

was gone before the worst of the Watergate hearings and impeachment came up. He returned to teaching and practicing with Covington and Burling here in DC. Still when you had a meeting with Ed he reacted like the law professor he was at heart and gave you a full tutorial on the subject being discussed.

I was later on the other side of Ed in the discussion of a bill proposed by Bob Dole to provide carryover basis rather than step-up at death. Ed was representing the Investment Company Institute and the banking industry and was a fierce competitor. He was as tough on me as if I had been a stranger. The bill passed, but Ed and his clients got it repealed before it went into effect. That was one tough competitor!

Ed lived 91 eventful and fruitful years. He was a champion of good government and a fair tax system. If you looked to see who were Ed's friends you would find all political groups represented. He was not interested in your political party, only your ideas. Ed had the ability to judge us on our argument, not on a label. I checked on Ed's political contributions in a couple of years to see if my judgment was right. In one year he gave to John Connally for President and at the same time to the most liberal member of the Ways and Means Committee, Jim Corman, one a Republican the other a Democrat. In other years it was similar, he gave to the members of either party based on his knowledge and friendships, not on political affiliation.

I was honored to give the fifth Erwin Griswold Lecture at the American College of Tax Counsel in 1997. Ed had preceded me by a couple of years having given the third Griswold Lecture, in 1995. He was always out in front in everything he undertook. He showed us the way to practice but more importantly, how to live our lives. His wife of 61 years, Helen, added to his longevity by getting the two of them off each summer to the summer camp she operated in

Maine. It added years to both of their productive lives.

We will miss Ed, but we are fortunate that he was with us as our teacher for such a long time.

— Sheldon S. Cohen, Washington, DC

## **BORIS KOSTELANETZ:** JUNE 16, 1911 – JANUARY 31, 2006

On January 31, 2006, Boris Kostelanetz passed from being a living treasure to a treasured legend. While future generations of lawyers will not enjoy the privilege of knowing him personally, his life story will remain an inspiration, and his contributions to the law, already an influence on several generations, will continue.

Boris was born on June 16, 1911, in Russia. He lived to see the nation of his birth cease to be Russia and become Russia again. When he was nine, his family fled St. Petersburg, and after an extended period, found a home in New York. In one story he told often, he was watching the neighborhood children playing in the street, and realized that they were yelling at him. In time, he realized it was because he was standing on third base. He learned the rules of stickball, made friends, and learned the ways of his adopted home.

Boris began his career as an accountant, attending St. John's Law School at night to give him an edge in his first profession. The combination of a legal education and accounting skills led him to a position as an assistant United States attorney, prosecuting complex financial crimes. From that point, Boris made history, becoming Special Assistant to the Attorney General of the United States and Special Counsel to the United States Senate Commission to Investigate Organized Crime in Interstate Commerce, commonly known as the Kefauver Committee. As a defense attorney, he and his long-time partner, the great and long-missed Jules Ritholz, filed the amicus brief that set

out the underpinnings of the *Kovel v. United States* decision. Boris, at one time an accountant, gave us the legal precedent to engage accounting services in giving legal advice. He had many other successes, as both a prosecutor and a defense attorney, but few better illustrate his groundbreaking contribution to bringing together an understanding of complex financial transactions with a litigation and criminal defense practice.

From immigrant beginnings, Boris changed the legal landscape. He was not the only legend in his family. Boris's brother, Andre, became an orchestra conductor of world renown. For his part, Boris acknowledged no musical talent, but would often add that his brother showed little acumen for the legal profession.

Boris's wife, Ethel, pre-deceased him by four years. He was dedicated to her, especially as she faced late-in-life health challenges. He also loved and was loved by a son, Richard, a daughter, Lucy, and a beautiful granddaughter, Eliza. His life was full. The law played a central role, but one he kept in balance. As an example, he had a dog named Judge. As he would tell it, after a long day, he enjoyed telling Judge to sit, to lie down, to be quiet.

I recall Bob Fink and Jack Tigue, each of whom had been Boris's partner, telling me, in one way or another over the years, that I was fortunate to know Boris during the period that he was openly beloved, rather than having been subjected to the many years in which his tenacity, hard drive, and demand for attention to detail, pushed so many that worked with him so very hard. Without doubt, however, his mentoring made those who worked with him better lawyers, and better mentors in turn. As Jack Tigue, who continued to have lunch with Boris years after they ceased to be at the same firm, said recently, "BK, as he was known in the firm, had tons of wit, charm and humor. His integrity, and his commitment to the law, to his

clients, and to his colleagues, is the gold standard we all strive to meet.” As Bryan Skarlatos, a partner today of the firm that bears the Kostelanetz name said, “His dedication to the law was true to the end of his life. He was still coming to the office until the week before he died, a reflection of the intensity and energy that he showed throughout his years of practice.”

Boris held too many titles, and received too many honors, to even try to do justice with an attempt at a list. He was dedicated to legal education, teaching at N.Y.U., and supporting schools of which he was and was not an alumnus. He was also committed

to the American Bar Association, receiving the Section of Taxation’s Distinguished Service Award in 1999. On his eighty-fifth birthday, he was inducted as an Honorary Member of the Benchers of the Honorable Society of King’s Inn, an honor rare for any American lawyer, and rarer still for one born a Russian Jew, but a fitting tribute for a man who celebrated Bloomsday as his birthday and the entire world as his home.

Boris Kostelanetz has often and rightfully been described as the “Dean” of tax litigation. Boris is survived by another legend, Lou Bender, long in retirement but one long held in

regard by Boris. In a notice that appeared after Boris’s passing in the New York Times, Mr. Bender wrote in tribute to his “dear friend, coprosecutor, co-lecturer, coauthor, and co-defense lawyer,” in words that may speak for all of us of “an everlasting debt for your wisdom and guidance, and knowledge of the law.... God bless and keep you.” ■

—Kathryn Keneally, *New York, NY*

## POINT & COUNTERPOINT

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Because textualism recognizes the need to consider the context within which the text is found, the rise of the use of textualism, if properly used, will not spell the demise of the tax laws as we currently know and understand them. Textualists will generally resolve questions arising under the Code and changes in the text by looking primarily at the text of the Code itself. However, the resolution should not mean looking at the language in isolation. Those textualists that acknowledge the need to look at the context of the statute to determine its meaning will also consider the regulations, the Code as a whole, and the body of law surrounding the Code. In addition, the context may also include “cultural, political, and ideological impingements on the production and interpretation of meaning.” George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 325 (1995).

A prime example of the need to consider the context is found in section 368(a)(1)(A). In isolation and without considering the context, including the regulations, one might

come to a very different understanding of what Congress meant by “a statutory merger or consolidation” than the meaning one would come to with an understanding of the background. It is possible that a strictly textual approach to interpreting the Code would, in some cases, lead to results that Congress did not anticipate. However, even if a textualist interpretation of individual sections of the Code occasionally results in consequences that Congress did not foresee or intend, such results are unlikely to lead to substantial harm to the entire tax system because tax litigation usually answers questions relating to individual sections or factual situations, not the entirety of the Code.

Moreover, Congress certainly has the ability to fix results that it did not intend, and has regularly done so. Since 1986, the Code has been amended several thousand times. Thus, it appears that Congress does not view the Code as static and is certainly willing to make changes to the Code as necessary. In fact, when Congress disagrees with the decisions of the courts

relating to tax matters, Congress historically has been willing to “fix” the law. Demonstrating its ability and willingness to address problems with the Code itself and the interpretation of the Code by the courts, Congress took less than a year to close the “loophole” created by *Gitlitz v. Commissioner*, 531 U.S. 206 (2001).

A textualist approach may lead to results unanticipated by Congress, but that possibility seems no less likely than when other methods of statutory interpretation are used. The likelihood that significant changes in the tax law will result from textualist interpretations is much lower when considering the broader, more modern approach to textualism, rather than the narrower, plain meaning approach that seeks meaning without consideration of context. A narrow, noncontextual reading of the Code poses a serious threat to current state of the tax law. As a result, we do not want the Code cut down to its text, but rather interpreted in light of its context. ■