STANLEY SURREY AND THE TRANSFORMATION OF ADMINISTRATIVE LAW IN JAPAN

Keigo Fuchi[†]

Abstract

Stanley Surrey, one of the most important figures in the history of American tax law scholarship, was a member of the Shoup Mission, which made a thorough recommendation on revising the Japanese tax system after the Second World War. In the Mission, he was in charge of modernizing Japan's tax administration system. Among other things, he recommended implementing the Blue Return System, a set of incentives for taxpayers to file their tax returns based on actual data on their economic activities. As is well-known in Japan, the System contributed significantly to the public's acceptance of the self-assessment approach. However, it is less known that Stanley Surrey, despite his original ideas that aimed at rationalizing the tax dispute resolution system, happened to have a considerable influence on the transformation of administrative law in Japan. This was especially notable on the birth of a common law doctrine with respect to the administrative agency's duty to provide reasons in a wide range of administrative determinations. In this article, the author points out the following facts. First, in the Report of the Shoup Mission, Surrey proposed several measures for mitigating tax disputes between the government and the taxpayers. The proposal was identical to one that he and Roger Traynor had previously put forward to improve the federal tax administration of the United States. Second, Surrey suggested that the taxpayer had to be notified of the reason for an assessment of deficiency and that the more comprehensively the tax office could investigate the taxpayer, the more detailed reasons should be provided to him. However,

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[†] Professor of Law, Kobe University Graduate School of Law. I thank participants at the workshops in the University of Tokyo, Harvard Law School, and Kobe University for helpful comments and suggestions on earlier versions of this paper. I am deeply grateful to Professor J. Mark Ramseyer and Professor Minoru Nakazato for giving me a chance to present an earlier version of this paper at the workshop "New Perspectives in Japanese Law" on September 28-29, 2018 hosted by the East Asian Legal Studies Program of Harvard Law School. This work was supported by JSPS KAKENHI Grant Number JP19K01281.

Japanese lawmakers made the notification a privilege for blue return filers, that is, for those who filed tax returns based on data that recorded details of their economic activities. Third, the Japanese judiciary followed the literal interpretation rule in reading the statutory mandate to give reasons. Above all, the Supreme Court of Japan in Udono, a 1963 decision, held that an administrative determination sent to a taxpayer without sufficient reasons should be revoked. The Court did so mainly because it believed that the statutory mandate to notify the taxpayer of the reasons embodied the spirit of due process and that to obey the spirit, it was inevitable to sacrifice the collection of a correct amount of tax in favor of ensuring the administrative agency's rational decision-making.

I. INTRODUCTION

Since the Meiji Restoration, American law has had an enormous influence on Japanese law.[1] This was especially true during the period when the Allied Powers occupied Japan just after the Second World War (WWII), as American Law had unprecedented impacts on Japanese law and society.[2] It changed the pattern of farmland ownership in Japan drastically.[3] It also introduced US-style antitrust law in Japan.[4] Part of the impact of the policies pursued by the Allied Forces lasted long after the occupation was terminated.

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[1] *See, e.g.*, Kenzo Takayanagi, *Reception and Influence of Occidental Legal Ideas in Japan, in* WESTERN INFLUENCES IN MODERN JAPAN: A SERIES OF PAPERS ON CULTURAL RELATIONS 70, 80 (Inazo Nitobe, et al., 1931) (describing that in the early years of Meiji, one of Japan's main juristic sources was the US); JOHN OWEN HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 67–80 (Donald Black ed., Studies of Law and Social Control Ser., 1991).

[2] *See generally* Thomas L. Blakemore, *Post-War Developments in Japanese Law*, 1947 WIS. L. REV. 632 (1947); Alfred C. Oppler, *The Reform of Japan's Legal and Judicial System under Allied Occupation*, 24 WASH. L. REV. & ST. B. J. 290 (1949).

[3] *See generally* LAURENCE I. HEWES, JR., JAPAN: LAND AND MEN: AN ACCOUNT OF THE JAPANESE LAND REFORM PROGRAM, 1945–51 (1955); RONALD DORE, LAND REFORM IN JAPAN (1959); Mary G. McDonald, *Agricultural Landholding in Japan: Fifty Years after Land Reform*, 28 GEOFORUM 55, 58 (1997); and Toshihiko Kawagoe, *Agricultural Land Reform in Postwar Japan: Experiences and Issues* (World Bank, Policy Research Working Paper, No. WPS 2111, 1999), http://documents.worldbank.org/curated/en/469971468771280762/Agricultural-land-reform-in-postwar-Japan-experiences-and-issues [https://perma.cc/7FL4-NBA3].

[4] *See generally* T. A. BISSON, ZAIBATSU DISSOLUTION IN JAPAN (1954); Michiko Ariga & Luvern V. Rieke, *The Antimonopoly Law of Japan and Its Enforcement*, 39 WASH. L. REV. 437 (1964); Kozo Yamamura, *The Development of Anti-Monopoly Policy in Japan: The Erosion of Japanese Anti-Monopoly, 1947–1967*, 2 STUD. L. & ECON. DEV. 1 (1967); ELEANOR M. HADLEY, ANTITRUST IN JAPAN (1970); Note, *Trustbusting in Japan: Cartels and Government-Business Cooperation*, 94 HARV. L. REV. 1064, 1065–68 (1981).

The Blue Return System [*aoiro shinkoku seido*] is one example.[5] It is a policy designed to give corporations and individual business owners strong incentives to file their tax returns according to their balance sheets, profit and loss statements, and other documents.[6] The Shoup Mission, in its 1949 Report on the reforms of the Japanese tax system (hereinafter the "Report"),[7] advocated strongly in favor of the policy.[8] By virtue of the policy, now, more than 98 percent of the active corporations and more than 50 percent of the business owners in Japan file tax returns according to their books and other documents.[9] This approach contributed

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[5] Monica Prasad, *Avoiding the Aid Curse? Taxation and Development in Japan*, *in* THE POLITICAL ECONOMY OF TRANSNATIONAL TAX REFORM: THE SHOUP MISSION TO JAPAN IN HISTORICAL CONTEXT 289, 293–94 (W. Elliot Brownlee et al. eds., 2013) (describing positive evaluations of the Blue Return System).

[6] Noboru Tanabe, *Blue Return System in Japan*, *in* READINGS ON INCOME TAX ADMINISTRATION: A COMPREHENSIVE SELECTION OF MATERIALS ON INCOME TAX ADMINISTRATION DRAWN FROM AROUND THE WORLD, SUPPLEMENTED BY TEXT, QUESTIONS, AND PROBLEMS OF THE EDITORS 221, 221–29 (Patrick L. Kelley & Oliver Oldman eds., 1973); Hideaki Sato & Masahiro Shibuya, *The Role of Tax Administration and Collection*, *in* A FINAL DRAFT REPORT FROM FAIR TO THE WORLD BANK ON "TAXATION AND ECONOMIC GROWTH" (ASIAN MIRACLE PROJECT) 175, 181–83 (Foundation for Advanced Information and Research, 1993); Justin Dabner, *Japan's Income Tax System: Lessons for Australia*, 11 REVENUE L. J. 1, 9–11 (2001).

[7] GEN. HEADQUARTER SUP. COMMAND. ALLIED POWERS, REPORT ON JAPANESE TAXATION BY THE SHOUP MISSION VOLUME I AND IV, http://dl.ndl.go.jp/info:ndljp/pid/10288496 (last visited Nov. 11, 2019) [https://perma.cc/2GWS-TVT8] [hereinafter Report].

[8] For an overview of the Shoup Mission written in English, *see generally* Carl S. Shoup, *The Tax Mission to Japan*, *1949–50*, *in* TAX REFORM IN DEVELOPING COUNTRIES 177 (Malcolm Gillis ed., 1989); HIROSHI KANEKO, THE DEVELOPMENT OF THE JAPANESE TAX SYSTEM AFTER WORLD WAR II, *in* A FINAL DRAFT REPORT FROM FAIR TO THE WORLD BANK ON "TAXATION AND ECONOMIC GROWTH" (ASIAN MIRACLE PROJECT) 7, 13–18 (Foundation for Advanced Information and Research, Japan, 1993). For a thorough and highly valuable analysis of the Shoup Mission, *see generally* W. Elliot Brownlee, *The American Occupation of Japan, the Shoup Mission, and the Transfer of Tax Ideas, 1945–1952*, *in* GLOBAl DEBATES ABOUT TAXATION 158 (Holger Nehring & Florian Schui eds., 2007); W. Elliot Brownlee, *The Shoup Mission to Japan: Two Political Economies Intersect*, *in* THE NEW FISCAL SOCIOLOGY: TAXATION IN COMPARATIVE AND HISTORICAL PERSPECTIVE 237 (Isaac William Martin et al. eds., 2009); W. Elliot Brownlee, *Shoup vs. Dodge: Conflict over Tax Reform in Japan, 1947–1951*, 47 KEIO ECON. STUD. 91 (2011); W. ELLIOT BROWNLEE ET AL., THE POLITICAL ECONOMY OF TRANSNATIONAL TAX REFORM: THE SHOUP MISSION TO JAPAN IN HISTORICAL CONTEXt (2013). *See also* Vicki L. Beyer, *The Legacy of the Shoup Mission: Taxation Inequities and Tax Reform in Japan*, 10 UCLA PAC. BASIN L. J. 388 (1992).

[9] Masahiko Hino, Aoiro shinkoku seido no igi to kongo no arikata [The Blue Return System's Significance and Its Future], 60 Zeimu daigakko ronso 315, 344–47 (2009).

significantly to the improvement of the tax administration system in postwar Japan.[10]

The influence of the Blue Return System is not limited to income tax. Since its inception, the system has had a considerable impact on the development of administrative law in Japan.[11] One of the privileges available for blue return filers substantially contributed to the emergence of an important doctrine in administrative law. A blue return filer who keeps books and records of his commercial activities and files tax returns supported by them with official authorization for doing so, enjoys the privilege of being informed of the reasons when the tax authorities try to assess a deficiency[12] in his tax liability.[13] In the first two decades after the WWII, the Supreme Court of Japan interpreted the requirement literally.[14] In several decisions, it revoked assessments when reasons were not expressed concretely in the letter of assessment.[15]

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[10] For an overview of the Japanese tax system written in English, *see generally e.g.*, Hiroshi Kaneko, *Japan: An Overview of Current Taxation Issues*, 14 INTERTAX 32 (1986); HIROMITSU ISHI, THE JAPANESE TAX SYSTEM (3rd ed. 2001). For an introduction to Japanese tax administration, *see generally* Koji Ishimura, *Japanese Tax Litigation System and Procedures*, 13 LAW JAPAN 111 (1980); SATO & SHIBUYA, *supra* note 6; Vicki Beyer, *Tax Administration in Japan*, 4 REVENUE L. J. 144 (1994).

[11] *See, e.g.*, Hiroshi Kaneko, Rule of Law and Japanese Tax Law 21–24 (unpublished manuscript) (on file with author), https://jtri.or.jp/assets/pdf/about/information03.pdf [https://perma.cc/73JF-EZH2] (discussing the improvement of tax procedures).

[12] Unlike the US income tax, there is no notice of deficiency in the Japanese tax system. If the Head of Tax Office finds deficiency in a taxpayer's tax return, he immediately makes an assessment [kōsei]. *See* Kokuzei tsūsoku hō [Act Regarding General Rules for National Taxes], Law No. 66 of 1962, art. 24 (Japan). In practice, however, the officer would first try to persuade the taxpayer to revise the tax return and make an assessment only after he failed to persuade the taxpayer. The assessment is generally deemed to be an example of the administrative dispositions [gyōsei shobun] or the administrative acts [gyōsei kōi]. For the meaning of these two concepts, *see e.g.*, Robert W. Dziubla, *The Impotent Sword of Japanese Justice: The Doctrine of Shobunsei as a Barrier to Administrative Litigation*, 18 CORNELL INT'L L.J. 37, 37–38 (1985). The Report uses the term "reassessment" instead of "assessment" presumably because, in the Report, an assessment refers to the taxpayer's act of filing tax return. *See* REPORT, *supra* note 7, at 217–20.

[13] *See* Shotoku zei hō [Income Tax Act], Law No. 33 of 1965, art. 155, ¶ 2 (Japan) (providing that the Head of Tax Office should describe the reasons of assessment in the letter of assessment); Hōjin zei hō [Corporate Tax Act], Law No. 34 of 1965, art. 130, ¶ 2 (Japan). *See also* DABNER, *supra* note 6, at 10; KANEKO, *supra* note 11, at 21–22.

[14] KANEKO, *supra* note 11, at 22.

[15] *See generally* Saikō Saibansho [Sup. Ct.] May 31, 1963, Sho 36 (o) no. 84, 17 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 617 (Japan); Saikō Saibansho [Sup. Ct.] Dec. 27, 1963, Sho 37 (o) no. 1015, 17 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ]

In these cases, the tax authorities were unable to make another assessment for the taxable year because of the statute of limitations. In essence, the Court prohibited the tax authorities from collecting the correct amount of taxes from taxpayers in order to support their privilege.[16]

Although the key legal issues in these cases centered on the interpretation of some particular provisions in the tax statutes, the Court implied that its decision was derived from a general principle of administrative law. In *Udono v. Tokyo kokuzeikyoku cho* in 1963, the leading case on this matter, the Court presented the following broad statement:

> In general, when a statute requires giving reasons in administrative disposition [*gyosei shobun*], it does so in order to ensure that administrative agencies make careful and reasonable decisions and hence to avoid their arbitrariness on one hand, and to benefit the private parties in taking an appeal by informing them the reasons for the decision on the other hand. Therefore, when an administrative agency fails to note down the reasons for a decision, the decision itself should be revoked. The extent of reasons to be given is determined with reference to the nature of the disposition on one hand and the aim and purpose of each provision in a statute that demands giving reasons on the other hand.[17]

Furthermore, it reiterated what it held in the context of tax-related matters in non-tax cases. It followed *Udono* entirely in the

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1871 (Japan); Saikō Saibansho [Sup. Ct.] Apr. 25, 1974, Sho 45 (gyō tsu) no. 36, 28 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 405 (Japan).

[16] To compare with the state of affairs in the United States, *see* INTERNAL REVENUE CODE § 7522(a) (1990) (providing that "an inadequate description" in a notice "shall not invalidate such notice") [hereinafter I.R.C.]. *See also* Michael Salzman & Leslie Book, IRS Practice and Procedure, §10.03 [3][b] (description of the case law on the validity of a notice).

[17] Saikō Saibansho [Sup. Ct.] May 31, 1963, Sho 36 (o) no. 84, 17 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 617, 620 (Japan). In Japan, a "revocable" administrative disposition can be revoked not only by the administrative agency itself but also by the courts. For the meaning of "revocable" administrative disposition in the tax contexts, *see* Michael Matsukawa, *Administrative Appeals from Tax Dispositions*, 16 LAW IN JAPAN 91, 92 (1983).

decision on a case in which a woman was suspected of a relationship with the Japanese Red Army and was denied a passport when she applied for it.[18] Citing *Udono*, the Court revoked the Foreign Minister's decision not to issue her a passport. Thus, the Court established a common law doctrine: the lack of sufficient reasons for an administrative disposition when a statute requires giving reasons in administrative dispositions makes such a disposition revocable.

In 1993, the Diet of Japan enacted the Administrative Procedure Act (APA).[19] The APA includes two provisions on giving reasons in making adverse dispositions.[20] It made giving reasons mandatory across the board for two broad categories of administrative dispositions. Although the provisions were apparently consistent with the existing common law doctrine on giving reasons, it was not clear whether the doctrine survived under the new act.[21] In 2011, the Supreme Court, in the decision on a case later known as the *First-Class Architect* case, held that it certainly survives.[22] In this case, without citing *Udono*, the Court found that

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[18] *See generally* Saikō Saibansho [Sup. Ct.] Jan. 22, 1985, Sho 57 (gyō tsu) no. 70, 39 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1 (Japan).

[19] *See generally* Gyōsei tetsuzuki hō [Administrative Procedure Act], Law No. 88 of 1993 (Japan). For an English translation of the act, *see* Mark A. Levin, *Administrative Procedure Law (Japan)*, 3 APLPJ 182 (2002). *See also* Lorenz Kodderitzsch, *Japan's New Administrative Procedure Law: Reasons for Its Enactment and Likely Implication*s, 24 LAW JAPAN 105, 115–129 (1991) (providing an overview of the act); Takehisa Nakagawa, *Administrative Informality in Japan: Governmental Activities Outside Statutory Authorization*, 52 ADMIN. L. REV. 175, 181–82 (2000); Katsuya Uga, *Development of the Concepts of Transparency and Accountability in Japanese Administrative Law*, *in* LAW IN JAPAN: A TURNING POINT 276 (Daniel H. Foote ed., 2008) (describing the contents and legislative history of the act); Tom Ginsburg, *The Politics of Transparency in Japanese Administrative Law*, *in* LAW IN JAPAN: A TURNING POINT 233, 304 (analyzing policy implication of the act).

[20] Gyōsei tetsuzuki hō [Administrative Procedure Act], Law No. 88 of 1993, art. 8 (Japan) (discussing reasons in turning down of applications [shinsei]) & art.14 (discussing reasons in making adverse dispositions [furieki shobun]).

[21] Some commentators claimed that the common law would not survive because it had deemed the failure to give reasons to be one of the defects or errors [kashi] in an administrative disposition whereas the new act embodied the idea of procedural due process. *See e.g.*, Kazuaki Nishitoba, *Riyu fuki hanrei hori to gyosei tetsuzuki ho no riyu teiji-1*, 112 MINSHOHO ZASSHI 851(1995); Kazuaki Nishitoba, *Riyu fuki hanrei hori to gyosei tetsuzuki ho no riyu teiji-2*, 113 MINSHOHO ZASSHI 1 (1995).

[22] Saikō Saibansho [Sup. Ct.] June 7, 2011, Hei 21 (gyō hi) no. 91, 65 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2081 (Japan) (X1 v. Kuni [The Government]), available at http://www.courts.go.jp/app/hanrei_en/detail?id=1110 [https://perma.cc/87K9-UK7S] [hereinafter First-Class Architect Case].

the spirit of Article 14 of the APA was the same as that of the common law doctrine. It revoked the decision by the Minister of Land, Infrastructure, Transport and Tourism because he had failed to record sufficient reasons for his decision in the notification letter.

In sum, the Blue Return System had given birth to a firmly established common law doctrine on giving reasons in Japan.

Until now, however, nobody has ever tried to find out the true origin of the doctrine.[23] Rather, it is vaguely but widely believed in Japan that the doctrine is derived from the principle of due process of law, which is most famously embodied in the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States.[24]

In this article, I will point out the following facts. First, Stanley S. Surrey, one of the most important scholars in the field of U.S. tax law, was the central figure in drafting the part of the Report of the Shoup Mission on the administration of Japanese income tax.[25] Second, the arguments on the tax administration in the Report bear a remarkable resemblance to the proposal for the reform of the U.S. federal tax administration system, which Surrey submitted in the late 1930s in collaboration with Roger J. Traynor, another important figure in the history of tax law.[26] At that time, they tried hard to dissolve the serious congestion in the process of tax appeals. Their proposal aimed at encouraging taxpayers to submit, as early as possible, all the necessary information to determine their tax

[23] Professor Shusaku Kitajima (Tohoku University) has written insightful articles on the development the doctrine. *See* Shusaku Kitajima, *Riyu teiji no teido to shobun kijun*, 373 HOGAKU KYOSHITSU 49 (2011); Shusaku Kitajima, *Riyu teiji hori no keisei to hatten*, 58 (1-SUP.) SHOMU GEPPO 160 (2012); Shusaku Kitajima, G*yosei tetsuzuki ho rippo katei no okeru riyu teiji kitei*, 59 (1-SUP.) SHOMU GEPPO 126 (2013); Shusaku Kitajima, *Gyosei tetsuzuki ho seitei go no riyu teiji*, 60 (1-SUP.) SHOMU GEPPO 105 (2014); Shusaku Kitajima, *Ippan ho to shiteno gyosei tetsuzuki ho no kaishaku ni tsuite*, 79 HOGAKU 133 (2015). But, as of now, he has not yet written about the origin of the doctrine.

[24] *See, e.g.*, KANEKO, *supra* note 11, 21–24 (noting that the requirement that the government explain the reasons for any reassessment is derived from the principle of due process of law). *See also* Hiroshi Shiono, *Gyosei shobun to riyu no fuki* [Administrative Dispositions and Giving Reasons], 1(3) JICHI JITSUMU SEMINA 36 (1962) (referring to the Administrative Procedure Act of the United States and article 31 of the Constitution of Japan (due process of law in criminal procedure) in contemplating whether the administrative agency should explain the reasons for administrative dispositions). But *see* NISHITOBA, *supra* note 21 (claiming that the common law doctrine did not stem from the principle of due process, whereas the Administrative Procedure Act of Japan does).

[25] Stanley S. Surrey was a former Professor of Law at Harvard Law School and a specialist of taxation.

[26] *See infra* text accompanying note 104 (providing a biography for Roger J. Traynor).

liability. They argued that if taxpayers disclosed the information on their economic affairs in the earlier stages of tax administration, the number of tax controversies would be smaller because the tax authorities would no longer have to send several notices of deficiency without firm foundations. By comparing the Report with the articles written by Traynor and Surrey, we now have a better understanding of the original intent of Surrey's proposal in the Report. The goal of his proposal was to provide the most cost-effective approach toward assessing and collecting income tax.

The original intent, thus found, will be contrasted with the development of the common law doctrine on giving reasons. While the doctrine has its origins in the Blue Return System proposed by Surrey, the development of the doctrine has by no means been consistent with his original intent.

This article is the first attempt ever to draw attention to this inconsistency. It is also the first study on the Blue Return System and the common law doctrine that originated from the system through the academic works of Stanley Surrey. In the past, neither administrative law scholars nor taxation law scholars, in the U.S. or in Japan, has tried to trace the origins of the system and the genesis of the doctrine.

To be sure, we already have very good analyses of the influence of American lawyers and other foreign professionals on Japanese administrative law in the period of occupation. Alfred Oppler, a German jurist and one of the members of the Supreme Commander for the Allied Powers (SCAP), looked back on the era nearly 30 years later.[27] John Haley, a specialist in Japanese law, focused on the significance of the reform in administrative law and analyzed the factors that blocked the reform, through research that was partly based on Oppler's memoirs.[28] We also have Shin'ichi Takayanagi's articles in Japanese on the transformation of the administrative litigation system in Japan under occupation.[29]

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[27] ALFRED CHRISTIAN OPPLER, LEGAL REFORM IN OCCUPIED JAPAN: A PARTICIPANT LOOKS BACK 8 (1976).

[28] John O. Haley, *Toward a Reappraisal of the Occupation Legal Reforms: Administrative Accountability*, *in* EIBEIHO RONSHU: TANAKA HIDEO SENSEI KANREKI KINEN 543 (Koichiro Fujikura ed., 1987). *See also* John O. Haley, *Japanese Administrative Law*, 19 L. JAPAN 1 (1986) (providing an overview of the administrative law development in post-war Japan).

[29] Shin'ichi Takayanagi, *Gyosei sosho hosei no kaikaku* [Reforms on the Administrative Litigation], 4 SENGO KAIKAKU [THE POSTWAR REFORMS] 291 (Tokyo

More recently, scholars of economic history both in the U.S. and in Japan published a book of excellent articles on the Shoup Mission and its influence on the Japanese tax system.[30] However, the articles in the book refer to Stanley Surrey only on limited occasions, presumably because they focus on the personal history of Carl Shoup, the head of the Mission. Although one of the articles carefully analyzes the key to the success of the Blue Return System, it does not engage with the common law doctrine on giving reasons.[31]

Even in Japan, nobody has ever tried to find out the effect of the Report by the Shoup Mission on administrative law in postwar Japan. Though the fact that the cases on the blue returns has created a common law doctrine on giving reasons is widely known, all comprehensive studies on the doctrine of giving reasons in administrative law in general, for some reason, have chosen jurisdictions other than the U.S. as a point of reference.[32] Scholars of law in the U.S. generally ignore the Japanese doctrine on giving reasons probably because they do not find any counterpart in the American law, where they deal not just with notice but also with notice and hearings in general.[33]

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daigaku shakai kagaku kenkyujo sengo kaikaku kenkyu kai ed., 1975); Shin'ichi Takayanagi, *Gyosei kokka sei yori shiho kokka sei he* [From an Administrative State System to a Judicial State System], 2 KOHO NO RIRON TANAKA JIRO SENSEI KOKI KINEN GE 2193 (Ichiro Ogawa ed., 1977); Shin'ichi Takayanagi, *Sengo shoki no gyosei soshoho kaikaku ron* [The Discourses on the Reform of Administrative Litigation System in the Early Postwar Era], 31 SHAKAI KAGAKU KENKYU 1 (1979). Narufumi Kadomatsu regards Takayanagi's trilogy as indispensable in studying the postwar judicial reforms. Narufumi Kadomatsu, *Gyosei ho tono kankei: Gyosei sosho seido wo megutte*, 612 HOGAKU SEMINA 33, 37 (2005).

[30] *See generally* BROWNLEE ET AL., *supra* note 8 (providing an overview of the Shoup Mission in English).

[31] PRASAD, *supra* note 5, at 293–97.

[32] *See, e.g.*, Shigeki Kubo, *Furansu ni okeru gyosei koi no riyu fuki-1* [Giving Reasons to the Administrative Dispositions in France], 87 MINSHOHO ZASSHI 703 (1983); Shigeki Kubo, *Furansu ni okeru gyosei koi no riyu fuki-2* [Giving Reasons to the Administrative Dispositions in France], 87 MINSHOHO ZASSHI 855 (1983) (a comparative study of Japanese law and French law); HISASHI KOKETSU, SHOBUN RIYU TO TORIKESHI SOSHO [THE REASONS OF ADMINISTRATIVE DISPOSITIONS AND THE LITIGATION FOR THE REVOCATION] (2000) (a comparative study of Japanese law and French law); Mamoru Suda, *Riyu teiji to shobun riyu* [Giving Reasons and the Reasons for the Administrative Disposition], 179 HOGAKU RONSO 1 (2016) (a comparative study of Japanese law and German law).

[33] *See generally* Nobushige Ukai & Nathaniel L. Nathanson, *Protection of Property Rights and Due Process of Law in the Japanese Constitution*, 43 WASH. L. REV. 1129 (1968) (describing due process in Japanese property law with no analysis on giving

This study is the first attempt to investigate the link between the philosophy of American tax lawyers and the development of the administrative law doctrine in Japan. In doing so, the author fills the massive void left by the preceding studies.

The works of Traynor and Surrey give us important implications on Japanese law and American law. The essence of their arguments is that the procedural safeguards including giving reasons are not worthwhile but are just a means to the end that everyone pays one's fair share. They place very little or no value on giving reasons or, more generally, notice and hearing. For Japanese law, their idea is contrasted with the orthodox understanding of giving reasons, according to which they embody the procedural rights of the people. For American law, their ideas may be compared with the Supreme Court's doctrine of reasoned explanation.[34] The Court applies the doctrine to all agency actions including rulemaking and adjudication.[35] However, Traynor and Surrey suggested that we might need different rationales for rulemaking and adjudication in requiring reasoned explanations. Their idea may have an effect on considering the issue of whether the doctrine of reasoned explanation is applicable to a notice of deficiency in the context of federal taxation.[36]

The rest of this article proceeds as follows. In Part I, I present what Stanley Surrey proposed in the Report of the Shoup Mission. I also briefly describe the Blue Return System and compare it with the Report in this part. It will then become clear that the Report supplied an integral component of the Blue Return

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reasons); Nathaniel L. Nathanson & Yasuhiro Fujita, *The Right to Fair Hearing in Japanese Administrative Law*, 45 WASH. L. REV. 273 (1970) (analyzing hearing right without mentioning giving reasons); John K. M. Ohnesorge, *Western Administrative Law in Northeast Asia: A Comparativist's History* (June, 2002) (unpublished S.J.D. dissertation, Harvard Law School) (on file with author's publication page on Wisconsin-Madison Law School website), https://media.law.wisc.edu/m/ngvjn/all.pdf. [https://perma.cc/D6QY-GTN5] (discussing comparative administration law with no analysis on giving reasons).

[34] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 417–19 (1972); Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto Co., 463 U.S. 29, 42–46 (1983).

[35] *Id.*

[36] *See* QinetiQ US Holdings, Inc. & Subsidiaries v. Commissioner, 845 F.3d 555 (4th Cir. 2017) (holding that IRS's notice of deficiency is not subject to Administrative Procedure Act's general requirement of reasoned explanation for final agency decision). *See also* Patrick J. Smith, *The APA's Reasoned-Explanation Rule and IRS Deficiency Notices*, 134 TAX NOTES 331, 341–44 (2012) (insisting on the application of the rule to notices of deficiency); Steve R. Johnson, *Reasoned Explanation and IRS Adjudication*, 63 DUKE L.J. 1771, 1793–95 (2014) (claiming that application is not advisable).

System but there is a considerable difference between the Report and the system. Among other things, the requirement of giving reasons in an assessment became applicable only to the blue return filers, despite Surrey's original proposal in the Report, in which the requirement was across the board. In Part II, I present what Traynor and Surrey proposed in the Traynor Plan, which sought to relieve the serious congestion in tax administration. The contemporary debates over the plan are also introduced in brief. I then contrast the plan with the Report to show that the Report is heavily indebted to the Traynor Plan. In Part III, we return to Japan and see how case law on the requirement of giving reasons has developed. We will learn that the judiciary, including the Supreme Court, has interpreted the requirement of providing reasons quite literally and that the procedural rights of taxpayers was respected significantly in this regard. I will examine what made the judiciary choose this interpretation. I also analyze why Surrey's original ideas did not survive in the administration of the Blue Return System. In conclusion, I locate our discussion in a broader context.

II. SURREY'S PROPOSAL IN THE REPORT OF THE SHOUP MISSION

In this part, I introduce the Shoup Mission briefly and explain the circumstances under which the Mission was organized. Then, I present Surrey's proposal in the Report including the Blue Return System.

A. The Shoup Mission

In 1945, soon after the WWII, General Douglas MacArthur, the SCAP, ordered his personnel to start the first attempt at tax reforms in Japan.[37] The central component of this project was the "Extraordinary Tax Program," the purpose of which was "to level off excessive concentrations of private wealth."[38] The program was composed of a couple of one-time levies, the capital levy [*zaisan zei*], and the war indemnity special tax [*senji hosho tokubetsu zei*],

[37] *See* Henry Shavell, *Postwar Taxation in Japan*, 56 J. POL. ECON. 124, 130–34 (1948) (introducing Japan's postwar tax development); Henry Shavell, *Taxation Reform in Occupied Japan*, 1 NAT'L TAX J. 127, 131–34 (1948) (introducing Japan's tax reforms).

[38] SHAVELL, *supra* note 37, at 132 (explaining Taxation Reform in Occupied Japan).

which was implemented in 1946.[39] Despite its appearance as a tax measure, it was in essence a confiscation of the economic value that was acquired through the war. Thereafter, the members of the project began to change the general framework of the Japanese income tax system. As part of this general tax reform, they proposed a self-assessment system instead of the traditional government assessment. Self-assessment was introduced by the newly enacted Income Tax Act of 1947.[40] However, the results were disastrous.[41] The government revealed its goal of tax revenue and allotted the amount to the regional tax bureaus and tax offices. Each tax office had to levy tax on the relatively affluent taxpayers in its district in order to collect the allotted tax revenue. Tax officials were forced to make assessments in many cases without reasonable grounds and, quite reasonably, the taxpayers gave rise to a flood of complaints.

It was around this time that MacArthur had asked L. Harold Moss, an able tax official who was working for the US Army in South Korea at that time, to join his team.[42] Moss arrived in Japan in April 1948.[43] With his help, General Douglas MacArthur decided to start a more thorough reform of the tax system in Japan.[44] Moss proposed that "a special mission of outstanding tax economists" should "conduct a comprehensive survey of the

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[39] *See generally* Zaisan zei hō [Capital Levy Act], Law No. 52 of 1946 (Japan); Senji hōsho tokubetsu sochi hō [Act on War Indemnity Special Measures], Law No. 38 of 1946 (Japan).

[40] Shotoku zei hō [Income Tax Act], Law No. 27 of 1947, art. 26 (Japan); SHAVELL, *supra* note 37 (Postwar Taxation), at 134. For the definition and the characteristics of self-assessment, *see* KELLY & OLDMAN, *supra* note 6, at 203–20; Alan D. Liker, *The Legal and Institutional Framework of Tax Administration in Developing Countries*, 14 UCLA L. REV. 240, 252–62 (1966).

[41] KEIICHIRO HIRATA ET AL., SHOWA ZEISEI NO KAIKO TO TEMBO (I), 291–351(1979); PRASAD, *supra* note 5, at 294–96 (describing the breakdown of Japanese tax administration in 1949).

[42] For the background of Moss, *see* W. Elliot Brownlee & Eisaku Ide, *Shoup and the Japan Mission: Organizing for Investigation*, *in* BROWNLEE, ET AL. (eds) *supra* note 8, at 195–98 (introducing Moss's background). For a more comprehensive analysis of the role Moss played in the reform of tax administration in Japan, *see* Shunichiro Koyanagi, *Sengo zeimu gyosei no keisei to GHQ: Harold Moss shi no kouken* [The Creation of Post-War Tax Administration and GHQ: The Contribution of Harold Moss], *in* SEIICHI MORI, HO BUNKA TOSHITENO SOZEI 111 (2015).

[43] HIRATA ET AL., *supra* note 41, at 336; KOYANAGI, *supra* note 42, at 124.

[44] Carl S. Shoup, *The Tax Mission to Japan: 1949–50*, *in* TAX REFORM IN DEVELOPING COUNTRIES 177 (Malcolm Gillis ed., 1989).

national and local tax laws" and make a recommendation based on the survey.[45]

The Shoup Mission, the core of MacArthur's project comprised seven members.[46] First, Moss asked Carl S. Shoup to become the leader of the mission.[47] Then, Shoup chose six other members, where there were four economists including Shoup himself (Carl S. Shoup, Howard R. Bowen, William S. Vickrey, and Jerome B. Cohen), two law professors (William C. Warren and Stanley S. Surrey), and one state tax official at Minnesota (Rolland F. Hatfield).[48] Some of them arrived in Japan on May 10, 1949. The others, including Surrey, arrived soon thereafter. Surrey, born on October 3, 1910, was 38 years old at that time, and had been a professor of jurisprudence at the University of California at Berkeley for just two years.[49] On May 30, Shoup announced how he would allocate the work among the members.[50] According to Shoup's plan, Surrey was in charge of "disposition of appeals and matters on litigation."[51] The members first interviewed the people in various social groups in Japan, and then prepared the drafts of the Report in Karuizawa, Nagano. On August 26, 1949, the digest of the Report was made public.[52] The main text of the Report was published on September 15 and the Appendix was disclosed on October 3. On September 18, General MacArthur wrote a letter to Prime Minister Shigeru Yoshida urging prompt action upon the contents of the Report.[53] Thus, the Report was supposed to be of great importance to the implementation of tax reforms in Japan.

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[45] BROWNLEE & IDE, *supra* note 42, at 198.

[46] OKURASHO ZAISEI SHI SHITSU [MINISTRY OF FINANCE, PUBLIC FINANCE HISTORY OFFICE] (ED.), SHOWA ZAISEI SHI: SHUSEN KARA KOWA MADE [A HISTORY OF PUBLIC FINANCE IN THE SHOWA ERA: FROM THE END OF THE WAR TO THE PEACE TREATY] 429–46 (1977). For an extensive analysis of the Mission, *see generally* BROWNLEE ET AL., *supra* note 8.

[47] BROWNLEE & IDE, *supra* note 42, at 198–201. OKURASHO ZAISEI SHI SHITSU, *supra* note 46, at 370.

[48] BROWNLEE & IDE, *supra* note 42, at 201–09.

[49] For a memoir by Surrey himself, *see* STANLEY S. SURREY, THE ADVISORY TAX MISSION TO JAPAN, *in* FINANCIAL EXECUTIVES INSTITUTE, ECONOMIC AND TAX DEVELOPMENTS OF SIGNIFICANCE TO CONTROLLERS 19, 19–21 (1949).

[50] OKURASHO ZAISEI SHI SHITSU, *supra* note 46, at 442.

[51] *Id.*

[52] *Id*. at 648–59 (providing a Japanese version of Shoup's comment). *See generally* Yomiuri Shimbun, *Yomidas Rekishikan*, TŌKYŌ: YOMIURI SHINBUNSHA, Aug. 27, 1949, Morning Ed., at 1.

[53] Jerome B. Cohen, *Tax Reform in Japan*, 18 FAR EASTERN SURVEY 307, 307 (1949).

B. Surrey's Proposal

Chapter 14 of the Report, titled "Compliance, Enforcement, and Appeal under the Income Taxes," is dedicated to proposals to improve the tax administration in Japan. Appendix D of the Report, titled "Administration of the Individual and Corporate Income Taxes," supplements these proposals. Though the Report does not make the author of each part public, it is strongly inferred from Shoup's announcement dated on May 30, 1949 that Stanley Surrey was the author of these parts.[54]

Chapter 14 comprised 14 sections. Appendix D was divided into six sections, under which there are 27 subsections. Although the proposals include secondary matters such as scholarly interest in taxation, most of them are concerned with one of two issues, namely the increased role of taxpayers and improvements in the machinery of tax authorities.[55] Hereinafter, I will show you what Surrey asserted on both points.

1. The Taxpayers' Role

Until around the time the Mission arrived in Japan, the role taxpayers played in tax administration was rather limited. They were supposed to play an important role per the law, but in practice, they did not. Even under the system of assessment by the government until 1946, a taxpayer was obliged to notify the tax office of the amount of income for each type of income.[56] Nevertheless, taxpayers had very little incentive to file returns with the correct amount of income because the authority of the tax officials in the examination of the amount of income was extremely restricted, as we will explain in the next subsection.[57] Under the newly introduced self-assessment system, there still seemed to be little incentive on part of the taxpayers to file returns with the correct amount of tax because the number of tax officials was small

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[54] *See* text accompanying *supra* note 46.

[55] REPORT, *supra* note 7, at 226–27.

[56] *See, e.g.*, Shotoku zei hō [Income Tax Act], Law No. 24 of 1940, art. 34 (Japan) (stipulating the obligation of individual taxpayers to file the amount of income); Hōjin zei hō [Corporate Income Tax Act], Law No. 25 of 1940, art. 18 (Japan) (stipulating that a corporation has duty to file the amount of income and the amount of capital, as well as its balance sheet, profit and loss statement, etc.).

[57] *See infra* text accompanying notes 64–74.

on the one hand and the tax offices made reassessments without reasonable foundations to reach the goal of tax revenue on the other.[58] The following proposal on the taxpayers' role by Surrey appeared against this backdrop.

Surrey asserted, in the appendix of the Report, that "the proper measure of [income] tax is . . . the actual income of the particular taxpayer."[59] It is self-evident, but it is worth emphasizing further because until then, the calculation of income tax relied heavily on various kinds of standards.[60] To accomplish the computation of the actual income, taxpayers had to take part in the tax administration process themselves.

> Successful income tax administration rests essentially on voluntary compliance by the taxpayer. He is the person best informed as to his taxable status, as to the amount of his income. The necessary voluntary submission of the data required to measure a taxpayer's income is called self-assessment. In areas where withholding does not operate, such self-assessment is vital to satisfactory tax administration. The business man, the farmer, the higher salaried employee, the corporation—in short, all taxpayers require to file returns are through self-assessment reporting to their Government the amount of their incomes. On each such person so reporting falls a share of the administrative task facing the nation. The great majority of such taxpayers must voluntarily perform their proper share of that task if tax administration is to succeed.[61]

"[P]roper taxpayer compliance under a self-assessment system is possible only if the taxpayer keeps accurate books and records whereby he may ascertain his income."[62] To break the vicious circle in which taxpayers benefited from keeping no or

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[58] *See* KEIICHIRO HIRATA ET AL, *supra* note 41 and accompanying text.
[59] REPORT, *supra* note 7, at Appendix D 3–4.
[60] *Id*. at 212–14.
[61] *Id*. at Appendix D 4–5.
[62] *Id*. at Appendix D 56.

fictitious records, Surrey proposed providing rewards for taxpayers who kept records. This is the Blue Return System.

> Rewards must be sought which will positively encourage the taxpayer to use these tools. One possibility is to provide special administrative treatment to a taxpayer who keeps books and records. Thus, a taxpayer desiring such special treatment would register with the Tax Office his willingness to keep accurate books and records. Such books would be kept on a form approved by the Tax Office; it would be one of the various forms developed as indicated above. A taxpayer so keeping books and records would be permitted to file his return on a different colored form so as to differentiate him from other taxpayers. The Tax Office would assure such taxpayer that if he keeps such books and records and files his tax return on the special form he will not be subject to reassessment until after an actual field investigation is made of his income for the year. And if a reassessment is made, the specific reasons therefor must be given.
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> A taxpayer not keeping such books and records would, on the other hand, not be guaranteed an investigation before reassessment but would be subject to reassessment by the use of standards. Moreover, such latter taxpayer would not be permitted to take an appeal to the Regional Bureau.[63]

As the quote indicates, Surrey enumerated a couple of procedural privileges to be awarded to blue return filers. A blue return filer would be reassessed only if tax officials investigated his books and records and found a precise amount of deficiency. Further, tax officials had to give him specific reasons for the reassessment while informing him of it. These privileges are two sides of the same coin. If tax officials find a deficiency of tax from an investigation into a taxpayer's books and records and make a

[63] *Id*. at Appendix D 58.

reassessment based on this fact, it would be fairly easy for them to notify the taxpayer of the reasons for the reassessment.

2. Allowing the Tax Officials More Power

In Japan, the power of income tax officials over taxpayers was severely limited. When the Income Tax Act of 1877[64] was being deliberated upon in the Senate [*Genroin*],[65] the Senate deleted an article in the draft that authorized the tax officials to enjoy the power to investigate.[66] Until 1940, the income tax acts stipulated only the power of inquiry and did not allow them to conduct investigations.[67] The Income Tax Act of 1940, granted the tax officials the power to investigate "books and other materials regarding the [taxpayer's] business" for the first time.[68] The act also stipulated that a fine would be imposed on taxpayers who either rejected or disturbed the investigations.[69] After WWII, the Capital Levy Act of 1946 introduced a maximum sentence of one year's imprisonment for any obstruction of inquiries and investigations.[70] This was the first time a tax statute had employed imprisonment as a means to secure the compliance of taxpayers. The Income Tax Act of 1947 followed suit. Like the preceding income tax acts, it gave tax officials powers of inquiry and investigation.[71] It prescribed that those who obstructed or did not cooperate with inquiries or investigations would be punished with a fine or imprisonment.[72]

In reality, under the Income Tax Act of 1947, the powers of inquiry and investigations of the tax officials were not exercised appropriately.[73] Surrey summarized the state of affairs in the following words:

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[64] *See generally* Shotoku zei hō [Income Tax Act], Imperial Order No. 5 of 1877 (Japan). It was the first income tax legislation.

[65] Genroin was the only quasi-legislative body present in those times. EDWIN O. REISCHAUER ET AL. (eds.), JAPAN: AN ILLUSTRATED ENCYCLOPEDIA 450 (1993).

[66] *See generally* JAPAN GENRŌIN, GENROIN KAIGI HIKKI [THE TRANSCRIPTS OF THE SENATE DEBATE], KOKI DAI 26 KAN 151 (Meiji hosei keizai shi kenkyujo ed.,1982).

[67] *See, e.g.*, HIROSHI FUJISAWA, DAI SAN SHU SHOTOKU ZEI HO CHUKAI, 126–29 (1921) (arguing for effective measures for encouraging proper tax returns).

[68] Shotoku zei hō [Income Tax Act], Law No. 24 of 1940, art. 81 (Japan).

[69] *Id.* at art. 92.

[70] Zaisan zei hō [Capital Levy Act], Law No. 52 of 1946, art. 77 (Japan).

[71] Shotoku zei hō [Income Tax Act], Law No. 27 of 1947, art. 63 (Japan).

[72] *Id*. at art. 70.

[73] *See also* text accompanying *supra* note 41.

> The small and medium size business man—shopkeeper, manufacturer, wholesaler, and so on—is the storm center of reassessment. In practically all of the tax offices that we have examined, the vast majority of the income tax returns filed by the non-farm group of self-assessed taxpayers have been deemed inadequate by the tax officials. The amount reported as net income is marked up by the official, often by 50 percent or more, and not infrequently by more than 100 percent. This has been done commonly, or at least fairly often, without any current investigation of the taxpayer's premises or books, and without any explanation to him of how the reassessed amount was reached. This is not to say that overassessment occurs frequently. On the contrary, our impression is that, even after reassessment the net income of most of these taxpayers has still been understated. But the hasty, arbitrary-appearing method itself is a barrier to obtaining that taxpayer compliance without which a recourse to some such method is almost inevitable. It will take time to break out of this vicious circle, but we are of the opinion that it can be done, provided the recent reforms in the structure of the Japanese tax administration and the detailed suggestion in the appendix to this report are adopted.[74]

Surrey was of the opinion that the tax officials' powers of inquiry and investigation should be expanded further to ascertain proper tax administration.[75] To change the aforementioned situation, he argued that tax officials had to be empowered to acquire information held by third parties. "Information should be sought from customers and suppliers of a business. Bank deposits should be checked; the rules governing Tax Office access to bank records should be changed to permit more extensive examination."[76]

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[74] REPORT, *supra* note 7, at 217.
[75] *Id.* at Appendix D 20–27.
[76] *Id*. at Appendix D 22.

Next, Surrey suggested that "[i]n order to expedite tax investigations, authorized tax officials and procurators should have the authority to administer oaths to which the appropriate penalty would attach."[77] However, his proposals also included measures that presumably benefited the taxpayers. Among others, the following proposal with regard to reassessment draws our attention. The taxpayers' right to know the basis of his tax is clearly articulated here:

> The taxpayer should be as fully informed as possible of the reasons for the reassessment. Where the action is based on actual investigation, the Tax Offices are in a position fully to explain the reasons and the computation of the new tax amount. Where the reassessment is based on standards, the information is necessarily more limited. But in either case, the taxpayer is entitled to know why he has been reassessed and how his additional tax was computed.[78]

In relation to the preceding proposal, Surrey suggested that the number of taxpayers' protests against the reassessed amount should be limited and that they should not be required to pay tax until the disputes end.[79] As to the former point, he proposed that "[t]he protest should be in writing, with the reasons specified."[80] He also recommended that appeals to the superior agency be limited or abolished.[81] Even when disputes occur, he deemed it ideal that they be settled at the administrative stage rather than at the judicial stage.[82] He also put forward a plan to establish a court or a panel specialized in taxation matters in order to manage them rapidly.[83] In the refund suits, "the taxpayer should have the initial responsibility of coming forward with evidence to show that the government's administrative decision in erroneous."[84]

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[77] *Id*. at Appendix D 23.
[78] *Id*. at Appendix D 27.
[79] *Id*. at Appendix D 27–28.
[80] *Id*. at Appendix D 27.
[81] *Id*. at Appendix D 30.
[82] *Id*. at Appendix D 32.
[83] *Id*. at Appendix D 36–38.
[84] *Id*. at Appendix D 33.

3. A Tentative Summary

Surrey proposed various measures to improve the relationship between taxpayers and tax officials. He criticized the goal system in which the goal of tax revenue was set for each tax office.[85] To achieve taxation based on the actual income of the taxpayers, he emphasized voluntary compliance of taxpayers with tax laws and the self-assessment of income tax liabilities.[86] He offered several means to give taxpayers incentives to report their income as correctly as possible.[87] He drew attention to dispute resolution in the context of income tax matters. He demonstrated how the existing reassessment could be improved.[88] He stressed that an extensive investigation program was necessary to execute the imposition of taxation according to the actual income.[89]

C. The Blue Return System in the Tax Acts

1. The Tax Reform in 1950

The Blue Return System was introduced in the Japanese tax system as soon as the Report was published.[90] The tax reform acts of 1950 inserted provisions in the Income Tax Act and the Corporate Income Tax Act implementing the Blue Return System.[91] The revision inserted Article 26-4 into the Income Tax Act.[92] The article stipulated that a taxpayer with business income, real property income, or forestry income may, under the authorization of the

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[85] *Id*. at 212–14, Appendix D 5–6.

[86] *Id*. at 215, Appendix D 3–5.

[87] *Id*. at Appendix D 12–14.

[88] *Id*. at 217–18, Appendix D 20–27.

[89] *Id*. at 218, Appendix D 20.

[90] To start the Blue Return System from the year 1950, an act and an ordinance of Ministry of Finance were promulgated on December 15, 1949, under which keeping of books was mandatory for those who want to join the Blue Return System. *See* Shotoku zei no rinji tokurei ni kansuru hōritsu [Act Regarding the Provisional Measures on Income Tax], Law No. 269 of 1949, art. 2 (Japan); Ordinance No. 105 of the Ministry of Finance (Japan).

[91] *See generally* Shotoku zei hō no ichibu wo kaisei suru hōritsu [Act on the Revision of the Income Tax Act of 1947], Law No. 71 of 1950 (Japan); Hōjin zei hō no ichibu wo kaisei suru hōritsu [Act on the Revision of the Corporate Tax Act of 1947], Law No. 72 of 1950 (Japan).

[92] Shotoku zei hō [Income Tax Act of 1947], Law No. 27 of 1947, art. 26-4 (Japan) (after the revision by Shotoku zei hō no ichibu wo kaisei suru hōritsu [Act on the Revision of the Income Tax Act of 1947]).

government, file a blue return. Article 46-2, another new article, provided that, in principle, reassessment of the income of a blue return filer shall be allowed "only when investigations in the books and records of him is carried out and if omission is found on the investigations."[93] The second paragraph of Article 46-2 made it mandatory to note the "reasons of the reassessment" [*kosei no riyu*] in the letter of notification in this case.[94] The same provisions were introduced in the Corporate Tax Act as well.[95]

2. A Comparison of the New Provisions with the Report

Although the idea of the blue return undoubtedly originated from the Report, the Blue Return System under the Income Tax Act of 1947 (after the tax reform of 1950) was materially different from the original proposals by Surrey in some crucial respects.

First, in his proposals, the system would be applicable only to individual business owners.[96] He intended making the maintenance of books and records mandatory for all corporations. However, not only the Income Tax Act but also the Corporate Income Tax Act opted for the Blue Return System. It meant that some of the corporations may avoid maintaining books and records by not joining the Blue Return System.

Second, he did not associate giving reasons exclusively with the Blue Return System. Rather, he located it as an element in his general plan to tax a taxpayer based on their actual income. He argued that tax officials had no difficulty explaining to the taxpayer the grounds for assessment against him because they had acquired enough information on the taxpayer's business affairs before making the assessment.[97] Taxpayers who were assessed based on standards rather than actual amounts would also be entitled to know the reasons for the assessment, even when there is limited

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[93] *Id*. art. 46-2.

[94] *Id.* The provisions of the Income Tax Act on the Blue Return System remain almost the same today. The Income Tax Act stipulates that the Head of Tax Office should, in case of making a reassessment of the amount of income shown in a blue return filed by residents, exhibit the reasons for the reassessment in the letter of reassessment. *See* SHOTOKU ZEI HŌ [INCOME TAX ACT OF 1965], art. 155, ¶ 2 (Japan).

[95] Hōjin zei hō [Corporate Income Tax Act of 1947], Law No. 28 of 1947, arts. 25, 31-3, & 32 (Japan) (after the revision by hōjin zei ho nō ichibu wo kaisei suru hōritsu [Act on the Revision of the Corporate Income Tax Act of 1947]).

[96] REPORT, *supra* note 7, at 225.

[97] *Id*. at Appendix D 27.

information.[98] However, the tax reforms in 1950 linked the requirement of giving reasons solely with the blue returns. The tax acts did not guarantee that taxpayers other than blue return filers would get to know the reasons for the assessment when the assessment was made.

The revision did not adopt most of Surrey's proposals to authorize tax officials to enjoy greater powers. The tax reforms of 1950 did not delegate any additional authority to the tax office to investigate taxpayers and third parties backed by penalties.[99] Nor did they give tax officials the authority to take sworn statements.[100] They did not follow Surrey's advice on dispute resolution either. They did not demand that taxpayers had to specify reasons for protests against tax offices.[101] They did not declare that a taxpayer bears the burden of proof in tax litigation, either.[102] Surrey's idea that taxpayers should be allowed to dispute reassessment before paying tax was not accepted.[103]

Thus far, we have analyzed the text of the Report presumably as written by Surrey and scrutinized the influence of the text over the tax reforms of 1950. However, it is not easy to discern Surrey's true intentions from the text alone because it was fairly simply stated. The ideas of the officials of the Ministry of Finance in Japan may have been included in the text. Thus, we must examine Surrey's earlier works on tax administration and use them as a key to understand his true intensions in the Report.

III. THE TRAYNOR PLAN AND ITS INFLUENCE ON THE REPORT

The articles that Surrey wrote in collaboration with Traynor laid the foundation for his proposals in the Report of the Shoup

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[98] *Id*.

[99] *Cf*. *Id*. at Appendix D 20 (proposing that tax evaders shall know that they are to be ferreted out by investigation and charged with plus penalties).

[100] *Cf*. *Id*. at Appendix D 23 (proposing that authorized tax officials shall have authority administer oaths to expedite investigation).

[101] *Cf*. *Id*. at Appendix D 27–28 (proposing that taxpayers should be fully informed and entitled to know the reason for reassessment).

[102] *Cf*. *Id*. at Appendix D 33 (proposing that taxpayers should bear the initial responsibility to show evidence of government's erroneous).

[103] *Cf*. *Id*. at Appendix D 28 (arguing that it is of disadvantage for taxpayers to pay reassessed tax before the final decision of reassessment reached, especially when the reassessment found to be improper).

Mission. In this part, I will elaborate on their opinions and compare them with the text of the Report.

A. Traynor and Surrey's Suggestions on Tax Administration

1. Who is Roger Traynor?

Roger J. Traynor was born in 1900. He was a lawyer who later became an Associate Justice and then the Chief Justice of the Supreme Court of California.[104] In 1931, he began to teach taxation at the University of California.[105] He also took part in drafting of taxation statutes for California. In 1937, he was appointed as a consultant to the Treasury Department of the federal government.[106] In the same year, Surrey began to serve the Department as tax legislative counsel.[107] Traynor and Surrey soon brought forward the Traynor Plan, a set of proposals to reform the federal tax administration. The central aim of their plan was to clear away the congestion of tax disputes and to rationalize the whole process of income tax administration.[108] Their plan stirred up considerable controversy and they eventually abandoned it.[109]

I will now summarize the contents of the Traynor Plan and the related arguments put forward by Traynor and Surrey. I will illustrate the significant features that the Traynor Plan and Surrey's proposal in the Report have in common. Traynor and Surrey have written four articles on the Plan.[110] The following summary is

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[104] *See* Les Ledbetter, *Roger J. Traynor, California Justice*, N.Y.TIMES (May 17, 1983) (an obituary) (stating his achievement as a Justice); Adrian A. Kragen, *Chief Justice Traynor and the Law of Taxation*, 35 HASTINGS L.J. 801 (1984) (stating his achievement in the field of taxation); Mirit Eyal-Cohen, *Preventive Tax Policy: Chief Justice Roger J. Traynor's Tax Philosophy*, 59 HASTINGS L.J. 877 (2008) (summarizing the philosophy of Traynor as the "preventive tax policy").

[105] KRAGEN, *supra* note 104, at 801–02.

[106] *Id*. at 803.

[107] Tax Notes, 58 TAXES 2 (1980).

[108] *See generally* Surrey, *Traynor Plan, infra* note 110, 17 TAXES 393, at 441.

[109] KRAGEN, *supra* note 104, at 804.

[110] *See generally* Roger John Traynor, *Administrative and Judicial Procedure for Federal Income, Estate, and Gift Taxes—A Criticism and a Proposal*, 38 COLUM. L. REV. 1393 (1938) (most comprehensive explanation of the plan written by Traynor with the cooperation of Surrey) [hereinafter Traynor, A Criticism and a Proposal]; Stanley S. Surrey, *The Traynor Plan: What It Is*, 17 TAXES 393 (1939) (providing a concise introduction to the Traynor Plan) [hereinafter Surrey, Traynor Plan]; Roger John Traynor & Stanley S. Surrey, *New Roads toward the Settlement of Federal Income, Estate, and Gift Tax Controversies*, 7 L. & CONTEMP. PROBS. 336 (1940) (including the proposal of the closing

founded on the most concise version as delivered by Surrey.[111] Surrey first pointed out five problems in tax administration at that time[112]. He then mentioned five fundamental drawbacks. Finally, he offered solutions to the problems he identified[113]. I will use the most comprehensive article by Traynor that was published in Columbia Law Review as a supplement to Surrey's article.[114]

2. The Components of the Traynor Plan

For Traynor and Surrey, the first problem in tax administration was the "*present delay in the disposition of cases*."[115] Since plenty of cases were pending before the Board of Tax Appeals, it typically took nine years to dissolve a tax controversy. Second, the vast majority of the cases were not resolved by judicial decisions but were settled by agreement.[116] Third, deficiencies were not collected sufficiently.[117] Fourth, because of the considerable delay in the disposition of cases, the Board failed to issue guidance when the questions for which guidance was necessary were emerging.[118] Finally, many of the petitions to the Board involved only a small amount of tax, although agreements between the Commissioner and the taxpayer would be more appropriate for their disposition.[119]

Behind these perceived problems, they found the following defects in the existing system. First, before the Treasury's decentralization program,[120] a taxpayer who accepted a notice of

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agreements); Stanley S. Surrey, *Some Suggested Topics in the Field of Tax Administration*, 25 WASH. U.L.Q. 399 (1940) (proceedings of the Surrey's lecture followed by questions and answers).

[111] Surrey, *Traynor Plan*, *supra* note 110.

[112] Surrey, *Traynor Plan*, *supra* note 110, at 393–94

[113] *Id.* at 395.

[114] Traynor, *A Criticism and a Proposal, supra* note 110.

[115] Surrey, *Traynor Plan*, *supra* note 110, at 393; Traynor, *A Criticism and a Proposal*, at 1395–96.

[116] Surrey, *Traynor Plan*, *supra* note 110, at 393; Traynor, *A Criticism and a Proposal, supra* note 110, at 1393–95.

[117] Surrey, *Traynor Plan*, *supra* note 110, at 393; Traynor, *A Criticism and a Proposal, supra* note 110, at 1396–97.

[118] Traynor, *A Criticism and a Proposal, supra* note 110, at 1397–98.

[119] Surrey, *Traynor Plan*, *supra* note 110, at 393–94; Traynor, *A Criticism and a Proposal, supra* note 110, at 1398.

[120] In the fiscal year ending June 30, 1939, the Bureau of Internal Revenue (predecessor of the Internal Revenue Service) established ten field division offices and gave the head of the division office more powers than before. *See* DEPARTMENT OF JUSTICE, MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE

deficiency had every incentive to file a petition.[121] He had nothing to lose in doing so, whereas he might have got a discount for his tax liability in the course of dispute resolution.[122] Second, the Commissioner was not able to collect necessary factual information on taxpayers but still issued notices of deficiency without any firm factual foundations because the burden of proof was on the taxpayers.[123] This practice gave rise to a situation in which more than two-thirds of the notices were abandoned in due course.[124] Third, because the Federal District Courts and the Court of Claims, in addition to the Board of Tax Appeals, had original jurisdiction for federal tax matters, the case law on them was not consistent across various courts.[125] Furthermore, the existence of many federal appellate courts and the Supreme Court's limited issuance of certiorari worsened the inconsistency in the case law on federal taxation.[126]

The Traynor Plan, a proposal to solve problems, had two fundamental objectives, which are as shown below.[127]

> (1) With respect to the administrative procedure, to bring about an objective analysis of controversies in the administrative stage, thereby increasing the number of cases settled in that stage and stopping the flood of petitions to a Board which cannot possibly handle all of them.
>
> (2) With respect to the system of judicial review, to establish a simplified structure which will insure certainty and uniformity in tax decisions.[128]

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18 (1941). *See generally* Arthur A. Armstrong, *Decentralization of the Bureau of Internal Revenue*, 19 TAXES 90 (1941).

[121] Surrey, *Traynor Plan*, *supra* note 110, at 394; Traynor, *A Criticism and a Proposal*, at 1398–1400.

[122] Surrey, *Traynor Plan*, *supra* note 110, at 394; Traynor, *A Criticism and a Proposal*, at 1398–1400.

[123] Surrey, *Traynor Plan*, *supra* note 110, at 394; Traynor, *A Criticism and a Proposal*, at 1400–02.

[124] Surrey, *Traynor Plan*, *supra* note 110, at 394; Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1400–02.

[125] Surrey, *Traynor Plan*, *supra* note 110, at 394; Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1402–04.

[126] Surrey, *Traynor Plan*, *supra* note 110, at 394–95; Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1404–11.

[127] Surrey, *Traynor Plan*, *supra* note 110, at 395.

To achieve the preceding two goals, the Traynor Plan contained the following nine suggestions. The first five were concerned with administrative procedure.[129] First, the preliminary conferences, a procedure before the issuance of informal notice of deficiency (the thirty-day letter), had to be more fully utilized.[130] Second, the informal notice of deficiency had to become a formal practice and the protest against it had to be made mandatory for a taxpayer to proceed to the next stage.[131] The taxpayer had to show the grounds of protest, relevant facts, and evidence for them. Third, when the Commissioner issued a final notice of deficiency (the ninety-day letter), it "would contain specific findings of fact on the matters involved, so that the taxpayer will have definite advice of the case against him."[132] Fourth, at the petition with the Board against the notice of deficiency, the scope of the review had to be limited.[133] They suggested the following four conditions:

> (1) The taxpayer in his proof before the Board would be limited to the grounds, documents and facts outlined in his protest.
>
> (2) The Commissioner in his proof would be limited to the issue and facts contained in the findings of fact. He could no longer present a claim before the Board for an additional deficiency.
>
> (3) The taxpayer, as at present, would have the burden of proving that the findings of fact were erroneous.
>
> (4) To insure the collectability of any deficiency found by the Board, it may be desirable to require the

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[128] *Id*.

[129] Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1411–25.

[130] Surrey, *Traynor Plan*, *supra* note 110, at 395.; Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1411–12.

[131] Surrey, *Traynor Plan*, *supra* note 110, at 395; Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1412–14.

[132] Surrey, *Traynor Plan*, *supra* note 110, at 395; Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1415.

[133] Surrey, *Traynor Plan*, *supra* note 110, at 395; Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1418–21.

> taxpayer to post a bond or other security at the time of filing his petition with the Board.[134]

Surrey summarized their plans for the reform of administrative procedure as follows.

> In short, the requirement of a protest would force disclosure of the facts either in the protest itself or in the preliminary conference preceding it, in view of the taxpayer's knowledge that the facts would have to be disclosed later in any event. The findings of fact would force the Commissioner to make a realistic appraisal of his case in the administrative stage. The limitations on proof before the Board would serve to insure the efficacy of both protest and findings of fact.[135]

They did not want to make the findings of fact by the Commissioner final.[136] They emphasized that the finality of the findings by an agency must be backed by a formal process of adjudication and that such a process was impossible when taxpayers disclosed only limited information.[137] Finally, they claimed that the deficiency procedure and refund procedures had to be consistent.[138]

They offered four plans to improve judicial procedure. The objectives of the plans were as follows:

> (1) Reduction in the number of tribunals passing upon tax questions, together with effective machinery for the resolution of conflicting decisions, in order to achieve uniformity and certainty in tax decisions.
>
> (2) Elimination of present method of appellate review of Board decisions.

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[134] Surrey, *Traynor Plan*, *supra* note 110, at 395.

[135] *Id*.

[136] *Id*. at 396; Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1421.

[137] Surrey, *Traynor Plan*, *supra* note 110, at 396; Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1421.

[138] Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1422–25.

> (3) Guarantee of collectability of tax in cases proceeding to the judicial stage.[139]

First, they proposed that original jurisdiction in tax cases be concentrated in the Board of Tax Appeals.[140] Second, they recommended decentralizing the Board into five divisions.[141] By doing so, they suggested that expeditious trial of petitions filed with the Board would be possible. Third, they argued that a Court of Tax Appeals had to be established instead of the present appellate jurisdiction of Circuit Court of Appeals.[142] Finally, they suggested that taxpayers had to file a bond on a petition before the Board to guarantee collectability of their tax dues.[143]

B. Aftermath of the Traynor Plan

Although the Traynor Plan was largely consistent with other proposals to improve tax administration,[144] including the decentralization program launched by the Treasury Department,[145] it was open to fierce criticisms by the practitioners.[146] The Report of the Special Committee to Study the Traynor Plan appointed in the American Bar Association (ABA Report), the most comprehensive criticism against the Traynor Plan, showed that the criticism derived from the practitioners' strong sense of antipathy toward the personnel in the Treasury. We will now outline the criticism by the American Bar Association.

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[139] *Id.* at 1425.

[140] Surrey, *Traynor Plan*, *supra* note 110, at 396; Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1425–26.

[141] Surrey, *Traynor Plan*, *supra* note 110, at 396; Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1426–27.

[142] Surrey, *Traynor Plan*, *supra* note 110, at 396; Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1427–33.

[143] Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1433–35.

[144] *See, e.g.*, Robert H. Jackson, *Equity in the Administration of Federal Taxes*, 13 TAXES 641, 642–43 (1935). *See also* Kirk J. Stark, *The Unfulfilled Tax Legacy of Justice Robert H. Jackson*, 54 TAX L. REV. 171, 180–81 (2001) (analyzing Justice Jackson's ideas on taxation).

[145] Surrey, *Traynor Plan*, *supra* note 110, at 395.

[146] *See, e.g.*, John M. Maguire, *Federal Revenue: Internal or Infernal*, 21 TAXES 77, 122 (1943); REPORT OF SPECIAL COMMITTEE TO STUDY THE SO-CALLED TRAYNOR PLAN, 1940 A.B.A. SEC. TAX'N PROGRAM & COMM. REP. 64, 64 (1940) [hereinafter A.B.A.]. *See also* EYAL-COHEN, *supra* note 104, at 899.

The ABA Report began with the characterization of the Traynor Plan.[147] It pointed out the "quasi-official" nature of the plan.[148] It found fault with the understanding of the present situation by the plan.[149] The main argument of the ABA Report was that the "defects" found by Traynor and Surrey were not defects at all: The number of disputes per tax revenue is not on the rise.[150] The ABA Report did not find any delay in the adjustment of tax controversies.[151] It claimed that the Commissioner had enough power to collect necessary information from taxpayers.[152]

Next, the ABA Report criticized each of the proposals of the Traynor Plan. First, the ABA Report insisted that the present informal nature of the communications between the tax officials and the taxpayers would be lost by the Traynor Plan's proposal seeking the limiting of the objectives of tax disputes.[153] Second, the ABA Report indicated that by placing the burden of proof on taxpayers, the Traynor Plan regarded the findings by the Commissioner as supported by substantial evidence.[154] However, as we have shown, Traynor and Surrey had clearly denied this understanding.[155] Third, the ABA Report claimed that requiring a bond before tax disputes was not a good idea.[156] Finally, the ABA Report declined all of the Traynor Plan's ideas on the reform of the tax judicial process.[157]

In short, the ABA Report rejected almost all the proposals by the Traynor Plan without seriously considering their appropriateness. It found no defects in the contemporary state of affairs and therefore preferred to maintain the status quo than to make any changes.[158]

As a result of the criticism, the Traynor Plan was not put into practice.[159] Nevertheless, the plan's spirit survived in Justice Traynor's opinions in the decisions of the Supreme Court of

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147 A.B.A., *supra* note 146, at 65.
148 *Id.*
149 *Id.* at 65–69.
150 *Id.* at 66.
151 *Id.* at 67–68.
152 *Id.* at 68.
153 *Id.* at 71.
154 *Id.* at 72.
155 *See generally* Surrey, *Traynor Plan*, *supra* note 110, at 396.
156 A.B.A., *supra* note 146, at 73–74.
157 *Id.* at 74–77.
158 *Id*. at 64.
159 EYAL-COHEN, *supra* note 104, at 899.

California and in the reform proposals by scholars.[160] Moreover, ideas from the Traynor Plan flew directly into the Report of the Shoup Mission, as I will show in the next section.

C. Comparison of the Traynor Plan with Surrey's Proposal in the Report of the Shoup Mission

Surrey's proposals in the Report of the Shoup Mission have much in common with the ideas indicated in the Traynor Plan. First, both the Traynor Plan and the Report advocated the policy of giving a taxpayer a sufficient incentive to disclose information at the earliest stage possible.[161] It was intended to mitigate the congestion of tax disputes and at the same time it aimed to realize taxation according to the actual amount of income. The state of affairs in postwar Japan in terms of congestion differed from that of the US in the late 1930s. In the US, there were many petitions pending before both the Bureau and the Board.[162] In Japan, the number of reassessments were large. However, the number of petitions against them seemed to have been small although the Report did not indicate any precise number. The quantity of tax litigation was also very small.[163] Nonetheless, the Report forecasted a substantial increase in tax cases and then proposed precautionary measures against the problem.[164] From this passage, we may infer that Surrey wrote his part of the Report with the Traynor Plan in mind.

Second, cooperation between the tax officials and the taxpayers aimed at reaching the true amount of income was an important component both in the Traynor Plan and in the Report. It is true that the taxpayers must first submit necessary information to tax officials because the taxpayers have all the necessary information to determine their tax liability.[165] However, after that, in Surrey's proposals, both parties were treated symmetrically in tax

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[160] *Id*. at 899–907.

[161] REPORT, *supra* note 7, at Appendix D 3–5; Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1395–96.

[162] Surrey, *Traynor Plan*, *supra* note 110, at 393; Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1395–96.

[163] REPORT, *supra* note 7, at 220–21.

[164] *Id*.

[165] REPORT, *supra* note 7, at Appendix D 22; Surrey, *Some Suggested Topics in the Field of Tax Administration*, *supra* note 110, at 394; Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1400–02.

administration. Both were required to indicate their judgments on tax liability, whether in the notice of deficiency or reassessment or in protest against them, with sufficient reasons and evidence supporting them.[166] In other words, Surrey demanded that taxpayers had to play a greater role than generally assumed in ascertaining their actual income. The requirement of giving reasons obviously makes the administrative tribunal and the court consider exclusively legal issues rather than factual ones, thereby helping realize the first point mentioned above.

Through the foregoing comparison with the Traynor Plan, we now have a far more detailed picture of Surrey's proposals in the Report. He certainly proposed the Blue Return System. He also recommended giving reasons in the letter of reassessment. However, these were merely a means to achieve his ideals in tax administration, that is taxation according to the taxpayers' actual income with fewer disputes between the tax officials and taxpayers. Under the ideals, each taxpayer's tax liability would be computed based on all the relevant information of the taxpayer. The burden of the appeal process and the judicial system would be relieved because most of the controversies on facts were settled beforehand.

Surrey considered the requirement for giving reasons as one of the means to limit the scope of disputes between tax officials and taxpayers. He did not consider it as a safeguard for taxpayers against tax authorities. It sometimes benefits taxpayers, but does so only by chance. Neither the Report nor the Traynor Plan offered evidence that Surrey sought the protection of taxpayers against governmental powers. It is not clear whether he thought about the concepts of notice and hearing, one of the basic principles in administrative procedure.[167] However, considering the absence of references to procedural rights of private parties in informal adjudication in contemporary materials, it may safely be assumed that he did not.[168]

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[166] *See* REPORT, *supra* note 7, at Appendix D 27, 33, & 58; Surrey, *Traynor Plan*, *supra* note 110, at 395; Traynor, *A Criticism and a Proposal*, *supra* note 110, at 1412–14, 1415, & 1418–21.

[167] *Cf.* HALEY, *supra* note 28, at 561–63 (indicating the members of Legislation and Justice Division of SCAP were in the opinion that Japan should provide for the concept in legislation).

[168] *Cf.* MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 120. *See also* ATTORNEY GENERAL'S COMMITTEE ON

IV. IGNORANCE AND EXCESSIVE ACCEPTANCE OF SURREY'S PROPOSALS IN POSTWAR JAPAN

A. The Long-Term Consequences of Surrey's Proposals in the Report

As I have demonstrated in the preceding chapters, the crux of Surrey's proposals in the Report of the Shoup Mission lay in realizing a rapid resolution of tax disputes and preventing disputes from occurring in the first place. To bring about these ideals, he made three proposals as below. First, he argued that the object of a tax dispute had to be a single factual or legal issue. He tried to realize the proposal by encouraging taxpayers to submit facts that would form the basis of his liability. Second, he supposed a dichotomy, in which a blue return filer, a taxpayer with sufficient records and books, calculated his income according to them, whereas a taxpayer without them would be subject to taxation based on some kind of standards. Third, he proposed that the tax officials had to have far more power to investigate and interrogate taxpayers. His idea of giving reasons in the assessment against a blue return filer is a component of the first proposal.[169] It would have been possible only when the third proposal is realized.

In reality, however, the third proposal was not accomplished.[170] The power of tax officials was relatively restricted. To make matters worse, the number of tax officials and their

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ADMINISTRATIVE PROCEDURE, DEPARTMENT OF JUSTICE, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941).

[169] Vicki L. Beyer, *The Legacy of the Shoup Mission: Taxation Inequities and Tax Reform in Japan*, 10 UCLA PAC. BASIN L.J. 388, 395–96 (1992).

[170] Except for Ryokichi Sugimoto, a judge at the Tokyo District Court, who persistently made arguments loyal to that of Surrey, nobody ever tried to promote Surrey's original idea. *Cf.* Ryokichi Sugimoto, *Zeikin sosho ni okeru shoko moshide no junjo* [The Order of Providing Evidence in Tax Cases], 17 ZAISEI 102 (1952) (explaining the debate over the burden of proof after the recommendation by the Shoup Mission); Ryokichi Sugimoto, *Sozeiho no kaishaku no doko* [Trends in the Interpretation of Tax Law], 29 HORITSU JIHO 1074 (1957); Ryokichi Sugimoto, *Sozei sosho no jittai to kihon mondai* [Present Status and Fundamental Problems of Tax litigation], 1 KINYU HOMU JIJO (7)1 (1958) (a proposal on tax litigation process very similar to Surrey's idea); Ryokichi Sugimoto, *Gyosei jiken sosho no chien* [Delay in Administrative Litigation], 30 HORITSU JIHO 1260 (1958); Ryokichi Sugimoto, *Gyosei jiken sosho* [Administrative Litigation], 465 HANREI JIHO 21332 (1967); Ryokichi Sugimoto, *Gyosei jiken sosho ni okeru saibansho no yakuwari* [The Role of the Court in Administrative Litigation], 156 HOGAKU SEMINA 2 (1969).

abilities were also limited. These factors made the fulfillment of the second proposal impossible. Tax officials were forced to use certain kinds of standards to calculate the income of some blue return filers because the tax officials were not able to collect necessary information on them. Further, some of the court decisions began to allow taxpayers who had their liabilities assessed according to a standard to argue that the tax liability was incorrectly assessed not because the standard was inappropriate but because the alleged tax liability did not reflect his true income. In other words, the courts permitted taxpayers who did not file blue returns to rebut reassessments by the actual amount of revenue or expenditure. This practice of the courts, along with the use of standards for the blue return filers, significantly blurred the distinction between blue returns filers and non-blue returns filers. Moreover, the judges declined to limit the object of a tax dispute to a single issue. Rather, they preferred to judge the appropriateness of a taxpayer's liability of a given year as a whole. Thus, the first proposal by Surrey was not put into practice. Thus, the legislature and the judiciary did not employ any of Surrey's core proposals.

Despite the apparent ignorance of Surrey's proposals, the tax administration of Japan in the latter half of the twentieth century almost lived up to Surrey's ideals. It did not experience the congestion of tax disputes that Surrey predicted and was deeply afraid of. It is difficult to pin down the precise reasons for the achievement. However, I believe that the following two points contributed toward achieving the goal.

Courts rarely declare tax liability determined in a self-assessment or reassessment void [*muk*ō]. In Japan, a tax refund claim is considered as a restitution claim. In a restitution suit, every administrative disposition is deemed correct.[171] The administrative disposition would even be revoked if it were disputed in a suit in which the plaintiff exclusively claimed that the disposition was illegal. It follows that it is extremely difficult for a taxpayer to recover the amount of tax paid through a refund suit. Then, it becomes rational for the tax officials to strongly recommend that the taxpayer file an amended return rather than to assess the deficiency by themselves. When they make an assessment, the taxpayer may challenge the assessment and then the tax dispute goes on.

[171] *See generally* ISHIMURA, *supra* note 10, 125–26.

However, if the taxpayer amends the return, the tax officials are almost relieved from the risk of continued involvement in the dispute.

Upon an assessment of deficiency, the tax authorities of Japan have the power to start a collection procedure for the deficiency amount even if the taxpayer in question does not agree with the assessment.[172] This power is horrifying especially for a taxpayer without sufficient financial resources because it could destroy his economic life. Thus, both tax officials and taxpayers would, in most cases, arrive at a reasonable compromise. To avoid the worst case scenario, it is rational for the taxpayer to admit the existence of deficiency even if he does not entirely agree with the alleged amount of deficiency. Since tax officials wanted to end tax disputes, as explained above, they offered taxpayers reasonable discounts if they consented to filing an amended return.

The ideas Surrey presented were largely ignored in the tax administration in Japan. However, an important part of his proposals, namely the requirement of giving reasons in the notice of assessment was accepted and magnified greatly by the judiciary.[173] In the next section, I will trace the development of the doctrine on giving reasons and explain how it became a unique doctrine in Japanese administrative law.

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[172] It is a principle applicable to the administrative dispositions in general. *See* Gyōsei jiken soshō hō [Administrative Case Litigation Act], Law No. 139 of 1962, art. 25 (Japan). In the United States, the rule is the same as that in Japan as long as federal taxation is concerned. *See* I.R.C. § 6331–44. Phillips v. Commissioner, 283 U.S. 589 (1931) (constitutionality of the provisions). But the Internal Revenue Code stipulates a broad exception. *See* I.R.C. § 6213 (a) (prohibiting the government from proceeding to the collection until the specified dates). *Cf. supra* note 103 and accompanying text for the comment of Surrey with regard to this point. For a comprehensive explanation of the question whether the execution of an administrative determination stays or not in various contexts, *see* Reginald Parker, *The Execution of Administrative Acts*, 24 U. CHI. L. REV. 292 305 (1957) ("[T]he tax claim will not become delinquent without judicial review or an opportunity for it"). *See also* Reginald Parker, *Administrative Law Through Foreign Glasses: The Austrian Experience*, 15 RUTGERS L. REV. 551, 565 (1961) (in Austria, every administrative agency has the power to execute its own decisions); L. Harold Levinson, *Toward Principles of Public Law*, 19 J. PUB. L. 327, 358–59 (1970) (in France, every administrative decision possesses the same enforceability as a court judgment).

[173] For an overview of the early cases, *see* Shin'ichi Takayanagi, *Aoiro shinkoku ni taisuru kosei no riyu fuki* [Giving Reasons in the Assessments against the Blue Return Filers], SOZEI HANREI HYAKUSEN 166 (Ichiro Ogawa & Hiroshi Kaneko eds., 1968).

B. Development of the Common Law Doctrine on Giving Reasons

1. *Udono* case

Shortly after the introduction of the Blue Return System, cases on the requirement of giving reasons began to appear.[174] In these cases, the Heads of Tax Office did not clearly explain their decision-making process or the evidence supporting their positions in their letters informing taxpayers of the assessments. In some cases, they did not indicate any reason at all.[175] Sometimes, they notified taxpayers of the reasons at a later date.[176] In these cases, taxpayers argued that the assessments were defective and had to be revoked.[177] At first, the National Tax Agency claimed that provisions for giving reasons in the Income Tax Act and the Corporate Income Tax Act were not requirements but only instructions.[178] However, not all lower court decisions followed this claim.[179] Rather, although gradually, some of the courts began to hold that the assessments without specified reasons were defective and thus, they revoked them.[180]

In 1962, the Supreme Court indicated, although in its *obiter dicta*, that when a Regional Commissioner failed to note the reasons for his ruling upon a taxpayer's appeal, his decision turned

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[174] *Id.*

[175] *See e.g.*, Yokohama Chihō Saibansho [Yokohama Dist. Ct.] Dec. 28, 1955, Sho 30 (gyo) No. 2, 6 GYŌSEI JIKEN SAIBAN REISHŪ [GYŌSAI REISHŪ] 2893 (Japan).

[176] *See e.g.*, Hiroshima Chihō Saibansho [Hiroshima Dist. Ct.] May 29, 1958, Sho 30 (gyo) No. 11, 9 GYŌSEI JIKEN SAIBAN REISHŪ [GYŌSAI REISHŪ] 986 (Japan).

[177] For the meaning of "revocation" of an administrative disposition, *see* text definition in *supra* note 17.

[178] *See e.g.*, Yokohama Chihō Saibansho [Yokohama Dist. Ct.] Dec. 28, 1955, Sho 30 (gyo) No. 2, 6 GYŌSEI JIKEN SAIBAN REISHŪ [GYŌSAI REISHŪ] 2893 (Japan); Nara Chihō Saibansho [Nara Dist. Ct.] Sept. 16, 1958, Sho 29 (gyo) No. 7, 9 GYŌSAI REISHŪ 1916. (Japan).

[179] *See e.g.*, Yokohama Chihō Saibansho [Yokohama Dist. Ct.] Dec. 28, 1955, Sho 30 (gyo) No. 2, 6 GYŌSEI JIKEN SAIBAN REISHŪ [GYŌSAI REISHŪ] 2893 (Japan); Nara Chihō Saibansho [Nara Dist. Ct.] Sept. 16, 1958, Sho 29 (gyo) No. 7, 9 GYŌSAI REISHŪ 1916. (Japan).

[180] *See e.g.*, Yokohama Chihō Saibansho [Yokohama Dist. Ct.] Dec. 28, 1955, Sho 30 (gyo) No. 2, 6 GYŌSEI JIKEN SAIBAN REISHŪ [GYŌSAI REISHŪ] 2893 (Japan); Nara Chihō Saibansho [Nara Dist. Ct.] Sept. 16, 1958, Sho 29 (gyo) No. 7, 9 GYŌSAI REISHŪ 1916. (Japan).

revocable.[181] In this case, the issue was whether the Commissioner should inform the taxpayer of the reasons for his decision in an adversarial administrative adjudication, even though the procedure was far less formal than that of independent administrative committees.[182] Thus, requiring the Regional Commissioner to give reasons was entirely understandable in this case. Further, the original tax assessment was maintained in the case.

In 1963, the Supreme Court decided upon *Udono*, where it followed the decisions of the lower courts and revoked tax assessments that did not offer a sufficient notification of reasons.[183] This attitude of the Court is surprising. When an assessment is revoked by the court, the Head of Tax Office cannot make another because of the statute of limitation. The Court thus called for compliance with the requirement of giving reasons at the sacrifice of proper taxation in each of these cases.[184]

The facts of the *Udono* case are as follows. Mr. Shizuhiro Udono was a retailer of shoes in Bunkyo-ku, Tokyo prefecture. He was a blue return filer since 1953. On March 14, 1957, he filed his tax return for his annual income in 1956. In this return, he alleged that his income was 309,000 yen in 1956. On July 29, 1957, however, the Head of Koishikawa Tax Office assessed Udono's deficiency based on the determination that his income in 1956 was 444,000 yen. The Head of Koishikawa Tax Office wrote, in a letter notifying Mr. Udono of the assessment, saying, "Considering your gross profit ratio, the amount of profit in your books is too small. I corrected the amount with reference to your actual gross profit ratio based on our investigation and therefore corrected the amount of income."[185] I translated the original statements written in Japanese

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[181] Saikō Saibansho [Sup. Ct.] Dec. 26, 1962, Sho 36 (o) No. 409, 16 Saikō Saibansho Minji Hanreishū [Minshū] 2557 (Japan) (Amakasu sangyo kisen kabushiki gaisha [Amakasu Industrial Steamship, Co., Ltd.] v. Shiba zemimusho cho [Head of Shiba Tax Office]). For an excellent overview of the development of the cases beginning in this case, *see* Shizuo Fujiwara, Riyu fuki hanrei ni miru gyosei tetsuzuki hosei no riron to jitsumu, [The Theory and Practice of the APA thorough the Cases on Giving Reasons], 3 Ronkyu jurisuto 67 (2012).

[182] NATHANSON & FUJITA, *supra* note 33, 302–33.

[183] *See supra* notes 14–17.

[184] *See generally* I.R.C. § 7522(a), *supra* note 16.

[185] 17 MINSHŪ, at 620. *Udono* case was discussed in the subcommittee on the tax system and the tax administration under the Finance Committee of the House of Representatives. *See generally* Dai 31 kai kokkai shugiin okura iinkai zeisei narabini zei no shikko ni kansuru sho iin kaigiroku [The Thirty-First Diet, Official Record of the Debates

into English. However, the precise meaning of the original statements is far from completely clear. Mr. Udono disputed the assessment, first by asking the Head of the Tax Office for reconsideration and, next by asking the Regional Commissioner of Tokyo Regional Tax Bureau for reviewing the assessment. Both the Head of the Tax Office and the Regional Commissioner rejected his claim. To make matters worse, while informing Mr. Udono of their decisions, neither offered any reasons or explanations.

Mr. Udono filed a lawsuit against the Regional Commissioner. In the lawsuit, he claimed that the "reasons" that the Head of the Tax Office had written in the letter of assessment and the "reasons" that the Regional Commissioner had written in the notification letter were both too abstract and their meanings were not clear. In effect, they failed to note the reasons, and therefore the assessment by the Head of the Tax Office and the determination by the Regional Commissioner were both illegal and the assessment had to be revoked.[186] In the first instance at the Tokyo District Court, the Regional Commissioner, the defendant, argued that the "reasons" that the two officials had given were sufficient and that the assessment did not need to be revoked. However, the Court affirmed the plaintiff's claim.[187]

In the second instance before the Tokyo High Court, the defendant clarified the process of calculating the allegedly correct income.[188] According to him, the tax officials at the Koishikawa Tax Office had first found that the amount of income in Mr. Udono's tax return was too small when compared with that of the other retailers with similar amounts of gross sales. They then investigated his books and records and found several omissions from them and estimated his gross profit ratio. By adding the

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in the Subcommittee on the Tax System and the Tax Administration under the Finance Committee of the House of Representatives], No. 2 (Feb. 18, 1959) and No. 3 (Feb. 25, 1959) (Japan). I did not find out whether the debates in the Diet had an influence on the Supreme Court decision.

[186] Saikō Saibansho [Sup. Ct.] May 31, 1963, Sho 36 (o) no. 84, 17 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 617, 630–31 (Japan) (Udono v. Tokyo kokuzeikyoku cho [Regional Commissioner of Tokyo Regional Taxation Bureau]).

[187] Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Feb. 4, 1959, Sho 33 (gyō) no. 55, 10 Gyōsai reishū 287 (Japan) (Udono v. Tokyo kokuzeikyoku cho [Regional Commissioner of Tokyo Regional Taxation Bureau]).

[188] Saikō Saibansho [Sup. Ct.] May 31, 1963, Sho 36 (o) no.84, 17 Saikō Saibansho Minji Hanreishū [Minshū] 617, 633–35 (Japan) (Udono v. Tokyo kokuzeikyoku cho [Regional Commissioner of Tokyo Regional Taxation Bureau]).

omissions and using this new ratio, the Head of the Tax Office assessed Mr. Udono's income tax for 1956. The Tokyo High Court reversed the decision of the original instance and held that the statements in the letter of assessment and those in the notification letter were both sufficient reasons because the taxpayer was able to understand the contents of the assessment by reading the statements.[189]

The Supreme Court reversed this decision and unanimously held that the statements in the letters were insufficient as proper reasons and ruled that the assessment had to be revoked.[190] The Supreme Court first articulated the aim of giving reasons in administrative dispositions in general.[191] The Court said that in the context of income tax, since the Income Tax Act guaranteed a taxpayer who chose to join the Blue Return System that his books and records would be respected, the content of the reasons in the letter of assessment had to explain the basis for the assessment based on materials that have more power of persuasion than the statement in the taxpayer's books.[192] The Court found that the "reasons" in the letter of assessment in this case were inadequate because from the statement, the taxpayer would not have been able to understand the extent of omission, the account for which the omission was found, the basis for the calculation of the amount, the basis for the calculation of the gross profit ratio, and the justification for using the ratio.[193] Thus, the Court held that the reasons were invalid and the assessment had to be revoked.[194]

Although the decision was surprisingly favorable to the taxpayer, it was anticipated by several commentators. In a short case comment published in April 1962, Kenzo Shiraishi, a highly respected judge at the Tokyo District Court specialized in administrative law, explained the significance of the requirement of

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[189] Tōkyō Kōtō Saibansho [Tokyo High Ct.] Oct. 27, 1960, Sho 34 (ne) no. 356, 17 Minshū 632 (Japan) (Tokyo kokuzeikyoku cho [Regional Commissioner of Tokyo Regional Taxation Bureau] v. Udono).

[190] Saikō Saibansho [Sup. Ct.] May 31, 1963, Sho 36 (o) no. 84, 17 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 617, 621 (Japan).

[191] *Id.* at 620.

[192] *Id.* 620–21.

[193] *Id.*

[194] *Id.* at 622.

giving reasons in general.[195] His remarks were followed almost word for word in *Udono*.[196] Hiroshi Shiono, the then associate professor of administrative law at the University of Tokyo, made a comment similar to that of Shiraishi in September 1962.[197]

2. Development of the Common Law Doctrine after *Udono*

The Supreme Court reaffirmed its decision in *Udono* in *Kameya Sewing Shop*, a corporate income tax case.[198] In *Kameya Sewing Shop*, the Court cited *Udono* and held that a reassessment without sufficient reasons had to be revoked irrespective of the fact that the taxpayer in question was able to estimate the reasons at the time of the reassessment.[199]

Contemporary commentators (other than the officials of the National Tax Agency) welcomed the common law doctrine offered by *Udono* that an assessment would be revoked when one of the requirements for it was defective.[200] This doctrine was not self-evident because it may well be argued that a slight defect in the procedural requirement does not make the assessment revocable. Further, almost all commentators agreed with the Supreme Court. [201] The conclusion is not obvious because even if one wants to penalize the tax authorities for failing to give sufficient reasons, there are other ways to do so, such as forcing them to pay damages to the taxpayers or imposing a punishment on the officials in charge internally. However, nobody suggested such alternatives.

There was a slight but sharp disagreement in theorizing the core idea of the *Udono* decision. Some commentators understood

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[195] Kenzo Shiraishi*, Sogan saiketsusho no riyu fuki* [Giving Reasons in Administrative Adjudication], *in* GYOSEI HANREI HYAKUSEN 165, 166 (1962).

[196] This fact is pointed out by Shizuo Fujiwara. *See* FUJIWARA, *supra* note 181.

[197] SHIONO, *supra* note 24.

[198] Saikō Saibansho [Sup. Ct.] Dec. 27, 1963, Sho 37 (o) no. 1015, 17 Saikō Saibansho Minji Hanreishū [Minshū] 1871 (Japan) (Kabushiki gaisha kameya ito ten [Kameya Sewing Shop, Co., Ltd.] v. Maebashi zeimusho chō [Head of Maebashi Tax Office]). In this decision, one out of five justices dissented. Justice Sakunosuke Yamada argued that the statement in the letter of assessment ("lack of the amount of sale by 190,500 yen") was acceptable as the "reason" of the assessment.

[199] Saikō Saibansho [Sup. Ct.] Dec. 27, 1963, Sho 37 (o) no. 1015, 17 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1871, 1873 (Japan) (Kabushiki gaisha kameya ito ten [Kameya Sewing Shop, Co., Ltd.] v. Maebashi zeimusho chō [Head of Maebashi Tax Office]).

[200] *See, e.g.,* KANEKO, *supra* note 11.

[201] *Id.*

the decision as an example of formal errors or defects.[202] In other words, they located the decision in a series of cases in which the validity of an administrative disposition lacking some of its formal requirements was the issue. According to the traditional account of the issue of formal errors, which was originally imported from German administrative law,[203] an administrative disposition was considered void when the formal errors in question are crucial, whereas it is considered valid when errors are trivial.[204] However, the commentators on the *Udono* decision declined the dichotomy and instead claimed that an administrative disposition with formal errors may be revocable when the parties concerned dispute the validity of the disposition. This argument is not convincing because it is quite difficult if not impossible to explain why a valid administrative disposition turns revocable once the parties concerned begin to dispute its validity.

That is why other commentators deemed *Udono* as a variation of a general principle of administrative procedure. For example, in a case comment on another Supreme Court decision, Hiroshi Kaneko, then associate professor of tax law at the University of Tokyo, wrote as follows:

> Though the requirement of giving reasons in an administrative disposition is one of the formal requirements, it has considerable significance and should be distinguished from merely formal requirements such as the statement of the date of the disposition. In view of that the aim of the requirement is to guarantee the substantive appropriateness of an administrative disposition, the

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[202] *See, e.g.*, JIRO TANAKA, SHIMPAN GYOSEIHO VOL. 1, 148 (2nd Revised ed., 1974). For one of the most comprehensive narrative of this position, *see* NISHITOBA, *supra* note 21.

[203] For the influence of German law on the modern administrative law of Japan, *see* John Ohnesorge, *Administrative Law in East Asia: A Comparative-Historical Analysis*, COMP. ADMIN. L. 78, 82–83 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2011). For a description of the treatment of procedural errors in Germany, *see, e.g.*, PÜNDER, *infra* note 218, 953–55.

[204] *See, e.g.*, SHOZABURO SUGIMURA, SHIN HANREI TO GYOSEI HO NO SHO MONDAI [New Cases and Various Questions on Administrative Law] 14–18 (1943) (discussing the standard to be applied in distinguishing the valid administrative dispositions and the void ones).

> requirement can be regarded as one of the requirements for administrative procedure.[205]

Nevertheless, the commentators who located *Udono* in the context of administrative procedure did not precisely articulate which of the principles in administrative procedure was in question. They vaguely found the requirement of giving reasons to be one of the questions of administrative procedure. This vague attitude gave rise to a couple of serious consequences. One is that they did not pay attention to the level of formality of the administrative procedure in question. They praised the private party's protection even if the situation in question was a rather informal one as long as an administrative disposition was delivered. The other is that most of them were not interested in the chance of the party concerned to convey his opinion to the administrative agency.[206] In other words, most of them were concerned not with notice and hearing but with notice alone.

The Supreme Court pushed its strict attitude toward the requirement of giving reasons still further in 1972. In a case in which the Head of Tax Office claimed that the defect of an original assessment caused by the insufficient statement of reasons for the assessment had been cured by the meticulous reasons stated in the following decision of the administrative adjudication, the court denied the claim unanimously, holding thus:[207]

> Given the aforementioned purpose of the requirement of giving reasons in the assessments, it is not appropriate to admit curing of the defect in an assessment (disposition) delivered by an

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[205] Hiroshi Kaneko, *Gyosei koi no kashi* [Defects in Administrative Disposition], *in* GYOSEI HANREI HYAKUSEN 248, 249 (Enlarged ed., 1965). *See also* Hiroshi Shiono, *Riyu no nai gyosei shobun wa nai* [No Administrative Disposition without Reason], *in* GYOSEIHO WO MANABU [Learning Administrative Law] vol. 1 254, 257 (Hiroshi Shiono ed., 1978) (locating the requirement of giving reasons as one of the doctrines on administrative procedure); KANEKO, *supra* note 11, 21–24.

[206] *Cf.* Kenzo Shiraishi, *Zeimu sosho no tokushitsu* [The Traits of Tax Litigation], 7(12) ZEIRI 8 (1964) (arguing that the whole process of the communication between the tax officials and the taxpayer should be evaluated when the validity of a tax assessment is determined).

[207] Saikō Saibansho [Sup. Ct.] Dec. 5, 1972, Sho 43 (gyō tsu) no. 61, 26 Saikō Saibansho minji hanreishū [Minshū] 1795 (Japan) (Oita zeimusho cho [Head of Oita Tax Office] v. Yamatoyo shoken kabushiki gaisha [Yamatoyo Securities, Co. Ltd.]).

> administrative agency through an act by another agency. For one thing, such a rule would be at odd with the purpose of the requirement, that is to make sure the first agency delivers the assessment with care and reasonableness. For another, under such a rule, the taxpayer in question would not be able to claim the grounds for his dissatisfaction with the assessment fully before he knows the concrete reasons of the assessment through the administrative adjudication.[208]

Therefore, the Supreme Court of Japan confirmed and strengthened the common law doctrine as established in *Udono*. According to the doctrine, an assessment of deficiency will be revoked as long as sufficient reasons are not given in the letter notifying the taxpayer of the assessment, even if the taxpayer is notified of the full reasons at a later date in the same administrative procedure.

In 1985, the Supreme Court admitted clearly that the common law doctrine *Udono* established for the blue returns was applicable to administrative dispositions in general, although the extent of reasons required would differ on a case-by-case basis.[209] In the *First-Class Architect* decision, it held *Udono* intact even after the enactment of the APA.[210] However, what the Court demanded in *First-Class Architect* was not to point out the facts found by the administrative agency, but to disclose the standards that the agency has established internally.[211] In other words, despite its apparent concurrence with the traditional common law doctrine, *First-Class Architect* may have considerably extended or changed its meaning.

In its revision of the tax acts in 2011, the Diet made Articles 8 and 14 of the APA, the provisions stipulating the requirement of giving reasons, applicable to assessments of deficiency and initial assessments [*kettei*]. Therefore, now the Head of Tax Office must give reasons to all taxpayers, both blue return and non-blue return

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[208] *Id.* at 1798.

[209] Saikō Saibansho [Sup. Ct.] Jan. 22, 1985, Sho 57 (gyō tsu) no. 70, 39 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1, 3–4 (Japan).

[210] First-Class Architect Case, *supra* note 22, at 2094. *See also* text accompanying *supra* notes 19–22.

[211] First-Class Architect Case, *supra* note 22, at 2094–95.

filers. As of 2019, neither the National Tax Agency nor commentators have found any theoretical principles explaining the different levels of giving reasons for each group of taxpayers.[212]

C. Uniqueness of the Doctrine

The common law doctrine on giving reasons in Japan is exceptional compared with the practices of other countries. Given the profound consequences that an assessment has on the taxpayer, the attitude toward the requirement of giving reasons is somewhat understandable.[213] However, it is undeniable that the doctrine has no counterparts in other countries.[214]

In the United Kingdom, they have a similar case law doctrine on giving reasons, but the doctrine is applied on a case-by-case basis and the penalty for the failure to give reasons is relatively light.[215]

In the U.S., the APA does stipulate a strict rule for giving reasons that is applicable only to determinations made through formal adjudication. In other words, the requirement for giving reasons is relevant only if a procedure in question is substantially similar to a judicial one in which the notification of the reasons for the tribunal's judgment is essential. The requirement is also applied when the administrative process in question is of rulemaking. As a result, when the Commissioner of the Internal Revenue Service sends a notice of deficiency to a taxpayer, the Commissioner has to state the reasons for the determination of the tax he owes, but his failure to do so does not make the notice of deficiency invalid or

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[212] *See* Hideaki Sato, *Gyosei tetsuzuki ho ni yori kazei shobun ni motomerareru riyu fuki no teido* [The Extent of Reasons Required by the APA], 144 ZEIMU JIREI KENKYU 19 (2015) (introducing the amendment to the APA in 2011 and providing an overview of the related lower court cases).

[213] *See* text accompanying *supra* note 172.

[214] *See generally* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 633–659 (1995) (discussing the meaning of giving reasons in general and the logic of giving reasons). Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 99–101 (2007) (a comparative legal analysis of the idea of giving reasons, including similarities between conceptions of "good administration" in the United States and in the European Union). Professor Mashaw's interest lies not in whether the statement of the reasons exists, but in whether the alleged reasons are in fact reasonable. *See* Jerry Mashaw, *The Rise of Reason Giving in American Administrative Law*, *in* COMPARATIVE ADMINISTRATIVE LAW 268 (Susan Rose-Ackerman, Peter L. Lindseth, & Blake Emerson eds., 2nd ed. 2017).

[215] *See, e.g.*, TIMOTHY ENDICOTT, ADMINISTRATIVE LAW 199–229 (4th ed. 2018).

revocable.[216] The reason for this treatment is that the Commissioner's determination before the notice of deficiency is an informal adjudication at best. Even in the context of the APA, the courts usually do not invalidate administrative decision-making just because there are defects in the procedure. The harmless error doctrine embodied in Section 706 of the APA prevents administrative adjudications with small errors from being revoked.[217]

The situation is almost the same in civil law countries such as Germany and France. In Germany, they recognize "procedural errors" in administrative decisions.[218] However, the procedural errors rarely render the decisions void or revocable. Article 45 of the German APA stipulates that the errors are curable during the procedure that follows.[219] Article 46 of the German APA provides that harmless errors are ignored.[220] In France, the treatment of procedural errors is almost the same as that in the U.S., the UK, and Germany.[221]

In sum, Japan is the only jurisdiction that makes harsh demands of administrative agencies to give reasons whenever they make an administrative decision with an external effect. The common law doctrine on giving reasons is far more peculiar when we consider that in Japan the protection of citizen's procedural rights is relatively limited.[222]

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[216] *See generally* I.R.C. § 7522(a), *supra* note 16.

[217] *See, e.g.*, Shinseki v. Sanders, 556 U.S. 396 (2009).

[218] Hermann Pünder, *German Administrative Procedure in a Comparative Perspective: Observations on the Path to a Transnational Ius Commune Proceduralis*, 11 INT'L J. CONST. L. 940, 953–55 (2013) (a comparative study of the question as to which consequences ought to be imposed upon procedural errors in Germany and in the United States). In Germany, a decision of the administration is considered to be an "administrative act," which is a concept equivalent to an administrative disposition in Japan. *See* HERMANN PÜNDER & ANIKA KLAFKI, ADMINISTRATIVE LAW IN GERMANY, *in* COMPARATIVE ADMINISTRATIVE LAW: ADMINISTRATIVE LAW OF THE EUROPEAN UNION, ITS MEMBER STATES AND THE UNITED STATES, 49, 52 (René Seerden, ed., 4th ed. 2018).

[219] Verwaltungsverfahrensgesetz (VwVfG) § 45, https://www.gesetze-im-internet.de/vwvfg/__45.html [https://perma.cc/6PDJ-ZKEE). *See* PÜNDER, *supra* note 218, at 953.

[220] Verwaltungsverfahrensgesetz (VwVfG) § 46, https://www.gesetze-im-internet.de/vwvfg/__46.html [https://perma.cc/TU37-QBCY). *See* PÜNDER, *supra* note 218, at 953.

[221] *Id.* at 957–58.

[222] *See generally* articles cited in *supra* note 19.

D. An Analysis

Japanese people did not understand Surrey's original ideas. The Diet did not give tax officials sufficient power to collect information from taxpayers. Even today, all tax officials can do is to resort to the power of investigation backed by very weak penalties for denying the investigation.[223] Courts put the burden of proof in tax cases on the tax office or the government.[224] The courts have traditionally considered a taxpayer's tax liability in a given year, rather than a legal evaluation of one of the foundations for such liability as the object of tax dispute. In other words, the scope of the judicial review of tax disputes is not limited. Under these conditions, it is impossible to realize Surrey's idea because taxpayers have lesser incentive to produce information than Surrey originally hoped for.

Yet, a question remains. Why did the Japanese people, both courts and commentators, stick to a literal and harsh enforcement of the giving reasons requirement in the Blue Return System? One possible, and most natural, answer is that they were influenced by the jurisprudence of procedural due process in the U.S.[225] Although Article 31 of the Constitution of Japan is applicable only to criminal procedures, some commentators have argued that it is also applicable to administrative procedures.[226] However, it was not until 1992 when the Supreme Court first held that the article might be applicable to administrative procedures under certain

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[223] *See, e.g.*, Kokuzei tsūsoku hō [Act on General Rules for National Taxes], Law No. 66 of 1962, art. 74–2 (Japan) (authorizing tax officials for income tax investigation) and art. 128, nos. 2 & 3 (Japan) (stating penalty of imprisonment for one year or less, or fine of 500,000 yen or less for not cooperating with the investigation provided in art. 74(2), etc.).

[224] SAIKO SAIBANSHO JIMU SOKYOKU [Supreme Court General Secretariat], 11 GYOSEI SAIBAN SHIRYO 49–52 (1950) (Japan) (Kunio Yano claimed the burden of proof in tax cases was on the defendant. Yano, then a member of the general secretariat of the Supreme Court, was in charge of administrative litigation). *Cf.* text accompanying *supra* note 84.

[225] *See supra* note 24 and accompanying text.

[226] Nakamura v. Murakami (Saikō Saibansho [Sup. Ct.] Nov. 28, 1962, Sho 30 (a) no. 2961, 16 Saikō Saibansho Keiji HanreishŪ [KeishŪ] (1593) (Japan) is an important decision of the Supreme Court on the article handed down almost the same time as *Udono*. In *Nakamura*, the Court held that forfeiture of a third party's belongings without notice and hearing to him violates article 31 of the Constitution and it invalidated the forfeiture. For English translation of *Nakamura*, *see* http://www.courts.go.jp/app/hanrei_en/detail?id=19 [https://perma.cc/C5NA-T52L].

conditions.[227] Besides, it has been agreed that administrative procedure attracted little interest in Japan until the 1970s.[228] The level of safeguards that the procedural due process clause provides to taxpayers is not high.[229] Thus, it would be difficult to see a direct link between the due process clause under the Constitution of the United States and the discourse on giving reasons in Japan.

My hypothesis on the above question is that Japanese courts and commentators took a rigid attitude toward giving reasons because of three factors which are presented below. American law influenced the first two factors, while the third is peculiar to Japan.

First, several provisions of the Constitution and general principles of administrative procedure were collectively recognized as measures to protect citizens' procedural rights in Japan. A similar phenomenon was found in the US in the *Lochner* era. For example, in *Boyd v. United States*,[230] the US Supreme Court combined the Fourth Amendment rule against unreasonable seizure with the self-incrimination clause under the Fifth Amendment.[231] Although recognizing various provisions and principles as a group does not necessarily mean failure to see the distinctiveness of each, it may make it easier to apply an element of a provision to another provision's context.[232]

Second, the exclusionary rule, or the rule of sacrificing a substantively correct judgment in the present in favor of deterring unfavorable actions by officials in the future[233] had a great impact

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[227] Saikō Saibansho [Sup. Ct.] July 1, 1992, Sho 61 (gyō tsu) no. 11, 46 Saikō Saibansho Minji Hanreishū [Minshū] 437 (Japan). *See also* KATSUMI CHIBA, HEISEI 4 (1992) NENDO SAIKO SAIBANSHO HANREI KAISETSU MINJI HEN [SUPREME COURT CASE COMMENTARY CIVIL EDITION (1992)] (Hosokai ed., 1995) 220, 246–57 (Japan); SHIGENORI MATSUI, THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS 112–13 (2011).

[228] Yasuhiro Okudaira, *Forty Years of the Constitution and Its Various Influences: Japanese, American, and European*, 53 L. CONTEMP. PROBS. 17, 31–32 (1990).

[229] Londoner v. Denver, 210 U.S. 373 (1908).

[230] Boyd v. United States, 116 U.S. 616, 633 (1886).

[231] *See* Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 787–91 (1994) (a critical analysis that there is a better way to think about the Fourth Amendment by returning to its first principles).

[232] *But see* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1907–28 (2014) (arguing that the exclusionary rule has its roots in the interaction between the Fourth Amendment and the Due Process Clauses).

[233] They are often called "prophylactic" rules. *See* Evan H. Caminker, *Miranda and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 11, 30 (2001) (defending the legitimacy of prophylactic doctrinal rules in constitutional law).

on Japanese lawyers.[234] They must have found the idea of securing the integrity of the legal process by giving up a benefit in the near future to be enlightening, and very "American," and therefore quite attractive. The Supreme Court applied the exclusionary rule in the context of criminal procedure for the first time in 1978.[235] However, six out of the fifteen Justices of the Court insisted on the adoption of the rule as early as in 1961.[236]

Third, the failure of the Japanese to follow Surrey's advice is partly accredited to the different lines drawn between civil and criminal laws in Japan and in the U.S. Japanese scholars and practitioners had relatively easily drawn an analogy with criminal law in understanding administrative law, especially when an administrative act may bring about a seemingly adverse impact on the citizens. The concept of an "adverse impact" is broad enough to include acts such as the ascertainment of tax liability. It appears that they have deemed administrative law to effectively be a branch of criminal law.[237] In the U.S., there is also a distinction between civil and criminal laws. Administrative law is definitely a branch of civil law. Even though the distinctions between a regulation, a typical administrative action, and a punishment are sometimes

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[234] *See, e.g.*, Davis v. United States, 564 U.S. 229, 236–39 (2011) (indicating the deterrence of future Fourth Amendment violations is the sole purpose of the exclusionary rule).

[235] Saikō Saibansho [Sup. Ct.] Sept. 7, 1978, Sho 51 (a) no. 865, 32 Saikō Saibansho Keiji Hanreishū [Keishū] 1672 (Japan).

[236] Saikō Saibansho [Sup. Ct.] June 7, 1961, Sho 31 (a) no. 2863, 15 Saikō Saibansho Keiji Hanreishū [Keishū] 915 (Japan). As the law clerk's report on the decision pointed out, two of the Justices (Katsushige Kotani and Daisuke Kawamura) insisted on exclusion of illegally acquired materials without exception, an idea more radical than that of the Supreme Court of the United States at that time. TADASHI KURITA, SHOWA 36 (1961) NENDO SAIKO SAIBANSHO HANREI KAISETSU KEIJI HEN [SUPREME COURT CASE COMMENTARY CRIMINAL EDITION (1961)] (Hosokai ed., 1973) 141, 147.

[237] It is not easy to discern where this idea came from. In the workshop held at Harvard Law School on September 29, 2018, Professor Mark Levin indicated the influence of the Chinese tradition. *See* HALEY, *supra* note 1, at 19–32; MARK LEVIN, *Continuities of Legal Consciousness: Professor John Haley's Writings on Twelve Hundred Years of Japanese Legal History*, 8 Wash. Univ. Global Stud. L. Rev. 317 (2009). It might be accredited to the tradition of German law, in which the conceptual framework of criminal law was employed in the scholarly investigations in the substantive tax law. *See generally* ALBERT HENSEL, STEUERRECHT (3rd ed. 1933) (providing a systematic discussion of tax law partly based on criminal law in Germany); SHOZABURO SUGIMURA, DOITSU SOZEI HO RON [GERMAN TAX LAW] (1931) (translating the second edition of the Hensel's textbook on tax law).

blurred,[238] there are many administrative actions that are far from the punishment of criminals, such as the ascertainment of tax liability of a taxpayer for a given year. American lawyers would not consider issuing a notice of deficiency to a taxpayer to be analogous with his prosecution.

In sum, the strict attitude of the Supreme Court of Japan toward the requirement of giving reasons might be ascribed to three factors: understanding procedural provisions as a whole; influence of the exclusionary rule; and the adverse impacts of administrative actions associated with criminal punishment.

V. CONCLUSION

In this article, I have argued the following two points. First, I have shown that Stanley Surrey wrote a part of the Report of the Shoup Mission based on articles he published during the project he had carried out with Roger Traynor. Second, I have described how Surrey's original idea was interpreted in a totally different context and how it gave birth to a *sui generis* doctrine on giving reasons in administrative procedures.

Although the Japanese experience is unique, we can learn important lessons from it. Recently, several tax law scholars began to criticize "tax exceptionalism," an implicit notion that the general principles of administrative law are not necessarily applied to tax cases.[239] In *Mayo*, the Supreme Court took up the invitation to abandon the tax exceptionalism in the context of the *Chevron* deference.[240] However, the courts are, entirely reasonably, reluctant to extend the reasoned explanation doctrine to the notice of deficiency.[241] Against this backdrop, it may be argued that the process of determining the tax liability of a taxpayer is entirely different from the traditional administrative process in which an

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[238] *See generally* Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 BU L. Rev. 201, 202–05 (1996) (providing an overview of explanations academics offer of the distinction); AUSTIN SARAT ET AL., LAW AS PUNISHMENT / LAW AS REGULATION (2011).

[239] *See, e.g.*, Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 531 (1994); Kristin Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV.1537, 1618 (2006).

[240] Mayo Foundation v. United States, 562 U.S. 44, 46 (2011).

[241] *See supra* note 36 and accompanying text.

administrative agency tries to realize its policy goals through command and control over the regulated parties.[242] In determining the tax liability, a taxpayer and the tax officials do cooperate with each other. A taxpayer discloses the factual information that is necessary in determining her tax liability in a given year to the tax officials. The tax officials then offer her the necessary legal information through statutes, regulations, letter rulings, and so on. Thus, the process of the determination of tax liability has embodied a collaborative relationship between the citizen and the administrative agency. The process of determining tax liability is best conceived as an example of the "third generation of administrative procedure."[243] The Japanese experience reinforces the idea by clarifying the problem of considering the process of determining the tax liability in the context of the traditional command-and-control model of administrative procedure.

[242] *See* Javier Barnes, *Towards a Third Generation of Administrative Procedure*, *in* COMPARATIVE ADMINISTRATIVE LAW 336, 344–45 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2011) (describing the traditional administrative procedure).

[243] *Id*. *See also* JAVIER BARNES, *Three Generations of Administrative Procedures*, *in* COMPARATIVE ADMINISTRATIVE LAW 302 (Susan Rose-Ackerman, Peter L. Lindseth, & Blake Emerson, 2nd ed. 2017) (explaining the "third generation of administrative procedure" expression).