WSEA
WISCONSIN SOCIETY OF ENROLLED AGENTS
POWERING AMERICA'S TAX EXPERTS

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President's Message

By Trish Evenstad, EA, WSEA President

I hope you are all enjoying the summer! The extended warmth has been great and hopefully you all have taken the time to enjoy it. We just wrapped up our 2nd Annual Midwest mEAyhem, joint seminar with the Minnesota Society of Enrolled Agents in La Crosse. It was great seeing some of you there. If you weren't able to make it, you missed a good one.

Our traditional update seminar will be on, Friday, **January 12th, 2018** in Fond du Lac with David & Mary Mellem, EAs from the Green Bay area. It is always a great presentation!

NAEA will have NTPI Levels 1, 2 & 3, as well as a combined Graduation Track, this year in sunny Orlando. The dates will be **November 8, 9 & 10** with the National Board Meeting on the 11th from 8:30am to 12:30pm.

Our first SW Wisconsin Tax Circle will be on **October 5th** in La Crosse, for more information contact me at evenstadtax@gmail.com. Our SE WI Tax Circle is going strong, with their next meeting on **October 19** at the Waukesha Public Library @ 9:00am. For those in the Fox Valley, there will be a Tax Circle starting soon in your area. Stay tuned for details! If you are not close to the current circles and would like to help organize one in your area don't hesitate to give me a call.

Hope to see you all soon!

Trish

WSEA Membership Outreach

By Michelle Gross, EA

On Friday, August 18, WSEA Membership Chair Connie Thomas, and members Jim Barsul, Robert Foley, and Michelle Gross gathered for the first Membership Outreach Party in Wisconsin. Our purpose was to solicit new members of WSEA. We were armed with a list of EAs, a schedule of events for the remainder of the year, and an outline of all the benefits membership offers. We celebrated after each successful call. We made close to 60 calls, and sent membership applications to EAs interested in joining. However, we will not have the results of our efforts for some time because prospects must mail applications to NAEA and because we left several messages that had not been returned by the end of the day.

We all agreed that "cold calling" was a dreaded task, but, acting as a group, with encouragement from each other, and throwing in silly celebrators like noisemakers and Mardi Gras beads, made a world of difference in our energy levels and attitude. We had so much fun, in fact, that we are planning our next Membership Outreach Party. We hope you can join us!

WSEA Day at the Capitol

By Michelle Gross, EA

Our Capitol building turns 100 years old this year! What better time to visit than during fall, the most beautiful time of year!

Robert Foley, EA has organized an event for all members, their staff, and guests. Bob is a former WSEA Board member and has been active in WSEA for many years. On Wednesday **October 18**, we will meet in the Rotunda at the Capitol in Madison at 9:45 am sharp. We have booked a tour of the Capitol building at 10 am. After the tour, you may visit the Senator or Representative from your district. While there, you should introduce yourself as an EA, a member of NAEA and WSEA. We will have brochures available to leave with their office. Our plan is to then regroup and enjoy lunch together.

The purpose of this outing is twofold: (1) we wanted to provide an opportunity to socialize with other members and (2) promote the EA credential among legislators and their staff. We will send an invitation to all members via

email. Please respond as you would for our seminar registration. We need a count of attendees for the tour. There is no cost to attend! If you have any questions, please contact Robert Foley by email: atwork@newnorth.net.

Photo credit: Jeff Dean, Wikipedia - Wis-capitol.jpg

Mark Your Calendar

Oct 5 – SW WI Tax Circle – LaCrosse. For information contact Trish at evenstadtax@gmail.com.
Oct 19 – SE WI Tax Circle – Waukesha Public Library @ 9:00am.
Nov 8 - 10 – NAEA NTPI – Orlando
Jan 12, 2018 – WI Update Seminar – Fond du Lac taught by EAs David & Mary Mellem.
May 21-22, 2018 – Madison **–** Estates &Trusts and the WSEA Annual Meeting.

Website - WSEA: http://wienrolledagents.org/

Facebook - Wisconsin Society of Enrolled Agents:
https://www.facebook.com/groups/540690799333168/

Follow-Up

By David J. Fayram, EA

California Tax Controversy (*Summer 2017 Newsletter*)

Those of you anxiously awaiting your first opportunity to participate in bribing government officials will have to wait. Apparently the California State Legislature was embarrassed by the appearance of corruption in the appeal process for income taxes after a report from the Department of Finance which found that "certain board member practices have intervened in administrative activities and created inconsistencies in operations, breakdowns in centralized processes, and in certain instances result in activities contrary to state law and budgetary and legislative directives." Can't have that!

The result of this embarrassment was the *Taxpayer Transparency and Fairness Act of 2017* that was passed and signed into law on June 27, 2017. This law completely changed the appeal process for income taxes. There is a new "agency" with the title "Department of Taxation and Fee Administration," which will have the acronym "DOT" (Do they have a Department of Transportation (DOT) in California, too?). In addition, there will be a second agency called "Office of Tax Appeals" (OTA). The rules for these agencies are very complicated, and, one could say, incomplete. Nobody knows how it will work. It is seminar time in California!

Reverse Mortgages (*Summer 2017 Newsletter*)

I noticed that there are already financial advisers who are certified as "Retirement Income Certified Professionals" (RICP). You can find one near you at www.designationcheck.com. You can find reverse mortgage lenders at www.reversemortgage.org.

WSEA Board of Directors – Contact Info

Trish Evenstad, EA (President) Evenstad Tax Service, LLP 114 S Main St Westby, WI 54667-1329 (608) 634-6887 evenstadtax@gmail.com	**David Fayram, EA (Director)** Motiff & Fayram, Ltd 402 Gammon Pl, Suite 200 Madison, WI 53719-1073 608-833-2111 dave@madcitytax.com
Michele Gross, EA (Vice President) Gross Tax Service W175N11081 Stonewood Dr, Suite 205 Germantown, WI 53022-4771 262-255-1600 mgross@grosstaxservice.com	**Chrystal Wheeler, EA (Director)** Wheeler's Tax Service 734 W 8th St Appleton, WI 54914-5233 920-731-7859 cwheetax@new.rr.com
James Barsul, EA (Secretary) 4976 N. 73rd St. Milwaukee, WI 53218-3815 414-462-3002 jbarsul@msn.com	**Marti Myers-Garver, EA (Director)** Armed Forces Tax Assistance 1723 Parkway Dr Bettendorf, IA 52722 702-432-1040 marti@armedforcestax.com
Julianne Molek, EA (Treasurer) Julie's Tax Service 159 S Main St Richland Center, WI 53581 (608)647-5764 juliestaxservice@gmail.com	

WSEA Committees

(If you would like to help, please contact us — we'd love to have you!)

Audit – Graciela Aubrey	**Finance/Budgeting** – Julie Molek
By-Laws – Trish Evenstad, Jeremy Burri	**Newsletter/Publications** – Dave Fayram, Mary Olson, Marti Myers-Garver
Educate America: Jeremy Burri, Connie Thomas, Robert Foley	**Nominating** – Trish Evenstad, Michelle Gross
Education/Convention – Michelle Gross, Marti Myers-Garver, Trish Evenstad, Crystal Wheeler	**Public Relations** – Robert Foley, Marti Myers-Garver
Government Relations – Michelle Gross, Connie Thomas, Trish Evenstad	**Ethics & Professional Conduct**– Jeremy Burri, Laurie Ziegler
Membership – Robert Foley, Connie Thomas, Char Meshiguad	**Webpage/Facebook –**Trish Evenstad, Michelle Gross, Marti Myers-Garver

WSEA Presidents – Past & Present

It is always good to remember our WSEA Presidential roots. Several of the names listed below will be familiar if you have been involved with WSEA or attend our meetings on a regular basis. At the next seminar, if you see one of these past Presidents, please take a moment to thank them for all of their hard work.

President's Name	Date Installed	President's Name	Date Installed
Michael D. Barnes, EA	June 21, 1986	Diane M. Lotto, EA	May 15, 2003
Marshall D. Mennenga, EA	July 10, 1987	Diane M. Lotto, EA	May 13, 2004
Richard J. Bast, EA	September 8, 1988	Joel Guthmann, EA	May 19, 2005
Dennis C. Alt, EA	October 20, 1989	Joel Guthmann, EA	May 18, 2006
Dennis C. Alt, EA	October 19, 1990	Joel Guthmann, EA	May 17, 2007
Dennis C. Alt, EA	October 18, 1991	Laurie Ziegler, EA	May 15, 2008
David J. Fayram, EA	October 16, 1992	Laurie Ziegler, EA	May 28, 2009
David J. Fayram, EA	October 8, 1993	Laurie Ziegler, EA	May 13, 2010
Edna Kratochvil, EA	October 21, 1994	Jeremy Burri, EA	May 19, 2011
Edna Kratochvil, EA	October 19. 1995	Joel Guthmann, EA	May 24, 2012
Richard L. Gause, EA	October 17, 1996	Julianne Molek, EA	May 23, 2013
Richard L. Gause, EA	October 24, 1997	Michelle D. McBride, EA	May 19, 2014
Roy B. Kortz, EA	October 23, 1998	Michelle D. McBride, EA	May 18, 2015
Roy B. Kortz, EA	October 8, 1999	Trish R. Evenstad, EA**	August 22, 2015
Roy B. Kortz, EA	October 19, 2000	Trish R. Evenstad, EA	May 23, 2016
Roy B. Kortz, EA*	October 18, 2001	Trish R. Evenstad, EA	May 22, 2017

*Mr. Kortz was president from his election in October 2001 until Ms. Lotto was elected to replace him in May 2003.
**Ms. Evenstad stepped up from VP to President when Ms. McBride moved out of WI.

>> Newsletter content, articles, comments, suggestions, ideas, tidbits, Q & A are always welcome, as are Getting to Know You articles. Submissions can be in any format, but preferably a Word document. Please submit articles to: Dave Fayram, EA & USTCP at: dave@madcitytax.com or Mary Olson EA, at: tax@theiolataxplace.com.

>>This Newsletter is intended to provide accurate and complete information to tax professionals. Although every effort has been made to assure that accuracy, neither the Wisconsin Society of Enrolled Agents nor the individual writers assume any responsibility whatsoever for the accuracy or completeness of the information contained herein. The reader should independently verify all the material before applying it to a particular fact situation, and should independently determine both the tax and nontax consequences of using any particular technique before recommending its implementation.

The EA Profession, Administrative Law and *Ridgely*

By David J. Fayram, EA

The EA profession now finds itself entangled in a struggle as to how the United States should govern themselves. At stake is the power that federal administrative agencies exercise over citizens. Many are now arguing that this power is excessive and that it is not constitutional.[1] This general topic is far too broad for this article, but the point here is that EAs test the limits of administrative authority every time they represent a

client before the IRS. Those EAs who are not aware of the controversy will be less effective in representing their clients. In addition, no matter how the controversy is resolved, the resolution will change the relationship between EAs and the IRS. The EA profession is likely to be in a state of turmoil during the period of resolution – which might be a long time.

There are three cases that directly affect the profession: *Loving v IRS*,[2] *Ridgely v. Lew*,[3] and *Sexton v Hawkins*.[4] All three have to do with attempts by the IRS to regulate enrolled agents and tax return preparers. The IRS lost in all three. *Loving* had to do with licensing of tax return preparers. *Ridgely* had to do with Section 10.27 of Circular 230 that prohibited [notice the past tense] contingent fees. *Sexton* had to do with the extent to which the Office of Professional Responsibility (OPR) could oversee suspended practitioners. The question here was, could the OPR demand documents containing confidential client information under a threat to remove Sexton's e-filing number? (The answer is "No" according to the District Court.)

This article will be limited to a discussion of *Ridgely*. The facts in this case are not common to many EAs, but, as you will see, it is important that EAs understand the basis for the decision and some of its consequences. Some of the ideas in this article originated with Charles R. Markham and his article in the *Journal of Tax Practice & Procedure*.[5] Mr. Markham is an EA, a Tax Court Practitioner, and a member of NAEA who practices in Norwell, Massachusetts. The author discussed his article with him during a telephone conversation on August 11, 2017.

There is hardly any discussion of Gerald Ridgely in the opinion. According to Markham, Ridgely is a CPA who specializes in review of corporate income tax returns in an effort to discover refunds. Most of these had to do with research and development credits, but they also found net operating loss carrybacks and other problems. Ridgely's fees were a percentage of the refunds. In order to avoid problems with Circular 230, Ridgely used unlicensed preparers to prepare the amended returns. The case originated as described in the opinion:

> Plaintiff Gerald Lee Ridgely, Jr., a practicing CPA, brought suit against the Secretary of the Treasury and the Commissioner of the IRS in their official capacities, arguing that the IRS exceeded the scope of its statutory authority in regulating the preparation and filing of "Ordinary Refund Claims" — refund claims that practitioners file after a taxpayer has filed his original tax return but before the IRS has initiated an audit of the return. Ridgely and the IRS cross-moved for summary judgment.

The problem was section 10.27(b) of Circular 230. The provision prevented EAs from charging contingent fees. There were three exceptions when contingent fees were permitted: (1) the return is being or will be audited by the IRS, (2) the claim for refund is in connection with statutory interest or penalties, and (3) the fee is related to a judicial proceeding. Ridgely simply argued that the IRS had no statutory authority for this rule.

Authority for regulation of agents practicing before the IRS is at 31 U.S.C. section 330. Section 330 was originally enacted in 1884. This language contained the seeds of our profession. The language has changed over the years, but the substance of the original language has not changed. Here is the original version from 133 years ago.

> The Secretary of the Treasury may prescribe rules and regulations governing the recognition of ***agents***, attorneys, or other persons representing claimants before his Department, and may require of such persons, ***agents*** and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed

> of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. [**Emphasis added.**]

Congress used the word "agents" here to designate those who eventually became "enrolled agents." CPAs did not exist at the time and Congress referred to them as "other persons." Attorneys existed then, still exist, and will continue to exist in perpetuity.

Circular 230 was based on this statutory provision and was first promulgated in proposed form on February 15, 1921. It remained in this state until published in Federal Register on October 31, 1958.[6] Some argue that this date was the origination of the EA profession because it marked the first time the government expressed its intention to use the provisions of Circular 230 against citizens and because it used the term "enrolled agents." The author knew a lawyer who consulted the IRS in this publication. His name was Jim McCarthy and he was a professor of law at the American University Law School in Washington, DC. McCarthy also worked with Les Shapiro when Shapiro became Director of Practice. Both McCarthy and Shapiro were adamant that tax **return preparation was *not* practice** before the IRS. Unfortunately, this wisdom became lost at the IRS.

So we have the statute and we have section 10.27. How is the Court to do that which Mr. Ridgely asked it to do? How can it decide if the regulation was or was not authorized by the statute? The answer is that the Court was bound by the rules described in a Supreme Court opinion called *Chevron*.[7] This is a "simple," two-step procedure as follows:

1. The court first uses the traditional tools of statutory interpretation to determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.
2. If the statute is silent or ambiguous with respect to the specific issue, the court must determine if the agency's interpretation is based on a permissible construction of the statute. The construction is permissible unless it is arbitrary or capricious in substance, or manifestly contrary to the statute.

Step two is often referred to as "judicial deference" because the judiciary has decided to defer to the executive branch with regard to regulations of the executive branch.

If a case is resolved at step one, one wonders why the case had come to court at all. If the statutory language is clear, why did the parties not come to agreement by themselves? Well, it happened to Mr. Ridgely.

Those questioning the administrative state have no problem with step one. Their problem is step two. Their point is that the judicial branch was established to protect the liberties of Americans from intrusions by the other two branches. By using such strong language in favor of the executive branch, hasn't the judicial branch abandoned its primary duty to protect American citizens? Unfortunately, everyone seems to conclude differently on this question and this is among the reasons that the uncertainty among EAs mentioned in the first paragraph above will not be resolved soon.

Why is it that courts in *Loving*, *Sexton* and *Ridgely* along with Professor McCarthy and DOP Shapiro all concluded that tax return preparation is not practice before the IRS? The opinion in *Ridgely* has a detailed description of this, as do the other two cases, but the argument can be summarized briefly. The statute authorizes the IRS to regulate those who practice before it. The "practice of representation" has long meant that the representative has the power to act on behalf of the person represented. When an EA practices as an

EA, the IRS must recognize the EA as if he or she were the taxpayer. When someone prepares a tax return, the taxpayer has **not** authorized the preparer to act on their behalf. In this sense, tax return preparation is the same as cutting someone's lawn or someone's hair or fixing their car. EA practice does not begin until the EA has a power of attorney in hand from the taxpayer. The *Ridgely* court used these reasons to find for Mr. Ridgely under step one of *Chevron*.

Why has the IRS been so opposed to contingent fees for EAs? Lawyers were off the hook in most situations and unlicensed preparers were free to go ahead as they pleased. Why was it necessary to place EAs at a competitive disadvantage? When challenged in *Ridgely* to come up with reasons, the IRS had three: (1) to prevent the audit lottery, (2) "…taking lucrative contingent fees from companies whose books they review jeopardized auditor independence because it leads accountants and their clients to share financial interests…", (3) This one takes the cake. The opinion describes it as, "In other words, according to the IRS, it has authority to regulate all actions of CPAs who—at some point—'practice' before it, regardless of 'whether they're acting in a representational or non-representational capacity.'" The court was harsh with regard to all three. There were also some other arguments, which according to the opinion, "… have been foreclosed by *Loving*." For example, the IRS argues that it has 'inherent authority' to regulate those that practice before it." This and number three above are particularly insulting to our liberty because they show a complete disregard for the rule of law. Together they confirmed a suspicion that the IRS had no reason for section 10.27(b) in the first place.

Contingent fees are common in several situations. The first are penalty abatements and objections to IRS interest computations. These have always been permitted under 10.27(b)(3). The second is for net operating loss carrybacks. There might be a psychological problem in charging more for the paperwork than the resulting refund. Then there is the problem when the fees relate to reimbursement of litigation and administrative fees under IRC section 7430. The probability of success is so low that it might be hard to charge for this in good conscience unless the client is very determined.

Here we need to review Form 8889, *Reportable Transaction Disclosure Statement*. Under the "Who Must File" section of the instructions, we find, "Any taxpayer, including an individual, trust, estate, partnership, S corporation, or other corporation, that participates in a reportable transaction and is required to file a federal tax return or information return must file Form 8886."

Of course, some might think that no one ever participates in a "reportable transaction" so this form is never necessary. Unfortunately, we need to read the definition of "reportable transaction." The water starts getting deeper because there are five categories and all the categories have complicated descriptions:

1. Listed Transactions
2. Confidential Transactions
3. Transactions with Contractual Protection
4. Loss Transactions
5. Transactions of Interest

Please notice number three, "Transactions with Contractual Protection." The first paragraph from the instructions reads as follows:

> A transaction with contractual protection is a transaction for which you have … the right to a full refund or partial refund of fees if all or a part of the intended tax consequences from the transaction are not sustained. Is also includes a transaction for which fees are contingent on

your realization of tax benefits from the transaction. For exceptions and other details, see Regulations section 1.601-4(b)(4) and Rev. Proc. 2007-20, 2007 I.R.B. 517, available at www.irs.gov/pub/irs-irbs/irb07-07.pdf.

Is it time to panic yet? This actually gets worse. What if your client had fee arrangements with you or with someone else under 10.27(b) (interest and penalties) or 10.27(c) (lawyers in court)? Did you fill out Form 8886 for those returns?

What about a de minimis exception for small amounts? There are no exceptions based on the amount of the fees.[8] There are some exceptions though and those are listed in Rev. Proc. 2007-20. The term "contractual protection" only applies to income taxes, not employment tax, estate or gift tax, or excise taxes. Also explicitly excluded are tax credits as follows:

1. Work opportunity credit under Code Section 51
2. Welfare-to-work credit under Code Section 51A
3. Indian employment credit under Code Section 45A(a)
4. Low-income housing credit under Code Section 42(a)
5. New markets tax credit under Code Section 45D(a)
6. Empowerment zone employment credit under Code Section 1396(a)
7. Renewal community employment credit under Code Section 1400H
8. Employee retention credit under Code Section 1400$(a), (b) or (c)

It is important to note that these are the *only* exceptions.

You must attach Form 8886 to the return. In addition, if it is an initial year for filing Form 8886, you must mail an exact copy of the form to IRS, OTSA Mail Stop 4915, 1973 North Rulon White Blvd., Ogden, Utah 84201. The main thing here is to *file the form*. For the most part, worry that filing will cause an audit is misplaced.

There is a **penalty** for **not attaching a copy** of the form **to the tax return *and*** an **additional penalty** for **not mailing an exact copy to OTSA**. The penalties are the same and equal to 75% of the tax savings involved. For individuals there is a minimum annual penalty of $5,000 and a maximum penalty of $10,000. For other entities, the minimum annual penalty is $10,000 and the maximum is $50,000. Thus, for an individual with a token **contingent fee arrangement** for a single year, the minimum penalty would be $10,000.

Enough! This form has little or nothing to do with the amount of tax due. The whole thing is one huge gotcha for tax return preparers and taxpayers. Those worried about the administrative state would not be concerned by the penalty itself, which was passed by Congress and signed by the President. The problem is that the Executive Branch ends up with authority to assess huge penalties without judicial due process, as provided by the Constitution. The statute does contain a provision allowing the IRS to assess the penalty and to abate it (the word "rescission" is used). The IRS issued a revenue procedure explaining the process that ends up at an appeals hearing. Theoretically, taxpayers may appeal the findings resulting from this hearing to the judicial branch. The trouble with this is that the petitioner will run smack up against step two of *Chevron* in making such a claim. The argument is that this effectively extinguishes judicial due process for these taxpayers.[9]

What to do? The rules for "rescission" are at Regulations Section 301.6707A-1(d).[10] Under these rules, penalties caused by failure to report contingent fees should be eligible for rescission provided the other rules are satisfied. There are many hurdles and all of these are there. The main thing to do is file the darn form, even if it is late and even if it is attached to a second filing of the original return. The IRS should be

sympathetic if the situation is ridiculous, but you will still have to conduct an appeals hearing and charge hundreds or thousands of dollars for it. There is no chance of having these fees reimbursed.

An abundance of caution suggests that the article should end with a caution. EAs are well within their purview with arguments based on the statutes, the regulations, and the revenue procedures presented above. However, it would be foolhardy for an EA to argue that the provisions are unconstitutional. Such an EA would be playing with the institutional gonads of the IRS and the results would not be pretty. Perhaps someday an organization with the political influence and the financial resources to withstand a sustained and intense response from the IRS will make the challenge. If you encounter a situation where you and the client believe that such arguments would be in the best interest of the client, your course of action is clear: you should withdraw for lack of competence under the aspirational standards at section 10.33 of Circular 230.

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[1] Philip Hamburger, *Is Administrative Law Unlawful?*, University of Chicago Press, 2014. Professor Hamburger is the Maurice and Hilda Friedman Professor of Law at Columbia Law School. When people refer to "The Administrative State," they are probably referring to the ideas in this book. Hamburger wrote the book as if it were a textbook for a course in law school. The author of this article talked to Hamburger on the phone and found him to be very personable. Hamburger was surprised when the author said he liked the book – Hamburger does not normally receive adulation for his academic writing.

[2] *Sabina Loving, et al., v Internal Revenue Service, et al.*, 2014-1 U.S.T.C. ¶ 50,175, CA-DC, 13-5061, (February 11, 2014).

[3] *Gerald Lee Ridgely, Jr. v. Jacob J. Lew, et al.*, 2014-2 U.S.T.C. ¶ 50,359, DC-DC, 1:12-cv-00565 (CRC), (July 16, 2014).

[4] *James C. Sexton, Jr. and Esquire Group LLC v. Karen L. Hawkins, Director of Office of Professional Responsibility, Internal Revenue Service, Department of Treasury*, 2014-2 U.S.T.C. ¶ 50,496, DC-NV, 2:13-cv-00893-RFB-VCF, (October 30, 2013).

[5] Charles R. Markham, *Life After Ridgely: While Some Contingency Fee Restrictions Have Been Lifted, Practitioners Should Be Mindful That Reportable Transaction Rules Apply*, Journal of Tax Practice & Procedure, 17, 5, October-November 2015 at 47.

[6] Circular 230 Amendment history, 2017(18), Stand. Fed. Tax Rep. (CCH), ¶ 43,499.10.

[7] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 US 847 (1984).

[8] *Ibid*. 5.

[9] The arguments for this are beyond the scope of this article. Dr. Hamburger, points to Article VI, Clause 2 of the Constitution, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; … shall be the supreme Law of the Land." See chapters 15, "Deference", and 16, "Return to Deference" in his book, particularly around page 292.

[10] Reg. § 301.6707A-1(d), 2017(17), Stand. Fed. Tax Rep. (CCH), ¶ 40,092.