

PENNINGTON V. COXE: A GLIMPSE AT THE FEDERAL GOVERNMENT AT THE END OF THE FEDERALIST ERA

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TABLE OF CONTENTS

I.	INTRODUCTION	417
II.	THE BACKGROUND POLITICS	419
	A. <i>The Repeal of the Internal Taxes</i>	422
	B. <i>The Tax Bureaucracy in Philadelphia</i>	428
	C. <i>The Taxpayers' Resistance and the Agreed Course of</i> <i>Action</i>	434
	D. <i>Delay and Disinterest</i>	446
III.	THE CASE IS JOINED AT LAST	454
IV.	JUSTICE MARSHALL'S DECISION	461
V.	POSTSCRIPT	468

I. INTRODUCTION

For those concerned with the vitality of the fledging federal government, the beginning of 1802 was a disconcerting time. Both the federal judiciary and the federal internal tax bureaucracy were little more than a decade old. These institutions were still young enough to be precarious even if they had had no obvious enemies. And they did have enemies.

The Federalists who supported these national institutions

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undoubtedly feared they were still too new to have obtained permanence. Significant questions about their constitutional design still remained unanswered. Those who did not support them, on the other hand, were hopeful that these institutions could be expeditiously diminished or eliminated before their constitutional role could become firmly established. Indeed, the Jeffersonian Republicans had just come into power the previous year. The Republicans were committed to dismantling those parts of the new national government, including the judiciary and the tax bureaucracy that, in their view, gave too much political power to the federal government at the expense of the state governments. The Federalists believed that allowing the Republicans to act on these intentions would defeat all hopes for a vigorous nation and a strong commercial economy.

As this struggle over the constitutional shape of the independent federal government played out, that federal government carried on with its business. Appointments to federal office were made, controversies appropriate for resolution in the federal courts arose, and federal revenue continued to be collected. How, in the midst of the maelstrom of political rhetoric surrounding Jefferson's assumption of the presidency, were the ordinary affairs of government to be carried out? This article will examine how, in one controversy over the repeal of the internal taxes, the ordinary affairs of government were handled in the face of the transitions the Republicans sought. In most of their aspects, the institutions of the federal government take shapes that seem comfortably familiar to us two centuries later. But a closer look at the details reported here reveals that the emergence of these familiar shapes was far from clear at the time.

The case of *Pennington v. Coxe*¹ involves a seemingly trivial and somewhat tawdry case of tax collection. In their pursuit of the case, both the taxpayers and the government invoked strategies that seem very similar to those in use today, but at the same time were complicated by options and uncertainties about their institutional context that today seem strange. Among the then unanswered questions the parties faced were: Who has authority to make administrative judgments in a national, but decentralized, system, and what is the most expeditious way to establish a national precedent? What aspects of the procedures of the federal courts, and the Supreme Court itself, can be made subject to the conditions imposed upon the courts by private agreements between the parties? Can otherwise innocuous private agreements be used to provide federal courts with

¹ 6 U.S. (2 Cranch) 33 (1804).

jurisdiction? Can Congress grant relief to taxpayers for taxes already imposed, even if the tax is clearly owed? Does it matter that the collector has already asserted a tax liability and is preparing to sue based on that liability? What is the nature of the tax collectors' rights to their commissions in such circumstances?

In the end, however, the case appears in the reports with only a slight hint of these uncertainties. There is barely anything in the published opinion that dates the case at all, except perhaps for the rigidity of the arguments regarding statutory interpretation made by the parties. Indeed, Chief Justice John Marshall found a way to use the case, despite the precariousness of the procedures involved, as a vehicle to caution future courts about their limited role in cases involving taxes. In typical Marshall fashion, however, he then ignores his own advice and expounds in dicta addressed to Congress about the characteristics of a well-designed tax base.

II. THE BACKGROUND POLITICS

Long before his own election, Thomas Jefferson had privately let his political allies know of his belief that if nothing else defeated the Federalists, their own internal taxes would.² These taxes had been imposed by the Washington and Adams administrations in four stages of ever increasing intrusiveness. First was the whiskey tax imposed in 1791,³ followed by the various duties imposed on carriages,⁴ tobacco

² Shortly after the enactment of the taxes, Jefferson predicted they would have a dampening effect on support for the Federalist program:

Party passions are indeed high. . . . However, the fever will not last. War, land tax & stamp tax, are sedatives which must calm its ardor. They will bring on reflection, and that, with information, is all which our countrymen need, to bring themselves and their affairs to rights. They are essentially republican.

Letter from Thomas Jefferson to James Lewis (May 9, 1798), in 7 THE WRITINGS OF THOMAS JEFFERSON 250 (Paul L. Ford ed., 1896). Jefferson held to that view after his election. Letter from Thomas Jefferson to Robert R. Livingston (Oct. 10, 1802), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 173 ("But it was not lies or argument on our part which dethroned them, but their own foolish acts, sedition laws, alien laws, taxes, extravagance & heresies").

³ Act of Mar. 3, 1791, ch. 15, 1 Stat. 199. This tax led to the unrest commonly known as the Whiskey Rebellion. Hamilton and at least some of his supporters may well have viewed the national effort to subdue it—which included gathering the militia of several states to march across Pennsylvania—as an important step in building the nation. It takes only a little hindsight to see that it may well have unnecessarily solidified the opposition. See generally THOMAS SLAUGHTER, THE

products, refined sugar⁵ and sales at auction in 1794,⁶ and a stamp tax on most documents with legal or commercial significance⁷ in 1797. Cynics even then thought that these excise taxes may have been imposed simply to create a need for an expanded federal bureaucracy; in any event, they brought in little revenue compared to the duties imposed on imports.⁸ Finally, in the tumult over the possibility of a war with France in 1798, and the military buildup the Federalists pursued in anticipation of it, an apportioned direct tax on dwellings, other land, and slaves was imposed in 1798.⁹

WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION (1986). A discussion of the issues associated with the whiskey tax can be found in TUN YUAN HU, *THE LIQUOR TAX IN THE UNITED STATES 1791-1947* 11-30 (1950).

⁴ Act of June 5, 1794, ch. 45, 1 Stat. 373, *amended by* Act of May 28, 1796, ch. 37, 1 Stat. 478. The carriage tax was not styled as a tax on the production or sale of a good (as the other excise taxes of this era were). It was instead a tax on the ownership of carriages, imposed every year on the same carriage, in the style of a property tax. As such, it was unsuccessfully challenged in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), as a direct tax, which Congress had no power to impose without apportioning the burden among the states by population.

⁵ Both the tobacco and sugar product taxes were imposed by the Act of June 5, 1794, ch. 51, 1 Stat. 391. The tobacco products tax was substantially amended by the Act of Mar. 3, 1795, ch. 63, 1 Stat. 426, to place the tax on capacity rather than actual production, and was separately repealed in 1800. Act of Apr. 24, 1800, ch. 36, 2 Stat. 54. The repeal of the tobacco products tax seems to have been the result of a combination of political opposition and defects in the design of the tax that, in the face of this opposition to the tax itself, could not be overcome. *See infra* note 63.

⁶ Act of June 9, 1797, ch. 65, 1 Stat. 397.

⁷ Act of July 6, 1797, ch. 11, 1 Stat. 527. This tax included charges that amounted to inheritance taxes (imposed on the receipts evidencing the devise of property, but based on the amount received), insurance taxes, and taxes on certain kinds of personal property, as well as what amounted to fees on litigation, since no document needing a stamp could be presented in court without the proper stamp. *See Edeck v. Ranuer*, 2 Johns. 423, 424 (N.Y. Sup. Ct. 1807) (indicating that such documents when unstamped could not be presented in either federal or state court).

⁸ ALEXANDER BALINKY, ALBERT GALLATIN: FISCAL THEORIES AND POLICIES 55 (1958), observes, "One of the principal political reasons for Republican opposition to the internal taxes was the centralized enforcement machinery such taxation made necessary. They saw in this system a multiplication of officials, an increase in patronage, and the forced intrusion into people's homes. But what Republicans feared most was that the Federalists wanted to keep the existing host of collectors in office as disseminators of Federalist sentiment. Republicans interpreted the effort to prevent repeal as a method of keeping a system of patronage intact for the day when Federalists would come back into power."

⁹ Act of July 14, 1798, ch. 75, 1 Stat. 597. In the years between 1790 and 1798, those opposing Hamilton and the Federalist agenda argued in favor of a federal direct tax, that is, a broad based property tax, while the Federalists tended to duck the issue.

In the early days of his administration, Jefferson let his followers believe that the hated internal taxes would soon be repealed.¹⁰ Although the demolition of the federal judicial apparatus of the Federalists was the first major order of Jeffersonian business before the seventh Congress, the repeal of the internal taxes by the act of

Some Federalists later accused their opponents of working to enact such a tax, which the public would perceive as a Federalist measure regardless of its origins, in the hopes of turning public opinion against the Federalists. This clearly was the view of George Gibbs, revealed in his account of the Washington administration in the papers of his grandfather, Oliver Wolcott, who succeeded Hamilton as Secretary of Treasury:

The anti-federalists proposed raising the whole sum required [necessary for tribute] by additional imports on imported goods, and by a direct tax on real estate. The motive for urging this latter tax was unquestionably that, as the most unpopular, it would result in the speedy breaking down of their rivals, and when in after years it became necessary in view of apprehended war to impose such a tax, it was used as a means to this end, and Mr. Jefferson's administration rested much of their claim to popularity upon its abolition. It was now however advocated by his adherents.

1 MEMOIRS OF THE ADMINISTRATIONS OF WASHINGTON AND JOHN ADAMS 141 (George Gibbs ed., 1846) (noting further that Federalists proposed extension of objects of internal taxation).

¹⁰ See, e.g., Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801) in 4 THE WRITINGS OF THOMAS JEFFERSON 425 (H.A. Washington, ed. 1859) ("You will perhaps have been alarmed, as some have been, at the proposition to abolish the whole of the internal taxes. But it is perfectly safe. . . . By suppressing at once the whole internal taxes, we abolish three-fourths of the offices now existing, and spread over the land."); Letter from Albert Gallatin to Thomas Jefferson (Mar. 14, 1801), in 1 WRITINGS OF ALBERT GALLATIN 24, 25 (Henry Adams ed., 1879) (noting that it would be unwise to push for the repeal of the internal taxes until Congress had actually taken steps to reduce expenses); Letter from Albert Gallatin to Thomas Jefferson (Nov. 15, 1801), in WRITINGS OF ALBERT GALLATIN, *supra*, at 61 (urging Jefferson that, given the cost of the bureaucracy needed to collect the taxes, it would be foolhardy to repeal some but not all of the internal taxes); Notes on the President's Message to Congress (Nov. 1801), in WRITINGS OF ALBERT GALLATIN, *supra*, at 63, 65 (urging Jefferson to refrain from being too specific about his intentions in his message to Congress, given the possibility that Congress might take offense at his interference with matters more properly considered only by Congress). Jefferson decreed the death of them all in his address of December 8, 1801. Thomas Jefferson, First Annual Message (Dec. 8, 1801), in 1 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS 1790-1966 (1966) 58, 59 (Fred L. Israel ed., 1966) ("[T]here is reasonable ground of confidence that we may now safely dispense with all the internal taxes—comprehending excises, stamps, auctions, licenses, carriages, and refined sugars, to which the postage on newspapers may be added, to facilitate the progress of information; and that the remaining sources of revenue will be sufficient to provide for the support of the government. . .").

April 6, 1802¹¹ followed shortly thereafter.¹²

A. *The Repeal of the Internal Taxes*

The popular mood against the taxes is well summed up in an account of the revelry that occurred the evening of the day on which its repeal took effect:

Wednesday last, being the 30th June, we had the pleasure of witnessing the last expiring moments of the oppressive and odious internal taxes, (the detestable offspring of the equally detested reign of John Adams) and the same noticed here by a number of truly republican characters. About sun-set they met at the Red-Lion, and after causing a large bon-fire to be erected, (over which having suspended in a conspicuous manner the United States Gazette, containing the hateful acts for levying and collecting the internal taxes, for the most dangerous and useless of all purposes *a standing army, navy, and a host of sycophants, dependents and drones,*) the whole was committed to the flames amidst the acclamations of a large body of spectators.¹³

The passage of the repealing bill had been the occasion of more than a little political haggling, some of which reflected the tenuous nature of

¹¹ Act of April 6, 1802, ch. 19, 2 Stat. 148.

¹² Among the other significant topics addressed early on in the Seventh Congress were reapportionment, a reduction in the armed forces, a limitation in the pay of civil servants, and a limitation on the appropriations for the navy. *See* Acts of the Seventh Congress of the United States, 2 Stat. viii (1802). All of these topics were viewed as closely related: taxes were necessary to pay for the army; taxes in turn necessitated both civil servants and federal courts. In the figures compiled in 1801 regarding the cases considered by the federal courts, 800 cases were attributed to the taxes, although it is not clear from the context whether this number includes import duties (which were never at risk of repeal) or only internal taxes. *See* ERWIN, C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 23 (1987). Surrency quotes Breckinridge's remarks reported in the debates; the version published in *American State Papers* does not break down into subject matter in this way. *See* 1 *American State Papers* (Misc.), No. 155, at 319 (Walter Lowrie & Matthew St. Claire Clarke eds., 1832).

¹³ This account appeared in the *Gazette of the United States* on July 17, 1802, with a statement that it was "taken from the Chillicothe paper of the 8th instant, and here published for the amusement of our readers." *The Triumph of Republicanism Over the United States Gazette, and the Internal Taxes*, GAZETTE OF THE U.S., July 17, 1802. The *Gazette's* source has not been verified.

the Congressional proceedings in the aftermath of the Republican victory. The first disputes in the House of Representatives involved the assignment of the dismantling task to committee, since the status of the standing Committee on Ways and Means was not yet fully established.¹⁴ The resulting Committee's report unhesitatingly urged repeal of all internal taxes.¹⁵

Next, the members quarreled over whether additional information, especially about the costs of collection of internal taxes, should be requested from the Secretary of Treasury. A debate on eliminating the taxes, the Federalists argued, could not be complete without better information on whether those taxes really cost as much as the Republicans claimed they did.¹⁶ The Federalists then created a small crisis for the House leadership when they attempted to establish the extent to which merchants who had suffered losses at the hands of the French pirates should be indemnified. This inquiry was necessary, the Federalists asserted, because the Republicans were relying on their claimed ability to reduce federal expenditures to support their position that entire revenue sources could be eliminated.¹⁷

When debate finally reached the merits, the Federalists insisted that the internal taxes should not be entirely removed, and that reduction in tariffs on imports, particularly foodstuffs like salt, brown sugar, coffee and tea would be more appropriate. The internal taxes were, after all, essentially luxury taxes and were mildly progressive both in form and effect. The import duties, especially those on salt

¹⁴ See 11 ANNALS OF CONG. 354, 356-60 (1801).

¹⁵ The report presented an analysis of the relative cost of the internal duties (exacerbated by the facts that the stamp tax was set to expire and that innovations in distillation were likely to make the tax on distilled liquor more costly to enforce). The report urged that "[a] wise policy. . . [would] induce the United States to abstain, wherever practicable, from exercising the right of taxation on those subjects over which the individual States possess a concurrent right" and listed among the reasons for repeal of the internal taxes "their tendency to multiply offices, and increase the patronage of the Executive." Internal Duties (Mar. 8, 1802), *reprinted in* 1 American State Papers (Fin.) No. 177, at 734-45 (Walter Lowrie & Matthew St. Claire Clarke eds., 1832). This report was available in the popular press, at least in Philadelphia. See, e.g., GAZETTE OF THE U.S., Mar. 19, 1802 (reprinting from the *National Intelligencer*).

¹⁶ See 11 ANNALS OF CONG. 445-47 (1802). RICHARD HILDRETH, 5 THE HISTORY OF THE UNITED STATES OF AMERICA 444 (Harper & Brothers 1880), suggests that these exchanges attracted some notoriety: "[B]y a very unusual practice, several calls for information, without being objected to or debated, were silently voted down by the majority, whom the Federalists stigmatized in consequence as the 'dumb Legislature'."

¹⁷ See 11 ANNALS OF CONG. 1003 (1802).

and other basic foodstuffs, fell on everyone, rich and poor alike.¹⁸ The

¹⁸ The Federalist press was merciless on this point, and continued to be so after the repeal debates were concluded. A mock letter, signed by “Brown Sugar, Bohea Tea, Coffee, Salt,” taunted:

[W]e consider [the objects from which the taxes were removed] as being mere servants of the rich, and as having little or nothing to do with the poor, who had been so long made to believe that their ease and welfare would always be remembered by your excellency. . . .

“Pleasure Carriages and white loaf sugar” may be very good things for those, who are wealthy enough to keep them. But they are kept only by those, who could also very well pay whatever tax was laid on them. If not, they had their choice to give up using articles, which the poorer rest of their fellow-citizens know not how to do without. They might give up nice refined “white sugar,” and take in its stead plain brown sugar or good molasses, such as contents a multitude of people, who are not for that reason a jot less worthy than themselves. They might come down from their grand coaches, and either walk on foot, being a healthy exercise, or travel in plain wagons, such as the family of many an honest farmer is satisfied to ride in abroad, or to go to church on Sundays. On the other hand, with respect to us, the people have not such a free choice; because we are commodities which almost every body in this country must now use.

From the Frederick Town Herald, To Thomas Jefferson, President of the United States, PA. GAZETTE, July 1, 1802, at 2 (without original date). On June 3, the same paper had reprinted a more restrained contribution of “An American” to the Washington Federalist, again without the original date:

Thus the president forgetful of his darling popularity, forgetful of the interests of the great bulk of the nation who made him their chief magistrate, has used that influence which he derived from the people themselves, to exonerate in a great measure the rich from their taxes, and to leave the same burthen upon the poor in the time of peace that existed in a state of war. Is this the first evidence of that regard he professed for the poor and their interests?

PA. GAZETTE, June 3, 1802, at 2.

Other authors were able to read the emerging sectional interests into the move:

The measures of the present administration are no doubt, dictated by Virginia. That proud and ambitious state, is aspiring at dominion over all the others. . . . The Internal Taxes were abolished, because that state had to pay her proportion. Duties on carriages especially were done away, because they were obnoxious to the Nabobs of that state; and it must be evident to every one on a moment’s reflection, that of duties on imported goods (the only taxes hereafter to be collected) her citizens pay in a very small proportion. She has, comparatively speaking, no commercial cities, no ships, no trade. Her consumption of imported wares is very trifling, for who should consume them? Not the Slaves. Thus do contributions fall very

Republicans refused to be embarrassed by these arguments. They focused on their real concern, the emerging federal bureaucracy, and railed against the inefficiency of the bureaucracy¹⁹ necessary to collect internal taxes compared to that used to impose the duties on imports.²⁰ The debate quickly degenerated into a free-for-all in which

unequally on the different states. The eastern and middle states furnish the money, but Virginia applies it, and directs the government. "*Bread*" is still taken "*from the mouths of labour,*" but the nobility of the Ancient Dominion enjoy their luxuries, exempted from the payment of taxes.

Internal Taxes, PA. GAZETTE, July 3, 1802, at 2 (reproducing an item signed by S. Murley, June 1802, previously appearing in the *York Recorder*).

¹⁹ Elimination of the bureaucracy as well as the taxes themselves was clearly a part of the Jeffersonian agenda, as indicated in Jefferson's observations on the motives of those who opposed it:

The suppression of useless offices, and lopping off the parasitical plant engrafted at the last session on the judiciary body, will probably produce some. Bitter men are not pleased with the suppression of taxes. Not daring to condemn the measure, they attack the motive; & too disingenuous to ascribe it to the honest one of freeing our citizens from unnecessary burthens and unnecessary systems of office, they ascribe it to a desire of popularity.

Letter from Thomas Jefferson to Benjamin Rush (Dec. 20, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 2, at 128. Jefferson, in his second Inaugural Address, indicated his satisfaction with the repeal of the internal taxes:

The suppression of unnecessary offices, of useless establishments and expenses, enabled us to discontinue our internal taxes. These, covering our land with officers and opening our doors to their intrusions, had already begun that process of domiciliary vexation which once entered is scarcely to be restrained from reaching successively every article of property and produce. If among these taxes some minor ones fell which had not been inconvenient, it was because their amount would not have paid the officers who collected them, and because, if they had any merit, the State authorities might adopt them instead of others less approved.

The remaining revenue on the consumption of foreign articles is paid chiefly by those who can afford to add foreign luxuries to domestic comforts, being collected on our seaboard and frontiers only, and incorporated with the transactions of our mercantile citizens, it may be the pleasure and the pride of an American to ask, What farmer, what mechanic, what laborer ever sees a taxgatherer of the United States?

Second Inaugural Address of Thomas Jefferson (Mar. 4, 1805), in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE U. S. 18-19 (1989).

²⁰ The *Gazette of the United States* reports that the Committee on Ways and Means, headed by John Randolph, brought forth a bill, only to have Randolph immediately propose long amendments thereto, and thus provoke a debate about the propriety of printing bills. See GAZETTE OF THE U.S., April 2, 3, 8, 19, 1802.

the Federalists made repeated motions to amend the bill to substitute particular import duties for particular internal taxes as subjects of repeal.²¹ Several more squabbles consumed four or five more days of debate before the inevitable enactment of the repeal.²² First, John Randolph was humiliated by having to accept an amendment to the bill so that it could properly repeal the duty on “carriages for the conveyance of persons” rather than the duty described in the bill as on “pleasurable carriages,” a duty which did not exist.²³ Second, Thomas Morris, a Federalist from New York, asserted that Jefferson had overstepped the bounds of the President’s proper role when he suggested the repeal of particular sources of revenue, since “all revenue systems must originate in this house.”²⁴ Despite the wrangling, the taxes were repealed by a vote of 61 to 24.²⁵

Despite the time taken in haggling over the specifics of the repealing act, the technical terms of the repeal were ambiguous. The whiskey tax and the sugar tax were ostensibly taxes on finished goods, but the statutes outlining the steps required for compliance mandated taxpayers’ attention not just to amounts manufactured, but also to capacity and goods in process as well as to amounts actually shipped.

²¹ 11 ANNALS OF CONG. 1015-25 (1802).

²² Some of the bickering reflected the ineptness of Randolph as a parliamentarian. Although not all of the Federalist maneuvering can be reconstructed from the reports in the Annals, a long partisan summary of the debates, see GAZETTE OF THE U.S., Apr. 2, 1802, reveals much more.

²³ 11 ANNALS OF CONG. 1026, 1043 (1802).

²⁴ *Id.* at 1067.

²⁵ *Id.* at 1073. The overall political implications of the actions of Congress in the first half of 1802 can be gleaned from the writing of Fabricius, a partisan Federalist:

Now for taxes: What taxes are there but impost?—And the old Congress proposed a five per cent impost. Necessity requires that some revenue should be collected to pay the salaries of the patriots who go from home to serve *the people at Washington*. But let the odious tax-gathering power of the United States’ Government be kept as much as possible on the sea-board:—confine it to the wharves, to the very edge of high-water mark. Do not let the people—“God’s chosen people” in *Virginia* see a loaf-sugar tax-man, nor a whisky collector—nor a still more accursed imp of power, dunning for a tax on those necessities of life, the splendid coaches of our patriots, the friends of equality. Thus away go our taxes in a lump, all in one repealing act. . . . *The Confederation come again*. Federal Justice—no more of it. . . . What is there of the old system of the confederation, that is not restored?—What i[s] there worth having of the new plan of government that in practice and in fact is not already gone?

For the sugar tax, the refiners were supposed to keep daily records of all sugar refined, but were only required to pay a duty after the refined sugar was shipped.²⁶ The repealing act took no such subtleties in the timing of the taxes into account. It simply declared that “from and after the 30th day of June next, the internal duties on stills and domestic distilled spirits, on refined sugars, licenses to retailers, sales at auction, carriages for the conveyance of persons, and stamped vellum, parchment and paper, shall be discontinued, and all acts and parts of acts relative thereto, shall from and after the said 30th day of June next, be repealed” and included a savings clause “for the recovery and receipt of such duties as shall have accrued, and on the day aforesaid remain outstanding. . . , the provisions of the aforesaid acts shall remain in full force and virtue.”²⁷

The redundant statutory language imposing the taxes and the reference to daily records of production and shipping in the compliance requirements of the sugar tax rendered the simplistic language of the repeal provisions inadequate. One question remained: was the duty no longer imposed on any sugar whatsoever shipped after June 30, or was the duty avoided only on sugar actually refined after June 30? The former interpretation, allowing previously refined sugar to avoid duty if shipped after June 30, would have created a strong incentive to hold back shipments of sugar already refined until after that date.²⁸ On the other hand, the latter interpretation would have meant that the tax continued in effect until

²⁶ Although the refiner was required to “enter . . . in a book or paper to be kept for that purpose, all sugar which he or she shall refine,” the act ultimately required only a “just and true account of all the refined sugar, which he or she shall have sent out . . . and . . . pay or secure the duties, which . . . ought to be paid upon the refined sugar in the said account mentioned.” Act of June 5, 1794, ch. 51, § 5, 1 Stat. 384, 386 (describing duties on snuff and refined sugar). Bond of \$5000 was to be posted to ensure the performance of this record keeping. *Id.* § 10, 1 Stat. at 386. Additional penalties for failing to make entries included forfeiture of refining equipment and a \$500 penalty, *id.*, with still further additional penalties for failure to swear oaths and report changes in equipment, *id.* §§ 8, 9, 1 Stat. at 386. The act also provided for the seizure and forfeiture of undutied sugar. *Id.* § 10, 1 Stat. at 386-87.

²⁷ Act of Apr. 6, 1802, ch. 19, § 1, 2 148 (repealing the Internal Taxes). The act also allowed continuation of “the payment of . . . allowances on the exportation of any . . . sugars legally entitled thereto” and of “the recovery and distribution of fines, penalties, and forfeitures, and the remission thereof. . . .” *Id.*

²⁸ As early as January 1802, the collector at Philadelphia speculated that receipts on the tax on distilled liquor would have been greater “had not the strong appearances of a repeal occurred.” Letter from Tench Cox to Peter Muhlenberg (Jan. 2, 1802) (Letter Books of the Supervisor of Pennsylvania, 1802-03, National Archives Record Group 58).

all sugar refined (or perhaps even in the process of being refined) before June 30 had left the factory, and thus would have required additional payments and an extended period during which the Federalist mechanisms for enforcing the tax remained in place.

B. The Tax Bureaucracy in Philadelphia

The refiners, along with all the other payers of federal taxes in Philadelphia, had plenty of warning of the fact that the local federal tax administration in Philadelphia would fully enforce the internal taxes up to the date of the repeal. Tench Coxe, then the federal collector for the city and county of Philadelphia, had purchased advertisements printed in local newspapers shortly after the repeal, pointing out that the federal internal taxes “would be in full force until the first day of July next; and the fines, penalties and forfeitures, be incurred, as heretofore, by neglect—Of which all concerned will take special notice.”²⁹

Coxe was a perennial bureaucrat, and more than a little bit of an opportunist.³⁰ He had served as Assistant Secretary of the Treasury

²⁹ The *Philadelphia Gazette* ran an advertisement apparently purchased on April 21, on at least three days. PA. GAZETTE, May 12, 19, 22 (1802), at 4. See also, e.g., GAZETTE OF THE U.S., Apr. 20, 1802, at 2 (running the advertisement as well).

³⁰ His first act of opportunism found him entering Philadelphia with Howe's troops in September 1777, and remaining there as a merchant selling to the occupation forces until the British abandoned the city late the following summer. JACOB E. COOKE, *TENCH COXE AND THE EARLY REPUBLIC* 23-40 (1978). He was attainted of treason, but apparently his willingness to take the patriot oath of allegiance and the intercession of family friend and later Governor of Pennsylvania, Thomas McKean, spared him the harshest consequences. *Id.* at 41. He continued as a merchant until his writings on political economy brought him sufficient attention that he was selected as a representative to the Annapolis Convention in the fall of 1786, where he met, among others, Alexander Hamilton and James Madison. *Id.* at 94-98. Coxe spent more and more time engaged in political writing, until he was chosen one of Pennsylvania's representatives to the lame duck Continental Congress, *id.* at 126, and finally, in May of 1790 was appointed Assistant Secretary of the Treasury under Hamilton, *id.* at 155.

Coxe, a somewhat less than charismatic figure who had been previously almost forgotten, has received recent attention from political and legal historians because of his writing regarding the right to bear arms. See generally Stephen P. Halbrook and David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms, 1787-1823*, 7 WM. & MARY BILL RTS. J. 347 (1999). It appears that Coxe was intimately familiar with the arms trade, having himself been a merchant dealing in arms and other goods in partnership with Nalbro Frazier of Boston from 1784 to 1790. See LUCY FISHER WEST, *GUIDE TO THE MICROFILM OF THE PAPERS OF TENCH COXE* 10-11 (1977); Summary of accounts entitled “Sales of Muskets” showing total sales

under Alexander Hamilton from the creation of the position during the Washington administration until he became the first Commissioner of Revenue when the Treasury was reorganized in 1792.³¹ He had had a falling out with Hamilton by the end of Hamilton's term of service early in 1795. It is difficult to determine whether Coxe fell into disfavor as a result of his overtures to Jefferson while in Hamilton's service, or whether the overtures were the result of Coxe having become aware that he was no longer in Hamilton's best graces. Regardless of the timing, by the time Hamilton left office, Hamilton's preference for Oliver Wolcott as Hamilton's successor as Secretary of the Treasury seems to have solidified the alienation of Coxe from the Federalist cause.³² Despite the fact that his Republican preferences were becoming ever more apparent, Coxe continued on as Commissioner of Revenue in the Adams administration after Wolcott's promotion over him.

Coxe finally broke publicly from the Federalist camp when he unwillingly left the Treasury in 1797.³³ He spent the next three years hoping to earn another political appointment by writing in support of the Republican cause, both at the national and local level. He was finally rewarded by an appointment to the Pennsylvania land office, but he remained unsatisfied. In that position he became an active political writer, attacking John Adams and his Federalist administration in newspapers, pamphlets and letters.³⁴ He dearly

and remittances for the years 1787 to 1791, in *Tench Coxe Papers* (maintained by the Historical Society of Pennsylvania) [hereinafter *Coxe Papers*]. He is also noteworthy as the public official offered a bribe by Robert Worrall, the prosecution of whom was the first of the cases in which the possibility of federal common law crimes was litigated. See *United States v. Worrall*, 2 U.S. (2 Dall.) 384 (1798).

³¹ COOKE, *supra* note 30, at 241-42.

³² *Id.* at 266-73.

³³ *Id.* at 302-07.

³⁴ Coxe had, even while still at the Treasury, written scathing attacks on the royalist tendencies of the Federalists. He is attributed with the *Juriscola* series that appeared in the *Philadelphia Gazette* in July 1795 attacking the Jay treaty, *id.* at 277, and with a series appearing over the name "A Federalist" which—despite the title and the fact that they also appeared in the *Gazette of the United States*—attacked Adams as a monarchist, *id.* at 286. His political writing after leaving the Treasury included a series against a possible war with France published in the *Philadelphia Gazette*, the *Aurora*, and Mathew Carey's *United States Recorder* under the name "An American Merchant." *Id.* at 338.

It appears that it was Coxe who in the spring of 1799 reported in the *Aurora* the statements of John Langdon of New Hampshire and John Taylor of Virginia witnessing Adams' inclination toward monarchy. And his own release of a letter he had received from Adams regarding undue British influence in the Washington

hoped to be rewarded therefor when the Republicans came into power. He apparently thought himself far more significant and far more useful than Jefferson did, and had difficulty putting his situation in perspective, for he doggedly wrote Jefferson insisting upon a satisfactory position.³⁵ He was totally undeterred by Jefferson's earlier admonition to him that "[w]henever a man cast a longing eye on [offices], a rottenness begins in his conduct."³⁶

Upon Jefferson's election, Coxe aspired to be appointed to a cabinet position, or at least be named Supervisor of Revenue for Pennsylvania.³⁷ Jefferson had no room in his cabinet for Coxe (who would bring neither statesmanship nor political popularity), and gave the Pennsylvania supervisor's post to John Peter Gabriel Muhlenberg. Peter Muhlenberg was a very popular Philadelphian who resigned his position as Senator-elect to take the more lucrative position (and, not insignificantly, to avoid the less than pleasant move to the new federal capital in the District of Columbia.)³⁸ Jefferson finally tried to

administration in 1792 to be reprinted in the *Aurora* led to the notorious sedition prosecution of the *Aurora*'s publisher, William Duane. *Id.* at 358-60. And as the 1800 election campaign proceeded, Coxe published pamphlets and articles revealing the letter written in 1796 by Jefferson to his neighbor Philip Mazzei decrying the monarchical influences at work on President Washington, *Strictures upon the Letter imputed to Mr Jefferson*, and deploring the continuation of such sentiments in Adams, *To the Republican Citizens*. *Id.* at 376-77.

Coxe probably was active in organizing and lobbying, as well as in writing, in the efforts to elect Thomas McKean for governor in the fall of 1799. *Id.* at 371-89.

³⁵ His letters entreating Jefferson for appointment include those dated January 25, March 10, March 23, June 24, June 25, and September 4, 1801. *Id.* at 392-400.

³⁶ Letter from Thomas Jefferson to Tench Coxe (May 21, 1799), in 7 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 2, at 381.

³⁷ See COOKE, *supra* note 30, at 394. For a survey of Jefferson's appointment practice, see Carl E. Prince, *The Passing of the Aristocracy: Jefferson's Removal of Federalists, 1801-1805*, 57 J. AM. HIST. 563 (1970) (concluding that, contrary to earlier historians' more casual observations, Jefferson forced the resignation or removal of many prominent Federalists and replaced them primarily with loyal Republicans).

³⁸ Muhlenberg was present for Jefferson's inaugural speech, but had resigned by the time the Seventh Congress convened to do business. See 11 *ANNALS OF CONG.* 1 (1801); see also EDWARD W. HOCKER, *THE FIGHTING PARSON OF THE AMERICAN REVOLUTION* 163-64 (1936).

The supervisor for Pennsylvania was paid a salary of \$1200, and was entitled to a commission of 1% of a taxes on distilled liquor, and ½% of most of the other internal taxes, as well as fees relating to inspections and a portion of fines and forfeitures successfully prosecuted. See Act of July 11, 1798, ch. 71, § 1, 8, 1 Stat. 591, 592-93; see also Compensation of Officers of the Customs, in 1 *American State Papers (Fin.)*, *supra* note 15, No. 132, at 576. Given that \$114,000 of the more than \$160,000 collected in 1800 was from distilled liquor taxes, Act of July 11, 1798, ch. 71, § 8, 1

appease Coxe by offering him either a mere inspectorship or collectorship under Muhlenberg; neither good jobs given Jefferson's well known attitude about internal taxes.³⁹ Despite Coxe's rantings that he deserved a far better position, Muhlenberg (who perhaps realized that everyone should fear Coxe's pen were it not otherwise employed) saw to it that Coxe was still allowed to serve as collector for Philadelphia, which office he assumed in October 1801.⁴⁰

Coxe was, of course, doomed to be a lame duck tax collector, for Jefferson and the Republicans were determined to rid the new nation of the very internal taxes he was to collect. Shortly after the repeal legislation was actually enacted, Muhlenberg obtained the far more desirable and secure position of collector of imposts for the port of Philadelphia.⁴¹ (No one in this era had ever contemplated eliminating duties on imported goods and tonnage, and the position of customs collector remained among the most lucrative federal patronage positions throughout the next century.) Muhlenberg's move left the lame duck supervisorship at last available to Coxe.⁴²

Stat. 591, 596 (listing revenues for year 1800), the position involved annual compensation of no less than \$2300 (some aspects of the compensation were statutory, and others were left to the discretion of the President and various supervising revenue officers). *See, e.g.*, Act of March 3, 1791, ch. 15, § 58, 1 Stat. 199, 213. Collectors of internal revenue, on the other hand, were entitled to a fixed salary of only \$80, but could claim 6% of revenues collected. *See* 1 American State Papers (Fin.), *supra* note 15, No. 93, at 400-01.

³⁹ COOKE, *supra* note 30, at 396. Jefferson's attitude toward Coxe had no doubt been shaped by Coxe's repeated, and increasingly pretentious, entreaties to him for political favor. Cooke reports that Coxe was said by William Duane to have been so affected by these events that he "declared he resolved to abandon politics; and indicated that all parties were alike." *Id.* at 400.

⁴⁰ Coxe replaced James Ash. *Id.* at 400 n.27.

⁴¹ The reasons for the vacancy in the customs position are not entirely clear. The Federalist press dealt with the situation as if the incumbent George Latimer had been forced out. *See* GAZETTE OF THE U.S., Sept. 6, 1802, at 2. Latimer, who had been a leader at the Philadelphia ratifying convention, unsuccessfully ran for Congress in the fall. *See* GAZETTE OF THE U.S., Oct. 14, 1802, at 3.

A letter from "A Pennsylvania Elector," GAZETTE OF THE U.S., Aug. 5, 1802, at 2, suggests that Muhlenberg's good luck was the result of the urgings of the then Governor of Pennsylvania, Thomas McKean, to Jefferson to give Muhlenberg a position sufficiently secure that he would not attempt to challenge McKean in the next gubernatorial election.

⁴² The timing of Coxe's appointments is somewhat confused. Cooke recites, without comment or explanation, that Muhlenberg reappointed Coxe to the collectorship on March 15, 1802, but that this certificate of appointment is endorsed by Coxe "declined accepting and giving bond and taking oath of office, and never acted in any one respect." COOKE, *supra* note 30, at 400. Cooke reports, however,

Coxe as collector had a set view of the effect of the repeal of the sugar tax: although the tax was not collected until the sugar was purchased and shipped out of the refinery, the tax was to be paid on all sugar that was refined in the United States on or before June 30. Therefore the tax would be collected on all such sugar even if it was not shipped until months later. Under the scheme for compensating revenue officers, Coxe stood to benefit personally from this interpretation; as a collector, he was entitled to 6% of the duties related to his district, and as supervisor he was entitled to 1/2 percent of the duties for the entire state.⁴³ On June 30 he sent a messenger to each of the refiners with a letter to the effect that he would continue to collect the duties on refined sugar not yet shipped and asking the refiners to provide information about refined sugar not yet shipped to

that it was not until July 28, 1802, that Jefferson appointed Coxe as supervisor of the revenue. *See id.* If both of these statements are true, Coxe had no formal authority for several months in mid-1802, despite the activities described here, except that granted directly by a deputation by Muhlenberg on January 13, 1802. *See* Letter from Peter Muhlenberg (Jan. 13, 1802), *in* Letter Books of the Supervisor of Pennsylvania, *supra* note 28. Coxe's commission as supervisor was signed by Thomas Jefferson and James Madison. *See* Commission of the President of the United States as Supervisor (July 28, 1802), *in* Coxe Papers, *supra* note 30. It was not until January 11, 1803, that Coxe's nomination was formally submitted for approval by the Senate. *See* 2 J. OF THE EXECUTIVE PROC. OF THE SENATE 431, 432 (1828). Cooke asserts that Coxe became purveyor of public supplies by interim appointment on August 1, 1803, and received a regular appointment on November 18, 1803. *See* COOKE, *supra* note 30, at 405 n.39. In any event, he was confirmed by the Senate on November 15, 1803. *See* 3 J. OF THE EXECUTIVE PROC. OF THE SENATE 454-55 (1828).

Coxe served as federal purveyor until the office was abolished in the midst of scandal about his performance of his duties. Although no evidence confirming this has been found, it is likely that Coxe officially retained the duties of the supervisorship when he became purveyor, under the Act of March 3, 1803, ch. 39, § 1, 2 Stat. 243 (1803), which allowed the President to transfer the duties of the revenue supervisors to any other federal officer.

Despite the anti-bureaucratic, anti-tax positions of his Jeffersonian party, Coxe was never too proud to accept a federal position, serving again as collector for the local Philadelphia collection district from 1813 and until early 1815 even after the Senate refused to confirm his appointment in 1814. *See* LUCY FISHER WEST, *supra* note 30, at 16, 83-84.

⁴³ *See* 1 American State Papers (Fin.), *supra* note 15, No. 93, at 400-01. Correspondence by Coxe with the remaining revenue officers in Pennsylvania for several years reflected the confusion about the timing of the accrual of the commissions, since those officers actually collecting duties in arrears felt they had as good a claim as the officers who were in office when the duties first accrued. *See, e.g.,* Letter from Peter Muhlenberg to Hughes (Jan. 18, 1802), *in* Letter Books of the Supervisor of Pennsylvania, *supra* note 28.

the messenger.⁴⁴

The sugar refiners—Edward Pennington,⁴⁵ John Dorsey, Samuel Fox and others—were not the sort of men who were likely simply to acquiesce to Coxe's position. Their businesses had been substantial for more than a generation,⁴⁶ and they held established positions in Philadelphia public life.⁴⁷ More important, they were more than

⁴⁴ Coxe presented his version of the communications of late June and early July 1802 within the government and with taxpayers in a letter that was printed in the *Gazette of the United States* on July 13, 1802.

The same issue of the *Gazette* printed a version of the circular letter carried by the messenger, which warned that “the sugar to be taken into account of must include what is in the moulds [sic] and in the drying apartments, as well as what is in the stores for sale or safe keeping, whether papered or unpapered.” Circular, *GAZETTE OF THE U.S.*, July 13, 1802, at 2.

⁴⁵ Despite the prevailing spelling in the literature, “Pennington,” Edward Pennington himself may have used only one “n.” This spelling is used in the petition submitted to Congress in December 1803, *see infra* note 97, and appears as his signature on his bond given to secure his performance, *see infra* note 86. This spelling appears to date from the Cromwell era, when those in the family loyal to the Crown had hoped to disassociate themselves from Pennington's great-great-grandfather, who was sent to the Tower for his role in the execution of Charles I, despite the fact that he had refused to sign the warrant therefore. *See generally Old Philadelphia Families XLVII Penington* (reproducing a descriptive genealogy of the Penington family reported to have been first published in the *NORTH AMERICAN* (Philadelphia, Apr. 26, 1908), at <http://freepages.history.rootsweb.com/~amxroads/Isaac/isaac.html> (last visited Sept. 1, 2002).

⁴⁶ *See generally* C.A. Browne, *Early Philadelphia Sugar Refiners and Technologists*, 20 *J. CHEMICAL EDUC.* 522 (1943). The loaf sugar produced in Philadelphia was apparently what we would now call a premium product. *See* Philadelphia loaf sugar advertisement, *VA. CHRON. & GEN. ADVERTISER*, June 23, 1794.

Thomas Doerflinger reports that the Miercken and Morris firm enjoyed profits in excess of 2000 pounds annually in the years immediately preceding the Revolution. *See* THOMAS DOERFLINGER, *A VIGOROUS SPIRIT OF ENTERPRISE: MERCHANTS AND ECONOMIC DEVELOPMENT IN REVOLUTIONARY PHILADELPHIA* 179-80, 217 (1986). Relying entirely on imported raw materials, their activities were halted during the Revolution itself, were slow to rebuild after the war's end, and may not have reached their pre-war volume even in 1790. *See id.*

⁴⁷ Two of their numbers, Samuel M. Fox and Edward Pennington, unsuccessfully ran as “Federal Republicans” for Select Council; two of their legal representatives, Jared Ingersoll and William Rawle similarly ran for Common Council. *See* *GAZETTE OF THE U.S.*, Aug. 30, 1802, at 2; *GAZETTE OF THE U.S.*, Oct. 14, 1802 (showing election results). Samuel Fox was the president of the Bank of Philadelphia. Recently deceased Frederick A. Muhlenberg (brother of Peter Muhlenberg) had been Speaker of the House of Representatives in the early 1790s and had also counted himself a sugar baker, both in his own right and as an in-law of the Schaefer family. *See* 13 *DICTIONARY OF AMERICAN BIOGRAPHY* 307 (Dumas Malone ed., 1934); 4 *ANNALS OF*

familiar with the federal politics of tariffs and duties.⁴⁸ They had organized in protest at the time the tax was first introduced through rallies, petition campaigns, and direct lobbying.⁴⁹ Their pamphleteering and petitioning had culminated in a substantial publication by James Thomas Callender.⁵⁰

C. The Taxpayer's Resistance and the Agreed Course of Action

The refiners had several choices available to them to counter Coxe's position in light of how the federal internal tax bureaucracy was organized in June 1802. One choice was to approach either Coxe as local collector or Muhlenberg as the soon-to-be departed supervisor for the state, both of whom were near-at-hand in

CONG. 635 (1794); HOCKER, *supra* note 38, at 180; THE NEW TRADE DIRECTORY FOR PHILADELPHIA 171-72 (1799).

The sugar merchants Peter Miercken, Henry Schaefer and John Dorsey served on a federal circuit court grand jury for April 1804 (along with former Federalist collector for Philadelphia, James Ash). See Minutes of C.C.E.D. Pa. 110, National Archives M932. Edward Pennington and John Grenier served on another, *id.* at 108.

⁴⁸ For an overall view of the political history of the sugar industry, see PAUL L. VOGT, THE SUGAR REFINING INDUSTRY IN THE UNITED STATES: ITS DEVELOPMENT AND PRESENT CONDITION 19-22 (Univ. Pa. Series in Pol. Econ. & Pub. Law 21, 1908)

⁴⁹ See generally Roland M. Baumann, *Philadelphia's Manufacturers and the Excise Tax of 1794: The Forging of the Jeffersonian Coalition*, 106 PA. MAG. HIST. & BIO. 3-39 (1982). Baumann traces the opposition to the excise taxes to the solidification of Republican sentiment in Philadelphia, especially in the success of John Swanwick in defeating incumbent Hamiltonian Thomas Fitzsimmons in the November 1794 Congressional election. Although some of the sugar refiners (including Jacob Morgan, Frederick Muhlenberg and his partner Jacob Lawerswyler) threw their lot with the emergent Republicans, others (including Pennington) appear to have remained essentially Federalists.

Baumann also reports that the Philadelphia manufacturers had petitioned the Pennsylvania legislature to intervene in the enactment of the first excise tax, that on distilled liquor, and in the debate on the 1794 excise taxes. See *id.* at 148. There is no evidence that they approached the state to assist in their battles with the federal government again in 1802.

⁵⁰ JAMES THOMSON CALLENDER, A SHORT HISTORY OF THE NATURE AND CONSEQUENCES OF EXCISE LAWS INCLUDING SOME ACCOUNT OF THE RECENT INTERRUPTION TO THE MANUFACTORIES OF SNUFF AND REFINED SUGAR (Philadelphia 1795). Baumann indicates that the work was commissioned by the snuff manufacturers and sugar refiners, an entirely plausible but unverified explanation for the work. See Baumann, *supra* note 49, at 153. The volume contains reprints of the various petitions prepared by the sugar refiners and snuff manufacturers to Congress, the Pennsylvania legislature, and President Washington. The volume was apparently printed to be distributed to all of the members of the Fourth Congress. See *id.*

Philadelphia. Another possible choice was for the refiners to present their case to the Commissioner of Revenue William Miller or the Secretary of the Treasury Albert Gallatin, both of whom maintained offices in Washington.⁵¹

The refiners chose to approach Muhlenberg (whom they probably knew personally) before he left office, and through him tried to precipitate a favorable opinion regarding the transition rules for the repeal of the internal taxes. The original response they received was probably of little help to them. Supervisor Muhlenberg forwarded the inquiry to Secretary Gallatin, who apparently passed it back down to Commissioner Miller.⁵² Miller's incomplete response indicated that no duties were currently owed on sugar remaining in the factory, but took no clear position about the only real matter in question, the sugar removed from the factory after June 30. His communication simply stated: "as long as sugar remains in the manufactory, it cannot be noticed."⁵³ It is impossible to tell whether by this statement Miller had meant that the only sugar that could be noticed for taxation on June 30 was that which had been removed from the factory, or whether the Miller position had in fact intended to remove all unshipped sugar both from current and future taxation. It should have been obvious that the issue was not whether the sugar could be

⁵¹ On first taking office as Secretary of Treasury, Gallatin expressed his frustration regarding the cumbersome nature of the bureaucracy. In despairing of a solution to the acute shortage of stamps for the stamp tax, he complained that he had no direct line of communication to the internal tax collectors, but instead was expected to go through the Commissioner, to the state supervisor, to the district inspectors under the supervisor, and only then to the collector. *See* Letter from Albert Gallatin to Thomas Jefferson, *in* 1 WRITINGS OF ALBERT GALLATIN, *supra* note 10, at 27. His complaint was at least as likely to be with the magnitude of the undertaking as with the layers of bureaucracy, given that at that time there were at least 368 supervisors, inspectors and collectors of internal tax, as well as various other officers of the direct tax, and almost 600 collectors for the ports. *See* Roll of Civil, Military and Naval Officers, prepared by Albert Gallatin and transmitted to Congress by Thomas Jefferson, *in* 1 American State Papers (Misc.), *supra* note 12, No. 154, at 260.

⁵² *See* Letter from William Miller to Peter Muhlenberg (June 19, 1802), *in* Letter Books of the Supervisor of Pennsylvania, *supra* note 28.

⁵³ Letter from Pennington, Clark & Grenier (June 12, 1802), *in* Cox Papers, *supra* note 30. This transcription of the initial inquiry and Miller's statement, under the heading that the matter has been referred to Gallatin, together indicate that the correspondence began even before May 30, 1802. Both the inquiry of the refiners and the reply of Miller also appear in the Pennsylvania Supervisor's Letter Book. *See* Letter Books of the Supervisor of Pennsylvania, *supra* note 28. The correspondence was also printed in the GAZETTE OF THE U.S., July 14, 1802, at 2.

taxed before it was shipped, but it also should have been easy to draft a response that addressed the issue more clearly. Perhaps Miller wished that the matter would just go away, without his having to rule on the issue.

Not to be deterred, the refiners also obtained opinions supporting their position from some of the most prominent lawyers in Philadelphia, including Jared Ingersoll, Moses Levy, William Rawle, William Lewis, and Joseph B. M'Kean.⁵⁴ The position they adopted admitted that the statute required the refiners to keep records of their sugar as it was refined. But they asserted that this measure was required only to allow reconciliation between the amounts shipped and the entire amount produced during the regular administration of the tax before the repeal; in other words, it was merely a provision that would allow meaningful verification of the amounts actually shipped. The duty itself did not attach on the refining of the sugar, it attached only on the selling and shipping of it, so no additional duties would be owed after June 30.

In early July 1802, the sugar refiners went public by publishing the opinions they had obtained, both from Commissioner Miller and from their own lawyers, in the newspapers.⁵⁵ The editorial introduction to

⁵⁴ Despite his Tory background (his mother had married the occupation mayor of Philadelphia and taken Rawle to London during the Revolution, where he studied law at the Middle Temple) and although his family had been Loyalists, Rawle had become a middling political figure in Philadelphia by this time. He had been elected to the state legislature in 1789, and served as United States Attorney for Pennsylvania from 1792 until 1800, and in the latter role had been responsible for the prosecution of the participants in the Whiskey Rebellion. See 15 *DICTIONARY OF AMERICAN BIOGRAPHY*, *supra* note 47, at 400.

Jared Ingersoll had served in the Continental Congress and as a delegate to the Constitutional Convention and had recently served as Attorney General for the State of Philadelphia (1790-99) and United States Attorney in Philadelphia (1800-01). See 9 *DICTIONARY OF AMERICAN BIOGRAPHY*, *supra* note 47, at 77 (1932). Joseph B. McKean was attorney general for the state of Pennsylvania. See 12 *DICTIONARY OF AMERICAN BIOGRAPHY*, *supra* note 47, at 77 (1932). Moses Levy became recorder of Philadelphia and presiding judge of the District Court of Philadelphia. See HENRY S. MORAIS, *THE JEWS OF PHILADELPHIA* 88 (1894).

⁵⁵ These opinions, dated June 30 and July 6th, were printed in the *Gazette of the United States*, on July 10, 1802. Nothing suggests that these opinions as printed were not authentic. Coxe's records contain several drafts of communications with the refiners as a group at the end of June and the beginning of July. In one, he requested a copy of the opinion of their counsel regarding the appropriate transition rules and warned them not to sell sugar at prices that did not contemplate the duty owed. See Letter from Tench Coxe to Refiners (July 10, 1802), in *Coxe Papers*, *supra* note 30. Muhlenberg, in his last days in office as Supervisor of the Revenue, wrote to Coxe,

these documents relished in pointing out that the operatives of the “ministerial party” (the now incumbent Republicans) to which such taxes were so “obnoxious” were now collecting taxes “not known to the law itself.”⁵⁶ Perhaps, the editorial taunted, the “government does not feel itself quite ready to spare all the taxes, or to loose its hold of the purses of the people.”⁵⁷ In its view, “[t]he ‘Farmer General’ [alluding to the notorious tax collectors who symbolized for many the corruption of the Ancien Regime in France] will need . . . a double portion of the spirit of sophistry, to maintain and vindicate the treasury instructions, in opposition to the force of opinion that besets them.”⁵⁸ This Federalist editor clearly took delight in portraying the Jefferson administration as avaricious and arbitrary in its efforts to collect.

Coxe responded with editorial and official documentation of his own on July 13.⁵⁹ He included a copy of a circular letter over Secretary Gallatin’s signature supporting his position, dated June 25.⁶⁰ In it, he defended the request for information about sugar not only ready for shipment, but in various processes of refinement, and reminded the sugar refiners that they each had been required to post a \$5000 bond to secure their obligation to keep a daily record of sugar refined.

Whether by name or pseudonym, Coxe was already familiar to readers of the political newspapers in Philadelphia. Not only had he

reporting that he had forwarded to Secretary of the Treasury Gallatin the opinion of counsel for the refiners. See Letter from Peter Muhlenberg to Tench Coxe (July 10, 1802), in Coxe Papers, *supra* note 30.

Coxe’s papers contain a note styled “Opinion of W. M. Levy. . . . Against payment of duty on sugar,” in which it is asserted that the duties on sugar “accrued and outstanding” anticipated in the repealing act as still collectible could not include duties on sugars “altho now manufactured or refined have not been sent out of the house or building.” Opinion of W.M. Levy (June 30, 1802), in Coxe Papers, *supra* note 30. It is unclear exactly what, if anything, Coxe received directly from the refiners or their counsel as the controversy intensified.

⁵⁶ GAZETTE OF THE U.S., July 10, 1802, at 2.

⁵⁷ *Id.*

⁵⁸ *Id.* The reference to the “Farmer General” is a reference to the notorious methods of tax collection in pre-Revolutionary France. The right to collect taxes had been sold to the highest bidding “tax farmers,” over whom the French monarchy ultimately lost control.

⁵⁹ See GAZETTE OF THE U.S., July 13, 1802.

⁶⁰ The circular letter from Gallatin to all supervisors also appears in the Supervisor’s Letterbook. See Letter Books of the Supervisor of Pennsylvania, *supra* note 28.

been a rabid supporter of Jefferson and the Republican cause prior to the 1800 election, the Federalist papers had frequently reminded the public of the several occasions on which the color of his coat had changed in the course of the nation's history.⁶¹

Coxe appears to have been able to obtain at least some statements from the refiners regarding the sugar for which the duty was in controversy, that sugar which was processed but not yet shipped on June 30, 1802.⁶² Thorough public servant that he was, he also attempted to ascertain the distilled liquor that was on hand on June 30 that was similarly undutied. His efforts to collect such additional whiskey tax as might have been due after repeal seem to have been even less successful.⁶³ A draft of his notice to distillers

⁶¹ As indicated in the text and notes at note 29, *supra*, Coxe's past made him an easy target for his enemies. A typical item appeared in the *Pennsylvania Gazette*, apparently reprinted from the *Lancaster Journal*:

On Thursday last Tench Coxe, "the patriot of 76," seated himself in a barber's shop, to be shaved and dressed. He was scarcely seated when a member of the Legislature came into the shop and commenced a conversation with the man of suds, on the subject of Paine and politics. The following is related to have been the latter part of that conversation, the whole of which passed while Coxe was getting *shaved & dressed*. [The poor barber however did not know that he was then shaving Mr. Coxe.]

Barber. A great many old whigs are now called old tories, and some are called whigs who joined the British.

Member. Who are they?

Barber. Why Tench Coxe and a great many more.

Member. How do you know that?

Barber. I know it very well—I was in Moylan's dragoons watching the tories when he piloted Howe into Philadelphia.

Question by Tench Coxe. How do you know there was not compulsion used?

Barber's answer. Oh I know very well that d— —d rascal piloted them of his own accord—for I was told so at the time.

By this time the patriot had gotten his nose from between the shavers fingers, and the reader need not be told that he *deserted* as soon as possible.

The truth of the above in substance can be proved.

Shaving and Dressing, PA. GAZETTE, Jan. 1803 (brackets and italics in the original). For additional haranguing of Coxe regarding his past, see *Tories! Tories! Tories!*, GAZETTE OF THE U.S., November 10, 1802.

⁶² See, e.g., Note of Information taken by Tench Coxe Regarding the Sugar Held by Mssr. Clark and Grenier (July 1, 1802), in Coxe Papers, *supra* note 30; statement signed by Peter Miercken (June 15, 1802), in Coxe Papers, *supra* note 30.

⁶³ There is some possibility that the fisc actually would have suffered were Coxe's construction applied to all of the repealed taxes. Several of the goods which were subject to repealed excises were also subject to drawback upon being exported.

contains a notation: “answer—none on hand in any of the distilleries in the entire town of Philadelphia and the Northern and Southern suburbs.”⁶⁴ Perhaps his tone indicates that he did not really believe that there would be no locally distilled whiskey available for some time that summer. In any event, the existing records offer few clues about why whiskey taxes for the lame duck period were not a greater matter of concern.

The administration of these drawbacks was not entirely free from criticism, as is indicated by the following item, originally published in the *Newburyport Herald*:

The law repealing the exise on New England rum was construed here as ceasing on the last day of June, and consequently no duties were expected to be paid on all rum on hand on that day: large contracts were accordingly made to be then delivered at a reduced price, which must now be exported: as Mr. Gallatin, wishing to save the amount of the duties of all the rum unsold, consulted Mr. Lincoln, (who receives 3000 dollars a year for his advice,) gave it as his opinion that the duties must be paid, and orders were sent immediately on to the Supervisors to enforce it. Now let us examine how much Mr. Lincoln's, advice will save: if the law obliges the distillers to pay the duty on all rum on hand, the same law allows a drawback on not only the duty on the rum but on the molasses likewise. Supposing then that there should be 2000 hogsheads on hand in the United States, or 200,000 gallons, the duties will be at 10 cts. per gallon 20,000 dollars, and the drawback allowed on the same quantity will be 28,000; so that by Mr. Lincoln's construction, a saving will be made to our government (according to the present meaning of the word) of another 8000 Dollars.

Lawyer Lincoln's Wisdom; Or More Money Saved by Our Saving Administration, GAZETTE OF THE U.S., July 15, 1802, at 2.

The operation in the snuff industry of the drawback of duties as a bounty for manufacturing appears to have been a factor in the repeal of the snuff tax. See Baumann, *supra* note 49, at 36; 5 ANNALS OF CONG. 1406, 1409 (1796); CALLENDER, *supra* note 50, at 199-202. Albert Gallatin reports the same phenomenon in his *Sketch of the Finances of the United States*, in 3 WRITINGS OF ALBERT GALLATIN, *supra* note 10, at 93.

The drawback on refined sugar was structured so that it too, may have operated as a bounty. The drawback was not necessarily of the amount of refining duty and import duty actually paid, but was determined by adding to the refining duty a formula amount intended to reflect the impost duties paid on the importation of the raw sugar products used. No proof was necessary of the amount actually paid on import, and thus the appropriateness of the amount of the drawback depended upon the amount of raw product used to obtain the refined product. It is possible that the duty with drawback worked as a net bounty for those producers who exported most of their product during the much of the period in which both the import duties and the processing duties were in effect. Insufficient information is available to confirm the possibility.

⁶⁴ Tench Coxe, Note to my assistant in the business of Philadelphia Distilleries (June 30, 1802), in Coxe Papers, *supra* note 30.

The bits of evidence available regarding the position of the government in Washington on the transition questions are equivocal. The follow-up response of Albert Gallatin, who had been in New York during July 1802, included asking Coxe how the statute had been interpreted upon its enactment. Coxe, after all, had been Commissioner of the Revenue when the tax was first imposed. Was all sugar sent out of the factory after the duty was imposed subject to the duty, regardless of when actually refined? If so, wouldn't a consistent interpretation require that the duty only be collected on sugar sent out before the repeal?⁶⁵ Levi Lincoln, the Attorney General, appears not to have focused on the question at all in the early stages of the dispute. Although Coxe had written to him as early as July, he did not answer Coxe until December, when he stated that he retained a confidence in his own legal advisers, but acknowledged the accusations of political motive that surrounded the discussions of the case.⁶⁶

Despite the skirmish in the press in July, the conflict over the interpretation of the repeal did not come to a head until the fall. (The intensity of the dispute was undoubtedly affected by the fact that in the summer of 1802 yellow fever caused those who could to flee Philadelphia and remain absent until the cool days of fall.) No real impact from the ambiguity in the repeal would be felt until October 1, when, according to the prevailing practice, the duties accruing in the prior quarter would be due for payment or for security.⁶⁷ The law

⁶⁵ Letter from Albert Gallatin to Tench Coxe (July 20, 1802), in Coxe Papers, *supra* note 30.

⁶⁶ See Letter from Levi Lincoln to Tench Coxe (Dec. 6, 1802), in Coxe Papers, *supra* note 30. As Attorney General, Lincoln was obligated to "give his advice and opinion upon questions of law . . . when requested by the heads of any of the departments, touching matters that may concern their departments." Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 93. For a more general view of the understanding of the Attorney General's role in this era, see John O. McGinnis, *Models of The Opinion Function of the Attorney General: A Normative, Descriptive, And Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 406-20 (1993).

⁶⁷ Section 5 of the act required the refiners to make quarterly reports of the amounts of refined sugar that had been shipped. Although a bit ambiguous, the language seems to require a report of shipments as of the day before the required reporting date. See Act of June 5, 1794, ch. 51, § 5, 1 Stat. 384, 385-86. Section 11 of the 1794 act provided only that the refiners had the option "either to pay, upon the rendering of his or her accounts aforesaid, the duties, which shall thereby appear to be due and payable. . . or to give bond. . . for the payment of the said duties at the expiration of nine months thereafter. . . ." *Id.* § 11, 1 Stat. at 387. This practice is evidenced by comparing the worksheet contained in the ledger book of the Pennington sugar house summarizing refining activity between 1799 and 1802 (on file

only required that the refiners quarterly “render a just and true account of all the refined sugar which he or she shall have sent out . . . producing and showing therewith, the original book or paper” and at the time of rendering the account, “pay or secure the duties.”⁶⁸ Thus, the quarterly account and payment for sugar sent out after June 30, if owed at all, was not due until October 1, 1802. The act also allowed the refiner “to give bond with one or more sureties to the satisfaction of the officer of inspection . . . for the payment of the said duties at the expiration of nine months thereafter.”⁶⁹ This bond was customarily set at the actual amount of duties owed, and thus represented a device for deferring payment until the refiner had been paid for the shipped goods, rather than a device for holding the refiner’s obligation open.

Before October 1, the date on which some definitive action would need to be taken as a result of the obligation to pay or post bond, Cox received an elaborate letter from Alexander J. Dallas, who held, among other offices, the position of United States District Attorney for Pennsylvania.⁷⁰ Dallas had apparently been in correspondence

with the Historical Society of Pennsylvania) and the records of bond with due dates in the Cox papers, see Tench Cox, Records of Bond, in Cox Papers, *supra* note 30. For instance, Pennington’s ledger shows that the sugar house of Peter Miercken produced (and presumably shipped) 83,915 pounds of sugar in the quarter ending September 30, 1801, upon which, at two cents a pound, duties of \$1,678.30 would be due. Act of June 5, 1794, ch. 51, § 2, 1 Stat. 384, 385. Presumably the amount refined was declared, and payment or security therefor arranged on October 1, 1801. Cox’s records show a bond in amount of 1,678.30 due July 1, 1802, nine months later. See Tench Cox, Records of Bond, in Cox Papers, *supra* note 30.

Section 5 clearly tied the reporting function to the shipment of sugar, and section 11 clearly tied the payment or securing of the duties to the reporting. Act of June 5, 1794, ch. 51, §§ 5, 11, 1 Stat. 384, 386-87. Thus, sugar refined but not shipped out before June 30 would be reported on October 1, 1802, and would produce a liability which under normal practice would result in payment on the bond on July 1 of the succeeding year. Even if these assumptions about the appropriate reporting practice for refined but unshipped sugar were erroneous, if the refiners posted bond for the duties on such sugar, the earliest these bonds could conceivably have become due would be April 1803, too late for nonpayment to produce a case for the 1803 Supreme Court Term.

⁶⁸ Act of June 5, 1794, ch. 51, § 5, 1 Stat. 384, 386. Failure to make such a report of sugar shipped out would result in the forfeiture of “every pan or boiler” used in sugar refining and a further forfeiture of \$500. *Id.*

⁶⁹ *Id.* § 11, 1 Stat. at 387. Payment rather than bonding permitted the refiners to take a 6% discount. See *id.* § 10, 1 Stat. at 387. If the duties were not “upon default being made in the paying or securing of the said duties,” the sugar in question would be forfeited. *Id.*

⁷⁰ Dallas’s other offices had been a matter of no small controversy. His attempt to serve both as a recorder in Philadelphia and as federal district attorney led to a quo

with William Miller, the Commissioner of Revenue, and developed a legal interpretation in support of Coxe's position. The position, simply, was that the duty accrued as the sugar was refined, and that the fact of shipment was only a condition of payment, not a condition of accrual of the duty. Any refiner, furthermore, who failed to make an on-the-books accounting for sugar refined before July 1, or sent out after July 1, or made his quarterly report and paid or secured the duty, and attested to the accuracy thereof, would be subject to the forfeitures and penalties prescribed.⁷¹

Dallas, it would appear, was not entirely happy to be pulled into the controversy.⁷² Jared Ingersoll, counsel for the refiners, had made

warranto action against him. *Respublica v. Dallas*, 3 Yeates 300 (Pa. 1801). He was allowed to continue in both positions on the grounds that the position of recorder, akin to the common law position of justice of the peace, was not within the meaning of "public office" for the purposes of the state constitution's incompatibility clause. *See id.* For some insight into the nature of the federal-state dual office controversy, see Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1146-53 (1994).

⁷¹ Letter from Alexander Dallas to Tench Coxe (Sept. 1, 1802), in Coxe Papers, *supra* note 30.

⁷² *See, e.g.*, Letter from Alexander Dallas to Jared Ingersoll (Sept. 26, 1802), in Coxe Papers, *supra* note 30. Unless the case actually went to court, there was no financial benefit to Dallas from his involvement. The district attorney's job was a fee-for-service position, and during this era was not expected to be a full time job. District attorneys were paid \$5 a day for each day in court, plus 10 cents a mile, plus the fees authorized in similar proceedings under the relevant state supreme court rules. Act of Feb. 28, 1799, ch. 19, § 4. 1 Stat. 624, 625. Dallas was additionally rewarded in this case for his appearance in the Supreme Court, *infra* note 111.

Perhaps the curt tone in Dallas' correspondence merely reflects the formality he sought to bring to his office. Dallas' biographer reports only a most cordial working relationship between Ingersoll and Dallas, and notes that they worked together on many cases, both in state and federal courts. RAYMOND WALTERS, JR., *ALEXANDER JAMES DALLAS: LAWYER—POLITICIAN—FINANCIER* 101 (1943). Alternatively, the fall of 1802 might have found Dallas particularly tepid in tax matters given his role in the hotly contested local elections, *see id.* at 133, and the attention this activity was bringing him in the Federalist press. *See e.g.*, *GAZETTE OF THE U.S.*, Nov. 26, 1802, at 2.

Nevertheless, this was not the first time that Dallas seems to have wanted to avoid association with tax collection. His own fellow Jeffersonian, Peter Muhlenberg, complained that Dallas seemed uninterested in pursuing defaulting collectors. Letter from Peter Muhlenberg to William Miller (Jan. 5, 1802), in Letter Books of the Supervisor of Pennsylvania, *supra* note 28. This would not be surprising in light of the fact that Dallas had made something of a name for himself in his attempt to defend tax protester John Fries against charges relating to the insurrection against the Federalist property tax. *See* 6 *AMERICAN NATIONAL BIOGRAPHY* 30 (John A. Garraty & Mark C. Carnes eds., 1999).

an overture to Dallas sometime in early fall 1802, suggesting that Dallas work with Ingersoll to get the dispute to the Supreme Court during the February 1803 term. Dallas rather testily replied that it “must surely be obvious to [Ingersoll] that [Dallas has] no right to interfere, til . . . called upon officially to prosecute delinquents.”⁷³ As if to further distance himself from a perhaps delicate political situation, Dallas added that “in the mean time the Sugar Refiners act at their own peril, and it is not in [Dallas’s] power nor in the power of Treasury Officers to dispense with the penalties and provisions of the Law.”⁷⁴

A group of the sugar refiners themselves approached Cox a few days later, offering to work with the government in obtaining a resolution of the issue, in exchange for forbearance on the part of the government in attempting to collect the duties through means disruptive of their businesses:

[The refiners’ counsels’] Opinions as well as our own reflections induce us strongly to believe that the act repealing the Internal Taxes has taken away the claim, which Government would otherwise have had to duties on such sugars and that of consequence we are not bound to pay them. A justifiable regard to our own interest will not permit us to give up an object of such magnitude without a fair investigation and competent judicial decision upon it. We are willing therefore to agree to any equal and amicable mode of bringing the questions to a speedy issue before the Tribunals of the United States, and as we cannot suppose that the Officers of the general Government will prefer harsh modes to those which are conciliatory with a body of citizens who apprehend their rights to be involved and wish only a legal investigation of them. We take it for granted that you will point out some just mode of arranging this business without committing the claims of the Treasury on the one hand or

To complicate matters further still, it appears that Dallas wanted as little as possible to do with Cox—despite the fact that in the preceding years, much of the work of U.S. attorneys involved, one way or another, tax enforcement. Although Cox and Dallas had worked together in local Republican activities during the previous years, they were not on good terms after their common enemies, the Federalist partisans, were defeated. *See COOKE, supra* note 30, at 433.

⁷³ Letter from Alexander Dallas to Jared Ingersoll (Sept. 26, 1802), *in Cox Papers, supra* note 30.

⁷⁴ *Id.*

that of the subscribers on the other.⁷⁵

Coxe reasserted the refiners' need to comply with the literal requirements of the statute, and dunned them for their accounts due on October 1.⁷⁶ Several of the refiners appear to have made the requested accounting to Coxe, although perhaps not in the form he would have preferred. One firm, Dorsey & Fox, asserted the terms on which it would proceed:

[t]he aforesaid Firm is not to obtain nor the amount thereof to be demanded unless in an amicable action now agreed to

⁷⁵ Letter from Dorsey & Fox, P. Miercken & Co., Morgan, Douglass, Schaffner, and Clark & Grenier, to Tench Coxe (Sept. 29, 1802), *in* Coxe Papers, *supra* note 30. Coxe replied:

I rec'd last evening your letter of the 2d instant and do not at all question the propriety of your declining to pay a duty to which your own judgments and the advice of numerous & eminent counsel are opposed. My instructions and the advice of counsel oblige me to claim the payment in an amicable & reasonable manner. I proposed therefore to [illegible] the first of Octo. the usual amounts of sugars refined before July 1802, which have been sent out of the refineries in the course of the current quarter and the usual exhibitions of the quantities refined with the lawful term. If the duties on request should be refused to be paid or bonded, I proposed to apply to the Atty Gen of the US to agree with your counsel to take measures for a [illegible] legal decision of the question in such correct measures as alone would be agreeable to the Government [illegible] and the Gentlemen of counsel on both sides.

I have spoken to the Atty of the US on the subject, and he will, on information of the events after the first of Octo., take [illegible] with your counsel on the subject. The Government cannot think of any measures of hardship, inconsistency or [illegible] expense. It is probable that one case considered and decided on by the Sup Ct of the U.S. will be deemed sufficient by both parties to settle the whole question. I communicated these ideas & the opinions of the Atty. Gen & Atty of the U.S. for Penn some time ago to Mssr. P. Mierken.

Letter from Tench Coxe to Dorsey & Fox, P. Miercken & Co., Morgan, Douglass, Schaffner, and Clark & Grenier (Sept. 29, 1802), *in* Letter Books of the Supervisor of Pennsylvania, *supra* note 28 (author's transcription of letter-book entry).

Coxe's papers include a short note from the Dorsey firm: "Agreeably to your suggestions we shall at once agree to an amicable course and decision, having every disposition to comply with the Law respecting refined sugar and none to oppose it." Letter from Dorsey & Fox to Tench Coxe (Sept. 30, 1802), *in* Coxe Papers, *supra* note 30.

⁷⁶ See Tench Coxe, draft letter styled "General Application" (Oct. 1, 1802), *in* Coxe Papers, *supra* note 30.

be instituted it shall be decided that the said amount shall be due to the United States, in which case Bonds as customary shall be then given, and it is further understood that in consequence of the present Entry evincing a disposition to comply with the Laws when their construction shall be known no penalty or other demand will be made except a participation in the Costs of Action.⁷⁷

Coxé appears to have agreed.⁷⁸ At least some of the refiners would

⁷⁷ Account of Dorsey & Fox (Oct. 1, 1802), *in* Coxé Papers, *supra* note 30. The account shows 14,929 loaves and lumps manufactured before June 30 and shipped thereafter. *Id.*

⁷⁸ Once promoted to Supervisor, Coxé undertook to report to Commissioner Miller on almost a weekly basis about the affairs of his office. He mentions the sugar duty matter with some regularity, but never appears to be answering any particular question put to him.

In a letter to Commissioner Miller in the first few weeks after becoming Supervisor, Coxé reported:

I will confer with the Atty. of the U.S. upon the subject of the Sugar tax. He is at present at his house at the falls of the Schuylkill, and I am Philadelphia. But as it does not occur to me that any legal proceeding can be instituted at this time, and it can be justifiably and amicably commenced on a refusal of a quarterly acct. of sugar sent out, on the 1st of October, the matter does not press. The only previous step that appears to be worth consideration is a cautious and amicable attempt to ascertain, by deference to their account of Sugar refined & the quantity on hand at the close of June 1802. Of this I will consider, and will endeavor to mark my intercourse with candour and forbearance. One of the most judicious of the refiners has spoken to me on the subject of the publication in the Gazette of the U.S. I mean Mr. Edward Pennington. He assured me that the Sugar refiners had no agency, in those publications, regretted and disapproved them much. I replied, with truth, that I never had suspected the refiners of any concern in the business, except making a stand in favor of their own interest, which all men of right may and convinced as they were, in duty ought to do. . . . There are some circumstances of delicacy, which I shall make the subject of a separate letter, a few days hence. There are some letters and papers concerning the management of the question upon the constitutionality of the carriage tax, on file in the Secys, atty Gen and revenue offices, which may be worth revising in settling the mode of proceeding at law in this case. If they should be examined, the necessary suggestions from them will doubtless be communicated.

Letter from Tench Coxé to William Miller (Aug. 17, 1802), *in* Letter Books of the Supervisor of Pennsylvania, *supra* note 28.

He continued on August 24, indicating his insistence on having a role in the case, and his distrust of Dallas:

proceed to post bond as usual, in exchange for Coxe's promise not to proceed with the more drastic remedies—including suit on their original bond, forfeiture of goods shipped, and forfeiture of their factories. The problem was then to find an alternative vehicle that would result in a binding decision from the courts.

D. Delay and Disinterest

The government and the taxpayers, as much as their correspondence suggests a mutual desire to obtain an “amicable” outcome, had a very difficult time arranging that outcome. The original goal appears to have been to have the case moved quickly through the federal circuit court in Philadelphia, and to have it heard before the United States Supreme Court. Negotiations about court proceedings were probably hampered because the federal courts, and the procedures whereby access to them was obtained, were moving targets during this period. Although the Act of March 8, 1802,⁷⁹ repealing the Second Judiciary Act of February 13, 1801,⁸⁰ and restoring the Judiciary Act of 1789, was enacted before the internal taxes were repealed, the Seventh Congress had not yet completed its deliberations with respect to the federal courts and the overall impact

It appears from circumstances highly desirable that the Sugar refiners Question should be . . . the subject of an argument before the Supreme Court. If they will not consent to it a verdict or judgment may be given, I presume, and then a appeal or writ of error may be adopted to bring it before that court. Assistant counsel will be necessary, and as things bore very inconveniently on me here in the case, I wish to select one or two as assistant counsel, who I shall take good care shall be agreeable to the Atty. U.S. [I]t is not merely that the counsel engaged by the refiners on this occasion and in their extensive offices are very numerous & able but they have let it be known to this office & to my late office that our law officer concurred with their counsel. [I]n a note, I have lately rec'd from him he appears to have adopted an opinion favorable to the claims of the US. As I wish to give this case a very attentive tho temperate treatment I shall be obliged by copies of any letter have or shall go to the Atty of the U.S. I do not think anything can be done until the refiners refuse to bond or pay the duty on the sugar sent out between June and Oct. Mr. Dallas has sent to me for a copy of my little publication which has been enclosed to him and all other papers will be sent. I understand he is making a written statement of his opinion.

Letter from Tench Coxe to William Miller (Aug. 17, 1802), in Letter Books of the Supervisor of Pennsylvania, *supra* note 28.

⁷⁹ Act of Mar. 8, 1802, ch. 8, §§ 1-3, 2 Stat. 132.

⁸⁰ Act of Feb. 13, 1801, ch. 4, 2 Stat. 89.

of the repealing act. The Act of April 29, 1802, eliminated the June 1802 session of the Supreme Court that had been established by the 1801 Act and directed that the Supreme Court would thenceforth hold term only in February, effectively eliminating a sitting of the Court for a year.⁸¹ Thus the target date was to be the first session in early 1803.

Additional confusion about the appropriate proceeding may well have stemmed from confusion surrounding the effect of the Act of March 8, 1802, on the subject matter jurisdiction of the Court. The 1801 Act had expanded federal court jurisdiction in several important ways. First, regarding subject matter jurisdiction of the trial courts: under the 1789 Act suits could be brought in either the district or circuit court only in the name of the United States, but under the 1801 Act any suit “arising under the constitution and laws of the United States” could be brought in the circuit court.⁸² Second, regarding the possibility of appeal to the Supreme Court: under the 1789 Act, cases first brought in the district court could be reviewed only by writ of error in the circuit court, with no further appeal permitted. A suit could be brought first in the circuit court (if the amount in controversy exceeded \$500) and could have then been reviewed by writ of error to the Supreme Court if the amount in controversy was greater than \$2000. The 1801 Act had expanded a litigant’s choices, since under section 33 of that act, a suit brought in the district court could be reviewed by appeal to the circuit court,⁸³ or, if brought in equity, could be appealed to the Supreme Court if the amount in controversy exceeded \$2000.⁸⁴ The more liberal provisions of the 1801 Act were repealed by the 1802 Act, and the original 1789 provisions were presumably reinstated. However, the constitutionality of the repealing act was uncertain because of its effect on the offices of existing circuit judges. In any event, the details of the restoration of the federal court system under the revived 1789 Act could easily have remained a confusing mystery to many well into the fall of 1802.⁸⁵

Whether because of confusion about the legal steps to be taken, clumsy communications among the several lawyers involved, or bad faith on the part of the refiners, progress toward the February 1803 goal was not easy, and it ultimately was not met. Despite the

⁸¹ Act of Apr. 29, 1802, ch. 31, §§ 1, 3, 2 Stat. 156, 156-57.

⁸² Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92.

⁸³ Act of Feb. 13, 1801, ch. 4, § 33, 2 Stat. 89, 98-99.

⁸⁴ *Id.* § 33, 2 Stat. at 99.

⁸⁵ For a general discussion of the Supreme Court’s handling of its business during this period, see Charles G. Geyh & Emily F. Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT. L. REV. 31 (1998).

protestations of both sides that a prompt resolution was desirable, negotiations seem to have broken down over the form the litigation would take.

In mid-December 1802, Dallas, still apparently uncomfortable with his role in the case, wrote to Commissioner Miller, warning him that all was not proceeding smoothly. He indicated at this point in time that he would prefer to simply sue on the refiners' bonds, but that the refiners' counsel had indicated that if this route were taken, they would challenge the legal form of the bonds.⁸⁶

⁸⁶ See Letter from Alexander Dallas to William Miller (Dec 18, 1802), in *Coxe Papers*, *supra* note 30. Dallas may have thought that the best route would be an action upon the bonds that were required of all refiners to secure their obligation to keep appropriate records, see *supra*, note 26. Although there would have been no problem with the amount in controversy if these bonds and the assets of the refiners also subject to forfeiture were contested, it may be that these bonds had not been properly obtained or were obtained in an inappropriate form. Any such defect is not obvious on the face of the bonds themselves, several of which, including Pennington's, can be found in the *Coxe Papers*, *supra* note 30. In a letter to Muhlenberg in January 1802 over a dispute with the refiners about deductions from dutiable weight for the paper and twine used to package sugar loaves, Coxe notes that this bond was never properly secured from at least one firm and emphasizes his aversion to proceeding by seizure, "which would be painful to the office and offensive to the company of refiners." Letter from Tench Coxe to Peter Muhlenberg (Jan. 11, 1802), in *Letter Books of the Supervisor of Pennsylvania*, *supra* note 28.

Action on the bonds posted on the date required for collection or bonding would have been premature at this point, see *supra* note 67. For those refiners who posted bonds in lieu of payment in October of 1802, no default would occur until at least nine months later, when payment on those bonds would come due; there is no clear indication of the forum in which the bonds would be litigated. And it was highly likely that no single refiner's payment bond represented an amount great enough to invoke the Court's jurisdiction.

Perhaps the problem was not so much in the form of the bonds themselves, but in the statutory authority provided for acting upon them. Such an action may have been possible only in the district court, with no possibility of Supreme Court review. The Act of June 5, 1794, ch. 50, § 3, 1 Stat. 384, 385, simply directed that the "same officers as are provided by the act [imposing the tax on spirits distilled within the United States]" would administer the snuff and sugar tax, and section 10 provided that "any officer of the inspection or of the customs" may seize the sugar or refining equipment, "as forfeited," *id.* § 10, 1 Stat. at 386. No provision was made regarding the jurisdiction of courts in the supervision of the forfeiture or prosecution of the bonds in question. These lapses stand in considerable contrast to the detail with respect to which such matters were spelled out in the act imposing the carriage tax, passed the same day. In that act, it was specified that unpaid duties could be sued for in federal or in state court, or recovered by distress and sale. *Id.* § 5, 1 Stat. at 386. They also stand in contrast to the prior act imposing duties on distilled liquor, which could be collected in suit "by bill, plaint or information."

Dallas's frustration continued through February 1803, as demonstrated by an exchange of letters with Coxe himself. Dallas complained that the plan put forward by Edward Tilghman, one of the counsel for the refiners, would involve great delay. Coxe in reply defended the state of the negotiations and indicated that he felt bound by the agreements reached the previous fall (although this correspondence does not make clear exactly what steps Coxe felt bound to take).⁸⁷ Coxe did indicate that an important part of the scheme was to provide an authoritative ruling in which refiners throughout the country would acquiesce—to establish a national rule, not just a de facto practice in Philadelphia. (It is not clear whether Coxe really saw this strategy as in his interest, since it would have made the case more visible and perhaps more vulnerable. It may have been a significant part of his agreement with the refiners, who no doubt saw themselves disadvantaged if the interpretation applied only in Philadelphia.) Still in a peevish tone, Dallas countered that he would “leave the negotiation of an amicable arrangement to [Coxe]” and further urged Coxe to “ascertain, as soon as possible, whether they will sign the agreement. Till that is done, [Dallas would] consider the matter at hazard.”⁸⁸

Less than a week later, Dallas wrote to Commissioner Miller that he had given up hope not only of having the case heard by the Supreme Court in the 1803 term, but also of having any say in the negotiation about the form that the litigation would take.⁸⁹

Coxe seems to have redone some of the oaths, and reports relating to the final months of the tax. See Statement by Charles Hupfield (Mar. 22, 1803), in Coxe Papers, *supra* note 30; Statement by Peter Miercken (Mar. 23, 1803), Coxe Papers, *supra* note 30; Letter from Tench Coxe to Peter Miercken (Jan. 11, 1803), in Coxe Papers, *supra* note 30 (stating, “I hope you will be so good as to end this troublesome little affair by signing the bond and returning it”).

⁸⁷ See Draft of letter from Tench Coxe to Alexander Dallas (Feb. 4, 1803), in Coxe Papers, *supra* note 30.

⁸⁸ Letter from Alexander Dallas to Tench Coxe (Feb. 6, 1803), in Coxe Papers, *supra* note 30.

⁸⁹ See Letter from Alexander Dallas to Tench Coxe (Feb. 9, 1803), in Coxe Papers, *supra* note 30. Dallas may simply have been irritated by Coxe's meddling in what, if litigation were anticipated, should have been left to him. See Letter from Tench Coxe to Commissioner Miller:

On the return of Mr. Dallas from Lancaster we spent some time upon the business of the Sugar tax for which I had previously prepared the other side by a conference with one of their Counsel and interviews with several of the refiners. On the first morning of Mr. Dallas's presence in the city a paper was drawn shewn to several of the refiners and sent to their counsels hands.

There is much that may never be explained about the negotiations aimed at generating a precedent that would have settled this controversy. Why did the Jefferson administration let Coxe pursue the matter, which can only have been an embarrassment to it? Secretary of the Treasury Gallatin had established something of a reputation during the Whiskey Rebellion as a defender of the common folk against arbitrary and burdensome taxes, when Coxe himself was second only to Alexander Hamilton in charge of collecting those taxes. Surely those closest to Jefferson hoped that all remnants of the internal taxes be eliminated quickly and quietly, despite the fact that many of the revenue agents whose offices were being eliminated were new Jefferson appointees.⁹⁰ Unfortunately, there is little evidence to indicate, one way or another, how strongly the Treasury officials and others in Washington felt about minimizing the activity of the lame duck bureaucracy and whether they supported Coxe in this matter.

Given the relatively small amount of revenue involved, why was Coxe allowed to pursue the matter at all? One possible answer is that a collector's right to a commission, to which Coxe would clearly have had a claim, would be viewed as a vested property right, with which

They have not yet replied but I urged it upon them yesterday. They will probably to reply tomorrow.

(Jan. 30, 1803), in Coxe Papers, *supra* note 30.

⁹⁰ As early as August 7, 1802, Coxe issued a circular to the then remaining collectors noting that as "the internal revenues having ceased to accrue, it becomes a matter of most earnest desire to enable the President to discontinue all the offices, and I trust Pennsylvania will not be behind the other states." Circular from Tench Coxe to tax collectors (Aug. 7, 1802), in Letter Books of the Supervisor of Pennsylvania, *supra* note 28. He added that "It may seem to our fellow citizens and to the government that delays in any district of collectorship arise from a desire to prolong the powers and benefits of the office, which will be disagreeable to every good officer." *Id.* For his own part, however, Coxe was decidedly reluctant to let go of a federal office, and held on to the duties of the Supervisor after having been appointed Purveyor. Perhaps his true interest was in collections, as evidenced by his circular letter to the collectors of the direct tax:

All monies in hand are to be remitted to me without delay; and I beg your most particular attention to this very important point, for there is no satisfaction in the revenue service so great as that produced by prompt remittances. Though our branch of the public service is about to be discontinued, you will not doubt that officers who distinguish themselves by a prompt and correct execution of their duties will enjoy the favorable remembrance of the government.

Circular letter from Tench Coxe to direct tax collectors (Aug. 11, 1802), in Coxe Papers, *supra* note 30.

the administration dared not interfere.⁹¹ Even those Republicans of the more radical bent—who might otherwise have been willing to let uncollected tax obligations go unpaid—might balk at being accused of unlawfully interfering with the rights of the collectors to the expected emoluments of their offices.

Why were the refiners willing to let the matter languish so long? Perhaps they merely thought that the longer after the repeal the litigation actually commenced, the more foolish the efforts of Coxe to collect on the repealed duties would appear.

Perhaps the refiners were also dragging their feet in hopes that getting Congressional attention would moot the need to proceed in court. The Pennsylvania refiners were not the only ones who mobilized to oppose a construction of the act that would result in payments after July 1802. The refiners in Baltimore, led by Charles Garts, petitioned Congress on February 7, 1803, seeking relief. They protested that they had acted “under the fullest impression and belief that no duties were legally demandable from them on account of sugars which were so refined, but not removed from the manufactory [on June 30 and] they made an equivalent reduction in the price of the

⁹¹ Cf. *United States v. Morris*, 23 U.S. (10 Wheat.) 246 (1825) (considering whether the Secretary of the Treasury could, in exercising his mitigation powers, interfere with the commissions of customs collectors). Disputes about which collector was entitled to receive commissions for, and obligated to make good on, taxes accruing in periods other than those during which the collector actually served, are a recurring theme in the correspondence of the Supervisor for Pennsylvania. Apparently some collectors continued to collect on taxes assessed during their tenure even after they left office, as was consistent with some state practices. See, e.g., Letter from Peter Muhlenberg to Hughes, (Jan. 18, 1802), in Letter Books of the Supervisor of Pennsylvania, *supra* note 28; Letter from Hughes to Peter Muhlenberg (Feb. 11, 1802), in Letter Books of the Supervisor of Pennsylvania, *supra* note 28. Such practices would be consistent with a property-like entitlement to such commissions.

The personal affairs of Coxe suggest that he may have been content to let the suit languish. He had engaged, like many of the old Federalist elite, in various land speculations and felt enormous pressure from creditors. His papers include some listings of the duties outstanding, and commissions that might be owed thereon, that look suspiciously more as if they were prepared to present to creditors in a statement of his personal financial worth, than in a report to superiors in the federal government. So long as the controversy remained open, these uncollected commissions could be shown as assets in his accounts.

Another far more cynical answer is possible. Some, including Levi Lincoln, may have known that the transition rule actually benefited some refiners, see *supra* note 63, and were perfectly content to let the matter languish until all drawbacks relating to the transition period had been paid.

article.”⁹² Seeking to avoid the cost of litigation, they prayed for a “declaratory law” explaining “the meaning and intent of the former one passed.”⁹³ Aware of the sensitivity of such a law given the likelihood of judicial involvement in the matter (the Baltimore refiners may not have known that no case had yet been filed in Philadelphia), they urged that “if such a Law should be deemed incompatible with your constitutional powers, that you would remit all right which the United States may have or claim to [the duties in question].”⁹⁴

Congress replied sympathetically, but not in a way that would ultimately benefit the refiners. On February 11, 1803, a report was issued by the Ways and Means Committee in response to the Garts petition, concluding that the duty was technically owed, but that it should not be collected. The duty was owed, the report reasoned, because: first, it had not been collected on sugar refined before but shipped after the initial imposition of the duty in 1794, so symmetry would require that sugar refined before the repeal be taxed; second, under the refiners’ construction it would have been too easy to simply withhold shipment and avoid payment.⁹⁵ The duty should not be collected, the report urged, because there had in fact been a decline in the price of sugar on the expectation that the duty would no longer be collected.⁹⁶ Without further action by the House and the Senate, these conclusions would have no force. Nothing, however, seems to have come of this initiative before the Seventh Congress adjourned.⁹⁷

⁹² Memorial of Charles Gartes and others, sugar refiners in the City of Baltimore, to the Second Session of the Seventh Congress (Feb. 7, 1803), RG 253, M1266 (National Archives Microfilm Publication).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ The committee does not seem to have attempted to ascertain whether the refiners did in fact withhold shipments. Only incomplete information is available about the normal rate at which sugar was processed by the refiners. Such information as there is shows quarterly production before the summer of 1802 to be far too unpredictable to be able to conclude definitively that the refiners had held back in hopes of shipping duty-free sugar into a market at which the pre-repeal price prevailed. The numbers available, however, are consistent with such behavior. According to Pennington’s ledger, only 314,931 pounds were shipped in the quarter ending June 30, 1802, whereas 499,326 had been shipped in the same quarter a year earlier. See Ledger book of Pennington sugar house, *supra* note 67.

⁹⁶ See 12 ANNALS OF CONG. 1287 (1803).

⁹⁷ In December 1803, a second petition seeking similar relief was filed in the Eighth Congress by the Philadelphia refiners, and a resolution in their favor was entered in the House on December 22, 1803. See 14 ANNALS OF CONG. 1477 (1803). No evidence of any action by the Senate has been found.

More puzzling still is Coxe's own position. Even if suit on the refiners' bonds was not a possibility,⁹⁸ his enforcement options included the ability to seize a refiner's business assets and begin forfeiture proceedings. Even if there was a specific agreement to continue "amicably," it is unlikely that such an agreement would have had any legal force, and, even if disavowing it involved a matter of honor, the refiners' other initiatives and delays would seem to have been enough to free Coxe to proceed more aggressively. A successful seizure would have been far more lucrative for him personally. But it would have brought with it public attention, both for him and for Dallas who would be called upon to initiate the proceedings, which neither would likely enjoy. Coxe himself seems to have viewed litigation as a routine, if not always desirable, means of obtaining a generally applicable interpretation of statutory law. In January 1802,

The sugar refiners had another, perhaps more important, plea to Congress as a result of the removal of the duty. Virtually all raw sugar was imported, and upon importation had been subject to duty. Under the 1794 sugar duty, the exporter of sugar was entitled to a drawback of an amount determined by formula aimed at refunding both the import duty and the manufacturing tax. *See supra* note 63. The drawback of the duties on raw sugar when exported in the form of refined sugar, however, was a part of the statute imposing the 1794 tax, not the impost law itself, and was repealed with the rest of the 1794 legislation. The sugar refiners urged Congress to reinstate the drawback of the import duty on raw sugar. The initial congressional response was favorable. *See* 12 ANNALS OF CONG. 517 (1803).

But later that same year, the reaction from the new Congress was an especially firm no: sugar refiners were protected enough by the high impost on refined sugar and by the import regulation requiring that sugar be imported only in quantities of 600 pounds or more in ships of 120 tons or more. *See* VOGT, *supra* note 48. The original import duty had been set at 5 cents per pound and had been increased to 9 cents per pound in 1794. *Id.* By 1800 imports of refined sugar had fallen from 265,000 pounds to 10,000 pounds. *Id.* No additional protection for the "infant" industry was deemed necessary, especially because the increases in sugar growing and refining in the new territory of Louisiana would create enormous problems in administering a drawback such as that proposed. *See* 13 ANNALS OF CONG. 785 (1803); *see also* 14 ANNALS OF CONG. 997 (1805) (report complaining of the frequency of drawback petitions from sugar manufacturers).

Drawbacks of the duty paid on imported raw sugar on export of refined sugar were again renewed in 1813, Act of July 22, 1813, ch. 18, 3 Stat. 35, renewed subsequent years, Act of April 30, 1816, ch. 172, 3 Stat. 340, Act of Dec. 23, 1817, ch. 1, 3 Stat. 401, and made permanent in 1818, Act of Apr. 20, 1818, ch. 86, 3 Stat. 444. *See* *United States v. Eighty-Five Hogsheads of Sugar*, 25 F. Cas. 991 (C.C.N.Y. 1830), *aff'd* *Barlow v. United States*, 32 U.S. (7 Pet.) 404 (1833) (discussing, in a libel suit for forfeiture, whether all byproducts of sugar refining should be considered "refined sugar" for the purposes of the drawback).

⁹⁸ *See supra* note 78 and accompanying text.

a minor dispute had arisen regarding whether the refiners should be allowed a deduction for the paper and twine with which their sugar loaves were wrapped prior to shipment. Apparently some refiners took such a deduction while others did not. In seeking advice from Muhlenberg about the resolution of the controversy, Coxe noted that litigation initiated by a seizure would be heard by jury and might “in the probable events of an unfavorable charge and verdict . . . appear odious and might be considered as vexatious.”⁹⁹ He sought advice about how to proceed: “Sir, tho I am ready under an instruction, to bring to the most amicable decision, by a trial, the present question, yet I beg leave to offer an opinion [that such deduction was allowable].”¹⁰⁰ Litigation that avoided the pitfalls of a jury trial was much less likely to either embarrass the administration or to provoke Congress, should it have been so inclined, to respond to the refiners’ requests for intercession.¹⁰¹

III. THE CASE IS JOINED AT LAST

Negotiations had straightened out somewhat in the last days of March 1803, when Dallas sent to Coxe a copy of some of the papers prepared by Jared Ingersoll to be filed in circuit court.¹⁰² Dallas was

⁹⁹ Letter from Tench Coxe to Peter Muhlenberg (Jan. 11, 1802), in Letter Books of the Supervisor of Pennsylvania, *supra* note 28.

¹⁰⁰ *Id.* Muhlenberg found the dispute much less interesting, and merely approved the acceptance of bonds securing payment of the lesser amount. See Letter from Peter Muhlenberg to Tench Coxe (Jan. 13, 1802), in Letter Books of the Supervisor of Pennsylvania, *supra* note 28.

¹⁰¹ Coxe seems to have been aware of the refiners’ efforts in Congress, but not to have taken an active role. In his monthly report to the Commissioner, he merely stated, “As soon as it is known what has been done by the legislature with respect to the duties on sugar refined before July, and removed after June, that matter will be proceeded in or otherwise according to the state of the laws.” Letter from Tench Coxe to William Miller (Feb. 28, 1803), in Letter Books of the Supervisor of Pennsylvania, *supra* note 28.

¹⁰² See Letter from Alexander Dallas to Tench Coxe (Mar. 28, 1803), in Coxe Papers, *supra* note 30. In his monthly report to Commissioner Miller, Coxe summarized the state of the negotiations with a tone that suggests that he was feeling some pressure from Washington to conclude the litigation—although it is still unclear how committed to Coxe’s position his superiors were:

I have been endeavoring to obtain from the refiners admissions of their quantities of sugar coming under the question to remedy any possible defects in the Bonds. Two of the refiners have rend’d accts of their quantities and sworn to them. One has a bond under consideration til tomorrow as the last day. One other has given an acct of the quantity. . . . Another has given the acct of the quantity in the store, but has

still not content, and complained in his cover letter that the declaration he was forwarding was insufficient to secure the government's position, and that a side agreement in which the parties agreed to put the matter in suit would be necessary. Again, Dallas seemed fed up with complications he viewed as unnecessary, and he questioned the form that the suit was taking and wondered why his proposed form was rejected. He noted that at one point he was told that the legal form of the bond was bad, and at another, that no single case was of great enough value to allow a writ of error to the Supreme Court.¹⁰³

The refiners' side, for reasons not clear from the correspondence, successfully insisted on invoking the jurisdiction of the circuit court through the device of pleading the case as a "feigned case." This device involved styling the case as if it involved a wager between Coxe and one of the refiners about whether the tax was in fact owed. The version of the pleadings filed with the Supreme Court¹⁰⁴ recites the underlying discourse, purported to have occurred on October 2, 1802, that constituted the wager: Coxe promised to pay \$5000 to Pennington if Pennington was not liable for the tax; Pennington promised to pay Coxe \$5000 if he was liable. On the date the duty would be owed, the recitation continued, Coxe had demanded payment. Pennington, "not regarding his promise and undertaking aforesaid but contriving

not yet stated the quantity in the drying apartment, but inadvertently blended it with what was in the moulds.

It appears probable that agreement will yet be necessary to give an opy to carry the case before the Supreme Court if desired because no refiner has 2000 Drs of duty in question. One refiner at his own house and at another in which he is the surviving partner refuses to render any acct nor has taken the oath, and today he is averse to allow an inspection of his book or paper.

The business will go forward to the April term of the Circuit Court. It could not have gone forward to that of October for the fever prevented the sitting of the Court, nor had I any acct of sugar sent out nor any means to prove it. It is by long various and unwearied exertion that I have obtained the information in the cases but Mr Pennington two concerns. It is now and was from the beginning in the straight path. . .the business proceeded as I will evince to you in a future letter.

Letter from Tench Coxe to William Miller (Mar. 26, 1803), *in* Coxe Papers, *supra* note 30.

¹⁰³ See Letter from Alexander Dallas to Tench Coxe (Mar. 28, 1803), *in* Coxe Papers, *supra* note 30.

¹⁰⁴ Despite the fact that several different drafts of the pleadings in the circuit court have survived, and the record in the Supreme Court contains a copying of the pleadings, it is unclear exactly which version was actually filed in the circuit court.

craftily and subtly to deceive and defraud the said Tench Coxe,” did not pay.¹⁰⁵ The record further recited that Pennington “still doth refuse to the damage of the said Tench Coxe twenty thousand dollars.”¹⁰⁶

The suit, therefore, was a suit to collect on the debt resulting from the fictitious bet, not a suit to collect the tax itself. This “feigned” case procedure was a common one in state courts in Philadelphia at the time, used to bring an issue of fact before a jury in a case that otherwise belonged in the jury-less realm of equity. In its more common usage, one party asked the equity court to “award an issue,” that is, to send the case to the court of common pleas to allow a jury to determine facts according to a special verdict.¹⁰⁷ Although it is not clear exactly why such a device was thought necessary in the matter of the refiners, the perceived problems with subject matter jurisdiction

¹⁰⁵ Draft of pleadings to be filed in the Circuit Court of the United States for the District of Pennsylvania in the Third Circuit, *Coxe v. Pennington*, 6 F. Cas. 692 (C.C.D. Pa 1803) (No. 3311), in *Coxe Papers*, *supra* note 30; see also Appellate Case Files of the Supreme Court of the U.S., 1792-1831, RG 267, M214 (National Archives Microfilm Publication).

¹⁰⁶ No mention is made in the pleadings of Coxe’s actual status; he was probably acting only as Muhlenberg’s deputy, or at most as a collector on June 30, 1802, and had been nominated as Supervisor by October 1802, but by the time the case was brought, he may no longer have been a revenue officer, and had instead been designated purveyor. He probably continued to have some authority in revenue matters under the Act of March 3, 1803, ch. 39, § 1, 2 Stat. 243, which had allowed the President to transfer the duties of the revenue supervisors to any other federal officer.

¹⁰⁷ For examples of essentially contemporary cases employing the device, see *Prevost v. Nichols*, 4 Yeates 479 (1808), *Vanlear v. Vanlear*, 4 Yeates 3 (1803), and *Heister v. Lynch*, 1 Yeates 108 (1792). Although the device involved the legal fiction of a wager, the only purpose of the fiction was to create an issue that could be pleaded as a debt actionable in a common law court. The use of the device began with an actual controversy, and was necessary to allow a defendant, brought into court by a plaintiff seeking a remedy only an equity court could grant, access to a jury and the evidentiary devices, including live testimony, available only in the common law court. Thus, although the case was “feigned,” in the sense that the case involved a legal fiction, the parties, like most who used the device, appear to have clearly acted as adversaries otherwise. *But see* Lindsay G. Robertson, “A Mere Feigned Case”: *Rethinking the Fletcher v. Peck Conspiracy and Early Republican Legal Culture*, 2000 UTAH L. REV. 249, 252, 261 (suggesting that *Pennington v. Coxe*, like *Fletcher v. Peck*, and *Hylton v. United States*, were suits in which the litigants sought means through which they could “they might try their . . . claim without meaningful opposition”). Although by the time it reached the Supreme Court, *Hylton* no longer involved two adversarial parties, in its inception it probably involved an actual controversy, thus it is distinguishable from *Peck*. See Charlotte Crane, *Reclaiming the Meaning of Direct Tax* (June 2003) (unpublished manuscript on file with author).

were thought to be solved by invoking this fiction.

Dallas seems to at least have had the pleasure of pointing out that the circuit court would only have jurisdiction of the feigned case on the debt—because it would be a state contract claim, not an action regarding the revenue—if the parties were citizens of different states.¹⁰⁸ Neither the district nor the circuit court had jurisdiction based upon the presence of a federal question alone—under the 1789 Act their jurisdiction over federal tax cases depended upon the United States appearing as plaintiff or petitioner.¹⁰⁹ In a suit presented as Coxe against a refiner on a private debt, the circuit court would not have jurisdiction unless the suit was “between a citizen of the State where the suit is brought, and a citizen of another State.”¹¹⁰ Dallas, apparently still unhappy to be involved at all, closed his letter to Coxe with the thought that he (Dallas) was “not willing again to expose myself to the mortification that I have experienced on this question, where my official duty does not require the sacrifice.”¹¹¹

This potentially fatal jurisdictional flaw in using the agreed upon approach did not deter counsel for the refiners. An apparently early

¹⁰⁸ According to the report of Dallas in *Knox v. Greenleaf*, 4 U.S. (4 Dall.) 360 (1802), Dallas and Ingersoll had forestalled a prosecution in the federal circuit court of Pennsylvania against James Greenleaf, a surety on the notes of the then failing financier Robert Morris, by successfully arguing that he had become a citizen of Pennsylvania despite his having moved from Massachusetts as recently as 1796, and thus was from the same state as the plaintiffs in the case. It is unclear why Ingersoll would have needed a reminder of the diversity requirement in the form he wished to use. It may well be that Rawle and Tilghman, who were probably less acquainted with federal procedures, rather than Ingersoll, conducted most of the negotiation.

¹⁰⁹ The Judiciary Act of 1801, ch. 4, § 11, 2 Stat. 89, 92, had granted the circuit courts jurisdiction over “all cases in law or equity, arising under the constitution and laws of the United States,” but this jurisdictional grant was undone by the Act of Mar. 8, 1801, ch. 8, §§ 1-3, 2 Stat. 132, which repealed the Judiciary Act of 1801. Broad-based and permanent federal question jurisdiction was not provided until 1875. See Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470.

¹¹⁰ Act of Sept. 24, 1789, ch. 20 § 11, 1 Stat. 73, 78.

¹¹¹ Letter from Alexander Dallas to Tench Coxe (Mar. 28, 1803), in Coxe Papers, *supra* note 30. Despite Dallas’s misgivings, the form of the pleadings was formalized only a few days later. Letter from Alexander Dallas to Tench Coxe (Mar. 30, 1803), in Coxe Papers, *supra* note 30 (requesting that Coxe “procure the assent of counsel, and the signatures of the refiners). Dallas did not go uncompensated for his troubles. On March 14, 1804, he was paid \$300 for his “services as counsel to assist the attorney general on behalf of the United States, in the case respecting duties on sugar refined in the United States before the 30th June, 1802, and not removed from the refineries previous to that day,” according to a report prepared by Albert Gallatin on March 15, 1804. 1 American State Papers (Misc.), *supra* note 12, No. 180, at 392, 394.

draft of the pleadings merely lists “AB” (the “John Doe” of legal documents of the day) as the delinquent refiner to be the named plaintiff. Drafts of the filings in the case contained in Coxe’s papers indicate that they were first drawn up with Pennington as plaintiff, but show him as a citizen of Pennsylvania.¹¹² Only later were the papers changed to state that Pennington was a citizen of New York. Since no evidence has been uncovered linking Pennington to New York, it seems likely that Pennington’s designation as a party had nothing to do with any real basis for diversity jurisdiction. Instead, he was probably chosen to be named in the suit because he, unlike several of his associates, had not posted bond to cover duties on shipments through September when payment was due on such duties in October. The duties he owed under Coxe’s theory would, therefore, have become due immediately, and suit against him—if the fictions of the pleadings did not channel the litigation successfully—would not be complicated by the fact that suit on the bond for the underlying duties would be premature until the summer of 1803. The correspondence contained no discussion of Pennington’s expedient change of address.

Once the extended haggling over the form the suit should take was over, the parties appear to have been able to have the case heard on short notice in the circuit court in April 1803.¹¹³ The report of the

¹¹² See Draft of pleadings to be filed in the Circuit Court of the United States for the District of Pennsylvania in the Third Circuit, *Coxe v. Pennington*, 6 F. Cas. 692 (C.C.D. Pa 1803) (No. 3311) (Coxe Papers). Pennington may have spent some time in New York City, but the likelihood that he thought himself “from” New York in the sense in which people claimed settlement and domicile in the early republic seems unlikely. Letter from Joseph Ditta, Reference Librarian, New-York Historical Society (Aug. 10, 2001) (on file with author). The equity records of Circuit Court in Philadelphia show an Edward Pennington who served on the grand jury both in April 1797 and in April 1804. Minutes of the US Circuit Court for the Eastern District of Pennsylvania, RG 21, M932 at 56, 108. Pennington also served on the Select Council of the City of Philadelphia in 1797. See *Item*, PA. GAZETTE, Oct. 4, 1797, item 82015 in Accessible Archives, available at <http://www.accessible.com>. The only other Edward Penningtons located in Philadelphia records of the time are the father and son of the Edward in question, the elder having died in 1796 and the younger not born until 1800. See *Old Philadelphia Families*, *supra* note 45.

¹¹³ Although the agreements they represented were not finalized until the last days of March or April of 1803, the papers reflecting activity in the circuit court are designated as relating to the October 1802 term.

Coxe summarized the status of the case in one of his monthly letters to William Miller:

The whole of the Sugar Bonds are discharged which were recd by me from my predecessor, taken by myself. The argument on the question of duty for

opinion by Judge Bushrod Washington contains no hint of any procedural irregularity, and simply states that the issue before the court was whether the refined but unshipped sugars were subject to tax.¹¹⁴ Washington attempted to answer the question posed by reference to the approach Congress had taken in the other tax legislation. He noted that in all cases, there was an event stated upon which the duty accrues, and another date upon which the duty must actually be paid.¹¹⁵ Although the mechanisms were slightly different (for instance, bonding of the duty on distilled liquor was required before shipment, while the bonding of the duty on refined sugar was not due until the end of the quarter in which the sugar was shipped), the general pattern of accrual with delayed payment was evident in all of the schemes.¹¹⁶ The refiners, Washington concluded, would have to pay on all of the sugar in question, not just that which was shipped before July 1, 1802.¹¹⁷

The litigation, with the refiners seeking review in the Supreme Court, proceeded far more smoothly after this point, even though the refiners were still pursuing their options in Congress.¹¹⁸ Chief Justice

sugar sent out since and refined before the commencement of July 1802 was assigned for this day but has been postponed by Judge Washington till Monday. Judge Peters has sat but little this term owing to indisposition. Messrs Ingersoll, E. Tilghman & Rawle are employed I understand by the refiners.

Letter from Tench Cox to William Miller (April 29, 1803), in Letter Books of the Supervisor of Pennsylvania, *supra* note 28.

An undated and unaddressed letter reported the argument itself:

This day the argument in sugar refiners came on before Judge Washington alone. Mr. Dallas for the US & Messrs Rawle, Ingersoll & E. Tilghman for the refiners, but the latter being indisposed did not speak after occupying about four hours, the bar proceeded to bring in other business and left the court to give its decision in its own time. Nothing has been said by the court as to the time when the decision will be given and as it is expected to rise this week, it not doubted that the matter will be concluded within three days. Nothing occurred in the course of the argument to give pain or regret. Judge Peters was not well yesterday and probably was prevented today by indisposition.

Tench Cox, undated, unaddressed letter, in Letter Books of the Supervisor of Pennsylvania, *supra* note 28. Judge Peters's ill health was confirmed by an item in the *Gazette of the U.S.* Apr. 12, 1803, at 3.

¹¹⁴ See *Cox v. Pennington*, 6 F. Cas. 692 (C.C.D. Pa 1803) (No. 3311).

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.* at 693 (analyzing mechanisms of similar tax statutes).

¹¹⁸ Cox reported, perhaps somewhat defensively, to Miller:

John Marshall requested the record from the circuit court before August 1803. The document filed in response in the Supreme Court is styled “Pleas before the Honorable the Judges of the Circuit Court,” but contains only the judges’ conclusions and an award of costs to Coxe without a distinction, or even a change in the handwriting, between pleadings and decision.¹¹⁹ The Supreme Court filing does, however, include additional recitations that suggest that neither party ever expected Pennington to pay according to the pleadings. Included in the record was a “Copy of the agreement to enter the action in the circuit court.” This agreement contained several rather bizarre stipulations, including one that if a “writ of error is brought and the supreme court of the united states shall be equally divided the judgment of the circuit court shall not be affirmed but the cause is to remain in the supreme court until a majority of the judges at any term

I believe that I have now ascertained the real views and ultimate expectations of the refiners. In a recent conference with one of them of whose fairness and temper I have the best opinion he hesitated about signing the Sugar Bond for the quantity refined before July 1802 and removed after June in that year...He was apprehensive that the proceedings on the part of the legislature which they yet expect might not authorize a refund tho it might direct the non collection of the duty. He unreservedly observed that there was little expectation from the Supreme Court. He seemed personally to have none. It may be unsafe however to omit preparation for the argument at Washington. No more than Messrs. Merken & Co. have yet signed the Bonds and I fear that the expectation of legislative relief wil prevent their signing. I have however not abandoned the hope of some more. I should be glad to receive a copy of their petition, and of the minutes of the proceedings of the Senate thereon and upon the representatives bill for the relief. I may be enabled to meet the refiners to more advantage with these papers.

Letter from Tench Coxe to William Miller (May 28, 1803), *in* Letter Books of the Supervisor of Pennsylvania, *supra* note 28.

Later that fall, the possibility of Congressional action was still on Coxe’s mind:

It may be well to dispose of the business of the Refiners before the Senate, where they consider it to be presiding, if that body concurs with the Representatives there will be an end of the business. If not it is probably several will pay before the Court.

Letter from Tench Coxe to William Miller (Oct. 25, 1803), *in* Letter Books of the Supervisor of Pennsylvania, *supra* note 28.

¹¹⁹ Pleas before the Honorable Judges of the Circuit Court of the United States in and for the District of Pennsylvania in the Third Circuit, *Coxe v. Pennington*, 6 F. Cas. 692 (C.C.D. Pa 1803) (No. 3311), Appellate Case Files of the Supreme Court of the U.S., 1792-1831, *supra* note 105.

shall decide the question.”¹²⁰ And a loss by Pennington would not be the loss anticipated by the pleadings at all under a further stipulation:

If the final judgment of the supreme court in a case a writ of error is brought shall be in favor of the plaintiff, or if the judgment of the circuit court is in his favor and no writ of error is brought the judgment so rendered shall not be enforced at any time, or in any way against the defendant.¹²¹

Pennington would therefore be liable only for the tax he actually owed, and not for the debt resulting from the wager. Lest anyone take the suit too literally, the following was also stipulated:

But it is understood and agreed that it is the true and only meaning of the parties, to have determined the question whether sugar actually refined but not sold and sent out before the 1 day of July 1802 is liable to any duty to the United States. And therefore the question and decision both in the Circuit Court, and in the Supreme Court if a Writ of Error is brought shall be utterly independent of all forms in which neither party is to be implicated nor shall either party object to or take advantage of any matter of form in the proceedings.¹²²

The summary of the proceedings in the circuit court contains no material at all relating to the merits of the case; it merely concludes that Coxe’s declaration was “good and sufficient in law for him the said Tench Coxe to have and maintain his said action thereupon against the said Edward Pennington.”¹²³

IV. JUSTICE MARSHALL’S DECISION

The Supreme Court seems to have taken all of this in stride. The notes of the reporter, William Cranch, simply state that “this was a feigned issue” between Tench Coxe . . . and Edward Pennington,” and that “[t]he declaration was upon a wager.”¹²⁴

¹²⁰ *Id.* This author has found no authority indicating whether this agreement would have been effective in altering the Court’s procedures had the Court in fact been evenly divided.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Pennington v. Coxe, 6 U.S. (2 Cranch) 33, 33-34 (1804).

For the refiners, Jared Ingersoll argued that the tax was meant to be a tax on consumption, as demonstrated by the fact that duties would not be owed on sugar exported directly from the refinery, and that drawbacks were available for previously dutied sugar that was eventually exported. In keeping with this emphasis on consumption, the duty should not accrue until the sugar was sold by the refiner, since this later date was a better surrogate for the actual consumption of the sugar. The record of the amount refined, Ingersoll further argued, was merely made so that the collector could more easily determine the amount of duties owed and reconcile the refiner's reports.

Alexander J. Dallas and Levi Lincoln argued on behalf of the government simply that the tax was on refined sugar, not on the quantity sold or sent out. Any of the provisions allowing for later payment and collection were included in the 1794 legislation in acknowledgment of the fact that "the fund for payment is created by the act of sale. . . . The duties payable by this act are on all the sugar refined; . . . [implicit in the condition of shipping prior to payment is the notion that] we will accept a partial payment in consideration that you have not yet sold the residue of the sugar."¹²⁵ In other words, the refining of the sugar created the duty, the removal of it fixed the time of payment.

Marshall's opinion began disingenuously. He recited that the action was brought "to recover the duty on sugars refined before the 30th of June, and sent out afterwards," without mentioning either the basis for jurisdiction or the actual circumstances giving rise to the case.¹²⁶

¹²⁵ *Id.* at 42.

¹²⁶ *Id.* at 51. There was no statutory authority for a government suit against a taxpayer for unpaid taxes; such actions were generally initiated by seizure or by suit on an unpaid bond. It is not clear that a cause of action would have been available, at least in any straightforward sense, for recovery of duty already paid. Run-of-the-mill disputes about the extent of federal taxes owed were ordinarily resolved in this period after the taxpayer had given bond for the amount owed, but before he had paid. The procedure to be used was outlined in an Act of Mar. 3, 1797, ch. 13, §§ 1-2, 2 Stat. 596, which contemplated a hearing before a federal district court judge or a state court judge who would then "cause the facts which shall appear upon such inquiry to be stated and annexed to the petition, and direct their transmission to the Secretary of the Treasury of the United States, who shall thereupon, have the power to mitigate or remit" the amount contested. Despite the similarity of this procedure to that found questionable in the scheme for dealing with pensions for invalid veterans, Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), the statute appears to have been followed without challenge or objection. *See, e.g.,* United States v. Morris, 23 U.S. (10 Wheat.) 246

On the merits, however, the analysis Marshall used to resolve the issue was far less formalistic than one might expect given the arguments presented to him. After reviewing the parties' essentially text-based arguments, he began his own analysis by offering a short treatise on statutory construction.¹²⁷ He then, however, rejected the

(1825). When first enacted, the procedure was set to sunset, but the sunset provision was removed by an act of Feb. 11, 1800, ch. 6, § 1, 1 Stat. 7.

Taxpayers who had paid but felt they had paid too much, whether for technical or equitable reasons, were also likely to petition Congress directly. *See, e.g.*, Act of June 7, 1794, ch. 53, 1 Stat. 390 (goods destroyed by fire); Act of Jan. 28, 1795, ch. 14, 2 Stat. 410 (duties imposed upon return of French from Nova Scotia); Act of January 29, 1795, ch. 18, § 3, 2 Stat. 411 (drawback of duty on wine for unspecified reasons); Act of March 3, 1797, ch. 13, 2 Stat. 506 (duties imposed upon ship in distress). It is impossible to determine, however, the degree to which such resort to Congress was accepted as a regular course of action, and to what extent it was an extraordinary step when other remedies were unavailable. *Cf.* Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381 (1998) (reviewing the record of legislative adjudication of claims against the public fisc in New York's early-eighteenth-century legislatures).

By 1802, however, Congress no longer felt the need to respond favorably to individual petitions. *See, e.g.* Transcribed Reports of the Committee on Claims, RG 233 (on file at National Archives) (including Report of the Petition of James Clark, Jan. 7, 1802 (no relief from distilled liquor tax owed after "elopement" of owner's lessee); Petition of Andrew Jackson, February 19, 1802 (no relief when stills destroyed by fire, "conformably to the repeated decisions of the House"); Petition of James Parks, December 21, 1803 (same; "applications of this nature have been so frequently made and so invariably rejected that your committee deems it unnecessary to assign the reasons for their opinion")). One clear indication in these reports is that Congress eventually realized the substantial efficiencies inherent in leaving it to the merchants and tradesmen involved to obtain full insurance against the loss of goods on which duties had been paid, rather than provide means through which each claim might be properly investigated.

Nevertheless, it was not until *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137, 154, 156-59 (1836), that the federal courts recognized the existence of a right of action against a Collector of Customs for refund of duties illegally assessed and paid under protest. Such a procedure was not outlined in statutes, but may have anticipated by other statutes. *See, e.g.*, Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198 (allowing for removal to federal court of suits brought against federal revenue agents). It is unclear whether *Swartwout* broke new ground or merely ratified prior practice.

¹²⁷ The sound bites Marshall used in setting up his discussion of the issues in *Pennington* have recently become popular bromides in the current debate on statutory interpretation. With such well-turned but essentially meaningless phrases as "a law is the best expositor of itself" and "the object of interpretation is to discover[] the mind of the legislature," *Pennington*, 33 U.S. at 52, is sometimes offered in support of text-based interpretation. *See, e.g.*, U.S. DEPT. OF JUSTICE OFFICE OF LEGAL POLICY, USING AND MISUSING LEGISLATIVE HISTORY: A REEVALUATION OF

urging of counsel on both sides to read too much into the apparently redundant expression providing that the tax be “levied, collected and paid,” and thus refused to use this language alone to determine the stage at which the tax became an unavoidable obligation of the taxpayer.¹²⁸ Indeed, in the sense that it attempts to reconcile the purposes of the legislation overall and the incentives created under the varying interpretations, his opinion has a surprisingly modern ring.

Should the 1794 Act have been read to impose a duty “upon all sugar which shall be refined within the United States,” in the literal sense implied by the second section of that act, or should the second section have been interpreted in light of the various subsequent provisions that seem to condition the tax on the sending out of the sugar? Marshall concluded his analysis of the text itself by observing that “the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act,” but then noted that this approach did not resolve the questions at hand.¹²⁹

After analyzing the text of the 1794 Act, Marshall considered—as urged by the taxpayer—whether there might be reasons that Congress would have conditioned liability for the duty on the shipment of the sugar. Here he agreed that there might be good reason to do so: “The object of the act imposing the duty being revenue, and not to discourage manufactures, it is reasonable to suppose that the attention of the legislature would be devoted to the article in that state in which it was designed to be productive of revenue. There could be no motive for imposing a duty never to be collected, or for imposing it on the article in that condition, in which it might remain forever, without yielding a cent to the treasury.”¹³⁰ Marshall then made much of the fact that “[all] those provisions of the act, which are calculated to bring the money arising from this tax, into the treasury, or to create any liability in the person who is to pay it, apply exclusively to sugars

THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 59 (1989); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 91 n.345 (2001); Mark R. Killenbeck, *A Matter of Mere Approval? The Role of the President in the Creation of Legislative History*, 48 ARK. L. REV. 239, 249 n.59 (1995); John Choon Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607 (1992). As explained in the text at notes 129-34, *infra*, these phrases, in typical Marshall fashion, were used only as jumping-off points for discussion that took an expansive view of the Court's proper role, albeit one that fell short of actually allowing intrusion upon the legislative prerogative.

¹²⁸ *Pennington*, 6 U.S. at 51-52.

¹²⁹ *Id.* at 52, 54-59.

¹³⁰ *Id.* at 55.

sent out of the building.”¹³¹ Marshall was willing to conclude that Congress had intended, sensibly, to impose tax obligations only when the imposition of the tax was most likely to actually raise cash, in this case, when the refiner was likely to be paid for the sugar actually shipped.

The opinion continued with an ingenious elaboration by Marshall on Ingersoll’s argument that the tax was not intended to be imposed on the manufacturers themselves. Very few manufacturers in the early republic would have been conducting business in forms that afforded their owners limited liability, and thus any tax would be the personal obligation of the manufacturer. If the government’s interpretation was correct, the manufacturer would become liable at the time the sugar was refined, and if he were to sell the business, the liability would remain his and would not be collectible from his purchaser, even after the purchaser shipped the sugar. But the enforcement provisions of the statute anticipated that the consequence of unpaid duties was the forfeiture of the sugar itself. If the obligation arose at the time the sugar was refined, before it was shipped by the new owner, the seizure of the sugar prescribed by the statute would be an inappropriate remedy.¹³² The tax must only accrue when the sugar is shipped; the sugar does not in effect become security for its payment until it is shipped.

Marshall then turned to arguments relied upon by the circuit court and based on the pattern set by Congress in other duty-imposing legislation. The government had pointed out that the notorious “duty on spirits of the home manufactory, [was] laid on their distillation, not on their removal, and that the legislature must therefore be presumed also, to have imposed the duty on sugars, on the act of refining them, and not on the act of removal.”¹³³ Here Marshall appeared to draw the first line regarding the role of the courts in dealing with tax laws. He essentially acknowledged that taxes are entirely the product of the legislature, and therefore that consistency need not be expected and precedent established by other legislative schemes could be ignored. The court should have no role either in attempting to make the overall methods of revenue collection more rational or in forcing the legislature to do so. The normal judicial task of reconciling various

¹³¹ *Id.* Marshall also observed that it would be unusual for the legislature to create a liability without also securing its payment in some way. *Id.* None of the enforcement mechanisms for the sugar tax (unlike the whiskey tax) were triggered before the shipping of the sugar. *See, e.g., id.* at 55-62.

¹³² *See id.* at 55-57.

¹³³ *Id.* at 58.

precedents simply does not apply to taxes because there is no underlying common law. In other words, Congress was free to be arbitrary with taxes and the courts should let it be:

Those political motives which induce the legislature to select objects of revenue and to tax them under particular circumstances, are not for judicial consideration. Where the legislature distinguishes between different objects, and in imposing a duty on them evidences a will to charge them in different situations, it is not for the courts to beat down these distinctions on the allegation that they are capriciously made, and therefore to be disregarded. It is the duty of the court to discover the intention of the legislature, and to respect that intention.¹³⁴

Justice Marshall then openly noted the varying provisions that might result in a payment of whiskey tax without sale and offered some incompletely specified reasons therefor, but ultimately concluded that “[such justification] is a legislative not a judicial inquiry and, if the difference exists, it must be respected, whatever may be the motives which produced it.”¹³⁵ Not only should the courts allow the legislature to be arbitrary, but they also should not bail out the legislature when it poorly crafts tax statutes.

Up to this point in the opinion Marshall seemed to be indicating that the courts should stay as far away from doing anything for which they can be blamed when it came to the development and administration of tax schemes. The whiskey tax, unlike the sugar tax, had clearly been imposed on the liquor as soon as it was distilled, and bond was required at that time. This result was clearly spelled out in the statute imposing the whiskey tax, and nothing was to be inferred from these provisions about the way in which the sugar tax should be administered. But Marshall then offered far more of the details regarding the implementation of the whiskey tax than would have been necessary if one took his assertions of the irrelevance of these details to his consideration of the case at face value.¹³⁶

This description of the administration of the whiskey tax was not just a token response to the government’s argument and the decision below. Marshall was laying the groundwork for a much more important point. Despite his own exhortation to courts to stay out of

¹³⁴ *Id.* at 59.

¹³⁵ *Id.* at 60.

¹³⁶ *See id.* at 61-62.

the business of tax design, Marshall could not resist closing his opinion with what amounted to his endorsement of the choices made by Congress in the design of the sugar tax:

[I]t was most apparently the object of the legislature through their whole system of imposts, duties, and excises to tax expense and not industry, and that, in the particular case of the duty now in question [unlike the whiskey tax and the carriage tax], this intent is manifested with peculiar plainness. The refiner of sugars never hazards the payment of the duty himself, because he is never to pay it until they are presumed to be sold, by being sent out of the building . . . In most other cases it has been deemed sufficient to secure this object by a credit, which will allow time for the sale of the article, after which the duty must be paid whether the article be sold or not. But in the case of refined sugars, the refiner can never be liable for the duty, but on a fact which is considered, and properly considered, as evidencing a sale, after which a credit for the collection of the duty is still allowed him. With respect to the refiner of sugars, then, it must, on an inspection of the act, emphatically be said, that the legislature designed him to collect the duty from the consumer, but never to pay it from the manufacture; that the tax should infallibly be imposed upon expense, and never on labour.¹³⁷

Although this exposition may not have much significance to the modern reader, it is unlikely that its import was lost on the contemporary reader. The whiskey tax, imposed as it was on liquor in process, and, worse, liquor for home consumption, had been unpopular. One significant source of unpopularity lay in the fact that it was required to be paid without regard for whether the liquor was produced with the expectation that it would generate cash. This tax had been so unpopular that its administration was a painful experience for the federal government and had led to the use of militia to subdue insurrection in western Pennsylvania. This John Marshall knew all too well, since his father, Thomas Marshall, had been in the front lines of the skirmishes over the whiskey tax in his capacity as a federal officer in what was to become Kentucky.¹³⁸ There can be little doubt that in this summary Marshall was indicating

¹³⁷ *Id.*

¹³⁸ See MARY K. BONSTEEL TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816* 67-73, 98-107 (1978)

his hope that Congress learned its lesson from the whiskey tax episode and would not again attempt to tax goods not fully entered into commerce, and which thus might not yield cash to the taxpayer adequate to pay the tax. A sensible tax would be designed so that it did not attach until the goods were shipped, and therefore, presumably, sold, and the proceeds of the sale available to pay the tax.

Marshall was thus anxious to doubly protect the Court when it came to tax cases. Early in the opinion Marshall admonished the Court to take no responsibility for any of the details in tax design. By the end of the opinion, however, his prose was aiming not only to dissociate himself and the federal courts from the prior, less well-designed (and less popular) taxes, but was also working to protect the Court from having to deal with bad taxes by instructing Congress in the ways taxes should be designed.

In the end, despite all the arcane procedural aspects of the case before it reached the Supreme Court—the patronage and commission system that put Coxe in office and gave him a reason to pursue the case, the uncertain ability of the Treasury bureaucracy to establish a precedent that would stick, the untested remedies available to the government in pursuing tax collection, the equal possibility of Congressional and judicial intervention, the bizarre form of the feigned case and allegations necessary for jurisdiction in the Supreme Court, the private agreement about the procedure at the Supreme Court and the significance of the judgment of the Court—Marshall's opinion barely offers the modern reader a clue about how contingent the institutions involved really were in the second decade of the nation's history.

V. POSTSCRIPT

Poor Coxe was left to learn of the Supreme Court's action only by rumor. In his May 1804 letter to Commissioner Miller, he petulantly reported:

The appeal in the case of the decision here against the Sugar Refiners (or Mr. Pennington as for the whole) is understood to have gone in favor of the Refiners. I am not officially informed on this point. It appears necessary that I should be so informed, and authorized to omit collecting in cases of Refiners, who have made their returns, and in case of one firm (Peter Mierken & Co.) which gave Bond. If I may cancel this bond and endorse the reason of it, the whole business will be settled because no case here is so strong as that, in which

Bond was given.¹³⁹

But perhaps even then he did not give up. When the tax on refined sugar was again imposed to fund the War of 1812, the transition rule was again challenged, this time regarding the transition from no tax to tax. Bushrod Washington again heard the case, and this time held for the refiners, that the new tax was only to be imposed on sugar that had not yet been refined on the effective date, rather than all sugar that had not yet been shipped out.¹⁴⁰ Although Coxe was involved in federal revenue collection again in this era, his role, if any, in this litigation has yet to be ascertained.¹⁴¹

¹³⁹ Letter from Tench Coxe to William Miller (May 29, 1804), *in* Letter Books of the Supervisor of Pennsylvania, *supra* note 28.

¹⁴⁰ *United States v. Pennington*, 27 F. Cas. 493 (C.C.D. Pa. 1815) (No. 16026).

¹⁴¹ *See supra* note 42.

