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# Developing the Duffy Defect: Identifying Which Government Workers Are Constitutionally Required to Be Appointed

Stacy M. Lindstedt\*

## ABSTRACT

*In 2007, Professor John Duffy wrote a brief article questioning whether administrative patent judges are constitutional officers and therefore subject to the Appointments Clause. A litigant latched onto the argument and challenged the validity of eight years of Board of Patent Appeals and Interferences determinations. Congress enacted a patch to provide for the appointment of patent judges, but the “Duffy Defect” did not stop there. Other scholars have questioned the constitutionality of various government actors from Bankruptcy Judges to the Pay Czar. The United States Tax Court dealt with a recent Appointments Clause challenge when a taxpayer questioned whether Internal Revenue Service (IRS) Appeals personnel who perform Collection Due Process hearings or their managers must be appointed. Given the broad powers of the current administrative state, these questions are bound to become common challenges to agency action and have strong potential to halt the federal government unless legislative action is taken proactively.*

*The Constitution provides little guidance on the characteristics that define an officer, noting only that an office must be “established by Law.” The Supreme Court has added that an officer is one who exercises “significant authority pursuant to the laws of the United States.” This Article attempts to define those phrases in a robust manner that preserves the separation of powers and political accountability. It first reviews the Appointments Clause, its history and purposes, and relevant legal precedent. To lend the reader context, it summarizes the current Collection Due Process procedures and describes the power the IRS Appeals Office holds. The Article analyzes the Tax Court’s holding, concluding that the Tax Court offers Congress a blueprint to avoid the Appointments Clause. The Article suggests an alternative framework for evaluating officer status and determines that IRS personnel should be appointed. The Article concludes with a consideration of the ef-*

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*fects of such a holding in the context of our current government structure and political environment.*

## I. INTRODUCTION

In 2007, a brief article by Professor John Duffy questioned the constitutionality of the appointment method for Administrative Patent Judges.<sup>1</sup> Duffy argued that Administrative Patent Judges were at least inferior officers under the Appointments Clause due to the substantial power they held – and with that contention, questioned the validity of eight years of Board of Patent Appeals and Interferences determinations.<sup>2</sup> The article made such an impact that Congress enacted a statutory patch to correct the issue.<sup>3</sup> But the spark didn't die there – a series of articles followed “The Duffy Defect,”<sup>4</sup> questioning the applicability of the Appointments Clause to a range of government actors, from Bankruptcy Judges to the Pay Czar.<sup>5</sup> The impact of Duffy's article reached courtrooms as well, prompting an Appointments Clause challenge in *Tucker v. Commissioner*.<sup>6</sup> In the United States Tax Court, Tucker argued that

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1. John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, PATENTLY-O BLOG (July 23, 2007), <http://www.patentlyo.com/lawjournal/files/Duffy.BPAI.pdf>.

2. *Id.* at 21-22. Although Duffy receives credit for highlighting the potentially omnipresent officer-versus-employee problem, see Adam Liptak, *In One Flaw, Questions on Validity of 46 Judges*, N.Y. TIMES, May 6, 2008, at A18; Harold C. Wegner, *The Duffy Defect*, IP FRONTLINE IP & TECH. MAG. (Apr. 16, 2008), <http://www.ipfrontline.com/depts/article.aspx?id=18519&deptid=4>, at about the same time, David R. Stras and Ryan W. Scott also published an article questioning the status of Senior Judges under the Appointments Clause – focusing on whether Congress can delegate new duties to an existing officer without reappointment. David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 494-95 (2007). This slightly different issue is likely to cause additional Appointments Clause challenges.

3. See Act of Aug. 12, 2008, Pub. L. No. 110-313, §1(a), 122 Stat. 3014, 3014 (amending 35 U.S.C. § 6(d) (2006)).

4. Wegner, *supra* note 2.

5. See Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233 (2008); Michael W. McConnell, *The Pay Czar Is Unconstitutional*, WALL ST. J., Oct. 30, 2009, at A25. In 2000, before Duffy's article, the Supreme Court declined to reach the issue of whether the Appointments Clause applies to *qui tam* relators. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000). More recently, the Senate Judiciary Committee Subcommittee on the Constitution held a hearing on the constitutionality of White House “Czars.” Steven D. Schwinn, *Do White House Czars Violate the Appointments Clause?*, CONSTITUTIONAL L. PROF BLOG (Oct. 7, 2009), <http://lawprofessors.typepad.com/conlaw/2009/10/do-white-house-czars-violate-the-appointments-clause.html>.

6. 135 T.C. 114 (2010); Memorandum of Law in Support of Petitioner's Motion to Remand at 13 n.29, *Tucker*, 135 T.C. 114 (No. 3165-06L) (noting that the

Appeals Officers or their managers within the Internal Revenue Service (IRS) are inferior officers of the United States because they provide statutorily required Collection Due Process (CDP) hearings.<sup>7</sup> In 2010, the IRS Office of Appeals received over 49,000 CDP hearing requests to determine whether it would move forward with proposed liens or levies on delinquent taxes, and that number increases each year.<sup>8</sup> A determination that CDP conductors are officers could halt compelled tax collection until appropriate personnel are appointed. Even more concerning, such a holding could compel the same result for similarly situated personnel in other federal agencies. A prime example is the Social Security Administration, which received 408,314 requests for benefit-determination hearings in the six months ending in March 2011.<sup>9</sup>

The Appointments Clause requires that officers of the United States be appointed by one of its specified methods. Principal officers must be appointed by the President with the advice and consent of the Senate.<sup>10</sup> With statutory permission, inferior officers may be appointed directly by the President alone, the Courts of Law, or Heads of Departments.<sup>11</sup> But the Constitution provides little guidance on the characteristics that define an officer. In one of the most thorough opinions to address the distinction between constitutional officers and mere employees, the Tax Court rejected Tucker's arguments, ruling that neither Appeals Officers nor their managers are officers in the constitutional sense and therefore need not be appointed.<sup>12</sup> The court first found the position of Appeals Officer was not "established by Law."<sup>13</sup> The court then found that IRS agents were mere employees because their decisions were not the "last word" of the agency.<sup>14</sup> The court further determined that the statutes establishing CDP hearings assigned those duties to the entire Office of Appeals, rather than to the named position of Appeals Officer, thus precluding the application of the Appointments Clause.<sup>15</sup> The Tax Court

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Appointments Clause challenge was prompted by Adam Liptak's article about Duffy's article).

7. *Tucker*, 135 T.C. at 116.

8. INTERNAL REVENUE SERVICE DATA BOOK 49 tbl.21 (2010) (49,049 cases received); INTERNAL REVENUE SERVICE DATA BOOK 49 tbl.21 (2009) (42,447 cases received); INTERNAL REVENUE SERVICE DATA BOOK 49 tbl.21 (2008) (35,760 cases received); INTERNAL REVENUE SERVICE DATA BOOK 47 tbl.21 (2007) (30,938 cases received). These data reflect the fiscal years ending September 30 of the year stated.

9. Social Security Administration, *Hearing Office Workload Data*, HEARINGS AND APPEALS, available at [http://www.ssa.gov/appeals/DataSets/02\\_HO\\_Workload\\_Data.pdf](http://www.ssa.gov/appeals/DataSets/02_HO_Workload_Data.pdf) (last visited May 30, 2011) (total number obtained by adding receipts for each office as of March 2011; data on website may be updated).

10. U.S. CONST. art. II, § 2, cl. 2.

11. *Id.*

12. *Tucker*, 135 T.C. at 116-17.

13. *Id.* at 152.

14. *Id.* at 144, 163-64.

15. *Id.* at 158-59.

concluded that finding Appeals Officers to be constitutional officers would be an inappropriate singling out, because a myriad of other administrative government actors who perform similar duties were not appointed.<sup>16</sup> This Article concludes that, in so holding, the Tax Court provides Congress with a blueprint on how to circumvent the Appointments Clause.<sup>17</sup>

The Tax Court decision is on appeal to the Court of Appeals for the District of Columbia Circuit.<sup>18</sup> But even if Tucker settles his appellate case, the spark ignited by Duffy's article suggests that this issue will resurface, in and out of the tax context, and in every circuit. This Article goes beyond Duffy's brief analysis to explore the officer-versus-employee distinction that *Tucker* highlighted and that is bound to become a common challenge to agency action. Duffy looked at the question for patent judges, but this Article sets forth a broader framework that can be applied to any government personnel. In particular, this Article will focus on the requirement that an Office be established by law and what it means for a government actor to exercise significant or sovereign authority.<sup>19</sup>

To that end, Part I of this Article reviews the Appointments Clause, its history and purposes, and relevant legal precedent leading up to *Tucker*. To lend the reader context, Part II summarizes the current CDP process and describes the power the IRS Appeals Office holds. Part III summarizes the reasoning and holding in *Tucker* and analyzes the Tax Court's decision. Part IV suggests an alternative analysis and, applying that framework, concludes that Appeals personnel should be appointed. Finally, the Article discusses the effects of such a holding and reviews the importance of the issue in context of our current government structure and political state.

## II. THE APPOINTMENTS CLAUSE

### A. *The Text, History, and Purposes*

The Appointments Clause, article II, section two of the United States Constitution, provides:

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16. *Id.* at 165-66.

17. See *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991).

18. See *Stipulation of Venue, Tucker*, 135 T.C. 114, *appeal docketed*, No. 11-1191 (D.C. Cir. June 21, 2011). Oral arguments are scheduled for February 6, 2012. *Tucker v. Commissioner*, No. 11-1191 (D.C. Cir. Nov. 3, 2011). The decision discussed in this Article was interlocutory, and the Tax Court decided the remaining issues in *Tucker v. Commissioner*, 101 T.C.M. (CCH) 1307 (2011).

19. This Article does not address the requirement that a position be continuing. See, e.g., *United States v. Eaton*, 169 U.S. 331, 343 (1898); *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890).

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>20</sup>

Officers of the United States must be appointed by one of these methods if their appointment method isn't provided by the Constitution itself.<sup>21</sup>

The clause serves several important purposes. First, colonists were tired of dealing with offices the King created and filled that did no more than strip them of resources.<sup>22</sup> If legislative and executive powers are vested in the same body, James Madison wrote, “there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.”<sup>23</sup> Thus the Appointments Clause divides the powers to enact and to execute laws in order to prevent the possibility that one branch of government could single-handedly create an office and then fill it. Additionally, the legislative branch, with the bulk of the law-making power, would not be tempted to create unnecessarily intrusive and powerful offices, because these offices would only strengthen a different branch, most often the executive.<sup>24</sup>

The Framers also recognized that “widely distributed appointment power subverts democratic government.”<sup>25</sup> The Appointments Clause prevents

20. U.S. CONST. art. II, § 2, cl. 2.

21. The Constitution provides appointment methods for the President, *id.* § 1, Vice President, *id.* Congressmen, *id.* art. I, §§ 2-3; *id.* amend. XVII, and officers for each house of Congress, *id.* art. I, § 2, cl. 5; *id.* § 3, cl. 5.

22. THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776) (“He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.”).

23. THE FEDERALIST NO. 47, at 302-03 (James Madison) (G. P. Putnam’s Sons ed. 1908)).

24. *See* Freytag v. Comm’r, 501 U.S. 868, 905-06 (1991) (Scalia, J., concurring) (“One of the best securities against the creation of unnecessary offices or tyrannical powers is an exclusion of the authors from all share in filling the one, or influence in the execution of the other.” (quoting THOMAS JEFFERSON, *Madison’s Observations on Jefferson’s Draft of a Constitution for Virginia*, reprinted in 6 PAPERS OF THOMAS JEFFERSON 308, 311 (J. Boyd ed. 1952))). Justice Scalia noted that the first concern is that legislators would appoint themselves to fill the positions created, but the Incompatibility and Ineligibility Clause wards off that evil. *Id.* at 904; *see also* U.S. CONST. art. I, § 6, cl. 2. The evil next in line, however, remained – that legislators would give the positions to their friends and political allies. *Freytag*, 501 U.S. at 904 (Scalia, J., concurring).

25. *See Freytag*, 501 U.S. at 885 (majority opinion).

this diffusion of the appointment power by keeping responsibility for officers close to the top of the political chain within a limited number of identifiable positions.<sup>26</sup> The Framers vested this “most insidious and powerful weapon”<sup>27</sup> in the Executive because one identifiable appointer (or a limited number of Heads of Departments) was thought to be held accountable more easily than a blurred, multimember body.<sup>28</sup> Therefore, as *Tucker* states, “when Congress establishes an ‘inferior Officer’ in the Executive Branch, it can vest the appointment power for that officer no further from the President than the Head of a Department whom the President himself has appointed.”<sup>29</sup> This restriction prevents Congress from “grant[ing] the appointment power to inappropriate members of the Executive Branch,”<sup>30</sup> or in other words, from watering down the appointment power.

Finally, this structure allows the American people to see which party is responsible if officers go awry. The Framers understood that the President would need help when taking care that the laws were executed faithfully but insisted that he maintain political accountability for the actions of those individuals who aided him.<sup>31</sup> Presumably, such transparency would increase the quality of appointees. As another byproduct, it may encourage the President and Congress to work together when the public tires of delays in appointment confirmations.<sup>32</sup>

The text of the clause delineates between “inferior Officers” and officers impliedly grander, which courts and scholars have dubbed “principal officers.”<sup>33</sup> Principal officers must be appointed by the President with the advice and consent of the Senate; however Congress, as it thinks proper, may direct a less onerous appointment method for inferior officers. If Congress chooses to do so, its choices are limited to removing the Senatorial advice-and-consent requirement and allowing the President alone, Heads of Departments, or the Courts of Law to appoint inferior officers. In essence, Congress’s only

26. *Ryder v. United States*, 515 U.S. 177, 182 (1995) (citing *Freytag*, 501 U.S. at 878).

27. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 143 (1969).

28. *THE FEDERALIST NO. 76*, at 455-57 (Alexander Hamilton) (C. Rossiter ed. 1961).

29. *Tucker v. Comm’r*, 135 T.C. 114, 121 (2010). Recently, the Supreme Court determined that a position that was subject to two levels of “for-cause” removal was too far removed from the President’s control under the Appointments Clause. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010).

30. *Freytag*, 501 U.S. at 880; *see also id.* at 904 n.4 (Scalia, J., concurring) (“The Appointments Clause is, intentionally and self-evidently, a limitation on Congress.”).

31. *Stras & Scott*, *supra* note 2, at 495-96 & n.300.

32. *Id.* at 495-96 n.300 (citing Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 *HARV. J.L. & PUB. POL’Y* 467, 482 (1998)).

33. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 668 (1988).

choice to simplify the process is to enhance the power of another government branch. If Congress does not explicitly provide for an alternative appointment method, an inferior officer must be appointed by the full principal-officer method.<sup>34</sup>

The Supreme Court and scholars have addressed the distinction between a principal and an inferior officer.<sup>35</sup> But a second distinction is at issue in *Tucker* – whether Appeals Officers or Appeals Team Managers are officers at all, and consequently, whether the Appointments Clause applies.<sup>36</sup> Beyond the phrase “established by Law” the constitutional text does not provide any clues to what constitutes an officer.<sup>37</sup>

### B. Defining Characteristics of an Officer

An officer under English common law was one the King enabled to conduct the affairs of the government, becoming involved in the affairs of his subjects without their consent.<sup>38</sup> United States Supreme Court decisions, colonial commentary, and the Constitution reflect a similar understanding. In 1926, the Supreme Court noted:

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone

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34. See *Edmond v. United States*, 520 U.S. 651, 660 (1997).

35. See *id.*; *Morrison*, 487 U.S. at 672; Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1111 (1998). *Morrison* established factors to determine principal or inferior status, but *Edmond* viewed inferiority to be largely, if not entirely, determined by whether an officer's decision must be ratified by a superior officer before taking effect. *Edmond*, 520 U.S. at 665. The *Edmond* Court utilized the factors from *Morrison* to evaluate whether the officer in question was in fact subordinate to another officer. *Id.* at 667-68. For a recent case discussing the principal-inferior distinction, see *Masias v. Secretary of Health & Human Services*, 634 F.3d 1283, 1293-95 (Fed. Cir. 2011).

36. *Tucker* concedes that if the CDP conductors or other IRS personnel are officers, they are inferior officers. Memorandum of Law in Support of Petitioner's Motion to Remand at 12, *Tucker*, 135 T.C. 114 (No. 3165-06L). Because no one in IRS Appeals is currently appointed, *Tucker*, 135 T.C. at 116, if CDP conductors are inferior officers then they violate the Appointments Clause. The IRS doesn't concede that this means *Tucker* should get a new hearing, however. Respondent's Memorandum of Law in Opposition to Petitioner's Motion to Remand at 33, *Tucker*, 135 T.C. 114 (No. 3165-06L) (arguing in the alternative for validation of the CDP conductors' acts by application of the de facto officer doctrine).

37. U.S. CONST. art II, § 2, cl. 2.

38. Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 1, 23-24 (2007) [hereinafter *Officers*] (citing *King v. Burnell*, Carth. 478 (K.B. 1700)); see also *id.* at 22 (quoting P.G. Osborn, A CONCISE LAW DICTIONARY 223 (2d ed. 1937)).



and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws.<sup>39</sup>

The Take Care Clause of the United States Constitution provides that the President “shall take Care that the Laws be faithfully executed,”<sup>40</sup> but the Appointments Clause provides the means to perform this task<sup>41</sup> – the President may delegate a portion of his sovereign authority to officers “‘who are in conjunction with himself to execute the laws.’”<sup>42</sup> An early American court opinion defined a portion of the sovereign power as “a legal power, which may be rightfully exercised, and in its effects will bind the rights of others, and be subject to revision and correction only according to the standing laws of the State.”<sup>43</sup> An influential nineteenth century treatise defined a public office as “the right, authority and duty, created and conferred by law, by which . . . an individual is invested with some portion of the sovereign functions of government, to be exercised by him for the benefit of the public.”<sup>44</sup> The 1899 Judiciary Committee of the House of Representatives defined sovereign authority as necessarily involving “‘the power to (1) legislate, or (2) execute law, or (3) hear and determine judicially questions submitted.’”<sup>45</sup> The House further concluded that where a government actor had “‘mere advisory’” responsibilities, without “‘power to decide any question or bind the Government or do any act affecting the rights of a single individual citizen,’” he did not have sovereign authority.<sup>46</sup>

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39. *Myers v. United States*, 272 U.S. 52, 117 (1926), *overruled in part by Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

40. U.S. CONST. art. II, § 3.

41. Officers, *supra* note 38, at 14 (“President’s authority to appoint and commission officers is ‘the means of fulfilling’ his obligation under the Take Care Clause” (quoting *Cunningham v. Neagle*, 135 U.S. 1, 63 (1890))).

42. *Id.* at 20 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1524, at 376 (Boston, Hillard, Gray & Co. 1833)).

43. *Shelby v. Alcorn*, 36 Miss. 273, 291 (1858).

44. Officers, *supra* note 38, at 29 (quoting FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 1, at 1-2 (Chicago, Callaghan & Co. 1890)).

45. *Id.* at 31 (quoting 1 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 493, 607 (Government Printing Office 1907)).

46. *Id.* at 32 (quoting 1 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 493, 610 (Government Printing Office 1907)).

Meaningful case law on the officer-employee distinction is sparse.<sup>47</sup> Several early Appointments Clause cases took cursory looks at the officer-employee distinction, sometimes relying entirely on whether the person had been appointed to determine if a person was an officer.<sup>48</sup> In a similar shortcut from early courts, officer status at times turned on whether the relevant statutes established an appointment method.<sup>49</sup> Later courts employed a modified version of this delineation, indicating that while a statutory method of appointment is not a requirement, if it exists it is an indicator of officer status.<sup>50</sup> More recently, courts and commentators have recognized how unhelpful these tests are in preserving the separation of powers under the Appointments Clause.<sup>51</sup>

Current Appointments Clause discussions generally date back only to 1976. In that year, the Supreme Court reviewed the established methods of appointment for the members of the Federal Election Commission in *Buckley v. Valeo*.<sup>52</sup> The Commission had a variety of functions, including information-reporting requirements, rulemaking duties (such as creating regulations to carry out the Federal Election Campaign Act), and adjudicative duties (such as determining individual candidate's eligibility for funds or to hold

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47. See Edward Susolik, Note, *Separation of Powers and Liberty: The Appointments Clause*, Morrison v. Olson, and Rule of Law, 63 S. CAL. L. REV. 1515, 1545 (1990) (“[A] definitive understanding of the term ‘officer’ is not forthcoming for two simple reasons: (1) there are too few cases for any consistent precedential principle to be articulated, and (2) the few cases that do exist posit conclusions rather than arguments and provide little insight to justify their results.”).

48. See, e.g., *United States v. Germaine*, 99 U.S. 508, 509-10 (1878). It is possible that the *Germaine* Court was attempting to narrow the application of the statute in question to those officers who were properly appointed because the statute was a criminal one. *Id.* at 510 (“It is, therefore, not to be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish any one not appointed in one of those modes.”).

49. *Burnap v. United States*, 252 U.S. 512, 516 (1920) (“Whether the incumbent is an officer or an employ[ee] is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto.”). The *Burnap* Court did not ultimately decide the case before it on that issue. *Id.* at 517 (“There is no statute which creates an office of landscape architect . . . nor any which defines the duties of the position.”).

50. See *Landry v. FDIC*, 204 F.3d 1125, 1133 (D.C. Cir. 2000) (citing *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991)).

51. See, e.g., *id.* at 1132-33 (“[T]he earliest Appointments Clause cases often employed circular logic, granting officer status to an official based in part upon his appointment by the head of a department.”).

52. 424 U.S. 1 (1976) (per curiam). The Court had previously noted what constituted an officer, but its references were often unhelpful recitations made in passing on the way to reach other issues. See, e.g., *Germaine*, 99 U.S. at 510 (“That all persons who can be said to hold an office under the government . . . were intended to be included within one or the other of these modes of appointment there can be but little doubt.”).

office).<sup>53</sup> By statute, the Commission was an eight-member body.<sup>54</sup> The Secretary of the Senate and the Clerk of the House of Representatives were nonvoting, *ex officio* members, and accordingly were not appointed at all.<sup>55</sup> The remaining members were appointed in three different ways: two members were to be appointed by the President pro tempore of the Senate with the recommendations of the Senate majority and minority leaders, two more were appointed by the Speaker of the House with recommendations from its majority and minority leaders, and the final two were appointed by the President.<sup>56</sup> The six appointed members were subject to the approval of both chambers of Congress<sup>57</sup> and could not be current government officials.<sup>58</sup> The appellants argued that the Commission violated the Appointments Clause because its members were at least inferior officers of the United States and therefore must be appointed by the limited mechanisms provided by the Constitution.<sup>59</sup>

The Supreme Court agreed. In finding the Commission's appointment methods unconstitutional, the Court provided the current test, stating that "Officers of the United States" include "any appointee exercising significant authority pursuant to the laws of the United States."<sup>60</sup> Applying that test, the Court categorized the Commission's duties into three types: informative, adjudicatory or enforcement, and rulemaking.<sup>61</sup> First, it found that the Commission constitutionally exercised its investigative and informative duties, noting that these duties fell "in the same general category as those powers which Congress might delegate to one of its own committees."<sup>62</sup> But, the Court reached a different result for the Commission's "more substantial powers."<sup>63</sup> The Court rebuffed Congress's encroachment on the executive function and noted that the Commission's enforcement and rulemaking powers were not "sufficiently removed from the administration and enforcement of . . . public law" to be exercised by nonofficers.<sup>64</sup> In short, the Court found the Commission's rulemaking and adjudicatory powers to be significant authori-

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53. *Buckley*, 424 U.S. at 109-13. Decisions were made by a majority vote. 2 U.S.C. § 437c(c) (2006); *Buckley*, 424 U.S. at 268 (White, J., concurring in part and dissenting in part).

54. 2 U.S.C. § 437c; *Buckley*, 424 U.S. at 109.

55. *Buckley*, 424 U.S. at 113.

56. 2 U.S.C. § 437c(a)(1)(A); *Buckley*, 424 U.S. at 113 n.156.

57. *Buckley*, 424 U.S. at 113.

58. This included any elected or appointed officers and employees of any branch of government. 2 U.S.C. § 437c(a)(2)-(3); *Buckley*, 424 U.S. at 268 (White, J., concurring in part and dissenting in part).

59. *Buckley*, 424 U.S. at 118-19.

60. *Id.* at 125-26.

61. *Id.* at 137.

62. *Id.*

63. *Id.* at 138.

64. *Id.* at 139.

ty.<sup>65</sup> The Court provided several specific examples of significant authority, including the Commission's "discretionary power to seek judicial relief,"<sup>66</sup> and its powers to make rules, to issue advisory opinions, and to determine a candidate's eligibility for funds or eligibility to stand for federal elective office.<sup>67</sup> The Court concluded that "each of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law."<sup>68</sup>

Concurring with the majority opinion, Justice Byron White noted that the Commission members were plainly officers, largely due to the wide power they held without any executive or legislative supervision.<sup>69</sup> Justice White pointed out that the Commission did not deny that the members were officers, but that it seemed to argue that Congress could nonetheless appoint them.<sup>70</sup> He disagreed with the Commission, noting, "This position that Congress may itself appoint the members of a body that is to administer a wide-ranging statute will not withstand examination in light of either the purpose and history of the Appointments Clause or of prior cases in this Court."<sup>71</sup> Justice White concluded that the Appointments Clause prevents Congress from appointing those individuals that enforce and administer the laws.<sup>72</sup>

Thus, the important question after *Buckley* became: What constitutes "significant authority pursuant to the laws of the United States?" Fifteen years later, the Court shed light on that question in *Freytag v. Commissioner*, which involved several taxpayers who had deducted a total of \$1.5 billion in losses arising from an alleged tax shelter.<sup>73</sup> Under § 7443A(b)(1), (2), and (3) of the Internal Revenue Code, the Chief Judge of the Tax Court may assign limited types of cases to Special Trial Judges (STJs).<sup>74</sup> For these cases, STJs may enter the final decision of the court.<sup>75</sup> In addition, § 7443A(b)(4) gave STJs authority to hear "any other proceeding which the chief judge may des-

65. *Id.* at 126.

66. *Id.* at 138.

67. *Id.* at 140-41.

68. *Id.* at 141.

69. *Id.* at 270 (White, J., concurring in part and dissenting in part) (noting that the FEC's only oversight, after appointment, required regulations issued by the Commission to be approved by Congress).

70. *Id.* at 270-71.

71. *Id.* at 271.

72. *Id.* at 274 ("Under Art. II as finally adopted, law enforcement authority was not to be lodged in elected legislative officials subject to political pressures. Neither was the Legislative Branch to have the power to appoint those who were to enforce and administer the law.").

73. *Freytag v. Comm'r*, 501 U.S. 868, 871 (1991).

74. 26 U.S.C. § 7443A (1988) (amended 1998 & 2006).

75. *Id.* § 7443A(c).

ignate.”<sup>76</sup> For this broader delegation, however, the STJ’s authority is limited to making recommendations for the resolution of the case.<sup>77</sup> In *Freytag*, with the consent of the taxpayers, the Chief Judge assigned the billion-dollar case to an STJ to make findings of fact and a proposed opinion pursuant to § 7443A(b)(4).<sup>78</sup> The STJ proposed a ruling against the taxpayers, which the Chief Judge adopted and entered as the decision of the court.<sup>79</sup> The taxpayers argued for the first time on appeal that the appointment of STJs by the Tax Court Chief Judge violated the Appointments Clause.<sup>80</sup>

In a brief discussion regarding whether STJs were officers, the court noted without explanation that the STJ position was established by law and that “the duties, salary, and means of appointment for that office are specified by statute.”<sup>81</sup> The court contrasted this example to Special Masters, whose positions are temporary, not established by law, and whose “functions are not delineated in a statute.”<sup>82</sup> The court noted that STJs perform “more than ministerial tasks,” listing examples such as taking testimony, conducting trials, ruling on the admissibility of evidence, and enforcing discovery orders.<sup>83</sup> The court observed that these duties required the exercise of significant discretion.<sup>84</sup> Based on this analysis alone, the court seemed headed toward a holding that STJs are officers.

In the following paragraph, however, the Court noted, “Even if the duties of special trial judges under subsection (b)(4) were not as significant as we and the two [lower] courts have found them to be, our conclusion would be unchanged.”<sup>85</sup> The court explained that the Commissioner had conceded STJs’ inferior-officer status with respect to their duties under § 7443A(b)(1), (2), and (3).<sup>86</sup> This concession alone required appointment because “[t]he fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution.”<sup>87</sup>

*Landry v. FDIC*, a 2000 decision from the Court of Appeals for the District of Columbia Circuit, provides another important look at significant au-

76. *Id.* § 7443A(b)(4). This provision is currently § 7443A(b)(7) due to other additions to the STJ’s final-decision-making powers. 26 U.S.C. § 7443A(b)(7) (2006).

77. *Freytag*, 501 U.S. at 873; see also TAX CT. R. 182(e).

78. *Freytag*, 501 U.S. at 871.

79. *Id.* at 871-72.

80. *Id.* at 892 (Scalia, J., concurring in part and concurring in judgment).

81. *Id.* at 881 (majority opinion).

82. *Id.*

83. *Id.* at 881-82.

84. *Id.* at 882.

85. *Id.*

86. *Id.*

87. *Id.* (finding it insignificant that the current case involved the duties under § 7443(A)(b)(4)).

thority.<sup>88</sup> In *Landry*, the court considered the powers of the Federal Deposit Insurance Corporation (FDIC).<sup>89</sup> The FDIC, a statutorily created agency, oversees the banking industry and regulates federally insured entities.<sup>90</sup> Its oversight power includes the ability to remove bank officers and to prohibit them from working in other federally insured institutions.<sup>91</sup> If the FDIC pursues a claim, the case is brought first before an administrative law judge (ALJ), who holds a formal hearing and issues a recommendation to the FDIC Board of Directors.<sup>92</sup> The Board then issues the agency's determination after a mandatory *de novo* review.<sup>93</sup>

In 1990, the FDIC pressured a Louisiana bank to obtain capital quickly or face insurance termination.<sup>94</sup> In "bizarre" attempts to solve the problem, Michael Landry, a senior officer of the bank, admitted to self-dealing by trying to "make money off the bank."<sup>95</sup> In 1996, the FDIC sought to remove Landry and to prohibit his further involvement with any FDIC-insured enti-

88. 204 F.3d 1125 (D.C. Cir. 2000). Tucker has appealed his case in the D.C. Circuit. See Notice of Appeal at 1, *Tucker v. Comm'r*, 135 T.C. 114 (2010) (D.C. Cir. May 17, 2011) (No. 3165-06L). Whether this venue is proper is a matter of current debate. As a matter of administrative convenience, the Tax Court generally follows precedent from the appropriate appellate court for the given case. *Golsen v. Comm'r*, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971). For CDP determinations, the Tax Court has generally followed precedent from the circuit where the taxpayer lived when he filed his petition. See, e.g., *Baltic v. Comm'r*, 129 T.C. 178, 180 n.5 (2007). One commentator, however, has pointed out an inconsistency with the appellate venue statute and general practice. See James Bamberg, *A Different Point of Venue: The Plainer Meaning of Section 7482(b)(1)*, 61 TAX LAW. 445, 468-69 (2008). The statute sets the D.C. Circuit as the default venue for review, but provides enumerated exceptions based on the content of the claim. 26 U.S.C. § 7482(b)(1) (2006). The exception followed by the Tax Court in CDP cases states that venue should follow the taxpayer's residence when the amount of the tax is at issue. *Id.* § 7482(b)(1)(A). Tucker, however, doesn't dispute the amount of tax owed. *Tucker*, 135 T.C. at 115. Under Bamberg's reading of the statute, this leaves Tucker to the default venue of the D.C. Circuit – where *Landry* is binding. Bamberg, *supra*, at 446. The Tax Court has never ruled on this issue, but a taxpayer made a similar argument in a motion currently before the court. Motion for Entry of Decision in Favor of Petitioner, *Asante v. Comm'r*, No. 15914-10 (T.C. May 9, 2011). The matter will not be addressed in *Tucker*, as the Department of Justice stipulated to venue in the D.C. Circuit. Stipulation of Venue, *Tucker*, 135 T.C. 114 (2010), *appeal docketed*, No. 11-1191 (D.C. Cir. June 21, 2011).

89. *Landry*, 204 F.3d at 1128.

90. 12 U.S.C. § 1811 (2006); see also *About FDIC*, FED. DEPOSIT INS. CORP., <http://www.fdic.gov/about/> (last visited Sept. 11, 2011).

91. 12 U.S.C. § 1818(e)(1).

92. *Id.* § 1818(e)(4); 12 C.F.R. § 308.38(a) (2011).

93. *Landry*, 204 F.3d at 1130 (citing 12 U.S.C. § 1818(h)(1); 12 C.F.R. § 308.38-40).

94. *Id.* at 1128-29.

95. *Id.* at 1129-30.

ties.<sup>96</sup> As required, Landry's case first went to an ALJ for an on-the-record hearing.<sup>97</sup> The ALJ recommended Landry's termination and a prohibition order.<sup>98</sup> As required by statute, the FDIC Board of Directors reviewed the ALJ's determination de novo.<sup>99</sup> The Board adopted the ALJ's findings of fact and issued the order against Landry.<sup>100</sup>

On appeal, Landry argued that the ALJs were inferior officers, and therefore, needed to be appointed.<sup>101</sup> Relying almost exclusively on *Freytag*, the *Landry* majority compared the roles of the ALJs to the roles of Tax Court STJs.<sup>102</sup> The court found (again without explanation) that the ALJ position was just as much established by law as the STJ position.<sup>103</sup> The court noted *Freytag's* reliance on discretion, calling it "rather a magic phrase under the *Buckley* test."<sup>104</sup> Initially, the court expressed uncertainty as to the importance of final decision-making power,<sup>105</sup> noting the seemingly contradictory import the High Court afforded an actor's ability to enter into a final agreement.<sup>106</sup> In the end, the court decided *Freytag* treated final decision-making power as a critical distinction between employees and inferior offic-

96. *Id.* at 1128.

97. *Id.*; see also 5 U.S.C. §§ 551-54 (2006 & Supp. IV 2010). An "on the record" or "formal" hearing has specific meaning within the Administrative Procedure Act (APA). 5 U.S.C. § 554. The APA governs both formal and informal hearings, but subjects formal hearings to more rules and procedures. Compare *id.*, and *id.* § 553. Formal-hearing conductors have quasi-judicial powers such as the power to administer oaths, issue subpoenas, rule on the admission of evidence, and take depositions. *Id.* § 556(c). Arguably, formal hearings entitle the claimant to greater procedural protections than informal hearings. "Off-the-record" or "informal" hearings are not subject to the same strict rules. Correspondingly, informal-hearing conductors do not explicitly have the right to perform the tasks listed above. See *id.* § 554. Practically speaking, an informal hearing conductor subject to court review must compile some sort of record to support their decision. See, e.g., Memorandum of Center for the Fair Administration of Taxes as Amicus Curiae at 12, *Tucker v. Comm'r*, 135 T.C. 114 (2010) (No. 3165-06L).

98. *Landry*, 204 F.3d at 1128.

99. *Id.*; 5 U.S.C. § 552.

100. *Landry*, 204 F.3d at 1128.

101. *Id.*

102. *Id.* at 1133.

103. *Id.*

104. *Id.* at 1134.

105. *Id.* at 1133 ("It is, to be sure, uncertain just what role the STJs' power to make final decisions played in *Freytag*.").

106. *Id.* at 1134 ("[T]he Court introduced mention of the STJs' power to render final decisions with something of a shrug . . . . Nonetheless, in another way the Court laid exceptional stress on the STJs' final decisionmaking power.").

ers.<sup>107</sup> Thus, the court concluded that ALJs were not inferior officers because they had merely recommendatory powers.<sup>108</sup>

Concurring in the judgment, the Honorable A. Raymond Randolph disagreed with the court's take on the importance of finality in the *Freytag* holding. He noted that the *Freytag* Court's discussion of finality was in an alternative holding, following a holding that indicated STJs were inferior officers based solely on their § 7443A(b)(4) duties to hold hearings and recommend an outcome to the Chief Judge.<sup>109</sup> Judge Randolph compared ALJs to federal magistrate judges who recommend findings and determinations to U.S. District Court judges.<sup>110</sup> Judge Randolph noted that although those recommendations, like the ALJs', must undergo de novo review, magistrates have long been recognized as inferior officers and properly appointed by the Courts of Law.<sup>111</sup> Judge Randolph also noted that a lack of finality often indicates inferior-officer status, as when a government actor exercising significant authority reports up the chain to a principal officer.<sup>112</sup>

A recent memorandum from the Department of Justice Office of Legal Counsel<sup>113</sup> suggests that *Buckley's* "significant authority" is equivalent to the historical phrase "sovereign authority":

The Court's reference in *Buckley* (and subsequent cases) to the exercise of "significant authority," does vary somewhat from the well

107. *Id.* ("Accordingly, we believe that the STJs' power of final decision in certain classes of cases was critical to the Court's decision.")

108. *Id.*

109. *Id.* at 1142 (Randolph, J., concurring in result). Judge Randolph concurred in the result because he believed Landry needed to – but hadn't – shown injury from the lack of proper appointment. *Id.* at 1143.

110. *Id.*

111. *Id.*

112. *Id.* at 1142 (citing *Edmond v. United States*, 520 U.S. 651 (1997)). In *Edmond*, the Court reviewed the status of civilian judges in the Coast Guard Court of Criminal Appeals, but the question before the court was whether the judges were inferior or superior officers. 520 U.S. at 655-56. Finding the judges to be inferior officers, the Court noted, "What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.* at 665.

113. The Office of Legal Counsel (OLC) is a body of specialized attorneys that advises the President on constitutional matters. *Office of Legal Counsel*, U.S. DEPARTMENT JUST., <http://www.justice.gov/olc/> (last visited Sept. 11, 2011) ("The Office also is responsible for providing legal advice to the Executive Branch on all constitutional questions . . ."). The Department of Justice further characterizes the OLC's work as "serving as, in effect, outside counsel for the other agencies of the Executive Branch." *Id.* Although OLC's opinions do not provide binding legal precedent, they are highly respected. *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 642-43 (1998) (finding reinforcement in its decision because the OLC had long interpreted the issue similarly).



established historical formulation, but nothing in the Court's opinion suggests any intention to break with the longstanding understanding of a public office or fashion a new term of art. On the contrary, the Court favorably discussed and cited several of the cases from the 1800s reflecting that understanding, some of them treating arguably insignificant positions as offices.<sup>114</sup>

Yet, thirty-five years after *Buckley*, "significant authority pursuant to the laws of the United States" remains relegated to definition by example. A few common factors can be discerned: an actor that executes or administers public laws in a nonministerial manner exercises significant authority, with finality and discretion playing at least some role.

### III. COLLECTION DUE PROCESS

In the Restructuring and Reform Act of 1998 (RRA), Congress attempted to correct perceived tax collection abuses by giving taxpayers the right to a last-chance appeal.<sup>115</sup> This last-chance appeal, called a Collection Due Process or CDP hearing,<sup>116</sup> requires the IRS Office of Appeals to hold such hearings in specified circumstances.<sup>117</sup> The statutes that require CDP hearings and vest the IRS Office of Appeals with the power and duty to hold them are found in the Internal Revenue Code:<sup>118</sup>

**[Section] 6330. Notice and opportunity for hearing before levy**

...  
**(b) Right to fair hearing. –**

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

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114. Officers, *supra* note 38, at 35 (citations omitted).

115. Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3401, 112 Stat. 685, 746; *see also* Danshera Cords, *Administrative Law and Judicial Review of Tax Collection Decisions*, 52 ST. LOUIS U. L.J. 429, 440 (2008).

116. Treas. Reg. § 301.6330-1(a)(1) (as amended in 2006).

117. *See* 26 U.S.C. § 6320(b)(1) (2006); 26 U.S.C.A. § 6330(b)(1) (2011).

118. Section 6320 covers procedures for proposed or new liens filed by the IRS while section 6330 applies to proposed levies. 26 U.S.C. § 6320; 26 U.S.C.A. § 6330. Both statutes have near identical language regarding notice procedures and the right to a fair hearing. 26 U.S.C. § 6320(a)-(b); 26 U.S.C.A. § 6330(a)-(b). Section 6320 refers readers to section 6330 for guidance on the conduct of the hearing. 26 U.S.C. § 6320(c) ("Conduct of hearing; review; suspensions. – For purposes of this section, subsections (c), (d) (other than paragraph (2)(B) thereof), (e), and (g) of section 6330 shall apply.").

(2) . . . .

(3) **Impartial officer.** – *The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax . . . before the first hearing under this section or section 6320. . . .*

(c) **Matters considered at hearing.** –

In the case of any hearing conducted under this section

–

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

(2) **Issues at hearing.** –

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

(i) appropriate spousal defenses;

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

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

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

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

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

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

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

....

**(d) Proceeding after hearing. –**

....

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

(A) collection actions taken or proposed with respect to such determination; and  
 (B) after the person has exhausted all administrative remedies, a change in circumstances with respect to such person which affects such determination.<sup>119</sup>

The Office of Appeals must offer a taxpayer a CDP hearing after the IRS has determined it will proceed with certain collection actions, such as filing a Notice of Federal Tax Lien (NFTL)<sup>120</sup> against a taxpayer or commencing a levy against that taxpayer's assets or income.<sup>121</sup> The taxpayer will be offered a CDP hearing before any levy or garnishment begins, but an NFTL typically is filed before the taxpayer receives the right to request a

119. 26 U.S.C.A. § 6330 (italics added).

120. The moment an unpaid tax liability is assessed against a taxpayer, a federal tax lien automatically arises against that taxpayer and his property, but a Notice of Federal Tax Lien must be filed for the government to take priority over subsequent creditors who otherwise did not have notice of the tax lien. *See* 26 U.S.C. §§ 6321, 6323(a), 6323(f)(1).

121. Not all collection actions are preceded by a CDP hearing. *See id.* § 6331. A jeopardy assessment, for example, may be collected before the CDP hearing is offered. *Id.* § 6331(a), (d)(3). A jeopardy assessment may happen when the IRS determines that the taxpayer appears to be planning to flee the country, hide or dissipate assets, or if the taxpayer's financial solvency is in danger. *Prince v. Comm'r*, 133 T.C. 270, 276-77 (2009); *Treas. Reg.* § 1.6851-1(a)(1) (as amended in 1978). The Supreme Court has determined that a predeprivation hearing is not constitutionally required by the Due Process Clause because the Government's interest in collecting taxes outweighs the individual's rights in this case. *Fuentes v. Shevin*, 407 U.S. 67, 92 (1972); *see also* *Cords, supra* note 115, at 430 n.9.

CDP hearing.<sup>122</sup> If a taxpayer receives a notice that the IRS intends to begin a new levy or has filed a new NFTL (for which he hasn't received a CDP hearing before), he has thirty days to request the statutorily required CDP hearing.<sup>123</sup> If the taxpayer's request is late, the Office of Appeals generally will offer the taxpayer an "equivalent hearing" which is almost identical to a CDP hearing but is not required by statute and is not subject to court review.<sup>124</sup>

At a minimum, during a CDP hearing the Office of Appeals must confirm that the IRS met all legal and procedural requirements for making the tax assessment,<sup>125</sup> consider all legitimate issues raised by the taxpayer,<sup>126</sup> and balance the need for effective tax collection against the taxpayer's interests, specifically considering whether the proposed collection action is more intrusive than necessary under the taxpayer's current circumstances.<sup>127</sup> Under current IRS procedures, Appeals Officers, Settlement Officers, or Appeals Account Resolution Specialists may hold CDP hearings.<sup>128</sup> Hearings can be face to face, over the phone, or by correspondence.<sup>129</sup> While the statutes are silent on whether a taxpayer has a right to a face-to-face hearing, the IRS has determined, and the Tax Court agrees, that a taxpayer only has a right to a face-to-face hearing if he intends to discuss nonfrivolous issues.<sup>130</sup> A face-to-face hearing may be denied if the taxpayer is not in compliance with current

122. The NFTL must be sent within five days *after* the filing of the federal tax lien. 26 U.S.C. § 6320(a)(2).

123. Taxpayers generally request CDP hearings by submitting a Form 12153, *Request for a Collection Due Process or Equivalent Hearing*. IRS, Form 12153 (revised Mar. 2011), available at <http://www.irs.gov/pub/irs-pdf/f12153.pdf>.

124. See *Orum v. Comm'r*, 123 T.C. 1, 4-5 (2004); Treas. Reg. § 301.6330-1(i) (as amended in 2006).

125. An assessment is the recording of a tax liability on the books of the IRS. 26 U.S.C. § 6203; *Billings v. Comm'r*, 127 T.C. 7, 31 (1999), *superseded by statute*, 26 U.S.C. § 6015(c)(1), *as recognized in* *Kosola v. Comm'r*, 99 T.C.M. (CCH) 1141 (2010).

126. 26 U.S.C.A. § 6330(c)(3)(B) (2011).

127. *Id.* § 6330(c)(3).

128. I.R.S. Deleg. Order Appeals-193-1, IRM Exh. 8.22.2-4 (Mar. 16, 2010) (formerly I.R.S. Deleg. Order 8-a (Rev. 1)).

129. *Katz v. Comm'r*, 115 T.C. 329, 337-38 (2000); Treas. Reg. § 301.6330-1(d)(2), Q&A D6.

130. Treas. Reg. § 301.6330-1(d)(2), Q&A D8; *see, e.g., Connolly v. Comm'r*, 95 T.C.M. (CCH) 1371 (2008) (taxpayer didn't raise relevant issues to resolve); *Ball v. Comm'r*, 92 T.C.M. (CCH) 7 (2006) (taxpayer wished only to raise tax-protestor arguments). IRS Counsel has also determined that a taxpayer who fails to submit completed financial information requested by the Office of Appeals may be denied a face-to-face hearing if the hearing was solely to discuss collection alternatives which require Appeals to review such documentation. Memorandum from Laurence K. Williams, Senior Counsel, I.R.S. Office of Chief Counsel, Submission of Financial Information as a Condition to Granting a Face-to-Face Collection Due Process Conference, at 4 (Mar. 23, 2010), available at [www.irs.gov/pub/lanoa/pmta\\_2010-06.pdf](http://www.irs.gov/pub/lanoa/pmta_2010-06.pdf).

federal tax obligations, including estimated payments for the current tax year.<sup>131</sup> If a taxpayer is granted a face-to-face hearing, he has a statutory right to audio record it at his own expense.<sup>132</sup> Conversely, if a taxpayer is relegated to a telephonic hearing he is not allowed to record it.<sup>133</sup>

CDP hearings are informal hearings and are not subject to the Administrative Procedure Act's on-the-record requirements.<sup>134</sup> This designation means that CDP hearings are subject to fewer rules and regulations than formal hearings.<sup>135</sup> A taxpayer is not under oath during a CDP hearing and is allowed to present evidence on any relevant issue relating to the unpaid tax, the pending collection action or proposed collection alternative.<sup>136</sup> CDP conductors do not have the power to subpoena third parties, and taxpayers do not have a right to subpoena and examine witnesses.<sup>137</sup> Accordingly no statute authorizes CDP conductors to issue discovery orders; however, they can request to use the IRS's summons power to obtain information from third parties.<sup>138</sup> Whether taxpayers are allowed to present witnesses at the hearing seems to be within the discretion of the CDP conductor.<sup>139</sup> The CDP conductor does not rule on evidentiary questions and must consider anything relevant the taxpayer brings forward.<sup>140</sup> The conductor retains discretion regarding when to conclude the CDP hearing and whether to extend its boundaries beyond the required elements.<sup>141</sup> A less-formal record, but one sufficient for abuse-of-discretion review, must be compiled for any possible appeal to the Tax Court.<sup>142</sup>

131. *See Williams v. Comm'r*, 96 T.C.M. (CCH) 25 (2008). These failings would render a taxpayer ineligible for collection alternatives in any case. *See Gillum v. Comm'r*, 100 T.C.M. (CCH) 562 (2010).

132. 26 U.S.C. § 7521(a)(1) (2006); *Keene v. Comm'r*, 121 T.C. 8, 19 (2003) (finding 26 U.S.C. § 7521 applies to face-to-face CDP hearings).

133. *Calafati v. Comm'r*, 127 T.C. 219, 229 (2006); *see also* 26 U.S.C. § 7521(a)(1) (recording limited to "in-person interview[s]").

134. *See* Treas. Reg. § 301.6330-1(d)(2) Q&A D6.

135. *See id.*

136. 26 U.S.C.A. § 6330(c)(2)(A) (2011).

137. *Davis v. Comm'r*, 115 T.C. 35, 41 (2000); *see also* Treas. Reg. § 301.6330-1(d)(2), Q&A D6.

138. 26 U.S.C. § 7602 (2006).

139. *See, e.g., Swann v. Comm'r*, 85 T.C.M. (CCH) 1006 (2003) (taxpayer witness attended hearing); *Smith v. Comm'r*, 85 T.C.M. (CCH) 889 (2003) (same).

140. 26 U.S.C.A. § 6330(c)(2)(A), (3)(B). Of course the CDP conductor must determine what is relevant. *See Connolly v. Comm'r*, 95 T.C.M. (CCH) 1371 (2008).

141. I.R.S. Chief Counsel Notice CC-2006-019, at 33 (Aug. 18, 2006), *available at* <http://www.unclefed.com/ForTaxProfs/irs-ccdm/2006/cc-2006-019.pdf> ("An appeals officer may, in that appeals officer's sole discretion, consider issues precluded under sections 6015(g)(2), 6330(c)(2)(B), or 6330(c)(4).").

142. *See Barnes v. Comm'r*, T.C.M. (CCH) 1126 (2010) (citing *Wright v. Comm'r*, 381 F.3d 41, 44 (2d Cir. 2004)).

At the hearing, the taxpayer can raise any relevant issues about the Commissioner's collection activities such as an innocent-spouse claim,<sup>143</sup> challenges to appropriateness of intended collection action,<sup>144</sup> or alternative collection suggestions.<sup>145</sup> Potential collection alternatives include proposed installment agreements,<sup>146</sup> partial payment installment agreements,<sup>147</sup> or offers in compromise.<sup>148</sup> Alternatively, the CDP conductor may put a taxpayer into currently not collectible (CNC) status. CNC status doesn't relieve the taxpayer of liability but halts collection efforts because the IRS recognizes in certain circumstances that collecting any tax would leave the taxpayer unable to meet basic living expenses.<sup>149</sup> No dollar limits exist for what may be con-

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143. Under limited circumstances, an innocent-spouse claim can relieve a taxpayer of all or a portion of liability for taxes incurred by a spouse. 26 U.S.C. § 6015; *see also* *Wilson v. Comm'r*, 99 T.C.M. (CCH) 1552 (2010); Rev. Proc. 2003-61, 2003-2 C.B. 296.

144. 26 U.S.C.A. § 6330(c)(2)(A).

145. *Id.*

146. Installment agreements allow a taxpayer to make payments over a defined time until the debt is paid off in full. *See* 26 U.S.C. § 6159; IRM 5.14.1.1 (June 1, 2010).

147. Partial-payment installment agreements also allow the taxpayer to make payments, but in the end, the entire tax debt does not get paid. *See* 26 U.S.C. § 6159; IRM 5.14.2.1 (Mar. 13, 2011).

148. An offer in compromise (OIC) is an agreement that settles tax liabilities for less than what was originally owed based on one of three grounds: doubt as to liability, doubt as to collectability, or effective tax administration. *See* 26 U.S.C. § 7122; Treas. Reg. § 301.7122-1(b) (2002). OIC's often involve a lump-sum payment but can consist of limited payment plans. IRM 5.8.1.8.4 (Mar. 16, 2010); *Offer in Compromise*, IRS, Form 656 (revised March 2009), *available at* <http://www.irs.gov/pub/irs-pdf/f656.pdf>. The IRS will generally accept an offer that is higher than a taxpayer's "reasonable collection potential" (income less necessary expenses), but it can accept lower offers or reject higher offers. *See* *Murphy v. Comm'r*, 125 T.C. 301, 309-10 (2005) (describing the offer-in-compromise process), *aff'd*, 469 F.3d 27 (1st Cir. 2006).

149. *See* IRM 5.16.1.1 (Apr. 29, 2011). The IRS may put a taxpayer in CNC status instead of accepting an offer in compromise, for example, if it believes the taxpayer might be able to pay more in the future. *See* IRM 1.16.11 (Apr. 29, 2011). In CNC status, taxpayers do not have to make payments, but their tax liability still exists and penalties and interest still accrue. I.R.S. Pub. 4418 (Mar. 2008). The ten-year collections statute does run. *See* 26 U.S.C. § 6502(a)(1); IRM 16.1.2.2.4 (May 5, 2009). The IRS will generally still put a lien on a taxpayer's assets while he is in CNC status if his outstanding balance is higher than the general lien threshold. *See* IRM 5.16.1.1(4) (Apr. 29, 2011). The IRS recently increased this lien threshold from \$5,000 to \$10,000. Nicole Duarte, *IRS Raises Lien Threshold, but Former Officials Say More Improvements Are Needed*, TAX NOTES TODAY, Feb. 25, 2011, *available at* 2011 TNT 38-2 (LEXIS); *see also* *Adjustments to Lien Policies*, INTERNAL REVENUE SERV., <http://apps3.irs.gov/businesses/small/article/0,,id=239095,00.html> (last visited Sept. 11, 2011).

sidered or decided within a CDP hearing.<sup>150</sup> A taxpayer also may challenge the amount of taxes due, or the “underlying liability,” at a CDP hearing if he did not have the chance to do so previously.<sup>151</sup> A CDP hearing reviews the decision of the IRS to institute a lien or levy at that time,<sup>152</sup> and many outcomes don’t preclude the IRS from revisiting the issue later, potentially imposing a new lien or levy. Some payment alternatives allow the IRS to review the taxpayer’s financial situation periodically,<sup>153</sup> and some alternatives require biennial review.<sup>154</sup>

Appeals Team Managers supervise CDP conductors and are responsible for the final determination of the hearing.<sup>155</sup> The CDP hearing officially ends when the Team Manager issues a notice of determination.<sup>156</sup> The notice provides written evidence of the Office of Appeals’ decision and starts the clock on a thirty-day window for the taxpayer to petition the Tax Court for review.<sup>157</sup> If the taxpayer did not challenge his underlying tax liability (or isn’t allowed to because he had a prior opportunity), the Tax Court reviews Ap-

150. See 26 U.S.C. § 6320 (2006); 26 U.S.C.A. § 6330.

151. 26 U.S.C.A. § 6330(c)(2)(B). This can happen when a CDP hearing stems from taxes that the taxpayer self-reported. *Montgomery v. Comm’r*, 122 T.C. 1, 9-10 (2004) (taxpayers who self-reported tax liability had not had a prior opportunity to dispute it). In *Tucker*, the IRS asserts that if a taxpayer properly challenges the underlying liability, that portion of the hearing is referred to an Appeals Officer, regardless of who was holding the original hearing. See Respondent’s Supplemental Memorandum at Law at 2 n.2, *Tucker v. Comm’r*, 135 T.C. 114 (2010) (No. 3165-06L) (“Internally, however, the IRS uses the terms settlement officer and appeals officer to distinguish between those appeals employees who generally make collection determinations, settlement officers, and those Appeals employees who generally make liability determinations, appeals officers.”).

152. If a taxpayer’s biweekly wages are to be garnished, for example, then the taxpayer will not receive new CDP hearings every two weeks. Treas. Reg. § 301.6330-1(d)(2), Q&A D1 (as amended in 2006). Further, if a taxpayer faces a lien and levy for the same tax year or tax years, then an effort will be made to consolidate the hearings. *Id.* at Q&A D2.

153. For example, the Internal Revenue Code allows the IRS to “alter, modify, or terminate” an installment agreement if it determines that the taxpayer’s financial circumstances have “significantly changed.” 26 U.S.C. § 6159(b)(3).

154. If a taxpayer is in a partial-payment installment plan, the IRS must review his financial circumstances at least once every two years. *Id.* § 6159(d).

155. I.R.S. Deleg. Order Appeals-193-1, IRM Exh. 8.22.2-4 (Mar. 16, 2010) (formerly I.R.S. Deleg. Order 8-a (Rev. 1)).

156. *Turner v. Comm’r*, 99 T.C.M. (CCH) 1173 (2010) (“All communications between the taxpayer and the Appeals officer between the time of the hearing request and the issuance of the determination notice constitute part of the CDP hearing.”).

157. 26 U.S.C.A. § 6330(d)(1). Currently the Tax Court has exclusive jurisdiction over CDP hearing reviews. See, e.g., *Dibble v. IRS*, 102 A.F.T.R.2d 2008-5176 (W.D. Mich. 2008) (holding that review of CDP determinations after October 16, 2006, are within the exclusive jurisdiction of the Tax Court due to statutory amendments).

peals' determination for an abuse of discretion.<sup>158</sup> When a taxpayer makes an innocent-spouse claim or appropriately challenges his underlying tax liability, the Tax Court reviews that determination de novo.<sup>159</sup> Tax Court decisions are appealable to Federal Courts of Appeals, and for individuals, most often venue is in the jurisdiction where the taxpayer resided when he filed the Tax Court petition.<sup>160</sup> The appellate courts review the Tax Court's fact finding for clear error and its application of the law de novo.<sup>161</sup> From the appellate level, a taxpayer may petition the United States Supreme Court for review.<sup>162</sup>

Though Congress mandated the CDP hearing process in 1998, the IRS Office of Appeals and the position of Appeals Officer existed long before the RRA.<sup>163</sup> The Office of Appeals' stated mission is to "resolve tax controversies, without litigation, on a basis which is fair and impartial to both the Government and the taxpayer."<sup>164</sup> As such, the Office of Appeals provides a last effort by the IRS to settle matters before they reach court. Through Appeals, taxpayers may enter payment plans, defer payment, or compromise their tax liability.<sup>165</sup> The Appeals Office also retains jurisdiction for CDP cases after court review.<sup>166</sup> If a taxpayer's financial circumstances change and he has exhausted all administrative remedies, the Appeals Office may reconsider its determination.<sup>167</sup> In addition, the Appeals Office offers "equivalent hearings" if the taxpayer fails to request a CDP hearing on time, but requests a hearing within one year of the notice advising him of the right to a CDP hearing.<sup>168</sup> Equivalent hearings in practice are nearly identical to CDP hearings, but the IRS provides them voluntarily (without a statutory mandate), and the taxpay-

158. *Sego v. Comm'r*, 114 T.C. 604, 610 (2000); *Goza v. Comm'r*, 114 T.C. 176, 181-82 (2000).

159. *Porter v. Comm'r*, 132 T.C. 203, 210-11 (2009) (innocent spouse); *Davis v. Comm'r*, 115 T.C. 35, 39 (2000) (underlying liability).

160. 26 U.S.C. § 7482(b) (2006). *But see supra* note 88.

161. 26 U.S.C. § 7482(a)(1) (requiring the same deference as if they were decisions from a federal district court, in a civil action tried without a jury); *see, e.g.*, *Green v. Comm'r*, 507 F.3d 857, 866 (5th Cir. 2007) (citing *Arevalo v. Comm'r*, 469 F.3d 436, 438 (5th Cir. 2006)).

162. 26 U.S.C. § 7482(a)(1).

163. *Tucker* notes that the Office of Appeals has existed in some form or another since 1918, and the IRS created the position of Appeals Officer in 1978. *Tucker v. Comm'r*, 135 T.C. 114, 134-36 (2010).

164. IRM 8.1.1.1(1) (Oct. 23, 2007); *Appeals . . . Resolving Tax Disputes*, INTERNAL REVENUE SERV. (Jan. 19, 2011), <http://www.irs.gov/individuals/content/0,,id=98196,00.html>.

165. *See* 26 U.S.C.A. § 6330(c)(2)(A)(iii) (2011).

166. *Id.* § 6330(d)(2).

167. Treas. Reg. § 301.6330-1(h) (as amended in 2006).

168. *See id.* § 301.6330-1(i), Q&A 17 (Under § 6330, a taxpayer has a year from the date the CDP notice is issued, but under § 6320 the taxpayer must file within the "one-year period commencing the day after the end of the five-business-day period following the filing of the NFTL.").



er does not have a right to judicial review.<sup>169</sup> In addition, the statute of limitation and collection actions are not tolled or stayed for an equivalent hearing.<sup>170</sup> In 1996, two years before the RRA was enacted, the Office of Appeals instituted the Collection Appeals Process (CAP), a program for taxpayers to contest IRS collection decisions such as imposing a lien or a levy.<sup>171</sup> CAP hearings bear striking similarity to CDP hearings,<sup>172</sup> though the IRS continues to conduct CAP and CDP procedures separately.<sup>173</sup> CAP hearings are more widely available than the statutorily created CDP hearings but, like equivalent hearings, taxpayers do not have a statutory right to a CAP hearing, determinations flowing from CAP are not appealable to any court and collection actions and the statute of limitations are not affected by CAP hearings.<sup>174</sup>

#### IV. *TUCKER V. COMMISSIONER*

Larry Tucker owes back taxes.<sup>175</sup> He doesn't deny this fact, nor the amount the government seeks, but he wants to pay it back on his terms pursuant to an offer in compromise.<sup>176</sup> Under the CDP framework, as long as Tucker's repayment suggestion fits certain criteria set by the IRS, generally

169. *See id.* § 301.6330-1(h)(2), Q&A H2 (“Only determinations resulting from CDP hearings are appealable to the Tax Court.”).

170. *See id.* § 301.6330-1(i)(2), Q&A I3.

171. IRM 8.24.1.1.1 (May 27, 2004). This is not the same CAP as the Compliance Assurance Program, which involves larger corporate taxpayers and continuous audits. I.R.S. Announcement 2005-87, 2005-2 C.B. 1144.

172. *See* Treas. Reg. § 301.6330-1(d)(2), Q&A D6 (noting similarity between CAP and CDP hearings). The government contends that the RRA codified CAP, adding only the right to raise collection alternatives and the right to judicial review. Respondent's Memorandum of Law in Opposition to Petitioner's Motion to Remand at 28, *Tucker v. Comm'r*, 135 T.C. 114 (2010) (No. 3165-06L).

173. *See* IRM 8.24.1.1.1 (May 27, 2004); *see also* Treas. Reg. § 301.6330-1(d)(2), Q&A D6; I.R.S. Pub. 1660, 3 (Rev. June 2011) (“You may appeal many IRS collection actions to the IRS Office of Appeals (Appeals) . . . . The two main procedures are Collection Due Process and Collection Appeals Program.”).

174. I.R.S. Pub. 1660, 3. In addition to the times CDP hearings are available, CAP hearings are available after the termination or rejection of an installment agreement and the denial of an offer in compromise. *Id.* at 1. One treatise also notes that under CAP procedures the Appeals Officer was limited to reviewing the proposed collection action and could not consider other appropriate collection alternatives. Robert E. McKenzie & Jaqualin Friend Peterson, *Prior Rights*, in 14 MERTENS LAW OF FED. INCOME TAX'N § 49E:20 (West 2011) (“The prior administrative appeals procedure did not grant such broad authority to the Appeals Officer. . . . The Appeals Division was not given the authority to find best remedy for the taxpayer.”).

175. Carlton M. Smith, *Does Collection Due Process Violate the Appointments Clause?*, 126 TAX NOTES 777, 777 (2010).

176. *Id.*

the law says he should be able to do so.<sup>177</sup> But the Settlement Officer that heard Tucker's case didn't think his offer met the IRS criteria, nor did the Appeals Team Manager that signed off on the decision to reject it.<sup>178</sup> Tucker first argues that the relevant statutes require that an Appeals Officer – as opposed to a Settlement Officer – conduct the hearing, but the Tax Court has rejected this argument before.<sup>179</sup> In the alternative, Tucker argues that regardless of who holds the hearing, that person is an inferior officer under the Constitution and therefore must be appointed.<sup>180</sup> Tucker doesn't argue that Appeals Officers were constitutional officers before the RRA was enacted, but focuses on the performance of statutorily required CDP hearings entitled to judicial review.<sup>181</sup> Tucker in essence argues that when Congress named Appeals Officers in the Internal Revenue Code, their positions became statutorily required.<sup>182</sup> In the alternative, Tucker claims that the Appeals Team Managers, as the final “deciders” of Appeals' determinations, are officers and must be appointed.<sup>183</sup> Essentially, Tucker argues that *someone* in Appeals has been delegated and is exercising significant authority pursuant to the RRA and therefore must be appointed.

The Government instead argues Congress did not name the specific position of Appeals Officer in the Code, but merely referred to “appeals officer” in the general sense of an employee of Appeals.<sup>184</sup> It argues that the individuals who decide CDP hearings do not hold positions established by law and that conducting CDP hearings does not amount to an exercise of significant

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177. An IRS actor has discretion to choose not to follow the established criteria in the guidelines, but is subject to an abuse-of-discretion standard of review in Tax Court. *See Woodral v. Comm'r*, 112 T.C. 19, 23 (1999) (“In order to prevail, a taxpayer must prove that the Commissioner exercised this discretion arbitrarily, capriciously, or without sound basis in fact or law.”).

178. Smith, *supra* note 175, at 777-78.

179. *See Tucker v. Comm'r*, 135 T.C. 114, 153-55 (2010) (citing *Powers v. Comm'r*, 98 T.C.M. (CCH) 318 (2009); *Reynolds v. Comm'r*, 92 T.C.M. (CCH) 260 (2006)).

180. *See id.* at 116.

181. Tucker doesn't pursue this argument for Appeals Officers before the enactment of the RRA because it isn't necessary to his case; though he does not concede that they were not constitutional officers before the RRA. *See* Petitioner's Supplemental Reply Memorandum at 20-21 & n.13, *Tucker*, 135 T.C. 114 (No. 3165-06L).

182. Tucker also argued that § 3465(b) of the RRA mandates the existence of Appeals Officers by requiring that “[t]he Commissioner of Internal Revenue shall ensure that an appeals officer is regularly available within each State.” Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3465(b), 112 Stat. 685, 768; *see Tucker*, 135 T.C. at 155-56.

183. Reply Memorandum at 9, *Tucker*, 135 T.C. 114 (No. 3165-06L); *see also* Smith, *supra* note 175, at 778-79.

184. Transcript of Record at 6, *Tucker*, 135 T.C. 114 (No. 3165-06L).

authority.<sup>185</sup> The Government also argues that the notice of determination issued at the end of the CDP hearing is not a final agency determination, and therefore, no one in Appeals exercises significant authority.<sup>186</sup> The Government concedes that the positions in question are continuing,<sup>187</sup> and no one contends that any personnel in Appeals are appointed currently.<sup>188</sup>

### A. *The Tax Court's Decision*

*Tucker* defines officers as “any appointee exercising significant authority pursuant to the laws of the United States” including “all appointed officials exercising responsibility under the public laws of the Nation,” but excluding lesser functionaries subordinate to an officer.<sup>189</sup> To begin, *Tucker* reviews the Office of Appeals and its long history.<sup>190</sup> *Tucker* notes that the RRA marked the first time that the Office of Appeals was mentioned directly in statute – but that this reference did not establish the office that had existed in some form for eighty years, but “presume[d] its prior existence.”<sup>191</sup> Similarly, *Tucker* points out that Appeals Officers, a specific position within Appeals, have existed and performed many of the same functions required by the CDP statutes for years.<sup>192</sup> The Tax Court notes that, although the Office of Appeals existed before the RRA, it is arguable that the multiple references to the Office in that Act now require its existence.<sup>193</sup> The court dismisses that argument as irrelevant because, it says, the issue is not whether the Office itself was established by law but whether any position within that Office was established by law.<sup>194</sup>

*Tucker* then questions whether CDP determinations are final.<sup>195</sup> The court looks at the myriad of circumstances when the taxpayer and Appeals might meet again after a CDP hearing or when a determination made by Appeals may be altered or abandoned in the future.<sup>196</sup> The court notes, for example, that the statute provides for retained jurisdiction within the Office of Appeals, signaling that Congress recognized that the notice of determination

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185. See Respondent’s Memorandum of Law in Opposition to Petitioner’s Motion to Remand at 1, *Tucker*, 135 T.C. 114 (No. 3165-06L).

186. See *id.*

187. *Id.* at 6-7 n.5.

188. *Tucker*, 135 T.C. at 116.

189. *Id.* at 123 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126, 131 (1976) (per curiam)).

190. *Id.* at 134-36.

191. *Id.*

192. *Id.* at 136.

193. *Id.* at 153 n.69.

194. *Id.*

195. *Id.* at 140.

196. *Id.* at 140-44.

might not conclude the matter forever.<sup>197</sup> Appeals can revisit a collection action, for instance, if a taxpayer's financial circumstances change.<sup>198</sup> More importantly for determining finality, the court says, the IRS Chief Counsel who argue the case in front of the Tax Court are not bound by the reasoning or positions within Appeals' notice of determination.<sup>199</sup> Extending the finality requirement to other agencies, the court notes that if a taxpayer brings a refund suit in federal district court, the Department of Justice is not bound by the Appeals Office's reasoning or determination in defending the suit.<sup>200</sup> Finally, *Tucker* notes that CDP determinations do not have res judicata or collateral estoppel implications for either party, and therefore cannot be final.<sup>201</sup> The court also reviews the differing circumstances when a taxpayer can get subsequent relief from an adverse decision, even a court decision, and concludes "there are numerous circumstances in which [CDP] determinations may not be the IRS's last word."<sup>202</sup>

*Tucker* looks to other administrative positions for comparison and concludes that the "CDP hearing officer . . . is by no means unique in the context of administrative adjudication."<sup>203</sup> It reviews the powers of administrative law judges (ALJs) employed by the federal government, who hold on-the-record hearings governed by the Administrative Procedure Act (APA).<sup>204</sup> The APA authorizes ALJs "to require attendance at the hearing, to administer oaths and affirmations, to issue subpoenas, to rule on offers of proof and receive evidence, and to order depositions."<sup>205</sup> *Tucker* concludes that these powers are greater than the powers wielded by an informal-hearing conductor such as an Appeals Officer.<sup>206</sup> Having determined that the Office of Appeals and Appeals Officers existed before the RRA, CDP determinations are not

197. *Id.* at 141.

198. *Id.* at 143 (citing 26 U.S.C. § 6330(d)(2)(B) (2006)).

199. *Id.* at 143-44 (citing 26 C.F.R. § 601.106(a)(1)(i), (d) (2011); Rev. Proc. 87-24, 1987-1 C.B. 720; I.R.S. Gen. Couns. Order No. 4 (Jan. 19, 2001)). This blanket statement is somewhat misleading. Under the authorities cited by the Tax Court, IRS Chief Counsel or the Department of Justice may abandon arguments or reasoning adopted by the IRS Appeals Office and can settle cases in certain circumstances. Courts, however, in conducting an abuse-of-discretion review, cannot uphold an administrative action on grounds not advanced by the agency in the original determination. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). Therefore, although IRS Chief Counsel and the Department of Justice may settle cases out of court on their own theories or abandon arguments made by the Appeals Office, they cannot advance new reasoning to uphold Appeals' determination.

200. *Tucker*, 135 T.C. at 146-47.

201. *Id.* at 145-46.

202. *Id.* at 149.

203. *Id.* at 151-52.

204. *Id.*

205. *Id.* (citing 5 U.S.C. §§ 554-57 (2006)).

206. *Id.* at 152, 165.

final, and CDP conductors are less powerful than their ALJ counterparts, *Tucker* turns to an analysis of the officer test.

*Tucker* applies a three-part test for officer status: (1) the position must be established by law, and it must be an office, meaning (2) the position must exercise significant authority, and (3) the position must be continuing.<sup>207</sup> The court begins with the “threshold trigger” that a position is established by law.<sup>208</sup> First, the court notes that the CDP conductor position is not expressly established.<sup>209</sup> For example, the court points out, no statute says, “[t]here shall be, within the Internal Revenue Service Office of Appeals, officers designated as Appeals Officers, who shall conduct CDP hearings.”<sup>210</sup> The court contrasts this lack of statutory language with other positions clearly set out in statute, citing *Landry* and *Freytag*.<sup>211</sup> The court admits this lack of express establishment cannot be dispositive but says it gives some indication of officer status.<sup>212</sup> Second, the court notes that the RRA assigned duties to the *preexisting* Office of Appeals, in contrast to other circumstances when Congress has created entirely new positions.<sup>213</sup> This finding, too, weighed against finding officer status. Finally, the court rejects that the RRA established any individual position by law because it assigns the responsibility for CDP hearings not to a specific position but to the entire Office of Appeals.<sup>214</sup> The court determines that although the statutes use the phrase “appeals officer,” Congress used the phrase in a generic way to mean a representative of the Appeals Office, rather than specifying the distinct position of Appeals Officer.<sup>215</sup> Buttressed by the statute’s requirement that an impartial “officer or

207. *Id.* at 152, 159-60. The IRS conceded in this case that Appeals Officers’ positions are continuing. *Id.* at 160.

208. *Id.* at 152 (quoting *Landry v. FDIC*, 204 F.3d 1125, 1133 (D.C. Cir. 2000)).

209. *Id.* at 153.

210. *Id.*

211. *Id.* at 152-53.

212. *Id.* at 153 (noting that a lack of explicit establishment by statute is “some indication that the position in question is *not* an office ‘established by Law’”); *id.* at 158 (“[I]f the phrase ‘established by Law’ were construed to mean that the Appointments Clause can apply only to a position expressly created by a statute, then abuses could arise.”).

213. *Id.* at 153.

214. *Id.* at 155.

215. *Id.* As a basis for this conclusion, *Tucker* relies in part on legislative history that “on one occasion” used the term “appeals officer” immediately followed by the more generic term “appellate officer.” *Id.* at 154-55. The court implies this was the only time the phrase “appeals officer” was used in the relevant legislative history and read its nexus to the more general phrase “appellate officer” to signify that Congress was using “appeals officer” in a generic sense. *Id.* On a review of the legislative history cited by the court, however, the term “appeals officer” is actually cited ten times, with “appellate officer” on its heels only in the instance cited by the Tax Court. H.R. REP. NO. 105-599, at 263-66 (1998). The term “appellate officer” is used one additional time (not immediately following mention of an “appeals officer”), when

employee” hold the hearing, *Tucker* finds that Congress did not intend to assign these duties specifically to the preexisting position of Appeals Officer.<sup>216</sup> The court notes it is impossible “to point to a position responsible for conducting CDP hearings and to question whether the person in that position was an ‘inferior Officer.’”<sup>217</sup> Thus the court concludes that the RRA did not establish any position and that the statute uses “appeals officer” to refer to any employee of the Office of Appeals who holds CDP hearings.<sup>218</sup>

Although *Tucker* decides the CDP conductor position was not established by law, the court continues to analyze whether CDP conductors exercise significant authority.<sup>219</sup> Analyzing *Buckley*, *Tucker* notes significant authority could include the power to issue “determinations without supervision under an Act of Congress.”<sup>220</sup> But *Tucker* also concludes that the *Freytag* Court, in finding officer status, relied heavily on the ability to issue final decisions with “independent authority,”<sup>221</sup> as did the D.C. Circuit Court of Appeals in *Landry*.<sup>222</sup> Specifically, *Tucker* notes that the *Landry* ALJs did not have significant authority because their decisions were not final, despite their power to hold formal on-the-record hearings.<sup>223</sup> *Tucker* reasons that CDP conductors, responsible for mere informal hearings, have less authority than the ALJs in *Landry*.<sup>224</sup> Therefore, because it had found that CDP determinations are not final and because CDP conductors have fewer and lesser powers than on-the-record hearing conductors, the court determines no one in the Office of Appeals exercises significant authority.<sup>225</sup>

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the conferees note that “to the extent practicable, the same appellate officer will hear the taxpayer with regard to both lien and levy issues.” *Id.* at 266.

216. *Tucker*, 135 T.C. at 154 (“This shows that Congress did not use the term ‘officer’ in any specialized sense.”).

217. *Id.* at 155.

218. *Id.* *Tucker* also considers whether a position established by administrative regulations can be considered “established by Law.” *Id.* at 156-59. *Tucker* points out that several appellate courts have held that positions established by regulation may require appointment, but it does not appear the established-by-law criteria was challenged in those cases. *Id.* at 156-58 (citing *Willy v. Admin. Review Bd.*, 423 F.3d 483 (5th Cir. 2005); *Holtzclaw v. Sec. of Labor*, 172 F.3d 872 (6th Cir. 1999); *Varnadore v. Sec. of Labor*, 141 F.3d 625 (6th Cir. 1998); *Pennsylvania v. HHS*, 80 F.3d 796 (3d Cir. 1996)).

219. *Id.* at 159-60.

220. *Id.* at 162.

221. *Id.* at 163.

222. *Id.* (“This lack of finality led the Court of Appeals to conclude that the ALJs in question are not officers.”).

223. *Id.* at 164-65 (“Despite this authority [to hold on-the-record hearings], the Court of Appeals for the District of Columbia Circuit held that the ALJs in *Landry* are not officers because they lack final decisionmaking power.”).

224. *Id.* at 165.

225. *See id.* at 164-65.

*Tucker* concludes by reiterating that CDP conductors do not exercise authority as significant as their counterparts in many other administrative agencies who hold on-the-record hearings.<sup>226</sup> “To survey these thousands of employees important to the administration of law and single out IRS ‘appeals officers’ as somehow requiring constitutional appointment would be unwarranted.”<sup>227</sup>

### B. Weaknesses in *Tucker*

Beginning with the only clue from the constitutional text, the Tax Court recognizes that an office must be “established by Law.”<sup>228</sup> From there, *Tucker* analyzes ways in which an Appeals Officer is not established by law, but never defines the phrase.<sup>229</sup> For example, *Tucker* notes that no statute establishes the position of Appeals Officer and specifically finds that the RRA did not create a new position.<sup>230</sup> *Tucker* also relies on Congress’s use of the phrase “officer or employee” in one section of the RRA to indicate that Congress did not intend to create an office.<sup>231</sup> The factors the Tax Court considered thus imply a definition: a position is established by law if it is (1) expressly set out in statute (or perhaps regulations), and (2) was not a preexisting position; alternatively, a position is established by law if there is some manifestation of congressional intent to establish an office.<sup>232</sup>

All of these factors – whether a position is set out expressly in statute, whether a position is preexisting, and whether Congress manifests an intent to create an office – are inappropriate to test whether an office exists because they are subject to congressional manipulation. *Tucker* itself recognizes that a position need not be created explicitly by statute as Congress could skip this step intentionally to avoid the Appointments Clause.<sup>233</sup> But excluding government actors with preexisting positions involves the same danger. Congress could assign duties to a preexisting nonofficer and thereby retain control over appointments or allow a more diffuse appointment method than the process that would otherwise be constitutionally required. Likewise, reliance on congressional intent to create a formal office places officer status squarely

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226. *Id.* at 165.

227. *Id.* at 165-66.

228. *Id.* at 152.

229. *Id.* at 153-56.

230. *Id.* at 155.

231. *Id.* at 154.

232. Presumably, if an office could be established by regulation, the intent that would be relevant would be that of the promulgating agency.

233. *Id.* at 158 (“For example, Congress could take a pre-existing low-level position (which had been created by the Executive Branch pursuant to a general authorization like section 7804(a), and which was not subject to appointment by the President or a Head of a Department) and could invest it with significant additional power, thus evading the Appointments Clause by seeming to avoid ‘establishing’ the office.”).

within the control of Congress because Congress controls the manifestations of its intent. For example, Congress could fail to provide for formal appointment although it intends to delegate significant authority. Thus, *Tucker's* established-by-law analysis gives Congress a blueprint<sup>234</sup> to avoid the Appointments Clause – create what would otherwise be an office by assigning significant authority to a preexisting nonofficer and add the words “or employee” to destroy any presumption of officer status.

Although *Tucker* determines CDP conductors are not established by law, it reviews whether they exercise significant authority. *Tucker* holds that CDP conductors and Appeals Team Managers do not have significant authority because their decisions are not final.<sup>235</sup> The most troubling assertion in this context is that finality means the absolute “last word.”<sup>236</sup> *Tucker's* definition of finality requires that the IRS, and even other agencies,<sup>237</sup> never be allowed to revisit the issue, even in the taxpayer’s favor.<sup>238</sup> *Tucker* also imposes judicial requirements in an agency context by holding that the notices of determination are not final because they do not trigger res judicata or collateral estoppel.<sup>239</sup>

*Tucker* relies on *Landry* for placing dispositive weight on finality in determination of significant authority.<sup>240</sup> Even assuming that *Landry's* emphasis on finality is a correct interpretation of *Freytag* (which is not clear<sup>241</sup>), *Landry* does not define final as the last word, but by contrast to “recommendatory power.”<sup>242</sup> The ALJs did not issue the final decision because the FDIC Board was *required* to review their determinations de novo and make its own findings of fact.<sup>243</sup> In this structure, the ALJ’s decisions had no force without the Board’s sanction.<sup>244</sup> This structure is similar to how the IRS has structured CDP hearings, in that Appeals Team Managers review determinations of CDP conductors, and the managers make the determination that is subject to court review.<sup>245</sup> But this realization should not end the inquiry because

234. See *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991).

235. *Tucker*, 135 T.C. at 164.

236. *Id.* at 143-44, 149.

237. *Id.* at 146-47 (noting that a CDP determination is not binding because the Department of Justice would not be bound by it in defending a later refund suit in district court); *id.* at 141 n.57 (noting same for Department of Justice defending an action to quiet title).

238. *Id.* at 147.

239. *Id.* at 146.

240. *Id.* at 163-65.

241. See *supra* notes 105-06 and accompanying text.

242. *Landry v. FDIC*, 204 F.3d 1125, 1132 (D.C. Cir. 2000).

243. *Id.* at 1130.

244. *Id.*

245. I.R.S. Deleg. Order Appeals-193-1, IRM Exh. 8.22.2-4 (Mar. 16, 2010) (formerly I.R.S. Deleg. Order 8-a (Rev. 1)). There does not seem to be a published



Tucker also challenges the Appeals Team Managers' authority. Therefore, before concluding, the court should look more closely at the constitutional status of Appeals Team Managers or perhaps at whether the IRS's imposed structure of CDP hearings comports with the requirements of the RRA.

The Tax Court's formulation of finality leaves little, if any, room for a decision to be final. *Tucker* notes, for example, that if a CDP notice of determination sustained a lien, the IRS could later determine to release it.<sup>246</sup> The STJs in *Freytag*, or even presidentially appointed Tax Court judges, could not pass this test. After any decision, the Tax Court retains discretion to grant a new trial, reconsider findings of fact, and vacate or revise decisions.<sup>247</sup> On the other hand, even if the Tax Court did not change its mind, the IRS could choose not to enforce the judgment against the taxpayer, perhaps due to a later innocent-spouse claim or changed financial circumstances – the equivalent of parties settling after obtaining a court ruling.<sup>248</sup> These later events do not change the final character of the court's original decision. Applying this narrow definition of finality, Congress would be free to grant itself appointment power over Tax Court and other judges whose decisions are not the absolute last word.

The scope of a CDP hearing is also important. What is at issue in a CDP hearing is a particular collection episode: either one collection action (a lien) or the beginning of a series of related collection actions (a levy) *at that time*.<sup>249</sup> The *Tucker* court views this limited scope as a sign of lesser authority.<sup>250</sup> But this type of review is similar to a lawsuit in which Article III judg-

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standard of review for CDP determinations within the Office of Appeals, and nothing otherwise suggests that Appeals Team Managers are required to give deference to the CDP conductors' findings.

246. See *Tucker v. Comm'r*, 135 T.C. 114, 141-42 (2010).

247. TAX CT. R. 161 (reconsideration of findings or opinion with or without a new trial); TAX CT. R. 162 (vacate or revise decision). Although the Rules contain general thirty-day deadlines, any finality gleaned from those limits is negated by the addition of "unless the Court shall otherwise permit." TAX CT. R. 161-62. These rules are similar to the retained jurisdiction provisions of the RRA. See 26 U.S.C.A. § 6330(d) (2011). The Government notes that a retained-jurisdiction hearing will only be granted if a taxpayer alleges that "the original determination is not being followed or that it should be reconsidered because the taxpayer's circumstances have changed for the worse." Respondent's Reply to Petitioner's Supplemental Memorandum of Law and the Center for the Fair Administration of Taxes' Amicus Curiae Memorandum at 12, *Tucker*, 135 T.C. 114 (No. 3165-06L).

248. See Memorandum of Center for the Fair Administration of Taxes as Amicus Curiae at 19, *Tucker*, 135 T.C. 114 (No. 3165-06L).

249. Treas. Reg. § 301.6330-1(d)(1)-(d)(2), Q&A D1 (as amended in 2006). If the IRS asserts a new tax for the same year, the taxpayer would receive a new hearing even if the old tax was settled or in repayment. *Id.* § 301.6330-1(d)(1)-(d)(2), Q&A D6.

250. *Tucker*, 135 T.C. at 164.

es are limited to the case or controversy before them.<sup>251</sup> A judge who does not settle all future breaches or disputes regarding a contract, for example, still exercises significant authority.

Additionally, finality may look different to an agency than it does to a court. To impose judicial standards of finality such as *res judicata* and to consider finality dispositive implies that only the judiciary or those individuals acting in a judicial capacity may exercise significant authority. Yet historically this implication is not true.<sup>252</sup> At the time the Supreme Court discussed finality in *Freytag*, the majority did not view the Tax Court in an administrative light, which explains the Court's discussion of *res judicata* and collateral estoppel as elements of finality without discussion of the potential administrative context.<sup>253</sup> Those considerations are appropriate for evaluating the finality of a court decision but should not be applied in an administrative context without consideration of whether the agency acted in a judicial capacity.<sup>254</sup>

Even accepting *Tucker's* equation of "final" with "last word," the court admits that in some circumstances the determination made at Appeals binds the government.<sup>255</sup> Under *Freytag*, this power is enough. If a government actor performs any duties that amount to significant authority (and the other requirements are met) then he must be appointed.<sup>256</sup>

251. U.S. CONST. art. III, § 2, cl. 1.

252. See *Buckley v. Valeo*, 424 U.S. 1, 133-34, 271 (1976) (per curiam) ("Neither has it been disputed and apparently it is not now disputed that the Clause controls the appointment of the members of a typical administrative agency . . ."); *id.* at 139 (finding rule-making powers to be significant authority); *id.* at 126 (citing *Myers v. United States*, 272 U.S. 52 (1926) (postmaster first class recognized as an officer); *Ex parte Hennen*, 38 U.S. 225 (1839) (clerk of district court)).

253. *Freytag v. Comm'r*, 501 U.S. 868, 891 (1991) (5-4 decision) (finding the Tax court to be a court of law). *But see* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162 (2010) (adopting the position that the Securities and Exchange Commission is an Executive department because it is a "free-standing, self-contained entity in the Executive Branch" (quoting *Freytag*, 501 U.S. at 915 (Scalia, J., dissenting))).

254. Agency determinations generally do trigger *res judicata* when the agency acts in a judicial or quasi-judicial capacity. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (stating that *res judicata* should apply when an "issue has been decided by an administrative agency, be it state or federal, which acts in a judicial capacity") (citation omitted); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) ("When an administrative agency is acting in a judicial capacity and resolve[s] disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose."), *superseded by statute*, Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383.

255. *Tucker*, 135 T.C. at 145 n.60.

256. *Freytag*, 501 U.S. at 882 (finding that if an actor was an officer for some of his duties then he was an officer for all of them).

*Tucker* also finds that the Appointments Clause doesn't apply if significant authority is assigned to an entire office, rather than to a particular position.<sup>257</sup> The court declines to impose responsibility because it can't tell who is doing what.<sup>258</sup> The court notes, "After the enactment of this statute, it was not possible to point to a position responsible for conducting CDP hearings and to question whether the person in that position was an 'inferior Officer.'"<sup>259</sup> Taking that reasoning to its logical conclusion provides Congress yet another route to bypass the Constitution. Congress could assign the duty to enforce a certain statute, for example, to an existing department composed entirely of nonofficers and then claim appointment rights for all employees of that department.

The *Tucker* court fell into the same trap when it examined whether any position within Appeals was established by law. While admitting that the multiple references to the Appeals Office in the RRA arguably required its existence (presumably meaning that the Office arguably was established by law), the court found this conclusion to be irrelevant because it denied that any specific position was required by the RRA.<sup>260</sup> Yet, if the RRA requires CDP hearings to be performed by the Appeals Office, then someone must exist within that office to conduct them. Thus those personnel – the CDP conductors – are required by the RRA. The specious distinction between the Office of Appeals and a specific position therein creates a gap for Congress to abuse the appointment power. As *Tucker*'s counsel notes, "Congress cannot get around the Clause merely by not giving a name to an employee to whom it delegates significant authority [of the United States]."<sup>261</sup>

Finally, the Tax Court improperly views a decision that Appeals Officers or Appeals Team Managers need to be appointed as singling them out among various government actors with similar authority.<sup>262</sup> Deciding the case at hand cannot be considered unfair attention. The CDP conductor and Appeals Team Manager are the only positions the Tax Court was charged with evaluating and the only positions that had interested parties fully arguing that case before it.<sup>263</sup> Furthermore, *Tucker* implies that because some similar positions are not appointed currently, then CDP conductors should not be appointed either. This reasoning is reminiscent of the early decisions that

257. See *Tucker*, 135 T.C. at 153.

258. See *id.* at 155.

259. *Id.*

260. *Id.* at 153 n.69.

261. Carlton M. Smith, *Does the Failure to Appoint Collection Due Process Hearing Officers Violate the Constitution's Appointments Clause?*, 10 J. TAX PRAC. & PROC. 35, 42 (2008) [hereinafter Smith, *Failure to Appoint*].

262. *Tucker*, 135 T.C. at 165-66.

263. The court did request briefing on similarly situated government actors, but this cannot substitute for individual review of a particular position by interested parties. Order dated Jan. 16, 2009, *Tucker*, 135 T.C. 114 (No. 3165-06L).

held that the method of appointment indicates officer status.<sup>264</sup> It is possible that, upon scrutiny, courts would find those individuals holding similar positions to be constitutional officers in violation of the Appointments Clause. Of course, the Tax Court's apparent concerns about the disruption to government are valid and practical. The Supreme Court, facing similar arguments in *Buckley*, replied, "[O]ne cannot dispute the basis for this sentiment as a practical matter . . . . But such fears, however rational, do not by themselves warrant a distortion of the Framers' work."<sup>265</sup> If the Tax Court is concerned with consistent application of the Appointments Clause and perhaps wishes to minimize the disruption its decision may cause, the most valuable thing it could do is establish a robust, explicit framework for distinguishing an officer from an employee. One suggestion for such a framework follows.

## V. AN ALTERNATIVE ANALYSIS

### A. *Established by Law and Significant Authority*

*Tucker* does not define what it means by the phrase "established by Law," and its implied definition does not protect the separation of powers and political accountability. A more workable definition reads "established by Law" to mean that the two requirements for officer status – exercising significant or sovereign authority and holding a continuing position – must be themselves established by law. That is, they must be set forth by some legal authority.<sup>266</sup> This definition provides a path for courts to assess objectively whether an office was established by law without resorting to the intent of Congress. Congressional intent is important, but courts should not ask whether Congress intended to create an office, but whether Congress intended to (and did) delegate sovereign authority to a continuing position. Within these confines, Congress could refer to a position in any manner it likes and

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264. See, e.g., *United States v. Germaine*, 99 U.S. 508, 509-10 (1878).

265. *Buckley v. Valeo*, 424 U.S. 1, 134 (1976) (per curiam).

266. This definition was offered to the *Tucker* court through the Office of Legal Counsel (OLC) memorandum. See *Officers*, *supra* note 38, at 120. *Tucker* dismissed the directly-on-point memorandum in a footnote by characterizing its argument as: "[I]f the positions existed, then the positions were 'established by law.'" *Tucker*, 135 T.C. at 157-58 & n.77. The court noted that "the assumption is problematic, in that it risks reading out of the Constitution the phrase 'established by Law', if the Appointments Clause would mean the same thing with or without that phrase." *Id.* at 158. Admittedly, the Tax Court's formulation of the OLC's position would be a poor argument. But the Tax Court misreads the memo, which instead defines "a position, however labeled" as an office if "(1) it is invested by legal authority with a portion of the sovereign powers of the federal Government, and (2) it is 'continuing.'" *Officers*, *supra* note 38, at 1. Specifically, it interprets the words "established by Law" in the Appointments Clause to mean that these two essential elements of an office must be set forth by some legal authority. *Id.* at 120.

delegate sovereign authority to preexisting positions or entire offices but would not be able to break out of its constitutional confines.

*Tucker* next addresses “significant authority” by reviewing the CDP conductor’s ability to issue a final decision, holding that one factor to be dispositive.<sup>267</sup> *Tucker*’s holding is in line with several formulations of significant authority that define it as encompassing the power to bind the government.<sup>268</sup> The view that reconciles more compelling precedent, however, is that finality is a strong indicator of significant authority, though there may be instances where an actor exercises significant authority yet is subject to review. For example, the *Landry* majority noted that purely recommendatory powers were not “fatal in themselves,” and other courts have considered a lack of finality to mean that the actor is an inferior as opposed to principal officer.<sup>269</sup> In *Buckley*, the Supreme Court noted that power to issue advisory opinions can constitute significant authority but found that information-gathering and investigative duties do not.<sup>270</sup> One potential inference is that an actor with recommendatory powers is not exercising significant authority if he performs information-gathering and investigative duties. This interpretation preserves a court’s ability to review an actor’s full range of responsibilities in context to determine if he is an employee, an inferior officer or a principal officer.

More disturbing, however, is *Tucker*’s equation of finality with “last word,” which leaves little room for any government actor to be considered an officer. A better test of finality, especially in the administrative context, is the developed administrative-law definition, because it measures the power of a government actor to administer the laws.<sup>271</sup> Administrative law finality is “generally understood to mean [an] action which is necessary and sufficient for judicial review.”<sup>272</sup> In the administrative context, final is not the “last word” possible but is defined in juxtaposition to preliminary, procedural, or

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267. *Tucker*, 135 T.C. at 164-65.

268. See *Officers*, *supra* note 38, at 32 (quoting 1 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 493, 610 (Government Printing Office 1907)).

269. *Landry v. FDIC*, 204 F.3d 1125, 1134 (D.C. Cir. 2000) (noting that the *Freytag* Court did not indicate that “purely recommendatory powers [are] fatal in themselves”); *id.* at 1142 (Randolph, J., concurring in result) (citing *Edmond v. United States*, 520 U.S. 651, 663 (1997)).

270. *Buckley*, 424 U.S. at 137, 140-41.

271. See *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 241-43 (1980); *Duffy*, *supra* note 1, at 23 (“The power to reach a final administrative decision – one that the courts are required to respect with deference – surely means that the members of the [Board of Patent Appeals and Interferences] are exercising significant authority under the law and are thus officers for purposes of the Appointments Clause.”).

272. See *Sec’y of Educ. Review of A.L.J. Decisions*, 15 Op. O.L.C. 8, 10 (1991).

intermediate.<sup>273</sup> In a 1991 opinion, the OLC noted that an administrative action can be “final” even if it is subject to review within the administrative agency, because it found that, “[f]inal agency action’ . . . is a familiar and well-developed term of administrative law referring to the action after which judicial review may be available.”<sup>274</sup> This formulation abides by five criteria the Supreme Court identified that demonstrate finality in the administrative context: To be final, the administrative action should (1) be a definitive statement of the agency’s position; (2) have a direct and immediate effect; (3) have the “status of law;” (4) be such that immediate compliance with the determination is expected; and (5) concern a legal question “fit for judicial resolution.”<sup>275</sup> Thus, finality in part measures when a decision is entitled to judicial review.<sup>276</sup> “[T]he relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action.”<sup>277</sup>

Some commentators perceive an additional requirement that the decision receive some level of deference upon review.<sup>278</sup> Administrative finality thus may incorporate degrees of review. An actor whose decisions are always subject to statutorily mandated *de novo* review before taking effect would be least likely to be an officer. On the opposite end of the spectrum, an actor whose determinations have immediate effect without further approval by the agency (i.e., can be followed immediately by judicial review) likely would be exercising significant authority.<sup>279</sup> If the administrative decision is entitled to

273. 5 U.S.C. § 704 (2006); *see also* Sec’y of Ed. Review of A.L.J. Decisions, *supra* note 272, at 10 (“Under these authorities, an agency’s decision need not be its last word on a subject to be considered ‘final agency action.’” (citing *Standard Oil*, 449 U.S. 232; *Carter/Mondale Presidential Comm., Inc. v. FEC*, 711 F.2d 279 (D.C. Cir. 1983))).

274. Sec’y of Ed. Review of A.L.J. Decisions, *supra* note 272, at 7.

275. *Carter/Mondale*, 711 F.2d at 286 (citing *Standard Oil*, 449 U.S. at 239-40); *see also Standard Oil*, 449 U.S. at 241-43 (finding issuance of a complaint was not a final agency action because it had “no legal force or practical effect upon [the company’s] daily business other than the disruptions that accompany any major litigation”).

276. *Carter/Mondale*, 711 F.2d at 285 n.9 (“[W]e conclude . . . Congress also assumed that ‘[a]gency action made reviewable by statute’ would be final action.” (alteration in original)).

277. *Port of Bos. Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970) (citations omitted).

278. *Duffy*, *supra* note 1, at 23 (citing *Dickinson v. Zurko*, 527 U.S. 150 (1999)).

279. This spectrum could also inform the debate between an inferior and principal officer. Judge Randolph, concurring in *Landry*, pointed out a potential problem if the imposition of review and the applicable standard are chosen and implemented by the agency: “It would be odd for the constitutional status of a special trial judge to depend on an internal rule of procedure, particularly since the Tax Court had discretion to

deference from the reviewing tribunal, the case is stronger that the administrative actor who made the decision was exercising significant authority: where “administrative adjudicators render either final agency decisions or decisions that are entitled to deference at the next stage of administrative review, the government has consistently conceded that the adjudicators are officers subject to the Appointments Clause.”<sup>280</sup>

This definition of administrative finality mirrors the discussion of significant authority. A final decision in the administrative context is one that has immediate legal effect on a citizen without further action by the agency.<sup>281</sup> This definition corresponds with the suggestion that actions taken must have immediate legal consequences without further review to amount to significant authority.<sup>282</sup> Equating significant authority to administrative finality also is consistent with the reasoning in *Landry*. *Landry* found that the ALJs were not officers because they merely made recommendations to the FDIC Board that made the final agency determination.<sup>283</sup> If the ALJs performed their duties, but the Board did not act, *Landry* might still be in banking today. The ALJ’s decision would not be considered a point of finality in administrative law, and correspondingly, was not considered significant authority.<sup>284</sup>

Beyond finality, the Supreme Court provides several other examples of what constitutes significant authority. *Buckley* found that when government actors move beyond the types of duties that Congress could delegate to its own staff and into the administration and enforcement of public law, they become officers.<sup>285</sup> *Buckley* provided examples such as having the power to make rules, issuing advisory opinions, or determining eligibility for funds or office.<sup>286</sup> *Freytag* added to the list items that were “more than ministerial tasks,” such as taking testimony, conducting trials, ruling on the admissibility of evidence, and enforcing discovery orders.<sup>287</sup> Consistent with these authorities, the Office of Legal Counsel concluded that sovereign authority encompasses “binding the Government or third parties for the benefit of the public,

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pick whatever standard of review it saw fit.” *Landry v. FDIC*, 204 F.3d 1125, 1141-42 (D.C. Cir. 2000) (Randolph, J., concurring).

280. Duffy, *supra* note 1, at 24 (citing *Ryder v. United States*, 515 U.S. 177, 180, 186-88 (1995); *Willy v. Admin. Review Bd.*, 423 F.3d 483, 491 (5th Cir. 2005)).

281. See *Carter/Mondale*, 711 F.2d at 286 (citing *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 137, 239-40 (1980)).

282. Officers, *supra* note 38, at 32 (quoting 1 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 493, 610 (Government Printing Office 1907)).

283. *Landry*, 204 F.3d at 1130 (citing 12 CFR § 308.38-.40).

284. See *Standard Oil*, 449 U.S. at 246-47 (holding that an intermediate decision without immediate legal consequences is not final).

285. *Buckley v. Valeo*, 424 U.S. 1, 137-38 (1976) (per curiam).

286. *Id.* at 140-41.

287. *Freytag v. Comm’r*, 501 U.S. 868, 881-82 (1991).

such as by administering, executing, or authoritatively interpreting the laws.”<sup>288</sup>

*Landry* also noted that “exercis[ing] significant discretion” was “a magic phrase under the *Buckley* test.”<sup>289</sup> Discretion seems to play a similar role as finality. Its existence indicates significant authority, but its absence does not preclude officer status.<sup>290</sup> *Freytag* suggests that a high level of discretion may outweigh an actor’s lack of final decision-making power.<sup>291</sup> Responding to the Commissioner’s argument that STJs were not officers because they could not enter final decisions in § 7443A(b)(4) cases, the Court said “this argument ignores the significance of the duties and discretion that special trial judges possess.”<sup>292</sup>

*Tucker* determined that because Congress delegated these duties to an entire office there was no position established by law.<sup>293</sup> The State of Ohio faced a similar scheme in 1857 and concluded:

It is true, the general assembly seems to have carefully avoided giving to the defendants any official name or designation. But surely this is immaterial to the question. The official or unofficial character . . . is to be determined, not by their name, nor by the presence or absence of an official designation, but by the nature of the functions devolved upon them. . . . [T]he mere fact that their functions are nameless can not alter the case.<sup>294</sup>

Rather than allowing Congress to circumvent the Constitution this way, judges should ask whether Congress delegated significant authority on a continuing basis. If so, whoever legally exercises that authority is a constitutional officer.<sup>295</sup>

The *Tucker* court faced another interesting problem. After Congress delegated significant authority to someone in the Appeals Office, the IRS

288. Officers, *supra* note 38, at 9-10.

289. *Landry v. FDIC*, 204 F.3d 1125, 1134 (D.C. Cir. 2000).

290. *Pennsylvania v. HHS*, 80 F.3d 796, 802 (3d Cir. 1996) (“The broad discretion and authority vested in the Board clearly establishes that its members are officers and not employees . . . .”); Officers, *supra* note 38, at 54-55 (“*Buckley* did rightly indicate that discretion in administering the laws typically will constitute the exercise of delegated sovereign authority, and therefore is of course relevant. . . . But *Buckley* did not say, nor does it follow, that such discretion is *necessary*.”).

291. *Freytag*, 501 U.S. at 881.

292. *Id.*

293. *Tucker v. Comm’r*, 135 T.C. 114, 155 (2010).

294. *State v. Kennon*, 7 Ohio St. 546, 557-58 (1857).

295. The Tax Court recognized there was a sort of unnamed, de facto position created by the RRA when it held that “an ‘appeals officer’ is any ‘officer or employee’ in the IRS Office of Appeals to whom is assigned the task of conducting a CDP hearing under section 6330(b)(3).” *Tucker*, 135 T.C. at 155.



internally split the baby by giving authority to exercise the statutorily mandated duties to one group and the authority to make the corresponding final decision to another group.<sup>296</sup> Neither Congress nor an agency should be able to avoid the Constitution in this way.<sup>297</sup> Assuming this split is a permissible action under the RRA, someone still should be appointed if the RRA delegates significant authority. Pragmatism suggests that the final decision maker be deemed as exercising the statutory duties because he or she holds the ultimate authority to ensure that the law is enforced. This construction preserves an agency's authority and flexibility to structure its own procedures within the bounds of the law, without discouraging internal review of enforcement actions. As an indirect benefit, assuming those supervisors who have the final say are fewer in number, this construction would minimize the administrative disruption of a holding that someone in the Office of Appeals must be appointed. Most importantly, this construction prevents Congress or administrative agencies from subverting the Appointments Clause by dividing the statutorily required duties from the related final decision-making power.

### B. Application to Tucker

Applying this alternative framework to *Tucker*, whether any position in Appeals is established by law would hinge on whether anyone exercised significant authority delegated by legal authority.<sup>298</sup> The RRA mandates that CDP hearings must occur and the Office of Appeals must perform them.<sup>299</sup> Congress delegated the following powers and duties when appropriate: determination of a taxpayer's liability; determination of whether the taxpayer will be granted relief from that liability; determination of whether an alternative payment plan is appropriate, including the ability to accept a lesser amount than is owed from the taxpayer in satisfaction of the entire liability; and determination of whether to proceed with a lien or levy on a taxpayer's assets or wages, including the ability to decide whether the proposed collection action would cause a hardship and whether the proposed collection action balances efficient tax collection with the corresponding intrusion into the taxpayer's life.<sup>300</sup>

Performing CDP hearings involves administering and enforcing public laws, specifically the RRA. While a CDP conductor or Appeals Team Man-

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296. I.R.S. Deleg. Order Appeals-193-1, IRM Exh. 8.22.2-4 (Mar. 16, 2010) (formerly I.R.S. Deleg. Order 8-a (Rev. 1)).

297. *Freytag*, 501 U.S. at 880 ("The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic.").

298. In a case where it is not conceded, the court would also need to review whether the positions are continuing. *See, e.g.*, *United States v. Eaton*, 169 U.S. 331, 377-78 (1898); *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890).

299. *See* 26 U.S.C. § 6320 (2006); 26 U.S.C.A. § 6330 (2011).

300. *See* 26 U.S.C. § 6320; 26 U.S.C.A. § 6330.

ager cannot do the exact same things as the STJs in *Freytag* (such as ruling on the admission of evidence or administering oaths), the duties prescribed by the RRA are more than ministerial. For example, CDP conductors can hear witnesses and evaluate evidence.<sup>301</sup> More significantly, CDP conductors or the Appeals Team Managers determine on the government's behalf whether to proceed with a direct enforcement action on a taxpayer's assets.<sup>302</sup> The D.C. Circuit Court of Appeals has called an enforcement action "the paradigm of 'direct governmental authority.'"<sup>303</sup> The *Tucker* court focuses on the limited scope and jurisdiction of the CDP conductor's review, but CDP conductors also can compromise or forgive a liability on behalf of the government and determine a taxpayer's liability.<sup>304</sup>

Furthermore, CDP conductors and Appeals Team Managers exercise an incredible amount of discretion, including the ultimate ability to treat similarly situated taxpayers differently.<sup>305</sup> The statutory language used in the RRA demonstrates that the CDP conductor has discretion by requiring the conductor to consider all relevant issues raised and "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary."<sup>306</sup> The deferential abuse-of-discretion review standard itself states that CDP conductors exercise discretion.<sup>307</sup> While CDP hearings are not on-the-record proceedings, this fact arguably increases the CDP conductor or Appeals Team Manager's discretion because they are bound by fewer rules and requirements.<sup>308</sup>

CDP conductors and Appeals Team Managers have the power to affect the interest of individuals because, in an administrative sense, CDP determinations are final. Although the IRS could revisit CDP determinations in lim-

301. See *supra* notes 138, 140 and accompanying text.

302. See *supra* notes 155-57 and accompanying text.

303. *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 824 (D.C. Cir. 1993).

304. See *Kindred v. Comm'r*, 454 F.3d 688, 696 (7th Cir. 2006) ("The decision to entertain, accept or reject an offer in compromise is squarely within the discretion of the appeals officer . . .").

305. *Jaffe v. Comm'r*, 87 T.C.M. (CCH) 1349 (2004) ("[T]he settlement discretion given to the IRS . . . is 'at its heart a discretion to treat similarly situated taxpayers differently.'" (quoting *Bunce v. United States*, 28 Fed. Cl. 500, 509 (1993))).

306. 26 U.S.C.A. § 6330(c)(3) (2011).

307. See Smith, *Failure to Appoint*, *supra* note 261, at 43.

308. A. Lavar Taylor from the Center for the Fair Administration of Taxes points out a CDP conductor's additional discretion, provided by I.R.S. Chief Counsel Notice CC-2006-019, at 33 (Aug. 18, 2006), available at <http://www.unclefed.com/ForTaxProfs/irs-ccdm/2006/cc-2006-019.pdf>, to determine when to conclude the CDP hearing and to consider issues otherwise precluded by statute. Memorandum of Center for the Fair Administration of Taxes as Amicus Curiae at 15-16, *Tucker v. Comm'r*, 135 T.C. 114 (2010) (No. 3165-06L). It is beyond the scope of this Article whether discretion provided by the IRS Chief Counsel is relevant to the evaluation of significant authority under the Appointments Clause.

ited circumstances, the notice of determination is not a preliminary, procedural, or intermediate step.<sup>309</sup> It has real and immediate consequences for the taxpayer, including a trigger of available court review.<sup>310</sup> If the taxpayer misses the window for review, the IRS can enforce the CDP determination, including confiscation of the taxpayer's property, without further notice.<sup>311</sup> And if a requirement of deference upon review exists, it is easily met. The Tax Court reviews CDP determinations for an abuse of discretion except when certain claims are involved.<sup>312</sup> But under *Freytag*, because the determinations are reviewed with deference for at least some of the cases, someone in Appeals is exercising significant authority pursuant to the laws of the United States and must be appointed.<sup>313</sup> In sum, a CDP determination is an enforcement action against a taxpayer with immediate consequences, and therefore its issuance cannot be said to be "sufficiently removed from the administration and enforcement of the public law as to permit [its] being performed by persons not 'Officers of the United States.'"<sup>314</sup>

Assuming the IRS's internal delegation of final decision-making authority to Appeals Team Managers is valid, then at least Appeals Team Managers should be appointed under the Appointments Clause. In the current CDP process, personnel conducting the hearings are similar to the ALJs in *Landry* with mere recommendatory power. Appeals Team Managers issue and sign the notice of determination.<sup>315</sup> Without the sanction of the Appeals Team Manager, the CDP conductor's determination does not have any effect on the taxpayer.<sup>316</sup> Determinations by Appeals Team Managers do have legal consequences for taxpayers without further action by the IRS.<sup>317</sup> Although the

309. 5 U.S.C. § 704 (2006).

310. A notice of determination, by the Tax Court's parlance, is often called a "ticket" to the Tax Court." *Weber v. Comm'r*, 122 T.C. 258, 263 (2004) (citing *Offiler v. Comm'r*, 114 T.C. 492, 498 (2000)).

311. *Danshera Cords, How Much Process Is Due? I.R.C. Sections 6320 and 6330 Collection Due Process Hearings*, 29 VT. L. REV. 51, 78 (2004) ("When a taxpayer fails or refuses to schedule a hearing, the Appeals officer has no choice but to issue a determination based on the available record so that collection can continue.").

312. *See Sego v. Comm'r*, 114 T.C. 604, 610 (2000); *Goza v. Comm'r*, 114 T.C. 176, 181-82 (2000).

313. *Freytag v. Comm'r*, 501 U.S. 868, 882 (1991) (finding that if an actor is an officer for some of his duties then he must be appointed).

314. *Buckley v. Valeo*, 424 U.S. 1, 139, 141 (1976) (per curiam); *see also* *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 824 (D.C. Cir. 1993).

315. *See supra* note 155 and accompanying text.

316. *See* I.R.S. Deleg. Order Appeals-193-1, IRM Exh. 8.22.2-4 (Mar. 16, 2010) (formerly I.R.S. Deleg. Order 8-a (Rev. 1)) (providing nondelegable authority to Appeals Team Managers to review and approve CDP determinations).

317. A determination letter approved by an Appeals Team Manager provides the jurisdictional basis for Tax Court review and starts the clock on the taxpayer's right to that review. *See* 26 U.S.C.A. § 6330(d)(1) (2011); *Lunsford v. Comm'r*, 117 T.C. 159, 160-61 (2001).

statute does not mention Appeals Team Managers, even *Tucker* agrees an office need not be created explicitly.<sup>318</sup> By overseeing the CDP hearings and issuing the final determinations, the Appeals Team Managers administer and enforce the RRA.<sup>319</sup> Therefore, Appeals Team Managers “exercise significant authority pursuant to the laws of the United States” and should be appointed.

If a court found that Appeals Team Managers must be appointed, this finding may not help Tucker himself. In *Buckley*, where the Supreme Court found the appointment method for Federal Election Commission members violated the Appointments Clause, the Court validated the past actions of the Commission and further stayed its decision for thirty days, allowing Congress a grace period to fix the problem.<sup>320</sup> This remedy, then, did not help anyone who may have been injured by the improper appointment of the members up to that point.

If Tucker wins on appeal his best case scenario is a remand to Appeals for a new hearing, held or approved by a constitutionally appointed officer. Tucker’s goal in bringing this challenge was to secure a new hearing, specifically with an Appeals Officer, based on his perception that Settlement Officers and Appeals Account Resolution Specialists are less qualified to understand and apply the intricacies of the Internal Revenue Code.<sup>321</sup> Tucker argues that the use of Settlement Officers and Appeals Account Resolution Specialists infringes on the rights of taxpayers because those CDP conductors receive less training and are not as qualified as Appeals Officers.<sup>322</sup> If a court adopts the reasoning of this Article – that Appeals Team Managers but not CDP conductors are officers – perhaps greater political accountability will lead to better-trained CDP conductors and Appeals Team Managers.<sup>323</sup> Oth-

318. *Tucker v. Comm’r*, 135 T.C. 114, 158 (2010).

319. A finding that Appeals Team Managers are constitutional officers also could reconcile the disagreement surrounding the phrase “officer or employee” as used once in the RRA. See *supra* notes 216-17. As noted, the Tax Court relied on Congress’s use of “officer or employee” to indicate that Congress did not intend to create a constitutional office. See *Tucker*, 135 T.C. at 154. Although congressional intent to create an office should not be controlling, this language could be consistent with the Appeals Team Manager holding a constitutional office, while a mere employee conducted the CDP hearing. The statute uses the phrase “officer or employee” only once, to specify who will hold the hearing. 26 U.S.C.A. § 6330. By contrast, the statute does not say that an “officer or employee” may make the final determination. *Id.*

320. *Buckley v. Valeo*, 424 U.S. 1, 144 (1976) (per curiam).

321. Petitioner’s Supplemental Reply Memorandum at 28-30, *Tucker*, 135 T.C. 114 (No. 3165-06L).

322. See *Smith*, *Failure to Appoint*, *supra* note 261, at 49.

323. *Id.* at 48-49.

erwise, the perceived problem of unqualified CDP conductors will be left to Congress to fix.<sup>324</sup>

## VI. CONCLUSION

Under a more robust analysis of the phrase “established by Law,” utilizing the administrative law definition of finality, Appeals Team Managers exercise significant authority pursuant to the laws of the United States and therefore should be appointed. This conclusion could affect many government agencies. Our current political climate might further aggravate the effect of a holding that Appeals Team Managers have to be appointed. Supreme Court Chief Justice John Roberts recently commented on the congressional stalemate in confirming judicial appointments,<sup>325</sup> and many federal agencies would face that same threat to efficient governance if the Appointment Clause is interpreted to mean that Appeals Team Managers and similar counterparts must be confirmed with the advice and consent of the divided Senate. But this concern is not new. Justice White noted the same problem in *Buckley*: “There is no doubt that the development of the administrative agency in response to modern legislative and administrative need has placed severe strain on the separation-of-powers principle in its pristine formulation.”<sup>326</sup> Justice White, like the Court, did not find this concern a sufficient excuse to “create a broad exception to the requirements of that Clause.”<sup>327</sup> Recently, the Court stated that the “fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.”<sup>328</sup>

Even though this conclusion may require a large number of new appointments, our government has faced the annual appointment of roughly

324. Tucker also may have a purely procedural problem because he raised this challenge for the first time in the Tax Court. *See Tucker*, 135 T.C. at 116-17. The Supreme Court has differed on whether this is fatal to a challenge of the authority of one conducting a hearing. *Compare Freytag v. Comm’r*, 501 U.S. 868, 879 (1991) (using the Court’s discretion to hear this case even though the Appointments Clause challenge was raised for the first time on appeal), *with United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (holding that a claim to set aside the decision of an Interstate Commerce Commission hearing could not be maintained because it was not raised below). Even in *Freytag*, four Justices did not believe the Court should reach the issue. *Freytag v. Comm’r*, 501 U.S. 868, 892 (1991) (Scalia, J., concurring in part and concurring in judgment).

325. John Roberts, 2010 Year-End Report on the Federal Judiciary 7-8 (Dec. 31, 2010) (transcript available at <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf>).

326. *Buckley v. Valeo*, 424 U.S. 1, 280-81 (1976) (per curiam) (White, J., concurring in part and dissenting in part).

327. *Id.* at 281.

328. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010) (quoting *Bowsher v. Synar*, 478 U.S. 714, 736 (1986)).

240,000 military officers in the past.<sup>329</sup> This staggering number begs the question whether these appointments are meaningful and continue to serve the purposes of the Appointments Clause.<sup>330</sup> But fixes are available. Congress should streamline the process by allowing appointment by heads of departments. Although this streamlining would require Congress to disperse with the legislative check on the appointment power, it would allow the Senate to step back politically from those appointments, pull negative attention away from stalemates or delays, and lighten its significant confirmation load. The Supreme Court recognized in 1878 that the Framers added the inferior-officers language for this reason:

[F]oreseeing that when offices became numerous, and sudden removals necessary, [the primary] mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments.<sup>331</sup>

Congress also has the benefit of case-by-case court determinations that appointments are needed. For example, a reversal of *Tucker* would only immediately affect the IRS. Therefore, Congress can take advantage of this slow, deliberate process to resolve the problem proactively for similarly situated government actors.

The first danger of *Tucker* is that it threatens the political accountability promised by the Appointments Clause. The Clause “articulates a limiting principle” that “forbids Congress to grant the appointment power to inappro-

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329. Although they are inferior officers, Justice Souter noted in *Weiss* that Congress had not authorized an alternative appointment mechanism, leaving military officers to be appointed by the President with the advice and consent of the Senate. *Weiss v. United States*, 510 U.S. 163, 182 (1994) (Souter, J., concurring). He further noted that the officers were reappointed upon promotion. *Id.* at 183. The most current statistics available from the Department of Defense indicate that there were 226,619 active military officers in 2005, but this does not shed light on how many appointments were necessary that year. See U.S. DEP’T OF DEFENSE, SELECTED MANPOWER STATISTICS 3 (2005), available at <http://siadapp.dmdc.osd.mil/personnel/M01/fy05/m01fy05.pdf>.

330. Justice Souter noted,

Writing in 1953, one observer pointed out that if each of the 49,956 nominations for military office sent to the Senate in 1949 “were considered for one minute . . . , it would require 832 hours to pass upon the nominations [or] an average of more than 5 hours each day that the Senate is in session.”

*Weiss*, 510 U.S. at 191 n.6 (alteration in original) (quoting JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 331 (1953)).

331. *United States v. Germaine*, 99 U.S. 508, 510 (1878).

priate members of the Executive Branch”<sup>332</sup> because “[t]he diffusion of power carries with it a diffusion of accountability.”<sup>333</sup> Even if the President approved of the encroachment, it could not stand.<sup>334</sup> “The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic.”<sup>335</sup> Thus, it is inappropriate for anyone less than the President, the Head of a Department, or a Court of Law to appoint officers. Without political accountability, the competence of those individuals exercising significant governmental authority may suffer, which is what *Tucker* suggests has happened with CDP conductors.

Whether Appeals Team Managers are hired instead of appointed may not seem to threaten the separation of powers because they are still hired by the Executive branch. To see the potential abuse one must take the implications of *Tucker* one step further. Ultimately, the Tax Court’s reasoning leads to the conclusion that Congress could empower itself to appoint CDP conductors or Appeals Team Managers as enforcers of the RRA. But this power goes too far. The Appointments Clause permits “the reasonable implication, even in the absence of express words, . . . that as part of his executive power [the President] should select those who were to act for him under his direction in the execution of the laws.”<sup>336</sup> Conversely, “[n]either was the Legislative Branch to have the power to appoint those who were to enforce and administer the law.”<sup>337</sup> In reality, it is unlikely that members of Congress are attempting to appoint their friends and supporters as Appeals Team Managers to control the enforcement of IRS collection actions, as powerful as those

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332. *Freytag v. Comm’r*, 501 U.S. 868, 880 (1991).

333. *Free Enter. Fund*, 130 S. Ct. at 3155 (2010); *see also id.* at 3156 (“Even when a branch does not arrogate power to itself, therefore, it must not ‘impair another in the performance of its constitutional duties.’” (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996))).

334. *Id.* at 3155 (“But the separation of powers does not depend on the views of individual Presidents nor on whether ‘the encroached-upon branch approves the encroachment.’” (citation omitted)); *Weiss*, 510 U.S. at 188 n.3 (Souter, J., concurring) (“Depending on the means used to circumvent the Appointments Clause, ‘diffusion’ can implicate either the anti-aggrandizement or the anti-abdication principle . . . . And if Congress, with the President’s approval, authorizes a lower level Executive Branch official to appoint a principal officer, it again has adopted a more diffuse and less accountable mode of appointment than the Constitution requires; this time it has violated the bar on abdication.”).

335. *Freytag*, 501 U.S. at 880.

336. *Myers v. United States*, 272 U.S. 52, 117 (1926), *overruled in part by Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935); *see also Buckley v. Valeo*, 424 U.S. 1, 271 (1976) (White, J., concurring in part and dissenting in part).

337. *Buckley*, 424 U.S. at 274.

positions may be. Yet, even where a situation seems innocuous, courts must reject an arrangement that provides a blueprint to avoid the Constitution.<sup>338</sup>

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338. *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 825 (D.C. Cir. 1993) (quoting *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276-77 (1991)).



