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Justice for All: Reimagining the Internal Revenue Service

David J. Herzig

Valparaiso University School of Law, david.herzig@valpo.edu

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JUSTICE FOR ALL: REIMAGINING THE INTERNAL REVENUE SERVICE

*David J. Herzig**

The ability of the Internal Revenue Service to both collect the tax and enforce the initial determination of tax liability in a neutral and fair manner has been compromised by a February 2011 pronouncement issued by the Department of Justice stating that the President and the Department of Justice believe that section 3 of the Defense of Marriage Act is unconstitutional and that the Department of Justice will no longer defend the statute in courts. The pronouncement results in a disparate treatment of similar taxpayers based solely on the forum of litigation. Through this lens, I examine whether it is proper for the Department of Justice and the Internal Revenue Service to continue to share prosecutorial powers when such results are possible. Assuming that any incremental improvement is desirable as long as does not harm one person, I conclude that the Department of Justice should have exclusive litigation authority to protect against this very result.

*Visiting Assistant Professor, Indiana University Robert H. McKinney School of Law and Associate Professor of Law, Valparaiso University School of Law. Professor Herzig would like to thank the 6th Annual Junior Tax Scholars Workshop held at the University of California, Irvine, the fourth annual regional junior faculty works-in-progress workshop at Washington University Law School, Emory University's Critical Perspectives on Tax Policy Workshop, Law and Society, the Pittsburgh Tax Law Review Symposium participants, Valparaiso School of Law Work in Progress, Aziz Huq (University of Chicago), William Eskridge (Yale University), David Gamage (University of California, Berkeley), Samuel Brunson (Loyola University Chicago), Patricia Cain (Santa Clara), Michael Murray (Valparaiso University), D.A. Jeremy Telman (Valparaiso University), Belinda Herzig, Esq., and research assistants Greg Sylvester, Melissa Gardner, Jessica Levitt, Jonathan Sichtermann, and John VanDenburgh for their help in the research and revision of the article, without binding them to conclusions with which they disagree.

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I. INTRODUCTION

To “[p]rovide America’s taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.”¹

¹ INTERNAL REVENUE SERV., THE AGENCY, ITS MISSION AND STATUTORY AUTHORITY, <http://www.irs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority> (last visited Jan. 16, 2013).

On the basis of a letter from Attorney General Eric Holder to Representative Boehner (the DOJ Pronouncement), the Department of Justice (DOJ) states that it no longer will defend section 3 of the Defense of Marriage Act (DOMA) in court.² The DOJ Pronouncement further states that the President will continue to enforce the terms of DOMA.³ Executive agencies, including the Service, are instructed to comply with section 3 of DOMA unless and until Congress repeals it or the judiciary finally determines its constitutionality.⁴ Despite the stated desire of the President and the DOJ to limit the pronouncement only to court cases, a ripple effect now cascades as the executive agencies enforce DOMA through the administrative process.⁵

The DOJ Pronouncement requires the Internal Revenue Service (Service) to treat similarly situated taxpayers differently. In a tax matter, after

² Letter from Eric H. Holder, Jr., Attorney General, to John A. Boehner, Speaker, United States House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> [hereinafter DOJ Pronouncement] (“Given that conclusion [that the Defense of Marriage Act (DOMA) is unconstitutional], the President has instructed the Department not to defend the statute in *Windsor* and *Pedersen*, now pending in the Southern District of New York and the District of Connecticut. I concur in this determination.”). Currently, the Department of Justice (DOJ) has followed up on its pronouncement and in a brief filed in the immigration context in Defendants’ Opposition to Bipartisan Legal Advisory Group’s Motion to Dismiss at 1, *Lui v. Holder*, No. 2:11-CV-01267-SVW (JCGx), 2011 WL 10653943 (C.D. Cal. 2011), available at <http://metroweekly.com/poliglot/Defendants%20Opposition%20to%20MTD%20Lui%20v.%20Holder.pdf> [hereinafter DOJ Sept. 2 Brief] (stating that DOMA is unconstitutional even in the immigration context); see also Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 508–09 (2012); Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1207 (2012); Nan D. Hunter, *Introduction: The Future Impact of Same-Sex Marriage: More Questions Than Answers*, 100 GEO. L.J. 1855, 1875–76 (2012); Aziz Z. Huq, *Enforcing (but Not Defending) ‘Unconstitutional’ Laws*, 98 VA. L. REV. 1001, 1003–04 (2012); Douglas Nejaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1217 (2012).

³ DOJ Pronouncement, *supra* note 2 (“Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch.”).

⁴ *Id.* (“To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive’s obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law’s constitutionality.”).

⁵ See, e.g., DOJ Sept. 2 Brief, *supra* note 2, at 1 (demonstrating the confusion of executive agencies in that the United States Citizenship and Immigration Services, an executive agency, is in theory required to comply with section 3 of DOMA but that DOJ will not defend section 3 of DOMA in court proceedings).

an administrative review process, the taxpayer may challenge the final determination in court. The significance of the choice of forum in tax issues is two-fold. First, there are three possible courts for this challenge: (1) Tax Court, (2) Federal Court of Claims, and (3) district court.⁶ Each court may, at times, have exclusive jurisdiction or concurrent jurisdiction depending on the underlying tax issue.⁷ Second, in Tax Court the Department of the Treasury (Treasury), represented by the Chief Counsel of the Service, represents the Commissioner in the litigation, while in district court, court of claims, and appellate court, the DOJ represents the Commissioner.⁸ The DOJ Pronouncement thus creates two different litigation positions depending on the resulting court: DOJ not defending DOMA and Chief Counsel defending DOMA.⁹

⁶ Thomas D. Greenaway, *Choice of Forum in Federal Civil Tax Litigation*, 62 TAX LAW. 311, 311–12 (2009); David J. Herzig, *Something From Nothing: Taxing Assets Accurately*, 2011 MICH. ST. L. REV. 1057, 1085 (2011); Leandra Lederman, *Tax Appeal: A Proposal to Make the United States Tax Court More Judicial*, 85 WASH. U. L. REV. 1195, 1196–97 (2008) [hereinafter Lederman Proposal]; Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 557 n.299 (2011); Bryan T. Camp, *The Equal Protection Problem in Innocent Spouse Procedures*, 112 TAX NOTES 281 (July 17, 2006) [hereinafter Camp, *Equal Protection*]. In sum, the Federal Court of Claims and the district court have concurrent jurisdiction except for limited items such as: (1) the Court of Federal Claims may *not* hear cases for the refund of either tax shelter promoter penalties or understatement penalties under the Internal Revenue Code (Code) sections 6700 and 6701, respectively, I.R.C. § 7422(i); (2) the Court of Federal Claims has *exclusive* jurisdiction to hear cases brought solely to recover statutory interest in excess of \$10,000, 28 U.S.C. § 1491(a)(1); (3) the Court of Federal Claims lacks jurisdiction to review an Internal Revenue Service (Service) denial of interest abatement under section 6404(e)(1) of the Code, *see* *Hinck v. United States*, 550 U.S. 501, 503 (2007) (stating that Tax Court is the exclusive forum); and (4) the Court of Federal Claims is without jurisdiction if the plaintiff has a claim pending for the same matter in any other court, 28 U.S.C. § 1500.

⁷ Greenaway, *supra* note 6, at 313–15; Lederman Proposal, *supra* note 6, at 1196–97; Camp, *Equal Protection*, *supra* note 6, at 281. For example, Tax Court and district court have concurrent jurisdiction based on the taxpayer’s decision for deficiency claims, while the Tax Court has exclusive jurisdiction for section 6015 innocent spouse relief and district court has exclusive jurisdiction for refund cases.

⁸ 5 U.S.C. § 901; I.R.C. § 7452.

⁹ *Cohen v. United States*, 578 F.3d 1, 6 (D.C. Cir. 2009) (finding that a Service notice “constituted a final agency action” under the Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2000 & Supp. IV 2004) [hereinafter APA], which ended what is referred to as tax exceptionalism); *see also* *Intermountain Ins. Serv. of Vail, LLC v. Commissioner*, 134 T.C. 211, 220, 225–26 (2010), *rev’d* 650 F.3d 691 (D.C. Cir. 2011); 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) (discussing the tax exceptionalism view); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1541 (2006) (noting that the “perception of tax exceptionalism . . . intrudes upon much contemporary tax

If the Service complies with the DOJ Pronouncement and enforces section 3 of DOMA, equal protection and due process issues arise. First, there will be a different standard applied during the administrative process, e.g., audit, than during the litigation process. Second, depending on the court in which the matter is heard, the government will take different litigation positions.¹⁰ The first issue results in claims that are examined under rational basis scrutiny, while the second issue is an access-to-courts situation that reads on a fundamental right and is examined under the strict scrutiny standard. Finally, if the Commissioner complies with the DOJ Pronouncement, he or she will violate the oath duty by enforcing a statute believed to be unconstitutional.

Additionally, the different treatment of similarly situated taxpayers is a failure of the purpose of the most recent Congressional reform effort of the agency in 1998.¹¹ The type of disparate treatment of taxpayers in the same court that has been shunned since the *Golsen v. Commissioner* decision in the 1970s has cropped up again.¹² As tax exceptionalism has slowly come to an end,¹³ a broader examination should be taking place to determine if the 1998

scholarship and jurisprudence.”).

¹⁰ Since a vast majority of the litigation is in Tax Court, this exacerbates the situation. Approximately ninety-five percent of all federal tax cases are litigated in the Tax Court. *See, e.g.,* Lederman Proposal, *supra* note 6, at 1197; Christopher M. Pietruszkiewicz, *Conflating Standards of Review in the Tax Court: A Lesson in Ambiguity*, 44 HOUS. L. REV. 1337, 1340 (2008).

¹¹ Internal Revenue Service Restructuring and Reformation Act of 1998, Pub. L. No. 105-206, §§ 1001–9016, 112 Stat. 685 (1998) [hereinafter 1998 Reform Act]; *see also Practices and Procedures of the Internal Revenue Service: Hearing Before the S. Comm. on Finance*, 105th Cong. 100 (1997) [hereinafter 1997 Senate Hearing]; *IRS Oversight: Hearing Before the S. Comm. on Finance*, 105th Cong. 7 (1998) [hereinafter 1998 Senate Hearing]; JOEL SLEMRD & JON BAKIJA, *TAXING OURSELVES: A CITIZEN’S GUIDE TO THE DEBATE OVER TAXES* 18 (2004); Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 20–26 (2004) [hereinafter Camp, *Administration*]; John R. Gardner & Benjamin R. Norman, *Effects of the Shift in the Burden of Proof in the Disposition of Tax Cases*, 38 WAKE FOREST L. REV. 1357–61 (2003); Michael J. Graetz, *100 Million Unnecessary Returns: A Fresh Start for the U.S. Tax System*, 112 YALE L.J. 261, 280 (2002); Shu-Yi Oei, *Getting More by Asking Less: Justifying and Reforming Tax Law’s Offer-in-Compromise Procedure*, 160 U. PA. L. REV. 1071, 1105–06 (2012).

¹² 54 T.C. 742, 757 (1970), *aff’d*, 445 F.2d 985 (10th Cir. 1971) (holding that the Tax Court will follow its own precedent or set its own rule of decision unless the court of appeal to which an appeal would lie has already ruled on the issue; in such a case, the Tax Court will follow the precedent of the relevant court of appeal).

¹³ Tax exceptionalism is the principle that tax law is different than other areas of administrative law and that Treasury Department (Treasury) regulations should not be afforded *Chevron* deference. *See* Kristin E. Hickman, *Agency Specific Precedents: Rational*

Reform Act accomplished the stated goals. If not, as this article argues, then Congress should revisit the 1998 reforms to institute the proper taxpayer protections.

In Part II, I argue that the disparate treatment of taxpayers under the current agency construct between the Service and the DOJ results in colorable equal protection claims. At a minimum, it is clear that there is a significant issue with the lack of intra-district enforcement of the same law depending on the prosecutorial authority, i.e., the Service or the DOJ. The splitting of the law creates an unnecessary friction, and this friction causes gaming by taxpayers.¹⁴ The potential for forum shopping by taxpayers is inefficient in both enforcement and compliance under our current system. Thus, even if the equal protection argument fails, the friction must result in a broader examination of the sharing of prosecutorial powers by the DOJ and the Service.

In Part III, I examine the history of the Service to demonstrate that its current incarnation is not the historical norm and has been significantly modified. Once it is understood that the agency is not static, structural changes to it may be examined in terms of whether they move the agency closer to or further from its proper function regarding the promotion of the efficient and fair collection of taxes. The Service, an agency that employs both inquisitorial and adversarial techniques, creates confusion and suboptimal reporting by taxpayers. Although other agencies utilize similar techniques, the Service is special in that all citizens and residents of the United States are subject to its jurisdiction. There are no opt-in or difficult opt-out provisions.¹⁵ Thus, extra protections must be afforded for taxpayers.

Ignorance or Deliberate Strategy?, 89 TEX. L. REV. 89, 104 (2011); Hickman, *supra* note 9, at 1548; Anthony C. Infanti, *Tax Reform Discourse*, 32 VA. TAX REV. 205, 249–52 (2012); Leandra Lederman, *The Fight Over “Fighting Regs” and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643, 700 (2012); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 968 (2004).

¹⁴ For example, although a taxpayer is married, for state law purposes, the related party rules do not apply because of DOMA. *See Voss v. Commissioner*, 138 T.C. 204 (2012) (recognizing that taxpayers, although married, claimed a higher mortgage interest deduction because of the application of DOMA); Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529, 1536–39 (2008); Dennis J. Ventry, Jr., *Saving Seaborn: Ownership Not Marriage as the Basis of Family Taxation*, 86 IND. L.J. 1459, 1469, 1471 (2011).

¹⁵ I.R.C. § 877; H.R. REP. NO. 108-548, pt. 1, at 62–63 (2013) (listing the objective requirements to be subject to the expatriation tax); I.R.S. Notice 09-85, 2009-45 I.R.B. 598; Richard A. Westin, *Expatriation and Return: An Examination of Tax-Driven Expatriation by United States Citizens, and Reform Proposals*, 20 VA. TAX REV. 75, 80–81 (2000); Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289 (2011).

From the premise that any incremental improvement is Pareto efficient,¹⁶ I ultimately argue in Part IV that the Service should be reformed. I argue that the optimal organizational structure is for the DOJ to have full litigation authority.

II. DOJ PRONOUNCEMENT

After decades of litigation, two different district courts in Massachusetts,¹⁷ applying a rational basis standard, struck down section 3 of DOMA¹⁸ as unconstitutional.¹⁹ Shortly following the *Gill v. Office of Personnel Management* and *Massachusetts v. U.S. Department of Health and Human Services* decisions, Attorney General Holder issued a pronouncement stating that the DOJ would no longer defend DOMA cases.²⁰ The DOJ Pronouncement went further than the *Gill* court, creating a new suspect classification based on an individual's sexual identity, and found that section 3 of DOMA violated the equal protection clause under a strict scrutiny approach.²¹ Subsequent to the DOJ Pronouncement, a number of cases have been decided, almost all of which held that DOMA was unconstitutional under the DOJ's articulated standard.²² Two of the DOMA series of cases are under consideration with the Court.²³

The DOJ Pronouncement provided that DOJ would not defend section 3

¹⁶ Eric A. Posner & David Weisbach, *Internal Paretianism: A Defense*, 13 CHI. J. INT'L L. 347, 349 (2013) ("The Pareto principle in economics is an ethical standard that provides that a project is socially desirable if it makes at least one person better off than in the status quo and makes no person worse off.").

¹⁷ *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), *aff'd*, 682 F.3d 1 (1st Cir. 2012); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010), *aff'd*, 682 F.3d 1 (1st Cir. 2012).

¹⁸ *Gill*, 699 F. Supp. 2d at 377 (quoting DOMA as stating "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

¹⁹ *Id.* at 387 ("[T]his court is convinced that 'there exists no fairly conceivable set of facts that could ground a rational relationship' between DOMA and a legitimate government objective.").

²⁰ DOJ Pronouncement, *supra* note 2; DOJ Sept. 2 Brief, *supra* note 2 (stating that DOMA is unconstitutional even in the immigration context).

²¹ DOJ Pronouncement, *supra* note 2; DOJ Sept. 2 Brief, *supra* note 2, at 10–23.

²² *See, e.g.*, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 113 S. Ct. 786 (2012); *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 113 S. Ct. 786 (2012); *Massachusetts*, 682 F.3d at 1. *But see* *Sevcik v. Sandoval*, No. 2:12-cv-00578-RCJ-PAL, 2012 U.S. Dist. LEXIS 169643 (D. Nev. Nov. 26, 2012).

²³ *Hollingsworth*, 113 S. Ct. at 786; *Windsor*, 113 S. Ct. at 786.

of DOMA.²⁴ This position, although not without controversy, appears to be within the authority of the agency.²⁵ Since President Barack Obama believes that DOMA is unconstitutional, he should neither enforce nor defend it.²⁶ Thus, the current prevailing constitutional theory opines that the DOJ Pronouncement is within the authority of the DOJ as an executive agency.²⁷

The practical result of the DOJ Pronouncement in tax enforcement is the creation of two litigation positions depending on the forum. In Tax Court, the Service is compelled to take the position that section 3 of DOMA is constitutional and enforce the provision.²⁸ In district court or the Federal Court of Claims, however, the DOJ will not defend the statute.²⁹ The result of these disparate positions is that similarly situated taxpayers will be treated differently — a traditional equal protection argument.

A. Equal Protection and Access to Courts

The Equal Protection Clause compels some limited standards of equal

²⁴ DOJ Pronouncement, *supra* note 2.

²⁵ Devins & Prakash, *supra* note 2, at 514–15 (“The President’s critics and defenders are both mistaken. Contrary to his critics, there simply is no duty to defend federal statutes the President believes are unconstitutional. Contrary to his defenders, there likewise is no duty to enforce such laws.”); Gorod, *supra* note 2; Huq, *supra* note 2; Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183 (2012); Saikrishna B. Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1664–66 (2008). There are older arguments that support contrary interpretations. See Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Revisiting the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 867, 881 (1994).

²⁶ President Barack Obama is not the first president to make such a pronouncement. President Thomas Jefferson was the first president to confront a law he believed unconstitutional and utterly rejected any notion that he had to enforce and defend it. The Sedition Act, passed during the presidency of John Adams, criminalized criticism of high-ranking federal officers. Jefferson believed it was beyond the powers of Congress and violated the First Amendment. See Letter from Thomas Jefferson to Edward Livingston (Nov. 1, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON 57 n.1 (Paul Leicester Ford ed., 1897) (describing Jefferson’s decision to stop the prosecution of crimes under the Alien and Sedition Act); Letter from Thomas Jefferson to William Duane (May 23, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 54, 55 (indicating intention to “order a nolle prosequi” in such cases); Devins & Prakash, *supra* note 2, at 514–15; Prakash, *supra* note 25, at 1664–66.

²⁷ See generally Devins & Prakash, *supra* note 2, at 509; Gorod, *supra* note 2, at 1203; Huq, *supra* note 2; Meltzer, *supra* note 25, at 1213–15.

²⁸ See, e.g., *Merrill v. Commissioner*, 98 T.C.M. (CCH) 25 (2009).

²⁹ See, e.g., *Windsor v. United States*, 133 S. Ct. 786, 786 (2012); *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F.3d 1, 7 (1st Cir. 2012); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 377 (D. Mass. 2010).

treatment toward litigants.³⁰ Most importantly, it requires that the government, including the courts, treat all similarly situated persons similarly.³¹ Laws that classify individuals based on race, ethnicity, national origin, alienage, and religion must be justified by a compelling state interest,³² and laws that classify individuals based on gender are subject to intermediate scrutiny.³³ Decisions based on other classifications, such as age or wealth, are presumed to be valid and subject only to rational basis review, absent some sub-constitutional protection.³⁴

Equal access to the courts has been deemed to be a fundamental right subject to the strict scrutiny standard.³⁵ If the right is neither a fundamental right nor a suspect classification, then the standard is examined using the rational basis test.³⁶ I will first argue that much like the habeas cases, this is a fundamental access to courts issue deserving strict scrutiny.³⁷ Alternatively,

³⁰ Alexandra D. Lahav, *The Case for "Trial by Formula"*, 90 TEX. L. REV. 571, 604 (2012).

³¹ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)); Lahav, *supra* note 30, at 604.

³² *Cleburne*, 473 U.S. at 440 (citing *Graham v. Richardson*, 403 U.S. 365 (1971); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)); Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1407 n.141 (2010) ("Religion has been included in the list of suspect classifications, albeit in dicta." (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam))); Lahav, *supra* note 30, at 604–05.

³³ *See Cleburne*, 473 U.S. at 441 ("A gender classification fails unless it is substantially related to a sufficiently important governmental interest." (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976))).

³⁴ *Id.* at 440 ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." (citing *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981)); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174–75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Dukes*, 427 U.S. 297); *see also* 42 U.S.C. §§ 6101–6107 (2006) (prohibiting discrimination in employment on the basis of age in programs receiving federal aid).

³⁵ *Cleburne*, 473 U.S. at 440; *United States v. Carolene Prods.*, 304 U.S. 144, 144 n.4 (1938); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); Calvin Massey, *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV. 1, 20 (2007) (stating that "access to courts receives strict scrutiny . . ."); Alexander Tsisis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693, 723 (2012).

³⁶ *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *see also Cleburne*, 473 U.S. at 440.

³⁷ *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2003) (collecting cases in which right of access to courts was held to be fundamental and strict scrutiny applied); *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (recognizing the right of access to courts as "fundamental"); Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine*, 43 CONN. L. REV. 1059 (2011); Laura Gaston Dooley, *Equal Protection and the Procedural Bar Doctrine*

even if this differing prosecutorial standard does not present an access-to-courts, strict scrutiny equal protection issue because there is no denial of *any* access to courts, then it is still a violation of equal protection under a rational basis test.³⁸

Tax issues are unique.³⁹ After the administrative review process, the taxpayer may challenge the final determination.⁴⁰ The uniqueness of tax issues is two-fold. First, there are three possible courts for this challenge: (1) Tax Court, (2) Court of Claims, and (3) district court.⁴¹ Each court may, at times, have exclusive jurisdiction or concurrent jurisdiction depending on the underlying tax issue.⁴² For example, Tax Court and district court have concurrent jurisdiction based on the taxpayer's decision for deficiency claims.⁴³ While Tax Court has exclusive jurisdiction for section 6015 innocent spouse relief, district court has exclusive jurisdiction for refund cases.⁴⁴ Second, in Tax Court, the office of the Chief Counsel of the Service represents the Commissioner in the litigation; in district court, the Court of Claims, and appellate court, the DOJ represents the Commissioner.⁴⁵

Under the DOJ Pronouncement, the Service is instructed to continue to

in Federal Habeas Corpus, 59 FORDHAM L. REV. 737, 755 (1991); Stephen I. Valdeck, *Federal Courts, Practice & Procedure: Boumediene's Quiet Theory: Access to Courts and the Separation of Power*, 84 N.D. L. REV. 2107, 2117–18 (2009) (describing *Griffin* as the beginning of a line of cases regrounding access to the courts in the Due Process and Equal Protection Clauses following the early development of the “denial-of-access” case law exemplified by *ex parte Hull*, 312 U.S. 546, 547–49 (1941)).

³⁸ *McGowan v. Maryland*, 366 U.S. 420, 425 (1961) (“The constitutional safeguard [of the Equal Protection Clause] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.*”) (emphasis added); Frank Easterbrook, *Levels of Generality in Constitutional Interpretation: Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992).

³⁹ See discussion *supra* note 9. Although other agencies have similar issues, tax adds layers of complexity in the perceived taking by the government as well as the opt-in by all U.S. citizens and residents.

⁴⁰ See *infra* Part IV.

⁴¹ Camp, *Equal Protection*, *supra* note 6, at 281; Greenaway, *supra* note 6, at 311–12; Lederman Proposal, *supra* note 6, at 1196–97.

⁴² Camp, *Equal Protection*, *supra* note 6, at 281; Greenaway, *supra* note 6, at 311–12; Lederman Proposal, *supra* note 6, at 1196–97.

⁴³ Camp, *Equal Protection*, *supra* note 6, at 281; Greenaway, *supra* note 6, at 311–12; Lederman Proposal, *supra* note 6, at 1196–97.

⁴⁴ Camp, *Equal Protection*, *supra* note 6, at 284; Greenaway, *supra* note 6, at 311–12; Lederman Proposal, *supra* note 6, at 1196–97.

⁴⁵ Greenaway, *supra* note 6, at 324; Lederman Proposal, *supra* note 6, at 1204.

enforce the terms of section 3 of DOMA.⁴⁶ Since the DOJ Pronouncement does not instruct the administrative agency not to defend section 3 of DOMA, the Chief Counsel would be required to advocate an unconstitutional position in Tax Court. Thus, the application of the DOJ Pronouncement to Tax Court proceedings violates equal protection principals. If access to a consistent prosecutorial position turns on merely the difference in forum, then taxpayers in courts that define the constitutionality of section 3 of DOMA differently are denied equal access to federal collateral review.⁴⁷ The procedural appeal of the agency determination treats similarly situated taxpayers differently even though their claims are identical.⁴⁸ That different treatment violates the equal protection principles the Court articulated in *Wainwright v. Sykes*.⁴⁹

The Court has a rich history of ensuring that similarly situated individuals are treated the same.⁵⁰ Further, there is a new movement pushing for the natural extension of this doctrine to outcome equality.⁵¹ The underlying principle is that once there is an avenue for challenging an outcome, the government cannot cut back on that opportunity in a discriminatory manner.⁵²

A hypothetical clarifies the problem. Suppose taxpayer *A* is a validly married same-sex partner and has, through audit, been assessed a deficiency because she claimed the marital deduction on the federal tax return. This deduction was denied because the DOJ Pronouncement instructs the Service to continue to enforce section 3 of DOMA, under which the marriage of taxpayer *A* is not recognized. Assume that taxpayer *A* does not have the requisite funds to go to district court and is forced to go to Tax Court, as is the case with the majority of taxpayers.⁵³ In Tax Court, the Chief Counsel

⁴⁶ DOJ Pronouncement, *supra* note 2.

⁴⁷ *But see* Camp, *Equal Protection*, *supra* note 6, at 288.

⁴⁸ Dooley, *supra* note 37, at 754.

⁴⁹ 433 U.S. 72, 87. 90–91 (1977); *see also* Dooley, *supra* note 37, at 754.

⁵⁰ *See* Tennessee v. Lane, 541 U.S. 509, 533–34 (2003).

⁵¹ *See, e.g.*, Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011); Lahav, *supra* note 30.

⁵² Dooley, *supra* note 37, at 755; *see also* Bounds v. Smith, 430 U.S. 817, 828–29 (1977) (stating that prison authorities must provide adequate law libraries and assistance to prisoners who wish to pursue court claims to preserve their fundamental constitutional right of access to the courts); Mayer v. City of Chicago, 404 U.S. 189, 198 (1971) (holding that a defendant convicted on misdemeanor charges is entitled to a transcript on appeal); Douglas v. California, 372 U.S. 353, 357–58 (1963) (holding that the state’s refusal to provide indigent appellants with counsel in appeals as of right violates equal protection); Smith v. Bennett, 365 U.S. 708, 713–14 (1961) (holding that the nominal filing fee required of habeas corpus petitioners violates equal protection).

⁵³ *See, e.g.*, Lederman Proposal, *supra* note 6; Pietruszkiewicz, *supra* note 10.

represents the Service and continues to defend DOMA in the trial.⁵⁴ Only upon a circuit court appeal will the DOJ take over the government's litigation.⁵⁵ It should be noted, however, that an appeal is not compulsory and might not even be likely. If one factors in the litigation costs, the prepayment of tax due for appeal, and the litigation risk that either the DOJ or another party will contest the appeal, or the court ignores the taxpayer and the DOJ positions and rules the taxpayer may never be subjected to the standard that the DOJ espoused in the memorandum.

On the other hand, we have taxpayer *B*, also a validly married same-sex partner who, through audit, has been assessed the same deficiency for the same reasons. Taxpayer *B*, however, has the requisite funds to go to district court, and the DOJ immediately files a brief conceding that section 3 of DOMA is unconstitutional and thus the deduction was valid.⁵⁶ The federal court system is treating taxpayers *A* and *B* differently even though their federal constitutional claims are identical. This different treatment violates equal protection principles.

Because disparate results occur based solely on the prosecutorial standard, this is a question regarding fundamental access to courts and should therefore be stricken under the strict scrutiny approach. That result is a natural extension of both the habeas cases decided in the 1990s and those

⁵⁴ Further, in Tax Court, the Service benefits from an asymmetry in expertise and familiarity with the court. Leandra Lederman & Warren B. Hrungr, *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers' Effects on Tax Court Litigation Outcomes*, 41 WAKE FOREST L. REV. 1235, 1253 (2006). The problem is exacerbated by the fact that most taxpayers represent themselves in Tax Court. Over fifty percent of taxpayers appear before the Tax Court without counsel and ninety percent of small tax cases are filed by pro se litigants. See Michael J. Bommarito II et al., *An Empirical Survey of the Population of U.S. Tax Court Written Decisions*, 30 VA. TAX REV. 523, 529 (2011). In fact, ninety percent of tax cases are heard in Tax Court. See INTERNAL REVENUE SERV., IRS DATA BOOK 2010, at tbl. 27 (2011), available at <http://www.irs.gov/pub/irs-soi/10databk.pdf>; Stephanie Hunter McMahon, *An Empirical Study of Innocent Spouse Relief: Do Courts Implement Congress's Legislative Intent?*, 12 FLA. TAX REV. 629, 649 (2012).

⁵⁵ See I.R.C. § 7452; Lederman, *supra* note 13, at 671; Lederman Proposal, *supra* note 6, at 1204; Shirley D. Peterson, *The Development of Tax Policy Through Litigation*, 38 FED. B. NEWS & J. 334, 334 (1991); David M. Schizer, *Enlisting the Tax Bar*, 59 TAX. L. REV. 331, 336 (2006).

⁵⁶ See, e.g., *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 113 S. Ct. 786 (2012); *Dragovich v. U.S. Dep't of the Treasury*, 872 F. Supp. 2d 944, 946 (N.D. Cal. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 976 (N.D. Cal. 2012); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 377 (D. Mass. 2010), *aff'd*, 682 F.3d 1 (1st Cir. 2012); *In re Balas*, 449 B.R. 567, 569–72 (Bankr. C.D. Cal. 2011); Heather Elliot, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 569 (2012).

under consideration in the current crop of cases involving outcome litigation principles.⁵⁷ Additionally, the Court has consistently held that “[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as ‘of basic importance in our society,’ rights sheltered by the Fourteenth Amendment”⁵⁸ The executive branch believes that DOMA is infringing on the fundamental right to marry and the application thereof by the Service results in disparate treatment.⁵⁹ Nonetheless, in the event that the Court espouses that this is not a fundamental right because there is access to judicial review, the standard would still be subject to rational basis review, which it also fails.⁶⁰

B. Rational Basis Scrutiny and Different Methodologies

The rational basis test is rather fluid and is applied more loosely or strictly depending on the classification and purposes.⁶¹ The most flexible version of the test determines if there is a government interest at stake, even if the parties did not articulate the basis but the court concluded that a valid basis exists, and if that interest has any theoretical connection to the classification at issue.⁶² A more restrictive version of the test requires that the interest be determined from the legislative history and a closer nexus exist between the interest and the classification.⁶³ A final version of the test states

⁵⁷ For habeas cases, see generally *Bounds*, 430 U.S. at 827; Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1 (1997); Dooley, *supra* note 37, at 761–62. For outcome litigation, see generally William N. Eskridge, *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183 (2000); Lahav, *supra* note 30; Justin Reinheimer, *What Lawrence Should Have Said: Reconstructing an Equality Approach*, 96 CALIF. L. REV. 505, 530 (2008).

⁵⁸ *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 (1996); see also Lloyd C. Anderson, *The Constitutional Right of Poor People to Appeal Without Payment of Fees: Convergence of Due Process and Equal Protection in M.L.B. v. S.L.J.*, 32 U. MICH. J.L. REFORM 441 (1999).

⁵⁹ *Romer v. Evans*, 517 U.S. 620 (1996).

⁶⁰ See, e.g., *Camp*, *Equal Protection*, *supra* note 6, at 288.

⁶¹ See *United States R.R. Bd. v. Fritz*, 449 U.S. 166, 176 n.10 (1980) (“[T]he most arrogant legal scholar would not claim that all . . . cases applied a uniform or consistent [rational basis] test under equal protection principles.”).

⁶² *McGowan v. Maryland*, 366 U.S. 420, 425 (1961) (“The constitutional safeguard [of the Equal Protection Clause] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.”).

⁶³ *Planned Parenthood of Minn. v. Minnesota*, 612 F.2d 359 (8th Cir. 1980), *aff’d*

that, “[n]ot only must ‘a classification . . .’ be reasonable, . . . it must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”⁶⁴

It has been argued that a meaningful review of the tax audit process should be subject to the last standard mentioned above.⁶⁵ There is a long and robust history of agency decisions, especially those involving liability assessments, being reviewed under the strictest version of the rational basis standard.⁶⁶

Let us investigate deeper into the history of taxpayers *A* and *B*. Upon the filing of the tax return, the Service makes a decision to accept or not accept the liability reported on the taxpayer’s return. Once the Service assesses the amount of tax due, it then makes certain decisions about how to collect any outstanding balance.⁶⁷ The assessment serves two functions: (1) to determine the liability, and (2) as the predicate to collect the tax.⁶⁸ This entire process is an administrative review by the agency, in this case, the Service. Both taxpayers *A* and *B* filed a joint return and reported all income and deductions accurately. Through the administrative process, however, the agents in charge of the review apply section 3 of DOMA, as the Service maintains DOMA is constitutional.⁶⁹

We must now determine the rationality of having one rule for the administrative process and one rule for the litigation process. There does not seem to be a rational relation to a legitimate government purpose. The purpose of an administrative review of the assessment and collection of tax by the Service is to ensure a correct reporting position.⁷⁰ In fact, the

without opinion, 448 U.S. 901 (1980) (striking down state funding statutes whose legislative history appeared to indicate the legislative purpose was to exclude Planned Parenthood from funding available to hospitals and whose litigation rationales were insufficiently connected to the disparate treatment of Planned Parenthood and hospitals).

⁶⁴ *Planned Parenthood*, 612 F.2d at 363.

⁶⁵ *Camp*, *Equal Protection*, *supra* note 6, at 288–90.

⁶⁶ Not only has the Court held that access to the courts is a fundamental right, *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2003), it has repeatedly emphasized the fundamental nature of the right to judicial review in a variety of contexts. *See, e.g.*, *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667 (1986) (reviewing history of judicial review of agency actions); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that imposition of filing fees on indigent plaintiffs was denial of due process); *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967) (reading the APA, *supra* note 9, as creating a strong presumption of judicial review).

⁶⁷ *Camp*, *Equal Protection*, *supra* note 6, at 282.

⁶⁸ *Bull v. United States*, 295 U.S. 247, 260 (1935).

⁶⁹ DOJ Pronouncement, *supra* note 2.

⁷⁰ *See, e.g.*, I.R.C. § 6662(d)(1)(A), (2)(A).

taxpayer's burden in Tax Court is to argue against the correctness of the determination.⁷¹ Yet, through this process the Service is espousing an incorrect reporting position in light of the litigation position of the DOJ and the President.

The best rationale is that since the DOJ Pronouncement was not issued through notice and comment rule, it is not binding on other agencies.⁷² In addition, there is a fluidity of the position itself because the official opinion of the DOJ may change upon the election of a new President.⁷³ Given the longer horizon of consistency in the interpretation of the Code, the Service may not want to respond to the DOJ. Historically, the Service has not wanted to take differing positions during an audit and makes certain concessions in order to avoid a situation when those positions may change upon litigation.

The Service always reserves the right to change litigation positions.⁷⁴ Since the agency itself is not bound by earlier decisions, potentially inconsistent treatment by following the DOJ does not seem rationally related to any stated government purpose; in fact, it is directly at odds with the stated government purpose. The position requires audits and challenges that result in direct expenses by the Service to refute a position that will eventually be conceded in litigation.

⁷¹ I.R.C. § 7491; *see also supra* note 2.

⁷² The DOJ must make some rules through the notice-and-comment rulemaking function. For example, in the area of the Foreign Corrupt Practice Act, the DOJ should issue positions through notice and comment. *See* Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001-5003, 102 Stat. 1415, 1415-25 (codified as amended in scattered sections of 15 U.S.C.); Department of Justice Anti-Bribery Provisions Notice, 55 Fed. Reg. 28,694, 28,694 (July 12, 1990); Gideon Mark, *Private FPCA Enforcement*, 49 AM. BUS. L.J. 419, 452 (2012). Executive agencies, however, are not bound by the notice-and-comment requirements for litigation positions. *See, e.g.,* Amanda Frost, *Congress in Court*, 59 U.C.L.A. L. REV. 914, 961 (2012). The failure to engage in such process would undermine basic administrative law principals that render the decision binding only on that agency.

⁷³ *See, e.g.,* Henry N. Butler & Jeffrey Paul Jarosch, *Policy Reversal on Reverse Payments: Why Courts Should Not Follow the New DOJ Position on Reverse-Payment Settlements of Pharmaceutical Patent Litigation*, 96 IOWA L. REV. 57, 87 (2010) (Obama Administration's DOJ reversed its longstanding position that reverse payments do not warrant antitrust scrutiny); Dawn Johnsen, "The Essence of a Free Society: The Executive Powers Legacy of Justice Stevens and the Future of Foreign Affairs Deference", 106 NW. U. L. REV. 467, 519 (2012) (change in position in the pending Guantánamo habeas litigation).

⁷⁴ *See generally* Golsen v. Commissioner, 54 T.C. 742 (1970); Bryan T. Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L.J. 57 (2009) [hereinafter Camp, *Failure*]; Amy E. Sloan, *The Dog that Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713 (2009); *infra* Part IV.

C. Oath Duty

In addition to the equal protection issues, the oath that the Commissioner of the Service takes presents a constitutional issue.⁷⁵ If the President's constitutional theory is true, then the Commissioner, like the President, should not enforce unconstitutional laws.⁷⁶

Under title 5, section 3331 of the United States Code, the Commissioner takes the following oath:

I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

Unlike the President, the Commissioner does not have a duty to execute the laws faithfully.⁷⁷ The sole duty of the Commissioner is to defend the Constitution. First, it is accepted that the President's article II oath duty prevails over the article II execution duty and the President must not defend legislation he believes to be unconstitutional.⁷⁸ Second, the President, the DOJ, and multiple courts believe that section 3 of DOMA is unconstitutional.⁷⁹ Thus, because of the Commissioner's oath duty and his status as a principal officer of the United States, the Commissioner must refuse to defend section 3 of DOMA.

III. HISTORY OF THE SERVICE

Under the current construct in which the Service and the DOJ split prosecutorial power, I argue that the disparate treatment of taxpayers results in colorable equal protection claims. Regardless of the ultimate conclusion of that premise, the discussion therein highlights the significant issue with the lack of intra-district enforcement of the same law depending on the prosecutorial authority, e.g., the Service or the DOJ. Thus, a review of the underlying construct, the sharing of prosecutorial powers, should take place.

The Service has both lawmaking and enforcement powers. Although the

⁷⁵ See 5 U.S.C. § 3331 (2000).

⁷⁶ See *supra* Part II.

⁷⁷ See U.S. Const. art. II, § 1; *supra* notes 19–20.

⁷⁸ See *supra* Part II.

⁷⁹ DOJ Pronouncement, *supra* note 2.

Service lies within the executive branch, the legislative branch has great influence over it as well. “Given the fine line between lawmaking and law enforcement, it is always difficult to say when one shades into the other, but clearly there is an inevitable tension between congressional oversight powers and the executive exercise of delegated powers to interpret, articulate, and execute the tax laws.”⁸⁰

This tension between the executive branch and the legislature has been demonstrated over time by the fluctuation of primary influence over the Service: the sphere of influence of the executive branch dominated during the 1960s through the late 1970s, while that of the legislature dominated during the early 1980s.⁸¹ In order to address the issue of whether or not the Service should have prosecutorial discretion, a review of the history, especially the tug of war over control of the agency, is necessary.

A. *The Early Tax and Collection*

Congress enacted the first income tax as part of the Revenue Act of 1861.⁸² Most lawmakers believed that the law was provisional as a result of the Civil War.⁸³ Since this was the first time there was a national tax, no collection agency yet existed; until this time, taxes were levied and collected at the state level. The Treasury, under Secretary Salmon P. Chase, and the public at large believed that creating a national bureaucracy was inefficient and expensive.⁸⁴ In fact, it is widely believed that Secretary Chase prevented the collection of the tax, requiring further action by Congress.⁸⁵

In 1862, Congress enacted a comprehensive income tax and a collection methodology.⁸⁶ The Revenue Act of 1862 provided for the establishment the

⁸⁰ Archie Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1368 (1980).

⁸¹ For the executive influence over the Service, see *infra* notes 116–148; for the legislative influence over the Service, see *infra* notes 149–165.

⁸² Revenue Act of 1861, ch. 45, § 49, 12 Stat. 292 (1861). There were other taxes such as excise and property before the Civil War, but the Revenue Act of 1861 imposed the first direct tax on income.

⁸³ John Thorndike, *Reforming The Internal Revenue Service: A Comparative History*, 53 ADMIN. L. REV. 717, 721 (2001).

⁸⁴ Joseph A. Hill, *The Civil War Income Tax*, 8 Q.J. ECON. 416, 418 (1894); Thorndike, *supra* note 83, at 721; *The Tax Bill — The Cost of Collecting the Taxes*, N.Y. TIMES, July 8, 1862, available at <http://www.nytimes.com/1862/07/08/news/the-tax-bill-the-cost-of-collecting-the-taxes.html>.

⁸⁵ SIDNEY RATNER, TAXATION AND DEMOCRACY IN AMERICA 391 (1967).

⁸⁶ Revenue Act of 1862, ch. 119, 12 Stat. 432 (1862); Thorndike, *supra* note 83, at 722; INTERNAL REVENUE SERV., BRIEF HISTORY OF THE IRS (Jan. 2, 2013),

Office of the Commissioner of Internal Revenue in the Treasury⁸⁷ and allowed the President to divide the country into collection districts.⁸⁸ President Abraham Lincoln divided the country into 185 districts, and George S. Boutwell took office as the first Commissioner.

Congress allowed this first income tax to expire in 1872, and it was not until The Tariff Act of 1894 that the tax was reintroduced.⁸⁹ The Tariff Act was short lived, as the Court found it unconstitutional one year later in *Pollock v. Farmers' Loan & Trust Co.*⁹⁰

During this time period, the Bureau of Internal Revenue (BIR), the precursor to the Service, was formed and, despite the demise of the income tax in 1895, the fundamental structure would endure.⁹¹ Powers regarding “[r]egulatory and interpretive issues were reserved for the commissioner’s office”⁹² and the tension between the executive and legislative branches regarding control over the office remained.⁹³ During these early years, Congress took the dominant role in shaping the BIR.⁹⁴ The executive branch was passive, which was amplified as a result of weak Presidents, including Andrew Johnson.⁹⁵

Then, in 1913 Congress passed the Sixteenth Amendment to the Constitution, and the Tariff Act of 1913, the first modern income tax, was passed soon thereafter.⁹⁶ The next major review and reform of the BIR happened after World War I, and much like the reform efforts after the Civil War, few changes occurred.⁹⁷ The key concept of these reform efforts was that Congress took the lead and review happened despite President Warren Harding’s Administrations’ attempts to stop it.⁹⁸ Since the World War I revenue legislation increased revenues from an average of \$281 million to

<http://www.irs.gov/uac/Brief-History-of-IRS>.

⁸⁷ Revenue Act of 1862, ch. 119, 12 Stat. 432 (1862); *see also* Bryan T. Camp, *Theory and Practice in Tax Administration*, 29 VA. TAX REV. 227, 229 (2009) [hereinafter Camp, *Theory*]; Martin D. Ginsburg, *Taxing the Components of Income: A U.S. Perspective*, 86 GEO. L.J. 123 (1997); Thorndike, *supra* note 83, at 723.

⁸⁸ Camp, *Theory*, *supra* note 87, at 229; Thorndike, *supra* note 83, at 723.

⁸⁹ *See* Revenue Act, ch. 349, 28 Stat. 509, 556 (1894).

⁹⁰ 158 U.S. 601 (1895).

⁹¹ Thorndike, *supra* note 83, at 723.

⁹² *Id.* at 724.

⁹³ *Id.* at 728.

⁹⁴ This includes both during its creation and the postwar reform in the 1860s. *See id.* at 733–35.

⁹⁵ *Id.* at 735.

⁹⁶ *See* Act of Oct. 3, 1913, ch. 16, § II(G)(a), 38 Stat. 114, 172 (1913).

⁹⁷ Thorndike, *supra* note 83, at 736.

⁹⁸ *Id.*

\$2.78 billion per year, the BIR was required to expand dramatically.⁹⁹ This burden left the BIR in dire straits.¹⁰⁰

By 1922, after numerous accusations of patronage, mismanagement, delayed processing, and corruption, the Treasury announced its intention to organize the bureau.¹⁰¹ Assistant Secretary Elmer Dover's restructuring plan also included the politicalizing of the bureau by proposing to replace the Woodrow Wilson Administration holdovers with new administration appointees.¹⁰² Although Treasury Secretary Andrew Mellon backed down from this type of political action, the Republican leaders in Congress took up a review of the agency.

The resulting reform was led by Congress and was not preventable by the Executive. In fact, Secretary Mellon was dragged through the mud by influential progressive Republican Senator James Couzens without the administration being able to stop the attacks.¹⁰³ Essentially, Couzens created a laundry list of items that Congress disliked about the BIR.¹⁰⁴ The most important item Congress adapted from the Couzens Committee report was the establishment of the Joint Committee on Internal Taxation that, with the Treasury, shaped tax policy.¹⁰⁵

In 1952, Congress was again actively exploring the BIR, in light of allegations of corruption, and President Harry Truman's Administration initially took an unsurprising passive approach.¹⁰⁶ Eager to gain political favor with the public, however, the executive branch began assembling plans for a "major overhaul of the BIR."¹⁰⁷ "The 1952 reorganization dramatically remade the BIR . . ."¹⁰⁸ For the first time since 1862, a new structure was implemented that abolished politically appointed positions beneath the Commissioner and created an entirely new organizational structure.¹⁰⁹ By

⁹⁹ *Id.* at 743.

¹⁰⁰ T.S. Adams stated that "[n]o federal administration, in my opinion, is capable during the next five or six years of carrying with even moderate success two such burdens as the income tax and the excess profits tax." *Id.* at 746; *see also* ROY G. BLAKEY & GLADYS C. BLAKEY, *THE FEDERAL INCOME TAX* 52–57, 533 (1940).

¹⁰¹ Thorndike, *supra* note 83, at 747.

¹⁰² *Id.*

¹⁰³ *See id.* at 736.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 752.

¹⁰⁶ Thorndike, *supra* note 83, at 760.

¹⁰⁷ *Id.*; *see also* SUBCOMM. ON ADMIN. OF THE INTERNAL REVENUE LAWS, 82D CONG., REPORT ON INTERNAL REVENUE INVESTIGATION 27 (Subcomm. Print 1952).

¹⁰⁸ Thorndike, *supra* note 83, at 762.

¹⁰⁹ *Id.*

1954, the reform change had been completed, including changing the name of the BIR to the Internal Revenue Service.¹¹⁰ The 1952 reform was unique from previous attempts at reform because of the degree of executive branch involvement; while Congress still took the lead the executive branch developed the details.

“The reform efforts of the 1950s insulated the [Service] from excessive Treasury meddling, reflecting concerns that the agency not be used for political purposes.”¹¹¹ Nevertheless, from the 1960s to today, there have been numerous allegations that the agency has been used as such, from executive branch interference in tax cases in the 1970s¹¹² to the auditing of certain charitable organizations. This can be clearly seen in one of the Articles of Impeachment proposed by the Judiciary Committee, which alleged that President Richard Nixon had “endeavored to obtain from the Internal Revenue Service, in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purposes not authorized by law”¹¹³

Congress’s response to the over-politicization of the Service was to enact section 6103 of the Code, which had stringent restrictions over the use of Service information.¹¹⁴ Nonetheless, Congress did not address whether the Treasury as an agent of the Executive would be prohibited from dictating public policy through the agency.

In 1996, the final reform effort took place, leaving the agency as it stands today. Once again responding to criticism that the Service was arbitrary, inquisitive, and overly political in nature, Congress convened a Commission to make recommendations.¹¹⁵ The Congressional Commission’s recommendation took a different approach from the earlier efforts.¹¹⁶ First,

¹¹⁰ *Id.* at 763.

¹¹¹ *Id.* at 771.

¹¹² See DEP’T OF THE TREASURY, INTERNAL REVENUE SERV., DISCLOSURE & PRIVACY LAW REFERENCE GUIDE, PUBLICATION NO. 4639, at 1-7 [hereinafter DISCLOSURE & PRIVACY], available at <http://www.irs.gov/pub/irs-pdf/p4639.pdf> (“The events leading to the revision of the tax disclosure laws in 1976 can, however, be directly traced to Executive Orders 11697 and 11709, issued by President Richard Nixon authorizing the Department of Agriculture to inspect the tax returns of all farmers ‘for statistical purposes.’”); see also Thorndike, *supra* note 83, at 771.

¹¹³ H. COMM. ON THE JUDICIARY, REPORT ON THE IMPEACHMENT OF RICHARD M. NIXON PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, at 3 (Comm. Print 1974); DISCLOSURE & PRIVACY, *supra* note 112, at 1-8.

¹¹⁴ See, e.g., T. Keith Fogg, *Transparency in Private Collection of Federal Taxes*, 10 FLA. TAX REV. 763, 770-72 (2011).

¹¹⁵ Thorndike, *supra* note 83, at 768-69.

¹¹⁶ SLEMROD & BAKIJA, *supra* note 11, at 18, 183; Thorndike, *supra* note 83, at 773.

it focused on creating a “friendlier” Service. Second, it set out to fundamentally reform the structure of the agency.¹¹⁷ This included a proposal to remove the Service from the Treasury to an independent agency.¹¹⁸

The White House did not endorse the Commission findings, including the recommendation that a new Board of Directors appoint the Service Commissioner.¹¹⁹ It was argued that the Congressional recommendations were unconstitutional eviscerations of executive powers.¹²⁰ In response, the White House released a governance plan that allowed the “Treasury Department overall control of the agency.”¹²¹

B. Misuses of the Service

As can be seen through the history of the Service, the agency is inherently political in nature. It answers to two masters: Congress and the Executive. The ebb and flow of which branch is the ultimate master has resulted in numerous allegations over time regarding the politicizing of the Service. Essentially, the Service has been accused of using the audit process for political purposes.¹²² From the McCarthy 1950s to the 1990s there is much lore of Service abuse, including Operation Leprechaun,¹²³ Operation

¹¹⁷ STAFF OF JOINT COMM. ON TAXATION, REP. ON TAXATION RELATING TO THE INTERNAL REVENUE SERVICE AS REQUIRED BY THE IRS REFORM AND RESTRUCTURING ACT OF 1998, JCX-38-02 at 34 (2002) [hereinafter 2002 SERV. REPORT] (“Goals of the IRS Reform Act included increasing public confidence in the [Service] and making the [Service] an efficient, responsive, and respected agency that acts appropriately in carrying out its functions.”); Wm. Brian Henning, *Reforming the IRS: The Effectiveness of the Internal Revenue Service Restructuring and Reform Act of 1998*, 82 MARQ. L. REV. 405, 405–06 (1999); Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 U. KAN. L. REV. 971, 977–80 (2003).

¹¹⁸ NAT’L COMM’N ON RESTRUCTURING THE INTERNAL REVENUE SERV., REP. OF THE NATIONAL COMMITTEE ON RESTRUCTURING THE INTERNAL REVENUE SERVICE 4 (1997), available at <http://www.house.gov/natcommirs/main.htm> [hereinafter NAT’L RESTRUCTURING COMM’N REPORT].

¹¹⁹ Thorndike, *supra* note 83, at 773.

¹²⁰ *Id.* at 773–74.

¹²¹ *Id.* at 774; Ryan Donmoyer, *Clinton Pitches Private-Sector Board of Trustees for the IRS*, 77 TAX NOTES 138, 138 (Oct. 13, 1997); Al Gore & Robert E. Rubin, *White House Report on IRS Reforms*, 97 TNT 198–67 (Oct. 14, 1997).

¹²² STAFF OF JOINT COMM. ON TAXATION, 106TH CONG., REP. OF INVESTIGATION OF ALLEGATIONS RELATING TO INTERNAL REVENUE SERVICE HANDLING OF TAX-EXEMPT ORGANIZATION MATTERS 12–13 (Comm. Print 2000) [hereinafter 2000 SERV. REPORT].

¹²³ See JOHN A. ANDREW, III, POWER TO DESTROY: THE POLITICAL USES OF THE IRS FROM KENNEDY TO NIXON 4–5, 299–313 (2002); *The IRS’s \$287 Billion Man*, TIME, Apr. 7, 1975, at 70, available at <http://www.time.com/time/magazine/article/0,9171,917244,00.html#ixzz1K1FE0tE5> (reporting a Nixon-era scandal involving the alleged recruitment by Service tax sleuths of a sex spy to collect information on prominent Floridians).

Snowball,¹²⁴ and the Nixon Enemies List.¹²⁵ Investigations in both the distant and near past have found many executive requests but have not found any such misuse.¹²⁶ Congress too has also abused the Service, including legislative prohibitions during the 1970s forbidding the Service from providing nationwide guidance with respect to certain tax issues.¹²⁷

The Service has a longstanding policy of shielding political appointees from involvement in almost all specific taxpayer matters.¹²⁸ This policy is supported by Congress's enactment of section 6103 of the Internal Revenue Code (Code), which protects taxpayer confidentiality. Clearly, politics should not be taken into account in deciding whom to audit or whether a group merits additional scrutiny. The additional question that must be addressed, however, is whether the Service should also be removed from making political decisions regarding the application of tax laws that favor taxpayers.

1. Executive Misuses

As discussed, from the Service's inception as the BIR through the late 1950s, the executive branch remained neutral or passive in its dominion over the agency. That backseat driver position began to change in the late 1950s when the Service was used to investigate individuals and groups associated with the Communist Party of the United States.¹²⁹ The Service was alleged to be conducting a crusade that mirrored Senator Joseph McCarthy's witch-hunt. In fact, one Ninth Circuit judge stated of an apparent targeted investigation of taxpayers in the late 1950s:

I regard what I have recited above as a scandal of the first magnitude in the administration of the tax laws of the United States. It discloses nothing less than a witch-hunt, a crusade by the key agent of the United States in this prosecution, to rid our society of unorthodox

¹²⁴ ANDREW, *supra* note 123, at 141–42 (discussing Operation Snowball, an investigation into more than thirty-one companies for attempting to make campaign contributions appear to be deductible).

¹²⁵ *Id.* at 201–24 (discussing President Nixon using Service records to target those on his enemies list, resulting in section 6103 of the Code).

¹²⁶ 2000 SERV. REPORT, *supra* note 122, at 6–11.

¹²⁷ Pamell, *supra* note 80, at 1369.

¹²⁸ Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625, 668–69 (2007).

¹²⁹ *See, e.g.,* *Lenske v. United States*, 383 F.2d 20, 27–28 (9th Cir. 1967) (Madden, J., writing separately) (stating that the Service targeted and investigated the defendant because of his thoughts on Communist countries such as Cuba, Laos, and China).

thinkers and actors by using federal income tax laws and federal courts to put them in the penitentiary. No court should become an accessory to such a project.¹³⁰

The 1960s witnessed a further mobilization of the Service as a tool for the President. President John F. Kennedy gratified his desire to root out organized crime by employing Carmine Bellino to inspect Service files on suspected criminal figures such as Jimmy Hoffa.¹³¹ In fact, when the Treasury issued a memorandum stating that it could not get involved in organized crime investigations, Attorney General Robert Kennedy ignored it.¹³² It is posited that the Kennedy administration specifically picked Service Commissioner Mortimer Caplin because of his close relationship with the family and his promise to collaborate in sharing intelligence with other agencies.¹³³ Prior to this, the Service had limited itself to investigations of cases where revenue was raised from fines and penalties.¹³⁴

Other than the potential misuse of the Service in the processing of the organized crime figures, the main other charge levied against the Kennedy Administration was the attack on tax-exempt organizations. In late 1961, the Service launched the Ideological Organizations Project.¹³⁵ This was the beginning of a four-decade use of the Service to investigate charitable organizations with political leanings. In 1962, President Kennedy asked Treasury Secretary C. Douglas Dillion to investigate charity balls.¹³⁶ As part of the inquiry, the Administration asked for a solution for the right wing critics. The resulting “Reuther Memorandum” to Attorney General Robert Kennedy outlined the “possible Administration policies and programs to combat the radical right.”¹³⁷ The third recommendation of the Reuther Memorandum was to “choke off the flow of money to the radical right by challenging the groups’ tax-exempt status.”¹³⁸

The inquiries into these organizations demonstrate how difficult it can

¹³⁰ *Id.*

¹³¹ ANDREW, *supra* note 123, at 11–12; ROBERT L. GOLDFARB, *PERFECT VILLAINS, IMPERFECT HEROES: ROBERT F. KENNEDY’S WAR AGAINST ORGANIZED CRIME* 48 (1995).

¹³² GOLDFARB, *supra* note 131, at 48.

¹³³ *Id.*; see also ANDREW, *supra* note 123, at 12. *But see* Mitchell Rogovin, *The Kennedy Years at the Internal Revenue Service: Mortimer Caplin, Commissioner (1961–1964)*, 14 VA. TAX REV. 425, 473 (1994) (ex-Commissioner Caplin claiming the Kennedy administration left the Service alone).

¹³⁴ GOLDFARB, *supra* note 131, at 48.

¹³⁵ *Id.* at 23.

¹³⁶ ANDREW, *supra* note 123, at 17.

¹³⁷ *Id.* at 20.

¹³⁸ *Id.* at 21.

be for the Service to be apolitical. On the one hand, in order to be a tax-exempt organization, political activity must not be significant, although it is permitted.¹³⁹ The Service, therefore, has an affirmative duty to ensure that all tax-exempt organizations comply with the grant of authority. Yet on the other hand, the Service is not supposed to *target* any tax-exempt organization based on political rather than compliance objectives.

Where is the line? If a majority political party is in office, then clearly alternative viewpoints espoused through a tax-exempt organization will rise to the top of the concern list. Is that organization being investigated for compliance or retaliation?¹⁴⁰ During the Kennedy administration, the Service admitted targeting, stating that “candidates for both the first and second phase were drawn from information received from Members of Congress, complaint letters from the public, publicity in the news media and information contained in the Service’s file.”¹⁴¹ Nonetheless, Commissioner Caplin denied that the Service was forced into acting based on pressure from the Kennedy White House.¹⁴² Although Caplin’s remarks seem to run counter to the record,¹⁴³ they demonstrate just how impossible it is for the Service to remain neutral.

Other than these accusations, there were no other earth-shattering Kennedy moments, aside from the historic patronage claims for the appointments of Service officials.¹⁴⁴

¹³⁹ Dana Brakman Reiser, *Charity Law’s Essentials*, 86 NOTRE DAME L. REV. 1, 29 (2011); *see also, e.g., in re Westboro Baptist Church*, 189 P.3d 535, 554 (Kan. Ct. App. 2009) (noting that “our Supreme Court has determined that political action or activities are not considered a religious activity” in affirming a denial of tax exemption for personal property owned by a religious group, but used for political purposes); *New Eng. Legal Found. v. City of Boston*, 670 N.E.2d 152, 158 n.8 (Mass. 1996) (asserting that state law precludes tax exemption for organizations at some level of political activity); *Mich. United Conservation Clubs v. Twp. of Lansing*, 378 N.W.2d 737, 743 n.6 (Mich. 1985) (“[C]ertain forms of lobbying may preclude a tax exemption.”).

¹⁴⁰ *See, e.g., ANDREW, supra* note 123, at 46–57. The inquiry into Billy James Hargis and the Christian Crusade shows that this is not really possible. Hargis started out as a clergy member. In the 1950s he devoted his time to “fighting liberalism and communism.” He linked together religion, liberalism, and communism, creating a political/religious organization. Thus, at the heart of his message was both religion and politics. How can they be separated? The Service thought that it was political with a religious cover. Despite three “no change letters” in earlier audits, in the fourth audit conducted within two years, finally in connection with the Ideological Operations Project, there was evidence that the organization was political in nature.

¹⁴¹ *Id.* at 23.

¹⁴² *Id.* at 24; Rogovin, *supra* note 133, at 473.

¹⁴³ ANDREW, *supra* note 123, at 25–44.

¹⁴⁴ *See id.* at 16, 181 (citing the example of the 1962 steel crisis and the tabling of key

The use of the Service by the Executive was tempered by President Lyndon Johnson.¹⁴⁵ By the termination of the Nixon administration, though, the Service had been fully infiltrated by the Executive. In fact, there was a Service employee described as an “undercover agent” responsible for transmitting information and reporting to the White House on sensitive matters.¹⁴⁶ It is no surprise today to learn that Nixon used the Service to punish his enemies and reward his friends.¹⁴⁷ Unlike under the Kennedy or Johnson administrations, we have extensive information of Nixon’s doings through the investigations held by the Watergate Special Prosecution Force.¹⁴⁸

The Nixon Administration wanted to treat the Service the way the second Bush administration treated the DOJ. First, the White House focused on removing Democrats from the agency by naming political appointments as assistant commissioners under the guise of reorganization.¹⁴⁹ Second, the administration wanted to control the focus of the agency and its enforcement decisions.

Upon taking office, Nixon immediately wanted to use the Service for political purposes.¹⁵⁰ The first opportunity Nixon took advantage of was appointing Clark Mollenhoff to the same post to which Kennedy had appointed Bellino: special counsel. Nixon’s Commissioner, Randolph Throewer, complied with White House requests to “inspect . . . tax return[s], application[s] for exemption, or other Internal Revenue file[s]”¹⁵¹ It was confirmed that all requests from Mollenhoff were directed by the White House.¹⁵² The interesting paradigm that existed at that time was that there

Kennedy administration officials as further Kennedy involvement, and the Truman tax scandals where politically appointed Service officials accepted bribes to affect taxes).

¹⁴⁵ *Id.* at 139 (“The relationship between the White House and the Internal Revenue Service is much more difficult to uncover under Lyndon Johnson than during the Kennedy years.”).

¹⁴⁶ Rogovin, *supra* note 133, at 473.

¹⁴⁷ ANDREW, *supra* note 123, at 179.

¹⁴⁸ *See, e.g., Operation Leprechaun: Hearing before the Subcomm. on Oversight of the H. Comm. on Ways & Means, 94th Cong. (1975); STAFF OF JOINT COMM. ON TAXATION, 94TH CONG., INVESTIGATION INTO CERTAIN CHARGES OF THE USE OF THE INTERNAL REVENUE SERVICE FOR POLITICAL PURPOSES (Comm. Print 1973) [hereinafter SERV. INVESTIGATION].*

¹⁴⁹ ANDREW, *supra* note 123, at 188–89.

¹⁵⁰ *Id.* at 180; *see also* Impeachment of Richard M. Nixon President of the United States, H.R. Doc. No. 93-339, at 3 (1974); Samuel D. Brunson, *Reigning In Charities: Using an Intermediate Penalty to Enforce the Campaigning Prohibition*, 8 *PITT. TAX REV.* 125, 153 (2011).

¹⁵¹ ANDREW, *supra* note 123, at 181.

¹⁵² *Id.*

was no question that the White House had the right to examine any income tax return.¹⁵³ Only the manner in which the returns were to be made available was limited.¹⁵⁴

This led to the famous “Enemies List,” a pattern of the White House exerting pressure over the Service to audit opponents of the administration.¹⁵⁵ Unlike the Kennedy administration’s focus on tax-exempts, Nixon expanded the scope of executive control to his political enemies. The Nixon administration established the Special Service Staff to specifically investigate “known militants and activists.”¹⁵⁶

After the full story of the abuses of the Service by the Nixon administration was documented by the Watergate Commission, Congress responded with the enactment of section 6103 of the Code. In the Tax Reform Act of 1976, Congress created a series of narrow exceptions to govern disclosure of tax information rather than granting broad discretion to the executive branch.¹⁵⁷

By the beginning of the 1980s, the Service was transformed into its most current incarnation. From its inception during the Civil War as the BIR to now, the Service is an agency that tries to collect tax without prejudice. This lofty ambition is full of dichotomy. For example, is the review of an exempt organization based on ideological principles or because the organization has both political and nonpolitical goals?¹⁵⁸ Is inaction by the Service really an action? Is the Service truly political in nature because at the end of the day it is bound by a political organization in enforcement of their policies?

2. Congressional Misuses

The executive branch is not alone in exercising its political influence over the Service. After the reform provisions in 1976, Congress took a more active role in the enforcement goals of the Service.¹⁵⁹ Since the Service’s inception, Congress has conducted an annual review of the Service in order

¹⁵³ *Id.* at 185

¹⁵⁴ *Id.*

¹⁵⁵ SERV. INVESTIGATION, *supra* note 148; ANDREW, *supra* note 123, at 201.

¹⁵⁶ ANDREW, *supra* note 123, at 250.

¹⁵⁷ Fogg, *supra* note 114, at 770–71; *see generally* STAFF OF JOINT COMM. ON TAXATION, 94TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976 313–16 (Comm. Print 1976), *reprinted in* 1976-3 C.B. 263 [hereinafter GENERAL EXPLANATION].

¹⁵⁸ The recent targeting of the “Tea Party” charities provides a current illustration of this question. *See, e.g.*, Op-Ed., *Release the Facts About the IRS Scandal*, N.Y. TIMES (June 16, 2013), available at http://www.nytimes.com/2013/06/17/opinion/release-the-facts-about-the-irs-scandal.html?_r=0.

¹⁵⁹ Parnell, *supra* note 80, at 1360.

to, among others things, ensure that there is no corruption¹⁶⁰ and examine enforcement methods.¹⁶¹

Much like executive involvement, Congressional involvement was occasional, but since the 1976 reform, there has been an explosion of Congressional hearings regarding the Service's administration of the law.¹⁶² For example, between the establishment of the oversight committees in January 1975 through 1979, the Service Commissioner made over 134 appearances before various congressional committees.¹⁶³ This includes 104 involving Congressional oversight of tax administration.¹⁶⁴ Congressional intervention is not limited to hearings. Congress has at times prohibited the Service from executing certain aspects of the tax law.¹⁶⁵

Intervention by Congress with the Service would seem to violate our basic tenants of separation of powers. Under our system of government, the high school civics approach is that a separation of powers doctrine is implied from the Constitution.¹⁶⁶ Legislative power is in the Congress, executive power in the President, and judicial in the Courts. In other words, Congress enacts the law, the President's duty is to enforce the law, and the judiciary interprets the law. The interaction between the executive and the legislative branch, however, is far more complicated.

The Service has law making powers that arise in a number of situations. First, when the Service interprets the Code, it makes law.¹⁶⁷ The Service also makes law institutionally — it issues nationwide guidance that comes in

¹⁶⁰ *Id.* at 1360–61; *see also, e.g.*, Louis Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359, 360 (1947) (“[E]very statute is a delegation of lawmaking power to the agency appointed to enforce it”); *cf.* BORRIS I. BITTKER & JAMES S. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS § 14.01, at 14-7 to 14-8 (4th ed. 1979) (noting that the Service can sometimes make “law” by “a lifted eyebrow;” practitioners must study statutes, regulations, decisions, published rulings, and “the informal administrative climate”).

¹⁶¹ Parnell, *supra* note 80, at 1368–69; *see also* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1675 (1975).

¹⁶² Parnell, *supra* note 80, at 1369.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1370; *see* Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, § 2006(c), 88 Stat. 829 (1974). The action was extended by Congress in the Tax Reform Act of 1976, Pub. L. No. 94-455, § 1506, 90 Stat. 1520 (1976), and the Tax Treatment Extension Act of 1977, Pub. L. No. 95-615, § 5, 92 Stat. 3097 (1978). The issue of tax treatment of salary reduction plans was finally resolved by Congress in the Revenue Act of 1978, Pub. L. No. 95-600, § 135, 92 Stat. 2785 (codified at I.R.C. § 401(k), 402(a)(18)).

¹⁶⁶ Devins & Prakash, *supra* note 2, at 508–09; Gorod, *supra* note 2, at 1207; Parnell, *supra* note 80, at 1362.

¹⁶⁷ Parnell, *supra* note 80, at 1362.

many forms: revenue rulings, private letter rulings, the Internal Revenue Manual, and Chief Counsel memorandum.¹⁶⁸ Finally, Congress has expressly delegated legislative power to the Service to make regulations for the enforcement of the Code.¹⁶⁹

The Service does have limitations on its power to create law. First, Congress has a number of checks on the Service. “Congress has the power to investigate the [Service’s] administration.”¹⁷⁰ Congress also has the power to attack with its purse-strings.¹⁷¹ Finally, courts review the Service’s guidance.¹⁷²

In response to the Nixon abuses, Congress has sometimes improperly tried to influence the Service, starting in the late 1970s. For example, during the Tax Reform Act of 1975, “Congress delayed Revenue Ruling 76-215 for one year.”¹⁷³ This allowed affected taxpayers to have another year to “renegotiate their contracts with foreign governments” and not be subject to the new rules.¹⁷⁴ Congress continued to use this newfound power to pick and choose Service interpretations it preferred. For example, the “[Service] was instructed to disregard Revenue Ruling 76-453 in determining the deductibility of travel expenses.”¹⁷⁵ Further, the “[Service] was instructed . . . to follow [Service] rules in effect prior to that ruling, and to issue no rulings or regulations prior to May 1978 with respect to the deductibility of travel

¹⁶⁸ *Id.* at 1363–64. For example, the Service issues the Internal Revenue Manual that is a compilation of instructions promulgated by the Service for the guidance of its employees in administering the tax law. See Archie W. Parnell, Jr., *The Internal Revenue Manual: Its Utility and Legal Effect*, 32 TAX LAW. 687, 687 (1979) (“[E]xplanation of structure and contents of the Manual, and analysis of what legal effect courts should give [it].”).

¹⁶⁹ I.R.C. § 7805(a); see also Parnell, *supra* note 80, at 1364.

¹⁷⁰ Parnell, *supra* note 80, at 1365.

¹⁷¹ H.R. CONF. REP. 105-760 (1998) (Congress refused to permit uses of funds without a plan); Leslie Book, *Refund Anticipation Loans and the Tax Gap*, 20 STAN. L. & POL’Y REV. 85, 92 (2009); Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 491–92 (1987).

¹⁷² Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465 (2013); Steve R. Johnson, *Preserving Fairness in Tax Administration in the Mayo Era*, 32 VA. TAX REV. 269 (2012).

¹⁷³ Parnell, *supra* note 80, at 1371; see Tax Reform Act of 1976, Pub. L. No. 94-455, § 1035(c)(3), 90 Stat. 1520 (1976). The provision was expanded in order to treat calendar year and fiscal year taxpayers equally in the Revenue Act of 1978, Pub. L. No. 95-600, § 701(u)(9), 92 Stat. 2916 (1978).

¹⁷⁴ Parnell, *supra* note 80, at 1371; see also GENERAL EXPLANATION, *supra* note 157.

¹⁷⁵ Parnell, *supra* note 80, at 1372; see also Rev. Rul. 76-453, 1976-2 C.B. 86 (providing that expenses incurred in traveling between taxpayer’s residence and place of work, even a temporary work place, may not be deducted).

expenses.”¹⁷⁶ Most importantly, Congress limited the ability of the Service to promulgate regulations in certain areas during the 1977 and 1978 Revenue Acts.¹⁷⁷

C. 1998 Revised Mission Statement

In 1995, Congress established a commission to consider restructuring the Service.¹⁷⁸ The purpose of Congressional intervention was to further insulate the Service from pressures of both Congress and the Executive. The commission made several recommendations focusing on oversight, technology, and recovering damages.¹⁷⁹ As a result of the commission’s report, legislation was introduced with the associated hearings.¹⁸⁰ Although the government subsequently investigated many of the horror stories and found them to be unfounded or exaggerated,¹⁸¹ the legislation was passed.

In 1998, Congress passed the Restructuring and Reform Act (1998 Reform Act).¹⁸² The Act established a taxpayer bill of rights that was intended to safeguard the taxpayer rights and assist taxpayers in disputes. The

¹⁷⁶ Tax Treatment Extension Act of 1977, Pub. L. No. 95-615, § 2, 92 Stat. 3097 (1978) [hereinafter 1977 Act]. Congress later extended these instructions until January 1980, Act of Oct. 7, 1978, Pub. L. No. 95-427, § 2, 92 Stat. 996 (1978) [hereinafter 1978 Act], and then continued them until June 1981, Act of Dec. 29, 1979, Pub. L. No. 95-167, § 2, 92 Stat. 1275 (1978) (uncodified). *See also* Parnell, *supra* note 80, at 1372.

¹⁷⁷ 1977 Act, *supra* note 176; Parnell, *supra* note 80, at 1372–73. Congress prohibited the Service from issuing any regulations, revenue rulings, or other form of nationwide guidance prior to July 1978 with respect to the taxation of fringe benefits. The Revenue Act of 1978 included a similar provision that prohibited the Service from issuing any nationwide guidance prior to January 1980 concerning the classification of employees and independent contractors for federal tax purposes. 1978 Act, *supra* note 176.

¹⁷⁸ CONG. RESEARCH SERV., CRS REPORTS ON STATUS OF IRS RESTRUCTURING AND REFORM CR-1 (2001) [hereinafter CRS REPORTS]; Lederman, *supra* note 117, at 978.

¹⁷⁹ CRS REPORTS, *supra* note 178, at CR-2.

¹⁸⁰ *Id.* at CR-1 to CR-3; *see also* Ryan J. Donmoyer, *GOP Opens IRS Horror Story Web Site*, 77 TAX NOTES 667 (Nov. 10 1997). Halloween was chosen as the date to unveil the website, apparently because of its symbolic value.

¹⁸¹ U.S. General Accounting Office, *GAO Report on Allegations of IRS Taxpayer Abuse*, 2000 TNT 80-13 (Apr. 25, 2000) [hereinafter *GAO Report*]; *see also* Joe Spellman, *Conference Panel Ponders Finance Hearing Horror Stories*, 83 TAX NOTES 1854, 1854–55 (June 28, 1999) (discussing the hearings generally and mentioning the situation of John Colaprete in particular).

¹⁸² Pub. L. No. 105-206, 112 Stat. 685 (1998) [hereinafter RRA 1998]. RRA 1998 was widely supported. Its original co-sponsors were Representatives Benjamin L. Cardin, a Democrat, and Rob Portman, a Republican. It ultimately had forty-three co-sponsors, nineteen Democrats and twenty-four Republicans. It passed in the House by a vote of 402 to eight and in the Senate by a vote of ninety-six to two. *GAO Report*, *supra* note 181, at 80-13.

1998 Reform Act “also contained an array of pro-taxpayer procedural provisions, most of which were collected under the label ‘Taxpayer Bill of Rights 3,’ the name for Title III of the Act, which contained over 70 provisions.”¹⁸³ Some of the most important taxpayer protection provisions restricted the Service’s approaches to collection and the “collection due process” procedures.¹⁸⁴ Finally, the “ten deadly sins” called for sanctioning and termination of employment for a wide variety of Service employee behavior.¹⁸⁵

The core concept was to view the taxpayer, not the government, as client.¹⁸⁶ As Commissioner Charles Rossotti stated, “[i]t is particularly important that performance measures do not directly or indirectly cause inappropriate behavior towards taxpayers, and that they provide incentives for service-oriented behavior.”¹⁸⁷ The 1998 Reform Act was the first time Congress was able to achieve relief for taxpayers.

Until the mid-1970s, taxpayers had limited recourse against the Service for procedural disputes.¹⁸⁸ It was not until Congress created the Problem Resolution Program (PRP) in 1976 that taxpayers were allowed procedural recourse.¹⁸⁹ The purpose of the PRP was to serve as a neutral body within the Service to investigate complaints and remediate the problems.¹⁹⁰ This revision was the first step in shifting the paradigm of power from a Service perspective to a taxpayer-centric position. The primary problem with the PRP system was its lack of authority to impose a final solution to disputes.¹⁹¹ The most the body could do was request the Service action be stopped and

¹⁸³ Lederman, *supra* note 1787, at 981.

¹⁸⁴ *Id.*; see I.R.S. Policy Statement 5-100, I.R.M. 1.2.14.1.17 (Jan. 30, 1992).

¹⁸⁵ Lederman, *supra* note 1787, at 981.

¹⁸⁶ See *supra* note 112.

¹⁸⁷ *IRS Restructuring: Hearings on H.R. 2676 Before the S. Fin. Comm.*, 105th Cong. 361 (1998) (Statement of Charles O. Rossotti).

¹⁸⁸ Heather B. Conoboy, *A Wrong Step in the Right Direction: The National Taxpayer Advocate and the 1998 IRS Restructuring and Reform Act*, 41 WM. & MARY L. REV. 1401, 1403 (2000); Gardner & Norman, *supra* note 11, at 1358.

¹⁸⁹ The Problem Resolution Program (PRP) was established in 1976 as part of the Taxpayer Service Division and was spun off the following year as its own organization. H.R. REP. NO. 100-1104, at 215 (1988); Conoboy, *supra* note 188, at 1401–02; Gardner & Norman, *supra* note 11, at 1358.

¹⁹⁰ See *Challenges Facing the National Taxpayer Advocate: Testimony Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 106th Cong. (1999) (Statement of Cornelia M. Ashby, Associate Director, Tax Policy and Administration Issues).

¹⁹¹ Marjorie E. Kornhauser, *When Bad Things Happen to Good Taxpayers: A Tale of Two Advocates*, 1998 TNT 45-58 (Mar. 9, 1998).

recommend possible ways to work out the problem.¹⁹² From this neutered position, in 1979, the national taxpayer ombudsman was established to head up the PRP.¹⁹³ The purpose in creating the ombudsman position was to give the office of PRP more authority and visibility. By centralizing the power in a single individual, the ombudsman could advocate effectively for taxpayer rights and interests.¹⁹⁴ Yet the underlying problem still persisted; the ombudsman was not sufficiently independent of the Service.

By the mid-1980s it became evident that the ombudsman was insufficient to truly protect taxpayer rights. In 1988, Congress responded by enacting the first Taxpayer Bill of Rights.¹⁹⁵ In response to taxpayer testimony of Service abuse, the legislation was introduced in order to enhance the procedural safeguards of the PRP.¹⁹⁶ In the 1988 Taxpayer Bill of Rights, there were requirements that the Service respect the taxpayer. For example, the Service was required to have audits conducted at a time and place convenient for the taxpayer and to protect the taxpayer's privacy by only collecting information related to the specific inquiry.¹⁹⁷

In the 1998 Reform Act, Congress significantly strengthened the Taxpayer Advocate's role by giving the office direct communication channels to Congress and by charging the position with performing "systemic advocacy."¹⁹⁸ The Taxpayer Advocate submits a very comprehensive annual report to Congress each December.¹⁹⁹

The Taxpayer Advocate Service thus provides the structural mechanism to pull taxpayers out of the automatic processing regime and put their individual situations before the appropriate Service employee. As it proclaims on its website, it is the voice of taxpayers within the Service.²⁰⁰

¹⁹² *Id.* ¶ 11.

¹⁹³ *Id.* ¶ 16.

¹⁹⁴ Internal Revenue Serv., *Taxpayer Advocate Releases Annual Report to Congress*, 1999 TNT 8-11 (Jan. 13, 1999).

¹⁹⁵ I.R.C. § 7811; Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 (1988); Gardner & Norman, *supra* note 11, at 1358.

¹⁹⁶ Gardner & Norman, *supra* note 11, at 1358; Creighton R. Meland, Jr., *Omnibus Taxpayers' Bill of Rights Act: Taxpayers Remedy or Political Placebo?*, 86 MICH. L. REV. 1787, 1787-88 (1988).

¹⁹⁷ Gardner & Norman, *supra* note 11, at 1358; Meland, *supra* note 196, at 1787-88.

¹⁹⁸ Samuel D. Brunson, *Watching the Watchers: Preventing I.R.S. Abuse of the Tax System*, FLA. TAX REV., 27 (2014) (transcript on file with author); Camp, *Equal Protection*, *supra* note 6, at 284.

¹⁹⁹ Examples of the National Taxpayer Advocate's Reports can be found at <http://www.irs.gov/uac/Taxpayer-Advocate-Service-6> (last visited Aug. 13, 2013).

²⁰⁰ See Camp, *Equal Protection*, *supra* note 6, at 275; *The Taxpayer Advocate Service is Your Voice at the IRS!*, INTERNAL REVENUE SERV., <http://www.irs.gov/uac/The-Taxpayer->

Further, a number of changes enhance the visibility and authority of local taxpayer advocates.²⁰¹

Finally, the 1998 Reform Act established within the Treasury the Service Oversight Board (Oversight Board).²⁰² The stated purpose of the Oversight Board is to oversee the Service in its administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws, related statutes, and tax conventions.²⁰³ As part of its general oversight functions, the Oversight Board is also supposed to ensure that the Service's organization and operation allow it to carry out its mission. Further, the Oversight Board files annual reports to Congress.²⁰⁴

The Oversight Board, however, has neither the responsibility nor the authority (1) to develop and formulate tax policy on existing or proposed internal revenue laws, related statutes, and tax conventions; (2) to carry out the Service's specific law enforcement activities, such as its examination, collection, and criminal investigation functions; (3) to carry out the Service's specific procurement activities; or (4) to execute specific personnel actions.²⁰⁵

IV. CURRENT INCARNATION OF THE SERVICE

The Service may investigate any taxpayer at any time with or without probable cause.²⁰⁶ A traditional investigatory scheme requires at minimum that a crime has occurred; nonetheless, the Service can begin an investigation based solely on a belief that the taxpayer has not complied with the law.²⁰⁷

Advocate-Service-Is-Your-Voice-at-the-IRS! (last visited Sept. 9, 2013).

²⁰¹ Section 6212 of the Code has been amended to require that each notice of deficiency must include a notice to the taxpayer that the taxpayer has the right to contact a local taxpayer advocate and the location and telephone number of that taxpayer advocate's office.

²⁰² I.R.C. § 7802(a), amended by 1998 Reform Act, *supra* note 11, § 1101.

²⁰³ I.R.C. § 7802(c), amended by 1998 Reform Act, *supra* note 11, § 1101.

²⁰⁴ See IRS OVERSIGHT BOARD: ANNUAL REPORT TO CONGRESS 2012 (Feb. 7, 2013), available at <http://www.treasury.gov/irsob/reports/2013/IRSOB~Annual%20Report%202012.pdf>.

²⁰⁵ See Henning, *supra* note 117, at 471; see generally FAQs, IRS OVERSIGHT BD., <http://www.treasury.gov/irsob/faqs.shtml> (last visited Aug. 13, 2013).

²⁰⁶ *United States v. Bisceglia*, 420 U.S. 141, 148 (1975); *United States v. Morton Salt Co.*, 338 U.S. 632, 642–43 (1950) (stating that an administrative agency subpoena has a general power of inquisition, not unlike that of a grand jury and the agency may base its inquiry on suspicion alone); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943) (holding that where evidence sought is not plainly incompetent or irrelevant to any lawful purpose, the court should order the production of the evidence); Bryan T. Camp, *What Good is the National Taxpayer Advocate?*, 126 TAX NOTES 1243 (Mar. 8, 2010).

²⁰⁷ See sources cited *supra* note 198.

The pushback against the Service is that once the investigatory system begins, taxpayers tend to believe that the process is inquisitorial, not adversarial. “An adversarial process separates the evidence-gatherer from the decision-maker; it relies on multiple parties in interest to gather evidence and present it to a passive, neutral decision-maker (either a judge or a jury).”²⁰⁸ Conversely, the inquisitorial system attempts to merge the roles, allowing the neutral decision-maker to gather the information as part of the process.²⁰⁹ To effectively determine where the Service falls in the adversarial/inquisitorial regime, an examination of the current system is necessary. From that position an examination of whether the agency is properly executing the prosecutorial discretion can take place.

Although it is not clear which system achieves fairer results for the aggrieved, it is often argued that in the inquisitorial model a searcher-judge would be best situated for truth seeking.²¹⁰ It is often stated that the inquisitorial approach is more efficient than the adversarial approach.²¹¹ The efficiency of this approach depends, however, on the incentives of the fact finder to conduct a thorough investigation and have correct findings of

²⁰⁸ Camp, *Administration*, *supra* note 11, at 18; *see also* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1488 (1999) (arguing that adversarial evidence-gathering ought to be, in theory, somewhat more efficient than inquisitorial gathering).

²⁰⁹ Camp, *Administration*, *supra* note 11, at 18; Posner, *supra* note 208, at 1487. In fact, most of Continental Europe, Japan, and other non-English speaking countries employ an inquisitorial system. Posner, *supra* note 208, at 1487.

²¹⁰ Craig M. Bradley, *The Convergence of the Continental and the Common Law Model of Criminal Procedure*, 7 CRIM. L.F. 471 (1996) (reviewing CHRISTOPHER HARDING ET AL., *CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY* (1995)); Posner, *supra* note 208, at 1488.

²¹¹ Hein Kötz, *The Reform of the Adversary System*, 48 U. CHI. L. REV. 478 (1981) (reviewing MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980)); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 866 (1985) (“The success of German civil procedure stands as an enduring reproach to those who say that we must continue to suffer adversary tricksters in the proof of fact.”); Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States — Opportunity for Learning from ‘Civilized’ European Procedure Instead of Continued Isolation?*, 42 AM. J. COMP. L. 147 (1994) (advocating reform in the direction of inquisitorial systems and criticizing American lawyers for their unwillingness to adopt foreign ideas); Franklin Strier, *What Can the American Adversary System Learn from an Inquisitorial System of Justice?*, 76 JUDICATURE 109 (1992) (arguing that some inquisitorial practices “could beneficially be imported into our trial procedure”); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 302–03 (1989) (concluding that nonadversarial elements in U.S. litigation, especially in complex litigation, “promote sound values and contribute to a more effective system,” but that perhaps adoption of these nonadversarial elements requires abandonment of adversary ideology).

fact.²¹² Moreover, public confidence in the process is degraded because the process is hidden from public view.²¹³ Neither is optimal for an enforcement agency.

While the perceived efficiency of the inquisitorial model is less than certain, it is often argued that the adversarial model is worse. There are duplicative costs, the searchers are not disinterested, and the system needs procedures to guard against manipulation.²¹⁴ The area of mass torts provides a prime example of such failings.²¹⁵ Far too much money has been funneled from victims to lawyers.²¹⁶ Moreover, in the area of mass tort litigation, the adversarial system has failed to provide consistent results.²¹⁷ This also is suboptimal.

In most administrative law constructs, the agency in question employs an inquisitorial system; this includes tax administration.²¹⁸ The quintessential purpose of the agency is to determine the truth through the inquisitorial system.²¹⁹ The fundamental question, though, is whether or not the administrative state is better or more efficient than are courts in conducting the inquisitorial process.

Despite the populist rhetoric that the most efficient mechanism to deal with large-scale problems is through an agency-based inquisitorial model, the reality is that most models are inefficient in practice.²²⁰ In the mass tort world, the tobacco industry was able to create a Congressional approach to the settlement. Notwithstanding bipartisan support for a Congressional settlement approach, the industry stopped the action.²²¹ The tobacco

²¹² Posner, *supra* note 208, at 1488.

²¹³ *Id.*

²¹⁴ *Id.* at 1490.

²¹⁵ Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 2016 (1999).

²¹⁶ Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 CARDOZO L. REV. 1967, 1977 (1992) (citing JAMES A. KAKALIK ET AL., COSTS OF ASBESTOS LITIGATION (1983) [hereinafter RAND STUDY]). The RAND Study's thirty-nine percent compensation figure dates back to the early 1980s and reflects transaction costs from a period when asbestos litigation had not fully matured as a mass tort litigation. Erichson, *supra* note 215, at 2016.

²¹⁷ Erichson, *supra* note 215, at 2016.

²¹⁸ Camp, *Administration*, *supra* note 11, at 19–20.

²¹⁹ *Id.* at 18–19; Erichson, *supra* note 215, at 2006–07.

²²⁰ Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005).

²²¹ David E. Rosenbaum, *Lott Wants Tobacco Bill Withdrawn*, N.Y. TIMES, June 9, 1998, at A14. Assured that the bill lacked the sixty votes needed for cloture, Senator Trent Lott called for the cloture vote. Three votes short, the bill was sent back to committee, and supporters

litigation highlights one of the problems with the inquisitorial model: capture by affected groups.

A. Service Failure as an Inquisitorial Agency

The Service as an agency employs an inquisitorial system, as described above.²²² It is both the decision maker and the searcher of evidence. In that dual role, the Service will fail for lack of the ultimate litigation authority to defend its position. The DOJ Pronouncement highlights not only the capture of the Service by the DOJ, but also the lack of the Service's ability to be a truth gatherer. First, the Service is effectively captured by the DOJ through the prosecutorial relationship between the two agencies. Second, the DOJ Pronouncement compels the Service to gather support for a position that does not represent what the ultimate prosecutor believes to be true.

The mechanism Congress enacted delegating the authority of the Service to determine the taxpayer's liability created the aforementioned inquisitorial system. Under section 6201 of the Code, the Service is authorized "to make the inquires, determinations, and assessments of all taxes."²²³ By the very definition of the scope of its authority, the Service is designed to both inquire into the amount owed and decide on the liability resulting in an assessment. Although the assessment does not create a tax liability,²²⁴ it serves as the Service's administrative judgment of the tax liability.²²⁵

1. Taxpayer Responsibility in Self-Reporting System

The goal of the Service determination process is to create an assessment. There are two mechanisms in which the Service assesses the taxpayer. The primary method is through the filing of the taxpayer return. Under the self-assessment system of reporting, taxpayers are required to file an accurate account of taxes owed.²²⁶ Failure to do so is a felony and there are additional

acknowledged that there was little chance of reviving the bill within the year. Erichson, *supra* note 215, at 2022–23; *see also* David E. Rosenbaum, *The Tobacco Bill: The Overview; Senate Drops Tobacco Bill with '98 Revival Unlikely; Clinton Lashes Out at G.O.P.*, N.Y. TIMES, June 18, 1998, at A1.

²²² Camp, *Administration*, *supra* note 11, at 19–20.

²²³ I.R.C. § 6201; *see also* Camp, *Administration*, *supra* note 11, at 20.

²²⁴ Camp, *Administration*, *supra* note 11, at 20.

²²⁵ An assessment is the functional equivalent of a judgment. *Cohen v. Gross*, 316 F.2d 521, 522–23 (3d Cir. 1963); *see* Camp, *Administration*, *supra* note 11, at 21.

²²⁶ I.R.C. §§ 6662(d)(2)(B), 7206(1); S. REP. NO. 94-938, at 318 (1976) (regarding disclosure to other government agencies, the Senate Finance Committee "tried to balance the particular office or agency's need for the information involved with the citizen's right to

negligence and substantial understatement penalties.²²⁷ If the taxpayer has a “reasonable basis” for taking the reporting position, the penalties may be abated.²²⁸

The core reporting issue facing taxpayers is that the real world is far from certain. The tax law is itself vague and ambiguous.²²⁹ If a taxpayer must produce a “true and correct” return and vagrancies exist, is the taxpayer required to take the least favorable position? Under the inquisitorial system, the taxpayer should be producing a return that takes the most favorable position that is at least as likely as not to prevail if challenged.²³⁰ There are essentially three tax litigation standards: “substantial authority,” “more likely than not,” and “reasonable basis.”²³¹ If the system structure was adversarial, then the trier of fact would weigh both positions and make a neutral decision. Aggressive taxpayer positions, although permitted in the adversarial system, in the inquisitorial system would undermine the self-assessment standards.²³²

privacy and the related impact of disclosure upon the continuation of compliance with our country’s voluntary assessment system”); Calvin Johnson, *True and Correct: Standards for Tax Return Reporting*, 43 TAX NOTES 1521 (June 19, 1989); Dennis J. Ventry, Jr., *Cooperative Tax Regulation*, 41 CONN. L. REV. 431, 449–50 (2008); Brett Wells, *Voluntary Compliance: This Return Might be Correct but Probably Isn’t*, 29 VA. TAX REV. 645, 670–71 (2010).

²²⁷ I.R.C. § 6662(d); see also Johnson, *supra* note 226, at 3; Wells, *supra* note 226, at 661–62.

²²⁸ I.R.C. § 6664(c); Treas. Reg. § 1.6664-4(a); see also Johnson, *supra* note 226, at 3; Richard Lavoie, *Analyzing the Schizoid Agency: Achieving the Proper Balance in Enforcing the Internal Revenue Code*, 23 AKRON TAX. J. 1, 6–8 (2008); Wells, *supra* note 226, at 661–62.

²²⁹ Johnson, *supra* note 226, at 3.

²³⁰ *Id.* at 4; *Working Draft of Chapters 1–4 and 8 of the Civil Tax Penalties Report by the Executive Task Force of the Internal Revenue Commissioner’s Penalty Study, Circulated to Members of the Commissioner’s Advisory Group*, 237 DAILY TAX REP. L-10, L-33-4 (Dec. 9, 1988).

²³¹ Treas. Reg. §§ 1.6694-2(b)(1), 1.6694-2(d)(2) (2009); see also Scott A. Schumacher, *Macniven v. Westmoreland and Tax Advice: Using “Purposeful Textualism” to Deal with Tax Shelters and Promote Legitimate Tax Advice*, 92 MARQ. L. REV. 33, 67–68 (2008) (“For example, the 2007 amendments to § 6694 provide, in essence, that a practitioner may not advise a taxpayer to take a position on a return unless the position has a more likely than not chance of success or the position is disclosed to the [Service]. However, under § 6662(d), a taxpayer may take a position on a return without disclosure as long as the position meets the lower standard of ‘substantial authority.’”); Ventry, *supra* note 226, at 449–50.

²³² Unlike the individual setting, the Service requires corporations to file an uncertain tax position form in the corporate setting. See I.R.S. Announcement 2010-76, *Requests for Documents Provided to Independent Auditors, Policy of Restraint and Uncertain Tax Positions*, I.R.B. 2010-41 (Oct. 12, 2010), available at http://www.irs.gov/irb/2010-41_IRB/ar12.html; Brett Wells, *New Schedule UTP: “Uncertain Tax Positions In The Age Of Transparency”*, 63 BAYLOR L. REV. 392, 408–09 (2011).

Since the 1998 Reform Act, the structure is such that the Service's mission is to collect the proper amount of tax efficiently and fairly.²³³ The Service must maximize the voluntary taxpayer compliance through appropriate standards. Audits and penalties are to serve the subsidiary function of encouraging accurate self-assessment.²³⁴ This mission correlates to the inquisitional system.

Since the premise is that the taxpayer must self-assess in an accurate manner, and the Service has limited resources, the vast majority of the returns are accepted as filed.²³⁵ Thus, although a technical determination, by accepting the return the Service assesses the tax liability as shown on the return.²³⁶ One of the primary problems with the lack of review is that taxpayers fail to comply unless an appropriate penalty regime is in place.²³⁷

2. Audit

As previously stated, the taxpayer, in areas that are not settled, may take a position on his tax return that has a "realistic possibility of success."²³⁸ If the taxpayer has decided that he has a foundation for a different position, he is not required to disclose the position on his return.²³⁹ The Service must investigate in a more thorough manner the taxpayer's return for compliance.

The audit function operates primarily to ensure taxpayer compliance with the Service's position of the law.²⁴⁰ An examining agent begins the review by examining the return for issue spotting and fact finding.²⁴¹ The Service does not grant the examining agent any true authority to make a

²³³ *The Agency, Its Mission and Statutory Authority*, INTERNAL REVENUE SERV., <http://www.irs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority> (last visited Aug. 13, 2007); see also IRM 8.1.1.4 (2003) ("The mission of the service is to encourage and achieve the highest possible degree of voluntary compliance with the tax laws and regulations and to conduct itself so as to warrant the highest degree of public confidence in its integrity and efficiency.").

²³⁴ IRM 1.1.1.1 (2011); Johnson, *supra* note 226, at 4.

²³⁵ This is the so-called "audit lottery," stating that less than 0.1% of returns are audited. 2002 SERV. REPORT, *supra* note 117, at 6; Camp, *Administration*, *supra* note 11, at 22–23.

²³⁶ Camp, *Administration*, *supra* note 11, at 22.

²³⁷ Herzig, *supra* note 6, at 1058–59; Leaderman Proposal, *supra* note 6, at 1197; Ventry, *supra* note 226, at 433.

²³⁸ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 85-352 (1985); Treas. Reg. § 1.6662-3(c)(1); 31 C.F.R. § 10.34 (2007); Lavoie, *supra* note 228, at 5.

²³⁹ Lavoie, *supra* note 228, at 5.

²⁴⁰ Camp, *Administration*, *supra* note 11, at 22–23.

²⁴¹ IRM 8.1.1.1 (2003); IRM 8.1.1.3 (2006).

determination of the law.²⁴² Rather, the examining agent is instructed to raise all meritorious issues.²⁴³ The only restraint is the examining agent taking a “strained construction” of the statute.²⁴⁴

Once the examining agent finishes the examination, a report is prepared and is submitted to a first-level manager.²⁴⁵ At that point if the manager approves the report, then the Service will either: (1) assess the tax (if it is assessable); (2) send out a Notice of Deficiency (the colloquial “ninety day letter”) if the tax is immediately assessable because it is a deficiency; or (3) send a notice that the Service intends to send a Notice of Deficiency (the “thirty day letter”).²⁴⁶

If during the examination period the taxpayer either cannot reach an agreement with the examining agent or disputes the findings of the agent, then the taxpayer can appeal the decision through the Service’s Appeals Office.²⁴⁷ It is important to note that if the taxpayer plans to obtain a judicial review via a refund claim (as opposed to a deficiency), the administrative process outlined in the Code must first be exhausted.²⁴⁸ The appeals agent reviews the examining agent’s report and may investigate new issues.²⁴⁹ After this initial review, the Appeals Office has the authority to weigh the legal merits of the issues and to make offers and compromise.²⁵⁰

The appeals process, unlike the examination and assessment processes, is similar to the adversarial construct. Taxpayers and the Service treat the process similar to litigation. The Service takes an aggressive position the same as they would in litigation.²⁵¹ The Appeals Office has various options

²⁴² Rev. Proc. 64-22, 1964-1 C.B. 689; Camp, *Administration*, *supra* note 11, at 24–26; Lavoie, *supra* note 228, at 10; Internal Revenue Serv., *IRS Releases ‘Oral History Interview’ of Former Commissioner Caplin*, 94 TNT 120-25 (June 22, 1994).

²⁴³ See *supra* note 242.

²⁴⁴ Rev. Proc. 64-22, 1964-1 C.B. 689; IRM 31.1.1.1 (Aug. 11, 2004); IRM 32.2.1.1 (Aug. 11, 2004); IRM 33.2.2.3 (Oct. 28, 2010); see also Camp, *Administration*, *supra* note 11, at 24–26; Lavoie, *supra* note 228, at 10–11.

²⁴⁵ MICHAEL I. SALTZMAN & LESLIE BOOK, *IRS PRACTICE AND PROCEDURE* ¶ 10.02 (2d ed. 2002); Camp, *Administration*, *supra* note 11, at 24.

²⁴⁶ SALTZMAN & BOOK, *supra* note 245, ¶ 10.02; Camp, *Administration*, *supra* note 11, at 23–24.

²⁴⁷ IRM 8.1.1.1 (2003); IRM 8.1.1.3 (2006); Camp, *Administration*, *supra* note 11, at 24; Lavoie, *supra* note 228, at 10.

²⁴⁸ I.R.C. § 7422(a).

²⁴⁹ IRM 8.1.1.1 (2003); IRM 8.1.1.3 (2003); IRM 8.6.1.4.2 (2001); Camp, *Administration*, *supra* note 11, at 24; Lavoie, *supra* note 228, at 10.

²⁵⁰ IRM 8.1.1.1 (2003); IRM 8.1.1.3 (2003); IRM 8.6.1.4.2 (2001); Camp, *Administration*, *supra* note 11, at 24–25; Lavoie, *supra* note 228, at 10.

²⁵¹ Lavoie, *supra* note 228, at 10–11.

after its initial review. The matter can be sent back to Examinations for further investigation and review.²⁵² The Appeals Office can settle the matter through the offer and compromise process.²⁵³ The settlement process is clearly defined by the adversarial process. The entire process of examination and appeals requires the agency to take the most aggressive position as allowed under law. That position is articulated under Revenue Procedure 64-22, stating that the Service should take a position that is most in favor of the collection of revenue.²⁵⁴ This literal interpretation allows the Service to settle cases utilizing a litigation risk assessments.²⁵⁵ Essentially, if the Service believes that it has a thirty percent chance of winning a case, then a settlement may be proffered at thirty percent of the tax liability.²⁵⁶ The hybridized process of an inquisitional and adversarial process creates the initial taxpayer dissatisfaction and negative perception of the agency.

Finally, if no agreement is reached during the appeals process, then Appeals may issue a Notice of the Deficiency.²⁵⁷ If a Notice of Deficiency is issued, then the taxpayer has ninety days to either pay the tax (and perhaps sue for a refund) or go to Tax Court.²⁵⁸ Once the Notice of Deficiency is issued, it carries the full weight of an agency decision.²⁵⁹

Once the Notice of Deficiency has been issued, if the taxpayer elects to pay the tax, then the taxpayer may sue for refund. When a taxpayer requests a refund of taxes already paid, the Service either rejects the claim or fails to act within six months.²⁶⁰ Though the refund process sounds simplistic and is often cited by courts as an adequate remedy, refund claims are subject to thorough administrative review by the Service.²⁶¹ In other words, by

²⁵² IRM 8.6.1.4.2 (2001).

²⁵³ Camp, *Administration*, *supra* note 11, at 24–25; Lavoie, *supra* note 228, at 10–11.

²⁵⁴ Rev. Proc. 64-22, 1964-1 C.B. 689.

²⁵⁵ Lavoie, *supra* note 228, at 10–11; George Guttman, *News Analysis: IRS Avenges: Winning Little, Losing Big*, 61 TAX NOTES 155, 156 (Oct. 11, 1993).

²⁵⁶ *See supra* note 255.

²⁵⁷ IRM 8.2.1.9.2 (1999); Camp, *Administration*, *supra* note 11, at 25.

²⁵⁸ I.R.C. §§ 6211(a), 6212(a), 6213(a) (defining and authorizing deficiencies and petitions); *see also* Leandra Lederman, “Civil”izing Tax Procedure: Applying General Federal Pleading to Statutory Notices of Deficiency, 30 U.C. DAVIS L. REV. 183, 192–203 (1996).

²⁵⁹ Camp, *Administration*, *supra* note 11, at 23–24; *see, e.g.*, Meserve Drilling Partners v. Commissioner, 152 F.3d 1181, 1183 n.3 (9th Cir. 1998); Edwards v. Commissioner, 84 T.C.M. (CCH) 24 (2002).

²⁶⁰ *See* I.R.C. § 7422(a) (stating that a taxpayer must exhaust administrative remedies with the Service before pursuing a refund claim in court); I.R.C. § 6532(a)(1).

²⁶¹ *See* Treas. Reg. § 601.105(e)(2) (1987) (stating that the examination of refund claims is subject to the same procedure and level of scrutiny as general audits).

submitting a refund claim, a taxpayer subjects herself to the equivalent of a second audit. The Service obtains a second bite at the apple and now has greater incentives based in the adversarial model to create a more favorable litigation position. In order to collect the most amount of revenue for the fisc, the Service should attempt to find additional issues and claim underpayment. Obviously, the refund route, as opposed to going to Tax Court, creates additional hurdles and risks for taxpayers that the deficiency route does not.

B. Litigation Problems with the Service's Self-Representation

Once the audit and appeals process plays out and the taxpayer ends up in Tax Court, Federal Court of Claims, or district court, the problems associated with the Service posturing during the assessment process continue to manifest themselves. There are two primary problems associated with the Service self-representation.²⁶² First, the underlying assessment that provides the foundation for the litigation is given judicial deference. Second, the Service represents both the agency as well as a neutral collector of the tax. This dichotomy affects several areas, including the Service's position that it is not required to take similar litigation positions in different circuits. Finally, because the Service does not ultimately represent itself through the entire litigation process, it is subject to capture by another administrative agency — the DOJ.

1. Dual Service Duties

The tension between the dual masters to which the Service is beholden can be seen in the final prong of the controversy process in Tax Court. The Office of Chief Counsel represents the Service in Tax Court. Through the policies established in the Chief Counsel Directives Manual,²⁶³ the Service imposes duties on its office to taxpayers.²⁶⁴ This dual role is inconsistent with true adversarial litigation in that the Chief Counsel does not always advocate to protect the fisc.²⁶⁵ The Chief Counsel does not represent the Service in a traditional attorney-client relationship. The objective of the Service is not to win at all costs, but rather to apply the tax laws impartially and apply a correct

²⁶² There are also more problems such as the power of the court and the differing burdens of proof. See, e.g., Herzig, *supra* note 6; Lederman, *supra* note 117; Pietruszkiewicz, *supra* note 10.

²⁶³ IRM 30.1.1.2 (Aug. 11, 2004).

²⁶⁴ Michelle M. Kwon, *The Tax Man's Ethics: Four of the Hardest Ethical Questions for an IRS Lawyer*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 371, 381 (2011).

²⁶⁵ See BERNARD WOLFMAN ET AL., STANDARDS OF TAX PRACTICE § 702, at 374–75 (3d ed. 1995).

interpretation of the law for the best interest of the public.²⁶⁶

The Chief Counsel exercises restraint by informing taxpayers of appropriate statutes of limitations and ensuring assessments are correct among many items. This restraint is especially necessary because the majority of taxpayers are not represented by counsel.²⁶⁷ The Chief Counsel acts as an advocate for the legal process and not merely an advocate for his or her client.²⁶⁸ Therefore, under the current paradigm, the Chief Counsel is hamstrung in its representation of the fisc. This is particularly true when examining the lack of restraint the DOJ exercises in district court.

The DOJ is limited in its posturing only by the Federal Rules of Civil Procedure. In fact since the DOJ represents the Commissioner, additional hurdles may be set forth because of privilege matters. For example, in *Marriott International Resorts L.P. v. United States*,²⁶⁹ the Federal Circuit reversed the Court of Federal Claims and upheld the government's assertion of executive privilege, finding that Service Delegation Order No. 220 (April 16, 1997) permits the Commissioner to delegate the assertion of this privilege to a subordinate, an Assistant Chief Counsel.²⁷⁰ There is no compulsion to exercise restraint, as there is for the Chief Counsel. Rather, there is incentive

²⁶⁶ Rev. Proc. 64-22, 1964-1 C.B. 689 (directing Service employees to “find the true meaning” of the tax laws rather than “adopt a strained construction in the belief that [they are] ‘protecting the revenue’”); IRM 35.6.2.9 (Aug. 11, 2004) (“Respondent counsel’s obligation as a public servant is to assist the court to reach the correct result, even if it is adverse to respondent’s original determination” and should offer “all available evidence of material facts . . . to help the court make a proper ruling.”); IRM 39.1.1.1(2) (Aug. 11, 2004) (Chief Counsel lawyers are “to provide the answer that most accurately reflects the meaning of the tax code” rather than “an answer that is most beneficial to the government.”); Kwon, *supra* note 264, at 411.

²⁶⁷ Kwon, *supra* note 264, at 379 (“There were 30,680 cases docketed in the Tax Court in the fiscal year ending September 30, 2009, of which 23,837 cases (77.7%) were pro se cases where taxpayers represented themselves.”).

²⁶⁸ MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (1983) (describing a prosecutor in a criminal case as a “minister of justice and not simply that of an advocate”); Kwon, *supra* note 264, at 382. The role of the Service lawyer may also be viewed as less of an advocate and more of an advisor. See MODEL RULES OF PROF’L CONDUCT PREAMBLE [1]. A lawyer acting as an advocate “zealously asserts the client’s position under the rules of the adversary system.” *Id.* By contrast, an advisor gives a client “an informed understanding of the client’s rights and obligations and explains their practical implications.” *Id.*

²⁶⁹ 437 F.3d 1302 (Fed. Cir. 2006).

²⁷⁰ See also *Proctor & Gamble Co. v. United States*, No. 1:08-cv-608, 2009 U.S. Dist. LEXIS 124049 (S.D. Ohio Dec. 31, 2009) (the DOJ trial attorney and Service attorney who had advised the audit team asserted the deliberative process privilege, and the court required the Service Commissioner, an Assistant Chief Counsel, or an “appropriately high-ranking non-litigation team member” to present an affidavit asserting the privilege within thirty days to prevent disclosure of the documents.).

to win the cases tried at all costs.²⁷¹

An example of aforementioned disparate litigation positions can be gleaned from a cursory examination of the scope of discovery in Tax Court compared to that in district court. Since the Service assessment is deemed correct, in Tax Court, the scope of discovery under the Tax Court Rules is generally narrower than in either the district courts or the Court of Federal Claims. Underlying the overall discovery process in Tax Court is the principle that discovery is not to be utilized unless the parties are unable to obtain the information on an informal basis.²⁷² Except in limited situations, discovery depositions in the Tax Court are available only by mutual agreement.²⁷³ The ability to depose nonparty witnesses is also more restrictive in the Tax Court.

There are further restrictions in Tax Court. First, there are only bench trials not juries. There is a strict mandatory stipulation process under which the parties are required to develop as full a statement of nonprivileged, relevant facts as the parties can reach.²⁷⁴ A stipulation is treated as a conclusive admission binding on all parties for which it has been submitted.²⁷⁵

Discovery in both the district court and Court of Federal Claims, by contrast, is subject to more liberal and broader rules. Even within the confines of the mandatory disclosure obligations imposed by the December 1993 amendments to the Federal Rules of Civil Procedure, discovery in the district courts remains quite expansive in comparison to the Tax Court's rules. DOJ attorneys can be expected to utilize discovery broadly within the confines of the applicable rules of procedure in the district courts and Court of Federal Claims in preparing the government's defense to the taxpayer's refund action.

2. Settlement Authority

There are many steps during the assessment process at which the dispute

²⁷¹ See *U.S. Dep't of Justice v. Tax Analyst*, 492 U.S. 136 (1989) (the Tax Division of the DOJ receives a copy of every federal court tax decision, which it classifies as a "win, partial win, or loss," and files for use in possible appeals); Peterson, *supra* note 55, at 334 (1991) (noting that the government turned its attention in Point II (Brief for the United States, *United States v. Tenzer*, No. 96-1653, at 42-62 (2d Cir. 2000) to developing the argument that even if Tenzer had met all the requirements of the policy, the government had no obligation to refrain from prosecuting him).

²⁷² *Branerton Corp. v. Commissioner*, 61 T.C. 691 (1974); T.C. R. 75(b).

²⁷³ T.C. R. 74.

²⁷⁴ T.C. R. 91.

²⁷⁵ T.C. R. 91(e).

may be resolved. One of the problems with the current construct, however, is that while the Service has established the frame of the inquiry through the audit phase, in the appeals and litigation phase taxpayers may only fight the law. The result of the misapplication of law is discussed below in the *Golsen* context. Prior to a discussion of the application of law, however, it is helpful to outline the actual authority to settle matters in dispute.

The Attorney General has the authority to settle a refund suit at any stage of the proceeding after the suit has been referred to the DOJ.²⁷⁶ The office carries the inherent power to agree to a compromise in any litigation in which the DOJ represents the United States. This inherent authority gives the Attorney General broad power and flexibility, thus affording the DOJ the opportunity to settle a case for reasons of strategy rather than solely for reasons based on the merits. The authority to settle refund suits is delegated by the Attorney General to different officials in the DOJ according to the amount of the concession by the government.²⁷⁷ Most of the settlement authority turns on the Service agreeing with the settlement. Only the Assistant Attorney General can resolve a disagreement between the Service and the person in the Tax Division who otherwise would have settlement authority, with respect to a proposed settlement.

To settle cases, the Service has limited settlement authority. Generally, the Chiefs of the Trial and Appellate Sections may settle refund suits less than \$500,000 in concessions. While amounts above \$500,000 but less than \$2 million require approval of the Deputy Assistant Attorney General,²⁷⁸ section 6405(a) of the Code requires that the Joint Committee on Taxation review all refunds of income, estate, or gift taxes (as well as certain other taxes) in excess of \$2 million.²⁷⁹ The DOJ is not bound to follow the views of the Joint Committee and has on occasion proceeded to settle cases without the Joint Committee's concurrence.²⁸⁰

This begs the question: why is there a check-and-balance system in the

²⁷⁶ I.R.C. § 7122(a).

²⁷⁷ Tax Division Redelegations of Authority to Compromise and Close Civil Claims, 72 Fed. Reg. 65457 (Nov. 21, 2007) (to be codified at 28 C.F.R., pt. 0, app. to subpart Y).

²⁷⁸ See Craig M. Boise, *Playing with "Monopoly Money": Phony Profits, Fraud Penalties and Equity*, 90 MINN. L. REV. 144, 209–10 (2005); Greenaway, *supra* note 6, at 324–25.

²⁷⁹ I.R.C. § 6405(a); see Boise, *supra* note 278, at 209–10; Greenaway, *supra* note 6, at 324; Amandeep S. Grewal, *The Congressional Revenue Service*, 2014 U. ILL. L. REV. (forthcoming 2014). Although the statute does not specifically refer to settlements by the DOJ, it is the practice and policy of the DOJ to request the review of the Joint Committee with respect to all proposed refunds in excess of \$2 million and to await the views of the Committee before authorizing those refunds.

²⁸⁰ Boise, *supra* note 278, at 210–11; Grewal, *supra* note 6, at 5.

DOJ settlement paradigm? I argue that it is because of the adversarial nature of the litigation. Having unchecked prosecutorial discretion is not optimal in the area of impartial collection of taxes. Thus, it is necessary to ensure a fair and impartial application of the tax law. So why is none of these checks in place for the Service through Appeals and the Tax Court? In fact, a more expansive settlement regime is in place through the acquiescence or nonacquiescence positions by the Service.

3. Nonbinding Court Positions

It is impossible to know how often the Service takes inconsistent positions during the assessment phase. “Most transactions between taxpayers and the [Service] are subject to privacy rules and do not become matters of public record.”²⁸¹ Essentially, the Service is able to take any posture of the liability and the theory of the tax law, then agree to settle the case without any public disclosure. In the “Star Chamber” world of Service assessment, no statistics are kept or even any redacted settlement agreements offered for public guidance. The Service can take any position, no matter how unreasonable, and unless the case moves to litigation and the litigation actually results in a verdict,²⁸² the agency has no accountability.

The problem of pinning the Service down on a theory is further exacerbated by a precedent problem. The Service may disagree with the district court opinions. In those cases, the Service may issue a nonacquiescence letter stating that it will not be bound to a lower court precedent until the Court has concluded on the matter.²⁸³ The only restriction on the Service’s ability to take a contradictory position is the *Golsen* rule.²⁸⁴ The Tax Court in applying precedential authority will apply the rule of the Court of Appeals,

²⁸¹ Steve R. Johnson, *An IRS Duty of Consistency: The Failure of Common Law Making and a Proposed Legislative Solution*, 77 TENN. L. REV. 563, 568 (2010); see also I.R.C. § 6103.

²⁸² Leandra Lederman, *What Do Courts Have to Do with It?: The Judiciary’s Role in Making Tax Law*, 65 NAT’L TAX J. 899 (2012).

²⁸³ IRM 8.22.2.4.8.1. Even if the issue is framed as a question of “law” (as the court framed it in *Crawford v. U.S.*, 422 F. Supp. 2d 1209 (D. Nev. 2006)), it generally takes more than one trial court opinion to convince the decision-makers within the Service to change an institutional position. For example, it took the decisions of five different circuit courts over a three-year period before the Service abandoned its systemic practice of reviving a tax liability when, due to a clerical error, it erroneously refunded a payment to the taxpayer. For a more complete description, see Camp, *Failure*, *supra* note 74, at 95; Bryan T. Camp, *The Mysteries of Erroneous Refunds*, 114 TAX NOTES 231 (Jan. 17, 2007).

²⁸⁴ *Golsen v. Commissioner*, 54 T.C. 742 (1970), *aff’d*, 445 F.2d 985 (10th Cir. 1971); Andre L. Smith, *Deferential Review of Tax Court Decisions of Law: Promoting Expertise, Uniformity, and Impartiality*, 58 TAX LAW. 361, 374 (2005).

if the court has opined on the issue. In *Golsen*, the court held, “where the Court of Appeals to which appeal lies has already passed upon the issue before us, efficient and harmonious judicial administration calls for us to follow the decision of that court.”²⁸⁵ The only exception occurs when the Tax Court and a district court have decided an issue differently, and neither case has been appealed.

Prior to *Golsen*, much like the earlier DOMA posit, taxpayers could receive different rulings depending on whether the case was tried in district court or Tax Court. Since the Tax Court is an article I, not article III, court, it is not bound to follow any circuit court’s precedent and could decide an issue contrary to the litigating taxpayer’s circuit’s rule of law. The rhetoric leading up to *Golsen* was the same as in the DOMA context: those who could avoid the Tax Court by paying the tax would, while poorer taxpayers are stuck with the incorrect Tax Court rule.

Within the Chief Counsel’s office, the Director of the Tax Litigation Division has delegated the authority to prepare and approve recommendations of acquiescence and nonacquiescence.²⁸⁶ The mechanism for providing notice to the public is through Actions on Decisions, which detail the reasons for the Division’s determination.²⁸⁷ Although the Internal Revenue Manual gives general guidance to the Action on Decision preparer, it provides no specific guidance on when nonacquiescence should be recommended in lieu of acquiescence.

The Service is theoretically designed to achieve a fair result in the impartial collection and assessment of taxation. Yet constant failure to clarify positions or to have structural guidelines and accountability does not create certainty for taxpayers. This friction is a direct result of the agency’s hybrid use of the inquisitorial and adversarial systems. In order to ensure the proper self-assessment, the Service utilizes uncertainty. It has been commented:

Of all the agencies of the government, the worst offender against sound principles in the use of precedents may be the Internal Revenue Service. . . . Its basic attitude is that because consistency is impossible, an effort to be consistent is unnecessary; therefore it need not consider precedents, and it may depart from precedents without explaining why.²⁸⁸

²⁸⁵ *Golsen*, 54 T.C. at 757.

²⁸⁶ IRM (30)312.3 (July 19, 1984).

²⁸⁷ IRM (30)1173.21 (June 7, 1983).

²⁸⁸ 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 8:12 at 206, 208–09 (2d ed. 1979); see also Johnson, *supra* note 281, at 569.

Yet the Service does not need to be forced into a *Golsen* posture. It could increase certainty by providing more regulatory or administrative guidance or making such guidance more clear.²⁸⁹ Unfortunately, the Service does not issue more actions on decisions,²⁹⁰ issue advance rulings on tax questions, disclose advance rulings provided to taxpayers, or forgo litigation of unclear tax issues.²⁹¹

Because of the systematic failure of the Service that allows the uncertainty to exist, the Service does not live up to the stated goal of clarity. Chief Counsel Lester Uretz once said, “[t]he policies which guide decisions as to whether to acquiesce reflect the Service’s two major objectives: to handle tax controversies fairly, efficiently, and expeditiously in order to avoid needless litigation, and to achieve the maximum possible uniformity and consistency of treatment among similarly situated taxpayers.”²⁹² Thus when given the opportunity to end litigation and to establish stable, nationally uniform rules of law through acquiescence, the Commissioner should acquiesce. Yet if the acquiescence does not create uniformity, then there should be no acquiescence.

To the extent that this has been studied empirically, it is shown this was not the result.²⁹³ The study tested 245 acquiescences and nonacquiescences over a five-year period.²⁹⁴ Based on the above model of uniformity, the study concluded that “on an overall basis for the five sample years, and for the sample years individually,” the Commissioner was no more likely to acquiesce in situations where uniformity would be an immediate result than in other cases.²⁹⁵ Moreover, the Chief Counsel mentioned the goal of national

²⁸⁹ See Sarah Lawsky, *Probably? Understanding Tax Law’s Uncertainty*, 157 U. PA. L. REV. 1017, 1072 (2009); Leigh Osofsky, *The Case Against Strategic Tax Law Uncertainty*, 64 TAX L. REV. 489, 495 (2011).

²⁹⁰ Actions on decision are statements as to the Service’s future litigation position regarding a court decision. *Actions on Decision (AOD)*, INTERNAL REVENUE SERV., <http://www.irs.gov/app/picklist/list/actionsOnDecisions.html> (last visited Aug. 13, 2013).

²⁹¹ Lawsky, *supra* note 289, at 1072; Osofsky, *supra* note 289, at 495.

²⁹² Lester R. Uretz, *The Chief Counsel’s Policy Regarding Acquiescence and Nonacquiescence in Tax Court Cases*, 14 TAX COUNS. Q. 129, 141 (1970).

²⁹³ GARY W. CARTER, *THE ACQUIESCENCE/NONACQUIESCENCE POLICY OF THE COMMISSIONER WITH RESPECT TO TAX COURT DECISIONS — AN EMPIRICAL ANALYSIS* 100–03 (1985) (Ph.D. dissertation) (on file with the University of Texas at Austin). Admittedly, this is just one study; however, no other work has been done on the issue.

²⁹⁴ *Id.* at 102.

²⁹⁵ *Id.* at 103. The sample years were 1972, 1974, 1976, 1978, and 1980. These years spanned two Republican administrations and one Democratic administration. During the sample period, four persons held the position of Commissioner and four persons occupied the Chief Counsel’s office. This suggests that there is no apparent reason why the results achieved

uniformity as a contributory reason for his recommendation of acquiescence in only one case examined.²⁹⁶

V. A REIMAGINED SERVICE

From the premise that any incremental improvement is beneficial, I ultimately argue that the Service should be reformed. In order to envision a different incarnation of the Service, I examined the nonstatic nature of the agency. Examining the historic Service with the articulated current goal of the agency, its proximity to the proper function within the construct of efficient and fair collection of taxes can be examined. The 1998 goals are no closer today than they were 15 years ago. Thus, extra protections must be afforded for taxpayers. The optimal protection for taxpayers would be a removal of prosecutorial discretion from the Service.

Because of the DOJ's separation from the Service, the refund attorneys should be expected to analyze and present a tax refund case more objectively and independently than would their counterparts from the district counsel's office.²⁹⁷ Although the DOJ works with the Chief Counsel's office, there is no vested interest in protecting the underlying investigation or the impact of internal process or policies of the assessment side of the tax law. Meanwhile, the Chief Counsel, under the current construct must, as a practical matter, consider the views of the local Service representatives involved in the administrative development of the controversy.²⁹⁸

The independent nature of the DOJ can be seen by its willingness to "confess error in cases when, upon review, we realize that the Government

would be different in current and future administrations. *Id.*

²⁹⁶ See *Mirsky v. Commissioner*, 56 T.C. 664 (1974), action on dec., 1749-69, 5135-69 (Aug. 25, 1972). The Chief Counsel referred to the Tax Court opinion that noted the congressional objective of nationally uniform tax treatment of payments to a divorced spouse, irrespective of differences in local law terminology.

²⁹⁷ See, e.g., MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1980) ("The responsibility of the public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); ABA STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE, Standard 3-1.2(C) ("The duty of the prosecutor is to seek justice, not merely to convict."); see also MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1993) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); Bruce A. Green, *Why Should Prosecutors Seek Justice?*, 26 FORDHAM URB. L.J. 607, 612 (1999); Michael Herz, "Do Justice!": *Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111 (1996); Sheri Lynn Johnson, *Symposium, Batson Ethics For Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475, 505 (1998); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 46 (1991).

²⁹⁸ Peterson, *supra* note 55, at 335.

has successfully advanced an erroneous position.”²⁹⁹ Whether that is for strategic or other reasons, the DOJ has this autonomy. Clear tension exists in this strange relationship. For example, the DOJ may confess error after a Tax Court decision where the Service has pressed a position that the DOJ ultimately determines to have been wrong.³⁰⁰ Obviously, such a determination might be deemed controversial with what the DOJ believes is “our client agency, the Internal Revenue Service.”³⁰¹

The practical effect of the DOJ’s ultimate authority over the proper posturing of a case through district court, Court of Claims, or the federal appellate courts is that it is the “final arbiter of the litigating positions that will be advanced on behalf of the United States.”³⁰² Despite the false narrative that the Chief Counsel and the DOJ act independently, the DOJ has a clear view of the subservient nature of the Chief Counsel. If the premise established by former Assistant Attorney General Patterson is true and the DOJ views the Service as a client, it follows that consultation would occur and more often than not an agreement would be reached.³⁰³ From the perspective of the DOJ, the Service is a client and the attorney, the DOJ, has the authority to make the ultimate position on the law.

So why then would the Service be required to take a position that is contrary to the ultimate litigation position of the DOJ? There is a real disconnect between the practical application of the intra-agency structure and the theoretical construct of the Tax Court. Without the Service representing itself in Tax Court the DOJ Pronouncement would not result in disparate treatment of taxpayers in differing courts. This disparate treatment is a direct result of the Service taking a position that the DOJ believes untenable. We are left then to discuss how the Service can be redesigned to prevent this problem in the future.

Layered upon this micro problem is the more macro problem of creating a Service that more accurately reflects the goals of the 1998 Reform Act. There appears to be two ways to avoid the micro problem: (1) giving the Service litigation authority in all tax matters, and (2) giving the DOJ exclusive litigation authority in all tax matters. A removal of litigation authority most closely aligns to the policy goals of the 1998 Reform Act. Moreover, even under the most expansive construct known, before the Court, the Solicitor General, with some notable exceptions, controls all aspects of

²⁹⁹ *Id.*

³⁰⁰ Green, *supra* note 297, at 612; Herz, *supra* note 297, at 117; Peterson, *supra* note 55, at 335–36.

³⁰¹ Peterson, *supra* note 55, at 336.

³⁰² *Id.*

³⁰³ *Id.*

independent agency litigation, including the power to seek certiorari. Ultimately, even if the Service is granted litigation authority, the ultimate decision is still with the DOJ.³⁰⁴ Although there are “turf wars” inherent in the change of agency autonomy, the Service has gone through these changes before.

A. *Reallocation of Litigation Authority to the DOJ*

An essential attribute of agency autonomy is the power to manage its own litigation and to represent itself in court.³⁰⁵ For decades it has been argued that independent agencies should have the power to litigate through the Court. The argument is that “[l]egal policymaking is a critical feature of independent agency decision-making; full control of litigating authority is, therefore, essential to independent agency autonomy.”³⁰⁶ The Service is not an independent agency, rather, an executive agency. The premise, though, would be to allow the Service similar independent agency characteristics.

Congress has reallocated litigation authority to agencies in the recent past.³⁰⁷ The instances in which Congress acted usually involve perceived failures, often in enforcement.³⁰⁸ In the posited situation, the DOJ is refusing to defend DOMA in a tax case. In *Windsor*, after advocating against DOMA

³⁰⁴ *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 113 S. Ct. 786 (Dec. 7, 2012) (No. 12-307); *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom.*, *Hollingsworth v. Perry*, 113 S. Ct. 786 (Dec. 7, 2012) (No. 12-144) (although the Court may decide differently in *Windsor* and *Perry*).

³⁰⁵ See Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 256 (1994).

³⁰⁶ *Id.* at 260.

³⁰⁷ Two independent agencies, the Interstate Commerce Commission (ICC) and the Federal Trade Commission (FTC), may represent themselves before the Court whenever the Solicitor General refuses to defend their position. ICC power dates back to 1910, Pub. L. No. 475, ch. 231, § 212, 36 Stat. 1087, 1150–51 (1911), and has been reaffirmed several times. This authority may also extend to the National Labor Relations Board (NLRB) and the Tennessee Valley Authority (TVA). The NLRB enjoys independent litigating authority under its statute, but the statute does not speak to the issue of Court representation. 29 U.S.C. §§ 154(a), 155, 160(j), 160(l), 161(2) (1988). The TVA lacks specific authority to represent itself before the Court. The historic practice here, however, is for the TVA to assert complete independence. In fact, when the TVA and Solicitor General jointly present a case to the Court, the TVA General Counsel insists that his name appear above the names of Solicitor General attorneys (except for the Solicitor General himself). See, e.g., Brief for Petitioner at I, *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (No. 76-1701) (indicating the name of the General Counsel for the TVA above the names of the other Solicitor General attorneys but under the name of the Solicitor General).

³⁰⁸ Devins, *supra* note 305, at 307.

consistent with the DOJ Pronouncement, the Second Circuit found DOMA unconstitutional.³⁰⁹ The DOJ via the Solicitor General refused to petition the Court for certiorari. Frustrated with the position of the DOJ, the House of Representatives anointed the Bipartisan Legal Advisory Group (BLAG) to petition the Court. Although certiorari was granted, an initial question was asked by the Court: whether BLAG has article III standing.³¹⁰ Congress has used grants of independent litigating authority to legislative entities such as the Comptroller General and the Senate's Office of Legal Counsel to ensure the vigorous defense of its priorities.³¹¹ Here, the DOJ has failed to protect the fisc by refusing to enforce DOMA. Congress reacted to this failure by appointing independent counsel. In the event that the Court finds this counsel has no standing or if Congress does not want to have to be pressed into similar action again in the future, then Congress may desire to expand the Service's litigation authority.

B. *The Service's Loss of Agency Authority*

One of the principles that advocates for expanding agency powers, especially in the litigation arena, is that failure to do so erodes the ability of the agency to effectively regulate. Through the stick of litigation, the agency has the power to enforce its own rules. By removing the stick, the agency is eviscerated. This narrative was played out in the 1975 revisions to the Federal Trade Commission (FTC).

In 1974, the House Committee on Interstate and Foreign Commerce maintained that the government's interest in putting forward its position with one voice outweighed the interest of the FTC in litigating its cases in a manner tailored to meet its particular enforcement goals.³¹² In 1975,

³⁰⁹ Brief for Senator Orrin G. Hatch et al. as Amici Curiae Supporting Respondent, *Windsor v. United States*, 113 S. Ct. 2675 (2013).

³¹⁰ *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 113 S. Ct. 786 (Dec. 7, 2012) (No. 12-307).

³¹¹ 2 U.S.C. § 687 (1988), 42 U.S.C. §§ 1320a-4(b), 6384(a), 6384(c) (1988) (Comptroller General); 2 U.S.C. §§ 288b, 288c, 288d, 288f (1988) (Office of Senate Legal Counsel). Although the President possesses limited appointment and removal power over the Comptroller General, the Comptroller is typically thought to be an arm of Congress. *See Bowsher v. Synar*, 478 U.S. 714, 747 (1986) (striking down the Gramm-Rudman Act on separation of powers grounds because the Act gives an executive function to the Comptroller General, who is subject to control by Congress); Bernard Schwartz, *An Administrative Law "Might Have Been" — Chief Justice Burger's Bowsher v. Synar Draft*, 42 ADMIN. L. REV. 221, 232 (1990) ("[T]he key to *Bowsher* is that the Comptroller General is removable by Congress, and therefore may not be entrusted with executive powers." (quoting a letter from Chief Justice Warren Burger to Justice John Paul Stevens (June 10, 1986))).

³¹² Devins, *supra* note 305, at 271; Elliott Karr, *Independent Litigation Authority and*

Congress passed the Federal Trade Commission Improvement Act.³¹³ The Act granted independent litigating authority to the FTC. The purpose of the change was a response to the perceived failure of the DOJ to adequately represent the FTC.³¹⁴

In addition to concerns about the adequacy of the FTC's representation before the Court, a likely motivating factor behind Congress's decision to transfer this authority to the FTC from the Solicitor General was a combination of the desire to limit the power of the President and the DOJ following Watergate and the "Saturday Night Massacre,"³¹⁵ and the overwhelming popularity of the FTC at the time during the "age of consumerism" of the 1970s.³¹⁶ During this period, Congress considered making the DOJ an independent agency.³¹⁷

A similar storm seems to be brewing currently. Starting with President George H.W. Bush's signing statements, the nature of Executive power has been ever expanding.³¹⁸ The current Executive posture has created a real tension with Congress, and Congress has been examining ways to restrict the power.³¹⁹ For the first time in a long time, Congress has appointed

Calls for the Views of the Solicitor General, 77 GEO. WASH. L. REV. 1080, 1084 (2009).

³¹³ See Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 204, 88 Stat. 2183, 2199 (1975) (codified as amended at 15 U.S.C. § 56 (1994)) (granting the FTC authority to represent itself before the Court); see also Act of Nov. 16, 1973, Pub. L. No. 93-153, § 408, 87 Stat. 576, 591-92 (1973) (authorizing the FTC to represent itself in lower federal courts).

³¹⁴ Devins, *supra* note 305, at 269-77; Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1348 (2000); Karr, *supra* note 312, at 1085, 1091-93; see also *Fed. Trade Comm'n v. Guigon*, 390 F.2d 323 (8th Cir. 1968).

³¹⁵ See Christopher S. Yoo et al., *The Unitary Executive In The Modern Era 1945-2004*, 90 IOWA L. REV. 601, 665 (2005). In 1975, the year the FTC was granted independent litigation authority, the Solicitor General was Robert Bork, who was involved in the dismissal of former Solicitor General Archibald Cox. See generally Ruth Marcus & Al Kamen, *Memories of the 'Saturday Night Massacre'*, WASH. POST, July 2, 1987, at A16.

³¹⁶ Devins, *supra* note 305, at 272; Karr, *supra* note 312, at 1092-93. For background on the 1974 Act, see LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE 177-204* (3d ed. 1993).

³¹⁷ S. 2803, 93d Cong. § 2(c) (1973). Under this proposal, the Attorney General, Deputy Attorney General, and Solicitor General would serve six-year terms and would be removable by the President only for "neglect of duty or malfeasance of office." *Id.*; see also Yoo, *supra* note 315, at 663.

³¹⁸ *Developments in the Law — Presidential Authority*, 125 HARV. L. REV. 2057 (2012) (providing a historical description of the expansion of the signing statements); Amanda Hollins-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981-2000*, 89 DENV. U. L. REV. 197, 236-38 (2011).

³¹⁹ Charles, Tiefer, *Can Congress Make a President Step Up a War?*, 71 LA. L. REV. 391,

independent counsel, BLAG, to ensure that the laws are enforced. Regardless of the ultimate decision of the Court in the *Windsor* case regarding BLAG's standing, Congress should take this as an opportunity to prevent the disparate treatment of taxpayers in the future.³²⁰ The method most closely tied to historic precedent is that of the FTC.

There would be consequences to a shift of power in that manner. Most importantly, the FTC model still grants only imperfect litigation authority. The FTC may represent itself before the Court only in the event that the Solicitor General declines to file a petition for certiorari. It would be reasonable to assume that this secondary supervisory authority would create tension between the FTC and the Solicitor General.

It appears, however, that the opposite result occurs. It has even been argued that this independent litigation authority actually improves "independent agency representation before the Supreme Court."³²¹ In fact, the Solicitor General has been a "respected advisor to the FTC on the cert-worthiness of its claims and a more earnest representative of FTC interests before the Court."³²²

Moreover, by expanding the Service's authority, Congress could protect its own interest in ensuring that the laws as written are enforced and all funds are collected for the fisc. If the history of the Service demonstrates anything, it is that the agency should not be beholden to either the executive or legislative branch of government.³²³ By granting independent litigation authority to the agency, Congress might ensure that the goals of the 1998 Reform Act are protected.

Failure to act now, or compromising to a lesser authority, would result in an Securities and Exchange Commission (SEC)-like failure. In 1973, Congress declined to grant the SEC independent litigating authority because Erwin Griswold, Solicitor General, made a convincing case for the adequacy of Solicitor General representation.³²⁴ Then, in the early 1980s, the SEC

415 (2011).

³²⁰ In *Windsor*, the Court held that BLAG had standing. *United States v. Windsor*, 133 S.Ct. 2675, 2686–88 (2013).

³²¹ Devins, *supra* note 305, at 307.

³²² *Id.* at 307–08.

³²³ See *supra* Part II.B.

³²⁴ Devins, *supra* note 305, at 290; see also *Securities Exchange Act Amendments of 1973: Hearings Before the Subcomm. on Commerce and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 93d Cong. 343, 348–49, 355–57 (1978) (testimony and statement of A. Everette MacIntyre, Commissioner, Federal Trade Commission); *id.* at 282–84 (statement of Solicitor General Erwin Griswold); A. Everette MacIntyre, *The Status of Regulatory Independence*, 29 FED. B.J. 1, 8–9 (1968) (noting instances during the 1960s when the Solicitor General refused the FTC's requests to file petitions for certiorari or refused to support an

passed on a congressional invitation to revisit the independent litigating authority issue.³²⁵ A proper balance seemed to be struck in which the Solicitor General advocated the position the agency determined, but when differences arose, the SEC position was either noted by the Solicitor General or independently presented by the agency.³²⁶

Unfortunately for the SEC, that utopia has not lasted. “From 1986 to 1993, the Solicitor General’s office became more restrictive, paying less attention to agency priorities in advancing the Solicitor General’s vision of the government’s position.”³²⁷ An example is the case *Chicago Mercantile Exchange v. Securities and Exchange Commission*,³²⁸ in which the Commodities Futures Trading Commission (CFTC) and the SEC disagreed with each other’s interpretation of the applicable statute. The Seventh Circuit agreed with the CFTC. The SEC wanted to appeal the case to the Court but the Solicitor General agreed with the CFTC and refused. In the petition, the Solicitor General refused to allow the SEC to file a separate brief, instead summarizing and discrediting the SEC’s views.³²⁹

Much like it did with the SEC, Congress has contemplated giving the Service independent agency status. A majority of the 1996 Commission approved a host of recommendations with that tenor.³³⁰ One of the central

agency’s position after allowing it to file in its own name).

³²⁵ Devins, *supra* note 305, at 290.

³²⁶ *Id.* at 290–91; *see, e.g.*, *Chi. Mercantile Exch. v. Sec. Exch. Comm’n*, 883 F.2d 537 (7th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990); Brief for the Sec. Exch. Comm’n as Amicus Curiae, *Int’l Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979) (No. 77-754).

³²⁷ Devins, *supra* note 305, at 292.

³²⁸ 883 F.2d 537.

³²⁹ Devins, *supra* note 305, at 292; *see* Brief for the Federal Respondent in Opposition at 20, *American Stock Exch., Inc. v. Chi. Mercantile Exch.*, 496 U.S. 936 (1990) (No. 89-1502) (“[P]etitioners and the SEC have cited the provision . . . known as the ‘SEC savings clause.’ That provision does not, in our view, justify limiting the CFTC’s jurisdiction over [index participations].”).

³³⁰ NAT’L RESTRUCTURING COMM’N REPORT, *supra* note 118, at 4, 6; Eric A. Lustig, *IRS, Inc. — The IRS Oversight Board — Effective Reform or Just Politics? Some Early Thoughts from a Corporate Law Perspective*, 42 DUQ. L. REV. 725, 733 (2004). The Commission’s other sixteen members were as follows: Democratic Congressman William J. Coyne (replaced in January 1997 by Congressman Robert T. Matsui); Ernest J. Dronenburg, Jr., Chairman California State Board of Equalization; Fred T. Goldberg, Jr., (a former Service Commissioner), law firm of Skadden, Arps et al.; Republican Senator Charles E. Grassley; Gerry Harkins, Southern Pan Services Co.; Larry Irving, Assistant Secretary (Communications and Information), U.S. Department of Commerce; David Keating, National Taxpayers Union; Edward S. Knight, General Counsel, Treasury; J. Fred Kubik, Baird, Kurtz & Dobson; Mark McConaghy, PricewaterhouseCoopers; George Newstrom, Electronic Data Systems; Grover Norquist, Americans for Tax Reform; Robert Tobias, President, National

recommendations was that “Congress should create an independent Board of Directors to oversee the [Service] within the Treasury.”³³¹ The Treasury had a limited role in the oversight of Service policy and major problems because of the abuses in the 1960s and 1970s by Nixon that lead to the 1976 Act by Congress. Moreover, to the extent that Treasury acted, the guidance was limited and chaotic.³³² It has never been proposed that an FTC type structure be adopted.

C. *Delegating Authority to the DOJ*

Although granting the Service ultimate litigation authority may be the best construct for agency efficiency, the Service historically has not been able to handle unchecked power. Thus, the pendulum swings back toward granting exclusive authority for tax matters to the DOJ. The DOJ, ultimately, is in the best position to litigate all matters. The DOJ, as the nation’s law firm, clearly has the capabilities to handle and understand the litigation matters as well as manage the litigation. Moreover, having the DOJ conduct secondary reviews of the Service positions achieves a better level of fairness for taxpayers.³³³

Despite the inherit tensions, the DOJ and not the agencies should be positioned to apply a fair interpretation of the law without inherit bias in agencies. Agencies have agendas and goals associated with the administration of principles that are at times misguided. In the past, this has been true of the Service’s approach to enforcement.³³⁴

Further, the prospect of the DOJ domination of agency decision-making does not seem to trouble Congress. Even in the realm of independent agencies, only three have litigating authority before the Court. If Congress truly intended agencies to be able to reach policy decisions at odds with the Executive, the current arrangement is at best counterproductive. The Solicitor General’s loyalty is first owed to the President and Attorney General and then to the affected agencies.³³⁵

Unfortunately, the DOJ is not immune from a misguided agenda. For example, the DOJ will execute the prosecutorial discretion and policy-making functions of the agency and decline to pursue winnable cases, it will

Treasury Employees Union; Josh S. Weston, Automated Data Processing; James W. Wetzler, Deloitte & Touche; and Margaret Milner Richardson, Service Commissioner.

³³¹ Lustig, *supra* note 330, at 733.

³³² NAT’L RESTRUCTURING COMM. REPORT, *supra* note 118, at 12.

³³³ See generally Peterson, *supra* note 55.

³³⁴ See generally *supra* text accompanying Part III.

³³⁵ Devins, *supra* note 305, at 323.

make litigating errors, and it will disrupt agency decision-making in ways that will predictably weaken and dilute agency initiatives.³³⁶ Nonetheless, the DOJ is a better answer because its record of misguided agendas is far cleaner than that of the agencies.³³⁷

There are problems with the pressures the Solicitor General faces from the Executive. For example, the Solicitor General took a strange position in *Bob Jones University*.³³⁸ *Bob Jones* concerned the Service's longstanding practice of denying tax breaks to racially discriminatory private schools. During the Reagan Administration, it was thought that Treasury was persuaded by the Attorney General to reverse the Service position.³³⁹ Obviously, changing Service policy to permit tax-breaks for racially discriminatory schools was a public policy nightmare. Therefore, the President felt compelled to tell the nation that he was not a racist and the DOJ litigated the *Bob Jones* case. The problem, like that of the DOMA cases, was a lack of policy change within the Service. The executive made a decision to no longer defend a position it was requiring the agency to continue to defend. In that instance, the Solicitor General asked the Court to appoint "counsel adversary" to Bob Jones University to defend the Service's earlier position.³⁴⁰

The primary problem with the grant to the DOJ is dilution of the Service's authority. By granting the authority to litigate in all matters, the DOJ inevitably will interfere rather than advance substantive agency programs, primarily, though not exclusively, by diluting effective enforcement.³⁴¹ This is the reason that granting the DOJ authority is second best. It is still, however, an improvement over the current situation.

³³⁶ Herz & Devins, *supra* note 314, at 1359.

³³⁷ There are tangential reports of misguided DOJ agendas. See, e.g., Michael J. Pitts, *Defining "Partisan" Law Enforcement*, 18 STAN. L. & POL'Y REV. 324, 325 (2007) (discussing Republican-influenced DOJ misapplying the preclearance Voting Rights Act); Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice"*, 13 CORNELL J.L. & PUB. POL'Y 167 (2004); Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785 (2006); Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: Response to Little*, 65 FORDHAM L. REV. 429 (1996) (discussing the Reno-rule governing prosecutorial ethics).

³³⁸ See *Bob Jones Univ. v. United States*, 461 U.S. 574, 581–82 (1983).

³³⁹ See *Bob Jones*, 461 U.S. at 623 n.9; Devins, *supra* note 305, at 276; Stuart Taylor, Jr., *U.S. Drops Rule on Tax Penalty for Racial Bias*, N.Y. TIMES, Jan. 9, 1982, at 1.

³⁴⁰ See Thomas McCoy & Neal Devins, *Standing and Adverseness in Challenges of Tax Exemptions for Discriminatory Private Schools*, 52 FORDHAM L. REV. 441, 464 (1984).

³⁴¹ Herz & Devins, *supra* note 314, at 1348.

VI. CONCLUSION

As an executive agency, the Service has not always had the same powers and responsibilities as it does in its current incarnation.³⁴² The agency evolved from a mere tax collection agency to the point it possessed so much discretion and unchecked power that Congress was compelled to create restraints.³⁴³ The reform proposed during the Clinton administration was in response to an outcry by taxpayers against the unreasonable tactics used by the Service in seeking to enforce the tax code.³⁴⁴ The inquisitorial nature of tax administration unfortunately still is too familiar to taxpayers despite the purpose of the 1998 Reform Act to create a more customer friendly service provider.³⁴⁵

Despite the best intentions of Congress — including changing the burden of proof,³⁴⁶ imposing civil damages for the Service agent's action,³⁴⁷ and structural changes to the organizational framework³⁴⁸ — the 1998 Reform Act did not go far enough. Although the purpose and design of the reform effort was to provide a supervisory check on the agency, the decision of Congress to continue with the Service structure at the time was suboptimal. The reform ultimately failed because it did not separate the Service's investigatory responsibility from the enforcement responsibilities. There is not much evidence that the 1998 Reform Act changed the Service's behavior.³⁴⁹ The Service is still the police, the district attorney, and sometimes even the judge.³⁵⁰

The *Bob Jones* case provides evidence that a DOMA-like situation is not

³⁴² See generally *supra* text accompanying Part III.

³⁴³ 1998 Reform Act, *supra* note 11.

³⁴⁴ See 1998 Senate Hearing, *supra* note 11; 1997 Senate Hearing, *supra* note 11; see generally Camp, *Administration*, *supra* note 11, at 20–26; Gardner & Norman, *supra* note 11, at 1357–61; Oei, *supra* note 11, at 1105–06.

³⁴⁵ See generally Camp, *Administration*, *supra* note 11, at 20–26.

³⁴⁶ See I.R.C. § 7491; see also Herzig, *supra* note 6, at 1084–85. See generally Camp, *Administration*, *supra* note 11, at 20–26; Gardner & Norman, *supra* note 11, at 1361.

³⁴⁷ See I.R.C. § 7426(h)(1).

³⁴⁸ See 1998 Reform Act, *supra* note 11.

³⁴⁹ See generally Vincent Burroughs Accuses IRS Agent Dora Abrahamson of Coercing Sex by Using Threat of Tax Penalty, HUFFINGTON POST (Feb. 1, 2013), http://www.huffingtonpost.com/2013/02/01/vincent-burroughs-sex-irs-agent_n_2602505.html; IRS Agents Regularly Tell Taxpayers Not to Hire an Attorney, THE PAPPAS GRP. (Feb. 24, 2009), <http://www.pappasontaxes.com/index.php/2009/02/24/irs-agents-regularly-tell-taxayers-not-to-hire-an-attorney>.

³⁵⁰ See Arno Herzberg, *Blueprint of a Fair Tax Administration*, 41 TAXES 161, 163 (1963).

isolated. Because of the perception of abuse by the Service, the current structure encourages under-reporting by taxpayers, who view the system as adversarial. In fact, the self-reporting system is designed on an adversarial system. The taxpayer takes reporting positions that will not be penalized if they meet certain litigation standards. The Service process through audit and appeals is based on sustainable litigation positions. So the question then beckons, why is the Service both establishing the foundation for the litigation and litigating? The answer is that it should not be doing both. That circumstance leaves but one option: removing the litigation authority and vesting it exclusively in the DOJ.