The Congressional Revenue Service

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THE CONGRESSIONAL REVENUE SERVICE

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Congress established a permanent Joint Committee on Taxation (the JCT) as part of the Revenue Act of 1926. Initially, the JCT was granted the broad oversight authority typically enjoyed by congressional committees. Under the 1926 Act, the JCT would investigate the operation of the tax laws and examine how the tax system affected the public. In the Revenue Act of 1928, Congress charged the JCT with an additional role in tax administration. Under that act, the JCT would review any large refund that the IRS proposed to issue to a taxpayer. The statute (now codified in § 6405(a) of the Internal Revenue Code) did not grant the JCT any explicit power to prevent the issuance of large refunds, but instead simply required that the IRS give the JCT thirty days' notice before issuing any of those refunds. Over time, the JCT has come to play more than a purely advisory role, and the IRS will not issue refunds without JCT approval.

This Article suggests that Section 6405(a) raises separation of powers questions because it mandates systematic congressional involvement in tax refund determinations, a task long considered inherently executive. Constitutional issues related to the JCT's involvement in refund determinations have gone largely unexplored in the scholarly literature, thought a few commentators have briefly analyzed the refund review function under INS v. Chadha. *Commentators apparently agree that the refund review function poses no constitutional problems because the JCT lacks a statutory veto over IRS refunds.*

This Article argues that the absence of a statutory veto does not automatically validate the JCT refund review function, and that § 6405(a)'s thirty-day holding period instead violates the separation of powers. In reaching this conclusion, this Article uses a largely formalist, text-centered approach to separation of powers questions. Under this approach, § 6405(a) violates the separation of powers because it goes outside of the "legislative power" granted to Congress in Article I.

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TABLE OF CONTENTS

I. INTRODUCTION

Like many things in Washington, the Joint Committee on Taxation was born of scandal. In the mid-1920's, Treasury Secretary Andrew Mellon came under fire for allegedly abusing his post to "impoverish the masses and to enrich a favored few."[1] Senator James Couzens and other legislators were convinced that Mellon had used the Treasury Department to provide improper benefits to wealthy individuals and corporations, including the Gulf Oil Company, which happened to be owned by Mellon. (Apparently, in those days one could head a department while owning a large corporation.) "Uncle Andy," as the legislators derisively called him,[2] allegedly made unwarranted tax refunds to privileged parties, including Gulf Oil, and issued favorable but legally questionable tax rulings to them.[3]

In response to its concerns, Congress organized a temporary committee[4] to investigate the Bureau of Internal Revenue (today, the IRS).[5] After its investigation, the committee made some troubling findings,

1. 68 CONG. REC. 2364 (1927) (statement of Sen. Heflin).

2. *See, e.g.*, 70 CONG. REC. 4971 (1929) (statement of Sen. McKellar); 70 CONG. REC. 1212 (1929) (statement of Rep. Garner).

3. This simplified summary does not do justice to the spectacular facts surrounding the Couzens-Mellon feud and the creation of the JCT. For an extensive analysis of the relevant history, see generally George K. Yin, *James Couzens, Andrew Mellon, the 'Greatest Tax Suit in the History of the World,' and Creation of the Joint Committee on Taxation and Its Staff*, 66 TAX L. REV. 787 (2013).

4. *See National Affairs: Couzens' Committee*, TIME, Dec. 21, 1925, at 9, 9 (describing committee's findings).

5. In the early days of the income tax, the U.S. tax collection agency was called the Bureau of Internal Revenue. In 1953, that agency was renamed. *See* T.D. 6038, 1953-19 I.R.B. 25 (stating any "reference to the Bureau of Internal Revenue" in any rule or regulation "shall be deemed to refer to the Internal Revenue Service").

concluding that there "appeared to be no system, no adherence to principle, and a total absence of competent supervision"[6] regarding one important area of the tax system. Congress consequently established a permanent Joint Committee on Taxation (the JCT) as part of the Revenue Act of 1926.[7]

Initially, the JCT was granted the broad oversight authority typically enjoyed by congressional committees. Under the 1926 Act, the JCT would investigate the operation of the tax laws and examine how the tax system affected the public.[8] The committee would also provide recommendations to the entire Congress regarding how legislation might help improve or simplify those laws.[9]

In the Revenue Act of 1928, Congress charged the JCT with an additional role in tax administration.[10] Under the 1928 Act, the JCT would review any large refund that the IRS proposed to issue to a taxpayer. The statute, now codified in § 6405(a) of the Internal Revenue Code, did not grant the JCT any explicit power to prevent the issuance of large refunds, but only required that the IRS give the JCT thirty days' notice before issuing any of those refunds.[11] The IRS, ostensibly, would be free to issue refunds even if the JCT disagreed with its interpretation and application of the relevant statutes.

Over time, the JCT has come to play more than a purely advisory role. The IRS generally will not issue a large refund when the JCT objects, even though § 6405(a) does not explicitly require JCT approval.[12]

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6. STAFF OF THE JOINT COMM. ON TAXATION, 105TH CONG., WRITTEN TESTIMONY OF THE STAFF OF THE JOINT COMMITTEE ON TAXATION WITH RESPECT TO CERTAIN PROVISIONS OF H.R. 2292, at 1 (Comm. Print 1997), *available at* https://www.jct.gov/publications.html?func=startdown&id=2156. The committee's investigation revealed severe problems relating to the IRS's valuation of oil-related properties. *See* STAFF OF JOINT COMM. ON TAXATION, 105TH CONG., DESCRIPTION AND ANALYSIS OF PROPOSALS RELATING TO THE RECOMMENDATIONS OF THE NATIONAL COMMISSION ON RESTRUCTURING THE INTERNAL REVENUE SERVICE, S. 1096, AND H.R. 2676 AS PASSED BY THE HOUSE 14 (Comm. Print 1998), *available at* https://www.jct.gov/publications.html?func=startdown&id=2935; *National Affairs: Couzens' Committee*, *supra* note 4, at 9 (describing committee's findings).

7. *See* Revenue Act of 1926, ch. 27, § 1203, 44 Stat. 9, 127–28 (current version at I.R.C. § 8001 (2006)).

8. *See* Revenue Act of 1926, ch. 27, § 1203(c)(1)–(6), 44 Stat. 9, 127–28; *see also* H.R REP. NO. 69-356, at 30 (1926) (Conf. Rep.); S. REP. NO. 69-52, at 13–14 (1926); H.R. REP. NO. 69-1, at 9 (1925).

9. *See* Revenue Act of 1926, ch. 27, § 1203(c)(4)–(5), 44 Stat. 9, 127–28.

10. *See* Revenue Act of 1928, ch. 852, § 710, 45 Stat. 791, 882. Under the statute, the JCT would review any refund over $75,000. That figure has been adjusted several times, and the statute currently sets a $2 million threshold. *See* I.R.C. § 6405(a) (2006).

11. *See* Revenue Act of 1928, ch. 852, § 710, 45 Stat. 791, 882. I.R.C. Section 6405(a) now provides:

> No refund or credit of any income, war profits, excess profits, estate, or gift tax, or any tax imposed with respect to public charities, private foundations, operators' trust funds, pension plans, or real estate investment trusts under chapter 41, 42, 43, or 44, in excess of $2,000,000 shall be made until after the expiration of 30 days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts and the decision of the Secretary, is submitted to the Joint Committee on Taxation.

I.R.C. § 6405(a) (2006). As its language indicates, § 6405(a) applies not only to most large tax refunds, but to large credits against a taxpayer's tax liability. *See also* I.R.C. § 6402 (2006).

12. *See infra* note 31.

For any large refund, the IRS must prepare a report that will allow the JCT to determine whether IRS positions are consistent with congressional intent.[13] In many cases, the JCT will quickly approve the IRS's decision, but in other circumstances, the JCT may request additional facts or make substantive recommendations regarding how the IRS should apply the applicable authorities.[14]

Section 6405(a) should raise separation of powers questions because it mandates systematic congressional involvement in tax refund determinations, a task long considered inherently executive.[15] Constitutional issues related to the JCT's involvement in refund determinations, however, have gone largely unexplored in the scholarly literature. A few commentators have briefly analyzed the refund review function under *INS v. Chadha*,[16] quickly distinguishing that case because § 6405(a) does not provide the JCT with an explicit veto over the IRS.[17] Commentators apparently agree that the refund review function poses no constitutional problems because the JCT lacks a statutory veto over IRS refunds.[18]

This Article argues that the absence of a statutory veto does not automatically validate the JCT refund review function, and that § 6405(a)'s thirty-day holding period instead violates the separation of powers.[19] In reaching this conclusion, this Article uses a largely formalist, text-centered approach to separation of powers questions.[20] Under this approach, § 6405(a) violates the separation of powers because it goes outside of the "legislative power" granted to Congress in Article I. Alt-

13. *See infra* note 31.

14. *Joint Committee Statutory Refund Review*, Joint Committee on Tax'n, https://www.jct.gov/about-us/refund-review.html (last visited Mar. 2, 2014).

15. *See also* JASPER L. CUMMINGS JR., THE SUPREME COURT, FEDERAL TAXATION, AND THE CONSTITUTION 590 (2013) ("[Section 6405(a)] places the legislative branch of government in the business of executing the tax laws and raises separation of powers issues that appear to have been ignored.").

16. In *INS v. Chadha*, the Supreme Court declared the so-called legislative veto unconstitutional. 462 U.S. 919, 959 (1983). Statutes containing legislative vetoes commonly stated that a particular act by the executive would take effect only if, after a specified period, some subset of Congress (like a particular committee or a particular house) had not expressed its disapproval of that act. For other forms of the veto, see Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785, 785 n.4 (1984).

17. *See* Diana Lisa Erbsen, *The Joint Tax Committee Refund Review Function: Is It 'Worth a Damn'?*, 72 TAX NOTES 227, 228 (1996); Donald L. Korb et al., *Rethinking Refund Review: Understanding the Joint Committee on Taxation*, CORP. BUS. TAX'N MONTHLY, Nov. 2002, at 8.

18. *See* Erbsen, *supra* note 17, at 228; Korb, *supra* note 17, at 8.

19. Professor Rosenkranz persuasively details the theoretical problems associated with calling a statute unconstitutional, as opposed to stating that Congress violated the Constitution through a given enactment. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010). Thus, it is not entirely accurate to say that Section 6405 goes beyond the legislative powers granted by Article I. Rather, *Congress* went beyond Article I when it enacted that statute. Although the distinction between these phrases might seem purely semantic, the identification of the actor, as opposed to a bare reference to a statute, can have profound implications and can solve many interpretive riddles. *See id.* at 1230–1235 (showing how identification of government actor resolves confusion between facial and as-applied challenges). Nonetheless, this Article will frequently refer to the unconstitutionality of Section 6405, and not the unconstitutionality of Congress's action in 1928, given that such phrasing is consistent with the Court's usage. *See id.* at 1230.

20. For some concise definitions of the formalist approach, see *infra* note 215.

hough the legislative power undoubtedly includes the authority to investigate the execution of the law, investigations must take place in the legislative sphere (that is, in connection with the passage or consideration of legislation).[21] Thus, for example, Congress could require reports from the IRS about issued refunds to assist with amending the law or for any other similarly legitimate legislative purpose. As this Article argues, however, systematic congressional review of *pending* refund claims does not serve any such purpose; that review merely gives the legislature an opportunity to participate in the determination of large refund claims.

The formalist analysis employed here contemplates that the Constitution assigns the legislative and executive powers exclusively to the legislature and the President, respectively.[22] This assumption, however, does not hold when one adopts a functionalist approach to separation of powers questions. Under the functionalist theory, one branch can exercise the powers constitutionally assigned to another branch as long as the overall balance of power between the branches is preserved. Functionalists have thus embraced the legislative veto and the assignment of judicial power to Article I agencies, and they might thus welcome the JCT's involvement in large refund adjudications. This Article will argue, however, that even functionalists should question § 6405(a)'s thirty-day review period.[23]

Part II of the Article provides some further background regarding the JCT refund review function. It describes how § 6405(a) operates as a *de facto* veto and explains why the IRS generally acquiesces to JCT involvement in refund determinations. Part III examines the key judicial pronouncements on separation of powers issues and, using a formalist approach, argues that the JCT refund review function exceeds Congress's legislative power and that it facilitates the improper performance of executive functions by the legislature. Part IV considers § 6405(a) from a functionalist perspective and argues that functionalists should question the constitutionality of the JCT refund review function, even if they sup-

21. *See, e.g.*, Watkins v. United States, 354 U.S. 178, 197 (1957) (noting that "an investigation is part of lawmaking" and "is justified solely as an adjunct to the legislative process").

22. The Constitution explicitly contemplates some blending of powers. The Senate, for example, acts judicially when it tries impeachments under Article I, Section 3. Additionally, a court may take on executive functions if Congress vests it with the power to appoint an inferior officer. *See* U.S. CONST. art. II, § 2. These provisions do not indicate that all powers may be blended. Rather, they reflect specific exceptions to the assignment of separate powers to separate branches. *See* INS v. Chadha, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new federal Government into three defined categories, legislative, executive, and judicial . . . ."). At the various state ratifying conventions, in fact, many delegates expressed concerns that the exceptions improperly infringed upon the separation of powers. *See, e.g.*, PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION: 1787–1788, at 286 (2010).

23. Much ink has been spilt in the formalism vs. functionalism debate, and many readers will likely come to this Article having decided their preferred interpretive approach. For that reason, no attempt will be made to specifically advocate for a formalist approach (the author's preferred approach). That task has been ably undertaken by many authors. *See infra* note 215. This Article adopts a formalist approach in Part III and will address functionalist considerations in Part IV, thus speaking to both audiences.

port other measures designed to increase congressional involvement in law execution.

Part V provides some brief recommendations to Congress. It suggests that Congress eliminate the JCT refund review function and proposes other devices that the legislature may use to monitor IRS handling of refund claims. There is no need for a "congressional revenue service"—modifications to existing IRS practices can ensure integrity in the refund process. Part V also provides recommendations to the IRS, with particular focus on preserving the integrity of its dispute resolution procedures.

II. OPERATION OF THE JCT

The Joint Committee on Taxation, as its name implies, represents a joint effort of the Senate and House of Representatives. Members from both the House and Senate sit on the committee, but the JCT remains largely nonpartisan.[24] Lawyers, economists, and accountants make up the highly regarded JCT staff,[25] which has traditionally maintained independence from political influences.[26] For example, when President Nixon came under scrutiny for allegedly taking improper positions on his tax returns, he asked the JCT staff to provide an independent review of his files.[27]

The JCT participates in most steps of the tax legislation process. For example, the committee fields questions from members of Congress and assists with the development of legislative proposals.[28] And while the Congressional Budget Office provides revenue estimates for most legislation, the JCT scores tax bills.[29] The JCT also drafts so-called Blue Books, which provide detailed explanations of previously enacted tax legislation.[30] In these ways, the JCT is much like a typical congressional committee, playing a significant and appropriate role in the drafting and enactment of legislation related to its area of expertise.

24. *See* I.R.C. § 8002(a) (2006).

25. *See, e.g.*, Michael J. Graetz, *Paint-By-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609, 615 (1995) (noting that JCT "staff have typically enjoyed great respect among Congressional members of both political parties").

26. The partisan chairs of the House Ways & Means and Senate Finance committees select the chief of the JCT, but the chief and his staff operate largely independently. *See* George K. Yin, *Should Congress Abolish the Joint Committee on Taxation?*, 126 TAX NOTES 861 (2010). *But see* Edward Kleinbard, *The Need for a JCT: Kleinbard Responds to Yin*, 126 TAX NOTES 991 (2010) (acknowledging that JCT staff offers objective advice to both parties, but noting that JCT enjoys less institutional independence than the Congressional Budget Office).

27. *See* STAFF OF JOINT COMM. ON INTERNAL REVENUE TAXATION, EXAMINATION OF PRESIDENT NIXON'S TAX RETURNS FOR 1969 THROUGH 1972, S. REP. NO. 93-768 (1974).

28. *See Joint Committee on Taxation Overview*, JOINT COMM. ON TAX'N 5, *available at* https://www.jct.gov/about-us/overview.html.

29. *See* 2 U.S.C. § 601(f) (2006). More specifically, the CBO provides estimates of changes in federal outlays for proposed legislation, whereas the JCT provides revenue estimates regarding proposed changes to the tax code.

30. *Joint Committee Bluebooks*, JOINT COMMITTEE ON TAX'N, https://www.jct.gov/publications.html?func=select&id=9 (last visited Mar. 2, 2014).

Through its refund review function, the JCT also plays a role in the execution of the tax laws. Under § 6405(a) the IRS cannot issue a large refund to a taxpayer until the JCT has had at least thirty days to review the proposed refund. The IRS must provide the JCT with the taxpayer's name, the amount of the refund, a summary of the facts underlying the taxpayer's claim, and the IRS's decision to grant the refund.[31] Until 1986, § 6405(b) also required that the JCT provide the entire Congress with a list of the persons receiving large refunds.[32]

Section 6405(a) seems to contemplate an advisory role for the JCT. The statute does not say that the JCT has any veto power over any large refunds but merely requires that the IRS explain itself when it proposes to pay them. Nonetheless, as one JCT publication puts it, "[a]lthough the statute does not require that the IRS comply with Joint Committee Staff requests . . . the IRS will not pay any part of a refund while the Joint Committee Staff has a continuing objection."[33]

31. I.R.C. § 6405(a) (2006); *see also* INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 34.8.2.8 (Aug. 11, 2004) (reports to JCT must explain reasons for refund); I.R.S. CHIEF COUNSEL NOTICE CC-2003-023, (July 3, 2003) ("[IRS must provide reports to the JCT to allow it] to determine whether the positions taken by the Service are consistent with Congressional intent.").

32. The JCT had actually ceased making such disclosures several years earlier, following the enactment of § 6103, which generally protects taxpayer return information from disclosure. *See* STAFF OF THE JOINT COMM. ON TAXATION, 99TH CONG., EXPLANATION OF TECHNICAL CORRECTIONS TO THE TAX REFORM ACT OF 1984 AND OTHER RECENT TAX LEGISLATION 193 (Comm. Print 1987) (explaining JCT practice).

33. *Joint Committee Statutory Refund Review*, JOINT COMMITTEE ON TAX'N 13, https://www.jct.gov/about-us/refund-review.html (visited Apr. 26, 2012). After the JCT received a draft copy of this article, it changed its website and removed the quoted language. *See id.* as of Oct. 20, 2013. The JCT's original characterization of its relationship with the IRS, on file with the author, is consistent with many other sources, however. Litigation documents, cases, IRS materials, and practitioner commentary acknowledge that the IRS generally will not pay a refund without JCT approval, although in some cases, the IRS and JCT may agree to disagree. *See, e.g.*, Philadelphia & Reading Corp. v. United States, 944 F.2d 1063, 1067 (3d Cir. 1991) (noting that section 6405(a) requires the IRS to submit for approval to Congress's Joint Committee on Taxation any large refunds); Girard Trust Bank v. United States, 602 F.2d 938, 941 (Ct. Cl. 1979) ("The refund claim was proposed for allowance by the District Director and allowed after approval by the Joint Committee on Taxation."); Trigon Ins. Co. v. United States, 215 F. Supp. 2d 687, 694 (E.D. Va. 2002) ("Trigon and the IRS reached a compromise on the treatment of losses . . . However, the Congressional Joint Committee on Taxation effectively rejected that agreement. The administrative claims were subsequently denied by the IRS."); Century Data Systems, Inc. through Cal. Computer Prods., Inc. v. Comm'r, 86 T.C. 157, 161 (1986) ("[A] letter recommending approval of the refunds was sent to the Joint Committee on Taxation. The Committee's approval was granted on May 29, 1973."); INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 8.7.9.5.1 (Sept. 27, 2013) ("[N]o settlement should be made effective [by IRS Appeals] until receipt of notice that the JCT has no objection to the proposed overpayment."); INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 4.36.1.3 (May 4, 2010) ("In the event the JCT disagrees with or questions the position taken in the report, the refund is, generally, as a matter of agency policy, not processed pending the resolution of the dispute."); MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE § 11.12 (Rev. 2d ed. 2003) ("If the Joint Committee staff has any questions or advises the Service that it does not approve a proposed refund for a particular reason, the case is sent back to the Service, further investigation is made, and no refund is actually paid until some agreement with the Joint Committee is reached."); L. HART WRIGHT, NEEDED CHANGES IN INTERNAL REVENUE SERVICE CONFLICT RESOLUTION PROCEDURES 77 (1970) (Section 6405(a) has "evolved into a 'live' pre-refund 'review' by the congressional committee's professional staff. Refunds or credits in affected cases are held up by the Service until the staff is satisfied."); Erbsen, *supra* note 17, at 230 ("Since the 1920s . . . it has been widely acknowledged that, despite the fact that section 6405 requires only that refunds be delayed for 30 days after a report to the JCT has been made, in practice, the Service will

About three quarters of the time, the JCT will quickly approve the IRS's payment of a refund.[34] But when disputes arise,[35] the refund review process generally takes substantially longer than the thirty days contemplated in the statute.[36] The JCT may ultimately adjust[37] or reject[38] the taxpayer's refund, although if the amount involved is small, the JCT will clear the refund payment but request changes in future cases.[39]

Information regarding IRS audits and JCT review generally remains private, but some publicly filed documents reveal how the JCT refund review function operates. For example, in an offering prospectus, the Radian Group explained that it had engaged in a dispute with the IRS over the deductibility of some tax items relating to its 2000–2007 tax years.[40] In late December 2010, Radian reached an agreement with the IRS.[41] When the settlement was sent to the JCT, however, the committee indicated that it opposed the settlement, and Radian disclosed that it would have to pursue further negotiations with the IRS or seek redress in court, which could be lengthy and costly.[42]

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not generally issue large refunds without JCT approval."); Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 280 (1993) ("The joint committee presently conducts a review (in effect a veto) of tax refunds . . . ."); John F. Manley, *Congressional Staff and Public Policy-Making: The Joint Committee on Internal Revenue Taxation*, 30 J. POL. 1046, 1049 (1968) (noting JCT's "informal veto" and describing its function as an "appellate court"). *Cf. also* Memorandum from the Associate Area Counsel (LB&I), Chicago to Team Manager Bert. W. Bennett (LB&I) Milwaukee, IRS 2013301F (Aug. 16, 2013) (execution of closing agreement under Section 7121 removed the JCT's "legal right to reject the settlement embodied in the closing agreement" where the failure to submit the agreement to the JCT was inadvertent).

34. *See* Meg Shreve, *Barthold Suggests Raising C Corporation Refund Review Level to $5 Million*, TAX NOTES TODAY 69-7 Apr. 10, 2013 (noting that JCT completes review within thirty days in seventy-five percent of cases). The seventy-five percent approval rate is unsurprising, given that large refunds will receive close attention from IRS personnel and will undergo multiple layers of review. Thus, mistakes probably are not made frequently. The number of disagreements, however, between the IRS and the JCT likely understates the committee's influence. If the IRS knows that the JCT will disagree with it on an issue, the IRS may follow the JCT's position in subsequent audits. *See* Sheryl Stratton, *JCT Oversight of IRS Should Be Expanded, Not Eliminated, Say Pearlman, Alexander*, TAX NOTES TODAY 116-3 June 15, 1995 (JCT Chief of Staff Kenneth Kies said that "indirect effects [of Section 6405(a)] could be larger because the IRS uses JCT recommendations in its examinations."). In any event, for purposes of separation of powers analysis, whether the JCT actually vetoes the IRS, or how often it does, does not resolve the constitutional questions raised here. Separation of powers violations may occur even in the absence of any legislative veto, whether *de jure* or *de facto*. *See infra* Part III.

35. Practitioners sometimes mention areas where the IRS and JCT have adopted competing views. *See, e.g.*, Jasper L. Cummings, Jr., *Treasury's 2005–2006 Corporate Priority Guidance Plan*, 108 TAX NOTES 1195, 1197 (2005) (regarding election under I.R.C. § 336(e) (2006), "some IRS agents have been willing to allow [such an] election without regulations, but the word is that the Joint Committee on Taxation disagrees, in reviewing large refund claims").

36. *See, e.g.*, Pruco Life Insurance Co., Annual Report (Form 10-K) (Mar. 9, 2012) (detailing multiple submissions to the JCT and the lengthy refund review process, which took more than 18 months).

37. *See, e.g.*, Computervision Corp. v. United States, 62 Fed. Cl. 299, 304–05 (2004) (noting referral of settlement to JCT and JCT requesting of adjustment to taxpayer's refund).

38. *See, e.g.*, Trigon Ins. Co. v. United States, 215 F. Supp. 2d 687, 694 (E.D. Va. 2002) (noting JCT rejection of settlement between taxpayer and IRS).

39. *See Joint Committee Statutory Refund Review*, *supra* note 33, at 13.

40. Radian Group, Inc., Prospectus (Jan. 28, 2013).

41. *Id.*

42. *Id.*

The MGIC Investment Corporation recently made similar disclosures.[43] In its filing, the company explained that it spent three years negotiating a tax matter with the IRS and finally reached a settlement in August 2010.[44] Under Section 6405(a), the IRS sent the case to the JCT, and about two years later, "upon completion of Joint Committee review, we [the corporation] were informed by the IRS that it would not finalize our previous settlement agreement."[45] According to MGIC, the IRS's reconsideration of the settlement could prevent the company from writing new insurance and could have a material negative impact on its financial statements.[46]

Hundreds, if not thousands, of publicly filed documents express a company's understanding that the JCT must approve large refunds or that "[a]lthough not required by statute, the IRS standard practice is to comply with any significant adjustments requested by the Joint Committee."[47] Some filings, like the ones regarding Radian and MGIC, explain circumstances where the JCT review actually upsets a negotiated agreement. Other filings reveal lesser but nonetheless significant influence, like circumstances where the JCT requests that the IRS audit a taxpayer, even after the taxpayer has already received a refund.[48] In some cases, the IRS will not perform a requested audit, but will simply reverse course and disallow the taxpayer's refund claim.[49]

This apparent influence may seem surprising, given that every modern President has criticized the legislature's interference with his execution of the laws.[50] One might consequently expect that the executive would look askance at recommendations about whom to audit and whether to issue a refund. Also, the IRS follows extensive internal review procedures before granting large refunds,[51] sometimes reaching a final decision only after several years of deliberations, negotiations and litigation involving the taxpayer. The JCT's advice on how to handle these issues might thus be viewed as an unwelcome intrusion.

43. *See, e.g.*, MGIC Inv. Corp., Quarterly Report (Form 10-Q) (Aug. 9, 2012).

44. *Id.*

45. *Id.*

46. *Id.*

47. Swift Energy Co., Annual Report (Form 10-K), at 60 (Feb. 23, 2012); *see also* Public Service Electric & Gas Co., Annual Report (Form 10-K), at 127 (Feb. 26, 2013) ("As required by statute, the IRS presented the refund claim to the Joint Committee on Taxation for approval."); Office Depot Inc., Annual Report (Form 10-K), at 32 (Feb. 20, 2013) ("The settlement is subject to the Congressional Joint Committee on Taxation approval which is anticipated in 2013.").

48. *See, e.g.*, Kemper Corp., Annual Report (Form 10-K) (Feb. 15, 2013) ("Even though the Company has already received the refunds from carrying these losses back to such earlier tax years, approval by the Joint Committee on Taxation ("JCT") is still required by law. The JCT has requested that the IRS perform an audit of these years before approving the refunds.").

49. *See, e.g.*, Grifols, S.A., Registration Statement (Form F-4) (Dec. 20, 2010) ("The JCT subsequently returned the audit file to the IRS Exam for additional fact finding. In lieu of engaging with the company in fact-finding efforts, IRS Exam issued a new audit report disallowing the tax credits . . . .").

50. *See, e.g.*, Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 655 (2005).

51. *See generally* SALTZMAN, *supra* note 33, § 11.01 et. seq.

At times, the President and the IRS have in fact objected to the JCT's involvement in tax administration. In 1932, Congress tried to increase the influence of the JCT and passed legislation that would grant the JCT an explicit veto power over large refunds.[52] But President Herbert Hoover, in one of his last acts in office, vetoed that legislation on separation of powers grounds. A sharply worded letter by Hoover's attorney general, William Mitchell, explained at length why the JCT veto would be unconstitutional.[53]

More recently, in 2003, the senior IRS official in charge of procedural matters issued a notice to all IRS personnel that sought to minimize the influence of the JCT.[54] The notice acknowledged that various Internal Revenue Manual provisions spoke of obtaining JCT "approval" or "authorization" for large refunds.[55] But the notice concluded that these provisions were inaccurate and that § 6405(a) does not actually give the JCT "the authority to approve, disapprove, authorize, or, in any way, prohibit the Service from taking whatever action the Service determines is appropriate."[56] The decision to issue a refund, the notice concluded, "rests solely with the Commissioner, regardless of the [JCT's] favorable or unfavorable views on the Service's proposed action."[57] The notice indicated that the IRS would amend the Internal Revenue Manual to reflect the JCT's proper advisory role.[58]

Although the notice promised to change the way the IRS would treat recommendations from the JCT, it apparently failed to gain steam.[59] The IRS amended some provisions of its policy manual after the issuance of the notice, but the IRS later added other provisions to the manual that once again stated or implied that the JCT had approval authority over large refunds.[60] While the 2003 notice might have had some temporary

52. H.R. 13975, 72d Cong., (2d Sess. 1933) (appropriations act for 1933).

53. *See* Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56 (1936). Attorney General Mitchell apparently made no constitutional objection to the existing statute, which provided only the thirty-day review period. As this Article will show, however, the law on separation of powers is much more developed today than it was in 1933, and existing precedents demonstrate the constitutional problems associated with § 6405(a). Additionally, executive branch acquiescence to a legislative encroachment device does not establish that device's constitutionality, and the Court will protect the President's control over law execution, even if the President himself does not. *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3144 (2010) (rejecting administration's arguments that legislative restrictions on Presidents' removal power were constitutional).

54. *See* I.R.S. CHIEF COUNSEL NOTICE CC-2003-023, *supra* note 31.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *See, e.g.*, Complaint at 13, Abbott Labs. v. United States, 84 Fed. Cl. 96 (2006) (No. 06–778-T) (noting that IRS had reversed course on taxpayer's refund claim after hearing from the JCT and suggesting that such practice was inconsistent with Notice CC-2003-023).

60. *See, e.g.*, INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 8.7.9.5.1 (Nov. 9, 2007) (Appeals cases "require JCT approval before final disposition"); Internal Revenue Serv., Internal Revenue Manual § 8.7.9.5.1.5 (Nov. 9, 2007) (implying that Service may be "seeking release or approval of a refund amount" from the JCT); INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 8.7.9.5.6 (Oct. 1, 2012) ("[D]o not execute any closing agreement on behalf of the Commissioner until after the JCT clears the case.").

effect in minimizing the influence of the JCT, the prevailing view is that the IRS generally will not issue a refund over a JCT objection.

A JCT publication provides one possible explanation for the IRS's deference to the JCT. It states that while § 6405(a) does not provide an explicit veto, "the IRS view[s] the review process as a way of improving tax administration" and consequently will not pay refunds over the JCT's objection.[61] If the JCT is correct, acquiescence follows from the IRS's independent judgment that the JCT, as a policy matter, should determine whether to issue a large refund.

This characterization, however, seems hard to accept, given the hostility with which the JCT's involvement has traditionally been met. Secretary Mellon retaliated against Senator Couzens (the chief architect of the JCT legislation) by instructing the IRS to issue a $10 million bill for back taxes against him.[62] And, as discussed earlier, President Hoover vetoed a bill that would have granted the JCT an explicit veto over large refunds. The 2003 notice also shows that some key IRS personnel have tried to curb the influence of the JCT. Thus, it seems doubtful that the IRS acquiesces to the JCT's recommendations simply in the interests of tax administration.

The potential consequences of ignoring a congressional committee's recommendations might better explain the IRS's practice. When congressional committees provide recommendations to an agency, those recommendations often come with "a threat in the background that if an agency does not align its actions with the desires of legislators, it will find itself subject to legislation including changes to the substance of its program, changes to its structure, reductions or reallocations of its budget or targeted appropriations riders."[63] If the IRS ignores a purportedly nonbinding recommendation from a congressional committee,[64] the consequences may be severe[65]—"the IRS is sufficiently behold[en] to Congress that it would make no sense for the IRS to pick a fight with the Joint Committee over a refund issue."[66]

The pressure that the IRS faces from congressional committees is not unique. Professor Steven Calabresi notes that chairs of congressional

61. *Joint Committee Statutory Refund Review*, *supra* note 33, at 13 ("[T]he IRS will not pay any part of a refund while the Joint Committee Staff has a continuing objection, and has on occasion requested that the staff monitor a particular issue to ensure that IRS agents are handling the item appropriately.").

62. *See* HARRY BARNARD, INDEPENDENT MAN: THE LIFE OF SENATOR JAMES COUZENS 166 (1958); *see also Ask Couzens to Pay $10,000,000 in Taxes; He Charges Revenge*, N.Y. TIMES, Mar. 10, 1925, at 1.

63. Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 121 (2006).

64. The Senate Finance Committee and the House Ways & Means Committee probably enjoy the greatest influence over the IRS. Although the JCT is formally separate from them, the JCT is itself composed of members from those two committees. *See* I.R.C. § 8002(a) (2006).

65. *See, e.g.*, Jay Starkman, *All IRS Ruling Deliberations Should Be Subject to FOIA, Writer Argues*, 128 TAX NOTES 893 (2010) (describing circumstances where the IRS caved to political pressure and issued questionable notices because it "did not want to make an enemy of Ways and Means member Burleson").

66. CUMMINGS JR., *supra* note 15, at 590–91.

committees often play the role of shadow executives, "rival[s] . . . to the cabinet secretaries whose departments and personal offices they oversee."[67] And Congress has not hesitated to defund or otherwise penalize agencies that fail to implement informally communicated positions.[68]

Although broad generalizations in this area are perilous,[69] and circumstances will vary from case to case, the potential for reprisal may help explain why an administrative agency (like the IRS) often follows purportedly nonbinding recommendations from a congressional committee.[70] That an agency follows such recommendations does not necessarily raise constitutional problems. Nothing in the Constitution requires "a hermetic sealing off of the three branches of Government."[71] And Congress has numerous tools, aside from the enactment of legislation, that it can use to fulfill its constitutional mandate, including communicating with an administrative agency.[72] Along the same lines, an agency generally need not ignore concerns expressed by legislators. But when Congress passes a statute ensuring its close and systemic involvement in one of an agency's core functions, the constitutional issues become more complex. The next Part considers those issues in the context of the JCT refund review function.

III. CONSTITUTIONALITY OF THE JCT REFUND REVIEW FUNCTION

The literature on the constitutionality of the JCT refund review function is sparse. Commentators who address the subject usually do so only in passing, noting that *Chadha* forbids an explicit veto and that § 6405(a), on its face, merely imposes a thirty-day waiting period on the issuance of refunds. Under this cursory analysis, the absence of a statutory veto preserves the constitutionality of § 6405(a).

But a closer look is in order. Although no court has squarely addressed the constitutionality of § 6405(a), the relevant pronouncements provide strong indications that the statute violates the separation of

67. Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 51 (1995).

68. *See* Fisher, *supra* note 33, at 290 (describing how Congress removed OMB's transfer authority regarding foreign assistance funds after OMB director challenged committee veto).

69. Although it is common to speak of it as a monolithic entity, a federal agency is ultimately made up of various individuals with differing views and objectives. Thus, it is somewhat misleading to say that the IRS fears retaliation from the JCT or does not welcome its involvement—the opinions of IRS personnel regarding the JCT refund review function undoubtedly vary.

70. *See* Fisher, *supra* note 33, at 288 ("Although the President may treat committee vetoes as having no legal force or effect, agencies have a different attitude. They have to live with their review committees, year after year, and have a much greater incentive to make accommodations and stick by them.").

71. Buckley v. Valeo, 424 U.S. 1, 121 (1976); *see also* Morrison v. Olson, 487 U.S. 654, 693–94 (1988) ("[W]e have never held that the Constitution requires that the three branches of Government 'operate with absolute independence.'") (quoting United States v. Nixon, 418 U.S. 683, 707 (1974)).

72. *See* CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 73 (Encyclopedia Britannica 1952) (legislature "has a right and ought to have the means of examining in what manner its laws have been executed").

powers. More specifically, the statute both (1) exceeds Congress's legislative power (that is, the function reflects a "legislative aggrandizement") and (2) facilitates the improper exercise of executive power by the legislature.

In separation of powers cases, courts sometimes do not specify whether a particular arrangement violates the legislative aggrandizement principle or if it instead facilitates the improper exercise of executive power. Courts may instead adopt a blended approach and find that an arrangement would violate the Constitution regardless of the line of reasoning used.[73] For analytical purposes, this Part will separate the discussion, even though the issues frequently reflect "two sides of the same theoretical coin."[74]

Section A argues that the JCT refund review function reflects an improper legislative aggrandizement. It examines two D.C. Circuit cases showing that Congress can unconstitutionally encroach on the executive even when it does not enjoy a statutory veto, and that a thirty days' notice requirement can violate the separation of powers. Section A also argues that § 6405(a) raises especially serious concerns because it does not facilitate the passage of any legitimate legislation. Congress has never used § 6405(a) to legislatively block the payment of a refund, and even if it did, that legislation would likely violate the due process clause and could qualify as a bill of attainder. Thus, the statute does not relate to the legislative power granted by Article I.

Section B argues that the JCT refund review function instead facilitates the exercise of the executive power by the legislature, a practice prohibited by *Bowsher v. Synar*. Although that case involved an arrangement under which a legislative agent could bind the President (a situation not contemplated by § 6405(a)), other Court cases show that a non-Article II branch can improperly perform executive functions, even if that branch can offer only recommendations to an agency.[75]

Sections A and B use a largely definitional, formalistic approach to the separation of powers issues raised by § 6405(a). Under this type of analysis, policy concerns related to the JCT refund review function do

73. *See, e.g.*, Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276 (1991) (stating that it is unnecessary to determine whether Congress had violated the legislative aggrandizement principle or whether Congress was impermissibly performing executive functions; "If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I § 7.").

74. *See* Citizens for Abatement of Aircraft Noise, Inc. v. Metro. Wash. Airports Auth., 917 F.2d 48, 56 (D.C. Cir. 1990), *aff'd*, 501 U.S. 252 (1991) (concluding that prohibition against congressional involvement in law execution and congressional requirement to act only through legislative as "two sides of the same theoretical coin").

75. Although the JCT generally enjoys a *de facto* veto, a formalist approach focuses on statutes and the inferences drawn from those statutes, and generally does not take into account actual administrative practice. *See* Rosenkranz, *supra* note 19, at 1236 ("[W]hen an action (or 'Act') of Congress is challenged, the merits of the constitutional claim cannot turn at all on the facts of enforcement."). The actual influence exercised by the JCT over the issuance of large refunds may be relevant to a functionalist, however, and will also be relevant in the due process context. *See infra* Parts IV & V.

not receive weight. Part IV, however, will consider the statute from a functionalist perspective and will show that those concerned with broader policy questions should question the constitutionality of § 6405(a)'s thirty-day review period.

A. Legislative Aggrandizement

Because commentators usually examine the constitutionality of the JCT refund review under the principles of *INS v. Chadha*, that case provides a natural starting point for the analysis here. In *Chadha*, the Court addressed the constitutionality of § 244(c)(2) of the Immigration and Nationality Act, which contained a legislative veto regarding the Immigration and Naturalization Service's decision to suspend deportations in cases of "extreme hardship."[76] Under the statute, either house of Congress could unilaterally invalidate the agency's decision simply by passing a resolution.[77] The House of Representatives did so in Jagdish Chadha's case, apparently believing that Chadha did not meet the statutory standard for extreme hardship and should be deported.[78]

Chadha challenged the constitutionality of the veto on numerous grounds, but the Supreme Court focused on Article I's bicameralism and presentment requirements in declaring the statute invalid.[79] The Article I requirements, the Court concluded, reflected "the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[80] Because action taken by either house under § 244(c)(2) "alter[ed] the legal rights, duties, and relations of persons . . . outside the Legislative Branch,"[81] that action reflected legislative power that Congress could exercise only in accordance with Article I's procedural requirements. But since § 244(c)(2) allowed for the alteration of legal rights merely through the passage of a one-House resolution, the statute was unconstitutional.[82]

Section 6405(a) differs from the statute at issue in *Chadha* because it does not provide an explicit veto. Tax commentators have relied on this distinction when concluding that the JCT refund review function passes constitutional muster.[83] But while *Chadha* may have invalidated all legislative vetoes, nothing in the case automatically immunizes all other legislative aggrandizement mechanisms.[84] Instead, courts will

76. INS v. Chadha, 462 U.S. 919, 923–25 (1983).

77. *Id.* at 925.

78. The congressional resolution provided no explanation. *See* H.R. Res. 926, 94th Cong., 121 Cong. Rec. 40,247 (1975).

79. *Chadha*, 462 U.S. at 946.

80. *Id.* at 951.

81. *Id*. at 952.

82. *Id*. at 958–59.

83. *See* Erbsen, *supra* note 17, at 228.

84. To be fair, *Chadha* is ambiguous on this point. After the Court struck down § 244(c)(2) (the provision containing the legislative veto), the Court concluded that § 244(c)(1) survived as a reporting provision and thereby seemed to bless report-and-wait devices. *See Chadha*, 462 U.S. at 934–35. The

closely scrutinize other arrangements where Congress influences the executive outside of the legislative sphere.

The D.C. Circuit's opinion in *FEC v. NRA Political Victory Fund* provides one example.[85] In that case, the court (whose panel included now-Justice Ginsburg) invalidated, on separation of powers grounds, a congressional encroachment device that fell short of a legislative veto.[86] Specifically, the court held that the Federal Election Commission was unconstitutionally composed because two members of Congress served as *ex officio* non-voting members of the agency.[87] The FEC had a total of eight members, and the six members from outside of Congress had sole authority to vote on enforcement issues and other matters within the FEC's jurisdiction.

In defending its composition,[88] the FEC argued that the congressional members were "constitutionally harmless."[89] The relevant statutes indicated that these members had no voting power and could not enjoy leadership positions, such as board chairman.[90] The congressional members did not even count for quorum purposes.[91] The FEC accordingly assured the court that the congressional members had "no *actual* influence" on agency decision making.[92]

But the D.C. Circuit rejected the FEC's contentions.[93] The Supreme Court, in *Buckley v. Valeo*,[94] had previously held that Congress could not appoint voting members of the FEC or any agency with executive powers, and the only question was "whether *ex officio* non-voting members enjoy a different status for purposes of constitutional analysis."[95] The court concluded that the non-voting status did not, in fact, make a difference. "[T]he mere presence of agents of Congress on an entity with executive powers offends the Constitution."[96] Although the FEC argued that the congressional members would play a "mere 'informational or advisory role,'"[97] the court could not "conceive why Congress would wish

Court, however, then suggested (without deciding) that any action taken under the reporting provision would be unconstitutional. *See id*. at 935 n.8 The Court's confusing language in *Chadha* thus should not be taken as the last word on the constitutionality of all reporting provisions. In fact, as discussed *infra*, the D.C. Circuit has invalidated a statute drafted as a reporting provision. *See* Hechinger v. Metro.Wash. Airports Auth., 36 F.3d 97, 105 (D.C. Cir. 1994).

85. Fed. Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993).

86. *Id.* at 827.

87. *Id.*

88. When the FEC took enforcement action against the National Rifle Association for allegedly violating the Federal Election Campaign Act, the NRA challenged the constitutionality of the FEC, arguing that the presence of congressional members on the FEC invalidated its authority and nullified its enforcement action. *Id.* at 822.

89. *Id.* at 826.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. 424 U.S. 1 (1976).

95. *NRA Political Victory Fund*, 6 F.3d at 826.

96. *Id.* at 827.

97. *Id.*

or expect its officials to serve as *ex officio* members if not to exercise *some* influence."[98] If Congress wanted to influence the FEC, it could do so, but only while acting in its "legislative role."[99] Thus, Congress could hold hearings, make appropriations, or even directly communicate with the agency,[100] but it could not constitutionally "place its agents 'beyond the legislative sphere' by naming them to membership on an entity with executive powers."[101]

The JCT refund review function is in many ways analogous to the arrangement declared unconstitutional in *NRA Political Victory Fund*. During § 6405(a)'s review period, the JCT receives a taxpayer's file and the IRS cannot issue a refund. As with the congressional members in *NRA Political Victory Fund*, it's hard to believe that the thirty-day review period is intended to give the JCT a "mere 'informational or advisory role.'"[102] To use the D.C. Circuit's language, it is impossible to "conceive why Congress would wish or expect its officials to serve as *ex officio* members [or, in this context, to demand prepayment reports about large refunds] if not to exercise *some* influence."[103]

The JCT refund review function might be distinguishable from the arrangement in *NRA Political Victory Fund* because in that case, the legislators were nominal members of the FEC, whereas JCT staffers do not enjoy any nominal association with the IRS.[104] But, as the D.C. Circuit later explained, its opinion in *NRA Political Victory Fund* rested ulti-

98. *Id.* at 826.

99. *Id.* at 827.

100. Legislators frequently write letters to agencies on behalf of constituents who may be engaged in proceedings before them. It is generally accepted that legislators may perform this constituent service, although difficult ethical questions arise regarding the extent of permissible involvement. *See generally* Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1 (1996). Additionally, if legislators interfere with administrative proceedings in a negative way—that is, if a legislator pressures an agency to rule against a private party—due process problems may arise. *See, e.g.*, Koniag, Inc. v. Andrus, 580 F.2d 601, 610 (D.C. Cir. 1978) (remanding matter to agency for new hearing because letter from congressman to Secretary "compromised the appearance of the Secretary's impartiality" during first adjudication). *See generally* MORTON ROSENBERG & JACK H. MASKELL, CONGRESSIONAL INTERVENTION IN THE ADMINISTRATIVE PROCESS: LEGAL AND ETHICAL CONSIDERATIONS (2003); *see also infra*, Part V.B.

101. *NRA Political Victory Fund*, 6 F.3d at 827.

102. *Id.*

103. *Id.* at 826. Some might believe that reading the statute in this common-sense way might be inconsistent with a formalist approach. Under a popular misconception, formalists examine constitutional questions in a wooden or hypertechnical way. But, in fact, formalists closely examine statutes when construing constitutional questions. For example, in his dissent in *Mistretta v. United States*, Justice Scalia, the leading judicial formalist, doubted whether a statute indicating that a federal agency would be located in the Judicial branch could actually make it so for constitutional purposes. *See* Mistretta v. United States, 488 U.S. 361, 420 (1989) (Scalia, J., dissenting). Along similar lines, formalists readily accept that to determine to which branch a government belongs, one must determine the branch which enjoys the power to remove him. *See* Bowsher v. Synar, 478 U.S. 714, 727–28 (1986) (adopting formalist approach and concluding that Comptroller General is an agent of Congress, the branch of government which enjoys the power to remove him). In this way, formalism does take into account, to some extent, the practical effects of a statute. The rigidity of formalism relates to the unyielding insistence that the vesting clauses' separate assignments of powers be observed, and not to an insistence that statutes be read in a close-minded fashion.

104. *NRA Political Victory Fund*, 6 F.3d at 823.

mately on concerns about the dangers of congressional influence through indirect means.[105] The court did not establish a *per se* rule under which congressional meddling would be permissible as long as the relevant statute kept a legislator from enjoying membership in an executive branch agency. And it would be odd for constitutional analysis to hinge on that membership—legislators can inappropriately influence the executive in many indirect ways.

The D.C. Circuit's opinion in *Hechinger v. MWAA* clearly illustrates that Congress may violate the legislative aggrandizement principle even when it does not directly place its members on an executive branch agency.[106] *Hechinger* followed earlier congressional attempts to control the decisions of the Metropolitan Washington Airports Authority ("MWAA"), a federal agency.[107] Congress had created a review board which would be led by members of Congress and which could veto decisions of the MWAA, but the Supreme Court struck down that arrangement on separation of powers grounds.[108]

In response, Congress revamped the review board.[109] Although the new review board lacked a statutory veto over the MWAA, that agency could not undertake key actions unless it provided the board with thirty calendar days' notice (or ten legislative days' notice) about its plans.[110] The review board would then provide a recommendation to the MWAA.[111] If the MWAA chose not to follow the review board's recommendation, its decision would be delayed for sixty legislative days to give Congress an opportunity to pass a joint resolution blocking the MWAA's proposed action.[112] Because a joint resolution becomes law only through Article I's bicameralism and presentment procedures, the legislative conferees believed that the new arrangement provided a "constitutionally acceptable structure"[113] and avoided the constitutional problems posed by a board veto.

105. *See* Hechinger v. Metro. Wash. Airports Auth., 36 F.3d 97, 102 (D.C. Cir. 1994) (noting that the "concerns that underpinned our decision in *NRA Political Victory Fund*" related to opportunities for congressional members to influence FEC decision makers and that "Congress must limit the exercise of its influence, whether in the form of advice or not, to its legislative role") (citation omitted).

106. *Id.* at 105.

107. *Id.* at 98 (citing Citizens for the Abatement of Aircraft Noise v. Metro. Wash. Airports Auth. 917 F.2d. 48 (D.C. Cir. 1990)).

108. *See* Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 277 (1991). In this respect, § 6405(a) shares some history with the statute in *MWAA*. Congress passed legislation that would have given the JCT a veto over refund payments, but President Hoover vetoed that congressional effort. Thus, both the statute in *MWAA* and § 6405(a) operate with failed legislative veto attempts in their backgrounds.

109. The new statute did not explicitly state that legislators would populate the review board, but the court pointed to various other indications showing that the review board would continue to be an agent of Congress. *See Hechinger*, 36 F.3d at 100–102.

110. *Id.* at 98.

111. *Id.* at 101.

112. *Id.* at 101–02.

113. H.R. CONF. REP. NO. 102-404, at 472 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1817, 1852 (citing opinion of the American Law Division of the Congressional Research Service that the legislation is constitutional, Congressional Record of November 18, 1991 at pp. 0347–10349).

The D.C. Circuit nonetheless found that Congress had "encroached 'beyond the legislative sphere'" because the board's powers allowed it to "interfere impermissibly" with the MWAA's executive responsibilities.[114] Through the thirty day review period and the sixty day delay period, the review board could "coerce the Airports Authority to comply with any 'recommendation.'"[115] And the mere existence of these provisions gave the MWAA an "enormous incentive to avoid confrontations by tailoring their decisions to suit the [b]oard's pleasure."[116] Although nothing suggested that the board had abused or would abuse its power, the "potential for abuse"[117] was there. As in *NRA Political Victory Fund*, the court observed that Congress could hold hearings, enact legislation, or directly communicate with the agency,[118] and that there could be "no question that Congress is able to exercise enormous influence over agency decisions in these and other constitutionally permissible ways."[119] But the structural relationship between the board and the MWAA required the latter to "trim [its] sails to accommodate the former's wishes," and this was sufficient to violate the separation of powers.[120]

Hechinger once again showed that "Congress must limit the exercise of its influence, whether in the form of advice or not, to its legislative role."[121] The opinion also showed that the absence of any formal veto does not automatically establish the constitutionality of the legislature's involvement in the execution of the laws—courts will look to the "potential for abuse."[122] *Hechinger* thus helps rebut the common view that the absence of any explicit veto in § 6405(a) automatically preserves the statute's constitutionality, and it demonstrates that even a seemingly modest thirty days' notice provision (like that contained in § 6405(a)) can threaten the separation of powers.[123]

Hechinger and *NRA Political Victory Fund* are of course decisions of a single appellate court, with which other appellate courts or the Su-

114. *Hechinger*, 36 F.3d at 104.
115. *Id.* at 105 (quoting district court).
116. *Id.*
117. *Id.*
118. If a legislator contacts an executive branch official to express her concerns regarding agency operations, no separation of powers violation occurs. But, as the *Hechinger* court concluded, systematic legislative influence over executive functions, made pursuant to statute, raises separation of powers questions.
119. *Id.* at 104.
120. *Id.* at 105.
121. *Id.* at 102. (quoting Fed. Election Comm'n. v. NRA Political Victory Fund, 6 F.3d. 821, 827 (D.C. Cir. 1993)).
122. *Id.* at 105.
123. Unlike the statute in *Hechinger*, § 6405 does not contain a statutory delay mechanism during which Congress can consider legislation. Perhaps this makes the *Hechinger* statute a greater intrusion than § 6405, although the opposite inference might be the better one—§ 6405 does not even offer the pretense of Congress acting through legislative channels. That is, in *Hechinger*, Congress at least acknowledged that it might try to use the Article I process to reverse MWAA decisions. Section 6405, by contrast, contemplates influence through means other than the Article I process.

preme Court might disagree.[124] In the 1980s, for example, two circuit courts rejected the Reagan administration's separation of powers challenge to the Competition in Contracting Act ("CICA"), under which the Comptroller General could investigate and delay federal agency procurement decisions.[125] The Comptroller, an agent of Congress, had no authority to veto those decisions but could offer recommendations to an agency.[126] The Reagan administration nonetheless challenged the legislation, arguing that the Comptroller improperly exercised executive power.[127] But, in *Ameron v. United States* and *Lear Siegler vs. United States*, the Third and Ninth Circuits disagreed, concluding (for various reasons) that the contested provisions reflected a proper exercise of legislative power.[128]

After these circuit court losses, the administration filed a petition for certiorari and the Supreme Court agreed to hear the case.[129] However, Congress soon backed off and modified the contested provisions, rendering the case moot.[130] Thus, the Court dismissed the petition for certiorari.[131]

Standing alone, *Ameron* and *Lear Siegler* provide some analogous support for the constitutionality of § 6405. Nevertheless, the Court's original decision to grant certiorari—notwithstanding the absence of a circuit split—may cast some doubt on the validity of the Third and Ninth Circuit's reasoning.[132] Additionally, even if one embraced the Third and Ninth Circuit's opinions (which this author finds dubious), the statute in those cases presents weaker constitutional concerns than does § 6405. Specifically, the contested CICA provisions allowed Congress to participate in an area where it clearly could substitute legislation for an agen-

124. The Court frequently grants certiorari to review an appellate court's decision to strike down a statute on constitutional grounds. Thus, the Court might have been expected to grant certiorari in *NRA Political Victory Fund* or in *Hechinger*. The Court, in fact, granted certiorari in *NRA Political Victory Fund*. *See* 512 U.S. 1218 (1994). The petition for certiorari, however, was dismissed later, on discovering that the Solicitor General had not met the relevant filing deadline. *See* 513 U.S. 88 (1994). Regarding *Hechinger*, the petition for certiorari was denied without explanation. *See* 513 U.S. 1126 (1995).

125. Pub. L. No. 98-369, Div. B, Tit. VII, 98 Stat. 1199–1203, 31 U.S.C. (Supp. IV) 3553, 3554 (codified with some differences in lanaguge at 31 U.S.C. §§ 3552–54 (2006)).

126. Pub. L. No. 98-369, § 3553, 98 Stat. 494 (1984) (codified with some differences in lanaguge at 31 U.S.C. § 3553 (2006)).

127. *See also* Ameron, Inc. v. U.S. Army Corps of Eng'rs, 787 F.2d 875, 887–90, *adopted in part on reh'g by*, 809 F.2d 979 (3d Cir. 1986), *cert. granted*, 485 U.S. 958 (1988), *cert. dismissed* 488 U.S. 918 (1988); Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1111–12 (9th Cir. 1988).

128. *Ameron*, 787 F.2d at 890–91; *Lear Siegler*, 842 F.2d at 1112.

129. *Ameron*, 485 U.S. at 958.

130. Under the compromise, Congress shortened the review period to 90 days. *See* Department of Defense Appropriations Act, Pub. L. 100-463, 102 Stat. 2270 (1988). The Solicitor General continued to believe that the statute posed constitutional problems, but concluded that Supreme Court review was not immediately necessary, in light of the concessions.

131. *Ameron*, 488 U.S. at 918.

132. The Supreme Court reverses the majority of cases it hears, with one recent study showing a reversal rate between fifty-five percent and eighty-four percent, depending on the circuit court from which the case arose. See Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, 2 LANDSLIDE 3, 8 (2010).

cy's decision.[133] That is, instead of giving a federal agency the discretion to enter into contracts, Congress undoubtedly could, "through legislation, dictate exactly what [an agency] must purchase, from whom, and at what price."[134] Thus, because Congress could itself make procurement decisions, congressional involvement in agency procurement decisions would be warranted, or so the circuit courts believed.

But Congress has no business issuing legislation regarding refund determinations and § 6405's notice provision thus differs from the CICA notice provision. As discussed below, if Congress actually passed a law blocking the payment of a refund, that legislation would likely violate the Due Process Clause and could qualify as a bill of attainder.[135] This negates any argument that § 6405(a) serves a proper legislative purpose,[136] unless one believes that the passage of unconstitutional legislation so qualifies.

In *United States v. Carlton*,[137] the Supreme Court explained the substantive due process limits on retroactive tax legislation, like the type needed to block the payment of a refund.[138] *Carlton* arose in 1987 when Congress enacted retroactive legislation to close a loophole created by the Tax Reform Act of 1986.[139] A taxpayer who detrimentally relied on

133. Ameron, Inc. v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 991 (3d Cir. 1986).

134. *Id.*

135. Whether a particular legislative act constitutes a bill of attainder necessarily "turn[s] on its own highly particularized context." Flemming v. Nestor, 363 U.S. 603, 616 (1959). *See generally* Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330 (1962). To determine whether a particular piece of legislation qualifies as a bill of attainder, courts generally look to whether the legislation specifies particular persons (the specificity prong) and whether the legislation imposes punishment (the punishment prong), without a judicial trial. *See* Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 846–47 (1984). A private law targeting a single taxpayer would easily pass the specificity prong of this test. The confiscation of property also generally qualifies as "punishment" for bill of attainder analysis, *see, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810) ("A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."), and the "exaction of a tax constitutes a deprivation of property." McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, 496 U.S. 18, 36 (1990). Additionally, there is no doubt that due process applies to tax matters—the government must provide a taxpayer some opportunity to challenge the lawfulness of a tax imposed. *See id.* at 39 (to satisfy the Due Process Clause, a state must provide taxpayers with "a fair opportunity to challenge the accuracy and legal validity of their tax obligation"). *Cf. also* Treas. Reg. § 601.106(f)(1) (1967) ("An exaction by the U.S. Government, which is not based upon law, statutory or otherwise, is a taking of property without due process of law, in violation of the Fifth Amendment to the U.S. Constitution.").

136. *See* Russell v. United States, 369 U.S. 749, 775–76 (1962) (Douglas, J., concurring) (Legislative "[i]nquiry is precluded where the matter investigated is one on which 'no valid legislation' can be enacted.") (quoting Kilbourn v. Thompson, 103 U.S. 168, 195 (1880)); Barenblatt v. United States, 360 U.S. 109, 111–12 (1959) ("Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the government."); *see also* Alex Hontos, *The Executive Reports, We Decide: The Constitutionality of an Executive Branch Question and Report Period*, 91 MINN. L. REV. 1047, 1057–59 (2007) (collecting authorities relevant to investigatory power).

137. 512 U.S. 26 (1994).

138. A taxpayer can obtain a refund only regarding an overpayment, and an overpayment necessarily relates to prior years. *See* Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1947) (an "overpayment" is any payment in excess of what was properly due in a prior year). Thus, a statute blocking a refund payment necessarily looks backward.

139. *Carlton*, 512 U.S. at 28.

the loophole argued that the Due Process Clause limited Congress's ability to pass the legislation.[140] The Court disagreed, finding that Congress acted promptly and with a rational basis, "establish[ing] only a modest period of retroactivity."[141] *Carlton* was thus distinguishable from an earlier case, *Nichols v. Coolidge*,[142] where the Court had struck down a statute with a twelve-year retroactivity period.[143]

Although *Carlton* and related cases bless "national legislation"[144] with periods of retroactivity ranging from about one month to about fourteen months,[145] these cases will not protect legislation designed to block the payment of a large refund to a single taxpayer. In most circumstances, the IRS will not agree to pay a large refund until several years after the tax year to which the refund relates, and legislation to reverse the decision would consequently require a retroactivity period significantly longer than fourteen months. Suppose, for example, that a taxpayer overpays its Year 1 taxes by $5 million. Putting aside any extensions or special rules,[146] the taxpayer will have until April 15, Year 5, to file a claim for refund. After the taxpayer files the claim for refund, the IRS will examine the claim, and if the claim cannot be settled administratively, the parties will go to court. If the taxpayer wins and the court directs the IRS to pay a refund, the JCT will review whether such payment is appropriate.[147] By this point, several years will likely have

140. *Id.* at 29.

141. *Id*. at 32. *See* United States v. Darusmont, 449 U.S. 292, 296–97 (1981) (per curiam) ("This 'retroactive' application apparently has been confined to short and limited periods required by the practicalities of producing national legislation . . . The Court consistently has held that the application of an income tax statute to the entire calendar year in which enactment took place does not *per se* violate the Due Process Clause of the Fifth Amendment.").

142. 274 U.S. 531 (1927).

143. *Id.* at 542–43.

144. *Darusmont*, 449 U.S. at 296–97 ("This 'retroactive' application [of the tax laws] apparently has been confined to short and limited periods required by the practicalities of producing national legislation."); *see also* United States v. Hudson, 299 U.S. 498, 500 (1937) ("As respects income tax statutes, it long has been the practice of Congress to make them retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment, or within so much of the calendar year as preceded the enactment; and repeated decisions of this Court have recognized this practice and sustained it as consistent with the due process of law clause of the Constitution.").

145. *See* United States v. Hemme, 476 U.S. 558, 562 (1986) (1 month); *Darusmont*, 449 U.S. at 294–95 (10 months); *Hudson*, 299 U.S. at 501 (1 month). In *Welch v. Henry*, 305 U.S. 134 (1938), a state legislature passed a tax in 1935 that would reach transactions completed in 1933. The Court, however, "emphasized that the state legislature met only biannually and it made the revision 'at the first opportunity after the tax year in which the income was received.'" *Carlton*, 512 U.S. at 38 (O'Connor, J., concurring).

146. The Internal Revenue Code does not explicitly allow a taxpayer to obtain an extension to file a claim for refund. If the IRS and the taxpayer extend the period for assessment, however, the deadline for filing a refund claim is also extended. *See* I.R.C. § 6511(c) (2006).

147. Section 6405(a) contains no exceptions for refunds paid by the direction of a court. Thus, a large refund payment is reviewed by the JCT, whether the IRS reaches the decision administratively or only after trial. Along the same lines, settlement agreements that require the payment of a large refund will also be reviewed by the JCT. *See, e.g.*, Estate of Smith v. United States, 103 Fed. Cl. 533, 539 (Fed. Cl. 2012) (noting JCT's approval of settlement); DecisionOne Holdings Corp. v. United States, No. 96-206T, 1996 WL 773320, at *1 (Fed. Cl. 1996) ("The parties agreed the proposed [settlement] was subject to the approval of . . . the Joint Committee on Taxation."); Matter of Unimet Corp.,

passed.[148] If Congress then passed legislation changing the Year 1 law,[149] that legislation would go far beyond the "modest period of retroactivity" sanctioned in *Carlton*, triggering due process problems.[150]

But even aside from due process problems, other constitutional issues arise when Congress enacts a private law, like one required to deny a taxpayer's refund claim. Private laws generally address a single private party and differ from public laws, which apply to broader classes of persons.[151] Congress has used private laws to grant aliens relief from immigrations laws, provide benefits to war widows, and allow taxpayers to make otherwise untimely claims for refunds, among other things.[152] Some scholars question whether these private laws violate the Equal Protection Clause, since they provide benefits to one specified individual and not others.[153] Several presidents have vetoed private laws for that

74 B.R. 156, 157 (Bankr. N.D.Ohio 1987) ("[A] proposed settlement on several of the issues in dispute was reached by the parties, and has since been approved by the Joint Committee on Taxation of the United States Congress.").

148. In *Smith*, 103 Fed.Cl. 533, the relevant tax year was 1997, and JCT review occurred more than a decade later. Even if the taxpayer and the IRS do not go to trial, the administrative dispute resolution process may be lengthy. *See, e.g.*, United States v. St. Joe Minerals Corp., No. 4:93–CV–1380 CEF, 2001 WL 1397744, at *1 (E.D. Mo., Sept. 28, 2001) (administrative settlement for 1974-1981 tax years reached in 1991 and then "was approved by the Joint Committee on Taxation"); Computervision Corp. v. United States, 62 Fed.Cl. 299, 303 (Fed. Cl., 2004) (noting that "[o]n June 23, 1993, the Joint Committee on Taxation approved" an issue related to the taxpayer's 1982 tax year, before litigation had begun). *See also, e.g.*, Westar Energy, Inc., Annual Report, (Form 10-K) (Feb. 27, 2009) (noting that the IRS audited its 1995–2002 tax returns and that a tentative settlement was reached with the IRS in December 2007 and was approved by the Joint Committee on Taxation and accepted by the IRS in February 2008).

149. The Small Business Job Protection Act of 1996 contained various retroactive provisions, including one reaching back 10 years. *See* Pub. L. No. 104-188, 110 Stat. 1755, § 1704(f)(3)(B) (1996) (amending provision relating to branch profits tax and prescribing an effective date relating back to 1986). This legislation has not yet been challenged on due process grounds. In one case, the Tax Court construed a retroactive provision in the act, but it did not address its constitutionality, perhaps because the provision was intended as a clarification. *See* Taiyo Haw. Co. v. Comm'r, 108 T.C. 590, 606 n.14 (1997) (concluding that taxpayer's case would be no different, irrespective of the effect of the retroactive provision).

150. *Carlton* did not establish fourteen months as a bright line, although Justice O'Connor wrote separately and stated that a "period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise . . . serious constitutional questions." 512 U.S. at 38 (O. Connor, J., concurring). Numerous courts have followed Justice O'Connor's rule of thumb and have applied a one-year rule, although other courts apply a more flexible standard and have sanctioned longer periods of retroactivity. For a survey of post-*Carlton* federal and state cases, see Robert R. Gunning, *Back from the Dead: The Resurgence of Due Process Challenges to Retroactive Tax Legislation*, 47 DUQ. L. REV. 291, 312–21 (2009). Although some of the lower court cases allow for a retroactivity period of several years, none of those cases involved retroactive legislation designed to target a single taxpayer.

151. *See generally* WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 118 (6th ed. 2004).

152. *See* Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684, 1701–02 (1966) (listing instances).

153. *See* Frank J. Doti, *Constitutionality of the 1986 Tax Reform Act Transition Rules*, 15 W. ST. U. L. REV. 81, 91 (1987) (arguing that targeted tax transitional rules in the Tax Reform Act of 1986 violate the equal protection clause); Lawrence Zelenak, *Are Rifle Shot Transition Rules and Other Ad Hoc Tax Legislation Constitutional?*, 44 TAX L. REV. 563, 587–588 (1989) (concluding that equal protection challenges to targeted tax transitional rules could plausibly be accepted, but a successful challenge would be unlikely).

reason,[154] but courts have generally rejected equal protection challenges to beneficial private laws.[155]

Private laws that target a single party for adverse treatment, like the denial of a refund claim, raise far more serious bill of attainder and equal protection concerns.[156] Suppose, for example, that taxpayers were generally entitled to a given deduction in Year 1. Suppose further that most taxpayers took the deduction on their tax returns or received appropriate refunds regarding the deduction. Finally, suppose that the IRS disputed a particular taxpayer's eligibility for the deduction,[157] but after the administrative or judicial process, the IRS in Year 7 finally agreed with the taxpayer and decided to issue a refund.[158] If Congress then tried to prevent the payment through a private law, that law could violate the Equal Protection Clause[159] or qualify as a bill of attainder, because it singled out the taxpayer for punishment.[160]

154. *See Private Bills in Congress*, *supra* note 152, at 1695–1701 (describing various types of private bills).

155. *See, e.g.*, Apache Bend Apartments v. United States, 964 F.2d 1556, 1558 (5th Cir. 1992) (rejecting constitutional challenges to targeted tax transitional rules).

156. In *Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940), the Court upheld a private law that allowed a federal agency to revisit an employee's award under a workers' compensation act, even though the statute of limitations on the action had otherwise expired and even though a private party (the employer) would bear the burden of any potential increase in the award. The Court emphasized that the statute did not fix any specific award and did not "create new obligations where none existed before." *Id.* at 378. In these circumstances, the Court believed there was no violation of the Due Process Clause. *See id.* Although *Paramino* seems to bless some private laws that injure private parties, further judicial developments cast doubt on its vitality. When *Paramino* was decided, the Equal Protection Clause had not been incorporated into the Due Process Clause, and the Court consequently did not consider the equal protection problems associated with the legislation. *See id.* at 379–80. The Court's decision in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), blessing a state legislature's re-opening of a trial in a pending civil action, is similarly restricted. *See also* Beermann, *supra* note 63, at 91 ("Any attempt to use a private bill to punish a particular person would raise constitutional concerns under the Due Process and Bill of Attainder clauses, and some of the historical uses of private bills, such as private bills waiving res judicata in private litigation, raise constitutional issues today that may not have been recognized earlier.").

157. The Internal Revenue Code taxes both individuals and some entities, and so the legislation could reach a taxpayer other than a natural person. Although the Supreme Court has never squarely held that the Bill of Attainder Clause could apply to legislation targeting an entity, that conclusion would seem to follow from the history of the Bill of Attainder Clause and its purpose. *See* Consol. Edison Co. of N.Y. v. Pataki, 292 F.3d 338, 347 (2d. Cir. 2002) (holding that Bill of Attainder Clause applies to corporations); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 n.9 (1995) (noting, in dicta, that Bill of Attainder Clause could apply to legislation targeting an "individual or firm").

158. A refund generally would not arise if the taxpayer proceeded in the Tax Court. Generally speaking, if the IRS asserts that the taxpayer owes more than he stated—that is, if the IRS asserted a deficiency—the taxpayer can fight the IRS in the Tax Court without paying the tax. If the taxpayer then won, no refund would be ordered. If, however, the taxpayer wanted to proceed in a federal district court or in the court of federal claims, the taxpayer would have to first pay the deficiency and then sue for a refund.

159. The Constitution's Equal Protection Clause, on its face, applies only to state action, not federal action. *See* U.S. CONST. amend. XIV. The Supreme Court, however, has repeatedly held that the Due Process Clause incorporates equal protection principles, and in this way, the Equal Protection Clause Restricts the federal government. *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting) ("The Constitution's guarantee of equal protection binds the Federal Government as it does the States.").

160. *See supra* note 135.

This analysis necessarily calls for speculation because Congress has never passed a law that targeted a single taxpayer and retroactively denied her a refund. In 2009, the House of Representatives did pass a bill that would retroactively impose a high tax on bonuses earned by some insurance company executives. But several commentators, including Professor Laurence Tribe and congressional staffers, expressed concerns that the legislation would qualify as a bill of attainder.[161] Perhaps for that reason, the bill never made it through the Senate.[162]

Of course, it is possible that Congress will use refund information to draft broad, prospective legislation, as opposed to a retroactive private bill. Information about the refund claim of an energy company, for example, could help Congress learn how various energy tax credits actually work. Congress could use this information to improve the Code's energy tax credit provisions.

This potential legislation justifies the legislature's collection of refund information, but it does not justify § 6405(a)'s thirty-day holding period, the only aspect of the statute about which this Article takes issue. If Congress intended to use refund information to draft broad, prospective legislation, it would have no need to contemporaneously review a refund claim and prevent the IRS from issuing the refund while it undertakes that review. (Whether a particular taxpayer receives a refund for a prior year has little to do with prospective, national legislation.) As one federal district court understood the statute, § 6405(a) was plainly intended to allow for congressional influence over refund payments: "Congress must have had *some* purpose in staying the hand of the Commissioner for a period of thirty days, and certainly if the Committee had suggested proper corrections, the suggestions would have been accepted by the Commissioner."[163]

Section 6405(a)'s thirty-day holding period thus allows Congress to influence whether a given taxpayer receives a refund without facing the constitutional problems associated with bills of attainder or with retroactive legislation. But although the JCT refund review function thus eludes some constitutional problems, it creates others. Most importantly, the JCT refund review function reflects an improper legislative aggrandizement, unrelated to any legitimate legislation. Additionally, § 6405(a) facilitates the legislature's involvement in the execution of the laws, and

161. *See* Amy S. Elliot, *Experts Debate Constitutionality of AIG Bonus Tax Bill*, 122 TAX NOTES 1548 (2009) (discussing Tribe's "growing doubts" about the legislation), and ERIKA K. LUNDER ET AL., CONG. RESEARCH SERV., R40466, RETROACTIVE TAXATION OF EXECUTIVE BONUSES: CONSTITUTIONALITY OF H.R. 1586 AND S. 651, at 8–17 (2009) (concluding that bill of attainder clause poses serious constitutional questions regarding H.R. 1586, which passed the House by a 328–93 vote); *see also* Erik M. Jensen, *Would a Tax on AIG Bonus Recipients Really Be a Tax?*, 123 TAX NOTES 1033 (2009) (arguing that alleged tax would really be an unconstitutional taking).

162. Senator Baucus also introduced legislation that would tax the insurance company executives, but the Senate never took action on it. *See* S. 651, 111th Cong. (2009).

163. Ohio Oil Co. v. United States, 1936 WL 6878 (N.D. Ohio June 18, 1936) (construing statutory predecessor to § 6405(a)).

the next section discusses specific constitutional problems with that involvement.

B. Exercise of Executive Powers by Non-Article II Agents

In *Chadha*, *Hechinger*, and *NRA Political Victory Fund*, the courts did not squarely address whether Congress could play the part of executive. In *Chadha*, the Court concluded that the veto reflected the exercise of legislative power and consequently examined the device only with regard to Article I procedural requirements.[164] And in *Hechinger* and *NRA Political Victory Fund*, the D.C. Circuit focused broadly on legislative aggrandizement principles without specifically characterizing the nature of the powers exercised by Congress.[165]

Other cases expressly deal with whether Congress can play the part of the executive. *Bowsher v. Synar*, the leading case on this issue, addressed whether Congress could grant the Comptroller General executive powers regarding a statute that prescribed a maximum deficit amount for federal spending.[166] If in any year the projected budget deficit exceeded the maximum amount, the Comptroller General would examine the applicable statutes and determine which programs must face budget cuts.[167] These determinations would bind the President.[168]

The Court observed that the Comptroller General's functions "plainly entail[ed] execution of the law in constitutional terms"; "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."[169] Given the complexity of the statutes and the number of programs involved, the Comptroller General would need to make a "judgment concerning facts," a function usually exercised by an "officer[] charged with executing a statute."[170] Although the Comptroller General would exercise executive functions, however, only Congress could remove him.[171] Thus, the Comptroller General was an agent of Congress performing executive functions.

The Court concluded that this arrangement violated the separation of powers.[172] The Constitution prohibited an "active role for Congress in the supervision of officers charged with the execution of the laws it enacts."[173] If executive powers were vested in an officer answerable only to Congress, this would, "in practical terms, reserve in Congress control over the execution of the laws," and the "structure of the Constitution

164. INS v. Chadha, 462 U.S. 919, 958 (1983).
165. *See generally* Hechinger v. Metro. Wash. Airports Auth., 36 F.3d 97 (D.C. Cir. 1994); Fed. Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993).
166. 478 U.S. 714, 717–18 (1986).
167. *Id.* at 718.
168. *Id.* at 733.
169. *Id.* at 732–33.
170. *Id.* at 733.
171. *Id.* at 727–28.
172. *Id.* at 723.
173. *Id.* at 722.

does not permit Congress to execute the laws."[174] Congress could neither execute a statute nor vest the responsibility for its execution in its own agent. Thus, the powers vested in the Comptroller General were unconstitutional, and budget cuts would be determined under an alternate method prescribed by the statute.

Bowsher plainly indicates that Congress cannot "invest itself or its Members with . . . executive power,"[175] but the JCT refund review function violates this principle. Even more so than the deficit control mechanism at issue in *Bowsher*, determining how to process a refund claim reflects the "very essence of 'execution' of the law."[176] Montesquieu, in his seminal writings on the separation of powers, regarded tax collection as a task suited for the executive, a characterization consistent with our nation's history.[177] And in 1789, the first Congress created the Treasury Department and established its authority to "superintend the collection of the revenue."[178] Consistent with that authority and the authority granted in later enactments, the executive branch has handled tax collection matters, including refund determinations.[179] Thus, although the exact scope of the Article II executive power remains uncertain, determining how much a taxpayer owes or is owed clearly reflects one of the functions constitutionally assigned to the President.[180]

One might nonetheless invoke the so-called "chameleon"[181] principle and argue that, even though the JCT staff performs functions similar to some IRS agents, that function becomes legislative when performed by the JCT. Under the case law, "[w]hen any Branch acts, it is presumptively exercising the power the Constitution has delegated to it."[182] And under this principle, different branches may perform similar functions,

174. *Id.* at 726.

175. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928).

176. *Bowsher*, 478 U.S. at 733.

177. *See* MONTESQUIEU, *supra* note 72, at 80 (discussing the exercise of executive powers by the Roman senate and including "farm[ing] out the revenue," i.e., managing the tax collectors, as among the powers exercised).

178. An Act to Establish the Treasury Department, ch. 12, § 2, 1 Stat. 65, 65–67 (1789). *See* 31 U.S.C. § 301.

179. The Whiskey Tax Act of 1791, for example, directed the President to appoint inspectors to collect the taxes imposed by that act. *See* Whiskey Tax Act of 1791, ch. 15 § 4, 1 Stat. 199, 200 (1791).

180. *See, e.g.*, Freytag v. Comm'r, 501 U.S. 868, 911 (1991) (Scalia, J., concurring) (making a determination that "this much or that much tax is owed" is "a classic executive function").

181. *See Bowsher*, 478 U.S. at 749 (Stevens, J., concurring) ("[O]ur cases demonstrate [that] a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned."). The chameleon principle helps explain the Court's statement in *Chadha* that the legislature had exercised legislative power because it had "alter[ed] the legal rights, duties and relations of persons . . . outside the Legislative Branch." INS v. Chadha, 462 U.S. 919, 952 (1983). Some commentators have expressed confusion about this remark, thinking that *Chadha* absurdly indicated that judges exercise legislative power, given that their orders and opinions also alter the rights and duties of persons outside the legislative branch. The chameleon principle, however, addresses the confusion: when *judges* affect the rights and duties of outside parties, the character of their action is generally judicial; when *executive officers* affect the rights and duties of outside parties, the character of their action is generally executive; and when *legislators* affect the rights and duties of outside parties, the character of their action is generally legislative.

182. *Chadha*, 462 U.S. at 951.

and the "particular function, like a chameleon, will often take on the aspect of the office to which it is assigned."[183] For example, when Congress enacts a statute with specific details regarding the deductibility of a tax item, it acts in its legislative capacity. If Congress instead enacts a broad statute and leaves the details of the deduction to the Secretary of the Treasury, the Secretary acts in his executive role when he promulgates regulations. And if a dispute arises and a judge provides a detailed explanation regarding the scope of the statute, she acts in her judicial capacity when issuing her opinion.

But the chameleon principle does not apply to the JCT refund review function. Section 6405(a) contemplates that the JCT will review a claim for refund during an administrative dispute between a single private party and the IRS, and as Attorney General Mitchell aptly explained, when "machinery has been set up in the Treasury Department for administrative examination and allowance of claims by executive officers, the function of executing this law becomes an executive one."[184] In other words, making a judgment about how to process a refund claim *during the administrative process* necessarily qualifies as an executive act, whether performed by the IRS, the JCT, or even a court.

The Supreme Court's decisions in *Hayburn's Case* and in *United States v. Ferreira* reflect these principles. *Hayburn's Case* involved a statute that granted federal and state courts the power to set pensions for disabled war veterans.[185] Under the Act, a court would examine a veteran's claim and determine his appropriate pension.[186] The court would then make a recommendation to the Secretary of War, who had the ultimate authority to make the pension payment.[187] Although the Court in *Hayburn's Case* did not specifically address the constitutionality of this arrangement, related circuit court opinions and a later Court case showed that the power to determine pensions "was not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the courts."[188] Whereas a court generally makes legal and factual determinations as part of a process under which an appellate court reviews its findings, the pension act required the court to pass along its judgment to the Secretary of War.[189] This made the delegated power executive, not judicial.[190]

Ferreira implicated another unconstitutional exercise of the executive power by the judiciary. In that case, Congress enacted a statute that

183. *Bowsher* 478 U.S. at 749 (quoting Myers v. United States, 272 U.S. 52, 291 (1926) (Brandeis, J., dissenting)).

184. Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 60 (1933).

185. Hayburn's Case, 2 U.S. (2 Dall.) 408, 408 n.* (1792).

186. *Id.*

187. *Id.*

188. *See* United States v. Ferreira, 54 U.S. (13 How.) 40, 52–53 (1851) (note by Chief Justice).

189. *Id.* at 49.

190. *See id.* at 46.

required a court to make an initial determination regarding claims for war related losses.[191] The court would examine whether the claimant qualified for relief and pass along a nonbinding recommendation to the Secretary of the Treasury.[192] Although the Court in *Ferreira* ultimately dismissed the case on jurisdictional grounds, it did so only after observing that the power conferred under the act was "nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims,"[193] which the judiciary could not constitutionally exercise.

Hayburn's Case and *Ferreira* help show why § 6405(a) impermissibly entangles the JCT in executive functions. Like the arrangements in those cases, the statute contemplates that a person outside of the executive branch will systematically provide recommendations to an administrative official regarding a private party's claim.[194] And like the arrangements in those cases, the JCT refund review function puts non-Article II agents in the shoes of the executive, an impermissible practice. The cases also show that the absence of any formal veto over the executive branch does not preserve the constitutionality of an arrangement. That is, a non-Article II branch can invalidly exercise executive power within the meaning of the Constitution even if it lacks the authority to bind the President.

The Court in *Morrison v. Olson* arguably retreated from these principles and allowed the judiciary, at least, some level of involvement in the execution of the law. The statute in *Morrison* gave a special court the duty of appointing an independent counsel to investigate executive branch corruption.[195] The special court would also perform some other "essentially ministerial" tasks like receiving reports and determining whether to issue them to the public.[196] But the Supreme Court found that the special court's authority to perform these seemingly executive functions, although unrelated to its constitutional authority to appoint inferior officers, did not violate separation of powers principles.[197] These func-

191. *Id.* at 45.

192. *Id.*

193. *Id.* at 48.

194. Section 6405(a) does not literally state that the JCT will provide a recommendation to the IRS, although it was obviously intended to give the JCT an opportunity to express its approval or disapproval of refund payments. *See, e.g.*, O'Gilvie v. United States, 66 F.3d 1550, 1555 (10th. Cir. 1995), *aff'd*, 519 U.S. 79 (1996) ("We believe that § 6405 was enacted so that the Committee could be involved in oversight of payments from the Treasury . . . ."); *In re* Revco D.S., Inc., 131 B.R. 615, 619 (Bankr. N.D. Ohio 1990) ("[T]he IRS must give 30 days notice to the Joint Committee on Taxation of the U.S. Congress to review the proposed income tax refund. The Joint Committee may recommend adjustments to any income tax refund."); Ohio Oil Co. v. United States, 1936 WL 6878 at *10 (N.D. Ohio 1936) (construing statutory predecessor to § 6405(a)). The statutory history of § 6405(a) also reflects this understanding. In 1932, when Congress tried to strengthen the JCT's involvement in refund determinations, it passed a statute (eventually vetoed by Hoover) granting the JCT an explicit veto over the payment of large refund claims. *See* H.R. 13975, 72d Cong. (2d Sess. 1933). This legislation reveals the congressional understanding that § 6405(a) was intended to ensure contemporaneous JCT involvement in refund determinations.

195. Morrison v. Olson, 487 U.S. 654, 660 (1988).

196. *Id.* at 681.

197. *Id.* at 697.

tions were not "*inherently* 'Executive,'" and unlike *Bowsher*, this case did not involve "an attempt by Congress to increase its own powers at the expense of the Executive Branch."[198]

In another case, *Mistretta v. United States*, the Court once again blessed judicial involvement in an arguably executive function, the promulgation of sentencing guidelines. Although rulemaking is usually associated with the executive, the Court found that the "sentencing function . . . has never been thought of as the exclusive constitutional province of any one Branch."[199] Additionally, the courts enjoyed special expertise in sentencing matters, which justified their involvement in promulgating the guidelines.[200] And while the Constitution prohibits a legislator from holding any office, history showed a long pattern of judges taking on extrajudicial government service.[201] Thus, a federal judge, in his individual capacity, could perform some executive functions without violating the Constitution, even if a legislator could not.[202]

Morrison and *Mistretta* blur the line regarding the performance of executive functions by federal judges, but the leeway granted to the judiciary does not validate the JCT refund review function. In both *Morrison* and *Mistretta*, the Court emphasized that Congress had not taken it upon itself to interfere with the executive, indicating that encroachments by "the least dangerous branch"[203] qualitatively differ from legislative encroachments.[204] And both decisions concluded that the acts at issue (appointment and oversight of an independent counsel, and promulgation of sentencing guidelines) were not inherently executive. The JCT refund review function, by contrast, reflects an encroachment by Congress in an inherently executive function.

Bowsher and related cases thus cast doubt on the constitutionality of the JCT refund review function. Commentators have failed to observe the key principle of these cases—that the legislature can play no systematic role in law execution—in assuming the constitutionality of § 6405(a). They have instead focused solely on the absence of any explicit veto in the statute, but, as this discussion shows, a non-Article II branch can impermissibly exercise executive power even if it lacks a statutory veto.

198. *Id.* at 694.
199. Mistretta v. United States, 488 U.S. 361, 390 (1989).
200. *Id.*
201. *Id.* at 398.
202. *See id.* at 403–04.
203. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (Carey & McClellan eds., 1990).
204. *See* Morrison v. Olson, 487 U.S. 654, 694 (1988) ("We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."); s*ee also* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986) ("Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch.").

C. Summary

Like most arrangements involving the aggrandizement of the legislature, the JCT refund review function presents a question of "real nicety."[205] Unlike a statute that, for example, replaced the Commissioner of the IRS with a Congressman, § 6405(a) does not scream a constitutional violation. And in assessing threats to the structure of our government, § 6405(a) probably does not jump to the forefront—congressional involvement in tax refund determinations has not caused and will not cause the republic to crumble.

But it would be a mistake to consequently dismiss constitutional arguments against § 6405(a). The Supreme Court has stated that even when a measure "might prove innocuous" or beneficial, it must be invalidated when it "provides a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role."[206] And it's easy to see how § 6405(a) might provide such a blueprint.[207] Rather than limit its review to large refunds, Congress might demand prepayment review of small refunds,[208] demand review of briefs about to be filed by the IRS in court, demand prepublication review of Tax Court opinions, and so on.

Of course, arguments based on the proverbial slippery slope rarely persuade. But when it comes to congressional involvement in executive decision making, there are strong indications that we are already near the bottom of the slope. Although *Chadha* unequivocally invalidated the legislative veto, Congress has openly defied the Court and has passed hundreds of statutes adopting that device.[209] It's fair to say that Congress exercises more influence over the executive today than at any other point in our nation's history.[210] Thus, provisions like § 6405(a) should be closely examined for their potential to violate the separation of powers.

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205. THE FEDERALIST NO. 48, *supra* note 203, (James Madison) ("It is not unfrequently [sic] a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere.").

206. Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 277 (1991). As the Court noted, James Madison had long ago warned that the legislature might "mask" the unconstitutional growth of its powers under "complicated and indirect measures." *Id.* at 277 (citing THE FEDERALIST NO. 48, *supra* note 203 (James Madison)).

207. Section 6405(a), in fact, served as a blueprint for an unconstitutional intrusion over the executive. As noted earlier, Congress in 1932 passed a bill that would have given the JCT an explicit veto over large refunds, but President Hoover vetoed that bill. *See* H.R. 13975, 72d Cong. (2d Sess. 1933). In the accompanying letter, Attorney General Mitchell expressed "slippery slope" concerns, without using that phrase. *See* 37 Op. Att'y Gen. 56, 62 (1933) ("participat[ion] in the execution of laws . . . would enable Congress, through committees or persons selected by it, gradually to take over all executive functions . . . .").

208. At some point, notice provisions could raise constitutional questions under the Take Care Clause. For example, if Congress demanded a thirty-day review period for even ministerial tasks, that could impede the President's ability to take care that the laws are faithfully executed.

209. *See* Louis Fisher, *Signing Statements: Constitutional and Practical Limits*, 16 WM. & MARY BILL RTS. J. 183, 196 (2007) ("The number of new legislative vetoes enacted after Chadha is well above two hundred. The total from 1983 to the present, by my estimate, exceeds one thousand.") (citation omitted).

210. *See generally* Beermann, *supra* note 63, at 61.

That closer examination reveals constitutional problems with the JCT refund review function. Congress should thus amend § 6405(a) and require that the IRS provide refund information to the JCT only *after* the refund's issuance. This procedure would accomplish all the legitimate purposes associated with refund review, without any of the constitutional problems.

Admittedly, post-issuance review would take Congress away from the "front lines"[211] of refund claim determinations. And one can expect that something would be lost by this removal. Direct participation in law execution adds a perspective that post-hoc review cannot. If legislators litigate cases in the federal courts, deliver the mail, negotiate plea bargains, or (as here) help determine refund claims, they will better understand how the executive branch works. But this improved understanding cannot support such legislative aggrandizement. As the Supreme Court stated in *INS v. Chadha*, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."[212]

The Constitution unambiguously assigns the executive power to the President, not the Congress. The legislature must learn about the executive branch through oversight and investigation of executive activities,[213] not, as with the JCT refund review function, through participation in them.

IV. FUNCTIONALIST CONSIDERATIONS

The academic literature regarding the separation of powers reflects a deep divide among theorists.[214] On one end, formalists generally emphasize that the Constitution's vesting clauses divide the powers delegated to the government into three distinct categories,[215] and that each

211. Stratton, *supra* note 34 (summarizing statement of former Assistant Secretary of Treasury Ronald Pearlman).

212. 462 U.S. 919, 944 (1983).

213. Congress has frequently investigated particular aspects of IRS operations. *See, e.g.*, Statement of Information: Hearing Before the Comm. on the Judiciary Pursuant to H. Res. 803, 93d Cong., 2d Sess. (1974) (investigation of allegations regarding President's Nixon's use of IRS for political purposes); *Equal Educational Opportunity: Hearings Before the Senate Select Comm. on Equal Educational Opportunity*, 91st Cong., (2d Sess. 1970) (examining IRS handling of tax exemptions claimed by racially discriminatory educational institutions); *Travel and Entertainment Expenditures: Hearings Before the Senate Comm. on Finance*, 88th Cong. (1st Sess. 1963) (examining regulations issued under I.R.C. § 274 (2006), which limits the availability of deductions regarding travel and entertainment expenses).

214. This divide follows from the Court's inconsistent approaches to separation of powers cases. *See generally* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

215. Various scholars have advocated a formal, definitional approach to separation of powers questions. *See, e.g.*, Lee S. Liberman, Morrison v. Olson*: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U.L. REV. 313, 343 (1989) ("A formalist decision uses a syllogistic, definitional approach to determining whether a particular exercise of power is legislative, executive, or judicial."); Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 454–55 (1991) ("[T]he Court's role in separation of powers cases should be limited to determining whether the challenged branch action falls with-

branch must, to the extent possible, confine itself to its assigned responsibility.[216] Functionalists, at the other end, take a far more holistic view to separation of powers issues. Under their approach, "structural disputes should be resolved not in terms of fixed rules but rather in light of an evolving standard designed to advance the ultimate purposes of a system of separation of powers."[217]

This Article has employed a formalist approach and has focused on the Constitution's vesting clauses, but functionalism contemplates a different mode of analysis. "All functionalists reject the exclusive functions idea"[218] and instead believe that a particular branch may exercise some of the powers constitutionally assigned to another branch, as long as the overall system of checks and balances remains unthreatened. For example, functionalist courts and scholars have defended the adjudication of state common law claims by Article I agencies[219] and the judiciary's involvement in rulemaking.[220]

Functionalists have also vehemently defended the validity of the legislative veto, under which some subset of Congress can explicitly override an executive branch decision.[221] Given their embrace of that device, functionalists might not see any constitutional problem with the JCT refund review function. After all, if an explicit veto by a congressional committee raises no objections, an apparently lesser measure, like a statute allowing for prepayment review of refunds, might not raise any objections either.

Functionalists, however, seem to accept some limits to the involvement of one branch in another branch's affairs. More specifically, some functionalists acknowledge that each branch has some core activities that other branches cannot constitutionally perform.[222] For example, Justice

in the definition of that branch's constitutionally derived powers—executive, legislative, or judicial. If the answer is yes, the branch's action is constitutional; if the answer is no, the action is unconstitutional. No other questions are to be asked; no other countervailing factors are to be considered."); *see also* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1949 (2011) (advocating "clause-centered methods of textual interpretation that track the diverse levels of generality at which constitution makers framed the structural provisions").

216. Although the Necessary & Proper Clause generally allows Congress to determine how the powers assigned under the Constitution will be carried out, that clause cannot abrogate other constitutional provisions, including the vesting clauses. *See* Manning, *supra* note 215, at 1990 ("[N]othing in the language of the [necessary & proper] clause supports the idea that Congress can prescribe alternatives to the assignments of power [provided in the vesting clause] . . . ."). *See generally* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L J. 267 (1993).

217. Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 231 (1991).

218. *Id.* at 232.

219. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 843 (1986).

220. *See* Mistretta v. United States, 488 U.S. 361, 386–87 (1989).

221. *See, e.g.*, Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1834 (1996) ("[T]here is every functionalist reason to look favorably upon the legislative veto . . . .").

222. *See* Strauss, *supra* note 214 at 489 (noting that the "functional approach . . . stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened"); s*ee also Schor*, 478 U.S. at 851 (examining constitutionality of statute granting some adjudicative powers to agency by reference to "essential attributes of judicial power").

White, in his spirited defense of the legislative veto, acknowledged that that device would not be appropriate if used to influence "inherently executive" functions.[223]

Given the vagueness of the "inherently executive" limitation, it is toothless in many contexts. The Constitution and related historical materials frequently fail to provide guidance on whether a particular activity reflects the core function of a given branch.[224] For example, asking whether the power to remove an executive officer qualifies as an inherently executive activity will not take one very far,[225] and one must resort to other constitutional principles to answer the question. But when it comes to tax collection, the "inherent activity" question should not be so difficult. Tax collection has long been considered a quintessentially executive activity, like prosecuting criminals or delivering the mail.[226] Thus, a functionalist should accept that legislative involvement in administrative tax collection violates the separation of powers.

In the past, Congress has actively participated in the adjudication of some monetary claims presented by private parties, but this experiment largely failed and raised serious constitutional questions.[227] In the early part of the nation's history, judicial relief for claims against the government was relatively limited.[228] To seek recovery for claims relating to, for example, public lands, pensions, or wartime losses, a private party would generally seek redress from the legislature.[229]

Over time, the number of claims overwhelmed Congress. More than 14,000 claims were presented to the 22nd, 23rd, and 24th Congresses, but fewer than 6000 received any legislative attention.[230] The committee in charge of these claims called the system one of "unparalleled injustice, and wholly discreditable to any civilized nation."[231] And aside from the backlog, bribery scandals involving House members and other forms of corruption plagued the claims process.[232]

223. INS v. Chadha, 462 U.S. 919, 1002 (1983) (White, J., dissenting) ("I do not suggest that all legislative vetoes are necessarily consistent with separation-of-powers principles. A legislative check on an inherently executive function, for example, that of initiating prosecutions, poses an entirely different question.").

224. *See* Manning, *supra* note 215, at 1986 (noting that indefiniteness of vesting clauses "means that they may ultimately not have resolving significance for many separation of powers issues").

225. *See id.* at 2013–14.

226. *See Chadha*, 462 U.S. at 960.

227. *See, e.g.*, *id.* at 961 (noting the "danger of subjecting the determination of the rights of one person to the 'tyranny of shifting majorities'").

228. *See* Ingalls Shipbuilding, Inc. v. United States, 13 Cl. Ct. 757, 762–63 (1987), rev'd, 857 F.2d 1448 (Fed. Cir. 1988).

229. *See id.*; *see also* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 611 (1999) ("[I]n post-revolutionary America, a petition to the legislature was viewed as a fundamental right and served as a means of securing redress of private grievances. The 'right to petition' thus protected the right to present individual petitions that today would constitute a civil action in court.").

230. *See* William M. Wiecek, *The Origin of the United States Court of Claims*, 20 ADMIN. L. REV. 387, 392 (1968).

231. *See id.*

232. *See id.* at 398 n.20 (citing relevant news stories).

Scandals aside, functionalists might argue that the congressional involvement in claims adjudication provides historical support for similar legislative involvement in tax refund determinations. The congressional claims process, however, was itself controversial and raised serious separation of powers concerns. In his 1861 State of the Union Address, President Abraham Lincoln announced that "[t]he investigation and adjudication of claims in their nature belong to the judicial department," and that it was appropriate to "remove this branch of business from the halls of Congress."[233] John Quincy Adams had earlier expressed similar reservations, writing in his diary that claim adjudication was a "judicial business" and that "legislative assemblies ought to have nothing to do with it."[234] Eventually, Congress removed itself from claim adjudication, establishing the United States Court of Claims and granting the court the authority to adjudicate monetary claims against the government.[235] Thus, although it took several decades, Congress finally recognized that even though it enjoys the appropriations power, the power to adjudicate individual claims sits outside the legislature.[236] Thus, functionalists should not point to early legislative practice regarding monetary claims to defend the JCT refund review function.

Functionalists should also recognize that many of their traditional defenses of legislative encroachments do not apply to the JCT refund review function. For example, functionalists sometimes defend the legislative veto because they believe that the device actually serves the President's interests. According to this theory, the President understands that the Congress will broaden the scope of an act if it retains a veto over its execution, and the President deliberately accepts this tradeoff in exchange for the increased authority.[237] Until 1940, for example, Congress reserved the exclusive power to suspend deportation proceedings against an alien, but the Roosevelt administration successfully lobbied Congress to grant the executive branch similar authority.[238] As part of the compromise, Congress reserved the right to veto any attorney general decision to suspend the deportation of an alien. In these circumstances, the legislative veto may have given the President greater authority than he would otherwise enjoy.

But this bitter-with-the-sweet theory has little to do with the JCT refund review function. The IRS *must* perform the bulk of the work re-

233. 7 UNITES STATES, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 3252 (James D. Richardson ed., 1901).

234. *See* 8 JOHN QUINCY ADAMS, MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, at 480 (Feb. 23, 1832 entry) (Charles Francis Adams ed., 1876).

235. *See generally* Wiecek, *supra* note 230.

236. *See generally* Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution From a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625 (1985).

237. *See* Fisher, *supra* note 33, at 275 ("The legislative veto originated because presidents wanted it.").

238. *See* Harvey C. Mansfield, *The Legislative Veto and the Deportation of Aliens*, 1 PUB. ADM. REV. 281, 281 (1941).

garding refund claims, regardless of the scope of any related legislation. Neither Congress nor the judiciary[239] enjoys the constitutional authority to examine billions of tax returns and process the related refund claims.[240] The JCT refund review function does not reflect one side of a tit-for-tat exchange between Congress and the President. In fact, the legislative history behind the JCT refund review function suggests the exact opposite—§ 6405(a) stemmed from congressional distrust of executive officials, not from any negotiated compromise.[241]

Functionalists also believe that the legislative veto and similar encroachments provide a practical counterbalance to the largely dormant nondelegation doctrine.[242] Under the nondelegation doctrine, Congress cannot delegate lawmaking powers to other branches.[243] For example, a statute broadly providing that "the IRS shall make the tax laws" would probably[244] violate this doctrine.

The Court has not sustained a challenge under the nondelegation doctrine since 1937, even though many agencies enjoy vague grants of authority that allow them to exercise considerable discretion in rulemaking and other activities.[245] Functionalists argue that legislative aggrandizement devices provide an important counterbalance to this problem.[246] These devices allow some subset of the legislature to place a check on any excessive delegated power, restoring the primacy of Congress in the lawmaking sphere.[247]

But § 6405(a) does not relate to this functionalist concern. Congress has perhaps granted the Treasury and the IRS too much rulemaking authority, but the JCT refund review function does not reflect an appropriate check on that authority. The IRS must review and process refunds regardless of the substantive content of its rules and regulations. And

239. Although the judiciary can decide whether a refund claim is proper in the context of an adversarial proceeding between the taxpayer and the executive, the judiciary has no authority to issue refund checks to taxpayer, establish an auditing arm, negotiate settlements with taxpayers, and so on.

240. Although the Constitution grants Congress the power to "lay and collect taxes," that clause refers to the power to enact laws relating to the laying and collection of taxes, not the power to directly lay and collect taxes. *See* THE FEDERALIST NO. 33, *supra* note 203, at 201 (Alexander Hamilton) ("What is the power of laying and collecting taxes, but a legislative power, or a power of making laws, to lay and collect taxes?"). And although the Constitution assigns the appropriations power to Congress, it is the executive branch (through the Treasury department) which issues payments, not the legislative branch, even when the private party specifically petitions Congress for monetary relief. *See* Reeside v. Walker, 52 U.S. 272, 291 (1850).

241. *See* Craig M. Boise, *Playing with "Monopoly Money": Phony Profits, Fraud Penalties and Equity*, 90 MINN. L. REV. 144, 209 (2005).

242. Merrill, *supra* note 217, at 247 ("[R]ealistically speaking, there is no meaningful judicial limitation on Congressional decisions to delegate legislative power to other branches.").

243. *See* Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 125, 147 (2011).

244. That such a statute would only probably violate the nondelegation doctrine speaks to the weakness of that doctrine. *See id.* at 142 ("[T]he conventional wisdom among administrative law scholars today is that the nondelegation doctrine is, for all practical purposes, 'a dead letter.'").

245. *See id.*

246. *See id.* at 156 (stating that the function of a branch may not be transferred to another branch).

247. *See, e.g.*, *id.* at 142–47 (explaining the how statutes such as § 6405(a) restore balance).

refund claims will generally involve a determination of how a set of facts apply under existing regulations or other administrative materials, not a determination of whether the IRS should have issued the guidance in the first place.

Functionalists should also recognize that the rejection of the JCT refund review function does not necessarily require rejection of all legislative review devices, including (perhaps most significantly) most report and wait statutes. Under a typical report and wait statute, an administrative regulation will take effect only after a specified number of days and only if Congress does not pass contrary legislation in the interim.[248] Functionalists generally support these devices, again citing nondelegation concerns.[249]

Section 6405(a), however, differs from typical report and wait statutes because the legislation contemplated under those statutes faces no constitutional problems. For example, if an agency proposed general environmental regulations and Congress used the mandated review period to address the same subject (but adopting different rules), the legislation would clearly satisfy the Constitution. The promulgation of broad environmental legislation falls neatly within the classic definition of the legislative power,[250] and the report and wait provision would assist in the exercise of that power.

But § 6405(a)'s thirty-day review period does not facilitate the passage of any legitimate legislation. As discussed earlier, if Congress used legislation to stop the payment of a refund, that legislation would likely violate the Due Process Clause and could qualify as a bill of attainder.[251] This distinction allows a functionalist to reject § 6405(a), even if he welcomes general report-and-wait statutes.

Additionally, although a court might not give significant weight to the actual administrative practice regarding the JCT refund review function, the functionalist theory contemplates an inquiry into the practical effects of a measure in determining its constitutionality.[252] And as a practical matter, § 6405(a) leads to significant entanglement between the legislature and the executive. As various public filings show, the JCT influences who the IRS audits and whether to issue refunds.[253] A functionalist may properly express reservations about this degree of entanglement, especially because, unlike many other legislative control measures, the rights of private parties are directly at stake.[254] As the next Part shows,

248. *See* INS v. Chadha, 462 U.S. 919, 935 n.9 (1983).

249. *See generally* Criddle, *supra* note 243 at 146–49 (discussing the non-delegation doctrine).

250. *See* Fletcher v. Peck, 10 (6 Cranch) U.S. 87, 136 (1810) ("It is the peculiar province of the legislature to prescribe general rules for the government of society . . . .").

251. *See infra* Part III.A.

252. *See* Strauss, *supra* note 214, at 489.

253. *See* Archie Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1366 (1980) (describing the control the JCT has over IRS investigation).

254. *See* Flaherty, *supra* note 221 at 1740 (emphasizing the functionalist motivation of preventing injustice).

close congressional involvement in an agency's quasi-judicial functions raises serious due process concerns, and a functionalist should take those concerns into account when evaluating the desirability of § 6405(a).

A functionalist will of course balance these concerns against some potential benefits of JCT refund review, including the detection of corruption and favoritism in the issuance of large refunds.[255] Congress, however, can ensure integrity in the refund process through measures other than the JCT refund review function. The next Part turns to a discussion of those tools before examining some of the procedural due process concerns related to the JCT refund review function.

V. RECOMMENDATIONS FOR CONGRESS AND THE IRS

A. Congressional Alternatives to JCT Refund Review Function

Although the JCT refund review function raises several serious constitutional problems, Congress probably will not repeal § 6405(a). In 1995, the House Appropriations Subcommittee made some modest efforts to eliminate the JCT refund review function but its efforts were ultimately rebuked.[256] Representative Ron Packard, the subcommittee chair, believed that it is "the IRS's job to determine tax refunds—not Congress'."[257] Packard also questioned whether anything in the Constitution said "that one branch of government should pick up the slack when the other fails to do its job."[258] But other legislators and members of the tax community spoke out against Packard, and he quickly retreated from his position.[259]

Congress should have taken Packard's proposals more seriously because the original justifications for § 6405(a) have long lost relevance.[260] Aside from their personal qualms with Mellon, legislators in the 1920's expressed concern that mere IRS "clerks"[261] would issue large refund payments. But the IRS now follows extensive procedures before issuing large refunds[262] and even maintains audit offices at the headquarters of

255. For an example of such corruption, see *id.*

256. Stratton, *supra* note 34 (noting that the "House Appropriations Subcommittee on the Legislative Branch inserted into its 1996 spending bill language prohibiting use of JCT funds to perform the mandatory review").

257. *See id*. (quoting June 12, 1995 statement by subcommittee Chair Ron Packard).

258. *Id*.

259. *See id*. at 1–2.

260 . *See* Eric Kroh, *JCT Will Review a Refund if It's Big Enough*, 143 TAX NOTES 160, 160 (2014) ("Refund review is an anachronistic function of the JCT left over from the early days of the income tax.").

261. WRIGHT, *supra* note 33, at 78 (quoting Senator McKellar). The administration denied McKellar's allegation. *See id.* at 78 n.19.

262. *See generally* SALTZMAN, *supra* note 33, § 11.01 et. seq. For a discussion of special IRS procedures regarding the audits of large taxpayers, see ERIN M. COLLINS & EDWARD M. ROBBINS JR., INTERNAL REVENUE SERVICE PRACTICE & PROCEDURE DESKBOOK, § 7.2 (Practising Law Institute 4th ed. 2010).

many corporate taxpayers.[263] And while Mellon's ownership of the Gulf Oil Company raised obvious ethical problems, federal conflict of interest rules would today prevent any Secretary of the Treasury from controlling a large corporation.[264]

Also, if Congress remains concerned with IRS handling of large refund claims, it can adopt various other measures that would minimize the risk of corruption. For example, Congress could create an executive agency to examine all large tax refund claims.[265] This would ensure thorough review of those claims and would allow Senate influence in the appointment of the agency head.[266]

To ensure transparency in the handling of large refunds, Congress can establish rules similar to those used in the offers-in-compromise context. Under § 7122(a), the IRS can settle a tax obligation for less than the amount actually owed.[267] The IRS must, however, explain its acceptance of the taxpayer's "offer in compromise" and put its explanation in a public file.[268] This disclosure regime helps prevent the corrupt or arbitrary exercise of the IRS's compromise authority.

Congress could establish similar sunshine measures for large tax refunds. For example, Congress could require that the IRS publish detailed information regarding any large refund that it pays. Although public disclosure of return information sacrifices taxpayer privacy,[269] Congress could require redaction of any identifying material.

Congress can also freely examine the issuance of large refund claims *after* their issuance. The General Accountability Office, for example, regularly audits executive branch agencies,[270] and the GAO could require periodic reports from the IRS regarding refunds paid. This procedure

263. *See* Amy S. Elliott, *Audit Proof? How Hedge Funds, PE Funds, and PTPs Escape the IRS*, 136 TAX NOTES 351 (2012) ("The IRS takes a thorough approach to its audits of many large C corporations. Under the coordinated industry case (CIC) program, more than 800 major U.S. corporations are audited year after year by a skilled team of IRS agents who maintain offices at the taxpayer's headquarters.").

264. *See, e.g.*, 18 U.S.C. § 208 (2006).

265. Arguably, it is the handling of small refund claims, not large refund claims, that requires further administrative and legislative attention. In 2011, for example, the IRS issued 8393 refunds to a single bank account and issued 23,994 refunds to a single Atlanta address. *See* TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, REF. NO. 2012-42-081, SUBSTANTIAL CHANGES ARE NEEDED TO THE INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER PROGRAM TO DETECT FRAUDULENT APPLICATIONS 18 (2012).

266. Currently, the Treasury Inspector General for Tax Administration independently oversees the IRS's administration of the tax laws. Congress could perhaps direct the TIGTA to specifically audit and investigate large refund cases, rather than create another oversight agency.

267. *See generally* Shu-Yi Oei, *Getting More by Asking Less: Justifying and Reforming Tax Law's Offer-in-Compromise Procedure*, 160 U. PA. L. REV. 1071 (2012).

268. *See* I.R.C. § 6103(k)(1) (2006).

269. Regarding the debate over tax privacy, see Joshua D. Blank, *In Defense of Individual Tax Privacy*, 61 EMORY L.J. 265, 269 (2011).

270. *See* Oei, *supra* note 267, at 1100 n.123 ("The GAO performs its work at the request of congressional committees and subcommittees, and its duties include 'auditing agency operations to determine whether federal funds are being spent efficiently and effectively' . . . .").

would accomplish all the legitimate purposes associated with refund review, without any of the constitutional problems.[271]

If Congress remains concerned that the IRS will cursorily review refund claims, it can expand the agency's authority to recover erroneously issued refunds. Under current law, the IRS generally has only two years to file a lawsuit to recover an erroneous refund.[272] If Congress lengthens this period to, for example, five years, that would increase the likelihood that the IRS can get the money back.

These alternative arrangements, to the extent that they expedite the payment of refunds without compromising the integrity of refund determinations, could save the government money. In his study of § 6405(a), Professor L. Hart Wright found that although JCT cases accounted for only three percent of tax refunds, they accounted for thirty-five percent of all interest paid by the government on tax refunds.[273] And aside from reducing the amount of interest paid, repeal of § 6405(a) would free up IRS resources currently committed to the preparation of refund claims for JCT review.[274]

Additionally, even if the JCT ended its contemporaneous review of refund determinations, that would hardly allow the executive to administer the law without any legislative oversight or involvement. In the 1970s, for example, the Treasury proposed guidance regarding the taxation of fringe benefits, a hot button issue at the time.[275] To reserve its right to determine the relevant rules, Congress passed a statute that prevented the Treasury from issuing guidance in that area.[276] Congress then established a task force to study the relevant issues[277] and ultimately passed legislation regarding fringe benefits in 1984.[278]

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271. *See* WRIGHT, *supra* note 33, at 78–82.

272. *See* I.R.C. §§ 6532(b) & 7405(d) (2006).

273. WRIGHT, *supra* note 33, at 80. Although the Code requires that the IRS pay interest on amounts refunded, *see* I.R.C. § 6611, in the current interest rate environment, taxpayers are likely the ones hurt by delays in JCT cases. That is, the low § 6611 interest rates do not properly compensate for the delay and uncertainty caused by JCT review.

274. *See* WRIGHT, *supra* note 33, at 81. According to this author's Westlaw search performed on August 5, 2012, more than 200 sections of the Internal Revenue Manual relate, at least in part, to JCT procedures. *See, e.g.*, INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 8.7.9.5.1 (Sept. 27, 2013) ("Reporting to the JCT"); INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 8.7.9.9.1 (Sept. 27, 2013) ("Informal Inquiries from the JCT"); INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 8.7.9.9.2.1 (Sept. 27, 2013) ("Formal Inquiries from the JCT - Staff Review Memorandum(SRM)"); INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 4.36.4.5 (May 4, 2010) ("Disclosure of Correspondence with the Joint Committee on Taxation").

275. *See* Fringe Benefits; Notice of Publication of Discussion Draft of Regulations, 40 Fed. Reg. 41,118–19 (proposed Sept. 25, 1975). Amidst controversy from all sides, the Treasury and the IRS withdrew this proposed guidance. *See* Fringe Benefits: Withdrawal of Discussion Draft of Proposed Regulations, 41 Fed. Reg. 56,334 (Dec. 28, 1976).

276. Act of Oct. 7, 1978, Pub. L. No. 95-427, 92 Stat. 996; *see also* Act of Dec. 29, 1979, Pub. L. No. 96-167, 93 Stat. 1275 (extending moratorium through May 31, 1981). Even after the last moratorium expired, the Treasury and IRS declined to issue guidance. *See* 1984-3 C.B. 1166.

277. *See generally* H.R. REP. NO. 95-1232 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2508.

278. *See* Tax Reform Act of 1984, Pub. L. No. 98-369, §§ 531–32, 98 Stat. 494, 877–87 (codified at I.R.C. §§ 117(d), 132, 133 (1984)).

Through the use of regulatory moratoria, Congress can ensure it has a say in key matters relating to tax policy. Although delays regarding refund determinations raise separation of powers problems, no such problems arise when Congress simply requires the executive branch to wait until the legislature decides how to address an issue.[279] Congress does not need the JCT refund review function to investigate, monitor, or otherwise influence the executive.

Nonetheless, Congress likely will not repeal § 6405(a). Over the past several decades, Congress has adopted increasingly aggressive measures to influence the executive and has blatantly ignored separation of powers limitations.[280] Congress is thus far more likely to expand the JCT refund review function than to eliminate it. With that in mind, this discussion turns away from Congress and considers how the IRS can improve how it handles JCT cases, with particular focus on the IRS Appeals office.

B. Integrity of IRS Dispute Resolution Process

The IRS Appeals office represents the IRS's neutral dispute resolution forum.[281] The office enjoys the power to settle cases[282] and holds tens of thousands of hearings each year.[283] Through the neutral handling of tax disputes, the Appeals office "enhance[s] voluntary compliance" and improves the "public confidence in the integrity and efficiency of the Service."[284]

The IRS created the Appeals office in 1927 without any specific congressional authorization,[285] but the Revenue and Restructuring Act of

279. *See* Susan Low Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation*, 76 GEO. L.J. 59, 115 (1987) (concluding that a statutory moratorium does not raise constitutional problems). *But see* Parnell, *supra* note 253, at 1377–83 (arguing that moratoriums preventing IRS action could plausibly violate the separation of powers). Putting aside potential constitutional issues, moratoriums against agency rulemaking may raise troubling policy issues. *See Tax-Exempt Status of Private Schools*: *Hearings Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 96th Cong. 896 (1979) (statement of Jerome Kurtz, IRS Commissioner) ("As an administrator, I can administer a law that says an item is exempt, but I can't administer a law which says, 'Don't tell anybody,' but that is essentially where we are on fringe benefits."). *See generally* Kathryn A. Watts, *Regulatory Moratoria*, 61 DUKE L.J. 1883 (2012).

280. Congress regularly includes legislative vetoes in its legislation, even though the Supreme Court unambiguously declared that device unconstitutional. *See* Louis Fisher, *The Unitary Executive and Inherent Executive Power*, 12 U. PA. J. CONST. L. 569, 581 (2010) ("Hundreds of committee vetoes appeared in statutes after *Chadha*."). The President will usually sign the legislation and simultaneously issue a statement indicating that he will not observe the veto. *See, e.g.*, Statement by President George W. Bush Upon Signing H.R. 3010, 2005 U.S.C.C.A.N. S53 (Dec. 30, 2005).

281. INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 8.1.1.2 (Feb. 10, 2012).

282. IRS regulations prescribe the specific type of cases regarding which the Appeals office enjoys settlement authority. *See* 26 C.F.R. § 601.106(a)(1)–(2) (2012).

283. IRS, *Appeals . . . Resolving Tax Disputes* http://www.irs.gov/Individuals/Appeals . . . -Resolving-Tax-Disputes (last updated Jan. 23, 2014).

284. *See* INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 8.6.4.1 (Oct. 26, 2007), *see* INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 1.2.17.1.6 (Apr. 6, 1986).

285. The right to appeal to the tax collector dates back to the creation of the Treasury department. *See* Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 (1789) (establishing the U.S. Treasury and allowing for administrative appeal to Treasury controller).

1998 explicitly recognizes the office and protects its independence.[286] In the statute, Congress prohibited *ex parte* communications between appeals officers and IRS employees.[287] IRS auditors thus cannot try to sway an appeals officer outside of the presence of the taxpayer involved.

Under its implementing regulations, the appeals office must also decide cases "with strict impartiality as between the taxpayer and the Government."[288] Along similar lines, the IRS policy manual instructs appeals officers to resolve issues in a "quasi-judicial manner,"[289] and, like a court, the appeals office cannot raise issues that IRS auditors missed.[290] These guidelines encourage the public to view the appeals office as a neutral forum, in which tax disputes can be resolved fairly and efficiently.

The JCT refund review function, however, can compromise the integrity of an appeals office hearing. Even if a taxpayer reaches a settlement with the appeals office, that settlement, under IRS practices, generally must be approved by the JCT.[291] This congressional involvement limits the appeals office's ability to adjudicate the taxpayer's refund claim in a neutral way.

In *Pillsbury Co. v. FTC*,[292] the Fifth Circuit explained that congressional involvement in a quasi-judicial proceeding can give rise to due

286. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1001(a)(4), 112 Stat. 685, 689 (1998).

287. *See id. See generally* Curt Rubin, *The New Ex Parte Rule and Its Impact on IRS Appeals*, 83 TAX NOTES 417, 418 (1999) ("Congress and a number of taxpayers apparently shared the belief that contacts with other IRS employees, conducted outside the presence of taxpayers, negatively affected the ability of taxpayers to receive an independent and impartial hearing at Appeals.").

288. 26 C.F.R. § 601.106(f)(1) (2013).

289. *See, e.g.*, INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 8.6.1.3 (Nov. 6, 2007) (Appeals officers should resolve "disputed issues in a quasi-judicial manner. It is essential to have an open mind and genuine interest in achieving a mutually acceptable agreement."); INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 8.6.4.1.4 (Oct. 26, 2007) ("*Judicial Attitude Towards Settlement*"). In Constitutional terms, the IRS performs executive functions when handling refund claims. But in the language used in the administrative law setting, Appeals office hearings would be considered "adjudicative" or "quasi judicial," because the office makes a determination. *See* U.S. DEP'T, OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1947) (as opposed to rulemaking, "adjudication is concerned with the determination of past and present rights and liabilities"). *See also* Arlington v. FCC, 133 S. Ct. 1863, 1873 n.4 (May 20, 2013) (noting that quasi-legislative and quasi-judicial agency functions constitute exercise of the executive power, in Constitutional terms).

290. Historically, the Appeals office has also acted like an inquisitor and could sometimes raise new issues. *See* 26 C.F.R. § 601.106(d)(1) (2013) (noting that the appeals office can raise new issue if the "ground for such action is a substantial one and the potential effect upon the tax liability is material"). The IRS, however, is eliminating the inquisitorial aspect of Appeals office hearings, moving it further towards a quasi-judicial forum. *See* Jaime Arora, *IRS Appeals Procedures Changing to Better Reflect Judicial Approach*, 140 TAX NOTES 308 (2013) (noting that Appeals will no longer raise new issues and the IRM will be amended accordingly, as part of a "judicial approach and culture project that . . . will come to fruition within the next few months"). Also, under recently proposed legislation, the Appeals Office's ability to raise new issues would be removed. *See* Jeremiah Coder, *Appeals Restrictions in Cornyn Legislation Get Mixed Reaction*, 2012 TAX NOTES TODAY 77-2 Apr. 20, 2012.

291. *See, e.g.*, INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 8.7.9.5.1 (Sept. 27, 2013) (instructing that "no settlement should be made effective until receipt of notice that the JCT has no objection to the proposed overpayment" and describing procedures for identifying cases that "require JCT approval before final disposition").

292. 354 F.2d 952, 963–65 (5th Cir. 1966). *See also* Koniag Inc. v. Kleppe, 405 F. Supp. 1360, 1372 (D.D.C. 1975), *modified sub nom*. Koniag Inc. v. Andrus, 580 F.2d 601, 610–11 (D.C. Cir. 1978).

process problems. In that case, the Pillsbury Corporation had acquired some of its competitors, and the FTC investigated whether these acquisitions violated the antitrust laws.[293] Initially, the FTC did not believe that they did.[294] When the Senate Committee on Antitrust and Monopoly learned of this, it held a hearing on Pillsbury's still-pending case.[295] The legislators subjected the FTC chairman to a "barrage of questioning"[296] and challenged his views about the appropriate legal standard to apply to Pillsbury's acquisitions. The FTC ultimately bowed to the congressional pressure and reversed course, ordering Pillsbury to divest itself of the acquired companies.[297]

Pillsbury challenged the FTC's order in court, arguing that the congressional interference violated its right to due process and that the order should be reversed.[298] The Fifth Circuit agreed, establishing the so-called *Pillsbury* doctrine.[299] According to the court, Congress has wide latitude to participate in an agency's quasi-legislative functions,[300] like rulemaking, but involvement in an agency's quasi-judicial function impairs "the right of private litigants to a fair trial."[301] A party cannot enjoy due process if legislators probe an agency's decision before it becomes final: "To subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him. . . sacrifices the appearance of impartiality- the *sine qua non* of American *judicial* justice."[302]

Numerous courts embrace the *Pillsbury* doctrine and "invalidate adjudicative agency decisions whenever congressional contact with an agency creates the mere appearance of bias or pressure."[303] Various federal agencies have also promulgated regulations prohibiting improper communications between agency decision makers and legislators.[304] And, in an ongoing dispute over the construction of a nuclear waste storage facility, the Nuclear Regulatory Commission recently invoked *Pillsbury*

293. Pillsbury Co. v. Fed. Trade Comm'n, 354 F.2d 952, 953–54 (5th Cir. 1966).
294. *Id.* at 955.
295. *Id.*
296. *Id.*
297. *Id.* at 963.
298. *Id.*
299. *Id.* at 963–64.
300. *Id.*
301. *Id.* at 964.
302. *Id.*; *see also, e.g.*, DCP Farms v. Yeutter, 957 F.2d 1183, 1187 (5th Cir. 1992) ("[T]he appearance of bias caused by congressional interference violates the due process rights of parties involved in *judicial* or *quasi-judicial* agency proceedings.") (citing *Pillsbury Co.*, 354 F.2d at 964).
303. *Yeutter*, 957 F.2d at 1187 (citing D.C. Federation of Civil Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971)); s*ee also supra* note 100.
304. *See, e.g.*, 49 C.F.R. § 1102.2(a)(2) & (c)(1) (2013) (regarding Surface Transportation Board, prohibiting ex parte communications during certain proceedings between agency and any person); Del. & Hudson Ry. Co.—Lease and Trackage Rights Exemption—Springfield Terminal Ry. Co., No. 30965, 1992 WL 401590, at *3 (ICC 1993) (noting that regulation's restriction reaches legislators).

and stated that it generally does not respond to congressional requests for information on pending matters.[305]

The IRS, however, does not protect taxpayers in this way. Instead, it passes the taxpayer's file on to the JCT[306] and instructs its agents that the committee must approve any settlements.[307] As *Pillsbury* and related cases demonstrate, this congressional influence necessarily compromises the appearance of the decision maker's neutrality.[308]

Because the IRS strives to ensure "strict impartiality" in appeals office matters and instructs its officers to resolve cases in a "quasi judicial" manner, the IRS should not allow for JCT review of appeals office matters.[309] Some taxpayers already question whether appeals really operates independently from IRS auditors,[310] and publicly filed documents indi-

305. *See* Letter from Gregory B. Jaczko, United States Nuclear Regulatory Comm'n, to Chairman Darrell E. Issa, Chairman, Comm. on Oversight & Gov't Reform (Mar. 30, 2011), *available at* http://www.thenwsc.org/ym/YM%20NRC.Comm.Jaczko%20Ltr%20to%20Rep.Issa%20033011.pdf (noting that *Pillsbury* establishes "impropriety of Congressional influence over matters which are the subject of agency adjudications" and that the "Commission does not generally respond to requests for information regarding adjudicatory matters").

306. *See* INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 8.7.9.5.1 (Nov. 9, 2007) ("Appeals Responsibility in JC Cases – Reporting to the JCT").

307. *See supra* note 291. *See also, e.g.*, Rev. Proc. 2003-40, § 5.08, 2003-25 I.R.B. 1044 ("[T]he Service may reconsider a proposed settlement . . . upon receipt of comments on the proposed settlement from the Joint Committee on Taxation.")

308. Technically speaking, this procedure may not violate the due process principles established in *Pillsbury*. That case involved a purely adversarial proceeding, and due process principles apply differently in the inquisitorial context, like some IRS Appeals hearings. In simple cases, for example, IRS auditors will not be present at an Appeals office hearing, nor will they provide a written response to a taxpayer's protest letter. Rather, the Appeals office will examine the facts and may make further inquiries. For larger cases, however, an Appeals office hearing may follow a more adversarial format (e.g., IRS auditors may be present at the Appeals hearing and may file a response to the taxpayer's protest letter). *See* 26 C.F.R. § 601.106(f)(4) (2013) (regarding presence of auditors at Appeals office hearings); Rubin, *supra* note 286, at 419 (describing IRS procedures when a large case is in front of Appeals). Additionally, the provisions in the IRS Restructuring and Reform Act of 1998 took a "subtle step on the road to turning the Office of Appeals into an administrative law court." 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, 102–03 (2004). *See also* Arora, *supra* note 289, at 308. And given that IRS regulations and the Internal Revenue Manual sometimes characterize an Appeals office hearing as a quasi-judicial function, a court might decide that some level of procedural due process protections apply. *See, e.g.*, ATX, Inc. v. U.S. Dept. of Transp., 41 F.3d 1522, 1527–28 (D.C. Cir. 1994) (court applies due process requirements to Transportation Department proceeding "[b]ecause the Department's regulations expressly characterize [those] proceedings as quasi-judicial"). Nonetheless, because a taxpayer generally obtains *de novo* judicial review of his claim after any adverse IRS decision, *see* Nat'l Right to Work Legal Def. & Educ. Found. v. United States, 487 F. Supp. 801, 805 (E.D.N.C. 1979), the amount of process due in an Appeals Office hearing is likely substantially lower than in the type of hearing at issue in *Pillsbury*. Nonetheless, as a prudential matter, if the IRS strives for quasi-judicial resolutions of its Appeals disputes, it should observe *Pillsbury* principles.

309. The IRS could perhaps reach this result synthetically, through the execution of a § 7121 closing agreement with a taxpayer. If this agreement were executed prior to the referral of the taxpayer's file to the JCT, the taxpayer could have some assurance that the JCT would not veto the IRS's decision to issue the refund. *See* IRS FSA 2013301F (Aug. 16, 2013) (concluding that where closing agreement was executed and IRS inadvertently failed to submit agreement to JCT for review, the agreement remained valid). The IRS, however, might face backlash if it deliberately closed a case before obtaining JCT review.

310. *See* Coder, *supra* note 289.

cate that the JCT can upset negotiated settlements.[311] If the IRS denied JCT review of appeals office cases, that would reinforce the IRS's commitment to the independence of that office.

If the IRS fears congressional reprisal for that action and continues to present appeals cases to the JCT for approval, it should at least improve the transparency of the process. Under a recent IRS notice, taxpayers do not enjoy any "opportunity to participate"[312] in discussions between the JCT and the appeals office. According to the IRS, because the IRS Restructuring and Reform Act of 1998 explicitly prohibits *ex parte* communications only between appeals officers and other IRS employees, appeals officers can talk freely with the JCT outside of the taxpayer's presence.

This approach again compromises the integrity of an appeals office hearing. "Courts reviewing quasi-adjudicative agency decisions for evidence of congressional [pressure]. . . have condemned ex parte contact and involvement."[313] The IRS should thus allow the taxpayer to participate in appeals office-JCT discussions. This participation would be especially helpful because the JCT must approve appeals office settlements,[314] and taxpayers would benefit from access to the ultimate decisionmakers regarding large refund claims.

If the IRS nonetheless insists on secrecy regarding its interactions with the JCT, it should, if nothing else, be forthright with taxpayers about any issues raised by the committee. The IRS policy manual states that if the JCT raises questions about an appeals office decision and the IRS must seek further information from the taxpayer, "under no circumstances should the [taxpayer] be told that the JCT" initiated the in-

311. *See, e.g.*, Radian Group, Inc., Prospectus (Jan. 28, 2013) ("In late December 2010, we reached a tentative settlement agreement with Appeals, which required review by the Congressional Joint Committee on Taxation ("JCT"). Based on its review, the JCT has indicated that it is opposed. . . . [W]e may be required to litigate the proposed adjustments.").

312. I.R.S. Notice 2011-62, IR-2011-32 (Aug. 8, 2011) ("Communications between Appeals and the Joint Committee or its staff are permissible without providing the taxpayer/representative an opportunity to participate. The ex parte communication rules only apply to communications between Appeals and other IRS employees."); s*ee also* SALTZMAN, *supra* note 33, § 11-127 ("As a practical matter, a taxpayer has no opportunity to communicate with Service personnel other than the Appeals officer or perhaps the Joint Committee coordinator, and rarely with the staff of the Joint Committee.").

313. Sokaogon Chippewa Cmty. v. Babbitt, 929 F. Supp. 1165, 1174 (W.D. Wis. 1996) (collecting cases). *See also, e.g.*, United States Lines, Inc. v. Federal Maritime Commission, 584 F.2d 519, 539 (D.C. Cir. 1978) ("The inconsistency of secret *ex parte* contacts with the notion of a fair hearing and with the principles of fairness implicit in due process has long been recognized."). Generally speaking, the prohibition against *ex parte* contacts applies only in adversarial proceedings—due process requires that a party be given an opportunity rebut his opponent's arguments. *See* United States v. Kenney, 911 F.2d 315, 321 (9th Cir. 1990). As noted earlier, *supra* note 308, however, the Appeals office has both inquisitorial and adversarial aspects, and the cited cases (dealing with adversarial hearings) thus do not necessarily apply. The 1998 Act's prohibition against ex parte contacts between Appeals officers and IRS auditors, however, reflects the sound congressional judgment that some due process principles should be incorporated in the Appeals context. Prohibiting *ex parte* contacts between Appeals officers and JCT staff would further the 1998's Act's goal, even if that prohibition is not constitutionally required.

314. *See supra* note 291.

quiry.[315] Instead, the questions must be presented as if "the Service is reconsidering its position."[316]

This deliberate misleading of the taxpayer further obscures the JCT's involvement in the taxpayer's case and creates political accountability problems. A taxpayer should know whether the executive or the legislature denied his refund claim.[317] The IRS should thus amend its policy manual and require candor in taxpayer communications.

In practice, the IRS will frequently make the taxpayer aware of the JCT's involvement in his case. For example, the IRS may condition a settlement agreement on JCT review or approval, which provides an obvious indication that the committee will be involved. Additionally, as the public filings discussed in Part II illustrate, the taxpayer will sometimes receive notification from the IRS that the JCT has disapproved of a settlement. In these cases, aside from notifying the taxpayer of a JCT objection, the IRS should ensure that the taxpayer can participate in any discussions with the committee.

Aside from protecting agency-level disputes from improper JCT influence, the IRS should protect litigation settlements from congressional interference. In particular, if the IRS enters into a binding settlement with a taxpayer and files that settlement with a court, it should not allow the JCT to veto that settlement. Doing so compromises the integrity of settlement negotiations and misleads the relevant tribunal about the status of the proceedings.

A recent securities filing illustrates the dangers posed by JCT involvement in settlement procedures. In its 2007 Form 10-Q, the Alliance Semiconductor Corporation explained that it had filed a petition in the Tax Court regarding a tax dispute with the IRS. On July 25, 2007, however, IRS and Alliance filed a settlement with the Tax Court, under which Alliance would receive a refund.[318] The settlement agreement acknowledged § 6405(a) and stated that after the 30-day review passed, the parties would file another document allowing for payment of the refund.[319]

But more than two months later, the refund remained unprocessed. The JCT had yet to opine on the refund and, according to a joint status report, the settlement thus could not go ahead.[320] Finally, after another month had passed, the IRS sent Alliance a letter stating that it had abandoned the stipulated settlement, pointing to concerns expressed by the

315. INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 8.7.9.9.2.1 (Aug. 28, 2009).

316. *Id.*

317. *Cf.* New York v. United States, 505 U.S. 144, 168–69 (1991) (emphasizing importance of electorate's ability to attribute decision making to proper level of government).

318. *See* Stipulation of Settled Issues, July 25, 2007 (on file with author).

319. *See id.*, Stipulation 8 ("Consistent with the requirements of Section 6405, Respondent is in the process of preparing and will submit a report to the Joint Committee. After 30 days has passed, the parties will fire a decision document allowing Respondent to legally bind himself to [issue the refund].") (on file with author).

320. *See* Joint Status Report, October 1, 2007 (on file with author).

JCT.[321] Alliance then moved for the Tax Court to enter a decision consistent with the previously stipulated settlement, arguing that the IRS was using JCT review to "vitiate the settlement previously reached by the parties."[322]

Although the record indicates that the taxpayer and the IRS ultimately reached another settlement, the involvement of the JCT in this matter highlights some troubling issues. During the litigation process, the IRS represented to the Tax Court that, although § 6405(a) gave the JCT thirty days to review the settlement, the IRS would move ahead as soon as that period had passed. But more than two months later, the IRS told the court that it could not take any action without the JCT's "recommendation."[323] And finally, after another month had passed, the IRS abandoned a settlement because of JCT influence.

The IRS should not handle its stipulated settlements this way. Taxpayers will be less likely to enter into settlements if they know that the IRS may renege upon JCT review, and this practice compromises the general policies favoring settlements.[324] And it's fundamentally unfair for the IRS to walk away from a settlement when the IRS would, no doubt, aggressively pursue any taxpayer who attempted to do the same.[325] Additionally, if the IRS represents to a court that it will issue a refund as soon as § 6405(a)'s review period has passed, it should abide by that representation.

The IRS should revise its procedures and prohibit JCT interference regarding litigation settlements. Its stipulated settlements should indicate that the JCT has no veto power and that the IRS will process refunds after the thirty-day review period has passed, regardless of whether the JCT has issued a recommendation and regardless of what any recommendation says. Although the JCT might not appreciate this, the IRS's duty of candor to the court trumps its duty to a congressional committee, and the IRS should fully honor stipulated settlements.

VI. CONCLUSION

If Congress, under the guise of seeking information about the operation of the judiciary, asked a federal court to provide it with drafts of its decisions thirty days prior to their issuance, most would be outraged. What legitimate reason could Congress possibly have for inspecting court

321. Neither the filing nor the trial record indicates whether the IRS allowed Alliance to participate in its communications with the JCT, or if instead the IRS decided to abandon the settlement agreement after *ex parte* contact with the committee.

322. *See* Motion for Entry of Decision, November 14, 2007 (on file with author).

323. *Supra* note 320.

324. *See, e.g.*, Manko v. Commissioner, 69 T.C.M. (CCH) 1636, 1368 (1995) ("For almost a century, it has been settled that voluntary settlement of civil controversies is in high judicial favor.") (citing Williams v. First Nat'l. Bank, 216 U.S. 582, 595 (1910), and St. Louis Mining & Milling Co. v. Montana Mining Co., 171 U.S. 650, 656 (1898)).

325. *See, e.g.*, Dorchester Indus., Inc. v. Commissioner, 108 T.C. 320, *aff'd*, 208 F.3d 205 (3d Cir. 2000) (discussing IRS attempts to bind taxpayers to settlements).

opinions before their release? Even if the relevant statute indicated that Congress lacked the power to reverse the court's tentative decision, the thirty-day review period could allow for pernicious influence. After all, Congress wields substantial control over the organization of the judicial branch, the salaries of judges, the jurisdiction of the courts, and so on. If Congress wanted to influence the outcome of the judicial process, most would insist that Congress pass laws, not perform prepublication review of judicial opinions.

Yet some welcome this type of encroachment when the executive, and not the judiciary, is the target. This position is not necessarily unjustified; the constitutional relationship between the legislature and the executive qualitatively differs from the constitutional relationship between the legislature and the judiciary. And an executive agency, a creature of Congress, must submit to closer congressional oversight than do courts.

A line nonetheless exists between proper congressional oversight and improper congressional meddling. And as the cases show, the legislative veto does not draw that line. Congress can improperly encroach on the executive even when it does not retain the statutory power to control or overrule executive decision making.

Congress has done just that through the JCT refund review function. Although cloaked as an innocuous thirty-day review provision, § 6405(a) allows for Congress to go outside the legislative sphere and improperly share the administration of the tax laws with the IRS. And aside from this separation of powers problem, the active congressional involvement in large refund determinations raises serious due process concerns.

Nonetheless, scholars have largely overlooked § 6405(a) and analogous provisions in the U.S. Code. And although the D.C. Circuit invalidated one thirty-day review provision, that decision has not sparked challenges to others. Perhaps further scholarship in this area will help develop interest in the constitutionality of these devices. This Article makes a modest attempt to get the ball rolling.