CHAPTER TEN



# The Lawgivers

*Nay, whoever hath an absolute authority to interpret any written or spoken law, it is he who is truly the Lawgiver to all intents and purposes, and not the person who first wrote or spoke them.*

—Sermon by Bishop Hoadly before King George I (1717)

*It is emphatically the province and duty of the judicial department to say what the law is.*

—*Marbury v. Madison*, 5 US 137, 177 (1803)

As shown in prior chapters, taxation generates a culture. At the IRS that culture has in the past been quite corrupt. Presidents have used the agency to cultivate friends and abuse enemies. Congress has refined the tax code into a vehicle that generates campaign contributions.

Our courts have a culture of believing they are fair toward taxpayers. "The court bends over backwards with the taxpayer," Tax Court Chief Judge Howard A. Dawson Jr. told *Business Week* in a 1984 interview. Not true, especially in regard to "Bend Over Backwards" Dawson, whose name appears frequently in this chapter.

Tax Court has some rules that are unfriendly to taxpayers, and it denies taxpayers access to affordable counsel. When Congress passes laws to create a friendlier judicial forum for taxpayers, like shifting burden of proof to the IRS and awarding litigation fees to taxpayers, courts resist implementing them. It's a little known scandal that

is almost never mentioned in the press. Tax Court Judge Herbert Chabot spoke frankly in a 1989 dissent.

> "Equity" and "equitable" are appealing words. They conjure up visions of "doing right", of "mercy", and of Solomon-like wisdom. Certainly, none of us wants this Court to be perceived as "inequitable". However, this connotation of "equity" and "equitable", and awareness of the antonym, should not be allowed to affect the nature and work of the Court or our decision-making process.

Tax Court judges insist that Congress has denied them equity authority. That's debatable because the court has clearly applied principles of equity. True, equity authority is limited to keep judges from doing favors for taxpayers they feel sorry for. The question is "How limited?" The judge's dissent quoted above dealt with a case where the Tax Court claimed equity power so that it could rule in favor of the government.

Just what percentage of cases are won by taxpayers? One academic study asserts that the IRS should win 60 percent of cases because the taxpayer makes claims that are clearly unallowable. This category includes unallowable deductions (e.g., claiming pets as dependents), as well as those lacking evidence (e.g., no receipts to prove deductions) and those involving tax protester arguments (e.g., the income tax is unconstitutional). Of the remaining 40 percent, an unbiased court might theoretically rule in favor of taxpayers half the time, granting victory in 20 percent of all cases. Taxpayers aren't likely to be right that often because IRS settles most of its weaker cases, taking only the stronger ones to trial.

The taxpayer wins outright or in a split decision in almost 15 percent of cases, according to the Taxpayer Advocate Service (the "consumer advocate" office within IRS) and studies by academics. A review of 945 "most litigated issues" for June 2006 to May 2007 shows that the taxpayer won outright just 8 percent of the time. It is often difficult to determine whether a taxpayer actually won much worthwhile in a split decision of multiple issues. The tax may be upheld, but the court abates penalties, so it's counted as a split. A decision that a taxpayer may deduct 10-20 percent of what he claimed is a split.

A group I worked with undertook to study all small case decisions (under $50,000, where the taxpayer elects this procedure) by the Tax Court from January 2001 to December 2002. There were about 400