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NONTAXPAYER SUITS: SEEKING INJUNCTIVE AND DECLARATORY RELIEF AGAINST IRS ADMINISTRATIVE ACTION

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INTRODUCTION

DURING A 1976 Senate Judiciary Committee subcommittee hearing on the causes of popular discontent with the administration of justice, noted tax policy activist Thomas F. Field testified:

> Bureaucrats, whether in the Internal Revenue Service or elsewhere, can make honest mistakes. Moreover, they can yield to political and other pressures to engage in lawless or illegal administrative actions.
>
> That is why, more than a generation ago, Congress provided broad access to the courts for those wishing to obtain judicial review of agency action.
>
> But in the case of the Internal Revenue Service, judicial review [of] some of the most important agency actions is claimed by the IRS to be barred by statute, judicial precedent or a combination of both. And, to date, those IRS claims have been generally sustained by the courts.
>
> The IRS actions which are said to be beyond the scrutiny of the courts fall into two categories: tax giveaways, and actions which injure the rights of non-taxpayers.[1]

Who should be entitled to challenge Internal Revenue Service (IRS) tax policy decision making? Should the concerned citizen or the aggrieved competitor of a company receiving favorable treatment from the IRS be precluded from seeking review of allegedly illegal action when his own taxes are not specifically involved?

In posing such questions, it is necessary to emphasize at the outset that there is ample statutory and judicial support for Mr. Field's contention that the IRS has been given an unprecedented, and uncalled for, immunity from challenge to its actions in the federal courts.

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[1] *Hearings on the Discontent with the Administration of Justice Before the Subcomm. on Constitutional Rights of the Senate Jud. Comm.*, 94th Cong., 2d Sess. 51 (May 19, 1976).

Recognizing that tax revenues are the life blood of government, Congress long ago sharply restricted the avenues available to taxpayers for judicial challenge to the assessment or collection of taxes. Enactment of the Tax Anti-Injunction Act[2] and a statute removing tax cases from the purview of the Declaratory Judgment Act[3] has limited the taxpayer whose own taxes are at issue, or whose property is to be subjected to IRS tax collection methods.[4] The taxpayer must now challenge assessment and collection of the tax either before payment in a proceeding in the United States Tax Court[5] or after payment of the disputed tax in a suit for refund.[6] The Supreme Court promptly upheld the constitutionality of delaying a taxpayer's challenge to the collection of a tax until after his property had been taken.[7] Congress has created some exceptions to the nearly complete ban against judicial proceedings which would interfere with the IRS assessment and collection process. Such exceptions include special judicial review of the tax exempt status of organizations,[8] jeopardy assessments,[9] and claims of wrongful levies on property owned by an individual or entity whose property is seized on account of the taxes of another individual or entity.[10] The first two of these exceptions were enacted as a result of Supreme Court decisions[11]

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[2] Act of March 2, 1867, ch. 169, § 10, 14 Stat. 475 (now I.R.C. § 7421(a)). The statute now reads: "except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), and 7429(b) no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

[3] 28 U.S.C. § 2201 (1970).

> In a case of actual controversy within its jurisdiction, *except with respect to Federal Taxes,* any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relation of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such (emphasis added).

The portion of the above provision pertaining to federal taxes was added by the Revenue Act of 1935, ch. 829, § 405, 49 Stat. 1027.

[4] The assessment provisions of the Internal Revenue Code comprise ch. 63 of the Code, I.R.C. §§ 6201-16. The collection provisions appear in ch. 64 of the Code, I.R.C. §§ 6301-65. Special jeopardy assessment provisions appear in ch. 70 of the Code, I.R.C. §§ 6851-6873.

[5] I.R.C. §§ 7451-64.

[6] I.R.C. § 7422.

[7] Dodge v. Osborne, 240 U.S. 118, 122 (1916).

[8] I.R.C. § 7428 (added by the Tax Reform Act of 1976, Pub. L. No. 94-455, § 1306, 90 Stat. 1717).

[9] I.R.C. § 7429 (added by the Tax Reform Act of 1976, Pub. L. No. 94-455, § 1204, 90 Stat. 1695).

[10] I.R.C. § 7426.

[11] I.R.C. § 7428, which permits a tax exempt organization qualifying under I.R.C. § 501(c)(3), to seek a declaratory judgment in the Tax Court or the United States District Court for the District of Columbia with respect to its initial or continuing qualification as a tax

and the third codified a doctrine developed in the federal courts that protected third parties whose property was levied upon by the IRS.[12] The Supreme Court has fashioned its own very limited exception to the Anti-Injunction Act,[13] but it is rarely used successfully.[14] For the most part, however, taxpayers must litigate issues concerning federal tax liability in the Tax Court or in a refund suit. This was the intent of Congress in enacting the Anti-Injunction Act and in establishing a procedure for judicial challenge to taxes only after payment and appeal to the Commissioner of Internal Revenue.[15]

It is clear that Congress' system of "tax justice" does not, in itself, provide an adequate judicial forum, or even any forum, for many controversies involving the interpretation or administration of the Internal Revenue Code. This is because the IRS, in exercising its power to make rules and regulations

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exempt organization, arose out of the following language in a decision of the Supreme Court:

> In holding that § 7421(a) blocks the present suit, we are not unaware that Congress has imposed an especially harsh regime on § 501(c)(3) organizations threatened with loss of tax-exempt status and with withdrawal of advance assurance of deductibility of contributions . . . . Specific treatment of not-for-profit organizations to allow them to seek pre-enforcement review may well merit consideration. But this matter is for Congress . . . .

Bob Jones University v. Simon, 416 U.S. 725, 749-50 (1974). *See* H.R. REP. No. 658, 94th Cong., 1st Sess. 283 (1975). I.R.C. §§ 6851 and 6861 were enacted as a result of the decision of the Supreme Court in Commissioner v. Shapiro, 424 U.S. 614 (1976). *See* S. REP. No. 938, Part I, 94th Cong., 2d Sess. 363-64 (1976).

[12] *See* Rothensies v. Ullman, 110 F.2d 590 (3d Cir. 1940); Bullock v. Latham, 306 F.2d 45 (2d Cir. 1962); Long v. Rasmussen, 281 F. 236 (D. Mont. 1922).

[13] In Enochs v. Williams Packing and Navigation Co., 370 U.S. 1, 7 (1962), the Court held that assessment and collection of tax may be enjoined only "if it is . . . apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim . . ." and equity jurisdiction otherwise exists. *See also* Pietsch v. President, 434 F.2d 861 (2d Cir. 1970), *cert. denied*, 403 U.S. 920 (1971).

But cf. Trinity United Methodist Church v. United States, 35 Am. Fed. Tax R. 2d 75-588 (N.D. Ala. Jan. 16, 1975) (where the court granted a preliminary injunction against an excise tax upon a showing by the plaintiff that "its claim is not frivolous and that the government would not be able to establish any reason why the relief sought by the plaintiff should not be granted").

For a thorough discussion of the *Williams Packing* decision *see* Note, 1963 DUKE L.J. 1975 (1963).

[14] In Center on Corporate Responsibility v. Shultz, 368 F. Supp. 863 (D.D.C. 1973), the plaintiff, a § 501(c)(3) organization whose status was revoked under circumstances indicating a great amount of political pressure, was successful in obtaining an injunction against denial by the IRS of its § 501(c)(3) status. This was on the basis of a finding by the court that, *inter alia*:

> the Plaintiff was denied a favorable ruling because it was singled out for selective treatment for political ideological and other improper reasons which have no basis in the statute and regulations . . . [and that] other factors indicate that the Defendants did not have "clean hands" in their dealings with the Plaintiff.

368 F. Supp. at 880.

[15] Snyder v. Marks, 109 U.S. 189, 193 (1883).

in administering the tax laws, may raise significant issues of social or economic policy.[16] An IRS determination, whether adversely affecting the tax liability of a single taxpayer or not, may have significant economic consequences for many persons and interests. This was recognized by a former IRS Chief Counsel:

> Although the rulings program directly affects only a comparatively small percentage of taxpayers, it has a broad impact on our national economy and on proper and reasonable tax administration. Just as the tax specialist has become a way of life so has the tax ruling. . . . Businesses have been destroyed by failure to receive a favorable ruling.[17]

From time to time the action of the IRS may, by chance or design, appear to have social consequences unrelated to the raising of revenue.[18] There have been instances in which IRS action, regardless of real or purported tax administration consequences, may have been seen as tending to foster national social objectives such as racial integration[19] or as an attempt to stifle dissent.[20]

Although it is likely that Congress' sole purpose in providing for such a controlled procedure of judicial review of IRS action was to protect the

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[16] I.R.C. § 7805(a). *E.g.*, Common Cause v. Connally, No. CA 1337-71 (D.D.C., voluntarily dismissed on motion of plaintiff, Jan. 13, 1972) in which various plaintiffs sought injunctive and declaratory relief against the Treasury Department's implementation of the Asset Depreciation Range System (ADR) of depreciation under I.R.C. § 167, 26 C.F.R. 1.167 (a)-11 (1971). Common Cause, a national citizens' organization, alleged that the billions of dollars that would allegedly be lost to the treasury would be unavailable to finance programs espoused by its members. Plaintiff Rep. Henry Reuss, a Congressman, alleged that the adoption of ADR without congressional authorization undermined the significance of his vote. The suit was mooted by Congress' adoption of ADR in the Revenue Act of 1971.

[17] Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 756, 764 (1965) (footnotes omitted).

[18] Referring to the power of the Commissioner of Internal Revenue concerning § 501(c)(3) organizations as "tantamount to a licensing procedure," Justice Blackmun, dissenting in Commissioner v. "Americans United" Inc., 416 U.S. 752 (1974), complained:

> [W]here the philanthropic organization is concerned, there appears to be little to circumscribe the almost unfettered power of the Commissioner. This may be very well so long as one subscribes to the particular brand of social policy the Commissioner happens to be advocating at the time (a social policy the merits of which I make no attempt to evaluate), but the application of our tax laws would not operate in so fickle a fashion. Surely, social policy in the first instance is a matter for legislative concern. To the extent these determinations are reposed in the authority of the Internal Revenue Service, they should have the system of checks and balances before an organization that for years has been favored with an exemption ruling is imperiled by an allegedly unconstitutional direction on the part of the Service.

416 U.S. at 774-75. Congress has since acted to provide judicial review for tax-exempt organizations. *See supra* note 11.

[19] *E.g.*, Bob Jones Univ. v. Simon, 416 U.S. 725 (1974); Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971).

[20] *E.g.*, Center for Corporate Responsibility v. Shultz, 368 F. Supp. 863 (D.D.C. 1973).

ability of the government to raise needed revenue,[21] judicial review is almost always limited for the taxpayer whose own taxes are at issue. This is true even when IRS action with respect to such a taxpayer appears to have motivation other than tax administration and when judicial intervention in such IRS action would have a marginal or collateral effect on revenues. If an action by anyone threatens interference in any way with real or potential tax assessment or collection or would result in the diminution of actual or potential tax liability of any taxpayer, then such action will run afoul of the proscriptions of I.R.C. Section 7421(a) and 28 U.S.C. Section 2201.

This has been clearly established by three decisions of the Supreme Court.[22] In *Bob Jones University v. Simon,*[23] the plaintiff was a racially segregated private university which attempted to obtain injunctive relief against IRS withdrawal of its status as a Section 501(c) (3) organization.[24] The plaintiff asserted that it was not seeking to enjoin collection of tax but rather to restrain the withdrawal of its qualification as a Section 501(c)(3) organization.[25] Although the Court noted that it was open to debate whether or not the plaintiff would owe federal income taxes upon revocation of its Section 501(c)(3) status, they held that Section 7421(a) barred such a suit because withdrawal of the status would result in FICA and FUTA[26] tax liability on the part of the plaintiff. Thus, any injunction of the IRS action would be an injunction of taxes.[27] With regard to the plaintiff's contention that the IRS action did not truly involve taxes, the Court held:

> There is no evidence that [this] position, [the inapplicability of Section 501(c)(3) to racially segregated universities,] does not represent a good faith effort to enforce the technical requirements of the tax laws, and . . . we cannot say that its position has no basis or is unrelated to the protection of the revenues.[28]

The Court also noted that by attempting to assure the deductible character of donations to it, the plaintiff sought "to restrain the collection of taxes from its donors—to force the Service to continue to provide advance

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[21] State Railroad Tax Cases, 92 U.S. 575, 613-14 (1875).

[22] Bob Jones Univ. v. Simon, 416 U.S. 725 (1974); Alexander v. "Americans United" Inc., 416 U.S. 752 (1974); United States v. American Friends Serv. Comm., 419 U.S. 7 (1974).

[23] 416 U.S. 725 (1974).

[24] Under I.R.C. § 501(c)(3) certain "[c]orporations, and any community chest, fund or foundation, organized and operated for religious, charitable, scientific, testing for public safety, literary or artistic purposes" etc. are exempt from taxation. I.R.C. §§ 170 (a) & (c) permit donors to such organizations deductions from gross income.

[25] 416 U.S. at 725.

[26] I.R.C. §§ 3501-05.

[27] 416 U.S. at 739.

[28] *Id.* at 740.

assurance to those donors that contributions to petitioner will be recognized as tax deductible, thereby reducing their tax liability."[29]

In *Bob Jones University,* the plaintiff's contention that the matter was not a tax controversy was somewhat ambivalent. The Court noted that the university had alleged in the district court that its tax liability might be "three quarters of a million dollars for one year and in excess of half a million dollars for another."[30] In view of that contention, it would be difficult to argue that the connection between the plaintiff's suit and the assessment and collection of taxes was attenuated.

In *"Americans United" Inc. v. Walters,*[31] the interference with federal revenues threatened by the plaintiff's action was questionable. In *"Americans United" Inc.,* a nonprofit educational corporation dedicated to disseminating knowledge concerning the constitutional principle of church and state, sought declaratory and injunctive relief against an IRS letter ruling revoking its Section 501(c)(3) status. In revoking the plaintiff's status the IRS contended that the plaintiff had devoted a substantial part of its activities to attempts to influence legislation and had thereby lost its requisite status.

The Court of Appeals reversed the district court's dismissal of the action[32]. However, the Supreme Court reversed the decision of the Court of Appeals.[33] Although the organization had voluntarily paid its FUTA tax liability occasioned by revocation of its Section 501(c)(3) status,[34] the Court noted that "the obvious goal of respondent's action was to restore advance assurance that donations to it would qualify as charitable deductions under Section 170 that would reduce the level of taxes of its donors."[35] The Court held that "a suit to enjoin the assessment or collection of anyone's taxes triggers the literal terms of § 7421."[36]

Justice Blackmun dissented from the Court's holding. His opinion did not disapprove of the *Williams Packing and Navigation Co.* construction[37]

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[29] *Id.* at 739.

[30] *Id.* at 738.

[31] 416 U.S. 752 (1974).

[32] "Americans United" Inc. v. Walters, 477 F.2d 1169 (D.C. Cir. 1973). The court of appeals dismissed the suit as to individual benefactors who were coplaintiffs with "Americans United" because their taxes were directly affected. The court of appeals, in holding the Anti-Injunction Act and the Declaratory Judgment Act exception inapplicable held that "Americans United" did not seek to enjoin its own taxes, that it had volunteered to pay any FUTA taxes even if its status were restored and that the restraining of collection or assessment of taxes was "at best a collateral effect" of the organization's suit. *Id.* at 1177-79.

[33] 416 U.S. 752.

[34] *Id.* at 755 n.4.

[35] *Id.* at 760-61.

[36] *Id.* at 760.

[37] *Id.* at 762 n.13.

limiting actions for injunctive relief in tax cases but regarded that case as factually distinguishable because the "incidence of taxation" was challenged therein.[38] In *"Americans United" Inc.*, however, the "avowed purpose" of the organization's lawsuit was "not to restrain tax collection but to assure "Americans United" restoration to the Cumulative List [of 501(c)(3)] organizations."[39] Justice Blackmun added:

> Arguably, where the challenged governmental action is not one intended to produce revenue but, rather, is one to accomplish a broad-based policy objective through the medium of federal taxation, the application of § 7421(a) is inappropriate. Obviously, § 501(c)(3) is not designed to raise money. Its purpose, rather, is to assure the existence of truly philanthropic organizations and the continuation of the important public benefits they bestow.[40]

Justice Blackmun concluded as a result of the Court's broad construction of Section 7421(a) and their decision in *Williams Packing and Navigation Co.* that "§ 7421 becomes an absolute bar to any and all injunctions, irrespective of tax liability, of purpose or effect of the suit, or of the character of the Service's action."[41]

The subsequent per curiam opinion of the Court in *United States v. American Friends Service Committee*,[42] also demonstrates the broad scope of Section 7421(a). In that case the plaintiff was a religious corporation. Two of the corporation's employees who were conscientious objectors to war asked their employer not to withhold 51.6% of what was required to be withheld under Section 3402 of the Internal Revenue Code, alleging this to be the percentage of the federal budget related to military spending.[43] The employer complied with the employee's request but paid to the government the full amount that should have been withheld. The employer sued for a refund of the amounts paid to the government but not withheld from the employees' wages. The IRS had also levied on the employees and thus had received a double payment of 51.6% of the employees' taxes. The employees joined in the employer's action seeking an injunction against enforcement of the tax against the employer.[44] The district court granted an injunction prohibiting

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[38] *Id.* at 770 (Blackmun, J., dissenting).

[39] *Id.*

[40] *Id.* at 771-72.

[41] *Id.* at 771.

[42] 419 U.S. 7 (1974).

[43] *Id.* at 7 n.1.

[44] The employees did not dispute their tax liability. However, they contended that the enforced withholding of their wages "was unconstitutional as a deprivation of their right to free exercise of religion under the First Amendment since it did not allow them to bear witness to their beliefs by refusing to voluntarily pay a portion of their taxes." *Id.* at 8.

the United States from enforcing Section 3402 against the employer as to 51.6% of the employees' wages.[45] The district court granted the employer judgment for the amount of the double payment which the United States did not contest on appeal.[46]

The employees contended that because only one method of collection had been enjoined, the Anti-Injunction Act was inapplicable. The Court held that this contention "ignores the plain wording of the Act which proscribes 'any suit for restraining the assessment or collection of any tax.' "[47] The employees then argued that a refund suit was an inadequate remedy for them because they would surely lose such an action. Citing *Bob Jones University* and *"Americans United" Inc.*, the Court noted that the employees would nevertheless have a full opportunity to litigate their tax liability in such a suit[48] and that the constitutional nature of the employees' claim did not render the bar of Section 7421(a) inapplicable.[49]

Although the injunctive relief granted by the district court was in a proceeding joined with a suit for refund, the court concluded that "[t]he injunctive relief granted by the District Court in this case is plainly at odds with the dual objectives of the Act: efficient and expeditious collection of taxes with 'a minimum of pre-enforcement judicial interference,' and protection of the collector from litigation pending a refund suit."[50]

Thus, *Bob Jones University, "Americans United" Inc.* and *American Friends Service Committee* make it clear that the Anti-Injunction Act, except in cases where the *Williams Packing and Navigation Co.* exception is applicable, bars actions for injunctive relief in the following instances:

1. Where a taxpayer's own tax liability is conceivably at issue, whether or not any taxes are currently due;
2. Where there is a possibility that such action may lead to a reduction of the taxes of another;
3. Where there may be any interference with the tax assessment or collection process.

From a tax administration standpoint, these three propositions are sound. A forum is provided for the taxpayer who may incur tax liability

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[45] 368 F. Supp. 1176, 1185 (E.D. Pa. 1973).

[46] 419 U.S. at 9.

[47] *Id.* at 10.

[48] *Id.*

[49] *Id.* at 11-12. In his dissent Justice Douglas points out that the application of § 7421(a) to deny a taxpayer the right to contest federal taxes for religious reasons is a violation of that person's constitutional rights. *Id.* at 16.

[50] *Id.* at 12.

so that he is able to contest the validity of his liability. In many instances, if the taxpayer so desires, he may avail himself of this opportunity before paying the tax.[51] As noted above, Congress has dealt with some of the more aggravated instances of irreparable injury that may be caused by delaying taxpayer access to a judicial forum outside of the Tax Court or in a refund suit.[52]

Furthermore, it is prudent not to permit an organization or other entity to litigate issues that may result in diminution of tax liability of third parties. Careful selection of plaintiffs could result in sidestepping congressional intent to relegate those whose tax liability is directly at issue to Tax Court or refund suit remedies.

However, a question to which no clear answer has yet emerged is whether the IRS may be enjoined at the behest of plaintiffs whose tax liability is not at issue, who do not seek to lessen anyone's tax burden or to interfere with tax assessment or collection in any way, but who allege that they have been injured or aggrieved in some way by IRS action. The answer to this question depends upon whether the overriding purpose of Congress in relegating taxpayers to a position where they have access only to narrow channels of judicial review was solely to protect tax revenues from undue interference or whether it was also to grant the tax collecting agency a unique trusteeship over its domain, with a minimum of "lay" judicial interference. If an action does not threaten the revenues themselves, but instead seeks to air tax policy grievances, it should not lie if Congress has determined that the IRS is to fashion tax policy without judicial interference. If, however, Congress has provided judicial review of IRS practices so that there can be examination and input by the general public as to tax policy, the action should be allowed to proceed. It is contended herein that actions for injunc-

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[51] 8 P-H 1978 FED. TAXES ¶ 38,936. The remedy in the Tax Court is generally limited to cases where the Commissioner has determined a deficiency in income, estate or gift taxes and excise taxes imposed on foundations by I.R.C. §§ 4941-45, or when a fiduciary or transferee has received a notice of deficiency. The Tax Court also has jurisdiction over declaratory judgments related to retirement plans, I.R.C. § 7476, and has concurrent jurisdiction over declaratory judgments involving tax-exempt organizations. The Tax Court lacks equitable jurisdiction. *See* Hays Corp. v. Commissioner, 40 T.C. 426, *aff'd*, 331 F.2d 422 (7th Cir. 1964).

[52] *See supra* note 11. A refund suit is no guarantee that the issues the taxpayer seeks to contest will be litigated. A problem noted by Justice Blackmun in his dissent in *"Americans United" Inc.*, is that when small amounts of money are involved in a refund suit, the government can avoid litigation of the issues raised by the taxpayer by tendering a refund. *See* Mitchell v. Riddell, 402 F.2d 842 (9th Cir. 1968), *appeal dismissed* and *cert. denied*, 394 U.S. 456 (1969); Church of Scientology v. United States, 485 F.2d 313 (9th Cir. 1973). Whether a court could resolve the issues the taxpayer seeks to litigate in the taxpayer's favor in futuro through injunctive relief against the service to avoid the necessity of multiple refund suits has not been resolved by the U.S. Supreme Court. 416 U.S. at 748 n.22; 419 U.S. at 11.

tive and declaratory relief are permissible against IRS action when, if stringent standing requirements are met, the plaintiff has no other means of obtaining judicial review and the action will not result in a decrease in federal revenues.

I. SIMON V. EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION: STANDING REQUIREMENTS FOR NONTAXPAYERS

An opportunity to resolve the question of whether actions for injunctive or declaratory relief which do not threaten interference with tax assessment or collection are ever permissible against the IRS was presented in *Simon v. Eastern Kentucky Welfare Rights Organization.*[53] The Court did not answer the question in its majority opinion.[54] This case involved a suit by several indigent individuals and organizations composed of indigents for injunctive and declaratory relief against the Secretary of the Treasury and the Commissioner of Internal Revenue. The plaintiffs attacked a determination by the IRS granting Section 501(c)(3) "charitable" status to nonprofit hospitals which provide only free emergency room care, as opposed to inpatient care, to persons unable to pay.[55] The challenged Revenue Ruling did not explicitly involve a hospital at which any of the plaintiffs had attempted to receive medical care. Individual plaintiffs alleged that they were disadvantaged in seeking hospital services because of indigency. The complaint alleged that each hospital which denied free medical care to one of the plaintiffs "had been determined by the Secretary and the Commissioner to be a tax-exempt charitable corporation, and each received substantial private contributions."[56] No hospital was a defendant in the suit. The plaintiffs contended that the challenged ruling departed from the proper interpretation of the term "chari-

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[53] 426 U.S. 26 (1976).

[54] Justice Stewart in his concurring opinion did provide an answer to some degree by commenting:

> I join the opinion of the Court holding that the plaintiff in this case did not have standing to sue, I add only that I cannot imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else.

Id. at 46. For a recent note discussing the decision in *Eastern Kentucky Welfare Rights, see* Note, 26 DRAKE L. REV. 728 (1977). It was concluded by the author therein that "[t]he *Simon* holding appears to have effectively foreclosed the bringing of public interest challenges to government action under section 10 of the Administrative Procedure Act before the present Court." *Id.* at 738. Standing requirements for plaintiffs seeking IRS action shall be discussed in part III herein.

[55] Rev. Rul. 69-545, 1969-2 CUM. BULL. 117, modifying Rev. Rul. 56-185, 1956-1 CUM. BULL. 202 which read in part:

> It [a hospital seeking treatment as a charitable organization] must not refuse to accept patients in need of hospital care who cannot pay for such services. Furthermore if it operates with the expectation of full payment from all those whom it renders services, it does not render charity merely because some of its patients fail to pay for the services rendered.

Id. at 203.

[56] 426 U.S. at 33.

table" in the Internal Revenue Code as established by the "legislative history of the Code, regulations of the IRS and judicial precedent."[57]

In the district court the defendants made a motion to dismiss based upon the plaintiffs' standing, the nonjusticiability of the subject matter, the Anti-Injunction Act, the Declaratory Judgment Act and the doctrine of sovereign immunity.[58] The district court granted summary judgment for the plaintiffs but the court of appeals for the District of Columbia circuit reversed.[59] Although the court of appeals upheld the challenged regulations on the merits, it rejected the defendants' contention that the district court lacked jurisdiction.[60] Both parties petitioned for certiorari and both petitions were granted by the Supreme Court and consolidated into one case.[61]

The Supreme Court held that the suit should have been dismissed because the plaintiffs lacked standing:

> We do not reach either the question of whether a third party ever may challenge IRS treatment of another, or the question of whether there is a statutory or immunity bar to this suit. We conclude that the District Court should have granted petitioners' motion to dismiss on the ground that respondents' complaint failed to establish their standing to sue.[62]

In holding that the plaintiffs did not have standing to challenge the issuance of Revenue Ruling 69-545, the Court noted that standing is a limitation on the exercise of federal court jurisdiction that "focuses on the party seeking to get his complaint before a federal court on the issues he wishes to have adjudicated."[63] In order to determine whether a plaintiff is a proper party for purposes of the constitutional "case or controversy" requirement of federal court jurisdiction,[64] inquiry must focus on "whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely

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[57] *Id.*

[58] *Id.* at 34-35.

[59] 506 F.2d 1278 (D.C. Cir. 1974).

[60] The court held that:

> [T]he pertinent Congressional enactments indicate a Congressional intent that the actions of the Internal Revenue Service be subject to judicial review . . . . By means of refund and deficiency actions, the courts review the policies, practices, rulings, and interpretations of the Internal Revenue Service . . . . As noted, *supra,* the rationale limiting suits to the post-collection period is not applicable in this case. To limit plaintiffs to a refund action under these facts is, as the district court concluded, equivalent to denying them judicial relief. That result is without foundation in the revelvant law.

Id. at 1286.

[61] 421 U.S. 975 (1975).

[62] 426 U.S. at 37 (footnotes omitted).

[63] *Id.* at 38, quoting Flast v. Cohen, 392 U.S. 83, 99 (1968).

[64] U.S. CONST. art. III. *See* Muskrat v. United States, 219 U.S. 346 (1911).

to be redressed by a favorable decision."[65] The Court noted that it had established in an earlier decision that an allegation of actual injury redressable by the court was sufficient to confer standing upon a plaintiff.[66] An allegation of actual injury is not sufficient. Emphasizing a point that was perhaps fatal to the plaintiffs, the Court held that "[t]he necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement."[67] It is clear from the decisions in *Eastern Kentucky Welfare Rights* and *Warth* that the plaintiff must allege that his injury will be redressed by the relief sought against the defendant.

The Court, from this standpoint, conceded that the plaintiffs had suffered injury to their interest in access to hospital services[68] due to the hospitals' refusal to serve them.[69] However, the Court stressed that the injury suffered by the plaintiffs was at the hands of hospitals, not the Treasury Department officials who were named as the defendants. It noted that "the 'case or controversy' requirement of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."[70]

The Court pointed out that it did not accept the plaintiffs' position that the adoption of Revenue Ruling 69-545 had encouraged hospitals to deny services to indigents or that injunctive relief against this ruling would result in the plaintiffs receiving the services they desired.[71] Noting conflicting evidence from both parties concerning the dependence of nonprofit hospitals upon private charity, the Court reasoned that "[s]uch conflicting evidence supports the common sense proposition that the dependence upon special tax benefits may vary from hospital to hospital."[72] Because the plaintiffs' allegations did not establish to the satisfaction of the Court that the hospitals

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[65] 426 U.S. at 38. This notion of redressibility is a refinement of the standing limitation developed in Warth v. Seldin, 422 U.S. 490, 498-99 (1975), which shall be discussed *infra*. In Baker v. Carr, 369 U.S. 186 (1962), plaintiffs alleged that Tennessee's legislative apportionment denied them equal protection of the laws through debasement of their votes. They were assumed to have a sufficient stake in the outcome of the controversy for purposes of standing because "[t]hey [were] asserting a plain, direct and an adequate interest in maintaining the effectiveness of their votes . . . ." *Id.* at 207.

[66] Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1969).

[67] 426 U.S. at 39.

[68] 426 U.S. at 40.

[69] *Id.* at 41.

[70] *Id.* at 41-42.

[71] *Id.* at 43. The Court found that "[s]o far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services."

[72] *Id.*

would be likely to extend services to the plaintiffs if the challenged ruling were enjoined, the Court concluded that the complaint had not suggested any substantial likelihood that victory in the suit would result in respondents' receiving the hospital treatment they desired.[73]

It is quite clear from the decision in *Eastern Kentucky Welfare Rights* that a plaintiff seeking injunctive or declaratory relief against the IRS must convincingly allege that the granting of such relief will remedy the injury inflicted on the plaintiff. The requirement in *Eastern Kentucky Welfare Rights* that the challenged government action be the *sine qua non* of injury to the plaintiff has important consequences in the tax area. Because of the limited use of the Anti-Injunction Act when a plaintiff's own tax liability is involved, most actions for injunctive relief against the IRS, if *any* are maintainable, must involve allegations of injury to the plaintiff as a result of IRS treatment of some other taxpayer.[74]

As a result of the decision in *Eastern Kentucky Welfare Rights* it appears that in actions for injunctive or declaratory relief against the IRS, the further one moves from the Scylla of the Anti-Injunction Act and the De-

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[73] *Id.* at 45-46. In his concurring opinion Justice Brennan agreed that there was a concrete and reviewable controversy because the plaintiff had not alleged applicability of the challenged ruling to any nonprofit hospitals other than a very narrow category specified by the ruling. *Id.* at 47. His opinion lamented the failure of the majority to find standing in view of its concession that the plaintiffs had suffered injury. Justice Brennan contended that the Constitution does not command that plaintiffs, for purposes of standing, must allege the redressibility of the injury:

> Nothing in the logic or policy of constitutionally required standing is added by the further injury-in-fact dimension required by the Court today—that respondents allege that the hospitals affecting them would not have elected to forgo the favorable tax treatment and that this would result in the availability to below-cost medical services.

Id. at 56. Justice Brennan also regarded a prudential limitation such as the majority had read into the injury-in-fact requirement as "inapposite" to judicial review sought under the Administrative Procedure Act, the plaintiffs' jurisdictional basis for their claim, citing the decisions in Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Sierra Club v. Morton, 405 U.S. 727 (1972); and United States v. SCRAP, 412 U.S. 669 (1973).

[74] A taxpayer may not bring suit to enjoin a taxation ruling as to his own taxes even when such a ruling has not resulted in tax liability. *See* Gardner v. Helvering, 88 F.2d 746 (D.C. Cir. 1936), where a taxpayer alleged that a sales tax ruling of the Commissioner concerning refuse palm oil made it impossible to procure a processor for it. Suit was held barred by the Anti-Injunction Act. *See also* J.C. Penney Co. v. United States Treasury Dept., 439 F.2d 63 (2d Cir. 1971), *cert. denied,* 404 U.S. 869 (1971), where an importer of television sets from Japan sought to enjoin the Secretary of the Treasury from making an investigation under the Anti-Dumping Act, 19 U.S.C. §§ 160-71 (Supp. V 1975), to determine whether the sets were being sold at less than fair value. Because the investigation could result in the imposition of a tax that could be challenged in the Customs Court the suit was barred by § 7421(a). "Where a complete system of review is provided there is no exceptional circumstance to take the case out of the general rule." 439 F.2d 63. *But see* Common Cause v. Shultz, 73-2 U.S. TAX CAS. ¶ 9512 (D.D.C. 1973), where taxpayers obtained an injunction against a temporary regulation, T.D. 7227, 1973-1 CUM. BULL. 591 which limited the time for designation of $1.00 to the Presidential Election Campaign Fund to the time a taxpayer files his return.

claratory Judgment Act exception, the closer one gets to the Charybdis of questionable standing. Yet in deciding *Eastern Kentucky Welfare Rights* on the basis of lack of standing, the Court did not foreclose the issue of standing of a plaintiff to challenge treatment by the IRS of another taxpayer and left for another day the issues of reviewability and jurisdiction in such suits. These issues were argued vigorously by the Treasury Department. In order to counteract the notion that Congress, in limiting judicial review of IRS action, did not contemplate situations in which plaintiffs would seek to litigate tax treatment of others on the basis of public policy or competitive injury,[75] the government argued that Congress' intent was to limit the courts' jurisdiction in tax matters and to give the agency as much discretion as possible. The government stated emphatically in its brief that "[f]rom the very inception of the Treasury as the tax collecting arm of the federal government, Congress has vested in its officials broad discretion in the enforcement of the revenue laws."[76]

As to the standing issue, the government contended that third parties could not maintain actions to litigate the tax issues of other taxpayers. The government likened the discretion of the IRS in administering the tax laws to prosecutorial discretion. The scope of prosecutorial discretion had recently been upheld by the Supreme Court in *Linda R. S. v. Richard D.*,[77] an action brought by an unmarried mother who sought to compel state prosecution against the nonsupporting father of her child. The government painted a stark picture of the abuse that might result if third persons had standing to compel the IRS to act concerning other taxpayers:

> [I]f petitioners can maintain this action, there are many others who could utilize litigation with the Internal Revenue Service as a sword to be wielded against adversaries. For example, such litigation might be brought to compel the Service to audit a particular taxpayer accord-

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[75] One district court has concluded pragmatically that Congress in enacting the Anti-Injunction Act did not consider the possibility of aggrieved third parties seeking to litigate IRS action vis-a-vis other taxpayers. In a suit for declaratory and injunctive relief by International Telephone & Telegraph Corp. seeking relief against revocation of a revenue ruling that would affect its shareholders, the court held:

> [I]t is possible that Congress did not consider the applicability of those sections to the unusual situation presented by the instant suit. In such circumstances, we can be guided only by the language and apparent purpose of these statutes [the Anti-Injunction Act and the Declaratory Judgment Act exception], both of which counsel dismissal of district court injunctive actions, whether brought by taxpayers or third parties collaterally affected by tax assessments.

International Telegraph & Telephone Corp. v. Alexander, 396 F. Supp. 1150, 1163 (D. Del. 1975). IT&T's action in this case would clearly have interferred with IRS tax collecting functions since the Service had assessed deficiencies against a number of IT&T shareholders.

[76] Brief for government at 16, Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976).

[77] 410 U.S. 614 (1973).

ing to the standards that the plaintiffs insisted were required by the statute rather than those employed by the Service.[78]

A large part of the government's argument comprised various reasons why IRS functions are nonreviewable by the courts except in the limited circumstances provided for by Congress. This is an important contention because it is obviously aimed at the plaintiffs' reliance on Section 10 of the Administrative Procedure Act (APA)[79] as a basis for review and jurisdiction. As will be discussed hereinafter, there is a strong presumption in the legislative history of the APA and in the recent cases construing it, which is in favor of judicial review of agency action at the behest of any party aggrieved by such action.[80] However, the government made several arguments contending that IRS functions are committed for the most part to the discretion of the agency. The government seemingly attempted to borrow insulation from the collection function of the IRS, which for the most part is clearly committed to agency discretion, contending that "[t]he 'process' of tax collection by the Department of the Treasury includes the making of administrative determinations such as the Revenue Ruling at issue here."[81]

The government exhibited what may have been a calculated ambivalence concerning the rulings function; if it is not committed to agency discretion as part of the tax collection function, then it is not the sort of concrete agency action that created a ripe and justiciable controversy. The government stated that "[s]uch a ruling is informational in character and represents an announcement of position in much the same way as a speech by a Treasury official or an argument presented to a court."[82]

It was emphasized by the government that the office of Commissioner of Internal Revenue was created in 1862 and that the Commissioner since that time has been authorized to issue rulings pertaining to the tax laws.[83]

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[78] Brief for government at 17, 426 U.S. 26.

[79] 5 U.S.C. § 702, *as amended by* Act of Oct. 21, 1976, Pub. L. No. 94-574,

[80] "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof . . . ." *Id.*

[81] Brief for government at 20, 426 U.S. 26.

[82] *Id.* at 26.

[83] *Id.* at 38. The statute creating the Office of the Commissioner, Act of July 1, 1862, ch. 8, § 321, 12 Stat. 432-33 indicates that its "rule-making" function was far more similar to that under I.R.C. § 7805(c) pertaining to forms and blanks rather than the current rulings function under I.R.C. § 7805(a):

> The Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal revenue; and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps and other matters pertaining to the assessment and collection of internal revenue.

The Commissioner's function appears to have been limited to administrative details. At least

A holding that the federal courts could review IRS revenue rulings would be inconsistent with the intent of Congress. There is no evidence that Congress ever intended to give the courts any authority to review tax suits other than in the form of basic jurisdiction to hear deficiency or refund cases brought by taxpayers contesting their own liability.[84]

Applying the above rationale to the facts in *Eastern Kentucky Welfare Rights,* the only persons or entities whose claims the federal courts could ultimately review would be the hospitals or their donors. However, it is highly unlikely that any taxpayer benefited by IRS action, regardless of its legality, would challenge it. Although this would render a significant part of IRS action unreviewable by the courts in all but the most limited circumstances,[85] control over the IRS to ensure proper administration of the tax laws is to be exercised by Congress through its Joint Committee on Internal Revenue Taxation.[86]

According to the IRS view, the federal courts may not review IRS action unless it ultimately involves a dispute involving the liability of a particular taxpayer in a refund suit or in the Tax Court. Congressional oversight rather than judicial review is designed to ensure that IRS actions comply with the tax laws.

The government also maintained that the Anti-Injunction Act and Declaratory Judgment Act bar actions that would affect the tax liability of others.[87] What is anomalous about that contention in *Eastern Kentucky Welfare Rights* is that the only plausible consequences of the relief sought by the plaintiffs would be that federal revenues would increase, because of the nondeductibility of contributions to hospitals involved and possible FUTA tax liability of the hospitals themselves, or they would stay the same. The government thus asked the Court to go a step beyond *Bob Jones University* and *"Americans United" Inc.,* where a diminution of third parties'

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one district court has noted this distinction, holding that rulings, as opposed to paperwork functions, were reviewable. National Restaurant Ass'n v. Simon, 411 F. Supp. 933, 999 (D.D.C. 1976). *See infra,* note 257.

[84] Brief for government at 42, 426 U.S. 26.

[85] One exception to the nonreviewability of government action has been clearly, if narrowly, established. Under Flast v. Cohen, 392 U.S. 83 (1968), if Congress or federal officials exceed a specific constitutional limitation in exercising the taxing and spending power conferred by art. I, § 8 of the U.S. Constitution, such abuse may be challenged judicially by a taxpayer. The Court held that "[s]uch an injury is appropriate for judicial redress, and the taxpayer has established the necessary nexus between his status and the nature of the allegedly unconstitutional action to support his claim of standing to secure judicial review." 392 U.S. at 106.

[86] Delegation of IRS control is found in 28 U.S.C. §§ 8001, 8002, 8021, 8022 (1970). Brief for government at 43, 426 U.S. 26.

[87] Brief for government at 59, 61.

tax liability was threatened, and apply the bar of Section 7421(a) in a situation that had no real relation to the expeditious collection of federal revenues. The government advanced the following rationale in supporting applicability of the Anti-Injunction Act to the situation in *Eastern Kentucky Welfare Rights:*

> It would be anomalous to impute to Congress the intent to bar injunctive actions by taxpayers who are directly affected by the collection of their tax liability but to permit non-taxpayers whose interests are far more tangential to enjoin the administrative determinations of the Treasury and thereby affect the tax liability of countless numbers of taxpayers.[88]

If the purpose of the Anti-Injunction Act is simply the preservation of federal revenues from undue preassessment judicial interference, then it is not necessarily anomalous to permit actions for injunction that will in no way interfere with revenue collections. This should be the case particularly where the plaintiff in such an action, unlike the taxpayer whose tax liability is in question, cannot remedy his grievance in the Tax Court or by a refund suit.

The government urged that a broad construction be given to the tax exception to the Declaratory Judgment Act. It urged rejection of the notion that the scope of the Declaratory Judgment Act is limited to that of the Anti-Injunction Act, which is solely the assessment and collection of taxes.[89] The government characterized the plaintiffs' suit as an "attempt to obtain a judicial redeclaration concerning the tax liabilities of other parties" and contended that, as such, it was barred.[90]

The final significant point made by the government was that the plaintiffs' suit was barred by the doctrine of sovereign immunity.[91] This doctrine has a very complicated history and is riddled with exceptions.[92] The doctrine has been roundly criticized[93] and yet has sometimes been used successfully

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[88] *Id.* at 63.

[89] *Id.* at 64.

[90] *Id.* at 69-70.

[91] *Id.* at 70.

[92] *Compare* Lank v. Dollar, 330 U.S. 731 (1947) *with* Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949); Malone v. Bowdoin, 369 U.S. 643 (1962); Dugan v. Rank, 372 U.S. 609 (1963); Hawaii v. Gordon, 373 U.S. 57 (1963).

[93] *E.g.*, Knox Hill Tenant Council v. Washington, 448 F.2d 1045 (D.C. Cir. 1971) where Judge McGowan commented in his concurring opinion: "The doctrine itself is in a considerable state of disrepair, at least in terms of intellectual respectability; and it is hardly in the original condition of pristine purity which once made it a useful tool for government lawyers seeking to dispense with trials on the merits." 448 F.2d at 1051.

against plaintiffs seeking injunctive relief against the IRS.[94] The defense has probably been deprived of validity in nontaxpayer suits by the 1976 amendment to the Administrative Procedure Act which eliminates the sovereign immunity defense in actions against a federal agency, its officers or employees.[95] If the Anti-Injunction Act, the Declaratory Judgment Act exception and some overriding congressional purpose to insulate IRS action do not prevent nontaxpayers from seeking review of IRS action, then sovereign immunity should not now do so.

Assuming the inapplicability of sovereign immunity to most actions for injunctive or declaratory relief against agency action, the government brief in *Eastern Kentucky Welfare Rights* raises, and the Court's decision leaves open, three crucial questions: 1) does a plaintiff whose own tax liability is not affected ever have standing to challenge IRS action concerning the taxes of another, 2) has Congress determined that IRS action, with the exception of refund and Tax Court suits, is not open to judicial review, and 3) does the Anti-Injunction Act even bar suits that would result in an increase of federal revenues and is the Declaratory Judgment Act exception so broad as to prevent *any* action for declaratory relief pertaining to federal taxation?

II. STANDING REQUIREMENTS AFTER SIMON V. EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION

Two recent District of Columbia Circuit Court decisions demonstrate that *Eastern Kentucky Welfare Rights* has not laid to rest the question of standing in actions challenging IRS treatment of third parties. These decisions are *Tax Analysts and Advocates v. Blumenthal,*[96] and *American Society of Travel Agents, Inc.* (ASTA) *v. Blumenthal.*[97] These two decisions are linked together by a common dissenting opinion of Judge Bazelon.[98] The facts of

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[94] *See* Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees, 495 F.2d 883 (10th Cir. 1974), *cert. denied, sub nom.* Junior Chamber of Commerce of Philadelphia v. United States Jaycees, 419 U.S. 1026 (1974).

[95] Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721 provides that in an action other than one for damages that:

> [A] claim that an agency or that an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensible party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.

The report of the House Judiciary Committee accompanying the legislation, H.R. REP. No. 94-1656, 87th Cong., 2d Sess 1, 1962, states that, "[t]he proposed legislation would amend section 702 of title 5, U.S.C., so as to remove the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review."

[96] 40 Am. Fed. Tax R. 2d 77-5232 (D.C. Cir. June 15, 1977), *petition for cert. filed* 46 U.S.L.W. 3338 (U.S. Nov. 14, 1977).

[97] 40 Am. Fed. Tax R. 2d 77-5782 (D.C. Cir. Sept. 15, 1977).

[98] *Id.* at 77-5787. Judge Bazelon's dissent was not reported in the *Tax Analysts and Advocates* opinion.

the cases are quite similar and yet the two opinions contrast sharply concerning injury in fact. In *Tax Analysts and Advocates,* the plaintiffs were a "tax reform" organization[99] and its executive director, Thomas Field, who had purchased an entire working interest in an domestic oil well. The suit was for declaratory and injunctive relief against IRS revenue rulings permitting domestic oil corporations to take a tax credit for income taxes paid to Saudi Arabia,[100] Libya,[101] Iran, Kuwait and Venezuela[102] in connection with oil production in those countries.[103] The plaintiffs contended that such taxes were in reality royalties or excise or severance taxes[104] and not foreign income taxes creditable under the Code.[105] Plaintiff Field contended that allowing international oil companies to credit such payments against United States income tax liability, rather than to deduct the payments from gross income, permitted the companies to sell such foreign oil in the United States at lower prices. This caused Field, who was permitted to deduct royalty payments to the owner of his domestic well only from gross income, to lose potential income from the sale of his domestically produced oil. Field contended further that as a result of this higher net income potential, the value of foreign oil investments was increased relative to domestic oil investments which placed him in a competitively disadvantageous position.[106]

Citing *Eastern Kentucky Welfare Rights*[107] the court had no trouble in finding injury in fact in Field's capacity as a competitor. Unlike the court in *Eastern Kentucky Welfare Rights,* the court in *Tax Analysts and Advocates* regarded "redressability" as a "prudential limitation" on federal court jurisdiction.[108] The court determined that satisfaction of the injury-in-fact requirement with so trivial an injury as that allegedly suffered by Field was

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[99] *See* Tax Analysts and Advocates v. Schultz, 376 F. Supp. 889 (D.D.C. 1974). *See also* note 250 and accompanying text *infra.*

[100] Rev. Rul. 55-296, 1955-1 CUM. BULL. 386.

[101] Rev. Rul. 68-552, 1962-2 CUM. BULL. 306.

[102] These were allegedly private revenue rulings. *See* 40 Am. Fed. Tax R. 2d 77-5232, 77-5234.

[103] Rev. Rul. 55-296 and Rev. Rul. 68-552 have been revoked by the IRS. *See* Rev. Rul. 78-63, 1978-8 INT. REV. BULL. 18.

[104] I.R.C. § 901(a).

[105] I.R.C. § 901(b).

[106] Perhaps the entry of Field into the oil business prior to the suit was an attempt to avoid the pitfalls encountered by the plaintiffs in Sierra Club v. Morton, 405 U.S. 727 (1972). Sierra Club, a well known conservation organization contesting the construction of a ski resort in the Sequoia National Forest, was deemed not to have standing because it did not allege that any of its members would be affected by the development. The government regarded Field's competitor status as disingenuous concluding that "[u]nder any realistic view, Field is not a competitor of the oil companies involved in the challenged rulings. Field's annual income of $200 from his wells is trivial by any standard." Brief for government at 26-27, 40 Am. Fed. Tax R. 2d 77-5232.

[107] *Id.* at 77-5236 n.47.

[108] *Id.* at 77-5236.

amply justified by the holding of the United States Supreme Court in *United States v. SCRAP.*[109] The question of redressability, *i.e.*, whether reversal of the IRS action would probably result in increased net income and enhanced desirability for Field's domestic oil investment, was not reached. Instead the court rejected the plaintiff's standing on the basis of a prudential limitation, the test being "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[110] It is sensible in terms of the constitutional "case or controversy" requirement to demand that a plaintiff challenging a particular illegal action be an intended beneficiary or subject of the legislative provision allegedly violated. Nevertheless, the zone of interests test has never been constitutionalized and has never been used by the Supreme Court in the manner in which it was employed in *Tax Analysts and Advocates.*

The Supreme Court introduced the zone test in two decisions handed down together, *Association of Data Processing Service Organizations v. Camp*[111] and *Barlow v. Collins.*[112] In *Data Processing Service* the Court held that plaintiffs who sold data processing services could challenge a ruling by the Comptroller of the Currency which permitted national banks to make data processing services available to other banks and bank customers. The plaintiffs contended that such a ruling was contrary to Section 4 of the Bank Service Corporation Act of 1962[113] which prohibited bank service corporations from engaging in any activity other than the provision of bank services to banks. Although the relevant statutory provision did not mention data processing companies the Court held that such companies were arguably protected by the statute because of a congressional interest in protecting competitors of national banks in nonbanking fields.[114]

In *Barlow* the plaintiffs were tenant farmers who challenged a regulation of the Secretary of Agriculture which permitted assignment of support payments received by tenant farmers under the Food and Agriculture Act of 1965[115] to rent for a farm. The tenant farmers contended that this regulation permitted their landlords to coerce them into making assignments of support benefits for rent, requiring them to secure financing for other farm needs from the landlords at inflated prices. The court of appeals affirmed the dis-

[109] 412 U.S. 669, 689 n.14 (1973). The Court held that an "identifiable trifle" was sufficient to confer standing.
[110] 40 Am. Fed. Tax R. 2d at 77-5236 citing 397 U.S. 150 (1970).
[111] 397 U.S. 150 (1970).
[112] 397 U.S. 159 (1970).
[113] 12 U.S.C. § 1864 (1970).
[114] 397 U.S. at 155.
[115] 7 U.S.C. § 1444(d) (1970).

trict court's dismissal of the action on the basis that the plaintiffs had shown no invasion of a legally protected interest.[116] However, the Supreme Court reversed, finding a general congressional intent in the Food and Agriculture Act of 1965 to protect the interests of the tenant farmers.[117] It is clear from *Data Processing Service* and *Barlow* that in order to determine whether a plaintiff is *arguably* someone to be protected by legislation upon which he attempts to posit standing, the Court has sanctioned reference to the legislative history of a provision or to other portions of a single act that may be relevant.

In a subsequent decision, *Arnold Tours v. Camp*,[118] which also involved Section 4 of the Bank Service Corporation Act,[119] the Supreme Court held that travel agents had standing to challenge a regulation of the Comptroller of the Currency permitting national banks to provide travel service to their customers. The Court noted that national banks are competing with travel agents when they provide travel services to customers.[120]

It is clear that the zone of interests of a statute cannot be determined solely by a mechanical examination of the text of the provision upon which the plaintiff bases his case. This, however, was how the court in *Tax Analysts and Advocates* applied the zone test. The court insisted that it would look only to the language of Section 901 in evaluating whether plaintiffs such as Field were to be regarded as within the zone of interests. The court also determined that it would not be proper to examine the legislative history of the provision upon which the allegations of illegality were based. Therefore it held that an examination of the legislative history might lead to prejudgment on the merits, that it might be "unilluminating" as to what interests are to be protected and that the "generous" nature of the zone test might be undermined by a requirement that a plaintiff make an affirmative showing of congressional intent when asserting standing.[121]

I.R.C. Section 901 refers specifically to a credit for foreign taxes paid by United States citizens or domestic corporations. In *Tax Analysts and Advocates*, the plaintiff paid no taxes and, therefore, under the court's analysis, lacked textual support for his claim that his interests were protected by Section 901. The court determined from the text of Section 901 that its purpose was to prevent double taxation of domestic taxpayers paying foreign taxes and

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[116] 398 F.2d 398 (5th Cir. 1968).
[117] 397 U.S. at 164-65.
[118] 400 U.S. 45 (1970) (per curiam).
[119] *Supra* note 113.
[120] 400 U.S. at 46.
[121] 40 Am. Fed. Tax R. 2d at 77-5238.

that the plaintiff could not be regarded as falling within that regulatory concern "without stretching the concept of regulation to implausible limits."[122]

While it is strongly implied in *Data Processing Service* and *Arnold Tours* that agency action taken pursuant to statutory authority might be challenged by a plaintiff whose interests Congress most likely knew would be affected by such regulation, the court sidestepped this issue by characterizing it as a "reverse zone of interests analysis."[123] The plaintiff in *Tax Analysts and Advocates* contended that he had standing because Section 901 could be read as a decision by Congress not to grant a tax credit to persons who have made payments other than *taxes* to foreign governments. Despite the obvious impact that an IRS departure from that congressional limitation would have on the plaintiff,[124] the court concluded:

> Every decision by a government agency generates consequences and various forms of impact on a wide range of valid interests held by a diverse range of parties. There is no doubt that the decisions embodied in the challenged revenue rulings have had an impact upon appellant Field. But the concepts of *consequence* and *impact* are not the proper guideposts to define the relevant zone of interests; reference to those concepts does not aid greatly in determining whether a protected interest exists . . . .[125]

Judge Bazelon, in his joint dissent to *Tax Analysts and Advocates* and *ASTA*[126] criticized the determination of the majority not to review other provisions of the Internal Revenue Code or the legislative history of the specific provision. Judge Bazelon noted the plaintiff's contention that the Code in its entirety is infused with certain general purposes.[127] Viewing Section 901 in a larger sense, as an attempt to establish equality between corporations required to pay foreign taxes and those required only to pay United States taxes, it may be seen as encompassing the plaintiff's interest in maintaining tax parity with other oil producers.[128]

Judge Bazelon noted that the legislative history of Section 901 is silent

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[122] *Id.* at 77-5240.

[123] *Id.* at 77-5241.

[124] It should be noted that the court conceded the requisite injury-in-fact to the plaintiff. *Id.* at 77-5236.

[125] *Id.* at 77-5241.

[126] Judge Bazelon's dissent to both cases was reported in the *ASTA* decision.

[127] 40 Am. Fed. Tax R. 2d at 77-5798. Judge Bazelon noted the reference by the plaintiff to H.R. REP. No. 1337, 83d Cong., 2d Sess. 1 (1954), accompanying the Internal Revenue Code of 1954, "[i]n general, the purpose of these changes has been to remove inequities, to end harassment of the taxpayer and to reduce barriers to future expansion of production and employment."

[128] 40 Am. Fed. Tax R. 2d at 77-5799.

concerning persons such as the plaintiff in *Tax Analysts and Advocates.*[129] Thus the language of the majority concerning the role of legislative history in application of the zone test appears to have had little practical consequence. Nevertheless, Judge Bazelon's criticism of the majority's rejection of legislative history is compelling. As to the contention that an examination of the legislative history may lead to prejudgment of the merits, the dissent noted that "[w]e trust federal judges to successfully perform such tasks all the time, as for example when ruling on the admissibility of evidence in non-jury trials. Standing and the merits require distinct inquiries, and federal judges are perfectly capable of using legislative history to answer the demands of each."[130]

As to the majority's contention that the legislative history might be "unilluminating" the dissent commented that "there is no way of knowing until one looks."[131] Finally, concerning the contention that resorting to the legislative history might contract the generosity of the zone test, the dissent contended that "if the determination of congressional intent is relevant, the use of legislative history may lead to more accurate application of the test."[132]

The majority's application of the zone test should not be regarded as a serious obstacle to plaintiffs in suits challenging IRS action because it has no support in the case law. In addition, the court demonstrated no reason why precedents in other areas of federal regulation are not relevant in suits against the IRS. The majority's rejection of the plaintiff's standing in *Tax Analysts and Advocates* appears to have little support.

Several cases, in addition to *Data Processing Service* and *Arnold Tours,* make it clear that competitors impacted by action allegedly pursuant to statutory authority have standing to challenge the legality of such action. This is true regardless of whether such plaintiffs are mentioned specifically in the statutory provision they allege has been violated.[133]

The decisions in *Ray Baillie Trash Hauling, Inc. v. Kleppe* and *Catovsky-Kaplan Physical Therapy Association v. United States* are particularly instructive.[134] In *Ray Baillie Trash Hauling* trash haulers sued the Small

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[129] *Id.*

[130] *Id.* at 77-5798.

[131] *Id.*

[132] *Id.*

[133] Curran v. Laird, 420 F.2d 122, 126 (D.C. Cir. 1969); Armco Steel Corp. v. Stans, 431 F.2d 779 (2d Cir. 1970); Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696, 701 (5th Cir. 1973), *cert. denied,* 415 U.S. 914 (1974); Catovsky-Kaplan Physical Therapy Ass'n, Ltd. v. United States, 507 F.2d 1363 (7th Cir. 1975); Safir v. Kreps, 551 F.2d 447 (D.C. Cir. 1977).

[134] *Supra* note 133.

Business Administration (SBA) demanding that they be permitted to bid for a trash hauling contract awarded to a minority owned business. The court determined that the plaintiff had standing to challenge the SBA action because, as a small business, its interests were arguably within those to be protected by the Small Business Act.[135]

In *Catovsky-Kaplan Physical Therapy Association,* private physical therapy corporations challenged an HEW regulation requiring nonprofit home health agencies to contract only with nonprofit corporations for physical therapy.[136] The plaintiffs alleged that they had been notified that some of their physical therapy contracts might be terminated because of the regulation. The government contended that the zone of interests test was not met because the regulation purports to regulate only home health agencies. The court held, however, that:

> if, pursuant to what it perceives to be its statutory authority, a government agency regulates the contractual relationships between a regulated and an unregulated party, the latter as well as the former may have interests that are arguably within the regulated zone for purposes of testing standing, and for this purpose a total prohibition is a form of regulation.[137]

In both of these cases the impact of regulation upon competitors of those regulated was readily foreseeable. Thus, it would not have been inconsistent with congressional intent to permit such competitors to challenge regulations that drastically affect their interests. It must be noted that the threshold requirement for standing is not that the plaintiff's interests be *clearly* within the zone of interests to be protected but, rather, that they be *arguably* within the zone of interests to be protected.[138] If the impact of a revenue ruling on its "beneficiary's" competitors might readily have been foreseen by Congress, the overwhelming weight of authority indicates that such competitors should have standing to challenge such a ruling.

In considering the relevant zones of interests in any challenge to a provision of the Internal Revenue Code, a court should be mindful of the congressional purpose that the ruling's function be exercised in such a way as to promote equality among taxpayers. Although the IRS has considerable discretion in determining how to avoid inequities among taxpayers,[139] this discretion is not unfettered.

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[135] 15 U.S.C. §§ 661-96 (1970 & Supp. V 1975).
[136] 20 C.F.R. § 405.1221(a) (1973).
[137] 507 F.2d at 1367.
[138] *See* 379 U.S. 150.
[139] *See* Automobile Club v. Commissioner, 353 U.S. 180, 184 (1957).

In *International Business Machines Corp. v. United States,*[140] International Business Machines (IBM) challenged a refusal by the IRS to treat it in a manner similar to its competitor, Remington Rand. Remington had received a ruling for a two year period that some of its computers were not business machines subject to the business machines excise tax of the Code.[141] The IRS revoked the ruling favorable to Remington but did not apply its revocation retroactively. IBM had never received a comparable ruling. IBM did not dispute that its computers similar to the favored Remington machines were "business machines." It asserted, however, that the unequal treatment of its competitor invalidated IBM's excise taxes for the same period. The court agreed, noting:

> Plaintiff's statutory right to this type of equal protection is not cut off by its omission to prove that it lost business by virtue of the discriminatory treatment. The inequality inheres in the payment of tax by IBM and its customers while Remington and its customers were allowed to go free . . . . The Code does not demand any special or greater proof of harm as a condition of recovery for an abuse of discretion under Section 7805(b).[142]

Also relevant in this regard is the decision of the Court of Claims in *Exchange Parts Co. v. United States.*[143] In that case the court held that the IRS could not make a ruling nonretroactive to some taxpayers dependent solely upon whether or not they had already paid their taxes. Thus, in evaluating whether plaintiffs have standing to challenge the tax treatment of others, a court must consider not only whether the impact of the action under the particular Code provision on competitors was forseeable, but also whether the plaintiff's interests are protected under the general protection for equity among taxpayers provided by the Code.

The cases cited by Judge Bazelon in his dissent in *Tax Analysts and Advocates* clearly support his contention that consideration of the legislative history is permissable in determining whether a plaintiff is within the zone of interests to be protected by an enactment.[144] The majority in *Tax Analysts and Advocates* cited no direct authority for this tightening of the zone of interests test and it appears to be contrary to the Supreme Court decisions

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[140] 343 F.2d 914 (Ct. Cl. 1965), *cert. denied,* 382 U.S. 1028 (1966).

[141] I.R.C. § 1491 (repealed by Pub. L. No. 89-44, § 206, 79 Stat. 140).

[142] 343 F.2d at 924.

[143] 279 F.2d 251 (Ct. Cl. 1960).

[144] City of Inglewood v. City of Los Angeles, 451 F.2d 948 (9th Cir. 1971); Secretary of Labor v. Farino, 490 F.2d 885 (7th Cir. 1973); Pesikoff v. Secretary of Labor, 501 F.2d 757 (D.C. Cir. 1974), *cert. denied,* 419 U.S. 1038 (1974); Hayes Int'l Corp. v. McLucas, 509 F.2d 247 (5th Cir. 1975), *cert. denied,* 423 U.S. 865 (1975); Rental Housing Ass'n v. Hills, 548 F.2d 388 (1st Cir. 1977). *See also* Concerned Residents v. Grant, 537 F.2d 29 (3d Cir. 1976).

in *Data Processing Service, Barlow* and *Arnold Tours.* Furthermore, its validity even within the District of Columbia circuit is questionable considering the subsequent decision rendered in *Southern Mutual Help Association, Inc. v. Califano.*[145]

In *Southern Mutual Help Association* a migrant worker health facility challenged HEW's discontinuance of its funding without a hearing. The court considered whether a facility whose funding had been discontinued would have standing to challenge agency action when the agency had substituted another facility and there was no interruption of service to the obvious beneficiaries of the funding, the migrant workers.[146] The court concluded that Congress tacitly recognized that conduit organizations such as the plaintiff were necessary to deliver the contemplated services and that the plaintiff's interests were therefore within the zone of interests to be protected.[147] Thus, it appears that the interpretation of the zone of interests test in *Tax Analysts and Advocates* has not been conclusively accepted by the District of Columbia circuit.

In *ASTA,* the District of Columbia circuit affirmed the dismissal by the district court of a suit by an association of travel agents contesting IRS tax treatment of tax-exempt organizations that had become involved in preparing tour packages for their membership. The plaintiff contended that the tax-exempt status of such organizations enabled them to sell tour packages at lower prices than private travel agents and that the IRS had thus bestowed an unfair competitive advantage on such organizations. It was also contended that if such organizations conducted large scale travel businesses they were no longer entitled to tax-exempt treatment.[148] The plaintiff urged that such nonprofit organizations be accorded the same income tax treatment as private travel agents.

The court, relying on the decision in *Eastern Kentucky Welfare Rights,* held that the plaintiff failed to demonstrate injury-in-fact and thus lacked standing.[149] The court held that the plaintiff had not indicated with sufficient specificity the manner in which the alleged injury had occurred, *i.e.,* that it had not alleged in its complaint that prospective customers had spurned its members because of the IRS tax treatment of tax-exempt organizations that had entered the travel business.

The court insisted that this result was mandated by the decision in

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145 574 F.2d 518 (D.C. Cir. 1977).
146 *See* 42 U.S.C. § 242(h) (1970).
147 574 F.2d at 524.
148 I.R.C. § 501(c)(3).
149 40 Am. Fed. Tax R. 2d at 77-5784, citing Warth v. Seldin, 422 U.S. 490 (1975).

Eastern Kentucky Welfare Rights. The court concluded that the plaintiff had not shown that its members would receive any tangible benefit from the relief sought because the tax-exempt organizations might still benefit from volunteer labor and willingness to accept lower profits, the organization's members might still prefer tour packages of their own organizations at higher prices, or the members of such organizations might simply travel less.[150] The court distinguished *Data Processing Service* on the basis that it was not a tax case and that, unlike the national banks in *Data Processing Service,* the tax-exempt organizations would still be able to remain in business competing with the plaintiffs even if the plaintiffs were successful.[151]

This determination appears very difficult to reconcile with the finding by a different panel in *Tax Analysts and Advocates,* considering that the court did determine in that case that the plaintiff had suffered competitive injury because of the tax credit accorded to importers of foreign oil. Judge Bazelon was also a member of the *ASTA* panel and dissented from the majority holding. His dissent was based largely upon the decision of the Supreme Court in *Investment Company Institute v. Camp.*[152] In that case the plaintiffs were investment fund companies who challenged a regulation of the Comptroller of the Currency authorizing national banks to establish and operate collective investment funds. The court determined that the plaintiff had standing to maintain the suit and that the alleged creation of illegal competition by agency action met the injury-in-fact requirement.[153]

Judge Bazelon disputed the majority's conclusion that *Eastern Kentucky Welfare Rights* mandated dismissal of the plaintiff's suit. His dissent emphasized that the plaintiffs in that case had failed to make a showing that the hospitals would offer free inpatient services to indigents rather than lose donations deductible to the donors.[154] The dissent noted that if ASTA had received the relief sought, the taxes of its competitors would rise and their costs would increase. Judge Bazelon referred to the suggestions of the majority regarding ways in which the tax-exempt organizations could maintain their customers despite higher tax liability as "corrosive skepticism [that] would altogether eliminate competitive injury as a basis for standing."[155] Concerning the contention that the tax-exempt organizations, unlike the national banks in *Data Processing Service,* would still remain in business, Judge Bazelon noted that this went only to the degree of injury suffered and

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150 40 Am. Fed. Tax R. 2d at 77-5786.
151 *Id.* at 77-5784.
152 401 U.S. 617 (1971).
153 *Id.* at 620.
154 40 Am. Fed. Tax R. 2d at 77-5793.
155 *Id.*

that only a very small degree of injury was required for purposes of standing.[156]

Despite the apparent cogency of Judge Bazelon's dissent, several recent decisions of the Supreme Court in the area of standing indicate that the redressability component of the injury-in-fact requirement is a much more serious roadblock to standing by one seeking to challenge IRS action concerning another taxpayer than the prudential zone of interest test. The Court has clearly made standing a more difficult matter in this regard. Despite the generosity of the decision specifying the quantity of injury required,[157] the plaintiff must allege that he himself has suffered such injury.[158] This requirement of a personal stake in the controversy has been upheld in the tax area on several occasions.[159] The injury alleged can not be a generalized grievance common to all citizens of the United States or an abstract grievance.[160] Nevertheless, the requirement that the plaintiff demonstrate that his injury, however slight, will be redressed by the relief sought has been the most important area of tightening up the standing requirements.

In *Linda R.S. v. Richard D.*[161] the Supreme Court held that a mother did not have standing to challenge the refusal of state prosecuting attorneys to prosecute the father of her illegitimate child for failure to support such

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[156] *Id.* at 77-5794, citing United States v. SCRAP, 412 U.S. 669 (1973).

[157] 412 U.S. 669.

[158] Sierra Club v. Morton, 405 U.S. 727 (1972). In a few instances organizational plaintiffs or plaintiffs not directly suffering injury have been accorded standing to protect the interests of third parties. *See, e.g.*, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965); Barrows v. Jackson, 346 U.S. 249 (1953). *See also* Mottola v. Nixon, 464 F.2d 178 (9th Cir. 1972), where the court held that members of the military reserves not under orders to report to the Indochina theatre did not have standing to challenge use of military personnel in Cambodia.

[159] For examples of dismissals of actions on the basis that alleged illegality on the part of the IRS had befallen individuals other than the plaintiffs, *see* Matthews v. United States Treasury Dep't, 60 F.R.D. 212 (C.D.Cal. 1973) and Dennison v. United States, 31 Am. Fed. Tax R. 2d 73-1348 (S.D.N.Y. May 1, 1973).

For examples of refund suits which were dismissed because taxpayers other than the plaintiff had paid the tax, *see* Dow Jones & Co., Inc. v. United States, 128 F. Supp. 748 (Ct. Cl. 1955) and Crown Zellerbach Corp. v. United States, 14 Am. Fed. Tax R. 2d 6340 (N.D. Cal. Oct. 31, 1964).

But see International Telephone and Telegraph Corp. v. Alexander, 396 F. Supp. 1150 (D. Del. 1975), where the court found sufficient injury-in-fact in that IT&T would be forced to defend suits brought by numerous shareholders of an acquired corporation who detrimentally relied upon its representations concerning the taxfree character of a merger.

[160] *See* Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974), where military reservists were denied standing to challenge service by members of Congress in the military reserves under U.S. CONST. art. I, § 6, cl. 2. *See also* Frothingham v. Mellon, 262 U.S. 447 (1923). *Cf.* Flast v. Cohen, 392 U.S. 83 (1968) (federal taxpayers may challenge federal spending program if they demonstrate the requisite personal stake in the outcome).

[161] 410 U.S. 614 (1973).

child. The Court concluded that prosecution of the father would result only in his being convicted of a completed offense and jailed. Whether that would result in payment of support was regarded as speculative at best.[162]

The redressability requirement was re-emphasized in *Warth v. Seldin*,[163] in which organizations and individuals in Rochester, New York challenged the zoning ordinances of Penfield, a suburb of Rochester. The plaintiffs alleged that the zoning ordinances had been used to exclude low and moderate income persons by allocating most of the town's land to relatively expensive single family housing. The Court held:

> Petitioners must allege facts from which it reasonably could be inferred that, absent the respondent's restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed.[164]

The Court noted the difficult burden imposed on plaintiffs alleging injury at the hands of third parties because of government action.[165] The Court noted that the individual plaintiffs who alleged that they desired housing in Penfield had not indicated that they had financial resources sufficient to obtain housing in any of the contemplated projects. The Court concluded that "their individual financial situations and housing needs suggest . . . that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of the respondents' assertedly illegal acts."[166]

A more recent decision of the Supreme Court indicates that the court in *ASTA* went too far in requiring the plaintiff to negate every possibility under which it might still suffer competition if relief against the IRS was granted. In *Arlington Heights v. Metropolitan Housing Corp.*,[167] one of the plaintiffs, a development corporation, applied for rezoning of a fifteen acre parcel from single family to multiple family classification in order to construct housing for low income persons. The Court agreed that the corporation had standing to challenge the refusal to rezone on the basis that it constituted an absolute barrier to construction of such housing. The Court

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[162] *Id.* at 618. Perhaps equally important to the decision was the court's conclusion that "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.* at 619.

[163] 422 U.S. 490 (1975).

[164] *Id.* at 504.

[165] *Id.* at 505.

[166] *Id.* at 506.

[167] 429 U.S. 252 (1977). *See also* National Ass'n of Neighborhood Health Centers v. Mathews, 551 F.2d 321 (D.C. Cir. 1976).

noted that the corporate plaintiff would still have to qualify for financing and federal subsidies and that rezoning would not *guarantee* construction of the project.[168] It determined, however, that "[w]hen a project is as detailed as [the plaintiff's], a court is not required to engage in undue speculation as a predicate for finding that the plaintiff has the requisite personal stake in the controversy."[169]

The decision in *Arlington Heights* makes it clear that the plaintiff must assert the likelihood, not the inevitability, that the injury he suffers will be alleviated by cessation of the allegedly illegal action. Thus, if illegal action of the IRS stiffens ASTA's competition, a plaintiff is required to allege only that the demanded relief would restore the competitive equilibrium that would exist without the illegal action. To require that the plaintiff convincingly allege that the requested relief would eradicate all competition, as does the opinion in *ASTA*, is a misapplication of *Data Processing Service, Arnold Tours, Investment Co. Institute* and many other decisions involving standing predicated on competitive injury.

Where a plaintiff has suffered competitive injury because a federal agency has violated a federal statute designed to protect competitive interests, that plaintiff has standing to challenge the alleged illegality. This principle was firmly established in *Hardin v. Kentucky Utilities Co.*[170] This does not mean that a party suffering from competition a fortiori has standing to challenge government action even when the government is fostering lawful competition.[171] But when an agency is authorized to protect competition, then an interested competitor has standing to challenge those departures from the congressional intent that illegally impair competitive balance.[172]

Cases in the lower federal courts since *Kentucky Utilities Co.* have clearly demonstrated an inclination to grant a competitor standing when it is arguably called for by the statutory provision at issue. In *Curran v. Laird*[173] the National Maritime Union and its members were held to have standing

[168] 429 U.S. at 261.

[169] *Id.*

[170] 390 U.S. 1, 6 (1968), citing the Chicago Junction Case, 264 U.S. 58 (1924).

[171] Tennessee Power Co. v. TVA, 306 U.S. 118 (1939).

[172] This is consistent with the Court's construction of § 402(b) of the Communications Act of 1934, 47 U.S.C. § 402(b) (1970), in Commission v. Sanders Radio Station, 309 U.S. 470 (1940), wherein licensees economically injured by grant of broadcasting licenses to others were permitted to challenge such grants of licenses. The Court concluded that Congress "may have been of the opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license." The doctrine of competitor standing became so entrenched in the communications industry that economic injury was the only basis for challenge of a license. This notion was rejected in the Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966).

[173] 420 F.2d 122 (D.C. Cir. 1969).

to sue the Secretary of Defense for an alleged violation of the Cargo Preference Act.[174] In *Scanwell Laboratories, Inc. v. Shaffer,* [175] one of the leading cases on competitor standing and the reviewability of federal agency action, a disappointed second lowest bidder for a FAA contract was held to have standing to challenge the agency's acceptance of the lowest bid on the allegation that the bid was nonresponsive.[176]

Of course, competitive economic injury is not the only sort of injury that will confer standing on a plaintiff;[177] however, a court may not turn a deaf ear to allegations of competitive injury at the hands of the IRS by distinguishing cases such as *Data Processing Service* on the basis that they are not tax cases. The court in *ASTA* erred in doing so. The IRS, in its rulings function, has a responsibility to maintain competitive equilibrium whenever Congress mandates such equilibrium. The IRS can be called to account for its actions at the behest of parties injured when it fails to implement Congress' mandates.

Plaintiffs bringing actions for declaratory and injunctive relief against the IRS should not be limited by the narrow constructions of standing requirements in *Tax Analysts and Advocates* and *ASTA* because those holdings are unjustified in light of other authority. No legislative addition to the jurisdiction of the federal courts is necessary for such suits, particularly when they are based upon competitive injury. The APA, as construed by the federal courts, provides sufficient basis for such standing.

III. REVIEWABILITY OF IRS ACTION UNDER THE ADMINISTRATIVE PROCEDURE ACT

Cases such as *Eastern Kentucky Welfare Rights, Tax Analysts and Advocates, ASTA* and others[178] demonstrate that IRS action, particularly in its

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[174] 10 U.S.C. § 2631 (1970).

[175] 424 F.2d 859 (D.C. Cir. 1970).

[176] *See also* Merriam v. Kunzig, 476 F.2d 1233 (3d Cir. 1973), *cert. denied, sub nom.* Gateway Center Corp. v. Merriam, 414 U.S. 911 (1973); William F. Wilke, Inc. v. Department of the Army of the United States, 485 F.2d 180 (4th Cir. 1973); Constructores Civiles de Centroamerica, S.A. v. Hannah, 459 F.2d 1183 (D.C. Cir. 1972), *cert. denied,* 409 U.S. 868 (1972); Ballerina Pen Co., Inc. v. Kunzig, 433 F.2d 1204 (D.C. Cir. 1970), *cert. denied, sub nom.* National Industries for the Blind v. Ballerina Pen Co., Inc. 401 U.S. 950 (1971); Blackhawk Heating & Plumbing Co. v. Driver, 433 F.2d 1137 (D.C. Cir. 1970); Air Reduction Co. v. Hickel, 420 F.2d 592 (D.C. Cir. 1969); Trailways of New England, Inc. v. C.A.B., 412 F.2d 926 (1st Cir. 1969).

[177] Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966); United States v. SCRAP, 412 U.S. 669 (1973); Scenic Hudson Preservation Cong. v. Federal Power Commission, 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 487 U.S. 935 (1967). This is also true in the context of actions against the IRS. *See* Tax Analysts and Advocates v. Shultz, 376 F. Supp. 889 (D.D.C. 1974) and Common Cause v. Shultz, 73-2 U.S. TAX CAS. ¶ 9592 (D.D.C. Aug. 1, 1973).

[178] *E.g.,* Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), and Center for Corporate Responsibility v. Shultz, 368 F. Supp. 863 (D.D.C. 1973).

rulings function, may often be alleged to have consequences transcending the collection of revenues. Although the plaintiffs in these cases alleged that action by the IRS resulted in some sort of injury to them because of improper interpretation of the tax laws, it is most unlikely that the IRS action in those instances could ever have been tested judicially through a refund suit or in the Tax Court. In his dissent in *"Americans United" Inc.* Justice Blackmun decried the power of the IRS to make social policy, a power that might imperil an exempt organization without prior checks and balances provided by judicial review.[179] Justice Blackmun's views are well-founded based upon developments in other areas of federal regulation.

While "Americans United" Inc. or a donor may have had an opportunity to challenge the allegedly erroneous action of the Commissioner, it is doubtful that the plaintiffs in *Eastern Kentucky Welfare Rights, Tax Analysts and Advocates* and *ASTA* would have had such opportunities. If the plaintiffs therein had alleged social or competitive harm resulting from illegal activity of agencies other than the IRS, it is clear that, assuming standing requirements are met, review would be available in the federal courts. In recent years the Supreme Court and lower federal courts have greatly expanded the scope of administrative action that may be reviewed under the APA.[180]

There presently exists a strong presumption in favor of reviewability of agency action in the federal courts. In *Abbott Laboratories v. Gardner,*[181] drug manufacturers challenged a regulation issued by the Commissioner of Food and Drugs[182] requiring that each instance of a drug's proprietary name on its label be accompanied by the drug's established (generic) name. The plaintiffs sought pre-enforcement review of the regulation. The court of appeals held that such review was beyond the jurisdiction of the district court.[183] The Supreme Court reversed. Justice Harlan, writing for the Court, noted that the manufacturers as a result of the regulation, were placed in the position of having to change all of the labels on their stock and all of their advertisements before obtaining judicial review:

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[179] 416 U.S. 752 (1974).

[180] *See* notes 79 & 80 *supra.*

[181] 387 U.S. 136 (1967). *See also* Rusk v. Cort, 369 U.S. 367 (1962). The government brief in *Eastern Kentucky Welfare Rights* attempts to distinguish the Court's decisions on reviewability of the decisions of other agencies. "[T]he court's decisions with respect to the availability of judicial review of other agency actions under the provisions of other statutes . . . have no bearing on the jurisdictional questions presented here." Brief of government at 58. Whether this is correct in light of the legislative history of the APA shall be examined *infra.*

[182] *See* Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-392 (1970).

[183] 352 F.2d 286 (3rd Cir. 1965).

> Where the legal issue presented is fit for judicial resolution, and where a regulation requires immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to non-compliance, access to the courts under the Administrative Procedure Act, and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance.[184]

Decisions of the Supreme Court since *Abbott Laboratories* indicate that the availability of judicial review of agency action is not limited to instances where the plaintiff is caught between severe penalties for noncompliance and considerable expense for compliance with an allegedly invalid agency determination. Indeed, these cases demonstrate that nonreviewability of federal agency action at the behest of individuals or entities aggrieved is exceptional.

In *Citizens to Preserve Overton Park v. Volpe*,[185] private citizens and local and national conservation organizations were permitted to challenge approval by the Secretary of Transportation of an interstate highway route through a public park. The plaintiffs contended that the Federal Highway Act of 1968[186] prohibited the Secretary from authorizing highway construction through a public park if feasible and prudent alternative routes existed and alleged that the Secretary had not indicated why there were no such feasible and prudent alternative routes. The Court, citing *Abbott Laboratories,* held that the determination approving the highway route was reviewable absent a showing that Congress sought to prevent judicial review.[187]

In *Dunlop v. Bachowski*[188] the court held that a determination of the Secretary of Labor not to set aside a union election could be reviewed in an action by a defeated union election candidate. The court held that "[j]udicial review of a final agency action will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."[189]

The strong presumption of reviewability of federal agency action arising from the above decisions has ample support in the legislative history of the APA as expressed in the report of the House Judiciary Committee:

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[184] 387 U.S. at 153.

[185] 401 U.S. 402 (1971).

[186] 23 U.S.C. § 138 (1970).

[187] 387 U.S. at 103.

[188] 421 U.S. 560 (1975).

[189] *Id.* at 567. *See also* Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970); Scanwell Laboratories Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970); and Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1971), *vacated as moot,* 404 U.S. 403 (1972).

> To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.[190]

Although there is no statute which provides for judicial or any other sort of review of the issuance of a revenue ruling,[191] it could be argued that anyone aggrieved by such IRS action, if some sort of injury can be established, should be able to seek judicial review of the action under Section 10 of the APA since there is no explicit prohibition against such review.

In its brief in *Eastern Kentucky Welfare Rights,* the government, as noted above, made essentially two arguments: that the revenue ruling process is informational, and, therefore, not subject to interference by the courts under the APA; and that Congress intended in passage of the Anti-Injunction Act and Declaratory Judgment Act exception to exclude the federal courts from general review authority over administration of the internal revenue laws.

As to the first contention, an appropriate method of framing the inquiry might be to consider whether the issuance of a revenue ruling by the IRS possesses sufficient finality of administrative action to permit review under the APA. On several occasions, the issuance of a rule, regulation, or interpretation has been sufficient to create a justiciable controversy. In *Abbott Laboratories,* the promulgation of a regulation adversely affecting a manufacturer was sufficient for judicial review. In *Columbia Broadcasting System, Inc. v. United States,*[192] a decision that antedated the APA, the Supreme Court held that a federal court had jurisdiction over a CBS challenge to FCC licensing regulations. The challenged regulations prohibited granting of licenses to radio stations having contracts with a network such as the contracts CBS had with its affiliates. CBS alleged that its affiliates had cancelled or were threatening to cancel contracts with it as a result of the regulations. The Court held that "[t]he Commission's contention that the regulations are no more reviewable than a press release is hardly reconcilable with

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[190] H.R. REP. No. 1980, 79th Cong., 2d Sess. 41 (1946).

[191] The Administrative Procedure Act does provide for notice of proposed rulemaking proceedings in the Federal Register and an opportunity for interested persons to participate. 5 U.S.C. § 553. However, this requirement has been held not to apply to revenue rulings on the basis that such rulings are "interpretive" rather than substantive. 506 F.2d at 1290. The Supreme Court did not disturb this determination by the court of appeals in its decision in *Eastern Kentucky Welfare Rights.*

[192] 316 U.S. 407 (1942).

its own recognition that the regulations afford legal basis for cancellation of the license of a station if it renews its contract with the appellant."[193]

Cases under the APA indicate that an agency, in nonadjudicatory action, may not avoid judicial review through the assertion that a determination having serious impact on interested parties is not final.[194] In *Independent Bankers Association of America v. Smith*,[195] a ruling of the Comptroller of the Currency that customer bank communication terminals were not "branch" banks within the meaning of the National Banking Act,[196] and hence subject to the Act's limitations on branch banking, was held to be sufficiently final to permit judicial review. The court, citing *Abbott Laboratories*, held that "an agency's interpretation of its governing statute, with the expectation that regulated parties will conform to and rely upon this interpretation, is final agency action fit for judicial review."[197]

From these decisions it appears that if the IRS's interpretation of the tax laws results in injury to an individual or entity such interpretation should be subject to challenge under the APA assuming that standing requirements have been met. This is true unless such interpretation is committed to agency discretion under the APA.

The Administrative Procedure Act contains limitations on the scope of judicial review available thereunder.[198] The legislative history of the APA indicates that these limitations were intended to be construed narrowly.[199] As noted above, the government argued vigorously in *Eastern Kentucky Welfare Rights* that Congress has chosen not to give the federal courts general authority to review IRS policy decisions.

It is clear that to a degree Congress did intend to limit judicial review of IRS action. Notwithstanding the judicial review provision of the APA,

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[193] *Id.* at 422.

[194] *See* Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) where the court held that an order of the EPA refusing to suspend federal registration of the pesticide DDT on the ground that there was no "imminent hazard" was sufficiently final to warrant judicial review.

[195] 534 F.2d 921 (D.C. Cir. 1976) *cert. denied, sub nom.* Bloom v. Independent Bankers Ass'n of America, 429 U.S. 862 (1976).

[196] 12 U.S.C. §§ 1 to 215 (1970).

[197] 534 F.2d at 929.

[198] 5 U.S.C. § 701(a)(1) & (2) (1970), provide that judicial review shall be available except to the extent that "statutes preclude judicial review" or "agency action is committed to agency discretion by law."

[199] S. REP. No. 752, 79th Cong., 2d Sess. 26 (1946): "Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified." *Accord*, 390 U.S. 150 (1950).
But see Cyrus v. United States, 226 F.2d 416 (1st Cir. 1955); Motah v. United States, 402 F.2d 1 (10th Cir. 1968).

the restrictions on judicial action embodied in the Anti-Injunction Act and the Declaratory Judgment Act exception retain their validity. Whether these two provisions were intended to be applicable to IRS actions other than tax assessment and collection shall be discussed herein.

The legislative history of the APA indicates that the proper inquiry in determining reviewability vel non is not to look for special authorization for judicial review, but rather to look for specific exclusion of the federal courts from jurisdiction.

The government brief in *Eastern Kentucky Welfare Rights* bases the existence of a general exclusion of the federal courts from jurisdiction in federal tax matters upon essentially two things: the long standing power of the Commissioner of Internal Revenue to issue rules and regulations pertaining to tax matters and the creation of the Joint Committee on Internal Revenue Taxation as a tax oversight committee.

There may be some validity to the contention that Congress intended that the rulemaking powers of the Commissioner not be subject to judicial review. Some justification for such a position may be found in the provisions of the Revenue Bill of 1938[200] authorizing the Commissioner to make closing agreements as to transactions not yet completed. Some language in the scant legislative history of this provision indicates that Congress intended that the Commissioner exercise considerable discretion in making closing agreements.[201] The language of the House committee report lends some credence to the contention of the government that the IRS has been given a unique authority over the administration of the tax laws. The legislative history reveals no explicit intention, however, to exclude judicial review of the closing agreement or rulings process.

Furthermore, the contention in the government brief in *Eastern Kentucky Welfare Rights,* that the Joint Committee on Internal Revenue Taxation[202] was intended to ensure that the Commissioner could administer the

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[200] §§ 801, 802, 52 Stat. 573 (Codified at I.R.C. § 7121(a), (b)). This authorized the Commissioner to give rulings and advice as to prospective as well as consummated transactions. For the most part the Service refused to issue rulings as to prospective transactions, a policy announced in Mim. 4963, 1939-2 CUM. BULL. 459, until 1953 when the Service began to issue rulings on proposed transactions. Rev. Rul. 10, 1963-1 CUM. BULL. 488.

[201] H.R. REP. No. 1860, 75th Cong., 3d Sess. 67 (1938) notes:

> Closing agreements will also be possible concerning transactions not yet consummated at the time of the agreement. The authority given to the Commissioner under this section is discretionary. Since closing agreements of this type will constitute a new method of settling controversies, it is contemplated that the Commissioner will exercise his discretionary power only where such exercise is in the interests of a wide administration of the revenue system.

[202] This committee was created by the Revenue Act of 1938, Ch. 27, § 1203, 44 Stat. 127 (now I.R.C. §§ 8001, 8002, 8021, 8022).

assessment and collection of taxes free from fear of judicial review, is not supported. There is no mention of such an intent in the purpose clause of the act creating the committee.[203]

The Joint Committee does indeed have authority to investigate the administration of the tax laws not only generally,[204] but also on a case by case basis.[205] The case by case participation of the Committee occurs primarily in cases of very large refunds or credits. If allegations of illegality against the IRS by plaintiffs who cannot secure judicial relief in regular tax proceedings involve important issues, such review powers of the Committee might be a sufficient substitute for judicial relief. Many nontaxpayer suits do not seek to disgorge large sums from the Treasury or to bring about tax policy reform. Such actions often seek relief against actions of third parties, harmful to the plaintiff, that have been somehow illegally fostered by the IRS. It would seem more appropriate to permit the injured party to seek his own redress since the allegedly illegal action may cause no harm at all to the government. Indeed, an important rationale of the standing limitation on federal jurisdiction is that the party directly aggrieved is best suited to seek his own relief.

It is important to note that passage of the APA followed both the creation of the Joint Committee and the authorization of the Commissioner to enter into closing agreements as to transactions not yet consummated. The legislative history of the APA reveals no intention on the part of Congress to provide a general exemption from judicial review, and its consideration of IRS functions in particular reveals that Congress intended that agency action should be exempted from Section 10 only to the extent it is reviewable de novo in the Tax Court or in the district courts. Review by the Joint Committee could not be at the instance of the party aggrieved. Contrary to the government's contention in *Eastern Kentucky Welfare Rights* there is no general exemption of the IRS from Section 10 of the APA.

It is clear from the legislative reports accompanying the APA that Congress intended to exempt no particular agency from judicial review under Section 10. Only particular functions of some agencies were ex-

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[203] H.R. REP. No. 1, 69th Cong., 1st Sess. 23 (1925). The House Ways and Means Committee stated:

> It shall be the duty of the committee to investigate and report upon the operation, effects and administration of the Federal system of income and other internal revenue taxes and upon any proposals or measures which in the judgment of the commission may be employed to simplify or improve the operation or administration of such systems of taxes and to make and report upon such other investigations in respect of such system of taxes as the commission may deem necessary.

[204] I.R.C. § 8022.

[205] I.R.C. § 6405.

empted.[206] It is also clear that Congress did intend to exempt some IRS action from judicial review under Section 10 but that this limitation applied only to matters which may be tried de novo in the Tax Court or the United States district courts.[207]

It is at least arguable that Congress considered excluding the IRS closing agreements function, which developed into the rulings program,[208] from the APA and rejected such a proposal since the following provision appeared in a House version of the Act:

> Sec. 404. Judicial review by an agency tribunal may be had in the manner and to the same extent as final orders or other determinations of that agency tribunal; except that this title shall not be deemed to modify existing provisions of law applicable to closing agreements concerning internal—revenue—tax matters.[209]

No such language was included in the final version of the APA.

On balance, the ambiguous language in the legislative histories of the closing agreements provision of the Revenue Act of 1938 and the provision of the Revenue Act of 1926 creating the Joint Committee on Internal Revenue Taxation is probably not of sufficient weight to create an exception to the overriding intent of Congress to provide for review of most federal agency action. At the time of the enactment of the APA, the courts had been purposely excluded from all but limited review of the assessment and collection of taxes. That Congress took cognizance of this exclusion in enacting the APA, and did not extend the restrictions on judicial review to other IRS functions, is convincing evidence that Congress never intended to provide a unique insulation from judicial review for the IRS.[210] Whether or not the rulings function may realistically be regarded as part of the tax assessment and collection functions of the IRS in all cases is a matter that will be discussed in the next section.

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[206] In S. REP. No. 752, 79th Cong., 1st Sess. 5 (1946) the Senate Judiciary Committee noted:

> [I]t has been the undeviating policy [of the committee] to deal with types of functions as such and in no case with administrative agencies by name. Thus certain war and defense functions are exempted, but not the War or Navy Departments in the performance of their other functions. Manifestly, it would be folly to assume to distinguish between "good" agencies and others, and no such distinction is made in the bill. The legitimate needs of the Interstate Commerce Commission, for example, have been fully considered but it has not been placed in a favored position by exemption from the bill.

[207] *Id.* at 28. The Senate Judiciary Committee, in considering agency functions exempted from judicial review, specifically used tax assessments as an example.

[208] *Supra* note 201.

[209] H.R. REP. No. 184, 79th Cong., 1st Sess. (1945).

[210] Brief for government, 506 F.2d 1278.

IV. THE SCOPE OF THE ANTI-INJUNCTION ACT AND THE DECLARATORY JUDGMENT ACT EXCEPTION

In order to sustain as wide a scope as possible for the Anti-Injunction Act, the government attributed to Congress in *Eastern Kentucky Welfare Rights*, an intent to preclude judicial interference with the expertise of the Commissioner in Internal Revenue matters.[211] It is argued that from this intent flows a prohibition which is so all encompassing that it includes any judicial review of a revenue ruling, even when such review will have no effect on or even increase tax revenues. In truth, there is no way to determine Congress' intent in enacting the Anti-Injunction Act, for the Act has no legislative history.[212]

It has been contended that it is likely that Congress did not even consider application of the Anti-Injunction Act to actions for injunctive or declaratory relief by persons or entities whose tax liability is not at issue and which do not threaten interference with collection of tax revenues.[213] The House Ways and Means Committee in considering the Tax Reform Act of 1976, specifically refused to criticize or endorse such actions.[214]

Realistically, all that can be done in attempting to determine whether Congress intended as wide a scope for the Anti-Injunction Act as the government urges in *Eastern Kentucky Welfare Rights* is to examine the provision in context with other statutes and with prior and subsequent court decisions. The Anti-Injunction Act was enacted as an amendment to a provision of the Revenue Act of 1866 which limits the right to sue for recovery of taxes paid

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[211] *Id.* at 35-39.

[212] For an excellent discussion of attempts to locate a legislative history of the Anti-Injunction Act, *see* Note, *Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition*, 49 HARV. L. REV. 109, n.9 (1935).

[213] *See* IT&T v. Alexander, 396 F. Supp. 1150 (D. Del. 1975).

[214] H.R. REP. No. 658, 94th Cong., 2d Sess. 284, n.6 (1976). The Committee noted:

> The Supreme Court has implicitly held that under certain circumstances suits can be brought by third parties to restrain the Internal Revenue Service from treating an organization as being exempt. Coit v. Green, 404 U.S. 997 (1971), affirming Green v. Connally, 330 F. Supp. (D.D.C. 1971), a decision by a special three judge district court. This bill constitutes neither an implied endorsement nor an implied criticism of such "third party" suits. However, your committee does intend that, with respect to accepting *amicus curiae* briefs and permitting appearances by third parties in declaratory judgment suits under this bill, the courts should be as generous as they can be, in light of the expeditious decisions in those cases and the general state of the courts' calendars.

This referred specifically to a provision providing for declaratory judgments for the status of § 501(c)(3) organizations. *Id.* n.11.

until after an appeal was made to the Commissioner of Internal Revenue.[215] The 1866 provision prevented an action to recover the tax actually paid before a claim was made to the Commissioner but it did not eliminate actions for injunctive relief before the tax was collected or assessed.[216] The failure of the 1866 Act to prescribe injunctive relief was a consequential omission since at least one federal circuit court had construed the Revenue Act of 1864[217] as preserving an 1833 statute[218] which provided broad federal court jurisdiction to grant remedies to aggrieved taxpayers. In *Cutting v. Gilbert*[219] a group of bankers and brokers sought to enjoin a tax under Section 99 of the Revenue Act of 1864.[220] The court denied relief on the basis that a determinate number of taxpayers could not bring an action on behalf of other taxpayers similarly situated. The court noted, however:

> I do not doubt the jurisdiction or power of the courts to interfere, and prevent the threatened imposition of the tax, if it is illegal. The second section of the act of March 2, 1833 (4 Stat. 632), known as the "Force Act," confers jurisdiction in express terms, and has been applied to the Act of 1864, by its fiftieth section. And jurisdiction had previously, and

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[215] Act of July 13, 1866, ch. 184, § 19, 14 Stat. 152 (now I.R.C. § 6532(a)). This ancestor of the present section limiting refund suits read as follows:

> [N]o suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue according to the provisions of the law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of said commissioner shall be had thereon, unless such a suit shall be brought within six months from the time of said decision, or from the time this act takes effect: *Provided,* that if such decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal.

[216] Thus, the text of the Anti-Injunction Act read simply: "That section nineteen is hereby amended by adding the following thereto: 'And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court.' " Act of March 2, 1867, ch. 169, § 10, 14 Stat. 475 (now I.R.C. § 7421(a)). This provision was added to the 1867 Act by Sen. Fessenden of Maine who was responsible for the wording of § 19 of the 1866 Act. *See* Note *supra* note 212; CONG. GLOBE, 39th Cong., 1st Sess. 3382 (1866).

[217] Ch. 173, 13 Stat. 241.

[218] The statute was the so-called "Force Act" of March 2, 1833, ch. 57, 4 Stat. 632. Section 50 of the 1864 Act did refer to the 1833 Act. Section 2 of the Force Act provided: "[T]he jurisdiction of the circuit courts of the United States shall extend to all cases, in law or equity, arising under the revenue laws of the United States, for which provisions are not already made by law . . . ." The Supreme Court held in Insurance Co. v. Ritchie, 72 U.S. (5 Wall.) 541 (1866), that § 67 of the Revenue Act of 1866, 14 Stat. 172, deprived the federal courts of jurisdiction in suits involving the internal revenue acts where diversity of citizenship was lacking between the plaintiff and the defendant revenue official. As a result of this decision the only actions for injunction that could be maintained concerning federal taxes were those against customs officials and those against internal revenue officials where diversity existed. The Force Act was repealed as obsolete by the Act of March 3, 1933, ch. 202, 47 Stat. 1428.

[219] 6 F. Cas. 1079 (C.C.S.D.N.Y. 1865).

[220] *Supra* note 217.

has since been upheld and exercised upon general principles of equity jurisprudence.[221]

In light of the availability of injunctive relief to plaintiffs contesting assessment and collection of federal taxes prior to 1867, the attempt to limit taxpayers in the 1866 Act must be seen as incomplete. The Anti-Injunction Act, in that context, appears not as a broad statement of congressional intent to exclude the federal courts from reviewing the functions of the IRS but as an attempt to plug a leak in the 1866 legislation.[222]

The early decisions of district courts construing the Anti-Injunction Act clearly indicate its very particular and limited purpose. In *Howland v. Soule*,[223] the court, holding that an action for injunctive relief against collection of a federal tax by distraint was barred by the Anti-Injunction Act reasoned:

> A person not pleased with a tax will readily conclude that it is illegal or erroneous, and a suit for injunction follows. His neighbor soon catches the infection, and the result would be that the wheels of government would be stopped by injunction and revenue would cease to flow into the treasury . . . . The statute prohibits all suits to enjoin the collection of a tax, and leaves the person who considers himself aggrieved by the collection thereof to the ordinary and usual remedy—an action at law to recover back the amount paid.[224]

Likewise, in *Delaware Railroad Co. v. Prettyman*,[225] the court construed the Anti-Injunction Act simply as withdrawing the power of injunctive relief against tax assessments and collections, "which it [was] believed on good legal authority rested in the power of the courts . . . ."[226]

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[221] 6 F. Cas. 1080. *See also* Magee v. Denton, 16 F. Cas. 382 (C.C.N.D.N.Y. 1863) where an action to enjoin collection of tax under the Revenue Act of 1862, ch. 119, 12 Stat. 433 was unsuccessful not because jurisdiction was lacking but because the plaintiff failed to avail himself of the steps required to invoke the legal remedy of mandamus.

[222] It is easier to view the 1866 and 1867 legislation restricting taxpayer remedies simply as an attempt to balance relief to the taxpayer with the government's need for prompt collection of revenues in light of Congress' creation of the Board of Tax Appeals in 1924. Revenue Act of 1924, Pub. L. No. 68-176, § 900 (now I.R.C. § 7441). This provided a forum where a taxpayer could litigate the validity of the tax before paying it. That the Board was intended as a means of restoring the balance between the needs of government and the taxpayer is indicated by the following comment by Rep. Gore during hearings on the legislation:

> [T]he taxpayer . . . is absolutely at the mercy of the Commissioner unless he is wealthy and can go to court. Every man who is unjustly assessed to an amount of $3,000 or less, can not afford to go into the Federal Court and fight it out. He can better afford to pay it, however unjust it may be.

REVENUE REVISION OF 1924: HEARINGS OF THE WAYS AND MEANS COMMITTEE OF THE HOUSE OF REPRESENTATIVES, 68th Cong., 1st Sess. 459-60 (1924).

[223] 12 F. Cas. 743 (C.C.D.Cal. 1868).

[224] *Id.* at 744.

[225] 7 F. Cas. 408 (C.C.D.Del. 1872).

[226] *Id.* at 409. *See also* Kissinger v. Bean, 14 F. Cas. 689 (C.C.E.D.Wis. 1875).

The decision of the Supreme Court in the *State Railroad Tax Cases* states broadly the legislative rationale behind the Anti-Injunction Act.[227] An analysis of the Anti-Injunction Act in context with other enactments and the early decisions construing it leads to two conclusions. The first is that the Anti-Injunction Act is inseparable from the notion of preventing interference with the actual assessment and collection of revenues. There is no basis for attributing any other tax administration purpose to Congress. Therefore, if an administrative function of the IRS does not actually involve the assessment and collection of taxes, then the Anti-Injunction Act is inapplicable.

The second observation that must be made is that an essential indicium of an assessment or collection function is that it be reviewable in a manner contemplated by Congress. As clearly as Congress intended to limit taxpayer remedies in the 1866 and 1867 Revenue Acts, it also intended to provide controlled alternatives for redress. If Congress has not provided a specific remedy for an individual or entity to challenge a particular action of the IRS, then it has not ousted the federal courts from jurisdiction.

The decisions of the Supreme Court in *Bob Jones University* and *"Americans United" Inc.* are consistent with these two observations. In both cases, while the possibility of tax liability on the part of the plaintiffs, and hence actual interference with collection of revenues was questionable, judicial relief with respect to the plaintiffs would have unquestionably affected the tax liability of the donors to the formerly tax-exempt organizations in both cases. Assuming that both organizations had donors willing to challenge the disallowance of a deduction of a contribution to the plaintiffs, or that the organizations would themselves have unemployment tax liability, judicial intervention would be improper because remedies in the Tax Court or a refund suit could have been pursued. Probably it was in recognition that the availability of prescribed forms of relief was so attenuated for both these plaintiffs that Congress provided a special form of declaratory relief in the Tax Reform Act of 1976.[228] This relief is available regardless of the obvious effects on the assessment and collection of taxes on the donors to purported tax-exempt organizations.

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[227] 92 U.S. 575 (1875). The court stated the rationale of Congress in enacting the Anti-Injunction Act as follows:

> [I]t shows the sense of Congress of the evils to be feared if the courts of justice could, *in any case,* interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment: and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice.

92 U.S. at 613. *See also* Snyder v. Marks, 109 U.S. 189, 193 (1883).

[228] *Supra* note 11.

Lower federal court decisions have tended to hold the Anti-Injunction Act inapplicable in cases involving plaintiffs challenging IRS action not directly involving their own taxes and where the relief requested could not plausibly result in a diminution of tax revenues. The prohibitions of the Anti-Injunction Act have remained intact, however, in those cases where the plaintiffs' suits would threaten to diminish federal revenues. Three recent cases have demonstrated the courts' application of the Anti-Injunction Act, *Cattle Feeders Tax Committee v. Shultz,*[229] *Investors Syndicate of America v. Simon,*[230] and *Educo, Inc. v. Alexander.*[231] In *Cattle Feeders Tax Committee* the plaintiffs, unincorporated associations, sought injunctive relief against Revenue Ruling 73-530,[232] which limited the ability of farmers on the cash basis method of accounting to deduct the cost of feed in tax years other than in the year the feed was actually consumed. The plaintiffs alleged that the ruling discouraged investment in the cattle business, thereby destroying the business of their members and causing irreparable injury. The court held that the plaintiffs failed to meet the strict requirements for injunctive relief embodied in the *Williams Packing and Navigation Co.* decision[233] and emphasized the availability of an alternative remedy to litigate the issues raised by the plaintiffs' suit since "any investor . . . could litigate the validity of the ruling in a suit for refund or in the Tax Court."[234]

In *Investors Syndicate of America,* the plaintiff was an investment company seeking injunctive relief against certain Treasury regulations that required holders of face amount certificates to report ratable portions of interest to be received at payout in the years before payout.[235] The plaintiff alleged that the promulgation of these regulations made these certificates unmarketable. The Court recognized that since any taxes on an interest in such certificates were imposed on the purchasers and not the sellers, the plaintiff would have no forum to contest the validity of the regulations.[236] Citing *Cattle Feeders Tax Committee,* however, the court held that the plaintiff's suit was barred by the Anti-Injunction Act because the plaintiff

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229 504 F.2d 462 (10th Cir. 1974).

230 407 F. Supp. 83 (D.D.C. 1975).

231 557 F.2d 617 (7th Cir. 1977).

232 Because of the filing of the suit in *Cattle Feeders Tax Committee* the IRS announced in TIR-1266, P-H 1973 FED. TAXES ¶ 55,446 (Dec. 12, 1973), that it would delay publication of Rev. Rul. 73-530. The Service announced it would maintain the ruling's interpretation but the ruling was never published.

233 370 U.S. 1 (1962).

234 504 F.2d at 466.

235 Treas. Reg. § 1.1232-1(c)(3) and § 1.1232-3A(f)(1) (as amended by T.D. 7365, 1975-2 CUM. BULL. 345).

236 407 F. Supp. at 85.

had failed to meet its burden of showing that under no circumstances could the government ultimately prevail.

In *Educo, Inc.*, the plaintiff was a corporation engaged in designing, administering and implementing educational benefit plans for corporate employees. In Revenue Ruling 75-448,[237] the IRS announced that employer contributions to such plans for their employees would be deductible as a business expense[238] only when included in the gross income of the employees for whose benefit such contributions were made. As in *Cattle Feeders Tax Committee* and *Investors Syndicate,* the IRS action did not affect the tax liability of the plaintiff in *Educo, Inc.* The plaintiff contended that as a result of the ruling some of its clients had threatened to cancel or had actually cancelled existing plans. The plaintiff contended that it only wished to maintain its business, but it was clear that an injunction against the challenged ruling would result in a reduction in taxes for numerous taxpayers. The court noted that *"Americans United" Inc.* and *Bob Jones University* applied to this situation and held that the action was barred under the Anti-Injunction Act.[239]

It is clear in *Cattle Feeders Tax Committee, Investors Syndicate* and *Educo, Inc.* that IRS action may have a devastating effect on businesses who are then denied any access to judicial review of such action. When injunctive relief against such action threatens interference with tax collections of *any* individual or entity, the congressional purpose in enacting the Anti-Injunction Act is best served by prohibiting such injunctive relief. Careful selection of plaintiffs could render the Anti-Injunction Act meaningless. Perhaps it is sensible to conclude that in instances where tax collections would be affected, and where deferring a remedy until after payment creates hardship, Congress will act to remedy such hardship.

In recent years, several district courts have granted injunctive relief against IRS action where the plaintiff's tax liability was not at issue. In all but two cases, injunctive relief could not plausibly have caused a diminution in federal revenues. In one very recent and unsettling case, *Investment Annuity, Inc. v. Blumenthal,*[240] the relief granted can only be seen as reducing federal revenues. Why this decision is probably incorrect shall be discussed

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[237] 1975-2 CUM. BULL. 55.

[238] *See* I.R.C. § 162.

[239] 557 F.2d at 620.

[240] 40 Am. Fed. Tax R. 2d 77-5558 (D.D.C. July 12, 1977) (government motion to dismiss reversed); 40 Am. Fed. Tax R. 2d 77-5922 (D.D.C. Sept. 28, 1977) (government motion to dismiss denied); 40 Am. Fed. Tax R. 2d 77-6151 (D.D.C. Nov. 9, 1977) (judgment for plaintiff).

herein. All of these cases can legitimately be regarded as third party or nontaxpayer suits, except perhaps for *Investment Annuity, Inc.*

The first of these decisions, *Green v. Kennedy*,[241] involved an action in which black taxpayers sought to enjoin the Secretary of the Treasury from granting tax-exempt status to private schools in Mississippi that discriminated against blacks in admissions. The court granted a preliminary injunction upon a finding that tax benefits by the IRS to segregated schools and their donors resulted in substantial and significant support to a pattern of segregated schools.[242] It does not appear that the Court even considered the Anti-Injunction Act. After the court entered its preliminary injunction, the IRS determined that it could no longer justify allowing tax-exempt status to schools that practice racial discrimination. In a subsequent opinion arising out of the same controversy, the court in *Green v. Connally*[243] granted a declaration that the Internal Revenue Code requires the denial and elimination of federal tax exemptions for racially discriminatory private schools and of deductions for their contributors. This relief was granted upon the conclusion that the provisions of the Internal Revenue Code on charitable exemptions and deductions could not be construed to frustrate federal policy by supporting schools operating on a discriminatory basis.[244]

Neither the Anti-Injunction Act nor the Declaratory Judgment Act exception was considered by the court in either decision.[245] While the court in *Connally* reviewed a policy determination by the IRS outside of the context of a refund suit, such review does not seem to run afoul of the purpose of Congress in limiting judicial review when assessment or collection of taxes are involved. The action of the court, in denying segregated Mississippi schools tax-exempt status and deductions to their contributors, could plausibly be seen as increasing tax revenues or having no effect upon them at all.

It is probably significant, however, that the IRS had changed its position on the tax exemptions involved in *Connally* during the pendency of the suit. The lack of a truly adversary proceeding and the failure of the court to consider the Anti-Injunction Act issue should probably limit the weight given *Connally* as precedent in the nontaxpayer suit context.

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[241] 309 F. Supp. 1127 (D.D.C. 1970), *appeal dismissed, sub nom.* Cannon v. Green, 398 U.S. 956 (1970). Later proceedings were reported in Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd, sub nom.* Coit v. Green, 404 U.S. 997 (1971).

[242] 309 F. Supp. at 1134.

[243] 330 F. Supp. at 1150.

[244] *Id.* at 1164.

[245] The Anti-Injunction Act would not be inapplicable because the plaintiff's claim involved constitutional issues. *See* United States v. Friends Serv. Comm. 419 U.S. 7, 11 (1974).

In a similar action, *McGlotten v. Connally*,[246] the court considered the applicability of the Anti-Injunction Act and the Declaratory Judgment Act exception. In *McGlotten* the plaintiff, a black American who alleged that he was refused membership in an Elks lodge because of his race, sought to enjoin the Secretary of the Treasury from granting federal tax benefits to fraternal and nonprofit organizations which exclude nonwhites from membership. The plaintiff alleged that to the extent that various sections of the Internal Revenue Code authorized benefits to such organizations, the sections were unconstitutional. Alternatively the plaintiff alleged that the Internal Revenue Code did not authorize such benefits. The court rejected the defendant's contention that the action was barred by the Anti-Injunction Act and the Declaratory Judgment Act exception:

> Plaintiff's action has nothing to do with the collection or assessment of taxes. He does not seek to limit the amount of his own tax, nor does he seek to limit the amount of revenue collectible by the United States. The preferred course of raising his objections in a suit for refund is not available. In this situation we cannot read the statute to bar the present suit.[247]

The court held that permitting deductibility of contributions to fraternal organizations discriminating against racial minorities and permitting a tax exemption for the organizations themselves for passive investment income as well as member generated funds[248] were a form of subsidy by the government within the Civil Rights Act.[249] The court fashioned an appropriate decree to prevent the Commissioner from according favorable tax treatment to such organizations.

In *McGlotten*, the plaintiff's action posed no threat to federal revenues. Assuming that Congress, in enacting the Anti-Injunction Act, intended to defer taxpayer remedies only where there is an effect on federal revenues, it is clear that the court violated no congressional mandate by proceeding to adjudicate the plaintiff's claim. Since Congress created alternative remedies for taxpayers in cases where it wished to protect tax revenues by deferring judicial review, no deferral of judicial review is intended where there is no threat to tax revenues.

This principle was developed further in *Tax Analysts and Advocates v. Schultz*.[250] In that case the plaintiffs, who included a nonprofit corporation

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[246] 338 F. Supp. 448 (D.D.C. 1972).
[247] *Id.* at 453-54.
[248] *See* I.R.C. § 501(c) (8).
[249] 42 U.S.C. § 2000(d) (1970).
[250] 376 F. Supp. 889 (D.D.C. 1974).

interested in "tax reform" and one of its members, sought, *inter alia*, injunctive and declaratory relief against Revenue Ruling 72-355.[251] That ruling permitted, under certain conditions, multiple gifts of $3,000 to different campaign committees of the same candidate for political office to be treated as gifts not to the same candidate. The ruling had the effect of permitting multiple exclusions for gifts to the same candidate from the gift tax provision of the Internal Revenue Code.[252] The individual plaintiff, a taxpayer, voter and small contributor to political campaigns, alleged that the effect of this ruling was to diminish his ability to affect the electoral process and to increase the influence of large contributors. The court held that this was sufficient to confer standing on the plaintiff.[253]

The court, in granting the plaintiff's motion for summary judgment, distinguished *Bob Jones University* and *"Americans United" Inc.* on the basis that the plaintiffs in *Tax Analysts and Advocates v. Schultz* did not seek, unlike the plaintiffs in *Bob Jones University* and *"Americans United" Inc.*, to restrain the enforcement of any tax. The court concluded that "Tax Analysts seeks to force the IRS to collect a tax which is due, but which has been allegedly avoided by an illegal Revenue Ruling . . . . [A]n action to *force the collection* of [a] tax is clearly outside the scope of both the language and intent of § 7421(a)."[254] The court also noted that the plaintiffs were not able to litigate their claims in a refund suit, unlike the plaintiffs in cases relied upon by the government as authority.[255]

Thus, after the decision of the district court in *Tax Analysts and Advocates v. Schultz*, it appeared that there might be an exception to the Anti-Injunction Act: 1) where the plaintiff's own tax liability is not in issue and no remedy in the Tax Court or a refund suit is available to him and 2)

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[251] 1972-2 CUM. BULL. 532.

[252] I.R.C. § 2503(b).

[253] *Supra* note 178.

[254] 376 F. Supp. at 893-94. That the court narrowly construed the congressional intent in enacting the Anti-Injunction Act is revealed in the following language dealing with sovereign immunity and reviewability under the APA:

> Defendants contend that full discretion over administration of the Internal Revenue Code has been entrusted to the Secretary of the Treasury and the Commissioner of Internal Revenue and therefore there is not consent to the suit and it must be dismissed . . . . The Court concludes that no statutory provision confers the absolute and unfettered discretion with which the defendants would have this court endow the Treasury Department and the Internal Revenue Service in connection with the administration and interpretation of the Internal Revenue Code.

[255] 376 F. Supp. at 895.

[256] *Id.* at 894.

where the plaintiff does not seek in any way a diminution of tax revenues from any source.[256]

Two decisions in the district courts since *Tax Analysts and Advocates v. Schultz* appear to stretch the exception to the Anti-Injunction Act even to situations where there may be some revenue effect but where there is no means of judicial review available to the plaintiff in the Tax Court or a refund suit. These two decisions, *National Restaurant Association v. Simon*,[257] and *Investment Annuity, Inc. v. Blumenthal*,[258] to the extent they permit injunctive relief that might result in decreased tax collections from taxpayers other than the plaintiffs, are inconsistent with *Bob Jones University, "Americans United" Inc.*, and probably the intent of Congress in enacting the Anti-Injunction Act.

In *National Restaurant Association* the plaintiffs challenged the legality of Revenue Ruling 75-400,[259] which requires restaurant owners to keep records of credit card tips paid by them to employees. The plaintiffs contended that this requirement was in conflict with other sections of the Internal Revenue Code and that the IRS had failed to follow the appropriate rulemaking procedures of the APA.[260] The court found that the injunction sought by the plaintiffs would have "the effect of hampering the proper assessment and collection of taxes rightfully due, within the meaning of the statute."[261]

Nevertheless, the court held Section 7421 inapplicable because the aggrieved party had no access to judicial review. The government suggested that the aggrieved restaurant owners could refuse to file the required statements, pay the fines occasioned thereby,[262] and then bring suit for a refund of the fines paid. Concerning this "remedy" the court noted:

> This is obviously not the "refund" action contemplated by the Act. It puts the plaintiffs in the untenable position of either complying, with

[256] The decision in Common Cause v. Shultz, 73-2 U.S. TAX CAS. ¶ 9592 (D.D.C. Aug. 1, 1973) is consistent with these two principles. In that case the plaintiffs, John Gardner and Common Cause as citizens, voters and contributors to and participants in campaigns, sought an injunction of Temporary Regulation § 12.6, T.D. 7227, 37 Fed. Reg. 27621 (1972), limiting the time for designation of $1.00 to the Presidential Election Campaign Fund to the time of the filing of one's return. The Court held that this regulation was in excess of the Commissioner's authority. It is difficult to imagine that there would be any revenue effect as a result of this action or that plaintiffs had alternative avenues in the form of a Tax Court proceeding or a refund suit.

[257] 411 F. Supp. 993 (D.D.C. 1976).

[258] 40 Am. Fed. Tax R. 2d 77-5558 (D.D.C. July 12, 1977).

[259] 1975-2 CUM. BULL. 464.

[260] As to the plaintiff's contention that rulemaking procedures of the APA had not been followed, the court determined that the rules were "interpretative" and thus did not require the formalities of 5 U.S.C. § 533 (1970).

[261] 411 F. Supp. at 995.

[262] I.R.C. § 6652.

> no judicial review, or of defying the government's interpretation of their legal obligations under the code, of being in essence a lawbreaker .... This is money not due the government in taxes, but rather is an extra sum the plaintiffs would apparently be required to risk merely to test the validity of a reporting and information requirement .... The Court therefore concludes, in light of these considerations, and the obvious constitutional problems they may raise, that the Anti-Injunction Act was not intended to, and does not apply in such a situation.[263]

Perhaps the only relaxation of the rigors of the Anti-Injunction Act contained in *National Restaurant Association* is that it will not be applicable where the only "tax" upon which a would-be plaintiff may base his refund litigation is a fine. There is some support for the notion that one need not incur criminal liability in order to challenge a tax.[264] At any rate, no injunction was granted in *National Restaurant Association* because the court held that the ruling itself was valid.

In *Investment Annuity, Inc.* the district court for the District of Columbia, in its first two of three decisions involved in the action,[265] fashioned a novel exception to the Anti-Injunction Act. In that case the plaintiff sought injunctive relief against Revenue Ruling 77-85.[266] In this ruling the IRS determined that investment annuities issued henceforth would no longer enjoy favorable tax treatment accorded conventional segregated asset accounts under the Code.[267] The ruling "grandfathered" existing investment annuity contracts, thereby continuing their favorable treatment and restricting the avenues by which the ruling could be challenged.

The plaintiff, a seller of such annuities, stopped selling them in anticipation of the ruling and as a result of action by the Securities and Exchange Commission and the Investment Commissioner of Pennsylvania. The court, in an initial consideration of the defendants' motion to dismiss, rejected the notion that the Anti-Injunction Act and the Declaratory Judgment Act exception barred the plaintiff's action. The court read the decision of the Supreme Court in *Bob Jones University* as limited only to situations where the agency action challenged may at some point be subject to judicial review.[268]

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[263] 411 F. Supp. at 996.

[264] Hill v. Wallace, 259 U.S. 44 (1922); Lipke v. Lederer, 259 U.S. 557 (1922).

[265] 40 Am. Fed Tax R. 2d 77-5558; 40 Am. Fed. Tax R. 2d 77-5923.

[266] 1977-15 I.R.B. 7.

[267] I.R.C. § 801(g)(1)(B). The effect of the ruling was that income was taxed to the holder of the annuity when added to the holder's separate account rather than, as previously, to the insurance company which would receive more favorable rate under § 804(c).

[268] 40 Am. Fed. Tax R. 2d at 77-5560.

The court considered that under the facts of the case, the challenged action of the IRS could not be reviewed in a Tax Court proceeding or refund suit. This was because the ruling would actually lower the taxes of Investment Annuity and because present annuity holders were not affected by the ruling. The court determined, however, that the plaintiff had not exhausted every conceivable avenue of obtaining judicial review.[269] The court reserved a decision on the defendant's motion to dismiss until the plaintiff had an opportunity to attempt to obtain permission from the Securities and Exchange Commission (SEC) and the Pennsylvania Investment Commissioner to sell a new investment annuity contract or to accept a new contribution under an existing contract in order to set the stage for a friendly third party refund suit or Tax Court proceeding.

When the court was later informed by the plaintiff that the SEC and the Pennsylvania Investment Commissioner had denied the plaintiff's request, it determined that the plaintiff could not stage a third-party suit without flouting the rulings of both agencies. The court therefore permitted the plaintiff's suit to proceed notwithstanding the Anti-Injunction Act and the Declaratory Judgment Act.

Like the plaintiffs in *National Restaurant Association,* the plaintiff was arguably in a position where it would have to become a lawbreaker in order to challenge IRS action. The holding of *Investment Annuity Inc.,* however, appears broader than that of *National Restaurant Association.* The court predicated its exception to the Anti-Injunction Act on the plaintiff's lack of any access at all to judicial review. In a later order[270] the court held the challenged revenue ruling invalid and granted the plaintiff full declaratory relief.

The decisions in *National Restaurant Association* and *Investment Annuity, Inc.* are probably incorrect to the extent that they permit injunctive relief against IRS action even though such injunctive relief results in a diminution of tax liability. In several instances where hardship has been caused by deferring judicial review of IRS action, Congress has attempted to solve the problems this action creates by enlarging the judicial remedies available. This supports the notion that where an individual feels he has an inadequate

[269] The *Investment Annuity, Inc.* court considered the decision in IT&T v. Alexander, 396 F. Supp. 1150 (D. Del. 1975), discussed *supra* note 75, in which IT&T unsuccessfully sought injunctive and declaratory relief against revocation of letter rulings that its merger with the Hartford Fire Insurance Co. was a tax free reorganization. Shortly after the revocation, the IRS had asserted deficiencies against a large number of shareholders. The court noted that if IT&T were denied a right to participate as interested nonparty or amicus curiae in the Tax Court or if it were denied intervention in the district court refund litigation, the court might reconsider its dismissal of IT&T's action on the basis of the Anti-Injunction Act and the Declaratory Judgment Act. 368 F. Supp. at 1168.

[270] 40 Am. Fed. Tax R. 2d at 6160.

judicial remedy, and injunctive relief would serve to lower the taxes of some third party, his plea should be directed to Congress and not to the courts.[271]

On the other hand, there is no indication whatsoever that Congress in enacting the Anti-Injunction Act intended to insulate the IRS or to give it extraordinary discretion not subject to judicial review. If a plaintiff's action does not threaten a diminution in federal tax revenues and the plaintiff meets standing requirements and the requirements of the APA for judicial review, his action should not be barred by the Anti-Injunction Act.

The Declaratory Judgment Act, perhaps more than the Anti-Injunction Act, supports the government's contention that Congress intended to preclude judicial review of IRS actions.

In *Eastern Kentucky Welfare Rights* it was argued that the provision in the Declaratory Judgment Act,[272] worded "except with respect to Federal Taxes," was intended to preclude resort to the declaratory judgment remedy in any case involving federal taxes. The exception to the Declaratory Judgment Act is not expressly limited to assessment and collection. The legislative history of the exception is ambiguous as to whether the provision was aimed

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[271] Congress might well consider a definitive resolution of the conflict between the government's need for efficient collection of revenues without undue judicial interference and the need for a judicial remedy of individuals or entities who are genuinely aggrieved by IRS action, but who may not challenge such action in the Tax Court or a refund suit. One such resolution might be to permit a plaintiff who is aggrieved by IRS action within the meaning of the APA, and who has no other judicial remedy available, to petition the Tax Court for a declaratory judgment as to the legality of the IRS action. The Tax Court now is able to give declaratory judgments concerning qualification for special tax treatment of retirement plans, *see* I.R.C. § 7476, and has concurrent jurisdiction with the district courts to give declaratory judgments pertaining to the status and classification of organizations under § 501(c)(3). *See* I.R.C. § 7428.

Obviously the Tax Court would have to grapple with difficult questions of standing and justiciability in a manner similar to the other federal courts. The Tax Court's lack of equity jurisdiction would prevent it from direct interference with the tax assessment and collection process.

It might be argued that establishing such a mechanism might cause the Tax Court to be flooded with suits by politically motivated individuals similar to suits which challenged the legality of the Vietnam War, *see, e.g.,* Pietsch v. President, 434 F.2d 861 (2d Cir. 1970), *cert. denied,* 403 U.S. 920 (1971), or certain welfare programs, *see, e.g.,* Frothingham v. Mellon, 262 U.S. 442 (1923). Such suits would probably be filed in the federal district courts anyway and the Tax Court would not proceed far with them if it were determined in threshold inquiry that standing or justiciability is lacking.

Although this remedy might be made available to plaintiffs regardless of the practical revenue effect of Tax Court declaratory judgments, the IRS would benefit in that it would litigate such controversies in a unified forum, the Tax Court, rather than in district courts throughout the United States, as is now the case.

[272] *Supra* note 3.

solely at actions for declaratory judgment that actually interfered with assessment and collection of taxes[273] or to IRS actions in general.

Examining the exception in the context of its enactment sheds some light on the problem Congress was attempting to remedy and perhaps the intent of Congress. The passage of the Declaratory Judgment Act in 1934 offered taxpayers a potential means of obtaining expeditious review of assessment and collection of federal taxes. At least one court held that an action for declaratory judgment against a federal tax was maintainable in those cases where injunctive relief was not available. In *Penn v. Glenn,*[274] an action to have a tobacco tax declared unconstitutional, the court held that "[a]s applied to tax statutes, this proceeding [under the Declaratory Judgment Act] is merely a convenient means of settling the law before payment of the tax, or after payment of the tax and before the institution of a suit for refund."[275] Such a construction would have rendered the Anti-Injunction Act meaningless. The subsequent enactment of the exception to the Declaratory Judgment Act resulted in the dismissal of many attempts to interfere with assessment and collection of federal taxes. [276]

The enactment of the exception, however, did not stop attempts by taxpayers to avail themselves of the declaratory judgment remedy in tax controversies. The federal courts have consistently rejected attempts by taxpayers to litigate in declaratory judgment actions concerning their own taxes,[277] or the tax liability of another taxpayer.[278] Many of these cases have taken the broad view that the declaratory judgment is unavailable in cases

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[273] This is demonstrated by somewhat conflicting statements in different parts of the legislative history concerning the purpose of the exception. S. REP. No. 2140, 74th Cong., 1st Sess. 11 (1935):

> Your committee believes that the orderly and prompt determination and collection of Federal taxes should not be interfered with by a procedure designed to facilitate the settlement of private controversies, and that existing procedures both in the Board of Tax Appeals and the courts afford ample remedies for the correction of tax errors.

The statement of Managers on the Part of the House, H.R. REP. No. 1885, 74th Cong., 1st Sess. 13 (1935) notes: "The amendment [of the Senate] also adds a section making it clear that the Federal Declaratory Judgment Act of June 14, 1934, has no applicability to federal taxes.

[274] 10 F. Supp. 483 (W.D.Ky. 1935), *appeal dismissed per stipulation,* 84 F.2d 1001 (6th Cir. 1936).

[275] 10 F. Supp. at 486-87.

[276] *See, e.g.,* Henrietta Mills v. Hoey, 12 F. Supp. 61 (S.D.N.Y. 1935), *rev'd mem.,* 80 F.2d 1011 (2d Cir. 1936); Meridian Grain and Elevator Co. v. Fly, 12 F. Supp. 64 (S.D. Miss. 1935); William B. Scaife & Sons Co. v. Driscoll, 18 F. Supp. 748 (W.D.Pa. 1937), *affd,* 94 F.2d 664 (3d Cir. 1937), *cert. denied,* 305 U.S. 603 (1939).

[277] *See* Mitchell v. Riddell, 402 F.2d 842 (9th Cir. 1968), *appeal dismissed* and *cert. denied,* 394 U.S. 456 (1969); Carmichael v. United States, 245 F.2d 676 (5th Cir. 1957).

[278] *See* Singleton v. Mathis, 284 F.2d 616 (8th Cir. 1960); In Re Wingreen Co., 412 F.2d 1048 (5th Cir. 1969); Philipp v. United States, 38 Am. Fed. Tax R. 2d 76-5376 (W.D. Wash. May 24, 1976).

involving taxes.[279] A recent case adopting this view was *Teutsch v. Ford*,[280] in which the plaintiff sought a declaration that the IRS could not permit Dow Chemical Company to deduct certain advertising expenses.[281] The court held that the "plaintiff is barred by the express provision of the Declaratory Judgment Act . . . from obtaining a declaratory judgment with respect to any provision of the Internal Revenue Act."[282]

In support of this holding the court cited *Jules Hairstylists v United States*,[283] a case supporting the opposing point of view, that the Declaratory Judgment exception is coterminous with the Anti-Injunction Act, in that declaratory judgments are prohibited only with respect to assessment and collection. Whether the court in *Jules Hairstylists* intended that declaratory judgments would be permissible wherever actions for injunction are maintainable is unclear. Nevertheless, that view has recently been espoused in many district court decisions.[284]

If injunctive relief is permitted under limited circumstances it makes little sense to limit the remedies available to the plaintiff, especially when the declaratory judgment remedy may be preferable since it involves less coercion of government officials.[285] The declaratory judgment remedy should not permit a plaintiff to litigate prematurely his tax liability or that of other taxpayers. Where a plaintiff is aggrieved by IRS action and has no other judicial remedy available, the weight of recent authority appears to permit actions for declaratory judgment if such action does not threaten to diminish federal revenues.

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279 *See* 245 F.2d 676; 284 F.2d 616; 402 F.2d 842; 38 Am. Fed. Tax R. 2d 76-5376.

280 39 Am. Fed. Tax R. 2d 77-510 (S.D. Tex. May 20, 1976).

281 I.R.C. § 162.

282 39 Am. Fed. Tax R. 2d at 77-511.

283 268 F. Supp. 511 (D. Md. 1967), *aff'd mem.*, 389 F.2d 389 (4th Cir.), *cert. denied*, 391 U.S. 934 (1968).

284 *See* 338 F. Supp. 448; 376 F. Supp. 889; 40 Am. Fed. Tax R. 2d 77-5558. Dietrich v. Alexander, 427 F. Supp. 135 (E.D. Pa. 1977); Chapman v. Alexander, 421 F. Supp. 930 (W.D. La.), *aff'd mem.*, 552 F.2d 367 (5th Cir. 1977).

285 *See* 40 Am. Fed. Tax. R. 2d at 77-6161.

CONCLUSION

It is clear from an analysis of recent decisions that several federal courts have been unwilling to accept the proposition that the Anti-Injunction Act and the Declaratory Judgment Act exception insulate the IRS from judicial scrutiny even when judicial intervention would pose no threat to federal revenues. An analysis of the history of the Anti-Injunction Act indicates that no such insulation was ever intended by Congress.

This does not mean, however, that the business of maintaining nontaxpayer suits is now a simple matter for it is fraught with peril. The redressability component of the injury-in-fact required for standing is always a formidable obstacle when a plaintiff alleges that harm at the hands of a third party was caused by illegal government action. When the IRS is involved, the alleged harm must almost always be inflicted indirectly if the plaintiff is to be able to maintain a successful action for injunctive relief. Although the decisions in *Tax Analysts and Advocates* and *ASTA* are inconsistent with each other and with most precedent in the area of standing, they signal the difficulty nontaxpayer suits face from courts eager to extend the decision in *Eastern Kentucky Welfare Rights.*

Nevertheless, the APA has accorded nearly across the board reviewability of agency actions that aggrieve individuals or entities. There is no basis for excluding IRS rulings from the scope of this act. Gradually, the lower federal courts, while deferring to the policy of the Anti-Injunction Act when appropriate, have properly permitted review of such IRS action.