunderlich Legislation,* 25 FORDHAM L. REV. 593, 597-600 (1957).

12 Over $4 billion outstanding at years' end for two successive years. *Hearings Before a Subcommittee of the Senate Select Committee on Small Business, on Participation of Small Business in Military Procurement,* 84th Cong., 1st Sess. 257 (1955); *Hearings Before a Subcommittee of the Senate Select Committee on Small Business, on Small Business Policies and Programs,* 84th Cong., 2d Sess. 366 (1956). At least a substantial portion of the sum involved appears to have been advanced without authority.

13 Act of Jan. 31, 1823, c. 9, 3 STAT. 723 (later revised by REV. STAT. § 3648 (1873), as amended 31 U.S.C. § 529 (1952)).

14 "In any case" would seem as unequivocal as "in any case whatever" as the statute read before codification.

prohibition are "in plain and distinct terms."[15] Nevertheless, and in seeming contempt for its exceptionally plain language, as will later be shown in this article, the statute has been subjected to extreme interpolation.[16] The anomalous aspects of the situation become more apparent upon an examination of the progress of the statute. Since it was enacted in 1823, a number of statutory modifications of the law against advances have been accomplished, but usually for limited periods only.[17]

By an act of August 2, 1946,[18] the first sentence of section 3648 was amended to read: "No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law."[19] The reason for the amendment is explained in the legislative history:

> The advance of public money generally is prohibited by section 3648, Revised Statutes (31 U.S.C. 529). Occasionally, to meet special needs and particular situations (especially in the case of transactions abroad) it has been found necessary to create

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15 Peirce v. United States, 1 Ct. Cl. 270, 285-86 (1865), *aff'd sub. nom.* The Floyd Acceptances, 74 U.S. (7 Wall.) 666 (1868).

16 See pp. 390-98 *infra.*

17 28 STAT. 582 (1894) (repealed, 55 STAT. 585 (1941), 31 U.S.C. § 542 (1952) (Treasury Department); 37 STAT. 32 (1911), 34 U.S.C. § 582 (1952) (as revised, 70A STAT. 464 (1956), 10 U.S.C. § 7521 (Supp. 1957)) (Navy Department); Act of Oct. 6, 1917, c. 79, § 5, 40 STAT. 383 (Secretaries of War and Navy Departments during World War I); Act of June 28, 1940, c. 440, 54 STAT. 676 (Secretary of the Navy and Secretary of the Treasury during national emergency declared Sept. 8, 1939); Act of July 2, 1940, c. 508, 54 STAT. 712 (Secretary of War, in interest of national defense); Act of Feb. 6, 1941, c. 5, § 2, 55 STAT. 6 (Maritime Commission); Act of Dec. 18, 1941, c. 593, § 201, 55 STAT. 839 (the President, whenever he determined that such action would faciliate the prosecution of the war); 64 STAT. 1257 (1951), 50 U.S.C. APP. § 611 (1952) (the President to facilitate the national defense). In Feb. 1951, the Under Secretary of the Army in concert with the Procurement Secretaries of the Navy and the Air Force, and approved by the Deputy Secretary of Defense, issued regulations, 16 FED. REG. 2623 (1951), which excluded the use of progress payments from those actions to be exercised under the statute involved, 1A CCH GOV'T CONTRACTS REP. ¶24,805 (1956); 1 CCH GOV'T CONTRACTS REP. ¶¶21,752-53, 753 (1956), and the incumbent President has never made any determination under the pertinent part of the statute, McClelland, *The Administration of Title II of the First War Powers Act,* 61 DICK L. REV. 215, 226-29 (1957)); 60 STAT. 780 (1946) (repealed, 70A STAT. 675 (1946), 5 U.S.C. § 475 (Supp. 1957)) (Navy Department for research and development); Act of July 13, 1955, c. 358, 69 STAT. 301 (Department of Defense Appropriation Act of 1956).

18 60 STAT. 809, 31 U.S.C. § 529 (1952).

19 As to the amendment, the Comptroller General reported that:
"[N]o objection appears to the apparent purpose of the proposed amendment, which is to lay the foundation for particular exceptions from time to time to be contained in appropriation bills and not to be subject to point of order." COMP. GEN. REPORT ON A BILL TO AUTHORIZE CERTAIN ADMINISTRATIVE EXPENSES, *Committee Print, House Committee on Expenditures in the Executive Departments,* 79th Cong., 2d Sess. 8 (1946). It is to be noted that the Comptroller General's report would indicate that he did not intend to extend the application of the decisions of his office on section 3648 to the extent to which the Defense Department has.

> legislative exceptions to the general rule. These situations are comparatively minor but are apt to require quick legislative action. Section 11 would amend the original section merely by adding the words "unless authorized by the appropriation concerned or other law". Its purpose is merely to sanction the incorporation of exceptions in appropriation acts as may be required from time to time without raising the question of a point of order.[20]

The reader will note from this legislative history that in 1946, Congress showed no indication of approving or recognizing the interpolation of section 3648 referred to in this article[21] with respect to the executive agencies' broad application of a Comptroller General's decision. Instead, Congress appears to be in full accord with the statement many years ago by the Court of Claims that the prohibition of the statute is "in plain and distinct terms."[22] Congress makes it clear that where the statutory prohibition against the advancement of public funds in any case is to be avoided, "it has been found necessary to create *legislative* exceptions to the general rule," which is vastly different from what the executive agencies have been doing for years.

In the Armed Services Procurement Act of 1947,[23] Congress approved a provision which subject to certain stipulated conditions, permits the agency head to make advance payments, under *negotiated* contracts, in any amount not exceeding the contract price. At that time, the Secretary of War furnished the Speaker of the House of Representatives an analysis of them in which he referred to the act of June 28, 1940,[24] and the War Powers Act[25] and stated that the experience gained under that emergency legislation had shown that a return to "the strict principle set forth in section 3648, Revised Statutes (31 U.S.C. 529) wherein advances of public money are forbidden in all cases," is undesirable.[26] Despite that official recognition of the strict limitations of section 3648 and of the necessity of obtaining legislation to circumvent those limitations, the actual practice for many years since that time in the Department involved

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20 H.R. REP. No. 2186, 79th Cong., 2d Sess. 7 (1946); S. REP. No. 1636, 79th Cong., 2d Sess. 7 (1946).

21 See pp. 397-405 *infra.*

22 See note 15 *supra.*

23 62 STAT. 21 (1948), 41 U.S.C. §§ 151, 154 (a) (1952), as superseded by 10 U.S.C. 2307 (a) (Supp. 1957). Also see § 305 of the Federal Property and Administrative Services Act of 1949, 63 STAT. 396, 41 U.S.C. § 255 (1952).

24 Act of June 28, 1940, c. 440, 54 STAT. 676.

25 Act of Dec. 18, 1941, § 201, 55 STAT. 839. (This Act was extended and amended by 64 STAT. 1257 (1951), 50 U.S.C. APP. 611 (1952)).

26 H.R. REP. No. 109, 80th Cong., 1st Sess. 24 (1947).

seems to conflict with such recognition insofar as progress payments are concerned. The 1947 act contains no provision permitting such payments. It is shown in the pages which follow that therefore the Defense Department must have decided that it would rely on certain broad language used by the Comptroller General, in a case involving very special facts, to take the place of the legislative sanction considered by the Army Secretary and by Congress as necessary to avoid the limitations of 3648.[27]

Without regard to the fact that the chronological progress of the statute prohibiting an advance of public funds discloses that, with the exception of the Navy under the act of 1911,[28] the Defense Department has had no authority to make progress payments in circumvention of section 3648 since at least June 30, 1953, when the War Powers Act became ineffective,[29] a recent article by the Chairman of the Contract Finance Committee, Department of Defense, stated that progress payments are the largest single segment of contract financing in that Department.[30] The text of the article contains no discussion of the authority relied upon and the text of an earlier article[31] by the same writer merely refers to title II of the First War Powers Act as "other authority" for progress payments. Accordingly, the desirability of determining specifically what accounts for the Defense Department's long-standing violations of the statute seems obvious.

II. Evidence of Ostensible Authority

One of the ironies of the situation with respect to the authority relied upon by the executive agencies in making advances of public funds in defiance of the statutory prohibition is its complete absence from the most publicized pertinent regulations of those agencies and the necessity of examining the law reviews to learn the facts. In the absence of any guidance in their current regulations[32] as to authority for progress payments, it is

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27 *Hearings on H.R. 9822 to Expedite Naval Shipbuilding, House Committee on Naval Affairs*, 76th Cong., 3d Sess. 3170 (1940).

28 37 Stat. 32 (1911), 34 U.S.C. § 582 (1952) (as revised 70A Stat. 464 (1956), 10 U.S.C. § 7521 (Supp. 1957)).

29 McClelland, *The Administration of Title II of the First War Powers Act*, 61 Dick. L. Rev. 215, 226-29 (1957).

30 Bachman, *Defense Department Contract Financing*, 25 Geo. Wash. L. Rev. 228, 229 (1957).

31 Bachman and Lanman, *Defense Contract Financing*, 12 Fed. B.J. 287, 288 (1952).

32 C.F.R. §§ 82.1-82.74 (1947); General Services Administration Personal Property Management Regulation No. 33, 1A CCH Gov't Contracts Rep. ¶24,875 (1956).

to be hoped that the agencies are as liberal in making those reviews available for the use of their contracting officers and finance officers as they are in making advances of public funds in the form of progress payments. While the text of the recent article by the Contract Finance Committee Chairman contains no discussion of the authority relied upon in making progress payments, a footnote citation to the statute prohibiting such payments is followed by a quotation from a decision by the Comptroller General.[33]

> While, under the prohibition of the statute, payment may not be made for articles in which the United States has acquired no right or interest and from which it derives no benefit, payment may be made for articles in advance of their delivery into the actual possession of the United States if title therein has vested in the Government at the time of such payment, or if the articles are impressed with a valid lien in favor of the United States in an amount at least equal to the payment.

The footnote also refers to 1 Comp. Gen. 143 (1921); 28 Comp. Dec. 468 (1949); and title II of the First War Powers Act and the implementing executive order of 1951. The writer of the article used the same references in his earlier article written in 1952.[34] Without any indication as to authority in the current regulations, and in view of the official position of the writer of the articles, the reader has no choice but to conclude that the footnote references represent the authorities relied upon by the Defense Department — and apparently by other executive agencies as well — in making progress payments. In the earlier article, as heretofore stated, the writer merely refers to title II of the First War Powers Act as "other authority"[35] for progress payments. Actually, title II when properly implemented by a determination by the President[36] is the only general statutory or other authority that ever existed to disregard the long-standing statutory prohibition against the advance of public money in any case.[37] One writer has questioned the existence of any authority to make progress payments when the First War Powers Act was in effect.[38] However, the Defense Department very recently con-

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33 20 COMP. GEN. 917, 918 (1941).

34 See note 31 *supra.*

35 *Ibid.*

36 See note 29 *supra.*

37 Act of Jan. 31, 1823, c. 9, 3 STAT. 723 (later revised by REV. STAT. § 3648 (1873), as amended, 31 U.S.C. § 529 (1952)).

38 Pasley. *The Interpretation of Government Contracts: A Plea For Better Understanding,* 25 FORDHAM L. REV. 211, 234-35 (1946).

firmed the distinct impression that the emphasis the Defense Department writer gives to the Comptroller General's decision impels the conviction that the Department has been using and will continue to use those decisions as complete authority for advancing public funds in any case notwithstanding the specific prohibition to the contrary and the fact that Congress has always considered the enactment of legislation necessary to avoid the prohibition of the statute. In a letter of August 27, 1957,[39] the Department's General Counsel assured Senator Eastland of the Senate Judiciary Committee that if title II were extended for another year, the Department would not use it for "authorizing the making of any progress payment" and added:

> I am sure you understand that in making the above undertakings we do not mean to indicate that the Department of Defense has in fact been following these practices, but we understand the desire of your committee to have these positive assurances.

Thus, it would appear from that letter that the Department of Defense is officially acknowledging that it has not been using and will not use title II because it has *other* authority which permits it to avoid section 3648 whenever it wishes to make a progress payment. That other authority clearly appears to be based entirely upon the Defense Department's construction of the decisions of the Comptroller General as authorizing an advance of public funds in any case, despite the statutory prohibition, if the Government has title in or a valid lien on the subject matter involved, in an amount equal to the advance. It is this writer's conviction that an examination of the facts and the prior cases on which the Comptroller General's decisions are based compels the conclusion that they must be strictly limited to the cases before the Comptroller at the time the decisions were rendered and that to consider them otherwise is to nullify completely the statutory prohibition against the advancement of public funds. Such an effect is what the executive agencies have produced by what appears to be an indiscriminate application of the decisions in question. In such circumstances, an analysis of those decisions is believed to be required.

III. The Security Steel Case

This case[40] appears to be the principal one upon which the executive agencies, particularly the Defense Department, rely

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39 S. Rep. No. 1152, 85th Cong., 1st Sess. 4 (1957).
40 20 Comp. Gen. 917 (1941).

in advancing public funds in the form of progress payments. In that case, the contractor was ready and willing to make delivery of certain steel document file equipment but was compelled to hold it for many months due to the continued inability of the Navy Department to arrange for the space necessary to receive the equipment. The contractor was working on borrowed capital, and funds for labor and material had been tied up for many months. Accordingly, the Department sought approval of a contract modification authorizing a payment of ninety per cent of the contract price on condition that the contractor furnish a bond in the amount of the payment to guarantee faithful performance of all of the obligations of the contract.

The Comptroller General approved the proposed modification and payment, provided the surety on the contractor's performance bond would consent and that the modification contain language definitely providing that the contractor should be responsible absolutely, and not as a mere bailee, for the care and protection of the Government's equipment. Before stating his approval of the proposed modification, the Comptroller General expressed the view that while, under the prohibition of the statute, payment may not be made for articles in which the United States has acquired no right or interest and from which it derives no benefit, payment may be made for articles in advance of their delivery into the actual possession of the United States if title therein has vested in the Government at the time of such payment, or if the articles are impressed with a valid lien in favor of the United States in an amount at least equal to the payment. The Comptroller General cited three sources in support of his view.[41] Before examining those decisions it is important to observe certain mitigating facts in the *Security Steel* case, since it is obvious that some executive agencies, including the Defense Department, are using it as authority to make progress payments in any case. The facts in the case which should be carefully considered are the Government's long inability to take delivery and the bond which guaranteed the care and protection of the equipment while in possession of the contractor as well as its eventual delivery to the Government. When the Government unjustifiably prevents the delivery that section 3648 requires for payment, the contractor should not be penalized by denial of payment and if the Government secures a bond guaranteeing

41 1 COMP. GEN. 143 (1921), 17 COMP. DEC. 894 (1911), and 29 OPS. ATT'Y GEN. 46 (1911).

delivery, the public funds paid out in advance of delivery, contrary to the statute, are recoverable under the bond in the event of default. Thus, the broad language used by the Comptroller General in the *Security Steel* case in describing the circumstances for making payment in advance of delivery does not seem required by the facts presented and clearly is not for general application by reason of the plain language of the statute which prohibits such advances "in any case."

It appears clear from the facts of the *Security Steel* case that it should not be cited as authority for progress payments. Therefore, those executive agencies relying on that case for authority are in constant violation of section 3648, and should be held fully accountable and required to furnish a complete explanation of their position, pursuant to the penalty provisions of the original statute.

The Army's View of the Security Steel Case as Disclosed by Its Published Regulations

The Army regulations pertaining to the making of payments by finance officers show that for approximately eleven years after its publication the Army, officially at least, appeared to disclose no use of the *Security Steel* case, in other cases, to circumvent the statutory prohibition against the advancement of public funds.

On March 15, 1939, the regulation as to when contract payments may be made referred to section 3648, Revised Statutes, (31 U.S.C. 529), as prohibiting payments in advance of the delivery of supplies or rendition of service, except as otherwise provided by law.[42] On June 12, 1942, or approximately one year after the *Security Steel* case, the regulation was stated in the same language but listed two exceptions provided by law.[43] One referred to section 1(c) of the act of July 2, 1940, authorizing the Secretary of War to advance payments to contractors for supplies or construction for the War Department in amounts not exceeding thirty per centum of the contract price, whenever, prior to July 1, 1942, the Secretary deemed it necessary in the interest of the national defense.[44] The other exception referred to title II of the First War Powers Act permitting the President to authorize any department or agency

42 Army Reg. 35-6040, March 15, 1939.

43 Army Reg. 35-6040, June 12, 1942.

44 54 STAT. 712 (1940).

of the Government, exercising functions in connection with the prosecution of the war effort, to make advance, progress and other payments without regard to the provisions of law relating to the making, performance, amendment, or modfication of contracts whenever he deemed such action would facilitate the prosecution of the war.[45]

Under date of February 1, 1944, the regulation[46] remained as it was stated on June 12, 1942, except that it contained a reference to the necessary executive order implementing title II of the First War Powers Act, which apparently was inadvertently omitted from the prior statement of the regulation, since the act itself, without such implementation, was no effective exception to the prohibition on the War Department, as imposed by section 3648. Approximately six years after the *Security Steel* decision, the statement of the regulation remained the same.[47] In 1952 the regulation was superseded by a new regulation[48] which contained a statement with respect to the prohibition against advances of public money, as provided in section 3648 of the Revised Statutes. Also, the new regulation changed the position of the words "in advance of the delivery of supplies or rendition of service," substituted the more important words which actually follow in the langauge of the statute, "in any case," and described what previously had been called exceptions as "War emergency exceptions." However, in seeming tongue-in-cheek silent commentary on the new regulation's reference to the statutory prohibition as applicable "in any case," after several numbered paragraphs beyond the paragraph involving section 3648, the regulation for the first time incorporated a reference to the *Security Steel* case, which had been of record for approximately eleven years, as authorizing payment in advance for articles if title therein has vested in the Government at the time of payment, or if the articles are impressed with a valid lien in favor of the United States in an amount at least equal to the payment.[49]

No explanation has been found to account for the Department's sudden adoption of the *Security Steel* case as general authority to make progress payments if the Government holds title or a "valid lien" on the article involved. Nor is it clear why reference to the case was not included in the paragraph of the

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45 55 STAT. 839 (1941); 64 STAT. 1257 (1951), 50 U.S.C. APP. 611 (1952).
46 See note 43 *supra*.
47 Army Reg. 35-6040, Feb. 18, 1947.
48 Army Reg. 35-3220, July 18, 1952.
49 *Id.* at 13.

regulation specifically dealing with section 3648, rather than placing it several paragraphs beyond. As the regulation was stated at that time, and allowed to remain at least as late as March 1958, its provision as to "When payment may be made" appears misleading since if the reader does not read other purportedly unrelated parts of the regulation, in addition to that particular provision, he is led to believe that the Army does not permit progress payments unless the case falls within the exceptions provided by law, such a title II of the First War Powers Act. However, notwithstanding the Army regulation's misplaced reference to the *Security Steel* case, it appears from the two law review articles[50] that what the Army officially refers to in its published regulations as one of only two exceptions to the statutory prohibition against progress payments, as contained in the First War Powers Act, is considered in actual administrative practice as another authority for such payments. The "other" authority used is the *Security Steel* case, especially, and incidentally, certain other decisions on which that case is based. But the facts involved in the other decisions are even more deficient than the *Security Steel* case in furnishing any basis to authorize progress payments in any case in which they might be requested.

IV. THE KERR CONSTRUCTION CASE

While it is true that in the *Kerr Construction* case,[51] in which the Army was permitted to pay approximately $58,000 in advance of the completion of a trenching machine which the Government was entitled to recapture for a total sum of only $17,000, the Comptroller General quoted with approval the holding in the *Security Steel* case, the facts showed, as in the *Security Steel* case, that there was a surety bond to protect the interest of the Government in the event that the contractor should fail to clear the equipment of all liens and encumbrances which might affect the title to be conveyed to the United States at the time the partial payments were made. There is nothing in the *Kerr* case which would warrant its use to justify progress payments in any other case. And the Comptroller General's reaffirmation of the *Security Steel* case gave the executive agencies no more authority to use it than was justified by the particular facts of the case at the time the case was decided.

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50 Bachman, *Defense Department Contract Financing*, 25 GEO. WASH. L. REV. 228 (1957); Bachman and Lanman, *Defense Contract Financing*, 12 FED. B. J. 287 (1952).

51 28 COMP. GEN. 468 (1948-49).

V. THE CURTIS AEROPLANE CASE

The article by the Contract Finance Committee Chairman refers to 1 Comp. Gen. 143, as one of the "other pertinent decisions of the Comptroller General." In that case the contract was with the Curtis Aeroplane and Motors Corporation and covered the construction and delivery of fifty airplanes and certain sets of spare parts. The first plane was to be delivered within three months after the contractor's detail drawings of necessary changes had been finally approved by the Government, and the remaining forty-nine were to be delivered within twelve months after the delivery of the first plane. Most of the payments were to be made in certain designated amounts at various times to be determined by the amount of work and materials on hand. The Comptroller General again cited three decisions[52] as his authority for holding that the provisions of section 3648 of the Revised Statutes do not necessarily preclude the making of any payment under a contract until the entire subject matter of the contract has been completed and turned over to the Government. Its prime purpose, as stated in the opinion, was to prevent the advancement to the contractor of funds with which to enable him to perform his contract, and not to prevent a partial payment in any case in which the amount of such payment had been actually earned and the United States had received an equivalent therefor.

The Comptroller General found that the amount of the proposed partial payment in each instance was well within the amount actually expended by the contractor for work and material to go into the performance of the contract. The Comptroller associated that finding with the fact that article VIII of the contract expressly provided that title to all property on which a partial payment is made should vest in the United States forthwith upon the making of such partial payment. Those facts, he held, fulfilled "the condition that the United States must receive a corresponding benefit in order to justify the making of a partial payment. . . ."

While the Comptroller General appears to have construed section 3648 very liberally in the *Curtis Aeroplane* case and he does not confine the application of his decision to the facts of the case before him, it is to be noted that the case was decided in 1921, long before the 1939 statement of the Army regula-

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52 18 OPS. ATT'Y. GEN. 105 (1885); 20 OPS. ATT'Y. GEN. 746 (1894) and 17 COMP. DEC. 894 (1911).

tion[53] on advances of public funds which makes no reference to the decision, and long before the enactment of the First War Powers Act of 1941,[54] the first general statutory exception to the basic prohibition of section 3648 against progress payments. Thus Congress, as well as the Army, did not consider that the decision in *Curtis Aeroplane* is for any general application despite the language used and found it necessary to enact special legislation to avoid the statutory prohibition. The President made the necessary determination; and, unless the war emergency exception was applicable, the Army regulation continued to require strict compliance with section 3648 until the 1952 edition.[55] How the Defense Department justifies its broad use of the Comptroller's decision in disregard of the views of the President, the Congress, and the Army has not been determined. An examination of the cases relied upon in *Curtis* indicates that the Army used good judgment in confining its use of that case to it alone, since the interpretation of section 3648 in the basic decision referred to the *Curtis* case was declared in connection with work done in the construction of ships for the Navy and a surety bond guarantteed full completion of the contract including delivery and good workmanship.[56] The application of that

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53 See note 42 *supra.*

54 See note 45 *supra.*

55 See note 48 *supra.*

56 Delivery here was a necessary part of the "performance" guaranteed under the bond. In the case cited from 17 COMP. DEC. 894 (1911), the question was whether in the event of the repeal of the act of March 11, 1911, 37 STAT. 32, 34 U.S.C. § 582 (1952) (as revised 70A STAT. 464 (1956), 10 U.S.C. § 7521 (Supp. 1957)), the Navy Department would be prohibited from making any part payments or whether the Department would be at liberty to make full part payments as provided for in its contracts for the construction of naval vessels. The contracts provided for a lien superior to all other liens.

The Comptroller referred to the opinion expressed approximately a month earlier by the Attorney General on the same question, in which that official cited an opinion of one of his predecessors, 18 OPS. ATT'Y. GEN. 105 (1885), handed down in a case in which the Government had a lien on the ship for all payments made and the contractor and his sureties guaranteed full completion and good workmanship. There the Secretary of the Navy was advised that section 3648 does not preclude a payment in any case where the money has been actually earned and the Government has received an equivalent therefor, stating that the object of the statute was "to prevent payments being made to contractors in advance of the performance of their contracts. . . ." The Comptroller also reviewed another opinion, 20 OPS. ATT'Y. GEN. 746 (1894), holding that no payment should be made unless the Government becomes the owner of the work paid for and concluded that:

> "The general rule would therefore seem to be well recognized that, in the absence of statutory prohibition, partial payments may be made on account of work done in the construction of vessels for the Navy if (1) title to the vessel shall have passed to the United States at the time of such payments or (2) a lien shall have been created by law or contract upon the unfinished vessel to the amount of such partial payments."

interpretation to the facts in the *Curtis* case, which disclose no surety to guarantee the delivery required by section 3648, appears clearly in error on the basis of the facts as well as the law which precludes advances of public funds in any case.

The False Hypothesis of the Security Steel Case Rule

The weakness of the equation underlying the procedure of the executive agencies of the Government in making progress payments in contravention of the specific statutory prohibition of section 3648, on the basis of decisions in which title or a paramount lien in the Government is equated to the delivery to the Govenment required by the statute, is shown by the patent conflict in certain language which those agencies advance as reconcilable:

> [P]ayment may be made in advance of delivery if title or a valid lien is held by the United States.[57]

> No advance of public money shall be made in *any* case. . . . And in all cases of contracts . . . payment shall not exceed the value of . . . the articles delivered. . . .[58] (Emphasis added).

The only explanation by the proponents of the equation is the language of the much earlier decision which stated that section 3648 does not preclude a payment in any case where the money has been actually earned and the Government has received an equivalent therefore, "its object being to prevent payments being made to contractors in advance of the performance of their contracts. . . ."[59] But delivery of the end product is the performance for which the Government obligates itself to pay out public funds to the contractor.[60] It is not something short of that, such as title to a collection of miscellany comprising inventories of materials, parts, and work in process acquired or produced by the contractor and allocated to the contract.[61]

On that basis the Comptroller advised the Navy that repeal of the 1911 act would not prohibit partial payments. It is to be noted that in predicating such a holding on "the absence of statutory prohibition," in a case involving a clear statutory prohibition against what was approved in the decision, the Comptroller is saying that there must be some other statute to prohibit that which was clearly prohibited in the statute before him.

57 20 COMP. GEN. 917 (1941).

58 REV. STAT. § 3648 (1873), as amended, 31 U.S.C. § 529 (1952).

59 18 OPS. ATT'Y. GEN. 105 (1885).

60 This is not to overlook contracts providing for divisible or installment deliveries.

61 1 CCH GOV'T CONTRACTS REP. ¶23,080 (d) (1956). The pertinent General Services Administration regulation, General Services Administration Personal Property

Contractor activity which does not extend beyond the collection stage is not such a contract performance as to impose any obligation, or authority, on the Governments' part to furnish public funds to the contractor; and, if he fails to perform as he is obligated, his right to proceed is, of course, eventually subject to termination for default.[62] Accordingly, since the object of the statute, as described in the earlier decision, is not fulfilled, the explanation relied upon by those who initiated and by those who have utilized the equation completely fails to justify it. It is as indefensible as the language of the basic decision which purports to jutify an exception[63] to a statute which contains specific language expressly precluding any exception.[64]

In short, the fact that the Government proceeds to take a paramount lien or title when it issues a progress payment accomplishes nothing in the way of avoiding the plain prohibition of section 3648. It is nothing but an exercise of ordinary business acumen, the least that could be expected where money is paid out for nothing tangible in hand, and clearly not overlooked by the legislative branch of the Government when it deemed it necessary to prohibit the advance of public funds in any case. Nevertheless, the significance of the transaction has been so inflated by those who have flouted section 3648 that they would have it recognized, without question, as an equivalent of delivery.

VI. The Joint Regulation as Additional Evidence of Ostensible Authority

While there is no authority permitting the Army or any of the other executive agencies[65] to make progress payments otherwise as stated in the specific paragraph on that subject in the pertinent Army regulation,[66] it appears that at the time of the

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Management Regulation No. 33, 1A CCH Gov't Contracts Rep. (1956), purports to demonstrate such certainty that the title acquired "fully" protects the interests of the Government so that only "unusual cases" are deemed to require performance bonds. Yet the principal decisions relied up to avoid section 3648 involved performance bonds, 20 Comp. Gen. 917 (1941); 17 Comp. Dec. 894 (1911); 18 Ops. Att'y. Gen. 105 (1885).

62 1 CCH Gov't Contracts Rep. ¶18,202 (1953) and ¶18,305 (5) and (11) (1950).

63 "[I]f title . . . or a valid lien. . . ." 20 Comp. Gen. 917 (1941).

64 The 1946 amendment to the statute, page 386, *supra,* still left the statute barring any exception for all practical purposes since "other law" is vastly different than executive exceptions attempted by executive interpolations of the statute.

65 With the exception of the Navy Deprtment, 37 Stat. 32 (1911), 34 U.S.C. 582 (1952), 10 U.S.C. 7531 (Rev. 1956).

66 Army Reg. 35-3220, July 18, 1952.

1952 edition of that regulation there was a Joint Regulation of the three Armed Services, issued four months earlier, covering the subject of contract financing and superseding all previous regulations inconsistent therewith.[67] The regulation states that the basic policies set forth in the regulation apply to guaranteed loans, advance payments, and "in the case of progress payments to the extent relevant," and that regulations are in the course of development concerning progress payments. Approximately ten years had passed since progress payments had been authorized by the War Powers Act[68] and yet no regulations had been fully developed to administer such payments. What portion of the Joint Regulation of 1952 was to be used for progress payments was left indefinite by the use of the equivocal language, "to the extent relevant." Two years later, or twelve years after the War Powers Act, the regulations were still in course of development.[69]

The Joint Regulation specifically refers to the First War Powers Act and the implementing executive order[70] as authority to make *advance* payments[71] on all contracts. Since the act and the order are equally applicable to *progress* payments, the failure of the regulation to include a similar reference in its provision for progress payments leaves the distinct impression that the Armed Services concluded that they have such other authority for progress payments as to make it unnecessary for them to use the War Powers Act for that purpose.[72] The law review articles[73] leave no doubt that it is the official position of the Armed Services that the decisions of the Comptroller General make it

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67 Joint Regulations of the Departments of the Army, the Navy, and the Air Force, 1 CCH GOV'T CONTRACTS REP. ¶23,000-01 (1952).

68 Act of Dec. 18, 1941, § 201, 55 STAT. 839. (This act was extended and amended 64 STAT. 1257 (1951), 50 U.S.C. APP. 611 (1952). However, the Defense Department suspended its use of the statute to justify progress payments pending the issuance of supplemental regulations. 1A CCH GOV'T CONTRACTS REP. ¶24805 (1956); 1 CCH GOV'T CONTRACTS REP. ¶21752-53 (1952).

69 DEP'T DEFENSE DIR. NO. 7840.1 (1954); *Hearings before a Subcommittee of the Senate Select Committee on Small Business, on Participation of Small Business in Military Procurement,* 83rd Cong., 2d Sess. 327-28 (1954).

70 Joint Regulations of the Departments of the Army, the Navy, and the Air Force, 1 CCH GOV'T CONTRACTS REP. ¶23,000 (1952).

71 Advance payments are considered as loans to the contractor prior to and in anticipation of complete performance of a contract. 1 CCH GOV'T CONTRACTS REP. ¶10,411 (1952). Actually, they precede little, if any, significant performance, whereas progress payments, or partial payments as they are sometimes called, should follow some measurable performance pursuant to the contract.

72 The Defense Department's letter of Aug. 27, 1957, to Senator Eastland seems to confirm this impression. 103 CONG. REC. 15062, 15064 (1957). Also, see the suspension of progress payments pursuant to the War Powers Act, 1A CCH GOV'T CONTRACTS REP. ¶24,805 (1956); 1 CCH GOV'T CONTRACTS REP. ¶21,752-53 (1952).

unnecessary to rely upon the War Powers Act to make progress payments. The Joint Regulation makes no reference to the Comptroller General's decisions on the subject of progress payments and provides that "the *authority* to make progress payments is subject to the provisions of section 3648, Revised Statutes. . .," (emphasis added) but does not state the authority relied upon which it considers subject to those provisions.[74]

Approximately four years after the first Joint Regulation, the Armed Services appear to have become so encouraged in finding that they could proceed to make progress payments without reference to their authority — and without any authority in fact since at least June 30, 1953[75] — that they issued a new Joint Regulation in December 1956[76] in which they still failed to cite any authority even though, as previously, they provided a paragraph with a title designed to show the authority involved. As in 1952, the Armed Services state that "the authority" is subject to section 3648 but they fail to identify the authority which is subject to that section.

The anomaly in the situation which involves a persistent violation of a clear statutory prohibition, and many procedural directives[77] issued as though no such prohibition exists, is perhaps equalled only by the fact that comprehensive regulations on the matter which in 1952 had been evolving for ten years, and continuing in that status in 1954, never reached a completed form until the Joint Regulation of December 1956.[78]

VII. The General Services Administration Regulation on Progress Payments

Two weeks after the issuance of the Joint Regulation[79] on progress payments, requiring its observance by all Armed Services, the General Services Administration issued a regulation[80]

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73 Bachman, *Defense Department Contract Financing*, 25 GEO. WASH. L. REV. 228, 229 (1957); Bachman and Lanman, *Defense Contract Financing*, 12 FED. B.J. 287, 288 (1952).

74 Joint Regulations of the Departments of the Army, the Navy, and the Air Force, 1 CCH GOV'T CONTRACTS REP. ¶23,008 (1952).

75 McClelland, *The Administration of Title II of the First War Powers Act*, 61 DICK. L. REV. 215, 226-29 (1957).

76 1 CCH GOV'T CONTRACTS REP. ¶23,000 (1956).

77 *Hearings before a Subcommittee of the Senate Select Committee on Small Business, on Participation of Small Business in Military Procurement*, 83d Cong., 2d Sess. 476-99 (1954).

78 See note 76 *supra*.

79 *Ibid.*

80 General Services Administration Personal Property Management Regulation No. 33, 1A CCH GOV'T CONTRACTS REP. ¶24,875 (1956).

on the same subject, governing all agencies, including the Armed Services, and said to have been developed co-operatively with the Department of Defense and to have been issued with the approval of the Comptroller General of the United States. It prescribes:

> . . . basic policies and procedures governing executive agencies in making partial payments and in providing contract financing in the form of progress payments, in consonance with Recommendation 6 of the First Progress Report of the Cabinet Committee on Small Business.

The regulation defines the term "progress payments" as follows:

> [P]ayments made from time to time during the performance of a contract on the basis of costs to the contractor, or percentage of completion or particular stage of completion, in connection with which the Government takes title to property acquired and work performed under the contract.

The GSA statement of the "basis" on which such payments are made follows substantially that used in the Joint Regulation of the three Armed Services. But also, like that regulation, it is most inaccurate and misleading in that it fails to state the most important fact; that they are payments made prior to delivery, in direct contravention of the specific statutory prohibition of section 3648.[81] That weakness may be explained by another weakness which makes the whole regulation questionable on its face — the omission of any statement of authority to make payments prior to delivery. The Armed Services Joint Regulation paid lip-service, at least, to well established administrative procedure by providing space and a title designation with respect to authority, even though it cited none, whereas GSA appears to have decided to omit any reference to authority since no authority exists in fact and since the practice of making progress payments has so long been indulged in without authority. A complete disregard for the lack of authority to make progress payments seems manifest in approximately four pages of the regulation devoted to provisions requiring bid invitations to offer progress payments to bidders.

It is stated in paragraph 8(b) of the regulation that in addition to the protection afforded by careful exercise of judgment

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81 31 U.S.C. § 529 (1952). Progress payments were defined as "predelivery payments" by the Chairman of the Contract Finance Committee, Department of Defense, see note 74 *supra* at 326, and as payments "before delivery" by the Department of the Army in *Hearings before a Subcommittee of the Senate Select Committee on Small Business, on Participation of Small Business in Military Procurement*, 84th Cong., 2d Sess. 300 (1956).

in determining bidders' responsibility as well as careful administration of the contract, the suggested title clause should be sufficient, except in unusual circumstances, to fully protect the Government's interests.[82] In this manner, the regulation conveniently ignores the fact that the existing law makes it clear that the *required* protection of the Government's interest is delivery as provided in the contract.[83] Appropriate advocacy of the Government's interests would compel GSA to show its authority for subjecting public funds to progress payments and precisely how it has determined that acquisition of title in the miscellany involved should be sufficient "to fully protect the Government's interests," absent unusual circumstances, so long as it is implemented "by careful exercise of judgment in determining bidders' responsibility as well as careful contract administration."[84] The suggested title clause declares title to be vested in the Government with respect to property "theretofore acquired or produced by the Contractor and allocated or properly chargeable" to the contract, but the regulation fails to disclose how title is acquired as to any such property in which a third party actually has a prior title or a prior valid lien of record.[85] What actual title, if any, may have existed in the miscellaneous assortment of property referred to in the title clause of the contract can substantially disappear by the contractor's disposition of that property and the substitution of a mere "credit memorandum" for it.[86] The regulation requires only that the progress payments are "fairly" supported by the *"value"* of work actually accomplished on the undelivered portion of the contract.[87] And unless

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82 General Services Administration Personal Property Management Regulation No. 33, 1A CCH GOV'T CONTRACTS REP. ¶24,875, 8(b) (1956).

83 "[P]ayment shall not exceed the value . . . of the articles delivered previously to such payment. . . ." REV. STAT. § 3648 (1873), as amended, 31 U.S.C. § 529 (1952).

84 See note 82 *supra.*

85 If the title clause is meant to imply appropriate contract surveillance, it appears vague. But see American Motors Corp. v. City of Kenosha, 274 Wis. 315, 80 N.W.2d 363, 368 (1957), *appeal docketed,* No. 343, 26 U.S.L. WEEK 3095 (U.S. Sept. 24, 1957); Detroit v. Murray Corp., 234 F.2d 380, 382 (6th Cir. 1956), *cert. granted,* 352 U.S. 963 (1957).

86 "With the consent of the Contracting Officer and on terms approved by him, the Contractor may acquire or dispose of property to which title is vested in the Government pursuant to this clause, and in that event, the costs allocable to the property so transferred from this contract shall be eliminated from the costs of contract performance and the Contractor shall repay to the Government (*by cash or credit memorandum*) an amount equal to the unliquidated progress payments allocable to the property so transferred." General Services Administration Personal Property Management Regulation No. 33, 1A CCH GOV'T CONTRACTS REP. ¶24,879, Exhibit D (d) (1956).

87 *Id.* at 8, para. 10 (b).

there is reason to question the reliability or accuracy of information furnished by the contractor, no pre-payment audit of the alleged *"costs"* on which the contractor seeks a progress payment is required by the regulation.[88] But the regulation implies that the Government's interests are "fully" protected by an inventory (miscellaneous property) value which is hardly likely to represent the true value, especially if the Government is compelled to sell as used material to a third party,[89] and may be much less than the value of the monies issued to the contractor as progress payments. It appears clear that the *"value"* declared by the contractor in support of requests for progress payments is nothing but the contractor's alleged costs which may be much greater than the value of what those costs produced and to which the Government takes title. Reservation of the "rights and remedies of the Government" under the contract, including the right to require the contractor in default to pay, upon demand, the amount of the unliquidaed progress payments,[90] further exposes the fallacy of the title which the regulation declares to "fully" protect the interest of the Government. As to two types of suggested progress payment clauses,[91] the regulation requires the contractor to maintain, not adequate, as required in two other types,[92] but only "reasonable" controls. He is to furnish such statements and information, not as may be requested, but as may "reasonably" be requested. And the Government is to be afforded only a "reasonable" opportunity to examine the contractor's books, records, and accounts.

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88 See note 82 *supra.*

89 THE SALE OF SURPLUS PROPERTY, *Committee Print, Sixth Report of the Preparedness Investigating Subcommittee of the Senate Armed Services Committee,* S. Res. 215, 84th Cong., 1st Sess. (1956).

90 General Services Administration Personal Property Management Regulation No. 33, 1A CCH GOV'T CONTRACTS REP. ¶¶24,875, 24,879, Exhibit D (h) (i) (1956). Actually, it appears to have become something in the nature of standard operating procedure to terminate for convenience rather than for default. H.R. REP. No. 1169, 85th Cong., 1st Sess. 5 (1957). The result has been to give a creditor status to some contractors whose contracts should have been terminated for default, so that they may become the recipient of public funds to which they are not entitled, rather then becoming potentially indebted to the Government by reason of the default. Some accounting firms do not list progress payments as a liability despite the fact that they are an indebtedness. See reports of Touche, Niven, Bailey, and Smart for the Glenn L. Martin Co. for the years 1952 through 1956, and those of Lybrand, Ross Bros., and Montgomery for the Curtis-Wright Corporation for the same period.

91 General Services Administration Personal Property Management Regulation No. 33, 1 CCH GOV'T CONTRACTS REP. ¶¶24,875-77 Exhibits A and B, (1956).

92 *Id.* at Exhibits D and E.

GSA's regulation on progress payments, especially the equivocal nature of the language used, is comparable to its regulation on Five-Percenters which has completely destroyed the efficacy of the Government standard form contract covenant against contingent fees, costing the Government millions, if not billions, in public funds.[93] It likewise is a reminder of GSA's failure to follow the law with respect to the standard "Disputes" clause.[94] The reader's curiosity may impel him to wonder why the legislative, or the executive, branch of the Government would permit the publication of a regulation so extremely contrary to the prohibition of section 3648. The answer seems to be that notwithstanding the great need for aggressive advocacy of the Government's interest in safeguarding the use of public funds in a period of unprecedented public spending, such advocacy appears to be much too spotty, undedicated and unorganized to cope with such pressure interests as produced the GSA regulation. The situation would seem to call for a strong, courageous, well-informed hand in the legislative branch of the Government to demand immediate corrective measures. However, to date the executive branch appears to have succeeded in making the legislative branch something in the nature of a mere rubber stamp for its procedures and regulations in more than one instance[95] in lieu of the independent check contemplated by our form of Government. The objectionable features of inviting requests for progress payments are discussed in a subsequent section of this article with respect to *The Federal Pacific Case.*

As a concluding observation on the GSA regulation in general, no better comment has been found than that made many years ago in *Pierce v. United States,* involving section 3648:

> It is not in the power of any one or all of the executive officers of the government, by any devices which they can employ, to take a case out of the act which by its facts and circumstances falls within its enactment. This power rests with Congress alone. If, however, that can be done by circumvention and evasion which may not be done directly, laws and statutes will be frail things indeed.[96]

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93 McClelland, *The Covenant Against Contingent Fees as a Method of Eliminating the "5-Percenter,"* 41 CORNELL L.Q. 399, 405-09, 423-25 (1956).

94 McClelland, *Government Advocacy As Related To Appeal Procedures Unaccomplished Since the Wunderlich Legislation,* 25 FORDHAM L. REV. 593, 595-96 (1957).

95 An over-developed camaraderie and collaboration—in lieu of a much needed strictly independent review—in lower echelons of the executive and legislative branches, which by necessity have great influence in formulating policies and procedures, could account for the situation.

96 1 Ct. Cl. 270, 288 (1865), *aff'd sub. nom.,* The Floyd Acceptances, 74 U.S. (7 Wall.) 666 (1868).

> If any such illegal and discreditable practice has prevailed among the officers of the government, no matter how long continued or extensive, it can never ripen into usage. No number of breaches of the law can abrogate or repeal it.[97]

VIII. THE FEDERAL PACIFIC CASE

The invitation to bid, involved in the contract in a Comptroller General's decision of November 14, 1955,[98] to the Federal Pacific Electric Company offered to make progress payments. While the invitation, No. 7754, was one issued in 1955, it appears from the decision that the administrative offer to bidders to make progress payments was also used approximately four years earlier. In the case which arose in 1955, Federal Pacific protested the award to the General Electric Company on the ground that interest and the administrative expense of making progress payments to General Electric, which has chosen that type of payment, would be appreciably more than the difference of $417 between the General Electric bid of $822,400 and the sum of $822,817 bid by Federal Pacific which did not request progress payments. Federal Pacific contended that if properly evaluated in the lights of the elected method of payment, its bid would have been lowest by at least $3,000 and probably by as much as $10,000.

Federal Pacific argued that progress payments cause more administrative work than one final payment and that the Government incurs additional cost in the form of interest by being required to pay a sum of money sooner than it would otherwise be required to pay. In that view of the matter, the complainant contended the Government is required to take such cost into consideration in evaluating the bids under the phrase "other factors" contained in the invitation.

The Comptroller noted that no specific basis for evaluation between the two methods of payment was provided in the invitation to bids and that apparently none had been provided in any other invitation where the provision was used. It was reported that such a factor had never been taken into consideration by the Department of the Interior in evaluating bids for award under similar circumstances. Yet, in obvious conflict with such an administrative policy, the Department's invitation expressly notified bidders that whenever applicable, elements or

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97 *Id.* at 291.
98 35 COMP. GEN. 282 (1955-56).

factors not specifically mentioned as provided therein, such as the cost of inspection, "or any other element or factor in adition to that of price which would affect the final cost to the Government, will be taken into consideration in making award."[99] And directly beneath that statement, as the last item of factors related to the award to be made, bidders were requested to indicate in the space provided, the basis of payment (progress or otherwise) desired.

The invitation was said to contain definite criteria for the evaluation of bids, including discounts, potential devices, engineer's travel expenses, but no specific provision to the effect that the basis of payment elected by the bidders would be a factor in evaluation. In the absence of such a specific provision and of specific criteria set forth in the applicable invitation or regulations, the Comptroller General expressed the view that the cost of additional administrative expense and interest which might be involved in making progress payments was to indefinite and speculative to be made an evaluation factor. In those circumstances the Comptroller held that his office was not warranted in concluding that the award was without authority or in violation of law.

The case seems noteworthy in several respects. In the first place, the Department of the Interior had no authority to make progress payments. What authority it ever had was under title II of the First War Powers Act and Executive Orders Nos. 9055 and 10298 issued pursuant to that act; and, at the time the bid invitation involved was issued, there had been no determination by the incumbent President, as required by the act,[100] that progress payments by Interior were necessary to facilitate the national defense.[101] And even if such a determination may be said to have been made, neither the act nor the Executive Orders contemplate the issuance of progress payments without regard to the needs of the contractor and his essentialty to the national defense. Moreover, the agencies have indicated they are not using title II[102] for progress payments. Thus, not only

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99 *Id.* at 283.

100 McClelland, *The Administration of Title II of the First War Powers Act*, 61 DICK. L. REV. 215, 226-29 (1957).

101 Nor does it appear that the Interior Department presented any facts to show that the national defense was involved.

102 Bachman, *Defense Department Contract Financing*, 25 GEO. WASH. L. REV. 228, 230-31 (1957). While the reference is limited to the Defense Department, the indications are that the Interior policy is the same. S. REP. No. 1152, 85th Cong., 1st Sess. 2 (1957); 103 CONG. REC. 15062-64 (daily ed. Aug. 29, 1957).

the award but the bid invitation as well was without authority of law.

Although the Interior invitation should have been reissued without reference to progress payments since the Department had no authority to make them, much less offer them in its bid invitations, further analysis is demanded, especially in the light of another Comproller General decision antedating that rendered in the *Federal Pacific* case.

It is reported[103] that in that case the invitation made no provision concerning progress payments. The holding is said to have been that bids conditioned upon the making of progress payments must be rejected as unresponsive, "premised upon the point that progress payments are materially beneficial." Since a contract with progress payment provisions was regarded as substantially more advantageous to the contractor than the same contract without progress payments, it was reasoned that a bid conditioned upon progress payments does not conform to invitations that make no mention of progress payments, and that an award made on such a bid would not meet the statutory requirements for free and full competition and conformity to invitations.

The conclusion impelled by that reasoning would seem to be that if progress payments are of such significance as to be *"materially beneficial"* and *"substantially more advantageous."* appropriate use of public funds in procurement requires that administrative regulations should contain these criteria for evaluating the factor of progress payments. Yet these were the considerations ignored by the Comptroller General in the *Federal Pacific* case as being too speculative. If such criteria do not exist, and therefore no such evaluation is possible, it would seem that the Federal Pacific bid invitation, which gave the false impression that the type of payment would be a factor in making the award, was an irresponsible act of the Department as well as a reckless use of public funds, and should have been cancelled. Otherwise the public interest is prejudiced by an administrative policy which merely pays lip service to the basic, well established principle that in advertised competitive procurement the Government cannot pay more than the lowest responsible bid price established after considering all elements

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103 Whelan, *Government Supply Contracts: Progress Payments Based on Costs; The New Defense Regulations,* 26 FORDHAM L. REV. 224, 237 n.56, (1957), citing an unpublished decision of the Comptroller General. MS. COMP. GEN. DEC. B-128454, Oct. 11, 1956.

or factors affecting the final cost. At the same time, such a policy appears most unfair to bidders because it has a tendency to cause some to lose awards by bidding high enough to avoid the necessity of demanding progress payments in their bids, thus making their bids too high to compete with another bidder who may know from previous experience or through unpublicized information that notwithstanding the language in its bid invitation, the Department actually disregards the factor of progress payments in evaluating bids.

The policy also seems to be contradictory to what appears to have existed in the Department of Defense prior to November 16, 1956, when that Department issued a directive that all bid invitations shall state that bids including requests for progress payments will be evaluated on an equal basis with those not including requests for progress payments.[104] That requirement is similar to the statement found in the recent GSA regulation on progress payments heretofore considered. Both statements have been associated with a recommendation of the First Progress Report of the Cabinet Committee on Small Business, which sought procedures designed to insure that a need by a bidder for progress or advance payments will not be treated as a handicap in awarding a contract.[105] The irony in the situation is not limited to the fact that the Cabinet Committee ignored the complete lack of authority in most agencies to make progress payments. It also discloses that what those who previously sought progress payments feared as inequality of position in the bid evaluation processes has by the efforts of that group of bidders become an inequality for those who do not seek progress payments. For if the latter are expected to bid a price which will have some reasonable likelihood of competing with the former, they must also seek progress payments since otherwise that price will reflect interest costs borne by them rather than by the Federal Government. The result is that those companies which can and should operate without progress payments, are compelled to request them to avoid the possibility of giving some competitors an advantage. Such a result would seem to be another reflection of levelling processes that are as stultifying and destructive of private initiative as other aspects of centralized governmental policies which tend to lower previous levels of individual enter-

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104 Department of Defense Directive No. 7800.4, 1 CCH GOV'T CONTRACTS REP. ¶ 23,126 (1956).

105 *Hearings Before the Senate Select Committee on Small Business,* 85th Cong., 1st Sess. 94 (1957).

prise and gumption. In other words, the encouragement of administrative policy such as that involved in the *Federal Pacific* case and in the Defense and GSA regulations has foreboding implications equally if not more serious than the fact that the policy is projected without authority and in defiance of the law.

The *Federal Pacific* case appears as a good illustration that the use of progress payments by the executive agencies has proceeded far beyond small business. One look at the balance sheets of any one of a number of large aircraft companies[106] today will show how far the Defense Department has gone since the necessity for progress payments — as well as advance payments — was presented to Congress as limited to small business.[107] Another look at the great unliquidated volume of those payments should show why there is much cause for concern as to whether, aside from its illegality, the executive policy on progress payments has not far exceeded what is good for either General Electric or the country.[108]

IX. Certain Serious Effects on the Money Market

The letter of December 12, 1953, from the Commanding General of the Signal Corps Supply Agency, Philadelphia, to contractors doing business with that agency announced that the authority of contracting officers to grant progress payments had been withdrawn and stated that the withdrawal of that authority was "one of a number of actions being taken to decrease the expenditure of public funds and keep within the national debt limitation of $275 billion."[109] The relationship between progress payments and the problem of keeping within the national debt limtiation would seem fairly obvious in the

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106 See, for example, the balance sheets for the following years on the Curtis-Wright Corporation and the Glenn L. Martin Co., which disclose progress payments as follows:

	Curtis-Wright	*Glenn L. Martin*
1956	$15,139,640.00	$ 34,711,046.00
1955	18,938,244.00	54,866.356.00
1954	38,155,012.00	80,979,401.00
1953	56,912,420.00	122,933,535.00
1952	56,088,200.00	80,165,533.00

107 S. Rep. No. 911, 77th Cong., 1st Sess. 2 (1941); *Hearing to Expedite Naval Shipbuilding, the House Armed Services Committee*, 76th Cong., 3d Sess. 11, 16, 17 (1940).

108 With due apologies to a former Secretary of Defense to whom a similar statement has been attributed with respect to General Motors, but not related to progress payments.

109 *Hearings before a Subcommittee of the Senate Select Committee on Small Business, on Participation of Small Business in Military Procurement*, 83d Cong., 2d Sess. 333 (1954).

light of unaccounted for balances of such payments in sums of approximately 4½ billion dollars at year's end, of which a very substantial portion[110] seems to have been made without authority and in direct violation of a statutory prohibition. The relationship is perhaps more obvious when the problem of keeping defense spending within the national debt limitation is shown to be so great that an announced addition of only $400 million to a defense budget of $38 billion makes headline news.[111] Coming as it did on the heels of much speculation as to whether the Russian Sputnik would mean more defense spending on missiles and similar projects, the news story seemed to have more significance in its implications than in the actual statements it contained. In other words, when it appears that the national defense is jeopardized by a lack of funds which may have been caused in no small part by liberality, and possible gross incompetence, in making progress payments which are contrary to law, a question may well arise as to whether, irrespective of intent, administrative violations of statutory prohibitions on the use of public funds may not be as deadly destructive of the national well-being as any other component of what frequently is classified as a fifth column.

Specific recognition of the effect of progress payments appears in the recent report that to assist in compelling a restoration of its spending to conform to the budget of the Department of Defense, which in the fiscal 1958's first quarter, spent its money at the rate of $40 billion annually, or $2 billion more than its 38 billion dollar budget, the Air Force proposed a temporary cut averaging 25 per cent in its monthly progress payments for aircraft production.[112] Other indications of grave consequences which flow from administrative violations of the statutory prohibition against the advance of public funds are shown in the Government's report on October 17, 1957, that it would pay an interest rate of 4⅞ per cent on certain short term bonds involving $750 million.[113]

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110 The Army and Air Force [with no authority to make progress payments] accounted for almost half of the unliquidated amount shown as of Dec. 31, 1954. *Hearings before a Subcommittee on the Senate Select Committee on Small Business, on Participation of Small Business in Military Procurement,* 84th Cong., 1st Sess. 257 (1955).

111 Washington, D.C., Evening Star, Oct. 30, 1957, § A, p. 1, col. 1.

112 Time, Oct. 28, 1957, p. 89, col. 1.

113 Washington, D.C., Evening Star, Oct. 19, 1957, § B, p. 1, col. 1.

The Treasury needed some "ready cash" which it normally would have obtained from the public by issuing bonds of indebtedness bearing 2½ or possibly 3 per cent interest. However, the national debt limitation of $275 billion presented a tough problem since the Treasury could borrow only $1¼ billion more before reaching the national debt limitation. Since the Federal National Mortgage Association (known as Fanny May), a government agency, owed the Government $1.7 billion, the Treasury Department had the Association offer $750 million in interest bearing notes which the Treasury thought would require an interest rate of 4⅞ per cent to make them readily marketable.

Thus, the financial condition of the Government has become so acute in its efforts to keep within the national debt limitation that the Treasury Department in seeking to obtain approximately 1½ billion dollars, finds it necessary to offer still higher rates of interest regardless of the fact that it adds to the depletion of a money market which for some time has been considered altogether too tight.

While the Government was able to secure three-quarters of a billion dollars without increasing the threat to the national debt limitation, the cost to the public was high. The cost of the higher interest rate has been estimated to be approximately $5 million.[114] Government bond prices declined. Fanny May's own interest costs were expected to increase approximately $18½ million, which would be passed on to the borrowing public. If the Government as well as the public must pay higher interest rates because the Government has been spending its borrowings too fast, it seems most appropriate to be fully aware of the manner in which those borrowed funds are spent as well as being informed as to the subject matter purchased. When the situation becomes so acute that the Government becomes "hard-put" for a mere three-quarter of a billion dollars, it would seem of more than passing interest to know that at the end of the year, for a consecutive period of at least three years, the Government has been "holding the bag" for over $4 billion in unliquidated progress payments paid by executive agencies without any evidence of authority for such payments except for the specific legislation heretofore mentioned. Some part of that $4 billion would have been quite useful when the Treasury was casting about for three quarters of $1 billion. The interest paid by the Government on the $4 billion which the agencies have

114 *Id.* at p. 2, col. 3.

failed to charge to the beneficiaries of the progress payments might well have compensated the Government for the $5 million extra interest it was compelled to pay in issuing at 4⅞ per cent the Fanny May notes. These in turn very likely would have been unnecessary had the executive agencies not created an unliquidated progress payment indebtedness of over $4 billion. Moreover, it is conceivable that the cost of administering the unlawful progress payments would closely approximate a substantial part of that three-quarter of a billion dollars sought by the Treasury Department. Perhaps, this sort of situation was in the mind of the commanding general at Philadelphia when he attempted to curb the use of progress payments "to keep within the national debt limitation of $275 billion." To determine more exactly how the proponents of progress payments in larger amounts, regardless of the law, prevailed at that time over those who four years ago must have foreseen some, if not all of the evils in the matter, could be determined only by an examination of the files as well as the individuals involved. Yet the efforts so far by Congress seem to be to determine why progress payments are not used more liberally rather than to determine the authority for using them and to hold duly accountable those who are responsible for violating the statutory prohibition.

So long as a policy of perpetuating errors to save face is pursued, the public can expect no respite from the accelerated spiral of Government expenditures with resultant higher taxes and a gradual lowering of the real[115] standard of living. At one time, various committees of Congress were much concerned by the extent to which the national budget was being drained by Five-Percenters.[116] Long, expensive hearings were held, which disclosed the fabulous amounts which the Government was losing annually by reason of unlawful payments to those agents. Nevertheless, Congress has never followed through on the matter to compel enforcement of the contract provision with respect to such agents. The result is that the Government has continued

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115 That is, in the terms of the life to be enjoyed on the basis of one's "real wages." FISHER, THE NATURE OF CAPITAL AND INCOME 104 (1906).

116 *Hearings Before the House Naval Affairs Committee Investigating the National Defense Program*, 77th Cong., 2d Sess. 1185 (1942); H. REP. No. 2356, 77th Cong., 2d Sess. (1942); *Hearings Before the Investigating Subcommittee, Senate Committee on Expenditures in the Executive Departments, Investigating "Influence in Government Procurement,"* 81st Cong., 1st Sess. (1949).

to lose large sums of money with no one making any effective attempt to recover them.[117]

XII. SUMMARY

Section 3648 of the Revised Statutes prohibits advances of public funds, including progress payments, in any case. The prohibition cannot legally be avoided without the enactment of "other law." Recognition, by both the executive and legislative branches of the Government, of the inflexibility of the prohiibtion against progress payments is conclusively shown in the various statutes, especially the First War Powers Act, the act of August 2, 1946, and the Armed Services Procurement Act of 1947, which from time to time have been sought and obtained by the executive agencies to avoid the prohibition against advances of public funds generally. Executive agencies some time ago abandoned the previous policy of seeking legal, statutory approval for progress payments such as they had sought and obtained under the First War Powers Act which required a determination by the President that progress payments were necessary to facilitate the prosecution of the War or, later, to facilitate the national defense. In lieu of that policy, the agencies have proceeded to substitute their own determination, without statutory approval, that the Comptroller General's decision in the *Security Steel* case, and similar cases, is sufficient authority to disregard the plain language of the prohibitory statute, which bars progress payments "in any case," and sufficient as a substitute for the enactment of statutory exceptions.

Abandonment of the War Powers Act, which actually became inoperative not later than June 30, 1953, is disclosed by the law review articles of a Defense Department representative and is confirmed by its general counsel's letter of August 25, 1957, to Senator Eastland. Executive reliance on the Comptroller General's decisions is completely unjustifiable in the light of the plain and distinct language of section 3648 and is in direct conflict with the official position of the Government as to the necessity for expressed legislative sanction on *all* exceptions to the statute. The equation in the decisions, upon which the executive agencies rely, is a false one because it attempts to equate title to the delivery specifically required by section 3648, by the use of language which purports to justify an exception to the statute which contains specific language ex-

117 See McClelland, *The Covenant Against Contingent Fees As A Method of Eliminating the "5-Percenter,"* 41 CORNELL L.Q. 399, 424-25 (1956).

pressly excluding any exception. The executive substitute of title, for the delivery required by the statute, is at best illusory and precarious and falls far short of fully protecting the Government's interests. Therefore, neither the Comptroller's decisions nor the equation used in them furnishes any legal authority for circumventing the prohibitory statute. The executive agencies know this, officially, and therefore noticeably refrain from stating an authority in their regulations on progress payments. Nevertheless, the General Services Administration has sought and somehow obtained the Comptroller General's approval of its regulation despite that official's recognition at the time of the 1946 amendment to section 3648, and at various times before and since, that it is necessary to create legislative exceptions to avoid the general rule that the advance of public money is prohibited by law.

The *Federal Pacific* case is a high water mark in disclosing the executive agency contempt for the prohibition of section 3648. No approval of the agency's proposal to make progress payments was sought from the Comptroller General, as in the *Security Steel* case. Instead, the matter reached the attention of the Comptroller General because the effect of the agency's procedure was to compel one of the bidders to seek progress payments which the law prohibits!

The fact that executive agencies have permitted the unliquidated balances of progress payments to accumulate to the extent of over $4 billion at year's end alone would seem to suggest the need for an investigation of the entire progress payment program. The fact that the program has been proceeding in defiance of the law to the extent that it has been a substantial factor in creating a tight money market and in the recent increase of $5 billion in the national debt limitation should make an investigation imperative.

The negative effects of the administrative weaknesses of the program, on the protection intended in requiring free and fully competitive bidding for Government contracts, may be as serious as any other aspect.

Congress and the President conceivably can be, if they have not been, misled by executive procedures which fail officially to disclose by regulation or otherwise that in making progress payments, the executive agencies are, and have been violating the statute without express or implied legislative sanction.

Those who still may find it difficult to believe that the executive agencies would be using public funds in such disregard of

the law need only again read the quotation at the beginning of this article and then refer to the purpose of a current investigation by the Special Subcommittee on Legislative Oversight[118] stated as follows: "[T]o go into the administration of the laws to see whether or not the laws as intended by the Congress were being carried out or whether they were being repealed or revamped by those who administer them."[119] While that subcommittee is limited to matters of interstate and foreign commerce, it might well be profitably used in matters of Government contracts. Establishment of that subcommittee is not the first Congressional expression of the need for determining the extent to which executive agencies actually follow the law.[120]

It sems very probable that there has never been a subject like progress payments on which so much has been said officially, with so little authority to say it, and with respect to which the names of those in high authority have been associated in an attempt "to give to airy nothingness a local habitation and a name."[121]

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118 *Hearing Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 85th Cong., 1st Sess. (1957).

119 *Id.* at 1.

120 See Sparkman, *The Administration of Title II, First War Powers Act, 1941*, 14 U. PITT. L. REV. 303, 317-18 (1953): "This means that oftentimes errors of interpretation will not come to light until much mischief has been done. . . . There should be a definite procedure whereby the Congress or its committees should be enabled speedily to redirect agencies of the executive branch where they are found to be misguided in their interpretation of a federal statute."

121 Shakespeare, "A Midsummer Night's Dream," act V, sc. 1, l. 7.