

Mabel Walker Willebrandt

By Jasper L. Cummings, Jr. and Alan J.J. Swirski*



Mabel Walker Willebrandt headed what became the Tax Division of the U.S. Justice Department from 1921 to 1929. She was famous at the time not for her tax duties but for her duties in enforcing the Volstead Act (Prohibition), which also was handled by her division. She was the second female Assistant Attorney General.†

Q What did you do before you joined the Justice Department?

A I graduated from the law school of the University of California in 1916 and largely defended prostitutes in police court. I served as the first public defender for women in Los Angeles, without pay, and represented over 2000 women. I did become active in Republican Party politics.

Q Why were you appointed to head Prohibition enforcement?

A Well, as one of my friends said: “Nobody in the Justice Department wanted that job. It had no political advantages at all. So, of course, they gave it to Mabel.” So I certainly did not seek out that part of the job. Eventually the opposition of the wets kept me from being appointed as the first female federal judge.

Q How much of your division’s time was spent on tax cases?

A Fifty percent. Of course there is a substantial overlap between the two because one of the chief vices of the bootlegger is the dastardly evasion of taxes. In addition, Prohibition

enforcement was assigned to the IRS. I also supervised the Federal Bureau of Prisons.

Q Was there any conflict between your responsibility for Prohibition enforcement and for tax appeals?

A Some would say so. I recall the time I ruled that imported bootleg alcohol could be sold by the Federal Marshals tax free. Secretary Mellon and the Commissioner were against me on that one and took it up with the Attorney General and Congress. The *Times* headline said I “overruled Mellon.”

Q How many cases did you argue in the Supreme Court?

A My office submitted 278 cases on certiorari to the Supreme Court and I personally argued many of them; I am listed on 172 cases. Of course, my staff wrote most of the briefs.

Q Which do you consider to be the most important tax cases?

A It is hard to say. I will list these: *Taft v. Bowers*, 278 U.S. 470 (1929) (donee must use donor’s cost basis in computing donee’s sale gain); *Hellmich v. Hellman*, 276 U.S. 233 (1928) (liquidating dividend is in exchange for stock); *Reinecke v. Northern Trust Co.*, 278 U.S. 339 (1929) (contemplation of death case).

Q Would you be surprised that 80 years after your work there would be disputes in the Supreme Court about prosecuting officials for failure to provide “honest services” to the government or to private employers under the federal anti-fraud statutes? (See current litigation in *Black v. United States*, *Weyhrauch v. United States*, and *Skilling v. United States*.)

A No. We faced that in *Donnelley v. United States*, 276 U.S. 505 (1928). Donnelley was a Prohibition enforcement officer who failed to report apparent violations by a small-time bootlegger named Curran. He was convicted and appealed on the basis of numerous objections to the jury charge. One of them was the charge that he should have reported the apparent violation to the U.S. Attorney even though he was unsure a violation had occurred. The official position of the Justice Department was that if Donnelley did not have enough facts to make a case against Curran then he did not have to report. I disagreed. So I signed and filed Solicitor General Mitchell’s brief but also signed and filed a second brief taking the opposition position: that it was not up to Donnelley to decide whether Curran could be convicted or whether it was most “advantageous” to the enforcement effort to pursue him rather than someone else. The Supreme Court agreed with me in affirming the conviction. (Elizabeth MacDonald thought Willebrandt stretched to make her argument.)

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† See generally Elizabeth K. MacDonald, “The Justice Department and Some Problems of Enforcement:” Mabel Walker Willebrandt, “Prohibition Portia” (posted at Women’s Legal History Project, Stanford University); Mabel Walker Willebrandt, *THE INSIDE OF PROHIBITION* (1929); Dorothy M. Brown, *MABEL WALKER WILLEBRANDT: A STUDY OF POWER, LOYALTY AND LAW* (1984) (which was serialized in the *New York Times*); The Frederick A. Cook Society website; *New York Times* obituary, Apr. 9, 1963, at 31; various *New York Times* Archive articles, including Jan. 11 and 19, 1925, Nov. 17, 1925, Sept. 27, 1928, May 28, 1929, Apr. 15, 1934, and Oct. 22, 1950.

Q How did you come to leave the Justice Department?

A I think it became politically difficult for me after I was perceived to have attacked Governor Smith in connection with the 1928 campaign. I made several speeches to religious groups under the auspices of the Speaker's Bureau of the RNC. There was a lot of press about that, positive and negative, and it was thought that there was a rift between me and Attorney General Mitchell (formerly Solicitor General). Finally on May 26, 1929, I submitted my resignation to President Hoover, informing him I would become D.C. counsel for the Aviation Corporation.

Q What did you do after you left the Justice Department?

A I did some work with the wine industry (actually, grape concentrate) and then devoted my practice mostly to income and estate tax work; in fact I was known as the "tax lawyer to the stars," including Louis B. Mayer. I also became interested in aviation law and worked with Amelia Earhart. I was the ABA's first female committee chairman, heading the Air Law Committee in 1938.

Q The 1928 election was a time of a lot of controversy for you. Did you experience anything like that later in your career?

A I became counsel to the Screen Directors Guild. As you recall, the Director's Guild agreed with the loyalty oath that Senator McCarthy demanded. We had quite a hot time when De Mille, Capra and a majority of the board opposed the president, Joseph Mankiewicz, who was supported by John Huston, Elia Kazan, Billy Wilder and William Wyler.

Q Did you have any involvement with Democratic administrations?

A Well only indirectly. I was portrayed at the 1934 Gridiron Club dinner as a representative of conservative principles, along with William Randolph Hearst, Clara Bow and Al Capone. I read about that in the *Times* and recall an interesting reference to Robert H. Jackson, who had just become General Counsel of the Bureau of Internal Revenue. He was in a skit about CCC boys and was described as being from New Hampshire, although of course he was from upstate New York, like the President. One of the other "actors" asked him "what is ethics?" and he responded: "Ethics is a noble sentiment that reaches its peak in Presidents between elections."

Q What was your last tax case?

A I think it was the case of Mr. Bronson. The Tax Court ruled that he should have included a large amount in income, and upheld the fraud penalty. I appealed to the Second Circuit, and with Hand dissenting, the Second Circuit reversed and remanded on the fraud penalty. *Bronson v. Commissioner*, 183 F.2d 529 (2d Cir. 1950), rev'g 7 T.C.M. (CCH) 415 (1948). I convinced the court that the receipt of stock in exchange for the taxpayer's release of an option to buy bonds and receive bonus stock in 1929 could reasonably be viewed as nontaxable. It is rather remarkable how long it took for the tax effects of that terrible year 1929 to work their way through the tax system.

Q Do you consider the taxation of ordinary income or capital gains to be more onerous?

A [As Secretary Mellon has said, the taxation of ordinary income is quite onerous. Consider this case.] "An heir to a large estate visits a lawyer. He convinces the lawyer that he is being victimized by rich culprits who have forged a will to deprive him of his share in the estate. The victim has no funds, but has in the opinion of the lawyer a sound case. The lawyer takes the case without retainer, of necessity. He burns the midnight oil, works devotedly for ten years, and finally, after taking the case through all the courts in the state, recovers for his client and receives a net fee of \$100,000. Along comes the United States government and taxes him as though he received that fee for one day's experience in court and requires him to pay \$30,220 as his tax for this year. It does not permit him to spread the income over the years in which it was earned. If, added to that situation, the lawyer in 1932 suffered a loss of all of his \$100,000 income through the decline of some South American bonds, which were sold to him on the representation that the State Department had approved the issue, he cannot deduct the loss. Even though he has had no real net income, since the \$100,000 fee would be offset by the \$100,000 loss on the bonds, the government still says he must pay a tax on income despite the actualities." Mabel Walker Willebrandt, *The Increasing Burden of Taxation*, 12 NEB. L. BULL. 63, 77 (1933) (Dec. 1932 Proceedings of the Nebraska State Bar Association). ■