

# IRS Appeals Officers Are Not Officers of the United States

## Cross References

- *Tooke*, 164 T.C. No. 2, January 29, 2025

The framers of the United States Constitution saw it necessary to protect the people against tyranny by providing for three divided powers of the federal government: legislative, executive, and judicial. Among these structural safeguards in the Constitution is the Appointments Clause.

The Appointments Clause of Article II is more than a matter of etiquette or protocol. It is among the significant structural safeguards of the constitutional scheme. It provides the exclusive means of appointing Officers and prevents Congress from dispensing power too freely. The Appointments Clause reads as follows:

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

The taxpayer in this case argued that the IRS Appeals Officers who conducted his CDP hearing, the Appeals Team Manager who reviewed and approved his determination, and the Chief who supervised and directed Appeals are all “Officers of the United States” who must be appointed in accordance with the Appointments Clause.

The taxpayer had self-assessed his tax liability but unpaid those taxes for the tax years 2012 through 2017. The taxpayer timely requested a CDP lien hearing. After the hearing, the IRS Independent Office of Appeals issued a Notice of Determination that sustained the filing of a Notice of Federal Tax Lien and proposed levy action.

The taxpayer did not challenge his tax liability, but instead filed a motion with the Tax Court to declare IRS Independent Office of Appeals unconstitutional as violating the separation of powers. He argued that the Appeals Officer who conducted his CDP hearing is an inferior “Officer of the United States” who must be appointed in a manner specified by the Appointments Clause. He also argued that the Appeals Team Manager who reviewed and approved his Notice of Determination is a principal “Officer of the United States,” as is the Chief who is responsible for supervising and directing Appeals. Therefore, the taxpayer argued that these “Officers” must be nominated by the President and confirmed with the advice and consent of the Senate.

**Author's Comment**

The taxpayer's argument appears to be a type of "tax protestor" argument in that instead of arguing whether he owes a tax liability, the IRS does not have the ability to collect such tax through levy, since the levy process must be approved by IRS Appeals, and Appeals Officers are not appointed by the President as required by the Constitution. The motion he filed with the Tax Court is one of first impression, and so the court needed to do an analysis of whether IRS Appeals has legal standing to be a part of the tax collection process.

The court stated the Appointments Clause applies to all "Officers," and therefore all persons who can be said to occupy an office were intended to be appointed within one of the modes of appointment provided by the Constitution. Implicit within the Appointments Clause is the distinction between "Officers of the United States," who must be appointed by the President, and non-officer employees or lesser functionaries who do not need to be appointed.

The court analyzed Supreme Court decisions on similar cases as to whether a government employee was an "Officer" or whether such person was a non-officer employee. The key to these decisions was centered around the authority of the employee.

The court stated Appeals Officers and Appeals Team Managers do not wield significant authority. They do not have the authority to examine witnesses or take testimony under oath. They do not have the power to subpoena and examine witnesses at a CDP hearing. They do not have the power to issue, serve, and enforce summonses through the IRS's general power to examine books and witnesses. An Appeals Officer is distinguishable from Tax Court judges who do have such power to issue subpoenas. Thus, Appeals Officers wield significantly fewer procedural tools and cannot be said to have the same broad powers as judges.

Courts have ruled that while they have the ability to compromise disputed tax liabilities, such authority is insufficient to rank them as "inferior Officers" who must be appointed. The court used the same line of reasoning for Appeals Team Managers. As a result, the court ruled that Appeals Officers and Appeals Team Managers are not "Officers of the United States" who must be appointed by the President.