

ADDENDUM TO THE REGULATIONS PROBLEM

FOR the past year, eminent tax lawyers have been battling back and forth the problem of the binding effect of regulations issued by the Treasury to interpret or supplement tax legislation.¹ Most of the fun has come in mauling the so-called "reenactment" rule, which is said to be in danger of coming to mean that when Congress has reenacted a revenue act, the regulations under the former act acquire the "force of law" as if Congress had specifically written them into the statute.² So extensive has been the recent writing in this field that the latest and best, Professor Griswold's *Summary of the Regulations Problem*,³ commences with an apology for further comment. Under the circumstances, still another word on the subject would seem superfluous. Nevertheless, I do have an excuse to offer. The other writers on the subject have been tax lawyers, who have written about the problem as primarily one in tax administration;⁴ there is still need to ask whether the reenactment rule should be abolished in other fields of administration.

One may ask the preliminary question — why did the courts evolve the reenactment rule? I suggest that the answer lies in the inevitable desire to find fixed points in the confusion which surrounds the liberal interpretation traditions of the federal courts. Once the "plain meaning" rule in the stringent formulation of the English cases⁵ is abandoned, the courts find themselves in a welter of "aids to construction": committee hearings, committee re-

¹ Griswold, *A Summary of the Regulations Problem* (1941) 54 HARV. L. REV. 398; Brown, *Regulations, Reenactment, and the Revenue Acts* (1941) 54 HARV. L. REV. 377; Alvord, *Treasury Regulations and the Wilshire Oil Case* (1940) 40 COL. L. REV. 252; Surrey, *The Scope and Effect of Treasury Regulations under the Income, Estate, and Gift Taxes* (1940) 88 U. OF PA. L. REV. 556; Paul, *Use and Abuse of Tax Regulations in Statutory Construction* (1940) 49 YALE L. J. 660.

² *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 115 (1939). For earlier formulations of the rule see Griswold, *supra* note 1, at 399.

³ *Supra* note 1.

⁴ Lee, *Legislative and Interpretive Regulations* (1940) 29 GEO. L. J. 1, deals largely with matters outside the tax field, but its scope is broader than the narrow problem of reenactment here considered.

⁵ *E.g.*, *Altrincham Electric Supply, Ltd. v. Sale Urban District Council*, 154 L. T. R. (N.S.) 379 (H. L. 1936).

ports, administrative and judicial constructions, legislative purpose, evils to be anticipated, results, analogous enactments, reenactments. Lacking fixed points, the courts are in danger of falling into an irrational *Gefühlsjurisprudenz* unless they devise standards to evaluate these aids to construction. The development of such standards is hampered by the struggle between two frequently antithetical principles: legislative intent looking back to the date of enactment, and administrative soundness and stability, looking to practical operation after enactment. The attractiveness of the reenactment rule to the courts seems to be its apparent reconciliation of these principles; by reenacting the statute Congress appears both to have expressed its own intent and added another stone to the pillar of continued administrative practice.

While the critics of the reenactment rule have shown that this attractiveness is in large measure delusive, they appear to have underestimated the difficulties of dislodging the doctrine. Griswold has pointed out that the reenactment rule is not a recent excrescence. The point could be reenforced by considering a parallel line of cases which, I believe, have been given insufficient attention. In a number of situations the Supreme Court has given weight to the mere failure of Congress to disapprove an administrative construction. In *United States v. Midwest Oil Co.*,⁶ the authority of the President to withdraw petroleum and other mineral lands from public settlement was challenged. Congress had in 1902 received a report from the Secretary of the Interior listing the various withdrawals and asserting that the President possessed the power to order them. In 1910, the President specifically asked for congressional authorization and Congress enacted a statute authorizing future withdrawals but not expressly validating past action. The majority of the Court held the silence of Congress to be enough to validate the previous withdrawals, saying:

Congress with notice of this practice and of this claim of authority, received the Report. Neither at that session nor afterwards did it ever repudiate the action taken or the power claimed. Its silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress.⁷

⁶ 236 U. S. 459 (1915).

⁷ *Id.* at 481.

Much the same rule was invoked only the other day in *Sibbach v. Wilson & Co.*⁸ The issue was whether Rule 35 of the Federal Rules of Civil Procedure, providing for physical examination of parties, was valid in view of earlier Supreme Court decisions disapproving the practice of examination. In upholding the validity of the Rule, the Court relied in part on the fact that when the Federal Rules were before Congress, it failed to disapprove this provision. The Court was cautious enough not to say that the silence of Congress gave the Rules the force of law; it did say, however: "That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found."⁹ An analogous situation is found in *United States v. American Trucking Associations*,¹⁰ involving affirmance by the enactment of another statute. The question was the delimitation of authority between the ICC and the Wages and Hours Administration over hours of service of employees of motor vehicle operators. The Court emphasized that the Fair Labor Standards Act¹¹ was enacted after the ICC had construed the pertinent provision in the Motor Carriers Act,¹² and that "seemingly the Senate at least was aware" of the Commission's construction. The Court thereupon concluded that: "Under the circumstances it is unlikely indeed that Congress would not have explicitly overruled the Commission's interpretation had it intended to exempt others than employees who affected safety from the Labor Standards Act."¹³ These were cases in which it affirmatively appeared that Congress had been apprised of the administrative construction. In *United States v. Shreveport Grain & Elevator Co.*,¹⁴ however, mere congressional acquiescence by silence in a long-continued administrative construction was held to be of greater significance than a contrary intent at the time of enactment apparent in congressional committee reports.

⁸ 61 Sup. Ct. 422 (Jan. 13, 1941).

⁹ *Id.* at 427. Mr. Justice Frankfurter (dissenting with Justices Black, Douglas, and Murphy) disagreed strongly: "Plainly the Rules are not acts of Congress and cannot be treated as such. Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality." *Id.* at 428.

¹⁰ 310 U. S. 534 (1940).

¹¹ 52 STAT. 1060 (1938), 29 U. S. C. § 201 (Supp. 1939).

¹² 49 STAT. 543, 546 (1935), 49 U. S. C. § 304 (Supp. 1939).

¹³ 310 U. S. at 549-50.

¹⁴ 287 U. S. 77 (1932).

Obviously this rule of acquiescence by silence is worse than the reenactment rule. It should by all means be abolished, and it is unfortunate that the Court should have relied on it so recently. That the courts have gone this far indicates the difficulty of eradicating the superficially more defensible reenactment rule. As the critics have shown, the notion that mere reenactment of a tax statute involves a congressional affirmation of administrative practice is unrealistic in fact and mischievous in result. Yet there is still some question outside the tax field as to whether reenactment should be considered an aid in determining the weight to be given administrative constructions.

The factor which differentiates tax administration is the periodic reenactment of the basic statute. This practice is not necessarily a mere accidental tradition, though we may have seen the end of it; the provisions of the taxing act must be varied to meet the fiscal and business needs of the moment. True, there are basic provisions which remain unaltered from year to year; but where there is such frequent and serious revision of detail, it seems a sensible thing to reenact basic provisions also. Regulatory statutes are different. Congress is not legislating for the next fiscal year; it is laying down a general policy intended to last for a long time to come. Reenactment of such a statute is very rare, and when it occurs the occasion is fraught with significance.

Consider the major statutes which have gone through the process of reenactment. The Federal Radio Act was substantially reenacted in 1934¹⁵ because a new agency with greatly extended powers was created. The same reason lies behind the reenactment in 1935¹⁶ of many of the provisions of the Federal Water Power Act of 1920. Parts of the Agricultural Adjustment Act of 1933, as amended, were reenacted in 1937.¹⁷ The occasion was a major change in the system of regulation following the declaration of unconstitutionality of the old Act. The Grain Futures Act was substantially reenacted by the Commodity Exchange Act in 1936,¹⁸ when it was desired to extend the scope of the Act to additional agricultural commodities. Numerous provisions of the Bank-

¹⁵ 48 STAT. 1064, 47 U. S. C. § 151 (1934).

¹⁶ 49 STAT. 838 (1935), 16 U. S. C. § 791a (Supp. 1939).

¹⁷ 50 STAT. 246 (1937), 7 U. S. C. § 601 (Supp. 1939).

¹⁸ 49 STAT. 1491 (1936), 7 U. S. C. § 1 (Supp. 1939).

ruptcy Act were reenacted in the Chandler Act,¹⁹ which was an epochmaking revision of the whole system of bankruptcy and reorganization. The Judicial Code²⁰ reenacted many provisions of existing law on the occasion of a significant change in the federal judicial system. Even if this list were exhaustive it would not be very long, for outside of the tax field, Congress has shown marked reluctance to reenact provisions of existing law on a large scale. The history of the Transportation Act of 1940 is instructive. An attempt was there made to codify and reenact the Interstate Commerce Act²¹ as a whole through the Wheeler Bill (S. 2009). The attempt was vigorously condemned by several witnesses before the Senate Committee on Interstate Commerce; in particular by Commissioner Eastman.²² The result was the substitution of the Lea Bill, which amended and added various provisions to the Interstate Commerce Act but attempted no reenactment. And it was this latter bill which was finally adopted.²³

Thus, in the case of the ordinary regulatory statute, reenactment comes very seldom if at all. When there is a reenactment, it is not for convenience in use by lawyers as in the case of internal revenue statutes, but because a significant change either in policy or in the general form of the Act is desired. Where reenactment is so infrequent and important an occasion, should not administrative constructions which have gone through the fire of reenactment be considered of more moment than those which have not stood in similar peril of congressional disapproval?

The objection to an affirmative answer is that it is unrealistic, that Congress is not aware of the details of administrative practice under the old statute. Valid as this objection is as a general

¹⁹ 52 STAT. 840 (1938), 11 U. S. C. § 1 (Supp. 1939).

²⁰ 36 STAT. 1087 (1911), 28 U. S. C. § 1 (1934).

²¹ 24 STAT. 379 (1887), as amended, 49 STAT. 543 (1935), 49 U. S. C. § 1 (Supp. 1939).

²² Transportation Act of 1939, *Hearings before the Senate Committee on Interstate Commerce on S. 2009*, 76th Cong., 1st Sess. (1939) 782. Note the statement of Senator Reed: "I do not think it is good public policy to undertake codification of an act that is the growth of legislation over 50 years, at a time when we are amending and revising and deleting the present provisions of the law and adding new duties and responsibilities to the greatest of the regulating bodies, the Interstate Commerce Commission." *Id.* at 784.

²³ Pub. L. No. 785, 76th Cong., 3d Sess. (Sept. 18, 1940), 49 U. S. C. A. § 1 (Supp. 1941).

proposition, I am not convinced that it is sufficient. Standards of construction must have something of the conventional in them. When courts look for "legislative intent" they know full well that, strictly speaking, there is no such thing. There is neither an ascertainable intent of the individual legislators nor, in any realistic sense, a corporate intent. What is ascertainable and what the courts look to is the intent of the committees and their chairmen.²⁴ Upon this realistic basis the courts build the convention of the intent of the whole legislature. I suggest that similar conventions with a basis in reality are possible in connection with reenactment.

The strongest case is in the field of congressional appropriations. Frequently the object of appropriation is described in very general terms: "public works," "projects," "work relief," and the like. Where an agency construes its powers as covering a particular class of expenditure and Congress thereafter appropriates money under the same general description, it has been held that the new appropriation constitutes congressional ratification of the validity of the original expenditure.²⁵ This seems an altogether proper result under the circumstances. It is the universal practice to report such expenditures to Congress, and appropriations committees examine expenditures with great care.²⁶ The record may not show

²⁴ Compare the now classic debate on statutory interpretation between Radin and Landis in (1930) 43 HARV. L. REV. 863, 886.

²⁵ *Alabama Power Co. v. Ickes*, 64 Wash. L. Rep. 563 (D. C. Sup. Ct. June 5, 1936), *aff'd on other grounds*, 91 F.(2d) 303 (App. D. C. 1937), *aff'd*, 302 U. S. 464 (1938). The authority of the PWA to construct electric power projects competitive with private utilities was challenged. The original appropriation for public works was contained in Title II of the National Industrial Recovery Act, 48 STAT. 210 (1933), 40 U. S. C. § 411 (1934). Several subsequent acts appropriated money for the continuance of PWA projects in general terms. These acts were held to constitute congressional approval of the PWA program.

²⁶ The same result should follow in the cognate problem of the creation by the President of governmental agencies under the very general delegations of authority contained in recent statutes. In the case of a number of these agencies Congress has never enacted a specific authorization, but in several cases it has either reenacted the basic statute, appropriated money for the agency by name, or referred to it by name in some other statute. Some notion of the great variation in congressional practice may be gathered from a few examples. The Commodity Credit Corporation was incorporated under the laws of Delaware pursuant to an executive order issued under the NIRA; its continuance was specifically authorized by Section 7 of the Act of Jan. 31, 1935, 49 STAT. 1, 15 U. S. C. § 713 (Supp. 1939). The National Youth Administration was established by executive order under authority of the Emergency Relief Appropriation Act of 1935. It was not specifically authorized by

that the committee specifically approved the particular item, and if we were to be hyper-realistic we should refuse any effect to the reenactment. Yet sound realism would require that we give effect to the established tradition of committee scrutiny even in the absence of specific reference in the record. The point I make here is not as yet of any great importance to the lawyer, since problems of the validity of appropriations rarely come to court. But it may soon become very important. Congress now has before it various proposals for administrative reform which include provisions for annual reporting of administrative regulations to Congress.²⁷ The courts may consider this reporting as of considerable importance in the event of reenactment, and indeed, may go so far as to apply the "acquiescence by silence" rule. Such a result would be unfortunate. Yet, if Congress were to set up a committee to scrutinize these reports on regulations, reenactment in the background of such a tradition of scrutiny should have great weight.

The next strongest case is the matter of major administrative policy following a "historic" reenactment (*i.e.*, once-in-a-lifetime as distinguished from the routine reenactment of the tax laws). If the policy is one which Congress must have known about, reenactment of the law without change is rather clear evidence that Congress had found the practice in accord with the statute.²⁸ Note that again we are dealing with a convention but it is a convention with a realistic basis — that Congress knows matters of common knowledge.

The next case is considerably weaker — where the practice alleged to have been ratified by reenactment is a matter of administrative detail rather than major policy and where there is no demonstrable tradition of congressional scrutiny. Is it proper to

Congress, but in the Emergency Relief Appropriation Act of 1936 and in subsequent appropriation acts, appropriations were made to the agency by name. The Resettlement Administration was also established by executive order under the Emergency Relief Appropriation Act of 1935, but no appropriation was made to it by name in the 1936 Act. However, the Act of June 29, 1936, 49 STAT. 2035, 40 U. S. C. § 431 (Supp. 1939), provided for a waiver of the exclusive jurisdiction of the United States over any resettlement project constructed "with funds allotted or transferred to the Resettlement Administration."

²⁷ See § 205 of the bill proposed by the Attorney General's Committee on Administrative Procedure. FINAL REPORT (1941) 195.

²⁸ I take it that Professor Griswold would agree with this point. See footnote 16 of his article, *supra* note 1, at 401-402.

say that the fact of reenactment is always inconsequential? I am inclined to the view that under some circumstances the fact of reenactment may, even here, be properly considered. Thus, where statutory provisions are reenacted without change as part of a major revision of organization and policy after prolonged and detailed study by a congressional committee and its experts, it seems not altogether unrealistic to say that administrative practice under the reenacted provisions stands on a somewhat surer footing than before. I do not mean to place any very great weight on reenactment under these circumstances. It should serve only as additional assurance when the meaning of the statute has been shaped from other aids. In the words of Mr. Justice Frankfurter: "The persuasion that lies behind that [the reenactment] doctrine is merely one factor in the total effort to give fair meaning to language."²⁹

What I suggest is an application of the reenactment rule with varying degrees of light and shade depending on the circumstances of reenactment. In no event do I urge the extreme "force of law" formulation of the rule as stated in the *Reynolds Tobacco* case.³⁰ Bad as it may be in the income tax field, it would be even worse if applied to other statutes. Income tax statutes are designedly temporary. The congressional machinery is geared to the correction of undesirable constructions by rapid amendment. If the Commissioner were to find that the *Reynolds Tobacco* rule prevents him from changing an interpretation after reenactment, it is in most cases relatively easy for him to appeal to Congress to amend the law. At any event, he can anticipate the framing of a new revenue act shortly which will give him an occasion for attempting to secure a change. The traditions are different in the case of regulatory statutes. Thus, successive Attorneys-General tried for years to secure an amendment of the commodities clause of the Hepburn Act³¹ and never succeeded.³² Numerous similar instances could be cited. The reason is usually not that Congress thinks the amendments undesirable, but that for political reasons

²⁹ *FCC v. Columbia Broadcasting System*, 311 U. S. 132, 137 (1940).

³⁰ *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110 (1939).

³¹ 34 STAT. 585 (1906), 49 U. S. C. § 1(8) (1934).

³² REP. ATT'Y GEN. (1909) 3; *id.* (1912) 4; *id.* (1913) 25; *id.* (1914) 5, 22; *id.* (1915) 7; *id.* (1916) 7; *id.* (1917) 7; *id.* (1927) 26.

it is often reluctant to subject statutes of controversial social policy to the amendment process. It is necessary, if flexibility and adaptability to changing conditions are to be preserved, to avoid any rule freezing administrative interpretations and preventing change by any except congressional action.

A word of caution is necessary on Professor Griswold's vigorous espousal of the great weight to be given to the contemporaneous construction of a statute. It is of course true that "contemporaneous regulations often express the general understanding of the times, and the actual understanding of men who played an important part in the drafting of the statute."³³ It is certainly true in the case of tax laws where the participation of Treasury draftsmen is highly important. It may, indeed, be true generally where a statute confers new powers on an existing agency, but it does not apply where the agency was not in existence when the statute was passed. We know, for example, that the personnel of the Social Security Board participated in the drafting of the 1939 amendments to the Social Security Act.³⁴ But that personnel did not participate in the drafting of the original act. This is perhaps a minor consideration. More important is the fact that as time passes, specific legislative intent may become less and less significant.³⁵ This is particularly true where an act expresses a major policy of government in general terms. The legislative history of the Sherman Act³⁶ is not nearly as important as the facts of present-day business organization to which the general policy in favor of a free competitive market must be applied.³⁷ Precisely what Congress

³³ Griswold, *supra* note 1, at 405.

³⁴ 49 STAT. 620 (1935), as amended 53 STAT. 1360 (1939), 42 U. S. C. § 301 (Supp. 1939). See testimony of Arthur J. Altmeyer, *Hearings before Senate Committee on Finance on H. R. 6635*, 76th Cong., 1st Sess. (1939) 1 *et seq.*

³⁵ Compare the striking language of Chief Justice Hughes on the relevance of the intent of the framers of the Constitution in *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 442-43 (1934).

³⁶ 26 STAT. 209 (1890), 15 U. S. C. § 1 (1934).

³⁷ The opinion in *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1940), illustrates this point. The Court pays considerable attention to the legislative history of the Sherman Act, but does not place exclusive reliance on it. The legislative history is coupled with the course of events since enactment. Thus the court speaks of "The legislative history of the Sherman Act as well as the decisions of this Court interpreting it," and again of "The legislative history and the voluminous literature which was generated in the course of the enactment and during fifty years of litigation." *Id.* at 490. Most striking is the manner in which the Court rejects the con-

thought it was doing when it enacted the rule against unjust and unreasonable discriminations in the Interstate Commerce Act is of only mild practical interest after the judicial and administrative glosses of decades have been laid over the original text. So too, contemporaneous constructions of such acts should not be singled out for too great consideration.³⁸ Should the contemporaneous construction of the Webb-Pomerene Act³⁹ by the Federal Trade Commission be given greater weight than a contrary construction twenty years later when the Commission has secured real experience with the operations of export associations? Reliance on the contemporaneous must not become a means for freezing an important statutory policy into the forms determined by the necessarily limited vision of its original administrators.

A second word of caution is needed on the question of legislative versus interpretative regulations. There can be no doubt of the validity of the distinction in principle. The legislative regulation is an exercise of a permissive authority to make a law to supplement or make effective the law passed by Congress. It is a response to the authorization: "the administrator may make such rules and regulations as are necessary to carry out the provisions of this section," or to the direction to the citizen to do such and such "under such rules and regulations as the administrator shall prescribe." The interpretative regulation, on the other hand, is not new law, but rather construction of a disputed term in a statute. In practice, this distinction becomes blurred and may be difficult to administer.⁴⁰ What looks like an interpretative regulation

tention that Congress intended wholly to exclude labor organizations and their activities from the Sherman Act. Without pausing to consider the contemporaneous legislative history, the Court gives the "short answer" that "for the thirty-two years which have elapsed since the decision of *Loewe v. Lawlor*, 208 U. S. 274, this Court . . . has repeatedly held that the words of the act . . . do embrace to some extent and in some circumstances labor unions and their activities; and that during that period Congress, although often asked to do so, has passed no act purporting to exclude labor unions wholly from the operation of the Act." *Id.* at 487-88.

³⁸ In *United States v. Chicago Heights Trucking Co.*, 310 U. S. 344, 353, n.16 (1940), Mr. Justice Black properly distinguished an early decision construing the Interstate Commerce Act as "an apparent exception, at an early date before the function of the Commission had become fully outlined against the background of time and the empiric pattern of litigation."

³⁹ 40 STAT. 516 (1918), 15 U. S. C. § 61 (1934).

⁴⁰ Compare the controversy over whether the regulations involved in *Helvering v. Wilshire Oil Co.*, 308 U. S. 90 (1939) were legislative or interpretative. See *Alvord*, *supra* note 1, at 257; *Surrey*, *supra* note 1, at 572.

may on close inspection be seen to be legislative, and vice versa. An exercise of a power to make legislative regulations may involve construction of a disputed term in the statute. Several writers have suggested that the distinction has important consequences. Thus Professor Griswold says:

It would seem clear, though, that reenactment must be immaterial as to the validity of a *legislative* regulation. Either the regulation is within the authority delegated by Congress, or it is not. If it is within the delegated power, there is no question of a proper construction of the statute or of actual legislative intent, and reenactment is not necessary. If it is beyond the delegated power, then, under even the strongest formulation of the reenactment rule, no amount of reenactment can help it.⁴¹

I confess that the validity of the conclusion of this statement is not apparent to me. Assuming that the reenactment rule is to be applied where the question is one of the meaning of an ambiguous term in the statute, why should it not be equally applicable where the question is whether the administrator has overstepped the bounds of a broad delegated power? Is it correct to say that there is no question of "actual legislative intent"? While there is no question of the intent of Congress on the substance of the statute, there is a question of intent as to how far the administrator was to be allowed to go under his general authority. Obviously, if it can be shown that Congress knew of the existence of an allegedly illegal legislative regulation when it reenacted the basis statute, the reenactment will be given weight. The analogy of express congressional ratification of an unlawful exercise of delegated power⁴² is close. If the force of reenactment in the case of legislative regulations is granted in this instance, it seems to me that any substantial reason for differentiating between legislative and interpretative disappears.

The aversion of tax experts to the reenactment rule is due as much to observation of its abuses in the tax field as to criticism of its logical basis. There can be no doubt that uncritical application of a standard of interpretation can be a serious evil. Yet, should an aid to construction be abolished because it can be put to

⁴¹ Griswold, *supra* note 1, at 401. *Accord*, Alvord, *supra* note 1, at 262; *cf.* Surrey, *supra* note 1 at 565.

⁴² *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297 (1937).

improper uses? ⁴³ The remedy is a more realistic consideration of the weight to be given to reenactment in the specific case. Where reenactment is a perfunctory routine as in the tax field it should be disregarded. Where a tradition is established of reporting administrative practice to Congress with detailed scrutiny by committees, as in appropriations acts, reenactment should be of considerable moment. Important weight should be given reenactment where a matter of major policy is involved. Where reenactment is a rare occurrence, it may mean much, or little, or nothing, depending upon the circumstances of both the regulation and the reenactment.

Rules of this kind would sound much better if they were expressed in precise formulae, but lack of precision is not an insuperable obstacle to administration. The reenactment rule, considered as an aid to construction rather than as a command, can help a court to arrive at sensible and stable constructions if court and counsel are willing to examine with care the circumstances surrounding reenactment and regulation.

A. H. Feller.

YALE LAW SCHOOL.

⁴³ Compare Landis in connection with the rule of legislative intent: "The fact that in the name of such a rule fictitious intents of legislatures have been derived by courts to conceal the fact that they, rather than the legislature, were in this instance the lawgivers, does not impeach the validity of the rule, but merely demonstrates an inapposite case for its application." *A Note on "Statutory Interpretation"* (1930) 43 HARV. L. REV. 886.

POSTSCRIPTUM

Mr. Feller has kindly allowed me to add a few words to his study of the regulations problem. I shall confine myself to reenactment. My chief difficulty with the reenactment rule as it has been used is that it seems almost never to be the reason for reaching a result. It is rather an explanation for reaching a result which was in fact reached on other grounds. If the result reached is consistent with the reenactment rule, then the reenactment rule is brought out. But if the result is not consistent with the rule, then reenactment is either ignored or explained away. A doctrine which is largely or often used only to make impressive a result reached on other grounds still seems to me unsound.

There really is not much difference between Mr. Feller's position and mine. An explanation may serve a purpose. What I am talking about is *mere* reenactment. If there is more than mere reenactment, that may well have weight. If it appears that the congressional committees actually considered the precise regulations, that will be entitled to a good deal of weight. If the statute in question was completely reconsidered and revamped by the committee after long hearings and thorough consideration of all aspects of problems relating to the administrative agency in question, that may have some weight. If the particular problem is one of fundamental policy, which has been mooted back and forth for years, that should have some weight. Anything that can be shown which has some tendency to prove that the congressional action (or inaction) really has some significance is relevant, and should be used for what it may be worth. But the *mere* fact of reenactment (which is usually all that is relied on in the tax cases, and in a good many others) should be recognized, it seems to me, as a will-o'-the-wisp.

The point may be summarized in this way: Reenactment plus something amounts to whatever the "plus" is worth; but reenactment alone should be without weight. In actual practice, particularly in the tax field, the cases which have arisen have with few exceptions been ones in which there was mere reenactment

without any other significant circumstance. Where there is reenactment plus, the reenactment may well be considered along with the "plus." But where the bald fact of reenactment stands alone, which is perhaps the typical case, at least in the tax field, my argument is that it should lend no weight, one way or the other, in determining the validity and application of a regulation.

Erwin N. Griswold.

HARVARD LAW SCHOOL.