

Taxation Unchecked and Unbalanced: The Supreme Court's Denial of Certiorari in *Sorrentino*

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To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior

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provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.¹

This [United States Supreme] Court has, to many, seemed particularly ill-equipped to resolve income tax disputes between the Commissioner and the taxpayers. The reasons are . . . that we seldom see enough of them to develop any expertise in the area.²

I. INTRODUCTION

On October 3, 2005, the United States Supreme Court denied a writ of certiorari in *Sorrentino v. United States*,³ letting stand a divided authority among the Federal Circuits regarding the means of proving a timely postmark on a document mailed to the Internal Revenue Service ("IRS") or the Tax Court.⁴

Following a discussion of the split authority of the Circuits regarding the I.R.C. § 7502⁵ postmark rule,⁶ this article will discuss the *Sorrentino* case⁷ and its broader implications in the context of the Constitutional checks and balances that ought be placed upon the taxation function by the judiciary.⁸

1. THE FEDERALIST No. 51 (Alexander Hamilton or James Madison), available at http://thomas.loc.gov/home/histdox/fed_51.html (last visited July 3, 2006), also available at Yale Law School <http://www.yale.edu/lawweb/avalon/federal/fed51.htm> (last visited July 3, 2006).

2. *Comm'r v. Idaho Power Co.*, 418 U.S. 1, 19 (1974) (Douglas, J., dissenting).

3. *Sorrentino v. United States*, U.S., 126 S. Ct. 334 (2005) (mem.) (denying writ of certiorari) (No. 04-1396).

4. See discussion *infra* notes 108 through 124 and accompanying text.

5. Consistent with the convention common among the taxation bar and bench, this article will cite the Internal Revenue Code as "I.R.C." instead of "26 U.S.C." See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION § P.5 at 16 and § 12.8.1 at 85 (Columbia L. Rev. Assn., et al., eds., 17th ed., 2000); ASSOCIATION OF LEGAL WRITING DIRECTORS & DARBY DICKERSON, ALWD CITATION MANUAL pt. 3, § 14.2(b)(3) at 103 (Aspen Law & Business, N.Y., 2000); see also Gregory M. Beil, *Comment: Internal Revenue Code Section 197: A Cure for the Controversy over the Amortization of Acquired Intangible Assets*, 49 U. MIAMI L. REV. 731, n.4 at 732 (1995). Likewise, regulations issued by the Treasury Department pursuant to the Internal Revenue Code will be cited as "Treas. Reg." instead of "26 C.F.R."

6. See discussion *infra* notes 18 through 55 and accompanying text.

7. See *infra* notes 80 through 124 and accompanying text.

8. See *infra* notes 125 through 184 and accompanying text.

II. THE I.R.C. § 7502 PROOF OF POSTMARK CONTROVERSY

A. *Statutory History and Background*

For many years, tax returns and payments filed via the mail were required to be received by the Bureau of Internal Revenue⁹ by the filing deadline.¹⁰ Although, in times past, certain individual Internal Revenue Collectors—then political appointees¹¹ who ran their districts as personal fiefdoms—were occasionally sufficiently well humored to waive the lateness penalties when the tax return or payment was timely mailed.¹² Moreover, the courts sometimes applied a common law presumption of delivery upon proof of mailing in order to alleviate taxpayer hardships caused by the capricious workings of the Post Office.¹³

A variation of the common law mailbox rule presumption was codified into Section 7502 of the Internal Revenue Code of 1954¹⁴ couched in the terms of application of the postmark rather than the deposit of the mailpiece into the mailbox.¹⁵

9. Effective August 26, 1953, the “Bureau of Internal Revenue” became the “Internal Revenue Service.” T.D. 6038, 1953-2 C.B. 443.

10. See, e.g., *Heard v. Comm’r*, 269 F.2d 911, 913 (3d Cir. 1959); *Pleasant Valley Wine Co. v. Comm’r*, 14 T.C. 519, 519 (1950); see also *Income Tax Returns Due Soon: Revenue Bureau Warns Filing Deadline is Midnight March 16*, N.Y. TIMES, Feb. 22, 1942, at p. 29 (“If income tax returns are placed in the mail they should be posted in ample time to reach the collector’s office on or before the due date.”); *Tax Office Warns of Delay Penalty*, N.Y. TIMES, Mar. 10, 1935, at p. N-5 (“If the return is mailed, it should be placed in the mail in ample time to reach the office of the Collector of Internal Revenue before midnight of March 15.”).

11. See *United States v. Nunan*, 236 F.2d 576, 579-80 (2d Cir. 1956), *cert. denied*, 353 U.S. 912 (1957) (reciting that defendant Joseph D. Nunan, Jr., whose career had progressed from State Legislator to Collector of Internal Revenue for the Brooklyn District to Commissioner of Internal Revenue, “denied that he was a tax expert and said he became a federal revenue officer only by ‘the chance of politics.’”).

12. See, e.g., *45,000 are Warned on Income Taxes*, N.Y. TIMES, June 5, 1934, at p. 25 (reporting crackdown against local Internal Revenue Collectors’ prior lax practices of waiving lateness penalties on tax returns and payments postmarked by the due date but received afterwards); *Topics of the Times: When is June 15?*, N.Y. TIMES, June 6, 1934, at p. 20 (editorially commenting on said crackdown).

13. See, e.g., *Arkansas Motor Coaches v. Comm’r*, 198 F.2d 189, 191 (8th Cir. 1952).

14. The Tax Reform Act of 1986, Pub. L. 99-514, § 2(b), 100 Stat. 2095 (1986), redesignated the Internal Revenue Code of 1954 as the Internal Revenue Code of 1986 and provided that except where inappropriate official reference to one shall entail reference to the other.

15. In its initial 1954 version, I.R.C. § 7502(a) provided:

If any claim, statement, or other document (other than a return or other document required under authority of chapter 61), required to be filed within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such claim, statement, or other document is required to be filed, the date of the United States postmark stamped on the cover in which such claim, statement, or

Notwithstanding all its amendments over the years,¹⁶ this “postmark rule”¹⁷ remains in force today.

*B. The Divided Authority on the I.R.C. § 7502 “Extrinsic Evidence”
Standard of Proof*

1. The Issue of Contention

Normally, the IRS notes the date of the postmark or retains the envelope for tax returns and other documents received in the mail after the due date.¹⁸ But the IRS is not immune to bureaucratic dysfunction. There have been instances within the IRS bureaucracy of illegible date notations,¹⁹ lost envelopes supposedly bearing postmarks,²⁰ and indeed, lost tax returns, payments and other documents.²¹

other document is mailed shall be deemed to be the date of delivery. This subsection shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of the claim, statement, or other document, determined with regard to any extension granted for such filing, and only if the claim, statement, or other document was, within the prescribed time, deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the agency, office, or officer with which the claim, statement, or other document is required to be filed.

1 BERNARD D. REAMS, JR., *THE INTERNAL REVENUE CODE* of 1954, 791 (1993). A subsequent 1966 amendment specifically brought, inter alia, tax returns within the embrace of § 7502(a), Act of Nov. 2, 1966, Pub. L. 89-713, § 5(a), 80 Stat. 1107, 1110.

16. The various provisions and amendments to I.R.C. § 7502 concerning private postage meters, private delivery services and electronic filing are beyond the ambit of this article.

17. I.R.C. § 7502 is sometimes erroneously referred to as the “mailbox rule,” e.g., *Weisbart v. United States*, 222 F.3d 93, 96-97 (2d Cir. 2000); *Manka v. United States*, 105 F. Supp. 2d 490, 491 (E.D. Va. 2000); *Anastasoff v. United States*, No. 1999 U.S. Dist. LEXIS 22238, at *5-7 (E.D. Mo. 1999), *aff’d*, 223 F.3d 898, (8th Cir. 2000), *vacated and remanded on rehearing en banc*, 235 F.3d 1054, (8th Cir. 2000). “Mailbox rule” is a misnomer, inasmuch as the scheme of § 7502 requires application of a postmark, and not mere deposit into a mailbox as under the common law mailbox rules.

18. See, e.g., *Huff v. Comm’r*, 86 T.C.M. (CCH) 328 (2003); Internal Revenue Manual (CCH) ¶¶ 3.0.273.32(1) (01-01-2006); 4.75.4.7.1(3)(b) (02-01-2003); 25.6.4.4.2.1(5) (11-01-2004); 25.6.2.4.13(1) (10-01-2004).

19. *Borsody v. Comm’r*, 66 T.C.M. (CCH) 1342 (1993), *aff’d* No. 94-1724, 1996 U.S. App. LEXIS 19038, (4th Cir. Aug. 2, 1996).

20. *Collins v. Comm’r*, 65 T.C.M. (CCH) 2435 (1993); *Borsody v. Comm’r*, 66 T.C.M. (CCH) 1342 (1993), *aff’d* No. 94-1724, 1996 U.S. App. LEXIS 19038, (4th Cir. Aug. 2, 1996); see also *Matter of Eloise A. Toomer*, N.Y. State Tax Appeals Tribunal, DTA No. 819279, n.1 and accompanying text (November 18, 2004) (noting that New York State Dept. of Taxation & Finance auditor failed to comply with requirement to retain envelope in which payment was received, admitting that he “probably discarded [the envelope] if [he] got it. Because I get Federal Express, I get UPS, I just can’t hold on to boxes and letters, you know.”).

21. *Andrew Crispo Gallery, Inc. v. Comm’r*, 16 F.3d 1336, 1339 (2d Cir. 1994); *In re Ashe*,

Likewise, the Tax Court has had occasion to inadvertently obliterate postmarks in its mail handling procedures.²² Moreover, items mailed to the IRS or Tax Court are subject to the dysfunctions of another bureaucracy, the United States Postal Service, which has applied illegible postmarks to mailpieces,²³ printed postmarks partially off the mailpiece,²⁴ and has even failed altogether to apply postmarks to mailpieces.²⁵ In such instances, it then falls upon the taxpayer to demonstrate a timely postmark.²⁶

"An envelope mailed is not an envelope postmarked. The two operations are separate and distinct."²⁷ While successful invocation of the common law "mailbox rule" requires proof that the mailpiece in question was deposited in a mailbox,²⁸ those who would benefit from the I.R.C. § 7502 postmark rule must additionally show that a timely postmark was applied to the mailpiece.²⁹ With due regard for the presumption that the postal bureaucracy timely and properly processes and delivers the mailpieces it receives,³⁰ the taxpayer must further prove that the mailpiece was

228 B.R. 457, 459 (C.D. Cal. 1998); *Palihnich v. Comm'r*, 86 T.C.M. (CCH) 448 (2003); United States General Accounting Office, Tax Administration: Information on IRS' Philadelphia Service Center, Report No. B-221000 at 31-40 (November 22, 1985) (reporting, inter alia, several substantiated incidents of unprocessed tax returns and/or remittance checks being placed in trash receptacles); see also IRS, *Problem Alert: IRS Reports Some Tax Payments From 13 States Lost*, Sept. 23, 2005, <http://www.irs.gov/newsroom/article/0,,id=98129,00.html> (last visited July 3, 2006) (reporting that, in aftermath of traffic accident, approximately 30,000 tax payments sent to the IRS "were ejected into the San Francisco Bay and are not recoverable"); cf. *Matter of Stephen Walter Kaminski*, N.Y.L.J., January 22, 1996, p. 33, col. 5 (Surr. Ct. Suffolk Co.) (noting that the New York State Dept. of Taxation and Finance twice lost tax refund submission, thus necessitating a third submission of the paperwork).

22. See *Gibson v. Comm'r*, 84 T.C.M. (CCH) 263 (2002).

23. See, e.g., *Skolski v. Comm'r*, 351 F.2d 485, 487 (3d Cir. 1965); *Berry v. Comm'r*, 67 T.C.M. (CCH) 2983 (1994); *Minuto v. Comm'r*, 66 T.C. 616, 617 (1976); *Molosh v. Comm'r*, 45 T.C. 320, 321 (1965); *Alpha-Bella VI, Inc. v. Clinton Twp.*, 14 N.J. Tax 597, 604 (1995); *Augustin v. Gilot*, 606 N.Y.S.2d 514, 515 (N.Y. App. Term. 1993); *In re Joshua T.*, No. 8150692, 2001 Cal. Ct. App. Unpub. LEXIS 553, at *4 n.4 (Cal. Ct. App. Dec. 20, 2001); *Migliore v. Migliore*, 717 So. 2d 1077, 1078 (Fla. Dist. Ct. App. 1998); *Difenderfer v. Carbon County Tax Claim Bur.*, 789 A.2d 366, 367 (Pa. Commw. Ct. 2001).

24. See *Selvaggi v. Dir. of Revenue*, Delaware Tax App. Bd., No. 952 (July 12, 1991).

25. See, e.g., *Fallen v. United States*, 378 U.S. 139, 141 (1964); *Casqueira v. Comm'r*, 42 T.C.M. (CCH) 656 (1981); *Sylvan v. Comm'r*, 65 T.C. 548, 549 (1975); *Higby v. Comm'r*, 32 T.C.M. (CCH) 836 (1973); *Rappaport v. Comm'r*, 55 T.C. 709, 710 (1971), *aff'd*, 456 F.2d 1335 (2d Cir. 1972); *Monasmith v. Comm'r*, 38 T.C.M. (CCH) 60 (1979).

26. Treas. Reg. § 301.7502-1(c)(1)(iii)(A) (2006).

27. *In re George*, 57 N.Y.S.2d 494, 496-97 (N.Y. Sup. Ct. 1945).

28. *Commonwealth v. Brayman Const. Corp.*, 513 A.2d 562, 566 (Pa. Commw. Ct. 1986); *Gardam v. Batterson*, 91 N.E. 371, 372 (N.Y. 1910); see also Jason Miller, *Mailbox Rule Requires Evidence of Preparation for Mailing*, 5 Law. J. 1 (2003).

29. *Madison v. Comm'r*, 28 T.C. 1301, 1302 (1957).

30. *Dunlop v. United States*, 165 U.S. 486, 494-95 (1897); *Henderson v. Carbondale Coal & Coke Co.*, 140 U.S. 25, 37 (1891).

deposited under circumstances and conditions whereby it would be subsequently postmarked on or before the relevant due date.³¹

I.R.C. § 7502(c) specifically provides:

(c) Registered and certified mailing; electronic filing.

(1) Registered mail. For purposes of this section, if any return, claim, statement, or other document, or payment, is sent by United States registered mail—

(A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed; and

(B) the date of registration shall be deemed the postmark date.

(2) Certified mail; electronic filing. The Secretary is authorized to provide by regulations the extent to which the provisions of paragraph (1) with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail and electronic filing.³²

I.R.C. § 7502(c) thus (1) provides that registered mail constitutes prima facie evidence of postmarking and delivery of the mailpiece; and (2) specifically authorizes the Treasury Department to prescribe rules and conditions under which a certified mailing is prima facie evidence of delivery.³³ The Treasury and the IRS³⁴ have in fact prescribed a regulation that accords similar prima facie status to evidence of a certified mailing.³⁵

Prior to September 21, 2004, Treas. Reg. § 301.7502-1(c)(2) provided:

(2) *Registered or certified mail.* If the document or payment is sent by U.S. registered mail, the date of registration of the document or payment is treated as the postmark date. If the document or payment is sent by U.S. certified mail and the sender's receipt is postmarked by the postal employee to whom the document or payment is presented, the date of the U.S. postmark on the receipt is treated as the postmark date of the document or payment. Accordingly, the risk that the document or payment will not be postmarked on the day that it is

31. See *Boyd v. Comm'r*, 23 T.C.M. (CCH) 1616 (1964).

32. I.R.C. § 7502(c) (2002).

33. *Id.*

34. Promulgating tax regulations is a complex process that involves multiple interactions between the IRS and the Treasury Department proper, with the IRS pulling the laboring oar. See Treas. Reg. § 601.601 (2006). Henceforth, any discussions in this article that may be couched in terms of the IRS or the Treasury promulgating regulations will refer to that collaborative process.

35. Treas. Reg. § 301.7502-1(c)(2) (2002). The revisions to § 301.7502-1 effective after September 21 2004 are discussed *infra* at notes 56 through 79 and accompanying text.

deposited in the mail may be eliminated by the use of registered or certified mail.³⁶

Over the years, controversy among the Federal Circuits has arisen regarding proof of a postmark under I.R.C. § 7502 where the postmark does not appear on the envelope or the postmarked envelope has been lost.³⁷ In some Circuits, the IRS has convinced the judiciary that evidence of a registered or certified mailing is the sole acceptable proof of a postmark permitted by § 7502,³⁸ while other Circuits allow extrinsic evidence.³⁹ Accordingly, when a tax return encounters a mishap during its trek to the IRS or the Tax Court, the standard of proof to which a taxpayer is held depends upon the Circuit in which the taxpayer resides, or in other words, the taxpayer's state of residence.⁴⁰

2. Why the IRS's Exclusive Means of Proof Construction Is in Error

The term "prima facie evidence" need not necessarily mean sole acceptable evidence. Nobody could seriously argue, for example, that the Code provision that provides, "[t]he fact that a partner's name is signed on the return shall be prima facie evidence that such partner is authorized to sign the return on behalf of the partnership,"⁴¹ precludes other evidence of a partner's authority to sign a partnership tax return. Additionally, the designation in I.R.C. §533(b) that "[t]he fact that any corporation is a mere holding or investment company shall be prima facie evidence of the purpose to avoid the income tax with respect to shareholders"⁴² hardly immunizes any corporation that is *not* a mere holding or investment company from the excess accumulated earnings tax.⁴³

36. *Id.*

37. See Kenneth H. Ryesky, *Analysis of the Split Authority on Proof of a Postmark under Internal Revenue Code § 7502*, 21 U. DAYTON L. REV. 379 (1996).

38. See *Washton v. United States*, 13 F.3d 49, 50 (2d Cir. 1993); *Surowka v. Comm'r*, 909 F.2d 148, 148 (6th Cir. 1990); *Deutsch v. Comm'r*, 599 F.2d 44, 46 (2d Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980).

39. See, e.g., *Sorrentino v. I.R.S.*, 383 F.3d 1187, 1194 (10th Cir., 2004), *cert. denied*, 126 S. Ct. 334 (2005); *Anderson v. United States*, 966 F.2d 487, 490 (9th Cir. 1992), *Estate of Wood v. Comm'r*, 909 F.2d 1155, 1160-61 (8th Cir. 1990), *Curry v. Comm'r*, 571 F.2d 1306, 1309-10 (4th Cir. 1978).

40. See, e.g., *Carroll v. Comm'r*, 71 F.3d 1228, 1233 (6th Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996), *aff'g* 67 T.C.M. (CCH) 2995 (1994) ("If the Carrolls had been residents of any state other than Tennessee, Kentucky, Ohio, Michigan, Connecticut, New York, or Vermont, the Tax Court would have allowed them to invoke the presumption of delivery and would have decided this case in their favor.").

41. I.R.C. § 6063 (2002).

42. I.R.C. § 533(b) (2002).

43. See, e.g., *Henry Van Hummell, Inc. v. Comm'r*, 23 T.C.M. (CCH) 1765 (1964), *aff'd*,

The very existence of the split authority on the matter indicates that the underlying statutes and regulations are susceptible to more than one interpretation. Indeed, the IRS issued a "clarification" of one of its official's alleged remarks made at an IRS-sponsored symposium,⁴⁴ which was apparently construed by at least one tax practitioner to mean that a Postal Service P.S. Form 3817 Certificate of Mailing would be acceptable to the IRS as proof of a postmark⁴⁵ (notwithstanding prior Tax Court dictum to the contrary).⁴⁶ It is an established canon of construction that taxation statutes are to be strictly and narrowly construed, and "[i]n case of doubt they are construed most strongly against the government, and in favor of the citizen."⁴⁷ Any "sole means of proof" interpretation of the language of I.R.C. §7502 is, at best, tenuous and ambiguous, and the statute should not be so construed.

Of even greater persuasion than the ambiguity argument, however, is the legislative history of I.R.C. §7502. Not only is it totally devoid of any language to indicate that Congress intended a registered or certified mailing to be the *exclusive* means of proving a postmark,⁴⁸ but when I.R.C. §7502 was amended in 1968, the House and Senate Reports specifically stated that "[t]he taxpayer, of course, could also establish the date of mailing by other competent evidence [besides registered or certified mail receipts]."⁴⁹ Accordingly, because Congress has in fact directly spoken on the precise question at issue, the IRS and the courts should allow other competent extrinsic evidence to prove a postmark.⁵⁰

That said, a numbered Post Office receipt is certainly better quality of proof than most other evidence.⁵¹ The cases of many taxpayers who proffer self-serving testimony without a corroborating postal receipt document are frequently otherwise fraught with credibility problems.⁵² Even where the witness's or affiant's good faith

364 F.2d 746 (10th Cir. 1966), *cert. denied*, 386 U.S. 956 (1967).

44. Tax practitioners and the public are entitled to place some reliance on public or special audience speeches by high-ranking IRS or Treasury officials. See *Vinson & Elkins v. Comm'r*, 99 T.C. 9, 58-59 (1992), *aff'd*, 7 F.3d 1235 (5th Cir. 1993).

45. IRS Serv. Ctr. Adv. Mem. 1998051, 1998 SCA LEXIS 108, at *2 (July 20, 1998).

46. See *Haaland v. Comm'r*, 48 T.C.M. (CCH) 378 (1984); *Sylvan v. Comm'r* 65 T.C. 548, 551 n.7 (1975).

47. *Ocean Drilling & Exploration Co. v. United States*, 988 F.2d 1135, 1156 (Fed. Cir. 1993) (quoting *Gould v. Gould*, 245 U.S. 151, 153 (1917)).

48. See *Estate of Wood v. Comm'r*, 909 F.2d 1155, 1160 (8th Cir. 1990).

49. S. REP. 90-1014, at 19 (1968), as reprinted in 1968 U.S.C.A.N. 2354, 2373; H. R. REP. 90-1104, at 14 (1968) as reprinted in 1968 U.S.C.A.N. 2341, 2354.

50. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

51. Though the possibility of a Postal Service employee misusing his or her office to manufacture an unauthorized false postal receipt for a taxpayer cannot be totally ignored. See *Berndt v. Comm'r*, 61 T.C.M. (CCH) 2136 (1991).

52. See, e.g., *Huff v. Comm'r*, 86 T.C.M. (CCH) 328 (2003) (indicating that taxpayer, who had filed untimely returns for seven out of ten years, exhibited "a selective loss of memory" when

is not necessarily impugned, statements such as “[d]ue and owing to the fact that my husband was always concerned about deadlines, I am sure that immediately after I signed the Form 1040X on April 7, 1997, my husband took the return to the United States Post Office for mailing” are too attenuated when standing alone to sufficiently demonstrate when and where a postmark was applied.⁵³ But Congress has specifically contemplated and approved the use of other extrinsic evidence to prove a postmark under I.R.C. § 7502,⁵⁴ and until 2004, the IRS took no action to limit by regulation the universe of acceptable proof.⁵⁵ Accordingly, the IRS had no legitimate basis to assert its “sole acceptable means of proof” stance before then.

C. *The Revision of Treasury Regulation § 301.7502-1*

It is preliminarily noted that the Secretary of the Treasury (and thus, effectively, the IRS)⁵⁶ is given broad latitude to enforce and administer the tax laws, including the mandate to “prescribe all needful rules and regulations.”⁵⁷ This surely includes the authority to reasonably specify the universe of acceptable proof with respect to a postmark under I.R.C. § 7502. Indeed, there has long stood a regulatory precedent of more exacting stringency than the position taken by the IRS.

The Federal Acquisition Regulation (“FAR”)⁵⁸ formerly contained, with respect to sealed bidding on government contracts, the following provision:

giving his testimony); *Sadler v. United States*, 856 F. Supp. 367, 370 (S.D. Ohio 1994) (mentioning a discrepancy between testimonies of taxpayer and IRS agent regarding which year's return was audited on a prior occasion); *Washton v. United States*, 13 F.3d 49, 50 (2d Cir. 1993) (reciting that taxpayer failed for many years to make inquiry to IRS regarding significant refund purportedly claimed on tax return); *Prowse v. I.R.S.*, No. cv-89-2084, 1992 U.S. Dist. LEXIS 14800, at *2 n.1 (E.D.N.Y. Sept. 9, 1992) (noting discrepancies between plaintiff's complaint and subsequent affidavit regarding the location of the IRS facility where he claimed to have filed the documents in question).

The taxpayer in *Prowse* likewise proffered uncorroborated and contradicted self-serving testimony—ultimately insufficient to prove his case—in a subsequent unrelated non-taxation matter brought in the Civil Court of the City of New York and arbitrated by the author of this article. *Prowse v. Guida*, N.Y.C. Civ. Ct., Index. No. SC-Q-2077/2003, Arbitrator's bench notes (October 27, 2003) (Kenneth H. Ryesky, Arb.) (on file with author). Mr. Prowse's credibility problems also came to light in a subsequent litigational encounter with the IRS. See *Prowse v. Commissioner*, T.C. Memo 2006-120.

53. *Boatwright v. United States*, No. 99-5-1054, 2000 U.S. Dist. LEXIS 15117, at *4 (D. Colo. Sept. 29, 2000), magistrate's recommendation adopted 2000 U.S. Dist. LEXIS 17690, at *1 (D. Colo. Oct. 26, 2000).

54. S. REP. No. 90-1014, at 19 (1968), as reprinted in 1968 U.S.C.C.A.N. 2354, 2373; H.R. REP. No. 90-1104, at 14 (1968), as reprinted in 1968 U.S.C.C.A.N. 2341, 2354.

55. The revisions to § 301.7502-1 effective after September 21 2004 are discussed *infra* at notes 56 through 79 and accompanying text.

56. See *supra* note 34.

57. I.R.C. § 7805(a) (2001).

58. Similar to the taxation bar convention of citing the IRS's regulations as “Treas. Reg.”

The only acceptable evidence to establish the date of mailing of a late bid, modification, or withdrawal sent to a contracting office in the United States or Canada either by registered or certified mail is a U.S. or Canadian Postal Service postmark both on the envelope or wrapper and on the original receipt from the U.S. or Canadian Postal Service.⁵⁹

The former FAR scheme further required that the mailpiece containing the bid be postmarked no later than five days before the bid opening date.⁶⁰ This provision had been a fixture in the FAR since its initial promulgation in 1983,⁶¹ and was previously incarnated in the FAR's predecessor regulations.⁶² The removal of those long standing fixture provisions from the FAR and its predecessors was occasioned by issues relating to incorporating current technologies and practices into the mechanics of the bidding process, and not on account of any legal or Constitutional questions regarding their stringency.

Therefore, the IRS and Treasury's authority to regulatorially restrict the universe of acceptable proof of a postmark has long been beyond cavil. Nor can the IRS claim that the idea of doing so never occurred to it, for it had certainly been suggested. In 1990, Judge Robert J. McNichols of the Eastern District of Washington opined that "[o]ne might think that if the IRS were going to take the position that sending by certified or registered mail constitutes the exclusive means of establishing delivery, it would freely advise the taxpaying public of that fact. But it does not."⁶³ Judge McNichols, whose opinion favoring the taxpayer was upheld on appeal, admonished the IRS to be more explicit in its instructions to the taxpayers.⁶⁴ In 1993, Judge G. Ross Anderson, Jr. of the District of South Carolina similarly observed that the IRS "needs to amend its publication to the taxpayers" if it is to assert its exclusive means of proof position.⁶⁵

instead of "26 C.F.R.," see *supra* note 5, the Federal contracting and acquisition community refers to the "Federal Acquisition Regulations" or "FAR" instead of "48 C.F.R." FAR § 1.105-2(c)(2); see also *Gen. Elec. Co. v. Delaney*, 251 F.3d 976, 978-80 (Fed. Cir. 2001) (citing, in the text of opinion, sections of the "FAR" but not mentioning "48 C.F.R.").

59. Former FAR § 14.304-1(b), revised 64 Fed. Reg. 51837, 51838 (Sept. 24, 1999), effective Nov. 23, 1999.

60. Former FAR § 14.304-1(a)(1), revised 64 Fed. Reg. 51837, 51838 (Sept. 24, 1999) effective Nov. 23, 1999.

61. 48 Fed. Reg. 42171 (Sept. 19, 1983).

62. Former Defense Acquisition Regulation (DAR) (formerly known as the Armed Services Procurement Regulation (ASPR)) § 2-303.2 (formerly codified at 32 C.F.R. Subpart A).

63. *Anderson v. United States*, 746 F. Supp. 15, 17 (E.D. Wash. 1990), *aff'd*, 966 F.2d 487 (9th Cir. 1992).

64. *Id.*

65. *Alexander v. United States*, 1993 U.S. Dist. LEXIS 12443, at *5 (D. S.C. Mar. 24, 1993).

Notwithstanding these admonishments from the judiciary, the IRS did not even begin to insert explicit language into its regulations or its tax form instructions until September 21, 2004. The Federal Register on that date featured the IRS's proposed amendments to Treas. Reg. § 301.7502-1,⁶⁶ which provided:

Other than direct proof of actual delivery, proof of proper use of registered or certified mail is the exclusive means to establish prima facie evidence of delivery of a document to the agency, officer, or office with which the document is required to be filed. No other evidence of a postmark or of mailing will be prima facie evidence of delivery or raise a presumption that the document was delivered.⁶⁷

The proposed amendment also provided that its exclusive mode of proof rule would apply to all mailpieces mailed after September 21, 2004, the date the proposed amendments appeared in the Federal Register.⁶⁸

Public comments were received regarding the proposed revision, and a public hearing was held on January 11, 2005.⁶⁹ At the public hearing, the author of this article advocated for the universe of acceptable proof to include not only certified mail and registered mail receipts, but also Postal receipts for PS Form 152 Delivery Confirmation, PS Form 153 Signature Confirmation, and Label 11 Express Mail. These mail services all entail traceable individual unique serial numbers, but did not exist when I.R.C. § 7502 was first enacted.⁷⁰

As the author reviewed the galley proofs of this article more than one year after the proposed revisions to Treas. Reg. § 301.7502-1 first appeared in the Federal Register, the IRS has yet to finalize them. Following over a decade of IRS inaction since the judicial admonitions in the *Anderson*⁷¹ and *Alexander*⁷² cases, the failure to expedite the final regulations has already been criticized as inappropriate and inordinate.⁷³

66. 69 Fed. Reg. 56377, 56379 (Sept. 21, 2004).

67. Treas. Reg. § 301.7502-1(e)(1), 69 Fed. Reg. 56377, 56379 (Sept. 21, 2004).

68. *Id.*

69. The author of this article testified at the January 11, 2005 hearing. See *Unofficial Transcript of IRS Hearing on Timely Mailing/Timely Filing*, 2005 TNT 12-21 (January 11, 2005). The unofficial transcript published by Tax Analysts, though not necessarily 100% verbatim, does fairly report the substance of the witnesses' testimonies.

70. See, e.g., U.S. Postal Service, Final Rule, Domestic Mail Manual Changes to Implement the Delivery Confirmation Program, 64 Fed. Reg. 12072, 12074 (Mar. 10, 1999).

71. *Anderson v. United States*, 746 F. Supp. 15 (E.D. Wash. 1990), *aff'd*, 966 F.2d 487 (9th Cir. 1992).

72. *Alexander v. United States*, 1993 U.S. Dist. LEXIS 12443, at *3 (D. S.C. Mar. 24, 1993).

73. Donald T. Williamson and A. Blair Staley, *Are the Proposed Timely Mailing/Timely Filing Regulations Timely?*, 2005 TNT 147-25, 108 TAX NOTES 597 (Aug. 1, 2005).

Though the proposed rulemaking action, if and when finalized, would prospectively obviate the split among the Circuits, some issues would remain. For one thing, it would not affect cases involving mailpieces alleged to have been postmarked on or before September 21, 2004; these would still be subject to the divided authority.⁷⁴ Additionally, unless and until the IRS rewords its instructions to the tax forms and its Publication 17 to explicitly set forth the universe of acceptable proof of a postmark, serious questions would remain regarding the efficacy of the Federal Register notice that the new explicit rules "will apply to all documents mailed after September 21, 2004."⁷⁵

Taxpayers are, of course, expected by the taxation authorities and the courts to read the official instructions for the tax return forms they file,⁷⁶ but there are serious questions as to whether the ordinary individual taxpayer is actually expected to read the Federal Register.⁷⁷ Accordingly, some potential for controversy and ambiguity will persist, even after September 21, 2004, until the tax form instructions and publications are updated to explicitly indicate the acceptable means of proving a postmark. The tax returns filed through mail or private delivery services during the 2005 and 2006 filing season were prepared under official tax form instructions, which continued the ambiguous statements from prior years regarding acceptable proof of a postmark.⁷⁸

Perhaps one conceivable factor in the delay may have been the transfer of Michael Desmond, initially the cognizant Treasury official in the rulemaking proceeding, to the position of acting Tax Legislative Counsel, and the resulting transfer of the particular rulemaking matter to the desk of some other Treasury bureaucrat whose familiarity and knowledge of I.R.C. § 7502 issues might not have initially been comparable to those of Mr. Desmond. See U.S. Treasury, *News Release, Treasury's Tax Legislative Counsel to Resign*, available at 2005 TNT 102-22 (May 26, 2005). Desmond's appointment became permanent shortly thereafter. See U.S. Treasury, *News Release, Treasury Names Three To Tax Policy Office* (Oct. 21, 2005), available at 2005 TNT 204-55, also available at <http://www.ustreas.gov/press/releases/js2986.htm> (last visited July 3, 2006).

74. Treas. Reg. § 301.7502-1(g)(4), 69 Fed. Reg. 56377, 56379 (Sept. 21, 2004).

75. *Id.*

76. See *United States v. Berkman*, 302 F. Supp. 1285, 1290-1291 (E.D. N.Y. 1969), *aff'd*, 1969 U.S. App. LEXIS 13501 (2d Cir. June 16, 1969); *Matter of Gloria R. Taccad*, N.Y. State Div. of Tax App., Docket No. DTA 819527 (Mar. 24, 2005) ("By choosing to prepare her own return, petitioner, at the very least, must carefully read the instruction booklet which accompanied the return."); see also *Beam v. Hamilton*, 289 F. 9, 13-14 (6th Cir. 1923); *United States v. Middlemiss*, 1977 U.S. Dist. LEXIS 16989, at *1 (D. N.H. Mar. 9, 1977); *Adkins v. Comm'r*, 46 T.C.M. (CCH) 1166 (1983); *Widder v. Division of Taxation*, 14 N.J. TAX 349, 354-56 (1994).

77. See *United States v. \$359,500 in United States Currency*, 25 F. Supp. 2d 140, 146-147 (W.D.N.Y. 1998) (quoting Justice Jackson's dissent in *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 387 (1947)); cf. *Loudner v. United States*, 905 F. Supp. 747, 754 n.9 (Dist. S.D. 1995) (ruling that distribution of settlement funds to large group of lineal descendants of certain Native American tribes required more notice than publication in Federal Register).

78. During the 2005 tax filing season, an increasing number of people filed electronically, including over 66 million e-file returns. See I.R.S. *2005 Tax Filing Season Sets Records*, *IRS News Release IR-2005-53*, April 28, 2005, <http://www.irs.gov/newsroom/article/0,,id=138112,00.html> (last visited July 3, 2006).

Whether and when the IRS updates the ambiguous language of its tax form instructions and its Publication 17 remains to be seen.⁷⁹

III. THE *SORRENTINO* LITIGATION⁸⁰

A. *Facts of the Case*⁸¹

The basic facts are not in material dispute.⁸² Rolly and Joann Sorrentino sought a refund of taxes which had been remitted to the IRS, having made estimated tax payments and/or having had taxes withheld from their income during 1994.⁸³ August 15, 1998 was the last day they could file their previously unfiled 1994 Income Tax Return without losing their entitlement to the refund claimed on the return.⁸⁴ The joint tax return was signed on March 1, 1998.⁸⁵ On a day not more than a week thereafter (Mr. Sorrentino was unable to pinpoint the date with better exactitude than “more than six weeks before the April 15, 1998 filing deadline”),⁸⁶ Mr. Sorrentino placed the tax return in an envelope properly addressed to the IRS, affixed sufficient postage,⁸⁷ and placed the envelope in a postal drop box at the Wheat Ridge, Colorado

79. In addition to the admonitions given the IRS in *Anderson* and *Alexander*, the author’s testimony at the January 11, 2005 public hearing specifically covered the need for the IRS to revise the tax form instructions and Publication 17. *Unofficial Transcript*, *supra* note 69 (“[U]ntil now, Publication 17 and the instructions for the tax forms have not stated what the acceptable proof universe is. Come this time next year your instructions [for] the tax forms and your Pub 17 should specifically state what the acceptable proof universe is.”).

80. *Sorrentino v. United States*, 171 F. Supp. 2d 1150 (Dist. Colo. 2001) (“*Sorrentino I*”), *decided on merits*, 199 F. Supp. 2d 1068 (Dist. Colo. 2002) (“*Sorrentino II*”), *rev’d* as to the result, 383 F.3d 1187 (10th Cir. 2004) (“*Sorrentino III*”), *cert. denied*, 126 S. Ct. 334 (2005) (“*Sorrentino IV*”).

This article does not discuss the District Court’s ruling regarding the Sorrentinos’ claim for attorney fees and costs, *Sorrentino v. United States*, 2002 U.S. Dist. LEXIS 3371 (Dist. Colo. 2002), nor does it discuss the Sorrentinos’ dispute with the IRS regarding the alternate minimum tax issues on their 1995 tax return, *Sorrentino v. Comm’r*, T.C. Summary 2001-123.

81. *Sorrentino II*, 199 F. Supp. 2d at 1071-72.

82. *Id.* at 1071.

83. *Id.*

84. *Sorrentino III*, 383 F.3d at 1189. In *Sorrentino I* and *Sorrentino II* the District Court opinions mistakenly state that the deadline was April 15, 1998. *Sorrentino I*, 171 F. Supp.2d at 1154; *Sorrentino II*, 199 F. Supp.2d at 1071. Because the Sorrentinos received an extension until August 15, 1995, the deadline for claiming the refund was three years later, August 15, 1998. *Sorrentino III*, 383 F.3d at 1189; *see also* I.R.C. § 6511(b) (2005).

85. *Sorrentino II*, 199 F. Supp. 2d at 1071.

86. *Sorrentino I*, 171 F. Supp. 2d at 1151.

87. The I.R.C. § 7502 postmark rule requires, with respect to items sent through the United States mails, prepayment of sufficient postage for the mailpiece. I.R.C. § 7502(a)(2)(B); *see also* *Selter v. Comm’r*, 80 T.C. M. (CCH) 491 (2000).

Post Office.⁸⁸ The mailpiece was sent via ordinary first class mail, with no special mailing or tracking services.⁸⁹

Having received no response by September 1995, Mr. Sorrentino made an inquiry to the IRS.⁹⁰ He was told that the IRS had no record of having received their tax return and was advised to forward the IRS a copy of the return.⁹¹ The forwarded copy was received by the IRS on October 2, 1995.⁹² The IRS subsequently denied the Sorrentinos' refund claim, taking the position that it was filed too late.⁹³ Rolly and Joann Sorrentino then brought suit against the IRS⁹⁴ in the Federal Court for the District of Colorado, seeking a refund of their overpaid taxes.⁹⁵

B. *The District Court Decisions*

The Sorrentinos appeared *pro se* in the District Court.⁹⁶ The government did not dispute that the Sorrentinos had overpaid their 1994 taxes, but argued that because the Sorrentinos did not file their tax return claiming the refund by April 15, 1998, they were precluded from claiming the refund.⁹⁷ The government moved for summary judgment to preclude the Sorrentinos from using evidence other than a certified or registered mailing to prove a timely postmark (and therefore their case).⁹⁸ District Judge John L. Kane denied the government's motion, ruling that the Sorrentinos could use extrinsic evidence to prove that the mailpiece containing their 1994 tax return was timely postmarked and therefore filed within the deadline for claiming the refund.⁹⁹

88. *Sorrentino II*, 199 F. Supp. 2d at 1071.

89. *Id.*

90. *Cf. Washton v. United States*, 13 F.3d 49, 50 (2d Cir. 1993) (expressing Court's incredulity regarding taxpayer's apparent failure for several years to make inquiry regarding refund claim).

91. *Sorrentino II*, 199 F. Supp. 2d at 1071.

92. *Id.* at 1072.

93. *Id.*

94. Many official documents in the case, and references to the case, are captioned as "Sorrentino v. Internal Revenue Service" or "Sorrentino v. I.R.S.," *see, e.g., Sorrentino III*, 383 F.3d at 1187. The defendant in the case should properly be captioned as the United States, inasmuch as the Internal Revenue Service cannot be sued *eo nomine*, *see, e.g., Freck v. I.R.S.*, 37 F.3d 986, 988 n.1 (3d Cir. 1994); *Labry v. I.R.S.*, 940 F. Supp. 148, 149 (E.D. La. 1996). Neither the U.S. Government attorneys, nor the courts themselves, seem to have been particularly concerned by the captioning of the IRS as a party. *Cf. Evseroff v. I.R.S.*, 2000 U.S. Dist. LEXIS 15888 at *6 (E.D.N.Y. 2000), *aff'd* 13 Fed. Appx. 16, 2001 U.S. App. LEXIS 13139 (2nd Cir. 2001); *Haley v. I.R.S.*, 2006 U.S. Dist. LEXIS 5318, n.1 at *1 (Dist. Md. 2006).

95. *Sorrentino I*, 171 F. Supp. 2d at 1151.

96. *Id.*

97. *Id.*

98. *Id.* at 1152..

99. *Id.* at 1154.

Approximately two months later, Judge Kane granted the Sorrentinos' motion for summary judgment, finding that Mr. Sorrentino's uncontradicted account of the relevant events to be credible evidence proving that a postmark had been timely applied to the mailpiece.¹⁰⁰

C. The Tenth Circuit's Reversal

The Government appealed the District Court decision.¹⁰¹ The Sorrentinos, as appellees, appeared in the Circuit Court pro se, but the Court also appointed Mr. Steven G. Sklaver, Esq., of Cooley Godward, LLP, as amicus curiae in the case.¹⁰²

A deeply divided Tenth Circuit panel reversed the result reached by the District Court.¹⁰³ Senior Circuit Judge Bobby Ray Baldock, who wrote the main opinion, ruled that taxpayers may introduce extrinsic evidence to prove a timely postmark, but that the extrinsic evidence proffered by the Sorrentinos did not sufficiently carry their burden of proof.¹⁰⁴ In what was denominated as a concurring opinion, Judge Harris L. Hartz agreed that the Sorrentinos failed to sufficiently prove a timely mailing because I.R.C. § 7502 precludes the introduction of extrinsic evidence other than registered or certified mail.¹⁰⁵ In what was nominally labeled as a dissenting opinion, Judge Stephanie Kulp Seymour agreed with Judge Baldock that extrinsic evidence other than registered or certified mail should be admissible by the taxpayer seeking to benefit under I.R.C. § 7502. However, Judge Kulp took issue with his evaluation of the evidence (apparently affidavits and/or depositions by the Sorrentinos) without the benefit of a trial.¹⁰⁶

Tallying up the votes of the Tenth Circuit panel of three judges, the Sorrentinos lost the case 2:1, but the ability of a taxpayer to introduce extrinsic evidence also carried 2:1.¹⁰⁷ Accordingly, while the proponents of the extrinsic evidence interpretation of I.R.C. § 7502 had cause to celebrate, the Sorrentinos were left in a position analogous to being informed by the surgeon that the operation was a success but that the patient had died.

100. *Sorrentino II*, 199 F. Supp. 2d at 1073-74.

101. *Sorrentino III*, 383 F.3d at 1189.

102. *Id.* at 1187.

103. *Id.* at 1195-97.

104. *Id.* at 1195.

105. *Id.* at 1196-1197 (Hartz, J., concurring in result).

106. *Sorrentino III*, 383 F.3d at 1198-99.

107. *Id.* at 1195-98.

D. *The Supreme Court's Denial of Certiorari*

The Sorrentinos petitioned the United States Supreme Court for certiorari. In their brief,¹⁰⁸ the question presented for certiorari was couched as

[w]hen the Internal Revenue Service claims it did not receive a tax document sent by a taxpayer, can a taxpayer prove timely delivery of a document to the Internal Revenue Service through testimony that the document was timely and properly mailed, in conformity with the longstanding common-law mailbox rule?¹⁰⁹

In the Government's opposing brief, however, the question presented was couched as

[w]hether taxpayers who claim that they mailed a required tax document by ordinary mail are entitled to a presumption that the document was delivered to the Internal Revenue Service in a timely manner even though the records of the Service reflect that the document was not, in fact, timely received.¹¹⁰

The Government further proceeded to argue that the IRS/Treasury's proceedings then in progress to prospectively revise Treas. Reg. § 301.7502-1, which were first announced in the Federal Register exactly one week after the Circuit Court's decision was filed,¹¹¹ rendered the Supreme Court's review of the issue unwarranted.¹¹²

The Supreme Court, shorthanded at the time on account of the vacancy left by the death of Chief Justice Rehnquist, denied the petition for certiorari on October 3, 2005.¹¹³

The denial of certiorari in *Sorrentino* was not written on a clean blackboard, for the slate was besmudged nine years earlier when the Supreme Court denied certiorari

108. In the Supreme Court appeal, the Sorrentinos were represented by Cooley Godward, LLP as counsel. Mr. Sklaver had left the firm by then. Docket for *Sorrentino IV*, 126 S. Ct. 334 (2005) (No. 04-1396).

109. Petition for Certiorari, at page i, *Sorrentino IV*, 126 S. Ct. 334 (2005) (No. 04-1396).

110. Brief for the United States in Opposition at I, *Sorrentino IV*, 126 S. Ct. 334 (2005) (No. 04-1396).

111. Though the fortuitous timing of the regulation revision did momentarily shine the spotlight on the I.R.C. § 7502 extrinsic evidence controversy, it had already been in the planning stages for nearly two years. See Treasury Department, Semiannual Regulatory Agenda, I.R.S. Reg. sec. 138176-02, 67 F.R. 75068 (Dec. 9, 2002).

112. Brief for the United States in Opposition at 8-9, *Sorrentino IV*, 126 S. Ct. 334 (2005) (No. 04-1396). The IRS's rulemaking activity to revise Treas. Reg. § 301.7502-1 is discussed *supra* at notes 56 through 79 and accompanying text.

113. *Sorrentino IV*, 126 S. Ct. at 334.

in the *Carroll* case from the Sixth Circuit.¹¹⁴ In the *Carroll* opinion, Circuit Judge David A. Nelson lamented that a majority of his fellow jurists in the Sixth Circuit had already declined to revisit the extrinsic evidence issue *en banc*, and accordingly, he was bound by the certified or registered mailing as the sole acceptable proof standard enunciated by the Circuit in the *Miller*¹¹⁵ and *Surowka*¹¹⁶ cases.¹¹⁷ The Sixth Circuit's *Carroll* decision was characterized as "a clear invitation to the Supreme Court to resolve [the] issue so that all taxpayers will be treated uniformly."¹¹⁸

Between *Carroll* and *Sorrentino*, the Supreme Court denied certiorari in two other matters involving proof of a postmark under I.R.C. § 7502—*McDermott*¹¹⁹ and *Brown*.¹²⁰ In *McDermott* and in *Brown*, the split of authority regarding I.R.C. § 7502 received neither the appellate judicial emphasis nor media publicity that attended the *Carroll* and *Sorrentino* cases. The Government's brief to the Supreme Court in *McDermott* acknowledged that "[r]esolution of this recurring issue by [the U.S. Supreme] Court is needed to avoid continuing uncertainty and to assure even-handed application of the revenue laws," but asserted, to the apparent agreement of the Court, that the facts of the particular case did not present the appropriate circumstances to resolve the issue.¹²¹ Indeed, the evidence presented by the taxpayers in *McDermott*, consisting of uncorroborated and nonspecific statements, would most likely have been insufficient to prove a timely postmark, even if they were admitted and considered.¹²² The evidence proffered in *Brown* was likewise deficient.¹²³

114. *Carroll v. Comm'r*, 518 U.S. 1017 (1996), *denying cert.* to 71 F.3d 1228 (6th Cir. 1995).

115. *Miller v. United States*, 784 F.2d 728, 730 (6th Cir. 1986).

116. *Surowka v. United States*, 909 F.2d 148, 149 (6th Cir. 1990).

117. *Carroll v. Comm'r*, 71 F.3d 1228, 1232 (6th Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996) ("Unless the Supreme Court or Congress should decide otherwise, therefore, *Miller* and *Surowka* will remain good law in the Sixth Circuit.").

118. Tom Herman, Tax Report, WALL ST. J., Jan. 17, 1996, at 1 (quoting attorney Martin D. Pollack).

119. *McDermott v. Comm'r*, 525 U.S. 1067 (1999), *denying cert.* to 1998 U.S. App. LEXIS 7428 (1st Cir. Mar. 18, 1998), *aff'g* 1997 U.S. Dist. LEXIS 7008 (D. Mass. May 6, 1997).

120. *Brown v. Comm'r*, 528 U.S. 967 (1999), *denying cert.* to 1999 U.S. App. LEXIS 8248 (6th Cir. Apr. 27, 1999), *aff'g* 71 T.C.M. (CCH) 2301(1996).

121. Brief for the United States in Opposition, *McDermott v. Comm'r*, 525 U.S. 1067 (1999), at 5.

122. See *McDermott v. Comm'r*, 1997 U.S. Dist. LEXIS 7008, at *10 (D. Mass. May 6, 1997).

The *McDermotts* have not produced any cover letters or any corroborating testimony other than a separation agreement which references the IRS refund. Even Mrs. *McDermott* could not corroborate the mailing. Indeed, in his deposition, Mr. *McDermott* admitted that the summer of 1991 was a period of 'divorce warfare', and that his documents from that time period were in a pile in New York.

Id.

123. *Brown v. Comm'r*, 1999 U.S. App. LEXIS 8248, at *7-*8 (6th Cir. Apr. 27, 1999).

Brown argues that repeated correspondence between the IRS and himself following the

And so, with the denial of certiorari, the Sorrentinos were left without any means to recover more than \$8,000 that was concededly overpaid to the IRS through excess wage withholdings.¹²⁴

IV. TAXATION CASES AND THE JUDICIARY

It is axiomatic that the drafters of the Constitution intended for the three branches of American government—the Executive, Congress and the Judiciary—to provide checks and balances upon one another. The need for controls over the taxation function is especially imperative. Taxation, as Justice Marshall famously observed, “involves the power to destroy.”¹²⁵ Dysfunctions in the taxation system, with the concomitant excessive exactions from the populace, have sparked wars and other manners of societal discord, including the French and American Revolutions. Indeed, even the text of the Rosetta Stone recounts a retreat from excessive taxation policies, likely undertaken to stave off a brewing insurrection.¹²⁶ Thus, it is hardly surprising that controls of some sort were placed upon the powers and discretions of the taxation personnel who served such diverse ancient regimes as the Roman Empire¹²⁷ and King Hammurabi.¹²⁸

alleged 1991 filing proves that his return had been received. The only supporting evidence he has submitted is one letter indicating that he requested copies of unspecified returns or W-2 forms. Nothing about this letter implies that a return for 1990 was received by the IRS in 1991.

Id.

124. The Sorrentinos were not entirely blameless in creating their predicament, because they failed to timely file the tax return in the first instance. “The Tax Code was obviously not set up to indulge the dilatory,” *Weisbart v. United States*, 222 F.3d 93, 96 (2d Cir. 2000).

Even where, as in the Sorrentinos’ situation, the taxpayer lacks complete information regarding his or her tax affairs, a tax return as complete as possible under the circumstances must be filed before the due date. *Neely v. Comm’r*, 85 T.C. 934, 952-953 (1985); *Scott v. Comm’r*, 74 T.C.M. (CCH) 1157 (1997); *Dennis v. Comm’r*, 73 T.C.M. (CCH) 3061 (1997); *Healey v. Comm’r*, 71 T.C.M. (CCH) 3148 (1996); *Du Poux v. Comm’r*, 68 T.C.M. (CCH) 667 (1994); *Krzepina v. Comm’r*, 66 T.C.M. (CCH) 360 (1993); *see also* Treas. Reg. § 20.6081-1(d) (2005) (requiring that an Estate Tax return “as complete as possible must be filed before the expiration of the extension period.”).

125. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

126. *See* E. A. Wallis Budge, *The Rosetta Stone in the British Museum* 55 (Religious Tract Soc’y, London, 1929), alternate translation also available at <http://www.rosetta.com/AcrobatDocs/Stone.pdf> (last visited July 3, 2006) (recounting that King Ptolemy had reduced or eliminated various taxes in Egypt).

127. *See, e.g.*, Code Just. 12.62.3 (Gratian & Valentinian) (c. 380), reprinted in 15 *The Civil Law* 319 (S. P. Scott, trans., Central Trust Co.) (photo. reprint, AMS Press 1973) (1932) (“Whenever a collector is accused and convicted of depredations, he must suffer the penalty prescribed by the law, without appealing to Our clemency.”).

128. *See* CODE OF HAMMURABI KING OF BABYLON § 38, at 25 (R. F. Harper trans., Wm. W. Gaunt & Sons, Inc., 1994) (circa 2250 B.C.) (“An officer, constable or tax-gatherer shall not deed to

Examining the American judiciary's efficacy in controlling the taxation function requires looking at the factors in, and judicial attitudes regarding, American taxation.

A. *Complicating Factors in American Taxation*

Even under the best of circumstances, taxation "frequently operates very differently from the intention of the legislature by its indirect effects."¹²⁹ American taxation is particularly subject to such indirect effects on account of several complicating factors and circumstances, making the need to control the taxation function all the more imperative.

1. Implications of a Tax upon Income

The income tax was not envisioned by America's Founding Fathers, and indeed, would be unconstitutional were it not for the Sixteenth Amendment.¹³⁰ Since the enactment of the first Income Tax statute to finance the Civil War,¹³¹ the primary source of contributions to the Federal fisc has transitioned from excise taxes to personal income taxes.¹³² Because the Founding Fathers did not include the income tax as such in their scheme of government, the provisions they made for checks and balances upon the taxation function were generic, and not specifically geared to an income tax enforcement establishment such as the IRS is today.

his wife or daughter the field, garden or house, which is his business (i.e., which is his by virtue of his office), nor shall he assign them for debt.").

129. DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION*, ch. 16, at 157 (Everyman's Library, no. 590, J. M. Dent & Sons, London, 1969).

130. U.S. CONST. amend. XVI. This article does not delve into the merits (or lack thereof) regarding tax protester arguments to the effect that the Sixteenth Amendment of the Constitution is invalid, *see, e.g.*, *Cheek v. United States*, 498 U.S. 192, 195 (1991); *United States v. Sassak*, 881 F.2d 276, 281 (6th Cir. 1989); *United States v. Scott*, 521 F.2d 1188, 1192 (9th Cir. 1975); *Rutherford v. Comm'r*, 42 T.C.M. (CCH) 1103 (1981); *see also* Christopher S. Jackson, *The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar—Whatever His Demands*, 32 GONZ. L. REV. 291, 298-307 (1996). Suffice it to say that unenthusiastic taxpayers in other nations have also advanced arguments questioning the constitutionality of the income taxes imposed upon them by their respective governments, *see, e.g.*, *Deputy Commissioner of Taxation v. Levick*, [1999] FCA 1580 (Fed. Ct. Australia 1999); *Regina v. Sydel*, 2005 BCPC 413 (Brit. Col. Prov. Ct. 2005); *Regina v. Dove*, [2004] O.J. No. 4015 (Ontario Sup. Ct. Just. 2004); *B v. Comptroller of Inland Revenue*, [1974] 2 MLJ 110 (Malaysia Fed. Ct. Civ. App., 1974); *Tan v. Del Rosario*, Philippines Sup. Ct., G.R. No. 109289 (October 3, 1994); *Youngstrom v. Kosrae*, [1991] FMSC 12 (Kosrae, Micronesia, 1991); *see also* Metcash Trading Ltd. v. Commissioner, 2001 (1) BCLR 1 (CC) (S. Afr. Const. Ct., 2000) (upholding constitutionality of South African value added tax).

131. Act of July 1, 1862, 12 Stat. 432.

132. *See* SHELLEY L. DAVIS, *UNBRIDLED POWER* 196-197 (HarperBusiness, 1997); *see also* U.S. TREASURY DEPT., TABLE 18.—TREASURY DEPARTMENT GROSS TAX COLLECTIONS: AMOUNT COLLECTED BY QUARTER AND FISCAL YEAR, FY 1987–2005 (2005), <http://ftp.qai.irs.gov/pub/irs-soi/histab18.xls> (last visited July 3, 2006).

It has been observed that “wherever money changes hands, so does information.”¹³³ The information necessary to verify and otherwise enforce an income tax is far more extensive than that required to verify and enforce an excise tax paid at a port of entry, distillery, or factory shipping dock, or a sales tax paid at a merchant’s cash register. Personal information such as name, Social Security Number, identity of spouse and children, address and employer—largely irrelevant to the collection and enforcement of ad valorem or excise taxes—is key to the collection and enforcement of the income tax. Moreover, in a tax audit situation, the tax auditor becomes privy to even more personal information in the taxpayers records, including but not limited to bank and brokerage account numbers,¹³⁴ and recipients and canceled checks from the taxpayer’s charitable giving¹³⁵ (from which can be often deduced the taxpayer’s political, social and religious leanings).

This great body of personal data must be kept confidential, else the public would entertain justifiable misgivings about voluntarily complying with the income tax laws.¹³⁶ To be sure, the breadth and length of the personal information that necessarily must repose in the hands and databases of an income tax enforcement authority does carry positive attributes, including great utility in law enforcement and homeland security.¹³⁷ But the management of such information has far-reaching implications for personal privacy and security of the citizenry. It is no fortuitous coincidence that the Internal Revenue Code provision that deals with the disclosure of taxpayer information is among the more verbose and complex sections of the Code.¹³⁸

133. Larry Pavlicek, *Developing a Counterintelligence Mind-Set*, SECURITY MGMT., April 1992, at p. 54.

134. See, e.g., Internal Revenue Manual § 4.10.3.4.5.1(6) (03-01-2003) (“Identify the taxpayer’s business and personal assets, including capital acquisitions, bank accounts and cash. At a minimum, the taxpayer and/or representative should be questioned regarding capital asset transactions, cash in bank, cash on hand, bartering, number and location of bank accounts, non-taxable sources of funds, and total assets held.”).

135. I.R.C. § 170(f)(8).

136. See, e.g., *Boske v. Comingore*, 177 U.S. 459, 469-70 (1900); *United States v. Tucker*, 316 F. Supp. 822, 825 (Dist. Conn. 1970); *Fed. Sav. & Loan Ins. Corp. v. Krueger*, 55 F.R.D. 512, 514 (N.D. Ill. 1972); *Webb v. Standard Oil Co. of California*, 319 P.2d 621, 624 (Cal. 1957); *New York State Dep’t of Taxation & Fin. v. New York State Dep’t of Law*, 378 N.E.2d 110 (N.Y. 1978).

137. See, e.g., Testimony of Gary M. Bald, Acting Assistant Director Counterterrorism Division, FBI, Before the Senate Caucus on International Narcotics Control (March 4, 2004), available at <http://www2.fbi.gov/congress/congress04/bald030404.htm> (last visited July 3, 2006) (mentioning involvement of IRS in anti-terrorism activity), see also John Mintz, *U.S. Freezes Accounts Of Large Saudi Charity*, WASH. POST, Feb. 20, 2004, at A-2 (reporting IRS participation in searching office of a charitable organization suspected of financing terrorism).

138. See I.R.C. § 6103 (2005).

2. The Judicial Forums for Litigating Tax Disputes

Taxpayers have several choices of forum in which to litigate tax controversies.¹³⁹ The most popular litigation path begins in the United States Tax Court.¹⁴⁰ Though the Tax Court convenes at several locations, often contemporaneously through the respective assignment of its several judges,¹⁴¹ it is constituted as one single tribunal.¹⁴² Yet, Tax Court decisions are reviewable by the various Circuit Courts of Appeals,¹⁴³ usually the Circuit in which the taxpayer resides.¹⁴⁴ The Tax Court therefore applies the law of the Federal Circuit to which the case is appealable.¹⁴⁵ Accordingly, taxpayers can be and are held to diverse standards by the Tax Court, depending upon their state of residence.¹⁴⁶

Over a half century ago, Supreme Court Justice Robert H. Jackson described the situation, noting that appeals from the Tax Court

fan out into courts of appeal of ten circuits and the District of Columbia. This diversification of appellate authority inevitably produces conflict of decision, even if review is limited to questions of law. But conflicts are multiplied by treating as questions of law what really are disputes over proper accounting. The mere number of such questions and the mass of decisions they call forth become a menace to the certainty and good administration of the law.¹⁴⁷

139. In addition to the Tax Court, District Court and Court of Federal Claims options discussed presently, tax litigation can effectively be conducted in a bankruptcy proceeding before a Bankruptcy Court, *see, e.g., In re Lynch*, 299 B.R. 62 (Bankr. S.D.N.Y. 2003).

140. *See* I.R.C. §§ 7441 et seq.

141. I.R.C. §§ 7445, 7446 (2005).

142. I.R.C. § 7441 (2005).

143. I.R.C. § 7482(a) (2005).

144. I.R.C. § 7482(b)(1) (2005).

145. *Golsen v. Commissioner*, 54 T.C. 742, 756-57 (1970), *aff'd*, on other grounds 445 F.2d 985 (10th Cir. 1971), *cert. denied*, 404 U.S. 940 (1971).

146. *Compare, e.g. Gasparutti v. Comm'r*, 76 T.C.M. 726 (CCH) (1998) (allowing California resident taxpayer, in case appealable to 9th Circuit, to introduce extrinsic evidence to prove timely postmark under I.R.C. § 7502) *with Maxon v. Comm'r*, 68 T.C.M. (CCH) 878 (1994) (prohibiting Connecticut resident taxpayer, in case appealable to 2nd Circuit, from introducing extrinsic evidence to prove timely postmark under I.R.C. § 7502); *see also Bruder v. Comm'r*, 57 T.C.M. (CCH) 873 (1989).

147. *Dobson v. Comm'r*, 320 U.S. 489, 499 (1943). Effective 1981, Congress split the states of Florida, Georgia and Alabama away from the old Fifth Circuit to create an Eleventh Circuit Court of Appeals. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. 96-452, 94 Stat. 1994 (1980).

Mr. Justice Jackson's perspective towards tax litigation was surely colored by his prior service as General Counsel of the Bureau of Internal Revenue (1934-1935), and as an Assistant Attorney General in the Justice Department Tax Division (1936-1938). *See* Federal Judges Biographical

Taxpayers can also commence litigation in a United States District Court or in the Court of Federal Claims.¹⁴⁸

The structure and operation of the judicial system in which tax disputes are litigated, which has been described as an “inverted pyramid,”¹⁴⁹ presents a very formidable challenge to controlling the excesses of the taxation authority.

3. Diverse Administrative Tax Materials

As Court of Federal Claims Judge Francis M. Allegra noted,

the Internal Revenue Service . . . has a robust administrative practice, characterized by a panoply of multi-faceted and multi-purposed administrative pronouncements and positions. Among these are Treasury regulations (both interpretative and legislative), revenue rulings, private letter rulings, technical advice memoranda and General Counsel Memoranda.¹⁵⁰

Judge Allegra can certainly be forgiven for failing to also mention such administrative pronouncements as Determination Letters, Opinion Letters, Information Letters and Closing Agreements, all of which are no less a part of the IRS's robust administrative practice.¹⁵¹ Also aboard the IRS's bandwagon are its training materials, and even speeches by its upper echelon officers, which likewise are given regard by the courts.¹⁵²

The diversity and complexity of the IRS's administrative materials, coupled with the fact that it interacts with virtually every household and business in America, make the task of controlling the IRS's excesses a very demanding task for the legislature and the judiciary.

Database, *Robert Houghwout Jackson*, <http://air.fjc.gov/servlet/tGetInfo?jid=1160> (last visited July 3, 2006).

148. 28 U.S.C. § 1346(a)(1) (2000); *see also* *Comm'r v. Lundy*, 516 U.S. 235, 250-253 (1996) (comparing jurisdiction over tax litigation among the Tax Court, the United States District Courts and the Court of Federal Claims).

149. *See* Kirk J. Stark, *The Unfulfilled Tax Legacy of Justice Robert H. Jackson*, 54 TAX L. REV. 171, 185-86 (2001); Sean A. Bryan et al., *Special Project: An Empirical Study of Intercircuit Conflicts on Federal Income Tax Issues*, 9 VA. TAX REV. 125, 128-29 (1989).

150. *Vons Companies, Inc. v. United States*, 51 Fed. Cl. 1, 3, (2001), *modified by* 2001 U.S. Claims LEXIS 241 (Fed. Cl. 2001).

151. *See, e.g.*, Treas. Reg. § 601.201 (2005).

152. *See* *Vinson & Elkins v. Comm'r*, 99 T.C. 9, 58-59 (1992), *aff'd*, 7 F.3d 1235 (5th Cir. 1993).

4. Taxation Authorities at Federal and State Levels

Many state statutes conform, in general scheme if not verbatim, to some analogous Federal statute. The Telephone Consumer Protection Act,¹⁵³ for example, has its counterparts in several state codes,¹⁵⁴ and the reasonable accommodation in the workplace provisions of the Americans with Disabilities Act have also state statutory parallels.¹⁵⁵

State taxation laws and schemes very frequently have Federal counterparts to which they conform and by which they are interpreted.¹⁵⁶ Quite notably, many state statutes are patterned after I.R.C. § 7502 and are construed by the respective state courts and tribunals according to the Federal statute's construction.¹⁵⁷ Moreover, the

153. 47 U.S.C. § 227 (2000).

154. *E.g.*, Conn. Gen. Stat. §§ 42-284-42-289 (2006); Mass. Gen. Laws ch. 159C; N.Y. Gen. Bus. L. §§ 396-aa and 399-p. The New York statutory code actually contains two separate and unrelated sections designated as Gen. Bus. L. §§ 396-aa, one relating to unsolicited telefacsimile advertising and the other relating to the use of simulated check documents. This double numbered statutory section is not unique in the New York code. Hon. Philip Straniere, a New York State judge, humorist and sometime expounder on literature, arts and popular culture, has commented on another such anomaly in New York's General Business Law, the Gen. Bus. L. § 396-p that relates to contracts for the sale of new motor vehicles:

Not to be confused with other GBL § 396-p 'Rates to be posted in taxicabs.' This is one of at least nine double numbered sections in the GBL. There are also double numbered sections in the EPTL, PHL and VTL. For those of you who are familiar with Joseph Heller's 'Catch 22' and wondering what ever happened to the character who 'sees everything twice,' we now know that he works for the state legislature.

Levitsky v. SG Hylan Motors, N.Y.L.J., July 3, 2003, p. 27, col. 5, n.1 at 28, col. 1 (N.Y.C. Civ. Ct., Richmond Co. 2003) (Straniere, J.).

155. *Compare, e.g.* 42 U.S.C. § 12112 (2000) with N.Y. Exec. L. §§ 296(3) and New York City Admin. Code § 8-107(1); *see also* Mohamed v. Marriott International, Inc., 905 F. Supp. 141, 156-157 (S.D.N.Y. 1995); Konipol v. Restaurant Associates, No. 01 Civ. 7857 (GEL), 2002 U.S. Dist. LEXIS 22439, at *18-*19 (Nov. 19, 2002) (S.D.N.Y. 2002) ("Except to the extent that the [New York Human Rights Law] supports a broader definition of "disability," . . . the legal standards for discrimination claims under the ADA and under New York state and city law are essentially the same.").

156. *See, e.g.*, 72 PA. CONS. STAT. ANN. sec. 7330(a) (2005); OHIO REV. CODE ANN. sec. 5747.01 (2006); *see also* District of Columbia v. National Bank of Washington, 431 A.2d 1, 4 (D.C. 1981); Comptroller of the Treasury v. Diebold, Inc., 369 A.2d 77, 81-82 (Md. 1977); FirstTier Bank, N.A. v. Dep't of Revenue, 580 N.W.2d 537 (Neb. 1998); United States Stationery Co. v. State Tax Comm'n, 394 N.Y.S.2d 88 (App. Div. 1977), *aff'd*, 406 N.Y.S.2d 759 (1978).

157. *See, e.g.*, State of Alabama v. Eli Witt Company, Inc., 627 So. 2d 947, 949 (Ala. Civ. App. 1993), *cert. denied*, 1993 Ala. LEXIS 1397 (Sept. 3, 1993); Director of Revenue v. Stroup, 611 A.2d 24, 27 (Del. Super. Ct. 1992); Dattilo v. Urbach, 645 N.Y.S.2d 352 (App. Div. 1996); *see also* Matter of Oggi Restaurant, Inc., New York State Division of Tax Appeals No. DTA 810572 (15 February 1995).

IRS and its counterpart agencies at the state level often share taxpayer information in order to mutually enhance their enforcement efforts.¹⁵⁸

Due to the very nature of taxation, an overwhelming majority of American households must annually interact with the state and federal taxation authorities. The sheer number and permutations of Federal-state interbureaucratic transactions can only complicate and impede the task of controlling the IRS.

B. *The Judiciary's Attitudes towards Tax Administration*

Deference to an administrative agency charged with enforcing and implementing a particular statute is, to be sure, quite appropriate,¹⁵⁹ and indeed, the IRS is given broad leeway in its interpretation and enforcement of the Internal Revenue Code.¹⁶⁰ There nevertheless comes a point where the judiciary must step in to prevent the IRS (or any other administrative agency) from overstepping its bounds.¹⁶¹

Judge Learned Hand commented that

the words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time.¹⁶²

158. See I.R.C. § 6103(d); see also *Hillecke v. Dep't of Revenue*, 2005 Or. Tax LEXIS 32 at *6 (Or. T.C. 2005) (reciting that Oregon Department of Revenue received information from IRS regarding taxpayer's income); *Zenith Industrial Corp. v. Michigan Dept. of Treasury*, 394 N.W.2d 451, 452 (Mich. Ct. App. 1986), *appeal denied*, 426 Mich. 875 (1986); *Brown v. Comptroller of the Treasury*, 747 A.2d 232, 233-234 (Md. Ct. App. 2000).

159. *United States v. Correll*, 389 U.S. 299, 307 (1967); see also *United States v. Moore*, 95 U.S. 760, 763 (1877).

160. See *Cottage Savings Ass'n v. Comm'r*, 499 U.S. 554, 559-61 (1991); *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 730 (1985); *Foodservice and Lodging Inst., Inc. v. Regan*, 583 F. Supp. 1018, 1024-1025 (D.C. 1984), *rev'd on other grounds*, 809 F.2d 842 (D.C. Cir. 1987).

161. See, e.g., *United Cancer Council, Inc. v. Comm'r*, 165 F.3d 1173 (7th Cir. 1999).

We were not reassured when the government's lawyer, in response to a question from the bench as to what standard he was advocating to guide decision in this area, said that it was the "facts and circumstances" of each case. That is no standard at all, and makes the tax status of charitable organizations and their donors a matter of the whim of the IRS.

Id. at 1179.

162. Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 169 (1947).

As the tax statutes and regulations have increased and multiplied,¹⁶³ other jurists have been similarly vexed by the tax law's complexity.¹⁶⁴

In light of such complexity, the bench has been very deferential to the IRS's interpretation and application of the Internal Revenue Code.¹⁶⁵ Even Judge Richard A. Posner, whose accomplished career on and off the Seventh Circuit bench includes significant expertise in economic and monetary matters,¹⁶⁶ and who certainly has not shrunk from admonishing or chastising the IRS,¹⁶⁷ has indicated a preference that the judiciary not play a starring center stage role in taxation matters.¹⁶⁸ And neither have

163. The familiar U.S.C.C.A.N. annual edition of the Internal Revenue Code (sometimes informally referred to as the "Red I.R.C.") has grown from a single volume of 1,930 pages in the 1976 edition to two volumes of 1,824 and 1,229 pages, respectively, for the 2005 edition. I.R.C. (West 1976); I.R.C. (Thomson/West 2005). The U.S.C.C.A.N. companion Federal Tax Regulations publication ("Red Tax Regs") has grown even more dramatically over the same period, from two volumes totaling 4,508 pages in 1976 to six volumes of 1,747, 1,654, 1,632, 1,610, 1,552 and 1,674 pages, respectively, in 2005. Tres. Reg. (West 1976); Treas. Reg. (Thompson/West 2005). The foregoing figures do not include the Roman numeral prefatory pages or the index pages.

164. See *Houston Textile Co. v. Comm'r*, 173 F.2d 464, 464 (5th Cir. 1949) ("This petition brings up for solution one of those difficult jigsaw tax law puzzles all too common in the present deplorable crazy quilt patchwork state of the Internal Revenue laws."); *Cohen v. United States*, 995 F.2d 205, 209 (Fed. Cir. 1993) ("It is rare that tax law bears any recognizable relationship to common sense."); *Tkac v. United States*, No. MJG-01-3758, 2002 U.S. Dist. LEXIS 16657, at *1 (Dist. Md. Aug. 1, 2002) ("Government counsel 'dumped' a collection of documents on the record and, in effect, left the Court to sort matters out on its own. Judges (and/or law clerks) unfamiliar with tax matters could find this a daunting task.").

165. See, e.g., *Ryan v. Bureau of Alcohol, Tobacco & Firearms*, 715 F.2d 644, 651 (D.C. Cir. 1983) (Wald, J., dissenting) ("There is always risk in generalist judges construing the intricate interrelationships of words and phrases in specialized legislation, and that danger is heightened in the case of the Internal Revenue Code."); *Rebecca K. Crown Income Charitable Fund v. Comm'r*, 8 F.3d 571, 576 (7th Cir. 1993) (Posner, J.) ("In so technical an area of tax law, . . . we generalist judges should be loath to lay down the law on the question without the Treasury's view.").

166. See Richard A. Posner: Publications, Presentations and Works in Progress, <http://www.law.uchicago.edu/faculty/posner-r/ppw.html> (last visited July 3, 2006); see also Adam Chodorow, *Economic Analysis in Judicial Decision Making—An Assessment Based on Judge Posner's Tax Decisions*, 25 VA. TAX REV. 67, 72 (2005); Robert A. Ferguson, *Tribute to Richard A. Posner*, 61 N.Y.U. ANN. SURV. AM. L. 1, 2 (2005).

167. See Chodorow, *supra* note 166, at 70; *United Cancer Council v. Comm'r*, 165 F.3d 1173, 1179 (7th Cir. 1999).

168. *BCS Fin. Corp. v. United States*, 118 F.3d 522, 527 (7th Cir. 1997).

What is peculiar about the informal-claim doctrine is that it is a gloss on the text of a Treasury regulation, specifying the form and contents of a claim for a refund, which could easily (we should think) be amended to specify the circumstances of substantial compliance or excusable noncompliance in which a nonstandard claim would be deemed adequate. Then the judges could take a back seat, which is where they usually belong in tax law.

the United States Supreme Court justices exuded enthusiastic attitudes towards taxation cases.¹⁶⁹

Notwithstanding this, excessive judicial entanglement in the tax affairs of the citizenry is, of course, inimical to the government's need to effectively collect its due taxes in an orderly and efficient manner, and indeed, the Anti-Injunction Act¹⁷⁰ significantly limits the judiciary's intervention into the tax collection process.¹⁷¹ But neither can an Executive Branch agency, least of all a taxation authority, be allowed absolute unfettered leeway.

The judiciary, lacking tax expertise, has largely chosen to defer to the IRS's positions. One illustrative example is the *Lykes* case,¹⁷² where the majority on the Supreme Court bench woodenly deferred to the IRS's regulations, but where Justice Jackson, whose tax background afforded him full appreciation of an unfettered tax collector's potential for tyranny,¹⁷³ wrote a hard-hitting dissenting opinion.¹⁷⁴

Many tax decisions are not published in the official court reporters.¹⁷⁵ In light of the stepchild status accorded such judicial opinions by some courts,¹⁷⁶ the relegation

169. See, e.g., Stuart Taylor, Jr., *Powell on His Approach*, N.Y. TIMES, July 12, 1987, at 18 (quoting former Supreme Court Justice Lewis Powell: "A dog is a case that you wish the Chief Justice had assigned to some other Justice. . . . a tax case, for example."); Stuart Taylor, Jr., *Supreme Court: Reading the Tea Leaves of a New Term*, N.Y. TIMES, Dec. 22, 1986, at B14 (Quoting Justice Harry A. Blackmun: "If one's in the doghouse with the Chief, he gets the crud. . . . He gets the tax cases.").

Notwithstanding his expressed distaste for taxation cases, Justice Blackmun did understand the need for the Supreme Court to adjudicate them, and occasionally criticized his fellow Justices for their reluctance to deal with tax issues. See *Singleton v. Comm'r*, 439 U.S. 940, 942 (1978) (Blackmun, J., dissenting from cert. denial) ("I hope that the Court's decision to pass this case by is not due to a natural reluctance to take on another complicated tax case that is devoid of glamour and emotion."); see also Robert A. Green, *Justice Blackmun's Federal Tax Jurisprudence*, 26 HASTINGS CONST. L.Q. 109, 109-10 (1998).

170. I.R.C. § 7421(a) (2000).

171. *Id.*; see also *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962) (holding that collection of social security and unemployment taxes could not be enjoined, even though the collection would destroy the corporation's business).

172. *Lykes v. United States*, 343 U.S. 118 (1952).

173. See *supra* note 147.

174. *Lykes v. United States*, 343 U.S. 118, 128-129 (Jackson, J., dissenting) (1952).

As for the Treasury Regulation, I would not give it one bit of weight. The Treasury may feel that it is good public policy to discourage taxpayers from contesting its unjustified demands for taxes and thus justify penalizing resistance. It is hard to imagine any instance in which the Treasury could have a stronger self-interest in its regulation.

Id. Justice Frankfurter joined in Jackson's dissent. *Id.* at 127.

175. Such opinions are commonly referred to as "unpublished opinions" or "unpublished cases," an obvious misnomer, for their appearance in unofficial commercial text media, including CCH and LEXIS, certainly constitutes publication.

176. See, e.g., *Sorchini v. City of Covina*, 250 F.3d 706, 709 (9th Cir. 2001); see also *Regency Pheasant Run, Ltd. v. Karem*, 860 S.W.2d 755, 758 (Ky. 1993) (noting that petitioner's

of a judicial opinion to “unreported” status enables the judiciary to avoid, to one extent or another, accountability for its actions.¹⁷⁷ It is perhaps ironic, but hardly a random coincidence, that the *Anastasoff* case,¹⁷⁸ a “reported” case that added much fuel to the unreported opinion debate,¹⁷⁹ was a taxation case, and specifically about the I.R.C. § 7502 extrinsic evidence of a postmark controversy.¹⁸⁰

One case where the use of unreported opinions was obviously convenient for the judiciary was the *BMC Bankcorp* litigation,¹⁸¹ a case involving the I.R.C. § 7502 postmark rule.¹⁸² In *BMC Bankcorp*, the Sixth Circuit panel effectively declared itself helpless to properly decide the case because it was unable to reverse itself on its own precedent for want of a majority agreement to a hearing en banc.¹⁸³

We must affirm the judgment of the district court. While we express no opinion on either the strength of the proof offered by BMC to show that the 1988 refund claim was timely mailed to the IRS or the soundness of the decisions of the Eighth and Ninth Circuits holding contrary to our decisions in *Miller* and *Surowka*, we are constrained to follow the clear precedent of *this* Circuit [emphasis added]. In both *Miller* and *Surowka*, we squarely rejected the plaintiffs’ ‘attempts to introduce extrinsic evidence other than the postmark or mail receipts to prove timely filing, and concluded that the only exceptions to

reliance on an unpublished opinion was inappropriate). FRAP 32.1, when implemented, will permit the citation of unreported opinions to the Federal Circuit Courts, but is silent on their precedential value. MEMORANDUM FROM JUDGE SAMUEL A. ALITO, JR., CHAIR, ADVISORY COMMITTEE ON APPELLATE RULES, TO JUDGE DAVID F. LEVI, CHAIR, STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, May 6, 2005, <http://www.uscourts.gov/rules/Reports/AP5-2005.pdf> (last visited July 3, 2006).

177. See, e.g., Edward A. Adams, *Increased Use of Unpublished Rulings Faulted*, N.Y.L.J., August 2, 1994, at 1, col. 5 (reporting that 2nd Circuit Judge Wilfred Feinberg acknowledged the bar’s “legitimate concern” over the judiciary’s use of unreported opinions as a tactic for “sweeping tough decisions under the rug”).

178. *Anastasoff v. United States*, No. 4:98cv1291 CDP, 1999 U.S. Dist. LEXIS 22238, at *5-*7 (E.D. Mo. Aug. 25, 1999), *aff’d*, 223 F.3d 898, (8th Cir., 2000), *vacated and remanded on rehearing en banc*, 235 F.3d 1054, (8th Cir., 2000).

179. See, e.g., *Anastasoff, Unpublished Opinions, and “No Citation” Rules*, 3 J. APP. PRAC. & PROCESS 169 (2001) (mini-symposium); Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002); Sheree L. K. Nitta, *The Price of Precedent: Anastasoff v. United States*, 23 HAW. L. REV. 795 (2001).

180. *Anastasoff*, 1999 U.S. Dist. LEXIS 22238, at *5-*6.

181. *BMC Bankcorp, Inc. v. United States*, No. 93-0174-P(H), 1994 U.S. Dist. LEXIS 8404, (W.D. Ky. June 6, 1994), *aff’d*, No. 94-5842, 1995 U.S. App. LEXIS 15147 (6th Cir. June 15, 1995), *reh’g denied*, 1995 U.S. App. LEXIS 32716 (6th Cir. Oct. 13, 1995).

182. *Id.* at *5.

183. See *Carroll v. Comm’r*, 71 F.3d 1228, 1232 (6th Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996) (explaining that the court had failed to muster a majority agreement for a hearing en banc in the *BMC Bankcorp* case to decide the same issue).

the physical delivery rule available to taxpayers are the two set out in section 7502. *Miller*, 784 F.2d at 730-731; *Surówka*, 909 F.2d 148 at 150. That rule is dispositive of this case [footnotes omitted].¹⁸⁴

Though the overturning by a Circuit Court of its own precedent is anything but routine, it has been done in tax matters.¹⁸⁵ In *BMC Bankcorp*, however, the Sixth Circuit judges collectively, if not individually, lacked the will and determination to effectively address the I.R.C. § 7502 issues by revisiting their own past pronouncements on the matter.¹⁸⁶

The judiciary, then, has tended to view its taxation expertise as mediocre or worse, and/or has viewed the subject matter of taxation with disdain, and consequently, has in too many instances not risen to the task of reining in the IRS.

V. THE SIGNIFICANCE OF *SORRENTINO*

In many respects, the Supreme Court's denial of certiorari in *Sorrentino* is emblematic of the Judiciary's failure to impose the appropriate checks and balances upon the Executive function of tax administration.

While "a denial of certiorari does not imply approval of the decision for which review is sought or of its supporting opinion,"¹⁸⁷ neither can it be said that a denial of certiorari is necessarily meaningless, innocuous or inconsequential.¹⁸⁸ As a positive consequence, a denial of certiorari can "allow the various States to serve as laboratories in which the issue receives further study before it is addressed by [the U.S. Supreme] Court."¹⁸⁹ But denying certiorari in an inappropriate instance can have negative effects, and indeed, the denial of certiorari by the Supreme Court in prior cases has in fact amplified "apprehensions" among the taxpayers in a taxation matter.¹⁹⁰ Certiorari is a filtering process over which the Supreme Court Justices

184. *BMC Bankcorp*, No. 94-5842, 1995 U.S. App. LEXIS 15147, at *6 (6th Cir. June 15, 1995).

185. See *Schulz v. Internal Revenue Service*, 395 F.3d 463, 465 (2d Cir. 2005), ruling clarified 413 F.3d 297 (2d Cir. 2005) ("We realize that our holding today stands in direct contradiction to our previous decisions in *Application of Colton*, 291 F.2d 487, 491 (2d Cir. 1961), and *In re Turner*, 309 F.2d 69, 71 (2d Cir. 1962). While reversal of our prior precedent is never a matter we regard lightly. . .").

186. *BMC Bankcorp*, 1995 U.S. App. LEXIS 15147, at *6.

187. *Elgin, Joliet & Eastern Railway Co. v. Gibson*, 355 U.S. 897, 897 (1957) (Frankfurter, J., concurring); see also *House v. Mayo*, 324 U.S. 42, 48 (1945); *United States v. Carver*, 260 U.S. 482, 490 (1923).

188. See, e.g., *Wells v. Meyer's Bakery*, 561 F.2d 1268, 1274-1275 (8th Cir. 1977) ("Although the denial of a writ of certiorari by the Supreme Court has no particular significance, the fact that certiorari was denied in [a particular case at a particular time] cannot be overlooked.").

189. *McCray v. New York*, 461 U.S. 961, 963 (1983).

190. *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 222 n.1 (1992)

wield significant control, and the cases that are and are not filtered out indicate the Justices' collective will to address the various legal issues.¹⁹¹

The Court's denial of certiorari in *Sorrentino* was neither meaningless, innocuous nor inconsequential. "The Treasury's relaxed approach to amending its regulations to track [Internal Revenue] Code changes is well documented."¹⁹² If the IRS and the Treasury are lax in tracking statutory changes to the Internal Revenue Code, then such inertia certainly applies to updating the Treasury Regulations in response to ambiguities brought out in litigation. Indeed, since the very early 1990s, the IRS and the Treasury were on notice that their tax form instructions and regulations were ambiguous regarding proof of a timely postmark under I.R.C. § 7502, yet, for over a decade, did nothing to remedy the situation.¹⁹³

Such being the tendencies of the Treasury in general and the IRS in particular, it falls upon the Legislature and the Judiciary to ensure the sound function of that Executive Branch agency.¹⁹⁴ Uniformity among the Federal Circuits is quite important, particularly in taxation matters,¹⁹⁵ and upon seeing that the Circuits are divided on a taxation issue, the Supreme Court has the responsibility, when given appropriate opportunity, to bring national uniformity to Federal taxation policy by resolving the question one way or the other.

On this score, the Supreme Court has fallen short. After passing up the clear opportunity in 1996 to resolve the issue in the *Carroll* case,¹⁹⁶ the Supreme Court once again ducked the issue in 2005 with its denial of certiorari in *Sorrentino*.¹⁹⁷ One factor that likely contributed to the denial of certiorari was the Government's mention in its brief of "ongoing administrative efforts to bring further clarity to" I.R.C. § 7502.¹⁹⁸ As already noted, the revisions to Treas. Reg. § 301.7502-1 only address the issue prospectively, and do nothing for the pre-existing cases where proof of a postmark is an issue.¹⁹⁹ The *Sorrentino* litigation, first adjudicated in the District

(Scalia, J.) (quoting H. R. Rep. No. 936, 86th Cong., 1st Sess., 2 (1959)); *id.* at 239-240 (1992) (Kennedy, J., dissenting).

191. See Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 78-81 (1991).

192. *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 836 (2001); *see also* *Umbach v. Comm'r*, 357 F.3d 1108, 1112 (10th Cir. 2003).

193. See *supra* notes 63-66 and accompanying text.

194. FEDERALIST No. 51, *supra* note 1 and accompanying epigraph text.

195. *Goodenow v. Comm'r*, 238 F.2d 20, 21-22 (8th Cir. 1956) and cases cited therein.

196. *Carroll v. Comm'r*, 518 U.S. 1017 (1996), *denying cert. to* 71 F.3d 1228 (6th Cir. 1995). See *supra* notes 114-118 and accompanying text for additional discussion on *Carroll*.

197. Between *Carroll* and *Sorrentino*, the Supreme Court denied certiorari in other cases involving extrinsic evidence as proof of a postmark under I.R.C. § 7502. See *supra* notes 119-123 and accompanying text.

198. Brief for the United States in Opposition at 8-9, *Sorrentino IV*, 126 S. Ct. 334 (2005) (No. 04-1396).

199. See *supra* notes 75-79 and accompanying text.

Court in 2001, involved a 1994 tax return filed in 1998.²⁰⁰ The time lag thus exemplified by *Sorrentino*, together with the fact that the proof of postmark issue has appeared in numerous other cases since the early 1990s,²⁰¹ strongly suggests that a fair number of such pre-existing cases—not covered by the IRS's "ongoing administrative efforts"—remain in the legal pipeline as of the writing of this article, perhaps unbeknownst to either the taxpayers or the IRS. Absent intervention by Congress, these pre-existing cases will be decided under the diverse standards of the Circuits. Unless, perchance, the IRS concedes the issue or the Supreme Court, with its new blood infusions,²⁰² chooses to grant certiorari in another I.R.C. § 7502 case. Taxpayers whose cases go before courts where the IRS has sold its Big Lie²⁰³ to the judiciary will likely be further victims of the IRS's excesses.²⁰⁴ The Supreme Court's denial of certiorari to *Sorrentino* thus allows the IRS and the judiciary to sweep its past errors under the rug.

The Supreme Court's laissez-faire approach to the I.R.C. § 7502 extrinsic evidence controversy gives the IRS impunity to construe a statute against the taxpayer in a manner beyond the bounds of fairness, and has left the taxpayer at the mercy of lower courts which have neither the will nor the expertise to curb the excesses of the tax gatherer. Such behavior of the IRS, driven more upon optimization of the revenue receipts than upon adherence to the requirements of the statute or safeguarding the rights of the taxpaying public, is hardly unique to matters regarding postmarks on mailpieces.²⁰⁵ In other words, the judiciary has allowed the IRS to cheat the public.

200. See *supra* notes 80-90 and accompanying text.

201. E.g. *Grothues v. Comm'r*, 84 T.C.M. (CCH) 561 (2002); *Gasparutti v. Comm'r*, 76 T.C.M. (CCH) 726 (1998); *Brown v. Comm'r*, 74 T.C.M. (CCH) 1449 (1997), *aff'd*, No. 98-1444, 1999 U.S. App. LEXIS 8248 (6th Cir. Apr. 27, 1999), *cert. denied*, 528 U.S. 967 (1999); *Maxon v. Comm'r*, 68 T.C.M. (CCH) 878 (1994); *Hiner v. Comm'r*, 66 T.C.M. (CCH) 1680 (1993); *McCarney v. Comm'r*, 66 T.C.M. (CCH) 608 (1993); *Mills v. Comm'r*, 61 T.C.M. (CCH) 1737 (1991), *aff'd*, No. 91-2080 1992 U.S. App. LEXIS 6569 (6th Cir. Apr. 2, 1992). The foregoing is not, and does not purport to be, a complete enumeration of cases involving the question of extrinsic evidence under I.R.C. § 7502.

202. At the time this article was written, Chief Justice John Roberts had very recently taken his seat at the center of the bench, and the confirmation process for Associate Justice nominee Samuel Alito was in progress.

203. See *Ryesky*, *supra* note 37, at 396.

204. *Id.*

205. Cf., e.g., *Dixon v. Comm'r*, 316 F.3d 1041, 1046, opinion editorially corrected at 2003 U.S. App. LEXIS 4843 (9th Cir. 2003) (noting that the secret settlement deals made by IRS trial attorneys, to the detriment of approximately 1,300 taxpayers "amounted to a fraud on both the taxpayers and the Tax Court."); *Straight v. Comm'r*, 74 T.C.M. (CCH) 1457, 1466-1467 (1997) (imposing sanctions on IRS for admitted alteration of document, and lying about it, by IRS agent); *In re Abernathy*, 150 B.R. 688, 696-97 (Bankr. N.D. Ill. 1993), further proceedings to calculate attorney fee 158 B.R. 749 (Bankr. N.D. Ill. 1993) (awarding attorney fees to debtor for proceedings against IRS's recalcitrant repeated attempts to collect taxes discharged in bankruptcy); 137 CONG. REC.

Nor is the judiciary's attitude towards § 7502 an isolated anomaly, for the IRS applies diverse standards, depending upon the applicable law of the Circuit, in other areas of the tax law as well.²⁰⁶ Indeed, the Supreme Court's aversion to taxation cases extends even to matters of state taxation, as exemplified by its denial of certiorari to two state taxation cases on the same day less than a month after the *Sorrentino* denial.²⁰⁷

This article does not address the various meritorious arguments, pro and con, regarding the creation of a National Court of Tax Appeals or similar tribunal.²⁰⁸ Suffice it to say that even under such an arrangement, the United States Supreme Court would remain at the top of the appellate chain,²⁰⁹ and the system would

S11813 (Aug. 1, 1991) (statement of Sen. Symms) ("As the pressure on the IRS grows year after year to collect every last dollar due to the Treasury, the incidents of taxpayers abuse by the Service grow as well."); see generally DAVIS, *supra* note 132, at 196 (detailing an ex-IRS employee's account of IRS violations).

206. See Bryan, *supra* note 149, at 125; Jeffrey S. Kinsler, *Circuit-Specific Application of the Internal Revenue Code: An Unconstitutional Tax*, 81 DENV. U. L. REV. 113, 113 (2003); see also IRS OFFICE OF CHIEF COUNSEL, NOTICE CC-2006-010 (March 2, 2006), <http://www.irs.gov/pub/irs-ccdm/cc-2006-010.pdf> (last visited July 3, 2006):

Chief Counsel attorneys should advise the Service to follow the holding in [*Glaze v. United States*, 641 F.2d 339 (5th Cir. 1981)] in cases that would be appealable to either the Fifth or Eleventh Circuits. Chief Counsel attorneys with cases appealable to other circuits should look for appropriate cases to litigate that challenge *Glaze*. Any case appealable to those other circuits involving the ability of a taxpayer to elect "married filing joint return" status for purposes of section 6013 should be coordinated with APJP Branch 2.

Id.

207. *Huckaby v. New York State Div. of Tax Appeals*, 126 S. Ct. 546 (Oct. 31, 2005), *denying cert.* to 829 N.E.2d 276 (N.Y. 2005); *Thorpe v. Colorado, U.S.*, 126 S. Ct. 545 (Oct. 31, 2005), *denying cert.* to *Thorpe v. State*, No. 0450796, 2005 Colo. LEXIS 125 (Colo. Feb. 14, 2005). On the very same day it denied certiorari to *Huckaby* and *Thorpe*, the Supreme Court also denied certiorari in another Federal taxation case, *Riggle v. United States*, 126 S. Ct. 586 (Oct. 31, 2005), *denying cert.* to No. 05-5026, 2005 U.S. App. LEXIS 7679 (Fed. Cir. May 4, 2005).

208. See, e.g., Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944); H. Todd Miller, *A Court of Tax Appeals Revisited*, 85 YALE L. J. 228 (1975); see also Kinsler, *supra* note 206, at 137-141 (advocating that exclusive jurisdiction for tax appeals repose in the Court of Appeals for the Federal Circuit).

209. But see *United States v. Jones*, 119 U.S. 477, 479 (1886) (explaining *Gordon v. United States*, 117 U.S. 697 (1865) (determining that the United States Supreme Court lacked appellate jurisdiction over the Court of Claims, and noting the subsequent enactment of the Act of March 17, 1866, c. 19, 14 Stat. 9, which gave the Supreme Court such appellate jurisdiction.)).

I.R.C. § 7482 obviates similar issues regarding the appealability of United States Tax Court decisions by specifically providing that Tax Court decisions are appealable to the Federal Circuit Courts of Appeals, and thence to the Supreme Court. I.R.C. sec. 7482.

The *Gordon* opinion referred to in *Jones* is not only a well-reasoned discussion on the separation of powers, but also an historical curiosity as "the last judicial paper from the pen of Mr. Chief Justice Taney" which was put into print for the first time more than twenty years after Taney had written it shortly before his death. *Gordon*, 117 U.S. at 697-98.

continue to require its review and oversight in order to function properly.²¹⁰ The Supreme Court's reticence to address taxation issues would be no less detrimental under such a proposed system than it is under the current appellate scheme.

VI. CONCLUSION

America's tax system is based upon voluntary compliance by the taxpayer.²¹¹ While no taxpayer is expected to have amorous feelings towards paying taxes, or towards the agencies that collect the revenue,²¹² taxpayers are more likely to enter the tax resistance camp when they perceive that their good faith in complying with the tax laws has been snubbed and unrequited.²¹³ Since the early 1990's, by which time the IRS could no longer say that it did not know of the need to make explicit in its tax form instructions and regulations the I.R.C. § 7502 standard of proof,²¹⁴ many good faith taxpayers were totally unaware that they needed a registered or certified mail receipt to prove a postmark on their tax documents.²¹⁵ These taxpayers feel cheated by their own government.²¹⁶ The courts, accordingly, have allowed the IRS to

210. See Samuel Estreicher and John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 808-809 (1984).

211. *Browne v. United States*, 176 F.3d 25, 26 (2d Cir. 1999) ("[V]oluntary compliance [is the] least restrictive means by which [the] IRS further[s] the compelling governmental interest in uniform, mandatory participation in the federal income tax system."); *United States v. McKee*, 192 F.3d 535, 544 (6th Cir. 1999); see also Treas. Reg. §§ 601.106(f)(2), 601.107(a), 601.601(d)(2)(iii), and 601.602(a) (2006).

Voluntary compliance "means that taxpayers are expected to comply with the law without being compelled to do so by action of a federal agent; it does not mean that the taxpayer is free to decide whether or not to comply with the law." Internal Revenue Service, Pub. 1273, Guide to the Internal Revenue Service for Congressional Staff at 4 (January 1996) (SuDoc No. T22.44/2: 1273/996); see also *Beresford v. United States*, No. 00-35650, 2001 U.S. App. LEXIS 3187 (9th Cir. Feb. 23, 2001), cert. denied, 534 U.S. 896 (2001) (affirming the district court's holding that the appellant had no legal obligation to file or pay income taxes because the American tax system is based on voluntary compliance).

212. *Belli v. Comm'r*, 57 T.C.M. (CCH) 1172, 1181(1989) ("Expressing one's feelings about the IRS . . . is not an element of tax fraud; if it were, our Federal prisons undoubtedly would be brimming with such 'tax convicts.' We fail to discern any requirement that taxpayers must enjoy or look forward to paying their taxes.").

213. Beryl N. Simpson, *Constitutional Protection for Creative Tax Shelter Promoters: Ninth Circuit Restricts the Government's Arsenal of Power*, 59 WASH. L. REV. 927, 946 (1984).

214. See *supra* notes 63-66 and accompanying text.

215. If the Sorrentinos' word is to be accepted (there being no apparent reason to disbelieve it), they were unaware of the IRS's position that certified or registered mail are the exclusive means of proving a postmark on a mailpiece containing a tax document. Telephone conversation with Mr. Rolly J. Sorrentino, October 6, 2005.

216. *Id.*

perpetuate a non-uniform system of tax enforcement which is hardly conducive to public compliance with the tax laws.

There is little doubt that the notorious complexity of the Internal Revenue Code contributes materially to the judiciary's aversion to addressing taxation cases.²¹⁷ But, our Federal system of checks and balances requires the participation of all three Branches of government. While the Congress must accept the responsibility for its part in legislating that "deplorable crazy quilt patchwork" statutory title known as the Internal Revenue Code,²¹⁸ there is much to be laid at the feet of the judiciary in bringing about the current inequities in the way taxes are administered. The *Sorrentino* certiorari denial is yet another indicium of the judiciary's lack of preparedness to deal with taxation.

217. See *Dobson v. Comm'r*, 320 U.S. 489, 498 (1943) (describing taxation law as "a subject that is highly specialized and so complex as to be the despair of judges.").

218. *Houston Textile Co. v. Comm'r*, 173 F.2d 464, 464 (5th Cir. 1949).

