NO. ___________

In The Supreme Court of the United States

LARRY E. TUCKER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1998, Congress enacted what it called the "Collection Due Process" ("CDP") provisions of the Internal Revenue Code at 26 U.S.C. §§ 6320 and 6330, providing for pre-collection hearings to be held before existing, unappointed employees of the IRS Office of Appeals. Over 300 Office of Appeals employees held over 50,000 CDP hearings in the fiscal year ended September 30, 2011. Given their powers to (1) decide underlying liability issues (the correct amount of tax), (2) enter into settlements of liability (either on hazards of litigation on the amount of underlying liability or on doubt as to full collectibility), (3) prevent proposed IRS levies, and (4) remove tax lien notices already filed by the IRS, are employees of the IRS Office of Appeals who hold CDP hearings and who issue determinations thereafter "inferior Officers" of the United States under the Appointments Clause of the Constitution (Art. II, sec. 2, cl. 2) such that they need to be appointed under its procedures?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Larry E. Tucker respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The opinion of the court of appeals for the D.C. Circuit (App. 1a-17a) is reported at 676 F.3d 1129. The opinion of the Tax Court on the Appointments Clause issue (App. 18a-103a) is reported at 135 T.C. 114. The opinion of the Tax Court on the cross motions for summary judgment (App.104a-141a) is at T.C. Memo. 2011-67, which is unofficially reported at 101 T.C.M. (CCH) 1307.

JURISDICTION

Judgment of the D.C. Circuit was filed on April 20, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II, Section 2, Clause 2 of the Constitution provides, in relevant part, that

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may

> by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The relevant statutes are set forth in the appendix. (App. 142a-150a)

STATEMENT OF THE CASE

This case concerns whether over 300 employees in the IRS -- Office of Appeals Settlement Officers and/or their Team Managers -- need to be appointed in conformity with the Appointments Clause. The problem is the current lack of political accountability of Congress, the President, and the Secretary of the Treasury for certain individuals -- sometimes unqualified by training and experience -- acting essentiality as statutory administrative judges within the IRS.

A. Facts of Larry Tucker's Case

Larry Tucker owed the IRS income taxes for the taxable years 1999 through 2003. In the summer of 2004, the IRS filed a notice of tax lien against Mr. Tucker for the 2000, 2001, and 2002 years and, under 26 U.S.C. §§ 6320 and 6330, offered him a "Collection Due Process" hearing concerning the lien notice. (App. 2a)

In 2005, an IRS Office of Appeals employee bearing the title "Settlement Officer" ("SO") held the hearing, at which Mr. Tucker did not object to the continued existence of the filed tax lien. Considering his maximum ability to pay, the SO proposed a "partial payment installment agreement" ("PPIA") of $316 per month for 116 months – the time left on the statute of limitations on collecting tax debts at 26 U.S.C. § 6502(a). This would produce total payments of $36,656 – a few hundred dollars less than full payment for all five years, but excluding further interest and penalties ordinarily accruable over that period. (App. 115a-117a) 26 U.S.C. § 6159 permits the IRS to enter into installment agreements. In 2004, Congress amended the section to permit PPIAs, as long as the IRS periodically obtained updated taxpayer financial information.

Mr. Tucker declined the PPIA, but instead submitted to the SO an "offer in compromise" ("OIC") under 26 U.S.C. §7122 based on doubt as to collectability. In it, he proposed fixing his liability at exactly $36,772, paying it in monthly installments of $317 over 116 months. In January 2006, the SO rejected the OIC, when she and her "Appeals Team Manager" issued to Mr. Tucker a notice of determination upholding the lien filing. (App. 117a-118a)

In turn, pursuant to 26 U.S.C. § 6330(d), Mr. Tucker appealed to the United States Tax Court. In July 2006, the IRS' lawyer successfully moved to remand the matter to the Office of Appeals, stating that "[t]he settlement officer erred as a matter of law in rejecting petitioner's offer for the stated reason that amendment of I.R.C. § 6159 to permit partial payment installment agreements renders obsolete deferred payment offers in compromise." (App. 119a)

In September 2006, a different SO working for the same Team Manager issued a supplemental notice of determination, again denying the OIC, and stating that (1) a PPIA was more in the IRS' interest than an OIC because, should Mr. Tucker's income increase, the IRS might be able to increase the monthly payment and (2) Mr. Tucker dissipated $44,700 that he had placed into a securities account in early 2003. (App. 119a-123a, 136a) The dissipated assets ground for rejecting the OIC was under the authority of the Internal Revenue Manual's instructions to IRS employees that they had discretion to reject an OIC when the sum of the amount that was currently projected for reasonable collection potential plus dissipated assets exceeded the total amount currently owed. Internal Revenue Manual ("IRM") §§ 5.8.1.1.3 (Mar. 16, 2010) and 5.8.5.4 (Sept. 1, 2005).

In 2007, the IRS moved for summary judgment that in the supplemental notice of determination, the SO and her Team Manager did not abuse their discretion in rejecting the OIC. (App. 124a) Responding to a cross motion for summary judgment filed by Mr. Tucker, the IRS lawyer later (1) admitted that the first ground relied on by the second SO was wrong as not reflecting IRS policy and (2) argued that, on the second ground, even assuming for purposes of summary judgment that Mr. Tucker may have later used $21,000 originally placed into the securities account for necessary living expenses (which would make them not "dissipated assets"), any error the SO made in the calculating "dissipated assets" was "harmless". (Tax Court Doc. 46, at 7-9)

During the Tax Court proceeding, Mr. Tucker argued that (1) the determination in the supplemental notice rejecting his OIC was an abuse of discretion and (2) the SO and/or her Team Manager were not competent to hold CDP hearings and issue notices of determination because they had not been, but were required to be, appointed in the manner required by the Constitution's Appointments Clause, Art. II, sec. 2, cl. 2. (App. 4a)

As used in this petition for certiorari (and by the courts below), "appointed" means the use of the procedures applicable to "Officers of the United States" under the Appointments Clause. As of September 30, 2011, the IRS had 88,308 full-time employees; IRS Data Book, 2011, Table 30, available at www.irs.gov; of whom only the Commissioner, the Chief Counsel, and the National Taxpayer Advocate were "appointed". 26 U.S.C. § 7803(a)(1)(A) , (b)(1), and (c)(1)(B)(ii). All other IRS employees, including the Office of Appeals employees at issue in this case, function under delegation orders descending, often under multiple levels of delegation, from the Secretary of the Treasury. (App. 83a-84a) None of these other IRS employees was "appointed". Rather, they were merely "employed" by the Commissioner under his authority at 26 U.S.C. § 7804 to "employ such number of persons as the Commissioner deems proper for the administration and enforcement of the internal revenue laws." The government makes no argument that the Commissioner is a person who could validly appoint an "Officer of the United States" under the Appointments Clause.

In a 2010 opinion (App. 18a-103a), the Tax Court ruled that the SO and her Team Manager were not constitutional "Officers", so need not be appointed. In a separate 2011 opinion (App. 104a-141a), the Tax Court granted the IRS summary judgment, although first concluding that for purposes of applying the IRM dissipated assets provision, Mr. Tucker could not have dissipated more than about the $14,000 that he owed the IRS when he lost the assets, but this was still a harmless error. (App. 138a-139a) Despite the IRS lawyer's concession, the court also affirmed the SO's ruling that she could reject an OIC on the ground that the IRS might receive more under a PPIA providing initially for the same monthly payment amount. (App. 139a-141a)

Mr. Tucker appealed both Tax Court rulings to the Court of Appeals for the D.C. Circuit, which (1) held that neither SOs nor their Team Managers need to be appointed and (2) affirmed the grant of summary judgment. (App. 1a-17a)

This petition for certiorari is limited to the Appointments Clause issue. If an Appointments Clause violation is found, Mr. Tucker requests that the opinions below be vacated and the case be remanded for consideration of an appropriate remedy – most likely a further remand to the Office of Appeals for an appointed SO and/or Team Manager to provide a new hearing concerning his

OIC. See *Ryder v. United States*, 515 U.S. 177 (1995) (similar remedy given).

B. The IRS Office of Appeals Prior to 1998

For several decades prior to 1998, the IRS was largely divided into two main pieces: the Examination Division and the Collection Division. Lawyers for both Divisions worked under a third IRS function, the IRS' Chief Counsel's Office – either in field offices or in the National Office (where policy is set). The purpose of the IRS Office of Appeals in those days was essentially to review the work of the Examination Division employees (most of whom bore the title Revenue Agent ("RA")), either before or after a "notice of deficiency" was issued to the taxpayer under 26 U.S.C. § 6212(a). A superior of the RA would issue "notices of deficiency" that proposed the assessment of a "deficiency". A "deficiency" is, essentially, the amount by which a return understates the correct tax. 26 U.S.C. § 6211(a). A "notice of deficiency" is also the original "ticket to the Tax Court" under 26 U.S.C. § 6213(a) through which taxpayers could request a pre-assessment hearing there on the correctness of the IRS' notice of deficiency position.

The Office of Appeals existed to provide taxpayers informal conferences, with the goals of (1) giving a fresh look at and (2) settling as many cases involving proposed deficiency assessments as possible – based on hazards of litigation. For this reason, when a matter was referred to the Office of Appeals, that office had sole settlement jurisdiction, exclusive of the Examination Division and IRS lawyers. 26 CFR § 601.106 (last amended in 1987 by 52 Fed. Reg. 38406); Rev. Proc. 87-24, 1987-1 C.B. 720 (authority to settle Tax Court cases).

The Office of Appeals was (and still is) an independent IRS function, reporting only to the Commissioner. IRS Data Book, 2011, *supra*, inside back cover, chart of IRS organization. Before 1998, Office of Appeals employees bearing the title "Appeals Officer" ("AO") reported to Appeals Team Managers. In the unusual occurrence that an AO was not sure of agency policy on a legal matter, the AO could request legal advice from IRS lawyers. The Office of Appeals did not have its own separate lawyers. Where the legal advice was in the form of "technical advice" from IRS National Office lawyers and was favorable to a taxpayer, the AO had to follow it, but where the technical advice was adverse to a taxpayer, the AO could disregard the advice as potentially wrong or settle on hazards of litigation. 26 CFR § 601.106(f)(9)(viii)(c).

In 1996, the Office of Appeals first began reviewing a very limited number of Collection Division Revenue Officer ("RO") actions under a new "Collection Appeals Program" ("CAP"). The IRS expanded CAP only a year later. H.R. (Conf.) Rep. 105-599, 105th Cong., 2d Sess. 291 (Jun. 24, 1998).

In 2002, then-IRS Commissioner Charles Rossotti testified that

> until relatively recently, IRS Appeals dealt with few collection issues. It began moving

> toward post-collection work in the 1990s when a number of programs were established to ensure taxpayers had the right to dispute actions, such as levies and liens. At the same time, we began hiring settlement officers (former revenue officers with collection background) to handle these cases.

Testimony to the Joint Committee on Taxation Annual Joint Review Progress Report on the Internal Revenue Service Restructuring and Reform Act of 1998 (May 14, 2002) at para. 97, reproduced at 2002 TNT 94-19 (May 15, 2002).

C. **The IRS Office of Appeals After 1998 and Collection Due Process Hearings**

During the 1990s, taxpayers complained that the occasional presence of Examination Division personnel and/or IRS lawyers at Office of Appeals conferences created the appearance that the Office of Appeals was not really independent. Taxpayers also complained about ROs often not exercising good judgment in collection actions – particularly in levies and seizures.

As to collection, this Court had long ago held that the IRS was treated specially under the Due Process Clause. Unlike private creditors, who may not take property without first obtaining a court judgment from an appointed officer (a judge), in *Phillips v. Commissioner*, 283 U.S. 589 (1931), this Court stated:

> The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where . . . adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. Property rights must yield provisionally to governmental need.

Id., at 595 (footnotes and citations omitted).

Prior to 1998, thus, ROs could (without any check except the limited CAP program) levy on property within weeks after taxes were assessed. 26 U.S.C. §§ 6303, 6321, and 6331. ROs could also, at will, improve the IRS' priority as a creditor by filing a public notice of federal tax lien – a notice comparable in effect to a court judgment. 26 U.S.C. § 6323(a) and (f).

In the Internal Revenue Service Restructuring and Reform Act of 1998 ("RRA '98"), Pub. L. 105-206, 112 Stat. 685, Congress made the Office of Appeals more independent – including naming it for the first time in statutes. Congress also decided to check potential RO collection abuses through newly-created so-called Collection Due Process ("CDP") hearings. The Senate Finance Committee wrote:

> The Committee believes 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.

> Accordingly, the Committee believes that the IRS should afford taxpayers adequate notice of collection activity and a meaningful hearing before the IRS deprives them of their property . . . . The Committee believes that the following procedures designed to afford taxpayers due process in collections will increase fairness to taxpayers.

S. Rep. 105-174, 105th Cong., 2d Sess. 67 (Apr. 22, 1998).

Congress made CDP hearings available either right before or right after two potentially devastating IRS notices – a notice of intention to levy (threatening a first levy within 30 days thereafter) or a notice of a recent filing of a tax lien. 26 U.S.C. §§ 6320 and 6330. Congress gave the hearings to unappointed employees of the Office of Appeals.

RRA '98 for the first time named "appeals officers", gave them record-gathering and adjudicative powers, and allowed them to issue notices of determination addressing the following areas as part of the CDP hearings: (1) the applicability of "appropriate spousal defenses" (i.e., whether 26 U.S.C. § 6015 relieved a spouse of joint and several income tax liability), (2) "challenges to the appropriateness of collection actions" (i.e., whether a levy should go forward or a notice of lien should be removed), (3) "offers of collection alternatives" (e.g., installment agreements or OICs), and (4) in certain circumstances, "challenges to the existence or amount of the underlying tax liability for any tax period" (e.g., whether an item was properly includible in income or deductible for income tax purposes or the value of property for estate or gift tax purposes) – all without limitation as to the amount in controversy. 26 U.S.C. §§ 6320(c) and 6330(c)(2).

Congress instructed that "[t]he appeals officer shall at the [CDP] hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met." 26 U.S.C. § 6330(c)(1). Congress required that "[t]he determination by an appeals officer . . . take into consideration . . . whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary." 26 U.S.C. § 6330(c)(3)(C). Congress guaranteed that the CDP hearing would be conducted by an impartial Appeals "officer or employee who has had no prior involvement with respect to the unpaid tax." 26 U.S.C. §§ 6320(b)(3) and 6330(b)(3).

Outside CDP, Congress also required that an "appeals officer" "is regularly available within each state." §3465(b) of RRA '98, 112 Stat. 768.

RRA '98 provided that in the forthcoming reorganization of the IRS (completed in 2000), to "ensure an independent appeals function within the Internal Revenue Service" there should be a "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." §1001(a)(4) of RRA '98, 112 Stat. 689. Although it did not amend its regulations at 26 CFR §601.106 to reflect this provision, the IRS adopted Revenue Procedures that severely limited the input of collection employees (ROs), audit employees (RAs), and IRS lawyers in saying anything substantive to Office of Appeals employees. See Rev. Proc. 2012-18, 2012-10 I.R.B. 455, and IRS Chief Counsel Notice 2012-010 (May 10, 2012), reproduced at 2012 TNT 93-42 (providing further instructions to IRS lawyers on ex parte contacts). As a result, ROs, RAs, and IRS lawyers no longer appear at Office of Appeals hearings and conferences.

Unlike taxpayers, the IRS may not "appeal" to any court an adverse CDP determination. Further, should IRS collection employees later feel that a taxpayer's financial circumstances have changed, those employees cannot take unilateral action, but must approach the Office of Appeals, which retains jurisdiction over altering its collection determinations. 26 U.S.C. § 6330(d)(2). Thus, if a CDP hearing employee in the Office of Appeals denied the IRS the ability to levy, that determination effectively functions as an injunction against the IRS, which the IRS may only seek to alter by showing changed circumstances to the same or another CDP hearing employee.

The Chief of the Office of Appeals has delegated to AOs and SOs the authority "to conduct hearings and make [CDP] determinations" and to Appeals Team Managers the authority "[t]o review and approve" such determinations. Delegation Order Appeals-193-1, IRM Exhibit 8.22.4-1 (Mar. 16, 2010).

"The formal hearing procedures required under the Administrative Procedure Act, 5 U.S.C. §551 et seq., do not apply to CDP hearings." 26 CFR § 301.6330-1(d)(2)(A-D6). While CDP hearing are not transcribed, they may be audio recorded; *Keene v. Commissioner*, 121 T.C. 8 (2003); and taxpayers sometimes bring witnesses. *Swann v. Commissioner*, T.C. Memo 2003-70, 85 T.C.M. (CCH) 1006. Prior to the conference, as happened in Mr. Tucker's case, it is typical for an SO to at least request that the taxpayer prepare and submit, under penalties of perjury, an IRS Form 433-A or 433-B setting out the taxpayer's assets, income, and expenses, together with voluminous supporting documentary attachments.

The Tax Court generally reviews the Appeals personnel's CDP rulings by limiting the taxpayers' arguments (except on certain procedural defects) to those made during the CDP hearing. *Giamelli v. Commissioner*, 129 T.C. 107 (2007). The Tax Court (following legislative history) reviews CDP determinations on an abuse of discretion standard, but reviews underlying liability determinations de novo. *Sego v. Commissioner*, 114 T.C. 604, 610 (2000). All three Circuit Courts to have faced the issue have held that, at least as to collection issues, Tax Court review is limited to the administrative record created at the CDP hearing. *Keller v. Commissioner*, 568 F.3d 710, 718 (9th Cir. 2009); *Murphy v. Commissioner*, 469 F.3d 27, 31 (1st Cir.

2006); *Robinette v. Commissioner*, 439 F.3d 455, 459 (8th Cir. 2006), rev'g 123 T.C. 85 (2004).

As of September 30, 2011, the Office of Appeals employed 865 AOs. IRS Data Book, 2011, *supra*, Table 30. Generally, SOs conduct nearly all CDP hearings – consulting AOs only on any underlying liability issue presented. (App. 69a) As of September 30, 2006, the IRS Office of Appeals employed 310 SOs. National Taxpayer Advocate 2006 Annual Report to Congress (December 31, 2006) at Vol. I, p. 277, available at www.irs.gov. No more recent statistics on SOs have been published. There are no published statistics on how many "Appeals Team Managers" the IRS employs. In the fiscal year ended September 30, 2010, the Office of Appeals closed 142,552 cases, of which 51,832 were CDP hearings. IRS Data Book, 2011, *supra*, Table 21.

D. The Tax Court's Appointments Clause Opinion

The Tax Court 2010 opinion in this case held that "established by Law" in the Appointments Clause likely requires Congress to have enacted a statute with the intent of creating an office. (App. 82a-92a) The Tax Court noted that within 26 U.S.C. §§6320 and 6330 – the CDP provisions – there are separate references to the hearings being held by the "Office of Appeals", the "appeals officer", and an impartial "officer or employee" of the Office of Appeals. (App. 84a-86a) "The statute thus does not create any positions for the personnel who would perform the CDP function but rather refers to them in a most diffuse manner." (App. 86a) The Tax Court held that even the Treasury regulations in this case did not set up an officer, merely the Office of Appeals. (App. 88a-92a) Thus, the Tax Court said, no office was established by law for purposes of the Appointments Clause.

This Court has held that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). In the alternative, the Tax Court also held that SOs and/or their Team Managers did not exercise "significant authority".

With regard to significant authority, the Tax Court – citing this Court's opinion in *Freytag v. Commissioner*, 501 U.S. 868, 882 (1991), involving whether Tax Court Special Trial Judges ("STJs") are "inferior Officers" under the Clause -- stated that "a position that is invested with broad adjudicative powers, like the position of STJ, may be an office if the incumbent can act free of supervision or has the final say within the agency." (App. 99a) But, the Tax Court felt that in collection matters in CDP, the SOs and Team Managers reviewed

> only a particular collection episode -- a given notice of lien or notice of proposed levy. . . . [I]n the absence of a written agreement with the taxpayer, the Office of Appeals (not the appeals officer) retains jurisdiction to reconsider and overturn its personnel's

> determinations with respect to collection action. Sec. 6330(d)(2). If Mr. Tucker's circumstances were to change, and it became clear that he could never repay the IRS, nothing would prevent collection personnel from relenting or prevent the Office of Appeals from holding a supplemental CDP hearing and revising its personnel's prior determination to uphold the tax lien.

(App. 100a) For underlying liability issues, the Tax Court noted that in the absence of a binding agreement entered into by the CDP hearing officer (i.e., an OIC), in the event that the SO ruled against the taxpayer, her ruling could later be abandoned or settled by IRS lawyers or Examination people on reconsideration or in settlement of a case. (App. 100a-101a) In those senses, the Tax Court did not think SO CDP rulings were "final" within the agency. (App. 101a)

The Tax Court also cited the informality of CDP hearings as indicative of the non-officer status of hearing conductors. (App. 101a-102a)

The Tax Court also noted the historic lack of appointment in the domestic revenue arm of the Treasury Department – the IRS – as opposed to the Customs Service. (App. 53a)

Finally, the Tax Court stated that the authority of CDP hearing officers

> does not involve an authority more "significant" than the authority exercised by other personnel important to tax

> administration (whether the Chief of the Office of Appeals (their superior), other high-ranking officials in the IRS, or many internal revenue collection personnel over the past 200 years) or as significant as the authority exercised by ALJs in many other agencies. To survey these thousands of employees important to the administration of law and single out IRS "appeals officers" as somehow requiring constitutional appointment would be unwarranted.

(App. 103a)

E. The D.C. Circuit Affirms on Different Reasoning

The D.C. Circuit, while affirming the Tax Court's holding that the Office of Appeals personnel were not "inferior Officers", abandoned nearly all of the Tax Court's reasoning.

The D.C. Circuit decided to "bypass" (App. 6a) whether SOs, AOs, or Team Managers were "established by Law" after 1998. Noting the longstanding nature of these positions before their mention in RRA '98, the D.C. Circuit expressed deep reservations on this issue, stating:

> [I]t would seem anomalous if the Appointments Clause were inapplicable to positions extant in the bureaucratic hierarchy, and to which Congress assigned "significant authority," merely because neither Congress nor the executive branch had formally created the positions. See Appellant's Br. 35-36;

> *Tucker*, 135 T.C. at 158. See also DOJ Office of Legal Counsel, Officers of the United States for Purposes of the Appointments Clause, 2007 OLC LEXIS 3, at *118 (Apr. 16, 2007) ("[T]he rule for which sorts of positions have been 'established by Law' such that they amount to offices subject to the Appointments Clause cannot be whether a position was formally and directly created as an 'office' by law. Such a view would conflict with the substantive requirements of the Appointments Clause.").

(App. 7a)

Next, trying to systematize this Court's officer/employee case law, the D.C. Circuit stated that:

> the main criteria for drawing the line between inferior Officers and employees not covered by the clause are (1) the significance of the matters resolved by the officials, (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions. In light of *Freytag* we can assume here that the issue of a person's tax liability is substantively significant enough to meet factor (1), in which case degrees of discretion and finality will ultimately be determinative.

(App. 8a) Without discussion, the D.C. Circuit disagreed with the Tax Court's lengthy lack of "finality" analysis and simply noted "the effective finality of Appeals employees' decisions within the executive branch". (App. 9a). Thus, the only question left under the D.C. Circuit's analysis was whether CDP hearing officers exercised sufficient "discretion" in making underlying liability and collection determinations.

The D.C. Circuit cited six reasons for not finding enough discretion in underlying liability determinations: (1) the Office of Appeals' employees' being instructed to request legal advice from IRS lawyers on "novel or significant issues", (2) their being advised to seek "Technical Advice" from IRS National Office lawyers on complex issues or ones where there appeared lack of IRS uniformity, (3) their being required to follow taxpayer-favorable legal advice given under (2) or (3) above, (4) their being advised to follow Office of Appeals settlement guidelines, (5) the requirement that any OIC they agree to be subject to IRS quality review, or, in the case of $50,000 or more of liability being settled, that they obtain an approving opinion from IRS lawyers, and (6) that any "closing agreement" under 26 U.S.C. § 7121—an agreement usually settling particular items; see., e.g., the closing agreement in *Hopkins v. Commissioner*, 120 T.C. 451, 453-54 (2003) – could only be done if the Treasury Secretary did not revoke his delegations to Office of Appeals employees to enter into such agreements. (App. 9a-11a)

The D.C. Circuit also noted, that, in contrast to *Freytag*'s STJs, while it did not think this determinative, the CDP hearings were conducted using informal procedures and the "district director" was not always represented at the hearings. (App. 11a-12a).

With respect to the discretion exercised in collection determinations, the D.C. Circuit held that an employee could do those tasks, merely saying:

> it is plain that the authority they exercise in the pure collections aspects of CDP hearings is not enough. As to those functions, the government is simply a creditor, and accordingly Appeals employees must make decisions based largely on the same mundane and practical concerns that any creditor faces. They include, of course, a potential need to compromise even the amount to be collected, but Appeals acts in such matters under the general duties discussed above—to seek advice from the Office of Chief Counsel or an Associate Chief Counsel, and to obtain review from the General Counsel for any decisions involving monetary compromise, and of course is subject to Secretarial monitoring.

(App. 12a)

REASONS TO GRANT THE PETITION

In *Freytag v. Commissioner*, *supra*, and *Buckley v. Valeo*, *supra*, this Court held that Tax Court Special Trial Judges and members of the Federal Election Commission, respectively, were "Officers of the United States", required to be appointed in conformity with the procedures of the Appointments Clause. In its analysis of whether IRS Office of Appeals SOs and/or their Team Managers were officers, the D.C. Circuit distinguished *Freytag* on grounds that do not appear to be of constitutional significance and in apparent ignorance of some of the facts of how Tax Court STJs and SOs operate.

Mr. Tucker understands that, usually, this Court does not correct errors of Courts of Appeals in the absence of Circuit splits. But, in the Appointments Clause case of *Freytag*, where there was no Circuit split, this Court broke that rule. It should do so again here. This case is even more important – and affects far more taxpayers -- than *Freytag*.

The Tax Court currently has only five STJs. The Tax Court's website indicates that in 2011, STJs collectively[1] issued only 77 opinions. By contrast, over 300 SOs are needed to hold over 50,000 CDP hearings and issue written notices of determination thereafter (the CDP equivalent of court opinions). Moreover, the areas that are the subject of CDP hearings are even broader than the areas that comprised the Tax Court's jurisdiction when *Freytag* was decided.

Buckley v. Valeo included an Appointments Clause challenge to the Federal Election Commission ("FEC"). In addition to holding that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed'"; 424 U.S., at 126; the Court held that

[1] In 2011, there were only four STJs, Judges Armen, Carluzzo, Dean, and Panuthos.

FEC members were “Officers”, in part, because of their administrative functions, including

> rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself. . . . [E]ach of these functions . . . represents the performance of a significant governmental duty exercised pursuant to a public law. . . . These administrative functions may therefore be exercised only by persons who are “Officers of the United States."

Id., at 140-141.

Freytag is concededly the most relevant opinion to Mr. Tucker’s case. So, below is a detailed comparison -- between *Freytag* and this case -- of all of the factors discussed by this Court in making the officer determination -- noting as to each factor, what the D.C. Circuit said (if anything) and whether other opinions of this Court indicate that the factor is necessary for officer status.

Freytag involved a challenge to STJs holding hearings and issuing proposed findings of fact and opinion in complex tax shelter cases. At the time of *Freytag* (1991), 26 U.S.C. § 7443A(b) allowed the Tax Court Chief Judge to assign to STJs (1) any declaratory judgment proceeding, (2) any proceeding under section 26 U.S.C. § 7463,[2] (3) any proceeding where neither the deficiency nor claimed overpayment exceeded $10,000, and (4) “any other

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[2] The jurisdictional limit for such cases then was that the deficiency or claimed overpayment not exceed $10,000.

proceeding which the chief judge may designate".[3] In the first three kinds of proceedings – but not the fourth (the one the case involved) -- the Code authorized the STJ to "make the decision of the court". 26 U.S.C. § 7443A(c). In the fourth kind of proceeding, the STJ merely proposed an opinion, which was subject to review by a Presidentially-appointed Tax Court judge under then Tax Court Rule 183.

Most of the dispute in this Court turned on whether, if STJs were "inferior Officers", the Chief Judge of the Tax Court was authorized to appoint them under the Appointments Clause by virtue of being the "Head[] of [a] Department[]" or whether the Tax Court was one of the "Courts of Law" under the Clause. This Court unanimously concluded that there was no Appointments Clause violation, though the Justices split on their reasoning.

But all nine Justices agreed that STJs were "Officers of the United States" under the Clause.[4] The Court had to address this question, since the government argued that an STJ, when acting under the catch-all "any other proceeding" authority of 26 U.S.C. § 7443A(b)(4), was not acting as an officer. Because of the centrality of what this Court said to Mr. Tucker's case, the text of this Court's discussion of this issue is quoted below in full:

[3] Paragraph (4) of 26 U.S.C. § 7443A(b) has since been redesignated as paragraph (7), as Congress has since given STJs power to hear and decide additional proceedings.

[4] *Id*. at 901 (Scalia, J., concurring) ("I agree with the Court that a special trial judge is an 'inferior Officer' within the meaning of this Clause.").

We turn to another preliminary issue in petitioners' Appointments Clause challenge. Petitioners argue that a special trial judge is an "inferior Officer" of the United States. If we disagree, and conclude that a special trial judge is only an employee, petitioners' challenge fails, for such "lesser functionaries" need not be selected in compliance with the strict requirements of Article II. *Buckley* v. *Valeo*, 424 U.S. 1, 126, n. 162 (1976).

The Commissioner, in contrast to petitioners, argues that a special trial judge assigned under §7443A(b)(4) acts only as an aide to the Tax Court judge responsible for deciding the case. The special trial judge, as the Commissioner characterizes his work, does no more than assist the Tax Court judge in taking the evidence and preparing the proposed findings and opinion. Thus, the Commissioner concludes, special trial judges acting pursuant to §7443A(b)(4) are employees rather than "Officers of the United States."

"Any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II]." *Buckley*, 424 U.S. at 126. The two courts that have addressed the issue have held that special trial judges are "inferior Officers." The Tax Court so concluded in *First Western Govt. Securities, Inc.* v. *Commissioner*, 94 T.C. 549, 557-559 (1990), and the Court of Appeals for the Second Circuit in *Samuels, Kramer & Co.* v. *Commissioner*, 930 F.2d 975, 985 (1991), agreed. Both courts considered the degree of authority exercised by the special trial judges to be so "significant" that it was inconsistent with the classifications of "lesser functionaries" or employees. Cf. *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 352-353 (1931) (United States commissioners are inferior officers). We agree with the Tax Court and the Second Circuit that a special trial judge is an "inferior Officer" whose appointment must conform to the Appointments Clause.

The Commissioner reasons that special trial judges may be deemed employees in subsection (b)(4) cases because they lack authority to enter a final decision. But this argument ignores the significance of the duties and discretion that special trial judges possess. The office of special trial judge is "established by Law," Art. II, § 2, cl. 2, and the duties, salary, and means of appointment for that office are specified by statute. See *Burnap* v. *United States*, 252 U.S. 512, 516-517 (1920); *United States* v. *Germaine*, 99 U.S. 508, 511-512 (1879). These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute. Furthermore, special trial judges perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.

Even if the duties of special trial judges under subsection (b)(4) were not as significant as we and the two courts have found them to be, our conclusion would be unchanged. Under §§7443A(b)(1), (2), and (3), and (c), the Chief Judge may assign special trial judges to render the decisions of the Tax Court in declaratory judgment proceedings and limited-amount tax cases. The Commissioner concedes that in cases governed by subsections (b)(1), (2), and (3), special trial judges act as inferior officers who exercise independent authority. But the Commissioner urges that petitioners may not rely on the extensive power wielded by the special trial judges in declaratory judgment proceedings and limited-amount tax cases because petitioners lack standing to assert the rights of taxpayers whose cases are assigned to special trial judges under subsections (b)(1), (2), and (3).

This standing argument seems to us to be beside the point. Special trial judges are not inferior officers for purposes of some of their duties under §7443A, but mere employees with respect to other

> responsibilities. The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution. If a special trial judge is an inferior officer for purposes of subsections (b)(1), (2), and (3), he is an inferior officer within the meaning of the Appointments Clause and he must be properly appointed.

Id., at 880-882.

The following compares an STJ acting in a proceeding under 26 U.S.C. § 7443A(b)(1), (2), or (3) with the Office of Appeals SO or Team Manager acting in a CDP hearing, discussing all factors cited by this Court in the above quote as supporting the conclusion that STJs were officers:

Position "established by Law": Both the positions of STJ and "appeals officer" are mentioned in the Code and given duties to perform. Although the D.C. Circuit herein "bypass[ed]" deciding whether the STJs were "established by law" under the Clause, it expressed skepticism of the Tax Court's holding that no position was established by law. While not cited by the D.C. Circuit, three other Circuits have even found adjudicative positions to be "inferior Officers" for purposes of the Clause where the positions were only created by regulation and delegation from a Cabinet Secretary – i.e., not by a statutory reference. *Willy v. Admin. Review Bd.*, 423 F.3d 483, 491 (5th Cir. 2005) (Dept. of Labor Administrative Review Board members); *Varnadore* *v. Sec. of Labor*, 141 F.3d 625, 631 (6th Cir. 1998) (same); *Holtzclaw v. Sec. of Labor*, 172 F.3d 872 (6th Cir. 1999) (same); *Pennsylvania v. HHS*, 80 F.3d 796, 800 (3d Cir. 1996) (Dept. of HHS Appeals Board members). In this case, Congress should not be able to evade the substantive requirements of the Clause merely by imprecisely giving a name to an employee to whom it delegates significant authority in the United States Code.[5]

Statutory duties: STJs and Office of Appeals personnel holding CDP hearings are both given substantially similar duties that can only be exercised by an officer. They are also given duties that may not have to be exercised by an officer. In *Freytag*, this Court held that the STJs' duties to hear and enter the decision in small-dollar income, estate, and gift tax deficiency cases in the Tax Court under 26 U.S.C. § 7443A(b)(2) and (3) were alone duties that could only be exercised by officers. As the D.C. Circuit noted, in the CDP area, Office of Appeals personnel are given the authority to make identical underlying tax liability determinations. 26 U.S.C. § 6330(c)(2)(B). So, for example, both STJs and the CDP Office of Appeals personnel could rule that (1) a charitable deduction in a particular amount was allowable for income tax purposes or (2) property owned by the decedent at death was worth a particular amount for estate tax purposes and did

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[5] See *State v. Kennon*, 7 Ohio St. 546, 557-558 (1857) ("The official or unofficial character of the defendants is to be determined, not by their name, nor by the presence or absence of an official designation, but by the nature of the functions devolved upon them.").

not qualify for the unlimited marital deduction. While in 1991, STJs only had this power for small-dollar cases ($10,000 and below) in the types of taxes as to which the Tax Court had deficiency jurisdiction (primarily income, estate, and gift taxes), the Office of Appeals CDP personnel have much more power, since they can rule without limit to (1) the amount in dispute; see, e.g., *Jones v. Commissioner*, T.C. Memo. 2007-142, 93 T.C.M. (CCH) 1312 ($14.8 million liability); or (2) the type of tax -- e.g., they can rule on underlying liability for trust fund recovery penalties under 26 U.S.C. § 6672 that the Tax Court did not have any jurisdiction to hear when *Freytag* was decided. See *Ginsberg v. Commissioner*, 130 T.C. 88, 92 (2008).

While STJs could hear and decide declaratory judgment proceedings, and CDP hearings do not involve declaratory judgments, the Office of Appeals personnel in CDP hearings have also been delegated extensive powers to decide collection issues and alternatives -- a much broader delegation of sovereign power than delegated to STJs when *Freytag* was decided.

The D.C. Circuit dismissed the CDP collection issues, saying: "Appeals employees must make decisions based largely on the same mundane and practical concerns that any creditor faces" (App. 12a). However, the D.C. Circuit ignores the IRS' powers going far beyond those of ordinary creditors. As this Court noted in *Phillips v. Commissioner*, *supra*, the IRS has special dispensation under the Due Process Clause to collect taxes before any court hearing. It may act through administrative levy or may administratively improve its priority against judgment creditors by filing a notice of federal tax lien. 26 U.S.C. § 6323(a) and (f). While CDP hearings are not required by the Due Process Clause, it was because of this Due Process exception, and the concern for abuse of this exception, that Congress set up CDP hearings. See H.R. (Conf.) Rep. 105-599, *supra*, at 263 ("The Senate Amendment establishes formal procedures designed to ensure due process where the IRS seeks to collect taxes by levy . . . . The due process procedures also apply after the federal tax lien attaches . . . .").

The IRS's administrative collection powers are significant governmental powers that private creditors lack, and so statutory administrative hearings on them should be held by a constitutional officer.

Freytag held that it was not important that, as to certain of their duties (drafting proposed opinions in "other proceeding[s]" under what was then 26 U.S.C. § 7443A(b)(4)), STJs may or may not have to be appointed. Therefore, it is also not important, as the D.C. Circuit pointed out (App. 10a), that as to certain OICs involving $50,000 or more of liability, an opinion from IRS counsel is also required for acceptance. 26 U.S.C. § 7122(b). Mr. Tucker concedes that such OICs need not be granted by an officer. But many of the other rulings in the CDP hearings must be made by an officer.

Discretion: This Court in *Freytag* noted the STJs' discretion as indicating officer status. The Office of Appeals hearing personnel in the CDP proceeding also possess considerable discretion. The statute obligates them to "take into consideration" both the issues that can be raised in such a hearing and "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary". 26 U.S.C. § 6330(c)(3). Further, except as to underlying liability determinations, Tax Court review of CDP notices of determination issued by Office of Appeals personnel is done under an "abuse of discretion" standard of review limited to issues raised at the Appeals hearing. *Giamelli v. Commissioner*, *supra*; *Sego v. Commissioner*, *supra*, at 610.

The crux of the D.C. Circuit's opinion appears to be that any discretion that CDP hearing personnel possess is too limited, since (1) such personnel are instructed to follow agency guidance and (2) occasionally, other IRS people (such as lawyers) might interfere with the discretion or revoke it (the Treasury Secretary's delegation of the ability to enter into closing agreements under 26 U.S.C. § 7121). (App. 9a-11a) The degree of independent discretion sought by the D.C. Circuit for officer status is one more appropriate to principal officer status than "inferior Officer" status.

In *Freytag*, *Morrison v. Olson*, 487 U.S. 654 (1988) (special prosecutor), and *Edmond v. United States*, 520 U.S. 651 (1997) (civilian military court judges), individuals were held inferior officers, even though their discretion was limited by, or they were under the control of, other constitutional officers. In

Freytag alone, while the Court did not note it, obviously, STJs followed Tax Court Rules of Practice and Procedure and Tax Court precedents in making their rulings (analogous to Office of Appeals guidance) and others at the Tax Court reviewed the STJs' work. See 26 U.S.C. § 7460(b) (allowing the Chief Judge 30 days to send the "report" [i.e., opinion] of any individual Tax Court judge to the full en banc Tax Court for review). Thus, the STJs' discretion was also limited along the same lines as CDP hearing personnel. Even the Department of Justices' Memorandum on the Appointments Clause (quoted by the D.C. Circuit at App.7a) notes that, under this Court's precedents, "'independent discretion' is not a necessary attribute of delegated sovereign authority". Department of Justice Office of Legal Counsel Memorandum Opinion for the General Counsels of the Executive Branch, "Officers of the United States for Purposes of the Appointments Clause" ("DOJ Opinion"), 2007 OLC LEXIS 3, 53-54.

Further, the D.C. Circuit's citation to the Technical Advice procedure by which Office of Appeals personnel's discretion might be limited by the pro-taxpayer views of IRS National Office lawyers seems quite a stretch. Research in LEXIS reveals that in 2011, the IRS only issued 8 Technical Advice Memoranda, of which only half were fully-favorable to the taxpayer – and it is not even clear any were issued to the Office of Appeals. This limitation is more theoretical than real.

And, in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 2012 U.S. App.

LEXIS 13757 (D.C. Cir. Jul. 6, 2012), the D.C. Circuit just held that Copyright Royalty Board judges setting copyright rates were not inferior, but principal officers – even though for a "novel material question of substantive law", they were required to obtain and follow the opinion of the Registrar of Copyrights, who was also allowed to review their final rulings for legal error. 17 U.S.C. § 802(f)(1). Despite an attempt to distinguish its holding in *Tucker*, it appears that there is confusion in the D.C. Circuit on the issue of agency legal opinions that this Court's review could correct.

The D.C. Circuit's view of the Office of Appeals as controlled by the rest of the IRS even conflicts with the view of the Chief of the Office of Appeals. A reporter recently wrote:

> IRS Appeals is sensitive to public perceptions that it may lack independence, the unit's chief, Christopher Wagner, said May 3, but he emphasized that Appeals personnel make their own determinations regardless of advice provided by the Office of Chief Counsel. . . .
>
> Wagner said Chief Counsel sometimes overlooks Appeals' goal of avoiding litigation. Appeals officers act in a manner somewhat similar to judges, in that they look at a case based on the evidence provided and consider appropriate hazards of litigation . . . .

Jeremiah Coder, "IRS Appeals Looks to Maintain Independence, Faces Longer Cycle Times", *Tax Notes Today*, May 4, 2012, 2012 TNT 87-2.

Ability to enter final decision: This Court in *Freytag* highly emphasized the STJs' ability to enter the decision of the Tax Court in declaratory judgment and certain small-dollar deficiency proceedings. As to small-dollar deficiency proceedings conducted under the elective small tax case provisions, neither party can appeal such decision; 26 U.S.C. § 7463(b); so the Tax Court's decision is final. Decisions entered by STJs in declaratory judgment proceedings and small-dollar deficiency cases not subject to a 26 U.S.C. § 7463 election become "final", unless appealed by the losing party to a Circuit Court of Appeal. 26 U.S.C. § 7482(a)(1).

The notice of determination issued in a CDP hearing is the final ruling of the agency before court review, and court review may be had only by an "appeal" filed by the taxpayer, not the IRS. 26 U.S.C. § 6330(d)(1). In this sense, the rulings of STJs and CDP hearing personnel are just as "final", and the D.C. Circuit correctly noted "the effective finality of Appeals employees' decisions within the executive branch". (App. 9a)

Salary: STJs are paid 90% of the salary of Presidentially-appointed Tax Court judges. 26 U.S.C. § 7443A(d). No statutory provision specifies SO or Team Manager salaries, but, clearly, they are paid civil servants.

Means of appointment: The Code sets out the means of appointment of STJs – i.e., by the Tax Court's Chief Judge. 26 U.S.C. § 7443A(a). In contract, no statute sets out a means of appointment for SOs or Team Managers. However, this is essentially the "established by law" issue repeated in a different form. As the DOJ Opinion observes:

> It is true that an individual not properly appointed under the Appointments Clause cannot technically be an officer of the United States . . . . But such a person may nevertheless be *required* to be appointed as prescribed by the Clause in order constitutionally to exercise his authority. A contrary conclusion would render the Appointments Clause a matter of etiquette or protocol, rather than one of the "significant structural safeguards of the constitutional scheme[.]" . . . . Under such a (tautological) reading, the Clause would require a certain means of appointment only for persons appointed by that means.

DOJ Opinion at 114-115 (citations omitted; emphasis in original).

Continuity of position: Neither STJs nor Office of Appeals personnel are temporary government workers. While none of their jobs has a fixed term, this did not seem to be of any concern to this Court in *Freytag*.

Powers to take testimony, conduct trials, and rule on admissibility of evidence: Under the rules of the Tax Court, STJs conduct trials at which they take testimony and rule on admissibility of evidence. Generally, the Federal Rules of Evidence apply to Tax Court trials; 26 U.S.C. § 7453, Tax Court Rule

143; but elective small tax case proceedings under 26 U.S.C. § 7463 are conducted as informally as possible consistent with orderly procedure, and any evidence deemed by the judge to have probative value is admissible. Tax Court Rules 174(b).

Holders of CDP hearings accept any proffered testimony or documents and decide what weight to give them. The Federal Rules of Evidence do not apply, as these are informal administrative proceeding. 26 CFR §301.6330-1(d)(2)(A-D6.) ("The formal hearing procedures required under the Administrative Procedure Act, 5 U.S.C. §551 et seq., do not apply to CDP hearings.")

The D.C. Circuit observed these differences and said:

> [W]e do not understand *Freytag* to suggest that mere informality of proceedings, or the absence of adversarial procedures, could justify denying "Officer" status to one whose powers would otherwise demand that classification. But the Court in *Freytag* may have taken the presence of those procedures as a signal from Congress of the weightiness of the substantive powers granted. That signal is missing here.

(App. 11a-12a). Surely, the D.C. Circuit speculates incorrectly on this point. One of the three types of cases in which the STJ may enter the decision of the Tax Court is an informally-conducted proceeding under 26 U.S.C. § 7463. 26 U.S.C. § 7443A(b)(2). This Court in *Freytag* did not even hint that such an informal proceeding deserved any less of an officer than the other, more formal, proceedings STJs could hear. And it would be very odd that "significant authority" would turn on such small differences in the manner in which facts and documents are gathered by the decision-maker. See also *Masias v. HHS*, 634 F.3d 1283 (Fed. Cir. 2011) (Vaccine Act special masters holding informal hearings under 42 U.S.C. § 300aa-12(c)(2) procedures are inferior officers).

Power to enforce compliance with discovery orders: An STJ can enforce compliance with discovery orders. By contrast, taxpayers do not have the right to discovery in CDP hearings. *Davis v. Commissioner*, 115 T.C. 35, 41-42 (2000). So, there can be no issue about the power to enforce compliance with CDP discovery orders addressed to the IRS. While power to enforce compliance with discovery orders is no doubt helpful in finding a person an officer, it is obviously not essential. In *Buckley v. Valeo*, this Court held that the FEC's power to issue advisory opinions on submitted proposed actions was alone a power that could only be held by an officer, yet there is no discovery in an advisory opinion ruling, either.

In sum, while not identical to STJs in all respects, SOs and Team Managers holding CDP hearings are so similar to STJs in all ways that appeared to matter to this Court in *Freytag* and its other precedents that any differences cannot be of constitutional significance.

Even though Mr. Tucker's case ended with an affirmance on an "abuse of discretion" standard, both the IRS and the courts conceded that there were numerous errors made by the CDP hearing officers – some quite serious. The ruling of the D.C. Circuit prevents political accountability for any substandard performance of Office of Appeals hearing personnel when they decide over 50,000 CDP cases a year. The public has a right to blame the President (or, if Congress delegates, the Treasury Secretary) for bad judges in the IRS.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 2012

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 6, 2012 Decided April 20, 2012

No. 11-1191

Larry E. Tucker,

Appellant,

v.

Commissioner of Internal Revenue,

Appellee

Appeal from the United States Tax Court

Carlton M. Smith argued the cause and filed the briefs for the appellant.

Teresa E. McLaughlin, Attorney, U.S. Department of Justice, argued the cause for the appellee. With her on the brief were *Tamara W. Ashford*, Deputy Assistant Attorney General, and *Teresa T. Milton,* Attorney.

Before: Sentelle, *Chief Judge,* Griffith, *Circuit Judge* and Williams, *Senior Circuit Judge.*

Opinion for the court filed by *Senior Circuit Judge* Williams.

Williams, *Senior Circuit Judge:* Taxpayer Larry Tucker appeals a judgment of the Tax Court rejecting two contentions: first, a constitutional claim that certain employees of the Internal Revenue Service's Office of Appeals are "Officers of the United States," so that their appointments must conform to the Constitution's Appointments Clause, art. II, § 2, cl. 2, and second, an argument that the employees in question abused their discretion in rejecting his proposed compromise of the collection of his tax liability. *Tucker v. Commissioner*, 135 T.C. 114 (2010) (rejecting constitutional claim); *Tucker v. Commissioner*, T.C. Memo. 2011-67, 2011 WL 1033849 (T.C. Mar. 22, 2011) (rejecting abuse of discretion claim and issuing judgment for the Commissioner). Because the authority exercised by the Appeals Office employees whose status is challenged here appears insufficient to rank them even as "inferior Officers," we reject the constitutional claim. And we find no abuse of discretion in those employees' decision in this case.

* * *

Tucker underpaid his federal income taxes by a total of over $24,000 over the period 1999-2003. With interest and penalties, his liability grew to over $35,000 by 2004, when the IRS sent him a "Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320" for years 2000, 2001, and 2002. Joint Appendix ("J.A.") 7. The hearing in question, called a collection due process or "CDP" hearing, is provided for in the IRS Restructuring and Reform Act of 1998. Pub. L. No. 105-206, § 3401, 112 Stat. 685, 746 (codified at 26 U.S.C. §§ 6320 (lien actions), 6330 (levy actions)). Such a hearing is an opportunity for a taxpayer to challenge the propriety of a pending tax lien or levy, to verify that a collection action against him is appropriate under the law, and to offer alternatives, one of which is a so-called offer-in-compromise or "OIC" (Tucker's preferred outcome). *Id.* §§ 6320(c), 6330(c)(2)(A). Challenges to underlying tax liability can also be raised at a CDP hearing, but only if the taxpayer did not receive statutory notice of the liability or did not otherwise have an opportunity to dispute it. *Id.* §§ 6320(c), 6330(c)(2)(B).

The 1998 statute calls for CDP hearings to take place in the Office of Appeals. *Id.* §§ 6320(b)(1), 6330(b)(1). Although no statute *created* that office, its existence is now reflected in various provisions of the Internal Revenue Code, such as the ones governing CDP hearings. See *Tucker*, 135 T.C. at 135-36 & n.49 (noting additional references). Besides providing for decision by an "officer or employee" of Appeals, the statute, in the interest of assuring a measure of independence between Appeals and other arms of the IRS, see § 1001(a)(4) of the 1998 Act, 112 Stat. at 689, specifies that the decisionmaker will be one with no prior involvement with the unpaid tax at issue, and directs the IRS to adopt rules against *ex parte* communications. 26 U.S.C. §§ 6320(b)(3), 6330(b)(3); Rev. Proc. 2000-43, 2000-2 C.B. 404 (to be superseded by Rev. Proc. 2012-18, effective May 15, 2012). Despite the word "hearing" and these seemingly trial-like features, the officer or employee does not adjudicate between adversaries, but rather represents the IRS—we discuss the procedures more below. A disappointed taxpayer can challenge the CDP hearing outcome in the Tax Court. See 26 U.S.C. §§ 6320(c), 6330(d)(1).

In Tucker's case the IRS was represented by a "settlement officer" (one of two types of IRS workers who conduct CDP hearings, the other type being "appeals officers"). After the hearing, Tucker proposed an OIC instead of the partial installment plan offered by the settlement officer, but the latter rejected his proposal, and her decision was approved by her "team manager"—a position tasked with overseeing various Appeals functions, including CDP hearings.

Tucker appealed to the Tax Court. That court initially remanded the matter back to Appeals for a supplemental CDP hearing, in which a different settlement officer and team manager again rejected Tucker's OIC. The case then resumed in the Tax Court, which rejected Tucker's constitutional and abuse of discretion arguments.

* * *

The Appointments Clause provides that

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the

> President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const., art II, § 2, cl. 2. The clause plainly distinguishes between "principal" and "inferior" officers, and its requirements have no application to employees falling below the "officer" threshold. See *Freytag v. Commissioner*, 501 U.S. 868, 880-81 (1991) (citing *Buckley v. Valeo*, 424 U.S. 1, 126 & n.162 (1976)). Although Tucker appeared to argue in his briefs that the clause governed all Office of Appeals workers involved in CDP hearings, at oral argument his counsel limited the challenge to team managers, who oversee the CDP determinations. Oral Arg. at 11:50-12:55. As our analysis applies equally to team managers, settlement officers, and appeals officers, however, we will use the term "Appeals employees" to refer to all in the three groups. We review the Tax Court's decision on this issue de novo.

The Supreme Court has often said that to be an "Officer of the United States" covered by Article II, a person must "exercis[e] significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 125-26; see also *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3160 (2010); *Landry v. FDIC*, 204 F.3d 1125, 1133 (D.C. Cir. 2000). In assessing Tucker's claim, we look not only to the authority that Appeals employees wielded in Tucker's case but to all their duties, or at least those to which Tucker calls attention. *Freytag*, 501 U.S. at 882 (rejecting government's argument that an Appointments

Clause challenger may rely only on authorities exercised over him). Most importantly, these duties include review of taxpayers' underlying tax liability, even though Tucker's liability was never at issue before the Office of Appeals. Because Appeals employees in CDP hearings exercise the most "significant" authority in disposing of liability questions (which of course they commonly address outside the CDP context), we will address the authority involved in liability review first, and will then return to the collection-related aspects of CDP review.

Before discussing how the authority of Appeals employees compares with that of persons found to be "Officers," we first consider—and ultimately bypass—whether, in the words of the clause, their positions were "established by Law." *Landry*, 204 F.3d at 1133. As we have explained, no statute created positions in the Office of Appeals, but the 1998 act entitled taxpayers to a hearing in that office, 26 U.S.C. §§ 6320(b)(1), 6330(b)(1), and called for a determination by the "appeals officer" on various issues relating to a proposed collection and to tax liability, *id*. §§ 6320(c), 6330(c); see also 26 C.F.R. §§ 601.103(c) (providing taxpayers the general opportunity to contest tax liability before Office of Appeals, outside of CDP context); see generally id. § 601.106 (describing Office of Appeals functions and procedures). Similarly as to regulations: 26 C.F.R. § 601.106 may "establish" the Office of Appeals, and the relevant Internal Revenue Manual provisions do delegate various responsibilities to settlement officers, appeals officers, and team managers, see, e.g., I.R.M. exh. 8.22.2-4, Delegation Order Appeals-193-1 (Mar. 16, 2010) (formerly App 8-1 (Rev. 1)), but the parties have not pointed us to a regulation or other agency authority in which these positions themselves are "established" in any formal sense. Rather, they appear simply to be types of employees used by the Commissioner pursuant to his general hiring power. 26 U.S.C. § 7804(a); see *Tucker*, 135 T.C. at 116, 119.

Nonetheless, it would seem anomalous if the Appointments Clause were inapplicable to positions extant in the bureaucratic hierarchy, and to which Congress assigned "significant authority," merely because neither Congress nor the executive branch had formally created the positions. See Appellant's Br. 35-36; *Tucker*, 135 T.C. at 158. See also DOJ Office of Legal Counsel, Officers of the United States for Purposes of the Appointments Clause, 2007 OLC LEXIS 3, at *118 (Apr. 16, 2007) ("[T]he rule for which sorts of positions have been 'established by Law' such that they amount to offices subject to the Appointments Clause cannot be whether a position was formally and directly created as an 'office' by law. Such a view would conflict with the substantive requirements of the Appointments Clause.").

In any event, because we conclude below that Appeals employees do not exercise significant authority within the meaning of the Appointments Clause cases, we need not resolve whether their positions were "established by Law" for purposed of that clause.[1] We therefore turn to the authority they exercise.

Although the cases are not altogether clear, the main criteria for drawing the line between inferior Officers and employees not covered by the clause are (1) the significance of the matters resolved by the officials, (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions. In light of *Freytag* we can assume here that the issue of a person's tax liability is substantively significant enough to meet factor (1), in which case degrees of discretion and finality will ultimately be determinative. Thus the special trial judges ("STJs") found to be inferior Officers in *Freytag* actually rendered the final decisions of the Tax Court in some matters (specified declaratory judgment and limited-amount tax cases), 501 U.S. at 882, while in others they played a less final role, taking evidence and preparing proposed findings of fact and opinions, *id*. at 880-81. Even when STJs acted in the latter, seemingly ancillary role, they exercised discretion on such matters as rulings on admissibility and enforcing compliance with discovery orders, id. at 881-82, and their factual findings were entitled to deference, being reversible by the Tax Court only if clearly erroneous, *Landry*, 204 F.3d at 1133 (citing what was then Tax Court Rule 183(c), now 183(d), and *Stone v. Commissioner*, 865 F.2d 342, 344-47 (D.C. Cir. 1989)). In *Landry*, by

[1] We read *Landry's* reference to the "established by Law" question as a "threshold trigger," 204 F.3d at 1133, to mean that such an inquiry may but need not be the start of an Appointments Clause analysis.

contrast, we found the absence of any authority to render final decisions fatal to the claim that the administrative law judges at issue there were Officers rather than employees. 204 F.3d at 1133-34.

The degree of discretion enjoyed by the officeholder is clearly an element in the mix. Thus in *Freytag* the Court was at pains to note that the STJs' tasks were "more than ministerial." 501 U.S. at 881. If the tasks assigned a position allowed the holder no choice, obviously, it would be pointless to classify him as an "Officer" even though the consequences of his ministerial decisions were both vital and final. And in this case, in fact, we conclude that the lack of discretion is determinative, offsetting the effective finality of Appeals employees' decisions within the executive branch.

Appeals employees' discretion is highly constrained. Before turning to the constraints, we note the characteristic of Appeals's powers that seems most significant. The office is authorized to compromise disputed tax liability on the basis of its probabilistic estimates of the hazards of litigation. Thus, if Appeals estimates that the IRS's chances of prevailing on a disputed point of law are 60%, it may agree to accept only 60% of the liability that turns on the point. See 26 C.F.R. § 601.106(f)(2); see generally 26 U.S.C. § 1722.

But in reaching such decisions (and indeed in all its decisions), Appeals is subject to consultation requirements, to guidelines, and to supervision. First, the office is instructed in the Internal Revenue Manual to "[r]equest legal advice from an Associate

Chief Counsel office on novel or significant issues." I.R.M. pt. 8.6.3.5 (Oct. 26, 2007). Second, the Manual tells Appeals to seek a "Technical Advice Memorandum" from the Chief Counsel's Office "when a lack of uniformity exists on the disposition of the issue or the issue is unusual or complex enough to warrant consideration by the Office of Chief Counsel." *Id.* pt. 8.6.3.3(3) (July 15, 2010); see also 26 C.F.R. § 601.106(f)(9). (The Chief Counsel is appointed by the President with the advice and consent of the Senate. 26 U.S.C. § 7803(b)(1).) Third, Appeals is required to follow any established technical or legal IRS position that is favorable to the taxpayer. I.R.M. pt. 8.6.3.5.2; 26 C.F.R. § 601.106(f)(9)(viii)(*c*). Fourth, various regulations and the Internal Revenue Manual impose detailed guidelines for what settlements Appeals may accept. See, e.g., 26 C.F.R. § 601.106(f); I.R.M. pt. 8.23.1; see also 26 U.S.C. § 7122(d)(1) (requiring the Secretary to prescribe such guidelines). Fifth, Appeals must obtain a favorable opinion from the General Counsel for the Treasury for any compromise in which the unpaid amount of tax is $50,000 or more, and its compromises of smaller amounts are subject to "continuing quality review by the Secretary." 26 U.S.C. § 7122(b). The authority to provide a favorable opinion for compromises of $50,000 or more has been delegated to the Chief Counsel and redelegated to Division Counsel, see I.R.M. pt. 33.3.2.1(3) (Nov. 4, 2010), but such delegations could be revoked at the General Counsel's discretion. Sixth, any "closing agreement" relieving a taxpayer of liability must be approved by the Secretary. 26 U.S.C. § 7121(b). As with the General Counsel approval, that authority has been delegated to the Commissioner, 26 C.F.R. § 601.202(a)(1), and redelegated to others including some Appeals employees, see Delegation Order 8-3, I.R.M. pt. 1.2.47.4 (Aug. 18, 1997) (formerly Delegation Order No. 97 (Rev. 34)); I.R.M. pt. 8.13.1.1.6 (Nov. 9, 2007), but the Secretary remains free to revoke it if he finds defects in practice under the delegations.

We noted earlier that *Freytag* had relied in part on the STJs' procedural powers, such as the authority to take testimony and to rule on admissibility of evidence. See 501 U.S. at 881-82. Appeals does nothing of this sort. It does not hold trials at all. It simply provides a chance for the taxpayer (and his counsel) to use argument and information to claim more favorable treatment than he has received from IRS employees encountered earlier in the process. "Proceedings before Appeals are informal," and "[t]estimony under oath is not taken," although taxpayers are free to submit factual materials such as affidavits. 26 C.F.R. § 601.106(c). In cases not yet docketed in Tax Court, the district director is represented only if the district director and the Appeals employees with settlement authority "deem it advisable." *Id*. Of course we do not understand *Freytag* to suggest that mere informality of proceedings, or the absence of adversarial procedures, could justify denying "Officer" status to one whose powers would otherwise demand that classification. But the Court in *Freytag* may have taken the presence of those procedures as a signal from Congress of the weightiness of the substantive powers granted. That signal is missing here.

Accordingly, we find even Appeals employees' authority over tax liability insufficient to rank them as inferior Officers.

This being so, it is plain that the authority they exercise in the pure collections aspects of CDP hearings is not enough. As to those functions, the government is simply a creditor, and accordingly Appeals employees must make decisions based largely on the same mundane and practical concerns that any creditor faces. They include, of course, a potential need to compromise even the amount to be collected, but Appeals acts in such matters under the general duties discussed above—to seek advice from the Office of Chief Counsel or an Associate Chief Counsel, and to obtain review from the General Counsel for any decisions involving monetary compromise, and of course is subject to Secretarial monitoring. Accordingly, the significance and discretion involved in the decisions seem well below the level necessary to require an "Officer."

* * *

Tucker claims that even absent a constitutional deficiency, the Office of Appeals's failure to accept his proposed OIC was an abuse of discretion. The Tax Court rejected this claim, see *Tucker*, T.C. Memo. 2011-67, 2011 WL 1033849, at *14, and so do we.

Tucker's primary argument is that the settlement officer in his supplemental CDP hearing wrongfully counted as "dissipated assets" some losses that he incurred in 2003 in day trading on the stock market. The concept of "dissipated assets" becomes relevant when Appeals considers a taxpayer's OIC proposal because of doubt about the collectability of a taxpayer's outstanding liability (the case here); Appeals is to accept the OIC only where it reflects the taxpayer's "reasonable collection potential" ("RCP"). Rev. Proc. 2003-71, § 4.02(2), 2003-2 C.B. 517. In calculating the RCP, Appeals inflates it by the amount of "dissipated assets"—not because they are in fact accessible to the taxpayer (they obviously are not), but to discourage such dissipation. See *Tucker*, T.C. Memo. 2011-67, 2011 WL 1033849, at *11. The concept is defined as "assets (liquid or non-liquid) [that] have been sold, gifted, transferred, or spent on non-priority items and/or debts and are no longer available to pay the tax liability." I.R.M. pt. 5.8.5.4(1) (Sept. 1, 2005). Dissipated assets can be included in computing RCP if they have been dissipated "with a disregard" for outstanding tax liability. *Id*. pt. 5.8.5.4(5).[2]

Tucker does not dispute that at the time he placed the $44,000 in his day trading account (January through April 3, 2003), leading to $22,645 in stock losses (accumulated by April 21, 2003, the date he stopped trading), his accrued tax liability

[2] The current version of the Manual addresses the inclusion of dissipated assets in reasonable collection potential at I.R.M. pt. 5.8.5.16(7) (Oct. 22, 2010).

(for years 1999, 2000 and 2001) was $14,945. See *Tucker*, T.C. Memo. 2011-67, 2011 WL 1033849, at *11-12 & n.12. He also does not dispute that settlement officers can include assets dissipated "with a disregard" for tax liability in a taxpayer's RCP. But he argues that the settlement officer miscalculated the amount of his day trading losses when she concluded that those losses exceeded his tax liability at the time, and that therefore the Tax Court, after it corrected the calculation, was barred by the principle of *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), from upholding Appeals's determination. He also argues that his day trading losses should not count against him at all because they were investments made in a good faith attempt to earn more money to pay off all of his debts. Neither argument has merit.

Regarding whether the amount of the dissipated assets exceeded Tucker's tax liability, the settlement officer in Tucker's supplemental CDP hearing concluded that "at the least, the money deposited [in Tucker's E-Trade account, i.e. the $44,700] could be included in the reasonable collection potential of an offer as dissipated cash assets. The amounts deposited were sufficient to full [sic] pay the taxes." Attachment to Supplemental Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 (Sept. 12, 2006), J.A. 38. The Tax Court found that the settlement officer erred in treating the whole $44,700 as dissipated, because Tucker ultimately withdrew $22,000 from the account and maintained that he spent that amount on basic living expenses, making it excludable from RCP under I.R.M. pt. 5.8.5.4(4). See *Tucker*, T.C. Memo. 2011-67, 2011 WL 1033849, at *12-13.

Nonetheless, the Tax Court found no abuse of discretion. Given that Tucker's $22,645 losses up to the date he stopped trading (April 21, 2003) exceeded his then accrued tax liability of $14,945, it found that the lost $22,000 was enough to pay his then due tax. [3] Accordingly, the court found the settlement officer's erroneous reliance on the full deposit amount harmless. See *id*. at *12-13 & n.16.

On appeal Tucker argues that the Tax Court improperly "rework[ed]" the settlement officer's analysis in violation of the *Chenery* principle, which requires a court reviewing an agency action to "judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." 332 U.S. at 196.

But the Tax Court *did* judge the propriety of the settlement officer's consideration of dissipated assets solely on the grounds invoked: that the amount of such assets "[was] sufficient to full [sic]

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[3] The Tax Court slightly fudged the issue of the exact date by which his losses tipped over the $14,945 level, but it seems safe to say that they must have done so before his 2002 taxes fell due on April 15, 2003. In any event, Tucker makes no issue of this potential discrepancy.

pay the taxes." Attachment to Supplemental Notice of Determination, J.A. 38; see also *id*., J.A. 39 ("Appeals has determined that you could have full [sic] paid the balances already."). That the settlement officer incorrectly used the higher amount, Tucker's initial placing of funds, rather than just the amount of losses, does not change its reasoning or conclusion that the amount dissipated exceeded his outstanding tax liability at the time. We therefore find no *Chenery* problem. See also *PDK Laboratories Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("If the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration.").

Tucker's second argument is that Appeals erred in including his day trading losses as dissipated assets because doing so in effect "requires all taxpayers to liquidate all assets upon initial assessment of taxes to avoid potentially 'dissipating' an asset via decline in asset value prior to payment. Under such a rule, a taxpayer would be required to sell her house immediately upon assessment of a tax liability for fear of a drop in its value." Appellant's Br. 54-55. But as the Commissioner points out, a mere drop in value of an existing asset would not count as dissipated because it would not have been "transferred" or "spent." We also find no abuse of discretion in Appeals's apparently finding Tucker's day trading to be more speculative than, e.g., buying or refinancing a home, and therefore finding the former and not the latter to qualify as "disregard" for one's tax liability.

Finally, because we find no abuse of discretion in the settlement officer's reliance on dissipated assets, we need not consider Tucker's attack on the Commissioner's alternative defense of Appeals's rejection of the OIC, namely that Appeals may reject an OIC simply because it will be able to collect more through a partial installment plan (under which the IRS can periodically update the required installment payments to reflect a taxpayer's increase in income). We note, however that the OIC guidelines appear to allow rejection of an OIC "if it is believed that the liability can be paid in full." I.R.M. pt. 8.23.1.1(6) (Sept. 13, 2011). This is essentially the position the settlement officer took here in rejecting the OIC and preserving the IRS's advantages under the partial installment plan.

* * *

We conclude that Office of Appeals team managers, settlement officers, and appeals officers are not inferior Officers who must be appointed in conformity with the Appointments Clause, and that there was no abuse of discretion in the Office's rejection of Tucker's proposed offer-in-compromise. The judgment of the Tax Court is therefore

Affirmed.

APPENDIX B

135 T.C. NO. 6

UNITED STATES TAX COURT

LARRY E. TUCKER,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 3165-06L. Filed July 26, 2010

P filed income tax returns for 2000, 2001, and 2002 that reported tax due; but he did not pay the tax. The Internal Revenue Service (IRS) assessed the tax and issued to P a notice of the filing of a tax lien (NFTL). P timely requested a collection due process (CDP) hearing, which is to be "conducted by an officer or employee" of the IRS Office of Appeals, I.R.C. sec. 6320(b)(3), and which is to conclude with a "determination by an appeals officer", I.R.C. sec. 6330(c)(3). P's CDP hearing was conducted by a settlement officer in the IRS Office of Appeals, and after the CDP hearing a team manager in that office issued to P a notice of determination upholding the NFTL. P filed with the Tax Court a timely appeal pursuant to I.R.C. sec. 6330(d)(1). After initial proceedings, this Court ordered a remand to the Office of Appeals for further consideration. A second CDP hearing was conducted by another settlement officer, and the team manager issued a supplemental notice of determination again upholding the NFTL.

The team manager and both settlement officers had been hired by the Commissioner pursuant to I.R.C. sec. 7804(a) and were not appointed by the President or the Secretary of the Treasury. P moved for a second remand so that a CDP hearing could be conducted by, and a notice of determination issued by, an officer appointed by the President or the Secretary of the Treasury, in compliance with the Appointments Clause. See U.S. Const., art. II, sec. 2, cl. 2.

Held: An "officer or employee" or an "appeals officer" under I.R.C. sec. 6320 or 6330 is not an "inferior Officer of the United States" for purposes of the Appointments Clause. P's motion to remand will be denied.

Carlton M. Smith, for petitioner.*

Matthew D. Lucey, for respondent.

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Briefs amicus curiae were filed by *A. Lavar Taylor* as counsel for the Center for the Fair Administration of Taxes. The following students assisted Professor Taylor: Joe Bosik, Habbib Hanna, and Kelly Regan.

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OPINION

GUSTAFSON, *Judge:* This case is an appeal, pursuant to section 6330(d) (1),[1] by which petitioner Larry E. Tucker seeks this Court's review of a determination by the Office of Appeals of the Internal Revenue Service (IRS) to sustain the filing of a notice of lien in order to collect Mr. Tucker's unpaid income taxes for the years 2000, 2001, and 2002. That determination was made after the Office of Appeals conducted a collection due process (CDP) hearing pursuant to section 6330(c) and a supplemental CDP hearing pursuant to a remand of this Court. The determination was reflected in an initial "Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330" and in a "Supplemental Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330". We will eventually review the merits of that collection determination.[2]

Currently before us, however, is Mr. Tucker's motion for remand. That motion presents a question

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[1] Unless otherwise indicated, all section references are to the Internal Revenue Code ("Code", 26 U.S.C.).

[2] In addition to the motion to remand that we address in this Opinion, there are also pending before us both respondent's motion for summary judgment asking the Court to sustain the supplemental notice of determination and Mr. Tucker's cross-motion for summary judgment asking that we hold that the supplemental notice reflected an abuse of discretion by the Office of Appeals. Those cross-motions address the merits of the CDP determination, and we do not decide them in this Opinion.

not about Mr. Tucker's tax liabilities nor about the collection decisions of the Office of Appeals in this case but about the constitutional validity of that Office's staffing of CDP proceedings that it conducts pursuant to section 6330(c). The settlement officers who conducted Mr. Tucker's CDP hearings and the team manager who signed and issued the notices of determination were all hired by the Commissioner of Internal Revenue pursuant to section 7804(a) and were not appointed by the President or the Secretary of the Treasury. Mr. Tucker contends, however, that the "appeals officer" in section 6330(c) is an "Officer of the United States" who, according to the Appointments Clause of Article II, Section 2, of the U. S. Constitution, must be appointed either by the President or by one of "the Heads of Departments" (in this case, the Secretary of the Treasury). Because the settlement officers who handled Mr. Tucker's CDP proceeding were not so appointed, Mr. Tucker contends that he has not yet been given the CDP hearing that Congress mandated, and he asks us to remand the matter for a valid hearing before a duly appointed officer.

We will deny Mr. Tucker's motion to remand. We hold that the "officer or employee" in section 6320(b)(3) or 6330(b)(3), also referred to as an "appeals officer" in section 6330(c)(1) and (3), is not an "Officer of the United States" subject to the Appointments Clause, for two reasons: First, there is no office "established by Law" to which the clause applies; and second, the CDP hearing officer does not exercise the "significant authority" that defines an "office" according to the relevant case law.

Background

The facts pertinent to Mr. Tucker's motion to remand can be stated very succinctly: He properly requested a CDP hearing pursuant to section 6320, and the employees of the Office of Appeals who conducted his CDP hearings and issued his notices of determination were not appointed by the President or the Secretary of the Treasury.

Those facts can be elaborated in somewhat more detail without any dispute, on the basis of the pleadings, the parties' motion papers, and the supporting exhibits attached thereto.

Tax years 2000, 2001, and 2002

Mr. Tucker failed to timely file tax returns for 2000, 2001, and 2002. In June 2003 he filed untimely Forms 1040, "U.S. Individual Income Tax Return", for those years, but he failed to pay any of the income tax liability shown on those returns. The IRS assessed the income tax liabilities that Mr. Tucker had self-reported but not paid. Almost a year later, on May 8, 2004, the IRS sent to Mr. Tucker a "Final Notice--Notice of Intent to Levy and Notice of Your Right to a Hearing", pursuant to sections 6330(a)(1) and 6331(d)(1), advising him of the IRS's intent to levy upon his property. Mr. Tucker did not timely request a hearing under section 6330 with respect to that notice. On July 22, 2004, the IRS sent to Mr. Tucker a "Notice of Federal Tax Lien Filing and Your Right to a Hearing", pursuant to section 6320(a)(1), advising him that the IRS had filed a notice of tax lien against him. Both notices reflected the income tax liabilities for 2000, 2001, and 2002.

CDP hearing

In response to the lien notice (but not the earlier notice of levy), Mr. Tucker submitted to the IRS on August 11, 2004, a Form 12153, "Request for a Collection Due Process Hearing". The CDP hearing was held as a telephone conference on May 31, 2005, between an IRS settlement officer and Mr. Tucker and his counsel; and subsequently, numerous letters were exchanged between the settlement officer and Mr. Tucker's counsel.

Mr. Tucker's OIC

On July 25, 2005, Mr. Tucker's counsel sent to the settlement officer a Form 656, "Offer in Compromise" (OIC), that proposed to settle Mr. Tucker's income tax liabilities for 1999, 2000, 2001, 2002, and 2003 for $36,772 payable in monthly payments of $317 over 116 months. In a letter dated November 18, 2005, the settlement officer rejected the OIC.

The notice of determination, and the commencement of this case.

On January 9, 2006, a team manager in the Office of Appeals issued to Mr. Tucker a "Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330", which determined to uphold the filing of a tax lien as to Mr. Tucker's income tax liabilities for 2000, 2001, and 2002. In response, Mr. Tucker timely filed a petition with this Court.

Previous Tax Court proceedings, remand to the Office of Appeals, and supplemental notice of determination

After filing his petition, Mr. Tucker filed a motion for summary judgment on June 9, 2006. Respondent opposed that motion and filed a motion for remand on July 17, 2006. By our order of July 27, 2006, we denied Mr. Tucker's motion for summary judgment and granted respondent's motion to remand the case to the IRS's Office of Appeals for further consideration of Mr. Tucker's July 2005 OIC and for issuance of a supplemental notice of determination no later than October 16, 2006.

The Office of Appeals then assigned a settlement officer (i.e., a different settlement officer from the one who had conducted Mr. Tucker's initial CDP hearing) to conduct a supplemental CDP hearing and to reconsider Mr. Tucker's July 2005 OIC. The supplemental CDP hearing was held as a telephone conference on September 11, 2006, between the settlement officer and Mr. Tucker's counsel. On September 12, 2006, the same team manager who had issued the first notice of determination issued a "Supplemental Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330", which determined to reject Mr. Tucker's July 2005 OIC and to uphold the filing of a tax lien as to Mr. Tucker's income tax liabilities for 2000, 2001, and 2002.

The hiring of the settlement officers and team manager

Respondent concedes that, to date, no appeals officer, settlement officer, or team manager in the Office of Appeals has been appointed by the President, with or without the advice and consent of the Senate, or by the Secretary of the Treasury. Instead, the Office of Appeals personnel who were involved in Mr. Tucker's case were all hired by the Commissioner pursuant to section 7804(a).

Mr. Tucker's motion to remand

In response to the supplemental notice of determination, on November 21, 2006, Mr. Tucker filed an amendment to petition with this Court in order to appeal the supplemental notice of determination. On November 29, 2007, respondent filed a motion for summary judgment asking the Court to sustain the supplemental notice of determination. Mr. Tucker filed a cross-motion for summary judgment on February 27, 2008, and filed a motion for remand on September 2, 2008. We reserve the issues raised by the parties' cross-motions for summary judgment, and we now address Mr. Tucker's motion for remand.

Discussion

To consider the applicability of the Appointments Clause to the "officer or employee" under sections 6320(b)(3) and 6330(b)(3), we first analyze the origin and purposes of the Appointments Clause, then describe generally the Office of Appeals and its CDP function, and then apply Appointments Clause analysis to the role of the CDP "officer or employee".

I. The Appointments Clause

A. The purposes of the Appointments Clause

The framers of the United States Constitution divided the power of the Federal Government among three branches-- legislative, executive, and judicial-- as a safeguard against tyranny. The former British colonies had experienced (in the words of the Declaration of Independence) "a long train of abuses and usurpations" by the British monarch, including the abuse that "He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people and eat out their substance." The framers guarded against this particular instance of tyranny-- i.e., the power both to erect offices and to send out the officers--in the so-called Appointments Clause in Article II, Section 2, of the Constitution, which provides for the appointment of "Officers of the United States":

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the

> President alone, in the Courts of Law, or in the Heads of Departments.

The Constitution itself provided explicitly for the appointment of very few Federal officials, and it left to future political process the creation of the great majority of "Officers of the United States" in the executive and the judiciary. It provided that their offices would be "established" by the Congress but "appoint[ed]" by persons outside the Congress.

The Appointments Clause has four related but distinct purposes. First, as we have already noted, the clause is a safeguard against Congress's taking to itself the power to create and fill governmental offices--a reflection of the separation-of powers framework of the U.S. Constitution. See *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991); The Federalist No. 47 (James Madison), No. 77 (Alexander Hamilton).

Second, the Appointments Clause protects the power of the executive by "preventing the diffusion of the appointment power", that is, by "forbid[ding] Congress to grant the appointment power to inappropriate members of the Executive Branch". *Freytag v. Commissioner, supra* at 878, 880; see also *Weiss v. United States*, 510 U.S. 163, 188 n.3 (1994) (Souter, J., concurring) ("if Congress, with the President's approval, authorizes a lower level Executive Branch official to appoint a principal officer, it again has adopted a more diffuse and less accountable mode of appointment than the Constitution requires"). When Congress establishes an "inferior Officer" in the Executive Branch, it can vest the appointment power for that officer no further from the President than the Head of a Department whom the President himself has appointed. There is, so to speak, only one degree of separation between any duly appointed officer and the President, thus maintaining the locus of executive power in the President himself.

Third, the Appointments Clause has a closely related democratic purpose: "by limiting the appointment power" to the President and his own immediate and principal appointees,[3] the Framers sought to "ensure that those who wielded it were accountable to political force and the will of the people." *Freytag v. Commissioner*, *supra* at 884.[4]

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[3] The Constitutional Convention did not accept a proposal by James Madison that "'Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices.'" *Freytag v. Commissioner*, 501 U.S. 868, 884 (1991) (quoting 2 Records of the Federal Convention of 1787, at 627-628 (M. Farrand ed. 1966)). *Non*-officer employees *may* be hired by "Superior Officers below Heads of Departments" (e.g., by the Commissioner of Internal Revenue), but under the Appointments Clause as promulgated by the Convention and ratified by the States, "Officers of the United States" may not be so hired.

[4] See also *Edmond v. United States*, 520 U.S. 651, 663 (1997) (the Appointments Clause was "designed to preserve political accountability relative to important Government assignments"); *Freytag v. Commissioner*, 501 U.S. at 907 (Scalia, J., concurring) ("the heads of departments * * * possess a reputational stake in the quality of the individuals they appoint; and * * * they are directly answerable to the President, who is responsible to *his* constituency for their appointments and has the motive and means to assure faithful actions by his direct lieutenants").

James Madison argued in The Federalist No. 39 that, because of the Appointments Clause, the "officers of the Union, will * * * be the choice, though a remote choice, of the people themselves".

Fourth:

> This disposition was also designed to assure a higher quality of appointments: The Framers anticipated that the President would be less vulnerable to interest group pressure and personal favoritism than would a collective body. "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty, and a more exact regard to reputation."

Edmond v. United States, 520 U.S. 651, 659 (1997) (quoting The Federalist No. 76, at 387 (Alexander Hamilton, M. Beloff Ed. 1987)).

B. The distinctions in the Appointments Clause: "Officers", "inferior Officers", and non-officer employees

1. "Principal" officers vs. "inferior" officers

The rules of the Appointments Clause apply to "all other Officers of the United States" (emphasis added), i.e., to officers other than those whose appointment is provided elsewhere in the Constitution. As a result, "all persons who can be said to hold an *office* * * * were intended to be included within one or the other of these modes of appointment". *United States v. Germaine*, 99 U.S. 508, 510 (1879) (emphasis added). As a general rule, then, all “officers” must be nominated by the President and confirmed by the Senate.

The Appointments Clause makes an explicit distinction of, and includes an exception for, “inferior Officers”. The case law applying this exception distinguishes these “inferior officers” from “principal officers”. The term “principal officer” is not in the Appointments Clause but is borrowed from the immediately preceding clause (i.e., U.S. Const. art. II, sec. 2, cl. 1), which provides that “The President * * * may require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices”. The Constitution thus conceives of “principal officers”, who must in every case be nominated by the President and confirmed by the Senate, and “inferior Officers”, for whom an exception is allowed. In the case of these inferior officers, “Congress may by Law vest” their appointment, “as they [in Congress] think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” *Id*. cl. 2 (emphasis added).

“The line between ‘inferior’ and ‘principal’ officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn.” *Morrison v. Olson*, 487 U.S. 654, 671 (1988). But in this case Mr. Tucker contends only that appeals officers are inferior officers, not that they are principal officers, so that the principal-inferior distinction is not at issue.

2. "Officers" vs. non-officer employees

A distinction implicit in the Appointments Clause is between "Officers", to whom the clause applies, and those employees who are not officers, to whom it does not apply. "The line between 'mere' employees and inferior officers is anything but bright", *Landry v. FDIC*, 204 F.3d 1125, 1132 (D.C. Cir. 2000),[5] but it is the line that must be drawn in this case. The Supreme Court has broadly defined the term "Officer of the United States" as "any appointee exercising significant authority pursuant to the laws of the United States", *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), and "all appointed officials exercising responsibility under the public laws of the Nation", *id.* at 131. The Court has explained, however, that the term "does not include all employees of the United States * * *. Employees are lesser functionaries subordinate to officers of the United States". *Id*. at 126 n.162.[6]

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[5] See Jerry L. Mashaw, "Recovering American Administrative Law: Federalist Foundations, 1787-1801", 115 Yale L. J. 1256, 1268 (2006) ("these Federalist-era state builders were not operating with a twenty-first-century kit of administrative understandings either. The idea of 'office,' for example, was highly ambiguous--an unsettled blend of public and private stations. This ambiguity made the legal structure of office holding problematic along multiple dimensions, from the way 'officers' should be remunerated, to whether and how they were subject to hierarchical direction and control by administrative superiors, to the means and extent to which they should be legally responsible in court"); *id*. at 1319.

[6] Officers of the United States are also "employees" for some purposes--e.g., employment taxes. See sec. 3401(c). However,

Mr. Tucker does not dispute the existence of this sub-officer category of "lesser functionaries"; he does not argue that all Federal employees are officers who must be appointed. However, lest it be thought that the lack of explicit warrant in the Constitution suggests that non-officer employees cannot properly exist in the Executive Branch, or that they cannot be numerous, it should be noted that the same question could arise with respect to the other two branches of Government. The Constitution has no explicit provision whatever that authorizes Senators, Representatives, or congressional committees to hire employees of any sort, whether officers, inferior

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the case law interpreting the Appointments Clause uses the term "employee" to refer to non-officers, and we follow that usage here. The case law also uses the term "lesser functionary" from *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976). Whatever its apparent connotation, that phrase simply starts with the word "functionary"--which comprehends principal officers and inferior officers, see *Ex parte Siebold*, 100 U.S. 371, 397-398 (1880) ("as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress")--and observes that employees subordinate to those functionaries are "lesser functionaries". The *Buckley* court distinguished "Officers of the United States", who are subject to the Appointments Clause, from non-officer employees who fill "'offices' in the generic sense", 424 U.S. at 138. That is, not every employee with the word "officer" in his job title is subject to the Appointments Clause, see *Steele v. United States*, 267 U.S. 505, 507 (1925) ("the expression 'civil officer of the United States duly authorized to enforce, or assist in enforcing, any law thereof,' as used in the Espionage Act, does not mean an officer in the constitutional sense"), and Mr. Tucker does not contend that "appeals *officers*" are subject to the Appointments Clause simply because of their job title.

officers, or lesser functionaries, but it would be absurd to interpret the constitutional silence on this matter as a bar to the legislature's hiring personnel necessary for its constitutionally mandated functions.[7] For many years congressional employees were few in number--but there were always at least a few: By 1792 the list of personnel for the House included the clerk of the House of Representatives, a principal clerk, two engrossing clerks, a chaplain, a sergeant-at-arms, a door-keeper, and an assistant door-keeper, and the list for the Senate included the secretary of the Senate, two clerks, a door-keeper, and an assistant doorkeeper[8]--a total of thirteen,

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[7] As one mundane example, Article I, Section 5, Clause 3 of the Constitution requires each House to keep and publish "a Journal of its Proceedings," a function hard to imagine Congress accomplishing without staff.

[8] See "List of Civil Officers of the United States, Except Judges, With Their Emoluments, For the Year Ending October 1, 1792", at 59 (Feb. 27, 1793), printed in I Documents, Legislative and Executive, of the Congress of the United States, at 57-58 (Gales & Seaton, 1834) (hereinafter, "1792 Roll"). Treasury Secretary Alexander Hamilton submitted the 1792 Roll to the Senate with the statement that it constituted "statements of the salaries, fees, and emoluments * * * of the persons holding civil offices or employments under the United States". *Id.* at 57. A decade later, in 1802, the combined staff consisted of 14 persons. See "Roll of the Officers, Civil, Military, and Naval, of the United States", at 302 (Feb. 17, 1802), printed in I Documents, Legislative and Executive, of the Congress of the United States, at 260-319 (Gales & Seaton, 1834) (hereinafter, "1802 Roll"). Treasury Secretary Albert Gallatin transmitted the list to the President with the statement that it was "the list of the several officers of Government * * * as compiled in this or received from the other Departments." President Thomas Jefferson transmitted

none of whom were explicitly authorized in the Constitution. Currently, the total employment of the Senate and House numbers in the thousands.[9]

For the judicial branch the Constitution does include an explicit provision for subordinate personnel, in that the Appointments Clause itself provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in * * * the Courts of Law". That is, it is explicit that "the Courts of Law" may appoint "inferior Officers". The Judiciary Act of 1789, enacted by the first Congress, provided for clerks of court and marshals,[10] and the 1792 Roll, at 59-60, does show such personnel on the list. However, the courts had to maintain courthouses, keep records, and collect fees,[11] functions for which additional employees beyond "inferior Officers" would seem to be inevitable, if not initially then at least eventually. Currently the Judicial Branch employs thousands of nonofficers. [12]

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it to Congress and called it "a roll of the persons having office or employment under the United States."

[9] See U.S. Office of Personnel Management, Federal Employment Statistics, http://www.opm.gov/feddata/html/2009/March/table2.asp.

[10] Act of Sept. 24, 1789, ch. 20, secs. 7, 27, 1 Stat. 76, 97.

[11] *Id*. secs. 3, 5, 1 Stat. 73, 75; Act of Sept. 29, 1789, ch. 21, sec. 2, 1. Stat. 93.

[12] See U.S. Office of Personnel Management, Federa Employment Statistics, http://www.opm.gov/feddata/html/2009/March/table2.asp.

In any event, the courts have acknowledged the practical necessity for and the propriety of non-officer employees in all three branches, including the executive. Therefore, in this case we do not decide whether such employees are constitutionally possible (they are), but whether CDP "officer[s] or employee[s]" are properly among their number.

C. Modes of appointment under the Appointments Clause

The Appointments Clause provides three modes of appointment for executive officers--i.e., by Presidential nomination and Senate confirmation, by the President alone, or by the Head of a Department.[13] However, as we noted above in part

[13] For purposes of the Appointments Clause, a department is a "'freestanding, self-contained entity in the Executive Branch'". *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. ___, ___, 130 S. Ct. 3138, 3162 (2010) (quoting *Freytag v. Commissioner,* 501 U.S. 868, 915 (1991) (Scalia, J., concurring in part and concurring in judgment)). The parties agree that the "Department" at issue is the Department of the Treasury (created not in Title 26 of the United States Code but in Title 31 ("Money and Finance"), chapter 3), whose head is its Secretary. Respondent does not contend that the IRS itself is a Department nor that the Commissioner is a "Head" who can make appointments under the exception in the Appointments Clause. The IRS operates not under the direct supervision of the President but "under the supervision of the Secretary of the Treasury." Sec. 7801(a); see *Freytag v. Commissioner, supra* at 886 ("the term 'Department' refers only to "'a part or division of the executive government, as the Department * * * of the Treasury,"' expressly 'creat[ed]' and 'giv[en] . . . the name of a department' by Congress. *Germaine*, 99 U.S. at 510-511. * * * Accordingly, the term 'Heads of Departments' does not embrace 'inferior commissioners and bureau officers.'

I.B.1, while the Appointments Clause does allow an exception for inferior officers to be appointed by the President alone or by the Secretary, the terms of that exception are that “Congress may by Law vest the Appointment” in the President alone or the Head of a Department. Where Congress has not made any such exception “by Law”, then the default rule applies.[14] Section 7804(a) authorizes the Commissioner to appoint IRS personnel “[u]nless otherwise prescribed by the Secretary”. We assume that, by that statutory phrase, Congress has, for purposes of the Appointments Clause, “vest[ed]” in the Secretary the power to appoint IRS personnel if he chooses to so “prescribe”. Therefore, if a given IRS position (such as a CDP hearing officer) were found to constitute an “inferior Office[]” requiring constitutional appointment, then the Secretary could presumably prescribe that the Secretary would appoint personnel to fill that office, and the requirements of the Appointments Clause would be fulfilled. However, respondent does not contend that

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Germaine, 99 U.S. at 511”); *Donaldson v. United States*, 400 U.S. 517, 534 (1971) (“the Internal Revenue Service is organized to carry out the broad responsibilities of the Secretary of the Treasury under § 7801(a) of the 1954 Code for the administration and enforcement of the internal revenue laws”); *LaSalle Rolling Mills, Inc. v. U.S. Dept. of Treasury*, 832 F.2d 390, 392 (7th Cir. 1987) (“the IRS * * * is an agency of the Treasury Department”).

[14] See *Edmond v. United States*, 520 U.S. at 660 (“The prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers”); see also *Weiss v. United States*, 510 U.S. 163, 187 (1994) (Souter, J., concurring) (“any decision to dispense with Presidential appointment and Senate confirmation is Congress’s to make”).

the Secretary has made any such prescription or has appointed any personnel in the Office of Appeals. Consequently, their hiring does not conform to the Appointments Clause.

D. Appointment of revenue personnel in the late 18th century

To apply the Appointments Clause to internal revenue personnel who are affected by the 1998 CDP provisions, we take instruction from the manner in which internal revenue personnel were appointed and hired in the years immediately after the Constitution was ratified. Of course, the earliest Congresses and executive administrations were not infallible in their adherence to the Constitution, and their example cannot be followed uncritically; but we do properly note "the early practice of Congress", *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. ___, ___, 130 S. Ct. 3138, 3162 (2010), particularly where it concerns revenue personnel, who were by no means an outlying example of early Federal employment. On the contrary, in that era revenue collection was a significant and conspicuous Federal effort--both quantitatively and qualitatively.[15] Nonetheless, very few internal

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[15] In the early years of the Republic, external and internal revenue employees were more than half the Federal civilian workforce. See Leonard D. White, The Federalists: A Study in Administrative History 123 (1948). Revenue statutes make up, by pages, roughly 40 percent of the first volume of Statutes at Large. "The revenue statutes were the most complexly articulated administrative system devised by the early Congresses". Mashaw, *supra* at 1278.

revenue personnel were appointed under the Appointments Clause.

1. The Department of the Treasury

The Act that established the Department of the Treasury on September 2, 1789, created only six offices--the Secretary, an Assistant to the Secretary, a Comptroller, an Auditor, a Treasurer, and a Register.[16] Nine days later Congress authorized the Secretary to "appoint such clerks * * * as * * * [he] shall find necessary".[17] The organizing Act charged the Secretary "to superintend the collection of the revenue",[18] a function that would obviously require a

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[16] Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 (1789). Except for the Assistant to the Secretary, who was to "be appointed by the said Secretary", the statute is not explicit as to who appoints these officers, so the default rule of the Appointments clause applied. The position of Assistant to the Secretary was later replaced by the Commissioner of the Revenue, who was made responsible for "collection of the other revenues of the United States" (i.e., other than "duties on impost and tonnage"). See Act of May 8, 1792, ch. 37, sec. 6, 1 Stat. 280.

[17] See Act of Sept. 11, 1789 ("An Act for establishing the Salaries of the Executive Officers of the Government, with their Assistants and Clerks"), ch. 13, sec. 2, 1 Stat. 68; Act of May 8, 1792, ch. 37, sec. 11, 1 Stat. 281 ("the Secretary of the Treasury be authorized to have two principal clerks"). Consistent with this statutory authorization, the 1792 Roll, at 57-58, lists the officials whose offices were named in the organizing statute, and also lists several "messengers" and "office-keepers".

[18] Act of Sept. 2, 1789, ch. 12, sec. 2, 1 Stat. 65; see also Act of June 5, 1794, ch. 48, sec. 4, 1 Stat. 376, 378 ("the duties aforesaid shall be received, collected, accounted for, and paid under and subject to the superintendence, control and

numerous staff. However, in 1792 the entire staff of the Treasury Department--from Secretary down to “messenger and office-keeper”--consisted of 110 persons.

The personnel actually employed in the collection of revenue were much more numerous and fell into two categories, external and internal. The manner of appointment used in these two categories was notably distinct.

2. External revenue collection

Before establishing the Treasury Department, Congress had already provided five weeks earlier, in July 1789, for some of the personnel necessary for collection of “external revenue”, i.e., duties on imports.[19] Congress had provided that for each port “a naval officer, collector[20] and surveyor shall be appointed”, presumably by the President.[21] It was

direction of the department of the treasury, according to the authorities and duties of the respective offices thereof”); Act of May 8, 1792, ch. 37, sec. 6, 1 Stat. 280 (“the Secretary of the Treasury shall direct the superintendence of the collection of the duties on impost and tonnage as he shall judge best”).

[19] Act of July 31, 1789, ch. 5, secs. 5, 6, 8, 1 Stat. 36-37.

[20] These Presidentially appointed external revenue “collectors” were different from the *internal* revenue “collectors” authorized in 1798 and appointed by “supervisors”, as discussed *infra* p. 47a-48a.

[21] Act of July 31, 1789, ch. 5, sec. 1, 1 Stat. 29. The statute does not state by whom the “naval officer, collector and surveyor” would be appointed. However, the preamble to the 1802 Treasury Roll, at 261, describes “[t]he officers employed in the collection of the external revenue” as falling into three groups,

the duty of the collector "to employ proper persons as weighers, gaugers, measurers and inspectors * * *, together with such persons as shall be necessary to serve in the boats * * * with the approbation of the principal officer of the treasury department".[22]

The next year, 1790, Congress provided that, for the collection of import duties, "there shall be established and appointed, districts, ports and officers", with one or more districts in every State.[23] The Presidentially appointed posts of "collector, naval officer and surveyor" were retained in this

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one of which consisted of "collectors, naval officers, [and] surveyors" who are said to have been "appointed by the President". The statute also allowed for "other *person*[s] *specially appointed* by either" the naval officer, collector, or surveyor to search, seize, and secure concealed goods. Act of July 31, 1789, ch. 5, sec. 24, 1 Stat. 43 (emphasis added). However, we infer that those "special" appointments were occasional and temporary; and if so then they did not constitute "offices". See *infra* part III.B.1.

[22] That position of "principal officer" was established a month later as Secretary of the Treasury. See also, to the same effect, Act of Mar. 2, 1799, ch. 22, sec. 21, 1 Stat. 642. Consistent with the 1789 statute, the preamble to the 1802 Treasury Roll states that "port inspectors, weighers, and gaugers" are "appointed by the collectors, with the approbation of the Secretary of the Treasury". We assume that, by virtue of this required "approbation" of the Secretary, these appointments satisfied the Appointments Clause as among those appointments that Congress "vest[ed] * * * in the Heads of Departments". See 4 Op. Atty. Gen. 162 (1843) ("approbation" of the Secretary required for "inspectors of the customs" in Act of Mar. 3, 1815, ch. 94, sec. 3, 3 Stat. 232, constituted appointment by the Secretary for purposes of the Appointments Clause).

[23] Act of Aug. 4, 1790, ch. 35, sec. 1, 1 Stat. 145.

regime, and once again they were to employ "weighers, gaugers, measurers and inspectors", *id.* sec. 6, 1 Stat. 154, presumably with the approval of the Secretary as the previous year's statute had required.[24]

In 1799 Congress authorized the President to build as many as ten ships called "revenue cutters", each to be manned by "one captain or master, and not more than three lieutenants or mates, first, second, and third, and not more than seventy men, including non-commissioned officers, gunners and mariners."[25] (Emphasis added.) The statute provided that the President appointed the "officers" of the revenue cutters, such as the captains or masters, but did not appoint the numerous others, such as the non-commissioned officers.[26] The same statute

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[24] The collector, naval officer, and surveyor were also authorized to name a "deputy" who would serve "in cases of occasional and necessary absence, or of sickness, and not otherwise", *id*. sec. 7, 1 Stat. 155, and would serve in the case of their disability or death "until successors shall be duly appointed", *id*. sec. 8. See also, to the same effect, Act of June 5, 1794, ch. 49, secs. 1, 12, 1 Stat. 378, 380; Act of Mar. 2, 1799, ch. 22, sec. 22, 1 Stat. 644. Because the deputies' positions were only temporary, we assume that they were not "offices" within the meaning of the Appointments Clause, see *infra* part II.B.1, and that the clause is therefore not implicated even where those non-appointed deputies were (temporarily) given substantial authority and discretion.

[25] Act of March 2, 1799, ch. 22, secs. 97 and 98, 1 Stat. 699.

[26] *Id*. sec. 99, 1 Stat 700. The preamble to the 1802 Roll, at 261, describes "[t]he officers employed in the collection of the external revenue" as falling into three groups, one of which consisted of, inter alia, "masters and mates of revenue

authorized the local collectors to "provide and employ such small open row and sail boats, in each district, together with the number of persons to serve in them, as shall be necessary for the use of the surveyors and inspectors in going on board of ships or vessels and otherwise, for the better detection of frauds", but to do so "with the approbation of the Secretary", which we take to constitute an appointment by the Secretary.[27] Cf. *supra* note 24.

Thus, almost all of the persons employed for external revenue collection under the early statutes either were appointed by the President or the Secretary, or else were temporary (i.e., the deputies, occasional inspectors, and persons "specially appointed"). The only permanent non-appointed positions referenced in the statutes were the "non-commissioned officers, gunners and mariners" for revenue cutters.[28] Thus the Department of the Treasury and its external revenue staff were virtually all "appointed". However, the internal revenue personnel (the predecessors of today's IRS) were treated differently, as we now show.

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cutters" who are said to have been "appointed by the President".

[27] *Id*. sec. 101, 1 Stat. 700. The statute also authorized the collectors to hire temporary and occasional inspectors. *Id*. secs. 14, 19, 38, 53, 1 Stat. 636, 640, 658, 667.

[28] *Id.* secs. 97 and 98. The 1802 Roll does not list "noncommissioned officers, gunners and mariners" but does refer, at 261, to "bargemen employed by collectors". We infer that the 1802 Roll's "bargemen" are these employees named in the statute.

3. Internal revenue collection

In 1792 Congress established the office of the Commissioner of the Revenue, who was responsible for collection of internal revenue. See *supra* note 16. In the previous year Congress had already provided that the United States was divided into fourteen districts for the purpose of collecting Federal revenue, both internal and external, and it had authorized for each district "a supervisor" and "inspectors" who were to be appointed by the President with the advice and consent of the Senate.[29] However, that 1791 Act had also provided "[t]hat the supervisor of each district shall appoint proper officers to have the charge and survey of the distilleries within" the district,[30] with no requirement that the Secretary's approval be obtained.

A 1794 internal revenue statute that imposed duties on carriages provided for duties to "be levied, collected, received and accounted for, by and under the immediate direction of the supervisors and inspectors of the revenue, and other officers of inspection".[31] A similar act in 1796, also imposing duties on carriages, referred to "officers or persons employed under" the supervisors and inspectors.[32] In

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[29] Act of Mar. 3, 1791, ch. 15, sec. 4, 1 Stat. 199.

[30] *Id.* sec. 18, 1 Stat. 203 (emphasis added); see also Act of June 5, 1794, ch. 48, sec. 3, 1 Stat. 377 (referring to "the several officers of inspection acting under" the supervisors)

[31] Act of June 5, 1794, ch. 45, sec. 2, 1 Stat. 374.

[32] Act of May 28, 1796, ch. 37, sec. 11, 1 Stat. 481.

1798 the supervisors were authorized to hire clerks.[33] These "proper officers" (authorized in 1791), "other officers of inspection" (authorized in 1794), "officers or persons employed under" them (referred to in 1796), and clerks (authorized in 1798) were thus not appointed by the President nor by the Head of a Department.

In July 1798 Congress imposed a direct tax of $2 million, apportioned among the States, to be assessed on "dwelling houses, lands and slaves".[34] In the same month Congress provided for the appointment of additional internal revenue personnel to perform the necessary enumerations and valuations. Act of July 9, 1798 ("An Act to provide for the valuation of Lands and Dwelling-Houses, and the enumeration of Slaves within the United States"), ch. 70, sec. 1, 1 Stat. 580. For revenue purposes Congress subdivided the States into various "divisions", *id.*, and provided that the President would appoint a "commissioner" for each division, *id*. sec. 3, 1 Stat. 584. (Each of the

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[33] Act of July 11, 1798, ch. 71, sec. 2, 1 Stat. 592; see also Act of Apr. 6, 1802, ch. 19, sec. 5, 2 Stat. 150. In 1805 the Secretary was authorized to employ clerks to serve under the direction of the supervisor of the district of South Carolina. See Act of Jan. 30, 1805, ch. 11, sec. 1, 2 Stat. 311.

[34] Act of July 14, 1798 ("An act to lay and collect a direct tax within the United States"), ch. 75, secs. 1 and 2, 1 Stat. 597, 598. Section 8 of Article I of the Constitution permits Congress "To lay and collect Taxes"; but before the ratification of the 16th Amendment, "No capitation, or other direct, Tax shall be laid, unless in proportion to the Census or Enumeration herein before directed to be taken."

commissioners was authorized to appoint a clerk, *id*. sec. 5; and as is noted below, each commissioner was authorized in 1800 to appoint his own "assistant".) The commissioners within the several States were authorized collectively to "divide their respective states into a suitable and convenient number of assessment districts, within each of which they shall appoint one respectable freeholder to be principal assessor, and such number of respectable freeholders to be assistant assessors, as they shall judge necessary for carrying this act into effect". *Id*. sec. 7 (emphasis added). These assessors and assistant assessors (appointed not by the President or the Secretary but by the Presidentially appointed commissioners) were "to value and enumerate the said dwelling-houses, lands and slaves", *id.* sec. 8, 1 Stat. 585, in order to establish the tax base against which the tax would be collected. One commentator observed:

> The tax on land, dwellings, and slaves (1798) * * * involved a wide area of official discretion. It required a valuation of property * * * for which Congress formulated some general rules that left the assessment largely to the judgment of local assessors-- but subject to an administrative review.

Leonard White, The Federalists: A Study in Administrative History, 452 (1948).

For the collection itself, the 1798 Act provided that the supervisors (Presidentially appointed) were "authorized and required to appoint such and so many suitable persons in each assessment district within their respective districts, as may be necessary for collecting the said tax". Act of July 14, 1798, ch. 75, sec. 4, 1 Stat. 599. If a property owner did not pay the tax upon demand, then the "collector" (again, appointed not by the President or the Secretary but by the Presidentially appointed supervisors)[35] could "proceed to collect the said taxes, by distress and sale of the goods, chattels or effects of the persons delinquent". *Id.* sec. 9, 1 Stat. 600. Another statute from 1798 allowed a property owner who disputed a valuation to appeal the matter to the principal assessor. Act of July 9, 1798, ch. 70, secs. 19 and 20, 1 Stat. 588. (No provision is made for a further appeal to the Presidentially appointed commissioner, but the commissioner did have the power "to revise, adjust and vary the valuations * * * as shall appear to be just and equitable". *Id*. sec. 22, 1 Stat. 589.[36]) The right of appeal from an assessor's valuation did have an exception: Where a property owner had submitted a property list that a court found to be "false and fraudulent", the assessor was authorized to make a valuation and enumeration "from which there shall be no appeal".

This 1798 Act provided for an additional official appointed neither by the President nor by the Secretary: The supervisors and inspectors (i.e., created in the 1791 and 1794 Acts) were authorized "to depute one skilful and fit person, in each

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[35] The 1802 Roll, at 261, confirms that the "collectors and auxiliary officers [were] appointed by the supervisors".

[36] See, to the same effect, Act of Jan. 2, 1800, ch. 3, sec. 1, 2 Stat. 4.

assessment district, to be *surveyor of the revenue*". *Id*. sec. 24 (emphasis added).[37] A "surveyor of the revenue" was a position different from the "surveyors" appointed by the President pursuant to the original 1789 Act. The principal duties of the surveyor of the revenue were: (1) to preserve "the records of the lists, valuations and enumerations" made pursuant to the Act; (2) to make appropriate charges and credits when property was sold; (3) to apportion value when property was divided; (4) to value and assess newly built houses; and (5) subject to the approval of the (Presidentially appointed) inspector of the survey, to reduce valuations when property was damaged or destroyed. *Id.* sec. 25. (In 1800 the surveyor of the revenue was also empowered, when property had been omitted from the lists, to "make a list and valuation thereof".[38])

In 1800 the Presidentially appointed commissioners were permitted to hire "such assistants as they shall find necessary, and appoint for that purpose", i.e., for the purpose of completing additions to or reductions of assessments that the commissioner has directed.[39]

In sum, the early internal revenue statutes authorized the employment not only of Presidentially appointed supervisors and inspectors

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[37] See also Act of Jan. 30, 1805, ch. 11, sec. 2, 2 Stat. 312.

[38] Act of May 13, 1800, ch. 60, sec. 1, 2 Stat. 80.

[39] Act of Jan. 2, 1800, ch. 3, sec. 2, 2 Stat. 4 (emphasis added). See also, to the same effect, Act of May 10, 1800, ch. 53, sec. 2, 2 Stat. 72.

but also of the following personnel who were not appointed by the President or the Secretary (and whose positions were not temporary, like the deputies'):

- "proper officers to have the charge and survey of the distilleries", Act of Mar. 3, 1791, ch. 15, sec. 18;

- "officers or persons employed under" the supervisors and inspectors, Act of May 28, 1796, ch. 37, sec. 11;

- "clerks" hired by the supervisors and commissioners, Act of July 11, 1798, ch. 71, sec. 2; Act of Apr. 16, 1802, ch. 19, sec. 5;

- "principal assessors" and "assistant assessors", Act of July 9, 1798, ch. 70, sec. 7;

- "collectors", Act of July 14, 1798, ch. 75, secs. 4, 9;

- "surveyors of the revenue", Act of July 9, 1798, ch. 70, sec. 24; and

- "assistants" to the commissioners, Act of Jan. 2, 1800, ch. 3, sec. 2.

The 1802 Roll, at 280-288, lists 16 supervisors and 24 inspectors, thus totaling 40 Presidentially appointed internal revenue personnel. It also lists 40 clerks, 361 collectors, 34 collectors' clerks, and 102 "Auxiliary officers" (apparently a generic term for the other personnel authorized in the statutes). The "collectors and auxiliary officers, *appointed by the supervisors*", *id*. at 261 (emphasis added), are significantly more numerous than the Presidentially appointed supervisors and inspectors.

E. Subsequent appointment of internal revenue personnel

In his first inaugural address, President Thomas Jefferson called for the repeal of the original internal revenue taxes, and that repeal took place in 1802.[40] Thereafter there were four iterations of the internal revenue tax, before the modern regime that is still in place today;[41] and the pattern of appointments that had been set for internal revenue in the late 18th century was followed in those four subsequent internal revenue statutes. That is, non-appointed personnel hired by persons inferior to the Secretary of the Treasury had more than ministerial responsibility in internal revenue statutes enacted during the War of 1812,[42] during the Civil War and Reconstruction,[43] after the ratification of the 16th

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[40] See Act of Apr. 6, 1802, ch. 19, 2 Stat. 148

[41] See Lucius A. Buck, "Federal Tax Litigation and the Tax Division of the Department of Justice", 27 Va. L. Rev. 873, 875-877 (1941).

[42] See Act of July 22, 1813, ch. 16, secs. 3, 8, 20-22, 3 Stat. 26, 27, 30, 31 (Assistant Assessors could correct fraudulent property lists without any taxpayer appeal right; Deputy Collectors could seize and sell personal and real property).

[43] See Act of Aug. 5, 1861, ch. 45, secs. 11, 34, 51, 12 Stat. 296, 303, 310 (Assistant Assessors are described with less detail; Assistant Collectors could levy upon property and could arrest and imprison taxpayers who refused to testify); Act of July 1,

Amendment,[44] and in connection with the first World War.[45]

1862, ch. 119, secs. 3, 5, 9, 12 Stat. 433-435 (Assistant Assessors and Deputy Collectors with powers similar to those in 1813); Act of June 30, 1864, ch. 173, secs. 8, 10, 13, 14, 52, 118, 13 Stat. 224-227, 242, 282 (Assistant Assessors and Deputy Collectors were given powers similar to those in 1862 (but arrest power was replaced with summons authority and power to apply to a judge for arrest for contempt), and both could also administer oaths and take evidence; Assistant Assessor could adjust taxable income upward "if he shall be satisfied" that income was understated, with appeal of any such increase to the assessor); Act of Mar. 3, 1865, ch. 78, 13 Stat. 480 (Assistant Assessor can adjust taxable income upward "if he has reason to believe" that income is understated); Act of July 13, 1866, ch. 184, secs. 4, 9, 14 Stat. 99, 126, (Assistant Assessors could give permits for cigar-making; Deputy Collectors could hold cotton until tax on it had been paid); Act of Mar. 2, 1867, ch. 169, secs. 19, 20, 14 Stat. 482 (any internal revenue officer could be authorized to seize property and could seize barrels if they had reason to believe that taxes on them had not been paid); Act of July 14, 1870, ch. 255, sec. 36, 16 Stat. 271 (weighers, gaugers, measurers, and inspectors).

[44] See Act of Oct. 3, 1913, ch. 16, 38 Stat. 169, 179 (a Deputy Collector could demand that a taxpayer show cause why the income amount on the return should not be increased and, if no return or a false or fraudulent return had been provided, could make a return based on the best information he could obtain, which return was then to be held prima facie good and sufficient for all legal purposes).

[45] See Act of Sept. 8, 1916, ch. 463, secs. 16-22, 39 Stat. 774-776 (Deputy Collector had powers similar to those in 1913); Act of Feb. 24, 1919, ch. 18, sec. 1317, 40 Stat. 1146-1148 (Deputy Collector had powers similar to those in 1913 and 1916, and could administer oaths and take evidence).

The pattern set in the late 18th century persists today: The general authority of the Secretary of the Treasury is described in 31 U.S.C. sec. 321 (2006), and it does not include employment or appointment of internal revenue personnel. "The Secretary of the Treasury is authorized to appoint * * * such attorneys and other officers and employees as he may deem necessary" in the Customs Service for external revenue collection, 19 U.S.C. sec. 2072(a) (2006); but the Secretary does not generally make appointments for internal revenue collection. Rather, "the Commissioner of Internal Revenue is authorized to employ such number of persons as the Commissioner deems proper for the administration and enforcement of the internal revenue laws". Sec. 7804 (a).

II. The Internal Revenue Service Office of Appeals

A. The legal basis for the Office of Appeals

The Office of Appeals is a component of the IRS within the Department of the Treasury. The Office of Appeals was not created by the CDP provisions at issue here (i.e., sections 6320 and 6330), which were added to the Internal Revenue Code in 1998, nor by the several other provisions of the Code that mention the Office of Appeals.[46] Rather, all these statutory

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[46] See secs. 6015(c)(4)(B)(ii)(I) (innocent spouse relief), 6603(d)(3)(B) (deposits), 6621(c)(2)(A)(i) (interest rates), 7122(e)(2) (taxpayer appeal of denial of offer-in-compromise), 7123 (Appeals dispute resolution procedures), 7430(c)(2), (c)(7), (g)(2) (reasonable administrative and litigation costs), 7522(b)(3) (content of letter of proposed deficiency),

provisions presume its prior existence. In its current form the Office of Appeals exists pursuant to section 7804(a), which provides:

> SEC. 7804. OTHER PERSONNEL
>
> (a) Appointment and supervision.--Unless otherwise prescribed by the Secretary, the Commissioner of Internal Revenue is authorized to employ such number of persons as the Commissioner deems proper for the administration and enforcement of the internal revenue laws, and the Commissioner shall issue all necessary directions, instructions, orders, and rules applicable to such persons.

Congress thus provided that, except as the Secretary otherwise prescribes, it is the Commissioner and not the Secretary who shall "employ" (not "appoint") other personnel in the Internal Revenue Service.[47] Pursuant to this congressional mandate, the Commissioner established the Office of Appeals and employed

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7612(c)(2)(A) (protection of confidential information on taxpayer software). Mr. Tucker describes section 7122(e) as if it provides for a "right to appeal * * * to an Appeals Officer", but the statute mentions no officer.

[47] One exception to this general rule is present in 5 U.S.C. sec. 9503(a) (2006), which authorizes the Secretary of the Treasury to appoint up to 40 individuals to critical administrative, technical, and professional positions in the IRS before July 23, 2013, provided that such individuals were not IRS employees before June 1, 1998, and that their appointments are limited to no more than 4 years.

personnel to staff that office. The stated mission of the Office of Appeals is to resolve tax controversies without litigation. This mission as well as the operating directives and guidelines of the Office of Appeals are set forth in the Internal Revenue Manual (IRM).[48]

B. A brief history of the Office of Appeals

The first precursor to the Office of Appeals was established by statute--i.e., by the Revenue Act of 1918, ch. 18, 40 Stat. 1057. Then known as the Advisory Tax Board, it had the authority only to offer its recommendation on cases submitted to it by the Commissioner. The Advisory Tax Board was soon replaced by the Committee on Appeals and Review, which was given the authority to hear administrative appeals from taxpayers and redetermine their deficiencies pursuant to the Revenue Act of 1921, ch. 36, 42 Stat. 227. The name and structure of the appeals function of the IRS has changed several times since then, [49] but its mission

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[48]According to the Internal Revenue Manual (IRM), "The Appeals Mission is to resolve tax controversies, without litigation, on a basis which 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." IRM pt. 8.1.1.1(1) (Oct. 23, 2007).

[49] The Committee on Appeals and Review was abolished on June 2, 1924, in favor of creating the Board of Tax Appeals because it was thought that a judicial tribunal would better serve taxpayers. IRS Document 7225, History of Appeals, 60th Anniversary Edition 3 (Nov. 1987). However, in response to the rapidly growing docket of the Board of Tax Appeals, the

to resolve tax controversies without litigation has remained the same. See IRS Document 7225, History of Appeals, 60th Anniversary Edition 3-6 (Nov. 1987).

However, in the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA), Pub. L. 105-206, 112 Stat. 685, Congress enacted provisions that directly addressed the appeals function. One of the four required features of the plan of reorganization that the IRS was to undertake was that it "ensure an independent appeals function within the Internal Revenue Service". Id. sec. 1001(a)(4), 112 Stat. 689. Explicit Reference to the Office of Appeals was added to the Code not only in the new CDP procedures in sections 6320 and 6330 but also in sections 6015(c)(4)(B)(ii)(I), 7122(d)(2) (now designated (e)(2)), 7123, 7430(c)(2) and (g)(2)(A), and 7612(c)(2)(A).

C. "Appeals Officers" in the Office of Appeals

1. The Pre-CDP Role of the "Appeals Officer"

The position of "Appeals Officer" has existed within the Office of Appeals since 1978. IRS Document 7225, *supra* at 3-5. Mr. Tucker does not argue that any Office of Appeals' personnel were "inferior Officers" before the passage of the RRA, but he asserts that as a result of the RRA those positions

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Special Advisory Committee was formed as a part of the Commissioner's office to reprise the role of the Committee on Appeals and Review. *Id*. This Court is the successor to the (statutory) Board of Tax Appeals, and the Office of Appeals is the successor to the Special Advisory Committee. See *id*.

possessed authority that may be consitutionally exercised only by an “officer of the United States”.

The position of “Appeals Officer”--as well as earlier positions within the Office of Appeals and its predecessors—had the authority to make deficiency determinations and hear collection-related appeals long before the passage of the RRA, which enacted the CDP regime. The appeals function had the authority to redetermine deficiencies since 1921. IRS Document 7225, *supra* at 3. And it had the authority to hear collection related appeals under the collection appeals program (CAP) since 1996.[50] IRM pt. 8.24.1.1.1 (May 27, 2004).

“CAP is an administrative review program not required by statute.” *Offiler v. Commissioner*, 114 T.C. 492, 494 (2000). In 1996 the IRS created CAP to provide taxpayers with the right to appeal lien, levy, and seizure actions. IRM pt. 8.24.1.1.1(1) (May 27, 2004). In 1997 CAP was expanded to implement the Taxpayer Bill of Rights 2, Pub. L. 104-168, 110 Stat. 1457 (1996), in order to provide taxpayers with the right to appeal the proposed termination of

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[50] Today both CAP and the CDP regime (discussed below) are administered by the Office of Appeals. IRM pt. 8.24.1.1.1 (May 27, 2004). As a result, a taxpayer may be eligible to request either a CAP or CDP hearing with respect to a lien or levy. *Id.* However, taxpayers are eligible for CAP hearings in more circumstances than CDP hearings. Publication 1660, Collection Appeal Rights 3 (rev. 03-2007). For example, a taxpayer is eligible for a CAP hearing when a CDP hearing is unavailable because the taxpayer already had a CDP hearing or failed to timely request such a hearing. IRM pt. 8.24.1.1.1(6) (May 27, 2004).

installment agreements. IRM pt. 8.24.1.1.1(2) (May 27, 2004); see also sec. 7122(e)(2). Although Congress did not codify CAP, the legislative history of the RRA shows that Congress was aware of CAP when it enacted the CDP regime (discussed below). See S. Rept. 105-174, at 92 (1998), 1998-3 C.B. 537, 628.

2. "Collection Due Process" procedures added to the Code in 1998

If a taxpayer fails to pay any Federal income tax liability after notice and demand, chapter 64 of the Code provides two means by which the IRS can collect the tax: First, section 6321 imposes a lien in favor of the United States on all the property of the delinquent taxpayer, and section 6323(f) authorizes the IRS to file notice of that lien; second, section 6331(a) authorizes the IRS to collect the tax by levy on the taxpayer's property.[51]

However, in 1998 Congress added to chapter 64 of the Code certain provisions (in subchapter C, part I, and in subchapter D, part I) as "Due Process for

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[51] Although this case involves only an Office of Appeals determination to sustain a notice of lien and not a determination to proceed with a levy, the function of the "appeals officer" that pertains to levies should be considered in determining the nature of that position. Cf. *Freytag v. Commissioner*, 501 U.S. at 882 ("The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution. If a special trial judge is an inferior officer for purposes of * * * [some of his duties], he is an inferior officer within the meaning of the Appointments Clause and he must be properly appointed").

Liens" and "Due Process for Collections". The IRS must comply with those provisions after filing a tax lien and before proceeding with a levy. Explicit mention of "appeals officers" was introduced by the RRA into these CDP provisions.[52] In the following brief description of those CDP procedures, we emphasize phrases from the statute that are important to the later analysis in this Opinion.

Within five business days after filing a tax lien, the IRS must provide written notice of that filing to the taxpayer. Sec. 6320(a). After receiving such a notice, the taxpayer may request an administrative hearing to "be held by the Internal Revenue Service *Office of Appeals*."[53] Sec. 6320(b)(1) (emphasis added).

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[52] The Internal Revenue Service Restructuring and Reform Act of 1998 (RRA), Pub. L. 105-206, 112 Stat. 685, also included three references to "appeals officers" that are not codified in the Internal Revenue Code. RRA section 3465(b), 112 Stat. 768, 1998-3 C.B. 228, provides: "The Commissioner of Internal Revenue shall ensure that an appeals officer is regularly available within each State"; RRA section 1001(a)(4), 112 Stat. 689, 1998-3 C.B. 149, provides that the reorganization plan should prohibit "ex parte communications between appeals officers and other Internal Revenue Service employees"; and RRA section 3465(c), 112 Stat. 768, 1998-3 C.B. 228, provides that the IRS should "consider the use of the videoconferencing of appeals conferences between appeals officers and taxpayers seeking appeals in rural or remote areas." (Emphasis added.)

[53] To the extent practicable, a CDP hearing concerning a lien under section 6320 is to be held in conjunction with a CDP hearing concerning a levy under section 6330, and the

Similarly, before proceeding with a levy, the IRS must issue a final notice of intent to levy and must notify the taxpayer of the right to an administrative hearing to "be held by the Internal Revenue Service *Office of Appeals*." Sec. 6330(a) and (b)(1) (emphasis added). Section 6330(b)(3), entitled "Impartial officer" (emphasis added), provides that "[t]he hearing under this subsection shall be conducted by an *officer or employee* who has had no prior involvement with respect to the unpaid tax" at issue (emphasis added).

The pertinent procedures for the agency-level CDP hearing are set forth in section 6330(c). First, the statute provides, "The *appeals officer* shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met." Sec. 6330(c)(1) (emphasis added). Second, the taxpayer may "raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy," including challenges to the appropriateness of the collection action and offers of collection alternatives. Sec. 6330(c)(2)(A). Additionally, the taxpayer may contest the existence and amount of the underlying tax liability, but only if he did not receive a notice of deficiency or otherwise have an opportunity to dispute the tax liability.[54] Sec. 6330(c)(2)(B). Section

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conduct of the lien hearing is to be in accordance with the relevant provisions of section 6330. See sec. 6320(b)(4), (c).

[54] Mr. Tucker did not challenge his underlying liabilities (which were, in fact, the liabilities that he himself had reported on his late returns). However, as we observed *supra* note 51, in order to determine the nature of the "appeals officer" position,

6330(c)(3) then provides, "The determination by an *appeals officer* under this subsection shall take into consideration" (emphasis added)--(1) the verification that he obtained, (2) the issues raised by the taxpayer, and (3) a balancing of the need for efficient tax collection with concerns that the collection be no more intrusive than necessary.

The authority to conduct CDP hearings and make determinations under sections 6320 and 6330 has been delegated to three positions within the Office of Appeals: (i) "Appeals Officers", (ii) "Settlement Officers", and (iii) "Appeals Account Resolution Specialists".[55] Appeals Delegation Order 8-a, IRM Exhibit 8.22.2-4 (Nov. 1, 2006). The authority to review and approve those determinations is delegated to team managers. *Id*. Today, in practice, settlement officers conduct CDP hearings and make an initial determination that is subsequently approved or overruled by a team manager, who makes the final determination on behalf of the Office of Appeals.

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we should consider all of its functions, not only those that were operative in this case.

[55] Mr. Tucker complains that "AARS is a fancy title for an even lower pay grade person who the IRS used to call a 'screener'" and that AARSs are "now holding CDP hearings in certain low-dollar situations". However, no CDP determination is issued until it has been reviewed and approved by a higher ranking team manager. If the Office of Appeals were to assign CDP hearings to employees untrained in or incapable of the task, their inadequate performance would be subject to review by this Court.

If the taxpayer is not satisfied with the determination he receives from the Office of Appeals, the taxpayer may “appeal such determination to the Tax Court”. Sec. 6330(d)(1). Where challenges to the underlying liability are at issue (under section 6330(c)(2)(B)), the Tax Court reviews the determination de novo. *Davis v. Commissioner*, 115 T.C. 35, 39 (2000). For other disputes, the Tax Court reviews the determination for abuse of discretion, *Sego v. Commissioner*, 114 T.C. 604, 610 (2000); *Goza v. Commissioner*, 114 T.C. 176, 182 (2000)--that is, to determine whether the determination was arbitrary, capricious, or without sound basis in fact or law, see *Murphy v. Commissioner,* 125 T.C. 301, 320 (2005), affd. 469 F.3d 27 (1st Cir. 2006).

Congress enacted these procedures in order to grant taxpayers “protections in dealing with the IRS that are similar to those they would have in dealing with any other creditor”, that is, in order to “afford taxpayers adequate notice of collection activity and a meaningful hearing before the IRS deprives them of their property.” S. Rept. 105-174, *supra* at 67, 1998-3 C.B. at 603. It is fair to say that the officer or employee who conducts the CDP hearing is performing a critical role in an important tax proceeding.

3. Post-CDP hearing procedures

However, because the “finality” of an Office of Appeals determination is relevant to the appeals officer’s status as an “officer” under the Appointments Clause, it is pertinent to note the circumstances in which the IRS may face again the same taxpayer whose collection issues and underlying liability have been previously considered by the Office of Appeals in a CDP hearing, and to discern the extent, if any, to which the IRS will be bound to the determination made in the CDP context--either a determination on a liability issue (whether the tax is owed) or determination on a collection issue (whether and how the tax will be collected).

a. Collection issues

If the CDP officer or employee enters into an installment agreement under section 6159, a closing agreement under section 7121, or an OIC under section 7122 with the taxpayer, then of course the agency will be bound under general contract principles to honor the agreement.[56] However the agency is also bound to honor such agreements that it enters into outside of the CDP context, whether by the Office of Appeals or by another branch of the IRS. Consequently, the authority to enter into such agreements on behalf of the IRS is not peculiar to an officer or employee conducting a CDP hearing.

However, the CDP hearing may yield a determination by the Office of Appeals that is not

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[56] In addition, if an agreement embodied in Form 870-AD, "Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment", is accepted by the IRS and executed with the taxpayer, equitable estoppel may apply to make that agreement binding on all functions of the IRS. See *Kretchmar v. United States*, 9 Cl. Ct. 191, 198 (1985).

embodied in one of those agreements, such as a determination that the taxpayer should be put in "currently not collectible" (CNC) status, see IRM pt. 8.22.2.4 (Mar. 11, 2009), 8.23.3.13 (Aug. 28, 2009), or that a lien should be released or subordinated, see sec. 6325; IRM pt. 8.22.3.9.6.1 (Apr. 8, 2009), 8.22.3.9.6.2 (Oct. 19, 2007), 8.22.2.4.6 (Dec. 1, 2006), or that a levy should be released, see sec. 6343; IRM pt. 8.22.3.9.5 (Apr. 8, 2009). We find no authority addressing any binding character of these determinations, but we assume that their force is enhanced by section 6330(d)(2), which provides:

> (2) Jurisdiction retained at IRS Office of Appeals.--The Internal Revenue Service Office of Appeals shall retain jurisdiction with respect to any determination made under this section, including subsequent hearings requested by the person who requested the original hearing on issues regarding—
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> > (A) collection actions taken or proposed with respect to such determination; and
> >
> > (B) after the person has exhausted all administrative remedies, a change in circumstances with respect to such person which affects such determination.

That is, we assume that the retention of "jurisdiction" by the Office of Appeals "with respect to any determination" would bar IRS collection personnel from contradicting Appeals' collection determination. If collection personnel undertook collection action in violation of Appeals' determination, then that action could be halted by Appeals in a retained jurisdiction hearing. Even so, the sense in which Appeals' collection determination can be said to be binding is qualified in several significant respects:

First, section 6330(d)(2) would bind only non-Appeals functions. The Office of Appeals itself, if it "retains jurisdiction", must retain jurisdiction to modify its determination.

Second, if the Office of Appeals sustains the notice of lien or intent to levy, there are circumstances in which the IRS[57] thereafter may forgo collection or make accommodations nonetheless. Collection personnel may perform the investigation required by section 6331(j) and decide not to proceed with a levy against specific property. Collection personnel retain the power to withdraw a notice of lien pursuant to sections 6323(j), to release a lien pursuant to section 6325, and to release a levy pursuant to section 6343. The taxpayer is always free to submit to IRS collection personnel another proposal of an installment agreement or an OIC, and those personnel have authority to accept that new proposal notwithstanding the Office of Appeals'

[57] If the taxpayer challenges the validity of a lien in an action to quiet title under 28 U.S.C. sec. 2410 in Federal District Court, the Government will be represented not by the IRS attorneys in the Office of Chief Counsel but by the Department of Justice, pursuant to 28 U.S.C. sec. 516. If the Department of Justice concludes that the lien is not valid, then there is no apparent basis for arguing that the Government is bound by the Office of Appeals' contrary determination sustaining the lien.

rejection of the taxpayer's prior proposal. See IRM pt. 1.2.44.2.[58]

Third, on the other hand, if the Office of Appeals determined not to sustain the notice of lien or of proposed levy that was challenged in a CDP hearing, IRS collection personnel would be free to issue another notice of lien or intent to levy, as long as the period of limitations for collection, see sec. 6502, remained open. The subject matter of a CDP hearing is the particular notice of lien or intent to levy that the taxpayer challenged under section 6320(a)(3)(B) or 6330(a)(3)(B).

Fourth, the National Taxpayer Advocate or her delegate can issue a Taxpayer Assistance Order (TAO) requiring the IRS to "release property of the taxpayer levied upon" or to "cease any action, take any action as permitted by law, or refrain from taking any action" with respect to its collection activities. See sec. 7811(b); 26 C.F.R. sec. 301.7811-1(c), Proced. & Admin. Regs.; see also IRM pt. 13.1.20.3(1) (Dec. 15, 2007) ("A TAO may be issued for either of two purposes: A. To direct the OD/Function [to] take a specific action, cease a specific action, or refrain from taking a specific action; or B. To direct the IRS to review at a higher

[58] See also H. Conf. Rept. 105-599, at 289 (1998), 1998-3 C.B. 747, 1020 ("A taxpayer could apply for consideration of new information, make an offer-in-compromise, request an installment agreement, or raise other considerations at any time before, during, or after the Notice of Intent to Levy hearing").

level, expedite consideration of, or reconsider a taxpayer's case").

Fifth, by its nature a collection determination could be binding only until there has been a change in the taxpayer's circumstances. The collection issues that the officer or employee may address in the agency-level CDP hearing involve the financial circumstances of the taxpayer that, by their nature, may change after the hearing. See sec. 6330(d)(2)(B); 26 C.F.R. sec. 301.6330-1(e)(1), Proced. & Admin. Regs.; Rev. Proc. 2003-71, sec. 4.03, 2003-2 C.B. 517, 518. To decide whether the IRS ought to proceed with collection, the officer or employee is instructed by agency regulations to request and obtain detailed financial information about the taxpayer during the hearing, and to make a determination on the basis of that information. See 26 C.F.R. sec. 301.6330-1(e)(1), Proced. & Admin. Regs. ("Taxpayers will be expected to provide all relevant information requested by Appeals, including financial statements, for its consideration of the facts and issues involved in the hearing"). However, if and when a taxpayer later becomes ill or loses a job, or when a previously ill or unemployed taxpayer is healed or gets a job, then the position of the tax collector may well change. This reality is reflected explicitly in section 6330(d)(2)(B), which contemplates "a change in circumstances with respect to such person which affects such determination." Thus, an appeals officer's collection judgments reflected in a notice of determination issued after a CDP hearing are not necessarily the last word, even for the Office of Appeals itself--nor should they be. Instead, the

Office of Appeals retains jurisdiction to continue to consider collection issues over time. This flexibility helps to ensure that, on a continuing basis, the IRS will tailor its collection activities to the taxpayer's current circumstances and that the IRS will not take collection action that is arbitrary or which creates unnecessary hardship for the taxpayer.

Sixth, if the taxpayer appeals an adverse determination to the Tax Court, then, as we have noted in part II.C.2 above, the appeals officer's collection decisions are reviewed in litigation. In that context, the determination is of course not binding on the Tax Court, which reviews for abuse of discretion. More important for evaluating "finality", however, is the fact that even the IRS as a litigant is not bound by the position in the Office of Appeals' notice of determination. In defending against that CDP appeal, the IRS (acting through its attorneys under the Chief Counsel) may re-think the appeals officer's collection decisions and may take a position -- in the litigation or in the settlement of it -- that is different from the position reflected in the Office of Appeals's CDP determination. See 26 C.F.R. sec. 601.106(a)(1)(i), (d), Statement of Procedural Rules; Rev. Proc. 87-24, 1987-1 C.B. 720; General Counsel Order No. 4. (Jan. 19, 2001). It is the experience of this Court that the Office of Chief Counsel sometimes does not defend the Office of Appeals' determination but rather admits an abuse of discretion and moves the Court to remand the case to the Office of Appeals for a supplemental CDP hearing. In those instances the agency's position (as taken by Chief Counsel) contradicts the notice of determination, to which the agency is manifestly not bound.

Consequently, the CDP determination of the Office of Appeals is not necessarily the agency's last word on collection issues.

b. Underlying liability

As we noted above in part II.C.2, a taxpayer who did not have a previous opportunity to dispute the amount of his underlying tax liability may raise such a dispute in the agency-level CDP hearing, pursuant to section 6330(c)(2)(B). In such a circumstance, the officer or employee conducting the hearing for the Office of Appeals will determine the IRS's position on that taxpayer's liability. Respondent explains that, in practice, a settlement officer will conduct the CDP hearing and will refer the case to an appeals officer to consider the issue of underlying liability. When the appeals officer makes a determination with respect to the liability issue, the case is returned to the settlement officer, who addresses any collection issues and makes an initial determination that is subsequently approved or overruled by a team manager, who makes the final determination on behalf of the Office of Appeals. The settlement officer will not reconsider the appeals officer's determination with respect to the liability issue, and generally, neither will anyone else within the Office of Appeals.

We noted in *Lewis v. Commissioner,* 128 T.C. 48, 59 (2007) (quoting 26 C.F.R. sec. 601.106(a)(1)(ii), Statement of Procedural Rules), that "[t]he Appeals officer has the 'exclusive and final authority' to determine the liability."[59] On the other hand, it is clear that such determinations are not absolutely "final". See *Jackson v. Commissioner*, T.C. Memo. 1988-143 ("Determinations by the Commissioner are not judicial in nature, but rather are administrative determinations, and are not res judicata to bind him for subsequent years, or for that matter, the same taxable year"); 1B J. Moore, Moore's Federal Practice, par. 0.422[2], at 3403 (2d ed. 1974) ("It is axiomatic to the doctrines of res judicata and collateral estoppel that only judicial decisions are given conclusive force in subsequent legal proceedings. Thus determinations made by the Commissioner of Internal Revenue are not judicial in nature but administrative and are not res judicata to bind him for the same taxable year or for subsequent years"). We must therefore discern the sense in

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[59] This provision in the regulations does not actually create "exclusive and final authority" but rather presumes such authority on the part of "the regional commissioner" and then provides that Appeals personnel "represent" the regional commissioner in that authority. It is a provision generally applicable when the Office of Appeals has jurisdiction over a determination of liability. It does apply when underlying liability is properly at issue in the CDP context, but its most frequent application must be in the non-CDP cases that come to the Office of Appeals for a deficiency determination. If the delegated authority to make the IRS's "exclusive and final" determination of a taxpayer's liability caused the Office of Appeals personnel to be "inferior Officers", then it would pose questions about the necessity of appointing even the Appeals personnel who handle non-CDP matters and the regional commissioners who possess this authority in the first instance and from whom the Office of Appeals receives this authority only derivatively.

which the CDP determination of underlying liability may be said to be "final".

i. If the liability determination is favorable to the taxpayer

If the liability determination made by the Office of Appeals in the CDP context is favorable to the taxpayer, then the CDP process generally ends with a unilateral agency determination not to proceed with collection.[60] Although the team manager in charge of the case has the authority to execute a closing agreement with the taxpayer under section 7121, see IRS Deleg. Order 97 (Rev. 34), IRM pt. 1.2.47.6 (Aug. 18, 1997), generally no closing agreement is executed, and no litigation ensues. Respondent states that, as with a liability

[60] If a taxpayer in a CDP hearing proposes not a complete concession by the IRS but an offer-in-compromise (OIC) based on doubt as to liability, and if the Office of Appeals accepts the OIC, then the resulting agreement is binding on the IRS. However, that binding effect is not unique to the CDP process; rather, the OIC accepted in the CDP context has the same effect (no more, and no less) as an OIC accepted in any context. In the absence of an OIC or a closing agreement, the non-liability determination is simply reflected in the notice of determination, see IRM pt. 8.22.3.9(1) (Oct. 19, 2007) ("Abatement of Tax"), and then is effectuated either by Office of Appeals personnel directly, see IRM pt. 8.22.3.9.3.1 (Oct. 19, 2007) ("APS [Appeals Processing Services] will input adjustments to tax"), 8.22.3.9.3.1.1(2) (Oct. 19, 2007) ("APS will abate the SFR/ASFR assessment and reverse withholding as requested by the hearing officer"), or by collection personnel, see IRM pt. 5.1.9.3.10(6) (Dec. 15, 2003), 5.19.8.4.9(2) (Nov. 1, 2007), 5.19.8.4.14(1) (Nov. 1, 2007) ("CDP 'back-end' work").

determination in a notice of deficiency, "an underlying liability determination in a CDP case is also binding on the Examination function. The Examination function generally has no opportunity to review Appeals' determination"; and we assume arguendo that this is correct.[61] However, this binding character is limited.

First, if it is true (as section 6330(d)(2) provides) that the Office of Appeals "shall retain jurisdiction with respect to *any* determination" (emphasis added), then it would seem that the Office of Appeals itself must have jurisdiction to reconsider its pro-taxpayer liability determination.

Second, if the taxpayer had paid all or part of the liability that had been at issue in a CDP hearing and thereafter sought a refund of it through litigation, no collateral estoppel or res judicata effect to govern the outcome of the refund suit would arise from the prior

[61] It is not clear why Examination would necessarily be bound by the CDP determination of a liability issue. A liability determination in a notice of deficiency (whether issued by the Office of Appeals or another IRS function) may acquire a quasi binding character within the agency because section 6212(c) restricts the determination of further deficiencies (though section 6214(a) permits an increased deficiency if the matter is challenged in the Tax Court); but the CDP determination may arise in the absence of a notice of deficiency (as when a taxpayer disputes tax assessed pursuant to his own return) and does not result in the issuance of a notice of deficiency--so that section 6212(c) is not implicated. Amicus observes that the point has not been litigated but concludes that the liability determination in a CDP hearing is probably not binding elsewhere, citing *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929).

CDP determination. See *Jackson v. Commissioner*, *supra*. The case would be defended not by the IRS but by attorneys of the Department of Justice, see 28 U.S.C. sec. 516 (2006),[62] which also has settlement authority in such cases, see sec. 7122.[63] But even in refund suits handled by the Department of Justice the IRS must request any counterclaim, see sec. 7403, must give a defense recommendation, see 28 U.S.C. sec. 520 (2006), and must give its views on proposed settlements.[64] In that context, it is the Office of Chief Counsel, and not the Office of Appeals, that speaks for the IRS; and Chief Counsel is not bound by the appeals officer's CDP determination. IRM pt. 34.8.2.11.5(4) (Aug. 11, 2004). The Government might therefore resist the refund claim--and might even plead a counterclaim--by asserting liabilities that the Office of Appeals did

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[62] By regulation, 28 C.F.R. sec. 0.15 (2007), it is the *Deputy* Attorney General (not one of the "Heads of Departments", in Appointments Clause parlance) who hires Department of Justice trial attorneys.

[63] An *Assistant* Attorney General heads the Tax Division and hires the Chiefs of the litigating sections in the Tax Division. See Memorandum of Dec. 29, 1999, to Heads of Department Components from then-Deputy Attorney General Eric Holder, available at http://www.usdoj.gov/jmd/ps/sesdelegmemo.htm. Settlement authority is delegated to those Chiefs. See Tax Division Directive No. 135, reprinted in 28 C.F.R. pt. O, subpt. Y, app.

[64] See *id*. (delegating settlement authority only in cases in which the agency agrees, and thereby requiring solicitation of IRS views to settle tax cases); see also "Department of Justice Tax Division Settlement Reference Manual", at 5-6, 16, available at http://www.usdoj.gov/tax/readingroom/foia/tax.htm.

not sustain, taking its cue not from the Office of Appeals but from the Office of Chief Counsel, which must be independent and impartial.[65]

Thus, a pro-taxpayer CDP determination on underlying liability has at most a limited "finality" within the agency.

ii. If the liability determination is not favorable to the taxpayer

If the liability determination made by the Office of Appeals in the CDP context is not favorable to the taxpayer, then there are several contexts in which the IRS may take a position different from that reflected in the CDP determination.

(A). CDP litigation

The taxpayer may appeal the adverse CDP liability determination to the Tax Court, pursuant to section 6330(d). If the taxpayer does appeal, then the Tax Court reviews the liability issues de novo. *Davis v. Commissioner*, 115 T.C. at 39. In Tax Court proceedings the IRS is represented by the Office of Chief Counsel, see sec. 7452, which may re-think the liability issues and may take a position different from that reflected in the notice of determination. See IRM pt. 1.1.6.1 (quoted *supra* note 65). In addition, the Office of Chief Counsel--not the Office

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[65] See IRM pt. 1.1.6.1 (July 29, 2005) ("Counsel must interpret the law with complete impartiality so that the American * * * [public] will have confidence that the tax law is being applied with integrity and fairness.").

of Appeals--has the authority to settle CDP cases that reach litigation, see sec. 601.106(a)(2)(i), Statement of Procedural Rules; Rev. Proc. 87-24, 1987-1 C.B. 720, and it has the authority to settle CDP cases without the concurrence of the Office of Appeals, see Rev. Proc. 87-24, *supra*; IRM pt. 35.5.1.4.3(2), 35.5.2.7(2), 35.5.2.14(2)(B) (Aug. 11, 2004).

If the taxpayer who receives an adverse notice of determination reflecting the officer's or employee's decision about underlying liability decides not to appeal to the Tax Court, then the IRS may nonetheless meet this taxpayer again in a variety of other circumstances in which, again, the CDP liability determination will not be binding on the IRS:

(B). Audit reconsideration

Audit reconsideration is a substantive review of the taxpayer's liability that may result in the abatement of an assessed tax liability. Specifically, audit reconsideration "is the process the IRS uses to reevaluate the results of a prior audit where additional tax was assessed and remains unpaid, or a tax credit was reversed." IRM pt. 4.13.1.2 (Oct. 1, 2006). The IRS's authority to conduct an audit reconsideration is grounded in section 6404(a), which provides that "[t]he Secretary is authorized to abate the unpaid portion of the assessment of any tax or any liability in respect thereof, which--(1) is excessive in amount, or (2) is assessed after the expiration of the period of limitations properly applicable thereto, or (3) is erroneously or illegally assessed."

Audit reconsideration is not precluded by a prior CDP determination. See IRM pt. 4.13.1.8 (Oct. 1, 2006) (listing circumstances in which "a request for [audit] reconsideration will not be considered"; prior CDP hearing is not listed). Therefore, a taxpayer who has received an adverse CDP determination with respect to his underlying liability could nonetheless have his liability redetermined in the course of an audit reconsideration.

(C). District Court collection suit

If the taxpayer does not pay the tax, the IRS may request the Department of Justice to file a collection suit against the taxpayer in Federal District Court. See sec. 7403(a) ("the Attorney General * * *, at the request of the Secretary, may direct a civil action to be filed in a district court"). It is the Office of Chief Counsel, and not the Office of Appeals, that decides for the IRS whether to make that request, and the Chief Counsel is not bound by the appeals officer's CDP determination of liability. See General Counsel Order No. 4 (rev. Jan. 19, 2001).

(D). Request for abatement, refund claim, and refund litigation

The taxpayer may request an abatement of tax, or he may pay the tax and claim a refund. We are aware of no reason or rule requiring that, when the IRS then considers administratively that request for abatement or claim for refund, it is bound by the appeals officer's adverse CDP determination. If the IRS denies a refund claim, the taxpayer may file a refund suit in Federal District Court or the Court of Federal Claims. As we noted above, the IRS will be asked for its defense recommendation and for its views on proposed settlements. In that context, it will be the Office of Chief Counsel, and not the Office of Appeals, that will speak for the IRS, and the Chief Counsel will not be bound by the appeals officer's CDP determination. See *supra* part II.C.3.b.i.

In sum, the collection and liability determinations made in CDP hearings by officers and employees of the Office of Appeals are an important aspect of the agency's administration of the tax law, and they affect to a greater or lesser extent the agency's ultimate position with regard to the tax liability and the collection of it. But there are numerous circumstances in which those determinations may not be the IRS's last word.

4. The tax administration context of the CDP "officer or employee"

The IRS personnel who are appointed by the President or the Secretary of the Treasury are the Commissioner, see sec. 7803(a)(1), the Chief Counsel, see sec. 7803(b)(1), members of the Internal Revenue Service Oversight Board, see sec. 7802(b)(1), and the National Taxpayer Advocate, see sec. 7803(c)(1). See also *supra* note 47. Personnel to fill other positions in the IRS are hired by the Commissioner pursuant to section 7804(a).

These hired, non-appointed positions include (i) the Deputy Commissioner for Services and Enforcement, who is delegated the authority to oversee the four primary operating divisions of the IRS, see IRM pt. 1.1.5.3 (Oct. 28, 2008); (ii) the Deputy Commissioner for Operations Support, who is delegated the authority to oversee the integrated support functions of the IRS, see IRM pt. 1.1.5.4 (Oct. 28, 2008); (iii) the Commissioners of the Wage and Investment Division, the Small Business/Self-Employed Division, the Tax-Exempt and Government Entities Division, and the Large and Mid-Size Business Division, who are delegated the authority to supervise and manage those divisions, see IRM pt. 1.1.13.1 (Sept. 1, 2005), 1.1.16.1 (Mar. 1, 2007), 1.1.23.2 (Feb. 1, 2007), 1.1.24.1 (Nov. 1, 2006); (iv) the Deputy Chief Counsel (Technical), who serves as the principal deputy to the Chief Counsel, acts as Chief Counsel when that office is vacant, maintains jurisdiction over legal issues arising in published guidance, letter rulings, technical advice, and other processes, and participates in the interpretation and development of internal revenue laws, see IRM pt. 1.1.6.2 (Dec. 16, 2009), (v) the Deputy Chief Counsel (Operations), who maintains jurisdiction over issues arising in litigation nationwide and participates in the formulation of tax litigation policy, see IRM pt. 1.1.6.3 (Dec. 16, 2009), and (vi) the Chief of the Office of Appeals, who is delegated the authority to plan, manage, direct, and execute the nationwide activities of that office, see IRM pt. 1.1.7.1 (Feb. 5, 2008).[66]

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[66] Justice Breyer would evidently characterize many of these

Lower in the IRS hierarchy, these hired positions include revenue officers (at or above the rank of GS-9[67]), who are delegated the authority (i) to issue, serve, and enforce summonses, to set the time and place for appearance, to take testimony under oath of the person summoned, and to receive and examine data produced in compliance with the summons, see IRS Deleg. Order 25-1 (formerly IRS Deleg. Order 4 (Rev. 23), 55 Fed. Reg. 7626); (ii) to issue notices of levy, see IRS Deleg. Order 5-3 (Rev. 1), IRM pt. 1.2.44.3 (Nov. 8, 2007); and (iii) to issue notices of Federal tax lien, see Delegation Order 5-4 (Rev. 1), IRM pt. 1.2.44.4 (Sept. 23, 2005). That is, revenue officers have the power--unless the CDP process intervenes--to effect the actual collection of tax.

5. The administrative law context of the CDP "officer or employee"

Today the Federal Government employs a corps of about 5,000 hearing officers who adjudicate cases for dozens of its agencies. Raymond Limon, Office of Admin. Law Judges, Office of Pers. Mgmt., "The

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personnel as "officers". See *Free Enter. Fund v. PCAOB*, 561 U.S. at ___, 130 S. Ct. at 3180 (Breyer, J., dissenting) ("by virtually any definition, essentially all SES [Senior Executive Service] officials qualify as 'inferior officers,' for their duties, as defined by statute, require them to 'direc[t] the work of an organizational unit,' carry out high-level managerial functions, or '*otherwise exercis[e] important policy-making, policy-determining, or other executive functions*.' §3132(a)(2) (emphasis added)").

[67] The General Schedule, abbreviated "GS", is the basic pay schedule for employees of the Federal Government. See 5 U.S.C. sec. 5332 (2006).

Federal Administrative Judiciary, Then and Now, A Decade of Change 1992-2002", at 3 (Dec. 23, 2002). Fewer than a third of those positions are classified as administrative law judges (ALJs) under the Administrative Procedure Act (APA), and the remainder of those positions are commonly referred to as non-ALJ hearing officers.[68] Over 80 percent of ALJs are currently employed by the Social Security Administration (SSA). OPM Report (showing the SSA employed 1,128 of 1,388 ALJs in June 2008). None of the SSA's ALJs are appointed by the Commissioner of the SSA, who serves as the department head. See Soc. Sec. Admin., ODAR Redelegations of Personnel and Equal Employment Opportunity Authorities (September 2006). Instead, the authority to appoint ALJs for the SSA is delegated to the Deputy Commissioner for the Office of Disability Adjudication and Review of the SSA. *Id*. Therefore, the great majority of ALJs are not appointed pursuant to the Appointments Clause.

ALJs are hired pursuant to 5 U.S.C. sec. 3105 (2006). An agency may appoint an individual as an ALJ only after the Office of Personnel Management certifies that individual as eligible for the position. 5

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[68] *Id*. at 1-4 (showing that the Federal Government employed 1,351 ALJs and 3,370 non-ALJ hearing officers in 2002); see also Office of Pers. Mgmt., Federal Administrative Law Judges, By Agency and Level, CDPF Status Report as of June 2008 (OPM Report) (showing the Federal Government employed 1,388 ALJs in June 2008). Justice Breyer determined that there are currently 1,584 ALJs. See *Free Enter. Fund v. PCAOB*, 561 U.S. at ___, 130 S. Ct. at 3180-3181 (Breyer, J., dissenting).

C.F.R. sec. 930.204 (2008). The APA generally requires that an ALJ preside over "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing". 5 U.S.C. sec. 554 (2006). If the adjudication is a so-called on the record hearing, then the hearing is a "formal adjudication" that must adhere to the formal hearing procedures of the APA, which provide, inter alia, that each party is entitled to present oral or documentary evidence, submit rebuttal evidence, and conduct cross-examination. 5 U.S.C. secs. 554-557. When presiding over an "on the record" hearing, ALJs have the authority to require attendance at the hearing, to administer oaths and affirmations, to issue subpoenas, to rule on offers of proof and receive evidence, and to order depositions. *Id*.

However, if the relevant statute does not require an "on the record" hearing, then the formal hearing procedures of the APA do not apply and a non-ALJ hearing officer may preside over the adjudication. See *id*. Sections 6320 and 6330 do not require an "on the record" CDP hearing, see *Davis v. Commissioner,* 115 T.C. at 41-42 (citing 26 C.F.R. sec. 601.106(c), Statement of Procedural Rules); and thus even apart from section 6330(b)(3) (allowing a CDP hearing before "an officer or employee"), APA procedures would not require the IRS to use ALJs to conduct CDP hearings. Therefore, the appeals officer who conducts and adjudicates a CDP hearing is more comparable to a non-ALJ hearing officer than to an ALJ.

The CDP hearing officer, hired and not constitutionally "appointed", is by no means unique in the context of administrative adjudication.

III. The status of the CDP "officer or employee" and "appeals officer" under the Appointments Clause

In order to determine whether the "officer or employee" (or the "appeals officer") of section 6330 is an "inferior Officer" who must be appointed in compliance with the Appointments Clause, we consider the two issues prompted by the text of the clause.

A. Whether the position is "established by Law"

"[T]he threshold trigger for the Appointments Clause" is that an office be "'established by Law'". *Landry v. FDIC*, 204 F.3d at 1133. We hold that there is no CDP hearing officer position "established by Law" under sections 6320 and 6330 whose incumbent could be an officer subject to the Appointments Clause.

1. Creation by statute

Where "the 'duties, salary, and means of appointment' for the office were specified by statute", that is considered "a factor that has proved relevant in the [Supreme] Court's Appointments Clause jurisprudence." *Id*. (quoting *Freytag v. Commissioner*, 501 U.S. at 881). If there were a statutory provision to the effect that "There shall be, within the Internal Revenue Service Office of Appeals, officers designated as Appeals Officers, who shall conduct CDP hearings", etc., then that would be some indication that the Appeals Officer position was "established by Law". There is no such statute, and this lack is some indication that the position in question is not an office "established by Law".

The IRS Office of Appeals was not, in its current form, initially created by the Internal Revenue Code,[69] nor were its "Appeals Officers". Congress did explicitly "establish" in the Internal Revenue Code certain officers who are to be appointed by the President, with the advice and consent of the Senate--i.e., the Commissioner, sec. 7803(a)(1), the Chief Counsel, sec. 7803(b)(1), and members of the Internal Revenue Service Oversight Board, sec. 7802(b)(1)--and the National Taxpayer Advocate (sec. 7803(c)(1)), who is appointed by the Secretary of the Treasury.[70] Otherwise, the employment of "Other Personnel" is authorized in Section 7804(a), which, as we noted above, simply provides that "the Commissioner of Internal Revenue is authorized to employ such number of persons as the Commissioner

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[69] Although the Office of Appeals was originally a creature of regulation, the multiple references to it that were added to the Code in 1998, see part II.B above, make it at least arguable that the Office of Appeals is now required by statute. However, there is no constitutional issue as to whether the Office of Appeals itself was "establish[ed] by Law"; rather, the issue is whether there are, within the Office of Appeals, personnel who are "officers" whose positions are "established by Law".

[70] The National Taxpayer Advocate's predecessor, the Taxpayer Advocate, was appointed by the Commissioner of Internal Revenue, pursuant to former section 7802(d)(1).

deems proper". Congress thus left to the Executive Branch almost the entire personnel structure of the IRS and refrained from establishing other particular offices within it.

As is shown above in part II.B, it was the Executive Branch that created the IRS Office of Appeals and its personnel structure, pursuant to that authority in section 7804(a). When Congress enacted in 1998 the CDP provisions in sections 6320 and 6330, it employed that pre-existing Office of Appeals and committed the new CDP function *to that office*. Secs. 6320(b)(1), 6330(b)(1), (d)(2). Mr. Tucker contends that the RRA established the pre-existing Appeals Officer position as the CDP hearing officer. The statute does refer to an "appeals officer" as the person who "obtain[s] verification * * * that the requirements of any applicable law or administrative procedure have been met", sec. 6330(c)(1), and who makes the "determination" whether to proceed with collection, sec. 6330(c)(3). However, for the following reasons we conclude that section 6330 uses the term "appeals officer" interchangeably with the term "officer or employee":

First, the provisions in the lien statute, section 6320(b)(3), and in the levy statute, section 6330(b)(3), that actually state who shall conduct the hearing state that "the hearing * * * shall be conducted by an *officer or employee* who has had no prior involvement with respect to the unpaid tax". (Emphasis added.) This is the first and only mention of an individual in the lien statute and the first mention of an individual in the levy statute. The caption of each paragraph is “Impartial *officer*”, thereby explicitly indicating that it might be an “officer *or employee*” who serves as the “Impartial *officer*”. (Emphasis added.) This shows that Congress did not use the term “officer” in any specialized sense. The phrase “or employee” is so contrary to Mr. Tucker’s position that he is forced to declare the phrase “mere surplusage”. However, we decline to read words out of the statute; rather, we attempt to give meaning to every word that Congress enacted, and here that is best accomplished by taking at face value the phrase “officer *or employee*” in sections 6320(b)(3) and 6330(b)(3) (emphasis added), and by understanding the phrase “appeals officer” in section 6330(c)(1) and (3) as shorthand for an officer or employee in the Office of Appeals. If Congress had intended to assign CDP duty to a particular rank of “Appeals Officer”, it would not have added the phrase “or employee”; and it could have used language like that which it used simultaneously in RRA section 3105 where it provided that a bond issuer could appeal an adverse ruling “to a *senior officer* of the Internal Revenue Service Office of Appeals”. (Emphasis added.)

Second, the conference report describing the provision does on one occasion use the designation “*appeals* officer” but almost immediately thereafter uses the designation “*appellate* officer”. H. Conf. Rept. 105-599, at 264 (1998), 1998-3 C.B. 747, 1018 (emphasis added).[71]

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[71] See also S. Rept. 105-174, at 68 (1998), 1998-3 C.B. 537, 604 (“The determination of the *appeals* officer”; “the

Neither the statute itself nor the legislative history shows that Congress intended to ascribe any particular importance or significance to the term "appeals officer". We hold that, for purposes of section 6330(c)(1) and (3), an "appeals officer" is any "officer or employee" in the IRS Office of Appeals to whom is assigned the task of conducting a CDP hearing under section 6330(b)(3).[72]

The statute thus does not create any positions for the personnel who would perform the CDP function but rather refers to them in a most diffuse manner ("conducted by an officer or employee"). After the enactment of this statute, it was not possible to point to a position responsible for conducting CDP hearings and to question whether the person in that position was an "inferior Officer"; instead the hearings would be conducted by "employees" yet to be designated, from time to time, within the Office of Appeals.[73] Thus, the mere mention of an "officer or employee" or an "appeals officer" in sections 6320

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determination of the *appellate* officer"; "the *appellate* officer's determination" (emphasis added)).

[72] See *Powers v. Commissioner*, T.C. Memo. 2009-229; *Reynolds v. Commissioner*, T.C. Memo. 2006-192.

[73] Mr. Tucker sets out an elaborate hypothetical circumstance, intended to show the importance of appeals officers, in which an appeals officer could end up holding jurisdiction over the three major U.S. car manufacturers and thereby "effectively become the United States 'Car Czar'"; "she could effectively end the United States domestic automobile industry"; "She could be in charge of the companies' fates for years". Among the reasons that we are not influenced by this possibility is that it is the Office of Appeals, and not an individual officer or employee, that retains jurisdiction under section 6330(d)(2).

and 6330 presumes but does not establish any position.[74] In addition to sections 6320 and 6330, however, Mr. Tucker points to a reference to "appeals officer" in a provision of the RRA that has not been codified in the Code.[75] RRA section 3465(b), 112 Stat. 768, 1998-3 C.B. 228, provides:

> The Commissioner of Internal Revenue shall ensure that *an appeals officer* is regularly available in each State. [Emphasis added.]

This provision, however, has little to do with the CDP hearing or its presiding "officer *or employee*". (Emphasis added.) The statute certainly does not establish (or even imply) a CDP hearing officer "in each State". That is, even if the statute were read to mean that "There shall be, and is hereby established, an IRS official known as 'Appeals Officer' in each State", Congress would not, by creating such an official, establish a CDP hearing officer, as Mr. Tucker's argument would require. Whatever that "appeals officer * * * in each state" might be tasked with doing, Congress made clear in sections 6320(b)(3) and 6330(b)(3) that a CDP

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[74] The mere mention of an office in the Code evidently does not establish that office or guarantee its continuance. Other administratively created IRS positions have been mentioned from time to time in sections of the Code but have thereafter been abolished by agency restructuring and their functions delegated to other personnel. See, e.g., sec. 6334(e)(2)(A) (mentioning "district director"); sec. 7611(b)(3)(C) (mentioning "regional commissioner").

[75] For the two other uncodified references to "appeals officers" in the RRA, see *supra* note 52.

hearing can be staffed by an "officer *or employee*". (Emphasis added.)

We therefore hold that the RRA did not establish the position of a CDP "appeals officer".

2. Creation by regulation

However, Mr. Tucker contends, in effect, that proper Appointments Clause analysis must consider both statute and regulations. We therefore consider whether an office might be "established" by the RRA taken together with the regime for the Office of Appeals that is established in the regulations. It is true that the case law does not posit a bright-line rule that would require an explicit statutory creation of an office before there can be an "officer" for purposes of the Appointments Clause. Opinions of the Courts of Appeals for the Third, Fifth, and Sixth Circuits seem to tend to the contrary:[76]

The Administrative Review Board (ARB) of the Department of Labor, composed of three "members" appointed by the Secretary of Labor, "'issu[es] final

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[76] In *Free Enter. Fund v. PCAOB*, 561 U.S. at ___, 130 S. Ct. at 3179 (Breyer, J., dissenting), Justice Breyer asserts explicitly that an "office" can be "created either by 'regulations' or by 'statute,'" for which he cites *United States v. Mouat*, 124 U.S. 303, 307-308 (1888) ("there is no statute authorizing the secretary of the navy to appoint a pay-master's clerk, nor is there any act requiring his approval of such an appointment, and the *regulations* of the navy do not seem to require any such appointment or approval for the holding of that position. The claimant, therefore, was not an officer" (emphasis added)).

agency decisions on questions of law and fact arising in review or on appeal' in whistleblower cases." *Willy v. Admin. Review Bd.*, 423 F.3d 483, 491 (5th Cir. 2005) (quoting 61 Fed. Reg. 19978 (May 3, 1996)). The ARB was created not by statute but by an order of the Secretary of Labor, pursuant to 5 U.S.C. sec. 301 (2006), which provides that "[t]he head of an Executive department * * * may prescribe regulations for the government of his department, the conduct of its employees, [and] the distribution and performance of its business". Both the Courts of Appeals for the Fifth Circuit, see *Willy v. Admin. Review Bd.*, 423 F.3d at 491-492, and the Sixth Circuit, see and *Holtzclaw v. Sec. of L*abor, 172 F.3d 872 (6th Cir. 1999); *Varnadore v. Sec. of Labor*, 141 F.3d 625, 631 (6th Cir. 1998), approved the creation of the ARB as being within the general authority granted to the Secretary of Labor under 5 U.S.C. sec. 301 (2006), analyzed the position of member on the ARB under the Appointments Clause and found it to be an "inferior Officer", and held that Congress, by 5 U.S.C. sec. 301, had authorized the Secretary to make the appointments, which satisfied the requirements of the Appointments Clause.

Similarly, the Appeals Board of the Department of Health and Human Services (HHS), composed of members appointed by the Secretary of HHS, resolves disputes under the Child Support Enforcement Act, 42 U.S.C. secs. 651-669(b) (2006). *Pennsylvania v. HHS*, 80 F.3d 796, 800 (3d Cir. 1996). The Appeals Board was created not by statute but by regulation, 45 C.F.R. pt. 16 (1981), promulgated by the Secretary of HHS, pursuant to

42 U.S.C. sec. 913 (2006), which provides: "The Secretary is authorized to appoint and fix the compensation of such officers and employees, and to make such expenditures as may be necessary for carrying out the functions of the Secretary under this chapter." The Court of Appeals for the Third Circuit approved the creation of the Appeals Board as being within the general authority granted to the Secretary of HHS under 42 U.S.C. sec. 913, analyzed the position of member on the Appeals Board under the Appointments Clause and found it to be an "inferior Officer", and held that Congress, by 42 U.S.C. sec. 913, had authorized the Secretary to make the appointments, which satisfied the requirements of the Appointments Clause. *Pennsylvania v. HHS*, *supra* at 804-805.

None of these opinions suggests that any party had argued that the positions under review were not "established by Law". Rather, the parties and the courts seem to have assumed that if the positions existed, then the positions were "established by Law".[77] If this assumption is correct, then it would seem that any "Office" that actually exists in the Federal Government is arguably "established by Law".

The Supreme Court has not so held, and the assumption is problematic, in that it risks reading out of the Constitution the phrase "established by

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[77] For a defense of this position, see Stephen G. Bradbury, "Officers of the United States Within the Meaning of the Appointments Clause", 31 Op. Off. Legal Counsel, at *36-38, 2007 OLC LEXIS 3, *117-123 (Apr. 16, 2007).

Law", if the Appointments Clause would mean the same thing with or without that phrase. One could argue instead that only a position created by a statute can be "established by Law" for purposes of the Appointments Clause. If a position is created not by Congress but by the Executive, then by definition there is no possibility that Congress both created and filled that position, which is the chief danger against which the clause is a safeguard.

However, if the phrase "established by Law" were construed to mean that the Appointments Clause can apply only to a position expressly created by a statute, then abuses could arise. For example, Congress could take a pre-existing low-level position (which had been created by the Executive Branch pursuant to a general authorization like section 7804(a), and which was not subject to appointment by the President or a Head of a Department) and could invest it with significant additional power, thus evading the Appointments Clause by seeming to avoid "establishing" the office.[78] Where such a pattern existed, the courts would have to see through the subterfuge and enforce the Appointments Clause. Mr. Tucker argues that the CDP provisions involve just this problem--i.e., that

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[78] An analogous abuse via "indirection" was hypothesized in *Springer v. Govt. of the Philippine Islands*, 277 U.S. 189, 202 (1928), when the Court stated: "the legislature cannot ingraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection". The Court did go on to observe that "the case might be different if the additional duties were devolved upon an appointee of the executive", *id*., but it did not elaborate on this scenario.

Congress took the existing Appeals Officer position and invested it with the “significant authority” (discussed below in part II.B.2) of the CDP process.

The argument fails, however, because Congress has assigned the CDP hearing function not to a particular rank or title of “Appeals Officer” nor to any other identifiable office-holder but generally to the Office of Appeals and, within it, to any “officer or employee”, secs. 6320(b)(3), 6330(b)(3), from among the “number of persons” who are employed in that Office “as the Commissioner deems proper for the administration and enforcement of the internal revenue laws”, sec. 7804(a). Likewise, even under the regulations the CDP responsibility does not inhere in any specific office or position. Pursuant to the administrative arrangements of the Office of Appeals, 250 employees are designated to perform that CDP function, but it is within the agency’s authority under section 6330 to allocate the function as it will among its 1,100 settlement officers and Appeals Officers. The Appointments Clause applies only when an office is “established by Law”, but there is no office established by statute or regulation to which Congress committed the CDP function.

B. Whether the CDP function could constitute an “office”

If, however, a position is “established by Law”, the second question in an Appointments Clause inquiry is whether that position constitutes an office of the United States. Only “offices” are subject to the requirements of the clause, and not every position that is "established by Law" is an office.[79] See *Freytag v. Commissioner*, 501 U.S. at 880-881. Assuming arguendo that the CDP function prescribed under sections 6320 and 6330 and the regulations thereunder is committed to a position "established by Law", we must determine whether that position could constitute an "office".

The Supreme Court has articulated two essential characteristics that a position must have in order to constitute an office: A position is an office if (i) it is invested with "significant authority pursuant to the laws of the United States", *Buckley v. Valeo*, 424 U.S. at 126, and (ii) it is "continuing", *Auffmordt v. Hedden*, 137 U.S. 310, 326-328 (1890); *United States*

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[79] The requirements of the Appointments Clause are not implicated unless an "office" exists. *Freytag v. Commissioner*, 501 U.S. at 880 (citing *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976)). Even if the position of a non-officer employee is clearly established by law, i.e., "the duties, salary, and means of appointment * * * are specified by statute", *id*., at 881, appointments to that position need not conform to the Appointments Clause, *id*. at 880-881. In *Freytag*, the Supreme Court noted that the position of Special Trial Judge on this Court is "established by Law", but nonetheless stated that Special Trial Judges "need not be selected in compliance with the strict requirements of [the clause]" "if we * * * conclude that a special trial judge is only an employee". *Id*. Likewise, in *Landry v. FDIC*, 204 F.3d 1125, 1133-1134 (D.C. Cir. 2000), the Court of Appeals for the District of Columbia Circuit noted that the position of ALJ for the Federal Deposit Insurance Corporation is "established by Law", but held that the position does not constitute an office. Moreover, the history of internal revenue collection in the United States is replete with officials whose positions were specified by statute, but were not appointed pursuant to the requirements of the clause. See *supra* pt. II.C.2.c.

v. Germaine, 99 U.S. at 511-512; *United States v. Hartwell*, 73 U.S. 385, 393 (1868). Whether a position possesses these characteristics and thus constitutes an office "is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto." *Burnap v. United States*, 252 U.S. 512, 516 (1920). Therefore, we examine the specific features of the "officer or employee" position within the CDP function to determine whether it is a "continuing" office invested with "significant authority".

1. Whether the CDP provisions created a "continuing" position

A position is "continuing" if it possesses "'tenure, duration, emolument, and duties'" that are "'continuing and permanent, not occasional or temporary.'" *Auffmordt v. Hedden*, *supra* at 327 (quoting *United States v. Germaine*, *supra* at 511-512). A position is most clearly "continuing" if it is permanently assigned sovereign authority that does not expire, inter alia, upon the passage of time or the completion of a discrete task. See *Auffmordt v. Hedden, supra* at 326-328; *United States v. Germaine, supra* at 511-512; *United States v. Hartwell, supra* at 393. Respondent concedes that, if the CDP "appeals officer" is a position "established by Law", then it is a "continuing" position; and we therefore proceed to consider whether that position is given "significant authority", so that the person holding that position would be an officer (i.e., an "inferior Officer") rather than a non-officer employee.

2. Whether the CDP hearing officer has "significant authority"

In *Buckley v. Valeo*, *supra* at 126, the Supreme Court held that a position invested with "significant authority" is an office:

> We think that the term "Officers of the United States" as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in *United States v. Germaine, supra*, is a term intended to have substantive meaning. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article.

In that case the Supreme Court examined the powers of the eight-member Federal Election Commission (FEC) established under the Federal Election Campaign Act of 1971 (1971 Act), Pub. L. 92-225, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263. *Id*. at 137-141. The Supreme Court concluded that none of the FEC's commissioners were appointed in conformity with the clause, and thus, none of them were constitutionally permitted to exercise "significant authority". *Id.* at 137. It then sorted the FEC's statutorily authorized powers into three categories in order to determine whether the powers in each category constituted significant authority:

> [T]he Commission's powers fall generally into three categories: functions relating to the flow of necessary information -- receipt, dissemination, and investigation; functions with respect to the Commission's task of fleshing out the statute -- rulemaking and advisory opinions; and functions necessary to ensure compliance with the statute and rules -- informal procedures, administrative determinations and hearings, and civil suits.

Id. The Supreme Court held that it was constitutionally permissible for the unappointed commissioners to exercise their investigatory and informative powers, because in so doing they were merely aiding Congress in performing its legislative function. *Id*. at 137-138. Since Congress could delegate those powers to its own committees, the Supreme Court stated "there can be no question" that Congress could delegate them to the FEC by statute. *Id.*

However, the Supreme Court held that it was not permissible for the unappointed commissioners to exercise their "more substantial [enforcement and interpretive] powers". *Id.* at 138. First, the Supreme Court held that only "Officers of the United States" could exercise the commissioners' power to bring suit to enforce the 1971 Act, because that power "is the ultimate remedy for a breach of the law" and belongs to the Executive—not Legislative--Branch. *Id.* at 138-140. Second, the Supreme Court held that only "Officers of the United States" could exercise the commissioners' power to interpret the entire 1971

Act through rulemaking, advisory opinions, and determinations—without supervision from either Congress or the Executive Branch—because that power "represents the performance of a significant governmental duty exercised pursuant to a public law." *Id*. at 140-141. From *Buckley* we therefore draw the general principle that only an "officer" may perform "significant" enforcement and interpretive functions. See *id*. at 124-141. In particular, the powers (i) to bring suit to enforce an Act of Congress and (ii) to issue regulations, advisory opinions, and determinations without supervision under an Act of Congress both constitute "significant authority".

The Supreme Court has yet to fully define the term "significant authority";[80] and "ascertaining the

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[80] While "significant authority" is an essential characteristic of an "office", *Buckley v. Valeo*, 424 U.S. at 126, this proposition cannot be construed to mean that non-officer employees of the Federal Government are insignificant or trivial. Mr. Tucker suggests that treating "appeals officers" as non-officer employees not subject to the Appointments Clause is to regard them as "unimportant". We disagree. For example, military ranks reflect the same distinction between officers who are appointed in compliance with the Appointments Clause, see 10 U.S.C. secs. 531, 571, 624 (2006), and non-officers who are not. However, those non-officers include "noncommissioned officers" (sergeants, corporals, and petty officers) who are promoted (not appointed) from among enlisted personnel. See, e.g., Army Regulation 600-8-19 ("Enlisted Promotions and Reductions"), ch. 3 ("Semicentralized Promotions (Sergeant and Staff Sergeant)"), sec. 3.1. No one could reasonably call the role of noncommissioned officers "insignificant". They have command of the enlisted personnel under them, and insubordination or disobedience of their commands is punishable by court-

test's real meaning requires a look at the roles of the employees whose status was at issue in other cases." *Landry v. FDIC*, 204 F.3d at 1133. In the two cases most analogous to our facts, the Supreme Court in *Freytag* and the Court of Appeals for the District of Columbia Circuit in *Landry* analyzed whether different adjudicative positions constituted "offices". In *Freytag* the Supreme Court faced the question whether a Special Trial Judge (STJ) of the Tax Court is an "inferior Officer"; and it observed that in some matters the STJ will "only hear the case and prepare proposed findings and an opinion" while in other matters the STJ may be assigned "not only to hear and report on a case but to decide it". *Freytag v. Commissioner*, 501 U.S. at 873. In deciding that STJs are "inferior Officers", the Supreme Court relied on the authority of STJs to render the final decision of this Court in some of the matters that come before them. See *id.* at 882.

In contrast, in *Landry v. FDIC*, supra at 1134, the Court of Appeals decided that ALJs for the Federal Deposit Insurance Corporation (FDIC) are not inferior officers. Both the ALJs in *Landry* and the STJs on this Court "'take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders.'" *Id*. (quoting *Freytag v. Commissioner*, 501 U.S. at 881-882). However, unlike the STJs, the ALJs lacked the power to make final decisions. *Id*. at 1133. Instead, ALJs file a recommended decision, 12

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martial. See 10 U.S.C. sec. 891 (2006). Thus, the issue here is not whether appeals officers are unimportant, but whether they are "Officers of the United States".

C.F.R. sec. 308.38 (1996), which the FDIC's board of directors reviews de novo before it issues the final decision of the agency, *id*. sec. 308.40(a), (c). This lack of finality led the Court of Appeals to conclude that the ALJs in question are not officers. *Landry v. FDIC, supra* at 1134.

This focus in Landry on final decision-making power is an appropriate application of the Supreme Court's earlier analysis of the FEC's interpretive powers in *Buckley v. Valeo*, 424 U.S. at 140-141, which held that the power to interpret the 1971 Act "free from day-to-day supervision of either Congress or the Executive Branch" constitutes significant authority. The power to make a final decision, which the Supreme Court described as "independent authority" in *Freytag v. Commissioner*, *supra* at 882, is a species of the power to act without supervision. See *Buckley v. Valeo*, *supra* at 141. Therefore, a position that is invested with broad adjudicative powers, like the position of STJ, may be an office if the incumbent can act free of supervision or has the final say within the agency. See *Freytag v. Commissioner, supra* at 882. However, such a position is not an office if the incumbent and her determinations are subject to supervision. See *Landry v. FDIC, supra* at 1133-1134.

Mr. Tucker and the amicus contend that the positions of settlement officer and team manager within the Office of Appeals are invested with "significant authority". In particular, Mr. Tucker posits that "Settlement Officers, and/or Appeals team managers holding CDP hearings are so similar to Special Trial Judges in all ways that mattered to the Supreme Court in its Freytag Appointments Clause analysis that any differences are not of Constitutional significance." We disagree.

While settlement officers, appeals officers, and team managers can be said to possess adjudicative powers to conduct hearings and to issue determinations to resolve those hearings, none possess the power to make final decisions for the IRS. Contrary to Mr. Tucker's assertion that "[n]otices of determination issued by Appeals personnel after CDP hearings are final and binding on the IRS", determinations by settlement officers and Appeals team managers are not "final" in the sense that is relevant to the Appointments Clause. They review only a particular collection episode--a given notice of lien or notice of proposed levy. As is discussed above in part II.C.3.a, in the absence of a written agreement with the taxpayer, the Office of Appeals (not the appeals officer) retains jurisdiction to reconsider and overturn its personnel's determinations with respect to collection action. Sec. 6330(d)(2). If Mr. Tucker's circumstances were to change, and it became clear that he could never repay the IRS, nothing would prevent collection personnel from relenting or prevent the Office of Appeals from holding a supplemental CDP hearing and revising its personnel's prior determination to uphold the tax lien.

Even determinations with respect to underlying liability by the personnel of the Office of Appeals are not binding on the IRS and may be overturned during audit reconsideration or overruled by the IRS Office of Chief Counsel in taking litigation positions or settling cases. See *supra* part II.C.3.b. The Office of Chief Counsel, not the Office of Appeals, has authority to "[n]egotiate or make a settlement in any case docketed in the Tax Court if the * * * determination was issued by Appeals officials". 26 C.F.R. sec. 601.106(a)(2)(i), Statement of Procedural Rules. Here, the Office of Chief Counsel was free to contest or settle Mr. Tucker's case, notwithstanding the team manager's determinations to uphold the tax lien at issue.

No position within the Office of Appeals is invested, in the CDP context, with the "final" decision-making power that may be exercised only by an "officer of the United States". For that reason, settlement officers, appeals officers, and team managers are more analogous to the ALJs in *Landry* than to the STJs in *Freytag*.

Moreover, non-officer ALJs have the authority to conduct "on the record" hearings, to require attendance at those hearings, to administer oaths and affirmations, to issue subpoenas, to rule on offers of proof and receive evidence, and to order depositions. 5 U.S.C. secs. 554-557. Despite this authority, the Court of Appeals for the District of Columbia Circuit held that the ALJs in *Landry* are not officers because they lack final decision-making power. *Landry v. FDIC*, 204 F.3d at 1133-1134.[81] In

[81] The status of ALJs as employees or "Officers of the United States" is "disputed". *Free Enter. Fund v. PCAOB*, 516 U.S. at ___ n.10, 130 S. Ct. at 3160 (citing *Landry v. FDIC*, 204 F.3d

contrast, settlement officers, appeals officers, and team managers lack not only final decision-making power but also these formal powers granted to ALJs under the Administrative Procedure Act. See 26 C.F.R. sec. 301.6330-1(d)(2), Q&A-D6, Proced. & Admin. Regs. CDP hearings are "informal in nature" and do not even require a face-to-face meeting. *Id*.

Since we find persuasive the reasoning of the Court of Appeals for the District of Columbia Circuit in its determination that ALJs for the FDIC do not exercise "significant authority", we hold that the lesser position of CDP "appeals officer" ("or employee") within the Office of Appeals likewise does not exercise "significant authority". We therefore hold that the positions of settlement officer, appeals officer, and team manager are not invested with "significant authority" under *Buckley v. Valeo*, 424 U.S. at 126.

1125 (D.C. Cir. 2000)). In Landry a divided panel of the Court of Appeals for the D.C. Circuit held that ALJs for the FDIC are not officers. However, in *Free Enter. Fund v. PCAOB*, dissenting Justice Breyer apparently indicates that he would hold that all ALJs are officers. 516 U.S. at ___ 130 S. Ct. at 3180 (Breyer, J., dissenting) (citing *Freytag v. Commissioner*, 501 U.S. at 910 (Scalia, J., concurring in part and concurring in judgment)). No court has held contrary to *Landry*, and we follow it. However, even assuming arguendo that ALJs are "Officers of the United States", it does not follow that CDP hearing officers are likewise "officers". CDP hearing officers lack not only final decision-making power but also the formal powers granted to ALJs. Whether or not the position of ALJ constitutes an "Office[] of the United States", the lesser position of CDP "appeals officer" is not an "office".

Conclusion

An "officer or employee" of the IRS Office of Appeals who conducts CDP hearings has neither a position "established by Law" nor "significant authority" that is characteristic of an "officer of the United States" for purposes of the Appointments Clause. Without at all minimizing the importance of conducting a CDP hearing, that function does not involve an authority more "significant" than the authority exercised by other personnel important to tax administration (whether the Chief of the Office of Appeals (their superior), other high-ranking officials in the IRS, or many internal revenue collection personnel over the past 200 years) or as significant as the authority exercised by ALJs in many other agencies. To survey these thousands of employees important to the administration of law and single out IRS "appeals officers" as somehow requiring constitutional appointment would be unwarranted. They are instead properly hired, pursuant to section 7804(a), under the authority of the Commissioner of Internal Revenue.

To reflect the foregoing,

An appropriate order will be issued.

APPENDIX C

T.C. Memo. 2011-67

UNITED STATES TAX COURT

LARRY E. TUCKER,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 3165-06L. Filed March 22, 2011.

P filed income tax returns for 2000, 2001, and 2002 that reported tax due; but he did not pay the tax. In early 2003, when P's tax liabilities totaled at least $14,945, P used $44,700 for day trading and lost $22,645. The Internal Revenue Service assessed the tax and issued to P a notice of the filing of a "Notice of Federal Tax Lien" (NFTL). After an initial hearing and an adverse determination, P filed a timely appeal of that determination with the Tax Court pursuant to I.R.C. sec. 6330(d)(1), contending that the Office of Appeals improperly rejected an offer-in-compromise (OIC) that P proposed. This Court ordered a remand to the Office of Appeals for further consideration of P's OIC. At a supplemental collection due process hearing, the Office of Appeals preferred a partial payment installment agreement but P proposed only his OIC. In calculating P's reasonable collection potential for purposes of evaluating his OIC, the Office of Appeals considered P's day trading to constitute asset dissipation. The Office of Appeals issued a supplemental notice of determination denying P's proposed OIC and upholding the filing of the NFTL. The parties have filed cross-motions for summary judgment.

Held: Where P engaged in day trading in disregard of his outstanding Federal income taxes, the resulting losses constitute dissipation of assets. R's Office of Appeals did not abuse its discretion in denying P's proposed OIC and upholding the filing of the NFTL.

Carlton M. Smith and Zachary Grendi (student), for petitioner.

Lydia A. Branche, for respondent.

MEMORANDUM OPINION

GUSTAFSON, *Judge*: This case is an appeal, pursuant to section 6330(d)(1),[1] by which petitioner Larry E. Tucker seeks this Court's review of a determination by the Office of Appeals of the Internal Revenue Service (IRS) to reject Mr. Tucker's proposed offer-in-compromise (OIC) and to sustain the filing of a notice of Federal tax lien (NFTL) in order to collect Mr. Tucker's unpaid income taxes for tax years 2000, 2001, and 2002.

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[1] Unless otherwise indicated, all section references are to the Internal Revenue Code ("Code", 26 U.S.C.) and all Rule references are to the Tax Court Rules of Practice and Procedure.

That determination was made after the Office of Appeals conducted a collection due process (CDP) hearing pursuant to section 6330(c) and a supplemental CDP hearing pursuant to a remand of this Court. The IRS's determination at issue in this case is reflected in an initial "Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330" and in a "Supplemental Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330". This matter is currently before this Court on the parties' cross-motions for summary judgment filed under Rule 121.

The specific issue to be decided is whether the Office of Appeals abused its discretion in September 2006--at a time when Mr. Tucker owed more than $39,000--by rejecting an OIC pursuant to which Mr. Tucker would have paid $317 over 116 months, totaling $36,772. We will grant respondent's motion and deny Mr. Tucker's motion. We hold that the Office of Appeals did not abuse its discretion in rejecting Mr. Tucker's OIC and sustaining the filing of the NFTL.

Background

The parties' motion papers and the supporting exhibits attached thereto show that there is no dispute as to the following facts. At the time he filed his petition, Mr. Tucker resided in New Mexico.

Mr. Tucker's tax returns

Mr. Tucker earned income in the five years 1999 through 2003. For the first three of those years Mr. Tucker failed to timely file tax returns. For the years at issue[2]—-2000, 2001, and 2002--he simultaneously filed Forms 1040, "U.S. Individual Income Tax Return", on April 15, 2003.[3] In March 2004 he filed an untimely Form 1040 for tax year 1999. And in

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2 The IRS's notice of determination at issue referred to liabilities for only three years--2000, 2001, and 2002--and this Court lacks jurisdiction to review collection of the liabilities for the years not included in the notices of determination. See *Sullivan v. Commissioner*, T.C. Memo. 2009-4. However, as is explained below, the OIC that Mr. Tucker submitted in his CDP hearing addressed five years--1999 through 2003. In determining whether the rejection of the OIC and the collection of liabilities for the years included in the notices of determination is appropriate, this Court is authorized (as the settlement officer was required) to consider "any relevant issue * * * including * * * offers of collection alternatives". Sec. 6330(c)(2)(A), (d). Therefore, we evaluate the settlement officer's exercise of discretion in rejecting the OIC, taking into account all the liabilities that were proposed to be compromised, even though we do not have jurisdiction to review the collection of all those liabilities. See, e.g., *Orum v. Commissioner*, 123 T.C. 1 (2004) (reviewing an OIC that covers income tax liabilities for tax years that are both within and outside of this Court's jurisdiction), affd. 412 F.3d 819 (7th Cir. 2005)

3 In our previous Opinion in this case, *Tucker v. Commissioner*, 135 T.C. 114, 117 (2010), we mistakenly stated that Mr. Tucker untimely filed all of these returns in June 2003. The transcripts of Mr. Tucker's accounts show that, while these returns were not processed by the IRS until June 2003, they were received by the IRS on April 15, 2003. These filings were therefore timely as to 2002 but untimely as to 2000 and 2001.

April 2004 he timely filed a Form 1040 for tax year 2003. For 2000 through 2003, some but not all of his tax liabilities were either prepaid or withheld from his wages. The IRS assessed the income tax liabilities that Mr. Tucker had self-reported. After the application of prepayment and withholding credits, Mr. Tucker had an outstanding reported tax due (not including any interest or penalties) for each year as follows:

Tax Year	Income Tax Reported	Withholding Credits	Reported Tax Liability Due
1999	$3,356	-0-	$3,356
2000	14,808	($6,702)	[1]8,106
2001	3,629	(146)	3,483
2002	13,404	(10,353)	3,051
2003	6,947	(633)	6,314
Total			24,310

[1]After filing his return for tax year 2000, Mr. Tucker made three voluntary payments of $349 towards the amount due. As a result, by July 2004, when the collection action at issue started, the tax due for 2000 (without any accruals) was reduced to $7,059, and the tax due for all five years (without any accruals) was reduced to $23,263.

On May 8, 2004, nearly a year after Mr. Tucker filed his delinquent returns for 2000, 2001, and 2002, the IRS sent to him a "Final Notice--Notice of Intent to Levy and Notice of Your Right to a Hearing" (hereinafter, "levy notice") for those three years, pursuant to sections 6330(a)(1) and 6331(d)(1), advising him of the IRS's intent to levy upon his property. Mr. Tucker did not timely request a hearing under section 6330 with respect to that notice. For the same three years, the IRS sent to Mr. Tucker on July 22, 2004, a "Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320" ("lien notice"), pursuant to section 6320(a)(1), advising him that the IRS had filed an NFTL against him.

Mr. Tucker's July 2004 OIC

On July 29, 2004, after the IRS had issued the lien notice, but before Mr. Tucker received it, he submitted a Form 656, "Offer in Compromise", proposing to settle his income tax liabilities for the five years 1999 through 2003. At that time, his unpaid tax liabilities for those five years totaled $24,310, and with interest and additions to tax ("accruals"), his total five-year liability was approximately $35,000.[4] Mr. Tucker proposed to compromise that five-year liability for a total of $6,000 payable in monthly payments of $100 over 60 months. Mr. Tucker also submitted a Form 433-A, "Collection Information Statement for Wage Earners and Self-Employed Individuals", detailing his assets, monthly income, and monthly expenses.

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[4] The record reflects that Mr. Tucker's outstanding liabilities with accruals through August 16, 2004, were $35,591.26, so we estimate his total outstanding liabilities (i.e., unpaid taxes plus accruals) as of July 29, 2004 (i.e., less than one month earlier), to be approximately $35,000.

The IRS received Mr. Tucker's July 2004 OIC on August 4, 2004. By letter dated August 25, 2004, the IRS examiner who evaluated the July 2004 OIC informed Mr. Tucker that the IRS had "determined that you have the ability to pay your liability in full within the time provided by law."[5] Mr. Tucker was given 14 days to dispute this determination.

At the same time the IRS was evaluating Mr. Tucker's July 2004 OIC, Mr. Tucker timely submitted to the IRS on August 11, 2004, a Form 12153, "Request for a Collection Due Process Hearing", in response to the lien notice. In the

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[5] This August 2004 determination that Mr. Tucker could fully pay his income tax liabilities--a determination not important to the outcome of this case--was made by comparing Mr. Tucker's then-current liabilities (i.e., $35,591.26 with accruals through August 16, 2004) to his total ability to pay (which was reckoned to be $609,680.73). Included in the IRS's calculation of Mr. Tucker's total ability to pay was $558,176.80 in dissipated assets from stock transactions, representing $697,721 discounted by 20 percent for quick sale purposes. The $697,721 represents the largest amount of stock sales Mr. Tucker had, in the aggregate, on any one day (i.e., February 3, 2003). We assume that the examiner concluded that if he had sales in that amount on that day, then he must have had cash in hand in that amount on that day; but if the examiner so concluded, she evidently failed to offset the proceeds by corresponding liabilities arising from margin purchases. It seems unlikely that Mr. Tucker had $697,721 of proceeds from his day trading in hand at any one time. In any event, before any determination was issued in this case, the OIC examiner abandoned the position that Mr. Tucker had dissipated $558,176.80 in stocks. As is set out below, the Appeals Office subsequently determined that Mr. Tucker had dissipated assets in a much smaller amount--$22,645.

attachment to Form 12153, Mr. Tucker expressed his desire for an OIC in the CDP context by stating that "on July 29, 2004, the taxpayer mailed to the IRS an offer in compromise covering these taxes and taxes for the years 1999 and 2003. An offer in compromise would be the sensible collection alternative to this lien." Because of the close timing of Mr. Tucker's submission of the July 2004 OIC and his August 2004 request for a CDP hearing, there was some confusion as to who (i.e., the original OIC examiner or the CDP settlement officer) should continue to consider Mr. Tucker's July 2004 OIC. As a result, there is some dispute as to whether Mr. Tucker ever disputed the financial determination outlined in the letter dated August 25, 2004, and whether his July 2004 OIC was rejected by the IRS before his case was assigned to a settlement officer. In any event, by letter dated May 19, 2005, from Mr. Tucker's counsel to the settlement officer assigned to Mr. Tucker's case, Mr. Tucker's counsel effectively withdrew Mr. Tucker's July 2004 OIC and indicated his desire for an installment agreement instead:

> Per your request, enclosed is the offer in compromise filed by Larry Tucker on July 29, 2004--i.e., prior to the IRS' issuance of collection due process notices.[6] I am also

[6] For clarification, Mr. Tucker's submission of the July 2004 OIC on July 29, 2004, was after the July 22, 2004, issuance of the lien notice by the IRS, but before Mr. Tucker received it. A "Final Notice--Notice of Intent to Levy and Notice of Your Right to a Hearing" relating to tax years 1999 and 2003 was, in fact, issued after Mr. Tucker's submission of the July 2004 OIC. Section 6331(k)(1) provides for a restraint on levy while

enclosing the Form 433-A filed at that time, together with its enclosures. Please note that we have since realized that the offer to pay $6,000 in the form of 60 monthly payments of $100 was a mistake in that the IRS requires that offers being paid in over two-year periods be payable over the entire collection period--which in this case is closer to ten years, since the offer was filed only a few months after the 2003 return was filed. Mr. Tucker is willing to make payments over the entire collection period remaining.

* * * * * * *

* * * [Mr. Tucker's] income can be more variable than the usual taxpayer. This may make an offer in compromise unfeasible, since a brief period of unemployment could result in the offer going into default and having to be completely redone. Perhaps a more sensible situation would be for us together to determine a full or partial payment installment payment arrangement for Mr. Tucker, which might be modified in the future as his circumstances change. Using the collection financial standards, we together could come to an amount. * * *

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an OIC is pending, and the issuance of the notice of levy violated that restriction. As a result, the IRS withdrew this levy notice against Mr. Tucker. The issuance of that first levy notice (and its subsequent withdrawal) was not part of the CDP hearing or determination and is not part of the CDP appeal at issue here

In this same letter, Mr. Tucker's counsel also addressed the issue that the original OIC examiner raised regarding dissipation of assets. In doing so, Mr. Tucker's counsel referred the settlement officer to his letter dated April 26, 2005, which had been submitted to the Office of Appeals before the settlement officer was assigned to Mr. Tucker's case. In that April 26, 2005, letter, Mr. Tucker's counsel had summarized Mr. Tucker's stock transactions as follows:

> In January 2003, Mr. Tucker received payment in advance for some independent contractor web design project to be performed by him later in the year. He knew he would need this money to live on during the year, but he also knew he owed taxes and other creditors. In retrospect unwisely, he decided to try to leverage currently-unneeded funds[7] into profits by which he could pay off his back tax debts and other creditors. So, he wire transferred some of the funds from his checking account to a newly-opened E-Trade account between January 10, 2003 and April 3, 2003. During January, he put $23,700 into the E-Trade account. Then, he began day trading. By the end of January, he showed a

[7] Mr. Tucker's counsel characterized as "currently-unneeded" the funds that Mr. Tucker could have used to pay his overdue liabilities for the years 1999 through 2001. Presumably he made that characterization because Mr. Tucker had not yet filed returns for those years. If that was his reasoning, then it was not correct. See the text accompanying note 12 below, discussing liabilities that were actually then due.

small profit, since the account was valued at $25,873.16 on January 31, 2003. From there, however, everything went south.

The E-Trade account lost $7,123.12 in value in February 2003. It continued losing money in March. So, starting on March 13, 2003, Mr. Tucker received "margin calls". Mr. Tucker was trading on margin - i.e, borrowing part of the money to trade from the brokerage firm. As the account declined in value, the brokerage firm insisted that Mr. Tucker put additional funds into the [E-Trade] account so that the margin borrowing did not exceed a certain percentage of the value of the account. If Mr. Tucker did not comply with these "margin calls", the brokerage firm would sell all the stocks in the account. So, from March 13, 2003 to April 3, 2003, Mr. Tucker put, in aggregate, $21,000 into the E-Trade account.

By mid-April, 2003, Mr. Tucker gave up on trading. He had lost $22,645 through his trading between January 10 and April 21. His last account position was liquidated on April 21, 2003. At that point, the E-Trade account had about $22,000 in cash in it and no securities. Between May 2, 2003 and October 27, 2003, Mr. Tucker gradually transferred money from the E-Trade account back to his checking account to pay his rent and other bills. In all, he transferred $18,503 between accounts in that period. At the same time, since the E-Trade account came with a debit

> card, he charged various personal expenses to thee-Trade [sic] account, approximating $3,500 in all. By October 27, 2003, the account was left with only 79 cents in it.
>
> So, Mr. *Tucker did not dissipate anywhere near the $697,721 determined by * * * [the original OIC examiner] - merely $22,645.* And he did this in a good faith attempt to repay his taxes. [Emphasis added.]

In her case activity records for May 27, 2005, the settlement officer observed: "POA [i.e., Mr. Tucker's "power of attorney"] admits that at least $22,645.00 in assets was dissipated. This amount must be added to RCP [reasonable collection potential]. I/A [installment agreement] might be more appropriate unless FP [full payment] is possible."

CDP hearing

The CDP hearing was held as a telephone conference on May 31, 2005, between the IRS settlement officer and Mr. Tucker and his counsel. During the conference Mr. Tucker's counsel reiterated that Mr. Tucker was no longer pursuing the July 2004 OIC proposing payments totaling $6,000 since circumstances had changed. Furthermore, Mr. Tucker's counsel advised that Mr. Tucker was not asserting that the lien filed against him had to be removed, but rather Mr. Tucker was hoping to find an installment payment arrangement that he could live with. Following the May 31 telephone CDP hearing, numerous letters were exchanged between the settlement officer and Mr. Tucker's counsel:

On June 8, 2005, Mr. Tucker submitted a revised page 6 of the Form 433-A to reflect new financial figures for his monthly income and expenses. This revised form demonstrated that Mr. Tucker had excess income over allowable living expenses of $326 per month. In the June 8, 2005, cover letter accompanying the updated financial information, Mr. Tucker's counsel advised the settlement officer that "Mr. Tucker would be prepared to enter into an installment payment arrangement to pay the IRS $326 a month." In response, by letter dated June 20, 2005, the settlement officer concluded that her "calculations indicate that the most * * * [Mr. Tucker] would be able to pay is $316.00" per month. Enclosed with the settlement officer's letter was a Form 433-D, "Installment Agreement", filled out by the settlement officer reflecting a proposed partial payment installment agreement (PPIA) to pay $316 per month. The settlement officer invited Mr. Tucker to review the terms of the PPIA and, if acceptable, sign and return the agreement by July 6, 2005.

On June 23, 2005, Mr. Tucker's counsel faxed the settlement officer a letter indicating that Mr. Tucker would prefer an OIC in lieu of the proposed PPIA, because an OIC would (assuming he adhered to all of the conditions) fix his liability to the IRS, whereas the PPIA could be reexamined every two years for possible increases. [8]

Mr. Tucker's July 2005 OIC

Consistent with the suggestion he had made in his June 23 fax, Mr. Tucker's counsel sent to the settlement officer a revised OIC dated July 20, 2005. At that time Mr. Tucker's liabilities for the five years 1999 through 2003 totaled approximately $37,000 (with accruals).[9] Mr. Tucker proposed to settle his income tax liabilities for those five years by making a total of $36,772 in monthly payments of $317 over 116 months (July 2005 OIC). The offer of $317 per month was intended by Mr. Tucker to be $1 more

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[8] See sec. 6159(d) ("In the case of an agreement entered into by the Secretary * * * for partial collection of a tax liability [i.e., a PPIA], the Secretary shall review the agreement at least once every 2 years."); sec. 7122 (authorizing agreement between a taxpayer and the Government that fully settles a tax liability for payment of less than the full amount owed.) But see Internal Revenue Manual (IRM) pt. 5.8.6 (Sept. 1, 2005) (when accepting an OIC, the Government may obtain a collateral agreement that enables the Government to collect funds in addition to the amount actually secured by the offer). Certain provisions of the IRM have been revised since the time of Mr. Tucker's CDP hearing. We quote the IRM provisions as in effect when the Office of Appeals made the determination that is under review in this case.

[9] The record reflects that Mr. Tucker's total outstanding tax liability with accruals through August 16, 2004, was $35,591.26, and his total liability with accruals through October 16, 2006, was $39,790.19. We therefore estimate his total outstanding liability as of July 20, 2005 (between those two dates), to be approximately $37,000.

than the settlement officer had previously determined he could pay per month (and was thus intended to exceed his RCP and thereby warrant acceptance). In a letter dated November 18, 2005, the settlement officer rejected Mr. Tucker's proposed July 2005 OIC. In doing so, the settlement officer stated, "It is usually not in the Government's best interest to accept an offer when there is more than five years remaining on the collection statute."

The notice of determination and the commencement of this case

On January 9, 2006, the Office of Appeals issued to Mr. Tucker a "Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330", in which Appeals determined to uphold the filing of the NFTL as to Mr. Tucker's income tax liabilities for 2000, 2001, and 2002. In response, Mr. Tucker timely filed a petition with this Court on February 13, 2006.

Previous Tax Court proceedings, remand to the Office of Appeals, and supplemental notice of determination

After filing his petition, Mr. Tucker filed a motion for summary judgment on June 9, 2006. Respondent opposed that motion and filed a motion for remand on July 17, 2006, stating that "[t]he settlement officer erred as a matter of law in rejecting petitioner's offer for the stated reason that amendment of I.R.C. § 6159 to permit partial payment installment agreements renders obsolete deferred payment offers in compromise." By our order of July 27, 2006, we denied Mr. Tucker's motion for summary judgment and granted respondent's motion to remand the case to the IRS's Office of Appeals "for an officer to exercise discretion in consideration of * * * [Mr. Tucker's] offer" and for issuance of a supplemental notice of determination no later than October 16, 2006.

The Office of Appeals then assigned a settlement officer (i.e., a different settlement officer from the one who had conducted Mr. Tucker's initial CDP hearing) to conduct a supplemental CDP hearing and to reconsider Mr. Tucker's July 2005 OIC. The supplemental CDP hearing was held as a telephone conference on September 11, 2006, between the settlement officer and Mr. Tucker's counsel. On September 12, 2006, the Office of Appeals issued a "Supplemental Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330", which determined to reject Mr. Tucker's July 2005 OIC and to uphold the filing of the NFTL as to Mr. Tucker's income tax liabilities for 2000, 2001, and 2002. The attachment to the supplemental notice of determination stated, inter alia:

> *Issues Raised by the Taxpayer*
>
> In an attachment to Form 12153, * * * [counsel] stated that you were unable to full pay the balances due based on sporadic employment and medical concerns and believe that an offer in compromise would be a sensible alternative to the lien. You submitted a long term deferred offer in the amount of $6,000.00 to compromise 1999, 2000, 2001,

2002, and 2003 1040 return balances. You subsequently amended your offer to $36,772.00. You owe $39,790.19 with accruals to 10/16/2006.

In response:

1. An offer is not an alternative to the filing of a NFTL. It is an alternative to the issuance of a levy or garnishment. Internal Revenue Manual (IRM) Section 5.8.4.9 requires that a NFTL be considered when reviewing an offer in compromise. This section does not require the filing of a NFTL but they are routinely filed on offers that have been accepted but will not be paid within 24 months in order to protect the government's interest in any assets an individual may own. Your proposal includes payments over the course of 116 months.

2. NFTL may not be released until full payment is received. A taxpayer may qualify for a withdrawal under circumstances laid out in IRC Section 6323(j) if the filing of the lien was premature or otherwise not in accordance with legal and administrative procedures, at the time a taxpayer entered into an installment agreement, he or she was not notified that a lien would be filed, withdrawal of the lien would facilitate collection, and hardship situations (this determination is normally made by the Taxpayer Advocate rather than Appeals). As stated above, all legal or procedural requirements have been

met. You have no installment agreement precluding the filing of the NFTL. The documents in the administrative file indicate that you want to pay the debts over 116 months based on your income. You site [sic] no other sources for funding the offer. Therefore, withdrawal of the lien would not facilitate collection by, for example, enabling you to get a loan to full pay the balance or gain business to speed up collection. Furthermore, in the response to the motion for summary judgment, you indicated that you did not request the NFTL be "removed".

3. Internal Revenue Manual (IRM) Section 5.8.1.4(1) lists four objectives of the offer in compromise program including to effect collection of what can reasonably be collected at the earliest possible time and at the least cost to the government, achieve a resolution that is in the best interest of both the individual taxpayer and the government, provide a taxpayer a fresh start toward future voluntary compliance with all filing and paying requirements, and secure collection of revenue that may not be collected through any other means. * * * [The previous settlement officer] offered to negotiate a shorter term offer that would accomplish all these objectives. A long term deferred offer may also accomplish these objectives but it also raises the possibility of a part payment installment agreement (PPIA). Appeals is required to consider all collection alternatives raised but

is not required to accept an alternative that it believes will not be in the best interest of the taxpayer AND the government (emphasis added).

4. Appeals still does not believe a long term deferred offer is a better alternative to a PPIA because the Service still has to collect and monitor payments for the next 116 months and unlike a long term deferred offer, the payments on a PPIA are negotiable. IRS Section 6159 requires that PPIAs be reviewed every two years. If there are increases to a taxpayer's income or equity in assets, then the taxpayer is required to increase the amount of the payments, liquidate the equity, and if the income and equity is sufficient enough, full pay the debts. If the taxpayer does not comply, the Service can terminate the PPIA. The bottom line, in the amount of time it takes to monitor your long term deferred offer, the Service can review a PPIA no less than four times, which may in fact result in an amount greater than what is offered and even full payment.

5. There is reason to believe the Service would collect more from a PPIA over the next 116 months based on the documentation in the administrative file and information available from internal sources. You are 45-years old, your diabetes is being controlled by medication and you are not receiving disability for this or any other ailments, and

> you are gainfully employed. Your employment history also indicates you have the ability to earn great sums of money. For instance, in 2003, you purchased and sold almost $7 million in stocks (you purchased more than $3.4 million in stocks and sold just about the same amount for which you ultimately claimed a loss on your 2003 1040 return).
>
> 6. Upon review, * * * [this settlement officer] believes that the stock sales are dissipated assets and believes the amounts dissipated should be included in a minimum offer calculation. As such, the minimum offer is actually full payment. These stock transactions in 2003 occurred * * * [after] the due dates of the 1999, 2000, and 2001 1040 returns. If you simply sold a little less than you bought, which was your option, you could have already paid the taxes in full.

Mr. Tucker's motion to remand and the parties' cross-motions for summary judgment

On November 21, 2006, in response to the supplemental notice of determination, Mr. Tucker filed an amendment to petition with this Court in order to challenge the determination in the supplemental notice of determination. In his amendment to petition, Mr. Tucker asserted that the Office of Appeals erred by: (1) determining that Mr. Tucker's offer was not in respondent's best interest; (2) determining that a PPIA was a better alternative to the OIC that Mr. Tucker proposed; (3) determining that there was reason to believe that

Mr. Tucker's income or assets would increase in the future, such that the IRS would collect more from a PPIA than from the OIC; (4) determining that Mr. Tucker's stock sales in 2003 constituted "dissipated assets"; (5) raising the dissipated assets issue in the supplemental notice of determination because it went beyond the scope of the remand order, as the issue was not raised in the original notice of determination; (6) determining that "there is no law or policy that requires the Service to accept an offer"; and (7) determining that "the cost it takes to monitor your long term deferred offer for 116 months would be similar to the cost it would take to monitor a part payment installment agreement".[10]

On November 29, 2007, respondent filed a motion for summary judgment asking the Court to sustain the supplemental notice of determination. Mr. Tucker filed a cross-motion for summary judgment on February 27, 2008, and filed a motion for remand on September 2, 2008. Mr. Tucker's motion to remand was previously denied in *Tucker v. Commissioner,* 135 T.C. 114 (2010), and we now address the parties' cross-motions for summary judgment.

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[10] Mr. Tucker also contended that the Office of Appeals failed to afford him his statutory right to a hearing, in that he was denied a hearing before an appeals officer appointed pursuant to the Appointments Clause in Article II of the Constitution. We rejected this contention in *Tucker v. Commissioner*, 135 T.C. 114 (2010).

Discussion

I. Applicable legal principles

A. Summary judgment standards

Where the pertinent facts are not in dispute, a party may move for summary judgment to expedite the litigation and avoid an unnecessary trial. Summary judgment may be granted where there is no genuine issue as to any material fact and a decision may be rendered as a matter of law. Rule 121(a) and (b). Since we will grant respondent's motion for summary judgment, we will focus on respondent as the movant. The party moving for summary judgment (i.e., respondent) bears the burden of showing that there is no genuine issue as to any material fact, and factual inferences will be drawn in the manner most favorable to the party opposing summary judgment (i.e., Mr. Tucker). *Dahlstrom v. Commissioner*, 85 T.C. 812, 821 (1985).

B. Collection review procedure

When a taxpayer fails to pay any Federal income tax liability after demand section 6321 imposes a lien in favor of the United States on all the property of the deliquent taxpayer, and section 6323 authorizes the IRS to file notice of that lien. However, the IRS must provide written notice of a tax lien filing to the taxpayer within five business days. After receiving such a notice, the taxpayer may request an administrative hearing before the Office of Appeals. Sec. 6320(a)(3)(B), (b)(1).

Administrative review is carried out by way of a hearing before the Office of Appeals pursuant to section 6330(b) and (c); and, if the taxpayer is dissatisfied with the outcome there, he can appeal that determination to the Tax Court under section 6330(d), as Mr. Tucker has done.

For the agency-level CDP hearing before the Office of Appeals, the pertinent procedures are set forth in section 6330(c):

First, the IRS appeals officer must obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met. Sec. 6330(c)(1).[11] The supplemental notice of determination and respondent's motion set forth the IRS's compliance with these requirements; however, in his petition at paragraph 4(m) and (n), Mr. Tucker called into question the accuracy of the filing date of the NFTL reflected on the lien notice:

m. On July 13, 2004, respondent prepared a notice of federal tax lien against petitioner for his 2000, 2001, and 2002 taxes. Respondent filed the notice of federal tax lien in Manhattan on August 4, 2004.

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[11] In the case of the lien filed against Mr. Tucker, the basic requirements, see sec. 6320, for which the appeals officer was to obtain verification are: a timely assessment of the liability, secs. 6201(a)(1), 6501(a); notice and demand for payment of the liability, sec. 6303; and notice of the filing of the lien and of the taxpayer's right to a CDP hearing, sec. 6320(a) and (b).

n. On July 22, 2004, respondent issued to petitioner a "Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320" for the years 2000, 2001, and 2002, erroneously stating that the Notice of Federal Tax Lien had been filed on July 15, 2004.

While Mr. Tucker concedes that the IRS issued to him a lien notice for tax years 2000, 2001, and 2002 on July 22, 2004, he disputes whether the NFTL was filed on July 15, 2004 (as reflected in the lien notice), or August 4, 2004 (as reflected on the website of the New York City Department of Finance). We find it unnecessary to resolve this issue, for the following reasons.

Under section 6320(a), the Secretary is required to send written notice to the taxpayer liable for the tax "not more than 5 business days after the day of the filing of the notice of lien." Whether the NFTL was filed on July 15, 2004, or August 4, 2004, the IRS sent notice of the filing to Mr. Tucker on July 22, 2004, which was "not more than 5 business days after" July 15, 2004, or August 4, 2004. There is no rule that the requisite notice cannot be sent before the filing of the NFTL. Therefore, even if the NFTL was filed on August 4, 2004, the lien notice that Mr. Tucker received on July 22, 2004, was still timely under section 6320(a). Mr. Tucker has raised no other verification issues under section 6330(c)(1), and we find no failure of verification.

Second, the taxpayer may "raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy," including challenges to the appropriateness of the collection action and offers of collection alternatives. Sec. 6330(c)(2)(A).

Mr. Tucker's principal contention--that the IRS Office of Appeals abused its discretion in not accepting his OIC--pertains to that second set of issues, which we will discuss below.

Additionally, the taxpayer may contest the existence and amount of the underlying tax liability if he did not receive a notice of deficiency or otherwise have a prior opportunity to dispute the tax liability. Sec. 6330(c)(2)(B). While Mr. Tucker did not have any prior opportunity to challenge his underlying self-reported liabilities, he did not make such a challenge during his CDP hearing or before this Court. Therefore, we find Mr. Tucker's underlying tax liabilities for 2000, 2001, and 2002 are not at issue.

When the Office of Appeals issues its determination, the taxpayer may "appeal such determination to the Tax Court", pursuant to section 6330(d)(1), as Mr. Tucker has done. In such an appeal (where the underlying liability is not at issue), we review the determination of the Office of Appeals for abuse of discretion. That is, we decide whether the determination was arbitrary, capricious, or without sound basis in fact or law. See *Murphy v. Commissioner*, 125 T.C. 301, 320 (2005), affd. 469 F.3d 27 (1st Cir. 2006); *Sego v. Commissioner*, 114 T.C. 604, 610 (2000); *Goza v. Commissioner*, 114 T.C. 176 (2000). Because Mr. Tucker does not dispute the filing of the NFTL as improper, our review of the supplemental notice of determination focuses on whether the Office of Appeals abused its discretion in rejecting Mr. Tucker's OIC.

II. Respondent's entitlement to summary judgment

A. Scope of remand

Mr. Tucker argues that the settlement officer assigned to his supplemental CDP hearing erred in raising the dissipated assets issue in the supplemental notice of determination because it went beyond the scope of the remand order, as the issue was not raised in the original notice of determination. As a result, we must decide whether it was proper for the settlement officer to include dissipated assets in her calculation of Mr. Tucker's reasonable collection potential. We hold that it was proper for her to do so.

Section 6330(c)(2)(A)(iii) permits a taxpayer to propose collection alternatives to the filing of a Federal tax lien. Section 4.02(2) of Rev. Proc. 2003-71, 2003-2 C.B. 517, 517, provides that an OIC based on doubt as to collectibility will be treated as an acceptable collection alternative only where the OIC reflects the taxpayer's reasonable collection potential. Where a taxpayer has dissipated assets in disregard of the taxpayer's outstanding Federal income taxes, the dissipated assets may be included in the calculation of the minimum amount that is to be paid under an acceptable OIC. Internal Revenue Manual (IRM) pt. 5.8.5.4(5) (Sept. 1, 2005).

Mr. Tucker is not correct in asserting that the dissipation issue was not considered by the original settlement officer and not raised in the original notice of determination. While the original settlement officer did not articulate her reasons for denying Mr. Tucker's OIC (thereby necessitating the remand), her case activity notes clearly reflect that she considered the issue of dissipation: "POA admits that at least $22,645.00 in assets was dissipated. This amount must be added to RCP. I/A might be more appropriate unless FP is possible."

In any event, we do not believe the second settlement officer's review was limited to issues raised in the original notice of determination. By its order of July 27, 2006, this Court granted respondent's motion to remand this case to the IRS's Office of Appeals "for an officer to exercise discretion in consideration of * * * [Mr. Tucker's] offer". We thus ordered the Office of Appeals to consider Mr. Tucker's OIC de novo. To do so, the settlement officer was required pursuant to IRM pt. 5.8.5.4 to consider any dissipated assets in calculating Mr. Tucker's reasonable collection potential. Since the viability of an OIC is contingent on a taxpayer's reasonable collection potential, we find that inherent in the consideration of Mr. Tucker's OIC was the consideration of dissipated assets. As a result, we hold that the issue of dissipated assets was properly considered by the settlement officer during the supplemental CDP hearing, and that consideration of that issue did not go beyond the scope of our remand order.

B. Dissipation of assets

Mr. Tucker also argues that the Office of Appeals erred in determining that his day trading in 2003 constituted a dissipation of assets. We disagree in part.

A dissipated asset is defined as any asset (liquid or not liquid) that has been sold, transferred, or spent on nonpriority items or debts and that is no longer available to pay the tax liability. *Samuel v. Commissioner*, T.C. Memo. 2007-312; IRM pt. 5.8.5.4(1). If the OIC examiner determines that assets have been dissipated with a disregard of an outstanding tax liability, then the examiner may include the value of the dissipated asset in the taxpayer's reasonable collection potential calculation. IRM pt. 5.8.5.4 states:

(1) During an offer investigation it may be discovered that assets (liquid or non-liquid) have been sold, gifted, transferred, or spent on non-priority items and/or debts and are no longer available to pay the tax liability. This section discusses treatment of the value of these assets when considering an offer in compromise.

* * * * * * *

(2) Once it is determined that a specific asset has been dissipated, the investigation should address whether the value of the asset, or a portion of the value, should be included in an acceptable offer amount.

* * * * * * *

(5) If the investigation clearly reveals that assets have been dissipated with a disregard of the outstanding tax liability, consider including the value in the reasonable collection potential (RCP) calculation.

Where a taxpayer's once-held assets have simply vanished, it makes obvious sense for the tax collector to include the assets in computing the taxpayer's reasonable collection potential, unless the taxpayer can account for them. See *Schropp v. Commissioner*, T.C. Memo. 2010-71, slip op. at 24-26, affd. without published opinion 106 AFTR 2d 2010-7424, 2011-1 USTC par. 50,122 (4th Cir. 2010). However, where a taxpayer can prove that he really did dissipate the assets (say, by lavish living or gambling that he substantiates), the long-gone assets cannot be said to increase his literal collection potential. However, in that circumstance the IRM nonetheless instructs the Office of Appeals to "consider" including the assets in RCP. The evident reason for this rule is to deter delinquent taxpayers from wasting money that they owe and should pay as taxes. Conscientious taxpayers would object--and the system would suffer--if a noncompliant taxpayer with overdue taxes and with money in hand could spend his money on "non-priority items" and nonetheless effectively obtain forgiveness of his liability simply by proving in the collection context that he really did reduce his collection potential by wasting the assets. Removing dissipated assets from "reasonable collection potential" could create perverse incentives, and the tax collector must have discretion to avoid that problem.

Mr. Tucker admittedly deposited $23,700 into an E-Trade account in January 2003 and made additional deposits totaling $21,000 between March 13 and April 3, 2003. At the time Mr. Tucker admittedly deposited funds into his E-Trade account (i.e., from January to April 3, 2003), he had not yet filed his income tax returns for tax years 1999 through 2001, which were then due. Nonetheless, because the due date for those returns had passed, his tax liabilities had accrued and he had outstanding tax liabilities (not including any interest or additions to tax) for tax years 1999, 2000, and 2001 totaling $14,945 at the time of his deposits.[12] Personal income taxes are due on the date the return is required to be filed. Sec. 6151(a); *Holywell Corp. v. Smith*, 503 U.S. 47, 58 (1992); *Pan Am. Van Lines v. United States,* 607 F.2d 1299, 1301 (9th Cir. 1979). Mr. Tucker's tax liabilities for tax years 2002 and 2003 had not yet accrued. Mr. Tucker was aware of his unpaid tax obligations for 1999 through 2001 when he transferred the $44,700 into his E-Trade account. Despite having known tax obligations, Mr. Tucker still transferred the money and for nearly four months engaged in the highly speculative and volatile activity of day trading. Mr. Tucker maintains that he did so in an effort to make enough money to pay off his delinquent taxes and other creditors, as well as pay his tax liability for 2002

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[12] The liabilities eventually reported on his returns but not prepaid by withholding or otherwise were $3,356 for 1999, $8,106 for 2000, and $3,483 for 2001, totaling $14,945. See *supra* p. 108a.

that would be coming due. Even if this is true, Mr. Tucker's motives do not change the character of his day trading activity.

Black's Law Dictionary (8th ed. 2004) defines "day trading" as "The act or practice of buying and selling stock shares or other securities on the same day, esp. over the Internet, usu. for the purpose of making a quick profit on the difference between the buying price and the selling price." Mr. Tucker had never owned stocks before and had no experience in day trading. To further complicate matters, Mr. Tucker was trading on margin-- i.e., was borrowing part of the money to trade from a brokerage firm-- and was making high-volume trades (e.g., trading as much as $697,721 in one day).

On April 21, 2003, Mr. Tucker stopped trading. By that time he had lost $22,645 of his initial deposits, leaving approximately $22,000 in the E-Trade account. Mr. Tucker maintains that he used this remaining $22,000 to provide for basic living expenses from May 2 through October 27, 2003. Under Rule 121 we view the facts in the light most favorable to Mr. Tucker, and we assume that the $22,000 was, in fact, used for necessary living expenses.[13] Pursuant to IRS administrative

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[13] This assumption may be unduly generous, since Mr. Tucker admits that some portion of this $22,000 may not have been used for necessary living expenses--e.g., $824.64 on May 19, 2003, for an airline ticket for a personal trip to Phoenix, Arizona; $274.84 on June 2, 2003, for the hotel stay associated with this personal trip; $535 on October 24, 2003,

guidelines, if this $22,000 was used for necessary living expenses, it will not be considered a dissipation. IRM pt. 5.8.5.4(4) ("When the taxpayer can show that assets have been dissipated to provide for necessary living expenses, these amounts should not be included in the reasonable collection potential (RCP) calculation"). We therefore consider as potential dissipation only the other $22,645, which Mr. Tucker lost.

The losses that Mr. Tucker sustained were not due to an unforeseeable event but rather were commonplace (especially for a neophyte) in such a highly volatile activity. Mr. Tucker knew he owed outstanding taxes; and he had the cash in hand that would have paid in full the taxes and accruals he owed as of early 2003 (i.e., for tax years 1999, 2000 and 2001); and yet he chose instead to devote that money to a risky investment. Mr. Tucker's foray into day trading was purely speculative, and his already slim chances of success were undermined by his inexperience. In short, Mr. Tucker's circumstances were of his own making.

Therefore, we cannot criticize the Office of Appeals' conclusion that Mr. Tucker's losses associated with his day trading were a dissipation of assets that should be considered for inclusion in RCP as contemplated by IRM pt. 5.8.5.4.

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for a bartending course; and $236 on August 12, 2003, for a personal cruise on the Hudson River.

In the supplemental notice of determination, the settlement officer concluded that Mr. Tucker had dissipated $44,700 in assets, measured by his deposits into the E-Trade account. For purposes of summary judgment, we find that that conclusion was excessive. The mere act of depositing the money into the E-Trade account did not rise to the level of dissipation, but the day trading and the losing of the money in the account did. Because at the time in April 2003 that Mr. Tucker lost a total of $22,645 from his day trading activities, he had outstanding Federal tax liabilities of at least $14,975,[14] we hold for purposes of summary judgment that Mr. Tucker dissipated assets of $14,975. The settlement officer determined that not just $14,975 but rather all $44,700 of the deposits had been dissipated. For purposes of summary judgment, we assume that conclusion was erroneous as to amount, but we find that error to be harmless for reasons explained below. See *infra* note 16. As a result, we conclude that the settlement officer did not abuse her

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[14] The record does not provide a basis for the Court to reasonably estimate Mr. Tucker's unpaid tax liabilities with accruals as of April 2003. As a result, for summary judgment purposes, we assume Mr. Tucker's unpaid tax liabilities to be the amounts reported as due when he filed his delinquent returns for tax years 1999, 2000, and 2001. Furthermore, although Mr. Tucker's tax liability for tax year 2002 accrued on April 15, 2003--the due date of the return--we cannot tell on the record before us whether the losses associated with the E-Trade account occurred before or after April 15, 2003. As a result, for summary judgment purposes we ignore the tax liability for 2002 in determining Mr. Tucker's outstanding tax liabilities at the time he dissipated assets.

discretion in determining that Mr. Tucker had dissipated assets as the result of his day trading in 2003.

C. Rejection of Mr. Tucker's OIC

The Office of Appeals rejected Mr. Tucker's OIC because, inter alia, it determined that he could fully pay his tax liabilities. At the time of the supplemental notice of determination, Mr. Tucker owed $39,790.19 (with accruals through October 16, 2006) in unpaid Federal income taxes for the years 1999 through 2003. The settlement officer assigned to Mr. Tucker's supplemental CDP hearing was tasked with considering Mr. Tucker's proposed OIC of $36,772 (to be paid at a rate of $317 per month over 116 months) based on doubt as to collectibility.

1. Mr. Tucker's dissipation of assets justified the rejection of his OIC.

Rev. Proc. 2003-71, sec. 4.02(2), 2003-2 C.B. 517, 517, provides that an OIC based on doubt as to collectibility will be treated as an acceptable collection alternative only where the OIC reflects the taxpayer's reasonable collection potential. A taxpayer's reasonable collection potential is determined, in part, using published guidelines that establish national and local allowances for necessary living expenses. Income and assets (possibly including dissipated assets in accordance with IRM pt. 5.8.5.4) in excess of those needed for necessary living expenses are treated as available to satisfy Federal income tax liabilities. See IRM pt.

5.15.1.2(1) and (2) (May 1, 2004); IRM exs. 5.15.1-3, 5.15.1-8, 5.15.1-9 (Jan. 1, 2005).

The parties agree that Mr. Tucker's disposable income (i.e., monthly income over allowable monthly expenses) was $316 per month, and that there were 116 months remaining before his collection period expiration date. See sec. 6502. "Generally, the amount to be collected from future income is calculated by taking the projected gross monthly income less allowable expenses and multiplying the difference times the number of months remaining on the statutory period for collection." IRM pt. 5.8.5.5.5(1) (Sept. 1, 2005). As a result, Mr. Tucker's future income subject to collection would be $316 x 116 months, or $36,656[15] -- an amount slightly less than the total of the payments he proposed in his OIC.

However, as we determined above, the value of asset that Mr. Tucker dissipated through his day trading activities was $14,945. Under IRS guidelines, Mr. Tucker's reasonable collection potential would therefore be $51,601--i.e., the sum of his future income stream ($36,656) plus the value of any dissipated assets (at least $14,945). Given that Mr. Tucker's reasonable collection potential thus exceeded his outstanding tax liabilities, the settlement officer did not err in determining Mr. Tucker could fully pay his Federal income tax

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[15] In calculating a taxpayer's future income stream for purposes of evaluating a offer, the IRM apparently does not direct settlement officers to discount the monthly income stream to a present value.

liabilities.[16] When an Appeals officer has followed IRS administrative guidelines to ascertain a taxpayer's reasonable collection potential and has rejected the taxpayer's OIC on that ground, we generally have found no abuse of discretion. See *McClanahan v. Commissioner*, T.C. Memo. 2008-161.

2. Even apart from Mr. Tucker's dissipation of assets, the Office of Appeals did not abuse its discretion in rejecting his OIC.

Assuming arguendo that we should ignore dissipated assets altogether and should conclude that Mr. Tucker's reasonable collection potential was less than full payment, we still hold that the Office of Appeals did not abuse its discretion in rejecting Mr. Tucker's OIC and insisting instead on a PPIA, for the following reasons.

Section 7122(a) authorizes compromise of a taxpayer's Federal income tax liability. "'The decision to entertain, accept or reject an offer in compromise is squarely within the discretion of the appeals officer and the IRS in general.'" *Gregg v. Commissioner*, T.C. Memo. 2009-19 (quoting *Kindred v. Commissioner*, 454 F.3d 688, 696 (7th Cir. 2006)). In reviewing this determination, we do not decide whether in our opinion Mr. Tucker's OIC should have been accepted. See *Woodral v. Commissioner*,

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[16] We find the settlement officer's inclusion of $44,700 of dissipated assets in Mr. Tucker's reasonable collection potential (as opposed to the $14,945 determined above) to be a harmless error because--as is shown above--even with inclusion of only the lower amount, Mr. Tucker could still fully pay his liabilities

112 T.C. 19, 23 (1999); *Keller v. Commissioner*, T.C. Memo. 2006-166, affd. in part 568 F.3d 710 (9th Cir. 2009). Instead, we review the determination for abuse of discretion.

As Mr. Tucker's representative acknowledged, an OIC permanently limits the Government to collecting only according to its terms, whereas a PPIA permits the Government to review the taxpayer's situation every two years and increase its collections if circumstances warrant. See *supra* note 8. In the supplemental notice of determination, the settlement officer articulated several reasons for her determination, largely on the basis of this distinction: (1) Mr. Tucker's offer was not in the best interest of the Government; (2) a PPIA was a better alternative to the OIC that Mr. Tucker proposed; (3) there is reason to believe that Mr. Tucker's income or assets would increase in the future, such that the IRS would collect more from a PPIA than from the OIC; (4) "there is no law or policy that requires the Service to accept an offer"; and (5) "the cost it takes to monitor * * * [Mr. Tucker's] long term deferred offer for 116 months would be similar to the cost it would take to monitor a part payment installment agreement". The decision whether to accept Mr. Tucker's OIC rested squarely within the discretion of the settlement officer, and we find there was a reasonable basis for the settlement officer's decision; it was not arbitrary, capricious, or without sound basis in fact or law. As a result, we cannot conclude that the Office of Appeals abused its discretion in rejecting Mr. Tucker's OIC and sustaining the filing of the NFTL, whether or not dissipated assets were considered by the settlement officer or included in his RCP.

Conclusion

On the basis of the foregoing, we conclude that the Office of Appeals did not abuse its discretion, and we hold that respondent is entitled to the entry of a decision sustaining the determination as a matter of law. To reflect the foregoing,

An appropriate order and decision will be entered.

APPENDIX D

26 U.S.C. §6320

§ 6320. Notice and opportunity for hearing upon filing of notice of lien.

(a) Requirement of notice.

(1) In general. The Secretary shall notify in writing the person described in section 6321 of the filing of a notice of lien under section 6323.

(2) Time and method for notice. The notice required under paragraph (1) shall be

(A) given in person;

(B) left at the dwelling or usual place of business of such person; or

(C) sent by certified or registered mail to such person's last known address, not more than 5 business days after the day of the filing of the notice of lien.

(3) Information included with notice. The notice required under paragraph (1) shall include in simple and nontechnical terms—

(A) the amount of unpaid tax;

(B) the right of the person to request a hearing during the 30-day period beginning on the day after the 5-day period described in paragraph (2);

(C) the administrative appeals available to the taxpayer with respect to such lien and the procedures relating to such appeals; and

(D) the provisions of this title and procedures relating to the release of liens on property.

(b) Right to fair hearing.

(1) In general. If the person requests a hearing in writing under subsection (a)(3)(B) and states the grounds for the requested hearing, such hearing shall be held by the Internal Revenue Service Office of Appeals.

(2) One hearing per period. A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.

(3) Impartial officer. The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or section 6330. A taxpayer may waive the requirement of this paragraph.

(4) Coordination with section 6330. To the extent practicable, a hearing under this section shall

be held in conjunction with a hearing under section 6330.

(c) Conduct of hearing; review; suspensions. For purposes of this section, subsections (c), (d) (other than paragraph (2)(B) thereof), (e), and (g) of section 6330 shall apply.

26 U.S.C. §6330 (excerpt)

§6330. Notice and opportunity for hearing before levy

(a) Requirement of notice before levy.

(1) In general. No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made. Such notice shall be required only once for the taxable period to which the unpaid tax specified in paragraph (3)(A) relates.

(2) Time and method for notice. The notice required under paragraph (1) shall be –

(A) given in person;

(B) left at the dwelling or usual place of business of such person; or

(C) sent by certified or registered mail, return receipt requested, to such person's last known address;

Not less than 30 days before the day of the first levy with respect to the amount of the unpaid tax for the taxable period.

(3) Information included with notice. The notice required under paragraph (1) shall include in simple and nontechnical terms—

(A) the amount of unpaid tax;

(B) the right of the person to request a hearing during the 30-day period under paragraph (2); and

(C) the proposed action by the Secretary and the rights of the person with respect to such action, including a brief statement which sets forth –

(i) the provisions of this title relating to levy and sale of property;

(ii) the procedures applicable to the levy and sale of property under this title;

(iii) the administrative appeals available to the taxpayer with respect to such levy and sale and the procedures relating to such appeals;

(iv) the alternatives available to taxpayers which could prevent levy on property (including installment agreements under section 6159); and

(v) the provisions of this title and procedures relating to redemption of property and release of liens on property.

(b) Right to fair hearing.

(1) In general. If the person requests a hearing in writing under subsection (a)(3)(B) and states

the grounds for the requested hearing, such hearing shall be held by the Internal Revenue Service Office of Appeals.

(2) One hearing per period. A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.

(3) Impartial Officer. The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or section 6320. A taxpayer may waive the requirement of this paragraph.

(c) Matters considered at hearing. In the case of any hearing conducted under this section –

(1) Requirement of investigation. The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.

(2) Issues at hearing.

(A) In general. The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including—

(i) appropriate spousal defenses;

(ii) challenges to the appropriateness of collection actions; and

(iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise.

(B) Underlying liability. The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

(3) Basis for the determination. The determination by an appeals officer under this subsection shall take into consideration—

(A) the verification presented under paragraph (1);

(B) the issues raised under paragraph (2); and

(C) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

(4) Certain issues precluded. An issue may not be raised at the hearing if –

(A)(i) the issue was raised and considered at a previous hearing under section 6320 or in any other previous administrative or judicial proceeding; and

(ii) the person seeking to raise the issue participated meaningfully in such hearing or proceeding; or

(B) the issue meets the requirement of clause (i) or (ii) of section 6702(b)(2)(A).

This paragraph shall not apply to any issue with respect to which subsection (d)(2)(B) applies.

(d) Proceeding after hearing.

(1) Judicial review of determination. The person may, within 30 days of a determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

(2) Jurisdiction retained at IRS Office of Appeals. The Internal Revenue Service Office of Appeals shall retain jurisdiction with respect to any determination made under this section, including subsequent hearings requested by the person who requested the original hearing on issues regarding—

(A) collection actions taken or proposed with respect to such determination; and

(B) after the person has exhausted all administrative remedies, a change in circumstances with respect to such person which affects such determination.