The Equal Protection Problem in Innocent Spouse Procedures

By Bryan T. Camp

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This column generally explores the laws and policies of tax administration to help guide readers through the thickets of particular procedural problems while also giving them a sense of the larger tax administration forest.

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Camp dedicates today's column to those attorneys, such as Jack Schiffman of Phoenix, who provide significant pro bono tax controversy services to clients who otherwise would lack a voice in our system of adversary process.

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Houston, we have a problem. It concerns the spousal relief rules in section 6015. It might be a constitutional problem. It is definitely a tax administration problem. It does not, however, result from the evil hearts of taxwriters, judges, or IRS employees. It is rather an accidental product of what commentator Tom Daley might call an "unintelligent design" of tax administration, as recently revealed by the Ninth Circuit's decision in *Ewing* and the Eighth Circuit's decision in *Bartman*.[1] I hope today's column will shed light on the scope of the problem and provide possible solutions.

The design problem involves the interplay of three legal rules governing judicial review of tax liabilities. First is the "pay-first" rule, epitomized by *Flora v. Commissioner*, which generally requires taxpayers to fully pay assessed taxes before courts will review the propriety of the liability. Second is the collection due process (CDP) exception to the pay-first rule, which allows courts to review some tax liabilities before approving IRS decisions to levy on taxpayer assets or file a notice of federal tax lien (NFTL). Notably, the second rule allows taxpayers to contest their liability in court even when the assessment is based entirely on self-reported liability.[2] Thus, taxpayers who believe the IRS has wrongfully denied them relief from liability under the equitable spousal relief provisions of section 6015(f) can obtain prepayment court review of that liability decision during CDP, even though the liability sought to be collected was self-reported and thus relief is available to the taxpayer only under section 6015(f) — what is known as a "stand-alone" 6015(f) decision.[3] The third rule, declared by the Ninth Circuit in *Ewing* and followed by the Eighth Circuit's "me too" opinion in *Bartman*, interprets section 6015(e) as barring taxpayers from Tax Court review of IRS stand-alone 6015(f) decisions.

Standing alone, each legal rule is constitutionally innocent. Taken together, however, they become constitutionally suspect because they create arbitrary access to judicial review of IRS decisions about section 6015(f) spousal relief. Part I of today's column explains how the three legal rules operate within the basic structure of tax administration and why, taken alone, they are unobjectionable. Part II shows how their interplay denies a group of taxpayers equal access to court review and considers whether that result violates the Fifth Amendment. I conclude it probably does. Part III suggests some fixes.

I. Context, Context, Context

When one considers any issue regarding tax procedure, one must first identify its context: Does it concern the liability process or the collection process? Those are the two basic tasks of tax administration: determining the correct tax liability and collecting it. While, in a significant sense, taxpayers make the primary liability and collection decisions (how much to report, how much to pay through withholding or otherwise), this column concerns the liability and collection decisions made by the government and the ability of taxpayers to obtain judicial review of those decisions. Part I.A sketches the distinction between liability and collection decisions. Part I.B explains the first of the three rules for judicial review whose interplay causes the problem, the pay-first rule. Part I.C sets out the second rule, which I call "CDP mash

[1] *See* Tom Daley, "Unintelligent Design: The Evolution of the Uniform Definition of Child," *Tax Notes*, May 15, 2006, p. 813; *Commissioner v. Ewing*, 439 F.3d 1009, *Doc 2006-3915, 2006 TNT 40-8* (9th Cir. 2006) (the Tax Court did not have jurisdiction to review IRS denial of section 6015(f) spousal relief when there was no deficiency); *Bartman v. Commissioner*, 446 F.3d 785, *Doc 2006-8459, 2006 TNT 85-14* (8th Cir. 2006) (same).

[2] *Montgomery v. Commissioner*, 122 T.C. 1, *Doc 2004-1409, 2004 TNT 15-9* (2004).

[3] *Magee v. Commissioner*, T.C. Memo. 2005-263, *Doc 2005-23408, 2005 TNT 221-11* (reviewing denial of stand-alone equitable relief raised in a CDP hearing).

up" because it puts judicial review of liability decisions into the collection process. Part I.D introduces the third rule, the section 6015(e) jurisdiction rule, which two circuit courts agree prevents the Tax Court from reviewing IRS denials of section 6015(f) relief in underpayment situations.

A. Liability and Collection Decisions

The government makes a liability decision about every taxpayer. Generally, the liability decision is to accept the liability reported on the taxpayer's return. That is admittedly not an individualized decision; it instead results from a bulk-processing rule. But it is still the government's "determination" of liability as much as any audit. It is the decision to accept the taxpayer's application of the relevant liability rules as proper. The liability rules are mostly found in subtitles A through E of the tax code. Those are the familiar rules of inclusions, exclusions, deductions, credits, and computations and apply to all of the various objects of taxation: incomes, estates, employment, and articles of commerce. The government's liability determination is reflected in its formal "assessment" of a liability on the IRS books of account.[4] Taxpayers do not "self-assess"; they self-report. The IRS assesses.

An important distinction between liability and collection decisions is the kind of information needed for decision.

Once the government assesses the tax and thus makes the liability decision — typically by accepting the liability shown on the return — the government then makes decisions on how to collect any balance due on the assessment. To do so the IRS follows the collection rules, found mostly in subtitle F of the tax code. Most collection decisions are also bulk-processing decisions that apply to classes of taxpayers and not to individual taxpayers. It is not until taxpayers get pretty far downstream in the collection process that IRS employees in the field begin to make truly individualized collection decisions.

The assessment thus not only represents the culmination of the liability determination process, it also represents the start of the collection process. That is, the assessment serves two functions: It records what the IRS has already done (determine the liability) and, like a court judgment, it serves as a necessary and sufficient predicate for what the IRS is about to do (collect the liability). As the Supreme Court explained in 1935:

> The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt. . . . Thus the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer. The assessment supersedes the pleading, proof and judgment necessary in an action at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution.[5]

An important distinction between liability and collection decisions is the kind of information needed for decision. Liability decisions are made on the basis of past events that are now over. Collection decisions, in contrast, are made on the basis of ongoing events and predictions of future events, as the IRS attempts to correctly classify taxpayers as "won't-pays" or "can't-pays," a classification that can change based on new events. Those readers with strong stomachs and access to Tax Analysts' online databases can see extended discussions of that distinction in my prior columns.[6] In today's column, however, I will use that distinction to highlight why section 6015 decisions are liability decisions and not collection decisions, even though those decisions often take place during the collection process. That will become an important part of the constitutional argument.

B. Old Context: The Pay-First Rule

Until 1998 the basic structure of tax administration kept collection decisions strongly separate from liability decisions. Once the assessment was made, it was very difficult for taxpayers to force the IRS to revisit the liability decision until after paying the tax. It was a pay-first, litigate-later structure. The overarching expression of that idea has traditionally been section 7421, the Anti-Injunction Act, which since 1867 has provided that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person whether or not such person is the person against whom such tax was assessed."[7] The Supreme Court has viewed that statute as prescribing "a minimum of preenforcement judicial interference" and requiring "that the legal right to the disputed sums be determined in a suit for refund."[8]

Before 1924 taxpayers had no opportunity for *any* judicial review of IRS liability decisions until they first paid the assessed tax. The refund route was the only path

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[4]Sections 6201, 6203.

[5]*Bull, Executor, v. United States*, 295 U.S. 247, 260 (1935).

[6]*See* Bryan T. Camp, "Failure of Collection Due Process, Pt. 1: The Collection Context," *Tax Notes*, Aug. 30, 2004, p. 969; "The Failure of CDP, Part 2: Why It Adds No Value," *Tax Notes*, Sept. 27, 2004, p. 1567; "The Costs of CDP," *Tax Notes*, Dec. 6, 2004, p. 1445.

[7]What is now section 7421 was first enacted in 1867 (14 Stat. 475) to plug a hole in the pay-first, litigate-later regime created by the administrative reform provisions of the 1866 Revenue Act (14 Stat. 98). Section 19 of the 1866 Revenue Act set up the basic refund scheme now codified in section 7422, but while it required taxpayers to pay before suing for refund, it did not prohibit taxpayers from seeking to enjoin collection on the basis that the assessment was wrong.

[8]*Hibbs v. Winn*, 542 U.S. 88, 103 (2004) (internal quotations omitted) (quoting *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962)).

to judicial review. That is, even when the IRS and taxpayers disagreed on the proper liability, the IRS could just assess and then start collecting. To get review of the liability decision, taxpayers had to first pay the tax and then file a claim for refund of the money paid. Only then, once the IRS denied or ignored the claim, could the taxpayer obtain judicial review of the agency liability decision.[9] The Supreme Court explained that pay-first rule in 1875:

> While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed.[10]

In 1924 Congress gave partial relief to the harshness of that rule by creating a specialized tribunal — then called the Board of Tax Appeals and now called the Tax Court — in which taxpayers could seek *preassessment* review for disagreements between them and the IRS over income, estate, or gift taxes.[11] Preassessment review was available, however, only when the IRS decided that the taxpayer had understated his tax liability (either on a return or by failing to file a required return). In those situations, the new statute required the IRS to give taxpayers a notice of the IRS liability decision. That, of course, is the famous notice of deficiency, which serves the dual purposes of giving taxpayers notice of, and reasons for, the IRS determination of a greater liability than reported and giving taxpayers the ticket to *preassessment* judicial review of that determination.[12] There was no provision for preassessment review of assessments based on self-reported liability.[13]

Even after 1924 the pay-first rule still applied to *postassessment* judicial review of an IRS liability decision. Once the IRS put the assessment on the books, the taxpayer still had to pay first, had to ask for a refund, and only then could seek court review of the liability decision. Thus, if a taxpayer missed the opportunity to go to the Tax Court, or was not entitled to preassessment judicial review — either because the liability involved an excise, employment, or other tax not subject to the special deficiency procedure, or because the unpaid assessment was based on the taxpayer's own self-reported liability — the taxpayer was stuck with the pay-first rule.

For some time both the courts and the IRS were pretty inconsistent about whether the pay-first rule meant that the taxpayer had to pay the *full* tax liability before seeking court review or could simply pay a portion of the tax due and then sue for a refund of that portion.[14] Basically, the issue was how to construe 28 U.S.C. section 1346(a)(1), which permitted taxpayers to file suit for "any internal revenue tax," "any penalty," or "any sum" that they alleged were either excessive or wrongfully collected. Some courts read the statute as permitting partial payments. Most courts read the statute as requiring full payment.

The Supreme Court settled the issue in 1960 in *Flora*, in which it construed 28 U.S.C. section 1346(a)(1) as requiring full payment.[15] The pay-first rule became a full-pay rule. *Flora* was a close case; not only was it decided by a bare majority, but the majority opinion did not find the answer clearly stated in the statute. It described the statute's language as "inconclusive."[16] Likewise, the Court found that the legislative history was "barren of any clue" and "irrelevant" to the question presented.[17]

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[9]This description of how taxpayers obtained judicial review is simplified but true, I believe, in its core descriptive power. Before 1952 the responsibility for the liability decisions and collection decisions was split, respectively, between the commissioner of internal revenue and the 64 presidentially appointed district collectors. The former did not collect and the latter did not, generally, audit. *See generally* William Plumb, "Tax Refund Suits Against Collectors of Internal Revenue," 60 *Harv. L. Rev.* 685 (1947).

[10]*Cheatham v. United States*, 92 U.S. 85, 89 (1875).

[11]Revenue Act of 1924, 43 Stat. 253. For a contemporary discussion of the harshness of the pay-first rule, see Robert H. Montgomery, *Income Tax Procedure* (Ronald Press Co. 1922) at 173-177, 235-238. Again, this description is somewhat simplified. The Board of Tax Appeals was widely viewed as an administrative office and not a "true" court. But it did provide independent third-party review in an adversarial forum. It served the same function as a court and eventually Congress changed the form to match the function it was already performing.

[12]*Scar v. Commissioner*, 814 F.2d 1363, 1372 (9th Cir. 1987); *see generally* Leandra Lederman, "'Civil'izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency," 30 *U.C. Davis L. Rev.* 183 (1996).

[13]Thus, when taxpayers merely underpaid their self-reported liability, and later wanted to contest their liability, they had to pay first. That situation could arise, for example, when the taxpayers sought to amend their returns and the IRS rejected the

(Footnote continued in next column.)

proposed amended returns. *See, e.g., Koch v. Alexander*, 561 F.2d 1115 (4th Cir. 1977) (taxpayer reported zero liability on amended return when original return showed $20,000); *Goldstone v. Commissioner*, 65 T.C. 113 (1975) (IRS has no duty to accept amended returns once a valid original return is filed).

[14]*See Flora v. Commissioner*, 362 U.S. 145, 179-185 (1960) (Whittaker, J., dissenting) (collecting cases that showed inconsistent judicial and administrative practice). *See, e.g., Sirian Lamp Co. v. Manning, Collector of Internal Revenue*, 123 F.2d 776 (3d Cir. 1941) (rejecting full-payment rule).

[15]362 U.S. 145 (1960). Courts are still split on whether the full-payment rule includes payment of interest and penalties. *Cf. Magnone v. United States*, 902 F.2d 192, 193 (2d Cir. 1990), *cert. denied*, 498 U.S. 853 (1990) (full-payment rule requires full-payment of the assessment, including penalties and interest), *with Shore v. United States*, 9 F.3d 1524, 1526, *Doc 93-11802*, *93 TNT 235-52* (Fed. Cir. 1993) (full-payment rule requires payment of tax principal only). *Flora* does not answer the question directly, but note 37 strongly suggests the answer is no. 362 U.S. at 171 ("In some of the cases the only amount remaining unpaid at the time of suit was interest. As we have indicated, the statute lends itself to a construction which would permit suit for the tax after full-payment thereof without payment of any part of the interest.").

[16]362 U.S. at 152. The Court did think the statute was "more readily construed to require payment of the full tax before suit than to permit suit for recovery of a part payment." *Id.* at 150.

[17]*Id.* at 151, 152.

The *Flora* majority based its decision on context: "We are not here concerned with a single sentence in an isolated statute, but rather with a jurisdictional provision which is a keystone in a carefully articulated and quite complicated structure of tax laws."[18] Central to the *Flora* Court's analysis was its view that a partial-pay rule would wreak havoc with what it saw as "the existing harmony of the tax statutes," notably the 1924 act creating the Board of Tax Appeals, the exception in the Declaratory Judgment Act for disputes "with respect to Federal taxes," and the refund authorization provisions of section 7422, all of which showed a strong congressional preference for resolving tax disputes at the agency level or through the specialized tax tribunal. Of great concern to the majority was the idea that allowing partial-pay refund suits would allow taxpayers to split their causes of action.[19]

> ***Central to the Flora Court's analysis was its view that a partial-pay rule would wreak havoc with what it saw as 'the existing harmony of the tax statutes.'***

That was the state of judicial review of liability decisions until 1998: Taxpayers could get a prepayment forum to obtain judicial review of liability decisions only under the deficiency procedures, when the IRS had examined the return and disagreed with it.[20] If the IRS accepted the taxpayer's return, but then rejected the taxpayer's amended return seeking a lower liability, the taxpayer still had to pay first, litigate later.[21]

Similarly, before 1998 judicial review of collection decisions was extremely limited, and even where it existed, it did not allow taxpayers to raise as a defense to collection the claim that they did not owe the tax. The Anti-Injunction Act made it well nigh impossible for taxpayers to complain in court about any decisions — liability or collection — until after the liability had been fully paid.[22] In statute after statute, Congress was careful to preserve the harmony of the pay-first structure. For example, section 7426(a)(1) permitted an action for wrongful levy to be maintained by third parties, but not by taxpayers. Even when Congress gave taxpayers a cause of action for some kinds of wrongful *collection* activity in 1988 in section 7433, Congress was careful to limit the scope of judicial review to a search for illegal actions by IRS employees. Courts rejected repeated taxpayer attempts to obtain judicial review of *liability* decisions via that statute.[23] The existence of an assessment allowed the IRS to call the collection tune, and full payment was the price to stop the music and obtain judicial review.

C. New Context: The CDP Mash-Up Rule

In the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA98), Congress made two discordant changes to that "harmony of the tax statutes" so important to the *Flora* decision.[24] First, the CDP provisions of sections 6320 and 6330 mashed up judicial review of liability decisions with judicial review of collection decisions. Second, section 6015(e) broadened judicial review of liability decisions by giving the Tax Court jurisdiction to review IRS spousal relief decisions. Those changes created the two other legal rules whose interplay — along with the *Flora* full-pay rule — potentially denies some taxpayers equal protection of the laws. I will discuss the first one here and the second in Part I.D.

The critical commentary on CDP is voluminous, and it is not my purpose to repeat it here.[25] Putting aside the foolishness of asking courts to "review" collection decisions that, by their very nature, are ongoing decisions based on unfolding events, the feature of CDP I wish to

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[18]*Id.* at 157-178.

[19]Justice Whittaker wrote a long and spirited opinion for the four dissenting justices. The crux of it was that the full-pay rule was harsh and was not required by the statutory language and that courts — including the Supreme Court — had at times reviewed the merits of assessments despite the taxpayer having not fully paid the tax first, with the full acquiescence of the IRS. Justice Whittaker also disagreed with the majority's concern about splitting causes of action.

[20]For you purists out there, taxpayers also had a prepayment forum in bankruptcy court under the authority of Bankruptcy Code section 505. But that was a rarely used forum, even unintentionally. The IRS denies that a bankruptcy court can use its section 505 powers to hear a stand-alone section 6015(f) claim. One bankruptcy court has disagreed. *See In re Drake*, 336 B.R. 155, *Doc 2006-3283, 2006 TNT 36-8* (Bankr. D. Mass. 2006). The IRS has appealed to the district court.

[21]Similarly, taxpayers who owe employment tax, excise taxes, or penalties such as the Trust Fund Recovery Penalty of section 6672 (also known as the 100 percent penalty), still have to pay first. But that is no big deal because those taxes are divisible taxes. *Flora*, 362 U.S. at 176 n.38 ("Excise tax assessments may be divisible into a tax on each transaction or event, so that the full-payment rule would probably require no more than payment of a small amount."). Typically, that means the taxpayer simply has to pay the tax due on only one item in full and then the IRS typically counterclaims for the balance. That does not create the problem of splitting causes of action that so

(Footnote continued in next column.)

worried the majority in *Flora* because there is no deficiency procedure available in the first place.

[22]Courts have been very reluctant to find exceptions outside those listed in the statute itself. *See Enoch v. Williams Packing*, 370 U.S. 1 (1962).

[23]*See, e.g., Shaw v. United States*, 20 F.3d 182, *Doc 94-4794, 94 TNT 94-89* (5th Cir. 1994) (although the IRS improperly assessed tax liability, it did not engage in improper collection procedures, and thus the taxpayer could not seek damages under section 7433); *Ihasz v. United States*, 997 F. Supp. 547, *Doc 97-29344, 97 TNT 207-69* (D.C. Vt. 1997) (IRS denial of interest abatement not reviewable under section 7433 because that section did not give taxpayers a forum to challenge liability determinations, including interest determinations).

[24]P.L. 105-206, 112 Stat. 685 (1998).

[25]*See, e.g.*, Diane L. Fahey, "The Tax Court's Jurisdiction Over Due Process Collection Appeals: Is It Constitutional?" 55 *Baylor L. Rev.* 453 (2003); Leslie Book, "Collection Due Process: A Misstep or a Step in the Right Direction?" 41 *Hous. L. Rev.* 1145 (2004); Danshera Cords, "Collection Due Process: The Scope and Nature of Judicial Review," 73 *U. Cin. L. Rev.* 1021 (2005).

emphasize today is how it has mashed up judicial review of liability decisions with judicial review of collection decisions.

Once the IRS assesses a liability and it remains unpaid, the IRS pursues collection using one or more of its three great collection tools: liens (section 6321), levies (section 6331), and setoff (section 6402). Of those three tools, setoff is the one most commonly overlooked. It was most certainly overlooked in the CDP provisions. The CDP provisions are triggered *only* when the IRS decides either to file an NFTL or to levy on the taxpayer's property. Moreover, although section 6330(e) prohibits the IRS from levying (or filing NFTLs), during the pendency of CDP, it does not prohibit setoffs.

If a taxpayer properly requests an administrative CDP hearing, not only must the IRS review its collection decision (to levy or file an NFTL) but section 6330(c)(2) requires the IRS to revisit its *liability* decision in two circumstances. First, a taxpayer can challenge the liability decision whenever the taxpayer can show that he "did not receive any statutory notice of deficiency . . . or did not otherwise have an opportunity to dispute such tax liability." Second, a taxpayer can claim entitlement to the spousal relief provisions in section 6015. A taxpayer who properly raises a liability issue during the CDP hearing can then obtain judicial review of the IRS decision through section 6330(d). What is important for this article is the second situation, when a taxpayer asks for spousal relief.

Granting or denying spousal relief is a liability decision, even though it may be made after assessment of the liability and during the collection process. First, the language of section 6015(a) says "Notwithstanding section 6013(d)(3)." Since section 6013(d)(3) is the provision that imposes joint and several liability, the meaning of section 6015(a) must be to undo the liability. Second, the section 6015 decision is based on a finite set of past events that are discernable. It is mostly a question of what the spouse knew and when he knew it. Third, if the IRS decides that the spouse is entitled to relief under any of the section 6015 provisions, it will abate the assessment under section 6404(a) because it has determined that the liability reflected in the assessment is excessive in amount.[26] The IRS will not be deciding whether the spouse has enough assets to justify collection action. Accordingly, the abatement will not be done under the authority of section 6404(c), which authorizes the IRS to abate assessments when the cost of collection exceeds the amount that could be collected. Nor will the IRS put the spouse into a currently not collectible (CNC) status, in which the assessment is not abated at all, but the account is instead put into an inactive status. The Internal Revenue Manual provides a list of reasons for putting accounts into CNC status, all of which involve collection decisions and none of which involve deciding that an innocent spouse should be relieved of liability.[27] For those reasons, questions arising under section 6015 are decisions about imposing liability and not decisions about how to collect a liability.

> ***In the Internal Revenue Service Restructuring and Reform Act of 1998, Congress made two discordant changes to that 'harmony of the tax statutes' so important to the Flora decision.***

In enacting the CDP provisions, Congress was chiefly concerned about situations in which taxpayers did not get a fair chance to challenge a proposed deficiency before assessment.[28] That is a particularly poignant possibility with spousal relief claims, as the innocent spouse may, for various reasons, not wish to raise the issue during a deficiency review in the Tax Court.[29] It is thus entirely rational to let spouses disclaim a liability even after they had the opportunity to do so during the prior deficiency process.

Although Congress meant CDP to apply to deficiency situations, the Tax Court has read the statute more broadly. In *Montgomery v. Commissioner*, the Tax Court held that section 6330 allows taxpayers to contest their own reported liability when the IRS refuses to accept an amended return. Why? Because taxpayers whose reported liabilities are accepted by the IRS as the basis for its assessment do not receive a notice of deficiency nor do they "otherwise have an opportunity to dispute such tax liability." They thus fall literally within the language used in section 6330 to trigger judicial review of the liability decision. Unlike the Supreme Court in *Flora*, which insisted on reading the statutory language in context, the Tax Court in *Montgomery* took a more conservative judicial philosophy of statutory interpretation: The plain meaning of section 6330(c) must be followed,

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[26]So concluded IRS ILM 200027052, 2000 IRS CCA LEXIS 63, *Doc 2000-18472, 2000 TNT 132-64* (June 2, 2000) ("Consequently, to the extent that the requesting spouse has been relieved of joint and several liability, an assessment against the requesting spouse in excess of the redetermined amount is excessive for purposes of section 6404(a). As such, the Service has the authority to abate this excessive liability with respect to the requesting spouse, i.e., the portion of the liability that the requesting spouse no longer owes."). For further IRS analysis, see IRS Chief Counsel Notice CC-2001-14 (Feb. 3, 2001), *Doc 2001-5770, 2001 TNT 40-22. See also Becker v. IRS (In re Becker)*, 407 F.3d 89, *Doc 2005-9433, 2005 TNT 86-9* (2d Cir. 2005) (explaining the difference between 6404(a) and (c) abatements); *United States v. Buckner*, 264 B.R. 908, *Doc 2001-10251, 2001 TNT 69-13* (N.D. Ind. 2001) (same).

[27]*See generally* IRM 5.16.1.1 (Sept. 19, 2005) at http://www.irs.gov/irm/part5/ch16s01.html (last visited June 10, 2006).

[28]*See, e.g.*, H.R. Rep. 105-599, at 265. As I explained in a previous column, the RRA98 taxwriters were completely focused on the deficiency process because of their misunderstanding of tax procedure. *See* Bryan T. Camp, "Failure of Collection Due Process, Pt. 1: The Collection Context," *Tax Notes*, Aug. 30, 2004, p. 969, at 974-976.

[29]I discussed this idea in more detail in "The Unhappy Marriage of Law and Equity in Joint Return Liability," *Tax Notes*, Sept. 12, 2005, p. 1307, at 1397.

no matter what the context. One would hope that the resulting absurdity of allowing taxpayers to challenge their own reported liabilities would generate some movement in Congress or the Treasury Department to fix the statute. So far, however, I have seen no evidence of that movement. Meanwhile, the IRS Office of Chief Counsel will not even argue the issue any longer.[30]

Unlike the Supreme Court in Flora, which insisted on reading the statutory language in context, the Tax Court in Montgomery took a more conservative judicial philosophy of statutory interpretation.

This, then, is the second rule of law that comes into play: Taxpayers can get *any* spousal relief decision reviewed in court through CDP review, including stand-alone section 6015(f) decisions. That is, whenever the IRS decides to use its lien or levy powers (but not setoff) to collect *any* assessed tax liability — whether assessed based on the taxpayer's self-reported liability or based on audit — taxpayers may interrupt the collection process to force the IRS to make a liability decision regarding spousal relief.

D. New Context: The 6015(e) Jurisdiction Rule

The third rule of law that creates the potential constitutional problem is the recent interpretation of section 6015(e) by the Eighth and Ninth circuits. Section 6015 allows taxpayers to seek relief of the joint and several liability imposed by section 6013. Section 6015(b) allows the traditional "innocent spouse" relief from asserted deficiencies; section 6015(c) allows what is termed "proportional relief" from asserted deficiencies; and section 6015(f) allows what is termed "equitable relief" whenever relief is not available under either subsection (b) or (c). That includes situations in which there is no deficiency and the taxpayer seeks relief from a self-reported but unpaid liability.

Until 1998 taxpayers who were denied administrative innocent spouse relief could obtain only *preassessment* judicial review, and then only during a deficiency proceeding. If that review was not available — usually because the claiming spouse had not participated in the deficiency proceeding, if any were even held — the taxpayer had to fully pay the tax liability and then claim a refund.[31] As I explained in more detail in a previous column, both commentators and Congress thought that was pretty harsh, so one of the unanimous reforms in RRA98 was to create an exception to the full-pay rule by allowing some *postassessment* (but prepayment) judicial review of spousal relief claims.[32]

The 1998 enactment of section 6015(e) gave taxpayers new access to judicial review of a liability decision. Section 6015(e) now permits a taxpayer "against whom a deficiency has been asserted and who elects to have subsection (b) or (c) apply" to petition the Tax Court for judicial review of the IRS denial of relief, as long as the claim for spousal relief "was not an issue" in any prior deficiency proceeding concerning the liability at issue and the claiming spouse had not "participated meaningfully" in that proceeding.[33]

In *Fernandez v. Commissioner*, the Tax Court held that as long as a taxpayer was seeking relief from a deficiency, the Tax Court had the authority to review the IRS denial of relief under subsection (f) as well.[34] The Tax Court found its authority in the plain language of section 6015(e)(1)(A), which permits the Tax Court, once it has jurisdiction, to "determine the appropriate relief available to the individual *under this section*," which includes subsection (f). In short, once the Tax Court had jurisdiction, it had authority.

In *Ewing v. Commissioner*, the Tax Court went beyond the plain language of section 6015(e) to hold that it had jurisdiction to review IRS section 6015(f) decisions even when there was no deficiency at issue and the taxpayer instead sought only equitable relief from a self-reported but unpaid liability.[35] In other words, the taxpayer sought stand-alone section 6015(f) relief. In *Ewing*, the Tax Court used a statutory context analysis quite inconsistent with its plain meaning approach in *Montgomery* and *Fernandez*. The Ninth Circuit rejected the *Ewing* analysis, followed quickly by the Eighth Circuit in *Bartman*.[36]

This, then, is the third rule: Taxpayers seeking equitable spousal relief from underpayments cannot obtain judicial review under section 6015(e). I have before noted the unfairness of that result as a matter of tax administration, because taxpayers who are able to seek spousal relief in the context of CDP *always* get judicial review but taxpayers who elect to file a stand-alone claim for spousal relief, unconnected with CDP, are denied judicial review if there is no deficiency at issue. I have also before

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[30]Chief Counsel Notice CC-2006-005, 2005 CCN LEXIS 2 (Nov. 21, 2005), *Doc 2005-24053, 2005 TNT 229-7* ("The holding in *Montgomery* is not plainly inconsistent with the language of section 6330 or its legislative history. The Office of Chief Counsel will no longer argue that a taxpayer is precluded from challenging the existence or amount of an underlying tax liability under section 6320 or 6330 solely on the ground that the disputed liability was reported on the taxpayer's tax return."). The Office of Chief Counsel later issued an AOD recommending acquiescence. AOD 2005-03 (Dec. 15, 2005), *Doc 2005-25382, 2005 TNT 242-19*.

[31]Taxpayers who tried to petition district courts for injunctions to restrain the assessment or collection of liabilities for which they claimed section 6013(e) relief were shut out of judicial review by section 7421, the Anti-Injunction Statute. *See Kirtley v. United States*, 488 F.2d 768 (10th Cir. 1973).

[32]*See* Bryan T. Camp, "Between a Rock and a Hard Place," *Tax Notes*, July 18, 2005, p. 359, at 363.

[33]Section 6015(e) gives the jurisdiction and section 6015(g) provides the modified claim preclusion rule.

[34]*Fernandez v. Commissioner*, 114 T.C. 324, *Doc 2000-13039, 2000 TNT 92-10* (2000) (court review of IRS denial of spousal relief also includes review of equitable relief under subsection (f)).

[35]118 T.C. 324 (2002), *rev'd*, 439 F.3d 1009 (9th Cir. 2006).

[36]446 F.3d 785 (8th Cir. 2006).

suggested various remedies, such as a separate cause of action, similar to a section 7424 wrongful levy action, which would avoid the full-pay rule. In the next section of this column, I will consider whether the third rule creates a problem of constitutional dimensions.

II. The Unconstitutionality of It All

Purely as a matter of statutory interpretation, I think the Ninth and Eighth circuits read section 6015(e) correctly. However, in discussing those cases with Jack Schiffman (Theresa Bartman's attorney) and Bob Nadler (a former IRS assistant district counsel who is now an attorney for the Legal Aid Society of Middle Tennessee), both asked whether that was a constitutional result. On reflection, I think they are correct that the circuit court decisions raise a constitutional issue. This part explains why. Part II.A explains the problem created by the interplay of the three rules I describe above. Part II.B explores how that problem might be one of a constitutional dimension.[37]

A. Houston, Here's the Problem

A hypothetical about the fictional Dr. Alex Smith and Dr. Blair Johnson will illustrate the problem created by the interplay of the full-pay rule, the CDP mash-up rule, and the section 6015(e) jurisdictional rule. Both were smart, successful doctors who were each married to other smart, successful doctors. Each marriage had the same arrangement: Each spouse kept his or her own bank account and paid joint expenses from the account of whoever was "in charge" of a particular issue. For example, in Alex's marriage, if Alex took responsibility for a home remodeling project, payment would come from Alex's accounts.

> ***A hypothetical about the fictional Dr. Alex Smith and Dr. Blair Johnson will illustrate the problem created by the interplay of the full-pay rule, the CDP mash-up rule, and the section 6015(e) jurisdictional rule.***

In both marriages, the other spouses were "in charge" of preparing and filing joint returns. Alex and Blair just signed on the dotted line, trusting in those to whom they had pledged their troth. Both couples timely filed their 2000 returns, self-reporting the same total taxes due of $44,000 and the exact same balance due of $24,000. In both cases, the IRS accepted the returns as filed and assessed the reported liability. In both cases, Alex and Blair were assured by their spouses that the return had been submitted with a check to cover the reported liabilities. In both cases, their spouses lied.

In 2001 each marriage fell apart because of the significant malfeasance of the other spouse. The other spouses took the money that was supposed to have paid the reported taxes due and used it to finance gambling or similar sole consumption activities. In traditional divorce law, both Alex and Blair were truly "innocent spouses." Whether they qualified for section 6015(f) relief would be a closer question.

In early 2002 the IRS started collecting the unpaid taxes. In both cases, for various reasons, the collection process bypassed the automated collection system and were assigned to the same field agent, John Morton.[38] Morton had little success against the wicked ex-spouses. Those baddies either had fled the country, had lost their licenses to practice medicine, had lost their assets to gambling, or were very adept at avoiding collection.

Morton had more success against Alex. He determined that Alex owned enough realty to justify filing an NFTL.[39] Accordingly, on May 1, 2002, he filed the NFTL and sent Alex the proper notices about CDP.[40] Alex sought a CDP hearing and there presented a case for section 6015(f) relief.[41] The Office of Appeals denied relief. Alex then petitioned the Tax Court, which, after reviewing the record, concluded that the IRS had abused its discretion in proceeding with collection and not granting Alex section 6015(f) relief.[42] Alex was thus able to use the CDP provisions to avoid the *Flora* full-pay rule and so obtain judicial review of a liability decision without having to pay first.

Blair presented a different collection picture than Alex. Morton determined that Blair was an unlikely candidate for collection by lien and levy because he could not find any assets in Blair's name. However, Blair's 2001 return showed an overpayment of $2,500. On May 1, 2002, the automated systems in the IRS set off the overpayment against Blair's outstanding liability for 2000. Blair immediately filed Form 8857, asking for relief from the joint

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[37]Schiffman, proceeding pro bono, convinced me to help him write a petition for rehearing to the Eighth Circuit, using the ideas I was developing for this column. A lot of attorneys would not have pursued the matter with so much vigor for so long nor would have listened to an academic's ramblings with so much patience. Schiffman filed the petition on June 19, 2006. On June 23, 2006, the Eighth Circuit asked the Justice Department to write a response.

[38]*See* IRM 5.1.1.13.4.1 (cases that bypass ACS and the queue that go directly to ICS) (Jan. 1, 2003); IRM 5.19.1.6.1 (CNC) (Dec. 8, 2005) (explaining how some business master file cases go directly to field collection from notice status for CNC determination); IRM 5.19.5.3.1 and Exhibit 5.19.5-10 (cases that systemically bypass ACS) (Jan. 1, 2000). For information on the historical John Morton, the originator of "Morton's Fork," see http://en.wikipedia.org/wiki/Morton%27s_Fork (visited June 14, 2006).

[39]*See generally* IRM 5.12.2.4 (notice of federal tax lien determination) (May 20, 2005).

[40]IRM 5.12.6.4 (CDP (RRA) notices) (Oct. 1, 2003).

[41]Section 6330(c)(2)(A)(I) allows a taxpayer to present "appropriate spousal defenses" to collection, which includes requests for spousal relief under section 6015.

[42]Section 6330(d) provides for judicial review of IRS determinations made at a CDP hearing. Both the IRS and the Tax Court use the factors listed in Rev. Proc. 2000-15, 2000-1 C.B. 447, *Doc 2000-2048, 2000 TNT 12-4*. *See Neal v. Commissioner*, T.C. Memo. 2005-201, *Doc 2005-17668, 2005 TNT 162-11*, for a case presenting similar — but much more detailed — facts as Alex's case in which the court overruled the IRS section 6015(f) determination.

liability under section 6015(f). The IRS denied relief. The Office of Appeals also denied relief. Blair then filed a petition in the Tax Court but it was dismissed on jurisdictional grounds, per the circuit holdings in *Ewing* and *Bartman*. Blair was thus unable to avoid the *Flora* full-pay rule and so had no recourse to court review of the IRS liability decision until fully paying the tax.

The problem with this judicial review structure is that it treats two taxpayers with identical liability claims and liability-related facts differently, solely because of the collection decisions made by the IRS. Both Alex and Blair have, by hypothesis, identical relevant facts regarding the proper application of section 6015(f). Those facts do not change. They already happened and they are what serves as the basis for granting or denying equitable relief. Both Alex and Blair also get identical treatment from the IRS, denial of section 6015(f) relief. But while Alex gets court review of that decision, Blair does not. The only reason that Alex gets court review is because the IRS wants to file an NFTL and that triggers CDP review. Blair, however, is subject to collection through the setoff power and must file a stand-alone claim for section 6015(f) relief. Blair is not entitled to court review.[43]

While the judicial review structure is unfair to Blair, at least Blair is a smart, successful doctor and can likely fully pay the liability and seek a refund. The structure becomes far more problematic for low-income taxpayers. As I have emphasized in previous columns, tax administration involves application of many bulk-processing rules and not individualized decisions. The determination of whether to file an NFTL appears to be one of those. The IRM appears to embody a bulk-processing decision not to file NFTLs on taxpayers who have a total unpaid balance of $5,000 or less.[44] While the IRM does not prohibit filing an NFTL for those taxpayers, it is written to presume no filing for them while presuming filing for taxpayers with larger unpaid balances. Thus, low-income taxpayers are much more likely to be in Blair's position because they will not often meet the IRM criteria to justify filing, but thanks to the earned income tax credit, they might well have yearly overpayments.

It does not really matter whether the court affirms the IRS section 6015(f) decision. What is denied to Blair is not a certainty of outcome, but an opportunity for the same prepayment "day in court" as is afforded Alex. As I suggested in my previous article on the topic, that disparity in treatment is, at the very least, extraordinarily poor tax administration.[45] What I want to explore here is whether that is a problem of constitutional dimension.

[43]The First Circuit recently reaffirmed this conclusion in *Boyd v. Commissioner*, 2006 U.S. App. LEXIS 14414, *Doc 2006-11454, 2006 TNT 115-9* (June 13, 2006), (rejecting taxpayer's argument that CDP protections were available for setoff because RRA98 changed section 6331(i)(3)(B)(i) to require that setoffs be accomplished by use of levies).

[44]IRM 5.12.2.4.1 (criteria for filing an NFTL) (May 20, 2005).

[45]Bryan T. Camp, "Between a Rock and Hard Place," *Tax Notes*, July 18, 2005, p. 359.

B. Is It a Constitutional Problem?

The Supreme Court has long held that the Fifth Amendment guarantees citizens "equality of application of the law."[46] While the words "equal protection" are nowhere to be found in the Fifth Amendment (which speaks only of due process), the Supreme Court says that the equal protection jurisprudence of the 14th Amendment applies with equal force to the rights protected by the Fifth Amendment.[47] Scholars have hotly debated just why that is so and whether it should be so, but for purposes of this column I will take the Supreme Court at its word and apply to the tax code the rules used for 14th Amendment equal protection analysis.[48]

Courts give strict scrutiny to classifications that either adversely affect a suspect class or involve a fundamental right; they give intermediate scrutiny to cases involving classifications based on gender or legitimacy of birth.[49] Otherwise, courts use the rational basis test: A classification will be upheld if it is rationally related to a legitimate government purpose.[50] The situation with Blair and Alex involves neither a suspect class nor a fundamental right. If it were about denial of *any* access to judicial review, that would implicate a fundamental right and the classification would receive strict scrutiny.[51] But it is not about that. It is about equal access to judicial review.

The rational basis test, however, is not uniformly applied.[52] The courts make looser or stricter demands on the connection between the classification at issue and the purpose for which it was created, depending on circumstances.

[46]*Truax v. Corrigan*, 257 U.S. 312, 331 (1921) (The full quote is: "Our whole system of law is predicated on the principle of equality of application of the law."). The Supreme Court first explicitly incorporated the text of the 14th Amendment into the Fifth Amendment in *Bolling v. Sharpe*, 347 U.S. 497 (1954) (segregated schools in the District of Columbia violated the equal protection guarantee incorporated into the Fifth Amendment) (companion case to *Brown v. Board of Education*).

[47]*Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

[48]For those interested, I recommend reading David E. Bernstein's article, "Fifty Years After *Bolling v. Sharpe*: *Bolling*, Equal Protection, Due Process, and Lochnerphobia," 93 *Geo. L. J.* 1253 (Apr. 2005).

[49]*Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985). That all goes back to *United States v. Carolene Products*, 304 U.S. 144 (1938), and its famous note 4.

[50]*See id.*; *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

[51]*Tennessee v. Lane*, 541 U.S. 509, 533-534 (2003) (collecting cases in which right of access to courts was held to be fundamental and strict scrutiny applied). Blair's access to court review after full-payment is a constitutionally sufficient process. *Phillips v. Commissioner*, 283 U.S. 589 (1931). That would end the story if Congress had not decided to give Alex an additional opportunity for judicial review.

[52]*See U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 176 n.10 (1980) ("the most arrogant legal scholar would not claim that all . . . cases applied a uniform or consistent [rational basis] test under equal protection principles").

The loosest application of the rational basis test is found most often in court review of state social or economic regulation. The test has two components, both of which can be completely made up by the court, regardless of what any legislator actually thought or intended.[53] First, the court can invent the government interest at stake. Importantly, the court can choose to state the government's interest at any level of generality. Judge Frank Easterbrook explains that phenomenon in a fascinating article; basically, the higher the level of generality used, the more likely the government will win.[54] Second, if the court can possibly imagine any theoretical connection between the government interest it decides is at stake and the classification at issue, then it will have found, by definition, a rational connection.[55]

This loosey-goosey rational basis test is not even dependent on the cleverness of the attorneys: It depends on the cleverness of the judges and their clerks. And those are very clever folks indeed. So it is no wonder that when a court uses this version of the rational basis test, the government wins. But sometimes that approach is the only one reasonably available, especially for state legislation for which legislative histories are often unwritten or unknown and for which legislatures are, to put it gently, generally not as thoughtful about their work product as their federal counterparts.

A stricter version of the rational basis test requires some actual purpose or interest to be discernable from the legislation or its history and demands a tighter nexus between the identified interest and the classification.[56] For example, when there is some suspicion that a legislature acted deliberately to create the classification based on an irrational prejudice against the adversely affected group, the courts have been willing to scrutinize the classification a bit more closely, even if the group is not a protected class.[57] It's not strict scrutiny, but courts are less willing to engage in abstract theorizing when the "actual" basis for the classification appears tainted.

Further, a stricter version will take a harder look at the connection between the classification and the identified government interest. "Not only must a classification be reasonable, it must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[58]

The stricter version of the rational basis test should apply to the classification of Alex and Blair for two reasons: the general importance of access to judicial review of agency decisions and the particular importance of that review in liability decisions. The situation is analogous to those involving legislative animus to a discrete but nonprotected minority group such as old folks or the handicapped. In those situations the Supreme Court has applied a more robust rational basis test. Likewise, even though the situation does not involve the direct denial of a fundamental right to one group, it does involve access to the courts, an important principle both generally and as applied to an agency adjudication.[59]

As to the importance of the general principle of equal access to courts, the 1835 case of *United States v. Nourse* illustrates how it has long been an important part of our laws. In that case, Treasury determined that the acting purser of the frigate *Constitution* (Randolph) was liable to the government for some $25,000.[60] He was seized and thrown in prison under an administrative warrant authorized by statute to be issued by Treasury. Randolph sued the United States in district court, challenging the administrative warrant. The court ruled in his favor: Not only was he not liable, but the United States actually owed him $11,000. Still in jail, however, Randolph then swore out a writ of habeas corpus arguing that the administrative warrant keeping him there was invalid. The United States argued that if the warrant was invalid, the district court's opinion was void because it would have had no

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[53]*McGowan v. Maryland*, 366 U.S. 420, 425 (1961) ("The constitutional safeguard [of the Equal Protection Clause] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.*") (Emphasis added.).

[54]Frank Easterbrook, "Levels of Generality in Constitutional Interpretation: Abstraction and Authority," 59 *U. Chi. L. Rev.* 349 (1992). *See also* Note: "Rational Review, Irrational Results," 84 *Tex. L. Rev.* 801 (2006).

[55]For an excellent example of this in action, see *Cleburne*, *supra* note 49. The Supreme Court has been especially likely to use this approach to classifications created by state taxing regimes. *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1 (1992) (rejecting challenge to the classification created by California's Proposition 13 between long-term homeowners and new buyers).

[56]*See, e.g., Planned Parenthood of Minnesota v. Minnesota*, 612 F.2d 359 (8th Cir.), *aff'd without opinion*, 448 U.S. 901 (1980) (striking down state funding statute whose legislative history appeared to indicate the legislative purpose to exclude Planned Parenthood from funding available to hospitals and whose litigation rationales were insufficiently connected to the disparate treatment of Planned Parenthood and hospitals).

[57]*See, e.g., Lawrence v. Texas*, 539, U.S. 558, 580 (2003) (O'Connor, J., concurring) (animus against gays); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448-450 (1985) (animus against the handicapped); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("unrelated person" exclusion in food stamp program found to lack rational basis; the Supreme Court emphasized that law "actually" was intended to discriminate against hippies).

[58]*Planned Parenthood of Minnesota v. Minnesota*, 612 F.2d 359 (8th Cir. 1980) (internal quote marks and citations omitted).

[59]Not only has the Supreme Court held that access to the courts is a fundamental right, *Lane*, *supra* note 51, it has repeatedly emphasized the fundamental nature of the right to judicial review in a variety of contexts. *See Boddie v. Connecticut*, 401 U.S. 371 (1971) (imposition of filing fees on indigent plaintiffs was denial of due process); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (reading Administrative Procedure Act as creating strong presumption of judicial review); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S, 667 (1986) (reviewing history of judicial review of agency actions).

[60]34 U.S. 8 (D.C. Cir. 1835). Justice Marshall was riding circuit and the case was reported in Peyton's Reports, which later became volume 34 of the U.S. Reports.

jurisdiction to decide the amounts owed. So the United States sued Randolph for the money.

Chief Justice John Marshall, riding circuit, held that the warrant was invalid but that the district court still had jurisdiction to determine the amount owed and that its decision was *res judicata*. He thought that reading the statute to permit judicial review of liability decisions only for those subject to *valid* administrative warrants would deny equal access to the courts for those subject to *invalid* warrants:

> It would be strange indeed if the legislature, intending to give [the United States] a prompt remedy against a particular class of debtors [those subject to the administrative process], should carefully guard that class [of debtors] against any abuse of the remedy; and yet leave all other persons, whether debtors or not, exposed to that abuse: that [person] liable to the process should be enabled to correct it, if it issued injuriously, by appealing to the law: and yet that an individual not liable to the process, should be compelled to submit to the oppression and to suffer the wrong.[61]

The general concern about the importance of equal access to judicial review of administrative decisions applies with particular force to section 6015(f) determinations, as an examination of Tax Court opinions reviewing IRS equitable relief decisions shows. I count 94 section 6014(f) decisions by the IRS reviewed by the Tax Court since 2001 under its deficiency, CDP, and section 6015(e) jurisdiction. The Tax Court has reversed the IRS in 20 of those cases. Most of the cases were underpayment situations. I list the reversals in footnote 62.[62] One can easily conclude from that reversal rate that judicial review adds value to the section 6015(f) determination. Accordingly, access to judicial review is not some ephemeral or theoretical right, but is of such importance that even a rational basis test should be applied with some care.

The classification created by the interplay of the full-pay rule, the CDP mash-up rule, and the section 6015(e) jurisdiction rule bears no rational relation to a legitimate government purpose. The classification divides the universe of requesting spouses seeking solely equitable relief (because there is no deficiency at issue) into two classes: Alexes and Blairs. The first are those, like Alex, against whom the IRS either files an NFTL or seeks to levy. Sections 6320 and 6330 allow those taxpayers a CDP hearing, at which time they can seek innocent spouse equitable relief under section 6330(c)(2)(A)(I). The entire content of CDP hearings is subject to court review, including any denial of equitable relief. In other words, those requesting spouses who can use CDP are able to obtain judicial review to ensure that the IRS is fairly applying the rules written by Congress and by the IRS for equitable relief from underpayments.

> ***The classification created by the interplay of the full-pay rule, the CDP mash-up rule, and the section 6015(e) jurisdiction rule bears no rational relation to a legitimate government purpose.***

The Blairs are not so lucky. When the IRS collects their liability by using its section 6402 setoff authority, there is no requirement for a CDP hearing because setoffs do not trigger CDP protections. CDP hearings are triggered only by filing an NFTL or a levy notice. Accordingly, a taxpayer against whom the IRS proceeds by setoff may not obtain judicial review except as allowed under section 6015(e). And that statute is not available for underpayments.[63]

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[61]*Id.* at 31.

[62]*Levy v. Commissioner*, T.C. Memo. 2005-92, *Doc 2005-8773, 2005 TNT 80-10* (underpayment); *Neal v. Commissioner*, T.C. Memo. 2005-201, *Doc 2005-17668, 2005 TNT 162-11* (underpayment); *Bright v. Commissioner*, T.C. Summ. Op. 2005-145, *Doc 2005-20293, 2005 TNT 192-8* (underpayment); *Siddons v. Commissioner*, T.C. Summ. Op. 2005-160, *Doc 2005-22530, 2005 TNT 213-11* (underpayment); *McGee v. Commissioner*, 123 T.C. 314, *Doc 2004-20430, 2004 TNT 202-13* (2004) (underpayment); *Foor v. Commissioner*, T.C. Memo. 2004-54, *Doc 2004-4902, 2004 TNT 46-13* (deficiency); *Keitz v. Commissioner*, T.C. Memo. 2004-74, *Doc 2004-5824, 2004 TNT 54-6* (underpayment); *Vuxta v. Commissioner*, T.C. Memo. 2004-84, *Doc 2004-6455, 2004 TNT 57-13* (underpayment); *Rosenthal v. Commissioner*, T.C. Memo. 2004-89, *Doc 2004-6823, 2004 TNT 60-37* (underpayment); *Browda v. Commissioner*, T.C. Memo. 2004-16, *Doc 2004-3026, 2004 TNT 30-15* (underpayment); *Thorpe v. Commissioner*, T.C. Summ. Op. 2004-98, *Doc 2004-15357, 2004 TNT 144-16* (CDP, remand to consider equitable relief); *Washington v. Commissioner*, 120 T.C. 137, *Doc 2003-10149, 2003 TNT 77-10* (2003) (underpayment); *Wiest v. Commissioner*, T.C. Memo. 2003-91, *Doc 2003-7950, 2003 TNT 60-9* (underpayment); *Gay v. Commissioner*, T.C. Summ. Op. 2003-36, *Doc 2003-9922, 2003 TNT 75-6* (deficiency); *Grow v. Commissioner*, T.C. Summ. Op. 2003-114, *Doc 2003-18962, 2003 TNT 161-6* (deficiency); *August v. Commissioner*, T.C. Memo. 2002-201, *Doc 2002-18742, 2002 TNT 156-11* (underpayment); *Ferrarese v. Commissioner*, T.C. Memo. 2002-249, *Doc 2002-22249, 2002 TNT 190-9* (deficiency); *Flores v. U.S.*, 51 Fed. Cl. 49, *Doc 2001-29779, 2001 TNT 233-10* (2001) (deficiency); *Rowe v. Commissioner*, T.C. Memo. 2001-325, *Doc 2002-173, 2001 TNT 251-13* (deficiency); *Cheshire v. Commissioner*, 115 T.C. 183, *Doc 2000-22640, 2000 TNT 170-10* (2000) (deficiency).

(Footnote continued in next column.)

[63]If CDP were available to all taxpayers, there would be no difference between Alex and Blair. But CDP is available only for taxpayers against whom the IRS seeks to file an NFTL or levy assets. *Boyd v. Commissioner*, 2006 U.S. App. LEXIS 14414, *Doc 2006-11454, 2006 TNT 115-9* (1st Cir. June 13, 2006). Since both processes cost money, the IRS frequently decides to forgo those collection options for taxpayers with few discoverable assets. And while the theoretical availability of the full-pay refund option may be good enough to save the scheme from violating due process, that is not the potential problem. The problem is equal access to court review. Further, refund claim litigation is not a practical option for can't-pays, whose refunds may be taken repeatedly in partial satisfaction of a joint liability before the IRS figures out they are can't-pays and allows them to exit the collection process. Thus, the classification of taxpayers into Alexes and Blairs is not ephemeral or simply a matter of timing. Also recall that we are talking only about underpayments, so, by definition, the deficiency process is unavailable for both groups.

I simply do not see how that classification of taxpayers into Alexes and Blairs has any rational relation to any stated government purpose. The actual purpose of allowing CDP court review was to act as a check on the IRS's collection decisions, to make sure IRS employees were not harassing taxpayers.[64] That collection distinction has no rational connection to the subject matter of review because the taxpayer is not seeking judicial review of the collection decision, but instead is seeking judicial review of the propriety of the assessment, which is a decision about liability. And the *only* feature distinguishing the two groups of taxpayers is the IRS's choice of collection method. Taxpayers can obtain judicial review when the IRS decides to collect by lien or levy, but cannot obtain judicial review when the IRS decides to collect by offset.

Collection decisions are all about *how* to collect a liability. Liability decisions are all about whether there is *any* liability to collect. Thus, for example, there might be a rational distinction between judicial review of collection by filing an NFTL, or levying, on one hand, and collection by setoff on the other hand. Both of the former are more public efforts at collection that can affect the credit and commercial relations of the taxpayer. The latter method is arguably less intrusive in that it is less public. Congress might rationally be deemed to have been more concerned about IRS abuse when the agency files an NFTL or levy than when it sets off an overpayment.

The distinction between collection methods, however, has nothing to do with the liability being collected. A taxpayer either owes a tax or does not owe a tax. There is a huge difference between reviewing the collection decision to determine the most appropriate method of collecting a tax owed and reviewing a liability decision to see whether there is any liability to collect in the first place. In effect, taxpayers who get review through CDP not only get a review about whether the levy or lien collection decision is appropriate, they also avoid *Flora* by getting a prepayment review of their liability. But taxpayers who are being collected against by setoff do not get that level of review. They remain bound by *Flora* and must wait until they fully pay the assessed liability (if ever) before becoming entitled to a court review of the section 6015 liability determination. While it may be rational to deny them review about the appropriateness of setoff as a collection method, it is not rational to deny them the prepayment liability review given to the Alexes of the world. The difference in collection methods is not a difference that rationally relates to disparate treatment of judicial review of the *liability*.

III. What Should Be Done?

Since the problem is caused by the interplay of three different legal rules, amending any one of them will fix the problem. Remember, the problem is not denial of court review, it is unequal access to court review. Thus, logically, denying Alex court review solves the problem just as much as granting Blair court review. While I firmly believe that review of collection decisions is useless and a huge waste of administrative and judicial resources, providing review of liability decisions is different. Again, the difference lies in facts under review. But how the rules should be amended and who should perform the amendments could be another column. Here, I will just sketch the possibilities.

First, the *Flora* full-pay rule can be fixed by either Congress or the Supreme Court. I suggested in a previous column how Congress should give spouses a cause of action, similar to a wrongful levy action, under which they can seek spousal relief and, if denied, get quick access to the courts.[65] The Supreme Court could also revise the reading it gave 28 U.S.C. section 1346(a). Since that reading was based in large part on the structure of tax collection and since the structure has now changed so radically, it would do no violence to *stare decisis* for the Court to revisit the *Flora* full-pay rule. Amending the full-pay rule would, of course, increase court involvement in prepayment determinations. That is not such a bad thing, considering that more than 90 percent of tax collected each year is collected at the source. So the "imperious need" of the sovereign to get its money first can generally be accomplished without the aid of harsh rules of law.

Second, the CDP mash-up rules can be fixed by Congress. I have before called for outright repeal of the noxious CDP provisions and have read nothing in the meantime to change my mind. But Congress could just stack stupidity on top of stupidity and, instead of abolishing CDP, could amend it so its "protections" extend to setoffs as well as liens and levies.

Finally, either Congress or any federal court can fix section 6015(e). Congress could modify the plain language. A court could reinterpret existing language to avoid the constitutional issue. Either way would allow the Tax Court jurisdiction. It is not clear that either the Eighth or Ninth Circuit was aware of the probable constitutional problem. When an otherwise acceptable construction of a statute would raise serious constitutional problems, courts will often construe the statute to avoid the problems, unless doing so is such a stretch that they have to simply strike it down.[66] Interpreting section 6015(e) to allow Tax Court jurisdiction to hear standalone section 6015(f) petitions is not the most straightforward interpretation of the statute. But a court could reasonably take that position on the Twister mat of jurisprudence and still not fall down on its job of interpreting and not creating law. The Tax Court did it. Striking down section 6015(e) is not an option, of course, because that does not cure the problem of unequal access. That, in fact, would result in the same problem.

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[64]For discussion of RRA98's purposes, see Bryan T. Camp, "Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998," 56 *Fla. L. Rev.* 1, 80-87, 119-121 (2004).

[65]*See* Bryan T. Camp, "The Unhappy Marriage of Law and Equity in Joint Return," *Tax Notes*, Sept. 12, 2005, p. 1307, at 1318-1319.

[66]*Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Buckley v. Valeo*, 424 U.S. 1 (1976).

In closing, the equal access problem I have discussed in this column may not affect many taxpayers, but it definitely affects some. Witness the 94 petitions filed with the Tax Court for review of an IRS section 6015(f) decision. Those 94 petitions represent just the tip of the iceberg of mostly low-income taxpayers, mostly women, whose liabilities resulted from self-employment liability on the part of their spouses. Sure, the amounts are reported and both spouses knew of the income. But the spouse whose activities created the liability often escapes collection because he flies under the bulk-processing radar — the amount owed is too small to ever get out of the queue and worked in the field. He has no withholding to create an overpayment, and his assets are too minimal to trigger lien or levy action by the automated collection system. So the wife ends up taking the collection hit because she is the one who most often qualifies for the EITC, and an overpayment shows up in her account each year. That is the scenario reported to me by those who regularly represent low-income taxpayers. For example, Nadler put it this way in a recent e-mail to me:

> Very few of my clients, all low-income taxpayers, have ever had a notice of lien filed against them. . . . I can tell you that it is a tragedy to require a woman living at the poverty line, who has been the subject of physical abuse, to pay the joint liability resulting from her husband's self-employment. When the husband leaves and she is making $12,000 or $14,000, and the IRS offsets the $3,000 EITC refund, it is pretty sobering.

I do not argue that those taxpayers should not pay the taxes they reported. I do not argue (here) that the joint return system should be abolished. Nor do I argue (here) that taxpayers *must* be given prepayment liability review. All I argue is that, once Congress makes the decision to grant one class of spouses the ability to obtain prepayment judicial review of their request for relief from joint liability under the equitable relief provisions of section 6015(f), Congress must not deny equal access to another class of spouses without a rational basis. Distinguishing between taxpayers based simply on the collection decisions made by the IRS is not a rational basis. It is a problem that deserves attention in a nation that takes pride in providing "equality of application of the laws."