

DISCUSSION

by J. SYDNEY SALKEY†

May I state at the outset that any views I express do not necessarily represent those of the Treasury Department. It has been indeed a privilege to hear Mr. Surrey, and I only regret that the time allotted is too short to permit me to pay Mr. Surrey the proper tribute. I wish, however, to say that I greatly enjoyed Mr. Surrey's talk and found it most informative. In his introduction Mr. Surrey stated that the administration of revenue legislation necessitated having "a fearless personnel, willing to make right decisions regardless of revenue lost." This is undoubtedly a step in the proper direction, even though not a cure-all.

In order properly to understand the personnel of the Bureau of Internal Revenue one must make a review, even though a hasty one, of the history of the Bureau of Internal Revenue. Our income tax laws are basically and philosophically new in the body of the law. Income tax, as we currently know it, eliminating all consideration of the Civil War income taxes and the brief legislation in the 1890's, goes back only to 1913. By a stretch of the imagination, we may carry it back as far as 1909, when there was imposed the first corporate excise tax, the tax being based on corporate income. After all, our whole experience can, therefore, be considered as being limited to thirty-one years. Prior to the enactment of income tax laws, our federal revenue was derived from custom duties and excise taxes on tobacco and liquor. As a result the personnel of the Bureau of Internal Revenue was engaged primarily in the following activities: One group was engaged in gauging whiskey and enjoying the hospitality of legal distilleries; the second group was engaged in licking stamps for cigar boxes and cigarette packages; while the third group went up hill and down dale searching for illicit stills.

When the income tax became effective, the administration thereof was placed in the hands of such personnel, and from that personnel we have built up the present administrative group. I do not mean, for a moment, to state that the present personnel is not composed of a different character of individuals with

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different experience, but I will state that the historic impress of the functions of the Bureau of Internal Revenue prior to the enactment of income tax laws has left its mark. The Bureau, having been a tax-collecting agency, still functions as such, without perhaps the proper regard always being given to the quasi-judicial functions which the administration of an income tax law requires.

Enough, however, for preliminary observation. The first part of Mr. Surrey's discussion is relative to the steps that have recently been taken for the decentralization of the Bureau. He dwells particularly on the decentralization of the Technical Staff. I am fully in accord with this move and believe that a very constructive step has been taken. It certainly has met with the acclaim of the taxpayers throughout the country, and has likewise met with the plaudits of tax practitioners throughout the country, with the exception of those practicing in Washington, who for obvious reasons objected greatly to the decentralization move. I feel that the move towards decentralization is particularly laudable in this day and age when we are moving towards totalitarianism, as it means that the Government is, to a certain extent, coming to its citizenry rather than requiring its citizens to come to the Government. I am, however, of the opinion that the decentralization has not cured some of the procedural defects.

May I illustrate by setting forth the procedure which is currently followed in tax cases: first, an examination is made of the taxpayer's books and records by a Field Agent, with whom, of course, either the taxpayer or his representative must of necessity confer. An agreement may be had in whole or in part. The Field Agent then takes his report up with his Reviewer. The Reviewer either agrees or disagrees with the Field Agent, and a further conference may be had with either the examining Field Agent or with the Reviewer. If an agreement is not reached at that time, a deficiency letter is mailed the taxpayer; protest is filed and a further hearing is had before a Conferee in the Revenue Agent's office. If an agreement is not then consummated, a further hearing can be had before the Technical Staff.

Now my objection to the present procedure is briefly this: according to Mr. Surrey two-thirds of the findings of the Revenue Agents and the Conferees are reversed by the Technical Staff in favor of the taxpayers. There must, therefore, be some-

thing vitally wrong with the efficiency of the Revenue Agent's office and the Conferees, or there is something amiss with the Technical Staff, in that they are too lenient in the interpretation of the law. I feel, however, that the criticism, if any, can be leveled at the fact that the Revenue Agents and Conferees are not vested with the necessary power and authority properly to conclude a case. The Revenue Agents are efficient, fearless, and, in most cases, as well versed as are the men on the Technical Staff. At least my experience with the local personnel of the Revenue Agent's office shows this to be the case; yet the Revenue Agents and the Conferees in the local Revenue Agent's offices are hide-bound by regulations and by the requirement of submitting matters in the application of the law and regulations, in which they should have discretionary powers, to higher authority. Under the current system you may have a hearing before the Technical Staff as aforementioned. It can be waived, it is true; but, if you desire a further discussion of the merits of your tax protest prior to appeal to the Board of Tax Appeals, you must present your case before a member of the Technical Staff who is the first person in all of the complicated procedure to this point having the power and authority to compromise or settle many issues. It is my point that if we are to have effective decentralization, power and authority should be vested in the Revenue Agents and their subordinates, so as to make it unnecessary for a further hearing to be had before another representative of the Commissioner of Internal Revenue who is beholden to the same authority as was the Conferee in the Revenue Agent's office. After the initial conference, if another hearing is desirable because of the inability of the taxpayer and the Government to agree, such conference should be with a representative of an independent agency. This agency need not necessarily be the Board of Tax Appeals but may be an agency similarly established, which would be completely separate and distinct from the Bureau of Internal Revenue, which, as I have previously stated, was primarily established for the collection of taxes.

The advantage of such an agency would be in permitting a conference before and with individuals whose judgment is not colored by tax-collecting functions, and in affording a conference free from all legal and procedural frills, a hearing where the taxpayer's representatives could discuss the case in a manner

somewhat similar to that of the pre-trial hearings now had in the civil courts in certain sections of the country. If a settlement could not be reached at such hearing, it might at least have the advantage of whittling down the issues and of stimulating the entering into of stipulations of fact, so as to make the actual hearings before the Board of Tax Appeals simpler and of shorter duration.

by WILLIAM R. ORTHWEIN†

The only reason that I am listed as a tax expert on this program is for the same reason that Mr. Elson stated last night, that is by decree of Dean McClain. When the Dean asked me to appear on this program, he told me that it wasn't so necessary for me to make an argument, but rather that my job was to promote argument. That ought not to be very hard with a group of lawyers.

First of all, I want to express my appreciation to Mr. Surrey for his very able and thorough treatise, which I read night-before-last and had great pleasure listening to again today. I think he has covered a vast amount of ground and given you a very clear picture. However, I am going to take exception to one thing in this treatise, a matter which he mentioned only lightly in opening his address and thereafter totally ignored, and that is the importance of the attitude and spirit of the department toward the taxpayer. When you vest in an administrative body legislative, administrative, and judicial power, I think that the success or failure of that body will depend not so much upon its efficiency as upon the restraint with which it exercises those powers and the fairness it shows to the individual citizen. Administrative law, as we know, has come to stay; but whether it will be successful or not will depend, I think, upon the attitude and good will of that body, rather than upon its efficiency.

I am not a tax expert, and my experience before tax boards has been very limited. I am also followed by Mr. Lowenhaupt, who has probably had more experience in this line than any other lawyer in the City of St. Louis, and so I am going to limit myself to just one or two general observations.

First, it seems to me that one of the troubles with the income

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tax department to a large extent is due to the fact that capital gains ever since the inception of the income tax laws have been treated as income when in truth they are not. This has led to many complicated problems and injustices. I think the complaint of the average taxpayer, particularly the small taxpayer who represents the great bulk, is that he does not have an opportunity to have a hearing before an impartial body. He feels that all the hearings he has before the regular tax authorities are hearings before both judge and prosecutor. The amount involved usually does not enable him to take his case either to Washington or to court. Therefore, I am very heartily in favor of this decentralization idea of Mr. Surrey's. I think, however, that it should be carried farther.

I, therefore, offer this one suggestion for what it is worth. It seems to me that on account of the vast number of tax claims, an administrative burden which I fully appreciate, some segregation of the handling of income tax controversies could be arranged on the basis of the amount of money involved. In other words, there might be established lesser tribunals whose jurisdiction would be limited in amount, just as in our Justice of the Peace Courts. Today you have your Board of Tax Appeals. In order to appear before that Board you have had to go to Washington. The traveling expense from St. Louis is about \$100.00 for the round trip. That Board, as I understand it, handles some seven or eight thousand appeals a year, compromising six or seven thousand and trying about a thousand. Obviously one Board cannot attend to all of them. If all claims of less than \$1000.00 could be heard and decided either by special commissioners of that Board or perhaps by separate tax boards of appeals located in each of the different districts, a great deal I think might be gained. Such lesser bodies, it seems to me, could easily co-ordinate and keep their decisions in harmony with those of the principal board in Washington, especially if the latter were given the power of review or if their decisions were subject to the principal board's approval.

The suggestion I am making, of course, is not a very concise or a very complete one. I just give it as a suggestion of how the efficiency of handling so many thousands of disputes might be increased. I feel that today the small taxpayer has no day in Court. He pays and pays and pays because he simply cannot

afford to take the matter farther. At any rate, I hope my suggestions may promote some discussion which, after all, was all I was asked to do.

by ABRAHAM LOWENHAUPT†

I have listened to Mr. Surrey's address with great interest but I believe that neither his nor Professor Traynor's analysis is addressed to the root of the difficulty. I believe that the real difficulty does not lie in the field personnel or administration, but in the upper and controlling branch, in the fact that there is no effective head of the administrative heads of the Treasury. The lawyers and superior officers do not abide by the rules or regulations they make. They do not harmonize one with the other. Lawyers in responsible positions in the Treasury or Justice Department are allowed to persist in contentions as to the proper construction and application of the statutes, notwithstanding that such contentions are opposed to the Treasury's rules and regulations. Consistency and uniformity in the application of the statutes can only be reached by fixed rules and regulations uniformly applied, and this attitude of the superior officers in the Treasury Department destroys all possibility of certainty, confidence or uniformity.

If a decision of the Board of Tax Appeals, lower court or court of appeals is unsatisfactory, they announce that they refuse to accept it and frequently they refuse proper obedience to the Supreme Court's ruling. I was told once, when I cited the Supreme Court's decision in the *Bull* case¹ that the Treasury Department was following the Bull case only where the taxpayer's name is Bull, and while this statement was possibly made partly in jest, the statement was nevertheless true in fact and the same principle in varying degrees rules through the whole higher administrative procedure.

The uncertainty resulting from the conflict between the Treasury and the courts, in which each persists in opposite constructions, is apparent. The Treasury persists in its construction of the statute, notwithstanding many defeats, until in many cases finally the courts agree.

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1. (1935) 296 U. S. 247.

In a recent case in the court of appeals, *Rothensies v. Cassell*² Judge Clark said:

* * * Our argument notes indicate that counsel (for the government) finally abandoned this uncongenial task and frankly stated that he agreed with the minority of the United States Supreme Court in *Helvering v. St. Louis Union Trust Company*, above cited, and *Becker v. St. Louis Union Trust Company*, above cited.

* * *

Why we cannot be so persuaded needs no elaboration. Counsel may in the vernacular pay their money, and take their choice. The choice is not one for an "inferior" Federal court. It must await the judicial miracle of the loaves and fishes, four becoming five.

In the matter just referred, the Treasury regulations had accepted the Supreme Court's former rulings. But individual and isolated lawyers in the Treasury and the Department of Justice contended not only against the Supreme Court's decision but also against the Treasury's rulings. By persistence, with the changed personnel of the Supreme Court, these objectors finally won, four became five, and *Helvering v. St. Louis Union Trust Co.*, and *Becker v. St. Louis Union Trust Co.* were overruled. During the interval many taxpayers settled their affairs upon the basis of the Treasury regulations, and the tax resulting from the Supreme Court's overruling of its former decision seems unfair.

There is a citation in Mr. Surrey's address with which I have had a very close experience and which is very illuminating. Mr. Surrey says, concerning conflicts between various circuit courts of appeals:

* * * Often a decade may pass before uniformity is restored through a decision of the Supreme Court. For example, in 1930 the Board of Tax Appeals decided that a loss realized by a taxpayer on a sale of property to a corporation wholly-owned by him was not a deductible loss. In 1934 this decision was reversed by the Court of Appeals for the District of Columbia. The Supreme Court denied certiorari. Thereafter the ninth, eighth and second circuit courts of appeals rendered similar decisions. The Board bowed before these authorities and likewise allowed such losses. But the Commissioner persisted in his view that the losses were not deductible. In 1939 his persistence bore fruit when the circuit

2. (C. C. A. 3, 1939) 103 F. (2d) 834.

court of appeals for the seventh circuit decided a case on a theory contrary to the other decisions. The Supreme Court consequently granted certiorari to review the question and in 1940 rewarded the Commissioner's tenacity with a decision denying the deductibility of such losses. But between the consideration of the issue by the Board and its final determination by the Supreme Court was a decade of uncertainty and litigation.

Mr. Surrey's statement as to what the Board of Tax Appeals held in 1930 is taken from the Supreme Court opinion³ in which it was necessary to find such a ruling at some early date in order to assign a reason for not conceding the justice of the application of the rule of *stare decisis*. The Court said:

The Bureau of Internal Revenue has insistently urged since February 18, 1930, the date of the Board of Tax Appeals' decision in *Jones v. Helvering*, that a transfer from a taxpayer to a controlled corporation was ineffective to close a transaction from the determination of loss.

This is a strange reason in itself. Moreover, an examination of the Board's opinion in the *Jones* case does not disclose that the Board made any such ruling or even that the Treasury made the contention which the Supreme Court says that the Bureau of Internal Revenue has consistently urged since that decision and which Mr. Surrey now cites as the beginning of that contention. The Board in at least one decision before 1930, not following but before the decisions in the courts of appeal, held the loss deductible.

It seems to me there was not any conflict or uncertainty in this situation. The Treasury Department had conceded it as far back as 1921. The Board of Tax Appeals and the courts were all harmonious upon the question. Only the Treasury changed its attitude, not by regulation, but in litigation. The Treasury, when it was ready, went before Congress in 1934, and Congress changed the law thenceforward. But this did not satisfy the Treasury Department. The uncertainty in the law prior to 1934 in this particular instance came from the private opinion of certain new lawyers in the Treasury Department, an opinion of which they ultimately obtained acceptance by a divided court. Although there were taxes involved—deficiencies in the particu-

3. *Higgins v. Smith* (1940) 60 S. Ct. 355, 358.

lar cases heard by the court, upon any proper analysis of the situation, the Treasury Department generally obtained a proper amount of taxes, even under the allowance of the loss against which it was contending.

The point that I want to make is that most serious conflict and uncertainty in the law and administration results usually from the influence in the Treasury Department of stubborn lawyers who persist and persist, against all opposition, in urging what they call "the fair construction of the statute," until they tire out the opposition. There are, of course, cases where it is proper for the Treasury Department to refuse to accept and abide by decisions of the lower courts in the further application of the statutes until such questions have been finally determined by the Supreme Court. These cases make for uncertainty also. But much the greater uncertainty has come from the unwillingness of the Treasury Department to seek its remedy in Congress and to adjust its affairs and its administration to fair decisions of the court, by which the revenue is not and cannot be harmed. With the change of court personnel, this effort has grown more persistent and more successful.

It seems to me there are many serious objections to the drastic changes in tax procedure proposed by Mr. Surrey and Professor Traynor. The effect of the change in court jurisdiction is not predictable, and the requirement of a bond for appeal to the Board of Tax Appeals, that is, a bond as a condition to a hearing by an independent body, will in many cases deprive the taxpayer of the right to an appeal and in others make appeals so burdensome that it is no longer beneficial. Treasury Department rulings, even arbitrary rulings, can be made with greater and greater impunity. But my real objection to the suggestion is that it leaves the real difficulty—real source of uncertainty—in the administration and construction of the law unchanged, and, in my opinion, magnifies the evil of that condition. It is not in the organization of the lower branches of the Treasury Department that revolutionary changes are necessary. Organization, some ruling authority to which the superior officers of the Treasury Department must defer, is essential, and when that is accomplished so the Treasury regulations, which the courts have in many cases said have the force of law, become binding and conclusive upon the Treasury itself, and its own lawyers do not contend that they are wrong,

then there may be some hope of securing a uniform administration of the law and some final conception of the meaning of the law. Most of the uncertainty, which Mr. Surrey so forcibly presents and deplors, will then no longer exist.

by J. SYDNEY SALKEY

Mr. Surrey discussed at some length the question of appellate review. Mr. Surrey laid great stress on the necessity of the procedural changes, but I do not believe that procedural changes will be of great benefit, as Mr. Lowenhaupt has well stated, until there is a change of attitude on the part of the Treasury Department. We have functioning at present a Board of Tax Appeals. To me it is questionable if not reprehensible for the Treasury Department to non-acquiesce in Board of Tax Appeals decisions adverse to the Government and still refrain from appealing the same; and thereafter, irrespective of such non-appealed Board of Tax Appeals decisions, to attempt to levy taxes in similar cases. The only explanation that has ever been given me by any official of the Treasury Department is the desire of the Department to await a proper case upon which to take its appeal. If the case which was decided adversely to the Government was such as to be an improper one for appeal, then it appears to me that the Government should have conceded the correctness of the taxpayer's position in the first instance; failing so to concede, the Treasury Department can justifiably be charged with over-emphasizing its tax-collecting function and failing to take account of the quasi-judicial function which it possesses.

I wish further to discuss for but a moment the third point raised by Mr. Surrey concerning closing agreements. He refers to the present law which permits the execution of closing agreements as to future taxes, and he refers to the great advantage redounding to the taxpayer from such agreements, the taxpayer thus being able to know with certainty what his tax liability might be on a future transaction. This concern for the taxpayer brings tears to my eyes. The reason for my grief-stricken response is the fact that the Treasury in its administration of the tax law has never been interested in definitely settling future tax liability, but has consistently left the taxpayer in apprehen-

sion as to liability resulting from any contemplated transaction. For instance, the Congress of the United States under popular pressure repealed the undistributed profits tax. Shortly thereafter the Treasury Department issued very minute regulations (T. D. 4914) relative to the application of Section 102 of the Revenue Act of 1938, which section is charitably called the corporate "surtax" section. In reality, however, it is a penalty section, since it imposes the additional tax only on corporations failing to distribute profits when such failure to distribute is for the purpose of avoiding the imposition of surtax on its shareholders.

Now, by the very issuance of these Regulations, the Treasury Department has raised a flurry of doubt and the taxpayer today is almost as apprehensive as before the repeal of the undistributed profits tax that it will pay the high rates imposed by Section 102 if it fails to distribute all of its earnings. It is not a question of whether the failure to distribute profits is to the economic advantage of the corporation and for its future welfare. The fear arises from the doubt as to what interpretation the Government may put on the corporation's failure to distribute. It may be asserted that if it is economically and financially desirable for the corporation not to distribute, then it has nothing to fear from the Government. We know that in practice this is not true; for if a too ambitious Revenue Agent, whose economic theories run contrary to those of the corporation's management, sees fit to regard the surplus of the corporation as too large for its ordinary business purposes, and if the surplus in his humble judgment is more than adequate for the proverbial rainy day, then the corporation is subject to such a penalty tax, even though the dose may be sweetened by calling it a surtax. I say that the Department on one hand is attempting to secure and obtain the support and cooperation of the taxpayer, but on the other hand, because of the influence of its past history as exclusively a tax-collecting agency, is filling the taxpayer with fears and apprehensions so that the taxpayer today cannot plan its financial affairs with any certainty on the basis of its true economic welfare.

A corporation today is faced, in order to avoid the imposition of the penalty tax, with the necessity of a distribution of all its earnings during the taxable year long before the taxable income

is determinable; and if it does not wish to subject itself to the hazards of the imposition of the surtax for failure to distribute, it must obtain the consent of its shareholders to pay a tax for the taxable year upon the share which such shareholders would receive, even though the amount which such shareholders were entitled to receive was not ascertainable until the following year. As a practical matter I do not have to urge upon you that it is impossible for a large corporation to obtain the consent of its myriad of shareholders. I shall never understand why a corporation should be denied sixty or ninety days subsequent to the close of its fiscal or calendar year to determine what its profits are and thereafter be subject to a surtax only for failure to distribute within a reasonable time the profits so ascertained. Despite the dilemma thus thrust upon the taxpayer, the Treasury Department has consistently applied Section 102 punitively against the taxpayer in a manner to obtain the largest revenue for the Government, irrespective of the corporation's requirements for the retention of the funds. Fortunately for the taxpayer, upon review punitive assessments have not been permitted in many instances to stand. This, however, is the result of judicial review and not due to the desire of the Department equitably to apply the section in question.

by A. H. FELLER

I should like to comment briefly about a matter which was referred to from time to time during the discussion today. All of us agree, of course, that it is essential that the personnel of administrative agencies be improved. But it seemed to me that much of the comment today was not about the quality of the personnel of the Treasury Department but about their "attitude." We all know what these gentlemen believe that attitude to be. It is "soak the taxpayer." Now as I sat listening to the discussion, I remembered that tax lawyers have, so long as I have known them, complained of the soaking of the taxpayer not only by the Treasury Department but also by the Board of Tax Appeals, the Circuit Courts of Appeals, and also and in particular by the Supreme Court. And not just by this Supreme Court but by the Supreme Court as it existed before the recent change in personnel. I remember the outcry from the tax bar when the old Supreme Court bench handed down the *Gregory* decision in 1934.

In thinking this over, I began to wonder how we were ever going to have that personnel, let us say, soak the Treasury instead of soaking the taxpayer. I don't think we ever will, and for this reason. Every time Mr. Lowenhaupt gets a decision which results in his client paying less taxes, every one of us will have to pay just a little bit more next year. We are all taxpayers, whether we know it or not. And when we talk of protecting the revenues, we are not talking about some very distant thing like that big vault at Fort Knox where they bury the money. We are not protecting that. We are protecting our own pocketbooks against the increased levy which must come if some people pay less than Congress voted they ought to pay. Consequently, no matter how impartial you try to make the personnel of the tax collecting or tax adjudicating agencies, every one connected with these agencies will inevitably tend to act so as to protect the revenue. Their policy will be, "If we have to err, let us err against the taxpayer."

I want to make one other remark about the question of personnel. I don't agree with Mr. Salkey on the character of the personnel of the Treasury. I don't think that they are merely the reformed or promoted chasers of stills. As I see it, the personnel of the Internal Revenue Bureau today is as closely akin to the personnel of the tax bar on the other side of the fence as one side of a coin is akin to the other. The tax bar, particularly the younger tax bar, constitutes the alumni of the Internal Revenue Bureau and the personnel of the Bureau today is the tax bar of next year. Now I say, that when our tax bar is so good,—and it is very good—I think it is technically the most competent body of lawyers in the country—it must follow that the personnel of the Bureau of Internal Revenue must also be pretty good.

Just one word on the whole subject of this symposium. A good many of us have become a little tired of the subject of administrative law. It is talked about a great deal in Washington and in the schools on the eastern seaboard. Yet of all the discussions I have attended on administrative law, this has been the most realistic. The bar here has shown more sympathy towards the administration and more desire to get down to realities and to avoid reveling among general principles,—the refuge of those who have axes to grind—than any group of the kind I have yet seen.

by STANLEY S. SURREY

I feel a little embarrassed at proceeding further after Mr. Salkey has characterized me as a whiskey-drinking, evil old man. I will try to struggle along, however. I wish to thank Mr. Feller for his kind assistance—it spares me the necessity of saying what he said.

As I tried to indicate at the very start, I wish you would realize that I feel deeply that the Treasury Department and the Bureau of Internal Revenue attempt to be as fair-minded as they can under the circumstances. With Mr. Feller, I believe that this characterizes the vast majority of Government employees, not only in the Treasury Department, but elsewhere. And, consequently, I tried to point out that the problem was not met by just saying, "Well, let's improve personnel"—without, incidentally, telling us how to improve personnel. The problem is to recognize that we have to take real and immediate steps with respect to our procedural machinery. As I said, there are seven million income tax returns filed annually. Men with hearts of gold could not handle those seven million tax returns unless they had a very smoothly functioning system. That is the problem facing the Bureau of Internal Revenue and the Treasury.

I agree with some of the remarks of Mr. Lowenhaupt. It is inadvisable for a Government department to argue contrary to its own regulations. But that is not done very often. In some cases, I might say, it is done, not by the Treasury Department, but by the Department of Justice, which, as you know, handles tax cases in the circuit courts and the Supreme Court.

When I listened to some of the other remarks, I wondered what you gentlemen would do if you became Chief Counsel for the Bureau of Internal Revenue or the Commissioner of Internal Revenue. As Mr. Feller states, the gentlemen who occupy these positions don't appear from nowhere—they are lawyers like yourselves. They come down there and then see what they are up against. They must take the revenue laws as passed by Congress and must administer these laws, subject to criticism by Congress and possible investigation. They cannot sit back and say, "Section 102 is unfair and let's disregard that Section." I am not going to go into an extended discussion on that particular Section, for what I say applies equally to any other section. The Commissioner's job is to interpret and apply the Section as

nearly as he can in the way that Congress intended it to be applied and not to decide whether the Section is a good Section or a bad Section. He has to interpret the Section so as to carry out the Congressional wishes. We don't just make up these tax laws—they are given to us by the Congress.

You gentlemen know what it is to conduct litigation on a rather extensive scale. The Commissioner opposes the taxpayer in the courts. His is not a judicial function. The Board of Tax Appeals and the courts protect the taxpayer. The Commissioner is the person charged with collecting the internal revenue. He can't make up the answers and let it go at that. The answers are given to him by the courts. He is doing his job when he says, "I don't know what the right answer is. I have to pass this along to the courts." If he didn't do that, I think he would be subject to criticism by the Congress.

The Commissioner has been criticised for struggling along and not giving up when one circuit court decides against him. I don't know what the final answer should be to the problem. But I do know that the Commissioner would probably say that many cases have been finally won in the Supreme Court. Those cases to which Mr. Lowenhaupt referred were won by the Government in the Supreme Court—the *Smith* and the *Hallock* cases. Now, can we say that the Commissioner was wrong when the Supreme Court has said that he was right? If you look at it that way, I think you will appreciate some of the problems involved.

Many doubtful situations confront the Commissioner constantly. Consequently, I think it only fair, before you start to criticise the Commissioner's policy and his resort to litigation, that you realize under what difficulties the Commissioner operates and what you yourself would do if suddenly put in charge of the Bureau of Internal Revenue. I think if you would stop and reflect along these lines you might be a little more appreciative of the job that the Commissioner of Internal Revenue has been doing.

by TYRRELL WILLIAMS†

The subject of this symposium is administrative law and procedure. I will ask you please to forget all about administrative law and procedure, and think about procedure in the ordinary

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courts, just for a few minutes, and think about the distinction that in this country we have drawn over a hundred years between general jurisdiction and special jurisdiction. Missouri is a typical American state. The Constitution has created a judicial department, and has conferred upon that department in various courts named, jurisdiction in common law and equity. The constitutional expression "law and equity" is a technical expression, but all lawyers know what it means. It means the common law and equity of England as developed down to about the time of the American Revolution. And in any Missouri court, if we have an ordinary contract case, or tort case, or injunction case, there are a great many presumptions in favor of jurisdiction of the court. A great many facts do not have to be alleged in the petition, or even proved.

But we have another kind of jurisdiction in Missouri courts which we call limited or special jurisdiction, a created, artificial jurisdiction, if you choose. Divorce jurisdiction is an example. There is no divorce in common law, nor in equity. Originally divorces in this country and in England, when granted at all, were granted by the legislature. In Missouri, in the early days, the power to grant divorce was conferred upon the courts by the Legislature—but under certain restrictions. As every Missouri lawyer knows, the plaintiff must live in the state in good faith and must reside in the state one whole year next before filing the petition, unless the wrong was committed in Missouri, in which event a shorter period is sufficient. But there must be residence and good faith present in every divorce case.

These allegations as to jurisdictional facts must be set forth in the petition and must be proved. It is necessary. If they are not set forth in the petition, even if there is a default by the defendant, there will be no divorce granted. Now then, let us think about these administrative tribunals.

They are all tribunals of limited jurisdiction. Although that term isn't ordinarily used, that is true. The tribunals themselves are created by the statute. They are entirely outside the course of common law and equity. In *certiorari*, we always have to allege, according to the old form books, that the tribunal created by the statute was acting outside the course of the common law. And this statutory tribunal, whether in England or this country, would have to have its jurisdictional limits set forth in the

statute. Now, that is the basis of administrative law in this country.

As several speakers have said, Congress, in the case of all federal administrative tribunals, is responsible for their jurisdictional limits. Perhaps Congress has acted unwisely. Perhaps Congress has not gone far enough; perhaps it has gone too far. I agree with Mr. Feller that the *Morgan* case was unfortunate in its result. I think it is terrible to put so much burden upon the Secretary of Agriculture, and only two assistants. But Congress has said that. The only point I see in the *Morgan* case is this question of statutory construction. The statute said that the Secretary of Agriculture was to make a decision, not the Department of Agriculture. The Secretary had to make the decision after a full hearing.

In the second *Morgan* case, and in the first *Morgan* case, taking them together, we find there were questions of law and questions of fact. Questions of fact were decided to this effect, that there was no "full hearing," as required by statute. One important question of law was to the effect that the word "Secretary" does not mean the department with two thousand employees. Now, I think there is a serious defect there in that legislation. And as Mr. Sellers has suggested, there ought to be a change in the statute. But the fault is in Congress, and not in the Supreme Court, and not in the Secretary.

So, all through here it seems to me, as several speakers this afternoon have suggested, if we have quarrels, our quarrels are not with the courts in reviewing these determinations, and not with the tribunals, generally speaking, but with Congress, the legislature. If we should have a change in personnel, let us go to Congress. It isn't fair, as *Fortune Magazine* suggested a year and a half ago in its excellent article on the Labor Relations Board, to blame the board, if we don't like the policy of the act. Let us blame Congress but not the Board. One of the points *Fortune Magazine* made was that the salaries of those young members of the staff were very small. Such salaries do not attract the kind of lawyers we have in this audience. But two hundred dollars a month looks pretty good to lads just out of law school. They may know something about law. But they haven't been hazed enough. They don't know human nature. They are tactless, perhaps. But after all, it seems to me that our quarrel,

if we are displeased with what happens, is with the legislative body that set up by statute these artificial tribunals and gave them a new kind of jurisdiction, which is outside the tradition of common law and equity.

CONCLUSION

RALPH F. FUCHS

I am privileged to say for the faculty how much we appreciate the interest which the members of the Bar and others have shown in coming here and listening for so long to these programs and the equal appreciation that we feel toward those who have come from long distances to make this program what it has been. To all who have participated we extend our very sincere thanks.

Our only disappointment in regard to this symposium has been the fact that the audience has not participated—last night and this morning through no fault of its own; this afternoon perhaps from a feeling that a great deal has been said and maybe there isn't any use saying much more. I see people here that I know have thoughts, even vigorous thoughts, upon this topic, which I wish very much could be expressed. Perhaps we can create an occasion for that later on, especially if, as we still hope, it turns out to be possible to get Professor Patterson to make a trip out here later in the season and address a meeting which possibly the St. Louis Bar Association will sponsor with us.

I am going to take a few minutes now to bring together a few thoughts it may be worth while to reiterate in an organized fashion regarding this whole subject.

The first is that there is a great deal of administrative rule-making and adjudicating that we haven't talked about at all in these three sessions that we have had. There is, for instance, a great mass of petty licensing, some of which even the federal government has carried on through the Bureau of Marine Inspection and Navigation, the Secretary of Agriculture, and other officials, which bears in a very important way upon individuals in earning a livelihood and upon business enterprises of various sorts. We have said nothing about that because we haven't had time. There is a great deal of administering of benefits carried on by the federal government and by other governmental units