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Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998

Bryan T. Camp

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TAX ADMINISTRATION AS INQUISITORIAL PROCESS AND THE PARTIAL PARADIGM SHIFT IN THE IRS RESTRUCTURING AND REFORM ACT OF 1998

*Bryan T. Camp** **

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I. INTRODUCTION

The tax code is a puzzle. Whether one views it as an engaging enigma or a ridiculous riddle, the tax code requires careful and considered attention to fit the statutory pieces together to form a sensible picture. The procedural pieces of the puzzle, however, are often neglected by taxwriters and academics. Tax academics eschew procedure because it is not “real” tax law and nontax academics tend to see it as isolated from the mainstream of legal thought.¹ Such neglect is unwarranted and unwise. The

1. See generally Paul L. Caron, *Tax Myopia, or Mama Don't Let Your Babies Grow Up to be Tax Lawyers*, 13 VA. TAX REV. 517, 590 (1994), making a general plea for more

ideas underlying tax administration deserve as much attention as those underlying substantive tax provisions if the puzzle pieces are to fit. This Article joins the small but growing number of commentators who have begun to apply ideas from other areas of academic study, such as civil procedure and administrative law, to tax administration, and *vice versa*.²

In this Article, I pursue three goals. The first is to describe and justify the inquisitorial nature of tax administration. I offer the conception of tax administration as two related but distinct functions: tax determination and tax collection, both of which employ inquisitorial processes. I suggest that the justification for the use of these processes lies in the government's need for information to ensure that all taxpayers pay their "proper" tax and thereby encourage voluntary compliance. My second goal is to show how certain procedural provisions in the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98)³ reflect Congressional ignorance of the basic inquisitorial process paradigm under which the Internal Revenue Service (the Service) has operated; the new statutes instead link to a conception of tax administration as primarily adversarial.⁴ In a

interdisciplinary work and concluding:

A symbiotic relationship between tax and nontax law will deepen our tax understanding while providing a fertile area in which to test and refine nontax principles. Accordingly, in performing their tax legislation, administration, and litigation functions, the relevant players must resist the notion that they bring nothing to the table other than their special tax expertise and background. By replacing their narrow tax lens with a panoramic perspective of the legal landscape, the tax debate will be invigorated with nontax learning while the special talents of tax lawyers and professors will generate insights useful to their nontax counterparts.

Id.

2. See, e.g., Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413 (1999) (arguing that changes in tax procedure were a "pernicious exercise in symbolic legislation"); cf. Marcus Schoenfeld, *A Critique of the Internal Revenue Service's Refusal to Disclose How It "Determined" a Tax Deficiency, and of the Tax Court's Acquiescence With This View*, 33 IND. L. REV. 517 (2000) with Leandra Lederman, *Are There Procedural Deficiencies in Tax Fraud Cases?: A Reply to Professor Schoenfeld*, 35 IND. L. REV. 143 (2001) (debating the conceptual and doctrinal role of the Tax Court *vis-à-vis* the Service's determination of liability in fraud cases); Leandra Lederman, "Civil"izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency, 30 U.C. DAVIS L. REV. 183 (1996) (linking practical difficulties in tax administration to the conceptual and doctrinal confusion about notices of deficiency).

3. Pub. L. No. 105-206, 112 Stat. 685 (1998). All citations to code sections are to the Internal Revenue Code of 1986, unless otherwise indicated.

4. It is thus beyond the scope of this Article to discuss those changes that introduce notions of "equity" at odds with the traditional "turn-square-corners" approach of administrative law in general and tax administration in particular: notably the provisions governing Offers In

fundamental way, the so-called “reforms” of the RRA 98 are bottomed on a paradigm in significant tension with the paradigm underlying prior law. This tension has already created a practical uncertainty in procedural matters and will likely create more as both the Service and the courts struggle to execute and interpret the new laws.⁵ Finally, if nothing else, I hope to convince the reader that discussion of tax administration should not be so much about “customer service” versus “tax enforcement” models of administration, but should instead focus on the degree to which tax administration should or should not be inquisitorial.

This Article proceeds in three parts. Part II links the viability of our “voluntary” system of tax compliance to the Service’s ability to acquire the information necessary for a “proper” determination of tax and explains how this ability, combined with the information asymmetry between taxpayers and government, forms the basis for an inquisitorial system of tax administration. Part III explains how both Congress and the courts have indeed adopted an essentially inquisitorial system of tax determination and collection, and how courts police the Service’s administration of the tax laws using inquisitorial logic. In so doing, Part III offers a conceptualization of tax administration as two relatively autonomous procedural boxes, one called “determination” and the other called “collection.” Part IV demonstrates how, beginning with the dramatic hearings held by the Senate Finance Committee in September 1997, the history of RRA 98 evidences not merely the taxwriters’ ignorance and misunderstanding of tax procedure but also of the underlying inquisitorial nature of the process. As a result, RRA 98 attempts to insert provisions grounded in adversarial logic into a scheme heretofore grounded in inquisitorial logic: a classic case of round pegs inserted into square holes. It should, therefore, come as no surprise that the puzzle pieces do not fit well together.

Compromise, § 7122, Taxpayer Assistance Orders, § 7811, and the spousal relief provisions in § 6015. These ideas of equity undercut the traditional idea of a “true” tax liability in favor of a more flexible approach where—like much else in current postmodern life where the contingency of truth is, ironically, itself an accepted truth—tax liabilities are treated more as simply another item up for negotiation and less as a civic responsibility. Nor do I discuss the archaic conception of tax-administration-as-face-to-face-process which runs throughout RRA 98. Tax administration is in reality an impersonal, high-volume process carried out largely by computers and machines. RRA 98 thus creates substantial mischief in tax administration because many of its provisions are written more for the 1863 Bureau of Internal Revenue than the current Service. Building that soapbox, however, is not my goal in this Article.

5. For another scholar who has explored specific doctrinal tensions in the interplay of inquisitorial and adversarial processes that exist in modern administrative law, see generally Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289 (1997) (addressing the appropriateness of an adversarial system issue exhaustion requirement in the Social Security Administration’s inquisitorial system of administrative claims adjudication).

II. THE CRITICAL NEED FOR INFORMATION

Courts and commentators have long proclaimed the United States tax system to be based on voluntary self-assessment.⁶ In one sense, this claim is false. For example, despite tax protestor rhetoric,⁷ it is not as though taxpayers have any *legal* choice in the matter: the law requires them to file returns, report their income and deductions, calculate their taxes, and pay any amounts owed when the return is filed.⁸ Congress weaves together civil and criminal penalties to enforce these duties and leaves the ever unpopular Service to swing the net.⁹

Like many cliches, however, “voluntary self-assessment” is true in a more significant sense than it is false. The tax determination process ultimately rests on taxpayers disclosing their financial affairs and paying what they owe—through withholding or otherwise—without overt government compulsion. It is “voluntary” in the same sense that stopping

6. *See, e.g.,* *Flora v. United States*, 362 U.S. 145, 176 (1957) (“Our system of taxation is based upon voluntary assessment and payment, not upon distraint.”); Joseph J. Darby, *Confidentiality and the Law of Taxation*, 46 AM. J. COMP. L. 577, 577 (1998) (“The United States enjoys what is quite probably the most successful tax collection system in the world. It is based on the principle of voluntary self-assessment.”).

7. *See* *Beresford v. I.R.S.*, No. 00-35650, 2001 U.S. App. LEXIS 3187, at *1-*2 (9th Cir. Feb. 23, 2001):

Steven Beresford, Ph.D appeals pro se the district court’s order dismissing his action seeking a refund of federal income taxes, penalties, and interest and requesting a permanent injunction. The district court properly rejected as meritless Beresford’s contention that he has no legal obligation to file or pay income taxes because the American income tax system is based upon voluntary compliance.

Id. (footnote omitted). Many tax protestors have less formal education than Dr. Beresford.

8. *E.g.*, §§ 6011-6012.

9. Chapter 68 of the Internal Revenue Code (the Code) lists forty-eight separate civil penalty provisions. Nine of them—called “additions to the tax” and “additional amounts”—are added to and assessed along with the amount of taxes owed. *See, e.g.*, § 6651 (failure to file tax returns or pay tax by return due date); § 6652 (failure to file information returns); § 6654 (failure to pay estimated taxes); § 6662 (accuracy-related penalty for negligence or disregard of rules or regulations which leads to an understatement of taxes owed); § 6663 (penalty for civil fraud). The rest are denoted “assessable penalties” because they may be assessed independently of any taxes. *See, e.g.*, § 6672 (trust fund recovery penalty for failure to withhold and pay over trust fund taxes, including employee income and social security (FICA) taxes); §§ 6694-6695 and 6695 (penalties aimed at tax return preparers); §§ 6700-6701 (penalties aimed at tax shelter promoters). Chapter 75 defines twenty-seven taxpayer crimes ranging from misdemeanors to felonies and provides for forfeiture of any property used in violation of the tax laws. *See, e.g.*, § 7201 (felony for tax evasion); § 7202 (felony for willful failure to pay tax); § 7203 (misdemeanor for willful failure to file return); § 7206 (felony for making false statements or concealing material facts or property in a variety of circumstances).

one's car at a red light—at midnight with no traffic and no one looking—is voluntary. It is each citizen's self-enforcement of the legal duty that keeps both the tax and transportation systems running smoothly. With over 130 million individual returns and over 80 million other returns (not including information returns) filed in calendar year 2001,¹⁰ the system depends on the veracity, if not the kindness, of taxpayers.

It is true that, like Bentham's Panopticon, the discipline of self-reporting and payment cannot be divorced from the constant coercive threat of discovery and the resulting civil or criminal sanctions.¹¹ Most people, however, recognize that compliance based on a desire to avoid the penalties implicit in potential government review is far removed from compliance based on government agents making the initial liability decision or confiscating one's property. It is in this sense that compliance is voluntary.

This sense of "voluntary" is best illustrated by *Packard v. United States*¹² and *Browne v. United States*.¹³ The taxpayers in both cases were bona fide religious tax protestors who had long refused to pay some or all of their taxes but had also made no effort to prevent the Service from actively collecting the taxes—plus penalties of about twenty-five percent of the taxes owed—from their bank accounts.¹⁴ While they did not object to the levies, the penalties were costly and they sued to be relieved of them.¹⁵ They argued that since they "allowed" the continual levying of their accounts, the imposition of penalties was unnecessary to achieve compliance and the Service therefore violated the Religious Freedom Restoration Act, which requires the government to use the method least burdensome on religious exercise to accomplish its compelling purpose (here, the collection of tax).¹⁶ Both courts rejected the argument that it was less restrictive to levy on assets than to impose penalties to encourage self-assessment and payment.¹⁷ The *Browne* court explained:

Allowing individuals like the plaintiffs to withhold a portion of their due taxes would encourage chaos in that every

10. BRIAN BALKOVIC, INTERNAL REVENUE SERV., PUB. NO. 1136, INDIVIDUAL INCOME TAX RETURNS, PRELIMINARY DATA 2001, STATISTICS OF INCOME BULLETIN 136, 137 (2002), available at <http://www.irs.gov/pub/irs-soi/01inprel.pdf> (last visited Nov. 9, 2003).

11. See MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 200-03 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978) (discussing Bentham's theory and the link between systems of punishment and internalized individual discipline).

12. 7 F. Supp. 2d 143 (D. Conn. 1998), *aff'd*, 198 F.3d 234 (2d Cir. 1999).

13. 22 F. Supp. 2d 309 (D. Vt. 1998), *aff'd*, 176 F.3d 25 (2d Cir. 1999).

14. *Browne*, 22 F. Supp. 2d at 310; *Packard*, 7 F. Supp. 2d at 144.

15. *Browne*, 22 F. Supp. 2d at 310; *Packard*, 7 F. Supp. 2d at 144.

16. *Browne*, 22 F. Supp. 2d at 310-11; *Packard*, 7 F. Supp. 2d at 146.

17. *Browne*, 22 F. Supp. 2d at 313; *Packard*, 7 F. Supp. 2d at 147.

individual with an objection to a particular governmental expenditure would be able to unilaterally impose additional, time-consuming administrative burdens on the IRS. Furthermore, acceptance of the plaintiffs' arguments would encourage more governmental involvement in religious matters in that the IRS would be required to assess the genuineness of each tax protester's religious beliefs. Finally, it is difficult to imagine a means of compliance with the tax laws which is less restrictive than the voluntary compliance to which the plaintiffs object.¹⁸

Undergirding the entire self-assessment regime is the idea that for every taxpayer, there exists a "true" tax liability. This idea appears in a variety of contexts. For example, courts routinely speak of the taxpayer's "legal duty to file true and accurate returns."¹⁹ The Service routinely penalizes taxpayers for filing inaccurate returns and, when taxpayers complain that it was their accountant's fault, courts routinely reply that "the duty of filing accurate [tax] returns cannot be avoided by placing responsibility on a tax return preparer."²⁰ Likewise, taxpayers may generally choose any method of accounting for their income, so long as that method "clearly reflects income."²¹ Further, the Service follows the "basic theory . . . that the taxpayer shall pay his full tax but not a penny more"²² and various Service publications urge Service employees to find and apply only the "true meaning" of the law.²³

18. 22 F. Supp. 2d at 313 (citations omitted). The *Packard* court agreed. 7 F. Supp. 2d at 147 ("[W]e see no less restrictive means [than penalties] of inducing the payment of taxes by taxpayers Since the income tax system is a self-reporting and self-assessment one based on voluntary actions, the Government cannot be compelled to resort to cumbersome methods to encourage compliance."). For another view of these cases, see Marjorie E. Kornhauser, *For God and Country: Taxing Conscience*, 1999 WIS. L. REV. 939, 985 (1999) (arguing for establishment of a peace tax fund to accommodate those bona fide religious tax protesters whose conscientious objections to war prevent them from paying taxes to support military spending).

19. See, e.g., *United States v. Alt*, No. 1:90 CR 45, 1991 U.S. Dist. LEXIS 8914, at *5 (W.D. Mich. June 27, 1991).

20. *MetraChem Corp. v. Comm'r.*, 88 T.C. 654, 662 (1987).

21. Treas. Reg. § 1.446-1(a)(2).

22. HARROP A. FREEMAN & NORMAN D. FREEMAN, *THE TAX PRACTICE DESKBOOK* ¶ 3-2 (1973).

23. See, e.g., Rev. Proc. 64-22, 1964-1 C.B. 689:

At the heart of administration is interpretation of the Code. It is the responsibility of each person in the Service, charged with the duty of interpreting the law, to try to find the *true meaning* of the statutory provision and not to adopt a strained construction in the belief that he is "protecting the revenue." The revenue is properly protected only when we ascertain and apply the *true meaning* of the statute.

Until 1998, the idea of a true tax liability was implicit in the Service's mission statement, which stated that "[t]he purpose of the IRS is to collect the proper amount of tax revenue."²⁴ It is widely assumed among scholars and policymakers that taxpayers are more willing to voluntarily comply with a system that treats like taxpayers alike than they are when similarly situated taxpayers are treated differently.²⁵ The idea of a "true" tax liability inheres in this compliance theory as well. A tax unpaid is a tax evaded. An increased perception that others are evading taxes

can create a vicious cycle of growing disrespect for the tax system, which undermines voluntary compliance. The IRS has some evidence that this is happening now from Roper surveys they commissioned in 1999 and 2001. In 1999, 87 percent of respondents said that cheating on taxes was unacceptable; in 2001, only 76 percent. In 1999, 96 percent of respondents agreed that it is everyone's duty to pay their fair share of taxes; in 2001, 91 percent. And, in 2001, respondents were skeptical that cheaters would be caught. A plurality of respondents (37 percent) said that cheaters were less likely to be audited in 2001 than in the past. Only one in three thought the odds of detection had increased.²⁶

The Service uses various tools to ensure that all taxpayers report and pay their "true" tax liability, and thereby encourage voluntary compliance. Sometimes the tools are an automated part of the incredible Spielberg-like operations in the Service Centers where those 210 million returns were received and processed in 2001.²⁷ Other times they are manually operated by Service employees in the field.²⁸ Whether a particular compliance tool

Id. (emphasis supplied).

24. *Practices and Procedures of the Internal Revenue Service: Hearing Before the Senate Comm. on Finance*, 105th Cong., S. HRG. 105-190, at 4 (1997) [hereinafter *Practices and Procedures*] (statement of Sen. William Roth) (quoting the IRS's mission statement).

25. See generally Leandra Lederman, *The Interplay between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L. J. (forthcoming 2003).

26. Leonard E. Burman, *Urban Institute Testimony on Tax Fraud, Evasion*, 2003 TAX NOTES TODAY 133-26 (July 11, 2003) (reporting the statement of Leonard E. Burman before the House Committee on the Budget).

27. See, e.g., *infra* note 29 and accompanying text.

28. For example, § 6011 and its regulations allow the Service to require taxpayers to file their employment tax returns (Form 941) returns monthly instead of quarterly. This allows quicker reaction to non-payment. Likewise, § 7512 allows the Service to require taxpayers to establish special trust fund accounts in a bank and to deposit withheld taxes within two days after making payroll. Again, this allows the Service to better monitor compliance and swiftly learn of any non-payment.

is wielded by Service Center computers or field agents, it runs on information.

The need for reliable information cannot be overemphasized. For example, one compliance tool, frequently overlooked in popular media complaints about low audit rates, is the Service's return matching programs.²⁹ The Code requires third party payors to send "information returns," such as W-2s to report wages paid,³⁰ and a veritable forest of 1099s to report all sorts of non-wage payments, from dividend distributions,³¹ to cash paid for fish.³² The knowledge that a payor will report payments to the Service is widely thought to be a great incentive for a taxpayer to properly report the payments.³³ The Service uses information returns to monitor and enforce the duty to report all income and has become increasingly sophisticated in doing so.³⁴ In 2001, for example, it

29. The main program is called the Information Returns Program (IRP), which matches W-2s and 1099s against Form 1040s. Charles O. Rossotti, *GAO Testimony at JCT Hearing on Annual Review of IRS Reform Act*, 2001 TAX NOTES TODAY 90-31, at ¶ 26 (May 9, 2001) [hereinafter Rossotti Testimony 2001] ("It is true that simply focusing on the audit rate does substantially understate the IRS' capacity to find errors in returns, especially in certain kinds of returns.").

30. § 6051; Treas. Reg. § 31.6051.

31. § 6042; Treas. Reg. § 1.6042-2.

32. § 6050R; see also INTERNAL REVENUE SERV., GENERAL INSTRUCTIONS FOR FORMS 1099, 1098, 5498, AND W-2G (2003), available at <http://www.irs.gov/formspubs/page/0,,id%3D111601,00.html> (last visited Nov. 4, 2003).

33. See 1 TAXPAYER COMPLIANCE: AN AGENDA FOR RESEARCH 73-75 (Jeffrey A. Roth et al. eds., 1989) (describing as "conventional" the view that a "taxpayer's fear of getting caught and punished depends in part on structural characteristics of his or her financial environment that make noncompliance more or less difficult to detect"). What economists call "transaction visibility" is widely believed to be an important component of voluntary compliance. See Kim M. Bloomquist, *Trends as Changes in Variance: The Case of Tax Noncompliance*, June 2003 IRS Research Conference, available at <http://www.irs.ustreas.gov/taxstats/article/0,,id=110164,00.html> (last visited Sept. 19, 2003). Studies show that taxpayers are consistently more likely to report not only those income items actually subject to third-party information reporting and withholding, *id.*, but also those items which the taxpayers perceive as being matchable. See Alan H. Plumley, *The Impact of the IRS on Voluntary Tax Compliance: Preliminary Empirical Results* (National Tax Association 95th Annual Conference on Taxation) Nov. 14, 2002, at 15 n.2 (noting that increase in third-party information documents had little impact on increased reporting compliance because "most taxpayers apparently assumed that the matching was always in place").

34. Compare Margaret Milner Richardson, Remarks at the 3rd Annual IRS-Weber State U. Tax Practitioner Symposium (Sept. 22, 1993), in 1993 IRB LEXIS 407 (describing the advent of the Automated Underreporter Program, performing computer matching of W-2's with tax returns to find and assess more than \$4 billion in discrepancies in 1992), with STAFF OF JOINT COMM. ON TAXATION, REPORT ON TAXATION RELATING TO THE INTERNAL REVENUE SERVICE AS REQUIRED BY THE IRS REFORM AND RESTRUCTURING ACT OF 1998, JCX-38-02, at 5 (2002) [hereinafter REPORT RELATING TO THE IRS] ("In fiscal year 2001, the IRS began capturing the data from 16.8 million K-1 forms which are used to report income, credits, and deductions of partners, shareholders and beneficiaries of passthrough entities. In 2002, the IRS will begin processing and matching K-1

was able to verify about eighty percent of reported income through matching.³⁵ It is the information provided by the third party payors that fuels these particular compliance tools.³⁶ Matching programs, however, can generally only monitor income items.³⁷ It is only by reviewing the entire return that the Service can monitor deduction items and credits to ensure that taxpayers are correctly reporting their transactions.³⁸

Audits are perhaps the most notorious compliance tool. Here, the need for information is both more and less obvious. Obviously, the examining revenue agent needs information about the taxpayer's relevant transactions and financial accounts. Less obviously, however, the revenue agent may need to evaluate both the taxpayer's state of mind during or prior to the transactions, and the taxpayer's relationship with other parties to the transaction. State of mind can be important to determine whether a transaction had a bona fide business purpose apart from its tax consequences.³⁹ For example, whether a transaction was a hedging transaction for purposes of characterizing the resulting gain or loss as ordinary or capital depends, in part, on whether the taxpayer entered into the transaction "primarily" to reduce certain defined business risks.⁴⁰ Likewise, the taxpayer's relationship with other parties to the transaction

forms with individual tax returns." The problems encountered by the Service in implementing its K-1 matching program are described in a GAO Report to the Senate Committee on Business and Entrepreneurship. See GAO, REPORT TO THE CHAIR, COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP, U.S. SENATE: CHANGES TO IRS'S SCHEDULE K-1 MATCHING PROGRAM BURDENED COMPLAINT TAXPAYERS (2003).

35. See REPORT RELATING TO THE IRS, *supra* note 34, at 5.

36. Note, however, that § 6201(d), added in 1996, places the burden on the Service to produce more evidence of an income item than solely a third party information return if the taxpayer has "fully cooperated" with the Service.

37. It is also used to match some deductions, such as the home mortgage interest deduction. Rossotti Testimony 2001, *supra* note 29, at ¶¶ 28, 29.

Document matching is not useful for verifying . . . gain or loss on asset sales, or most itemized deductions. We estimate that the total personal income that cannot be verified by document matching represented about \$1.2 trillion in FY 1998, or 19.7 percent of total reported personal income. An important role of audits is to verify these major categories of income and deductions.

Id.

38. *Id.*

39. See, e.g., *ACM P'ship v. Comm'r*, 157 F.3d 231 (3d Cir. 1998) (providing a debate between the majority and dissent over the proper weight to be given to a taxpayer's intent in determining tax the consequence of a transaction); *Estate of Strangi v. Comm'r*, 115 T.C. 478 (2000), *aff'd in part, rev'd in part sub nom. Gulig v. Comm'r*, No. 01-60538, 2002 U.S. App. LEXIS 11920 (5th Cir. June 17, 2002) (debating between the majority and dissents over role of subjective intentions in deciding whether a family partnership was a sham).

40. See, e.g., Treas. Reg. § 1.1221-2(b)(c).

is often important in determining the true nature of the transaction and, hence, its tax consequences. Relationships help determine whether a transaction was a bona fide loan, gift, compensation for services, or a corporate dividend,⁴¹ whether to impute interest to a below market loan,⁴² whether a loss on a sale should be allowed,⁴³ or how to treat the disposition of an installment sale obligation,⁴⁴ just to mention a few examples. Information is thus critical in determining the proper tax, not only for the taxpayer who initially reports the tax result, but also to the Service in verifying the accuracy of the returns, either through automated programs or through individualized audits.

Neither the matching programs nor audits would be effective without a penalty regime to back them up. Penalties are one of the most critical compliance tools. Both in theory and in practice, the Service tries to administer penalties more to encourage upfront voluntary compliance than to punish bad behavior. The theory finds expression in the Service's Penalty Policy Statement:

Penalties are used to enhance voluntary compliance: Penalties constitute one important tool of the Internal Revenue Service in pursuing its mission of collecting the proper amount of tax revenue at the least cost. Penalties support the Service's mission only if penalties enhance voluntary compliance. Even though other results such as raising of revenue, punishment, or reimbursement of the costs of enforcement may also arise when penalties are asserted, the Service will design, administer and evaluate penalty programs solely on the basis of whether they do the best possible job of encouraging compliant conduct.⁴⁵

41. *See, e.g.,* Klamath Medical Service Bureau v. Comm'r, 29 T.C. 339, 347 (1957), *aff'd*, 261 F.2d 842, 845 (9th Cir. 1958) (holding that a taxpayer corporation was not allowed to deduct payments as compensation because they were disguised dividends to shareholder-employee).

42. § 7872.

43. § 267.

44. § 453(b).

45. INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL POLICY STATEMENT P-1-18, I.R.M. 1.2.1.2 (1992). Policy Statements are published in the Internal Revenue Manual, available on the IRS website. Go to www.irs.gov, click on "Tax Professionals," click on "Internal Revenue Manual," and look in Part I, Chapter 2, Section 1, titled "Policies of the Internal Revenue Service." The Policy Statements are grouped by function with the "Administrative" statements in the P-1-x series. Notice that the part quoted in the text speaks of the Service's mission as "collecting the proper amount of tax revenue at the least cost." The Service revised its mission statement in response to RRA 98, taking out "collecting the proper . . . tax" and putting in "helping [taxpayers] understand and meet their tax responsibilities." I.R.M. 114.1.4.2 (1999).

For a practical example of a penalty used to enhance compliance and the resulting need for information to administer it, consider the section 6698 penalty for partnerships. This penalty encourages compliance with the return requirements for partnerships, which in turn allows the Service to match partnership returns against partners' individual returns using one of the automated matching program tools.⁴⁶ Section 6698, added to the Code in 1978, imposes a penalty against "any" partnership that fails to file a required return, unless the failure is due to "reasonable cause."⁴⁷ Despite that absolute statutory "any," the Service issued a Revenue Procedure in 1984 which basically said that partnerships of fewer than 10 individuals automatically had "reasonable cause" as long as either the partnership or one of the partners certified that all partners had timely filed returns that together completely reported all partnership income.⁴⁸ The Revenue Procedure was based on language in the House Ways and Means Committee Report that "[a]lthough these [small] partnerships may technically be required to file partnership returns, the committee believes that full reporting of the partnership income and deductions by each partner is adequate and that it is reasonable not to file a partnership return in this instance."⁴⁹

But wait, there's more. One would think that the Revenue Procedure relieved small partnerships of the section 6698 penalty. One would be wrong. The reason lies in the bulk processing nature of the tax determination procedure and the Service's need for information. Recall that the Service processed over 210 million returns in calendar year 2001,⁵⁰ and that is not counting information returns, such as W-2s or 1099s. Until at least 2001, Service Center computers automatically sent out a proposed section 6698 penalty to taxpayers who reported partnership income but whose return could not be matched with a partnership return. This resulted in many taxpayers being assessed a section 6698 penalty who, under the 1984 Revenue Procedure, should not have been. Since the penalties were relatively small, the taxpayers had little incentive to hire attorneys who would then find and apply the 1984 Revenue Procedure.⁵¹ The Pacific

46. Schedule E (Form 1040), Part II (2002) requires individuals reporting profit or loss from partnership distributions to disclose the partnership's Employer Identification Number (EIN). The Service Center computers have a program that seeks to match that number with a database containing the EINs of all partnerships that have filed returns. If the Service Center does not find a corresponding EIN, then the Center automatically generates and mails a letter to the partner proposing a § 6698 penalty.

47. § 6698(a).

48. Rev. Proc. 84-35, 1984-1 C.B. 509 (1984), *superseding* Rev. Proc. 81-11, 1981-1 C.B. 651 (1981).

49. H.R. REP. NO. 95-1445, at 75 (1978).

50. BALKOVIC, *supra* note 10, at 137.

51. The penalty is \$50 times the number of partners in the partnership. § 6698(b).

Northwest Citizens Advocacy Panel pointed out the problem to the local Taxpayer Advocate and proposed a solution, which was approved in a Service Center Advisory.⁵² Similar to the *Packard* and *Browne* courts above, the Service Center Advisory rejected as impractical the idea of putting the burden on the Service to discover the information necessary to apply the small partnership exception:

Requiring the Service to audit each and every partnership to determine whether it meets the criteria set forth in revenue procedure 84-35 before asserting the section 6698 penalty would not only be contrary to the Code, but also unnecessarily expensive and time consuming.

Generally, the Service does not know whether the partnership meets the reasonable cause criteria or qualifies for relief under Rev. Proc. 84-35 unless and until the partnership files a return (Form 1065) or some other document with the Service. The individual partners' income tax returns, even if timely filed and complete, are not linked together during their initial processing.⁵³

At the same time, the Service Center Advisory recognized the need to apply the section 6698 penalty appropriately.

Penalties exist to encourage voluntary compliance by supporting the standards of behavior expected under the Internal Revenue Code. To achieve this desired effect penalties must be proportionate to the offense they intend to correct, severe enough to deter noncompliance, and applied by the Service in a consistent, accurate, and impartial manner. See generally Penalty Policy Statement P-1-18; IRM 120.1.1.2. In addition, the taxpayers against whom the penalty is imposed must be given an opportunity to have their interest heard and considered.⁵⁴

The resulting problem was an information problem: how could the Service learn about small partnerships which qualified under the 1984 Revenue Procedure for relief from the section 6698 penalty? The answer was to solicit the information from the affected partners. Thus, the Citizen Advisory Panel proposed, and the Service Center Advisory blessed, the idea that whenever the Service Center computers automatically generated

52. INTERNAL REVENUE SERV., SERVICE CENTER ADVISORY, SCA 200135029 (Aug. 1, 2001).

53. *Id.*

54. *Id.*

a letter proposing the section 6698 penalty, they could also generate both another letter explaining the Revenue Procedure exception and a form for the taxpayer to use to give the Service the information it needed to not apply the penalty.⁵⁵ The Service Center Advisory suggested that the letter contain, in part, the following language:

Under revenue procedure 84-35, some partnerships are presumed to meet the reasonable cause standard if they meet certain criteria. You may answer the questions on the next page and return them to us in the envelope provided so that we may determine whether you qualify for abatement of this penalty under revenue procedure 84-35. Before you return the questionnaire to us, make sure . . . that each partner or his or her representative with a power of attorney signs the questionnaire under the penalties of perjury.⁵⁶

Just as reliable information is needed for the matching programs and audits, it is also critical to enable the Service to apply penalties. As the Service Center Advisory acknowledged, “penalties must be proportionate to the offense they intend to correct.”⁵⁷ For penalties to support either automated or manual compliance tools, the Service again needs information, not only about the facts and circumstances of the transactions relating to the return, but also about the taxpayer’s intent and planning.⁵⁸ Many penalties are structured similarly to the section 6698 failure to file penalty: the penalty is asserted merely for an act or a failure to act but relieved if the taxpayer shows some “reasonable cause.”⁵⁹ With the burden so placed, taxpayers have every incentive to provide the Service with the information that demonstrates their “reasonable” behavior, including their reasonable reliance on professional tax advice.⁶⁰ For these types of

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *See, e.g.*, § 6651, § 6662; *see also* Monahan v. Comm’r, 109 T.C. 235, 257 (1997) (finding a section 6662(b)(2) substantial understatement); ASAT, Inc. v. Comm’r, 108 T.C. 147, 175 (1997) (holding that there was section 6662(b)(1) negligence or disregard); Electric & Neon, Inc. v. Comm’r, 56 T.C. 1324, 1342 (1971) (finding a section 6651 failure to file). The section 6672 Trust Fund Recovery Penalty is similar in that it is asserted for any intentional failure to pay trust fund taxes, but may be relieved if the taxpayer can show the failure was unintentional. *See, e.g.*, United States v. Rem, 38 F.3d 634, 643 (2d Cir. 1994) (stating that taxpayer’s belief that corporation was paying trust fund taxes must be reasonable under the circumstances in order to escape application of the penalty). Note, however, that RRA 98 modified section 7491 to place the burden of production on the Service as to penalties, for examinations started after July 22, 1998, to certain taxpayers and under certain conditions. § 7491(c); *see* discussion *infra* Part IV.B.2.a.

60. *See, e.g.*, Paula Constr. Co. v. Comm’r, 58 T.C. 1055, 1061 (1972), *aff’d*, 474 F.2d 1345

penalties, information about taxpayer intent is necessary only to relieve the penalty, not to impose it.⁶¹ For other penalties, however, the Service bears the burden to show not only an act of noncompliance with the law, but also an intent to circumvent it.⁶² For these types of penalties, the Service requires information about the taxpayer's intentions and state of mind to judge whether to impose the penalty.

The chief source of information needed to ensure tax compliance is the taxpayer. It is the taxpayer who knows what transactions have occurred and what their state of mind was regarding those transactions. It is the taxpayer who knows where relevant documents are located. It is the taxpayer upon whom the Code and attendant regulations place the burden of creating and retaining adequate documentation of transactions.⁶³ It is true that third parties who participate in transactions with the taxpayer are a secondary source of information. However, to the extent that these third parties must file various information returns, as discussed above, they must also send a copy to the taxpayer.⁶⁴ Both commentators and courts have

(5th Cir. 1973) (stating that reliance on a qualified adviser will constitute reasonable cause only if the taxpayer has acted in good faith and has made full disclosure of all relevant facts to the adviser). *See also* INTERNAL REVENUE SERV., FIELD SERVICE ADVICE, FSA 200132029 (Aug. 10, 2001), reviewing all facts and circumstances to conclude that

penalties should be imposed. [The taxpayer] appears to have a lax attitude about properly following the information reporting and income reporting tax rules. Our federal income tax system should not and cannot tolerate such a lax attitude. [The taxpayer] apparently never attempted to comply with the reporting requirements specifically . . . but instead reported as it chose and now contends that its manner of reporting was sufficient.

61. Similarly, taxpayers can avoid the special extended six year period for the Service to audit their return by disclosing with their return any items of income they are not reporting. § 6501(e)(1)(A)(ii).

62. For example, the Service bears both the burden of production and persuasion whenever it asserts the § 6663 fraud penalty. *Bacon v. Comm'r*, No. 00-3665, 2001 U.S. App. LEXIS 21882 (3d Cir. Sept. 25, 2001). *See also* *Conforte v. Comm'r*, 692 F.2d 587, 592 (9th Cir. 1982).

63. § 6001 sets forth the general rule that taxpayers "shall keep such records, render such statements, make such returns . . . as the Secretary may from time to time prescribe." Likewise, *Treas. Reg. § 1.6001-1(a)* generally requires taxpayers "to keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information." Other statutes impose more specific duties. *See, e.g.*, § 274(d) (imposing specific substantiation requirements before certain meal and entertainment expenses may be claimed as deductions under § 162).

64. All sections in Chapter 61A, Part IIIB, contain a subsection generally entitled "Statements to be furnished to person with respect to whom information is required" requiring the third party payor to provide a copy of the information return to the taxpayer. § 6041-6050T.

long recognized this information asymmetry as a central justification for why the taxpayer bears the burden of proof in tax controversies:

The machinery prescribed by Congress to determine the amount due the Government is the *assessment* of the administrative agency charged with its collection. Once the tax is assessed a rebuttable presumption arises based, in part, on the probability of its correctness. The presumption is also based upon considerations of public policy. First, as to the accuracy of the amount assessed, the presumption furthers the policy of requiring the taxpayer to meet certain bookkeeping obligations placed upon him by the Code. It also recognizes that the taxpayer has more readily available to him the correct facts and figures.⁶⁵

For these reasons, in order to maintain a voluntary tax reporting system, the government must have access to enough information about the taxpayer's transactions to monitor, verify, and enforce the law. Who determines what is "enough" information and from what sources that information may be obtained? It is this Article's contention that the legal structure Congress has created and has historically adhered to allows the Service to decide what information it needs to determine tax liabilities and where to get it. While the discretion is not unfettered, the system has historically contained only the slightest judicial check on what is most accurately described as the Service's inquisitorial powers, until RRA 98. As summarized by the Second Circuit in 1933 in approving the enforcement of a summons against a taxpayer during the pendency of the taxpayer's appeal before the then Board of Tax Appeals, "[n]evertheless, we think that the Commissioner's power still persists pending the appeal. Properly, it is not a power to procure or perpetuate evidence at all; it is strictly inquisitorial, justifiable because all the facts are in the taxpayer's hands."⁶⁶

65. *Psaty v. United States*, 442 F.2d 1154, 1160 (3d Cir. 1971). *See, e.g.*, Leo P. Martinez, *The Summons Power and the Limits of Theory: A Reply to Professor Hyman*, 71 TUL. L. REV. 1705, 1717-24 (1997) (describing the idea that the taxpayer and the Service should be equally restricted in obtaining information from each other as "The Myth of the Level Playing Field"); *see also* *United States v. Rexach*, 482 F.2d 10, 16 (1st Cir. 1973) (noting that the burden of proof serves to bolster "the presumption of administrative regularity; the likelihood that the taxpayer will have access to the relevant information; and the desirability of bolstering the record-keeping requirements of the Code"); *United States v. Lease*, 346 F.2d 696, 700 (2d Cir. 1965) (providing an excellent discussion of justification for burden of proof rules on taxpayers); *Church of Scientology v. Comm'r*, 83 T.C. 381, 468 (1984) (placing the burden of proof on taxpayers in Tax Court is justified by information asymmetry). *See generally* *United States v. Janis*, 428 U.S. 433 (1976) (discussing burden of proof rules in context of "naked" assessment).

66. *Bolich v. Rubel*, 67 F.2d 894, 895 (2d Cir. 1933). *Accord* *United States v. Admin.*

III. TAX ADMINISTRATION AS INQUISITORIAL PROCESS

This section explores the pre-RRA 98 legal structure. It will define what characteristics distinguish an inquisitorial process from an adversarial process, and examine the extent of the Service's decisional powers to assess and collect tax liabilities and the scope of the Service's most potent tool for gathering information—the summons—to show how, until 1998, Congress and the courts worked together to define and expand an inquisitorial model of tax determination by allowing the Service to be both the evidence-gatherer and primary decision-maker regarding taxpayers' proper tax liability.

A. *Inquisitorial Process Defined*

The idea of an inquisitorial tax system seems un-American. It certainly seems counterintuitive to anyone who has been the subject of inquiry from the Service. To taxpayers under the scrutiny of a revenue agent, a revenue officer, or worse, a special agent, the process feels most adversarial as taxpayers resist as best they can the unwanted intrusion into their lives. Tax resistance is always adversarial in this respect, whether the resistance arises from bizarre ideological misconceptions about the law, legitimate disputes over application of the law, or practical preferences to pay more immediately important creditors than the government.

But feelings of “us” against “them” are not the hallmark distinctions that scholars have traditionally used to differentiate adversarial systems from inquisitorial systems. Instead, scholars have suggested two ways in which one can put decisional processes into the adversarial box or the inquisitorial box, one being descriptive and the other being normative. I

Enters., Inc., 46 F.3d 670 (7th Cir. 1995) (upholding enforcement of summons during pendency of Tax Court proceedings); *see also* Ash v. Comm'r, 96 T.C. 459 (1991) (providing divergent views within the Tax Court over whether allowing the Service to issue a summons during a pending Tax Court appeal disadvantages the taxpayer in Tax Court); Leo P. Martinez, *The Summons Power and Tax Court Discovery: A Different Perspective*, 13 VA. TAX REV. 731, 754 (1994) (expressing the view that information asymmetry between the taxpayer and the Service justifies use of summons power even during pending Tax Court review). *See generally* United States v. Wyatt, 637 F.2d 293, 299 (5th Cir. 1981) (finding that the IRS' powers of investigation “have been justified and should be liberally construed, ‘because all the facts are in the taxpayer’s hands’”) (citing *Bolich*, 67 F.2d at 895); United States v. McKay, 372 F.2d 174, 175 (5th Cir. 1967) (same); Hubner v. Tucker, 245 F.2d 35, 43 n.5 (9th Cir. 1957) (“As to a taxpayer, ‘[i]t is strictly inquisitorial, justifiable because all the facts are in the taxpayer’s hands.’”) (citations omitted); *In re* Albert Lindley Lee Mem'l Hosp., 209 F.2d 122, 123 (2d Cir. 1953) (same); PAA Mgm't v. United States, 817 F. Supp. 425, 427 (S.D.N.Y. 1993) (same); United States v. Upjohn Co., No. K77-7 Misc. CA-4, 1978 U.S. Dist. LEXIS 19410, at *28 (W.D. Mich. Feb. 23, 1978) (same); United States v. Cecil E. Lucas Gen. Contractor, Inc., 406 F. Supp. 1267, 1277 (D.S.C. 1975) (same); *In re* Tax Liability of Norda Essential Oil & Chemical Co., 142 F. Supp. 868 (S.D.N.Y. 1956) (same).

suggest that tax administration is inquisitorial under both. That is, descriptively, tax administration has in fact functioned as an inquisitorial system supported by the laws and doctrines created by Congress and courts. Further, these doctrinal developments are justified by the societal values served by inquisitorial systems.

The key descriptive distinction between adversarial and inquisitorial process, so far as it relates to tax determination, lies in the relation between the decisionmaker and the evidence-gatherer. That is, who controls the gathering and presentation of the information to the decisionmaker?⁶⁷ An adversarial process separates the evidence-gatherer from the decisionmaker; it relies on multiple parties in interest to gather evidence and present it to a passive, neutral decisionmaker (either a judge or a jury).⁶⁸ An inquisitorial process merges the two roles; it relies on a neutral decisionmaker to gather the relevant information as part and parcel of the decisionmaking.⁶⁹ The adversarial process stereotypically dumps a load of evidence on the decisionmaker all at once, whereas the inquisitorial process is stereotypically heuristic, with the decisionmaker gathering evidence and making decisions about the issues interactively.⁷⁰ A review of the pre-RRA 98 statutory structure, the administrative practice and the judicial interpretations of both will demonstrate that prior to RRA 98 the Service was responsible for (a) deciding both the tax liability and how to collect it, and (b) gathering the evidence with which to make those decisions.⁷¹

A key normative distinction between adversarial and inquisitorial process has been offered in a recent article by Matthew T. King.⁷² King suggests that inquisitorial systems reflect a normative preference for a “full

67. See generally John A. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) (contrasting inquisitorial model of German litigation with American adversarial model); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999) (arguing that adversarial evidence-gathering ought to be, in theory, somewhat more efficient than inquisitorial gathering). The debate over proper tax administration has generally been over a “customer service” model versus a “tax enforcement” model. See discussion *infra* Part IV. Part of this Article’s purpose is to try and move the discussion of tax administration away from those terms and towards the idea of inquisitorial and adversarial process models.

68. Posner, *supra* note 67, at 1488.

69. See *id.*

70. *Id.* at 1495 (citing MIRJAN R. DAMAGRAV OKA, *EVIDENCE LAW ADRIFT* (1997)). Naturally, I paint here with a broad brush, and in fact do not claim that the administrative tax determination process is solely inquisitorial, since the administrative decisionmaker may ultimately become a litigant to compel compliance with information requests. That is the “slightest judicial check” I mentioned before and discuss in some detail below.

71. See *infra* Part III.B.-C.

72. Matthew T. King, *Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems*, 12 INT’L LEGAL PERSP. 185 (2002).

accounting [of] what happened in a given transaction,” which he calls absolute truth (“Truth”).⁷³ “With the full Truth, inquisitorial systems can then go on to dispense the exact and proper justice required . . . in a case.”⁷⁴ In contrast, adversarial systems reflect a willingness to compromise the search for Truth in favor of other values, which King calls “pragmatic truth.”⁷⁵ King freely admits that the “assertion that inquisitorial justice systems champion absolute Truth, while adversarial systems prefer a pragmatic truth is a daunting one to prove.”⁷⁶ In his article, King focuses on the rules of criminal procedure that exclude reliable but wrongly obtained evidence.⁷⁷

My study of tax administration supports King’s thesis, perhaps in ways he may not have anticipated (he was quite focused on judicial systems and did not appear to consider the grand inquisitorial history of administrative agencies). For my purposes, I stress that I am only looking at public law, that is, law involving the government as a legal actor. I also use a more specific (and less nuanced) dichotomy than King. I suggest that one value that the American adversarial system prefers over Truth is the protection of an individual’s freedom to act without having to account to the state for the act, and freedom from state monitoring or intervention: in short, a sphere of individual autonomy (“Autonomy”). King suggests that the value of Autonomy is supported, indeed justified, by a philosophical tradition in the United States that “stresses reliance on the individual to engage in processes that yield an aggregated, societal good.”⁷⁸

Neither preference is absolute in either system, of course, but each stands in reverse relationship to the other. That is, an inquisitorial system is more willing to sacrifice Autonomy in order to find Truth while an adversarial system is more willing to protect Autonomy than to find Truth.⁷⁹ I extend King’s idea further to suggest that each system also prefers different types of checks on potential abuse of state power. An inquisitorial system will tend to rely more on controls internal to the state actor and an adversarial system will tend to rely on controls external to the state actor.⁸⁰

Tax administration, I suggest, is an inquisitorial system in both of the senses I outline above. First, it is a system where the Service acts as both

73. *Id.* at 188.

74. *Id.* at 236.

75. *Id.* at 189.

76. *Id.* at 190.

77. *Id.* at 221-29.

78. *Id.* at 201. King supports this assertion with a brief review of works by Locke, Smith, von Hayek, Jefferson, and Madison. *Id.* at 201-07. I accept his analysis and leave further scrutiny to others.

79. *Id.* at 216, 232.

80. *Id.* at 230-35.

the decisionmaker and the evidence-gatherer. Second, it is a system that has historically valued Truth over Autonomy. As discussed above, it is at least arguable that the basis for our system of voluntary compliance is the idea of a “true” tax liability that all taxpayers report and pay. Until RRA 98, the Service’s mission was to determine the “proper” tax,⁸¹ and Congress and the courts had resolutely supported the Service’s mission to find Truth, even to the extent of some sacrifice to Autonomy. Third, I hope to show that, until RRA 98, controls on abuses were chiefly internal and that the courts relied on those internal controls when construing the law to give the Service its broad powers.

B. *The Service As Decisionmaker*

1. Tax Determination

The Service makes the primary decision about a taxpayer’s liability. Section 6201 authorizes the Service “to make the inquiries, determinations, and assessments of all taxes.” This language nicely summarizes the tax determination process: a process of inquiry and decisionmaking which culminates in an assessment. Section 6203 defines the “method of assessment” as “recording the liability of the taxpayer” in the Service’s books of account. Thus, at one level, an assessment is simply the formal recordation of a tax liability in the Service’s books. An assessment in no way *creates* tax liability.⁸² It merely accounts for a liability, which is “deemed . . . due and owing at the close of the taxable year.”⁸³

At a deeper level, however, the idea of assessment is the critical demarcation between the tax determination and tax collection processes. Assessments serve as the Service’s administrative judgment of what taxes a taxpayer owes the government. A properly recorded assessment is the

81. See *supra* note 45 and accompanying text.

82. See Bryan Camp, *Limitations Periods Applicable to Government Action*, in *FEDERAL TAX PRACTICE AND PROCEDURE* 8-30 (Leandra Lederman & Ann Murphy eds., 2003); see also *Lewis v. Reynolds*, 284 U.S. 281, 283 (1932) (stating that the expiration of the assessment limitations period without an assessment being recorded does not bar the Service from retaining payments already received if they do not exceed the amount which could have been—but was not—properly assessed within the limitations period); *Ewing v. United States*, 914 F.2d 499, 502-03 (4th Cir. 1990) (rejecting a taxpayer’s argument that, prior to assessment, there can be no tax liability and therefore no “payment” of taxes); *Bachner v. Comm’r*, 109 T.C. 125, 130-31 (1997), *aff’d*, 172 F.3d 859 (3d Cir. 1997) (taxpayer’s refund claim reduced by the amount of correct tax liability, including penalties, for that taxable year, even though tax and penalties were not assessed within the limitations period).

83. *Edelson v. Comm’r*, 829 F.2d 828, 834 (9th Cir. 1987).

functional equivalent of a judgment against the taxpayer.⁸⁴ No one has explained why better than Justice Roberts in *Bull v. United States*:⁸⁵

Some machinery must be provided for applying the rule to the facts in each taxpayer's case, in order to ascertain the amount due. The chosen instrumentality for the purpose is an administrative agency whose action is called an assessment. The assessment may be a valuation of property subject to taxation, which valuation is to be multiplied by the statutory rate to ascertain the amount of tax. Or it may include the calculation and fix the amount of tax payable, and assessments of federal estate and income taxes are of this type. Once the tax is assessed, the taxpayer will owe the sovereign the amount when the date fixed by law for payment arrives. Default in meeting the obligation calls for some procedure whereby payment can be enforced. The statute might remit the government to an action at law wherein the taxpayer could offer such defense as he had. A judgment against him might be collected by the levy of an execution. But taxes are the lifeblood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection. The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt.⁸⁶

84. *Cohen v. Gross*, 316 F.2d 521, 522-23 (3rd Cir. 1963) (stating that "assessment is a prescribed procedure for officially recording the fact and the amount of a taxpayer's administratively determined tax liability, with consequences somewhat similar to the reduction of a claim to judgment").

85. 295 U.S. 247 (1935).

86. *Id.* at 259-60. The use of the assessment as a substitute for a court judgment was clearer prior to the 1952 reorganization of the Service. Before 1952, the Commissioner of the Bureau of Internal Revenue (as the Service was then called) had little real control over tax collection because the country was divided into sixty-four Collection Districts, each one headed by a politically appointed Tax Collector. See ROBERT W. KEAN, HOUSE SUBCOMM. ON ADMIN. OF THE INTERNAL REVENUE LAWS, REP. TO THE COMM. ON WAYS AND MEANS 25-26 (1953) (reporting that Collectors "were not amenable to control by the Bureau."). Only the Collector was authorized to summarily collect tax liabilities through administrative means, such as by levy and setoff. *United States v. Jersey Shore State Bank*, 781 F.2d 974, 979 (3d Cir. 1986), *aff'd*, 479 U.S. 442 (1987). The Commissioner could collect taxes only through the adversary process of filing suit, which the Collector could not do. *Jenkins v. Smith*, 99 F.2d 827, 828 (2d Cir. 1938). That is why § 6501 provides that "no proceeding in court without assessment for the collection of such tax shall be begun after the expiration" of the three year limitation period. Thus, the assessment was the mechanism by which the Commissioner issued his judgment on the proper tax liability and provided the basis for the Collector to act.

The goal of the Service's tax determination process, therefore, is to create an assessment. The Service gets there via one of two paths. The most common path is to rely on the taxpayer's return. Voluntary compliance is the primary method by which the Service fulfills its duty to make the "determinations and assessments" of tax.⁸⁷ Due to sheer numbers, the Service accepts the vast, vast majority of returns as filed, and has done so at least since the World War II tax legislation "brought many millions of people in small income groups into the fold of Federal taxpayers."⁸⁸ While in the early post-war period, 49 out of 50 returns were accepted as filed,⁸⁹ today the number is more like 199 out of 200.⁹⁰ Thus the most common method of tax determination is through the taxpayer fulfilling the statutory duty to accurately account for and pay the taxes owed.⁹¹ The Service accepts the returns as filed and assesses the tax liabilities shown on the returns.

This initial accounting is not final, nor should it be. The Service generally has three years in which to review and correct returns for errors resulting from both honest mistakes and attempts to game the system.⁹² The Service sometimes has even more time; for example, if a taxpayer fails to file a return or files a fraudulent return, the limitation period for

87. See MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE § 4.01 (Rev'd 2d ed. 2003).

88. HUGH C. BICKFORD, SUCCESSFUL TAX PRACTICE 210, 212 (2d ed. 1952) (stating that in normal practice, approximately one in fifty returns will actually be investigated and verified by collectors or agents).

89. *Id.* at 212.

90. REPORT RELATING TO THE IRS, *supra* note 34, at 6.

In fiscal year 2001, the audit rate increased slightly to .58 percent and the number of returns audited increased to approximately 732,000. By contrast, the number of returns audited in fiscal years 1997, 1998, and 1999 were approximately 1,519,000, 1,193,000, and 1,100,000—demonstrating a steady decline in number of returns audited. The IRS continues to audit the 1,100 largest corporations every year but the audit rate for all other corporations declined from 3 percent in 1992 to 1.1 percent in fiscal year 2001.

Id.

91. § 6201(a)(1) allows the Service to accept and assess the liability reported by taxpayers on their return without having to verify every return.

92. § 6501(a).

assessment is unlimited.⁹³ This investigation of a return or a taxpayer is the second path the Service takes to an assessment.

The second path is the audit path, sometimes followed by examining the taxpayer's return and sometimes, if the taxpayer has not filed a return, by examining the taxpayer's "lifestyle" and financial affairs to create a return.⁹⁴ As discussed above, this second method of tax determination is a vital compliance tool. But this path to assessment is more circuitous than direct reliance on the taxpayer. If the Service concludes that there is a "deficiency in respect of any tax imposed,"⁹⁵ it may *not* simply assess the deficiency if the tax is an income, estate, gift, or certain type of excise tax.⁹⁶ When the Service finds a deficiency in one of these types of taxes it must, instead of assessing, send the taxpayer a "notice of deficiency" indicating its *intent* to assess at the end of (generally) ninety days.⁹⁷ Taxpayers then have (generally) ninety days to file a Tax Court petition for a "redetermination of the deficiency," during which time the Service is barred from assessing the deficiency.⁹⁸ The Notice of Deficiency is also called the "90-day letter" and is often thought of as the "ticket to the Tax Court" since its primary function is to allow the taxpayer access to a pre-payment forum to resolve any disputes as to the merits of the proposed deficiency.⁹⁹ A Notice of Deficiency carries the same weight and enjoys

93. § 6501(c)(1), (3). However, if a taxpayer has failed to file a tax return, the taxpayer can reinstate the three year period by filing an untimely return, provided that the original failure to file was not false or fraudulent. *See Bennett v. Comm'r*, 30 T.C. 114, 123 (1958). Once the taxpayer files a fraudulent return, however, the taxpayer may not reinstate the three year period by filing a nonfraudulent return after the due date to "cure" the fraud. *Badaracco v. Comm'r*, 464 U.S. 386, 396 (1984). An amended return is thus treated as a supplemental return confessing error and not as a substitute for the original return. Other longer limitations period may apply in special circumstances. For example, the Service has six years to audit a return when a taxpayer understates their gross income by more than twenty-five percent. § 6501(e)(1)(A).

94. §§ 6020, 7602. Prior to RRA 98 the Service had wide discretion to perform "lifestyle" audits when it determined a taxpayer was living beyond his or her obvious means. § 7602 (1994), amended by Pub. L. No. 105-206, 112 Stat. 685 (1998). The open-ended nature of these audits created significant opposition among tax practitioners, taxpayers and politicians. *See, e.g.*, Barbara Whitaker, *When the I.R.S. Agent Peeks Under the Mattress*, N.Y. TIMES, July 28, 1996, at F8; Stephen Moore, *Remarks of CATO Institute at IRS Restructuring Meeting*, 97 TAX NOTES TODAY 75-39 (Apr. 18, 1997).

95. § 6212.

96. § 6213. "Deficiency" is a difficult term of art confusingly defined in § 6211. Essentially, a "deficiency" is difference between the proper tax and the tax reported by the taxpayer (or not, if the taxpayer did not file a return). *See Kurtzon v. Comm'r*, 17 T.C. 1542, 1548 (1952) ("A similar statement of the definition . . . is the correct tax imposed, plus rebates, minus the tax on the return, minus prior assessments.").

97. §§ 6212-6213.

98. § 6213.

99. It also serves both a pleading purpose and a notice purpose. *See Lederman, "Civil"izing Tax Procedure*, *supra* note 2, at 192-203.

the same judicial deference as an assessment; courts recognize it as the expression of the Service's judgment on the proper tax.¹⁰⁰

The Service may make its institutional determination of tax (whether expressed as an immediate assessment or expressed as a Notice of Deficiency) at one or both of two levels: the Examination level or the Appeals level.¹⁰¹ At the Examination level, when the Service employee who has conducted the examination is finished, he or she prepares a report and submits it to the first level manager.¹⁰² If the report concludes that the taxpayer owes more tax, then when the manager approves the report, the Service will either (a) assess the tax, (b) send the taxpayer a Notice of Deficiency, if the tax is not immediately assessable because it is a "deficiency," or (c) send the taxpayer a notice that the Service intends to send the taxpayer a Notice of Deficiency in 30 days (typically called the "30-day letter").¹⁰³

Taxpayers who cannot reach agreement with the Service at the Examination level can generally take their case to the Appeals level.¹⁰⁴ The Office of Appeals has historically been composed of experienced former examination agents whose mission "is to resolve tax controversies, without litigation, on a basis that is fair and impartial to both the Government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service."¹⁰⁵ The Office of Appeals essentially reviews the work of the examining agent; in rare cases it may also spot and investigate new issues.¹⁰⁶ The Appeals officer may meet with taxpayers and with Service employees, either alone or together.¹⁰⁷ The Office of Appeals concludes its review by taking one of several actions. First, it can send the case back to the Examination level for more work.¹⁰⁸ Second, it can reach agreement with the taxpayer as to the

100. See, e.g., *Meserve Drilling Partners v. Comm'r*, 152 F.3d 1181, 1183 n.3 (9th Cir. 1998) (stating that a Notice of Deficiency is presumed to be a "determination" unless it reveals on its face that the Service did not consider any information that related to the taxpayer who was the subject of the Notice); *Edwards v. Commissioner*, 84 T.C.M. (CCH) 24 (2002) (explaining the general rule that courts refuse to look behind a Notice of Deficiency to question the Service's motives and procedures leading to the determination unless the Notice shows on its face that no determination of deficiency was made).

101. See SALTZMAN, *supra* note 87, at 10.02.

102. *Id.*

103. *Id.*

104. There are significant differences between going to the Appeals after receiving the 90-day letter and going there after receiving the 30-day letter, but those differences are beyond the scope of this Article.

105. I.R.M. 8.1.3.2 (1998).

106. I.R.M. 8.6.1.4.2 (2001).

107. *Id.*

108. *Id.*

unagreed issues, memorialized on a Form 870-AD.¹⁰⁹ Third, if no agreement is reached and the Notice of Deficiency has not been issued, then Appeals can issue the taxpayer the Notice of Deficiency ticket to the Tax Court.¹¹⁰ Either way, the Office of Appeals' decision becomes the decision of the Service.

At both the Examination and Appeals levels, the purpose remains the same: to encourage taxpayer compliance through monitoring.¹¹¹ Accordingly,

a Service representative in his/her conclusions of fact or application of the law, shall hew to the law and the recognized standards of legal construction. It shall be his/her duty to determine the correct amount of the tax, with strict impartiality as between the taxpayer and the Government, and without favoritism or discrimination as between taxpayers.¹¹²

The procedures by which the Service selects returns for audit is beyond the scope of this Article.¹¹³ But to understand the inquisitorial nature of the Service's tax determination process, it is important to understand that Service employees are required to act "with strict impartiality as between the taxpayer and the Government" at both the Examination and Appeals level.¹¹⁴

Because of its status as a judgment, a properly recorded assessment is a critical procedural pre-requisite for the administrative collection of a taxpayer's tax liability.¹¹⁵ Only once the assessment is on the books may the Service proceed to collect the liability through use of lien, levy, or setoff powers and taxpayers are unable to obtain judicial review unless and

109. I.R.M. 8.2.1.8 (1999); 8.8.1.1 (2001). *See generally* EFFECTIVELY REPRESENTING YOUR CLIENT BEFORE THE "NEW" IRS ch.6 (Jerome Borison ed., 2002).

110. I.R.M. 8.2.1.9 (1999).

111. I.R.M. 1.2.4.10 (1974) ("The primary objective in selecting returns for examination is to promote the highest degree of voluntary compliance on the part of taxpayers.").

112. I.R.M. 1.2.4.5 (1960).

113. *See* 1 EFFECTIVELY REPRESENTING YOUR CLIENT, *supra* note 109, ch.3.

114. I.R.M. 1.2.1.4.5 (1960).

115. A discussion of this aspect of assessment is beyond the scope of this Article. Note, however, that a proper assessment is one of the steps necessary to create the tax lien, § 6321, and is necessary before the Service can seize the taxpayer's property to satisfy the liability, § 6331. A properly recorded assessment is also a necessary step if the Service wants to preserve the taxpayer's liability beyond the applicable assessment limitations period. *See, e.g.,* Illinois Masonic Home v. Comm'r, 93 T.C. 145, 150-51 (1989) (stating that the Service cannot assess a transferee under § 6901 if the Service has not assessed the original taxpayer within the appropriate limitation period because expiration of the assessment limitation period bars both the remedy of collecting the tax and also extinguishes the liability of the taxpayer, a necessary prerequisite to the liability of a transferee); *Diamond Gardner Corp. v. Comm'r*, 38 T.C. 875, 879 (1962) (same). That is, the limitations period is a "statute of repose." *United States v. Powell*, 379 U.S. 48, 59 (1964) (Douglas, J. dissenting) (citing 69 CONG. REC. 3852-53 (1956)).

until they pay the assessed tax in full.¹¹⁶ This is true regardless of whether the assessment results from the liability reported on a return—prepared by either by taxpayers or by the Service for taxpayers who fail to file¹¹⁷—or, after audit, from the Service’s proposed adjustment, if it is either approved by the Tax Court or uncontested by the taxpayer in that forum.¹¹⁸ While in this critical sense the Service acts as the primary decisionmaker as to the taxpayer’s liability, that is not the end of the story. For every lawyer at some point learns the unhappy lesson that it is one thing to be owed money, and quite another to collect it.

2. Tax Collection

In collecting the tax liability reflected in the assessment, the Service again has a wide degree of autonomy—much more so before RRA 98 than since—in making decisions about when and how to collect from which sources. Before RRA 98, much to the envy of private creditors, the Service could decide among a variety of potent administrative tools to aid collection.¹¹⁹ Unlike private creditors, the Service could generally collect the tax without judicial aid, choosing what assets to seize or, if the liability were joint, which taxpayer to collect from.¹²⁰ Under section 6323 it could file a Notice of Federal Tax Lien which would take priority over all but a

116. See § 6321 (lien); § 6331 (levy); § 6402 (setoff). Note that the Service takes the position it can setoff a liability even before making an assessment, so long as it has sent out the 90-day letter, from which the assessment is made automatically unless the taxpayer obtains a different judgment from the Tax Court. See *United States v. Helig-Meyers Co.*, 2003-1 T.C.M. (CCH) ¶ 50,287 (2003). Otherwise, offset may not occur until an assessment is made. See *id.* Note further, that the Service may use judicial process to collect a liability even when no assessment has been recorded. See Camp, *supra* note 82, at 8-30 to 8-33 (explaining § 6501’s three year period of limitation for collection without assessment). That, of course, is adversarial process. I do not in any way claim that tax administration is exclusively inquisitorial: taxpayers may always force the Service into litigation in a traditional adversarial process by paying a tax in full and then suing for a refund. § 7422. The point here is that assessment entitles the Service to use an administrative collection process that, as shall be seen below, was essentially inquisitorial in nature up until RRA 98. The Supreme Court articulated the full payment rule in *Flora v. United States*, 362 U.S. 145, 163 (1960). Note, however, that before filing suit, taxpayers must file a refund claim with the Service to allow the Service a chance to correct its prior decision. § 7422(a). Note further that taxpayers’ burden of proof in refund cases is more difficult than in Tax Court cases. See discussion *infra* Section III.B.2.a.

117. § 6201(a)(1) (authorizing Service to assess based on the taxpayer’s return); § 6020 (authorizing the Service to make return when the taxpayer does not).

118. See §§ 6211-6216 (containing the special rules for the deficiency process).

119. See generally Marilyn E. Phelan, *A Summary of the Extensive Collection Powers of the Internal Revenue Service*, 9 VA. TAX REV. 405 (1990) (providing a description on the state of the law at that time).

120. *Id.* at 463-64.

very few favored creditors.¹²¹ Under section 6331 it could seize or levy first, then adjudicate ownership later.¹²² Indeed, the Service “pursued the administrative practice . . . of seizing any property found in the possession, custody or control of the person against whom the tax had been imposed.”¹²³ Section 7426 protected third parties whose property might be seized by mistake by giving them a post-seizure cause of action for wrongful levy.¹²⁴ This satisfied any notion that constitutional due process required an *adversary* hearing.¹²⁵

Once the Service recorded its tax liability determination by making an assessment, taxpayers before RRA 98 could not collaterally attack the

121. Section 6321 provides that the tax lien arises automatically after assessment, notice and demand for payment, and a failure to pay, without any need for public notice, but section 6323(a) provides that this “secret” lien is no good against four broad classes of creditors until public notice is given. Once the Notice of Federal Tax Lien is filed, then only a small group of creditors can assert a higher priority. § 6323(b). *See generally* DAVID A. SCHMUDDE, *FEDERAL TAX LIENS* (4th ed. 2001).

122. *See, e.g.*, *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 731 (1985) (holding that the Service could seize funds in a taxpayer's bank account even though account was jointly held with a non-liable third party); *Phillips v. Comm'r*, 283 U.S. 589, 597 (1931) (finding that a post-seizure hearing satisfied constitutional due process in tax collection seizures); *Murray's Lessee v. Hoboken Land & Improv. Co.*, 59 U.S. (18 How.) 272 (1855). Section 6331(a) authorizes the Service to “levy,” which § 6331(b) defines as “distrain and seizure by any means.” For reasons unknown to me, the Service uses the terms “levy” and “seizure” differently in internal guidance than the Code uses the terms. *See* I.R.M. § 5.111.1.1.2 (1999). In Service jargon, a “seizure” is what is done to something that can be sold, usually tangible realty or personalty, while a “levy” is done to something that cannot be sold, generally intangible property such as payments due the taxpayer from a third party, or money. *See id.* That distinction is not evident from the statute or from its history. Note that the GAO believes that the Service “differentiates between the levy of assets in the possession of the taxpayer (referred to as “seizure”) and the levy of assets, such as bank accounts and wages, which are in the possession of third parties, such as banks or employers (referred to as a “levy”).” GENERAL ACCOUNTING OFFICE, REPORT TO THE HOUSE SUBCOMM. ON OVERSIGHT, IMPACT OF COMPLIANCE AND COLLECTION PROGRAM DECLINES ON TAXPAYERS n.5, GAO-02-674 (2002). The GAO gives no citation or reason for why it believes that to be the Service's distinction. *See id.*

123. *Matter of Carlson*, 580 F.2d 1365, 1369 (10th Cir. 1978).

124. § 7421.

125. *Phillips*, 283 U.S. at 597-98. Court interpretations of § 6303 also support viewing the assessment as a functional equivalent to a judgment. *See, e.g.*, *United States v. Chila*, 871 F.2d 1015, 1018 (11th Cir. 1989). That statute requires the Service to give the taxpayer notice and demand for payment within sixty days of making the assessment. § 6303(a). Despite the unambiguous and broad language, courts have restricted the statute's application to only situations where the Service seeks to collect administratively. *See, e.g.*, *Chila*, 871 F.2d at 1018. Courts reason that the § 6303 notice serves a due process function analogous to notice pleading, so that when the Service attempts, like any ordinary creditor, to obtain a court judgment, the § 6303 notice becomes superfluous. *Id.* (agreeing with the district court that “the requirement of [6303] notice was for the protection of a taxpayer only in case the IRS used the summary administrative remedies to collect the tax that are available to it”), *accord* *United States v. Jersey Shore State Bank*, 781 F.2d 974 (3d Cir. 1986), *aff'd*, 479 U.S. 442 (1987).

determination during the collection process, that is, until after the tax judged due by the Service was collected.¹²⁶ There was no idea that *taxpayers* were “due” an adversary hearing at this point in the process because their remedy was to pay the tax in full and then seek a refund.¹²⁷ For example, the section 7426 remedy was not and is still not available for taxpayers.¹²⁸ Not only does section 7426(a) provide that the levy cannot be contested by “the person against whom is assessed the tax out of which such levy arose”¹²⁹ but section 7426(c) prevents taxpayers from using a third party as a stalking horse by providing that the assessment on which the levy is based “shall be conclusively presumed to be valid.”¹³⁰ It is simply impossible to argue the validity of the Service’s tax determination in a wrongful levy context. More broadly, section 7421, commonly called the Anti-Injunction Act, still prevents any “suit for the purpose of restraining the assessment or collection of any tax.”¹³¹ This again forces taxpayers, and indeed “any person whether or not such person is the person against whom such tax was assessed,”¹³² to follow the inquisitorial process established by the Code and stay out of adversarial process until the government collects the tax.¹³³

The most significant restriction on the Service’s decisionmaking came in the 1976 *G.M. Leasing* decision, where the Supreme Court held that judicial approval was required before the Service could enter private homes to search for and seize assets.¹³⁴ Even then, later developments

126. *Flora v. United States*, 362 U.S. 145, 146 (1960).

127. *Id.* at 176.

128. § 7426(a)(1).

129. § 7426(a)(1).

130. § 7426(c).

131. § 7421(a).

132. § 7421(a).

133. Of course these generalities have exceptions. For example, the Supreme Court held that a wife who paid her ex-husband’s sole tax liabilities in order to free her home from the tax lien was a “taxpayer” within the meaning of § 6511(a) and so had standing under 28 U.S.C. § 1346(a)(1) to sue for a refund, even though it was not her tax she had paid. *United States v. Williams*, 514 U.S. 527, 535-36 (1995). Also, the Court will not apply the Anti-Injunction Act in certain narrow circumstances, such as when Congress has provided no alternative procedure for the party to be heard in an adversary proceeding. *See South Carolina v. Regan*, 465 U.S. 367, 373 (1984).

134. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 358 (1977) (requiring a warrant for entry onto private premises to seize assets, but allowing warrantless seizure of property in public areas). Note that the *G.M. Leasing* decision itself reversed the prior practice of warrantless entries onto premises solely on the basis of administrative determination. *See United States v. Shriver*, 645 F.2d 221, 221 (4th Cir. 1981). Prior to *G.M. Leasing*, the Court had viewed the matter solely as an issue of due process. *See generally Phillips v. Comm’r*, 283 U.S. 589 (1931). Indeed, it was the limitless nature of the discretion given to the Service by the levy statute, § 6331(a), that prompted the *G.M. Leasing* court to impose a Fourth Amendment restriction on the Service. 429 U.S. at 357-58 (rejecting government’s argument that § 6331 contained sufficient internal restraints on Service employees’ discretion as to what property to seize, and concluding: “to give

show that both the Court and subsequent courts recognized and deferred to the Service's position as a decisionmaker.

First, the Court held that the Service could proceed through an *ex parte* proceeding in which the district court would grant a writ of entry upon a showing of probable cause that taxpayer assets were within the premises.¹³⁵ Subsequent courts rejected taxpayer attempts to convert the writ application process into an adversarial proceeding. For example, in *United States v. Shriver*, the Fourth Circuit found a district court to have committed error in allowing the taxpayers to challenge the writ application.¹³⁶ In so doing, the circuit court implicitly grounded its decision on the recognition of the Service as being the entity entrusted with making the liability decision:

[T]he warrant should have issued upon the *ex parte* application of the United States on behalf of the Internal Revenue Service. The proceeding should not have been converted into an adversary one or prolonged over a period of years while taxes presumptively due and owing remain uncollected.¹³⁷

Second, while subsequent courts have split over the quantum of "probable" required of the government,¹³⁸ both of the two groups use inquisitorial logic to support their respective views. One group relies on the fact that the writ of entry is sought in furtherance of an administrative scheme of collection, implicitly relying on the Service's administrative controls over the seizure process.¹³⁹ For example, internal Service guidance

the statute that reading would call its constitutionality into serious question. We therefore decline to read it as giving carte blanche for warrantless invasions of privacy.").

135. *Matter of Carlson*, 580 F.2d 1365 (10th Cir. 1978).

136. 645 F.2d at 222.

137. *Id.*; see also *Matter of Carlson*, 580 F.2d 1365. In fact, there is no reported case of a court allowing the application for a writ of entry to be converted into an adversarial hearing.

138. See Erin Suzanne Enright, Comment, *Probable Cause for Tax Seizure Warrants*, 55 U. CHI. L. REV. 210, 211 (1988) (dividing circuit courts between those which applied the "traditional probable cause standard" of "fair probability" and those which applied a lesser standard of administrative regularity and control over discretion of seizing agents).

139. *Shriver*, 645 F.2d at 222-23:

We are not unsympathetic with the district judge's concern over the possibility that the revenue agents, after an authorized entry, might make an excessive levy. The agents act under administrative instructions designed to protect taxpayers from oppressively excessive levies, but they must be left with a substantial amount of discretion, for, in advance of entry, they cannot determine the condition or the probable value at a forced sale of personal property they will find.

suggests that “pornographic materials or drug paraphernalia may have significant monetary value, but public policy may dictate that this material should not be sold by the government to satisfy a person’s tax debt.”¹⁴⁰ Accordingly, some courts give the Service significant decisionmaking powers once inside the premises and do not require a particularized description of the property to be seized.¹⁴¹

Other courts require a more particularized showing of “sufficient specificity to enable the judge to make an *independent determination* of whether probable cause exists and to prevent the agents from having uncontrolled discretion to rummage everywhere in search of seizable items once lawfully within the premises.”¹⁴² This group also, however, imposes the more particularized demands in recognition of the Service’s inquisitorial powers to gather the information upon which to base an entry:

The policy behind requiring such a heightened standard of proof is that the government has unique access to the information it used as a basis for its levy and . . . fairness mandates that the government come forward with substantial evidence of the connection between the property levied upon and the taxpayer.¹⁴³

Further, as a practical matter, both groups of courts impose similar restrictions on the Service’s discretion over *which* of the particular assets actually found within the property it can seize.¹⁴⁴ Most courts, and the Service, take the position that the writ application and order is not limited to the items specified on the writ but, at the same time, Service employees

140. INTERNAL REVENUE SERV., LITIGATION GUIDELINE MEMORANDUM, GL-40 (WRITS OF ENTRY), in 2000 TAX NOTES TODAY 91-36 (June 27, 1996) [hereinafter LGM ON WRITS OF ENTRY]. For other administrative controls, see I.R.M. 5.10.3.5.1 (2003).

141. See, e.g., *Shriver*, 645 F.2d at 222-23. In *In re Brown*, No. C-84-651A, 1984 U.S. Dist. LEXIS 21776 (D. Utah Nov. 26, 1984), the court explained:

[T]he standard for probable cause in an IRS writ of entry is not the same as for a criminal warrant. Thus, in an application for such a writ of entry, the IRS must establish by affidavit that: (1) it has a right to levy and seize assets of the taxpayer; this means proper assessment, notice of assessment to the taxpayer, demand for payment, and nonpayment, pursuant to 26 U.S.C. §§ 6213, 6303 and 6331; and (2) there is probable cause to believe that there are assets which may be seized on the premises to be entered.

142. *United States v. Condo*, 782 F.2d 1502, 1505 (9th Cir. 1986) (emphasis in original).

143. *Oxford Capital Corp. v. United States*, 211 F.3d 280, 283 (5th Cir. 2000).

144. See, e.g., *Matter of Stubblefield, Inc.*, 810 F. Supp. 277, 278-79 (E.D. Cal. 1992).

must receive additional court approval to seize items that are not similar to the ones approved by the court.¹⁴⁵

In a very real sense, then, the pre-RRA 98 statutory structure made the Service the decisionmaker in both determining the tax liability and deciding how to collect it. The former decision was made through either an assessment or a Notice of Deficiency (issued either by the Examination function or the Office of Appeals), both of which served the same function as a judgment: to formally express a tax determination. If tax determination were an adversarial system, the decisionmaker would not engage in discovering the evidence necessary to the decision but would instead rely upon the parties in interest both to decide what information was relevant and to provide it. Likewise, if tax collection were an adversarial system, the Service would be required to behave as a litigant and seek approval from some neutral third party before it could decide which collection tool to use. The only approval necessary, however, was in the limited circumstances where the Service sought to enter private premises to search for distrainable assets.

Not only did the Service act as the decisionmaker as to the determination and collection of taxes, it also performed the role of evidence-gatherer, determining what information it required and who should provide it. After all, section 6201 requires the Service not just to make a determination and assessment, but to also make the “inquiry” necessary for the determination and assessment. Further, section 7601 authorizes the Service to “inquire after . . . all persons . . . who may be liable to pay any internal revenue tax.” The next subpart explores the extraordinary powers granted by both Congress and the courts that allows the Service to gather the evidence necessary to both its tax determination and tax collection decisionmaking processes.

C. The Service As Evidence-Gatherer

Practitioners and courts recognize that control of information flow to the Service is critical to both determination and collection. Mostly, the Service gathers the information it needs to determine taxes voluntarily from taxpayers and third parties through the returns system, through various information-sharing agreements with federal and state agencies, through access to the vast public database of courthouse records, and through informal requests. The heart of the Service’s information-gathering authority is section 7602 which gives the Service various powers

145. *Id.* at 279 (holding that the Service was “entitled to an order that permits entry into the premises of Stubblefield, Inc. and seizure of the listed items as well as other inventory, equipment, and furnishings of a restaurant which belong to the taxpayer”); LGM ON WRITS OF ENTRY, *supra* note 140.

to aid its section 7601 “inquiry.” The most potent power is that of the summons. Even though summonses are not routinely issued, the following analysis will focus on that aspect of this statute because it is there that the logic of inquisition finds its fullest expression.

1. The Modern Summons Power

Subsection (a) of section 7602, entitled “Examination of books and witnesses” provides:

(a) Authority to summon, etc. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

- (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
- (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
- (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Generally, when the Service needs information to perform its duties it simply asks for, and usually gets, it.¹⁴⁶ Sometimes, however, either the taxpayer or a third party refuses the request. In such cases, the Service can issue a summons. The summons power is the key piece of the inquisitorial puzzle because it defines the outer limits, the contours, of the Service’s inquisitorial power.¹⁴⁷

146. See I.R.M. 25.5.1.4 (1999) (stating that an employee should first ask the taxpayer for needed information).

147. See Martinez, *supra* note 66, at 742. As a practical matter, summonses are rarely issued, for a variety of reasons. Revenue agents may believe, when faced with a recalcitrant taxpayer, that resistance to the summons will drag the process on too long and so may be discouraged from issuing a summons. Instead, a more typical response is to simply make an assessment based on available information and aim high, thus forcing the taxpayer to disclose the information to the Tax

It is not immediately obvious why the summons power is inquisitorial. After all, it is not self-enforcing.¹⁴⁸ While the summoned party has a legal duty to respond, the Service cannot compel a response administratively.¹⁴⁹ Instead, it must first petition a federal district court to enforce the summons before the summoned party is exposed to the possibility of punitive sanctions for failing to respond.¹⁵⁰ Nor is the enforcement proceeding generally *ex parte* as is the application for a writ of entry, discussed above.¹⁵¹ Once the Service files a petition, the court issues a show cause order to the summoned party, who then files an answer.¹⁵² The normal Federal Rules of Civil Procedure apply.¹⁵³ There is the possibility of discovery and a hearing.¹⁵⁴ The enforcement order, if there is one, is an

Court in order to avoid a judgment. See William L. Raby, *TCMP, Economic Reality, and the IRS Summons Power*, 95 TAX NOTES TODAY 140-97 (July 19, 1995). Mr. Raby, an accountant, puts a rather cynical spin on it when he asserts that “the normal recourse of the agent when the taxpayer fails to cooperate is to set up an arbitrary deficiency, not to get involved with a summons and its subsequent enforcement. The notice of deficiency usually motivates the taxpayer to come forward with any proof that he has that it is wrong.” *Id.* Those who were Service attorneys might dispute the term “arbitrary” because revenue agents must still have a factual basis to assert a deficiency. *E.g.*, I.R.M., 25.5.1.4 (1999); I.R.M., 25.5.4.4.1(2) (1999). See generally Johnson, *supra* note 2, at 485. There is little doubt, however, that in such situations, a revenue agent’s report will contain a bit of “water” which can then be drained in the Appeals process. Likewise, when a revenue officer who is trying to collect a tax wants to know whether a third party is holding assets of the taxpayer, it is often easier to issue a levy than a summons. A levy will catch the assets, if any, while a summons simply gives the taxpayer an opportunity to move them.

148. Courts hold that compliance is voluntary and not compelled until the Service obtains a court order. *E.g.*, *Vaughn v. Baldwin*, 950 F.2d 331, 333 (6th Cir. 1991) (“[T]he administrative summons issued to the plaintiff in this case did not make the production legally compulsory, and because the government’s right to possession stemmed from the owner’s consent, the government had no right to possession after consent was withdrawn.”); *Linn v. Chivatero*, 714 F.2d 1278, 1288 (5th Cir. 1983) (Clark, C.J., concurring) (stating that absent court intervention, a taxpayer’s production of documents in response to a summons is voluntary); see also *United States v. Peters*, 153 F.3d 445, 456, 459 (7th Cir. 1998) (holding that the summoned party’s compliance with a summons was a voluntary act such that evidence so turned over was not eligible for suppression as having been obtained by compulsion). *But see* *Backer v. Comm’r*, 275 F.2d 141, 143-44 (5th Cir. 1960) (determining that certain rights granted by 12 U.S.C. § 555 to “a person compelled to submit data or evidence” to a government agency applied to a person appearing in response to a tax summons).

149. See § 7604(b).

150. § 7604. See *United States v. Rylander*, 460 U.S. 752, 756 (1983).

151. *Backer*, 275 F.2d at 143.

152. *United States v. McCarthy*, 514 F.2d 368, 372-73 (3d Cir. 1975) (explaining procedure generally adopted by courts). Note too that before the Service may petition for enforcement of summons where the taxpayers are unknown “John Does,” the Service must first obtain court approval even to issue the summons, through an *ex parte* proceeding governed by § 7609(f). See discussion in Part III.C.3.b.ii.

153. *Donaldson v. United States*, 400 U.S. 517, 528 (1970).

154. See *United States v. Michaud*, 907 F.2d 750, 754 (7th Cir. 1990) (en banc) (remanding to district court for further findings, including possible discovery); *United States v. Kis*, 658 F.2d

appealable final order without *res judicata* effect.¹⁵⁵ In short, a summons enforcement procedure in district court looks like a Typical Adversarial Process where the court decides, on the basis of evidence presented by the parties in interest, what information the Service may use in its tax determination or collection process.¹⁵⁶

In spite of these attributes, the judiciary has long recognized that while “the government’s power lies not in the fashion of the Courts of the Star Chamber and the High Commission,” nonetheless “the investigative power of the Internal Revenue Service is fundamentally inquisitorial . . . in its ability to invade, in a civilized manner, the personality and privacy of every citizen in the United States.”¹⁵⁷ Therefore, even though summons

526, 543-44 (7th Cir. 1981) (establishing discovery standards for the 7th Circuit); *United States v. Stuckey*, 646 F.2d 1369, 1372-76 (9th Cir. 1981) (collecting case law); *United States v. Genser*, 595 F.2d 146, 152 (3rd Cir. 1979) (stating that the court will not grant discovery as a matter of course, but may permit it after an evidentiary hearing).

155. *Church of Scientology v. United States*, 506 U.S. 9, 13, 15 (1992) (finding that compliance with summons enforcement order did not moot circuit court’s jurisdiction to hear appeal).

156. *Reisman v. Caplin*, 375 U.S. 440, 445-46 (1964) (holding that proceeding for the enforcement of a summons issued by the Commissioner of Internal Revenue under § 7602 is “an adversary proceeding affording a judicial determination of the challenges to the summons”).

157. *United States v. Kasmir*, 499 F.2d 444, 454 (5th Cir. 1974), *rev’d sub nom. Fisher v. United States*, 425 U.S. 391, 395, 414 (1976) (footnotes omitted) (reversing the circuit court’s refusal to enforce a summons). *See, e.g., United States v. Giordano*, 419 F.2d 564, 568 (8th Cir. 1969) (“Taxpayer in his brief characterized the Government’s efforts as a ‘fishing expedition.’ If so, the Secretary or his delegate has been specifically licensed to fish by § 7602.”); *United States v. McKay*, 372 F.2d 174, 176 (5th Cir. 1967):

We think the power of the Commissioner of Internal Revenue to investigate the records and affairs of taxpayers is greater than that of a party in civil litigation. His power has been characterized by this court as an inquisitorial power, analogous to that of the grand jury and one which should be liberally construed.

Id.; *De Masters v. Arend*, 313 F.2d 79, 88 (9th Cir. 1963):

Clearly, [the Service] may as a general rule check to determine whether a return should have been filed where one was not, or whether more tax was due than was actually paid, without first showing that there was probable cause, or any cause at all, to believe that these things were true.

Id.; *Bolich v. Rubel*, 67 F.2d 894, 895 (2d Cir. 1933) (holding that Service could exercise summons power even during taxpayer’s appeal to Board of Tax Appeals (later the Tax Court) because “it is not a power to procure or perpetuate evidence at all; it is strictly inquisitorial, justifiable because all the facts are in the taxpayer’s hands”); *Brownson v. United States*, 32 F.2d 844, 849 (8th Cir. 1929) (“[T]he power of the Commissioner . . . to examine corporate books and papers is analogous to the power of the federal grand juries . . . and . . . the fact that the corporation whose books and papers are required to be produced is not under investigation is immaterial.”); *United States v. First Nat’l Bank of Mobile*, 295 F. 142, 144 (S.D. Ala. 1924) (“It is monstrous . . . to say that . . . the

enforcement requires judicial review, “it is for the agency, and not the taxpayer, to determine the course and conduct of an audit, and ‘the judiciary should not go beyond the requirements of the statute and force IRS to litigate the reasonableness of its investigative procedures.’”¹⁵⁸ It is this freedom to be “unreasonable” in its demands for evidence that makes the Service’s power inquisitorial. As discussed further below, the putative adversarial nature of the summons enforcement proceeding is more a lick-and-a-promise than a substantive check on the Service’s power to determine what information it needs and how much information is enough to determine or collect a tax liability. While statistics certainly do not tell the whole story, it is nonetheless significant that in the reported outcomes of 201 summons enforcement cases during five calendar years, district courts apparently completely quashed only 1 and partially enforced only 14 others; that is, only about 1 out of 200 times did courts actually overturn the Service’s evidence-gathering decision.¹⁵⁹

government could not inquire as to the moneys of its citizens who owe income taxes, and trace these moneys through its various agencies, such as national banks, in order to ascertain the correct income tax that is owing by the citizen.”); *In re Phillips*, 19 F. Cas. 506, 507 (D. Va. 1869) (No. 11,097) (“The objection that the inquiries are inquisitorial in their character is too vague It would, if allowed, defeat all efforts to detect every . . . conspiracy to defraud the treasury, and the government would be compelled to surrender to its worst and most unscrupulous enemies.”).

158. *United States v. Norwest Corp.*, 116 F.3d 1227, 1233 (8th Cir. 1997) (citations omitted).

159. LEXIS searches on file with the author. The years were picked at random. I do not, of course, argue that the *availability* of court review has *zero* influence on Service decisions on what information to ask for, but the discussion in the text suggests that such influence is minimal. The Service does not make public the number of summons issued, but does report that for FY2002, it examined just under 827,000 returns. INTERNAL REVENUE SERV., 2002 IRS DATA BOOK, Table 12 (2003), *available at* <http://www.irs.gov/taxstats> (last visited Nov. 10, 2003). Assuming the 827,000 is a reasonable number for a given calendar year as well as fiscal year, then even if the Service issues summons in only one percent of the examinations, that is still some 8,000 summonses per year. Thus, that only 44 summons went to court is a pretty small percent on almost any assumption. Nor does there appear to be much difference in enforcement statistics pre- and post-RRA 98, as the following table shows:

	1995	1996	1997	2000	2002	Total
Enforcement granted	48	39	35	26	38	186
Enforcement granted in part, denied in part	5	2	0	1	6	14
Enforcement denied	1	0	0	0	0	1
Total Number of Petitions to Enforce/Quash	54	41	35	27	44	201

A close review of how the requirements of the statute have changed over time and how courts have interpreted serves two purposes. First, it delineates more clearly the inquisitorial contours of the Service's summons power. Disagreement over its history has led to disagreement within the Supreme Court over its proper interpretation.¹⁶⁰ Second, it illustrates the interpretive tradition that courts have created in making sense of the summons power. Regardless of general theories of statutory interpretation, when faced with new challenges, courts have drawn upon an interpretive tradition of *this* statute, which one might call an enabling tradition.¹⁶¹ In that sense, the history of the statute demonstrates the practical reasoning that courts actually use to settle controversies and, as I shall demonstrate, that reasoning resounds with inquisitorial logic.¹⁶²

2. The Inquisitorial History of the Summons Power

This subsection examines the history of the summons power to demonstrate how it evolved from a conditional power in its first manifestation, to a general unconditioned power by 1954. While this history is part of the broader story of the development of modern administrative law, it is uniquely tied to the statute codified as section 7602 in 1954. This subsection first looks at how Congress put two different summons powers into the tax law between the Civil War and the 1877 Revised Statutes: one narrow and conditional, and one broad and unconditional. It then looks at how, between 1877 and 1954, Congress inadvertently abolished the broad summons power, how the broad summons power came to be reinserted by the 1939 codifiers and eventually became section 7602. During both these time periods the subsection will explore how courts struggled to fit the summons power within adversarial process traditions but had not settled on any uniform logic in delineating the scope of the summons authority.

160. See *United States v. Bisceglia*, 420 U.S. 141, 156 (1975) (Stewart, J., dissenting) ("The Court today completely obliterates the historic distinction between the general duties of the IRS, summarized in § 7601, and the limited purposes for which a summons may issue, specified in § 7602."). Actually, this Article suggests that the majority's reading is more consistent with the statutory history. See *id.* at 148-51. Justice Stewart failed to consider the entire history, going no further back than § 3172 of the Revised Statutes of 1874 and apparently not realizing that the summons power was indeed enacted to reinforce the duty to inquire, being derived originally from § 14 of the 1864 Revenue Act, discussed below, which was created to enforce the duty to "inquire" found in § 12 of the same Act. *Id.* at 154 n.1. See Revenue Act of 1864, ch. 173, §§ 12, 14, 13 stat. 223 (1864).

161. See generally Linda S. Mullenix, *The Influence of History on Procedure: Volumes of Logic, Scant Pages of History*, 50 OHIO ST. L.J. 803 (1989) (arguing for greater use of history in analyzing procedural statutes).

162. For a modern explanation of a theory of statutory interpretation as "practical reasoning," see generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

a. Civil War to the Revised Statutes

The summons story starts with a lacuna. In response to the huge demands for revenue created by the Civil War, Congress passed the Revenue Act of 1862.¹⁶³ The 1862 Act was an unprecedented, radical assertion of the federal government's taxing powers. Because of its size, scope and complexity it has been called "the foundation of the present internal revenue system."¹⁶⁴ It reached all manner of occupations, industries—even incomes.¹⁶⁵ The Act divided the country into separate districts, authorized the President to appoint an assessor and collector for each and authorized each assessor and collector to appoint assistant assessors and deputy collectors, who did all the work.¹⁶⁶ The assessor was to gather the lists and returns to determine the tax; the collector was to collect the tax.¹⁶⁷

The 1862 Act contained no summons powers. The focus of the Act was on the traditional sources of revenue for the Federal government—property (notably liquor) and licenses—so the procedures centered on obtaining accurate lists of property subject to taxation and assigning a proper value to that property.¹⁶⁸ Section 7 required most classes of persons subject to tax to file some type of list or return and directed the assistant assessor to visit each person to obtain the lists and verify the value personally.¹⁶⁹ If the taxpayer was uncooperative or was not home, the assistant was supposed to make up the list himself "according to the best information which he can obtain."¹⁷⁰ But there was no mechanism in the 1862 Act for the assistant assessor to require any person to produce information. Thus, while subsections 7602(a)(1) and (a)(3) trace back to the Act of 1862, the summons power came later.

The ancestor of current section 7602(a)(2) was born two years later in the Revenue Act of 1864.¹⁷¹ Congress found it necessary to revise the 1862

163. Revenue Act of 1862, ch. 119, 12 Stat. 432 (1862).

164. See generally AUBREY R. MARRS, AN HISTORICAL REVIEW OF THE STATUTORY JURISDICTION AND ADMINISTRATIVE PROBLEMS OF THE COMMISSIONER OF INTERNAL REVENUE 33 (1948).

165. Revenue Act of 1862 § 39-119.

166. Revenue Act of 1862 §§ 2-4. See generally EDWIN R. A. SELIGMAN, THE INCOME TAX 435-40 (2d ed. 1914) (describing actual operation of the 1862 Act).

167. Note that this tax administration structure remained in place from 1862 until the 1952 reorganization. See KEAN REPORT, *supra* note 86, at 25-27. The idea of the tax determination process as separate from the tax collection process was thus placed in the structure of the agency at its inception. Revenue Act of 1862 § 2.

168. *E.g.*, Revenue Act of 1862 § 9 (providing a penalty for making a fraudulent list).

169. Revenue Act of 1862 § 7.

170. §§ 9, 11.

171. Revenue Act of 1864, ch. 173, 13 Stat. 223 (1864).

Act, not only to increase revenue (by raising rates and subjecting even more items to taxation), but also to provide for “increased care in the construction of the machinery of collection.”¹⁷² The “machinery” was very much based on person-to-person contact. Thus, section 11 imposed the duty “to make a list or return, verified by oath or affirmation, to the assistant assessor,”¹⁷³ who, under the authority of section 12, would “proceed through every part of their respective districts, and inquire after and concerning all persons . . . liable to pay any duty,”¹⁷⁴ and would either receive the list or return from the taxpayer or would, under the authority of section 13, prepare the list or return based on the taxpayer’s disclosures and consent.¹⁷⁵ If the taxpayer balked, or avoided the assistant assessor, then and only then did section 14 give assessors the power to summons both taxpayers and “any other person as he may deem proper” and to require the summoned party to produce “books of account” “relating” to the taxpayer’s trade or business.¹⁷⁶

Before the assessor could use a summons, however, the following chain of events had to occur: a person required to make a return (a) was “absent from his or her residence or place of business at the time an assistant assessor shall call to receive the annual list or return,” (b) was properly notified by the assistant assessor of the requirement for a list or return, and (c) either failed “to give such list or return within the time required” or else gave a “list, statement, or return, which, in the opinion of the assessor, is false or fraudulent, or contains any understatement or undervaluation.”¹⁷⁷ Only then would it be lawful for the assessor to summon

such person, his agent, or other person having possession, custody, or care of books of account containing entries relating to the trade or business of such person, or any other persons as he may deem proper, to appear before such assessor and produce such book . . . and to give testimony or answer interrogatories . . . respecting any objects liable to duty or tax as aforesaid, or the lists, statements, or returns thereof, or any trade, business, or profession liable to any tax or license as aforesaid.¹⁷⁸

172. CONG. GLOBE, 38th Cong., 1st Sess. 1721 (1864) (statement of Rep. Stebbins). *See also* SELIGMAN, *supra* note 166, at 440-49.

173. Revenue Act of 1864 § 11.

174. § 12. This language was eventually codified in §7601 of the current Code.

175. § 13.

176. § 14.

177. § 14.

178. § 14.

Section 14 was structured into three parts. After the first part listing the conditions precedent to exercise of the summons power, the middle part required that a summons be served by hand.¹⁷⁹ The last part provided for enforcement.¹⁸⁰ As enacted, the section 14 summons was not self-enforcing. Once the power were triggered and the summons served, the assessor had to then petition a federal district court.¹⁸¹ The court would then issue a writ of attachment against the disobedient summoned party and once the party was brought in, the court would “proceed to a hearing of the case, and upon such hearing the judge . . . shall have power to make such order as he shall deem proper to enforce obedience to the requirements of the summons and punish such person for his default or disobedience.”¹⁸² There was no provision in the 1864 legislation, however, authorizing *collectors* to use summons. By its terms, section 14 applied only to *assessors*, not collectors.

As might be expected, most of the debates in Congress over the enactment of the 1864 Act were over tax substance and not procedure.¹⁸³ The scope and enforcement of the summons power, however, did occasion some debate.¹⁸⁴ The first point of contention was over the power to issue a summons.¹⁸⁵ The original House Bill was unclear on what grounds a summons could be issued but appeared to grant both the assessor and the assistant assessor with the power to issue a summons only whenever a particular return was alleged by someone to be false or fraudulent.¹⁸⁶ The Senate proposed to limit the summons power to the assessor but widen the grounds for issuance to all instances in which it was the opinion of the assessor that the return was false or contained undervaluation or

179. § 14.

180. § 14.

181. § 14.

182. § 14. In further attempt to improve the “machinery of collection,” the Revenue Act of 1864 created enforcement positions other than assessor and collector. Section 4 authorized the appointment of five “revenue agents” to “aid in the prevention, detection, and punishment of frauds upon the internal revenue, and in the enforcement of the collection thereof.” Section 5 authorized the appointment of additional “inspectors” and provided that both the inspectors and “revenue agents aforesaid” would have “all the powers conferred upon any other officers of internal revenue in making any examination of person, books, and premises which may be necessary in the discharge of the duties of their office.”

183. There was no debate in the House on §§ 4, 5, or 14 as originally proposed in the House Bill (H.R. 405). Section 4 as originally proposed in the House Bill did not contain the clause “and in the enforcement of the collection thereof.” That language was added by Senate amendment. CONG. GLOBE, 38th Cong., 1st Sess. 2438 (1864). Likewise, the House’s § 5 did not contain the phrase “and revenue agents aforesaid,” which was also added by Senate amendment. *Id.* Both amendments were approved by the House without comment. *Id.* at 2996.

184. *Id.* at 2439-41.

185. *Id.* at 2440.

186. *Id.*

understatements.¹⁸⁷ One Congressman objected to this amendment and asked the House to reject the amendment as violating

every idea of individual right and liberty which belongs to the common law and to our people. The clause as amended proposed to allow an assessor upon mere suspicion, no matter how baseless it may be, that a party has made a false oath, to examine into all of his private accounts, to call for his books, and make himself master of all the business transactions of the party. . . .

. . . .

. . . It allows, without any probable cause, every little petty officer of all this number scattered through the whole country, to take advantage of his suspicion, whether founded or unfounded, to institute an investigation into the private affairs of the citizen.¹⁸⁸

Despite this objection, the House approved the amendment.¹⁸⁹

The second point of contention was over the method of enforcing a summons.¹⁹⁰ The original House Bill authorized the assessor to apply for an attachment against persons who refused to obey the summons “as for a contempt” and then stopped.¹⁹¹ The Senate Finance Committee proposed to add “and for the purpose of enforcing such attachment said assessor shall be vested with all the powers exercised by judges of the district courts of the United States in like cases.”¹⁹² Several senators objected to this amendment, agreeing with Senator Davis’ exclamation: “Why, sir, it is clothing a pigmy with the power to wield a thunderbolt.”¹⁹³ In the end, the Senate compromised by requiring a judge to order the arrest of a person who refused to answer a summons and once brought before the judge, to “make such order as he shall deem proper” to enforce the summons and punish the miscreant.¹⁹⁴ This Senate amendment was objected to in the House where some members proposed that a court be first required to issue a show cause order before ordering an arrest and punishment.¹⁹⁵ However, the House voted down that proposal and accepted the Senate

187. *Id.*

188. *Id.* at 2997 (statement of Rep. Brown).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* (statement of Sen. Davis).

194. *Id.* at 2997.

195. *Id.*

amendment.¹⁹⁶ In practice, some courts refused to issue an attachment and order the arrest without first issuing a show cause order,¹⁹⁷ while other courts had no problem with ordering the jailing of a recalcitrant taxpayer until proper answer was made to the summons.¹⁹⁸

Congress continued to tinker with “the machinery of collection.” Section 9 of the Revenue Act of July 13, 1866 modified the procedure for summons enforcement so that the judge, instead of making “such order as he shall deem proper” was instructed to make “such order as he shall deem proper, not inconsistent with the provisions of existing laws for the punishment of contempts.”¹⁹⁹ And the assessor’s summons power was explicitly extended to any district beyond the assessor’s district where the summoned party was to be found.²⁰⁰

Section 49 of the Revenue Act of July 20, 1868 added a new summons power. That section authorized the appointment of up to twenty-five “supervisors of internal revenue” in as many districts whose job it was to “see that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with; to aid in the prevention, detection, and punishment of any frauds in relation thereto, and to examine into the efficiency and conduct of all officers of internal revenue.”²⁰¹ To enable these newly created officers to perform their job, section 49 further provided that:

for such purposes he shall have power to examine all persons, books, papers, accounts, and premises, and to administer oaths and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel a compliance with such summons in the same manner as assessors may do.²⁰²

Litigation in the early 1870’s highlights the difference between the conditional section 14 summons powers and the unconditional section 49 summons powers. In *Stanwood v. Green*,²⁰³ the supervisor for the states of Alabama and Mississippi (Stanwood) used his section 49 authority to summons to a bank for “all books of accounts and papers containing entries of accounts between the banking house of said J. & T. Green and

196. *Id.*

197. *In re Chadwick*, 5 F. Cas. 401, 402 (D. Mass. 1870) (No. 2570).

198. *In re Phillips*, 19 F. Cas. 506, 507 (D. Va. 1869) (No. 11,097).

199. Revenue Act of July 13, 1866, ch. 184, § 9, 14 Stat. 98, 102 (1866).

200. § 9.

201. Revenue Act of July 20, 1868, ch. 186, § 49, 15 Stat. 125, 144-45 (1868).

202. § 49.

203. 22 F. Cas. 1077, 1077 (D. Miss. 1870) (No. 13,301).

all other persons.”²⁰⁴ The bank refused.²⁰⁵ When the supervisor obtained an attachment, the bank moved to quash it, offering the court a variety of reasons to limit the scope of the summons authority.²⁰⁶ First, the bank urged the court to construe the language in section 49 “in the same way that assessors may do” as making the supervisor’s summons powers co-extensive with the section 14 assessors’ powers.²⁰⁷ Since the bank had done nothing to trigger the assessors’ section 14 summons powers, the summons was invalid. The court rejected this argument by noting that section 49 placed the supervisor under more extensive duties than assessors and “to enable him to perform any one or all of these duties he is invested with these extraordinary powers, as they are termed, without which . . . he would be unable to perform the duty assigned him.”²⁰⁸ Therefore, “the [summons] powers are of a different character altogether.”²⁰⁹ Different duties meant different powers.

The court also rejected the idea that the supervisor was bound to tell the bank why the supervisor wanted the summoned records, “for such a disclosure might have defeated the very object of the examination.”²¹⁰ Finally, the court rejected the bank’s argument that to construe the statute so broadly would render it unconstitutional.²¹¹ The court reasoned that because judicial approval was required in order to enforce the summons, Congress had “not left it to the supervisor to be the judge of the extent of his powers in such cases.”²¹² At the same time, the court blithely declared that “it is not to be presumed that the supervisor would desire to inquire into the private affairs of citizens for any other purpose than those connected with his official duties.”²¹³ In other words, the Service’s ability

204. *Id.* at 1077.

205. *Id.*

206. *Id.* at 1078.

207. *Id.* at 1079.

208. *Id.* at 1078-79.

209. *Id.* at 1079.

210. *Id.* Cf. *In re Becker*, 3 F. Cas. 20, 22 (E.D. Mo. 1875) (No. 1208) (refusing to enforce a summons which did not recite the statutory language under which it was issued, holding “[i]t is not necessary that the summons should state who is charged with an offence, for the work in hand is a mere investigation, possibly to ascertain whether any offence has been committed. Still the summons should indicate to what the proposed evidence relates. If this be not correct, and the broadest interpretation of section 3163, as to all persons, etc., is to obtain, then even the ordinary rules as to subpoena duces tecum for the protection of private rights are overthrown.”).

211. *Stanford*, 22 F. Cas. at 1079.

212. *Id.* at 1079. Supervisor Stanwood got just a little careless in a later case, when he issued a summons in the morning to require a bank to produce its records that afternoon, but neither he nor the summons said where to produce the records. See *United States v. Fordyce*, 25 F. Cas. 1143 (N.D. Ala. 1871) (No. 15,130). In that case, after the bank proved that the bank officers went around town looking for Stanwood, the court discharged the contempt. *Id.* at 1144.

213. *Stanford*, 22 F. Cas. at 1079.

to gather evidence must have a legitimate purpose, but at the same time the court would presume a legitimate purpose.²¹⁴

The contrasting case is *In re Chadwick*, which construed the section 14 summons powers of assessors.²¹⁵ In that case, the assessor had summoned a corporation's books to aid in his determination of a shareholder's income.²¹⁶ The first issue was procedural. Recall that Congress had considered and rejected requiring a show cause order before a court could enforce a summons through a writ of attachment.²¹⁷ In *Chadwick* the government argued that the court was bound by the statute to issue an attachment after the government presented its case in a *ex parte* proceeding.²¹⁸ And indeed, the statute did read "[i]t shall be the duty of such judge . . . to hear such application, and, if satisfactory proof be made, to issue an attachment."²¹⁹ The court rejected the argument and issued a show cause order to the corporation to appear and defend its noncompliance with the summons.²²⁰ In so doing, the court disregarded both the language and history of the statute in favor of analogizing this procedure to cases in chancery, where show cause orders were "done every day in the circuit court in patent causes."²²¹ It held that it had an inherent power to give the summoned party an opportunity to appear in court to defend against arrest.²²²

The substantive issue was whether section 14 allowed the assessor to summons the books and records of someone other than the taxpayer (here a corporation) for books and records not related to the taxpayer's trade or business (but which would certainly tend to show whether the taxpayer

214. To the same effect, see *In re Meador*, 16 F. Cas. 1294, 1294 (N.D. Ga. 1869) (No. 9375), where the Georgia supervisor issued a summons in order to aid the Virginia supervisor's investigation of Virginia taxpayers. To arguments that the Georgia supervisor thereby exceeded authority, the court replied "a public officer is presumed to act in obedience to his duty, until the contrary appears." *Id.* at 1296. If the rationale in these cases sounds familiar, of course, it is because that rationale eventually became the dominant rationale in summons law. See discussion *infra* Part III.C.3.

215. 5 F. Cas. 401 (D. Mass. 1870) (No. 2570).

216. *Id.* at 402.

217. See *supra* note 183 and accompanying text.

218. *Chadwick*, 5 F. Cas. at 402.

219. Revenue Act of 1864, ch. 173, § 14, 13 Stat. 223, 226 (1864).

220. *Chadwick*, 5 F. Cas. at 402.

221. *Id.*

222. *Id.* The court cited to § 32 of the Judiciary Act. *Id.* That provision, however, just empowers courts to cure defects of form in any paper. Judiciary Act of 1789, ch. 20, § 32, 1 Stat. 73, 91 (1789). A better approach might have been to cite the courts powers under the All Writs Act, and then reason that a show cause order is simply a lesser included power to the writ of attachment. All Writs Act, ch. 20, § 14, 1 Stat. 73, 81 (1789). The point remains, however, that by construing the statute to permit a show cause order, the court insisted on an adversarial method and not a one-sided, inquisitorial method.

received income). The court held that the “whole scope and purpose” of section 14 was to allow the assessor “to examine the taxpayer’s books To effectuate this object, it adds agents and all other persons having care or custody or even bare possession of the books. This is the whole of the enactment. It is impossible to misunderstand it.”²²³ The court acknowledged that

I agree that in some cases [examining a third party’s books] might be very convenient; but I doubt whether this convenience would make up for the very great inconvenience which the companies and their officers must suffer The argument from convenience may fairly enough be said to be balanced, but not so the argument from the construction of the statute itself. There is nothing in the statute which makes corporations partnerships or the books of a corporation the books of the individual shareholders. . . . [this] only proves that the law may to some extent, and in some cases, fail to furnish full evidence.”²²⁴

On the one hand, this distinction between section 14 and section 49 became less important by 1877, for two reasons. First, in 1872 Congress abolished the position of assessor and transferred his duties and powers to the collectors, including the restricted section 14 summons power which remained unchanged.²²⁵ Second, in 1876,²²⁶ Congress abolished the supervisors positions transferring their internal audit duties and powers to the Commissioner and providing that “all other powers conferred, and duties imposed, by said section upon supervisors, are hereby conferred and imposed upon collectors.”²²⁷ Thus, both the old assessors summons powers of section 14 and the old supervisors summons powers of section 49 were lodged together in the collectors.

On the other hand, the distinction between the restrictive section 14 authority and the broad section 49 authority remained important because the two sections were separately codified in the first codification of all the laws. Called the Revised Statutes, this codification was the precursor to the United States Code, and was made absolute law first in 1874,²²⁸ and then by reenactment in 1877.²²⁹ Title 35 of the Revised Statutes covered Internal Revenue. The codifiers split the section 14 summons powers into Revised

223. *Chadwick*, 5 F. Cas. at 402.

224. *Id.* at 403.

225. Act of Dec. 24, 1872, ch. 13, § 1, 17 Stat. 401 (1873).

226. Act of Aug. 15, 1876, ch. 287, 19 Stat. 143, 152 (1876).

227. Act of Aug. 15, 1876, ch. 287.

228. Act of June 20, 1874, ch. 333, § 3, 18 Stat. 113 (1874).

229. Act of Mar. 2, 1877, ch. 82, § 2, 19 Stat. 268 (1877).

Statutes (R.S.) sections 3173, 3174 and 3175.²³⁰ Section 49 became R.S. section 3163. What happened next illustrates the strange journey of the inquisitorial section 49 powers, which were lost and then regained, ultimately coming to rest as section 7602(a)(2) of the 1954 Code.

b. Revised Statutes to the 1954 Code

After enacting the Revised Statutes into law for a second time in 1877, it took almost 50 years before Congress got its “acts” together into another codification—this time called the U.S. Code.²³¹ One problem with the Revised Statutes had been that there was no mechanism for incorporating new statutes into the Code.²³² Thus by 1925 Congress had produced 23 more volumes of the Statutes At Large in which it had impliedly repealed well over 1000 sections of the Revised Statutes.²³³ Included in the mass of legislation was a long series of Revenue Acts, some of which repealed all provisions of prior Acts and substituted new ones and some of which repealed only parts of prior Acts and some of which had no clear directions either way.²³⁴

A careful tracing of the various Revenue Acts between 1877 and 1925 reveals that Congress did not significantly modify the restrictive section 14 assessor summons power that had been codified in R.S. sections 3173,

230. Section 3173 began by imposing a duty on every “person, partnership, firm, association, or corporation made liable to any . . . tax imposed by law” to make a return or a list of taxable objects. This derived from § 11 of the 1864 Act. Although the word “any” was broad, the procedures contemplated only the enforcement of taxation on property and licenses, since the income tax had been allowed to expire in 1871. SELIGMAN, *supra* note 166, at 464 n.5. It then set forth two proviso clauses. The first authorized the collector to make up a list or return based on information provided by persons who had neglected to submit a required list or return. This derived from § 13 of the 1864 Act. The second proviso imported the first part of § 14, which provided the authority to issue summons after the proper triggering events, with only slight change in language. Section 3174 imported the middle part of § 14, explaining how summons were to be served. Section 3175 contained the last part of section 14, providing the method of enforcement, and made no changes to the prior law. The “inquiry” part of § 12 became R.S. § 3172.

231. See Roy G. Fitzgerald, *Preface to THE CODE OF THE LAWS OF THE UNITED STATES* (1926), reprinted in 26 U.S.C.S., at vii (1934).

232. Raymond J. Cannon, *Preface to UNITED STATES CODE 1934 EDITION* (1935), reprinted in 26 U.S.C.S., at v (1934); see also *Consolidation and Codification of the Internal-Revenue Laws: Hearing Before the Senate Committee on Finance*, 76th Cong. (1939) (testimony of Colin F. Stam and John Hanes); 74 Cong. Rec. 467-71 (1930) (statement of Rep. Fitzgerald).

233. See Cannon, *supra* note 232.

234. Generally, up until the revenue laws were once again consolidated into the 1939 Code, each Revenue Act contained an “extension” provision like section 1100 of the 1926 Revenue Act: “All administrative, special, or stamp provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this Act.” Act of Feb. 25, 1926, ch. 27, § 1100, 44 Stat. 110, 111 (1926).

3174, and 3175.²³⁵ Congress did, however, abolish the broad section 49 supervisors summons power. When, in 1879, Congress authorized the Commissioner to appoint general revenue agents to aid him,²³⁶ it amended R.S. section 3163 by completely substituting new text for the old text. While the new text still provided that “[e]very collector within his collection-district and every internal-revenue agent shall see that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto,”²³⁷ it did *not* provide (as the old text did) that the collector had “power to examine all persons, books, papers, accounts, and premises, to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel a compliance with such summons in the same manner as assessors may do.”²³⁸ In this way, the amendment deleted the broad section 49 supervisors summons powers.²³⁹ There is no recorded explanation for the deletion. One might suspect the reason: Congress had abolished the assessors a few years before and had transferred their power to the collectors, so the reference to “in the same manner as assessors may do” would seem to be redundant. And so the summons power baby was thrown out with the redundant reference bathwater.

The deletion of the section 49 summons powers did not seem to trouble the Service. Despite the deletion, applicable Treasury Regulations nonetheless took the position that the section 49 summons power was still vested in the collectors. For example, the regulations in effect in 1915 provided that:

Under the provisions of section 1 of the act of August 15, 1876 (sec. 3163*a*, Compilation of 1911), it is [the collector’s] duty to see that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with, and to aid in the prevention detection, and punishment of any frauds in relation thereto, and for such purposes he is empowered to examine all persons, books, papers, accounts, and premises, to administer oaths, and to

235. Congress amended R.S. § 3173 several times. Act of Mar. 1, 1879, ch. 125, § 3, 20 Stat. 327, 330 (1879) (changing return due dates); Act of Aug. 24, 1894, ch. 394, 28 Stat. 558, 558-59 (1894) (adding income tax returns); Act of Oct. 3, 1913, ch. 16, 38 Stat. 114 (1913) (changing return due dates); Revenue Act of 1918, Pub. L. No. 254, § 1, 39 Stat. 796 (1918) (adding that person, includes corporations, joint-stock companies or associations, or insurance companies. This definition was eventually placed in § 7701(a)(1)).

236. Act of Mar. 1, 1879 § 12, 20 Stat. 329.

237. Act of Mar. 1, 1879, ch. 125, § 12, 20 Stat. 328.

238. Revenue Act of July 20, 1868, ch. 186, § 49, 15 Stat. 125, 144-45 (1868).

239. Act of Mar. 1, 1879 § 12, 20 Stat. 327, 328.

summon any person to produce books and papers, or to appear and testify, under oath, before him.²⁴⁰

By 1928, the section 49 supervisors summons powers reappeared in the laws, in a roundabout way. In 1925, after Congress again turned its attention to codification of all federal law, it authorized the publication of the first edition of the United States Code.²⁴¹ Unlike the Revised Statutes, it was not to be the law, but only “prima facie evidence of the law” out of a concern that some laws had been missed.²⁴² The organizers of the U.S. Code, which was published in 1926, collected both the tax statutes in the Revised Statutes and all the later laws into title 26 of the U.S. Code. Title 26 was divided into 23 Chapters. Chapter 3 concerned Assessments and Collections. Just as the codifiers of the Revised Statutes had broken section 14 into three statutes, so did the compilers of the 1926 Code break the summons process into multiple sections. The main part of R.S. section 3173, which set forth the taxpayer’s duty to make returns, became 26 U.S.C. section 93. The section 3173 proviso clauses which had incorporated the triggering events of section 14 became 26 U.S.C. section 94, while the R.S. section 3174 provisions governing manner of service became section 95, and the R.S. section 3175 judicial enforcement provisions became section 96.

The broad section 49 summons power—transferred to the Commissioner and collectors in 1876, codified as R.S. section 3163 in 1877, and then deleted in 1879—became 26 U.S.C. section 1544. Recall that section 49 gave supervisors the “power to examine all persons, books, papers, accounts, and premises” in fulfilling their duties, with these powers being transferred to the collectors by the 1876 Act abolishing the supervisors.²⁴³ In 26 U.S.C. section 1544, the compilers of the 1926 U.S. Code simply reprinted the R.S. section 3163 version of the statute as made applicable to collectors by the 1876 Act, and seemingly ignored the fact that Congress had abolished this summons power in 1879.²⁴⁴ Thus, section 1544 read:

Every collector within his collection district shall see that all laws and regulations relating to the collection of internal

240. TREAS. DEP’T, REGULATIONS NO. 1, REGULATIONS CONCERNING ASSESSMENTS 15 (1917). Early regulations were much closer in tone and substance to the current I.R.M. than to current regulations.

241. See H.R. REP. NO. 76-6, at 1 (1939).

242. *Id.*

243. See *supra* notes 201-2 and accompanying text.

244. 26 U.S.C. § 1544 (1926). The more likely explanation is that the Codifiers recognized that both the Service and taxpayers were acting as if the baby were still in the bathtub and that R.S. § 3163 was still authority.

revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto. For such purposes, he shall have power to examine all persons, books, papers, accounts, and premises, to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel compliance with such summons in the same manner as provided in section 1515.

There was only one problem with this reincarnation of the old section 49 supervisors summons powers in the 1926 U.S. Code: it was not the law, or even *prima facie* evidence of the law. Thus, when the collector of New York district issued a summons to Messrs. Muccini and Caplis to appear on July 5, 1933 and “then and there testify before me in a certain matter arising under the Internal Revenue Laws, depending before me wherein this office is attempting to enforce collection of the income tax liability assessed against one John M. Phillips now deceased,” both the district and circuit courts in the Second Circuit refused to enforce the summons.²⁴⁵ This is the only reported case, however, to deny enforcement of the summons and, presumably, the Service issued, and taxpayers complied with, many similar summons.

Thus, as matters stood in 1928, the Service's powers of inquisition were contained in the following statutes. First, 26 U.S.C. section 94 codified the essential summons powers of R.S. section 3173. It gave the power only to the collectors and then only upon the occurrence of the triggering events dating back to section 14. Second, 26 U.S.C. section 1544, which also applied to collectors only, codified the broader powers which had been given supervisors in section 49 of the 1868 Act and codified at R.S. section 3163. Finally, 26 U.S.C. section 1247 gave revenue agents examination powers—that is, the power to “examine any books, papers, records,” etc. for the purpose of auditing a return—but not summons authority.²⁴⁶

245. *Rasquin v. Muccini*, 72 F.2d 688, 689-90 (2d Cir. 1934) (holding that sections 94 and 1247 of the 1926 U.S. Code did not provide authority for the collector to issue a summons in aid of collection and, although section 1544 of the 1934 U.S. Code would provide such authority, it had not been enacted into law at the time the summons was issued and so provided no authority).

246. In addition to the two summons powers, the codifiers combined into 26 U.S.C. § 1247 of the 1926 Code old § 5 of the Revenue Act of 1864, which had given revenue agents and inspectors the power to make “any examination of persons, books, and premises,” ch. 173, § 5, 13 Stat. 223, 224 (1864), and Revenue Act of 1918, ch. 18, § 1305, 40 Stat. 1142 (1919), which had expanded those powers. As combined, Revenue Act of 1919, ch. 18, § 1305, 30 Stat. 1142 (1919) read:

The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby

After 1928, a different set of codifiers, led by the Joint Committee on Taxation, began work creating a new Internal Revenue Code. In 1930, they

published a complete substitute for title 26 of the United States Code, containing all the law of a permanent character, relating exclusively to internal revenue, in force on December 1, 1930. This was not a mere duplication of the old title, for, in addition to correcting errors and eliminating obsolete matter, certain omitted provisions were added and the title completely rearranged in a manner considered logical and useful.²⁴⁷

The Joint Committee's version was substituted for the U.S. Code version in 1932 and was enacted into absolute law in 1939.²⁴⁸

The 1939 Code revised the structure of the summons statutes. First, the section 1247 examination powers became section 3614(a) of the 1939 codification which also added section 3614(b) to give the Commissioner the same powers with respect to determining the liability of a transferee.²⁴⁹ Second, section 3615(a) of the 1939 Code used the essential summons language from R.S. section 3173 as previously codified at section 94 of the 1926 U.S. Code, providing that:

It shall be lawful for the collector, subject to the provisions of this section to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath,

authorized, by any [revenue agent or inspector] designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

Id. Congress reenacted this statute in 1924 (Revenue Act of 1924, ch. 234, § 1005, 43 Stat. 340) and 1926 (Revenue Act of 1926 § 1104, 44 Stat. 113) and amended it in 1928 (Revenue Act of 1928 § 618, 45 Stat. 878) to substitute "officer or employee of the Bureau of Internal Revenue, including the field service," for "revenue agent or inspector." While this statute did not clearly give revenue agents a summons authority it did confirm the ability of the revenue agents to examine certain items, although nothing more than "any books, papers, records or memoranda."

247. S. REP. NO. 76-20, at 4 (1939).

248. I.R.C., pt. 1, ch. 1-48, 53 Stat. 1 (1939). Until that time, however, it was not even *prima facie* evidence of the internal revenue laws. *Rasquin v. Muccini*, 72 F.2d 688, 689 (2d Cir. 1934).

249. I.R.C., ch. 34, § 3615, 53 Stat. 435, 439 (1939).

respecting any objects or income liable to tax or the returns thereof.²⁵⁰

Section 3615(b) listed four acts which would trigger the summons power, section 3615(c) described the persons subject to the summons power, section 3615(d) described how service was to be made, and section 3615(e) provided for the enforcement of the summons. Finally, the broad section 49 supervisors' powers which had been codified at 26 U.S.C. section 1544 were transferred, without change in language, to section 3654 of the 1939 Code. When the 1939 Code was enacted into law, its sections also became the sections of the U.S. Code. One finds the language of these sections unchanged up through the 1952 edition of the U.S. Code.

The latest codification of the Internal Revenue Code was on August 16, 1954.²⁵¹ The essential summons power was placed in section 7602, with the same language as is used today. This section appears to be a consolidation of section 3614, 3615, 3632(a) (concerning the Commissioner's power to administer oaths) and 3654. The derivation tables in the appendix to the codification, however, list only sections 3614, 3615(a) and 3632(a) as being incorporated into section 7602(a) and not section 3654.²⁵² The most reasonable reading of the codification history, however, is that section 7602(a) incorporates the summons power contained in section 3654 of the 1939 Code because none of the other precursor statutes allowed the summons power to be used for collection matters.²⁵³ First, the introduction to the tables contains this careful caveat: "No inference, implication, or presumption of legislative construction or intent shall be drawn or made by reason of such tables."²⁵⁴ Thus, the omission in the tables of section 3654 as a precursor to section 7602 does not mean that the section was repealed or not incorporated into the 1954 Code. Second, courts did not hesitate to enforce collections summonses

250. § 3615.

251. Internal Revenue Code of 1954, Pub. L. No. 591-736, 68A Stat. 1 (1954). While Congress reenacted the Internal Revenue Code in the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986), it pretty much preserved the 1954 codification scheme, particularly as to the procedural provisions in section 6000 *et seq.* See also STAFF OF THE JOINT COMM. ON TAXATION, SUMMARY OF CONFERENCE AGREEMENT ON HR 3838 (TAX REFORM ACT OF 1986) 79 (Comm. Print 1986) ("The conference agreement enacts into law the Internal Revenue Code of 1986. That is, the conference agreement reenacts the provisions of the 1954 Code—as in effect on the date of enactment of the bill—together with amendments as made by the conference agreement.").

252. I.R.C. app. Table I (1954).

253. See *Rasquin v. Muccini*, 72 F.2d 688, 689-90 (2d Cir. 1934) (quashing collection summon and holding that sections 94 and 1247 of the 1926 U.S. Code did not provide authority for the collector to issue a summons in aid of collection and, although section 1544 of the 1934 U.S. Code would provide such authority, it had not been enacted into absolute law at the time the summons was issued and so could not provide authority).

254. I.R.C. app. Table I (1954).

under the 1939 Code,²⁵⁵ and the drafters of the 1954 Code carefully explained that the enactment of section 7602 “contains no material change from existing law.”²⁵⁶ Therefore, the best reading of the legislative history of section 7602(a) is that it was meant to consolidate the powers given by subsection 3614, 3615 and 3654 of the 1939 Code, which included the powers given to supervisors by the 1868 Act. Such has been the interpretation apparently given by the Supreme Court.²⁵⁷

Accordingly, the current information-gathering powers are contained in Subtitle F of the Code, Chapter 78, Subchapter A, section 7601 through 7613. Sections 7601 and 7602 contain the Service’s general inquisitorial powers, which trace back to both section 12 and section 14 of the 1864 Act²⁵⁸ and, more importantly, to section 49 of the 1868 Act.²⁵⁹ The middle part of the old section 14 found its way into current section 7603, which instructs how the Service must serve summons, and the section 7604 provisions for the judicial enforcement of summons trace back to the last part of section 14. No longer, however, are the old conditions prerequisite to the section 14 summons necessary for enforcement.²⁶⁰ Section 7602(a)(2) is in effect the codification of section 49 of the 1868 Act.²⁶¹ As the next subsection will discuss, courts have interpreted these provisions since 1954 broadly using an inquisitorial logic and, until recently, to the extent Congress has responded to such interpretations, it has been to affirm and codify them to reinforce the inquisitorial nature of the tax determination process.

3. The Inquisitorial Logic of Summons Opinions Since 1954

The above examination of the summons power shows its statutory expansion from a conditional power, linked to only certain functions and then usable only after a specified chain of events occurred, to the modern text codified in 1954. It also showed how the evidence-gathering power expanded from being simply an aid to tax determination to being an aid for tax collection as well. The following discussion will show that as the Service’s use of its summons tool expanded since 1954—taking on new

255. See, e.g., *Jarecki v. Whetstone*, 82 F. Supp. 367 (N.D. Ill. 1948), *aff’d sub nom.* *Sauber v. Whetstone*, 199 F.2d 520 (7th Cir. 1952) (enforcing collection summons under § 3654).

256. See H. R. REP. 83-133, at A436 (1954); S. REP. 83-1622, at 617 (1954) (stating that “this section corresponds to that of the House bill”).

257. See *United States v. LaSalle Nat’l Bank*, 437 U.S. 298, 310 (1978) (“Section 7602 derives assertedly without change in meaning, from corresponding and similar provisions in §§ 3614, 3615, and 3654 of the 1939 Code.”) (footnotes omitted).

258. See Revenue Act of 1864, ch. 173, §§ 12-14, 13 Stat. 223, 225-27 (1864).

259. See Revenue Act of 1868, ch. 186, § 49, 15 Stat. 125, 144-45 (1868).

260. Compare Revenue Act of 1864 § 14, with I.R.C. §§ 7601-7603 (2000).

261. Compare Revenue Act of 1868 § 49, with I.R.C. § 7602(a)(2) (2000).

dimensions as it sought to investigate new and different problems in tax compliance—so did judicial interpretation of section 7602 and related statutes expand to accommodate the Service's increased needs for information. Such a result was not inevitable in that the statutes could reasonably have been construed narrowly instead of expansively. But time and again when new issues raised the question of who would control the information accessible to the Service, the court ultimately deferred to Service control. To the extent Congress responded to these decisions, it created procedural safeguards consistent with the inquisitorial process of tax determination, such as requiring more high-level internal review of certain summonses, or prohibiting use of summonses once another governmental institution entered the investigation.²⁶² Until RRA 98, Congress imposed few substantive restrictions on what information the Service could summons.²⁶³

262. Additionally, Congress often explicitly excludes the Service from general restrictions placed on government investigatory powers contained in statutes other than the Tax Code. It has, however, sometimes restricted the Service's information-gathering powers in situations where other policy considerations become more important than tax determination or where tax determination is not at issue. For an example of the former situation, *compare* the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3402 (1978), *with* the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2703 (1986). In the RFPA Congress excepted the Service from the strictures of that statute as long as the Service followed the information-gathering procedures authorized by the Tax Code. *See Neece v. United States*, 922 F.2d 573, 578 (10th Cir. 1990). Congress did not make any exception in the ECPA, however. The Bankruptcy Code provides an example of limits on the Service's summons ability where tax determination is not an issue. 11 U.S.C. § 362 (2002). The strong bankruptcy policy of giving debtors "breathing room" from creditors extends to the Service. Thus, when a person files for bankruptcy protection, 11 U.S.C. § 362(a)(6) automatically prohibits "any act to collect . . . a claim against the debtor" even by a government entity, with no exception for the Service. Of course, this prohibition extends only to tax collection. Although the I.R.C. permits summonses to be used for tax collection purposes as well as tax determination purposes, the general prohibition of the Bankruptcy Code limits the scope of summons powers for tax collection. *In re Pyramid Restaurant Equip. Co.*, 24 B.R. 455, 456 (Bankr. W.D.N.Y. 1982) (finding that the service violated automatic stay by issuing collections summonses to corporate Chapter 11 debtor's bank).

263. Pre-RR98 restrictions, however, were generally consistent with the inquisitorial model. For example, in the Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 1033 (1984), Congress added § 7611 to restrict inquiries and examinations of churches. This statute required significant internal review, notices and conferences to the targeted church before the Service could begin either an inquiry or an examination. Even here, however, the statute does not restrict the scope of information which the Service could obtain; it is aimed at a particular type of examination. By attempting to curb unnecessary church examinations, § 7611 served the same purpose as § 7605's attempt to curb unnecessary second examinations of any taxpayer. Notably, § 7611(e) provides that the *exclusive* remedy for violation of its notice and internal review provisions is that a court stay a summons enforcement proceeding "until the court finds that all practicable steps to correct the noncompliance have been taken." This provision thus precludes a court from imposing an evidentiary exclusion rule. In this way § 7611 is quite consistent with the inquisitorial model of tax administration. In contrast, RRA 98 added § 7525 (potentially excludes from the Service's

This subsection will illustrate the thesis that, when given a choice between narrow and expansive interpretations of I.R.C. section 7602, the Supreme Court has consistently interpreted the Service's summons powers expansively, using inquisitorial logic. By that I mean the Court based its decision on one or more of the following rationales: (a) an expansive interpretation was necessary to preserve the Service's role as decision-maker or evidence-gatherer; (b) Truth trumped Autonomy as the value promoted by the statute; and (c) potential abuse should be or was actually limited through internal bureaucratic controls, and external adversarial controls were inappropriate. I will first review the landmark decision *United States v. Powell*,²⁶⁴ in which the Court decided the Service did not need probable cause to issue a summons, using all three rationales. I will then review three additional issues which presented opportunities to either expand or restrict the Service's summons power through statutory construction. Each issue was ultimately resolved in the Supreme Court. And for each issue, the Court adopted the construction that expanded power, using one or more of the rationales that I am calling inquisitorial logic. To the extent Congress responded to the judicial decision, it was always to affirm the substance of the Court's decision.

a. Probable Cause

The year 1954 is significant not only as the year in which the Internal Revenue Code was completely overhauled and re-codified, but also as the first full year of Earl Warren's tenure as Chief Justice. Even tax geeks know 1954 as the year of *Brown v. Board of Education*.²⁶⁵

Scholars widely agree that during the Warren years the Court dramatically expanded individual liberties as against the state:

The Warren Court . . . will be remembered for that legacy. The Court's decisions were guided by a broad, humanitarian vision of the role of the judiciary and of the Constitution as a living document. The Warren Court expanded concepts of equality, due process, and individual liberty, handing down decisions that redefined notions of justice and fairness. In the area of civil rights, the Warren Court helped usher in revolutionary and irreversible changes in race relations. It also issued landmark First Amendment decisions such as *New York Times Co. v. Sullivan* and *Engel v. Vitale*, expanding the

summons entire classes of documents), § 7602(c) (restricting Service contacts with third parties), § 7612 (restricting the Service's ability to obtain computer source code). See discussion *infra* Part IV.B.4.

264. 379 U.S. 48 (1964).

265. 347 U.S. 483 (1954).

protections afforded the free press and strengthening freedom from state-sponsored religion. It implemented “one person, one vote” in *Reynolds v. Sims*, changing our entire political system. And in its criminal justice decisions, the Warren Court established groundbreaking rules in cases such as *Gideon v. Wainwright*, *Miranda v. Arizona*, and *Mapp v. Ohio*, for the first time implementing some of the Bill of Rights’s most fundamental promises and giving life to the Fourth, Fifth, and Sixth Amendments. The rules were as elementary as the one holding that everyone charged with a crime has the right to be defended by counsel.²⁶⁶

Of course, scholars recognize that the Court did not become immediately “liberal” the day Earl Warren took his oath of office.²⁶⁷ The consensus view seems to be that “[a]fter the 1962 term, the Warren Court emerged as the powerful institution of liberal change against which Nixon and others railed. The Court routinely took a strong liberal position in eighty percent of civil liberties cases.”²⁶⁸

The seminal case on the summons power is one of the other twenty percent. In 1964, the Warren Court, supreme defender of liberties against the overreaching state, decided in *United States v. Powell* that the Service did not have to demonstrate even probable cause to obtain judicial enforcement of a summons.²⁶⁹ A close examination of the decision and its context demonstrates the power of the inquisitorial model of tax administration because in *Powell* the Court explicitly rejected a plausible alternative construction of the statute based on a view of tax determination as adversarial process in favor of a construction based on inquisitorial logic.

In *Powell* the Service had issued a summons to Max Powell, President of William Penn Laundry, Inc. in March 1963 to reexamine certain books and records of the corporation for 1958 and 1959.²⁷⁰ Powell refused and

266. Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. “Process,”* 74 N.Y.U. L. REV. 313, 314-15 (1999) (citations omitted).

267. Kermit L. Hall, *The Warren Court: Yesterday, Today, and Tomorrow*, 28 IND. L. REV. 309, 315 (1995).

268. *Id.* (citing to Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103, 104 (1989)).

269. *United States v. Powell*, 379 U.S. 48, 51 (1964). *Powell* has been cited by courts 1,758 times (1,861 total citations less 103 non-court citations, such as law reviews, annotated statutes, and treatises, *per* Shepards queries on LEXIS as of Mar. 22, 2003). To put that number in perspective, *Brown v. Board of Education*, 347 U.S. 483 (1954) has been cited by courts only about 438 more times (8,185 total citations less 5,989 non-court citations *per* Shepards queries on LEXIS on Mar. 22, 2003).

270. *United States v. Powell*, 325 F.2d 914, 915 (3d Cir. 1963).

the Service sought enforcement of the summons in district court under section 7604.²⁷¹ Powell argued that the Service had already examined these records and had determined the corporation's tax liability for those years, which the corporation had paid.²⁷² Further, at the time the Service sought to reexamine the records, the normal three year limitations period had ended.²⁷³ The Service could therefore only assert a tax liability against the taxpayer on a theory that the taxpayer had submitted "a false or fraudulent return with the intent to evade tax,"²⁷⁴ and for that the Service bore the burden of proof.²⁷⁵ Further, the Service was faced with the prohibition in section 7605(b) against "unnecessary examination" which it could overcome only by showing why the reexamination of the taxpayer's books was necessary.²⁷⁶ The only explanation offered by the Service, however, was that it "ha[d] reason to suspect" that the corporation had filed false returns for 1958 and 1959.²⁷⁷ The Service gave nary a hint as to the basis for its "reason to suspect."

The district court had enforced the summons.²⁷⁸ The Third Circuit had reversed, using a two-step rationale.²⁷⁹ First, the Circuit panel agreed that since the three year limitation period had ended, then "logically," a reexamination of the corporate records "must be 'unnecessary' within the meaning of section 7605(b) unless something has been discovered by the Secretary's delegate which might cause a reasonable man to suspect that there has been fraud in the return."²⁸⁰ Since this was true, then the adversary nature of a summons enforcement proceeding provided the second step of the rationale. The court noted that section 7604

[r]equires a "hearing" on the application to enforce the administrative summons at which 'satisfactory proof' shall be made. We think this provision means that the court shall decide on the basis of the showing made in the normal course of an adversary proceeding whether the agent's suspicion of fraud is reasonable. . . . This the court cannot do unless the agent discloses whatever may have created his suspicion.

271. *Id.*

272. *Id.*

273. *Id.*; see § 6501(a).

274. § 6501(c)(1).

275. § 7454(a).

276. *Powell*, 325 F.2d at 915; § 7605(b) ("No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.").

277. *Powell*, 325 F.2d at 915.

278. *Id.*

279. *Id.* at 915-16.

280. *Id.* at 915.

Since the agent in this case failed to make such disclosure . . . his application for judicial assistance should have been denied.²⁸¹

In so ruling, the Third Circuit disagreed with the Second Circuit,²⁸² and joined with the First Circuit,²⁸³ which had used a similar rationale.

The Supreme Court rejected both steps of the Third Circuit's adversary-process based analysis. First, the Court rejected the "logic" that the section 7605(b) prohibition against "unnecessary" examinations required an affirmative showing of necessity.²⁸⁴ If the Service needed the taxpayer's records "in order to determine the existence or nonexistence of fraud," that reason alone was enough to make the examination not "unnecessary."²⁸⁵ Importantly, the Court conceded that "a more stringent interpretation is possible, one which would require some showing of cause for suspecting fraud."²⁸⁶ Such an interpretation was out of place in an inquisitorial tax determination process, however, "because it might seriously hamper the Commissioner in carrying out investigations he thinks warranted, forcing him to litigate and prosecute appeals on the very subject which he desires to investigate, and because the legislative history of section 7605(b) indicates that no severe restriction was intended."²⁸⁷ The Court then used the legislative history of the statute to demonstrate how it should be read in light of the inquisitorial nature of tax determination. The Court read that history as a Congressional effort to suppress "unnecessary visits and inquisitions after a thorough examination is supposed to have been had."²⁸⁸

281. *Id.* at 916 (citations omitted).

282. *Foster v. United States*, 265 F.2d 183, 189 (2d Cir. 1959).

283. *O'Conner v. O'Connell*, 253 F.2d 365, 369-70 (1st Cir. 1958):

[W]e cannot adopt the Government's contention that to obtain an order for enforcement as to a "closed" year all that the Secretary or his delegate needs to show is the honesty of his subjective belief that fraud existed in such a year. The reason for this is that in the Government's view the necessity for an examination into a closed year would for all practical purposes be left to administrative determination and § 7605(b) would be relegated to hardly more than a pious exhortation directed to the tax authorities. As a practical matter, according to the Government's contention, the court's function under § 7604 would be reduced to little more than that of summarily affixing its stamp of approval to administrative action

Id.

284. *Id.* at 52, 53.

285. *Id.* at 53.

286. *Id.*

287. *Id.* at 54.

288. 61 CONG. REC. 5855 (Sept. 28, 1921) (statement of Sen. Penrose), quoted in *Powell*, 379 U.S. at 54.

To the Court, the statute's purpose was to "curb low-echelon revenue agents" by "requiring such agents to clear any repetitive examination with a superior."²⁸⁹ The purpose was therefore to require *internal* management checks within the Service and not to create external, adversary checks once the Service had followed proper procedures to conclude that a reexamination was necessary.²⁹⁰ The Court further supported its reading by noting that when section 7605 was reenacted in 1926, a more restrictive substitute measure was defeated, "which would have limited the Commissioner to two examinations appertaining to returns of any one year."²⁹¹

The Supreme Court also rejected the second step of the circuit panel's analysis, again using the inquisitorial nature of the tax determination process to support broad information-gathering powers. By analogy to other agencies, the Court suggested that the Service

has a power of inquisition . . . which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.²⁹²

The Court concluded by transforming the inquisitorial logic into doctrine: courts should enforce tax summonses whenever the Service shows that (1) the investigation for which the summons is issued has a legitimate purpose, (2) the summons seeks information which may be relevant to that purpose, (3) the Service does not already have the information sought, and (4) the issuing employee has complied with any administrative steps required by

289. 379 U.S. at 56. Later courts have followed *Powell's* reasoning to rely on the Service's internal administrative checks to control unnecessary examinations. See, e.g., *United States v. Schwartz*, 469 F.2d 977, 983 (5th Cir. 1972).

We do not believe the use of the word "inspection" in Section 7605(b), as contrasted with the words "unnecessary examination or investigations" can be so restricted as to mean that there is an 'inspection' every time the agent or special agent looks at a book of account of a taxpayer. The word 'inspection' must, in all reason, have some relation to the activities of the agents in making the examination authorized under the statute.

Cf. id. at 985-86 (Bell, J., dissenting) (arguing that a majority of courts misread *Powell* on the second inspection issue, that courts had created an illegitimate doctrine of "continuing inspection" to undermine the controls placed on examinations by 7605(b)).

290. See *Powell*, 379 U.S. at 56, 58.

291. *Id.* at 55, n.13.

292. *Id.* (internal quotes and citations omitted).

the Code (such as the section 7605(b) requirements for a “second” inspection).²⁹³

The *Powell* Court acknowledged that taxpayers could challenge the summons in a court hearing and suggested that the summons should be quashed if a taxpayer could show that the summons had been issued for an improper purpose “such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.”²⁹⁴ Indeed, next to alleging procedural deficiencies, allegations of improper purpose are perhaps the most common objections raised in summons enforcement proceedings. How the Court has responded to them further illustrates the inquisitorial nature of tax determination.

b. Improper Purpose

The *Powell* requirement of “legitimate” purpose means that the Service may not use its summons powers for an “improper” purpose.²⁹⁵ Since *Powell*, taxpayers have constantly claimed that certain uses of the summons power are improper. The following subsections explore three areas where taxpayers have made reasonable assertions of abuse, based on adversarial logic, but the Court has rejected those claims, based on inquisitorial logic: that the Service may not gather evidence for solely criminal investigations; that the Service may not use its powers to gather evidence about unknown taxpayers so as to fish around for taxpayers to audit; and that the Service may not use a legitimate examination as a pretext to gather evidence for a purpose other than that examination. The common doctrinal response to each charge has been to enforce a summons so long as the Service has *any* plausible legitimate purpose for it, even if improper purposes are mixed in. In short, inquisitorial logic allows the Service to decide what evidence it needs to gather in order to discover Truth, even at the cost of Autonomy.

i. Criminal Investigations

First, the Service sometimes uses its summons powers to investigate potential criminal violation of the Code. As many courts and commentators have observed, the Code is “a law enforcement system in which criminal and civil elements are inherently intertwined.”²⁹⁶ For

293. *Id.* at 57-58. This is the standard four-part test recited in most summons enforcement cases and standard tax procedure treatises. See SALTZMAN, *supra* note 87, at ¶ 13.04[1]; FEDERAL TAX PRACTICE AND PROCEDURE, *supra* note 82, at ¶ 6.01[2][a].

294. *Powell* 379 U.S. at 58.

295. *See id.*

296. *United States v. LaSalle Nat’l Bank*, 437 U.S. 298, 309 (1978).

example, fraudulently filing an inaccurate tax return can lead to civil penalties or to an indictment for tax evasion.²⁹⁷ Likewise, an employer's failure to collect, account for, or pay over income taxes required to be withheld from employee paychecks can lead to either a civil penalty or imprisonment.²⁹⁸ Thus the Code contains both civil and criminal sanctions for the *exact* same conduct.²⁹⁹ Of course, the Service cannot itself prosecute a taxpayer; it can only recommend to the Department of Justice ("Justice") the initiation of a criminal prosecution.³⁰⁰ Once that happens, then the Service loses control of the prosecution and the Assistant United States Attorney presents the government's case to a grand jury who decides what, if any, additional information is needed before deciding whether prosecution is warranted.³⁰¹

Although the Code mixes criminal and civil liability, the Service's internal structure sharply divides the civil and criminal investigative functions. If, during the course of a civil audit, a revenue agent develops a firm indication of fraud on the part of the taxpayer, the revenue agent must immediately stop work on the civil case and turn the file over to the Criminal Investigation division (CI) where a special agent then investigates the case for criminal prosecution.³⁰² The special agent's primary function is to find evidence to support a criminal prosecution.³⁰³ At the end of the special agent's investigation, CI decides if the case warrants prosecution or not.³⁰⁴ If so, and if counsel agrees, the Service sends a referral letter to

297. Compare § 6663 (providing a civil penalty when "any underpayment of tax required to be shown on a return is due to fraud"), with § 7207 (setting forth a criminal penalty for "[a]ny person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be fraudulent").

298. Compare § 6672(a) (providing a civil penalty for "[a]ny person . . . who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax [imposed by this title] or the payment thereof"), with § 7202 (setting a criminal penalty for "[a]ny person . . . who willfully fails to collect or truthfully account for and pay over such tax"), and § 7201 (authorizing a criminal penalty for "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof").

299. The difference turns on state of mind. Thus, the term "willfully" is interpreted differently when applying the civil penalties than when applying criminal penalties. See *Domanus v. United States*, 961 F.2d, 1323, 1326 (7th Cir. 1992). See generally Bryan T. Camp, *Dual Construction of RICO: The Road Not Taken in Reves*, 51 WASH. & LEE L. REV. 61, 87 (1994) (demonstrating how the statutory same term is sometimes given dual interpretations in differing contexts).

300. See 28 U.S.C. § 547(1) (2000) (authorizing District Attorneys to prosecute federal crimes); § 7122(a) (allowing the Service to compromise criminal cases only "prior to reference to the Department of Justice for prosecution").

301. See SALTZMAN, *supra* note 87, § 12.13[2].

302. The revenue agent may still assist the special agent and work under the special agent's direction. See *id.* § 12.13; see also *infra* notes 313-16 and accompanying text.

303. See SALTZMAN, *supra* note 87, § 12.03.

304. *Id.*

Justice.³⁰⁵ If not, CI returns the case to the revenue agent who then resumes the civil investigation.³⁰⁶ The bottom line is that a special agent's presence in an investigation indicates that the Service is considering criminal prosecution, but it is not conclusive because CI may decide to kick the case back to the civil side.³⁰⁷ This sharp division of function, and the suspension of the civil audit pending the outcome of the criminal investigation, is designed to prevent taxpayers from arguing that the Service violated the Fourth Amendment by "tricking" them into revealing information by masking a criminal investigation as a civil one.³⁰⁸

The classic objection to allowing the Service to use a summons to prepare a criminal case is found in *United States v. O'Connor*.³⁰⁹ There the taxpayer had already been indicted by the Grand Jury and Justice was preparing to file its bill of particulars.³¹⁰ The Service issued the summons to help Justice prepare its case.³¹¹ With his usual eloquence, Judge Wyzanski rejected this process on the grounds that it would allow the Executive branch to trench on the powers of the Grand Jury:

The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure. That is the inquisitorial body provided by our fundamental law to subpoena documents required in advance of a criminal trial, and in the preparation of an indictment or its particularization.³¹²

The Supreme Court limited *O'Connor's* holding in *Donaldson v. United States*.³¹³ There, the Court rejected the taxpayer's contention that the Service's use of a summons in a CI investigation raised the same concerns expressed by Judge Wyzanski.³¹⁴ The Court recognized that a CI investigation was generally for both civil and criminal purposes.³¹⁵ It noted

305. *Id.*

306. *Id.*

307. *Id.*

308. *See, e.g.,* *United States v. Tweel*, 550 F.2d 297, 300 (5th Cir. 1977) ("Since the consent given by [the taxpayer] was obtained by deception, the microfilming of the documents constituted an unreasonable search in violation of the Fourth Amendment.").

309. 118 F. Supp. 248, 250 (D. Mass. 1953).

310. *Id.*

311. *Id.*

312. *Id.* at 250-51.

313. 400 U.S. 517, 533 (1971).

314. *Id.*

315. *Id.* at 535 ("[T]he special agent may well conduct his investigation jointly with an agent from the Audit Division; . . . their combined efforts are directed to both civil and criminal

that the *O'Connor* holding was limited “to the situation of a pending criminal charge or, at most, of an investigation solely for criminal purposes” and that “[a]ny other holding . . . would thwart and defeat the appropriate investigatory powers that the Congress has placed in ‘the Secretary or his delegate.’”³¹⁶

Despite this limitation on *O'Connor*, taxpayers picked up on the italicized language to argue that the Service could not use its summons powers solely to prepare a criminal case for recommendation to Justice.³¹⁷ Taxpayers argued that section 7602(a) limits the legitimate purposes of a summons to the purposes there listed and those purposes did not include criminal investigation. In *United States v. LaSalle National Bank*,³¹⁸ the District Court agreed and quashed a summons that the Service admitted was issued by a criminal investigator solely because that particular investigator wanted to develop a criminal case against the taxpayer:

The recommendation for criminal prosecution is certainly the event which definitely determines the focus of the Internal Revenue Service upon criminal prosecution as the end and goal of its investigation. It is apparent, however, that this focus and determination may be arrived at, under certain circumstances, before the actual recommendation for criminal prosecution has been made. In the event such focus and determination has been arrived at the time of the issuance of the Internal Revenue summons, the fact that it precedes the formal recommendation for criminal prosecution is not relevant. An Internal Revenue summons under such circumstances is not issued in good faith.³¹⁹

Although the Seventh Circuit agreed with the District Court, the Supreme Court did not.³²⁰ It held that it was the *institutional* posture of the investigation which determined whether the summons power was encroaching on the prerogatives of the grand jury and exceeding the authority of the Service.³²¹ Just because “a single agent attempts . . . to build a criminal case” did not mean that the Service, as an institution, had

infractions; and . . . any decision to recommend prosecution comes only after the investigation is complete or is sufficiently far along to support appropriate conclusions. The fact that a full-scale tax fraud investigation is being made does not necessarily mean that prosecution ensues when tax liability becomes apparent.”)

316. *Id.* (emphasis added).

317. *See, e.g., United States v. Morgan Guarantee Trust Co.*, 572 F.2d 36 (2d Cir. 1978); *United States v. Hodge & Zweig*, 548 F.2d 1347 (9th Cir. 1977).

318. No. 75 C 3842, 1976 U.S. Dist. LEXIS 16235 (N.D. Ill. Mar. 9, 1976).

319. *Id.* at *2-*3.

320. *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 303-04, 313 (1978).

321. *Id.* at 312-13, 316.

committed to criminal prosecution.³²² That would not happen, the Court emphasized, until the formal referral to Justice deprived the Service of the ability to compromise the case.³²³ Such a referral would come only after significant internal review by supervisors and other offices within the Service.³²⁴ It was this “multilayered and thorough” review which the Court said would “provide the taxpayer with substantial protection against the hasty or overzealous judgment of the special agent.”³²⁵

While clarifying that any summons issued *after* a formal referral to Justice was impermissible, the five member Court majority stopped short of declaring that any summons issued *before* a referral was therefore permitted.³²⁶ It acknowledged that the Service could defeat the formal referral rule by delaying the recommendation to Justice *even when* “there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution.”³²⁷ To this the four Justices in dissent took issue, charging that allowing taxpayers the opportunity to litigate—and thereby engage in discovery—the issue of “institutional good faith” *before* a formal referral would “produce little but endless discovery proceedings and ultimate frustration of the fair administration of the Internal Revenue Code.”³²⁸ Accordingly, the dissent would have adopted the bright-line formal referral rule and would have categorically enforced any summons issued before referral of the case to Justice.

Soon after *LaSalle*, Congress amended section 7602 by (1) codifying the formal referral rule to prohibit use of summonses “if a Justice Department referral is in effect,” and by (2) adding a new subsection explicitly authorizing the Service to issue summonses for “the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.”³²⁹ These modifications, taken together, codified the dissent’s view in *LaSalle*.³³⁰ If Congress had made only the first modification to section 7602, there could be a reasonable argument that the modification did not preclude the possibility that a summons issued before a formal referral could still be improper if the taxpayer could show that there was no possible civil consequence to the investigation. This result would follow because section 7602(a) does not

322. *Id.* at 314-15.

323. *Id.* at 315.

324. *Id.*

325. *Id.*

326. *See id.* at 318.

327. *Id.* at 317.

328. *Id.* at 320 (Stewart, J., dissenting).

329. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 333(a) (1982).

330. *LaSalle*, 437 U.S. at 320 (Stewart, J., dissenting).

explicitly authorize a summons for a criminal investigation and so the courts could plausibly read the statute as requiring some civil component to the investigation that the summons was intended to aid, as did the *Powell* majority.³³¹ Once Congress made the second modification, however, courts cannot ignore that a criminal investigation is, by itself, a proper purpose.³³²

The *LaSalle* opinion follows *Powell* in giving the Service extremely wide latitude in deciding what information it needs to investigate a taxpayer. Both cases rely on the rectitude of the bureaucracy to prevent “overzealous” individual employees from abusing the summons powers.³³³ This reliance on internal controls is a hallmark of inquisitorial logic, for it places the control against abuse not on an adversarial process using an outside decisionmaker but instead on unilateral administrative review. More importantly, both *LaSalle* and the Congressional response explicitly value Truth over Autonomy. That is, from the taxpayer’s view, there is no substantive difference between the Service’s criminal investigators intruding into the taxpayer’s affairs and any other criminal investigator’s intrusion: both are government agents trying to build a case for the state to impose penal sanctions against a citizen. Autonomy is invaded equally. And yet the Service’s civil need to discover the taxpayer’s true liability trumps the intrusion.

ii. Third Party and John Doe Summons

No discussion of the inquisitorial nature of the Service’s evidence-gathering powers would be complete without reviewing the expansion of the summons powers from the particular to the general. That is, over time the Service has moved from summoning a particular taxpayer under audit to summoning third parties about unknown taxpayers in order to obtain

331. See *United States v. Powell*, 379 U.S. 48, 51-52 (1964).

332. The Sixth Circuit recently canvassed the field in *Scotty’s Contracting & Stone, Inc. v. United States*, 326 F.3d 785 (6th Cir. 2003), joining the five other circuits who have ruled on the issue, holding that the Service “may validly issue a summons pursuant to 26 U.S.C. § 7602, as amended in 1982, for the sole purpose of a criminal investigation.” *Id.* at 787. Dicta from other circuit cases, however, suggest that the issue may not be completely settled. See *Hintze v. I.R.S.*, 879 F.2d 121, 127 (4th Cir. 1989) (“The taxpayers here might well have prevailed, moreover, had they succeeded in showing that the IRS was pursuing its investigation for the sole purpose of building a case on anticipated criminal charges.”) *overruled on other grounds* by *Church of Scientology v. United States*, 506 U.S. 9 (1992); *United States v. Lawn Builder of New England, Inc.*, 856 F.2d 388, 391-92 (1st Cir. 1988) (stating that “the IRS must not have abandoned the pursuit of civil tax determination or collection” although no such allegation had been made by the taxpayer in the case). In *United States v. Michaud*, 907 F.2d 750 (7 Cir. 1990) (en banc), the seven member majority ducks the issue, see *id.* at 752 n.2, while the four member dissent vigorously argues for the holding adopted in the other circuits, *id.* at 756-57.

333. See *LaSalle*, 437 U.S. 298; *Powell*, 379 U.S. 48.

sufficient information to open audits on them. Call it “research” or call it “fishing,” the story of this expansion illustrates the inquisitorial nature of tax administration.

Recall that the original restrictive section 14 summons power from the 1864 Act contemplated a personal interaction between the Service employee and the taxpayer. The typical view was that summonses were needed to obtain the *taxpayer's* books and records and so would be issued to the *taxpayer*.³³⁴ Even after enactment of the 1954 Code it was not settled just when the Service could obtain a third party's records. For example, in *Local 174 v. United States*, the Service was investigating the President of Local 174 of the International Brotherhood of Teamsters, Frank Brewster.³³⁵ The Service issued a summons to Local 174 for all records “which in any way refer or relate” to transactions between Brewster and the Local.³³⁶ The local brought some records but not all and the Service petitioned for enforcement of the summons, providing a list of examples where the Service already knew the Local had paid for Brewster's personal expenses (such as a house, a car, club fees) which payments Brewster had not reported as income.³³⁷ On this showing, the district court agreed that the Local should turn over all of its records.³³⁸

The Ninth Circuit reversed in a 2-1 split. The majority took the adversarial process view, declaring it “fundamental error” that both the parties and the court treated summons enforcement as something other than “just another lawsuit.”³³⁹ That is, “the revenue agents cannot be the ‘sole judges as to the scope of the examination.’”³⁴⁰ Instead, “[t]hey must satisfy the Court that what they seek may be actually needed. Otherwise, they would be assuming inquisitorial powers beyond the scope of the statute.”³⁴¹ If the court merely allowed the Service to look at *all* the Local's files, without independently determining the degree to which the Service really needed any particular document, then such action “would constitute the administrative enforcement officials the judges of relevance and in the meantime deprive the Local of its right of privacy.”³⁴² The error, in short, lay in the district court's failure to treat the proceeding as an adversary proceeding: “If the order had required production in court so that testimony could be heard and the judge could exercise an independent

334. See discussion of the § 14 summons powers in *In re Chadwick supra* notes 215-24.

335. 240 F.2d 387, 388 (9th Cir. 1956).

336. *Id.*

337. *Id.*

338. *Id.* at 389-90.

339. *Id.* at 391.

340. *Id.* at 392.

341. *Id.* at 390 (quoting *Martin v. Chandis Sec. Co.*, 33 F. Supp. 478, 480 (S.D. Cal. 1940)).

342. *Id.* at 391.

judgement as to what documents or entries were relevant, it might have been upheld.”³⁴³

Judge Pope dissented, taking the inquisitorial process view.³⁴⁴ He thought “the majority opinion indicates a misapprehension of the nature and character of this proceeding” and objected to the majority’s “apparent insistence upon treating the administrative action as though it were an adversary proceeding to which there were named parties.”³⁴⁵

In my view the majority have completely missed this point which is that the right to issue the subpoena and to have it enforced stems from the right of the tax officials to carry on an investigation merely on suspicion that the law is being violated, or even just because (they) want assurance that it is not.³⁴⁶

Local 174 was decided in 1956 and expressed a minority viewpoint even then, being shortly overruled *sub silentio* by the Supreme Court on its doctrinal point.³⁴⁷ It well illustrates, however, how differing views of tax determination as an adversarial or inquisitorial process led to different outcomes.

Before *Powell*, even the Supreme Court sent mixed messages on just how much of an adversary check the summons enforcement hearing was supposed to be. In *Reisman v Caplin*, decided in 1963, just one term before *Powell*, the Court noted that “[a]ny [summons] enforcement action under this section [section 7402] would be an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness.”³⁴⁸ At the same time, however, the Court did not address who as between the Service and the district court judge was the arbiter of relevancy of documents held by third parties. Rather, the Court’s focus was instead on the mechanism of how a taxpayer could quash a third party summons before the third parties turned over documents that the taxpayer believed were protected by privilege or otherwise unavailable to the Service.³⁴⁹ In fact, there was no allegation in

343. *Id.* at 393.

344. *Id.*

345. *Id.* at 393, 394.

346. *Id.* at 394 (internal quotes omitted).

347. See *Civil Aeronautics Bd. v. Herman*, 353 U.S. 322, 323 (1957) (upholding enforcement of a Civil Aeronautics Board subpoena without specific findings of relevancy by the judge); *Foster v. United States*, 265 F.2d. 183, 188 (2d Cir. 1959) (“This opinion [*Herman*] was announced subsequent to the *Huber* and *Local 174* cases and in effect overruled the holdings of those cases.”); see also *United States v. Newman*, 441 F.2d 165, 169, n.15 (5th Cir. 1971).

348. 375 U.S. 440, 446.

349. *Id.* at 445.

Reisman that the Service lacked the power to obtain records from a third party in relation to the investigation of a specific taxpayer.

It is important not to read too much into the *Reisman* statement that the summons enforcement is an adversarial process. The Court there simply meant that the Service could not unilaterally impose civil or criminal sanctions against a summoned party. The *Reisman* opinion thus revisited the 1864 debate over where the contempt power should be lodged and correctly read that legislation as putting the power of contempt into the court's hands. But to say that civil or criminal sanctions for refusing a summons could only happen after a hearing before a neutral third party does not speak to who is the evidence-gatherer. And it was in the very next term after *Reisman* that the Court affirmed, in *Powell*, the inquisitorial notion that the Service's wide discretion over what information to obtain was subject to only the slightest of judicial checks.³⁵⁰

After *Powell*, it was settled that the Service could obtain information from third parties concerning a *specific* taxpayer who was under a specific investigation. The lower courts were still reluctant, however, to allow the Service to obtain information from third parties about unknown taxpayers where the Service had no specific investigation pending.³⁵¹ For example, when the Service learned that someone had made the highly unusual deposit of \$40,000 in well-worn \$100 bills in the Commercial Bank of Middlesboro, Kentucky, it wanted to know who made the deposit.³⁵² So it issued a summons to the Bank (served on Mr. Bisceglia, a Vice President) for "[t]hose books and records which will provide information as to the (persons) or (firms) which deposited" the money.³⁵³ The Bank refused to respond.³⁵⁴ The Service admitted that it had no idea whether there was any tax liability involved and "that it neither suspected nor was it investigating a particular person or taxpayer."³⁵⁵ The district court modified the summons to ask for all "deposit tickets" instead of "books and records" and ordered the summons enforced.³⁵⁶

The Bank appealed to the Sixth Circuit, which agreed with the Bank's primary argument that section 7602 did not authorize the Service to issue

350. See *United States v. Powell*, 379 U.S. 48 (1964).

351. E.g., *United States v. Theodore*, 479 F.2d 749, 755 (4th Cir. 1973) (holding that § 7602 "only allows the IRS to summon information relating to the correctness of a particular return or to a particular person and does not authorize the use of open-ended Joe Doe summonses").

352. *United States v. Bisceglia*, No. 1966, 1972 U.S. Dist. Lexis 13471, at *1-*2 (E.D. Ky. June 1, 1972), *rev'd* 486 F.2d 706 (6th Cir. 1973), *rev'd* 420 U.S. 141 (1975).

353. *Id.*

354. *Id.* at *2.

355. *Bisceglia v. United States*, 486 F.2d 706, 709 (6th Cir. 1973).

356. *Bisceglia*, No. 1966, 1972 U.S. Dist. LEXIS 13471, at *6.

summonses regarding an investigation into unknown persons, or “John Does.”³⁵⁷

In this section [7602], Congress has not authorized the IRS to examine records pertaining to the financial affairs of an indefinite number of unspecified persons for the purpose of ascertaining the identity of one or some of those persons who may be taxpayers and liable for taxes. Instead, the section presupposes that the IRS has already identified the person in whom it is interested as a taxpayer before proceeding.³⁵⁸

While the court recognized that it was “required to ‘liberally construe the powers given the governmental agency’ by section 7602,” it vehemently rejected any interpretation of the statute that would permit the summons at issue.³⁵⁹ It criticized the district court’s “sweeping interpretation of this section” for going “beyond mere statutory construction.”³⁶⁰

The Supreme Court reversed. Building on the inquisitorial logic of *Powell*, the Court majority relied explicitly on the idea of tax determination as an inquisitorial process:

Of necessity, the investigative authority so provided is not limited to situations in which there is probable cause, in the traditional sense, to believe that a violation of the tax laws exists. *United States v. Powell*, 379 U.S. 48 (1964). The purpose of the statutes is not to accuse, but to inquire. Although such investigations unquestionably involve some invasion of privacy, they are essential to our self-reporting system, and the alternatives could well involve far less agreeable invasions of house, business, and records.³⁶¹

The key intellectual move made by the majority was to link section 7602 to section 7601's duty to “inquire” after “*all* persons . . . who *may* be liable

357. *Bisceglia*, 486 F.2d at 710. Since most summonses are issued with respect to a particular taxpayer, the pre-printed header of Summons Form 2039 reads “In the Matter Of: _____.” The Service would typically fill in the blank with “John Does” when the taxpayer was unknown. These types of summons thus became known as John Doe summonses.

358. *Bisceglia*, 486 F.2d at 710. The court did not therefore reach the Bank’s second argument that to enforce this particular summons violated the Fourth Amendment’s proscription against unreasonable searches because the Service admitted it had no idea whether there was any tax liability connected with the deposit. *Id.*

359. *Id.*

360. *Id.*

361. *United States v. Bisceglia*, 420 U.S. 141, 146 (1995).

to pay *any* internal revenue tax.”³⁶² The duty could not be confined, said the Court, solely to known persons:

It would seem elementary that no meaningful investigation of such events [large cash deposits by unknown persons] could be conducted if the identity of the persons involved must first be ascertained, and that is not always an easy task. Fiduciaries and other agents are understandably reluctant to disclose information regarding their principals, as respondent was in this case. Moreover, if criminal activity is afoot the persons involved may well have used aliases or taken other measures to cover their tracks. Thus, if the Internal Revenue Service is unable to issue a summons to determine the identity of such persons, the broad inquiry authorized by § 7601 will be frustrated in this class of cases.³⁶³

The dissent thought the Court’s opinion was “a breathtaking expansion of the summons power,” remarking that “[t]here are obviously thousands of transactions occurring daily throughout the country which, on their face, suggest the *possibility* of tax complications for the unknown parties involved.”³⁶⁴ The dissent claimed that the majority ignored the legislative history of the summons statute in that “Congress has never made that power coextensive with the Service’s broad and general canvassing duties.”³⁶⁵

The dissent was correct in the narrow sense. As discussed above, the 1864 Revenue Act did not contemplate summonses being issued to anyone except the taxpayer, and then only under certain conditions. The broader power to summons “any” person came later, in section 49 of the Revenue Act of 1868 and the powers eventually merged together. But the majority was correct in the larger sense. Congress did in fact link the summons power to the duty to inquire. As discussed above, the 1864 Revenue Act placed the duty of inquiry in section 12, the procedures for performing that duty in section 13, and the summons power in section 14, being triggered by the failure of the section 13 procedures to carry out the section 12 duty.

Thus the majority in *Bisceglia* proved the Sixth Circuit correct: interpreting section 7602 as authorizing John Doe summonses *was* going beyond “mere” statutory construction because the majority based its decision not so much on standard tools of statutory construction (plain language, legislative history, etc.) as on the *structure* of the tax

362. *Id.* at 149 (quoting § 7601) (emphasis supplied by the Court) (internal quotation marks omitted).

363. *Id.* at 150.

364. *Id.* at 157 (emphasis added).

365. *Id.* at 155.

determination system. The majority emphasized that the inquisitorial nature of the system required the Service be able to investigate unknown taxpayers and it was sufficient protection against abuse that “[o]nce a summons is challenged it must be scrutinized by a court.”³⁶⁶

Justice Blackmun gave a prophetic concurrence in *Bisceglia*. Contrary to the dissent’s claim that the floodgate of summonses lay open because every transaction had “possible” tax consequences, Justice Blackmun explained that courts should approve a John Doe summons only when the summons “was issued pursuant to a genuine investigation” against an “ascertainable group” of taxpayers.³⁶⁷ That is, Justice Blackmun noted, approval should come when “[t]he Service was not engaged in researching some general problem; its mission was not exploratory.”³⁶⁸

Congress agreed with Justice Blackmun and, in the Tax Reform Act of 1976, enacted section 7609 to govern third-party summonses in general and section 7609(f) and (h) to govern John Doe summonses in particular.³⁶⁹ As a substantive matter, section 7609(f) follows Justice Blackmun’s concurrence in that it permits the Service to serve John Doe summonses only when the Service (1) has a “reasonable basis” to believe that (2) an “ascertainable group or class of persons” may not have complied with a tax law, and (3) the Service cannot readily obtain the information other than

366. *Id.* at 146.

367. *Id.* at 152.

368. *Id.*

369. Pub. L. No. 94-155. Congress was also responding to *Donaldson v. United States*, where the Court had concluded that taxpayers did not have sufficient interest in third party summonses to allow them to intervene in an enforcement proceeding to quash the summons. 400 U.S. 517, 531 (1971). As originally enacted, § 7609(b) gave taxpayers the ability to direct the third party not to comply with the summons, thus forcing the Service to bring an enforcement action. The statute gave the taxpayer a right to intervene in the enforcement action. Tax Reform Act of 1976, Pub. L. No. 95-155, § 7609(b). In 1982, at the behest of the Service, Congress removed the ability to direct a third party not to comply and instead gave the taxpayer the ability to file a petition to quash (and retained the right to intervene) thus placing the burden on the taxpayer to initiate a court proceeding to stop the third party from complying with the summons. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248 § 331(a). In this respect the statute reflects a belief in the enforcement proceeding as an adversarial check on the Service. As discussed in the main text, however, the actuality of a proceeding to either enforce or quash a summons is its use as a method of avoiding penalties for disobeying a summons and not to any significant degree a check on the Service’s decision on what information it wants. In other words, since it was so difficult for a litigant to find any substantive grounds on which to limit the Service’s decision on information to obtain, allowing taxpayers to participate in the proceeding did not make the system less inquisitorial. Note, too, that until 1998 § 7609 applied only to summons issued to a defined class of third parties labeled “third party recordkeepers.” Tax Reform Act of 1976, Pub. L. No. 94-455, § 7609(a)(1)(A). These were generally financial institutions, accountants, credit agencies and others who regularly kept data on a large number of transactions and provided such data to customers. *See id.* at § 7609(a)(3). The section was expanded to all third parties, again at the request of the Service, in RRA 98. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206 § 3415(a).

from the summoned party. Of greater interest, however, is the procedure Congress chose to implement these requirements: section 7609(f) does not allow the Service to even serve a John Doe summons until “after a court proceeding” in which the Service establishes the three substantive prerequisites. Significantly, section 7609(h) provides that the court proceeding is to be *ex parte* and grants district courts subject matter jurisdiction to conduct the proceeding. These amendments, then, potentially required the Service to take two trips to court to obtain information through a John Doe summons: first to obtain permission to issue the summons and, perhaps second, to obtain an order enforcing the summons.

The House Committee Report to the 1976 Tax Reform Act³⁷⁰ suggests that Congress was not trying to impose an adversarial process check on the Service’s discretion on what information it needed. While the Report generally approved of *Bisceglia’s* inquisitorial justification for issuing John Doe summonses, it sought limits on the Service’s discretion beyond internal controls.³⁷¹ It sought to apply those limits, however, consistently with the inquisitorial process by making the *issuance* decision subject to an *ex parte* proceeding using the less-than-probable-cause standard of *Powell*:

It is enough for the Service to reveal to the court evidence that a transaction has occurred, and that the transaction (in the context of such facts as may be known to the Service at that time) is of such a nature as to be *reasonabl[y] suggestive of the possibility* that the correct tax liability with respect to that transaction *may* not have been reported [correctly].³⁷²

Courts have applied section 7609(f) consistently with the idea that the new process was to check only arbitrary or bizarre decisions and not to create a new adversarial check on the Service’s summons powers. For example, in the late 1970’s the Service began a project to investigate barter exchanges and those who participated in them. To support the project, it served John Does to various barter exchanges, seeking their membership lists.³⁷³ Demonstrating that members of one barter exchange tended to under-report income was enough “reasonable basis” to support John Doe

370. H.R. REP. NO. 94-658 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2897, 2897.

371. *Id.* at 311.

372. *Id.* (emphasis added).

373. When a particular tax dodge comes to the Service’s attention, it generally creates special projects to deal with it. In this case the Service began a “Barter Exchange Project Unreported Income Program” in 1979. *See United States v. Thompson*, 701 F.2d 1175, 1176-77 (6th Cir. 1983) (describing the program).

summons against other barter exchanges for their membership lists even if it fell short of “probable cause.”³⁷⁴

More importantly, summoned parties have attempted to argue, in the *enforcement* proceeding, that the Service failed to meet its burden in the *ex parte issuance* proceeding. In early cases, they were successful in being allowed to *raise* the substantive section 7609(f) requirements in the enforcement proceeding, even if they were not successful on the merits.³⁷⁵ It did not take long, however, for the majority of courts to reject that position. As the Second Circuit explained:

By requiring that the application [to issue a John Doe summons] be made . . . *ex parte*, we believe Congress intended that the question whether a John Doe summons could be served should not become embroiled in an adversary proceeding. Nothing in the legislative history or on the face of the statute suggests that Congress intended to permit a summoned party to challenge the showings which are a requisite for service of a summons. Were this the case, the enforcement proceedings would, contrary to the legislative intent, “so delay tax investigations by the . . . Service that they ‘would’ produce a problem for sound tax administration greater than the one they seek to solve.”³⁷⁶

iii. Dual Purpose

The degree to which the Service can obtain information about unknown taxpayers from third parties was not resolved by section 7609(f). As explained above in Part II, the Code contains a huge web of reporting requirements which attempt to capture the flow of money in myriad types of transactions. Chapter 68 imposes a substantial number of either “Additions to Tax” (Chapter 68A) or “Assessable Penalties” (Chapter 68B) for various failures to comply with the reporting requirements. The

374. See *In re Tax Liabilities of Matter of John Does, Members of the Columbus Trade Exch.*, 671 F.2d 977, 979 (6th Cir. 1982) (agreeing with the Service that “Congress did not intend to impose stringent restrictions on the Service’s investigatory function, but merely sought to prevent the indiscriminate exercise of the John Does summons power.”); see also *United States v. Pittsburgh Trade Exch. Inc.*, 644 F.2d 302, 306 (3d Cir. 1981).

375. See, e.g., *United States v. Brigham Young Univ.*, 679 F.2d 1345, 1347, 1350 (10th Cir. 1982) (rejecting Service’s claim that the University could not object to the summons on the grounds that the summons lacked the reasonable basis requirement of § 7609(f)(2) but also finding that the Service had met the reasonable basis requirement), *vacated and remanded by* 459 U.S. 1095 (1983).

376. *Agric. Asset Mgmt. Co. v. United States (In re Tax Liabilities of John Does)*, 688 F.2d 144, 148-149 (2d Cir. 1982) (quoting S. REP. NO. 94-938, at 371, *reprinted in* 1976 U.S.C.C.A.N. 3800); accord *United States v. Samuels, Kramer & Co.*, 712 F.2d 1342, 1346 (9th Cir. 1983).

amounts are treated as tax. The Code is redundantly explicit that the Chapter 68 penalties and additions to tax “shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes.”³⁷⁷

These reporting requirements allow the Service to engage in pretextual investigations of the correctness of a reporting requirement (and hence the “tax” due even if the entity itself reports no tax liability, such as a partnership), in order to discover substantial information about an entire group of taxpayers who are not themselves under audit—yet. For example, issuing a John Doe summons to barter exchanges for their membership lists opened the Service to the risk of district courts refusing to find “reasonable basis” for issuing the summons, or worse, being forced to litigate the “reasonable basis” in the enforcement proceeding. So the Service instead began opening audits of barter exchanges themselves and asking for the membership lists as part of the audit. Most barter exchanges were set up as either corporations or partnerships and so had a separate tax liability or, in the case of partnerships, a separate reporting requirement. Initially, the Service met with mixed success, with the Sixth Circuit requiring the Service to use section 7609(f) in *United States v. Thompson*,³⁷⁸ and the Eighth Circuit enforcing the summons regardless of the dual purpose in *United States v. Barter Systems, Inc.*³⁷⁹

Once again, the cases reflect two plausible holdings based on differing visions of the degree of autonomy the Service should have in deciding what information it needed and how much was enough. On the one hand, the Sixth Circuit emphasized that to allow the Service to use the regular summons process simply by claiming that the “In The Matter Of” referred to a specified taxpayer (the barter exchange), when the *real* object was to obtain information about unknown taxpayers, completely undercut the Congressional decision to have courts review investigations about unknown taxpayers:

We do not believe that the IRS can avoid the requirements of section 7609(f) merely by identifying the record keeper as a person with respect to whose liability the summons is issued. Nor do we believe that even a legitimate investigation of a record keeper’s own tax liability can be used to exempt the

377. *E.g.*, § 6665(a)(1) applying to any “additions to the tax, additional amounts, and penalties provided by this chapter”; § 6671 (applying to “the penalties and liabilities provided by this subchapter). Section 6671 repeats word for word § 6665(a) and there seems no particular reason for its existence. It is simply redundant. Both statutes also provide that “any reference in this title to ‘tax’ imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this [chapter] [subchapter].”

378. 701 F.2d 1175 (6th Cir. 1983).

379. 694 F.2d 163 (8th Cir. 1982).

IRS from following section 7609(f) procedures when at the time of its issuance a summons in fact also pertains to the liability of other unidentified persons. To hold otherwise would present the IRS with an irresistible invitation to avoid the clear Congressional safeguards of section 7609(f).³⁸⁰

On the other hand, the Eighth Circuit, citing to the Supreme Court's repeated statements in *Powell*, *Bisceglia*, and *Donaldson*, emphasized that the summons powers should be construed to maximize the "effective performance" of congressionally approved purposes absent an "express statutory prohibition."³⁸¹ The court found that the Service's investigation of the barter exchange was a congressionally-approved purpose (that is, it met the "legitimate purpose" test of *Powell*) and that section 7609(f) did not expressly apply in this circumstance because it expressly applied only to any summons "which does not identify the person with respect to whose liability the summons is issued."³⁸² In short, unless and until Congress revised the statutory language, the Service could choose alternative methods of acquiring the same information (the barter exchange membership list).

We hold that the John Doe summons procedures . . . do not apply to the issuance of a summons which has the purpose of determining a known taxpayer's liabilities and produces the fallout or further effect of discovering information that would aid in identifying unnamed taxpayers and investigating their tax liabilities.³⁸³

The Supreme Court agreed to resolve the circuit split in *United States v. Tiffany Fine Arts, Inc.*³⁸⁴ where, during an examination of a holding company whose various subsidiaries licensed certain tax shelters, the Service asked for a list of its licensees.³⁸⁵ As had the barter exchanges, the taxpayer offered to provide all the information regarding transactions with its licensee, but with identifying information redacted.³⁸⁶ The taxpayer also offered to provide the Service with a randomly-selected list of licensees to meet the Service's asserted need for verification.³⁸⁷ The Service conceded that one of its purposes in obtaining the list was to make "further inquiry"

380. *Thompson*, 701 F.2d at 1180, n.8.

381. *Barter Sys., Inc.*, 694 F.2d at 167.

382. *Id.* at 167-68 (quoting § 7609(f)).

383. *Id.* at 169.

384. 469 U.S. 310 (1985).

385. *Id.* at 311.

386. *Id.* at 312.

387. *Id.* at 323.

into whether the licensee “correctly reported their income tax liabilities.”³⁸⁸ The district court enforced the summons and the Second Circuit affirmed, agreeing with the Eighth Circuit that such a “dual purpose” did not require the Service to use the section 7609(f) procedures.³⁸⁹

The Supreme Court unanimously affirmed. Like the Eighth Circuit, the Court first set up a heavy presumption in favor of upholding the Service’s decision of how to gather information, citing to “a formidable line of precedent construing congressional intent to uphold the claimed enforcement authority of the [IRS] if [this] authority is necessary for the effective enforcement of the revenue laws and is not undercut by contrary legislative purposes.”³⁹⁰ Next, the Court decided that the plain language of section 7609(f) was ambiguous as to “whether the statutory reference to ‘the person’ should be read as ‘every person’ or whether it should be read as ‘at least one person.’”³⁹¹ Therefore the Court turned “to consider whether dual purpose summonses give rise to the same concerns that prompted Congress to enact section 7609(f).”³⁹² It characterized those concerns as preventing the Service from looking around for targets to investigate when it had no “legitimate investigation of an ascertainable target” because such “fishing expeditions” infringed on taxpayers privacy rights to be free from government intrusion in their lives.³⁹³

The strong inquisitorial base of the *Tiffany* decision is masked by its ostensible use of an adversarial process rationale. The Court characterized section 7609(f) as a substitute for the adversarial check provided by the summons enforcement proceeding. Congress enacted it, the Court asserted, because a party who, not itself under investigation, receives a John Doe summons “might have little incentive to oppose enforcement vigorously. Then, with no real adversary, the IRS could use its summons power to engage in ‘fishing expeditions’ that might *unnecessarily* trample upon taxpayer privacy.”³⁹⁴ Therefore, the Court concluded, the section 7609(f) substitute was not necessary when the summoned party was itself under investigation because “the summoned party will have a direct incentive to oppose enforcement. In such circumstances, the vigilance and self-interest of the summoned party—complemented by its right to resist

388. *Id.* at 313.

389. *United States v. Tiffany Fine Arts, Inc.*, 718 F.2d 7, 13-14 (2d Cir. 1983).

390. *Tiffany*, 469 U.S. at 318 (quoting *United States v. Euge*, 447 U.S. 707, 715-16 (1980)) (modification found in Supreme Court opinion).

391. *Id.* at 319.

392. *Id.* at 320.

393. *Id.*

394. *Id.* (emphasis supplied to indicate that the Court was implicitly distinguishing between necessary and unnecessary trampling on taxpayer privacy).

enforcement—will provide some assurance that the IRS will not strike out arbitrarily or seek irrelevant materials.”³⁹⁵

The Court acknowledged that “Congress . . . did not seek to ensure that the IRS have an adversary in all summons proceedings” and that “[it] is possible that the summoned party, even if it is itself being investigated, will not oppose enforcement, and that as a result the IRS might obtain some information that is relevant only to the liabilities of unnamed taxpayers.”³⁹⁶ Nonetheless, the Court concluded that “where the summoned party is itself being investigated, that party’s self-interest provides sufficient protection against the evils that Congress sought to remedy when it enacted § 7609(f).”³⁹⁷

The Court’s adversarial process rationale is specious; it does not truly explain the holding. Think again about the Service’s investigation of the barter exchanges. Whether the Service proceeded by a John Doe summons or by a dual purpose summons, the barter exchanges had the exact same motivation, and the exact same opportunity in the summons enforcement proceeding, to raise the exact same arguments against enforcement of the summons. Likewise, the incentive of Tiffany Fine Arts, Inc. to protect its client base was the same whether it received a summons titled “In the Matter of John Does” or titled “In the Matter of Tiffany Fine Arts, Inc.” The Court’s purported distinction between either the willingness or ability to resist a summons turning on whether the summoned party itself was under investigation contradicts the Court’s own analysis in *Bisceglia*.³⁹⁸ Ironically, the Court “proved” its adversarial process point by concluding: “Here, for example, Tiffany argued vigorously—albeit unsuccessfully—against enforcement of the summonses.”³⁹⁹ A check which is unsuccessful as a rule is no check at all and the Court’s observation falls into the category of rules observed more in the breach than in the execution.

The adversarial process rationale makes the Court’s conclusion circular. This is evident by the Court’s holding that “by definition, the IRS is not engaged in a ‘fishing expedition’ when it seeks information relevant to a legitimate investigation of a particular taxpayer. In such cases, any incidental effect on the privacy rights of unnamed taxpayers is justified by

395. *Id.* at 321. The Court also used adversarial logic to reject the Sixth Circuit’s argument that allowing the Service to open an investigation on the taxpayer holding the desired records would undermine § 7609(f). *Id.* at 322 (“[I]n such a case,” the Court opined, “the summoned party would still have a sufficient interest in opposing enforcement . . .”).

396. *Id.*

397. *Id.*

398. *United States v. Bisceglia*, 420 U.S. 141, 150 (1975) (“Fiduciaries and other agents are understandably reluctant to disclose information regarding their principals, as respondent was in this case.”).

399. *Tiffany*, 469 U.S. at 321.

the IRS's interest in enforcing the tax laws."⁴⁰⁰ That is true *only* by definition and by a definition which begs the question of what is or is not "fishing." At bottom, the Court's view is that a certain amount of "fishing" is part of the inquisitorial mandate and Congress, in section 7609(f), added a non-adversarial process to check only the most blatant forms of it.

That *Tiffany Fine Arts* is more accurately based on inquisitorial logic is apparent in the Court's heavy reliance on its own precedents, themselves built on inquisitorial logic, to conclude that "restrictions upon the IRS summons power should be avoided "absent unambiguous directions from Congress."⁴⁰¹ In addition to the cases discussed above, the Court here cited to its opinion in *United States v. Arthur Young*, where the Court enforced the Service's summons against the taxpayer's accountants for the accountant's "tax accrual" workpapers, documents that reviewed and analyzed the weaknesses and problematic positions in the taxpayer's return.⁴⁰² The Court there rejected some very sound arguments for creating a type of work-product immunity for the particular work product.⁴⁰³ Citing to the need for "disclosure, and the concomitant power of the Government to compel disclosure," the Court refused to create a new privilege to shield relevant information from the Service.⁴⁰⁴ This again raises the value of finding the "true" tax liability over competing values; otherwise, "our national tax burden would not be fairly and equitably distributed."⁴⁰⁵ Further, note the Court's reaction to Tiffany's offer to provide the Service with a random sample of its licensees so the Service could contact them.⁴⁰⁶ Once the court decided that the Service was not required to follow the section 7609(f) procedure, it quickly held that the Service was entitled to the full enforcement of its summons.⁴⁰⁷ It was no objection that the Service wanted more documents than it could process, because "[w]e have never held . . . that the IRS must conduct its investigations in the least intrusive way possible."⁴⁰⁸ Likewise, Tiffany's offer would in effect remove the evidence-gathering function from the Service. "The decision of how many, and which, licensees to contact is one for the IRS—not Tiffany—to

400. *Id.*

401. *Id.* at 318 (quoting *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984) (quoting *Bisceglia*, 420 U.S. at 150)).

402. 465 U.S. 805, 807-09 (1984).

403. *See id.* at 810, 814-17.

404. *Id.* at 816.

405. *Id.*

406. *Tiffany*, 469 U.S. at 323.

407. *See id.* at 322-24.

408. *Id.* at 323.

make.⁴⁰⁹ It was for the Service, not the taxpayer and not the courts, to decide which of all the possibly relevant records to scrutinize.⁴¹⁰

D. Summary

The above discussion demonstrates how the Service has historically functioned as both decisionmaker and evidence-gatherer in both the tax determination and tax collection processes. Further, it has shown how both Congress and the courts have operated within an inquisitorial frame of reference when enacting reforms or deciding controversies by judging issues in light of what would best accomplish the Service's mission of searching for Truth (in the form of the "proper" or "true" tax liability). It is true that all of this takes place within an overall adversarial system of justice. But that adversarial method of dispute resolution does not even become available until *after* the Service has gathered its evidence and made its determination or collection decision. Thus, for example, note again how the central *Powell* holding that the Service does not need probable cause to enforce its summons places Truth above Autonomy.⁴¹¹

409. *Id.*

410. Although beyond the scope of this Article, the cases regarding conditional enforcement of summonses also engage in inquisitorial versus adversarial logic, with the inquisitorial logic winning out. *See, e.g.,* *United States v. Jose*, 131 F.3d 1325 (9th Cir. 1997) (limiting district courts to either enforcement or denial of summonses and prohibiting them from attaching conditions on the use of the summoned information in the enforcement order); *United States v. Barrett*, 837 F.2d 1341 (5th Cir. 1988) (en banc) (same).

411. *United States v. Powell*, 379 U.S. 48 (1964). Lower courts routinely adopt that logic. For example, "in light of the unique inquisitorial mandate of the IRS, its burden of demonstrating 'substantial need' to overcome the [work product] privilege should be reduced." *United States v. Arthur Young & Co.*, 496 F. Supp. 1152, 1158 (S.D.N.Y. 1980) *aff'd in part, rev'd in part*, 677 F.2d 211 (2d Cir. 1981), *aff'd in part, rev'd in part*, 465 U.S. 805 (1984). On similar logic, courts refuse to attach conditions to the Service's ability to use the information summoned because to do so would improperly interfere with the Service's decision as to what actual purpose to put the information.

The cases decided since *Powell* have shown that the requirement of legitimate purpose means nothing more than that the government's summons must be issued in good faith pursuant to one of the powers granted under 26 U.S.C. § 7602. . . . We find no case requiring the government to delineate a specific and narrow purpose, and then holding that the summons will be enforced only insofar as it is relevant to that purpose. Indeed, the cases discuss not what the *actual* purpose is, but whether the summons was issued in good faith pursuant to a legitimate investigation, that is, an investigation authorized by section 7602.

United States v. Rockwell Int'l, 897 F.2d 1255, 1262-63 (3d Cir. 1990) (emphasis added) (reversing district court's conditional enforcement order because "the district court erred by ignoring the general and overarching institutional purpose of the IRS and by determining relevancy as against the specific suspected wrongdoing asserted by a single IRS agent.") (internal citations

Contrast that holding with the same Court's jurisprudence in criminal law where, by creating the exclusionary rule to enforce the probable cause requirement for police searches, the Court places Autonomy above Truth. Further, when the adversarial system does come into play, the scales of justice have traditionally been weighed heavily in the government's favor, in deference to the "imperious need" for taxes identified by Justice Roberts,⁴¹² and in recognition that voluntary compliance links to perceptions of fairness which themselves link to the need for the Service to have the power of inquest to determine the "truth" of the tax matter.

The next section considers the rhetoric and reality of RRA 98. It explores the extent to which the public conversation before the statute, the language of the committee reports, and the provisions actually enacted turn away from the inquisitorial model of tax administration towards an adversarial model. I hope to show that the taxwriters not merely misunderstood the mechanics of how the Service operates—although I shall give one rather striking example of the taxwriters' ignorance at that level—but, more importantly, how certain restructuring and reform provisions are based on an adversarial process paradigm that (a) removes decisionmaking and evidence-gathering powers from the Service and attempts to create new types of neutral third parties so that the Service is reduced from decisionmaker to litigant, and (b) promotes Autonomy over Truth.⁴¹³ Just how far the new statutes will be pushed in that direction remains unclear. The provisions have caused confusion in the courts, with no real relief for taxpayers from the abuses to which the reforms were directed. To put it mildly, RRA 98 is not Congress' finest work product. To put it bluntly, RRA 98 is the quintessential FUBAR⁴¹⁴ statute.

IV. RRA 98: SWINGING PENDULUM OR SHIFTING PARADIGM?

Pre RRA 98 Service Mission Statement:

The purpose of the Internal Revenue Service is to collect the proper amount of tax revenue at the least cost; serve the public by continually improving the quality of our products and services; and perform in a manner warranting the highest degree of public confidence in our integrity, and fairness.⁴¹⁵

omitted); *see also* United States v. Jose, 131 F.3d 1325 (9th Cir. 1997).

412. Bull v. United States, 295 U.S. 247, 259 (1935).

413. I do not mean to suggest that RRA 98 was simply the product of Congressional ignorance of the prior paradigm, but discussion of the other causes for the excesses of RRA 98—such as political opportunism, or the failure of the Congressional oversight and hearing process—are beyond the scope of this Article.

414. In PG-rated parlance, FUBAR is the acronym for "Fouled Up Beyond All Recognition."

415. S. REP. NO. 105-174 at 8 (1998).

Post RRA 98 Service Mission Statement:

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.⁴¹⁶

At the start of the Senate Finance Committee hearings in September 1997, Senator Roth declared: “[w]hat we seek to do is help the IRS get back to its mission statement.”⁴¹⁷ By the end of the legislative process ten months later, however, the newly enacted RRA 98 had abandoned that goal and instead required the Service to “review and restate its mission to place a greater emphasis on serving the public and meeting taxpayers’ needs.”⁴¹⁸

I suggest that both the change in the mission statement and the felt need to statutorily direct that change is symbolic of RRA 98, but not in the way most commentators have noted. Most commentators have focused on the absence of the word “collect” in the new mission statement.⁴¹⁹ Indeed, this absence is all the more striking because when the Service posted two proposed versions of a revised mission statement on its website for public comment, *both* versions still contained the phrase “collect the revenue.”⁴²⁰ The deletion of “collect” has generated a spirited debate about how far the “pendulum” has swung, and should swing, between “service” and “enforcement,” which are widely viewed as two agency missions fundamentally at odds with each other.⁴²¹

416. INTERNAL REVENUE SERVICE, THE AGENCY AND ITS MISSION, at <http://www.irs.gov/irs/article/0,,id=98141,00.html>. (last visited Nov. 13, 2003).

417. *Practices and Procedures*, *supra* note 24, at 4.

418. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1002 (1998).

419. See, e.g., Christopher Bergin, *Tax Analysts' Executive Director Addresses IRS's Split Personality*, 2002 TAX NOTES TODAY 98-57 (Tax Analysts Doc. No. 2002-12126) (“What’s missing? In the new mission statement the words ‘collect taxes’ do not appear.”); Donald C. Alexander, *Former Commissioner Alexander Muses on the Service*, 1999 TAX NOTES TODAY 69-86 (1999) (Tax Analysts Doc. No. 1999-13496) (“What is missing is any mention of collecting taxes.”).

420. Delmar R. Threadgill, *FEI Critiques IRS's Draft Mission Statements*, 98 TAX NOTES TODAY 187-88 (1998) (Tax Analysts Doc. No. 98-29088) (reprinting both drafts).

421. See, e.g., *Practices and Procedures*, *supra* note 24, at 28 (statement of Joseph F. Lane, enrolled agent, chairman, National Government Relations Committee, the National Association of Enrolled Agents, Gaitherburg, M.D.) (“[P]erhaps one of the ways of approaching the problems we are dealing with in tax administration was to divide the IRS into two separate agencies, one for taxpayer service, and the other for tax law enforcement.”); see also Robert Reno, *Who's getting ripped: The IRS or Taxpayers?*, Milwaukee J. Sentinel, Sept. 2, 2000, at 15A (“The pendulum of Washington outrage seems to be swinging in an opposite direction toward the notion that the IRS is in danger of becoming less a ripper agency and more a ripped-off one.”). Compare William Stevenson, *IRS's Primary Focus on Service is the Right Way To Go*, 2003 TAX NOTES TODAY 121-

A more telling change, however, is that neither the two proposed mission statements nor the one actually adopted contain the notion of a “proper” or “correct” tax.⁴²² It is the absence of this concept, I suggest, that signals a shift in the relative importance of truth and autonomy values such that Autonomy now trumps Truth in tax administration in a way that it did not before. Further, both the rhetoric and reality of RRA 98 remove certain decisionmaking and evidence-gathering functions away from the Service and put them into the hands of neutral third-party or quasi-third-party decision-makers. In both of these ways, RRA 98 represents more of a shift of the paradigm than a swing of the pendulum, albeit a partial shift, leaving tax administrators to reconcile a mix of processes that arguably work at cross-purposes.

Subsection A looks at how the rhetoric signals this shift by: (a) denying the existence of a “true” tax liability and (b) decrying the Service’s ability to make tax determination or tax collection decisions without approval from a neutral third party after hearing from the taxpayer. Subsection A then contrasts the 1998 reform rhetoric with that from the previous great reorganization of the Service between 1950 and 1953. Subsection B then examines how particular RRA 98 provisions carry out this shift in one or more of the following ways: (a) creating circumstances where Truth yields to Autonomy in a way it did not before RRA 98; (b) removing or reducing the Service’s ability to make the unilateral tax determination and tax collection decisions described in Part III-B; and (c) reducing the Service’s ability to gather information as described in Part III-C.

A. *The Bark*

Debate over the structure and function of tax administration simmered for years after the 1986 Tax Reform Act.⁴²³ The sensationalist hearings held by the Senate Finance Committee in September 1997 brought it to a boil. The Senate Finance Committee had spent about a year carefully gathering the stories that would fuel the hearings,⁴²⁴ and they became the

22 (June 23, 2003) (Tax Analysts Doc. No. 2003-15042) (title says it all), with Alvin D. Lurie, *Killed With Kindness or How We Stopped Hating the IRS*, 2003 TAX NOTES TODAY 145-35 (July 28, 2003) (Tax Analysts Doc. No. 2003-17551) (contending that enforcement should be primary mission). See generally Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 KAN. L. REV. (forthcoming 2003) (detailing effects of RRA 98 on Service compliance operations).

422. I confess not to be the first to notice this. See Threadgill, *supra* note 420, at ¶ 7 (objecting to the absence of the word “proper” in both drafts).

423. For a good synopsis of this history, see Adriana Wos-Mysliwicz, Note, *The Internal Revenue Restructuring and Reform Act of 1998: Does it Really Shift the Burden of Proof to the IRS?*, 14 ST. JOHN’S J. LEGAL COMMENT. 301, 306-07 (1999).

424. See *Practices and Procedures*, *supra* note 24, at 200 (Testimony of Mike Dolan, Acting Commissioner) (referring to the opening announcement of the investigation); See generally *id.* at

fire that fed reform.⁴²⁵ The rhetoric cooled somewhat in hearings held in January 1998 when the Senate Finance Committee returned to the dull, expert-witness-driven format of traditional oversight.⁴²⁶ In April 1998, however, the Committee sought to keep the heat on the Service with yet more sensational and titillating stories of abuse.⁴²⁷ The September and April hearings were high political theater and, as with most theater, were mostly fictional: the dramatic allegations made from behind face screens and voice screens were generally unsupported.⁴²⁸ But from the heat of the moment, RRA 98 emerged.

323-24 (opening statement of Sen. Roth) (describing the course and methodology of the Committee investigation).

425. See, e.g., *IRS Restructuring: Hearings Before the Senate Comm. on Finance on H.R. 2676*, 105th Cong., S. HRG. 105-529, at 52-53 (1998) [hereinafter *IRS Restructuring*] (statement of Rep. Rob Portman, Chair, National Commission on Restructuring the IRS (noting that the House had passed legislation based on the Restructuring Commission's recommendations, "[b]ut it was this committee, the Finance Committee's work and particularly your hearings last September that really focused all of America on the need to fundamentally reform this troubled agency."); *IRS Oversight, Hearings Before the Senate Comm. on Finance*, S. HRG. 105-598, at 10 (1998) [hereinafter *IRS Oversight*] (statement of Sen. Don Nickles) ("I have got about a dozen things that we added that was not [sic] in the House bill, [but] is in the Senate bill.").

426. See *IRS Restructuring*, supra note 425.

427. See *IRS Oversight*, supra note 425.

428. See David Cay Johnston, *Inquiries Find Little Abuse by Tax Agents*, N.Y. TIMES, Aug. 15, 2000, at C1 ("Most of the crucial testimony in the 1997-98 hearings that preceded the new law, contending abuses by I.R.S. agents, has proved to be unfounded, based on false or misleading testimony or disproved in subsequent court actions."); GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON FINANCE, U.S. SENATE, TAX ADMINISTRATION: INVESTIGATION OF ALLEGATIONS OF TAXPAYER ABUSE AND EMPLOYEE MISCONDUCT ¶2 (1999) reprinted in 2000 TAX NOTES TODAY 80-13 (Tax Analysts Doc. No. 2000-11630)

Based on our investigation, we did not find any evidence to support the allegation that IRS managers' decisions to "no-change" or "zero-out" proposed tax assessments were improper. . . . We found that each manager had acted within his or her discretion and openly discussed relevant issues with both the employee and senior management. Their decisions were approved by appropriate individuals and were documented in the files. These managers followed IRS policies and procedures related to auditing taxpayers. . . .

Generally, we found no corroborating evidence that the criminal investigations described at the hearing were retaliatory against the specific taxpayer. In addition, we could not independently substantiate that IRS employees had vendettas against these taxpayers. Our investigation did find that decisions to initiate the investigations were reasonably based on the information available to IRS at the time and were documented in agency files when they were made. Further, we found no evidence that IRS employees had acted improperly in obtaining and executing the search warrants.

1. Autonomy and Truth

The rhetoric was hot: “Criminals have more rights in this country than taxpayers do. It shouldn’t be that way. That’s wrong, and we’re going to fix it.” said Republican Bill Archer.⁴²⁹ Not to be outdone, Democrat Dick Gephardt in a separate news conference on the same day grimly declared: “Today, accused violent felons have more rights in court than law-abiding, tax-paying citizens. And that’s wrong.”⁴³⁰

Upon cool reflection, most listeners might well dismiss these statements as hysterically overwrought nonsense, since the statements ignore the fundamental difference between criminal and civil sanctions. Yet, when restated in a more neutral tone, the statements do recognize a fundamental difference between adversarial and inquisitorial processes: there are times where Truth yields to Autonomy in the criminal justice system in a way it does not in the tax collection system. That is, an adversary system (i.e. criminal justice system) will protect Autonomy by policing the government’s evidence-gathering in a way that the inquisitorial tax system will not. The most obvious example is the exclusionary rule: the sanction meted out in criminal trials for unwanted government intrusion on Autonomy is to deny probative evidence which would help establish Truth.⁴³¹ It may not happen often, but it happens, in criminal tax trials as well as other criminal trials. In contrast, one is hard pressed to find any application of the exclusionary rule in a *civil* tax proceeding.⁴³² In that sense the rhetoric connects to a theme that resounds in American history and political culture: inquisitorial systems are antithetical to the basic American cultural and political value of the right to be left alone.

429. Representative Bill Archer, News Conference (Oct. 21, 1997) (transcript available on LEXIS in FDCH Political Transcripts).

430. Representative Dick Gephardt, News Conference (Oct. 21, 1997) (transcript available on LEXIS in FDCH Political Transcripts).

431. See King, *supra* note 72, at 209-12.

432. See, e.g., *United States v. Janis*, 428 U.S. 433, 453-54 (1976) (refusing to suppress, in a civil tax proceeding, evidence which the Los Angeles Police had illegally obtained and then given to the Service). See generally Craig W. Budner, Note, *The Exclusionary Rule’s Application In Tax Proceedings: Reconciling the Rule’s Purpose for Tax Defendants*, 68 TEX. L. REV. 789, 789 (1990) (concluding that “[c]ourts . . . have failed to give the rule its full effect in tax proceedings”). Prior to *Janis*, only one circuit court had suppressed evidence in a civil tax matter. See *Pizzarello v. United States*, 408 F.2d 579, 586 (2d Cir. 1969). Since *Janis*, however, courts have almost uniformly refused to apply the exclusionary rule in civil tax cases, even where the Service itself committed the illegal search and is not simply using the fruits of another agency’s illegal search, as in *Janis*. See, e.g., *United States v. Speck*, No. C-97-828 EFL, 1997 U.S. Dist. LEXIS 8795, at *9-13 (N.D. Cal. June 13, 1997) (reviewing cases). But see *Vander Linden v. United States*, 502 F. Supp. 693 (S.D. Iowa 1980) (excluding evidence in civil proceeding).

The RRA 98 rhetoric comparing tax determination to criminal justice was surprisingly robust. It was simply too powerful to let go.⁴³³ For example, when former Commissioner Margaret M. Richardson explained her opposition to shifting the burden of proof in tax cases, Senator Roth interrupted in this colloquy:

Ms. Richardson. . . . What concerns me, and I think many people who have worked in the tax area, is that the taxpayer really is in possession of the facts and does have the knowledge about—

The Chairman. Isn't a person accused of a crime, a murder, also the one, peculiarly, with the knowledge and information?

Ms. Richardson. Well, we are talking about civil proceedings here, not criminal proceedings. . . .⁴³⁴

At the same time that the rhetoric elevated the value of Autonomy through comparing tax determination with criminal convictions, it also deflated the idea of a “true” tax liability. After all, the less one believes in Truth, the less power it has against Autonomy. For example, if determining one’s tax liability becomes so complicated that reasonable minds can disagree on the “proper” tax, then it becomes difficult to maintain that there *is* a “proper” tax at all. Tax liabilities become contingent on circumstances, the most important being the identity of the decisionmaker. It thus becomes easier to view the Service’s tax determination and collection decisions as illegitimate exercises of powers and it becomes easier to promote Autonomy over Truth.

It is for this reason that an undercurrent of distrust about “true” tax liability—much less noticeable than the criminal justice rhetoric but nonetheless detectable—assumes an importance that might otherwise escape notice. For example, in another news conference shortly after the September Senate Finance Committee hearings, Rep. Bill Archer, Chair of the House Ways and Means Committee, explained why he thought that the “bigger part of the problem is the complexity of the code itself:”

Because, income is a subjective term. No two people agree on precisely what is income for tax purposes. And as a result, the

433. In the actual statute, however, Congress reverted to form by repeatedly excepting criminal investigations from the protections otherwise granted taxpayers. For example, § 7602(c) restricts the Service’s ability to contact third parties, except in criminal investigations; § 7612 restricts the Service’s ability to summons source code software, except in criminal investigations; § 7609 protections were expanded to all third party summonses, except those issued in criminal investigations; under § 7525 taxpayers can keep secret certain prior communications with their tax advisors in civil audits, but not in criminal investigations.

434. *IRS Restructuring*, *supra* note 425, at 68.

Congress over the years has been redefining it. And redefining it. And redefining it. And, I don't think that will ever stop as long as income is the base of our tax system. And we charge the IRS with an enormous responsibility to go through and evaluate big, gray areas. And that is not a good tax system.⁴³⁵

Of course Archer, and some others who sounded this theme, were using it to segue into their arguments for alternative taxing regimes, such as flat taxes or consumption taxes. While this theme provides a predicate for those arguments, it also provides the predicate for devaluing Truth relative to other important social values, such as Autonomy.

Archer was not alone in linking the rhetoric of complexity to the Service's inability to determine the true tax. Senator Roth likened the Code to "a mine field for most Americans, and even too complex to be efficiently and consistently administered by the Internal Revenue Service."⁴³⁶ And even in the budget hearings, held by the Senate Committee on Appropriations, Subcommittee on Treasury and General Government, the Chairman, Sen. Campbell, noted that "[t]axpayers are tired of being notified years after they have filed that they have an additional tax obligation, which has by then grown to several times the initial debt because of interest and penalties."⁴³⁷ Implicit in that statement is a denial that there is a "true" liability. The Service's redetermination has not simply *found* the correct liability but has in fact *changed* it to add a new, *additional* liability.⁴³⁸

The same theme can be found in reports from the more neutral General Accounting Office. For example, in its report to Senator Roth on the results of its independent investigation into the April 1998 allegations of Service abuse, the GAO concluded that the allegations were substantially untrue, but nonetheless

several of these cases are illustrative of concerns raised in our prior work. We previously reported that (1) the complexity

435. Representative Bill Archer, News Conference (Sept. 30, 1997) (transcript available on LEXIS in FDCH Political Transcripts). Of course, Archer was trying to segue into his favorite reform: consumption tax. *See id.*

436. *IRS Oversight*, *supra* note 425, at 2.

437. *Internal Revenue Services Methods, Hearing Before a Subcomm. of the Senate Comm. on Appropriations*, 105th Cong. 2 (1998).

438. In contrast, those senators who opposed the hearings still emphasized the importance of "truth" in tax reporting. "Americans expect that everyone else who enjoys the benefits that taxes pay for will shoulder their share of the burden as well . . . that everyone is filing returns and the amounts claimed on those returns are accurate and true." *IRS Oversight*, *supra* note 425, at 3 (opening statement of Sen. Max Baucus).

and vagueness of the tax code cause differences in interpretation and (2) the tax system creates a tension in seeking a proper balance between the tax administrator's need for information and the taxpayer's burden in providing information.⁴³⁹

In contrast to their doubts about the existence of "true" liability, members expressed no doubts regarding citizen rights to be free of government intrusion. In almost all the hearings between September 1997 and April 1998, in almost every statement, in the questioning of almost every witness, and in almost every press conference, Senators and Representatives continually expressed concerns about the Service's ability to reach into taxpayers' personal affairs for, assertedly, no legitimate reason.

I think we are all concerned about stories that we hear every day from our constituents about how they are being abused, about how heavy handed the IRS is, and how it uses tactics that we would view, and I think the average American would view, as inappropriate."⁴⁴⁰

This image is what gave the hearings such punch: the vision of "the biggest network of potential intrusion into the privacy of every American" jack-booting its way into the living rooms and lives of good American citizens.⁴⁴¹ In the Senate hearings, Senators were repeatedly shocked, shocked to discover that "[t]he IRS can seize property, paychecks, and even the residences of the people it serves. Businesses can be padlocked, sometimes causing hundreds of employees who are also taxpayers to be put out of work."⁴⁴² These intrusions caused fear and loathing as witnessed

439. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON FINANCE, U.S. SENATE, *supra* note 428. Note that this is not a publically available document on the GAO website. Tax Analysts obtained it under a Freedom of Information Act Request. It is interesting to note that *this* GAO report, which could be read as critical of the Senate Finance Committee hearings, was not released nor commented on by the Finance Committee member, Senator Roth, who requested it, even though Senator Roth issued a press release touting the tepid results of another GAO report, investigating allegations of Service management retaliation for whistle blowing, which found that the Service's records were not sufficiently well kept to either support or rebut the charges. *See id.*; *see also* Sen. William V. Roth, Jr., *Roth Release on GAO Report on Alleged IRS Employee Misconduct*, 1999 TAX NOTES TODAY 118-100 (1999) (Tax Analysts Doc. No. 1999-21306).

440. *Practices and Procedures*, *supra* note 24, at 16 (opening remarks of Senator Phil Gramm).

441. Representative Bill Archer, News Conference (Sept. 30, 1997) (transcript available on LEXIS in FDCH Political Transcripts).

442. *Practices and Procedures*, *supra* note 24, at 2 (statement of Senator William V. Roth).

by the display of abused taxpayers “whose lives have been altered by IRS actions. These men and women have related their sometimes tragic experiences, not out of vindictiveness or mean-spiritedness, but out of deep concern and a fundamental belief that such a violation of their civil rights should not have taken place, not in America.”⁴⁴³

2. Checks and Balances

The rhetorical response to the litany of abuses recited at the hearings was to speak the virtues of adversarial process. Witnesses testified that asserted abuses came about because the Service had unreviewed power to make tax determination and tax collection decisions. “The IRS can take a taxpayer’s home by just the signature of the district director alone. The irony of that rule is that it was part of the first Taxpayer Bill of Rights.”⁴⁴⁴ In other words, the inquisitorial paradigm reliance on internal checks was not working.

Seizures may be done for status and promotions as much as for enforcement. Not only are levies and seizures measures of an employee’s performance, but so is the number of cases referred to the Criminal Division.

In other words, while there may be no basis in fact for a criminal referral, a taxpayer’s life may well be turned upside down simply to keep an employee’s or district’s performance statistics up.

Liens and levies may be filed against those whom the IRS knows have no liability for a particular tax. Parents, relatives, a company employee may have liens filed against their property or have a paycheck levied in order to get the real taxpayer to comply.⁴⁴⁵

What was needed to cure these abuses was an adversarial check. “See, the problem that you have is that you have got an internal conflict of interest within the IRS. They are their own judge and jury over people’s lives. Let us remove that. This will cure the ‘Ivory Soap’s’ worth of taxpayer abuse.”⁴⁴⁶ Specifically, the rhetoric asserted that only an

443. *Id.* Again, note that Senators who opposed the hearings sought, unsuccessfully, to counter this theme with one of tax compliance: “How can we spend 4 days talking about a handful of cases that the IRS might or might not have mishandled yet not spend a single minute talking about how some Americans are flouting the tax laws?” *IRS Oversight, supra* note 425, at 4 (opening statement of Senator Max Baucus).

444. *Practices and Procedures, supra* note 24, at 40 (testimony of Robert Schriebman).

445. *Id.* at 3-4 (opening statement of Senator William V. Roth) (describing forthcoming witness testimony).

446. *Id.* at 58 (testimony of Robert Schriebman).

adversarial process where a neutral third-party decisionmaker reviewed and approved Service actions could provide the appropriate checks and balances and prevent the abuse of citizen autonomy:

I am still totally convinced that the problem is this agency has too much unchecked power. An agency in a free society should never have the ability to investigate, evaluate, and basically prosecute, all wrapped up into one. There clearly is an absence of checks and balances within this agency, and I think it needs to be changed.

. . . With the Internal Revenue Service, you have no external checks, and I think, basically, that is the problem.⁴⁴⁷

As Senator Roth summed it up: “Perhaps most importantly, reform must go beyond a few minor improvements of strengthening taxpayer protections to literally addressing the balance of power between the taxpayer and the agency.”⁴⁴⁸

3. Old Wine In New Bottles: The Contrast Between 1998 and 1953

RRA 98 was not the first time that Congress reorganized the Service. An equally significant reorganization took place in the early 1950’s, after the House Ways and Means Committee spent some two years investigating what was then called the Bureau of Internal Revenue (“Bureau”) and issued its chief findings in a 1953 report commonly called the King Report.⁴⁴⁹ As in 1997 and 1998 Congress held high-profile hearings exploring allegations of corruption and abuse. Although the events leading to and resulting in the reorganization of the Bureau into the Service are beyond the scope of this article, even a cursory comparison between the 1997-1998 Senate Finance Committee activities and the 1951-1953 Ways and Means Committee activities demonstrates two rather startling contrasts.

The first contrast is in rhetoric. As demonstrated above, the 1998 reformers spoke in terms of outrage over alleged Service employee

447. *IRS Oversight*, *supra* note 425, at 211 (opening statement of Senator Phil Gramm). Note again the use of the word “prosecute,” implicitly labeling tax determination as a criminal process.

448. *IRS Restructuring*, *supra* note 425, at 4 (opening statement of Senator William V. Roth).

449. H.R. REP. NO. 82-2518 (1953) [hereinafter KING REPORT]. The Committee’s work was done chiefly through a Subcommittee on Administration of the Internal Revenue Laws, chaired alternatively by Cecil R. King (D—N.Y.) and Robert W. Kean (R—N.J.) depending on which party controlled the House at the time. A follow-up report from the Subcommittee to the full Committee in later 1953 is known as the “Kean Report.” SUBCOMM. ON ADMIN. OF THE INTERNAL REVENUE LAWS, 82ND CONG., INTERNAL REVENUE INVESTIGATION (Subcomm. Print 1953) (by Representative Robert W. Kean) [hereinafter KEAN REPORT].

misconduct and, in so doing, stressed the need for outside “independent” bodies to check the power of Service employees, not trusting the employees or internal management to prevent the alleged abuses. In contrast, the 1953 reformers spoke in far more balanced tones:

Revelations by your subcommittee of misconduct at various levels of the Bureau have received much public attention. That the apparent criminality of certain Bureau employees should have come to light only as a result of a congressional investigation proves that the heretofore existing self-policing devices of the Bureau . . . have been gravely inadequate.

. . . Public confidence in the integrity of employees of the Bureau . . . is essential to preservation of this self-assessment system. The new measures to eradicate corruption in the Bureau . . . will contribute to such public confidence. *Equally important, however, to the preservation of faith in the honesty of the Bureau is the careful avoidance of unfounded and unsubstantiated charges against the Bureau and its employees.*⁴⁵⁰

The reactions of the 1953 Congress to the abuses uncovered, however, were very different from the reactions of the 1998 Congress. Whereas the 1998 rhetoric advocated the creation of external adversarial checks and balances, the 1953 reformers advocated stronger *internal* checks and balances through creation of an internal Inspection Service to investigate allegations of abuse and, through periodic audits of employees and net worth reports, to guard against the “revenue officer who derives profit from abuse of his office.”⁴⁵¹

Admittedly, the remedies discussed above are not infallible. It is clear, however, that they will be of great value to the Bureau in preventing a recurrence of the conditions exposed by your subcommittee. Careful investigation by the Inspection Service of each report . . . together with diligent enforcement of the new net worth questionnaire and auditing programs, should result in substantial elimination of corruption in the Bureau without injury to the great mass of honest and efficient employees.⁴⁵²

450. KING REPORT, *supra* note 449, at 5 (emphasis added).

451. *Id.*

452. *Id.* at 7.

The second contrast makes these rhetorical differences all the more surprising. Both the 1998 and the 1953 reformers spoke of exposing abuses within the Service organization. Yet the 1953 reformers truly found abuse and corruption running rampant in the system. They developed their case for reform after two years of extensive and careful investigations, which resulted in the removal or resignation of an extraordinary number of high-level officials, including the Assistant Commissioner in Charge of Operations, the Chief Counsel, the Assistant Attorney General in Charge of the Tax Division of the Department of Justice, and nine of the sixty-four Collectors, three of whom were also criminally prosecuted.⁴⁵³ Additionally, the subcommittee directed the Service to investigate all Bureau employees “against whom seemingly derogatory information had been received” and disciplinary action was recommended in over 17% of the cases reviewed.⁴⁵⁴

In contrast, the 1998 reformers truly did not find abuse and corruption in the Service, much less running rampant. When the smoke cleared and the mirrors were put away, the General Accounting Office,⁴⁵⁵ the Treasury Inspector General’s Office, and the Service’s Inspection Office all performed thorough inquiries of all allegations made.⁴⁵⁶ The most significant finding made was that Service management employees had shared condensed statistical data on seizures with field employees in an inappropriate manner through one particular document.⁴⁵⁷ The document had been cleared by the Office of Chief Counsel on the condition that certain language be removed.⁴⁵⁸ While that language was indeed removed, later revisions reintroduced the same concepts and senior management failed to catch the error before distributing the document and directing that it be shared with field employees.⁴⁵⁹ Consequently, there were violations of law and policy regarding use of enforcement statistics in every District.

In February 1998, Commissioner Rossotti created a special panel of senior government officials, all from outside the Service, to review all

453. KEAN REPORT, *supra* note 449, at 3 (documenting the resignation or removal of nine collectors); KING REPORT, *supra* note 449, at 2 (documenting the other terminations).

454. KING REPORT, *supra* note 449, at 6.

455. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN COMMITTEE ON FINANCE, U.S. SENATE, *supra* note 428.

456. See Amy Hamilton, *IRS Misuse of Statistics—The Findings and the Fallout*, 98 TAX NOTES TODAY 189-5 (Sept. 30, 1998) (Tax Analysts Doc. No. 98-29258).

457. See *id.* This was the finding of the Treasury’s Office of the Inspector General and the Service’s internal Inspection Office. *Id.* The GAO focused on the claims made by witnesses in the April 1998 hearings, finding them unsupported. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON FINANCE, U.S. SENATE, *supra* note 428.

458. Hamilton, *supra* note 456.

459. *Id.*

allegations and all the investigations generated by the hearings.⁴⁶⁰ The special panel finished its work in September, concluding that there was a clear failure of leadership as a result of which mid-level managers increased emphasis on collection tools, specifically seizures.⁴⁶¹ However, “no direct connection has yet been established between the violations of P-1-20 and TBOR before the Panel and specific Collection actions such as seizures that may have been inappropriate.”⁴⁶² Further, “there is nothing in the record before the panel that indicates these infractions resulted in activity that could be characterized as an illegal seizure or potential mistreatment of taxpayers.”⁴⁶³

The 1997 and 1998 Senate Finance Committee “investigations” resulted in no criminal prosecutions, no forced resignations, no removal from office. The sole individual implicated in the congressional hearings, a mid-level manager in the Arkansas-Oklahoma District, was “portrayed as a national symbol for collection abuses . . . and characterized as a collection rogue by the national press.”⁴⁶⁴ And yet, of the twenty allegations against this individual—described in an eighty page narrative report with 2,200 pages of attachments reflecting interviews with 140 people, including every revenue officer and manager in the individual’s office—only six violations of policy were substantiated, none involving abuse of specific taxpayers.⁴⁶⁵ Collectively, the follow-up investigations on the 467 cases of alleged seizure abuses against taxpayers resulted in a finding that the Service followed all applicable rules and regulations in 337 cases and the violations in the other 130 were generally foot-faults, such as not investigating all alternatives to seizure, seizing an asset that could result in a significant hardship to the taxpayer who owed the tax, and not making enough attempts to contact the taxpayer personally before making the seizure.⁴⁶⁶ After reviewing the results of these investigations, the special panel concluded that the inappropriate activity documented did not support any disciplinary action greater than a suspension of fourteen days.⁴⁶⁷ The panel concluded that “more severe action was not appropriate, and if taken, would not withstand third party scrutiny.”⁴⁶⁸ And yet after reviewing the same results, Senate Finance Committee Chair William Roth

460. *Id.*

461. *Id.*

462. *Id.* (quoting the special panel’s conclusions).

463. *Id.*

464. *Id.*

465. *Id.* One related to improper tracking of a document. The others related to improper use of statistics in personnel evaluations and in setting group goals. *Id.*

466. See Amy Hamilton, *IRS Releases Reviews of Seizure Activity*, Examination Division, 80 TAX NOTES TODAY 160 (July 13, 1998).

467. Hamilton, *supra* note 456.

468. *Id.* (quoting panel report).

concluded they were “a stunning confession of the sins of the IRS.”⁴⁶⁹ The independent panel simply disagreed with the politician running for re-election.

In sum, although the rhetoric was hot in 1997 and 1998, the actual factual case for reform was lukewarm at best. Nonetheless, the taxwriters managed to cook up a goulash of statutes in the RRA 98 which had some real bite.

B. *The Bite*

The words “Restructuring” and “Reform” in RRA 98’s title are apt. The Act reflected a basic distrust of the Service’s ability to make the “right” tax determination and collection decisions, a basic distrust of the Service’s evidence-gathering powers, and a belief that internal administrative checks were not enough to preserve the correct balance between Autonomy and Truth. While the legislative process, particularly the input of the Service (unwelcome as it was) moderated much of the wildness of the rhetorical proposals, the same ideas are present in the statute: (a) removal of decisional authority from the Service and into either “external” or “internal” third parties, thus transforming the Service from a decisionmaker into a litigant; and (b) a shift, in certain situations, to preferring Autonomy over Truth. After first discussing some of the significant structural changes that affected both decisionmaking and evidence-gathering powers, this subsection will then consider those changes primarily affecting the Service’s tax determination powers, tax collection powers, and evidence-gathering powers.

1. Adversarial Structural Changes

Five of RRA 98's structural changes illustrate this Article's thesis. Two indirect restrictions on the Service's decisionmaking powers lay in the creation of the external Oversight Board and an “external” internal inspection function. Three other structural changes more directly affected the Service's ability to make tax determination and tax collection decisions. First, Congress transformed the Office of the Taxpayer Advocate (OTA) from a function providing “internal” administrative review to one providing quasi-adversarial review, with the effect of diluting the Service's decisionmaking authority. Second, Congress took the first steps in turning the Office of Appeals from a management review process into an administrative law judge review process. Third, Congress externalized the Service's internal procedural manual by transforming it

469. Amy Hamilton, *New IRS Internal Audits: A 'Stunning Confession'?* 80 TAX NOTES TODAY 286 (July 20, 1998).

into binding law, again with the effect of diluting the Service's decisionmaking authority. Each of these moves replaced inquisitorial process with adversarial process. I shall discuss each in turn.

a. External Decisionmakers

The most widely noted structural changes in RRA 98 were creation of two external oversight functions: the Oversight Board⁴⁷⁰ and the Treasury Inspector General for Tax Administration (TIGTA).⁴⁷¹ These changes only indirectly impinged on the Service's substantive tax administration decisionmaking. They did however, reflect a basic distrust—inherent in the adversarial process view—that internal oversight can prevent inquisitorial powers from being abused. In this way they represent a partial shift towards adversarial process.

The connection between the Oversight Board and abuse is not immediately obvious. The idea of an Oversight Board came from the earlier IRS Restructuring Commission, co-chaired by Sen. Kerry and Rep. Portman. The Commission's recommendation had nothing to do with preventing abuses; the Commission had not found abuse to be a problem.⁴⁷² Consistent with that idea, RRA 98 provides that the purpose of the Oversight Board is to “oversee the Internal Revenue Service in its administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes and tax conventions to which the United States is a party.”⁴⁷³ The Senate Finance Committee justified the Oversight Board by noting that “while the Treasury is responsible for IRS oversight, it has generally provided little consistent strategic oversight or guidance to the IRS. The Secretary and Deputy Secretary have many other broad responsibilities and generally leave the IRS largely independent.”⁴⁷⁴ Rep. Newt Gingrich put it more bluntly: “The Secretary of the Treasury is too busy to manage the IRS.”⁴⁷⁵

After the September 1997 hearings, however, taxwriters had no difficulty tying the Oversight Board recommendation to the prevention of abuse. Gingrich did so in the course of criticizing President's Clinton's creation of an *internal* oversight board: “In other words, [Clinton's] response to the dozens of horror stories we have heard from innocent

470. § 7802.

471. § 7803.

472. *Practices and Procedures*, *supra* note 24, at 10 (statement of Representative Steny Hoyer) (quoting the IRS Restructuring Commission which found “very few examples of IRS personnel abusing power.”)

473. § 7802(c)(1)(A).

474. SEN. REP. NO. 105-174, at 11 (1998).

475. Representative Newt Gingrich, Remarks at the National Press Club (Sept. 30, 1997) (transcript available on LEXIS in FDCH Political Transcripts).

taxpayers over recent weeks is that we leave exactly the same people in charge who have already failed to solve the problem.”⁴⁷⁶ Rep. Grassley made the same tie-in during the September hearings.⁴⁷⁷ The point is not that these are logical statements or connections, but that they evidence a distrust of internal administrative oversight as a check on the Service’s powers.

Likewise, Congress created TIGTA because it was concerned that the internal Office of the Chief Inspector “lacks sufficient structural and actual autonomy from the agency it is charged with monitoring and overseeing. Further the current relationship between the Treasury IG and the IRS Office of the Chief Inspector does not foster appropriate oversight over the IRS.”⁴⁷⁸ How TIGTA’s role as an external decisionmaker affects the Service’s decisionmaking will become clearer in the discussion of the “Ten Deadly Sins” below.

b. Quasi-External Decisionmakers: Offices of Taxpayer Advocate and Appeals

Traditionally, “internal” oversight had been performed through managerial review. For example, before RRA 98, the Code provided that a working level revenue officer could not seize and sell a taxpayer’s primary residence without obtaining approval from the District Director.⁴⁷⁹ As noted above by one of the witnesses at the September 1997 hearings, this had actually been a reform in TBOR I. It was a reform consistent with inquisitorial process.

Although as a statutory matter, the TBOR I reform created only one layer of review, as a functional matter, it created four separate formal approvals because the revenue officer had to go up the chain of review: first to his or her group manager, then to the Collection Branch Chief, then to District Counsel, and finally to the District Director. Additionally, there were often other layers of review because the Branch Chief and District Director each had deputies who would generally participate in a decision of that magnitude and the review process in the District Counsel’s office often involved at least two attorneys reviewing the file, the working level attorney and that attorney’s line manager. This process was not necessary

476. *Id.*

477. *See Practice & Procedures, supra* note 24, at 6. Grassley criticized the Service’s repeated invocation of § 6103 to refuse to answer questions concerning specific cases. Grassley thought that doing so “also protects the privacy of those who abuse the taxpayers’ rights, who mislead Congress, and who might use collection quotas in tax enforcement despite their illegalities. Such abuses occur when independent oversight is lacking. . . . Hence, the commission’s recommendations for an independent board over the IRS.” *Id.*

478. S. REP. NO. 105-174, at 29 (1998).

479. § 6335(e)(1) (1997).

for most other levies; in most cases it was the revenue officer alone who made the decision of which assets of the taxpayer to levy without managerial review for each and every attempt. But it was necessary for some others (such as when seizing and selling the taxpayer's asset would cause problems for third parties, such as nursing home residents). The Internal Revenue Manual (IRM) helped employees know when they needed to obtain supervisory approval of levies.

This kind of managerial review is part of an inquisitorial system of tax administration because internally reviewed decisions are still *institutional* decisions, only made by higher-level employees rather than lower-level employees or, in a less hierarchical system, by larger rather than smaller groups of employees.⁴⁸⁰ It is this kind of internal review which the Supreme Court relied on as part of its inquisitorial logic. For example, in *United States v. Arthur Young*⁴⁸¹ the Court declined to create an accountant-client privilege to protect certain documents from Service scrutiny, partly because

the IRS has demonstrated administrative sensitivity to the concerns expressed by the accounting profession by tightening its internal requirements for the issuance of such summonses. Although these IRS guidelines were not applicable during the years at issue in this case, their promulgation further refutes respondents' fairness argument and reflects an administrative flexibility that reinforces our decision not to reduce irrevocably the § 7602 summons power.⁴⁸²

Before RRA 98, the OTA fit comfortably into this inquisitorial paradigm of management review. The predecessor to the OTA was the Office of the Ombudsman, created in 1979 to oversee operation of the Problem Resolution Program (PRP). PRP was designed to provide continuous administrative review over the tax collection process.⁴⁸³ Because so much of the Service's operation, including tax collection, was automated, taxpayers were vulnerable to computer failure since computer programs could not account for the variety of individual circumstances.⁴⁸⁴ Taxpayers were also vulnerable to human failure as well since, like a

480. The extent to which a bureaucracy is and is not hierarchical is a fascinating area of study, far beyond the scope of this article. Suffice to say that my eight year experience in the Office of Chief Counsel was that the organization was simultaneously quite hierarchical and quite flat.

481. 465 U.S. 805 (1984).

482. *Id.* at 820-21 (citations omitted). See also discussion of *Powell*, *supra* notes 269, 289, 411.

483. See H.R. REP. NO. 100-1104, at 215.

484. See SALTZMAN, *supra* note 87, at § 15.02[1].

computer program, the IRM could not account for and give proper instructions for all circumstances. The Ombudsman reviewed all cases where taxpayers complained that collection actions were inappropriate, whether initiated by computer or by employees.⁴⁸⁵ The Ombudsman was restricted to hearing only those complaints from taxpayers who could show that the collection action was causing or about to cause them “significant hardship.”⁴⁸⁶ The PRP’s structure involved detailing revenue officers to work as Problem Resolution Officers (PROs), giving them broad exposure in seeing how other parts of the Service worked (or not), and then sending them back to their posts of duty, hopefully to carry back and apply their new knowledge. While on detail to the PRP, PROs remained career Service employees who, while working *with* the Ombudsman, still worked *for* the top management layers in each geographic Collection function.⁴⁸⁷

Over time, Congress codified the Service’s administrative initiative. In 1988, in the first Taxpayer Bill of Rights (TBOR I), Congress authorized the Ombudsman to formalize its decisions about the appropriateness of certain collection activities in Taxpayer Assistance Orders (TAOs).⁴⁸⁸ Congress continued the limitation on OTA jurisdiction to situations where a taxpayer was suffering or about to suffer a “significant hardship.”⁴⁸⁹ In 1996, Congress renamed the Ombudsman as the Taxpayer Advocate in TBOR II.⁴⁹⁰ In all these reforms, Congress did not change the PRP structure. Career Service employees still reviewed the decisions of other career Service employees. Thus, the Service remained the *institutional* decisionmaker about what collection actions to take. For what it is worth, practitioners believed it to be a successful program.⁴⁹¹

485. *Id.* at § 15.02[2].

486. *Id.*

487. See NAT’L TAXPAYER ADVOCATE, INTERNAL REVENUE SERV., THE NATIONAL TAXPAYER ADVOCATE’S REPORT TO CONGRESS, FISCAL YEAR 2004 OBJECTIVES, app. I (2003) (Tax Analysts Doc. No. 2003-16146).

488. § 7811. TBOR was enacted as part of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647 102 Stat. 3342 (1998). Subtitle J of the legislation was the first Taxpayer Bill of Rights which created § 7811.

489. § 7811(a)(1)(A). In 1996, Congress renamed the Ombudsman the “Taxpayer Advocate” (TPA) in TBOR II. The TPA’s name was again changed in RRA 98 to the “National Taxpayer Advocate” (NTA) to distinguish the head of the office from the field TPAs. For simplicity, I shall use “NTA” to refer to that position, whether it was called Ombudsman, Taxpayer Advocate, and National Taxpayer Advocate.

490. Taxpayer Bill of Rights, Pub. L. No. 104-168, § 101(b)(1)(B), 110 Stat. 1452, 1455 (1996).

491. *Practices & Procedures*, *supra* note 24, at 30. (testimony of Robert L. Goldstein, Chairman, Relations with IRS Committee, New York Society of Certified Public Accountants) (“The Problems Resolution Program has been extremely successful and praised by practitioners and taxpayer[s] alike, and offers an example of how different attitudes by IRS personnel, taxpayers and their representatives emerge when the customer-service model is used.”).

RRA 98 made significant changes to the PRP. It established the OTA as an independent administrative body within the Service consisting of the National Taxpayer Advocate (NTA) and a system of local taxpayer advocates.⁴⁹² The Service renamed the new OTA organization the Taxpayer Advocate Service (TAS).⁴⁹³ The legislation ensured independence by (a) placing all TAS employees under direct line authority of the NTA, (b) making the TAS a separate career path for employees, thus severing TAS employees from Service employees, (c) requiring that the NTA not be otherwise employed by the Service for the 2 years before appointment and 5 years after resignation, (d) providing that the NTA answered only to the Commissioner for decisions in individual cases, (e) requiring the NTA to submit annual reports directly to Congress, without review by the Service, and (f) providing that TAS employees need not “disclose to the Internal Revenue Service contact with, or information provided by” taxpayers.⁴⁹⁴ Further, RRA 98 expanded the TAS jurisdiction from cases where a taxpayer alleged significant hardship to other appropriate situations, notably “an immediate threat of adverse action” or “a delay of more than 30 days in resolving the taxpayer account problems”⁴⁹⁵

Like the pre-RRA 98 OTA, the pre-RRA 98 Office of Appeals fit comfortably within the inquisitorial paradigm. The functional predecessor to Appeals became the Office of Appeals as part of the Reorganization Plan #1 in 1952.⁴⁹⁶ In contrast to the OTA, which provided administrative review over collection, Appeals traditionally provided administrative review over the tax determination process.⁴⁹⁷ As described above in Section III-B, the decision of Appeals *was* the decision of the Service. Pre-RRA 98, Appeals settled over 90% of the cases that came to it.⁴⁹⁸ The way

492. See NATIONAL TAXPAYER ADVOCATE, INTERNAL REVENUE SERV., THE NATIONAL TAXPAYER ADVOCATE’S FISCAL YEAR 2002 OBJECTIVES REPORT TO CONGRESS 4 (2001) available at <http://www.irs.gov/pub/irs-utl/tas02obj.pdf>. (last visited Aug. 3, 2003).

493. *Id.*

494. § 7803(c). Further supporting the independent nature of the TAS is the Service’s ruling that the confidentiality section, § 7803(c)(4)(A)(iv), permits TAS employees to ignore the general reporting requirements of § 7214(a)(8), which generally requires Service employees to report taxpayer wrongdoing. See I.R.S. Notice CC-2001-40 (Aug. 16, 2001).

495. § 7811(a)(2).

496. LAURENCE F. CASEY, 1 FEDERAL TAX PRACTICE §§ 1.7-1.9 (1955).

497. Before RRA 98, Appeals handled only a small volume of collection issues; taxpayers were not confident that Appeals had either the expertise or inclination to perform a useful review function in collection situations. See *Practices & Procedures*, *supra* note 24, at 26 (testimony of Joseph F. Lane).

498. INTERNAL REVENUE SERV., DATA BOOK (1996), available at <http://www.irs.ustreas.gov/taxstats/article/0,,id=97216,00.html> (last visited Nov. 3, 2003) (showing Appeals settled 93.6% of the cases it received); Curt Rubin, *The New Ex Parte Rule and Its Impact on IRS Appeals*, 1999 TAX NOTES TODAY 74-118, ¶3, n.3 (1999) (Tax Analysts Doc. No. 1999-14374).

Appeals worked was that when taxpayers disagreed with a tax determination decision, usually made by a revenue agent and memorialized in a document called a Revenue Agent Report (RAR), they would protest the decision to the revenue agent's supervisor and, if not satisfied, to Appeals. Once received by Appeals, the assigned Appeals Officer would conduct an in-house review, which would involve reviewing the RAR with its author. The appeals officer would decide what additional information he or she needed, if any, and from whom. The appeals officer would often meet independently with the revenue agent and with the taxpayer.⁴⁹⁹ If the taxpayer had invoked the Appeals process before being issued a Notice of Deficiency, then Appeals would issue the Notice of Deficiency on behalf of the Service which, as explained in Section III-B, represents the Service's decision on tax liability and is given great deference by the courts.

RRA 98 contained two provisions which significantly changed the relationship between Appeals and the rest of the Service.⁵⁰⁰ First, an off-Code provision set up an *ex parte* rule. Section 1001 of RRA 98 provided that the Service must "ensure an independent appeals function . . . including the prohibition . . . of *ex parte* communications between appeals officers and other Internal Revenue Service employees to the extent that such communications appear to compromise the independence of the appeals officers."⁵⁰¹ Second, section 3421 of RRA 98 (codified as I.R.C. subsection 6320 and 6330) expanded Appeals' involvement in tax collection by creating an administrative appeals process for certain collection decisions and directing that Appeals be the reviewing function. I consider the adversarial process inherent in those "Collection Due Process" provisions below.

In sum, RRA 98 took what had been two successful internal review processes—in the Office of Appeals and the Office of the National Taxpayer Advocate—and transformed them into quasi-adversarial processes. While keeping these offices nominally within the Service's chain of command, Congress restructured their relationship with the rest of the Service functions so that they would operate more like external checks rather than internal checks. In doing this, Congress diluted the Service's ability to make tax determination and tax collection decisions because the "independent" function became an arbiter between the Service and the taxpayer, making the Service less the decisionmaker and more the litigant. Thus, the more that the newly independent "internal" functions make decisions, the more they turn the inquisitorial process of tax

499. See Rubin, *supra* note 498, ¶ 4, 19.

500. RRA 98 does not officially create the office; it just assumes its existence in two provisions. See §§ 1001, 3421.

501. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1001(4) (1998).

administration into an adversarial process of tax administration. This effect becomes more evident upon a closer examination of two problems that have arisen with respect to these structural changes.

First, transformation of the OTA into the “independent” TAS created the potential problem of a “shadow Service” within the Service, a gadfly decisionmaker, sapping decisional authority from the Service. Specifically, while it is clear that the TAS can override *procedural* decisions made by the Service (usually in tax collection, but sometimes in tax determination as well, such as helping taxpayers get access to Appeals), what remains unsettled is the extent to which the TAS can override *substantive* decisions using the TAO power. On the one hand, section 7811 authorizes a TAO to make the Service “cease any action, take any action as permitted by law, or refrain from taking any action, with respect to the taxpayer under . . . any other provision of law which is specifically described by the National Taxpayer Advocate . . .”⁵⁰² On the other hand, the ellipses here are important because what comes in them is a list of purely procedural provisions and so the general phrase “any other provision of law” could be construed to mean any other provision like the procedural provisions listed before, thus restricting TAO authority to procedural matters only.⁵⁰³

Each of the first two National Taxpayer Advocates responded to this potential problem, albeit with different approaches. The first Taxpayer Advocate, W. Val Oveson, declared bluntly “I am committed personally to testing my authority in TAO issues.”⁵⁰⁴ And so he did, attempting, for example, to direct the Service to make an offset bypass refund after it had already performed the offset.⁵⁰⁵ That is, whenever a taxpayer overpays one tax liability but owes money on another (or has other unpaid government debts), the Service has the discretion to either refund the overpayment or offset it against the other liability.⁵⁰⁶ Normally, the Service offsets the overpayment. An “offset bypass refund” is when the Service decides to bypass its normal procedure and refund the overpayment to the taxpayer because the taxpayer shows that he or she really and truly needs the

502. *Id.* § 7811.

503. This premise, of course, is an application of the well-settled principle *ejusdem generis* that a general catchall phrase which follows a specific list of items is “construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” SUTHERLAND, 2A STATUTORY CONSTRUCTION, § 47.17 n.4 (1992). This principle is no stranger to tax statutes. *See, e.g.*, *Tax Analysts v. I.R.S.*, 117 F.3d 607, 614-15 (D.C. Cir. 1997) (construing term “data” in § 6103(b)(2)(A)).

504. *Quoted in* Sheryl Stratton, *New Taxpayer Advocate, Man on a Mission*, 98 TAX NOTES TODAY 205-3 (1998) (Tax Analysts Doc. No. 98-31546).

505. *See* Tech. Adv. Mem. CCA 199913028 (Feb. 2, 1999).

506. § 6402. For some types of debts, such as unpaid child support obligations, the Service has no discretion but *must* perform the offset. § 6402(c).

money.⁵⁰⁷ In one case, the TPA was apparently convinced that a taxpayer was suffering a significant hardship by not receiving the overpayment and tried to issue a TAO to order the Service to refund an overpayment. But the Service Center had already applied the overpayment to another debt. The TAO ordered the Service Center to undo the offset and issue a refund instead. The Service refused, with the Office of Chief Counsel explaining that “[o]nce the overpayment is credited, and the liability is paid, the overpayment ceases to exist . . . and there is no authority for the Secretary, absent clerical or mathematical error, to reverse a tax payment properly credited to an outstanding liability of a taxpayer.”⁵⁰⁸

This attempted TAO illustrates how the TAS can potentially operate to dilute the decisionmaking authority of the Service. In effect, the Service had decided to collect a taxpayer’s tax liability through the offset of an overpayment. As discussed above, pre-RRA 98 that decision would have been the end of the matter: the Service’s discretion on how to collect the taxes owed was administrative and required no third-party decisionmaker to approve. To the extent the PRP would become involved, it would participate in the decision as part of the Service. Post-RRA 98, however, the TAS becomes, in effect, a third-party decisionmaker to review the Service’s collection action and it makes its decision after weighing and reviewing the available evidence, gathered from both the Service and the taxpayer.

The second National Taxpayer Advocate, Nina E. Olson, has been more circumspect, and more conflicted. In her first report to Congress she raised as simply an issue “to explore” the question of whether TAS employees are “*merely* facilitators or mediators between taxpayers and other IRS functions” or whether they should “be authorized to render substantive determinations in taxpayer cases?”⁵⁰⁹ In another part of the report, however, she asserted that “[i]t is a misnomer to describe the Taxpayer Advocate Service’s authority to resolve taxpayer problems as ‘*merely*’

507. See CCA 199913028, *supra* note 505.

508. *Id.*; see also *Fine v. Commissioner*, 70 T.C. 684, 689 (1978) The Service

is not authorized or directed by anything in the Code, as petitioner contends, to “reverse the offset of the husband’s liability and reinstate the amount as it existed prior to the overpayment.” Indeed, a procedure of crediting and reversing credits tentatively allowed could create chaos in the administration of the tax laws.

But see *Comm’r v. Newport Indus., Inc.*, 121 F.2d 655, 657-58 (7th Cir. 1941) (upholding reversal of *erroneous* application of payment and collecting cases supporting “the general rule that within the period of limitations the Commissioner may reopen his own administrative rulings and findings.”).

509. NAT’L TAXPAYER ADVOCATE, *supra* note 487, at 2 (emphasis supplied).

procedural. While it is true that Taxpayer Advocate Service employees cannot and should not make substantive determinations in cases, they can still influence the outcome of a case.”⁵¹⁰ These statements—particularly the term “merely”—lean towards a view that the TAS should take decisionmaking authority away from the Service, one way or another. At the same time, she cautioned that “The Taxpayer Advocate Service must not set itself up as a second IRS.”⁵¹¹

The potential for the TAS to dilute the decisionmaking authority of the Service, as to substantive tax determination and tax collection decisions, is also addressed in the 2001 Delegation Order from the Commissioner to the National Taxpayer Advocate in which he delegates certain authorities but not others.⁵¹² The Delegation Order attempts to set boundaries on the TAS. It explicitly declares that:

This delegation does not permit employees of the Taxpayer Advocate Service to overrule determinations made by employees of other IRS functions who have been delegated comparable authority. To the extent the Taxpayer Advocate Service employee disagrees with such a determination, a TAO may be issued explaining the basis for disagreement and ordering the function to reconsider its determination.⁵¹³

Further, it adopts (referencing an attached but unreleased legal memorandum from the Office of Chief Counsel) the *ejusdem generis* principle and confines TAO authority to statutory provisions similar to the procedural ones listed in section 7811.⁵¹⁴

At this time, the extent to which RRA 98 has *succeeded* in transforming the TAS into a true third-party decisionmaker is unclear. What is clear, however, is that RRA 98 replaced an inquisitorial structure with a structure more amenable to adversarial process. The more the TAS exercises independent judgments about tax determinations and tax collections, the more it reduces the Service to just another party in an adversarial process.⁵¹⁵ Instead of being trained to exercise neutral judgment without

510. *Id.* at 5-6.

511. *Id.*

512. Memorandum From the Commissioner of Internal Revenue Regarding delegation of Authority to the National Taxpayer Advocate and Guidelines for Issuing Taxpayer Assistance Orders (Jan. 17, 2001) (reprinted in 2001 TAX NOTES TODAY 72-16 (Jan. 25, 2001) (Tax Analysts Doc. No. 2001-10757)).

513. *Id.* ¶ 3.

514. *Id.* ¶ 10.

515. One should not confuse the number of TAOs issued (very few) with the decisional authority of the TAS. It is the *ability* of the TAS to issue TAOs which gives them the decisional authority, not the actual use of TAOs. In practice, TAS employees try to first persuade the Service

favor to the taxpayer or the government, Service employees can, with some justification, tell themselves: “I do not have to worry about going too far in the government’s favor. If I am wrong, the taxpayer can take it to the TAS.” As the current National Taxpayer Advocate herself recently wrote, the current structure “leads to two very different types of relationships—partnership and adversarial—between Taxpayer Advocate Service (TAS) employees and other Internal Revenue Service (IRS) employees.”⁵¹⁶ In other words, to the extent the TAS is not the Service, it is therefore not the Service making the tax determination or tax collection decision. The process thereby becomes less inquisitorial and more adversarial. As a result, the TAS’s role in tax administration and its relationship with the Service remains problematic and contingent on the leadership of the particular National Taxpayer Advocate.⁵¹⁷

The second tax administration problem is caused by the *ex parte* rule. RRA 98’s prohibition of *ex parte* communications from Service employees to Appeals Officers is a more subtle dilution of decisional authority than the creation of the TAS as an agency-within-an-agency. The effect, however, is similar in that it isolates Appeals from the other Service components, transforming it into an “other” decisionmaker. Further, it transforms the process by which Appeals makes its decisions into an adversarial process with the taxpayer on one side and the Service function (whether Exam or Collection) being appealed from on the other side.

employees to follow the TAS employee’s decision voluntarily. As Nina Olson observed:

And they can use as the persuasion the fact that the taxpayer assistance order exists—that’s awfully persuasive. If I’m saying to someone, ‘Look we can settle this now or I can bring a lawsuit, now which would you rather do? I may lose my lawsuit in the end, but you’re going to be tied up and it’s not going to be a lot of fun. Now do you want to do that or do you want to sit down and talk to me directly?’ If you do it in that way, then the taxpayer assistance order becomes a very powerful tool and you never have to use it. But you may have to.

Amy Hamilton et al., *Taxpayer Advocate Nina Olson Opens IRS Reforms Next Chapter*, 2001 TAX NOTES TODAY 73-1 (2001) (Tax Analysts Doc. No. 2001-10901).

516. NAT’L TAXPAYER ADVOCATE, *supra* note 487, at 1.

517. Thus, under the first National Taxpayer Advocate, the TAS locked horns with the Service. The second National Taxpayer Advocate has taken a more balanced approach with her concept of partnership, her focus on advocacy over raw power, and her work in creating an institutional history within the Service of including the TAS in the planning stages of various initiatives and projects. See generally NAT’L TAXPAYER ADVOCATE, *supra* note 487; Hamilton et al., *supra* note 515. The requirement that the National Taxpayer Advocate be an “outsider” only exacerbates the difficulty of keeping the TAS “within” the Service.

The *ex parte* rule itself is a creature of adversarial process.⁵¹⁸ “As a general rule, *ex parte* communications by an adversary party to a decisionmaker in an adjudicatory proceeding are prohibited as fundamentally at variance with our conceptions of due process.”⁵¹⁹ As implied by the quote, the rule *only* exists where you have two adversarial parties and a decisionmaker. The rule is a necessary corollary to the “dialectic of the adversary system.”⁵²⁰ It exists to ensure that the decisionmaker is not unduly influenced by one of the adversarial parties by providing each litigant equal access to the decisionmaker and equal opportunity to hear and respond to what the other side says.

The potential transformative effects of the *ex parte* rule on Appeals procedures are explored in Curt Rubin’s thoughtful commentary on the extent to which the new *ex parte* rules potentially require the Service to “reconsider how Appeals fits into the overall scheme of tax administration and how Appeals Officers will interact with other IRS officials in performing Appeals’ settlement role.”⁵²¹ Mr. Rubin details quite well the adversarial process which the *ex parte* rule could arguably require. For example, he notes that when a case is protested to Appeals, the very transmittal of the administrative file, along with additional information provided to Appeals by the revenue agent which “typically contains the thoughts and opinions of the revenue agent” is a communication.⁵²² Therefore, it could be that “allowing the appeals officer access to such information, without giving the taxpayer the same access and a chance to respond to such information, is an *ex parte* communication prohibited by the 1998 act.”⁵²³

The Service has not actually gone that far, concluding that “[t]he statutory provision cannot . . . be interpreted as mandating a major redesign of the fundamental processes Appeals has traditionally followed to carry out its dispute resolution mission.”⁵²⁴ Nonetheless, the infliction of an *ex parte* rule on Appeals is a subtle step on the road to turning the Office of

518. See, e.g., *United States v. Kenney*, 911 F.2d 315, 321 (9th Cir. 1990) (“[I]n our system, adversary procedures are the general rule and *ex parte* examinations are disfavored. Adversary proceedings protect the defendant’s due process rights by providing the defendant a chance to explain or rebut the prosecution’s arguments.”).

519. *Doe v. Hampton*, 566 F.2d 265, 276 (D.C. Cir. 1977).

520. GEOFFREY C. HAZARD, J.R. & W. WILLIAM HODES, 1 *THE LAW OF LAWYERING* § 3.3:501 (2d ed. Supp. 1992).

521. Rubin, *supra* note 498, ¶ 36.

522. *Id.* at ¶ 22.

523. *Id.*

524. Rev. Proc. 2000-43, 2000-2 C.B. 404. The Service based this conclusion, in part, on the fact that only *ex parte* communications which “‘appear to compromise the independence’ of Appeals” were prohibited, in contrast to an earlier proposal which would have made Appeals fully independent and would have prohibited “‘any communication.’” *Id.*

Appeals into an administrative law court, similar to how the Board of Tax Appeals was viewed in its early days.⁵²⁵

c. Elevating the IRM into Law

The Internal Revenue Manual (IRM) is a bodacious compendium of instructions to Service employees. It translates both the tax administration statutes and the Service's official policies into practical terms that employees can follow. Think of it as a computer program written for humans: it sets out the algorithms regulating each functional component of the Service according to the Service's interpretation of the laws. It translates broad principles into rules of action. It not only tells employees how to make decisions but also tells them what records to keep, what computer codes to enter and, basically, what "i's" to dot and what "t's" to cross when executing the decisions that they make. Although publically available, the IRM has long been considered an "internal" document, written for the benefit of employees and not taxpayers.⁵²⁶

The extent to which government agency personnel are bound by their internal processing rules and regulations has long been an issue in administrative law in general. For example, in *United States v. Caceres*,⁵²⁷ the Supreme Court held that conversations taped by a Service employee were admissible in a later criminal trial because the taping did not violate either the Constitution or statutes even though the Service employee had violated IRM procedures in taping.⁵²⁸ In so holding, the Court emphasized the necessity of preserving a sphere of autonomy for administrative agencies to regulate the conduct of their employees without elevating those regulations to the level of law:

Regulations governing the conduct of criminal investigations are generally considered desirable, and may well provide more valuable protection to the public at large than the deterrence flowing from the occasional exclusion of items of evidence in criminal trials. Although we do not suggest that a suppression order in this case would cause the IRS to abandon or modify its electronic surveillance

525. See, e.g., *Old Colony Trust Co. v. Comm'r*, 279 U.S. 716, 725 (1929) ("The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided.").

526. See, e.g., *First Fed. Sav. & Loan Ass'n v. Goldman*, 644 F. Supp. 101, 102 (W.D. Pa. 1986) (agreeing with the government that "the IRM is an internal handbook and . . . the instructions and guidelines contained therein are not mandatory and do not convey upon the taxpayer any substantive rights").

527. 440 U.S. 741 (1979).

528. *Id.* at 744, 757.

regulations, we cannot ignore the possibility that a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures. Here, the Executive itself has provided for internal sanctions in cases of knowing violations of the electronic-surveillance regulations. To go beyond that, and require exclusion in every case, would take away from the Executive Department the primary responsibility for fashioning the appropriate remedy for the violation of its regulations. But since the content, and indeed the existence, of the regulations would remain within the Executive's sole authority, the result might well be fewer and less protective regulations. In the long run, it is far better to have rules like those contained in the IRS Manual, and to tolerate occasional erroneous administration of the kind displayed by this record, than either to have no rules except those mandated by statute, or to have them framed in a mere precatory form.⁵²⁹

Caceres involved the potential suppression of evidence in a criminal trial.⁵³⁰ The Court acknowledged that civil cases brought under the Administrative Procedure Act might present a different picture.⁵³¹ Courts routinely rely on *Caceres*, however, to uphold the validity of civil agency actions when Service employees violate IRM provisions.⁵³² Moreover, I

529. *Id.* at 755-56.

530. *Id.* at 743. Lower courts have varied in their enthusiasm for applying *Caceres* in criminal contexts. Compare *United States v. McKee*, 192 F.3d 535, 541-42 (6th Cir. 1999) (noting in *dicta* that the provision in the IRM requiring civil revenue agents to stop their investigation and turn the matter over to special agents was mandated by the constitution) with *United States v. Kontny*, 238 F.3d 815, 819 (7th Cir. 2001) (describing *McKee* as an "outlier[] . . . reflecting a common but perhaps excessive hostility to the Internal Revenue Service"). Both *McKee* and *Kontny*, however, agree that "a taxpayer may challenge a conviction by relying on the Manual's provisions, so long as the taxpayer's challenge was based on an alleged violation of a constitutional right." *McKee*, 192 F.3d at 541; see *Kontny*, 238 F.3d at 819 ("It is true as we have noted that *Caceres* left the door slightly ajar by indicating that it might be a denial of due process to induce reasonable reliance on the regulation and then pull the rug out from under the defendant . . .").

531. *Caceres*, 440 U.S. at 754.

532. *E.g.*, *Groder v. United States*, 816 F.2d 139, 142 (4th Cir. 1987) (stating that to quash a summons, "a taxpayer must show more than a mere violation of the Internal Revenue Manual. He must show that the government proceeded against him in bad faith."); *Vallone v. Comm'r*, 88 T.C. 794, 808-09 (1987) (finding that failure to comply with IRM procedure for obtaining extension of period of limitation did not necessitate suppression of evidence obtained after extension obtained); *Epstein v. Comm'r*, 58 T.C.M. (CCH) 128 (1989) 1989-498 (failure to follow procedures set forth in IRM did not invalidate statutory notice); *First Fed. Sav. & Loan Ass'n v. Goldman*, 644 F. Supp. 101 (W.D. Pa. 1986) (failure to comply with IRM procedure for levying upon Individual Retirement Accounts did not invalidate levy).

shall discuss below how the Court's rationale applies as well in the civil context as the criminal one.

RRA 98 elevates the IRM to the status of law in several circumstances. Most obviously—because it is the only Code provision to explicitly refer to the “Internal Revenue Manual”—section 7811 provides that whenever a Service employee “is not following applicable published administrative guidance (including the Internal Revenue Manual), [a Taxpayer Advocate] shall construe the factors . . . in determining whether to issue a Taxpayer Assistance Order in the manner most favorable to the taxpayer.”⁵³³

Less obviously, but more importantly, section 1203 of RRA 98, provides for the automatic termination of employment for any Service employee who violates “the Internal Revenue Code of 1986, Department of Treasury regulations, or policies of the Internal Revenue Service (including the Internal Revenue Manual) for the purpose of retaliating against, or harassing, a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service.”⁵³⁴

Section 1203 also describes nine other acts that automatically result in termination of employment.⁵³⁵ Together, they are known as the “10 Deadly Sins”; the one involving the IRM is number six.⁵³⁶ If a taxpayer feels harassed by a Service employee, the taxpayer can make a complaint and the complaint is investigated by TIGTA, one of the external “checks” on

533. § 7811(a)(3). I do not here include the common practice of codifying particular IRM provisions. Doing so carries other dangers than the ones I address in the text. For example, RRA 98 added section 6331(j) to require Service employees to make a “thorough investigation” of any property before seizing it and sets out the requirements of a “thorough investigation.” The Senate Finance Committee Report explained that it was just codifying administrative procedures, specifically former IRM section 56(12) and Policy Statements P-5-34 and P-5-16. S. REP. NO. 105-174 at 85-86 (1998). What the Report does not state, however, is that the draft provision would have required the Service to consider (and document) obtaining writs of entry as part of *every* levy investigation. While the Code makes no distinction between a “seizure” and a “levy” (and in fact defines a levy as “seizure by any means” in section 6331(b)), the IRM labels levies of salable property “seizures” and labels levies of nonsalable assets “levies.” See I.R.M. 5.11.1.1.2; see *supra* note 122 (discussing differences between levies and seizures). For example, if the Service demands that the taxpayer’s debtor pay the Service instead of the taxpayer, that is called a levy. If the Service instead goes to the taxpayer, takes all of his or her accounts receivable and then sells them to a factor, that is a seizure. So the taxwriters’ mistake here was to “seize” upon the IRM provision that dealt only with seizures and essentially require the Service to get a writ of entry for *all* levies on private property, even though no one would suggest, for example, that the Service needs a writ to enter a bank and serve a levy.

534. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1203(b)(6), 112 Stat. 720 (1998). This is another off-Code provision. U.S.C.S. reprints it in the Notes section under § 7804. Other commercial services may reprint it elsewhere.

535. *Id.* § 1203(b).

536. See Lee A. Sheppard, *The Sixth Deadly Sin*, 2001 TAX NOTES TODAY 161-5 (2001) (Tax Analysts Doc. No. 2001-22120).

the Service discussed above. The vast majority of taxpayer complaints under section 1203 involve the complaint that the Service employee is misusing the Code, regulation, or IRM to harass the taxpayer.⁵³⁷ From the effective date of RRA 98 (July 22, 1998) through May of 2000, TIGTA investigated 830 such complaints of harassment.⁵³⁸ None were substantiated and only 4 of the Service's 16,000 auditors were fired in that period under section 1203, all for improper threats to audit.⁵³⁹ Typical was the revenue agent who, after being arrested for drunk driving, demonstrated once again that alcohol impairs judgment by telling the arresting officer that he would "find out" about him and "have a good time" with him.⁵⁴⁰

By giving the IRM this kind of legal dimension, RRA 98 once again shifts the formerly inquisitorial tax determination and collection process into a more adversarial mode. First, it removes the decision over the consequences of IRM violations from the Service to an external source: either TIGTA, TAS, Appeals or the courts. That is, so long as the IRM is simply a set of internal rules of action governing employee decisions, then decisions of what to do about IRM violations are also kept within the Service. This practice allows the manual instructions to be written as precise rules to cover the majority of routine cases with the understanding that nonstandard cases warrant a departure from the usual rules. Even though the standards for departure may be vague, the agency culture sets the boundaries and employees know the safe range of tax determination and collection decisions they can make without being found to be harassing the taxpayer. When the IRM is enforced by an external investigator, however, then it becomes more difficult to justify a departure from rules that now have the force of law. The agency becomes locked into the decisions reflected in the IRM even when those decisions may be inappropriate in a specific case. The scope of action is narrowed and

537. See *Joint Hearing Before the Committees of the United States Senate and United States House of Representatives* 107th Cong. 11 (2002) (testimony of David C. Williams, Inspector General, Treasury Inspector General for Tax Administration).

538. Amy Hamilton, *Alleged IRS Harassment, No Misconduct Found in 95 Percent of Cases*, 2000 TAX NOTES TODAY 157-1 (2000) (Tax Analysts Doc. No. 2000-21262).

539. David Cay Johnston, *Inquiries Find Little Abuse by Tax Agents*, N.Y. TIMES, Aug. 15, 2001, at C1.

540. *Id.* In May of 2003, the Joint Committee on Taxation staff reported that from section 1203's inception through March 31, 2003, TIGTA and the Service together completed 3,970 investigations of alleged section 1203 violations, resulting in the resignation or removal of 203 employees, or 5.1% of the total (assuming one complaint per employee—multiple complaints would raise the percentage). See STAFF OF THE JOINT COMM. ON TAXATION, 108TH CONG., REPORT OF THE JOINT COMMITTEE ON TAXATION RELATING TO THE INTERNAL REVENUE SERVICE AS REQUIRED BY THE IRS REFORM AND RESTRUCTURING ACT OF 1998 Appendix Ia (Comm. Print. 2003).

employees are more constrained in their tax determination or collection decisions.

The paralyzing effect of giving the IRM a statutory presence is well documented. Each year sees articles and studies documenting significant adverse effects of the ten deadly sins, including sin number six, on employee performance and morale.⁵⁴¹ Some commentators suggest that it is significantly responsible for the well documented and highly publicized decrease in certain Service collection activities.⁵⁴² In this way, the decisionmaking authority of the Service is vested in third parties. If a Service employee takes a certain action, the taxpayer will complain and a third party will adjudge the propriety of the employee's decision. The reason for this rule, of course, is to prevent harassment and abuse of taxpayers by Service employees. This rule is thus another example how RRA 98 prefers autonomy values over truth values where before RRA 98 the preference ran the other way.

This shift to adversarial review of Service decisionmaking creates a problem in tax administration in that the IRM becomes a much less useful tool to enable employees to take appropriate actions. To the extent that employees are constrained in their ability to depart from its specific rules of action, the Service may make the IRM less specific and thus give less guidance; this is the danger the *Caceres* Court warned about. For example, section 6331 permits the Service to levy on *any* property of the taxpayer. As discussed above, in an inquisitorial tax collection process the Service (through a combination of the IRM and the employee's execution of the IRM) makes the unilateral decision of what particular property to levy. At one time, Service policymakers decided that an Individual Retirement Account (IRA) should only be seized as a last resort.⁵⁴³ The IRM translated

541. E.g., Hamilton, *supra* note 538; Amy Hamilton, *Ten Deadly Sins: Effective Tool or Invitation to IRS Employee Harassment?*, 1999 TAX NOTES TODAY 238-1 (1999) (Tax Analysts Doc. No. 1999-39064); Ann Murphy & David Higer, *The 10 Deadly Sins: A Law With Unintended Consequences*, 2002 TAX NOTES TODAY 151-39 (2002) (Tax Analysts Doc. No. 2002-18023); Sheppard, *supra* note 536.

542. Johnston, *supra* note 539.

One result of the new law has been extreme caution by I.R.S. workers, especially those involved in sensitive audits and collections against those who owe taxes past due, many of whom have become much less aggressive and others of whom say dust gathers on their requests to managers for permission to take enforcement actions. Collection has grown so lax that some prominent tax advisers said in interviews last year that they were amazed that the I.R.S. was not trying to collect taxes owed by their clients.

Id.

543. The policy used to be reflected in IRM 536(14). See *First Fed. Sav. & Loan Ass'n v.*

that policy into rules. IRAs could “not be levied upon except when the taxpayer flagrantly disregards requests for payment” and even then, the revenue officer was to determine whether the taxpayer was “relying upon [the IRA] as the chief means of support, and if so, whether deprivation of the amount would cause hardship.”⁵⁴⁴ If the revenue officer decided to levy an IRA, then the levy form was to be initialed so that the reviewing manager would be alerted of the revenue officer’s intention.⁵⁴⁵ In *First Federal Savings and Loan Ass’n v. Goldman*, the taxpayers alleged that the revenue officer levied the IRA without making the appropriate determinations and without initialing the form.⁵⁴⁶ The court agreed with the government that “the IRM is an internal handbook and . . . the instructions and guidelines contained therein are not mandatory and do not convey upon the taxpayer any substantive rights.”⁵⁴⁷

Now, however, while one can still argue that the IRM does not give taxpayers substantive rights, an employee’s disregard for the IRM could result either in third-party disciplinary action or in the TAS issuing a TAO to stop the collection action. Therefore, the Service may instead choose not to translate its policy regarding IRAs into any set of specific criteria. In fact, the current IRM has replaced the old language on IRA’s with this new language: “Use discretion before levying retirement income.”⁵⁴⁸ It is not clear whether this particular change occurred because of RRA 98, but it nonetheless illustrates the point: creating third-party adversarial “checks” against abuse potentially reduces the internal checks as the Service attempts to preserve administrative flexibility, and thus potentially reduces the very protections sought.

2. Tax Determination as Adversarial Process

a. Burden of Proof

Section 7491 represents one of the more significant shifts to adversarial process in RRA 98. That section provides that in “any court proceeding” the Service bears the “burden of proof” with respect to any “issue” when the “taxpayer introduces credible evidence” and meets certain other criteria.⁵⁴⁹ This is part of the adversarial view that taxpayers should have better rights to be heard by a third party decisionmaker. As discussed

Goldman, 644 F. Supp. 101, 102 (W.D. Pa. 1986) (reprinting the IRM provisions).

544. *Id.* at 102.

545. *Id.*

546. *Id.*

547. *Id.*

548. I.R.M. 5.11.6.1 (2001).

549. § 7491(a).

above in Part III-B, the Service's judgment about a taxpayer's tax liability was, pre-RRA 98, final for all practical purposes of the taxpayer having to pay it. That is what made the process inquisitorial. The taxpayer had the right to be heard by a neutral decisionmaker, but that neutral decisionmaker was the Service and its decisions were treated like court judgments. This insularity from review also gave the Service greater discretion over what evidence was enough to support a tax liability determination.

Doctrinally, this idea was captured in a presumption of correctness. Whether evidenced by a notice of deficiency or an actual assessment, the Service's liability determination carried a strong presumption of correctness: taxpayers bore heavy burdens, both of production and persuasion, before a court would look behind the notice or assessment to exercise independent judgment about the determination.⁵⁵⁰ A narrow exception for "naked" assessments applied when the Service asserted that a taxpayer had unreported income but had only an arbitrary foundation for the assertion.⁵⁵¹ Even then, the Service needed only to supply "ligaments of fact" that supported the assertion (which could be based on hearsay or other inadmissible evidence) in order to gain back the presumption.⁵⁵² Once supplied, the taxpayers were once again under a duty to come forward with specific evidence to overcome the presumption.⁵⁵³ And the "naked" assessment exception did not apply to just *any* issue or *any* case; it applied only when the Service asserted unreported income and not when the Service rejected "deductions or credits claimed by the taxpayer."⁵⁵⁴

Section 7491 changes all that. It blows a hole in the presumption of correctness. By weakening the presumption, it thereby shifts the tax determination from inquisitorial to adversarial by removing both decisionmaking and evidence-gathering powers from the Service to an external third party. It is true that section 7491 speaks in terms of "burden of proof" and not "presumption of correctness."⁵⁵⁵ It is also true that the committee reports attempt to distinguish the terms and explain that the

550. See *United States v. Janis*, 428 U.S. 433, 441-42 (1976) (stating that the general rule would not apply in the "unusual" cases where the Service's determination that the taxpayer had unreported income was so arbitrary as to be a "naked" assessment).

551. *Id.*

552. *Carson v. United States*, 560 F.2d 693, 696 (5th Cir. 1977) (providing a delightfully mixed metaphor that deserves reprinting: "The tax collector's presumption of correctness has a herculean muscularity of Goliathlike reach, but we strike an Achilles' heel when we find no muscles, no tendons, no ligaments of fact."); see also *Sealy Power, Ltd. v. Comm'r*, 46 F.3d 382, 387 (5th Cir. 1995).

553. *Sealy Power*, 46 F.3d at 387.

554. *Id.*

555. § 7491.

term “burden of proof” really means just the burden of production.⁵⁵⁶ However, the presumption of correctness and the burden of proof “are for the most part but the opposite sides of a single coin.”⁵⁵⁷ That is, the presumption of correctness automatically relieves the Service of the burden of production, regardless of which party has the ultimate burden of persuasion. That is why many courts refer to it as a “procedural device.”⁵⁵⁸ To the extent that section 7491 reimposes the burden of production upon the Service, it logically destroys any presumption of correctness that would otherwise apply.⁵⁵⁹ And to the extent that the Conference Report signals congressional intent *not* to disturb the presumption of correctness, it just demonstrates the taxwriters’ misunderstanding of how the provision affects the inquisitorial nature of tax administration. Let’s now look at how the provision affects the system.

The effect of section 7491 will vary depending on whether the taxpayer is contesting a proposed deficiency or claiming a refund.⁵⁶⁰ Taxpayers undertake a greater task in contesting assessments than in contesting notices of deficiency. That is, once the taxpayer overcomes the presumption of correctness attached to a proposed deficiency (generally in Tax Court), the taxpayer then only bears the burden of persuasion as to the incorrectness of the Service’s deficiency claim. Therefore, unless the Service introduces positive evidence to support its proposed deficiency, what is sufficient to overcome the presumption of correctness is generally

556. See H.R. REP. NO. 105-599, at 238-42 (1998). The Conference Report rather confusingly seems to equate the term “presumption of correctness” with the concept of “burden of persuasion” and equates the term “burden of proof” as used in the statute with the concept of “burden of production.” See *id.* As with many other of the descriptions of current law sections in the Conference Report, this one needs to be read with a skeptical eye that the taxwriters accurately stated the law. In this case, the taxwriters cited only a blurb from *Danville Plywood Corp. v. United States*, which was a refund case. 16 Cl. Ct. 584, 586 (1989). As I explain in the text, the taxwriters completely ignored the different burden assigned to taxpayers in Tax Court proceedings.

557. *Carson*, 560 F.2d at 695.

558. *E.g.*, *Danville*, 16 Cl. Ct. at 593.

559. *Id.* But see Johnson, *supra* note 2, at 441 (noting that section 7491 “uncouples the two, potentially shifting the burden of proof, but leaving the presumption of correctness intact”).

560. I use my words advisedly. The distinction does not turn on what court the taxpayer is in but on what the taxpayer seeks to accomplish in that court: to negate an asserted liability or to recover a sum of money already paid. Generally, taxpayers contest proposed deficiencies in Tax Court and claim refunds in district courts or the Court of Federal Claims. Too often overlooked as tax litigation fora, however, are Bankruptcy courts. Bankruptcy Code § 505 empowers bankruptcy courts to determine tax liabilities. 11 U.S.C. § 505(a)(1) (2000). In bankruptcy court, therefore, a taxpayer may be contesting either an assessment already made, or may be contesting a liability for which no assessment has yet been made, but which the Service claims is due, thereby being in the same position—and arguably having the same burdens—as a taxpayer in Tax Court. See *Raleigh v. Ill. Dep’t of Revenue*, 530 U.S. 15, 26 (2000) (holding that the “burden of proof on a tax claim in bankruptcy remains where substantive tax law puts it”).

enough to meet the burden of persuasion.⁵⁶¹ In a refund suit, however, when challenging an assessment, the taxpayer has to not only prove the excessiveness of the assessment, but also has to then independently establish the correct liability in order claim the refund.⁵⁶² Thus, losing the presumption of correctness in a deficiency proceeding is potentially more damaging to the Service than losing it in a refund proceeding.

It may be that section 7491 is so “hedged . . . with . . . conditions and exceptions” that it can rightly be criticized on a theoretical level as a “pernicious exercise in symbolic legislation” as Professor Johnson so wonderfully describes it in his masterful dissection of the statute shortly after it was enacted.⁵⁶³ Recent developments in contested deduction cases, however, suggest that in practice section 7491 may indeed have substantive bite as well as rhetorical bark.

It often happens that when a taxpayer claims a deduction the issue turns on the subjective intent of the taxpayer. The only evidence may be the taxpayer’s own testimony. Under a strong presumption of correctness, if the Service denies the deduction because it does not believe the taxpayer’s testimony, then that effectively ends that. The taxpayer can go to Tax Court and offer the same testimony, but typically the Tax Court refuses to make any *independent* evaluation of the taxpayer’s credibility, instead generally holding that the taxpayer’s “self-serving” testimony is not enough to rebut the presumption of correctness, and thus, in effect, relying on the Service’s judgment to uphold the proposed deficiency.⁵⁶⁴ That practice is what makes the Eighth Circuit’s reversal of the Tax Court’s application of section 7491 in *Griffin v. Commissioner* significant.⁵⁶⁵

Griffin was a garden-variety contested deduction case. There, taxpayers husband and wife had paid property taxes on properties owned by a partnership in which their wholly owned S corporation (but not themselves personally) was a 60% partner.⁵⁶⁶ They paid the taxes because the partnership had defaulted.⁵⁶⁷ They deducted the payments from income,

561. While the IRM instructs Service attorneys to “develop, to the extent practicable, all affirmative evidence to sustain the Commissioner’s determination, even though [the taxpayer] has the burden of proof of the issues,” I.R.M. 35.5.1.2, that instruction is honored more in the breach than in the execution. See Stephen G. Salley & Anthony J. Scaletta, *The Incredible Taxpayer: The U.S. Tax Court and I.R.C. § 7491*, 77 FLA. B.J. 80, 82 (2003).

562. See *United States v. Janis*, 428 U.S. 433, 440-41 (1976); *Lewis v. Reynolds*, 284 U.S. 281, 283 (1932) (“The action to recover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him.”).

563. Johnson, *supra* note 2, at 413, 427.

564. See, e.g., Salley & Scaletta, *supra* note 561, at 80-81.

565. 315 F.3d 1017, 1017 (8th Cir. 2003).

566. *Id.* at 1017-18.

567. *Id.* at 1018.

falsely attributing them on Schedule E to property which they did in fact own.⁵⁶⁸ On audit, however, the Service discovered the deception and denied the deduction.⁵⁶⁹ Generally, one cannot deduct amounts paid on behalf of third parties, but if the payment qualifies as ordinary and necessary for one's *own* business then the deduction is allowable.⁵⁷⁰ Whether there is a sufficient connection between the payment and one's own business is an issue of fact and in this case, as in many, depends on the subjective intent of the taxpayer.⁵⁷¹ In *Griffin*, the husband testified that he was in the construction business (it said so on his Schedule C) and that if banks learned that the partnership had defaulted, he would have a hard time getting financing from the banks.⁵⁷² He testified in all sincerity.⁵⁷³ The Service attorney cross-examined him but introduced no other testimony.⁵⁷⁴

The taxpayers then claimed that the testimony was just the kind of credible evidence that should shift the burden of proof to the Service to present evidence on why the deduction should be disallowed.⁵⁷⁵ The Tax Court disagreed, holding that “[o]n the basis of [Robert Griffin’s] testimony, we are unable to conclude that the tax payments would have represented ordinary expenses to advance any business carried on in [appellants’] individual capacities.”⁵⁷⁶ The Tax Court explained that the testimony was not credible, for among other reasons, because the taxpayers had reported the payments on Schedule E instead of Schedule C.⁵⁷⁷ The Tax Court then added a CYA footnote: “Even if the burden of proof were placed on [the Commissioner], we would decide the issue in his favor based on the preponderance of the evidence.”⁵⁷⁸

The Eighth Circuit reversed, holding that uncorroborated testimony of the taxpayer was enough to shift the burden of proof to the Service.⁵⁷⁹ It did this by focusing on one part of the definition of “credible evidence” found in the Conference Committee Report: “the quality of evidence which, after critical analysis, the court would find sufficient upon which to base a decision on the issue *if no contrary evidence were submitted*

568. *Id.*

569. *Id.*

570. *Id.* at 1019.

571. *See, e.g., Capital Video Corp. v. Comm’r*, 311 F.3d 458, 465-66 (1st Cir. 2002) (upholding Tax Court’s refusal to shift burden of proof on basis of taxpayer’s testimony).

572. 315 F.3d at 1020.

573. *See id.* at 1021.

574. *Id.* at 1019.

575. *See id.* at 1020.

576. *Griffin v. Comm’r*, T.C. Memo 2002-6; No. 7315-00, 2002 WL 22016, at *12 (T.C. Jan. 8, 2002) (all but initial modification from Eighth Circuit opinion).

577. *Id.*

578. *Griffin*, No. 7315-00, 2002 WL 22016, at *9 n.4.

579. *Griffin*, 315 F.3d at 1021-22.

(without regard to the judicial presumption of IRS correctness).⁵⁸⁰ Although not explicit about it, the circuit court apparently believed that the taxpayer's testimony, taken alone, was "credible evidence" if it was plausible taken at face value.⁵⁸¹ The error apparently committed by the Tax Court was in evaluating the taxpayer's testimony in light of the other evidence in the record. While that evaluation may go to weight, it does not go to the "credible evidence" determination, according to the Eighth Circuit. The taxpayer's uncorroborated testimony is, after all, "evidence" and therefore it is sufficient to trigger section 7491 as long as it is plausible *when viewed in isolation from anything else in the record*.

In so ruling, the Eighth Circuit apparently discounted the "critical analysis" part of the "credible evidence" definition given above by emphasizing that the testimony must be evaluated alone, "in the absence of any evidence or presumptions to the contrary."⁵⁸² Apparently, "critical analysis" does not involve comparing the taxpayer's testimony with other evidence in the record, even if that other evidence makes the testimony, literally, incredible.

To emphasize its dissatisfaction with the Tax Court, the Eighth Circuit included this pointed language in its remand instruction:

On remand, the tax court may reconsider all of the evidence properly before it or hold a new hearing. In either case, the tax court is instructed to make new findings of fact in light of the shifted burden of proof. *If the same conclusion is reached by the tax court without a new hearing, an explanation is warranted as to how the existing record justifies the conclusion that the Commissioner has met his burden of proof.*⁵⁸³

It remains to be seen whether the Eighth Circuit's reasoning will be adopted elsewhere.⁵⁸⁴ If so, it puts teeth into section 7491 and, correspondingly, reduces the Service's ability to decide how much to count or discount taxpayer testimony. As practitioners have already noted, there

580. H.R. REP. NO. 105-599, at 240-41 (1998) (emphasis added).

581. This would also be consistent with the Conference Report which goes on to explain that "A taxpayer has not produced credible evidence for these purposes if a taxpayer merely makes implausible factual assertions, frivolous claims, or tax-protestor type arguments." H.R. REP. NO. 105-599, at 241 (1998).

582. *Griffin*, 315 F.3d at 1021.

583. *Id.* at 1022 (emphasis added).

584. The Eighth Circuit's reasoning is unsound because it creates a paradox: testimony which is incredible given the other evidence in the record, nonetheless, is "credible evidence" to shift the burden of proof to the Service. It requires the Tax Court to turn a blind eye to anything except the taxpayer's demeanor and the internal content of the testimony.

are “hundreds of factual tax disputes in which subjective intent, behavior, business purpose, valuation, or other issues [are] subject to testimony by a taxpayer” on his or her own behalf.⁵⁸⁵ Under the Eighth Circuit’s rule, the Tax Court can no longer dismiss taxpayer testimony under the presumption of correctness cover. Practitioners are delighted at this potential “quiet revolution,” which, echoing Senator Roth’s rhetoric, potentially “rebalanc[es] the playing field between the IRS and the taxpayer.”⁵⁸⁶

Thus, in section 7491 the reality of reform matches the rhetoric. But it does so at a cost of shifting tax administration into a less efficient, adversarial process. Shifting evaluation of taxpayer testimony to an external third party adds little value to the tax administration process, at least so long as the taxpayer believes that the opportunity to be heard before the Service is meaningful. To the extent that the objection to the prior process was that taxpayers did not, either in fact or in perception, receive a fair hearing from the Service, the answer was not to turn the Service from a decisionmaker into a partisan, but to reform the Service to ensure its neutrality. By abandoning inquisitorial process for adversarial process, the reformers simply conceded that the Service must necessarily be biased against taxpayers and so made the understandably intuitive move towards adversarial process, even if the extent of the move was unanticipated.

b. Suspension of Interest

The legislative process that resulted in RRA 98 is replete with egregious misunderstandings of tax administration. Although beyond the scope of this Article, the taxwriters’ (particularly Senate Finance Committee staff’s) ignorance and overt hostility towards the Service made RRA 98 one of the most difficult pieces of tax legislation to process in recent times. The suspension of interest provision, now codified in section 6404(g), is a good example of both the ignorance and the arrogance, as well as yet another example of how RRA 98 tilts towards adversarial process values by implicitly denying Truth and so elevating Autonomy values over it.

As discussed in Part II, most of the assessments made by the Service result from the Service accepting the liability reported by the taxpayer. While the Service generally has three years in which to select a taxpayer’s return for audit and decide whether the return was an accurate account of

585. Salley & Scaletta, *supra* note 561, at 80.

586. *Id.*

the taxpayer's financial affairs,⁵⁸⁷ it does so for only about 0.5% of the returns.⁵⁸⁸

Section 6601 provides that interest on any underpayment of tax runs from when it should have been paid until it is actually paid. Thus, when the Service audits a return and decides that it understated the correct tax liability, section 6601 applies retroactively, reflecting the idea that the Service has merely discovered the "true" tax liability and has not somehow changed the taxes owed. In fact, however, just as most of the assessments of tax do not result from audits, neither do most of the Service's accounts receivable; they instead arise from properly reported, but unpaid, liabilities.⁵⁸⁹ In other words, most accounts receivable do not involve tax liabilities that were ever the subject of dispute.

The Senate Finance Committee was concerned about the running of interest. Even though the Code gives the Service three years to review returns, the Senate Finance Committee thought it unacceptable for the Service to take more than one year to identify, evaluate, and decide whether to propose a deficiency for any given return. Accordingly, the Senate Finance Committee proposed a new provision, section 6604(g), which would require the Service to suspend interest anytime the Service "does not provide a *Notice of Deficiency* to the taxpayer" within one year of the return being filed (or the due date, whichever was later).⁵⁹⁰ The provision applied only to taxpayers who filed timely returns.⁵⁹¹

To someone ignorant of tax procedure, the provision might be sensible: penalizing the government for not telling a taxpayer that the taxpayer's return was wrong would encourage the Service to audit returns "promptly." Even here, however, the provision could be reasonably questioned since (a) it is inconsistent with the general three year limitation period, (b) section 6404(e) already gives the Service discretion to abate any interest and penalties which are "attributable in whole or in part to any

587. § 6501(a).

588. See *supra* notes 34, 91.

589. While I know this from my work at the Service, it can be inferred from the Statistics Of Income (SOI) reports. For example, for FY 2000, compare Table 10 (Examination Coverage: Recommended and Average Recommended Additional Tax After Examination, by Type and Size of Return) with Table 16 (Delinquent Collection Activities, Fiscal Years 1999 and 2000). INTERNAL REVENUE SERV., DATA BOOK 16 tbl. 10, 21 tbl. 16 (2000).

590. H.R. 2676, 105th Cong. § 3305 (1998) (emphasis added). RRA 98 wound its way through the legislative process mostly in the form of H.R. 2676. The House version passed the House on November 5, 1997. See <http://thomas.loc.gov> (detailing the bill's history) (last visited Nov. 10, 2003). The Senate Finance Committee kept the number but struck the text and substituted its own bill. As thus modified, the Senate passed H.R. 2676 on May 7, 1998. The Conference Committee met on June 10, 1998 and produced its report on June 24, 1998. *Id.*

591. H.R. 2676 § 3305.

unreasonable error or delay” of a Service employee,⁵⁹² and (c) putting an artificial deadline might pressure Service employee’s to propose deficiencies on little evidence just to get the notice of deficiency out in time, thus forcing resolution of the dispute at more expensive and formal levels. Nonetheless, perhaps a bright-line “one year rule” would be easier to administer.

To someone with knowledge of tax procedure, however, the proposal contained two glaring errors. First, it automatically suspended interest after one year unless the Service sent “a Notice of Deficiency.” The term “Notice of Deficiency,” however, has a specific and limited meaning in the Code: it describes a specific document that the Service sends out only when proposed adjustments in income, estate and gift tax liabilities. For other taxes and penalties, notably excise taxes, employment taxes, and the Trust Fund Recovery Penalty imposed by section 6672, the Service does not follow deficiency procedures and never issues a Notice of Deficiency.⁵⁹³ So, by making the Notice of Deficiency the necessary document to prevent suspension of interest, the Senate Finance Committee was proposing to give interest-free loans to taxpayers who misreported excise and employment taxes.

The second error was worse. The proposal completely ignored the common situation where a taxpayer correctly reported a liability but failed to pay it. In those situations, the Service would *never* send a Notice of Deficiency. There would be no deficiency. There would simply be an unpaid tax liability, which thanks to the generosity of the Senate Finance Committee, would run interest-free after one year with the Service unable to do anything to restart the interest.

The proposal also evidenced hostility towards the Service in two ways. First, Senate taxwriters repeatedly ignored Service technical experts who had caught the error and urged the Senate taxwriters to change the provision.⁵⁹⁴ Second, the proposal reveals a distrust of the Service in that it bypasses section 6404(e) and removes from the Service the ability to decide, first, what is a “delay” and, second, whether the delay is caused by Service employees or the taxpayer. Implied in the Senate Finance Committee language is the assumption that *all* delays of more than one year are the Service’s fault: “[T]he Committee is concerned that accrual of interest and penalties absent prompt resolution of tax deficiencies may lead to the perception that the IRS is more concerned about collecting revenue

592. § 6404(e)(1)(A).

593. § 6672.

594. I myself heard two Treasury representatives attempt to explain the consequences of the provision, only to be cut off by the taxwriters.

than in resolving taxpayer's problems."⁵⁹⁵ That statement is only true if the reason for the delay is the Service's fault.

The Conference Committee fixed both errors. As enacted, section 6604(g) replaced the "Notice of Deficiency" language with "a notice to the taxpayer specifically stating the taxpayer's liability."⁵⁹⁶ The replacement language is now broad enough to cover all types of notices, including demands for payment (which are the typical notices sent out when a taxpayer reports but does not pay a liability). The enacted statute also explicitly provides that it does not suspend interest "with respect to any tax liability shown on the return."⁵⁹⁷ That fixes the problem of a taxpayer sending in a return but not sending in the money.

Even as "fixed," however, the provision still illustrates the shift towards adversarial process values and the lessening importance of the idea of a "true" tax liability. As noted above, it puts the Service under the gun to produce a deficiency within one year. To the extent that the Service employee cannot obtain and sort through and judge the information needed to make a decision, the employee might simply propose a high adjustment, one with plenty of "water" in it, simply to get the notice of deficiency out the door, thinking "Let Appeals sort it out." The statute thus denigrates the truth-seeking function of inquisitorial process and elevates the importance of the adversarial process entailed in using a third-party decisionmaker (be it Appeals, or the Tax Court or district court). And it does so in order to serve an arguable autonomy value: saving taxpayers from paying a fair market rent on the use of the government's money.

3. Tax Collection as Adversarial Process

As discussed in Part III-B, the Service historically enjoyed broad administrative collection powers. Section 6331 authorized the Service to levy on "all property and rights to property" of the taxpayer. Aside from the narrow categories of property exempted from levy under section 6334, Service employees could seize any asset they could find. Statutes such as the Anti-Injunction Act⁵⁹⁸ and Supreme Court rulings such as *Flora*⁵⁹⁹ forced taxpayers into the inquisitorial tax collection process and denied them access to adversarial process until after their asserted tax liabilities were paid.

Most of the rhetorical thundering during the Senate Finance Committee hearings was directed at the Service's alleged collection abuses,

595. S. REP. NO. 105-174, at 64 (1998).

596. § 6404(g)(1)(A).

597. § 6404(g)(2)(C).

598. § 7421.

599. *Flora v. United States*, 362 U.S. 145, 177 (1960).

particularly in making bad decisions about what assets to seize and in executing the seizures. It is not surprising, therefore, that the strongest moves towards adversarial process are found in the RRA 98 provisions concerning tax collection. Although many of the RRA 98 provisions deal with collection matters, I will only use two to illustrate my thesis: the requirement to obtain court approval to seize homes, codified in section 6334(a)(13) and (e); and the “collection due process” provisions codified in sections 6320 and 6330.⁶⁰⁰

a. Seizure Restrictions

RRA 98 very straightforwardly shifts collection to adversarial process by requiring the Service to obtain a court order before seizing certain significant assets of the taxpayers, notably their homes. Specifically, section 6334(a)(13) adds new categories of property exempt from levy. If the amount to be collected by the levy is \$5,000 or less, then not only is the taxpayer’s principal residence exempt from levy, but so are *any* non-rental properties owned by the taxpayer and used by someone else as a home. Further, these assets are absolutely exempt. If the amount to be collected is more than \$5,000, then the taxpayer’s principal residence is still exempt, unless the Service chooses to obtain court permission to seize it per section 6334(e).⁶⁰¹ Section 6332(e), in turn, requires written approval from a district court for seizure and then only if the court “determines that the taxpayer’s other assets subject to collection are insufficient to pay the amount due.”⁶⁰²

Here again, Autonomy triumphs over Truth. The Senate Finance Committee explained that it

is concerned that seizure of the taxpayer’s principal residence is particularly disruptive for the taxpayer as well as the taxpayer’s family . . . and is not justified in the case of a small deficiency. . . . Accordingly, the Committee believes that the taxpayer’s principal residence or business should only be seized to satisfy tax liability as a last resort⁶⁰³

While one might criticize the statutory policy choice of protecting Autonomy over Truth, the point here is to see how the policy choice

600. Thus, I will not consider, for example, the Spousal Protection provisions added to § 6015, which also provide for limited judicial review of Service decisionmaking.

601. § 6334(a)(13)(B).

602. Judicial approval was added in Conference. *See* H.R. REP. NO. 105-599, at 285 (1998).

603. S. REP. NO. 105-174, at 86 (1998).

reflects a distrust of inquisitorial process checks and so substitutes adversarial process checks.⁶⁰⁴

b. Collection Due Process

The most elaborate adversarial checks on the Service's tax collection decisionmaking are contained in the massively misnamed "Due Process" provisions, codified in sections 6320 and 6330. I will first review how they were proposed, then how they were enacted, and then how they have been implemented by the Service. In so doing I will discuss how they shift the inquisitorial collection process into an adversarial process.

As proposed by the Senate (there was no comparable provisions in the House Bill, of course, because these ideas came out of the Senate Hearings), the collection due process provisions were a dramatic departure from previous law. The Senate Finance Committee proposal, adopted by the full Senate, would have required that before the Service could make *any* levy against a taxpayer and before it could file *any* Notice of Federal Tax Lien (NFTL), it had to give the taxpayer 30 days to request a hearing before Appeals.⁶⁰⁵ During that 30 days no lien filing or levy was permitted, unless the Service went through special jeopardy procedures.⁶⁰⁶ The hearing was to be a "kitchen sink" hearing: that is, the taxpayer would be able to contest the proposed action on *any* grounds, including "challenges to the underlying liability as to existence or amount."⁶⁰⁷ If the taxpayer did not like the result of the hearing, the taxpayer had 30 days to take it to Tax Court and, from there, to the Courts of Appeals.⁶⁰⁸ Meanwhile, during all this time, "the levy actions which are the subject of the requested hearing" were suspended.⁶⁰⁹ If the taxpayer took no appeal, then the suspension lasted for 90 days after the final determination from which the taxpayer had not taken the appeal.⁶¹⁰ While the Service could still propose *other* levy actions, since each one was subject to the same process, the taxpayer could essentially freeze collection.

604. The check itself is vague. Since a federal tax lien will always protect the Service's claim, it is difficult to imagine the need for a "last resort" seizure on realty. It is thus difficult to imagine the Service ever successfully seizing a taxpayer's home. Of course, the statutory test is not strictly a "last resort" test; it is simply whether the taxpayer's other assets could raise enough to pay the liability. But, the Committee Reports make clear that collection alternatives such as installment agreements and offers in compromise should also be preferred over seizures. S. REP. NO. 105-74, at 87 (1998). How the Service and courts will balance the statutory language with the expectations set out in the Committee report remains to be seen.

605. S. REP. NO. 105-174, at 68 (1998).

606. *Id.*

607. *Id.*

608. *Id.*

609. § 6330(3)(1).

610. *Id.*

As proposed, the Senate's due process provisions effectively made the taxpayer the decisionmaker on tax collection, completely reversing prior law. The Service could not make a move without taxpayer approval. If the taxpayer did not approve of a levy, the taxpayer would invoke the hearing process and could do so for each and every discrete tax collection decision. It was a tremendous shift of power to the taxpayer. While prior law required a single notice of intent to levy at least 30 days before the first levy, in section 6331(d), the Service was afterwards free to levy on any property of the taxpayer it could find without further notice.⁶¹¹ Under the Senate proposal, the taxpayer was automatically given at least 30 days to hide assets each time the Service went looking and, more importantly, to sell assets before the tax lien could protect the government's claim. The proposed provisions gave the taxpayer a perpetual timing advantage over the Service and forced the Service to play a perpetual game of catch-up.

As enacted, the due process provisions do not put quite as much decisional power in taxpayer hands. Basically, they require that before the Service makes its *first* levy, and within 5 days after the Service files its *first* Notice of Federal Tax Lien (NFTL), the Service must give the taxpayer 30 days to ask for a "fair hearing" before an "[i]mpartial officer" from the Office of Appeals.⁶¹² The hearing is widely known as the Collection Due Process hearing, or CDP hearing. The taxpayer thus gets only a maximum of two CDP hearings for each tax liability being collected and is not given an opportunity to sell assets before the NFTL is filed.⁶¹³ The CDP hearings are also modified in scope from the kitchen sink hearings proposed by the Senate. The taxpayer may still raise any arguments as to why the levy should not go forward or why the NFTL should be removed, *except* that the taxpayer can challenge the underlying tax liability determination only if the taxpayer "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability."⁶¹⁴ Appeals must give a written decision and the taxpayer then has 30 days to appeal to a court, either the Tax Court, if it otherwise has jurisdiction over the underlying tax liability, or the district court if the Tax Court is not available.⁶¹⁵ Filing in the wrong court is not fatal: the taxpayer has 30 days from the determination of an incorrect filing to re-file in the right court.⁶¹⁶

611. See, e.g., *Glover v. Walters*, No. 72-363-civ-JLK, 1972 U.S. Dist. LEXIS 14608 (S.D. Fla. Mar. 17, 1972).

612. §§ 6320(a)(2)(c),(b), 6330(a)(2)(c),(b).

613. §§ 6320(b)(2), 6330(b)(2) (only one hearing per tax period).

614. §§ 6320(c), 6330(c)(2)(B).

615. §§ 6320(c), 6330(d)(1)(A).

616. §§ 6320(c), 6330(d)(1)(B).

As enacted, the due process provisions still significantly shift the collection paradigm away from inquisitorial to adversarial on a number of levels. First, and most obviously, is the ability of the taxpayer to make the Service a litigant in an adversarial action in court over collection decisions once the tax determination has been made. Instead of making the collection decision, the Service must justify its decision to an external third party and must hold off on all levy actions while the CDP hearing process winds its way through its various stages. The Service no longer calls the shots. Second, and less obviously, the collection due process provisions also undermine the Service's tax liability decisionmaking. Recall that the pre-RRA 98 statutory scheme gave the Service's assessment the force of judgment: taxpayers were not allowed to contest it, either in wrongful levy proceedings or through an injunction action or in any other way, until after fully paying it. While they could get one pre-payment bite at the judicial apple whenever the Service had proposed a greater liability than the taxpayer had reported, once the Service made the assessment, it had free reign to collect the tax. That is no longer true. Taxpayers can not only raise collection arguments in the due process hearing, they can still raise substantive tax arguments in those situations where they show they had not received a notice of deficiency, or did not "otherwise have an opportunity to dispute" it.⁶¹⁷ In other words, the Service's determination of tax liability, as reflected in the assessment, no longer provides the strong basis for collection that it did pre RRA 98. Third, the provisions implicitly contain a conception of "due process" that taxpayers have the right to be heard before an impartial decisionmaker and the Service is *not* an impartial decisionmaker: it is instead an adversary.

As enacted, the collection due process provisions meet the declared goal of the Senate Finance Committee to use the kryptonite of adversarial process to reduce the Service from a supercreditor to an ordinary creditor. Perhaps the most telling statement in the Senate Finance Committee Report is the one declaring that "taxpayers are entitled to protections in dealing with the IRS that are similar to those they would have in dealing with any other creditor."⁶¹⁸ This is especially revealing because (1) taxpayers deal with "any other creditor" through adversary process and (2) the statement completely ignores the fact that, unlike private creditors, the Service has not voluntarily assumed the risk of nonpayment by dealing with taxpayers.⁶¹⁹

617. §§ 6320(c), 6330(c)(2)(B).

618. S. REP. NO. 105-174, at 67 (1998).

619. See William T. Plumb, Jr., *Federal Liens and Priorities—Agenda for the Next Decade II*, 77 YALE L.J. 605, 606 (1968) (discussing why state debtor-creditor laws should not apply to the Service).

As implemented, the CDP provisions have been a boon to tax protestors and a pain to everyone else. As of July 31, 2003, a review of the LEXIS database shows that since RRA 98's enactment, courts have decided 328 appeals from CDP hearings. Of those, at least 145 involved taxpayers who could reasonably be called tax protestors.⁶²⁰ The following chart summarizes the data, demonstrating that both tax protestor cases and cases in which courts feel compelled to impose monetary sanctions on the taxpayer are becoming an increasing percentage of the judicial inventory.

	1999	2000	2001	2002	2003 (to June 30)	Total
Total CDP Cases Reported	0	22	33	179	94	328
TP Wins (reversal/remand)	0	3	4	5	4	16
Tax Protestor Cases	0	4	7	90	44	145
Sanctions Imposed Against TPs	0	0	1	25	33	59

As might be expected, taxpayers have not been very successful in their newfound access to adversarial process. Only 16 of the cases can remotely be construed as taxpayer "wins," almost all of which were on a procedural point (such as *Mesa Oil* and *Keene* discussed below), whereas in 58 cases (all in 2002 and 2003) not only did the taxpayer not "win" but one or more courts imposed monetary sanctions. While still general, these numbers suggest that the CDP provisions do little good and much harm. Scholars who have studied the matter in greater depth have reached similar conclusions: "as currently applied, the CDP provisions in fact provide few taxpayer rights, require significant administrative and judicial resources, delay the collection of unpaid tax liabilities, and may adversely impact the public's perception of the fairness of the tax system."⁶²¹

Part of the CDP provisions failure in implementation is that their shift to adversarial process does not fit well with the traditional inquisitorial

620. The Service of course, cannot call them that because RRA 98 § 3707 (another off-Code provision) forbids the Service from labeling any taxpayer "as [an] illegal tax protester[]" (or any similar designation)." The language probably also prevents the Service from referring to this class as "taxpayers formerly known as tax protestors."

621. Danshera Cords, *How Much Process is Due? IRC Sections 6320 and 6330, Collection Due Process Hearings*, (forthcoming 2004) (on file with author).

paradigm.⁶²² The Service and the courts have struggled with just how much adversarial process the collection due process provisions require and how much of the old inquisitorial process they allow. The Service's regulations and procedures generally work to channel taxpayers away from the CDP hearing, which gets judicial review, to what it calls the "equivalent hearing," which does not. The Service, understandably, pushes for internal over external review. For example, while the statute requires a CDP hearing "if the person requests a hearing,"⁶²³ the regulations provide that "[t]he taxpayer must make a request in writing."⁶²⁴ Likewise, the Service sends out the CDP notice as a part of its series of generic collection notices. Administratively, the decision makes sense, but it also hides the CDP notice among all the other information being sent to the taxpayer and, more importantly, triggers the 30 day period when there is no specific levy or seizure contemplated. In other words, the Service has set the system up to minimize taxpayer opportunities to have a meaningful review in an *adversarial* forum. In exchange, the Service's process gives taxpayers ample opportunity to be heard in the traditional inquisitorial administrative review. Taxpayers can always request and receive the "equivalent" hearing. Further, regulations provide that "Appeals will consider the same issues that it would have considered at a CDP hearing on the same matter."⁶²⁵

Courts also appear conflicted on just how the CDP requirements should be implemented, with some being more sensitive to the traditional inquisitorial role Appeals has historically played and others being more sensitive to the newer adversarial process rights implied by the statute. The conflict is seen, for example, in the debate over just what rights the statutory term "hearing" confers on the taxpayer. The essence of a hearing in an adversary process is the ability to control evidence: to call witnesses, to confront and cross-examine adverse witnesses, to present to the neutral

622. CDP hearings may also serve the purpose of giving taxpayers at least the perception of having "voice" in the collection process, thus promoting acquiescence to the collection decisions. To the extent that giving taxpayers voice is a laudable goal of tax administration, there is nothing inherent in an inquisitorial system that denies voice. Taxpayers can participate as actively in a system where the decisionmaker is also the evidence-gatherer as they can in a system where the two functions are separated. To the extent, however, that giving taxpayers voice means giving them control over the information presented, then that does conflict with inquisitorial, but not adversarial, process. That is how I suggest the issues regarding the development of the CDP hearings be framed.

623. § 6320(b).

624. Treas. Reg. § 301.6320-1(c)(2). The Service is less stingy when the shoe is on the other foot. Section 7602(c)(1) provides that the Service must give the taxpayer "reasonable notice in advance" of third-party contacts. § 7602(c)(1). Like the language in sections 6320 and 6330, this language does not specifically require written notice. The Service here interprets the silence the other way, providing that the "notice may be given either orally or in writing." Treas. Reg. § 301.7602-2(d)(1).

625. Treas. Reg. § 301.6330-1(i)(2).

decisionmaker the evidence supporting the story being told.⁶²⁶ Thus, when in *Davis v. Commissioner* the Tax Court rejected the taxpayer's argument that he had the right to subpoena witnesses to the CDP hearing,⁶²⁷ that was a decision disfavoring adversarial process. The Court emphasized the traditional informality of Appeals procedures and declined to require changes.⁶²⁸ Likewise, in *Lundsford v. Commissioner*, the Tax Court majority refused read the statutory term "hearing" as requiring an actual opportunity for the taxpayer to physically appear in front of an Appeals Officer.⁶²⁹ Instead, the Court decided that it would determine on a case-by-case basis whether a face-to-face hearing was required and, since the taxpayer's only substantive issue was a loser on paper, a hearing was "neither necessary or productive" to the tax administration process.⁶³⁰ The spirited dissent in *Lundsford* argued that since the statute required a "hearing" then that was what the taxpayer was entitled to, regardless of whether it looked necessary.⁶³¹ After all, the taxpayer might develop arguments at the hearing itself.⁶³² Interestingly, the *Lundsford* dissent relied in no small part on the *Senate Finance Committee Report*⁶³³ which, as discussed above, was explaining the considerably more adversarial provisions passed by the Senate and not the toned-down CDP provisions enacted by Congress.⁶³⁴

The issue of what kind of record should be made of CDP hearings has caused tension between the Service and the courts. It also illustrates the implementation choices between adversarial and inquisitorial process. "One of the most basic rules of adversary jurisprudence is that the evidentiary facts on which a decision rests must be found in a record

626. See generally John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

627. 115 T.C. 35, 40-42 (2000).

628. *Id.* at 41 ("The references in section 6330 to a hearing by Appeals indicate that Congress contemplated the type of informal administrative Appeals hearing that has been historically conducted by Appeals . . .").

629. See 117 T.C. 183, 183, 188-89 (2001).

630. *Id.* at 189; see also *Bartschi v. Comm'r*, 84 T.C.M. (CCH) 480 (2002). Other courts have disagreed with *Lundsford* on the question of whether the substantive issue was a loser. See *Erickson v. United States*, No. 6-01-20798-JF, 2002 WL 57179, at *3 (N.D. Cal. Mar. 14, 2002) (remanding case back to Appeals because Form 4340 without a 23C date was not sufficient verification that a liability existed despite *Lundsford* Court's finding to the contrary).

631. *Lundsford*, 117 T.C. at 195-96 (Laro, J. dissenting).

632. *Id.* at 191-92 (arguing that denial of face-to-face hearing was denial of taxpayer's right to present his case).

633. *Id.* at 194-95.

634. The Service's regulations try to split the baby; they provide that while CDP hearings need not be held in person, nonetheless if the taxpayer thinks to ask for a physical hearing, then Appeals must offer one at the Appeals office closest to the taxpayer's home or business. Treas. Reg. § 301.6330-1(d)(2).

constituting the exclusive basis for decision. Without this rule, hearings could be rendered meaningless and judicial review might be totally frustrated.”⁶³⁵

Traditionally, the Service has not created formal records of Appeals proceedings.⁶³⁶ In *Mesa Oil, Inc. v. United States*, however, a district court in Colorado held that it could not provide effective judicial review without a record of the hearing and so remanded back to Appeals to create a *verbatim* record.⁶³⁷ The Service nonacquiesced, citing to *Davis*.⁶³⁸ Nothing in *Mesa Oil*'s reasoning, however, requires verbatim transcripts and later courts have not followed that aspect of the case, although they have approved of its general reasoning that “there must be enough information contained in the documentation created by the IRS for a court to draw conclusions about statutory compliance and whether the AO abused his or her discretion.”⁶³⁹ And indeed, the adversarial pressure of the CDP provisions makes it very difficult to disagree with the general reasoning that the CDP hearing must, at the end of the day, produce some record which can be reviewed for abuse of discretion.

Taxpayers, however, have pressed the issue of a verbatim transcript. They have latched onto I.R.C. section 7521(a), which provides that if a taxpayer gives sufficient advance notice, the taxpayer may “make an audio recording of such interview at the taxpayer’s own expense and with the taxpayer’s own equipment.”⁶⁴⁰ Section 7521 was enacted as part of TBOR I and applies to “any in-person interview with any taxpayer.”⁶⁴¹ Taxpayers argue that they can therefore make their own recording of the CDP hearing because they are being “interviewed” by the appeals officer.⁶⁴² The Service has strongly resisted.⁶⁴³ First, the Service notes that the CDP provisions uniformly use the word “hearing” while section 7521 uses the term “interview.”⁶⁴⁴ An “interview” is different from a “hearing.” A taxpayer is generally required, or even compelled, to attend an “interview” whereas a

635. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 742 (5th ed. 2002).

636. See SALTZMAN, *supra* note 87, ¶ 9.05[3].

637. No. Civ.A 00-B-851, 2000 WL 1745280, at *7 (D.C. Col. Nov. 21, 2000) (This record may be made either through audio tape recording, video tape recording, or stenographer; along with all paper documents presented by the parties. . .”).

638. 2001-34 I.R.B. 174.

639. *Mesa*, 2000 WL 1745280, at *7; *accord* Rohner v. United States, No. 5:02-CU-2309, 2003 WL 21456733, at *7 (N.D. Ohio Mar. 16, 2003).

640. § 7521(a)(1).

641. § 7521(a). This section was added by the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6233 102 Stat. 3342 (1988).

642. Keene v. Comm’r, No. 11604-02L, 2003 WL 21525479 (T.C. July 8, 2003).

643. *Id.*

644. *Id.*

taxpayer voluntarily attends, indeed initiates, an in-person “hearing.”⁶⁴⁵ The Service has put its views in the CDP regulations, there stating that “[a] transcript or recording . . . is not required.”⁶⁴⁶

So when Curtis B. Keene asked to record his CDP hearing, the Service said “no way.” Keene said “way” and got his “way” in Tax Court. In *Keene v. Commissioner*, the Tax Court majority held that the Service must allow a taxpayer who fulfils the section 7521 requirements to record a CDP hearing.⁶⁴⁷ The Court’s opinion is itself yet another good argument for why the Service should abandon the silly practice of writing regulations in question-and-answer format.⁶⁴⁸ The majority dismissed the regulation as just “a description, in general terms, of the conduct of a section 6330 hearing” and not itself a rule.⁶⁴⁹ On the merits of the position, the Tax Court majority thought the Service’s position was “tenuous and unpersuasive.”⁶⁵⁰

The Service had the better argument.⁶⁵¹ A CDP “hearing” is not an “interview” within the meaning of section 7521, but not for quite the reasons the Service gave. An “interview” is part of the evidence-gathering process. The only other statute in the Code which uses the term “interview” is section 7491, the burden of proof shifting statute.⁶⁵² One of the requirements for a taxpayer to claim the benefit of that statute is that the taxpayer “has cooperated with reasonable requests by the Secretary for witnesses, information, documents, meetings, and interviews.”⁶⁵³ In other words, the taxpayer must show that he cooperated with the Service’s evidence-gathering requests. When the Service “interviews” the taxpayer or a witness, it is for the purpose of making a tax determination or tax collection decision. As discussed in Part III, this is an integral part of the inquisitorial process of tax determination. Appeals does not “interview” taxpayers in that sense. The function of Appeals has never been to conduct an examination but only to provide administrative review of examinations

645. *Id.*

646. Treas. Reg. § 301.6330-1(d)(2).

647. *Keene*, 2003 WL 21525479.

648. The best argument, of course, is that the Q&A format makes it harder to read and follow the logic of the rules to apply to issues which are not posed in a hypothetical question. I should emphasize that these CDP regulations do about as good a job in the Q&A format as can be expected and their drafting reflects extraordinary care and attention to the difficult issues raised by the CDP provisions. That such carefully drafted regulations failed in their central purpose to provide binding guidance to taxpayers is all the more reason for the Service to abandon that useless format.

649. *Keene*, 2003 WL 21525479.

650. *Id.*

651. The Service has conceded the *Keene* issue and is formulating procedures to allow taxpayers to record CDP hearings. See Chief Counsel Notice CC-2003-031 (Sept. 11, 2003), reprinted in 2003 TAX NOTES TODAY 180-9, ¶ 6 (2003) (Tax Analysts Doc. No. 2003-20586).

652. § 7491.

653. § 7491(a)(2)(B).

already completed. If Appeals believes that the administrative file does not support the proposed deficiency, the IRM instructs that the case be returned to the examination function to collect better evidence.⁶⁵⁴ Thus, while Appeals is part of the tax determination decisionmaking process (and, in reviewing collection decisions, part of the tax collection decisionmaking process) it is not part of the evidence-gathering process. Judge Chiechi's careful review of section 7521's legislative history supports this interpretation as well.⁶⁵⁵

This last issue points up the struggle over the identity of Appeals: should it continue its traditional role as part of the Service's decisionmaking process or should it embrace a new role as a proto-administrative court, independent of the Service and before whom the Service becomes an "other," a litigant? Having one foot in the historical inquisitorial process and one foot in the RRA-98-mandated adversarial process additions, where Appeals fits in the tax process is a puzzle confronting the Service, courts, and Appeals. Requiring transcripts of CDP hearings or, in what amounts to the same thing, permitting taxpayers to make their own recordings, pushes CDP hearings before Appeals in the adversarial process direction far more than necessary. So long as the CDP hearing results in "a" record sufficient for judicial review, the adversarial process requirements are satisfied. A verbatim transcript is not needed, and tilting Appeals towards becoming a "mini-me" Tax Court is unwise.

Courts who are more sensitive to the historical inquisitorial nature of tax determination should have no trouble holding that, at the time section 7521 was added to the Code, tax administration was still inquisitorial and this reform fit that model quite well. The RRA 98

654. See I.R.M. 8.2.1.2 (2001):

The appeals officer will make a preliminary review as soon as possible to determine whether a nondocketed case should be returned to the originating compliance function. If the case requires further significant action or could probably have been disposed of without referral to Appeals, it should be returned without delay. See also Chapter 8.1, General, for cases where an appeals conference is not appropriate. The appeals officer does not act as an investigator or examining officer, but is not precluded from requesting additional information or evidence if required. However, Appeals should not accept a case if it must obtain substantial additional information or evidence. The following circumstances, which are not all-inclusive, are grounds for returning a case

Id. While this language is written for "nondocketed" cases, I.R.M. § 8.2.1.1 provides that the entire chapter applies to all types of cases in Appeals unless another chapter contains more specific contrary instructions.

655. Keene v. Comm'r, No. 11604-02L, 2003 WL 21525479 (T.C. July 8, 2003) (Chiechi, J. dissenting).

additions of the CDP provisions should not be allowed to warp the fit of that particular piece of the Tax Code puzzle.

4. Evidence-Gathering as Adversarial Process

RRA 98 created fewer restrictions on the Service as evidence-gatherer than on the Service as decisionmaker. Three provisions, however—section 7612 (source code restrictions), section 7602(c) (third party contact restrictions), and section 7525 (restrictions on access to certain taxpayer communications to federally authorized tax practitioners)—nudge the evidence-gathering process from inquisitorial to adversarial. As with the other reforms, while the enactment represents potential shift, the degree of shift will be determined more in implementation by the Service and interpretation by courts than in enactment.

First, the most straightforward restriction on the Service's information-gathering powers is section 7612, which prevents the Service from obtaining source code software, unless the Service follows strict procedural requirements and meets certain conditions. The statute further provides that when the Service seeks to enforce the summons in court, "the court shall, at the request of any party, hold a hearing to determine whether the applicable requirements of this subsection have been met."⁶⁵⁶ The Senate Finance Committee Report explains that while one animating concern was that computer software might be inadvertently disclosed to a competitor, the "Committee also believes that the indiscriminate examination of computer source code by the IRS is inappropriate."⁶⁵⁷ Thus, although the animating concern for the statute may have been garden-variety congressional micro-managing, the statute's very terms diminish the Service's evidence-gathering powers by changing the nature of the enforcement proceeding from a summary proceeding to a full-blown adversary proceeding.

Second, RRA 98 revised section 7602 to restrict third-party contacts. That is, section 7602(c) now provides that a Service employee "may not contact any person other than the taxpayer" until after giving the taxpayer "reasonable notice in advance . . . that contacts with persons other than the taxpayer may be made." While the provision does not outright forbid third party contacts, it is still a potentially important restraint on the Service's ability to obtain information.

As discussed in Part II, taxpayers generally have the information the Service needs to make the tax determination or tax collection decision. For practical reasons, Service employees generally turn to taxpayers first for

656. § 7612(b)(4).

657. S. REP. NO. 105-174, at 72 (1998).

needed information. Even so, third party contacts are still necessary for several reasons. First, Service employees may need to contact third parties simply to find the taxpayer, who may not be at the address in the Service's records. Third parties such as the Post Office, the Division of Motor Vehicles, and state or local taxing authorities might have helpful information. So might current or former clients, coworkers, employers, former spouses, or former neighbors. One can imagine, however, a significant difference between choosing to contact public agencies where the information might be a matter of public record, and contacting third parties who may have personal relationships with the taxpayer. Secondly, taxpayers are sometimes less than forthcoming with the information they possess. In those cases, the Service needs to be able to look to alternative sources for the information. Again, those sources might be public records or might be sources with personal relationships with the taxpayer. Third, and most often, the Service needs to verify the information provided by the taxpayer. Again, depending on the particulars, Service employees have a range of sources to choose from to verify information.

Section 7602(c) on its face broadly shifts tax administration towards adversarial process by restricting the Service's ability to decide where to gather the evidence necessary to make the tax determination or collection decision. While the section 7602(c) hurdle is more procedural than substantive, it gives taxpayers another opportunity to make the Service justify its information-gathering decisions to a third party. For example, in *United States v. Jillson*, the Service issued summonses to two of the corporate taxpayer's officers, who were also "significant shareholders" owning 100% of the corporation.⁶⁵⁸ The Service did not notify the corporation that it intended to summons the officers.⁶⁵⁹ The district court quashed the summons because the Service had not obeyed section 7602(c) and therefore failed to meet the fourth *Powell* requirement of following all applicable administrative steps.⁶⁶⁰

The *Jillson* court's rhetoric illustrates how section 7602(c) changes the relative value of Autonomy and Truth. The court emphasized that "Congress established a series of procedural safeguards to protect taxpayers from overreaching by IRS investigations. One of the most important of these safeguards is codified at 26 U.S.C. § 7602(c)."⁶⁶¹ The court emphasized that even though the two summoned officers controlled the corporation, they still fell into the literal language of the statute because they were "person[s] other than the taxpayer."⁶⁶² Noting that the purpose

658. No. 99-14223-CIV, 1999 WL 1249414, at *1-2 (S.D. Fla. Oct. 28, 1999).

659. *Id.* at *2.

660. *Id.* at 2-3.

661. *Id.* at *2.

662. *Id.* at *3.

of the pre-contact notice was to require the Service to seek the information first from the taxpayer, the court concluded that “failing to provide a notice of contact letter prior to serving the summonses . . . denied [the taxpayer] the opportunity to resolve issues and volunteer information prior to contact, and as such [the taxpayer] was not only harmed, but was harmed in the very way Section 7602(c) was enacted to remedy.”⁶⁶³

The *Jillson* court’s rhetoric follows on that of Congress. Section 7602(c) was added by the Senate Finance Committee after the September 1997 hearings. In explaining the reasons for the provision, the Committee’s Report states: “Such contacts may have a chilling effect on the taxpayer’s business and could damage the taxpayer’s reputation in the community.”⁶⁶⁴ Recognizing that this autonomy value was affected more by some types of contacts than others, the Report goes on to say—in contradiction to the broad language of the statute—that “[c]ontacts with government officials relating to matters such as the location of assets or the taxpayer’s current address are not restricted by this provision.”⁶⁶⁵ Using regulatory judo, the Service has flipped this statement from mere precatory verbiage into law by including it in its regulations.⁶⁶⁶

The regulation itself demonstrates the potential impact of section 7602(c) on the Service’s information-gathering powers. It contains no less than twenty-four different examples of widely varying situations where the Service’s ability to acquire information is affected by the statute.⁶⁶⁷ Each situation requires a delicate and difficult decision on the degree to which the statute restricts Service employees. Naturally, more times than not, the regulation explains why section 7602(c) does *not* restrict the choices of evidentiary sources that Services may make. To read the regulation, however, is to see the myriad ways in which the Service regularly interacts with third parties and acquires information about taxpayers.

The third restrictive provision added by RRA 98 is section 7525. Section 7525(a)(1) provides that a taxpayer may keep secret from the Service any communications made to a federally authorized tax practitioner (“FATP”) “to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.” Academic and practitioner commentary on section 7525 has been extensive.⁶⁶⁸ I will not add much to it here except to note that the

663. *Id.*

664. S. REP. NO. 105-174, at 77 (1998).

665. *Id.* at 77.

666. Treas. Reg. § 301.7602-2(f)(5) (statute “does not apply to any contact with any office of any local, state, Federal or foreign governmental entity”).

667. *See id.* § 301.7602-2.

668. For academic commentary see generally Steve R. Johnson, *Tax Advisor-Client Privilege:*

provision is a blatant slap at the Service's information-gathering powers since it is only good against the Service, not against any other government agency.⁶⁶⁹ Further, regardless of its actual utility, it is a significant symbolic shift to adversary process, if read as an attorney-client privilege analog. Historically, the attorney-client privilege subordinates the need for information to determine truth to the need for a sphere of autonomy in which taxpayers can conduct their affairs free from government interference.⁶⁷⁰ And it may well be that the statute's protection is more symbolic than real. The first extensive opinion on the matter, *United States*

An Idea Whose Time Should Never Come, 98 TAX NOTES TODAY 35-89 (1998) (Tax Analysts Doc. No. 98-7027) (critiquing House proposal); Louis F. Lobenhofer, *The New Tax Practitioner Privilege: Limited Privilege and Significant Disruption*, 26 OHIO N.U. L. REV. 243 (2000); Paul R. Rice, *The Tax Practitioner Privilege: A Sheep in Wolf's Clothing*, 98 TAX NOTES TODAY 148-66 (1998) (Tax Analysts Doc. No. 98-24228); Alicia K. Corcoran, Note, *The Accountant-Client Privilege: A Prescription for Confidentiality or Just a Placebo?*, 34 NEW ENG. L. REV. 697 (2000); Therese LeBlanc, Note, *Accountant-Client Privilege: The Effect of the IRS Restructuring and Reform Act of 1998*, 67 U. MO.-KAN. CITY L. REV. 583 (1999); Alyson Petroni, Note, *Unpacking the Accountant-Client Privilege Under I.R.C. Section 7525*, 18 VA. TAX REV. 843 (1999).

For practitioner commentary see generally Edward Brodsky, *The New Federal Accountant-Client Privilege*, 221 N.Y.L.J. 3 (1999); Howard S. Fisher, *The Limited Scope of the New Tax Adviser-Client Privilege*, 23 L.A. LAW. 20 (2000); Phillip W. Gillet, Jr., *The Federal Tax Practitioner-Client Privilege (I.R.C. Section 7525): A Shield to Cloak Confidential Communication or a Dagger for Both the Practitioner and the Client?* 70 U. MO.-KAN. CITY L. REV. 129 (2001); Robin L. Greenhouse & James L. Malone III, *Privilege in the IRS Audit Process—How and When Does it Apply?*, 91 J. TAX'N 133 (1999); Bruce Kayle, *The Tax Adviser's Privilege In Transactional Matters: A Synopsis and A Suggestion*, 54 TAX LAW 509 (2001); Terry L. Lantry, *Be Careful What You Ask For, You May Get It: With the Client-Accountant Privilege You May Have Gotten Less Than You Thought*, 77 TAXES, June 1999, at 31; Michael M. Lloyd, *The New Federal Accountant-Client Privilege: A Taxpayer Protection or a Toothless Tiger?*, in FEDERAL BAR ASSOCIATION SECTION OF TAXATION REPORT 1 (Summer 1999); Dan L. Mendelson et al., *The New CPA-Client Confidentiality Privilege*, 29 TAX ADVISOR 676 (1998); Burgess J.W. Raby & William L. Raby, *The CPA Tax Practice Privilege—Less Than Meets the Eye*, 97 TAX NOTES TODAY 210-55 (1997) (Tax Analysts Doc. No. 97-29757) (critiquing House proposal); William L. Raby & Burgess J.W. Raby, *Tax Practitioners and Burden of Proof*, 98 TAX NOTES TODAY 156-71 (1998) (Tax Analysts Doc. No. 98-25530); Lee A. Sheppard, *What Tax Advice Privilege?* 98 TAX NOTES TODAY 128-3 (1998) (Tax Analysts Doc. No. 98-21218); Christopher S. Rizek, *When Is Tax Practice 'Legal'?*, LEGAL TIMES, July 5, 1999, at § 24.

669. See S. REP. NO. 105-174, at 70 (1998) (stating that the privilege "should be available in noncriminal proceedings before the IRS and in noncriminal proceedings in federal courts with respect to such matters where the IRS is a party"). Ironically, for all the rhetoric about how taxpayers have fewer rights than criminals, the statute does not protect communications against the Service in criminal proceedings, just civil ones.

670. The modern justification for the attorney-client privilege is basically an instrumentalist one preferring Autonomy to Truth. See, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Fisher v. United States*, 425 U.S. 391, 403 (1976); Edward J. Imwinkelried, *The Historical Cycle in the Law of Evidentiary Privileges: Will Instrumentalism Come into Conflict with the Modern Humanistic Theories?*, 55 ARK. L. REV. 241, 243 (2002).

v. *KPMG LLP*,⁶⁷¹ is widely viewed in the tax practitioner community as having reduced section 7525 to a nullity.⁶⁷² Regardless of its actual impact, however, the provision still indicates RRA 98's tendency to shift tax administration from inquisitorial to adversarial process in that it purports to protect Autonomy (the ability to confer with one's tax advisors) at the sacrifice of Truth (evidence to determine the "true" tax liability).

Much of the effect of the RRA 98 provisions on information-gathering cannot be measured because decisions to forgo certain information or certain sources of information are not captured in any database. A quick look at what data is available—the outcome of summons enforcement proceedings—shows no diminution in the Service's almost unbroken string of successful summons enforcement actions. For example, in 2002, the courts judged the appropriateness of a summons in 44 instances, mostly in the context of enforcement proceedings brought by the government but also in some motions to quash.⁶⁷³ In none of those proceedings did the Service fail to obtain judicial enforcement of its summons, although in 6 cases it had to settle for less than the full amount of information requested by the summons.⁶⁷⁴ In all other cases, however, the summons was fully enforced.⁶⁷⁵ Thus, to outward appearances, the core of the Service's inquisitorial powers—its power to gather the information it needs to determine taxes—remains intact after RRA 98.

V. CONCLUSION

Taxwriters and academics have given insufficient thought to what process model tax administration should follow. This article has argued that thinking about tax administration as an inquisitorial process is the most coherent and sensible approach to understanding the procedural aspects of the tax code puzzle and proposed reforms should be evaluated in that light. The justification for inquisitorial process is the need for the information that underpins voluntary compliance and the need to ensure that taxpayers properly determine and pay their true and proper tax liability. RRA 98 shows how reforms that attempt to promote autonomy

671. 237 F. Supp. 2d 35 (D.D.C. 2002).

672. See Lee A. Sheppard, *News Analysis: No Privilege for Tax Planning*, 2003 TAX NOTES TODAY 9-9 (2003) (Tax Analysts Doc. No. 2003-1290). The *KPMG* opinion is actually incoherent. It denies the § 7525 privilege for a tax opinion prepared by an accountant on the grounds that it was created to aid in the preparation of a tax return and so the taxpayer could not have the requisite intent to keep the document's contents confidential. See *KPMG*, 237 F. Supp. 2d at 42-43. The court then, without explanation, decided that the attorney-client privilege nonetheless applied to the exact same tax opinion, this time signed by a lawyer and not an accountant. See *id.* at 44.

673. See table *supra* note 159.

674. *Id.*

675. *Id.*

values through an adversary process paradigm are, literally, sense-less when applied to an existing inquisitorial regime. While there are limits, the Service and courts have choices in how they implement and execute the RRA 98 reforms. In light of the purpose and history of tax administration, and in light of the poor understanding of these matters by the RRA 98 taxwriters, the choices should be towards minimizing adversarial process aspects of the reforms in favor of interpretations more consistent with the historically inquisitorial process paradigm.

