A Study in Administrative Procedure: The Case of the Red Sea Charters

Maurice Finkelstein
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MAURICE FINKELSTEIN †

The oft repeated rule that resort to the courts must await exhaustion of available administrative remedies, perhaps requires an agonizing reappraisal. We shall not here discuss the merits of that problem. Like the earlier papers in this series,¹ this is a factual study of but a single case ² made not only from reported decisions, but from papers, correspondence and materials in the lawyers' files. Whithersoever they lead, our views must follow.

Early in 1941, the military situation of the Allied Powers in North Africa was in urgent need of improvement. Among their needs were additional supplies of war material, which could be obtained only from the "arsenal of liberty." Lend-lease funds were available to the British for the purchase of the needed supplies, but shipping facilities were difficult to obtain. The United States Maritime Commission undertook therefore the task of filling this void. Eighty-one vessels were assembled from private owners and contracts for space charters were entered into between the ship owners and the British Ministry of War Transport. The Maritime Commission took a leading part, not only in assembling the tonnage, but also in negotiating the rates to be paid by the British Ministry of War Transport. The materials had to be carried through then perilous waters to Suez via the Red Sea.

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This venture was carried through efficiently and smoothly. Ninety voyages were made by the eighty-one vessels. Delays and losses were negligible. The charter hire was paid by the Maritime Commission (out of lend-lease funds), and in addition many of the nineteen shipping companies involved were able to pick up satisfactory return cargoes.

When the voyages to the Red Sea and back had been completed, it developed that out of total revenues of $31,364,880.11, the shipping companies had earned net profits of $26,874,176.70. The publicity attained by these somewhat unusually high profits resulted in the inevitable congressional investigation.

The investigation was held by the House Committee on The Merchant Marine and Fisheries. Hearings before the Committee were held on March 23, 24, 25, 30, 31, 1943, and January 27, 1944. The Committee reported that in its opinion the rates paid for the Red Sea charters were too high, "and exceedingly so," and completely out of line with what had been anticipated.

Even before the Committee's report, but after the hearings were held, two of the companies which had participated in the Red Sea charters (Weyerhauser Steamship Company and American President Lines) had made voluntary repayments of a substantial portion of their profits to the Maritime Commission.

Shortly after the Committee's hearings and prior to the Committee's report, the Price Adjustment Board of the Maritime Commission had instituted proceedings to renegotiate the various charters entered into by the steamship companies in connection with this Red Sea venture. The Waterman Steamship Company thereupon brought suit in the United States District Court for the District of Columbia to enjoin the Price Adjustment Board of the Maritime Commission from maintaining such proceedings.

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4 Id. at 12.
5 Id. at 11.
The Waterman Company's position was that the Price Adjustment Board was without jurisdiction to renegotiate the Red Sea charters since these charters were contracts with the British Government and not with a "Department" of our Government, as required by the Renegotiation Act. It was also claimed that two time limitation periods provided for in the act had elapsed and ousted the Board of power to commence or continue renegotiation of the Red Sea charters.

The district court dismissed the complaint, briefly stating that Waterman had not exhausted its administrative remedies and therefore had no standing in court. On appeal, the court of appeals held this rule to be inapplicable to the case. Relying on a prior decision of its own, and quoting therefrom, it said:

Certainly the power of a federal court, in a case of actual controversy involving no question of administrative discretion, to enter judgment declaratory of the rights of the parties is fundamental where no exclusive remedy is provided by statute—and likewise, even where a remedy of some sort is afforded, if it is not an adequate substitute and does not provide relief. And that is certainly true in this case, for here, as the result of the District Court's disclaimer of jurisdiction, Waterman would be subjected to an expensive inquisitorial investigation. This might be followed by the sequestration of moneys due it by the United States on other contracts; and if these are insufficient in amount, it might then be confronted with an order, based on an ex parte determination, requiring it to repay a large sum of money—all in advance of a decision on the primary question, whether it is liable at all. To grant such a proposition would be contrary to the principles of expeditious justice.

The Supreme Court granted certiorari because of, as it said, "the importance of the question." Whether Waterman was required first to test the applicability of the Renegotiation Act before the administrative agency or whether...

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8 Waterman S.S. Corp. v. Land, 131 F.2d 292 (D.C. Cir. 1945).
9 Id. at 297.
it was permitted to proceed directly to court for a speedy solution to its problem was the "important question." Were the Red Sea charters contracts with the United States, and hence renegotiable under the act, or were they in fact contracts with the British and hence not covered by the act? The court of appeals had allowed that the court's aid could properly be called upon to settle this problem in the first instance.

It will be noted that the court of appeals merely remanded the case to the district court with instructions to consider whether the Red Sea charters were contracts with a "department" within the meaning of the Renegotiation Act of 1942. It was to review this holding that the Supreme Court had granted certiorari.

After full consideration, the Supreme Court reversed and reinstated the holding of the district court. The Waterman Company was thus told to exhaust its administrative remedies before coming into court. The Red Sea carriers proceeded to do just that. Ten years later (as we shall hereinafter explain), the Supreme Court denied certiorari to review a holding by the Court of Appeals for the District of Columbia that the Red Sea charters were in fact contracts with the British and hence not subject to renegotiation under the act.

In the initial stages of renegotiation, the Price Adjustment Board held a series of conferences with representatives of the carriers. An effort was made by the Board to recapture part of the profits derived from the Red Sea charters. To these efforts all the carriers but the two which had made partial repayment, mentioned above, turned a deaf ear. For this unyielding position they advanced four bases.

In the first place, it was urged that a substantial part of the profits were earned on the return voyages, by carrying cargo for private business, not even remotely connected with the Government. As to such profits which had been included in the twenty-six million dollar figure supplied by the Com-

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12 Waterman S.S. Corp. v. Land, 151 F.2d 292, 298-99 (D.C. Cir. 1945).
mission to the House Committee, there could be neither moral nor legal pretense for any claim to recapture.

In the second place, it was urged that when the Red Sea voyages were undertaken, they were extremely perilous. Some vessels were actually lost. In a rapidly rising freight rate market, the insurance money is but small comfort to the carriers, who could not replace the vessels. There was, moreover, ample private business to be had by the carriers and they were loath to take on this Red Sea business for fear of losing their vessels and thus being disabled from benefiting from the rise in business activity after years of meagerness.

Thirdly, the carriers pointed out that the rates agreed upon in the Red Sea charters were actually lower than the going rate in the private carriage-by-sea trade, and that but for the return cargoes, the profits on the Red Sea voyages would have been much smaller than profits available to the charterers elsewhere.

Finally, it was pointed out that the carriers were under no legal obligation to repay anything to the Commission, and even if the Red Sea charters were considered a windfall, corporate carriers would be acting far beyond their legitimate powers, in the face of the unanimous opinions of all their counsel that the profits were not subject to renegotiation, should they voluntarily return money to the Commission.

The Price Adjustment Board listened, calculated, urged settlement, but arrived nowhere. The Commission in the end issued unilateral orders against thirteen of the carriers directing them to return approximately one-half of their profits and from all thirteen carriers the instructions to counsel were the same—"appeal at once."

The Renegotiation Act permitted a proceeding in the Tax Court to determine whether in fact any undue profits were earned by any one contracting with the Government. This proceeding was not designed as a review of the Maritime Commission's order. It was, on the contrary, a proceeding de novo. The carriers, of course, were still confident that

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15 H.R. REP. No. 2088, 78th Cong., 2d Sess. 6 (1944).
16 Id. at 3-4.
the Red Sea charters were not renegotiable, but the Supreme Court had held that this determination must be made on the administrative level, at least in the first instance, saying that: "...a decision as to what are and are not [re]negotiable contracts is an essential part in determining the amount of a contractor's excessive profits." 18

The thirteen carriers all filed petitions with the Tax Court naming the Maritime Commission and its Chairman as respondents. There was much conferring among lawyers for the various carriers, and much legal research. The lawyers treated the case much the same as do our brethren in the medical profession when they run across an "interesting" case in the ward. But here there was to be no post-mortem, and so the numerous opinions will remain forever untested and numerous problems forever unresolved.

The many petitions—with but unimportant differences—were essentially alike. These petitions proceeded along four avenues to attack the Commission's orders. First was the proposition that the Red Sea charters were contracts with a foreign power—the British Government—and hence not subject to renegotiation by the express terms of the statute. The Renegotiation Act of 1942 19 defined the term "Department" to mean the "War Department, the Navy Department, and the Maritime Commission." 20 The term "Secretary" as used in the act is said to mean in the case of the Maritime Commission, the Chairman thereof. 21

The statute then carefully provides that the "Secretary" may renegotiate the terms of any contract with a "Department." 22 Since the Red Sea charters were contracts between American steamship companies and the British Ministry of War Transport—an organism not included within the definition of the word "Department"—it seemed obvious that the Renegotiation Act did not apply to these charters.

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20 The term is now defined: "Department of the Army, the Navy Department, the Treasury Department, the Maritime Commission, the War Shipping Administration, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company..." 56 STAT. 245 (1942), as amended, 50 U.S.C. App. § 1191(a) (1) (1952).
22 Id. § 1191(c) (1).
The second attack on the Commission's orders was via the act's statute of limitations. The act provides that renegotiation proceedings are initiated by the mailing of a registered letter by the "Secretary" to the contractor involved, and that this proceeding lapses unless it is commenced within one year after the close of the fiscal year in which the "completion or termination" of the contract occurred. It was pointed out that the renegotiation proceedings were not commenced until November, 1943, while the Red Sea voyages were completed in 1941 and that therefore more than one year had elapsed after the end of the fiscal year in which completion of the contracts had occurred.

Thirdly, it was urged upon the Tax Court that final payment of amounts due on the Red Sea charters had been made in 1941 and that the statute expressly exempted from its coverage all contracts with respect to which final payment had been made prior to April 28, 1942.

Lastly, and as a final and conclusive thrust, the carriers maintained that there were no excessive profits earned from the Red Sea charters.

Although as we have seen, this case had already been before the Supreme Court once and was to be before that tribunal again and again, there never was a decision by the high court on any of the four points raised by the petitioning carriers and the entire case was ultimately disposed of by a denial of certiorari. But first there was to be a great deal of legal travail and at one point considerable vexation of spirit.

To each of the four attacks on the Commission's orders, the government lawyers had a ready answer. They maintained first that the Red Sea charters were in reality contracts with the Maritime Commission. The fact that the British Ministry of War Transport was named as the charterer in the written agreements was deemed irrelevant, since it was claimed that the British Ministry was acting as agent for the United States Government. Secondly, the Government urged that the statute of limitations had not yet run,

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23 Id. § 1191(c)(3).
since the "completion or termination" of the contracts had not yet occurred. This was due to the fact that the carriers had filed claims for demurrage which had not yet been adjusted. This point was also used to destroy the third attack on the Commission's orders. For if the demurrage claims had not yet been adjusted, it was clear, said the government lawyers, that final payment had not yet been made.

As to the last attack on the Commission's orders, that there were in fact no excessive profits earned by the carriers from the Red Sea charters—as to this, the Government was never called upon to answer. The figures given by the House Committee on Marine and Fisheries were never alluded to in the entire course of the litigation.

The California Eastern Line was the first to be heard. It was the owner of the S.S. Vermont, one of the vessels chartered to the British Ministry of War Transport for the Red Sea venture. While the California Eastern Line was not among the companies listed in the House Committee report, nevertheless, a Commission order had been made directing the return of $164,000 by the company to the Commission.

The first step taken by counsel for California Eastern was to ask the Tax Court to sever the issues, that is, to postpone the consideration of the problem of excessive profits—an admittedly difficult investigation—until after a determination of the legal problems raised by the petition. The Tax Court acquiesced and agreed to a first and separate trial on the question of coverage, that is, on the question of whether or not the Renegotiation Act was applicable to the Red Sea charters. To be presented also in this first trial were the various provisions of the Renegotiation Act dealing with time limitations. It was obvious that if any one of these matters were to be decided in favor of the petitioners, it would be necessary to vacate the order of the Commission and hence it would be unnecessary to go into the complex problem of excessive profits.

At the trial before the Tax Court most of the facts were stipulated by the parties. There was, however, serious

25 Ibid.
acrimony about a document, Exhibit G, which the Government offered in evidence. If the statements contained therein were true, there would be no doubt but that the Red Sea charters were with the Maritime Commission and not with the British.

The history of this controversial exhibit is not without interest. In the course of its preparation for the trial of this case, the Department of Justice asked the Department of State to procure from the British Government an official statement as to the relationship between the United States Government and the British Government at the time the charters were executed. Such a statement was procured, signed by one F. V. Cross, Assistant Secretary of the Ministry of Transport. The effect of the official statement, thus procured, was to certify that in signing the Red Sea charters, His Majesty's Government "were agents only and that the principal and real party in interest was the United States Government as represented by the United States Maritime Commission." 29

The Tax Court declined to admit the document in evidence, but added that "even upon that basis the Government did not establish its point." The proffered statement, however, ultimately received full consideration in the court of appeals. 30

After the trial, nearly one year elapsed before the Tax Court rendered its 2-1 decision upholding the contention of the petitioner that the Red Sea charters were contracts with a foreign power and not with a "Department," and hence not covered by the Renegotiation Act. 31

Judge Turner dissented and termed the majority view "unrealistic." To him the essential problem was not one of "agency," but what he called "common knowledge" that lend-lease funds expended for the prosecution of the war would never be claimed from governments for whose benefit they were spent. Since the Red Sea charters were executed early

29 Ibid.
30 Ibid.
in 1941, one may be excused for wondering just how general this "common knowledge" was.32

On February 26, 1952, the Tax Court entered its formal order that there was no renegotiable contract within Section 403(c)(1) of the Renegotiation Act.33

The Tax Court rules permit a limited time within which to move for "rehearing, further hearing or reconsideration." 34 But the Government instead of making the motion, obtained from the Tax Court an extension of time within which to file such a motion to April 2, 1952. In support of this application for enlargement of its time to move for "rehearing, further hearing or reconsideration," it was represented by the Government that:

The British Embassy in Washington, D.C., from public sources, learned of this Court's opinion in this proceeding and requested the Department of Justice to furnish copies of this opinion. This was done. The British Embassy in Washington, D.C. has advised the Department of Justice that it desires to submit a statement in connection therewith. The British Embassy in Washington, D.C. anticipated that such statement would be forthcoming within the time allowed by Rule 19(e). However, due to certain difficulties in connection with the transmission of messages to London plus the necessity of that Government to have such statement properly released by both the Foreign Office of that Government and the Ministry of Transport it now believes that it will be unable to receive such statement from London within the time permitted.35

No such statement from the British Embassy was forthcoming, and April 2, 1952, came and went without action by the Government. But on April 25, 1952, "The United States of America and the Department of Commerce as successor to the Chairman of the United States Maritime Commission" petitioned the United States Court of Appeals for the District of Columbia for a review of the decision of the Tax Court.

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32 Id. at 1343.
34 Tax Court Rule 19(c).
It was while this petition for review was pending that the law firms representing the carriers received a staggering blow from lawyers of the Department of Justice which sent their research men scurrying to the various law libraries looking for a way out of what seemed at first blush a hopeless dilemma. The instrument of confusion was a casual motion by the Government in the Court of Appeals for the District of Columbia, to remand the case to the Tax Court with instructions that it be dismissed. Millions of dollars hung in the balance.

Long before any substantial research had been done, the lawyers for the merchant marine fleet were loudly protesting not only that the motion was without legal basis, but that the government lawyers who had filed it were guilty of the worst possible taste. "This is the sort of thing," said one of them, "which is simply not done."

It appeared that while the case was pending in the Tax Court a reorganization of federal agencies was effected whereby the United States Maritime Commission was abolished and its functions transferred to the Secretary of Commerce. The Reorganization Act provided:

No suit, action, or other proceeding lawfully commenced by or against the head of any agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties, shall abate by reason of the taking effect of any reorganization plan under the provisions of ... [the Reorganization Act], but the court may, on motion or supplemental petition filed at any time within twelve months after such reorganization plan takes effect, showing a necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, allow the same to be maintained by or against the successor of such head or officer under the reorganization effected by such plan or, if there be no such successor, against such agency or officer as the President shall designate.\(^3\)

As no substitution had been asked for by either party to the proceedings within the time specified, the Government's motion in the court of appeals that the cause be remanded to the Tax Court with instructions that the petition

be dismissed was filed. This was the motion that had caused so much perturbation of spirit to the lawyers for the merchant marine interests. Nor was the legal fraternity disturbed without cause. Government counsel had called the attention of the court to two recent cases which gave color to their position, *Defense Supplies Corporation v. Lawrence Warehouse Company* 37 and *Updegraff v. Pace*. 38

In the *Defense Supplies* case, 39 the courts were confronted by a statute which had abolished the Defense Supplies Corporation as of July 1, 1945. The statute also provided that no actions by or against the corporation should "abate," but that for proper cause shown, a court might within twelve months of the dissolution of the Defense Supplies Corporation substitute its successor, the R.F.C. as a party plaintiff or defendant, as the case may be. No such substitution was made within the year. But the court had during the year entered judgment in favor of the Defense Supplies Corporation. The Supreme Court of the United States held: (1) That the judgment was valid since the action had not abated when it was entered; (2) that no substitution could be ordered after the twelve month period had expired, since it was not thinkable that "Congress intended a gesture of futility when it stated a twelve month period for substitution"; 40 (3) that after the twelve month period, the action was at an end and no appellate court could review it on the merits.

In *Updegraff v. Pace*, 41 a suit against the Secretary of the Army was dismissed where the Secretary's functions had been transferred to the Secretary of the Air Force and no substitution had been asked for or ordered within the twelve month period provided by the National Security Act of 1947.

Of course, the statute here involved was somewhat different from the statutes involved in the two cases cited above and relied on by the Government. Yet it was clear that the lawyers for the carriers should have asked in the Tax Court

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38 188 F.2d 646 (D.C. Cir. 1951).
40 Id. at 636.
41 188 F.2d 646 (D.C. Cir. 1951).
for a substitution of the Department of Commerce for the Maritime Commission. At long last, the case had reached an embarrassing impasse. The lawyers could only plead by way of confession and avoidance. The consequences were serious not only to the clients, but also to the lawyers, for if the benefits of the judgment for the California Eastern in the Tax Court were to be lost, no new action could be brought—as the short ninety day period of limitations to petition the Tax Court had long ago expired.42

But study and reflection brought counsel, and direction for much research was suggested by a dissenting opinion written by Mr. Justice Frankfurter. The opinion was written in Snyder v. Buck,48 a most unfortunate case. The suit was by the widow of a member of the naval services for mandamus to compel the Paymaster General of the Navy to pay to the plaintiff a death gratuity authorized by Congress.44 Judgment for the plaintiff had been rendered by the district court on January 30, 1948.45 On March 18, of the same year, notice of appeal had been filed in the name of Buck, Paymaster General of the Navy. Buck, however, had retired on March 1st, and had been replaced. Six months passed without either side moving for substitution, and the court of appeals thereupon vacated the judgment and remanded the cause to the district court with instructions to dismiss the complaint.46 The Supreme Court affirmed, saying petitioner lost her judgment and must start over.47

It will be noted that both in Buck v. Snyder,48 as in Defense Supplies Corp. v. Lawrence,49 the judgment appealed from was entered before the period within which substitution of defendants might have been made had expired. Yet in Buck v. Snyder,50 the judgment was vacated and complaint dismissed, whereas in Defense Supplies Corp. v. Lawrence,51

44 Act of June 4, 1920, c. 228, 41 STAT. 824.
46 Buck v. Snyder, 179 F.2d 466 (D.C. Cir. 1949) (per curiam).
48 179 F.2d 466 (D.C. Cir. 1949) (per curiam).
49 168 F.2d 199 (9th Cir. 1948).
50 179 F.2d 466 (D.C. Cir. 1949) (per curiam).
51 168 F.2d 199 (9th Cir. 1948).
the appeal was dismissed, but the judgment allowed to stand. According to the majority, an amendment to the statute forced this result.52

For many years, it had been held in the federal courts that an action to compel an official to discharge his official duty abated when the official died or retired from office.53 The reasons for the rule will not stand the tests of logic, but nonetheless the rule was well-established. Reacting to a suggestion made by the Supreme Court, in the course of its decision in Bernardin v. Butterworth,54 Congress by the Act of February 8, 1899, provided that no action against a federal officer, in his official capacity should abate by reason of his death or resignation, but that the same might be continued by a timely request for substitution.55

In response to a second suggestion by the Supreme Court in Irwin v. Wright,66 that it would promote the ends of justice if the provisions of the Act of February 8, 1899, were extended to suits in the federal courts by and against state officers, Congress enacted Section 11 of the Judiciary Act of 1925. It was under this later act that Snyder v. Buck57 was decided. While the purpose of Section 11 was merely, as Mr. Justice Frankfurter pointed out, to extend the coverage of the 1899 act to state officers, the new act included the old and made some changes in wording. These changes, according to the majority, dictated a dismissal of the complaint in Snyder

52 The earlier statute had provided that "... no suit ... lawfully commenced ... shall abate ... but, in such event, the Court ... at any time within twelve months thereafter ... may allow the same to be maintained...." Act of Feb. 8, 1899, c. 121, 30 Stat. 822. But the Supreme Court pointed out that:

"The rule was again changed by §11 of the Judiciary Act of 1925. The provision that no action should abate was eliminated. It was provided that the action might be continued against the successor on the requisite showing within the stated period. The revision effected a substantial change. The 1925 Act made survival of the action dependent on a timely substitution." Snyder v. Buck, 340 U.S. 15, 19 (1950).

The elimination of the words "no suit shall abate" from the amended act destroyed the case ab initio.


54 169 U.S. 600 (1899).


56 258 U.S. 219 (1921).

Mr. Justice Frankfurter, however, was of a different opinion. He said:

So far as concerns the legal effect upon the pendency of an action due to change in the occupancy of an office, a reading of the provisions of the 1899 and 1925 Acts can leave not a shadow of doubt as to their identity of purpose and procedure for its accomplishment. The difference between the two acts is a matter of English and not of law. In both, Congress assumed that a proceeding by or against an officer of the United States in relation to his official conduct would abate unless within a time certain the court authorized continuance of the proceeding by or against the successor in office. Only the phrasing of this rule differs. In the 1899 Act, Congress said that such an action shall abate unless leave is given for its continuance; in the 1925 Act, Congress said that unless leave is given for the continuance of such a suit it is at an end. To say as we said in *Defense Supplies Corp. v. Lawrence Warehouse Co.*, that the 1899 Act "categorically" provided that "no action shall abate" is a mutilating reading. The dominant thought of an enactment controls the primary import of isolated words. To find that the 1925 Act "eliminated" this provision has significance only if what is meant is that certain words of the 1899 Act were "eliminated" while the thought was retained.

But Justice Frankfurter went further and suggested for the first time, the real basis for the rule of the abatement of actions against public officers. It had best be stated in his own words.

The intrinsic and not merely formalistic answer to this question is of course entangled with the doctrine of sovereign immunity from suits. In scores of cases this Court has had to consider when a suit, though nominally against one holding public office, is in fact a suit against the Government and as such barred by want of the sovereign's consent to be sued. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, App. 729. The subject, it has been recognized, is not free from casuistry because of the natural, even if unconscious, pressure to escape from the doctrine of sovereign immunity which—whatever its historic basis—is hardly a doctrine based upon moral considerations. The trend of deep sentiment, reflected by legislation and adjudication, has looked askance at the doctrine. See *Keifer & Keifer v. R.F.C.*, 306 U.S. 381, 390-392. If astuteness has been

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exercised to deny the representative character of an official in order to avoid his identification as the sovereign \textit{ad hoc}, it runs counter to the rational administration of justice not to find an official of the sovereign \textit{ad hoc} and the suit against him, in effect, a suit against the sovereign when sovereign immunity is not circumscribed thereby.\textsuperscript{60}

The result, had Justice Frankfurter's views prevailed, would be that the rule of abatement would in practical effect be limited to those cases in which the sovereign had not consented to be sued.

This suggestion provided a point of departure for re-reading the numerous cases on abatement of actions and a new application of these cases to the Reorganization Act, involved in the case of the Red Sea charters. A thread was drawn through the cases which seemed to confirm Justice Frankfurter's view. For it could be shown that not all actions against public officers abated even dehors the statutes. Only in the case of mandamus was the rule of abatement uniformly applied. Other actions did not abate. From this it was argued that saving clauses such as were contained in the Reorganization Act were needed only to save actions which would otherwise have-abated. But the petition of California Eastern to the Tax Court was not mandamus, hence the saving clause with its limited period of substitution was not applicable to it. So it was argued.

A counter motion by counsel for California Eastern to dismiss the Government’s petition for review for lack of jurisdiction only served further to complicate the issues before the court.

After the argument before the court of appeals of both the Government's motion to remand with instructions to dismiss, and California Eastern’s motion to dismiss the petition for review for lack of jurisdiction, the court on its own motion raised—and asked the parties to brief—a further jurisdictional question. It appeared that the petition for review in the court of appeals was captioned “Chairman of the United States Maritime Commission, Petitioner for Review vs. California Eastern Line, Inc., Respondent-Appellee.” The petition itself began by reciting that “The United States of

\textsuperscript{60} Id. at 28-29.
America hereby respectfully petitions for review of a decision of the Tax Court.” The question upon which the court of appeals wanted further light was whether or not the proper parties were before it. Of course, further briefs were written and filed.

The opinion of the court was handed down on April 16, 1953, and was concurred in by three judges—Clark, Prettyman and Washington. The erudite learning concerning the differences between actions which do abate and those which do not, were of little apparent effect on the opinion of the court. No one, of course, can ever gauge the shove to predisposition that the impact of a forceful argument makes on the minds of judges. Nonetheless, it was somewhat disheartening to find that instead of a definitive holding on the law of abatement of actions against public officers, the Government’s position was disposed of on a collateral point. It was held that the Tax Court was an administrative body, not a court, and that the rules of abatement did not apply to administrative agencies. Said the court:

We turn, then, to the statute on which the Government relies. The Reorganization Act of 1949, in the provision above-quoted relative to abatement, speaks of a “suit, action, or other proceeding.” This must mean a suit, action, or proceeding before a court, for the second clause of the provision says “the court” may allow survival. The statute’s primary purpose was evidently to ameliorate the harsh consequences of the common-law abatement rules usually applicable to judicial proceedings. Any effect it has in causing termination of a “suit, action, or other proceeding” would appear to be secondary. Administrative proceedings, as far as we can discover, have never been held to be subject to the common-law rules of abatement. In principle they should not be, and a statute should not be interpreted as making them so subject unless the legislative intent clearly so requires. Changes in the personnel or organization of the executive branch should not be permitted, without good purpose, to delay or hinder the citizen in his dealings with any part of it.

Neither then nor later was any effort made by the Government to have this determination by the court of appeals reviewed in the Supreme Court.

62 Id. at 400.
As to the motion of the California Eastern to dismiss the petition to review for lack of jurisdiction the court said:

The California Eastern Line has filed a motion to dismiss the Government's petition on the ground that this court lacks jurisdiction by reason of the nature of the question presented, contending it is not one of those which this court will review under the doctrine of United States Electrical Motors v. Jones, supra. We defer decision on that motion, as it deals with the substance of the petition for review. The case will be set down for hearing on the merits after the briefs have been filed.63

As to the problem raised by the court on its own motion, the court held that "... a petition filed here in the name of the Chairman of the Maritime Commission should be held sufficient to warrant our review, even though the office has been abolished and the former incumbent has become a private citizen." 64

The case was now ripe for a decision on the merits, of the holding by the Tax Court that the Red Sea charters were not, under the act, renegotiable. But this was not yet to be. The oral argument before the court took place on November 13, 1953. Again counsel for California Eastern urged strongly that the issue before the court did not concern either a constitutional question nor a problem of the Tax Court's jurisdiction and that, hence, the petition for review raised nothing which the court of appeals was authorized to review. The Government stressed the errors in the Tax Court, particularly the exclusion of Exhibit G, and insisted that it was the jurisdiction of the Tax Court which was being questioned on appeal.

The opinion of the court of appeals was handed down on January 21, 1954.65 In it, the court declined jurisdiction. Largely, the court's conclusion was bottomed on the opinion of the Supreme Court in the Waterman case.66 In that case the Supreme Court had said:

A contractor aggrieved by the Chairman's determination of excessive profits may have them redetermined in a "de novo" proceeding before

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63 Id. at 403.
64 Ibid.
66 Id. at 637.
the Tax Court. Section 403(e)(1) of the Act provides that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits . . . ." Contrary to respondent's contention that this language limits the Tax Court's jurisdiction so as not to include the power to decide questions of coverage, we think the language shows that the Tax Court has such power. For a decision as to what are and are not [re]negotiable contracts is an essential part in determining the amount of a contractor's excessive profits.67

While probably a dictum, the court of appeals felt that it could not "disregard it." 68 Nor was the court of appeals impressed by the language of the Supreme Court in a case subsequent to the Waterman case in which (referring to the Waterman case) it was declared that, "the Waterman Corporation had contracted directly with a government agency, the Maritime Commission." 69 This latter statement was disposed of with finality:

This sentence, says the Government, was a conclusive finding upon the point in dispute in the Waterman case and also in the case at bar. But we think the Supreme Court did not intend that this one sentence, in the midst of a discussion of the Waterman case for other purposes, should constitute a final and conclusive finding of fact in a case which was not then before the Court and as to which it had no record, and particularly where the Court had held that the Tax Court must make the initial finding of that precise fact.70

In spite of the fact that the Renegotiation Act provides that the Tax Court "shall have exclusive jurisdiction . . . to finally determine the amount, if any, of such excessive profits . . . ." and that "such determination shall not be reviewed or redetermined by any court or agency," 71 the court of appeals had on a number of occasions held that the Tax Court could not finally determine its own jurisdiction and that therefore " . . . judgments of the Tax Court in renegotiation cases may be examined in this court to determine whether jurisdictional or constitutional limits have been

But what constitutes a question of "jurisdiction" is not always easy to determine. Specifically in this case the question of "coverage," that is, the question of whether or not the Red Sea charters were subject to the act—surely a preliminary question to that of excessive profits—hung on the border line, at least, of "jurisdictional" questions.

As required by the rules, the Government petitioned the court of appeals en banc for a rehearing as a preliminary step to an application for certiorari, and on March 12, 1954, the application was denied. The court en banc consisted of eight judges, but Chief Judge Stephens did not participate—no doubt in an effort (in the event not needed) to avoid an even decision.

The path was now cleared for review by the Supreme Court. Certiorari was granted and for the second time the Supreme Court had the Red Sea charters before it. The only issue raised on the petition for certiorari was the alleged error of the court of appeals in declining to review the judgment of the Tax Court, on the ground that it did not involve a question of jurisdiction.

The Supreme Court (Mr. Justice Douglas dissenting) reversed the court of appeals and held that while no court was authorized to review a judgment of the Tax Court concerning excessive profits, nevertheless, the question of coverage could and should be reviewed by the appellate court. The opinion of Mr. Justice Black recites the factual background of the case and strongly suggests that the learned Justice was not without convictions on the merits. From these glimpses of his hintergedanke the carriers derived no solace whatever.

The case was now back in the court of appeals—this time for a decision on the merits. The oral argument took place on May 18, 1955. On February 16, 1956, the unanimous opinion of the court, per Danaher, Circuit Judge, was handed down. It unanimously upheld the Tax Court.

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The delay in deciding is accounted for in the opinion:

Because of the earnest insistence by the Government that the Tax Court's findings must fall, we have carefully examined the entire record and the scores of exhibits included.\textsuperscript{77}

After its exhaustive and also chronological review of the record, the court concluded:

And so the record goes, overwhelming the suggestion that the British Ministry of War Transport was the agent in any capacity for the Government of the United States or for any of the Departments enumerated in the statute.\textsuperscript{78}

The argument made by the Government that Exhibit G, by itself, was sufficient to show that the Red Sea charters were signed by the British Ministry of War Transport as agent for the United States is carefully dealt with by Judge Danaher. He first adopts by quoting at length the reasoning of the Tax Court in this regard, then adds:

We need not rule directly upon the admissibility of the document or decide that it shall have "the force of proof" or that it is any more than a statement of the contentions of the Government as a litigant. It certainly is not offered by the British Government in its own behalf. We regard it as immaterial in the light of the whole record, the facts as stipulated, and the exhibits. Whether the British Government held the view or "understood" that we should earlier have entered the war, or that the United States was transporting for its own account war goods purchased by Great Britain for use by the latter in the African campaign, or that its Ministry of War Transport was acting as our Government's agent for the accomplishment of our nation's objectives is beside the point. That we had a purpose is well known. Our own Government took careful, planned and cautious steps to carry on this transaction for the benefit "of the democracies," as President Roosevelt said in his April 30, 1941, letter to the Commission. The whole operation was ""'part of the defense effort to which this country is committed.'"\textsuperscript{79} For reasons deemed valid by the Executive, means were then adopted to make certain that at the bar of history, the United States would not appear as a belligerent, or as committing an act of war or as offering, under American auspices, a target to the aggressor. The measures were designed to protect our status, and the Commission saw to it that the documents reflected that status. That they were sufficient, as the Tax Court concluded, we agree.\textsuperscript{79}

\textsuperscript{77} Id. at 756.
\textsuperscript{78} Id. at 757.
\textsuperscript{79} Id. at 760.
Neither the problem of the admissibility of the British statement, Exhibit G, nor the ultimate problem as to the merits of this case were ever reviewed by the Supreme Court. Though the Government secured from the Chief Justice an extension of time to file for certiorari to May 23, 1956, it was to no avail. The petition was denied in October, 1956.80

Now that the Supreme Court has had the case of the Red Sea charters before it five times—three applications for certiorari and two full arguments—we still do not definitively know:

1. What are the limits of the rule with respect to the abatement of actions against public officers?
2. What is the legal significance of an intergovernmental statement procured, as was Exhibit G?
3. Were the Red Sea charters really contracts with the British?
4. And above all, does the rule of prior exhaustion of administrative remedies require reconsideration by the Supreme Court to avoid repeated experiences like the case at bar.

The carriers are, of course, content. The loss of a hoped for $7,000,000 to the Government is possibly not too distressing. We said, at the outset, that we shall not reach the merits. But one thought about the procedure must be uttered. Had the court of appeals reversed the Tax Court, or had the Supreme Court granted certiorari and then reversed the court of appeals, the litigation would have been back at the starting line. There had remained undecided the question of the statutes of limitation contained in the Re-negotiation Act. Any decision made by the Tax Court in this regard would, under Justice Black's views, have been reviewable in the courts. And, finally, if all went against the carriers, there still remained the determination to be made by the Tax Court as to amount, if any, of the excessive profits of the carriers. But as to this, the statute is explicit, even court-proof, that the Tax Court's determination "shall not be reviewed or redetermined by any court or agency." 81