ORAL ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES:

THE WARREN COURT, 1953 TERM—1968 TERM

A Microfiche Project of
UNIVERSITY PUBLICATIONS OF AMERICA, INC.
44 North Market Street • Frederick, Maryland 21701

ISBN 0-89093-694-3.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1954

Washington, D. C.

THE UNITED STATES OF AMERICA
AND THE SECRETARY OF COMMERCE,
AS SUCCESSOR OF THE CHAIRMAN OF
THE UNITED STATES MARITIME
COMMISSION

Petitioners

v.

CALIFORNIA EASTERN LINE, INC.,

Respondents

February 10, 1955

No. 263

WARD & PAUL
1760 PENNSYLVANIA AVE., N. W.
WASHINGTON, D. C.

NATIONAL 8-4266
8-4267
8-4268
8-4269

C O N T E N T S

	Page
ARGUMENT ON BEHALF OF THE UNITED STATES OF AMERICA	
By Mr. Davis	2
ARGUMENT ON BEHALF OF RESPONDENT	
By Mr. Finn	36
REBUTTAL ARGUMENT ON BEHALF OF THE UNITED STATES OF AMERICA	
By Mr. Davis	47

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1954

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION Petitioners v. CALIFORNIA EASTERN LINE, INC., Respondents	No. 263

Washington, D. C.
Thursday, February 10, 1955.

The above-entitled cause came on for oral argument at 3:00 p.m.

PRESENT:

The Chief Justice, Honorable Earl Warren, and Associate Justices Black, Frankfurter, Douglas, Burton, Clark, and Minton.

APPEARANCES:

On behalf of United States of America:

OSCAR M. DAVIS, ESQ.

On behalf of California Eastern Line, Inc.:

HAROLD B. FINN, ESQ.

- - -

PROCEEDINGS

The Chief Justice: No. 263, the United States of America and the Secretary of Commerce v. California Eastern Line.

The Clerk: Counsel are present.

The Chief Justice. Mr. Davis.

ARGUMENT ON BEHALF OF THE UNITED STATES OF AMERICA

By Mr. Davis

Mr. Davis: May it please the Court, this case comes here on certeriori from the Court of Appeals of the District of Columbia Circuit. It arises under the Wartime Renegotiation Act and concerns the efforts of the Government to eliminate excessive profits alleged to have been made by the respondent, the California Eastern Line, on a certain contract which it entered into in 1941.

California Eastern owned a ship called the S.S. VERMONT, which was sent on a mission to carry supplies to the British in East Africa, and the question arises, and the basic question at issue, not in this proceeding but in the renegotiation proceeding, is whether California Eastern made excess profits on that run of the S.S. VERMONT.

Now, the Tax Court, which is the court, you will recall, that has the stellar role in renegotiation matters, held that there were no powers to renegotiate this contract which California Eastern had entered into because the Tax Court thought that it was with the British Government and not with an agency of

the United States, and the Renegotiation Act requires, before a contract can be renegotiated, that they have to be with certain named departments or agencies of the United States.

The Government, relying on various previous decisions of the Court of Appeals of the District of Columbia, that it would review a Tax Court holding in a renegotiation case of this type, sought review in the Court of Appeals. Somewhat to our surprise, the Court of Appeals held that it was without authority to review this kind of question in a Tax Court renegotiation matter, and so the case was brought here by the Government on certeriori, and I would stress that the issue here is not the basic renegotiability of California Eastern's charter to carry supplies to East Africa, but the question is whether the Court of Appeals of the District of Columbia Circuit has authority to review the holding of the Tax Court that that contract was not renegotiable under the World War II Renegotiation Act.

If I may state, shortly at the beginning what our position is, it is, one, that the Government is entitled to the same rule which the Court of Appeals has been applying on contractors' appeals to that court in renegotiation matters; and, two, that the issue of contract renegotiability is within the power of the Court of Appeals and should be reviewed there.

This case involves on ship line alone, but there are twelve other cases pending in the Tax Court involving the same general issue of the renegotiability of a Red Sea charter, a charter to

carry supplies to the Red Sea.

The facts go back to the period in the spring of 1941, shortly after the Lend-Lease Act had been passed, and, of course, before the United States entered World War II. President Roosevelt, in April, 1941 directed the Maritime Commission to assemble a fleet of two million tons, a large part of which was to be used to carry supplies to the British who had just captured a port on the Red Sea and were engaging in the famous North African campaign.

The Maritime Commission was designated by the President to make the arrangements and to assemble this large fleet. And the Commission did so.

It held conferences and discussions with the various shipowners, including representatives of California Eastern, and they discussed the terms of the charter and what the prices should be and what should be done under the charter. But the charter was not signed technically by the Maritime Commission. It was signed, for reasons that I will go into a little while later, by the British Ministry of War Transport, because the British were to receive these Lend-Lease supplies.

However, the S.S. VERMONT, the ship which is involved in this case, sailed before the actually signing of the charter. It sailed during the course of the discussions and negotiations between the Maritime Commission and the shipowners. And I should say that the British Government took no part whatsoever in the

negotiations and conferences relating to this charter.

The funds for the payment of the contract, the payment to respondent, came solely from Lend-Lease funds. They were a fund appropriated by the Congress under the Lend-Lease Act, and the British Government undertook no responsibility for payment and made no payment whatsoever.

Now, the bulk of these funds were paid to respondent before the enactment of the Wartime Renegotiation Act on April 28, 1942. But there was a substantial sum, something over $15,000, which was not paid until after that time. The Renegotiation Act provides explicitly that it covers all contracts which are unperformed as of the date of the passage.

So the Government originally took the position that the Renegotiation Act covered this contract, which the Government said was in substance with the Maritime Commission, an agency named in the Renegotiation Act.

First, there were efforts made and voluntary renegotiation, because it was discovered after the finishing of the voyages that what appeared to be very large profits had been made on these Red Sea charters. The risks of the voyage turned out to be much less than had been anticipated, and in some quarters it was felt that the profits were excessive up to 100 or 80 per cent in the matter, and, as I say, efforts at renegotiation were undertaken, but they were undertaken unsuccessfully.

The committee of Congress investigated the matter and came

to the same conclusion that there had been prima facie large excessive profits, and recommended renegotiation under the Renegotiation Act. And this was commenced in November of 1943 by the sending of a notice of renegotiation under the statute to the California Eastern Line.

Shortly thereafter another company, the Waterman Company, which was in the same situation, and also had a Red Sea charter, tried to cut off the renegotiation administrative proceeding by bringing a declaratory judgment and injunction action in the District Court for the District of Columbia, and their claim was similar to the claim which the present respondent has made, that they were not subject to renegotiation because their contract was not with the Maritime Commission, but with the British Government; therefore, it did not fall under the Act. And they said it would be a waste of time to go through the renegotiation proceedings because it was clear they were not covered.

The District Court here threw out the case on the ground that they had to exhaust their administrative remedies, citing and relying on the famous case of Myers v. Bethlehem, which had made that holding for the Labor Board some years before. But the Court of Appeals for the District of Columbia reversed. It thought that the primary issue of whether the contracts were renegotiable at all was jurisdictional, and it thought it could decide that, and without requiring or without permitting the case to go through the normal course of administrative proceedings.

And it sent the case back for trial on that issue. It had come to the Court of Appeals solely on the pleadings, the allegation of the shipowner that the case was not renegotiable, and the case was sent back by the Court of Appeals for trial on that issue of contract renegotiability.

The Government sought certeriori, which was granted, and this Court reversed the decision of the Court of Appeals of the District of Columbia.

This Court said that the doctrine of primary adjudication, the doctrine of exhaustion of administrative remedy, should apply, that the case should go back to the ordinary course of administrative proceedings through the original renegotiation agencies, and then on to review in the Tax Court of the United States.

I will have occasion later on to discuss more fully this decision of the Court, because it is relied on very heavily by the Court of Appeals in the present case, and, of course, by respondent.

Well, these cases did go back, and I should mention that the present respondent itself filed a declaratory judgment action similar to that filed by Waterman, which was kept in abeyance pending the resolution of the Waterman controversy, and after this Court had dismissed the Waterman case, the present respondent also dismissed its case, and renegotiation proceedings through, of course, respondent and the other shipowners claimed that their charters, their contracts, were not subject to renegotiation.

In 1949, the Chairman of the Maritime Commission, which was the renegotiating agency under the statute for this purpose, held that excessive profits had been made on this contract. Out of the gross receipts of some $350,000, he found that $164,000, a little less than about 40 per cent, I should say, were excessive.

Now, the Renegotiation Act provides for a de novo proceeding in the Tax Court. It is not a review proceeding in the sense that it is a review of administrative findings. It is a completely de novo proceeding, which was instituted by the respondent here in the Tax Court. But because the respondent claimed that it was not subject to rengotiation at all under the contract, it moved to sever that issue and two other comparable issues before any determination of excessive profits was made.

The Tax Court granted that motion and set this issue of contract renegotiability down for a separate hearing. And so there has never been in this case any determination or finding of the amount of excessive profits.

In the Tax Court, of course, respondent and the Government put in their case, and in what I say about the Government's case, I am not intending to suggest that the issue of contract renegotiability is now before this Court, because it is not, but I do wish to assure the Court that in our view we have a substantial case in that a review of our case in the Court of Appeals of the District of Columbia may very well result in a determination that

California Eastern's charter was renegotiable, and therefore remand to the Tax Court for a proceeding to determine the amount of excessive profits.

Now, California Eastern's claim is quite simple. The charter was signed at the end by the British Ministry of War Transport, and they say it is with that agency and not with the Maritime Commission at all.

The Government's case, on the other hand, is that the British Ministry of War Transport was in effect the signing agent for the Maritime Commission, and also that the Renegotiation Act is an effort by Congress to eliminate excessive profits from all contracts paid for by Government-appropriated funds, and that under the terms of the Renegotiation Act, this contract was a contract with the Maritime Administration.

As I have said, all the conferences and discussions took place between the Maritime Commission and the respondent and the other shipowners. There were no conferences and discussions with the British at all. The Maritime Administration intended to enter into a contract, in our view. We rely on various resolutions passed by the Maritime Commission at that time.

The funds were clearly to come from the United States Government. There was not even to be the use of the British as a convoy. The Maritime Commission was to pay directly to the shipowners whatever amounts were due them under their charters. And this was actually done.

As I have said, the funds came from appropriated funds allotted by the Congress of the United States.

Now, the British did sign the contract, and it appears from the various negotiations and conferences which are in the record and which, of course, would have to be considered if the merits of the case were to be decided by a court -- it appears from those discussions and negotiations that it was not even certain that the British were to sign the contract, that it was only at a very relatively late date, I believe after the sailing of this ship, the S.S. VERMONT, that it was definitively decided that the British were to sign the contract, and I need not speculate to the Court on the reasons why at the end of May and June, 1941, it might have been thought undiplomatic or inappropriate for the Federal Government, the United States Government, to sign a contract for the carrying of supplies to the British Government in the Red Sea when the British Government, which was not then our formal ally, was undertaking the North African campaign.

Now, we rely on all these materials, as I have said, and we rely on two further, and we think very significant, documents. The first is an official statement by the British Government which was procured for the purpose of this case and which states that the British Government considered itself at all times to be the agent of the Maritime Commission, and that the Maritime Commission, or the United States Government represented by the

Maritime Commission, was in substance, in actual effect, the charterer of the ship. And we also rely on an exchange of correspondence between the respondent, California Eastern, and the British Government in 1952, after the case had been through the Tax Court and while it was still on appeal to the Court of Appeals.

(4) The California Eastern sent a refund to the British Government. Under the terms of the charter, certain refunds were to be made if the war risk premiums turned out to be less than expected, and there was a refund due of about $12,000. This was sent by the ship line to the British Ministry of War Transport, which promptly sent it back, saying, "We are not the charterer; the Maritime Commission is the charterer. We were the agents only, and they are entitled to the money."

Now, as I have already pointed out, the Tax Court did not accept our arguments. The Tax Court held, in a decision which was reviewed by the full Court with one dissent, that this charter was not with the Maritime Commission, but with the British Ministry of War Transport. It indicated that it reached its decision reluctantly because it thought that the purpose and policy of the Renegotiation Act would require the elimination of excessive profits in a contract of this type, but nevertheless it felt bound by what it viewed to be the situation and the terms of the statute.

In reaching its decision, the Tax Court, through Judge Raum,

excluded the official British statement which I mentioned, as not properly before the court, and even though the judge said that he had looked at it, it is quite clear from his discussion that he did really grant it full credence; he viewed it as the views and understanding of some unidentified lower ranked officials of a certain designated British agency rather than as a formal official representation through diplomatic channels of the British Government to the court.

Also, the Tax Court decision rests, in our view, on two erroneous basic premises, particularly the premise that the Maritime Commission at that time was not empowered by the statute to make a space charter, a space charter as distinguished from a bare-boat charter. This was a space charter. It was not a bare-boat charter. The Maritime Commission may well not have had authority to enter into a bare-boat charter in which the charterer takes over the entire operation of the vessel. It may well not have had the authority at that time to do that, but we believe it to be clear that it had the right to hire space aboard this ship in order to ship supplies, and that is exactly what was done here.

Well, as I said before, the Tax Court decided adversely to the Government. We took the case to the Court of Appeals, as I have said, also relying on a line of six or seven previous decisions in which the Court of Appeals had in our view said that it would review the issue of contract renegotiability, whether

a contract was renegotiable under the Renegotiation Act.

The Court of Appeals phrases this line of demarcation in the terms that it will review constitutional and jurisdictional issues. And the issue really arises because of the terms of the Renegotiation Act, which contains a finality clause which I will have occasion, I believe, to discuss at considerable length a little further on in the argument.

Suffice it to say that the decision of the Court of Appeals was adverse. We applied for rehearing en banc, which was denied. After the denial of the rehearing en banc, three other renegotiation cases were heard orally by the Court of Appeals by different panels, panels different from the one which had decided the present case. And at the oral hearing of those three cases, which took place in March and April, 1954 questions from the bench gave Government counsel clear indications that those members of that court had grave doubts as to the correctness of the present decision, and as to whether it should be applied in the cases then pending before the court.

Justice Frankfurter: Evidently assertive questions from that bench carry more significance than, sometimes, assertive questions from this bench.

Mr. Davis. I do not think so, Mr. Justice Frankfurter, because of the possibility that the Government might find itself in the position that in an appeal taken by it -- and this particular case was the first appeal taken by the Government in

a renegotiation case to the Court of Appeals -- and in the first appeal it was turned down on the ground that there was no review.

(5) Well, the Government faced the possibility that if appeals might be barred on the ground that the court had no powers to review, while on the contractors' appeals, the court would entertain the cases and consider them on their merits.

The case is now here, and there are really, I suppose, two basic issues before the Court. The first one, which is perhaps the most basic one, is whether there is any review at all, any review at all in the Court of Appeals of a Tax Court renegotiation decision. And the secondary question is, if there is review in some measure, does this case fall within the reviewable area or outside it?

Now, as to the question of reviewability or not at all, that turns, of course, on the wording of the finality clause of the Renegotiation Act when it is read in the light of its background. And that appears in the Government's brief on page 73. It provides upon the filing of a petition for redetermination in the Tax Court, the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency."

Justice Black. Did that contract have to be in writing?

Mr. Davis. There is no requirement that it be in writing.

The court below was of the view that this issue was foreclosed, that the decision of this Court in the Waterman case, which I mentioned a few minutes ago, foreclosed the decision, and held that the issue of contractor renegotiability, which has been called in ordinary renegotiation parlance, the issue of coverage, that that issue, when determined by the Tax Court, was final and conclusive.

But as I believe I have already mentioned, the Waterman opinion clearly indicates that all the Court was deciding there was that the shipowner had to exhaust his administrative remedies; he could not attempt to foreclose the administrative remedy by coming to the Court in the first instance. He had to go back and go through the renegotiation process, including the appeal to the Tax Court, because the opinion of this Court makes it absolutely clear, in our view, that it was not determining what would be the situation after the administrative process had been exhausted, after the contractor had gone through all steps set forth by Congress in the statute.

The Court referred several times to the Myers v. Bethlehem case, and said that the situation was the same, that the contractor here and the employer there was required to exhaust his administrative remedies and could not seek judicial intervention in advance. It said, of course, the Tax Court and the renegotiating agencies will have power to determine initially issues of contract renegotiability and other issues of law and fact that arise

incidental to and in the course of the determination of the amount of excessive profits which the contractor may have made. But the Court also said that that is for the Tax Court in the first instance, and not for the District Court in the first instance.

The shipowner had tried to have the District Court decide that issue in the first instance. And this Court said:

"Whether or not the District Court ever can decide that issue, it cannot do it now, and at this time and in this proceeding it cannot decide it."

In effect, the Court held that, "We reserve for the future the question of what judicial review there can be after the administrative procedure has been exhausted," and that is precisely what the Court continued to do in renegotiation cases.

There have been two renegotiation cases in this Court since the Waterman case, the Aircraft and Diesel case in 331 U.S., and the Lichter case, which upheld the Constitutionality of the statute in 334 U.S. And in each of those cases the Court went out of its way to be very explicit to say that they were not passing upon and indeed were explicitly reserving the decision upon the question of what court review there would be after completion of the Tax Court remedy.

So it is quite clear, we believe, that in this Court the issue is open. It is open in this Court. It has never been passed on.

Now I come to the part of my argument which may be considered a confession of error, not a confession of error in this case, but a frank description of the Government's position on this issue over the past several years, because the Government's position which I am exposing at the bar of this Court today in 1955 is not the same as the Government's position taken in 1944 and 1955 in the midst of wartime renegotiation and litigation.

The initial position which the Government took at that time was that there was no review at all of Tax Court renegotiation decisions on any issues. I should say, and I have been over the Government's briefs in these cases, that it was not taken with an extreme amount of dogmatism or with undue firmness, and you will find in the briefs waverings and quaverings even at that time, but on the whole --

Justice Frankfurter: It was just persuasiveness or understatement?

Mr. Davis: I think not, Mr. Justice Frankfurter. I think it was perhaps the unsureness of the ground.

Justice Frankfurter: Anyhow, you absolutely disavow any of this record in the past?

Mr. Davis: Precisely. But on the whole, the Government did take the position that there was no review.

Now, the first case in which an effort was made to attain review after the Tax Court entered its decision in a Court of Appeals was the U.S. Electrical Motors case, which was heard and

decided by the Court of Appeals for the District of Columbia Circuit in the early days of 1946. And in that case -- and that is the case in which the Court of Appeals enunciated the doctrine that despite the finality clause, or I should say, not despite the finality clause, but under the terms of the finality clause, Constitutional and jurisdictional issues were open for review in that court. In that case the Government did take the position that there was no review at all of renegotiation decisions, but it is quite clear why the Government took that position, and this is clear not only from recollection, but from the terms of the Government's brief in that case.

The Government was afraid of the tremendous amount of litigation clogging and impeding the continuance of renegotiation. There had been threats of injunction litigation, and many injunction suits had been brought, and the whole fear and apprehension was that renegotiation would be impeded ad infinitum, because it was not sought by many contractors unless there was a quick determination by an agency such as the Tax Court.

The Government's brief in the U.S. Electrical Motors case said:

"If review is granted in this case, the Court of Appeals can confidently expect that in every single one of the 300 renegotiation cases now pending" -- that is, pending early in 1946 in the Tax Court -- "it will be asked to review all kinds of questions of law and fact, and we will never have an end to

the elimination of excessive profits, which Congress has set as one of the primary goals of our war effort."

That I think was the major reason for the Government's position. And there was another reason. At that time the Government thought that if review were allowed at all, it would be a full-scale review, exactly the same kind of review on all questions of law, including substantial evidence, such as is given in Tax Court tax cases or in other cases decided by administrative agencies, and of course, if that were done, there would be an invitation to contractors to seek review on all kinds of issues.

But, of course, the Court of Appeals did not grant that kind of review; it granted a limited type of review, only on Constitutional or jurisdictional issues. In this Court our position was primarily in cases that came here that the issue did not have to be decided, but if we were pressed to it, and it did, as I said, with certain exceptions, in Aircraft and Diesel, for instance, we took no position at all on finality. But in general the wavering line was that Congress had and could constitutionally endow the Tax Court with full authority to decide all questions in renegotiation cases.

Justice Frankfurter: Is that in controversy?

Mr. Davis: Pardon me?

Justice Frankfurter: Is that in controversy? The power?

Mr. Davis: Of the Tax Court?

Justice Frankfurter: No; the question of leaving it to the finality of the Tax Court.

Mr. Davis: No, I do not think it is in controversy, Mr. Justice Frankfurter.

Justice Frankfurter: It is merely a construction of the statute?

Mr. Davis: Yes. But I would say this: I will try to bring it out more fully, that one of the factors in deciding the issue of construction was the belief, merited or unmerited at the time the statute was passed, on the part of Government and non-Government agencies and outside contractors, that it could not be done. There was at that time a belief, and I say regardless of whether the belief was merited or unmerited, there was a belief that Congress probably or possibly could not endow the Tax Court with final authority on --

Justice Frankfurter: That makes the Government's position rather bold, does it not?

Mr. Davis: Well, I think it does. I think it was a kind of forerunner. And only in that aspect is the issue in controversy here.

Now, where is the Government's position different today? This is 1955, not 1946. We are looking toward the end of litigation rather than the beginning. Further, actual experience has shown the inaccuracy of our prophecy. The original anticipation was that review would be sought in every single one

of the Tax Court renegotiation cases. There have been 900 Tax Court renegotiation cases, and review has been sought in twenty, I believe, or possibly twenty-one or twenty-two cases. And so experience and history have proved the falsity of our alarms, and this we believe is a factor that should be taken into consideration.

Justice Frankfurter: So that this problem hasn't a large scale, has it?

Mr. Davis: It is not of as large a scale as we foresaw and were alarmed about in the early days.

Secondly, the general measure of review, the limited type of review on so-called jurisdictional and Constitutional issues which has been accorded by the Court of Appeals has found general acceptance with contractors, and the Government is content at this time because review of this type has a kind of preventive, curative and hygienic value, which I think both sides in these renegotiation cases find to be an important element in the Tax Court.

There is a further factor. In 1951 Congress adopted a new Renegotiation Act. This was after the Korean episode had begun, the 1951 Renegotiation Act. And that Act contains exactly the same provisions for Tax Court de novo proceedings as the present, or the Act which I am talking about, the 1942-43 Act, and it contains exactly the same finality clause. But when that Act was going through Congress, the committees were told

about the rule which the District of Columbia had adopted in the five years previously, in the U.S. Electrical Motors case, and there was an indication, not overwhelming, but an indication, that that statute was adopted in the light of the Court of Appeals line of rulings, and an argument can well be made by a person renegotiating under the 1951 statute that that statute incorporated the Court of Appeals ruling, so that under that statute review is surely to be accorded. And we think it inappropriate and unequal to have a different rule for that statute under which renegotiations are presently proceeding from that which has been accorded under the old wartime statute.

Justice Frankfurter: Mr. Davis, may I go back to a question that you answered really a minute ago, namely, that there were contemporaneous doubts about leaving it finally in the Tax Court?

Mr. Davis: Yes, sir.

Justice Frankfurter: I should think it would be relevant and important if those doubts were expressed by members of either House in charge of the litigation.

Mr. Davis: Yes, Mr. Justice. They were expressed by the Assistant Attorney General, Mr. Shea, who was appearing before the Senate committee. He was attempting to have the Senate adopt the Court of Claims as the reviewing body rather than the Tax Court. In doing so he cast doubt upon the status of the Tax Court as the final arbiter. From his point of view, he said, it would mean that there would be endless litigation, because it

was unclear that you could leave it.

Now, these doubts were echoed on the Floor, particularly by Senator Clark, Bennett Champ Clark, Senator as he then was, who was very active in renegotiation.

Justice Frankfurter: Did he have charge of it?

Mr. Davis: I cannot say that he had charge of the bill, but he was on the committee and very active in it, as the debates show. He did not take a firm position, but he certainly echoed these doubts. And there were other echoes throughout the hearing, and also in the House debates, although not as strongly in the Senate debates. There is quite strong indication in the Senate debates, particularly by Senator Clark, that if you sent it to the Tax Court, really, that might not be any good, because it was not a Constitutional court constituted under Article III; and these things, we think, as I say, are factors which should be taken into consideration.

Now, all that I have been saying only has real warrant if the statute does not inexorably command finality in the Tax Court. I shall try to devote some minutes to showing that that is not so, that the statute does not show clearly that the court has no powers of interpretation and construction or command finality and conclusiveness for the Tax Court decision.

Turning to the Tax Court Statute on page 73 in our brief -- and it also appears in the statutory pamphlet which, I believe has been handed up to the Court, atpage 37, I would like to point out that it says:

"Upon such filing such Court shall have exclusive jurisdiction, by order," by order, "to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency."

Now, construing a statute like this, the Court has recently given us a rather explicit admonition. In the case of Heikkila v. Barber, the deportation case heard here, I believe, two terms ago, the Court said that in construing a statute to determine whether administrative action is reviewable, the absence of a judicial review provision is not conclusive, and what seems to be on the surface a bar to judicial review is not final. You have to look at the statute, its terms, its history, its purposes, in order to determine what Congress meant and that, of course, has been what has happened under this statute.

Now, if you took these words literally, in the broad sense in which respondent and others have been taking it, they would prevent review even on constitutional issues after the Tax Court had determined, had rendered a determination of excessive profits.

No court has held that. There has been review on

constitutional issues. The government has not alleged there could not be review on constitutional issues.

Justice Frankfurter: What do you mean by constitutional issues?

Mr. Davis: For instance, one case that arose in the Court of Appeals was the Ring case.

There a contract was entered into before the Act was passed on April 28, 1942. The question arose whether the Constitution could be applied retroactively to the contract as it could before, and the court held it could, and the government no contention -- This was after Tax Court review -- that the Tax Court decision in favor of constitutionality was binding and conclusive; and certiorari sought was denied.

It seems to us that if you look at the bare words of the statute they provide that it is only the determination of the amount of excessive profits which is conclusive. There is an order of the Tax Court which includes a determination of excessive profits, and the amount of excessive profits, and also holdings on other issues of law and fact, preliminary issues, such as whether the contract was renegotiable at all, and on that issue, there is no provision -- on issues of that type, there is no provision -- in the finality clause requiring the Court of Appeals to stay its hand.

If you compare the statute here with other portions of the Act, this would become more clear. I will not take the time

to point it out.

It is pointed out in our brief; but in talking about the renegotiating agency, of the War Contracts Price Adjustment Board, it provides that its order shall be final and conclusive, not its determination of amount, but its order shall be final and conclusive.

In contrast, as far as the Tax Court is concerned, it provides only the determination of the amount shall be final; it does not even use the word "conclusive."

If you read all this together, we think it means that the Tax Court has full authority to review every single issue involved in an order of the renegotiating agency, the Contracts Price Adjustment Board, but once the Tax Court has decided the issue, the Court of Appeals does not have comparable authority for broad review. Its review only goes to issues not involved in the determination of the amount of excessive profits.

Now, what is the amount of excessive -- determination of the amount of excessive profits? The legislative history and practice under this statute, the terms of the Act itself, indicate that what Congress was thinking about was the actual appraisal of a business' costs, what profits it had been making, what risks it was undertaking, how much profit was reasonable, how much was abnormal in the light of previous history, and so forth. Those issues are involved in the determination of excessive profits, but the preliminary issue of whether you can

undertake to renegotiate at all, those are not involved directly in the determination of excessive profits.

And when Congress was using the words "to determine the amount of excessive profits," it is reasonable to assume that it was saying that those issues within the special expertise of the Tax Court, and comparable to issues which the Tax Court determines in tax cases, would be left with the Tax Court, but that the preliminary issues of whether you undertake any review at all, any redetermination of excessive profits at all, whether the contract is a contract between the United States or with Great Britain, those issues are not for the final determination of the Tax Court.

Now, how is review to be had in the Court of Appeals? There is a general review provision for Tax Court cases in 1141(a) of the Internal Revenue Code, which is in the Government's brief on page 75, and it provides, in general terms, that the Court of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, not limited to tax cases, and that provision can be used, and has been used, by the Court of Appeals to have review here.

On the whole, then, it is our view that there is a mechanism available permitted by the terms of the statute, which the Court should not at this time in renegotiation litigation upset or review in the Court of Appeals on limited issues of Tax Court renegotiation decisions.

Justice Frankfurter: That statute was in existence when the Act was passed, was it not?

Mr. Davis: Yes, it was.

Justice Frankfurter: Was there any reference to this mechanism, as you call it?

Mr. Davis: No, there was not, Mr. Justice; and, I think, the reason there was not, was that Congress was solely concerned, as the legislative history shows, with the issue of the existence of profits.

It was not concerned at all with the preliminary issue of who decides whether you can start and undertake to renegotiate at all. That hardly does not come up at all, as far as I can see, and it was thinking solely of the actual process of renegotiation.

Justice Frankfurter: To be sure that they put the intent of Congress in here, that it was deciding what the Body of Legislation means, the Legislation means?

Mr. Davis: That is right; in the light of the past.

Justice Frankfurter: You assume intent on the part of the Congress?

Mr. Davis: Yes. There is no specific intent, except that there was -- and I should point out this -- that the Tax Court renegotiation provisions came into the Act in February, 1944. The Act had been passed two years before.

There was no review at all in the Act before; yet, everyone assumed there was review in the courts, the constitutional courts

in some way or other, and it is clear when they put the Tax Court provision in, they did not intend to cut down that review in general terms.

I would say this: That there is that indication that they did not intend to deprive people of review which otherwise existed.

Justice Frankfurter: Is it clear that they did not intend that? Nothing was said when it was originally passed in 1942, and this vague assumption, of course, was that it was going to the courts anyhow -- in 1944, they provided expressly adjudicatory machinery, but nothing as to whether there was a residuum of general authority; that is a fair statement, is it not?

Mr. Davis: Between 1942 and 1944 there were discussions before the House committees in hearings about how, of course, review exists and there were general statements, "Oh, we don't intend to close the courts entirely," statements of that type.

I think those have to be taken in context with the establishment of the Tax Court mechanism, but they are the most that I can gather from a legislative --

Justice Frankfurter: I suspect that you can squeeze very little bloodout of the body of the material.

Mr. Davis: I think, perhaps, you are right.

Justice Black: It is your idea that the Court of Appeals would have the right to review questions of fact? Does the Government take that view?

Mr. Davis: Questions of fact involved in the renegotiation of excessive profits, no. That is a question of what costs a company had, what its profits were in preceding years, the amount of risks that it undertook, no.

The questions of fact which are involved in the preliminary questions which the Court of Appeals has hitherto called jurisdictional, whether you can undertake to renegotiate it at all -- in this case, for instance, a question of fact involved in an issue of whether this was a contract with the Maritime Commission or with the British Government -- those issues, we think, are reviewable under the ordinary plainly erroneous rule to which the Tax Court decisions are subject in the Court of Appeals.

Justice Black: Suppose it had been an oral contract?

Mr. Davis: Oral contract?

Justice Black: No written contract.

Mr. Davis: Yes.

Justice Black: And they varied from it one way or the other, on the facts in evidence. Do you think that is or that would be reviewable?

Mr. Davis: We think it would be reviewable in exactly the same way that a Tax Court case could be reviewable; that is, if the Court of Appeals found that the Tax Court decision on that was plainly erroneous, it could reverse; otherwise, not.

Justice Black: Was this decision here based wholly on a written contract or was there oral evidence that the Government

-- which might indicate that the Government, whatever might be the terms of the written contract, had a contract of its own?

Mr. Davis: There is a tremendous amount of evidence consisting not only of the written contract but negotiations between the parties; and one of the arguments that we are making in the Court of Appeals, and which, we hope this Court will allow us to make if it sends the case back, is that there was not only a written contract, which is the charter involved, but there was an oral contract between the Maritime Commission and the ship owner here. That is one of the issues which is raised in the Court of Appeals, and which the Court of Appeals felt it is barred from passing on.

Justice Black: This whole question, as far as you see it, is whether the Court of Appeals has jurisdiction under the Renegotiation Act to review a decision of the Tax Court when it did not have power to try this case?

Mr. Davis: It is exactly that.

Justice Black: Don't you agree with me?

Mr. Davis: It is exactly that, Mr. Justice.

In the few minutes remaining, I would like to discuss the preceding cases in the Court of Appeals because we think they show clearly that prior to this case, the Court of Appeals said that it had power to review exactly that issue which you mentioned, Mr. Justice Black.

In U.S. Electrical Motors, which was the first case, in

January, 1946, it said that the criterion for review is, is the issue a jurisdictional one, and it has used that term since.

Under the rule of jurisdiction it has put the following kind of cases. There was a case in which the Court held that it had power, the Court of Appeals had power, to review a decision of the Tax Court that renegotiation could not be had for a part of a year rather than the whole year.

The Court of Appeals said, "No, we can review that decision, and we find that you, Tax Court, have power to renegotiate for part of a year as well as for a whole year." That was the Maguire case.

Then, there is the Armstrong case. In the Armstrong case, the contractor said he was a broker. He said, "I am not a subcontractor within the terms of the statute; I don't come within the Renegotiation Act at all."

The Tax Court said that he was. The case went to the Court of Appeals. The Government said that was not a jurisdictional issue. The Court of Appeals said, "Oh, yes, it is; it is a jurisdictional issue. We will decide whether this man was a subcontractor within the meaning of the Act," and proceeded to hold that he was, and affirmed the decision of the Tax Court.

That is, we think, exactly comparable to the issue here, whether a man is a subcontractor being comparable to whether he is a contractor.

Then there is the Lowell Wool case. The Renegotiation Act

says that you are not subject to renegotiation if your sales to the Government are less than half a million dollars, but it has an exception. It says if you and another company under common control have an aggregate of a half million dollars, then you are subject to renegotiation.

In the Lowell Wool case, the Lowell Wool Company had said, "We are not subject to renegotiation." The Government said, "You are, because you are under common control with the Nichols Company," an issue of fact, a pure issue of fact.

The Tax Court said, "Yes, you are under common control."

They appealed to the Court of Appeals. The Court of Appeals said, "That is a jurisdictional issue; we will decide for ourselves whether you, Lowell Wool, are under common control with the Nichols Company," and held that they were, and the opinion of the Court goes into all the facts which show that Lowell Wool and Nichols were under common control.

Then, there is the Ring case, which I mentioned before, and that was the issue, whether Ring had a contract antedating the Renegotiation Act. There were two questions in the case. One is, is this contract renegotiable as a matter of statutory interpretation? Does the Act, as a matter of statutory interpretation, cover existing contracts, and if it does, is that constitutional?

The Court reviewed both issues, the Court of Appeals. It said, "We have jurisdiction to review the issue of statutory interpretation and also constitutionality."

Then, there are three cases: Blanchard, Warner and Swasey, and Eastern Machinery cases, all involving the single issue, a similar issue, involving Defense Plant Corporation contracts, which I will not burden the Court with, but I want to point out that in each case there was the issue whether a certain contract was renegotiable under the Act, and the Government said, "Yes, they are." The contractor said, "No, they are not," and in each case the Court of Appeals reviewed the issue and determined that the contracts were renegotiable.

There have been certain cases denying review in the Court of Appeals and they, in our view, fit into this kind of pattern. They are all cases which involve the question of actual renegotiation, the actual determination of excessive profits; how much your costs have been, what your profits were in preceding years; and it may involve an issue of law.

For instance, one of the cases there had an issue of law as to what taxes were payable to Wisconsin by one of the contractors. It was an issue of law. But there, of course, it went to the question of what his costs were, whether he could deduct it or it had to be excluded, and the Court of Appeals said, "We have no jursidction to review an issue of that type. That is solely for the Tax Court."

Now, if you take the cases which the Court of Appeals decided in favor of jurisdiction prior to the instant case, and place them against the places in which they held against their own

jurisdiction, and left the issue to the Tax Court, you get a very clear rationale which I have been discussing, that is, when the issue is whether something is renegotiable, whether the Tax Court has power to consider it at all, the Court of Appeals will review and decide for itself whether the Tax Court has that power. But where the issue, on the other hand, involves the appraisal and computation and calculation of costs and profits and risks and things like that, that it will not review.

I stress again that it does not make any difference whether the issue is one of fact or of law, because if it is a jurisdictional issue in the former category the Court reviews under the usual standards of review, both questions of law and questions of fact.

And, as I have tried to point out, and as we point out, I believe, more fully in our brief, this demarcation accords with the strict language of the Act. It has found acceptation in Government contracting circles and also by contractors, and we believe that at this late day it would be wise for the Court and appropriate to accept those rulings of the Court of Appeals, but to insist that they be applied to the Government in this case as they have been applied to contractors in the preceding cases.

Justice Black: When was the first case decided that it could be reviewed?

Mr. Davis: 1946; January, 1946. It was before the Waterman case, a month before the Waterman case, Mr. Justice.

The Chief Justice: Mr. Finn.

ARGUMENT ON BEHALF OF RESPONDENT

By Mr. Finn

Mr. Finn: May it please the Court, apparently the main contention made by the Government in this case is that although the statute has been the same and unchanged since 1942, and although for some fifteen years all the minds of the Department of Justice felt that the statute precluded any review whatsoever of the Tax Court, they now seek to change their position, not on any legal grounds, not for any confession of error of law, but merely because it is now more convenient and suitable for the Government to be on the other side of the case.

You did not hear any suggestion that there was an error in the conclusions of law. At most, it was a statement that it could have been reasoned either way,"and for non-legal motives we choose the one which was the more favorable to the Government. Now the same balance exists, and for that reason we choose now to take the other side."

It seems to me, with all due respect to the Department, that the place to look for the law is not in the minds of committees or in the minds of a counsel. The simplest way to find the answer is to look at the statute under which the power was granted the secretaries of the various departments to renegotiate contracts.

The statute originally in 1942 gave the individual

secretaries of a very limited number of departments -- it was not a blanket power of renegotiation of all contracts during that time. It did not apply to all Government disbursements. It was limited originally to four or five, and eventually to eight departments, all named in the Renegotiation Act.

As that Act was originally passed, there was no appeal whatsoever, so far as the statute was concerned, from any decision of the Secretary. The Chairman of the Maritime Commission had similar power. He was included in the term "Secretary".

Then, in 1943, it was quite obvious that this discretionary power, which was merely by administrative fiat, to say, "Your excessive profits were X dollars, pay them back," and he did not even have to keep a record; he did not have to tell you why they were excessive, why it was not X plus or X minus -- simply with a stroke of the pen as he tried to do here, "You had X dollars profit; give them back or else."

Now, Congress recognized the injustice of that. There were extensive hearings at which business interests pleaded for review.

There was also some uncertainty and some doubt in the minds of the committees as to whether or not they should give a right of review from the secretaries' determinations -- not from the Tax Court's, from the secretaries' determinations.

Some thought it should be the Tax Court because it involved the words "excessive profits," and there was the analogy to

excessive profits taxes.

Others thought it should be the Court of Claims because they were going to be suing to get money back which had been exacted from the contractors .

But after all discussion -- and when the wind blew away, there remained a statute which said, without any qualification whatsoever, that:

"Any contractor or subcontractor aggrieved by an order of the Board" -- and "Board" is in the 1943 Act, and 1942 it was "the Secretary," and the second section of 403(e) included to cover the secretarial orders -- "any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits . . . may file a petition with the Tax Court of the United States for a redetermination thereof." And then the significant language which to us and to the Government, until the present case was final, is simply this:

"Upon such filing such Court shall have exclusive jurisdiction" -- now, that was the issue in the Waterman case in the opinion that was written by Mr. Justice Black -- "by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency."

Now, unless we are simply going to ignore the express unqualified language of the statute, there is no review. Congress

could not have expressed it more clearly.

Now, of course, counsel can say it should have been otherwise; counsel can say that it would have been better if Congress had made other provisions -- and even courts have done that occasionally. But when Congress says that there shall be no review or redetermination by any court or agency, how can we go beyond that?

Now, that question first came up in the Court of Appeals for the District of Columbia Circuit. The U. S. Electrical Motors case was a case where the Tax Court had on a procedural technicality of time -- whether it was one or two days either way -- had dismissed a petition for review, a petition for redetermination filed by a contractor under the Renegotiation Act, as amended.

The Tax Court threw out the petition right at the inception, on the summary motion of the Government, on the ground that it was not filed within the prescribed time period.

The issue in that narrow point was when does the first day start and when does the last day end. If it started one day he had a timely petition. If it started the next he was too late.

The Tax Court decided summarily that he was too late, and the contractor immediately took an appeal to the Court of Appeals for the District of Columbia Circuit.

Th held that their power under the Internal Revenue Code

had not been taken away by Congress as to jurisdictional questions because they said no agency can determine the limits of its own jurisdiction, and on that narrow question they referred that case back. They said, "Yes, we will review it, and that should go back to the Tax Court for redetermination of that jurisdictional issue."

Now, that is the basic law of the District of Columbia Circuit. It was taken over the opposition of the Government, and it is only in that Circuit that it has ever been accepted as the basic law.

In the Ninth Circuit, similar and other questions came up in the French case, and Government counsel persuaded that Court to disregard the rule of the District of Columbia Circuit.

That rule in the District of Columbia Circuit, they said, was wrong and erroneous because the statute precludes any review by the Court of Appeals on any grounds whatsoever. That was the position they took in French.

It is the position that they convinced the Court in French, the Ninth Circuit was the correct position, and they established by those two decisions -- you have the law of the country, so to speak, with the Ninth Circuit saying, "No review in any court on any act by the Tax Court," and the District of Columbia Circuit saying, "A limited review on questions of jurisdiction or constitutionality. Constitutionality went to the constitutionality of the act, as settled by

this Court in Lichter.

Jurisdictional questions were still further narrowed. They said a jurisdictional question is whether or not the individual contractor is subject to renegotiation, but a question whether or not a specific contract is subject to renegotiation is a question of coverage, and that became the law of the District of Columbia Circuit up to the time this case arose.

Now we come down to the present case, and the alleged inconsistency. There is no inconsistency at all between the decision of the Court of Appeals in this case or in any prior decision since the establishment of the law in this District of Columbia Circuit.

The Government purports to find such inconsistency, and purports to find a mistaken interpretation of this Court's opinion in Waterman.

Now, the Waterman case involved the identical situation. This is almost like Act 2 of the Waterman case, with the leading role having a new actor in it.

The negotiations were the same, the contract was the same, the form of the contract was the same and, as you will recall, Waterman tried to save time in 1946 by seeking a declaratory order that that contract was not subject to renegotiation because it was -- and nothing the Government produced can possibly change it from anything but -- a contract with the

British Ministry of War Transport and the British Government, and there is no provision whatsoever for renegotiating such a contract.

But this Court, I think quite properly, said, "No, go back and finish your administrative remedy."

But in the course of the argument, Waterman's counsel contended, "But wait, the Tax Court's jurisdiction is limited by the statute. It says the Tax Court may redetermine only the amount of the excessive profits, and our problem," said Waterman, "is not a question of dollar amount. Our problem is we are not even covered by the Act. Our contract is not a contract subject to renegotiation."

And this Court said, "Oh, yes, it is, because the term 'amount' is broad enough and necessarily includes the essential element of whether or not your contract is covered by the statute, and as to that coverage issue" -- and that is how the Court described it, the coverage issue, the very coverage issue that we have in this case -- "is within the exclusive jurisdiction of the Tax Court by order to finally determine." And while it was unnecessary at that time, of course, the rest of the same sentence is "and such determination shall not be reviewed or redetermined by any court or agency."

Now, when the case -- this case -- came before the Court of Appeals, the question raised immediately was, does the

petition for review present any question within the jurisdiction of this Court of Appeals as defined by this Court of Appeals to review; is it a jurisdictional or constitutional question?

Well, obviously, it was not constitutional nor was it jurisdictional.

This Court had said in Waterman that the Tax Court had jurisdiction to determine the very question sought to be reviewed. The respondent had sought the jurisdiction of the Tax Court under the Act, and the Government did not challenge it; it could not. It was obviously apparent that the Tax Court had jurisdiction to determine or redetermine this question of coverage.

Then the Court of Appeals said, "Well, now, our rule, which is only in our District, our rule is that we only have power to review jurisdictional or constitutional questions. There is no constitutional question. The question presented here is not jurisdictional, because the Supreme Court has already said in the Waterman case that the question presented here is a coverage question, and under our rules of the Court of Appeals for the District of Columbia Circuit," they said under their own rules, they could not review coverage questions.

They did not believe or say, as suggested in one of the briefs by our opponents, that this Court had forbidden them

to review. We all agree this Court has not yet passed upon it.

This Court has not yet said that the finality clause is to be read differently than its clear language. It is only the Government which is suggesting it.

The Court of Appeals pointed out specifically that this Court had reserved the point in Waterman, but they did say, "We apply the definition of coverage to the situation before us as determined by the Supreme Court, and under the Supreme Court's declaration, if you want to use that word, that the question of coverage is within the jurisdiction of the Tax Court. Therefore, there can be no dispute here as to the jurisdiction of the Tax Court, and we have nothing to review," and that was the basis for dismissing the Government's petition for lack of jurisdiction.

in(9)

Now, quite a bit has been said today about not reviewing the facts, but quite a bit has been said about the facts. I will not burden you with them to any great extent, but I wish to point out that the decision of the Tax Court was based upon some 200 hundred pages of stipulated facts and documents.

Among those documents were official transcripts of the records of the Maritime Commission contemporaneously with the making of these contracts between the respondent and the British Ministry of War Transport.

We pointed out to the Tax Court -- it was well briefed and well documented -- that the Maritime Commission itself had very carefully avoided any possible situation which would get them involved as a contractor in this case. They acted in the nature of a broker.

Brokers frequently, your real estate broker, your ship broker, frequently conduct all the negotiations for their principals, and then the principal signs the contract and performs it.

Now, that was the situation here. The Government had on occasions sought to reverse that. They said, "No, the British agency was the agent in principle."

Now, the case here is one where the Maritime Commission acted as the business negotiator for the British Ministry of War Transport. It negotiated the rate; it negotiated the form of the contract, and it provided in the contract that it would

in(9)

Now, quite a bit has been said today about not reviewing the facts, but quite a bit has been said about the facts. I will not burden you with them to any great extent, but I wish to point out that the decision of the Tax Court was based upon some 200 hundred pages of stipulated facts and documents.

Among those documents were official transcripts of the records of the Maritime Commission contemporaneously with the making of these contracts between the respondent and the British Ministry of War Transport.

We pointed out to the Tax Court -- it was well briefed and well documented -- that the Maritime Commission itself had very carefully avoided any possible situation which would get them involved as a contractor in this case. They acted in the nature of a broker.

Brokers frequently, your real estate broker, your ship broker, frequently conduct all the negotiations for their principals, and then the principal signs the contract and performs it.

Now, that was the situation here. The Government had on occasions sought to reverse that. They said, "No, the British agency was the agent in principle.

Now, the case here is one where the Maritime Commission acted as the business negotiator for the British Ministry of War Transport. It negotiated the rate; it negotiated the form of the contract, and it provided in the contract that it would

be between the British Ministry of War Transport and the shipowners, and that the contract would be subject to approval by the Maritime Commission under its authority to approve or disapprove contracts to aliens.

Well, now, obviously they could not very well approve a contract of their own as a contract to an alien.

Well, anyway, after the evidence was in, and considered by the Tax Court, we have the following -- the Tax Court, after weighing the evidence, made the following ultimate finding of fact, "The charter of VERMONT was neither a contract with the Commission nor with any other department named in the Renegotiation Act nor a subcontract under such a contract. The contract contained in that charter was only between petitioner and the Ministry of War Transport acting for the British Government."

The Commission did not intend itself to be a party by contract or to be the charter of the VERMONT.

In entering into the contract in the chartering of the VERMONT, neither the British Government nor the Ministry of War Transport actually acted for the Commission.

Well, now, in findings of fact a court which makes a study for a year, reads 200 hundred pages of documents, if it is just to be tossed lightly aside in the face of a Congressional statute where its determination shall be final, then the statute means nothing.

I would like to point out that the legislative history of

the Act does not in any way support a suggestion that the finality clause was not intended to be final.

The Act -- the history, to the contrary, indicates that Congress was asked to provide for judicial review, but in the committee hearings, as we have noted in our brief, they refused to grant a judicial review. They, instead, limited it to the Tax Court.

I think, gentlemen, that the case is one in which we only have to look to the statute to find out that the decision of the Court of Appeals was correct.

Thank you.

The Chief Justice: Mr. Davis.

REBUTTAL ARGUMENT ON BEHALF OF THE UNITED STATES OF AMERICA

By Mr. Davis

Mr. Davis: I have just a few words to say, if I may.

It is not just this case that the Government has had qualms about its previous position, about the lack of finality of Tax Court decisions; this is not something that was developed for this case. It has been something that has been germinated within the Department of Justice, as reviews of the Government's briefs in this Court and the Court of Appeals for the past nine years will indicate.

Counsel mentioned, just in closing, something that I would like to discuss, and that is, it is true that in 1945, after the passage of the Act, there was a suggestion that the statute be

amended to include judicial review.

Now, this was before the Court of Appeals rendered its decision in the U.S. Electrical Motors case, and it is quite clear that, I would say, in the colloquy in the hearings, the only thing that really appears is that some people thought there was review already, some people thought there were not. Some people were afraid of a too quick review, and some people did not think there should be any.

I think very little can be based upon that post-legislative history which occurred after the passage of the Act in 1944.

I also would like to point out that the Ninth Circuit case which counsel stresses so much, although it did say there could be no review in the Court of Appeals, gave a tremendous opening which the Government would like to avoid, if possible. It suggested that they could not review in the District Court.

Now, we think on exactly the issues here -- we think if there is to be review in courts, it is better to centralize review in the District of Columbia Court of Appeals, which has gained expertise in these cases, than to allow a review in all the ninety odd District Courts throughout the country; and so there is more to it than just a conflict between the Court of Appeals for the District and the Court of Appeals for the Ninth Circuit on review, because the Court of Appeals has adopted a channel of review that, we think, is appropriate, and the Ninth Circuit has suggested one which we think would lead to endless litigation

without uniformity of decision.

(Whereupon, at 4:15 p.m. the argument was concluded.)

- - -