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*IRS Restructuring and Reform Act of 1998: Monopoly of Force,
Administrative Accountability, and Due Process*

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Abstract by Janet C. Goldberg

The Internal Revenue Service (IRS) has a history of imposing unfair collection practices on taxpayers, while taxpayers' rights to respond have been limited. Taxpayers' ability to sue the federal government for Internal Revenue Service (IRS) employees' reckless or intentional violations of the Internal Revenue Code (IRC) was prohibited due to the government's sovereign immunity, until 1971, when the Supreme Court recognized qualified immunity of the federal government. Qualified immunity permitted taxpayers to sue federal employees who violated the taxpayer's individual constitutional rights while acting under the color of law. However, this right to sue was subsequently narrowed by the Supreme Court in 1988 to circumstances where the taxpayer had exhausted administrative remedies.

Section 7433 of the Internal Revenue Code (IRC), established by the 1988 Taxpayer Bill of Rights, superseded earlier Supreme Court precedent by providing the exclusive remedy for recovering damages caused by IRS tax collection activities. Specifically, section 7433 enabled taxpayers to sue the United States government for damages caused by IRS employees' reckless or intentional violations of the IRC, when such violations occurred in conjunction with collection actions.

The mens rea requirement of section 7433 was lowered from a reckless, or intentional, standard to negligence by the IRS Restructuring and Reform Act of 1998 (1998 Act). The 1998 Act also provided structural reforms to the IRS, including a new Oversight Board and an Office of the National Taxpayer Advocate (NTA). Congress's creation of the Oversight Board, to monitor the progress of IRS reform, indicates Congress's belief that internal administrative oversight requires continuing oversight. The extent to which the Board will induce the IRS to reform itself is unclear. Moreover, separation of function questions emerge with respect to the NTA because the extent to which this entity has the independence necessary for providing meaningful advocacy is unclear.

Although section 7433 provides taxpayers with a right to sue IRS employees, taxpayers' exercise of this right is problematic due to the present structure of the tax judiciary. There are too many courts with original and appellate subject matter jurisdiction over tax matters, resulting in legal incoherence and doctrinal confusion. The Federal Courts Study Committee (FCSC), created by Congress to study the federal judiciary system, proposed a simplified, two-tiered tax court as a solution to the current decentralization of the tax judiciary. Unfortunately, Congress did not adopt this recommendation.