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Wrestling Antaeus: The Necessity of Appointed Counsel in Civil Tax Disputes

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WRESTLING ANTAEUS: THE NECESSITY OF APPOINTED COUNSEL IN CIVIL TAX DISPUTES

I. INTRODUCTION

Greek mythology tells the story of Antaeus, who would challenge all who passed through his land to a wrestling match.[1] Without fail, Antaeus overwhelmed every traveler he challenged.[2] One day, Antaeus challenged Herakles—son of Zeus and hero in his own right.[3] They wrestled at great length, but each time Herakles came close to pinning him, Antaeus became stronger and recovered in a startling fashion.[4] After almost pinning him several times, Herakles realized Antaeus became stronger the closer to the earth he was and lifted him up from the ground.[5] Upon doing so, Antaeus became weak, allowing Herakles to finally prevail.[6]

Not only was Antaeus an experienced and accomplished wrestler, but he also enjoyed a systematic advantage: the closer he was to the earth, the stronger he became.[7] Accordingly, Antaeus's ordinary challengers never stood a chance.[8] Even Herakles did not win easily; he simply had a fair match.[9] If, instead of falling prey to Antaeus, these ordinary travelers were afforded a champion—a Herakles of their own to fight for them—perhaps they would have met a better fate. At the very least they could have had a fairer fight.

In many ways, taxpayers can face a challenge of antean proportions when receiving a deficiency notice from the Internal Revenue Service ("IRS").[10] Luckily, and for reasons likely related to why they received the

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1 *See* RICHARD P. MARTIN, MYTHS OF THE ANCIENT GREEKS 157 (2003); *see also* THOMAS BULFINCH, BULFINCH'S MYTHOLOGY 141 (Barnes & Noble Books 2006) (1855).

2 MARTIN, *supra* note 1, at 157. Some accounts say Antaeus used the skulls of those he killed to roof the temple to his father, Poseidon. *Id.*

3 *Id.* at 152–57. Herakles is best known for his labors, which made the world safe. *Id.* at 153. They involved, *inter alia*, killing the Neman lion, reclaiming a swamp taken over by a hydra, and (worst of all) cleaning Augeas's cow barn. *Id.* at 152–54.

4 *Id.* at 157–58.

5 MARTIN, *supra* note 1, at 157–58.

6 *Id.* at 158.

7 *Id.* at 157–58.

8 *Id.* at 148–52.

9 *Id.* at 157; *see also* BULFINCH, *supra* note 1, at 140–41 (telling the story of Herakles holding the sky while Atlas retrieved the apples of Hesperides).

10 *See* Leandra Lederman & Warren B. Hrung, *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers' Effects on Tax Court Litigation Outcomes*, 41 WAKE FOREST L. REV. 1235, 1281–82 (2006) (finding the difference between litigated outcomes of tax disputes with experienced attorneys is significantly better for the taxpayer than representing themselves pro se).

notice to begin with, many of these taxpayers have money to hire their own Herakles to fight on their behalf.[11] This is the task of tax attorneys—to ensure a fair dispute between the IRS and the taxpayer.[12] However, not all taxpayers may have the money to hire counsel to represent them.[13] In these cases, the adjudication process may not be as fair as we would hope.[14]

It is for this reason this Note argues the Tax Court should appoint counsel to indigent taxpayers, even though it is a civil court dealing exclusively in monetary judgments.[15] First, Part II discusses the background of tax law as well as the law governing when it is appropriate for a court to appoint counsel to a litigant.[16] Part III applies the standards used for counsel appointment to indigent taxpayers before the Tax Court.[17] Part III argues that, to satisfy the requirements of the Due Process Clause—or alternatively as a discretionary measure to protect against unjust government takings—the Tax Court should appoint counsel to indigent pro se taxpayers before it.[18]

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11 *See* William H. Ise, Comment, *The Relationship Between Civil and Criminal Tax Fraud and its Effect on the Taxpayer's Constitutional Rights*, 12 B.C. INDUS. & COM. L. REV. 1176, 1190 (1971) (querying whether taxpayers suspected of tax evasion could be indigent, presumably because evading taxes would have afforded them some assets).

12 *See generally* MODEL RULES OF PROF'L CONDUCT pmbl. 2 (A.B.A. 2016) (detailing a lawyer's responsibility to serve as an advocate by asserting the client's position under the rules of the adversary system).

13 *See* IRS, *Low Income Taxpayer Clinics*, TAXPAYER ADVOC. SERV. (May 4, 2016), https://www.irs.gov/Advocate/Low-Income-Taxpayer-Clinics [https://perma.cc/M9AN-9S7Q] [hereinafter *Low Income Taxpayer Clinics*] (detailing the IRS's Low Income Taxpayer Clinic ("LITC") program which provides federal funds to legal clinics that offer representation to low income taxpayers at no or low cost).

14 *Cf.* Lederman & Hrung, *supra* note 10, at 1281 (finding a significant advantage in litigated disputes before the Tax Court attributable to experienced counsel). An advantage in litigation alone does not necessarily speak to fundamental fairness of proceedings, but may where the proceedings begin to resemble a government taking without fair representation. *Id. See also* Lassiter v. Dep't of Soc. Serv., 452 U.S. 18, 25–27 (1981) (discussing the due process requirement of "fundamental fairness").

15 *See infra* Part III (applying due process standards to the potential appointment of counsel to indigent taxpayers before the Tax Court).

16 *See infra* Part II (providing a general background of tax law and of law used to appoint counsel to indigent litigants: namely, the Sixth Amendment, the Due Process Clauses, and 28 U.S.C. § 1915(d)).

17 *See infra* Part III (canvassing Supreme Court precedent regarding the right to appointed counsel and applying it to taxpayers before the Tax Court).

18 *See infra* Part III (arguing generally that the Tax Court should appoint counsel to indigent taxpayers before it, either in compliance with the Due Process Clause or federal statutory discretion).

II. BACKGROUND

The development of tax law in the United States has been both complicated and controversial.[19] Even in today's divisive political climate, the necessity of tax reform appears to be a subject that gathers widespread support, implying that no one is happy with it.[20] The complexity of the tax code can be fairly attributed to a number of factors, but a discussion of the development of the tax system may aid in its understanding.[21] Part II.A provides a basic overview of the evolution of tax law in the United States while Part II.B explains when courts may appoint counsel to litigants.[22]

A. General Overview of Tax Law

Throughout its development in the United States, tax law has not always enjoyed extraordinary clarity in its pronouncement and

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[19] *See* JOSEPH P. CROCKETT, THE FEDERAL TAX SYSTEM OF THE UNITED STATES 3 (1955) (describing the development of multiple forms of taxation in the United States); Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057, 1169–73 (2001) (discussing the development and adoption of the Sixteenth Amendment providing for the federal income tax).

[20] *See* Rand Paul, *Blow up the Tax Code and Start over*, WALL ST. J. (June 17, 2015), http://www.wsj.com/articles/blow-up-the-tax-code-and-start-over-1434582592 [https://perma.cc/H2BH-BE8X] (concluding that "the tax code has grown so corrupt, complicated, intrusive and antigrowth that . . . the system isn't fixable[]"); *Reforming the Tax Code*, WHITE HOUSE, https://www.whitehouse.gov/economy/reform/tax-reform [https://perma.cc/H3ZB-8E8Z] (detailing President Obama's suggestions for "comprehensive tax reform"); *Tax Reform That Will Make American Great Again*, DONALD J. TRUMP FOR PRESIDENT, https://www.donaldjtrump.com/positions/tax-reform [https://perma.cc/Q6Q2-Z5QL] (giving details on a plan to simplify the tax code); *Why Reform the Tax Code?*, TAXREFORM.GOV, https://taxreform.gov/why-reform.html [https://perma.cc/882J-CJ9F] (describing the tax code as "broken").

[21] *See* William G. Gale & Janet Holtzblatt, *The Role of Administrative Issues in Tax Reform: Simplicity, Compliance, and Administration*, *in* UNITED STATES TAX REFORM IN THE TWENTY-FIRST CENTURY 6–7 (George R. Zodrow & Peter Mieszkowski eds. 2008) (identifying three factors that explain why tax systems are complex as: (1) "conflict among the consensus goals of tax policy," (2) "the political process," and (3) "the ability and willingness of taxpayers to avoid or evade taxes"; *see also* Michael J. Boskin, *Introduction: Taxation and the Role of Government in the Economy*, *in* FEDERAL TAX REFORM: MYTHS AND REALITIES 25 (Michael J. Boskin ed. 1978) (describing complicated development of tax policy: "Our tax system has evolved historically through a series of compromises and reforms which have attempted, on the one hand, to achieve some level of efficiency and equity while raising a given revenue and, on the other, have reflected important political forces embodied in special interest groups. But the underlying economic forces which determine the desirability of specific features of our tax laws have changed markedly through time.").

[22] See *infra* Part II.A–B (explaining the general background of tax in the United States and the case law surrounding appointment of counsel under the Sixth Amendment and Due Process Clauses).

application; this section attempts to explain some of it.[23] First, Part II.A.1 provides a history and overview of tax enforcement in the United States.[24] Part II.A.2 then shifts to adjudication and provides a general explanation of how the Tax Court operates.[25]

1. Tax Enforcement

Taxation, as it developed in the Anglo-American legal tradition, wore many hats: some traditional methods of collecting revenue were structured as payments for services provided.[26] Others were enforced through aggressive market controls, which left smuggling as the only categorical method of tax evasion.[27] Many were enforced with a feudal claim to seize property in the event of nonpayment.[28] Some "taxes" were even voluntary.[29] Most federal taxes were enforced administratively

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[23] *See* CROCKETT, *supra* note 19, at 3 (discussing how the "lack of integration and coherence" of pre-1939 taxation laws "fostered litigation and was an impediment to orderly administration").

[24] *See infra* Part II.A.1 (describing the history and development of tax law and of tax enforcement).

[25] *See infra* Part II.A.2 (describing the history and development of the U.S. Tax Court).

[26] *See* Duties in America (Stamp) Act, 5 Geo. 3, c. 12 (1765) (raising the cost of government documents such as, *inter alia*, court pleas, motions, and petitions; licenses; letters of mark; and grants of land); *see also* Justin DuRivage & Claire Priest, *The Stamp Act and the Political Origins of American Legal and Economic Institutions*, 88 S. CAL. L. REV. 875, 876–77 (2015) (describing the Stamp Act's establishment of taxes on "institutional services").

[27] *See* Matthew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts (Part I)*, 26 J. MAR. L. & COM. 581, 591 (1995) (outlining the aims of Navigation Acts as controlling imperial commerce, establishing England as a trade entrepot for the colonies, and aiding and maintaining English shipping). Virginia, for example, collected significant tax revenues from the production and marketing of tobacco. William E. Nelson, *Law and the Structure of Power in Colonial Virginia,* 48 VAL. U. L. REV. 757, 843 (2014). These market controls made it illegal to import or export any goods by any means other than through an English-controlled port. *Id.* The tax, then, was the import or export duty. *Id.* The punishment for evading the tax was prosecution for the crime of smuggling, which was not necessarily a tax crime. *Id.*

[28] *See* 1 PHILLIP ALEXANDER BRUCE, ECONOMIC HISTORY OF VIRGINIA IN THE SEVENTEENTH CENTURY: AN INQUIRY INTO THE MATERIAL CONDITION OF THE PEOPLE, BASED UPON ORIGINAL AND CONTEMPORANEOUS RECORDS 569 (1896) (explaining how the failure to pay feudal quit-rents resulted in the repossession of land to whomever received the conveyance under patent); *see generally* Beverly W. Bond, Jr., *The Quit-Rent System in the American Colonies*, 17 AM. HIST. REV. 496, 496–98 (1912) (explaining the early quit-rent system in American Colonies).

[29] *See* ALVIN RABUSHKA, TAXATION IN COLONIAL AMERICA 723 (2008) ("Colonial assistance to Britain during the French and Indian War relied on voluntary requisitions of the separate colonies, encouraged by promises of British reimbursement."). Another example of a tax with enforcement contemplated on the voluntary cooperation of citizens is the Navigation Act of 1651, which granted citizen informants a half share in the proceeds from any seizure. THOMAS C. BARROW, TRADE AND EMPIRE: THE BRITISH CUSTOMS SERVICE IN COLONIAL AMERICA 11 (1967).

through control of port operations.[30] Taxes were often levied against some form of property that acted as collateral, and collection was generally limited to property that went through government-controlled areas (e.g., ports, town gates) or was granted to an individual (e.g., real property, licenses, charters).[31] These enactments bound the collection of tax inseparably from other, non-tax, claims of right.[32] This makes a direct comparison between older tax structures and contemporary understandings of a tax system somewhat difficult.[33] This murky historical line in classifying and enforcing taxation has extended to some difficulty in categorizing the contemporary tax scheme.[34] Today, however, the IRS enforces a more categorically-defined tax system.[35] Civil audits, conducted by IRS agents, investigate potential civil deficiencies in tax payment.[36] Criminal audits, conducted by the Criminal Investigative Division ("CID"), investigate potential tax crimes.[37] If a criminal

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30 *See* BARROW, *supra* note 29, at 11 (describing port-based controls, including required registration of ships with port officials and posting bond to guarantee compliance with commodity controls).

31 *See id.* at 5–6 (describing some English laws regulating colonial commerce, such as the Navigation Acts which only allowed import or export on ships owned and manned by English subjects).

32 *See* The Cleopatra, 5 F. CAS. 1029, 1029 (E.D.N.Y. 1871) (sustaining a forfeiture of a ship for smuggling because the crew evaded an import duty). Taxes enforced through incarceration were often not classified strictly as tax crimes, but were tied to government control of some other area. *Id.* Another problem arises when attempting to classify port taxes in that they were governed under admiralty law, but that lies far outside the scope of this Note. *See* The Mary J. Vaughan, 16 F. CAS. 991, 991 (S.D.N.Y. 1867) (analyzing complications that arose between varying valuation methods when shipments of goods sunk before delivering their cargo).

33 *See* United States v. Certain Diamonds, 30 F. 364, 365 (N.D. Ill. 1887) (seizing diamonds where owner smuggled them into the country to avoid paying duties). Smuggling, for example, was a crime and was even recognized as an attempt to defraud the revenue of the United States, but was prosecuted as the independent crime of smuggling and not as criminal tax fraud. *Id.*

34 *See infra* Part II.A (discussing blurred lines between contemporary civil and criminal enforcement, and in Tax Court, classification and oversight).

35 *See* Edward L. Froelich, *United States*, *in* THE TAX DISPUTES AND LITIGATION REVIEW 327, 329–30 n.7 (Simon Whitehead ed., 2d ed. 2014) (giving a general overview of the U.S. tax reporting and enforcement system).

36 *See* I.R.C. § 6201 (2014) (authorizing the IRS to make "inquiries, determinations, and assessments of all taxes . . . under internal revenue law[s]"); § 7602 (authorizing the IRS to examine any books, records, papers, or other relevant data or material belonging to the taxpayer or third parties); Froelich, *supra* note 35, at 331 (describing the general structure and purpose of audits, the different kinds of audits, and the process through which an audit progresses).

37 *See* Froelich, *supra* note 35, at 329–30 n.7 (detailing broad differences between civil and criminal audit procedure).

investigation ripens sufficiently, the CID may refer the matter to the Department of Justice ("DOJ") for prosecution.[38]

Yet not all aspects of tax law prove that clean-cut in practice.[39] Tax fraud, for example, straddles the worlds of civil and criminal law.[40] In theory, civil tax fraud and criminal tax fraud are two distinct offenses with different penalties.[41] The elements for each violation are not only "inherently intertwined," however, but identical.[42] When the IRS investigates the potential of criminal misconduct, it *necessarily* examines the appropriateness of a civil liability.[43] By no means is this an accident.[44] The legislative history behind the Internal Revenue Code supports the conclusion that Congress intended to design a system with interrelated civil and criminal elements.[45] In fact, the 1939 Code contemplated the use of the IRS's summons authority in criminal as well as civil investigations.[46] Moreover, Congress has not categorized tax fraud investigations into civil

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38 *Id.*

39 *Id.*

40 *See infra* Part II.A.1.a (describing tax fraud as an example of blurred civil and criminal tax enforcement).

41 *See* United States v. Univ. Sav. Ass'n, 666 F.2d 312, 314 (5th Cir. 1982) (explaining the general structure of tax fraud).

42 *See id.* ("Congress has created a law enforcement system in which the criminal and civil elements of tax liability are inherently intertwined."); Moore v. United States, 360 F.2d 353, 356 (4th Cir. 1965) ("[W]hile the criminal evasion statute does not explicitly require a finding of fraud, the case-by-case process of construction of the civil and criminal tax provisions has demonstrated that their constituent elements are identical."); Tomlinson v. Lefkowitz, 334 F.2d 262, 265 (5th Cir. 1964) ("From examining the components of [civil and criminal tax fraud] it can readily be seen that 'willful' includes all the elements of 'fraud.' The difference [between civil and criminal tax fraud], if any, is in the greater degree of bad motive or evil purpose required under criminal prosecution; both require a wrongful intent to deprive the Government of taxes owing it."). The elements of both civil and criminal tax fraud are: (1) an affirmative act constituting an attempt to evade or defeat taxes, (2) willfulness, and (3) additional tax due as a result. Ise, *supra* note 11, at 1177. Civil penalties for tax fraud are limited to payment of the unpaid amount due to the IRS in addition to interest of varying rates. I.R.C. § 6651 (2014). Criminal penalties, over and above requiring the repayment of whatever tax was due, allows for additional fines, requiring the defendant to pay for the costs of prosecution, and imprisonment. § 7201.

43 *See Univ. Sav. Ass'n*, 666 F.2d at 314 (describing the interrelated nature of civil and criminal tax fraud). The court explained that statute definitionally bundles a civil penalty into in a criminal fraud conviction. *Id.* Part of the penalty incurred when committing criminal fraud is thus a civil penalty. *Id.*

44 *See* United States v. LaSalle Nat'l Bank, 437 U.S. 298, 310–11 (1978) (discussing Congress's design of a system of civil and criminal tax fraud that are necessarily intertwined to ensure enforcement and deterrence, including the overlapping elements of both as well as statutory authorizations of the summons power); Donaldson v. United States, 400 U.S. 517, 535–36 (1971) (analyzing the intent of Congress when designing a system with intertwined civil and criminal aspects).

45 *LaSalle Nat'l Bank*, 437 U.S. at 310–12.

46 *Id.*

and criminal components.[47] Instead, the civil and criminal aspects of an investigation are placed entirely at the discretion of the IRS, and only begin to diverge when the IRS recommends criminal prosecution to the DOJ.[48] It is only at that point the IRS loses any amount of discretion regarding whether to pursue a civil penalty, a criminal penalty, both, or neither.[49] But even after recommendation to the DOJ, the civil and criminal elements of the investigation do not completely separate.[50] In fact, the only things that substantially change when the IRS recommends prosecution to the DOJ is (1) the IRS can no longer prevent the DOJ from prosecuting and (2) the IRS loses its ability to compromise the criminal aspect of the fraud case.[51] It is not uncommon for civil assessments to become criminal investigations, nor for failed criminal investigations to be given another shot as civil assessments.[52] This is partly because the IRS

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47 *Id.* at 310. For example, Congress stated, "[e]very collector within his collection district shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto." *Id.* (quoting I.R.C. § 3654(a)). To effectuate that responsibility, the statute then gave collectors all powers under a section contemplating both fine and imprisonment. *Id.* At no point in the statute does Congress distinguish between civil and criminal law regarding offenses, penalties, or otherwise. *Id.*

48 *LaSalle Nat'l Bank*, 437 U.S. at 310; *see* Paul P. Lipton, *The Relationship Between the Civil and Criminal Penalties for Tax Frauds*, 1968 U. ILL. L.F. 527, 530 (1968) (laying out the IRS's available choice of sanctions regarding tax fraud cases, along with the accompanying procedure).

49 *See* Lipton, *supra* note 48, at 530 (discussing the IRS's choice of available sanctions for tax fraud).

50 *See LaSalle Nat'l Bank*, 437 U.S. at 311–12 (distinguishing when a civil investigation transforms into a criminal prosecution, going as far as stating that "Congress has not categorized tax fraud investigations into civil and criminal components.").

51 *See id.* at 312 (explaining that the IRS cannot try its own criminal prosecutions—that is a power reserved for the Justice Department); I.R.C. § 7122(a) (2014) ("The Secretary [of the Treasury] may compromise any civil or criminal case arising under the internal revenue laws before reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.").

52 *See* Mathis v. United States, 391 U.S. 1, 4 (1968) (explaining that "tax investigations frequently lead to criminal prosecutions," and holding that res judicata did not bar the assessment of a civil fraud penalty when the taxpayer was acquitted on a charge of criminal tax fraud for the same act). The Court stated:

> In fact, the last visit of the revenue agent to the jail [holding the defendant in *Mathis*] took place only eight days before the full-fledged criminal investigation concededly began. And as the investigating revenue agent was compelled to admit, there was always the possibility during his investigation that his work would end up in a criminal prosecution.

Id. See also Helvering v. Mitchell, 303 U.S. 391, 400–04 (1938) (affirming the constitutionality of the dual nature of tax fraud enforcement); Ise, *supra* note 11, at 1178–79 (noting that this allows both civil and criminal penalties to be imposed in every case of tax evasion, and going

does not know exactly what an audit will uncover at the outset; it is difficult to know which audits will ultimately result in civil assessments and which will end in prosecution.[53]

However, when the IRS ultimately chooses not to pursue criminal prosecution—thereby avoiding the Sixth Amendment requirement to adequate counsel—it still benefits from a systematic advantage in civil litigation.[54] A large proportion of Tax Court defendants are pro se, and representation by counsel has been shown to significantly improve a taxpayer's chances of success, at least on cases that go to trial.[55]

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on to discuss when *Miranda* warnings should attach and whether information obtained through administrative subpoena may be used in criminal prosecution). Current policy objectives of the IRS result in the criminal aspects of an investigation to be given priority over civil aspects of the same investigation. *See* United States v. Jaskiewicz, 278 F. Supp. 525, 536–37 (E.D. Pa. 1968) (quoting IRS Audit Division Manual, Ch. 4500, P-4560-3 (approved March 2, 1960)) (noting IRS policy to consider the imposition of criminal sanctions in the cases selected for prosecution "paramount" in relation to the civil tax aspects of the cases because attempts to prosecute both aspects of a case have shown to "seriously militate" against success with respect to either); *see also LaSalle Nat'l Bank*, 437 U.S. at 308–11 (analyzing at which point a civil audit can become a criminal investigation); Lipton, *supra* note 48, at 532 (suggesting that "the [IRS] policy of holding the civil phase in abeyance may reflect the inherent unfairness and possible constitutional doubt involved in the commingling of civil and criminal investigations").

[53] *Mathis*, 391 U.S. at 4. From a due process perspective, it is generally more worrisome that in a criminal prosecution, the Justice Department can rely on evidence obtained through less-procedurally-restrictive civil means, thereby bypassing the Fifth Amendment's self-incrimination protection. *See, e.g.*, United States v. Squeri, 398 F.2d 785, 790 (2d Cir. 1968) (affirming the admittance and use of evidence found during a civil audit to convict a taxpayer of criminal tax fraud because the IRS did not contemplate criminal prosecution when it received the records); *but see Mathis*, 391 U.S. at 4 (reversing a conviction of criminal tax fraud because the lower court admitted evidence obtained while the defendant was in custody for an unrelated offense). The case law regarding when to give *Miranda* warnings after the investigation becomes criminal in nature seems to mostly focus on whether the government has custody over the taxpayer, not whether he is being investigated criminally. *See*, *e.g.*, *Mathis*, 391 U.S. at 4 (focusing on whether the taxpayer was in government custody when evidence was received in determining whether it could be used in the criminal prosecution); *Squeri*, 398 F.2d at 790 (using the custody analysis); *but see* United States v. Parrott, 248 F. Supp. 196, 202 (D.D.C. 1965) (holding that "the Government may not bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for subsequent criminal prosecution," and noting that defendant's conviction could likely be overturned because the Securities and Exchange Commission ("SEC") elicited testimony from the defendant after recommending criminal prosecution but not informing the defendant).

[54] Lederman & Hrung, *supra* note 10, at 1281–82. Professor Lederman found the IRS enjoys a statistically-significant advantage in litigated outcomes against pro se litigants that does not exist when taxpayers are represented by counsel. *Id. See also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense").

[55] Lederman & Hrung, *supra* note 10, at 1237 n.14. The IRS data shows that 46.01% of taxpayers were pro se defendants in cases other than small tax cases ("S cases"), and

Thus, the IRS's wide discretion to pursue a matter civilly or criminally turns the enforcement process into a continuous system rather than a truly dichotomous one.[56] A case that meets the "evil motive" requirements for criminal investigation, but where the IRS does not believe the criminal standard of proof can be met, may simply be pursued as a civil matter.[57] By shifting to civil investigation, the IRS can lower its standards of proof, deny the defendant's guarantee of representation, and significantly increase its chance of prevailing before the Tax Court.[58] This wide discretion and ambiguous distinction between civil and criminal tax fraud have been accused of eroding the traditional distinction between civil and

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Lederman's analysis of empirical data demonstrated a statistically-significant advantage in litigated outcomes for represented defendants. *Id.* This means 46.01% of taxpayers before the Tax Court are brought there by the government while suffering a systematic disadvantage in advocating for their interests. *Id.* at 1281. Professor Lederman's data failed to show that representation provided a significant advantage one way or another for settled disputes. *Id.* Lederman suggests that the procedural complexity in Tax Court proceedings—which does not extend to negotiation with the IRS—is a likely explanation for this discrepancy. *Id.* Litigated outcomes also correlated not only with representation generally, but also with the experience of the attorney representing the defendant. *Id*. Lederman noted the likelihood that some of the demonstrated effect is likely due to the procedural complexity of tax litigation, which makes it difficult for a pro se defendant to fully and effectively advocate for his interests. Lederman & Hrung, *supra* note 10, at 1237 n. 14.

56 *See* United States v. Turzynski, 268 F. Supp. 847, 854 (N.D. Ill. 1967) ("[The] CCH Federal Tax Service Release . . . indicates that Special Agents of the Intelligence Division are now required at first interrogation to read to a taxpayer a 'Statement of Rights: which contains the substance of the constitutional admonition specified in *Miranda*.'"). This unnecessary statement of right given by the IRS at the entry of its Special Agent may very well have arisen as an acknowledgement of the fuzzy line between civil and criminal procedures. *See* Ise, *supra* note 11, at 1190 ("The IRS apparently has indicated, either as a precaution against judicial disfavor or because it too recognizes that there might be some merit to the application of *Miranda*, that some warnings should be given to the taxpayer when the special agent enters the case."). The introduction of the Special Agent happens before the assessment technically becomes a criminal investigation, but does indicate the IRS's intention to look at the situation criminally. *See id*. at 1185–86 ("[T]he accusatory stage is not reached until arrest or indictment occurs."). Since 1967, the Service has, however, only required its special agents to give the first three Miranda warnings upon entering the case. *Id*. at 1190. Interestingly, the fourth, that an indigent accused is entitled to state-appointed counsel, is not given. *Id*.

57 *See id*. at 1179 (using "evil motive" and "bad purpose" to describe requirements of criminal prosecution); *see also* Lipton, *supra* note 48, at 534–35 (explaining that, while courts used to simply allow a criminal conviction of tax fraud to be used as evidence of a civil fraud issue, collateral estoppel now bars taxpayers from contesting the imposition of a civil fraud penalty at all after being convicted of tax evasion).

58 *See* Lederman & Hrung, *supra* note 10, at 1281–82 (showing a significant advantage to representation in litigated tax outcomes). If pursuing civil enforcement rather than criminal prosecution can take that advantage away from the taxpayer, the IRS may be incentivized to make that strategic choice in close cases where the taxpayer may not have the funds to hire an attorney. *Id.*

criminal law.[59] Practically, however, this blurred line between criminal and civil fraud is necessary to ensure enforcement.[60]

In the event the IRS determines a taxpayer owes a civil deficiency, and the taxpayer wishes to dispute it, the taxpayer has a couple of options.[61] First, the taxpayer has the option of paying the tax and bringing an action against the IRS for return of the money, arguing that he did not properly owe it in taxation.[62] If the taxpayer follows this route, he may bring his claim against the IRS for repayment in the Court of Federal Claims or a district court.[63] If the taxpayer wishes to dispute the claimed tax before

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59 *See* Mathis v. United States, 391 U.S. 1, 6–8 (1968) (White, J. dissenting) (calling the Court's determination that criminal aspects of an investigation attach when the taxpayer is in custody "troubling"); *cf. id.* (holding that a taxpayer had a right to *Miranda* warnings regarding a tax investigation before the IRS considered criminal prosecution because the taxpayer was in police custody for an unrelated investigation).

60 *See* United States v. LaSalle Nat'l Bank, 437 U.S. 298, 310–11 (1978) (analyzing the nature of a system with inherently-intertwined civil and criminal aspects); Donaldson v. United States, 400 U.S. 517, 535 (1971) (discussing Congress's intent in designing a system with intertwined civil and criminal aspects). This Note is explicitly *not* arguing that civil and criminal tax litigation should be merged or otherwise treated the same way. Instead, this Note seeks to recognize that the line between the two in tax enforcement is less clear than in other areas of law, and that the emergence of holes in the dividing line may require effusion of some legal concepts across that line. *See Mathis*, 391 U.S. at 6–8 (White, J. dissenting) (commenting on the problem involved in deciding a taxpayer was entitled to criminal Miranda warnings where the IRS agents were not pursuing criminal prosecution). The Supreme Court has implicitly recognized this erosion of the dichotomy between civil and criminal law within tax enforcement in *Mathis*. *Id.* The court has not done anything to further break down the distinction, nor should it. *Id.*

61 *See* Leandra Lederman, *(Un)Appealing Deference to the Tax Court*, 63 DUKE L.J. 1835, 1836–37 (2014) (describing taxpayer options for contesting an assessment of civil tax deficiency).

62 *Id.*

63 *Id.* The Court of Federal Claims and United States District Courts have largely concurrent jurisdiction with disputes before the United States Tax Court, though the Tax Court hears over ninety-five percent of litigated federal tax cases. David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 18 (1995). This likely has something to do with the Tax Court's status as the only forum in which a taxpayer can litigate a deficiency *before* paying it. *See* Lederman, *supra* note 61, at 1836–37 ("[O]nly in the Tax Court can a taxpayer avoid paying the claimed tax before litigating"); *see also* J. MARTIN BURKE & MICHAEL K. FRIEL, TAXATION OF INDIVIDUAL INCOME 6 (11th ed. 2015) (describing the Tax Court as the "poor person's court" because the taxpayer can commence an action for redetermination of a deficiency without first paying the asserted deficiency). One important distinction between the Court of Federal Claims and District Court lies in appellate jurisdiction. *See* Lederman, *supra* note 61, at 1837–41 (describing which courts may review the Tax Court's decisions and what standard of review they must use). Judgments rendered by district courts are appealed to their respective circuit court, whereas those rendered by the Court of Federal Claims are appealed to the federal circuit. *See* 28 U.S.C. § 1291 (1982) ("The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States"); *id.* § 1295(a)(3) ("The United States Court of Appeals for the Federal Circuit

paying it, however, he has but one option: he must bring his case before the Tax Court.[64]

2. The United States Tax Court

In many ways, and much to the chagrin of numerous tax scholars, the Tax Court is an exceptional federal court.[65] It is a trial court located in Washington, D.C., that conducts trials nationwide.[66] Its decisions are appealed to all the regional courts of appeal and its judges are appointed in much the same way as Article III judges, but they serve fifteen-year terms.[67] It elects its own Chief Judge, and its Special Trial Judges serve the Chief Judge at-will, unlike federal magistrates at district court.[68] These administrative idiosyncrasies can be partially explained by the Court's history and development.[69] Congress first established the Board of Tax Appeals as an independent executive agency in 1924.[70] It was primarily created to adjudicate disputes arising out of the changed structure of

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shall have exclusive jurisdiction . . . of an appeal from a final decision of the United States Court of Federal Claims.").

64 *See* Kaffenberger v. United States, 314 F.3d 944, 958 (8th Cir. 2003) ("Full payment of a tax assessment is a prerequisite to suit in federal district court; taxpayers may bring prepayment suits only in United States Tax Court.").

65 *See* Leandra Lederman, *Restructuring the U.S. Tax Court: A Reply to Stephanie Hoffer and Christopher Walker's* The Death of Tax Court Exceptionalism, 99 MINN. L. REV. 1, 2–3 (2014) [hereinafter Lederman, *Restructuring*] (discussing the Tax Court and tax exceptionalism).

66 *See* 42 U.S.C. § 7445 (1954) ("The principal office of the Tax Court shall be in the District of Columbia. . . ."). "The Tax Court, [like the Court of Federal Claims,] has nationwide jurisdiction over taxpayers[,] regardless of where [they reside]." Laro, *supra* note 63, at 23.

67 *See* I.R.C. § 7482(a) (1997) ("The United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have exclusive jurisdiction to review the decisions of the Tax Court . . . ."). In contrast, the Court of Federal Claims, which also has trial-level jurisdiction over certain federal tax cases, has its decisions appealed to the Court of Appeals for the Federal Circuit. *See* 28 U.S.C. § 1295(a)(3) (2012) ("The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a final decision of the United States Court of Federal Claims . . . ."); § 7443(b) (1954) ("Judges of the Tax Court shall be appointed by the President, by and with the advice and consent of the Senate."); § 7443(e) ("The term of office of any judge of the Tax Court shall expire [fifteen] years after he takes office.").

68 *See* § 7444(b) ("The Tax Court shall at least biennially designate a judge to act as chief judge."); § 7443A(a) ("The chief judge may, from time to time, appoint special trial judges who shall proceed under such rules and regulations as may be promulgated by the Tax Court."); 28 U.S.C. § 631(e) (2010) ("The appointment of any individual as a full-time magistrate judge shall be for a term of eight years, and the appointment of any individuals as a part-time magistrate judge shall be for a term of four years . . . .").

69 *See* Lederman, *supra* note 65, at 8–23 (detailing the historical development of the Tax Court).

70 HAROLD DUBROFF & BRANT J. HELLWIG, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 49 (2d ed. 2014).

federal tax, which existing institutions were ill-equipped to handle.[71] In 1942, the Board was renamed the "Tax Court of the United States."[72] In the years to come, there would be several attempts to designate the Tax Court as an Article III court, but these would ultimately prove unsuccessful.[73] Instead, in 1969, the Tax Court of the United States was renamed the "United States Tax Court" and was officially denominated as an Article I court rather than an independent agency.[74]

Yet the reclassification did not significantly alter the Tax Court's activities, which were already largely judicial.[75] Nor did the reclassification make an admittedly judicial body part of the judicial branch, despite it carrying the title of a court and wielding the power of contempt.[76] The Supreme Court has held that the Tax Court exercises judicial power, that its function and role closely resemble federal district

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71 *See id.* at 1 (explaining that the Tax Court originated in part in response to "the inadequacy of preexisting institutions, both administrative and judicial, for adjudicating in an acceptable manner the disputes growing out of the changed conditions brought on by the new taxes").

72 *Id.* at 184.

73 *Id.* at 20–40. One issue deemed important in these debates was who would be entitled to represent taxpayers before the Tax Court. *Id.* at 193–94. Non-attorneys had been permitted to practice before the Board of Tax Appeals, and it was thought that designating the Tax Court as an Article III court would change this, only allowing attorneys to argue before it. *See id.* at 193 ("[D]ating back to 1924, only lawyers and certified public accountants were eligible to represent taxpayers before the Board . . . ."). In fact, the debates seemed primarily concerned with this issue of who could practice before the court. Leandra Lederman, *Tax Appeal: A Proposal to Make the United States Tax Court More Judicial*, 85 WASH. U. L. REV. 1195, 1204 (2008) [hereinafter Lederman, *Tax Appeal*].

74 I.R.C. § 7441 (1954); Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730. There has been some discussion as to whether the Tax Court is even constitutional, both specifically as it exists and fundamentally as a court under Article I. *See* Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985, 985 (1991); Daniel L. Ginsberg, *Is the Tax Court Constitutional?*, 35 MISS. L.J. 382 (1963). Practically speaking, it is highly unlikely that the Supreme Court would consider whether the Tax Court is an unconstitutional legislative encroachment on the judicial power so many years after its creation and prolonged operation. Diane L. Fahley, *The Tax Court's Jurisdiction over Due Process Collection Appeals: Is it Constitutional?*, 55 BAYLOR L. REV. 453, 456 (2003).

75 *See* Lederman, *Tax Appeal*, *supra* note 73, at 1205 n.72 (quoting Harold Dubroff, *Federal Taxation*, 1973 ANN. SURV. AM. L. 265, 272 (1973)) ("The Tax Court was given the authority to 'punish contempt of its authority by fine or imprisonment, and provided that in carrying out its powers the court should have the same assistance as is provided generally to federal courts.'"); *see also* Tax Reform Act § 956, 83 Stat. 732 (amending I.R.C. § 7456(d) and granting the Tax Court the contempt power). In addition to Congress regarding the Tax Court as a traditional federal court, it is also indicative of its position—despite being classified as an Article I court—that the Supreme Court has held the Tax Court to be a "court of law" in certain instances. Freytag v. Comm'r, 501 U.S. 868, 890–91 (1991).

76 *See* Lederman, *Tax Appeal*, *supra* note 73, at 1205 n.72 (describing the Tax Court's receipt of the contempt power).

courts, that it exercises its judicial power in much the same way as federal district courts exercise theirs, and even that it qualifies as a "Court of Law."[77]

Despite all of these ways in which the Tax Court resembles an Article III court, it does operate differently in some respects.[78] Article III provides

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[77] *See Freytag*, 501 U.S. at 891–92 (Scalia, J., concurring in part and concurring in the judgment) (analyzing the status and power of the Tax Court). Scalia ultimately concluded that:

> The Tax Court's function and role in the federal judicial scheme closely resemble those of the federal district courts, which indisputably are "Courts of Law." Furthermore, the Tax Court exercises its judicial power in much the same way as the federal district courts exercise theirs. It has authority to punish contempts by fine or imprisonment, 26 U.S.C. § 7456(c); to grant certain injunctive relief, § 6213(a); to order the Secretary of the Treasury to refund an overpayment determined by the court, § 6512(b)(2); and to subpoena and examine witnesses, order production of documents, and administer oaths, § 7456(a). All these powers are quintessentially judicial in nature . . . The Tax Court's exclusively judicial role distinguishes it from other non-Article III tribunals that perform multiple functions and provides the limit on the diffusion of appointment power that the Constitution demands.

Id. But see id. at 912 (Scalia, J., concurring in part and concurring in the judgment) (arguing that "[w]hen the Tax Court was statutorily denominated an 'Article I Court' in 1969, its judges did not magically acquire the judicial power. They still lack life tenure; their salaries may still be diminished; they are still removable by the President for 'inefficiency, neglect of duty, or malfeasance in office' . . . How anyone with these characteristics can exercise judicial power 'independent . . . [of] the Executive Branch' is a complete mystery"); *see also id.* at 888–90 (examining the history of the Tax Court and determining it fits within the definition of a "court of law," at least for the purposes of the appointments clause).

[78] See *id.* at 912 (Scalia, J., concurring in part and concurring in the judgment) (questioning how officers fully-answerable to the Executive and Legislative powers could exercise independent judicial power); *see also* Lederman, *Tax Appeal*, *supra* note 73, at 1211–12 (discussing the extra-judicial incentives faced by the Tax Court). Professor James Pfander has argued that Article III "courts" and Article I "tribunals" are not actually the same. *See* James Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 645, 652–55 (2004) (discussing the interplay between Article III courts and legislative tribunals, and advancing a substantive distinction between the two to clarify their relationship). This distinction would delineate Congress's power to create Article III courts inferior to the Supreme Court from its power to create inferior tribunals for adjudication under Article I. *See id.* at 775–76 (comparing the "inferior tribunals" approach to the interplay between Article I tribunals and Article III courts to other approaches). Under Professor Pfander's approach, the Tax Court, currently considered an Article I court, would be properly characterized as a tribunal. *See id.* at 760 n.553 (observing the classification of the Tax Court as an Article I tribunal and noting that it "simply functions as a more formal version of the executive official who calculated the amount due from [the taxpayer] and instituted collection proceedings against him"). This terminological distinction would clarify confusion arising from classification of the Tax Court as an Article I court of record that nonetheless seems to operate halfway between the legislative and judicial branches of government. *See id.* at 775–76 (explaining the benefits of the inferior tribunals method of delineating between adjudicatory bodies serving under different branches of government).

some protections to ensure the impartiality of judges.[79] Article I courts, including the Tax Court, do not benefit from these impartiality protections.[80] For example, the Tax Court makes its budget requests directly to Congress, which are considered by the same committees that write the Internal Revenue Code.[81] The Tax Court is thus tasked to impartially judge disputes in which the United States is always a party, but must make its own budget requests directly from the very same people who write the law being applied.[82] This, combined with the fact that Congress has the power to alter the salaries of Tax Court judges, places upon the Tax Court a natural temptation to explain its performance to the tax-writing committees.[83] Some have raised doubts about how

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It would also eliminate any latent constitutional issue regarding the Tax Court's status as a court exercising judicial power of the United States under Article I. *See generally id.* (explaining the advantages of Professor Pfander's inferior tribunals approach to categorization).

79 *See* Pfander, *supra* note 78, at 646 (discussing Article III's establishment of tenure and salary protections from Congress). It would not be necessary for another entity to have direct and substantial control over judicial terms and compensation for it to have a potential effect on the impartiality of courts. *See* U.S. CONST. art. III, § 1 (providing that federal judges "shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office"). Even if the majority of cases would be unchanged, the threat of losing their positions or other retribution could influence the judgment of those sitting on the Tax Court in controversial cases. *Id*.

80 *See Freytag*, 501 U.S. at 912 (Scalia, J., concurring in part and concurring in the judgment) (questioning how Tax Court judges could exercise independent judicial authority when their livelihoods are subject to the executive).

81 *See* Lederman, *Tax Appeal*, *supra* note 73, at 1210–11 n.108 and accompanying text (providing the Chief Judge of the Tax Court J. Edgar Murdock's explanation of the administrative matters and appropriations requests of the Court); *see also International Conference of Courts with Income Tax Jurisdiction: Conference Discussion Agenda: Responses and Materials Provided by the Participants in the International Conference of Courts with Income Tax Jurisdiction*, 8 VA. TAX REV. 255, 296 (1988) ("The Court primarily deals in Congress with the tax writing committees. Appropriations are by subcommittees handling treasury and general government appropriations—not the judiciary.").

82 *See* Lederman, *Tax Appeal*, *supra* note 73, at 1210–12 (expressing concern over the necessity of the Tax Court to request its budget from the same people that write the IRC).

83 *See* Geier, *supra* note 74, at 1001 n.77 (discussing the separation-of-powers and impartiality problems of non-Article III tribunals); *see also* THE FEDERALIST No. 79, at 408 (A. Hamilton) (Liberty Fund Inc. 2001) (emphasis in original) ("Next to permanency in office, nothing can contribute more to the independence of the judges, than a fixed provision for their support . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will*."); Lederman, *Tax Appeal*, *supra* note 73, at 1210–12 (articulating concern for the impartiality, actual or perceived, of the Tax Court). For example, when justifying the Tax Court's 1990 budget, Chief Judge Arthur Nims said "[d]uring fiscal year 1988, the dollar amount of deficiencies ultimately determined by the Court to be owed by taxpayers was $1.3 billion, over 46 times the amount of our fiscal year 1990 budget request." Lederman, *Tax Appeal*, *supra* note 73, at 1211–12 (quoting then-Chief Judge Samuel B. Sterrett who justified the proposed budget by saying "During fiscal year 1986, the amount of

impartial Tax Court judges can truly be when faced with these conflicting structural incentives.[84]

Despite perhaps being too closely connected to Congress to make impartial decisions, the Tax Court faces somewhat unclear oversight.[85] It is not legally subject to the Administrative Procedure Act, Administrative Office of United States Courts, Rules Enabling Act, Judicial Conference, or Freedom of Information Act.[86] Instead, the Court's primary source of transparent accountability lies in appellate review.[87] However, the effectiveness of appellate review of the Tax Court has been questioned because is necessarily case-specific and limited to what is included in the record.[88] These critics point out how difficult, if not impossible, it is for appellate courts to review actions outside of the record.[89] In all matters beyond potentially reversing a particular decision, the only meaningful source of oversight faced by the Tax Court is direct congressional supervision.[90]

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deficiencies ultimately determined by the Court to be owed by taxpayers was $758,863,980 or about 27 times the amount of our fiscal year 1988 budget request."). Granted, no such comments during budget request meetings have been made for years after 1990. *Id*. at 1212. Regardless, the structural incentives continue to raise concern. *Id.*

84 *See id*. at 1212 (explaining how, even if the Tax Court judges can truly remain neutral when judging disputes despite the adverse incentives they face, questions about the objectivity of the Tax Court may undermine the confidence in the tax system which is particularly detrimental to a system relying on voluntary compliance).

85 *See* Lederman, *Restructuring*, *supra* note 65, at 2–3 (describing the historical and interpretational difficulties associated with the Tax Court).

86 *Id*. at 2–3. For example, in 1985, the Comptroller of the United States explained that the "U.S. Tax Court, a legislative court of record, is not bound by GSA [General Services Administration] regulation on person convenience items (41 C.F.R. § 101–26.103–2) which applies only to executive branch agencies, nor by an Administrative Office of the United States Courts regulation (Title VIII of the 'Guide to Judiciary Policies and Procedures') since the Tax Court is not part of the judicial branch." Decision of the Comptroller General, Matter Of: Purchase of Decorative Items for Individual Offices at the United States Tax Court 1, 5–6, File B–217869 (Aug. 22, 1985), http://archive.gao.gov/lglpdf16/127736.pdf [https://perma.cc/TX46-TVHE].

87 *See* Lederman, *Tax Appeal*, *supra* note 73, at 1215–16 n.132 and accompanying text (noting a distinct lack of documents from the Government Accountability Office ("GAO") regarding the Tax Court—a total of six during the nineteen-year period from 1970 to 1989).

88 *See id.* at 1215–16 (describing appellate review of Tax Court decisions and the nature of appellate review). As noted above, cases decided by the Tax Court may be appealed to the respective regional federal circuit courts. *See supra* note 63 and accompanying text (describing how appeals from the Tax Court go to regional Circuit Courts and appeals from the Court of Federal Claims goes to the Federal Circuit Court).

89 Lederman, *Tax Appeal*, *supra* note 73, at 1216. Such actions would include, for example, the Court's rule-making, setting of internal policies, and potentially the decisions of what to include in the record. *Id.*

90 *Id*. Congressional oversight, however, is not well-suited to routine guidance. *Id.*

In addition to the critiques for its impartiality and lack of oversight, the Tax Court has also been criticized for its lack of transparency.[91] In *Ballard v. Commissioner of Internal Revenue*, evidence showed that the judge who signed the opinion of the Tax Court was not responsible for the entirety of the opinion and did not make his own final findings of fact.[92] Indeed, there was evidence the final opinion reversed the initial factual findings instead of deferring to them.[93] It was not until the Supreme Court, noting "it is routine in federal judicial and administrative decision-making both to disclose the initial report of a hearing officer, and to make that report part of the record available to an appellate forum," held that the Tax Court could not conceal the initial report and remanded to the appellate circuits, which ordered the Tax Court to produce the report, over the objection of the IRS.[94] When the report was ultimately disclosed, the Eleventh Circuit noted the Tax Court judge did indeed improperly disregard the initial factual findings.[95] The Eleventh Circuit also asserted

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91 *See id.* (describing critiques of the Tax Court and pointing out that courts have both transparent and opaque procedures). Lederman explains that we generally expect courts to utilize transparent procedures when issues of deference or the independence of decision makers is involved (e.g., judicial fact-finding), or when transparency would prevent shirking of one's duty (e.g., whether a judge participated in a particular decision). *Id*. *See also* Leandra Lederman, *Transparency and Obfuscation in Tax Court Procedure*, 102 TAX NOTES 1539, 1544 n.44 (2004) [hereinafter Lederman, *Transparency*] (describing a situation in which a Tax Court judge withheld a report written by a special trial judge ("STJ") from the record which meaningfully hampered appellate review and arguing that the Tax Court should be required to disclose STJ reports, at least to reviewing appellate courts).

92 544 U.S. 38, 53–56 (2005). This is troublesome because findings of fact is one area where the judicial system expects transparency. *See supra* note 91 and accompanying text (providing some areas in which we expect transparency from courts). If the judge that signed the opinion did not find the facts on the record and another factfinder is not identified, appellate courts have no way of holding the fact finder accountable for potential abuses of discretion. Lederman, *Transparency*, *supra* note 91, at 1540–41.

93 *See* Louise Story, *Secrecy ls Lifted in Some Tax Court Trials*, N.Y. TIMES, http://www.nytimes.com/2005/07/12/business/secrecy-is-lifted-in-some-tax-court-trials.html [https://perma.cc/TEK5-RMX8] (July 12, 2005) (telling the story surrounding *Estate of Kanter v. Comm'r*, 337 F.3d 833 (7th Cir. 2005) (*rev'd*), where a Tax Court judge and a STJ told Kanter's lawyers the final opinion had improperly reversed the initial findings of fact).

94 *Ballard*, 544 U.S. at 46; *see also* Lederman, *Tax Appeal*, *supra* note 73, at 1221 (explaining the procedural developments in *Ballard* after the Supreme Court reversed and remanded the lower decisions, including *Kanter*).

95 Lederman, *Tax Appeal*, *supra* note 73, at 1221–22. The original report concluded, in contrast to the Tax Court's official opinion, with respect to the fraud penalty, that:

> Respondent has not established that there was an underpayment of tax by any of the petitioners arising out of what respondent derisively described throughout the trial of this case as "kickback schemes" wherein moneys were exacted as a condition for doing business, and that such moneys constituted income that was no[t] reported by

the withholding of the report prevented proper review of the evidence on the record and materially impeded the process of appellate review.[96]

B. Appointed Counsel

Having looked at how the tax system operates, it is now appropriate to examine under what circumstances courts will appoint counsel to litigants.[97] Appointment of counsel is generally justified in one of three ways: under either (1) the Sixth Amendment, (2) the Due Process Clause, or (3) 28 U.S.C. § 1915(d).[98] First, Part II.B.1 examines Sixth Amendment appointments of counsel.[99] Next, Part II.B.2 describes appointments made to comply with due process.[100] Part II.B.3 introduces § 1915(d) and discuss under which circumstances counsel may be appointed under the statute.[101] Finally, Part II.B.4 briefly explains the indigency requirement necessary for appointment of counsel under the methods above.[102]

> petitioners . . . There is no[] showing that taxes were evaded or avoided on any of the payments made by "The Five."

Id. Quite the contrary, respondent's witnesses, including its own agents, testified that all of the payments by "'The Five' had been reported on Federal income tax returns, and the taxes due thereon had been paid . . . . The Court . . . does not consider [certain] transactions [the IRS cited as indicative of fraud] as even rising to the level of suspicion of fraud." *Id.* (quoting Memorandum Findings of Fact and Opinion of STJ Couvillion, Ballard v. Comm'r of Internal Revenue, 429 F.3d 1026 (11th Cir. 2005) (No. 01-17249), *reprinted in Ballard Special Trial Judge Opinion Released to Eleventh Circuit*, TAX NOTES TODAY, June 6, 2005, *available at* 2005 TNT 107-16 (LEXIS)).

96 *See* Ballard v. Comm'r of Internal Revenue, 429 F.3d 1026, 1032 (2005) (determining that withholding evidence the court relied on from the record prevented proper appellate review); *see also* Lederman, *Tax Appeal*, *supra* note 73, at 1222 n.167 (explaining that, once the appellate court received the report excluded from the record, it reached the opposite result than it had done without access to the report). The Eleventh Circuit went as far as to say "*[i]t is obvious now* that the withholding of Special Trial Judge Couvillion's original report did, in fact, impede the process of appellate review." *Ballard*, 429 F.3d at 1032 (emphasis added). The Eleventh Circuit emphasized in its remand instructions that Judge David Couvillion's factual findings were to be presumed correct unless "manifestly unreasonable"—the proper standard the Tax Court should have used initially. *Id.*

97 *See infra* Part II.B.1 (examining law surrounding appointment of counsel under the Sixth Amendment); *infra* Part II.B.2 (discussing appointment of counsel under the Due Process Clause); *infra* Part II.B.3 (introducing statutory discretionary appointment of counsel).

98 *See infra* Part II.B (outlining the ways in which counsel may be appointed for litigants).

99 *See infra* Part II.B.1 (describing Supreme Court precedent regarding Sixth Amendment appointment of counsel).

100 *See infra* Part II.B.2 (discussing Supreme Court precedent regarding due process appointment of counsel).

101 *See infra* Part II.B.3 (detailing appointment of counsel under 28 U.S.C. § 1915(d)).

102 *See infra* Part II.B.4 (explaining the indigency requirement *all* appointments of counsel are subject to).

1. Appointed Counsel under the Sixth Amendment

The Sixth Amendment to the Constitution ensures criminal defendants the right to the assistance of counsel.[103] The Supreme Court did not construe this to mean that all criminal defendants have a right to counsel, however.[104] Instead, the Court read the amendment to mean that counsel must be provided for defendants unable to employ counsel themselves, unless the right is competently and intelligently waived.[105]

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[103] U.S. CONST. amend. VI. The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the Assistance of Counsel for his defense*.

Id. (emphasis added).

[104] *See* Johnson v. Zerbst, 304 U.S. 458, 468 (1938) (noting the defendants who have the means to retain counsel have access to counsel). It is only those criminal defendants who are unable to retain counsel (or not offered an opportunity to) that fall under the protection of the Sixth Amendment. *Id.*

[105] *See id.* at 467–68 (analyzing the text of the Sixth Amendment). Justice Clark McReynolds reasoned:

> Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost 'in the course of proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake.

Id. Interestingly, Judge Richard Posner wrote an order where, by all accounts, the defendant had competently and intelligently waived his right to counsel, but Judge Posner threatened to appoint counsel to him regardless. United States v. Hakeem El Bay, 14 CR 447, Order of February 20, 2015. El Bey was indicted for defrauding the IRS and set out to represent himself pro se. *Id.* Hakeem appeared of sound mind but insisted on presenting comically incredible arguments in his defense. *Id.* Inter alia, he argued that the Queen of England, via the Stamp Act, exonerated him from paying income tax. *Id.* He also argued that he was a "sovereign citizen" and was thus outside the court's jurisdiction (the proper forum for the action was, according to El Bey, the International Court of Trade). *Id.* After pointing out the incoherency of El Bey's arguments, Judge Posner wrote that a defendant who has the cognitive ability to represent himself in a legal proceeding but refuses to confine his defense to testimony, argument, and other evidence that are permissible in a legal proceeding—

The right to government-appointed counsel under the Sixth Amendment is thus very limited.[106] First, the Sixth Amendment guarantees only the right to *access to* counsel, not necessarily the *provision of* counsel.[107] If a defendant has access to counsel but competently chooses not to obtain it, the government has not denied him counsel—he simply chose not to utilize it.[108] In contrast, if a defendant could have retained counsel for his defense and the government prevented him from doing so, that would constitute a violation of the Sixth Amendment.[109] Furthermore, the Sixth Amendment demands the government give a criminal defendant more than a chance to call a lawyer.[110] If a criminal defendant lacks the ability hire a lawyer, any chance the government gives him to hire one would be moot because he lacks the ability.[111] In this case, to comply with the Sixth Amendment, the government must appoint counsel to represent him.[112]

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refuses in effect to cooperate with the court and obey the law governing the proceeding—forfeits his right to defend himself. *Id.*

106 *See* Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (declining to extend an automatic right of counsel to defendants at a civil contempt proceeding for failure to pay a child support order). *Turner* outlines alternative procedural safeguards the state can use:

> (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.

Id. at 2519.

107 *See* Gideon v. Wainwright, 372 U.S. 335, 339–45 (1963) (outlining a test for when due process requires access to assistance of counsel). There is a technical argument to be made that an indigent defendant may have access to counsel if he can find an attorney willing to represent him pro bono. While this may meet a stricter interpretation of "access to," courts have not followed this, possibly arising from a reluctance to require a criminal defendant to place himself at the mercy of an independent attorney. *See id.* (discussing "access to" Sixth Amendment guarantee of the right to assistance of counsel). To this end, court-appointed counsel is made available to indigent defendants. Defendants are still able to retain counsel pro bono if they can find it, but courts have not interpreted access to adequate counsel so strictly as to force a defendant to lay his fate before, potentially, the only attorney willing to represent him pro bono.

108 *See Johnson*, 304 U.S. at 467–68 (analyzing the requirements of the Sixth Amendment).

109 *Id.*

110 *Id.*

111 *Id.*

112 *See id.* at 459–63 (describing the poor excuse for due process that can result from a lay defendant with neither court-appointed counsel nor the means to hire an attorney). The defendant testified:

> I objected to the witness' testimony. I didn't ask him any questions, I only objected to his whole testimony. After the prosecuting attorney was finished with the witness, he said, "Your witness," and I got up and

In 1963, the Court famously incorporated the Sixth Amendment right to counsel against the states.[113] In *Gideon v. Wainwright*, the Court reasoned that an indigent defendant has access to counsel only if the government provides it, and would otherwise be swept away in legal proceedings he does not properly understand, but on which his very liberty relies.[114] The government running a defendant through a gauntlet of criminal proceedings, despite his inability to obtain counsel on his own, thus qualifies as a violation of the Sixth Amendment guarantee "to have the assistance of counsel."[115]

Because the Sixth Amendment explicitly limits itself to criminal matters, one might expect the right to appointed counsel to stop there.[116]

> objected to the testimony on the grounds that it was all false, and the Trial Judge said any objection I had I would have to bring proof or disproof.

Id.

[113] *See* Gideon v. Wainwright, 372 U.S. 335, 342–43 (1963) (accepting "*Brady*'s assumption . . . that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment," but rejecting its conclusion that the Sixth Amendment is not one of those fundamental rights).

[114] *Id*. *See also* Powell v. Alabama, 287 U.S. 45, 68–69 (1932) (describing the perils faced by *pro se* defendants). The Court stated:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id.

[115] *See Gideon*, 372 U.S. at 344–45 (holding that due process requires criminal defendants to be provided with paid counsel if they cannot do so themselves).

[116] *See Johnson*, 304 U.S. at 463 ("[T]his court has pointed to the humane policy of the modern criminal law which now provides that a defendant, if he be poor, may have counsel furnished him by the state."); *see also Gideon*, 372 U.S. at 344–45 (failing to extend the right of paid counsel to those who can pay for an attorney themselves). Criminal proceedings are not necessarily required for a court to appoint counsel, but courts have *only* appointed counsel where some kind of incarceration is at stake. Turner v. Rogers, 131 S. Ct. 2507, 2510 (2011) ("Cases directly concerning a right to counsel in civil cases have found a presumption of such a right '*only*' in cases involving incarceration, but have not held that a right to counsel exists in *all* such cases"). This subsection will primarily address the first requirement: the criminal limitation of appointment of counsel. The indigency requirement will be addressed in the next subsection. *See infra* Part II.B.4 (discussing the indigency requirement for the appointment of counsel).

However, the Court has found a right to counsel in some limited civil proceedings.[117] This extension of the right is not animated by the Sixth Amendment, however, for the simple reason that its language cannot be read to apply to civil cases.[118] Instead, a limited right to appointed counsel has been recognized in a small number of civil proceedings when required by "the specific dictates of due process."[119]

2. Appointed Counsel under the Due Process Clause

The Sixth Amendment may specifically guarantee the appointment of counsel, but courts also use the Due Process Clause to guarantee the appointment of counsel in certain situations.[120] Interestingly enough, one of the better examples of due process in the context of appointed counsel comes from before *Gideon*'s incorporation of the Sixth Amendment.[121] In 1932, the Court heard *Powell v. Alabama*, where two young black men were charged with rape, indicted, tried, and sentenced to death—all without a meaningful opportunity to speak with a lawyer—or even their own families.[122] As the Court had not yet incorporated the Sixth Amendment, *Powell* could not rely on it to overturn the conviction.[123] Instead, the Court asserted the right to counsel was so important that its denial could, under certain circumstances, amount to a violation of the Due Process Clause.[124]

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117 *See Turner*, 131 S. Ct. at 2510 (acknowledging the extension of appointed counsel to indigent defendants in some civil contempt proceedings).

118 *See id.* (noting that the Sixth Amendment does not govern civil cases); *see also* U.S. CONST. amend. VI ("In all *criminal* prosecutions . . . .") (emphasis added).

119 *See Turner*, 131 S. Ct. at 2510 (explaining, because a contempt proceeding to compel support payments is civil in nature, the court must examine the "distinct factors" laid out in *Mathews* to determine if due process required appointment of counsel); Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (applying "distinct factor" due process analysis).

120 *See, e.g.*, *Turner,* 131 S. Ct. at 2510 (demanding the appointment of counsel under due process analysis).

121 *See* Powell v. Alabama, 287 U.S. 45, 49–50 (1932) (overturning convictions because the state's failure to appoint counsel constituted a violation of the Due Process Clause).

122 *Id.*

123 *See* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (incorporating the Sixth Amendment guarantee of access to counsel against the states through the Due Process Clause).

124 *See Powell*, 287 U.S. at 70 (recognizing that state decisions regard the right to the aid of counsel as "fundamental in character"). *Powell* declared that:

> [E]ven if opportunity had been given[] to employ counsel . . . we are of the opinion that, [under the circumstances of this case], the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.

Id. at 71. Granted, the facts in *Powell* were severe. *See id.* (observing that the defendants were young and illiterate, the public was hostile to them, they were closely surveyed my military forces, their friends and families were all in other states and difficult to communicate with,

It asserted the facts in *Powell* were sufficient to meet that standard, but kept its holding notably narrow.[125]

More general applications of the Due Process Clause utilize a general test.[126] In determining which specific safeguards the Due Process Clause requires of civil proceedings to ensure they are "fundamentally fair," the Supreme Court examines "distinct factors," including: (1) the nature of the private interest to be affected, (2) the comparative risk of an erroneous deprivation of the private interest with and without additional or substitute procedural safeguards, and (3) the nature and magnitude of any countervailing interest in not providing additional or substitute procedural requirements.[127] At first glance, these factors may not seem overly strict, but the Court's application of this due process test reveals just how limited it is.[128] While a full exploration of the bounds of this due process test would fall outside the scope of this Note, it is worth mentioning the Court has interpreted it narrowly enough to allow the

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and that their lives were at peril). It is possible the Court only focused so much on the severity of the case to find a due process violation because the Sixth Amendment was not then applicable to the states. *See id.* (requiring federal and state courts to appoint counsel for indigent criminal defendants under the Due Process Clauses). The Court considered the appointment of counsel as an indisputable protection against government overbearance. *Id.*

125 *See id*. at 71–72 (holding narrowly that due process required appointment of counsel in a capital case). The Court's specific hedging went thus:

> Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, "that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.

Powell, 287 U.S. at 71–72 (quoting Holden v. Hardy, 169 U.S. 366, 389 (1898)). The Court maintained its reluctance to require the appointment of counsel up through *Gideon* with assertions such as: "in the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial." Betts v. Brady, 316 U.S. 455, 471 (1942).

126 *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) laying out three factors to due process analysis).

127 *Id*. *See also* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27–31 (1981) (applying the *Mathews* framework).

128 *See* Turner v. Rogers, 131 S. Ct. 2507, 2517 (2011) (pointing out that the Court had found a right to counsel *only* in cases involving incarceration, but not even *all* cases involving incarceration); *Mathews*, 424 U.S. at 335 (declining to extend the right of paid counsel to those facing termination of their social security disability benefits).

deprivation of counsel, even in some circumstances where the defendant may be incarcerated for up to a year.[129] The most succinct statement of the test is thus: the Court has found a right to counsel *only* in cases involving incarceration, but *not in all* cases involving incarceration.[130]

3. Appointed Counsel under § 1915(d)

In addition to the Constitution authorizing courts to appoint counsel under certain circumstances, federal statute also provides a basis for them to do so.[131] Section 1915(d) of the United States Code enables trial courts to appoint counsel to any party, and places such an appointment at the discretion of the trial judge.[132] While the statute places almost no restriction on this authority, the appellate courts have provided some standards to help determine when it is appropriate for a judge to invoke § 1915(d).[133] At this point, it is sufficient to say the circuit courts do not agree on one standard.[134] Instead, two primary tests have emerged: this Note will refer to them as the *Farmer* test and the *Maclin* test.[135]

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[129] *See Turner*, 131 S. Ct. at 2510, 2517 (emphasizing the limited scope of appointed counsel under the Due Process Clause).

[130] *See id.* (surveying prior case precedent to observe a general pattern of application of due process appointment of counsel). The Court stated in *Turner*, for example, that the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration for up to a year. *Id.* The Court went on to clarify:

> In particular, [the Due Process Clause] does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings.) We do not address civil contempt proceedings where the underlying child support payment is owed to the State.

Id. at 2520. Note that the Court seemed to think it mattered whether the defendant was opposing another private party or the state when considering the appropriateness of appointing counsel. *Id*. In Tax Court, taxpayers are always opposing government lawyers.

[131] *See* 28 U.S.C. § 1915(d) (1996) (authorizing courts to "request an attorney to represent any person unable to afford counsel").

[132] *Id.*

[133] *See* Farmer v. Haas, 990 F.2d 319, 321–22 (7th Cir. 1993) (comparing tests for applying § 1915(d) used by different appellate courts).

[134] *See id.* (discussing multiple standards used by different circuits).

[135] *See id.* (abandoning the multi-factor test laid out in Maclin v. Freake, 650 F.2d 885, 887 (7th Cir. 1981), and providing an alternative inquiry). The old *Maclin* test consisted of several factors: (1) whether the plaintiff's claim had some merit; (2) the plaintiff's ability to investigate the facts without the assistance of counsel; (3) the complexity of the evidence; (4) the plaintiff's ability to represent himself; and (5) the difficulty of the legal issues. *Id.* The Seventh Circuit noted a number of problems with the *Maclin* test: (1) if the first factor is not met, the case should be dismissed out of hand with no need to worry about counsel; (2) the

4. Indigency Requirement for All Methods of Appointing Counsel

Even assuming a case otherwise meets the requirements for appointing counsel to a litigant, the appointee can be appointed counsel only if he is unable to hire his own attorney.[136] Unfortunately, the Court has not provided substantial guidance for determining when a defendant qualifies.[137] After quoting Justice George Sutherland on the right to counsel, the *Gideon* court simply stated that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[138] While written in lofty language, "too poor to hire a lawyer" is hardly a clear standard.[139] Some of the best guidance provided by the Court on determining indigency came fifteen years before *Gideon*.[140] In *Adkins v. E.I. DuPont de Nemours Co.*, the Court interpreted a statute which allowed a litigant in federal civil or criminal court to prosecute or defend

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second and third factors blend together into one factor involving the plaintiff's ability to present evidence; and (3) the fourth factor is dependent on the second, third, and fifth factors. *Id.* While some courts (like the Tenth Circuit) still follow the *Maclin* test, the Seventh Circuit adopted a simpler one in *Farmer*. *Id.* The *Farmer* test asks three questions: (1) has the indigent plaintiff made reasonable efforts to retain counsel or been effectively precluded from making such efforts before reaching appointment; (2) given the difficulty of the case, did the plaintiff appear to be competent to try it himself; and (3) if not, would the presence of counsel have made a difference in the outcome. Pruitt v. Mote, 503 F.3d 647, 654 (7th Cir. 2007). *See also* United States v. Madden, 352 F.2d 792, 793–94 (9th Cir. 1965) (noting that "the appointment of counsel in a civil case is, as is the privilege of proceeding *in forma pauperis*, a matter within the discretion of the district court. It is a privilege and not a right . . . . In civil actions for damages, appointment of counsel should only be allowed in exceptional cases").

136 *See* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (declining to extend right of appointed counsel to those who can afford it themselves); *but see* United States v. Hakeem El Bay, 14 CR 447, Order of February 20, 2015 (intimating a judicial willingness to appoint counsel despite the defendant being able (although unwilling) to hire counsel to defend him).

137 *See* William L. Dick Jr., *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 WM. & MARY L. REV. 627, 627–29 (1989) (discussing the indigency requirement of paid counsel); John P. Gross, *Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of their Sixth Amendment Right to Counsel*, 70 WASH. & LEE L. REV. 1173, 1174–77 (2013) (describing how some defendants may be unable to hire counsel and still not be considered indigent for the purposes of being provided paid counsel); Elizabeth Neeley & Alan Tomkins, *Evaluating Court Processes for Determining Indigency*, 43 CT. REV. 4, 4–8 (2007) (evaluating court processes for determining indigency).

138 *Gideon*, 372 U.S. at 344. While apparently an "obvious truth" to Justice Hugo Black, this simple statement does not provide any insight into how poor qualifies as "too poor" to hire an attorney. *Id.*

139 *See supra* note 135 and accompanying text (describing the divergent and inconsistent methods that have arisen to determine what "too poor to hire a lawyer" really means).

140 *See* Adkins v. E.I. DuPont de Nemours Co., 335 U.S. 331, 336 (1948) (finding error in a lower court's denial of Adkin's motion for appeal on the grounds that her lawyers had not made satisfactory affidavits of poverty).

actions without prepaying fees or costs if he submitted an affidavit attesting "that because of his poverty he is unable to pay the costs."[141] The *Adkins* Court determined that a litigant need not be absolutely destitute to be considered indigent and declined to read the statute in a way that would require litigants to expend all their resources before invoking the statute.[142] *Adkins* also noted that it is not only contrary to public policy, but even illogical to interpret the requirement of being unable to pay court costs because of his poverty as requiring a litigant to make himself completely destitute or abandon a meritorious claim.[143] Thus, it was not "complete destitution" that should determine indigency, but rather whether the litigant can pay the costs "and still be able to provide himself and dependents with the necessities of life."[144] The Supreme Court has thus provided a vague, yet very fact-specific inquiry for determining indigency which gives some guidance but has nonetheless allowed

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[141] *Id.* The statute, allowing for appeals *in forma pauperis*, stated: "Upon leave to proceed *in forma pauperis*, the district court may by order specify some different and more economical manner by which the record on appeal may be prepared and settled, to the end that the appellant may be enabled to present his case to the appellate court." *Id.* at 337.

[142] *See id.* at 339–40 ("To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support. Nor does the result seem more desirable if the effect of this statutory interpretation is to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution.").

[143] *Id.*

[144] *Adkins*, 335 U.S. at 339–40 (internal quotation marks omitted). A year after *Gideon* was decided, Justice Arthur Goldberg attempted to further clarify the meaning of "indigence" in a footnote to his concurring opinion in *Hardy v. United States*, which, in pertinent part, read: "Indigence must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means. An accused must be deemed indigent when 'at any stage of the proceedings [his] lack of means . . . substantially inhibits or prevents the proper assertion of a [particular] right or a claim of right.'" Hardy v. United States, 375 U.S. 227, 289 n.7 (Goldberg, J., concurring) (citations omitted) (quoting ATT'Y GEN.'S COMM. ON POVERTY & THE ADMIN. OF CRIM. JUST., REP. ON POVERTY AND THE ADMIN. OF FED. CRIM. JUST. 8 (1963)). Indigence must be defined with reference to the particular right asserted. *Id.*

countless differing standards to arise.[145] The specific determination of indigency is not the focus of this Note, however.[146]

Thus, Part II has provided a background of tax law and of the methods used to appoint counsel to indigent litigants.[147] Part III applies the methods of appointing counsel to indigent taxpayers in Tax Court.[148] Ultimately, Part III does not contribute a new statute or rule to the Tax Court, but rather seeks to contribute an interpretation: an interpretation of the Due Process Clause or of § 1915(d) as applies to indigent taxpayers in civil litigation.[149]

III. ANALYSIS

This Note will now apply the previously-discussed standards to the Tax Court and ultimately conclude indigent taxpayers meet at least one of those standards and should thus be appointed counsel by the Tax Court.[150] Part III.A first applies the existing due process analysis to indigent taxpayers in Tax Court.[151] Part III.B then examines the propriety of discretionary § 1915(d) appointment of counsel as an alternative to appointment of counsel under the Due Process Clause.[152]

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145 *See* Gross, *supra* note 137, at 1193–94 (describing varying methods of determining indigency). State courts have taken various approaches in determining indigency, though many of them incorporate the usage of Federal Poverty Guidelines as well as the discretion of the trial court. *Id.* Gross highlights some problems with how the states have taken to determining indigency, including the peculiar result of some criminal defendants qualifying for food stamps but not assigned counsel. *Id. See also* Neeley & Tomkins, *supra* note 137, at 4–8 (mentioning the different methods used to determine indigency, many based on yearly income at different percentages of the federal poverty line).

146 *See infra* Part III (arguing the Tax Court should appoint counsel to indigent taxpayers, however indigency is fairly-determined).

147 *See supra* Part II (providing a background of tax law and law governing appointment of counsel to defendants).

148 *See infra* Part III (applying methods of appointing counsel to indigents before the Tax Court and arguing such indigents should be appointed counsel).

149 *Infra* Part III.

150 *See infra* Part III.A–B (arguing for applicability of existing methods of appointing counsel to the Tax Court). Some older decisions seem to focus on whether the defendant requested counsel or not. *See also* Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law"). This Note will not draw a distinction between those circumstances, although the Tax Court limiting appointment of counsel only to indigent taxpayers who request it would not seem unreasonable.

151 *See infra* Part III.A (addressing discretionary appointment of counsel under federal statute and discussing why extending counsel to taxpayers not in fear of incarceration is, while unprecedented, justified).

152 *See infra* Part III.B (applying § 1915(d) tests to taxpayers in Tax Court).

A. Appointment of Counsel under Due Process Standards

To properly address the question of due process in a civil proceeding, it is necessary to show both that the proceeding meets the general requirements of due process analysis and that the extension is not flying too far afield of the Supreme Court's repeated assertion that due process affords civil litigants the right to counsel only in very limited circumstances.[153] Part III.A.1 applies standard due process analysis to taxpayers before the Tax Court.[154] Part III.A.2 then follows by assuring readers the Due Process Clause can remain limited while allowing this one extension.[155]

1. Application of Due Process Standards to Indigent Taxpayers before the Tax Court

As discussed above, the Supreme Court has recognized that an indigent defendant may require the state to provide him with counsel he could not otherwise provide for himself.[156] This requirement is almost exclusively limited to criminal proceedings, but even that seemingly clear distinction blurs in some tax circumstances.[157] Returning to the example of tax fraud, auditing taxpayers for suspected fraud involves a concurrent inquiry into both offenses, which share identical constituent elements.[158] Nonetheless, there is a recognized difference between civil and criminal tax offenses, and there has been some case law attempting to clarify the

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153 *See infra* Part III.A.1–2 (demonstrating due process analysis to taxpayers and explaining why the unprecedented extension is appropriate in practice).

154 *See infra* Part III.A.1 (applying Supreme Court due process precedent to indigent taxpayers before the Tax Court).

155 *See infra* Part III.A.2 (acknowledging hesitations to extend the Due Process Clause to more civil proceedings).

156 *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that the Due Process Clause requires an indigent criminal defendant to be provided counsel).

157 *See* Ise, *supra* note 11, at 1178 (comparing the sections of the IRC which govern civil and criminal tax fraud). Ise explains:

> The identity between the two sections has further significance because the imposition of one sanction by the government does not bar the imposition of the other. Conceivably, each penalty might be imposed in every case of tax evasion. This latter possibility gives a tax fraud investigation a dual nature and generates issues concerning the point at which the *Miranda* warnings should attach, and whether or not discovery obtained by means of an administration subpoena issued by the IRS may be used in criminal prosecution.

Id.

158 *See id.* (discussing the implications of civil and criminal offenses constituted of identical elements).

line between the two.[159] When trying to determine when *Miranda* warnings should be given to a potential defendant in a criminal tax prosecution, the Supreme Court attempted to delineate when an IRS investigation actually transforms from civil assessment to criminal investigation.[160] Prior to 1966, the Court asserted a defendant is protected by the Sixth Amendment guarantee of access to counsel beginning at the moment the IRS shifts its focus from investigatory to accusatory.[161] Post-*Miranda*, however, most courts focus primarily on whether the taxpayer was in government custody at the time in question.[162]

This custody requirement would seem simple: the taxpayer is entitled to counsel at the moment he is arrested for a tax crime.[163] This is complicated, however, by *Mathis v. United States*, where the Supreme Court held *Miranda* warnings were required when the defendant was questioned by IRS agents while in custody for a charge unrelated to the tax investigation.[164] Statements made by the taxpayer were thus deemed inadmissible because the interview took place in a jail, even though at the

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159 *See id.* (surveying the Supreme Court's attempts at drawing a line between civil and criminal tax fraud).

160 *See generally id.* at 1182–92 (dedicating significant explanation and analysis to *Miranda* warnings in tax investigations). *Miranda* warnings are: (1) the right to remain silent; (2) that any statement made may be used against the person undergoing interrogation; (3) the right to consult and have present an attorney; and (4) the right to have an appointed attorney in the event of indigency. Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

161 *See* Escobedo v. Illinois, 378 U.S. 478, 492 (1964). While the investigatory versus accusatory distinction gives scarcely more guidance than a civil versus criminal distinction, the Court would later refine its line-drawing in the *Miranda* decision by focusing on governmental custody of the defendant. *See Miranda*, 384 U.S. at 444–45 (including a consideration of police custody into the determination of whether a defendant was entitled to appointed counsel). The information at issue in *Escobedo* was obtained while the defendant was in police custody and being questioned in an interrogation room. *See* 378 U.S. at 481–84 (reversing defendant's conviction based on analysis which considered police maintaining custody over him). Without having been read his *Miranda* rights, the information Escobedo disclosed at that time was deemed inadmissible by the Court. *Id.*

162 *See* Ise, *supra* note 11, at 1185–86 (discussing cases using both the custody test and the accusatory test to determine when *Miranda* warnings should attach).

163 *Id.*

164 391 U.S. 1, 4–5 (1968). The Court further recognized that:

> A "routine tax investigation" may be initiated for the purpose of a civil action rather than criminal prosecution. To this extent tax investigations differ from investigations of murder, robbery, and other crimes. But tax investigations frequently lead to criminal prosecutions, just as the one here did. In fact, the last visit of the revenue agent to the jail to question petitioner took place only eight days before the full-fledged criminal investigation concededly began. And as the investigating revenue agent was compelled to admit, there was always the possibility during his investigation that his work would end up in a criminal prosecution.

Id.

time the IRS investigation was purely civil.[165] This decision appears to frame the custody element of delineating civil from criminal tax investigations as a convenient place to draw a line rather than a true indicator of where constitutional due process requirements may actually lie.[166] This standard is understandable, given it is often impossible to know whether the IRS will ultimately pursue criminal prosecution until it has already collected evidence of criminal culpability as part of the civil investigation.[167]

Yet with such a nebulous investigatory system—and a standard for delineating the threshold for criminal procedural protections that bears little resemblance to what the IRS may actually be investigating—it is difficult to say a taxpayer at risk of criminal prosecution enjoys the same protections as those afforded to citizens suspected of non-tax crimes.[168] For example, it cannot be said with certainty that a civil defendant may not be subject to future criminal prosecution for tax fraud unless (1) he has already faced prosecution for the act, thereby under the protection of the Double Jeopardy Clause; or (2) the statute of limitations has passed.[169] This is particularly troubling given the general ability of the IRS to initiate civil assessment, gather information, make findings, and then convert the assessment into a criminal investigation.[170] It is uncontroverted that an

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165 *See id.* (holding evidence produced in an interview conducted for a civil investigation inadmissible because it was conducted while the defendant was in police custody for an unrelated criminal matter).

166 *Cf.* Ise, *supra* note 11, at 1187–88 (explaining the difficulty in applying a strict custody test, partly because some cases seem to conflict with others). *United States v. Dickerson*, for example, focused on the statement in *Mathis* that "routine tax investigations frequently lead to criminal prosecutions" when deemphasizing the factor of custody. *Id*. at 1187 (citing 413 F.2d 1111 (7th Cir. 1969)). Likewise, the Supreme Court appeared to deviate from the custody requirement in *Orozco v. Texas*, where it required *Miranda* warnings where no formal custody existed because there was an appearance that the defendant was deprived of his freedom in a significant way. *Id*. at 1188 (citing 394 U.S. 324 (1969)).

167 *See Mathis,* 391 U.S. at 4 (noting routine tax investigation frequently leads to criminal prosecutions).

168 *See supra* Part II.A (describing the process surrounding tax investigation).

169 *See* U.S. CONST. amend. V (providing that no person "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb"). Depending on the tax violation, the statute of limitations for criminal tax fraud or evasion is generally three to six years. I.R.C. § 6531(2). These can be significantly lengthened, however. *See*, *e.g.*, United States v. Irby, 703 F.3d 280, 283–84 (2012) (holding that the statute of limitations for tax evasion began to run on the date of defendant's last act of evasion occurred, rather than the date his return was filed). Some courts, for example, have held the six year statute on criminal tax evasion begins to run only upon the last act of evasion. *Id*. Civil tax fraud does not have a statute of limitation. *See* I.R.C. § 6501(c)(1) (2014) (providing that "[i]n the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time").

170 *See* Ise, *supra* note 11, at 1185–86 (giving examples of IRS enforcement procedures).

indigent criminal defendant is entitled to paid counsel, but by the time an indigent defendant ultimately faces criminal prosecution, he may have already affected his criminal case while he was left without access to counsel.[171] Conversely, because prosecution of criminal fraud is usually followed by imposition of a civil fraud penalty, an indigent tax defendant who was appointed counsel for his criminal proceeding would have his attorney taken away from him for the civil proceeding which would undoubtedly involve the findings of the former.[172] The defendant would thus be left with the remains of a complicated tax matter to re-litigate the same issues his attorney just argued, but in a civil context.[173]

Assuming the IRS's plenary discretion discussed above is sufficient to raise due process concerns regarding indigent taxpayers before the Tax Court, the next step in the analysis would involve applying the Supreme Court's "distinct factors" to determining which specific safeguards are required by the Due Process Clause.[174] This application should occur while keeping in mind the stated goal of such due process protections: to make the proceedings between the government and the citizen "fundamentally fair."[175] Without the requirement of fundamental fairness between government and citizen, the risk of abusive use of power and

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171 *See id.* at 1181–82 (discussing the application of collateral estoppel to tax fraud).

172 *Id.*

173 *See* Lipton, *supra* note 48, at 532 (discussing the IRS's priority of sanctions). The converse, or a defendant being appointed counsel after already handling his own civil assessment pro se, is unlikely given the IRS's policy to give overriding importance to the criminal aspects of tax fraud investigation. *Id.* The doctrine of collateral estoppel, however, makes the potential interplay between criminal and civil tax proceedings more troubling. *See* Ise, *supra* note 11, at 1181–85 (describing the application of collateral estoppel within the context of taxpayer *Miranda* warnings). When a taxpayer is convicted of criminal tax fraud, for example, he is necessarily liable for civil tax fraud. *Id.* at 1181. On the other hand, due to the different standards of proof, a prior acquittal of tax fraud does not necessarily mean he is exempt from civil liability. *Id. See also* Lipton, *supra* note 48, at 534 n.3 (discussing collateral estoppel in civil and criminal tax proceedings). The only situation in which a taxpayer could potentially benefit from collateral estoppel is if he prevailed on the issue of fraud in a civil case and then invoked the doctrine in a subsequent criminal proceeding. *Id.* This situation is unlikely, however, given the IRS policy to give "overriding importance" to the criminal aspects of a tax fraud investigation and hold all civil aspects in abeyance. *Id.*

174 *See* Mathews v. Eldridge, 424 U.S. 319, 334–40 (1976) (providing three factors to aid in due process application). The "distinct factors," as relevant to a civil proceeding, were listed by the Supreme Court as: (1) the nature of the "private interest that will be affected;" (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards;" and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]." *Id.*

175 *See* Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (concluding the right to access to counsel is "fundamental . . . [and] essential to a fair trial" and is applicable to the states).

unjustified takings falls too far in favor of the government.[176] This goal was the underlying and fundamental concern of the Court when requiring the appointment of counsel in *Gideon*, *Lassiter*, and *Powell*.[177] This concern becomes no less important if the government is seeking to seize money the taxpayer may not have and may not be owed.[178]

The first factor considered by the Court in determining the specific requirements of due process is the nature of the private interest to be affected.[179] The Court has never considered the mere loss of money as an interest comparable to one's physical liberty.[180] Specifically, the Court has only provided paid counsel in circumstances where incarceration is at issue.[181] Namely, criminal proceedings or some civil proceedings involving incarceration such as civil contempt.[182] However, Justice Byron White's discussion of blending unrelated custody requirements in his *Mathis* dissent would seem to indicate that the incarceration requirement is not as clear as one would think.[183] If *Miranda* warnings are required during a civil assessment because custody asserts a certain form of government coercion to answer questions, then the right to access to counsel is not guaranteed inherently by government custody of the taxpayer, but rather by *the presence of unfair government coercion*.[184] Thus, when examined through the lens of *Mathis,* the identical tax fraud

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176 *Cf. id*. at 344 ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him . . . Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime.").

177 *See id.* (highlighting the inequity between indigent litigants pitted against the government). Governments likewise spend vast sums of money to ensure taxes are properly assessed and collected. *See* Lipton, *supra* note 48, at 532–35 (describing IRS enforcement methods). While criminal interaction between government and defendant risks liberty, interaction between government and a taxpayer retains this overbearing power of the state. *Id.*

178 *Cf. Gideon*, 372 U.S. at 344 (speaking directly to appointing counsel in criminal cases, but implying an overarching concern of government overreach).

179 *See Mathews*, 424 U.S. at 334–35 (applying "distinct factor" due process analysis); Turner v. Rogers, 131 S. Ct. 2507, 2517 (2011) (explaining and applying the "distinct factors" laid out in *Mathews* to determine if due process required the appointment of counsel).

180 *See Turner,* 131 S. Ct. at 2510–17 (continuing to limit appointed counsel to cases involving incarceration, generally criminal).

181 *See id.* (expressing that the Court previously had found a right to counsel "'*only*' in cases involving incarceration, but have not held that a right to counsel exists in *all* such cases").

182 *Id.*

183 *See* Mathis v. United States, 391 U.S. 1, 7 (1968) (White, J., dissenting) ("But *Miranda* rested not on the mere fact of physical restriction but on a conclusion that coercion—pressure to answer questions—usually flows from a certain type of custody, police station interrogation of someone charged with or suspected of a crime.").

184 *See id.* (implying counsel is appointed in some civil cases not necessarily because they involve incarceration, but because they involve otherwise-unchecked government power bearing down on an individual).

elements and the significant discretion and power of the IRS, the private interest to be affected may only be money, but the *nature* of the interest and the proceedings surrounding its deprivation are far more severe.[185]

The second factor is the comparative "risk" of an "erroneous deprivation" of the interest with and without the "additional or substitute procedural safeguards."[186] To the indigent taxpayer, the risk of deprivation of his right to counsel is significant.[187] As a pro se litigant before the Tax Court, the taxpayer would face a significant disadvantage in advocating his interests.[188] Furthermore, as an indigent, his interest in whatever money he does have would be comparatively greater than courts might ordinarily assume.[189] Of particular importance and relevance to indigents, tax deficiencies are one of the few forms of debt not dischargeable in bankruptcy.[190] As someone incapable of affording his own counsel, set against the might of specialized IRS litigators, and facing the possibility of losing what money he has left, depriving an indigent taxpayer of adequate counsel risks subjecting him to substantial hardship.[191]

The third factor is the nature and magnitude of any countervailing government interests in not providing "additional or substitute procedural requirement[s]."[192] The sum of countervailing government interests and costs are not entirely clear in this situation; the government would certainly face the financial burden of paying for the counsel provided but it also has an interest in proper adjudication of tax disputes, which actually militates in favor of providing counsel to indigent

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185 *Cf. id.* (intimating a broader application of due process appointment of counsel).

186 *See Turner*, 131 S. Ct. at 2510 (continuing to lay out factors for consideration to determine the specific requirements of due process).

187 *See* Marcus Schoenfeld, *The Tax Concepts of "Defendant" and "Support": Their Impact on "Tax Indigents,"* 33 VAL. U. L. REV. 855, 855–56 (1999) (pointing out low-income taxpayers may suffer more than wealthy taxpayers in some ways because low-income taxpayers are less likely to have their returns completed by a professional, resulting in a greater probability of error).

188 *See* Lederman & Hrung, *supra* note 10, at 1281–82 (demonstrating an observable advantage in litigation afforded by professional counsel).

189 *Id.*

190 *See* 11 U.S.C. § 523(a)(1) (2012) (designating debt for a tax or customs duty non-dischargeable).

191 *See* Daniel Friedman & József Sákovics, *The Marginal Utility of Money: A Modern Mashallian Approach to Consumer Choice* 1–3 (July 19, 2011), http://economics.ucsc.edu/research/downloads/Friedman-Sakovics-MU23.pdf [https://perma.cc/CU3X-S7PU] (introducing the concept of marginal utility of money).

192 *See* Turner v. Rogers, 131 S. Ct. 2507, 2510 (2011) (describing the factors for finding the specific dictates of due process).

taxpayers.[193] Because paid counsel has never been an issue in civil tax disputes, it is hard to say how many taxpayers would qualify as indigent, but some have questioned whether a large number of taxpayers could qualify.[194] One would generally think that if the IRS is spending time to pursue a civil investigation, the defendant has at least some assets upon which he can draw to hire counsel if he desires.[195] On the other hand, the IRS already provides funding to Low Income Tax Clinics ("LITC") that provide free or low-cost representation to taxpayers meeting certain indigency requirements.[196] Recognizing that (1) LITCs demonstrate some level of indigency among taxpayers before the Tax Court; (2) it is entirely possible for an indigent criminal tax defendant to be appointed counsel for his criminal defense only to be subsequently required to litigate nearly the very same issues in a civil investigation on his own; and (3) civil and criminal tax investigation are highly fluid; whatever countervailing government interests exist against appointing counsel to indigent taxpayers is not strong enough to prevail.[197]

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193 *See Low Income Taxpayer Clinics*, *supra* note 13 (describing the IRS's LITC program, which already provides federal funds to legal clinics that offer representation to low income taxpayers at no or low cost). Court-appointed counsel would likely divert some taxpayers from the clinics the IRS already provides funding to. *Id.* Such a change would not therefore create such a heavy financial burden for the government to bear as might otherwise be thought; the IRS has already shouldered some of the financial burden, possibly as an acknowledgment that indigent taxpayers require some form of legal assistance. *Id. See also* Gideon v. Wainwright, 372 U.S. 335, 339–45 (1963) (mentioning judicial refusal to interpret the Sixteenth Amendment's guarantee of "access to counsel" to criminal defendants satisfied by the availability of soliciting an attorney to represent them pro bono). An indigent's access to counsel in civil tax proceedings should be interpreted similarly.

194 *See* Ise, *supra* note 11, at 1190 n.110 (wondering whether issuing the fourth *Miranda* warning (that an indigent accused is entitled to have counsel appointed for him) is necessary in criminal tax investigations and asking "[h]ow many taxpayers suspected of tax evasion are indigent?").

195 *See id.* (questioning the prevalence of indigent taxpayers charged with tax evasion); *see also* Luis v. United States, 136 S. Ct. 1083, 1088 (2016) (holding that pretrial restraint of legitimate assets not traceable to a criminal offence and needed for a criminal defendant to retain his counsel of choice violates the Sixth Amendment). Granted, *Luis* dealt with a criminal defendant, not a litigant in Tax Court. *Luis*, 136 S. Ct. at 1088. If a taxpayer has enough money to hire counsel for Tax Court, however, but not enough to hire counsel and pay the potential deficiency, he may be forced to choose between effective counsel and fulfilling a legitimate obligation to the IRS.

196 *See Low Income Taxpayer Clinics*, *supra* note 13 (noting the IRS's LITC program, where it helps fund clinics that represent taxpayers before the Tax Court).

197 *See supra* Part II.A (describing how the elements for civil and criminal tax fraud are identical and how the only potential difference is an "evil motive" difference of degree). Especially because a criminal fraud conviction *necessarily* imposes a civil fraud liability, it would be reasonable to at least say that those criminal defendants who qualified as indigent under traditional criminal procedures would maintain their status when tried in civil court. *Supra* Part II.A. As a reminder, this Note is not suggesting a full extension of *Gideon's* requirement of access to counsel to all civil litigation where the government is a party. Nor

Some have asked how many taxpayers suspected of tax evasion would, in reality, qualify as indigent.[198] This doubt is understandably founded on the presumption that tax defendants are involved in tax deficiency procedures because they had money that they declined to pay taxes on, yielding them even more money.[199] Theoretically, all of this money would be available to pay for a tax lawyer in the event that the IRS took the defendant to court.[200] While this is certainly an easy picture to paint of those charged with tax fraud, it is not the only portrait seen in the Tax Court.[201]

Within the context of appointed counsel, indigency simply requires that the defendant be unable to obtain adequate legal counsel by his own means.[202] This does not necessarily mean that one must be in abject poverty to qualify as indigent for the purposes of state-appointed counsel.[203] A taxpayer may potentially be considered a part of the middle class, but if he is unable to hire adequate counsel on his own, he would presumably fit the definition of "indigent."[204] Indeed, depending on the

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is it suggesting that court-appointed counsel must be available in all civil tax litigation. Instead, this Note argues that the ambiguities of tax enforcement should be recognized, that the indigency requirement of court-appointed counsel be maintained, and that, where there is uncertainty with respect to the line between civil and criminal investigation and issues of fairness between the government and unsophisticated taxpayers, courts should lean toward protecting fundamental constitutional rights of the citizen by ensuring that tax defendants on the margin have access to a fair hearing.

198 *See* Ise, *supra* note 11, at 1190 n.110 (questioning the existence of indigent taxpayers suspected of tax evasion).

199 *See id.* (noting the apparent incongruity between crimes directly resulting in a defendant owning more money and indigency). This Note does not discuss how a taxpayer would necessarily become subject to tax deficiencies while lacking the funds to pay them. It is instead content to leave the factual determination of indigency for a more detailed analysis and rest on the assumption that indigent taxpayers may, in fact exist. *See supra* note 138 (getting into more detail about how different states determine indigency).

200 *See* Ise, supra note 11, at 1190 n.110 (wondering how many charged with tax evasion would truly be indigent).

201 *See Low Income Tax Clinics, supra* note 13 (referencing the IRS's LITC program). Given that some taxpayers in Tax Court already qualify as "low income," it would seem improbable for no taxpayers before the Tax Court to qualify as indigent. *Id.*

202 *See* Adkins v. E.I. DuPont de Nemours Co., 335 U.S. 331, 336 (1948) (refusing to require litigants to place themselves in abject poverty to enjoy the benefit of a statute allowing for appeals *in forma pauperis*); *see also* Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963) ("[C]ounsel must be provided for defendants unable to employ counsel . . . .").

203 *See* Schoenfeld, *supra* note 187, at 855–56 (1999) (discussing indigency within tax contexts). Although, it is possible that low income taxpayers suffer more in the aggregate from civil assessment because, among other factors, the IRS targets taxpayers for audit based on areas where errors on returns are common. *Id.* Taxpayers such as these would be unlikely to have their tax returns prepared professionally, leaving a greater likelihood of error. *Id.*

204 *See id.* (emphasizing the cost of tax litigation, which has the potential of being prohibitively expensive for persons of normal means).

complexity of the case, some defendants with moderate means might be considered indigent for the purposes of the litigation if hiring counsel adequate to the case would be beyond such means.[205] Courts distinguish a taxpayer capable of hiring counsel who decides against doing so from a taxpayer who cannot afford to hire an attorney to properly advocate on his behalf.[206]

While it is true that many taxpayers may, strictly speaking, be able to find the money to hire a tax attorney for some period of time, they should not be forced to choose between complete destitution and having their taxes properly assessed.[207] This interpretation is the contribution of this Note; it is not proposing an additional test for due process analysis, nor is it proposing an independent statute providing counsel to all taxpayers in Tax Court.[208] Rather, this Note seeks to contribute the interpretation that indigent taxpayers can meet the preexisting standards for appointment of counsel under due process despite not facing the risk of incarceration.[209] Granted, this is an unprecedented extension of the Due Process Clause into civil litigation.[210] However, the circumstances surrounding disputes in the Tax Court justify such an extension.[211]

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[205] *See id*. (suggesting an indigency determination that balances the taxpayer's resources with those necessary to adequately litigate a given dispute). Indigency should be distinguished from a defendant deciding it is simply uneconomic to hire counsel. *See* Johnson v. Zerbst, 304 U.S. 458, 460–68 (1938) (discussing waiver of the Sixth Amendment's right to access to counsel). A wealthy taxpayer facing an unfounded deficiency action for twenty dollars may choose to pay the deficiency rather than hire an attorney to dispute it. *Id.* That is not to say this taxpayer could not hire counsel if he chose to. In this hypothetical, he merely decides to spend his money in a different way and submits to the IRS claim. *Id.* Similarly, this wealthy taxpayer could decide against hiring an attorney to fully dispute an IRS claim but still decide to challenge the claim pro se. *Id.* Perhaps he sees the marginal benefit of the lawyer's advocacy over and above his own as less than the lawyer's estimated cost, or perhaps he has always wanted to argue before a court. *Id.* Regardless, he was capable of hiring counsel but simply chose not to. *Id.*

[206] *See* Schoenfeld, *supra* note 187, at 855 (mentioning circumstances where it is uneconomic to hire a tax professional for a given dispute—when the professional's fee would exceed the potential liability).

[207] *See Adkins*, 335 U.S. at 339–40 (attempting to clarify the bounds of indigency and intimating that the requirement fell short of complete destitution).

[208] *See supra* Part III.A (applying due process analysis to Tax Court litigants).

[209] *See* Turner v. Rogers, 131 S. Ct. 2507, 2517–20 (2011) (applying the "distinct factors" to determine if due process required the appointment of counsel); Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (using "distinct factor" due process analysis).

[210] *See Turner*, 131 S. Ct. at 2510 (emphasizing the limited nature of appointment of counsel under the Due Process Clause).

[211] *See supra* Part II (describing law surrounding tax litigation and appointment of counsel).

2. The Due Process Clause Can Remain Limited While Allowing This One Extension

It is not unreasonable to argue that extending state-appointed counsel to civil litigation is a dangerous precedent to establish.[212] This is an understandable concern, but as discussed above, state-appointed counsel has already been extended to a narrow range of civil disputes.[213] Furthermore, courts do not ordinarily provide counsel to indigent parties in civil proceedings because civil lawsuits are generally between private parties and because the litigants do not risk losing their liberty.[214] With regard to the first, it would indeed prove improper and administratively impossible for courts to begin analyzing how much each party is spending on legal representation and attempting to ensure both parties receive an "equal" representation before the court.[215] This is not the situation before the Tax Court, however.[216] All disputes before the Tax Court are between a taxpayer and the government, and began because the IRS made a demand of the taxpayer.[217] The second consideration is more important—that civil proceedings do not generally place any party at risk of losing liberty.[218] Understandably, these are placed under less procedural scrutiny than when a criminal defendant runs the risk of incarceration or other severe limitations on his liberty as a citizen.[219] While it is true civil tax deficiencies do not threaten any lack of liberty if the taxpayer loses, the IRS haling an indigent taxpayer into court and forcing him to choose between accepting a debt not dischargeable in bankruptcy or attempting

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212 *See Turner*, 131 S. Ct. at 2510 (keeping the due process to appointed counsel limited).

213 *See supra* Part II.B.2 (describing usage of state-appointed counsel in some civil cases involving incarceration).

214 *See* Lassiter v. Dep't of Soc. Serv., 452 U.S. at 26–27 (1981) (holding that a presumption exists against requiring appointed counsel when an unsuccessful litigant cannot be deprived of his personal liberty); *see also* Dick Jr., *supra* note 137, at 627 (evaluating the Supreme Court's approach to appointed counsel in civil proceedings and suggesting different treatment when, *inter alia*, the state is the opposing party).

215 *Cf.* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (setting out factors to guide judicial appointment of counsel that does not even contemplate proceedings between private parties, but rather assumes the action would be brought by the state against a private individual).

216 *See* Froelich, *supra* note 35, at 340–44 (describing available forums for tax disputes).

217 *See id.* (explaining various options available to a taxpayer presented with a Notice of Deficiency).

218 *See Lassiter*, 452 U.S. at 25 ("The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.").

219 *See* U.S. CONST. pmbl. ("We the people of the United States, in order to form a more perfect union . . . secure the blessings of liberty to ourselves and our posterity."); *see also Lassiter*, 452 U.S. at 26 ("[A]s a litigant's interest in personal liberty diminishes, so does his right to appointed counsel.").

to defend himself in an area of the law that most lawyers do not understand does not resemble a fair dispute between two private parties.[220] In fact, it almost begins to resemble a government taking.[221]

Further extension of appointed counsel to indigent tax defendants before the Tax Court would not significantly widen the limited precedent of court-appointed counsel in civil cases, partly because of the potential infrequency of such defendants and partly because the IRS already provides funding to such defendants indirectly.[222] There is also sufficient ambiguity between civil and criminal tax investigation where providing counsel on both sides of the dividing line could reduce procedural costs and uncertainties associated with (1) determining exactly when a civil assessment becomes a criminal investigation; (2) when *Miranda* rights must be read to the defendant; and (3) when counsel must be appointed and potentially withdrawn.[223]

The Supreme Court's extreme caution and hesitation in finding generalized due process requirements, as well as specific extensions of the right to court-appointed counsel reflects the valid concern that extending paid counsel into civil litigation is a dangerous and difficult-to-control

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220 *See* IRM § 9.5.13.2 (2009) (listing only monetary penalties); 11 U.S.C. § 523(a)(1) (2012) (designating debt for a tax or customs duty non-dischargeable); *see also* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (extending the federal due process guarantee of counsel in criminal proceedings to the states based, in part, on the fundamentally unfair nature of the government haling a citizen incapable of providing for his own legal defense into court).

221 *See* U.S. CONST. amend. V ("private property [shall not] be taken for public use, without just compensation"); *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015–19 (1992) (discussing law surrounding government takings). Unfortunately, constitutional law surrounding takings is not ultimately of much use when looking at tax proceedings because much of it focuses on what constitutes a taking. *See Lucas*, 505 U.S. at 1015–19 (analyzing at what point property is over-burdened with regulation to the point where the regulation constitutes a taking of the property). Taxes are necessarily a complete taking of one's monetary property. While tax comparison to takings in this Note focuses more on the seizure of property without affording due process, the Court has acknowledged special circumstances surrounding indigents in proceedings where the government holds the exclusive remedy. *See* Boddie v. Connecticut, 401 U.S. 371, 382–83 (1971) (holding that the Fourteenth Amendment Due Process Clause prevents states from denying indigents the ability to obtain a divorce due to inability to pay court fees and costs, partly because of the state monopoly on the means by which one can dissolve a marriage); *but see* United States v. Kras, 409 U.S. 434, 445–46 (1973) (declining to extend *Boddie* to indigents in bankruptcy proceedings because government did not hold the *exclusive* remedy for adjusting legal relationships with creditors—the debtor could also negotiate adjustments). In the case of taxes, it seems beyond question that the government holds the exclusive means of resolution.

222 *See* Ise, *supra* note 11, at 1190 n.110 (questioning the existence of indigent taxpayers suspected of tax evasion); *Low Income Tax Clinics, supra* note 13 (describing the IRS's LITC program).

223 *See* Ise, *supra* note 11, at 1185–86 (examining the line between civil and criminal tax offenses).

precedent.[224] It would likely be untenable for the government to provide counsel for everyone's private civil disputes.[225] The Sixth Amendment guarantees counsel only in criminal prosecutions, and the Due Process Clause only extends that right to a fraction of civil cases involving incarceration.[226] Extending the right this much further would not greatly burden the system of state-appointed attorneys, nor would it easily invite further extensions.[227] Civil tax assessment before the United States Tax Court is a comparatively niche area of the law where the IRS is always a party and the subject matter always concerns civil tax claims.[228] The Tax Court itself encourages attorney representation by limiting transparency and oversight and by effectuating a categorical disadvantage to pro se litigants, despite almost half of the defendants litigating in this way.[229]

One might also point to the public defender system as it currently operates and ask why that requires expansion.[230] Most current public defender offices are underfunded, undervalued, and relatively ineffectual.[231] This is true, but does not mitigate a constitutional right to counsel. It is rather a critique of the proper execution of an admittedly necessary aspect of our jurisprudential system.[232] The proper solution lies in remedying the public defender system itself, not in refusing to extend its conceptual paradigm to other areas of the law where due process requires it.[233]

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224 *Cf.* Turner v. Rogers, 131 S. Ct. 2507, 2510 (2011) (keeping right of appointed counsel very limited).

225 *Cf. id.* (declining to extend the right of appointed counsel beyond constitutional requirements).

226 *See* U.S. CONST. amend. VI ("in all criminal prosecutions"); *see also Turner*, 131 S. Ct. at 2510 (clarifying just how limited precedent is for extending the right of appointed counsel).

227 *Cf. Turner*, 131 S. Ct. at 2510 (asserting the limited scope of appointed counsel under due process).

228 *See* Froelich, *supra* note 35, at 327–32 (providing an overview of the tax reporting and enforcement system).

229 *See* Lederman & Hrung, *supra* note 10, at 1281–82 (demonstrating an advantage to counsel in Tax Court and observing that almost half of taxpayers in Tax Court represent themselves pro se).

230 *See, e.g.*, Jacob Gershman, *Florida Judge in Courthouse Brawl is a Retired Army Reserve Colonel*, WALL ST. J. (June 3, 2014), http://blogs.wsj.com/law/2014/06/03/florida-judge-in-courthouse-brawl-is-a-retired-army-colonel [https://perma.cc/FD6Z-CZXU] (revealing video footage of a judge and a public defender stepping outside a courtroom during proceedings to engage in a fist fight).

231 *See* Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 L. & CONTEMP. PROBS. 81, 85–88 (1995) (examining the current public defender system and noting the challenges of working as a public defender as well as making suggestions as to how the system can be improved).

232 *See id.* (discussing institutional problems with the public defender system).

233 *See id.* (demonstrating problems with the implementation of the public defender system, not critiquing the premise behind it).

One might also argue that, in a time when the Federal Government is in a fantastic amount of debt, it may not be wise to saddle it with even more financial obligations.[234] As discussed above, the financial burden of providing paid counsel to indigent tax defendants is unlikely to be unbearable based on the probable infrequency of taxpayers being considered truly indigent, and the IRS already allocating funds toward the representation of those taxpayers.[235] For the indigent taxpayers who exist, it is the government's duty, as the sovereign and provider of a just judicial system, to ensure they receive their rights afforded to them by the Due Process Clause.[236]

B. Appointing Counsel to Indigent Taxpayers under § 1915(d)

Federal statute enables trial courts to appoint counsel to any party.[237] This statutory appointment is placed at the discretion of the trial judge, but does not skirt around the indigency requirement.[238] Rather, the statute only allows a court to appoint counsel to a party "unable to employ counsel."[239] While this requirement keeps usage of the statute somewhat limited on its own, the appellate courts have also provided additional guidance to help district courts determine whether to appoint counsel to an indigent party under this statute.[240] In an attempt to help guide the application of § 1915(d) to the Tax Court, this Note will examine two tests: the *Maclin* test and the *Farmer* test.[241]

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234 *See US Debt Clock*, http://www.usdebtclock.org [https://perma.cc/T7JV-RCFC] (identifying United States national debt at approximately $19,058,852,850,000). With the National Debt over nineteen-trillion dollars at the time of this writing, money-saving arguments appear to receive fair consideration, at least in the political arena. *Id.* Even if this is the case, providing a just and stable jurisprudential system is one of the central functions of government. Doing so properly is of the utmost importance.

235 *See* Ise, *supra* note 11, at 1190 n.110 (wondering whether taxpayers suspected of tax evasion could qualify as indigent); *Low Income Tax Clinics, supra* note 13 (referencing IRS's LITC program).

236 *See supra* Part III.A (proposing the Tax Court appoint counsel to indigent taxpayers); *see also* U.S. CONST. amend. V (providing that no person shall "be deprived of life, liberty, or property, without due process of law").

237 *See* 28 U.S.C. § 1915(d) (authorizing courts to "request an attorney to represent any such person unable to employ counsel").

238 *See id.* (granting trial judges discretionary authority to appoint counsel).

239 *Id. See also* United States v. Madden, 352 F.2d 792, 793–94 (9th Cir. 1965) (noting that "the appointment of counsel in a civil case is, as is the privilege of proceeding *in forma pauperis*, a matter within the discretion of the district court. It is a privilege and not a right . . . In civil actions for damages, appointment of counsel should only be allowed in exceptional cases").

240 *See* Farmer v. Haas, 990 F.2d 319, 321 (7th Cir. 1993) (abandoning the multi-factor test laid out in *Maclin* and providing an alternative inquiry).

241 *See* Maclin v. Freake, 650 F.2d 885, 887 (7th Cir. 1981) (describing a method of determining when it is appropriate for courts to appoint counsel under § 1915(d)).

When using the *Maclin* test to determine if appointing counsel under § 1915(d) is proper, a trial court considers several factors: (1) whether the plaintiff's claim has some merit, (2) the indigent litigant's ability to investigate the facts without the assistance of counsel, (3) the complexity of the evidence, (4) the indigent litigant's ability to represent himself, and (5) the difficulty of the legal issues.[242] Some taxpayers would certainly fit this requirement in litigation before the Tax Court.[243] There are plenty of non-frivolous claims to bring in tax law and many of those may be more complicated—either in regard to fact, law, or both—than a lay person may be able to adequately manage.[244]

While applying this test would help indigent taxpayers, Judge Posner has identified some problems with it.[245] First, if a case fails the first factor of the *Maclin* test, the case should simply be dismissed out of hand; there would be no need to worry about appointing counsel.[246] Next, the second and third factors blend together into one consideration of whether the indigent litigant is able to effectively present evidence.[247] Lastly, the fourth factor is dependent on the second, third, and fifth factors, turning those into partial subparts of the fourth.[248] Thus, while some courts still follow the *Maclin* test, the Seventh Circuit adopted a simpler one in *Farmer*.[249]

In applying the *Farmer* test, courts ask three questions: (1) has the indigent plaintiff made reasonable efforts to retain counsel or been effectively precluded from making such efforts before reaching appointment; (2) given the difficulty of the case, did the plaintiff appear to be competent to try it himself; and (3) if not, would the presence of counsel have made a difference in the outcome.[250] This test is clearer than the *Maclin* test and could also apply to certain taxpayers in Tax Court.[251] The first factor could be satisfied by the Court simply determining actual

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242 *See id.* (laying out the *Maclin* test).

243 *Cf. id.* (presenting a test that could apply to any litigant who met the criteria).

244 *Cf. id.* (laying out a § 1915(d) test involving consideration of the complexity of a party's legal claim).

245 *See Farmer*, 990 F.2d 319, 321–22 (critiquing the *Maclin* test, as well as multi-factor balancing tests more generally).

246 *Id.*

247 *Id.*

248 *Id.*

249 *See id.* (criticizing the *Maclin* test and asserting the superiority of the *Farmer* test as an alternative).

250 *See* Pruitt v. Mote, 503 F.3d 647, 654 (7th Cir. 2007) (outlining the simplified test set out in *Farmer*).

251 *See id.* at 657–58 (applying the *Farmer* test).

indigency for the purposes of counsel.[252] Similarly, the third factor could be satisfied by simply showing an attorney would do a better job of representation than the taxpayer himself.[253] Recalling Professor Lederman's showing that attorneys presented a statistically significant advantage in litigated disputes before the Tax Court, one would almost *expect* cases to satisfy this factor.[254] The second factor is probably the most difficult to judge, but tax law is complicated—certainly some taxpayers will be faced with an issue too complicated to adequately advocate on their own behalf.[255]

Thus, even if the Tax Court is not ultimately convinced that due process guarantees its indigent taxpayers appointed counsel, or if it is overly concerned about an unprecedented expansion of the Due Process Clause, it could still serve well the Constitution and the people of the United States by liberally applying the *Farmer* test on a case-by-case basis.[256] This is the second aspect of this Note's contribution: the liberal interpretation of § 1915(d) such that it applies to Tax Court litigants.[257] This second interpretive contribution comes as an alternative to the first; even if the Tax Court is unwilling to accept this Note's earlier interpretation of the Due Process Clause, it can still appoint counsel to indigent taxpayers by accepting this interpretation of § 1915(d).[258] In an area of the law as complicated as tax, where there exist enough low-income taxpayers for the IRS to fund clinics, and where empirical data demonstrate the assistance of counsel has a meaningful effect on litigation, the Tax Court is perfectly situated to exercise its discretion as a court of law to implement the authority given to it by § 1915(d) to ensure "fundamental fairness."[259]

Appointing counsel to indigent taxpayers before the Tax Court would acknowledge and address the conjoined nature of tax investigation while

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[252] *See id.* at 654–55 (asking, as the first factor, whether the indigent plaintiff made reasonable efforts to retain counsel or has been effectively precluded from doing so).

[253] *See id.* at 657–58 (asserting the notion that an appointment of counsel not be futile before doing so).

[254] *See* Lederman & Hrung, *supra* note 10, at 1281–82 (providing data showing attorney representation in Tax Court tends to make a difference in litigated outcomes).

[255] *Cf. Pruitt*, 503 F.3d at 654 (discussing the competency of a plaintiff to represent himself in complicated legal matters).

[256] *Cf. id.* (discussing a § 1915 appointment of counsel, guided by "sound legal principles").

[257] *See* 28 U.S.C. § 1915(e)(1) (2012) (giving trial courts broad discretion to appoint counsel to litigants).

[258] *See supra* Part III.A (arguing the Due Process Clause should be read to apply to indigent taxpayers in Tax Court); *see also* § 1915(e)(1) (authorizing courts to appoint counsel at their discretion).

[259] *See supra* Part II.A (discussing the complex nature of tax law and Lederman's data demonstrating an attorney advantage in litigated outcomes before the Tax Court); *see also Low Income Tax Clinics*, *supra* note 13 (describing the IRS's LITC program).

also satisfying existing due process requirements.[260] It would diminish the categorical bias suffered by pro se defendants.[261] It would encourage a more consistent scheme of enforcement by ensuring cases are not decided solely on the defendant's inexperience and lack of resources.[262] It would help keep the Tax Court and the IRS honest despite any potential problems with incentives, oversight, or an abundance of discretion.[263]

Taxpayers facing civil action by the IRS deserve more than an opportunity to get lost in the enigmatic labyrinth of the Internal Revenue Code before having their taxes improperly assessed. Tax enforcement has never been extraordinarily clear on where a civil action ends and criminal prosecution begins, and that problem has persisted to this day in areas such as tax fraud.[264] The Tax Court has likewise faced difficulties in categorization and authority, and by its very operation seems to perpetuate the idea of tax exceptionalism, for better or worse.[265] The Supreme Court has acknowledged some bleed between civil and criminal law in certain circumstances, and has recognized a right to paid counsel in particular civil situations.[266] This Note advocates the recognition of that right in one other situation—one in which the subject matter, parties, and forum all lend themselves to its extension.

IV. CONCLUSION

While the IRS perhaps lacks the ancestry and malice of Antaeus, it does not lack for his strength. The power of the IRS serves well to ensure government revenue—like the skulls which adorned Antaeus's temple to Poseidon, the reach and reputation of the IRS serves as a warning to those

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260 *See supra* Part II.A (describing the current methods of tax fraud investigation and tax audits generally).

261 *See supra* notes 58, 188 and accompanying text (referencing Professor Lederman's data showing a significant bias in favor of the IRS in litigated outcomes before the Tax Court).

262 *See supra* notes 258–61 and accompanying text (discussing the circumstances when a court could appoint counsel, at least in part, for the benefit of the precedent and the development of the law). Presumably, the best adjudicative tax policy would emerge from a continuous dialectic involving zealous and capable advocates on both sides of an issue. *Id.* In this way, ensuring all litigants had access to adequate counsel would ensure the best arguments supporting each position are provided to the Court to consider and balance them appropriately. *Id.* Tax law would reap the benefit of this policy consideration regardless if the Tax Court appointed counsel to indigent taxpayers on the basis of due process or its own discretion. *Id*.

263 *See supra* Part II.A (detailing perceived problems surrounding the Tax Court's independence and transparency as well as the IRS's mandate affording it substantial discretion).

264 *See supra* Part II.A (outlining the blurred historical treatment of taxes regarding civil and criminal aspects).

265 *See supra* Part II.A (describing the Tax Court's development and classification).

266 *See supra* Part II.B (outlining case law surrounding the appointment of counsel).

who would defraud the government—but it must not be allowed to grow so far as to impinge upon individual constitutional guarantees. Taxpayers before the Tax Court may not face incarceration, but they are still pitted against the might of the federal government in a very complicated area of the law. To allow the government the potential ability of wrongfully seizing a taxpayer's property merely because the government is not also threatening to seize his person is to dramatically over-constrain the constitutional guarantee of due process.

As Herakles performed his labors, he tamed and controlled various dangers, making the world a safer and more civilized place. The law shares a similar mandate: to establish justice, to promote the general welfare, and to secure the blessings of liberty. The Due Process Clause of the Fifth Amendment serves to constrain the government from becoming a terror to the citizens it seeks to protect. To that end, the Tax Court should appoint counsel to represent those unable to do so themselves.

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