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THE COVENANT AGAINST CONTINGENT FEES AS A METHOD OF ELIMINATING THE "5-PERCENTER"

C. S. McClelland*

*"Can such things be,
And overcome us like a summer's cloud,
Without our special wonder?"***

In stressing the importance of giving constant attention to the problem and in recommending that continuing studies be made to improve upon the present methods of eliminating the "5-percenter," the public,¹ as well as Congress and the executive agencies of the Government, has been included by a congressional subcommittee among those which should keep constantly vigilant.² However, notwithstanding certain criticism contained in some of the legislative history on the subject,³ the public has been given practically no specific information on actual enforcement of the standard form government contract contingent fee covenant as a method of eliminating the "5-percenter" in the many cases involving the payment of such fees for procuring government contracts. Inasmuch as many millions, if not billions, of dollars⁴ of public funds are involved and as the contingent fee provision in government contracts long has been paid for⁵ by the public to protect itself against the "5-percenter," it seems appropriate for a member of the public, as distinguished from members of Congress and the executive agencies, to examine the covenant against contingent fees, its history, the extent to which it has been utilized and enforced and the recorded cases in which it has been involved.

* See Contributors' Section, Masthead, p. 437, for biographical data. This article was written while author was an attorney in private practice. Stated views and conclusions, not otherwise identified, are the author's.

** Macbeth, Act III, Sc. iv.

¹ S. Rep. No. 1232, 81st Cong., 2d Sess. 31 (1950).

² S. Rep. No. 611, 82d Cong., 1st Sess. 2 (1951).

³ E.g., 7 Hearings Before the House Naval Affairs Committee investigating the National Defense Program, 77th Cong., 2d Sess. 1191-92 (1942); S. Rep., supra note 1, at 26-27.

⁴ Hearing Before the Senate Committee on Naval Affairs, on H.R. 1900, An Act to Prevent the Payment of Excessive Fees or Compensation in Connection with the Negotiation of War Contracts, 78th Cong., 1st Sess. 16 (1943); H.R. Rep. No. 2056, 78th Cong., 2d Sess. 139-41 (1944).

⁵ H.R. Rep. No. 2356, 77th Cong., 2d Sess. 4 (1942):—"Any contingent fee he agrees to pay is, of course, included in the price of any contract procured as a result of these services"; Schultz, "Proposed Changes in Government Contract Disputes Settlement," 67 Harv. L. Rev. 217, 223 n. 24 (1953); Hearings Before the Investigating Subcommittee, Senate Committee on Expenditures in the Executive Departments, Investigating "Influence in Government Procurement," 81st Cong., 1st Sess. 11 (1949): "It is the taxpayer" who suffers. *Id.* at 607: ". . . in the final analysis the taxpayers of the United States pay the commissions these men receive."

Agreements to influence government officials to award public contracts affect public policy and therefore questions frequently arise as to their validity. Some consider the early common-law rule with respect to contingency agreements to obtain public contracts to have been modified⁶—though the language chiefly relied upon appears to be dictum. Actually, the federal rule, comprised of long-established administrative procedure,⁷ executive orders,⁸ and statutes,⁹ all based upon the original common-law rule, has never been modified. Although many people have become familiar with the term “5-percenter,” some either have not been aware of, or have not fully comprehended, its connection with the rules of law involved. The term “5-percenter” is a general one that may be applied to one who is compensated on any percentage rate or other basis that is contingent upon the agent’s success in securing a government contract for his principal. So long as the agency agreement shows that the agent’s compensation is contingent upon his success in securing a government contract, the contract covenant entitles the Government to cancel the contract or to collect from the contractor the amount paid as compensation to the agent. Such an agency agreement is referred to as a “no-contract-no-fee” arrangement or understanding. In the consideration of “5-percenter” cases in which the federal government has been a party, government appeal boards have seemed to ignore the common-law basis of the federal law and regulations on the matter of “no-contract-no-fee” arrangements and have based the reasoning of their ultimate decisions or opinions on factors irrelevant to the common-law rule and the governing federal law and regulations.

The importance of enforcement of the covenant becomes more obvious when it is realized that every provision of a government contract is an element which doubtlessly affects the contract price.¹⁰ Therefore, any contingent fee that a government contractor agrees to pay is included in the price of any contract procured as a result of the services performed

⁶ *Oscanyon v. Arms Co.*, 103 U.S. 261, 275 (1880). In fact, it is certain language only, and not the holding itself, that is liberal and since the language involved was not necessary to the conclusion reached, it appears to be mere dictum. Cf. 6 Williston, *Contracts* § 1729A (Williston & Thompson rev. ed. 1936).

⁷ For the contingent fee covenant adopted in 1924, see page 401 *infra*. What changes have been made have not affected the actual “rule.”

⁸ Exec. Order No. 9001, 6 Fed. Reg. 6737 (1941), and later similar executive orders, requiring the covenant in all contracts entered into pursuant to Exec. Order No. 9001. 32 C.F.R. §§ 7.103-20, 590.503 (1954).

⁹ Armed Services Procurement Act § 4(a), 62 Stat. 21, 23 (1948), 41 U.S.C. §§ 151, 153 (1952); Federal Property and Administrative Services Act, 63 Stat. 377, 393 (1949), 41 U.S.C. § 252 (1952).

¹⁰ Schultz, *supra* note 5, at 223 n. 24.

by the contingent fee agent.¹¹ Further, it can be seen that a contractor, who has any appreciable doubt that his agent will qualify under the contingent fee provision, may include *twice* the amount of the fee in the contract price to cover not only the amount to be paid to the agent but also a like amount which the Government might deduct if it concludes that the contractor violated the contingent fee provision in choosing his agent. Congressmen and representatives of government agencies have acknowledged the covenant's prohibition against "no-contract-no-fee" arrangements, and that its history and its language are to that effect.¹² But very little evidence of enforcement appears.

ANALYSIS OF THE HISTORICAL DEVELOPMENT OF THE COVENANT

Since at least 1924, the prohibition against contingent fees has been stated in the government standard form contract, as follows:

COVENANT AGAINST CONTINGENT FEES.—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through *bona fide* established commercial or selling agencies maintained by the contractor for the purpose of securing business.

In 1949,¹³ except for the addition of the term, "bona fide employees," the language of the covenant remained substantially unaltered in a restatement of the covenant, as follows:

The contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.¹⁴

The substance of the reason for the development of the contingent fee

¹¹ See note 5 *supra*.

¹² H.R. Rep., *supra* note 5, at 4-5; 1949 Hearings at 612; Hearing Before Joint Congressional Committee on Defense Production (Defense Production Act Progress Report No. 7), 82d Cong., 1st Sess. 304 (1951); 1942 Hearings, *supra* note 3, at 1191.

¹³ Federal Property and Administrative Services Act § 304(a), 63 Stat. 377, 393 (1949), 41 U.S.C. § 252 (1952).

¹⁴ In 1947, this language was approved for negotiated contracts in the Department of Defense. See the Armed Services Procurement Act § 4(a), 62 Stat. 21, 23 (1948), 41 U.S.C. §§ 151, 153 (1952).

covenant is shown in that part of the Attorney General's press release of April 2, 1918,¹⁵ which refers to "a reasonable price for goods" and to a then recent Supreme Court declaration that the "no-contract-no-fee" arrangement suggests an attempt to use sinister and corrupt means.¹⁶ That is, if an examination of the arrangement, or agreement as referred to in the covenant, discloses that if the agent obtains no contract for the contractor, he will receive no payment of any kind from the contractor, such arrangement or agreement suggests an attempt to use sinister and corrupt means. The Attorney General also referred to "the suggestion of evil" in such agreements as described by the case of *Tool Co. v. Norris*,¹⁷ which he specifically names in his later press release of April 5, 1918.¹⁸ Also, in a case before him many years later, the Comptroller General of the United States quoted from the *Tool Co.* case to show what the Comptroller described as "the evil which the provision was designed to prevent."¹⁹ In a later case decided by the Supreme Court,²⁰ it is stated that the objection to "no-contract-no-fee" arrangements rests in their *tendency*, not in what was done in the particular case. The theory, as described in a much later case²¹ commenting upon the *Tool Co.* case, is that where the employment compensation is dependent upon success, there is a tendency to exert improper influence to effect the successful procurement of the contract; that such a situation is objectionable; and that in passing upon the legality of the contract of employment (or agency), it is immaterial whether improper means are contemplated or actually used in procuring the public contract. While a number of cases²² have followed that theory, some more specifically than others, another group of cases²³ have seemed to follow the theory that the contingency of com-

¹⁵ 1942 Hearings, supra note 3, at 1185.

¹⁶ Id. at 1186; *Crocker v. United States*, 240 U.S. 74 (1916).

¹⁷ 69 U.S. (2 Wall.) 45, 55 (1865).

¹⁸ 1942 Hearings, supra note 3, at 1186.

¹⁹ 22 Comp. Gen. 124, 126 (1942).

²⁰ *Hazelton v. Sheckells*, 202 U.S. 71, 79 (1906).

²¹ *Bradley v. American Radiator and Standard Sanitary Corp.*, 6 F.R.D. 37 (S.D.N.Y. 1946), aff'd, 159 F.2d 39 (2d Cir. 1947).

²² *Mitchell v. Flintkote Co.*, 185 F.2d 1008 (2d Cir.), cert. denied, 341 U.S. 931 (1951); *McNeill v. Nevius*, 187 F.2d 81 (D.C. Cir. 1950); *Silverman v. Osborne Register Co.*, 155 F.2d 879 (D.C. Cir.), cert. denied, 329 U.S. 765 (1946); *Bradley v. American Radiator and Standard Sanitary Corp.*, 6 F.R.D. 37 (S.D.N.Y. 1946), aff'd, 159 F.2d 39 (2d Cir. 1947); *Hardesty v. Dodge Mfg. Co.*, 154 N.E. 697 (Ind. App. 1927); *Davidson v. Button Corp.*, 137 N.J. Eq. 357, 44 A.2d 800 (Ch. 1945), aff'd, 113 N.J. Eq. 113, 46 A.2d 787 (Ct. Err. & App. 1946); *York v. Gaasland Co.*, 41 Wash. 2d 540, 250 P.2d 967 (1952).

²³ *Reynolds v. Goodwin-Hill Corp.*, 154 F.2d 553 (2d Cir. 1946); *Buckley v. Coyne Elec. School*, 343 Ill. App. 420, 99 N.E.2d 370 (1951); *Gendron v. Jacoby*, 337 Mich. 150, 59 N.W.2d 128 (1953); *Ebeling v. Fred J. Swaine Mfg. Co.*, 357 Mo. 549, 209 S.W.2d 892 (1948); *Stone v. William Steinen Mfg. Co.* 22 N.J. Misc. 353, 39 A.2d 241 (Cir. Ct. 1944),

compensation may be harmless and that the question of the legality of a "no-contract-no-fee arrangement" is to be determined, not merely by the contingent nature of the compensation, but by weighing all of the elements involved and then deciding whether its inherent tendency is to invite or promote the use of sinister or corrupt means to accomplish the end or to bring influence to bear upon public officials of any other nature than the single one of genuine advantage to the Government.²⁴

The United States was not a party in any of the cases cited above. That is, none of those cases involved any action in which the facts showed that the United States had charged the contractor with obtaining a contract by means of a "no-contract-no-fee" arrangement or understanding with an agent, contrary to the covenant against contingent fees in the contract so obtained. Thus, the courts had not been required to determine the rights of the United States arising out of the agreements or understandings between the contractors and the agents involved in any of those cases and, therefore, any comments made in those cases on the requirements of the covenant are mere dicta. The covenant used by the contractors in those suits as a basis for a defense that the agency agreement or understanding was against public policy and therefore illegal and void provided the methods by which the Government could protect or recoup itself, but that had nothing to do with the contentions between the parties.

The facts on the historical development of the covenant show that despite many protests:

. . . the Attorney General was firm in stating that this covenant as originally included in Government contracts was all-inclusive and a warranty which prohibited any and all commissions or contingent fees to agents or brokers for sales to or contracts with the Government irrespective of whether or not the sales agency was well established and bona fide.²⁵

However, after a "great mass of material" was filed in the Department of Justice on the complaints of "heads of the executive departments, by

aff'd, 133 N.J.L. 16, 42 A.2d 268 (Sup. Ct. 1945), aff'd, 133 N.J.L. 593, 45 A.2d 486 (Ct. Err. & App. 1946); *Bradford v. Durkee Marine Products Corp.*, 180 Misc. 1049, 40 N.Y.S.2d 448 (Sup. Ct. N.Y. County 1943); *Glass v. Swimaster*, 74 N.D. 282, 21 N.W.2d 468 (1946) (but ruled against the agent because of an affirmative finding of influence); *Hall v. Anderson*, 18 Wash. 2d 625, 140 P.2d 266 (1943).

²⁴ *Nobel v. Mead-Morrison Mfg. Co.*, 237 Mass. 5, 129 N.E. 669 (1921).

²⁵ 1942 Hearings, *supra* note 3, at 1187. It seems reasonable to conclude that President Wilson's later statement that "our single object was to prevent the contingent fee based upon no real service" is a statement of the reason only for prohibiting "no-contract-no-fee" arrangements as accomplished by the covenant and does not furnish any defense for a contractor who may happen to receive various services from a "no-contract-no-fee" operator in addition to the procurement of a government contract. At least, the present exception in the covenant does not provide that additional services or "real service" will show that the agent is "maintained" although it may aid to show he is a bona fide agent.

manufacturers, and by sales agencies and commission brokers," and after the various exchanges of communications between President Wilson and the Attorney General, an exception to the "all-inclusive" prohibition against "no-contract-no-fee" arrangements was provided for those agencies which were engaged in securing commercial as well as governmental business, even though the compensation to be received by the agent might be entirely contingent upon success in obtaining business. After that relaxation of the prohibition it was not many years before the exception was broadened to include agencies engaged exclusively in securing government business if they were "maintained by the contractor for the purpose of securing business." It appears that this was done because "there are large numbers of important and responsible concerns which maintain branch offices in Washington for the purpose of furnishing supplies to the Government and that it is very desirable from the standpoint of the Government that these offices be maintained."²⁶ In considering whether that exception as well as the one preceding it actually were "very desirable from the standpoint of the Government," it is to be noted at the outset that by creating those exceptions, the Government immediately lost a substantial part of its protection against the tendency to exert improper influence inherent in "no-contract-no-fee arrangements," inasmuch as the contingent part of the compensation of the agencies excepted doubtless would usually greatly exceed any compensation which was certain by reason of their being "maintained."²⁷ Thus, for "large numbers," there remained the incentive, at least, to use the very means to secure government contracts which the covenant, in its "all-inclusive" form, had been adopted to preclude. Moreover, it unjustly discriminated against those agents which were not "maintained" as well as against the contractors who could not afford to maintain the agents; a "maintained" agent could earn, and charge his principal, the contractor, a much greater fee than another agent such as the regular salaried employee who may have been equally as competent and valuable as the "maintained" agent and without the possible "evil" implications involved where part or all of the compensation is contingent upon success. Further, in succumbing to pressure to modify the "all-inclusive" covenant, the Government not only lost a substantial part of its protection against improper influence but also lost

²⁶ 1942 Hearings, *supra* note 3, at 1189.

²⁷ It would seem obvious that the use of the word "maintained" in the second exception modified the first exception to the extent that in order to qualify, the agent's compensation no longer could be entirely contingent upon success in obtaining business. Nevertheless, government appeal boards seem to disagree. An idea of how much the contingent compensation may exceed that which is certain may be seen in the 1942 Hearings, *supra* note 3, at 1201, 1276; see also S. Rep., *supra* note 1, at 26-27.

a substantial part of its protection against the use of public funds to pay exorbitant fees and commissions in its procurement activities. But what is at least as serious is the apparent custom, of many years standing in the executive branch, to construe that exception to permit the agent's compensation to be wholly contingent upon the agent's success, and so to nullify the covenant itself, whereas the validity of the exception, as an exception, as well as the word, "maintained" in the exception clearly show that any contingent compensation must only be something in addition to the certain compensation to which the agent is entitled by reason of being "maintained." The tendency of government appeal boards to burden the Government with one of the very problems the covenant was designed to avoid—ascertaining whether "influence" was used—has resulted in bringing actual covenant violators within the covenant. Also, it seems safe to assume that those not excepted naturally have been very active in attempts to qualify under the exception and that one expressed result of those attempts was the exception added in 1947 and 1949 to cover bona fide employees. Although the modification was most revolutionary in that the controlling administrative interpretation of the term furnished a broad new means for many contractors to circumvent the covenant, it has not been found that it was preceded by the publicity necessary to give all interested government agencies and Congress an opportunity to realize its impact and to be heard on the matter, all of which emphasizes the urgent need for appropriate action to investigate the circumstances accounting for the modification and the desirability of its retention.

A published General Services Administration regulation²⁸ states that the term, "bona fide employee," for the purpose of the exception to the prohibition of the covenant, means an individual (including a corporate officer) employed by a concern in good faith to devote his full time to such concern and to no other concern (unless it is a "small-business" concern) and over whom the concern has the right to exercise supervision and control as to time, place, and manner of performance of work. While GSA allows a "bona fide employee" to work for more than one contractor, the first page of Standard Form 33, prescribed by the same agency, refers to a "full-time employee" as the type permissible under the excepted class of contract solicitors. The regulation also indicates that an agent may qualify as a bona fide employee under the covenant even though he is paid on a contingent basis. That is contrary to the view expressed in 1942 by the chairman of the House Naval Affairs Committee who makes it clear

²⁸ Gen. Services Administration, Gen. Circular No. 12, 44 C.F.R. § 150.5(d) (Supp. 1955), 1 CCH Gov't Contracts Rep. ¶ 18,321A (1952).

that the covenant can be fulfilled by the contractor's putting the agent on his payroll, for "permanent pay . . . on an annual but not on a contingent basis."²⁹ Such a view would seem to be the proper one to take with respect to the employee referred to in the covenant inasmuch as its juxtaposition in the covenant with "bona fide established commercial or selling agencies" is such that the two terms appear as a compound object of the participle, "excepting," modified by the word "maintained." To agree with GSA would ignore the obvious facts that the covenant requires that the employee be maintained and that otherwise such an employment arrangement would be in direct contravention of the covenant's prohibition of a "no-contract-no-fee" agency agreement. However, the GSA view apparently has prevailed because no one has challenged it despite its vulnerability. Therefore the 1949 exception to the covenant, as interpreted by GSA, conceivably may have caused the Government to waive collection of many additional millions of dollars paid from public funds for services by individuals who actually did not qualify under the covenant, as an examination of excepted agency agreements might show.

Also, while it seems clear enough in the exception as it was stated from 1924 to 1947-49, and as the Government has successfully argued,³⁰ that the key word in the exception is the word "maintained," the General Services Administration, now responsible for that aspect of government procurement policy, has given practically no space to that word in its published regulation on the subject of contingent fees, and the published proceedings of the pertinent congressional committees have not given much more attention to the word or to the court decision favorable to the Government with respect to the word "maintained."

The history of the contingent fee covenant as contained in the House document³¹ does not furnish sufficient information on the complaints that occasioned the first exception to the covenant to show why the Government made such a substantial concession and no legislative documents have been found to contain any probe of that very important aspect of the covenant by any of the congressional committees engaged in the studies of influence in government procurement and related subjects. Thus, the public has no means of determining whether the decision made so many years ago, or that made in 1947-49, to modify the covenant actually was in the best interests of the Government; apparently Congress has never assembled the necessary information to make an accurate ap-

²⁹ 1942 Hearings, *supra* note 3, at 1191.

³⁰ *United States v. Paddock*, 178 F.2d 394 (5th Cir. 1949), cert. denied, 340 U.S. 813 (1950).

³¹ 1942 Hearings, *supra* note 3, at 1185-90.

praisal, notwithstanding the fact that the covenant was "readopted" for use in World War II when the fees involved were "astronomical" and Congress was holding extensive hearings and investigations to determine means to prevent them.³² In that connection an examination of the facts on the more modern theory of further relaxation of the covenant by reason of the interest of small business appears to have no merit whatever.³³ And if the facts which occasioned the first exception to the covenant are as deficient in merit as those with respect to the small business theory, there would seem to be no justification for retaining any part of the exception in the covenant. If the exception cannot be justified by the facts but is to be left in the covenant arbitrarily, then the covenant should be eliminated from the government standard contract form. Then, at least to that extent, public funds will not be dissipated in paying for something for which the public receives no value.

It seems clear from the historical background of the covenant that in making it a part of the standard form government contract, the authors of it were convinced that the exercise of undesirable influence may be too deep to find.³⁴ They therefore relieved the Government of the burden and risk of having to prove such influence in the protection of the best interests of the Government, by requiring its contractors to furnish a guarantee of such a nature as would give the Government the best assurance obtainable under the circumstances that no undesirable influence was exercised in securing contracts with the United States, especially since the circumstances seemed to require a great volume of negotiated as distinguished from competitive purchasing as required by section 3709 of the Revised Statutes. In other words, it appears clear that the authors of the covenant believed that if government contractors were willing to guarantee that their contracts were not secured by means of an agent operating on a "no-contract-no-fee" arrangement or understanding, the likelihood of income

³² H.R. Rep., *supra* note 5, at 5. The Committee was working on legislation, which it said (*id.* at 4) would permit "No exception to the prohibition against the payment of contingent fees"; but the legislation (H.R. 7304, 77th Cong., 2d Sess. (1942)) was penal in nature and died in the Senate because of complaints from trade associations, chambers of commerce, and business men. S. Rep. No. 255, 78th Cong., 1st Sess. 1 (1943). The latter report also shows that a substitute bill without penal provisions was also defeated, it being reported that the War Department, the Navy Department, and the House Naval Affairs Committee would not accept the proposed substitute. Most noteworthy, however, would seem to be the indication that the wisdom of the covenant's exceptions was questioned; but instead of directing that they be dropped, the Committee seemed intent on intensifying the liability instead of using the administrative means provided by the existent covenant if enforced and revised to read as it did prior to the 1924 exception.

³³ See pages 419-26 *infra*.

³⁴ *Hazelton v. Sheckells*, 202 U.S. 71, 79 (1906).

pressures upon agents to use undesirable political and social pressure, or influence, to secure contracts for their principals (the potential contractors) would not be as great as it otherwise might be. Nevertheless, as will be shown in cases to be discussed, the Government has assumed the task of attempting to establish whether the agent of the contractor exercised undesirable influence, notwithstanding the fact that it is this very task that the covenant was designed to avoid, irrespective of the fact that there appears to be no authority for assuming such a task, and despite the fact that the Government has paid for a guarantee against influence.

By applying the Government's argument in the *Wunderlich* case³⁵ that every provision of a government contract is reflected in the contract price,³⁶ it is easily understood how important it is to be certain that the Government enforces the covenant.³⁷

The basis for some of the statements by the counsel to the Joint Congressional Committee for Defense Production with respect to "the present law" is not clear. There is nothing in the language of the covenant against contingent fees which states that the Government is entitled to "cancel the contract or refuse to pay the amount of the commission," "if they find that someone was peddling influence."³⁸ At least, those alternative rights of the Government are not provided by the contingent fee covenant unless it is established that the contractor broke his warranty that the contract was not obtained by an agent operating on a "no-contract-no-fee" arrangement or understanding. It is to be noted that the warranty required by the covenant raises a question with respect to another of the committee counsel's statements that "The Government simply required that each contractor be required to state how much he paid in the way of fees or commissions, so that Government procurement officials could have an idea of what was going on."³⁹ Counsel apparently was referring to Government Standard Form 119 affixed as the first page of each bid form and providing for certain statements as to any assistance rendered to the contractor in dealing with government procurement officials, but the context in which he made the statement leaves the impression that the Government's requirements are very simple as to contingent fees whereas the warranty required is far from simple, especially if it were enforced. Perhaps, the counsel was thinking of the Government's laxity in enforcement of the covenant when

³⁵ *United States v. Wunderlich*, 342 U.S. 98 (1951).

³⁶ *Schultz*, supra note 5, at 223 n. 24.

³⁷ Any contingent fee he agrees to pay is, of course, included in the price of any contract procured as a result of these services.
H.R. Rep. supra note 5, at 4.

³⁸ 1951 Hearing, supra note 12, at 309.

³⁹ *Ibid.*

he described the Government's requirements so casually. Certain of his conclusions⁴⁰ indicate that such may have been the case.

THE CONFLICT OF VIEWS ON THE MEANING OF THE COVENANT

The Salutary Effect of the Judicial View

The significance of the language used in the covenant perhaps is best illustrated by the case of *United States v. Paddock*⁴¹ in which the court stated that the decision turns upon the meaning of the word "maintained" and held that to be the key word in the exception. The court referred to the various meanings of the word "to maintain," such as "to sustain," "to keep up," and "to supply what is needed," and held that in view of those meanings, an agent employed merely on a contingent fee did not meet the test prescribed by the exception.

Approximately one year ago, and about six years after the *Paddock* case, the case of *Le John Manufacturing Co. v. Webb*⁴² quoted the *Paddock* case with approval and stated that in its view, the restrictive approach of the *Paddock* case on the language of the covenant is necessary in order to prevent the excepting clause from utterly defeating the purpose and effect of the warranty itself. Yet, the administrative agency of the Government responsible for this procurement policy has provided in its regulations⁴³ very little to show the Government's position on the meaning and significance of the word "maintained" as used in the covenant. Instead, one of the stated principles or standards declared in those regulations is that the existence of a fee of a contingent nature is involved does not preclude a relationship which qualifies under the exceptions to the prohibition of the covenant.

That such a principle or standard does utterly defeat the purpose and effect of the warranty itself is apparent from an examination of various cases decided by government appeal boards. Those boards apparently have decided to find an exception for contingency agreements even at the expense of the covenant itself on the theory that the "decisions of the Federal courts are not in harmony as to the meaning to be given to the exception" in the covenant and on the further theory that the *Paddock* construction of the word, "maintained," in that exception, renders the exception meaningless.⁴⁴ Yet the boards fail completely to state their con-

⁴⁰ 1951 Hearing, *supra* note 12, at 336-37.

⁴¹ 178 F.2d 394 (5th Cir. 1949), cert. denied, 340 U.S. 813 (1950).

⁴² 222 F.2d 48, 51 (D.C. Cir. 1955).

⁴³ Gen. Services Administration, Gen. Circular No. 12, 44 C.F.R. §§ 150.1-13 (Supp. 1955), 1 CCH Gov't Contracts Rep. ¶ 18,321A (1952).

⁴⁴ Appeal of Metro Engineering and Mfg. Co., A.S.B.C.A. No. 1495 (March 15, 1954), 2 CCH Gov't Contracts Rep. ¶ 61,567 (1954).

struction of the word. And there would appear to be no real lack of harmony as to the meaning to be given to the exception because no courts, other than those in the *Paddock* and *Le John* cases, have ever ruled on the construction to be placed upon the word "maintained." Those courts which did rule on the word have shown it to be of such importance in the exception that its meaning cannot be disregarded by slurring over it along with other words in the covenant. Such courts have ruled so as to recognize the continued existence of the covenant in the government standard form contract whereas the executive branch of the Government, through its boards, seems determined to conjure up an exception by interpolation of the covenant's exception clause even though it destroys the covenant itself and renders it meaningless. The explanation would seem to be that the executive branch has taken the position that the exception permits an agency agreement to qualify under the covenant even though it is a "no-contract-no-fee" agreement whereas it is clear from the word "maintained" that the exception is designed to permit contingency in the agent's compensation only as something in addition to the certain compensation to which the agent will be entitled if he is "maintained." To construe the exception, as the executive branch of the Government appears to construe it, to permit the agent's compensation to be wholly contingent upon his success in securing contracts, gives no significance to the word "maintained" and no significance to the covenant itself or, as the court in the *Le John* case stated, utterly defeats the purpose and effect of the warranty (the covenant) itself.

The Destructive Effect of the Administrative View

The Armed Services Board of Contract Appeals reviewed the *Paddock* case in the case of the *Illinois Lumber Manufacturing Co.*⁴⁵ but stated that it was its conclusion, from a consideration of the pertinent cases involving the question of contingent fees, various congressional reports on the subject, as well as the opinions of government departments on the question, that the contract between the agent and the contractor was not in violation of the contingent fee provisions of the contract involved.

The reasons given were (1) lack of improper influence, (2) agent's thorough familiarity with the type of business involved, (3) extent of agent's services *after* award of contract, (4) prior recognition as a bona fide agent of *other* manufacturers, (5) prior custom of contractor in dealing with *other* manufacturer's agents, and (6) complete disclosure, of the agent-contractor relationship, to certain government officials. But none of

⁴⁵ Armed Services Board of Contract Appeals (hereinafter A.S.B.C.A.) Nos. 54 (B.C.A. No. 1925) and 651, 5 CCF ¶ 61,235 (1951).

those reason establishes that the agent was "maintained" by the contractor, as required by the contingent fee covenant and they fail to show that he was operating other than on the prohibited "no-contract-no-fee" arrangement. The Board quoted what the court in the *Paddock* case and in previous litigation⁴⁶ involving the agent and the contractor in the *Illinois Lumber* case stated about the word "maintained," but it did not directly tie those statements into its own analysis of the facts of the agency relationship. In fact, the Board expressed no opinion on the word "maintained" or on any of the other language of the contingent fee covenant.

The Board quoted the pertinent portion of the Comptroller General's decision^{46a} as to the meaning of the word "maintain" but that case seems without significance where the facts of the agency relationship are not similar to those involved in the case and especially since it is stated in the early legislative history of the covenant that bona fide, established, recognized real estate agents who were selling or renting real estate to the Government—as in the Comptroller General's decision—were the one permitted exception to the prohibition contained in the covenant.⁴⁷ Accordingly, it seems certain that the meaning of the word "maintain" as referred to in 22 Comp. Gen. 124, was not intended for use in all cases involving the contingent fee covenant but only in cases involving real estate agents *representing the Government*, in view of which it is not clear why that decision was quoted by the Board in the *Illinois Lumber* case where no real estate, or any similar, agent was involved. Moreover, the definition given in the Comptroller General's decision actually is described as an "obsolete" one in the dictionary referred to in the decision. And the Board in the *Illinois Lumber* case did not state that it accepted that definition of "maintain" as applicable to the facts before it.

Also, the Board inexplicably quoted the district court which previously heard the facts involved in the *Illinois Lumber* case⁴⁸ but it seems obvious that the work which the agent "agreed to and did" is of very little, if any significance in showing whether he was "maintained," though it might tend to show that he was a bona fide agent. Actually, it would seem equally obvious that it is not what the agent agrees to do but what the contractor agrees to do that determines whether the agent is maintained as required by the covenant. In other words, if the contractor agrees to pay the agent a certain amount irrespective of whether the agent is

⁴⁶ *Beach v. Illinois Lumber Mfg. Co.*, 92 F. Supp. 564 (E.D. Ill. 1950).

^{46a} 22 Comp. Gen. 124 (1942).

⁴⁷ 1942 Hearings, *supra* note 3, at 1189.

⁴⁸ *Beach v. Illinois Lumber Mfg. Co.*, 92 F. Supp. 564 (E.D. Ill. 1950).

successful in obtaining a contract for the contractor,—which was not shown to be the fact in either the *Paddock* case or in the *Illinois Lumber* case—the agent is “maintained” as defined in the *Paddock* case. Therefore, the Board’s reason for quoting from the district court’s opinion in the *Illinois Lumber* case appears no clearer than its reason for quoting from the Comptroller General.

While it cannot be disputed that elimination of improper influence in government procurement is desirable and one of the objectives in the use of the contingent fee covenant, it appears obvious from the language of the covenant that it does not impose upon the Government the burden of proving improper influence, fraud, collusion, misrepresentation, or any other unwholesome practice, in order to enable the Government to enforce the covenant. Yet the Board also ignores that fact in another opinion rendered on the same day in the case of *Consolidated Tool and Products Co.*⁴⁹

In a case⁵⁰ which arose about three years before the *Illinois Lumber* case and before the promulgation of the General Services Administration regulations, the Army Board of Contract Appeals rendered an opinion which showed that much consideration was given to the general historical background of the matter as well as to the detailed factual basis and legal precedent involved in the case itself but failed to show how the facts “demonstrate to the Board that, in the meaning of the exception clause of the warranty article, he [the agent] was a bona fide agent maintained by appellant.”⁵¹

How the lack of impropriety and personal influence or the extensiveness of the agent’s services demonstrated to the Board that the agent was maintained by the appellant is not shown in the opinion. On the contrary, the findings of fact in support of the opinion seem to show that the agent, instead of being maintained by the contractor, maintained himself, since paragraph (3) of the agreement between the agent and the contractor states that—

Alloy Products will pay Alders for all services rendered by him hereunder five (5%) per cent of the gross amount of all amounts received by it on any and all contracts or orders which Alders or Alloy Products heretofore entered into with or obtained from, or hereafter enters into with or obtains from the Government or suppliers of the Government, for such low pressure oxygen system cylinders. Payment thereof will be made by Alloy Products

⁴⁹ A.S.B.C.A. No. 361, 5 CCF ¶ 61,234 (1951).

⁵⁰ Appeal of Alloy Products Corp., Army Board of Contract Appeals (hereinafter A.B.C.A.) No. T-1571, 4 CCH CCF ¶ 60,389 (1950).

⁵¹ Both the contracting officer and the special representative of the Under Secretary of War previously had found that the agent was not a bona fide agent maintained by the appellant.

to Alders within fifteen (15) days after receipt by Alloy Products of any moneys pursuant to any of such contracts or orders.

It will be noted that the agreement does not show that the agent had been maintained or was entitled to be maintained by the contractor. The agent was entitled only to five percent of the gross amount received by the contractor from the Government or suppliers of the Government.

It appears clear that the agent was operating under a "no-contract-no-fee" arrangement; that he was not maintained by the contractor; and that, therefore, the Government should have been allowed to recover from the contractor the fees paid to the agent, in the sum of at least \$228,145.40. It would seem of interest to Congress to ascertain from the Department of Justice whether the Government—on the basis of the *Paddock* case, decided since the decision in the *Alloy Products* case—should attempt to reopen the matter and recover such fees in view of a case filed by the same contractor in the Court of Claims,⁵² wherein the contractor seeks to recover from the Government the sum of \$85,000, representing the reported amount of fees paid the agent, Alders, during the year 1944, which the renegotiation officials of the Government disallowed as a part of the contractor's cost of operation in renegotiating the contractor's business for that year, pursuant to the Renegotiation Act of 1943.⁵³ If the Department of Justice were successful in such action, the plaintiff contractor, instead of recovering \$85,000, might be compelled to pay that much, plus the sums of \$73,256.91 and \$100,888.49 to cover the amounts reported to have been paid by the contractor to Alders for the years 1944, 1942, and 1943, respectively, apparently in violation of the contract covenant against such payments. In any event, it would seem of interest to Congress to know whether the Government ever developed the information necessary to show what other contractors may have paid the same agent in violation of the contingent fee covenants in their contracts.⁵⁴ Since this case is apparently the first case of public record, involving the Government as a party, on the question of a contingent fee covenant violation, it would appear that it should have been included in the later pertinent investigations by Congress, especially since it was decided on the basis of matters not primarily relevant. Nevertheless, no reference to it has been found in the reports on those investigations.

Instead of using the historical background of the covenant to show that insofar as its language is concerned, it has never varied in its prohi-

⁵² Ct. Cl. No. 50187, petition filed June 11, 1951 and still pending as of January 10, 1956.

⁵³ 57 Stat. 348, 564 (1943), as amended 50 U.S.C. App. § 1191 (1952).

⁵⁴ Par. 15 of the findings of fact in the Alloy Products case (*supra* note 50) states that the agent also assisted other prime contractors in getting started on the product involved, and that he succeeded in starting two or three other important sources of supply on production.

bition against agents operating under a "no-contract-no-fee" arrangement, the Board, after making a brief reference to the length of time the contingent fee clause had been in use and what it was intended to prevent, referred to what certain later cases and the Contracts Restatement have said about proper and improper "lobbying" contracts. It forthwith concluded that "it may therefore safely be assumed that the Presidential decree intended to permit the payment of brokerage commissions in customary business dealings." An analysis of that reasoning alone is enough to explain why there practically never has been any enforcement of the contingent fee covenant since few have appeared as advocates for the Government to challenge its merits, with the result that it, or reasoning equally, if not more vulnerable, has controlled substantially all of the cases in which the Government has been interested. The weaknesses of the Board's reasoning are apparent to anyone who is familiar with the subject involved. Neither the later cases nor the restatement law, to which the Board referred was at all relevant to the matter involved since irrespective of the *general* "later" law on the subject, the *federal* government declared in no uncertain terms, by the use of the covenant, that agents operating under a "no-contract-no-fee" arrangement occupy no different status than they did at the time of the *Tool Co.* case.⁵⁵ That is, the later cases and the Restatement had no effect whatever on the covenant with which the Board was dealing. Its language, as the Board itself admitted, remained in substantially similar form since its adoption. In fact, the covenant was written long after the "later" cases to which the Board refers, thereby showing a clear intention on the part of the federal government in its contracts "to outlaw," in effect, the agent operating under a "no-contract-no-fee" arrangement, regardless of how much the courts or restatements of the law might or might not modify the *general* law with respect to such agents. Accordingly, it seems necessary to state that the Board's reasoning laid no basis for its assumption "that the Presidential decree intended to permit the payment of brokerage commissions in customary business dealings." Also, the Board appears to prove nothing by its reference to the Comptroller General's decision, since the portion quoted by the Board contains nothing to indicate that the exception allows a "no-contract-no-fee" agent such as the Board was dealing with in the *Alloy Product* case. It is true that "in some instances dealing with agents or contractors is not objectionable,"⁵⁶ so long as the agents are not operating under a "no-contract-no-fee" arrangement.

⁵⁵ And also since disallowance in renegotiation proceedings did not mean that the amount was collected pursuant to the covenant against contingent fees.

⁵⁶ 22 Comp. Gen. 124, 126 (1942).

Notwithstanding the fact that in the case of the *Aetna-Standard Engineering Co.*,⁵⁷ the Tax Court concluded that there was no undue influence involved, it seems clear from the facts of that case that the agency was not maintained and was operating under a "no-contract-no-fee" arrangement; and that the Government should have been entitled to collect from the contractor the fees paid the agency and to collect from the "various other manufacturers," referred to in the opinion of the Tax Court, what those manufacturers may have paid the same agents on a similar basis. The fact that no undue influence was contemplated or exercised is immaterial under the *Tool Co.* case theory on which the contingent fee covenant was based. And the various services rendered by the agency in this case do not alter the fact that it was operating on a "no-contract-no-fee" arrangement prohibited by the covenant. This case would seem to be of interest to Congress not only because of the covenant violation involved but also for the purpose of determining whether the Army gave the low bidder an opportunity to answer the agent's representations that the low bidder was not qualified, and the extent to which the Army made awards to other than the low bidder upon representations by a competing bidder that the latter was less vulnerable to possible enemy attack.

The case of *United States v. Buckley*⁵⁸ involved a criminal prosecution. Notwithstanding the Navy Department to the contrary,⁵⁹ even the dictum of the *Buckley* case does not appear to contain any definite statement of what the exception in the covenant means.

The fact that Buckley was not to be paid a fee unless he was successful in "obtaining such a contract or contracts from the Government" shows clearly that he was operating under the "no-contract-no-fee" arrangement or understanding prohibited by the covenant and was not "maintained" and that, therefore, the Government apparently was entitled to collect from the contractor the amount of the fee paid to Buckley irrespective of the disposition of the criminal action.⁶⁰ While a congressional committee was briefly apprised of it,⁶¹ the *Buckley* case is one of a number of good examples of how far afield the Government seems to have wandered from one of the most obvious and economical means of handling the contingent fees matter. Instead of enforcing the contingent fee covenant by exercising the remedy offered by the covenant, the Government chose what would appear to be one of the most difficult, most expensive, and least likely to

⁵⁷ 15 T.C. 284 (1950).

⁵⁸ 49 F. Supp. 993 (D.D.C. 1943).

⁵⁹ 1943 Hearing, *supra* note 4, at 16.

⁶⁰ *Stone v. United States*, 167 U.S. 178 (1897); *United States v. Warner Bros. Pictures*, 13 F. Supp. 614, (E.D. Mo. 1936), *aff'd*, 298 U.S. 643 (1936).

⁶¹ 1943 Hearings, *supra* note 4, at 16, 18, 22-24.

succeed means available—that of a criminal action for fraud. It is not infrequent that fraud is most difficult to prove. Yet the Government chose that task in preference to the remedy provided in the contract and for which it already has paid at least once.

It appears fairly certain from the facts appearing in a later case⁶² involving the same agent that if the Government had asserted its civil rights in this case, the recovery would have been much more than the amount of the fee paid by the contractor involved since the later case shows that the agent represented at least five other contractors. However, it cannot be found that any of the studies by Congress ever developed that fact.

Notwithstanding the persuasive logic of the original opinion in the *Paddock* case, it would appear that attempts have been made to avoid its application by unduly emphasizing certain language of that opinion and of the ruling on the petition for rehearing, in an attempt to convey the impression that the court may have based its opinion on the fact that the agent involved was one recently established for the specific purpose of procuring government contracts. An example is to be found in an attempt by the counsel to the Joint Committee to state the rule in that case.⁶³ However, any statement of the *Paddock* case rule which does not emphasize the word "maintained" and its meaning, which the case makes clear is "the key word in the exception," would appear to be of questionable value from the viewpoint of accuracy and utility.

In view of the language used by the Supreme Court in the case of *Muschany v. United States*⁶⁴ and the position of three members of that Court in the case of *Zell v. American Seating Co.*,⁶⁵ it would not seem reasonable to infer that its refusal to grant certiorari in the *Paddock* case constituted disapproval of the principles enunciated by the lower courts.

Legislative Views on the Covenant

Certain statements of a nature too serious to leave unchallenged, especially since they are a part of a congressional document, are those with respect to the conflict of views on the covenant made by the counsel to the Joint Congressional Committee on Defense Production:⁶⁶

Under modern business customs and practices, there is absolutely no reason to condemn commission, percentage, brokerage or contingent fee agreements in Government contracts any more than in any other contract

⁶² Buckley v. Coyne Elec. School, 343 Ill. App. 420, 99 N.E.2d 370 (1951).

⁶³ 1951 Hearing, supra note 12, at 327.

⁶⁴ 324 U.S. 49, 64-65 (1945).

⁶⁵ 322 U.S. 709 (1944), reversing 50 F. Supp. 543 (S.D.N.Y. 1943).

⁶⁶ 1951 Hearing, supra note 12, at 333.

provided legitimate methods are to be used, real and valuable services are to be performed and the amount agreed upon is not exorbitant.

However, the courts are faced with the prohibition in the Executive order, and now in the statute. This confirms their distrust of such agreements upon their face, a distrust which they formed perhaps in reading old decisions in musty books during the judge's early law training. The courts are not likely to interpret broadly the exceptive clause in these provisions for covenants against contingent fees. It will be more difficult to prove to a court than it would be to the General Services Administration that an agency is a "bona fide commercial or selling agency" within the meaning of the exceptive clause.

Perhaps, a partial answer to the Committee counsel's statements is to be found in certain conclusions in the report on Ethical Standards in Government,⁶⁷ in pertinent part as follows:

Decisions must be made on their merits as objectively and realistically as conscientious and intelligent men can make them. Fairness, impartiality, and *freedom from irrelevant considerations are now as important for the legislator and the administrator as for the judge*, perhaps even more important. (Emphasis added.)

Actually, it would seem reasonable to expect that a government agency, the General Services Administration, would be more likely to enforce a government contract provision than a court of law. At least, the government agency would not appear authorized to use irrelevant considerations such as "modern business customs and practices," "legitimate methods," and "real and valuable services" to avoid the enforcement of the covenant which contains no such exceptions. Unless the Government completely succumbs to such reasoning by eliminating the covenant from its contract forms, it would seem to vitiate the covenant and to prove nothing to employ that reasoning in dealing with the matter of enforcing the covenant. The counsel's suggestion that perhaps Congress may "one day" strike the covenant from the contract form might also imply that since the use of such irrelevant considerations to defeat attempts to enforce the covenant in cases involving the Government has so long been unchallenged the covenant should be eliminated. Accordingly, the obvious need for a thorough consideration of the actual relevant facts involved in the contingent fee problem cannot be overemphasized. That is to say, Congress, the executive agencies, and the public, to whose constant vigilance the 1951 investigation⁶⁸ refers, should have an opportunity to know the relevant facts of the whole matter pertaining to influence in government procurement before any action is taken or considered to eliminate the covenant against contingent fees.

⁶⁷ Comm. Print Rep. on Ethical Standards in Government by a Subcommittee of the Senate Committee on Labor and Public Welfare, 82nd Cong. 1st Sess. 16 (1951).

⁶⁸ S. Rep., supra note 2, at 2.

In further regard to the committee counsel's reasoning, it is important to note that he specifically refers to the prohibition of the covenant as contained in the executive order and the statute. Further, it is important to note that the counsel's statement, that the prohibition confirms old decisions, coincides in effect with what previously has been emphasized, that the prohibition of the covenant is based upon the *Tool Co.* case which prohibits a "no-contract-no-fee" arrangement. However, it is quite surprising to note the suggestion that the early indoctrination of judges might cause them to enforce the covenant against contingent fees as it is written rather than be guided or influenced by irrelevant considerations said to be justified under "modern business customs and practices." It is difficult to conceive how any committee of Congress could embody in one of its documents statements by its counsel that appear to lampoon the judiciary for enforcing a provision of a government contract. The difficulty is increased by the sweeping language used by the counsel. He states there is "absolutely" no reason to condemn contingent fee agreements in government contracts any more than in any other contract. On the contrary, there would appear to be every reason to condemn such agreements, if based upon a "no-contract-no-fee" arrangement, since the government still uses the covenant in its contracts. Counsel admits it is still used⁶⁹ but for some reason—which the Committee apparently did not seek to learn—he gives the impression that the General Services Administration would uphold "no-contract-no-fee" arrangements regardless of the prohibition against them "in the Executive order, and now in the statute."⁷⁰ In view of its regulation which seems to emphasize everything but the most important word, "maintained," and its testimony before congressional committees, there appears little, if anything, to support a conclusion that the General Services Administration would not uphold such an arrangement despite the fact that it should exercise no more discretion than the judiciary under similar circumstances. Counsel's use of three factors only, legitimate methods, valuable services, and reasonable amount, to circumscribe the sweep of his statement suggests again that it cannot be over-emphasized that those who advance such factors, especially "legitimate methods," appear to overlook the language as well as the historical basis of the covenant which unequivocally demonstrate that its enforcement in no way is to be dependent upon methods used or intended to be used.

⁶⁹ Even if it were not still used, there may always exist the possibility that the same "sinister and corrupt means" which the covenant was designed to modify if not to avoid actually will be used despite the fact that such means were not intended "to be used" as stated by the committee counsel.

⁷⁰ He seems to overlook the fact that the prohibition existed under well-established administrative procedure for at least seventeen years before the executive order.

Neither the counsel, the General Services Administration, nor any other proponent of the so-called theory of "modern business customs and practices,"⁷¹ such as the government appeal boards, has ever furnished any real explanation of the authority for using such factors to avoid enforcement of the covenant until such time as Congress might pursue the counsel's suggestion with respect to striking the covenant from the government form.

The counsel's lampooning of what the public would naturally seem to expect as the judiciary's reaction toward a violation of the contingent fee covenant should be compared with the court cases⁷² wherein the contractor's defense in effect admitted a covenant violation but with respect to which it has not been found that the administrative agencies involved ever took any action to collect from the contractor. While such an explanation would seem to offer no valid excuse, it is not too difficult to perceive the hesitation of the agencies in those cases if non-enforcement of other covenant violations is as widespread throughout the agencies as it appears to be. But the apparent inaction of the Government in the cases involved appears to emphasize the irony of the whole situation with respect to the administration of the covenant against contingent fees, especially when associated with the congressional document which takes the judiciary to task for enforcing it.⁷³

THE SMALL BUSINESS ARGUMENT FOR NON-ENFORCEMENT OF THE COVENANT

The Validity of the Small Business Argument

While it has not been found that any of the assigned reasons for non-enforcement of the covenant has ever been persuasively presented, it is not difficult to find those who, especially in view of the many years of non-enforcement, are willing to gloss over the covenant's prohibition

⁷¹ It would appear important to have the proponents of the theory of "modern business customs and practices" show just what exists in the modern business world which did not exist at the time the Government deemed it necessary to insert the contingent fee covenant in its contracts or, in other words, on just what do those proponents rely for their conclusion that the use of corrupt and sinister means in securing government contracts in the modern business world is sufficiently easy to detect so as to justify placing the burden of such detection upon the Government, rather than avoiding that burden as was done in 1924 at the time the covenant against contingent fees, except for the term "bona fide employees," was adopted.

⁷² *Mitchell v. Flintkote Co.*, 185 F.2d 1008, 1011 (2d Cir.), cert. denied, 341 U.S. 931 (1951); *Bradley v. American Radiator and Standard Sanitary Corp.*, 6 F.R.D. 37 (S.D.N.Y. 1946), aff'd, 159 F.2d 39 (2d Cir. 1947); *York v. Gaasland Co.*, 41 Wash. 2d 540, 250 P.2d 967 (1952).

⁷³ The satirical "tack" taken with respect to the judiciary should be associated with the administrative failure to use the Paddock case.

against "no-contract-no-fee" arrangements by arguing that to enforce it is not realistic, especially in view of the interests of small business.⁷⁴

If it has been administratively determined that the covenant against contingent fees should not and will not be enforced because its enforcement would hurt small business, how expensive is it to waive the enforcement of the covenant in the name of small business? Also, what is the expense in intangibles, such as in character and integrity,⁷⁵ in addition to the actual money cost, in maintaining and paying public funds for a provision in a standard form contract that is not being enforced?

One answer to the cost of non-enforcement may be found in the report of the House Naval Affairs Committee on July 20, 1942,⁷⁶ which concluded that the use of the contingent fee method for compensating manufacturers' agents for services in procuring government business is indefensible in any case and that some method of compensating the agents on the basis of the actual value of the services rendered by them must be worked out if they wish to continue in business. The committee further stated that such an arrangement can be worked out even in the case of the agent representing several small firms unable to afford government representation singly.

One senator refers to the cost involved for a small manufacturer to secure a war contract, stresses the small manufacturer's inability "to put someone on a salary basis and expenses," but appears to overlook the fact that it is immaterial, insofar as the prohibition of the covenant is concerned, whether "political pressure is used" or whether the agent is "rendering a legitimate service."⁷⁷ His reference to "a salary basis and expenses" tends to indicate strongly that he realized that the covenant prohibits an agency based upon a "no-contract-no-fee" arrangement but the remarks which follow appear to be based upon wishful thinking in that he sought "a public statement or a regulation" which he apparently hoped would modify the covenant so as to allow a "no-contract-no-fee" arrangement if "no political pressure is used" and "a legitimate service" is rendered.

It would seem appropriate to be certain that there are no better means of assisting small business to secure its fair share of government contracts that could be achieved without disregarding the prohibition of the con-

⁷⁴ See S. Rep. No. 1459, 82d Cong., 2d Sess. 25 (1952), as to significance of small business as an asset. Also, see S. Rep. No. 1092, 83d Cong., 2d Sess. at 28 (1954); Hearings Before the Senate Select Committee on Small Business, 84th Cong., 1st Sess., at 33, 35-36, 39 (1955).

⁷⁵ It is stated in the Paddock case, 78 F.2d at 396, that Exec. Order No. 9001 (which included the covenant against contingent fees) was a declaration of public policy and that its purpose was to preserve the contractual integrity of the United States, citing the case of *Bradley v. American Radiator Corp.*, 6 F.R.D. 37 (S.D.N.Y. 1946), *aff'd*, 159 F.2d 39 (2d Cir. 1947).

⁷⁶ H.R. Rep., *supra* note 5, at 4.

⁷⁷ 1951 Hearings, *supra* note 12, at 305.

tingent fee covenant. That there are such means is fairly certain in view of the fact that a part of the whole philosophy in enacting the legislation providing for a Small Business Administration, was the desire to give the small businessman a Washington representative.⁷⁸

Also, the Department of Defense has shown that the Department, in cooperation with the Small Business Administration,⁷⁹ has a comprehensive program designed to give to interested manufacturers and suppliers and to potential subcontractors the widest practical notice of proposed purchases.⁸⁰

An earlier Secretary of Defense stated that there is no need for anyone to have a broker to intervene between small business and the Government to procure government contracts.⁸¹

In the Committee Print of the Senate Report on Ethical Standards in Government,⁸² it is stated that:

The businessman's code is to be independent and stand on his own feet, but some organized industries, as well as other economic groups, do not hesitate to use all possible political force to secure highly favorable decisions from legislators and administrators at the public expense.

Accordingly, any failure to enforce the covenant against contingent fees on the ground of unfairness to small business appears unjustified.

*A Rationalization of the Covenant as an Aid to Small Business,
as Projected by a Congressional Committee*

While it is not expressly so stated in the report in which it appears, the Senator's suggestion of "a public statement or a regulation" to clear up "much confusion in the minds of the several million businessmen of the country,"⁸³ apparently accounts for the opinion on the matter rendered by the committee counsel.⁸⁴

The substance of the counsel's conclusion is found in certain language of the first and third paragraphs of his opinion now quoted in reverse as follows:

If the manufacturer's agreement is based upon legitimate and valuable services. . . .⁸⁵

⁷⁸ Hearings Before the Select Committee on Small Business, 83d Cong., 2d Sess. 40 (1954).

⁷⁹ Also, the Department of Commerce, through its daily synopsis of proposed procurements, has been of material aid.

⁸⁰ Hearings on Military Procurement, Before a Subcommittee of the Senate Committee on Small Business, 84th Cong., 1st Sess. (1955).

⁸¹ 1949 Hearings, *supra* note 5, at 3.

⁸² S. Rep., *supra* note 67, at 9.

⁸³ 1951 Hearing, *supra* note 12, at 305, 309.

⁸⁴ *Id.* at 319-37.

⁸⁵ *Id.* at 337.

If his agreement with his agent is not based upon nonexisting services or influence peddling or corrupt practices, it will stand the light of day and the contractor need not fear making a full disclosure. Under normal procedures, if his bid otherwise qualifies, he will be awarded Government contracts.⁸⁶

Does that language mean that even though the agent operates on a "no-contract-no-fee" arrangement or understanding and therefore does not qualify as a bona fide employee or a bona fide established commercial or selling agent maintained by the contractor for securing business, the Government will not exercise its rights under the covenant so long as his agreement with the contractor requires him to render "legitimate and valuable services" and "is not based upon nonexisting services or influence peddling or corrupt practices"? It would seem that the answer in many, if not most instances, may be affirmative and that the conclusions apparently were stated from the conviction that:

. . . the emphasis has shifted from the ancient approach of regarding contingent fee agreements per se as suggestive of impropriety to a new and more reasonable aspect of the problem:

Do the facts involved in the transaction indicate the likelihood or the fact that the agent was to have recourse to corrupt or devious methods and that he charged at least part of the consideration for "influence"?⁸⁷

The above-quoted conviction presumably is based upon certain administrative regulations⁸⁸ and upon a group of cases⁸⁹ which have failed to follow the theory of the *Tool Co.* case. But it is important to note that at the time, as well as after the time, that conviction was stated, there was little, if any, difference in the number of the cases following the *Tool Co.* case and those which failed to follow it. Therefore the basis for the committee counsel's use of the word "emphasis" must not be the number of court cases involved but rather the number of cases decided by the Armed Services Board of Contract Appeals and its predecessor. However, while some courts have rejected the *Tool Co.* case theory that a "no-contract-no-fee" arrangement or understanding is void because of its undesirable tendencies, it seems appropriate to bear in mind that the contracts of the United States, as well as the orders of its chief executives and the enactments of its legislature, still pay at least lip service to the theory of that case by retaining the language of the contingent fee covenant. In view thereof, it would seem clear that there is no authority in those charged with the enforcement of the covenant to fail to enforce it by ignoring its prohibition and by using the reasoning of a view, possibly

⁸⁶ *Id.* at 336.

⁸⁷ *Id.* at 335.

⁸⁸ Gen. Services Administration, Circular No. 12, 44 C.F.R. §§ 150.1-13 (Supp. 1955), 1 CCH Gov't Contracts Rep. ¶ 18,321A (1952).

⁸⁹ See cases cited notes 23, 24 *supra*.

the minority view, contrary to the *Tool Co.* case, which view has developed not from cases in which the rights of the Government under the covenant were involved but rather the rights of the agent under the agency agreement. Yet that is the position into which those responsible for enforcement seem to have "shifted." Even though the language of the covenant remains unaltered to show that it regards "contingent fee agreements per se as suggestive of impropriety," the theory of unrelated cases has been adopted to require the evaluation of the actual facts found with respect to corrupt and devious methods or influence in each case despite the enormity of that task and the fact that frequently what was improper "probably would be hidden and would not appear."⁹⁰

The pertinent administrative regulations of the General Services Administration⁹¹ provide that any fee, whether called commission, percentage, brokerage, or contingent fee, or otherwise denominated, is within the purview of the covenant if, in fact, any portion thereof is dependent upon success in obtaining or securing the government contract or contracts involved. They also provide that a fee of a contingent nature does not preclude a relationship which qualifies under the exceptions to the prohibition of the covenant. In stating certain factors for consideration in determining whether an agent is a bona fide established commercial or selling agency maintained by the contractor for the purpose of securing business, the regulation discusses the term "bona fide," the amount of the fee, the necessity for the agent to have adequate knowledge of the contractor's business and products, the continuity of the relationship, and the necessity for the agent to be an *established* concern, but mentions no standard for determining whether the agent actually is "maintained" by the contractor as required by the covenant. In contrast to the emphasis placed upon that word in the *Paddock* case, the administrative regulation contains no separate discussion of the word and states that:

It is neither possible nor desirable to prescribe the relative weight to be given any single factor as against any other factor or as against all other factors. The conclusions to be reached in a given case will necessarily depend upon a careful evaluation of the agreement and other attendant facts and circumstances.

What more could such a regulation provide to show that "manufacturers (still) will be at the mercy of government officials whose judgments may be conflicting and made without reference to a predictable standard,"⁹² notwithstanding the committee counsel's assertions to the contrary? It

⁹⁰ *Hazelton v. Sheckells*, 202 U.S. 71, 79 (1906).

⁹¹ Gen. Services Administration, Gen. Circular No. 12, 44 C.F.R. §§ 150.1-13 (Supp. 1955), 1 CCH Gov't Contracts Rep. ¶ 18,321A (1952).

⁹² 1951 Hearing, *supra* note 12, at 319.

would seem reasonable to doubt the value of an administrative regulation which practically ignores the one word in a contract provision which has been given such prominence by a federal court in a case decided in favor of the Government. And what is more disturbing is to have the document of a joint congressional committee embracing a legal opinion that points to that administrative office as the answer to the manufacturer's fears of arbitrary action. Actually, the administrative regulation appears self-contradictory since its statement of factors constituting "a relationship which qualifies under the exceptions to the prohibition of the covenant" is such that there is little, if any, significance to its statement that any fee is within the purview of the covenant "if, in fact, any portion thereof is dependent upon success in obtaining or securing the government contract. . . ." And therein lies an obvious reason for no discussion of the word "maintained" in the regulation inasmuch as the *Paddock* case definition, and what appears to be the correct definition of the word "maintained," shows that if the agent is supported by the contractor, he is not the "no-contract-no-fee" agent prohibited by the covenant.⁹³

Thus, by following GSA regulation and the reasoning of irrelevant cases, few, if any, cases of "influence" are proved. The procedure, apparently followed by most of the government agencies involved, of not enforcing the contingent fee covenant unless the use of "influence" is affirmatively established, actually is not warranted inasmuch as there is nothing in the language of the covenant which requires that such a determination be made. Such procedure makes enforcement of the covenant virtually impossible because of the indefinite nature of the word "influence" and the fact that the use of "influence" does not necessarily preclude a bona fide representation.⁹⁴ Accordingly, the Government's failure to enforce it in the great majority of cases apparently has made the covenant against contingent fees of no consequence or value to the Government and therefore, a very costly, superfluous provision in the Government's standard contract form. It appears as valueless as the liquidated damage provision of the same form would be if the Government took the position that it must prove actual damages in order to collect liquidated damages

⁹³ For other criticism of a GSA regulation in this connection, see Hearing Before the Investigations Subcommittee of the Senate Committee on Expenditures in the Executive Departments, investigating Influence in Government Procurement, 82d Cong., 1st Sess. 47-48 (1951). It will be noted that the form now prescribed has eliminated the Air Force objections. 44 C.F.R. §§ 150.1-13 (Supp. 1955), 1 CCH Gov't Contracts Rep. ¶ 18,321A (1952).

⁹⁴ Pars. 5(d)(3) and (e)(1) of Gen. Services Administration, Gen. Circular No. 12, 44 C.F.R. §§ 150.1-13 (Supp. 1955); 1 CCH Gov't Contracts Rep. ¶ 18,321A (1952), is contra. But S. Rep., supra note 1, at 3, does not list "influence" as precluding a bona fide representation. It seems untenable to hold that, in every instance that an agent might in some way exert influence, the agent could not be a bona fide representative of his principal.

for delay. The Government's present position seems to be that it will not pay for services involving "influence" whereas the contingent fee provision precludes payment for services engaged on the basis of a "no-contract-no-fee," rather than a "maintenance," arrangement or understanding because of the greater possibility that "influence" may be involved. Yet, an agent may be maintained and in all other respects qualified under the terms of the covenant, and still be found to have exerted the "influence" undesired by the Government. While appropriate action should be taken to eliminate influence, such action should not preclude enforcement of the contingent fee covenant if the agent is not maintained as required by the covenant, especially since such enforcement is an important means of eliminating influence.⁹⁵

It seems clear that if the Government is not going to enforce the covenant it should be eliminated. A hint of this will be noted in the committee counsel's statement that Congress:

. . . may well at that time strike out the first part of the covenant whereby the contractor warrants that he has not employed any person to solicit or secure the contract upon any agreement for a commission, percentage, brokerage or contingent fee.⁹⁶

It would not seem unreasonable to conclude that the quoted statement may be a hint or an acknowledgment that if warranty is not being enforced it should not be retained especially since "the first part of the covenant" actually is the covenant itself. Also, that which the counsel describes as "the modern, more reasonable approach"⁹⁷ to the matter actually would appear to be the widespread failure to enforce the covenant as written. In other words, counsel has responded to one Senator's wishful thinking and has issued a statement to assure contractors that while the language of the covenant remains unaltered, it will not be enforced if no undesirable influence is used. It would appear that the Government either should enforce its prohibition against the "no-contract-no-fee" arrangement under the covenant as stated or discontinue its use. Continuing its use in the government standard form contract, but, at the same time, continuing the policy of non-enforcement, is to perpetuate the windfall to the many contractors who may include twice the amount of the agent's fee in their bid prices to protect themselves in the event that the covenant should be enforced. There

⁹⁵ S. Rep., *supra* note 1, at 19. The subcommittee is of the opinion that the solution of this problem does not lie in any single course of action, but that various means including legislation can be used effectively to arrive at the final solution.

⁹⁶ 1951 Hearings, *supra* note 12, at 337.

⁹⁷ *Ibid.*

would appear to be no mystery in its language for any who are trained to be true advocates of the government's interests, and likewise no mystery to those who deal with the Government on an intellectually honest basis. The real mystery would appear to be the expediencies indulged in for so many years in its non-enforcement without a public demand for an explanation.

THE CONGRESSIONAL COMMITTEES' TREATMENT OF
ADMINISTRATIVE ENFORCEMENT FAILURE

In February, 1942,⁹⁸ the War Department, Office of the Chief of Ordnance, issued a directive with a view to the elimination of all contingent fees, excessive brokers' fees, or unreasonable commissions to non-productive third party interests as might be unwarranted and to institute proper controls as might be essential to protect the interest of the United States to which such fees, etc., might be charged, directly or indirectly. However, the directive makes no reference to the contingent fee covenant as an appropriate provision for prime contractors to impose upon subcontractors to accomplish the purpose of the Ordnance office.

On May 29, 1942, the House Naval Affairs Committee referred a file on an agent who appeared to be within the class of agents prohibited by the covenant to the Navy Department and the Comptroller General for consideration of collection action against the contractor.⁹⁹ Less than two months later, the same Committee held hearings¹⁰⁰ which disclosed other agents who were no more "maintained" than the agent considered in the earlier hearing in May. Public records¹⁰¹ show that the Government collected from at least one, but are not clear as to the other three or four contractors involved in the May hearing, and the report as to certain action taken by the Government against the many contractors involved in the July hearings appears most indefinite.¹⁰²

⁹⁸ H.R. Rep. No. 2272, 77th Cong., 2d Sess. 361 (1942).

⁹⁹ 6 Hearings Before House Committee on Naval Affairs on Investigation of the Naval Defense Program Pursuant to H.R. Res. 162, 77th Cong., 2d Sess. 1057 (1942). Note, *id.* at 1029-30, that the committee counsel used exclusively the dicta of *Oscanyon v. Arms Co.*, 103 U.S. 261 (1880), to explain to the Committee the law with reference to contingent fees and thus noticeably omitted a reference (1) to the theory of the important *Tool Co.* case, and (2) to the Executive Order No. 9001 (note 8 *supra*) then in effect. No one on the Committee challenged his assertions despite their limited applicability to the matter before the Committee, although the chairman later reminded counsel of the executive order.

¹⁰⁰ 1942 Hearings, *supra* note 3.

¹⁰¹ *Stone v. William Steinen Mfg. Co.*, 22 N.J. Misc. 353, 39 A.2d 241 (Cir. Ct. 1944), *aff'd*, 133 N.J.L. 16, 42 A.2d 268 (Sup. Ct. 1945), *aff'd*, 133 N.J.L. 593, 45 A.2d 486 (Ct. Err. & App. 1946).

¹⁰² 1943 Hearing, *supra* note 4, at 16-20.

On July 16, 1942, certain members of the House Naval Affairs Committee stated that the Navy Department had been lax in enforcing the covenant and that the Navy procurement officers should be requested to explain the matter.¹⁰³ The committee four days later reported¹⁰⁴ that the "Navy Department is now taking steps to see that the warranty [covenant] is being enforced according to its terms"; the report contains a letter from the Under Secretary of War, in which it is stated that:

The War Department will take prompt action, as it has in the past, to recover the amounts of contingent fees paid, in every instance where it is disclosed that such payments violate the warranty against contingent fees contained in all War Department procurement contracts.

On April 12, 1943, the House Naval Affairs Committee issued another report¹⁰⁵ in which it is stated that since the hearing on July 16, 1942, the War and Navy Departments employed every means at their disposal to recapture excessive fees and commissions paid in the past and to forestall additional payments in the future and that those Departments had relied principally upon a strict interpretation of the warranty clause.¹⁰⁶ One month later, May 12, 1943, at a hearing¹⁰⁷ of the Senate Naval Affairs Committee, a special assistant to the Under Secretary of the Navy stated that for administrative purposes the Department had construed the "exception" to the covenant strictly but that it "was immediately realized that to apply this interpretation strictly would result in unduly penalizing companies" and that it was therefore decided "that wherever possible, amicable adjustments should be effected." In August, 1949, an Assistant Judge Advocate General of the Army stated that "somehow the thing [the covenant] should be enforced. We have tried several methods and I

¹⁰³ 1942 Hearings, *supra* note 3. The possibility of security violations by contractors who violate the contingent fee clause seems, for the most part, to have been disregarded or overlooked by Congress as well as by the government agencies and the courts, except for some brief attention given to it in those hearings. In certain cases of covenant violation, the contractor has made much of the point that the agent did much more than to obtain the contract, stressing his work on the plans and specifications. In view of the many confidential contracts now current and of those performed during World War II, it would seem especially important to the public welfare that those who act as intermediaries between the Government and its contractors be in every respect—as contemplated by the exact language of the contingent fee clause—a bona fide employee or a bona fide established commercial and selling agent maintained by the contractor for the purpose of securing business. If the employee or the agent is truly maintained, then the control and rapport between agent and contractor necessary to protect the best interests of the public should be assured.

¹⁰⁴ H.R. Rep., *supra* note 5, at 4-5.

¹⁰⁵ H.R. Rep. No. 353, 78th Cong., 1st Sess. 5 (1943).

¹⁰⁶ But the report does not show why the exception in the covenant "presents many difficult questions of law and fact" when applied to a "no-contract-no-fee agent,"—an agent not maintained by the contractor.

¹⁰⁷ 1943 Hearing, *supra* note 4, at 18-19.

do not know just what the final answer to that is." But, a little later at the same hearing, he also stated that "I do not know of any case where we have had to recover from a contractor or cancelled his contract."¹⁰⁸ Yet, at that time, there were a number of court cases of record where, by asserting the invalidity rather than denying the existence of the agency contract, the contractor in effect admitted a violation of the covenant in Army contracts.¹⁰⁹ About five months later, in January, 1950, the congressional investigations subcommittee which held the previous August hearings, issued a report¹¹⁰ in which it is stated that "too many Government officials fail to appreciate the need for a vigorous and effective compliance enforcement" and that for a number of years and up to the initiation of the subcommittee's inquiry it was "quite obvious that no real effort was made by the Government to expose the 5-percenter or to assess penalties¹¹¹ against those businessmen who hired the services of the influence peddler." Over a year later, in March, 1951, the apprehension expressed by one writer that manufacturers would be "at the mercy of Government officials whose judgments may be conflicting and made without reference to a predictable standard"¹¹² seemed apropos of the impressions one might have received by reading the statements made in 1942 and thereafter on what the Government was doing and would do with respect to enforcement of the contingent fee covenant. Approximately one month later, with apparently no further report since 1950 on the actual enforcement of the covenant, a Senator, who had been listening to discussions of administrative methods of disclosure, as distinguished from enforcement, stated: "I think, frankly they are doing a very good job on it."¹¹³ Yet his committee counsel seemed to opine that business need not fear enforcement and speculated that Congress may one day strike out the covenant.¹¹⁴

The "amicable adjustments" reported as effected by the Navy "whenever possible," in lieu of a strict interpretation (enforcement)¹¹⁵ of the

¹⁰⁸ 1949 Hearings, *supra* note 5, at 12, 15.

¹⁰⁹ *Reynolds v. Goodwin-Hill Corp.*, 154 F.2d 553 (2d Cir. 1946); *Bradley v. American Radiator and Standard Sanitary Corp.*, 6 F.R.D. 37 (S.D.N.Y. 1946), *aff'd*, 159 F.2d 39 (2d Cir. 1947); *Merit Supply Co. v. Lawson Mfg. Co.*, 52 F. Supp. 287 (W.D. Pa. 1943); *Hall v. Anderson*, 18 Wash. 2d 625, 140 P.2d 266 (1943).

¹¹⁰ S. Rep., *supra* note 1, at 19, 26.

¹¹¹ Actually, the deductions allowed are for liquidated damages and not for a penalty. See *United States v. Paddock*, 78 F.2d at 396.

¹¹² 1951 Hearing, *supra* note 12, at 336.

¹¹³ *Id.* at 309. The Senator's description of the type of job that was being done must have been limited to disclosure since there appeared to be no basis for such a description with respect to enforcement.

¹¹⁴ *Id.* at 337.

¹¹⁵ 1943 Hearing, *supra* note 4, at 18-19.

covenant against contingent fees, are said to have been made with twenty-four contractors and their agents and to be expected with "many more companies" as soon as their cases could be reached. Earlier in its testimony, the Navy representative testified that the Department had completed an investigation of more than 40 agents representing 200 manufacturing concerns, and the chart submitted at the hearing contains the names of approximately 122 agents. The Navy's reference to the sum of \$2,300,000, as returned to the Navy in the form of cash refunds and contract price reductions resulting from the adjustments reported to have been made with twenty-four contractors and their agents, may prima facie be considered impressive. Yet it actually would appear to mean very little without other figures, which the Navy did not furnish, to show, among other data, the total amount those contractors actually owed the Government under the covenant against contingent fees.¹¹⁶ Nor did the Navy show the total amount actually owing by the other 176 manufacturing concerns investigated by the Navy but apparently not included in the "amicable adjustments" at the time of the Senate hearing, and the proportionate amount of the total returned to the Navy that actually was a result of the renegotiation of the contract price rather than a collection of agency fees in violation of the covenant against contingent fees.¹¹⁷ The chart submitted shows that a sum of approximately \$14,000,000 was paid or due to be paid during the period from 1939 to 1942 for retainer fees, reimbursements of expenses, salaries, and commissions to manufacturers' agents.

It is to be noted that the Navy testimony does not disclose the names of the twenty-four companies with whom the "amicable adjustments" were made, the names of the agents involved, the terms of the agency agreements, whether the "amicable adjustments" were uniform in the percentage of refund obtained from each company, the names of those companies which refused to enter into an amicable adjustment, nor what

¹¹⁶ It was shown in the previous July hearings, 1942 Hearings, supra note 3, at 1145, that for the year 1939, the total of the commissions received by a single commission agency was \$62,451.47; for 1940, \$160,056.96; for 1941, \$591,458.21; and for 1942, to date of the hearings, \$730,311.43, or a total of \$1,544,278.07; that the total still due as of July 1, 1942, was \$492,103.13.

¹¹⁷ It would appear that since the covenant against contingent fees entitled the Government to collect from the contractors a sum equal to the full amount paid by them to any agents operating on a "no-contract-no-fee" basis, neither the War nor the Navy Departments were compelled "of necessity [to] depend upon the voluntary give-ups" by the contractors involved, as distinguished from the agents who were then not subject to the Renegotiation Act of 1942. But see H.R. Rep., supra note 105, at 6. And since the contractors were subject to the Act, whatever profits reflected an allowance for such agent's commissions would also be recoverable by the Government without dependence upon the so-called "voluntary give-ups."

action had been or would be taken with respect to those who refused. In view of the vulnerability of the three tests¹¹⁸ applied by the Navy in judging the qualifications of the agents involved, it would appear that companies may have made refunds to the Government although not legally obligated to do so, and that many other companies may not have made any refunds despite the fact that they may have been legally obligated under the terms of the contingent fee covenant.

The Navy testimony on May 12, 1943, as to the action taken by that Department with respect to violations of the contingent fee covenant does not seem to show much progress in the action reported by the House Naval Affairs Committee¹¹⁹ approximately a year earlier that the "Navy Department is now taking steps to see that the warranty is being enforced according to its terms," and does not seem to support the statement made in that Committee's report on April 12, 1943.¹²⁰

A further question is raised by the Navy's decision with respect to these contractors. Why did the Navy's testimony before the Senate Naval Affairs Committee fail to include any specific information to identify and distinguish those contractor-agency agreements which showed no obligation to pay a fee to the agent if the agent failed to procure a contract for the contractor from those showing an obligation to pay the agent a certain amount regardless of the agent's success in procuring contracts? In other words, the important information, the facts to show whether the agents involved actually were supported—maintained—by the contractors so as to qualify them under the pertinent part of the covenant, is noticeably omitted in the Navy's testimony. Possibly this was because that Department had adopted three tests of its own to judge the agents' qualifications, which tests omitted the most important one of all under the express terms of the covenant against contingent fees. Thus, it would appear that the net result of the tests adopted by the Navy Department was not an interpretation but an interpolation of the actual terms of the government contract covenant against contingent fees. If emergent war-time conditions were deemed sufficient to justify the Navy's course of action, the testimony given by the Department at the Senate hearing does not appear to contain any convincing correlation between such conditions and the action taken.

¹¹⁸ These excepted from the prohibition of the warranty only those agents (1) who had been in business for a considerable length of time, (2) who had represented their principals in selling to commercial customers as well as to the Government, and (3) who had been hired because of their familiarity with their products rather than with the intricacies of government procurement or with procurement officers. 1943 Hearing, *supra* note 4, at 18.

¹¹⁹ H.R. Rep., *supra* note 5, at 4.

¹²⁰ See note 105 *supra*.

The Navy's fear of Court of Claims suits (an additional reason for not enforcing the covenant as required, since "the companies might well succeed"), seems to lack conviction in the absence of more indications of the basis for that Department's conclusions in the matter. Clearly, for reasons herebefore stated, the opinion in the *Buckley* case, referred to at that hearing, should not have influenced those conclusions.

The case of *Hall v. Anderson*¹²¹ appears to be the first reported case after the beginning of World War II, and after the issuance of Executive Order No. 9001,¹²² in which the defendant contractor contended that the agency arrangement or understanding was void, as against public policy, relying on the *Tool Co.* case. The case also is noteworthy in that although there apparently was bidding pursuant to section 3709 of the Revised Statutes, referred to by the Comptroller General of the United States in his decision of June 28, 1934,¹²³ the contractor appeared to believe that the employment of a contingent fee agent was necessary. The facts as they appear in the amended complaint set forth in the report of the case are that the defendant's was the lowest responsive bid submitted pursuant to a War Department invitation but because the Government "threatened to award said contract to a higher bidder," the defendant orally agreed to pay the plaintiff his expenses if he would go to Washington "to interview the War Department for the purpose of endeavoring, by legal means, to urge and persuade the War Department to cause said contract to be awarded to said defendant, Anderson, in accordance with, and on the merits of the bid," and that if the contract was awarded to the defendant, he would pay the plaintiff "as attorney's fees and compensation, a sum equivalent to one-half of one percent of the amount of said contract bid." The plaintiff traveled to Washington with the defendant and "proceeded to urge upon various members of War Department the propriety, fairness and justice of accepting on its merits" the defendant's bid. Thereafter, the bid was accepted and a contract was awarded in the sum of \$936,517, on which the plaintiff claimed a fee of \$4,682.50.

The court, relying especially on the case of *Nobel v. Mead-Morrison Mfg. Co.*,¹²⁴ one of the cases that does not follow the *Tool Co.* case, reversed the judgment of the lower court in favor of the defendant—whose defense was based upon a violation of the covenant against contingent fees—and held that the agency contract was not void as against public policy.

¹²¹ 18 Wash. 2d 625, 140 P.2d 266 (1943).

¹²² See note 8 supra.

¹²³ 13 Comp. Gen. 471 (1934).

¹²⁴ 237 Mass. 5, 129 N.E. 669 (1921).

It would seem to be of value to Congress to know the circumstances which made it necessary for a contractor, whose bid apparently was the lowest, and responsive in every way to the government's invitation, to engage the services of a contingent fee agent to secure the award. Nevertheless, there has been found no reference to this case in the numerous congressional hearings held and reports made subsequent to the *Hall* case. In the hearing in which there seemed to be agreement "that no manufacturer ought to pay any sum of money to get information from the Federal Government,"¹²⁵ no one mentioned the fact that a case of public record indicated that one contractor apparently felt it necessary to pay a sum of money to secure an award on which he had submitted the lowest responsive bid. The facts, as they appear in the reported case, could mean either that pressure and influence were being exerted to secure the award to a higher bidder, and that it was necessary for the low bidder to exert greater pressure and influence, or that pressure and influence were needed to overcome attempts to show that the low bidder actually was not responsive. The fact that the case report does not show that pressure and influence were used is, of course, not conclusive of the matter. If what was done was improper, it might not appear.¹²⁶ It may well be that the administrative office involved possessed facts which would have completely offset any undesirable inferences that might be drawn from the facts in the *Hall* case but nothing has been found to show that Congress ever sought to obtain the facts or that the case was even mentioned by any congressional committee engaged in a study of the payment of contingent fees. Of importance to Congress, at least equal to the unusual circumstances which caused the use of a contingent fee agent, would seem to be the position that the Government should take in a case such as *Hall v. Anderson*, where the contractor itself alleges a violation of the contingent fee covenant as a defense in the agent's suit for his fee, and to be informed by the administrative office involved as to the action, if any, it took to recover the amount of the fee. It seems clear that the fact that the court upheld the legality of the agency agreement as between agent and contractor was not determinative of the rights of the Government, not a party to the suit, nor of the agent's qualifications under the contingent fee covenant. It appears from the facts that except for the agreement to pay plaintiff's expenses if he would make the trip to Washington, the agency agreement seems to be the exact "no-contract-no-fee" arrangement which the *Tool Co.* case and the covenant, which is based thereon, prohibits. The covenant's prohibition contains no exception for attorneys. In view of

¹²⁵ 1951 Hearing, *supra* note 12, at 304.

¹²⁶ *Hazelton v. Shekells*, 202 U.S. 71, 79 (1906).

the action taken about a year earlier by the House Naval Affairs Committee in referring the file on the *Stone* case¹²⁷ agent to the Navy Department to consider whether collection should be made from the contractor, it would seem that the Army would have had an equal interest in the agent in the *Hall* case, whose Washington trip expenses do not seem as persuasive as the drawing account of the agent in the *Stone* case to show that the agent was "maintained" as required by the covenant. The public record shows that the Government collected in the *Stone* case, but there appears to be nothing of public record to show that collection was made in the *Hall* case even though it seems to be a proper case for collection and the House Naval Affairs Committee had reported in April, about three months before the *Hall* case was decided, that the War and Navy Departments were employing every means at their disposal to recapture excessive fees and commissions and that they had relied principally upon a strict interpretation of the contingent fee covenant.¹²⁸

The Assistant Judge Advocate General, in charge of the Procurement Division, Office of the Judge Advocate General, stated at the extensive 1949 hearings on influence in government procurement that:

In a number of cases under this act contractors have come in and told us what the arrangement was, asked whether it was proper or not. Sometimes, we thought it was proper, and sometimes not. I do not know of any case where we have had to recover from a contractor or canceled his contract.¹²⁹

In the light of that statement, it would seem that if the congressional committee had been, as it would seem it should have been, aware of the *Hall* case, the representative of the Judge Advocate General's Office would have been requested to explain the position of that Office in that case, which involved a War Department contract, and the standards used by that Office in determining what arrangements were "proper" and those that were not.¹³⁰ It would also seem that the committee would have been very interested to learn what "contacts" were possessed by the agent in the case of *Davidson v. Button Corp.*¹³¹ that influenced the contractor to agree to pay him "12½% on the net amount of the selling price," which the Army contractor presumably included in its bid price but apparently never paid the agent; what collections, if any, were made by the Govern-

¹²⁷ See note 101 supra.

¹²⁸ See note 105.

¹²⁹ Supra note 5, at 15.

¹³⁰ No one on the committee asked the JAG representative to explain the methods tried and what the difficulty seemed to be. 1949 Hearings, supra note 5, at 12. The procedures discussed by him did not relate to methods of covenant enforcement, which are clearly stated in the covenant—contract cancellation or deduction of the amount of the fee.

¹³¹ 137 N.J.Eq. 357, 44 A.2d 800 (Ch. 1945), aff'd, 138 N.J.Eq. 113, 46 A.2d 787 (Ct. Err. & App. 1946).

ment from other contractors who dealt with the agent in the *Stone* case; the complete facts on the reported activity of certain members of the Senate and a former Navy Department employee in the case of *Glass v. Swimaster Corp.*,¹³² whether the Government at least collected in the case of *Silverman v. Osborne Register Co.*,¹³³ where the facts are fairly clear to show that "the price quoted . . . [was] raised in the bid to the Government" to include the contingent fee to be paid the agent and where the court denied payment of the fee to the agent; whether the War Department agreed with the construction of its regulation and "gloss" by the court in the case of *Reynolds v. Goodwin-Hill Corp.*,¹³⁴ how the Army Board of Contract Appeals reconciled the factors used as the basis for its opinion in the *Alloy Products Corp.* case¹³⁵ with the actual language of the contingent fee covenant; and how the Chemical Warfare Department of the United States Army was able to approve the "no-contract-no-fee" arrangement in the case of *Bradley v. American Radiator and Standard Sanitary Corp.*,¹³⁶ in view of the prohibition of the covenant.

Notwithstanding the fact that a thorough examination and discussion of those cases, together with appropriate enforcement action by the administrative office involved, might have been the most effective result of the 1949 hearings, it has not been found that any of the cases are as much as mentioned in the published report on those hearings. In view of the statement by the representative of the Judge Advocate General's Office that he did not know of any case where recovery had been made, it would appear fairly certain that the Army has never taken any collection action in the court cases involving Army contracts. If that is true, there would appear to be many hundreds, if not thousands, of contracts, not involved in court cases, in which the covenant was violated but not enforced despite the fact that the fee may have been included once, if not twice, in the contract price, and despite the fact that in July 1942, the Under Secretary of War advised the Chairman of the Naval Affairs Investigating Committee that his department would continue to take prompt action.¹³⁷ Yet no record has been found that the War Department took any steps to recover even in the court cases where the defendant admitted a violation of the covenant and was upheld by the court.

At hearings in 1951,¹³⁸ approximately two years after those in 1949,

¹³² 74 N.D. 282, 21 N.W.2d 468 (1946).

¹³³ 155 F.2d 879 (D.C. Cir.), cert. denied, 329 U.S. 765 (1946).

¹³⁴ 154 F.2d 553 (2d Cir. 1946).

¹³⁵ A.B.C.A. No. T-1571, 4 CCH CCF ¶ 60,389 (1947).

¹³⁶ 6 F.R.D. 37 (S.D.N.Y. 1946), aff'd, 159 F.2d 39 (2d Cir. 1947).

¹³⁷ H.R. Rep., supra note 5, at 5.

¹³⁸ 1951 Hearing, supra note 93, at 43-46.

both the Army and Navy still seemed to be expressing generalities; the committee still made no request of the Navy to show the standards it was using in its determinations, including its action or lack of action in the *Glass* case, and also made no request for the evaluation standards of the Army which continued to appear more intent on obtaining disclosures on the number of operating agents than on enforcement of the covenant as a means of reducing the number of such agents. The statement by the Army at the 1951 hearing noticeably omitted a report on any action by that Department, and it has not been found that the congressional committee asked for any report on what action had been taken against the contractors in such cases as the *Hall* case, the *Reynolds* case, and the *Bradley* case. In the same year, two other cases apparently involving Army contracts, show that the defendant contractor's defense was that the agency agreement was contrary to the public policy expressed in Executive Order No. 9001 and thus unenforceable; the court upheld the defendant in the case of *Mitchell v. Flintkote Co.*¹³⁹ and rejected the defense in the case of *Buckley v. Coyne Electrical School.*¹⁴⁰ It has not been found that the Government ever collected—or that any congressional committee ever inquired whether the Government ever collected—from the contractors involved in those suits, despite the fact that they in effect admitted that the covenant had been violated. In the following year, 1952, the defendant in the case of *York v. Gaasland Co.*¹⁴¹ also used the same defense and was upheld; no record of collection by the Government has been found. The amount reported in the case to have been spent in entertaining government officials and military officers would seem at least of some interest to Congress but it does not appear that the case has ever been included in any congressional report. In 1953, the case of *Gendron v. Jacoby*¹⁴² disclosed that the Government had made no deduction to cover the agent's commission. While the court denied the defense of public policy, the fact still remains that the defendant relied upon a plea of violation of the contingent fee covenant, which the Army apparently did not pursue. The Army's apparent failure in this case is especially difficult to reconcile since the facts tend strongly to indicate that the use of influence was at least intended.

¹³⁹ 185 F.2d 1008 (2d Cir.), cert. denied, 341 U.S. 931 (1951).

¹⁴⁰ 343 Ill. App. 420, 99 N.E.2d 370 (1951).

¹⁴¹ 41 Wash. 2d 540, 250 P.2d 967 (1952).

¹⁴² 337 Mich. 150, 59 N.W.2d 128 (1953).