
2010

Is the United States Tax Court Exempt from Administrative Law Jurisprudence When Acting as a Reviewing Court

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Recommended Citation

Diane L. Fahey, *Is the United States Tax Court Exempt from Administrative Law Jurisprudence When Acting as a Reviewing Court*, 58 Clev. St. L. Rev. 603 (2010)
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IS THE UNITED STATES TAX COURT EXEMPT FROM ADMINISTRATIVE LAW JURISPRUDENCE WHEN ACTING AS A REVIEWING COURT?

DIANE L. FAHEY*

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I. INTRODUCTION

To maintain legitimacy and stability, a government must have access to a reliable source of revenue. Taxes are the lifeblood that sustains a government. They fund student loans, provide equipment for the men and women serving in our military, and maintain our highways. All these things develop and protect our society. As far

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back as 1931, the United States Supreme Court has enforced the principle that the executive branch of the federal government must be unimpaired in its ability to collect taxes owed; otherwise, the government could be undermined by citizens who attempt to delay or evade their obligation to pay taxes.¹

Taxpayers have always been permitted, of course, to dispute the amount of their liability; however, until recently, taxpayers had little opportunity to dispute the method employed by the IRS to collect an assessed tax. In 1998, Congress enacted the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA of 1998), which represents a dramatic departure from this principle.² Among its provisions the RRA of 1998 provided that taxpayers may demand a hearing before the IRS as to the proposed collection method and may also suggest alternatives, such as installment agreements or offers-in-compromise. A dissatisfied taxpayer could then appeal the IRS's determination on the matter either to the United States Tax Court or the federal district court, jurisdiction depending on the type of tax involved.³

Unfortunately, these collection due process statutory provisions are short on details, and the IRS and the courts have struggled to create procedures that comport with the spirit of the law within the confines of their respective authorities. The United States Tax Court is an Article I court Congress created to provide taxpayers with a forum to protest certain alleged tax deficiencies prior to their payment. The Tax Court has been uncomfortable with its new appellate role and has tried to create a judicial review process by analogizing collection due process appeals to the Tax Court's deficiency procedures. However, when the Tax Court hears deficiency cases, it acts as a trial court and hears the matter *de novo*. When the Tax Court hears collection due process appeals, it acts as an appellate court reviewing agency action to determine its propriety—an entirely different role and process from deficiency cases.

The district courts turned to the Administrative Procedure Act (APA) and traditional administrative law jurisprudence to fill in the gaps Congress left in the enabling legislation.⁴ The Tax Court did not. As a result, the two courts applied different review standards and different rules regarding evidence the courts would consider during the appeal.⁵ Therefore, despite the fact that the same enabling

¹ See *Phillips v. Comm'r*, 283 U.S. 589 (1931).

² Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3401, 112 Stat. 685, 747-50.

³ When first enacted, the RRA of 1998 split jurisdiction for collection due process appeals between the United States Tax Court and the federal district courts. In 2006, Congress amended the law and vested the United States Tax Court with exclusive jurisdiction. Pension Protection Act of 2006, Pub. L. No. 109-280, § 855(a), 120 Stat. 780, 1019 (codified as amended at I.R.C. § 6330(d)(1) (2006)) (providing exclusive jurisdiction in the United States Tax Court for all collection due process appeals regardless of which court had jurisdiction over the underlying tax liability).

⁴ See, e.g., *Olsen v. United States*, 414 F.3d 144 (1st Cir. 2005); *Living Care Alternatives of Utica, Inc. v. United States*, 411 F.3d 621 (6th Cir. 2005).

⁵ For example, as discussed *infra* note 43, both courts agreed that the standard should be abuse of discretion with regard to appeals that involved only the method the IRS proposed to use to collect the tax. However, the Tax Court applied this standard in a different way from the district courts. Also, the Tax Court did not confine itself to the record created during the

legislation empowered both courts to hear taxpayer appeals, the two courts conducted the appeals in significantly different ways that affected taxpayer rights. Although the Tax Court now has sole jurisdiction over collection due process appeals, its position remains problematic. In the absence of legislation specifying how a court is to review agency action, the APA and traditional administrative law jurisprudence step into the breach and provide structure for the court's review process. As a result, participants in the process are assured of consistency and predictability regarding the review process, thus rendering the process fairer. The Tax Court thwarts these expectations when it creates its own rules of procedure and evidence when acting as a reviewing court.

Commentators have argued that the Tax Court should fill in the gaps in its statutory authority for collection due process appeals by turning to traditional administrative law jurisprudence, including the APA, which suggestion the Tax Court has resisted despite the fact that the federal district court did so.⁶ The majority of the Tax Court insists that it has never been subject to administrative law jurisprudence or the APA, nor could it be. Most of the courts of appeals that have considered the issue have held that the Tax Court is bound by the APA and traditional administrative law jurisprudence when the Tax Court is acting as a reviewing court. An exploration of the Tax Court's and the APA's history reveals that the Tax Court can be, and should be, subject to the APA and traditional administrative law jurisprudence when it acts as a reviewing court of agency action.

Part II of the article explains how the collection due process administrative hearings and appeals therefrom operate and some of the difficulties that have arisen with these appeals. Part III reviews the history of the Tax Court: how it began as a division of the Internal Revenue Service, became an independent agency, and then finally evolved into an Article I court. Part IV explores how the APA came into being and the initial questions as to its potential application to the predecessors of the Tax Court. Part V then considers and rejects the argument that the APA cannot apply to the Tax Court either because it is an Article I court or because it is a court of specialized, as opposed to general, jurisdiction.

II. COLLECTION DUE PROCESS HEARINGS AND APPEALS

A. *The Internal Revenue Service's Assessment and Collection Authority and Procedures*

1. Assessment Authority and Procedures

The United States Constitution empowers Congress to impose and collect taxes;⁷ although Congress continues to be the authority that imposes taxes, the IRS actually

IRS level administrative appeal, but rather, permitted taxpayers to introduce new evidence during appeal.

⁶ See generally Danshera Cords, *Administrative Law and Judicial Review of Tax Collection Decisions*, 52 ST. LOUIS U. L.J. 429 (2008); Christine K. Lane, *On-The-Record Review of CDP Determinations: An Examination of Policy Reasons Encouraging Judges to Stick to the Administrative Record*, 6 FLA. ST. U. BUS. L. REV. 149 (2007); Nick A. Zotos, *Service Collection Abuse of Discretion: What is the Appropriate Standard of Review and Scope of the Record in Collection Due Process Appeals?*, 62 TAX L. 223 (2008).

⁷ U.S. CONST. art. I, § 8, cl. 1, amended by U.S. CONST. amend XVI.

has the authority to assess and collect taxes. Generally, the Internal Revenue Service cannot commence collection proceedings until the tax has been assessed.⁸ Assessment is the recording of the taxpayer's liability in the office of the Secretary of the Treasury.⁹ The Internal Revenue Service is permitted to assess a tax after a taxpayer has filed a tax return showing a tax is owed¹⁰ or after the Tax Court has found the taxpayer is liable for a deficiency in income, estate, gift, and certain excise taxes.¹¹ An assessment is the functional equivalent of a judgment against a taxpayer.¹²

The Tax Court provides the taxpayer with an opportunity to receive pre-assessment judicial review of some tax liabilities.¹³ In the case of income, estate, gift, and certain excise taxes, if the Internal Revenue Service determines that there is a deficiency in the tax shown on the return, or if no return was filed, the Internal Revenue Service must send the taxpayer a notice of deficiency.¹⁴ Within ninety days after the notice is mailed, the taxpayer may file a petition with the Tax Court for a de novo re-determination of the deficiency.¹⁵ When conducting a deficiency hearing, the Tax Court is not confined to and does not rely on the administrative record compiled by the Internal Revenue Service in its dealings with the taxpayer. Instead, the Tax Court acts as a trial court, hears the matter de novo, and determines for itself the taxpayer's correct amount of tax due. Although the Tax Court determines the taxpayer's liability in a deficiency hearing, the Tax Court hears no evidence and makes no findings as to the manner in which the Internal Revenue Service will collect the tax if it is found to be owed.

The Internal Revenue Service is prohibited from assessing or collecting the disputed tax during the ninety-day notice period; and if the taxpayer files a petition with the Tax Court, until the Tax Court's decision is final.¹⁶ If the taxpayer fails to file a timely petition with the Tax Court, or if the Tax Court determines that there is a deficiency, the Internal Revenue Service may assess the tax and then begin

⁸ I.R.C. §§ 6201, 6203, 6303, 6322 (2006). The Internal Revenue Service can immediately assess a tax and commence collection if it determines that the tax is in jeopardy.

⁹ *Id.* § 6203.

¹⁰ *Id.* § 6201(c).

¹¹ *Id.* § 6213.

¹² Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 20-21 (2004).

¹³ I.R.C. § 6214.

¹⁴ Internal Revenue Code section 6212 directs the Secretary to send the taxpayer a notice of deficiency. Section 6211 defines deficiency. A deficiency arises if the Internal Revenue Service believes that the taxpayer has understated, on the return, the correct amount of tax owed. A deficiency does not include the situation where the taxpayer has indicated on the return that a certain amount of tax is owed, but simply fails to include the payment. *Id.*

¹⁵ Section 6213(a) states that a taxpayer has ninety days to file a petition; if the taxpayer resides in another country, the time to file a petition is one hundred and fifty days. Section 6214 provides that the Tax Court has jurisdiction to re-determine the deficiency after a timely petition has been filed.

¹⁶ *Id.* § 6213(a).

collection proceedings.¹⁷ The Tax Court is the sole pre-assessment judicial forum available to taxpayers and, as noted above, is only available to contest income, estate, gift, and certain excise taxes.

If the tax is one not subject to the Tax Court's jurisdiction, such as a payroll tax or tax that the taxpayer has acknowledged on the return to be due (and merely has not paid), the Internal Revenue Service may immediately assess the tax and commence collection if the taxpayer fails to pay.¹⁸

Other than as provided in I.R.C. sections 6320 and 6330, discussed below, the only relief from liability to which a taxpayer is entitled after assessment is rendered post-payment.

If the taxpayer disputes that he is liable for the assessed tax, he nevertheless must first pay the tax and then file an administrative claim with the Internal Revenue Service for a refund.¹⁹ If the Internal Revenue Service denies the claim, the taxpayer may then file suit for refund in either the district court or the court of federal claims.²⁰ However, the suit will address only the existence and the amount of the taxpayer's liability; the suit will not address any methods the Internal Revenue Service may have employed to collect the tax. Prior to enactment of the RRA of 1998, taxpayers had little recourse with respect to IRS debt collection methods such as liens and levies.²¹

¹⁷ I.R.C. § 6213(c) provides for assessment in the event the taxpayer fails to file a timely petition. I.R.C. § 6215(a) provides that the tax may be assessed after the Tax Court's determination of a deficiency becomes final as provided in I.R.C. § 7481. However, I.R.C. § 7482 permits the taxpayer to appeal the Tax Court's decision to the United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit), and such review shall be to the same extent as decisions of district courts in civil actions tried without a jury. The United States Supreme Court may review the appellate court's decision upon certiorari.

¹⁸ *Id.* § 6201.

¹⁹ I.R.C. § 6511 provides that the taxpayer must file an administrative claim for refund three years from when the return was filed or two years from the time the tax was paid, whichever is later. If the taxpayer did not file a return, he or she must file a claim for refund within two years from the time the tax was paid.

²⁰ I.R.C. § 7422(a) states that no civil suit for refund may be commenced unless a taxpayer has first filed an administrative claim for refund. I.R.C. § 6532(a) provides that the suit cannot be commenced until six months after the taxpayer has filed an administrative claim for refund, unless the Internal Revenue Service rejects the claim earlier. After the Internal Revenue Service rejects the claim or six months elapse, the taxpayer must file suit within two years of that event.

²¹ The United States Supreme Court has held specifically that the collection of tax debt by means of a lien is constitutional. *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 721 (1985); *see also Phillips v. Comm'r*, 283 U.S. 589 (1931).

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.

Phillips, 283 U.S. at 595.

It is important to note that a taxpayer is supposed to get only one chance to dispute, in court, his tax liability.²² If the taxpayer avails himself of the Tax Court's pre-assessment/pre-payment deficiency procedures and loses, the taxpayer cannot pay the tax and then file a suit for a refund.²³ The Tax Court's decision is res judicata as to the taxpayer's liability. If the tax was not one within the Tax Court's jurisdiction, or if the taxpayer chose not to file a petition with the Tax Court within the ninety-day period after receiving the notice of deficiency, the taxpayer must pay the tax and then avail himself of the refund procedures previously described.

2. Collection Authority and Procedures

Historically, the Internal Revenue Service has enjoyed broad collection powers not subject to judicial review.²⁴ The Internal Revenue Service is permitted to collect a delinquent tax by summary administrative proceedings and, with only a few exceptions,²⁵ need not obtain a court order to take the taxpayer's property. These collection powers are buttressed by the Anti-Injunction statute,²⁶ which prohibits a taxpayer from obtaining a court injunction against assessment or collection, subject to a few statutory exceptions contained therein.²⁷

²² The collection due process appeals have changed this and enabled some taxpayers to dispute their liability more than once in court. See Diane L. Fahey, *The Tax Court's Jurisdiction over Due Process Collection Appeals: Is It Constitutional?*, 55 BAYLOR L. REV. 453, 491-92 (2003).

²³ I.R.C. § 6512(a) ("If the Secretary has mailed to the taxpayer a notice of deficiency . . . and if the taxpayer files a petition with the Tax Court . . . no credit or refund . . . shall be allowed . . . and no suit . . . for the recovery of any part of the tax shall be instituted in any court . . .").

²⁴ See Marilyn E. Phelan, *A Summary of the Extensive Collection Powers of the Internal Revenue Service*, 9 VA. TAX REV. 405 (1990). Although Professor Phelan's article predates the enactment of the RRA of 1998, much of her discussion of the Internal Revenue Service's vast collection powers remains timely and is an extremely useful summary of the Internal Revenue Service's summons, enforcement, and collection powers. See also Camp, *supra* note 12, at 20-21.

²⁵ For example, the IRS must obtain a warrant in order to enter into private residences to seize assets (although a warrant is not required to seize property in public areas). See *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 358 (1977).

²⁶ I.R.C. § 7421(a) ("Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436 . . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . . ."). *Id.*

²⁷ One of the exceptions was discussed above. See *supra* text accompanying note 25. A taxpayer may obtain an injunction if the Internal Revenue Service attempts to assess or collect a tax during the ninety-day period that the notice of deficiency is pending or while the Tax Court has jurisdiction over the deficiency proceeding. In addition, the United States Supreme Court recognizes an exception to the Anti-Injunction statute and permits a taxpayer to obtain injunctive relief if the taxpayer can demonstrate two factors: (1) irreparable harm, and (2) certainty of success on the merits—a virtually impossible standard to satisfy. See *Bob Jones Univ. v. Simon*, 416 U.S. 725, 737 (1974); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 6-7 (1962).

After assessing the tax, the Internal Revenue Service must send the taxpayer a notice informing him of the amount due and demanding payment.²⁸ If the taxpayer fails to pay the tax within ten days, the Internal Revenue Service sends the taxpayer a notice of federal tax lien, which attaches to all of the taxpayer's real and personal property.²⁹ The Internal Revenue Service may then proceed and levy on the taxpayer's property on which there is the federal tax lien³⁰ except for certain exempt property.³¹ The taxpayer must be notified of the intent to levy at least thirty days prior to the levy,³² and this notice must advise the taxpayer, in "simple and nontechnical terms," of the procedures relating to a levy and sale of property, available administrative appeals (including, most importantly, the right to a due process collection appeal), and alternatives that might prevent the levy.³³

3. IRS Administrative Level Collection Due Process Hearings

Unfortunately, I.R.C. section 6330 provides little guidance as to how the IRS should conduct the administrative hearing or how the Tax Court should conduct judicial review thereof. After some initial confusion and debate, the courts determined that the hearings should be informal.³⁴ At the administrative hearing, the taxpayer may raise any relevant issue pertaining to the unpaid tax or the proposed levy, including challenges to the appropriateness of the proposed collection action, offers of collection alternatives such as installment agreements, or offers in compromise.³⁵ In addition to raising issues as to the proposed collection, the taxpayer may dispute the underlying tax liability itself if the taxpayer either did not receive the notice of deficiency or did not otherwise have an opportunity to dispute the tax.³⁶

²⁸ See I.R.C. § 6303. The notice and demand must be sent within sixty days of assessment. *Id.* § 6303(a). Although the Internal Revenue Service is obligated to send only one notice and demand, in fact, the Internal Revenue Service sends several computer-generated notices before taking any further collection action. See also MICHAEL J. SALTZMAN, *IRS PRACTICE AND PROCEDURE* ¶ 14.03[3] (rev. 2d ed. 2002).

²⁹ *Id.* § 6321.

³⁰ *Id.* § 6331(a).

³¹ I.R.C. § 6334 lists thirteen categories of items exempt from the levy. They include such things as the taxpayer's clothes, books, tools of trade, unemployment benefits, and disability benefits. In addition, the Internal Revenue Service must obtain judicial permission to levy on the taxpayer's personal residence.

³² *Id.* § 6331(d)(1)-(2).

³³ *Id.* § 6331(d)(4)(B)-(D).

³⁴ See, e.g., *Katz v. Comm'r*, 115 T.C. 329, 337 (2000) (noting that hearings before the IRS's Appeals division historically have been informal and, therefore, by analogy CDP administrative hearings should also be informal); see also *Treas. Reg. § 301.6330-1* (2006).

³⁵ *Id.* § 6330(c)(2)(A).

³⁶ *Id.* § 6330(c)(2)(B). The statute does not explain what is meant by "or did not otherwise have an opportunity to dispute such tax liability." *Id.* The I.R.C. has interpreted this as meaning that the taxpayer did not have an opportunity to dispute the liability at a prior conference with Appeals, either before the assessment (for example, during an audit) or after. See *Treas. Reg. § 301.6330-1(e)(3)(vi)Q-E2-A-E2*.

The Appeals Officer is obligated to make a determination that all procedural requirements have been met and all appropriate issues have been considered. Further, the Appeals Officer must determine whether the proposed collection action balances the need for the efficient collection of taxes against the taxpayer's concern that the collection be no more intrusive than necessary.³⁷ When the Appeals Officer makes his determination, he will send the taxpayer a Notice of Determination letter.³⁸

B. Judicial Review of IRS Collection Due Process Hearings

Internal Revenue Code section 6330(d)(1) merely provides that the taxpayer is entitled to judicial review in the Tax Court. Congress failed to specify in the statute the standard for review that the courts should apply when reviewing collection due process appeals; however, the legislative history states that Congress intended for the courts to consider appeals of the underlying tax liability on a de novo basis and to consider appeals from the proposed collection on an abuse of discretion basis.³⁹ The Tax Court has adopted this standard.⁴⁰

Because the collection due process (CDP) administrative hearings before the IRS are informal, there is very little record available for the Tax Court to review. The administrative record in CDP appeals usually contains the following: the CDP lien or levy notice; the taxpayer's request for a CDP hearing and any other correspondence; the Appeals Officer's history notes and Notice of Determination; the appeals transmittal and case memoranda; a summary of the taxpayer's account; any documents submitted by the taxpayer after the date of the hearing request up until the date of the Notice of Determination; and any tape recordings or transcriptions of the hearing if made.⁴¹ Because the hearings are informal and not recorded, there is usually no transcript of the proceedings available for court review on appeal.

³⁷ I.R.C. § 6330(c)(3).

³⁸ Treas. Reg. § 301.6630-1(e)(3)(vi)Q-E8-A-E8. "Taxpayers will be sent a dated Notice of Determination by certified or registered mail." *Id.*

³⁹ H.R. REP. NO. 105-599, at 265 (1998).

Where the validity of the tax liability was properly at issue in the hearing, and where the determination with regard to the tax liability is a part of the appeal, no levy may take place during the pendency of the appeal. The amount of the tax liability will in such cases be reviewed by the appropriate court on a de novo basis. Where the validity of the tax liability is not properly part of the appeal, the taxpayer may challenge the determination of the appeals officer for abuse of discretion. In such cases, the appeals officer's determination . . . will be reviewed using an abuse of discretion standard of review.

Id.

⁴⁰ *Davis v. Comm'r*, 115 T.C. 35, 39 (2000). When the district courts had joint jurisdiction with the Tax Court over collection due process appeals, the district courts also adopted these standards. As shall be discussed below, there was a dichotomy in how the Tax Court and the district courts actually applied the abuse of discretion standard with the district courts applying abuse of discretion as it is traditionally interpreted under administrative law jurisprudence and the Tax Court applying what really amounted to de novo review. *Id.*

⁴¹ See, e.g., Lane, *supra* note 6, at 155.

Because the Tax Court does not consider itself bound by either traditional administrative law jurisprudence or the APA, the Tax Court does not limit its judicial review to the record created at the administrative hearing (the record rule).⁴² Instead, the Tax Court has permitted taxpayers to expand the record with testimony on matters not considered by the Appeals Officer. In *Robinette v. Commissioner*,⁴³ the Tax Court reiterated its position, which position the Tax Court has adhered to in subsequent cases.⁴⁴ After failing to pay almost one million dollars in taxes, Dr. Robinette entered into an offer-in-compromise in 1995 with the IRS in which he agreed to pay \$100,000 in settlement of his tax liabilities and to file his income tax returns for the next five years on a timely basis.⁴⁵ If Dr. Robinette failed to file his returns on a timely basis, the offer-in-compromise could be revoked and he would again be liable for the full amount of his tax liability.⁴⁶

Subsequently, he received an extension until October 15, 1999 to file his 1998 tax return.⁴⁷ Dr. Robinette's accountant, Mr. Coy, later testified before the Tax Court that on October 15 he drove to Dr. Robinette's home sometime between 8:45 p.m. and 9:00 p.m., returned to his office, sometime after 11:00 p.m. but before 12:00 a.m., where he affixed the appropriate amount of postage to the envelope containing Dr. Robinette's tax return, using a private postage meter in his office, and then deposited the envelope in the U.S. Postal Service mailbox in his building.⁴⁸

On no less than three occasions, the IRS notified Dr. Robinette that it had not received his 1998 tax return and warned him that the offer-in-compromise was in jeopardy if he did not provide a copy.⁴⁹ Although Dr. Robinette did not respond to the IRS, he testified at the Tax Court that he gave these letters to Mr. Coy.⁵⁰ The IRS finally sent Dr. Robinette a letter informing him that the offer-in-compromise was in default and then sent him a final notice of intent to levy. Mr. Coy timely requested an administrative collection due process hearing before the IRS on the grounds that Dr. Robinette did not owe the money.⁵¹

At the collection due process hearing, the only evidence the Appeals Officer would consider for proof of mailing was a certified mail or registered mail receipt and refused to consider Dr. Robinette's pattern of asking for extensions and filing on

⁴² *Robinette v. Comm'r*, 123 T.C. 85, 94-95 (2004). The Tax Court acknowledges that although the proper standard for review is abuse of discretion, the scope of review is, essentially, de novo in that the Tax Court can hear new evidence. *Id.*

⁴³ *Robinette v. Comm'r*, 123 T.C. 85 (2004).

⁴⁴ *Oropeza v. Comm'r*, T.C. Memo. 2008-094, discussed *infra* notes 67, 68 and accompanying text.

⁴⁵ Dr. Robinette had income tax liabilities for the years 1983 through 1991 and employment tax liabilities for portions of 1988, 1989, and 1990 for a total liability of \$989,475. *Robinette*, 123 T.C. at 86.

⁴⁶ *Id.* at 86-87.

⁴⁷ *Id.* at 87.

⁴⁸ *Id.* at 88.

⁴⁹ *Id.* at 89-90.

⁵⁰ *Id.*

⁵¹ *Id.* at 90.

October 15, as he had done in previous years.⁵² The Appeals Officer issued a Notice of Determination to Dr. Robinette declaring that the offer-in-compromise was in default and that collection proceedings would continue.⁵³ Dr. Robinette filed a timely appeal with the Tax Court contending, inter alia, that the Appeals Officer should have considered Mr. Coy's testimony and records. The Tax Court agreed, but rather than remand the matter back to the IRS, the Tax Court allowed Dr. Robinette to introduce this evidence into the record stating that "we are not limited by the Administrative Procedure Act (APA) and our review is not limited to the administrative record."⁵⁴ The Tax Court noted that it had so held in a number of previous cases regarding requests by taxpayers to supplement the administrative record created at the IRS hearing.

Since the enactment of section 6330, the Court has applied our traditional de novo procedures in deciding whether an Appeals officer abused his or her discretion in determining to proceed with collection. At trials under section 6330 when reviewing for abuse of discretion, the Court has received into evidence testimony and exhibits that were not included in the administrative record. See, e.g., *Wells v. Commissioner*, T.C. Memo. 2003-234 (taxpayer's testimony admissible at trial when he was represented by counsel and taxpayer was not present at hearing); *Maloney v. Commissioner*, T.C. Memo. 2003-143 (taxpayers presented numerous letters sent to Commissioner asking him to recalculate their FICA taxes as evidence of claimed overpayments) . . . *Gougler v. Commissioner*, T.C. Memo. 2002-185 (Court considered two documents at trial that were not presented to Appeals officer); *Holliday v. Commissioner*, T.C. Memo. 2002-67 (Commissioner permitted to present documents, records, and testimony at trial that was not part of administrative record) . . .⁵⁵

The only federal district or appellate court case that the Tax Court cited in support of its position was from the taxpayer's appeal to the Court of Appeals for the Ninth Circuit in *Holliday*.⁵⁶

The Tax Court went on to observe that "[t]he APA has never governed proceedings in the Court (or in the Board of Tax Appeals)"⁵⁷ and cited in support a

⁵² *Id.* at 91.

⁵³ *Id.*

⁵⁴ *Id.* at 95.

⁵⁵ *Id.* at 95-96.

⁵⁶ *Holliday v. Comm'r*, 57 F.App'x 774 (9th Cir. 2003). The Ninth Circuit in an unpublished opinion simply stated that "the 'record review' provisions of the Administrative Procedure Act . . . do not apply to the Tax Court." In support of its position, the Ninth Circuit relied on 5 U.S.C. § 544(a)(1), holding that the "APA does not apply where 'a matter [is] subject to a subsequent trial of the law and the facts de novo in a court.'" *Id.* However, 5 U.S.C. § 544(a)(1) dictates when an agency must conduct its hearings in accordance with formal, trial-type procedures and which section goes on to provide that an agency is exempt from using formal adjudication if the matter will be tried de novo in a court of law.

⁵⁷ *Robinette*, 123 T.C. at 96.

number of cases, including *O'Dwyer v. Commissioner*⁵⁸ and *Nappi v. Commissioner*.⁵⁹ However, as shall be discussed more fully below, neither *O'Dwyer* nor *Nappi* supports the Tax Court's position.

Dr. Robinette appealed to the Court of Appeals for the Eighth Circuit, which reversed the Tax Court.⁶⁰ Among other things, the Eighth Circuit held that the Tax Court (1) should have adhered to the record rule when conducting its review of the IRS's actions,⁶¹ (2) is bound by the APA in this context,⁶² and (3) had misconstrued *O'Dwyer* and *Nappi*.⁶³

The Eighth Circuit's position regarding the applicability of the record rule and the APA to collection due process appeals dovetails with that of the First and Sixth Circuit Courts of Appeals when the district courts shared jurisdiction over collection due process appeals with the Tax Court. In *Olsen v. United States*,⁶⁴ the taxpayer argued that the district court was in error when it upheld the IRS's determination that the levy should proceed. The taxpayer argued that the district court should have permitted him to conduct discovery while the collection due process appeal was before the district court rather than limiting him to the administrative record created at the IRS collection due process hearing. The First Circuit ruled against the taxpayer, stating that the district court's review was limited to the administrative record, and if that record was inadequate, the appropriate course of action is to remand the matter back to the agency for further proceedings rather than attempting to supplement the administrative record with new evidence:

We turn next to Olsen's argument that the district court erred in denying his motion to conduct discovery and in limiting its review to the administrative record. The Supreme Court has consistently stated that review of administrative decisions is "ordinarily limited to consideration of the decision of the agency . . . and of the evidence on which it was based," and that "no de novo proceeding may be held." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 714-15, 83 S.Ct. 1409, 10 L.Ed.2d 652 (1963). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). See also *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.").

It is true the instant record is not of a formal adjudication. But an administrative record was compiled and made available, reflecting the

⁵⁸ *O'Dwyer v. Comm'r*, 266 F.2d 575 (4th Cir. 1959).

⁵⁹ *Nappi v. Comm'r*, 58 T.C. 282 (1972).

⁶⁰ *Robinette v. Comm'r*, 439 F.3d 455 (8th Cir. 2006).

⁶¹ *Id.* at 459-61.

⁶² *Id.* at 460 n.4.

⁶³ *Id.* at 461.

⁶⁴ *Olsen v. United States*, 414 F.3d 144 (1st Cir. 2005).

actions, contentions, and reasoning of those involved. And the Supreme Court has made clear that the record rule extends to informal agency adjudications. *See, e.g., Lorion*, 470 U.S. at 744, 105 S.Ct. 1598 (“The APA specifically contemplates judicial review on the basis of the agency record compiled in the course of *informal* agency action in which a hearing has not occurred.”) In the event the administrative record is found inadequate for judicial review, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *Id.*; *see also Carlo Bianchi*, 373 U.S. at 718, 83 S.Ct. 1409 (remand “would certainly be justified where the department had failed to make adequate provision for a record that could be subjected to judicial scrutiny”)⁶⁵

The Court of Appeals for the Sixth Circuit, in *Living Care Alternatives v. United States*,⁶⁶ also held that the reviewing court should limit its review of the IRS’s action to the record created during the administrative hearing.

Subsequently, the Tax Court decided *Oropeza v. Commissioner*,⁶⁷ and the Tax Court again determined that it was not bound by either the APA or traditional administrative law jurisprudence when conducting judicial review of IRS administrative-level collection due process hearings.⁶⁸

The Tax Court places great reliance on its history as an entity, which, historically, has reviewed on a de novo basis IRS determinations that a taxpayer owes a tax, stating a number of times that the Tax Court and its predecessors have never been subject to the APA. It is true that the Tax Court and its predecessors have never been charged with the typical agency responsibilities of rulemaking or investigation of taxpayer behavior, but rather only had adjudicatory duties. That fact, however, is not dispositive of the question. Other agencies also operate in this fashion.⁶⁹ The position that the Tax Court and its predecessors have “always” been

⁶⁵ *Id.* at 155.

⁶⁶ *Living Care Alternatives of Utica, Inc. v. United States*, 411 F.3d 621 (6th Cir. 2005). The Sixth Circuit discussed *Mesa Oil, Inc. v. United States*, No. Civ.A. 00-B-851, 2000 WL 1745280, at *7 (D. Colo. 2000), where the district court held that the administrative record was inadequate and remanded the matter back to the IRS for further proceedings. The Sixth Circuit believed that the *Mesa Oil* district court had applied an overly rigorous standard of review but also believed that the district court acted properly in remanding the matter to the agency rather than attempting to supplement the record during the court proceedings. *Living Care Alternatives*, 411 F.3d at 629.

⁶⁷ *Oropeza v. Comm’r*, T.C. Memo. 2008-094.

⁶⁸ *Id.* at 4.

⁶⁹ Tax enforcement is not the only area in which the Congress has deemed it wise to separate out the enforcement and prosecutorial duties from the adjudicatory duties. In 1970, Congress created two entities to implement occupational safety and health: (1) the Occupational Safety and Health Administration (which is located within the Department of Labor), which makes policy, conducts investigations, and assesses penalties, and (2) the Occupational Safety and Health Review Commission (an independent commission), which adjudicates contested assessments. Despite the fact that the Occupational Safety and Health Review Commission is a stand alone entity and only charged with adjudicatory duties, no one contends that it is, therefore, not an agency. Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (2006).

considered exempt from traditional administrative law, and the APA specifically, is somewhat simplistic and ignores the Tax Court's own history, which reveals that courts and executive officials questioned this contention a number of times.

III. EVOLUTION OF THE UNITED STATES TAX COURT

A. *Committee on Appeals and Review: Administrative Agency*

Prior to enactment of the modern federal income tax, the federal government derived most of its revenues from tariffs and customs duties on imports, from some internal excise taxes (for example on the sale of alcohol and tobacco), and from the sale of public lands.⁷⁰ In 1913, Congress enacted the Internal Revenue Act of 1913 (1913 Act)⁷¹—the predecessor to today's federal income tax as now codified in Title 26 of the United States Code. The 1913 Act was relatively modest in its scope with low rates and a generous exemption so that out of a population of 97 million, only 358,000 individual income tax returns were filed for the 1913 tax year.⁷² However, in 1914, World War I (WWI) began in Europe, and, although the United States would not officially enter the conflict until the spring of 1917, the United States immediately experienced financial repercussions from the war as a result of (1) reduced revenues from customs receipts due to trade reduction with Europe, and (2) increased government expenditures as the United States made preparations to enter the conflict.⁷³ In response, Congress enacted the Revenue Acts of 1916,⁷⁴ 1917,⁷⁵ and 1918⁷⁶ (collectively, WWI Revenue Acts), which raised tax rates and reduced the exemption amount and also enacted the excess profits tax⁷⁷ in an attempt to stem war profiteering.⁷⁸ Each one of these revenue measures added more complexity to the ever-evolving new tax code and also increased the number of taxpayers who were required to file returns so that by 1917, 3.5 million individuals filed income tax returns, and by 1920, the number had increased to seven million.⁷⁹

The federal government needed an agency to administer this new tax system. In 1861 and 1862, Congress had enacted legislation temporarily creating an income tax

⁷⁰ HAROLD DUBROFF, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 2* (1979). Prior to 1913, Congress enacted a federal income tax for two brief periods during our country's history: during the Civil War and at the turn of the nineteenth century, although Congress had considered enacting an income tax at other times such as during the War of 1812. *Id.*

⁷¹ Act of Oct. 3, 1913, ch. 16, 38 Stat. 114. Several years earlier, in 1909, Congress had enacted a federal income tax on corporations. Act of Aug. 5, 1909, ch. 6, § 38, 36 Stat. 112.

⁷² DUBROFF, *supra* note 70, at 8.

⁷³ *Id.* at 8-9.

⁷⁴ Revenue Act of 1916, ch. 463, 39 Stat. 756.

⁷⁵ Revenue Act of 1917, ch. 63, 40 Stat. 300.

⁷⁶ Revenue Act of 1918, ch. 18, 40 Stat. 1057.

⁷⁷ Act of Mar. 3, 1917, ch. 159, § 201, 39 Stat. 1000.

⁷⁸ DUBROFF, *supra* note 70, at 9-10.

⁷⁹ *Id.* at 10-12.

to finance the Civil War⁸⁰ and also creating the Bureau of Internal Revenue (Bureau) to administer the income tax.⁸¹ Although the income tax was repealed after the Civil War, the Bureau remained in existence to administer what few internal revenue taxes remained—such as on alcohol and tobacco—and to perform certain other miscellaneous duties such as administering the bounty for United States sugar producers, certifying Chinese laborers, and collecting the tax on opium and oleomargarine.⁸²

The Bureau struggled to keep up with its new duties imposed by the Act of 1913, but when Congress enacted the WWI Revenue Acts, the Bureau was overwhelmed. The Bureau felt compelled to audit every return that was filed while, at the same time, the number of returns and the complexity of the tax code both had dramatically increased within the space of a few years.⁸³ Further exacerbating the problem, the Bureau was hindered by the lack of trained personnel to audit the returns or answer taxpayer questions. The Bureau made strenuous efforts to recruit auditors at a time when the labor market was already reduced due to military recruitment; however, each auditor required a training period of several months, and many auditors would leave the Bureau within a short period of time to work in the more lucrative private sector providing advice to taxpayers.⁸⁴

In these first few years, as the Bureau experienced high turnover in its personnel and endeavored to interpret the new, ever-changing tax code, it was not uncommon for a taxpayer to be subject to multiple audits and assessed differing amounts for the same tax year. Unfortunately, the various revenue acts failed to provide that taxpayers should be given any advance notice of the new or changed assessments or a hearing to question the alleged liability prior to payment. If the taxpayer failed to pay, the Bureau could begin collection proceedings.⁸⁵ Prior to the enactment of the

⁸⁰ Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 292, 309; Act of July 1, 1862, ch. 119, § 89, 12 Stat. 432. See Joe Thorndike, *Reforming the Internal Revenue Service: A Comparative History*, 53 ADMIN. L. REV. 713 (2001).

⁸¹ Rev. Act, ch. 45, § 49, 12 Stat. 292, 299 (1861).

⁸² DUBROFF, *supra* note 70, at 14.

⁸³ *Id.* at 14-15.

⁸⁴ *Id.* at 15-16.

The scope of the problem is revealed by the fact that in 1920, 50% of the personnel of the Income Tax Unit, which had primary responsibility for income and excess profits tax matters, either resigned or were discharged. Roughly, then, the average tenure at that time was approximately one year and, when the training period is taken into account, the time actually spent on Bureau work by the average employee was six to eight months.

Id. at 16.

⁸⁵ *Id.* at 20-21. A taxpayer who disputed an assessed liability had two choices: (1) pay the tax and then file for a refund with the Commissioner of the Bureau, and if the Commissioner rejected the refund request, file suit in either the federal district court or the court of claims, or (2) not pay the tax and file with the Bureau a claim of abatement, which required the taxpayer to post a bond for the disputed tax and which procedure was subject to a number of exceptions. *Id.* at 21-23, 28-35.

permanent federal income tax in 1913, when the federal government had relied primarily on license fees, customs duties, and excise taxes for revenue, the “pay first, argue later” system was not considered to be overly onerous on taxpayers. However, the WWI Revenue Acts imposed very high rates on high income taxpayers so that the “pay first” rule became harsh and further fueled the need for an impartial tribunal to provide taxpayers with some opportunity to dispute a tax before assessment and collection.⁸⁶

The federal government needed to find a way to alleviate taxpayer dissatisfaction with the new tax so that taxpayers would continue to comply voluntarily with the system and pay. Over the next few decades, the federal government endeavored to find a mechanism or system to enable taxpayers to dispute a tax, but, at the same time, not enable taxpayers to hold the government hostage by refusing or delaying the payment of the tax. As discussed below, the government initially created an entity within the Bureau itself to hear disputes, then shifted to an agency independent of the Treasury Department or the Bureau, and then, finally, created an Article I court, which sat in a courthouse separate from the Treasury Department. The dispute mechanism or system evolved in this way in order to provide taxpayers with assurance that the dispute mechanism was not a sham or biased in favor of the government. Congress steadily increased the autonomy of the dispute mechanism to bolster public trust in the tax system.

The Commissioner created a subdivision within the Bureau in late 1919 or early 1920: the Committee on Appeals and Review (Committee);⁸⁷ it was separate from the Income Tax Unit (which was responsible for administering the income and excess profit taxes), although the Committee was staffed by five former members of the Unit.⁸⁸ Initially, the Committee’s purpose was twofold: (1) to hear taxpayer appeals, and (2) to advise the Commissioner regarding the preparation of Treasury decisions, regulations, and rulings, with most of the Committee’s time being spent on the latter.⁸⁹

However, in 1921, Congress amended the tax code by enacting the Revenue Act of 1921, which required the Commissioner to give a taxpayer notice of an

Filing suit for a refund was not a straightforward matter at the time. Prior to 1921, refund suits could be brought against the United States under the Tucker Act, which had been enacted in 1886. If the claim exceeded \$10,000, however, the taxpayer had to proceed against the collector personally. Unfortunately for the taxpayer, if the collector were dead or no longer in office, the taxpayer could not sue in district court but had to go to the, then, Court of Claims. The Tucker Act eventually was amended so that taxpayers could sue in the district court for refunds in excess of \$10,000 even if the collector had died or was out of office. *See* *Flora v. United States*, 362 U.S. 145, 152 (1960); *Camp*, *supra* note 12, at 21 n.86.

⁸⁶ CHARLES D. HAMEL & EDWARD H. MCDERMOTT, *HAMEL’S MANUAL OF BOARD OF TAX APPEALS PRACTICE* 4-5 (Prentice-Hall 1929).

⁸⁷ 1920 COMM’R OF INT. REV. REP. 14-15.

⁸⁸ DUBROFF, *supra* note 70, at 39. The Committee’s size increased to ten in 1922 and then to twenty in 1923. *Id.* at 41 nn.232-33. *See* 1920 COMM’R OF INT. REV. REP. 15; 1921 COMM’R OF INT. REV. REP. 14; 1922 COMM’R OF INT. REV. REP. 15; 1923 COMM’R. OF INT. REV. REP. 9.

⁸⁹ DUBROFF, *supra* note 70, at 39, 41.

assessment and an opportunity to file an administrative appeal,⁹⁰ and the Committee was given the task of hearing these section 250(d) appeals, which occupied most of the Committee's time. As noted by the Commissioner at the time, "[t]he duties of the Committee became 'more closely confined to . . . [those] of a purely appellate body.'"⁹¹ Although individual Committee members would hear an appeal, the Committee would meet to approve each recommendation of each member. After the Committee increased in size and was divided into subcommittees, each subcommittee would meet to approve each member's recommendation, and then the subcommittee's recommendation would be forwarded to the Chairman of the Committee for his review and approval. This process was designed to ensure consistency in decision-making among the Committee members.⁹² Beginning in 1923, the Committee began to dispatch subcommittees to cities other than Washington, D.C., to hear cases.⁹³

This collegiality with regard to the decision process, review by the chairman of the Committee, and circuit riding were practices that carried over to the Board of Tax Appeals and then later to the Article I United States Tax Court. However, the Committee differed in some important ways from its successors. The Committee was not a fact finder during appeal hearings and did not operate as a trial court, but rather functioned in an appellate capacity.⁹⁴ Taxpayers submitted evidence in written form⁹⁵ and could request an oral hearing and submit written briefs.⁹⁶ The hearings were informal and non-adversarial, and "Committee proceedings frequently became negotiating sessions; in these cases Committee recommendations were no more than settlements of disputed issues rather than judicial determinations of legal questions."⁹⁷

However, almost from the Committee's inception, it was faced with calls for its replacement by an independent Board of Tax Appeals, which would operate with more formal procedures.⁹⁸ The Committee's status as an entity within the Bureau

⁹⁰ Rev. Act, ch. 136, § 250(d), 42 Stat. 265 (1921).

⁹¹ 1923 COMM'R OF INT. REV. REP. 8, in DUBROFF, *supra* note 70, at 41 n.236.

⁹² DUBROFF, *supra* note 70, at 40.

⁹³ *Id.* at 42.

⁹⁴ 1923 COMM'R OF INT. REV. REP. 8 ("In its later years, the Commissioner referred to the Committee as a 'quasi-judicial body of appellate jurisdiction.'). See DUBROFF, *supra* note 70, at 42.

⁹⁵ The Committee could, in its discretion, accept new evidence. See A.R.M. 219, III-1 C. B. 319, 319-20 (1924).

⁹⁶ *Id.*; O.D. 709, 3 C. B. 370 (1920).

⁹⁷ DUBROFF, *supra* note 70, at 43.

⁹⁸ The American Mining Congress and the United States Chamber of Commerce proposed creation of a Board of Tax Appeals. The most influential advocate for an independent Board of Tax Appeals was the Tax Simplification Board, created by the Revenue Act of 1921, ch. 136, § 1327, 42 Stat. 317, whose purpose was to investigate the administration of the internal revenue laws. DUBROFF, *supra* note 70, at 51. In addition, on November 10, 1923, the Secretary of the Treasury issued his annual report in which he recommended the creation of a board of tax appeals to be located within the Treasury Department, although either party

undermined the public's confidence in its independence in two, somewhat contradictory ways. First, the public was concerned that the Committee was inclined to find in the Bureau's favor because if the Bureau prevailed in the appeal, the taxpayer would be forced to pay the tax and then sue for a refund; however, if the taxpayer prevailed in the appeal, that was the end of the matter because the Committee was part of the Bureau and, therefore, the Committee's decision represented the final decision of the Bureau (at least after 1923). This created the impression, if not the reality, that the Committee was biased, in favor of the Bureau, to generate revenue.⁹⁹ Second, the newspapers had publicized several cases in which the Committee ruled in favor of taxpayers who received very large refunds. Because of the informal, nonpublic nature of Committee hearings, the public feared that some taxpayers were receiving special treatment.¹⁰⁰

B. The Board of Tax Appeals: Independent Administrative Agency

Taxpayers still had the right to pay a tax and sue for a refund in either the, then, Claims Court or the district courts, both of which were completely independent of the executive branch and, therefore, taxpayers could be confident of their impartiality. However, Congress did not want to create a new Article III court to hear pre-payment disputes, yet still needed to reassure taxpayers that the system was fair. One way to do so was to remove the decision-making function from the same agency that investigated and prosecuted delinquent taxpayers. As a result, Congress passed the Revenue Act of 1924,¹⁰¹ which created the Board of Tax Appeals (BTA), an agency located within the executive branch and independent of both the Bureau and the Department of the Treasury.¹⁰² The Revenue Act of 1924 empowered the BTA to conduct pre-assessment review of income, estate and gift, and excess profits taxes.¹⁰³ Unlike the prior Committee that it was replacing, the BTA was to operate

dissatisfied with the result could then sue in federal court. See HAMEL & MCDERMOTT, *supra* note 86, at 5.

⁹⁹ DUBROFF, *supra* note 70, at 41-42.

¹⁰⁰ Sully, *Those Refunded Millions*, SATURDAY EVENING POST, June 21, 1924, at 36, cited in DUBROFF, *supra* note 70, at 45 n.260.

¹⁰¹ Rev. Act, ch. 234, § 1100(a), 43 Stat. 352 (1924).

¹⁰² Rev. Act, ch. 234, § 900(a), (k), 43 Stat. 336, 338 (1924). For an overview of the various House and Senate proposals and committee reports detailing how Congress progressed from creating the BTA as an agency under the control of the Treasury Department to that of an independent, stand-alone agency free to create its own rules and procedures, see Appeal of S. Cal. Loan Ass'n, 4 B.T.A. 223, 229-34 (1926); Old Colony Trust v. Comm'r, 279 U.S. 716, 721-22 (1929).

¹⁰³ Rev. Act, ch. 234, § 324, 43 Stat. 316 (1924). The BTA also was authorized to hear taxpayer appeals from jeopardy assessments if the taxpayer filed a claim in abatement. *Id.* §§ 279, 312, 43 Stat. 300, 310 (1924). As noted, in 1924 a number of excise taxes existed, such as on cameras, corporate stock, mah-jongg sets, and narcotics, but because these excise taxes did not raise a significant amount of revenue, the BTA was not given authority to provide pre-assessment review for them. DUBROFF, *supra* note 70, at 73; see *infra* note 138. See also *Flora*, 362 U.S. at 158.

in a more structured manner and was to publish its decisions; however, the BTA created its own procedures and rules of evidence.¹⁰⁴

Because the BTA was an independent agency, it no longer could privately review the Bureau's or Treasury Department's files, but rather would need to render a decision based on the information the taxpayer and the Bureau presented to the BTA.¹⁰⁵ However, the BTA's findings, conclusions, and decisions were merely *prima facie* evidence in the event of a future trial. Neither party had the right to challenge directly the BTA's decisions by filing an appeal in the circuit courts. Rather, the BTA's decisions were merely considered to be *prima facie* evidence if either party filed a subsequent action in the district courts, which action would be heard *de novo*.¹⁰⁶ Therefore, if the taxpayer prevailed before the BTA, the Bureau could not summarily assess the tax, but had to commence a new action in federal court for a readjudication of whether a deficiency existed. If the Bureau prevailed before the BTA, the Bureau could immediately assess and collect the tax; however, the taxpayer could sue in court for a refund.¹⁰⁷ As a result, as noted by the First Circuit Court of Appeals, the hearings before the BTA were "little more than a preliminary skirmish, a run for luck."¹⁰⁸

¹⁰⁴ Rev. Act, ch. 234, § 900(g), (h), 43 Stat. 337, 338 (1924).

Hearings before the Board and its divisions shall be open to the public. The proceedings of the Board and its divisions shall be conducted in accordance with such rules of evidence and procedure as the Board may prescribe. It shall be the duty of the Board and of each division to make a report in writing of its findings of fact and decision in each case, and a copy of its report shall be entered of record and a copy furnished the taxpayer. If the amount of tax in controversy is more than \$10,000 the oral testimony taken at the hearing shall be reduced to writing and the report shall contain an opinion in writing in addition to the findings of fact and decision. All reports of the Board and its divisions and all evidence received by the Board and its divisions . . . shall be public records open to the inspection of the public. The Board shall provide for the publication of its reports at the Government Printing Office . . .

Id. at 337-38.

¹⁰⁵ Appeal of Lyon, 1 B.T.A. 378, 379 (1925) ("[E]vidence that has been introduced before any other department of the Government must be reintroduced before this Board before we can consider it.").

¹⁰⁶ *Old Colony Trust*, 279 U.S. at 721-22. See also Appeal of Union Metal Mfg. Co., 4 B.T.A. 287, 289 (1926).

The remedy of trial before the Board before payment was supplemental to the taxpayer's established remedy by suit in court after payment. This added remedy the taxpayer could avail himself of at his pleasure and to the extent he might desire and still retain his preexisting remedy in court. When he sued in court the Board's decision had not the force of a judgment, binding unless reversed, but by section 900(g), 'the findings of the Board shall be *prima facie* evidence of the facts therein stated.' It was clearly contemplated that, so far as all the courts were concerned, the Board's decision and findings of fact should not be *res adjudicata* but should merely be *prima facie* evidence.

Id.

¹⁰⁷ See DUBROFF, *supra* note 70, at 116.

¹⁰⁸ Blair v. Curran, 24 F.2d 390, 392 (1st Cir. 1928).

This system proved to be inefficient because each case heard by the BTA could be retried by the district court, and then subject to appeal in the courts of appeals, and then appeal to the United States Supreme Court (assuming the United States Supreme Court granted certiorari). Therefore, in the Revenue Act of 1926, Congress provided for direct judicial review of the BTA's decisions by either party filing "a petition for review in a Circuit Court of Appeals or the Court of Appeals of the District of Columbia under rules adopted by such courts."¹⁰⁹ If either party appealed, the matter would be heard as an appellate matter in the court of appeals (including possibly in the court of appeals for the District of Columbia) and would no longer be retried de novo in the district courts.¹¹⁰ As a result, the BTA needed to operate in a more formal fashion in order to create an appropriate record for appellate review.¹¹¹ The Revenue Act of 1926 provided that the BTA's rules of evidence had to be in accordance with the rules of equity applicable in the District of Columbia.¹¹²

¹⁰⁹ *Old Colony Trust*, 279 U.S. at 722. Either the taxpayer or the Commissioner had to file the petition within six months or the BTA's decision would be final. Only by filing an appeal within six months could the taxpayer delay the assessment or the collection of the tax. *Id.* at 725-26. See also Rev. Act, ch. 27, §§ 1001, 1005, 44 Stat. 109, 110 (1926).

In 1948, Congress enacted legislation to clarify that decisions of the then denominated "Tax Court of the United States" (still an independent agency in the executive branch but with a judicial title) be reviewed on appeal under the same standards applicable to decisions of the district courts sitting without juries. Rev. Act, ch. 646, § 36, 62 Stat. 991 (1948).

¹¹⁰ Rev. Act, ch. 27, § 1003(b), 44 Stat. 110 (1926) (providing that the courts of appeals and the United States Supreme Court "shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require"). See also *Old Colony Trust*, 279 U.S. at 722.

¹¹¹ See *Curran*, 24 F.2d at 392.

[The BTA] was created by the Act of 1924 to decide tax appeals. . . . It was authorized to establish its own rules of evidence and procedure. . . . Consequently it was not restricted by legal rules of evidence, but could receive such evidence as seemed to it worthy of credit, though not measuring up to the legal standard. No appeal from or right of review of the Board's decision was provided. The parties, therefore, did not contemplate an appeal, and there was no occasion for their saving their rights by way of exceptions to evidence and requests for findings and rulings, to be preserved in a record on appeal.

Id.

¹¹² Rev. Act § 907(a) (1926), cited in *Curran*, 24 F.2d at 392.

The Revenue Act of 1926 radically changed the situation from what it had previously been. By it the Circuit Courts of Appeals were given exclusive jurisdiction to review the decision of the Board. . . . In furtherance of this the Circuit Courts of Appeals were authorized to adopt rules for the preparation of the record for review . . . the hearings before the Board were to be stenographically reported; and defined rules of evidence were prescribed. . . . It took away the right of a party aggrieved by a decision of the Board to bring a court action and have a trial de novo on issues of fact and law . . . and limited his right to a review of the Board's decision in the Circuit Courts of Appeals on questions of law only.

Id.

As the Final Report of the Attorney General's Committee on Administrative Procedure¹¹³ later noted, oftentimes it is unduly burdensome for agencies to comply with the rules of evidence for jury trials; however, agencies generally do observe some standard with regard to the proffering and acceptance of evidence, and the Acheson Report found nothing out of the ordinary with regard to the BTA's standard of the rules of equity applicable to the District of Columbia. Certainly, this evidence standard does not signify that the BTA was a court and not an agency.

The absence of a jury and the technical subject-matter with which agencies often deal, all weigh heavily against a requirement that administrative agencies observe what is known as the "common law rules" of evidence for jury trials. Such a requirement would be inconsistent with the objectives of dispatch, elasticity, and simplicity which the administrative process is designed to promote.

....

As a result, it is rarely suggested that the older common law rules of evidence for jury trials should be imposed upon administrative agencies. Congressional sanction has been given to varying degrees of relaxation. The Federal Power Commission and the National Labor Relations Board are expressly freed from application of "the rules of evidence." The Board of Tax Appeals must observe only the rules of evidence applicable in the courts of the District of Columbia in equity proceedings. Even where the statute is silent, some agencies have prescribed adherence to reasonable requirements.¹¹⁴

The federal courts, and the BTA itself, repeatedly acknowledged that it was an agency, albeit an "anomalous" one with strictly judicial duties.¹¹⁵ For example, in

¹¹³ See discussion *infra* Part III, C.

¹¹⁴ FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8 at 70 (1941).

¹¹⁵ *Old Colony Trust*, 279 U.S. at 725 ("The Board of Tax Appeals is not a court."); see also *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117 (1926) noting that the BTA was an independent agency in the executive branch of the government, albeit one with "quasi-judicial duties". The Supreme Court went on to note that it would be odd for the BTA not to be authorized to prescribe rules of practice for the admission of attorneys permitted to practice before it "when in the Treasury Department and the office of the Commissioner of Internal Revenue there is a list of attorneys enrolled for practice in the very cases which are to be appealed to the Board." *Id.* The Supreme Court compared the Board's authority in this area to two agencies and not to the federal courts; *Shults Bread Co. v. Comm'r*, 10 B.T.A. 268, 270-71 (1928). The Board held that it was not bound by the interpretations the federal courts have placed on rules of practice and procedure and the permitted relaxation thereof.

Both of the parties have failed to point out whether the same lines of reasoning applied to the construction of rules of court are applicable in construing the rules of this Board. If the same reasoning applies it must be on the postulate that the Board is a court. The Board in many respects occupies a unique position in the governmental scheme. It is clearly denominated by Congress as 'an independent agency in the executive branch of the Government.' Its functions, however, are at least quasi-judicial . . . and it has 'appellate powers which are judicial in character' . . . Its proceedings are required by statute to be conducted 'in accordance with the rules of evidence applicable in courts of equity in the District of Columbia.' From it, despite

1927, the Seventh Circuit Court of Appeals issued its decision in *Chicago Railway Equipment Co. v. Blair*¹¹⁶ in which the Court held that the BTA had failed to carry out its duties as an agency, and conduct its own investigation, when neither the Commissioner nor the taxpayer had introduced evidence on a critical issue. In *Chicago Railway Equipment Co.*, the taxpayer and the Commissioner disagreed as to the fair market value of certain depreciable property as of March 1, 1913 (when the federal income tax was first imposed).¹¹⁷ The federal tax code at that time provided that depreciation was to be calculated based on the property's fair market value as of that date, and if the fair market value could not be determined, then by the property's cost less any depreciation that had been taken as of that date.¹¹⁸ The Commissioner calculated the depreciation based on cost and stated that there was no evidence available as to the property's fair market value.

The Seventh Circuit reversed and remanded the case back to the BTA because "the board disregarded competent and material evidence bearing upon the market value as of that date."¹¹⁹ The Court reviewed the chronology of the taxpayer's business, including its acquisition of the various pieces of depreciable property, which would indicate the fair market value and noted that it was "not possible that in their investigation [the revenue agents] remained ignorant of so many of the facts above herein recited."¹²⁰ The Court then went on to hold that the BTA had erred in failing to consider this evidence.

Congress disagreed with the Seventh Circuit that the BTA had a duty to conduct its own independent investigation. The House version of the Revenue Bill of 1928 contained a provision stating that "no decision of the board . . . should hereafter be modified or reversed because the board . . . has failed to consider evidence not adduced [at the hearing]."¹²¹ The Senate agreed with the House in principle but thought it unnecessary to include the provision in the final bill because the legislative history made it clear to the courts Congress's view that the BTA was an executive agency but that it only performed a judicial-type function.¹²²

its being an executive body, appeals may be taken directly to the Federal courts. These considerations serve to show the anomalous character of the Board and in our opinion decisions of the judiciary as to their rules can not be taken bodily and set down as conclusive upon us.

Id. But see *S. Cal. Loan*, 4 B.T.A. at 234, in which the BTA responded with asperity, if not outright indignation, to the petitioner's contention that "this Board is purely an administrative branch of the executive branch of the executive department and does not partake, nor have the aspects of, a judicial tribunal," *id.* at 229. After an extensive review of its legislative history, the BTA held meritless petitioner's contention that the rules applicable to court procedure had no application to the BTA. *Id.* at 234.

¹¹⁶ *Chicago Ry. Equip. Co. v. Blair*, 20 F.2d 10 (7th Cir. 1927).

¹¹⁷ *Id.* at 11.

¹¹⁸ *Id.* at 13.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 14.

¹²¹ H.R. REP. NO. 70-2, at 30-31 (1927); H.R. REP. NO. 70-1882, at 21-22 (1928).

¹²² S. REP. NO. 70-960, at 38 (1928). See also DUBROFF, *supra* note 70, at 167.

C. Final Report of Attorney General's Committee on Administrative Procedure

Administrative agencies began to proliferate at the beginning of the twentieth century and, in particular, during the Roosevelt administration.¹²³ However, these agencies oftentimes operated with great independence, and there was no coherent or consistent governing principles as to how the agencies operated or the standards the courts should employ when conducting judicial review.¹²⁴ In late 1938, Attorney General Homer Cummings sent a letter to President Franklin Roosevelt urging him to request that Congress authorize the Attorney General to form a committee to investigate the procedures by which administrative agencies operate and the standards the courts should employ when conducting judicial review.¹²⁵

¹²³ George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1561-62 (1996).

The Great Depression accelerated a trend that had begun in the late nineteenth century toward greater control of the economy by federal commissions and agencies. Even before 1929, the federal government had already reached far into the nation's economic life. Before 1900, approximately one-third of present federal agencies already existed. . . . In the first three decades of the twentieth century . . . the number of agencies doubled. . . .

Growth in the number of agencies quickened under Franklin D. Roosevelt's administration. Upon taking office in 1933, Roosevelt and the Democratic Congress moved quickly to save the country from the economic and social devastation that the Depression had caused. An avalanche of new federal agencies and commissions . . . reached ever more broadly into a free market that appeared to have failed.

Id.

¹²⁴ S. DOC. NO. 79-248 (1946) (comments of Rep. Doliver), reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 379-80 (1946).

Mr. Chairman, during the period of time since the close of the First World War, there has been a tremendous expansion of the number of agencies, administrative bodies, and commissions of the United States Government. . . .

It necessarily followed, I suppose, since so many of them were created, that each of them would develop its own variety of procedure—that each of them would have its own method of doing business. Accordingly the problem that confronted the citizen who overstepped the bounds of the rules of some agency was to discover how to alleviate the situation. It was more complex because there were no uniform rules of procedure, and a person had to delve into the intricacies of each agency or each commission in order to find out what to do.

This bill is certainly a step in the right direction. It attempts to give some uniformity of procedure. It attempts to direct these agencies and commissions and departments to use forms that can be understood which shall be uniform through all of them.

Not only does it promote uniformity but it codifies the procedures in a court review.

Id. (describing agency operations and judicial review that the APA was designed to harmonize and make more uniform).

¹²⁵ FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 252 (1941) (letter from Homer Cummings). Concerns about the increasing power of administrative agencies had been brewing for some time. As more agencies came into existence and increasingly affected every day life, congressional and public alarm grew that this unregulated and unelected part of government could impinge on due process rights if left unchecked. At the same time, Congress and the public recognized

I venture to bring to your attention, and to renew the suggestion which I have made publicly at different times, that there is a need for procedural reform in the wide and growing field of administrative law. Experience has proved the importance and necessity for the increasing use of the administrative process in the aid of executive, legislative, and judicial function. Government cannot perform its many and varied tasks without this efficient and flexible instrumentality. Its usefulness and increasing assistance to the functions of government necessarily depend, however, upon a procedure which affords quick and well informed action, grounded upon the fundamentals of fair play.

....

The problem is one which calls for a most thorough survey of existing practices and procedure and a careful consideration by a trained body, constituted of individuals who can detect present deficiencies and point the way to improvements in the use of this process Of course, it goes without saying that in such procedure there should be proper safeguards for the protection of substantive rights and adequate, but not extravagant, judicial review.¹²⁶

President Roosevelt responded on February 16, 1939 by directing the Attorney General to investigate the issue, noting that “[i]t seems appropriate that the reform of administrative procedure should . . . be sponsored by the Department of Justice.”¹²⁷ On February 23, 1939, Attorney General Frank Murphy issued Order No. 3215 in which he created the Attorney General’s Committee on Administrative Procedure and appointed its members.¹²⁸ On January 24, 1941, Attorney General Robert H.

that exigencies of modern life necessitated resort to administrative agencies. Throughout the 1930s in particular, the government and the American Bar Association called for review of administrative agency power.

The debate may be said to have got beyond the point of mere skirmishing when the American Bar Association in the spring of 1933 appointed a Special Committee on Administrative Law and to have resulted in a somewhat inconclusive victory for the viewers-with-alarm upon passage of the Administrative Procedure Act of 1946. Significant among the events of the intervening years of contest were this Special Committee’s original advocacy of an independent administrative court; the abandonment of that effort in 1937 and the decision of the American Bar Association to press instead for legislation to assure the fundamentals of due process; the report in that same year of the President’s Committee on Administrative Management, with its startling recommendation that the independent agencies be absorbed into the executive departments; and, by way of climax, the passage of the Walter-Logan Act followed by President Roosevelt’s strongly, if not intemperately, worded veto of that legislation on December 18, 1940.

Id. at vi (Editor’s Preface).

¹²⁶ *Id.* at 252 (letter from Homer Cummings).

¹²⁷ *Id.* (letter from Franklin D. Roosevelt).

¹²⁸ *Id.* (Order No. 3215). On March 15, 1939, Attorney General Murphy issued Supplement No. 1 to Order No. 3215 in which he appointed additional members to the Attorney General’s Committee on Administrative Procedure. *Id.* at 253. See *Report of the Special Committee on Administrative Law*, 66 ANN. REP. A.B.A. 439 (1941).

Jackson transmitted the Acheson Committee's final report with its recommendations to President Roosevelt.¹²⁹ The Acheson Committee conducted in-depth investigations of twenty-seven agencies, including the Bureau of Internal Revenue and the Board of Tax Appeals.¹³⁰ The Final Report was organized as follows:

- Chapter I. The Origins, Development, and Characteristics of the Administrative Process;
- Chapter II. Administrative Information;
- Chapter III. Informal Methods of Adjudication;
- Chapter IV. Formal Adjudication: Problems of Organization;
- Chapter V. Formal Adjudication: Problems of Procedure;
- Chapter VI. Judicial Review of Administrative Adjudication;
- Chapter VII. Procedure in Administrative Rule-Making.

Although the APA, enacted several years later, did not adopt a number of the Acheson Committee's recommendations, it did adopt many of them and one can discern the skeletal structure of the APA in the Final Report's organization. It is significant that nowhere in the Final Report does the Acheson Committee even hint that it viewed the BTA as anything other than an administrative agency nor does the Final Report recommend that the BTA's status be altered in any way or that it should be exempt from the Final Report's recommendations. The Final Report acknowledges that the BTA operates in a "judicial" fashion—as do other agencies—and finds nothing remarkable or unique in the BTA's function.

A substantial number of existing administrative agencies represent an effort to discharge in a fashion analogous to the judicial a function which might have been discharged executively or even legislatively. Many of these, as we have noted in the proceeding paragraph, are concerned with disbursing what, in legal theory, have been regarded as benefits. The Patent Office, so far as concerns the issuance of patents, is an early illustration. So also came to be the General Land Office. The United States Employees' Compensation Commission—so far as concerns payment of benefits to Federal employees—is an administrative agency doing what Congress formerly did by private acts. . . . Most recently, in the field of general social security, Congress in creating the Social Security Board and the Railroad Retirement Board directed action by adjudication as a matter of course; indeed, establishment of these agencies would scarcely have been possible, politically, on any other terms.

Extension of the rule of law through resort to the administrative process is by no means confined to the disbursing of benefits. In the assessment of taxes, for example, the development of an administrative procedure through the Bureau of Internal Revenue and the Board of Tax

Although James W. Morris was appointed as Chairman, at the time of the Committee's final report, Dean Acheson was the Chairman and the Committee is oftentimes referred to as the Acheson Committee, and the author will follow suit here.

¹²⁹ FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at iii (1941) (letter from Robert H. Jackson).

¹³⁰ *Id.* at 3-5.

Appeals has operated in considerable measure to replace an executive procedure.¹³¹

The Final Report directed its attention towards reformation of agency formal adjudication processes. The Acheson Committee noted that there was considerable diversity as to how the various agencies conducted formal adjudication and the weight attached to the decisions of the agency officials who conducted the hearings. Again, the Acheson Committee did not find anything extraordinary in how the BTA conducted its hearings or the weight accorded the decisions of its members.

The methods of hearing and initial decision and the internal procedural structure vary from agency to agency. In general, it has been customary to designate hearing officers before whom evidence may be adduced—whether they be a board of three or more individuals, or, as is more common, a single hearing officer These hearing officers have been selected in various ways. Cases coming before the Board of Tax Appeals—which has no other duties than to hear and decide cases—and the National Mediation Board are heard by single members of the agency itself; cases coming before the National Railroad Adjustment Board are heard by the full bi-partisan membership of one of the four divisions into which the Board is divided by statute. . . .

No less varied is the weight attached by the several agencies to the judgments of those who conduct the hearings. In most of the agencies the person who presides is an adviser with no real power to decide. In a few agencies the hearing officer's or board's decision is conclusive unless appealed by the parties to the head of the agency or unless the agency head itself takes the case up for consideration after initial decision.¹³²

The Final Report then went on to note that the Board of Tax Appeals followed the latter course with regard to weight.¹³³

The Acheson Committee made a number of recommendations for improving formal agency adjudication to ensure that initial hearings were conducted by an official who possessed the power to render a decision and to expedite review of that initial decision by agency heads.¹³⁴ However, the Acheson Committee found that the procedures by the BTA—and some other agencies—did not need to be changed because the procedures in place were effective. The Acheson Committee's statement that its recommendations need not be adopted by the BTA was based on the fact that the BTA was operating effectively, and not based on some perception that the BTA was somehow exempt from recommended agency procedure or was not actually an agency.

¹³¹ *Id.* at 12.

¹³² *Id.* at 44.

¹³³ *Id.* at 44 n.1 (“This is the formula adopted by the Railroad Retirement Board, the Veterans’ Administration, the administration of the grazing statutes by the Department of the Interior, the Social Security Board, the Board of Tax Appeals, and cases handled by the Bureau of Motor Carriers of the Interstate Commerce Commission.”).

¹³⁴ *Id.* at 45-55.

The purpose of the recommendation is, insofar as possible, to fix the responsibility for initial determinations in able, highly placed officials who have themselves heard the evidence, and to make their determinations a significant part of the process of administrative decision. Obviously, then, the recommendations do not apply in agencies where the heads themselves hear and decide cases. Agencies like the United States Tariff Commission and the National Railroad Adjustment Board are therefore altogether excluded, while other agencies which occasionally sit *en banc* are in no wise intended to be precluded from continuing to do so. Nor is anything in the Committee's recommendations intended to affect the hearing of cases by one or more, but less than a majority, of the members of an agency. The procedures of the Board of Tax Appeals, for example, need not be altered.¹³⁵

The Acheson Committee also recommended that agencies employ prehearings in order to expedite and simplify formal adjudication and noted that the BTA, along with several other agencies such as the Social Security Board and the Civil Aeronautics Board, already did so to their advantage. Again, the Acheson Committee did not find this arguably "judicial" function to be a uniquely distinguishing feature of the BTA.¹³⁶

Finally, the Acheson Committee addressed the issue of what rules of evidence should control formal agency adjudication in light of the fact that agencies do not use juries and frequently deal with technical issues. The Final Report recommended that Congress permit agencies to employ a more relaxed rule with regard to the introduction of evidence, noting that the BTA, like other agencies, did not use the same rules of evidence as the courts.

[I]t is rarely suggested that the older common law rules of evidence for jury trials should be imposed upon administrative agencies. Congressional sanction has been given to varying degrees of relaxation. The Federal Power Commission and the National Labor Relations Board are expressly freed from application of "the rules of evidence." The Board of Tax Appeals must observe only the rules of evidence applicable in the courts of the District of Columbia in equity proceedings.¹³⁷

The Acheson Committee conducted one of the most thorough and well-respected reviews of agency procedure.¹³⁸ Unfortunately, its recommendations were held in abeyance, because of the start of World War II, so that the matter of administrative agency reform and enactment of the APA did not occur until 1946.¹³⁹ It is

¹³⁵ *Id.* at 53-54.

¹³⁶ *Id.* at 65-66.

¹³⁷ *Id.* at 70.

¹³⁸ See, e.g., Walter Gellhorn, *Birth Pangs of the Administrative Procedure Act*, 10 ADMIN. L.J. AM. U. 51 (1996). "Justice Felix Frankfurter applauded the Final Report . . . as having given 'for the first time . . . a comprehensive and luminous insight into the practices and procedures of federal administrative agencies and their relation to the judiciary.'" *Id.* See also *Editorials*, 27 A.B.A. J. 95 (1941) (describing the report as "monumental in character and momentous in . . . significance and usefulness").

¹³⁹ LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, *supra* note 124, at 248.

significant that the Acheson Committee never believed nor recommended that the BTA, which had been in existence for more than fifteen years, should be treated as a court or somehow in a different manner than other administrative agencies.

D. Tax Court of the United States: Independent Administrative Agency

In 1942, while Congress was considering enactment of the Revenue Act of 1942,¹⁴⁰ the Chairman of the BTA, John Edgar Murdoch, urged Congress to change the name of the BTA to the Tax Court of the United States.¹⁴¹ Chairman Murdoch supported his request by noting that, although the BTA operated as a judicial body with formal procedures, the name designation of “Board of Tax Appeals” confused the public who expected the BTA to operate as an agency with informal procedures. Further, when riding circuit, BTA members experienced difficulty in arranging for suitable hearing rooms in courthouses because court clerks balked at providing space to an agency.

Chairman Murdock contended that difficulties the Board was experiencing in obtaining the use of hearing rooms in many of the fifty cities in which it held trials could be reduced by simply naming the Board a court. The nature of Board proceedings was judicial and courtrooms were the most appropriate sites for trials. But many providers of court space throughout the country were, according to Chairman Murdock, reluctant to permit administrative hearings to be carried on in their facilities since such hearings were generally informal ones “to which large and undesirable crowds [were] attracted” and at which “smoking” was permitted.¹⁴²

Then Attorney General Francis Biddle strongly opposed the proposal. He expressed his views in his letters to Senator Doughton, Chair of the Senate Finance

In August 1941 the increasingly threatening international situation moved the Senate Judiciary Committee to postpone further consideration of the legislative proposals. The attack at Pearl Harbor occurred before the year was out. During the war years 1942-43 the subject was necessarily in abeyance; but war legislation, administration, and congressional investigations brought administrative processes more and more into prominence. In June 1944 new bills were introduced by the chairmen of the Senate and House Judiciary Committees . . . and thereafter there was a good deal of discussion and activity in and out of the Government with respect to the form such legislation should take. The Attorney General, utilizing some of the staff of his former Committee on Administrative Procedure, had a voluminous analysis made of the new bill.

Id. See also *id.* at 296, 380.

¹⁴⁰ Rev. Act, ch. 619, § 504, 56 Stat. 957 (1942).

¹⁴¹ Actually, Chairman Murdoch asked that the BTA’s name be changed to the United States Tax Court, and much of the correspondence and proposed legislation used that nomenclature; however, Commerce Clearing House, which reported tax cases in a reporting service entitled “United States Tax Cases,” was concerned that confusion would result if the court and the cases shared the same initials. DUBROFF, *supra* note 70, at 184. Therefore, the final version of the Revenue Act of 1942 changed the BTA’s name to the Tax Court of the United States. *Id.*

¹⁴² DUBROFF, *supra* note 70, at 178.

Committee,¹⁴³ and to Representative George, Chairman of the House Ways and Means Committee,¹⁴⁴ stating that he did not agree that the BTA was a court “in everything but name” and pointed to several Supreme Court decisions in support of his position. For example, in *Old Colony Trust v. Commissioner*¹⁴⁵ the Supreme Court had flatly stated that “[t]he Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided.”¹⁴⁶ In addition, in *United States ex rel. Girard Co. v. Helvering*,¹⁴⁷ the Supreme Court had noted that the BTA did not have the authority to enforce its decisions—an inherent judicial power—but rather, had to turn to the district courts for enforcement.¹⁴⁸

Attorney General Biddle was concerned that the name change was a first step towards converting the BTA to an Article III court (which he considered unnecessary because the BTA was functioning well as an administrative agency) and that even if after the name change the Tax Court of the United States continued to function as an agency, the public would be confused or misled into believing that they were dealing with a court.¹⁴⁹

Despite Attorney General Biddle’s opposition, the Revenue Act of 1942 changed the name of the Board of Tax Appeals to the Tax Court of the United States; its members were given the title of judges and the chairman was given the title of Chief Judge.¹⁵⁰ However, the Tax Court of the United States continued its status as an independent agency located in the executive branch.

In 1943, the United States Supreme Court decided *Dobson v. Commissioner*¹⁵¹ in which the Court made it clear that the BTA and the Tax Court of the United States

¹⁴³ *Id.* at 180. Francis Biddle had been a member of the Acheson Committee, prior to his tenure as Attorney General.

¹⁴⁴ *Id.* at 178.

¹⁴⁵ *Old Colony Trust v. Comm’r*, 279 U.S. 716 (1929).

¹⁴⁶ *Id.* at 725. It should be noted that Justice McReynolds thought that the Court violated separation of powers principles by hearing the case. Justice McReynolds argued that the judicial branch was intruding on the authority of the executive branch because the Court was deciding a dispute between two executive branch agencies: the BTA and the BIR.

The Board of Tax Appeals belongs to the executive department of the Government and performs administrative functions—the assessment of taxes. The statute attempts to grant a broad appeal to the courts and directs them to reconsider the Board’s action—to do or to say what it should have done. This enjoins the use of executive power, not judicial.

Id. at 731.

¹⁴⁷ *United States ex rel. Girard Trust Co. v. Helvering*, 301 U.S. 540 (1937).

¹⁴⁸ *Id.* at 542.

¹⁴⁹ DUBROFF, *supra* note 70, at 180-81.

¹⁵⁰ Rev. Act, ch. 619, § 504, 56 Stat. 798, 957 (1942). “The Board shall be known as the Tax Court of the United States.” *Id.*

¹⁵¹ *Dobson v. Comm’r*, 320 U.S. 489 (1943).

were administrative agencies¹⁵² whose findings of fact on appeal were entitled to the greater level of deference accorded findings of fact by agencies.¹⁵³ In *Dobson*, the taxpayers sold stock that had lost its value and properly deducted the losses in the two years of sale. Subsequently, the taxpayers successfully brought suit against the entity that had sold them the stock; however, by the time the taxpayers received the settlement, the statute of limitations had expired for the years in which the taxpayers had deducted the losses.¹⁵⁴ The Commissioner's position was that the settlement was ordinary income in the year received.¹⁵⁵ However, the settlement did not entirely

¹⁵² The taxpayers had their deficiencies reviewed by the BTA; however, while the case was wending its way through the judicial system, Congress enacted the Revenue Act of 1942, which changed the name of the BTA to the Tax Court of the United States. In its opinion, the United States Supreme Court made no distinction between the two entities with regard to the matter under consideration. *See id.*

¹⁵³ Unless Congress has specified that an appellate court should apply a different standard for review of a district court's finding of fact, Federal Rules of Civil Procedure 52(a)(6) provides that findings of facts made by district courts in civil cases "must not be set aside unless clearly erroneous." A finding of fact is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). In other words, if the district court's finding is plausible in light of the record viewed in its entirety, the appellate court may not reverse the finding even if the court is convinced that it would have weighed the evidence differently.

In contrast, findings of fact by agencies are given more deference by the reviewing court. Congress had not yet enacted the APA at the time of the *Dobson* decision. However, the standards for review set out in section 706 of the APA were based on principles already in existence. *See ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT* 93 (1947). Unless Congress has specified that the reviewing court should apply a different standard, section

706(2)(E) of the APA provides that for agency adjudication that was conducted in accordance with formal procedures (which is usually not the situation), the reviewing court shall set aside agency findings that are unsupported by substantial evidence. The term "substantial evidence" is a bit misleading. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a finding after reviewing the entire record. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

Section 706(2)(A) of the APA provides that for informal agency adjudication (which is the norm and how the IRS conducts collection due process hearings), the reviewing court shall set aside agency findings that are arbitrary, capricious, or an abuse of discretion. An agency does not abuse its discretion when making a finding of fact if there is a rational basis for the finding. *See Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1977). Therefore, it is more difficult for a reviewing court to reverse informal agency findings of fact than to reverse a district court's findings.

In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-16 (1971), the U.S. Supreme Court determined that if Congress fails to specify which section 706 APA standard to apply to review of agency action, the reviewing court should apply section 706(2)(A)—the abuse of discretion standard.

¹⁵⁴ *Dobson*, 320 U.S. at 491.

¹⁵⁵ *Id.*

compensate the taxpayers for the stock's loss in value, and if the portion of the settlement allocable to the prior two years of loss had been added to what the taxpayers had received from the stock's sale at the time, the taxpayers still would have suffered a loss.¹⁵⁶ Therefore, the taxpayers appealed to the BTA, which held that the taxpayers had no taxable gain.¹⁵⁷ The Commissioner appealed to the Eighth Circuit Court of Appeals which held that the BTA's position was not supported by the applicable statutes or regulations and, that as a matter of law, the BTA was wrong.¹⁵⁸

Although the Revenue Act of 1926 empowered the courts of appeals to modify or reverse the BTA if its decision was not "in accordance with law," the United States Supreme Court found that the BTA had decided an issue of fact and not an issue of law, and the BTA's findings with regard to issues of fact should be accorded the same finality as that accorded to other administrative agencies.¹⁵⁹ The Court acknowledged that during the BTA's tenure, the reviewing courts, including the Supreme Court itself, had not always "paid the scrupulous deference to the tax laws' admonitions of finality which they have to similar provisions in statutes relating to other tribunals."¹⁶⁰ The Court found that this lack of deference to the BTA's findings of fact was not the result of deliberate judicial or legislative policy but, rather, resulted from historical peculiarities as to the development of tax administration: to wit, (1) jurisdiction to resolve tax disputes resided initially only in the district courts, and (2) during the first few years of the BTA's existence, its findings were not final, but were only prima facie evidence at a later trial in the district courts.¹⁶¹

With regard to the first historical peculiarity, the courts of appeals give the district courts less deference with regard to its findings of fact than that accorded administrative agencies. However, after the Revenue Act of 1926 empowered parties to appeal the BTA's findings directly to the circuit courts, the courts of appeals were receiving tax cases from two different sources: the BTA (deficiency determinations) and the district courts (refund cases). Therefore, it was "more difficult to maintain sharp separation of court and administrative functions in tax than in other fields."¹⁶² In other words, the courts of appeals tended to review tax cases with the same degree of deference regardless of whether the case had originated in the BTA—an administrative agency entitled to more deference—or the district courts.

With regard to the second historical peculiarity, the Supreme Court noted that oftentimes the legislation that empowers the courts to review agency action also

¹⁵⁶ *Id.* at 491-92.

¹⁵⁷ *Id.* at 492.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* The United States Supreme Court noted that the Revenue Act of 1928, § 272 (g), 45 Stat. 854, provided that the BTA "in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency." *Id.* at 493.

¹⁶⁰ *Id.* at 494.

¹⁶¹ *Id.* at 495-97.

¹⁶² *Id.* at 495.

contains limitations on the courts' scope of review.¹⁶³ Tax administration and the BTA did not evolve in this fashion. As far back as the income tax imposed during the Civil War, taxpayers had to pay a disputed tax and then sue for a refund in the federal courts. The Revenue Act of 1913 also had not provided for any administrative review of the Bureau's assessment of liabilities. It was not until 1923, when Congress created the BTA, that taxpayers had recourse to an independent administrative agency, and, even then, the BTA's findings of fact were not final, but rather, were only prima facie evidence in a later trial.¹⁶⁴ Finally, in 1926—thirteen years after the income tax was first enacted—the BTA became an administrative agency whose findings were entitled to the same finality as that of other agencies.¹⁶⁵ Therefore, between 1913 and 1926, the courts had been given the time to develop and establish their own way of thinking about and approaching tax issues, and the courts were in the habit of reviewing findings of fact without restraint.¹⁶⁶

Nevertheless, in light of the specialized nature of tax combined with the BTA's and Tax Court of the United States's independence from the Bureau, the Supreme Court held that it was highly appropriate that the findings of fact be given the deference due an administrative agency. The Supreme Court emphasized that this is required by the goals of consistency, uniformity, and expedition of resolution that are the hallmark of agency action.¹⁶⁷

The court is independent, and its neutrality is not clouded by prosecuting duties. Its procedures assure fair hearings. Its deliberations are evidenced by careful opinions. . . . It has established a tradition of freedom from bias and pressures. It deals with a subject that is highly specialized and so complex as to be the despair of judges. It is relatively better staffed for its task than is the judiciary. . . . Individual cases are disposed of wholly on records publicly made, in adversary proceedings, and the court has no responsibility for previous handling. Tested by every theoretical and practical reason for administrative finality, no administrative decisions are entitled to higher credit in the courts. Consideration of uniform and expeditious tax administrations require that they be given all credit to which they are entitled under the law.¹⁶⁸

E. Enactment of the Administrative Procedure Act

In 1946, Congress enacted the APA.¹⁶⁹ The APA prescribed procedures for agency action and for judicial review of agency action. The APA can be roughly

¹⁶³ *Id.* at 496.

¹⁶⁴ *Id.* at 497.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 497-98.

¹⁶⁷ *Id.* at 499.

¹⁶⁸ *Id.*

¹⁶⁹ Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551-99, 701-06, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006)).

divided into two sections: (1) those specifying the procedures agencies are to use when performing their rulemaking or adjudicatory functions, and (2) those specifying the standards courts are to employ when reviewing agency action.¹⁷⁰ (It is important to keep in mind that Congress intended the APA to control agencies and courts only in the absence of a more specific statutory structure).¹⁷¹

Section 2 of the APA defines an “agency” as “each authority of the Government of the United States” other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia.¹⁷² One of the issues about which Congress had been concerned was the status of the Tax Court of the United States (which despite its title remained an administrative agency) and of the legislative courts such as the Claims Court—would these entities be considered “courts” and hence exempt from the APA’s provisions regarding agency adjudication procedures? The drafters of the APA had originally contemplated that most agency adjudication would be formal and would, therefore, be conducted in accordance with the trial-type procedures specified in APA sections 554, 556, and 557. Congress was concerned that these legislative courts and judicial-type agencies continue to act in accordance with the formal procedures already in place for them through their specific enabling legislation; and further that these entities continue to act in a judicial capacity only and not be forced to engage in prosecutorial or investigatory activities.

Attorney General Tom Clark advised the Senate Judiciary Committee that “‘Courts’ includes The Tax Court, Court of Customs and Patent Appeals, the Court of Claims, and similar courts. This act does not apply to their procedure nor affect the requirement of resort thereto.”¹⁷³ Congress was concerned that these judicial entities not be deemed agencies under the sections of the APA specifying agency adjudicatory procedures because these entities already had procedures in place.

With regard to judicial review of agency action, section 706 of the APA specifies the different standards and scope that courts are to employ when reviewing agency action (unless Congress has specified some other standard or scope is to be employed instead). The legislative history explaining when the reviewing court should use *de novo* review actually uses the Tax Court of the United States as an example.¹⁷⁴ The Bureau was not required to use formal adjudication procedures

¹⁷⁰ 5 U.S.C. §§ 551-57 (2006) of the APA detail the procedures agencies are to follow for rulemaking and formal adjudication; §§ 701-06 govern judicial review.

¹⁷¹ 5 U.S.C. § 703.

¹⁷² 5 U.S.C. § 551.

¹⁷³ S. DOC. NO. 79-248 (1946) (letter from Att’y Gen. Tom C. Clark), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 224 (1946). Interestingly, the Congressional Record also contains the discussion or address of Mr. Allen Moore, “a prominent member of the Colorado bar,” who refers to the Tax Court of the United States as a “legislative court” when discussing the APA’s provisions for judicial review of agency action. S. DOC. NO. 79-248 (1946), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 334 (1946) (“There is an introductory limitation by which there is excluded any matter subject to a subsequent trial *de novo* or judicial review in any legislative court such as the Customs Court, the Court of Customs and Patent Appeals, the Tax Court, or the Court of Claims.”).

¹⁷⁴ *Id.* (report of Senate Judiciary Committee), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 213-14 (1946).

when determining a taxpayer's liability because Bureau determinations with regard to tax liability were subject to de novo review before the Tax Court.¹⁷⁵ Therefore, it would be redundant to require the Bureau of Internal Revenue to hold a formal hearing to make findings of fact if the same matter would be heard de novo in the Tax Court, which would make its own findings of fact. The sections of the APA regarding formal hearing requirements at the agency level dovetail with the sections of the APA regarding judicial review of agency action.

Section 10(E) provides for the scope of court review and provides in pertinent part as follows:

Reviewing courts are required to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of any agency action. They must (A) compel action unlawfully withheld or unreasonably delayed and (B) hold unlawful any action, findings, or conclusions found to be . . . (6) unwarranted by the facts so far as the latter are subject to trial de novo.¹⁷⁶

With regard to the sixth category—trial de novo—the Report of the House Judiciary Committee specifically referred to the Tax Court of the United States as fitting within that category.

The sixth category, respecting the establishment of facts upon trial de novo, would require the reviewing court to determine the facts in any case of adjudication not subject to sections 7 and 8 [formal hearing requirements] or otherwise required to be reviewed exclusively on the record of a statutory agency hearing. . . . [T]he test is whether there has been a statutory administrative hearing of the facts which is adequate and exclusive for purposes of review. Thus, adjudications such as tax assessments not made upon a statutory administrative hearing and record may involve a trial of the facts in The Tax Court or the United States district courts.¹⁷⁷

¹⁷⁵ *Id.* (Senate Judiciary Print, June 1945), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 21-22 (1946).

[Section 5] defines generally the procedure for the administrative adjudication of particular cases. The introductory clause removes from the operation of sections 5, 7, and 8 [(the formal adjudication requirements)] all administrative procedures in which Congress has not required orders to be made upon a hearing, and the first of the further exceptions eliminates matters subject to a subsequent trial of the law and the facts *de novo* in any court. . . . The exception of matters subject to a subsequent trial of the law and the facts *de novo* in any court exempts such matters as the tax functions of the Bureau of Internal Revenue (which are triable *de novo* in The Tax Court).

Id.

¹⁷⁶ SCOPE OF REVIEW, S. DOC. NO. 79-248 (1946), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 278 (1946).

¹⁷⁷ S. DOC. NO. 79-248 (1946) (report of House Judiciary Committee), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 279 (1946); *see also id.* (report of the Senate Judiciary Committee), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 214 (1946).

In other words, not only was the Tax Court of the United States not exempt from the APA but, rather, was used as an example of how section 706(e) of the APA was intended to operate. Further, section 706(e) of the APA also referred to the federal district courts regarding tax assessments. The Tax Court's recent statement, that the above provision is further proof that the Tax Court is exempt from the APA, is not entirely logical. Section 706 of the APA refers to the United States District Courts, which hear refund cases de novo. Despite the fact that district courts also act as trial courts hearing matters de novo, such as tax refund suits, the district courts, at times, also function as reviewing courts subject to the APA's procedures. In fact, section 702 of the APA refers to the reviewing courts, which is interpreted as meaning the district courts. Yet, no one argues that the district courts are not reviewing courts, subject to section 706 of the APA, when performing judicial review of agency action.

Shortly after Congress enacted the APA, the Sixth Circuit, in a series of cases, held that the APA enlarged the ability of the appellate court to review factual findings made by the Tax Court of the United States despite the United States Supreme Court decision in *Dobson*. In *Lincoln Electric Co. v. Commissioner*¹⁷⁸ the taxpayer sought to deduct as ordinary and necessary business expenses premiums paid on employees' retirement annuity policies and employees' trust funds.¹⁷⁹ The Internal Revenue Service had disallowed the deductions, and the Tax Court of the United States sustained that position.¹⁸⁰ On appeal, the Internal Revenue Service argued that whether the payments were ordinary and necessary business expenses was an issue of fact, and, that as long as the Tax Court of the United States' position had any substantial basis in the evidence, the Sixth Circuit was bound to uphold the Tax Court's position under *Dobson*.¹⁸¹ In contrast, the taxpayer argued that the Sixth Circuit could review the Tax Court's factual findings because the recently-enacted APA rendered *Dobson* obsolete.¹⁸² The Internal Revenue Service argued that the taxpayer was mistaken as to the applicability of the APA because the Act specifically exempts courts, and, according to the Attorney General, the Tax Court of the United States would be considered a court for purposes of applying the Act.¹⁸³

The Sixth Circuit held that the deductibility of the premiums was an issue of law, not fact,¹⁸⁴ but went on to state that, despite the Attorney General's position, the Tax Court of the United States was an agency, and that the APA had expanded the Sixth Circuit's powers of review with regard to issues of fact.

The Board of Tax Appeals was, however, by the language of the statute creating it . . . an independent agency in the executive branch of the government. It was so held in *Old Colony v. Com'r* When by § 504(a) of the Revenue Act of 1942, its name was changed to the Tax

¹⁷⁸ *Lincoln Electric Co. v. Comm'r*, 162 F.2d 379 (6th Cir. 1947).

¹⁷⁹ *Id.* at 379-80.

¹⁸⁰ *Id.* at 379.

¹⁸¹ *Id.* at 381.

¹⁸² *Id.* at 382.

¹⁸³ *Id.*; see also S. REP. NO. 79-752, at 38 (1945).

¹⁸⁴ *Lincoln Electric Co.*, 162 F.2d at 383.

Court of the United States, the Act expressly provided: 'the jurisdiction, powers, and duties of the The Tax Court shall be the same as by existing law provided in the case of the Board of Tax Appeals.' . . . When the Supreme Court came to consider, in *Com'r v. Gooch Milling & Elevator Co.* . . . the jurisdiction of the Board of Tax Appeals to order a refund or credit a prior overpayment against a deficiency, it concluded that the Board possessed no power to grant equitable recoupment as did tribunals having general equity jurisdiction, for the Board . . . is but an independent agency in the Executive Branch of the Government. That case was decided in December, 1943, after the Board of Tax Appeals had become the Tax Court of the United States. . . . While our conclusion is that review of Tax Court decisions is governed by the Administrative Procedures Act, it does not become necessary, in view of our reliance upon the Bingham case, to particularize in what respect our power to review has been enlarged, except to say that it doubtless has been broadened and that it will be time enough to consider the precise application of the Act when clear-cut questions of fact or mixed questions of fact and law are brought to us for review.¹⁸⁵

In two subsequent cases, the Sixth Circuit reaffirmed its position that it could review the Tax Court of the United States under the standards set forth in the APA.¹⁸⁶

In 1948, Congress changed the standard under which appellate courts would review Tax Court of the United States' decisions, thereby effectively overruling *Dobson*. Henceforth, appellate courts' scope of review would be the same as appeals from district courts' decisions tried without a jury.¹⁸⁷

F. United States Tax Court

From 1943 to 1967, Congress considered changing the Tax Court of the United States' status from an agency in the executive branch to an Article III court.¹⁸⁸ Proponents of the change argued that Article III status would finally resolve and remove the confusion that periodically had cropped up as to the application of the APA to the Tax Court of the United States. Further, Article III status would give the court more prestige and attract highly qualified persons to serve, although both the BTA and the Tax Court of the United States were highly regarded.¹⁸⁹

¹⁸⁵ *Id.* at 382 (quotations omitted).

¹⁸⁶ *See Dawson v. Comm'r*, 163 F.2d 664 (6th Cir. 1947); *Lawton v. Comm'r*, 164 F.2d 380 (6th Cir. 1947).

¹⁸⁷ Housing and Rent Act of 1948, ch. 646, § 36, 62 Stat. 99 (codified at I.R.C. § 7482 (2006)); *see Steve R. Johnson, The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference to Tax Court Decisions Is Undesirable*, 77 OR. L. REV. 235, 236 (1998) (considering whether, as a practical matter, the appellate courts still follow *Dobson* and why heightened deference is undesirable).

¹⁸⁸ *See A Proposal to Give the Tax Court Article III Status: Hearings on S. 2041 Before the S. Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 90th Cong. 13-19 (1968) (describing the history of the Tax Court and containing a chronology of the legislation introduced since 1924 to change the status of the Tax Court to an Article III court).

¹⁸⁹ DUBROFF, *supra* note 70, at 206.

However, the proposed change encountered substantial opposition from several quarters. If the Tax Court of the United States became an Article III court, it no longer would be under the jurisdiction of the House Means and Way Committee and the Senate Finance Committee, but instead, would be under the authority of the House and Senate Judiciary Committees leading to turf wars between congressional members. The Department of Treasury was opposed because of its concern that the Department of Justice would take over the task of representing the United States before the Article III court instead of the attorneys from the Office of Chief Counsel in the Internal Revenue Service.¹⁹⁰ Taxpayer representatives were opposed out of concerns that accountants would no longer be permitted to represent taxpayers before the Article III court. (Accountants represented taxpayers more often back then). Finally, the United States Judicial Conference opposed the change on the ground that it was inappropriate for a judge in a court of such specialized jurisdiction to have Article III status.

As a last minute compromise, the Tax Reform Act of 1969¹⁹¹ was amended, and the Tax Court of the United States was changed from an independent agency to a legislative court entitled "The United States Tax Court" (Tax Court) created under Article I of the Constitution.¹⁹² In order to further assure taxpayers of the Tax Court's independence from the IRS and the Treasury Department, Congress also provided funds for the construction of a new courthouse in which to house the Tax Court.

After the Tax Court became a legislative court, Chief Judge William F. Drennen issued an order that the Tax Court's notices, orders, rules, and other public documents were no longer subject to the APA's requirements that such items be published in the Federal Registrar and also ordered that the Code of Federal Regulations delete provisions dealing with the Tax Court (because the Tax Court was no longer an agency).¹⁹³

¹⁹⁰ Usually, the Department of Justice represents the United States in court and does so in tax refund cases in District Court and the U.S. Court of Federal Claims; however, the Department of Treasury (Office of Chief Counsel in the Internal Revenue Service) has always represented the government in cases heard in the BTA, the Tax Court of the United States, and the United States Tax Court. This dichotomy arose because taxpayer appeals initially were heard by the Committee on Appeals and Review, which was part of the Bureau of Internal Revenue, and was an informal process conducted between the taxpayer, the Committee, and the Bureau's representatives. *See Johnson, supra* note 187, at 242 n.31 (providing a more detailed explanation as to the government's representation on tax matters before the various courts, including the bankruptcy courts).

¹⁹¹ Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 730 (amending I.R.C. § 7441 (1954)).

¹⁹² *See Fahey, supra* note 22, at 479-80.

¹⁹³ Tax Court of the United States: Deletion of Chapter, 35 Fed. Reg. 12462 (1970).

Whereas the Tax Reform Act of 1969 . . . amending section 7441 of the Internal Revenue Code, established the U.S. Tax Court as a court of record under article I of the Constitution of the United States; and

Whereas, publication in the FEDERAL REGISTER of the Court's public notices, orders, rules, and other public documents is no longer within the purview of the Administrative Procedure Act:

Now, therefore, the material appearing under Chapter II, Title 26 of the Code of Federal Regulations, is deleted, and the codification determinations assigned to the

Shortly after becoming an Article I court, the Tax Court decided *Nappi v. Commissioner*¹⁹⁴ wherein the Tax Court stated that “since the United States Tax Court is a court of record established under Article I of the Constitution of the United States, the provisions of the Administrative Procedure Act are not applicable to Tax Court procedures or jurisdiction.”¹⁹⁵ The taxpayer had received a notice of deficiency from the IRS but had failed to file his petition with the Tax Court within the ninety-day period required for the Tax Court to be able to exercise jurisdiction over the petition.¹⁹⁶ The taxpayer argued that, nevertheless, the Tax Court could exercise jurisdiction because “the provisions of the Administrative Procedure Act are controlling in this situation and supplant the requirements of section 6213(a), so as to confer jurisdiction on the Tax Court to hear and decide this income tax controversy.”¹⁹⁷ Although it is not entirely clear from the opinion, it appears that the taxpayer was endeavoring to use sections 702, 703, and 704 of the APA to argue that the Tax Court could exercise jurisdiction.¹⁹⁸

The Tax Court could have—and should have—reasoned that because Congress had already prescribed when and how the Tax Court could acquire jurisdiction over a

Court in its former status under the executive branch of the Government are relinquished.

This action is effective upon publication in the FEDERAL REGISTER.

Id.

¹⁹⁴ *Nappi v. Comm’r*, 58 T.C. 282 (1972).

¹⁹⁵ *Id.* at 282.

¹⁹⁶ *Id.* at 283; I.R.C. §§ 6213(a), 7502 (1954) (providing that the petition must be filed within ninety days).

¹⁹⁷ *Nappi*, 58 T.C. at 283.

¹⁹⁸ 5 U.S.C. § 702 (2006) provides that a person who is seeking relief from agency action may seek judicial review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

Id.

5 U.S.C. § 703 provides that “[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action . . . in a court of competent jurisdiction.” A “court of competent jurisdiction” usually refers to the district courts but because the “special statutory review proceeding” here—I.R.C. §6213(a) provides that the Tax Court should hear the matter, and the Tax Court would be the appropriate court.

5 U.S.C. § 704 provides that “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”

deficiency proceeding, the APA's provisions were inapposite. Instead, the Tax Court argued that the APA's provisions apply to an "agency" of the Government, but specifically exclude "the courts of the United States,"¹⁹⁹ and, because the Tax Court was an Article I court, the APA did not apply to the Tax Court. However, the APA provisions to which the Tax Court referred are those contained in sections 551 through 559, which control agency adjudication and rulemaking and not judicial review by the courts. It is true that because the Tax Court was a court it was not subject to those APA provisions that dictate how, in the absence of other Congressional direction, an agency should perform rulemaking or formal adjudication. However, the APA's provisions regarding judicial review contained in sections 701 through 706 apply to courts in the absence of Congressional directive regarding the conduct of judicial review of agency action. Therefore, the reason that the taxpayer could not invoke the Tax Court's jurisdiction over his deficiency petition was because he had failed to comply with the statutorily-mandated process for doing so²⁰⁰ and not because the APA could not apply to the Tax Court.

In addition, the Tax Court referred to prior case law in support of its position: *O'Dwyer v. Commissioner*,²⁰¹ *Anderson v. Commissioner*,²⁰² and *Kennedy Name Plate Co. v. Commissioner*,²⁰³ stating that these cases held "that the Administrative Procedure Act did not apply to the Tax Court before the Tax Reform Act of 1969."²⁰⁴ However, that is an overly broad reading of those three cases, and they did not specifically hold that the APA did not apply to the Tax Court. Indeed, in *Kennedy Name Plate Co.*, the Ninth Circuit Court of Appeals acknowledged that the APA might well apply at times.²⁰⁵ The Ninth Circuit also held that the taxpayer was not entitled to a hearing before the entire panel of the Tax Court of the United States because its enabling legislation permitted one judge to hear and dispose of a matter.²⁰⁶ With regard to *Anderson*, the Seventh Circuit Court of Appeals had

¹⁹⁹ 5 U.S.C. § 551(1).

²⁰⁰ I.R.C. § 6213(a) (2006).

²⁰¹ *O'Dwyer v. Comm'r*, 266 F.2d 575 (4th Cir. 1959).

²⁰² *Anderson v. Comm'r*, 164 F.2d 870 (7th Cir. 1947).

²⁰³ *Kennedy Name Plate Co. v. Comm'r*, 170 F.2d 196 (9th Cir. 1948).

²⁰⁴ *Nappi*, 58 T.C. at 284.

²⁰⁵ *Kennedy Name Plate Co.*, 170 F.2d at 198.

²⁰⁶ *Id.* at 198-99. The Ninth Circuit reasoned that the APA specifically states that it does not repeal specific grants of authority. Congress specifically provided that the entire panel of the Tax Court of the United States need not decide a case. Again, it is significant to note that the Ninth Circuit did not say that the APA does not apply to the Tax Court of the United States but, rather, that the APA itself authorized the use of a different procedure.

To begin with it is to be observed that Sec. 2 of the Act, after defining the term "agency," provides that "Nothing in this Act shall be construed to repeal delegations of authority as provided by law." Turning to the statute relating to the organization and procedure of the Tax Court, we note a provision authorizing the presiding judge to divide the Court into divisions of one or more members. *Section 1118(a) of 26 U.S.C.A.* provides that "A division shall hear, and make a determination upon, any proceeding instituted before the Tax Court and any motion in connection therewith, assigned to such division by the presiding judge, and shall make a report of any such

simply held that it did not matter whether it reviewed the “whole record,” as provided in APA section 706, because substantial evidence supported the Tax Court of the United States’ determination under any standard.²⁰⁷

In *O’Dwyer*, the Fourth Circuit affirmed that when the Tax Court conducts deficiency hearings, it is a trial court hearing evidence de novo and is not confined to the record compiled by the IRS during its administrative proceedings.²⁰⁸ Therefore, *O’Dwyer* fails to shed light on the standards governing the Tax Court when it conducts collection due process hearings or other review of agency action.

In *O’Dwyer*, the IRS contended that the husband and wife taxpayers had failed to include certain items in gross income. William O’Dwyer had been the mayor of New York from 1945 to 1950, after which time he served as ambassador to Mexico.²⁰⁹ The IRS determined that when he was running for re-election as mayor in 1949, William O’Dwyer had received \$10,000 from the Uniformed Firemen’s Association, ostensibly as a campaign contribution.²¹⁰ In fact, the evidence indicated that Mr. O’Dwyer received the \$10,000 for his personal use.²¹¹ The IRS also determined that while Mr. O’Dwyer was ambassador to Mexico, his wife, Sloan O’Dwyer, had deposited \$1,500 into a personal bank account, the source of which funds she could not satisfactorily explain.²¹²

The O’Dwyers appealed the IRS’s deficiency determination to the Tax Court of the United States, which, after making some adjustments to the amount due to allow for some deductions, upheld the IRS’s deficiency determination.²¹³ The Tax Court also refused to enforce two subpoenas duce tecum that the O’Dwyers had managed to procure, which required the IRS to turn over the revenue agents’ reports. Revenue agents’ reports are confidential files compiled by the revenue agents during the course of investigating a taxpayer’s deficiency.²¹⁴ The O’Dwyers argued that the

determination which constitutes its final disposition of the proceeding.” (Emphasis supplied.) By subdivision (b) of the same section the report of the division becomes the report of the Tax Court within thirty days after such report, “unless within such period the presiding judge has directed that such report shall be reviewed by the Tax Court.”

The comparable provision of the Administrative Procedure Act, as found in Sec. 7 thereof, states that “nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute.”

We conclude that the relevant procedure of the Tax Court, as prescribed specifically by law, and as followed here, is not affected by the Administrative Procedure Act.

Id. (citation omitted).

²⁰⁷ *Anderson*, 164 F.2d at 874.

²⁰⁸ *O’Dwyer v. Comm’r*, 266 F.2d 575 (4th Cir. 1959).

²⁰⁹ *Id.* at 578.

²¹⁰ *Id.* at 583.

²¹¹ *Id.*

²¹² *Id.* at 588.

²¹³ *Id.* at 577.

²¹⁴ SALTZMAN, *supra* note 28.

revenue agent reports were part of the IRS record, and, therefore, the Tax Court was obligated to consider those reports according to section 706 of the APA; however, the Tax Court disagreed.

This Court is not subject to the Administrative Procedure Act. We do not review in the same sense as other courts perhaps review actions of the Federal Communications Commission or some other federal agency. We do not review in that same manner the determinations of the Commissioner. This is a trial ‘de novo’ and the question before me is simply whether or not the deficiencies determined by the Commissioner are correct.²¹⁵

The O’Dwyers appealed, and among their contentions was that the Tax Court had erred in refusing to enforce the two subpoenas duce tecum because the APA required the IRS to turn over these reports to the taxpayers and the Tax Court for its review when rendering its decision.²¹⁶ The O’Dwyers argued that the IRS’s determination was subject to judicial review in accordance with section 706 of the APA, that the Tax Court was a reviewing court subject to the provisions of section 706, and that section 706 requires the Tax Court to review the “whole record” upon which the IRS based its determination, which would include the revenue agents’ reports.²¹⁷

The Fourth Circuit held that the O’Dwyers had misinterpreted the APA. When Congress requires an agency to hold a hearing in accordance with sections 554 through 557 of the APA, the agency must employ formal, trial-type procedures and create a formal record, which includes all the testimony and other evidence that the parties presented and on which the agency based its decision.²¹⁸ If either party appeals, the reviewing court must confine its review to that formal record and cannot consider other evidence.²¹⁹ However, the IRS was not (and is not) subject to sections 554 through 557 of the APA when dealing with taxpayers.²²⁰

The provisions of the Administrative Procedure Act must be read and construed together and we hold that the judicial review of the ‘whole record’ mentioned in section [706(e)] envisages, in the case of adjudication, a review of the record made in cases wherein Sections [554, 556, and 557] are applicable. Where these sections apply, the administrative agency is required to hold a formal hearing within a strict statutory framework and to make up a record of the testimony and exhibits introduced thereat, upon which record the agency must base its decision. This formal record is the subject of the review provided in Sec. [706]. To hold that Sec. [706] applies to a determination of the Commissioner and that the Tax Court is a ‘reviewing court’, within the meaning of that section, would be to hold that such determination is

²¹⁵ *O’Dwyer*, 266 F.2d at 579.

²¹⁶ *Id.* at 578-79.

²¹⁷ *Id.* at 580.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Cohen v. Comm’r*, 176 F.2d 394, 397 (10th Cir. 1949).

subject to the rigid requirements of Secs. [554, 556, and 557]. Without a ‘record’ to review, the provisions of Sec. [706] would be meaningless and thus inapplicable here.

It has been held that the Bureau of Internal Revenue is exempt from the requirements of Secs. [554, 556, and 557] of the Administrative Procedure Act. The Tax Court is given jurisdiction to redetermine the deficiency asserted by the Commissioner, and in doing so it is empowered to prescribe rules of practice and procedure and is required to apply the rules of evidence applicable to nonjury trials in the United States Court of the District of Columbia and make findings of fact upon such evidence. The Tax Court thus renders its decision only upon the evidence produced before it. . . .

The Tax Court, rather than being a ‘reviewing court’, within the meaning of Sec. [706] reviewing the ‘record’, is a court in which the facts are triable de novo and the burden is upon the taxpayer to come forward with evidence showing the determination of deficiency to be erroneous. We agree that the Tax Court is not subject to the Administrative Procedure Act.²²¹

IV. SPECIALIZED COURT STATUS AND THE APA

A. Article I v. Article III Courts: The Distinction

The mere fact that the Tax Court and the district courts are not in harmony as to the applicability of the APA to collection due process appeals is not a sufficient justification for imposing the APA on the Tax Court. A taxpayer arguing a deficiency before the Tax Court does not have the matter heard in accordance with the same procedures and rights as a taxpayer arguing a refund before the district court.²²² This discrepancy has been upheld by the courts, which recognize that deficiency hearings and refund hearings serve different purposes and spring from different statutory schemes. Collection due process appeals, however, do arise from a common statutory root: I.R.C. section 6330. There is nothing in the statute itself, nor its legislative history, to indicate that Congress intended or anticipated that there would be any difference in how the appeals were conducted, whether before the Tax Court or the district court.

One then must consider whether the Tax Court’s Article I status, or the fact that it is a court of specialized jurisdiction, renders the APA inapplicable; that is to say, one must ask if there is something about the nature of an Article I or a specialized Article III court that makes it inappropriate for the APA to apply.

Article III of the Constitution states that the “judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”²²³ The Justices of the Supreme Court and the inferior federal courts “shall hold their Offices during good Behaviour, and shall . . . receive for their Services, a Compensation, which shall not be diminished

²²¹ *O’Dwyer*, 266 F.2d at 580 (citations omitted).

²²² *Id.*

²²³ U.S. CONST. art. III, § 1.

during their Continuance in Office.”²²⁴ It is important to note that, although the Constitution does not obligate Congress to create inferior federal tribunals, the Constitution demands that if Congress chooses to do so, the judges must have their salary and tenure protected.²²⁵

Read literally, Article III appears to require that the judicial power must reside only in federal tribunals whose judges must enjoy tenure and salary protection. However, even the framers of the Constitution did not contemplate that Article III would be interpreted so narrowly.²²⁶ For example, the first Congress enacted legislation authorizing the executive branch to resolve disputes involving claims to veterans’ benefits and customs duties.²²⁷

From time to time Congress has created courts to hear specific matters and whose judges sit for fixed terms, and they do not enjoy salary and tenure protection. Congress usually creates these non-Article III tribunals pursuant to one of its enumerated powers under Article I of the Constitution together with the necessary and proper clause contained therein.²²⁸ These federal courts are referred to as legislative courts or Article I courts. The United States Tax Court is an Article I court, as is the United States Court for Federal Claims.²²⁹ As far back as 1828, the United States Supreme Court upheld the use of non-Article III tribunals under

²²⁴ *Id.*

²²⁵ See generally ERWIN CHEMERINSKY, FEDERAL JURISDICTION §§ 1.1–1.4.6. (3d ed. 1999) (explaining Article III’s provisions and the early history of the federal courts).

²²⁶ See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 919–21 (1988). Professor Fallon posits that there are three problems with literalism: (1) The early history indicates that Congress did not construe Article III literally. The first Congress vested power in the executive to hear disputes regarding customs and veterans’ benefits. (2) Literalism raises policy concerns in our modern administrative state. At the time the Constitution was adopted, the federal government was very limited in its functions. However, our modern government has created entitlements and assumed responsibility for enforcing a broader range of legal rights. Literalism would frustrate these interests that Congress has sought to advance through the use of non-Article III tribunals. (3) A literal reading of Article III is incompatible with, and would lead to the rejection of, an enormous amount of case law and current practice (although stare decisis is entitled to less deference with regard to constitutional issues). *Id.*

²²⁷ See, e.g., Act of Sept. 29, 1789, ch. 24, 1 Stat. 95 (military benefits); see Act of Sept. 1, 1789, ch. 11, 1 Stat. 55 (customs duties).

²²⁸ U.S. CONST. art. 1, § 8, cls. 1–18. Although non-Article III tribunals are created pursuant to Congress’s enumerated powers under Article I, this is not always the case. *Id.* For example, territorial courts are created pursuant to Congress’s power under Article IV, section 3 of the Constitution, which provides that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. CONST. art. IV, § 3, cl. 2.

²²⁹ Other Article I courts include the Court of Private Land Claims created by Congress in 1891 to resolve claims to land based on Spanish and Mexican grants to land later ceded to the United States from Mexico. Act of Mar. 3, 1891, ch. 539, 26 Stat. 854. The Choctaw and Chickasaw Citizenship Courts were designed to resolve claims to membership in the tribes, which would affect the right to previously allocated lands and funds. Act of July 1, 1902, ch. 641, 32 Stat. 641. See Randall R. Rader, *Specialized Courts: The Legislative Response*, 40 AM. U. L. REV. 1003 (1991).

certain circumstances. In *American Insurance Co. v. 365 Bales of Cotton*,²³⁰ the United States Supreme Court considered the constitutional status of a court created for the territory of Florida, which was not yet a state. Chief Justice Marshall, who wrote the opinion, held that Congress had the power to create non-Article III courts and upheld the constitutionality of the territorial court.

These Courts, then, are not constitutional Courts They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States.²³¹

Article I courts function as courts in their application of law to facts in order to render opinions; however, they do not have “inherent powers” but only such powers as are given to them by statute.²³² They are courts of specialized, as opposed to general jurisdiction such as the federal district courts.²³³

However, not all courts created under Article III of the United States Constitution have general subject matter jurisdiction. Congress has created a number of Article III courts that have specialized jurisdiction. For example, in 1956, Congress established the Court of International Trade as an Article III court.²³⁴ The Court of International Trade has exclusive jurisdiction over case disputes between the federal government and private citizens with regard to import transactions.²³⁵ In 1978, Congress created both the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review.²³⁶ The Foreign Intelligence Surveillance Court is empowered to hear applications for orders approving electronic surveillance to gather foreign intelligence information. It is staffed by district court judges who take

²³⁰ *Am. Ins. Co. v. 365 Bales of Cotton*, 26 U.S. 511, 546 (1828).

²³¹ *Id.* at 546. See also Leandra Lederman, *Equity and the Article I Court: Is the Tax Court’s Exercise of Equitable Powers Constitutional?*, 5 FLA. TAX REV. 357, 363 (2001). Professor Lederman notes that it is arguable that the United States Supreme Court recognized the legitimacy of legislative courts even earlier in *Marbury v. Madison*, 5 U.S. 137, 162 (1803), where the Court recognizes the right of William Marbury to his five-year term as a Justice of Peace for the District of Columbia, thereby allowing the exercise of judicial power without life tenure. Lederman, *supra*, at 363.

²³² Lederman, *supra* note 231, at 369 n.61 (citing in support *In re Hessinger & Assocs.*, 192 B.R. 211, 215 (N.D. Cal. 1996) (“Because the bankruptcy courts are creatures of Article I, they have no ‘inherent’ powers and their jurisdiction is limited to that expressly granted by Congress.”)).

²³³ In 1875, Congress authorized the federal district courts to hear cases arising under the Constitution, laws, and treaties of the United States. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470. This grant of general federal question jurisdiction is codified in 28 U.S.C. § 1331 (2006).

²³⁴ Act of July 14, 1956, ch. 589, 70 Stat. 532. The Court of International Trade is the successor to the Board of General Appraisers, which was created to reduce the district courts and also to promote uniformity in customs cases. In 1926, the Board’s name was changed to the United States Customs Court. Act of May 28, 1926, ch. 411, 44 Stat. 669.

²³⁵ 28 U.S.C. §§ 1581-85.

²³⁶ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801-11).

turns sitting on the court located in the District of Columbia. The Foreign Surveillance Court of Review hears appeals from the Foreign Intelligence Surveillance Court and is staffed by three appellate court judges, who sit for terms.²³⁷ The Emergency Court of Appeals was established in 1942 to review regulations and orders issued by the Office of Price Administration.²³⁸ The Office of Price Administration and the Emergency Court of Appeals were designed to control rising domestic prices after the United States entered World War II. The Emergency Court of Appeals was terminated in 1961.

The Tax Court is not a court created by Congress under Article III of the United States Constitution.²³⁹ Rather, the Tax Court is a specialized court created by Congress pursuant to one of its powers enumerated in Article I of the United States Constitution²⁴⁰ and the necessary and proper clause also contained therein.²⁴¹ Because the Tax Court is a legislative or Article I court, it “is a court of limited jurisdiction, and . . . may exercise . . . jurisdiction only to the extent authorized by Congress.”²⁴²

B. Specialized Courts Subject to the APA

Congress, when empowering an Article I or specialized Article III court, will provide in the enabling legislation what authority and powers the courts may exercise. This makes sense; after all, the very purpose of an Article I court or a specialized Article III court is to hear a particular matter such as tariff disputes or contract claims against the government. However, if the Article I or specialized Article III court is acting as a reviewing court, and if a special statutory proceeding does not exist or the special statutory proceeding is inadequate, the APA can and should function as a gap-filler.²⁴³ The Supreme Court has not found any constitutional or statutory impediment to an Article I or specialized Article III court turning to the APA, and, in fact, the Supreme Court has held that the federal courts must turn to the APA if Congress has not specified otherwise.

In *Dickinson v. Zurko*,²⁴⁴ the United States Supreme Court reversed the Court of Appeals for the Federal Circuit, a specialized Article III court, which had reviewed factual findings of the Patent and Trademark Office’s under a “clearly erroneous standard.” The clearly erroneous standard is a more stringent review standard than the APA’s substantial evidence standard, which is used to review formal agency

²³⁷ See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, Apr. 2, 1990, at 187-89.

²³⁸ Act of Jan. 30, 1942, ch. 31, 56 Stat. 23, amended by Inflation Control Act of 1942, ch. 578, 56 Stat. 765.

²³⁹ U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

²⁴⁰ U.S. CONST. art. I, § 8, cls. 1-17.

²⁴¹ U.S. CONST. art. I, § 8, cl. 18. See discussion *supra* Part III.F.

²⁴² *Meyer v. Comm’r*, 115 T.C. 417, 420 (2000) (citing I.R.C. § 7442; *Judge v. Comm’r*, 88 T.C. 1175, 1180-81 (1987); *Naftel v. Comm’r*, 85 T.C. 527, 529 (1985)).

²⁴³ 5 U.S.C. § 703 (2006).

²⁴⁴ *Dickinson v. Zurko*, 527 U.S. 150 (1999).

adjudications.²⁴⁵ The Supreme Court held that “a reviewing court must apply the APA’s court/agency review standards in the absence of an exception.”²⁴⁶ The Supreme Court noted that to hold otherwise would frustrate the purposes of the APA, which was to bring consistency to the conduct of judicial review.

Recognizing the importance of maintaining a uniform approach to judicial review of administrative action, see, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489, 71 S.Ct. 456, 95 L.Ed. 456 (1951); 92 Cong. Rec. 5654 (1946) (statement of Rep. Walter), we have closely examined the Federal Circuit’s claim for an exception to that uniformity. In doing so, we believe that respondents must show more than a possibility of a heightened standard, and indeed more than even a bare preponderance of evidence in their favor. Existence of the additional requirement must be clear. This is suggested both by the phrase “recognized by law” and by the congressional specification in the APA that “[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly.” § 12, 60 Stat. 244, 5 U.S.C. § 559. A statutory intent that legislative departure from the norm must be clear suggests a need for similar clarity in respect to grandfathered common-law variations. The APA was meant to bring uniformity to a field full of variation and diversity. It would frustrate that purpose to permit divergence on the basis of a requirement “recognized” only as ambiguous.²⁴⁷

The Supreme Court also rejected the argument that the Court of Customs and Patent Appeals, a predecessor to the Court of Appeals for the Federal Circuit,²⁴⁸ had used a heightened court/court standard of review prior to the enactment of the APA. The Supreme Court found that, in fact, the Court of Customs and Patent Appeals had used the more deferential court/agency substantial evidence standard, not the heightened clearly erroneous standard. It is significant that the Supreme Court did not make mention, or even consider if there were, any constitutional or statutory impediment to subjecting these courts to the APA.

V. CONCLUSION

Commentators and several federal courts of appeals have argued that the Tax Court should fill in the gaps in its statutory authority for collection due process appeals by turning to traditional administrative law jurisprudence, including the APA. Doing so would promote consistency and predictability to the Tax Court’s judicial review of the IRS’s collection due process hearings, thus rendering the process fairer for all of the participants. By adhering to traditional administrative law jurisprudence and the strictures of the APA, the Tax Court would be acting in

²⁴⁵ 5 U.S.C. § 706(2)(E).

²⁴⁶ *Dickinson*, 527 U.S. at 154.

²⁴⁷ *Id.* at 154-55.

²⁴⁸ The Court of Customs and Patent Appeals at various times was deemed by the Supreme Court to be an Article I court or an Article III court. In the time period immediately before the APA’s enactment, the Court of Customs and Patent Appeals was considered to be an Article I court by the Supreme Court.

accordance with the values this body of law is designed to implement: uniformity in procedure. Further, a review of the Tax Court's and the APA's history reveals that the Tax Court and its predecessors were not exceptions to the APA's requirements but, rather, they were consistently viewed as within the APA's purview.