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## IN MEMORIAM: RANDOLPH W. THROWER<sup>†</sup>

*N. Jerold Cohen\**

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Randolph Thrower was born in 1913, the same year in which the Sixteenth Amendment was ratified. Perhaps it was destiny, perhaps not, but Randolph's path slowly but ultimately led him into the world of tax law, where he came to enjoy great success and well-deserved admiration as one of the premier tax lawyers of his day.

Randolph's career had many milestones. It started with his joining the firm of Sutherland Asbill & Brennan (then Sutherland Tuttle & Brennan) in Atlanta following his graduation from Emory's School of Law in 1936. With a few years of practice under his belt, he decided to become a special agent of the FBI before entering the Marine Corps to serve during World War II. When the war ended, he returned to practice law at the Sutherland firm.

It was not too long before Randolph found himself arguing a landmark tax case before the U.S. Supreme Court—not once, but twice. The case presented the very important question whether a taxpayer had to pay the full tax assessed against him before he could sue for a refund, as the Government claimed, or whether a partial payment would suffice. Randolph argued the case in May 1958 and lost it twenty-seven days later in an 8–1 opinion.<sup>1</sup>

Undaunted by the outcome, he would not give up the fight. Despite the million-to-one odds against him, he believed the majority opinion contained errors that justified a rehearing. The Court held his petition for a full year before granting it. Randolph then reargued the case, only to lose again, this time by a vote of 5–4.<sup>2</sup> Notwithstanding the result, Randolph's indefatigable

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<sup>†</sup> This tribute is reprinted with slight modifications with the permission of the authors from *The Tax Lawyer*. See N. Jerold Cohen & Jerome B. Libin, *In Memoriam: Randolph W. Thrower*, 67 *TAX LAW* 399 (2014).

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<sup>1</sup> *Flora v. United States*, 357 U.S. 63 (1958) (opinion by Chief Justice Warren, with Justice Whittaker dissenting).

<sup>2</sup> *Flora v. United States*, 362 U.S. 145 (1960) (opinion again by Chief Justice Warren, with Justices Whittaker, Frankfurter, Harlan and Stewart dissenting).

efforts on behalf of his client earned the wide respect of the tax bar, which had been following the case with great interest.

Randolph was quite active in the work of the ABA Tax Section. In 1961, he was elected Chair of the Section. Later, to honor his many years of work in the Section, in 1996 he was named the second recipient of the Tax Section's highest award, its Distinguished Service Award.

As a complement to his tax practice, Randolph also found the time to handle a number of civil rights cases on a pro bono basis. In 1963, when racial tensions in the country were quite high, he was among the small group of lawyers invited to the White House by President Kennedy to form the new Lawyers' Committee for Civil Rights Under Law. Randolph was very proud to have been one of the founding members of the Lawyers' Committee and remained an active participant in its work for many years.

Randolph also devoted substantial time to numerous American Bar Association activities. He served in the ABA House of Delegates for seventeen years and as president of the American Bar Foundation. He was a member of the ABA's first Commission on the Status of Women in the Law (chaired by Hillary Clinton). In 1990, he co-authored the ABA's amicus brief supporting a successful Supreme Court challenge to the Flag Protection Act.<sup>3</sup>

No wonder, then, that in 1993 the American Bar Association awarded Randolph the ABA Medal, its highest award. The citation stated that he had "worked tirelessly as an advocate for the poor, for women, for minorities and for our system of government that serves us all." It also noted that he "set a standard to which all lawyers can aspire." The ABA citation fittingly described Randolph's contributions to the law and to society. But we have not yet told his full story here.

The most challenging period in Randolph's long and distinguished career undoubtedly began in 1969, when President Nixon took office and selected him to be Nixon's first Commissioner of Internal Revenue.

Early on, Randolph was confronted with the politically sensitive question whether private schools that had maintained racially discriminatory admissions policies should continue to enjoy tax-exempt status under section 501(c)(3).

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<sup>3</sup> Brief for the American Bar Association as Amicus Curiae in Support of Appellees, *United States v. Eichman*, 496 U.S. 310 (1990) (Nos. 89-1443, 89-1434), 1990 U.S. S. Ct. Briefs LEXIS 1033; *see also Eichman*, 496 U.S. 310 (Flag Protection Act held unconstitutional in 5-4 decision).

Randolph reversed the long-standing IRS position on this question and ordered a full review involving numerous private schools that had been granted tax exemption. His position, which generated considerable negative reaction in certain quarters, eventually resulted in the revocation of a number of exemptions, with ensuing litigation and ultimately a decision of the Supreme Court upholding his position.<sup>4</sup>

In addition, from the outset of his tenure as Commissioner, Randolph was under pressure from the White House staff on various fronts. He began running into serious trouble in 1970, when the staff sent over a person known for some questionable activities to take an important position in what was then the Alcohol, Tobacco and Firearms Division of the IRS. When Randolph refused to accept the candidate, the White House staff sent over G. Gordon Liddy, whom Randolph also refused to accept. Not long afterwards, in January 1971, Randolph announced his resignation as Commissioner for personal reasons.

Two years later, as the Watergate story unfolded, the real reason for Randolph's resignation emerged. It was widely reported then, and is well-known now, that the Nixon White House had sent him an "enemies list" with a request that the people on it be audited. Thinking that President Nixon did not know about the list, Randolph requested a meeting to make the President aware of how his staff was trying to use the IRS. Randolph was told such a meeting was impossible. He was also told that if he refused to go after the "enemies" on the list, he should resign. So he resigned. According to White House tapes later made public, Nixon then described the kind of Commissioner he wanted: "I want to be sure he is a ruthless son of a bitch, that he will do what he is told, that every income tax return I want to see I see, that he will go after our enemies and not go after our friends." Randolph, of course, had not fit the description. (To his everlasting credit, neither would Randolph's friend and successor, Johnnie M. Walters.)

Following his service as Commissioner, Randolph returned to the Sutherland firm and resumed his tax practice. When, shortly thereafter, he visited the IRS National Office, the IRS employees aware of his presence in the building stood in the halls and applauded him.

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<sup>4</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (upholding revocation in 8–1 decision). *See also* *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974) (unanimously denying injunctive relief to prevent revocation).

Randolph also resumed his work with the Atlanta Legal Aid Society, which later gave him a special tribute for his many years of commitment. And when ethical questions involving certain officials in the Atlanta Police Department came to a head, he was asked by the Mayor to co-chair a special commission to investigate the situation. The findings of his commission resulted in the resignation of a high-level Department official.

In his eighties, Randolph delivered the Erwin Griswold lecture to the American College of Tax Counsel. In keeping with his lifelong focus, his talk was on professional ethics and a lawyer's obligation to his or her community. In particular, Randolph decried the concentration on billable hours and marketing and the relative lack of attention given to pro bono activities.

Practicing law with Randolph was truly an educational experience. He taught younger lawyers to explore all avenues and review all facts before coming to a conclusion. He used the *Flora* case to show the importance of meticulous research and having the will to continue the fight when you believe you are right. In one situation, he was representing a well-known businessman charged with overstating his company's inventories. Randolph delved into the businessman's background and found that he never disposed of anything. He still owned every automobile he had ever acquired, over many decades, and he always retained all of his inventories. When the facts were presented, the IRS agreed there was no overstatement case to be made.

Attending an IRS Appeals conference with Randolph was also a lesson. He would listen to both the younger lawyer accompanying him and the Appeals Officer, then turn to the younger lawyer and say: I think the Appeals Officer makes some good points. How do you respond? He would then turn to the Appeals Officer and ask: What about that response? Before one knew what was happening, the roles were reversed and Randolph had become the decision maker.

Those of us lucky enough to have worked with him were constantly taught the importance of practicing law as a true professional, as well as the responsibility of a lawyer to aid the downtrodden and disadvantaged. Both were integral parts of Randolph's DNA. What a mentor. What a tax lawyer. What a person.

Following his death on March 8, 2014, his obituary was carried in newspapers across the country, including the *New York Times*,<sup>5</sup> the *Washington Post*,<sup>6</sup> and many others. But perhaps the *Tyler Morning Telegraph* best summed it up: “If only we had such a taxman now. . . . Oh, for another Randolph W. Thrower.”<sup>7</sup>

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<sup>5</sup> Paul Vitello, *R.W. Thrower Dies at 100; Ran I.R.S. Under Nixon*, N.Y. TIMES, Mar. 19, 2014, at B14, available at <http://www.nytimes.com/2014/03/19/us/andolph-w-thrower-dies-at-100-ran-irs-under-nixon.html>.

<sup>6</sup> Matt Schudel, *IRS Chief Stood Up to Nixon White House*, WASH. POST, Mar. 19, 2014, at B7, available at [http://www.washingtonpost.com/national/andolph-w-thrower-defiant-irs-chief-under-nixon-dies-at-100/2014/03/19/069e414e-af96-11e3-9627-c65021d6d572\\_story.html](http://www.washingtonpost.com/national/andolph-w-thrower-defiant-irs-chief-under-nixon-dies-at-100/2014/03/19/069e414e-af96-11e3-9627-c65021d6d572_story.html).

<sup>7</sup> Editorial, *Randolph Thrower, Honorable Taxman*, TYLER MORNING TELEGRAPH (Texas), Mar. 28, 2014, <http://www.tylerpaper.com/TP-Editorials/197239/andolph-thrower-honorable-taxman>.