1938

The Traynor Plan: The Kiplinger Tax Letter and Other Correspondence: National Tax Association Files, 1938 to 1939

Roger J. Traynor

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Although no proposed legislation along this line has as yet been introduced in the present Congress, the possibility exists that this will occur during the current session. One indication of the nature of changes which may be suggested is contained in an article by Roger John Traynor in the Columbia Law Review for December, 1938*, page 1393. The principal points in this article are summarized below.

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The protest, in writing and under oath, would contain:

(a) the grounds of protest, item by item;

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**Board of Tax Appeals**

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An important feature of the suggested procedure is that once the tax liability of a taxpayer for a particular year has been questioned, either by the Commissioner or by the taxpayer, the consequent consideration of the return would be conclusive as to the entire tax liability for that particular year, and after such determination any further deficiencies or refunds would be barred regardless of the non-expiration of the statute of limitations.
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February 9, 1939

Randolph Paul, Esq.
Lord, Day and Lord
25 Broadway
New York, New York

Dear Mr. Paul:

Many thanks for your judgment about the
Kiplinger Letter.

Sincerely yours,

Roger J. Traynor
JANUARY 30
1939

Mr. Roger J. Traynor
University of California
Berkeley, California

Dear Mr. Traynor:

Yours of the 26th is at hand.

Let me assure you that I shall be glad to read the article on "Administrative and Judicial Procedure for Federal Income, Estate and Gift Taxes - A Criticism and A Proposal". I feel sure that it will be beneficial when the bill which I have introduced at this session comes up for consideration.

With best wishes, I remain

Sincerely yours,

M. M. Logan

M. M. Logan
Mr. Roger J. Traynor,
School of Jurisprudence,
University of California,
Berkeley, California

Dear Mr. Traynor:

I acknowledge with thanks your letter of January 26th, advising that you are sending under separate cover a copy of the December issue of the Columbia Law Review, containing your article on "Administrative and Judicial Procedure for Federal Income, Estate and Gift Taxes - A Criticism and A Proposal."

With warm personal regards,

Sincerely,
Mr. Roger J. Traynor,
School of Jurisprudence,
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Berkely, California.

Dear Mr. Traynor:

I have received your letter of January 26, 1939, enclosing a copy of the December issue of the Columbia Law Review containing an article on "Administrative and Judicial Procedure for Federal Income, Estate and Gift Taxes - A Criticism and A Proposal."

I had already read your article and had hoped to get the opportunity of discussing it with you upon the occasion of your recent trip to Washington. Some of your suggestions are so far reaching that I would not attempt an offhand discussion of them. It is apparent that you have given most thoughtful study to a difficult situation. Your article has provoked a good deal of discussion among tax people in Washington, both within and without the Government, and in the long run there should come from it some beneficial changes in the administrative machinery.

Sincerely yours,

[Signature]

Chairman.
Department of Justice
Washington

February 3, 1939.

Dr. Roger J. Traynor,
School of Jurisprudence,
University of California,
Berkeley, California.

Dear Dr. Traynor:

The Attorney General has requested me to acknowledge receipt of and thank you for your letter of January 26, 1939, and for the copy of the December issue of the Columbia Law Review containing your article on "Administrative and Judicial Procedure for Federal Income, Estate and Gift Taxes--A Criticism and A Proposal," which you forwarded under separate cover.

With warm personal regards,

Sincerely yours,

JAS. W. MORRIS,
Assistant Attorney General.
February 6, 1939

Mr. Roger J. Traynor
University of California Law School
Berkeley, California

Dear Mr. Traynor:

I do not know how to tell you to answer the Kiplinger letter except I doubt whether you should make any answer. This is the opinion of Stanley Surrey with whom I talked last week, and I am inclined to agree with him. I believe he is trying to get the Kiplinger people to withdraw part of its statement.

If you do reply, I think you should direct your answer to the two basic errors made: (1) Your plan does not make the Commissioner's findings of fact final, and (2) you were not trying to eliminate the Board, but on the contrary are increasing its importance.

One would doubt whether the writer of the Kiplinger letter has ever read your article.

Very truly yours,

[Signature]

REP:A
Dear Sir:

Resurvey of the tax outlook to keep you current with the trend, to keep pace with the changing prospects and developments in Washington, as a guide to future events, is offered herein.

Congress already has begun to tackle many tax recommendations which are before it this session. Tax-exempt salaries and securities, social security, codification of the tax laws -- all are being considered. Detailed action on these issues will be commented on more fully later in this Letter, and progress will be reported in future Tax Letters.

A GENERAL tax bill is being talked behind scenes in Congress, despite the fact that most of the current publicity out of Washington relates to less important tax issues. Playing down the chances for tax revision later this session fits in with the strategy of the administration to avoid temporarily the problem which most here believe must be faced...higher taxes.

Hopeful attitude, now evident within Congress, is misleading. Many members publicly say that they would like to avoid increased taxes. That is true. But privately they indicate they believe that Congress will vote some sort of new and increased taxes this session.

A special message on taxes from the President is being awaited, despite the fact that he urged Congress in his January budget message to raise more revenue to cover farm and defense spending. Congressional leaders have stated, however, that they would not take the initiative on tax legislation unless the President prods them, and unless he tells them in more specific terms what he really wants.

Consensus is that the President WILL send a special tax message to Congress sometime around April 1. This view is expressed widely in both official and unofficial tax circles. There is much comment here that this will become more & more obvious as the session moves forward, as it becomes evident that Congress will continue policy of spending. Current speculation is that about one-half Billion added taxes will be the amount urged by the President.

Treasury now is working on various estimates, preparing lists of numerous subjects to see what tax changes will be necessary to raise one-half Billion in new taxes.

HOW raise the added revenue? There is no official indication as to just what Treasury may recommend to Congress, but current comment continues to put the emphasis on these possibilities:

Increased surtaxes, between $10,000 and $50,000, perhaps higher; get more money from estate and gift taxes by lowering present exemptions; possibly try to broaden the income tax base; adjust corporation taxes. But other surprise proposals not now mentioned probably will develop.
Undistributed profits tax: Opportunistic view now mentioned is that administration may not oppose repeal when general tax bill is up. Idea is that any substitute plan for this tax would raise corporate rates and bring in some of the added revenue which will be needed.

Important point is that Congress will be forced to do something about the undistributed profits tax, for it expires Dec. 31, 1939.

Excise taxes: Those which would be eliminated in June and July, if Congress failed to act, WILL be continued. Agitation for repeal and reductions in rates will come from the special interests affected, but this isn't the year to get such taxes lowered or eliminated.

Special import excise tax on all articles now on dutiable list is proposed in Connery bill (H.R. 2650) as means of protecting labor in the U.S. against low foreign labor costs. There are no signs that the proposal will make any headway this session.

Tax-exempt gov't salaries: House passed bill which would provide for reciprocal taxation of federal- & state salaries. Also would prevent retroactive collection from those now held taxable under court ruling. Bill will have a more difficult time getting Senate approval, that is, the provision for reciprocal taxing of salaries. Senate WILL approve portion preventing retroactive collection, however.

Tax-exempt securities: Array of witnesses appearing at hearings before special Senate committee during the week dealt another strong blow against the enactment of a simple bill. House Ways and Means Committee anticipated trouble on this phase of tax-exempt problem and postponed taking up the part dealing with securities.

There will be much surface activity in Congress about proposal to tax income from these exempt bonds, but there's very little chance that anything will be voted this session.

Special tax treatment to aid railroads probably will be offered when general tax bill is considered. The suggestion will be to provide relief for railroads by permitting them to buy in their own securities at less than face or par value without paying tax on the difference between par value and repurchase price as now is required under the law. A similar provision covering ALL corporations was voted in the Senate when 1938 Revenue Act was up last year, but was discarded in conference.

Social security: Treasury will appear at hearings to point out that cost of proposed amendments will substantially increase spending, to offset statements that government can go ahead and pay more benefits without having to get additional revenue for many years. It is obvious that Social Security Board proposals are resulting in "troubled minds" for the Treasury fiscal planners. But Treasury does not want to be put in position of opposing social benefits, which it regards as "threat" which may force administration to ask for "even more taxes."

Tax law codification has been finally enacted.

Limiting the maximum tax rate to 25% by constitutional amendment or by ordinary legislation: This is being held out as a possibility, is causing a stir among business men. But no one in tax circles here takes any such proposal very seriously.
A new plan for judicial and administrative handling of tax cases, offered in the Dec. Columbia Law Review by Roger J. Traynor, has caused much comment within Washington tax circles. Traynor advises the Treasury on tax matters, thus giving the article more than usual significance.

Our Jan. 14 Tax Letter covered main points of the Traynor plan. Since that time, however, additional points of view have been expressed. These are reported herein.

Fact-finding limitations seem to be most controversial point. Interpretation by many tax lawyers that the Commissioner would control the finding of facts in tax cases is challenged.

What is intended, say those who support plan, is that the facts and issues presented in the taxpayer's protest and by the Commissioner would bind each side respectively before appeal to the Board.

This would alter the present system which now permits parties to present new facts and issues after case goes to Board. It is not the intention to establish Bureau procedure as quasi-judicial set-up, nor to give finding of facts "administrative finality," however.

Objective is quicker and easier settlement of most tax cases. Contention is that now neither government nor taxpayer really knows all that should be known about the cases before trial actually is begun. Proposed procedure virtually would force both government and taxpayer to present entire case before going to the Board.

Refund claims: Many lawyers agree with Traynor recommendation that jurisdiction of such suits should be given to Board of Tax Appeals. Now they are initiated in the federal district courts. Only difference between deficiency assessments begun in the Board and claims for refunds begun in the courts is that in court cases taxpayer pays his tax first.

If plan should reach legislative stage, it would have rough road. It is evident that many lawyers would be opposed.

Incidentally, there is feeling within some government circles that the tax bar generally is inclined to jump to hasty conclusions, without determining just what is suggested.

Proposal to create an Administrative Court is worth noting now, in light of the interest over the Traynor recommendations which include a Court of Tax Appeals, to be the "last word" in most tax cases.

Logan bill (S. 916) proposes separate court to review decisions and final orders of government administrative authorities and tribunals, including, of course, the Board of Tax Appeals. Best current view is that this will not be enacted this session.

Walter T. Cardwell will be in charge of the Eastern Division, the next step in gov't's program to decentralize tax law administration, which will begin operations March 1 and cover Pennsylvania and New Jersey, with offices in Philadelphia, Pittsburgh, and Newark.

Hartford Allen will be the head legal officer of new division. Both men have had more than 15 years in internal revenue service.

Regulations covering the 1938 Revenue Act now have been approved and have been sent to the Gov't Printing Office. Copies will NOT be available for distribution for several weeks. We shall advise you when they may be purchased.
Corporate salary publicity: Under present tax laws, another list of salaries in excess of $15,000 would be made public. They would be corporate salaries paid during 1937 and, under ordinary circumstances, would be given publicity this year. This situation comes as a surprise to certain members of Congress who believed that the 1938 Revenue Act providing for publicity by the Treasury of salaries in excess of $75,000 settled this matter. But, the 1938 Revenue Act covers taxable years beginning AFTER Dec. 31, 1937. Thus 1937 salaries were covered under the 1936 Act, which publicizes salaries above $15,000.

Treasury was urged to interpret 1938 Act so that it would cover the 1937 salaries, but the Treasury balked. Thus -

Doughton bill to provide that Treasury publicize 1937 salaries above $75,000, instead of having Congress publicize those above $15,000 for same year, has been introduced. Meanwhile, Doughton has arranged for delay of salary publicity usually released early in January.

Bill will pass House, but probably will meet Senate opposition, especially from McKellar and La Follette. Final outcome not clear.

Ways and Means tax subcommittee has been appointed to take charge of general tax legislation which comes up before the full committee. This is the group which will do the "digging" in the preparation of a new tax bill. But the subcommittee probably will do little work until the President is more specific in his recommendations to Congress. Meanwhile, however, subcommittee members can have Joint Committee staff do any work they deem necessary.

Jere Cooper (Tenn.) has been named chairman of tax subcommittee. This places another pro-administration member at head of this tax group, for Cooper succeeds Vinson, who now is a federal judge.

But Cooper will be unable to pave the way for any tax proposals offered by the administration as smoothly as Vinson did in past sessions. New chairman is not so well grounded in tax fundamentals as Vinson was, say congressional colleagues.

In addition, political opposition within Ways and Means Committee will be stronger than for the past several years, because the Republicans have three more seats than last session.

Other members of subcommittee are important, for these are men who will be most influential in molding the tax laws:

McCormack (Mass.) is highly regarded by other House members, and will have much to say about tax legislation. He might have been chairman of the tax subcommittee, except for his opposition last session to some of the administration tax plans.

Boehne (Ind.), Disney (Okl.), Buck (Cal.), and Duncan (Mo.) are the other Democratic members of subcommittee.

Republicans named to the tax subcommittee are Treadway (Mass.), Reed and Crowther (both from N.Y.).

Activities of the tax subcommittee in formulating legislation which will apply to 1939 will be covered in future Tax Letters.

Yours very truly,

Feb. 11, 1939.

THE KIPLINGER WASHINGTON AGENCY

N.O.B. MATERIAL IS PROTECTED BY COPYRIGHT AND IS NOT TO BE DUPLICATED IN WHOLE OR IN PART IN ANY FORM WHATSOEVER.
"A new plan for judicial and administrative handling of tax cases, offered in the Dec. Columbia Law Review by Roger J. Traynor, has caused much comment within Washington tax circles. Traynor advises the Treasury on tax matters, thus giving the article more than usual significance.

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February 24, 1939.

Professor Roger J. Traynor,
University of California Law School,
Berkeley, California.

Dear Traynor:

I had quite a long talk with Mr. Sternhagen yesterday in which the subject of your Columbia article came up. I think Mr. Sternhagen disagrees pretty violently with your recommendations, particularly as to what he calls an inconsistency between concentrating the courts of appeal and spreading the Board all over the country. He thinks the Board could not function that way. I told him that so far as the Board was concerned your principal thought was not to diffuse the Board so much as to give it jurisdiction as to refunds.

I might have been able to do more with Sternhagen if I had not had to leave before we could cover this subject. Anyway I thought you would be interested to know that I had the conference. Mr. Sternhagen said incidentally that Mr. Arundell was also rather worried.

Sincerely,

[Signature]

REP: JK
March 16, 1939

Dear Roger:

I imagine you will receive your reprints very shortly. I have not yet been informed of the cost and consequently cannot bill you for your proper share. In order not to cross wires, will it be all right for me to send reprints to Milton Carter, Marrs, Wenchel, Beam, O'Brien, and a couple of other Treasury people that I may think of, on behalf of all three?

Best regards,

Sincerely yours,

Stanley S. Surrey

Professor Roger John Traynor,
School of Jurisprudence,
University of California,
Berkeley, California.

Copy to Professor Maguire
Dear Roger:

Enclosed is a draft of the talk I expect to give to the Tax Clinic. Will it be possible for you to look it over and give me your comments, with the hope that the comments may reach me at least by Wednesday of next week?

Best regards,

Sincerely yours,

Stanley S. Surrey

Professor Roger John Traynor,
School of Jurisprudence,
University of California,
Berkeley, California.
Prof. Roger John Traynor, of the School of Jurisprudence, University of California, Berkeley, California.

Dear Sir:

May I ask you to read the enclosed article on "Judicial Review in Taxation"?

I desire to call your special and particular attention to the quotation from Woodrow Wilson at the conclusion thereof.

Sincerely yours,

Geo. Stewart Brown
April 15, 1939

Professor Roger J. Traynor,  
University of California,  
Berkeley, California.

Dear Sir:

I have been reading in various places, most recently in the April issues of The Tax Magazine and the Bar Association Journal, about your suggestions for improving the procedure for determining federal income taxes.

To be quite blunt about it, and, of course, without first-hand knowledge of the facts, I should infer from what I have read that you cannot have a very adequate idea of what actually happens in the "run of the mill" adjustments of taxes between taxpayers and the Bureau of Internal Revenue. While (1) pressure to collect taxes is as great as it is, (2) revenue agents are rated as to efficiency, in part at least, for the additional taxes they bring in, and (3) the general capacity of field agents remains as it is, there is, I am satisfied after many years of experience, just about a "Chinaman's chance" of proper findings of controverted facts in negotiations between taxpayers and representatives of the Department. As to the conditions above mentioned which control in a large measure the actual disposition of most of the cases (1) there seems no prospect of less pressure to get revenue in the immediate future, (2) the spirit of rivalry of agents, for their own advantage, in trying to get more taxes is not something that is likely to disappear, and (3) the general capacity of revenue agents to find facts under the existing system is not likely to improve, much. Therefore, as I see it, the practical effect of what you are suggesting would probably be (1) even more wasted effort and expense of taxpayers in trying to get facts established with the Department, and (2) frustration because, in spite of such effort, the facts would not be properly developed short of such an impartial tribunal as the Board of Tax Appeals.

Although I fully realize the shortcomings of the present system, I cannot help feeling that in the long run it will not prove to be a constructive service either to taxpayers or to the Treasury to advocate a system under which facts would have to be found before a case gets out of the Treasury; because there is not now, and I do not think there will be, any opportunity for satisfactory fact finding procedure when both parties to the effort to find the facts are almost of necessity so partisan as to make practically impossible the spirit in which fact finding can be expected to be efficient.

Very truly yours,

E. E. Wakefield
Professor Roger J. Traynor,
University of California,
Berkeley, California.

Dear Sir:

I have been reading in various places, most recently in the April issues of The Tax Magazine and the Bar Association Journal, about your suggestions for improving the procedure for determining federal income taxes.

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Very truly yours,

E. E. Wakefield
April 19, 1939

E. E. Wakefield, Esq.
80 Federal Street
Boston, Massachusetts

Dear Mr. Wakefield:

If you have an opportunity to read the complete article in 38 Columbia Law Review 1393, some of the doubts set forth in your letter of April 15 should be removed. I should like to call your attention particularly to the second paragraph of note 51 appearing at page 1421 of the article.

Sincerely yours,

Roger J. Traynor

RJT: A
April 19, 1939

E. E. Wakefield, Esq.
80 Federal Street
Boston, Massachusetts

Dear Mr. Wakefield:

If you have an opportunity to read the complete article in 38 Columbia Law Review 1393, some of the doubts set forth in your letter of April 15 should be removed. I should like to call your attention particularly to the second paragraph of note 51 appearing at page 1421 of the article.

Sincerely yours,

Roger J. Traynor
In the general discussion over Administrative Law now going on, it may be profitable to consider the origin, history and development of the judicial review of the legality of a tax. This arose and was fully developed before the expression “Administrative Law” was ever used in this country.

In the first place the term “Administrative Law” may be somewhat misleading. It simply means “Public Law,” that which grows out of litigation between the citizen and his government, as distinguished from “Private Law,” the law which controls litigation between private individuals.

To the casual person the term “Administrative Law” may falsely suggest the idea of a court performing some part of the administration of government. That is a complete misconception. For clarity, then, the term “Public Law” is greatly to be preferred in any discussion of the subject of whether or not, and if so to what extent, the action of governmental administrators should be subject to court review.

When government was simple, before it assumed its present multitudinous duties and all pervading control of social problems, the suits between the citizens and their government arose principally concerning the incidence, and application, of tax laws. The administrative action of government officials in applying, assessing and levying taxes was the principal administrative action which citizens desired to have reviewed by the courts.

As the sovereign government was not suable directly without statutory permission and as, at that time, there were no statutes giving such review it required the ingenuity of the common-law lawyers to invent remedies to meet the situation and to promote the ends of justice.

It was always plain that when an administrative official misapplied a tax law, by including within the tax subjects or persons not intended by the legislature, or by imposing a rate or amount of tax higher than the law authorized, either by misapplying the facts which made the law apply, or by misconstruing the terms of the law itself, an injustice was done and the government treasury was enriched at the expense of the citizen by taking something which did not belong to it.

* A.B., Johns Hopkins University (1893), LL.B., University of Maryland (1895). Judge of United States Customs Court since 1913. Author of: The United States Customs Court (1933) 19 A. B. A. J. 333; Judicial Review in Customs Taxation (1933) 26 Law. and Bank. 263.
The common-law writs of mandamus and prohibition, the writ of right and the equitable writ of injunction, all invented or applied by the courts to control the illegal acts of public officials, as well as the illegal acts of individuals, did not fully meet the situation. They generally lay in the discretion of the court, and the court could not review a discretion in the official expressly granted by the statutory law, but could only correct an arbitrary abuse of such official discretion. For the purpose of giving a judicial review of the administrative act of collecting an illegal rate or amount of tax they were not fully effective. Something more had to be done.

The common law courts came to the rescue by sustaining the common law action against the tax collector himself which compelled him to pay to the citizen the amount of an illegal tax collected by him, whether it arose through his mistake in finding the facts which made the law applicable, or his mistake in construing the law. The former, of course, was just as vital and necessary as the latter.

In the United States, following settled British precedents the doctrine was first declared in its fullness by the Supreme Court in Elliott v. Sweartwout. The court here points out that, if in making payment to a collector, notice is given to him that the duties charged are too high, and that the party paying did so only to get possession of his goods, and a declaration is made by such party that he intends to sue the collector to recover the amount erroneously paid and so the collector should not pay it over to the Treasury, then certainly the party in question should have an action against the collector.

To hold otherwise would mean that no action would lie against a collector to recover excess duties paid to him, but that recourse must always be had to the government for redress. This would be carrying the exemption of public officers too far.

Later in Bend v. Hoyt the court concludes in effect that the law must be where an agent illegally demands and receives money, and then pays such money over to his principal, after notice not to do so, he is nevertheless personally liable for such money as was paid to him illegally.

1 Irving v. Wilson, 4 T. R. 485 (1791).
2 "The suit was originally instituted in the Superior Court of the City of New York by the plaintiff against the defendant, the Collector of the Port of New York; and was removed by certiorari into the Circuit Court of the United States." 10 Pet. 137 (U. S. 1836).
3 In Bend v. Hoyt, 13 Pet. 263, 267 (U. S. 1839), Justice Story said, "As to the first question, there is no doubt that the collector is generally liable in an action to recover back an excess of duties paid to him as collector where the duties have been illegally demanded and a protest of the illegality has been made at the time of payment or notice then given that the party means to contest the claim whether he has paid in the money to the government or not."
Mr. Justice Cardozo made some interesting comments regarding the historical development of the judicial remedy in taxation in *Moore Ice Cream Company v. Rose, Collector of Internal Revenue,* wherein he stated that, at common law, and under the Federal Statutes for many years, protest at time of payment was a condition precedent to the recovery of taxes. This rule was finally abolished by the *Revenue Act of 1924* which applied to all future suits (but not to suits pending). He pointed out further that this requirement of protest, when it was in effect prior to the statute, applied to suits against the government itself as well as the Collector of Internal Revenue and that in the latter case the United States was usually the genuine defendant, the liability of the nominal defendant being only a formality. *Thus the Government was unjustly enriched at the expense of the taxpayers when it held on to moneys collected illegally, with or without protest.* It is to be noticed that Judge Cardozo refers to customs cases and income tax cases interchangeably, rightly considering the principles equally applicable to both.

The trouble with those who maintain that the finding of the facts which make the tax applicable by the administrative officials should be binding on the reviewing court if there is any substantial evidence to support it (and there usually is some), is that they practically propose that the party defendant (or his subordinates, which amounts to the same thing) may bind the plaintiff taxpayer as to the facts without effective judicial review. That is obnoxious to the most elementary principles of justice. It violates the principle that no one can be both actor and judge in his own case. The judicial review remaining, whenever the case turned upon a mixed question of law and fact, which is generally the case in customs taxation and frequently true in other taxation, would be a sham and a farce.

4289 U. S. 373, 375 (1933).

5 Elliot v. Swartwout, 10 Pet. 137, 153 (U. S. 1836); Curtis's Adm'x. v. Fiedler, 2 Black 461 (U. S. 1862); Cheseborough v. United States, 192 U. S. 253 (1904); United States v. N. Y. & Cuba Mail S.S. Co., 200 U. S. 488 (1906).

6 289 U. S. 373, 378 (1933). Justice Cardozo continues on page 380: "As the law stood before later statutes, the taxpayer's protest was notice to a Collector that suit was about to follow, and was warning not to pay into the Treasury the moneys collected. Elliott v. Swartwout, *supra;* Smietanka v. Indiana Steel Co., 257 U. S. 1, 4. Statutes first enacted in 1839 (Act of March 3, 1839, c. 82, § 2, 5 Stat. 348) and progressively broadened (R. S. § 3210, c. 26 U. S. C. § 140), made it the duty of the Collectors to pay the money over to the Government, whether there had been protest or no protest. At first this was thought to have relieved them from personal liability (Cary v. Curtis, 3 How. 236; Smietanka v. Indiana Steel Co., *supra*), but later acts of Congress establish a different rule, though maintaining the duty to make remittance to the Treasury. Philadelphia v. Collector, 5 Wall. 720, 731; Curtis's Adm'x v. Fiedler, 2 Black 461, 479; Collector v. Hubbard, *supra;* Arnson v. Murphy, 109 U. S. 238, 241; 5 Stat. 727; 12 Stat. 434, 725, 729; 12 Stat. 741, § 12; 13 Stat. 239; 14 Stat. 329, § 8."
Only in those rare cases where the facts are admitted and the litigation turns solely upon the construction of the language of the law would the citizen's rights be protected and preserved.

Those early Supreme Court cases where the principle was declared, involved customs taxation, then the main source of our Federal revenue. The principle necessarily applies, however, to all forms of taxation. It carries with it a right to a jury trial on the facts.

While statutory remedies have succeeded it since 1890 in customs taxation by direct suit against the United States, an equivalent action to recover illegally collected income, estate and other taxes with a jury trial may be brought in the United States District courts today.

Thus the public law to permit review of governmental action in levying illegal taxation developed early as a substantive proposition in a class by itself. Such judicial review is vital in a government of law constitutional in form, as distinguished from a totalitarian government where the citizen has no rights which the government is bound to respect.

Without it, Frank J. Goodnow, former President of Columbia University and of Johns Hopkins University, says that constitutional government is impossible.

The judicial review from the findings of the so-called independent agencies of Congress, such as the Interstate Commerce Commission, the Federal Trade Commission, the Labor Relations Board, the Tariff Commission, and the like, is very limited in scope. This is because they carry out delegated powers legislative in character. They fill in the legislative details and apply to particular situations a legislative discretion in furtherance of the general indefinite legislative policy declared by Congress.

Judicial review of the action of the above agencies and their factual determinations is usually confined to constitutional questions, which are few; and to violations of the statutory requirements in procedure, including a fair hearing. The courts cannot review the weight of the evidence upon which their findings are based but can only set them aside as being purely arbitrary.

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7 See the writer's The United States Customs Court (1933) 19 A. B. A. J. 333; 82 Cong. Rec., Part 3, Appendix, December 11, 1937, at 411.
9 Goodnow, Principles of Constitutional Government (1st ed. 1916) 244.
10 Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294 (1933); L. & N. Ry. v. Garrett, 231 U. S. 268; 305 (1913); Simpson v. Shepard, 230 U. S. 354 (1913); Arizona Grocery v. Atchison Ry., 284 U. S. 370 (1932), at page 386 Mr. Justice Roberts says... it speaks as the legislature, and its pronouncement has the force of a statute.
Whatever justification there may be for that limited review, on principle it cannot apply to the administration of a tax law. The administration of tax laws consists simply in collecting the rate or amount of taxes which the legislature has imposed. The tax collector does not act under a delegated power, legislative in character, to levy taxes as the agent of Congress under a delegated Congressional rule, as does the tariff Commission under the Flexible Tariff and the President in negotiating a reciprocity treaty. The collector simply collects the taxes in rate or amount as fixed by Congress in the law itself. He does not make the law. He does not change the law even in the remotest detail.

If then his discretion in construing it, or in finding the facts which make it applicable, is binding, without any right to the disgruntled taxpayer to a day in court to test the accuracy of his findings, both as to law and fact, before a court independent in tenure of the executive, which must weigh the evidence as well as construe the law, the tax collector becomes an autocrat instead of an administrator. The taxpayer has no protection from the collector's illegal action whatsoever. The taxpayer in such circumstances must pay what the official demands from him whether the legislature has taxed him or not.

As La Ferrière says, before the official the citizen can only beg and complain. Any relief he obtains is a matter of favor and grace. When he gets before a court, however, he asserts a right to be treated according to the terms of the law and according to the facts which make the law applicable, and demands that his rights be respected by a judgment of the court in his favor.11

That denotes the difference between a government of law and a government of men, between a free government and one under which the citizens are not free.

Denial of the judicial review in taxation would set up autocracy in its worst form, applying the principles of a totalitarian government. It would amount to taxation by administrative fiat instead of by law. As taxation is the power to destroy it would indeed establish a supreme omnipotent bureaucracy. This is equally true no matter what supposedly expert advice the tax administrator takes before acting and no matter how full and free a hearing he, or his subordinates of limited tenure, vouchsafe to the begging and complaining taxpayer.

After all he, or his subordinates acting for the Government, are virtually the defendants when the matter gets into court, and so far and to the extent that his action on either law or fact binds the court and limits the review, he becomes actor and judge in his own case.

11 *La Ferrière, Traité de la Jurisprudence Administrative et des Recours Contentieux*, pp. 6, ¶ 2 (1896).
The dangerous ground which we are approaching is vividly set forth by Coleman Silbert in the January, 1938 GEORGETOWN LAW JOURNAL in an article entitled "Federal Taxation Remedies and the Doctrine of Sovereignty." At page 224 he mentions the recent suggestions of some legal writers that the remedies of all taxpayers be curtailed. This would be a calamity. The public should be aroused to the danger thus threatened, presumably in the name of fancied efficiency in government.

No government could be described rightly as either efficient or honest which denies to its citizens all legal remedy for the return of illegally collected taxes. It is admitted that believers in a totalitarian form of government would not concur in that statement.

As the functions of government continue to increase, and new forms of taxation multiply, the question of the judicial review of administrative action, and particularly the question of maintaining in their full integrity the legal remedies to compel the return by government of illegally collected taxes, becomes of tremendous importance in a government of law such as ours.

The denial of a full, adequate and complete judicial review of either questions of law or questions of fact in taxation cases becomes more disastrous in its effects upon the citizens of a free democratic state as governmental functions continue to expand and multiply.

The fact that under the doctrine of sovereignty the government may have the "power" to deny such relief to its citizens is not a sound public reason for exercising such tyrannical power. It is hardly a question of policy or expediency as some seem to think. It seems to the writer to be a simple question of right and wrong.

Mr. Justice Story stated in effect in Cary v. Curtis that the most important power of a free people is that of levying taxes and duties; that if this power is to rest simply with an executive functionary of the government, who has discretionary powers from which there is no appeal to any judicial tribunal, then certainly, there is no security whatsoever for the rights of citizens. Furthermore if Congress can, within its constitutional authority, vest such arbitrary power of interpretation in an executive functionary, there is hardly a limit to the scope of legislation which may give further such power to the executive department, even to the executive himself. Certainly it was not the intent of Congress to deprive the citizen of such an important remedy and so leave him without any adequate protection.

Justice Story points out further that in such a case the only place of appeal will be to the Secretary of the Treasury. None of the rules of law will apply and even though the Secretary acts in a fair and just manner, as he naturally would, there is nevertheless a usurpation of judicial authority by the executive branch of the government. In a sense one entire field of controversy will no longer be tried by the law courts, but rather be decided by a single man. And lastly, discounting all of the above, the question arises can one man decide a problem so fraught with difficulties, and in which the line of demarcation between various articles and fabrics, for instance is so fine and sometimes obscure? Certainly in such complicated matters a judicial inquiry is more fitting than the discretion of one man.

Justice Story summarizes in his conclusion, that it is a known fact that the Secretary of the Treasury issues his instructions in detail to the various collectors of the customs setting out his interpretation of the various revenue laws. Therefore, the right of appeal to the Secretary is fruitless, as he has already made known his ideas and in the great majority of the cases the collectors follow his instructions in detail. Thus everyone knows in advance how the Secretary will decide. And since the constitution looks to the courts for the interpretation of the laws, it is illogical now to rest that right in an executive officer. In the opinion of Justice Story, Congress never intended to pass any statute by which the courts of the United States and the courts of the several states should be excluded from all judicial power in the interpretation of the revenue laws, and substituted for these courts an executive functionary. This would in effect deprive the citizen of rights, privileges, and liberties to which he is entitled under our system of government.

Although what Justice Story had to say in the above opinion was filed as a dissent it became the law by declaratory action of Congress thirty-six days after its delivery. It is the most forceful statement of the absolute necessity of an independent judicial review in taxation to be found anywhere.

Dr. Frank J. Goodnow, former President of Columbia University and former President of Johns Hopkins University, also adds weight to the argument that the reviewing court must be independent of executive control if constitutional government is to be preserved:

"We may say, then, that one of the fundamental principles of constitutional government, as seen in the law of modern European States is:

"First—The existence of judicial bodies independent in tenure of the executive; which shall,

"Second—Apply the law regulating the relations of individuals one with another—usually called the private law—by deciding the cases brought before them; and,
“Third—Shall apply in the same manner the law regulating the relations between officers of the government and private individuals—usually called the public or administrative law.

“Whether a formal distinction is made between the private and the administrative law, and whether these two functions are discharged by the same courts, are matters of comparatively little importance. The important thing is that the courts which have these powers shall be independent of the executive. Without such independence it may be said that constitutional government is impossible.”

In conclusion, Woodrow Wilson in his lectures at Princeton stated the necessity of such an independent judicial review in a fashion which seems to be a prophetic answer to the present day advocates of an authoritarian, as distinguished from a constitutional, form of government:

“A man is not free through representative assemblies, he is free by his own action, in his own dealings with the persons and powers about him, or he is not free at all. There is no such thing as corporate liberty. Liberty belongs to the individual, or it does not exist. And so the instrumentalities through which individuals are afforded protection against the injustice or the unwarranted exactions of government are central to the whole structure of a constitutional system. From the very outset in modern constitutional history until now it has invariably been recognized as one of the essentials of constitutional government that the individual should be provided with some tribunal to which he could resort with the confident expectation that he should find justice there, not only justice as against other individuals who have disregarded his rights or sought to disregard them, but also justice against the government itself, a perfect protection against all violations of law. Constitutional government is par excellence a government of law.”

13 Goodnow, Principles of Constitutional Government (1st ed. 1916) 244.
14 Wilson, Constitutional Government in the United States (1st ed. 1908) 16, 17.
April 19, 1939

Honorable George Stewart Brown  
United States Customs Court  
201 Varick Street  
New York, New York

Dear Judge Brown:

Thank you very much for sending me a reprint of your article on Judicial Review in Taxation which I have read with much interest. I should like to call your attention to the second paragraph of note 51 of the article in 38 Columbia Law Review at page 421 which makes clear that the article does not advocate that the Commissioner's findings of fact should be binding on the Board if supported by substantial evidence.

Sincerely yours,

Roger J. Traynor
May 2, 1939

Professor Roger J. Traynor,
University of California
School of Jurisprudence,
Berkeley, California.

Dear Sir:

I have read your article in the Columbia Law Review on Administrative and Judicial Procedure for Federal Income, etc. Taxes. Nothing in it leads me to any different conclusion from that which I expressed in writing you recently, viz., that you do not seem to have a sufficient familiarity with the way (as I expressed it) the "run of the mill" cases of taxpayers go.

Ideally, the field agent should be the representative of the Department best able to find facts bearing on the liability of taxpayers. He has access to the accounts and records of the taxpayer, has the opportunity informally to discuss the case with the taxpayer, his employees and his representatives, and in many cases has sufficient local background so that he knows either the taxpayer or his line of business, or the particular problem under the local conditions and applicable law.

Actually, however, while he remains in the work classification in which he now is, with consequent range of compensation, and while he is, as he now is, under continuous pressure, both by formal rulings and otherwise, to find additional tax wherever possible, what actually happens is that he reports, in many cases, not the actual facts, but a garbled or erroneous version of them as related to the indicated additional tax. It is largely not his fault, but rather the result of the conditions under which he works.

When his report is submitted for consideration in the next stage of proceedings of the Department, the taxpayer is under a very great handicap, as I am sure you would realize if you were all the time dealing with cases as they come up on agents' reports. The next representative of the Department almost inevitably starts with a bias in favor of the report coming to him from the field agent. The conferee lacks the opportunities of the field agent for directly informing himself of the facts. In consequence, in very many instances cases are settled not on the facts but by a compromise between the taxpayer and the conferee not merely as to the principles involved but as to the facts assumed for the purpose of the compromise.
If and when the Department becomes willing to take its position as the representative of the community, including the particular taxpayer, and not as if it were an opposing party in a private controversy, and if and when the standard of capacity and compensation of field agents can be raised to a considerably higher level, most of the difficulties in cases, other than those involving necessarily new and controversial questions of law, could best be disposed of in the first contact between the taxpayer and the Department, viz., with the field agent.

In the meantime such a procedure with reference to determination of facts as you propose would, I am confident, lead to much fruitless expense and vexation for the taxpayer. He would be in the position of struggling against findings of fact by the Commissioner which would be likely to be far from judicial determinations, or he would, in despair of getting a proper result, continue, as he does now, in many cases, to pay more than he should because he cannot with the present Department machinery reach a basis for a proper conclusion. Under these circumstances, in the relatively few cases that taxpayers find it necessary or are willing to appeal beyond the Treasury, it seems to me that the more important thing is to give an opportunity before an unbiased tribunal to find what the real facts are and to determine the tax properly, rather than, as you suggest on page 1419 of your article, to do away with the possibility of a real correction of the liability by the independent tribunal.

I hope you will understand that I am writing you again not because I have any desire to make captious criticism of your proposals. I realize fully the shortcomings of the present system. I feel, however, that we shall not get ahead by trying to make improvements as if the conditions in actual operations between the Treasury and the taxpayer were what they are not. It seems to me that it is vital to recognize the necessary shortcomings of administrative procedure as we are able to have it and not, in a matter as important as taxation, to shut off the opportunity of the taxpayer who has the patience and the courage to go after it, to get an unbiased determination both of his state of facts and the application of the law to them. In theory, of course, any determination of facts by the Commissioner under the protest would be subject to correction, but in practice I am satisfied the taxpayer needs a free hand to establish his real liability before the Board both on the facts and on the law.

Very truly yours,

E. E. Washfield