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CONSTITUTIONAL LAW-WAR CONTRACT RENEGOTIATION ACT-INJUNCTION PROCEEDING-UNAUTHORIZED SUIT AGAINST THE UNITED STATES

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CONSTITUTIONAL LAW—WAR CONTRACT RENEGOTIATION ACT—INJUNCTION PROCEEDING—UNAUTHORIZED SUIT AGAINST THE UNITED STATES —A holder of war contracts with the federal government brought suit in the District Court for the District of Columbia to enjoin the Secretary of the Navy from withholding payments due under one contract to offset alleged excess profits received on others on the ground that the statute was unconstitutional, and to obtain a declaratory judgment with respect to his right to the disputed funds. The district court dismissed the bill. *Held,* since the essential allegations and the relief sought did not make it a case of threatened trespass against property but in effect constituted a suit designed to collect a debt alleged to be owed by the government, the United States had such an interest that it was an indispensable party and, therefore, the suit could not be maintained here without its consent. The judgment of the district court is affrmed. *Mine Safety Appliance Company v. Forrestal,* (U.S. 1945) 66 S. Ct. 219, affirming (D.C.D.C., 1945) 59 F. Supp. 733.

This case represents one of the unsuccessful attempts to attack the constitutionality of the Renegotiation of War Contracts Act.[1] The act provides that, whenever, in the opinion of the War Contract Price Adjustment Board, the amounts received by any contractor show an excessive profit, a conference will

[1] 56 Stat. L. 226 at 245 (1942); id. 798 at 982; 57 Stat. L. 347 (1943); id. 564; 58 Stat. L. 21 (1944), 50 U.S.C. (Supp. 1941-45), Appx. § 1191.

be called with the contractor and an agreement sought.[2] If no agreement is reached, the board determines the amount, mails a statement to the contractor, and may adopt any one or more of several means of enforcement. It may authorize various administrative officers (1) to reduce the amounts payable, (2) to withhold from amounts otherwise due a contractor, (3) to direct other contractors to withhold payments from the contractor against whom the order was issued and (4) to recover amounts by suit. As amended,[3] the law allowed any aggrieved contractor to file a petition with the Tax Court ninety days after the order had been issued for a redetermination in a trial de novo. The law states that the Tax Court "shall have exclusive jurisdiction . . . . and such determination shall not be reviewed or redetermined by any court or agency." This administrative procedure was first attacked as unconstitutional in *Rolls-Royce Incorporated v. Stimson*[4] where the petitioner sought by writs of mandamus and prohibition to prevent the Price Adjustment Board at the first stage of the procedure from compelling the attendance of the petitioner at the conference. The district court held that, although the remedies sought here were sufficient to give jurisdiction,[5] the proceeding had not reached its final stages so that any relief could be given. The second attempt occurred in *Lincoln Electric Company v. Knox*.[6] On a motion for a summary judgment the petitioner sought to have the act declared unconstitutional when the Secretary of the Navy, as in the principal case, threatened to withhold funds due from customers. The court in denying the summary judgment and recommending that the case should be tried on its merits indicated that where a public officer interfered with a contract between the petitioner and his customers, the United States was not an indispensable party because the judgment would not compel specific performance of a contract by the government. The third case challenging constitutionality of this statute was *Spaulding v. Douglas Aircraft Company*,[7] a declaratory judgment proceeding, instituted when the War Department directed that the payments due the plaintiff should be withheld by the defendant. Sidestepping the constitutional issue, the court contended that the parties were estopped to deny the constitutionality of the statute because it had been incorporated into their contracts by reference to it in their correspondence. Thus, the principal case is the fourth attempt to determine the constitutionality of the statute, but the first of the four to reach the Supreme Court. It will be noted that the fundamental problems are: the manner of enforcement of the act, and the procedures available to test its validity. Although the Tax Court is given exclusive jurisdiction in these cases, it acts in these matters in its capacity as an expert administrative tribunal.[8] If the view expressed by Justice Frankfurter in the

[2] 56 Stat. L. 226 at 245, § 403, c. 2 (1942); 50 U.S.C. (Supp. 1941-45), Appx. § 1191c(2).

[3] 58 Stat. L. 78 at 86 (1944); 50 U.S.C. (Supp. 1941-45), Appx. § 1191e.

[4] (D.C. D.C. 1944) 56 F. Supp. 22; 153 A.L.R. 1455 (1944).

[5] 28 U.S.C. (1940) § 380 a.

[6] (D.C. D.C. 1944) 56 F. Supp. 308; 153 A.L.R. 1455 (1944).

[7] (D.C. Cal. 1945) 60 F. Supp. 985.

[8] Loughran, "The Tax Court's 'Exclusive Jurisdiction' as the Second and Final Administrator of the Renegotiation Act," 12 D.C.B.A.J. 327 (1945).

course of a recent opinion is followed,[9] the Tax Court has no power as an independent agency within the executive department to determine constitutional questions. Accordingly, the Tax Court's administrative jurisdiction should not preclude the district courts, in appropriate types of proceedings, or the Court of Claims, in actions based on contract claims against the United States,[10] from entertaining jurisdiction in cases raising issues of law dealing with the constitutionality of the act and the limits imposed by statute on the Price Adjustment Board's jurisdiction.[11] The Court for the District of Columbia where these four cases arose has not decided the constitutional question where the circumstances do not squarely call for a decision as in the *Rolls Royce* and *Spaulding* cases or where the procedure is inadequate to test the question as in the *Lincoln* case. In the principal case the procedural question centered in the issue whether the United States was an indispensable party. The finding that the United States was an indispensable party in view of the nature of its interest was no doubt correct here since the funds, if awarded to the plaintiff, would have been paid from the United States Treasury. Where the interest of the United States is direct, it is a necessary party.[12] Unless its consent is obtained, the suit must be dismissed.[13] The courts will look not only to the nominal parties of record [14] but also to the real parties in interest so that one cannot do by indirection what he cannot do directly,[15] namely sue the United States without its consent. Although suits may be brought against public officers individually in their ministerial capacity to pay over funds,[16] no right of action will be allowed, as in the instant case, where the official is acting within his statutory discretionary authority. Suits may also be maintained when such officers act outside their powers or under an unconstitutional statute. If the pleadings and the circum-

[9] Bingham's Trust v. Commissioner of Internal Revenue, 325 U.S. 365 at 377, 65 S. Ct. 1232 (1945).

[10] 28 U.S.C. (1940) § 250(1).

[11] Steadman, "A Further Inquiry into Renegotiation: II," 43 MICH. L. REV. 235 at 274 et seq. (1944).

[12] Where property owned by the United States was condemned, Minnesota v. United States, 305 U.S. 382, 59 S. Ct. 292 (1939); where sought to quiet title to land occupied by United States, Stanley v. Schwalby, 162 U.S. 255, 16 S. Ct. 754 (1896); where sought to compel payment out of the Treasury, Haskins Bros. & Co. v. Morgenthau, (App. D.C. 1936) 85 F. (2d) 677, cert. denied, 299 U.S. 588, 57 S. Ct. 118 (1936); Cummings v. Hardee, (App. D.C. 1939) 102 F. (2d) 622; where sought to compel sovereign to perform a contract, United States ex rel. Shoshone Irrigation Dist. v. Ickes, (App. D.C. 1934) 70 F. (2d) 771.

[13] United States ex rel. Goldberg v. Daniels, 231 U.S. 218, 34 S. Ct. 84 (1913).

[14] Marshall's view in Osborn v. Bank of United States, 9 Wheat. (22 U.S.) 738 (1824), that the parties are determined by the record has been discarded.

[15] New Hampshire v. Louisiana, 108 U.S. 76, 2 S. Ct. 176 (1883); Minnesota v. Hitchcock, 185 U.S. 373, 22 S. Ct. 650 (1902); Morrison v. Work, 266 U.S. 481, 45 S. Ct. 149 (1925); Ford Motor Co. v. Department of the Treasury, 323 U.S. 459, 65 S. Ct. 347 (1945).

[16] Houston v. Ormes, 252 U.S. 469, 40 S. Ct. 369 (1920); Smith v. Jackson, 246 U.S. 388, 38 S. Ct. 353 (1918); New York Casualty Co. v. Zwerner, (D.C. Ill. 1944) 58 F. Supp. 473; Von Knorr v. Miles, (D.C. Mass. 1945) 60 F. Supp. 962.

stances on which they are based present a situation in which the United States is not a party and in which the constitutional issue can and will be decided, then, and only then, can an action be maintained against the Secretary of the Navy. In the light of the cases well represented by the instant one, those contractors wishing to contest the constitutionality of the contract renegotiation statute must choose one of two alternatives: either an action in the Court of Claims on the contract or a case in the district court presenting a controversy between private individuals not directly or indirectly involving the United States.

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