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No Healthcare Penalty? No Problem: No Due Process

Steven J. Willis[†] & Nakku Chung^{††}

I. INTRODUCTION

The Patient Protection and Affordable Health Care Act (“Act”), which mandates all individuals to have health insurance and “penalizes”¹ those who do not, is unconstitutional for five well-documented and well-argued reasons:

1. The mandate for individuals to purchase healthcare (“Mandate”) exceeds Congress’s power to regulate commerce among the several states under the Commerce Clause² of article I, section 8, clause 3 of the U.S. Constitution.³
2. The penalty imposed on individuals who fail to honor the Mandate (“Penalty”) is an unconstitutional direct tax because it is unapportioned, as required by article I, section 1, clause 3,⁴ and by article 1, section 9, clause 4.⁵

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¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 18091, 124 Stat. 119, 242 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified primarily in scattered sections of 42 U.S.C.)

² The author succumbs to use of the traditional nomenclature, *to wit* “Commerce Clause,” albeit an infinitive phrase.

³ “To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3. For support of the Commerce Clause violation, see *Is the Obama Health Care Reform Constitutional? Fried, Tribe and Barnett Debate the Affordable Care Act*, HARVARD LAW SCHOOL (Mar. 28, 2011), <http://www.law.harvard.edu/news/spotlight/constitutional-law/is-obama-health-care-reform-constitutional.html>. The authors herein agree with the position espoused by Barnett.

⁴ “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers” U.S. CONST. art. I, § 2, cl. 3. The reference to numbers is clearly a reference to population according to an “actual Enumeration.” *Id.*

⁵ “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” *Id.* at art. I, § 9, cl. 4. For support of the apportionment violation, see generally Steven J. Willis & Nakku Chung, *Of Constitutional Decapitation and Healthcare*, 128 TAX NOTES 169 (2010); Steven J. Willis & Nakku Chung, *Oy Yes, the Healthcare Penalty Is Unconstitutional*, 129 TAX NOTES 725 (2010); Steven J. Willis & Nakku Chung, *Credits vs. Taxes: The Constitutional Effects on the Health Care Reform Debate*, (Wash. Legal Found., Working Paper No. 176, 2011).

3. The Penalty does not satisfy the Necessary and Proper Clause of article I, section 8, clause 18.⁶
4. The Act violates the Tenth Amendment reservation of unenumerated powers to the states and to the people.⁷
5. The mechanical, procedural aspects of the Penalty violate the due process guarantee in the Fifth Amendment.⁸

This Article focuses on the fifth reason: the lack of *procedural* due process. So far, *all courts*⁹ and *almost all commentators*¹⁰ have failed to discuss this fatal flaw.

⁶ “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers” U.S. CONST. art. I, § 8, cl. 18. For support of the necessary and proper violation, see Brief of Steven J. Willis, Urging Reversal at 9-16, *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3359 (U.S. Nov. 30, 2011) (No. 11-679), <http://aca-litigation.wikispaces.com/file/view/Willis+amicus+%2805.23.11%29.pdf> [hereinafter *Seven-Sky Brief*].

⁷ “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. While others have argued the point, the authors neither adopt nor deny their arguments; instead, the authors suggest the issue is clear: if the Congressional assertion of the power to issue the mandate exceeds its enumerated power, then it must be one of the powers reserved to the states or to the people.

⁸ “No person shall be . . . deprived of life, liberty, or property, without due process of law” *Id.* at amend. V.

⁹ Of the district courts considering the issue, two have ruled against the Act on Commerce Clause grounds and three have ruled favorably. See *Virginia ex rel. Cuccinelli*, 728 F. Supp. 2d 768, 782 (N.D. Va. 2010), *vacated*, 656 F.3d 253 (4th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3221 (U.S. Sept. 30, 2011) (No. 11-420) (unconstitutional); *Florida ex rel. McCollum v. U.S. Dep’t of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1161-62 (N.D. Fla. 2010) (unconstitutional); *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 895 (E.D. Mich. 2010), *aff’d*, 651 F.3d 529 (6th Cir. 2011), *petition for cert. filed*, (U.S. July 26, 2011) (No. 11-117) (constitutional); *Mead v. Holder*, 766 F. Supp. 2d 16, 34 (D.D.C. 2011), *reh’g en banc denied sub nom. Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3359 (U.S. Nov. 30, 2011) (No. 11-679) (constitutional); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 635 (W.D. Va. 2010), *vacated*, No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011), *petition for cert. filed*, 80 U.S.L.W. 3240 (U.S. Oct. 7, 2011) (No. 11-438) (constitutional). Of the circuit courts considering the issue, three have ruled in favor of the government and one in favor of the petitioners. See *Virginia ex rel. Cuccinelli*, 656 F.3d 253 (ruling for the government on standing grounds, without reaching the merits); *Seven-Sky*, 661 F.3d 1 (ruling for the government on Commerce Clause grounds); *Thomas More Law Ctr.*, 651 F.3d 529 (ruling for the government on Commerce Clause grounds); *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted sub nom. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 603 (2011) (mem.), *and cert. granted*, 132 S. Ct. 604 (2011) (No. 11-398) (mem.) (argued Mar. 26-27, 2012), *and cert. granted in part*, 132 S. Ct. 604 (2011) (No. 11-400) (mem.) (argued Mar. 28, 2012) (ruling for petitioner on Commerce Clause grounds).

¹⁰ Steven J. Willis argued the due process issue in brief to the D.C. Circuit. See *Seven-Sky Brief*, *supra* note 6, at 24-28. The authors herein amplify and alter his argument. In particular, in the brief, the author conditioned his due process concerns on the “penalty” not being a tax. *Id.* at 25. Herein, the authors reflect a changed opinion and analysis: the violations of due process exist regardless of whether the penalty is a tax. To the extent the brief suggested the collection due process (CDP) process (incorrectly labeled as “CDC” in the brief) was non-essential for trust fund and other taxes not subject to section 6212 notice of deficiency procedures, the authors now reject that suggestion and regret having made it.

Indeed, Chairman Roth was correct in 1998 in demanding additional taxpayer protection for taxpayers subject to *taxes* not covered by section 6212 procedures. Press Release No. 105-276, Uncle Fed’s Tax Board, Summary of Highlights of Chairman Roth’s Comprehensive IRS Reform Legislation (1998), *available at* <http://www.unclefed.com/TxprBoR/1998/105-276.html> (discussing the reform’s protection of taxpayers). Also, Willis questioned whether the section 5000A(g) levy and lien limitations apply to a section 6722 penalty or to section 6601 interest. See *Seven-Sky Brief*, *supra* note 6, at 27. Willis and Chung herein conclude the limitation would not apply to those sections. This issue is not directly relevant to the due process argument, however, except to limit it to the section 5000A penalty.

II. WHO MUST WIN WHAT?

Contrary to what many have argued, the heavy burden in this litigation is on the government because it must win *all* the following issues:

1. Commerce: If the Court finds the Mandate violates Congress's power to regulate commerce, the Act would necessarily fail: without the Mandate, the remainder serves little purpose and much harm. Even if the Court found the provision severable (which would be a mistake), the remaining provisions would likely die politically.¹¹ Consider the Act's requirement of pre-existing condition coverage in health insurance plans.¹² Without the Mandate, the Penalty would be superfluous: section 5000A(b)(1) imposes the penalty only on those who fail to satisfy the section 5000A(a)(1) mandate. Thus, without the Mandate, nothing would exist to penalize.¹³ Healthy people could wait to purchase insurance until they had a serious condition. That is akin to allowing homeowners to wait to purchase fire insurance until their house is on fire. This alone would cause all health insurance policies to be actuarially unsound—an intolerable situation which Congress would have to fix.¹⁴
2. Unapportioned Direct Tax: If the Court finds the Penalty to be an unapportioned direct tax, the Act would similarly fail: without the Penalty, the Mandate is meaningless. Without the Penalty, the Mandate is unenforceable because the only enforcement mechanism is the Penalty.¹⁵ An unenforceable mandate is not a mandate but a suggestion. Widespread polling data suggests how unpopular the Mandate is.¹⁶ Common sense suggests many individuals would ignore the healthcare *suggestion*, particularly young and healthy ones.¹⁷

¹¹ See *Is the Obama Health Care Reform Constitutional?*, *supra* note 3 (pointing out Professor Barnett's view that Congress did not want to pay politically for using its tax power to increase healthcare access). This is a political prediction; after the Democrats lost the Senate seat in Massachusetts to Senator Brown—and thus lost their sixty-vote-near-filibuster-proof majority—the chance of Congress passing material changes to the healthcare legislation, other than possible repeal, seems remote.

¹² Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 18091, 124 Stat. 119, 242 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified primarily in scattered sections of 42 U.S.C.).

¹³ Section 5000A(a)(1) imposes the Mandate and paragraph (b)(1) imposes the Penalty only on persons who fail to satisfy the Mandate. I.R.C. § 5000A(a)(1) (2010). If the Court were to strike just the Mandate, no one could fail to satisfy it and thus no one could trigger the Penalty.

¹⁴ Although one can imagine the political issues involved in the repeal of the pre-existing condition provision, one can also see that it would have to be changed were the Mandate or the Penalty held to be unconstitutional. However politically difficult such a change might be, generally if something has to happen, it does. The alternative, all health insurance companies refusing to write any further coverage, would be unacceptable and politically worse than keeping the pre-existing condition provision.

¹⁵ Section 5000A(g)(2)(A) waives the application of criminal sanctions for failure to comply with the Mandate. I.R.C. § 5000A(g)(2)(A). Similarly, subparagraph (g)(2)(B) precludes the Secretary from filing liens and levies with regard to section 5000A failures. *Id.* § 5000A(g)(2)(B). The only enforcement mechanism Congress provided was the subsection (b)(1) penalty, *id.* § 5000A(g)(2)(B)(1); however, if the Court were to strike that subsection, it would leave the subsection (a) mandate with no enforcement provision.

¹⁶ See, e.g., *Kaiser Health Tracking Poll*, KAISER FAM. FOUND. (Mar. 2011), <http://www.kff.org/kaiserpolls/upload/8166-f.pdf>; *CNN Poll: Majority Oppose Individual Mandate*, CNN (June 9, 2011), <http://politicalticker.blogs.cnn.com/2011/06/09/162714/>.

¹⁷ See Daniel L. Mellor, *The Individual Mandate Tax: Healthcare's Toothless Watchdog*, 130 TAX NOTES 105, 112 (2011).

3. Necessary and Proper: Even if the Court finds the Mandate consistent with Congress's power to regulate commerce, and even if the Court further finds the Penalty not to be a tax, the Court could (and should) nevertheless find the Penalty as either unnecessary or improper. The Commerce Clause is not self-actuating; by itself, it grants no enforcement power.¹⁸ In contrast, the taxing power is self-actuating; it includes the power to lay and collect taxes.¹⁹ To enforce regulations of commerce, Congress must justify the regulation as both necessary and proper.²⁰ If the government fails to carry that burden, both the Mandate and the Penalty fail. If the Mandate fails, the Act (or at least most of it) also fails.
4. Tenth Amendment: If the Court were to find that the Act violates the Tenth Amendment reservation of unenumerated powers to the states and to the People, the Act would fail.²¹
5. Procedural Due Process: If the Court were to find the Act's procedures for Penalty enforcement lacking procedural due process, the Penalty itself must fail and with it, the Mandate, which would become "the Suggestion." In turn, serious portions of the Act—such as pre-existing condition coverage²²—would arguably become unpalatable; without the Mandate, but with pre-existing condition coverage, all health insurance plans would become unsound and would either disappear or become far more expensive.²³

Conventional wisdom has been to place the heaviest burden on the Act's opponents who allegedly must win all arguments.²⁴ To the contrary, the government must defend and win on all fronts: any one of the above five fatal flaws is sufficient to stop the Act.

¹⁸ See U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power - To make all Laws which shall be necessary and proper for carrying into Execution the *foregoing* Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (emphasis added)). James Madison argued, in Federalist 44: "Without the *substance* of this power, the whole Constitution would be a dead letter." THE FEDERALIST NO. 44, at 251, 253-54 (James Madison) (Am. Bar Ass'n ed., 2009); see also *United States v. Comstock*, 130 S. Ct. 1949, 1962 (2010) ("The powers 'delegated to the United States by the Constitution' include those specifically enumerated powers listed in Article I along with the implementation authority granted by the Necessary and Proper Clause." (quoting *New York v. United States*, 505 U.S. 144, 156, 159 (1992))).

¹⁹ U.S. CONST. amend. XVI ("Congress shall have the power to levy taxes . . .").

²⁰ See *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) ("[A]s in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States.'" (quoting U.S. CONST., art. I, § 8)).

²¹ *Id.* at 52 (O'Connor, J., dissenting) ("Congress cannot use its authority under the Clause to contravene the principle of state sovereignty embodied in the Tenth Amendment.").

²² Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2704, 124 Stat. 119, 154 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified primarily in scattered sections of 42 U.S.C.).

²³ "Like in a masonry arch, the keystone of the individual mandate enables all the other pieces of reform to lock into place. Without it, the arch crumbles. Think about it. People could wait until they were seriously ill to buy coverage, knowing that insurance companies could not turn them down. Insurers, because they would be covering mostly sick people, would need to raise premiums to stay afloat." Karen Davenport, *Yes: It's the Key to Reform*, Section of *Should Everyone Be Required to Have Health Insurance?*, WALL ST. J. (Jan. 23, 2012), <http://online.wsj.com/article/SB10001424052970204124204577152842650354880.html>.

²⁴ See generally Seven-Sky Brief, *supra* note 6.

III. SUMMARY OF THE DUE PROCESS ARGUMENT

The Internal Revenue Service (IRS) has the power to assess and to collect the penalty for failing to have adequate health insurance.²⁵ Unlike other taxes and penalties, the lack-of-health-insurance penalty has virtually no procedural protections for individuals subjected to it.²⁶

The IRS must notify the individual of its assessment and intent to collect before it may collect the amount assessed. It need provide neither a formal nor an informal hearing, no opportunity to respond, no opportunity to litigate the issue in a court, nor even a significant waiting period prior to collection.²⁷ Instead, if the IRS believes an individual lacks health insurance and thus owes the Penalty, it must notify him or her of such and then it may collect the amount due.²⁸ An individual only has the right to seek a refund administratively *after* payment.²⁹ If that fails, the individual may then sue for a refund in either federal district court or the Claims Court.³⁰ The individual will have the burden of proof.³¹ Arguably, this amounts to the *civil* equivalent to a criminal presumption of guilt.³²

²⁵ *Seven-Sky v. Holder*, 661 F.3d 1, 5 (D.C. Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3359 (U.S. Nov. 30, 2011) (No. 11-679).

²⁶ *Seven-Sky Brief*, *supra* note 6, at 26.

²⁷ *Id.* (outlining the statutory framework for hearings). Section 5000A(g)(1) eliminates the possibility of criminal proceedings, as well as civil proceedings involving liens and levies. I.R.C. § 5000A(g)(1) (2010). It then subjects the penalty to other subchapter 68B procedures. Section 6671(a) provides: “The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes.” I.R.C. § 6671(a) (1986). Subchapter 68B does not otherwise provide procedures relevant to the section 5000A(b)(1) penalty. Section 6201 grants the Secretary authority to assess a tax. I.R.C. § 6201(a) (2012). Subchapter 63B then provides the procedural mechanism for many taxes, but not including the section 5000A(b)(1) penalty. I.R.C. § 6211 (1988). These procedural rules provide the routine procedures for Tax Court jurisdiction pre-collection, predicated on a notice of deficiency. I.R.C. § 6212 (1998). Section 6301 grants the Secretary authority to collect taxes. I.R.C. § 6301 (1986). Section 6303 requires that “notice and demand” occur within sixty days of assessment. I.R.C. § 6303 (1986). Section 6302(a) grants the Secretary general authority to promulgate regulations regarding the collection of taxes. I.R.C. § 6302(a)(1) (1986). No such regulations yet exist in relation to the section 5000A(b)(1) penalty and nothing in section 5000A requires any particular regulation, waiting period, or opportunity to be heard; hence, the Secretary may grant such periods or opportunities pursuant to the general section 6302 regulatory authority, but Congress did not require the Secretary to exercise that authority. Section 6321 grants the Secretary authority to file liens on taxpayer property. I.R.C. § 6321 (1998). Sections 6320 and 6326 provide procedural appeal rights to taxpayers subject to such liens. I.R.C. §§ 6320 (2006), 6326 (1988). Section 5000A(g)(2)(B)(i) precludes the Secretary from filing a notice of lien and thus precludes the operation of the lien procedural protections. Section 6330 provides procedural protections for taxpayers subject to levy. I.R.C. § 6330 (2006). However, section 5000A(g)(2)(B)(ii) precludes the Secretary from levying with regard to a section 5000A penalty; hence, the levy protections cannot apply. No other significant procedural collection protections exist in the Internal Revenue Code.

²⁸ Mellor, *supra* note 17, at 108.

²⁹ *Seven-Sky Brief*, *supra* note 6, at 28 (noting citizens will only have opportunity to sue for a refund).

³⁰ *See id.*

³¹ *Oppliger v. United States*, 637 F.3d 889, 892 (8th Cir. 2011).

³² Leslie Book, *The New Collection Due Process Taxpayer Rights*, 86 TAX NOTES 1127, 1132 n.30 (2000) (“Changes to the burden of proof in tax cases substantively did little but were important and worth enacting because of the perception that under prior law criminal defendants enjoyed a presumption of innocence and taxpayers were presumed “guilty” in dealings with the IRS.”).

IV. SUMMARY OF THE STANDING ARGUMENT

States have standing to assert the Penalty is an unconstitutional unapportioned direct tax.³³ Apportionment is an interest of the states much more than of the People.³⁴ As such, if anyone has standing to raise the issue, states do. The Court of Appeals for the Fourth Circuit improvidently dismissed the Commonwealth of Virginia.³⁵ The Supreme Court must reverse that aspect of the case. Even if the Court finds the Penalty not to be a tax, surely Virginia has the right to contest the issue.

V. BACKGROUND ON TAX PROCEDURE

Tax procedure differs substantially from that of other legal matters; hence, graduate tax programs all have (or should have) required courses in procedure. Traditionally, one who asserts an action must proceed and has the burden of proof.³⁶ Alas, tax law is very different. For most taxes—particularly for income taxes³⁷ and for most excises³⁸—the taxpayer has a very limited opportunity for prejudgment review.³⁹

³³ *But see* Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253, 272 (4th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3221 (U.S. Sept. 30, 2011) (No. 11-420) (holding Virginia lacked standing to challenge *Mandate* because it lacked “personal stake” in case outcome). The Circuit addressed the *Mandate* and Penalty together, rather than separately, as argued herein.

³⁴ *But see id.* (citing Ill. Dep’t of Transp. v. Hinson, 122 F.3d 370, 373 (7th Cir. 1997)) (“[R]ules of standing aim to prevent state ‘bureaucrats’ and ‘publicity seekers’ from ‘wresting control of litigation from the people directly affected.’”).

³⁵ *Id.*

³⁶ TAX CT. R. 142(a).

³⁷ For purpose of this Article, an income tax is one authorized by the Sixteenth Amendment. *See* U.S. CONST. amend. XVI.

³⁸ The corporate income tax is actually an excise and not a direct tax. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 151-52 (1911). For this proposition, *Stone Tracy* remains authoritative. In *Brush v. Commissioner*, 300 U.S. 352, 372 (1937), the Court distinguished *Stone Tracy* on a minor issue: “The contention is made that our decisions in *South Carolina v. United States*, 199 U.S. 437, 461, 462, and *Flint v. Stone Tracy Co.*, 220 U.S. 107, 172, are to the effect that the supplying of water is not a governmental function; but in neither case was that question in issue, and what was said by the court was wholly unnecessary to the disposition of the cases and merely by way of illustration. Expressions of that kind may be respected, but do not control in a subsequent case when the precise point is presented for decision.” That issue had nothing to do with whether the corporate tax was or is an excise, rather than a direct tax or an income tax. Later, the Court in *Garcia v. San Antonio Transit Authority*, referred to the prior distinction:

In 1911, for example, the Court declared that the provision of a municipal water supply “is no part of the essential governmental functions of a State.” *Flint v. Stone Tracy Co.*, 220 U.S. 107, 172. Twenty-six years later, without any intervening change in the applicable legal standards, the Court simply rejected its earlier position and decided that the provision of a municipal water supply was immune from federal taxation as an essential governmental function, even though municipal waterworks long had been operated for profit by private industry. *Brush v. Commissioner*, 300 U.S., at 370-373.

496 U.S. 528, 542 (1985). Unfortunately, LEXIS and Sheppard’s erroneously describe *Stone Tracy* as having been overruled. *Stone Tracy*, however, has not been overruled and remains one of the top tax decisions in United States history.

³⁹ *See* Seven-Sky Brief, *supra* note 6, at 26.

A. TRADITIONAL TAX CASES

Typically,⁴⁰ the government initiates an audit, either by correspondence or in the field. Tax law imposes significant administrative burdens on the government during an audit, but it also grants substantial administrative powers. If the government and the taxpayer disagree, eventually—again, in most cases—the IRS issues a “Notice of Deficiency.”⁴¹ More commonly, tax practitioners refer to this as a ninety-day letter, or as a taxpayer’s ticket to Tax Court.⁴²

A taxpayer has ninety days from the date of the letter’s issuance (*not* its receipt) to file a petition in the Tax Court.⁴³ Failure to file timely is jurisdictional: the Tax Court has no power to entertain a late-filed petition.⁴⁴ If the taxpayer fails to file timely, the IRS has the power to assess the tax asserted in the Notice of Deficiency.⁴⁵ An assessment acts as a judgment.⁴⁶

This last point is critical: the administrative branch need not obtain a court judgment before it can proceed to collect a tax.⁴⁷ This is not only unusual, but it is surprising to many taxpayers, including attorneys. For example, if the government were to assert that someone committed a crime, it must charge him and then give him an opportunity for a trial.⁴⁸ If the government were to assert that someone breached a contract and thus owed the government money (perhaps the person provided services in a public park or museum), it would have to sue the alleged breacher.⁴⁹ The government would have the burden of proof and the obligation to proceed in a court with jurisdiction over the person, as well as the obligation to provide adequate notice.⁵⁰ Similarly, if the government believed someone committed a tort against it (perhaps he or she damaged public property), it would again have to sue that person.⁵¹ The government would thus have the burdens of proceeding, proof, and notification.

For taxes, however, all is different. The government must generally grant administrative hearings and then substantial notice of what it seeks in terms of the amount and type of tax, as well as the year or return involved. The government

⁴⁰ The government has limited power to proceed in matters involving “jeopardy assessment” per section 6331 or a “termination assessment” per section 6851. *See* I.R.C. § 6331(d)(3) (2006) (jeopardy requirement); *id.* § 6851(a)(1) (termination assessments permissible where taxpayer likely to flee). Such assessments involve situations where the taxpayer is likely to depart the United States quickly or in which collection is otherwise in jeopardy. *Id.* §§ 6331(d)(3), 6851(a)(1). However, in each case, the taxpayer is afforded the opportunity for quick post assessment and levy review per section 7429. *Id.* § 7429(a)(2). The Chief Counsel for the IRS must personally approve any levy pursuant to such assessments unless thirty days have passed after notice and demand; plus, the taxpayer is entitled to quick administrative review, as well as quick judicial review. *Id.* § 7851. Many courts have upheld these procedures on due process grounds.

⁴¹ *Id.* § 6212.

⁴² *Notice of Deficiency, Tax Court, and District Court*, INSIGHT LAW, <http://www.insightlawfirm.com/notice-of-deficiency-and-tax-court.html> (last visited Feb. 28, 2012).

⁴³ I.R.C. § 6213(a).

⁴⁴ *Id.*

⁴⁵ *Id.* § 6213(c).

⁴⁶ “Assessment is the statutorily required recording of the tax liability.” IRM 35.9.2.1 (Aug. 11, 2004), http://www.irs.gov/irm/part35/irm_35-009-002.html. Subject to the sixty-day notice requirement of section 6303, the Secretary may proceed to collect any tax. I.R.C. §§ 6301, 6303 (1986). Nothing requires a court judgment, although for some taxes, the taxpayer has a pre-collection opportunity to be heard. *See supra* text accompanying note 27.

⁴⁷ *See supra* text accompanying note 27.

⁴⁸ U.S. CONST. amend. V.

⁴⁹ *See, e.g.*, 31 U.S.C. §§ 3729-3733 (2006).

⁵⁰ *See, e.g.*, FED. R. CIV. P. 4 (notice requirement).

⁵¹ *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1948).

cannot proceed further with assessment, collection, or liens until ninety days after the issuance of the notice.⁵² If the taxpayer objects, *the taxpayer* must proceed, *the taxpayer* must notify the government, and *the taxpayer* has the burden of proof.⁵³ To receive a jury trial, as supposedly guaranteed by the Seventh Amendment,⁵⁴ a taxpayer must first *pay* the deficiency, file for a refund, endure administrative proceedings, and then sue in district court⁵⁵—again with the burdens of proceeding, proof, and notification.⁵⁶

These traditional procedures are well-documented⁵⁷ and almost universally accepted.⁵⁸ Other than tax protestors, no one seriously objects that they lack procedural due process.

B. OTHER TAX CASES (*EXCEPT* FOR THE HEALTHCARE PENALTY)

For some taxes—most commonly trust fund taxes⁵⁹—the procedural protections afforded taxpayers are much more limited.⁶⁰ For these, the government has no duty—indeed, it has no power—to issue a notice of deficiency or a ticket to Tax Court. Instead, the government has the power to assess and to collect the tax.⁶¹ It could voluntarily entertain a taxpayer protest; however, no statute requires such a procedure. Until 1998,⁶² taxpayers who objected had to pay the tax and then seek an administrative refund.⁶³ If denied the refund, they could then sue in district court (or

⁵² I.R.C. § 6213(a) (2006). The ninety-day period comprises the taxpayer opportunity to file a petition in the Tax Court without having to first pay the tax deficiency asserted in the ninety-day notice. If the taxpayer fails to file such a petition, the IRS may assess the tax and then proceed with collection.

⁵³ TAX CT. R. 142(a)(1) (“The burden of proof shall be upon the petitioner, except as otherwise provided by statute or determined by the Court; and except that, in respect of any new matter, increases in deficiency, and affirmative defenses, pleaded in the answer, it shall be upon the respondent.”).

⁵⁴ “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .” U.S. CONST. amend. VII.

⁵⁵ The Tax Court, as an Article I court, does not have juries and lacks general equitable powers. *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987) (“The Tax Court is a court of limited jurisdiction and lacks general equitable powers.”); *About the Court*, UNITED STATES TAX COURT, <http://www.ustaxcourt.gov/about.htm> (last visited Feb. 28, 2012). In the alternative, the taxpayer may sue for a refund in the United States Court of Federal Claims, which, as an Article I court, also does not have juries. 28 U.S.C. § 1491 (1996); *see* UNITED STATES COURT OF FEDERAL CLAIMS, *THE PEOPLE’S COURT* (2012).

⁵⁶ I.R.C. §§ 6212-6215.

⁵⁷ *See generally* MICHAEL J. SALTZMAN, *IRS PRACTICE AND PROCEDURE* (2d ed. 2008).

⁵⁸ *Id.*

⁵⁹ According to the IRS “[a] trust fund tax is money withheld from an employee’s wages (income tax, social security, and Medicare taxes) by an employer and held in trust until paid to the Treasury.” *Trust Fund Taxes*, IRS.GOV (Oct. 18, 2011), <http://www.irs.gov/businesses/small/article/0,,id=98830,00.html>.

⁶⁰ Compare I.R.C. §§ 6320, 6330 (2010), *with id.* § 6212.

⁶¹ *See* U.S. CONST. amend. XVI.

⁶² Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, sec. 3401(a)-(b), §§ 6320, 6330, 112 Stat. 746 (1998) (“Subchapter C of chapter 64 (relating to lien for taxes) is amended by inserting [section 6320] . . . Subchapter D of chapter 64 (relating to seizure of property for collection of taxes) is amended by inserting [section 6330].”).

⁶³ *Id.* Until 1998, taxpayers subject to lien or levy fit into two general categories: those who were entitled to a section 6212 notice of deficiency and those who were not. For those covered by section 6212, the government could not proceed with collection until after the ninety days provided by the section ended or until after the Tax Court proceeding, if any, was final. *Id.* §§ 6212, 6213(c). For those not entitled to a section 6212 notice, the government could proceed to collection after notice and demand. I.R.C. §§ 6301 (1986), 6303 (1986).

the Claims Court), where they had the burdens of proceeding, proof, and notification.⁶⁴

This extraordinarily limited procedural protection existed for years prior to the 1998 amendments creating collection due process hearings.⁶⁵ Some authorities questioned the prior procedures on due process grounds.⁶⁶ Indeed, the issue prompted considerable controversy among members of Congress.⁶⁷ On June 25, 1997, a national commission chaired by Senator Kerry and Representative Portman issued *A Vision for a New IRS*.⁶⁸ The report, which was critical of many IRS practices, resulted in the Internal Revenue Service Restructuring and Reform Act of 1998,⁶⁹ also known as the Taxpayer Bill of Rights III. Alas, while the proposed act passed the House,⁷⁰ it failed in the Senate. It failed because Chairman Roth of the Senate Finance Committee refused to cooperate in bringing the proposal to the floor for a vote.⁷¹ He refused because he questioned the due process protections provided in IRS collection proceedings. The issue became quite political and was the subject of many discussions in tax circles. Others clearly wanted to move the bill through to the President. Roth, however, prevailed. After further Finance Committee hearings in 1998, the bill passed, but with substantial new provisions for "Collection Due Process" procedures.⁷² While legislative history is often of limited use, this particular history seems very helpful. Senator Roth specifically questioned whether the existing IRS collection procedures satisfied due process.⁷³ The Senate Finance Committee held hearings on that specific issue.⁷⁴ The Senate amended the bill to provide for additional taxpayer protections and entitled them "Collection Due Process" (CDP) and CDP hearings; the House passed the bill containing that language and President Clinton signed it.⁷⁵ A logical conclusion is that Senator Roth and a majority of Congress actually believed that IRS procedures failed to satisfy due process prior to the enactment.

⁶⁴ See *supra* text accompanying notes 53-56.

⁶⁵ See Book, *supra* note 32, at 1128 ("One important change that specifically addresses supposed IRS collection abuses is the enactment of sections 6320 and 6330, the new due process rights with respect to collection activities. Effective for collection actions initiated after January 18, 1999, these sections give taxpayers expanded pre-seizure notice rights.").

⁶⁶ See *generally id.* (quoting and documenting complaints regarding alleged IRS abuses).

⁶⁷ *Id.* at 1132 n.32 (documenting controversy among legislators and with the executive). See *generally* Ryan J. Donmoyer, *Chairman Roth and the Politics of IRS Reform*, 77 TAX NOTES 1296 (1997); Ryan J. Donmoyer, *Roth Outlines 'Deficiencies' in IRS Reform Bill*, 77 TAX NOTES 764 (1997) (describing controversy between Senator Roth and Senator Kerry plus forty-one other Senate Democrats).

⁶⁸ NAT'L COMM'N ON RESTRUCTURING THE INTERNAL REVENUE SERV., *A VISION FOR A NEW IRS* (1997), available at <http://www.house.gov/natcommirs/report1.pdf>.

⁶⁹ Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685.

⁷⁰ 144 CONG. REC. S4452 (1998); see Ryan J. Donmoyer and Jacqueline Rieschick, *It's (Almost) Unanimous: IRS Reform Bill Passes House*, 77 TAX NOTES 639 (1997).

⁷¹ See *generally* Donmoyer, *Chairman Roth and the Politics of IRS Reform*, *supra* note 67; Donmoyer, *Roth Outlines 'Deficiencies' in IRS Reform Bill*, *supra* note 67.

⁷² See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685.

⁷³ See *supra* text accompanying note 66.

⁷⁴ *IRS Restructuring: Hearing on H.R. 2676 Before the S. Comm. on Finance*, 105th Cong. (1998).

⁷⁵ See Nathan E. Clukey, *Examining the Limited Benefits of the Burden of Proof Shift*, 82 TAX NOTES 683, 683 (1999).

1. CDP for Levy

The IRS collects unpaid taxes primarily through levy. Under section 6330, the government must first send the taxpayer a notice of its intent to levy as well as notice of his right to a hearing: “No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made.”⁷⁶

As a practical matter, the IRS uses a standard letter, known as Letter 1058, to explain the process.⁷⁷ Formally, the letter bears the title “Notice of Intent to Levy and Notice of Your Right to a Hearing.”⁷⁸ It includes this language:

We previously asked you to pay the federal tax shown on the next page, but we haven’t received your payment. This letter is your notice of our intent to levy under Internal Revenue Code (IRC) Section 6331 and your right to appeal under IRC Section 6330.

We may also file a Notice of Federal Tax Lien at any time to protect the government’s interest. A lien is a public notice to your creditors that the government has a right to your current assets, including any assets you acquire after we file the lien.

If you don’t pay the amount you owe, make alternative arrangements to pay, or request an appeals hearing within 30 days from the date of this letter, we may take your property or rights to property. Property includes real estate, automobiles, business assets, bank accounts, wages, commissions, social security benefits, and other income. We’ve enclosed Publication 594, which has more information about our collection process; Publication 1660, which explains your appeal rights; and Form 12153, which you can use to request a Collection Due Process hearing with our Appeals Office.⁷⁹

Taxpayers who receive the letter have thirty days to request a CDP hearing before an “impartial” IRS officer.⁸⁰ The letter itself states the exact date by which the request must be postmarked and provides taxpayers with the option to fax the request.⁸¹ Taxpayers must use Form 12153 to request such a hearing.⁸² Request of the hearing tolls the ten-year statute of limitations during which the government may collect the tax due.⁸³ A final “determination”⁸⁴ by the hearing officer is appealable to

⁷⁶ I.R.C. § 6330(a)(1) (2010).

⁷⁷ *LT 11 (Letter 1058) Frequently Asked Questions*, IRS.GOV, <http://www.irs.gov/individuals/article/0,,id=185720,00.html> (last updated Jan. 12, 2012)

⁷⁸ *Notice of Intent to Levy and Notice of Your Right to a Hearing*, IRS.GOV, <http://www.irs.gov/individuals/article/0,,id=128017,00.html> (last updated Apr. 25, 2011)

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, CAT. NO. 26685D, FORM 12153: REQUEST FOR A COLLECTION DUE PROCESS OR EQUIVALENT HEARING (2011), *available at* <http://www.irs.gov/pub/irs-pdf/f12153.pdf> [hereinafter FORM 12153].

⁸³ *Id.*

⁸⁴ The determination is critical, as it prompts Tax Court jurisdiction. *See* I.R.C. § 6330(d)(1) (2006). Section 6320(c), dealing with CDP hearings for lien notices, incorporates subsection 6330(d). *Id.* § 6320(c). Section 6330(c)(3) describes the “[b]asis for the determination.” *Id.* § 6330(c)(3). Treasury Regulations under section 6330 describe the importance of the determination. Treas. Reg. § 301.6330-1(e)(3), Q&A (E-10) (2006) (discussing importance of Notice of Determination and its date). In “equivalent hearings,” discussed below, the hearing officer issues a decision, rather than a determination. Decisions do not prompt Tax Court jurisdiction. Treas. Reg. § 301.6330-1(i) (2) Q&A (16) (2006).

the Tax Court.⁸⁵ Specifically, instructions on Form 12153 state: “You can go to court to appeal the CDP determination the IRS Office of Appeals makes about your disagreement.”⁸⁶

If the taxpayer fails to timely request a hearing, he may nevertheless request an “Equivalent Hearing” using the same form.⁸⁷ Such a hearing does not suspend collection and does not toll the statute of limitations.⁸⁸ An equivalent hearing decision is also not appealable to the Tax Court.⁸⁹ Issues covered in a CDP hearing (or Equivalent Hearing) are statutorily limited:

(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—

- appropriate spousal defenses;
- challenges to the appropriateness of collection actions; and
- 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.⁹⁰

For most taxes—such as the income tax—the taxpayer will have received a “statutory notice of deficiency,”⁹¹ the ninety-day letter, which is the “ticket to tax court.”⁹² As a result, a subsequent CDP hearing will not consider the underlying merits of the tax liability issue; instead, it will cover only procedural issues related

⁸⁵ See I.R.C. § 6330(d)(1).

⁸⁶ See FORM 12153, *supra* note 82.

⁸⁷ See Treas. Reg. § 301.6330-1(i)(1) (“A taxpayer who fails to make a timely request for a CDP hearing is not entitled to a CDP hearing. Such a taxpayer may nevertheless request an administrative hearing with Appeals, which is referred to herein as an ‘equivalent hearing.’ The equivalent hearing will be held by Appeals and generally will follow Appeals procedures for a CDP hearing. Appeals will not, however, issue a Notice of Determination. Under such circumstances, Appeals will issue a Decision Letter.”).

⁸⁸ INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, CAT. NO. 14376Z, PUBL’N 1660: COLLECTION APPEAL RIGHTS (2011), available at <http://www.irs.gov/pub/irs-pdf/p1660.pdf>.

⁸⁹ Treas. Reg. § 301.6330-1(i)(2), Q&A (I6) (“Q-I 6. Will a taxpayer be able to obtain Tax Court review of a decision made by Appeals with respect to an equivalent hearing? A-I 6. Section 6330 does not authorize a taxpayer to appeal the decision of Appeals with respect to an equivalent hearing. A taxpayer may under certain circumstances be able to seek Tax Court review of Appeals’ denial of relief under section 6015. Such review must be sought within 90 days of the issuance of Appeals’ determination on those issues, as provided by section 6015(e).”)

⁹⁰ I.R.C. § 6330(c)(2) (2010).

⁹¹ See Treas. Reg. § 301.6503(a)-1 (1986).

⁹² Tax practitioners and judges commonly refer to the ninety-day letter as a “ticket to tax court” because it is the most common prerequisite to Tax Court jurisdiction. For an example of Tax Court judges doing so, albeit in a dissent, see *Thompson v. Comm’r*, No. 30586-08, 2011 WL 6781017, at *10-12 (T.C. Dec. 27, 2011) (Goeke, J., dissenting).

to collection.⁹³ In such a case, the Tax Court lacks jurisdiction to consider the merits on an appeal of a final CDP determination.⁹⁴

For other taxes—most commonly trust fund taxes—the process and jurisdictional issues are significantly different. A section 6672⁹⁵ responsible party⁹⁶ penalty—for failure to collect, account for, or pay over trust fund taxes—does not trigger a notice of deficiency.⁹⁷ Hence, taxpayers subject to the penalty have no opportunity to petition the Tax Court.⁹⁸ Instead, their typical opportunity for judicial review follows payment by way of a refund request and subsequent district court or Claims Court petition based on a denied refund.⁹⁹ In such cases, however, the taxpayer still does not necessarily have an opportunity for pre-collection *judicial* review on the merits: to receive such review, the taxpayer must have lacked “an opportunity to dispute such tax liability.”¹⁰⁰ The government has created just such a process. Essentially, it involves the taxpayer receiving notice of the penalty assessment and the opportunity to file a “Protest Letter” with the IRS.¹⁰¹ A hearing prompted by the protest letter may be a sufficient “opportunity to dispute” the merits of the underlying tax or penalty. If it so qualifies, the Tax Court lacks jurisdiction on the merits.¹⁰²

⁹³ I.R.C. § 6330(c)(2)(B) (2006).

⁹⁴ Treas. Reg. § 1.301-6330-1, Q&A (F3) (2006) (“In seeking Tax Court review of a Notice of Determination, the taxpayer can only ask the court to consider an issue, including a challenge to the underlying tax liability, that was properly raised in the taxpayer’s CDP hearing.”). Per section 6330(c)(2)(B), a person may not raise challenges to the underlying tax liability at a CDP hearing if the person received a statutory notice of deficiency for such liability. I.R.C. § 6330(c)(2)(B) (limiting CDP hearing issues to, *inter alia*, challenges of tax liabilities for which the person received no notice of deficiency).

⁹⁵ I.R.C. § 6672 (1989).

⁹⁶ See *Oppliger v. United States*, 637 F.3d 889, 893 (8th Cir. 2011), for a judicial discussion of who constitutes a responsible party.

⁹⁷ Section 6212 limits the Secretary’s power to grant a notice of deficiency for taxes imposed by subtitle A or B or chapter 41, 42, 43, or 44. I.R.C. § 6212(a). Section 6672 appears, however, in chapter 68; hence, it cannot prompt a section 6212 notice of deficiency.

⁹⁸ Tax Court jurisdiction arises generally under section 7442. I.R.C. § 7442 (1986). With regard to deficiencies, it arises under section 6213. I.R.C. § 6213 (1998).

⁹⁹ See 3 NAT’L TAXPAYER ADVOCATE SERVICE, 2005 ANNUAL REPORT TO CONGRESS 471, 543 (2005) available at http://www.irs.gov/pub/irs-utl/section_3.pdf (noting frequent litigation regarding section 6672 penalties in the Claims Court, the district courts, and in the Bankruptcy Court).

¹⁰⁰ I.R.C. § 6330(c)(2)(B) (2010).

¹⁰¹ *Trust Fund Recovery Penalty (TFRP)*, IRS.GOV, <http://www.irs.gov/individuals/article/0,,id=160741,00.html> (last updated Jan. 25, 2012).

¹⁰² *Greene-Thapedi v. Comm’r*, 126 T.C. 1, 6 (2006) (citations omitted):

The Tax Court is a court of limited jurisdiction; we may exercise jurisdiction only to the extent expressly authorized by Congress. . . . Our jurisdiction in this case is predicated upon section 6330(d)(1)(A), which gives the Tax Court jurisdiction “with respect to such matter” as is covered by the final determination in a requested hearing before the Appeals Office. . . . “Thus, our jurisdiction is defined by the scope of the determination” that the Appeals officer is required to make. . . . The Appeals officer’s written determination is expected to address “the issues presented by the taxpayer and considered at the hearing.” . . . At the hearing, the Appeals officer is required to verify that “the requirements of any applicable law or administrative procedure have been met.” . . . The Appeals officer is also required to address whether the proposed collection action balances the need for efficient tax collection with the legitimate concern that any collection action be no more intrusive than necessary. . . . The taxpayer may raise “any relevant issue relating to the unpaid tax or the proposed levy.” . . . The taxpayer is also entitled to challenge “the existence or amount of the underlying tax liability” if he or she “did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.”

Importantly, the IRS does not have the power itself to determine the sufficiency of the opportunity; instead, that power belongs first to a subsequent CDP hearing officer, and then to the Tax Court on timely appeal of a CDP determination.¹⁰³ Essentially, a taxpayer must have at least “one bite at the apple” to discuss and argue the merits with the government. But also essentially, he must receive two bites at the apple with regard to whether his first bite was sufficient. If the CDP hearing officer determines the taxpayer had no sufficient opportunity to dispute the underlying tax, the CDP hearing includes a determination on the merits.¹⁰⁴ In such a case, the Tax Court—on appeal from the CDP determination—may consider the merits *de novo*.¹⁰⁵

Or, if the CDP hearing officer determines the taxpayer had a sufficient opportunity to dispute the tax—and thus does not grant a CDP hearing on the merits—the Tax Court may overrule that jurisdictional issue.¹⁰⁶ If the court, disagreeing with the hearing officer, finds the taxpayer had no such prior meaningful opportunity, the Tax Court may simply take jurisdiction itself on the merits.¹⁰⁷ Arguably, the court could essentially remand the matter for proper administrative review.

2. CDP for Lien

In addition to levy, the IRS may also file a lien on taxpayer property to secure the tax liability. The lien itself is automatic.¹⁰⁸ Filing of the lien such that it affects third parties requires the IRS to issue a “Notice of Federal Tax Lien” per section 6320.¹⁰⁹ That section also provides for a CDP, using the identical process and jurisdiction as used for a section 6330 hearing on a proposed levy.¹¹⁰ Typically, the two hearings are combined.¹¹¹

To summarize, a taxpayer must have a reasonable and meaningful opportunity to dispute a tax or penalty prior to collection by the IRS. While that opportunity may be administrative rather than judicial, the taxpayer must have an opportunity to dispute the sufficiency of the original opportunity to dispute. Critically, the second opportunity must be judicial. These minimal requirements are statutory; however, they have significant constitutional implications. Prior to 1998, the government did

¹⁰³ I.R.C. § 6330(d)(1).

¹⁰⁴ *Id.* § 6330(c)(2)(B) (“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.”).

¹⁰⁵ *Swanton v. Comm’r*, No. 7181-08L, slip op. at 3 (T.C. June 24, 2010) (“Where the validity of the underlying tax liability is properly in issue, the Court will review the matter *de novo*; but where the validity of the underlying tax is not properly in issue, the Court will review the Commissioner’s determination for abuse of discretion. . . . An abuse of discretion is any action that is arbitrary, capricious, or without sound basis in law or fact.” (internal citations omitted)), *available at* <http://www.ustaxcourt.gov/InOpHistoric/swanton.TCM.WPD.pdf>.

¹⁰⁶ *Id.* Essentially, the Court would find the Appeals Officer’s determination that the taxpayer had a sufficient opportunity was “without sound basis in law or fact.” *Id.* Indeed, that is what occurred in *Swanton*.

¹⁰⁷ *Id.* at 8.

¹⁰⁸ *See* I.R.C. § 6321 (2006) (“If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.”).

¹⁰⁹ *Id.* § 6320(a)(2)-(3).

¹¹⁰ *Id.* § 6320(b).

¹¹¹ *Id.* § 6320(b)(4).

not guarantee these minimal opportunities.¹¹² Senator Roth, and ultimately Congress and the President, created them specifically to address what they saw as widespread due process violations.¹¹³ Congress, with the ultimate presidential signature and Treasury interpretation, effectively labeled the procedures as “Collection Due Process.”¹¹⁴ The label is important. It illustrates a critical congressional belief: collection without such minimal opportunities to be heard is unconstitutional as violative of the Fifth Amendment Due Process Clause.

VI. PROCEDURES FOR THE HEALTHCARE PENALTY

If the IRS believes an individual has violated the Mandate, it must notify him or her of the Penalty and demand that he or she pay it.¹¹⁵ It can then collect the amount alleged to be due.¹¹⁶

That is it. No audit. No opportunity to respond. No need for *actual* notice. No administrative hearing. No court hearing. No court judgment. Nothing but perfunctory notice and demand followed by collection. Prior to collection of a tax, taxpayers since 1998 have had a judicially reviewable right to a fair hearing, even if the hearing itself is merely administrative. Although taxpayers do not always have a statutory right to judicial review on the merits, they at least have the right to judicial review of the fairness of the administrative review.¹¹⁷ For the section 5000A healthcare Penalty, however, no such right exists.¹¹⁸ Even if the Treasury or IRS adopts protest or appeal procedures for the Penalty, they cannot be *judicially* reviewable: the Tax Court lacks jurisdiction to hear such matters¹¹⁹ and neither the Treasury nor the IRS has the authority to grant such jurisdiction, which only Congress may grant.¹²⁰ District courts would be barred by the Anti-Injunction Act from hearing such matters prior to collection.¹²¹

¹¹² Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105–206, 112 Stat. 685.

¹¹³ S. REP. NO. 105-174, at 67 (1998).

¹¹⁴ Congress (and thus the President with his signature) actually used the terms “Due Process for Liens” and “Due Process for Collections” in the titles to part I of subchapter C and part I of subchapter D of chapter 64 of the Internal Revenue Code. The Secretary of the Treasury promulgated regulations transposing the words to “Collection Due Process” and thus CDP. Treas. Reg. § 301.6330-1(a)(1) (2006).

¹¹⁵ I.R.C. § 5000A(b) (2010).

¹¹⁶ See *supra* text accompanying notes 45, 61.

¹¹⁷ I.R.C. § 6320(a)(2)-(3) (2006).

¹¹⁸ I.R.C. § 5000A(g)(2)(B).

¹¹⁹ The Tax Court’s jurisdiction rests on a section 6212 notice of deficiency or on a CDP determination. The section 5000A(b) Penalty, however, is not among the provisions listed in section 6212 that can trigger a notice of deficiency. I.R.C. § 6212(a)(1) (1998). Further, section 5000A(g) bars the Secretary from the use of levy or from filing a notice of lien, the two actions which prompt CDP hearings. As such, Congress has created no possibility of pre-collection judicial review of the healthcare Penalty. Under the Constitution, only Congress may grant jurisdiction to courts. U.S. CONST. art. I, § 8, cl. 9; *id.* at art. III, § 1.

¹²⁰ U.S. CONST. art. I, § 8, cl. 9; *id.* at art. III, § 1.

¹²¹ I.R.C. § 7421(a) (2006) (“Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), and 7429(b), and 7463 no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.”).

VII. ANALYSIS OF THE PROCEDURES (OR LACK THEREOF)

A. HOW CAN THE IRS “COLLECT” THE PENALTY?

The IRS may not use the section 6331 levy process;¹²² nor may it file a notice of lien under section 6321.¹²³ Also, it may not seek criminal sanctions for a taxpayer’s failure to pay the penalty. Section 5000A(g) provides:

(1) In general

The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Special rules

Notwithstanding any other provision of law—

(A) Waiver of criminal penalties

In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

(B) Limitations on liens and levies

The Secretary shall not—

(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

(ii) levy on any such property with respect to such failure.¹²⁴

On first view, subsection (g) appears very taxpayer friendly: no criminal sanctions, no levy, and no lien. Even on a re-reading, the subsection may appear to so severely limit collection that the Penalty may appear essentially unenforceable.¹²⁵ A closer reading, however, reveals the folly of such a viewpoint.

1. Criminal Liability

A careful reading of subparagraph 5000A(g)(2)(A) reveals that it applies only to the “failure by a taxpayer to timely pay” the penalty “imposed by this section.”¹²⁶ Other criminal sanctions are possible; indeed, common sense says they are probable. The government has yet to promulgate regulations on how it will enforce section 5000A; however, three possibilities for criminal sanctions come to mind. This portion of this Article is extraneous to the due process argument: any potential criminal sanctions would undoubtedly provide for due process. Nevertheless, this discussion is relevant to a full understanding of how the government will likely collect the penalty.

¹²² I.R.C. § 6331.

¹²³ I.R.C. section 6321 provides for an automatic or “silent lien.” For the lien to be effective against third parties, the IRS must file a notice of lien, consistent with the CDP protection of sections 6330 and 6320. *Id.* § 6321; Mellor, *supra* note 17, at 108.

¹²⁴ I.R.C. § 5000A(g) (2010).

¹²⁵ See generally Mellor, *supra* note 17 (opining that the Penalty is a constitutional tax, but also noting its limited enforceability).

¹²⁶ I.R.C. § 5000A(g)(2)(A).

a. Perjury

Exactly how the government will know whether a person lacks health insurance is an interesting issue. One method is to ask. Clearly, the penalty is to be paid to the IRS, which has broad authority to promulgate forms. Many IRS forms include questions and no one seriously challenges the authority to ask such questions. The IRS is likely, therefore, to amend the Form 1040 basic income tax form to ask the question “Do you and all your dependents claimed on this Form have adequate health insurance?” It will likely contain a box for “Yes” and a box for “No.” Because the Form 1040 is filed “under penalty of perjury,”¹²⁷ a taxpayer who checks “Yes” when the correct answer is “No” is subject to prosecution.¹²⁸ If the taxpayer checks “No” but fails to pay the penalty, criminal sanctions for that violation are not available.¹²⁹

b. Failure to File

Section 6651 imposes a civil penalty on the failure to file a return.¹³⁰ If a taxpayer refuses to answer the question regarding health insurance, the resulting Form 1040 would be incomplete and thus constitute a failure to file, prompting potential civil liability and a penalty. If the failure to file—including a failure to provide required information—is “willful,” section 7203 considers it a misdemeanor, subject to a fine of up to \$25,000 or imprisonment for up to one year.¹³¹ Failure to pay the civil penalty for failure to file would likewise trigger section 7203 and a second misdemeanor count.¹³²

c. Criminal Liability for Failure to Pay a Penalty for Failure to Pay the Penalty

Section 6651 imposes a civil penalty on the failure to pay various penalties and taxes.¹³³ As explained above, failure to pay the section 6651 penalty can be criminal under section 7203.¹³⁴ Thus, while Congress promised that failure to pay the lack of health insurance Penalty would not be criminal, it failed to mention that failure to pay the civil penalty for failure to pay the healthcare Penalty *would* be criminal. This, however, does not directly affect due process because any prosecution under section 7203 would itself be subject to due process protections.¹³⁵

The relevance is much more subtle. First, notice the disingenuousness of the Act. Essentially, Congress misled the American people through the Act: the claim that the Penalty “is not criminal” may be technically true, but it is substantively

¹²⁷ See, e.g., INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, CAT. NO. 11340T, FORM 1040-ES: ESTIMATED TAX FOR INDIVIDUALS (2011) [hereinafter FORM 1040-ES] (“Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.”).

¹²⁸ I.R.C. § 7206 (making false statements on a tax return is a felony, punishable by a fine of up to \$100,000 and/or imprisonment of up to three years).

¹²⁹ I.R.C. § 5000A(g) (2010).

¹³⁰ See I.R.C. § 6651.

¹³¹ See *id.* § 7203 (applying to the willful failure to file a return, supply information, or pay a tax). Regardless whether the section 5000A Penalty for the failure to have adequate health insurance is a tax or a mere penalty, the section 7203 penalty is surely a tax triggered by the failure to supply information. This is consistent with Congress’s enumerated power to lay and collect taxes. U.S. CONST. art. I, § 8, cl. 1.

¹³² See I.R.C. § 7203.

¹³³ See *id.* § 6651.

¹³⁴ See *id.* § 7203.

¹³⁵ U.S. CONST. amend. V.

false. Congress enacted the CDP legislation precisely because powerful members of Congress did not believe they, and taxpayers, could trust the executive to provide due process.¹³⁶ They properly and wisely required ultimate judicial oversight pre-collection.

2. “Levy” is a Narrow Term of Art

Clause 5000A(g)(2)(B)(ii) expressly prohibits the Secretary of the Treasury (and thus the IRS) from levying on taxpayer property.¹³⁷ What that provision omits is the limited definition of a “levy.” The government has two substantial methods to collect the Penalty.

a. Offset

Per section 6402(a), the service may retain an “overpayment” to satisfy other obligations.¹³⁸ In more common parlance: they keep your refund. This process, however, does not constitute a “levy” and thus is not prohibited by clause 5000A(g)(2)(B)(ii).¹³⁹ Because it is not a levy, it also cannot prompt a CDP hearing. Tax Court jurisdiction to review procedural collection issues, as well as the underlying merits of the tax or penalty, arises only upon a final CDP determination.¹⁴⁰ Without the CDP hearing, no determination is possible. Without the determination, no Tax Court jurisdiction is possible.

Hence, if the government believes a taxpayer owes the Penalty but has not paid it, the government may seize any past, current, or future overpayment of any tax to satisfy the obligation to pay the Penalty. The only limitation on this is the paragraph 5000A(g)(1) requirement that the Secretary provide “notice and demand.”¹⁴¹ That notice, however, need not be like notices for other taxes and penalties. It will not be a notice of deficiency prompting a taxpayer’s right to seek Tax Court review. It will not be a section 6330 notice of intent to levy prompting a CDC hearing followed by Tax Court review. It will be simple notice and demand. Nothing precludes the government from seizing a refund immediately following the notice. Nothing requires the government to listen to taxpayer disputes, let alone grant a sufficient hearing.¹⁴² Even if the government promulgates rules providing for such disputes, nothing grants any court jurisdiction to review the sufficiency of the hearing. Indeed, the Tax Court specifically lacks such jurisdiction on collection matters except through the CDP process, which will be unavailable.¹⁴³ The Anti-Injunction Act precludes district court and Claims Court review.¹⁴⁴

¹³⁶ See *supra* Part V.B.

¹³⁷ I.R.C. § 5000A(g)(2)(B)(ii) (2010).

¹³⁸ See I.R.C. § 6402.

¹³⁹ Mellor, *supra* note 17, at 110 (explaining the availability of offset despite the prohibition on levy).

¹⁴⁰ See *supra* notes 84-85 and accompanying text.

¹⁴¹ I.R.C. § 5000A(g)(1).

¹⁴² As posited *supra* in the text accompanying notes 15, 27, the Treasury could grant protest and other administrative remedies; however, nothing in the Act requires that it do so. The authors, however, suggest the due process requirements of the Fifth Amendment compel the government to grant such procedures, and further compel Congress to make the sufficiency of them judicially reviewable. Without such remedies and review, the collection procedures of section 5000A appear to violate due process.

¹⁴³ See *supra* note 27.

¹⁴⁴ See 28 U.S.C. § 2283 (2010).

b. Reapplication¹⁴⁵ of Tax “Payments”

Arguably, the government’s ability to seize refunds is of little concern because taxpayers have the ability to ensure no refund is due. With the aid of a good tax attorney or accountant one can project ultimate annual tax liability and thus periodic “payments” through employer withholding and estimated tax returns.¹⁴⁶ Two problems exist with that argument.

i. Refunds

First, many taxpayers lack the skills or the resources to adjust withholding amounts.¹⁴⁷ Many people rely on tax refunds as a type of short-term savings.¹⁴⁸ Surely, many taxpayers are fully capable of adjusting their W-4 and Form 1040ES to eliminate the likelihood of significant refunds (which amount to a zero-interest loan to the government). The idea that all taxpayers—or frankly, even most—have that skill or foresight is absurd. Almost certainly, many taxpayers will lose refunds otherwise due through a collection process that is not a levy. Why is this so problematic? Consider the following scenario.

Suppose Sally Taxpayer does not pay the penalty for lacking proper health insurance. Never mind whether she is actually insured or whether she is exempt. Suppose the IRS, in searching various data bases of the “insured,” does not find her name. What happens?

The IRS sends her a notice and demand letter. That letter need not include any information about her right to a hearing before an administrative or judicial body because she has none. It will simply demand, assess, and collect. No hearing. No court. No judgment. Just demand and collection.

But, what if Sally really *does* have insurance? Perhaps her insurance company misspelled her name as “Sallie.” Or, what if she had a religious exemption? Or, what if she were imprisoned and thus not subject to the penalty? None of that would matter because Congress provided no *pre*-collection remedy.¹⁴⁹ *After* Sally pays the *full* tax, including interest and a failure-to-pay penalty equal to the failure-to-have-insurance penalty, she may seek a refund by filing an IRS Form 1040X.¹⁵⁰ *After* exhausting her administrative rights, she can sue in district or Claims Court,

¹⁴⁵ Reapplication of tax “payments” is not a widely used tool; however, at least some courts have approved it. *See* *Davis v. United States*, 961 F.2d 867, 878-80 (9th Cir. 1992) (recognizing general authority to allocate undesignated payments, as well as authority to re-designate previously allocated amounts). *See also* Mellor, *supra* note 17, at 111 (arguing that reallocation of tax payments is an available tool in relation to the section 5000A Penalty).

¹⁴⁶ Section 3402 provides for withholding of income tax at the source. I.R.C. § 3402 (2004). Subsection (f) permits an employee to modify the amount withheld. *Id.* § 3402(f). Employees use Form W-4 for the process. INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, CAT. NO. 10220Q, FORM W-4 (2012), available at <http://www.irs.gov/pub/irs-pdf/fw4.pdf>. Form 1040-ES similarly permits a taxpayer to adjust the amount of his estimated tax deposits. *See* FORM 1040-ES, *supra* note 127.

¹⁴⁷ *See* Gerald Prante, *Average Taxpayer Spends 21 Hours Each Year*, TAX FOUND. TAX POL’Y BLOG (Sept. 23, 2005), <http://www.taxfoundation.org/blog/show/1080.html>.

¹⁴⁸ *See Enhance Short-Term and Emergency Savings*, POLICYFORRESULTS.ORG, <http://www.policyforresults.org/topics/policy-areas/children-safe-supportive-successful-families/reduce-poverty/poverty-level/what-works/strategies/build-household-assets/enhance-short-term-and-emergency-savings> (last visited Feb. 28, 2012).

¹⁴⁹ *See supra* text and explanation accompanying notes 45, 61.

¹⁵⁰ *See* INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, CAT. NO. 11360L, FORM 1040X (2011), available at <http://www.irs.gov/pub/irs-pdf/f1040x.pdf>.

assuming she knows how and can afford to do so.¹⁵¹ If she loses, she may be assessed the government's litigation costs.¹⁵² And, *she* would have the burden of proof; not the government.¹⁵³

Yes, the executive may adopt procedures to permit a "protest letter" and an administrative hearing. But Congress specifically precluded the possibility of any judicial review of the sufficiency of such a hearing.¹⁵⁴ That is contrary to the fundamental purpose behind sections 6330 and 6320: a mere administrative hearing and administrative determination of the due process sufficiency of such hearing is a denial of due process.¹⁵⁵ A taxpayer must have the ability to obtain judicial review of the process prior to collection. But, for the healthcare Penalty, no such judicial review is possible.

ii. Estimated Tax "Payments"

Estimated tax "payments" made quarterly with Form 1040ES vouchers are not "payments" of tax until the due date of the return, which is normally April 15th of the following year.¹⁵⁶ Effectively, they are deposits until that point and do not bear interest if refunded.¹⁵⁷ The government has no obligation to apply them to the current year's income tax liability, even though the taxpayer deposits them for that purpose and the government may apply them to any debt.¹⁵⁸

Consider Sally Taxpayer again. She has adequate health insurance. She checks the "Yes" box on her Form 1040 in response to the question inquiring about health coverage. She does not pay the Penalty because she believes she does not owe it. She is not due a refund because she properly adjusted her W-4 and 1040ES voucher "payments" to preclude it. The government, however, disagrees. It does not find her name on a proper list of the insured. Or, it "determines" that the particular health insurance policy that Sally has is inadequate.

The government will likely create a ruling process by which health insurance companies can secure a determination regarding the adequacy of policies. It may

¹⁵¹ Section 7422(f)(1) permits a refund suit. I.R.C. § 7422(f)(1) (1986). Section 7422(a) requires the taxpayer to first exhaust administrative remedies. I.R.C. § 7422(a) (2010).

¹⁵² I.R.C. § 7430 (1998).

¹⁵³ *Id.* § 7491. The burden shifts to the government if the taxpayer presents credible evidence. *Id.*

¹⁵⁴ See *supra* text accompanying note 118.

¹⁵⁵ See I.R.C. §§ 6320(b)(1), 6330(b)(1).

¹⁵⁶ See FORM 1040-ES, *supra* note 127.

¹⁵⁷ *Id.* I.R.C. section 6211(b)(1) refers to them as "payments on account of" tax, as opposed to payments of tax; however, it disregards estimated "payments," as well as amounts withheld for purposes of determining a deficiency. I.R.C. § 6211(b)(1) (2010). Essentially, the amounts are deposits potentially subject to reapplication. Per section 6315, they are "payments on account" of the underlying tax. I.R.C. § 6315 (1986). They become payments of the underlying tax upon the filing of the return, when they are "applied against the tax shown on such return." Treas. Reg. § 301.6315-1 (1954). The distinction of "payments" versus "deposits" is a common distinction in tax law and has resulted in significant litigation. Generally, a payment refers to a transfer in satisfaction of an amount due, earned, or certain to be earned. See *Comm'r v. Indianapolis Power & Light Co.*, 493 U.S. 203, 212-14 (1990) (rejecting pre-existing tests of what constitutes a deposit rather than a payment and applying a new test which focuses upon the certainty of the earning). In relation to "tax payments," the same dichotomy is relevant. As noted in *Davis v. United States*, 961 F.2d 867, 879 (9th Cir. 1992), whether a debt is mature is relevant in determining the validity of a tax "payment" reallocation. Ultimately, this becomes an issue of labels. Just as calling the healthcare Penalty a penalty rather than a tax is arguably not determinative of whether it is a penalty or a tax, calling an estimated tax payment a payment should not be determinative of whether it is a tax payment rather than a deposit. The substance of the transfer should control.

¹⁵⁸ Burgless J.W. Raby & William L. Raby, *The Tax Court's Offset Jurisdiction — Or Lack Thereof*, 113 TAX NOTES 833, 836 (2006) (discussing, *inter alia*, reapplication of estimated taxes).

require that something akin to a Form 1099 be issued to all those who are insured. Mistakes happen, however. Can anyone believe such lists will be perfect and problem free? We cannot. While insurance companies will surely be able to litigate the denial of a favorable determination—or the withdrawal of one—taxpayers should also be able to raise such defenses.

Also, people change names: they get married, they obtain divorces. Many use one name professionally and another socially. Some people spell their names differently for different purposes. “Vickey” is sometimes spelled “Vicky” and sometimes “Vickie.” Birth certificates can use one spelling and the person another. The population of the United States is approximately 350,000,000.¹⁵⁹ Mistakes will occur with regard to some of those people. And what will be their remedy? It will be to pay the Penalty and sue for a refund, with the burden of proceeding, proof, and notification falling on them. Even if the government grants administrative review, the taxpayer will have no ability to challenge the sufficiency of that review in court; at least not until after payment.

But let us get back to Sally Taxpayer. The government makes a mistake regarding her liability for the Penalty. It owes her no tax refund, so how does it make her pay? It can re-apply future estimated tax “payments,” probably also including future employer withholding, to satisfy the Penalty from a prior year.¹⁶⁰ It need not even notify her of that, at least not until it determines an income tax deficiency for the year to which Sally thought the estimated tax “payments” or withholding applied.¹⁶¹ Sally probably cannot challenge the amount of that deficiency because she will likely admit it. She cannot challenge the reapplication of her “payments” because they were not payments, just deposits. Several years may potentially go by before she is even aware of the deficiency. Potentially, the statute of limitations on the Penalty refund could run before she even knew of the Penalty payment through subsequent reapplication.

Further, suing for a refund would be costly because Sally would likely need an attorney or accountant to handle the refund claim, if the return remained open for purposes of a refund claim.¹⁶² She would also need an attorney to handle the refund suit in district court or the Claims Court. The amount of the mistaken Penalty could be relatively small. Whether a refund claim would be worth the cost years after the reapplication of estimated taxes or of an overpayment is a serious issue. That issue itself goes to the sufficiency of the process—whether it amounts to “due process.” We think it fails.

VIII. CONCLUSION

Put aside for a moment whether the Act is wise or unwise, whether the Mandate is constitutional, and even whether the government can force us to buy broccoli.¹⁶³

¹⁵⁹ *U.S. POPClock Project*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/popclockus.html> (last visited Feb. 27, 2012).

¹⁶⁰ Mellor, *supra* note 17, at 111.

¹⁶¹ See *id.* at 108, 111. Because reapplication or re-prioritization is not a formal procedure, nothing requires the service to provide notice of it. The general notice requirements in the code are for a section 6212 notice of deficiency, a 6330 notice of intent to levy, a section 6320 notice of intent to file a lien, and a section 6155 notice and demand. None require notice of a reapplication.

¹⁶² I.R.C. § 6511(a) (1958) (taxpayers must file a refund claim within three years of the date the return was filed or two years of payment, whichever is later).

¹⁶³ See *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1351, 1355 (11th Cir. 2011) (Marcus, J., dissenting in part), *cert. granted sub nom. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 603 (2011) (mem.), and *cert. granted*, 132 S. Ct. 604 (2011) (No. 11-398) (mem.).

Focus, instead, on a “tax penalty,” which the government can assess and collect without any court process. Focus on the financial and legal burdens taxpayers subject to the Penalty face to seek a refund. Have we come so far that the government can presume us guilty, take our money, and then force us to pay for the opportunity to prove our innocence? What happened?