

# Tax Law, Self-Government and Judicial Restraint

*John Q. Barrett\**

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In summer 1962, Justice Felix Frankfurter, age 79 and disabled by a stroke, retired from the Supreme Court of the United States after 23 years of active service.

As a retired Justice, Frankfurter kept his mind and interested eyes on many matters. In winter 1964, for example, he spotted, or someone called to his attention, a quotation that an official U.S. Internal Revenue Service (IRS) form attributed to his late colleague Justice Robert H. Jackson (who thirty years earlier had been the Revenue bureau's chief counsel).

According to the IRS, Jackson once said or wrote—no source was specified—“[t]hat a people so numerous, scattered and individualistic annually assesses itself with a tax liability, often in highly burdensome amounts, is a reassuring sign of the stability and vitality of our system of self-government.”<sup>1</sup>

Justice Frankfurter loved this alleged Jackson line but could not place it. So Frankfurter, who for his whole life kept up fascinating correspondence with a very large number of friends and acquaintances

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\* Professor of Law, St. John's University School of Law, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, New York ([www.roberthjackson.org](http://www.roberthjackson.org)). An earlier version of this essay was posted to my Jackson Email List on April 18, 2011. This version was updated on July 20, 2022.

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<sup>1</sup> Mortimer M. Caplin, *A Personal Letter to Taxpayers*, Federal Income Tax Forms for 1963.

around the world, went to the source—he dictated a letter to the Commissioner of Internal Revenue, Mortimer M. Caplin:

My dear Caplin:

That any official form from the Bureau over which you preside should have given me pleasure you may think incredible, but such is the fact. Not only has it given me pleasure, but it has given me pleasure that you have put it under the eyes of millions of taxpayers. I am referring to your Form 1040 for 1963 which carries a quotation from my late beloved brother Robert H. Jackson, for he was, as you may know, a person to whom I felt closest of all my colleagues since I came to the Court.

It was a happy thought to quote what you did, because what Jackson wrote is not only deeply true but it is important that you bring it to the consciousness of the American people as you have done. I thought I knew every citation for all his felicitous observations, and he could hardly write without being felicitous, but I am stuck in trying to place the quotation you have used. I can only surmise that it may have been, naturally enough, from one of his tax opinions, which so often lighted up dreary subjects with wise observations, but I cannot place it and therefore I am troubling you to tell me what the source is.

I am very sorry that the affliction which befell me has barred me from seeing something of you.

With every good wish,

Very sincerely yours,

/s/ Felix Frankfurter<sup>2</sup>

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<sup>2</sup> Felix Frankfurter to Hon. Mortimer M. Caplin, Mar. 2, 1946 (photocopy of unsigned carbon copy), *in* Felix Frankfurter Papers, Library of Congress, Manuscript Division, Washington, D.C. (“FF LOC”), Box 149, Jackson folder.

Commissioner Caplin promptly supplied the answer:

Dear Mr. Justice Frankfurter:

It was very nice of you to write about this year's Form 1040. I regret that we have not had an opportunity of late to get together, but I hope an occasion will arise in the near future.

The quotation used in the "Personal Letter to Taxpayers" came from *United States v. Kahriger*, 354 U.S. 22 (1953).<sup>3</sup> Mr. Justice Jackson wrote a concurring opinion, and the specific quotation is contained on page 36.

As you may recall, the decision upheld a \$50-a-year stamp tax on persons "engaged in the business of accepting wage[r]s." You wrote a separate dissenting opinion.

I hope you are enjoying better health these days.

With warm regards,

Sincerely,

/s/ Mort Caplin<sup>4</sup>

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In April 2011, the IRS website quoted another, perhaps less uplifting, piece of Justice Jackson's tax law-related wisdom: "No other branch of the law touches human activities at so many points. It can never be made simple."<sup>5</sup>

Jackson made that observation in his December 1943 opinion for the unanimous Supreme Court in another tax case, *United States v. Dobson*.<sup>6</sup>

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<sup>3</sup> Accord [www.oyez.org/cases/1950-1959/1952\\_167](http://www.oyez.org/cases/1950-1959/1952/1952_167).

<sup>4</sup> Mortimer M. Caplin to Justice Felix Frankfurter, Mar. 4, 1964 (photocopy), in FF LOC, Box 149, Jackson folder.

<sup>5</sup> See [www.irs.gov/irm/part4/irm\\_04-010-007.html#d0e40](http://www.irs.gov/irm/part4/irm_04-010-007.html#d0e40).

<sup>6</sup> 320 U.S. 489, 494-95 (1943), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=320&page=489>;

Interestingly, this quotation by the IRS was misleadingly incomplete. Jackson, who generally championed judicial deference to legislative and agency judgments, was specifically cautioning in *Dobson* against federal judges making decisions that insert themselves into the work of the IRS and thus add to the complexity of tax law.

“No other branch of the law touches human activities at so many points,” Jackson wrote. “It can never be made simple, *but we can try to avoid making it needlessly complex.*”<sup>7</sup>

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*see generally* John Q. Barrett, *Justice Jackson on “What the Law’s Going to Be”—At Least Until Its “Gelding,”* 6 THE GREEN BAG 2D 125 (2003) (describing Jackson’s decision making and law clerk-instructing in *Dobson*).

<sup>7</sup> 320 U.S. at 494-95 (emphasis added).